

# Due Process and Procedural Law in Accountability Mechanisms: The Case of the World Bank

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## I. Introduction

As a result of enormous public pressure, international organizations (IOs) concerned with the regulation of world economy have become ever more human rights conscious.<sup>1</sup> For example, the institutions composing the World Bank Group have been at the centre of critique for the lack of transparency and participation by affected populations, in many of its decisions to concede loans or credits to either states or private corporations so they can carry out so-called ‘development projects.’ As a response to this, institutions within the World Bank Group have sought to develop accountability mechanisms (AMs) allowing for parties affected by projects under their financing to seek answers from the Bank for their potential violation of certain individual and collective rights. These mechanisms, such as the World Bank Inspection Panel (WBIP or Inspection Panel)<sup>2</sup> or the Compliance Advisory/Ombudsman (CAO),<sup>3</sup> have increasingly acquired a more ‘judicial’ function. This has happened despite the fact that the rules upon which they base their decisions are not considered *law* in the traditional sense.<sup>4</sup>

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1 H. Weidner, Politisierung als Prozess und Ergebnis: Weltbank, Bergbausektor und Nachhaltigkeit, in M. Zürn, M. Ecker-Ehrhardt (eds.), *Die Politisierung der Welt-politik – Umkämpfte internationale Institutionen* (2013), 312.

2 Resolution Establishing the Inspection Panel N. IBRD 93-10, Resolution N. IDA 93-6.

3 Office of the Compliance Advisor/Ombudsman (CAO) Terms of Reference, available at [http://www.cao-ombudsman.org/about/whoweare/documents/TOR\\_CAO.pdf](http://www.cao-ombudsman.org/about/whoweare/documents/TOR_CAO.pdf) (last visited 6 December 2018).

4 The nature of these internal rules (Operational Policies and Procedures for the IBRD/IDA as well as the Performance Standards for the IFC/MIGA) is still highly debated. They do constitute part of the internal legal order of these organizations, but their normative reach is normally limited to their staff. They may eventually impact and condition borrowers’ actions. For a short analysis of the nature of these rules and their relationship to sources of international law, see III below.

To a certain degree, this reveals the extent in which international legal standards impact not only substantive rules, but also the procedural principles guiding such mechanism. Nevertheless, human rights are not their only core focus.

In the lack of proper mechanisms to hold international financial institutions (IFIs) responsible for international wrongful acts,<sup>5</sup> these AMs are so far the most effective means to have IFIs respond for their eventual misdemeanours. These AMs operate on the basis of internal regulations set out by the organizations themselves. Two of the most prominent independent AMs have been established within the World Bank group. The first one was the World Bank Inspection Panel, which investigates eventual violations of the International Bank for Reconstruction and Development (IBRD) and the International Development Association's (IDA) operational procedures and policies (also called Operational Standards). These procedures and policies seek to condition the action of Bank staff when conducting the Bank's financial transaction (loan or credit concession, for example). Some of these procedures and policies are binding upon staff, while others only reflect and inform best practices.<sup>6</sup> The second is the Compliance Advisor/Ombudsman, which has three different functions and responds to requests and claims made by the affected people in respect of potential violations of the International Finance Corporation (IFC) and Multilateral Investment Guarantee Agency's (MIGA) Performance Standards by their own staff. They also provide a forum to settle disputes be-

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5 The Articles on the Responsibility of International Organizations (ARIS) are still an incipient attempt to construct a legal framework wherein IOs can be held responsible for international wrongful acts. It has recently received considerable attention, but being mostly the work of 'progressive development' of international and not properly an exercise of 'codification,' IOs have been very much reluctant to accept the application of such an instrument. Some of the reasons for this reluctance were already given in some IOs comments to the draft articles circulated by the International Law Commission. In this respect, the comments by the World Bank and the IMF are very informative. For this, see 'Comments and Observations received from Governments and international organizations,' A/CN.4/556, and 'Comments of the World Bank (IBRD and IDA) on the Draft Articles on the Responsibility of International Organizations adopted by the International Law Commission on First Reading in 2009,' available at <http://siteresources.worldbank.org/INTLAW/JUSTICE/Resources/ILCResponsibilityofIntlOrgIBRDComments.pdf> (last visited 6 December 2018).

6 L. Boisson de Chazournes, *Policy Guidance and Compliance: The World Bank Operational Standards*, in D. Shelton, *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (2000), 285.

tween the private companies receiving the loans or credit by IFC/MIGA and the population who are affected by the projects being carried out.

If AMs are increasingly acting in similar ways as judicial bodies, could they benefit from the development of an international procedural law? What would such a body of law actually mean for the application of a due process principle in such institutions? Legal theory has attempted to a certain degree to answer a few of these inquiries. Projects such as Global Administrative Law,<sup>7</sup> Global Constitutionalism<sup>8</sup> and the International Public Authority,<sup>9</sup> each have sketched out theoretical frameworks, based either on particular conceptions of international rules (constitutional norms guiding and conditioning institutions behaviour), or laying down principles (grounded on particular ideas of public law) upon which international institutions should not only base their actions, but also their rulemaking activities. If much attention has been paid to the way in which law and legal principles should be applied to executive decision-making processes in international organizations,<sup>10</sup> very little has been said about how this should, in turn, be applied to accountability mechanisms.<sup>11</sup>

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- 7 See for instance B. Kingsbury, N. Krisch, R.B. Stewart, *The Emergence of Global Administrative Law*, 68 *Law and Contemporary Problems* (2005), 15-61; Also, B. Kingsbury, *The Concept of "Law" in Global Administrative Law*, 20 *EJIL* (2009), 23-57.
  - 8 J. Klabbers, A. Peters, G. Ulfstein (eds.), *The Constitutionalization of International Law* (2016). Also T. Kleinlein, *Konstitutionalisierung im Völkerrecht: Konstruktion und Elemente einer Idealistischen Völkerrechtslehre* (2012).
  - 9 A. von Bogdandy et al. (eds.), *The Exercise of Public Authority by International Institutions. Advancing International Institutional Law* (2009).
  - 10 See, from a GAL perspective, N. Krisch, B. Kingsbury, *Introduction: Global Governance and Global Administrative Law in the International Legal Order*, 17 *EJIL* (2006), 1-13; B. Kingsbury and L. Casini, *The Global Administrative Law Dimension of International Organizations*, 6 *Int.Org.L.R* (2009), 319-358; L. Boisson de Chazournes, *Changing Roles of International Organizations: Global Administrative Law and the Interplay of Legitimacies*, 6 *Int.Org.L.R.* (2009), 655-666. For a global constitutionalism point of view, E.-U. Petersmann, *Constitutionalism and International Organizations*, 17 *Northwestern Journal of International Law and Business* (1997), 398-469; A. Peters, *Global Constitutionalism Revisited*, 11 *International Legal Theory* (2005), 39-68. For the IPA analysis on this, see the case studies presented in Bogdandy et al., *supra* note 9.
  - 11 The question here, nonetheless, is that some scholars have identified the mechanisms as part of the whole executive machinery of IOs. Be that as it may, with their activities having taken an increasingly 'judicial' character, the question of how to translate or apply procedural rules and principals typical of executive and administrative bodies becomes blurred. The extent to which these mechanisms should be treated as 'administrative', 'quasi-judicial', 'judicial' bodies, is highly debatable

In this context, this chapter investigates to what extent the application of the principle of due process of law, as applied to judicial courts' activities, results in a process of judicialization of accountability mechanisms within the World Bank. In doing so, this study hopes to provide an assessment of how much international law affects the construction of what has been coined the 'accountability' of international organizations. This may also allow for an understanding of how international legal standards – in particular those concerning procedural law – impact the development of sustainable accountability bodies within international institutions. An assessment of the authoritativeness of international law on these mechanisms may also allow for the verification of whether or not reference to international law increases the chances of compliance by the organization for its own internal standards.

To this end, instead of providing a full-fledged critique of the work of such AMs, this study will proceed by describing their activities and analysing the way in which procedures, administrative rules and law are articulated within their work. In order to accomplish what is proposed, this chapter will be divided into three parts. First, it will discuss the way in which procedures and procedural law have been dealt with in the context of international institutional law (II). More specifically, this section will attempt to highlight the importance of perceiving procedural law as broader than just the law applicable to judicial proceedings. The chapter will follow by presenting the way in which due process is applied in international institutions, by means of investigation how the concept of due process, as applied in courts, may be used as a normative principle in international organizations (III). Lastly, the final remarks will look at how some of the accountability mechanisms within the World Bank Group may benefit from the application of the principle of due process into their activities (IV).

## *II. Expanding the Perception of Procedural Law for International Organizations*

With rare exceptions, legal scholarship has for a long time abdicated from theorizing the role of procedures as elements constitutive of bureaucratic institutions.<sup>12</sup> Such a work has been mostly done by social scientists eager

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and this chapter has no intention to answer it. It will, however, by looking at these bodies' work, see to which degree should procedural law and procedural principles be differently perceived in their context.

12 An example of such an exception, D. Galligan, *Due Process and Procedural Fairness* (1997).

to identify the conditions under which bureaucracies and other institutions were and are created in societies.<sup>13</sup> Lawyers see procedures mostly through the lens of legal standards. Different procedures are identified according to the set of rules which organize them and these rules set the goals of such procedures.<sup>14</sup> In fact, for lawyers legal procedures are normally not thought of outside the ambit of such legal standards and in many aspects are considered as the standards themselves.<sup>15</sup> This distinction matters in this context, because the accountability mechanisms presently analysed are at the same time instrumental procedures in IFIs<sup>16</sup> – especially considering that their function is to review the organizations’ actions – but are not governed by rules that are considered international law proper. The rules setting out their functioning as well as those in which decisions are taken within these accountability mechanisms are internal rules.<sup>17</sup> Despite some of these rules being binding on the organizational staff, they do not

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- 13 Even so, the role of ‘procedures’ has not been exhaustively examined in general in the social sciences. A few scholars who have dedicated themselves to an attempt to provide a definition to the concept of procedure include N. Luhmann, *Legitimation durch Verfahren* (1969); P. Bourdieu, *Esquisse d’une Theorie de la Pratique* (1972); M. de Certeau, *L’Invention du Quotidien*. Vol. 1 *Art de Faire* (1980); M. Douglas, *How Institutions Think* (1986).
  - 14 It has been argued that even in legal settings, the goal of procedures is to discover or uncover a particular truth of the system, Luhmann, *supra* note 13, 12.
  - 15 Robert Kolb suggests that although the definition of ‘procedure’ may be somewhat troublesome, in general ‘the term covers (i) all devices devoted to the enforcement of the rules of substantive law and (ii) the rules determining the organization, the competence and the functioning of the organs existing to achieve that goal. In the context of judicial proceedings, the term “procedure” *lato sensu* covers all rules relating to international judicial action. These include the rules governing the composition of the court, questions of competence and admissibility, the objective and subjective conditions for bringing a claim, as well as the modalities according to which the case will be dealt with.’ R. Kolb, *Competence of the Court, General Principles of Procedural Law*, in A. Zimmermann, K. Oellers-Frahm, C. Tomuschat (eds.), *The Statute of the International Court of Justice: A Commentary* (2012), 873.
  - 16 Even though they are independent agencies created within the scope of the IFIs.
  - 17 The nature of these rules has also been largely debated. It is conventional to attribute to them the quality of ‘soft law.’ See for instance D. Bradlow, D. Hunter (eds.), *International Financial Institutions and International Law* (2010); J. Alvarez, *International Organizations as Law-makers* (2005), in particular 235-240; Also, for a more general overview of how internal regulation of IOs are treated as soft law, see J. Klabbers, *An Introduction to International Organizations Law* (2015), especially chapter 8; M. Ruffert, C. Walter, *Institutionalised International Law* (2015), 33-42; and N.D. White, *Lawmaking*, in J.K. Cogan, I. Hurd, I. Johnstone (eds.), *The Oxford Handbook of International Organizations* (2016).

constitute sources of international law in the formal sense.<sup>18</sup> In this context, the question we seek to answer is of whether the rules of procedure introduced by means of these internal regulations aiming at governing these accountability mechanisms somehow take consideration of typical rules and principles that are also applicable to courts. Rather than inventing a procedural law for IOs, the idea is to uncover the rules and principles already existing within this normative body (the various internal regulations set out by the organizations) that compose the general order of procedural law. However, because the accountability mechanisms in these organizations seek precisely to distance themselves from the model of courts,<sup>19</sup> that it may be hard to find in the ‘rules’ indications that there are similarities between the way in which procedural law is applied in these two settings. This is why, instead of focusing on particular rules of procedural law, this chapter intends to concentrate on the role that the concept of ‘due process’ has in these mechanisms. In observing why and how the principle of due process is applied in AMs, we may be able to understand to which extent the operation of these mechanisms is coming closer (or not) to that of international courts.

#### A. *The Modern Uses of Law to Regulate Procedures*

Procedures are a fundamental element of any institutional system.<sup>20</sup> They constitute the very materialization of rationalization processes required for bureaucratic institutions to properly function.<sup>21</sup> In fact, procedures perform an integral function in guaranteeing predictability within the system by setting up a rational means, based on rules and principles, through which actions and decisions can be taken.<sup>22</sup> This applies to a variety of institutions, ranging from courts to larger bureaucracies, such as international organizations.<sup>23</sup> In each of these contexts, procedures are used as mech-

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18 I make particular reference to the list provided in article 38 of the International Court of Justice’s statute.

19 After all, they rely precisely on an idea of ‘accountability’ as opposed to that of ‘responsibility’.

20 Galligan, *supra* note 12, 5.

21 M. Weber, *Economy and Society* (2013), in particular Chapter XI on Bureaucracy; and also C. Lefort, *The Political Forms of Modern Society: Bureaucracy, Democracy, Totalitarianism* (1986). Also M. Hauriou, *Principes de Droit Public* (1916).

22 Galligan, *supra* note 12, 293.

23 G. della Cananea, *Due Process of Law Beyond the State* (2010), 99.

anisms to reach decisions on a variety of matters.<sup>24</sup> They exist within the scope of law, but also in the larger space of social life, governing the most varied types of rites and actions.<sup>25</sup> In this context, legal scholarship has been very attentive to the rules of legal procedures, but has dedicated little thought to procedures' normative purposes and how these procedures are constructed within general institutional social spaces.<sup>26</sup> The importance of proceeding with such a broader analysis lies in the necessity to better understand, in each one of the social and institutional spaces, the best way in which procedures can be devised with a view to achieving not only the institutional goal, but also the objectives of any social system. This means that, in fact, procedures are not merely necessary elements of institutional constructs. They should be analysed in conjunction with other social factors within the community or social system,<sup>27</sup> that is, they should be also ascribed a place within the normative – besides structural – project of the society.

Lawyers, in general, have mainly focused in conceptualizing procedures by means of rethinking the rules that set them up and organize them.<sup>28</sup> The nature and conditions under which these rules are laid down and fol-

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24 Galligan, *supra* note 12, 8.

25 Hauriou, *supra* note 17, 158.

26 Luhmann, *supra* note 13, 11. Luhmann points to the fact that so far only Kelsen's Pure Theory of Law is the first attempt to think of providing such a description of the interrelation between the normative and structural character of procedures.

27 For an interesting analysis of how rites, procedures and institutions may develop differently in communities and societies, see F. Tönnies, *Gemeinschaft und Gesellschaft: Grundbegriffe der reinen Soziologie* (2010), 1887.

28 It is clear from this definition of procedure that the thing-in-itself (the procedure) and the rules that set it up and govern it (procedural law) are here taken interchangeably. This was noted by Luhmann already in the late 60s, when he recognized that lawyers had so far only devoted themselves to dealing with procedural law (Verfahrensrecht) and not with procedure proper (Verfahren). This was largely due to the influence of Kelsen's pure theory of law, which sought to detach the constitution of procedure within a legal framework from all sorts of sociological analysis and fundamentals (and of any other social sciences for that matter): 'Die bisherigen Bemühungen um eine allgemeine Verfahrenslehre haben sich unter dem Einfluss von Kelsen bewusst von der Rechtssoziologie abgesetzt und sich betont rechtsimmanent verstanden. Sie konnten methodenstreng überhaupt nicht von der Verfahren, sondern nur von Verfahrensrecht handeln. Die Schwierigkeiten, in die ein sich selbst begründender Rechtspositivismus als Theorie gerät, sind inzwischen jedoch offensichtlich. Das legt es nahe, den umgekehrten Weg zu gehen und sich an die Soziologie zu wenden und nach einer soziologischen Theorie des Verfahrens (nicht: des Verfahrensrecht!) zu fragen.' (Until now the efforts consecrated to a general theory of procedures have, under the clear influence of

lowed constitute one of the fundamental topics of procedural law scholarship nowadays.<sup>29</sup> There has been a great deal of attention paid by scholars – and practitioners in various domains – to the role rules setting procedures play within institutional contexts. Rules governing procedures are not treated uniformly in legal scholarship. They are normally classified as those governing judicial proceedings; and those in bureaucratic settings and legislatures. In the former case, reference is made to those rules governing both civil and criminal proceedings. The latter is that of administrative institutions and legislatures, where rules are set to organize decision-making processes. In this case, procedural law is included within the rules and principles of *public* law.<sup>30</sup> Although they are set out in different domains of law, these rules are all *procedural* in nature and therefore constitute by and large the *corpus* of a general procedural law. For instance, it would be no exaggeration to say that ‘procedures’ remain the main focal point of administrative law. This is true especially when considering ad-

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Kelsen, distanced themselves from legal sociology. They clearly stem from a strong positivist position.\* These efforts have in the strict application of their method been able to only concentrate on the topic of procedural law and not on procedures in general. The difficulties in which such a self-justified legal positivism works out are rather obvious. This suggests however that the opposite way should be taken, with a turn to sociology and to question about the possibility of a sociological theory of procedures [and not of a theory of procedural law] Luhmann, supra note 13, 12, our translation. \*The translation of *rechtsimmanent* finds no precise equivalent in English. It refers however to an understanding of the law as not extending beyond the norm that espouses it, therefore it denotes a positivist position, rather than one that sees the law as existing outside or detached from the norm that creates it.

29 In particular, an important debate that has become very topical recently in this regard concerns the ‘constitutionalization’ of legal procedures in international institutions (both courts and international organizations). This has been very much inspired by developments in national jurisdiction (for a debate of how the constitutionalization of administrative law and procedures has gained large importance in both Germany and France, see for example E. Schimdt-Assman, S. Dragon, *Deutsches und Französisches Verwaltungsrecht im Vergleich ihrer Ordnungsidee. Zur Geschlossenheit, Offenheit und gegenseitigen Lernfähigkeit von Rechtssystemen*, 67 *ZaÖrV* (2007), 413-425). It has, however, taken a distinct trait at the international level, precisely because of the lack of an agreed constitutional instrument setting out general and universal principles for all international institutions. (For this debate, see also Cananea, supra note 19, 94-96).

30 Reference to public law in this case is meant to include both the law governing actions of the state based on the constitution (*Staatsrecht*) and administrative law (*Verwaltungsrecht*). For an interesting investigation into the origins of this concept, see M. Loughlin, *Foundations of Public Law* (2010), in particular chapters 7 and 9.



ministrative law's double function to "protect the individual's rights against the administration, and [...] make legal procedures and instruments available to the administration, so that it can effectively carry out its tasks."<sup>31</sup> In this context, however, it is important to notice that different legal traditions have also referred to the regulation of procedures in different manners. This has a manifold impact, especially because it reveals different ways in which procedures can be *viewed*. A crucial work of systematization is the one made in the early 20<sup>th</sup> century by Italian lawyers, which gave rise to the idea of a *diritto procesuale* in addition to that of mere procedural law.<sup>32</sup> This has fundamentally impacted the development of different lines of understanding about law and procedures. It is worth dedicating a few lines to this issue.

Nevertheless, as mentioned above, legal scholarship has failed (if maybe more simply avoided) to give a proper and well-rounded definition of the field of procedural law. Also, a universal or at least wide comprehensive definition is made harder to achieve by the fact that there are fundamental differences between the various existing legal systems. Taking the example of the two largest 'legal families,' the common law and civil law systems,<sup>33</sup> we can identify differences regarding the way procedures are generally treated by law and legal doctrine. Common law is fundamentally a 'procedural' legal system. Since its initial developments in the mid-12<sup>th</sup> century, the very basis of the common law system was to provide means for the different actors to have some sort of access to justice. It was not only the attempt to bring all local courts under royal rule that meant to facilitate access to justice, but also the creation of various writs, brought together in the *Glanvill*, known as the book that was "in effect a guide to writs and their working"<sup>34</sup> that justifies such an assertion that in its very origins, the common law, is a procedural system. It is only after a system of institutions and procedures had been instituted that a 'substantive' common law started forming.<sup>35</sup> In common law countries, therefore, procedural law has fun-

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31 E. Schmidt-Assmann, The Internationalization of Administrative Relations as a Challenge for Administrative Law Scholarship, in A. von Bogdandy et al. (eds.), *The Exercise of Public Authority by International Institutions. Advancing International Institutional Law* (2009), 947.

32 L. Cadiet, J. Normand, S. Amrani Mekki, *Théorie Générale du Procès* (2013), 5.

33 For an introduction to differences not only in terms of procedural law, but also substantive law, see the classic R. David, *Les Grands Systèmes de Droit Contemporain* (1964).

34 D. Ibbetson, *Common Law*, in *Oxford International Encyclopedia of Legal History* (2009), 80.

35 *Ibid.*, 81.

damentally been seen in connection with substantive law, especially as the means to provide remedies to secure the latter.<sup>36</sup> Because procedural law would be in such an association with substantive rights provided by the law, the common law system has possibly not cared much about its systematization and to its position as a particular, very distinct, field within the legal order more generally.<sup>37</sup> This may explain, as Lever has put it, why in the late nineties little attention was paid to the procedural reform being put in motion in England.<sup>38</sup>

In civil law countries, however, procedural law has been progressively systematized so as to make sense of a variety of differences – not only in terms of rules, but also in terms of principles<sup>39</sup> – existing within the legal system. Particularly with regards to the laws governing judicial proceedings, this systematization – which is ultimately the result of a historical legal *prise de conscience* of certain aspects of specific procedures – has culminated in a differentiation that has gone beyond mere doctrinal exercise and has found its way into well-defined codes of law. The main example of this kind is the definition of an effective sub-field (or sub-discipline for that matter) to that of ‘procedural law’ (or the laws that govern procedures in general. This was first done in Italy in the early 20<sup>th</sup> century, by Giuseppe Chiovenda who proposed the expression *diritto procesuale* to designate a

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36 J. Lever, Why Procedure is More Important than Substantive Law, 48 International and Comparative Law Quarterly (1999), 285-301, 286-287.

37 An interesting point, for instance, is that differently from continental law, in the common law system for the claiming of a substantive right, processes had always a particular ‘form’, or better, a specific ‘writ’, through which it would be brought before a court. Continental law, though also requiring that most times claims be brought in writing, at its very origin cared little about the procedural form. ‘The legal process that flowed from them was directed largely to the framing of a question that could be answered by a jury, and legal expertise was therefore focused on this. Since the question would vary from writ to writ, the common law was always framed around the different writs, rather than around abstract categories: it knew, for example, a law of debt – that is, it had rules applicable to the writ of debt – rather than a law of contract. The greatest contrast between the English common law and the legal systems of most of continental Europe would lie in this. Legal process in Europe, derived from Roman law and canon law, allowed the parties to frame their claims (normally in writing) in whatever way they wanted, without having to use stereotyped forms of writs; Continental lawyers, therefore, thought in terms of abstract categories, within which the facts as alleged could be understood and analyzed.’ Ibbetson, supra note 34, 82.

38 Ibid., 285.

39 The fundamental principles governing civil and criminal procedures, for instance, are very different, but also are the psychological and sociological assumptions, Luhmann, supra note 13, 57.

specific science dedicated to study of litigious procedures.<sup>40</sup> More importantly, this is possibly the first time where civil procedure – even before criminal procedures – were thought out in a systematic way so as to constitute a fully distinguished discipline from civil law – according to its roman origins.<sup>41</sup> This new science, however, should not be restricted to civil procedures. As a general science of litigious procedures, this *diritto processuale* would encompass all sorts of procedures – civil, criminal, and administrative – and provide a common thread through which to think systematically about them. This would prove extremely useful, because it allows for a distinction between a general procedural law comprehending all sorts of procedures, including those related to decision-making, law-making, etc., and a procedural law focused on judicial means of dispute resolution, which in the lack of a specific word in English for this sub-field, we shall call it simply ‘judicial proceedings law,’<sup>42</sup> the latter being comprised within the former. It follows then that rules and legal norms regulating procedures are present basically in every area of a legal order.<sup>43</sup> Most times ‘procedural law’ is referenced at the international level, the first idea one has, remains that of the body of law regulating and organizing judicial proceedings.<sup>44</sup> As mentioned above, every other procedure that does not fit within the proper scheme of judicial decision-making would eventually be considered outside of the traditional discipline of procedural law.<sup>45</sup>

This description and differentiation matters because it allows one to have a more comprehensive grasp of the content of what one calls procedural law. Judicial procedural law is but one area of a larger, more general, field. It should not be confused with the set that encompasses other types of legal rules regulating procedures which are not necessarily those of judi-

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40 Cadiet et al., *supra* note 32, 6.

41 H. Vizioz, *Études de Procédure* (1956), 172-173.

42 Discussion with Prof. Hélène Ruiz Fabri, Luxembourg, 2/08/2017.

43 Procedures are also an integral feature of constitutional law. In it, one finds a variety of rules regulating different procedures. From law-making to political decision-making, constitutional law sets out and determines the way in which procedures happen within the state organization. See for instance J. M. Mashaw, *Due Process in the Administrative State* (1985). Also, P. G. Kauper, *Frontiers of Constitutional Liberty* (1971).

44 See for instance E. Lauterpacht, *Principles of Procedure in International Litigation*, 345 RCADI (2011); N. Klein, *Litigating International Law Disputes* (2014); C. Romano et al., *The Oxford Handbook in International Adjudication* (2015); H. Thirlway, *The Law and Procedure of the International Court of Justice* (2013); and C. Brown, *A Common Law of International Adjudication* (2007).

45 Luhmann, *supra* note 13, 17.

cial proceedings. As previously stated, all sorts of state procedures are controlled and regulated by the law.<sup>46</sup> The fact that, historically, legal doctrine – both nationally and internationally – has focused on rather systematizing and determining the content of a procedural law that relates specifically to litigious judicial proceedings should not exclude the consideration of other procedures and the law that governs them. Precisely in a moment where means other than those judicial are being more frequently used to solve conflicts, it is important to take account of the comprehensiveness of procedural law. But as most things in law, this re-learning of the content of procedural law has also been sparked by the understanding that law has to make itself not only present, but, more importantly, effective in all sorts of procedures within the larger state machinery. In this respect, the principle of due process plays a fundamental part, from its initial conceptualization and application to litigious proceedings – in the English sense – to being redefined and applied to all sorts of administrative and also legislative procedures – as it was done in the United States. How this principle has also impacted the way in which procedures are seen in international law is what we seek to see next.

### *B. Conceptualizing Due Process for International Institutions*

In an effort to define the content and the meaning procedures may have for various institutions, one should attempt to find common traits that justify their instalment in societies. Since the formation of the modern state and the development of new bureaucratic apparatuses for the purposes of government,<sup>47</sup> one aspect of procedures in institutional settings that seems to have increasingly gained prominence, in that it allows for proper access of members of the public sphere to the issues at stake in societal institutions, is that of publicity. Publicity here is understood as being a broader concept than that of transparency, because it not only serves to push international institutions to make clear whatever happens within their procedures, but also hopes to constrain these institutions to become clearer

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46 P. Cane, *Controlling Administrative Power. A Historical Comparison* (2016), 476-477.

47 On this, see M. Foucault, *Sécurité, Territoire et Population* (2004), particularly 53-76. Also, for a more legal perspective, see M. Stolleis, *Geschichte des öffentlichen Rechts in Deutschland. Erster Band 1600-1800* (2012). Both do address, however, the origins of the *Policeywissenschaft* as the starting point of a science to think out procedures in public institutions.

about their intentions in general. It is an element which seeks to curb whatever type of unknown political or ideological purposes of these international institutions, by making these same purposes apparent to the larger public. Because large bureaucracies are intended to be the instruments through which general (or public) interest is managed,<sup>48</sup> publicity is seen as an integral trait of procedures. This is largely a reaction to the old scheme of things, whereby old governmental structures, in particular those of the late 17<sup>th</sup> and early 18<sup>th</sup> Century monarchies would function, which was strongly based on the politics of secrets.<sup>49</sup> The concept of due process has since developed to a great extent; in this same sense publicity in administrative procedures has become a cornerstone element of such concept. Yet publicity is not necessarily a constitutive element of the larger general concept of due process. Again, due process is meant to serve as a principle that guides both judicial and administrative procedures. In the administrative sphere it is a means to ensure that whenever the administration takes ac-

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48 See M. Weber, *Economy and Society* (2013). However, this clearly draws out from Hegel's ideal of how the state apparatus is supposed to represent this general interest, especially through the medium of the local corporations reuniting private interests of members from the civil society (*bürgerliche Gesellschaft*) (G.W.F. Hegel, *Grundlinien der Philosophie des Rechts* (1986), 1821, para. 289).

49 It is precisely in reaction to this politics of secrets in the old absolutist monarchies that such a principle of publicity began being developed. Such a principle was quickly incorporated into the modern legal administrative imaginary. "In den Wissenschaften ist zwar von Arkandisziplinen und Arkansprachen die Rede, in der Politik wurden Arkanpraktiken als Verstoss gegen das Öffentlichkeitsprinzip der Demotrakie gerügt, in Staatslehre, Staats- und Verwaltungsrecht steht das Prinzip der Öffentlichkeit gegen die monarchischen Arkantradition." (In [social] sciences the secret disciplines and secret languages certainly constitute an object of analysis; in politics the secret practices are reproved as a violation of the democratic principle of publicity; in state theory, public and administrative law the principle of publicity is set in opposition to the monarchic tradition of secrecy.) M. Stolleis, *Staat und Staatsräson in der frühen Neuzeit*, 37, our translation. This laid down the basis for the future development of the "Policywissenschaft", which rests at the very origin of current administrative law. For this, see M. Stolleis, *Geschichte des öffentlichen Rechts in Deutschland* (1988), Ch. 9. Interestingly, secrecy or secret politics remained one of modern bureaucracy's main objects of critique. Marx, for example, was very critical of the way in which state administration was organized in capitalist societies and argued that the essential spirit of state bureaucracies is the secret: "L'esprit général de la bureaucratie, c'est le secret, le mystère; au dedans, c'est la hiérarchie qui préserve ce secret et, au dehors, c'est son caractère de corporation fermée. Aussi, la bureaucratie ressent-elle toute manifestation de l'esprit politique et du sens politique comme une trahison de son mystère." K. Marx, *Critique de la Philosophie Politique de Hegel*, in K. Marx, *Cœuvres Philosophiques* (1982), 921.

tion regarding various freedoms of citizens that those affected will have instruments and ways to argue in favour of their rights.

It is precisely this historical shift in the content of the principle of due process that will determine a transformation in the way that procedures are also observed. In US legal doctrine – a place where the principle of due process most likely saw its major development – it is common to divide the due process in two branches: procedural and substantive. The former has less to do with specific substantive rights and more with ‘the procedures to be used when they are at issue.’<sup>50</sup> The latter is in strict connection with a particular set of rights (substantive), that comprising the rights to life, liberty and property, and allows for the occasional deduction of rights ‘not written’ that guarantee the proper materialization of the set.<sup>51</sup> This latter form of due process – substantive – is closely associated to the content of certain rights – liberty, life and property – present in the US’ constitution. Its occasional transposition to the international level would have to account for a similar right present in a similar instrument. Although some argue of its existence,<sup>52</sup> as a matter of *practice* – not necessarily of *fact* – this is very hard to prove.<sup>53</sup> Instead, a *procedural* due process seems to be the most viable version of such a principle to be transposed to the international level.<sup>54</sup> What can be drawn from this, however, is that regardless of the quality attributed to the principle of due process – be it either substantive

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50 J. Orth, Due Process, in Oxford International Encyclopedia of Legal History (2009), 368.

51 “Since rights enumerated in the constitutions are more specific, the emphasis of substantive due process has been on ‘unenumerated rights’, that is, rights not expressly mentioned in the text. The very generality of the words ‘life, liberty, and property’ has proved a useful reference when dealing with changes in economic organization and social priorities.” Ibid., 368.

52 As do, for instance, those belonging to the so-called global constitutionalist, see supra note 8.

53 In this respect, our position is rather agnostic. In the same way we are unable to state as a matter of fact the existence of an international constitution – considering all sorts of legal arguments could be presented to make its case – we cannot also prove or demonstrate its inexistence. However, as a question of practice, despite the necessity to abide by certain rules of jus cogens, international actors will still many times rely on a voluntarist understanding of international law. This ‘variation’ between positions prevents us from taking a firm position on the existence of rights – which do in fact exist – in the same way as they do in domestic constitutions – since there is no agreement on an international constitution.

54 Devika Hovell provides an interesting analysis and critique of what could be seen as the closest approach possible to tackling due process at the international level from a substantive perspective: a source-based methodology. On the one hand,

or procedural – the fact remains that, in historical terms, it has operated a fundamental transformation of procedures in public institutions. Due process has gone beyond judicial proceedings, turned into a fundamental principle of public administration, and has pervaded the whole society and its rituals. It served as an ‘eye opener’<sup>55</sup> and it has ultimately redefined the content of regulations and rules governing all sorts of procedures, including in the private sector.<sup>56</sup> This is also one of the reasons for which different procedures need reexamination by legal scholars. In order to better understand the way in which due process is applied to international organizations, however, it is necessary to understand how and why due process has gone beyond the limits of judicial proceedings and arrived at procedures in different public institutions. This requires looking for those occasional common elements of these procedures.

The search for common elements between different procedures requires an investigation into the principles governing the way in which they should be set out and how they should function, especially when considering the procedures leading up to decisions by public authorities. Procedures both at judicial and administrative settings have become ever more imbued with the principle of due process, as it serves as a normative guidance protecting individuals against abuses of public institutions. In this sense, therefore, in order to better grasp the potentially different ways in which procedural law can be observed in international organizations, it is important to assess the way in which the principle of due process has been used and applied in their settings.

Procedural rules, however, do not exist alone within the various legal domains. They are constantly developed and arranged with a view to attend to certain practical, axiological or normative purposes of the institution are often contained in principles guiding their activities. In the con-

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she identifies those who seek to justify violations of due process on the basis of particular procedural rights set out in international or regional legal instruments, such as the European Convention of Human Rights or the American convention of Human rights. Others attempt to deduce general principles of administrative law, which would be also applicable as standards in general decision-making and litigious procedures. Even though they are both somewhat based on a positivist methodology, they also limit and distort the way in which the concept is understood and applied at the international level. See D. Hovell, *The Power of Process. The Value of Due Process in Security Council Sanctions Decision-Making* (2016), 34-35.

55 Discussion with Prof. H el ene Ruiz Fabri, Luxembourg, 2/08/2017.

56 Many administrative procedures in private institutions take also account of the principle of due process nowadays.

text of constitutionally and democratically governed societies, the principle of 'due process' plays a fundamental role in the development and strengthening of different types of procedures. The principle of due process pervades procedures in both public administrations and in the judiciary. Due process is thus arguably one of the fundamental principles of public institutions and should serve as a guarantee against their abuses.<sup>57</sup>

Whether and how the principle of due process can be identified at the international level remains a contentious issue. Nevertheless, this matter has received more attention recently, given the prominent role international courts and organizations play in world politics. The exercise of their authority has increasingly had more impact on local populations in the last three to four decades.<sup>58</sup> IOs' decisions have begun to be felt more directly by national and local populations – and also individuals. For instance, Security Council's decisions affecting particular individuals potentially involved in terrorist activities have been the object of studies (more specifically the SC's targeted sanctions procedures).<sup>59</sup> Even though defining the scope of what can be called procedural law in international law is a challenge, there are a few international legal standards pointing to some agreed principles of what may be said to account for due process in international law. There are the rules present in a variety of conventions, such as the International Covenant on Civil and Political Rights (ICCPR), the American Declaration of Human Rights (ADHR) and the European Convention on Human Rights (ECHR).<sup>60</sup>

In addition to making sure IOs conduct their activities in a legal and appropriate manner, this new reality brings about also the question of the legitimacy of their decisions. As such decisions begin to affect directly peoples' lives and local populations become more wary of IOs decisions' impacts, claims that the procedures leading up to such decisions are made

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57 Ibid., 19.

58 Again, on this topic, see Bogdandy et al. (eds.), *supra* note 9. Also on the increasing authoritative and regulatory position of international organizations: M. Zürn, M. Ecker-Eckhardt, *Die Politisierung des Weltpolitiks. Umkämpfte internationale Institutionen* (2013); M. Heupel, M. Zürn (eds.), *Protecting the Individual from International Institutions: Human Rights in International Organizations* (2017); On the changing authority of international courts, A. von Bogdandy, I. Venzke, *In Whose Name? A Public Law Theory of International Adjudication* (2014). Also, from a political science perspective, K. Alter, *The New Terrain of International Law: Courts, Politics and Rights* (2014).

59 See B. Fassbender, *Targeted Sanctions and Due Process*. Available at [http://www.un.org/law/counsel/Fassbender\\_study.pdf](http://www.un.org/law/counsel/Fassbender_study.pdf) (last visited 6 December 2018).

60 ICCPR, article 14; ADHR, article 26; ECHR, articles 6-7.



more transparent, public and that affected people participate in them have become also more frequent and urgent. Scholars have noticed that this has become a central issue in various IOs and have therefore attempted to situate this new reality within different theoretical legal frameworks, each of which has come up with their own idea of due process of law. Some of these theories are, for example, the Global Administrative Law (GAL), Global Constitutionalism and the International Public Authority (IPA). Their approach may be different, but their goal is basically the same: provide a justifiable legal framework within which the control of IOs in terms both of procedures and substantive rights is made possible. While Global Constitutionalism functions on the basis of the recognition of rules at the international level with the normative force of a constitution – thereby constraining the actions of any entity endowed with international legal personality – GAL and IPA base their framework on the development of principles drawn out from an idea of public law.

When comparing all these theories, it is possible to see how the concept of due process plays a fundamental role in adapting international institutions to their framework. In particular, there are two elements which seem to be integral for the proper application of a concept of due process for international institutions. These elements are participation by those involved in the matter or, affected by the outcome of a particular decision and publicity of the acts. Participation is seen as a fundamental component of any decision-making process which hopes to be granted some degree of legitimacy by the larger international public. To the extent that entities or peoples are affected by decisions or actions of international institutions, they have to be granted some sort of means to take part in either the decision-making process or afterwards in the form of remedies in the case of rights violations.

IOs activities nowadays affect peoples' lives in a more direct way than they have ever before. This means that finding ways to survey and control their activities have also become ever more urgent. The recognition of this exercise of public authority by international institutions<sup>61</sup> brings to the fore the question of how eventual wrongdoings by IOs may be assessed. As mentioned above, the lack of a proper legal framework to hold international institutions responsible<sup>62</sup> has pushed some organizations to develop their own mechanisms to assess accountability of their own staff when rep-

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61 For this, see A. von Bogdandy et al. (eds.), *The Exercise of Public Authority by International Institutions: Advancing International Institutional law* (2010).

62 See *supra* note 1.

representing the institution. The idea that international law and constitutional rules of the organization must be followed by IOs' staff gained momentum after a number of incidents in which they were involved. In particular, the Cholera outbreak in Haiti, in 2010, was a turning point in determining that international law should in one way or another seek to regulate IOs actions.

Practical necessity of conforming organizations' actions to legal standards has been theoretically framed under the debate over the existence of an international rule of law. In this regard, the respect for due process in institutional settings is seen as a cornerstone element of any understanding of an international rule of law. Even when considered in a more traditional way, as a principle that guides the way in which procedures should be dealt with between member-states alone within the organization, due process has been seen as fundamental.<sup>63</sup>

If the concept of due process has a long-standing history in national jurisdictions, its application in international institutions, including both courts and IOs has not yet been fully realized. Whilst the origins of the principle are debated,<sup>64</sup> the content of the concept of due process has acquired a more or less consensual definition. In the most basic sense, it provides that no one shall be deprived of her life, liberty or property without due treatment before the law. Defining the concept of due process for IOs is crucial for the proper application of the principle in institutional proce-

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63 See for example W. Jenks, *Due Process of Law in International Organisations*, 19 *International Organization* (1965), 163-176.

64 It is said that the idea of due process finds its origins in the Magna Carta of 1215 (*nisi per legem terrae*), although the basis for its modern understanding derives from the Constitutional Amendments to the United States Constitutions n. 5 and 14. The construction of such a concept runs somehow parallel to that of the idea of 'rule of law'. Some scholars actually argue that in England the concept of due process was gradually replaced by this more 'vague expression', the rule of law. J. V. Orth, *Due Process*, in S. N. Katz (ed.), *The Oxford International Encyclopedia of Legal History* (2009), 367. This argument however is debatable, as the concept of rule of law in England followed a particular development, which was not always associated with that of the concept of due process. It could be more appropriate to say that the idea of due process was later incorporated into that of rule of law, but that they remained, nevertheless, distinct legal concepts and figures. On the development of the concept of rule of law, see L. Heuschling, *Etat de Droit, Rechtsstaat, Rule of Law* (2002), in particular Chapters 2 and 3. Also, it is interesting to see how this history has somehow been transposed to the international. For this, even if mentioned briefly, see J. P. Gaffney, *Due Process in the World Trade Organization: The Need for Procedural Justice in the Dispute Settlement System*, 14 *American University International Law Review* (1999), 1173-1221.

dures. Evidently, the materialization of the principle of due process in international law should most likely be different than that in domestic public bureaucracies (or even for domestic jurisdictions).<sup>65</sup> Yet international organizations already have a history and many of them have consolidated a variety of their decision-making procedures, making them both a matter of politics and legal technique.<sup>66</sup>

The question has not been completely ignored. For instance, recently, a number of scholars have attempted to provide a framework for thinking and applying the concept of due process to the work of the Security Council.<sup>67</sup> Recently also, a few courts and international organizations have attempted to provide definitions of due process of law in international law. The Inter-American Court of Human Rights (IACtHR), in an advisory opinion on due process and consular relations, established that, throughout time, the concept of due process had evolved to incorporate the realization in practice of a variety of procedural rights.<sup>68</sup> Although limited, the

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65 S. Casese and E. d'Alterio, Introduction: the development of Global Administrative Law, in S. Casese (ed.), *Research Handbook on Global Administrative Law* (2016), 8. Casese argues not only that their content is different, but also their 'structure and function' differs from what we find in national jurisdictions.

66 Wilfred Jenks noted in the late 50s how the structuration of international organizations had advanced a lot faster than that of international courts after the World War II. More specifically, his point was that in terms of procedure, the ICJ, despite having already provided a variety of decisions that responded to many doubtful aspects of international law, had not yet developed enough about its understanding of its own procedural law. W. Jenks, *Le Prospettive del Processo Internazionale*, in R. Argo, M. Giuliano, P. Ziccardi, *Comunicazioni e Studi* (1960), 37.

67 See for example Hovell, *supra* note 54; also, see Fassbender, *supra* note 59.

68 'In the opinion of this Court, for "the due process of law" a defendant must be able to exercise his rights and defend his interests effectively and in full procedural equality with other defendants. It is important to recall that the judicial process is a means to ensure, insofar as possible, an equitable resolution of a difference. The body of procedures, of diverse character and generally grouped under the heading of the due process, is all calculated to serve that end. To protect the individual and see justice done, the historical development of the judicial process has introduced new procedural rights. Examples of the evolutionary nature of judicial process are the rights not to incriminate oneself and to have an attorney present when one speaks. These two rights are already part of the laws and jurisprudence of the more advanced legal systems. And so, the body of judicial guarantees given in Article 14 of the International Covenant on Civil and Political Rights has evolved gradually. It is a body of judicial guarantees to which others of the same character, conferred by various instruments of international law, can and should be added; The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion, OC-16/99, IACtHR, 1.10.1999, 59, para. 117.

IACtHR has provided a conceptualization of due process. Other organizations have done similarly. The Counter-Terrorism Implementation Task Force (CTITF), together with the United Nations High Commissioner for Human Rights (OHCHR), prepared a “Basic Human References Guide” for the Task Force in which it gave a broad – but rather useful – definition of due process. The principle of due process is then defined as:

[...] the legal requirement that the State must respect all of the legal rights that are owed to a person.<sup>69</sup>

It remains hard to establish the content of due process at the international level, as these definitions put forward by different institutions address the concept of due process to be applied at a domestic level. They do, however, reveal an important dimension of this principle (of due process) that seems to cut across most of the doctrinal understandings and this is that due process is a guiding principle asserting that those undergoing any sort of administrative or judicial scrutiny, collectively or individually, should have all those rights, acquired through time or attributed to them by their single existence in the legal order, respected during such process.<sup>70</sup> This principle must be, in order to be properly executed, duly translated into procedural practices and mechanisms that will guarantee such a situation. In this respect, there is no reason for not applying it, as a general principle in international law,<sup>71</sup> to the work of both courts and IOs.

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69 CTITF, Basic Human Rights Reference Guide, CTITF Publication Series, October 2014, p. 4. In it, the document further stresses that “‘due process’ is treated as meaning the process that is due to be respected in the context of the specific setting—whether concerning the detention, trial or expulsion of a person—and required to ensure fairness, reasonableness, absence of arbitrariness and the necessity and proportionality of any limitation imposed on rights of the individual in question.” *Ibid.*, 4.

70 Similar to the concept of *procès équitable*, the concept of due process has to be tackled in its typical temporal structuration, given it is the ‘result of a permanent transaction between the universal requirements of good justice and national [legal] specificities;’ our translation (*Le droit au procès équitable, qui est un plus petit commun dénominateur procédural, n'est donc pas un principe transcendant, venant du ciel comme un Deus ex machina; il est le résultat d'une transaction permanente entre les exigences universelles de bonne justice et les spécificités tant nationales que matérielles des différents contentieux qui y sont soumis.*). L. Cadet, *Pour une « Théorie Générale du Procès »*, 28 *Ritsumeikan Law Review* (2011), 127-145, 136.

71 Judge Cançado Trindade noted, in his separate opinion in the *Pulp Mills Case*, that Herman Mosler had already in the 1980s – rightly in our view – concluded that general principles of law applicable in international law can also be found in

An observation, however, should be made about the difference between rules and principles here. This distinction matters, because it allows one to grasp the relationship between the principle of due process and the procedural rules deriving thereof. Both principles and rules can be considered as norms.<sup>72</sup> This goes on a direction, for instance, of what Judge Cançado Trindade says in his Separate Opinion on the Pulp Mills case.<sup>73</sup> This reasoning fails to recognize the normative force principles have to induce both the creation of rules and practices.<sup>74</sup> Principles are not merely ideas. They are norms and they prescribe the necessity to act either negatively or positively in given situations.<sup>75</sup> The principle of due process, for instance, finds its materialization through the creation of a variety of rules of procedure as well as in the constitution of various procedural practices for the most diverse public institutions. But because principles can also normatively guide the invention of practices, it is not necessarily attached to rules deduced from them. This means that institutions seeking to justify their actions in the terms of the principles of democracy, rule of law or fundamental freedoms – such as those belonging to the UN system<sup>76</sup> – cannot escape the application of due process in their decision-making process affecting

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national jurisdiction: “In the mid-1980s, Hermann Mosler observed that general principles of law have their origins either in national legal systems or at the level of international legal relations, being consubstantial with *jus gentium*, and applied to relations among States as well as relations among individuals.” A. Cançado Trindade, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Separate opinion, ICJ Reports 2010, 135, para 42.

72 R. Alexy, *Theorie der Grundrechte* (1985), 71.

73 ‘A principle is not the same as a norm or a rule; the latter are inspired in the former, and abide by them.’ (A. Cançado Trindade, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Separate opinion, ICJ Reports 2010, 135, para. 17.

74 Alexy, *supra* note 43, 72.

75 ‘[the] word ‘principle’ signifies, first, something that we can act on, or in conformity with, or, on the other hand, in breach of.’ R. Hare, *Presidential Address: Principles*, 73 *Proceedings of the Aristotelian Society* (1972/1973), 1-18.

76 United Nations Charter, Article 1, paragraph 1 and paragraph 3. The importance of these principles for the UN in general was also later confirmed and reinforced in a Declaration of the High Level Meeting of the General Assembly on the Rule of Law at the National and International Levels: ‘We recognize that the rule of law applies to all States equally, and to international organizations, including the United Nations and its principal organs, and that respect for and promotion of the rule of law and justice should guide all of their activities and accord predictability and legitimacy to their actions. We also recognize that all persons, institutions and entities, public and private, including the State itself, are accountable to just, fair and equitable laws and are entitled without any discrimination to equal protection of the law.’ A/RES/67/1, para. 2. Also, ‘We reaffirm that human

collectives and individuals, even if such a principle of due process is not expressly stated in their constitutive agreements and internal law.

The application of the concept of due process in international institutions is, as has been shown, not fully novel.<sup>77</sup> It has received some attention in recent years, with the increasing authority acquired by international organizations and the far-reaching impact of their decisions. As a means to control the way in which decisions are taken within IOs, not only are specific rules needed, but also forceful principles have to be laid down,<sup>78</sup> in order for proper procedures of control to be put into place. There is no real due process scheme in decision-making in IFIs. Staff and Boards act and decide in the way they see fit best their interests. In addition, they also create and set the rules which they believe are the most suitable for the achievement of the institutions' goals. This is done without any proper regard to general 'public interest.' Well, if they are a general administration regulating the economy, then they have no way out of publicity and due process should apply.

### *III. Due Process in Accountability Mechanisms*

Applying the concept of due process to accountability mechanisms requires as a first step defining the nature of such mechanisms, particularly that of the WBIP and of the CAO. Are they purely administrative institutions or do they carry out also some sort of judicial function? Is it possible to set them somewhere in between these two categories in a third category that some call 'quasi-judicial'? If so, what concept of due process should then be applicable to their procedures? A way to attempt an answer to these questions is to look for the ultimate objective of these mechanisms and tackling them in order to work out some sort of functional definition of these AMs. This could allow for the articulation of the concept of due

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rights, the rule of law and democracy are interlinked and mutually reinforcing and that they belong to the universal and indivisible core values and principles of the United Nations; *ibid.*, para. 4.

77 See Hovel, *supra* note 54.

78 Principles and rules in international law can be said to complement internal regulations in IOs in the process of creating a framework for the action of international organizations. See for instance K. Daugirdas, *How and Why International Law binds International Organizations*, 57 *Harv.Int'l L.J.* (2016), 325-81. See also the list of principles presented in *ILA Final Report on the Accountability of International Organizations*, Berlin 2004.

process within their specific procedures. In order to seek such a definition, this section will look into the rules that have set out the WBIP and the CAO, then attempt to draw out, from this normative analysis, some sort of workable description of AMs in which a concept of due process can be reasonably articulated.

### *A. Principles and Rules of Procedures in Accountability Mechanisms*

The basic rules governing and defining the work of the World Bank group are set out within the Articles of Agreement of each one of its institutions.<sup>79</sup> This is the case of the IBRD, IDA, IFC and MIGA. These Articles impose upon each one of these institutions a certain degree of autonomy in regulating their own operations. This should be no surprise, given that these institutions need some degree of autonomy for performance of their financial operations. It is precisely this double nature of these IFIs that brings about an interesting problem. They are at once international organizations and financial corporations. Therefore, the internal rules they produce to guide and direct the way in which the organization – through its staff – works has to account for this double nature. When it comes to the IBRD/IDA and the IFC/MIGA, the internal rules that set out the way in which this question has to be tackled are the safeguard and operational policies (for the IBRD/IDA), as well as the performance standards (for the IFC/MIGA). These organizations ambiguous position at the international plane is what requires one to take a closer look at how these internal rules in particular are elaborated.

A fundamental question that has been constantly asked concerns the nature of such internal rules. Such a question matters because understanding the quality of such norms allows us to grasp the extent to which such rules affect the organization action as well as those being affected by such action. The World Bank introduced some of its first social and environmental safeguards even before the first accountability mechanisms were introduced.<sup>80</sup> Even though secondary law of international organizations or any other ‘internal’ rule of the organization normally finds its legal basis on the institution’s constitution, the various safeguards created by the World

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79 The exception is the International Centre for Settlement of Investment Disputes (ICSID), which is governed by the ICSID Convention (October 14, 1966).

80 M. Heupel, *Human Rights Protection in World Bank Lending: Following the Lead of the US Congress*, in Heupel, Zürn, supra note 58, 250.

Bank were done so on an *ad hoc* basis.<sup>81</sup> Not because the Articles of Agreement do not authorize the Bank to regulate the ways in which it should conduct its businesses, but rather because it has no provision establishing the necessity to account for whatever social or environmental rights its projects may eventually violate.<sup>82</sup> However, considering it grants the Bank relative autonomy and authorizes the Bank to determine the most efficient and beneficial ways in which to conduct its business, these rules find their legal basis on the authority of the organization to establish them.<sup>83</sup> They may not be considered sources of obligations and rights in the same way as the sources set out in Article 38 of the ICJ statute, but they are still *legal* rules and compose the internal legal order of the Bank and thus cannot also be ignored by international lawyers.<sup>84</sup> In fact, some authors consider internal rules of IOs to be also part of international law.<sup>85</sup> Certainly they are imbued with a certain degree of ambiguity with respect to whether they are legally binding or not,<sup>86</sup> but they can still be considered appropriate means to determine the conduct of IOs and can constitute the basis on which to establish their accountability. In the case of the World Bank, considering the different accountability mechanisms created, one needs to take into consideration the specific rules of the organization under which they have been created and the safeguard rules on which they are supposed to take decisions.

Both the WBIP and the CAO have specific rules governing their activities. Before delving into the fundamental questions as to whether due process is regarded in the exercise of their functions, a brief explanation of their operating rules and these mechanisms activities is needed.

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81 *Ibid.*, 243.

82 *Ibid.*

83 M. Benzing, International Organizations or Institutions, Secondary Law, in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, last updated March 2007, para. 9. See also G. Ballardore Pallieri, *Le Droit Interne des Organisations Internationales*, 127 RCADI (1969), 22.

84 J. Alvarez, *The Impact of International Organizations on International Law* (2017), 351.

85 Ballardore Pallieri, *supra* note 83, 17.

86 Alvarez, *supra* note 84, 363.



### 1. *The World Bank Inspection Panel's Procedures*

The WBIP's procedures are governed by a variety of rules. The primary sources of the WBIP's activities are Resolutions IBRD 93-10 and IDA 93-6,<sup>87</sup> from 1993. This joint-resolution created the Inspection Panel and set out its mandate. Besides clearing out the WBIP's mandate, the resolutions also lay out some rules of procedure for the mechanism. In particular, paragraphs 16-23 describe the main working procedures of the WBIP, from the receipt of requests and decisions on registrations to the post-investigation phase. The joint-resolution was revised in 1996 and in 1999 a "Clarification of the Review of the Inspection Panel's Work" was issued. In it the Bank reaffirmed the general principles guiding the work of the Panel and highlighted the Panel's independence and integrity.<sup>88</sup> In addition to the Resolution, the WBIP's work is also governed by the Operating Procedures,<sup>89</sup> an internal regulation set out by the Bank to detail the way in which the WBIP should function. These are the two instruments – the Resolution, together with the Operating Procedures – that potentially showcase the way in which the principle of due process may or may not be applied to the WBIP's work.

The procedure before the WBIP has four phases. The first one is the receipt of request and the decision on whether or not to register it. Should all the formal criteria established in the operating guidelines be attended, the Panel will register the request. The criteria to be observed for registration of a request are laid down in section 3.1 of the Operating Procedures.<sup>90</sup> The second phase commences right after the request is registered, with the Panel informing the Bank's Management of the request's contents. Management has then 21 days to respond to the allegations, informing the Panel that it has complied with the standards set out in the contract or intends to comply with standards set out in the contract. After receiving the Management's response, the Panel has 21 days to assess the eli-

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87 Resolution IBRD 93-10, Resolution IDA 93-6, available at <https://inspectionpanel.org/sites/ip-ms8.extcc.com/files/documents/Resolution1993.pdf> (last visited 13 December 2018).

88 '1999 Clarification of the Board's Second Review of the Inspection Panel' available at <https://inspectionpanel.org/sites/ip-ms8.extcc.com/files/documents/ClarificationSecondReview.pdf> (last visited 13 December 2018).

89 The Inspection Panel of the World Bank, Operating Procedures (2014, with Annex 2 added in February 2016), available at <https://inspectionpanel.org/sites/ip-ms8.extcc.com/files/documents/2014%20Updated%20Operating%20Procedures.pdf> (last visited 13 December 2018).

90 *Ibid.*, section 3.1, 12.

gibility of the request. If the Panel deems the request to be eligible, it will recommend the Executive Directors of the Bank to initiate an investigation of the claimed violations of operational standards. In case an affected party has put the request forward, the Executive Directors have two weeks to inform such party of their decision.

The third phase follows the Executive Directors decision. If they decide to proceed with an investigation, the Panel's chairman will choose one or more members to conduct the investigation. During this period, the Panel members shall have access to supporting staff and may visit the place where the project is being undertaken. Moreover, during the whole process of investigation, both the Borrower and the Executive Directors shall be informed of the actions of the Panel in response to the request. Once the investigation is concluded, the Panel will prepare a report and submit it to the Executive Directors and the President of the Bank. The report shall contain all facts and evidences analysed by the Panel and should indicate whether or not there has been violation of the operational standards.

The fourth phase begins with the Bank's management response to the Panel's investigation report. Management prepares a report responding to the Panel's findings and indicating the measures it expects to take to remedy the situation, which is called the "Management Report and Recommendations in Response to the Inspection Panel's Investigation Report" (MRR). Following the presentation of this report, Management will agree on a plan of action with the Borrower in order to tackle the situation in question. Once this is done, Management informs the Panel, which may decide to submit a follow-up report to the Board of Directors of the Bank presenting a plan of adequacy of the actions suggested by Management. The Board will decide whether adaptation to the plan of actions is needed and inform both Management and the Panel. In the follow-up of the implementation of the plan of action, Management is required to report periodically to the Board and the Panel to inform of the measures being taken to remedy the situation.

All of these actions are based on the potential violation of a number of standards designed internally to guide the actions of the Bank's staff when conducting their financial activities. These standards are known generally as "Operational Standards" and include a variety of rules and guidelines, some of which are binding upon the Bank's staff, while others provide merely best-practice examples. Operational Standards comprise different types of internal rules within the Bank: Bank Procedures, Operational Policies and Good Practices. These internal rules have recently acquired stronger normative force and their prescriptions have come to be seen con-

stantly as mandatory for Bank staff.<sup>91</sup> Within the Operational Standards, the Operational Policies and the Bank Procedures are binding upon staff, while the Good Practices are a guide of best practices.<sup>92</sup> These Operational Standards are taken to be the ‘applicable law’ of the Inspection Panel.

Besides these standards, another type of internal regulation that is crucial to the work of the WBIP is the Operational Procedures.<sup>93</sup> This document sets out in detail the working procedure of the Inspection Panel following the principles and rules previously laid down by the 1993 Resolution and its following reviews. In it the Bank sought to develop rules detailing the investigation proceedings taking place at the WBIP. Interestingly, the Operational Procedures of the Inspection Panel contain a variety of sections, which hint at some sort of concept of due process. Mindful of the fact that affected populations and communities fundamentally act as a ‘party’ to the investigations, the Bank has attempted to lay down rules that create the conditions for them to have as much access as possible to the procedure. This has not always been the case and it has only been after the two reviews (first in 1996 and the second in 1999) that the Bank agreed to enforce this policy of participation.<sup>94</sup>

## *2. The Compliance Advisory Ombudsman Operational Guidelines*

The CAO has a different mandate and different functions from that of the Inspection Panel. Created in 1999, the Terms of Reference of the CAO establishes three functions for its office. It should serve as a dispute resolution mechanism (problem-solving between the company borrower and the affected people), as an advisor to the IFC and MIGA’s management on how to properly apply the Performance Standards in their financial activities and, as a compliance mechanism, assessing to which extent both of these institutions are following such standards.<sup>95</sup> The CAO is an employee

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91 Boisson de Chazournes, *supra* note 6, 283.

92 *Ibid.*, 285.

93 See *supra* note 26.

94 As mentioned above, participation and publicity are the two main features of a potential concept of due process that can be applied to accountability mechanisms. Although imperfect in many forms, it is important to highlight that, at least from a policy perspective – if not necessarily from a practical one – this has guided the development of the Inspection Panel procedures so far.

95 Terms of Reference of the Compliance Advisory Ombudsman, endorsed by the President of the World Bank Group, available at

of the IFC and MIGA at the level of vice-president and should liaise with the Board of Directors of both institutions.

In contrast to the WBIP, the CAO bases its work on other rules set out both by the IFC and MIGA. These rules are known as the Performance Standards<sup>96</sup> (PFs) and are of a different nature than that of the Operational Standards. Although similar in the objectives, they differ significantly in the way they are constructed. The various functions of the CAO mean that the Performance Standards are applied in different manners. There are at present eight different types of PFs, ranging from environmental impact assessment regulations to the protection of cultural heritage. Equivalent to the Operational Standards in the Inspection Panel, these PFs are considered to be the 'applicable law' in the CAO.

Despite also being an independent accountability mechanism, the CAO differs greatly from the WBIP, given that it accumulates three different functions. The first of these functions is that of compliance assessment. In this capacity, the CAO oversees the financial activities of the IFC and MIGA with respect to their borrowers in order to verify whether the PFs agreements in the loan or credit agreements are being appropriately followed. This is a simple case of where the CAO best attempts to subsume the actions of IFC and MIGA's staff to the regulations stipulated in the PFs. The affected communities and peoples may require information about such process. This, however, follows a petition claiming the violation of PFs by IFC/MIGA staff. Once a complaint is made, the CAO must assess whether there has been a potential violation of such standards by IFC/MIGA staff. If the CAO finds that there are indications this might have been the case, it indicates that it will proceed with an audit in order to investigate such potential violations. In this capacity, all the CAO is capable of doing is pointing out to IFC and MIGA management where they have failed or where they fail to comply with PFs. The weakest point in the system is that there is no provision establishing that Management is obliged to comply with the CAO's assessment.<sup>97</sup> This means that Management is free to consider and take it to account or not, the assessment on the continuation of its activities in a particular project.

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[http://www.cao-ombudsman.org/about/whoweare/documents/TOR\\_CAO.pdf](http://www.cao-ombudsman.org/about/whoweare/documents/TOR_CAO.pdf) (last visited 6 December 2018).

96 Performance Standards on Environmental and Social Sustainability, available at [http://www.ifc.org/wps/wcm/connect/c8f524004a73daeca09afdf998895a12/IFC\\_Performance\\_Standards.pdf?MOD=AJPERES](http://www.ifc.org/wps/wcm/connect/c8f524004a73daeca09afdf998895a12/IFC_Performance_Standards.pdf?MOD=AJPERES) (last visited 6 December 2018).

97 D. Bradlow, A.N. Fourie, *The Operational Policies of the World Bank and International Finance Corporation*, 10 *Int.Org.L.R.* (2013), 3-80, in particular 40.

The second function of the CAO is that of advisor to the IFC/MIGA. While performing this function, the CAO basically acts as an independent source of advice for the President of the World Bank Group as well as to the Management of the IFC and MIGA about the best ways to implement the PFs in the projects being agreed. Furthermore, the CAO also advises Management on broader policy designs concerning environmental and social issues.

The third function of the CAO is of acting as an Ombudsman or a sort of problem-solver between the affected parties and the companies executing the projects. This is not necessarily a dispute resolution function, but it is within the framework of this capacity that affected communities, peoples or their 'representatives' can present a complaint against the violation.<sup>98</sup> Whenever affected communities or peoples identify potential violations of PFs, which are actually endangering their current situation or violate any sort of right they have, they are entitled to present a complaint to the CAO. In this case, the CAO will act as a sort of mediator between both parties: the affected people and the company carrying out the project. A number of criteria, however, have to be attained for such a complaint to be received and registered. The CAO first analyses the complaint to verify whether there is indeed a conflict. If such a conflict exists, the CAO then proceeds to attempt a solution between the parties. As mentioned above, if the CAO also sees that there has been potential violation of PFs by IFC/MIGA staff, it can initiate a compliance proceeding.

Another difference between the WBIP and the CAO concerns the rules detailing the procedures. In the case of the CAO, instead of well-refined operational procedures – with sections laying down more or less precise rules of procedure – there are procedural guidelines. These are enshrined in the so-called Operational Guidelines of the CAO.<sup>99</sup> This document serves as a guide to inform IFC/MIGA Management, as well as all other parties interested in the way in which the CAO functions. It does also detail the requirements for receiving complaints, the time-line expected for the solution of problems between borrowers and affected parties, and the compliance (or audit) proceedings. In comparison to the WBIP Operational Procedures, it is safe to say the Operational Guidelines are far less 'legal'; in the sense that they are not and cannot be taken as proper sources

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98 Some Non-Governmental entities are allowed to present a complaint on behalf of those affected by the projects being conducted.

99 Operational Guidelines of the CAO, available at [http://www.cao-ombudsman.org/documents/CAOOperationalGuidelines\\_2013.pdf](http://www.cao-ombudsman.org/documents/CAOOperationalGuidelines_2013.pdf) (last visited 6 December 2018).

of rights and obligations.<sup>100</sup> This does not however, prevent the CAO from using it as a book of rules and principles, basing its decisions and actions on it whenever needed.

*B. Between Judicial and Administrative Procedures in Accountability Mechanisms*

In discussing and describing the functioning of these AMs, one is faced with the question regarding their very legal nature. Are these mechanisms solely administrative institutions or do they perform some sort of judicial function? If they do perform the latter functions, what kind of institutions are they in fact? There is no doubt that given their constitutive agreements, they can and will be considered as administrative institutions. Nevertheless, over time they have applied their own rules – internal rules of the World Bank institutions – in such a way that they have been redesigning their own functions.<sup>101</sup> From merely being mechanisms to make known to the World Bank's institutions that there were people unsatisfied with the way they were conducting their activities, they have become powerful forces in curbing these same institutions' actions. By means of constructing their work in reference to a variety of international legal standards and by attempting to apply, in practice, due process to their procedures, these AMs have attained a degree of legitimacy in their work that has definitely gone beyond initial expectations.<sup>102</sup> Nevertheless, this is no reason to be overly optimistic. The fact that the normative force of these mechanisms has increased over time does not mean that they have become the *main* force within these institutions. IBRD/IDA and IFC/MIGA still retain an immense degree of discretion in their actions and will hardly be constrained by these mechanisms in such a way that an international lawyer, keen on devising a framework of responsibility for IOs, would hope. They have nonetheless, affected the internal legal culture of the institutions increasing awareness of the necessity – not in ideological terms, but rather in economic terms – of having to attend to some of these international legal

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100 Alvarez, *supra* note 17, 238.

101 Bradlow and Fourie, *supra* note 70, 6.

102 D. Bradlow, *International Law and the Operations of the International Financial Institutions*, in Bradlow, Hunter, *supra* note 17, 27-28. In this same volume, see also B.S. Chimni, *International Financial Institutions and International Law: A Third World Perspective*, 46-47.

standards (mostly those concerned with environmental protection and social rights).<sup>103</sup>

It is this precise awareness that has been created by means of allowing a variety of other ‘stakeholders’ to take part in these AMs’ procedures and to bring their ‘legal’ arguments forward. Now, these arguments could only have been brought given the necessity of allowing participation and publicity to form the fundamental stones of such procedures.<sup>104</sup> The role the concept of due process has played in allowing for further development of arguments, which seek to bring about a more legalized view of these AMs’ work. Fundamentally, it is by developing procedural mechanisms – which have been grounded on a concept of due process – that arguments about substantial rights are being brought into international institutions. Even more interestingly, the fact that even though these rights are not provided for explicitly in the internal rules created by the World Bank institutions, those taking part in the procedures manage to articulate them well with international legal standards. Through this articulation, international law is brought into the World Bank and elicits a process of legalization<sup>105</sup> of the procedures seeking to hold them accountable. This articulation – normally done through a process of interpretation – between international legal standards and internal rules of the World Bank institutions creates a situation wherein these internal rules (Operational Standards and Performance Standards) are granted a different level of normative force.<sup>106</sup> As they effect changes outside the organizations, they are seen as having to conform to already established international standards concerning the issues their activities are affecting. It is not necessarily a matter of subsuming these internal rules to international law on a *constitutional* manner.<sup>107</sup> But because these Operational Standards and Performance Standards seek to regulate actions

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103 G. Sarfaty, *Values in Translation. Human Rights and the Culture of the World Bank* (2012), 86.

104 In particular on this topic, see ILA Final Report on the Accountability of International Organizations, Berlin 2004.

105 We draw here from the concept of legalization established by Abbot et al. in K. Abbot et al., *The Concept of Legalization*, 54 *International Organizations* (2000), 401.

106 Bradlow and Fourie, *supra* note 70, 24-25.

107 On systemic and constitutional interpretation within international organizations, J. Arato, *Treaty Interpretation and Constitutional Transformation: Informal Change in International Organizations*, 38 *Yale J. Int’l L.* (2013).

on matters already regulated, they have to conform or adapt in order to avoid 'systemic' conflicts or contradictions *tout court*.<sup>108</sup>

This process of legalization through the reinforcement of procedures ends up also creating a stronger framework for the protection of substantial rights. In this respect, even though their work is still very incipient, both the WBIP and more recently the CAO have pointed out ways in which the control of IOs actions can be done without necessarily taking recourse to an international law of responsibility of international organizations.<sup>109</sup> It is yet to be seen, however, whether this process of legalization brought about in these AMs can really lead to proper ways of securing control, or at least providing surveillance, of IOs external actions (in this particular case the World Bank group institutions).

Nevertheless, if the accountability mechanisms analysed here are not courts *per se*, they are also not merely administrative organs. This ambiguous role they play is due to a constantly changing of their nature, which is very much led by their own practice. That is by creating the conditions to attain the objectives and goals they are required to by their constitutive instruments (be it either internal resolutions or simply terms of references), they continuously absorb international legal practices<sup>110</sup> and incorporate them into their own work, thereby creating a process of legalization that fits within their limited administrative mandate. The concept of 'due process,' quite interestingly, seems to be one instrument upon which these AMs seem to replicate – not just simply create – certain 'legal practices.' This is the very element that shows how a process of legalization may be happening more appropriately by means of developing procedural rules, instead of creating legal frameworks that would justify the work of the AMs on the necessity to protect or respect certain substantive rights. The latter are of course of great importance. However, if there is any intention to create the means through which they should be protected in terms of *law* within these mechanisms, then the development of solid norms of procedure should be the first stage.<sup>111</sup>

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108 G. B. Pallieri, *Le Droit Interne des Organisations Internationales*, RCADI II (1969), 16.

109 Especially when the framework that has been thus far devised is much more the work of progressive development of international law, than of codification – which means there is not necessarily enough practice (and maybe even legitimacy) to justify its application.

110 On the concept of legal practices, see J. Brunnée and S. Toope, *Legitimacy and Legality in International Law: an Interactional Account* (2010), 12-13.



#### *IV. Concluding Remarks*

After reviewing the way in which due process is internalized in the WBIP and the CAO, one might ask what role procedural law can have in reinforcing the work of AMs. The transformation of their work requires an analysis of how the process of legalization of the internal rules guiding their work has occurred. When compared, both the WBIP and the CAO have fundamental differences in terms of degree and also of nature with regard to the process of legalization. The one point that seems to be common is that both attempt, to a large extent, to apply a sort of concept of due process based on participation from affected parties and publicity –, as aforementioned, as a broader concept encompassing that of transparency is to be understood here.

It is true that there are no specific rules in the operating instruments of the accountability mechanisms functioning within the scope of the World Bank group dealing directly and specifically with the question of due process. This is due, to a large extent, to the fact that these institutions are not seen as proper dispute resolution mechanisms. Instead, they are seen as either investigative or as conflict solving and compliance bodies.<sup>112</sup> However, since their inception, they have constantly incorporated such principle into their work not from a perspective of protecting a substantial right of affected peoples, but because procedurally it grants their work legitimacy in the eyes of international society and allows them to approximate themselves to proper judicial institutions. The way in which this will be dealt with in the future remains uncertain. What seems to be clear is that, despite the eventual flexibility of non-legalized or judicialized mechanisms, it becomes ever more pressing to properly control and keep watch of the way in which IFIs act externally.

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111 On the interaction between substantive rights and procedures within international organizations, see ILA Final Report on the Accountability of International Organizations, Berlin 2004, 18-22.

112 The CAO is entrusted with a 'dispute resolution' process. Nevertheless, in this capacity the CAO is not authorized to arbitrate cases between the affected people and the company (or companies) conducting the projects. It has merely the function of mediating the conflict or acting as a conciliator. The CAO bears no authority to interpret the Performance Standards and decide whether one of the parties has incurred in any misdoing. It is only when the CAO exercises its 'Compliance' function that it is allowed to interpret the Performance Standards. In this case, however, it looks not at whether the company has violated such rules, but rather at whether the IFC or MIGA staff has conducted its activities inappropriately according to the standards.

