Legal Vice Presidency
The World Bank

ADVISORY OPINION

ON

CERTAIN ISSUES ARISING IN CONNECTION WITH RECENT SANCTIONS CASES

No. 2010/1

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Senior Vice President and General Counsel

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TABLE OF CONTENTS

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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

Advisory Opinion No. 2010/1
November 15, 2010

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;[7] 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."[8] 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.[9] 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

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,

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

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. . 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,[17] 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

occasionally—particularly in order to fill procedural

include provisions establishing the Bank‟s right to sanction to the *project* where the Sanctionable Practice allegedly took place.[23] 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

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.[27] 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.

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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.[28]

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 Crat4 211.61879E8h

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 Evalua

Advisory Opinion No. 2010/1
November 15, 2010

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

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".[35] 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 ensu

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

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,[38] 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.[39] 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. [40]

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

Advisory Opinion No. 2010/1

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.[51]

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

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

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

Advisory Opinion No. 2010/1
November 15, 2010

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.[65]

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-

described in the following paragraphs, for determining whether or not a Respondent‟s

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.[79] 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.

As for the Respondent‟s awareness of the risk, while a subjective awareness is not r

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 exist

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

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,[86] 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

129. Nevertheless, it is our view that government officials should be susceptible to

NOTES

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

[2] IBRD Articles of Agreement, Article III, Section 5(b) (as amended effective February 16, 1989).

[3] *See*

[19] In this connection, LEG will shortly issue a manual [hereinafter the „Sanctions Manual"] consolidating

[45] *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.

[46] 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.

[47] Thornburgh Report, page 31 [*supra* note 3].

[48] 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.

[49] Modem 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 *Strafgesetbuch,* Sec. 25 (1): "Whoever commits the crime himself or through another person shall be punished as perpetrator".

[50] 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 *Strafgesetbuch*, Section 25 (2): "If a number of persons commit the crime jointly, each shall be punished as perpetrator (co-perpetrator)."

[51] 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).

[52] 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

[53] *Prosecutor v Dusko Tadic*, Case No.: IT-94-1-A, "Judgment", 15 July 1999.

[54] Crim. 24 aout 1827, B. no. 224 (France), Pinkerton v. US (328 U.S. 640) (US).

[55] *See* Pinkerton v. US (328 U.S. 640).

[56] *See* International Tribunal for Rwanda (ICTR). *Nkatirutimana* Appeal Judgment, paras. 463, 468.

[57] 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.

[58] *See* In re Stashynskij (BGHSt 18, 87) (German).

[59] It may actually be more precise to call this a „*scienter*ô requirement because, as explained below, it relates essentially the state of knowledge of the accused party.

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.

[79] 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.

[80] 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.

[81] 57A AmJur2d §281.

[82] *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.

[83] *See* Section IV of the Sanctioning Guidelines; see also Case No. 102 (India) decided September 20, 2010 (Sanctions Board Case No. 38).

[84] *See* 37 Am Jur 2d Fraud and Deceit § 26.

[85] *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.

[86] *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
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