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## **Piercing jurisdictional immunity: The possible role of domestic courts in enhancing World Bank accountability**

This article looks at the role domestic courts currently do and in future might play in enhancing the accountability of the World Bank for projects financed and supported by loans and grants of the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA). The piece will first outline its underlying assumption that international institutions, including the World Bank, are of increasing importance in global governance and make decisions which, to an incremental extent, directly affect people's lives. Like similar organizations, the World Bank invokes its jurisdictional immunity in order to shield itself from suits before domestic courts. That it regularly achieves so successfully will be shown in the second part of this article. However, the World Bank has also established the Inspection Panel as a forum for relief for people negatively affected by Bank-funded projects. After an analysis of the Panel's jurisdiction and powers, the article will examine whether victims claiming to suffer damage or harm from a Bank project should pursue remedies on the national level or ask for a request of investigation before the Panel (Part IV). Thereby, it shall analyze to what extent the establishment of the Panel has an impact on the scope of the Bank's immunity as granted by domestic courts (and vice versa) and whether an adjustment of this relation is desirable and feasible.

### **1. THE NEED FOR MORE ACCOUNTABILITY OF INTERNATIONAL ORGANIZATIONS**

#### ***1.1. International Organizations as evolving Leviathans***

Whereas the virtues of international law (for instance, in advocating for the advancement of global human rights) have always been acknowledged, its vices have until recently mostly been obfuscated. This existing dichotomy in particular holds true for international organizations whose flaws have for a long time exclusively been seen in inefficiency and tardiness rather than in their direct and negative impacts on individuals. Though, almost commensurate with the extending powers entrusted upon international institutions<sup>1</sup> have increased situations in which individuals might be negatively affected by the exercise thereof.<sup>2</sup> The most

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1 Thomas Franck (ed.), *Delegating State Powers: The Effect of Treaty Regimes on Democracy and Sovereignty* (Ardsley: Transnational Publishers, 2000).

2 Mattias Kumm, *Democratic constitutionalism encounters international law: terms of engagement*, in: Sujit Choudhry (ed.), *The Migration of Constitutional Ideas* (Cambridge: Cambridge University Press, 2006) 256, 282.

paramount current examples include the lack of adequate legal protection of individuals against individual sanctions adopted by the Security Council, the decisions and actions of other UN bodies and agencies, such as UNMIK, or much broader against coordination arrangements among State regulators, such as the Basle Committee of Central Bankers.<sup>3</sup> To be precise, one must make a distinction between more frequent legislative acts<sup>4</sup> and executive acts of organs of International Organizations.<sup>5</sup> Whereas the former require an intermediary (mostly States) for implementation, the latter can, in exceptional cases, directly infringe upon individuals' rights and properties.

Apart from the idiosyncratic case of the European Union which has established an elaborate but yet incomplete array of legal protection,<sup>6</sup> decisions and actions of International Organizations often lack appropriate remedies in which they might be challenged. In the absence of inter-organizational remedies, affected individuals may only resort to national courts of the jurisdiction where the organization is located and/or an alleged violation of rights has taken place. In most cases, however, this remains a futile exercise, as International Institutions regularly can successfully rely on their immunities from jurisdiction and execution in domestic proceedings.

### **1.2. Privileges and immunities as a shield**

It is well accepted that international organizations require certain privileges and immunities for the effective performance of their tasks and to preserve the independence of the organization from its member States.<sup>7</sup> Whereas privileges cover all cases in which international institutions are exempted from the application of local legislation,<sup>8</sup> immunity from jurisdiction (jurisdictional immunity) prevents law suits against them before domestic courts and immunity from execution hinders the seizure or prevents the pre-judgment attachment of their properties or other assets.<sup>9</sup>

Immunities of international organizations are usually laid down in their constituent instruments (most notably, Article 105 UN Charter). This is done in

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3 See for further examples Benedict Kingsbury, Nico Krisch and Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 *Law and Contemporary Problems* (2005) 15, 18-19, available at [http://ilj.org/global\\_adlaw/documents/TheEmergenceofGlobalAdministrativeLaw.pdf](http://ilj.org/global_adlaw/documents/TheEmergenceofGlobalAdministrativeLaw.pdf).

4 José E. Alvarez, *International Organizations as law-makers* (Oxford-New York; Oxford University Press, 2005).

5 Such as acts of UN, NATO or AU peacekeepers or certain decisions by the European Commission which directly address and affect individuals.

6 See e.g. Joseph H. Weiler, *The Transformation of Europe*, 100 *Yale Law Journal* (1991), 2403, 2419-22.

7 Dapo Akande, *International Organizations*, in: Malcom D. Evans (ed.), *International Law*, 2<sup>nd</sup> ed. (Oxford: Oxford University Press, 2006) 277; the functional necessity of privileges and immunities has been recognized by the International Court of Justice for instance in the *Mazilu Case*, Advisory Opinion, ICJ Reports 1989, 177, in particular paras. 44-55.

8 Henry G. Schermers and Niels M. Blokker, *International Institutional Law*, 4<sup>th</sup> ed. (Boston-Leiden: Martinus Nijhoff Publishers, 2003) § 323.

9 Akande, *International Organizations*, supra note 7, 296-7.

derived, general multilateral agreements specifying the immunities of a particular institution<sup>10</sup> and/or in bilateral agreements such as headquarters agreements with the host State or Status-of-Forces Agreement with States, in whose territory the organization performs a particular (e.g. peacekeeping of fact-finding) mission.

Jurisdictional immunity, in fact, constitutes one very common and widely used avoidance technique employed by national courts to decline to exercise jurisdiction over disputes involving international organizations.<sup>11</sup> The subject has traditionally been approached by analogy to State immunity,<sup>12</sup> though it is important to bear in mind that there exist considerable differences in doctrine and practice between immunities of IOs and State immunity.<sup>13</sup> While the shift away from absolute immunity and to restrictive immunity of organizations has occurred almost simultaneously to State immunity, the lack of sovereignty of international organizations results in the inapplicability of the distinction between acts *iure imperii* on the one hand, and acts *iure gestionis* on the other hand.<sup>14</sup> Instead, the contemporaneous view argues in favor of the applicability of the doctrine of functional necessity, which has its firm grounding in Article 105 para. 1 UN Charter which provides: "The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes." This doctrine explicitly reflects the prime rationale behind immunity of international institutions, which rests with the necessity of being able to perform their functions in the territories of a member State without the latter's undue interference.<sup>15</sup> Other arguments frequently invoked on behalf of far

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- 10 Convention on the Privileges and Immunities of the United Nations, 1 UNTS 15, 13 February 1946; Convention on the Privileges and Immunities of the Specialized Agencies of the United Nations, 33 UNTS 261-302, 21 November 1947.
  - 11 August Reinisch, *International Organizations before National Courts* (Cambridge: Cambridge University Press, 2000) 157-68; other such 'avoidance techniques' are according to Reinisch non-recognition as a legal person under domestic law, non-recognition of a particular act, the doctrines of act of state, political questions and non-justiciability, lack of adjudicative power of domestic courts, lack of controversy and discretion to prevent harassing lawsuits and mock trials (35-156).
  - 12 Michael Singer, *Jurisdictional Immunity of International Organizations: Human rights and functional necessity concerns*, 36 Virginia Journal of International Law (1995) 53, 59-65.
  - 13 Cf. Charles H. Brower, II, *International Immunities: Some dissident views on the role of municipal courts*, 41 Virginia Journal of International Law (2000) 1, 16 who points out that international organizations and states are very different institutions and demands a cautious approach in borrowing from the law of State immunity; for an overview of the historical development of immunities of international organizations see 8-20; similarly *The Status of International Organizations under the Law of the United States*, 71 Harvard Law Review (1958) 1300, 1310.
  - 14 Chittharanjan Felix Amerasinghe, *Principles of the Institutional Law of International Organizations*, 2<sup>nd</sup> ed. (Cambridge: Cambridge University Press, 2005) 321-2 who unequivocally rejects opposite views and decisions; see also Reinisch, *International Organizations before National Courts*, supra note 11, 259-61, pointing to some commentators who "pursue a more cautious approach, leaving open the possibility of talking of commercial and public acts of international organizations at least in an analogous way" (260) who at the end of his assessment (348-56) comes to a different conclusion and finds that "it appears plausible to regard international organizations as sovereign or at least quasi-sovereign in a sense that would make the application of state immunity principles plausible" (356).
  - 15 Schermers and Blokker, *International Institutional Law*, supra note 8, § 324.

reaching immunities of international organizations before domestic courts allude to the unfamiliarity of local judges with the issues at stake, considerations of diplomacy and policy, an undue power of host States which could regulate many issues related to the organizations located within their territories, or simply an alleged unfavorable attitude towards the 'foreign' institution.<sup>16</sup>

However, the well-established doctrine of functional necessity does not lead to more clarity concerning the scope of an organization's immunity because it does not provide any clarifications on the quintessential question of how much immunity from municipal jurisdiction is required by an international organization to properly exercise its functions.<sup>17</sup>

It is important to note in this regard that immunity from jurisdiction does not absolve an organization from its obligations under the applicable laws but constitutes a mere exemption from the adjudicative power of domestic courts.<sup>18</sup> Certainly, the non-enforceability of these obligations casts doubt on the legal quality of corresponding rights against an 'immune' organization.<sup>19</sup> While the various rationales behind immunities are to varying degrees acknowledged, the continuance of an organization's obligations is grist to the mill of incrementally persisting claims calling for broader accountability of international institutions. As pointed out below, the conviction that international organizations are also obliged to respect human rights and the evolving right of access to court have aggrandized pressure on limiting immunities or at least to provide for alternative fora for individuals affected by actions or omissions by international organizations.

### **1.3. The road to more accountability – cutting across or bypassing 'immunity land'?**

In principle, two possible avenues can be followed to attain a larger extent of accountability of international organizations. One possibility is to directly tackle immunity in order to mitigate its scope and eventually requires national courts to be more assertive towards international organizations. In the alternative, one might accept a broad understanding of immunity but at the same time demand international organizations to subordinate themselves to the control of alternative means of dispute resolution other than domestic courts. The nature and suitability of these two options heavily depend on the notion of accountability which is envisaged.

In general, I will use accountability as a broad term encompassing the subjugation of governance powers under some form of internal or external scrutiny and monitoring, which shall in particular enhance transparency and certainty without necessarily resulting in binding measures counter-balancing or compensating for an organization's acts or omissions.<sup>20</sup> In contrast, the term

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16 Reinisch, *International Organizations before National Courts*, supra note 11,, 35-7.

17 Singer, *Jurisdictional Immunity of International Organizations*, supra note 12, 66-67.

18 Schermers and Blokker, *International Institutional Law*, supra note 8, § 1612.

19 Hans Kelsen, *Reine Rechtslehre*, 2<sup>nd</sup> ed. (Vienna: F. Deuticke, 1960) 51 et subs.

20 There has crystallized a legion of definitions of accountability which mainly differ along the question whether or not review mechanisms must provide for some sort of sanctions, see for

"responsibility" is regularly used in relation to acts that involve breaches of international or domestic law, whereas "liability" refers to acts that are not unlawful but nonetheless cause damage to individuals.<sup>21</sup> Thus, accountability as a broad notion regularly covers (international and domestic) responsibility and liability.

It is important to bear in mind that the precise scope of accountability which is envisaged will ultimately influence the suitable options available to attain them. Someone who seeks compensation from an international organization for breach of contract will, for example, not be satisfied by an ad-hoc investigation coming up with a non-binding and non-enforceable report, which in contrast will be perfectly suitable to an NGO fighting for increased transparency available for the public.

As outlined above, accountability of IOs can either be guaranteed by domestic courts based on a restrictive approach towards immunity or by alternative fora for dispute resolution. Basically, two options exist to mitigate the scope of immunities. First, any international organization can waive its immunity and thus consent to the jurisdiction of a domestic court.<sup>22</sup> Second, domestic courts can narrowly interpret the scope of existing immunities and thereby vest themselves with the jurisdiction to adjudicate suits against international institutions. In the absence of access to domestic courts or even in addition thereto, international organizations might themselves provide for internal monitoring mechanisms such as the World Bank Inspection Panel or provide alternative remedies to other judicial or quasi-judicial bodies like the Court of Arbitration for Sport.

It is indispensable to bear in mind that these two avenues – domestic courts or inter-/extra-organizational fora – are not mutually exclusive but interdependent. This was highlighted by the International Court of Justice in the *Effect of Awards* advisory opinion in relation to the UN Administrative Tribunal, where the Court held that since "Article 105 [UN Charter] secures for the United Nations jurisdictional immunities in national courts...[i]t would, in the opinion of the Court, hardly be consistent with the expressed aim of the Charter to promote freedom and justice for individuals...that it should afford no judicial or arbitral remedy to its own staff for the settlement of any disputes which may arise between it and them".<sup>23</sup> Thus, there appears to be an inextricable link between the existence of alternative means of supervision or dispute resolution and the breadth of immunities of an international organization. While it is surprising that more than half a century after the Court rendered the above-mentioned opinion the contours

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instance the definition of Ruth W. Grant and Robert O. Keohane, *Accountability and Abuses of Power in World Politics*, 99 *American Political Science Review* (2005) 29, 29-30: "Accountability, as we use the term, implies that some actors have the right to hold other actors to a set of standards, to judge whether they have fulfilled their responsibilities in light of these standards, and to impose sanctions if they determine that these responsibilities have not been met." For a broader definition putting emphasis on "adequate standards of transparency" see Kingsbury, Krisch and Stewart, *The Emergence of Global Administrative Law*, supra note 3, 17.

21 Cf. Schermers and Blokker, *International Institutional Law*, supra note 8, § 1582.

22 On the concise procedure how to claim and to waive immunity Amerasinghe, *Principles of the Institutional Law*, see supra note 14, 348-50.

23 ICJ, *Effect of awards of compensation made by the U. N. Administrative Tribunal*, Advisory Opinion of 13 July 1954, I.C. J. Reports 1954, 57.

of this link seem still very opaque, I will nonetheless attempt to elucidate on this relation in the light of the evolving right of access to a court. For two reasons the immunities of the World Bank in relation to its Inspection Panel serve as a very appropriate and timely subject for exemplification thereof: First, as I will show in the next part of this article, the immunities of the World Bank as laid down in its constituent document(s) allow for far more flexibility than one would expect them to do. Second, the Panel has both been praised and criticized with regard to its capability to produce relief for aggrieved individuals and at the same time marginalized substantial discussion on the scope of the World Bank's immunity. Thus, first I would like to take a closer look at the Bank's immunities.

## 2. THE WORLD BANK'S IMMUNITY FROM JURISDICTION

### 2.1. *The scope of immunity as provided by the Articles of Agreement*

As a specialized agency of the UN, the World Bank relies on the 1947 Convention on the Privileges and Immunities of the Specialized Agencies of the United Nations<sup>24</sup> to claim that it enjoys immunity from jurisdiction in domestic courts unless it has waived its immunity. Article III Section 4 of the Convention supports this position by providing as follows:

"The specialized agencies, their property and assets, wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except in so far as in any particular case they have expressly waived their immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution."<sup>25</sup>

In contrast, the Articles of Agreement of the World Bank provide for a much narrower reading of status, immunities and privileges of the IBRD (Article VII AoA-IBRD) and the IDA (Article VIII AoA-IDA). Article VII Section 3 on the position of the IBRD with regard to judicial process is far from unequivocal and leaves some room for interpretation:

"Actions may be brought against the Bank only in a court of competent jurisdiction in the territories of a member in which the Bank has an office, has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities. No actions shall, however, be brought by members or persons acting for or deriving claims from members. The property and assets of the Bank shall, wheresoever located and by whomsoever held, be immune from all forms of seizure, attachment or execution before the delivery of final judgment against the Bank."<sup>26</sup>

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24 1947 Convention on the Privileges and Immunities of the Specialized Agencies of the United Nations, 33 UNTS 261-302, 21 November 1947.

25 The provision is modeled after Article II Section 2 of the Convention on the Privileges and Immunities of the United Nations, 1 UNTS 15, 13 February 1946.

26 Since Article VIII Section 3 of the AoA-IDA is tantamount to Article VII Section 3 of the AoA-IBRD the following considerations which will be based on the IBRD are valid for both the IBRD

Whereas, for instance, Article IX of the Articles of Agreement of the IMF is fully in line with the Convention on the Privileges and Immunities of the Specialized Agencies, the clear distinction as regards the World Bank requires further elaboration as the Bank's Articles of Agreement are *leges speciales* and will in any event prevail over the more general 1947 Convention.<sup>27</sup> The express wording of Article VII Section 3 AoA-IBRD seems inconsistent with a view in favor of the "Bank's general immunity as an international organization pursuing public purposes"<sup>28</sup>. On the contrary, as *Amerasinghe* has correctly pointed out, the immunity of the Bank is reversed in comparison with common practice among international organizations because "there is a presumption of absence of immunity"<sup>29</sup> with immunity only being recognized in specific circumstances rather than generally applicable. In fact, Article VII Section 3 provides for the admissibility of actions against the Bank as long as these are submitted before a court within the territory of a member State, in which the Bank has an office, an agent accepting service of process, or has issued or guaranteed securities. The exceptions from jurisdiction expressly provided for in Article VII Section 3 only concern actions by member States or derived thereof as well as property and assets of the Bank.

As we will see below, however, domestic courts have interpreted the Bank's immunity more restrictively than the wording of Articles VII and VIII AoA would imply.<sup>30</sup> Nonetheless, practice is scarce and one must take into due consideration that the Bank's immunity provisions pronouncedly differ from those of its sister organization, the IMF.<sup>31</sup> In the light of the only limitation of jurisdiction immunity regarding claims from 'members or persons acting for or deriving claims from members,' even *Shihata* concedes that: "It cannot...be stated with certainty what other types of actions against the Bank national courts would rule to fall outside their jurisdiction or declare inadmissible"<sup>32</sup>. Regardless of the fact that such a preclusion of domestic jurisdiction would be in total defiance of the text of the AoA, it is imperative to bear in mind that absolute immunity from jurisdiction (either of States, agents or other entities with international legal personality like

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and the IDA and will be treated interchangeably as the scope of immunities applicable to the World Bank.

27 Further intricacies can arise in situations in which there is an additional document on the World Bank's immunities or there exists a bilateral agreement with the country in which a specific operation is located. Though, mostly the norms on immunities do not conflict because such agreements regularly refer directly to the pertinent provisions in the Bank's Articles of Agreement, see for instance the reference in Section 2 of UNMIK Regulation No. 2000/44 on the privileges and immunities of the World Bank Group and its officials in Kosovo, available at [http://www.unmikonline.org/regulations/unmikgazette/02english/E2000regs/RE2000\\_44.htm](http://www.unmikonline.org/regulations/unmikgazette/02english/E2000regs/RE2000_44.htm).

28 Ibrahim F. I. Shihata, *The World Bank Inspection Panel: In Practice*, 2<sup>nd</sup> ed. (Oxford-New York: Oxford University Press, 2000) 243.

29 Amerasinghe, *Principles of the Institutional Law*, see supra note 14, 321.

30 Thomas Buß, *Zwischen Immunität und Rechtsschutz: Das Inspection Panel innerhalb der Weltbankgruppe*, *Recht der Internationalen Wirtschaft* (1998), 352, 353.

31 Sigrun I Skogly, *The human rights obligations of the World Bank and the International Monetary Fund* (London-Sydney: Cavendish Publishing, 2001) 179.

32 Ibrahim F. I. Shihata, *The World Bank Inspection Panel*, 1<sup>st</sup> ed. (Oxford-New York: Oxford University Press, 1994) 112.

IOs), covering acts including those running counter to *ius cogens* obligations, is today regarded as impermissible.<sup>33</sup>

Recognizing that the scope of the Bank's immunities is thus oscillating between absolute and restrictive immunities, it appears to be indispensable to contrast the broad language of Articles VII and VIII of Articles of Agreement with the (limited) practice arising out of cases before national courts which has evolved over recent years.

### **2.2. Domestic practice concerning the World Bank's immunities from jurisdiction**

In order to become binding under domestic laws, the various sources of international law concerning immunities in most countries require implementation into the legal orders of the Bank's member States.<sup>34</sup> State practice in this regard varies considerably. Some countries have enacted statutes covering privileges and immunities of all or a particular group of International Organizations.<sup>35</sup> Others have published the convention providing for an IO's immunities in the country's official gazette, making its provisions directly applicable provided that they are unconditional and precise enough in order to be self-executing.<sup>36</sup>

As a corollary, member States can in the former case – i.e. by transforming the immunities into domestic legislation – deviate from their scope as provided for in the constituent document or other agreement. However, this may entail negative implications by leading to a diversification of applicable immunities in different member States and therefore requires IOs to carefully keep track with the applicable domestic standards. A possible deviation can occur in both directions, thus either extend or restrict the breadth of immunities. On the one side, this might result in a clarification of ambiguous terms of the pertinent international convention. On the other side, it also has the potential to cause a

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33 While it must be admitted that cases in which the World Bank would violate *ius cogens* provisions seem highly hypothetical, this ensues from the hierarchical superiority of *ius cogens* (see Articles 53 and 64 Vienna Convention on the Law of Treaties, May 22, 1969, 1155 UNTS 331) over other norms of international law; cf. Skogly, *Human rights obligations*, supra note 31, 180. On *ius cogens* norm in general see e.g. Alexander Orakhelashvili, *Peremptory norms in International law* (Oxford: Oxford University Press, 2006) and Stefan Kadelbach, *Jus cogens, obligations erga omnes and other rules – The identification of fundamental norms*, in: Christian Tomuschat and Jean-Marc Thouvenin (eds.), *The fundamental rules of the international legal order* (Leiden-Boston: Martinus Nijhoff Publishers, 2006) 21, 28-35.

34 Buß, *Zwischen Immunität und Rechtsschutz*, supra note 30, 353.

35 See for instance the U.S. International Organizations Immunities Act, 29 December 1945, 22 U.S.C. § 288a(b)(1988), the U.K. International Organisation (Privileges and Immunities) Act of 12 July 1950 or the Canadian Privileges and Immunities (International Organizations) Act, R.S.C. 1985, c. P-23.

36 This is the practice followed in Austria and other European states. See for instance the publication of the Articles of Agreement of the IBRD in Austria's Federal Official Gazette (Bundesgesetzblatt), Artikel des Abkommens der Internationalen Bank für Wiederaufbau und Wirtschaftsförderung, Bundesgesetzblatt (BGBl.) Nr. 105/1949 in der Fassung von (as amended by) BGBl. Nr. 65/1966.

certain dynamic between the organization and a State in which it is located or its operations take place.

This dynamic inherently brings about a political momentum, which might in case of a disagreement contribute to boost an existing controversy between an IO and a member State. The recent example of Bangladesh and the World Bank illustrates that well. After a Bangladeshi employee of the World Bank filed a suit in Dhaka against the termination of her contract, the government of Bangladesh succumbed to pressure from Washington D.C. and amended the 1972-bill on immunities of International Financial Institutions (IFIs). The new International Financial Organisations Order (Amendment) Act 2004 introduced full immunity of certain IFIs including the World Bank from all legal procedures.<sup>37</sup>

Irrespective of its compatibility with international law, domestic courts – which want their decisions to stand – will in any event have to decide on the basis of their domestic laws. Thus, we have to take a closer look at domestic practice as regards immunities of the World Bank and other IFIs and regional development banks. This is to a large extent practice from the US, which not in the least ensues from the fact that the IFIs have their headquarters within US territory and are subject to US law.

### 2.2.1. US practice

#### 2.2.1.1. *The International Organizations Immunities Act of 1945 (IOIA)*

The controlling statute in the US is the International Organizations Immunities Act of 1945 (IOIA).<sup>38</sup> The IOIA provides in relevant part as follows: "International organizations, their property and their assets, wherever located, and by whomsoever held, shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments, except to the extent that such organizations may expressly waive their immunities for the purpose of any proceedings or by the terms of any contract."<sup>39</sup> It is clear from this wording that Congress, in enacting the IOIA in 1945, undoubtedly intended to provide International Organizations with absolute immunity then enjoyed by foreign governments.<sup>40</sup> However, the law of immunities of States and international organizations has moved on in the previous years and renounced absolute immunity. In contrast to the prevalent view in international law as outlined above,<sup>41</sup> the IOIA guarantees immunity of IOs to the same extent "as [it] is enjoyed by foreign government". Therefore, the IOIA (still) refers to the principle of state immunity. As this referral is of a general and thus dynamic nature, it

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37 This was heavily criticized by civil society organizations as granting the World Bank impunity, see for example see <http://www.voicebd.org/campaigns.html>.

38 22 U.S.C. § 288 (1988).

39 Section 2 lit b) IOIA.

40 Richard J. Oparil, *Immunity of International Organizations in United States Courts: Absolute or restrictive?*, 24 Vanderbilt Journal of Transnational Law (1991) 689, 692.

41 See supra 1.2.

must in fact today be understood as an implicit referral to the Foreign Sovereign Immunities Act (FSIA) of 1976.<sup>42</sup> In this way, it provokes the question whether the FSIA's distinction between acts *iure imperii* and acts *iure gestionis* should also be applicable in the context of international organizations. It will be necessary to analyze US practice since 1976 in order to be able to determine this issue. Even if one is skeptical about the suitability of introducing this distinction into the law of immunities of international organizations, one must conclude without reservations that this reference to the FSIA acknowledges that arguing for an absolute immunity of international organizations is no longer tenable.

#### 2.2.1.2. Decisions of US courts

The following non-exhaustive overview includes the most important US courts' decisions on jurisdictional immunities of IOs with a particular focus on cases filed against the World Bank. It is apparent that most suits were brought by staff members with regard to their employment.

##### 2.2.1.2.1 Broadbent v. OAS

In *Broadbent v. Organization of American States (OAS)* several dismissed staff members of the OAS brought a contract suit against the organization claiming reinstatement.<sup>43</sup> The Court of Appeals analyzed whether the IOIA calls for an absolute or restrictive immunity but found that it needs not decide "this difficult question of statutory construction...[as] on either theory...immunity exists sufficient to shield the organization from lawsuit on the basis of the acts involved here."<sup>44</sup> Nonetheless, the Court went on to discuss the restrictive immunity formula and applied the distinction between non-commercial and commercial activities as provided for in the FSIA. In his reasoning, Judge Leventhal, alluding to the unique nature of the international civil service, held that international organizations must be free to perform their functions and that no member state may take action to hinder the organization.<sup>45</sup> According to the Court of Appeals, international officials must be able to perform their duties free from the peculiarities of national politics and it would "seem singularly inappropriate for the international organization to bind itself to the employment law of any particular member".<sup>46</sup> The Court went on:

"An attempt by the courts of one nation to adjudicate the personnel claim of international civil servants would entangle those courts in the internal administration of those organizations. Denial of immunity opens the door to divided decisions of

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42 28 U.S.C. § 1602-11 (1988); for an outline and analysis of the act see Andreas Lowenfeld, *International Litigation and Arbitration*, 3<sup>rd</sup> ed. (St. Paul: West Publishing, 2006) 701-747.

43 628 F.2d 27 (1980); see also Reinisch, *International Organizations before National Courts*, supra note 8, 199-200.

44 Id., 32-3.

45 Id., 34.

46 Id., 35.

the courts of different member states passing judgment on the rules, regulations, and decisions of the international bodies. Undercutting uniformity in the application of staff rules or regulations would undermine the ability of the organization to function effectively."<sup>47</sup>

Thus, it becomes clear that, even if one concedes the applicability of the FSIA-dichotomy of noncommercial activities and commercial activities in the context of immunities of IOs, the Court finds the relationship of an international organization with its internal administrative staff to be of a noncommercial nature and that, in the absence of a waiver of immunity, activities defining or arising out of that relationship may therefore not become the basis of an action against the organization.<sup>48</sup> However, in its reasoning the Court explicitly refers to the efficient functioning of the respective IO which, in my opinion, resonates in the acceptance of some sort of a functional necessity doctrine.

#### 2.2.1.2.2. Mendaro v. World Bank

Broadbent v. OAS set the framework for other courts to follow in employment- or administration-related cases. In *Mendaro v. World Bank*, an Argentine citizen brought a suit against the Bank claiming that she was a victim of sexual harassment and discrimination by other Bank employees during her term of employment which had terminated.<sup>49</sup> The Court of Appeals affirmed the decision of the district court which had dismissed the case on grounds of immunity of the IBRD.

The decision of the Court of Appeals starts with an important determination clarifying the relation between the IOIA and the Bank's Articles of Agreement: According to the opinion, penned by Judge Wilkey, the AoA prevail as more special regulation over the broad immunity provided by the IOIA.<sup>50</sup> Consequently, the Court analyzes Article VII Section 3 of the AoA-IBRD as the controlling provision. In rejecting Mendaro's argument, it found "the somewhat clumsy and inartfully drafted language of Article VII section 3"<sup>51</sup> not to establish a blanket waiver of the Bank's immunity from every type of suit not expressly prohibited by reservations of the pertinent provision. The court, in relying on the fact that the purpose of the waiver provision is "[t]o enable the Bank to fulfill the functions with which is entrusted"<sup>52</sup>, went on to examine the interrelationship

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47 *Id.*, 35.

48 *Id.*, 35.

49 717 F.2d 610 (1983); see Monroe Leigh, *Mendaro v. World Bank*, 717 F.2d 610, 78 American Journal of International Law (1984) 221-3.

50 See 717 F.2d 610, 614: "When President Truman extended the Act's [the IOIA's] privileges and immunities to the World Bank, he limited the Bank's immunity by the terms of the functional waiver contained in the Bank's articles...Thus, even though the extensive immunity conferred by section 2(b) would normally insulate the Bank from jurisdiction over this type of action brought by its employees,...this court must accept jurisdiction over Mendaro's claim unless the Articles of Agreement preserve the World Bank's immunity to suits by employees."

51 717 F.2d 610, 614.

52 Article VII para. 2. Articles of Agreement of the IBRD, 2 UNTS 180.

between the functions of the Bank set forth in the Articles of Agreement and the underlying purposes of international immunities.

In contradistinction to *Broadbent vs. OAS*, Judge Wilkey did not refer to the relevance of differentiating between noncommercial or commercial acts but found the achievement of the functions to be the decisive criterion. However, in interpreting Article VII Section 3 AoA-IBRD, he found that insistence on immunity might not only be to the benefit but in certain scenarios could also "prevent or hinder the organization from conducting its activities"<sup>53</sup>. Therefore, Judge Wilkey concluded:

"A nonspecific waiver such as that contained in Article VII section 3 should be more broadly construed when the waiver would arguably enable the organization to pursue more effectively its institutional goals. However, when the benefits accruing to the organization as a result of the waiver would be substantially outweighed by the burdens caused by judicial scrutiny of the organization's discretion to select and administer its programs, it is logically less probable that the organization actually intended to waive its immunity."<sup>54</sup>

Applying these principles to the Bank's Articles of Agreement, the Court came to the conclusion that it could not find evidence that the Bank intended to waive its immunity to employee suits,<sup>55</sup> not in the least as the Bank's immunity is limited only to the extent necessary to further its objectives.<sup>56</sup> The Court went on that Article VII Section 3 AoA-IBRD expressly subjects the Bank to suit only in territories where the Bank has an office or agent appointed to receive service of process, or has issued or guaranteed securities. In the light of its previous considerations, the Court held that these exceptions to its immunity were primarily designed to enhance the marketability of its securities and the credibility of its activities in the lending markets.<sup>57</sup> This is so because the Bank aims to sell securities and potential investors would be much less likely to acquire these securities if they could not sue the Bank to enforce its liabilities.<sup>58</sup> Similarly, the commercial liability of the Bank's direct loans and private loan guarantees would be significantly vitiated if its debtors and beneficiaries were required to accept the Bank's obligations without recourse to judicial process.<sup>59</sup>

As a result, the Court of Appeals concluded that the Bank's articles waive its immunity only from actions arising out of its *external* relations with its debtors and creditors<sup>60</sup> but not with regard to its *internal* operations, such as the relationship with its own employers.<sup>61</sup>

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53 717 F.2d 610, 617.

54 *Id.*, 617.

55 *Id.*, 617.

56 *Id.*, 618.

57 *Id.*, 618; *cf. The Status of International Organizations under the Law of the United States*, *supra* note 13, 1310.

58 *Id.*, 618.

59 *Id.*, 618.

60 See the case *Lutcher S.A. Celulose e Papel v. Inter-American Development Bank*, 382 F.2d 454.

61 717 F.2d 610, 618, where the Court adds the following reasoning: "Rather than furthering the purposes and operations of the Bank, this waiver [regarding internal operations] would lay the

In sum, the Court in *Mendaro*, carrying forward its decision in *Broadbent*, seems to have adopted an approach very much consistent with the doctrine of functional necessity, thereby granting an international organization wide discretion and more or less the choice between reliance and renouncement of immunity as long as this is required to properly fulfil its functions and objectives.

#### 2.2.1.2.3. *Morgan v. International Bank for Reconstruction and Development*

In this case, the D.C. District Court followed the Court of Appeals' distinction between external and internal operations and dismissed an action against the IBRD for false imprisonment, libel, slander and intentional infliction of emotional distress.<sup>62</sup> The complainant asserted that on the day when he was starting his work as a temporary secretary assigned to the World Bank, his identification pass was confiscated and he was taken into custody by the Bank's security personnel who accused him of theft.<sup>63</sup> Although he had been able to take up his position at the Bank later, he claimed that he was also in the future subjected to continued harassment by the Bank's security agents.<sup>64</sup> According to the court, nothing about the complainant's action related to the World Bank's external lending or commercial activity but solely affected internal employment practices, for which the Bank did not waive its immunity.<sup>65</sup> Similarly to the *Broadbent* case, the Court did not rule whether the FSIA-distinction between noncommercial and commercial activities would control, but again found that even if it were applied and the FSIA's restrictive theory of immunity governed, the World Bank would still be immune, and the complainant's action would have been anyway dismissed.<sup>66</sup>

The court in *Morgan* has followed the jurisprudence of *Broadbent* and *Mendaro*, but once again without expressing itself on the looming question of whether the FSIA's commercial activity exception or tort exception<sup>67</sup> might be applied when it comes to immunities of international organizations. What is striking, however, is that the D.C. District Court in *Morgan* did not differentiate the case from the previous case, although the alleged violations of inter alia forcible and arbitrary detention were not merely employment disputes but in fact violated fundamental human rights of the complainant.<sup>68</sup>

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Bank open to disruptive interference with its employment policies in each of the thirty-six countries in which it has resident missions, the more than 140 nations in which it could be involved in its lending and financing activities."

62 752 F.Supp. 492 (D.D.C. 1990); see Daniel Hammerschlag, *Morgan v. International Bank for Reconstruction and Development*, 16 Maryland Journal of International Law and Trade (1992) 279.

63 752 F.Supp. 492, 493.

64 *Id.*, 495.

65 *Id.*, 494; see also Oparil, *Immunity of International Organizations in United States Courts*, *supra* note 40, 702.

66 752 F.Supp. 492, 494.

67 On the tort exception of Section 1605(a)(5)(A) for tortious injury to a citizen resulting from the conduct of an official exercising discretionary authority see Hammerschlag, *Morgan v. International Bank for Reconstruction and Development*, *supra* note 62, 289-91.

68 See Article 9 para. 1 International Covenant on Civil and Political Rights, Dec.16, 1966, 999 UNTS 171.

#### 2.2.1.2.4. Other US cases

Other US cases produced similar outcomes as the above-mentioned decisions. In *Novak v. World Bank*, the D.C. District Court dismissed an action claiming age discrimination and conspiracy also on the grounds that it did not affect the Bank's external, commercial activities but its internal personnel practices.<sup>69</sup> In *Chiriboga v. IBRD*, the Court extended the scope of its decision in *Mendaro* to give the Bank immunity also in relation to third-party beneficiaries over matters relating to employment benefits.<sup>70</sup> The question of the applicability of the FSIA standards onto International Organizations was once again explicitly left open in *Boimah v. United Nations General Assembly*, in which the UN was granted immunity in relation to an employment discrimination suit brought by a temporary worker because "an international organization's self-regulation of its employment practices is an activity essential to the 'fulfillment of its purposes', and thus an area to which immunity must extend."<sup>71</sup> One of the rare decisions in favor of jurisdiction over an IO was taken in *Lutcher S.A. Celulose e Papel v. Inter-American Development Bank*<sup>72</sup>, a case arising out of the Bank's external lending activities, in which a debtor of the Inter-American Development Bank (IADB) sued the Bank for breach of contract, alleging that the IADB had violated implied provisions of its loan agreement by making subsequent loans to the debtor's competitor.

#### 2.2.1.2.5. Conclusion

The US practice, shaped primarily by the courts of the D.C. Circuit, still upholds a very broad notion of immunities for international organizations. With regard to the World Bank, the courts, departing from the wording of the Article VII Section 3 AoA, establish immunity as the rule allowing for only a very limited exception concerning the issuing or guaranteeing of securities. Further, the US cases are restricted to employment disputes and have not settled the law on the question of the relationship between the IOIA and the FSIA satisfactorily.

### 2.2.2. Other jurisdictions

Compared with the US – which is the host State for many international organizations – there is only a fairly decent number of cases in other jurisdiction. Besides, accessibility of domestic cases is often difficult and as pointed out earlier, whereas academia has been focusing on State immunity, there is only a small number of works on jurisdictional immunities of International Organizations. Therefore, the elaborate study of *Reinisch*, which is the main contemporary work analyzing and comparing domestic practice on jurisdictional immunities of

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69 No. 81-1329 (D.D.C. Dec. 21, 1983).

70 616 F. Supp. 963 (D.D.C. 1985).

71 664 F. Supp. 69 (E.D.N.Y. 1987).

72 382 F.2d 454.

international organizations, does also focus on US decisions.<sup>73</sup> In addition, *Reinisch* points to the practice of predominantly Italian courts which favors a restrictive immunity concept by incorporating the State immunity's differentiation between acts *iure imperii* and acts *iure gestionis*.<sup>74</sup> Relying on a reservation to the 1947 Convention on Privileges and Immunities of Specialized Agencies of the UN, the Italian Supreme Court of Cassation denied in 1982 immunity to the Food and Agriculture Organization of the United Nations (FAO) for claims demanding increases in rent for office premises rented by FAO in Rome.<sup>75</sup> The Court's decision, though, provoked strong protests by the FAO which – after a threat by the FAO to request an advisory opinion from the ICJ – was diplomatically solved, when Italy became a party to the Convention on Privileges and Immunities of Specialized Agencies of the UN without the disputed reservation.<sup>76</sup>

With regards to employment disputes, judicial decisions in many other States follow the US line of cases by granting broad immunity to the respective organizations.<sup>77</sup> In *Mukoro v. European Bank for Reconstruction and Development*<sup>78</sup> and in *Bertolucci v. European Bank for Reconstruction and Development*<sup>79</sup> the English Employment Appeal Tribunal decided that the EBRD enjoyed functional immunity for 'official acts' including 'administrative activities'. Similarly, the Dutch Supreme Court denied jurisdiction over a suit brought by an employee of the Iran-United States Claims Tribunal for unjustified dismissal on grounds of an unwritten rule of international law providing for jurisdictional immunity of international organizations according to which "an international organization is in principle not subject to the jurisdiction of the courts of the host State in respect of all disputes which are immediately connected with the performance of the tasks entrusted to the organization in question."<sup>80</sup> In line with these decisions, the Bavarian Appellate Administrative Court in Munich held in *T. v. European Patent Organization* (EPO) that 'official activities' for which EPO was eligible to benefit from immunity covered all activities that are strictly necessary for the organization's administrative and technical work and thus included the legal relationships between EPO and its employees.<sup>81</sup> The notion of 'official activities' was also provided for in the headquarters agreement as covering immunity and thus was at stake in a lease contract dispute between the Austrian E GmbH and the European Patent Organization. The Court of Appeals reversed a decision of the lower court which rejected the claim and argued by following the distinction

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73 Reinisch, *International Organizations before National Courts*, supra note 8, 177-229.

74 Id., 186-194.

75 Food and Agriculture Organization of the UN v. Istituto Nazionale di Previdenze per I Dirigenti di Aziende Industriali (INPDIAI), Corti di Cassazione, 18 October 1982.

76 See Reinisch, *International Organizations before National Courts*, supra note 8, 188.

77 Amerasinghe, *Principles of the Institutional Law*, see supra note 14, 325.

78 Employment Appeal Tribunal, 19 March 1994.

79 Employment Appeal Tribunal, EAT/276/97, 19 August 1997.

80 AS v. Iran-United States Claims Tribunal, Supreme Court, 20 December 1985, reprinted in 18 Netherlands Yearbook of International Law (1987) 360.

81 Bavarian Appellate Administrative Court Munich, 13 November 1991, 3 B 91.1972 (unpublished), see Reinisch, *International Organizations before National Courts*, supra note 8, 209.

between acts *iure imperii* and acts *iure gestionis* that the lease contract was not an 'official activity' since it could also be exercised by a private individual. The Austrian Supreme Court reversed the decision of the Appellate Court and held that the lease of premises would fall under 'official activity' and thus be covered by EPO's immunity.<sup>82</sup>

### 2.2.3. Assessment

The law and practice of jurisdictional immunities of International Organizations remains to be extremely unsettled. Whereas the International Law Commission has finalized its work on State immunity which has been the basis for the UN Convention on Jurisdictional Immunities of States and Their Property adopted by the General Assembly in 2004,<sup>83</sup> the ILC had attempted to assemble the core principles related to the privileges and immunities of international organizations, but abandoned the topic in 1992 because of the lack of interest from Member States on the issue.<sup>84</sup> The pertinent rules remain scattered around constituent documents of IOs or host State-agreements with much uncertainty on the relevant terms as exemplified by the Articles of Agreement of IBRD and IDA. While domestic courts are still extremely reluctant to restrict the organizations' immunities, concerns demanding to control the incremental powers of IOs and to uphold the rule of law and human rights provoke a more restrictive doctrine of immunities. Acknowledging the need for better legal protection against acts of international organizations, several international and regional organizations established internal review mechanisms including tribunal-like guarantees.<sup>85</sup> As regards the World Bank the Inspection Panel is such an institution responding to demands for more accountability of IOs and shall in the following part be discussed.

## 3. THE MOVE TOWARDS MORE ACCOUNTABILITY IN THE WORLD BANK: THE CREATION OF THE INSPECTION PANEL

### 3.1. The rationale behind the establishment of the Inspection Panel

Responding to growing criticism in the 1980s and 1990s that its projects were not always of adequate quality and increasingly caused serious adverse and even

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82 See Reinisch, *International Organizations before National Courts*, supra note 8, 211-2.

83 The Convention is annexed to General Assembly Resolution 59/38, 16 December 2004; for an analysis of the convention which incorporates the restrictive theory of sovereign immunity, under which governments are subject to essentially the same jurisdictional rules as private entities in respect of their commercial transactions see David P. Stewart, *The UN Convention on Jurisdictional Immunities of States and Their Property*, 99 *American Journal of International Law* (2005) 194.

84 Report of the International Law Commission on the work of its forty-fourth session, U.N. Doc. A/47/10 (1992), 53.

85 See Eisuke Suzuki and Suresh Nanwani, *Responsibility of International Organizations: The accountability mechanisms of multilateral development banks*, 27 *Michigan Journal of International Law* (2005) 177.

irreversible consequences to the environment and local population, the World Bank in an attempt to shift the Bank towards sustainable development adopted substantial social and environmental policies and guidelines for its lending operations. In the wake of the controversy over the consequences of the Sarovar dam on the Narmada River in India in the early 1990s and reacting to rising criticism of the gap between rhetoric and implementation of the policy framework, the Board of Executive Directors decided to establish the World Bank Inspection Panel.<sup>86</sup> The Panel is governed by the founding Resolutions IBRD 93-10 and (the identical) IDA 93-6 as well as by the more detailed Operating Procedures.<sup>87</sup> It serves as a permanent, quasi-independent body which is open for complaints about violations of Bank policies filed directly by local individuals affected by Bank-financed projects. Thus, the Panel provides a forum where local people can voice their concerns at the highest level of the institution.<sup>88</sup> The Panel consists of three members who are appointed to non-renewable five-year-terms by, and are responsible to the Board of Directors of the World Bank.<sup>89</sup>

### **3.2. Eligibility (admissibility) of complaints**

Requests for inspection initiating the Panel process can be submitted by "an affected party in the territory of the borrower which is not a single individual", the local or another representative of the affected party, an Executive Director of the Bank in "special cases of serious alleged violations" of operational policies and procedures and the Executive Directors acting as a Board.<sup>90</sup> According to the 1999 Clarifications, before dealing with substance, the Panel assesses the eligibility

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86 Aside from these external factors, there were initially internal reasons for getting the process resulting in the set-up of the Inspection panel started. These were triggered by the then incoming President of the World Bank, Lewis T. Preston, who wanted to improve the overall efficiency of the Bank's operations. The task force established came up with the so-called 'Wapenhans Report' (named after its author, then Bank Vice President Willi Wapenhans) which criticized the Bank's 'approval culture' meaning that the Bank staff were often concerned about getting as many projects as possible approved without giving sufficient attention to a project's implementation or the degree of ownership assumed by borrowers; see in more detail Shihata, *The World Bank Inspection Panel: In Practice*, 2<sup>nd</sup> ed., supra note 28, 1-27 and Dana Clark, *Understanding the World Bank Inspection Panel*, in: Dana Clark, Jonathan Fox and Kay Treacle (eds.), *Demanding Accountability Civil-Society Claims and the World Bank Inspection Panel* (Oxford: Rowman & Littlefield Publishers, 2003) 1, 2-9.

87 Resolutions IBRD 93-10 and IDA 93-6, 22 September 1993 as amended by the 1996 Clarification of certain aspects of the resolution (hereinafter 1996 Clarification) and the 1999 Clarification of the Board's Second Review of the Inspection Panel (1999 Clarification), see all documents at [www.worldbank.org/inspectionpanel](http://www.worldbank.org/inspectionpanel).

88 Dana L. Clark, *The World Bank and Human Rights: The need for greater accountability*, 15 *Harvard Human Rights Journal* (2002) 205, 217-8.

89 On the composition of the Panel see paras. 2-11 Resolution IBRD 93-10 and Daniel D. Bradlow, *Private Complainants and International Organizations: A comparative study of the independent inspection mechanisms in international financial institutions*, 36 *Georgetown Journal of International Law* (2005) 403, 411-3.

90 Para. 12 Resolution IBRD 93-10.

(admissibility) of the complaint.<sup>91</sup> It thus examines whether the requirements of para. 12 of Resolution 93-10 in connection with the 'technical eligibility criteria' provided by para. 9 lit (a)-(f) of the 1999 Clarifications are met. The resolution requires that a group of persons must demonstrate that the persons' rights or interests have been adversely affected by the Bank's action or omission; the complaint can not be brought by a single individual nor by the borrower of a loan agreement.<sup>92</sup> The conditions laid out in para. 9 of the 1999 Clarifications necessitate *inter alia* that the affected party resides in the borrower's territory, that the matter is not related to procurement, that the related loan has not been closed or substantially disbursed (this is pursuant to para. 14 lit (c) of Resolution 93-10 the case, once at least ninety five percent of the loan proceeds have been disbursed) and that the Panel has not previously made a recommendation on the subject matter or, if it has, that the request asserts that there is new evidence or circumstances not known at the time of the prior request. In general, the Panel has adopted a quite relaxed position on these standing requirements.<sup>93</sup>

In substantive terms, one must note that the alleged failure to observe the operational policies must be at least *prima facie* attributable to the Bank; that includes requests for inspections concerning actions or omissions attributable both to the Bank and the borrower.<sup>94</sup>

### 3.3. Process of investigation

After the Panel has determined that a request meets the eligibility criteria it makes a recommendation to the Board of Executive Directors, which then decide whether or not to authorize an investigation.<sup>95</sup> This ultimate discretion of the Executive Directors whether to launch an investigation severely weakens the independence of the Panel.

If an investigation is approved, the chairperson of the panel first designates one or two members as having primary responsibility for a given inspection.<sup>96</sup> The investigative work consists of an examination of the Bank's relevant documents, interviewing the Bank's staff and performing on-site inspections, the latter requiring the consent of the project State.<sup>97</sup> Pursuant to para. 12 of the 1999 Clarifications the function of the in-country activities is to gather information

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91 For a detailed analysis of the eligibility requirements see Shihata, *The World Bank Inspection Panel: In Practice*, 2<sup>nd</sup> ed., supra note 28, 33-74 and also Richard E. Bissell, *Institutional and procedural aspects of the Inspection Panel*, in: Gudmundur Alfredsson and Rolf Ring (eds.), *The Inspection Panel of the World Bank: A Different Complaints Procedure* (The Hague: Martinus Nijhoff Publishers, 2001) 107, 115-118.

92 See Alexander Orakhelashvili, *The World Bank Inspection Panel in Context Institutional Aspects of the Accountability of International Organizations*, 2 *International Organizations Law Review* (2005), 57, 88.

93 *Id.*, 90.

94 Para. 14 lit (a) Resolution IBRD 93-10.

95 Para. 19 Resolution IBRD 93-10.

96 Para. 20 Resolution IBRD 93-10.

97 *Ibid* and para. 46 of the Operating Procedures.

through consultation with affected people; the fact-finding work should be carried out in an independent and low-profile manner and not amount to an investigation into the performance of the borrower but of the Bank.<sup>98</sup> Once the investigation is off the ground, the role of the individuals filing the request is clarified by neither resolution 93-10 nor its clarifications and hence appears to be rather limited without substantial due process rights.<sup>99</sup>

### **3.4. Findings and remedial powers**

After the Panel has concluded its investigation it has to submit a report to the Executive Directors and the Bank's President which must conclude with its findings on whether the Bank has complied with all relevant internal policies and procedures.<sup>100</sup> Once the Executive Directors and the President receive the report, the Bank's Management will have up to six weeks from that date to submit its own report including recommendations to the Board.<sup>101</sup> The ultimate remedial competence lies with the Board of Executive Directors which has to decide on whether it will issue recommendations to the Management concerning the pertinent project and inform the affected party "on the results of the investigation and the action taken in its respect, if any"<sup>102</sup>. These procedures convey that the final decision whether any action is going to be taken in response to an investigation rests with the Executive Directors. While the Inspection Panel has considerable clout to induce and influence the nature of the Board's remedial powers, its recommendations are not binding and can therefore in the worst case even be totally ignored by the Board.<sup>103</sup>

In practice, in several cases the outcomes have satisfied the concerns of the claimants and provoked the cancellation of the Bank's involvement in a project, which happened in the Arun dam project in Nepal or as regards the population transfer program in the China Western Poverty Reduction Project.<sup>104</sup> Results gave little satisfaction to the requesters, though, in cases which were already in implementation, because the Board of Executive Directors frequently – after protests and promises to take measures by the Bank's management – even

98 Para. 12 1999 Clarifications.

99 See the critique of Karel Wellens, *Remedies against international organisations* (Cambridge: Cambridge University Press, 2002) 186-7, who depicts the absence of a direct right for the requesters to participate in the Panel proceedings and the lack of a possibility for them to respond as 'flaws in procedural fairness'.

100 Para. 22 Resolution IBRD 93-10; paras. 52-3 of the Operating Procedures.

101 Para. 23 Resolution IBRD 93-10; paras. 54-5 of the Operating Procedures see also Shihata, *The World Bank Inspection Panel: In Practice*, 2<sup>nd</sup> ed., supra note 28, 85-8.

102 Para. 23 Resolution IBRD 93-10. Pursuant to para. 25 the recommendation must be made publicly available within two weeks, see Shihata, *The World Bank Inspection Panel: In Practice*, 2<sup>nd</sup> ed., supra note 28, 86.

103 See Orakhelashvili, *The World Bank Inspection Panel in Context*, supra note 92, 98-9, who argues that there are certain legal limitations on the discretionary action or inaction of the Bank's Executive Directors.

104 Clark, *The World Bank and Human Rights*, supra note 88, 219; Buß, *Zwischen Immunität und Rechtsschutz*, supra note 30, 355-6.

abstains from opening an investigation; this is what happened for instance in the 'Planaflo' -project in Rondonia (Brazil),<sup>105</sup> where the concerns of the Panel about the deforestation of 450.000 hectares remained unheard.<sup>106</sup> Another weak point of the effectiveness of the Panel's role arises from the fact that, provided that the Board has made recommendations to its management implementing (at least parts of the) Panel report, the Inspection Panel lacks any oversight authority over the enforcement of those remedial measures.<sup>107</sup> In sum, this leads in overall to little Board interference with Management's projects cycles and entails many cases, where the Inspection Panel finds violations of Bank policies resulting in harm to claimants, but where no effective remedy is provided.<sup>108</sup>

### 3.5. Assessment

An overall assessment of the World Bank Inspection Panel reveals dichotomous results. On the one hand, the establishment of the Panel is, in particular compared to other international organizations, a significant achievement to enhance accountability of multilateral institutions. By issuing recommendations to the Board of Executive Directors the Panel has repeatedly prompted the Bank's Management to abandon several projects with disastrous repercussions on the individuals' rights and the environment. It gives a forum to affected individuals which would otherwise be trapped in a legal vacuum and is in general a precious enterprise heading into the right direction.<sup>109</sup>

On the other hand, the Inspection Panel in certain aspects is a lukewarm undertaking and only seems to put up a big front for the World Bank because, as outlined above, it features various flaws. At the end of the day, these shortcomings leave the affected parties without legal redress but subjugate them more than ever to the discretionary power of the essentially political Board of Directors. As a corollary, one must not be satisfied that a mechanism currently exists to provide for some form of accountability of the World Bank but demand the further improvement of the Panel to make it in fact, as it is frequently named, a quasi-judicial supervisory body.<sup>110</sup> In order to become a true guardian of rights

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105 Buß, *Zwischen Immunität und Rechtsschutz*, supra note 30, 356; Shihata, *The World Bank Inspection Panel: In Practice*, 2<sup>nd</sup> ed., supra note 28, 109-14.

106 Though, even without ever launching an investigation, there was an extraordinary increase in the supervisory activity, see Bissell, *Institutional and procedural aspects of the Inspection Panel*, supra note 91, 120-122.

107 Clark, *The World Bank and Human Rights*, supra note 88, 219.

108 Id., 220.

109 It is here not the place to carry out a detailed analysis of the cases hitherto brought before the Panel, see instead Shihata, *The World Bank Inspection Panel: In Practice*, 2<sup>nd</sup> ed., supra note 28 and the contributions in Dana Clark, Jonathan Fox and Kay Treacle (eds.), *Demanding Accountability Civil-Society Claims and the World Bank Inspection Panel* (Oxford: Rowman & Littlefield Publishers, 2003).

110 See for example Daniel D. Bradlow, *International Organizations and private complaints: The case of the World Bank Inspection Panel*, 4 Virginia Journal of International Law (1994) 553, 602; Gary J. Klein, *The emergence of independent advisory panels*, 99 American Society of International Law Proceedings (2005) 257.

such an organ would require first complete independence from the Board of Executive Directors and second the power to prescribe and enforce its findings because "a right without a remedy is no right at all"<sup>111</sup>.

#### 4. AVENUES OF REDRESS PAVED WITH PITFALLS AND HURDLES: INSPECTION PANEL OR DOMESTIC COURTS – A HOBSON'S CHOICE?

##### 4.1. Introduction and imaginary fact pattern

From the perspective of a legal advisor to individuals negatively affected by a Bank's project the quintessential question arises which possibility of legal redress is the most worthwhile and promising to pursue: Should they file a request for investigation with the Inspection Panel or bring a complaint against the Bank before the competent domestic court?<sup>112</sup> First, expectations must remain modest because, as I have shown above, with respect to both an action before domestic courts and a complaint before the Inspection Panel considerable hurdles obstruct access to a true remedy. An initial swift response might legitimately argue that in the light of the broad immunity the Bank enjoys there is no choice at all because the only promising avenue is to appeal to the Inspection Panel and that an action before domestic courts would be entirely futile. However, I will attempt to challenge that assumption and to point out some arguments why and under what conditions it could make sense to (additionally) bring the matter before the domestic judiciary and what kind of role national courts might be able to or should be ready to play.

In order to illustrate my considerations I will use an oversimplified fact pattern. Alluding to the Chad-Cameroon Petroleum Development and Pipeline Project<sup>113</sup> and similar infrastructure projects so far inspected by the Panel,<sup>114</sup> I take as an example the construction of a pipeline traversing lands of an indigenous people funded by a loan of IBRD and a grant of IDA; members of the indigenous group will have to be resettled and compensated for house and land losses. In addition, the project might lead to serious implications on their traditional lifestyle and health and cause violations of human rights if we assume the affected individuals refuse to leave their homes and are therefore forcefully evicted and even

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111 Clark, *The World Bank and Human Rights*, supra note 88, 220 paraphrasing Blackstone's famous dictum as cited in *Marbury v. Madison*, 5 U.S. 137, 163 (1803).

112 In addition, affected individuals will and should in almost all circumstances bring suit against the corporation implementing the project funded by the Bank and thus primarily responsible for the damage caused. Though, the focus of this paper is only on possible legal redress against the Bank.

113 For information on the project see for example <http://www.columbia.edu/itc/sipa/martin/chad-cam/> and <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/EXTREGINI/EXTCHADCAMPIPELINE/0,,menuPK:843277~pagePK:64168427~piPK:64168435~theSitePK:843238,00.html>; see also Andrew Clapham, *Human rights obligations of non-State Actors* (Oxford: Oxford University Press, 2006) 153-5.

114 See various of the cases described by Shihata, *The World Bank Inspection Panel: In Practice*, 2<sup>nd</sup> ed., supra note 28, 99-154.

temporarily detained. In short, some of the conceivable acts, the affected population might wish to complain about, concern a) lack of (at least adequate) compensation and b) violations of the individual human right to housing<sup>115</sup> and the right to liberty<sup>116</sup>.

## 4.2. Hurdles in domestic courts

### 4.2.1. Immunity of the World Bank

The main barrier to proceedings in domestic courts is of course the jurisdictional immunity the World Bank will rely upon unless the unlikely scenario of a waiver thereof. Assuming that domestic laws do not contain any specific and derogating provisions national judges will refer to the Articles of Agreement of the IBRD/IDA. The Bank will insist on a narrow reading pointing to the established case-law as outlined above which grants immunity for the World Bank in order to fulfil its functions and accepts exceptions to its immunity primarily only in order to enhance the marketability of its securities and the credibility of its activities in the lending markets.<sup>117</sup> To repudiate accusations that the Bank's immunity results in a violation of the individuals' rights of access to a court and thus in a denial of justice, the Bank will probably suggest that the affected persons might file a request for investigation before its Inspection Panel and point out that in similar situations the Panel has issued recommendations which have repeatedly led to a change of pertinent project policies.

A complainant would necessarily argue in favor of a restrictive theory of immunity and point to the narrow wording of immunity according to the Bank's Articles of Agreement. As *Amerasinghe* has shown, in contradistinction to other international organizations, the Bank's own constituent document reverses the common practice among international organizations and calls for "a presumption of absence of immunity".<sup>118</sup> Hence, the burden of proof to show its immunity would shift to the Bank. However, the Bank may fail to successfully prove its immunity because the case at hands does not arise out of the Bank's internal operations but of its external relations with its debtors and creditors.<sup>119</sup> To pierce immunity, complainant could also argue that the Bank must not only pick raisins and rely on immunity when it is suitable for the Bank to advance the marketability of its guarantees or securities. It is unconvincing why the Bank should have no immunity with regard to the latter but be able to invoke it in respect of projects which were completely or substantially funded by its loans or guarantees as both aspects of its operations are equally necessary to fulfil its functions according to

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115 As provided by Article 11 International Covenant on Civil and Political Rights, Dec.16, 1966, 999 UNTS 171.

116 As provided by Article 9 International Covenant on Economic, Social and Cultural Rights, Dec.16, 1966, 993 UNTS 3.

117 See the case of *Mendaro v. World Bank* supra 2.2.1.2.2.

118 *Amerasinghe*, Principles of Institutional Law, see supra note 14, 321.

119 See the case of *Mendaro v. World Bank* supra 2.2.1.2.2.

its Articles of Agreement. Such a position advocating for a denial of immunity must eventually be based upon the argument that the affected individuals would in case of a dismissal of the action on grounds of immunity be deprived of their fundamental human right of access to a court<sup>120</sup> (with the anticipated rebuttal, though, that they are able to petition to the Inspection Panel).<sup>121</sup>

#### 4.2.2. Liability of the World Bank

Even if one could successfully pierce through immunity, a claim against the Bank would face the difficult problem on the merits of how to establish the Bank's liability for a third party's actions of omissions causing damage. The Bank's activities related to the financing of a project consist of entering into contracts – agreements on loans, guarantees or grants – with member States and private investors, not with the individuals who might be affected by the funded project, such as the pipeline. In cases where for instance construction workers or local residents of the group of indigenous people are injured in the course of an accident, the affected persons would have to sue the corporation(s) or joint venture carrying out the construction works for damages. There would be contractual (workers) or delictual liability (residents) only between the contractors who might have subcontracted with the member governments with whom the Bank has for instance a loan agreement but not with regard to the Bank as the its staff is no position to directly cause harm to people affected by the pipeline construction.<sup>122</sup> The only possibility to establish the Bank's liability would in these situations and in the case of lack of (adequate) compensation for resettlement (deprivation of property) lead over the concept of lender liability. In this regard it must be noted that the laws of countries, in which the Bank finances projects, differ considerably and do often not provide for lender liability, while it might exist to a varying scope in other countries.<sup>123</sup> However, it would go well beyond the purpose of this contribution to elaborate on the controversial issue of lender liability.<sup>124</sup> When it comes to serious human rights violations – which might reach

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120 See *infra* 4.4.1. and ECtHR, *Waite and Kennedy v. Germany*, 18 February 1999, RJD 1999-I and ECtHR, *Beer and Regan v. Germany*, 18 February 1999, available at <http://www.echr.coe.int/echr/>.

121 On the relation between the Panel and domestic courts see *infra* 4.4.

122 It is important to note that the Bank's loans and grants are not sub-contracts in the sense of activities of any operational kind which are carried out by private contractors; on this form of sub-contracting within the UN, where the organization's immunity is partly extended to such contractors, see Wellens, *Remedies against international organizations*, *supra* note 99, 92-3.

123 See the remarks by Sabine Schlemmer-Schulte in *The Accountability of International Organizations to non-State actors*, 92 American Society International Law Proceedings (1998) 359, 361.

124 Lender liability is in general a very limited concept. In the US it is provided for by the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund) and has caused discussions with regard to its exceptions as interpreted by the Environmental Protection Agency (EPA), see from an abundant literature Sara A. Goldberg, *Lender liability under CERCLA: Shaping a new legal rule*, 4 New York University Environmental Law Journal (1995) 61.

the threshold of *ius cogens* violations – one could, in the alternative, also attempt to rely on the delictual standards of "aiding and abetting" as derived from international criminal law to hold the Bank responsible.<sup>125</sup>

### 4.3. Pitfalls within the Inspection Panel

As shown above, the Inspection Panel cannot be denominated an independent judicial body yet.<sup>126</sup> With the ultimate decision-making power whether to initiate an investigation left to the (essentially political) Body of Executive Directors and lack of due process rights for the requesters it does not provide the guarantees of independent proceedings. In fact, the Panel is still to a large extent an advisory body who can only issue recommendations to the Panel which will – after having heard the Bank's project management – decide upon whether and what kind of measures should be taken in response to the individuals' request for investigation. While the Panel's investigations revealed mixed outcomes in practice, it is at least possible that – provided that the project is still in its initial stage and the allegations of infringements of Bank policies and procedures are of a particular grave nature – the Board will order the management to take action to halt the infringement of Bank standards and thus mitigate the negative effects of the project on the affected people.

Nonetheless, it must be highly recommended if not be regarded as mandatory to advise affected persons to petition first the Inspection Panel before going to a domestic court. As regards my hypothetical, requesters would be able to purport a violation of Bank Policy Operational Directive (OD) 4.30 on Involuntary Resettlement which regulates the Bank's actions in matters of resettlement and compensation. Pursuant to OD 4.30 project-affected individuals must be assisted in the reestablishment or improvement of their standards of living and levels of production and adequate compensation for loss of resources must be paid prior to project implementation.<sup>127</sup> Concerning alleged human rights violations, requesters may invoke a violation of OD 4.20 on Indigenous Peoples which might prompt the Board of Executive Directors to order the Bank's management to exert leverage on the respective member State or one of its subcontractors to bring the alleged malpractice to an end otherwise it would halt further loan or grant disbursements.<sup>128</sup>

Our hypothetical shows the appropriateness of the Panel to provide for indirect remedial action, i.e. relief for the requesters ensuing from leverage by the Bank's management on the State and the corporations implementing the project funded

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125 On 'aiding and abetting' see e.g. Joseph Rikhof, *Complicity in International Criminal Law*, 4 *Journal of International Criminal Justice* (2006) 702, 706-712.

126 See supra 3.2.-3.5.

127 Cf. e.g. in the investigation report of the Cameroon Petroleum Development and Pipeline Project, and Petroleum Environment Capacity Enhancement Project (Report No. 25734, 2 May 2003) paras. 152-167, av. at <http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/CAMInvestigationRptEnglish.pdf>.

128 On human rights and the World Bank see Clapham, *Non-State actors*, supra note 113, 142-159.

by the Bank. Though, expectations must not become too ambitious, as the Board of Executive Directors might refuse to approve of an investigation, fail to follow the Panel's recommendations or omit to supervise whether the Management of the Bank enforces an eventually adopted action plan. In the event of a negative or unsatisfactory outcome of the Panel request, it might thus be still worthwhile for the aggrieved individuals to attempt to hold the Bank accountable before domestic courts.

#### **4.4. The interdependence between the Inspection Panel and domestic courts in the context of the right of access to a court**

##### **4.4.1. The right of access to a court and the duty to establish internal remedies**

It can be argued that the ICJ's *obiter dictum* in its 'Effect of Awards' advisory opinion<sup>129</sup> not only allows but even might oblige international organizations to establish (administrative) tribunals to provide a forum for complaints against actions or omissions of the organization.<sup>130</sup> This was taken up by the ILC Special Rapporteur on relations between states and international organizations who claimed that there is an "obligation imposed on international organizations to institute a judicial system for the settlement of conflicts or disputes in which they may become involve".<sup>131</sup> Indeed, such an international duty to establish internal tribunals becomes additional momentum under the evolving right of access to a court as established by the European Court of Human Rights (ECtHR) in its landmark decision in *Golder*.<sup>132</sup> In interpreting the ambit of Article 6 para. 1 of the European Convention on Human Rights (ECHR)<sup>133</sup> the Court held that the right of access to court constitutes an element which is inherent in the guarantees of Article 6 para. 1 ECHR because the scrupulously enumerated characteristics of a fair trial were "of no value at all if there are no judicial proceedings"<sup>134</sup>.

In the context of employment disputes and suits filed against the European Space Agency (ESA) the Court has decided in the parallel cases of *Waite and Kennedy v. Germany*<sup>135</sup> and *Beer and Regan v. Germany*<sup>136</sup> that, notwithstanding

129 ICJ, *Effect of awards of compensation made by the U. N. Administrative Tribunal*, Advisory Opinion of 13 July 1954, I.C. J. Reports 1954, 57, see supra 1.3.

130 Cf. Reinisch, *International Organizations before National Courts*, supra note 8, 270-1.

131 Leonardo Díaz-González (Special Rapporteur), 'Fourth Report on Relations between States and International Organizations (Second Part of the Topic)', UN Doc.A/CN.4/424, Yearbook of the International Law Commission (1989), vol. II, Part One, 153-68, at 161.

132 ECtHR, *Golder v. United Kingdom*, 21 February 1975, Series A-18.

133 Article 6 para. 1 ECHR provides as follows: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

134 ECtHR, *Golder*, supra note 132, para. 35.

135 ECtHR, *Waite and Kennedy v. Germany*, 18 February 1999, RJD 1999-I.

136 ECtHR, *Beer and Regan v. Germany*, 18 February 1999, available at <http://www.echr.coe.int/echr/>.

the issue of jurisdictional immunities "it must next examine whether this degree of access limited...was sufficient to secure the applicants' 'right to a court'...".<sup>137</sup> The ECtHR went on "where States establish international organizations...and where they attribute to these organizations certain competencies and accord them immunities"<sup>138</sup> that it "would be incompatible with the purpose and object of the Convention [the ECHR], however, if the Contracting States were thereby absolved from their responsibility under the Convention in the field of activity covered by such attribution"<sup>139</sup>. Though, the Court found that in the concrete case the applicants, while hindered by ESA's immunity from suing the organization before domestic courts, had alternative means to protect effectively their rights because they had recourse to the ESA Appeals Board established under ESA's Staff Regulations "to hear disputes relating to any explicit or implicit decision taken by the Agency and arising between it and a staff member".<sup>140</sup> Therefore, in the light of the alternative means of legal process available to the applicants the Court found that the German courts in giving effect to ESA's immunity from jurisdiction did not limit the "right to a court" according to Article 6 para. 1 ECHR.<sup>141</sup>

It is fair to conclude that the Court would have found a violation of Article 6 ECHR by the German courts in granting immunity in the case of absence of an internal tribunal established within ESA. One can therefore read Article 6 ECHR as an obligation of its Contracting Parties to set up only such international organizations which provide for quasi-judicial, internal tribunals guaranteeing individuals affected by an organization's action a 'fair trial' pursuant to the requirements of Article 6 ECHR;<sup>142</sup> in the lack thereof member States' domestic courts must apply a restrictive approach of immunity in order to safeguard individuals' right of access to a court.<sup>143</sup> A similar obligation to establish international organizations which provide for adequate legal protection against their own actions and omissions arises on a global level, and thus also for all non-ECHR contracting States, from the right to a court under Article 14 para. 1 ICCPR (and other human rights instruments)<sup>144</sup> as well as under customary

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137 ECtHR, *Waite and Kennedy v. Germany*, supra note 135, para. 58.

138 ECtHR, *Waite and Kennedy v. Germany*, supra note 135, para. 67.

139 *Id.*, para. 67.

140 *Id.*, paras. 68-9.

141 *Id.*, para. 73.

142 This also ensues particularly from the legal tenet that a State cannot avoid its responsibilities by hiding behind the supposed autonomy of an international organization, regardless of whether the State itself shares responsibility for creating the organization, see Singer, *Jurisdictional Immunity of International Organizations*, supra note 12, 162.

143 Reinisch, *International Organizations before National Courts*, supra note 8, 282-6.

144 Article 14 para. 1 ICCPR states in the relevant parts as follows: "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law..."; see also Article 2 para. 3 of the Universal Declaration of Human Rights, GA-Res. 217A(III), U.N. Doc. A/810 (1948) and the detailed analysis of Dinah Shelton, *Remedies in International Human Rights Law*, 2<sup>nd</sup> ed. (Oxford-New York: Oxford University Press, 2006) 114-143.

international law.<sup>145</sup> Such an obligation for the structure of international organizations must at least encompass all matters concerning "criminal charges" and "civil rights and obligations" and would cover alleged violations of property rights as in the hypothetical of inadequate compensation for resettled members of a group of indigenous people who were deprived of their homes and land.

#### 4.4.2. Inter-organizational remedies and their effects on the scope of jurisdictional immunity

What are the repercussions of such a duty of international organizations to establish tribunals guaranteeing adequate legal protection on the scope of jurisdictional immunities? The response must be two-fold, distinguishing between organizations without any mechanism of legal protection and those which have established internal remedies and thus access to bodies like the World Bank Inspection Panel.

##### 4.4.2.1. Lack of internal remedies

In the first scenario, where domestic courts are the only forum available for individuals negatively affected by acts of an organization, I would espouse a radical rethink of the law of jurisdictional immunities of international organizations. Acknowledging that the law has moved on and international organizations today fulfil a vast array of tasks which can heavily intrude into individuals' rights, the organization's immunity must be balanced with its level of accountability. If one takes the protection of rights seriously, it can in fact not make a difference whether the violator is a State organ (triggering significant legal safeguards mechanism against the State) or an organ of an international organization (resulting in a legal vacuum without any protection). Therefore, national judiciaries should no longer rely on the vague and in reality apologetic standard of functional necessity (every single act of an organization can be justified to be necessary for its functioning); instead, domestic courts should restrict an organization's immunity and exercise jurisdiction *as long as* international organizations have not provided for respective inter-organizational (internal) remedies guaranteeing access to either an own quasi-judicial body or an external court or arbitral tribunal.<sup>146,147</sup>

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145 Cf. by the practice shown in Reinisch, *International Organizations before National Courts*, supra note 8, 286-305 and Shelton, *Remedies in International Human Rights Law*, supra note 144, 114-143.

146 For the quintessential role of the ICJ as an external tribunal with extended access in the future see Wellens, *Remedies against international organizations*, supra note 99, 224-261.

147 This approach – which would grossly fall under the category of a "result-oriented method dependent upon alternative dispute resolution procedures" according to Reinisch, *International Organizations before National Courts*, supra note 8, 365-9 – inevitably follows the approach of the German Federal Constitutional Court in its 'Solange-decisions', in which, the Court in defiance of EC law and jurisprudence continued to exercise its jurisdiction with regard to cases

It goes without saying that such an approach would vest domestic courts with an extremely powerful role which they must exercise with caution. It entails the inherent danger that an international organization which operates worldwide would be subject to many different legal standards and that court decisions all over the world might substantially differ and lack coherence. Thus, it is imperative that the restrictive stance on jurisdictional immunity would be only of a temporary nature and cease once an international organization has implemented legal remedies for affected individuals which provide for access to an internal or external court or tribunal.<sup>148</sup> In sum, the relation between the scope of immunities and the existence of an organization's accountability mechanism can be depicted as directly proportional, with greater immunity of international organizations before national courts, the greater the organization's internal system of legal protection is.

#### 4.4.2.2. *Effects of inter-organizational remedies*

The evolving Pareto optimality would therefore exist in a situation knowing absolute immunity of international organizations before domestic courts with comprehensible legal remedies against the organization either to internal or external independent tribunals recognizing the full array of due process rights.<sup>149</sup> In such a constellation the role of domestic courts would be reduced to zero because they would axiomatically have to reject jurisdiction on grounds of immunity of the IOs. As such a scenario at least today comes out to be utopian, however, the relationship between domestic courts and international organizations remains essentially dynamic and thus immunity continues to oscillate between an all-embracing and a more restrictive level.

As a consequence, in cases where IOs have established accountability mechanism domestic judges should, when evaluating whether they claim or reject jurisdiction on grounds of an organization's immunity, examine the nature of such internal or external mechanisms of legal protection. In making their decision on immunity they should be guided by the following rule of thumb: It would be overburdening to demand international organizations to establish legal remedies with the same amount of due process rights as established under

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concerning fundamental rights *as long as* (solange) the European Court of Justice did not provide for adequate protection of human rights; see in this regard, E.R. Lanier, *Solange, Farewell: The Federal German Constitutional Court and the recognition of the Court of Justice of the European Communities as Lawful Judge*, 11 Boston College International & Comparative Law Review (1988) 1.

148 As Reinisch, *International Organizations before National Courts*, supra note 8, 369 puts it, "domestic courts should step in and engage in vicarious dispute settlement" where international organizations lack internal procedures.

149 See Singer, *Jurisdictional Immunity of International Organizations*, supra note 12, 147 who makes the essentially same point in the following words: "An organization that preferred to insulate its conduct from examination by the local judiciary would set up an appropriate review tribunal, or, at its own option, make use of an existing tribunal. This approach grants an international organization as much immunity from the jurisdiction of the local courts as it desires, even perhaps to the point of absolute immunity. In return, the organization is expected to make itself available for examination in some independent forum."

member States' domestic laws. In addition, one must take into account that the standard of legal protection inevitably varies within the domestic legal systems of these States. In fact, courts should investigate whether an organization's means of legal redress fulfil a minimum threshold of rights and safeguards. This basic threshold must at least encompass fundamental due process rights like the right to be heard, a certain effectiveness and transparency (reasoning) of the final decision and a possibility to appeal the final decision on grounds of major procedural or substantive flaws. In cases, in which an accountability mechanism does not meet these standards, the domestic court should follow the restrictive immunity theory and accept jurisdiction. Similar as in situations without any inter-organizational remedies<sup>150</sup> a counter-argument would evidently claim this approach to be without any teeth, as, even if the courts deny jurisdictional immunity, international organizations would still enjoy immunity from enforcement. While this constitutes certainly a valid point, the restrictive approach would necessarily also have to be applied to the IO's immunity from enforcement and thus open the way for execution of assets of an organization located within the pertinent country's territory.

#### 4.4.3. Domestic courts as leverage on the World Bank Inspection Panel

It follows that in cases of inadequate remedies within an organization's structure there should be a certain dynamic, in which domestic courts exert leverage on international organizations to establish independent tribunals which meet minimum standards of transparency and guarantee basic due process rights of the complainants. As regards the World Bank Inspection Panel it would be necessary to ascertain whether the review mechanism triggered by a request for investigation meets these minimum requirements. This appears to be difficult to determine because, as outlined above, the Panel does on its face not guarantee independent, quasi-judicial proceedings.<sup>151</sup> However, as numerous cases have shown, the Panel repeatedly provided relief for affected individuals what reflects its existing capabilities. As a result, it appears to be legitimate that domestic courts acknowledge the Bank's immunity and deny their jurisdiction with respect to situations where individuals have failed to issue a request for inspection before the Panel.<sup>152</sup>

In practical terms, this would in my view amount quasi to an 'Exhaustion of internal remedies-rule' (EIRR) for individuals trying to sue the World Bank before national courts. Not least since in the absence of channels for diplomatic protection exercised by States on behalf of their nationals against International Organizations

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150 See supra 4.4.2.1.

151 See supra 3.2.-3.5.

152 Singer, *Jurisdictional Immunity of International Organizations*, supra note 12, 146-7 who convincingly argues for the case of the World Bank Inspection Panel that "respect for the organization's autonomy may require a municipal court to defer to the inspection panel by granting jurisdictional immunity in any case falling within the panel's competence."; see also the consenting opinion of Wellens, *Remedies against international organizations*, supra note 99, 188.

domestic courts assume the role usually exercised by the executive branch to protect their citizens (more precisely, all people residing within the territory, where the alleged violation takes place),<sup>153</sup> this allusion to the exhaustion of local remedies-rule in the context of diplomatic protection between States seems to be justifiable.<sup>154</sup>

Thus, only once a group of individuals has (unsuccessfully) exhausted the process under the World Bank Inspection Panel it should be eligible to sue the World Bank in domestic courts. But even in such a situation it should not be axiomatic for the domestic judges to immediately lift the Bank's immunity. Instead, they should assess the investigation carried out by the Panel and then make their determination. In principle, I suggest, there should be a presumption for the correctness of the Panel's work and the ultimate actions taken by the Board of Executive Directors and the Bank Management.

As a result, the Bank would usually benefit from immunity and the court would refuse to entertain the action. Though, a reversal of the presumption should be permissible when the domestic court comes to the conclusion that the Board of Executive Directors without justification refused to launch an investigation or, after the latter was carried out, no further actions were taken or implemented which remedied the interference into the complainants' rights. Such a reversal of the presumption of the effectiveness of the Panel process must in any event take into account the seriousness of the rights violations at stake and be limited to gross and obvious shortcomings of the Bank's review mechanism causing a denial of justice of the applicants in violation of the fundamental human right of access to a court.<sup>155</sup> In other words, the domestic courts should reserve the right to exercise a review of the Panel process and fulfil a subsidiary role in cases of severe and outrageous failures only.<sup>156</sup> Nonetheless, this caveat to deny immunity to the World Bank must be exercised with considerable caution and should be

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153 See Karel Wellens, *Fragmentation of international law and establishing an accountability regime for international organizations: The role of the judiciary in closing the gap*, 25 Michigan Journal of International Law (2004) 1159, 1178-9 who even makes the argument that the lifting of jurisdictional immunities of international organizations by domestic courts may be considered to be an exercise of diplomatic protection by the forum State; thereby Wellens cites and paraphrases Jean-Francois Flauss, *Protection Diplomatique et Protection Internationale des Droits de l'Homme*, 13 Schweizerische Zeitschrift für Internationales und Europäisches Recht (2003) 1, 9 arguing similarly in the context of State immunity.

154 On the exercise of diplomatic protection of a State vis-à-vis International Organizations and the application of the exhaustion of internal remedies-rule see Wellens, *Remedies against international organizations*, supra note 99, 76-8 who argues that as there is no jurisdictional connection between the individual and the IO – the existence of such a connection being one of the basic requirements of the rule – and thus there is no general principle that the exhaustion of local remedies-rule is automatically applicable.

155 In a similar vein Singer, *Jurisdictional Immunity of International Organizations*, supra note 12, 164-5 who suggests to adopt a restrictive immunity theory only in situations of (more or less serious) human rights violations, otherwise "a municipal court should be scrupulously careful to avoid interfering in those activities of an international organization in which autonomous decision making is crucial to the exercise of its functions."

156 This is what Reinisch, *International Organizations before National Courts*, supra note 8, 369 phrases "vicarious dispute settlement"; see also Wellens, *Remedies against international organizations*, supra note 99, 215-6.

suspended once the World Bank has transformed the Inspection Panel to a fully fledged independent tribunal which takes due account of due process rights exceeding the minimum threshold described above.

With respect to the pipeline fact pattern, this would mean that negatively affected individuals should first make a request for an investigation before the Inspection Panel and only in the event of an unsuccessful outcome file an action before the competent domestic court. This court shall eventually presume the Bank to benefit from immunity and thus deny jurisdiction, unless complainants show that the Panel process in fact amounted to a denial of justice. In the latter case, the domestic court should refuse immunity and initiate proceedings because the lack of adequate compensation and the forced eviction and detention are undoubtedly of such a serious nature to justify the piercing of the Bank's immunity.

#### **4.5. Assessment and outlook**

The nature of the Bank's immunity and its conceivable liability in domestic courts concern intricate questions paved with pitfalls and obstacles. However, the evolving responsibility and liability of international organizations under both international and domestic law requires a more assertive approach towards the enforcement of an IO's obligations which are today in most circumstances still shielded behind the claim of jurisdictional immunity. In this regard, the European Court of Human Rights has pointed out that the right to a fair trial including the right to a court also binds international organizations. Thus, the perseverance of an organization's immunity must become conditional upon the existence of inter-organizational remedies to an internal or external quasi-judicial body which has to fulfil certain minimum standards of independence and due process rights. In the absence thereof, domestic courts should, contrary to current practice and regardless of the inherently political questions and risks of diversification of standards and judgments within different jurisdictions,<sup>157</sup> at least temporarily unveil IO's immunity until the organizations have – in discharge of their obligations – come up with requisite legal remedies.<sup>158</sup> Such leverage from domestic courts would affect the World Bank Inspection Panel only to a lesser extent than other organizations, but could eventually enhance and extend the Panel to an essentially independent quasi-judicial review body.

### **5. CONCLUSION**

This contribution has tried to highlight the inadequacy of the current approach of practice and theory to the underexposed field of jurisdictional immunities of international organizations. It calls for a radical rethink of the concept of

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157 Cf. Singer, *Jurisdictional Immunity of International Organizations*, supra note 12, 164.

158 See Wellens, *Fragmentation of international law and establishing an accountability regime for international organizations*, supra note 153, emphasizing the eminent role of domestic courts in closing the accountability gap.

organizations' immunities in the light of the evolving right of access to a court. Instead of pursuing an unhelpful and merely apologetic 'functional necessity doctrine' or an artificial, non-comprehensible distinction between acts *iure imperii* and acts *iure gestionis*, which are falsely inferred from the law of State immunities, the article demands to balance immunities of international organizations with the accountability mechanisms provided by these institutions. As a result, domestic courts should deny immunity and exercise jurisdiction over international organizations as long as these lack adequate instruments guaranteeing the right to a court for individuals adversely affected by an organization's actions or omissions. The World Bank which has set up the Inspection Panel as an adequate supervisory review process for individuals, will, however, in principle be eligible to successfully invoke its jurisdictional immunities before domestic courts unless the Panel process *de facto* amounted to a complete denial of justice for the affected persons.

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