World Bank Sanctions: Guidance for Practitioners

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August 6, 2012

The World Bank sanctions system has teeth. Just ask Oxford University Press, Alstom, KBR, and the more than eighty other companies and individuals debarred over the last year for violating the Bank's Procurement Guidelines and Consultant Guidelines with corruption, fraud, or collusion. Or ask the numerous entities currently under investigation by the Bank's Integrity Vice Presidency (INT).

In fact, World Bank debarment may be the most significant penalty you have never heard of. It can have effects that go beyond ineligibility for World Bank work. Through cross-debarment procedures, tagged companies and individuals generally are deemed ineligible to participate in projects financed by other multilateral development banks. Moreover, debarred companies show up on due diligence "red flag" lists as "blacklisted" companies – even after their debarment is over – complicating efforts to conduct international business. Some debarred companies must also pay steep fines.

As one of the small number of U.S. lawyers who has investigated and built cases that have gone before the Sanctions Board (as well as similar entities at other development banks), I have taken great interest in recent developments at the World Bank Sanctions system. If you happen to be serving as a respondent's attorney before the Sanctions Board, here are some things you should know:

Consult the Law Digest. One of the challenges of World Bank debarment has been the lack of public awareness of the Bank's investigations processes and sanctions decisions, including the quasi-judicial mechanism of the World Bank Sanctions Board. Because of this, World Bank practitioners took great interest when the Sanctions Board released its first Law Digest earlier this year. The Digest summarizes the developing legal principles and practices in this heretofore opaque area developed through core holdings in the system's first few years.

While the Digest is limited in that it contains only summaries of a relatively small number of cases that have reached the second level of review (most cases end at the first level of review by an Internal Evaluation and Suspension Officer and are not appealed to the Sanctions Board), the Digest still provides important, basic information. It is comprehensive and detailed – a remarkable achievement that private practitioners should celebrate. In my time working with the World Bank, I participated in the development of some of these principles when many cases were ones of first impression. Building on that experience, FCPAméricas plans to offer perspectives on various aspects of the Law Digest in upcoming posts. As a preliminary matter, it is important for practitioners to spend considerable time combing through each page of the Law Digest. Given the page limitations of your

submissions to the Sanctions Board, you will need to emphasize those theories that have worked in the past.

As the body of case law grows, even more clarity is in store. The Sanctions Board has already started publishing it full decisions.

National Laws of Little Importance to the Board. Experienced practitioners before the Sanctions Board never base their cases on national laws. In the Law Digest, the Sanctions Board makes this point clear. The Board states that national laws are irrelevant in its mandate to determine whether the evidence supports the conclusion that a respondent has engaged in a sanctionable practice and, if so, to impose an appropriate sanction on the respondent. Neither the Sanctions Board Statute nor the Sanctions Procedures provide a basis on which to consider a national law framework as controlling in the Bank's sanctions proceedings. In its Decision No. 45 (2011), the Board stated, "the Sanctions Board did not accept that national law principles, as the respondent asserted, would define the respondent's liability for the acts of its agent or affiliate."

Instead, arguments should be based on Bank rules and practices, and reason. By focusing on the World Bank's own jurisprudence, respondents show Sanctions Board members that they respect this particular system of rules. In contrast, by elevating national principles above World Bank practice, respondents run the risk of offending their international audience on the Board and undermining their case.

Is national law irrelevant? Of course not. For example, if a respondent presents an analysis that shows that the legal systems of several different countries each treat a particular legal issue the same, Board members might very well find this persuasive. The information would be influential, not because it is based on a national law, but because the treatment is a fair and reasonably thing to do.

Do not Rely on Precedent. The Sanctions Board does not base decisions on precedent. It is not bound by any holding that came before. It thereby preserves a high degree of independence in its reviews. Nonetheless, lawyers should read the decisions, analyze what the Board has done, and emphasize patterns and themes of Sanctions Board practice. The fact that the Board has decided in a certain way previously is persuasive.

In addition, practitioners should keep in mind that the Sanctions Board carries out a full *de novo* review, and is not bound by any decision by INT or the Evaluations Officer. This provides respondents with greater room to design and argue their cases.

Most Cases Do Not Go to the Sanctions Board. There is much more law out there than you might think. Over the last few years, the rate of appeal to the Sanctions Board has held steady at less than half. Most interestingly, cases can only go to the Sanctions Board if the respondent appeals them. No World Bank authority – not INT,

the Evaluations Officer, or the Sanctions Board itself – can appeal the case on its own.

Oftentimes, companies will choose to appeal strictly because they have so much to lose with an adverse finding. Most of the time, they focus the challenge on the interpretation of the facts as made by the Evaluations Officer or INT. Sometimes they challenge the legal theories in the case, some of which might be novel. Most every time, the respondent is a large company with the resources available to hire qualified counsel. In a few cases, smaller companies have appealed by representing themselves or using less experienced local counsel.