SANCTIONABLE PRACTICES AT THE WORLD BANK: INTERPRETATION AND ENFORCEMENT

Michael S. Diamant, Christopher W.H. Sullivan & Jason H. Smith*

INTRODUCTION 986
I. THE WORLD BANK SANCTIONS PROCESS 993
II. SANCTIONABLE PRACTICES 1008
A. Obstructive Practice 1009
1. Obstruction as an Aggravating Factor or Sanctionable Practice 1015
2. Roots of Obstructive Practices in Sarbanes-Oxley 1016
3. Threats, Harassment, and Intimidation 1019
4. Concerns Raised by Obstructive Practices 1021
B. Fraudulent Practice 1023
1. Omission or Misrepresentation 1025
2. Knowingly or Recklessly 1027
3. Analogues Under U.S. Law 1032
4. To Obtain a Financial or Other Benefit or Avoid an Obligation 1034
5. Detriment to the Borrower 1035
6. Respondeat Superior 1036
C. Corrupt Practice 1038
1. Offering or Giving a Thing of Value 1039
2. Solicitation 1042
3. Public Official / Another Party 1042
4. To Influence (Improperly) the Action of a Public Official 1045
D. Collusive Practice 1048
1. Elements of a Collusive Practice 1050
2. Evidence of Collusion 1050
3. U.S. Antitrust Law 1052
E. Coercive Practice 1055
CONCLUSION 1057

* Mr. Diamant is a partner, Mr. Sullivan is counsel, and Mr. Smith is an associate at Gibson, Dunn & Crutcher LLP in Washington, D.C. They have significant World Bank enforcement experience, defending clients under investigation by the World Bank Integrity Vice Presidency and helping companies to emerge from World Bank sanctions.

INTRODUCTION

The World Bank plays an indispensable role as a global leader in combating poverty world-wide. Comprising the International Bank for Reconstruction and Development ("IBRD") and the International Development Association ("IDA"), the World Bank provides funds to developing countries with the aim of eradicating poverty and hunger.[1] Since 1990, it has disbursed more than $690 billion. In fiscal year 2015 alone, it committed $60 billion in loans, grants, and guarantees across more than 300 projects.[2] This amount exceeds the gross domestic products of roughly half the world's countries. Projects funded by the Bank can be an attractive source of potential business for the private sector, with nearly half of recent funds going to infrastructure projects in the energy, transportation, water, and IT sectors—areas ripe for private sector participation.[3]

The countries receiving the most World Bank funds—the world's underdeveloped and developing countries—also tend to be those perceived as posing higher corruption risks.[4] The Transparency International Corruption Perceptions Index ("TI CPI") is a commonly used proxy for corruption

1. *See* The World Bank, *A Guide to the World Bank* xix (3d ed. 2011) (explaining the role of the World Bank). The term "World Bank" refers to the IBRD and IDA, while the "World Bank Group" refers collectively to the IBRD and IDA, together with the International Finance Corporation ("IFC"), the Multilateral Investment Guarantee Agency ("MIGA"), and the International Centre for Settlement of Investment Disputes ("ICSID"). *Id.* at 2, 10. Unless specifically noted otherwise, references in this article to the Bank or the World Bank refer to the IBRD and IDA.

2. *See* The World Bank, *Annual Report 2015*, 4-5, 30, 34, 38, 42, 46, and 50 (2015), http://www.worldbank.org/en/about/annual-report [https://perma.cc/AQM5-ZH3T] (detailing World Bank funding in 2015). The World Bank Annual Report 2014 covers the period from July 1, 2014 to June 30, 2015.

3. *See* The World Bank, *Annual Report 2014*, 15 (2014) (reporting that helping countries to meet basic infrastructure needs accounted for 47 percent of World Bank's total assistance of client countries in fiscal 2014).

4. *See generally* Eric Chetwynd et al., *Corruption and Poverty: A Review of Recent Literature*, (Management Systems International, D.C.), Jan. 2003; S. Gupta et al., *Does Corruption Affect Income Inequality and Poverty?* 29 (IMF Working Paper, May 1998) ("The impact of corruption on income inequality and poverty is considerable."); Paolo Mauro, *Corruption: Causes, Consequences, and Agenda for Further Research*, 35 FINANCE & DEVELOPMENT, at 13 (Mar. 1998) ("One striking empirical finding is that poorer countries are usually considered to be more corrupt."); *The Integrity Vice Presidency, FY 13 Annual Update* (The World Bank, D.C.), 2013, at 3 ("Those who have the greatest need are also the most vulnerable. It is precisely because institutions may be weak, systems lacking, and resources scarce that countries turn to the World Bank for financial and technical assistance.").

risk.[5] In 2015, the TI CPI scored 167 countries and territories on a scale from 0 to 100. Countries that score less than 50 out of 100 "are perceived to have a serious corruption problem."[6] The top ten recipients of IDA financing for fiscal year 2015—Bangladesh, Ethiopia, Ghana, India, Kenya, Myanmar, Pakistan, Nigeria, Tanzania, and Vietnam—averaged a score of just 30.7 on the 2015 TI CPI.[7] The top ten all-time recipients of IBRD funds—Argentina, China, Colombia, Egypt, India, Indonesia, Morocco, Poland, Turkey, and Ukraine—fare only slightly better with an average TI CPI score of 38.3.[8] In the last decade, these countries were cited more than 280 times in U.S. Foreign Corrupt Practices Act ("FCPA") enforcement actions.[9]

Companies pursuing Bank-funded projects can face heightened risks of corruption and other contracting improprieties. The size, scope, and complexity of many of these projects, combined with the potential for substantial government involvement in geographies with challenging regulatory regimes and local business customs, amplify the risks.[10] Of course, the

5. Transparency International is a global organization that seeks "to stop corruption and promote transparency, accountability and integrity at all levels and across all sectors of society." *Mission, Vision and Values*, TRANSPARENCY INTERNATIONAL, https://www.transparency.org/whoweare/organisation/mission_vision_and_values/0/ [https://perma.cc/7E6X-5DLQ]. Its Corruption Perceptions Index "ranks countries and territories based on how corrupt their public sector is perceived to be[,] . . . drawing on corruption-related data collected by a variety of reputable institutions." *Corruption Perceptions Index 2014: In Detail*, TRANSPARENCY INTERNATIONAL, http://www.transparency.org/cpi2014/in_detail [https://perma.cc/5UU4-4U49].

6. *See Visualizing the Corruption Perceptions Index 2013*, TRANSPARENCY INTERNATIONAL, http://www.transparency.org/cpi2013/infographic [https://perma.cc/89PU-5REA] (charting global corruption perceptions in 2013).

7. *See* The World Bank, *IDA Financing*, http://www.worldbank.org/ida/financing.html [https://perma.cc/8Y9Q-E3PZ] (last visited Mar. 24, 2016) (detailing recipients of IDA Financing); Transparency International, *Corruption Perceptions Index 2014*, http://www.transparency.org/cpi2015#results-table [https://perma.cc/QNN8-GTX7] (last visited Mar. 24, 2016) (charting the corruption score of each country and territory). These same ten countries have an average rank of 137.5 (out of 189) for "ease of doing business" in the World Bank's June 2015 *Doing Business Report*—an annual survey of the ease of doing business around the world. The World Bank Group, *Doing Business – Economy Rankings*, http://www.doingbusiness.org/rankings [https://perma.cc/LUD3-NRWL] (last visited Mar. 24, 2016).

8. *See Annual Report 2015*, *supra* note 2, at 57 (charting recipients of IDA funds); Transparency International, *Corruption Perceptions Index 2015*, http://www.transparency.org/cpi2015#results-table [https://perma.cc/2S3R-QLJ4] (last visited Feb. 29, 2016) (charting perceived corruption of various countries).

9. Gibson Dunn analysis (on file with author). The FCPA prohibits bribery of non-U.S. public officials and sets standards of recordkeeping and internal controls at corporations that are publicly traded in the United States, and is dually enforced by the U.S. Department of Justice and U.S. Securities and Exchange Commission.

10. *See generally* Dana Maria Pop, *Tackling Corruption in Development Projects:*

World Bank is attuned to these risks and their consequences; it estimates that more than $1 trillion is paid in bribes globally each year.[11] The World Economic Forum has estimated that the cost of corruption annually exceeds 5% of the global gross domestic product, adding up to a 10% surcharge to the cost of doing business globally and up to 25% to the cost of procurement contracts in developing countries.[12] These figures help to quantify how corruption can sap the World Bank's resources and deeply undermine its mission. As World Bank Group President Jim Yong Kim articulated, "[E]ach dollar lost to corruption is a dollar stolen from a pregnant woman who needs health care; or from a girl or a boy who deserves an education; or from communities that need roads and clean water."[13]

Dovetailing with this broader concern, the IBRD's Articles of Agreement themselves require it to "make arrangements to ensure that the proceeds of any [funding] are used only for the purposes for which the [funding] was granted," creating a fiduciary duty that underpins its efforts to police misconduct in Bank-funded projects.[14] To combat the fraud and cor-

---

World Bank Sanctions and Corporate Risks, SUSTAINALYTICS, http://www.sustainalytics.com/tackling-corruption-development-projects-world-bank-sanctions-and-corporate-risks [https://perma.cc/3K28-ZABN] (analyzing impact of corruption on business); *see also* John Lurie & Nicholas Burkill, *Bribery and Corruption in the Construction Industry: Challenges for International Construction and Engineering Projects*, 29 CONSTRUCTION L.J. 17 (Feb. 2013) (looking at bribery and corruption in the construction industry).

11. *See Six Questions on the Cost of Corruption with World Bank Institute Global Governance Director Daniel Kaufmann*, THE WORLD BANK, http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:20190295~menuPK:34457~pagePK:34370~piPK:34424~theSitePK:4607,00.html [https://perma.cc/YX99-S8XG] (last visited Mar. 24, 2016) (estimating annual worldwide bribery of about $1 trillion); *see also The World Bank's Anti-Corruption Guidelines and Sanctions Reform: A User's Guide*, (The World Bank, D.C.) Oct. 15, 2006 ("Diversion of funds from development projects through fraud, corruption, collusion, and coercion or obstruction . . . impairs the ability of governments, donors and the World Bank to achieve the goals of reducing poverty, attracting investment, and encouraging good governance."); Sanjay Pradhan, *How Open Data is Changing International Aid*, TED TALKS, https://www.ted.com/talks/sanjay_pradhan_how_open_data_is_changing_international_aid/transcript?language=en [https://perma.cc/MZ5S-6SVT] (June 2012) ("[T]he challenge of development: abject poverty surrounded by corruption."); *Corruption 'Impoverishes and Kills Millions*,' BBC NEWS (Sept. 3, 2014), http://www.bbc.com/news/world-29040793 [https://perma.cc/NLF2-XBX5] (reporting that millions of lives are lost because of $1 trillion a year taken out of poor countries due to corruption).

12. International Chamber of Commerce et al., *The Business Case against Corruption* at 2, (providing the estimates of the cost of corruption).

13. *Report on Functions, Data and Lessons Learned 2007-2013*, (The World Bank Office of Suspension and Debarment, D.C.) 2015, 3.

14. IBRD Articles of Agreement, art. III, § 5(b); *accord* IDA Articles of Agreement, art. V, § 1(g); *see also Report on Functions, Data and Lessons Learned 2007-2013*, *supra* note 13, at 7 (explaining the World Bank's fiduciary duty deriving from its Articles of Agreement); World Bank Sanctions Procedures, art. I § 1.01(a) (Apr. 15, 2012) (requiring

ruption that undermine its goal of fighting poverty, the World Bank has implemented—and continually developed—robust integrity enforcement mechanisms to discipline firms and individuals found to have engaged in misconduct in connection with Bank-funded projects.

The implementation of enforcement mechanisms is a relatively recent development in the Bank's seventy-plus year history. In 1999, the Bank created the Anti-Corruption and Fraud Investigation Unit—the precursor to what is now The Integrity Vice Presidency ("INT"), the Bank's investigatory and prosecutorial division—and brought its first sanction cases against seven companies and two individuals.[15] Also in 1999, the Bank defined two types of misconduct that can lead to sanctions (called "Sanctionable Practices")—fraudulent and corrupt practices. This was followed by the addition of collusive and coercive practices in 2004 and an "obstructive practice" in 2006. World Bank Guidelines provide unique descriptions of each of the five Sanctionable Practices and specify the elements of each offense.[16]

In recent years, World Bank enforcement of Sanctionable Practices has been vigorous. Over the five years from 2011 to 2015, the World Bank publicly sanctioned more than 300 entities and numerous subsidiaries, reaching a high water mark of 84 in fiscal year 2012.[17] During roughly the same time period, by comparison, the U.S. Department of Justice ("DOJ") and U.S. Securities and Exchange Commission ("SEC")—the dual enforcers of the FCPA—initiated 144 FCPA enforcement actions.[18] The World Bank also has a significant pipeline of cases, with 99 new investigations initiated in fiscal year 2015.[19]

The Bank's sanctions regime is not supposed to be punitive.[20] Never-

---

the World Bank to ensure the funds it provides are used only for their intended purposes).

15. *The Integrity Vice Presidency FY 14 Annual Update*, (The World Bank, D.C.) at 1.

16. *The World Bank's Anti-Corruption Guidelines and Sanctions Reform: A User's Guide*, *supra* note 11, at 5-9.

17. *FY 14 Annual Update*, at 34; *FY 15 Annual Update*, at 38.

18. *2015 Year-Year FCPA Update* (Gibson, Dunn & Crutcher LLP) Jan. 4, 2016, at 2, http://www.gibsondunn.com/publications/pages/2015-Year-End-FCPA-Update.aspx [https://perma.cc/8JWV-FNFS].

19. *FY 15 Annual Update*, *supra* note 17, at 1.

20. *See* Anne-Marie Leroy & Frank Fariello, *The World Bank Group Sanctions Process and Its Recent Reforms*, A WORLD BANK STUDY (The World Bank, D.C.) 2012 at 4 n.23 ("The principal goal of World Bank Group sanctions proceedings is to protect the Group's funds, not to 'punish' respondents . . . ."). In contrast to SEC and DOJ enforcement actions, World Bank sanctions typically do not involve monetary penalties. *See* Frank Fariello & Giovanni Bo, *The World Bank Group Sanctions System and Access to Justice for Small and Medium-Size Enterprises*, 5 THE WORLD BANK LEGAL REVIEW 417, 436 (H. Cissé et al. ed. 2014) (noting the Bank's sanctions system is meant to be protective and rehabilitative, involving re-education and commitment on the part of the respondent); World Bank Sanctions Procedures, art. IX § 9.01 (Apr. 15, 2012) (describing the nature of the sanctions

theless, the consequences for violating the World Bank's guidelines have teeth. Of the types of sanctions available, the most severe is debarment, which precludes entities for a period of time from participating, directly or indirectly, in future Bank-financed activities.[21] If a company's business depends on projects funded even in part by multilateral development banks ("MDBs"), debarment can pose a greater threat—indeed, often an existential one—than the court or administrative sanctions associated with an FCPA enforcement action.[22]

Sanctions are public[23] and often accompanied by severe conditions and collateral consequences, including the imposition of a corporate compliance monitor and third-party investigator,[24] ongoing cooperation requirements,[25] reciprocal blacklisting by other MDBs and members of the World Bank Group,[26] and referrals to government authorities.[27] On a more

---

such as being declared ineligible for a Bank-financed contract or loan).

21. *Id*.

22. *See* F. Joseph Warin, Michael S. Diamant & Elizabeth Goergen Silver, *The U.S. Foreign Corrupt Practices Act: Enforcement and Compliance*, 285 SECURITIES PRACTICE PORTFOLIO SERIES (BNA) A-36 (2014) (comparing the threat of debarment with FCPA action).

23. *See* Todd J. Canni, *Debarment is No Longer Private World Bank Business: An Examination of the Bank's Distinct Debarment Procedures Used for Corporate Procurements and Financed Projects*, 40 PUBLIC CONTRACT L.J. 147,147–48 (2010) (discussing circumstances that led the Bank to publicize all debarments).

24. *See, e.g*., Press Release, The World Bank, The World Bank Group Debars Macmillan Limited for Corruption in World Bank-supported Education Project in Southern Sudan (April 30, 2010) http://www.worldbank.org/en/news/press-release/2010/04/30/the-world-bank-group-debars-macmillan-limited-for-corruption-in-world-bank-supported-education-project-in-southern-sudan [https://perma.cc/2B7V-UUH9] (describing the actions the sanctioned party agreed to take as a condition of reduced debarment). For a detailed discussion of FCPA monitorships, *see generally* F. Joseph Warin, Michael S. Diamant & Veronica S. Root, *Somebody's Watching Me: FCPA Monitorships and How They Can Work Better*, 13 U. PA. J. BUS. L. 321 (2011).

25. *See, e.g*., Press Release The World Bank, World Bank Debars SWECO Environment AB, and Conditionally Non-debars SWECO International AB for Three Years (Mar. 28, 2014) http://www.worldbank.org/en/news/press-release/2014/03/28/world-bank-debars-sweco-environment-three-years [https://perma.cc/5594-CMSE] (noting that the sanctions include the sanctioned party's cooperation with INT's investigation).

26. Sanctions issued by the Bank may be enforced by other international financial institutions pursuant to the April 9, 2010 Agreement for Mutual Enforcement of Debarment Decisions. In addition, each member of the World Bank Group has its own sanctions procedures, which can differ slightly. For example, a World Bank debarment does not necessarily lead to a reciprocal debarment by the IFC, because the IFC's sanctions procedures govern how a World Bank debarment impacts the ability to participate in IFC projects. *See* IFC Sanctions Procedures, art. IX § 9.01(c) (discussing the impact of a World Bank-imposed debarment on an entity's relationship with the IFC).

27. The Bank referred 22, 22, and 23 cases to national authorities in fiscal years 2015, 2014, and 2013, respectively, turning over evidence discovered during World Bank investigations. *See FY 15 Annual Update*, *supra* note 17, at 52-54 (listing the referrals made in

practical level, debarment can complicate even private international business transactions. For instance, sophisticated business partners routinely conduct due diligence that utilizes public debarment lists.[28] This can lead to questions from prospective business partners that are difficult for a debarred entity to answer in light of confidentiality that the Bank requires around its sanctions—with the result being, at times, lost business opportunities.[29] Sanctions also complicate corporate transactions, because of the uncertainty under existing Bank policies, procedures, and practice about the circumstances in which sanctions could extend to a purchaser or successor of a sanctioned entity.[30] A debarment can complicate day-to-day opera-

fiscal year 2015); *FY 14 Annual Update*, *supra* note 17, at 47-50 (listing the referrals made in fiscal year 2014). In addition to creating the possibility of criminal proceedings in certain instances, in at least one case, the Bank sanctions regime effectively supplanted the criminal justice system: a government recently forewent criminal sanctions against a corporation altogether because "the act had [already] resulted in extensive reactions from the World Bank" and a corporate penalty combined with the sanctions "might have disproportionate consequences for the company." HR-2013-1394-A, No. 2012/2114, Norconsult (Supreme Court of Norway), http://www.domstol.no/en/Enkelt-domstol/-Norges-Hoyesterett/ Summary-of-Recent-Supreme-Court-Decisions/Summary-of-Supreme-Court-Decisions-2013 [https://perma.cc/A8WP-3FAW].

But the Bank has temporarily limited its referrals, pending the outcome of litigation in Canada. In 2011, INT provided information to Canadian authorities resulting from its investigation of SNC-Lavalin Group, Inc., which led to the criminal prosecution of several former employees in Canada. *FY 15 Annual Update*, *supra* note 17, at 15 n.1. Lawyers for the charged employees subsequently requested the Bank's records, but the Bank refused, insisting on immunity based on its status as an international organization. *See World Bank Group v. Wallace*, 2014 ONSC 7449 (36315), at ¶¶ 33-34, 40, 64-65. The Ontario Superior Court of Justice rejected the argument and ordered the World Bank Group to produce the documents, finding that the Bank had impliedly waived its immunities by volunteering the information to and cooperating with the authorities. *See FY 15 Annual Update*, at 15 n.1. The Supreme Court of Canada granted the Bank's leave to appeal, and a decision is pending. *Id*. During the pendency of this litigation, the Bank has limited its referrals to national authorities.

28. *Cf*. Todd J. Canni, *Debarment is No Longer Private World Bank Business: An Examination of the Bank's Distinct Debarment Procedures Used for Corporate Procurements and Financed Projects*, 40 PUBLIC CONTRACT L.J. 147, 149 (2010) ("[T]he Bank's debarments have the potential to inflict far-reaching reputational and economic harm on contractors, 'roughly the equivalent to Hawthorne's scarlet letter.'").

29. *See* World Bank Sanctions Procedures, art. XIII, § 13.06 (Apr. 15, 2012) ("Neither the Respondent (include any Affiliate thereof) nor the Bank shall disclose to, or discuss with, any third party any part of the record, or information relating thereto, except" for purposes of obtaining legal counsel, compliance with a court order, or where the Bank deems disclosure necessary in accordance with policies and procedure).

30. *See* World Bank Sanctions Procedures, art. IX, § 9.04(c) (Apr. 15, 2012) (discussing the application of sanctions to successors and assigns); *The World Bank Group's Sanctions Regime: Information Note* (The World Bank, D.C.), at 9, 20–21 (noting that the Sanctions Procedures allows affiliates of a respondent to be sanctioned); *see also* The World Bank Sanctions Board, Sanctions Board Decision No. 83, ¶¶ 74–75 (2015) (considering

tions as well. As one example, the circumstances in which the Bank would permit a debarred entity to participate in privately funded portions of a project that may receive some Bank financing in the future are unpredictable.[31]

And though the consequences can be severe, the standard of proof to establish a Sanctionable Practice is relatively modest. Citing the "administrative" character of its investigations, INT need only prove "that it is more likely than not that the alleged misconduct has occurred."[32] INT's burden is "lower than the criminal standard of 'beyond a reasonable doubt'" and is instead "akin to a 'balance of probabilities.'"[33] No doubt this has contributed to a high rate of success in substantiating Sanctionable Practices. In 2014 and 2015, for example, the World Bank's adjudicative body that decides contested cases, known as the "Sanctions Board," issued twenty decisions that considered thirty nine separate allegations of Sanctionable Practices. Thirty of the Sanctionable Practices alleged by INT (nearly 77%) were substantiated. Twenty seven of the thirty six named entities or individuals (75%) were sanctioned in those decisions.

What may be particularly surprising is the variety of conduct that can give rise to a Sanctionable Practice and how it can differ from analogous U.S. laws. The recent explosion in FCPA enforcement and stepped-up international anti-corruption enforcement, in general, have helped to sensitize many multinational companies to the risks of corrupt business practices.[34] Although some World Bank sanctions cases involve traditional bribery schemes,[35] the World Bank casts a much wider enforcement net. Statistically speaking, the Bank is approximately six times more likely to scrutinize an entity for fraud rather than corruption.[36]

---

successor liability); The World Sanctions Board, Sanctions Board Decision No. 66, ¶¶ 28–30 (2014) (same).

31. *See* World Bank Sanctions Procedures, art. IX, § 9.01(c) (Apr. 15, 2012) (declaring debarred entity ineligible for a Bank-financed contract or loan).

32. The World Bank, *External Investigations*, http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/ORGANIZATION/ORGUNITS/EXTDOII/0,,contentMDK:22641983~menuPK:2452528~pagePK:64168445~piPK:64168309~theSitePK:588921,00.html [https://perma.cc/5FHJ-FEYR].

33. *Id.*

34. *See generally* F. Joseph Warin, Michael S. Diamant & Elizabeth Goergen Silver, *The U.S. Foreign Corrupt Practices Act: Enforcement and Compliance*, 285 SECURITIES PRACTICE PORTFOLIO SERIES (BNA) A-25, A-73–A-85 (2014) (discussing the recent increase in FCPA enforcement and multinational efforts to fight corruption).

35. *See, e.g.*, Press Release, The World Bank, World Bank Sanctions Oxford University Press for Corrupt Practices Impacting Education Projects in East Africa (July 3, 2012) (noting "improper payments to government officials for two contracts to supply text books in relation to two World Bank-financed projects").

36. *Report on Functions, Data and Lessons Learned 2007-2013*, *supra* note 13, at 28 (graphing the percentage of cases and settlements the Bank enforced by type of sanctionable practice, showing fraud as 86% and corruption as 14%).

Given the Bank's intense enforcement, the variety of conduct that can give rise to a violation, the relaxed burden for proving a violation, and the significant consequences of sanctions that can result, international business organizations, as well as legal and compliance professionals who work with multinational companies, should understand this new and evolving area and its potentially profound ramifications for individual companies. This article seeks to elucidate the World Bank's integrity enforcement regime and endeavors to contribute to a fuller understanding of the legal concepts articulated in the Sanctions Procedures. In particular, the following analysis of these areas attempts to help furnish a richer and more dynamic conceptualization of the developing sanctions definitions, and also endeavors to draw analogies to more established legal concepts and enforcement regimes—specifically, available analogues under U.S. law. The World Bank's Legal Vice Presidency itself has noted the need to look to generally accepted principles of law to develop the understanding of each Sanctionable Practice,[37] and the Sanctions Board has considered general principles of law in deciding cases.[38] The treatment below aims to play a role in understanding these legal concepts, which are so crucial to this active and growing enforcement regime.

I. THE WORLD BANK SANCTIONS PROCESS

Entities that participate in World Bank-funded projects are subject to Bank rules by becoming parties to agreements that incorporate the Bank's Anti-Corruption Guidelines, Procurement Guidelines, or Consultant Guidelines—documents that define Sanctionable Practices and set forth the obli-

37. *See* Anne-Marie Leroy, *Advisory Opinion on Certain Issues Arising in Connection with Recent Sanctions Cases, Opinion No. 2010/1*, LEGAL VICE PRESIDENCY UNIT OF THE WORLD BANK, at 5-6 (Nov. 15, 2010). (viewing general principles of law as a useful and legitimate source of law for the sanctions regime).

38. *See, e.g.*, The World Bank Sanctions Board, Sanctions Board Decision No. 57, ¶ 8 ("In the absence of guidance on how to define . . . exceptional circumstances under the Statute and Procedures, the Bank's legislative history, or the Sanctions Board's previous jurisprudence, the Sanctions Board looked to general principles of law, as demonstrated by leading international and national practice, to inform its analysis as set out in Sanctions Board Decision No. 43."); The World Bank Sanctions Board, Sanctions Board Decision No. 80, ¶ 12 & n.6 (considering the governing rules and procedures at other international administrative tribunals). In other cases, however, the Sanctions Board has observed that the Sanctions Board Statute and Sanctions Procedures "do not provide any basis on which to consider a national law framework as controlling in the Bank's sanctions proceedings, and . . . the scope of a respondent's liability under the Bank's administrative sanctions process may not be coextensive with the scope of its potential liability under national law." Sanctions Board Decision No. 65, ¶ 42 (2014) (citing Sanctions Board Decision No. 45, ¶ 46 (2011) and Sanctions Board Decision No. 50, ¶ 51 (2012)).

gations of borrowers and recipients of loan proceeds.[39] The Procurement Guidelines and Consultant Guidelines apply to procurement actions under Bank loans and credits, and are incorporated into standard Bank bidding documents and contracts.[40] In 2006, the Bank implemented a series of reforms to its sanctions process, including adopting the Anti-Corruption Guidelines, which expanded the sanctions regime to cover recipients of Bank funds other than consultants, suppliers, and contractors from whom goods and services are procured.[41] Borrowers of Bank funds are required to include provisions in contracts with each recipient of loan proceeds that incorporate the Anti-Corruption Guidelines.[42] Further, although the sanctions regime is rooted in contract, the Sanctions Board has asserted jurisdiction over—and can debar—individual employees of an entity that was itself subject to the Guidelines by competing for or receiving a contract, even if the applicable Guidelines do not specifically refer to the possibility

---

39. *See* Guidelines on Preventing and Combating Fraud and Corruption in Projects Financed by IBRD Loans and IDA Credits and Grants ("World Bank Anti-Corruption Guidelines") ¶ 5 (Oct. 15, 2006 rev. Jan. 2011) ("These Guidelines apply to the Borrower and all other persons or entities which either receive Loan proceeds for their own use (e.g., 'end users'), persons or entities such as fiscal agents which are responsible for the deposit or transfer of Loan proceeds . . . , and persons or entities which take or influence decisions regarding the use of Loan proceeds."); Guidelines: Procurement of Goods, Works, and Non-Consulting Services under IBRD Loans and IDA Credits & Grants by World Bank Borrowers ("World Bank Procurement Guidelines") ¶ 1.16(e) (Jan. 2011 rev. July 2014) (requiring "that a clause be included in bidding documents and in contracts financed by a Bank loan, requiring bidders, suppliers and contractors, and their sub-contractors, agents, personnel, consultants, service providers, or suppliers, to permit the Bank to inspect all accounts, records, and other documents relating to the submission of bids and contract performance, and to have them audited by auditors appointed by the Bank"); Guidelines: Selection and Employment of Consultants under IBRD Loans and IDA Credits & Grants by World Bank Borrowers ("World Bank Consultant Guidelines") § 1.8 (Jan. 2011, rev. July 2014) ("The principles, rules, and procedures outlined in these Guidelines apply to all contracts for consulting services financed in whole or in part from Bank loans."); *see also The World Bank Group's Sanctions Regime: Information Note*, at 18 ("It is clear from this expansive formulation that the jurisdiction of the Bank's sanctions regime essentially includes any and all actors involved in Bank financed procurement, other than the Borrower itself."). The World Bank has, with some exceptions, consistently defined the Sanctionable Practices across the different versions of the Anti-Corruption Guidelines, Procurement Guidelines, and Consultant Guidelines. For ease of reference, this article refers to the Procurement Guidelines unless otherwise stated.

40. *See* Mario A. Aguilar, Jit B.S. Gill & Livio Pino, *Preventing Fraud and Corruption in World Bank Projects: A Guide for Staff* (The International Bank for Reconstruction and Development/The World Bank, D.C.) 8-10 (2000) (discussing the Procurement Guidelines and Consultant Guidelines that embed the Bank's Anticorruption policy on procurement); World Bank Anti-Corruption Guidelines 3 (May 5, 2008) (describing the roles of Procurement Guidelines and Consultant Guidelines).

41. *Id.* at 11.

42. World Bank Anti-Corruption Guidelines § 9(d).

of sanctioning individuals.[43]

Against a ten-year statute of limitations, sanctions can result "if at any time the Bank determines that [the] individual or entity has engaged in [Sanctionable Practices] in connection with [Bank-funded projects]"[44]—typically during bidding, procurement, and execution of a Bank-funded project. Again, the Sanctionable Practices have World Bank-specific definitions and application; one should not necessarily associate them with analogous national laws. The Legal Vice Presidency of the World Bank Group has noted, however, that it is sometimes appropriate for the Sanctions Board to resort to "general principles of law" in resolving issues, given that the legal framework for the sanctions regime is "thin."[45]

The World Bank's process to sanction companies and individuals alleged to have acted improperly in connection with Bank-funded projects is described in and governed by several documents, among them the World Bank Sanctions Procedures (which describe the procedures to be followed in cases involving alleged Sanctionable Practices), the Sanctions Board Statute (which describes the operation and composition of the Bank's adjudicative body that determines whether misconduct occurred and the appropriate sanction in contested cases), and the World Bank Sanctioning Guidelines (which provide guidance on the considerations that the Bank believes are relevant to sanctioning decisions). The administrative nature of this system means that many of the due process safeguards available in sanc-

---

43. *See, e.g.*, The World Bank Sanctions Board, Sanctions Board Decision No. 81, ¶ 29 (2015) (recognizing that the Sanctions Board may assert jurisdiction over corporate officers, managers, and directors employed by a firm); The World Bank Sanctions Board, Sanctions Board Decision No. 64, ¶ 28 (2014) (noting that the Bank can assert jurisdiction to sanction without the consent of or privity with a respondent).

44. Guidelines on Preventing and Combating Fraud and Corruption in Program-for-Results Financing, ¶ 7(d) (Feb. 1, 2012); *see* World Bank Sanctions Procedures, art. IV, § 4.01(d) (Apr. 15, 2012) ("[T]he Evaluation Officer shall close the matter . . . if the accusations . . . pertain to (i) a Sanctionable Practice in connection with a contract the execution of which was completed more than ten (10) years prior to the date on which the Statement of Accusations and Evidence was submitted . . . or (ii) for all other cases, a Sanctionable Practice that took place more than ten (10) years prior to the date on which the Statement of Accusations and Evidence was submitted . . . ."). Respondents sometimes have unsuccessfully challenged proceedings due to the passage of time. In Sanctions Board Decision No. 64, for example, the respondent moved to dismiss the proceedings due to the passage of more than seven years between the last alleged misconduct and the initiation of sanctions proceedings. Sanctions Board Decision No. 64, ¶ 30 (2014). The Sanctions Board determined that this did not warrant a summary dismissal, noting that the allegations were not barred by the ten-year statute of limitations, but allowed the respondent to present arguments about the harm caused by the delay. *Id.*

45. Anne-Marie Leroy, *Advisory Opinion on Certain Issues Arising in Connection with Recent Sanctions Cases, Opinion No. 2010/1*, LEGAL VICE PRESIDENCY UNIT OF THE WORLD BANK, at 5 (Nov. 15, 2010).

tions proceedings are less substantial than those that accompany a more traditional judicial process. The process includes the following basic aspects:

Complaint Intake and Investigations: The sanctions process typically begins with receipt of a complaint by INT. Headed by Leonard McCarthy, an experienced former South African prosecutor, INT's mandate is to detect, investigate, and seek sanctions with respect to allegations of Sanctionable Practices in Bank-funded activities, including projects funded by members of the World Bank Group,[46] as well as allegations of misconduct involving Bank staff.[47] Because "INT has sole responsibility for selecting which matters are investigated, conducting objective fact-finding inquiries and initiating sanctions proceedings when it believes that it has uncovered sufficient evidence that a contractor has engaged in sanctionable misconduct,"[48] it is incredibly influential in setting the Bank's sanctions agenda. Reporting directly to the Bank President, INT is composed of approximately 90 staff members from around the world with various legal, law enforcement, and forensic accounting backgrounds—arguably making it the world's largest dedicated anti-corruption squad.[49] Each year, INT receives hundreds of complaints, from inside and outside of the Bank.[50] INT screens each complaint to help ensure it implicates a Sanctionable Practice in Bank-funded activities and is sufficiently serious to warrant an investigation.[51] Based on more than 320 of such initial assessments during fiscal year 2015, INT opened 99 formal investigations, covering 86 countries and

46. *See The World Bank Group's Sanctions Regime: Information Note*, at 4 ("INT is charged with, among other things, investigating allegations and other indications that sanctionable practices have occurred in connection with Bank Group-financed projects.").

47. *The Integrity Vice Presidency FY 13 Facts & Figures* (The World Bank, D.C.), at 9. The World Bank Group created the Department of Institutional Integrity in 2001, which was elevated to a Vice Presidency in 2008.

48. *Report on Functions, Data and Lessons Learned 2007-2013*, (The World Bank Office of Suspension and Debarment, D.C.) 2015, at 11.

49. *See* Michael Diamant & Joseph F. Warin, *Webcast-World Bank Sanctions and Enforcement: Why You Need to Be Prepared* (May 27, 2014), http://www.gibsondunn.com/publications/Pages/Webcast-World-Bank-Sanctions-and-Enforcement-Why-You-Need-to-Be-Prepared.aspx [https://perma.cc/DP2W-8U6E] (presenting practical information on the World Bank Sanctions and Enforcement of Corruption).

50. *See, e.g.*, *FY 14 Annual Update supra* note 15, at 30; *FY 13 Annual Update supra* note 15, at 2, 5; *The Integrity Vice Presidency FY 12 Annual Update* (The World Bank, D.C.), at 32 (describing the complaints receives by the INT).

51. *See FY 12 Annual Update supra* note 50, at 32; The World Bank, *External Investigations*, http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/ORGANIZATION/ORGUNITS/EXTDOII/0,,contentMDK:22641983~menuPK:2452528~pagePK:64168445~piPK:64168309~theSitePK:588921,00.html [https://perma.cc/VQX7-7DYW] (explaining complaint intake process).

an array of industry sectors.[52]

While lacking investigative powers traditionally enjoyed by government enforcement authorities, such as subpoena power, INT can leverage the cooperation of those under scrutiny, as well as Bank contractual audit-rights provisions, to employ many traditional investigative techniques, such as interviews and document review.[53] One of the Sanctionable Practices, obstruction, gives INT a powerful tool to induce cooperation, because it creates an independent basis to sanction entities that impede investigations, even if INT cannot substantiate the underlying allegation. Further, INT is not constricted by the rules of evidence,[54] and the standard of proof applicable to INT investigations works to its advantage. Operating under a more-likely-than-not standard, akin to a "preponderance of the evidence" standard frequently found in civil cases,[55] if INT finds sufficient evidence to conclude that a Sanctionable Practice occurred, it considers an allegation to be substantiated and will take further action.[56] Although an INT investi-

52. *FY 15 Annual Update supra* note 17, at 1, 6, 35.

53. *See INT, World Bank Group Settlements: How Negotiated Resolution Agreements Fit Within the World Bank Group's Sanctions System* (The World Bank, D.C.) 2, http://siteresources.worldbank.org/INTDOII/Resources/NoteOnSettlementProcess.pdf [https://perma.cc/3B3J-8VHS]; (outlining purpose and scope of World Bank sanctions process); David M. Nadler & Glenn T. Ware, *The World Bank Implements New Sanctions Procedures*, 53 THE GOVERNMENT CONTRACTOR 6, Feb. 9, 2011 at 4 (commenting on new World Bank Sanctions procedures); The World Bank, *Integrity Vice Presidency, Presentation to the ICC* 9, https://www.icc-cpi.int/nr/rdonlyres/65f602a2-a0f6-413a-beed-d70f5d091a8f/282330/presentationmccarthy.pdf [https://perma.cc/3P2Z-FPUT] (presenting the structure and process of the INT). INT's approach, which is administrative in nature but implicates important rights, can lead to complex discussions regarding the proper involvement of defense counsel. *See World Bank 2013 Phase I Sanctions Review Stakeholder Consultation: Comments of the U.S. Defense Bar*, 4 (Oct. 31, 2013), https://consultations.worldbank.org/Data/hub/files/consultation-template/consultation-review-world-bank-group-sanctions-systemopenconsultationtemplate/materials/us_defense_bar_comments_10_31_13_wb_sanctions_system_review_consultation.pdf [https://perma.cc/3PHF-ES7Y].

54. *See* World Bank Sanctions Procedures, art. VII, § 7.01 (Apr. 15, 2012) ("Any kind of evidence may form the basis of arguments presented in a sanctions proceeding . . . ."). The Bank does, however, respect the attorney-client privilege and attorney work product doctrines. *Id*. § 7.02.

55. Anne-Marie Leroy, *Advisory Opinion on Certain Issues Arising in Connection with Recent Sanctions Cases, Opinion No. 2010/1*, LEGAL VICE PRESIDENCY UNIT OF THE WORLD BANK, ¶ 45 (Nov. 15, 2010).

56. If an individual or entity engages in factually distinct incidents of misconduct, each separate incident may be considered separately and sanctioned on a cumulative basis; alternatively, this pattern of behavior may be considered an aggravating factor. World Bank Sanctioning Guidelines § III (Jan. 1, 2011); *see also* The World Bank, *External Investigations*, http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/ORGANIZATION/ORGUNITS/EXTDOII/0,,contentMDK:22641983~menuPK:2452528~pagePK:64168445~

gation does not necessarily mean that sanctions will result, there is a high likelihood that if INT opens an investigation, it will find enough evidence to meet its thresholds. For example, of the more than 220 investigations that INT completed in fiscal years 2013, 2014, and 2015, it found sufficient evidence of Sanctionable Practices more than 68% of the time.[57] Part of this is attributable to the standard of proof, but INT also has nearly tripled its substantiation rate in recent years by selecting investigative targets more carefully.[58] The percentage of substantiated investigations has dramatically increased over the last seven years: FY09 (25.5%), FY10 (17.6%), FY11 (45.8%), FY12 (52.2%), FY13 (67.4%), FY14 (61.8%), FY15 (74%).[59]

Before commencing sanctions proceedings, INT may first send the subject a "show-cause letter."[60] A show-cause letter could well be a company's first indication that it is on INT's radar, and the letter could arrive months after the project at issue is completed. Similar to an SEC Wells notice,[61] a show-cause letter sets forth allegations and provides the target an opportunity to present a written response with arguments and evidence demonstrating why INT should not seek sanctions against it. Although data are not publicly available regarding the efficacy of such responses, our experience has been that an effective response can help to narrow the allegations and factual disputes. Responding to the show-cause letter, however, can pose practical challenges, because INT is not obligated at this point to disclose evidence it possesses.[62] A respondent company and its counsel

---

piPK:64168309~theSitePK:588921,00.html [https://perma.cc/LT2L-YJE9] ("[T]he standard of proof is akin to a 'balance of probabilities' and therefore lower than the criminal standard of 'beyond a reasonable doubt.'") "Unsubstantiated" allegations, in contrast, are those that lack sufficient proof, while "unfounded" allegations are those for which INT concludes that the allegation wholly lacks basis. *See FY 14 Annual Update supra* note 15, at 31 (outlining external investigations of the World Bank).

57. *FY 15 Annual Update supra* note 17, at 37.

58. *Id*. at 35 ("INT continues to refine its selection process for matters going to full investigation and has devoted additional resources to more thorough preliminary screening of allegations before commencing a full investigation.").

59. *FY 13 Facts & Figures supra* note 47, at 3, 5; *FY 14 Annual Update supra* note 15, at 33; *FY 15 Annual Update supra* note 17, at 37.

60. INT is not required to issue a show-cause letter before initiating sanctions proceedings. *See* Sanctions Board Decision No. 81 (Sanctions Case No.215), ¶ 34 (2015) (rejecting related challenges in cases where INT did not issue one).

61. SEC rules provide that the SEC staff "may advise [persons who become involved in preliminary inquiries or formal investigations] of the general nature of the investigation, including the indicated violations . . . and the amount of time that may be available for preparing and submitting [a written statement setting forth their views] prior to the presentation of a staff recommendation to the Commission for the commencement of an administrative or injunction proceeding." 17 C.F.R. § 202.5(c).

62. *See* World Bank Sanctions Procedures, art. III, § 3.02 (Apr. 15, 2012) (providing that INT must provide evidence along with the Statement of Accusations and Evidence).

therefore may feel as if they are trying to prove a negative. Further, the possible lack of factual predicate to the allegations may effectively force the respondent to provide a detailed response, possibly restricting its flexibility in making arguments in its own defense later in the sanctions process. Indeed, the Sanctions Board may consider a statement made in a response to a show-cause letter as an admission.[63]

If INT substantiates an allegation upon conclusion of its investigation, it will draft a final investigation report.[64] The report is provided to the Bank President and ultimately made publicly available in redacted form on the Bank's website.[65] In addition to producing the final investigative report, if INT substantiates an allegation it will prepare a document called a Statement of Accusations and Evidence ("SAE").[66] This document is presented to the Bank's Chief Suspension and Debarment Officer ("SDO") and formally commences the Bank's administrative sanctions process.[67] The SAE can span hundreds of pages, identifies the alleged Sanctionable Practice(s) at issue, and summarizes the underlying facts and evidence, together with any exculpatory or mitigating evidence.[68] In fiscal year 2015,

63. *See, e.g.*, The World Bank Sanctions Board, Sanctions Board Decision No. 52 (Sanctions Case No. 134), ¶ 30 (2012) ("By the CEO's own admission in responding to INT's show-cause letter, 'our primary motivation' in using the agent to quickly secure the Bid Security was the timely submission of the Bid.").

64. *See FY 14 Annual Update supra* note 15, at 33 (detailing final investigation reports).

65. *Id.*; The World Bank, *External Investigations*, http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/ORGANIZATION/ORGUNITS/EXTDOII/0,,contentMDK:22641983~menuPK:7281670~pagePK:64168445~piPK:64168309~theSitePK:588921,00.html [https://perma.cc/R5YY-M9QR].

66. *FY 13 Facts & Figures supra* note 47, at 6 (describing SAE); *Report on Functions, Data and Lessons Learned 2007-2013*, (The World Bank Office of Suspension and Debarment, D.C.) 2015, at 11. The IFC and MIGA each have their own Evaluation and Suspension Officers. *See* The World Bank, Suspension and Debarment Officer / Evaluation and Suspension Officers, http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/ORGANIZATION/ORGUNITS/EXTOFFEVASUS/0,,contentMDK:21272397~menuPK:3601082~pagePK:64168445~piPK:64168309~theSitePK:3601046,00.html [https://perma.cc/A7DH-XJSF] (listing Evaluation and Suspension Officers).

67. Other members of the World Bank Group have their own Evaluation Officers ("EO"), who perform similar functions with respect to their own sanctions procedures. *See, e.g.*, IFC Sanctions Procedures, art. II, § 2.01 ("[A] statement of accusations and evidence . . . will be presented to the IFC Evaluation Officer within a maximum period of one year . . . ."); The World Bank, Sanctions Board Decision No. 76 (Sanctions No. 265) (2015) (considering a case brought under the IFC Sanctions Procedures in which the IFC EO recommended debarment with conditional release, but concluding that the Sanctions Board was without jurisdiction to consider the allegations because there lacked a sufficient nexus between the alleged misconduct and the project at issue).

68. *See* World Bank Sanctions Procedures, art. III, § 3.01(b) (Apr. 15, 2012) (explaining referrals process to the IFC Evaluation Officer); World Bank Sanctions and Anti-Corruption Efforts Panel Discussion 19 (Oct. 24, 2011). In one decision in which the Sanc-

INT submitted 29 SAEs to the SDO, fewer than the 45 SAEs it submitted in fiscal year 2014 but on par with the 33 and 25 SAEs submitted in 2013 and 2012, respectively.[69]

Our clients frequently ask how long investigations last. INT has tracked and reported on the average or median number of months it takes between opening a case and finalizing the investigative report for the past few years. Although each case differs and these figures do not account for additional time spent engaging in settlement negotiations or challenging the allegations through the Bank's sanctions system, INT's reported data provide some insight into the typical pace of INT investigations: FY10 (14.5-month average),[70] FY11 (17.1-month average),[71] FY12 (11.5-month median),[72] FY13 (16-month median),[73] FY14 (12-month median),[74] FY15 (13-month average).[75] Many investigations, however, last several years.[76]

Temporary Suspensions: Under the Sanctions Procedures, the SDO may impose a temporary suspension, known as "Early Temporary Suspensions," before INT actually completes its investigation.[77] The World Bank developed this mechanism in 2009 to address the risk that an entity remains eligible to bid on Bank-funded projects until it has been formally sanctioned, even if evidence already suggests it committed a Sanctionable Prac-

---

tions Board determined that INT failed to timely present exculpatory evidence in the SAE, the Sanctions Board considered whether this failure "compromised the Respondents' ability to mount a meaningful response to INT's allegations." Sanctions Board Decision No. 81 ¶ 36 (2015); *see also* The World Bank Sanctions Board, Sanctions Board Decision No. 63 (Sanctions Case No.119, 124), ¶¶ 40–41 (2014) (same). In another, the Sanctions Board avoided addressing the treatment of exculpatory evidence obtained from a respondent but not submitted into the record by INT—something the Sanctions Procedures do not specifically address—because the Sanctions Board determined that the evidence was not exculpatory. The World Bank Sanctions Board, Sanctions Board Decision No. 70 (Sanctions No. 206), ¶¶ 18–19 (2014).

69. *FY 15 Annual Update supra* note 15, at 38.

70. *The Integrity Vice Presidency FY 10 Annual Update*, (World Bank Group, D.C.) at 28.

71. *The Integrity Vice Presidency FY 11 Annual Update*, (World Bank Group, D.C.) at 34.

72. *FY 12 Annual Update*, at 34.

73. *FY 13 Facts & Figures supra* note 47, at 5.

74. *FY 14 Annual Update supra* note 15, at 33.

75. *FY 15 Annual Update supra* note 17, at 37.

76. *See Report on Functions, Data and Lessons Learned 2007-2013*, *supra* note 66, at 36–49 (calculating the periods from the date of the earliest investigative activity to the date of the submission of the SAE).

77. The World Bank, *The World Bank Sanctions Procedures, Early Temporary Suspension of Companies Involved in World Bank-Financed Projects*, http://siteresources.worldbank.org/INTDOII/Resources/ETS_Announcement.pdf [https://perma.cc/HL93-Z2SD].

tice.[78] As noted above, the lifecycle of a case, from investigation to sanction, can run for several months, if not for years. Now, the Sanctions Procedures provide that INT can request a temporary suspension from the SDO before concluding its investigation, which respondents are afforded an opportunity to contest,[79] if it believes that there is sufficient evidence to support a finding of a Sanctionable Practice and it will successfully complete the investigation and prepare an SAE within one year.[80] If the SDO agrees with INT that there is sufficient evidence and would recommend a period of debarment of at least two years for such misconduct, then the SDO is obligated to initiate the temporary suspension.[81] A temporarily suspended entity is debarred from obtaining new Bank-funded business for a period of six months, which can be extended for an additional six months.[82] Unlike normal suspensions, the cross-debarment agreement among MDBs does not apply to temporary suspensions.[83] Thus far, this early temporary suspension mechanism has not been used often.[84]

"Tier One" of the Sanctions Process: The first level of the sanctions process involves the SDO evaluating the SAE to determine if it is sufficient to support the allegations.[85] Since March 2007, Pascale Hélène Dubois, a lawyer by training, has served as the World Bank SDO.[86] Applying the same more-likely-than-not standard, the SDO "analyzes the claims made and the evidence furnished in the SAE, and looks carefully at whether the claims made by INT adhere to the World Bank's legal framework."[87] This

78. Anne-Marie Leroy & Frank Fariello, *The World Bank Group Sanctions Process and Its Recent Reforms*, A WORLD BANK STUDY (The World Bank, D.C.) 2012 at 12–13; *FY 14 Annual Update supra* note 15, at 3.

79. World Bank Sanctions Procedures, art. II, § 2.02 (Apr. 15, 2012).

80. World Bank Sanctions Procedures, art. II, § 2.01(a) (Apr. 15, 2012).

81. World Bank Sanctions Procedures, art. II, § 2.01(c) (Apr. 15, 2012).

82. World Bank Sanctions Procedures, art. II, § 2.04(a) (Apr. 15, 2012).

83. *See Report on Functions, Data and Lessons Learned 2007-2013*, *supra* note 66, at 15 (discussing temporary suspensions).

84. *See id.* at 24 (graphing number of firms/individuals temporarily suspended by OSD).

85. *Id.* at 10–11.

86. *See* Pascale Hélène Dubois, *Biography*, http://siteresources.worldbank.org/EXTOFFEVASUS/Resources/3601045-1373561382853/Pascale_Dubois_CV_(as_of_August_20,_2014).pdf [https://perma.cc/JEN3-7ARU]. The other members of the World Bank Group have their own Evaluation and Suspension Officers. *See* The World Bank, *Suspension and Debarment Officer / Evaluation and Suspension Officers*, http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/ORGANIZATION/ORGUNITS/EXTOFFEVASUS/0,,contentMDK:21272397~menuPK:3601082~pagePK:64168445~piPK:64168309~theSitePK:3601046,00.html [https://perma.cc/ZAH8-G6YP] (naming those Officers).

87. *Report on Functions, Data and Lessons Learned 2007-2013*, *supra* note 66, at 12.

review lasts on average two months.[88] If the SDO finds insufficient evidence to support one or more of the allegations, she remands the case to INT, at which point INT can drop the unsupported charges or investigate further and then send revisions to the SDO.[89] Historically, in such instances, INT has taken an average of approximately four months to provide a revised submission to the SDO.[90] As an independent function reporting directly to the Bank President, the SDO "serves as an impartial check and balance on the work of the World Bank's investigators and endeavors to ensure a fair and objective process for all parties involved."[91] Indeed, according to a report recently issued by the Bank's Office of Suspension and Debarment, the SDO has found insufficient evidence for at least one allegation in more than one-third of cases she reviewed.[92]

If the SDO finds sufficient evidence supporting a Sanctionable Practice, she will issue a document to the entity called a Notice of Sanctions Proceedings.[93] The Notice will include the SAE, a recommended sanction, and instructions about how to contest the accusations.[94] Further, if the recommended sanction includes a period of debarment of more than six months, the respondent is automatically suspended pending the conclusion of the proceedings, which will typically be the case.[95]

After delivery of the Notice, the respondent has thirty days to provide the SDO with a written "Explanation" as to why the Notice should be withdrawn or the recommended sanction modified.[96] Because the Notice actually includes INT's evidence, the Explanation presents an important opportunity for effective advocacy to challenge the evidence, theories of liability, and the sanction. In fact, the SDO can (1) "withdraw the Notice upon concluding that there is a manifest error or other clear basis for supporting a finding of insufficiency of evidence against the Respondent" or (2) "revise the recommended sanction in light of evidence or arguments as to mitigating factors presented by the Respondent."[97] The Notice must attach the SAE, and presents a Respondent's first opportunity to contest the allega-

---

88. *Id.* at 48.
89. *Id.* at 12.
90. *Id.* at 48.
91. *Id.* at 11.
92. *Id.* at 11, 30. However, in 95% of cases, the SDO has determined that there was sufficient evidence for at least one of the claims made by INT. *Id.* at 30.
93. World Bank Sanctions Procedures, art. IV, § 4.01 (Apr. 15, 2012).
94. World Bank Sanctions Procedures, art. IV, § 4.01(b) (Apr. 15, 2012).
95. World Bank Sanctions Procedures, art. IV, § 4.02(a) (Apr. 15, 2012); *see Report on Functions, Data and Lessons Learned 2007-2013*, *supra* note 66, at 23 (presenting overall OSD case management statistics).
96. World Bank Sanctions Procedures, art. IV, § 4.02(b) (Apr. 15, 2012).
97. World Bank Sanctions Procedures, art. IV, § 4.03(a) (Apr. 15, 2012).

tions before the SDO. It thus is somewhat surprising that only about one-third of respondents have submitted Explanations in response to Notices.[98] This may be attributable historically to respondents that are unrepresented by counsel or unfamiliar with the sanctions process.

In addition to submitting an Explanation, the respondent has ninety days after delivery of the Notice to appeal the case to the World Bank's Sanctions Board.[99] Otherwise, the SDO's recommended sanction "shall enter immediately into force,"[100] and it will be published on the World Bank's public website. Most cases end at this level; historically, only forty percent of respondents have appealed to the Sanctions Board.[101] And according to a recent review by the Bank's Legal Vice Presidency, of the respondents that did not appeal to the Sanctions Board, more than 90% of the cases involved respondents that simply failed to respond at all to the Notice.[102]

"Tier Two" of the Sanctions Process: The Sanctions Board is composed of seven members, including four external members and three senior Bank officials, each serving three-year terms.[103] Its external members are a diverse and impressive group and currently include the first woman Justice and President of the Supreme Court of Brazil, a former Judge of the Constitutional Court of South Africa, and the former General Counsel of the Inter-American Development Bank.[104] A respondent initiates an appeal by submitting a written response to the allegations and recommended sanction.[105] Upon request of the respondent or INT, or upon decision of the Sanctions Board Chair, "the Sanctions Board will hold a hearing on the accusations against the Respondent."[106] Hearings are intended to be informal—with a presentation by INT of its case, a presentation by the respondent of its case, and a reply by INT—and limited to arguments and evidence

98. *Report on Functions, Data and Lessons Learned 2007-2013*, *supra* note 66, at 15 n.35; *see also* The World Bank Group: World Bank Sanctions and Anti-Corruption Efforts Panel Discussion 22 (Oct. 24, 2011) (noting that the SDO receives an Explanation in only 28% of cases) (on file with author).

99. World Bank Sanctions Procedures, art. V, § 5.01(a) (Apr. 15, 2012).

100. World Bank Sanctions Procedures, art. IV, § 4.04 (Apr. 15, 2012).

101. *Report on Functions, Data and Lessons Learned 2007-2013*, *supra* note 66, 31 (2014).

102. Frank Fariello & Giovanni Bo, *The World Bank Group Sanctions System and Access to Justice for Small and Medium-Size Enterprises*, 5 THE WORLD BANK LEGAL REVIEW at 424.

103. World Bank Sanctions Board Statute, art. V, ¶ 5 (Sept. 15, 2010).

104. The World Bank, *Sanctions Board Members*, http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/ORGANIZATION/ORGUNITS/EXTOFFEVASUS/0,,contentMDK:21272308~menuPK:3601081~pagePK:64168445~piPK:64168309~theSitePK:3601046,00.html [https://perma.cc/LY9U-9EWH] (last visited Dec. 26, 2015).

105. World Bank Sanctions Procedures, art. V, § 5.01 (Apr. 15, 2012).

106. World Bank Sanctions Procedures, art. VI, § 6.01 (Apr. 15, 2012).

in the written submissions filed with the SDO and/or the Sanctions Board, evidence relating to mitigating or aggravating factors, questions from the Sanctions Board, and limited opportunities for testimony.[107] The Sanctions Board conducts de novo review of cases appealed to it based on the record and renders a final decision about whether a sanction should be imposed.[108] Applying the same more-likely-than-not standard, if the Sanctions Board finds that the respondent engaged in Sanctionable Practices, it must impose sanctions.[109] The Sanctions Board also issues written decisions, and it began publishing new decisions on the Bank's public website in December 2011.[110]

Sanctions Board decisions offer important insights about the Sanctions Board's approach to evidence. First, even if no single piece of evidence, standing alone, suffices to show misconduct, the cumulative weight of evidence may do so.[111] This approach was apparent in a decision in which the Sanctions Board found that a director's silence during a meeting by itself failed to establish acquiescence in the offering of a bribe, but was sufficient "when viewed together with evidence of the [director's] statements in a [later] June 2006 meeting, and – most importantly – the Director's continued silence during email negotiations for the potential reallocation of Contract proceeds."[112] Second, the Sanctions Board generally discounts, but does not necessarily preclude, witness testimony of business competitors or even accomplices.[113] In Sanctions Board Decision No. 50, representatives

107. World Bank Sanctions Procedures, art. VI, § 6.03(b) (Apr. 15, 2012).

108. Anne-Marie Leroy & Frank Fariello, *The World Bank Group Sanctions Process and Its Recent Reforms*, A WORLD BANK STUDY (The World Bank, D.C.) 2012, at 3.

109. World Bank Sanctions Procedures, art. VIII, § 8.01(b) (Apr. 15, 2012).

110. *INT, World Bank Group Settlements: How Negotiated Resolution Agreements Fit Within the World Bank Group's Sanctions System* 3, http://siteresources.worldbank.org/INTDOII/Resources/NoteOnSettlementProcess.pdf [https://perma.cc/JF3J-32ZB]; The World Bank, *Sanctions Board Decisions*, http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/ORGANIZATION/ORGUNITS/EXTOFFEVASUS/0,,contentMDK:23059612~pagePK:64168445~piPK:64168309~theSitePK:3601046,00.html [https://perma.cc/9H6Q-UCGE] (last visited Dec. 15, 2015).

111. The World Bank Sanctions Board, Sanctions Board Decision No. 50, ¶ 28 (2012).

112. Sanctions Board Decision No. 50, ¶ 34 (2012).

113. *See* Sanctions Board Decision No. 50, ¶ 39 (2012) ("In assessing the weight of witness statements, the Sanctions Board takes into account all relevant factors bearing on the witness's credibility, including whether the witness is a business competitor and whether such witness may have been involved in any sanctionable practices. The fact that testimony comes from a competitor may discount its value, depending on the circumstances, but will not necessarily preclude its use. Similarly, a witness's own involvement in the misconduct at issue should be considered, but it would not necessarily preclude use of that witness's testimony or even primary reliance upon it, where appropriate."). In Sanctions Board Decision No. 1, the Sanctions Board noted that confidential witness statements from competitors are "significantly discounted" if INT inexplicably withholds such evidence from the respondent. *Upholding the Rule of Law in the Fights Against Corruption and Poverty*, SANCTIONS

of a firm provided testimony to INT regarding a payment scheme.[114] The Sanctions Board noted that the firm's status as a competitor to the respondent and its own potential involvement in corruption "call[ed] for extra scrutiny of [their] reliability as witnesses."[115] Further diminishing the competitor's credibility was the fact that INT interviewed the representatives together, which the Sanctions Board observed "may compromise the candor of each individual's testimony, and does not permit for cross-checking of each witness's separate statement against other witnesses' statements."[116] In such circumstances, the Sanctions Board frequently looks for documentary evidence to corroborate witness testimony.[117] In Sanctions Board Decision No. 50, for example, the Sanctions Board found that a representative's handwritten meeting notes and subsequent email correspondence supported the witness's credibility.[118] Indeed, the Sanctions Board has even primarily relied on the testimony of a witness involved in the bribery scheme at issue where the witness provided "detailed, candid admissions against [his] self-interest, which were corroborated by contemporaneous documentation and other witnesses."[119]

Respondents have had some success before the Sanctions Board. In the Sanctions Board's first five years of existence, for example, fifty-one respondents had appeals decided by the Sanctions Board; fifteen (twenty-nine percent) ultimately received no sanction.[120] Further, even where it finds culpability, the Sanctions Board often imposes a period of debarment that is shorter than what is recommended by the SDO.[121] This is partly a

BOARD LAW DIGEST, (The World Bank, D.C.) Dec. 2011 at 34 (citing Sanctions Board Decision No. 1, ¶ 7 (2007)). Notably, this is the only decision in which the Sanctions Board found insufficient evidence of a Corrupt Practice.

114. Sanctions Board Decision No. 50, ¶ 40 (2012).

115. *Id.*

116. Sanctions Board Decision No. 50, ¶ 40 (2012). Also, as discussed above, the Sanctions Board noted that the weight of the witnesses' testimony was further compromised by the fact that INT only proffered summary interviews (as opposed to verbatim transcripts) that were not reviewed and signed by the interviewees. *Id.*

117. *See, e.g.*, Sanctions Board Decision No. 50, ¶ 40 (2012) (justifying extra scrutiny of witnesses because of their improper arrangements with Implementing Agency); The World Bank Sanctions Board, Sanctions Board Decision No. 41, ¶ 32 (2010).

118. Sanctions Board Decision No. 50, ¶ 40 (2012).

119. *Id.* (citing Sanctions Board Decision No. 41, ¶ 32 (2010)).

120. *Upholding the Rule of Law in the Fights Against Corruption and Poverty*, SANCTIONS BOARD LAW DIGEST, (The World Bank, D.C.) Dec. 2011 at 21.

121. *See, e.g.*, Sanctions Board Decision No. 65, ¶¶ 2, 86 (2014) (describing how the SDO recommended conditional debarments of four years and two years, respectively, and the Sanctions Board imposed a two-year conditional debarment and letter of reprimand, respectively); The World Bank Sanctions Board, Sanctions Board Decision No. 56, ¶¶ 4, 89 (2013) (describing how the SDO recommended a conditional debarment of three years, but the Sanctions Board imposed a one-year conditional debarment).

result of the period of any temporary suspension already served. The Sanctions Procedures instruct the Sanctions Board to consider this as a factor in determining the appropriate sanction.[122] As noted above, some respondents will have been temporarily suspended pending the conclusion of INT's investigation or automatically suspended following the SDO's review, and it takes an average of six to eight months from filing the appeal to the Sanctions Board's decision.[123]

Settlements: Companies and enforcement authorities alike often favor settlements over the time, cost, and uncertainty inherent in the adversarial process,[124] and the World Bank's sanctions process is no exception. Starting in 2010, the World Bank has offered a settlement possibility through what it calls a Negotiated Resolution Agreement ("NRA").[125] The World Bank allows that a "settlement may be pursued at any stage of an investigation or sanctions proceeding."[126] These agreements replace formal sanctions proceedings and allow the respondent and INT to negotiate an agreed-upon sanction. Many of the terms contained in NRAs might vary, but they generally require certain key terms. For instance, an NRA likely will contain an admission of culpability, compliance conditions (such as an obligation to improve a corporate compliance program in accordance with the World Bank's Integrity Compliance Guidelines),[127] imposition of a compliance monitor, and obligations to cooperate with INT in various respects during the period of sanction. Although INT drafts and negotiates NRAs, before becoming effective, they must be approved by the Bank's General Counsel and reviewed by the SDO.[128] NRAs represent only a fraction of

---

122. World Bank Sanctions Procedures, art. IX, § 9.02(h) (Apr. 15, 2012).

123. *Upholding the Rule of Law in the Fights Against Corruption and Poverty*, SANCTIONS BOARD LAW DIGEST, (The World Bank, D.C.) Dec. 2011 at 21.

124. *See generally* F. Joseph Warin, Michael S. Diamant & Melissa Farrar, *2014 Year-End Update on Corporate Non-Prosecution Agreements and Deferred Prosecution Agreements*, SECURITIES REGULATION & LAW REPORT, 47 SRLR 332 (Feb. 16, 2015), http://www.gibsondunn.com/publications/Documents/Warin_Diamant_Farrar-2014-Year-End-Update-on-NPAs-and-DPAs-BNA-2.16.15.pdf [https://perma.cc/83ZS-2A2G].

125. Anne-Marie Leroy & Frank Fariello, *The World Bank Group Sanctions Process and Its Recent Reforms*, A WORLD BANK STUDY (The World Bank, D.C.) 2012 at 20.

126. *INT, World Bank Group Settlements: How Negotiated Resolution Agreements Fit Within the World Bank Group's Sanctions System* 3, http://siteresources.worldbank.org/INTDOII/Resources/NoteOnSettlementProcess.pdf [https://perma.cc/4NQQ-29JQ].

127. The Integrity Compliance Guidelines describe a non-exclusive set of "standards, principles and components commonly recognized by many institutions and entities as good governance and anti-fraud and corruption practices" which must be adequately implemented before debarment or conditional non-debarment is lifted. The World Bank, The Summary of World Bank Group Integrity Compliance Guidelines, http://siteresources.worldbank.org/INTDOII/Resources/Integrity_Compliance_Guidelines.pdf [https://perma.cc/APK6-ASAG].

128. World Bank Sanctions Procedures, art. XI, § 11.02 (Apr. 15, 2012); *INT, World Bank Group Settlements: How Negotiated Resolution Agreements Fit Within the World*

the cases resolved by INT, with eleven in fiscal year 2011, sixteen in fiscal year 2012, eight in fiscal year 2013, six in fiscal year 2014, and eleven in fiscal year 2015. Nevertheless, they have been used to resolve some of the Bank's highest-profile investigations.[129]

Sanctions: The World Bank—whether the SDO or the Sanctions Board—can impose five types of possible sanctions: (1) letter of reprimand, (2) debarment for a definite or indefinite period, (3) conditional non-debarment, (4) debarment with conditional release, and (5) restitution.[130] A series of enumerated aggravating or mitigating factors can increase or decrease the sanction.[131]

REPRIMAND. In cases of "truly minor misconduct or peripheral involvement," such as where a party commits an isolated lack of oversight, a public letter of reprimand may be appropriate.[132]

DEBARMENT. The World Bank will debar a party where "no appreciable purpose would be served by imposing conditions for release but deterrence requires some period of debarment," after which the debarment is automatically lifted.[133] The Sanctioning Guidelines identify situations in which "there would be no reasonable purpose served by imposing conditions" as including instances where the sanctioned party already has in place a strong compliance program, where the Sanctionable Practice in-

---

Bank Group's Sanctions System 4, http://siteresources.worldbank.org/INTDOII/Resources/NoteOnSettlementProcess.pdf [https://perma.cc/DP29-KFQV].

129. *FY 14 Annual Update*, at 34; *FY 15 Annual Update* at 38; *Report on Functions, Data and Lessons Learned 2007-2013*, (The World Bank Office of Suspension and Debarment, D.C.) 2015, at 23; Press Release, The World Bank, World Bank Debars SNC-Lavalin Inc. and its Affiliates for 10 years (Apr. 17, 2013) ("The debarment is part of a Negotiated Resolution Agreement . . . ."); Press Release, Enforcing Accountability: World Bank Debars Alstom Hydro France, Alstom Network Schweiz AG, and their Affiliates (Feb. 22, 2012).

130. Anne-Marie Leroy & Frank Fariello, *The World Bank Group Sanctions Process and Its Recent Reforms*, A WORLD BANK STUDY (The World Bank, D.C.) 2012, at 4-5; World Bank Sanctions Procedures, art. IX, § 9.01 (Apr. 15, 2012).

131. Aggravating factors include the severity of the misconduct (one to five year increase), the harm caused by the misconduct (one to five year increase), interference with INT's investigation (one to three year increase), and a past history of adjudicated misconduct (ten year increase). Mitigating factors include having a minor role in the misconduct (up to twenty-five percent decrease), taking voluntary corrective action (up to fifty percent decrease, or more in exceptional circumstances), and cooperating with the investigation (up to thirty-three percent decrease, or more in exceptional circumstances). World Bank Sanctioning Guidelines §§ I, IV, V (Jan. 1, 2011).

132. Anne-Marie Leroy & Frank Fariello, *The World Bank Group Sanctions Process and Its Recent Reforms*, A WORLD BANK STUDY (The World Bank, D.C.) 2012 at 5; World Bank Sanctioning Guidelines § II(D) (Jan. 1, 2011); *see, e.g.*, The World Bank Sanctions Board, Sanctions Board Decision No. 67 (2014) (describing the appropriateness of a letter of reprimand).

133. Anne-Marie Leroy & Frank Fariello, *The World Bank Group Sanctions Process and Its Recent Reforms*, A WORLD BANK STUDY (The World Bank, D.C.) 2012 at 4.

volved isolated acts of personnel who have been terminated, and where the proposed debarment is for a relatively short period.[134]

DEBARMENT WITH CONDITIONAL RELEASE. Under the Sanctioning Guidelines, the baseline sanction for all Sanctionable Practices is a three-year debarment with conditional release, which means that the debarred entity will be released from sanction only after it has satisfied certain conditions. Conditions typically include the implementation or improvement of a satisfactory corporate compliance program.[135] The Bank's Integrity Compliance Office, which sits within INT but is administratively separate from the investigations function, is tasked with monitoring implementation and deciding whether the conditions have been satisfied.[136]

CONDITIONAL NON-DEBARMENT. Here, by contrast, a party is not debarred so long as it complies with certain conditions. Conditional non-debarment may be appropriate for parties that are affiliated with a respondent and were not directly involved in the misconduct but have some responsibility or have demonstrated that they "have taken comprehensive corrective measures and that such other mitigating factors apply . . . so as to justify non-debarment."[137]

RESTITUTION. Restitution and other financial remedies "may be used in exceptional circumstances, including those involving fraud in contract execution where there is a quantifiable amount to be restored to the client country or project."[138]

II. SANCTIONABLE PRACTICES

The Procurement Guidelines define the five Sanctionable Practices, and the Sanctions Board has further refined their meanings and application, and developed precedent by applying them to specific factual circumstances. Much like the written opinions of national courts of law, Sanctions Board decisions provide factual findings, summarize the various arguments and factual assertions of the parties, apply the applicable standards and analyze their merits, and reach conclusions, sometimes even including a dissenting opinion.[139] Not all Sanctions Board decisions, however, are availa-

134. World Bank Sanctioning Guidelines § II(B) (Jan. 1, 2011).

135. *Id*. Starting punishment for all Sanctionable Practices at the same level—for instance, a bribe to obtain a project versus a non-intentional, immaterial inaccuracy in bid materials—may lead to results that cause entities that engage in objectively less culpable conduct to question the calibration of the process.

136. Anne-Marie Leroy & Frank Fariello, *The World Bank Group Sanctions Process and Its Recent Reforms*, A WORLD BANK STUDY (The World Bank, D.C.) 2012 at 16–17.

137. World Bank Sanctioning Guidelines § II(C) (Jan. 1, 2011).

138. World Bank Sanctioning Guidelines § II(F) (Jan. 1, 2011).

139. *See* Sanctions Board Decision No. 81 (2015) (D. Robitaille dissenting op.) (repre-

ble to the public. Of the seventy-five Board decisions rendered through the end of 2014, thirty-four had been fully published, with an additional eight decisions published in 2015.[140] Twenty more decisions, issued before December 2011, are summarized in the Sanctions Board Law Digest.[141] Relying on available Sanctions Board decisions, the following subsections analyze both the required elements of each Sanctionable Practice and the types of evidence the Sanction Board has considered in assessing culpability. In addition to providing a synthesis and analysis of the contours of each Sanctionable Practice, this section draws parallels to more established laws and regulations in an effort to develop this relatively new area of law.

A. *Obstructive Practice*

The various versions of the Procurement Guidelines have defined an Obstructive Practice to encompass two types of behavior:

- "[D]eliberately destroying, falsifying, altering, or concealing of evidence material to the investigation or making false statements to investigators in order to materially impede a Bank investigation into allegations of a corrupt, fraudulent, coercive or collusive practice; and/or threatening, harassing or intimidating any party to prevent it from disclosing its knowledge of matters relevant to the investigation or from pursuing the investigation"; or
- "[A]cts intended to materially impede the exercise of the Bank's inspection and audit rights provided for under [a clause required to] be included in bidding documents and in contracts financed by a Bank loan, requiring bidders, suppliers and contractors, and their subcontractors, agents, personnel, consultants, service providers, or suppliers, to permit the Bank to inspect all accounts, records, and other documents relating to the submission of bids and contract performance, and to

senting an example of a dissenting opinion). Article XIV of the Sanctions Board Statute and § 20(1) of the Sanctions Procedures provide that Sanctions Board decisions are final and unappealable. Sanctions Board Decision No. 80, ¶ 5 (2015). Nevertheless, the Sanctions Board may recognize exceptional circumstances, such as newly discovered evidence, allowing it to reconsider a final decision. *Id*.

140. The World Bank, Sanction Board Decisions, http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/ORGANIZATION/ORGUNITS/EXTOFFEVASUS/0,,contentMDK:23059612~pagePK:64168445~piPK:64168309~theSitePK:3601046,00.html [https://perma.cc/EL34-PKCX] (last visited Dec. 15, 2015).

141. *Upholding the Rule of Law in the Fights Against Corruption and Poverty*, SANCTIONS BOARD LAW DIGEST, (The World Bank, D.C.) Dec. 2011 at 25-32.

have them audited by auditors appointed by the Bank."[142]

The precedent regarding Obstructive Practices is limited. As of the publication of the Law Digest in October 2011, the Sanctions Board had not reviewed an obstruction case.[143] Since then, however, the Sanctions Board has issued two publicly available opinions that consider Obstructive Practices.[144] Further, although the creation of Obstructive Practices as a Sanctionable Practice in 2006 suggests that it was intended as a standalone deterrent to prevent firms from so severely obstructing an investigation that no other Sanctionable Practice could be proven,[145] the Sanctions Board has not yet reviewed a case in which the sole allegation is that a respondent engaged in an Obstructive Practice—in these cases, another Sanctionable Practice was instead the core allegation. Five opinions review obstructive behavior that has been characterized by INT as an aggravating factor—rather than an independent Sanctionable Practice—that should influence the severity of the sanction imposed. Though an Obstructive Practice is a standalone Sanctionable Practice, interference with INT's investigation remains one of the enumerated aggravating factors in the Sanctioning Guidelines, and can lead to a one-to-three-year increase in the sanction.

The definition of Obstructive Practices in the Procurement Guidelines is similar to that of the "interference with investigative process" aggravating factor present in the Sanctioning Guidelines, but differs from it in an important way: like Obstructive Practices, which include "acts intended to materially impede the exercise of the Bank's inspection and audit rights," the aggravating factor applies to "acts intended to materially impede the exercise of the Bank's contractual rights of audit." The language of the aggravating factor also includes, however, "acts intended to materially impede . . . the Bank's . . . access to information."[146] Notably, the Anti-Corruption Guidelines define an Obstructive Practice consistent with the Sanctioning Guidelines' aggravating factor—as "acts intended to materially impede the exercise of the Bank's contractual rights of audit or *access to information*."[147] Despite the different definitions, the aggravating factor cases provide additional insight into the interpretation of Obstructive Prac-

---

142. World Bank Procurement Guidelines §§ 1.16(a)(v)(bb), 1.16(e) (Jan. 2011 rev. July 2014).

143. *Upholding the Rule of Law in the Fights Against Corruption and Poverty*, SANCTIONS BOARD LAW DIGEST, (The World Bank, D.C.) Dec. 2011 at 22.

144. The World Bank Sanctions Board, Sanctions Board Decision No. 60 (2013); The World Bank Sanctions Board, Sanctions Board Decision No. 77 (2015).

145. *See Sanctions Reform: Expansion of Sanctions Regime Beyond Procurement and Sanctioning of Obstructive Practices* (The World Bank, D.C.) Aug. 1, 2006 at 5 (informing borrowers of reforms).

146. World Bank Sanctioning Guidelines § IV(C) 1 (Jan. 11, 2011).

147. World Bank Anti-Corruption Guidelines § 7(e) (Oct. 15, 2006, rev. Jan. 2011).

tices. Of course, in these cases INT has made a decision to charge the behavior as only an aggravating factor, suggesting some level of discretion.

Notably, one of the Sanctions Board's two Obstructive Practices decisions found that INT failed to present sufficient evidence. In Sanctions Board Decision No. 77, the principal allegation was that the respondent engaged in fraud by submitting allegedly false documents in a proposal.[148] The respondent argued that the allegedly false submission should not be attributed to it because it was made by an unauthorized individual.[149] In support of its defense, the respondent submitted two power-of-attorney documents that it had given to the individual for other matters and pointed to differences in the "alleged" signature on the allegedly false documents and those on the powers of attorney.[150] Believing that the so-presented power-of-attorney documents were actually themselves fabricated, however, INT alleged that the respondent "engaged in an obstructive practice by deliberately fabricating two documents constituting material evidence in order to impede INT's investigation."[151]

The Sanctions Board confirmed that it would analyze Obstructive Practices similarly to how it reviews the "interference with investigative process" aggravating factor and set out the following two elements: INT must show that it is more likely than not that (1) the respondent deliberately falsified evidence, and (2) that is material to the investigation in order to materially impede a Bank investigation into allegations of a [Sanctionable Practice]."[152]

In finding that INT failed to meet its burden on the first element, the Sanctions Board noted that INT had not presented any evidence that the documents were fabricated nor anything to suggest any indicia of inauthenticity on the face of the documents.[153] Nor did the Sanctions Board itself see any such indicia, observing that the documents appeared to have original stamps and signatures.[154] Because INT did not satisfy the first element, the Sanctions Board did not need to consider whether the documents were

---

148. Sanctions Board Decision No. 77, ¶ 8 (2015).

149. *Id*. at ¶ 17.

150. *Id*. at ¶ 18.

151. *Id*. at ¶ 8.

152. *Id*. at ¶ 38. Although the Sanctions Board did not do so, adopting an alternative approach would have been to divide the second element into two sub-elements—(a) the evidence is material to the investigation and (b) was deliberately destroyed, falsified, altered, or concealed in order to materially impede a Bank investigation. The Sanctions Board's brief analysis of the second prong does consider separately whether the falsified evidence was material to the investigation, and then whether it was falsified in order to materially impede a Bank investigation. *See id*. ¶ 43 (stating that the Sanctions Board need not consider whether falsification was intended to materially impede the investigation).

153. *Id*. at ¶ 41.

154. *Id*.

material to the Bank's investigation or whether any falsification was intended to materially impede the investigation.[155]

In the second Obstructive Practices decision, the Sanctions Board concluded that the intentional deletion of documents relevant to an INT inquiry was sanctionable. In Sanctions Board Decision No. 60, INT alleged, among other things, that certain respondents "engaged in obstructive practices by deleting email correspondence relevant to INT's investigation."[156] In particular, INT alleged that, in anticipation of INT's arrival for an audit, a manager intentionally deleted emails showing that someone had received confidential information from a procurement advisor regarding contracts for a Bank-financed project. The respondent admitted that the emails were deleted before INT's audit despite understanding that they could be relevant to the audit, but argued that the deletion had no material negative effect on INT's investigation.[157] Nevertheless, the Sanctions Board found sufficient evidence. The timing of the deletions suggested that they were intended to impede the investigation, and the Sanctions Board observed that "at least some [of the deleted] emails related to [the respondent's] communications with the Procurement Advisor and therefore were material to the investigation."[158]

The Sanctions Board, in the aggravating-factor cases, has declined to find aggravation absent evidence that the spoliation was intentional. In Sanctions Board Decision No. 61, INT again claimed that the respondents interfered with its investigation by deliberately destroying emails.[159] Here, however, the respondents claimed that a technical issue caused the unintentional loss of emails. Although skeptical of the timing of the email loss, the Sanctions Board concluded that the record lacked "sufficient evidence . . . that any of the Respondents instructed or participated in any deliberate destruction or concealment of evidence."[160]

---

155. *Id.* at ¶ 43.

156. Sanctions Board Decision No. 60, ¶ 12 (2013).

157. *Id.* at ¶ 104.

158. *Id.* at ¶ 105. Notably, the SDO in this case had "recognized the alleged obstruction to be temporary and *de minimis* and largely outweighed by the significant cooperation that the relevant Respondents provided to INT." *Id.* at ¶ 104. The Sanctions Board, however, neither expounded on its holding nor explained why it departed from the SDO's assessment. In contrast to the SDO, the Sanctions Board disregarded the respondents' cooperation with INT in this analysis, noting that "such cooperation could be mitigating but not exculpatory." *Id.* at ¶ 105.

159. The World Bank Sanctions Board, Sanctions Board Decision No. 61, ¶ 12 (2013).

160. *Id.* at ¶ 38. INT also asserted that the respondents made misleading statements about the supposed destruction. Because the Sanctions Board did not find it "more likely than not that the emails were deliberately destroyed, it conclude[d] that the Respondents' alternative explanations regarding the missing emails d[id] not warrant aggravation as false statements to INT." *Id.* at ¶ 39.

On its face, the definition of Obstructive Practices under the World Bank Procurement Guidelines should not allow for culpability when no contractual provision grants INT a right to inspect or audit. Again, the definition prohibits acts "intended to materially impede the exercise of the Bank's inspection and audit rights provided for under [a clause required to] be included in bidding documents and in contracts financed by a Bank loan, requiring bidders, suppliers and contractors, and their subcontractors, agents, personnel, consultants, service providers, or suppliers, to permit the Bank to inspect all accounts, records, and other documents relating to the submission of bids and contract performance, and to have them audited by auditors appointed by the Bank."[161] But the definition of Obstructive Practices under the World Bank Anti-Corruption Guidelines may allow for such culpability, covering "acts intended to materially impede the exercise of the Bank's contractual rights of audit or *access to information*."[162] The latter three words can be read either to suggest that culpability can attach independent of any contractual right of audit, where general "access to information" has been obstructed, or that a contractual right of audit is a prerequisite. The 2006 report establishing Obstructive Practices supports the former interpretation. It notes that Obstructive Practices would "provide[] a means for enforcing the Bank's third-party rights *and a mechanism for discouraging firms from non-cooperation in circumstances where there are no contractual rights or where those rights have lapsed*."[163] If it confronts an Obstructive Practices case under the World Bank Anti-Corruption Guidelines, the Sanctions Board could easily disagree with this position, however, because it would render the "contractual rights of audit" language in the definition practically redundant.

Aggravating-factor opinions offer some help in parsing the language, and have generally focused on the specific scope of the Bank's audit rights rather than giving the phrase "access to information" the broadest possible meaning. In Sanctions Board Decision No. 63, INT alleged that one of the respondents impeded the Bank's audit by refusing to provide INT access to joint venture correspondence and other documents.[164] The Sanctions Board concluded that INT failed to establish that the respondent's narrow interpretation of the Bank's audit rights under the contract constituted deliberate

161. World Bank Procurement Guidelines §§ 1.16(a)(v)(bb), 1.16(e) (Jan. 2011, rev. July 2014).

162. World Bank Anti-Corruption Guidelines § 7(e) (Oct. 15, 2006, rev. Jan. 2011) (emphasis added).

163. *Sanctions Reform: Expansion of Sanctions Regime Beyond Procurement and Sanctioning of Obstructive Practices* (The World Bank, D.C.) Aug. 1, 2006 at 5(emphasis added).

164. Sanctions Board Decision No. 63, ¶¶ 16, 35 (2014).

interference.[165] Had it read the definition of the aggravating factor more broadly, the Sanctions Board could have found aggravation warranted based on the respondent's refusal to provide INT with "access to information." But the Sanctions Board fit the respondent's obligations to the scope of the Bank's audit rights. Because the respondent refused to provide documents outside the scope of the Bank's audit rights, no deliberate interference occurred. This outcome is logical given that the entire sanctions regime at the World Bank is rooted in contract. Again, to hold otherwise would render audit clauses practically unnecessary.

Likewise, in Sanctions Board Decision No. 56, INT argued that the respondents deserved an enhanced sanction for interfering with and obstructing its investigation. INT argued that the respondents impeded the Bank's audit rights by denying INT access to relevant information.[166] The respondents countered that the audit rights did not encompass information that pre-dated the signing of the relevant contract and objected to INT's inquiries into earlier events. The Sanctions Board sided with INT, but, importantly, did so by relying on an expansive reading of the Bank's audit rights under the contract (as opposed to some general right to investigate). It interpreted the audit clause to require the respondents to allow the Bank to inspect all accounts and records related to the services provided in the contract. The Sanctions Board determined that this language covered relevant pre-contract activity.[167]

The same reasoning, but a different outcome, is found in Sanctions Board Decision No. 71, in which INT alleged that the respondent impeded the Bank's audit rights.[168] The respondent here also argued that "INT's audit request was unreasonable and exceeded the scope of INT's rights."[169] Because the record did not contain any evidence "that would have clarified the scope of INT's request and supported INT's allegation,"[170] the Sanctions Board found no basis for aggravation. Here, the Sanctions Board could not properly assess the request to determine if it fell within the scope of the Bank's audit rights.

Beyond access to documents, the Sanctions Board also has considered the application of interference to situations involving INT's access to employees. The scope of INT's authority in this area is hotly contested. In Sanctions Board Decision No. 69, INT argued for interference as an aggravating factor alleging that it met with the respondent's representatives three

165. *Id.* at ¶ 103.
166. Sanctions Board Decision No. 56, ¶¶ 13, 15(iii), 61 (2013).
167. *Id.* at ¶ 62.
168. The World Bank Sanctions Board, Sanctions Board Decision No. 71, ¶ 88 (2014).
169. *Id.*
170. *Id.*

times but they repeatedly refused to answer questions about documents relevant to the investigation.[171] The Sanctions Board concluded that aggravation was not warranted, because "INT [did] not allege that the Respondent engaged in any overt acts that interfered with INT's investigation, which are the types of acts that the Sanctioning Guidelines suggest would warrant aggravation under this factor," and because "the record reveals at least a certain degree of responsiveness on the part of the Respondent."[172]

1. Obstruction as an Aggravating Factor or Sanctionable Practice

The severity of the misconduct and the strength of evidence available to INT seem to play a role in INT's decision whether to charge an Obstructive Practice or merely to allege interference as an aggravating factor. Perhaps the clearest comparison can be made between Sanctions Board Decisions Nos. 60 and 61. Both decisions addressed a respondent's deletion of emails material to INT's investigation, but the deletion in Sanctions Board Decision No. 60 was alleged to be an Obstructive Practice in itself, whereas the same act was characterized as an aggravating factor in Sanctions Board Decision No. 61. In Sanctions Board Decision No. 60, in addition to alleging that the respondents had engaged in corruption and fraud, INT alleged that the respondents engaged in obstruction when "[a] Respondent Director instructed [a] Respondent Project Manager to delete emails [relevant to the investigation]."[173] A respondent commercial manager confirmed that emails had been deliberately deleted before INT's arrival but argued that the deletion was a "panicked prior reaction which [Respondent] overcame and corrected, and which had no material . . . effect on the . . . investigation," and that the conduct was "outweighed by the significant cooperation that the relevant Respondents provided to INT."[174] The Sanctions Board rejected these arguments, noting that regardless of any later regret, the emails were deleted with the intent to impede INT's investigation, and any subsequent cooperation with the investigation could not serve to be exculpatory but may only be considered as a mitigating factor.[175]

In Sanctions Board Decision No. 61, in addition to alleging that the respondent had engaged in fraud, INT argued that the respondent had deleted emails that implicated it in the fraud.[176] The respondent argued that a

171. The World Bank Sanctions Board, Sanctions Board Decision No. 69, ¶ 37 (2014).

172. *Id.*; *see generally* Sanctions Board Decision No. 81, ¶¶ 31–33 (2015) (finding that there was insufficient evidence to conclude it was more likely than not that the respondents engaged in the alleged fraudulent practice).

173. Sanctions Board Decision No. 60, ¶ 104 (2013).

174. *Id.*

175. *Id.* at ¶ 105.

176. Sanctions Board Decision No. 61, ¶ 38 (2013).

technical issue caused the unintentional loss of emails.[177] Despite the apparent lack of any credible explanation for the timing of the loss of emails shortly before INT's fieldwork and the fact that the respondent was only able to recover one potentially exculpatory email, the Sanctions Board held that the record did not include sufficient evidence to support a finding that it was more likely than not that the respondents deliberately destroyed evidence.[178]

In both Obstructive Practice and aggravating factor cases, Sanctions Board decisions suggest that the mens rea requirement is difficult to establish. Again, the World Bank Procurement Guidelines define an Obstructive Practice as one done "in order to materially impede a Bank investigation" or as "acts intended to materially impede the exercise of the Bank's inspection and audit rights."[179] The Sanctioning Guidelines' aggravating factor definition (and the Anti-Corruption Guidelines) uses the same language, while also including "acts intended to materially impede the exercise of the Bank's . . . access to information."[180]

Therefore, INT must show that it is more likely than not that a respondent engaged in the purported misconduct *with the intent to* materially impede a Bank investigation or the Bank's contractual rights. In Sanctions Board Decision No. 60, discussed above, the only Board decision to find that the required mens rea of Obstructive Practice was present, the respondent admitted to deleting emails to impede the Bank's investigation.[181] Conversely, in Sanctions Board Decision No. 61, even considering the timing of the purported system failure and the firm's ability to recover only one potentially exculpatory document, the Sanctions Board found insufficient evidence that the respondent *intended* to impede the Bank's contractual rights or access to information.

2. Roots of Obstructive Practices in Sarbanes-Oxley

The precedent regarding Obstructive Practices is limited, and therefore it is also worth considering the history behind its adoption. The Bank adopted Obstructive Practices as a new Sanctionable Practice in 2006 to reach certain acts not covered by the Bank's then-existing prohibitions on fraud, corruption, collusion, and coercion.[182] The Bank was concerned that

177. *Id.*
178. *Id.*
179. World Bank Procurement Guidelines § 1.16(a)(v)(bb) (Jan. 2011, rev. July 2014).
180. World Bank Sanctioning Guidelines § IV(C)1 (Jan. 11, 2011); World Bank Anti-Corruption Guidelines § 7(e) (Oct. 15, 2006, rev. Jan. 2011).
181. Sanctions Board Decision No. 60, ¶ 104 (2013).
182. *See generally Sanctions Reform: Expansion of Sanctions Regime Beyond Procurement and Sanctioning of Obstructive Practices* (The World Bank, D.C.) Aug. 1, 2006 (set-

"the destruction [of evidence] could only be used as an aggravating factor in the determination of sanctions, and only if the Bank were able to prove the underlying offense."[183] In other words, an entity could theoretically avoid sanctions altogether simply by sufficiently obstructing INT's investigation.

According to a 2006 report, the Bank consulted the laws of several countries in devising its prohibition on Obstructive Practices.[184] The Bank specifically highlighted Section 802 of the U.S. Sarbanes-Oxley Act ("SOX") (codified at 18 U.S.C. § 1519).[185] Therefore, a firm plausibly could draw on precedents from the application of § 1519 in mounting a defense to an Obstructive Practice charge.

Among its extensive reshaping of U.S. securities regulation, SOX introduced a new "anti-shredding" provision. Crafted in broad terms, this provision, 18 U.S.C. § 1519, provides as follows:

> Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States . . . or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.[186]

Some commentators have described changes wrought by § 1519 as providing prosecutors with "greater power, lower requirements of proof, and increased penalties" as compared to previous obstruction-of-justice provisions.[187] Presently, the text, legislative history,[188] and judicial con-

ting forth new sanctionable practices).

183. *Id.* at 5.

184. *Sanctions Reform: Expansion of Sanctions Regime Beyond Procurement and Sanctioning of Obstructive Practices* (The World Bank, D.C.) July 28, 2006 at 14 n.24.

185. *Id.*

186. *Sanctions Reform: Expansion of Sanctions Regime Beyond Procurement and Sanctioning of Obstructive Practices* (The World Bank, D.C.) Aug. 1, 2006.

187. John Hasnas, *The Significant Meaninglessness of Arthur Andersen LLP v. United States*, 2005 CATO SUP. CT. REV. 187, 194 (2005).

188. *See* S. REP. NO. 107-146, at 14–15 (2002) (§ 1519 "is meant to apply broadly to any acts to destroy or fabricate physical evidence so long as they are done with the intent to obstruct, impede or influence the investigation or proper administration of any matter, and such matter is within the jurisdiction of an agency of the United States"; is "specifically meant not to include any technical requirement . . . to tie the obstructive conduct to a pending or imminent proceeding or matter"; and intends to "do away with the distinctions . . . between court proceedings, investigations, regulatory or administrative proceedings (whether formal or not), and less formal government inquiries, regardless of their title"). Contemporaneous statements from legislators support the expansive understanding of § 1519. Upon introducing the bill, Representative John Conyers, then-Chairman of the House Judiciary

struction of § 1519 support a broad interpretation of the conduct prohibited by the statute. Section 1519's prohibition against "alter[ing], destroy[ing], mutilat[ing], conceal[ing], cover[ing] up, falsif[ying], or mak[ing] a false entry in" any document or tangible object apparently is expansive enough to prohibit making false oral statements to company counsel conducting an internal investigation, whose findings will ultimately be conveyed to U.S. authorities.[189]

Speaking to the statute's breadth, courts have interpreted § 1519 not to require a direct nexus between an obstructive act and an ongoing government proceeding. This has empowered the U.S. government to use the statute to prosecute obstructive conduct, for example, in the context of corporate internal investigations even when there was no government proceeding pending or even anticipated.[190] Unlike the U.S. law interpreting § 1519,

---

Committee and a sponsor of SOX, said that § 1519 would create a new "felony which could be effectively used in a wide array of cases where a person destroys or creates evidence with the specific intent to obstruct a federal agency or a criminal investigation." 148 CONG. REC. E463–01, E463 (daily ed. Apr. 9, 2002) (statement of Rep. John Conyers, Jr.). Senator Patrick Leahy—also a co-sponsor of the bill—declared on the Senate floor that "[t]here w[ill] be no technical requirement that a judicial proceeding was already underway or that the documents were formally under subpoena." 148 CONG. REC. S1783–01, S1786 (daily ed. Mar. 12, 2002) (statement of Sen. Patrick Leahy).

189. In *United States v. Ray*, the U.S. government charged senior executives of a public company with conspiring to violate § 1519, by knowingly misleading the Chief Legal Officer in an internal investigation of potential stock-option backdating. Criminal Information, *United States v. Ray*, No. 2:08-cr-01443 (C.D. Cal. Dec. 15, 2008). The Senior Vice President of Human Resources pleaded guilty to making false oral statements knowing that they would be incorporated into a report on the company's stock-option grant process (which was submitted to the Audit Committee), "with the intent to impede, obstruct, or influence" a contemplated potential—but not actual or even imminent—SEC investigation of potential back-dating practices. Plea Agreement for Defendant Gary Ray, *United States v. Ray*, No. 2:08-cr-01443 (C.D. Cal. Dec. 15, 2008).

190. For example, in April 2009, Hong "Rose" Carson was indicted, along with several of her former co-workers at Control Components Inc. ("CCI"), a California-based control valve manufacturer, for conspiring to pay bribes in violation of the FCPA. Carson was also charged with destroying documents relevant to CCI's internal investigation of the payments, in violation of § 1519. Prosecutors claimed that just before her interview with the private lawyers conducting the internal investigation, Carson tore up relevant documents and flushed them down the toilet in a restroom at CCI. Although a federal investigation had not been initiated, CCI had made a voluntary disclosure to the government two days before Carson destroyed the documents. *See* Indictment at 10, 28-29, *United States v. Carson*, SACR No. 09-0077, (C.D. Cal. Apr. 8, 2009) (demonstrating that CCI had made a voluntary disclosure); Richard L. Cassin, *Rose Carson's Big Flush*, THE FCPA BLOG (Sept. 7, 2010, 7:28 AM), http://www.fcpablog.com/blog/2010/9/7/rose-carsons-big-flush.html [https://perma.cc/4C4C-RE4N]. A superseding information was filed on April 16, 2012, however, which eliminated the obstruction charge under § 1519. Superseding Information, *United States v. Carson*, SACR No. 09-00077 (C.D. Cal. Apr. 16, 2012). The government stated in its motion, without further explanation, that "[i]n the interests of justice, the government seeks an order dismissing count sixteen [charging Carson with a violation of §

however, the definition of Obstructive Practices does seem to require a nexus between obstructive conduct and a Bank inquiry. Under the first prong of the definition, the act must be done "deliberately . . . in order to materially impede a Bank investigation"; and under the second prong of the definition, the act must be "intended to materially impede the exercise of the Bank's inspection and audit rights."[191] Nevertheless, the logic behind U.S. court decisions could apply to the actions of employees who mislead internal investigators conducting a parallel inquiry into alleged Sanctionable Practices, knowing that the results of the investigation will be reported to INT. Likewise, the definition of an Obstructive Practice seems to allow for the possibility of even going back in time and considering as "obstructive" false statements or destructive acts in a tender process taken to hide prohibited conduct from a future Bank inquiry.

3. Threats, Harassment, and Intimidation

Destroying, falsifying, and concealing documents are not the only types of obstructive behavior that are sanctionable: "[T]hreatening, harassing or intimidating any party to prevent it from disclosing its knowledge of matters relevant to the investigation" also count.[192] To date, only one Sanctions Board decision has addressed such behavior, and it did so in the context of considering it as an aggravating factor. In Sanctions Board Decision No. 47, INT primarily alleged that the respondent had submitted eighteen forged or otherwise deceptive performance certificates to obtain Bank-funded contracts.[193] INT argued that the respondent interfered in the Bank's investigation by "attempt[ing] to pressure the firms that purportedly had issued the certificates . . . into recanting their conclusions of fraud."[194]

In considering whether the behavior warranted aggravation, the Sanctions Board focused on the plain language of the Sanctioning Guidelines describing conduct constituting "interference by the sanctioned party in the

---

1519] of the indictment." In *United States v. Hunt*, 526 F.3d 739 (11th Cir. 2008), a U.S. appeals court upheld the conviction under § 1519 of a police detective who made a false incident report regarding the circumstances of an arrest, without knowing that the incident would later be investigated by the FBI. The court found that it was sufficient for the purposes of the statute that the defendant was aware that the FBI had jurisdiction to investigate claims. *See also United States v. Yielding*, 657 F.3d 688, 714 (8th Cir. 2011) (holding that it is sufficient that the "matter" in connection with which the obstruction occurred "is within the jurisdiction of a federal agency as a factual matter").

191. Guidelines: Procurement Under IBRD Loans and IDA Credits ¶ 1.14(v)(bb) (May 2004 rev. Oct. 2006) (emphasis added).

192. World Bank Procurement Guidelines § 1.16(a)(v)(aa) (Jan. 2011, rev. July 2014).

193. The World Bank Sanctions Board, Sanctions Board Decision No. 47 (Sanctions Case No. 121), ¶ 7 (2012).

194. *Id.* at ¶ 46 (2012).

Bank's investigation" as "*threatening, harassing, or intimidating* any party to prevent it from disclosing its knowledge of matters relevant to the investigation." [195] The Sanctions Board concluded that INT offered no evidence that the respondent threatened, harassed, or intimidated anyone into recanting past assertions of fraud.[196] Merely asking a firm to retract its statements, the Sanctions Board concluded, was insufficient to suggest a threat, harassment, or intimidation, as is required by the aggravating factor.[197]

Although the Sanctions Board found insufficient evidence in this case, firms subject to the Bank's Guidelines should be wary of inducing someone to withhold information from INT. This portion of the Obstructive Practice definition is analogous to the U.S. criminal "witness and informant tampering" statute—18 U.S.C. § 1512(b)—and courts construing this statute historically will consider *any* circumstance that suggests a request to withhold information was done in a subjectively or objectively threatening manner.

Section 1512(b) provides as follows:

> Whoever knowingly uses intimidation, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to—
>
> > (1) influence, delay, or prevent the testimony of any person in an official proceeding; [or]
> > (2) cause or induce any person to—
> >
> > > (A) withhold testimony, or withhold a record, document, or other object, from an official proceeding; [or]
> > > (B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding;
>
> . . . .
> shall be fined under this title or imprisoned not more than 20 years, or both.[198]

Judicial decisions interpreting § 1512(b) find that explicit threats of physical harm to prevent a party from providing evidence clearly satisfy the statute.[199] But in the gray area between actual threats of physical force and, like in Sanctions Board Decision No. 47, mere requests not to disclose in-

195. *Id.* at ¶ 46 (2012).
196. *Id.* at ¶ 47.
197. *Id.*
198. 18 U.S.C. § 1512(b).
199. *See* United States v. Persico, 645 F.3d 85 (2d Cir. 2011) (holding that a witness, who was the target of a murder investigation, violated 18 U.S.C. § 1512 when he met with the murder victim's family and attempted to persuade them not to speak candidly in any government investigation, and implied victim's family could be injured if they did not do as instructed).

formation, § 1512(b) case law suggests that even mere requests can be threats if the requester knew that the recipient would feel threatened, given the requester's status or past behavior.[200] It would be logical for the Sanctions Board to interpret an Obstructive Practice similarly. Indeed, Sanctions Board Decision No. 47 turned, in part, on the lack of any in-person meeting between the respondent and the representatives he was alleged to have threatened, and the lack of any other "evidence to suggest a threat, harassment or intimidation beyond the request itself."[201] Had there been evidence that the representatives actually felt threatened by the request, the Sanctions Board may well have concluded that such behavior qualified as an Obstructive Practice.

4. Concerns Raised by Obstructive Practices

Traditional requirements of due process are relaxed in administrative proceedings, like the World Bank's sanctions regime. Nevertheless, the World Bank has acknowledged that those accused of violating its rules are entitled to some measure of due process,[202] and the sanctions regime as a whole reflects some due-process considerations.[203] The creation of obstruction as a Sanctionable Practice in 2006, however, gave rise to new due process concerns. In particular, it has created a possible problem within the INT investigation process by shifting the balance of power in contractual interpretation decisively to INT. The "contractual rights" referred to in the Obstructive Practice definition include contractual provisions in Bank-funded contracts that typically allow the Bank to audit the "accounts and records relating to the performance of the [World Bank contract]."[204] As discussed above, the scope of the Bank's audit rights often is contested dur-

200. *See* United States v. Freeman, 208 F.3d 332 (1st Cir. 2000) (holding that a mere request to not talk to the police violated 18 U.S.C. § 1512 since a reasonable jury could infer that the defendant knew the employee would be threatened by such words, given his status as a police officer and her first-hand knowledge of his erratic personality and violent temper).

201. Sanctions Board Decision No. 47, ¶ 47 (2012).

202. *See* Anne-Marie Leroy & Frank Fariello, *The World Bank Group Sanctions Process and Its Recent Reforms*, A WORLD BANK STUDY (The World Bank, D.C.) 2012 at 2-3 ("The Bank Group['s] . . . quasi-judicial administrative process for sanctioning firms . . . is intended to provide the accused party . . . with an appropriate level of due process before it is decided whether the Respondent will be sanctioned and, if so, which sanction will be imposed.").

203. *See* Laurence Boisson de Chazournes & Edouard Fromageau, *Balancing the Scales: The World Bank Sanctions Process and Access to Remedies*, 23 EUR. J. INT. LAW 963, 966 (2012) (discussing the due process considerations at play in the sanctions process).

204. The World Bank Sanctions Board, Sanctions Board Decision No. 63, ¶ 103 (2014).

ing the course of an INT audit,[205] and there is uncertainty about whether a respondent may attempt to hold INT to the strict confines of the Bank's contractual audit rights without committing an Obstructive Practice. With this lack of certainty and no apparent mechanism by which to seek a neutral decision, an entity facing a broad, potentially overreaching INT request may have two unattractive options: (1) object to a request and face potential sanctions for obstruction or (2) comply with a request and risk potentially damning information being discovered. Importantly, such information could be unrelated to a Bank project and still put a firm in legal jeopardy. As a matter of policy, the Bank shares information with national authorities.[206] Therefore, information could be discovered by INT during an over-broad inspection that will, in turn, be handed over to national authorities that otherwise would lack probable cause. This highly plausible scenario underscores the due process challenges this issue poses.

Other than relying on INT to work through these issues in good faith, there currently is little opportunity for a party to object to a request or to seek an impartial determination of whether the Bank is entitled to certain information. In the U.S. law enforcement context, information obtained where the government lacks probable cause might be excluded from evidence.[207] In contrast, "[f]ormal rules of evidence shall not apply" in Sanctions Board proceedings.[208] Rather, "[a]ny kind of evidence may form the basis of arguments presented in a sanctions proceeding and conclusions reached by the [SDO] or the Sanctions Board," including hearsay evidence—and, potentially, improperly obtained evidence—with the SDO and Sanctions Board having discretion "to determine the relevance, materiality, weight, and sufficiency of all evidence offered."[209] One potential solution would be for the SDO or Sanctions Board to accord no weight to improperly obtained evidence, so as not to reward investigative overreach. In a related situation, for example, Sanctions Board Decision Nos. 60 and 72 caution that "[t]he use of intimidation [by INT] is impermissible" and that "[a]ny suggestion that an interviewee's request to consult a lawyer in itself demonstrates non-cooperation . . . may also raise concern as to the fairness of the investigation."[210] Another possible solution would be to enable a pu-

205. *See* The World Bank Sanctions Board, Sanctions Board Decision No. 63 (2014) and Sanctions Board Decision No. 71 (2014) (detailing an instance of the Bank's auditing rights being contested).

206. *See FY 15 Annual Update* at 52-53 (providing information to national authorities).

207. *See* Mapp v. Ohio, 367 U.S. 643 (1961) (providing for an exclusionary rule in evidence).

208. World Bank Sanctions Procedures, art. VII, §7.01 (Apr. 15, 2012); *accord* The World Bank Sanctions Board, Sanctions Board Decision No. 59, ¶ 8 (2013).

209. World Bank Sanctions Procedures, art. VII, §7.01 (Apr. 15, 2012).

210. The World Bank Sanctions Board, Sanctions Board Decision No. 72, (Sanctions

tative respondent to contest the scope of an INT audit to the Sanctions Board while it is ongoing, somewhat like a motion to suppress evidence[211] or even a *Bivens* action in U.S. federal courts.[212]

A further due process tension arises from the fact that the Bank does not require probable cause to exercise its audit right. Unlike a prosecuting entity to whom the Bank very well could refer the investigation, INT can leverage the provisions common to Bank-funded contracts at will to conduct invasive investigations. In addition, corporate deferred prosecution agreements resolving FCPA charges routinely require companies to "cooperate fully with . . . the Multilateral Development Banks ('MDBs'), in any investigation of the Company."[213]

B. *Fraudulent Practice*

Nearly 75% of Sanctions Board decisions involve allegations of a Fraudulent Practice.[214] Its definition and elements can vary depending upon which guidelines are incorporated in the bidding or procurement documents governing the project at issue. The January 1997 Consultant Guidelines, for instance, define a Fraudulent Practice as a "misrepresentation of facts . . . in order to influence a selection process or the execution of a contract . . . to the detriment of the Borrower."[215] The May 2004 Procurement Guidelines, by contrast, do not mention detriment to the borrower and define a Fraudulent Practice to include, in addition to misrepresentations, any "*omission* of facts in order to influence a procurement process or the execution of a contract."[216] The World Bank's Legal Vice Presidency has since opined that pre-2004 definitions of a Fraudulent Practice were never intended to exclude omissions; rather, the 2004 definition clarified "existing understandings of the sanctionable practice, not expansions of their scope."[217]

Case No. 211), ¶ 34 (2014) (citing Sanctions Board Decision No. 60, ¶ 60 (2013)).

211. In U.S. federal courts and some state courts, criminal defendants can conditionally plead guilty while reserving the right to challenge the admissibility of certain inculpatory evidence. *See, e.g.*, United States v. Goyer, 567 F. Appx. 414 (6th Cir. 2014) (providing an example of conditional pleadings).

212. A *Bivens* action is initiated when a person sues federal officers for violating his or her constitutional rights.

213. Deferred Prosecution Agreement ¶ 5, United States v. Weatherford Int'l Ltd. (S.D. Tex. Nov. 26, 2013).

214. *Upholding the Rule of Law in the Fights Against Corruption and Poverty*, SANCTIONS BOARD LAW DIGEST, (The World Bank, D.C.) Dec. 2011 at 22.

215. The World Bank Sanctions Board, Sanctions Board Decision No. 53, ¶ 29 (2012).

216. The World Bank Sanctions Board, Sanctions Board Decision No. 46, ¶ 11 (2012).

217. Anne-Marie Leroy, *Advisory Opinion on Certain Issues Arising in Connection with Recent Sanctions Cases, Opinion No. 2010/1*, LEGAL VICE PRESIDENCY UNIT OF THE WORLD

In October 2006, the World Bank added an explicit mens rea requirement, defining a Fraudulent Practice as "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."[218] The Sanctions Board has read "knowingly or recklessly" into pre-October 2006 definitions, concluding that the "October 2006 incorporation of the 'knowing or reckless' standard was intended only to make explicit the pre-existing standard for mens rea, not to articulate a new limitation."[219] The Bank again updated the Procurement and Consultant Guidelines in July 2014, but did not alter the definition of Fraudulent Practice. [220]

The required objective or purpose of the misrepresentations or omissions also can vary depending upon which definition applies. The October 2006 Procurement Guidelines require a misrepresentation or omission be made in order to "obtain a financial or other benefit or to avoid an obligation," whereas the May 2004 Procurement Guidelines look to whether a misrepresentation was intended to "influence" the selection or execution of a contract.[221] The October 2006 definition appears to expand the range of conduct that could qualify as fraudulent, as the subject conduct is no longer tethered to that which is intended to influence the selection of execution of a contract. In Sanctions Board Decision No. 74, the respondent was subject to both definitions because of its involvement in one project in Ethiopia, which was governed by the May 2004 Procurement Guidelines, and two others in Tanzania and Uganda, both of which were governed by the October 2006 Procurement Guidelines.[222] Combining the definitions, the Sanctions Board noted that a Fraudulent Practice required INT to show "(i)[] misrepresentations or omissions of facts (ii) that were knowing or reckless (iii) in order to influence the procurement process or the execution of a contract (May 2004 Procurement Guidelines), or in order to obtain a financial or other benefit or avoid an obligation (October 2006 Procurement

BANK, ¶ 124 (Nov. 15, 2010).

218. Guidelines: Procurement Under IBRD Loans and IDA Credits ¶ 1.14(a)(ii) (May 2004 rev. Oct. 2006) (emphasis added).

219. Sanctions Board Decision No. 83, ¶ 14 (2015); Sanctions Board Decision No. 71, ¶ 12 (2014).

220. Guidelines: Selection and Employment of Consultants under IBRD Loans and IDA Credits & Grants by World Bank Borrowers (The World Bank, D.C.) Jan. 2011 rev. July 2014; Guidelines: Procurement of Goods, Works, and Non-Consulting Services Under IBRD Loans and IDA Credits & Grants by World Bank Borrowers (The World Bank, D.C.) Jan. 2011 rev. July 2014.

221. Guidelines: Procurement Under IBRD Loans and IDA Credits ¶ 1.14(a)(ii) (May 2004); Guidelines: Procurement Under IBRD Loans and IDA Credits ¶ 1.14(a)(ii) (May 2004 rev. Oct. 1, 2006).

222. The World Bank Sanctions Board, Sanctions Board Decision No. 74, ¶ 25 (2014).

Guidelines)."[223] The Sanctions Board ultimately ruled in INT's favor, concluding that the misrepresentation related to the Ethiopia project "was intended to 'influence a procurement process'" and the misrepresentations related to the projects in Uganda and Tanzania "were made to 'obtain a financial or other benefit.'"[224]

1. Omission or Misrepresentation

The Bank's Guidelines do not define what constitutes a "misrepresentation" or "omission." Typical misrepresentations considered in Sanctions Board decisions involve false bid information (e.g., fabricated performance certificates or forged signatures) or false documents used during contract execution (e.g., bogus invoices for reimbursement).[225] In addition to affirmative misrepresentations, the Sanctions Board has also found that a respondent's failure to disclose a conflict of interest constituted a misrepresentation or omission of facts.[226]

In determining whether a misrepresentation has occurred, the Sanctions Board has relied on a variety of evidence.[227] In several decisions, the Sanctions Board has found sufficient evidence of misrepresentations based primarily on admissions contained in responses to show-cause letters or at Sanctions Board hearings.[228] The Sanctions Board also has considered statements from INT interviews to varying degrees. Standardized state-

223. *Id.*

224. Sanctions Board Decision No. 74 ¶ 29 (2014).

225. *See* World Bank Group, *Upholding the Rule of Law in the Fights Against Corruption and Poverty*, SANCTIONS BOARD L. DIGEST, at 25-32 (Dec. 2011) (providing case summaries). Other examples of misrepresentation include forged advance payment guarantees, *id.* at 25; forged bid securities, *id.* at 25; falsified curriculum vitae, *id.* at 27; audit report of another entity in place of its own, *id.* at 28; forged financial report, *id.* at 28; forged manufacturer authorizations, *id.* at 30; and statements regarding the progress of contract execution, *id.* at 31.

226. Sanctions Board Decision No. 65 (2014). The request for proposal at issue in Sanctions Board Decision No. 65 required bidders to disclose any existing conflicts of interest. The Sanctions Board relied on the definition of "conflict of interest" found in the May 2004 Consultant Guidelines. Because a conflict of interest existed and the Respondent did not disclose it, the Sanctions Board found that the Respondent's proposal contained a misrepresentation or omission of facts. *Id.* ¶ 49; *see also* Sanctions Board Decision No. 83, ¶ 50 (Sept. 30, 2015) (stating that failure to disclose an agency relationship as required constituted a misrepresentation).

227. *See, e.g.*, Sanctions Board Decision No. 46 ¶ 23 (2012) (representing one example); The World Bank Sanctions Board, Sanctions Board Decision No. 48 ¶ 23 (2012).

228. *See* Sanctions Board Decision No. 48 ¶ 23 & n.7 (2012) (citing Sanctions Board Decision No. 2, ¶ 4 (2008) and Sanctions Board Decision No. 6, ¶ 6 (2009)); Sanctions Board Decision No. 52, ¶ 21 (2012); Sanctions Board Decision No. 53, ¶ 31 (2012); The World Bank Sanctions Board, Sanctions Board Decision No. 75, ¶ 20 & n.8 (2014).

ments on pre-printed Bank letterhead have been found less compelling than personal attestations in the witness's own words.[229] Moreover, summaries prepared by INT, especially those which lack the interviewee's signature or contain an alleged admission of misconduct, carry less weight than verbatim transcripts.[230]

In Sanctions Board Decision No. 59, one of only two publicly available decisions in which the Sanctions Board found insufficient evidence of a misrepresentation, the respondent submitted a bid to construct an underwater sewage outfall in Colombia.[231] The bidding documents required each bidder to provide information about its experience as a principal contractor of similar projects.[232] The respondent provided a list of previous projects and submitted a performance certificate purportedly signed by a representative involved in one of those projects.[233] INT alleged that the certificate contained false statements and a false signature, pointing to a seemingly large amount of evidence, including facial inconsistencies on the certificate, the purported signatory's denial of having signed the certificate, and other testimonial evidence that the respondent was not in fact the principal contractor for the listed project.[234] Although the purported signatory's denial was transcribed by INT, the Sanctions Board noted several concerns that undermined its weight: the purported signatory refused to provide a sample signature for comparison; would not reaffirm in a signed, written statement his testimony to INT; and refused to answer repeated questions regarding whether he would normally sign such documents.[235]

The Sanctions Board also considered whether there was evidence of misrepresentations on the face of the bid. Here, too, the evidence was lacking.[236] Without appropriate comparators, the Sanctions Board rejected supposed discrepancies in the certificate's letterhead, font, and form.[237] The Sanctions Board also rejected INT's contention that the certificate falsely described the respondent as "*the* main contractor" for a listed project when,

229. Sanctions Board Decision No. 47, ¶ 24 (2012).

230. *Id.*; *see also* Sanctions Board Decision No. 64, ¶¶ 33–34 (2014) (finding that the INT's record of its interview with the Respondent should be given limited weight because the record was not created with adequate notice of the legal repercussions of the Respondent's statements).

231. Sanctions Board Decision No. 59 ¶¶ 5-7 (2013); The World Sanctions Board, Sanctions Board Decision No. 73, (2014), discussed below, is the other publicly available decision in which the Sanctions Board found insufficient evidence of a misrepresentation as to one of the respondents.

232. Sanctions Board Decision No. 59, ¶ 6 (2013).

233. *Id.* ¶ 7.

234. *Id.* ¶ 12.

235. *Id.* ¶¶ 21-22.

236. *Id.* ¶ 24.

237. *Id.* ¶ 24.

in fact, the certificate referred to the respondent's role as "*a* Main Contractor."[238] In doing so, the Sanctions Board noted that INT relied on stale witness testimony characterizing the work the respondent actually performed as opposed to, for example, contemporaneous documents demonstrating the respondent's actual role in the listed projects.[239] The Sanctions Board therefore terminated the proceedings and lifted the temporary suspension that had been imposed by the SDO.[240]

The Sanctions Board has addressed the concept of a culpable act or omission consistently with its flexible approach to consider all forms of probative evidence. Where testimony has been incomplete or incredible, the Sanctions Board has considered "whether the record as a whole may contain sufficient additional evidence to corroborate or complement the witness's statements."[241] But as these decisions show, this does not mean that the Sanctions Board necessarily accepts any kind of evidence without scrutiny.

2. Knowingly or Recklessly

There often is little debate about whether, as a factual matter, a misrepresentation or omission occurred. The more common focus is whether the misrepresentation or omission was done knowingly or recklessly.[242] Nevertheless, the Sanctions Board has yet to find in a publicly available decision that a misrepresentation occurred without knowledge or recklessness. The Anti-Corruption Guidelines include an explanatory footnote providing 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."[243] The Sanctions Procedures allow the Sanctions Board to infer knowledge from circumstantial evidence.[244] As the Legal Vice Presidency has explained, this flexible approach, consistent with the administrative nature of Sanctions Board pro-

238. *Id.* ¶¶ 26-27.
239. *Id.* ¶ 27.
240. *Id.* ¶ 30.
241. *Id.* ¶ 24.
242. *See, e.g.*, Sanctions Board Decision No. 83, ¶ 51 (2015) (using the "knowingly" standard to find that the First Predecessor Firm failed to disclose its relationship with the Marketing Consultant); Sanctions Board Decision No. 52, ¶ 23 (2012) (summarizing the parties' arguments for and against the Respondent possessing the requisite knowledge and recklessness to establish a misrepresentation of facts).
243. World Bank Anti-Corruption Guidelines, at 3 n.13 (Oct. 15, 2006 rev. Jan. 2011).
244. World Bank Sanctions Procedures, art. VII, § 7.01 (Apr. 15, 2012) (noting that 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").

ceedings, is designed to avoid unreasonable evidentiary burdens of proving scienter.[245]

Sanctions Board decisions frequently give brief attention to the issue of knowledge, as this concept is self-explanatory and may be substantiated through the respondent's own contemporaneous statements or admissions made during sanctions proceedings.[246] In "indirect fraud" cases, however, where the respondent relies on or conveys information supplied by a third party (for example, when a primary contractor submits a bid that contains false information from a subcontractor), establishing the mens rea required for a Fraudulent Practice is more complex. Here, the Sanctions Board has turned to the lesser standard of recklessness, which requires INT to show that the "respondent was aware of, but disregarded, a substantial risk – such as harm to the integrity of the Bank's procurement process due to false or misleading bid documents."[247] Alternatively, if evidence fails to show subjective awareness of a risk, the Sanctions Board looks to whether the respondent "should have known of the substantial risk presented" by applying a "due care" standard—i.e., whether the respondent exercised "the degree of care the proverbial 'reasonable person' would exercise under the circumstances"—as informed by industry standards, customary or firm-specific business policies, the World Bank's procurement policies, and the underlying bidding documents.[248] As discussed below, this approach veers from the commonly understood definition of recklessness under Anglo-American jurisprudence and is more akin to simple negligence.[249]

---

245. Anne-Marie Leroy, *supra* note 217, at ¶¶ 101, 104.

246. *See, e.g*., Sanctions Board Decision No. 46, ¶ 24 (2012) (stating that the record included an admission that the individual who forged a signature admitted that "he was not authorized" to sign the documents); Sanctions Board Decision No. 48, ¶ 24 (2012) (holding that a deliberate attempt to mislead is sufficient to establish fraudulent practices and that a showing of actually being misled is unnecessary). *See also* Sanctions Board Decision No. 83, ¶ 51 (2015) (finding that a failure to disclose an agency agreement was done knowingly); Sanctions Board Decision No. 75, ¶¶ 21–24 (Nov. 6, 2014) (finding that an inauthentic manufacturer's authorization was submitted knowingly, based on inconsistent and incredible explanations); Sanctions Board Decision No. 74, ¶ 28 (2014) (relying on an admission to establish knowledge); Sanctions Board Decision No. 72, ¶ 40 (2014) (same).

247. The World Sanctions Board, Sanctions Board Decision No. 51 (Sanctions Case No. 145& 146), ¶ 33 (2012); Sanctions Board Decision No. 52, ¶ 25 (2012); *accord* The World Bank Sanctions Board, Sanctions Board Decision No. 82 (Sanctions Case No. 335), ¶ 31 (2015) (stating that when circumstantial evidence indicates that one should have been aware of a substantial risk, the due care standard of a reasonable person applies).

248. Sanctions Board Decision No. 82, *supra* note 247, ¶ 31; Sanctions Board Decision No. 51, ¶ 33 (2012).

249. *See, e.g*., Safeco Ins. Co. of Am. v. Burr, 127 S. Ct. 2201, 2215 (2007) ("While the term recklessness is not self-defining, the common law has generally understood it in the sphere of civil liability as conduct violating an objective standard: action entailing an unjustifiably high risk of harm that is either known or so obvious that it should be known." (inter-

It also differs from the analysis of the Legal Vice Presidency. In an advisory opinion from 2010, the Legal Vice Presidency clarified the standard for recklessness, among other legal issues.[250] According to the Legal Vice Presidency, due care "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."[251] The Legal Vice Presidency recommended that the degree of due care should correspond to the (1) likelihood that false information is being conveyed and (2) potential severity of harm flowing therefrom.[252] If either factor increases or decreases, so too does the standard of due care.[253] The severity of harm, according to the Legal Vice Presidency, can be measured in terms of internal impact on the integrity of the procurement process (i.e., to what extent is the information material to the overall bid), as well as collateral consequences (i.e., whether falsification potentially threatens life or severely impacts the economy).[254] A cost/benefit analysis was also recommended: "There may be cases where a particular risk is justifiable in light of the potential benefits to be gained . . . ."[255] Likewise, "taking a particular risk may be justifiable in light of the exorbitant cost of guarding against it."[256]

The standard of due care serves as a baseline against which to judge the respondent's conduct.[257] According to the Legal Vice Presidency, "recklessness requires a deviation [from due care] more egregious than either simple and even 'ordinary' gross negligence."[258] In other words, "[i]t is not enough to show merely that the reasonable person would have acted differently in light of the risks involved, but [it must be shown] that the Respondent's conduct represents a shocking indifference to those risks."[259]

Although the Legal Vice Presidency's advisory opinion does not offer specific examples showing the degree of deviation from the common due care standard that would give rise to a Fraudulent Practice, it does provide that merely signing or including false or misleading information in bid ma-

---

nal quotation marks omitted)).

250. Anne-Marie Leroy, *supra* note 217, at ¶ 1.
251. *Id.* ¶ 106.
252. *Id.* ¶ 113.
253. *Id.* ¶ 107.
254. *Id.* ¶ 107.
255. *Id.* ¶ 108.
256. *Id.* ¶ 108.
257. *Id.* ¶ 106.
258. *Id.* ¶ 102.
259. *Id.* ¶ 113.

terials would not, by itself, suffice.[260] This is consistent with the Anti-Corruption Guidelines, which state that inaccurate information caused by "simple negligence" does not constitute recklessness.[261]

To be clear, the Legal Vice Presidency offers its standard for due care only as a recommendation. And it acknowledges that the standard ideally would be derived from the Bank's procurement policies and the bidding documents governing the Bank-funded project.[262] It also acknowledges, however, that the Bank's policies do not provide a specific standard of care for preparing bids.[263] Consequently, it recommends "alternative approaches to the development of a Bank-specific concept of an appropriate reasonable standard of care in the context of Bank operations."[264]

Its first alternative approach is to examine the bidding documents to see if they specify a standard of care.[265] Its second alternative approach is to consider relevant industry standards and customary or firm-specific business policies, procedures, or practices.[266] Finally, the Legal Vice Presidency proposes that, when the first two approaches do not provide guidance, "standards be articulated over time through jurisprudence."[267] The Legal Vice Presidency describes this third approach as "a kind of 'common law' approach to the development of Bank law in this area,"[268] which requires the SDO and Sanctions Board to "exercise discretion in deciding such cases based on the individual facts of each case."[269]

Although the Bank has repeatedly stated that negligence is not enough to meet the mens rea required for a Fraudulent Practice, the Sanctions Board's standard is similar to negligence—i.e., the failure to abide by the standards of a reasonable person under the same circumstances—rather than explicitly requiring the kind of "shocking" deviation from the standard of care suggested by the Legal Vice Presidency. For example, in Sanctions

260. *Id.* ¶ 115.
261. World Bank Anti-Corruption Guidelines, *supra* note 243, at ¶ 7 n.10.
262. Anne-Marie Leroy, *supra* note 217, at ¶ 111.
263. *Id.*
264. *Id.*
265. *Id.*
266. *Id.*
267. *Id.*
268. *Id.* The Sanctions Board recognizes stare decisis; it routinely cites the precedents set by its prior decisions. *See, e.g.*, Sanctions Board Decision No. 83, ¶ 53 (2015) ("[T]he Sanctions Board will consider, consistent with past precedent, whether the First Predecessor Firm (i) had an actual or potential conflict of interest, (ii) that was subject to a disclosure obligation, and (iii) disclosed any such conflict of interest."); Sanctions Board Decision No. 81, ¶ 29 (2015) (Sanctions Board pronouncing that its interpretation of the May 2004 Consultant Guidelines "would be consistent with the Sanctions Board's precedent and the sanctions framework").
269. Anne-Marie Leroy, *supra* note 217, at ¶ 111.

Board Decision No. 82, INT alleged that the respondent, an accounting firm, recklessly appended inaccurate data sheets to audits report that it was selected to provide in connection with a Bank-funded project.[270] The respondent countered, among other things, that the information was preliminary and that local staff assigned to the audited project may have contributed to the alleged inaccuracies.[271] The Sanctions Board determined that the respondent was on notice of a substantial risk of inaccuracies because of various difficulties in obtaining information, including the fact that some of the information could not have been verified until after the audit reports were submitted.[272] The Sanctions Board applied a standard of care informed by the terms of the relevant contracts.[273] Because the information included on the data sheets appeared to be critical to the contracts, and because "the record d[id] not reflect that the Respondent took adequate steps to verify the statements and key findings" before submission, the Sanctions Board found that the respondent's failure to confirm or correct the data sheets was reckless.[274] Thus, although the facts presented may have actually suggested reckless conduct, the due care standard employed by the Sanctions Board appeared more akin to negligence.

Further, in Sanctions Board Decision No. 79, INT alleged that the respondent acted knowingly or recklessly in submitting bids that contained a falsified work experience certificate.[275] The respondent admitted that the certificate was falsified, but attributed the misconduct to a rogue employee project manager.[276] The Sanctions Board concluded that the record did not support a finding that the respondent acted knowingly, but considered whether the respondent acted recklessly in submitting the false certificate.[277] INT argued that the respondent must have been aware of the risk that the work experience certificate was false because it contained four "major discrepancies," including identifying incorrectly the name, number, and value of the cited contract.[278] In determining whether the respondent should have been aware of a substantial risk that the document was false, the Sanctions Board considered "whether any indicia of falsity were apparent on the face of the document and whether a responsible individual made any effort to supervise the bid preparation process," as well as "whether the record shows that the respondent took precautions that were commensurate

270. Sanctions Board Decision No. 82 (Sanctions Case No. 335), ¶¶ 7, 8, 15 (2015).
271. *Id.* ¶¶ 16, 21.
272. *Id.* ¶ 32.
273. *Id.* ¶ 33.
274. *Id.* ¶¶ 33-34.
275. The World Bank Sanctions Board, Sanctions Board Decision No. 79, ¶ 6 (2015).
276. *Id.* at ¶ 12 (2015).
277. *Id.* at ¶¶ 24-25 (2015).
278. *Id.* at ¶ 25 (2015).

with the risk involved."[279] The Sanctions Board determined that the respondent's employees should have been aware of a substantial risk that the certificate was false, because "basic discrepancies" on the document "should have been apparent . . . at the time of the Bids' preparation."[280] In addition, the Sanctions Board faulted the employees who signed the bids for not examining the certificate for authenticity.[281] Because of the reasonable-person, due-care standard employed by the Board, it is difficult to gauge whether the respondent's conduct actually constituted shocking indifference to a substantial risk rather than, for example, simple or even gross negligence.[282]

3. Analogues Under U.S. Law

One established area of law in which the Sanctions Board can benefit from close examination as it further develops the Bank's jurisprudence is the U.S. common law of fraud. Such an approach may help to root the Sanctions Board's jurisprudence more firmly in traditional concepts of recklessness, as suggested by the Legal Vice Presidency. The common law elements of civil fraud in the United States can differ by state, but in most jurisdictions one of the elements is the "defendant's knowledge that the statement was false."[283] Some states do not require direct knowledge but instead require a showing of recklessness.

Those U.S. states that require recklessness, however, seem to interpret the standard as requiring further deviation from the standard of care than that employed by the Sanctions Board. For example, both New York and Texas "permit a showing of scienter by recklessness only when the plaintiff alleges facts showing that the speaker made a statement as a definitive assertion *knowing* he was without knowledge as to the truth."[284] In contrast, as discussed above, the Sanctions Board has found recklessness where the respondent "should have known" that a document "could be" forged.[285]

The Legal Vice Presidency's 2010 advisory opinion explored U.S. laws for which "recklessness" and "knowledge" have been applied as an

279. *Id*. at ¶ 27 (2015).
280. *Id*. at ¶ 28 (2015).
281. *Id*. at ¶¶ 28-29 (2015).
282. *See also* Sanctions Board Decision No. 77, ¶ 33 (2015) (applying the common "due care" standard).
283. Tricontinental Indus. v. PricewaterhouseCoopers, LLP, 475 F.3d 824, 841 (7th Cir. 2007) (citing Connick v. Suzuki Motor Co., 174 Ill. 2d 482 (Ill. 1996)).
284. Newby v. Enron Corp. (*In re* Enron Corp. Secs., Derivative & ERISA Litig.), 761 F. Supp. 2d 504, 536 (S.D. Tex. 2011) (emphasis added).
285. Sanctions Board Decision No. 52, ¶ 24 (2012).

element of fraud.[286] In particular, the Legal Vice Presidency considered Rule 10b-5 of the Securities Exchange Act, the books-and-records provision of the FCPA, and the False Claims Act. Rule 10b-5 of the Securities Exchange Act does not specify a mens rea, but courts have interpreted it to include a "knowing or reckless" standard.[287] Courts construing Rule 10b-5 have defined "reckless conduct" as "a highly unreasonable [act or] omission, involving . . . 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."[288] Likewise, under the books-and-records provision of the FCPA, issuers may be held criminally liable for knowingly falsifying books, records, or accounts.[289] Similarly, the False Claims Act holds parties liable for knowingly presenting a false claim for payment to the U.S. government, where "knowingly" includes "deliberate ignorance of the truth or falsity of the information" or "acts in reckless disregard of the truth or falsity of the information."[290] As the Legal Vice Presidency noted in its 2010 advisory opinion, U.S. courts have interpreted this language to include "failures to explore a credible concern about billing or other records, 'seriously deficient' record-keeping systems or failures to inquire that rise to the level of 'deliberate ignorance.'"[291] Reference to these developed areas of law that address the concept of recklessness could aid the Sanctions Board in sharpening its jurisprudence.

286. Anne-Marie Leroy, *Advisory Opinion on Certain Issues Arising in Connection with Recent Sanctions Cases, Opinion No. 2010/1*, LEGAL VICE PRESIDENCY UNIT OF THE WORLD BANK, ¶ 99 (Nov. 15, 2010).

287. *Id.* at ¶ 99 (citing Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193-94 (1976)).

288. Hollinger v. Titan Capital Corp., 914 F.2d 1564, 1569 (9th Cir. 1990) (emphasis added); Sundstrand Corp. v. Sun Chemical Corp., 553 F.2d 1033, 1045 (7th Cir. 1977) (emphasis added and internal citation omitted).

289. United States v. Reyes, 577 F.3d 1069, 1074 (9th Cir. 2009). The Legal Vice Presidency's advisory opinion does not appear to have considered civil liability under the FCPA's books-and-records provision, which requires issuers to keep books and records with "such level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs." 15 U.S.C. § 78m(b)(7). The U.S. Congress legislated that an organization must act with specific intent to be held criminally liable. Most courts have construed the accounting provisions to have no scienter requirement when enforced civilly against issuers. F. Joseph Warin, Michael S. Diamant & Elizabeth Goergen Silver, *The U.S. Foreign Corrupt Practices Act: Enforcement and Compliance*, at A-23, 285 SECURITIES PRACTICE PORTFOLIO SERIES (BNA) (2014).

290. 31 U.S.C § 3729 (b)(1)(A)(ii), (iii).

291. Anne-Marie Leroy, *Advisory Opinion on Certain Issues Arising in Connection with Recent Sanctions Cases, Opinion No. 2010/1*, LEGAL VICE PRESIDENCY UNIT OF THE WORLD BANK, ¶ 99 (Nov. 15, 2010). (citing Miller v. United States, 550 F.2d 17, 23 (Ct. Cl. 1997) and United States v. Krizek, 111 F.3d 934 (D.C. Cir. 1997)).

4. To Obtain a Financial or Other Benefit or Avoid an Obligation

The January 2011 Procurement Guidelines (as revised in July 2014) require the misrepresentation to be motivated by financial gain, some other benefit, or avoidance of an obligation.[292] Under the earlier definitions of a Fraudulent Practice, INT need only show that the misrepresentation occurred in order to influence the procurement process or execution of a contract.[293] Whichever standard applies, the threshold to establish this element is quite low. If the Sanctions Board concludes it is more likely than not that a knowing or reckless misrepresentation occurred, the act of submitting the falsification—whether for a tender or during contract execution—generally suffices to establish a motive either to obtain a financial gain or to influence the procurement process or execution of a contract. As the Sanctions Board stated in Sanctions Board Decision No. 83, the Board has "found sufficient evidence of intent to influence the procurement process where the record showed that misrepresentations had been made in response to a tender requirement" and has found "evidence of intent to influence the execution of a contract where a misrepresentation was material to a respondent's remuneration."[294] For example, the Sanctions Board has found that the submission of a forged certificate was aimed to influence the procurement process because the tender required such a certificate and the respondent likely submitted the forged certificate to win the bid.[295] Similarly, in a case where a general manager signed and submitted a letter of commitment under a consultant's name without permission, the Sanctions Board inferred motive to influence the bidding process because the request for proposal required the certificate and because the tendering entity "made clear in negotiations it saw the Consultant's particular involvement as im-

292. Guidelines: Procurement of Goods, Works, and Non-Consulting Services under IBRD Loans and IDA Credits & Grants by World Bank Borrowers ¶ 1.16(a)(ii) (Jan. 2011 rev. July 2014).

293. *See, e.g.*, Sanctions Board Decision No. 60, ¶ 101 (2013) (finding all elements of fraud because it was more likely than not misrepresentation occurred to influence the procurement process and/or to obtain a financial benefit); Sanctions Board Decision No. 53, ¶ 35 (2012) (finding misrepresentations in the invoices and supporting documentation were made in order to influence the execution of a contract).

294. Sanctions Board Decision No. 83, ¶¶ 52, 63 & nn.10, 13 (2015) (citing Sanctions Board Decision No. 74, ¶ 29 (2014) and Sanctions Board Decision No. 56, ¶ 47 (2013)).

295. The World Bank Sanctions Board, Sanctions Board Decision No. 54, ¶ 28 (2012); *see also* Sanctions Board Decision No. 75, ¶ 25 (2014) ("The Sanctions Board has previously found that, where the record showed that a respondent's submission of forged or misleading documents was made in response to a bid requirement, the respondent's use of the documents was more likely than not intended to show the respondent's qualifications and thereby help the respondent win the tender and benefit from such award.").

portant."[296] In contrast, in Sanctions Board Decision No. 81, the Sanctions Board concluded, over a dissent, that meeting minutes that incorrectly represented a proposed team leader's availability for the contract at issue were not intended to influence the selection process in light of evidence that the respondent had previously communicated the team leader's unavailability to the implementing agency.[297]

With respect to motive of financial gain, which was first set forth in the 2006 Procurement Guidelines, trying to obtain a contract appears to be considered synonymous with seeking to obtain a financial benefit.[298] In fact, the Sanctions Board has rejected arguments that the respondent did not need to win a tender and therefore was not motivated by financial gain, observing that "[e]ven if Respondent had other business priorities, it must have stood to obtain some benefit from being awarded the Tender; otherwise it would not have authorized the bid in the first place."[299] Notably, nowhere in the publicly available Sanctions Board misrepresentation decisions has the Sanctions Board ever concluded that motive of financial gain did not exist where there was an attempt to influence the procurement process or contract execution. For all practical purposes, a knowing or reckless submission of a misrepresentation in the course of a Bank-funded project appears to satisfy this element.

5. Detriment to the Borrower

Some definitions of a Fraudulent Practice require detriment to the borrower. The Sanctions Board defines "detriment to the Borrower" broadly to include "not only tangible or quantifiable harms, but also intangible harms."[300] Again, the threshold here is quite low. "Detriment to the borrower" generally is established so long as the misrepresentation could conceivably harm the borrower, even if the respondent ultimately completed the contract as specified. This is because the Sanctions Board regards a fraudulent submission as inherently detrimental; misrepresentations distort the selection process, undermine a fair and efficient procurement process, and waste the borrower's time and resources on reviewing invalid bids.[301]

296. Sanctions Board Decision No. 51, ¶ 40 (2012).

297. Sanctions Board Decision No. 81, ¶ 43 (2015).

298. *See, e.g.*, Sanctions Board Decision No. 60, ¶ 101 (2013) (listing a contract award as an example of a financial benefit); Sanctions Board Decision No. 48, ¶ 26 (2012) (finding the respondent had submitted fraudulent documents to be awarded the tender and obtain some financial benefit as a result).

299. Sanctions Board Decision No. 48, ¶ 26 (2012).

300. Sanctions Board Decision No. 47, ¶ 29 (2012).

301. *Id.* (citing Sanctions Board Decision No. 41 (2010)); *see also* Sanctions Board Decision No. 73, ¶ 34 (2014) ("Detriment to a borrowing country may include intangible as

In cases where the misrepresentation led to obtaining a Bank-financed contract, inherent harm results simply by contracting with "a bidder willing to engage in unethical behavior."[302] No publicly available Sanctions Board decision has found that a knowing or reckless misrepresentation failed to cause (even intangible) harm to the borrower. Again, it appears from the decisions issued to date that knowing or reckless misrepresentations are considered to be inherently prejudicial. Perhaps because it was rendered redundant, this element was removed from the Guidelines in 2004 and has not reappeared in subsequent versions.

6. Respondeat Superior

The Sanctions Board sometimes must determine whether an employer is liable for the fraudulent acts of its employees under the doctrine of respondeat superior. In these instances, the Sanctions Board considers "whether the employees acted within the course and scope of their employment, and were motivated, at least in part, by the intent of serving their employer."[303] Where a respondent company argues that the misconduct was the result of a "rogue employee," the Sanctions Board will assess "evidence presented regarding the scope and adequacy of the respondent entity's controls and supervision at the time of the misconduct."[304] The Sanctions Board has declined to require proof that an entity expressly condoned or directed the misconduct in question, and has instead asked "whether the employee's misrepresentations were . . . 'a mode, albeit an improper mode' of carrying out his duties."[305]

For example, in Sanctions Board Decision No. 48, the deputy general manager of the respondent's branch office forged a bid document.[306] As a defense, the respondent argued that the deputy general manager engaged in the misconduct without its consent, authorization, or knowledge.[307] The Sanctions Board, however, did not endorse this "rogue employee" theory,

well as tangible or quantifiable harms . . . ."); Sanctions Board Decision No. 69, ¶ 24 (2014) (same).

302. Sanctions Board Decision No. 47, ¶ 29 (2012) (citing Sanctions Board Decision No. 41 (2010)).

303. Sanctions Board Decision No. 83, ¶ 69 (2015); Sanctions Board Decision No. 73, ¶ 35 (2014).

304. Sanctions Board Decision No. 83, ¶ 69 (2015); *see also* Sanctions Board Decision No. 48, ¶ 28 (2012) (citing Sanctions Board Decision No. 37, ¶ 42 (2010)) (finding an employer's failure to implement any controls enough to hold it responsible for the actions of its employees and finding no evidence of any defenses such as a "rogue employee").

305. Sanctions Board Decision No. 48, ¶ 29 (2012).

306. *Id.* at ¶ 8 (2012).

307. *Id.* at ¶ 16(ii) (2012).

holding the respondent liable because it did not have controls in place to prevent or detect the type of misconduct that occurred, nor did it adequately supervise the employee,[308] despite what the Sanctions Board viewed as his "relative inexperience and the challenges of the operating environment in which Respondent placed him."[309] Responsibility for preparing the bidding documents was left entirely to the branch office, which had no arrangements to verify their accuracy.[310] Additionally, the Sanctions Board viewed as probative the respondent's incentive structure, in which employees received bonuses based on the contracts they brought in.[311] The Sanctions Board found that the incentive structure was not necessarily inappropriate, "but [that] it demands strong controls to ensure unethical conduct does not result."[312]

In contrast, in Sanctions Board Decision No. 73, the Sanctions Board found that the respondent firm was not responsible for the respondent director's fraudulent conduct. In particular, the evidence failed to show that the director was acting on behalf of the firm as a duly authorized officer and employee.[313]

In sum, though the definition of a Fraudulent Practice varies somewhat depending on which Guidelines apply, it generally requires a respondent knowingly or recklessly mislead, or attempt to mislead, a party for the purpose of obtaining a benefit or avoiding an obligation. A Fraudulent Practice is the most common charge brought before the Sanctions Board and can be proven in a variety of ways. In most Fraudulent Practice cases, proving knowledge or recklessness has been relatively straightforward. For "indirect fraud" cases where information is conveyed by third parties, the Sanctions Board considers recklessness using a "due care" standard akin to negligence. Similar to showing fraud under U.S. civil law, the Legal Vice Presidency has recommended that recklessness require more than a simple deviation from the standard of due care. But in practice, the Sanctions Board has applied a standard that hews more closely to negligence. Finally, the Sanctions Board has applied basic principles of respondeat superior to determine whether an employer is liable for the fraudulent acts of its employees.

308. *Id*. at ¶ 30 (2012).
309. *Id*. at ¶ 30 (2012).
310. *Id*. at ¶ 30 (2012).
311. *Id*. at ¶ 31 (2012).
312. *Id*. at ¶ 31 (2012).
313. Sanctions Board Decision No. 73, ¶ 36 (2014).

C. *Corrupt Practice*

Corruption in connection with a Bank-financed project can also lead to sanctions. Earlier World Bank Guidelines defined a Corrupt Practice as "the offering, giving, receiving, or soliciting of anything of value to influence the action of a public official in the [procurement or selection] process or in contract execution."[314] That definition survived several revisions before being subtly expanded in May 2004 to encompass "the offering, giving, receiving, or soliciting, *directly or indirectly*, of anything of value to influence the action of a public official in the [procurement or selection] process or in contract execution."[315]

Another change resulted from October 2006 amendments that redefined a Corrupt Practice as "the offering, giving, receiving or soliciting, directly or indirectly, of anything of value to influence *improperly* the actions of *another party*."[316] The Guidelines have undergone several subsequent revisions—the Procurement Guidelines most recently in July 2014—but this definition remains operative.[317] Two footnotes in the Guidelines elucidate the added text. The first states that "any action to influence the [procurement or selection] process or contract execution for undue advantage is *improper*."[318] And the second defines "another party" as "a public official acting in relation to the [procurement or selection] process or contract execution."[319] This clarification seemingly cuts against the interpretation that "another party" was substituted for "public official" in October 2006 to give the definition a broader scope.

Typical corruption cases reviewed by the Sanctions Board involve allegations of payments to procurement officials in exchange for confidential

---

314. *Upholding the Rule of Law in the Fights Against Corruption and Poverty*, SANCTIONS BOARD LAW DIGEST, (The World Bank, D.C.) Dec. 2011 at 52. This definition applied to any cases brought under the January 1995 version of the Procurement Guidelines (rev. Jan. and Aug. 1996, Sept. 1997, and Jan. 1999) or the January 1997 version of the Consultant Guidelines (rev. Sept. 1997, Jan. 1999, and May 2002). *Id.*

315. Guidelines: Procurement Under IBRD Loans and IDA Credits ¶ 1.14(a)(i) (May 2004) (emphasis added); Guidelines: Selection and Employment of Consultants by World Bank Borrowers ¶ 1.22(a)(i) (May 2004) (emphasis added). This definition applies to cases brought under the May 2004 versions of the Procurement or Consultant Guidelines. *Upholding the Rule of Law in the Fights Against Corruption and Poverty*, SANCTIONS BOARD LAW DIGEST, (The World Bank, D.C.) Dec. 2011 at 52.

316. Guidelines: Procurement Under IBRD Loans and IDA Credits ¶ 1.14(a)(i) (May 2004 rev. Oct. 2006) (emphasis added); Guidelines: Selection and Employment of Consultants by World Bank Borrowers ¶ 1.22(a)(i) (May 2004 rev. Oct. 2006) (emphasis added).

317. Guidelines: Procurement of Goods, Works, and Non-Consulting Services under IBRD Loans and IDA Credits & Grants by World Bank Borrowers ¶ 1.16(a)(i) (Jan. 2011 rev. July 2014).

318. *Id.* at ¶ 1.16 n.19 (emphasis added).

319. *Id.* at ¶ 1.16 n.20.

information (e.g., technical specifications) during the tender process.[320] In other cases, a government official may have awarded a Bank-financed contract to an entity in exchange for a kickback.[321]

The elements of a Corrupt Practice vary somewhat depending on which definition applies. Distilling the elements, a Corrupt Practice involves offering, giving, receiving, or soliciting, directly or indirectly, anything of value to improperly influence the actions of a public official in relation to the procurement process or contract execution.[322]

The written elements of the Corrupt Practice definition strongly resemble those of the FCPA's anti-bribery provisions, which make it illegal to corruptly offer or provide money or anything of value to officials of foreign governments, foreign political parties, or public international organizations with the intent to obtain or retain business.[323] Those familiar with the FCPA, however, should not automatically equate this standard with a Corrupt Practice. As described below, though there are commonalities between the two, the FCPA has not always been interpreted or applied in the same manner as a Corrupt Practice.

1. Offering or Giving a Thing of Value

Liability for a Corrupt Practice requires that the respondent gives or offers, either directly or indirectly, anything of value.[324] Bank Guidelines and Sanctions Board decisions have not defined the term "anything of value." Available Sanctions Board decisions regarding a Corrupt Practice generally involve the transfer of money, but Bank Guidelines and Sanctions Board decisions have never suggested that the term "anything of value" is limited to money. Indeed, in Sanctions Board Decision No. 78, the Sanctions Board determined that employing a project manager's daughter qualified as a thing of value for the project manager.[325] In Sanctions Board Decision No. 66, the Sanctions Board similarly concluded that hiring a World

---

320. *See, e.g.*, Sanctions Board Decision No. 60, ¶ 84 (2013) (showing an example of a firm that allegedly attempted to influence a Procurement Advisor).

321. *See, e.g.*, Sanctions Board Decision No. 50, ¶ 29 (2012) (stating that two consortium partners agreed to a bribe via a management fee in a contract).

322. *Cf.* Sanctions Board Decision No. 70, ¶ 20 (2014) ("In accordance with the definition of a corrupt practice under Paragraph 1.14(a)(i) of the October 2006 Procurement Guidelines, INT bears the initial burden to show that it is more likely than not that Respondents (i) offered or gave, directly or indirectly, anything of value (ii) to influence improperly the actions of another party.").

323. 15 U.S.C. § 78dd-1 (2016).

324. Sanctions Board Decision No. 60, ¶ 65 (2013).

325. The World Bank Sanctions Board, Sanctions Board Decision No. 78, ¶¶ 53–54 (2015).

Bank staff member's son satisfied this element.[326]

The same term in the FCPA is not defined in the statute or legislative history, but it is commonly understood to include items such as gifts, travel, entertainment, jobs and internships, favors, meals, educational and medical expenses, and travel assistance.[327] And there is no statutory exception for nominal payments or gifts.[328] This element of the FCPA's anti-bribery provisions seems consistent with the Bank's definition of a Corrupt Practice. Consummated and attempted bribes are proscribed in each domain, as are nontraditional bribes, such as offers of jobs and internships. Both regimes also lack any explicit exception for nominal payments.

The Sanctions Board considers the terms "give" and "offer" as alternative elements of a Corrupt Practice.[329] The term "offer" refers to "both a proactive offer of payment and a promise or commitment to pay a bribe when solicited."[330] Thus, even if no payment occurs, the mere offer of a bribe can qualify as a Corrupt Practice.[331] In Sanctions Board Decision No. 60, for example, a consultancy agreement required the respondent to pay five percent of the total contract value to a Bank-employed procurement advisor.[332] The consultancy agreement contemplated a five-percent fee for other, future contracts.[333] The Sanctions Board acknowledged that the record showed no evidence of an actual payment in connection with the other contracts.[334] But based on the consultancy agreement, and coupled with other corroborating evidence,[335] the Sanctions Board concluded that the respondent's promise of future payments to the procurement advisor was an offer for purposes of a Corrupt Practice.[336]

326. Sanctions Board Decision No. 66, ¶ 24 (2014).

327. U.S. Dep't of Justice, *FCPA: A Resource Guide to the U.S. Foreign Corrupt Practices Act* 14-15 (2012).

328. F. Joseph Warin, Michael S. Diamant & Elizabeth Goergen Silver, *The U.S. Foreign Corrupt Practices Act: Enforcement and Compliance*, 285 SECURITIES PRACTICE PORTFOLIO SERIES (BNA) A-16 (2014).

329. Sanctions Board Decision No. 60, ¶ 70 (2013); Sanctions Board Decision No. 78, ¶ 54 (2015).

330. Sanctions Board Decision No. 60, ¶ 73 (2013).

331. *Id.* at ¶ 70; *see also* Sanctions Board Decision No. 63, ¶ 59 (2014) ("[T]he first element of the definition of corrupt practices requires only that the Respondents have offered or given something of value – not that all the earmarked funds were ultimately disbursed.").

332. Sanctions Board Decision No. 60, ¶ 71 (2013).

333. *Id.*

334. *Id.* at ¶ 72.

335. In particular, the Sanctions Board noted that respondent provided a listing of all contracts in which the Procurement Advisor was involved and the type of services provided. *Id.* Further, INT interviews and email correspondence revealed communications between the respondent and the procurement advisor regarding tenders before the public issuance of the bidding documents and during the procurement processes. *Id.*

336. Sanctions Board Decision No. 60, ¶ 74 (2013).

The Sanctions Board has found that even silence, although not explicitly contemplated in the Bank Guidelines defining a Corrupt Practice, can constitute an offer of a bribe. Acquiescence by silence occurs when "the silent party heard and understood what was being said" and "the silence in response to what was being said was, under the circumstances, so unnatural as to amount to implied acquiescence."[337] In Sanctions Board Decision No. 50, the Sanctions Board concluded that "persistent silence – in the face of repeated attempts to make unexplained reallocations that happen to correspond to the amount of the alleged improper payment at issue – is more likely than not a sign Respondent had agreed to the payment scheme."[338] The respondent and several business partners attended a meeting at which an agreement was reached to improperly pay an agency seventeen percent of a contract's value as a "management fee."[339] INT acknowledged that the respondent's director was silent during the meeting, but contended that his silence signaled acquiescence to offering a bribe.[340] The Sanctions Board was not persuaded that the meeting alone constituted such an offer, but it considered additional evidence, including a subsequent meeting at which the respondent commented that the partners should honor their commitments or risk harm.[341] Perhaps most influential to the Sanctions Board's decision was a series of email exchanges over the course of two months between the partners concerning a dispute over the allocation of funds.[342] The respondent was copied on the emails but remained silent throughout.[343]

The Sanctions Board also has recognized that although the Guidelines do "not explicitly provide for liability on the basis of support, authorization, and oversight of corrupt acts[;] a respondent cannot avoid liability simply by directing or empowering another party to make corrupt payments."[344] Thus, like the FCPA, liability for corrupt practices can extend to situations involving "instructions or orders, approval or guidance, or inferred authorization in cases of close supervision," or "a duty to supervise combined with deliberate non-intervention."[345] In Sanctions Board Decision No. 64, the Sanctions Board squarely considered this issue. In that decision, the Sanctions Board determined that the respondent was not culpable for a bribery scheme where there was no evidence that he instructed or

337. Sanctions Board Decision No. 50, ¶ 30 (2012) (citing J. Weinstein & M. Berger, WEINSTEIN'S EVIDENCE ¶ 801(d)(2)(B)[01], at 801-202 n.15 (1985)).
338. *Id.* at ¶ 37 (2012).
339. *Id.* at ¶ 29.
340. *Id.*
341. *Id.* at ¶ 41.
342. *Id.* at ¶¶ 36-37.
343. *Id.* at ¶ 37.
344. Sanctions Board Decision No. 64, ¶ 37 (2014).
345. *Id.*

ordered the payment of bribes, played any role in discussions to initiate the scheme, or approved or guided the alleged misconduct.[346] The Sanctions Board also found insufficient evidence that the respondent had a duty to supervise the employee who allegedly paid the bribes, knew of or was willfully blind to the employee's misconduct, and did not intervene.[347]

2. Solicitation

Bank Guidelines and Sanctions Board decisions do not define "soliciting." Sanctions Board Decision No. 50, discussed above, is one of the only publicly available decisions to consider this term. There, the question was whether a managing director's comment to consortium partners regarding the necessity of honoring commitments—which INT contended was an effort to pressure the partners to participate in the bribery scheme—constituted solicitation, albeit on behalf of someone else.[348] The Sanctions Board answered in the affirmative, noting that "[n]othing in the applicable definition specifies that one must solicit payment for oneself, or that the soliciting party must be the party with influence."[349] The Sanctions Board concluded that solicitation includes "both the act of soliciting something for oneself in exchange for exerting improper influence, as well as the act of soliciting or enticing another to give something to a third party in exchange for the third party's improper influence."[350] Hence, the term "soliciting" encompasses asking for and accepting a bribe, as well as asking or enticing another to commit bribery. In Sanctions Board Decision No. 78, sufficient evidence of solicitation was present where a project manager emailed companies requesting that they consider hiring her daughter.[351]

3. Public Official / Another Party

As discussed above, for contracts governed by earlier definitions of a Corrupt Practice, the respondent must act with a purpose to "influence the action of a public official in the [procurement] process or in contract execution."[352] Later versions of the Guidelines require a motivation to influence "another party."[353] As noted above, however, a footnote in the Guidelines

346. *Id.* at ¶ 38.
347. *Id.* at ¶ 39.
348. Sanctions Board Decision No. 50, ¶ 42 (2012).
349. *Id.* at ¶ 44.
350. *Id.* (citing BLACK'S LAW DICTIONARY (9th ed. 2009)).
351. Sanctions Board Decision No. 78, ¶ 63 (2015).
352. *Upholding the Rule of Law in the Fights Against Corruption and Poverty*, 2011 WORLD BANK GROUP SANCTIONS BD. LAW DIGEST, ch. D, §2(a), at 52.
353. *Id.* at 53.

defines "another party" as "a public official acting in relation to the [procurement or selection] process or contract execution."[354] The Guidelines also state that "[i]n this context, 'public official' includes World Bank staff and employees of other organizations taking or reviewing procurement decisions."[355] The Sanctions Board likewise has held that the terms "public official" and "another party" refer to "public officials acting in relation to the procurement process or contract execution, including 'World Bank staff and employees of other organizations taking or reviewing procurement decisions.'"[356] It is not synonymous with the term "government official."[357]

The only publicly available Sanctions Board decision analyzing this element concluded that a short-term consultant for the Bank qualified as a "public official," even though the consultant never held a World Bank staff position or formal appointment related to the contracts at issue.[358] The Sanctions Board noted that "[e]ven without being officially assigned responsibility in a procurement process, a public official may have an actual or perceived role in taking or reviewing procurement decisions, and thus be the target of sanctionable influence."[359] Although formal designations are unnecessary, qualifying as a "public official" does require some position of influence over the contract at issue.[360] The Sanctions Board found that the short-term consultant's involvement in the procurement process for the contracts at issue, coupled with his employment as a consultant for the World Bank during the years in which the alleged misconduct occurred, qualified him to meet the definition of a "public official."[361]

The "foreign official" element of the FCPA's anti-bribery provisions—as interpreted—is clearly broader than its World Bank analogue. U.S. courts have addressed the scope of the FCPA's definition when issuing jury instructions in FCPA trials. The FCPA defines a "foreign official"

354. Guidelines: Procurement of Goods, Works, and Non-Consulting Services under IBRD Loans and IDA Credits & Grants ¶ 1.16 n.20 (Jan. 2011 rev. July 2014); *see also* Sanctions Board Decision No. 70, ¶ 22 (2014) (discussing this explanatory note).

355. *See* Guidelines: Procurement of Goods, Works, and Non-Consulting Services under IBRD Loans and IDA Credits & Grants, *supra* note 34 (emphasis omitted); *see also* Sanctions Board Decision No. 66, ¶ 25 (2014) (stating that a World Bank staff member qualifies as a public official).

356. Sanctions Board Decision No. 60, ¶ 75 (2013) (citing the May 2004 Procurement Guidelines, § 1.14(a)(i) n.17, and October 2006 Procurement Guidelines, § 1.14(a)(i) n.19).

357. Sanctions Board Decision No. 78, ¶ 45 (2015).

358. Sanctions Board Decision No. 60, ¶ 77 (2013).

359. *Id.* at ¶ 78.

360. *See, e.g.*, *id.* at ¶ 77-78 (stating that without official responsibility for procurement, a public official may still have a real or perceived role in the procurement decision-making process, which can open the official to outside influence); Sanctions Board Decision No. 50, ¶ 45 (2012).

361. Sanctions Board Decision No. 60, ¶ 78 (2013).

as "any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or . . . public international organization."[362] Employees of all ranks fall within the scope of this provision.[363] Precisely what constitutes a foreign government "agency" or "instrumentality," however, has been the subject of litigation, owing to the government's broad interpretation of those terms.[364] A "public international organization" is any organization designated as such by executive order and includes organizations such as the World Bank, the United Nations, the International Monetary Fund, and the Red Cross.[365] Employees of such organizations qualify as foreign officials under the FCPA.[366]

Finally, it bears mentioning that the mental state necessary to satisfy the "public official" element of a Corrupt Practice is unclear. The few relevant Sanctions Board publicly available decisions generally focus on whether the recipient was, in fact, a public official. But the Sanctions Board has never specifically considered—and World Bank Guidelines do not provide—whether the respondent must know it was bribing a public official. In one FCPA enforcement case, in contrast, Judge James V. Selna of the U.S. District Court for the Central District of California issued instructions that specifically required the jury to determine whether the bribe was to "a person the defendant knew or believed to be a foreign official."[367] But *some* mental culpability clearly is required to commit a Corrupt Practice because the Sanctions Board has stated that the respondent must have "acted *with a purpose to* (i) 'influence the action of a public official['] . . . or (ii) 'influence improperly the actions of another party.'"[368] Although purposeful influence is required, it is less clear if this means a respondent must have known or believed that the recipient was a public official. From the limited precedent available, the answer appears to be that a respondent must understand, at some level, it is attempting to bribe a public official. In Sanctions Board Decision No. 60, the Sanctions Board concluded that the respondent committed a Corrupt Practice because he "approved a payment

362. 15 U.S.C. § 78dd-1(f)(1)(A) (2016).

363. *See* F. Joseph Warin, Michael S. Diamant & Elizabeth Goergen Silver, *The U.S. Foreign Corrupt Practices Act: Enforcement and Compliance* 285 SECURITIES PRACTICE PORTFOLIO SERIES (BNA) at A-13 (2014) (broadly subjecting all ranks of employees to this "foreign official" element of the FCPA's anti-bribery provision).

364. *Id*.

365. *Id*. at A-14.

366. *Id*.

367. Order Regarding Select Jury Instructions at 11, United States v. Carson, SACR 09-00077 JVS (C.D. Cal. Feb. 16, 2012).

368. Sanctions Board Decision No. 60, ¶ 75 (2013) (emphasis added).

that he knew was intended to influence a public official."[369] Moreover, the Sanctions Board indirectly suggested that unawareness of the recipient's status as a public official would have constituted a valid defense to a Corrupt Practice when it rejected the respondent's contention that they "were not aware of the Procurement Advisor's official status, since he had introduced himself as an independent expert in his communications with them."[370] Nevertheless, in the same decision, the Sanctions Board noted that INT need not prove that the respondent "knew the identity of the specific beneficiary of [the] payment."[371]

4. To Influence (Improperly) the Action of a Public Official

This element varies to some degree depending on which definition of a Corrupt Practice applies. Earlier Bank Guidelines require a motive "to influence the action of a public official *in the [procurement or selection] process or in contract execution*."[372] The current definition requires a motivation to "influence *improperly* the actions of another party,"[373] presumably obviating arguments that a certain bribe somehow skirted *both* the procurement process and the contract's execution. Although Bank Guidelines do not define improper influence, the Sanctions Board has taken an expansive approach. In Sanctions Board Decision No. 60, the Sanctions Board found that payments to a procurement advisor "to do his job properly" and to avoid unfair treatment constituted improper influence.[374] The Sanctions Board held that the term "improper influence is not limited to circumstances in which a public official is induced to act in breach of his or her duties (e.g., by promoting an unqualified bidder for contract award)."[375] Rather, the Sanctions Board concluded that it also encompasses payments made in order to cause "a public official to act or refrain from acting in connection with his or her official duties . . . regardless of whether the official's act

369. *Id*. at 81 (emphasis added).

370. *Id*. at 83.

371. *Id*. at ¶ 81.

372. *Upholding the Rule of Law in the Fights Against Corruption and Poverty*, SANCTIONS BOARD LAW DIGEST, (The World Bank, D.C.) Dec. 2011 at 52. This definition applied to any cases brought under either the January 1995 version of the Procurement Guidelines, which was revised in January and August 1996, September 1997, and January 1999, or the January 1997 version of the Consultant Guidelines, which was revised in September 1997, January 1999, and May 2002. *Id*.

373. *Id*. at 53 (emphasis added). This definition applies to cases brought under the October 2006, May 2010, or January 2011 versions of the Procurement or Consultant Guidelines, or under the October 2006 or January 2011 version of the Anticorruption Guidelines. *Id*.

374. Sanctions Board Decision No. 60, ¶ 80 (2013).

375. *Id*. at ¶ 82 (internal quotations omitted).

would have been lawful had the payment or offer not been made."[376] This view accords with the Legal Vice Presidency's 2010 advisory opinion, which opined that the giving of a bribe is inherently 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 . . . ."[377]

In light of the Sanctions Board's expansive interpretation of the term "improper," it seems there is no carve-out for the kind of "facilitating payments" contemplated by the FCPA. Under the FCPA's facilitating payments exception, payments may be made to secure the performance of non-discretionary, "routine government action," such as processing visas, obtaining work permits, or similar clerical acts.[378] Though Sanctions Board decisions have not explicitly ruled out facilitating payments, its imposition of liability in Sanctions Board Decision No. 70—in which the respondent acknowledged making a payment of $4,000 to facilitate the processing of items through customs—seems at odds with the FCPA's statutory exception for facilitating payments[379] That payment arguably was intended to "move a particular matter toward an eventual act or decision" and did not involve "any discretionary action."[380] Indeed, the Legal Vice Presidency's advisory opinion takes the position that, because bribes intended to induce even proper action are improper, "facilitation payments are not exempted" from the ambit of a Corrupt Practice.[381]

Also unclear is whether, or to what extent, the respondent's mental state bears on the definition of "influence improperly." The Sanctions Board has made clear that the respondent must have "acted *with a purpose to* . . . influence improperly the actions of another party . . . ."[382] This phrasing suggests that, at minimum, a respondent must act intentionally to influence another, and the means of influence must be improper. Less clear, however, is whether the term "with a purpose" means the respondent must know or believe its influence is improper. If so, does the respondent's

---

376. *Id*.

377. Anne-Marie Leroy, *Advisory Opinion on Certain Issues Arising in Connection with Recent Sanctions Cases, Opinion No. 2010/1*, LEGAL VICE PRESIDENCY UNIT OF THE WORLD BANK, ¶ 55 (Nov. 15, 2010).

378. Criminal Div. of the U.S. Dep't of Justice & Enforcement Div. of the U.S. Sec. and Exch. Comm'n, *FCPA: A Resource Guide to the U.S. Foreign Corrupt Practices Act* 25 (2012), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf [https://perma.cc/V2RF-X4MU].

379. Sanctions Board Decision No. 70, ¶ 20 (2014).

380. H.R. REP. NO. 95-640, at 8 (1977). *See also* Michael S. Diamant & Jesenka Mrdjenovic, *Don't You Forget About Me: The Continuing Viability of the FCPA's Facilitating Payments Exception*, 73 OHIO ST. L.J. 19 (2012) (discussing H.R. Rep. No. 95-640 and the facilitating payments exception).

381. Anne-Marie Leroy, *supra* note 377, at ¶ 55.

382. Sanctions Board Decision No. 60, *supra* note 374, at ¶ 75 (emphasis added).

subjective belief of improper conduct suffice or must the respondent believe his or her conduct is improper as defined by the World Bank? The Sanctions Board has thus far not addressed this issue in any publicly available decision.

Comparing this standard with the FCPA's mens rea requirement shows a key similarity and a key difference. The FCPA requires corrupt intent. It does not define the term, but legislative history states that "[t]he word 'corruptly' connotes an evil motive or purpose, an intent to wrongfully influence the recipient."[383] Legislative history also clarifies that the FCPA was intended to distinguish payments "to induce the recipient to misuse his official position"[384] and payments "which merely move a particular matter toward an eventual act or decision or which do not involve any discretionary action."[385] Again, the latter are facilitation payments and do not give rise to liability under the FCPA.[386]

Further, the FCPA prohibits offers or payments to a foreign official for the purpose of "obtaining or retaining business."[387] But the sought-after business need not be with the foreign government or foreign government instrumentality that receives the offer or payment.[388] This element of the FCPA's anti-bribery provisions is slightly more specific than the Bank's definition of a Corrupt Practice. The Bank's definition encompasses payments to "improperly influence the actions of another party," and the Guidelines explain that an influence is "improper" if it is intended to yield an "undue advantage."[389] In the context of Bank enforcement actions discussed above, however, "undue advantage" would almost always result in commercial and economic benefits not otherwise available, bringing the practical implications of this definition very much in line with the FCPA's "obtaining or retaining business" requirement.

Duress likely is an available defense to a Corrupt Practice.[390] The World Bank Guidelines and Sanction Board decisions have not defined duress, and the only relevant publicly available decision on this topic found that the record failed to support a finding of duress. In Sanctions Board Decision No. 60, the respondents alleged "that they were subject to an extortion scheme and acted under duress, with the Consultancy Agreement

383. S. REP. NO. 95-114, at 10 (1977).

384. *Id*.

385. H.R. REP. NO. 95-640, *supra* note 380, at 8.

386. 15 U.S.C. § 78dd-2(b). For a more detailed discussion of facilitation payments, see Warin et. al., *supra* note 22, at A-17.

387. 15 U.S.C. § 78dd-2(a).

388. *See* Warin et. al., *supra* note 22, at A-16 (interpreting the meaning of the FCPA prohibitions on payments to foreign officials).

389. World Bank Procurement Guidelines, *supra* note 39, at ¶ 1.16 n.19.

390. Sanctions Board Decision No. 60, *supra* note 368, at ¶ 88.

imposed on them by the Procurement Advisor."[391] In rejecting this argument, the Sanctions Board noted that the respondents invited the Procurement Advisor to travel abroad with them and actively sought his advice.[392] Although the respondents claimed they felt obligated to pay the procurement advisor, the Sanctions Board found "no evidence that such payments were due to threats, implicit or express, or that they made any attempt to terminate their arrangement with the Procurement Advisor."[393]

In rejecting the argument from the respondents, the Sanctions Board implicitly acknowledged that duress could be a valid defense to a Corrupt Practice charge. This is intuitive. The intent level required for any infraction can be obviated if the actor was compelled to the action by an external force against his or her will. The U.S. enforcers of the FCPA have explicitly acknowledged as much in the context of that law's enforcement.[394] Here too, despite the differing texts, there appears to be some convergence in the practical operation of these two anti-bribery regimes. This concurrence could allow the FCPA's more-developed jurisprudence, forged through nearly 40 years of enforcement, to inform aspects of Sanctions Board's understanding of a Corrupt Practice.

D. *Collusive Practice*

Collusive conduct is a common form of wrongdoing leading to sanctions.[395] The definition of a Collusive Practice has gradually shifted from narrow, specifically-defined conduct involving artificial price fixing between bidders or consultants to any form of simulated competition including any participants in the procurement process. In its earliest form, collusion was subsumed by the definition of a Fraudulent Practice, with the latter defined to "include[] collusive practices among [bidders/consultants] (prior to or after [bid submission/submission of proposals]) designed to establish [bid] prices at artificial, non-competitive levels and to deprive the Borrower of the benefits of free and open competition."[396] Starting in 2004, collusion became a standalone Sanctionable Practice defined as "a scheme or arrangement between two or more [bidders/consultants], with or without the knowledge of the Borrower, designed to establish [bid] prices

391. *Id.* at ¶ 86.
392. *Id.* at ¶ 87.
393. *Id.* at ¶ 87.
394. Criminal Div. of the U.S. Dep't of Justice, *supra* note 372, at 27.
395. World Bank Group, *supra* note 367, at 22.
396. *Id.* at 48 (Dec. 2011). This definition applies to cases brought under the January 1995 version of the Procurement Guidelines, which were revised in January and August 1996, September 1997, and January 1999, or the January 1997 version of the Consultant Guidelines, which were revised in September 1997, January 1999, and May 2002. *Id.* at 47.

at artificial, non-competitive levels."[397]

The Guidelines currently define a Collusive Practice expansively as (1) "an arrangement between two or more parties" (2) "designed to achieve an improper purpose, including to influence improperly the actions of another party . . . ."[398] Although the terms "influence improperly" and "improper purpose" appear to contemplate a wide array of misconduct, an explanatory footnote narrows their application by defining the term "parties" as "participants in the procurement process (including public officials) attempting either themselves, or through another person or entity not participating in the procurement or selection process, to simulate competition or to establish bid prices at artificial, non-competitive levels, or are privy to each other's bid prices or other conditions."[399] This footnote alters the standard of finding a Collusive Practice from prior definitions in two significant ways: first, collusion can involve both participants and non-participants in the procurement process. Second, a Collusive Practice now includes conduct attempting to "simulate competition" in addition to, as provided in prior versions, conduct intended to create artificial, non-competitive bid prices. World Bank Guidelines and Sanctions Board decisions do not differentiate "simulate[d] competition" from other forms of collusion.

Typical collusion cases involve allegations of coordinated bid pricing to ensure that one individual or entity wins the contract.[400] Although many Sanctions Board decisions involve collusion, the available case law is sparse: no publicly available full-text decision and only five summarized decisions in the Law Digest discuss collusion.[401] Two of the five cases discussed in the Law Digest found insufficient evidence of a Collusive Practice.[402] In the Law Digest cases, INT alleged that respondents engaged in collusive behavior to obtain a disproportionately large number of contracts,[403] participated in a collusive scheme involving government officials to direct awards to certain contractors in exchange for bribes,[404] and coor-

397. *Id.* at 48 (Dec. 2011). This definition applies to cases brought under the May 2004 versions of the Procurement or Consultant Guidelines. *Id.*

398. World Bank Procurement Guidelines, *supra* note 39, at ¶ 1.16(a)(iii).

399. *Id.* at ¶ 1.16(a)(iii) n.22.

400. *Upholding the Rule of Law in the Fights Against Corruption and Poverty*, SANCTIONS BOARD LAW DIGEST, (The World Bank, D.C.) Dec. 2011, at 30 (Dec. 2011) (citing Sanctions Board Decision No. 40 (2010)); *id.* at 32 (citing Sanctions Board Decision No. 45 (2011)).

401. *Id.* at 25-32.

402. *Id.* at 26 (citing Sanctions Board Decision No. 4 (2009) and Sanctions Board Decision No. 5 (2009)).

403. *Id.* (citing Sanctions Board Decision No. 4 (2009)).

404. *Id.* at 30 (citing Sanctions Board Decision No. 40 (2010)).

dinated bid prices with other firms to ensure that the respondent would win the contract.[405]

1. Elements of a Collusive Practice

The available guidance from the Sanctions Board concerns only the elements of a Collusive Practice as defined in the May 2004 Procurement Guidelines.[406] The Sanctions Board has held that proving the first element of a Collusive Practice—i.e., whether a scheme or arrangement between bidders exists—does not automatically satisfy the second element of a Collusive Practice—i.e., that the scheme or arrangement was designed to set prices at artificial, non-competitive levels.[407] The Law Digest further explains that the term "artificial, non-competitive levels" involves "the nature of the pricing, not the simple quantitative level of the prices."[408] Because "[c]olluding bidders might well agree to submit relatively low prices" or, conversely, "submit higher prices for any number of reasons," a showing of specific price points "is therefore neither necessary nor sufficient to establish collusion."[409]

The mens rea necessary to commit a Collusive Practice is unclear. It appears, however, that some amount of intent is required, as the arrangement must be "designed to achieve an improper purpose" under the latest definition,[410] or "designed to establish [bid] prices at artificial, non-competitive levels" under prior definitions.[411]

2. Evidence of Collusion

It is difficult to completely understand the Sanctions Board's assessment of collusive evidence without the benefit of fully published decisions. The available summaries in the Law Digest, however, suggest that the Sanctions Board relies heavily on circumstantial indicia of collusion.[412] In Sanctions Board Decision No. 1, the Sanctions Board gave "primary weight" to and found "particularly compelling" evidence that two of the respondents had identical pricing in the same bid tender and concluded that it

405. *Id*. (citing Sanctions Board Decision No. 40 (2010)); *id*. at 32 (citing Sanctions Board Decision No. 45 (2011)).
406. *Id*. at 48-49.
407. *Id*. at 48 (citing Sanctions Board Decision No. 45, ¶ 51 (2011)).
408. *Id*. at 49 (citing Sanctions Board Decision No. 45, ¶ 51 (2011)).
409. *Id*. (citing Sanctions Board Decision No. 45, ¶ 51 (2011)).
410. *Id*. at 48.
411. *Id*.
412. *See id*. at 49 (citing Sanctions Board Decision No. 4, ¶¶ 3, 6 (2009), which states that the Sanctions Board used different factors as evidence of indicia of collusion).

was more likely than not that the parties had engaged in Collusive Practices, especially in light of their failure to adequately explain the similarities.[413] But, as discussed above, INT need not show specific pricing across bids to prove collusion. Likewise, in Sanctions Board Decision No. 4, the Sanctions Board found collusion by relying on high bid prices, bids containing "significant errors," "strange and unnatural" bid prices, symmetrical relationships among bids, the submission of fraudulent bid securities, and "clusters" of bids.[414]

In Sanctions Board Decision No. 40, the Sanctions Board similarly found the respondents liable in light of an "inexplicable degree of congruity" across bid prices, identical total bid prices in certain sections of two of the bids at issue, and "insignificant variance" between the total prices of all bids. The Sanctions Board also rejected the respondent's contention that the similar bid prices were caused by shared suppliers in a small market, finding that a "simple commonality of suppliers . . . would not explain the high degree of congruity . . . nor the systematic small variations between prices."[415] Moreover, it pointed to physical similarities across bids that indicated their shared preparation, including similar handwriting, identical substantive and spelling errors, common contact information, identical envelopes, cover sheets with the same font, the same computer file path number at the bottom of the bid documents, and "the apparent re-use of bidding documents from one firm, whose name had been partially concealed with correction fluid, by another firm."[416]

The Sanctions Board has taken this approach on other occasions. In Sanctions Board No. 45, the Sanctions Board relied on documentary evidence showing several identical errors and other physical similarities across bids in concluding that there was "ample support for [INT's] allegation that the bids submitted by the respondent and another firm had been jointly prepared with coordinated bid prices."[417] In addition, while the "use of shared administrative support by different bidders" is not necessarily proof of collusion, it suggests the existence of collusion "when viewed in conjunction with other evidence of extensive and substantive similarities across the bids in question."[418] Circumstantial evidence of collusion is not boundless. The Sanctions Board has found that general business cooperation among bidders—i.e., referring to other bidders as "business colleagues," "common business interests," or prior work on the same project—is "neither a viable

413. *Id*. (citing Sanctions Board Decision No. 1, ¶ 6 (2007)).
414. *Id*. (citing Sanctions Board Decision No. 4, ¶¶ 3, 6 (2009)).
415. *Id*. at 50 (citing Sanctions Board Decision No. 40, ¶ 21 (2010)).
416. *Id*. (citing Sanctions Board Decision No. 40, ¶ 22 (2010)).
417. *Id*. at 52 (citing Sanctions Board Decision No. 45, ¶¶ 30-33 (2011)).
418. *Id*. at 51 (citing Sanctions Board Decision No. 40, ¶ 23 (2010)).

explanation for the proximity of bids in an allegedly collusive scheme, nor presumptive proof of collusion between the bidders."[419]

Of course, in addition to circumstantial evidence in the bids themselves, the Sanctions Board reviews the "totality of the evidence [available to it], including all statements made in the interviews, read in context and weighted for relative credibility."[420] In Sanctions Board Decision No. 4, the Sanctions Board found compelling testimonial evidence of "confidential and non-confidential witnesses" coupled with other "indicia of collusion, including high bid prices, symmetrical relationships among bids, bids containing significant errors, 'clusters' of bids, 'strange and unnatural' bid prices, submission of fraudulent bid securities, and the inconsistent application of criteria within the prequalification process."[421]

In Sanctions Board Decision No. 40, the Sanctions Board found that one respondent's statement regarding a "verbal or gentleman's agreement" coupled with another bidder's admission "to having known about the proximity in bid prices" and making a mistake by not carefully reviewing the bids "could be construed to some degree as admissions of collusive arrangements."[422] In Sanctions Board Decision No. 45, collusion was substantiated through corroborating statements from key witnesses indicating that the bids submitted by the respondent and another firm had been jointly prepared with coordinated bid prices.[423] Moreover, the Sanctions Board has considered testimonial evidence of witnesses who initially denied but later admitted to collusive conduct because not "all participants in an alleged collusive arrangement will spontaneously and consistently admit the charges."[424]

3. U.S. Antitrust Law

Clear parallels between the Bank's anti-collusion regime and U.S. antitrust law exist. Just as the Bank's Guidelines prohibit arrangements designed to set bid prices at artificial levels, U.S. antitrust laws proscribe a wide variety of anti-competitive behavior. In the United States, antitrust violations are subject to criminal and civil enforcement under the Sherman Antitrust Act, among other statutes. Antitrust liability under Section 1 of the Sherman Act arises where (1) the defendant was "a party to a contract,

419. *Id.* at 47 (citing Sanctions Board Decision No. 40, ¶ 27 (2010)).
420. *Id.* at 51 (citing Sanctions Board Decision No. 40, ¶ 25 (2010)).
421. *Id.* at 49 (citing Sanctions Board Decision No. 4, ¶¶ 3, 6 (2009)).
422. *Id.* at 51 (citing Sanctions Board Decision No. 40, ¶ 24 (2010)).
423. *Id.* at 52 (citing Sanctions Board Decision No. 45, ¶¶ 30-33 (2011), which notes key witnesses' corroborating statements in finding collusion).
424. *Id.* at 51 (citing Sanctions Board Decision No. 40, ¶ 25 (2010)).

combination . . . or conspiracy" and (2) "the conspiracy to which the defendant was a party imposed an unreasonable restraint on trade."[425] U.S. courts analyze the latter element according to the "rule of reason," which, under a "totality of the circumstances" test, considers whether the conduct in question promotes or suppresses market competition.[426] Certain practices, such as bid rigging and price fixing, are presumptively an unreasonable restraint on competition and are thus considered a per se violation of the Sherman Act.[427] As such, per se violations require no further inquiry into the unlawful practice's actual effect on the market or the intentions of those who engaged in the practice.[428]

Though never addressed explicitly by the Sanctions Board or the Guidelines, there appears to be little room in Bank jurisprudence for the kind of "rule of reason" approach contemplated by U.S. courts. Unlike the Sherman Act, the definition of a Collusive Practice does not consider whether the conduct at issue impacted the market. But all relevant publicly available Sanctions Board decisions involve some variation of price fixing and bid rigging, both of which are presumed under U.S. law to negatively impact competition. In theory, however, a defense should be available for respondents who enter into arrangements for a purpose that is not "improper."

Both the Sherman Act and World Bank require evidence of conspiracy between parties; however, the standard of proof under each regime diverges significantly. As discussed above, the Sanctions Board has found sufficient evidence of an agreement through, for example, high prices across bids, significant errors across bids, "strange and unnatural" prices across bids, symmetrical relationships among bids, identical pricing between respondents in the same bid tender, and an "otherwise inexplicable degree of congruity" across bid prices.[429] Such evidence, labeled "conscious parallelism"

425. *In re* Ins. Brokerage Antitrust Litig., 618 F.3d 300, 315 (3d Cir. 2010) (internal quotation marks omitted).

426. Cont'l T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 49 n.15 (1977) (requiring that the fact finder weigh "all of the circumstances" to determine whether a restrictive practice imposes "an unreasonable restraint on competition").

427. *In re* Ins. Brokerage Antitrust Litig., 618 F.3d 300, 315 (3d Cir. 2010) (internal quotation marks omitted).

428. *See* Fed. Trade Comm'n, *The Antitrust Laws*, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws [https://perma.cc/WH8M-DY6S] (last visited Apr. 3 2016) (explaining that the Sherman Act provides no defense or justification to per se violators whose acts so harmful to competition that they are almost always illegal.)

429. *See Upholding the Rule of Law in the Fights Against Corruption and Poverty*, SANCTIONS BOARD LAW DIGEST, (The World Bank, D.C.) Dec. 2011 at 49-50 (citing Sanctions Board Decision No. 4, ¶¶ 3, 6 (2009); Sanctions Board Decision No. 40, ¶¶ 20-24 (2010)) (listing numerous circumstances under which the Sanction Board has found suffi-

by U.S. courts, is insufficient under the Sherman Act because it "does not establish . . . contract, combination, or conspiracy."[430] Where the claim relies on parallel conduct, U.S. courts have commonly required plaintiffs to proffer evidence of "plus factors" to meet the conspiracy element, such as "motive to conspire," "parallel acts [that] were against the apparent economic self-interest" of those involved, and "a high level of interfirm communications."[431] These factors, according to U.S. courts, "tend to ensure that courts punish concerted action—an actual agreement—instead of the unilateral, independent conduct of competitors."[432]

The Sanctions Board, by contrast, has found collusion solely through parallel behavior, without the "plus factors" U.S. courts typically require. In Sanctions Board Decision No. 1, for example, the Sanctions Board found "particularly compelling the circumstantial evidence of identical pricing between the respondents in the same bid tender" to the point of shifting the burden of proof on the respondents to explain how their conduct was not collusive.[433] In Sanctions Board Decision No. 40, the Sanctions Board found collusion where there was an

> inexplicable degree of congruity across the bid prices contained in the three bids at issue, including a significant number of unit prices that were either identical or differed consistently by small, standardized amounts across the three bids; identical total bid prices in several sections of two bids . . . and insignificant variance between the total prices of all bids.[434]

This lower evidentiary standard likely stems from the administrative nature of Sanctions Board proceedings, but it also risks conflating independent actions between competitors with truly collusive conduct.[435]

---

cient evidence of collusion).

430. *See, e.g.*, Bell Atl. Corp. v. Twombly, 550 U.S. 544, 553-54 (2007) (internal citation and quotation marks omitted) (establishing a "plausibility" standard for pleading).

431. *In re* Publ'n Paper Antitrust Litig., 690 F.3d 51, 62 (2d Cir. 2012) (internal quotation marks omitted); *see also In re* Chocolate Confectionary Antitrust Litig., 801 F.3d 383, 398 (3d Cir. 2015) ("[E]vidence of conscious parallelism cannot alone create a reasonable inference of a conspiracy. To move the ball across the goal line, a plaintiff must also show that certain plus factors are present . . . [which] may include (1) evidence that the defendant had a motive to enter into a price fixing conspiracy; (2) evidence that the defendant acted contrary to its interests; and (3) evidence implying a traditional conspiracy." (internal citations and quotation marks omitted)).

432. *Id.* (alteration and internal quotation marks omitted).

433. *Upholding the Rule of Law in the Fights Against Corruption and Poverty*, SANCTIONS BOARD LAW DIGEST, (The World Bank, D.C.) Dec. 2011 *supra* 225 note, at 49 (citing Sanctions Board Decision No. 1, ¶ 6 (2007)).

434. *Id.* at 50 (citing Sanctions Board Decision No. 40, ¶ 21 (2010)).

435. To be fair, the burden of proof for *civil* antitrust enforcement actions also is a preponderance of the evidence. *See, e.g.*, Fed. Trade Comm'n v. Abbott Labs., 853 F. Supp.

E. *Coercive Practice*

The January 2011 Procurement Guidelines define a "Coercive Practice" as "impairing or harming, or threatening to impair or harm, directly or indirectly, any party or the property of the party to influence improperly the actions of a party."[436] The term "party" is defined as "a participant in the procurement process or contract execution."[437]

The Sanctions Board had not reviewed an appeal involving allegations of a Coercive Practice as of publication of the Law Digest.[438] Moreover, none of the published decisions available as of December 2015 on the Bank's website involves allegations of a Coercive Practice. One World Bank publication, however, has provided that coercion includes threats to harm the future business interests of a competitor or the physical well-being of competitors' staff to ensure that they submit inflated bids.[439] Coercion could also involve the payment of money to "losing" bidders to obtain the winning bid.[440]

There is at least one instance in which the SDO sanctioned a person for engaging in a Coercive Practice. In 2014, the Bank debarred an individual for a minimum period of five years for engaging in Fraudulent and Coercive Practices.[441] INT alleged that the respondent "engaged in a coercive practice by threatening an individual."[442] Because he failed to submit a response, the accusations and recommended sanction were uncontested.[443]

526, 535 (D.D.C. 1994) (refusing to find collusion because a preponderance of the evidence did not establish that the defendant's bids in question had resulted from collusion with its competitors).

436. World Bank Procurement Guidelines, *supra* note 142, at ¶ 1.16(a)(iv). Before the World Bank's 2006 reforms, Coercive Practice was defined as "harming or threatening to harm, directly or indirectly, persons, or their property to influence their participation in a procurement process, or affect the execution of a contract." Guidelines: Procurement Under IBRD Loans and IDA Credits, *supra* note 218, at ¶ 1.14(a)(iv).

437. World Bank Procurement Guidelines, *supra* note 142, at ¶ 1.16(a)(iv) n.23.

438. *Upholding the Rule of Law in the Fights Against Corruption and Poverty*, SANCTIONS BOARD LAW DIGEST, (The World Bank, D.C.) Dec. 2011, *supra* note 225, at 22 (reporting that the Sanctions Board had not received any appeals involving allegations of coercion as of October 31, 2011).

439. *The World Bank's Anti-Corruption Guidelines and Sanctions Reform: A User's Guide*, *supra* note 11, at 7 (defining and providing examples of coercive practice).

440. *Id.* (describing an instance of coercion).

441. Board Sanctions Case No. 264 (Yusri Yusuf), Notice of Uncontested Sanctions Proceedings (2014) (notifying of the sanctions proceedings against Yusri Yusuf based on his fraudulent practice of submitting misleading vehicle registration documents and related materials).

442. *Id.* at ¶ 3.

443. *Id.* at ¶ 7 (deeming the sanction against Yusuf uncontested because no response had been submitted within the specific period).

The Sanctions Board therefore did not review the case and did not issue an opinion delineating the factual background, evidence, or analysis.

Beyond these brief examples, little else is known concerning the legal elements and evidentiary requirements for finding a Coercive Practice.

The concept of coercion is found throughout U.S. law, including as a prohibited criminal offense and an affirmative defense to criminal charges. Black's Law Dictionary defines coercion as "[c]ompulsion of a free agent by physical, moral, or economic force or threat of physical force."[444] In the criminal context, coercion is defined as follows:

> Coercion intended to restrict another's freedom of action by (1) threatening to commit a criminal act against that person; (2) threatening to accuse that person of having committed a criminal act; (3) threatening to expose a secret that either would subject the victim to hatred, contempt, or ridicule or would impair the victim's credit or goodwill, or (4) taking or withholding official action or causing an official to take or withhold action.[445]

In addition to its criminal application, coercion can include "[c]onduct that constitutes the improper use of economic power to compel another to submit to the wishes of one who wields it."[446]

Due to the broad language used by the Bank to define Coercive Practices and the lack of precedent, it is difficult to pinpoint which U.S. laws are most comparable and could serve as a vehicle to analyze the possible contours of this Sanctionable Practice as it develops in Sanctions Board; however, a few states have adopted criminal coercion statutes based on Model Penal Code § 212.5 that appear to be analogous.[447] For example, New York criminalizes coercion under its penal law.[448] The statute provides, in part, as follows:

> A person is guilty of coercion in the second degree when he or she compels or induces a person to engage in conduct which the latter has a legal right to abstain from engaging in, or to abstain from engaging in conduct in which he or she has a legal right to engage . . . by means of instilling in him or her a fear that, if the demand is not complied with, the actor or another will [engage in nine threatened consequences].[449]

The nine listed consequences include causing "physical injury to a

444. BLACK'S LAW DICTIONARY 315 (10th ed. 2014).

445. *Id*.

446. *Id*.

447. *See, e.g.*, 18 PA. CONS. STAT. ANN. § 2906 (West 2016) (defining criminal coercion and noting that the section was derived from Model Penal Code § 212.5).

448. N.Y. PENAL LAW § 135.60 (McKinney 2008).

449. *Id*.

person; or . . . damage to property," both of which are explicitly included within the Bank's Coercive Practice definition.[450] The New York statute also outlines six other specific events that may form the basis of coercion,[451] and it concludes with a catch-all provision that encompasses "any other act which would not in itself materially benefit the actor but which is calculated to harm another person materially with respect to his or her health, safety, business, calling, career, financial condition, reputation or personal relationships."[452] The New York statute is clearly more specific than the Bank's provision defining Coercive Practice. Due to the Sanctions Board's lack of guidance, however, it is unclear whether statutory coercion is more or less narrowly tailored than Coercive Practice regarding the requisite underlying conduct, and if the evidence weighed by U.S. courts to assess such conduct would be comparable to that considered by the World Bank.

CONCLUSION

As the reach of the World Bank's lending system continues to expand, so too will its enforcement net. Therefore, the development of the five Sanctionable Practices merits significant attention and care. The foregoing is presented in the hope that it contributes to such a process, as well as serving as a helpful primer for corporations and practitioners alike in navigating the Bank enforcement process. The robust analogues under U.S. law are merely one place where the Sanctions Board could (and should) look as it develops the jurisprudence of the Bank's Sanctionable Practices. But given the convergence of many of these legal concepts, the roots of some of the Sanctionable Practices from U.S. law, and the long history of these enforcement regimes in the United States, U.S. law can offer a rich and textured reference point for the Sanctions Board. In particular, the experience of white collar enforcement and its evolution in the United States can help to identify pitfalls and clarify thorny legal issues of, for example, mens rea. Thorough consideration of the practical implications and study of analogous legal concepts will lend further credibility to the Bank's integ-

450. *Id.*

451. These events include engaging "in other conduct constituting a crime"; accusing a person "of a crime or caus[ing] criminal charges to be instituted against him"; exposing "a secret . . . tending to subject some person to hatred, contempt or ridicule"; causing a "boycott or other collective labor group action injurious to some person's business [except] when the act or omission compelled is for the benefit of the group"; testifying or providing information, or refusing to do so, "with respect to another's legal claim or defense"; and using a "position as a public servant" to perform an act related to official duties, or refusing to do so, "in such manner as to affect some person adversely." *Id.*

452. *Id.*

rity enforcement, aiding further its global fight against corruption.