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Sanctions Board Decision No. 101

Decision of the World Bank Group¹ Sanctions Board finding that the World Bank committed an abuse of discretion in determining that the appellant entity (the “Appellant”) in Successor Appeal No. 216/249 is a successor to an entity sanctioned pursuant to Sanctions Board Decisions No. 71 (2014) and No. 87 (2016) (the “Sanctioned Firm”).²

I. INTRODUCTION

1. The Sanctions Board met in panel sessions in November 2017 to review the Appellant’s appeal (the “Appeal”) of the World Bank’s determination that the Appellant is a successor to the Sanctioned Firm and subject to the Sanctioned Firm’s sanction. For deliberations on the present appeal, the Sanctions Board was composed of J. James Spinner (Chair), Ellen Gracie Northfleet, and Catherine O’Regan.

2. The Sanctions Board deliberated and reached its decision on this appeal based on the entirety of the record, which included the following:

- i. the Appeal submitted by the Appellant to the Secretary to the Sanctions Board on September 11, 2017;
- ii. comments on the Appeal submitted by the World Bank Group’s Integrity Vice Presidency (“INT”) to the Secretary to the Sanctions Board on September 29, 2017 (“INT’s Comments”); and
- iii. the Appellant’s additional submission submitted to the Secretary to the Sanctions Board on October 20, 2017 (the “Additional Submission”).

II. GENERAL BACKGROUND

3. In Sanctions Board Decision No. 71 (2014), the Sanctions Board imposed a sanction of debarment with conditional release on the Sanctioned Firm with a minimum period of ineligibility of three (3) years. In Sanctions Board Decision No. 87 (2016), the Sanctions Board imposed a sanction of debarment with conditional release on the Sanctioned Firm with a minimum period of ineligibility

¹ In accordance with Section II(y) of the World Bank Procedure: Sanctions Proceedings and Settlements in Bank Financed Projects issued by the World Bank on June 28, 2016 (the “Sanctions Procedures”), the term “World Bank Group” means, collectively, the International Bank for Reconstruction and Development (“IBRD”), the International Development Association (“IDA”), the International Finance Corporation (“IFC”), and the Multilateral Investment Guarantee Agency (“MIGA”). The term “World Bank Group” includes the guarantee operations of IBRD and IDA, but does not include the International Centre for the Settlement of Investment Disputes (“ICSID”). As in the Sanctions Procedures, the terms “World Bank” and “Bank” are here used interchangeably to refer to both IBRD and IDA. See Sanctions Procedures at Section II(x).

² The Sanctioned Firm is referred to as the “Respondent” in Sanctions Board Decision No. 71 (2014) and as the “First Respondent Firm” in Sanctions Board Decision No. 87 (2016).

of twenty-two (22) years and six (6) months, with the minimum debarment period to be added to the minimum debarment period imposed on the Sanctioned Firm in Sanctions Board Decision No. 71 (2014). On August 15, 2017, the World Bank added the Appellant to the World Bank's public debarment list as the Sanctioned Firm's successor. On September 11, 2017, the Appellant filed the Appeal.

III. APPLICABLE STANDARD OF REVIEW

4. When a determination is made by the World Bank after the conclusion of sanctions proceedings that an existing sanction should apply to a particular firm or individual as the successor of a sanctioned party, the successor is given notice and has the right of appeal to the Sanctions Board.³ Pursuant to Section III.A, sub-paragraphs 9.03 and 9.04(c) of the Sanctions Procedures, the Sanctions Board reviews the World Bank's successorship determination under an "abuse of discretion" standard. Section III.A, sub-paragraph 9.03(e)(iv) of the Sanctions Procedures provides that an "abuse of discretion" is committed if the determination at issue (i) lacks an observable basis or is otherwise arbitrary; (ii) is based on disregard of a material fact or a material mistake of fact; or (iii) was taken in material violation of the procedures set out in Section III.A, sub-paragraph 9.03. Under the sanctions framework, abuse of discretion is meant to encompass truly abusive or otherwise egregious behavior on the part of the decision-maker.⁴ It is not a basis for challenging or "second guessing" the decision-maker's ordinary exercise of judgment, and the burden of proof lies with the party alleging abuse.⁵

IV. PRINCIPAL CONTENTIONS OF THE PARTIES

A. The Appellant's Principal Contentions in the Appeal

5. The Appellant submits that the Bank's successorship determination, as communicated by INT, was made in violation of the applicable procedures and did not take into account material facts. Procedurally, the Appellant argues that the Bank's successorship determination lacks an observable basis because the Appellant did not receive a detailed justification for the determination and the Appellant's arguments were not properly considered and examined. The Appellant further argues that the Bank disregarded material facts, including that the assets the Appellant acquired from the Sanctioned Firm represent only 7% of the Appellant's total assets; that former employees of the Sanctioned Firm now employed by the Appellant comprise only "a smaller part of the management of higher and middle level" staff of the Appellant; and that revenue under contracts that the Appellant acquired from the Sanctioned Firm represents only 0.026% of the Appellant's total turnover in 2016. In addition, the Appellant asserts that application of the Sanctioned Firm's sanction to the Appellant would not only negatively impact its business reputation and economic position, but also the economic and strategic development of the country as a whole.

³ See The World Bank Group's Sanctions Regime: Information Note (November 2011) at p. 22, available at: <http://go.worldbank.org/CVUUIS7HZ0>.

⁴ Id. at p. 29.

⁵ Id.

B. INT's Principal Contentions in Its Comments

6. INT submits that the Appellant has failed to demonstrate that the World Bank abused its discretion in making its successorship determination. INT disputes that the Bank's determination process was procedurally flawed or lacked an observable basis. According to INT, the Sanctions Procedures do not detail a specific process for successorship decisions because such decisions "are supposed to be made flexibly . . . to enable the Bank to protect itself from sanctions circumvention." INT argues that the process the Bank followed in this case was thorough, asserting that INT sent multiple communications to the Appellant setting out the grounds for the Bank's conclusions and provided the Appellant with a full opportunity to respond to those conclusions. INT also disputes that the Bank "disregarded material facts to reach a disproportionate decision." INT argues that the Bank considered all information available – including the factors raised by the Appellant – when making its successorship determination, and expressly noted those considerations in its letters to the Appellant. INT further argues that none of the new information provided by the Appellant in its Appeal suggests a material mistake of fact by the Bank.

C. The Appellant's Principal Contentions in Its Additional Submission

7. In its Additional Submission, the Appellant reiterates arguments raised in the Appeal and sets out additional arguments regarding its connections with the Sanctioned Firm. The Appellant also argues that application of the Sanctioned Firm's sanction to the Appellant would be disproportional in light of the facts in this case. The Appellant requests the opportunity to meet with Bank staff and that a hearing be held on this matter. The Appellant concludes by stating that it is ready to cooperate with the Bank in order to avoid sanctions, including by selling assets acquired from the Sanctioned Firm and terminating labor relations with its employees who were former employees of the Sanctioned Firm.

V. THE SANCTIONS BOARD'S ANALYSIS AND CONCLUSIONS

8. The Sanctions Board will first address the procedural matters raised by the Appellant. The Sanctions Board will then consider whether the Bank committed an abuse of discretion in its successorship determination.

A. Procedural Matters

9. As noted above, the Appellant requests the opportunity to meet with Bank staff and that a hearing be held on this matter. The Sanctions Board denies both requests. Regarding a meeting with Bank staff, the Sanctions Board notes that the sanctions framework does not give the Sanctions Board the mandate to compel meetings between parties in sanctions cases and employees of the World Bank. With respect to the request for a hearing, the Sanctions Board considers that the Sanctions Procedures do not contemplate hearings in the context of successor appeals and that the record here is sufficient for the Sanctions Board to reach a determination on the present appeal.

B. The World Bank's Successorship Determination

10. The sanctions framework does not provide a definition of the term "successor." In assessing the meaning of the term "successor" in the context of sanctions proceedings, the Sanctions Board

takes into consideration the views of the World Bank’s Legal Vice Presidency (“LEG”), as contemplated in Section III.A, sub-paragraph 1.02(c) of the Sanctions Procedures. LEG advises that the Bank’s approach to successorship is based on a concept of economic successorship – specifically, whether the entity in question continues to carry out business operations of the sanctioned entity. The Sanctions Board also takes into consideration the specific factors set out by the Bank in reaching its determination that the Appellant is a successor to the Sanctioned Firm. For the reasons set out below, the Sanctions Board determines that the World Bank committed an abuse of discretion in determining that the Appellant is a successor to the Sanctioned Firm.

11. The record in this appeal reflects that, in reaching its successorship determination, the Bank considered the following factors: common business lines and business address, ownership and managerial connections, corporate relationship, assignment of legal and financial rights, and public understanding. The Sanctions Board addresses each factor in turn below.

1. Common business lines and business address

12. In support of the Bank’s successorship determination, INT submits that the Appellant and the Sanctioned Firm are both information technology companies and that they share common business lines. According to INT, the Appellant and the Sanctioned Firm are vendors and partners to some of the same top multinational technology companies. The Appellant does not dispute these facts, but asserts that any information technology company that intends to be competitive in the industry aims to partner with the same global suppliers. The Sanctions Board acknowledges that the Appellant and the Sanctioned Firm are both technology companies and that they partnered with some of the same top multinational companies. However, these facts provide no evidence that the Appellant is a successor to the Sanctioned Firm. There can be few, if any, major information technology companies that do not partner with some of the same global suppliers.

13. INT also submits that the Appellant and the Sanctioned Firm share a common business address. The Appellant has satisfactorily rebutted this submission. The Appellant notes that its main office is at a different address (which is supported by evidence), and that it has smaller satellite offices in other locations. The address that INT asserts the Appellant shares with the Sanctioned Firm is, according to the Appellant, the address for a business complex with several buildings. The Appellant notes that its office in that complex is in a different building than the Sanctioned Firm’s office.

2. Ownership and managerial connections

14. INT asserts that there are close ownership connections between the Appellant and the Sanctioned Firm. INT states that the Appellant was established in 2000 under a different name, and owned from 2000 to 2011 by two individuals – including an individual who was an employee of the Sanctioned Firm between 2005 and 2013 (the “First Employee”). INT states that the Appellant (under its previous name) was sold to a holding company registered in foreign jurisdiction (the “Holding Company”), and that the ultimate beneficiary was a citizen of that foreign jurisdiction. INT further states that, in 2013, the Appellant’s name was changed to its current name and the company was registered in its current national jurisdiction. According to INT, in 2016, the Holding Company sold its shares in the Appellant to another holding company whose ultimate beneficiary was a lawyer living in another foreign jurisdiction. INT states that the Appellant’s most recent registration document (dated in April 2017) shows that the current ultimate beneficiary is the individual who has been

signing for the Appellant in the present appeal. By and large, the Appellant has confirmed this corporate history.

15. The Sanctions Board has carefully reviewed the arguments and evidence put forward by the parties in relation to the Appellant's corporate and ownership history. There is no evidence indicating that the Appellant is currently owned by any person that had previously owned the Sanctioned Firm. The only evidence of an ownership connection between the Appellant and the Sanctioned Firm is that the Appellant was formed in 2000 by the First Employee. However, it is undisputed that the First Employee sold the Appellant in 2011 – years before World Bank sanctions were imposed on the Sanctioned Firm. In these circumstance, it cannot be said that the record provides any observable basis for finding a contemporary, or even a recent, ownership connection between the Appellant and the Sanctioned Firm.

16. INT also asserts that the Appellant has close managerial connections with the Sanctioned Firm and “[r]elationships with [d]ebarred [i]ndividuals/[c]orporations” – namely, the First Employee and two other former employees of the Sanctioned Firm (respectively, the “Second Employee” and the “Third Employee”). With respect to the First Employee, who was a director of the Sanctioned Firm, though was not himself subject to Bank sanctions, INT states that he is currently the Chief Accountant of the Appellant. INT produces two documents to support this claim. The first document is a screenshot of a webpage from a municipal website (apparently downloaded in April 2017) that provides a brief description of the Appellant, including that the First Employee is the Appellant's Chief Accountant. However, there is no indication as to how this information was sourced and how often it is updated. In addition, this evidence is inconsistent with INT's second piece of evidence, a screenshot of the First Employee's LinkedIn page (apparently downloaded in April 2017), which provides an overview of the First Employee's employment history. The LinkedIn screenshot does not state that the First Employee is Chief Accountant of the Appellant, and it indicates that the First Employee left the Appellant's employ in 2011. The Appellant confirms that the First Employee was a director of the company from 2000 to 2011, but states – and produces evidence to establish – that the First Employee was dismissed by the Appellant in 2011. In these circumstances, there is no observable basis for INT's claim that the First Employee is presently the Appellant's Chief Accountant.

17. Regarding the Second Employee, who was the Sanctioned Firm's president and sanctioned pursuant to Sanctions Board Decision No. 87 (2016),⁶ INT asserts that he is a manager of the Appellant. In support of this assertion, INT's evidence is a media report published in December 2016 of an interview with the Third Employee, who was the owner of the Sanctioned Firm. The Appellant disputes that it ever employed the Second Employee. The Sanctions Board has closely reviewed INT's evidence. The media report is poorly translated and there is no explanation as to the source or context of the interview with the Third Employee, which renders the document's authenticity dubious. Nevertheless, even accepting the authenticity of the media report, the substance of the interview as reported does not support INT's assertion that the Second Employee is a manager of the Appellant. To the contrary, the unclear and poorly translated report of the Third Employee's statement could at best suggest the Third Employee's understanding that the Second Employee joined the Appellant for

⁶ The Second Employee is referred to as the “Respondent President” in Sanctions Board Decision No. 87 (2016).

a time but has left the Appellant's employ. This evidence does not provide an observable basis for a finding that the Second Employee is presently a manager of the Appellant.

18. With respect to the Third Employee, who was the owner of the Sanctioned Firm, though was not himself subject to Bank sanctions, INT asserts that he stated in a press interview that "he was aware of [the Appellant], he had an indirect relationship to the company, and [the Appellant] rented the building he had built." Even accepting this portrayal of the press interview, these facts would not provide an observable basis for a finding that the Third Employee is a manager or closely connected to the Appellant.

19. INT identifies two other individuals who are purported former senior managers of the Sanctioned Firm and current members of the Appellant's management. The Appellant confirms that one of the individuals is presently employed as a director, but asserts that the other individual has never been employed by the Appellant. The Appellant notes that it has 234 employees, including 41 managers (composed of senior level management, line management, and middle managers). According to the Appellant, in total, only four of its current managers were previously employed by the Sanctioned Firm. The record does not indicate that any of these individuals were senior managers of the Sanctioned Firm or implicated in the misconduct for which the Sanctioned Firm was sanctioned. The Sanctions Board does not find that these facts provide an observable basis for determining that the Appellant is a successor to the Sanctioned Firm. The record here indicates that the Sanctioned Firm had previously employed over 1,000 individuals. Considering the highly competitive nature of the information technology sector, it may be expected that, following the Sanctioned Firm's liquidation, many of the Sanctions Firm's employees sought and secured employment with other leading information technology companies, including the Appellant.

3. Corporate relationship

20. INT asserts that the Appellant, under its previous name, was one of seven companies within the Sanctioned Firm's corporate group. According to INT, the Appellant was "listed" as part of the Sanctioned Firm's corporation until at least 2011. INT asserts that after 2011, the Appellant's management continued to report to the Third Employee, who was the owner of the Sanctioned Firm. In support of these assertions, INT refers to a series of press articles and the press report of an interview with the Third Employee discussed in Paragraph 17 above. The Sanctions Board has carefully reviewed these press publications, a number of which are over 10 years old, and finds that the substance of the evidence does not provide an observable basis for a finding that the Appellant was, or is currently, part of the Sanctioned Firm's corporate group. Because the substance of the press publications do not support INT's corporate relationship claims, the Sanctions Board need not address the question of whether press reports alone (which may represent views of a particular journalist or publication) would be sufficient to establish a corporate relationship for purposes of the Bank's successorship determinations.

4. Assignment of legal and financial rights

21. INT submits that the Appellant has been assigned legal and financial rights from the Sanctioned Firm – such as payment rights under ongoing contracts, the right to collect debts, and legal rights as a plaintiff – and owns trademarks previously owned by the Sanctioned Firm. The Appellant acknowledges that, following the Sanctioned Firm's liquidation, it acquired rights under

two of the Sanctioned Firm’s contracts (the “Contracts”) and purchased one of the Sanctioned Firm’s production units (the “Production Unit”). The Appellant has offered to alienate all assets purchased from the Sanctioned Firm. The Sanctions Board does not find that these facts provide an observable basis for determining that the Appellant is a successor to the Sanctioned Firm. The record indicates that the Contracts and the Production Unit represent only a small percentage of the Appellant’s rights and assets, and an even smaller percentage of the Sanctioned Firm’s rights and assets. The Appellant notes that the turnover from the Contracts in 2016 represented 0.026% of the company’s total turnover for that year, and has produced evidence supporting that the value of the Production Unit represents 7% of the company’s total assets. Moreover, there is no indication in the record that any of the acquired rights or assets were connected to the misconduct for which the Sanctioned Firm was sanctioned.

5. Public understanding

22. Finally, INT asserts that the national press of the Appellant’s domicile and the information technology community describe the Appellant and its management as a successor of the Sanctioned Firm. However, an asserted public understanding of a fact without evidential support is not sufficient to establish that fact. Indeed, INT concedes that “‘common knowledge’ does not evidence legal or economic successorship.” Moreover, the record suggests that the government of the Appellant’s domicile does not share the view that the Appellant is a successor of the Sanctioned Firm. Contrary to the public understanding asserted by INT, the record includes a bid evaluation report from 2017 in which the bid evaluation committee takes the view, following consultation with the ministry of justice, that the Appellant and the Sanctioned Firm are not inter-related. In these circumstances, the Sanctions Board finds that INT’s assertions under this factor do not provide an observable basis for determining that the Appellant is a successor to the Sanctioned Firm.

23. The Sanctions Board has now very carefully reviewed the basis for the World Bank’s successorship determination, including the factors discussed above, the parties’ submissions, and the entirety of the record. In light of the abuse of discretion standard applicable here, the Sanctions Board accords a high degree of deference to the World Bank’s determination. Notwithstanding this deferential standard of review, for all of the reasons discussed above, the Sanctions Board concludes that the World Bank’s determination that the Appellant is a successor to the Sanctioned Firm lacks an observable basis, and that the World Bank thus committed an abuse of discretion in making that determination.



J. James Spinner (Chair)

On behalf of the
World Bank Group Sanctions Board

J. James Spinner
Ellen Gracie Northfleet
Catherine O’Regan