**Challenges and review mechanisms for International Organizations’ contracts**

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### I.- Introduction

This chapter looks at challenge and review mechanisms of public contracts entered into by International Organizations (I.Os). Globalization indeed affects the internationalization of public contracts[[1]](#footnote-1), not only by bringing more foreign companies on domestic procurement markets but also by multiplying the projects with crossborder effects conducted by I.Os. Most of these contracts are financed by I.Os implementing development agendas in needing countries, but they are actually awarded by the governments and national agencies borrowing money and using development grants. Although claims for these contracts often fall outside the scope of the domestic law, through exemption provisions and arbitration clause for their disputes, issues arising about their award process are usually governed by the domestic laws and national challenge mechanisms.

However, I.Os need also to purchase goods and services either for their own purpose through what is sometimes called “corporate contracts”, or as a way to render public services they are in charge of. With some of the largest sums spent on pharmaceuticals, medical equipment, food, transportation and construction[[2]](#footnote-2), the value of procurement of goods and services by the United Nations was $17 billion in 2016 (10 billion in 2008), with the largest purchasers overall being the United Nations Development Program (UNDP), the United Nations Procurement Division (UN/PD), the World Food Program (WFP), the United Nations Children's Fund (UNICEF) and the United Nations Office for Project Services (UNOPS), in descending order. Of course, this volume depends on the activities entrusted to the international organization. A UN agency which has to provide reconstruction or infrastructure improvement missions[[3]](#footnote-3), such as the United Nations Development Program (UNDP), will have financially more significant procurement activities than an I.O whose role is mainly to guide a particular sector and which will therefore have essentially needs of intellectual services contracts. In order to frame the analysis, we will only consider contracts directly entered into by I.Os.

While many studies have been published on the question of precontractual challenges and appeals, they have been carried out at the national or regional level (in the global sense). These studies, however, rarely address the international organizations’ precontractual procedures. Thus, it is worth looking at how international organizations (I.Os) deal with protests from companies dissatisfied with the conduct of their procurement proceedings prefiguring truly “international contracts”[[4]](#footnote-4). Therefore, this chapter will look at the review/protest/challenge internal mechanisms and controls that I.Os’ corporate contracts can be subject to.

To this end, this chapter is actually an update, almost 10 years after, of a report which[[5]](#footnote-5) made use of the results of a questionnaire circulated to a number of I.Os[[6]](#footnote-6). At that time, the report concluded that most I.Os either had no formal mechanism, or, when it did exist, it hardly went beyond the obligation to inform the bidders that their offer had been rejected. The lack of specific complaint mechanism was obvious. Considering that several of these IOs were in charge of conducting public sector reforms, including the improvement of transparency in public affairs, this lack of due consideration for candidate companies was disturbing.

Since the last ten years have been characterized by an intensification of international discussions disserting on the best principles and practices that should drive national procurement systems, with the adoption of several international instruments such as the revised Government Procurement Agreement entered into force in 2014, it may be time to fathomwhere these I.Os stand now, and to measure what progress have been made so far. We will first look at the rules governing the challenge of I.Os purchasing activities (2) with a focus on the larger international buyers, before getting to the procedure (3) and the most salient issues (5) raised by these challenges. These lines will be relevant when assessing, from an empirical point of view, to what extent these complaint systems are balanced and compliant with international standards.

### 2.- Overview of I.Os contracts rules

It is first necessary to clarify the law applicable to I.Os corporate contracts and how the immunity status may interfere with the rights of the bidders for challenge.

2.1. *I.Os corporate procurement rules*

Usually referred to as “corporate procurement”, the contracts awarded by I.Os on their own behalf are different from those which they may finance through loans or grants for beneficiary States. To a certain extent, institutional or “corporate” contracts are subject to specific written procedures which need to comply with the founding statutes of the international organizations. Thus, recognized as autonomous subjects of international law distinct from their member States, I.Os are endowed with an internal organizational power[[7]](#footnote-7). Prepared by the IOs themselves and applied to third parties (the bidders), their procurement rules raise competence issues attracting the attention of International Public and Private Law specialists. For some authors, these procurement rules “constitute, in reality, the administrative law of international organizations”[[8]](#footnote-8). As written by Mathias AUDIT: “Where international organizations are constrained to carry out their internal functioning or their tasks of concluding contracts, it is conceivable to admit that the issuing of procurement regulations is based on a power implicitly conferred by the Member States”[[9]](#footnote-9). For some authors, mainly with an International Private Law background, these contracts may qualify, at least during their performance phase, as being private or commercial contracts[[10]](#footnote-10).

Apart from taking stock of some provisions characteristic of specific international financing organizations (2.1.1.), we shall concern ourselves more with the system pertaining to the UN organizations (2.1.2.), and the European institutions’ contracts (2.1.3.), for they are good examples of the variety of solutions that may be displayed by I.Os.

2.1.1. – *Rules governing IFIs corporate contracts*

From the outset, multilateral banks such as the World Bank, the African Development Bank, or the European Bank for Reconstruction and Development (EBRD), may now have the most comprehensive legal framework for their corporate contracts. Indeed, to cope with international standards governing public procurement, to the definition of which these IFIs are greatly contributing, their corporate procurement frameworks have been recently updated.

At the World Bank, corporate procurement represents 1 billion dollars annually (2013). To regulate such contracts, the World Bank Group Vendor Guide[[11]](#footnote-11), updated and published in 2013, enounces the procedures to be implemented[[12]](#footnote-12), above a minimal threshold for competitive procedures set at $ 10,000. Even though more detailed than they used to be, these rules remain terse provisions displayed over 9 pages, in contrast with the extremely detailed Procurement Policies and rules[[13]](#footnote-13) prepared by the Bank to regulate the contracts concluded by its borrowing countries. As another MDB, the EBRD corporate procurement is governed by the Corporate Procurement Policy approved by its board of Directors in May 2009 and updated in January 2014. In 2015, corporate procurement expenditure was GBP 85,203,365, representing an increase of 57% when compared to the 2014 total[[14]](#footnote-14). On its side, the African Development Bank (AfDB) spends approximately 40 million Euros a year on goods, works and services for its internal needs. Its corporate procurement[[15]](#footnote-15) is ruled by a detailed Presidential Directive of 2013[[16]](#footnote-16). Most of the AfDB’s procurement is conducted by its Corporate procurement division. In addition, these banks usually allow devolution of procurement roles to their field offices.

2.1.2. - *Rules governing UN agencies’ corporate contracts*

As a recent improvement, all UN Agencies are now bound by the United Nations Financial Regulations and Rules[[17]](#footnote-17), complemented by the 287 pages of the Procurement Manual[[18]](#footnote-18), with their bidding opportunities centralized on a common platform: UN Global Market Place[[19]](#footnote-19). In view of constant changing procurement practices and technology, the Procurement Manual is subject to periodic updating, and the UN reserves the right to make exceptions to its provisions, if and when necessary, and in the best interests of the Organization.

As a UN agency, the UNESCO provides for “Suppliers protest” when perceiving that they have been unjustly or unfairly treated in connection with a solicitation, evaluations, or award of a contract. It that case, they may complain to the relevant UNESCO Contracting Unit (i.e. Sector/ Bureau/Institute/Field Office) indicated in the solicitation documents. Should the protestor be unsatisfied with the reply provided by the UNESCO Contracting Unit, the protestor may contact the Chief Financial Officer (CFO) in the Bureau of Financial Management (BFM). The CFO may seek all necessary clarifications from responsible UNESCO officers and from the Legal Office. If the protest involves allegations of misconduct by UNESCO personnel or corrupt or fraudulent practices, the protest shall be forwarded directly to the Office of Internal Oversight.

2.1.3. - *Rules governing procurement by the European Institutions and Agencies*

Outside the scope of the EU public procurement Directives[[20]](#footnote-20), specific rules govern procurement activities of the European Union institutions[[21]](#footnote-21). Indeed, the EU budget’s spending priorities require activities contributing to a coherent role for Europe on the global stage[[22]](#footnote-22). Therefore, EU bidding processes are both subject to the EU treaty principles and to an EU specific legal framework.

2.3.1.1. - *Rules for European Institutions*

When European institutions act as contracting authorities, they are subject to specific subsequent EU laws with the provisions of Title V, Chapters 1 and 2, of Council Regulation No 966/2012 of 25 October 2012 on the financial rules applicable to the general budget of the Union[[23]](#footnote-23). This Financial Regulation is complemented by the Commission Delegated Regulation (EU) No 1268/2012 of 29 October 2012, updated in 2015[[24]](#footnote-24), laying down detailed rules for its implementation[[25]](#footnote-25). These two texts (hereinafter referred to as the “Financial Regulation”) define the budgetary principles and financial rules governing the establishment and implementation of the general budget of the EU and their procurement provisions are essentially based on the EU procurement Directives.

Actually, to take care of the new procurement 2014 Directives and other modifications, these sets of provisions have been updated several times, as in 2014[[26]](#footnote-26) and 2015[[27]](#footnote-27), and more recently compiled in July 2017[[28]](#footnote-28). It is worth mentioning that a proposal was released by the Commission on 14 September 2016[[29]](#footnote-29), merging the two main Regulations into a [single set of rules](http://ec.europa.eu/budget/mff/lib/COM-2016-603/COM-2016-605_en.pdf) with improvements and [simplification](http://ec.europa.eu/budget/mff/simplification/index_en.cfm)s.

Under the current framework, the provisions for public procurement, now including concessions, are divided into 2 chapters. They are completed by detailed procurement rules applicable to EU institutions and bodies, consolidated in an annex of the revised Financial Regulation, which could easily be modified by the Commission with a delegated act. Chapter One is about general rules, covering also the initial challenge process with article 164.2 requiring the EU contracting authority to notify the bidders with the grounds on which the award decision was taken, as well as the duration of the standstill period referred to in Article 169(2). This article belongs to chapter 2 dealing with provisions applicable to contracts awarded by the institutions on their own account (ex: contracts entered into by EU Parliament, European Council[[30]](#footnote-30), EU Commission[[31]](#footnote-31), or the European Court of Justice[[32]](#footnote-32)). For example, the [European Court of Auditors](http://www.eca.europa.eu/en/Pages/PublicProcurement.aspx) (ECA) mentions on its procurement website[[33]](#footnote-33) that it is bound only “in the cases mentioned in the Financial Regulation (FR) (…) to use public procurement procedures when acquiring goods, services or works”, and ECA puts upfront its special conditions of contracts[[34]](#footnote-34). Indeed, the law applicable to EU Institutions’ contracts can be either a Member State law (usually where the contract is going to take place) or the “general principles of EU law”[[35]](#footnote-35), as specified by a special clause in the contract[[36]](#footnote-36).

Some European institutions may also have their own internal procurement and contracts’ rules, such as the Procurement rules[[37]](#footnote-37) for the European Central Bank (ECB) and its general terms and conditions for contracts for services and for work[[38]](#footnote-38). Under its procurement rules, the ECB states that it “respects the general principles of procurement law as reflected in the Procurement Directive and the Financial Regulation” but after having asserted that “neither this Directive nor Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council (the Financial Regulation”) applies to ECB[[39]](#footnote-39).

2.3.1.2. - *Rules for EU Agencies*

EU agencies are distinct bodies from the EU institutions – separate legal entities set up to perform technical and scientific tasks that help the EU institutions implement policies and take decisions. 34 to date, they are spread across the EU, such as the European Aviation Safety Agency (EASA), the European Food Safety Authority (EFSA) or the European Union’s Judicial Cooperation Unit (Eurojust)[[40]](#footnote-40). It is not surprising that the diversity of the European agencies is reflected in a certain complexity in their public procurement systems. For that matter, the website providing information on their calls for tenders used to be confined to an alphabetical listing of the agencies. For many years, several agencies were in the process of modernizing their award procedures, either in order to harmonize them further with EU rules (as it is true for the European Medicines Agency (EMEA)), or to adapt them to their specific characteristics. In this regard, the approach followed by the European Defence Agency (EDA) is significant. Established in 2004, the EDA benefited on 18 September 2007 from a Council decision which requests it to amend its financial rules and procurement regulations in order to ensure their consistency with the provisions of the European directives, while taking into account Article 296 (now 343) of the Treaty, which allows member States to exclude themselves from European competition for reasons of national security. In 2016, a revision of the 2007 Financial Regulation for EDA was voted on by the Council[[41]](#footnote-41), submitting the EDA procurement to the Title V of Regulation (EU, Euratom) No 966/2012 and Delegated Regulation (EU).

 Some agencies also make use of international tendering procedures in the framework of EuropeAid and external co-operation programs, as is true of the European Agency for Reconstruction[[42]](#footnote-42). Rules for these contracts are governed by the already mentioned Financial Regulations 2017, Part II, Title 4 on External actions, Chap. 3 on procurement procedures. The EuropeAid Co-operation Office and the European Development Fund (EDF), which were established, under the Cotonou Agreement[[43]](#footnote-43), to finance co-operation with the African, Caribbean and Pacific States (ACP), have special procurement procedures mentioned in the Practical Guide to Contract Procedures for EC External Actions (PRAG)and its annexes [[44]](#footnote-44). The PRAG is annually revised, and lastly in 2016, a regulation establishing the Common Rules and Procedures for the Implementation of the Union's instruments for External Action (CIR) was adopted. Contracting entities subject to the PRAG are entities referred to in Article 190.2 of the Financial Regulation i.e., (i) in case of direct management: the European Commission on behalf of and for the account of the partner country/countries, (ii) in case of indirect management: the State or the entity concluding the contract as provided for (where appropriate) in the Financing Agreement. For what this guide is concerned, the main impact of the CIR are the new rules on nationality and origin for public procurement and grant award procedures.

Other Agencies may be governed by a separate system, such as the European Space Agency (ESA)[[45]](#footnote-45), which is, as being an international organization, not subject to the European Directives[[46]](#footnote-46). Indeed the participating States are not all EU member states, and, in order to encourage the specific industrial policy objectives[[47]](#footnote-47), their industries benefit from the geographical return principle with restricts eligibility of the companies through preference rules based on nationality. To preserve such original principle, ESA has organized a sophisticated appeal process relaying on an independent board[[48]](#footnote-48).

2.2. - *The law applicable to I.O.s contractual disputes procedures and contracts*

The topic of the applicable law is also reflecting the particularism of I.Os corporate contracts. They actually may not by subject to domestic law, even the law of the country where they operate. However, this characteristic is not all the time mentioned by the I.Os procurement rules, spurring legal uncertainty. While the WB Corporate policy states clearly: “*The Bank Group is not an agency of the United States Government and, therefore, is not subject to federal, state, or local procurement regulations*”, other I.Os regulations remain silent regarding the law governing their contracts. Indeed, in 1977 in Oslo, the Institut of International Law (IDI) prepared a Report on Contracts Concluded by International Organizations with Private Persons commanding such contracts to refer expressly to a domestic law as the applicable law of the contract. Thus, several I.Os’ contracts are today refereeing to a specific domestic law of contract, usually the one of the country where their headquarters are located. However, some IOs, noticeable the UN and its agencies, still prefer to refer to “general principles of law including international law” for their applicable law and contractual disputes.

Moreover, contractual disputes of such contracts may benefit from the immunities attached to the I.Os’ status. Indeed, the Convention on the Privileges and Immunities of the Specialized Agencies adopted by the General Assembly of the United Nations on 21 November 1947 granted such status to the UN Agencies[[49]](#footnote-49), its Article IX - Settlement of disputes Section 31 stating: “Each specialized agency shall make provision for appropriate modes of settlement of (…) disputes arising out of contracts or other disputes of private character to which the specialized agency is a party”. For this reason, UN contractual disputes relating to internal institutional matters, including employment contracts, fall entirely outside the competence of national judges[[50]](#footnote-50). Actually even if the I.O. may be prosecuted before a domestic court, although eventually pertaining to commercial activities, its contract will be entitled to both immunity from jurisdiction and from enforcement[[51]](#footnote-51). Two exceptions may be granted only (1) if the founding status or convention of the I.O. specifically waives such immunity or (2) if the I.O. decides to renounce to its immunity by including a special clause in its contracts attributing potential contractual disputes to the local courts, or by including a compromissory clause[[52]](#footnote-52).

### 3. - Rules governing the challenge of corporate contracts by I.Os

The immunity status applied to their contractual disputes has also influenced the way I.Os look at protest and challenge mechanisms offered to their bidders. While the question of contractual immunities for I.Os has been much debated by international lawyers from the contractual claims’ point of views[[53]](#footnote-53), protests and challenges by I.Os’ vendors appears to be a rather confidential question, although a very complex one[[54]](#footnote-54). Mathias AUDIT has recently suggested that arbitration could be considered, with both parties consenting to submit potential issues related to the bidding processes[[55]](#footnote-55). However, if arbitration would indeed offer an impartial forum, this dispute mechanism is actually not crafted to resolve objective conflicts, where the issue at stake is not about finding a compromise between subjective rights of two parties, but more about the objective compliance of the procuring entity with the administrative and competition rules governing the bidding method. With such substantive question still unresolved, it is not surprising that challenge procedures before I.Os remain diverse and uneven.

So far, discrepancies are still vivid. Several I.Os have created uncomplete challenge mechanisms, restricted to specific phases, creating unbalanced protection for the companies. When existing, these procedurals rules range from minimal to sophisticated requirements, offering protection almost equivalent to the best domestic challenge policies.

3.1. - Right of information

At minimum, some I.Os prefer to stress the right of information attached to the tender phase, either by organizing a procedure for asking question or by organizing a post award transparency procedure through a debriefing phase. In the United Nations agencies’ procurement, under the former “UN System Business Guide for Potential suppliers” of 2006 [[56]](#footnote-56), only this information step was systematically implemented by sending a “letter of regret”. This is not anymore the case with the UN Procurement Manual of 2013[[57]](#footnote-57), where guidelines to file a complaint are provided online completed by an electronic form, notification of the results is mandatory, but debriefing remains facultative.

According to the European Central Bank procurement rules, since 2010, unsuccessful tenderer may ask for the reasons of the rejection of their tenders, and, furthermore, they can obtain the name of the winner and access to the key characteristics and relative advantages of his tender. They may even request copies of all documents relating to the evaluation of the successful tender, which goes way beyond the usual practice. However, in 2016, the benefit of such procedure has been restricted to admissible tenderers, and the ECB may shield some information in order to protect commercial or public interests (art.34.4).

Some organizations nonetheless make a distinction between communicating to an enterprise the reasons for rejection of its offer and receiving a claim. Thus, the African Development Bank has established basic mechanisms which consist of sending a letter to enterprises informing them of the reasons for their failure, as well as the setting up of an informal procedure for appeals to the same administrative authority and appeals to a higher authority, such as the Director of General Services or a vice-president of the Bank. In practice, no appeal seems to have been filed for at least six years.

Although debriefing of the award decision is often presented as a basic requirement for international procurement standards for domestic procurement, some I.Os may still be reluctant to offer such clarification to the bidders. They are fearing that such obligation may offer further grounds for challenge to the bidders. As for the World Bank, debriefing remains exceptional and performed only upon request of a vendor and in the case of a highly technical contract. While the scope of the debriefing will be only[[58]](#footnote-58) to identify the technical deficiencies or weaknesses of the offeror’s proposal, the corporate policy excludes to discuss trade secrets and methods, or financial or cost information about other offer; nor evaluation scoring or ranking of the offerors.

Public information may also be limited: according to its new policy, the World Bank reserves the right to publicly disclose award information of a corporate contract above $250,000, subject to the exceptions of the respective information disclosure policies (Corporate Policy, 2013, 13.2.2.). However, only the name of the vendor, the amount of the contract and a brief description of the contract’s obligations will be actually released.

3.2 - *I.Os putting emphasis on the second tier review body*

I.Os paying minimal attention to their procurement challenge policies are requesting the bidder’s demand to be submitted to the procuring entity itself. This is the first review step. As a second tier, review of the procuring entity’s decision might take place before an internal or an external appeal system. Lacking any international independent body in charge of reviewing bidders’ complaints, I.Os have struggled to set up internal appeal mechanisms in compliance with due process requirements and impartiality. While ESA has created an Agency’s “Industrial Ombudsman” in charge of reviewing procurement decisions through its written recommendations[[59]](#footnote-59), the UN Procurement Manual relies on the Award Review Board (ARB) is a new UN administrative board which reviews complaints by unsuccessful bidders. Its procedures are set by the “Guidelines to file a Procurement Challenge”[[60]](#footnote-60), which is intended “*to afford an opportunity to file a challenge by UN Vendors who participated in eligible competitive procurement process (i.e. ITB or RFP resulting in awards above USD 200,000), issued by the UN Procurement Division*”. Conditions for eligibility of the complaint are detailed. On standing, this new procedure is only open to unsuccessful bidders/proposers, excluding third parties. Regarding its process, filing of a challenge (through a paper or an electronic complaint form) must be within the time limit of 10 business days after a formal debrief meeting. Finally, the review will only be conducted by the ARB if it perceives the case to be substantive.

When I.Os detail the rules driving the Second Tier review body, they indeed try to align with international best practices. Such recent move can be found with MDBs. As an example, the African Development Bank procurement regulation based on the Presidential directive No. 05/2013[[61]](#footnote-61) which sets out the rules concerning corporate procurement activities. It is complemented by a 14 pages Guideline on Award Protest Procedure enacted in September 2015 which includes a form for preparing a protest and a form of appeal which must be used when submitting a complaint.

 On its side, the World Bank distinguishes among two types of claims depending on the phase of the invitation to tender. During the biding period, the World Bank Corporate Procurement Policy Summary envisages the protest as a way for attracting attention of the head of the Procurement Unit about potential errors in the specifications or in the bidding documents. Such a protest must be submitted within ten days of the Bank’s issuance of a solicitation. Appeal will be before the GSD Director for a final determination. Regarding the award protest procedures[[62]](#footnote-62), the unsuccessful offeror/bidder that wishes to protest must inform, in writing, the World Bank Chief of Corporate Procurement, during the “Notice Period” of 10 business day after the award, as a standstill period. The offeror must include a detailed statement of all factual and legal grounds for the protest and an explanation of the alleged prejudice. Upon receipt of the protest, the Chief of corporate procurement will provide the protestor with a written acknowledgement and initiate a review of the protestor’s allegations. The protestor will then receive a written notification of the decision and the basis upon which it was made. However, nothing is said by the WB Corporate policy about what type of decision can be made, neither the powers (suspension, annulment? indemnification?) that could be mobilized. The policy just mentions that the decision will be final unless, within 10 business days, the protestor files a written appeal with the Director of GSD.

3.3. - *Sophisticated challenge rules backed by an external appeal mechanism*

In the EU, the Financial Regulation[[63]](#footnote-63), and its Rules of Application apply to procurement conducted by European institutions (see above), but without any specific reference to the Remedies Directive or to an equivalent system of protest. Nevertheless, it endeavors to lay the groundwork for an effective review mechanism.

First of all, the Financial Regulation makes a clear distinction between clarification asked by the bidders (FR article 112 & RAP art. 160), information about the award and grounds for rejection of the offer (FR article 113), and challenge. Standstill period lasts 10 days with electronic procedures and 15 days with other means (FR art 118). Although there is no equivalent of the Remedies Directive for contracts entered into by European Institutions, bidders can challenge the award based on article 263 of the TFEU (former 230 EC[[64]](#footnote-64)). With a more elaborated system backed by the European Court of Justice, European institutions have been able to organize a robust appeal mechanism. As stated by article 240 of the EU Treaty (ex-art. 183) « *sous réserve des compétences attribuées à la Cour de justice par le présent traité, les litiges auxquels la Communauté est partie ne sont pas, de ce chef, soustraits à la compétence des juridictions nationales* ».

As for the EU institutions with their own protest mechanisms, the example of Central Bank procurement rules of 2007 (art.33 – now art. 39 since 2016)[[65]](#footnote-65) have designed an “Appeal procedure” before the ECB’s Procurement review Body (PRB). Tenderers and candidates have 15 days from the receipt of the information or of the notification to challenge in writing. “*If the PRB considers that the decision to reject the appellant’s application or tender infringes this decision or general principles of procurement law it shall either order that the tender procedure or parts of it are reiterated or take a final decision. Otherwise the appeal shall be rejected*”. The PRB shall notify the appellant in writing of its decision within one month following the receipt of the appeal. The decision shall state the reasons on which it is based. The appeal shall not have suspensive effect. If deemed appropriate, the PRB may suspend the procurement procedure or the award of the contract. According to article 34, the ECJ shall have exclusive jurisdiction in any dispute between the ECB and a supplier relating to a procurement procedure. However, the appeal must be exhausted before bringing the matter to the ECJ. “*Time limits set out in the Treaty shall begin to run from the receipt of the appeal decision*”.

To take care of ECJ decisions on time limit[[66]](#footnote-66), the time frame for raising objections was revised in 2010, to run either from the receipt of the documentation or from the moment the candidates or tenderers become aware of the irregularity or could reasonably have become aware of it (now art.28.2 of the 2016 ECB Procurement rules).

For its part, EuropeAid has set up precontractual review mechanisms, distinguishing whether the measure at the origin of the dispute was taken by the Commission or by a country receiving aid. In the first case, Community procedures apply. That is, under Articles 225 and 230 of the EC Treaty (consolidated version), the Court of First Instance shall have jurisdiction in proceedings for cancellation instituted within two months of publication of the measure, of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter. It may also have jurisdiction in proceedings for compensation under Articles 225, 235 and 238 of the EC Treaty (consolidated version). If the disputed precontractual act originates in a third country which is an aid recipient, the enterprise will have to fall back on national review mechanisms, to the extent that they exist. Having been informed of this dispute, the Commission will make its opinion known to the State concerned and may seek an amicable settlement. If the dispute is related to failure to follow the Practical Guide to Contract Procedures for EC External Actions, the Commission may suspend, withhold or recover funding for the contracts concerned.

For contracts related to EU external actions, protest are mainly governed by the EU PRAG 2016 which provides for legal remedies[[67]](#footnote-67). It displays rules for Complaints to the contracting authority, complaints to the European Ombudsman, and ordinary actions. According to the first category, (PRAG 2.4.15.1.) “*where the European Commission is the contracting authority, the complaint will be sent to the person who took the contested decision, who will endeavor to investigate the complaint and respond within 15 working days. Alternatively, if the candidate, tenderer or applicant is not satisfied with the answer received, he may refer to the relevant geographical director in headquarters. The complaint shall be substantiated and its sole subject shall not be to obtain a second evaluation for no reason other than the complainant disagrees with the final award decision*.” Alternatively, the bidder (PRAG 2016, 2.4.15.3. Ordinary Actions) “adversely affected by an error or irregularity allegedly committed as part of a selection procedure or procurement”, may also file ordinary actions before domestic courts. Where the European Commission is the contracting authority, the action shall be launched, in accordance with the rules set out by the TFEU, before the EU General Court which has jurisdiction over acts of the European Commission intended to produce legal effects vis-à-vis third parties - pursuant to Articles 256 and 263 of the Treaty on the Functioning of the European Union (TFEU). The deadline to introduce an action for annulment before the EU General Court against the European Commission's decisions runs from the moment of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be (pursuant to the TFEU). ECJ can annul the precontractual acts.

4. - *Remaining issues*

4.1. *Standing*

Standing, or the right to protest, is essentially restricted to bidders. In the practice of the IOs studied, only companies that have actually participated in the selection procedure have standing to dispute the outcome or the manner in which it was carried out. These conditions for admissibility of the protest therefore exclude potentially interested firms which were unable or unwilling to submit a bid, and of course citizens.

World Bank Corporate policy strictly defines standing: Award Debriefing and Protests procedures are available only to offerors/bidders who participated in a Bank Group competitive solicitation and who were not awarded a purchase order or contract. Such procedures are not “available to vendors who did not participate in the solicitation; non-responsive or late offerors/bidders; or when the solicitation was cancelled by Bank Group”. The African Dev. Bank also restrains protest only to effective bidders who participated but were unsuccessful. Indeed, the Guideline Award Protest Procedure gives a list of “qualification criteria for submitting a protest: the bidder must submit a proposal, on time, for a procurement which was not cancelled by the AFD and his letter of protest was received by the Bank within seven (7) calendar days of issuance of the Bank’s regret letter or debriefing by the Bank.

However, under the PRAG 2016 (2.4.15.2), third parties may bring a complaint to the European Ombudsman: “any citizen of the European Union or any natural or legal person residing or having its registered office in a Member State has the right to complain to the Ombudsman for any instance of maladministration by the European Union institutions (Article 228 of the Treaty on the Functioning of the European Union (TFEU[[68]](#footnote-68))).

4.2 - *Deadlines for protests*

I.O.s rules governing protest have usually set limited deadlines. However they often vary from one I.O. to another, without forgetting rules about prior award or post award challenge. Only claims which are filed immediately after the contract is awarded may be accepted. According to EUMETSAT’s General Conditions of Contract, a 30 day period begins to run after the award. This period is reduced to ten days in UNDP and World Bank contracts.

The African Dev. Bank also restrains protest to limited deadlines. The letter of protest shall be received by the Bank within seven (7) calendar days of issuance of the Bank’s regret letter or debriefing by the Bank. Considering the cross-border nature of these contracts, this very short timeframe seems quite unrealistic and may prevent many unsuccessful bidders to exercise their rights. Although the protest is sent by email, at least sparing days of postal service, this short delay contrasts with the 5 working days allowed for the Bank’s acknowledgment of receiving the complaint and no time frame at all for rendering its decision. The appeal time frame is slightly extended with 7 working days granted.

Such discrepancies among delays not only create obstacles for bidders but they also question the will of I.O.s to align their protest rules with international standards which now rely at least on a 10 days standstill period.

4.3. - *The lack of an independent appeal*

One of the main critics raised about the current protest system before I.Os is the absence of a neutral forum for appeal. Usually, the protest is addressed either to the author of the decision rejecting the bid, or to his/her immediate supervisor when he/she is the chief of procurement (as in the case of EUMETSAT) or to the Vice-President in charge of corporate services, but in consultation with the Director of Procurement and Fiduciary Services Department who has initially decided the case (African Dev. Bank). Only in EU, truly external review mechanisms are available, such as the European Ombudsman. (EU : PRAG 2014 2.4.15.2)[[69]](#footnote-69), and then the appeal before the ECJ.

Some I.O.s try to mitigate the potential criticism of partiality by having a collective decision deciding on the merits of the challenge. At EBRD, the review of any complaints with respect to Tendering and Contract awards shall be referred to the Procurement Complaints Committee ("PCC"). Complaints relating to fraud or corruption must be referred to the Office of the Chief Compliance Officer for further investigation (2014 Corporate Procurement policy). However, in all these examples, there is no neutral forum to hear the protest.

The efficiency of the appeal also relies on the powers granted to the 2nd Tierreview body. Detailed provisions on this crucial parameter are often missing in I.O.s procurement rules. For the EU, Article 153 of the Commission’s implementing regulation stipulates that:

“1. Contracts shall be suspended under Article 103 of the Financial Regulation in order to verify whether presumed substantial errors or irregularities or fraud have actually occurred. If they are not confirmed, performance of the contract shall resume as soon as possible (…) substantial error or irregularity shall be any infringement of a provision of a contract or regulation resulting from an act or an omission which causes or might cause a loss to the Community budget”.

 However, nothing specific is said in these texts about the conditions for termination of the contract if irregularities are found. It would be advisable to distinguish between the termination hypotheses, which are applicable going forward, and the cancellation hypotheses, which are retroactive in scope.

4.4. *Still fragmented rules governing bidders’ rights in I.Os*

In our first assessment of the matter, conducted in 2008, infrequently formalized and rarely sophisticated rules were prevailing in the I.Os regulations, demonstrating the scant attention paid up to the issue of complaints in corporate contracts. Among the meagre regulations available, one could note, with few exceptions, a degree of confusion between the right to information and the right of the company to file a protest. Moreover, the I.Os’ authorities responsible for examining challenges were mixed with the contracting authorities. Lastly, the entire procedure had a very limited scope. Yet some organizations, such as the WB and the ESA, had already implemented a sketch of protest rules, and other I.Os were poised to adopt codified procedures. In 2017, we may consider that notable progress have been made but heterogeneity remains, with challenge rules set by I.Os ranging from banning any action to the design of quite sophisticated mechanisms.

To begin with, it is worth mentioning that the access to the challenge policy may itself be an issue for certain I.O.s. Not only it prevents any analysis of their policy, but it raise critics about the transparency of their whole procurement system.As an example, the European Organization for the Exploitation of Meteorological Satellites (EUMETSAT) provides, in its EUMITS User Guides[[70]](#footnote-70) for a list of documents that might have provisions about how to protest or challenge a procurement decision. However, only registered companies may now have access to these information. That was not the case in 2008 when the initial report on protest was established and it underscores a reflux of transparency.

When accessible, the protest policy may not provide for detailed information to the potential protestors. As one of the most engaged UN agencies in development projects, the UNDP advertises on its website about a protest procedure. All procurement protests should be addressed to the UNDP Country Office or HQ Business Unit that undertook the procurement action. If the matter is not resolved satisfactorily, it may be raised to PSO by the Country Office or Business Unit. What is presented, however, is more a list of the substantive basic information that a bidder’s claim should submit rather than elements about the relevant organization’s procedure for the protest itself.

Although less than noticed 9 years ago in the 2008 study, the immunity status is still protecting some I.O.s from the requirement of setting up a transparent challenge policy for their corporate contracts. Even the OECD which is well known for preparing procurement policy advises for countries does not offer such challenge mechanism for its own corporate vendors. By contrast, it is worth mentioning that the 2015 OECD Recommendations on Public Procurement insist that countries should: “handle complaints in a fair, timely and transparent way through the establishment of effective courses of action for challenging procurement decisions to correct defects, prevent wrong-doing and build confidence of bidders, including foreign competitors, in the integrity and fairness of the public procurement system. Additional key aspects of an effective complaint system are dedicated and independent review an adequate redress”.

Indeed, some I.O.s still do not have any challenge policy at all. As an example, the OSCE still does not provide for any specific challenge procedure and its procurement policy proclaims through a legal notice: “The OSCE reserves the right to accept or reject any bid, and to annul, in whole or in part, or to suspend the bidding process and reject all bids at any time prior to contract award, without thereby incurring any liability to the affected bidder or bidders or any obligation to inform the affected bidder or bidders of the reasons for the OSCE's action”. Moreover, it is interesting to note that this organization had initially developed protest practices that, in 2008, were to be codified in regulations. The soon-to-be challenge provisions should have provided for a letter to be sent, at the express request of the enterprise, drafted by the Chief of Procurement and containing the reasons for rejection of the offer, but without disclosing the merits of other offers. These provisions were never enacted. Obviously, the policy choice was made to shield from any bidders protest, claiming the protection of the international status.

To explain such position, paying attention to the main mandate of the I.O. might be relevant. Among dozens of existing I.O.s, several do not pursue an economic goal, such as the ones dedicated to protecting security or promoting human rights. One may understand that contracts’ law (and fairness) is not their first priority. For example, the International Criminal Court is both an intergovernmental organization and an international tribunal launched in 2002 under the Rome Statute currently signed by 124 countries, created to prosecute international crimes of genocide, crimes against humanity and war crimes. Administration and financed issues are handled by the Registry. Its vendors’ webpages apply the ICC Financial Regulations and Rules[[71]](#footnote-71), with Rules 110.12 to 110.19 governing ICC procurement. However, these rules lack provision looking at complaint, debriefing, or any transparency requirements. However, with international standards progressing around minimal procurement rules and protest mechanism, with transparency and accountability being now recognized standards in public money spending, improvement in this area would be a noticeable move, at the least forging the credibility of such organizations in the way they are managing their budgets[[72]](#footnote-72).

Despite remaining recalcitrant, many more I.O.s are now enacting internal rules offering protection and right of protest to their vendors. This is certainly true for I.O.s involved in implementing the Development agenda. For many years, a paradoxical situation could have been noticed with, at the same time as some I.Os were lobbying for transparency to be observed in national systems, they themselves were still free of this obligation when acting as contracting entities. This position, if justified from a legal point of view based on the immunity protection, was hardly defendable from a political perspective, while the I.Os involved in Development were also committed to promote good governance and transparency, notably through the Millennium goals. This is even less defendable while the U.N. Sustainable Development Goals, adopted in 2015, encourage vendors to adhere to compliance programs, and mandate countries to reform their domestic public contracts policies. These factors have concurred toward setting major reforms in I.O.s complaint procurement policies, that will need to be monitored in the coming years.

Ultimately, this ongoing process should be compared to a related area which has gained much attention recently. It does drastically contrast with the rapid implementation of sanctions and debarment procedures in several I.O.s rules. Designed to prevent awarding contracts to companies convicted of wrong doing, including fraud and corruption, these rules are meant to protect the fiduciary obligations of the I.Os. However they may also raise other issues related to the right for companies as being registered vendors[[73]](#footnote-73), and furthermore for due process and consideration for the proportionality of the sanctions[[74]](#footnote-74).

1. L. FOLLIOT LALLIOT, “From the Internationalization of Rules to the Internationalization of Public Contracts: How International Instruments Are Reshaping Domestic Procurement Systems”, in *Transnational Law of Public Contracts*, M. AUDIT & S. SCHILL (eds.), Bruylant, 2016. [↑](#footnote-ref-1)
2. Source UNOPS, <http://www.unops.org/english/whatwedo/news/Pages/UN_procurement_reaches_154_billion_in_2012.aspx>, last visited January 14, 2017. [↑](#footnote-ref-2)
3. D. MEYER, « Les contrats de fourniture de biens et services dans le cadre des opérations de maintien de la paix », *Annuaire français de droit international,* volume 42, 1996. pp. 79-117. [↑](#footnote-ref-3)
4. M. AUDIT, S. BOLLEE et P. CALLE, Droit du commerce international et des investissements, LGDJ 2014, n° 254 et s. [↑](#footnote-ref-4)
5. Centre de Recherches en Droit Public (CRDP) and the Centre de Droit International de Nanterre (CEDIN), Université Paris-Ouest Nanterre, Enterprises and international organizations: what review mechanisms should be established in connection with public procurement by international organizations, prepared by L. FOLLIOT LALLIOT, C. PREBISSY-SCHNALL, and M. BERNARD, PHD Student in International Public Law (CEDIN), 2008, English translation OSCE 2008. [↑](#footnote-ref-5)
6. This study was conducted from June to September 2008 by consulting I.Os procurement websites and through a number of interviews and gathering of replies to a questionnaire addressed to the public procurement services of several I.Os. Unfortunately, despite the interest aroused by this survey, not everyone responded. It is possible, therefore, that this study failed to take into account an effective claim system established by some organization, but that should not alter its general conclusions. [↑](#footnote-ref-6)
7. A. REINISCH, *International Organizations Before National Courts*, Cambridge, 2000, p.28. [↑](#footnote-ref-7)
8. B. KNAPP, article 68, Adde M. SINKONDO, *International Law*, Ellipses, 1999, p. 435-43 and Ph. CAHIER, *The internal legal order of international organizations in Handbook on international organizations*, dir. from R.-J. DUPUY, Martinus Nijhoff, 2nd ed. 1998, p. 377 to 396. [↑](#footnote-ref-8)
9. M. AUDIT, Les marchés de travaux, de fournitures et de services passés par les organisations internationales - *Journal du droit international (Clunet)* n° 4, Octobre 2008, doctr. 8, n° 16 (translated). [↑](#footnote-ref-9)
10. R.H. Harpignies, Settlement of disputes of a private law character to which the United Nations is a party – A case in point : The arbitral award of 24 September 1969 in Re Starways Ltd. V. The United Nations : RBDI 1971, p. 451 à 468. [↑](#footnote-ref-10)
11. Corporate Procurement Policy Summary for Vendors Doing Business with the World Bank Group, available at [http://siteresources.worldbank.org/EXTCORPPROCUREMENT/Resources/CorporateProcurementPolicySumma)ry\_V7-13.pdf?resourceurlname=CorporateProcurementPolicySummary\_V7-13.pdf](http://siteresources.worldbank.org/EXTCORPPROCUREMENT/Resources/CorporateProcurementPolicySumma%29ry_V7-13.pdf?resourceurlname=CorporateProcurementPolicySummary_V7-13.pdf) (last visited December 2016) [↑](#footnote-ref-11)
12. The former Policy Guide one was enacted in 2005, only two pages of explanations about the methods of procurement and the review procedures were indirectly alluded to. [↑](#footnote-ref-12)
13. The World Bank's new Procurement Framework, approved by the Board on July 21, 2015, modernizes the procurement policy. To frame this new policy, the WB has enacted a genuine (and complex) internal hierarchy of norms made of the Procurement Policy which sets the principles for Investment project financing, the Procurement Regulations, the Procurement Directive, the Procurement Procedure, and guidance notes, in force since July 2016. [↑](#footnote-ref-13)
14. Source: 2015 EBRD Report on corporate procurement [↑](#footnote-ref-14)
15. <http://www.afdb.org/en/documents/corporate-procurement/> last visited on May 15, 2014 [↑](#footnote-ref-15)
16. <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Corporate-Procurement/Presidential%20Directive%20Concerning%20the%20Rules%20for%20Corporate%20Procurement%20Activities%20of%20the%20AfDB.pdf> [↑](#footnote-ref-16)
17. As promulgated by Secretary-General's Bulletin ST/SGB/2013/4 dated 1 July 2013. [↑](#footnote-ref-17)
18. The most recent version of the Procurement Manual is Revision 7.0 published on 1 July 2013, <https://www.un.org/Depts/ptd/sites/www.un.org.Depts.ptd/files/files/attachment/page/pdf/pm.pdf> [↑](#footnote-ref-18)
19. <https://www.ungm.org/>, last visited February 2017 [↑](#footnote-ref-19)
20. Directives 2014/23/EU (4) and 2014/24/EU (5) of the European Parliament and of the Council were adopted on 26 February 2014. [↑](#footnote-ref-20)
21. D. Ritleng, Les contrats de l'administration communautaire in Droit administratif européen, ss la dir. de J.-B. Auby et J. Dutheil de la Rochère : Bruylant, 2007, p. 147 à 170. – H.C. Hofmann, Agreements in EU Law : ELR, 2006, p. 800 à 820. – S. Perez, Autorité et contrat dans l'administration communautaire : AEAP, vol. XX, 1997, p. 181. – Z. Okamoto, Contracts between the European Economic Community and Private persons : Japanese Annual of Int'l Law, 1983, p. 1 à 17. [↑](#footnote-ref-21)
22. Development funding from the EU budget forms part of the EU's external action subject to the Regulation (EU) No 233/2014 of the European Parliament and of the Council of 11 March 2014 establishing a financing instrument for development cooperation for the period 2014-2020. The general EU budget covers all EU development funding, except finance for African, Caribbean and Pacific (ACP) countries provided under the European Development Fund (EDF). The later do not fall under the “corporate contracts” category this chapter is covering. [↑](#footnote-ref-22)
23. Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002 (OJ L 298, 26.10.2012, p. 1). [↑](#footnote-ref-23)
24. Commission Delegated Regulation (EU) No 2015/2462 of 30 October 2015. [↑](#footnote-ref-24)
25. Commission Delegated Regulation (EU) No 1268/2012 of 29 October 2012 on the rules of application of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council on the financial rules applicable to the general budget of the Union (OJ L 362, 31.12.2012, p. 1). [↑](#footnote-ref-25)
26. Regulation (EU, Euratom) No 1142/2014 of the European Parliament and of the Council of 22 October 2014 Amending Regulation (EU, Euratom) No 966/2012 as regards the financing of European political parties [↑](#footnote-ref-26)
27. Regulation (EU, Euratom) No 2015/1929 of the European Parliament and of the Council of 28 October 2015 Amending Regulation (EU, Euratom) No 966/2012 on the financial rules applicable to the general budget of the Union. [↑](#footnote-ref-27)
28. http://ec.europa.eu/budget/library/biblio/documents/regulations/financial\_regulation\_2017\_en.pdf [↑](#footnote-ref-28)
29. COM(2016) 605 final, 2016/0282 (COD) : http://ec.europa.eu/budget/mff/lib/COM-2016-603/COM-2016-605\_en.pdf [↑](#footnote-ref-29)
30. Procurement at the General Secretariat: http://www.consilium.europa.eu/en/general-secretariat/public-procurement/ [↑](#footnote-ref-30)
31. https://ec.europa.eu/info/funding-tenders/tender-opportunities-department\_en [↑](#footnote-ref-31)
32. http://curia.europa.eu/jcms/jcms/Jo2\_7009/ [↑](#footnote-ref-32)
33. http://www.eca.europa.eu/en/Pages/PublicProcurement.aspx [↑](#footnote-ref-33)
34. http://www.eca.europa.eu/Lists/ECADocuments/GENERAL\_CONDITIONS\_2016/GENERAL\_CONDITIONS\_2016\_EN.pdf [↑](#footnote-ref-34)
35. Association of European Administrative Judges (AEAJ) [↑](#footnote-ref-35)
36. See M. COMBA, “Principles of EU Law relevant to the performance of public contracts”, Bruylant, 2013 and the discussion of the “meaning of national law and European law in the context of EU public contracts”, U. STELKENS and H. SCHRÖDER, p. 398, same book. [↑](#footnote-ref-36)
37. Decision of the European Central Bank of 3 July 2007 laying down the Rules on Procurement (ECB/2007/5) (2007/497/EC) with several revisions. <http://www.ecb.europa.eu/ecb/legal/pdf/l_18420070714en00340048.pdf?42411110c7456dce56eabd535dca2177> [↑](#footnote-ref-37)
38. As of July 2016, <http://www.ecb.europa.eu/ecb/jobsproc/proc/pdf/Terms_services_works_EN.pdf?a92f1a09054cf83c0a29f15781b37672> [↑](#footnote-ref-38)
39. As reaffirmed by Decision (EU) 2016/245 of the European Central Bank of 9 February 2016 laying down the rules on procurement (ECB/2016/2) http://www.ecb.europa.eu/ecb/legal/pdf/celex\_32016d0002\_en\_txt.pdf?418d2c8e13d4db10c6469f28c2dfe3ad [↑](#footnote-ref-39)
40. Agency for the Cooperation of Energy Regulators (ACER); Office of the Body of European Regulators for Electronic Communications (BEREC Office); Community Plant Variety Office (CPVO); European Agency for Safety and Health at Work (EU-OSHA); European Border and Coast Guard Agency (Frontex); European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (eu-LISA); European Asylum Support Office (EASO); European Aviation Safety Agency (EASA); European Banking Authority (EBA); European Centre for Disease Prevention and Control (ECDC); European Centre for the Development of Vocational Training (Cedefop); European Chemicals Agency (ECHA); European Environment Agency (EEA); European Fisheries Control Agency (EFCA); European Food Safety Authority (EFSA); European Foundation for the Improvement of Living and Working Conditions (Eurofound); European GNSS Agency (GSA); European Institute for Gender Equality (EIGE); European Insurance and Occupational Pensions Authority (EIOPA); European Maritime Safety Agency (EMSA); European Medicines Agency (EMA); European Monitoring Centre for Drugs and Drug Addiction (EMCDDA); European Union Agency for Network and Information Security (ENISA); European Union Agency for Law Enforcement Training (CEPOL); European Police Office (Europol); European Public Prosecutor's Office (in preparation) (EPPO); European Union Agency for Railways (ERA); European Securities and Markets Authority (ESMA); European Training Foundation (ETF); European Union Agency for Fundamental Rights (FRA); European Union Intellectual Property Office (EUIPO); Single Resolution Board (SRB); The European Union’s Judicial Cooperation Unit (Eurojust); Translation Centre for the Bodies of the European Union (CdT). [↑](#footnote-ref-40)
41. Council Decision (EU) 2016/1353 of 4 August 2016, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016D1353&from=EN>, visited January 2017 [↑](#footnote-ref-41)
42. H-J Priess, Award procedures for EU Institutions, Chap 16 in R. Caranta, and al., EU Public Contracts law, Bruylant 2013 [↑](#footnote-ref-42)
43. ACP-EC Partnership Agreement signed at Cotonou on 23 June 2000 as first revised on 25 June 2005; 2nd revision dated 23 June 2010 applicable on a provisional basis from 1 November 2010. [↑](#footnote-ref-43)
44. Available on the website of the International Cooperation and Development of the EU Commission, <http://ec.europa.eu/europeaid/node/101249>, last visited February 2017. [↑](#footnote-ref-44)
45. ESA Procurement rules and implementing regulation, ESA/REG/001, rev. 3, Paris, 20 December 2012. [↑](#footnote-ref-45)
46. Since 2004 the ESA/EU Framework Agreement has been the basis for cooperation between ESA and the EU (extended in 2016 until 2020), OJUE 6/8/2004, L261/65. [↑](#footnote-ref-46)
47. ESA Convention, Article VII, Article XVIII, and Annex V. [↑](#footnote-ref-47)
48. ESA Procurement Rules *Op. Cit*., Part VI and Annex V, Implementing instruction concerning the establishment and proceedings of the ESA Procurement Review Board. [↑](#footnote-ref-48)
49. It was accepted, together with Annex IV, by the General Conference, effective 7 February 1949. It covers: (a) The International Labour Organization;  (b) The Food and Agriculture Organization of the United Nations;  (c) The United Nations Educational, Scientific and Cultural Organization;  (d) The International Civil Aviation Organization;  (e) The International Monetary Fund;  (f) The International Bank for Reconstruction and Development;  (g) The World Health Organization;  (h) The Universal Postal Union;  (i) The International Telecommunication Union; and  (j) Any other agency in relationship with the United Nations in accordance with Articles 57 and 63 of the Charter.  [↑](#footnote-ref-49)
50. In addition, these latter contracts often fall under particular jurisdictions such as the United Nations Administrative Tribunal or the Administrative Tribunal of the International Labor Organization. [↑](#footnote-ref-50)
51. M. AUDIT, S. BOLLE, P. CALLE, Droit du commerce international et des investissements, n° 151, p. 117, LGDJ, 2014. R.-J. Dupuis, *A Handbook on International Organizations*, 1998. [↑](#footnote-ref-51)
52. Ch. DOMINICE, « L’ordre juridique international entre tradition et innovation », p. 127-145,  collection *Publications de l'Institut de hautes études internationales*, PUF, Paris, Graduate Institute Publications, Open Edition books 2014. [↑](#footnote-ref-52)
53. A. REINISCH, *Contracts between International Organizations and Private Law Person,* 2006 , Universitat Wien. Les deux études les plus complètes sur ces contrats : P. Glavanis, Les litiges relatifs aux contrats passés entre organisations internationales et personnes privées, préf. Ph. Fouchard : LGDJ 1991. – F. Seyersted, Applicable law in relations between intergouvernmental organizations and private parties : RCADI 1967 (II), vol. 122, p. 434 à 624. While some authors of International private law, pleading for a “private law” approach for these contracts with balanced relations between the parties, are presented as being an exception to the “administrative law approach”: V. J.P. COLIN et M.H. SINKONDO, “Les relations contractuelles des organisations internationales avec les personnes privies”, *Revue de droit international et de droit compare*, 1992, p. 7 à 43. [↑](#footnote-ref-53)
54. “Compared to the wealth of literature on State immunity, the topic of immunity of International Organizations remained to be surveyed”, in August REINISCH, *International Organizations Before National Courts*, Cambridge University Press, 2000, p. 20. [↑](#footnote-ref-54)
55. M. AUDIT, Les marchés de travaux, de fournitures et de services passés par les organisations internationales (préc.) : «  Il existerait bien l'alternative consistant à prévoir, au sein même des textes réglementant l'appel d'offres, un mécanisme d'arbitrage visant à la résolution des conflits pouvant naître à l'occasion du processus d'adjudication. Par le truchement d'un consentement dissocié à l'image de celui qui désormais prévaut en matière d'arbitrage relatif aux investissements, le soumissionnaire écarté aurait ainsi la possibilité d'y recourir s'il souhaite contester en justice la manière dont s'est déroulée la sélection de l'adjudicataire du marché. Mais il ne semble pas qu'une telle possibilité ait pour le moment été expérimentée .» [↑](#footnote-ref-55)
56. <https://www.ungm.org/Areas/Public/Downloads/gbg_master.pdf>, last visited on May 15, 2014. [↑](#footnote-ref-56)
57. <https://www.un.org/Depts/ptd/sites/www.un.org.Depts.ptd/files/files/attachment/page/pdf/pm.pdf>, last visited on January 2017. [↑](#footnote-ref-57)
58. WB Corporate policy 2013, 14.1.2 [↑](#footnote-ref-58)
59. ESA Procurement rules and implementing regulation, ESA/REG/001, rev. 3, Paris, 20 December 2012, Art. 53. [↑](#footnote-ref-59)
60. <https://www.un.org/Depts/ptd/complaints/complaints-guideline>, last visited March 2017. [↑](#footnote-ref-60)
61. The Presidential Directive can be found on the Bank’s website: http://www.afdb.org/en/aboutus/corporate-procurement [↑](#footnote-ref-61)
62. WB Corporate policy 14.2 [↑](#footnote-ref-62)
63. <http://ec.europa.eu/budget/library/biblio/documents/regulations/financial_regulation_2017_en.pdf>

Amended Regulation (EU, Euratom ) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002 . It lays down the rules for the establishment and the implementation of the general budget of the European Union. In particular, it also contains rules on public procurement. [↑](#footnote-ref-63)
64. Under the former art 230 EC, pre-award decisions were challenged (United Kingdom v. Commission, Case 114/86, 1988, ECR 5289. [↑](#footnote-ref-64)
65. <http://www.ecb.europa.eu/ecb/legal/pdf/l_18420070714en00340048.pdf?42411110c7456dce56eabd535dca2177> [↑](#footnote-ref-65)
66. Case C-406/08 Uniplex (UK) v. NHS Business Services Authority (2010) ECR 1-0000 and C-456/08 Commission v. Ireland (2010) ECR 1-0000. [↑](#footnote-ref-66)
67. Practical Guide to Contract Procedures for EC External Actions PRAG 2016: 2.4.15. Legal remedies. [↑](#footnote-ref-67)
68. Website http://www.ombudsman.europa.eu/en/home.faces. [↑](#footnote-ref-68)
69. Without prejudice to other remedies and, in particular, without altering the deadlines laid down for the appeals set out in paragraphs 2.4.15.3, any citizen of the European Union or any natural or legal person residing or having its registered office in a Member State has the right to complain to the Ombudsman for any instance of maladministration by the European Union institutions (Article 228 of the Treaty on the Functioning of the European Union (TFEU)). More information may be found on the website http://www.ombudsman.europa.eu/en/home.faces . [↑](#footnote-ref-69)
70. Version of June 2015, available at <https://eumits.eumetsat.int/> [↑](#footnote-ref-70)
71. The text of the Financial Regulations and Rules is taken from the Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First Session, New York, 3-10 September 2002 (United Nations publication, No. F.03.V.2 and corrective), second part. D. [↑](#footnote-ref-71)
72. As for example the regular increase of the ICC budget has raised concerns (153 Million Euros in 2016), including the huge portion allocated to the Registry (81 Million). N. Jakobsson: “The 2016 ICC Budget- More Money, More Problems?” <https://justicehub.org/article/2016-icc-budget-more-money-more-problems>. See International Criminal Court ICC-ASP/15/11- Report on Budget Performance of the International Criminal Court as at 30 June 2016. [↑](#footnote-ref-72)
73. At the UN, the Vendor review committee (VRC - Articles (7.12- 13-14) https://www.un.org/Depts/ptd/sites/www.un.org.Depts.ptd/files/files/attachment/page/pdf/pm.pdf) shall hear complaints from requisitioners and/or other UN staff against vendors who have been suspended or removed from the Register of Vendors. Some of them are alleged to have failed to perform in accordance with the terms and conditions of contracts awarded, and were denied the right to register. The VRC may rely on other UN advices, from the Office of Legal Affairs or the Ethics Office in case of debarment. Exceptionally, the Director UN/PD may refer a case to a Special Vendor Review Committee with members external to UN/PD, if such case is related to proscribed practices (including but not limited to: corruption, fraud, coercion, collusion, obstruction, or any other unethical practice) that have occurred under a UN procurement action. The VRC only renders advices submitted to the ASG/OCSS which shall decide whether to suspend or remove a Vendor from the Register and shall notify the Vendor who is entitled to a maximum period of 30 days following receipt thereof to request review of a UN decision. [↑](#footnote-ref-73)
74. See G. RACCA and Ch. YUKINS (eds.) *Integrity and Efficiency in Sustainable Public Contracts. Balancing Corruption Concerns in Public Procurement Internationally,* Bruylant, (2014) ; J.-B. AUBY, E. BREEN and Th. PERROUD (eds.), *Corruption and Conflicts Of Interest. A Comparative Law Approach*, Edward Elgar Publishing, 2014. [↑](#footnote-ref-74)