

Burden of Proof in International Courts and Tribunals

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I. Introduction

Adjudication of disputes under public international law has more frequently involved addressing the legal questions dividing the parties, rather than points of fact.¹ This has contributed to the view that the burden of proof should not be overemphasised. Although seldom referring directly to the issue, the Permanent Court of International Justice (PCIJ) did expressly apply the rule that a party asserting a fact bore the burden of proving it,² but the Court's decisions generally

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¹ M O Hudson, *The Permanent Court of International Justice: A Treatise* (1934) 500; M Kazazi, *Burden of Proof and Related Issues: A Study on Evidence before International Tribunals* (1996) 83; H W A Thirlway, 'Procedural Law and the International Court of Justice' in V Lowe and M Fitzmaurice (eds), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (1996) 389, 302.

² See *The Mavrommatis Jerusalem Concessions* [1925] PCIJ (ser A) No 5; *Legal Status of Eastern Greenland* [1933] PCIJ (ser A/B) No 53, 49. A Riddell and B Plant, *Evidence Before the International Court of Justice* (2009).

rested on uncontested facts.³ The International Court of Justice (ICJ) has likewise usually hinged its decisions on legal questions and based them on undisputed facts, making little reference to the burden of proof.⁴ Nor have standards of proof traditionally been a strong focus of attention in international tribunals.⁵

In practice, arguably the duties on litigants to cooperate with international courts and tribunals in all matters relating to proof⁶ are considerably more significant than the rule on the allocation of the burden of proof.⁷ These duties follow from a general duty to act in good faith in international dispute settlement.⁸ The fulfillment of the international judicial function depends on states' provision of adequate information to international courts and tribunals,⁹ and on their cooperation at all stages of the proceedings, especially during hearings.¹⁰ The rule on allocation of the burden of proof is usually applied retrospectively by a tribunal, if at all, once most or all of the evidence is in.¹¹ Courts and tribunals are aware that

³ 'As regards matters of evidence, a review of the jurisprudence of the PCIJ reveals that the Court's general approach was to establish and rely on the facts which were not in dispute between the parties.' Kazazi, above n 1, 75. See also D V Sandifer, *Evidence before International Tribunals* (1975) 132.

⁴ S Rosenne, *The Law and Practice of the International Court, 1920–2005* (4th ed, 2006) 1039; Sandifer, above n 3, 134; Kazazi, above n 1, 83; Hudson, above n 1, 500; H W A Thirlway, 'Procedure of International Courts and Tribunals' in R Bernhardt (ed), *Encyclopaedia of Public International Law* (vol 3, 1997) 1128–31; Riddell and Plant, above n 2, 74. For example, the International Court of Justice assessed closely a large body of evidence in the *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* [2005] ICJ Rep, yet, without reference to the allocation of the burden of proof, made findings on questions such as the defences asserted by Uganda of consent and self-defence. See also the *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* [2007] ICJ Rep, in which the Court rested many of its factual findings on prior conclusions of the ICTY; S Sivakumaran, 'Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)' (2007) 56(3) *International and Comparative Law Quarterly* 695, 706–08.

⁵ G Schwarzenberger, *International Law as applied by International Courts and Tribunals* (1986) 192, 643; J M Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (2003) 213; C F Amerasinghe, *Evidence in International Litigation* (2005) 232.

⁶ J C Witenberg, 'Onus Probandi devant les Juridictions Arbitrales' (1951) 55 *Revue Generale de Droit International Public* 321, 331–3.

⁷ R Kolb, 'General Principles of Procedural Law' in A Zimmerman, C Tomuschat and K Oellers-Frahm (eds), *The Statute of the International Court of Justice: A Commentary* (2006) 793, 828.

⁸ *Ibid* 828.

⁹ *Ibid* 828–9.

¹⁰ Rosenne, above n 4, 1340.

¹¹ Schwarzenberger, above n 5, 644.

litigants' satisfaction is likely to be greater where outcomes are based on material points rather than the rule regarding the burden of proof.¹²

Yet the rules on the burden and standard of proof remain a permanent feature of international adjudication. International courts have a duty to reach a decision on disputes properly brought before them. Litigators take into account the rule on burden of proof in determining their strategies as they prepare their cases, and the rule is connected closely with disputants' responsibilities to the Court.¹³

(a) When the rule on burden of proof may determine a case

The concept of the burden of proof is intended to help ensure that a decision is reached in every case¹⁴ and indeed the rule on the burden of proof comes most strongly into its own in cases where evidence is unclear or incomplete.¹⁵ Here, the application of the rule may determine the outcome of international litigation. For example, in the *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*,¹⁶ Hungary bore the burden of proof in relation to its assertion that ecological necessity precluded its responsibility for the breach of its 1977 Treaty with Slovakia for building a system of locks and dams on the River Danube. Hungary's defence failed, as the necessity of stopping work on the *Gabčíkovo-Nagymaros* project was the subject of ongoing scientific research and a full factual case could not be provided by Hungary. The Court found that it had not been established that there was a state of ecological necessity.¹⁷ Taking another example, albeit one where the burden of proof is less prominent, the *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)* turned on Argentina's inability to demonstrate that the Botnia Mill built on the River Uruguay was having harmful effects substantively contravening the Statute of the River Uruguay. The Court concluded that there was 'no conclusive evidence in the record' that Uruguay had failed to act with due diligence or that the mill's discharges had been having significantly deleterious effects.¹⁸

¹² R Bilder, 'The Fact/Law Distinction in International Adjudication' in R B Lillich (ed), *Fact-Finding before International Tribunals: Eleventh Sokol Colloquium* (1991) 95, 97; Sandifer, above n 3, 24–28, 132.

¹³ J Waincymer, *WTO Litigation: Procedural Aspects Of Formal Dispute Settlement* (2002) 536.

¹⁴ Schwarzenberger, above n 5, 643, note 18; Amerasinghe, above n 5, 34, citing Dalloz *2 Répertoire de Droit International* (1969) 627, art 2.

¹⁵ J Pauwelyn, 'Evidence, Proof and Persuasion in WTO Dispute Settlement: Who Bears the Burden?' (1998) 1 *Journal of International Economic Law* 227, 258.

¹⁶ *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* [1997] ICJ Rep 7.

¹⁷ The case has been criticised for not following the logic of the precautionary principle. *Inter alia*, see C E Foster, 'Necessity and Precaution in International Law: Responding to Oblique Forms of Urgency' (2008) 32(2) *New Zealand Universities Law Review* 265.

¹⁸ *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)* [2010] ICJ Rep, [265]. See also [264].

Further illustrating the point, the World Trade Organisation (WTO) Panel that dealt with the trans-Atlantic dispute over the use of growth promotion hormones in cattle in *European Communities – Measures Concerning Meat and Meat Products (Hormones)*¹⁹ allocated the burden of proof to the EC. The EC had to show that trade-restrictive measures adopted to counter health risks from hormone-treated beef complied with all the applicable provisions of the WTO Agreement on Sanitary and Phytosanitary Measures (SPS Agreement).²⁰ The EC was not able to discharge this burden, and the Panel found the EC's measure to be inconsistent with Articles 3.1, 5.1 and 5.5 of the SPS Agreement. The Appellate Body subsequently overruled the Panel regarding the allocation of the burden, although agreeing that the EC had acted inconsistently with Article 5.1. Through this decision, and subsequent cases decided under the SPS Agreement, determinations on the allocation of the burden of proof have gained particular prominence in scientific disputes in the WTO. In later litigation in the same dispute the parties' tactics have been significantly influenced by the prospect of an adverse allocation of the burden of proof. Indeed, in the growth promotion hormones dispute:

It [was] widely thought that fear of bearing the full burden of proof in a scientifically complex and politically sensitive dispute – like all those involving public health – [was] the main factor impeding the initiation of substantive compliance proceedings by any party', leading to a long, drawn-out, political battle.²¹

The burden of proof may potentially be important in proceedings before the ICJ concerning Japan's Antarctic Scientific Whaling Programme, JARPA II, in

¹⁹ *European Communities – Measures Concerning Meat and Meat Products (Hormones): Complaint by Canada* (WT/DS48), *Complaint by the United States* (WT/DS26). Two identically constituted WTO dispute settlement Panels (the Panel) circulated parallel reports in this case: Panel Report (*Complaint by Canada*) WTO Doc WT/DS48/R/CAN (13 February 1998) as modified by Appellate Body Report WTO Doc WT/DS26/AB/R, WTO Doc WT/DS48/AB/R, DSR 1998:II, 235; Panel Report (*Complaint by the United States*) WTO Doc WT/DS26/R/USA (13 February 1998) as modified by Appellate Body Report WTO Doc WT/DS26/AB/R, WTO Doc WT/DS48/AB/R, DSR 1998:III, 699. See also the Appellate Body Report, WTO Doc WT/DS26/AB/R, WTO Doc WT/DS48/AB/R (13 February 1998) DSR 1998:I, 135.

²⁰ Agreement on the Application of Sanitary and Phytosanitary Measures, *The Legal Texts: the Results of the Uruguay Round of Multilateral Trade Negotiations* (1999) 59.

²¹ ICTSD, 'EU Takes First Step to Clarify Beef Hormones Science' (December 2008–January 2009) 6 *Bridges* 14. The Appellate Body remarked in the *Continued Suspension of Obligations* cases dealing with art 22.8 of the WTO Dispute Settlement Understanding that '[m]uch of the reluctance of the parties to secure a definitive determination in respect of Article 22.8 is the apprehension that, upon initiation, a party will attract the full burden of proof.' Appellate Body Report, *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute*, WTO Doc WT/DS321/AB/R (14 November 2008); Appellate Body Report, *United States – Continued Suspension of Obligations in the EC – Hormones Dispute*, WTO Doc WT/DS320/AB/R (14 November 2008) [359]. See also Reports of the Panel, adopted 14 November 2008.

Whaling in the Antarctic (Australia v Japan).²² In this case the Court may have to consider whether the entitlement for parties to issue scientific whaling permits to their nationals under Article VIII of the International Convention for the Regulation of Whaling does or does not constitute an exception that would attract a burden of proof for Japan. The case could go against Japan if Japan were allocated the burden of proof under Article VIII and could not demonstrate sufficiently that Article VIII is applicable, which would include proving that the Japanese whaling programme is indeed ‘scientific’.²³

These cases show the significance of the rule on burden of proof in contemporary disputes. The concrete effects of the burden’s allocation in such decisions draws attention to the need to re-evaluate practice in the articulation and application of the rule of burden of proof, and inquire into whether the rule is properly serving its purpose.

(b) The arguments that will be put forward in this article

This article begins by ascertaining the principles underlying the rule on burden of proof in the international setting. Building on theories explaining the rule on burden of proof at the national level, Part II of the article investigates the balance between fairness and certainty that will ideally be promoted through the rule on burden of proof. The article finds that, while grounded in fairness in the sense of a rough equality between disputants, contemporary practice in the articulation of the rule on burden of proof recognises the importance of certainty for actual and potential litigants. One of the underpinnings of the rule on burden of proof that has contributed significantly to maintaining consistency of practice and engendering certainty is a presumption of compliance by states with their international legal obligations.

The article encourages international courts and tribunals further to increase certainty about burden of proof for actual and potential litigants by recognizing expressly that the allocation of the burden of proof pivots on the assertion of a legal claim or defence. It further argues that it would be helpful to draw a clear distinction between the articulation of the rule on burden of proof and the application of the rule. In the articulation of the rule certainty is to be favoured, while there should remain scope for flexibility in the application of the rule in order to deal with concerns about potential unfairness in particular cases, such as where the parties do not share equal access to important evidence. Part III focuses on the articulation of the rule on burden of proof.

Part IV of the article then deals with the application of the rule on burden of proof. In individual cases where an inflexible application of the rule on burden of proof might produce unfairness, international courts and tribunals may respond in a

²² *Whaling in the Antarctic (Australia v Japan)*, Application Instituting Proceedings, 31 May 2010.

²³ The opportunity for development in the rules on burden of proof presented by this case is discussed further in the concluding section of this article.

number of ways. Notably, making use of a *prima facie* case approach and of inferences, presumptions and assumptions may be helpful, provided that international courts and tribunals give transparency to their reasoning. However, in other cases troublesome issues emerge in connection with the potential for a flexible application of the rule on burden of proof. Problems may arise in relation to: (a) the absence of an established standard of proof in international law; (b) the absence of an agreed approach for characterising the substantive rules to which the burden of proof applies (in terms of whether they are general rules or are exceptions, defences, or justifications); and (c) segmentation of the substantive rules into claims and defences.

Part V of the article addresses the distinct question of how the burden of proof is to be allocated in instances where a successful applicant might later institute compliance proceedings, as seen in the cases *Canada – Suspension of Concessions* and *US – Suspension of Concessions*.²⁴ As indicated above, the allocation of the burden of proof has proved a significant matter in this context in the WTO. In these cases the Appellate Body provided a roadmap to guide future practice under Article 21.5 of the WTO Dispute Settlement Understanding (DSU), which may prove helpful in that context. More generally under public international law the correct position is probably that the presumption of compliance should be applied in the same way as always, to the benefit of the respondent, taking into account that a compliance dispute will be differently configured to the original dispute, and legally speaking will be a new dispute. However, where subsequent proceedings are brought not by the original claimant but by an original respondent asserting that countermeasures to enforce the earlier ruling of an international court or tribunal are illegal, then the party imposing countermeasures would usually bear the burden of proof, as countermeasures are only justifiable as exceptional measures. In principle, the party imposing the countermeasures would, if challenged, have to show that the party on the receiving end of the countermeasures is still out of compliance with its obligations.

Finally, Part VI of the article underlines that the rule on burden of proof possesses a special potential for ongoing development, due to the fact that it appears to derive simultaneously from several sources. The multiple origins of the rule may have contributed to the relative lack of doctrinal clarity to date in relation to the rule's purpose and precise content. At the same time, this endows the rule on burden of proof with characteristics that are out of the ordinary and may facilitate its evolution in response to new challenges, such as the need for implementing a more defined standard of proof in international adjudication.

II. Principles Underlying the Rule on the Allocation of the Burden of Proof

Before proceeding to analyse the considerations that underlie the rule on burden of proof in international law, it is necessary briefly first to set down the basic content

²⁴ *Canada-Continued Suspension of Obligations in the EC-Hormones Dispute* *US-Continued Suspension of Obligations in the EC-Hormones Dispute*, above n 21.

of the rules relating to standard of proof and burden of proof. International adjudication functions on the basis that a court is expected to know the law in accordance with the maxim *jura novit curia*, and there is no need to prove the law.²⁵ A clear distinction is to be drawn between fact and law, in that facts require proving while the law does not.²⁶ The burden and standard of proof relate only to questions of fact.

(a) The content of the rules

(i) Standard of proof

The absence of a formal standard of proof is one respect in which international adjudication more closely resembles civil law proceedings than common law proceedings.²⁷ The common lawyer regards the use of an objective standard of proof as a logical aspect of judicial decision-making,²⁸ bringing to the application of the law an element of standardisation and transparency. Civil lawyers have expressed the contrasting view that judicial appraisal of facts is a subjective exercise.²⁹ As in Roman law,³⁰ the approach of the civil law judge is to decide whether he or she, personally, is persuaded by the evidence before the court. The *conviction intime du juge*³¹ or *freie richterliche Überzeugung*³² is the basis for

²⁵ *Fisheries Jurisdiction Case (United Kingdom of Great Britain and Northern Ireland v Iceland)* [1974] ICJ Rep 1, 9; cf *Case Concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)* [1992] ICJ Rep 1992 350, 376; Kazazi, above n 1, 43.

²⁶ Although in practice advocates regularly lay out their view on the content of the law, and tribunals are assumed to find this helpful: Kazazi, above n 1, 49.

²⁷ Riddell and Plant, above n 2, 125.

²⁸ D P O'Connell, *International Law* (2nd ed, 1970).

²⁹ Kazazi, above n 1, 325 and 377. Another argument is that a standard of proof cannot be a fixed concept because it is not realistically possible to specify meaningfully and objectively a particular point in the spectrum of 'degrees of belief to which human minds may be susceptible': Kazazi, above n 1, 343.

³⁰ M C Fergusson, 'A Day in Court in Justinian's Rome: Some Problems of Evidence, Proof and Justice in Roman Law' (1961) 46 *Iowa Law Review* 732, 766.

³¹ J F Lalive, 'Quelques Remarques sur la Preuve devant la Cour Permanente et La Cour Internationale de Justice' (1950) 7 *Annuaire Suisse de Droit International* 77, 78; M Damaška, *Evidence Law Adrift* (1997) 20–21. See also M Taruffo, 'Rethinking the Standards of Proof' (2003) 51 *American Journal of Comparative Law* 569, 666.

³² J A Frowein, 'Fact-Finding by the European Commission of Human Rights' in R B Lillich (ed), *Fact-Finding before International Tribunals: Eleventh Sokol Colloquium* (1991) 237, 248. Kazazi, above n 1, 324; J Kokott, *The Burden of Proof in Comparative and International Human Rights Law: Civil and Common Law Approaches with Special Reference to the American and German Legal Systems* (1998) 1, 18, 196. It is interesting to note that the notion of moral certainty is also part of common law thinking: the standard of proof beyond reasonable doubt in criminal cases derives from the notion of 'moral certainty, to the exclusion of reasonable doubt': W Twining, *Theories of Evidence: Bentham and Wigmore* (1985) 95, citing T Starkie, *Practical Treatise on the Law of Evidence* (1824). See also Y Taniguchi, 'Understanding the Concept of *Prima Facie* Proof in WTO Dispute Settlement' in

findings of fact, that is to say a *preuve morale*,³³ or ‘*ce qui persuade l’esprit d’une vérité*’.³⁴

Pursuing a *via media*, international jurisprudence ‘has always avoided a rigid rule regarding the amount of proof necessary to support the judgment’.³⁵ Typifying this position, the WTO Panel deciding the *US-Shrimp Case* took the view that ‘We [therefore] have to assess the evidence before us in the light of the particular circumstances of this case. This implies that we may consider any type of evidence, and also that we may reach our conclusions regarding a particular claim on the basis of the level of evidence that we consider sufficient.’³⁶ At present, the situation would seem to be that international courts and tribunals are either persuaded by parties’ dossiers, or they are not, although a certain level of probative evidence has always been required.³⁷ However, as discussed further below, there have increasingly been calls for the adoption of a formal standard of proof.³⁸

M E Janow, V Donaldson, A Yanovich (eds), *The WTO: Governance, Dispute Settlement and Developing Countries* (2008) 553–72, 561, referring to the requirement in German law for ‘a degree of certainty useable for practical life’ or ‘such a high degree of probability as would quiet, without eliminating, the doubts of a person of reasonable and clear perception of the circumstances of life’, citing P Murray and R Stürner, *German Civil Justice* (2004) 267.

³³ Twining, above n 32, 667.

³⁴ Cheng regards the standard of proof in international tribunal as ‘the truth’: B Cheng, *Bin General Principles of Law As Applied by International Courts and Tribunals* (1987) 329; see also Sandifer, above n 3, 173. In the European Court of Justice, where the civil law tradition may be at its strongest, there is an implicit reliance on the continental European test that the conviction of the judge determines proof: B Hanotiau, ‘Satisfying the Burden of Proof: the Viewpoint of a ‘Civil Law’ Lawyer’ (1994) 10(3) *Arbitration International* 341–53, 341, 346. This is seen in the various phrases that have been employed to refer to the standard of proof. There has been reference to: ‘*une preuve complète*’, ‘convincing proof’ and ‘*preuve intégrale*’, a ‘reasonable degree of certainty’, ‘*des indices graves établissent un haut degré de probabilité*’, ‘sufficiently precise and coherent proof’, ‘sufficiently clear evidence’, ‘specific and concrete evidence’, and ‘a firm, precise and concordant body of evidence’: K P E Lasok, *The European Court of Justice: Practice and Procedure* (2nd ed, 1994) 420–38, 429–30; R Plender, ‘Procedure in the European Courts: Comparisons and Proposals’ (1997) 267 *Receuil des Cours*, 171.

³⁵ *Velásquez Rodríguez Case* (1989) 28 ILM 291, 315–16. The IACHR referred to the decisions of the ICJ in the *Corfu Channel Case (United Kingdom v Albania)* [1949] ICJ Rep 2 and in the *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States of America) (Jurisdiction and Admissibility)* [1984] ICJ Rep 169.

³⁶ Panel Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58/R (6 November 1998) DSR 1998:VII, 2821, [7.30], [7.14].

³⁷ That point is clear even in the decision-making of the Iran-US Claims Tribunal, where evidence has frequently been difficult to locate: *Jalal Moin Case* (1994) 30 Iran-US CTR 71, 75; Amerasinghe, above n 5, 367.

³⁸ See text n 176–80.

(ii) Burden of proof

The rule on the allocation of the burden of proof that is applied in international courts and tribunals is that the party making an assertion must prove that assertion: *actori incumbit probatio*.³⁹ The rule derives from the rule applying in civil trials in Roman law: *ei incumbit probatio qui dicit non qui negat*. According to the maxim *reus in exceptione fit actor*, a party relying on an exception in the substantive law will attract the burden of proving the applicability of the exception or defence. Thus, as Rosenne has written: 'Generally, in application of the principle *actori incumbit probatio* the Court will formally require the party putting forward a *claim or a particular contention* to establish the elements of fact and of law on which a decision in its favour might be given.'⁴⁰

(b) The considerations underlying the rule on the allocation of the burden of proof*(i) Fairness*

Ripert observed in 1933 that the rule on burden of proof in international law rested on a logic that had never been discussed.⁴¹ Both in national and in international law, the underlying aim of the adjudicatory process is a proper application of the law to the facts,⁴² but the rule on burden of proof has been developed in the knowledge that there are always risks of an erroneous outcome. In cases where the rule comes into operation, it will allocate such risks between the parties.

In national law, the rule on burden of proof has been seen as helping maintain fairness in adjudication by providing a rough equality between the parties in the form of a tie-breaker rule requiring each party to prove his or her own allegations.⁴³ Aiming for more than a rough equality between the parties has not been possible. To require a court to allocate the burden based on a sophisticated estimate of what each party is risking in a case would undermine certainty in adjudication, and would impose a legislative role upon an adjudicatory body. The same is true in international law, where this would be of particular concern. The aim of fairness, rather than equality per se, is therefore a stronger contender as a

³⁹ Rosenne, above n 4, 1040; Kazazi, above n 1, 54; C Brown, *A Common Law of International Adjudication* (2007) 92; Sandifer, above n 3, 123ff; Amerasinghe, above n 5, 61–62; Pauwelyn, above n 15, 235, 237; R S J Martha, 'Presumptions and Burden of Proof in World Trade Law' (1997) 14 *Journal of International Arbitration* 67, 98; Lasok, above n 34.

⁴⁰ Rosenne, above n 4, 1040.

⁴¹ 'Le principe que le fardeau de la preuve incombe au demandeur est admis sans hésitation devant les juridictions internationales. Il repose sur les idées de justice et de logique qui n'ont jamais été discutées.' G Ripert, 'Les Règles du Droit Civil Applicables aux Rapports Internationaux' (1933) 44 *Receuil des Cours* 569, 646.

⁴² J Bentham, *Rationale of Judicial Evidence: Specially applied to English Practice: from the Manuscripts of Jeremy Bentham* (1827).

⁴³ A Stein, *Foundations of Evidence Law* (2005).

principle that has guided the development of international rule relating to the burden of proof.⁴⁴

At the operational level, however, another vital aspect of the rule on burden of proof in international law is that it should provide relative certainty about the allocation of the burden for litigants and potential litigants. From a practical point of view, maintaining relative certainty and predictability in the rule on burden of proof itself must be recognised as an inherent requirement in a system oriented towards fairness. The notion of the presumption of compliance, discussed in the next section, has helped to maintain the necessary consistency and certainty in the rule on burden of proof in international law.

This article investigates how certainty may further be enhanced by developing international courts' and tribunals' practice in the articulation of the rule. As discussed below in Part III of this article, international courts' and tribunals' articulation of the rule on burden of proof today generally gives good effect to the principle of certainty and thus to the concepts of equality and fairness. Where particular circumstances require more specific fairness, this may be provided through the application of the rule.

(ii) The presumption of compliance

The rule on burden of proof in international law embodies a presumption of compliance by states with their legal obligations, and this has been an important contributing factor in maintaining consistency of practice in the rule on burden of proof internationally. The presumption of compliance is not unique to international law. It is found in most domestic legal systems,⁴⁵ consistent with an expectation that the actors in the system will continue to go about their day-to-day activities in a law-abiding manner. The presumption respects the dignity of each member of a community in assuming they are committed to the good of the community and have acted consistently with its norms.⁴⁶

The presumption of compliance is supported by the idea that what is normal is to be presumed and any other state of affairs is subject to proof. Thus, '[i]t may also be said that what is customary, normal or more probable is presumed and that anything to the contrary must be shown to exist by the party alleging it.'⁴⁷ This is consistent with theories of proof in French law. From the French perspective, it is taken as a starting point that '*les individus soient libres les uns à l'égard des autres*' and therefore a claimant must prove '*le lien juridique qui assujettit celui*

⁴⁴ Indeed, commentary on equality as a principle of international procedure has omitted reference to the rule on burden of proof in discussing the procedural rules that give effect to equality: Kolb, above n 7, 800–2, see also 818–20; Rosenne, above n 4, 1048–52.

⁴⁵ Kazazi, above n 1, 57–66.

⁴⁶ D A Nance, 'Civility and the Burden of Proof' (1994) 17 *Harvard Journal of Law and Public Policy* 647, 653. See also Stein, above n 43, 222.

⁴⁷ Amerasinghe, above n 5, 215–16.

qu'il désigne comme son débiteur'.⁴⁸ The presumption of compliance corresponds reasonably well to the reality of states' international legal behaviour in general and helps protect states from vexatious claims that they are in breach of their obligations. A claimant who so asserts must expect to bear the burden of proving the applicability and breach of the rules invoked.⁴⁹

The presumption of compliance is applicable in all cases involving allegations of non-compliance with international legal obligations. The presumption sits comfortably with the norm '*pacta sunt servanda*', although not deriving its force directly from this norm. Although the two are allied, especially through the respect they accord to the dignity of states, the presumption of compliance does not equate directly with the notion that states act in good faith. In the *Continued Suspension of Obligations* cases in the WTO, the Panel viewed the presumption of compliance as a presumption of good faith compliance, referring to the obligation reflected in Article 26 of the Vienna Convention on the Law of Treaties that parties perform their international treaty obligations in good faith.⁵⁰ The Appellate Body did not accept the Panel's approach.⁵¹ The Appellate Body reasoned that even if the EC was presumed to have acted in good faith it would not necessarily follow that the EC had achieved compliance with its obligations.⁵²

⁴⁸ J Ghestin, G Goubeaux, and M Fabre-Magnan, *Traité de Droit Civil* (1994) 619. An explanation of the French approach has also been offered which suggests that the effect of taking a court action is to destroy the appearance of a lack of an obligation towards the claimant, and therefore the claimant must prove that the reality differs from the apparent situation: C Larroumet, *Droit Civil I* (1998) 341. See also P Malaurie, and P Morvan, *Droit Civil: Introduction Générale* (2005) 127.

⁴⁹ As observed by Judge ad hoc Ecer in his Dissenting Opinion in the *Corfu Channel Case*:

There is a *presumptio juris* that a State behaves in conformity with international law. Therefore, a State which alleges a violation of international law by another State must prove that this presumption is not applicable...

Corfu Channel Case above n 35, 119 (Judge Ecer). See also C F Amerasinghe, 'Presumptions and Inferences in Evidence in International Litigation' (2004) 3(3) *Law and Practice of International Courts and Tribunals* 395, 398; Amerasinghe, above n 5, 215.

⁵⁰ Panel Report, *Canada-Continued Suspension of Obligations in the EC-Hormones Dispute*, above n 21, [7.312] – [7.323]. See also Panel Report, *US-Continued Suspension of Obligations in the EC-Hormones Dispute*, above n 21. The presumption of compliance and the expectation that states will act in good faith were conflated both by the EC in its pleadings in these proceedings (see, eg, the Closing Statement of the EC, 15 September 2005, 2–3) and by the Panel itself. *Canada-Continued Suspension*, [7.312] – [7.357]; *US-Continued Suspension*, [7.312] – [7.359].

⁵¹ Appellate Body Report, *Continued Suspension*, above n 21, [278], [315]–[16, 581].

⁵² *Ibid* [315]. Further, the fundamental nature of the presumption of compliance was not appreciated by the WTO Panel in the *Continued Suspension of Obligations Cases* in the *EC-Hormones* dispute. The Panel applied the presumption as an ordinary evidential presumption that helped discharge the EC's burden of proof. Panel Report, *Canada-Continued Suspension*, above n 21, [7.382]; Panel Report, *US-Continued Suspension*, above n 21, [7.385].

The relationship between the concept of a standard of proof and the presumption of compliance underlying the rule of burden of proof is one of compatibility, and need not stand in the way of the adoption of a formalised standard or standards of proof. The presumption of compliance that is employed in the allocation of the burden of proof assumes that most actors comply with their legal obligations most of the time. A standard of proof, such as proof on the balance of probabilities, is applied in any particular case where non-compliance is asserted, as a gauge against which the presumption of compliance may be overcome. Both the presumption of compliance and the standard of proof are creatures of a legal system designed to produce findings either of compliance or non-compliance.

(iii) Alternative approaches

Are there other theoretical and practical approaches to the question of the burden of proof that merit consideration? For example, within the dispute settlement processes of the World Trade Organization should there be a law-and-economics based determination of where the burden of proof should lie? One law-and-economics perspective is that the assessment of the relative costs of proof, the costs of error and the estimated likelihood that complaints will be well-founded, is part of the legislative function and negotiators will have already taken these factors into account in the drafting of legal provisions. On this approach the burden of proof will usually lie with a complainant unless otherwise specified.⁵³ This perspective offers another possible rationalisation for accepting that the burden of proof usually lies with the complainant, and may complement the rationalisations of the rule on the burden of proof outlined above.

An alternative proposed law-and-economics approach would involve panels and the Appellate Body assessing legal provisions individually and deciding whether there is reason to allocate the burden of proof to the defending party rather than the complaining party in relation to each provision through reference to the estimated likelihood that the complaints are well-founded, the relative costs of proof and the costs of error in a tribunal's findings of fact.⁵⁴ In the absence of direction from the WTO Membership, this approach would require panels and the Appellate Body to make substantive determinations of how the burden should be allocated in relation to the various and multitudinous provisions of WTO law. The task is not only onerous, but also overtly legislative in nature in the same way as other attempts to fine-tune the allocation of the burden of proof systematically at the adjudicatory stage. The resulting loss of certainty or predictability has been admitted.⁵⁵

The constitutional problems that would be associated with such an approach in national law take on new dimensions in international law, a voluntary and

⁵³ M T Grando, *Evidence, Proof, and Fact-finding in WTO Dispute Settlement* (2009) 203, 358.

⁵⁴ *Ibid* 203–04, 224.

⁵⁵ *Ibid* 215.

horizontal legal system where it is important to constrain the judicial function. The multilateral trade regime of the WTO may be considered to possess differentiating features marking it out from the general international legal system, in the form of a compulsory system of dispute resolution by adjudication and close to universal participation in a package of trade agreements covering a large part of the field of international economic regulation. Yet the underlying political and legal structures remain those of public international law, primarily a reactive system in which adherence to obligations is founded on the voluntary consent of notionally sovereign equals. States require certainty in their international legal relations, and this is better to be attained through an approach to the burden of proof conceiving of the adjudicatory role as neutral, and devoid of the complexity involved in developing a provision-by-provision approach. Further, it would be unhelpful if practice in relation to burden of proof in the WTO were to diverge from practice in other international courts and tribunals at a time when a more or less 'common law of evidence' is emerging across these bodies,⁵⁶ helping bring WTO law into the broad fold of public international law.

(iv) Balancing certainty and fairness

In summary, considerations of fairness between states, the associated need for certainty in international adjudication, and the call to respect the dignity of states all remain important factors lying behind the rule on burden of proof in international law. As discussed below in Part III of this article, the need for certainty is served relatively well in the judicial articulation of the rule on burden of proof, although Part III considers how certainty could be better advanced. This need not come at the cost of flexibility to help ensure fairness in individual cases. As discussed in Part IV, there remains scope for flexibility in the application of the rule in cases where this is necessary. A departure from the usual practice may be required when the standard approach would create an 'improper inequality' in a way that affects the fairness of the proceedings.⁵⁷ An international court or tribunal must ensure that neither party obtains, 'some unfair advantage over the other, where that is due to the particular circumstances of the case.'⁵⁸

III. Judicial Articulation of the Rule on Burden of Proof

This article argues that the rule on burden of proof should consistently be articulated in a way that maximises certainty for litigants, and that the best way to accommodate the need for fairness in individual cases is through a flexible application of the rule on burden of proof. Accordingly, Part III of the article

⁵⁶ Brown, above n 39.

⁵⁷ Kolb, above n 7, 802. For example, in order to avoid serious inequality between the parties, the ICJ declined to hear oral argument from UNESCO in *Judgments of the Administrative Tribunal of the ILO* and subsequent cases, because the individual civil servants affected were not entitled to appear before the Court. *Judgments of the Administrative Tribunal of the ILO upon Complaints Made Against UNESCO* [1956] ICJ Rep 77, 85–86.

⁵⁸ Rosenne, above n 4, 1049.

evaluates the practice of international courts and tribunals in articulating the rule on burden of proof and advocates steps that might be taken to improve certainty for litigants. Part IV of the article then looks at how fairness can be enhanced in individual cases, if necessary, through the application of the rule. However, judicial discretion cannot be boundless and the article finds that there is a need to identify the terms on which discretion in the application of the rule is being exercised and to evaluate the need for developing appropriate constraints.

(a) The usual articulation of the rule on the allocation of the burden of proof

On many occasions international courts and tribunals have stated that a party will bear the burden of proving all the facts it asserts. The ICJ observed in its judgment on jurisdiction and admissibility at the provisional measures stage in 1984 in the case of *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* that:

any judgment on the merits in the present case will be limited to upholding *such submissions* of the Parties as have been *supported by sufficient proof of relevant facts*, and are regarded by the Court as sound in law ... Ultimately, however, *it is the litigant seeking to establish a fact who bears the burden of proving it*.⁵⁹

This basic rule was rearticulated in 2010 in the *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)*, where the Court said:

To begin with, the Court considers that, in accordance with the well-established principle of *onus probandi incumbit actori*, *it is the duty of the party which asserts certain facts to establish the existence of such facts*. This principle which has been consistently upheld by the Court ... applies to the assertions of fact both by the Applicant and the Respondent.⁶⁰

In 1998 in the *Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria* the Court found that neither Cameroon nor Nigeria had established the facts necessary to support their respective claims relating to the incidence of violence in the Bakassi Peninsula and along the parties' disputed border. The Court said that it was '[t]he litigant seeking to establish a fact who bears the burden of proving it; and in cases where evidence may not be forthcoming, a submission may in the judgment be rejected as unproved'.⁶¹ In

⁵⁹ Emphasis added. *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States of America) (Jurisdiction and Admissibility)* above n 35, [101]. See also *Avena and other Mexican Nationals (Mexico v United States of America)*, where the Court referred in 2004 to the 'well-settled principle' in international law that a litigant seeking to establish the existence of a fact bears the burden of proving it: *Avena and other Mexican Nationals (Mexico v United States of America)* [2004] ICJ Rep 128 [55]; and *Case Concerning the Frontier Dispute (Burkina Faso and Mali)* [1986] ICJ Rep 554, [65].

⁶⁰ *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)*, above n 18, [162], emphasis added. See also [24] (Judge Greenwood).

⁶¹ Emphasis added. *Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria) (Preliminary Objections)* [1998] ICJ

2007 in the *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* the Court said '[o]n the burden or onus of proof, it is well established in general that the applicant *must establish its case* and that a party *asserting a fact must establish it...*'⁶²

In WTO jurisprudence the leading case on the allocation of the burden of proof is *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India (US-Wool Shirts)*.⁶³ In that case, the Appellate Body stated:

various international tribunals, including the International Court of Justice, have generally and consistently accepted and applied the rule that the party *who asserts a fact*, whether the claimant or the respondent, is responsible for providing proof thereof. Also, it is a generally-accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, *who asserts the affirmative of a particular claim or defence*.⁶⁴

Similarly in investment arbitration the burden is allocated to the party making a claim, but also lies with the party asserting a fact.⁶⁵

(b) Unpacking the rule

From these references it can be seen that the requirement for a party to prove all the facts it asserts is generally taken as convenient shorthand for the requirement that a party should prove all the facts going to make up its legal case. The assumption is that the facts a party asserts will be those required for its case. This article advocates the view that it would be appropriate for international courts and tribunals to place greater emphasis on the need for a party to establish *the facts supporting its legal claims and defences*, rather than merely *the facts asserted, per*

Rep 275, 319.

⁶² *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, above n 4, [204].

⁶³ Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WTO Doc WT/DS33/AB/R (23 May 1997), DSR 1997:I, 323.

⁶⁴ Emphasis added. Ibid 14. For reiterations that continue to incorporate this formula, see Panel Report, *Turkey – Restrictions on Imports of Textile and Clothing Products*, WTO Doc WT/DS34/R (19 November 1999) DSR 1999:VI, 2363, [9.57], citing Panel Report, *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/R (22 April 1998) DSR 1998:III, 1033, [6.34] – [6.40].

⁶⁵ C H Schreuer, *The ICSID Convention: A Commentary* (2nd ed, 2009) 669. See also, in the International Tribunal for the Law of the Sea, Vice-President Wolfrum's approach in his Separate Opinion in the *M/V 'Saiga' (No 2) Case*. Vice-President Wolfrum was prepared to determine that St Vincent and the Grenadines bore the burden of proof due to its position as claimant, but referred to the principle *actori incumbit probatio* as putting the burden of proof on a party asserting a fact: *M/V Saiga (No 2) (St Vincent and the Grenadines v Guinea) (Admissibility and Merits)* (1999) 38 ILM 1323, [7], [8].

*se.*⁶⁶ This would be consistent with the presumption of compliance in disputes involving state responsibility and would make a significant contribution to increasing certainty for litigants.

Taken literally, reliance on the notion that a party asserting a fact must prove that fact may potentially introduce considerable uncertainty into the allocation of the burden of proof. It may reduce the allocation of the burden to a matter more or less of chance, subject it to unpredictable tactical interplay between the parties, or invite the arbitrary exercise of judicial power. There may be complex ramifications for parties' litigation strategies in disputes where the parties perceive the allocation of the burden of proof as important.⁶⁷ One party may seek to provoke the other into making an assertion of fact in order to avoid taking on the burden proof. In other cases both parties may assert competing propositions of fact. Actual and potential litigants would benefit from greater certainty regarding the incidence of the burden of proof if the burden were more clearly and expressly allocated to the party asserting a particular claim or defence.

The assertion of legal claims and defences is central to the operation of the rule on burden of proof in disputes involving state responsibility. The legal claims and defences asserted by the parties provide the pivots on which the burden of proof will turn, and cluster together the facts that each party is required to prove. An emphasis on each party's burden of proving the facts it asserts may be more natural in boundary disputes, where rival claims are presented.⁶⁸ However, even in boundary cases it is not necessary to retain this emphasis. Arguably, boundary disputes could equally be approached by requiring parties to prove the facts required to establish their legal assertions.

An emphasis on claims and defences rather than simply on facts is frequently seen in national law. In Roman law a party making a legal claim bore the burden of proving the facts needed to substantiate the claim.⁶⁹ A party asserting a defence

⁶⁶ Grando interprets the dicta of the International Court of Justice on the need for each party to prove the *facts* it asserts as referring only to auxiliary propositions and not to 'the burden of proof *stricto sensu*'. Grando, above n 53, 199.

⁶⁷ Consider, eg, the EC's complex litigation strategy in the *EC-Hormones* dispute, referred to at a number of places in this article.

⁶⁸ Thus, to take an example, in the *Temple of Preah Vihear Case*, Cambodia and Thailand each based their claims on a series of facts and contentions, and it was for each party to establish the facts underlying its claims. *Case Concerning the Temple of Preah Vihear (Cambodia v Thailand)* [1962] ICJ Rep 615–16. See also *Case Concerning the Frontier Dispute (Burkina Faso and Mali)*, above n 59, 587–8, [65]. In 2008 in *Pedra Branca* the International Court of Justice stated that '[i]t is a general principle of law, confirmed by the jurisprudence of this Court, that a party which advances a point of fact in support of its claim must establish that fact': *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)* [2008] ICJ Rep [45]. Similarly in 2009 in the *Black Sea Case*, the Court reiterated that 'the party asserting a fact as a basis of its claim must establish it': *Maritime Delimitation in the Black Sea (Romania v Ukraine)* [2009] ICJ Rep [68].

⁶⁹ A Berger, 'Encyclopaedic Dictionary of Roman Law' (1953) 43(2) *Transactions of the American Philosophical Society* 652, citing the Digest of Justinian. The Roman law

bore the burden of establishing the facts necessary to support the defence.⁷⁰ The claim and the defence were tried separately, one after the other.⁷¹ In relation to the trial of the claim, the claimant was the *actor* and bore the burden of proof. In relation to the trial of the defence, the defendant was the *actor* and bore the burden of proof.⁷² The term *actor* derives from the verb *agere*, literally *to act*, but referring in the legal context to the act of pleading or making a case.⁷³

Both common law and civil law conceptions of the allocation of the burden of proof centre on the parties' assertions as to the existence of an obligation or a defence. In French law, under Article 9 of the New Code of Civil Procedure:

[e]ach party is under a duty to prove in accordance with the law those facts which are necessary for the success of his *claim*.⁷⁴

The French Supreme Court has added that 'the uncertainty or doubt subsisting after the production of evidence should necessarily be retained to the detriment of the one who had the burden of proof'.⁷⁵ German law envisages that '[e]ach party

origins of the rule on burden of proof have been noted by a number of writers. M Lachs, 'Evidence in the Procedure of the International Court of Justice: Role of the Court' in Bello, G Emmanuel and B A Ajibola, (eds), *Contemporary International Law and Human Rights* (vol 1, 1992) 265, 267; above, n 6, 'Onus Probandi', 232; V S Mani, *International Adjudication: Procedural Aspects* (1980) 202.

⁷⁰ Berger, above n 69, 652, citing the Digest of Justinian.

⁷¹ 'The Praetor sent to the judex a *formula* containing a brief indication of the plaintiff's claim, of the affirmative defence, if any, of the affirmative replication, if any, and so on – with instructions to hear the parties and their witnesses, and then decide the case. No denials were mentioned in the formula, but each affirmative case was understood to be denied. Then followed a trial of each of these cases separately': J B Thayer, 'The Burden of Proof' (1890–1891) (2) *Harvard Law Review* 45, 56.

⁷² Thayer, above n 71, 56. 'In general, he who seeks to move a court to take action in his favour, whether as an original plaintiff whose facts are merely denied, or as a defendant, who, in setting up an affirmative defence, has the role of *actor* (*reus excipiendo fit actor*), — must satisfy the court of the truth and accuracy of the grounds of his claim, both in point of fact and law.' *Ibid* 57.

⁷³ Amerasinghe, above n 5, 62, n 2.

⁷⁴ Emphasis added. *Dalloz* (1983) 5, quoted by Kazazi, above n 1, 60, with historical background. For an alternative translation, see New Code of Civil Procedure <http://lexinter.net/ENGLISH/code_of_civil_procedure.htm>. In the French:

Il incombe à chaque partie de prouver conformément à la loi les faits nécessaires au succès de sa prétention.

Nouveau Code de Procédure Civile, J-L Delvolvé, *Arbitration in France* (2003) 100, quoted by Kazazi, above n 1, 60. See also C Larroumet, *Droit Civil I* (1998), above n 48, 340–41.

⁷⁵ 'L'incertitude ou le doute subsistant a la suite de la production d'une preuve doivent nécessairement être retenus au détriment de celui qui avait la charge de cette preuve.' Cass Fr, 31 January 1962, Bull Cass, 1962, C.I.V.IV, no 105 as cited by Hanotiau, above n 34, 343. See also Taruffo, above n 31, 673, describing this point as the basic mechanism of the burden of proof in civil law systems. In Belgium, the rule on the allocation of the burden is expressed both in terms of the proof of asserted facts and in terms of proof of the facts supporting a party's claim or defence. Art 870 of the Code

must prove those facts *which gave rise to the rights or defences* on which it relies.⁷⁶ The law of the Netherlands provides that where the legal rules applying to a case ‘*attach a certain legal consequence to the existence of certain facts, he who claims to be entitled to this consequence must prove the facts.*’⁷⁷ In Italian law the burden of proof has been described as ‘the burden of persuading the court of the truth of the allegations *underlying a claim or defense.*’⁷⁸ Iranian civil law is based on Islamic law, but is also inspired in some parts by the Codes of the civil law countries.⁷⁹ In Iranian law, Article 1257 of the Civil Code provides that:

Whosoever claims a right must prove it and if the defendant, in defence, claims a matter which requires proof it is incumbent upon him to prove that matter.⁸⁰

The UNIDROIT Principles of Transnational Civil Procedure provide that ‘each party has the burden to prove all the material facts *that are the basis of that party’s case*’.⁸¹ To the extent that there is an emphasis on proof of facts *per se* in civil law jurisdictions, this may be partly because the relationship between fact and law differs from this relationship in the common law. Establishing the facts establishes the existence of an obligation towards a claimant.⁸² For example, in the French law of delict human deeds causing harm to another are constitutive of obligations of compensation.⁸³ However, even in the civil law it can clearly be said that the significance of proving facts is that they support a legal claim or defence.

Judiciaire states that in civil cases: ‘*Chacune des parties a la charge de prouver les faits qu’elle allègue.*’ Art 1315 of the Civil Code provides that:

Celui qui réclame l’exécution d’une obligation doit la prouver. Réciproquement, celui qui se prétend libéré, doit justifier le payement ou le fait qui a produit l’extinction de son obligation.

Kazazi, above n 1, 61. Hanotiau, above n 34, cites also Belgian decision Cass, 10 December 1976, Pas, 1977, I, 410.

⁷⁶ Emphasis added. Kazazi, above n 1, 64, citing E J Cohn, ‘Law of Civil Procedure’ in E J Cohn (ed), *Manual of German Law* (vol 2, 1968–1971) 162–260, 219.

⁷⁷ Emphasis added. Kazazi, above n 1, 64, citing P A Stein, ‘Civil Procedure’ in D C Fokkema, J M J Chorus, E H Hondius and E Ch Lissers (eds), *Introduction to Dutch Law for Foreign Lawyers* (1978) 231–62, 246.

⁷⁸ Emphasis added. Sandifer, above n 3, 126–7, quoting M Cappelletti and J M Perillo, *Civil Procedure in Italy* (1965). See also L Prieto-Castro y Ferrándiz, *Derecho Procesal Civil* (5th ed, 1989) 149.

⁷⁹ Kazazi, above n 1, 62, referring to France, Switzerland and Belgium.

⁸⁰ Emphasis added. Translated from Persian. *Ibid* 62.

⁸¹ Emphasis added. American Law Institute, *UNIDROIT Principles of Transnational Civil Procedure* (2006) Principle 21.1. See the accompanying proposed Rule 28.1.

⁸² See, eg, the discussion in Ghestin et al, above n 48, 620; see also Prieto-Castro y Ferrándiz, above n 78, 151, referring to facts constitutive of juridical relationships.

⁸³ J Bell, S Boyron and S Whittaker, *Principles of French Law* (1998) 355. Equally, a respondent who believes him or herself to be free from an obligation must prove the fact that extinguishes the obligation. For discussion, Malaurie and Morvan, above n 48, 125.

Although they have often placed emphasis on the need for parties to prove all the facts they assert, commentators have also described the burden of proof as a way of allocating the duty to bring forward evidence that will substantiate the *contentions* that the parties develop in their pleadings⁸⁴ and stated that the burden of proof applies to *the facts that underlie a claim*.⁸⁵ They note also that the burden of proof will be allocated to the ‘real’ claimant actually putting forward a legal claim: the burden is not allocated to the party who is merely the claimant in a procedural sense, for example by virtue of having initiated dispute resolution.⁸⁶

(c) The absence of an evidential burden in international law

The absence of a concept of evidential burden in international law may partly explain why international courts and tribunals have articulated the rule on the allocation of the burden of proof with reference to which party asserts a fact rather than with reference primarily to the assertion of legal claims and defences. The common law concept of the ‘evidential’ burden of proof is not generally recognised in international tribunals.⁸⁷ The sense in which reference to the burden of proof is usually made in international law is the sense shared by the common law and the civil law, coinciding with the common law conception of the ‘legal’ or fixed burden of proof.⁸⁸ Indeed, the concept of an evidential burden was rejected by the International Court of Justice in *Avena and other Mexican Nationals (Mexico v United States of America)*.⁸⁹

⁸⁴ Sandifer, above n 3, 123, 127 and see 135; N H Alford Jr, ‘Fact Finding by the World Court’ (1958) 4 *Villanova Law Review* 37, 83; Kazazi, above n 1, 30; Witenberg, above n 6, 2. Cheng, above n 34, 334, refers to the Latin: *actore non probante reus absolvitur*.

⁸⁵ Amerasinghe, above n 5, 50. See also Kolb, above n 7, 819.

⁸⁶ An example often cited is the *Rights of Nationals of the USA in Morocco Case*. In this case France took the position of the plaintiff in order to bring the matter before the ICJ, yet the Court’s approach was to examine and reject in turn each of the rights asserted by the US: *United States Nationals in Morocco (France v United States)* [1952] ICJ Rep 176; Amerasinghe, above n 5, 65.

⁸⁷ Alford, above n 84, 83 in relation to the practice of the ICJ. Waincymer, above n 13, 536–7.

⁸⁸ Kazazi, above n 1, 31. The common law distinguishes between the ‘true’ ‘legal’ burden of proof (also known as the ‘persuasive burden’) and the ‘evidential’ burden. The allocation of the legal burden may determine whether a party will lose the case or the point at issue, whereas the evidential burden is only a requirement to produce evidence to counter the evidence already produced by the other party. The evidential burden has been described as shifting from one party to another during proceedings, while the legal burden remains fixed: C Tapper, *Cross and Tapper on Evidence* (11th ed, 2007) 130–38.

⁸⁹ *Avena and other Mexican Nationals*, above n 59, [56–57], as interpreted in the Declaration of Judge Ranjeva, [2]. Amerasinghe, above n 5, 37 and 43, although see 87–88. There are of course requirements in international courts that applicants submit with their statements of claim the facts they assert and ‘the nature of the evidence they intend to rely on’. For example, see art 38(2) Rules of Court of the International Court of Justice. These requirements are not to be equated with the discharge of the common law ‘evidential burden’. They are designed to inform a tribunal, to ensure respondents

Nor has the idea of a shifting burden of proof been taken up as a general practice by international courts and tribunals, although the idea has been vogue in dispute settlement within the WTO. Indeed, in *US-Wool Shirts and Blouses* the Appellate Body conceptualized the judicial weighing of evidence in these terms.⁹⁰ However explicit reference to the shifting of the burden of proof has not been a consistent feature of WTO dispute resolution.⁹¹ Nevertheless, as discussed below a WTO panel will commonly state that it has reached the view that a party has established a *prima facie* case and that this case has remained un rebutted by the other party.⁹² In contrast in international investment arbitration it may be more likely that a tribunal will expressly state that the burden of proof shifts upon the establishment of a *prima facie* case.⁹³ The reason may be that investment arbitrators have followed the dicta of the Appellate Body in *US-Wool Shirts*,⁹⁴ or have been influenced more significantly by common law practice.

In order to see how the absence of the concept of the evidential burden may play out in practice, we may consider the case of *Japan — Measures Affecting the Importation of Apples Case* in the WTO in 2003. The Panel allocated the burden of proof to the respondent, Japan, to prove particular facts asserted by Japan, for example that there was sufficient evidence that fireblight bacteria carried by an infected US apple could be transferred to a host plant in Japan by means of rainsplash.⁹⁵ The Appellate Body emphasised ‘the principle that the party that

know the case they are answering, and to set a framework for judgment *infra petita*. M Brealey, ‘The Burden of Proof before the European Court’ (1985) 10 *European Law Review* 250, 251.

- ⁹⁰ As cited above, ‘If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption’: *United States — Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, above n 63, 14.
- ⁹¹ See *Korea-Dairy*, where the Panel stated that as a matter of law the burden of proof rested with the complainant, and did not shift during the proceedings, but remained with the claimant throughout. The Panel would then weigh together all the evidence it had received and decide if it thought the complainant’s claims well founded: Panel Report, *Korea — Definitive Safeguard Measure on Imports of Certain Dairy Products*, WTO Doc WT/DS98/R (12 January 2000) DSR 2000:I, 49, [7.24].
- ⁹² One contemporary member of the Appellate Body suggests that WTO practice is best explained by reference not to the common law evidential burden but to the concept of a burden of persuasion in German civil procedure (*Beweisführungslast*), also referred to as a subjective burden of proof (subjektive *Beweislast*): Taniguchi, above n 32, 562, 571 (cf Unterhalter, see below n 97, 22).
- ⁹³ Schreuer, above n 65, 669.
- ⁹⁴ Investment tribunals have referred to the remarks of the Appellate Body in *United States — Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, above n 63; *International Thunderbird Gaming Corporation v The United Mexican States*, (Arbitral Tribunal constituted under Chapter Eleven of the North American Free Trade Agreement, 26 January 2006) [95]; *Marvin Feldman v Mexico*, Case No ARB(AF)/99/1 (16 December 2002) [177].
- ⁹⁵ Panel Report, *Japan — Measures Affecting the Importation of Apples*, WTO Doc WT/DS245/R (10 December 2003) DSR 2003:IX, 4481, [8.168].

asserts a fact is responsible for providing proof thereof'.⁹⁶ Common lawyers might seek instead to explain the situation in *Japan-Apples* by saying that sufficient evidence had been submitted in relation to the US claim notionally to 'shift' the 'evidential' or 'tactical' burden onto the respondent, who could, by providing enough persuasive evidence supporting its own argument, potentially throw that burden back onto the complainant. On a common law analysis of the example from the *Japan-Apples Case* the US carried the legal burden of proof, but it would have been in Japan's interests to establish the fact in question regarding transfer by rainsplash in case the Panel considered Japan's line of argument to be a persuasive counterweight to the US case.

Yet it is unclear whether international courts' and tribunals' continued reference to the notion that a party asserting a fact must prove that fact is indeed due partly to the absence of the notion of the evidential burden in international law. At least so far as WTO practice is concerned, perhaps the *Japan-Apples Case* was a temporary deviation.⁹⁷ Alternatively, and at least so far as other international courts and tribunals are concerned, it may be that reliance on this notion has been preferred because, as mentioned above, such a formula can be applied quite readily in boundary disputes as well as in disputes involving the alleged breach of international law. Further, the notion that a party asserting a fact must prove that fact has to date proved a workable way to implement the allocation of the burden with much the same results as would be produced through reliance on the notion that a party asserting a claim or defence must prove that claim or defence. However, in the long term, it would be advantageous to reduce the potential for uncertainty that is associated with the formula that a party asserting a fact must prove that fact.

(d) Reducing uncertainty for litigants in other ways

There are a number of other areas of uncertainty for litigants in the articulation of the rule on burden of proof.

(i) Access to evidence

From time to time it is suggested that the burden of proof should be allocated to the litigant with the best access to relevant information.⁹⁸ Although this was more frequently suggested with greater force in some of the older cases, the idea

⁹⁶ Appellate Body Report, *Japan — Measures Affecting the Importation of Apples*, WTO Doc WT/DS245 (10 December 2003) DSR 2003:IX, 4391, [157].

⁹⁷ It is difficult to square the Appellate Body's remarks in *Japan-Apples* with analyses by current Appellate Body member David Unterhalter which seem to indicate that we should after all interpret the general practice of the Appellate Body, at least, as reflecting the common law approach of distinguishing between the fixed legal burden and a shifting evidential burden: D Unterhalter, 'The Burden of Proof in WTO Dispute Settlement' in M E Janow et al, above n 32.

⁹⁸ *Lighthouses Arbitration between France and Greece* Claim No. 6, 24 July 1956 23 677, 678. Canvassing further authorities and discussing associated issues, see Grando, above n 53, 196.

continues to surface. For example, counsel drew on this notion in *Case Concerning Pulp Mills on the River Uruguay*, pointing out that the parties were not on an equal footing. While Argentina had to rely on experts' reports and processes of deduction, Uruguay had much greater access to evidence concerning the Botnia mill because of its right to exercise governmental functions in its own territory.⁹⁹

The idea of allocating the burden to the litigant with the best access to information is consonant with the view put forward by Bentham that 'he should have the burden on whom it would sit lightest',¹⁰⁰ but has been described as potentially 'theoretically disputable.'¹⁰¹ In practice a litigant may well carry the burden of proof even though it is likely that the other party has better access to the relevant information. An illustration from the jurisprudence of the ICJ is seen in the *Avena* case. In this case the ICJ found that the US had not discharged the burden of showing that Mexican nationals were also US nationals, even though necessary information, such as their dates of birth and their parents' marital status at that time, was thought to be held by Mexico.¹⁰² An asymmetry in the parties' ability to produce evidence to support their claims and defences may be inherent in the circumstances of certain cases, but this does not alter the application of the rule on burden of proof.¹⁰³ Nor has the WTO Appellate Body been prepared to accept that disputants' relative ease of access to pertinent information determines the allocation of the burden of proof.¹⁰⁴

Thus, contemporary practice in the articulation of the rule on burden of proof in relation to litigants' relative ease of access to information in disputes involving state responsibility has been consistent with the desirability of certainty in the rule on burden of proof and with the presumption of compliance. The burden of proof is often allocated to a party even though the other party has better access to the evidence. Where this places a party in an awkward position, it may be of some help to recall litigants' duty to cooperate with international courts and tribunals in bringing forward evidence that will help them to decide the case.¹⁰⁵ In case of non-cooperation, adverse inferences may be drawn.¹⁰⁶ Further, some relief may also be

⁹⁹ *Case Concerning Pulp Mills on the River Uruguay*, above n 18, Verbatim Record (trans), public sitting held on Monday, 28 September 2009, 10–11.

¹⁰⁰ Thayer, above n 71, 59, citing *The Works of Jeremy Bentham* (1843) vi, 139, 136.

¹⁰¹ J J Van Hof, *Commentary on the UNCITRAL Arbitration Rules: The Application by the Iran-U.S. Claims Tribunal* (1991) 162–63.

¹⁰² The US had not demonstrated adequate efforts to obtain the information from the Mexican authorities. *Case Concerning Avena and other Mexican Nationals (Mexico v United States of America)*, above n 59, [41], [55–57]. Rosenne, above n 4, 1042.

¹⁰³ *Case Concerning Oil Platforms (Iran v US)* [2003] ICJ Rep 160, [42–46] (Judge Owada).

¹⁰⁴ Panel Report, *European Communities — Trade Description of Sardines*, WTO Doc WT/DS231/R (23 October 2002) DSR 2002:VIII, 3451, [281].

¹⁰⁵ Riddell and Plant, above n 2, 49; Amerasinghe, above n 5, 96ff.

¹⁰⁶ Cheng, above n 34, 324–30; Amerasinghe, above n 5, 43, 132–37, 141–42, and see also 206. Note also the jurisprudence of the UN Human Rights Committee and the Inter-American Court for Human Rights in drawing adverse inferences against a state.

possible through a discretionary application of the *prima facie* case rule, as discussed below.¹⁰⁷

(ii) *Negative and affirmative propositions*

There has also been uncertainty accompanying the idea that the burden of proof should be allocated to the party who asserts the positive aspect of a given factual proposition. In Roman law an actor who had to prove a negative proposition could be freed from his duty through the rule *negativa non sunt probanda* or *negantis nulla probatio*.¹⁰⁸ This proposition additionally derives some of its persuasive power from the view put forward by Bentham, referred to just above, that 'he should have the burden 'on whom it would sit lightest'.¹⁰⁹

However, it has been suggested that this rule does not apply today, domestically or internationally.¹¹⁰ Certainly, there will be circumstances where an international litigant will be put in the position of being required to prove a negative. For example, in the *Southern Bluefin Tuna Cases*, Australia and New Zealand were claiming that Japan had not cooperated with them in relation to measures necessary for the conservation of the living resources of the high seas under Articles 64 and 116 to 119 of the United Nations Convention on the Law of the Sea.¹¹¹ Had the case reached the merits stage this would have required proof of a negative proposition. Experience with the application of the SPS Agreement has also provided many examples of the need for a claimant to establish factual propositions taking a negative form.

Contemporary practice regarding negative propositions in disputes involving state responsibility trends towards consistency with an appreciation of the desirability of certainty and predictability. The burden of proof is often allocated regardless of the question of which party may have to prove a negative proposition. Again, where necessary, a court or tribunal may allow a claim on the basis of an un rebutted *prima facie* case in order to accommodate considerations of fairness arising from the assertion of negative propositions, as discussed further below.

¹⁰⁷ In contrast, see Grando, above n 53, 330–31, 361–2. Where mechanisms for equalising access to evidence fail, Grando envisages either a reversal of the burden of proof or the application of new legal presumptions to enable findings to be made on the basis of facts that can be proven from the available evidence.

¹⁰⁸ Kolb, above n 7, 824.

¹⁰⁹ Thayer, above n 71, 59, citing *The Works of Jeremy Bentham* (1843) vi, 139, 136.

¹¹⁰ Kolb, above n 7, 824. M T Grando, 'Allocating the Burden of Proof in WTO Disputes: A Critical Analysis' (2006) 9(3) *Journal of International Economic Law* 615, 641. For further discussion, including with reference to WTO practice, Grando, above n 53, 193–6.

¹¹¹ *Southern Bluefin Tuna Case (Australia and New Zealand v Japan) (Jurisdiction and Admissibility)* (2000) 119 ILR 509.

(e) The overall trend

Overall the judicial articulation of the rule on burden of proof today is increasingly consistent with a prioritisation of certainty. This is apparent in three ways. The first is seen when the rule on burden of proof is unpacked: the facts that international courts and tribunals seem to be requiring disputants to prove are nearly always the facts necessary to support a claim or defence. This article therefore encourages international adjudicators to articulate the rule on burden of proof more clearly with reference to the need to prove the facts required to establish a claim or defence. This would be consistent with the presumption of compliance and would help increase certainty for litigants and potential litigants.

The second way in which certainty is increasingly successfully pursued in the articulation of the rule on burden of proof is through the non-acceptance of variation to the rule on burden of proof that would allocate the burden according to which party has access to relevant information. The third way in which the judicial articulation of the rule on burden of proof is consistent with the prioritisation of certainty in international law lies in the common acceptance in many cases today that parties may sometimes have to prove negative assertions.

In these three ways, certainty in relation to the rule on burden of proof is increasingly sustained. The practical need to alleviate unfairness generated by increasing certainty as to the content of the rule on burden of proof may, in rare cases, be met through mechanisms such as the use of a *prima facie* case approach in the application of the rule on proof, as discussed further below.

IV. Judicial Application of the Rule on Burden of Proof

Encouraging certainty and predictability in the articulation of the rule on burden of proof, as advocated in Part III, may lead to a rigidity that fails to deal sufficiently with the need to maintain fairness between disputing parties. Accordingly, the flexible application of the rule is important to help ensure this fairness. For example, flexibility may be needed where one of the parties has a monopoly over access to evidence, or in some instances where a party is required to prove a broadly phrased negative proposition, or where circumstances call for an international court or tribunal to employ presumptions or inferences. Such practices are to be accepted and encouraged in instances where this is genuinely necessary in order to help ensure fairness between the parties in an individual case, provided that a court or tribunal exercises judicial restraint and makes its reasoning sufficiently transparent.

However, there are a number of other more problematic aspects of the application of the rule on burden of proof. For instance, arguably a fixed standard of proof should be introduced in international adjudication, rather than continuing to rely on individual judges' and arbitrators' instinctive and often tacit formulations of the applicable standard or standards. Additionally, international judges and arbitrators should be aware of the need for care in the characterisation of rules of substantive law as general rules and exceptions respectively. They should also be wary of proposals to segment substantive rules into component rules and

exceptions. This part of the article will first address the use of judicial power in ways that help ensure fairness in the application of the rule on burden of proof, and will then consider some of the more troublesome aspects of maintaining an untrammelled judicial power in the application of the rule.

(a) The use of judicial power to help ensure fairness

(i) The *prima facie* case approach

The origins of the *prima facie* case may be found in Roman Law, with reference to the understanding of *probatio*. An actor was considered to have presented *probatio* by furnishing evidence at the outset of a case, although in the face of counter-evidence it was necessary to keep up the *probatio*.¹¹² In the context of international adjudication, a *prima facie* case has been described as evidence ‘which, unexplained or uncontradicted is sufficient to maintain the proposition affirmed’.¹¹³ In decisions by the Iran-US Claims Tribunal,¹¹⁴ and other claims commissions,¹¹⁵ the establishment of a *prima facie* case has been considered sufficient basis for a decision in favour of a claimant in circumstances where evidence to substantiate a fuller case may be especially difficult to obtain,¹¹⁶ or where a litigant is put in the position of attempting to furnish an impossible proof or *probatio diabolica*.¹¹⁷ The extent to which the necessary evidence for a fuller case is genuinely unobtainable will be relevant.¹¹⁸ The *prima facie* case rule is also regarded as being of potential assistance in cases where an actor must prove a negative proposition.¹¹⁹ However, it is understood that ‘mere suspicions can never be a basic element of juridical findings.’¹²⁰

¹¹² Thayer, above n 71, 67.

¹¹³ See the decisions of the USA-Mexico General Claims Commission in *Lillie S. Kling* (1930) 4 RIAA 585. See also the *Parker Case (USA v Mexico)* (1926) 4 RIAA 39–40 (hereafter the *Parker Case*). See also Grando’s discussion of the claims commission decisions: Grando, above n 53, 142–6.

¹¹⁴ For example, see *Lockheed Corporation v The Government of Iran, the Iranian Airforce et al* (1988) 18 Iran-US CTR 292, 95–97; and the *Rockwell Case* (1989) 23 Iran-US CTR 188.

¹¹⁵ Sandifer, above n 3, 129–30, discussing the decision of the US-Mexican General Claims Commission in the *Parker Case*, above n 113.

¹¹⁶ Kazazi, above n 1, 332–340. *International Technical Products Corp v Iran* (1985) 9 Iran-US CTR 10, 28; *Time Inc v Iran* (1984) 7 Iran-US CTR 8, 11.

¹¹⁷ Cheng, above n 34, 323.

¹¹⁸ Amerasinghe, above n 5, 139–40, discussing the decision of the British-Mexican Claims Commission *In re Odell* (1931) 6 ILR 423. See also, eg, *Sola-Tiles Inc v Iran* (1987) 14 Iran-US CTR 223, 232–33. See also the 1956 decision of the Permanent Court of Arbitration in the *Lighthouses Arbitration Claim No 6 (France v Greece)* [1956] 23 ILR 677, 678.

¹¹⁹ For example in the *Mexico City Bombardment Claims*, the British-Mexican Claims Commission was prepared to take the view that there was strong *prima facie* evidence of Mexico’s failure to respond to revolutionary forces’ occupation and looting of a YMCA hostel where the British Agent demonstrated that the circumstances were known to the Mexican authorities at the time: *Mexico City Bombardment Claims*

Commentators have urged care in the use of the *prima facie* case, given the absence of appeal from the decisions of most international courts and tribunals,¹²¹ and some have argued that a *prima facie* case should meet the usual standard of proof applying to a case.¹²² In the absence of a recognised and generally applicable standard of proof in international adjudication, it is unlikely that a specific standard of proof for the establishment and rebuttal of a *prima facie* case will be developed. At present, there seems only a fine distinction between the potentially undisciplined use of *prima facie* case approaches and the exercise of discretion in the weighing of evidence.¹²³ There is also the possibility that a court or tribunal might be prepared to rely on factual inferences where evidence is scarce, as seen in the *Corfu Channel Case*, discussed below.

All of these techniques for lightening a party's load will need to be employed rarely and with caution. However, they are likely to remain vital for helping ensure fairness in the application of the rule on burden of proof. Whichever techniques are employed in a given case it will be essential that international courts and tribunals continue to confine the employment of these techniques to cases where this appears essential, and to lay out clearly their reasons for diverging from the usual approach. As discussed further below, one instance in which allowing reliance on a *prima facie* case may be especially important is in a situation where there is considerable scientific uncertainty as to the facts and a precautionary approach is called for.¹²⁴

The situation regarding the use of *prima facie* cases in WTO dispute settlement is a little different to the situation in other international courts and tribunals. In the WTO, a '*prima facie* case' rule is a central and established feature of judicial decision-making, used in all cases and not merely in cases where evidence is difficult to obtain.¹²⁵ For example, the *US-Wool Shirts Case*, in which the *prima facie* case approach was laid down, concerned a complaint by India that the US had not acted consistently with its obligations under the Agreement on Textiles and Clothing in adopting a safeguard action that affected India. The Appellate Body said that a party claiming that a WTO Agreement had been violated by another

(1930) 5 ILR 166; Amerasinghe, above n 5, 249; Kolb, above n 7, 825.

¹²⁰ Amerasinghe, above n 5, 249.

¹²¹ Ibid 253.

¹²² Amerasinghe, above n 5, 256.

¹²³ Indeed the exercise of discretion in the weighing of evidence may, where appropriate, be a more flexible and less cumbersome method to give effect to the need for fairness in the application of the rule on burden of proof, although international courts and tribunals will want to bear in mind that such discretion is only to be exercised in especial circumstances. For example, reference might be made to the comment of the ICJ in the *Nicaragua Case* that Nicaragua's evidence in response to US allegations over the supply of arms was to be assessed bearing in mind that Nicaragua had to prove a negative: *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14, 80.

¹²⁴ See below n 301.

¹²⁵ For history and critique, Pauwelyn, above n 15, 243f.

Member had to assert and prove its claim. This meant that India had to put forward sufficient evidence and legal argument to provide a *prima facie* case demonstrating that the United States' safeguard action was unjustified under the Agreement. When India had done this, the onus then shifted to the United States, which had to bring forward evidence and argument in order to disprove India's claim. The United States was not able to do so, and therefore the Panel had been correct in finding that the US action violated the Agreement.¹²⁶ Although the language of a shift in the burden of proof has not been used consistently in WTO dispute resolution, as noted above, the application of the '*prima facie* case rule' remains standard practice.¹²⁷

WTO practice also applies the '*prima facie* case' rule in relation to defences. In *United States-Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, the US unsuccessfully invoked Article XIV of General Agreement on Trade in Services (GATS), which is a general exceptions provision that parallels Article XX of General Agreement on Tariffs and Trade (GATT). The US asserted that its measures restricting internet gambling were 'necessary to protect public morals' and so were justified under Article XIV(a). The US was found to have raised an un rebutted *prima facie* case that its measures were necessary under paragraph (a) of Article XIV, but the US case was unsuccessful due to failure to prove that its measures were applied in accordance with the chapeau to Article XIV in a way that did not involve arbitrary or unjustifiable discrimination.¹²⁸

¹²⁶ *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, above n 63, 16–17.

¹²⁷ For example, in the *EC-Hormones Case* the Panel recalled the rule laid down in *US-Wool Shirts*. Panel Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, above n 19, [8.58]; *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, above n 63, [98]:

we consider that, as is the case in most legal proceedings, the initial burden of proof rests on the complaining party in the sense that it bears the burden of presenting a *prima facie* case of inconsistency with the SPS Agreement. It is, indeed, for the party that initiated the dispute settlement proceedings to put forward factual and legal arguments in order to substantiate its claim that a sanitary measure is inconsistent with the SPS Agreement ... Once such a *prima facie* case is made, however, we consider that, at least with respect to the obligations imposed by the SPS Agreement that are relevant to this case, the burden of proof shifts to the responding party.'

Accordingly, in this case Canada and the US bore the burden of establishing a *prima facie* case that the EC's ban on meat from cattle treated with growth promotion hormones was inconsistent with the SPS Agreement. Once a *prima facie* case was established, the EC had to rebut the case established by Canada and the US, which the EC failed to do.

¹²⁸ Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc WT/DS285 (20 April 2005) DSR 2005:XII, 5663 [309]–[311], also 358ff.

Does the use of the *prima facie* case rule as applied in the WTO involve a potential lowering of the standard of proof?¹²⁹ There is still a clear bottom line. In *EC-Hormones* the Appellate Body commented that:

It is also well to remember that a *prima facie* case is one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the *prima facie* case.¹³⁰

However, this bottom line remains a flexible one. Rather than articulating a standard of proof to guide panels in working out when a *prima facie* case has been established, in *Wool Shirts* the Appellate Body said only that:

precisely how much and precisely what kind of evidence will be required to establish such a presumption will necessarily vary from measure to measure, provision to provision, and case to case.¹³¹

Thus, it seems, in practice the *prima facie* case approach also operates through the exercise of judicial discretion in the WTO. The standard involved in establishing a *prima facie* remains unarticulated and susceptible to variation. It may even be that higher standards of proof may be applied in relation to the other party's response to a *prima facie* case.¹³² When the International Tribunal for the Law of the Sea applied a similar *prima facie* case approach in the *M/V Saiga No 2 Case*, this was recognised clearly by one judge to entail a lower standard of proof than usual.¹³³ Grasping the nettle, one member of the WTO Appellate Body has suggested recently that the standard of proof required for a *prima facie* case in WTO dispute settlement should be knowable in advance, according to a defined metric.¹³⁴ He advises that there is 'little reason not to adopt a standard that is clear

¹²⁹ Pauwelyn, above n 15, 246, 256. Cameron and Orava suggest that: 'The standard for presenting a *prima facie* case is, under virtually any definition, relatively low.': J Cameron, and S Orava, 'GATT/WTO Panels between Recording and Finding Facts: Issues of Due Process, Evidence, Burden of Proof, and Standard of Review in GATT/WTO Dispute Settlement' in F Weiss (ed), *Improving WTO Dispute Settlement Procedures: Issues and Lessons from the Practice of other International Courts and Tribunals* (2000) 195, 237. Canvassing authorities, Grando notes that the *prima facie* case standard in the WTO would seem to be a low one: Grando, above n 53, 106, 131. She considers there is no justification for applying a lower standard of proof in the WTO, although reliance on inference may be necessary in some cases: *Ibid* 147.

¹³⁰ Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, above n 19, [104].

¹³¹ Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, above n 63, 13–14. The WTO Appellate Body has here used the term 'presumption' to refer to a *prima facie* case. This contrasts with the more specific use of the term 'presumption' in the context of factual and legal presumptions discussed below.

¹³² T Christoforou, 'WTO Panels in the Face of Scientific Uncertainty' in F Weiss, above n 129, 243, 243–65, 644, and note 60. Pauwelyn considers that a party rebutting a *prima facie* case should be required only to cast reasonable doubt on it: Pauwelyn, above n 15, 257.

¹³³ *M/V Saiga (No 2)*, above n 65, [72]–[73]; [33] (Judge Warioba).

¹³⁴ Unterhalter, above n 97, 551.

and well understood in other contexts, the most obvious candidate being proof on a balance of probabilities'.¹³⁵ This would be especially helpful in WTO dispute settlement, where the use of a *prima facie* case approach is not confined to situations where access to evidence is difficult, but is applied across the board in all cases.

(ii) *Presumptions*

International courts and tribunals also enjoy a measure of discretion in the application of inferences and presumptions. The concept of the presumption is known both to the common law, and the civil law.¹³⁶ Reference has already been made to the 'presumption of compliance'. However, when the term 'presumption' is used by an international court or tribunal, it usually takes a different meaning. The designation 'presumption' applies where one fact is deemed to be proved on the basis of another.¹³⁷ The application of presumptions is an accepted aspect of international adjudication, and is considered a legitimate judicial method for the evaluation of evidence.¹³⁸ Inference, presumptions, indicia and circumstantial evidence may all be relied upon by international courts and tribunals, in addition to direct evidence.¹³⁹

Reliance upon inference is seen quite clearly in the work of a number of international tribunals,¹⁴⁰ including not only the ICJ,¹⁴¹ but also the Iran-US Claims Tribunal,¹⁴² the human rights courts,¹⁴³ the WTO¹⁴⁴ and the European Court of Justice.¹⁴⁵ Inferences have also been drawn on the basis of failure to deny

¹³⁵ Ibid 552.

¹³⁶ Malaurie and Morvan, above n 48, 128–30; Larroumet, above n 48, 339, 342–44; Ghestin et al, above n 48, 699–702; Prieto-Castro y Ferrándiz, above n 78, 151–52, 192–94. Indeed, the active use made of presumptions has been described as an outstanding feature of the main categories of civil suit. C N Ngwasiri 'The Role of the Judge in French Civil Proceedings' (1990) 9 *Civil Justice Quarterly* 167, 167. See also J Beardsley, 'Proof of Fact in French Civil Procedure' (1986) 34 *American Journal of Comparative Law* 459, 472–74.

¹³⁷ Amerasinghe, above n 5, 211; Amerasinghe, above n 49, 395; Tapper, above n 88, 146.

¹³⁸ As agreed by the parties in *Islamic Republic of Iran v United States of America* (1986) 11 Iran-US CTR 271, 276.

¹³⁹ *Velásquez Rodríguez Case*, above n 35, [130].

¹⁴⁰ Cheng, above n 34, 322f.

¹⁴¹ K Highet, 'Evidence and Proof of Facts' in L F Damrosch (ed), *The International Court of Justice at a Crossroads* (1987) 355–75, 363–65.

¹⁴² H M Holtzmann, 'Fact-Finding by the Iran-United States Claims Tribunal' in R B Lillich (ed), *Fact-Finding before International Tribunals: Eleventh Sokol Colloquium* (1991) 101, 270, 354.

¹⁴³ Pasqualucci, above n 5, 209; *Velásquez Rodríguez Case*, above n 35, [124], [126].

¹⁴⁴ Waincymer, above n 13, 619.

¹⁴⁵ The European Court of Human Rights has indicated that 'proof may follow from the co-existence of sufficiently strong, clear and concordant inferences or of similar un rebutted presumptions of fact.' *Ireland v United Kingdom* (1978) 25 ECHR (ser.A)

an alleged point of fact. In the *Nicaragua Case*, at the merits stage, the ICJ drew the inference that undenied US overflights above foreign territory had indeed taken place.¹⁴⁶ The *Corfu Channel Case* is often cited as the classic illustration of reliance upon inference and circumstantial evidence.¹⁴⁷ In *Corfu Channel* the Court agreed that, given the difficulties involved in gathering evidence, ‘a more liberal recourse to inferences of fact and circumstantial evidence’ was permissible in concluding that Albania must have known of the minelaying that had taken place in the Corfu Channel.¹⁴⁸ The circumstantial and indirect evidence relied upon included the geographical configuration of the relevant territory, the estimated time required for mine laying, the distance of the minefield from the coast, the absence of an Albanian investigation into certain events, and notes kept by the Albanian government.¹⁴⁹ The Court also took into account the ‘exclusive territorial control exercised by a state within its frontiers’.¹⁵⁰ The Court found that:

In cases where proof of fact presents extreme difficulty, a tribunal may [thus] be satisfied with less conclusive proof i.e. *prima facie* evidence ... *the inference in every case must, however, be one which can reasonably be drawn.*¹⁵¹

In the WTO context, reference might be made to the assumptions relied on by the Panel in *Australia-Salmon*.¹⁵² Assumption was also employed, in quite different circumstances, by the UNCC, the UNCC faced particular difficulties obtaining evidence in relation to claims for mental suffering consequent upon Iraq’s invasion of Kuwait.¹⁵³ On the basis of a commissioned expert report,

65, [161]. See also *Nachova and Others v Bulgaria* (2005) ECHR [147].

¹⁴⁶ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, above n 123, 51–52; Amerasinghe, above n 49, 406.

¹⁴⁷ Amerasinghe, above n 5, 139, 204–08; Cheng, above n 34, 323 and 325, as cited by Sandifer, above n 3, 173; see also Highet, above n 141, 364.

¹⁴⁸ *Corfu Channel Case*, above n 35, 18. Judge Azevedo also agreed on this point in his Dissenting Opinion:

it would be going too far for an international court to insist on direct and visual evidence and refuse to admit, after reflection, a reasonable amount of human presumptions with a view to reaching that state of moral, human certainty with which, despite the risk of occasional errors, a court of justice must be content: 90–91.

¹⁴⁹ See Kazazi, above n 1, 86–89 and 261.

¹⁵⁰ *Corfu Channel Case*, above n 35, 18. See also Dissenting Opinion of Dr Ecer, the Judge *ad hoc* nominated by Albania in the *Corfu Channel Case*, referring to ‘the legal presumption of international law according to which States act in conformity with international law.’ Ibid 127. Dr Ecer did not consider that the ‘presumption of fact’ that Albania was cognizant of the minelaying in the Channel established Albanian responsibility.

¹⁵¹ Emphasis added.

¹⁵² Panel Report, *Australia — Measures Affecting Importation of Salmon*, WTO Doc WT/DS18/R (20 March 2000) DSR 1998:VIII, 3407 8.135 and 8.124, see also 8.159.

¹⁵³ *Claims Against Iraq (Category ‘C’ Claims) (Report and Recommendations made by the Panel of Commissioners concerning the First Instalment of Individual Claims up to US \$100 000)* (1994) 109 ILR 205.

particular policies were adopted to guide the level of awards made, in an attempt to mitigate difficulties with proof and to streamline the processing of claims. As a general point the UNCC decided to ‘lower the levels of evidence required’,¹⁵⁴ and held that the level of evidence required for Category C Claims was ‘the reasonable minimum appropriate under the circumstances involved’.¹⁵⁵ More specifically, once the fact of injury was proven, mental suffering was assumed.¹⁵⁶

Judicial presumptions have their roots in the judicial capacity for inference,¹⁵⁷ which is linked with judicial freedom in relation to the evaluation of evidence. A judicial presumption is an inference that is commonly applied in a recurring situation.¹⁵⁸ This distinction between presumptions and inferences has not always been clearly maintained, and the two terms are often used interchangeably.¹⁵⁹ The presumption most frequently invoked in international legal proceedings is a judicial presumption, the presumption of the regularity of government activity: *omnia acta rite esse praesumuntur*.¹⁶⁰ This presumption is applied, for example, with respect to the validity of nationalisation and consular certificates as evidence of citizenship,¹⁶¹ and the validity of municipal court decisions.¹⁶² A range of other

¹⁵⁴ Ibid 243, citing Sandifer, above n 3, 22, on the practice of claims commissions dealing with complex questions of fact relating to hundreds and thousands of individuals’ claims, and noting that such claims may arise out of circumstances of conflict where evidence is not retained.

¹⁵⁵ Ibid 243.

¹⁵⁶ Ibid 440.

¹⁵⁷ Rosenne, above n 4, 1046. See also Kolb, above n 7, 824 on inferences or presumptions of fact (*praesumptiones hominis*).

¹⁵⁸ Amerasinghe, above n 49, 405.

¹⁵⁹ Kazazi, above n 1, 240, 260; Amerasinghe, above n 5, 224, 405. For example, in *Argentina-Footwear* the Panel consulted a number of dictionaries and concluded that a presumption was an inference in favour of a particular fact, or a conclusion reached in the absence of direct evidence: *Argentina — Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, above n 64, 1033, 253. See the Dissenting Opinion of Judge Ecer in *Corfu Channel Case*, above n 35. The *Iran National Airlines Co Case* also provides an example. In this case, the Iran-US Claims Tribunal rejected US arguments for the application of a ‘presumption’ that the US Air Force had already made payment on a number of invoices from Iran on the basis that past practice showed a pattern of prompt payment. As it happened, the Tribunal did not doubt US practice, but did not consider there was adequate evidence to justify drawing such an inference: *Iran National Airlines Company and The Government of the United States of America* (1987) 17 Iran-US CTR 187,193; Amerasinghe, above n 49, 402.

¹⁶⁰ Mani, above n 69, 208; cf Cheng, above n 34, 305f. Amerasinghe, above n 49, 397; Witenberg, above n 6, 329. This presumption was regarded as a ‘universally accepted rule of law’ in the *Valentiner Case*, *Venezuelan Arbitrations* 1903, 564, as cited by Amerasinghe, above n 5, 26 and 214.

¹⁶¹ Sandifer, above n 3, 145; J L Simpson and H Fox *International Arbitration: Law and Practice* (1959) 199.

¹⁶² Sandifer, above n 3, 143, 144; J H Ralston, *The Law and Procedure of International Tribunals: Being a Resumé of the Views of Arbitrators upon Questions Arising under the Law of Nations and of the Procedure and Practice of International Courts* (1926) 217.

presumptions have been applied in international courts and tribunals, most notably by the Inter-American Court of Human Rights. These include a presumption of death in relation to individuals who have disappeared in violent situations and have not reappeared for many years, a presumption that victims' relatives pay for their funeral and a presumption that impunity causes anguish, pain and sadness to victims and their families.¹⁶³ To take another example, the Iran-US Claims Tribunal has consistently applied a presumption that invoices are correct and are evidence of a debt.¹⁶⁴

Whereas a judicial presumption reflects a repeated practice of drawing a particular conclusion regarding one type of fact on the basis of another, a legal presumption is a presumption requiring a certain conclusion to be drawn as a matter of law.¹⁶⁵ This distinction holds true across both the civil and common law systems.¹⁶⁶ An example of a legal presumption is found in Article 2.5 of the WTO Technical Barriers to Trade Agreement (TBT Agreement). The first sentence of Article 2.2 of the TBT Agreement, providing that 'Whenever a technical regulation is prepared, adopted or applied for one of the legitimate objectives explicitly mentioned in paragraph 2, and is in accordance with relevant international standards, *it shall be* rebuttably presumed not to create an unnecessary obstacle to international trade.'¹⁶⁷ In domestic law, legal presumptions may derive from statute, although common lawyers are also comfortable with the notion of presumptions finding their origin in the judgments of the courts. In international law, legal presumptions have been recognised as deriving from general principles of law, treaty law and customary international law.¹⁶⁸ Whether legal presumptions can be created through the implied or inherent powers of international courts and tribunals is an open question.

All presumptions have a certain effect in relation to the discharge of the burden of proof. When weighing the evidence in a case, a tribunal will take into account any presumptions that may favour one party or the other and consider the extent to which they have been rebutted.¹⁶⁹ The effect of presumptions has been described

¹⁶³ Pasqualucci, above n 5, 209–10, referring also to a number of additional examples. In the *Velásquez Rodríguez Case*, the IACHR found that, where government support for or toleration of a policy of forced disappearances had been established, the disappearance of an individual could be proved through presumptive, circumstantial or indirect evidence, as a matter of logical inference: *Velásquez Rodríguez Case*, above n 35, [124], [131]. See, above, on adverse inferences.

¹⁶⁴ Amerasinghe, above n 5, 375–6.

¹⁶⁵ Amerasinghe, above n 5, 211–12. See also Kolb, above n 7, 823 on ordinary presumptions of law (*praesumptiones juris*).

¹⁶⁶ Amerasinghe, above n 49, 395, n 1; Amerasinghe, above n 5, 212.

¹⁶⁷ Emphasis added. See also art 3.2 of the SPS Agreement, as referred to above. As to rebuttable presumptions in international law, see Kolb, above n 7, 824 (*praesumptiones juris et de jure*).

¹⁶⁸ Kazazi, above n 1, 245; Amerasinghe, above n 5, 214, 218; Witenberg, above n 6, 329–31; Sandifer, above n 3, 141.

¹⁶⁹ Amerasinghe, above n 5, 219, 227–28; Amerasinghe, above n 49, 401.

by one writer, adopting the terminology of the Roman Law, as providing a *levamen probationis*.¹⁷⁰ However, it has been observed in relation to most presumptions that the burden of proof does not shift.¹⁷¹ This holds true where the burden of proof is expressed in the sense corresponding to the proof of the facts necessary to support legal claims, referred to above. However where the result of applying a presumption is that a legal claim is considered to be proved, then there has arguably been a reversal in the burden of proof. It is of interest to note that dissenting opinions in both *Corfu Channel*¹⁷² and *DRC v Uganda*¹⁷³ addressed the issue of whether a respondent state should be allocated the burden of proof by virtue of states' obligations to exercise vigilance and be aware of illegal acts in their own territories.¹⁷⁴

(b) Matters on which judicial power remains more problematically unguided

There are a number of matters relating to the application of the rule on burden of proof where the exercise of judicial power remains problematically unguided. The absence of a standard or standards of proof in international courts and tribunals is troubling, and there is also a need for more attention to be paid to the methods for characterising rules as either general rules or exceptions.

(i) Standard of proof

One of the more concerning areas of practice remains the absence of an objective standard of proof as known in the common law. The adoption of a formal standard or standards of proof in international adjudicatory decision-making would be a positive step. It would accentuate the significance of the judicial weighing of evidence, and lead to increased transparency in the articulation by international courts and tribunals of how persuasive they find particular evidence.¹⁷⁵

As noted above, there have increasingly been international judicial calls for the adoption of a formal standard of proof. Judge Higgins, President of the ICJ, commented in the *Oil Platforms Case* that '[t]he principal judicial organ of the United Nations should ... make clear what standards of proof it requires to establish what sorts of facts.'¹⁷⁶ In the International Tribunal for the Law of the

¹⁷⁰ Thayer, above n 71, 63.

¹⁷¹ Amerasinghe, above n 5, 219 and see 223; Kazazi, above n 1, 251, 253, but see also 258.

¹⁷² *Corfu Channel Case*, above n 35, 44 (Judge Alvarez).

¹⁷³ *DRC v Uganda*, above n 4, 15 (Judge Kooijmans).

¹⁷⁴ Riddell and Plant, above n 2, 88, 92.

¹⁷⁵ D W Prager, 'Procedural Developments at the International Court of Justice' (2004) 3 *Law and Practice of International Courts and Tribunals* 125.

¹⁷⁶ *Oil Platforms Case*, above n 103, [33]. See also the Separate Opinions of Judge Buergenthal and Judge Owada, and see J A Green, 'Fluctuating Evidentiary Standards for Self-Defence in the International Court of Justice' (2009) 58(1) *International and Comparative Law Quarterly* 163.

Sea, Vice-President Wolfrum remarked in *M/V Saiga (No 2)* on the need for a more consistent approach to the standard of proof.¹⁷⁷ As discussed above, arguments have also been made for a pre-determined standard of proof to be established for *prima facie* cases in the WTO to provide more consistency and predictability.¹⁷⁸ A standardisation in the rules of evidence in international courts and tribunals has been encouraged in the Iran-US Claims Tribunal,¹⁷⁹ and adoption of a consistent standard of proof has been advocated even for the European Court of Justice.¹⁸⁰

Commentators suggest that if the standards of proof presently applied by international courts and tribunals are extrapolated from their decisions these standards fall into several identifiable clusters, including proof beyond reasonable doubt, proof on the balance of probabilities, and conclusive proof.¹⁸¹ However, the standard of proof most commonly applied in practice is to require a case to be established as a minimum on the preponderance of the evidence.¹⁸² The most appropriate standard to adopt for general application in most situations would therefore be a standard reflecting the common law standard for civil cases: the balance of probabilities or ‘preponderance of the evidence’ test.¹⁸³ Indeed this formulation was adopted by Judge Greenwood in his Separate Opinion in the *Case Concerning Pulp Mills*.¹⁸⁴ If such a standard were adopted, this would diminish the scope for the arbitrary application of the rules on proof. A standard of proof along these lines would correlate with the standard of proof applied in civil cases in common law jurisdictions, that is: whether a court considers a fact to be established ‘on the balance of probabilities’ or on the preponderance of the evidence.¹⁸⁵

¹⁷⁷ *M/V Saiga (No 2)*, above n 65, [2] (Vice-President Wolfrum).

¹⁷⁸ D Unterhalter, above n 97; J Pauwelyn, ‘The Use of Experts in WTO Dispute Settlement’ (2002) 51 *International and Comparative Law Quarterly* 325, 360; Cameron and Orava, 235. See also Grando, above n 53, 92, 132, 147, 356–7.

¹⁷⁹ C N Brower, ‘Evidence Before International Tribunals: The Need for Some Standard Rules’ (1994) 28 *International Law Spring* 47.

¹⁸⁰ A suggested formula is that of a ‘reasonable degree of certainty’: Lasok, above n 1, 431; Plender, citing Advocate General Gand in *Acciaierie e Ferriere Publiese v High Authority Case 8/65* [1966] ECR 1, 12.

¹⁸¹ Kazazi, above n 1, 347–50; Brown, above n 39, 98; Amerasinghe, above n 5, 234. On conclusive proof, see the judgment of the ICJ in *Oil Platforms Case*, above n 103, [71], [72].

¹⁸² Amerasinghe, above n 5, 245.

¹⁸³ Brown, above n 39, 19. In relation to the WTO, see also the views of Unterhalter, above n 134; and Grando, above n 53, 132, 149, 356–7. Grando still contemplates a higher standard of proof in cases concerning the protection of human, animal and plant life or health in the territory of the respondent, on the basis that more is at stake in these cases: *ibid* 141.

¹⁸⁴ ‘I believe that Argentina was required to establish the facts which it asserted only on the balance of probabilities (sometimes described as the balance of the evidence)’. *Case Concerning Pulp Mills*, above n 18, [26] (Judge Greenwood).

¹⁸⁵ Tapper, above n 88, 174. See also A A S Zuckerman *on Civil Procedure: Principles of Practice* (2006) 756–79.

Should there be any additional and separate standard of proof for more serious cases? In the past it has been accepted within the common law that there may be different degrees of proof within one standard of proof, depending on the subject matter.¹⁸⁶ For example, in an instance of alleged fraud a court may require more probative evidence than would be needed in the case involving allegations of negligence.¹⁸⁷ This has been described as involving an ‘enhanced standard of proof’.¹⁸⁸ In international courts and tribunals it is clear that standards of proof have altered depending on the nature of the issues,¹⁸⁹ and that there may be some justification for this.¹⁹⁰ Where the charges leveled against a state are considered to be particularly serious there has been some inclination to maintain a higher standard of proof. To take an example, a high standard of proof is found in the *Partial Awards of the Eritrea-Ethiopia Claims Commission on the Treatment of Prisoners of War*. In light of submissions made by the parties, the Commission considered that:

[p]articularly in light of the gravity of some of the claims advanced, the Commission will require clear and convincing evidence in support of its findings.¹⁹¹

Similarly in the *Genocide Case* the ICJ took the view that the Court ‘had to be fully convinced’ that allegations of genocide and other acts had been clearly established.¹⁹² These comments were reminiscent of the ICJ’s comments in the *Corfu Channel Case*. In the *Corfu Channel Case* the UK argued that it could satisfy the burden of proof by showing with reasonable certainty the complicity of Albania in minelaying in the Channel. The Court said however that ‘a charge of such exceptional gravity against a state would require a high degree of certainty

¹⁸⁶ Ibid 185, although see *Re B (Children)* (FC) [2008] UKHL 35.

¹⁸⁷ In the United States, an additional category of proof has been created, according to which ‘clear and convincing’ evidence is required: T Anderson, D Schum and W Twining, *Analysis of Evidence* (2nd ed, 2005) 243. This approach was adopted by the Iran-US Claims Tribunal in cases where forgery was alleged: Amerasinghe, above n 5, 373–5.

¹⁸⁸ Amerasinghe, above n 5, 373–5.

¹⁸⁹ A Watts, ‘Burden of Proof, and Evidence before the ICJ’ in Weiss, above n 129, 289–301, 289; Kazazi, above n 1, 323. See also Amerasinghe, above n 5, ch 12.

¹⁹⁰ Green, above n 176, 167.

¹⁹¹ *Partial Awards on Prisoners of War between the State of Eritrea and the Federal Democratic Republic of Ethiopia: Eritrea’s Claim 17* (2003) 42 ILM 1083, [43] ff; *Ethiopia’s Claim 4* (2003) 42 ILM 1056 [34] ff.

¹⁹² *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, above n 4, 209. An interesting feature of the formulation in the *Genocide Case* is that it is cast in terms of the subjective state of mind of the Court: the Court ‘had to be fully convinced’. This is reminiscent of the civil law approach to standard of proof, where the standard being applied goes unpronounced. Likewise see the variable adoption of subjective and objective standards in *DRC v Uganda*, above n 4, [207], [237], and the *Oil Platforms Case*, above n 103, eg [71], [76]. On the civil law approach in relation to standards of proof, see Grando, above n 53, 88–89.

that has not been reached here.¹⁹³ It may be that there is a need for agreement on an alternative and higher standard of proof for particularly serious allegations dealt with by international courts and tribunals. However, on the other hand it is important not to undermine the vindication of the individuals' human rights allegedly so gravely violated in such cases.

(ii) *Distinctions between general rules and exceptions*

In addition to the absence of a collective discipline for the application of standards of proof, international adjudication is presently characterised by the potential for the relatively untrammelled exercise of judicial power in regard to determinations of whether a rule constitutes a general rule or an exception. The distinction is vital. The principle that the burden of proof will be allocated to a party seeking to rely on an exception is recognised in states' approach to the conduct of proceedings in international tribunals,¹⁹⁴ and has been followed clearly and consistently since early in international judicial practice.¹⁹⁵ It is reflected in the writings of commentators,¹⁹⁶ and occasionally in tribunals' rules of procedure.

Courts and tribunals must act with great care in determining whether a rule is a general rule, or whether it is a defence or exception.¹⁹⁷ In relation to a general rule,

¹⁹³ *Corfu Channel Case*, above n 35, 17. See also *Qatar v Bahrain (Jurisdiction and Admissibility)* [1995] ICJ Rep 5, 63 (Judge Shahabuddeen). A similar approach is taken in human rights cases. In the *Velásquez-Rodríguez Case*, relating to the forced disappearance of Manuel Velásquez-Rodríguez, the Inter-American Court of Human Rights considered it was appropriate to apply a high standard of proof in order to reflect the seriousness of the charge against Honduras. See, eg, *Velásquez Rodríguez Case*, above n 35, [129]. See also *Godínez Cruz* (1989) IACH (ser C) No 5 [135]. The ECHR has also required proof beyond reasonable doubt in relation to serious allegations: see the *Irish Case* (1978) 58 ILR 264; *Cyprus v Turkey* (European Court of Human Rights, Application 25781/94, 10 May 2001) [112] – [115].

¹⁹⁴ See, eg, the arbitral award in *Libyan Arab Foreign Investment Company (LAFICO) and the Republic of Burundi* (1991) 96 ILR 279, 309–20, where Burundi attempts to justify the expulsion of Libyan nationals from Burundi; and the earlier *Naulilaa Case*, in which Germany sought to justify aggression in Angola, relying on a thesis based on the right to conduct reprisals. *Responsabilité de L'Allemagne à Raison des Dommages causés dans les Colonies Portugaises du Sud de L'Afrique (Sentence sur le principe de la responsabilité)* (1928) II RIAA 1012, 1025–28. On the same point, see also the *Cysne Case, Responsabilité de L'Allemagne à Raison des Actes commis Postérieurement au 31 Juillet 1914 et avant que le Portugal ne participât à la Guerre* (1930) II RIAA 1035, 1056.

¹⁹⁵ *Asylum Case (Colombia/Peru)* [1950] ICJ Rep 266, 282; *Cysne Case*, above, n 194, 1056.

¹⁹⁶ Amerasinghe, above n 5; Brown, above n 39; Pauwelyn, above n 15, 232, 235; Martha, above n 1, 87f, reviewing GATT panels' practice in relation to the general exceptions under art XX of GATT, commercial and economic defences, exceptions to the prohibition on qualitative restrictions, safeguard provisions, and security exceptions. cf Grando, above n 53, 187–8. Grando questions the distinction between general rules and exceptions.

¹⁹⁷ Thayer, above n 71, 46, 58–59. 'Once the norm is assumed, the burden of proof will weigh heavily against the supposed deviation': E Gordon, 'The World Court and the

a defending state's compliance with international law is presumed. Where a state has to rely on an exception, the state's compliance is no longer presumed. Those who rely on provisions deemed to be general rules are privileged over those who rely on exceptions. In this respect there is an implicit hierarchy between general rules and exceptions.

At the same time, it is important not to undermine the significance of the policies often encapsulated in exceptions. The Appellate Body has been at pains to emphasise that the importance of the policies represented in exceptions should not be underappreciated. In *EC-Tariff Preferences*, the Appellate Body emphasised that the characterization of the Enabling Clause as an exception did not diminish its status in any way.¹⁹⁸ The reports of the Appellate Body to date in cases involving environmental exceptions within the multilateral trade framework also demonstrate a determination to avoid this pitfall. Deviation from the general rule may be necessary to protect important interests.

To a certain extent, the rationale underlying the distinction between general rules and exceptions may be that day-to-day implementation of general rules is more common than reliance on exceptions. There is also consistency here with the notion that what is more normal or probable is to be presumed.¹⁹⁹ This perspective on the character of exceptions resonates with the principle according to which exceptions are to be narrowly construed. However, it also needs to be recognised that the categories of general rule and exception are partly a product of history. The term 'exception' bears a close connection with the Roman Law concept of the *exceptio*, which described an affirmative defence in the formulary system.²⁰⁰ The *exceptio* was an assertion that was put forward in opposition to the plaintiff's claims, but was more than a mere denial of the claim.²⁰¹ An *exceptio* was also included as a negative condition in the *interdict*, and permitted the defendant to disregard the praetor's order if the condition applied. Certain exceptions were an integral part of an *interdict*, while others were inserted by the praetor at the request of the defendant.²⁰²

Examples of exceptions in the primary law are found in the various branches of international law. In the *United States – Wool Shirts* case the WTO Appellate Body observed that Articles XX and XI:2(c)(I) of GATT could be categorized as

Interpretation of Constitutive Treaties: Some Observations on the Development of an International Constitutional Law' (1965) 59 *American Journal of International Law* 794, 807. Grando recognises this, and takes a position that is wary of adjudicators second-guessing the relative importance attached by drafters to the provisions they crafted. Grando, above n 53, 169, 177, 184–5.

¹⁹⁸ Appellate Body Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WTO Doc WT/DS246/AB/R (20 April 2004) DSR 2004:III, 951, [98].

¹⁹⁹ See above n 45–49.

²⁰⁰ W A Hunter, *Introduction to Roman Law* (1908) 183.

²⁰¹ Rosenne, above n 4, 806.

²⁰² Berger, above n 69, 458.

exceptions or ‘affirmative defences’,²⁰³ (even though Article XX is worded as a savings clause, stating that ‘nothing in this Agreement shall be construed to prevent the adoption or enforcement of measures ... [adopted in accordance with the subparagraphs of this article]’).²⁰⁴ The point was confirmed in *United States – Standards for Reformulated and Conventional Gasoline*.²⁰⁵ This practice has been followed in subsequent cases.²⁰⁶ Exceptions are also found elsewhere in WTO law.²⁰⁷ Likewise, the Iran-US Claims Tribunal has required parties to prove the applicability of the exceptions on which they rely.²⁰⁸ The European Court of Justice, too, has held that ‘the burden of proving circumstances justifying a derogation from the principle of the free movement of goods rests on the Member state whose legislation is responsible for the obstruction.’²⁰⁹

Exceptions may also be referred to as defences, and the category of defences includes pleas in justification. When the justification of necessity was raised by Hungary in the *Gabčíkovo-Nagymaros Case*, the International Court of Justice indicated that it viewed the defence as an exception, remarking that an assertion of necessity ‘could only be accepted on an exceptional basis.’²¹⁰ The Court noted that

²⁰³ Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, above n 63, 16. An ‘affirmative defence’ may be contrasted with a defence that consists merely of the denial of a plaintiff’s claim: Thayer, above n 71.

²⁰⁴ Art XX, General Agreement on Tariffs and Trade.

²⁰⁵ *United States – Standards for Reformulated and Conventional Gasoline*, Complaint by Brazil (WT/DS4); Panel Report, *United States – Standards for Reformulated and Conventional Gasoline*, WTO Doc WT/DS2/R (20 May 1996) DSR 1996:I, 29, [6.20], [6.31], [6.35]; Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WTO Doc WT/DS2/AB/R (20 May 1996) DSR 1996:I, 3, 22–23.

²⁰⁶ Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, above n 36, [7.30]; Panel Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WTO Docs WT/DS161/R, WT/DS169/R (10 January 2001) DSR 2001:I, 59, [8.177], ABR 651; Panel Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc WT/DS135/R and Add.1 modified by Appellate Body Report, WTO Doc WT/DS135/AB/R (5 April 2001) DSR 2001:VIII, 3305, [8.177]; Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc WT/DS285/R (20 April 2005) DSR 2005:XII, 5797, [6.12], [6.449]–[6.451]; Panel Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WTO Doc WT/DS308/R (24 March 2006) DSR 2006:I, 43 [8.166]; Panel Report, *Brazil – Measures Affecting Import of Retreaded Tyres*, WTO Doc WT/DS332/R (17 December 2007) DSR 2007:V, 1649, [7.669].

²⁰⁷ Grando, above n 53, 155. See, eg, Panel Report, *Canada – Patent Protection of Pharmaceutical Products*, WTO Doc WT/DS114/R (7 April 2000) DSR 2000:V, 2289, [7.16].

²⁰⁸ In particular, see *R N Pomeroy et al* (1983) 2 Iran-US CTR 372, 382.

²⁰⁹ See, eg, *Ministère Public v Claude Muller and Others* (Case 304/84, 1996). Reference for a Preliminary Ruling from the Cour d’Appel de Colmar [1986] ECR I–1511 [16].

²¹⁰ *Case Concerning the Gabčíkovo-Nagymaros Project*, above n 16, [51]. Similarly, in the *M/V ‘Saiga’ (No 2) Case* the International Tribunal for the Law of the Sea

the International Law Commission had explained that not only did it view the justification of necessity ‘as really constituting an exception’ but also ‘one even more rarely admissible than is the case with the other circumstances precluding wrongfulness’.²¹¹ Hungary had not established to the satisfaction of the Court that the construction of the project would have led to the consequences alleged.²¹²

There are a number of other circumstances in which the wrongfulness of a breach of international law is precluded as a matter of secondary international law. The six potential defences identified in the International Law Commission’s Articles on State Responsibility are: the consent of the affected state, self-defence, *force majeure*, distress, necessity, and the adoption of countermeasures in response to an internationally wrongful act by another state.²¹³ A party arguing that responsibility for its conduct is precluded on such grounds will bear the burden of proof in relation to that defence.²¹⁴ In relation to waivers of rights adopted prior to or at the time of the commission of what would otherwise be a breach of an obligation owed to the party or parties who have adopted the waiver, the defence of consent, referred to above, will apply.²¹⁵ This is a helpful explanation for the WTO Appellate Body’s characterization of the Enabling Clause in *EC-Tariff Preferences* as an exception, discussed further below. Defences may simultaneously be available both in primary and in secondary law. In the *CMS Gas Transmission Co v Argentina* annulment decision it was held that the principles of *lex specialis* required that the relevant provision in the applicable treaty should be applied first, and only then should a tribunal consider the applicability of the necessity exception in the secondary law on state responsibility.²¹⁶

considered that the burden of proof lay with Guinea to prove the applicability of the defence of necessity. Guinea failed to show grave and imminent peril to its essential interests justifying the application by Guinea of its customs laws in its exclusive economic zone: *M/V Saiga (No 2)*, above n 65, [132]–[135].

²¹¹ Ibid, citing ‘Draft Articles on the International Responsibility of States’ [1980] II(2) *Yearbook of the International Law Commission* 51, [40].

²¹² *Case Concerning the Gabčíkovo-Nagymaros Project*, above n 16, (Judge Koroma).

²¹³ ‘Draft Articles on the Responsibility of States for Internationally Wrongful Acts’ , [2001] II(2) *Yearbook of the International Law Commission*, 76, arts 20–25; also published as J Crawford, *The International Law Commission’s Articles on State Responsibility, Introduction, Text and Commentaries* (2002).

²¹⁴ In relation to the defence of necessity see the *Cysne Case*, above, n 194, 1056, although the burden of proof in this matter was indicated in the Declaration of London, which the parties had each declared would govern their conduct of hostilities, 1052. In relation to the defence of *force majeure*, see the *Russian Indemnity Case, Affaire de L’Indemnité Russe* (1912) XI RIAA 421, 443. The allocation of the burden is not referred to in every case where the application of the defences is considered. For example, see the award of the France-New Zealand Arbitral Tribunal in the case of the *Rainbow Warrior (New Zealand v France)* (1990) 82 ILR 499.

²¹⁵ International Law Commission’s Articles on the International Responsibility of States, above n 213, Commentary to Article 20, [2], [3].

²¹⁶ *CMS Gas Transmission Co v Argentina (Annulment)* (ICSID Arbitral Tribunal, Case No ARB/01/8, 25 September 2007) [130]–[136].

The interests of certainty and stability in international law will generally demand that decisions to create exceptions in the law need to be regarded as having been taken at the time that such provisions are created, their character from then on generally being immutable. Therefore, determining whether a provision embodies a general rule or an exception is part of the interpretation of the provision. Established customary and conventional rules on the interpretation of treaties are applicable and their reasoned application should help reinforce objectivity in the determinations that are made. However, a particular challenge may arise for adjudicators where the categorisation of the legal provisions applying to a given dispute involves taking a position on the reconciliation of competing policy goals within a high-intensity regime. As discussed further below this has led to a difficult struggle within WTO dispute settlement. As a result, there have been attempts within WTO case law to set down guidance on when a provision constitutes a general rule and when it constitutes an exception. However, this has so far not led to any firmly established practice on the subject, and international courts and tribunals must essentially still rely on the basic tools of interpretation in order to ascertain the character of a provision.

An intriguing example of the struggle that may arise over the categorisation of general rules and exceptions is the development within WTO jurisprudence of various categories of rule in addition to the notions of general rule and exception. A number of forms of provision have been identified that permit deviations from a rule but have not been denoted exceptions. These categories of provision have been described as ‘exemptions’ and ‘autonomous rights’, and do not attract the burden of proof. Only in relation to exceptions does a respondent bear the burden of proof; in relation to exemptions and autonomous rights the burden of proof will lie with the complainant, as usual.

Whether these analytical categories are justifiable has been questioned.²¹⁷ Designation as an ‘autonomous right’ may merely be a way of adding judicial emphasis to the importance of a general rule. Certainly, the content of the ‘autonomous right’ identified by the Appellate Body in the form of Article 3.3 of the WTO Agreement on Sanitary and Phytosanitary Measures in *EC-Hormones* is of particular social significance.²¹⁸ Article 3.3 says that Members may introduce or maintain measures resulting in a higher level of protection than would be achieved by measures based on the relevant standards, guidelines or recommendations if

²¹⁷ T Broude, ‘Genetically Modified Rules: the Awkward Rule-Exception-Right Distinction in *EC-Biotech*’ (2007) 6(2) *World Trade Review* 215–31.

²¹⁸ Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, above n 19, [104]. The provision in art 3.3 has also been described as containing a ‘conditional’ right because a respondent has a right to act in the way discussed in the provision provided the respondent’s action falls within the provision’s terms or conditions. The provision in art 27(4) of the WTO Agreement on Subsidies and Countervailing Measures has been described in the same way, and art 6 of the Textiles Agreement would seem to share the same features: Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, above n 63, 16. Remarks by J Pauwelyn in ‘Internet Roundtable: the Appellate Body’s GSP Decision’ (2004) 3(2) *World Trade Review* 239, 257.

there is a scientific justification or as a result of the level of protection considered by the Member to be appropriate in accordance with Article 5.1 to 5.8.²¹⁹

A similar dynamic has been seen in jurisprudence under the TBT Agreement. In *European Communities – Trade Description of Sardines*, a WTO Panel found that an EC Regulation preventing Peruvian exporters from describing their product as ‘sardines’ was inconsistent with Article 2.4 of the Agreement on Technical Barriers to Trade. Article 2.4 provides that WTO Members are to base their technical regulations on international standards, except where such standards would be an ineffective or inappropriate means to fulfill the legitimate objectives.²²⁰ The Appellate Body did not share the Panel’s view that there was a general rule-exception relationship between the first and second parts of Article 2.4.²²¹ Again, the content of the second part of Article 2.4 is of special significance, socially and in environmental terms.²²²

Both Article 3.3 of the SPS Agreement and Article 2.4 of the TBT Agreement run counter to the trade-related objectives of the WTO regime, narrowly understood. The value of the designation ‘autonomous right’ may lie in the recognition especially accorded to these provisions, ringfencing them from designation as exceptions. The Appellate Body is refusing to accept that the proper interpretation of these provisions would place them lower in the hierarchy of applicable rules, stripping the presumption of compliance from parties who rely on them, with potentially concrete consequences in cases where the evidence may be finely balanced.

The concept of an ‘exemption’ has also been referred to in disputes under the Agreement on Sanitary and Phytosanitary Measures, specifically in relation to Article 5.7 of the Agreement. Article 5.7 of the SPS Agreement is a provision allowing a WTO Member to adopt SPS measures without a risk assessment, as a temporary response to a risk and under strict conditions. Article 5.7 was first categorized as an ‘exemption’ by the Appellate Body in the *Japan-Agricultural Products Case*, albeit a ‘qualified exemption’.²²³ In the *Japan-Apples Case* there

²¹⁹ Such measures are also not to be inconsistent with any other provisions of the Agreement.

²²⁰ Article 2.4 states:

Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfillment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems.

²²¹ Panel Report, *European Communities – Trade Description of Sardines*, WTO Doc WT/DS231/R (23 October 2002) DSR 2002:VIII, 3451, [7.50]; Appellate Body Report, *European Communities – Trade Description of Sardines*, WTO Doc WT/DS231/R (23 October 2002) DSR 2002:VIII, 3359, [275].

²²² See, *ibid* [274].

²²³ Appellate Body Report, *Japan-Measures Affecting Agricultural Products*, WTO Doc

was a temporary deviation in the categorisation of Article 5.7, and the burden of proof was allocated to the respondent, Japan, in relation to Article 5.7.²²⁴ On the facts of *Japan-Apples* the burden's allocation under Article 5.7 probably made little difference. As there was a 'large quantity' of 'high quality' scientific evidence in which 'the experts have expressed strong and increasing confidence',²²⁵ even if the burden had been correctly allocated to the US it was clear that Article 5.7 was inapplicable. However, the question was revisited and corrected in the *EC-Biotech Case*, where it was made clear that Article 5.7 does not attract the burden of proof and is not an exception, either to Article 2.2 or Article 5.1 of the SPS Agreement. The Panel in this case referred to Article 5.7 as a 'qualified right' rather than an exemption.²²⁶ The notion of a 'qualified right' is reminiscent of the term 'autonomous right' used to describe Article 3.3 of the SPS Agreement.

The WTO Appellate Body applied a legal test for determining whether a provision embodies an exception in *EC-Tariff Preferences*.²²⁷ On this test, an exception will usually apply simultaneously with a general rule, although the exception will govern the situation.²²⁸ In *EC-Tariff Preferences* it was found that the Enabling Clause of GATT applied simultaneously with Article I(1), although the Enabling Clause took precedence over Article I(1).²²⁹ It was found that the Enabling Clause was an exception. The *EC-Tariff Preferences Case* concerned a complaint by India against the EU's Drug Arrangements, which were designed to combat drug production and trafficking. The Drug Arrangements were one of the programmes forming part of the EC's 2001 Generalised System of Preferences for developing countries (GSP). Under the Drug Arrangements, only twelve selected developing countries, not including India, were eligible for tariff free access to EU

WT/DS76/AB/R (19 March 1999) DSR 1999:I, 277, [80].

- ²²⁴ Panel Report, *Japan — Measures Affecting the Importation of Apples*, above n 95, [7.26], [8.212], [8.222]. The question of the burden of proof under Art 5.7 was not raised by Japan on appeal.
- ²²⁵ *Ibid* [8.219].
- ²²⁶ Panel Report, *European Communities — Measures Affecting the Approval and Marketing of Biotech Products*, Complaint by United States, Canada, Argentina (WT/DS291, WT/DS292, WT/DS293) (21 November 2006) DSR 2006:III, 847, [7.2952], [7.3260]. See, though, [7.3254] where the term exception is used, perhaps inadvertently.
- ²²⁷ See also the prior decision in *Brazil — Export Financing Programme for Aircraft*, Complaint by Canada (WT/DS46) Appellate Body Report, WTO Doc WT/DS46/AB/R (20 August 1999) DSR 1999: III, 1161, [139]. The Appellate Body agreed with the Panel that allowance for the non-application of the WTO prohibition on export subsidies as a transitional measure did not amount to an exception. See Panel Report, WT/DS46/R (20 August 1999) DSR 1999:III, 1221, [7.50]–[7.56].
- ²²⁸ Citing Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, above n 19, 104; Appellate Body Report, *European Communities – Trade Description of Sardines*, above n 221, [275]. See also Appellate Body Report, *Brazil – Export Financing Programme for Aircraft*, WTO Doc WT/DS46/AB/R (20 August 1999) DSR 1999:III, 1161, [139]–[141].
- ²²⁹ Appellate Body Report, *EC-Conditions for the Granting of Tariff Preferences to Developing Countries*, above n 198, [90].

markets, provided they complied with conditions laid down by the EU for combating drug production and drug trafficking. India argued that the EC Drug Arrangements breached the most favoured nation rule in Article I of the GATT, which required all WTO Members to be treated equally. India also argued that the Drug Arrangements were not protected by the 1979 Enabling Clause, a waiver of the rights adopted by the Contracting Parties to the GATT that permitted preferences to be granted to developing countries under GATT in exceptional circumstances.²³⁰ India won the case. The Enabling Clause was found to apply only to GSP schemes that were non-discriminatory.²³¹ As the EU's tariff preferences were discriminatory they were not protected by the exception found in the Enabling Clause.²³² The EC could not rely on the exception embodied in the Enabling Clause. Characterisation of the Enabling Clause as an exception was one of the important outcomes in this case.

On the Appellate Body's approach a provision that applies instead of another provision, rather than simultaneously, will not be an exception. Applying the Appellate Body's test, Articles 3.3 and 5.7 of the SPS Agreement and Article 2.4 of the TBT Agreement would not amount to exceptions. Accordingly, they would not attract the burden of proof. Thus the Appellate Body has striven for an approach to the identification of exceptions that respects the status of such key provisions. Yet at the same time, the Appellate Body indicated in *EC-Tariff Preferences* that the distinction in this respect between exceptions and other permissive provisions might not always be able to be drawn, and might not always be evident. The distinction between provisions that create exceptions and provisions that may exclude the application of other provisions has been criticised for its artificiality.²³³

The Appellate Body also suggested in *EC-Tariff Preferences* that an adjudicatory body may be expected to apply a general rule before proceeding to apply an exception.²³⁴ Indeed, there was some consternation when the *EC-Biotech* Panel decided to examine the EC's compliance with Article 5.1 of the SPS Agreement before applying Article 5.7, because this could be taken to infer that Article 5.7 was an exception when it was recognised as constituting only an exemption.²³⁵ Other international courts and tribunals do not always follow the order of analysis proposed by the Appellate Body in *EC-Tariff Preferences*. A court or tribunal may decide to omit making a finding on whether there is a breach

²³⁰ See art XXV(5) General Agreement on Tariffs and Trade (30 October 1947) 55 UNTS 194 and now art IX(3) Marrakesh Agreement Establishing the World Trade Organization (April 15, 1994) 1867 UNTS 154 (hereinafter WTO Agreement).

²³¹ Appellate Body Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, above n 198, [145], [190].

²³² Appellate Body Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, above n 198, [180] – [184], [188].

²³³ *Grando*, above n 53, 181–84.

²³⁴ Appellate Body Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, above n 198, [102].

²³⁵ *Broude*, above n 217.

of a general rule and proceed directly to considering the applicability of an exception. The *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)*²³⁶ concerned two United States attacks on Iranian oil production complexes in 1987 and 1988 during the 1984-1988 Tanker war. Iran complained that these attacks were in breach of the parties' 1955 bilateral Treaty of Amity (the Treaty). The ICJ considered first whether the US might be exculpated under the rubric of self-defence by virtue of a savings clause in Article XX(1)(d) of the Treaty allowing the parties to protect essential security interests.²³⁷ The burden of proof was allocated to the US to prove that its actions were consistent with the law on self-defence, a recognised exception to the international legal prohibition on the use of force by one state against another.²³⁸ The Court found that the US had failed to prove that its actions could be justified as a matter of self-defence and were therefore not justified under Article XX(1)(d) of the Treaty.²³⁹ The Court then considered whether the US attacks had, as alleged, breached the obligations to allow freedom of commerce and navigation found in Article X(1) of the Treaty, but as there had been no interference with commerce in oil between the territories of the parties the Court found there to be no violation.²⁴⁰ By addressing the exception first, the ICJ was enabled to make findings on the question of US compliance with the law on the use of force, an issue of the highest importance to the international community.²⁴¹

One further feature of the *EC-Tariff Preferences Case* deserves mention. Although exceptions are usually raised by respondents as defences, in this case in light of the special characteristics of the Enabling Clause, combined with the circumstances of the case,²⁴² the Appellate Body considered that a complaining

²³⁶ *Case Concerning Oil Platforms*, above n 103.

²³⁷ Art XX(1)(d) provided that:

the present Treaty shall not preclude the application of measures: ... (d) necessary to fulfill the obligations of a High Contracting Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests.

²³⁸ *Case Concerning Oil Platforms*, above n 103, [57].

²³⁹ *Ibid* [79], [125(1)].

²⁴⁰ *Ibid* [99], [125(1)]. Arguably, this finding rendered the finding on self-defence immaterial to the legal dispute before the Court. In the instance of the *Oil Platforms Case* there is also room for discomfort on other grounds in relation to the Court's decision to address initially the US claim of self-defence, rather than starting with the question of whether the US had committed a breach of its obligations to Iran under the bilateral treaty. Jurisdiction on the subject of the use of force had been rejected at the preliminary objections stage. The Court had taken jurisdiction under the Treaty of Amity only in relation to the subject of freedom of commerce and navigation: *Case Concerning Oil Platforms (Iran v US) (Preliminary Objections)* [1966] ICJ Rep 803.

²⁴¹ *Case Concerning Oil Platforms*, above n 103, [38]. Cf the views of Judge Higgins, Judge Buergenthal and Judge Owada, who considered that the finding on art X(1) did not merit the place it was given in the Court's *dispositive*; [22]–[23], [49] (Judge Higgins); [30] (Judge Buergenthal); [12] (Judge Owada).

²⁴² Appellate Body Report *European Communities – Conditions for the Granting of Tariff*

party would not be fulfilling its legal responsibilities as claimant if it omitted reference to the Clause and its relevant subparagraphs from its claims and did not address the subject of the Clause's application in its written submissions.²⁴³ The Appellate Body emphasised that the Enabling Clause was critical for developing countries, and accordingly played a vital role in promoting trade. In the event, India had appropriately incorporated such references and material.²⁴⁴ As alluded to above, these responsibilities are distinct from the burden of proof.

Why, it might be asked, is the identification of 'exemptions' and 'autonomous rights' a particular feature of the WTO, SPS and TBT Agreements? The high regime-intensity of the SPS and TBT Agreements may be the most significant factor in producing provisions that will be treated by the WTO judiciary in this way. By 'high regime-intensity' it is meant that both agreements contain a dense set of rules tightly marshaled around a central policy: they are designed as bulwarks against economic protectionism. Yet other goals are also important within the deregulated international economic system, and should not be allowed to remain below the radar. If the rules in Articles 3.3 and 5.7 of the SPS Agreement and Article 2.4 of the TBT Agreement were redrafted as exceptions, that would lessen their utility as important counterweights that can be employed by adjudicators, and indeed policy-makers, administrators, and negotiators, to help balance out the policy content of the agreements in favour of other interests. WTO adjudicators have demonstrated an increasing awareness of this aspect of WTO law.

The true analytical need for maintaining distinct subcategories of general rules such as 'exemptions' and 'autonomous rights' may be minimal. Rhetorically, however, notions such as the 'autonomous right' may have some value. For example, in the *EC-Hormones Case* referred to above, the WTO Appellate Body looked beyond the regime's immediate demands to combat economic protectionism, demands that had strongly influenced the Panel at first instance. The Appellate Body took into account the importance, both socially and in terms of the balance necessary for the regime's survival, of recognizing that WTO Members had not forgone the right to establish their own desired level of protection against sanitary and phytosanitary risks, even if this were a higher level of protection than that afforded by international standards, without attracting the burden of proof in relation to the conformity of their sanitary and phytosanitary measures with WTO law. The idea of an 'autonomous right' is a way of emphasizing perspectives such as these.

The WTO experience in relation to 'exemptions' and 'autonomous rights' highlights that potentially crucial powers lie in the hands of international courts and tribunals when it comes to the application of the rule on burden of proof. The principled and reasoned exercise of these powers will be important for the stability

Preferences to Developing Countries, above n 198, [106].

²⁴³ Ibid [106], [118].

²⁴⁴ Ibid [119]. For further discussion see J Harrison, 'Legal and Political Oversight of WTO Waivers' (2008) 11(2) *Journal of International Economic Law* 411.

of international adjudication. The most important issue will remain whether an international court or tribunal does the best possible job of identifying whether or not a rule constitutes an exception that attracts the burden of proof. Decisions on whether rules constitute exceptions need to be thoroughly reasoned, applying basic interpretative principles in accordance with the Vienna Convention on the Law of Treaties and customary international law, including with reference to travaux as necessary.

One of the most fascinating outstanding questions in the longer term may be whether there is scope to revisit the categorization as an exception of Article XX of GATT, together with similar provisions in the General Agreement on Trade in Services. As noted above, these provisions are worded as savings clauses rather than exceptions. While parties relying on these clauses may have better access to necessary evidence, this should be a matter going only to the application of the rule on burden of proof. Further discussion of this issue lies beyond the scope of this article, but the subject merits greater study. Immediate change is unlikely, taking into account that such provisions are widely recognised as exceptions also in regional trade agreements and additionally that the status of security provisions like that in Article XXI of GATT would also be revisited.

(iii) Segmentation of legal claims

Important, too, will be the exercise of judicial restraint in the face of temptation to segment legal rules into component parts comprising general rules and exceptions. Segmentation has been contemplated, for example, within the environmental defences in WTO law. In WTO jurisprudence the test of whether a measure is 'necessary' in terms of the relevant exceptions in Article XX of GATT and Article XXIV of GATS incorporates a test of whether there are any reasonably available alternative measures.²⁴⁵ For example, in the *EC-Asbestos Case*, Canada argued that a reasonably available alternative to the banning of chrysotile asbestos by the EC was to adopt safer 'controlled use' policies for the use of chrysotile, although the Panel did not consider that Canada's argument was sufficiently well supported by the evidence to rebut the EC's *prima facie* case that its ban on chrysotile was necessary to the protection of human life and health in accordance with Article XX (b) of GATT.²⁴⁶ In *US-Gambling*, the Appellate Body observed that it was not incumbent upon a responding party who asserted that a measure fell within the scope of XIV (a) of GATS to address all potential alternative measures with which

²⁴⁵ GATT Panel Report, *United States Section 337 of the Tariff Act of 1930*, L/6439 (adopted 7 November 1989) BISD 36S/345, [5.26]; Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, Complaint by Australia (WT/DS169); Complaint by the United States, WTO Doc WT/DS161/AB/R (10 January 2001) DSR 2001:I, 5, 165; Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, above n 206, [171].

²⁴⁶ Panel Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, above n 206, [8.222]; Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, above n 206, [175].

its own measure was to be compared.²⁴⁷ If a complainant raised a possible alternative measure then the responding party would have to address the alternative that had been identified.²⁴⁸ This has led at least one writer to ask whether complainants should specifically be allocated the burden of proving the positive assertion that alternative measures are reasonably available.²⁴⁹ However, even though this might make it easier for respondents to rely successfully on the Article XX exceptions, it is simplest to continue with an approach under which the burden of proof revolves around the parties' claims.²⁵⁰ The relevant assertion of law here would be that paragraph (a) of Article XX was applicable.

There are other fields of international law where a practice has developed of segmenting out distinct elements of a legal claim for the purposes of allocating the burden of proof. In the law relating to diplomatic protection, a respondent asserting that a claim is precluded by the availability of local remedies must prove the availability of such remedies. However, if a claimant then asserts that such remedies are ineffective, the claimant must prove their ineffectiveness.²⁵¹ In international human rights law, where the power differential between the parties will normally be particularly wide, the segmentation is different: in a case where it is not clear that there is access to effective local remedies a respondent state may be required to demonstrate both the availability and the effectiveness of the local remedies.

International courts and tribunals should be wary of exercising their power in a way that introduces greater segmentation into the rule on burden of proof. This is an activity involving normative judgments that should not lightly be taken on by an adjudicative body and will detract from certainty in the application of the rule on the burden of proof.

(c) Comment

The articulation of the rule on burden of proof increasingly reflects the importance of certainty for litigants. This trend is to be encouraged, and a more primary focus should lie on the requirement that a party who is putting forward a legal *claim* or *defence* should establish all the necessary supporting facts, at least in disputes involving state responsibility where the presumption of compliance comes into

²⁴⁷ Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, above n 128, [309], [320], [326].

²⁴⁸ See also *Brazil – Measures Affecting Import of Retreaded Tyres*, above n 206, [156].

²⁴⁹ L Bartels, 'Commentary' in F Ortino and S Ripinsky (eds), *WTO Law and Process: the Proceedings of the 2005 and 2006 Annual WTO Conferences* (2007) 220, 222.

²⁵⁰ Grando characterises Appellate Body's approach as imposing on the claimant a burden of pleading a sub-element of a claim but discourages this practice: Grando, above n 53, 212–15.

²⁵¹ I Brownlie, *Principles of Public International Law* (7th ed, 2008) 492–501; A Watts and R Jennings, *Oppenheim's International Law* (9th ed, 1992) 526; Amerasinghe, above n 5, 78 ff. In art 15(a) of the International Law Commission's 2006 draft Articles on Diplomatic Protection this was cast as an exception to the local remedies rule.

play. In relation to the application of the rule it is important to retain some scope for flexibility in order to help ensure fairness, for instance in cases where evidence is truly difficult to obtain. However there is a need for considering introducing greater discipline on several fronts. At present considerable scope for the relatively unguided exercise of judicial power is apparent. This is seen particularly in the absence of a recognised standard of proof in international adjudication, and also in relation to determinations about whether provisions constitute general rules or exceptions and whether they might be susceptible to internal segmentation into general rules and exceptions.

V. The Functioning of the Rule on Burden of Proof in Compliance Proceedings

A further realm in which the rule on burden of proof may be significant ought also to be considered: the functioning of the rule on burden of proof in compliance proceedings, as alluded to at the beginning of this article. Will states benefit in subsequent proceedings from the same presumption of compliance with their international legal obligations that they have enjoyed during the original proceedings? Writing on the problem of non-compliance with decisions of the ICJ, Rosenne has observed that '[a]n approach to the problem of the post-adjudication phase of judicial settlement cannot be based on any presumption of law that states observe their treaty obligations, because the problem arises when the conduct of a state does not follow the pattern of conduct prescribed in the binding statement of what its legal obligations are'.²⁵²

Viewing non-compliance as a wrong of a special kind, Rosenne notes that the original complainant's burden of proof may be lightened so that, if a *prima facie* case of non-compliance can be established, then the successful original complainant (or more precisely the 'judgment creditor') may be able to rely on inferences in relation to matters known only to the original respondent (or 'judgment debtor').²⁵³ In many instances it is indeed likely that the complainant in non-compliance proceedings will be the original complainant, who bore the burden of proof in the original proceedings in relation to the relevant issues. It does initially seem unreasonable that this party should have to bear the full burden of proof a second time to establish non-compliance. The level of non-compliance with their legal obligations is probably higher among actors who have been found to be out of compliance in prior judicial proceedings than among the general population of states. This undermines to a degree one of the factors supporting the use of the presumption of compliance in initial proceedings: the aim of deterring non-serious litigants.

How then should the presumption of compliance operate in compliance proceedings? In addressing this question it is important to note first that states will not always bring compliance proceedings as such. For example, in the *Avena Case*, Mexico sought only an interpretation of the ICJ's judgment of 2004, and in the

²⁵² Rosenne, above n 4, 202.

²⁵³ Rosenne, above n 4, 224.

event was unsuccessful in this.²⁵⁴ Even where a dispute dealing directly with alleged non-compliance does come before an international court or tribunal, it will probably be differently configured to the original dispute. A dispute over non-compliance will usually be a distinct legal dispute from the dispute that was the subject of the original proceedings.²⁵⁵ This discrete non-compliance dispute will involve the alleged breach of a recalcitrant state's prior agreement to abide by the original judgment, and in the case of ICJ decisions a breach of the UN Charter obligation to comply with judgments in cases to which it is party.²⁵⁶

In a suit for non-compliance, it is these breaches that would need to be established by the complainant, with direct reference to the question of the state's adherence to the terms of the judgment already given and only indirect reference to the original legal obligations found in that judgment to have been breached. However the question of a state's compliance with the legal obligations at issue in the original judgment and the question of its compliance with obligations to give effect to that judgment can be expected to overlap. To this extent it may be helpful to note that the findings in the original judgment will be *res judicata*, and there will therefore be some matters in relation to which there is no burden of proof to discharge. Also, as a general rule the subject matter of the compliance litigation will be limited in that no new claims alleging breach of different legal obligations to those involved in the original proceedings can be raised unless fresh proceedings are instituted.

On the other hand, it is also likely that there will have been developments in the interim since the judgment was issued, and so there will be new elements to the dispute between the parties. In particular, there is likely to be the question of the sufficiency of any steps that have been taken towards compliance, as well as the question of whether any other developments have created a situation of compliance. For example, in the *Continued Suspension of Obligations* cases in the growth production hormones dispute in the WTO, the EC decided to rely for the first time on Article 5.7 of the SPS Agreement. The EC argued that new scientific evidence had arisen in relation to the potential harmfulness of genetically modified organisms. According to the EC, this now allowed the EC to rely on the provision in Article 5.7 permitting provisional measures to be adopted where the scientific information available was insufficient for a risk assessment.

Taking into account that a compliance dispute will be differently configured to the original dispute, and legally speaking will be a new dispute, the correct position is probably that the presumption of compliance should be applied in the same way as always, to the benefit of the respondent. While this does not seem a completely fair outcome for claimants dealing with recalcitrant and recidivist states, its advantages in terms of consistency and predictability recommend it. In accordance

²⁵⁴ *Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and other Mexican Nationals (Mexico v United States of America)* [2009] ICJ Rep 2009.

²⁵⁵ Rosenne, above n 4, 211.

²⁵⁶ *Ibid* 202, 220.

with the suggestion made by Rosenne, adjudicators may wish to bear in mind the possibility of relying on inferences to alleviate the applicant's burden of proof in particular cases, while taking care to explain any such reliance as fully as possible in order to preserve the integrity of the judicial function.

An interesting question arising in this context is the allocation of the burden of proof where subsequent proceedings are brought not by the original claimant but by an original respondent who is suffering the effects of countermeasures put in place by an original claimant and considers the maintenance of those countermeasures to be illegal. As discussed above, the burden of proof will lie with a party seeking to rely on an exceptional justification for a breach of international law, and under the general law on state responsibility these justifications include the justification that the breach has been deliberate and is a countermeasure.²⁵⁷ Countermeasures must be deployed with the aim of inducing a state to come into compliance with its obligations, and may remain in place only so long as the other party's illegal conduct continues.²⁵⁸ If challenged, a party imposing countermeasures would usually have to demonstrate compliance with those requirements in order to show that the countermeasures are consistent with international law. So far as the allocation of the burden is concerned, there should be no variation to the basic rule allocating the burden to the party imposing countermeasures merely because there are circumstances where there has already been an authoritative determination that the party on the receiving end of the countermeasures is out of compliance with its obligations. There remains scope for the exercise of judicial discretion in the application of the rule.

In the WTO it has been thought that there might be greater scope for the allocation of the burden of proof to a party that has been targeted by countermeasures. Article 22.8 of the DSU provides that a suspension of concessions shall only be applied until such time as a measure found to be inconsistent with a WTO agreement has been removed. In case of an allegation that this provision has been breached, the burden of proof would, following normal practice, be allocated based on a presumption of compliance with the provision by the party that has imposed the suspension of concessions, rather than a presumption of compliance benefiting the original respondent.

It is understood that the WTO system is the *lex specialis* in matters of responsibility within the multilateral trade system, and the institutional context of Article 22.8 is important here. A suspension of concessions may only be levied where authorised by the WTO Dispute Settlement Body, consisting of the entire WTO Membership, and in cases where there is failure to comply with an original dispute settlement ruling. A respondent will have had the opportunity to challenge

²⁵⁷ 'Where conduct in conflict with an international obligation is attributable to a State and that State seeks to avoid its responsibility by relying on a circumstance under Chapter V ... the onus lies on that State to justify or excuse its conduct.' ILC Articles on State Responsibility, above n 213, Commentary on Chapter V Circumstances Precluding Wrongfulness, [8].

²⁵⁸ Arts 49 and 53, ILC Articles on State Responsibility, above n 213.

that original ruling at the time it was issued, by appeal to the WTO Appellate Body, and will have had the opportunity to initiate proceedings under Article 21.5 asserting its compliance with the relevant obligations – *albeit* that the respondent would bear the burden of proof in both types of proceeding.²⁵⁹ By the time that the stage is reached of an authorised suspension of concessions, there is considerable institutional weight behind the assertion that the suspension is legitimate. This renders it more clearly appropriate that the presumption of compliance be enjoyed by a party levying countermeasures than would be the case under general international law.

There are no parallel processes in general international law, where the judicial arm of governance stands alone and the use of compliance mechanisms remains uninstitutionalised. Further, in situations involving factually close-run disputes there could be a downside to adopting such a rule. If there were such a rule, then imposing countermeasures following an initial victory in international legal proceedings could be used as an insurance policy, loading the dice so that if subsequent proceedings were to take place it would be more likely that a recalcitrant state would itself bear the burden of establishing its compliance with the applicable obligations. This is not necessarily desirable, as countermeasures should not be overemployed.

However in any event in the WTO the Appellate Body appears to have headed off at the pass the possibility of taking forward an allegation of breach of Article 22.8. A challenge to the suspension of concessions was pursued in the WTO by the EC in the longrunning *Hormones* dispute. Having defended itself unsuccessfully in the original proceedings, the EC now challenged the ongoing suspension of trade concessions against it by Canada and the US.²⁶⁰ This challenge was mounted in the form of fresh proceedings under the usual rules for the instigation of dispute settlement proceedings under the DSU. The EC argued *inter alia* that Canada and the US were in breach of Article 22.8 of the WTO DSU. Hearing an appeal from this case in late 2008, the WTO Appellate Body indicated that such proceedings are not the appropriate way to resolve ongoing disputes about compliance in the WTO, and expressed the view that the case should be dealt with by convening a compliance panel under Article 21.5 of the DSU. This would also make for more efficient dispute settlement, as a compliance panel will, wherever possible, be composed of the same members as the panel that originally heard the dispute. The Appellate Body recommended that the parties initiate Article 21.5 proceedings without delay.

²⁵⁹ Art 21.5 provides that where there is disagreement as to whether measures taken to comply with recommendations and rulings of the DSB have been adopted or are consistent with the relevant WTO obligations, this dispute is to be decided through recourse to the dispute settlement procedures in the DSU.

²⁶⁰ Appellate Body Report, *Canada-Continued Suspension of Obligations in the EC-Hormones Dispute*, *US-Continued Suspension of Obligations in the EC-Hormones Dispute*, above n 21.

Usually, WTO compliance proceedings under Article 21.5 of the DSU are initiated by an original claimant, who bears the burden of proof to establish non-compliance just as it did in the original proceedings.²⁶¹ However, the Appellate Body set out to explain how it considered that the burden of proof should be allocated in Article 21.5 proceedings in a situation like the present one. The Appellate Body envisaged two sets of Article 21.5 proceedings. In the first set of proceedings the original respondent, the EC, initiating the proceedings, was expected to put forward claims that it had rectified the specific inconsistencies with WTO law identified in the prior ruling.²⁶² In the second set of proceedings the original complainants were expected to put forward claims concerning the ways in which the original respondent's measures were allegedly inconsistent with provisions of the WTO agreements not covered by the original respondent's request for a panel in the first set of proceedings.²⁶³ Thus, in the first set of proceedings, the original respondent, the EC, would bear the burden of proof in relation to the assertions it was putting forward, and would not benefit from a presumption of compliance. In the second set of proceedings, the original respondent would benefit in the usual way from a presumption of compliance in relation to any new claims raised against it. From a practical point of view, the two sets of Article 21.5 proceedings envisaged by the Appellate Body would ideally be combined, as indeed the Appellate Body envisaged.²⁶⁴ Structuring them into two sets of proceedings might unintentionally generate falsely simplified perceptions of the complex relationships between the claims and issues to be addressed in the litigation and imply an overstated degree of party control over the scope of what is to be addressed in each of the two sets of proceedings.

For the purposes of deciding the suit immediately before it in *Canada-Suspension* and *US-Suspension*, the Appellate Body also addressed the allocation of the burden at some length. The Appellate Body took the view that the allocation of the burden should be a function of three considerations: first, the nature of the

²⁶¹ See, eg, Panel Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Recourse to Article 21.5 of the DSU by New Zealand and the United States* WTO Docs WT/DS103/RW, WT/DS113/RW (18 December 2001), reversed by Appellate Body Report, WTO Docs WT/DS103/AB/RW, WT/DS113/AB/RW, DSR 2001:XIII, 6865, [66]; Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS27/RW/EEC and Corr.1 (12 April 1999) DSR 1999:II, 783 [4.13] (unadopted.); Appellate Body Report, *Chile – Taxes on Alcoholic Beverages*, WTO Docs WT/DS87/AB/R, WT/DS110/AB/R (12 January 2000) DSR 2000:I, 281, [74]. At the same time, it has been made clear that a respondent relying on an exception with WTO law who has not taken steps to come into compliance cannot expect successfully to defend itself in compliance proceedings merely by re-arguing its case in an effort better to discharge the burden of proof.

²⁶² Appellate Body Report, *Canada-Continued Suspension of Obligations in the EC-Hormones Dispute, US-Continued Suspension of Obligations in the EC-Hormones Dispute*, above n 21, 353.

²⁶³ Ibid 354.

²⁶⁴ Ibid 354.

cause of action being taken under Article 22.8; second, which party might be expected to be in a position to prove an issue; third, the requirements of procedural fairness.²⁶⁵ It is to be hoped that the Appellate Body will revert to the usual more simple rule on the allocation of the burden of proof in future cases.

VI. The Sources and Potential for Development of the Rule on the Allocation of the Burden of Proof

How susceptible to change and further development are the rules on burden of proof in international law? This article takes the view that the rules governing the burden of proof are highly distinctive among international legal rules, because of the multiplicity of their sources.²⁶⁶ This endows the rules with an unusual nature, and increases their capacity for further development and amendment, for example a standard or standards of proof could find their way into the rules on burden of proof in a number of different ways, independently or simultaneously. However, the most likely pathway for the introduction of changes in the rules is initially at least through the exercise of international courts' and tribunals' inherent powers in matters relating to evidence and procedure as discussed below.

In his 1975 work *Evidence before International Tribunals*, Sandifer described international rules about evidence and proof as 'tantamount to a customary law of evidence'.²⁶⁷ Explicit support for the rules as currently formulated may be found in the arguments of states' representatives before international tribunals (although the value of pleadings as evidence of *opinio juris* must be subject to considerable qualification). States' implementation of the decisions of international tribunals,²⁶⁸ and their continued participation in international litigation, could be regarded as acquiescence in the rules on burden of proof usually applied by courts and tribunals. Objections raised in relation to the rules about proof tend to focus on the application of the rules rather than on their content. It is therefore not impossible to view the rules on burden of proof as founded in customary international law. However, it is clear that the support for this is more limited and of a different character to the support usually required to support the existence of a rule of customary international law. The threshold for customary international law is high.

²⁶⁵ Ibid 361. The Appellate Body found that the Panel had erred in its allocation of the burden of proof under both art 5.1 and art 5.7 of the SPS Agreement due to a failure to allocate the burden with reference to these principles, and this was one of the bases on which the Appellate Body reversed the Panel's findings that the EC had acted inconsistently with the requirements of both provisions: *ibid* 580, 584, 617–18, 717–18, 733–34.

²⁶⁶ There is no reason to doubt the validity of the usual sources of international law in relation to procedural law: Thirlway, *above* n 1, 389; Brown, *above* n 39, 37. Rosenne writes: 'Since there is no essential difference between substantive and adjectival law in the broad sense, it follows that they have similar, if not identical, origins, whether customary or conventional.' Rosenne, *above* n 4, 1027.

²⁶⁷ Sandifer, *above* n 3, 458. On the burden of proof rules as customary international law see also Witenberg, *above* n 6, 327; cf Thirlway, *above* n 4, 1128; and the hesitation observed by Amerasinghe, *above* n 5, 26.

²⁶⁸ Brown, *above* n 39, 53, note 106.

In principle a general and consistent practice is required on the part of states, in which they engage because of their belief in a rule they are obliged to follow.²⁶⁹

International courts and tribunals do aim for consistency in their procedural decisions,²⁷⁰ and remark has been made that ‘the practice of an international tribunal may in general, if sufficiently consistent, generate a procedural rule which that particular tribunal, at least, may not lightly depart from, and which possibly also has some degree of general validity as a component of the general corpus of procedural law of international tribunals’.²⁷¹ References to the ‘customary practice’ of international courts and tribunals,²⁷² ‘international judicial practice’,²⁷³ and ‘customary rules developed in international judicial practice’²⁷⁴ convey a certain status. Still, on balance international courts’ borrowing from one another of practices and methods that have proved themselves successful and efficient can not, strictly, be regarded as more than a practically motivated activity lacking the power directly to generate new procedural norms.²⁷⁵ Clearly, the customary practice of international tribunals cannot be directly equated with state practice in terms of its power to create binding new rules of customary international law.²⁷⁶ Such activity may nevertheless be a most important plank in the practical development of procedural rules. International law is understood to develop *inter alia* via soft law generated through usage and expectation.

A further potential source of rules on evidence and proof in international courts and tribunals may be identified in the form of the specific provisions in the constitutive documents of a number of tribunals, referred to above, envisaging that tribunals will develop their own rules of procedure. Such provisions could be regarded as delegating to international courts and tribunals the authority to make and develop rules on proof, and to respond to procedural issues arising in cases on an *ad hoc* basis. Generally, tribunals consult with disputants over particular procedures that may be required to deal with a case, and may issue interim orders on procedural points if this is considered necessary.

Additionally, the rules on burden of proof may arguably find their source in general principles of law.²⁷⁷ Rules on evidence in international courts are often put

²⁶⁹ Brownlie, above n 251, 8–10.

²⁷⁰ Ibid 21. See also Riddell and Plant, above n 2, 31.

²⁷¹ H Thirlway, ‘Dilemma or Chimera? Admissibility of Illegally Obtained Evidence in International Adjudication’ (1984) 78 *American Journal of International Law* 622, 623.

²⁷² Brown, above n 39, 54.

²⁷³ Ibid 53.

²⁷⁴ Ibid 229.

²⁷⁵ Thirlway, above n 4, 1128.

²⁷⁶ Thirlway, above n 271, 623–24.

²⁷⁷ Amerasinghe prefers to let this explanation suffice, as it reflects the approach taken by international courts themselves: Amerasinghe, above n 5, 26. See also Brown, above n 39, 93, 118; Kolb, above n 7, 335, describing the rule on burden of proof and related rules as created by certain ‘general principles of law based on common sense and

forward among the relatively scarce examples of general principles of law as referred to in Article 38(1)(c) of the Statute of the ICJ.²⁷⁸ There are differing views on what is meant by the reference to general principles of law in Article 38(1)(c). One view is that general principles of law as referred to in Article 38(1)(c) may be extracted from principles or rules common among municipal legal systems. Frequently, general principles argued to be derived in this way are held to include rules of procedure and evidence. Few writers explicitly suggest that the rules about burden of proof are under contemplation, but a particular strength of the rule on the burden of proof is its commonality across domestic legal systems.²⁷⁹ On another view, the drafters of Article 38(1)(c) of the Statute of the ICJ shared an intention that their reference to general principles of law was intended to relate to objective principles of justice, to be understood at the level of general propositions.²⁸⁰ Such latent principles of law should guide international judges, enabling them gradually to determine the content of international law more closely.²⁸¹ The view has been taken that general principles of law in this sense include the rule on the allocation of the burden of proof (*actori incumbit probatio*),²⁸² as well as a number of other principles of judicial procedure, including the rule that no-one may be a judge in their own cause (*nemo debet esse iudex in propria sua causa*), the due process rule (*audi alteram partem*), the principle that the court knows the law (*jura novit curia*) and the principle of *res judicata*.²⁸³ In practice the two views regarding general principles of law overlap. Often domestic principles reflect universal notions of justice or effectiveness. The rule on the burden of proof may qualify as a general principle of law on both views. Whether rules on standard of proof could so qualify at present may be open to argument, given their different treatment in different legal traditions.

Explicit provisions on the allocation of the burden of proof are found in the constituent documents and rules of procedure of only a few international courts and tribunals. The statutes of the PCIJ, ICJ and the ITLOS are silent on the subject, and, indeed, they say little on questions of procedure more generally. Article 30 of the Statute of the ICJ provides specifically that the Court shall frame rules for carrying out its functions, including procedural rules. The same provision is found in Article 16 of the ITLOS Statute. However no provisions dealing explicitly with the burden or standard of proof have been included in the rules of procedure adopted by either body.²⁸⁴ The WTO Dispute Settlement Understanding (DSU)

developed through human experience’.

²⁷⁸ Art 38(1) sets out the law to be applied by the ICJ in deciding the disputes submitted to the Court, and is commonly regarded as articulating the recognised sources of international law.

²⁷⁹ M N Shaw, *International Law* (6th ed, 2008) 98–105; Brownlie, above n 251, 16–18.

²⁸⁰ Cheng, above n 34, 18, 24.

²⁸¹ *Ibid* 18–19.

²⁸² *Ibid* 327.

²⁸³ Brown, above n 39, 16, ch 2; Cheng, above n 34, 257–301.

²⁸⁴ Under art 48 of the Statute of the International Court of Justice (26 June 1945) 33 UNTS 993, replicated in art 27 of the Statute of the International Tribunal for the Law

does not go much further. Article 12(1) provides that panels are to follow the working procedures found in Appendix 3 of the DSU, while the Appellate Body was to draw up working procedures for appellate review under Article 17(a).²⁸⁵ Neither set of working procedures addresses the burden of proof. The *actori incumbit probatio* rule was discussed in his Report on Arbitral Procedure of 1950 by Georges Scelle, the Special Rapporteur of the International Law Commission,²⁸⁶ but not included in the Commission's 1958 Model Rules on Arbitral Procedure.²⁸⁷

Although the 1899 and 1907 Hague Conventions on the Pacific Settlement of Disputes are silent on burden of proof, Article 24(1) of the Optional Arbitration Rules of the Permanent Court of Arbitration incorporates the rule, stating that:²⁸⁸

Each party shall have the burden of proving the facts relied on to support its claim or defence.

The rule was included in Article 24 of the Iran-US Claims Tribunal's Rules of Procedure,²⁸⁹ mirroring Article 24 of the UNCITRAL arbitration rules, and is considered to represent 'generally accepted principles of international arbitration practice and contribute to the effective resolution of cases before the Tribunal'.²⁹⁰ A number of Iran-US Claims Tribunal decisions have been based around the allocation of the burden of proof, and questions of burden of proof also have a high profile in the views of dissenting arbitrators.²⁹¹ It may be noted also that Rules 33

of the Sea (see Annex VI to the UN Convention on the Law of the Sea (10 December 1982) 1833 UNTS 3), the Court is also to make orders for the conduct of individual cases including in relation to the form and timeframes for the submission of argument and in relation to all matters connected with the taking of evidence. See also arts 49–52 of the Statute, concerning requests for the production of evidence from the parties and the taking of expert testimony.

²⁸⁵ Working Procedures for Appellate Review (7 October 2004) <<http://www.wto.org>>.

²⁸⁶ 'Model Rules on Arbitral Procedure' (1950) II *Yearbook of the International Law Commission* 114, 134.

²⁸⁷ 'Model Rules on Arbitral Procedure' (1958) II *Yearbook of the International Law Commission*, 82.

²⁸⁸ Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States. See likewise art 24(1) of the: Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two Parties of which Only One is a State; Permanent Court of Arbitration Optional Rules for Arbitration involving International Organizations and States; Permanent Court of Arbitration Optional Rules for Arbitration between International Organizations and Private Parties; Permanent Court of Arbitration Optional Rules for Arbitration of Disputes relating to Natural Resources and/or the Environment. These rules of procedure are available at <<http://www.pca-cpa.org>>.

²⁸⁹ Article 24 states that 'each party shall have the burden of proving the facts relied on to support his *claim or defence*.' Emphasis added: *Final Tribunal Rules of Procedure* (1983) I Iran-US CTR 57, art 24,

²⁹⁰ Kazazi, above n 1, 104; *Islamic Republic of Iran and the United States of America Case A-20* (1986) 11 Iran-US CTR 271, 274.

²⁹¹ Kazazi, above n 1, 108, 112–13. For example, *Iran-United States, Case A/1* (Issues I,

and 34 of the Model Rules of Procedure for Chapter 20 of the North American Free Trade Agreement (NAFTA) explicitly state that a claimant must prove that a respondent's actions are inconsistent with NAFTA, and that a party asserting that a measure is covered by an exception must so prove.²⁹²

Alternatively, a procedural and evidentiary rule-making capacity may be regarded as an inherent power of a tribunal, whether domestic or international, deriving from the need to ensure that tribunals are fully equipped to carry out the judicial function.²⁹³ The view has consistently been taken that the judicial function involves the settlement of disputes and the sound administration of justice.²⁹⁴ The ICJ has observed that such powers inhere automatically in international judicial organs, and that their purpose is to protect the basic functions of international judicial bodies.²⁹⁵ This approach has won support, and probably represents the best way to understand the inherent powers of international courts and tribunals.²⁹⁶ The alternative view is that these powers are not inherent, but rather are to be implied from the constituent documents of international courts and tribunals in much the same way as international organisations' powers can be implied from their constituent documents.²⁹⁷ On this view, international judicial organs are impliedly attributed the powers necessary to carry out their role on the same basis as other international institutions established by states.²⁹⁸ However, examples of where international courts have adopted the language of implied powers are very rare.²⁹⁹

III, and IV) (1982) I Iran-US CTR 189; *Flexi-Van Leasing, Inc v The Islamic Republic of Iran* (1982) 12 Iran-US CTR 335.

²⁹² Model Rules of Procedure for Chapter 20 of NAFTA <<http://www.nafta-sec-alena.org>>.

²⁹³ Brown, above n 39; Simpson and Fox above n 161, 147, 152; Kazazi, above n 1, 177.

²⁹⁴ Brown, above n 39, 72–78; P Gaeta, 'Inherent Powers of International Courts and Tribunals' in L C Vohrah, F Pocar, Y Featherstone, O Fourmy, C Graham, J Hocking and N Robson (eds), *Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese* (2003) 353, 354–55.

²⁹⁵ *Nuclear Tests (Australia v France)* ICJ Rep 253, 259–60; *Nuclear Tests (New Zealand v France)* ICJ Rep 457, 463.

²⁹⁶ Brown, above n 39, 71; See also Gaeta, above n 294, 364–68.

²⁹⁷ Brown, above n 39, 69; Gaeta, above n 294, 360, 362.

²⁹⁸ *Reparation for Injuries suffered in the Service of the United Nations* [1949] ICJ Rep 174, 182–84.

²⁹⁹ Brown, above n 39, 69. Gaeta refers to the phrasing used by the ICTY Trial Chamber in *Prosecution v Blaskic* (1997) 110 ILR 608, but the Appeals Chamber preferred the language of 'inherent powers', considering that 'the International Tribunal must possess the power to make all those judicial determinations that are necessary for the exercise of its first jurisdiction.' Gaeta, above n 294, 704. In *Mexico-Taxes on Soft Drinks* the WTO Appellate Body indicated the same preference, disregarding the appellant's use of the term 'implied powers' in stating 'We agree with Mexico that WTO panels have certain powers that are inherent in their adjudicative function'. Panel Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WTO Doc WT/DS308 (24 March 2006) DSR 2006:I, 43.

Thus it can be seen that the rules on burden of proof in international courts and tribunals derive simultaneously from multiple sources. In relation to the future development of the rules, international courts and tribunals themselves may have to take the lead in some instances, through the exercise of their inherent powers, or possibly under the rulemaking powers expressly conferred upon them in some instances. Subsequently, court-led modifications to the rules could come to permeate customary international law, and take their place among conventional rules governing international adjudication or come to be recognised as consistent with general principles of law. The pattern will be different in each case.

The direction in which development should proceed is towards greater certainty in the articulation of the rule on burden of proof: most notably through the identification of a standard of proof or standards of proof, and the recognition of claims and defences (or legal assertions) as the pivots for the allocation of the burden of proof. As discussed above, fairness in individual cases may best be assured through a flexible application of the rule. On a distinct note, it would additionally be a positive development if further judicial consideration could be given to the need to modify the application of the rules on burden of proof in disputes where the precautionary principle should rightly be taken into account by adjudicators. The best method for accommodating scientific uncertainty in the international rules on burden of proof is likely to be through a precautionary *prima facie* case rule. Unfortunately the scope of this article does not permit further investigation of this issue, which will be left for discussion by the author elsewhere.³⁰⁰

VII. Conclusion

As a 'community of courts' develops at the international level,³⁰¹ it is important that these bodies share a common understanding of their procedural rules, including the rule on the allocation of the burden of proof. The need for predictability in adjudicatory decision-making is particularly strong in international law, a system of law among sovereign equals where submission to the jurisdiction of international courts and tribunals is essentially voluntary. Relative certainty about the rules on proof will reinforce international actors' commitment to legal means of dispute settlement and their adherence to international law more generally.

An increased judicial emphasis on the requirement for a party to prove all the facts necessary to establish its *claims or defences* is desirable. This aspect of the rule on burden of proof is seen in both common and civil legal systems and links back to the presumption of compliance by states with their international legal obligations. The organizing power of this aspect of the rule is strong: it clusters together the facts that a claimant or respondent has to prove. The result of a greater emphasis on this aspect of the rule would be to help eliminate scope both for

³⁰⁰ C Foster, *Science and the Precautionary Principle in International Courts and Tribunals: Expert Evidence, Burden of Proof and Finality* (2011).

³⁰¹ Y Shany, *The Competing Jurisdictions of International Courts and Tribunals* (2003).

confusion as to which party bears the burden in relation to a particular fact, and for tactical pleading. Further, judicial discretion will be subjected to greater discipline. There will be a reduced volume of cases where ‘who must prove what ... depends on an arbitrator’s personal judgment of what is fair under the circumstances.’³⁰² The secondary aspect of the rule on the burden of proof, that a party must prove all the facts it asserts, merits less emphasis than it presently receives. Operating alone, or in pride of place in lieu of the first aspect of the rule, this secondary aspect of the rule may introduce greater uncertainty into international litigation, and potentially render the outcomes subject to parties’ strategic decisions on when to assert a fact and when to attempt to provoke an opposing party into doing so.

Scope remains for the relatively unguided exercise of judicial power in the application of the rule on burden of proof. Calls are increasingly made for the adoption of formal standards of proof in order to bring greater consistency and accountability to international judicial decision-making. Further, judges and arbitrators will exercise considerable power in determining whether substantive rules are general rules or exceptions, and accordingly where the burden of proof will lie. Members of international courts and tribunals must be alert that the determination of whether a provision is a general rule or an exception may involve a tacit but potentially significant normative judgment. It will be important that this task is carried out with an appreciation for the normative neutrality required, in a way that respects the usual rules of interpretation and the intentions implicit in the law. Further, international courts’ and tribunals’ reasoning on the identification of exceptions must be transparent. Yet at the same time there is scope for an enlightened approach to legal interpretation, which will be especially important in contexts where there is a powerful institutional pull towards narrow interpretations in pursuit of the direct goals of particular regimes. For example, while analytically not essential, the notion of ‘autonomous rights’ developed in WTO jurisprudence bolsters judicial determination in this regard, according special recognition to provisions in the applicable law that cut across, yet remain essential complements to, the dominant policies within the regime.

The article has also addressed the newly emerging issue of how to allocate the burden of proof in proceedings subsequent to an original decision on the merits, such as non-compliance proceedings or a challenge to countermeasures imposed in response to alleged non-compliance. The approach that has been set out by the WTO Appellate Body for the allocation of the burden of proof in compliance proceedings under Article 21.5 of the DSU is a constructive response. In international law more generally, it is helpful to take into account Rosenne’s observation that the original complainant’s burden of proof is lightened so that an original complainant may rely on inferences in relation to matters where the original complainant does not have access to the necessary evidence, if a *prima facie* case of non-compliance can be established.³⁰³ Thus, an international court or tribunal may employ the flexibility available in the application of the rules on

³⁰² Van Hof, above n 101, 163.

³⁰³ Rosenne, above n 4, 224. See also above text n 253.

burden of proof. However the underlying rule on burden of proof remains applicable as usual: the presumption of compliance would apply to the benefit of the respondent. In the distinct context where subsequent proceedings are brought not by an original claimant but by an original respondent who asserts that countermeasures imposed against it are illegal on the ground that the original respondent is no longer in breach of its own obligations, then the party imposing countermeasures would usually bear the burden of proof, as countermeasures are justifiable only as exceptional measures. However, again some flexibility may be available in the application of the rule.

Finally, it is to be underlined that the rules on burden of proof possess a special character by virtue of their derivation simultaneously from a number of sources. This should help facilitate the initiation and entrenchment of desirable changes in the rules in order to move beyond difficulties such as those discussed in this article. In pursuit of this end it would be helpful if the ICJ were in a position to provide guidance on the principles regarded by the Court as underpinning practice in relation to burden of proof in international courts and tribunals in future cases, including in its forthcoming decision in *Whaling in the Antarctic*. The Court might also be able to provide an indication of its thoughts on the scope of international courts' and tribunals' flexibility to help ensure fairness through the application of the rules on burden of proof. In particular the Court may have the opportunity to comment on when it is appropriate to apply a *prima facie* case approach to counter imbalances in parties' access to significant evidence and on the role that may be played by the precautionary principle. Certainly, international courts and tribunals are to be encouraged to carry forward practice in relation to the articulation of the rules on burden of proof, including by considering further the adoption of a standard of proof and by making clear that the characterisation of provisions as general rules and exceptions must be carried out through a methodology firmly grounded in the principles of treaty interpretation. It remains to be seen whether this will ultimately preclude the characterization of savings clauses like those in the GATT and in Article VIII of the International Convention on the Regulation of Whaling as exceptions.