Facts, Evidence and the Burden of Proof in the World Bank Group Sanctions System

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ABSTRACT

The large and growing number of international judicial and quasi-judicial bodies has made international procedural law an important part of public international law. This article examines how procedural rules of a certain type—provisions related to facts, evidence, and the burden of proof—have been designed in the World Bank Group Sanctions System. The main conclusion is that such rules play a central role, and that considerable efforts have been made during the last two decades to develop a well-functioning body of procedural provisions. However, the article also argues that certain parts of the system could be developed further, in order to make it as clear as possible what is expected from the different actors in the proceedings.

INTRODUCTION

When describing the international legal landscape of today it is difficult to overstate the importance of international judicial and quasi-judicial bodies: courts, tribunals, panels, boards, and so forth. The main role of such bodies is to interpret and apply substantive rules within different fields of international law. However, if there is a judicial or quasi-judicial body, there is also always some sort of procedural rules, stating \textit{inter alia} how proceedings can be initiated, the rights of the parties, and how evidence should be treated. In domestic legal systems, there is usually a well-developed body of procedural rules, interpreted in case law, and analysed in the writings of legal scholars, during a long period of time. In international law, on the other hand, the situation is often rather unclear. Treaty negotiators and international judges have their backgrounds in different types of domestic systems: common law, civil law, and others. And to a large extent, they rely on domestic principles and concepts when procedural provisions are negotiated and interpreted.\textsuperscript{1} Thus, there is always a risk for the introduction of procedural elements not necessarily well-suited for the international context, or not fitting together. An important research task is therefore to examine the special character of international proceedings, and to analyse how principles and concepts originating

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\textsuperscript{1} The ‘general principles of law recognized by civilized nations’ are one of the sources of public international law mentioned in Art 38 of the Statute of the International Court of Justice.

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in domestic systems are incorporated, interpreted, and applied in international legal regimes. International procedural law has become a research field more relevant than ever before.\(^2\)

The aim of the present article is to contribute to a better understanding of how a certain type of procedural rules—rules related to facts, evidence, and the burden of proof—has been designed in an important, but from a scholarly point of view still rather unexplored, international system with strong quasi-judicial features: The World Bank Group Sanctions System (WBGSS).\(^3\) Each year, the World Bank Group (WBG) provides loans and other types of financial assistance, worth billions of dollars, to developing countries around the world, for investments in areas such as education, health, and infrastructure.\(^4\) Fraud and corruption are well-known problems in WBG-financed projects, and the WBGSS has been developed as a key component in the fight against these problems. Like in other international legal systems, it has been relevant to examine domestic legal systems, and to distill general principles of law under international law.\(^5\) And like in other legal systems, rules related to facts, evidence, and the burden of proof play important roles, since they determine \textit{inter alia} which facts the quasi-judicial body has to be persuaded about, which party shall carry the heaviest burden of persuading the body, and to what extent the body must be persuaded.

After this introduction, section II provides a brief description of the WBG and the historical background of the WBGSS. Since almost all cases handled in the WBGSS so far concern projects related to the two WBG bodies referred to as the World Bank (WB)—the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA)—the article will focus on the provisions applicable in this type of cases.\(^6\) Section III analyses a number of fundamental issues related to facts, evidence, and the burden of proof in the WBGSS, in light of how such issues can be understood from a more general, theoretical perspective. Finally, section IV contains a summary of the main conclusions in the article.

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\(^2\) S.I. Strong, ‘General Principles of Procedural Law and Procedural \textit{Jus Cogens},’ 122:2 Penn State Law Review 347 (2018).

\(^3\) On the judicialization of the WBGSS, see Laurence Boisson de Chazournes and Edouard Fromageau, ‘Balancing the Scales: The World Bank Sanctions Process and Access to Remedies’, 23 European Journal of International Law 963 (2012), at 975–81.

\(^4\) In the fiscal year ending the 30 June 2019, WBG commitments were nearly $60 billion. WB, \textit{World Bank Annual Report 2019} (2019) 3.

\(^5\) WB, \textit{The World Bank Group’s Sanctions Regime: Information Note} (November 2011) 15. It seems that, when the original sanctions system was reformed, an important source of inspiration was the US Federal Acquisition Regulation. Dick Thornburgh, Ronald L. Gainer and Cuyler H. Walker, \textit{Report Concerning the Debarment Processes of the World Bank} (14 August 2002) (Second Thornburgh Report) 4, footnote 2. See also Anne-Marie Leroy and Frank Fariello, \textit{The World Bank Group Sanctions Process and Its Recent Reforms} (WB 2012) 8, footnote 42; Pascale Hélène Dubois, ‘Domestic and International Administrative Tools to Combat Fraud & Corruption: A Comparison of US Suspension and Debarment with the World Bank’s Sanctions System’, 2012 University of Chicago Legal Forum 195 (2012).

\(^6\) WB, \textit{World Bank Group Sanctions System Annual Report FY19} (2019) 6.
I. THE WBG AND ITS SANCTIONS SYSTEM

The WBG consists of five bodies: The IBRD, the IDA, the International Finance Corporation (IFC), the Multilateral Investment Guarantee Agency (MIGA), and the International Centre for Settlement of Investment Disputes (ICSID). Common to these bodies is that they support investments in developing countries in different ways. The IBRD provides loans to middle-income and credit-worthy low-income countries. The IDA provides interest-free loans and grants to the poorest countries. The IFC focuses exclusively on the private sector, and delivers financing to businesses in emerging markets. The MIGA promotes cross-border investment in developing countries by providing guarantees to investors and lenders, protecting them from non-commercial risks. And the ICSID, which is the only non-financial institution in the WBG, facilitates foreign investment by providing a system for investment dispute settlement. Four of the above bodies—the IBRD, the IDA, the IFC, and the MIGA—are covered by the WBGSS. The procedures are basically regulated in three different documents, one for cases involving WB projects, one for cases involving IFC projects, and one for cases involving MIGA projects. As mentioned above, almost all cases handled in the sanctions system so far concern WB projects, and the article will therefore focus on the provisions applicable in this type of cases.

Furthermore, the starting point for a more formal sanctions system in the WBG can be traced back to the mid 1990s. A Sanctions Committee (SC), composed of senior staff of the WB, was created in 1998. The role of this body was to review allegations of fraud and corruption by bidders, contractors, suppliers, and consultants in IBRD projects, and to recommend which sanction to impose. The President of the WB then made the final sanction decision, usually debarment. During the last two decades, this original system has gone through a number of reforms, increasing its quasi-judicial features. Many reforms are results of recommendations in the so-called ‘Thornburgh reports’. In 2001, the Department of Institutional Integrity (INT) was created. The INT is an independent unit in the WBG, with the responsibility to investigate allegations of fraud and corruption. Before the INT was created, allegations were investigated by a number of different types of WB units, and outside law firms. Moreover, today’s two-tier procedure was introduced in 2004 (but did not start operating until 2007). The first tier was an Evaluation and Suspension Officer (EO), and the second tier, replacing the SC, a Sanctions Board (SB). In 2013, the title EO was changed to Suspension and Debarment.

7 WB, Bank Procedure: Sanctions Proceedings and Settlements in Bank Financed Projects (7 January 2016) (Sanctions Procedures); IFC, IFC Sanctions Procedures (1 November 2012); MIGA, MIGA Sanctions Procedures (28 June 2013). There are also special procedures for WB guarantee and carbon finance projects. WB, World Bank Private Sector Sanctions Procedures (8 October 2013).
8 WB, Fraud and Corruption: Proposed Amendments in the Bank’s Loan Documents for the Purpose of Making Them More Effective in the Fight Against Fraud and Corruption (10 July 1996); WB, Reform of the World Bank’s Sanctions Process (28 June 2004).
9 Dick Thornburgh, Ronald L. Gainer and Cuyler H. Walker, Report to Shengman Zhang, Managing Director and Chairman of the Oversight Committee on Fraud and Corruption, The World Bank, Concerning Mechanisms to Address Problems of Fraud and Corruption (21 January 2000) (First Thornburgh Report); Second Thornburgh Report, above n 5; Dick Thornburgh, Ronald L. Gainer and Cuyler H. Walker, Report Concerning the Proposed Strategic Plan of the World Bank’s Department of Institutional Integrity, and the Adequacy of the Bank’s Mechanisms and Resources for Implementing that Strategy (9 July 2003) (Third Thornburgh Report).
Officer (SDO) in the rules applicable in WB cases. Another important change was the expansion of the procedure in 2006, to cover the MIGA, the IFC, and the Bank’s Partial Risk Guarantee (PRG) activities, and to cover fraud and corruption more generally, not only in procurement cases.\footnote{10}

Today, there is a large body of case law concerning the different sanctionable practices, and since 2012 all full-text decisions of the SB are published. There are also two editions of the SB Law Digest, setting out legal principles and core holdings in cases between 2007 and 2019.\footnote{11} The ‘normative architecture’ of the system is described in the Bank Directive of 2016.\footnote{12} Five sources of law are mentioned: Articles of Agreement, Policy Framework, Operational Legal Framework, Authoritative Interpretation, and General Principles of Law. These sources are also defined in more detail in the document. The jurisdiction of the WBGSS, and the persons and entities that may be subject to a sanction, are described in the Bank Directive and the Sanctions Procedures.\footnote{13}

Compared to other international sanctions regimes, the WBGSS has a rather limited scope. While for example the United Nations Security Council may decide on a broad range of sanctions under Article 41 of the UN Charter, sanctions within the WBGSS are limited to a few specific forms, as a response to a few specific sanctionable practices within bank-financed projects. However, regimes similar to the WBGSS can be found in other development banks, for example the African Development Bank Group and the Asian Development Bank.\footnote{14}

II. FACTS, EVIDENCE, AND THE BURDEN OF PROOF IN THE WBGSS

A. Fact-finding in adversarial proceedings

A distinction can be made between inquisitorial and adversarial proceedings. To put it simple, in the first type of proceeding, the judicial or quasi-judicial body is responsible for finding answers to questions of fact. In the second type, this responsibility rests on the parties. The reason why a system is designed in one way or the other can be described as a choice between ‘truth’ and ‘fairness’.\footnote{15} In an inquisitorial system, the main goal is to come as close as possible to the truth. The idea is that this can be achieved if the body, as a neutral actor, has the responsibility to investigate factual issues. In an adversarial system, on the other hand, the main goal is a fair result. The idea is that this can be achieved if the body remains passive, and leaves to the parties to present the facts.
Common law systems are often described as adversarial and civil law systems as inquisitorial. But in reality, it is probably difficult to find any pure adversarial or inquisitorial systems.\textsuperscript{16} Many proceedings—including international proceedings—contain both inquisitorial and adversarial elements, but are of a mainly adversarial character, in the sense that the main responsibility for answering questions of fact rests on the parties.\textsuperscript{17} Typically, one of the parties will claim that the other has violated a rule. The judicial or quasi-judicial body may have certain possibilities to investigate factual issues. But it will usually primarily be up to the parties to make claims about facts and produce evidence. Thereafter, the body will determine which facts have been proved and whether the rule has been violated.\textsuperscript{18}

Like proceedings in other international organizations, the design of the WBGSS has been inspired by proceedings in domestic legal systems. The system is often described as administrative in nature, similar to suspension and debarment processes found in certain countries, but it also contains elements from a range of other procedural models. Since the sanctionable practices constitute conduct considered criminal in most countries, it has been relevant to benchmark the system against criminal proceedings. Elements related to contract and tort law have also been relevant to examine. Moreover, the international character of the system has made it relevant to take into consideration both common and civil law traditions, and arrangements in other international organizations, primarily other multilateral development banks.\textsuperscript{19}

The WBGSS is adversarial in character, in the sense that there are two parties in the proceeding—the INT and the Respondent—carrying the main responsibility for claiming facts and presenting evidence. Allegations of sanctionable practices are investigated by the INT, performing a function similar to that of a prosecutor, or other type of agent for the government, in a domestic legal system.\textsuperscript{20} The INT has an obligation to consider all relevant evidence, also evidence that would reasonably tend to exculpate the Respondent or mitigate the Respondent’s culpability.\textsuperscript{21} If the investigation shows sufficient evidence to support a finding of one or more sanctionable practices in connection with a WB-financed project, the INT may seek to initiate proceedings.\textsuperscript{22} The INT will then submit a ‘Statement of Accusations and Evidence’ (Statement) to the SDO, which is the first tier in the two-tier system.\textsuperscript{23} Moreover, if

\footnotesize{\textsuperscript{16} J.A. Jolowicz, ‘Adversarial and Inquisitorial Models of Civil Procedure’, 52 International and Comparative Law Quarterly 281 (2003).}

\footnotesize{\textsuperscript{17} Caslav Pejovic, ‘Civil Law and Common Law: Two Different Paths Leading to the Same Goal’, 42 Victoria University of Wellington Law Review 817 (2001), at 830–1; C.H. van Rhee and Remme Verkerk, ‘Civil Procedure’, in Jan M. Smits (ed), Elgar Encyclopedia of Comparative Law (Cheltenham: Edward Elgar, 2006) 120–34, at 126.}

\footnotesize{\textsuperscript{18} In common law systems, in proceedings with a jury, questions of fact are usually left to the jury. Roderick Munday, Cross & Tapper on Evidence, 13th ed. (Oxford: Oxford University Press, 2018) 177.}

\footnotesize{\textsuperscript{19} Leroy and Fariello, above n 5, at 8. It has been stated that the WBGSS contains ‘an unorthodox combination of legal disciplines’. Pascale Hélène Dubois and Aileen Elizabeth Nowlan, ‘Global Administrative Law and the Legitimacy of Sanctions Regimes in International Law’, 36 The Yale Journal of International Law Online 15 (2010), at 17.}

\footnotesize{\textsuperscript{20} Rules regarding temporary suspensions and settlement agreements are not discussed in the present article.}

\footnotesize{\textsuperscript{21} Para 3.02 of Section III.A Sanctions Procedures.}

\footnotesize{\textsuperscript{22} Para 3.01 of Section III.A Sanctions Procedures.}

\footnotesize{\textsuperscript{23} Para 3.01(b) of Section III.A Sanctions Procedures.}
the SDO finds sufficient evidence in support of the accusations, it will issue a 'Notice of Sanctions Proceedings' (Notice) to the Respondent.\textsuperscript{24} One part of the Notice is the recommendation of one of the following five sanctions: reprimand, conditional non-debarment, debarment, debarment with conditional release, or restitution.\textsuperscript{25} After this, the Respondent is given thirty days to submit a 'written explanation' (Explanation), with evidence and arguments in support of a withdrawal of the Notice or a revision of the recommended sanction.\textsuperscript{26} The SDO will withdraw the Notice if there is a 'manifest error or other clear basis for supporting a finding of insufficiency of evidence against the Respondent', and that would be the end of the proceeding.\textsuperscript{27} In cases where the Respondent does not contest the accusations within ninety days, the proceeding will also end here, and the sanction will enter into force.\textsuperscript{28}

However, the Respondent may also contest the case by submitting evidence and arguments in a 'written response' (Response) to the SB, which is the second tier in the two-tier system.\textsuperscript{29} The INT is then given the opportunity to submit a 'written reply' (Reply) with evidence and arguments.\textsuperscript{30} At this point, the Respondent and the INT may also request a hearing, where they can present their cases orally for the SB.\textsuperscript{31} After having made a \textit{de novo} review of the case, the SB will make a 'written decision' (Decision), including a recitation of the relevant facts, the determination as to the culpability of the Respondent, any sanction to be imposed and the reasons therefor.\textsuperscript{32} If the SB finds that the Respondent has been engaged in sanctionable practices, the decided sanction will be imposed. Otherwise, the proceeding is terminated. The Decision is final, binding on the parties, takes effect immediately, and is without prejudice to any action taken by any government under its applicable law.\textsuperscript{33}

As can be seen, the system implies that the SDO and the SB perform the function of neutral bodies, examining evidence and arguments presented by the parties. Formal rules of evidence do not apply.\textsuperscript{34} Hence, the parties may present any type of evidence, and the SDO and the SB may use any kind of evidence—including hearsay evidence—in support of their conclusions. Moreover, it is entirely up to the SDO and the SB to determine the relevance, materiality, weight, and sufficiency of the evidence.
presented. However, beside the above-described adversarial elements of the system, there are also certain inquisitorial elements, especially when a case has reached the SB. The SB has the authority to call and question witnesses, and to question the representative of the INT and/or the Respondent or the representative of the Respondent. If a party refuses to answer, or fails to answer truthfully or credibly, this may be construed against that party.

Systems of a mainly adversarial character, like the WBGSS, need burden and standard of proof rules. Such rules stipulate which party shall carry the heaviest burden of persuading the judicial or quasi-judicial body about the facts (the burden of proof) and to what extent the body must be persuaded (the standard of proof). The burden and standard of proof in the WBGSS will be examined below. However, it can be noted that, while these rules determine how questions of fact shall be answered in the proceeding, the interpretation and application of the rules themselves are questions of law. And in most legal systems—including the WBGSS—the responsibility to answer questions of law rests on the judicial or quasi-judicial body.

B. Facts

In a proceeding where one party has claimed that another party has violated a rule, the claim is really about facts that must be proved. A simple example: Rule X stipulates that Act Y is prohibited. The act is described in the rule. If one party—Party A—claims that the other party—Party B—has violated Rule X, the judicial or quasi-judicial body wants to know: (1) how to interpret the description of Act Y in the rule (a question of law), and (2) whether Party B has performed this act in reality (a question of fact). A description of an act in a rule can be referred to as an ‘abstract legal fact’, and a claim that this act has been performed in reality a ‘concrete legal fact’. The latter is a fact that needs to be proved in the proceeding (factum probandum). When trying to persuade the body about such fact, a party may also claim a fact that is not itself a concrete legal

35 The SDO and the SB may for example consider the cumulative weight of evidence. Sanctions Board Decision No 50 (Sanctions Case No 117) IBRD Loan No 4721—TH Thailand (30 May 2012) para 28.
36 Paras 6.03(b)(iv) and 6.03(c) of Section III.A Sanctions Procedures.
37 Bin Cheng, General Principles of Law as Applied by International Courts and Tribunals (Cambridge: Cambridge University Press, 2006) 299; Mojtaba Kazazi, Burden of Proof and Related Issues: A Study on Evidence Before International Tribunals (The Hague: Kluwer Law International, 1996) 42–50.
38 On the distinction between ‘abstract legal facts’ and ‘concrete legal facts’, see Bengt Lindell, ‘Evidence in Sweden,’ in José Lebre de Freitas (ed), The Law of Evidence in the European Union (The Hague: Kluwer Law International, 2004) 407–435, at 407. The term ‘legal fact’ seems to be used primarily within civil law systems. John Henry Merryman and Rogelio Pérez-Perdomo, The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America, 3rd ed. (Stanford, Calif.: Stanford University Press, 2007) 75–6. In common law systems, such facts are often referred to as ‘facts in issue’, ‘principal facts’ or ‘ultimate facts’. Munday, above n 18, at 29–30; Richard Glover, Murphy on Evidence, 15th ed. (Oxford: Oxford University Press, 2017) 35–6; Adrian Keane and Paul McKeown, The Modern Law of Evidence, 12th ed. (Oxford: Oxford University Press, 2018) 9–10.
39 John Henry Wigmore, 'The Science of Judicial Proof', in Peter Murphy (ed), Evidence, Proof, and Facts: A Book of Sources (Oxford: Oxford University Press, 2003) 181–203, at 181; Terence Anderson, David Schum and William Twining, Analysis of Evidence, 2nd ed. (New York: Cambridge University Press, 2005) 90–2; William Twining, Theories of Evidence: Bentham and Wigmore (Stanford, Calif.: Stanford University Press, 1985) 125.
fact, but that is offered in evidence as proof of a concrete legal fact (factum probans). This can be referred to as an ‘evidentiary fact’.

The concrete legal facts and the evidentiary facts will look different in different cases. The INT will claim facts that are supposed to show that the rule has been violated, and the Respondent facts that are supposed to show that the rule has not been violated. But the possible abstract legal facts in a system are usually the same, since they are part of the substantive rules. In the WBGSS, the relevant abstract legal facts can be found in the provisions describing the sanctionable practices. The WBG Policy contains the following general definition of a Sanctionable Practice:

(i) collectively and individually, corrupt practice, fraudulent practice, collusive practice, coercive practice, and obstructive practice, as such practices may be defined in the legal agreements or other documents governing the WBG operation, including any relevant instrument prepared thereunder, in connection with which such practices may occur; and
(ii) specific and limited violations of procedures in connection with the Sanctions System as the Board may determine.

Even though there is a possibility for the Board—meaning the Executive Directors of the IBRD, IDA, IFC, and/or the Directors of the MIGA—to specify violations, the main descriptions of the sanctionable practices can be found in the first subparagraph: ‘corrupt practice’, ‘fraudulent practice’, ‘collusive practice’, ‘coercive practice’, and ‘obstructive practice’. Moreover, in the Sanctions Procedures, the term Sanctionable Practice is defined in the following way:

(i) with respect to any case under sub-paragraph 1.01(c)(i) of Section III.A, a corrupt, fraudulent, coercive, collusive, or obstructive practice, as such terms are defined in the Anti-Corruption Guidelines, Procurement Guidelines or Consultant Guidelines, as the case may be, under which such case is being brought (see Annex A); (ii) with respect to any case under sub-paragraph 1.01(c)(ii) of Section III.A, a corrupt, fraudulent, coercive, collusive, or obstructive practice, as defined in the World Bank Vendor Eligibility Policy in connection with the Bank’s corporate procurement; (iii) with respect to any case under sub-paragraph 1.01(c)(iii) of Section III.A, a violation of a Material Term, as defined in the VDP Terms & Conditions; and (iv) with respect to any case under sub-paragraph 1.01(c)(iv) of Section III.A, a violation of sub-section 11.05 of Section III.A.

Sub-paragraphs (iii) and (iv) refer to special types of sanctionable practices, namely breaches of material terms in Voluntary Disclosure Programs (VDP) and breaches of confidentiality provisions in the Sanctions Procedures. But the main sanctionable practices can be found in sub-paragraphs (i) and (ii). These are the same as the five

40 Ibid.
41 It seems that the term ‘evidentiary fact’ is used in both civil law and common law systems. Other terms used for this type of facts are ‘circumstantial evidence’, ‘facts relevant to the issue’ and ‘subordinate facts’. Munday, above n 18, at 30–1; Lindell, above n 38, at 407; Julius Stone, ‘Burden of Proof and the Judicial Process: A Commentary on Joseph Constantine Steamship, Ltd. v. Imperial Smelting Corporation, Ltd.’, 60 The Law Quarterly Review 262 (1944), at 263 and 266.
42 Para (m) of Section II WBG Policy: Sanctions for Fraud and Corruption (7 January 2016) (WBG Policy).
43 Para (r) of Section II Sanctions Procedures.
practices mentioned in the WBG Policy. The Sanctions Procedures refer to the definitions in the Anti-Corruption Guidelines, the Procurement Guidelines, the Consultant Guidelines, and the World Bank Vendor Eligibility Policy.44 These definitions are also normally incorporated by reference into the Bank’s legal agreements.45 Moreover, four of the definitions—corrupt practice, fraudulent practice, coercive practice, and collusive practice—are not only used within the WBGSS. The WBG has agreed with a number of other multilateral development banks, and the International Monetary Fund and the European Investment Bank Group, to apply the same standardized definitions (the Uniform Framework).46

As can be seen, it is not entirely easy to find the relevant abstract legal facts. One has to look in the relevant guideline or policy. Even though the definitions of the sanctionable practices are not exactly the same, word-by-word and comma-by-comma, in the different documents, the important abstract legal facts are the same. The definition of ‘fraudulent practice’ can be used as an example.47 In the most recent guidelines and policy documents, and in the Uniform Framework, the definitions are more or less the same. The following definition can be found in the Uniform Framework: ‘A fraudulent practice is 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’.48 There are a number of abstract legal facts in this sentence. The first part is that there has to be an ‘act or omission’, and it is specified that this includes ‘misrepresentations’. Moreover, the act or omission has to ‘mislead’ or ‘attempt to mislead’ another ‘party’. And this has to be done ‘knowingly or recklessly’, and to ‘obtain a financial or other benefit’ or to ‘avoid an obligation’. In certain documents, some of these abstract legal facts are defined further in footnotes.49 Hence, in a specific case, the INT will have to claim concrete legal facts matching all of the above abstract legal facts. As can be seen, the facts include both objective and subjective elements. The INT will for example have to prove that there has been an act or omission that can be objectively observed, but also that the Respondent has had certain intentions. The Respondent, on the other hand, will claim concrete legal facts showing that the

44 These documents are also defined in the Sanctions Procedures. Paras (b), (f), (p) and (aa) of Section II Sanctions Procedures.
45 WB, World Bank Group Sanctions Regime: An Overview (15 September 2010) para 26.
46 Para 1 Uniform Framework for Preventing and Combating Fraud and Corruption (September 2006) (Uniform Framework); Para 2(a) Agreement for Mutual Enforcement of Debarment Decisions (9 April 2010).
47 Fraudulent practice is by far the most common sanctionable practice handled in the WBGSS. WB, The World Bank Office of Suspension and Debarment: Report on Functions, Data and Lessons Learned 2007–2015 (2nd edn, WB 2015) 30.
48 Para 1 Uniform Framework. For an analysis of the abstract legal facts in the definition of fraudulent practice, see Anne-Marie Leroy, Advisory Opinion on Certain Issues Arising in Connection with Recent Sanctions Cases (15 November 2010) paras 86–127.
49 E.g. Para 1.16(a)(ii) Guidelines Procurement of Goods, Works and Non-Consulting Services Under IBRD Loans and IDA Credits & Grants by World Bank Borrowers (January 2011); Para 1.23(a)(ii) Guidelines Selection and Employment of Consultants Under IBRD Loans and IDA Credits & Grants by World Bank Borrowers (January 2011, revised July 2014); Para 7(b) Guidelines on Preventing and Combating Fraud and Corruption in Projects Financed by IBRD Loans and IDA Credits and Grants (1 July 2016).
requirements in one or several abstract legal facts are not fulfilled. And both parties will probably claim evidentiary facts supporting their concrete legal facts.

C. Burden of proof

In reality, the judicial or quasi-judicial body will rarely reach full certainty about the concrete legal facts in a case. If we look at the example above, we can see that the parties in the proceeding will claim two different concrete legal facts, where one is the negation of the other. Party A will claim that Party B has performed the act (Y), and Party B that it has not performed the act (\(\sim Y\)). Hence, Party A will have to persuade the body about Y, and Party B about \(\sim Y\). When we refer to the ‘burden of proof’, we usually refer to what could be described as the ‘greater risk of non-persuasion’, or simply the ‘burden of persuasion’.\(^{50}\) Each party will carry a risk of not persuading the body, but one of them will carry a greater risk than the other. If the judicial or quasi-judicial body finds, based on the evidence presented, that the claim of Party A seems as probable as the claim of Party B, it still has to make a ruling. One of the parties must lose, and the losing party is the party carrying the burden. Hence, in proceedings of this type it is unavoidable to allocate the burden to one of the parties.\(^{51}\)

The WBGSS includes a proceeding of a mainly adversarial character, and it has therefore been necessary to handle burden of proof issues when developing the system. Already in 2000, in the First Thornburgh Report, it was recommended that the SC should develop ‘written policies and statements for determining the sufficiency of proof of wrongdoing’.\(^{52}\) When the Sanctions Committee Procedures of August 2001 were adopted, there was no regulation of the burden of proof, only a rather vague regulation of the standard of proof. It was stated that the SC should recommend a sanction if it found that the evidence was ‘reasonably sufficient’ to support a finding that the Respondent had engaged in sanctionable practices.\(^{53}\) But it was not stated whether the burden should rest on the INT or the Respondent. However, in practice, the burden was normally imposed on the INT.\(^{54}\)

In the Second Thornburgh Report, burden and standard of proof issues were examined rather thoroughly. It was stated that in virtually all judicial and administrative proceedings, there is a requirement that the party initiating the proceeding should carry the burden. It was also stated that in many proceedings, once the initiating party has made out its case, the burden shifts to the other party to overcome the evidence against it.\(^{55}\) Hence, the recommendation in the report was that the Sanctions Procedures

\(^{50}\) John T. McNaughton, ‘Burden of Production of Evidence: A Function of a Burden of Persuasion’, 68 Harvard Law Review 1382 (1955), at 1383. The burden of proof is also referred to as the ‘legal burden’, the ‘fixed burden of proof’ and the ‘probative burden’. C.R. Williams, ‘Burdens and Standards in Civil Litigation’, 25 Sydney Law Review 165 (2003), at 166. The most common terms seem to be the ‘burden of persuasion’ and the ‘persuasive burden’. Monday, above n 18, at 124; John J. Barceló III, ‘Burden of Proof, Prima Facie Case and Presumption in WTO Dispute Settlement’, 42 Cornell International Law Journal 23 (2009), at 27–35.

\(^{51}\) Fleming James Jr., ‘Burdens of Proof’, 47 Virginia Law Review 51 (1961), at 52.

\(^{52}\) First Thornburgh Report, above n 9, at 52.

\(^{53}\) Para 13(b)(2) of Section VII Sanctions Committee Procedures (August 2001).

\(^{54}\) Second Thornburgh Report, above n 5, at 47.

\(^{55}\) Ibid.
should be changed and that it should be clearly stated that the burden should rest on the INT, but shift to the Respondent when the INT had presented evidence establishing that the Respondent had engaged in sanctionable practices.\textsuperscript{56}

These recommendations were adopted, and are now part of the Sanctions Procedures applicable today. The WBGSS consists of a two-tier procedure, where the first step is the SDO, and the second step the SB. The INT will submit an accusation to the SDO, and the SDO will issue a Notice if it determines that the accusation is supported by sufficient evidence. After that, the Respondent will be given an opportunity to submit an Explanation. And then the SDO may decide to withdraw the Notice, if there is a manifest error or other clear basis for supporting a finding of insufficiency of evidence. However, the Sanctions Procedures do not contain a specific regulation of how the burden should be allocated during this first step of the proceeding. There is only a specific regulation for the second step. With regard to decisions of the SB, the burden of proof is defined in the following way in the Sanctions Procedures:

\begin{quote}
INT shall have the burden of proof to present evidence sufficient to establish that it is more likely than not that the Respondent engaged in a Sanctionable Practice. Upon such a showing by INT, the burden of proof shall shift to the Respondent to demonstrate that it is more likely than not that the Respondent’s conduct did not amount to a Sanctionable Practice.\textsuperscript{57}
\end{quote}

When looking at how the burden of proof is regulated in the WBGSS, and the background documents, it seems clear that the system has adopted the principle \textit{actori incumbit probatio} (the claimant carries the burden). This is a widely recognized principle, applied in many legal systems, both at the national and the international level.\textsuperscript{58} However, when the principle is applied, it is not always clear who should be considered the ‘claimant’. The term could refer to the party initiating the proceeding, or to the party making a claim in respect of a certain fact. It appears that the first-mentioned view has been adopted in the WBGSS. In the Second Thornburgh Report it was stated that it is usually the party initiating the proceeding who should carry the burden, and this was followed when designing the regulation in the Sanctions Procedures, where it is stated that the burden rests on the INT.

In many situations, the above distinction does not play an important role, since the party initiating the proceeding is also the party claiming the relevant concrete legal facts. But this is not always the case. If one takes a broader view on how burden of proof issues are handled in legal systems applying the above-mentioned principle, it seems reasonable to understand the ‘claimant’ as the party making a claim in respect of a certain fact. This follows for example from the fact that the principle is often combined with

\textsuperscript{56} Ibid.

\textsuperscript{57} Para 8.02(b)(ii) of Section III.A Sanctions Procedures.

\textsuperscript{58} Kazazi, above n 37, at 53–118; Cheng, above n 37, at 306 and 328; V.S. Mani, \textit{International Adjudication: Procedural Aspects}, (New Delhi: Radiant Publishers, 1980) 202; Anna Riddell and Brendan Plant, \textit{Evidence Before the International Court of Justice}, (London: British Institute of International and Comparative Law, 2009) 87; Henrik Horn and Petros C. Mavroidis, ‘Burden of Proof in Environmental Disputes in the WTO: Legal Aspects’, 18 European Energy and Environmental Law Review 112 (2009), at 114.
another burden of proof principle: \textit{quicunque exceptio invocavit eiusdem probare debet} (the party invoking an exception carries the burden). If the party initiating the proceeding has made certain claims in relation to a general rule, the respondent may have the possibility to invoke an exception. And the respondent will then be the ‘claimant’ in respect of the concrete legal facts related to the exception. An additional example is the burden with regard to evidentiary facts. In many legal systems the burden to prove such facts rests on the party claiming the fact, regardless of whether this is the party initiating the proceeding or the respondent in the proceeding. It appears that these latter burden of proof principles have not been discussed when developing the WBGSS. However, this type of broader understanding of the ‘claimant’ could be useful in discussions in case law, and in future reforms of the system.

Furthermore, another important part of the WBGSS burden of proof rules is the provision saying that the burden shall shift to the Respondent when the INT has reached the applicable standard of proof, and that the Respondent will then have to reach the same standard. This provision may cause some confusion in light of the rather established view that, in basically all legal systems, the burden does not shift when it has been allocated to a certain party. So the question is how the provision should be understood. Statements in background documents and case law indicate that the provision does not concern the ‘burden of persuasion’, but rather the ‘burden of production’. The main difference between the two burdens is that, while the former becomes relevant at the end of the proceeding, the latter is relevant during the proceeding. At least in theory, one could imagine a point in time in the proceeding...

59 Cheng, above n 37, at 306; Horn and Mavroidis, above n 58, at 115.

60 An example in the WBGSS could be when the Respondent has pleaded an affirmative defense. It seems that, in such cases, the SB has allocated the burden of persuasion to the Respondent with regard to the relevant facts. Sanctions Board Decision No 60 (Sanctions Case No 170) IDA Credit No 3979-UZ, IDA Grant No H124-UZ Uzbekistan; IDA Grant No H197-KG Kyrgyz Republic; IDA Credit No 4154-ALB Albania; IBRD Loan No 4839-RO Romania; IDA Grant No H343-TP Multi-Donor Trust Fund Grant No TF 091653 Timor-Leste; IDA Credit No 4470-KH Cambodia; IDA Credit No 4432-WS Samoa (9 September 2013) paras 86–8.

61 Mani, above n 58, at 203.

62 An example from case law is when the Respondent claims a mitigating factor, affecting which sanction shall be imposed. The SB has stated that, in such case, the Respondent carries the burden with regard to the relevant facts. E.g. Sanctions Board Decision No 71 (Sanctions Case No 216) IBRD Loan No 4807-UA Ukraine (9 July 2014) para 91; Sanctions Board Decision No 93 (Sanctions Case No 397) IBRD Loan No 4760-RO Romania (2 June 2017) para 100; Sanctions Board Decision No 100 (Sanctions Case No 330) IBRD Loan No 4764-IN India (26 October 2017) para 49; Sanctions Board Decision No 109 (Sanctions Case No 443) IDA Grant No H547-LA, IDA Grant No H789-LA Lao People’s Democratic Republic (13 April 2018) para 45.

63 Stone, above n 41, at 262; James B. Thayer, ‘The Burden of Proof’, 4 Harvard Law Review 45 (1890), at 60; Joost Pauwelyn, ‘Evidence, Proof and Persuasion in WTO Dispute Settlement’, 1 Journal of International Economic Law 227 (1998), at 230. However, there are also scholars arguing that the burden shifts in certain types of domestic proceedings. E.g. Barceló III, above n 50, at 24, footnote 1.

64 Second Thornburgh Report, above n 5, at 47. The ‘burden of production’ may also be referred to as the ‘evidential burden’ or, after the burden has shifted, the ‘tactical burden’. Munday, above n 18, at 125 and 129; Williams, above n 50, at 166–7. The SB has used the terms ‘evidential burden’ and ‘evidentiary burden.’ Sanctions Board Decision No 103 (Sanctions Case No 374) IDA Credit No 4902-NP, IDA Grant No H660-NP Nepal (18 December 2017) para 29; Sanctions Board Decision No 110 (Sanctions Case No 463) IDA Credit No 4011 UNI Nigeria (23 April 2018) para 25; Sanctions Board Decision No 118 (Sanctions Case No 488) IDA Credit No 4938-BD Bangladesh (24 April 2019) para 66.
When the party carrying the burden of persuasion has presented enough evidence to reach the required standard of proof. At this point, the burden of production shifts to the other party, which has to produce evidence to persuade the judicial or quasi-judicial body. But at the end of the proceeding, the body will have to consider the totality of the evidence presented and determine whether the party carrying the burden of persuasion has reached the required standard of proof.

However, the burden of production only becomes relevant in a proceeding where the judicial or quasi-judicial body actually determines whether the burden has shifted. If both parties are allowed to present evidence more or less simultaneously, and the body assesses all evidence together, there is no need to talk about a burden of production. In the WBGSS, the first tier—the SDO—contains different steps. The INT will submit a Statement, and the SDO will then assess the evidence. If the SDO finds sufficient evidence—that is, if the INT has reached the required standard of proof at this point—it will issue a Notice to the Respondent. And the Respondent will then be given the opportunity to present evidence in an Explanation. Here, it seems reasonable to talk about a burden of production. The Notice will be issued when the SDO has determined that the burden of production has shifted to the Respondent. After the Explanation has been submitted, the SDO will examine all evidence together and determine whether the party carrying the burden of persuasion—the INT—has reached the required standard of proof.

When we come to the second tier—the SB—the situation is different. The Respondent will submit a Response and the INT a Reply. There may also be a hearing, and after that the SB will make a Decision. But if one looks at the Sanctions Procedures, there is no apparent room for the SB to determine whether the burden of production has shifted. All evidence will be assessed together, and the SB will only determine whether the party carrying the burden of persuasion—the INT—has reached the required standard of proof. This implies that, with regard to the part of the proceeding where it seems relevant to talk about a shift in the burden of production—the SDO—there is no specific regulation of that burden, or the burden of persuasion, in the Sanctions Procedures. And with regard to the part of the proceeding where it seems irrelevant to talk about a shift in the burden of production—the SB—there is a specific regulation referring to such shift.

D. Standard of proof

The standard of proof is the level of persuasion required in the proceeding, with regard to a certain fact. As described above, the parties will usually claim different facts, and both of them have to persuade the judicial or quasi-judicial body to different degrees. The party carrying the burden of persuasión has to persuade the body to a higher

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65 In certain cases, however, the reasoning of the SB seems to imply that the evidence is examined in two steps. First, the examination focuses on what the INT has presented. If the standard is reached, the burden (of production) shifts, and the SB will then examine what the Respondent has presented. E.g. Sanctions Board Decision No 59 (Sanctions Case No 187) IBRD Loan No 4507-CO Colombia (24 June 2013) para 25.

66 David Hamer, ‘Probabilistic Standards of Proof, Their Complements and the Errors That are Expected to Flow from Them’, 1 University of New England Law Journal 72 (2004), at 96.
degree than the other party. In the Second Thornburgh Report, it was noted that several members of the SC were of the opinion that the standard applicable at the time in the WBGSS—that the evidence should be ‘reasonably sufficient’—was unclear. Therefore, the report discussed different standards in different types of proceedings. It was observed that it is common to apply the high ‘beyond a reasonable doubt’ standard in criminal proceedings, and the significantly lower ‘preponderance of evidence’ standard in civil proceedings. Two arguments in favour of a low standard were presented. The first was that the primary purpose of the WBGSS is to protect the Bank’s assets from misuse or abuse in the future, not to punish the Respondent or to compel the Respondent to make restitution. In light of this, the report argued that it would be neither effective nor efficient to adopt a high standard.

The second argument was that, to a large extent, the INT has to rely on the Bank’s own records and those provided voluntarily by third-parties or the Respondent. It was mentioned in the report that, unlike investigators in domestic legal systems, the INT does not have law enforcement powers to obtain evidence. And unlike parties in certain domestic legal systems, it does not have the right to compel the production of evidence or witness testimony. The report argued that, because of the difficulties the INT may have to produce evidence, it would be unrealistic to apply a high standard. Hence, the report recommended that the ‘reasonably sufficient’ standard should be replaced with a more descriptive standard, such as ‘more likely than not’.

This recommendation was adopted, and is now part of the Sanctions Procedures applicable today. The main ground for initiating sanctions proceedings is if the INT, after an investigation, believes that there is ‘sufficient evidence’ to support a finding of sanctionable practices in connection with a WB-financed project. Moreover, the SDO will only issue a Notice if it determines that the INT’s accusations are supported by ‘sufficient evidence’. And the INT may withdraw the Notice if it, after having examined the Respondent’s Explanation, finds that there is an ‘insufficiency of evidence’. The Sanctions Procedures contain the following general definition of the term ‘sufficient evidence’: ‘... evidence sufficient to support a reasonable belief, taking into consideration all relevant factors and circumstances, that it is more likely than not that the Respondent has engaged in a Sanctionable Practice.’

The term ‘sufficient evidence’ is the only specific regulation of the standard of proof for the first step of the proceeding—the SDO—in the Sanctions Procedures. However, a general definition of the standard, covering both the SDO and the SB, can be found

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67 Second Thornburgh Report, above n 5, at 18–19.
68 Ibid, at 48–9.
69 It should, however, be noted that the INT also has certain other possibilities to gather information. One such possibility is the so called ‘third party audit clause’, which can be found in the Procurement Guidelines. Para 1.16(e) Guidelines Procurement of Goods, Works and Non-Consulting Services Under IBRD Loans and IDA Credits & Grants by World Bank Borrowers (January 2011). Another possibility is through judicial cooperation between the INT and national authorities.
70 Second Thornburgh Report, above n 5, at 50.
71 Para 3.01(a)(i) of Section III.A Sanctions Procedures. It can be noted that paragraph 3.01(a) also contains two other grounds for the INT to initiate proceedings. These grounds are not examined in the present article.
72 Para 4.01(a) of Section III.A Sanctions Procedures.
73 Para (u) of Section II Sanctions Procedures.
in the WBG Policy: ‘Sanctions are imposed through sanctions proceedings only if the SDO, the relevant EO or the Sanctions Board, as the case may be, after considering the whole of the evidentiary record provided to them, determines that it is more likely than not that the sanctioned party has engaged in, or bears responsibility for, a Sanctionable Practice.’\textsuperscript{74} This definition is also in line with the specific regulation of the standard of proof under the SB proceedings that can be found in the Sanctions Procedures:

The Sanctions Board shall determine whether the evidence presented by INT, as contested by the Respondent, supports the conclusion that it is more likely than not that the Respondent engaged in a Sanctionable Practice. “More likely than not” means that, upon consideration of all the relevant evidence, a preponderance of the evidence supports a finding that the Respondent engaged in a Sanctionable Practice.\textsuperscript{75}

Hence, unlike the burden of proof, the standard of proof is described in several different places, not only in the Sanctions Procedures, but also in other documents. As mentioned in the Second Thornburgh Report, a common term for this standard is the ‘preponderance of evidence’ standard (or the ‘balance of probabilities standard’).\textsuperscript{76} This is the lowest possible standard for a party carrying the burden of persuasion.

The arguments presented in the Second Thornburgh Report, as to why this particular standard should be adopted, have to be evaluated in light of the general reasons for allocating the burden to a certain party and for applying a certain standard. It seems that the most important reason is the desire to avoid erroneous outcomes.\textsuperscript{77} An erroneous outcome is a ruling, which the judicial or quasi-judicial body would not have made if it would have had full knowledge about the concrete legal facts in the case. In our example, there are basically two types of possible erroneous outcomes. The body may find that Party B has violated Rule X, even though it has not, or that Party B has not violated the rule, even though it has. The first type may be referred to as a Type I error, and the second as a Type II error.\textsuperscript{78} If the burden is allocated to Party A (the claimant), the risk of Type II errors will be higher than the risk of Type I errors. The higher the standard, the higher the risk.\textsuperscript{79} And if the burden is allocated to Party B (the respondent), the risk of Type I errors will be higher than the risk of Type II errors. The higher the standard, the higher the risk. Hence, a higher standard than the preponderance of evidence standard should basically only be applied if one type of error is considered more problematic than the other.\textsuperscript{80} A classic example is the ‘beyond reasonable doubt’
standard often applied in criminal proceedings. In many legal systems, the prosecutor will have to reach this very high standard since it is considered more desirable to avoid Type I errors (to convict an innocent person) than to avoid Type II errors (to acquit a guilty person). If one type of error is not considered more problematic than the other, it usually makes sense to apply the preponderance of evidence standard, since this is a way of reducing erroneous outcomes in general. The judicial or quasi-judicial body will simply rule in favour of the most probable claim.

The first argument in the Second Thornburgh Report was that the primary purpose of the WBGSS is to protect the Bank’s assets from misuse or abuse in the future, not to punish the Respondent or to compel the Respondent to make restitution. This argument has to do with what could be referred to as the ‘norm goal’. It is often possible to see that one type of error affects the goal of the regulatory framework—in case of the WBGSS to protect the Bank’s assets—more negatively than the other. An argument related to the norm goal implies that the burden of proof rules shall be designed so that the risk of this type of error is reduced. In the WBGSS, one could argue that Type II errors affect the norm goal more negatively than Type I errors, since they entail that actors who have been engaged in sanctionable practices are not sanctioned. Hence, if the norm goal is considered more important than other aspects, it may make sense to allocate the burden of persuasion to the Respondent. It may also make sense to adopt a high standard. The Second Thornburgh Report did not go this far. Instead, it used the argument to recommend a low standard for the claimant. A reason for this could be another argument presented in the beginning of the report, pointing in another direction. It was observed that, often, projects funded by the WB are large-scale, or specialized in nature. Thus, there may be only a few actors with the necessary capabilities. Therefore, it could be in the economic interest of the Bank to avoid results where the Respondent is erroneously found guilty of a sanctionable practice (a Type I error). This is an argument related to the norm goal, but which, unlike the argument above, can be used in favour of allocating the burden to the claimant.

However, as part of the first argument it was also mentioned that the primary purpose of the system is not to punish. Even though the purpose is not to punish, a sanction could still be seen as a punishment, in the sense that it has negative consequences for the Respondent. A sanction usually also implies that the Respondent has been found guilty of a conduct that is considered criminal in many domestic legal systems. Thus, the decision of the SDO and/or the SB may have other negative consequences than the sanction. Here, we find another category of arguments, namely arguments related to the ‘risk aspect’. When taking into account such arguments, the relevant question is not whether the purpose of the system is to punish, but rather how serious a Type

81 Jon O. Newman, ‘Beyond “Reasonable Doubt”,’ 68 New York University Law Review 979 (1993).
82 Hamer, above n 66, at 81; Kevin M. Clermont and Emily Sherwin, ‘A Comparative View of Standards of Proof’, 50 The American Journal of Comparative Law 243 (2002), at 252–3.
83 Second Thornburgh Report, above n 5, at 6.
84 Even though the WBGSS is often described as administrative or quasi-judicial in nature, one could argue that many features of the system also reflect a criminal justice mechanism. Tina Søreide, Linda Gröning and Rasmus Wandall, ‘An Efficient Anticorruption Sanctions Regime? The Case of the World Bank’, 16 Chicago Journal of International Law 523 (2016), at 535.
I error should be considered for the Respondent. The negative consequences for the Respondent could have been used as arguments in favour of adopting a higher standard than the preponderance of evidence standard for the INT.

The second argument in the report is also a type of argument relevant to use when designing burden of proof rules, and it could even have been used to allocate the burden of persuasion to the Respondent. The argument has to do with the ‘evidentiary possibility’. If it is significantly easier for one of the parties in the proceeding to produce evidence, it may be reasonable to allocate the burden to this party, and sometimes also to adopt a high standard. The idea is that, if the judicial or quasi-judicial body wants to know as much as possible about the facts in the case, it shall force the party with the best evidentiary possibility to produce evidence. This way, the general risk of erroneous outcomes will be reduced. But in order to know whether the argument makes sense, one has to look both at the general level and the situation in specific cases. While the INT may have certain general difficulties to produce evidence, compared to investigators in domestic legal systems, the evidentiary possibility of the Respondent may differ depending on who the Respondent is. In cases with a ‘weak’ Respondent, the evidentiary possibility could be an argument not only in favour of allocating the burden to the INT, but also in favour of adopting a higher standard.

### III. CONCLUDING REMARKS

A large and increasing number of international judicial and quasi-judicial bodies have made the field of international procedural law an important part of public international law. The aim of the present article has been to contribute to a better understanding of how procedural rules of a certain type—provisions related to facts, evidence, and the burden of proof—have been designed in the WBGSS. The main conclusion is that such rules play a central role in the system, and that considerable efforts have been made during the last two decades to develop a well-functioning body of procedural provisions. The WBG has come a far way. The Sanctions Procedures contain detailed provisions, explaining the mainly adversarial character of the system, where the INT and the Respondent carry the main responsibility for presenting and proving facts. Issues related to evidence, and the burden and standard of proof, are regulated, and have been discussed in different types of background documents over the years.

However, the article has also shown that, in certain respects, there is still room for improvement. One part of this is how the procedural provisions, and the substantive provisions containing the relevant abstract legal facts, are structured. The abstract legal facts—what needs to be proved in a certain case—can be found in the definitions of the sanctionable practices. The WBG Policy refers to the definitions in the legal agreements governing specific projects, and such agreements usually incorporate definitions from other WBG documents, primarily the different guidelines. Moreover, the Sanctions Procedures refer to these other documents. Hence, it is not entirely easy to follow the references, and to find the relevant abstract legal facts. To collect a uniform set of definitions in one place, and to make sure that the central procedural document—the Sanctions Procedures—contains a clear reference to this place, would be an improvement.
Furthermore, the provisions related to the burden and standard of proof are rather straightforward, in the sense that it is clear which party shall carry the burden, and which standard shall be applied. But there is only an explicit regulation of the burden in respect of the second step of the procedure (the SB), not the first step (the SDO). And regulations of the standard can be found both in the WBG Policy, and in several places in the Sanctions Procedures. A clearer structure would be to collect the provisions concerning the burden and standard of proof in one place in the Sanctions Procedures, and explicitly state that they are applicable for both steps of the procedure.

When it comes to the content of the burden and standard of proof provisions, two remarks can be made. The first has to do with the fact that the Sanctions Procedures state that, when the INT has reached the standard, the burden ‘shifts’ to the Respondent. This is a provision that could be difficult to understand and apply. The established view is that the burden—the ‘burden of persuasion’—does not shift during the proceeding. It seems that, what the provision in the Sanctions Procedures refers to is rather the ‘burden of production’. When the INT has produced evidence and reached the standard, the Respondent has to do something in order not to lose the case. Evidence pointing in the other direction has to be produced; the burden of production has shifted. However, it is only relevant to talk about a burden of production if there is a point in the proceeding when the judicial or quasi-judicial body will actually determine whether the burden has shifted. This seems to be the case during the first step of the proceeding (the SDO), but not the second (the SB). Hence, if the system is reformed in the future, it would probably be a good idea to carefully consider the use of the word ‘shift’. As the system looks now, it could be reasonable to use it for the first step of the proceeding, but not the second.

The second and final remark has to do with the reasons for allocating the burden of persuasion to a certain party, and for applying a certain standard. Today, the WBGSS contains the burden of proof principle *actori incumbit probatio*, and the preponderance of evidence standard. Different reasons for this have been presented in background documents, primarily the Second Thornburgh Report. An attempt in the present article has been to place these reasons in a more general framework—using aspects such as the ‘norm goal’, the ‘risk aspect’, and the ‘evidentiary possibility’—to discuss why it can make sense to allocate the burden in a certain way or to adopt a certain standard. The conclusion here is that, to a large extent, the reasons presented in the background documents support the approach taken in the system. But there are also arguments for allocating the burden in a different way and for applying a different standard. Moreover, it should be noted that there is nothing saying that a legal system has to adopt the same burden of proof principle, and the same standard, for all types of cases and all abstract legal facts. Hence, in future reforms of the system, it could be useful to further examine the above type of arguments, and to explore whether it would make sense to adopt a more differentiated approach.