THE WORLD BANK GROUP
SANCTIONS BOARD

Date of issuance: November 10, 2016

Sanctions Board Decision No. 89

Decision of the World Bank Group[1] Sanctions Board denying a request for reconsideration of Sanctions Board Decision No. 4 (2009) and/or Sanctions Board Decision No. 84 (2015), as filed by a respondent entity and the individual respondent in Sanctions Case No. 73 (respectively, the "Respondent Firm" and "Respondent Owner" and collectively, the "Respondents").[2]

I. INTRODUCTION

1. The Sanctions Board met in person and through virtual means in a panel session on July 28, 2016, to review a request for reconsideration and a "supplemental plea in equity for [a] clarificatory examination of all witnesses" (the "Request") filed by the Respondents with regard to Sanctions Board Decision No. 4 (2009) and/or Sanctions Board Decision No. 84 (2015). In Sanctions Board Decision No. 4 (2009), the Sanctions Board debarred the Respondents for an indefinite period of time for collusive practices in Sanctions Case No. 73.[3] In Sanctions Board Decision No. 84 (2015), the Sanctions Board denied a previous request for reconsideration filed by the Respondents with regard to Sanctions Board Decision No. 4 (2009) (the "First Request").[4] For deliberations on the present Request, the Sanctions Board was composed of J. James Spinner (Chair), Catherine O'Regan, and Judith Pearce.

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

i. the Request submitted by the Respondents to the Secretary to the Sanctions Board on January 20, 2016, and supplemented on April 14, 2016;

ii. comments on the Request submitted by INT to the Secretary to the Sanctions Board on June 20, 2016 ("INT's Comments");

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[1] In accordance with the World Bank Sanctions Procedures as adopted October 15, 2006 (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"). See Sanctions Procedures at Article I(a), n.1 and Article II, Section 1, n.10. As in the Sanctions Procedures, the terms "World Bank" and "Bank" are here used interchangeably to refer to both IBRD and IDA. See id. at Article I(a), n.1.

[2] The Respondents frame their request as a request for reconsideration of Sanctions Board Decision No. 84 (2015), which denied a previous request for reconsideration filed by the Respondents with regard to Sanctions Board Decision No. 4 (2009). In substance, however, the Respondents seek relief in the form of a "lift[ing]" of the sanctions imposed by the Sanctions Board in Sanctions Board Decision No. 4 (2009).

[3] See Sanctions Board Decision No. 4 (2009) at paras. 6, 8.

[4] See Sanctions Board Decision No. 84 (2015) at para. 39.

iii. Sanctions Board Decision No. 84 (2015) as issued on December 24, 2015 (the "Decision on the First Request");

iv. Sanctions Board Decision No. 4 (2009) as issued on January 12, 2009 (the "Original Decision"); and

v. the record previously considered in the proceedings in Sanctions Case No. 73.

II. GENERAL BACKGROUND

3. In the Original Decision, the Sanctions Board took into account multiple witness statements identifying the Respondents as "ringleaders" and noted the Respondent Firm's position as a designated winner in a collusive scheme.[5] The Sanctions Board also considered that the Respondents had engaged in multiple instances of misconduct.[6] On this basis, the Sanctions Board concluded that the Respondents' conduct "was sufficiently egregious as to warrant the most severe sanction."[7] On December 12, 2014, the Respondents requested the reconsideration of the Original Decision in their First Request. On December 24, 2015, following a hearing, the Sanctions Board denied the First Request.[8] On January 20, 2016, the Respondents filed the present Request, supplemented on April 14, 2016.

III. APPLICABLE STANDARDS OF REVIEW

4. The statutory and procedural framework that governed the original proceedings in Sanctions Case No. 73 includes the Sanctions Board Statute as issued in December 2006 (the "Statute") and the Sanctions Procedures as adopted on October 15, 2006. Both the Statute and the Sanctions Procedures provide that Sanctions Board decisions "shall be final."[9] However, the Sanctions Board has previously recognized that fundamental principles of fairness dictate that finality must, on occasion, yield in narrowly defined and exceptional circumstances.[10] Examples of such narrowly defined and exceptional circumstances may include the discovery of newly available and potentially decisive facts, fraud or other misconduct in the original proceedings, or a clerical mistake in the issuance of the original decision.[11] In contrast, mere attempts to re-argue or re-litigate a case, or respondents' failure to timely or effectively present previously available

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[5] Sanctions Board Decision No. 4 (2009) at para. 8.

[6] Id.

[7] Id.

[8] See Sanctions Board Decision No. 84 (2015) at para. 39.

[9] The Statute provides that Sanctions Board decisions "shall be final and without appeal." See Statute at Article XIV. The Sanctions Procedures provide that Sanctions Board decisions "shall be final and shall take effect immediately." See Sanctions Procedures at Section 16(1).

[10] See, e.g., Sanctions Board Decision No. 57 (2013) at para. 8 (citing Sanctions Board Decision No. 43 (2011) at paras. 14-15).

[11] See, e.g., Sanctions Board Decision No. 84 (2015) at para. 9.

facts or related evidence to the Sanctions Board, either on the advice of legal counsel or for other reasons, do not warrant reconsideration.[12]

IV. PRINCIPAL CONTENTIONS OF THE PARTIES

A. The Respondents' Principal Contentions in the Request

5. The Respondents request a review of the Decision on the First Request and seek relief in the form of a "lift[ing]" of the sanctions of indefinite debarment imposed pursuant to the Original Decision. Alternatively, the Respondents seek any "[o]ther reliefs consistent with equity and justice." The Respondents primarily assert the following grounds for reconsideration.

i. Developments following the Respondents' debarment in 2009 justify a review of their sanctions of indefinite debarment.

ii. The retroactive application of "beneficial rules" – i.e., rules favorable to respondents – to "finalized judgement[s]" is a "generally accepted principle in disciplinary proceedings in international and national jurisdictions." The "Unified Sanctions Guidelines" constitute such types of "beneficial rules" and should therefore be applied retroactively in this case.[13]

iii. The Respondents' sanctions of indefinite debarment are not in proportion with the Sanctions Board's subsequent decisions, which have all imposed lighter sanctions, even in cases of more egregious misconduct.

6. In addition, the Respondents assert that their "good behavior and outstanding track record" since the Original Decision are "worthy of consideration." The Respondents also make a "supplemental plea in equity for [a] clarificatory examination of all witnesses."

B. INT's Principal Contentions in its Comments

7. INT asserts that "there is nothing in the [Request] which is new" and that there is "no reason for the Sanctions Board to reverse its decision in Sanctions Board Decision No. 84." With respect to the Respondents' asserted grounds for reconsideration, INT submits the following main arguments.

i. Evidence presented by the Respondents in support of the asserted post-debarment developments is of questionable evidentiary value and neither potentially decisive nor newly available.

ii. The Respondents do not provide persuasive legal support of the asserted universal consensus on the retroactive application of beneficial rules.

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[12] See, e.g., id.

[13] The Respondents appear to be referring to the General Principles and Guidelines on Sanctions published in 2010 (the "2010 Sanctioning Guidelines").

iii. In the Decision on the First Request, the Sanctions Board already rejected the Respondents' argument regarding subsequent Sanctions Board decisions.

8. With respect to the Respondents' argument regarding their asserted "good behavior and outstanding track record," INT also asserts that the Sanctions Board rejected this argument in the Decision on the First Request. INT does not comment on the Respondents' "supplemental plea in equity."

V. ANALYSIS AND DISCUSSION

9. The Sanctions Board will first address whether the Respondents present evidence of exceptional circumstances that would warrant a reconsideration of either the Original Decision or the Decision on the First Request. The Sanctions Board will then address the Respondents' "supplemental plea in equity for [a] clarificatory examination of all witnesses."

A. Exceptional circumstances that would warrant reconsideration

10. For the reasons set out below, the Sanctions Board does not find any circumstances that would justify a reconsideration of either the Original Decision or the Decision on the First Request.

11. First, with respect to their argument that post-debarment developments justify a review of the Respondents' sanctions, the Respondents now submit evidence that they already referenced, but failed to include, in their First Request. The record does not support a finding that this evidence constitutes newly available facts. The evidence appears to be from 2009, and the Respondents do not offer any explanation or evidence as to why they were not able to include this evidence in their First Request, which was filed in 2014. Moreover, the record does not support a finding that the evidence constitutes potentially decisive facts. The Respondents submit an affidavit of one of the witnesses in Sanctions Case No. 73, which appears to contradict the witness's reported statements during INT's investigation in 2006. However, in the Original Decision, the Sanctions Board relied on statements of multiple other witnesses in finding the Respondents liable and determining their sanctions.[14] The Respondents also submit parliamentary resolutions ordering national investigations into the misconduct at issue in Sanctions Case No. 73, and a parliamentary report on the findings of one such investigation. However, the documents do not provide any new and potentially decisive insights into the Respondents' role in the misconduct. Furthermore, the Sanctions Board notes that the report appears to address criminal liability, which may require a higher standard of proof than the Bank's administrative sanctions process. In any event, the Sanctions Board has previously observed that national law standards and judgements are not binding on the Bank or the Sanctions Board's proceedings, and the scope of a respondent's liability for purposes of the Bank's administrative sanctions process may not be coextensive with the scope of the respondent's potential liability under national law.[15] In these circumstances, the Sanctions Board finds that

[14] See Sanctions Board Decision No. 4 (2009) at paras. 6, 8.

[15] See, e.g., Sanctions Board Decision No. 63 (2014) at para. 53; Sanctions Board Decision No. 86 (2016) at para. 41.

the Respondents have not presented evidence of newly available and potentially decisive facts warranting reconsideration.

12. Second, the Respondents argue that the continued imposition of the Respondents' sanctions of indefinite debarment cannot be justified under the 2010 Sanctioning Guidelines, which should be applied retroactively. In the Decision on the First Request, the Sanctions Board declined to consider the Bank's adoption of the 2010 Sanctioning Guidelines as an exceptional circumstance,[16] and noted, among other things, that the Respondents could not point to any international law rule or precedent that would stipulate the retroactive application of beneficial rules in finalized cases.[17] In the present Request, the Respondents cite to new legal materials in support of their assertion that beneficial rules should apply retroactively even in finalized cases. The cited materials concern criminal and disciplinary proceedings. Sanctions proceedings, however, are administrative in nature.[18] In addition, and as the Sanctions Board observed in the Decision on the First Request, it is not apparent, as a factual matter, whether the Respondents would have received lighter sanctions under the 2010 Sanctioning Guidelines.[19] In these circumstances, the Sanctions Board reaffirms its conclusion that the Bank's adoption of the 2010 Sanctioning Guidelines does not constitute an exceptional circumstance warranting reconsideration.[20]

13. Finally, the Sanctions Board notes that the Respondents repeat, in their Request, a number of the arguments that they made in their First Request, without presenting any material new evidence or legal reasoning in support of these arguments. Given that the Sanctions Board rejected these arguments, with reasons, in the Decision on the First Request, the Sanctions Board declines to reconsider them here and refers the Respondents to the Decision on the First Request.[21]

14. For all of the reasons stated above, the Sanctions Board hereby denies the Respondents' request for reconsideration.

B. "Supplemental plea in equity"

15. "[I]n the interest of due process and fairness," the Respondents also make a "supplemental plea in equity for [a] clarificatory examination of all witnesses" to determine "once and for all" the merits of the "ringleaders-of-cartel story" and the excessiveness of the sanctions. The Sanctions Board notes that nothing in the sanctions framework or the Sanctions Board's precedent allows for the examination of witnesses in a "clarificatory" proceeding. In

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[16] See Sanctions Board Decision No. 84 (2015) at para. 29.

[17] See id.

[18] See, e.g., Advisory Opinion on Certain Issues Arising in Connection with Recent Sanctions Cases, No. 2010/1, Legal Vice Presidency of the World Bank (November 15, 2010) at p. 10, para. 43.

[19] See Sanctions Board Decision No. 84 (2015) at para. 29.

[20] See id. at para. 29.

[21] See id. at paras. 31, 34.

addition, and consistent with the Decision on the First Request,[22] the Sanctions Board finds no evidence of a failure of due process in the original proceedings. The Sanctions Board hereby denies the Respondents' "supplemental plea in equity."

J. James Spinner (Chair)

On behalf of the
World Bank Group Sanctions Board

J. James Spinner
Catherine O'Regan
Judith Pearce

[22] See id. at para. 38.