

Legal Vice Presidency  
The World Bank

ADVISORY OPINION

ON

CERTAIN ISSUES ARISING IN CONNECTION  
WITH RECENT SANCTIONS CASES

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Senior Vice President and General Counsel

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# TABLE OF CONTENTS

## **I. Issues of General Relevance**

A. Sources of Law for World Bank Sanctions	1
B. Rules of Evidence and Standards of Proof	10
C. <i>Mens Rea</i> as an Element of Sanctionable Practices	12
D. Theories of Liability	17

## **II. Issues Relating to Fraudulent Practice**

A. Recklessness and Fraudulent Practice	22
B. Application of the ‘Knowing and Reckless’ Standard to pre-2006 Definitions	31
C. Omission as an Element of Fraudulent Practice in pre-2004 Definitions	31
D. Establishment of ‘Prospective Fraud’ in Bids	31

## **III. Other Issues**

A. The Sanctioning of Government Officials	32
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<b>NOTES</b>	34
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## **ADVISORY OPINION ON CERTAIN ISSUES ARISING IN CONNECTION WITH RECENT SANCTIONS CASES**

**Anne-Marie Leroy, Senior Vice President and General Counsel**

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1. The Legal Vice Presidency (LEG) has been asked by the Integrity Vice Presidency (INT) to provide advice on certain legal issues that have arisen in connection with recent sanctions cases. The Office of Evaluation and Suspension (OES) has also welcomed more clarity on the legal standards that they should be applying the sanctions cases, and has referred some additional issues for LEG's consideration. These issues include a number of issues of general relevance to sanctions cases, including (1) the sources of law for the Bank's sanctions regime and their application to sanctions cases, (2) the proper approach to the concept of *mens rea* as an element of sanctionable practices, and (3) the proper standards for assessing evidence and the burden of proof. We have also been asked to provide advice on a number of issues surrounding the proper interpretation of fraudulent practice, including the proper understanding of the concept of 'recklessness', and whether sanctions cases may be brought against government officials.

2. This Advisory Opinion articulates general principles that, in our view, should guide the consideration of each of these issues in the context of sanctions cases governed by the IBRD/IDA Sanctions Procedures. It is intended as a general reference for INT, OES and the Sanctions Board in the preparation and disposition of future sanctions cases.<sup>1</sup> We express no view as to the legal principles and standards that should be applied to sanctions cases brought under the IFC or MIGA procedures.

### **I. ISSUES OF GENERAL RELEVANCE**

#### **A. Sources of Law for World Bank Sanctions**

3. Perhaps the most fundamental issue that arises in sanctions cases is what "law" applies to the case. The matter is often straightforward, but can become complex when two perceived sources of law (e.g., the Procurement Guidelines and the Standard Bidding Documents) conflict. Our analysis begins with identifying the sources of law for sanctions cases and the hierarchy of norms among them. In our view, the relevant sources of law are the following, to be applied in the following order of precedence:

4. *The Articles of Agreement.* Though often overlooked in the context of specific cases, we should not lose sight of the underlying legal basis for the sanctions regime, which is the 'fiduciary duty' to protect the use of Bank financing in the Articles of

Agreement.<sup>2</sup> This provision not only provides the legal basis for the regime but it also delimits its scope. Thus, the Bank has not asserted the authority to debar parties based on the misuse of project co-financing, nor has it debarred for wrongdoing that may be illegal or immoral (such as tax evasion) but does not impinge on the use of Bank loans, credits or grants. The fiduciary duty rarely affects the disposition of sanctions cases, because INT is well aware of the limitations that the Articles impose on the regime. Nevertheless, on occasion the tenuous connection of a case to the misuse of loan proceeds raises ‘constitutional’ issues of this kind.

5. ***The Policy Framework and ‘Legislative History’ of the Sanctions Regime.*** The policy framework for the Bank’s sanctions regime, which can be found in the Thornburgh Reports,<sup>3</sup> 2004 Sanctions Reform Board Paper,<sup>4</sup> subsequent Audit Committee papers,<sup>5</sup> in the minutes of Board and Audit Committee meetings and in the various *travaux préparatoires* for these policy statements, which we often refer to as the ‘legislative history’ for the sanctions regime, plays a multifaceted role in sanctions cases.

6. Most commonly, we turn to the legislative history not as an independent source of law, but to help us interpret the meaning either of the Sanctions Procedures or other elements of the legal framework, particularly the various definitions of fraud and corruption (see below). For example, LEG has reviewed the legislative history in advising that the pre-2004 definition of “corrupt practice” did not encompass secondary forms of liability such as aiding and abetting.<sup>6</sup>

7. More rarely but still pertinent in some cases, it is useful to bear in mind the policy purposes that the sanctions regime was established to serve when looking at particular issues that may arise in connection with individual cases or potential cases. In this sense, the policy framework, as evidenced by the legislative history, can be seen as not simply a source of interpretation, but as constituting an independent source of law second in precedence only to the Articles themselves. At its most basic, the question should be asked: was this the kind of conduct that the sanctions regime was established to address? The issue can arise even in cases where the letter of the definitions of fraud and corruption, which are stated in extremely broad terms, might be interpreted to fit the conduct in question.

8. ***The Legal Framework for the Bank Financing.*** While the above sources of law take precedence over all others, as mentioned they rarely have a direct effect on the disposition of individual sanctions cases. The main source of law, and the one that governs every sanctions case, is the legal framework for the Bank finance in connection with which the alleged Sanctionable Practice took place. This is because it is the legal framework that (i) establishes the Bank’s ‘jurisdiction’ to sanction firms and (ii) contains the relevant definitions of Sanctionable Practice by which the allegations that are the subject to sanctions proceedings should be judged. A sanctions case stands or falls on whether the alleged misconduct falls within at least one of these definitions.

9. Normally, the issue is straightforward. The Procurement, Consultant and/or Anti-Corruption Guidelines apply to the Bank project or program in question, establishing the

sanctions regime's jurisdiction. The Statute of the Sanctions Board provides that the Board will have the competence to hear cases and impose sanctions as set out in the Sanctions Procedures;<sup>7</sup> the Sanctions Procedures provide that the cases subject to them include "cases involving Sanctionable Practices... in connection with Bank financed or Bank executed projects and programs governed by the Bank's Procurement Guidelines, Consultant Guidelines or Anti-Corruption Guidelines."<sup>8</sup> These same Guidelines contain the applicable definition of Sanctionable Practices that is the legal standard against which the alleged misconduct is to be assessed. Typically, sanctions cases involve bidding for a Bank financed contract, so the Procurement Guidelines that apply to the project also apply to the case, and the bidding documents under which the bidding took place reflect the provisions of the applicable version of the Procurement Guidelines.

10. However, issues arise when there are variations between these documents, in particular when the definitions in the Procurement Guidelines are at variance with those in the bidding documents. This typically happens when the Bank has updated the definitions of Sanctionable Practices in the Procurement Guidelines, and the Bank and the borrower have agreed to use updated bidding documents that reflect the new definitions, but the Loan Agreement is not (formally) amended to reflect the change. This issue is discussed at some length below.

11. INT has sometimes asked why new versions of the definitions of Sanctionable Practices should not apply, *ipso facto*, to new sanctions cases or, at least, to alleged misconduct that occurs after their adoption. The answer lies simply in the fact that the sanctions regime, at least as it is currently constructed, is based on a quasi-contractual model: as stated above, the Bank's jurisdiction (as stated in the Sanctions Procedures) is established by application of the Procurement, Consultant or Anti-Corruption Guidelines to a particular project.<sup>9</sup> This is typically accomplished by agreement between the Bank and the relevant borrower in the legal agreement for the relevant loan and project. Under current model forms, the legal agreement specifies that a particular version of the various Guidelines—and therefore a particular version of the definitions—will apply to the loan and project for their duration, unless the legal agreement is amended or, if the agreement so stipulated, the parties otherwise agree. These are therefore the definitions that the Bank has agreed to apply in judging any alleged misconduct that may occur under the project in question.<sup>10</sup>

12. It should be pointed out that this is not the only possible way in which the sanctions regime could theoretically operate. For instance, legal agreements could incorporate by reference the various Guidelines as amended from time to time, in which case new versions of the definitions would apply automatically to any conduct that occurs after their adoption. More radically, the argument could be made that the Bank has inherent authority, by virtue of its 'fiduciary duty' under the Articles of Agreement, to sanction firms that have engaged in fraud and corruption in connection with its financing. In theory, this is a legally sound position and was invoked at least once in the Bank's history to debar a firm before the sanctions regime was formally established in 1996.<sup>11</sup> Once the formal system was established, however, the Bank committed itself to

exercising its inherent authority in a particular fashion, so it is now constrained by the legal framework outlined in this Opinion.

13. ***Authoritative Interpretation.*** Given that the formal legal framework for the Bank's sanctions regime is rather 'thin' and the main legal standards to be applied to sanctions cases, the various definitions of Sanctionable Practices, are notoriously broad, it has always been recognized that they would require interpretation over time. Of course, general principles applicable to the interpretation of legal texts should apply. Therefore, the first and most important source of interpretation is the plain meaning of the text itself. No interpretation may do violence to that plain meaning. But where the meaning is open to variable readings, then it is fair and useful to turn to exogenous sources.

14. The most important source of interpretation is the Bank's own legislative history, as discussed above. Sometimes (but surprisingly seldom) the legislative history can illuminate the intended meaning of a definition, a provision of the Sanctions Procedures or some other aspect of the legal framework for sanctions cases, or provide the basis for a purposive interpretation of the definition. Given the paucity of guidance in the legislative history, however, ongoing guidance on interpretation is required. The first formal guidance for IBRD/IDA sanctions cases<sup>12</sup> is contained in the Commentaries on the Anti-Corruption Guidelines, which include interpretations of the 2006 definitions.<sup>13</sup> The interpretations of the various Sanctionable Practices in the Commentaries will bear on our advice in this Advisory Opinion.

15. Another source of interpretation, and one that the Bank intends to rely on heavily, is the jurisprudence of the Sanctions Board. It was for this reason, at least in part, that the Bank has decided to require fully reasoned, published Sanctions Board decisions. But the Sanctions Board may not be in a position to provide the requisite guidance in all cases. *First*, in practical terms, it will take some considerable time for the Board to develop sufficient jurisprudence on a range of legal issues, so issues of first impression are likely to arise for the foreseeable future. *Second*, the Sanctions Board was not established as a policy-making body, so certain issues, in particular as to the proper interpretation of the Bank's legal and policy framework, lie outside its purview.

16. It is for these reasons that LEG has proposed to provide authoritative advice on the proper interpretation of the Bank's legal and policy framework, including the Sanctions Procedures and the various definitions of Sanctionable Practices. LEG's advice, however, must of necessity be limited to legal principles. It remains within the purview of the EO and Sanction Board to apply the law to the particular facts of cases. Moreover, since no general legal advice can or should attempt to cover all fact patterns, and many legal standards are fact-dependent, these decision-makers play a key role in developing jurisprudence over time that will articulate the specific standards by which general legal principles are applied.

17. It is important to bear in mind that interpretation, as mentioned at the outset, must be carried out according to general principles of legal interpretation, first and foremost that any interpretation must flow logically from the intended meaning of the text.

Interpretation, even of texts as broadly stated as the definitions, must not slip into a disguised form of amendment—which would amount to a retroactive application of norms.

18. **General Principles of Law.** While there is no formal document in the legal framework for the Bank’s sanctions regime that explicitly recognizes general principles as a source of law for the Bank’s sanctions regime, it is not uncommon in international<sup>14</sup> and administrative law to resort to general principles to resolve legal issues not clearly addressed within the applicable legal framework. LEG views general principles of law as a useful and legitimate source of law for the sanctions regime, within certain parameters. The formal legal framework for the Bank’s sanctions regime is rather ‘thin’ and the main legal standards to be applied to sanctions cases, the various definitions of Sanctionable Practices, are notoriously broad.

19. The decision whether or not it is appropriate to apply a particular legal theory based on general principles of law to sanctions cases must be grounded both in legal and legal policy considerations. The threshold question has to be whether the purported general principle of law actually exists as a matter of legal ‘fact’.<sup>15</sup> Before making its argument based on a theory ‘imported’ from general principles, INT (or any other party seeking to assert or apply such a theory) should first establish, through appropriate citations to national and international norms, the existence of the general principle in question. We understand the potential difficulties here, but to be considered a general principle, in our view, at a minimum, it must be shown that the legal theory in question is supported by leading jurisdictions in both civil and common law systems.<sup>16</sup>

20. Once the theory is established as a general principle as a matter of legal ‘fact’, the decision whether or not it should be recognized as part of the Bank’s legal framework is one of legal policy. LEG has proposed to assume a more proactive role in these decisions because it is uniquely placed to do so, for a number of reasons, first of all because of its institutional role as custodian of the Bank’s legal framework. It is uniquely able to assess whether a particular legal theory would make sense within the larger framework, bearing in mind, for example, that the definitions of sanctionable practices are also part of the Bank’s operational legal framework (General Conditions, Procurement, Consultant and Anti-Corruption Guidelines) and so their interpretation impacts on both Bank operations and member country relations.

21. Moreover, the policy grounds for the application of general principles needs to be balanced against other considerations: *First*, the definitions are part of a larger legal framework and the implications of any application of legal theories must be carefully considered from a policy perspective, not simply their usefulness in a particular sanctions case. *Second*, the need for interpretation must be balanced against the need for legal certainty, recalling again that the definitions of fraud and corruption are embedded in legal agreements with the Bank’s member countries and harmonized with other MDBs. *Third*, the fundamental principle of fairness embodied in the adage *nulla poena sine lege* requires that any legal theories flow logically from a reasonable understanding of the

intended meaning and scope of the definitions, as evidenced by the text of the definitions themselves or from their legislative history, not simply because of *ex post* convenience.

22. **Notions of ‘Natural Justice’.** Natural justice and considerations of fundamental fairness play a threefold role in the Bank’s sanctions system. *First*, they inform the formal substantive and procedural legal framework and can therefore be a source of interpretation. *Second*, they can be called upon to resolve conflicts among sources of law (see below). *Third*, as is the case in other judicial or quasi-judicial proceedings,<sup>17</sup> in cases where no formal source of law provides an answer to a legal question, the EO or the Sanctions Board may—on an exceptional basis—decide a matter *ex aequo et bono* according to their best faith judgment of the demands of fundamental fairness.

23. Notions of natural justice, on the other hand, are not acceptable grounds for overriding other sources of law, including the Bank’s own written law. While the sanctions process must be grounded in fundamental principles of fairness and due process, this is accomplished through their reflection in the written legal framework. If any party believes that an aspect of that framework does not comply with such fundamental principles, it is their right, and arguably their duty, to agitate for changes in the framework. They may not, however, appeal directly to their views of natural justice in order to unilaterally override the written law. It should be obvious that such an approach, which must inevitably be based on the party’s subjective opinion as to what constitutes ‘natural justice’, is untenable.

24. **National law.** As LEG has advised previously,<sup>18</sup> national law is not binding on the Bank, and it cannot be used to supersede the Bank’s own legal framework. However, national law can provide a useful point of reference, both to establish the existence of a general principle of law as described above, or simply as a possible approach to a difficult legal issue for which the Bank’s own framework provides no clear answer. However, we must be very cautious in applying national law concepts to sanctions cases *ex post*; such applications generally amount to a retroactive application of norms. National law concepts are more likely to be reference points for the prospective amendments to the Bank’s legal framework, and, in fact, many of the proposals in the current round of sanctions reforms are grounded in a survey of ‘benchmark’ national legal systems.

25. **Sanctions Procedures.** The above sources of law go to the substantive merits of sanctions cases. The procedural aspects of cases are governed by the Sanctions Board Statute, the Sanctions Procedures and related guidance materials that the Bank may issue from time to time.<sup>19</sup> These materials go to issues such as the standard and burden of proof, the weighing of evidence, and the like. As has been the view since Thornburgh,<sup>20</sup> LEG should provide guidance on the proper interpretation of the Sanctions Procedures, even if in the past it has not been called upon consistently to resolve procedural issues.<sup>21</sup>

26. The interpretation of the Sanctions Procedures, and the application of *ad hoc* procedures in situations not covered by the formal Sanctions Procedures, relies on similar sources of law, including the legislative history, authoritative interpretation and



occasionally—particularly in order to fill procedural *lacunae* as in the case of recent settlements—general principles of law.

27. ***Conflicts among sources of law.*** Any conflict among sources of law should be settled through the application of the foregoing hierarchy. ‘Constitutional’ issues arising under the Articles of Agreement, for example, supersede all other considerations. Likewise, considerations of policy purposes may supersede the literal meaning of the definitions of Sanctionable Practices, the Bank’s own legal framework supersedes general principles of law, and so on.

28. A thornier issue arises when equivalent sources of law, such as different versions of the legal framework, conflict. The most common such issue arises when the legal agreement between the Bank and the borrower incorporates a certain version of the definitions, as set out in a certain version of the Procurement or Consultant Guidelines, and the bidding documents governing the procurement where the alleged Sanctionable Practice occurred contain a different version of the definitions, or even no reference to the Bank’s legal and policy framework for fraud and corruption at all.

29. The sanctions regime was developed as part of the Bank’s comprehensive effort to ensure that loan proceeds are used for the purposes intended. The regime has its origins in a 1996 decision of the Board of Executive Directors, which approved the introduction of fraud and corruption provisions in the Bank’s Procurement and Consultant Guidelines and the amendment of the General Conditions to provide contractual remedies for fraud and corruption, as well as the establishment of the Sanctions Committee as predecessor to the Sanctions Board. The definitions of Sanctionable Practices have undergone several iterations since 1996, most recently in 2006, when the Bank adopted major reforms of the sanctions regime. Among these was the adoption of new harmonized definitions for four Sanctionable Practices (i.e., corrupt, fraudulent, collusive and coercive practices) among the major MDBs and the inclusion (by the Bank only) of a new fifth Sanctionable Practice (i.e., obstructive practice). In each case, the changes in definitions were adopted prospectively, with no application intended to ongoing loans and projects.<sup>22</sup>

30. Thus, the question arises: which version of the Guidelines, each of which may contain different legal standards for defining the sorts of misconduct which may be sanctioned by the Bank, should apply to a particular sanctions case? Is it the standard generally in effect at the time of the conduct? Or the standard in the version of the Guidelines incorporated in the legal agreement between the Bank and the borrower for the relevant loan and project? Or, if different, as sometimes happens, the standard set out in the bidding documents and/or the contract between the borrower and a contractor?

31. To analyze this issue correctly, we must start by distinguishing two different issues which are often conflated: the establishment of jurisdiction over a case, on the one hand, and the legal standards to be applied to the case on the other.

32. ***Jurisdiction.*** As discussed above, jurisdiction is established through the application of any of the Procurement, Consultant or Anti-Corruption Guidelines that

include provisions establishing the Bank's right to sanction to the *project* where the Sanctionable Practice allegedly took place.<sup>23</sup> This application typically occurs through the incorporation by reference of the relevant guidelines into the loan or other legal agreement governing the project. This jurisdiction does not depend on, and is not affected by, the provisions of any subsidiary agreement between the Borrower and third parties or the bidding documents. Conversely, the absence of such provisions in the legal agreement deprives the Bank of jurisdiction, notwithstanding the inclusion of such language elsewhere.<sup>24</sup>

33. The Bank does not need the agreement of third parties to sanction, since the right to sanction is one that carries with it no corresponding obligation on the part of the sanctioned party. For example, the Bank does not need a firm's consent to issue a letter of reprimand to that firm. In the case of debarment, there is arguably a corresponding obligation, not on the part of the debarred party but rather on the part of borrowers, which are required to respect the ineligibility of the debarred party in carrying out Bank financed procurement. Even in cases where conditions are placed on non-debarment or release from debarment, these are not contractual obligations but a unilateral determination on the part of the Bank that it will either debar a party, or not release a party from debarment, if those conditions are not met.<sup>25</sup>

34. The agreement of third parties is necessary, on the other hand, to establish other rights of the Bank that entail a corresponding obligation on the part of the third party. The most common and important such right is the so-called 'third party audit right', which permits the Bank to inspect the books and records of bidders, contractors and other recipients of Bank financing and the corresponding obligation of such recipients to permit the Bank access. Other such obligations are embedded in paragraph 10 of the Anti-Corruption Guidelines, including the obligation to report allegations of Sanctionable Practices and cooperate with Bank investigations.

35. It should also be mentioned that the inclusion of appropriate provisions regarding Bank sanctions and fraud and corruption generally in bidding documents and contracts, while not necessary to establish the Bank's authority to sanction, serves two important purposes relevant to the sanctions regime. *First*, as a matter of fundamental fairness, it puts bidders and contractors on notice that they are subject to the sanctions regime. The existence of 'secret' rules offends fundamental principles of fairness and due process. *Second*, these provisions bolster the Bank's defenses against potential claims of tortious interference with contract or defamation by sanctioned parties, for reasons examined in depth in the July 2009 Audit Committee paper on Sanctions Reform.<sup>26</sup> The exclusion or revision of these provisions without the Bank's concurrence should therefore be viewed as a serious performance breach by the borrower or project implementing entity.

36. The above is only a general discussion of the issues surrounding jurisdiction of the sanctions process. LEG has provided detailed guidance on issues relating to subject matter and *in personam* jurisdiction in the Sanctions Manual.

37. ***Legal Standards and the definitions of Sanctionable Practices.*** Once jurisdiction is established, a separate question arises as to the applicable legal standards for judging allegations of fraud and corruption. The first point to make is that, as mentioned above, the legal standard is not necessarily the one most recently adopted at the time that the conduct takes place. As explained above, the legal standards that apply to a particular loan and project are established contractually as between the Bank and the borrower. Under current practice, unless the legal agreement is amended, these standards apply for the duration of the project.

38. A particular problem arises when, as not infrequently happens, the standards in the legal agreement between the Bank and the borrower are at variance from those that apply to a particular bidding process where a Sanctionable Practice is alleged to have taken place, or those embedded in a contract financed by the Bank during the implementation of which a Sanctionable Practice is alleged to have taken place. When the Bank updates its procurement policies, borrowers are customarily given the option to apply these new policies—including the corresponding updated standard bidding documents—to bidding processes on a forward-looking basis. This should be reflected in an amendment to the legal agreement, in which case the two are harmonized leaving no ambiguity, but often the change is agreed informally between the TTL and line ministry or project staff, not the borrower's designated representative, which is normally the Ministry of Finance or equivalent.<sup>27</sup> Nevertheless, since the Guidelines themselves do not specify the application of a particular version of the standard bidding documents but only 'appropriate' bidding documents, it can be argued that the Guidelines allow for some flexibility for the Bank and borrower to agree on updated legal standards for particular procurement, or for procurements generally, during project implementation.

39. Moreover, the Procurement Guidelines themselves state:

The rights and obligations of the Borrower and the providers of goods and works for the project are governed by the bidding documents, and by the contracts signed by the Borrower with the providers of goods and works, and not by these Guidelines or the Loan Agreements.<sup>28</sup>

40. Thus, the legal standards that govern the relationship between the borrower and bidders and contractors are those set forth in the bidding documents and contract forms, *even* if the legal agreement between the Bank and borrower contains different standards through incorporation by reference of a prior or subsequent version of the Procurement and Consultant Guidelines.

41. Although the Bank is neither party to nor bound by the bidding documents or the contract between the borrower and the Respondent, and even if the Bank's 'jurisdiction' does not depend on it, it is LEG's view that the Bank cannot simply ignore the fact that the Respondent has been put on notice that it would be subject to sanction based on a particular set of definitions, even in cases where those definitions are not the ones agreed in the Loan Agreement. Often, the Bank itself has agreed to the application of updated standard bidding documents that led to the mismatch in definitions, which means that all

three relevant parties—the borrower, the contractor and the Bank—all have reached the same understanding on the applicable legal standards. In such cases, considerations of equity should compel the Bank to accept the standards agreed as between the Borrower and the Respondent as governing the particular contract and any sanctions case in connection with the procurement or implementation of that contract. From a legal policy point of view, this also often serves the interests of the Bank, since the definitions in the bidding documents are more recent and therefore more comprehensive. However, this also represents something of a double-edged sword: it also means that in those cases where the bidding documents and contracts specify an earlier version of the definitions, because, for example, of a lag between the adoption of new policies and the implementation of new standard bidding documents, the Bank must be willing to accept the application of earlier, less comprehensive definitions.

42. In cases where the bidding documents are silent on the issue, however, the above considerations of equity do not, in our view, apply. There are, essentially, no standards to override those set out in the legal agreement, so those standards should apply.

### **B. Rules of Evidence and Standards of Proof**

43. Consistent with the administrative nature of the proceedings, the Sanctions Procedures provide for an extremely permissive approach to evidentiary issues. Section 7.01 of the Sanctions Procedures provides as follows:

Any kind of evidence may form the basis of arguments presented in a sanctions proceeding and conclusions reached by the Evaluation Officer or the Sanctions Board. The Evaluation Officer and the Sanctions Board shall have discretion to determine the relevance, materiality, weight, and sufficiency of all evidence offered. Hearsay evidence or documentary evidence shall be given the weight deemed appropriate by the Evaluation Officer or the Sanctions Board. Without limiting the generality of the foregoing, the Evaluation Officer and the Sanctions Board shall have the discretion to infer purpose, intent and/or knowledge on the part of the Respondent, or any other party, from circumstantial evidence. Formal rules of evidence shall not apply.

44. So, in short, INT (or the Respondent) may present any kind of evidence. Therefore, ‘best evidence’<sup>29</sup> is clearly not a requirement, although where it is available, we see little reason for INT not to present it. Where best evidence is not available, Section 7.01 permits INT to present whatever circumstantial evidence it can marshal to support an allegation or factual assertion. At the same time, it is entirely up to the EO and the Sanctions Board, in their discretion, to evaluate and weigh the evidence, so they may freely decide that circumstantial evidence proffered by INT is insufficient to support the relevant allegation or assertion.<sup>30</sup> In exercising that discretion, the EO and the Sanctions Board should consider all the relevant circumstances and the inferences that may reasonably be drawn from them (see below), bearing in mind that the standard of proof for sanctions proceedings is ‘more likely than not’.

45. INT has asked LEG to advise on our understanding of the meaning of ‘more likely than not’. It should be borne in mind that the standard of proof is predicated on the same basic considerations that underlay the omission of an explicit *mens rea* requirement from most of the definitions, namely the administrative nature of the proceedings and INT’s lack of investigative tools. This standard of proof is understood as being equivalent to the ‘preponderance of the evidence’, essentially the standard to be found in civil cases in most jurisdictions. When this nomenclature adopted in 2004, it was felt that the phrase ‘more likely than not’ would be more understandable to non-lawyers.<sup>31</sup>

46. This history indicates that INT’s view of the standard of proof as requiring “more than 50%” of the corpus of evidence has some merit. Certainly, the standard is not meant to be in any way equivalent to “beyond a reasonable doubt” that prevails in criminal law. Therefore, the decision maker may still be left with “reasonable doubts” about the culpability of the Respondent and nevertheless impose a sanction.

47. However, the “more than 50%” approach may not be the most useful or appropriate either at the EO stage or at the Sanctions Board stage. *Firstly*, it suggests a formulaic approach to the evidence while, as we saw in our analysis of Section 7.01 above, the Sanctions Procedures calls for a discretionary approach. Different pieces of evidence may be given more or less weight, or judged more or less relevant or credible, by the EO and the Sanctions Board in their discretion. While perhaps in theory this process could be reduced to a mathematical formula, we do not view this as a feasible or even desirable way to think about the exercise of discretion. Rather, the EO and the Sanctions Board should look at the corpus of evidence before them *as a whole* and determine whether the allegations are more likely than not to be true.

48. Moreover, the EO’s assessment of the evidence requires special considerations, given that he or she is looking at only one side of the case. The EO is actually charged with assessing the *sufficiency* of the evidence, in contrast to the preponderance of the evidence. The difference is explained in the Guidance Note for the IBRD/IDA Evaluation Officer adopted in April 2009,<sup>32</sup> which reads, in relevant part, as follows:

Sufficiency of evidence differs from the preponderance of evidence required for the imposition of sanctions by the Sanctions Board, since, at the time that the EO reviews a proposed Notice of Temporary Suspension or Notice of Sanctions Proceedings, the EO will not have seen any counter-evidence from the Respondent. The EO therefore generally looks simply at the evidence presented in either type of Notice ... to determine whether a reasonable person would conclude, considering all relevant circumstances, that it was more likely than not that the Respondent had engaged in a Sanctionable Practice.<sup>33</sup> When the EO has received the Respondent’s Explanation or Preliminary Explanation, however, s/he may consider whether any counter-evidence presented by the Respondent has cast enough doubt on the sufficiency of the evidence to render it *less* likely than not that the Respondent has engaged in a Sanctionable Practice.

49. So, in layman’s terms, the issue for the EO is: What would a reasonable person make of the evidence before the EO, taking into consideration all of the known facts and circumstances? And while it is not the EO’s job to make the Respondent’s case, in

making this assessment, it is appropriate for the EO to consider other inferences that might be drawn from the evidence beyond the inferences posited by INT. If an inference that would exculpate the Respondent is at least as likely than an inference that would inculpate it, then the EO may reasonably conclude that INT has not offered sufficient evidence to show that it was more likely than not that the Respondent engaged in a Sanctionable Practice.

50. This is not to say that the EO should engage in idle speculation. It would be unreasonable to require INT to disprove any and all hypothetical alternative explanations for a Respondent's actions. Any alternative inferences the EO considers should arise logically and ineluctably from the record itself—as should any inferences posited by INT. To take a facile example for purposes of illustration, the payment by a bidder to a procurement official shortly before being awarded a bid should, on its face, provide ample grounds for an inference that the payment was made to influence the official's decision. INT need not exclude other possible hypothetical explanations unless there is something specific in the record that suggests that alternative explanation. If, on the other hand, the payment was made at a poker party, the EO would be justified in considering whether the payment has another explanation before concluding that improper purpose was the most likely.

51. While it can be argued that the EO's review of the evidence should be more lenient than this, given the Respondent's opportunity to make out its own before the Sanctions Board, it is our view that, besides the clear intent of the legislative history, there are strong legal policy reasons for a high level of scrutiny at the EO stage of proceedings. Both as a matter of fundamental fairness and to protect the Bank against unnecessary legal risk, the Bank should not impose the burden of litigation and the economic cost of temporary suspension on Respondents without a robust vetting of INT's arguments and evidence. Just as the EO should not engage in speculation in assessing the evidence, INT should not pursue cases based on speculative evidence. Moreover, overreliance on the adversarial process, as pointed out above, has certain drawbacks in the context of the Bank's sanctions regime. All things considered, we believe that the method of considering the various inferences that may be reasonably drawn from the record, within the parameters outlined above, provides the best assurance of a fair outcome.

### **C. *Mens Rea* as an Element of Sanctionable Practices**

52. **Legislative History.** The issue of *mens rea* is not a new one for the sanctions regime. In the course of the 2006 round of sanctions reform, INT and LEG<sup>34</sup> collaborated in successfully resisting calls by some EDs to include an explicit 'intent' requirement in the definitions of Sanctionable Practices. In so doing, INT and LEG relied on two considerations: *First*, sanctions proceedings are not criminal in nature, and an intent requirement is typical of criminal law, not civil or administrative law. Civil law liability, for example, can arise from negligence or, where strict liability applies, no *mens rea* at all. *Second*, INT lacks the investigative tools of a police force and should not be obligated

to demonstrate intent which, as it relates to an accused party's subjective state of mind, is notoriously difficult to prove.

53. At the same time, it was recognized at the time that an implicit *mens rea* element could be inferred from the definitions, arising from the requirement that misconduct be undertaken "in order to" achieve a particular purpose and, typically, that said purpose be "improper".<sup>35</sup> This position is reflected in the Commentaries to the Anti-Corruption Guidelines, which provides the following interpretation of *mens rea* in regard to "corrupt practices":

Unlike the definitions of corrupt practice found in most international conventions, but like the Bank's Procurement and Consultant Guidelines both before and after the 2006 sanctions reforms, this definition does not include an explicit and specific element of "*intent*" (i.e., evidence of the actual state of mind of the accused party). Most international conventions require intent because they are aimed at the criminalization of corruption, and *mens rea* is a fundamental element of a criminal act. The Anti-Corruption Guidelines deal with contractual obligations, on the one hand, and administrative measures which the Bank calls "sanctions", on the other... Further, because of the Bank's ability to investigate fraud and corruption in connection with loan proceeds is limited and does not, for example, include the ability to subpoena witnesses or use other police powers, an "intent" requirement would impose an unnecessarily high standard of proof. However, the definition does require that the corrupt practice be undertaken for a demonstrable *purpose*—to influence improperly the actions of the "target" of the corrupt practice—which can be seen as an implicit element of intent. This purpose can be shown either by direct evidence or, more typically, by reference to a course of dealing, acts of the accused party or other circumstantial evidence from which purpose can reasonably be inferred.

54. The very conscious objective of this approach was to avoid INT having to prove a particular state of mind on the part of the Respondent, something that—even with the flexible approach to evidence in the Sanctions Procedures—was thought to be likely to prove an insurmountable obstacle in many cases.

55. Nevertheless, the sanctions regime was clearly not intended to penalize innocent parties or conduct. Some changes to the definitions were made in the course of their internal review at the Bank in order to ensure this was the case. Notably, the word "improperly" was inserted in the definition of 'corrupt practice' to ensure that it would not inadvertently capture legitimate conduct. The Commentaries explain the requirement as follows:

The definition includes an element of *impropriety*. This element may refer either to the purpose of the corrupt transaction (e.g., to induce a breach of duty by a public official) or to the means by which it is effected (e.g., a bribe) or to the result (e.g., an undue advantage accruing to the corrupt actor). An element of impropriety is necessary to the definition because it could otherwise be interpreted to cover legitimate conduct (e.g., the payment of a salary to "influence" an employee to perform his or her job). While the term "improper" may appear subjective on its face, it should be read in the light of international

conventions such as UNCAC, the OECD Convention and the Council of Europe's Criminal Law Convention on Corruption, which typically require that corruption involve a breach of duty by the "target" of the corruption (see, e.g., UN Convention, Council of Europe Convention) and/or the receipt of an undue advantage to, or the avoidance of an obligation by, that target (e.g., the OECD Convention, UN Convention, Council of Europe Convention) or the party seeking to influence the target (see, e.g., OECD Convention). The giving of a bribe is therefore improper, whether or not the person accepting the bribe takes any improper action, or even whether or not the bribe is intended to induce an improper action (another reason why facilitation payments are not exempted). By the same token, an otherwise proper payment or giving of a thing of value may constitute corruption if it can be shown to have induced (or was meant to induce) the "target" to breach a duty, for example a contribution to a charity favored by a government official in order to secure the award of a contract to the contributor that, under applicable rules, should have gone to another party.

56. It is interesting to note that, according to this interpretation, corrupt practice can be found even in cases where there is no improper purpose, but where the means to achieve the purpose is improper.

57. In the case of fraudulent practice, a specific element was added requiring that the fraud be committed "knowingly or recklessly". This issue, along with certain other issues relating to fraudulent practice, is discussed separately and in detail below.

58. ***Mens Rea Requirements in National and International Law.*** If the Bank were to read into these definitions a specific *mens rea* requirement, the question then arises, what should that requirement be? The task is complicated by the fact that common and civil law systems do not share exactly the same approaches to the issue. For example, the common law term 'recklessness' finds no easy counterpart in continental European languages, while the civil law concept of *dolus eventualis*, while roughly equivalent to recklessness, has no precise translation into English (or common law concepts).

59. The common law recognizes the following degrees of *mens rea*:

- *Specific intent*: The offender has both the foresight (aka knowledge) to understand that his actions may result in a particular result and the desire to achieve that result, on a subjective basis.
- *Recklessness*: The offender does not necessarily desire it, but is aware<sup>36</sup> of the possible result of his actions and goes ahead anyway, thus exposing his victim to the risk of harm.<sup>37</sup> The greater the probability of the risk, the more egregious the recklessness and the greater the penalty imposed.
- *Negligence*: The offender neither foresees nor desires the result of his actions, but a reasonable person would have been able to foresee the result and therefore refrained from the action. In criminal law, negligence is usually only applied where the consequences of the offender's actions are so severe—e.g.,



negligent homicide—that society has an interest in punishing the offender notwithstanding his or her lack of true intent.

- *Strict liability*: The offender is held liable for his actions alone (*actus reus*) regardless of his mental state. This standard is relatively rare but not unknown in criminal law,<sup>38</sup> but is often applied in contract and tort law, for the purpose of risk allocation.

60. The civil law tradition recognizes the following degrees of *mens rea*:

- *Dolus directus*: The offender has both the foresight (aka knowledge) to understand that his actions may result in a particular result and the desire to achieve it, on a subjective basis. This therefore corresponds to common law ‘specific intent’.
- *Dolus* in the second degree: The offender is held culpable on *dolus* in the second degree for collateral harm that is a necessary consequence of the specific result that he or she desired and foresaw.<sup>39</sup> This can be seen as a form of recklessness under common law.
- *Dolus eventualis*: The offender is aware that, as a result of his behavior, an offence could occur; the offender is aware of the possible result of his actions and goes ahead anyway. This corresponds roughly to the common law concept of recklessness.<sup>40</sup>
- *Culpa*: The offender neither foresees nor desires the result of his actions, but a reasonable person would have been able to foresee the result and therefore refrained from the action. *Culpa* in the civil law tradition implies a moral or normative judgment with regard to an objective standard of care (allegedly applied by a reasonable person). This corresponds to the common law concept of negligence.
- *Strict liability*. The concept of strict liability also exists under civil law. As under common law, it is most often used in contract and tort law as a risk allocation device.<sup>41</sup>

61. While most international conventions on anti-corruption apply a specific intent requirement, a requirement that the Bank consciously rejected, the Statute of the International Criminal Court, which attempts to create a ‘hybrid’ system melding both common and civil law approaches, may be of interest to the Bank. Article 30 of the Statute defines *mens rea* as requiring both intent and knowledge, with intent meaning both (i) the intent to commit the act and (ii) either the desire or knowledge that a certain consequence will ensue. Knowledge means awareness that a consequence will ensue in the ordinary course of events.

62. ***Policy Implications of Mens Rea as an Element of Misconduct.*** If the Bank were to specify the degree of *mens rea* required to establish culpability, it would need to choose from among the foregoing options, bearing in mind the purpose of the sanctions regime itself and the actual words of the definitions. Here we are faced with a quandary: the words “in order to” which gave rise to this issue in the first place speak quite directly to a desire to achieve certain results, which arguably suggests specific intent/*dolus directus*, since neither recklessness nor negligence are predicated on the offender actually have a specific purpose. So, if emphasis is to be put on *mens rea*, rather than the transaction itself, it is hard to avoid adopting a specific intent/*dolus directus* requirement, which we know from the legislative history the Bank did not intend. Bearing in mind the legislative history, we should carefully examine the impact of a specific *mens rea* requirement on INT’s ability to bring and win sanctions cases.

63. It would also be appropriate to reflect on the implications for the range of sanctions available under the current process and the relevant aggravating and mitigating factors specified in the Sanctioning Guidelines. In most legal systems, the degree of *mens rea* is not only a requirement for liability, but it may determine either the way in which the offense is characterized (e.g., murder vs. negligent homicide) and/or the punishment. At the moment, the sanctions system takes *mens rea* into account in only a few instances, in particular under the guidance on corporate groups, where ‘failure to supervise’ (i.e., based on negligence) by a controlling person may give rise to a sanction under Section 9.04 of the Sanctions Procedures, but specifies that the sanction would not ‘normally’ be debarment but rather, depending on the prevalence of the failure, either conditional non-debarment or a letter of reprimand. Similarly the former Sanctioning Guidelines recognized the ‘egregiousness’ of the conduct as an aggravating factor, which could be interpreted as providing for additional debarment time for higher degrees of *mens rea*, although we are not aware of any actual case where the EO or the Sanctions Board has invoked the factor in this way. The new Sanctioning Guidelines do not recognize *mens rea* as an aggravating or mitigating factor, although it is arguably implicit in some of the factors cited (e.g., acting as ‘ring leader’, use of sophisticated means).

64. ***LEG’s Recommended Approach.*** In any event, these are questions of legal policy that do not have a clear pre-ordained answer. It is our view that the best course to take in regards to *mens rea*—and the one closest to the spirit and intent of the 2006 reforms—would be to simply follow the strict letter of the definitions, without introducing a formal *mens rea* requirement.

65. Given the safeguards already built into the definitions, we would question whether a *mens rea* requirement—at least one that is disaggregated as an element of the definitions and argued as a separate matter—is either advisable or necessary. If, for example, it can be shown that money passed hands from a bidder to a government procurement official in connection with a procurement, and it is clear from the circumstance that the purpose of the transaction was to influence a procurement decision, we see no significant value in requiring a showing that the bidder acted with specific intent, recklessly or even (if such a thing is possible) negligently. Nor do we see a significant risk that an innocent party would be sanctioned. One of the reasons for

avoiding an explicit *mens rea* requirement in the 2006 definitions (other than fraudulent practice) was to take the focus off of the subjective *state of mind* of the Respondent and on to more easily provable objective facts, the *course of dealing* from which the purpose of the transactions under examination can be inferred. On the other hand, it is true that the Respondent's state of mind may equally be inferred from this same course of dealing—but, again, this is arguably merely an alternative way to conceptualize the essentially same analysis.

66. Therefore, in our opinion, once the EO determines that INT has made out a *prima facie* case that an act was undertaken for an improper purpose—a case that may be based on reasonable inferences from objective facts, not necessarily the Respondent's state of mind—it should then be up to the Respondent to attempt to rebut by showing that the action did not, in fact, have an improper purpose: to follow on the example cited above, that its payment to a procurement official was, in fact, repayment of a debt. Or that a particular misrepresentation was due to mere error, not any intent to mislead. In this sense, while *mens rea* would not be an element to establish culpability, the lack thereof could be used by Respondents as an affirmative defense. As for any affirmative defense, the burden of proof would be on the Respondent to make the appropriate showing.

#### **D. Theories of Liability**

67. Some of the most vexing issues for the disposition of sanctions cases are those concerning the extent to which theories of joint or secondary liability may support the sanctioning of persons who have not physically perpetrated the wrongdoing.

68. In this connection, it is important to set out some basic distinctions made in the legal framework as to the basis on which a party may be sanctioned. The first is between named Respondents, on the one hand, and other parties which may be sanctioned under Section 9.04 (formerly Section 19(4)) of the Sanctions Procedures, on the other. Respondents must be *culpable*, which is to say that they must be directly involved in the actual Sanctionable Practice, while other parties may be held *responsible*, even though they had no hand, either directly or indirectly, in the Sanctionable Practice.<sup>42</sup>

69. It is also important to distinguish between the 2004 and 2006 definitions of corrupt and coercive practices, which, as mentioned, include the words 'directly or indirectly', on the one hand, and prior definitions, on the other. LEG has already commented on the importance of this change in its 2008 advice in connection with the NRIMP case.<sup>43</sup> The legislative history is clear that these definitions prior to 2004 did *not* include 'aiding and abetting' or other forms of secondary liability; the introduction of the phrase 'directly or indirectly' was a conscious effort to address this 'loophole' in the early definitions.<sup>44</sup>

The first issue [whether the pre-2004 definition of "corrupt practice" includes within its scope participatory acts such as aiding and abetting, complicity and/or conspiracy] has a fairly straightforward answer. The record strongly suggests that the 1999 definition of "corrupt practice" did not capture secondary forms of wrongdoing such as aiding and abetting, and that the addition of the words

“directly or indirectly” to the definition in 2004, as proposed by Management based on the Thornburgh reports and approved by the Executive Directors, was intended to close this lacuna. The President’s Memorandum to Executive Directors covering the 2004 versions of the Procurement and Consultant Guidelines specifically stated that the proposed changes to the definitions relating to fraud and corruption were intended, among other things, to capture “indirect participation in corrupt activities”.<sup>45</sup> The 2000 Thornburgh report had alluded to the need to “refine” the 1999 definition of “corrupt practice”, and the 2002 Thornburgh report had found that the 1999 definitions needed to be supplemented to assure coverage of, among other things, “an action in furtherance of an advanced conspiracy”, “fraud or corruption accomplished through a middleman” and “acts constituting assistance to others in executing fraud and corruption”.<sup>46</sup> The 2002 report had recommended that these “existing gaps ... be corrected, and that incomplete forms of the offenses, and forms of the offenses accomplished largely by others, be incorporated as well.”<sup>47,48</sup>

70. ***The Concept of ‘Culpability’***. INT has asked for LEG’s view of the proper interpretation of the requirement that Respondents be ‘directly involved’ in the wrongdoing, bearing in mind that a narrow interpretation would limit Respondents to those who participate personally in the physical act (e.g., the ‘bag man’ for a bribe). We should begin by saying that, as mentioned above, the ‘direct involvement’ requirement does not necessarily mean that others will not be liable. The 2004 and 2006 definitions of corrupt practice allow for ‘direct or indirect’ action, thus encompassing various forms of indirect participation, including the use of agents, aiding and abetting, and the like. The introduction of ‘collusive practice’ captures various forms of indirect participation as well. Moreover, Section 9.04 of the new Sanctions Procedures provides a basis for sanctioning related persons, even where direct involvement in the Sanctionable Practice cannot be established.

71. Nevertheless, we are of the view that culpability should extend beyond carrying out the predicate physical act(s) that constitute the Sanctionable Practice. It would create a perverse result if a party could escape culpability simply by using another as an instrumentality to commit a sanctionable practice. Instruction or orders, as well as plausibly lesser forms of involvement such as approval or guidance, should provide grounds for culpability and therefore naming the party as a Respondent, even under pre-2004 definitions. In such cases, long-standing theories of agency<sup>49</sup> or ‘co-perpetration’,<sup>50</sup> commonly understood across legal systems, provide a solid basis for holding such parties culpable. On the other hand, mere knowledge of or non-intervention in a Sanctionable Practice clearly should not grounds for culpability and—barring a duty to supervise such as in the case of a parent company with respect to its subsidiaries or managers with respect to their subordinates—should not be grounds for sanction on the basis of responsibility.

72. ***Respondeat Superior and Vicarious Liability***. We support the notion that firms should be sanctioned as Respondents for the acts of their employees for or on behalf of the firm. Assuming that such acts are within the employee’s actual or apparent authority, they are actions of the firm as a matter of law, so it is not entirely clear that even we need

resort to *respondeat superior* as a basis for liability. The practice of sanctioning of firms for the acts of employees, to our knowledge, has been routinely followed in the jurisprudence of both the Sanctions Committee and the Sanctions Board over the years.<sup>51</sup>

73. The theory of *respondeat superior* may also be useful where the authority of the employee is either in doubt or difficult to prove. From a legal policy point of view, we would agree that requiring a showing that a particular employee was specifically authorized to commit the Sanctionable Practice would place an unacceptable evidentiary burden on INT, for the reasons we have already discussed. It should be sufficient that the employee acted on behalf of the firm to establish a *prima facie* case that the firm would then need to rebut through the interposition of an affirmative ‘rogue employee’ defense.<sup>52</sup>

74. If the firm can show that the person who engaged in the wrongdoing was a true ‘rogue employee’ (e.g., acting on his or her own, without the authorization or knowledge of his supervisors and in violation of corporate policy), then this could be the basis for either full exculpation or a significant mitigating factor in determining the appropriate sanction for the firm. Where the firm can show that there was no failure to supervise and that appropriate corrective measures were taken as soon as the wrongdoing come to light, then that could be grounds for exculpation. The tripartite test proposed by INT strikes us as a reasonable approach. In each case, this being an affirmative defense, the burden of proof should rest on the firm.

75. ***Managers and other Controlling Persons.*** A different approach, in our view, would be appropriate when considering the culpability of managers, supervisors and other controlling individuals. In such cases, we would turn to concepts akin to those that apply to the criminal liability of individuals, where a corporate officer is held liable for acts performed by other corporate agents only when it can be shown that they acted under his or her direction or with permission; mere knowledge or passive acquiescence in wrongdoing by subordinates is not sufficient. However, given the special circumstances in which the Bank’s sanctions regime operates—including the limitations on INT’s investigatory powers and the fact that the regime is administrative in nature—it is our view that evidentiary requirements may be relaxed in appropriate cases. In cases involving small, closely held companies, for example, it would not be unreasonable to infer authorization if the manager exercises close supervision over, and has intimate knowledge of, all of the company’s business operations.

76. Responsibility of managers and other controlling persons as a basis for sanction as a non-Respondent (generally not debarment) may be established in the usual fashion through a showing of a failure to supervise or similar default.

77. ***Joint Criminal Enterprise and other Theories Based on ‘Conspiracy’.*** Since 2004, participation in a joint scheme is itself sanctionable as collusive practice, although the 2004 definition, as well as the 2006 definition as modified through footnotes in the Procurement and Consultant Guidelines, are limited to ‘bid rigging’ schemes. So the issue goes not to whether such conduct should be sanctionable, since it is (at least under the 2004 and 2006 definitions) but rather whether participation in a joint enterprise

should be a basis for sanctioning a party as a culpable principal in another predicate offense such as corrupt or fraudulent practice. It is, in essence, a subset of the question above as to what constitutes culpability.

78. To apply joint criminal enterprise or similar theories based on ‘conspiracy’ as a theory of liability in Bank sanctions cases, it must be shown that the theory has been already established as a ‘general principle of law’ at the relevant time. As INT has correctly pointed out, joint criminal enterprise has been adopted by international criminal tribunals. Our research indicates that it was largely created by the judges and prosecutors of the Yugoslav Tribunal, its prominence dating from the case of Dusko Tadic in 1999.<sup>53</sup> The rationale behind the theory in that case was that holding persons who conspired to commit war crimes liable merely as aiders and abettors would understate their role and degree of responsibility. The theory allows them to be held liable as principals. The other rationale was the horrendous nature of the war crimes involved, including genocide, under wartime conditions that made it difficult to prove the culpability of individual perpetrators. The prospect of such crimes going unpunished or under-punished because of lack of direct evidence of individual culpability seemed, understandably, unacceptable.

79. These rationales do not seem particularly apposite to the typical sanctions case. However, concepts of joint liability akin to joint criminal enterprise as used in the Tadic case have existed across legal systems for over a century.<sup>54</sup> The core elements of joint criminal enterprise include: (1) a plurality of persons, (2) existence of a common plan and (3) participation of the accused in the common plan. The plan itself may be established by direct or circumstantial evidence. Participation, in most jurisdictions, must be established through the showing that the accused committed some overt act in furtherance of the common plan; passive acquiescence or mere knowledge of the plan is not sufficient to establish participation.<sup>55</sup>

80. International customary law recognizes three forms of joint criminal enterprise<sup>56</sup> two of which are potentially relevant to the Bank’s sanctions regime:

- *Basic*: Under the basic form of joint criminal enterprise, each participant in the joint enterprise is culpable for acts committed that a part of the common plan.
- *Extended*: Under the extended form of joint criminal enterprise, participants may also be liable for acts other than those which were specifically included in the common plan if (i) it was foreseeable that the act might be perpetrated by one or other participants in the joint enterprise, and (ii) the accused was aware that the act was a possible consequence of the execution of the plan, and with that awareness, the accused decided to participate in the enterprise.<sup>57</sup>

81. While the exact parameters of any theory of liability drawing on joint criminal enterprise should be worked out, on a case by case basis, through the development of jurisprudence, it is our view that the extended form of joint criminal enterprise is not consistent with the Bank’s legal framework for sanctions, as it relies on mere foreseeability and therefore essentially sets a simple negligence standard for culpability.

However, we would support a concept that extends the basic form of joint criminal enterprise to allow for culpability of acts that the Respondent either knew or, under the circumstances, must have known were likely to occur as a result of the enterprise—a standard similar in nature to the *scienter* required for recklessness in fraudulent practice, as explained below. In any event, the common plan required for establishing a joint criminal enterprise will no doubt need to be established by inference from circumstantial facts in many if not most cases, so the difference between the two standards is likely to be largely academic, and the question of what acts lie within or without a common plan, and what collateral acts should be considered a ‘likely’ consequence of the plan, will need to be argued by INT, and determined by the EO and Sanctions Board, on a case by case basis, based on the particular circumstances of the case.

82. In our view, given its long-standing wide acceptance across legal systems, theories of liability based on notions akin to joint criminal enterprise may be considered as constituting a general principle of law and therefore a legitimate source of law for the Bank’s sanctions regime. However, it is also our view, in light of the legislative history, that application of this theory to pre-2004 definitions would constitute a retroactive application of norms. As quoted above, the words ‘directly or indirectly’ were introduced into the 2004 definitions specifically to remedy certain lacunae in the pre-2004 definitions, including ‘actions in furtherance of an advanced conspiracy’. The same logic, then, that compelled us to take the view that the pre-2004 definitions did not encompass aiding and abetting and other forms of secondary liability compel us equally to conclude that those definitions do not encompass joint liability beyond situations of true agency or co-perpetration.

83. *Accessories.* As explained above, the words ‘directly or indirectly’ were introduced into the 2004 and 2006 definitions of corrupt and coercive practices for the purpose of capturing aiding and abetting, and other forms of secondary liability. It is therefore our view that accessories may be sanctioned as culpable parties (i.e., as Respondents) under those definitions. The distinction between accessories and those who may be held liable as joint principals under joint criminal enterprise and other conspiracy theories lies in their motivation: whether the Respondent wishes to perpetrate the offence ‘as his or her own’ (*animus auctoris*) or merely wishes to support someone else’s actions (*animus socii*).<sup>58</sup>

84. Traditionally, accessories were not punished with the same severity as principals, although the common law distinctions between principals and accessories have largely been abolished. The new Sanctioning Guidelines do not make a distinction between principals and accessories, *per se*, but they do establish playing a ‘minor’ or ‘marginal’ role as a mitigating factor, while acting a ‘ring leader’ is an aggravating factor.

85. As stated in the 2008 Legal Memorandum, the legislative history shows that the pre-2004 definitions did not encompass aiding and abetting or other secondary forms of liability. As for the lack of conspiracy-based sanctionable practices, this is a legacy issue that the Bank must live with.

## II. ISSUES RELATING TO FRAUDULENT PRACTICE

86. LEG has also been asked to opine on several issues specifically relating to fraudulent practice, which has, by far, formed the most common grounds for recent sanctions cases. These issues include (i) the proper understanding of the term ‘recklessness’ as used in the 2006 definition of fraudulent practice; (ii) whether the ‘knowing and reckless’ standard should also be applied to cases based on pre-2006 definitions; and (iii) whether an omission may be considered a ‘misrepresentation of fact’ for purposes of the pre-2004 definitions of fraudulent practice.

### A. Recklessness and Fraudulent Practice

87. The World Bank Group currently defines ‘fraudulent practice’ as follows:

‘Fraudulent practice’ is any act or omission, including a misrepresentation, that *knowingly or recklessly* misleads, or attempts to mislead, a party to obtain a financial or other benefit or to avoid an obligation. (*emphasis supplied*)

88. A footnote to the definition in the IBRD/IDA Anti-Corruption Guidelines explains that:

[t]o act “knowingly or recklessly”, the fraudulent actor must either know that the information or impression being conveyed is false, or be recklessly indifferent as to whether it is true or false. Mere inaccuracy in such information or impression, committed through simple negligence, is not enough to constitute fraudulent practice.

89. This definition is unique among the harmonized definitions of Sanctionable Practices in that it contains an express *mens rea*<sup>59</sup> element, ‘knowingly or recklessly’. This element was introduced in the course of discussions in the sanctions reform working group in 2006, principally to address concerns expressed by IFC and MIGA representatives that misrepresentation through negligence should not be sanctionable. All concerned agreed that the essence of ‘fraud’ did not encompass a mere mistake, consistent with the overall purpose of the sanctions regime to enforce *ethical*, not simply professional, standards.<sup>60</sup> For the same reason, it has been agreed among INT and LEG that this standard should also be read into earlier versions of the definition, even though they did not contain this express element (see below).

90. In many cases, the ‘knowingly or recklessly’ standard has not proven problematic. When a firm or consultant submits a bid, for example, that overstates its/his/her experience, it is usually a straightforward matter to conclude that the misstatement constitutes a fraudulent misrepresentation since the false information being conveyed is within the direct personal or corporate knowledge of the accused. And firms have routinely been found liable for the misrepresentations by their employees or agents under the theory of *respondeat superior*.<sup>61</sup>



91. More difficult issues arise, however, when a firm or individual relies on and conveys information supplied by another. For the sake of convenience, we will call this type of case ‘indirect fraud’. By way of example, where the chief executive officer of a firm signs a bid (often several hundred pages long) that contains one or more misrepresentations, should he or she be personally sanctionable in the absence of proof of his/her direct knowledge of the inaccuracy of the information or even that the information has been included in the bid? Or where a would-be primary contractor includes false or misleading information provided by a subcontractor in its bid, should the primary contractor be liable for the misrepresentation? Where there is evidence that the CEO or primary contractor had actual knowledge of the misrepresentation in question, there is no issue, but that is not usually the case.

92. The key issue in such cases, then, is the exact meaning of ‘recklessness’ as used in this definition. The explanatory footnote provides some guidance, but not enough to settle some hard cases. LEG has therefore been asked to provide further guidance. In considering this issue, LEG has reviewed the two principle general concepts of recklessness, one under criminal law and the other under tort law, as well as a number of relevant national laws in which recklessness has been applied to civil fraud.

93. ***Criminal Recklessness.*** As cited above, the contemporary common law concept of criminal recklessness under common law requires awareness of a risk of harm, of which the defendant is aware and proceeds anyway, thereby causing the harm to occur. It is commonly said that recklessness requires “indifference to, acceptance of or resignation to a known risk”. This notion of ‘reckless indifference’ is reflected in the explanatory footnote in the Anti-Corruption Guidelines cited above.

94. Criminal recklessness requires the accused to be aware of a risk that a certain consequence may ensue from their action that they choose to consciously disregard. It is therefore dependent on the subjective state of mind of the accused. Recklessness in this sense is sometimes described as having a ‘devil may care’ or ‘don’t give a damn’ attitude. In the context of fraudulent practice, this would mean that the accused knows that the information being conveyed (for example, in a bid) may be false or misleading, but nevertheless goes ahead without checking its accuracy.

95. Under common law, the risk involved must be material, in both senses of the word. *First*, the risk must be not merely remote or theoretical, but ‘substantial and unjustifiable’.<sup>62</sup> *Second*, there must be a reasonably close nexus between the risk and the situation in which the accused found themselves. Common examples include running a red light (where the red light makes the accused aware of an immediate, substantial and unjustifiable risk of a crash), carrying a gun during a fight (where the risk that the gun might go off is obvious)<sup>63</sup> or hitting a child (where the risk of serious injury to the child is equally clear).<sup>64</sup>

96. This concept of recklessness is distinguishable from negligence, or even gross negligence, by its *subjective* nature, i.e., its requirement of a showing of awareness on the part of the accused. By contrast, negligence applies an *objective* test: a ‘reasonable

person' should have known that the information could be inaccurate. Negligence thus imposes a 'duty of care' to check on the accuracy of information being conveyed, without the need to show that the accused had knowledge of the inaccuracy or a material risk of inaccuracy.<sup>65</sup>

97. ***Tortious Recklessness.*** The other principal way to understand the term 'recklessness' is grounded in tort law, as well as more traditional criminal law approaches. This approach finds some support in the drafting of the Bank's legal framework, in particular the IBRD/IDA Anti-Corruption Guidelines. It should be noted that the explanatory footnote to the definition of fraudulent practice specifically excludes 'simple negligence', i.e., the failure of an actor to abide by the standards of a reasonable person under the same circumstances. The modifier 'simple' is generally used in contrast to 'gross negligence', which is understood as a particularly egregious deviation from the due care that a reasonable person would have applied in the circumstances, taking a substantial and unjustifiable risk.

98. Under this concept of recklessness, simple negligence, gross negligence and recklessness lie on a continuum: each involves unjustifiable risk-taking, differing only in the degree of the actor's deviation from the standard of due care that a reasonable person would have applied in the same circumstances (i.e., when faced with the risk in question). Tortious recklessness may be seen as parallel in concept to criminal recklessness, in that the wrongdoer must have taken a substantial and unjustifiable risk, but is distinguished from criminal recklessness in that the Respondent's subjective awareness of that risk need not be shown.

99. ***Recklessness as Applied to Civil Fraud under National Law.*** We have also examined three areas of US national law in which the concept of 'recklessness' has been applied, either legislatively or by judicial interpretation, as an element of fraud: (1) Rule 10b-5 of the Securities Exchange Act, (2) the 'books and records' provisions of the Foreign Corrupt Practices Act (FCPA) and (3) the False Claims Act.

- ***Rule 10b-5:*** Under this rule, the Securities Exchange Act<sup>66</sup> provides a civil cause of action for persons who claim to have been defrauded by the issuers of securities. While the Rule itself does not specify a *mens rea* element, over the years since its adoption, courts have interpreted the rule to include a 'knowing or reckless' standard.<sup>67</sup> Although recklessness is subject to varying interpretations, most courts have taken the view that recklessness under Rule 10b-5 requires a showing that the defendant acted without regard to the truth of the statement. The standard, as stated in one appellate case, is as follows:

Reckless conduct may be defined as a highly unreasonable [act or] omission, involving not merely simple, but even inexcusable negligence, but an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is *either known to the defendant or is so obvious that the actor must have been aware of it.* [emphasis supplied]

- *FCPA*: The ‘books and records’ provisions of the FCPA<sup>68</sup> place an obligation on publicly traded companies to maintain proper records and maintain an internal system of controls to properly monitor the record-keeping obligation; issuers may be liable for “knowingly” falsifying their books, records or accounts. The courts have held that this *scienter* requirement was introduced to codify SEC enforcement policy that penalties not be imposed for ‘insignificant or technical infractions or inadvertent conduct’, but not to provide a defense for those who ‘shield themselves from the facts’.<sup>69</sup>
- *False Claims Act*: This statute<sup>70</sup> holds parties liable for ‘knowingly’ presenting a false claim for payment or approval to the US government. The term ‘knowingly’ is defined to include willful blindness or ‘reckless disregard of the truth or falsity of the information’. Courts have interpreted this language to include, *inter alia*, failures to explore a credible concern about billing or other records,<sup>71</sup> ‘seriously deficient’ record-keeping systems or failures to inquire that rise to the level of ‘deliberate ignorance’.<sup>72</sup> At least one court has found that the Act was intended to place at least a limited duty of inquiry on the defendant in order to ‘reach what has become known as the ‘ostrich’ type situations where an individual has... failed to make simple inquiries that would alert him that false claims are being submitted.’<sup>73</sup> Some courts have also found that the Act encompasses ‘extreme carelessness’.<sup>74</sup>

### **LEG’s recommended approach**

100. Looking at these various approaches holistically, it is clear that there are some core elements of the concept of ‘recklessness’ common to each approach, across legal systems and across substantive areas of law: the existence of a substantial and justifiable risk—in the case of fraud, the risk that the information being conveyed is either false or misleading—coupled with either actual awareness of the risk, willful blindness to the risk, or a kind of ‘cluelessness’ as to that risk. The main difference among approaches—in particular what sets criminal recklessness apart from other approaches—is the insistence of specific evidence of actual, subjective knowledge of the risk.

101. It is our view that an approach to liability for fraudulent practice that adopted the criminal recklessness requirement of a showing of actual, subjective knowledge on the part of a Respondent in all cases would be inconsistent with the legislative intent of the 2006 reforms to avoid standards that would create unreasonable evidentiary burdens for the Bank, bearing in mind as well, as was often stated when the 2006 definitions were discussed with Executive Directors, that sanctions proceedings are administrative and not criminal in nature. We would therefore propose a hybrid approach, focused on the core elements of recklessness that may be divined from all the approaches we have examined, while taking a permissive stance with regard to the element of knowledge.

102. This approach does require the exercise of considerable discretion and therefore some basic guidance to assist the EO and the Sanctions Board in coming to their determinations would be appropriate. We would propose an analytic framework,

described in the following paragraphs, for determining whether or not a Respondent's deviation from due care is sufficiently egregious so as to establish that the Respondent took an 'substantial and unjustifiable' risk that merits sanction, bearing in mind that recklessness requires a deviation more egregious than either simple and even 'ordinary' gross negligence.

103. **Cases based on actual or inferred knowledge of risk.** As a threshold matter, if a case can be made out following the classic criminal approach—that the Respondent knew of a substantial and unjustifiable risk that a statement was false or misleading and ignored it—that would, *ipso facto*, constitute recklessness. It is also to be preferred where possible, for while such a case is undeniably harder to prove, once proven—even through the drawing of reasonable inferences—it should be more straightforward to litigate, revolving as it does around a 'tangible' and unambiguous *scienter* standard.

104. In this connection, we recall that the Sanctions Procedures contain flexible rules of evidence, which among other things allows the inference of knowledge from circumstantial evidence. (See the discussion of evidentiary matters in Section I.B above.) This flexibility was established, once again, in recognition of the difficulties of proving fraud and corruption cases in the Bank Group context. INT is free to provide circumstantial evidence that an accused party was aware of a risk, for example through the existence of 'red flags', that put the accused on notice that a particular piece of information may be false or misleading, from which it may be inferred that the accused had knowledge of the relevant risk. Whether or not such an inference is reasonable to draw from a particular set of circumstances is left up to INT to argue and for the EO, and then the Sanctions Board, to evaluate.<sup>75</sup>

105. **Cases based on extreme carelessness amounting to recklessness.** Even with such flexibility, it may not always be possible to make out a case based on actual or inferred knowledge of the risks involved. In these cases, we would recommend a concept of recklessness that draws on general tort law concepts of extreme carelessness, as evidenced by the sort of blindness (willful or otherwise) to obvious risks articulated in civil fraud cases.

106. The analysis begins with a proper understanding of 'due care'. Even if recklessness should represent a particularly egregious deviation from this norm, 'due care' still provides the 'baseline' against which a Respondent's conduct should be judged. Due care is usually conceived as the degree of care that the proverbial 'reasonable person' would exercise under the particular circumstances of the case. Put another way, this standard asks what precautions a reasonable person would take—in the case of fraud, what steps a bidder should take to ascertain the accuracy of information contained in the bid—in light of a substantial and unjustifiable risk that at least some of that information may be false or misleading.

107. The conduct of the Respondent should be judged against the nature of the risk, in terms of both the likelihood<sup>76</sup> that the information being conveyed is false or misleading, and the severity of the potential harm flowing from the communication of such

information. The higher either is, the higher the required duty of care. Conversely, the lower either the likelihood or the severity of the potential harm, the less precaution is required. There are at least two ways of viewing the requisite harm. *First*, the degree of harm to the integrity of the procurement process, as measured by how material the information is to the overall bid, will influence the requisite duty of care. Clearly the Bank has the right to expect a higher duty of care as to ascertaining facts that are key to establishing bid validity. *Second*, the consequences of the harm are also relevant: where false or misleading information may result in the loss of life or dire economic consequence, for example, the duty of care is naturally higher.

108. Against the nature of the risk, the benefit of the Respondent's chosen course of action, together the costs of taking further precautions are also taken into account. There may be cases where a particular risk is justifiable in light of the potential benefits to be gained by the Respondent's chosen course of action. By 'benefit' we do not mean to include, of course, any prospective illicit gains to the Respondent, but rather the benefit to the procurement process or the project concerned, in terms, for example, of efficiency or cost savings. Similarly, taking a particular risk may be justifiable in light of the exorbitant cost of guarding against it.

109. The proverbial 'reasonable person' is usually conceived of in light of the standards of a particular society. A typical definition<sup>77</sup> runs as follows:

**reasonable person. 1.** A hypothetical **person** used as a legal **standard**, esp. to determine whether someone acted with negligence; specif., a **person** who exercises the degree of attention, knowledge, intelligence, and judgment that society requires of its members for the protection of their own and of others' interests. • The **reasonable person** acts sensibly, does things without serious delay, and takes proper but not excessive precautions. — Also termed *reasonable man*; *prudent person*; *ordinarily prudent person*; *reasonably prudent person*; *highly prudent person*... "The **reasonable** man connotes a **person** whose notions and **standards** of behaviour and responsibility correspond with those generally obtained among ordinary people in our society at the present time, who seldom allows his emotions to overbear his **reason** and whose habits are moderate and whose disposition is equable. He is not necessarily the same as the average man — a term which implies an amalgamation of counter-balancing extremes." R.F.V. Heuston, *Salmond on the Law of Torts* 56 (17th ed. 1977).

110. At common law, it was traditionally common to refer to the 'reasonable person' as the 'man on the Clapham omnibus'. In the international and multi-cultural context in which the sanctions regime operates, this standard obviously poses some challenges. At the same time, it would be impractical (and wrong from a policy point of view) to try to judge Respondents by different standards according to their nationality or location.<sup>78</sup>

111. Ideally, such a standard would be derived from, if not actually stipulated by, the Bank's procurement policies, as articulated in the Procurement and Consultant Guidelines and the related standard bidding documents. We understand, however, that the Bank's policies do not provide for a specific standard of care for the preparation of bids,

nor are there norms from which such a standard could be reasonably inferred, at least none clear enough to provide a basis for a claim of fraud.<sup>79</sup> LEG would therefore advise taking the following alternative approaches to the development of a Bank-specific concept of an appropriate reasonable standard of care in the context of Bank operations:

**First**, if the bidding documents themselves specify a standard of care, that standard may be used to judge the conduct in question. Where, for example, the Respondent affirms the accuracy of the information contained in its bid, there is no reason not to hold the Respondent so accountable.

**Second**, in appropriate cases, reference may be made to relevant industry standards, which in many industries are internationally recognized, or customary or firm-specific business policies, procedures or practices. The policies, procedures or practices of the Respondent firm may be relevant, since a person who is charged by a firm's own policies, procedures or practices with the accuracy of a bid may reasonably be held accountable if the bid turns out to be misleading. In any case made out on these grounds, INT should present evidence of the relevant standards, policies, procedures or practices that serve as the reference point for due care.

**Third**, for cases where the points of reference outlined above are absent, we would propose that standards be articulated over time through jurisprudence. The EO and/or Sanctions Board will need to exercise discretion in deciding such cases based on the individual facts of each case, taking a kind of 'common law' approach to the development of Bank law in this area. This will require them to set out their thinking underlying their determinations as precedent for future cases.

112. Once this threshold is crossed, the analysis would then turn to whether the Respondent's conduct has deviated so far from the notional 'due care' in ascertaining the accuracy of information which a reasonable person would exercise that it constitutes recklessness.

113. **'Guideposts' for analyzing recklessness:** While there is no escaping the exercise of considerable discretion, based on the above considerations, LEG would offer the following guideposts for assessing claims of recklessness in fraudulent practice cases:

- As explained above, the threshold question in each case of 'indirect fraud' is: Was the Respondent faced with a substantial and unjustifiable risk that the information on which he/she/it relied was false or misleading? To be 'substantial and unjustifiable', the risk must have evidenced both a significant likelihood that the information being relied on is false or misleading, and significant potential harm flowing therefrom. The risk should also have presented a clear and direct nexus to the particular circumstances faced by the Respondent. Recklessness cannot be grounded in theoretical, remote or generic risks.

- As for the Respondent's awareness of the risk, while a subjective awareness is not required, the Respondent must be shown to have ignored significant and obvious 'red flags' that would have put any reasonable person on notice of a substantial and unjustifiable risk that a piece of information on which the Respondent is relying may be false or misleading. (This analysis would not be very different, in practice, from the 'must have known' standard applied in civil fraud cases.)
- Cases in which the Respondent took affirmative steps to avoid knowing about the risk involved, known as 'willful blindness', also provide a basis for recklessness. Such cases can be viewed either as a form of inferred or constructive knowledge or as a form of extreme carelessness.
- As pointed out above, the deviation from ordinary 'due care' must be egregious, extreme or wanton, without necessarily being deliberate. It is not enough to show merely that the reasonable person would have acted differently in light of the risks involved, but that the Respondent's conduct represents a shocking indifference to those risks. Courts have seen this standard as showing an *utter* lack of care, a failure to exercise even that degree of care that a careless or inattentive person would exercise.<sup>80</sup>
- AmJur2d usefully describes recklessness as follows: "Conduct may be reckless even though the actor does not recognize it as being extremely dangerous. It is enough that he knows or has reason to know of circumstances that would bring home to the realization of the ordinary, reasonable person the highly dangerous character of his conduct. The inability to realize the danger may be due to the actor's own reckless temperament, or to the abnormally favorable results of previous conduct of the same sort. The actor must know or have reason to know, the facts that create the risk."<sup>81</sup>
- A standard akin to criminal negligence could also amount to recklessness: cases where the Respondent's actions or their consequences are so egregious that it would undermine the purposes of the sanctions system, in particular general deterrence, if his/her/its actions were not sanctioned by the Bank. As for any case, the conduct or its consequences must be so egregious as to constitute an ethical, and not solely a professional failure.

114. We would emphasize that these 'guideposts' are not meant to be exclusive, nor are they meant to be cumulative. In some ways, they present alternative ways to conceptualize recklessness. As mentioned above, in our view the only way to develop a true legal test for recklessness in the context of Bank sanctions cases is through the development over time of Bank-specific jurisprudence.

115. It is beyond the scope of this Advisory Opinion (and LEG's role in the sanctions process) to prescribe outcomes from the application of these 'guideposts' to particular fact patterns. It is clear, however, that certain situations lie within or without the

parameters of recklessness as we have defined it here. The mere act of signing a bid document, for example, without additional facts or circumstances, is not enough to establish personal liability fraudulent practice on the part of the signatory, even if the bid contains false or misleading information. Nor is the inclusion by a bidder of false or misleading information provided by a sub-contractor enough, in and of itself, to establish that the bidder engaged in fraudulent practice.

116. ***Other Relevant Considerations.*** Two other considerations are relevant to cases of ‘indirect fraud’ under existing features of the sanctions process regardless of the standard against which recklessness is judged:

117. ***Responsibility of Controlling Parties.*** The Sanctions Procedures and related guidance<sup>82</sup> already provide for derivative liability for controlling persons under what is essentially a negligence standard. Persons who control a Respondent may be sanctioned if it can be shown that their failure to supervise enabled the misconduct of the Respondent. It is stated that these controlling parties are held responsible for the misconduct, even if they are not culpable as wrongdoers. This provision is most often invoked in cases of parents and subsidiaries, but could be applied more broadly. Thus a CEO may be held responsible for a fraudulent bid by a firm for having failed to put into place proper procedures to ensure the accuracy of information contained in their bids.

118. ***Scienter and the Choice of an Appropriate Sanction.*** It should also be noted that the degree of severity of the Respondent’s conduct is a factor relevant to the choice of an appropriate sanction.<sup>83</sup> While a Respondent’s actions may meet the threshold for recklessness, the appropriate sanction for fraudulent practice based on recklessness would not normally be as severe as the sanction for fraud based on actual (or inferred) knowledge. Moreover, the guidance on corporate groups specifies that derivative liability based on a failure to supervise does not normally lead to debarment, but to lesser forms of sanction such as reprimand or conditional non-debarment.

119. ***Procedural Implications.*** In order to implement this approach, we would advise the EO and the Sanctions Board to exercise discretion, based on the analytical framework outlined above, in determining whether a particular conduct of a Respondent is reckless, setting out clearly their thinking underlying their determinations so that specific standards may be developed over time.

120. We recognize that this approach represents a departure, particularly for the Bank EO, in that it requires that the Respondent’s conduct be judged against a highly discretionary standard. The Bank EO will be required to go beyond its usual role of simply applying the law and play a part in making the law. In this regard, without involving LEG in the merits of particular cases, the Bank EO may wish to request LEG advice on the application of this standard in cases of first impression.

121. Furthermore, given the prominent role that jurisprudence will play in the development of a Bank-specific standard for recklessness, there is a strong argument that a full adjudication of the facts, which is only available at the Sanctions Board stage of



proceedings, should be encouraged, in particular at the earlier stages in the development of this standard. We would therefore recommend that, in exercising its discretion, the EO give due consideration to colorable arguments posited by INT in cases of first impression and, in cases of doubt, to allow such arguments to reach the Sanctions Board. At the same time, we would stress the need for all actors in the process to respect the Bank EO's autonomy of decision-making and the inviolability of her determinations once made.

#### **B. Application of the 'Knowing and Reckless' Standard to pre-2006 Definitions**

122. As explained above, the inclusion of the 'knowing and reckless' standard was understood at the time as a clarification, not a limitation on the scope of fraudulent practice. It is therefore our view that that standard may be seen as an implicit element of pre-2006 version of the definition and be used as a benchmark for the *mens rea* required to make out a sanctions case based on those definitions of fraudulent practice.

#### **C. Omission as an Element of Fraudulent Practice in pre-2004 Definitions**

123. Omission was first mentioned as an explicit element of fraudulent practice in the 2004 definition of fraudulent practice. However, it is generally understood across legal systems that fraud may be committed through the omission of a material fact as well as non-verbal acts.<sup>84</sup> The conduct that may constitute fraud relates not to the particular modality of its perpetration but in its tendency to mislead.

124. The Bank's own legislative history, as it relate to the definition of fraudulent practice as it has evolved over time, contains no suggestion that the pre-2004 definitions were intended to exclude omission.<sup>85</sup> It is therefore our considered view that the inclusion of 'omission' in the 2004 definition and the formulation of 'acts or omission, including a misrepresentation' in the 2006 definition were both intended as clarifications of existing understandings of the sanctionable practice, not expansions of their scope.

#### **D. Establishment of 'Prospective' Fraud in Bids**

125. Some recent sanctions cases have presented a difficult issue regarding possible 'bait and switch' schemes in connection with consultancy contracts, where the Respondent wins a bid based on a particular named team of consultants, some or most of whom do not eventually form part of the team working on the assignment. From the circumstances of these cases, it seems possible that the Respondents never in fact intended to use the consultants named in their bids. Proving this, however, can be challenging, and LEG has been asked for its view of the appropriate standards to be applied.

126. Clearly, the analysis must begin with the establishing whether or not a misrepresentation occurred. The mere fact that the bid named consultants who were subsequently changed is not, in and of itself, enough to establish that at the time of the bid, the Respondent did not intend to use the original consultants. Here we immediately encounter a threshold challenge, as the Bank's Consultant Guidelines and standard

bidding documents do not provide a definitive answer as to what a bidder is actually representing when it submits a list of consultants, at least for purposes of establishing fraud. There may be cases in which the bidding documents themselves provide an answer,<sup>86</sup> but even where that is not the case, it seems intuitively obvious that at least *some* assurance must be implicit in a bid that includes a list of named consultants, or else bids would be essentially meaningless. At the same time, we understand that under the business model for consulting prevalent today—one in which consultancy firms rely on a ‘market’ of independent experts rather than their own permanent staff to meet bidding requirements—it is not uncommon that changes in consultancy teams take place after a bid is submitted. Consultancy contracts typically allow for changes in the consultancy team so long as the new consultant is of equivalent qualifications, the fee does not increase, and the change is agreed by the client.

127. Despite this ambiguity, there are at least some facts under which we believe that a colorable case of fraudulent practice could be made, in particular what the bidder has actually done, or not done, to confirm the availability of the named bidders. It seems to us obvious that the evidence must show whether or not the named consultants were available to the bidder or not at the time of the bid, which can be most directly and convincingly established through confirmation by the consultants themselves. The typical fact-patterns will lie along a continuum of possible arrangements: at one extreme, if the bidder had no prior contacts with a particular consultant and made no efforts to contact him or her in advance of the bid, we would argue that a strong inference of fraudulent intent may be drawn. Moreover, a repeated pattern over time of the same ‘bait and switch’ by the same firm over several bids would, in our view, be highly suggestive. And where a bidder has a general consent from the consultant to use his or her name in bids, but made no effort to confirm the consultant’s availability for a particular assignment, we would be of the view that this conduct would tend to show that the Respondent was reckless in ascertaining his or her availability. But less clear-cut cases may easily occur, and each case should be considered on its own merits, in the light of the requirements discussed above.

### **III. OTHER ISSUES**

#### **A. The Sanctioning of Government Officials.**

128. It has long been the Bank’s policy that governments and government officials should not be sanctioned, based on the Bank’s structure as a cooperative institution in which most of its borrowers are also member governments or subnational governments. It is also grounded in respect for the sovereign status of its members. This policy of ‘immunity’ for government and government officials is embedded expressly in the Anti-Corruption Guidelines<sup>87</sup> and implicit (at least as far as government is concerned) in the Procurement and Consultant Guidelines provision that allows for sanctions of ‘firms and individuals’.

129. Nevertheless, it is our view that government officials should be susceptible to sanction when they act in their individual rather than their official capacity. For example, a government official that controls a firm that bids on Bank financed contracts should be liable to sanction for any Sanctionable Practice that he or she engages in as head of the bidding firm. In such situations, the notions of comity and respect for sovereignty that underlie that Bank's policy do not apply. There is already precedent for this sort of distinction in the Bank's current practice: state-owned enterprises are liable to sanction when they operate autonomously and participate in bidding for Bank financed contracts, while they are not liable to sanction (and nor are they able to bid on Bank financed contracts) if they are essentially arms of government acting within their own country.<sup>88</sup>

130. We would also point out, however, that cases against government officials must not run afoul of the 'political prohibition' contained in the Article of Agreement.<sup>89</sup> Such cases, particularly if pursued against high officials or political appointees, have the potential of entangling the Bank in the political affairs of the member country concerned, or give the appearance thereof. We would therefore strongly advise INT to seek LEG's advice and to consult with the relevant Region before launching any such case.

## NOTES

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<sup>1</sup> Any advice we may have as to the application of the principles articulated in this Advisory Opinion to specific cases will be communicated separately.

<sup>2</sup> IBRD Articles of Agreement, Article III, Section 5(b) (as amended effective February 16, 1989).

<sup>3</sup> See “Report Concerning the Debarment Process of the World Bank”, August 14, 2002 by Dick Thornburgh et al [hereinafter Thornburgh Report].

<sup>4</sup> Reform of the World Bank’s Sanctions Process, dated June 28, 2004 [Board Paper R2004-0025/2].

<sup>5</sup> See, e.g., “Sanctions Reform: Proposal for Early Temporary Suspension” dated April 15, 2009 (AC2009-0120); see also “Sanctions Reform: Proposal for Early Temporary Suspension” dated June 5, 2009 (AC2009-0025/2).

<sup>6</sup> See office memorandum dated, April 30, 2008, from Scott White, Acting Vice President and General Counsel, to Pascale Dubois, Evaluation and Suspension Officer [hereinafter the ‘2008 LEG memorandum’] paragraph 8.

<sup>7</sup> Sanctions Board Statute, Article III.

<sup>8</sup> Sanctions Procedures Section 1.01(c) (proposed July 1, 2010 version). The same language is found in Art. I, Section (c) of the current Sanctions Procedures.

<sup>9</sup> *Id.*

<sup>10</sup> A related argument that is sometimes made is that since the legal agreement between the Bank and the borrower is adopted by the borrower as part of its national law, once a new version of the definitions has been agreed by a borrower through a legal agreement, it should apply as any new law, to any conduct that occurs after its adoption. This argument is flawed for a number of reasons, but mainly because (i) not all borrowers are countries, (ii) not all borrower countries incorporate legal agreements with the Bank into national law and (iii) in any event, the ‘law’ in question, by its terms only applies to the implementation of a particular project.

<sup>11</sup> See Thornburgh Report, pp. 10-11, footnote 6 [*supra* note 3].

<sup>12</sup> IFC, MIGA and Bank Guarantees adopted Anti-Corruption Guidelines in 2006 which were, in fact, interpretative glosses on the definitions of Sanctionable Practices.

<sup>13</sup> These were discussed and agreed about a year after the adoption of the Guidelines by a working group led by LEG and including INT, OPCS and the Asia Region. While still in draft, the Commentaries are a useful tool for interpretation and, once issued, will be authoritative.

<sup>14</sup> See Statute of the International Court of Justice, Article 38, Section 1(c); *accord* WBAT (*de Merode*, Case No. 1). See also ILOAT Judgment No. 2906 where the Tribunal applied general principles of law where the Service Regulations did not provide any specific provision governing the disputed issue.

<sup>15</sup> In some Notices that we have seen, there is no argument to support the assertion that a particular theory of liability is grounded in general principles of law, it is simply taken as a given. This is, as the saying goes, putting the proverbial ‘cart before the horse’.

<sup>16</sup> The ‘benchmark’ jurisdictions for this exercise could be (as we have done to benchmark various sanctions reforms) the US, UK, France, Germany and possibly China.

<sup>17</sup> See Statute of the International Court of Justice, Article 38, Section 1.

<sup>18</sup> 2008 LEG memorandum, paragraph 8 [*supra* note 6].

<sup>19</sup> In this connection, LEG will shortly issue a manual [hereinafter the ‘Sanctions Manual’] consolidating and codifying all guidance materials on the sanctions process.

<sup>20</sup> Thornburgh Report, pg. 27, footnote 20 [*supra* note 3].

<sup>21</sup> The Sanctions Board Statute provides that the Chair will instruct the Board on matters not covered by either the Statute or the Procedures. However, this does not preclude the Chair seeking LEG’s advice. Moreover, it does not apply to situations where the matter is covered, but the meaning and application of the legal framework is not clear.

<sup>22</sup> The 2006 Sanctions Reform Board Paper stated with respect to the effective date that: “[t]he foregoing reforms will apply ... to all IBRD and IDA financed investment projects, as well as PRG operations, for which the Project Concept Note is issued on or after October 15, 2006.” There was a clear intention that the reforms contained in the 2006 Sanctions Reform Board Paper would not be retroactive. *See* “Sanctions Reform: Expansion of Sanctions Regime Beyond Procurement and Sanctioning of Obstructive Practices” (R2006-0149/4) dated August 1, 2006, paragraph 44.

<sup>23</sup> We have provided a full treatment of jurisdictional issues in the Sanctions Manual.

<sup>24</sup> In cases where, as sometimes still happens, the original legal agreement does not include such provisions, jurisdiction may still be established by a showing, either through a formal amendment of the legal agreement or through an exchange of communication or course of dealing, a subsequent agreement between the Bank and the borrower as to the Bank’s right to sanction.

<sup>25</sup> Thus, in the case of supply contracts with UN agencies financed through IBRD loans or IDA credits, where the UN agency itself is exempted from Bank sanctions, the Bank asserts the right to investigate and sanction third parties, notwithstanding the lack of any consent thereto by those third-parties, based on the fact that the Procurement, Consultant and Anti-Corruption Guidelines nevertheless apply to the project.

<sup>26</sup> *See* “Sanctions Reform: Proposals for Improving the Sanctions Process” (AC2009-0075) dated July 17, 2009.

<sup>27</sup> *See, e.g.*, Section 9.02 (b) of the IDA General Conditions which provides that: “The representative so designated by the Recipient or person so authorized by such representative may agree to any modification or amplification of the provisions of the Financing Agreement on behalf of the Recipient by written instrument executed by such representative or authorized person; provided that, in the opinion of such representative, the modification or amplification is reasonable in the circumstances and will not substantially increase the obligations of the Recipient under the Financing Agreement. The Association may accept the execution by such representative or other authorized person of any such instrument as conclusive evidence that such representative is of such opinion.” Similar provisions are set out in the IBRD General Conditions and the Standard Conditions for Grants.

<sup>28</sup> Guidelines Procurement Under IBRD Loans and IDA Credits, Section 1.1.

<sup>29</sup> The best evidence rule is a common law rule of evidence which can be traced back at least as far as the 18th century to the effect that no evidence was admissible unless it was “the best that the nature of the case will allow”. The general rule is that secondary evidence, such as a copy or facsimile, will be not admissible if an original document exists, and is not unavailable due to destruction or other circumstances indicating unavailability.

<sup>30</sup> For example, in one recent case mentioned to us by OES, the issue in question related to a bid of which a copy was not available. INT presented circumstantial evidence that tended to show that the bid had been submitted by the Respondent. OES found that there was sufficient evidence to show that the bid had been submitted, but, without the bid itself (or a copy), the evidence was insufficient to support the allegation that the bid had been fraudulent in nature.

<sup>31</sup> *See* Thornburgh Report, pg. 49, *supra* note 3.

<sup>32</sup> This guidance has now been incorporated into Chapter 8 of the Sanctions Manual.

<sup>33</sup> However, INT is required under the Section 3.02 of the Sanctions Procedures to present to the EO and the Sanctions Board all relevant evidence, including exculpatory and mitigating evidence. Therefore, some balancing of contrary evidence may still be required.

<sup>34</sup> The matter pre-dates current INT and SLU management and the establishment of OES and the Sanctions Board. The issue was handled by Duncan Smith for INT and Hassane Cisse and Frank Fariello for LEG.

<sup>35</sup> See “Report to the Board from the Audit Committee” dated May 24, 2006 (AC2006-0057). Paragraph 8 states that: “With respect to the issue of intent, management elaborated saying that a degree of intent can be inferred from the requirement in the definition that the corrupt act was done for a purpose, i.e., to influence improperly the actions of another party. That is sufficient for an administrative process, and management believes that it would be inappropriate for the Bank to raise the bar to a criminal or quasi-criminal standard in an administrative process. Furthermore, the Procurement Guidelines do not specifically refer to intent which is implicit in the context.”

<sup>36</sup> As explained at greater length below, the actual degree of awareness of the risk depends on the area of law. Criminal recklessness requires actual, subjective knowledge of the risk, while in tortious recklessness and civil fraud, recklessness may be established through inference, willful blindness or simple ‘cluelessness’ as to the risk.

<sup>37</sup> The American Law Institute’s Model Penal Code also recognizes a category of *mens rea* of ‘knowingly’ where the offender does not necessarily desire the result, but is practically certain that it will ensue from his actions.

<sup>38</sup> Strict liability is used, for example, on social utility grounds in cases of ‘statutory rape’ or drunk driving or, on efficiency grounds, for minor offenses (e.g., parking violations). See, e.g., the Sexual Offenses Act of 2003.

<sup>39</sup> For example, the offender places an explosive on a bus in order to kill the driver. The murder of the driver will be considered *dolus directus*, while the damages of the bus are considered as *dolus* in the second degree.

<sup>40</sup> The civil law also recognizes a form of negligence known in Spanish as *culpa con representación*: The offender accepts that as a result of his behavior an offence may occur. The offender is aware of the possible result of his actions and goes ahead anyway. However, the offender has the confidence that because of his personal skills the result will not be achieved. Here again, in most cases, this would probably be considered as a form of recklessness under common law. The limit between the *dolus eventualis* and the *culpa con representación* is very narrow and in most cases theoretical.

<sup>41</sup> E.g., The German Strict Liability Act, under which strict liability is imposed for death, personal injury and property damage caused through the operation of a railway. Also, Pharmaceutical Products Act renders producers of medical products liable if death or serious personal injury is caused by the use of the product as prescribed, provided the product's harmful effects go beyond those which are to be tolerated according to the current state of medical science. There of course is the Product Liability Act, too where the producer's liability for personal injury and property damage caused by a defective product regardless of negligence is established.

<sup>42</sup> It bears mentioning that the requirement of ‘direct involvement’, which was contained in the original guidance note that accompanied the Sanctioning Guidelines, has now been replaced with guidance that focuses on the between culpability and responsibility, and we will base our analysis on that distinction.

<sup>43</sup> See 2008 LEG memorandum [*supra* note 6].

<sup>44</sup> *Id.*

<sup>45</sup> See Guidelines: Procurement under IBRD Loans and IDA Credit and Guidelines: Selection and Employment of Consultants by World Bank Borrowers: Proposed Modification, dated June 25, 2003 (R2003-0129; IDA/R2003-0152) discussed at the Board meeting of July 17, 2003.

<sup>46</sup> Dick Thornburgh, Ronald L. Gainer, Cuyler H. Walker, Report to Shengman Zhang, Managing Director and Chairman of the Oversight Committee on Fraud and Corruption, Concerning Mechanisms to Address Problems of Fraud and Corruption (January 21, 2000 (Rev.)), page 57.

<sup>47</sup> Thornburgh Report, page 31 [*supra* note 3].

<sup>48</sup> Furthermore, in a 2006 Audit Committee paper on sanctions reform, it was observed that the words “directly or indirectly” in the current definition of “corrupt practice” could be cited to capture participatory acts such as aiding and abetting, while conspiracy and complicity were captured in the definition of collusive practice. See “Sanctions Reform: Background Note on the Definitions of Fraud and Corruption (AC2006-0040) discussed at the May 24, 2006 meeting of the Audit Committee.

<sup>49</sup> Modern criminal law has come to apply the notion of indirect perpetration even where the direct and physical perpetrator is criminally responsible (“perpetrator behind the perpetrator”). This is especially relevant if crimes are committed through an organized structure of power in which the direct and physical perpetrator is nothing but a cog in the wheel that can be replaced immediately. Since the identity of the direct and physical perpetrator is irrelevant, the control and, consequently, the main responsibility for the crime committed shifts to the persons occupying a leading position in such an organized structure of power. See, e.g., German *Strafgesetzbuch*, Sec. 25 (1): “Whoever commits the crime himself or through another person shall be punished as perpetrator”.

<sup>50</sup> Co-perpetration generally requires joint functional control over a crime. Co-perpetrators must pursue a common goal, either through an explicit agreement or silent consent, which they can only achieve by coordinated action and shared control over the criminal conduct. See, e.g., the German *Strafgesetzbuch*, Section 25 (2): “If a number of persons commit the crime jointly, each shall be punished as perpetrator (co-perpetrator).”

<sup>51</sup> Such treatment is provided for in the Procurement Guidelines. See Guidelines, Procurement under IBRD Loans and IDA Credits, Appendix III, paragraph 6 (Revised, October 2006).

<sup>52</sup> Compare, however, US criminal law, which requires for an employer to be criminally liable for the acts of its employee, it must be shown that the employee’s acts were within the scope of his or her employment and undertaken in the course of the employer’s business, or that the acts were habitually done in the course of the business. Typically, this means showing that the employee was authorized by management; passive acquiescence or even knowledge of the acts is insufficient standing alone to establish liability

<sup>53</sup> *Prosecutor v Dusko Tadic*, Case No.: IT-94-1-A, “Judgment”, 15 July 1999.

<sup>54</sup> *Crim. 24 aout 1827*, B. no. 224 (France), *Pinkerton v. US* (328 U.S. 640) (US).

<sup>55</sup> See *Pinkerton v. US* (328 U.S. 640).

<sup>56</sup> See International Tribunal for Rwanda (ICTR). *Nkaturimana* Appeal Judgment, paras. 463, 468.

<sup>57</sup> The third, “systemic” form of joint criminal enterprise is a variant of the basic form, characterized by the existence of an organized system of ill-treatment. An example is extermination or concentration camps, in which the prisoners are killed or mistreated pursuant to the joint criminal enterprise. This form of joint criminal enterprise, however, appears to have little or no application to the Bank’s sanctions regime.

<sup>58</sup> See *In re Stashynskij* (BGHSt 18, 87) (German).

<sup>59</sup> It may actually be more precise to call this a ‘*scienter*’ requirement because, as explained below, it relates essentially the state of knowledge of the accused party.

<sup>60</sup> See, e.g., paragraph 1.14 of the Procurement Guidelines. Of course, these two areas of concern are not mutually exclusive, but the point is that a failure of professional conduct that does not rise to the level of an ethical failure was not intended to be sanctionable under our current sanctions regime. There are those who contend that this should not be the case, and that—as in the case of many national debarment regimes—breach of contract and poor performance, for example, *should* be grounds for debarment. Whatever the merits of that position, which we should consider in the course of the upcoming review of the sanctions regime, it is clear that our current system was not intended to extend that far.

<sup>61</sup> This theory was invoked in the most recent cohort of Sanctions Board decisions. See, e.g., Case No. 105 (India). decided on September 20, 2010 (SB Case No. 36).

<sup>62</sup> See Joshua Dresler, "Understanding Criminal Law " Fifth edition, pg. 135 (March 2006).

<sup>63</sup> See State v. Engle, 731 N.W. 2d 852 (Minn. Ct. App. 2007).

<sup>64</sup> See Dorsey v. U.S., 902 A. 2d 107 (D.C. 2006), *but see also* People v. Deskins, 927 P. 2d 368 (Colo. 1996), discussed in detail below.

<sup>65</sup> Negligence is generally a tort law concept, but certain crimes require only ‘criminal negligence’: inadvertent risk-taking that represents a gross deviation from a reasonable standard of care. The offender takes a substantial and unjustifiable risk, but, unlike a case of recklessness, he/she may not be aware of the risk. Criminal negligence is controversial for allowing the punishment of persons who have acted without malice, but is justified on utilitarian ground of general deterrence—and sometimes a sense of ‘natural justice’: the level of negligence should be so great that it would be shocking to allow the actor’s lack of awareness to excuse his actions under the circumstances.

<sup>66</sup> Securities Exchange Act 1034- Rule 10 b-5- Employment of Manipulative and Deceptive Devices.

<sup>67</sup> See Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193-194 (1976).

<sup>68</sup> See 15. U.S.C. S 78m (b) (2).

<sup>69</sup> See US v. Jensen, 532 F. Supp. 2d 1187 (2007).

<sup>70</sup> 31 U.S.C 3729 (b)(1)(A)(ii),(iii).

<sup>71</sup> See Miller v. U.S., 213 Ct. Cl. 59, 550 F.2d 17, 23 (1977).

<sup>72</sup> See U.S. v. Krizek et al., 111 F.3d 934 (D.C. Cir. May 2, 1997).

<sup>73</sup> See Senate Judiciary Committee, False Claims Amendments Act of 1986, S. Rep. No. 99-345, at 21 (1986); *see also* Crane Helicopter Servs., Inc. v. United States, 45 Fed. Cl. 410, 433 (1999) (“[The FCA’s knowing standard was designed to address] ‘the ‘ostrich-like’ refusal to learn of information which an individual, in the exercise of prudent judgment, had reason to know’” and to reach “those who ignore obvious warning signs.”)

<sup>74</sup> See Miller, 550 F.2d 17, 23.

<sup>75</sup> Similar allowance of inference can be found in various conventions on money laundering, e.g., the Vienna Convention, the Palermo Convention, the FATF Recommendations.

<sup>76</sup> To establish simple negligence, it is often said that the risk of harm must have been foreseeable to the reasonable person. Without foreseeability, not even simple negligence can be established. Foreseeability may be judged objectively, through the existence (or lack thereof) of ‘red flags’ that would put a reasonable person on notice of the risk of harm. To establish recklessness, of course, the likelihood must be much higher than simple foreseeability.

<sup>77</sup> Black’s Law Dictionary (8<sup>th</sup> Ed. 2004).

<sup>78</sup> This is not to say that the conduct should not be considered contextually. Without trying to draw too fine a line, the standard does ask what the proverbial reasonable person would do *under the circumstances*, so



the context in which the act takes place is relevant. But this is not quite the same as adopting a variable ‘reasonable person’ standard, since different people react differently under the same circumstances.

<sup>79</sup> Under the Bank’s standard bidding documents, bid signatories do attest to the accuracy of bid information ‘to the best of [their] knowledge’, but there is no requirement as to the due diligence (if any) that should underlie the attestation.

<sup>80</sup> W. Prosser, *Handbook of the Law of Torts* § 34, at 183-84 (4th ed. 1971) (footnotes omitted). The Model Penal Code distinguishes between acting recklessly and acting negligently according to whether a person “consciously disregarded” or simply “should be aware of” a substantial and unjustifiable risk. Model Penal Code § 2.02, reprinted in 10 *Uniform Laws Ann.* at 465.

<sup>81</sup> 57A *AmJur2d* §281.

<sup>82</sup> See Section 9.04 of the Sanctions Procedures and guidance in Annex B to the Audit Committee paper on Sanctions Reform: Phase III (AC2010-0047) dated May 12, 2010.

<sup>83</sup> See Section IV of the Sanctioning Guidelines; see also Case No. 102 (India) decided September 20, 2010 (Sanctions Board Case No. 38).

<sup>84</sup> See 37 *Am Jur 2d* Fraud and Deceit § 26.

<sup>85</sup> See Sanctions Reform: Background Note on Definitions of Fraud and Corruption (AC2006-0040) dated May 23, 2006 and the related slideshow (AC2006-0040/1) dated June 7, 2006.

<sup>86</sup> See India case [*supra* note 83], where a Respondent signed an affidavit attesting to the accuracy of the information provided in the bid and accepting personal responsibility—including possible sanctions—in the event that the information were to prove inaccurate.

<sup>87</sup> See IBRD/IDA Anti-Corruption Guidelines, paragraph 11(a) and the related footnote 14.

<sup>88</sup> See Procurement Guidelines, paragraph 1.08(c), Consultant Guidelines, paragraph 1.11(b), and IBRD/IDA Anti-Corruption Guidelines, paragraph 11(a), footnote 14.

<sup>89</sup> The Articles of Agreement of the IBRD contain a provision that states that “[t]he Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned.” (Article IV, Section 10); see also IDA Articles of Agreement, which contain an identical provision (Article V, Section 6).