Evidentiary obligations in contemporary international litigation: with special reference to the practice of the World Trade Organization and the Iran-United States Claims Tribunal

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Universiteit van Amsterdam
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With special reference to the practice of the World Trade Organization and the Iran–United States Claims Tribunal

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:sJudge K.H. Ameli

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The current version is the final edition of my thesis, which incorporates all valuable comments and recommendations provided by Prof. dr. J. F. Weiss, Prof. dr. P.A. Nollkaemper, Prof. dr. N. J. Schrijver, Prof. dr. P.J.Kuijper and also Prof. dr. Paul de Waart and Judge K.H. Ameli, who joined the Promotiecommissie in December 2008. This version was submitted to the Members of the Promotiecommissie and the digital libraries, therefore other drafts must be disregarded.

As part of my researches for this thesis, I consulted Judges at the ICJ, IUSCT, ICTY, Parties’ Counsels, Professors and Researchers in Iran, UK and the US. I received countless comments, materials, and e-mails. However, some materials and opinions may not be publicly available yet (January 2009). Therefore, I would like to acknowledge and outline a number of references and names as follows:

- The IUSCT unpublished orders and parties’ general comments in legal issues before the Tribunal (Ch; I-VIII)
- Course materials about the WTO and International Organizations, presented by: Prof. F. Weiss, Dr. J.H. Mathis, Prof. P.A. Nollkaemper, Prof. N. J. Schrijver, Prof. P. J.Kuijper (The WTO Sections)
- BIICL Research Projects, Evidence before International Courts and Tribunals (ICJ), Anna Riddell and Brendan Plant (The ICJ Sections)
- Opinions of Judges in some of the Tribunal’s orders, namely, Judges Noori, Ameli, Aghahosseini, Aldrich, Brower, Khalilian and Kashani (Ch; I, VI, VII, VIII)
- General comments from Judge Awn Shawket al-Khasawneh (ICJ cases)
- Comments from Judge Gabrielle Kirk McDonald and H. Abtahi (Criminal Courts)

Notes about Sources and Cases

- WTO cases and materials have been downloaded from the WTO Documents Online, WTO Trade Topics Online, and referenced books and materials
- Due to some reshuffling of the pages and topics at the last moment (January 2009), a few cross-references or sources might be relocated or deleted
- All original references in awards, decisions and discussions have been cited
- Texts and summaries of the IUSCT awards, decisions and separate opinions have been extracted from the Tribunal’s official Database and the Tribunal’s published reports and The Hague Yearbook of International Law
- Texts and summaries of the ICJ cases and decisions have been extracted from the ICJ Annual Reports, Max Planck World Court Digest and related books and articles.

Zeinalabedin A. Marossi
January 2009
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<td>AD</td>
<td>Anti-dumping Measures</td>
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<td>ADR</td>
<td>Alternative Dispute Resolution</td>
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<td>ATC</td>
<td>Agreement on Textiles and Clothing</td>
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<td>BITs</td>
<td>Bilateral Investment Treaties</td>
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<td>CJEC</td>
<td>Court of Justice of European Community</td>
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<tr>
<td>CTD</td>
<td>Committee on Trade and Development</td>
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<td>CVD</td>
<td>Countervailing Duty (subsidies)</td>
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<td>DSB</td>
<td>Dispute Settlement Body</td>
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<td>DSU</td>
<td>Dispute Settlement Understanding</td>
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<td>EC</td>
<td>European Communities</td>
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<tr>
<td>ECHR</td>
<td>European Court of Human Rights</td>
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<td>EEZ</td>
<td>Exclusive Economic Zone</td>
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<td>EFTA</td>
<td>European Free Trade Association</td>
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<td>EU</td>
<td>European Union</td>
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<tr>
<td>GATS</td>
<td>General Agreement on Trade in Services</td>
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<td>GATT</td>
<td>General Agreement on Tariffs and Trade</td>
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<td>IACHR</td>
<td>Inter-American Commission on Human Rights</td>
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<tr>
<td>IBA</td>
<td>International Bar Association</td>
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<tr>
<td>ICANN</td>
<td>Internet Corporation for Assigned Names and Numbers</td>
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<td>ICC</td>
<td>International Court of Arbitration</td>
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<tr>
<td>ICC</td>
<td>International Criminal Court</td>
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<tr>
<td>ICJ</td>
<td>International Court of Justice</td>
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<td>ICRC</td>
<td>International Committee of the Red Cross</td>
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<td>ICSID</td>
<td>International Centre for Settlement of Investment Disputes</td>
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<td>ICTR</td>
<td>International Criminal Tribunal for Rwanda</td>
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<td>ICTY</td>
<td>International Criminal Tribunal for the former Yugoslavia</td>
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<td>ILO</td>
<td>International Labor Organization</td>
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<td>ILOAT</td>
<td>International Labor Organization Administrative Tribunal</td>
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<td>IMF</td>
<td>International Monetary Fund</td>
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<td>ITLOS</td>
<td>International Tribunal for the Law of the Sea</td>
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<tr>
<td>ITO</td>
<td>International Trade Organization</td>
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<tr>
<td>IUSCT</td>
<td>Iran–United States Claims Tribunal</td>
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<tr>
<td>MERCOSUR</td>
<td>Southern Common Market</td>
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<tr>
<td>MFN</td>
<td>Most-Favored-Nation</td>
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<tr>
<td>NAFTA</td>
<td>North American Free Trade Agreement</td>
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<tr>
<td>ODR</td>
<td>Online Dispute Resolution</td>
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<tr>
<td>PCA</td>
<td>Permanent Court of Arbitration</td>
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<td>PCIJ</td>
<td>Permanent Court of International Justice</td>
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<td>Abbreviation</td>
<td>Description</td>
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<tr>
<td>SCM</td>
<td>Agreement on Subsidies and Countervailing Measures</td>
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<td>SPS</td>
<td>Sanitary and Phytosanitary Measures</td>
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<tr>
<td>TACT</td>
<td>Trans Atlantic Consumer Dialogue</td>
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<tr>
<td>TBT</td>
<td>Technical barriers to trade</td>
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<td>TNC</td>
<td>Transnational companies</td>
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<td>TPRM</td>
<td>Trade Policy Review Mechanism</td>
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<td>TRIMs</td>
<td>Trade-related investment measures</td>
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<td>TRIPS</td>
<td>Trade-related aspects of intellectual property rights</td>
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<tr>
<td>UN</td>
<td>United Nations</td>
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<tr>
<td>UNCITRAL</td>
<td>United Nations Commission on International Trade Law</td>
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<tr>
<td>UNCTAD</td>
<td>UN Conference on Trade and Development</td>
</tr>
<tr>
<td>UNIDROIT</td>
<td>International Institute for the Unification of Private Law</td>
</tr>
<tr>
<td>US</td>
<td>United States of America</td>
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<tr>
<td>WIPO</td>
<td>World Intellectual Property Organization</td>
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<td>WTO</td>
<td>World Trade Organization</td>
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• **Introduction**

As a consequence of cultural, social and industrial globalization, over the past several decades, international law and regulations have been developed beyond the national boundaries. The diversity of the legal and political systems inevitably cause disputes among people and States, therefore, such an environment, requires reliable dispute settlement mechanisms.

There is an ever-increasing general impression that national courts cannot deal with and resolve international disputes, therefore, promoting international dispute settlement mechanisms that are more up-to-date and specialized in dealing with complex commercial disputes is necessary. The main objective of reliable dispute settlement bodies has always been to facilitate efficient resolution of disputes. In this regard, the specific wording of dispute settlement clauses may differ from contract to contract, but efficiency, fair and reliable system are the main pillars of all dispute resolution bodies.

International dispute resolution bodies, whether “institutionalized” bodies such as the WTO’s Dispute Settlement Body (the DSB), or *ad hoc* Tribunals such as the Iran-United States Claims Tribunal (the IUSCT), play a key role in shaping and promoting procedural and substantive principles of international adjudication. Despite their unquestionable advantages, many aspects of these dispute resolution mechanisms have yet to be fully discussed.

However, some States parties to international accords, are, concerned that submission to international courts and tribunals may against their interests. In particular, they are concerned that in addition to being financially burdensome, such bodies might undermine their national legal sovereignty. There are many other issues, which require careful consideration. For example, the right to be heard before international judicial *fora* not only implies the obligation to produce or present potentially sensitive documents, it also provides an opportunity, in certain situations, to obtain access
to essential evidence in the possession of the opposing party or some other third-parties.

In addition, international arbitrators are faced with many new challenges, such as requests for e-discovery. Furthermore, international tribunals must confront issues of confidentiality and privilege as an excuse by the parties to comply with requests for discovery. Finally, in the context of document production and procedures a tribunal must be aware of issues of fraud or forgery.

This thesis will consider and analyze particular aspects of the evidentiary process before international courts and tribunals with particular reference to the jurisprudence of two important bodies (the IUSCT and the DSB) that have adjudicated thousands of inter-State and private cases involving different matters.

In brief, the main theme of this thesis is to examine various aspects of parties' evidentiary obligations before international judicial fora, and to examine methods of compliance with courts and tribunals orders and their contractual obligations.

- **Scope and method of the Study**

This thesis will focus on analyzing the evidentiary obligation of parties in international litigation, particularly in the context of international trade and commercial arbitration. Rather than quoting some comments and opinions and following a general standard to examine the limited number of sources, this study involves a comprehensive examination of various issue related to evidentiary obligation of parties. It provides a pragmatic perspective of looking at the issue, analyzing legal points of more than 260 cases and reports, and commenting on the results where it is required. It will explore different approaches to the issue of discovery, the availability of discovery, as well as the scope, conditions and limitations of the availability of discovery in international litigation. It is only by clearly understanding the scope of discovery that parties can make sound choices, where such a choice is possible,
about whether to use international dispute settlement mechanisms or to proceed with national court litigation.

This study, however, is not an exhaustive examination of every aspect of the evidence and rules governing the burden of proof. It is not also a comparative study of the subject in international litigation as between different dispute settlement bodies. Consequently, it does not cover topics related to the applicable law, the definition of legal systems, or the final and binding effect of awards, except where a study of those issues assists in the review of the obligations of the parties in the particular context of this subject.

In separate but interrelated chapters, it will first outline the legal issues, which should be elaborated based on the jurisprudence of various international courts and tribunals. In particular, much of the discussion will focus on the IUSCT, an international claims settlement tribunal that has adjudicated almost 4000 private and inter-States cases. In addition, to address the question of document production in modern international business transactions, it will turn to the rules and practice of the WTO dispute settlement body as a model for international trade dispute, both in its mechanism and its operational features.

However, the objective of this study is not “a comparative study” of an international tribunal and the DSB. Therefore, the scope of this study is not confined to the practice of the IUSCT and the DSB. Reference will also be made, as necessary, to the rules and case law of certain other international courts and tribunals including the ICJ, ICSID, NAFTA Arbitration, ITLOS, ICC, and ICTY.

The present study is divided into eight interconnected chapters. In each chapter, I will first identify the particular legal problem, then analyze, and substantiate my review by reference to judicial decisions and writings of highly qualified commentators in the field. In my study, I will examine the impact of newly technological advancements on international transactions.
• **Objective of the Study**

Procedural law determines the methodology of gathering and presenting evidence before international courts and tribunals. In this respect, arriving at a basic understanding of the nature and extent of the parties' rights and obligations *vis à vis* evidence and proof is one of the primary challenges facing the parties and arbitrators in international litigation. It is consequently no surprise that the document production or the so-called *discovery of evidence* is a debated issue in international litigation.

In this respect, it is intended to examine the interaction among different legal systems and international *fora* and to set forth recommendations on an efficient methodology for handling requests for document production in international litigation.

Harmonized instruments and rules of procedure on the taking and presenting evidence should be disused in more details to discover further new approaches and solutions needed for international litigations. Paramount to the entire discussion is the need to develop a regulatory framework, including an effective dispute resolution procedure, which responds to the demands of the modern world. Among the features required for such a structure is a unified and efficient system of gathering evidence and information. Equally important is the establishment of a norm that would harmonize the idea of the obligation of parties to cooperate in contemporary international litigation.

• **Outlines of Chapters**

This thesis is divided into two parts, each consisting of four interconnected chapters. The first part, comprising Chapters I to IV, deals with introductory issues related to dispute settlement mechanisms generally, and the issues of evidence and the burden of proof applicable in various international *fora*.

**Chapter I:** Serves as a background to this study. It discusses the subjects of international business transactions, dispute settlement
mechanisms, and their legal structures, particularly those of the IUSCT and the DSB.

**Chapter II**: Examines the significance and potential impact on the outcome of cases, rules of procedure and evidence in several international dispute settlement mechanisms. This study underscores the fact that a functionally progressive, updated and well-drafted set of procedural rules plays a crucial role in facilitating dispute settlement and thereby fostering justice in international relations.

**Chapter III**: Deals with the issue of the burden of proof including situations where the burden of proof may shift in the course of a dispute settlement process. The burden of proof regularly stays with the claimant, and it shifts to the Respondent where the *prima facie* claim is supported by sufficient evidence or arguments that were submitted by the parties. In many cases, the decision of who bears the burden of proof is a matter of significant debate. This chapter aims to examine those debates with reference to the practice of international courts and tribunals.

**Chapter IV**: Discusses issues related to the standards of evidence in international litigation. An analytical study of the concept of standard of proof can contribute to a better understanding of evidence and the burden of proof. Rules of procedure are always silent as to which kind of standard of proof an arbitral tribunal should apply. Consequently, standards of proof may vary between institutions even where the matters before them are similar. This chapter addresses the different standards of evidence, accepted thresholds that must be met by the parties to the dispute and the amount of evidence that parties must present in order to prevail.

The Second Part of the thesis discusses issues surrounding document production, and the parties' responsibilities to cooperate with courts and tribunals. International dispute settlement bodies adopted different approaches to, and have different understandings of, the concept of document production and transparency. Despite efforts to standardize practice in this respect, issues related to the
concept of discovery of evidence are still the subject of serious debate.

Chapter V: Presents an analysis of the subject of document production or discovery of evidence with reference to the practice of international courts and tribunals. This chapter puts forward suggestions based on the practice of international arbitrators, for transnational solutions to strike a proper balance between efficiency and fairness.

Chapter VI: Discusses about parties' contractual obligations to cooperate with international courts and tribunals, and to disclose the required evidence and information. A contract, or treaty, is an exchange of enforceable promises between the parties to do, or refrain from: doing an act. Transparency, as used in a legal context, implies openness, communication, and accountability. This chapter also analyzes the concept of transparency and the contractual obligations of parties from an international law point of view.

Chapter VII: discusses exceptions to rules governing the discovery of evidence. The scope of information that a party or tribunal can compel a party to reveal is very broad. However, there are some limits. Rules and regulations that provide the right of access to evidence and information may exempt some document on grounds of confidentiality, State interest, or public policy. This chapter will focus on the nature of these ‘exception’ clauses, inter alia national security, and confidentiality of evidence as a bar to the disclosure of evidence and information, as well as a limitation of the evidentiary obligation of the litigant parties. This chapter also discusses the discretion and power of judicial review of international courts and tribunals

Chapter VIII: Examines in more detail how best to draft a request for document production as well as the consequences of non-compliance with document production orders and other significant issues to be observed and addressed in formulating and presenting claims and defenses in different kinds of cases.
Conclusions, this work seeks to promote a model of discovery of evidence based on cost effectiveness, a fundamental issue meriting particular attention when drafting procedural rules. In addition to some analytical comments at the end of each chapter, some observations are presented at the end of parts one and two.

Final remarks summarize the issues that have been discussed and analyzed in all eight chapters. This section further highlights the impact of new technological advancements on international dispute settlement and the need to develop a regulatory framework, including an effective body of procedural rules matching the nature and meeting the demands of the contemporary international dispute settlement. Among the features required for such a structure are adequate unified systems of gathering evidence and information as well as the establishment of norms that can harmonize the understanding of the obligations of parties to cooperate with each other in international litigation.
Part One: Evidence and Proof in the Contemporary International Litigation
Chapter I: International Transactions and Dispute Settlement Mechanisms

In the process of international cooperation, legal and policy aspects of trade, commercial and international investment are critically important to all the actors. This process generally entails the removal of all barriers, and ensuring that all parties fully meet their obligations under international accords. The result has been the creation of bodies for the governance of international economic cooperation. In this environment, international law and regulations manage parties’ rights and responsibilities.

The rule of law and predictability are the main elements in the process of current international cooperation. In this regard, international legal instruments such as the WTO and bilateral investment treaties are often contain different methods of securing parties rights and responsibilities. Nevertheless, because of globalization, institutionalized dispute settlements have become a reality of the contemporary world.

Now the question is; which kind of institution or system may be able to facilitate quick and effective settlements of parties’ disputes?

1. Framework of International Economic Cooperation

In the contemporary world, many international and bilateral treaties, or conventions such as the Convention for the International Sales of Goods (CISG)\(^5\), GATT, ICSID and several other treaties dealing with dispute resolution and the enforcement of awards and contracts.\(^6\) In addition, there are bodies such as the United Nations Conference on Trade and Development (UNCTAD), NAFTA and the WTO, which was created on 1 January 1995\(^7\) for promoting economic development through international trade\(^8\) and UNIDORIT\(^9\) and the UNCITRAL\(^10\) all are tools for further harmonization and unification of the law of international trade.\(^11\)

As a result, the rules of international trade and commercial now extend into many new substantive areas, such as services, online

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7. See, e.g. Young, A. The Trouble with Global Constitutionalism, Texas International Law Journal 38 (2003), 527.
8. United Nations Conference on Trade and Development, established in 1964, UNCTAD promotes the development-friendly integration of developing countries into the world economy. UNCTAD has progressively evolved into an authoritative knowledge-based institution whose work aims to help shape current policy debates and thinking on development, with a particular focus on ensuring that domestic policies and international action are mutually supportive in bringing about sustainable development.
9. UNIDROIT International Institute for the Unification of Private Law. Is an independent intergovernmental organization with its seat in Rome. Its purpose is to study needs and methods for modernizing, harmonizing and co-coordinating private and, in particular, commercial law as between States and groups of States.
10. The United Nations Commission on International Trade Law (UNCITRAL) that was established by the General Assembly in 1966 (Resolution 2205(XXI) of 17 December 1966 in order to play a more active role in reducing or removing trade obstacles by harmonization and unification of the law of international trade.
11. See e.g., Chantal Thomas, Constitutional Change and International Government, 52 Hastings L.J. 1, 3 (2000).
business, intellectual property, e-commerce and investment. From the first WTO Ministerial Conference in Singapore in December 1996 to the present, the international trade issues have been expanded to include new areas such as the agriculture, competition and textiles; the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs); the Agreement on Trade Related Investment Measures (TRIMs); and, e-commerce to foster international economic cooperation.

The mandates of all those international treaties and organizations are to provide support for countries and persons participating in international transactions and to enhance the promotion of trade, environment and development; and, to encourage all countries to contribute more to the process of economic development and social stability among their nation.

In the light of regional and international economic cooperation, globalization has been one of the most compelling social, political and economic theories of the late twentieth century.

1.1. International Cooperation and Globalization

Globalization in general is a process of growing interdependence among all people of this planet and refers to the process that compels all people toward a single world society. Indeed, we are living in a world where there are significant changes in social, economic, and even the legal systems of individual countries.

12. The dispute between the United States (“U.S.”) and Antigua and Barbuda (“Antigua”) (Dispute over, Internet Gambling) is as an example involving Internet trade that has gone through the dispute settlement system of the WTO. The legal base for this dispute are inter alia GATS article XIV (c) (a) / footnote (5) / chapeau and GATT Article XX.

13. See http://www.unctad.org/Templates/Page.asp?intItemID=1532&lang=1


Because of these changes and developments, nowadays people of the world are linked together economically and socially. While the process of increasing global economic integration is underway, it is still not clear as to how the legal issues could be managed.

1.2. Technology and the International Legal Order

International e-commerce is a new issue among industries of the contemporary world, which has changed traditional definition of the international transaction, market and business structures. E-commerce has several important consequences and impact on the international business transactions, including reduction in transaction costs, promoting competition, lowering product prices and introducing new legal issues relate to the transaction. While e-commerce is a new method and it has expanded into the international community, there are still many questions about it, including some comment about the ability of current international legal system and norms to manage the growth of current cyberspace and e-commerce.

As the E-commerce has developed into a global phenomenon, it challenges some States’ abilities to address issues related to electronic commerce and the internet. The international nature of the digital world and e-commerce require a transparent legal and framework for managing electronic commerce. However, several organizations and treaties including the WTO, UN, and NAFTA are developing rules and principles to manage issues related to E-business.

The world is experiencing some new developments and interactions, which makes it necessary for all countries to redefine the traditional understanding of international law, relations and borders.\(^{21}\) The realities of cyberspace and contemporary world force international community to redefine the traditional definition of national boundaries.\(^{22}\) Thus, traditional law cannot manage cyberspace and e-commerce and regulations, therefore, the online world should create its own legal jurisdiction.\(^{23}\)

### 1.3. The Impact of Globalization on National Law

The phenomenon of globalization and the move towards more unification and integration has redefined many aspects of legal and social systems of countries.\(^{24}\) In light of these developments, legal and political matters namely arbitration rules that were previously mainly domestic or private issues have become more internationalized. For example, all new reform of model laws such as UNCITRAL Arbitration Rules has a significant contribution to the denationalization of arbitral proceedings.\(^{25}\) This situation shows that many national norms and regulations have been largely if not entirely under influence of international norms and definitions.\(^{26}\)

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2. Settling International Disputes

Compliance with obligations in international relation is the main concern of all actors who are active in international.27 However, there are different methods of monitoring and implementing rights and responsibilities of individuals or States in the international community. For example, *retorsion*28 or *reprisal*,29 are well-known methods of protecting rights under the international law.30

In trade agreements under the WTO for example, when a Member fails to comply with its contractual obligations, the other party may suspend trade concessions as a remedy. It is worth noting that, the use of trade sanctions or other remedies permitted under the WTO are as means of promoting compliance by all parties. In *EC - Bananas III* (US), the arbitrators in their decision ruled that the authorization to suspend concessions is a temporary remedy pending full implementation by the member concerned. However, the arbitrators considered that:

This purpose does not mean that the DSB should grant authorization to suspend concessions beyond what is equivalent to the level of nullification or impairment. In our view, there is nothing in Article 22.1 of the DSU, let alone in paragraphs 4 and 7 of Article 22, that could be read as a justification for countermeasures of a punitive nature.31

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28. Means taking actions that are lawful or permissible, but are designed to compel the violating state into compliance. See, Black’s Law Dictionary, R: *retorsion*
29. Which is otherwise illegal, is an action taken by a State through that State’s reaction to another State’s breach of international law. Black’s Law Dictionary, R: *reprisal*.
31. Decision by the Arbitrators on EC · Bananas III (US) (Article 22.6 · EC), para. 6.3. See also Decision by the Arbitrators in EC · Hormones (Article 22.6 · Canada), para. 39.
Self-help, or Self-defense by a party, is one of the methods of protecting rights and establishing order in some agreements.\(^{32}\)

However, when an agreement or even the applicable law in a dispute does not provide for specific remedies for noncompliance of a party, the court or tribunal has the discretion to decide about the proper remedies.\(^{33}\) In *Chorzow Factories* case, the Permanent Court of International Justice (PCIJ) stated that:

> It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore, is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself.\(^{34}\)

### 2.1. Peaceful Settlement of International Disputes

The term of dispute, in general context refers to a difference of opinion or a controversy over some facts or legal points. As the ICJ has stated in several cases\(^{35}\) that: “A mere assertion is not sufficient to prove the existence of a dispute any more than a mere denial of the existence of the dispute proves its non-existence. Nor is it adequate to show that the interests of the two parties to such a case

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*32.* Self-help as a legal remedy discussed by the WTO dispute settlement system is about to bring non-complying Members into compliance with their obligations. However, its effectiveness has been subjected to some criticisms. See, e.g., Niall P. Meagher, *Representing Developing Countries in WTO Dispute Settlement Proceedings*, in George A. Bermann, Petros C. Mavroidis (eds), *WTO Law and Developing Countries*, (Cambridge University Press 2007) pp 213-227.


*34.* See 1929 PCIJ Series A, No. 8, 4, at 21

are in conflict." In this regard, the PCIJ in the *Mavrommatis Palestine Concessions* (Preliminary Objections) case has given a definition of dispute, the court stating that:

A dispute is a disagreement on a point of law or fact, a conflict of legal views or of the interests between two persons.

In this part, however, instead of analyzing the literature and the philosophy of dispute settlement as a legal issue, I concentrate on the practical aspect of international dispute settlement.

International disputes are generally adjudicated by an international forum but in some cases, a dispute may be adjudicated by a domestic forum such as an “internationalized court”.

The International Centre for Settlement of Investment Disputes (ICSID), the North American Free Trade Agreement (NAFTA) Tribunals, the Iran-US Claims Tribunal (IUSCT), Permanent Court of Arbitration (PCA), and the WTO panels are international, although they may deal with issues relate to national laws or domestic issues. However, those bodies or tribunals should implement international rules and principles and may not allow the domestic rules of one the parties prevail over the rules and practice of another party.

38. For more details about this issue, see, e.g, *Case Concerning Right of Passage Over Indian Territory (Portugal v India)* (Merits) [1960] ICJ Rep 34; South-West Africa Cases (*Ethiopia v South Africa; Liberia v South Africa*) (Preliminary Objections) [1962] ICJ Rep 328, 343; *Case Concerning East Timor (Portugal v Australia)* [1995] ICJ Rep 99.
To the extent that an international dispute is brought before a national court or tribunal, that court also should decide the case based on the international standards. However, this does not mean that the court or tribunal is an international body, because it does not satisfy the definition, which requires for creation of an international body.

In any event, the principle of peaceful settlement of international disputes is central to the UN system, which enshrined in several international conventions.

Article 33 of the UN Charter, indicates that the parties to any dispute shall first, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, or other peaceful means of their own choice. As the ICJ elaborated, the lack of jurisdiction of a court e.g. the ICJ, does not relieve UN Members of their obligation to settle their disputes by peaceful means.

In the *Pakistan v. India* case, the court upheld that:

> The choice of those means admittedly rests with the parties under Article 33 of the United Nations Charter. They are nonetheless under an obligation to seek such a settlement, and to do so in good faith in accordance with Article 2, paragraph 2, of the Charter.

Accordingly, in *Pakistan v. India* case the Court recalled the parties’ obligations to settle their disputes by peaceful means only, and in

42. In this regard see reports published at, *International Law in Domestic Courts, database provided by the Oxford University* at: http://ildc.oxfordlawreports.com/public/about_ildc?topic=about_ildc_editorial_team
43. See the wording of Art. 2 para. 3 of UN Charter.
44. See e.g, *Case Concerning Military and Paramilitary Activities in and against Nicaragua. Merits (Nicaragua v. USA)*, ICJ Reports 14, para. 290. (1986).
particular the dispute arising out of the aerial incident of 10 August 1999, in conformity with UN charter the obligations, which all UN Members have undertaken.  

2.2. **Mechanisms of Dispute Settlement**

Generally, settlement of disputes between parties can be either institutional or *ad hoc* as a method.

Under some statutes of international organizations, member States merely undertake to settle their disputes peacefully. In international trade regimes, such as NAFTA or the General Agreement on Tariffs and Trade (GATT)/WTO, a specific dispute settlement system has been designed, which has exclusive jurisdiction to settle all disputes between Members of those agreements.  

There are, and have been several international courts and tribunals. Such courts are the PCIJ, the ICJ, and the International Tribunal for the Law of the Sea (ITLOS), the Court of Justice of European Communities (CJEC), the ECHR, and the Inter-American Commission on Human Rights (IACHR). An *ad hoc* tribunal considers a dispute independently according to the rules specified by the parties.

As will be discussed, in international community settlement of dispute through arbitration is a preferable form many parties. Therefore, *Ad hoc* tribunals such as the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), the Iran-United States Claims Tribunal, and also some other tribunals such as the International Centre for Settlement of Investment Disputes (ICSID), tribunals created under specific multilateral investment agreement,

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47. Ibid.

such as NAFTA or tribunals created under Bilateral Investment Treaties BIT are as international tribunals as well.\textsuperscript{49}

In the Uruguay Round of GATT negotiations, the World Trade Organization (WTO) was formed,\textsuperscript{50} and with it, a dispute resolution mechanism was established.\textsuperscript{51} The WTO’s dispute settlement process is an exclusive, binding and peaceful mechanism of settling all disagreement between the WTO Members.\textsuperscript{52}

It is noteworthy that there are an abundance of methods of peaceful settlement institutions and procedures. Nevertheless, all parties who are involved in international activities always look for techniques that are more reliable to resolve their disputes peacefully. This has led to an almost endless range of possibilities at the disposal of parties for dealing with their disputes.\textsuperscript{53}

A well-designed dispute settlement mechanism in international community will inevitably contribute to the legal and economic goals of all parties to multilateral or bilateral agreements. A brief study of some procedural aspects of an international arbitration such as the Iran-United States Claims Tribunal and the WTO Dispute Settlement Mechanism will demonstrate how different dispute settlement systems and proceedings may streamline further international economic cooperation and stability.

\textsuperscript{49} See, Chiththaranjan F. Amerasinghe, \textit{Evidence in International Litigation} (Bril NV, 2005), pp 8-10.

\textsuperscript{50} Agreement Establishing the World Trade Organization, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, in, the Results of the Uruguay Round of Multilateral Trade Negotiations 1, 33 I.L.M. 1144. (1994)


3. A Brief Study of International Arbitration

International arbitration is a consensual means of dispute resolution that produces a legally binding and enforceable decision. When the parties agree in principle, to complete a transaction, their primary goal is to reduce their costs and avoid dispute. Therefore, including a well-drafted arbitration clauses in contracts provide significant benefits to the parties in the form of lowering the litigation costs and secure the stability of the contract. In this regard, parties often agree either when they negotiate about their business or after a dispute has arisen, to submit their disagreement about the contract or any legal issue to arbitration rather than submit it to a national court.

The distinguishing feature of arbitration is its non-governmental nature and the parties’ freedom to determine, nearly all aspects of how their dispute should be settled.

International arbitration is usually created to assure parties from different jurisdictions and legal systems that their disputes will be resolved neutrally. Therefore, an arbitration agreement should generally meets the parties’ expectations and should address some significant issues, such as the rules of procedures; enforceability,

55. See Keith N. Hylton, *Agreement to Waive or to arbitrate Legal Claims: An Economic Analysis.* 
56. See the Statute of Iran- United States claims Tribunal.
58. See, Andrew T. Guzman, *Arbitrator Liability: Reconciling Arbitration and Mandatory Rules,* 49(5)
jurisdiction;\textsuperscript{59} applicable law and the language that should be used in proceedings before the settlement body. \textsuperscript{60}

As will be discussed (Chapter 7) because of the parties’ freedom to determine the rules of procedure, they can decide about the level of privacy in the arbitration procedures. For several reasons, parties may wish to avoid disclosure of the substance of their dispute or even the existence of a dispute. In addition, in order to prevent the disclosure of sensitive confidential evidence and information the parties may define some condition for discovery procedures that can be more limited than those available can under applicable law.

The formation and validity of arbitration agreements are very importance element in the course of recognition and enforcement of awards issued by an arbitral tribunal. In this regard, Articles II and V of the New York Convention, (1958)\textsuperscript{61} and most national arbitration laws, give effect to an international arbitration agreement that has been lawfully concluded.\textsuperscript{62}

\textbf{3.1. Disputes Within the Exclusive Domain of the National Courts}

Courts in civilized societies might be defined as government created bodies, which are the legitimate and enforceable means of dispute resolution. While international arbitration is a mechanism of peaceful settlement of disputes, which deals with issues related to

\textsuperscript{59} Article 16 of the UNCITRAL Model Law on International Commercial Arbitration (1985). The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

\textsuperscript{60} See, e.g. ARTICLE 17 of the IUSCT Rules of Procedure

\textsuperscript{61} Convention on the Recognition and Enforcement of Foreign Arbitral Awards - the "New York" Convention (1958) at:

mostly private law.\textsuperscript{63} This means that issues about public law disputes mostly are within the exclusive domain of the courts.\textsuperscript{64}

One of the main consequences of submitting a dispute to arbitration is that the parties normally exclude the jurisdiction of domestic courts over their dispute. Therefore, to enforce the tribunal’s award a winning party can submit the final award to the national court in a country where the other party has assets.\textsuperscript{65} Nowadays, international arbitration attract much more attentions, however, in matters related to the public policy or social interest of society, many States are very reluctant to waive jurisdiction or to compromise their courts’ authority to enforce those kind of awards.\textsuperscript{66}

In this regard, different countries introduced various rules that can limit the freedom of parties to submit their disputes to arbitration. This kind of limitation is based on the assumption that an international tribunal may not be able or willing to implement the law as accurately as a national court would. However, this paper cannot go into details to prove or disprove arguments about different understandings of national authorities.\textsuperscript{67}

In the shadow of current international economic cooperation and globalization, we can observe a clear trend towards considerable increase and expansion of arbitration dispute resolution.

In the past decades, for example, in many countries such as Iran or the United States legal system a clear shift from a suspicion attitude

\textsuperscript{63}. See, Gary B. Born, op.cit54, ch,1 pp-2-10
\textsuperscript{65}. Provided that that country has ratified the New York Convention of 1958 on Recognition and Enforcement of Foreign Arbitral Awards. More than 100 countries have ratified the New York Convention.
\textsuperscript{66}. For more details see, G.C. Moss, op.cit,62 p 7. In some of these areas special forum or tribunals have been established by treaty or national law such as tribunal for dispute over national tax .
toward arbitration, to an arbitration-friendly attitude is obvious.\textsuperscript{68} The same shift can be seen in other legal systems, such as, for example, the Swedish legal system\textsuperscript{69} and in some developing countries like Iran.\textsuperscript{70}

3.2. Development of International Arbitration

Nowadays, technology and cyberspace has transformed the fundamental legal notion of an international transaction. Now the international community talks about e-commerce, alternative dispute resolution (ADR),\textsuperscript{71} and online dispute resolution (ODR). Recently there has been a growing tendency that because of new technology the online dispute resolution can work as the most preferred dispute resolution mechanism for electronic commercial transactions. For instance the Trans-Atlantic Consumer Dialogue (TACD), a forum of the United States’ and European Union’ consumer organizations that promotes consumer interests in policy making, recommending ways for alternative dispute resolution in the context of business-to-consumer transactions in e-commerce.\textsuperscript{72}


\textsuperscript{70} On 17 September 1997, the Iranian Parliament enacted the Law on International Commercial Arbitration (LICA) on the basis of the draft proposed by the Council of Ministers; the LICA was entered into force on 5 November 1997,

\textsuperscript{71} ADR refers to any means of settling disputes outside of the courtroom. ADR typically includes arbitration, mediation, early neutral evaluation, and conciliation

\textsuperscript{72} See, Trans-Atlantic Consumer Dialogue, Alternative Dispute Resolution in the Context of Electronic Commerce (Feb. 2000) at http://www.tacd.org/cgi-bin/db.cgi? page=view&config=admin/docs.cfg&id=41
Furthermore, arbitrations proceed through a number of institutions, or on an *ad hoc* basis, in several Bilateral Investment Treaties that offer the option of arbitration for the settlement of disputes involving foreign direct investment. Bilateral Investment Treaties inevitably deal with issues related to the public interest and public policy of hosting States, however, almost all BITs allow foreign investors to settle their disputes which arising from the investment treaties through international arbitration mechanism which acts under some rules of procedures such as UNCITRAL.

Globalization and economic cooperation, which coupled with the proliferation of arbitration agreements in both domestic and international businesses, required a comprehensive study of arbitration. Therefore, examination of all features and structure of dispute settlement mechanisms and how they may operate is necessary. In this regard, I only discuss the structure, jurisdiction and some features of Iran-United States Claims Tribunal.

### 3.3. The Iran-United States Claims Tribunal

The IUSCT is one the most significant arbitral body in history of international law and its awards and decisions can be one of the most important sources of information for international lawyers and judges. However, a comprehensive legal analysis of the Tribunal’s jurisprudence shows that some issues addressed by the Tribunal were not subjected to the degree of care as someone expect from an international tribunal.

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73. As of 2000, the United States has signed forty-six BITs with many countries. Each BIT containing arbitration clauses. See: U.S. Dept. of State website, at http://www.state.gov/e/eb/rls/fs/1139.htm.
In January 1981, the Tribunal was established by the Algiers Declarations as a mechanism to settle the disputes of Iranian nationals or the government against the United States and disputes of the American nationals or the government against the Iranian government. The Declaration provides that: “Claims referred to the arbitration Tribunal shall, as of the date of filing of such claims with the Tribunal, be considered excluded from the jurisdiction of the courts of Iran, or of the United States, or of any other court." The Tribunal consists of nine arbitrators. Iran and the United States each appoint three arbitrators and the six appointed arbitrators or appoint three remaining third arbitrators and in the event if agreement cannot be reached among the six appointed arbitrators the Appointing Authority appoints arbitrators.

The Tribunal has three Chambers each consisting of three arbitrators, on third-country arbitrator who serves as president one Iranian and one American, and the President of the Tribunal is elected from the third-party arbitrators. The ‘Full Tribunal’ consists of all nine arbitrators and decides disputes between the two governments, as well as important cases and questions referred to it by the Chambers. Cases are distributed to the Chambers by the Tribunal’s Registry.


78. Claims Settlement Declaration Article VII, Para 2.

79. Claims Settlement Declaration Article III(1).

80. All the private cases have been terminated by the parties or by the Tribunal. At the time, there are interstate cases, which should be decided by the Full Tribunal.
So far, 3,953 cases have been filed by the Tribunal, which involves issues such as, the breach of contract, expropriation, expulsion and requests for interpretation. The Tribunal generally conducts its work in accordance with the UNCITRAL Arbitration Rules as modified by the Tribunal or two parties. At this time, 3,936 cases have been terminated by awards, decisions and orders and only seventeen cases are pending. However, the two governments can still file new claims concerning the interpretation or performance of Deceleration.

3.3.1. Jurisdictions of the Tribunal

International arbitration such as the IUSCT, which was established by two States, generally, was given jurisdiction over intergovernmental cases as well as between states and individuals. However, the jurisdiction of the Tribunal covers four areas:

1. Claims of nationals of the United States against Iran and claims of nationals of Iran against the United States, and any counterclaim which arises out of the same contract, transaction or occurrence that constitutes the subject matter of that national’s claim, if such claims and counterclaims are outstanding on the date of this Agreement, whether or not filed with any court, and arise out of debts, contracts (including transactions which are the subject of letters of credit or bank guarantees), expropriations or other measures affecting property rights;

2. Official claims of the United States and Iran against each other arising out of contractual arrangements between them for the purchase and sale of goods and services;

3. Disputes over whether the United States has met its obligations undertaken in connection with the return of the

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82. See. www.iusct.org
83. Claims Settlement Declaration Article II (2).
property of the family of the former Shah of Iran, Reza Pahlevi.\textsuperscript{84}

4. Other disputes concerning the interpretation or application of the Algiers Accords.\textsuperscript{85}

Some issue excluded from the Tribunal’s jurisdiction including claims related to the seizure of the American embassy in Tehran by students, claims about the injury to United States nationals or their property as a result of popular movements in the course of the Islamic Revolution which were not acts of the Government of Iran; and claims arising out of contracts that specifically provided for the sole jurisdiction of the Iranian courts.\textsuperscript{86} Claims related to issues of morality and personal injury are clearly outside the scope of the functions of this Tribunal as well.\textsuperscript{87}

3.3.2. The International Character of the Tribunal

The Algiers Accords are called Declarations, which were issued by the Algeria; however, the commitments made by the two parties are subject to international law. The declarations and all the related technical agreement are binding for both parties and fall under the definition of the Article 2 of the Vienna Convention.\textsuperscript{88}

Having considered the Algiers Declarations as a binding treaty, in case of interpretation of provisions of those decorations the Tribunal has applied the provisions of Articles 31, 32 and 33 of the Vienna Convention on the Law of Treaties, and also the general principles of international law as to the interpretation of the treaties.\textsuperscript{89} In \textit{Iran v. the United States, Case A/1}, as a first case

\textsuperscript{84} General Declaration, Para. 16.

\textsuperscript{85} Claims Settlement Declaration Article II (3).

\textsuperscript{86} General Declaration, Para. 8 and 11.


\textsuperscript{88} See e.g. M. Mohebi, \textit{The International Law Character of the Iran- United States Claims Tribunal}. (Kluwer 1999) pp91-95.

before the Tribunal, it considered the Declarations as binding treaties between the parties.\textsuperscript{90} In \textit{Iran v. the United States} Case A/21, also the Tribunal held that the Algiers Declarations were ‘international agreements’ for the interpretation of which the means set out in the Vienna Convention should be employed.\textsuperscript{91} In \textit{Iran v. the United States}, Case A/18,\textsuperscript{92} the issues was about the Tribunal’s jurisdiction to decide the claims of dual nationals. In that case and in the light of Article VII (1) of the Claims Settlement Declaration, and considering the Tribunal’s previous decision in case A/1, the Tribunal confirmed that the Algiers Declarations constitute a treaty under international law.

In addition to the aforementioned cases, the Tribunal has consistently held, and both Parties agree, that the Algiers Declarations are to be interpreted in accordance with the Vienna Convention.\textsuperscript{93}

\textbf{3.3.3. Applicable Law and Procedures}

The Statute of the IUSCT and its procedural rules were laid down by the Claim Settlement Declaration and the Tribunal Rules.\textsuperscript{94} The Tribunal is required by Article III (2) of the Claims Settlement Declaration to conduct its business in accordance with the UNCITRAL Arbitration Rules (1976) except to the extent modified by the parties or by the Tribunal to ensure that the Claims Settlement Declaration can be carried out.\textsuperscript{95}

\textsuperscript{90} See, Mohebi, op.cit.88 p 94. See also \textit{Iran v. the United States}, Case A/1, Decision No: 12-A/1-FT, at 1, IRAN-U.S. C.T.R. p 189 (1982).


\textsuperscript{92} Case A/18, at 5, IRAN-U.S. C.T.R., p. 256: stating that ‘as the Tribunal has previously held (Decision in Case A/1), and as the Parties have agreed, the Algiers Declarations constitute a treaty under international law and should be interpreted in accordance with Articles 31 and 32 of the Vienna Convention on the Law of Treaties’.

\textsuperscript{93} For more details, see, Mohebi, op.cit.88.


\textsuperscript{95} The necessary modifications to the UNCITRAL Arbitration Rules were made by the Tribunal at an early stage which came into effect in 1983.
Arbitration Rules provide the arbitrators with a considerable discretion to manage the Tribunal’s works and actual operations.\textsuperscript{96} The flexibility of the arbitral procedure obviously contributes to operation of the Tribunal and creates an effective forum.\textsuperscript{97}

Under Article V of the Claims Settlement Declaration, as it was incorporated in Article 33 of the Tribunal Rules, “The arbitral tribunal shall decide all cases on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the arbitral tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances.\textsuperscript{98}

Article V provides the arbitrators with discretion to consider all necessary elements of facts and law including the general principle of law to decide cases before the Tribunal.

For example, in \textit{CMI International Inc. v. Iran} Case\textsuperscript{99} No. 245, the applicable law of contracts between the parties was the law of the State of Idaho of the United States.\textsuperscript{100} The Tribunal in its award set aside the contractual choice of law clause, and refused to apply the domestic law of the State of Idaho to the merits of the case.\textsuperscript{101} The Tribunal ruled that:

\begin{quote}
It is difficult to conceive of a choice of law provision that would give the Tribunal greater freedom in determining case by case the law relevant to the issues before it.
\end{quote}

\begin{footnotesize}
\textsuperscript{96} See, Jessica Bodack, \textit{International Law for the Masses}, 15 Duke Journal of Comparative & International Law, pp368-75 (2005) . See, Claims Settlement Declaration, Art III (2)"……..Tribunal shall conduct ... in accordance with the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL) except to the extent modified by the Parties or by the Tribunal .....".
\textsuperscript{97} See, Jessica Bodack, p 372. See also Claims Settlement Declaration, Art. V.
\textsuperscript{100} UCC · Uniform Commercial Code.
\textsuperscript{101} Ibid. \textit{CMI International} p,267.
\end{footnotesize}
The Tribunal further noted, “Our search is for justice and equity, even in cases where arguably relevant national laws might be designed to further other and doubtless quite legitimate goals”.102

### 3.3.4. Enforcement Mechanisms

According to Article IV, Paragraph 1, of the Claims Settlement Declaration, all decisions and awards of the Tribunal shall be final and binding.103 Paragraph three of the same Article, States that:

> Any award, which the Tribunal may render against either government shall be enforceable against such government in the courts of any nation in accordance with its laws.

Further, Article 32, Paragraph 2, of the Tribunal Rules104 declares that, “[t]he award shall be made in writing and shall be final and binding on the parties. The parties undertake to carry out the award without delay.”

In accordance with Paragraph 7 of the General Declaration, Iran has committed to deposit in a Security Account an initial one billion U.S. dollars, and to maintain the balance in that Account at a certain level, for securing the payments of awards issued by the Tribunal against Iran. Paragraph 7 of the General Declaration States that whenever the Central Bank105 shall notify Iran that the balance in the Security Account has fallen below US$500 million, Iran shall promptly make new deposits sufficient to maintain a minimum balance of US$500 million in the Account. Regarding Iran’s performance of its obligations under this Article the United

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102. Ibid, p 268. For more details, see Mohebi, op.cit.,88, pp 91-157

103. For more details, see, Mohsen Aghahosseini; The Enforcement Mechanism Provided for the Awards of the Iran- United States Claims Tribunal, in The Global Community, Yearbook of International Law and Jurisprudence 2003, Volume I


105. The Bank of England was later designated by the Parties as the Central Bank referred to in the quoted paragraph.
States filed two claims against Iran in Case No: A/28, and Case A/33, that in case A/33, the Tribunal requested Iran to comply with its obligation to replenish the Security Account, as determined by the Tribunal in its Decision in Case No. A28.

The Algerian accord contains no specific mechanism on the enforcement of awards and decisions issued in favor of Iran or Iranian nationals. Therefore, the Iranian Claimants may enforce their award through national enforcement mechanism of the United States. The procedure of the United States enforcement mechanism is the source of two interpretive decisions of the Full Tribunal.

In case A/21, in May 1987, the Tribunal noted that enforcement procedure was available in the United States, but Iran has not attempted to use the available procedures to enforce the arbitral awards in United States Courts. According to the United States, the appropriate means for enforcing Tribunal awards in the United States was the procedure provided by the New York Convention.

Following the Tribunal’s decision in case A/21, Iran initiated before the United States Courts two separate enforcement actions against two of the United States’ corporations, relying on the 1958 New York Convention. The outcome of Iran's action, about Avco Corp case was different from the outcome in the Gould case.

108 See, Aghahosseini , op.cit.103
111. Ibid at note 89
The *Avco* case was initially brought before the United States Court for the District of Connecticut. The District Court granted the Avco Corp a summary judgment, because the Iranian parties failed to file a timely objection. On appeal, before the United States Court of Appeals for the Second Circuit, *Avco* claimed, that it had been deprived of its right to present its case before the Tribunal in a meaningful manner. *Avco* claimed that the deprivation vitiated the award against *Avco* and made it unenforceable under Article V (1) (b) of the New York Convention.\(^{114}\) Finally, on 24 Nov 1992 the Court of Appeals dismissed the enforcement action.\(^{115}\)

The refusal of the Court to recognize and order the enforcement of the *Avco* award, caused the Iranian government to bring the second interpretive case before the Tribunal, as Case No. A/27.\(^{116}\) In Award No 586 issued in June 1998, the Tribunal referred to the fact that in the enforcement action in *Avco*, unlike that in another case, the United States had chosen not to file a Statement of interest with the Circuit Court. If the United States had filed a statement, in the Tribunal's view, the Court might have paid more attention to the text of the award, rather than to the views expressed in a dissenting opinion.\(^{117}\) Finally, the Tribunal concluded that the United States had violated its obligations under the Algerian Declarations and was thus liable for damages.\(^{118}\)

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\(^{114}\) 980 F2d 141 (2nd CIR.1992). Article V (1) (b) provides that: “[R]ecognitions and enforcement of the award may be refused ... only if the] party against whom the award is invoked was ... unable to present his case.

\(^{115}\) For more details see, *Avco Corp. v. Iran*, op.cit.112. See, e.g. Aghahosseini, op.cit.103.


\(^{118}\) Ibid, Award No 586-A27-FT Para. 71
4. Critical Evaluation of International Arbitration

Arbitration is usually a voluntary process, which has its own advantages and disadvantages. There are several issues, which require more attention; however, I may only analyze the IUSCT as an example of international arbitration.

First, international arbitration is known as a more effective and efficient dispute resolution mechanism; therefore, expensive and long proceedings are some disadvantages. Considering the IUSCT as a model, it is quite expensive tribunal. The parties have been required to pay the costs of this Tribunal for almost 28 years. In reality, an expensive international commercial arbitration like IUSCT is not fast at all, while in the last ten years of its operation, the Tribunal is busy with only a few pending cases.

Second, the lack of firm guidelines have caused different results in some legal issues before the Tribunal. For instance, inconsistencies in the Tribunal's approach to the evidentiary issues and standard of proof in different cases have caused objections by the parties who, claimed that they had met the burden of proof, while at the end their cases have been dismissed on the evidentiary grounds.

Third, one should not overlook the lack of clear setting of precedent by the arbitration award that may be the reason for inconsistency between the Chambers’ decisions. In some legal issues, e.g. caveat as defined by the Full Tribunal in case A/18, 119 while in some similar situations, the Chambers have issued awards resulted from their different interpretation of the issue in a case.120

119. Iran, v. United States, Dec No 32-A18-FT, reprinted in 5 Iran-U.S. C.T.R. p 251. Decision Concerning Jurisdiction over Claims of Persons with Dual Nationality. Request for interpretation of Article VII, paragraph 1, of the Claims Settlement Declaration in regard to whether the Tribunal has jurisdiction over claims against Iran by persons who are, under United States law, citizens of the United States of America and are, under Iranian law, citizens of the Islamic Republic of Iran.

120. For example, in Karubian case (Award No: 569-419-2) decided by Chamber two and Aryeh (Award No: 583-266-3) case decided by Chamber three. The claimants in both cases had acquired their rights solely
Fourth. Articles 35, 36 and 37 of the Tribunal Rules, permit a party to request, an interpretation of the award, and correction of any computational, clerical, typographical, or similar errors. However, these Rules do not contain any provision for the admissibility of an appeal for a total or even partial review of a final award. In short, an arbitration award is much more difficult to reverse or appeal than a national court judgment.

Overall, the Tribunal has managed the procedures in accordance with the applicable rules of procedure and has accomplished its manmade as were outlined by Claims Settlement Declaration.

However, discussing international dispute settlement is insufficient without a look into the WTO dispute settlement mechanism. In this regard, a brief examination of the WTO dispute settlement process both in its design and in some of the successful operational features could highlight pros and cons of this kind of dispute settlement body.

5. Legal Aspects of Dispute Settlement in International Trade

Dispute Settlement Body (DSB) administers the process of disputes related to the WTO agreements. The DSB has the authority to “establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and

reserved to Iranian national after their naturalization in the United States. However the claim for payment of compensation was denied in one case while it was granted, in the other.


122 For more details, see, K.H. Ameli, op.cit98, see also, ee M. Mohebi, op.cit.,88. See also Brower op.cit.76. See also, Aghahosseini , op.cit.103.

authorize suspension of concessions and other obligations." The dispute settlement system primary goal is to ensure that all Members respect multilateral trade rules and encourages Members to make best possible efforts to bring legislation into compliance with the WTO agreements and panel ruling.

In general, there are four phases of WTO dispute settlement: consultation, the panel process, the appellate process, and surveillance of implementation of the results.

Under the DSU, a dispute settlement process begins with a “request for consultations” by the party who is claiming a violation. If consultations fail to provide mutually acceptable outcomes after sixty days, the complaining party then requests the DSB to draw up a panel to resolve the dispute.

Parties can appeal against a panel’s decision to the Appellate Body, which consists of seven individuals appointed by the DSB for four-year terms, which is renewable only for another four-year. The Appellate Body hears appeals in divisions of three Members, but those three Members can consult the other four Members of the Appellate Body before they decide the case.

The last phase of the dispute settlement process is surveillance of the implementation of the decision.

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124. Article 2 of the DSU
125. Article 21 of the DSU
127 See, N. David Palmeter, Petros C. Mavroidis, op.cit. 123 p 105 ff.
The enforcement mechanism or remedies at the WTO system are different with the remedies under international law or arbitration agreements. In case of breach of WTO obligations or wrongful conduct by a party, the WTO system provides mandatory remedies, including the cessation illegal act and non-repetition of the wrongful conduct. However, if the illegality persists, the WTO system can offer compensation as well. Where all those measures fail to secure redress, the Claimant party is entitled to take counter-measures.

5.1. Reference to the Practice of the DSB

In a comparative study of the new dispute settlement mechanism with which was under the law of the original GATT, it is clear that new system has created more definitive and reliable system of trade disputes than the old GATT system. In fact, the DSU provides the panels and Appellate Body sufficient power to resolve all trade related disputes before them. In this regard, panels have inherent power to decide all matters that are inherent to the adjudicative function and have the right to determine the scope of their jurisdiction.

The DSU of the WTO acts as an exclusive dispute settlement mechanism under which Member States are required to solve their disputes solely by recourse to the rules and procedures that govern the settlement of disputes. While, the Appellate Body acts as an appellate court, the WTO panels function more of the arbitral model.

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134. Art. 23.1, DSU

Article 12.1 of the DSU States that, “Panels shall follow the Working Procedures in Appendix 3 unless the panel decides otherwise after consulting the parties to the dispute”. However, as the Appellate Body has determined nothing in the DSU gives a panel the authority to disregard or modify the provisions of the DSU. The Appellate Body has previously emphasized that:

Although panels enjoy some discretion in establishing their own working procedures, this discretion does not extend to modifying the substantive provisions of the DSU. To be sure, Article 12.1 of the DSU says: ‘Panels shall follow the Working Procedures in Appendix 3 unless the panel decides otherwise after consulting the parties to the dispute’. Yet that is all that it says. Nothing in the DSU gives a panel the authority either to disregard or to modify other explicit provisions of the DSU.136

About the doctrine of stare decisis, in the Japan–Alcoholic Beverages Case, the Appellate Body dismissed the panel’s conclusion that the panel reports constitute ‘subsequent practice’ in the sense used in Article 31 of the Vienna Convention on the Law of Treaties, and stressed that they were not binding, except with respect to resolving the particular dispute between the parties to that dispute only.137 This means that previous rulings do not bind panels and in subsequent cases, but they create legitimate expectations, therefore, should be taken into account where they are relevant to any dispute.138

At the same time, however, in the Japan–Alcoholic Beverages Case the Appellate Body recognized that adopted panel reports are ‘an

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138. Ibid, paras 107-108. For more study, see, The WTO Dispute Settlement Procedures, op.cit. 126.
important part of the GATT *acquis*.”139 Thus, in reality, the same as ICJ and other international tribunals, the WTO Panels and Appellate Body’s rulings create legitimate expectations; therefore, those bodies consider their own decisions as precedents.140

The Appellate Body has addressed the doctrine of *stare decisis* in *US-Final Anti-Dumping Measures on Stainless Steel* as well.141 The Appellate Body disapproved the decision of the panel to depart from well-established jurisprudence, and ruled, “absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case”.142

It is notable, that the Appellate Body generally supports the doctrine of *stare decisis* and has ruled that “consists of jurisprudence is valued also in dispute settlement in other international fora”.143

### 5.2. Cause of Action Under the GATT

The provisions of international treaties and contracts highlight issues such as the rights and obligations of the contracting parties. Article XXIII of GATT provides that in case of “nullification or impairment of any benefit accruing under this Agreement”.144 Under Article 3.8 of DSU, and the Appellate Body findings, breach of obligations by a Members States are considered as “prima facie nullification or impairment of benefits”.

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139. Ibid.


142. Ibid, para 160.

143. Ibid, para 160: footnote 313 of the Appellate Body report.

In many cases, the panels and Appellate Body clearly has interoperated the term of non-violation under Article XXIII and the *prima facie* nullification. In the *Japan – Film* dispute between the United States and Japan, the panel considered all arguments and made a general statement about the non-violation remedy within the WTO/GATT legal framework. The panel ruled that:

The non-violation nullification or impairment remedy should be approached with caution and treated as an exception concept.

In spite of the panels and Appellate Body efforts, it has been very difficult to establish a unified and clear set of norms regarding the definition of non-violation nullification and *prima facie* nullification. Nevertheless, Member States still invoke the non-violation provisions, because their ambiguities provide the ground for the parties to call for the panels’ intervention.

In brief, in accordance with the Article XXIII of GATT 1994, “violation complaints” and "non-violation complaints" are the main “causes of action” under the WTO dispute settlement mechanism.

### 5.3. Legal Interest of the Parties

In order, for a court or tribunal to determine whether a party has breached any contractual duties, it will be necessary to determine

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147. Panel Report on Japan - Film, para. 10.36


the “legal interests” of parties; otherwise, a tribunal should dismiss a claim at its outset.\textsuperscript{150}

In the \textit{Monetary Gold} case, Italy filed a case against France, Britain and the United States, requested the ICJ to decide over certain legal questions concerning monetary gold removed by the Germans from Rome in 1943 and found to belong to Albania. The ICJ held that it had no jurisdiction to decide a case where a third State’s “legal interests would not only be affected by the decision, but would form the very-subject matter of the decision”.\textsuperscript{151}

In the \textit{South West Africa} cases, the ICJ decided about the claims brought by Ethiopia and Liberia. The Claimants argued that all members of the League of Nations should be deemed to have legal rights regarding the performance of the Mandate for South West Africa. The Court decided that the Claimants did not have sufficient legal interest to bring a case against South Africa, the Court held:

\begin{quote}
[T]he argument amounts to a plea that the Court should allow the equivalent of an \textit{actio popularis}, or right resident in any member of a community to take legal action in vindication of a public interest. But although a right of this kind may be known to certain municipal systems, it is not known to international law as it stands at present: nor is the Court able to regard it as imported by the "general principles of law" referred to in Article 38, paragraph 1 (c), of its Statute.\textsuperscript{152}
\end{quote}

Article XXIII: 1 of the GATT 1994 and Article 3.7 of the DSU clearly indicate that “a Member has broad discretion in deciding whether to bring a case against another Member under the DSU,” and as the Appellate Body stated in \textit{EC-Bananas} case “a Member is expected to

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\footnotesize

\textsuperscript{151} Case of Monetary Gold Removed from Rome in 1943 (Preliminary Question), Judgment, I.C.J. Reports 1954, p. 32.

\textsuperscript{152} ICJ, South-West Africa cases (Second Phase) (\textit{Ethiopia v South Africa, Liberia v South Africa}), 18 July 1966, ICJ Reports 6, para 88.
\end{flushright}
be largely self-regulating in deciding whether any such action would be ‘fruitful’.”  

With regard to the right of a WTO Member to bring a claim under the GATT 1994, the Appellate Body in *EC-Bananas* agreed with the Panel’s finding and stated, that there is no explicit requirement in the DSU requiring that a Member should have a “legal interest” to request a panel, nor is such a conditions implied in the DSU or in any other provision of the WTO Agreement.  

Thus, the provisions of the WTO agreements, namely Article XXIII of the GATT support this idea that a Member can initiate a dispute before the WTO, if it considers that its benefit is being nullified, impaired, or impeded.  

5.4. **Locus Standi and Amicus Briefs**

With regard to the concept of *Locus Standi*, dispute resolution systems have different rules and procedures to identify the parties, which may bring a case or stand before the dispute settlement body as a claimant. Traditionally, international institutional dispute resolution mechanisms such as ICJ were only open to States.

In international trade, also private parties may not initiate a claim before the dispute body. As a procedural matter in the *EU–Bananas* Case, in its first substantive meeting with the parties on 10 September 1996, the panel decided that the private counsel seeking to represent *Saint Lucia* was not entitled to appear at the panel’s meetings in the case. However, the Appellate Body ruling in the

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154. Ibid, para 132.

155. Ibid. para 133. For more study, see, The WTO Dispute Settlement Procedures, op.citat 126.

156. Art. 34 (1) of the Statue provides that “only States may be parties before the Court.” For more details see, the ICJ Advisory Opinion of 11 April 1949 – ICJ Rep. (1949) p. 174.

EU–Bananas and Indonesia–Autos cases clearly permits governmental representation by private counsel in hearings.\textsuperscript{158} The WTO has also recognized the rights of private parties or organizations to submit \textit{amicus curiae} briefs in support of their positions in international trade disputes to which they are not a party.\textsuperscript{159} The Appellate Body decisions concerning the participation of NGOs as \textit{amicus curiae} in the Shrimp-Turtles litigation is a significant development for parties who wish to submit \textit{amicus curiae} briefs.\textsuperscript{160}

The Appellate Body clarified its position on this issue in the \textit{US–CVDs on Steel}\textsuperscript{161} case as well and ruled:

\begin{quote}
We are of the opinion that we have the legal authority under the DSU to accept and consider \textit{amicus curiae} briefs in an appeal in which we find it pertinent and useful to do so.\textsuperscript{162}
\end{quote}

The issue was part of the Asbestos dispute\textsuperscript{163} as well. In that case and following the panel proceedings, the Appellate Body decided, to invite briefs from all interested sources. In the Appellate Body’s view, its legal authority to invite briefs is based on Article 16 (1) of the Working Procedures for Appellate Review.\textsuperscript{164}

\begin{itemize}
\item \textsuperscript{159} See, e.g. J. Durling, D. Hardin, \textit{Amicus Curiae Participation in WTO Dispute Settlement: Reflection on the Past Decade}, in, Rufus H. Yerxa, Bruce Wilson(eds), Key Issues in WTO Dispute Settlement: The First Ten Years · Page 221, (Cambridge University ,2005), p 19 ff.
\item \textsuperscript{160} United States · Import prohibition of certain shrimp and shrimp products, WT/DS58/AB/R, 12 October 1998.
\item \textsuperscript{161} Appellate Body report on United States · Imposition Of Countervailing Duties On Certain Hot-Rolled Lead and Bismouth Carbon Steel Products Originating in the United Kingdom, WT/DS138/AB/R of 10 May 2000.
\item \textsuperscript{162} Ibid, at 42.
\item \textsuperscript{163} European Communities Measures affecting asbestos and products containing asbestos (DS135/R) and (DS135/R/Add.1). Document inviting briefs: DS135/9.
\item \textsuperscript{164} Art. 16(1) states: “In the interest of fairness and orderly procedure in the conduct of an appeal, where a procedural question arises that is not covered by these Rules, a Division may adopt an appropriate
5. **Efficiency of International Dispute Settlement Mechanisms**

Taking into account the history of international relations and different approaches toward State sovereignty and national interest by the States and the specific nature of economic rules, disputes between States, are inevitable.\(^\text{165}\)

In this regard, State sovereignty and provision of national security may undermine the efficiency of an international *forum*, either arbitration or the WTO panels. The reason for this assumption is that, enforcing an award against a State can present a challenge since States may invoke their national security and national interest to resist enforcement of international awards.\(^\text{166}\)

Different rules and different approaches of international courts and tribunals have led to the creation of an assumption, namely who decides a case or records of panelists and international arbitrators. Therefore, parties to an international dispute, commercial, investment or trade-related cases are very vigilant about the background of an arbitrator or panelist. The parties always consider all judges, panelist and arbitrators’ records when selecting the arbitrators or panelists if applicable.\(^\text{167}\)

In any case, the trend in contemporary international arbitration is strongly towards a uniform set of standards of independence and impartiality of all Members of the tribunals and panels. In fact, all

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\(^3\) See, e.g. G. Born, *op.cit*54.
arbitrators or panelists, including parties' appointed arbitrators, should be independent and impartial in the course of managing and resolving a dispute and the same ethical rules apply to all decision makers without distinction.\textsuperscript{168}

The concept of \textit{Locus Standi} is another major problem in the current international trade dispute system. The GATT and the WTO regulate international trade in goods, services, intellectual property, etc., and decisions of a DSB inevitably have an effect on States, individuals or companies who do transnational business. In this context granting the right to non-state parties to stand before an international judicial body is a remarkable issue in international adjudication.\textsuperscript{169}

Accordingly, the powers and functions of international courts and tribunals substantially differ from those of the past. An example of a remarkable change is the IUSCT’s decision on claims filed by the Iranian and American dual nationals against Iran based on their dominant and effective American nationality. The Tribunal’s interpretative decision in \textit{Case A/18} to the effect that it has jurisdiction over such claims has opened the interesting legal debate among the scholars on the subject matter of dual nationality and \textit{Locus Standi}.\textsuperscript{170}

In this regard, the WTO also needs to launch a comprehensive study about the concept of \textit{Locus Standi} in light of great contributions and involvement of individuals and companies in international transactions. This means that the WTO should introduce rules and


methods to provide private parties with the rights to bring a case before the DSB.\textsuperscript{171}

To say the least, scrutinizing the jurisprudence of international courts and tribunals from a pure fairness and justice perspective, shows that not all outcomes of the international courts or tribunals necessarily can satisfy the parties.\textsuperscript{172} There are many reasons for this understanding, which are beyond the scope of this paper. For example, a legal issue may look the same, but in different cases with different judges or arbitrator, the results could be different. In fact, once a case is filed before an international court or tribunal, the adjudication body is almost reconstituted every time when it deals with a new legal or factual issue, because the applicable law, rules of procedure and the set of international legal obligations of the parties are different in each case and issue before the tribunal.\textsuperscript{173}

Besides, a party’s legal background and its strategies to present the case or to rebut the opponent’s arguments have a profound impact on the outcome of a case.


\textsuperscript{172} In This regard, see, different awards and decision rendered by the IUSCT in almost similar subject. For example, in some cases with dual national claimants the Tribunal rejected a claim by referencing to the Tribunal’s finding in its Decision no: 32- A/18- FT, but in some cases it did not.

Chapter II: International Justice and Rules of Procedure

Justice is the most important virtue of all societies, and any unjust action must be disregarded.\textsuperscript{174} Fair process of national and international litigation is a principle to which all parties are entitled.\textsuperscript{175} The juridical impartiality and an equality of opportunity for all parties to present their case and required evidence is an integral part of any dispute settlement body. It is guaranteed under Article 14 of the International Covenant on Civil and Political Rights (ICCPR), which provides that “everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law”.\textsuperscript{176}

To establish a fair trial, parties to international litigation should not be prejudiced.\textsuperscript{177} In fact, fair procedure is the essential part of all international dispute settlement mechanisms and has a potentially significant impact on the outcome of cases.\textsuperscript{178} As a result, clear, progressive, and updated procedural rules play a crucial role in maintaining justice in international relation.\textsuperscript{179} The procedural law also plays very important role in the course of enforcement of an arbitral award.\textsuperscript{180}


\textsuperscript{175} About the principle of fairness see, e.g. Thomas M. Franck, \textit{Fairness in International Law and Institutions}, (Oxford University Press 1995).


\textsuperscript{178} See, e.g. C.F Amerasinghe, \textit{Evidence in International Litigation}, (Brill 2005) p 16.


1. **Effective Rules of Procedure in International Litigation**

International dispute-settlement mechanisms and standard of evidence are governed by procedural rules that are different from the substantive applicable law to the merits of a dispute.\textsuperscript{181} However, the border between “procedural law” and “substantive law” is not always clear. \textsuperscript{182}

The freedom of parties before international arbitration to choose rules of procedures and substantive law, which apply to merit of a case, is an accepted fact. Therefore, parties can select particular institutional procedural rules\textsuperscript{183} or they can merge different sets of rules such as the IBA Rules on Evidence and the UNCITRAL Arbitration Rules, setting up new rules to govern procedure.\textsuperscript{184}

If the parties decide not to use their right to choose rules, the tribunal has the power to determine the procedural direction it believes appropriate. \textsuperscript{185} In this case, many arbitral bodies such as the IUSCT have developed or modified their own of rules of procedure.\textsuperscript{186}

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Rules concerning evidence and burden of proof before international courts and tribunals are less elaborate than procedural rules of national courts. In fact, due to the legal statute, rules of procedure and legal background of judges and arbitrators of the international dispute-settlement bodies; they may have a different approach to the concept of evidence, burden of proof and discovery. Moreover, due to the diversity of rules of procedure and the preferences of the parties or a tribunal, the concept of evidence could be dealt with differently. For example, the type of evidence to be submitted by a claimant in a dispute before the IUSCT depends on the circumstances of each particular case, as viewed by the tribunal.

This does not prevent the parties before international tribunals to adopt some very general rules of procedures, to govern a dispute-settlement procedure. In any case, rules of procedures of international arbitration contain provisions about evidence and the way the arbitral tribunal can explore the facts and issue an award in a case before it. Indeed, the jurisprudence of most international tribunals such as IUSCT have contributed to the development of rules relating to evidence and burden of proof.

However, to avoid any setbacks in the process of international arbitration the International Law Commission has codified some general rules for the arbitral procedure as Model Rules on Arbitral Procedure.\textsuperscript{192}

1.1. Drafting Rules of Procedure in International Arbitration

A carefully drafted settlement clause in a contract between the parties always provides an adequate and fair method of settling their contractual disputes. Unlike proceedings in institutional settlement bodies such as the ICJ, WTO or European Court of Justice, the parties' freedom to select arbitrators and their freedom to determine the arbitral procedure is fundamental element of arbitration.\textsuperscript{193} Nonetheless, there are different texts of settlement clause that can be inserted into a contract, treaty or even international conventions.

For example, under paragraph 17 of the General Declaration between Iran and the United States\textsuperscript{194} that dispute between the parties may be submitted to arbitration.\textsuperscript{195} Nevertheless, the parties did not determine rules of procedures in the General Declaration, but under Article III of “Claim Settlement Declaration”,\textsuperscript{196} the

\begin{footnotesize}
195. Paragraph 17 states: If any other dispute arises between the parties as to the interpretation or performance of any provision of this Declaration, either party may submit the dispute to binding arbitration by the tribunal established by, and in accordance with the provisions of, the Claims Settlement Agreement. Any decision of the tribunal with respect to such dispute, including any award of damages to compensate for a loss resulting from a breach of this Declaration or the Claims Settlement Agreement, may be enforced by the prevailing party in the courts of any nation in accordance with its laws.
\end{footnotesize}
Tribunal shall conduct its business in accordance with the UNCITRAL rules\textsuperscript{197} except to the extent modified by the Parties.\textsuperscript{198}

Parties often prefer to adopt existing rules to govern the procedural aspects of their disputes, as Iran and the United States did in adopting the UNCITRAL Arbitration Rules\textsuperscript{199} to govern the work of the Tribunal.\textsuperscript{200} Parties can use general guidelines such as the UNCITRAL Arbitration Rules, Rules of Procedure for Arbitration Proceedings (ICSID Arbitration Rules), Rules of Arbitration of the International Chamber of Commerce (ICC)\textsuperscript{201} and the International Bar Association (IBA) new Rules on the Taking of Evidence in International Commercial Arbitration.

International arbitration is a forum that brings together parties and arbitrators from a variety of different legal systems and backgrounds, therefore, the UNCITRAL Arbitration Rules are a helpful tool, but cannot be a final set. However, because the obligatory nature of the arbitration agreement, almost all arbitration rules are silent about the standard of proof, admissibility of evidence, burden of proof. In fact and those issues are left to the judgment of the arbitral tribunal. As a result, parties before international dispute settlement bodies can at any time depart from those guidelines because flexibility is the ultimate objective.

Suffice it to say, that national legal systems and arbitrators backgrounds have impact on the methods of appreciation of evidence in international tribunals. In this regard, Judge \textit{Levi Carneiro} said hat, it is inevitable that all judges in the Court retain some trace of

\begin{itemize}
\item \textsuperscript{197} The United Nations Commission on International Trade Law (UNCITRAL) 1976. at www.uncitral.org
\item \textsuperscript{198} See Jacomijn J. van Hof, Commentary On The Uncitral Arbitration Rules: The Application By The Iran-U.S. Claims Tribunal (Kluwer 1991) pp 103-08
\item \textsuperscript{200} Amended Rules of Procedure of the Tribunal, reprinted in 2 Iran-U.S.C.T.R. p 405 (1983-I)
\item \textsuperscript{201} Article 15 - Rules Governing the Proceedings.
\end{itemize}
their legal education and their former legal activities in their country of origin.202

When the parties decide that the arbitration shall be conducted in accordance with a set of rules of procedure, they and the arbitral tribunal can reach some understanding on procedural issues such as taking and presenting evidence.203

1.2. The Rules of Procedure Before the DSB

The Articles XXII and XXIII were the main Articles related to the dispute settlement mechanism of the GATT 1947. Because of expansion of trade issues, many other trade areas are under the jurisdiction of the DSB as stipulated in Article XXII and XXIII of GATS and Article 64 of TRIPS.204

The dispute settlement procedures were codified in decisions and understandings agreed by the GATT Member States in 1966, 1979 and 1989.205 Dispute Settlement Understanding, is the main mechanism that shall cover all disputes brought under the WTO agreements. There are new features of the WTO dispute settlement system such as compulsory nature, the establishment of the Appellate Body that will drive the WTO dispute settlement system into a judicial model of dispute settlement.206

204. For more details, see, DSU, Appendix 2: Special or Additional Dispute Settlement Rules and Procedures.
As will be discussed in coming chapters, the GATT Article XXIII as a foundation of the dispute settlement system and the DSU have not explicitly defined some procedural rules such as, the *onus probandi actori incumbit*, standard of evidence and proof. However, most of the WTO agreements such as the Anti-dumping Agreement207 (AD) and the Agreement on Subsidies and Countervailing Measures (SCM) illustrate some standard of evidence and proof to initiate an investigation process. Some panel/AB reports also made suggestions about the *onus probandi actori incumbit*, standard of evidence and proof.208

2. Evidence in International Litigation

Evidence in international litigation consists of anything presented in support of claim or assertion or legal issues before a court or tribunal.209 Documents relevant to a dispute can be divided into two categories: favorable and unfavorable. Generally, the party who has favorable documents in its possession produces all requested documents without any problem. Problems may arise when there is a request for documents that are unfavorable to a party at the case.210

2.1. Presenting Evidence in Arbitration

In international arbitration, such as the IUSCT, written evidence, witnesses and arguments may be presented in different form and the tribunal shall determine the admissibility of the evidence.211

208. See, e.g. Appellate Body Report on Canada - Aircraft, para. 38
The Tribunal Rules of Procedure deal with issues related to the evidence and document production. At the request of one of the parties at any stage of the proceedings, the tribunal should hold hearings for the presentation of evidence by witnesses, or for oral argument. In the absence of such a request, the tribunal may decide whether to hold hearings, or whether to determine the dispute solely based on documents and other materials before the tribunal.

Note 4 to the Article 15 of the Tribunal Rules of Procedure states that pre-hearing conference will normally be held by the Tribunal only after the Statement of Defence in the case has been filed. Note five to Article 15 also provides that in special circumstances the tribunal can receive oral or written Statements from the parties or, from any other person who is not a party to the case, if the tribunal first satisfies itself that such Statements are likely to assist it in carrying out its task.

Taking into consideration the circumstances of each case, The Tribunal may hear witnesses at any place it deems appropriate. It may also meet at any place it finds appropriate for the inspection of goods or other property or documents, provided only that the parties give sufficient notice to be present at the inspection.

The rules of procedure before international tribunals such as the IUSCT or other commercial arbitration are usually drafted to minimize the intervention of the national court in the course of the proceedings or in time of enforcement of the Tribunal awards. However, while the standard of the evidence may be the province of the tribunals and arbitrators, the intervention of the national court are subject to the applicable law.

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213. Article 15 (2).
214. Article 16 (2).
215. Article 16 (3).
216. See, e.g. K.H. Ameli, op.cit, p 272.
2.2. Presenting Evidence in Trade Disputes

Presenting evidence to the DSB is usually the same as it is with other international dispute-settlement bodies. However, the jurisprudence produced by the panels and Appellate Body indicate that those bodies have considerable authority to investigate the facts and decide cases based on their own assessment of the facts. The Appellate Body has developed procedural rules for both the panels and the Appellate Body itself. In this regard, the Appellate Body held that:

The thrust of Articles 12 and 13, taken together, is that the DSU accords to a panel established by the DSB, and engaged in a dispute settlement proceeding, ample and extensive authority to undertake and to control the process by which it informs itself both of the relevant facts of the dispute and of the legal norms and principles applicable to such facts. That authority, and the breadth thereof, is indispensably necessary to enable the panel to discharge its duty imposed by Article 11 of the DSU to "make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements."

In fact, panels and the Appellate Body have the power to schedule presentations of Statements and evidence and to decide issues

regarding the burden of proof and the standard of proof. However, the methods and the timeframe of presenting evidence and arguments by the parties to the panel have been illustrated in the DSU and its Appendix 3.

Paragraph 4 of Appendix 3 provides the parties shall transmit to the panel written submissions in which they present the facts of the case and their arguments. However, there are some situations relating to the fact-finding process that have not been explicitly regulated. In that situation, as the Appellate Body held in EC–Hormones, the panels, under the DSU, enjoy a margin of discretion to deal with those situations. The Appellate Body noted:

[T]he DSU, and in particular its Appendix 3, leave panels a margin of discretion to deal, always in accordance with due process, with specific situations that may arise in a particular case and that are not explicitly regulated. Within this context, an Appellate requesting the Appellate Body to reverse a panel's ruling on matters of procedure must demonstrate the prejudice generated by such legal ruling.

In many cases, the Appellate Body has adopted a very clear stand that the parties must be fully forthcoming. In India–Patent Protection, where the Appellate Body, commenting about the United States failure to include one claim in its initial ‘terms of reference’, the Appellate Body noted:

All parties engaged in dispute settlement under the DSU must be fully forthcoming from the very beginning both as to the claims involved in a dispute and as to the facts relating to those claims. Claims must be stated clearly. Facts must be disclosed freely. This must be so in consultations as well as in the most formal

setting of panel proceedings. In fact, the demands of due process that are implicit in the DSU make this especially necessary during consultations. For the claims that are made and the facts that are established during consultations do much to shape the substance and the scope of subsequent panel proceedings.\textsuperscript{222}

According to the Appellate Body, when a party believes that not all evidence and information relating to a claim are before the panel, it should ask the panel to engage in additional fact-finding.\textsuperscript{223}

With respect to time when evidence must be submitted to a panel, Appellate Body stated that neither Article 11 of the DSU nor the working procedures set out in Appendix 3 of the DSU establish any precise time limits for the presentation of evidence. In this regard, the Appellate Body has noted that working procedures do not constrain panels with rules on deadlines for submitting evidence.\textsuperscript{224} However, the Appellate Body has introduced two different stages in a proceeding before a panel: the first stage is the exchange of the first written submissions and the first substantive meeting with the parties, and the second stage is the rebuttal submissions and the substantive meeting with the parties.\textsuperscript{225} Under the Working Procedures in Appendix 3, parties should set out their case in chief, on the basis of submission of supporting evidence, during the first stage. The second stage is generally designed to permit “rebuttals”\textsuperscript{226}

As a general term, the same as other international courts and tribunals, the DSB requires the parties to put forward sufficient evidence to satisfy the panels and the Appellate Body, therefore, a respondent’s measure will be treated as WTO-consistent, until

\textsuperscript{222} Ibid, India - Pharmaceuticals, at para. 94.
\textsuperscript{223} This will be discussed in Part III of this paper.
\textsuperscript{224} Argentina-Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items (Argentina-Import Measures), WT/DS56/AB/R, at para. 80-81.
\textsuperscript{225} Ibid. para. 79.
\textsuperscript{226} Ibid. For more details see, \textit{WTO Appellate Body Repertory of Reports and Awards (1995-2006) & WTO Analytical Index Online} (Evidence).
sufficient evidence is presented to prove otherwise. This means that the usual rules on burden of proof and evidence must be applied, as they reflect a “canon of evidence” accepted and applied in international proceedings.

3. Sources of Evidence

What kind of documentation and materials are admissible as evidence before international courts and tribunals? This question has been discussed in many cases decided by international adjudication bodies.

Most arbitration and institutional rules of procedures determine issues such as the manner, time and number of copies of documents that must be filed by the parties, however, they are silent about the precise rules governing admissibility of evidence, the standard of proof and related issues. Generally, parties do not lay down detailed and clear rules of procedure about the methods that evidence should be presented or whether a specific sort of evidence is admissible or not. In fact, method of submitting and admissibility of documents is a matter that the arbitral tribunal can determine. In any case, it is clear that the parties must be treated fairly and must be given the opportunity to present their evidence and arguments.

Before discussing the standard of evidence and proof, it is more relevant to discuss about the sort of adduced evidence in international litigation. There are different types of evidence that could be submitted. Some rules of evidence apply to all evidence and some are applicable to some of them. Here I discuss general rules of

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228. See, e.g. Articles 2 and its supplementary notes of the Rules of Procedure of IUSCT.

governing the process of presenting all evidence, and rules that relate to specific kinds of evidence such as electronic evidence.

3.1. Documentary Evidence

In international litigation, a court or tribunal may order the parties to submit all documentary evidence they wished the tribunal to consider in connection with the subject and the schedule set forth by the tribunal. The term documentary evidence includes types of written evidence as distinguished from oral arguments and testimonies. There are several sorts of evidence that may be introduced in a trial, which can include all any object including Letters, contracts, deeds, licenses, certificates, tickets, maps.

Should a court or tribunal allow the parties to file voluminous documentary evidence and the written or oral explanations, which require either clarification or technical opinion? On the other hand, can the tribunal indicate in advance the evidence needed to establish prima facie proof of complex facts and exclude the evidence offered or the witness presented or identified?

It must be taken into account that voluminous submission by a party may cause undue prejudice to the other party. In fact, when a party submits, evidence, the opposing party should be provided with enough opportunity to review the authentication and accuracy of that evidence. If there, is a voluminous submission without any explanations or outlines it consume the party or even the tribunal’s time to assess documents.

Nowadays, parties to arbitration expect a more active role from arbitrators in the course of arbitration. In fact, arbitrators are not observers therefore; they may take an active role in the settlement

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230. See, e.g. Amerasinghe, op.cit.178 , p 203.
231. For more details see, Brower op.cit.76. pp183-189.
process to manage the proceeding. The tribunal should manage the parties’ plans for submission and the whole proceeding by determining in advance. Tribunal can instruct the parties to submit only the evidence that the arbitral tribunal considers necessary to establish the *prima facie* proof of particular facts at issue. Then, the tribunal may allow the parties to submit additional documents if necessary.

For example, with respect to proof of the nationality of certain claimants, in *Flexi-Van Case*, the Tribunal decided to simplify and expedite the presentation of evidence and implemented the same approach in the other cases as well. The decisions of the Tribunal in *Flexi-Van* and *General Motors* established an evidentiary principle and play relatively as a jurisprudence to streamline proceedings.

### 3.2. Witness Testimony

To prove a fact or legal point in a dispute, a party can call a witness or submit affidavits or formal statements signed by witnesses. Before giving any evidence, each witness or expert witness shall take an oath, and after that oath, his or her testimony may provide the tribunal with a degree of certainty in the light of the other documentary evidence.

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237. See, e.g. Article 94 ICTY See also Article 64 of Rules of the Court, International Court of Justice.

238. Rules of Procedure for the International Court of Justice (ICJ) Article 64, Notes to Article 25 of the IUSCT Rules of Procedures, ICTY, Rule 90, Testimony of Witnesses, ICC, Rule 66 Solemn undertaking.
However, as Article 90 of the ICTY rules of procedure and evidence provides, “A child who, does not understand the nature of a solemn declaration, may be permitted to testify without that formality, if the Chamber is of the opinion that the child is sufficiently mature to be able to report the facts of which the child had knowledge and understands the duty to tell the truth. The judgment, however, cannot be based on such testimony alone”.

A witness must have personal knowledge about the subject of his testimony, and must have perceived something with his senses that is relevant to the dispute before a court or tribunal. 239 A witness should not express his or her own opinion or draw conclusions from the fact. Therefore, there are significant differences between a witness and expert witness, who is appointed by the tribunal because of his/her experience in a particular subject.240

3.3. Expert Evidence

Expert evidence is very important issue in international disputes. International courts and tribunals may appoint experts, on specific issues to be determined by the court or tribunal and the parties shall give the expert all relevant information or provide for his inspection any relevant documents. An expert in the case can assist the tribunal to determine the issues in dispute, and it is the expert's responsibility to provide the dispute settlement body with explanations and expert opinion understandable by the tribunal.241

In the course of the fact-finding process, an international court and tribunal usually search for all facts and legal points, which are

240. For more study see, Roth, Marianne. False Testimony at International Arbitration Hearings Conducted in England and Switzerland – A Comparative View, 11 J. INT'L ARB. 5 (Mar. 1994).
relevant and significant. In this regards, a tribunal shall be able to assess all documents, witness and use an independent expert’s opinion if necessary.

For example, under Article 62 of the Rules, the ICJ at any time may call witnesses, under Article 50 of the Statute and Article 67 of the Rules it can appoint an expert to give an expert opinion.

Similar to the ICJ the IUSCT rules, mainly Article 15 (2) Article 16 (2) Article 25 (2) and Article 27, empower the IUSCT to entrust any individual, or organization with the task of carrying out an enquiry to give an expert opinion or Statement. For example, in Ebrahimi Case No 44/45 the Tribunal appointed an expert to provide the Tribunal with a report about the value of the Claimants’ shareholding interest in a private joint stock company. In Starrett Housing Corp. Case No 24 the tribunal appointed an accounting expert to assist in the valuation of damages claimed by Starrett with respect to a housing development. In many others cases, the Tribunal appointed or for some reasons such as untimely request, the tribunal refused to appoint an expert.

Parties to the dispute may even ask the dispute-settlement body to appoint an expert to furnish it with additional information. Article 289 of the United Nations Convention on the Law of the Sea (UNCLOS), clearly indicates that, in any dispute involving scientific or technical matters, a court or tribunal exercising jurisdiction under this section may, at the request of a party or proprio motu, select in consultation with the parties no less than two scientific or technical experts, to sit with the court or tribunal but without the right to vote.

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244. Id. at PARA, 11
246. See, Brower op.cit.76. p 198
In the *Gulf of Maine* case, the parties requested the ICJ to appoint a technical expert nominated jointly by them to assist the chamber with, *inter alia*, preparing the description of the maritime boundary and some other issues in that case. The Court appointed the expert and his technical report was annexed to the final judgment.\(^{247}\)

In any event, experts shall be independent and enjoy the highest reputation for fairness, and before entering upon their duties, such experts shall make a solemn declaration in a public setting.\(^{248}\)

### 3.3.1. Refusal to Appoint an Expert

International tribunals such as the IUSCT have the authority to appoint an expert; however, the parties' right to ask the court or tribunal to appoint an expert is not absolute.\(^{249}\) International courts and tribunals exercise their power about appointing of an expert, by considering the circumstance of each case.\(^{250}\)

While the ICJ has appointed experts in the *Corfu Channel* and *Gulf of Maine* cases, the Court refused to uses its powers under Article 50 to appoint expert to evaluate some evidence in some other cases. In this regards, Judge Oda in his Separate Opinion in *Kasikili, case*, challenged the Court’s practice for not using its powers under Article 50 to obtain an expert opinion.\(^{251}\) For example, the Court refused request from Nicaragua, and noted that although it has the power, to appoint any individual or a group of judges, but

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\(^{248}\) See Article 15 of Rules of the Tribunal (ITLOS/8).


\(^{250}\) Brower op.cit.76. p200 ff

\(^{251}\) Botswana, v, Namibia Judgment [1999] ICJ Reports, para 61 (Sep Op Judge Oda). For more references, see also BIICL Project, Evidence before International Courts and Tribunals (ICJ), by A. Riddell and B.Plant.
it had all documentary materials from various sources on which to base its decision on the merits. The Court held that:

In this context, the Court has the power, under Article 50 of its Statute, to entrust "any individual, body, bureau, commission or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion", and such a body could be a group of judges selected from among those sitting in the case. In the present case, however, the Court felt it was unlikely that an enquiry of this kind would be practical or desirable, particularly since such a body, if it was properly to perform its task, might have found it necessary to go not only to the applicant State, but also to several other neighboring countries, and even to the Respondent State, which had refused to appear before the Court.²⁵²

In many cases, the IUSCT has refused to appoint experts as well. In Riahi Case No 485,²⁵³ the Claimant requested the tribunal to appoint an expert pursuant to Article 27(1) of the tribunal rules to ascertain the value of the properties at issue.²⁵⁴ The Claimant urged the tribunal to do it promptly following the issuance of an interlocutory award establishing Iran’s liability for any or all of the nine claims at issue.²⁵⁵ On 26 April 1996, the Respondent filed its comments on the claimant’s request and requested the Tribunal to reject the claimant’s request.²⁵⁶ By its Order of 2 May 1996, the Tribunal decided that it was not appropriate to accept the Claimant's late-filed request to bifurcate the proceedings. Furthermore, the Tribunal did not find it necessary to appoint an expert at that stage of the proceedings.²⁵⁷

²⁵⁴. The Claimant filed letter, on 11 April 1996 Doc No 118.
²⁵⁶. Ibid Doc No 120
²⁵⁷. Ibid Doc no 122.
In *Rockwell* Case No 430, the Respondent called the Article 27 of the tribunal rules, and requested the appointment of an expert to inspect and visit the project sites, but the tribunal refused to appoint an expert and denied all of the Respondent's requests.\(^{258}\)

In *PepsiCo* Case No 18, \(^{259}\) the tribunal rejected the Respondent's request to appoint an expert to determine the value of the shares of the Zamzam Companies. In that case, the Tribunal found that the Respondent had not sufficiently explained or substantiated that request. The Respondent submitted only an affidavit of the auditor of the Foundation for the Oppressed Accounting Institute that was unsupported by any financial Statements or specific analysis. From the Tribunal's viewpoint that evidence was inadequate to support the Respondent's allegations and did not form a sufficient basis to warrant the appointment of an expert. The Tribunal noted that, the Respondents did not pursue or offer further evidence in support of these allegations. In view of the foregoing, the tribunal held that there was no need to grant the request for the appointment of an expert, or for the production of further documents.\(^{260}\)

The jurisprudence of international tribunals demonstrates that even where they have not been expressly granted the right to appoint an expert, they can refer the matter to an expert if necessary.\(^{261}\)

### 3.3.2. Expert Evidence Before the WTO

Article 13: 1 and 13:2 of the DSU clearly authorizes the panel to seek information and technical advice from any individual or body, which it deems appropriate, and to consult experts to obtain their opinion on certain aspects of the dispute. The parties may also

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\(^{260}\) Ibid, Award No 260, Section 3.

request, but the panel may deny such request. However, in the light of fair procedure a panel may not refuse a party's request to appoint experts without reasons, otherwise, it may undermine the legitimacy of the panel. In some agreements, e.g., the Sanitary and Phytosanitary Measures (SPS) agreement requires panels to seek the opinions of experts therefore; a panel shall appoint an expert. Article 11.2 of SPS States:

In a dispute under this Agreement involving scientific or technical issues, a panel should seek advice from experts chosen by the panel.

Paragraph 2 of Appendix 4 of the DSU restricted an expert review group to “persons of professional standing and experience in the field in question”. Paragraph 3 of Appendix 4, States that all experts shall serve in their 'individual capacities' and citizens of the parties to the dispute shall not serve without the joint agreement of the parties “except in exception circumstances when the panel considers that the need for specialized scientific expertise cannot be fulfilled otherwise”. Paragraph 4 of Appendix 4 provides that “Expert review groups may consult and seek information and technical advice from any source they deem appropriate”. The Rules of Conduct for the panel and Appellate Body Members also apply to experts appointed by the panels. The main principle of these rules is that experts “shall be independent and impartial, shall avoid direct or indirect conflicts of interest and shall respect the confidentiality of proceedings”.

There are still questions and issues about who can be appointed as an expert and how and when an expert opinion should be obtained. The focus of this thesis is the issue of document production, and it is beyond its scope to deal with expert evidence in more details.

262. See, The WTO Analytical Index Online: Art 13.2
264. WTO doc WT/DSB/RC/1, dated 11 Dec 1996
3.3.3. Expert Opinions

In many cases, courts and tribunals receive expert opinions from both sides; however, the admissibility of expert evidence is subject to the relevancy and reliability of those evidences. 265

When there is scientific or technical issue, which is outside the experience and knowledge of an arbitrator or judge, an expert's opinion can furnish the tribunal with scientific information. In that situation, a tribunal may not refuse to call a qualified expert witness. For example, in a patent dispute, technical expert is an essential element to understand the issue. It is the same in many other scientific and technical cases before international courts and tribunals. Certainly, all expert opinions must be based upon sufficient facts or data.

3.4. The Impact of Technology and Electronic Evidence

In the contemporary world, electronic evidence is quickly becoming a central part of all litigations. 266 Electronic evidence has been broadly defined as information created, stored or transmit in a digital format in a computer or digital tools to accomplish a task. 267

265. In the ‘Camouco’ Case before ITLOS, the Respondent, France, valued the arrested vessel at FF 20,000,000 but, Panama, valued the arrested vessel at only FF 3,717,571. France government did not present evidence to substantiate its submission about the value of the vessel while Panama supported its arguments and valuation with expert evidence. The Tribunal ended up imposing a bond of FF 8,000,000 francs. See the ‘Camouco’ Case No 5, (Panama v. France), Judgment of 7 February 2000 at [64]-[70] &[74].
Most people use electronic means to create, store, transmit, or even negotiate a deal with little thought that there are traces, which can be used as evidence. Nowadays parties before courts and tribunals, use electronic technology to present their evidence and substantiate their claims, which in many cases there is less paper evidence and more e-documents. There are many high-profile cases and issues regarding electronic information. For example, some banks and companies have settled multibillion-dollar cases when the prosecutor disclosed e-mails and other electronic evidence about the plaintiff’s business.

In the course of international litigations, parties usually request courts and tribunals to compel the other party for production of documents; including electronic information in hopes that such requests will produce evidence that can assist their claims. The IUSCT for example, has resolved many disputes over high-tech contracts, in which, the parties submitted plenty of data, microfiche and computer printouts as evidence. An example is Haris Case No 409, which was about a contract forming part of the so-called ‘IBEX' project, the Iranian Air Force program in the mid-1970s that sought to modernize and expand Iran's military electronic intelligence system. The various IBEX contractors commissioned to provide electronic equipment and technology to train personnel to operate and to maintain the equipment, to construct facilities for training, data collection and data analysis, and to expand logistic services.

270. See, e.g. Susan J. Silvernail, Electronic Evidence: Discovery in the Computer Age, 58 The Alabama Lawyer (May 1997), 176, 177.
The parties filed several documents including computer printouts, microfiches, and data analyses. The Tribunal always received and filed parties’ documents without considering their format and nature, however, it provides the other parties with the opportunity to review and comment on those submissions. In the *Haris* Case, the Tribunal did not decide the admissibility of the submitted document, but it reserved its right to decide about the admissibility of some contested electronic evidence until after the hearing.  

I brief, the Tribunal's jurisprudences are in conformity of this fact that the tribunal did not disregard parties’ documents based on their format, rather when it admits documents, the Tribunal review all submitted materials and issues awards on information derived from those submissions.\(^\text{274}\)

\(^{273}\) By order of 25 July 1986, the Tribunal invited the Respondents to reply to the Claimant’s Pre-hearing Summary of Evidence and Appendix.

\(^{274}\) Ibid, *Haris* case, p. 86.
Chapter III: Parties’ Responsibilities and Evidentiary Burdens in International Litigation

The mere causation of damage to a party in international law does not by itself, means the responsibility of the person.\textsuperscript{275} At the same time, under some circumstances a person can be responsible for acts or damages, which are not prohibited by international law.\textsuperscript{276}

When a claim is pending before a court or tribunal, the forum follows the rules of procedure and decides the case based on the evidence that has been presented and in some cases from events surrounding a case. Courts and tribunals are authorized also to draw adverse inferences from the silence of a party in the course of proceeding.\textsuperscript{277}

In trade disputes arising from the WTO agreements also, determination of the Respondent responsibility depends on the circumstance of the case and the DSB power and discretion. A panel or tribunal may order both claimants and respondents to provide it with certain trade data, evidence and interpretation.\textsuperscript{278}

In this chapter, I, briefly discuss burden of proof, who must shoulder the burden of proof and an alternative allocation for the burden of proof.


\textsuperscript{278} See, e.g, Pauwelyn, J. \textit{Evidence, Proof and Persuasion in WTO Dispute Settlement · Who Bears the Burden}, 32 (Vol 1 No2) Journal of International Economic Law, pp 242-244.
1. **Burden of Proof**

In any system of dispute settlement, the concept of burden of proof and the standard of evidence are the main elements for determining the facts and legal points in a dispute. Burden of proof in international litigation means that parties who claim or raise a counterclaim shall substantiate their assertions by presenting enough evidence or arguments to prove their points.\(^{279}\)

Some of the international rules of procedure contain provisions about the burden of proof, e.g. Article 19 of the AAA Rules\(^{280}\) and the Article 24 (1) of the UNCITRAL Rules provides that each party bears the burden of proving the facts relied on to support its claim or defense.\(^{281}\)

Therefore, it is the duty of each party in a dispute to prove its claims in accordance with the applicable rules of procedure and the standard of proof, by a tribunal.\(^{282}\) In any case, the party who alleges a fact should present evidence to establish its claim or counterclaim.\(^{283}\)

In *Parker case*, the Mexico/United States General Claims Commission ruled that an unexplained failure to produce material evidence ordinarily within the knowledge of one of the parties could

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280. Article 19 of the American Arbitration Association (AAA) International Arbitration Rules states that: Each party shall have the burden of proving the facts relied on to support its claim or defense.


282. See, Kazazi, op.cit.277. p 30-40

be taken into account by a tribunal in reaching a decision.\textsuperscript{284} The commission ruled that:

The Commission denies the “right” of the Respondent merely to wait in silence in cases where it is reasonable that it should speak.\textsuperscript{285}

In fact, every legal system, rules of procedures and jurisprudence of international courts and tribunals recognize the rule of \textit{actori incumbit probatio}, which remains, on the party putting forward a claim or counterclaim, to establish all elements of fact and law to the satisfaction of the court or tribunal.\textsuperscript{286} When a party brings a claim against other party, he should establish all elements of law and fact.\textsuperscript{287} In this respect Bin Cheng, stated that:

With regard to the incident of the burden of proof in particular, international judicial decisions are not wanting which expressly hold that there exists a general principle of law placing the burden of proof upon the claimant, and that this principle is applicable to international judicial proceedings.\textsuperscript{288}

The issue of establishing a point by someone who bears the burden of proof has been explicitly elaborated by many international courts and tribunals. The ICJ in the \textit{Nicaragua} Case, stated that:

Ultimately, however it is the litigant seeking to establish a fact, which bears the burden of proving it.\textsuperscript{289}

\begin{itemize}
\item \textsuperscript{285} Ibid at 41.
\item \textsuperscript{286} S. Rosenne, op.cit\textsuperscript{173}. p 580. See, Kazazi, op.cit.\textsuperscript{277}.pp 232-3.
\item \textsuperscript{287} See, Kazazi, op.cit.\textsuperscript{277}.pp 54-66. and pp116-117.
\item \textsuperscript{288} See, Bin Cheng, \textit{General principles of law as applied by international courts and tribunals}, (Cambridge: Grotius\textsuperscript{1994}) p 327.
\item \textsuperscript{289} Case Concerning Military and Paramilitary Activities in and against Nicaragua (\textit{Nicaragua v. United States of America}), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, p. 437, para. 101.
\end{itemize}
The ICJ, however, illustrated the concept of proof in several other cases, including the Temple of Preah Vihear case where the Court decided whether Cambodia or Thailand had sovereignty over the said temple:

As concerns the burden of proof it must be pointed out that though, from the formal standpoint, Cambodia is the plaintiff having instituted the proceedings, Thailand also is a claimant because of the claim which was presented by her in the second Submission of the Counter-Memorial and which relates to the sovereignty over the same piece of territory. Both Cambodia and Thailand base their respective claims on a series of facts and contentions which are asserted or put forward by one Party or the other. The burden of proof in respect of these will of course lie on the Party asserting or putting them forward.\textsuperscript{290}

1.1. Elements of Burden of Proof

In a dispute settlement process, the procedural questions are: Who has the burden of evidence and proof? Which party must present the factual of a claim and which party should submit the required evidence to convince the tribunal that its claim about the issue should be accepted as the truth?\textsuperscript{291} The burden of proof involves two main elements: the burden of producing enough evidence, and the burden of persuasion to prove that all points asserted by a party are true.\textsuperscript{292}

Therefore, the burden of proof may fall on the Respondent if it claims a fact or legal point in response to the allegations presented by the claimant. In this regard, the Permanent Court in the Greece v. Britain case discussed the issue of burden of proof and ruled:

\begin{flushleft}
\textsuperscript{290} Cambodia v Thailand, judgment of 15 June 1962, ICJ Reports at I5-16 (1962).
\end{flushleft}
In these circumstances, the Court considers that it is for the Respondent to prove that the concessions are not valid\textsuperscript{293}

The Mexico/United States General Claims Commission in the \textit{Parker} case said that:

While ordinarily it is incumbent upon the party who alleges a fact to introduce evidence to establish it, yet before this Commission this rule does not relieve the Respondent from its obligation to lay before the Commission all evidence within its possession to establish the truth, whatever it may be.\textsuperscript{294}

The Commission held that the other party also should offer its own evidence. The Commission said that:

[I]t is proper to here point out that the parties before this Commission are sovereign Nations who are in honor bound to make full disclosures of the facts in each case so far as such facts are within their knowledge, or can reasonably be ascertained by them.\textsuperscript{295}

To carry its burden, a claimant must offer sufficient evidence to prove the truth of its claim. In fact, the party having the burden of proof must not only bring evidence in support of its allegations but should also show that the document is reliable.\textsuperscript{296}

The burden of producing evidence rests initially on the party having the burden of evidence to submit enough evidence in order to convince the court to consider the claim. However, when the Claimant has put in a \textit{prima facie} case, he avoids the possibility that the court dismisses the claim. The jurisprudence of international


\textsuperscript{296} Bin Cheng op.cit. 288, p.302 ff. See Kazazi, op.cit.277.pp.129-133
courts and tribunals support the fact that subject to the standard of proof required in a case the burden of producing evidence could be satisfied by a presumption or an admission.297

When a claimant files a claim against a respondent, it would initially have both the burden of proof and the burden of persuasion. However, by establishing a *prima facie* case the burden of producing evidence shifts to the Respondent who should rebut the evidence and argument presented by the claimant. If the Respondent fails to rebut the evidence, the tribunal should decide against it. To say the least, the burden of persuasion always remains with the Claimant, until the case is concluded by the court or tribunal.298

1.2. Burden of Proof in the Practice of the IUSCT

The manner in which evidence is managed and submitted by the parties before the Tribunal is the same as other courts and tribunals. As an international tribunal, the IUSCT is not allowed to make the national rules or judicial practice of one party prevail over the rules and practice of the other.299 The burden of proof upon parties before the IUSCT is specified in Article 24, of the Tribunal Rules. According to Article 24:

1. Each party shall have the burden of proving the facts relied on to support his claim or defense.
2. The Arbitral Tribunal may, if it considers it appropriate, require a party to deliver to the Tribunal and to the other party, a summary of the documents and other evidence that that party intends to present in support of the facts in issue set out in his Statement of claim or Statement of defense.
3. At any time during the arbitral proceedings, the Arbitral Tribunal may require the parties to produce documents,

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297. For more study, see Kazazi, op.cit.277.pp.23-26 and 31-38,
298. Brower op.cit.76. p185. See also Kazazi, op.cit.277. 23-26 and 31-42
exhibits or other evidence within such a period of time as the Tribunal shall determine.

This Article is broad enough to include all types of burden, namely, the evidentiary burden or the burden of persuasion. Further, the Article refers to a party, either the Claimant to prove his claim or the Respondent to prove the facts relied upon to support his response or rebuttal.300

In its Award of 6 May 1992 in Case A/15, the Tribunal stated, “each Party shall have the burden of proving the facts relied on to support its claim of defense concerning the compensation at issue”.301 In Pointon v. Iran, the Tribunal pointed out that “according to Article 24 paragraph 1 of the Tribunal Rules each party has the burden of proving the facts relied on to support his claim or defense”.302

The standard of evidence and proof depends on the circumstances of a case. After the Claimant has met its burden by establishing a prima facie case to support its claim, the Tribunal may find that the Claimant is entitled to any compensation, but if a claimant fails to meet its burden of proof, the Tribunal normally dismisses the claim.

1.3. Burden of Proof Before the WTO

The GATT Article XXIII and the DSU have not clear definition about allocation of burden of proof. If fact, the same as other international rules of procedure, the DSU is silent about the requirement of burden of proof.303 As a result, panels and Appellate

303. Article 10.3 of the Agreement on Agriculture addresses the question of the burden of proof. See Panel Report, Canada - Measures Affecting the Importation of Milk and the Exportation of Dairy Products, WT/DS103/R, WT/DS113/R, adopted 27 October 1999, at para 7.33. See also, Rutsel Silvestre J. Martha,
Body have discretion to determine about allocation of burden of proof, standard of proof and presentation of evidence. 304

Under Article 3.8, of DSU in case of an infringement of the obligations assumed under WTO agreements, the action is considered a prima facia case of nullification or impairment. As this article provides, there is normally a presumption of breach of the rules therefore, it shall be up to the party against whom the complaint has been brought to rebut the claim. 305 At the same time, many panel reports also follow this general principle that a party who claims the violation of an international obligation carries the burden to prove that such a violation occurred. 306

The Appellate Body also upheld the principle that “the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defense”. 307

In Japan–Taxes on Alcoholic Beverages, when addressing the claim under GATT Article III: 2, first sentence, the panel noted that:

[Complainants have the burden of proof to show first, that products are like and second, that foreign products are taxed in excess of domestic ones. 308

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306 See, e.g. Measures on Animal Feed Proteins, adopted on 14 March 1978, BISD 25S/49, para. 4.21; In Argentina - Ceramic Tiles, the panel ruled that “Article 3.8 of the DSU thus provides that there is a presumption that benefits are nullified or impaired – i.e., there is a presumption of “harm” – where a provision of the Agreement has been violated. Article 3.8 of the DSU also provides for the possibility that the Member found to have violated a provision may rebut the presumption” paras. 6.105. WT/DS189/R 28 September 2001.

With respect to the allocated the burden of proof under Article under GATT Article III, the panel made clear that:

[T]he complainants have the burden of proof to show first, that the products concerned are directly competitive or substitutable and second, that foreign products are taxed in such a way so as to afford protection to domestic production.309

In *United States Measure Affecting Imports of Woven Wool Shirts* the Appellate Body held that it is up to India to provide evidence and argument sufficient to establish a presumption of violation by the United States and then it was up to the United States to bring evidence and argument to rebut that presumption.310 The Appellate Body referred to general rule of international law about allocation of burden of proof and finally affirmed the panel’s conclusion and held that:

We find it difficult, indeed, to see how any system of judicial settlement could work if it incorporated the proposition that the mere assertion of a claim might amount to proof. It is, thus, hardly surprising that 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.311 Also, it is a 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 defense312

309. Ibid., para. 6.28.
311. The footnote to this sentence refers to Kazazi, op.cit.277,p 117.
312. Appellate Body Report at 14. The Appellate Body then referred to a series of GATT 1947 cases supporting the proposition that the burden of establishing a violation under GATT 1947 was on the complaining party.
Considering the special feature of the WTO system, the issue of allocation of burden of proof and evidentiary obligation of the parties before the Dispute Settlement Body, are the same as other international courts and tribunals. As was discussed, a *prima facie* case is a requirement for cases before the WTO and in the absence of effective refutation, a panel rules in favor of the party presenting the *prima facie* case. Therefore, the complaining party is responsible for providing evidence and proof and must establish a *prima facie* case of inconsistency or impairment, it is then for the responding party to rebut it. In this regard, one panel report held as follows:

In implementing the compensation provision of Article XXIII: 2, the Contracting Parties would, therefore, need to know what benefits are accruing under the Agreement, in the view of the country invoking the provisions, had been nullified or impaired, and the reasons for this view. In cases where there is a clear infringement of the provisions of the General Agreement, or in other words, where measures are applied in conflict with the provisions of GATT and are not permitted under the terms of the relevant protocol under which the GATT is applied by the contract party, the action would, *prima facie*, constitute a case of nullification or impairment and would *ipso facto* require consideration of whether the circumstances are serious enough to justify the authorization of suspension of concessions or obligations. While it is not precluded that a *prima facie* case of nullification or impairment could arise even if there is no infringement of GATT provisions, it would be in such cases incumbent on the country invoking Article XXIII to demonstrate the grounds and reasons of its invocation. Detailed submissions on

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313. It may be noted in this connection that the status of a measure (that is, whether or not it is consistent with GATT) is not to be affected by a waiver decision taken subsequently. In fact, Decisions taken under Article XXV:5 granting waivers from GATT obligations have normally expressly provided for the continued validity of the procedures of Article XXIII in respect of the otherwise "waived" obligations (cf. inter alia, BISD, Third Supplement, pages 35 and 41; Eighth Supplement, page 22).
the part of that contracting party on these points were therefore essential for a judgment to be made under this Article.314

However, once a complaining party proves that a measure infringes a WTO Agreement, Article 3.8 of the DSU provides that the action should be considered *prima facie* to constitute a case of nullification or impairment, therefore the burden of proof falls on the defending party to prove otherwise. Recalling Article XXIII: 1(b), and Article 26.1(a) of the DSU, the dispute settlement system is also available to a party, in case of non-violation nullification and impairment, when a party finds that a trade measure of another country is denying benefits to which it is entitled. However, in a case of non-violation nullification or impairment, the complaining party bears the burden of providing a detailed justification to prove its claim.315

### 1.4. Burden of Proof and *Jura Novit Curia*

Under a well-known principle of *jura novit curia*, the parties do not need to prove the applicable law to their case, because “the court knows the law”. As a result, it is the responsibility of the adjudicators to discover the facts and apply the relevant law in a case.316

This means that the burden of establishing or proving rules of international law cannot be imposed upon the parties because the law is within the knowledge of the court or tribunal.317

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The parties’ responsibility to prove the law and degree of agreement between the parties as to the content of the applicable law has been discussed by the ICJ in several cases including the Nicaragua case.

In the Nicaragua case, the Court ruled that under the principle of *jura novit curia*, the Court has responsibility to determine and apply the law. In that case, the Court recognized that it should determine what rules of customary international law are applicable and referred to the principle of *jura novit curia*. 318 The court noted that: “For the purpose of deciding whether the claim is well founded in law, the principle *jura novit curia* signifies that the Court is not solely dependent on the argument of the parties before it with respect to the applicable law”. 319 The Court quoted its finding in the Fisheries Jurisdiction cases, which is as follows:

The Court ..., as an international judicial organ, is deemed to take judicial notice of international law, and is therefore required in a case falling under Article 53 of the Statute, as in any other case, to consider on its own initiative all rules of international law which may be relevant to the settlement of the dispute. It being the duty of the Court itself to ascertain and apply the relevant law in the given circumstances of the case, the burden of establishing or proving rules of international law cannot be imposed upon any of the parties, for the law lies within the judicial knowledge of the Court. 320

However, there are exceptions to the principle of *jura novit curia*. When a party relies on local law and regulations, he should carry the burden of proving it and provide the tribunal with the text of the cited laws or decisions. 321

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1.4.1. National Law and *jura novit curia*

The reality is that in the international litigation, a tribunal may limit itself to the material presented by the parties, but evidence and information could come to a tribunal by all means, which is not contemplated by the rules of procedure. In a case where municipal law is the applicable law of the contract, it does not fall within the *Jura novit curia*, and must be proved by the party relying upon it.322

Therefore, invoking national laws and regulations before international arbitration or WTO dispute settlement system is a matter of fact not law. In that situation a party cannot expect a judge or arbitrator to provide legal interpretation of municipal law base on the principle of *jura novit curia*.323

1.4.2. Responsibility for Clarifying the Relevancy of National Law Before the IUSCT

The IUSCT has ruled that parties are responsible for clarification of law and regulation in the case. In *Mohtadi Jahangir and Mohtadi Jila*, Case No. 271,324 the subject of burden of proof was discussed when the Tribunal reviewed claims regarding the Shahsavar properties. The Respondent argued that the Claimant must have acquired ownership of the Shahsavar property by means of Iranian legislation (Lands Grant Act 1979). The Respondent argued that in order for the Claimant to have been able to own the property, the forestland must have been developed into farmland or similarly cultivated land before 1971. Consequently, it argued that in 1979, when the Lands Grant Act was passed, the Shahsavar property would no longer have been wooded land. The Tribunal in its award

323. Kazazi, op.cit.277.t pp 47-49.
described the Respondent’s explanation plausible. The Tribunal faced with a somewhat ambiguous text of Iranian legislation, while did not have at its disposal adequate information to determine the status of the claimant’s property from an Iranian legal point of view. More importantly, it was unclear to the Tribunal what the scope of the definition of ‘woodlands’ in the Lands Grant Act was. For instance, it was unclear whether the improvements admittedly existing on the property would have removed the Shahsavar property from the category of ‘woodlands’. Faced with this ambiguity, the Tribunal stated that:

The Tribunal usually would view the responsibility for providing a complete and persuasive account of Iranian legislation as falling upon the Respondent. This is because the Respondent is surely better positioned than a claimant to explain the meaning and effect of its own laws. Especially where the legislation is confusing and its scope ambiguous, as in the case of the Lands Grant Act, the Respondent may not confine itself to a mere assertion that a particular legislation does not apply.

However, the Tribunal determined that the burden of proof on the claimant's side is to "demonstrate with clarity the details that bring his property within the scope of the legislation that allegedly expropriated his property." Finally, the Tribunal dismissed the claims regarding the Shahsavar property because the Claimant failed to meet his burden of proof in this respect.

1.4.3. *Jura Novit Curia* Before the WTO

As with other international courts and tribunals, it is the WTO DSB’s responsibility to ascertain the facts and apply the relevant

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325. Ibid, p 150. para 80-2
326. Ibid, p 151.
327. Ibid.
328. Ibid. at 160.
law in the given circumstances of the each case. In the EC Tariff Preferences Case, the Appellate Body clearly indicated that:

We are, therefore, of the view that the European Communities must prove that the Drug Arrangements satisfy the conditions set out in the Enabling Clause. Consistent with the principle of jura novit curia, it is not the responsibility of the European Communities to provide us with the legal interpretation to be given to a particular provision in the Enabling Clause; instead, the burden of the European Communities is to adduce sufficient evidence to substantiate its assertion that the Drug Arrangements comply with the requirements of the Enabling Clause.

The responsibility of the adjudicator is clear under Article 11, of the DSU, which requires the WTO Panels to make an objective assessment of matters before them, including the facts of the case and the applicability and conformity with the covered agreements. In order to discharge this duty, and make an ‘objective assessment of the matter’ as required by Article 11 of the DSU, the panels have a considerable range of authority and duties with respect to the burden of proof.

In principle, a member's laws and regulations should be considered as WTO-consistent until proven otherwise. However, if a member claims that another member's law is inconsistent with the covered agreements under WTO that party bears the burden of producing evidence as to the scope and meaning of such law to substantiate that claim. The nature and extent of the evidence required to discharge the burden of proof will vary from case to case. The Appellant Body held in US–Carbon steel that:


The party asserting that another party's municipal law, as such, is inconsistent with relevant treaty obligations bears the burden of introducing evidence as to the scope and meaning of such law to substantiate that assertion. Such evidence will typically be produced in the form of the text of the relevant legislation or legal instruments, which may be supported, as appropriate, by evidence of the consistent application of such laws, the pronouncements of domestic courts on the meaning of such laws, the opinions of legal experts and the writings of recognized scholars.333

Relevant to this discussion, it should be said that a claimant must identify in its submissions the relevant legislations. The Appellant Body in Canada–Wheat held that:

In our view, it is incumbent upon a party to identify in its submissions the relevance of the provisions of legislation the evidence on which it relies to support its arguments. It is not sufficient merely to file an entire piece of legislation and expect a panel to discover, on its own, what relevance the various provisions may or may not have for a party's legal position. We are not satisfied that the United States argued the relevance before the panel of the various provisions of the Canadian Wheat Board Act on which it now relies. ... Therefore, we do not agree with the United States that the panel disregarded facts relevant to the independence of the CWB and we see no failure by the panel in this respect to comply with its duty under Article 11 of the DSU.334

1.5. The Allocation of the Burden of Proof

All international courts and tribunals operate with the general principle that the party, who asserts a fact, whether as claimant or

333. Id para 157
respondent, is responsible for providing proof thereof. Therefore, the rules of procedures and tribunal’s jurisprudence indicate a party's duty of proving facts and law in legal proceedings.

However, allocating the burden of proof can change under some circumstances but as general principle it remains with the party seeking for relief and, the burden of producing evidence may shift between the parties.

2. Shifting the Burden of Proof

There is no clear definition and standard for allocating the burden of proof, but as a general principle in dispute before international courts and tribunals the Claimant has the initial burden of proof and persuasion. In fact, the Claimant is the one who is seeking affirmative relief in a dispute. Now the point is; what is the margin and extension of burden of proof and evidence, which must be carried out by a party to prove facts and legal points in a case?

There are situations where, the burden of proving facts and the burden of evidence may shift to the responding party to rebut other party’s evidence and arguments. In this regard, the Commission in the *Parker* case held that:

[W]hen the Claimant has established a *prima facie* case and the Respondent has offered no evidence in rebuttal the latter may not insist that the former pile up evidence to establish its allegations.

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337 See, e.g. Hay .Bruce L op.cit.279, pp 651-62

338. See, Amerasinghe, op.cit.178, pp. 6-88, 369 ff.
beyond a reasonable doubt without pointing out some reason for doubting.\textsuperscript{339}

This means that the party who is seeking affirmative relief in a dispute has the responsibility to prove its assertions and bears the burden to produce enough evidence to prove its basic \textit{prima facie} case. When, the claimant, discharge its burden of evidence to the extent that the tribunal considers \textit{prima facie} proof of the case, then it creates an evidentiary obligation upon the Respondent to present evidence and to rebut the claim. In fact, an evidentiary burden shifts between parties over the course of procedure.\textsuperscript{340}

\subsection{Prima Facie Cases}

In a dispute, the burden of evidence may shift to the Respondent when the tribunal considers \textit{prima facie} proof of the case and the Respondent fails to rebut the \textit{prima facie} case, the tribunal rules in favor claimant.\textsuperscript{341}

However, \textit{prima facie} evidence must be clear; therefore, merely submitting general evidence is not enough to be considered as \textit{prima facie} proof of the case, even where the Respondent submits no evidence to the rebut the case.\textsuperscript{342} The Claimant should submit minimum of materials and credible evidence to support its case.

In the \textit{JI Company} Case No 244, the IUSCT dismissed the claim, because the Tribunal found the claimant’s evidence insufficient “even in the absence of any evidence to the contrary.”\textsuperscript{343}

As a result, the threshold of reaching the \textit{prima facie} proof of the case can be different in each case. The Inter-American Court of

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{340} Kazazi, op.cit.277.p332,
\item \textsuperscript{341} See, Amerasinghe, op.cit.178, p 246.
\item \textsuperscript{342} For more details about prima facie, see,Amerasinghe,op.cit.178.
\item \textsuperscript{343} \textit{J.I Co. v. I.R. Iran}, Award 57-244-1 (June 15, 1983), reprinted in 3 Iran-U.S. C.T.R. pp 62, 65.
\end{itemize}
\end{footnotesize}
Human Rights, for example, adopted a heightened standard of proof in a case involving serious charges of human rights abuses. The court held that:

The Court cannot ignore the special seriousness of finding that a State Party to the Convention has carried out or has tolerated a practice of disappearances in its territory. This requires the Court to apply a standard of proof which considers the seriousness of the charge and which, notwithstanding what has already been said, is capable of establishing the truth of the allegations in a convincing manner.\textsuperscript{344}

When a claimant or the party who is seeking affirmative relief adduces evidence sufficient to pass the threshold of \textit{prima facie} case, however, the burden of production shifts to the opposing party who will fail unless it adduces sufficient evidence to rebut the presumption.\textsuperscript{345}

\textbf{2.1.1. The \textit{Prima Facie} Case Before the IUSCT}

The standard of proof was defined by the Tribunal as evidence, which may inspire a minimally sufficient degree of confidence in the alleged fact. In \textit{Ebrahim Rahman Golshani} Case No. 812,\textsuperscript{346} the Claimant asserted the expropriation of his properties. In support of his claims, he submitted deed. The Respondent, requested the Tribunal to decide, as a preliminary issue, whether the deed was a forgery and whether the Claimant had \textit{locus standi}.\textsuperscript{347} The Claimant acknowledged that he only had the initial burden of proving \textit{prima facie} that the deed was authentic, as a result, the burden of proving that the deed was a forgery shifted to the Respondent.\textsuperscript{348}

\textsuperscript{345} Marvin Feldman v. Mexico, ARB(AF)/99/1, award of 16 December 2002, (2003) 42 ILM 625 at 662.
\textsuperscript{347} Ibid., Letter filed 20 March 1990
\textsuperscript{348} Ibid. See, e.g., M. Aghahosseini, Evidence before the Iran-United States Claims Tribunal, in International Law FORUM du droit 1(4): p213, (1999)
The Tribunal examined the issue with reference to Article 24, Paragraph 1 of the Tribunal Rules, which states “[e]ach party shall have the burden of proving the facts relied on to support his claim or defence.” In that case, the Tribunal noted that:

It was the Respondent who, at one point during the proceedings in this Case, raised the defence that the Deed is a forgery. Specifically, the Respondent has contended that the Deed, dated 15 August 1978, was in fact fabricated in 1982. Because of having made that factual allegation, the Respondent has the burden of proving it. However, the Tribunal was about to come up with an answer to the question "whether the Respondent has met that burden if the Claimant has submitted a document inspiring a minimally sufficient degree of confidence in its authenticity. It is, therefore, up to the Claimant first to demonstrate prima facie that the Deed is authentic.349

To adjudicate the issue the Tribunal examined all submitted evidence; including; the deed and the affidavits of its signatories, and finally the Tribunal ruled that the submitted documents did not inspire the minimal degree of confidence in the deed’s authenticity, which would require it to shift the burden of proof to the Respondent. The Tribunal finally decided that the claimant’s presentation did not make out a prima facie case of authenticity and that, consequently, the tribunal did not address the question whether the Respondent had met its burden of proving that the deed was a forgery. In view of this determination, the claim was dismissed for lack of proof of ownership.350

In this case, the Tribunal concluded that until a party initially offers a certain degree of evidence out a prima facie case, the allegation would be rejected irrespective of the opponent's possible rebutting evidence. However, in some cases the Tribunal decided that once

349. Ibid., at 93.
350. Ibid., at 116.
prima facie evidence is submitted by the claimant, the burden of proof shifts to the defending party.\textsuperscript{351}

As part of the application of the fundamental principle actori incumbit probatio, the Tribunal the same as other international courts and tribunals has affirmed that it is necessary for the Claimant to make a prima facie case. However, prima facie evidence must be conclusive, and tribunal cannot rely on evidence or argument presented by that party only, but it must assess all evidence submitted by the parties.\textsuperscript{352}

\textbf{2.1.2. Prima Facie Case Before the WTO}

The Member States cooperation with the panels and the Appellate Body is essential to promote and realize standards and fundamental principles and rights of WTO agreements. However, in the absence of a prima facie case party who is seeking affirmative relief, the tribunal or panel should dismiss the claim and no one expects a respondent to provide any evidence in favor of its case.\textsuperscript{353}

The function of panels and the Appellate Body under Article XXIII of GATT is to decide whether a party’s benefit has been nullified or impaired. In this regard, an obligation rests on the Claimant to establish a prima facie case of inconsistency of an action or policy with WTO rules.\textsuperscript{354}

\textsuperscript{353} See, Kazazi, op.cit.277. p. 138. For more study see, R. Silvestre and J. Martha, op.cit.303..
\textsuperscript{354} Panel Report, Argentina – Safeguard Measures on Imports of Footwear, WT/DS121/R, (January 2000, as modified by the Appellate Body Report, WT/DS121/AB/R, DSR 2000:II), para. 6.37: the panels ruled that “We consider that when the Appellate Body refers to the obligation of the complainant party to provide evidence to establish a 'presumption', it refers to two aspects: the procedural aspect, i.e. the obligation for the complainant to present evidence first, but also to the nature of evidence needed.”
To constitute a *prima facie* case, panels, and Article 3.8 of the DSU, have clearly outlined that when an inconsistency with a WTO obligation is established, this inconsistency will constitute a *prima facie* case of nullification or impairment, and it must be refuted by the other party. Article 3.8 of the DSU States that: “This means that there is normally a presumption that a breach of the rules has an adverse impact on other Members parties to that covered agreement, and in such cases, it shall be up to the Member against whom the complaint has been brought to rebut the charge”

In *Canada–Measures Affecting the Export of Civilian Aircraft* the panel held that, “a *prima facie* case, is a case which, in the absence of effective refutation by the defend ing party, requires a panel, as a matter of law, to rule in favor of the complaining party presenting the *prima facie* case.” Furthermore, the Appellate Body also held that, a refusal to provide information requested on the basis that a *prima facie* case has not been made implies that the member concerned believes that it is able to determine for itself whether the other party has made a *prima facie* case. However, no member is free to determine for itself whether a *prima facie* case has been established by the other party. That competence is necessarily vested in the panel under the DSU, and not in the parties to the dispute.

Under the principle of *actori incumbit onus probandi* a party is not in a position to determine whether the other party has made a *prima facie* case. Notwithstanding, when a party submits evidence and arguments to prove its basic *prima facie* case it shifts the burden of evidence and proof upon the other party to rebut the claimant's assertion. In this regard, Sandifer said that:

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357 Ibide.
The broad basic rule of burden of proof adopted, in general, by international tribunals resembles the civil law, rule and may be simply stated: that the burden of proof rests upon him who asserts the affirmative of a proposition that if not substantiated will result in a decision adverse to his contention.359

2.2. Presumption of Fact

A presumption is an assumption of fact in a case, which can be made from another fact and generally shifts the burden of evidence.360 Thus, if a party submits enough evidence or arguments to raise a presumption that its claim is true, that presumption permits the tribunal to rule in favor that party, unless other party submits evidence to rebut that presumption.361

The effect of the presumption is that, where applicable, it can shift the burden of producing evidence and proof to the other party in a case.362

However, under international law, a presumption should be in favor of States therefore responsibility of a State could not to be presumed.363 This means that the presumption of legality of conduct of the States is different from those of a private party.364

See also, California Codes, California Evidence Code, Evidence Code Section 600-607, available at: http://law.justia.com/california/codes/evid/600-607.html
363. See, e.g. Bin Cheng, General Principles of Law as applied by International Courts and Tribunals, (1994), pp 304-6. See also, R. Silvestre and J. Martha, op cit 303 p75,
2.2.1. Presumption of Performance Before the IUSCT

The Tribunal has made several presumptions for shifting the burden of proof to the other side in claims before it.365

In one part of PepsiCo Case No 18,366 the PepsiCo claimed payment of US$3,348,000 for accounts receivable for Pepsi-Cola soft drink concentrate which sold and delivered to all of the Zamzam Companies in Iran. The Claimant also submitted evidence relating to the offer and acceptance of the sales and shipment of the concentrates together with copies of specimen drafts and instructions for collection sent to Bank Saderat. However, the determination of the delivery dates was not possible based on the Claimant’s evidence, which was limited to shipping documents only. The Tribunal examined the parties’ evidence and arguments and indicated that:

Although the Claimant did not offer evidence that showed the exact date of arrival at the port of destination of each shipment of concentrate, the Claimant did submit several "Billing Data Sheets" or other records for each invoice that indicate the date of shipment of the concentrate. Assuming that the concentrate arrived at its port of destination in Iran 30 days after its date of shipment, then each invoice involved in this Case was unpaid for more than 180 days after its arrival at its port of destination as of 20 April 1979. Indeed, even assuming that the concentrate arrived at its port of destination in Iran 60 days after its date of shipment, then all but four invoices were unpaid for more than 180 days as of 20 April 1979. Thus, the Tribunal finds that when the Claimant demanded acceleration on 20 April 1979, the Zamzam Companies were in breach of

365. See, Amerasinghe, op.cit.178, pp 373-375. See also Brower, op cit76, p. 182 ff
366. PepsiCo, INC. v I.R. Iran , Award No 260-18-1 reprinted in 13, Iran.U.S.C.T. R. p 3. In this case the PepsiCo claimed that the Respondents are the Government of the Islamic Republic of Iran, the Foundation (Bonyad) and the Zamzam Companies.
Paragraphs 3(f) and 4 of the Main Agreement, thereby entitling the Claimant to accelerate.\(^{367}\)

While there was not conclusive evidence, but the Tribunal inferred a fact and assumed that the shipment arrived at the Iranian in the average time, which it took for goods to travel from the United States to Iran.

In some other cases also inferred a fact in dispute. For example, with regard to the Tribunal's jurisdiction,\(^{368}\) a corporation must prove the fact of organization under the law of the US by a certificate issued by officials of the State of incorporation.\(^{369}\) In this regard, in Aveco Corp., Case No 261 the Tribunal has ordered, nonetheless that:

\begin{quote}
[i]f the certificate shows that the corporation was organized before the claim arose, if the date of the certificate is after January 19, 1981, and if no convincing rebuttal evidence is produced the [Tribunal] will draw the reasonable inference that the corporation was continuously in existence from the date the claim arose until at least January 1981.\(^{370}\)
\end{quote}

Suffice to say that a presumption by a tribunal cannot be based on another presumption or inference only, rather it must be substantiated with other document or circumstances of case.\(^{371}\)

\(^{367}\) Ibid, p 24.

\(^{368}\) The Tribunal has jurisdiction over claims by the American companies if the company can prove that it was organized under the law of the United States during the entire period from the time the claim arose until the date of the Claims Settlement Declaration-January 19, 1981.


2.2.2. Presumption of Nullification Before the WTO

It is part of the WTO system that a violation of a WTO provision creates a presumption of nullification of trade benefits.\(^{372}\)

Under GATT ArticleXXIII: 1(a), a claim of nullification or impairment of benefits of a complaining party may be brought before the DSB on the account that the claim resulted from the failure of the Respondent party to carry out its obligations under the GATT. In addition, ArticleXXIII:1(b), also provides that, a Member State may bring a case of nullification or impairment of benefits whether the impairment or nullification was the result of a measure conflicting with the provisions of the GATT or of a measure which was consistent with the GATT.\(^{373}\)

The panel report in *French Import Restrictions*, with regard to the matter concerning the Uruguayan recourse to Article XXIII, held that where some measures of Member are in conflict with the provisions of the GATT, the action would, *prima facie*, constitutes a case of nullification and impairment.\(^{374}\) This finding is now part of Article 3:8 of the DSU.

Whenever there is a claim that a measure or action is inconsistent with the WTO agreements, it can be presumed that the measure has negative impact on the complaining party therefore, the burden of proving otherwise shifts to the other party, which has to provide sufficient evidence to rebut the presumption.\(^{375}\)

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\(^{372}\) WTO Analytical Index: GATT 1994. See also, Silvestre & Martha, op cit 303 p76

\(^{373}\) The panel report in Italian Discrimination against Imported Agricultural Machinery, adopted 23 October 1958, L/833, BISD 7S/60, at p. 65, para. 18. See, Silvestre & Martha, op cit 303 p76.

\(^{374}\) The panel report in French Import Restrictions adopted 14 November 1962, L/192 1, BISD 11S/94, para. 4 and p. 95, para 5

\(^{375}\) The Appellate Body has confirmed this separation in Appellate Body Report, Wool Shirts and Blouses DSR1997-I, 323 at 334 and 335. For more details see, e.g., Silvestre & Martha, op cit 303 p78 and also WTO Analytical Index Online.
2.3. Res Ipsi Loquitur

*Res ipsa loquitur* is an exception to the general rule of burden of proof and means, “the thing speaks for itself”. It refers to situations when a court can assume that damage to a person or properties was caused by the negligent action of another party. Under, *Res ipsa loquitur* a tribunal or panel may give the defendant the burden of proof on the issue of his own negligence.

In *Escola and Greenman*, the plaintiff sued the bottling company for negligence. The Claimant relied exclusively on the theory of *res ipsa loquitur*. At trial, the plaintiff did not provide proof that the Coca Cola was responsible, while the Respondent produced several evidence, which revealed that the Respondent did not make the bottle at issue. Nevertheless, the jury decided in the plaintiff's favor, and the California Supreme Court upheld the jury's finding and noted that *res ipsa loquitur* ordinarily is a question of fact for the jury. Justice Traynor concurred with this result; he observed that there was no obvious inconsistency between the jury's verdict and the plaintiff's theory of recovery. The theory of *res ipsa loquitur*, can be used to compel the defendant to prove that the causing injury or damage to a claimant cannot be attributed to his action. The claimant, however, must convince the tribunal that the other party had exclusive control of the element and the instruments of the damage.

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376. See, *Black's Law Dictionary* under the term of RES
379. Escola v. Coca Cola Bottling Co., 150 P.2d 436, 437 (Cal. 1944). In Escola, the plaintiff-waitress sustained an injury when a bottle of Coca Cola broke in her hand.
381. For further study, see, Andrew Rogers, op.cit,210, pp129-30. See also, Samir Mankabady, *The International Maritime Organization: Accidents at Sea* (Routledge, 1987), p. 75, ff.
2.4. Affirmative Defenses

A respondent can either deny a claim brought against him or file an answer in response to the details of the claim. Part of an answer, evidence or argument in which a respondent provides or his arguments that there are some other facts that constitute a defense, are called ‘affirmative defenses’.382

An affirmative defense may shift the burden of proof on a given issue to the defendant. For example, in Dadras, 383 Case Nos. 213/215, before the IUSCT the Respondents, in their rebuttal and counter-arguments, asserted the affirmative of a proposition and claimed that some or all of the claimants’ documents were forged. The Respondents argued, among other things, that a signature on a letter of approval was not indeed a genuine signature. In that situation, normally the burden of proving of forgery falls on the Respondents.384

The Tribunal determined that the allegation of forgery requires higher standard of proof and the Respondent must prove that the documents in question were in fact forged. Relying upon Chamber One's decision in Oil Field of Texas, Inc.385 the Tribunal determined that the allegation of forgery requires an greater standard of proof. In its award the Tribunal further determined that the “minimum quantum” of evidence required establishing the existence of forgery "may be described as 'clear and convincing evidence'."386

386. Ibide. Dadras, Cases 213/215, p 162
3. The Necessity of Parties' Cooperation

A claim before international courts or tribunals must be proven on the balance of probabilities based on all available evidence and the circumstances of a case. In all cases, adjudication bodies should consider and make a balance between submitted evidence by the parties then issue a well-reasoned award. In a case where both parties have submitted extensive facts and evidence, the dispute settlement body’s job is to consider all evidence on record and decide whether the party who bears the burden of proof has convinced the tribunal about the validity of its claims. However, in case of uncertainty or inconsistency of evidence, the tribunal should give the benefit of the doubt to the Respondent. 387

Where a party files a claim, it would be a normal assumption that he/she has access to all evidence and has the initial burden to show that the other party is responsible in that case. As was discussed, the jurisprudence of international courts and tribunals provide a convincing explanation of why the burden should be allocated in most cases to the claimant. Once the Claimant submits evidence sufficient to prove its assertions, it is then the Respondent's job to rebut the claimant’s assertions.

In international litigations, the Respondent is not under any obligation to produce evidence if the Claimant fails to make a *prima facie* case. International courts and tribunals sometimes order respondents to cooperate with the claimants in obtaining evidence. The reason for such orders usually depends on the subjects, parties, rules of procedure, transparency, and contractual obligation that will be discussed in coming chapters.

In this regard, an international tribunal, the WTO panels and Appellate Body may be able to develop a set of guidelines to manage the procedural aspect of evidentiary issues and standard of proof in a dispute. At the same time, considering the courts and tribunals inherent power to manage the procedures, they should be aware that, the power does not mean that the panels or tribunals would be free to analyze the provisions and factual issues as they wish. This means that after a careful consideration of all evidence and facts in a case, a tribunal may determine that the burden of proof should be allocated to the respondent or the claimant.

To have a clear picture of who bears the burden of proof, what is the alteration, what is the legal justification for shifting the burden of proof and many other related issues, it is necessary to launch comprehensive and comparative studies of many rules of procedure, jurisprudence and case law. In this part of the thesis, I only outlined some procedural rules and practice that would alter the general assumption of the burden of proof. Nevertheless, each of those issues requires an extensive analytical discussion supported by law, jurisprudence and legal opinions, which is beyond the scope of this thesis.
Chapter IV: Standards of Evidence and Proof in International Litigation

After discussing the evidence and the burden of proof, now the concept of standard of proof can contribute to a better understanding of those topics and the parties’ evidentiary obligations. The standard of evidence and proof generally refers to the criteria for the appropriate valuation of evidence and arguments provided by the parties to either support or rebut a claim or counterclaim.388

Parties put forward evidence and argument to prove their assertions, but rules of procedure of international courts and tribunals are silent as to which standard of proof they should apply.389 In reality, some evidence and arguments may be highly convincing to a tribunal, while the same evidence may leave another forum completely skeptical.

The ambiguity and determination of different criteria by courts and tribunals for standard of proof is inevitable. As, Jeremy Bentham stated: “nobody can be ignorant that belief is susceptible to different degrees of strength or intensity”.390

In any case, the question is: what is the standard for a party for convincing the court to hear its claim? In general, study of rules of procedure, shows that there are some indirect guidelines for defining the standard of proof.

1. Evaluation of Evidence in International Litigation

A fair trial generally requires that a tribunal must determine and weights the value of all submitted evidence.391 The jurisprudence of international adjudication bodies indicates that those bodies impose

391. See, Kazazi, op.cit.277,pp, 32, 40 and 323 ff.
different standards of proof and the quantum and quality of proof. However, it is clear that in all kinds of litigations, a claimant must offer enough evidence to prove the truth of its claim, and if he/she fails to prove the required element of its claim, the Respondent must prevail.

The lack of a standard of evidence leaves courts and tribunals, to consider general principles of judicial procedure. In fact, every court and tribunal has latitude of discretion to manage a proceeding and reviewing the value of the submitted evidence. Whatever standard a court or tribunal may adopt, it must dismiss claims, which is not properly supported by evidence.

As a general definition, it could be stated that the standard of admissibility of evidence is the threshold or level of believe that a tribunal may reach about the submitted evidence or arguments. At the same time, adduced evidence can be worthless if the party, who submitted evidence, cannot demonstrate to a tribunal their relevancy.

In any case, a tribunal should test the reliability of all submitted evidence and in case of technical evidence; an expert should assess the reliability of the information.

In the light of rules of procedures and international jurisprudences a simple and general definition of standard of proof or standard of

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394. See, e.g. the finding of the ICJ in the Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA, the ‘Nicaragua case’), Merits, judgment of 27 June 1986, ICJ Reports at 40, para. 60 (1986): ‘In so doing, [...], within the limits of its Statute and Rules, it has freedom in estimating the value of the various elements of evidence, though it is clear that general principles of judicial procedure necessarily govern the determination of what can be regarded as proved.


396. See Kazazi, op.cit.277. pp406-7

397. See,e.g. Kazazi, op.cit.277. pp 180-220
evidence is that, it is a level of having a strong believe that a party’s assertions are true.  

1.1. Self-Authentication and Substantive Evidence

Some types of documents are capable of self-authentication, and can be authenticated by the adjudication bodies without extra evidence of authenticity.  

Under some rules of procedure documents, such as certified copies of public records, official documents and certain commercial records can be labeled as self-authenticating. Thus, those documents generally should be assumed to be what they prepared to be and will be considered without further authentication. If a piece of evidence is not self-authenticating, a party should prove its authenticity with other evidence and testimonies. The opposing party may also challenge authenticity of the submitted evidence, and the tribunal should determine the value and authenticity of documents.  

Credible and relevant evidence is very important in the course of settling a dispute. Therefore, a tribunal’s award must be supported by relevant and credible evidence, which means, evidence that is relevant to the case and can lead a court or tribunal to a certain conclusion. However, the relevancy of adduced evidence in each case is different: it is a matter of justice that a tribunal cannot ignore substantial and credible evidence.

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399. In Arbitration between the British Petroleum Co. and Amerada Petroleum Corp. of Libya, et al., AAA No. 1310-0923-77 (Final Award, September 30, 1985) several documents submitted into evidence on a self-authenticating basis. See also, US Federal Rules of Evidence, Rule 902.
400. In practice of the IUSCT the Admissibility of documents depend on their nature for example Admissibility of newspapers or periodical are subject to other supportive argument and evidence.  
In *Fils et Câbles d'Acier de Lens v. Midland Metals Corp.*, which involved contracts for the sale of galvanized wire, the contracts called for the American Arbitration Association (AAA) arbitration, with a special provision for judicial review:

Upon an application to the court for an order confirming said award, the court shall have the power to review (1) whether the findings of fact rendered by the arbitrator are, on the entire record of said arbitration proceedings, supported by *substantial evidence*, and (2) whether as a matter of law based on said findings of fact the award should be affirmed, modified or vacated. Upon such determination, judgment shall be entered in favor of either party consistent therewith.

Based on that the said provision, one party to the dispute challenged the final arbitral award before the United State District Court and claimed that the award is not supported by substantial evidence. The Court upheld this provision and reviewed the arbitration award under standard chosen by the parties rather than the standard prescribed by the FAA.

1.2. **Preponderance of the Evidence**

Preponderance of evidence means the quantum of evidence and proof that leads a tribunal to reasonable probability sufficient to believe that the assertion of a party is correct. In order to prove a claim under the notion of preponderance of evidence, a party must establish the case to the extent that his evidence is more convincing than the evidence offered by the other party. Some procedural rules clearly indicate that awards should be based upon a

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403. See *La Pine Tech. Corp. v. Kyocera Corp.*, 130 F.3d884 (9th Cir of US. 1997).
404. Ibid.
preponderance of the evidence presented by the parties, unless an agreement of the parties or the applicable law provides otherwise.\textsuperscript{408}

However, there is no a clear definition for the term preponderance of evidence and each court or tribunal may adopt different approaches to this concept. For Example, in the \textit{Corfu Channel} case, the ICJ found that a witness allegation that he saw mines being loaded onto two Yugoslav minesweepers did not constitute “decisive legal proof” that the mines that damaged British ships were laid by these two minesweepers.\textsuperscript{409} The court held that “[a] charge of such exception gravity against a State would require a degree of certainty that has not been reached here.”\textsuperscript{410}

In disputes related to domain names for example, the threshold question in proceedings under the Internet Corporation for Assigned Names and Numbers (ICANN) is to identify the proper standard for reaching a decision on each issue.\textsuperscript{411} In \textit{Madonna v. Dan Parisi et al.}, before the WIPO Arbitration and Mediation Center, the tribunal held that:

\begin{quote}
Since these proceedings are civil, rather than criminal, in nature, we believe the appropriate standard for fact-finding is the civil standard of a preponderance of the evidence (and not the higher standard of "clear and convincing evidence" or "evidence beyond a reasonable doubt"). Under the "preponderance of the evidence" standard a fact is proved for the purpose of reaching a decision when it appears more likely
\end{quote}

\textsuperscript{408} See, for example Rule 37.H, of the National Arbitration Forum, code of Procedure. (The FORUM Code of Procedure has been the guiding rule set for thousands of commercial and consumer disputes since 1986.) available at: http://www.adrforum.com/main.aspx?itemID=609&hideBar=False&navID=162&news=3

\textsuperscript{409} 1949 I.C.J. 4, 16 (Apr. 9).

\textsuperscript{410} Ibid. at 17.

\textsuperscript{411} Cases are decided in accordance with ICANN Uniform Domain Name Dispute Resolution Policy, dated October 24, 1999 (“the Policy”) and the ICANN Rules for Uniform Domain Name Dispute Resolution Policy, dated October 24, 1999 (“the Rules”).
than not to be true based on the evidence. We recognize that other standards may be employed in other jurisdictions [...].\textsuperscript{412}

However, the standard and the level of a preponderance of evidence in a case are still not clear. In \textit{Dadras Case No 213/215},\textsuperscript{413} the IUSCT considered the Respondent's allegations of forgery, and after examining the credibility of the claimant's authentication witnesses and the considering expert opinions and related evidence submitted by the Respondents to prove the alleged forgeries, the Tribunal concluded that:

\begin{quote}
[T]he respondents did not prove by clear and convincing evidence, or even by a preponderance of the evidence, that the contract or any of the pre-contractual evidence had been forged.\textsuperscript{414}
\end{quote}

All evidence and opinions are valuable as along as being accepted by tribunals. However, in case of State responsibility, for example, courts or tribunals apply some higher standard that is very difficult to achieve.

Suffice to say that, there is not a universal definition of standard of evidence and proof that must be achieved by the parties before international courts and. However, proof means that a party can convince a tribunal that something is reasonably true and the true answer is the only one that really makes sense for tribunal.\textsuperscript{415}

There are many cases decided by international courts and tribunals, in which they have applied a varying standard of proof.

\textsuperscript{414} Ibid.
\textsuperscript{415} See, e.g. Morris Raphael Cohen, Ernest Nagel, John Corcoran, \textit{An Introduction to Logic} (Hackett Publishing, 1993) p XVIII.
1.3. Beyond Reasonable Doubt

The natures of criminal cases are different from the usual dispute before commercial tribunals; as a result, the requirement of standard of evidence to prove a fact generally is higher. In international criminal courts, the standard of proof is that the court should be satisfied by evidence that demonstrates "beyond a reasonable doubt".\(^{416}\) This is the highest level of burden of proof and means that an assertion must be proven to the extent that there is no "reasonable doubt" in the mind of a reasonable person.\(^{417}\)

In accordance with Article 87 of ICTY Rules, the ICTY judges can only convict a defendant only if the prosecution can prove all allegations "beyond reasonable doubt." As the Trial Chamber held in Delalic et al that:

In the common law system, the burden of proof rests on the prosecution to show beyond a reasonable doubt that Statements of an accused person were made voluntarily, and that they were not obtained either by fear of prejudice or hope of advantage held out by interrogators.\(^{418}\)

In this regard, the ICTY Appeals Chamber Judgment in the case of Naser Orić clearly indicates that:

However, proof that crimes have occurred is not sufficient to sustain a conviction of an individual for these crimes. Criminal proceedings require evidence establishing beyond reasonable


\(^{418}\) Delalic et al .. Case No, IT-96-21-T, Trial Chamber decision on the motions for the exclusion of evidence by the accused, Zejnil Delalic , 1997, para 32.
doubt that the accused is individually responsible for a crime before a conviction can be entered. 419

In brief, proof beyond a reasonable doubt means that the evidence and arguments must be so conclusive that all reasonable doubts can be disregarded.420

1.4. **Benefit of the Doubt**

In cases and claims before courts and tribunals, a claimant has the burden of proof, the other party, the benefit of the doubt.

The Latin legal term for the benefit of the doubt is *in dubiis pro reo* that means, “In doubt you must decide for the defendant.” 421 Therefore, if a court gives a respondent the benefit of a doubt; it means that any doubt about the claim must be given to the Respondent.422

In all litigations either civil or criminal procedures defendant has the benefit of the doubt. However, if the burden of proof moves to the defendant, then he cannot be silence because of the benefit of the doubt. Therefore, the benefit of the doubt will move to the claimant, and if the defendant fails to rebut the adduced evidence or arguments, the Claimant may prevail in that case.423

422. Id. P 120.
2. Standard of Evidence in Practice

A comparative study of awards and decisions of international courts and tribunals shows that the degree of certainty or standard of convincing a court or tribunal is different. In any case, the jurisprudence of international courts and tribunals indicate that it is an obsolete idea if one expects that an international body to reach absolute certainty to conclude a case. As John Stuart Mill said, there is no such thing as absolute certainty in human life. 424

2.1. Degree of Certainty Before the IUSCT

The same as other rules of procedure there is no provision in the IUSCT Rules with respect to the required standard of proof. However, in many case the Tribunal has imposed the standard of proof on the balance of probability.425

The claimant’s responsibility to submit sufficient evidence of each element of his claim has been illustrated in several cases including in *Cyrus Petroleum Ltd.*,426 Case No 624 about the Claimant assertion that Iran expropriated various properties. In that case the Claimant in its Statement of claim submitted a list of the allegedly expropriated properties along with their valuations, which, taken together, amounted to US$970,000,000 plus interest. Those were all details specifying the Claimant's claim.427 The Tribunal dismissed the claim, stating that:

Neither in the Statement of Claim nor in subsequent filings does the Claimant detail the substance of its allegations or

427. Ibidd. at 71.
provide any evidence to support them [.....] These pleadings fail to establish to the Tribunal's satisfaction any basis for the claim.428

The award clearly indicates that simply submits some general documents by a claimant or the information about some properties with their supposed value cannot meet the Tribunal’s standard of proof. The Tribunal’s awards in several other cases also show that, evidence must support all element of the purported fact and law.

However, in some cases, the tribunal was more flexible and required lower standards of proof to reach a conclusion in those case. In Rockwell International Systems, INC Case No.430, 429 the Tribunal explained the reason behind the lessening of the burden of proof in the following terms:

*Prima facie* evidence must be recognized as a satisfactory basis to grant a claim where proof of the facts underlying the claim presents extreme difficulty and an inference from the evidence can reasonably be drawn. This is particularly true, where the difficulty of proof is the result of the Respondent's failure to raise objections in a timely manner and in such a way that the Claimant could adequately establish its Claim. In such a case, a lower standard of proof is acceptable.430

The Tribunal always distinguishes between the parties’ primary and secondary burdens, which is burden of evidence to allow the claim to be heard, and burden of persuasion in a case. In Harris Case No. 409,431 the Respondents challenged the Tribunal’s jurisdiction and requested a suspension of the proceedings. In its Statement, the Respondent argued that the Claimant had not

428. Ibid. at 71.
430. Id, at 188.
furnished sufficient proof to establish its United States nationality.432

About the initial duty of a party to submit sufficient evidence in support of his claims, the Tribunal ruled that:

Filings containing facts and evidence are the most likely to cause prejudice to the other party and to disrupt the arbitral process if filed late. Each Party has the burden of setting out the facts upon which it wishes to base its case, and the heavier “burden of proving the facts relied on in support of his claim or defence,” as provided by Article 24, paragraph 1, of the Tribunal Rules, if the allegations are contested.433

2.1.1. Standard of Proof in Case of State Responsibility

In case of State responsibility, the international courts and tribunals generally take a higher standard of proof.434 However, in one occasion, the IUSCT has adopted a very low standard of proof and has issued awards against a sovereign State without substantial evidence and proof.

In Daley Case no 1054,435 with respect to the claims relating to the alleged incidents at Iran Mehrabad Airport, to the effect that some of the claimant’s properties including a wrist watch had been confiscated by the Airport officials. The Tribunal accepted that the burden was on the Claimant to prove: (1) his ownership of the property at the time of leaving via Mehrabad Airport; (2) its expropriation, as alleged, by individuals whose acts were attributable to the Government; and, (3) the value of the alleged property. The Tribunal then stated that:

432. Ibid, para. 22 p 38.
433. Ibid, para 63. p 47.
434. See, infra ICJ decision in Bosnian Genocide Case.
The Tribunal is satisfied that there is sufficient evidence to make a judgment on the possession of Mr Daley’s watch. A specific brand, Rolex, is mentioned and the Tribunal finds that it is probable that Mr Daley, like the majority of business people, would possess and wear a watch in the normal course of events, as he stated in evidence that he was in the habit of doing.436

The Tribunal based its final award on presumption and accepted that Mr. Daley as a businessperson owned and possessed a Rolex wristwatch. The Tribunal then assumed that the watch was confiscated at Iran Airport, and the airport was under the control of the Revolutionary Guards therefore the Iranian Government was legally liable for the Revolutionary Guards actions in that time. In accepting the assertion that Mr. Daley owned and possessed a watch, the Tribunal assumed that every businessperson probably wears a Rolex wristwatch. The Tribunal took the claimants’ own allegation, as evidence that the watch was, presumably, confiscated at the airport; and it then held that the possible confiscation of the watch at the airport by government officials constituted an act of expropriation. Because of these considerations, the Tribunal decided that the Claimant’s watch was confiscated therefore it awarded the sum of $800 in compensation.437

2.1.2. Clear and Convincing Evidence

Due to the nature of some cases, the Tribunal also adopted a higher standard of proof in some cases. 438In Dadras Cases, Nos. 213/215 the Tribunal considered whether the nature of the allegation of forgery which are particularly grave, requires the application of a standard of proof greater than the customary civil standard of ‘preponderance of the evidence’. The Tribunal recalled its ward in Oil Field of Texas case and held that the allegation of forgery must

436. Ibid. at para. 32.
437. Ibid. at para 34 and also pp. 266-8, Dissenting Opinion, Judge Noori.
be proved with a higher degree of probability than other allegations in these cases.\textsuperscript{439}

In case of forgery, the Tribunal required a minimum quantum of evidence, therefore it described that standard as “clear and convincing evidence”, although the Tribunal considered that precise terminology less important than the enhanced proof requirement that it expresses. However, at the end the Tribunal dismissed the Respondent’s allegation with reference to the term of minimum quantum of evidence.\textsuperscript{440}

\textbf{2.1.3. Standard of Proof of \textit{Locus Standi}}

According to the provisions of Articles VII(1) of the Claims Settlement Declaration, nationals of Iran and the United States could be natural or juridical persons. The Iranian and American’s nationals, who, according to provisions of the Claims Settlement Declaration, may bring claims against respectively, Iran and the United States, are defined in Article VII, Paragraph 1. Paragraph 2 of Article VII defines ‘claims’ of such nationals. These include, \textit{inter alia}, claims that are owned by such nationals through ownership of capital stock, if the ownership interests, at the time the claim arose, were sufficient to control the corporation.

To have \textit{locus standi} before the Tribunal parties should be the direct owners of the properties, and must possess the nationality of one of those States. About the juridical persons, commercial enterprises or other legal entities, the nationality of their owners and major shareholders also are relevant for \textit{locus standi}. Under Article VII (1)(b) such persons might stand before the Tribunal only if they are fifty percent or more owned by natural persons who have the nationality of the Iran or the United States.

Under paragraph 2 of the said Article VII another category of the nationals, who may bring a case before the Tribunal, are natural or juridical persons and the private indirect owners of the claims of a corporation. However, their *locus standing* is subject to two conditions: firstly, they must control the corporation; and secondly, that the corporation itself cannot stand before the Tribunal. 441

In *Flexi-Van Leasing, INC* Case No. 36, *Flexi-Van* the Claimant filed his claim as the United States national. 442 It argued that the Iranian Government as respondent took control of its subsidiaries Star Line and Iran Express no later than 29 February 1980 and that through these two companies the government expropriated Flexi-Van’s contract rights in the lease agreements. Claimant failed to submit evidence showing the citizenship of its stockholders but it, submitted arguments and an affidavit stating that shareholders of record who had United States addresses held the majority of all of its outstanding common shares.443

The Respondent contended that Claimant had not submitted sufficient evidence and proof of its United States nationality in accordance with the requirements of the Claims Settlement Declaration. The Respondent denied that it controlled either Star Line or Iran Express in the sense of Article VII, paragraph 3, of the Claims Settlement Declaration and therefore contended that it was not a proper respondent in this case.444

The Tribunal issued an order concerning the evidence proving the United States nationality of publicly held corporations.445 The Tribunal ordered the Claimant to provide the Tribunal with the following facts:

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441. For more details, see, Mohebi, op.cit.,88, pp157-9.
443. Ibid.pp337-42.
444. Ibid.p336
First, there must be evidence in support of the allegation that Flexi–Van Corporation is a corporation organized under the laws of the State of New York. The Claimant and the Respondent agree that such evidence can be in the form of a certificate by a government official of the State of New York showing the date when Flexi–Van Corporation was incorporated under the laws of New York and that it continues in existence. If the certificate shows that the corporation was organized before the claim arose, if the date of the certificate is after 19 January 1981, and if no convincing rebuttal evidence is produced the Chamber will draw the reasonable inference that the corporation was continuously in existence from the date the claim arose until at least 19 January 1981.

Second, there must be evidence to support the allegation that, from the date the claim arose until January 19, 1981, fifty percent or more of the capital stock of Flexi–Van Corporation has been held, directly or in-directly, by natural persons who are citizens of the United States.446

Based on the factual evidence provided by the Claimant regarding nationality of shareholders, the Tribunal decided that the requirements of Article VII, Paragraph 1 of the Declaration the nationality of publicly held corporations should be based upon nationality of voting stock of a company because the Declaration must be interpreted as referring to voting stock.447

The same standard of Locus Standi was implemented by the French–Mexican Claims Commission when decided that an international arbitral tribunal in determining nationality of a party can apply “less strict requirements where it does not appear to be reasonably necessary to set in motion the entire process of formal proofs.”448

446. Ibid, 459.

447. Ibid. Case No. 36 (Order of 20 December 1982) and also see, General Motors Corporation v. I.R. Iran, Case No. 94 (Order of 21 January 1983). See also Case No. A20, Decision No. DEC 45-A20-FT (10 July 1986).

2.1.4. Inconsistent Evidence

The Tribunal’s jurisprudence shows that inconsistency of evidence and argument presented by the parties in a case, certainly undermine their reliability. As a result, the Tribunal in several cases upon examination of evidence, the Tribunal found that it cannot rely upon them to any significant degree.

In *Seismograph Service Corp* Case No 443, for example, the Tribunal ruled that:

> Upon examination of this evidence, the Tribunal finds the explanations and summary tables to be so incomplete and internally inconsistent that it cannot rely upon them to any significant degree. Consequently, the evidence submitted does not establish the Claimant's entitlement to the claimed amount. The Tribunal must therefore determine a reasonable amount of compensation due to the Claimant.449

In case of inconsistency between a current and a prior Statement of a party, the Tribunal has prevented the parties from departing from their prior assertions of fact. In *Tavakoli* Case No 832, the Tribunal decided the case in accordance with the claimant’s earlier Statement, and disregarded the claimant’s subsequent Statement.450 In *Phillips Petroleum* case, No. 39 the Tribunal held that the doctrine of preclusion, whether based upon concepts of acquiescence, estoppel, or waiver, is available as a general principle of law, which the Tribunal is authorized to consider pursuant to Article V of the Claims Settlement Declaration.451

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2.1.5. Contemporaneous Evidence

In international business, when a seller’s performance is allegedly inadequate, other party must give timely notice of breach. This international custom has been codified in a number of international conventions. In general, where a party has denied either the fact or the contractual performance, the claim should be supported with evidence of a contemporaneous objection.

The Tribunal has decided in several cases that, in the absence of contemporaneous objections, invoices or payment documents presented during the course of a business are presumed to be correct. Therefore, from the Tribunal’s viewpoint, failure to respond to invoices within a reasonable period of time raises the presumption that they have been accepted.

In *Lockheed Corp* Case No 829, claimant filed the case to recover losses allegedly sustained by three of its corporate divisions. The Tribunal ordered for recovery of charges based on the contemporaneous evidence presented while the Respondent made no contemporaneous objections about the amount requested or the authenticity of the attendance records and made partial payments.

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In the absence of contemporaneous objections to an invoice letter or other notice of performance, the Tribunal generally concludes that the party in fact received the property in question.

In *Component Builders*\(^\text{456}\) Case No. 395, the Tribunal considered whether prefabricated housing units were delivered to the Respondent, Bank Rahni, while the Claimant submitted an invoice and chart to show delivery of items. The Tribunal concluded that there is nothing to show that those items were not all delivered to Bank Rahni as required. Indeed, if that were not the case it seems probable that Bank Rahni would have shown some contemporaneous objection.\(^\text{457}\)

However, from the Tribunal viewpoint the burden of evidence and proof required to establish whether the properties in a dispute have been actually delivered cannot be determined definitively in the abstract, because these issues may well vary with the nature and circumstances of particular transactions and case. In *Iran v United State* Case No B1, the Tribunal held that:

> [T]he Tribunal does not believe it feasible to decide these questions in the present proceeding, which is in advance of consideration by the Tribunal of actual disputes as to shipment of particular articles. However, for the guidance of the Parties in their present efforts to define the nature and extent of such disputes, the Tribunal is prepared at this stage to decide the adequacy of two types of evidence. First, the Tribunal holds that a shipping document which shows receipt by a carrier, freight forwarder or authorized representative of the purchaser and which identifies the defense article in question as having been shipped shall, by itself, constitute conclusive evidence of shipment. Second, the Tribunal holds that a delivery listing (a document attached to each quarterly billing Statement for each contract), by itself, does not constitute such evidence. What other documents or


\(^{457}\) Ibid.
combinations of documents may suffice to establish shipment, the Tribunal will decide only in the context of concrete disputes about the shipment of particular defense articles.\footnote{458. Iran v. United States, Award No. ITL60-B1-FT, reprinted in, 10 Iran-U.S. C.T.R. pp 207, 216-17.}

In summary, where a party submits sufficient evidence about its performance and contractual obligations and the other party fails to produce contemporaneous evidence of its objection, the Tribunal uphold the claim.\footnote{459. For more details, see Brower op.cit.76. p 187 ff}

\section*{2.2. Development of Standards of Proof Before the ICJ}

The ICJ’s standard of evaluation of evidence and proof and the broad legal importance of this issue have been discussed in several judgments and proceedings of the Court.\footnote{460. See,e.g. Rosenne, op cit173 ,p. 1039 ff}

The Court’s standard of evidence and proof could be, clear and convincing evidence, beyond reasonable doubt, preponderance of evidence and evidence that is fully conclusive which have been discussed in many case and in separate opinions of judges as well.\footnote{461 See, e.g. Corfu channel case , ICJ Report 1949 p 17 I.R.of Iran v United States of America, Judgment [2003] ICJ Reports 189, paras 30-4 (Sep Op of Judge Higgins)Certain Norwegian Loans (France v Norway), Judgment [1957] ICJ Reports 3, 39, (Sep Op of Judge Lauterpacht). Kasikili/Sedudu Island (Botswana/Namibia) Judgment [1999] ICJ Reports 1233 (Diss Op Judge Rezek).}

The Court examined this issue in different cases. For example, in the \textit{Corfu Channel} case the court considered the standards of proof “to be free from any doubt”\footnote{462. Corfu channel case, op. cit, para 14}. The court also find a statement submitted by a witness, not suffice to constitute decisive legal proof. The court ruled, \footnote{463. Ibid, para 16.} “The proof may be drawn from inferences of fact, provided that they leave no room for reasonable doubt”\footnote{464. Ibid.}
In the *Nicaragua* case,\(^\text{465}\) also the ICJ stated that the presentation of evidence and the standard of proof should be governed by specific rules relating to the subject of each case.\(^\text{466}\) In the *Oil Platforms* case the Court considered that:

\[\text{If at the end of the day the evidence available is insufficient to establish that the missile was fired by Iran, then the necessary burden of proof has not been discharged by the United States.}^\text{467}\]

The Court finally concluded that: ‘the evidence indicative of Iranian responsibility for the attack on the Sea Isle City is not sufficient to support the contentions of the United States’.\(^\text{468}\) In that case the Court ruled that it was not “sufficiently convinced that the evidence available supports the contentions of the United States.”\(^\text{469}\)

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466. In that Case the Court held that: The Court is bound by the relevant provisions of its Statute and its Rules relating to the system of evidence, provisions devised to guarantee the sound administration of justice, while respecting the equality of the parties. The presentation of evidence is governed by specific rules relating to, for instance, the observance of time-limits, the communication of evidence to the other party, the submission of observations on it by that party, and the various forms of challenge by each party of the other's evidence. The absence of one of the parties restricts this procedure to some extent [.....]
Article 53 of the Statute therefore obliges the Court to employ whatever means and resources may enable it to satisfy itself whether the submissions of the applicant State are well-founded in fact and law, and simultaneously to safeguard the essential principles of the sound administration of justice.
The Court should now indicate how these requirements have to be met in this case so that it can properly fulfill its task under that Article of its Statute. In so doing, it is not unaware that its role is not a passive one: and that, within the limits of its Statute and Rules, it has freedom in estimating the value of the various elements of evidence, though it is clear that general principles of judicial procedure necessarily govern the determination of what can be regarded as proved.
468. Ibid. para 61.
469. Ibid. para 76.
In case concerning *Congo v Uganda*, the Court recalled its jurisprudence in the *Nicaragua* and *Tehran Hostages* cases and made the following observation:

As it has done in the past, the Court will examine the facts relevant to each of the component elements of the claims advanced by the Parties. In so doing, it will identify the documents relied on and make its own clear assessment of their weight, reliability and value. In accordance with its prior practice, the Court will explain what items it should eliminate from further consideration.\textsuperscript{470}

The ICJ jurisprudence shows that the same as other international tribunals, the Court prefers the contemporaneous evidence from persons with direct knowledge.\textsuperscript{471}

### 2.2.1. Responsibility Beyond any Reasonable Doubt

The latest development was in the *Bosnia and Herzegovina v. Serbia and Montenegro* Case.\textsuperscript{472} As an extremely fact-intensive case, many witnesses were examined, and the parties submitted thousands of pages of documentary evidence.\textsuperscript{473} A substantial part of the judgment was devoted to analyzing evidence and standard of proof to find whether the alleged violation occurred and, if so, whether there was the specific intent on the part of the Respondents to destroy in whole or in part the protected group “Bosnian Muslims”, as identified by the court.\textsuperscript{474}

\textsuperscript{470} The ICJ judgment in the case of armed activities on the territory of the Congo (Democratic Republic of the Congo (DRC) v. Uganda), 19 December 2005, para 59


\textsuperscript{473} Ibid. For more details See, Dissenting Opinion Of Al-Khasawneh, ICJ Decision in Bosnian Genocide Case.2007

\textsuperscript{474} Speech by H.E. Rosalyn Higgins, President of the International Court of Justice, at the 59th Session of the International Law Commission 10 July 2007. p4.
In its final judgment the Court ruled that although the Bosnian Serbs were closely aligned with and supported by Serbia, they were nevertheless independent from them. The Court pointed to differences in policy between Serbia and the Bosnian Serb militias that showed some “qualified, but real, margin of independence”.475

In the Bosnia’s case the ICJ’s determined that, claims against a State must be proved by evidence that is fully conclusive and in light of the exception gravity of Bosnia’s genocide claims, the court must be fully convinced that genocide have been committed and that Serbia was legally responsible.476 With regard to the standard of proof about claim that the Serbian has breached its undertakings to prevent genocide, the Bosnia suggested that the Court should not set the standard of proof, so high. Nevertheless, the court required “proof at a high level of certainty appropriate to the seriousness of the allegation.”477

### 2.2.2. Criteria for Evaluation of Evidence

An analysis of international-court and tribunal decisions and awards indicate that they implement different standards of evidence and proof in different cases.478

It is clear that, when the ICJ deals with the issues of evidence and proof, it impalements its standers admissibility and proof on a case-by-case basis. Therefore, the Court has not articulated a particular standard of proof, or set of rules about the level of proof required for a particular fact or legal points. As was discussed, in some cases, the Court expected a party to prove the claim with convincing evidence or preponderance of evidence, while in some cases it compelled the party to submit evidence beyond reasonable doubt.479

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475. Ibid., at para. 394.
476. ICJ Judgment, Para 209.
477. Ibid., 210.
478. See e.g. Brower op.cit.76. p 183-189.
Summarily, the standard of proof such as; clear and convincing evidence, beyond reasonable doubt, preponderance of evidence and evidence that is fully conclusive means that a court or tribunal is in a position to decide a case. However, if the defendant can discredit and successfully rebut a claimant's evidence and arguments, the tribunals dismiss the claim. If the defendant fails to do so, then a tribunal should uphold the claim, because the claimant managed to prove his assertion on the tribunal’s satisfaction. 480

2.3. Evidentiary Threshold Requirement Before the WTO

There are some WTO Agreements that introduce some standard by requiring sufficient evidence to initiate an investigation or a dispute.

The Antidumping Agreement sets forth conditions to initiate an investigation to determine the existence of any alleged dumping by or on behalf of the domestic industry who believe that, they have been injured by the dumping actions or other measures of a foreign competitor. 481

However, this procedure may be used as a supportive tool in cases when a country’s domestic market is unable to compete with foreign competition. Therefore, determination of a standard of evidence is the first step to manage the number of investigations that may be initiated by Members. 482

In this regard, the issues of minimum evidentiary threshold is part of the standard for initiating an antidumping investigation. 483

483. See, Gingerich, T. Why the WTO Should Require the Application of the Evidentiary Threshold Requirement in Antidumping Investigations. 48 Am.ULRev. 135, 138 and 147. See, Terence P. Stewart,
In fact, if there was no minimum evidentiary threshold, the number requests for investigations or dispute would surge. However, to protect the principle of fair trade Article 2 Anti-Dumping Agreement provides that “The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties.”

With regard to the evidentiary burden, Article 5 of the Anti-Dumping Agreement determined specific requirements before initiating an investigation. Article 5.6 States that a request for an investigation must include all evidence of dumping to prove an injury under Article VI of GATT, and a link between the dumping and injury. However, Panels and the Appellate Body’s decisions are the best guidelines about the evidentiary threshold for initiation an investigation.

In Guatemala–Cement II, Mexico claimed that Guatemala’s authorities were in violation of Article 5.2, by initiating the Anti-dumping investigation without sufficient evidence of dumping having been included in the application. The question before the panel was whether Article 5.3 imposes an additional obligation upon the national authority above the requirements set out in Article 5.2. The panel interpreted the requirements in Articles 5.2 and 5.3 as imposing separate obligations on the applicant and the national authority, respectively. The panel described the further requisite

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484. Ibid. Gingerich, T. pp 138-140
486 AD, Arts. 5.2, 5.4. See, Id. Gingerich, T. p 154.
488. Ibid, Panel Report-WT/DS60/R 18 June 1998. paras. 7.4-7.7
examination of the evidence and information in the application as follows:

If the investigating authority were to determine that the evidence and information in the application was not accurate, or that it was not adequate to support a conclusion that there was sufficient evidence to justify initiation of an investigation, the investigating authority would be precluded from initiating an investigation.490

The panel also considered relevancy of Article 5.8, which States:

An application under Paragraph 1 shall be rejected and an investigation terminated promptly as soon as the authorities concerned is satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case.491

The panel finally decided that the provision of Article 5.8 implied that an investigation could be initiated only if the application contains sufficient evidence of dumping and injury.492

In case of a minimum threshold, the WTO panels and Appellate Body insist that a party should meet a minimum threshold before a national authority can initiate an antidumping investigation.493

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490. Ibid. Panel report, para. 7.45
491. Ibid. Panel report, para. 7.59.
492. Ibid. Panel report, paras. 7.57 and 7.67
Conclusion of Part One

International dispute settlement mechanism in whatever form, can help to improve and manage international relationships more efficiently.

In today’s world, use of traditional international rules of procedure may not suit the present realities, because of their inability to determine many aspects of contemporary international disputes. In the view of the current development of international relations, the methods of international dispute settlement also became more complex. Against such a background, it is understandable that concerns over evidence and proof, have grown, along with the need to assure parties and national legal systems that international adjudication systems still work properly.

Indeed, in order to respond to the current development created by more economic cooperation and a shift from traditional system to cyberspace, a shift in the manner of managing proceeding before international courts and tribunals is inevitable.

1. Case Management and the Role of Judges and Panelists

It frequently happens that dispute-settlement clauses or rules of procedure are drafted very poorly and do not create an efficient dispute settlement mechanism. What should be the role of judges, arbitrators or panelist in such situations?

A dispute-settlement body is more effective when adjudicators are more active and taking the initiative to manage the procedure,

which certainly contribute to the efficiency of procedures.\textsuperscript{496} However, to what extent should an arbitrator be active? What are the parties and arbitrators’ responsibilities in the process of gathering the required documents to decide the claims?\textsuperscript{497}

International litigation is a place where parties, lawyers, and arbitrators, generally are from different legal systems. In this regard, however, freedom of the parties to determine the arbitral procedure is an accepted principle in international arbitration. Therefore, to some extent they can decide about the arbitrators’ roles and their discretion in the proceedings of the case.

Considering the practice of international arbitrations, it is clear that some arbitrators are unwilling from taking a pro-active role in determining arbitration procedures. They may argue that an active role is contrary to the parties’ expectations and would be against independence, impartiality and neutrality requirements of arbitrators. However, to overcome those concerns procedural rules such as the UNCITRAL, IUSCT or DSU have developed to ensure that dispute settlement processes are fair, independence and reasonable. There is no doubt that in the course of document production and applying the standard of proof in a case, adjudicators bear in mind the principles of natural justice and fair procedures, which entails impartiality of adjudicators and providing adequate notice, time and opportunities for both parties.\textsuperscript{498}

An efficient and cost-effective discovery of evidence certainly contributes to the fair procedures of dispute settlement bodies. Therefore, an arbitrator can be more active in the arbitral process if it is necessary. An Arbitrator may even express his/her preliminary view, on the procedural issues and evidence before the tribunal.

\textsuperscript{496} For more study see, Poppleton, A. \textit{The Arbitrator's Role in Expediting the Large and Complex Commercial Case}, i36(4) Arbitration Journal, (December, 1981) 4 pp. 6-10.

\textsuperscript{497} Ibid. See, e.g. Kaufmann-Kohler, op.cit.188, p 1323.

2. Diversity of Rules and Parties’ Expectations

In pragmatic terms, lawyers and parties from different legal systems who participate in international cases should be ready to make a balance between various factors in the course of international litigations. For example, many rules of procedure do not outline a clear set for submitting evidence or discovery of evidence, while some rules such as the UNCITRAL provides the tribunal with discretion to manage the proceedings and evidence.499

For example, in an international case where one party with a common-law background being involved in a dispute, finds out that he may not be able to cross examine witnesses, or the tribunal does not have the power to compel the other party to provide information or documents. What will he be likely to think? On the other hand, a civil-law party being involved in a dispute can find it stressful and potentially very costly, if his opponent may cross-examine witnesses, and the tribunal orders the parties to produce evidence, which are exclusively in their possession.500

In spite of efforts made to bridge the gap between the major legal systems, but all these differences are real and there are yet many divisions in the way of approaching and implementing the concept of evidence and discovery.501

As discussed, diversity of rules, jurisdiction and methodologies of managing evidence are associated with the nature of international courts and tribunals. As a result, it may seem out of the ordinary if we expect a unified contribution of those bodies to the process of harmonization of procedural rules. Nevertheless, regulatory reform,

e.g. harmonization of rules of procedure of international commercial arbitration, positively paves the way for more international legal and commercial cooperation.\textsuperscript{502}

Model laws such as the 1983 and the 1999 IBA Rules of Evidence or the UNCITRAL Rules may contribute to the process of unification of laws and regulation governing procedural aspects of international dispute settlement. Those Model laws are very positive example of harmonization of rules, and can introduce some general standards covering many controversial issues e.g. evidence, discovery and standard of proof that have long caused problems in the course of international dispute-settlement processes.

However, legal diversities mainly different approaches of the adversarial or inquisitorial system often make it difficult to set desirable and harmonized rules of procedures. As a result, the recommendations about procedural rules, which combine the advantages of civil and common law systems are to be, encouraged as best solution for harmonization of rules of international litigations. Such procedures assist arbitrators and panelist in international disputes deciding cases and rendering reasoned and enforceable awards.\textsuperscript{503}

To conclude this part, apparently, an ideal harmony with the international procedural rules is not going to happen in the near future, but any attempt to combine the two legal systems and to harmonize them is necessary. This is the consequences of international cooperation and proliferation of economic agreements that stimulate the international community to gear up their effort toward a new approach and definition of matters related to evidence. In the 21st century, the concept of different legal and cultural


systems cannot impede the efforts to overcome obstacles in the way of international cooperation.
Part Two: Document Production and Parties’ Responsibilities to Cooperate with International Courts and Tribunals
Chapter V: Discovery of Evidence in International Litigation

With cross-border transactions and in the light of current economic cooperation, the contemporary world needs unified and more harmonized procedural rules govern the inevitable cross-border disagreements. In this regard, the issue of document production, notably discovery, is exceedingly important.504

Many international lawyers and scholars share the belief that the subject of document production and rules governing the discovery of documents in international litigation is unclear.505 In fact, there are still many parties in arbitration who believe that the notion of discovery of evidence is potentially very costly procedure.506

There are many positive points about the discovery, which may trigger the interest of parties before international tribunals. For example, where all evidence and information relating to a particular event are exclusively in the possession of one party, the power of tribunals to order document production is to ensure that all relevant documents should be made available to the tribunal and if necessary to the other party. However, still some civil law lawyers who are active in international litigations have always regarded discovery as a new notion.507

504. For more study about discovery in international arbitration see, e.g. O'Malley, Nathan D., and Shawn C. Conway, Document Discovery in International Arbitration: Getting the Documents You Need, 18 Transnational Lawyer (2005) p. 371, ff.
505. Arthur Rovine, was a member of Baker & Mckenzie litigation department since 1983. He was as the Agent of the United States before the Iran-U.S. Claims Tribunal from 1981-1983.
1. Discovery as a Legal Means in the Process of Fact-Finding

The manner in which evidence is gathered and presented to the arbitral tribunal or panel is very important.\textsuperscript{508} The collaboration of the parties in these matters can shape the outcome of almost every dispute. Normally the production of documents by itself does not cause any problems; however, where a party is in possession of documents, which may seem unfavorable to its position in the case, and the other party or the tribunal requests to get those evidences, problems may arise.\textsuperscript{509}

The manner in which international courts and tribunals manage the process of the fact-finding and requests for document production is determined by the rules of procedures, applicable law, the arbitrators’ legal backgrounds and the inherent power of courts and tribunals. If a party, who bears the burden of proof, cannot get the required documents to prove its claim while those documents are within the control of its opponent, what is the consequence of this situation? It is clear that, if a tribunal refuses to order production of documents it may, in certain circumstances, deprive the party from a fair and sound procedure.\textsuperscript{510}

It is equally important to note, that the nature of issues relating to evidence, and particularly the concept of discovery, make it difficult to provide a comprehensive discussion of the issue. It is why some authors believe, that properly used, discovery is a powerful tool of


\textsuperscript{510} See, e.g. Kaufmann-Kohler, op.cit.188, p 1313 ff. See also, op.cit.506 and 508.
justice however, if a court or tribunal implement it with discrimination, the procedure can have several disadvantages. 511

However, the scope of discovery available to parties varies, and this is often an important issue in international disputes; as parties from different legal systems have different expectations. People from civil law systems generally have somewhat conservative attitude towards the concept of discovery, whilst people from common law system, believe that the parties and the tribunal should have access to all relevant documents. 512

1.1. Discovery in Different Legal Systems

Discovery is generally known as a pre-trial phase in litigation of many common-law systems at the start of a claim or trial. 513 Under discovery, each party through the rules of procedure can request documents from other parties or can submit a request for document production to the tribunal. 514

In the civil-law systems, parties produce the documents on which they intend to use as supportive elements of their cases. In Civil law systems, parties are not obliged to produce documents that may have negative impact on their case. However, there are some identical differences between civil-law countries and the common law systems about the concept of discovery of evidence. 515

In many civil-law adjudication systems, a dispute procedure is managed in a different way and logic than that of the common-law system. This means that there is no pre-trial discovery and no distinction between discovery of evidence and presenting evidence.\(^{516}\)

In the civil-law system, it is for the court to identify the legal and factual issues involved in a case, and the judge may participate in the fact-finding inquiry.\(^{517}\) The judge needs to know the facts to decide the case therefore, if there is not enough evidence and information to reach a reasoned conclusion, the judge can ask for additional evidence.\(^{518}\) In brief, in the civil-law procedure, judge decides on all matters of procedure, which may arise during a hearing including the quantum of required evidence to reach a justifiable decision.\(^{519}\)

The civil-law judge’s role is not to explore every possible avenue in preparation for trial to decide the case.\(^{520}\) For example, in Iran’s civil procedures, the judge only explores what he thinks is relevant, and necessary for the case, if there are insufficient evidence and information to decide the case, he then can compel parties to submit evidence.\(^{521}\) In this regard, Geoffrey Hazard compares discovery in the United States and civil-law countries, as follows:

[Civil-law litigation proceeds through a series of short hearing sessions sometimes less than an hour each focused on

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517. Ibid.
development of evidence. The products of this are then consigned to the case file until an eventual final stage of analysis and decision. In contrast, common-law litigation has one or more preliminary or pre-trial stages, and then a trial at which all the evidence is received consecutively, including all “live” testimony.522

In general, in civil law systems with an inquisitive litigation, judges determine all elements of evidence, while, in adversarial system, discovery of evidence, is the main element of litigation.523

1.2. Pros and Cons of Different Approaches

Whether the adversarial or the inquisitive model of presenting evidence is better equipped to be implemented by international courts and tribunals in the processes of fact-finding, cannot be determined without a comprehensive study.524

Nonetheless, some lawyers may support the adversarial fact-finding system and find it more accurate than investigatory fact-finding.525 In terms of efficiency of this system in litigation however, there are two categories of arguments:

(1) Adversarial litigation is better than investigatory litigation, despite its higher costs, because it produces a more valuable result in a more accurate set of decisions.
(2) The inefficiency of the adversarial system is an incidental cost of implementing social and political goals apart from the actual conduct or outcomes of litigation.526

On the other hand, Lord Woolf has criticized features of the adversarial system in his report to the Lord Chancellor on the civil justice system in England and Wales. He identified disadvantages of the adversarial system of litigation, as practiced in those jurisdictions, as follows:527

- It is too expensive and costs often exceed the value of the claim;
- It is too slow in bringing cases to a conclusion;
- It is too unequal there is a lack of equality between the powerful, wealthy litigant and the under-resourced litigant;
- It is too uncertain there is difficulty in forecasting what litigation will cost and how long it will last;
- It is incomprehensible to many litigants.

In this regard, former United States Chief Justice Warren E. Burger528 also commented about litigation system and said that, “Our system is too costly, too painful, too destructive, and too inefficient for a truly civilized people.”529

Truly, the concept of discovery is a controversial issue in international litigations. In reality, the controversy over discovery is not only about the different approaches of the common law or the civil law.530 In fact, many parties before international dispute settlement bodies are more concern about very liberal approach to and implementation of discovery in international litigation. It is worth mentioning that even United Kingdom’s legal system criticizes the American-style of discovery to the extent that the Irish

writer George Bernard Shaw once described America and England as “two countries divided by a common language”.531

1.3. Need for a Unified Cost Effective Approach to Discovery

The rapid pace of the implementation of discovery rules and necessity of disclosure of data and information in current international business transactions has required redefinition of the scope of discovery. The very liberal approach to and implementation of discovery in international litigation always deters many parties to accept this notion.532

In the course of considering advantages and disadvantages of discovery litigation costs is very important issue. Commercial dispute settlement mechanisms need speedy resolution; therefore, delays and expenses in international arbitration, namely the IUSCT, raise the question whether an adversarial system of litigation can manage commercial cases more efficiently. In many commercial cases, time is a great asset for the parties. In an intellectual property dispute, for example time is very important because a party may lose money if it cannot present into market a patented product due to delays and uncertainty of litigation.533

In fact, the liberal style of discovery is the main reason for many parties to international litigations to be concern, because when they are being exposed to American style of discovery, they find it as an expensive concept of litigation.534

In brief, this paper is not to promote this idea that liberal discovery is a fundamental right, rather it promote a efficient and cost effective model, which requires particular attention when parties drafting procedural rules. In fact, implementation of the concept of discovery in international litigation depend on the costs and advantages of discovery rules for parties and in some case for the tribunal. Therefore, a balanced discovery of evidence can be a desired method of document production as long as the tribunal can considers the proportionality, legal costs and momentous of time for the parties. Therefore, if parties can agree on a plan of discovery beneficial to both of them and the dispute settlement proceeding, there shall be no further objections against the inclusion of discovery rules in rules of procedure or arbitral contracts.

However, a moderate system of discovery and disclosure of evidence and information in international litigation will significantly increase the possibility of timely settlement of disputes between the parties from different legal systems.

1.4. Impact of Modern Technology on Discovery of Evidence

Nowadays, information can be stored electronically and are, therefore, relatively easy to copy and transport and use in any litigation process. Nowadays, e-evidence, emails, digital

information are known as assets and represent a significant part of modern companies’ net worth and are often protected through privacy law, trade secret and copyright law.539

Several multilateral, intellectual property agreements in force today have some element of trade data and internet protocol (IP) protection. The World Intellectual Property Organization 540 and the Paris Convention541 were the first international agreements about patent protection. There are several provisions for protection of the trade secret in TRIPS542 and NAFTA543 agreements as well.

All those rules and practice are the example of relevancy of E-evidence and information and technology in international transactions. At the same time, reliance on information assets causes some concerns about their security, authentication and maintenance.544

540. Convention Establishing the World Intellectual Property Organization (Signed at Stockholm on July 14, 1967 and as amended on September 28, 1979). The WIPO is one of the specialized agencies of the United Nations. WIPO was created in 1967 by the founding member States “desiring, in order to encourage creative activity, to promote the protection of intellectual property throughout the world”. It has 182 member states, and administers 21 international treaties. The headquarters of WIPO are in Geneva, Switzerland.
541. The Paris Convention for the Protection of Industrial Property, dates back to 1883, and since then several conventions and treaties have been signed which cover various aspects of the protection of intellectual property, such as the protection of literary and artistic works (the Berne Convention), and the protection of performers, producers of phonograms and broadcasting organisations (the Rome Convention).
Therefore, national authorities and the international community should consider whether traditional legal regimes like rules of procedure could provide the best solution to confront the consequences of implementing new technology in international disputes and cooperation.\textsuperscript{545}

In today’s cyber-world, paper evidence and traditional arbitration proceeding is no longer adequate. In fact electronic technology digital transactions offer efficient ways for conducting business and discovery of evidence. In addition, electronic technology in arbitration offers efficient ways for conducting discovery of electronic documents, emails, software and data. However, effective use of electronic discovery requires careful planning about how those materials must be generated and be used in litigations.\textsuperscript{546}

2. Document Production in International Litigation

International courts and tribunals are regularly establishing the facts of a case by all appropriate means and evidence available to them.\textsuperscript{547} The process of fact-finding in international tribunals is mainly subject to the parties’ cooperation to provide necessary documents and information. In this regard, the Mexico–United States Claims Commission ruled in the \textit{Parker} Case as follows:

\[ \text{[I]t is the duty of the respective Agencies to cooperate in searching out and presenting to this tribunal all facts throwing any light on the merits of the claim presented. The Commission denies the 'right' of the Respondent merely to wait in silence in cases where it is reasonable that it should speak}\textsuperscript{548} \]


\textsuperscript{547} See Art. 20, s. 1 ICC Rules.

In that case, for reasons the umpire did not order the production of documents, nonetheless all the documents in question were carefully examined. In addition, the Claims Commission firmly recalled that:

It is well recognized that Governments who have agreed to arbitrate are under obligation in entire good faith to try to ascertain the real truth.

In many legal systems, the laws or the domestic court provides a party with an effective and enforceable mechanism for obtaining documents relevant to a dispute from the other party. As was discussed the ability of parties or the tribunal to gather documents and information is a critical component for justice to be achieved in arbitration.

International rules of procedures, such as the IUSCT, ICSID or WTO DSU, generally grant the decision makers or the tribunal the right to order the production of documents. In this regard, UNCITRAL Article 24, Paragraph 3, provides that:

At any time during the arbitral proceedings, the arbitral tribunal may require the parties to produce documents, exhibits, or other evidence within such a period as the tribunal shall determine.

Article 20 of the International Chamber of Commerce Arbitration Rules 1998 (ICC) refers to the ability of the tribunal to study all documents and may compel parties to provide additional evidence. Thus, a tribunal has the right to order a party to produce all

550. Ibid. 16 October 1930, R.I.A.A. VIII, p. 85.
551. See, related discussion about discovery in the UK and US legal system
552. See, e.g. C. Brower and J. Sharpe, op.cit. pp. 217, 240.
documents that the party relied upon, or may compel parties to submit documents in addition to those on which they have already chosen to rely.  Therefore, under many rules of procedure, parties may be obligated to provide documents upon which they rely, and arbitrators are given the right to ask a party to provide additional evidence if necessary.

However, those rules of procedure may not be clear enough to provide parties before international courts and tribunals with this explicit right to request the dispute settlement forum to compel their opponent party to provide them with the requested document. However, international courts and tribunals have this discretion to impose the burden of producing evidence on a party even when there is no clear rules about document production.

However, for the sake of fairness and fair process a tribunal is required to take into account the expectations of the parties. As discussed, a party from a civil-law jurisdiction typically has different vision of litigation, while a party with common-law background usually assume discovery entirely appropriate.

### 2.1. Document Production Before the ICJ

The rules and procedures of international courts and tribunals generally require the production of all documents. Evidentiary discovery has been explicitly provided for in the Statute of the ICJ. Under Article 49 and Article 50, the Court 'enjoys

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556. Supra, pages.


considerable powers in the obtaining of evidence'. 559 Article 49 provides that “[t]he Court may, even before the hearing begins, call upon the agents to produce any document or to supply any explanations. Formal note shall be taken of any refusal.” 560 In this regard, the ICJ in the Nuclear Tests cases, held that:

In view of the non-appearance of the Respondent, it is especially incumbent upon the Court to satisfy itself that it is in possession of all the available facts. 561

Articles 49 and 50 of the Statute along with Articles 61, 62 and 66 of the Rules empower the Court to compel the parties to produce any document or to supply explanations. 562 Article 49 provides the court with this power to impose a sanction on a party who fails to comply with the court’s order to provide further information. 563 In fact, the power of courts to request further information from the parties is, in principle, undisputed. Article 50 States that “The Court may, at any time, entrust any individual, body, bureau, commission, or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion”. Article 66 of the Rules States that “The Court may at any time decide either proprio motu or at the request of a party, to exercise its functions with regard to the obtaining of evidence at a place or locality to which the case relates”. Article 61 of the Rules provides that all judges, also have similar right to put questions to the parties, but before exercising this right they should make their intention known to the President. 564

Article 61 of the Rules enables the Court actively to participate in the fact-finding process and states that the Court may at any time of proceeding indicate any points or issues to which it would like the parties specially to address themselves, or on which it considers that there has been sufficient argument by way of questions. Paragraphs 2–4 of Article 61 of the Rules are about the procedure regarding the questions to the parties.

Article 58.2 of the Rules, determines the Court shall decide about the method of handling the evidence and of examining any witnesses and experts, and the number of advocates to be heard on behalf of each party. In accordance with Article 45 of the Statute, the President is responsible for the control of the hearing. However, pursuant to Rule 61, paragraph 4 prescribes that “[t]he agents, counsel and advocates may answer either immediately or within a time-limit fixed by the President.”

With reference to its power under Article 49 and 50, the Court in several cases has compelled the parties to submit specific documents, which it considered necessary. In several cases before the Court, the parties requested the Court to make use of its power to request documents held by the other party. In the United States Nationals in Morocco case, before the hearings referred to Article 49 and requested further explanations about a point of law, namely as to the capacity in which France had instituted proceedings.

565. For more details about Art 45, 49 and Evidence, see, Andreas Zimmermann, et.al, op.cit562
566. See, e.g. Corfu Channel case (United Kingdom/Albania), Pleadings, vol. IV, p. 428: Ambatielos (Greece/ United Kingdom), Pleadings, pp. 346-347 and pp. 566-567.
In the *Bosnia* Case, which was decided by the ICJ on February 27, 2007, the Claimant requested the Court to make use of its power under Article 49 to order the Respondent to produce certain documents. The deputy agent of Bosnia and Herzegovina argued that the Court has the power to call upon Serbia and Montenegro, under Article 49 of the Statute and Article 62, paragraph 1, of the Rules of Court, to produce the requested documents. Nevertheless, by a letter dated 31 January 2006, the co-agent of Serbia and Montenegro communicated his Government’s refusal regarding the claimant’s request. By letters dated 2 February 2006, the registrar informed the parties that the Court had decided, at this stage of the proceedings, not to call upon Serbia and Montenegro to produce the documents in question. However, the Court reserved the right to exercise subsequently, if necessary, its powers under Article 49 of the Statute and Article 62, paragraph 1, of the Rules of Court, to request, *proprio motu*, the production by Serbia and Montenegro of the documents in question.569

The Court considered the issue in its final judgment.570 However, at the end the court did not draw any adverse inference from Serbian refusal.571

### 2.2. Document Production Before the IUSCT

There is a general understanding that all parties before international courts and tribunals should cooperate with those bodies in pursuit of their objectives.572 Article 24 (1) of the Tribunal Rules States that, “[e]ach party shall have the burden of proving the

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570. Ibid. para 207.

571. See also Dissenting Opinion Al-Khasawneh in Bosnia and Herzegovina Case. See also BIICL Research projects about evidence before ICJ (2002-2008) Anna Riddell and Brendan Plant.

572. See, Kazazi, op.cit.277.p121.
facts relied on to support his claim or defense.” Paragraph 3 of the same Article States that:

[a]t any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the tribunal shall determine.

The Tribunal may initiate a fact-finding process or grant a discovery order if necessary, but there is not any precise reference to the term document production, in the rules of procedure. Nevertheless, under the rules of procedure, the same as the ICJ, the Tribunal may order the production of some documents or categories of documents. However, it is clear that the Tribunal rules do not grant a party the right of discovery. In practice, the Tribunal has issued document production orders in several occasions.

The jurisprudence of the IUSCT provides that it be “for the Parties to select what evidence they wish to rely on in support of their claim.”

As will be discussed in chapter VIII of this paper, during the arbitral proceedings or in response to a party’s request the Tribunal in several occasions has issued orders and compelled the parties to submit evidence or technical information within a period of time as the tribunal has determined.

573. For more study see, e.g. Amerasinghe, op.cit.178., p.368 ff.
2.3. Document Production in International Criminal Cases

The UN Security Council under Chapter VII of the UN Charter established the International Criminal Tribunals including the International Criminal Tribunal for the former Yugoslavia ICTY and the International Criminal Tribunal for Rwanda (ICTR). As a result, in cases before the ICTY and ICTR all States are under an obligation to cooperate with these Tribunals, and to assist them in all stages of the proceedings including providing evidence and information.

The ICTYs’ Statute provides that all States “shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber”. When an order is issued by the ICTY or ICTR, all States in whose territory the person concerned or documents are present must execute the court’s order. State has failed to comply the Tribunal’s order; such failure shall be referred to the Security Council. Pursuant to Rule 61 of the ICTY, if a State has failed to execute an arrest warrant, a Trial Chamber may conduct a public proceeding, in which it receives documentary and testimonial

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577. Article 29 of the ICTY Statute reads: “Cooperation and judicial assistance - 1. States shall cooperate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law. 2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to: (a) the identification and location of persons; (b) the taking of testimony and the production of evidence; (c) the service of documents; (d) the arrest or detention of persons; (e) the surrender or the transfer of the accused to the International Tribunal.” The same text appears as Article 28 of the ICTR Statute.

578. See Rule 7bis of the ICTY and ICTR Rules of Procedure and Evidence: “Non-compliance with Obligations: (A) In addition to cases to which Rule 11, Rule 13, Rule 59 or Rule 61 applies, where a Trial Chamber or a permanent Judge is satisfied that a State has failed to comply with an obligation under Article 29 of the Statute which relates to any proceedings before that Chamber or Judge, the Chamber or Judge may advise the President, who shall report the matter to the Security Council. (B) If the Prosecutor satisfies the President that a State has failed to comply with an obligation under Article 29 of the Statute in respect of a request by the Prosecutor under Rule 8, Rule 39 or Rule 40, the President shall notify the Security Council thereof.” See also ICTY, Prosecutor v. Blaškic, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997, (Case No. IT-95-14-AR108bis), paras. 33-37.
evidence from the Prosecutor.\footnote{In this regard, see, Gabrielle Kirk McDonald, \textit{Problems, Obstacles and Achievements of the ICTY}, 2, Journal of International Criminal Justice (June, 2004) pp 558-570.} In addition to Rule 61, there are other rules that concern the reporting of non-compliance to the Security Council.\footnote{See also Rule 11 of ICTY: If, within sixty days after a request for deferral has been notified by the Registrar to the State under whose jurisdiction the investigations or criminal proceedings have been instituted, the State fails to file a response which satisfies the Trial Chamber that the State has taken or is taking adequate steps to comply with the equest, the Trial Chamber may request the President to report the matter to the Security Council. Pursuant to Rule 7bis(A), a Judge or Trial Chamber can advise the President of non-compliance related to proceedings before that Judge or Trial Chamber, and the President is obligated to report the matter to the Security Council. If a state fails to comply with a request from the Prosecutor pursuant to Rule 8, 39 or 40, the Prosecutor can notify the President and, if the President is satisfied that a state has failed to comply, the President must report the matter to the Security Council. See Rule 7bis(B) ICTY RPE. For more details See, Ibid. Gabrielle Kirk McDonald.} 

However, the Appeals Chamber pointed out that the Tribunal’s power is not limited to what the UN Security Council has expressly conferred upon it in its Statute,\footnote{Interlocutory Appeal Decision. Tadic (IT-94-1-AR72). Appeals Chamber, 2 October 1995, para 15.} but as the Appeals Chamber had recognized the Tribunal had an 'incidental or inherent jurisdiction'.\footnote{Ibid., at para. 18.} Finally the UN Security Council Resolution 827, para. (4) States that, 'all States shall cooperate fully' with the ICTY and that all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and Statute of the tribunal, particularly assistance and orders issued by a Trial Chamber under Article 29 ICTY’s Statute.

Under Rule 98, “A Trial Chamber may order either party to produce additional evidence. It may \textit{proprio motu} summon witnesses and order their attendance”. While the Tribunal’s judges, can question witnesses and order the production of additional evidence, under Rule 70 as well. Rule 70 also encourages States, to share all information with the Tribunal on a confidential basis and by guaranteeing information providers that the confidentiality of the

\footnotesize{579. In this regard, see, Gabrielle Kirk McDonald, \textit{Problems, Obstacles and Achievements of the ICTY}, 2, Journal of International Criminal Justice (June, 2004) pp 558-570.} 

\footnotesize{580. See also Rule 11 of ICTY: If, within sixty days after a request for deferral has been notified by the Registrar to the State under whose jurisdiction the investigations or criminal proceedings have been instituted, the State fails to file a response which satisfies the Trial Chamber that the State has taken or is taking adequate steps to comply with the equest, the Trial Chamber may request the President to report the matter to the Security Council. Pursuant to Rule 7bis(A), a Judge or Trial Chamber can advise the President of non-compliance related to proceedings before that Judge or Trial Chamber, and the President is obligated to report the matter to the Security Council. If a state fails to comply with a request from the Prosecutor pursuant to Rule 8, 39 or 40, the Prosecutor can notify the President and, if the President is satisfied that a state has failed to comply, the President must report the matter to the Security Council. See Rule 7bis(B) ICTY RPE. For more details See, Ibid. Gabrielle Kirk McDonald.} 

\footnotesize{581. Interlocutory Appeal Decision. Tadic (IT-94-1-AR72). Appeals Chamber, 2 October 1995, para 15.} 

\footnotesize{582. Ibid., at para. 18.}
submitted documents by the States or individuals and of the information’s sources will be protected.\(^{583}\)

Relevant to this discussion is the International Criminal Court (ICC) that was created by Rome treaty and requires States parties’ ratification. Under the ICC Statute, \(^{584}\) all State Parties are bound by the provisions of the treaty, to cooperate with requests from the court, and it refers to “facilitating the voluntary appearance of persons as witnesses or experts before the Court”.\(^{585}\) ICC rules of procedure empower the Court to order document production as well. For example, Article 65(4) of the Rome Statute allows the Trial Chamber to order the prosecutor to present additional evidence and information about the facts of the case. The Trial Chamber may even order the trial to proceed under ordinary trial procedures if a more complete presentation of the facts of the case is required in the interest of justice and, in particular, in the interests of the victims.\(^{586}\)

The Inter-American Court of Human Rights also has the power to compel the parties to submit additional evidence. In a case, decide on 29 July 1988 the Court ordered Honduras to produce some additional documents and to make available as witnesses two individuals so that they might give oral testimony.\(^{587}\)

The criminal courts and tribunals have all required legal framework necessary for effective operation. As required by the ICTY Statute, the Tribunal can rely on the Security Council to compel compliance.

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585. Article 93(1)(e) of the Rome Statute.


In the case of non-compliance with obligations, the President also can report the matter to the Security Council. So far, the Security Council has not adopted concrete measures in response.\footnote{588}

2.4. Document Production Before the WTO

The Term of fact-finding international law can be used for a variety of purposes.\footnote{589} In litigation, fact-finding means the responsibility of determining the relevant facts to decide a case.\footnote{590} However, the burden of proof and the standard of review should be discussed in the light of the DSB’s mandate.

Article 3.7 of DSU clearly States that the mandate of the dispute settlement mechanism is to secure a positive resolution of the dispute.\footnote{591} However, the DSU contains few rules concerning the fact-finding process and evidence, but as was discussed, the panels and Appellate Body have enough power to manage proceedings to achieve an adequate understanding of the issues before them.\footnote{592} Article 11 provides that:

[A] panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case.\footnote{593}

Article 11 of DSU calls for an “objective assessment” of disputes brought before panels. Panels decide about the burden of proof that

\footnotesize{588. See, e.g. Gabrielle Kirk McDonald, op.cit.579, p 570.}
\footnotesize{590. See the report of the UN Secretary-General on methods of fact-finding, UN Doc. A/6228, GAOR (XXI) of 22 April 1966, Annexes Vol. 2, Agenda item 87, 1-21.}
\footnotesize{591. See, e.g. F. Weiss (ed.), Improving WTO Dispute Settlement Procedures. Issues and Lessons from the practice of other International Courts and Tribunals (Cameron/May, London 2000).}
\footnotesize{592. For more details see, e.g. WTO Analytical Index online.DSU.}
\footnotesize{593. See Article 11 of the Understanding on Rules & Procedures Governing the Settlement of Disputes, Apr. 15, 1994.}
parties to a dispute must bear. In this regard, the Appellate Body stated that:

> If [...] any party believes that all the pertinent facts relating to a claim are, for any reason, not before the panel, then that party should ask the panel in that case to engage in additional fact-finding.\(^{594}\)

This finding suggests that to resolve an issue before the panel, it can engage in investigation beyond that which has been outlined in Article 11 of DSU. Therefore, a panel or the Appellate Body should take active role as much as necessary to enable the parties to resolve their dispute. It is, therefore, conceivable, and in practice it happens quite frequently, that panels exercise their complete authority regarding the fact-finding process.\(^{595}\)

In accordance with Article 11, panels are obliged to examine all factual and legal issues. Thus, under the DSU, in examining claims, panels must make an “objective assessment” of the factual and legal issues, their “applicability” to the dispute, and the “conformity” of the measures at the case with the covered agreements. To achieve this objective a panel must be in possession of sufficient evidence and information to support the conclusion.\(^{596}\)

In this regard, WTO Members are required to cooperate with the panels. The Appellate Body in *Canada–Aircraft*, ruled that the refusal by Members to provide the requested evidence and information undermines the ability of a panel to make an objective assessment of the facts and the matter, as required by Article 11 of the DSU. Such a refusal also undermines the ability of other Members of the WTO to look for the satisfactory resolution of

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\(^{596}\) Ibid.
disputes under the procedures “for which they bargained in concluding the DSU.”

2.4.1. Right to Seek Information

Article 13.1 provides that, “Each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate”. However, a Member is under obligation to respond promptly and fully to requests by a panel for such evidence and information, as the panel considers necessary. Article 13 is as a legal tool for the panel to conduct fact-finding investigation in a dispute, while confidential data and information, which is provided, shall not be disclosed.

The panels and Appellate Body’s decisions support the broad authority of panels to seek information established by Article 13 of the DSU. This issue was addressed in EC–Bananas III, case where the panel stated that under Article 13, the panel has a broad right to request any evidence and information and the panel can consider evidence even if not provided by any of the parties as well. However, Article 13 encourages parties, to share all information with the panel by guaranteeing that the confidentiality of the submitted documents by the parties or individuals will be protected.

Relevant to this discussion the Appellate Body has concluded that panels have the discretion to seek information from any relevant source, and there is no condition on the exercise of this

598. Ibid, WTO Analytical Index. op.cit595, p 494. ff. See, Katrin Arend, pp 415-418
discretionary authority. Moreover, the Appellate Body has stated that a panel “is vested with ample and extensive discretionary authority to determine when it needs information to resolve a dispute and what information it needs.”

The Appellate Body in the US–Shrimp Case also held that the word “seek” is excessively formal and technical in nature and in any case, the panel has the discretionary authority. The Appellate Body held that in the light of a panel’s mandate to seek information “for all practical and pertinent purposes, the distinction between “requested” and “non-requested” information vanishes”. In that case, the Appellate Body commented about “the comprehensive nature of the authority of a panel to seek information and technical advice from “any individual or body” it may consider appropriate, or from “any relevant source.” The Appellate Body stated that:

It is particularly within the province and the authority of a panel to determine the need for information and advice in a specific case, to ascertain the acceptability and relevancy of information or advice received, and to decide what weight to ascribe to that information or advice or to conclude that no weight at all should be given to what has been received.

The extent of the WTO panel’s right to seek information from “any individual or body” it may consider appropriate” was discussed in the EC–Hormones Case. The EC challenged the panel’s right to consult experts to obtain their opinion. In paragraph, 148 of its report the Appellate Body emphasized that; there is no legal obstacle to the panel drawing up, in consultation with the parties to


604. Ibid, para.104.

605.Ibid, para 104.

the dispute, ad hoc rules for those particular proceedings. The Appellate Body found that “in disputes involving scientific or technical issues, neither Article 11.2 of the *SPS Agreement*, nor Article 13 of the DSU prevents panels from consulting with individual experts”.607 The Appellant Body also observed that Article 13 of the DSU “enable[s] panels to seek information and advice as they deem appropriate in a particular case.”608

The panels’ discretionary authority to evidence and seek information is without any condition. In *Thailand Anti-dumping Case*, Thailand argued that, the claims of Poland were not sufficiently clear, and that the panel, therefore, overstepped the limits of its authority in asking questions of the parties. The Appellate Body Report noted that:

[W]e have previously stated that panels are entitled to ask questions of the parties that they deem relevant to the consideration of the issues before them. In our Report on Canada–Measures Affecting the Export of Civilian Aircraft, we dismissed the view that a panel has no authority to ask a question relating to claims for which the complaining party had not first established a prima facie case, and stated that such an argument was "bereft of any textual or logical basis."609

The Appellate Body in the *Canada Aircraft* Case also concluded a panel is vested with extensive discretionary authority to determine when it needs information. A panel may need such information needs information to resolve a dispute before or after a Member has established its complaint or defence on a *prima facie* basis.610

607. Ibid., para. 138.
608. Ibid, para. 147.
2.4.2. Requests for Information from International Organizations

Article 13 is not limited to the individuals or member States that may be requested by a panel to provide information. Article 13, empowers panels to seek the opinion of other international organizations such as the International Monetary Fund (IMF) and the World Intellectual Property Organization (WIPO).\(^{611}\)

In the *India–Quantitative Restrictions* Case, the questions before the panel was whether in the light of Article XV:2, which States that they shall consult fully with the IMF, a panel is authorized to consult with the IMF. In fact, in that case the panel consulted with the IMF about India’s situation.\(^{612}\)

The United States in its submissions argued that the terms of Article XV:2 of GATT 1994, should be read with paragraph 2(b) of the Incorporation Clause of *GATT 1994* in Annex 1A of the WTO Agreement, which authorize the WTO including panels to consult with the IMF in specific matters. While India, challenged that argument, and stated that the panel is not authorized to consult with the IMF. India argued that there is division of functions between the different bodies of the WTO, and Article XV only authorizes the General Council and the Committee on Balance-of-Payments Restrictions (BOP) to consult with IMF. The panel stated:

> Article 13.1 of the DSU entitles the panel to consult with the IMF in order to obtain any relevant information relating to India’s monetary reserves and balance-of-payments situation which would assist us in assessing the claims submitted to us.

We do not find it necessary for the purposes of this case to decide the extent to which Article XV:2 may require panels to consult with the IMF or consider as dispositive specific determinations of

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612. Panel Report on India - Quantitative Restrictions, para. 5.11-5.14
the IMF. As will be seen in Section V.G *infra*, we accept in the circumstances of this case certain assessments of the IMF. In this regard, however, we note that whether or not the provisions of Article XV:2 extend to panels, the panel has the responsibility of making an objective assessment of the facts of the case and the conformity with GATT 1994, as incorporated into the WTO Agreement, of the Indian measures at issue, in accordance with Article 11 of the DSU.613

In the light of panels and the Appellate Body reports, it is clear that panels may seek information or advice from international organization, as well as WTO bodies such as the General Council and or Committee on Regional Trade Agreements.614

2.4.3. Complying with Requests for Document Production

As discussed earlier, the language of Article 13 gives the panel a discretionary authority to request and obtain information, “from any individual or body” within the jurisdiction of a member of the WTO.615

Article 13 authorizes the panels to request evidence and information from the parties and to ask questions that panels find relevant to a dispute. In this regards, the panel in the *Turkey—Textiles* Case used its extensive discretionary authority and submitted a series of questions to the EU.616

However, in the process of settling a dispute before the DSB, all Members are under obligation to give prompt and full information

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614. For more details see: WTO Appellate Body Repertory of Reports and Awards (1995-2006) & WTO Analytical Index Online DSU.


to the panel. In the *EC–Hormones* case, the Arbitrators determined that such an obligation rests on all parties to produce evidence and to collaborate in presenting evidence to the arbitrators.617

In the *Argentina–Footwear* Case, the panel discussed the Members’ duties to cooperate about presenting evidence. In that case, the United States requested that Argentina produce additional customs invoices, which Argentina refused to do. 618 The panel held that the evidence presented by the United States, combined with “the fact that Argentina did not present any convincing evidence to the contrary,” created a presumption that excess duties were imposed.619 In this regard, the panel made some general observations about the duties of the Members to provide information to the WTO panels.620

In the *Canada–Aircraft* Case, Canada argued that it was not under any legal obligation to comply with the panel’s request to submit the requested information. The Appellate Body has clarified the extent of the Members’ duty to disclose information to the panels, as well as the consequences that may result from a failure to disclose the requested information. The Appellate Body held that Members are, under a duty and an obligation to “respond promptly and fully” to requests made by panels for information.621 If a party refuses to disclose requested information, the panel had the legal authority and the discretion to draw inferences from the facts before it.622

Article 13 of the DSU States that, Members should respond promptly to any request as the panel considers necessary and appropriate. In this regard, the Appellate Body, in *Canada–Aircraft case* determined that “the word “should” in the third sentence of Article 13.1 is, in the context of the whole of Article 13, used in a

619. Id. para. 6.61.
620. For more details see, e.g., Appellate Body Repertory of Reports, 2007 & WTO Analytical Index
normative, rather than a merely exhortative, sense”.623 In other words, when requests made by panels for information under Article 13.1 of the DSU all Members are “under a duty and an obligation to 'respond promptly and fully’”.624 The Appellate Body concluded that, if Members had no legal duty to 'respond' by providing such information, that panel's undoubted legal "right to seek" information under the first sentence of Article 13.1 of the DSU would be rendered meaningless"625

The Appellate Body continued by stating that “If a panel is prevented from ascertaining the real or relevant facts of a dispute, it will not be in a position to determine the applicability of the pertinent treaty provisions to those facts, and, therefore, it will be unable to make any principled findings and recommendations to the DSB”.626 The Appellate Body further noted that “the broader duties of Members under Article 3.10 of the DSU not to consider the "use of the dispute settlement procedures ..., and, when a dispute does arise, to "engage in these procedures in good faith in an effort to resolve the dispute."627

The power attributed to a panel or Appellate Body is, therefore, not conditional.628 Those bodies may compel the parties to a dispute to submit all required evidence and information and if a party refuses to disclose requested information, the panel can draw inferences from the facts before it.629 However, the scope of a party’s responsibility to comply with requests from panels or a tribunal is a debated issue.630

624. Canada--Aircraft Appellate Body Report. op.cit. 601
625. Canada--Aircraft Appellate Body Report. op.cit. 601. para 188
626. Canada--Aircraft Appellate Body Report. op.cit. 601. para 188.
628. For more details see, See, Katrin Arend, op.cit599 pp 415-430, in R. Wolfrum, P.Tobias ,K. Kaiser (eds)op.cit.599. See also Id. Shoyer, op.cit.622 p..682ff.
629. Ibid.
3. The Need for Reasonable Discovery in International Litigation

According to the procedural rules of the many international courts and tribunals, they should establish facts and legal issues in each case by all appropriate means.\textsuperscript{631} Those rules provide arbitral tribunals with power of compelling the parties to put forward evidence and information upon request of the other party or the tribunal itself. In cases where all evidence and information relating to a particular event or fact lies in the possession of one of the parties only, discovery of evidence may be the only means of getting those documents.\textsuperscript{632}

In this regard, the Mexico–United States General Claims Commission in the \textit{Parker} Case, held that:

\begin{quote}
  The parties before this Commission are sovereign Nations who are in honor bound to make full disclosures of the facts in each case so far as such facts are within their knowledge, or can reasonably be ascertained by them.\textsuperscript{633}
\end{quote}

The referral of dispute to an international body does logically give the assigned arbitrator or panelist the responsibility for managing the process of a case. In this regard, arbitrators have the authority to decide all issues before them, including issues related to the discovery of evidence. However, in practice, unless the parties have expressly agreed to a degree of discovery, international tribunals are reluctant to conduct a comprehensive discovery and they limit their order to the production of certain specified evidence or some categories of necessary documents only.\textsuperscript{634}

\textsuperscript{631} See Art. 20: s. 1, ICC Rules; Art. 22.1(c), LCIA Rules.

\textsuperscript{632} For more details see, O’Malley, Nathan D., and Shawn C. Conway, op.cit. 555 p371 ff. See also, Morgan, op.cit.507, p 9.

\textsuperscript{633} 31 March 1923, R.I.A.A. IV, p. 39.

3.1. Parties’ Rights to Request Document Production

Many procedural rules of international courts and tribunals generally allow judges and arbitrators to order the production of documents at the request of any party to the dispute or at their own discretion.635

However, discovery of evidence in international litigation is far less extensive than discovery under some national litigation.636 The reason for this view is that the practice and the language of procedural laws of many international courts and tribunals are not so clear. As discussed earlier, some rules of procedures, such as those of the Court of Arbitration of the International Chamber of Commerce, IUSCT, and WTO provide for some limited discovery of evidence.637 The same as other international tribunals Under Article 49 of the Statute the ICJ can compel parties to produce any document or to supply explanations.638 The Court can also call upon the parties during proceedings to produce any documents, which it considers necessary for the elucidation of any aspect of the matters in a case a matter either of fact or of law.639

These rules typically give the judges and arbitrators the power to order discovery of evidence, however, there is no guarantee that one party can get full discovery as he/she may consider necessary for the case.

635. See, the ICJ, IUSCT and the UNCITRAL Ruels. See also Rules: Commercial Arbitration Rules and Mediation Procedures (AAA Commercial Rules”), R-21, at http://www.adr.org
637. See, e.g., ICC Rules of Arbitration, Articles 3, 4 and 14: See also American Arbitration Association International Arbitration Rules, Article 19.
638. Article 49 of the Statute.
639. Article 62, paragraph 1 of the Rules.
Nevertheless, the judges and arbitrators or WTO panels generally grant a well-reasoned request for discovery, which meets all requirements.640

3.2. Sound Administration of a Request for Discovery

The goal of due process in international litigation is to produce, with fair procedures, an accurate result.641 In this regards, the ICJ rules and jurisprudence require that, the provisions related to evidence are about to guarantee the sound administration of justice. In *Nicaragua* case, the court ruled that:

The Court is bound by the relevant provisions of its statute and its rules relating to the system of evidence, provisions devised to guarantee the sound administration of justice, while respecting equality of the parties. The presentation of evidence is governed by specific rules relating to, for instance, the observance of time-limits, the communication of evidence to the other party, the submission of observations on it by that party, and the various forms of challenge by each party of each other’s evidence.642

In arbitration also, Article 15(1) of the IUSCT rules explicitly requires that the parties should be treated with equality and that at any stage of the proceedings the parties shall be given a full opportunity of presenting their case.

The principles of equal treatment of parties and fair procedures as contemplated in Article 15(1) and other Articles of the IUSCT Rules of Procedure include all aspect of arbitration proceeding e.g.

640. See, e.g. O’Malley, Nathan D.,et.al op.cit555 p371 ff. The will be discussed in chapter VIII.


considering document production requests, the conduct of hearings, the translation of documents and the testimony of witnesses.

In exercising principles of equal treatment of parties and fair procedures in *Nicaragua* judgment, ICJ ruled that:

> Neither Article 53 of the Statute, nor any other ground, could justify a selective approach, which would have undermined the consistency of the Court's methods and its elementary duty to ensure equality between the Parties.

However, the extent of parties’ right to present their claims in whatever form they wish and a tribunal’s authority to compel other party to provide some document requires more discussion by international jurists. In fact, adjudication bodies always provide the parties with every opportunity to defend their point and consider the elements of fact and law before deciding to accept or reject requests from the parties. In this regard, Rosenne once noted that:

> The procedure for the examination of witnesses was characterized by its liberality, lack of rigidity, and lack of strict adherence to municipal practice [...] From the point of view of the Court, the object was that as much light as possible should be cast upon the matters to be discussed and the Parties should be given every opportunity to defend their point of view.

In brief, the parties before international adjudication bodies have the right to call upon the court or tribunal for implementation of procedural. At the same time, in the light of rules of procedures, all

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parties are under obligation to cooperate fully and produce all evidence as requested by other party or ordered by the tribunal. However, as will be discussed in detail in chapter 7 below, the parties have the right to refrain from disclosing evidence, which reveals confidential secrets.

3.3. **Discovery Facilitate the Fact-Finding Duty**

Procedural rules such as the UNCITRAL Arbitration Rules maintain that, an arbitral tribunal shall provide the reasons upon which the award is issued, unless the parties have agreed that no reasons are to be given.646

Article 23 Paragraph 2 of the Statute of the ICTY also provides that a judgment shall be accompanied by a reasoned opinion in writing, to which separate or dissenting opinions may be appended.647

In accordance with Article 12.7, of the DSU, reports must reflect the basic rationale behind the panel’s findings. The duty of panels under Article 12.7 of the DSU to provide a “basic rationale” reflects the principles of fundamental fairness and due process.648

When an international court or tribunal is about to consider a case or render a reasoned award, it should be in possession of all available facts, evidence and legal issues.649 Accordingly, the international dispute-settlement bodies have been empowered with sufficient authority to manage the production of evidence in a way they consider appropriate and to seek evidence and information.

646. Article 32 (3) UNCITRAL.
In this regard, rules of procedures such as Article 13 of the DSU, Article 49 of the ICJ statute or Article 24 of IUSCT Rules of Procedures all provide the required grounds for those bodies to exercise their authority for gathering evidence and information.\textsuperscript{650} Article 13 of DSU and some other provisions of the WTO agreements give the panels and Appellate Body discretionary authority to request and obtain information, from any individual or States.\textsuperscript{651}

3.4. **Discovery is a Tool not a Common Law Invasion**

Because of the proliferation of internal and recently international transactions, the attitude toward the implementation of discovery in many legal systems has been changed.

Now, we can better understand the negative reaction of civil law systems to an extensive discovery of evidence. As was discussed, under the civil-law system, the judge is in charge of whole proceeding including managing evidence, hearing witness and requesting necessary materials to decide the case. In fact, governmental officials in many civil law systems may consider the extensive discovery of evidence as an attempt to undermine their judiciary system or their sovereignty.\textsuperscript{652}

For example, in common law system like the United States federal courts compel the parties to produce all required documents, while, in many civil law systems judges are reluctant to a discovery order especially in private arbitrations.\textsuperscript{653} However, unlike the very wide

\begin{itemize}
  \item \textsuperscript{651} For more details see, See, Katrin Arend, pp 415-430, in R. Wolfrum, P.Tobias ,K. Kaiser (eds)op.cit.599.
  \item \textsuperscript{653} See, Emmanuel Gaillard, *Court-Ordered Production of Evidence*, 221 (60) New York Law Journal, (March 1999), P 3.
\end{itemize}
discovery available under common law, in many civil law countries one may obtain by discovery only specific documents.654

Overall, comprehensive studies discussions are necessary about the advantages and disadvantages of discovery in international litigations and the methods of presenting evidence. The arbitration agreements can be structured and negotiated in ways to empower the parties and the tribunal with the right to compel all the parties, without imposing an unnecessary burden or extra costs. However, in the light new developments, the parties to any kind of contract or agreement should give careful thought about discovery and become sure that the process of documents production is necessary for disputes that may arise.655

Beyond that, until years ago, evidence and information was exclusively in the form of hard evidence or paper only. Now we live in a digital world, which electronic documents and data are part of all litigations, therefore, unnecessary burden or extra cost associated with paper evidence to be prepared by the parties is not as a considerable element any more.656

To conclude this part, I should say that the integrity of an international court and tribunal or the WTO dispute settlement system, depend on their ability to compel the parties to comply with their orders including document production orders and in case of unreasoned failure of a party to follow the orders the adjudication body should draw an adverse inferences.657

654. See, the Iranian Civil procedural code Article 315-322.
657 . See, e.g. Canada–Aircraft Appellate Body Report, op.cit.601 p204.
Chapter VI: Contractual Obligation to Cooperate and to Disclose Evidence

Rules about accessing to information and records held by government bodies are often guided by the principles of freedom of information and transparency of laws and regulations. For example, the European Commission sets rules, which ensure freedom of access to information on the environment held by public authorities and the basic terms and conditions under which such information should be made available.

In the international community, the parties of any kind of accord should cooperate in the process of the implementation of the signed agreement and, in particular, to exchange information. As a result, the parties must cooperate in a manner consistent with their agreement and with international law and not to engage in activities that undermine the effectiveness of international cooperation. To foster international cooperation, international agreements have to create incentives for the parties to be bound by the commitments they have undertaken.

In this regard, almost all international treaties and conventions require parties to act in a way to eliminating all obstacles in the way of international cooperation. For this purpose, parties usually establish contact points to promote the exchange of evidence and information and enhance cooperation between all Member States.

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660. See, e.g. Article V of Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, approved on 24 November 1993 by Resolution 15/93 of the Twenty-Seventh Session of the FAO Conference. Available at: http://www.fao.org/DOCREP/MEETING/003/X3130m/X3130E00.HTM (last visit 31 March 2008).
parties to cooperate with the international organizations, including
dispute-resolution bodies.  

Here I specifically analyze some legal points regarding parties’
obligations to cooperate in providing documents and information,
found in international conventions, including the WTO Agreements.

### 1. Transparency as a Legal Obligation to Disclose Information

Transparency in international relations and business means the
parties’ maximum accountability and openness. From the
European Central Bank viewpoint, for example, transparency means
that the central bank provides the public and the markets with all
relevant information on its strategy, assessments and policy
decisions as well as its procedures in an open, clear and timely
manner. In this part, I limit my discussion to the international
litigation context, defining it to mean the availability of all evidence
and information to the interested parties and the dispute-settlement
body in an adjudicatory decision-making process.

The general definition of international law is that States join
international accords, which are in their interest, and when parties
do not comply with their contractual obligations sanctions can be
imposed. However, there is no an obligation for maximum
transparency and openness for States parties to an international

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661. See, e.g. GATT: X, Anti-Dumping Agreement 6 and Annex II, Agreement on Subsidies and
Countervailing Measures Articles 12 and 22, The Technical Barriers to Trade Agreement (TBT) Article 2
and Article 10 and Annex 2 of TBT, The Sanitary and Phytosanitary Measures Agreement or SPS, TRIM
article 6, TRIPs Part III, Section 2 –Articles 31, 42, 43, 44, GATS Article III.

662. See, e.g. Todd Weiler, *International Investment Law and Arbitration: Leading Cases from the ICSID,*


664. For more details see, M.R. Goldshmidt, *The Role of Transparency and Public Participation in
agreement, unless there will be a transparency clause such as those at the WTO agreements or some investment treaties like NAFTA.665

In an international trade or investment agreement, having maximum knowledge about activities of others is indispensable. To maximize benefits in international transaction, parties should collect information and date to evaluate their own performance or to monitor the performance of their counterpart.666 For example, from Abram and Antonia Chayes’ viewpoints the concept of transparency means availability of evidence and information, which can ensure parties’ compliance with their contractual obligations and treaty norms in a number of areas, including international communication and environmental protection.667

Transparency in international community promotes and ensures compliance by all parties and enables them to achieve a clear understanding of their national and international interests and responsibilities.668 In fact, the provision of transparency, if inserted and implemented in a proper way as a process within the treaties, can guaranty the main goals of international accords.669 In addition, transparency encourages compliance by providing assurance that all parties to an accord are respecting their contractual obligations and helps decision makers to identify all advantages and disadvantages of their own policies to avoid potential conflicts.670

668 See, Patricia Isela Hansen, op. cit666 pp 1060-2. See also Goldshmidt, op.cit. 664.
Nevertheless, transparency and openness in any legal regime, is a fundamental element. There is increasingly compelling evidence in the international dispute settlement bodies that transparency and cooperation by all parties are essential to the ongoing legitimacy of dispute settlement mechanisms. Several economic agreements such as NAFTA, Bilateral Investment Treaties and WTO agreements promote transparency and participation. It evident that implementation of basic rules of transparency to international dispute settlement mechanism will continue to predominate.

At the preamble of NAFTA parties agreed to ensure a predictable commercial framework for business planning and investment. Article 1802 of NAFTA requires that ‘[e]ach Party shall ensure that its laws, regulations, procedures, and administrative rulings of general application respecting any matter covered by this Agreement are promptly published or otherwise made available in such a manner as to enable interested persons and Parties to become acquainted with them’.

However, a Tribunal established under Chapter Eleven of NATFA, must decide the issues in dispute in accordance with NAFTA and applicable rules of international law. In addition, NAFTA, Art 102(2) provides the Parties must interpret and apply the provisions of this Agreement in the light of its objectives set out in paragraph 1 and in accordance with applicable rules of international law. Objectives set out in paragraph 1 include transparency and the substantial increase in investment opportunities in the territories of the Parties.

Finally, the provision of transparency through providing evidence and information can facilitate the process of judicial fairness and

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671. For more details, see, Goldshmidt. Op.cit, 664
672. See, op cit. 666.
673. NAFTA Preamble, para. 6.
674. Ibid., Art. 1802.1.
675. NAFTA, Art. 1131(1). See, Raymond L. Loewen v. US, ICSID Case No. ARB(AF)/98/3, para 50.
676. NAFTA, Art. 102(1)(c). Ibid. ARB(AF)/98/3, para 70
due process between parties, which is as the primary target for managing conflicts that arise under international treaties. In fact, one of the most important values of transparency is that dispute-settlement bodies have access to required and reliable data and information on the process of deliberation, assessment of evidence and final judgment. Transparency makes it possible to improve understanding of the international dispute-settlement system, assess their performances, and evaluate parties’ submissions accordingly.677

1.1. Transparency Obligation Under WTO

Transparency in international economic cooperation, and specifically with regard to trade and investments, is critical for ensuring that transnational business is not subject to unknown barriers.678 Transparency is essential to minimize uncertainty and encourage the enforcement of parties’ contractual obligations.679

Transparency in WTO aims to bring the world trade to a more efficient and fair, set of policies.680 Along with the principles of most-favored-nation and national treatment, transparency is as one of the fundamental principles of the WTO system.681 Therefore, it is a legitimate goal of the WTO to have uniform transparency measures and maximum openness for all Members.682

677. For more details, see, Ronald B. Mitchell, op.cit666pp 109-111.
Transparency principles are part of the WTO Agreements, but Article X of the GATT 1994 is the most obvious example of provision of transparency, which requires governments to ensure that their regulations or actions which affecting international trade to be published promptly and administered in a “uniform, impartial and reasonable manner.”

The contracting parties must make available all rules and policies about: their custom tariffs; restrictions or prohibitions on imports or exports; taxes or other charges; the transfer of payments; or the sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use of imports or exports. All those disclosures shall be done promptly and in such a manner as to enable governments and traders to become acquainted with them.

The Appellate Body recalled Panel Report, in EC–Poultry, which the panel ruled that “Article X:1 of the GATT makes it clear that Article X does not deal with specific transactions, but rather with rules ‘of general application’.

In US–Underwear, the Appellant Body further stated that Article X:2, may be seen to embody a principle of fundamental importance, that of promoting full disclosure of governmental measures affecting Members and private parties and enterprises, whether of domestic or foreign nationality. The Appellant Body also held that the relevant policy principle in Article X:2 is widely known as the ‘principle of transparency’ and has obviously due-process dimensions. From the Appellate Body viewpoint the important conclusion is that Members and private parties and enterprises likely to be affected, by governmental measures imposing restraints, requirements and other burdens, should have a reasonable opportunity to acquire authentic information about such measures.

684. Article X:1 of GATT , 1994. See also, Id. pp3-5
and accordingly to protect and adjust their activities or alternatively to seek modification of such measures.\textsuperscript{687}

Some other WTO agreements also require all Members to be transparent about their measures and provide a reasoned explanation for the proposed measures. Those requirements enable all-contracting parties to review and present their views, and if necessary provide responses to those views.\textsuperscript{688}

Under the WTO, agreements there are several transparency procedures and provisions, which codify all Members’ specific obligations and set methods to compel all Members to fulfill their contractual and mutual obligations with regard to the principle of transparency and openness in their international trade. In this regard, two Uruguay Round Agreements specifically deal with the issue of transparency. The first is the Trade Policy Review Mechanism (TPRM), which is the successor to the Trade Policy Review Mechanism first created in 1989.\textsuperscript{689} The second is the Decision on Notification Procedures, a partial successor arrangement to the 1979 Tokyo Round Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance.\textsuperscript{690}

The General Agreement on Trade in Services (GATS) characterizes the concept of transparency in its Preamble as: “Wishing to establish a multilateral framework of principles and rules for trade in services with a view to the expansion of such trade under conditions of transparency and progressive liberalization[,]” However, the goal of strengthening GATS transparency provisions, is to secure “an overall balance of rights and obligations, while giving due respect to national policy objectives”; and “[t]he right of Members to regulate,

\textsuperscript{687} Ibid. Appellate Body Report on US - Underwear, p. 21
\textsuperscript{688} Agreement on Agriculture :Article 7- Agreement on the Application of Sanitary and Phytosanitary Measures ; Article 7 - Agreement on Technical Barriers to Trade ; Articles ,2,5,15- Agreement on Rules of Origin , Articles,2(g) and 3(e)- Agreement on Trade in Civil Aircraft , Article 9 - Agreement on Government Procurement , Article XVII - Transparency.
\textsuperscript{690} For more details, see, Robert Wolfe, op cit.682, p. 159 ff. Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, GATT. BISD, 26th Supplement (1980).
and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives.”

Article III and VI of the GATS, set out the main transparency obligations of Members and their obligation for publication and administration of domestic rules affecting trade in services. Article III contains the general obligation regarding transparency of measures affecting the operation of the GATS. Under Article III, Members shall publish all relevant measures of general application, which affect the operation of GATS. Under Article VI, all Members shall ensure that all measures affecting trade in services are administered in a reasonable, objective and impartial manner. This Article contains requirements on the administration of domestic regulations. There are several other GATS articles contain specific requirements on notifications to the WTO and bilateral consultations with other WTO Members.

Suffice it to say, that the concept of transparency is not confined to the aforementioned provisions, transparency is a well-known principle in the WTO Agreements. In this regards, Jagdish Bhagwati called the transparency "Dracula Principle," meaning that problems will disappear once light is thrown on them.

However, lengthy discussion of all those provisions is beyond the scope of this thesis but below is some analysis of transparency from the international law perspective.

1.2. Transparency from the International Law Perspective

It is clear that requirements of publication of laws and regulations and related obligations mentioned in investment treaties, GATT,

693. For more details about transparency and WTO, See, F. Weiss, op.cit. 678 p 1545.
GATS and other WTO provisions are binding upon the parties but they do not appear to be a legal principle in international law.\(^{694}\)

In international law, all parties must respect accords to which they have become parties. In this regard, Article 26 of Vienna Convention on the Law of Treaties clearly states, “Every treaty in force is binding upon the parties to it and must be performed by them in good faith”. States and even private parties always join accords about every conceivable topic.\(^{695}\) In addition, under international law a unilateral promise by a party is also binding for that party, if that party intended its promise to be legally binding.\(^{696}\)

International accords, either bilateral or multilaterals, always contain monitoring and dispute settlement mechanisms. The WTO provisions about transparency are as example of such a treaty provision. Given that, transparency is a legal term that exists in international law as defined under Article 38 (1) (a) of the Statute of the ICJ. In this regard, Oppenheim emphasized that "the only way in which international law can be made by a deliberate act, in contradistinction to custom, is that the Members of the family of nations conclude treaties in which certain rules for their future conduct are stipulated."\(^{697}\)

In fact, in all treaties and agreements, trust between the parties is an essential element. In Nuclear Test Case, the ICJ stated; “One of the basic principles governing the creation and performance of legal obligations, […], is the principle of good faith. Trust and confidence are inherent in international cooperation…” \(^{698}\)

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\(^{696}\) Id. See also Nuclear Tests Case (Australia v. France), ICJ Rep. 1974, 253, 267-8).


In the *North Atlantic Coast Fisheries* Case (1910) also the Permanent Court of Arbitration ruled that that:

> Every State has to execute the obligations incurred by treaty bona fide, and is urged thereto by the ordinary sanctions of inter-national law in regard to observance of treaty obligations.699

Apart from the language or source of a legal obligations, all parties must respect accords to which they have become parties. Therefore, they should carry out their contractual obligations according to the real intention of the parties at the time the treaty was concluded, that is in fact, the spirit of the concluded accord and not its mere literal meaning.700

Now, can we say that transparency exists in customary international law under Article 38(1) (b) of ICJ Statute?

International business and transaction is a rule-bases system therefore there is very little room for customary international law. In fact, the majority of rules in that field exist in contract between the parties while the concept of transparency is a standard provision of international economic agreements.701

Nowadays the concept of transparency is a standard provision of many international legal texts such as the EU Treaties, EC Directives, BIT, and treaties such as GATT, GATS and NAFTA.702

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Yet, there is still no consensus needed to identify transparency as general principles of law to which States are bound.\textsuperscript{703}

Therefore, it would be a little controversial to argue that transparency norms rise to the level of general principles of law.

2. International Cooperation in Judicial Proceedings

International judicial cooperation means the cooperation between authorities of different States and is managed with agreements concluded either within the framework of the regional or international organizations such as the UN, WTO, the European Union, or under bilateral agreements.\textsuperscript{704}

As will be discussed, all those legal tools are for cooperation and performance of procedural acts \textit{inter alia} delivery of documents, collection of evidence and legalization of documents with the help of the public authorities of another country.

2.1. Implementing Contractual Obligations

When States undertake to assist each other, in accordance with the provisions of a convention, such as taking evidence, the latitude of a State discretion in implementing contractual obligations can cause a dispute among the parties.

In a recent case, \textit{Djibouti v. France}\textsuperscript{705} which was about the mutual assistance in litigation\textsuperscript{706} the ICJ held that the obligation to execute

\textsuperscript{703} For more details about this subject, see, S. Arrowsmith, J. Linarelli and D. Wallace Jr., \textit{Regulating Public Procurement: National and International Perspectives}, Ch. 7 (2000: Kluwer Law International).


\textsuperscript{705} In the context of the investigation into the death of the French judge Bernard Borrel in Djibouti in 1995.
international letters rogatory which was laid down in Article 3 of the 1986 Convention on Mutual Assistance in Criminal Matters is to be realized in accordance with the procedural regulations of the requested State. 707

However, the Court noted that while the States must “ensure that the procedure is put in motion”, it does not thereby guarantee the outcome, “in the sense of the transmission of the file requested in the letter rogatory”. The Court accordingly considered that government of France was not under obligation pursuant to Article 3 of the said Convention to transmit the requested documents.708

The ICJ further noted that Article 2 (c) of the Convention, if a State considers that execution of a request may prejudice, its security, its sovereignty its public order or other of its essential interests that States is authorized to refuse to execute a letter rogatory. The Court recalled that the soi t-transmis of Judge Clément, the investigating judge, on 8 February 2005, provides the grounds for her decision to refuse the request for mutual assistance.

The ICJ also stated reasons for which it considered that the transmission of the file “contrary to the essential interests of France” and the file contained declassified “defence secret” documents, together with information and witness Statements in respect of another case in progress. The Court then addressed Djibouti’s claim that France violated Article 17 of the Convention, providing that “[r]easons shall be given for any refusal of mutual assistance”. In its judgment, the Court noted that France did inform Djibouti that it would not comply with the request for assistance by letter dated 6 June 2005. However, the Court concluded that, as France gave no reasons, it failed to comply with its obligation under Article 17 of the Convention. It observed however that, the failure


708. Ibid. Summary of the Judgment of 4 June 2008
did not prevent France from relying upon Article 2 (c) and finally the Court rejected Djibouti submissions about the merits of the case.709

2.2. The Hague Convention on the Taking of Evidence Abroad

In international community where countries or private parties are involved, the 1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (Hague Evidence Convention)710 is a clear procedure for judicial authorities of a member State to request evidence located in the territory of another signatory country.711 The Hague Evidence Convention is a moderate legal instrument to foster international cooperation regarding evidence in transnational litigation.712

The Hague Evidence Convention facilitates taking evidence in civil or commercial matters from other sovereign countries, while respecting their sovereignty.713 As was discussed, discovery of evidence or document production is an essential part of international litigation process.714 Therefore, the Convention can be used as a legal tool by the parties for discovery of evidence.715 However, as Article 1 provides that the Conventions shall not be used to obtain evidence, which is not intended for use in judicial proceedings.

715. Ibid. Gary Born p 896.
Nevertheless, as stated in Article 23, parties may refuse to comply with request for “pre-trial discovery of documents as known in Common Law countries”.

Article 1 of the Hague Evidence Convention, sets procedures for a request by a State party "request the competent authority of another Contracting State, by means of a Letter of Request, to obtain evidence, or to perform some other judicial act." Article 27(b) of the Convention makes it clear that contracting States may allow letters of request to be executed upon “less restrictive conditions” than those set out in The Hague Evidence Convention.

2.3. Discovery of Evidence under The Hague Convention

Article 23 of the Hague Evidence Convention indicates that there is some flexibility in procedures and discovery, and States that:

[a] Contracting State may at the time of signature, ratification or accession, declare that it will not execute Letters of Request issued for the purpose of obtaining pretrial discovery of documents as known in Common Law countries.

Article 23 allows a signatory State to block the use of the convention to obtain discovery of documents. A member country can refuse to comply with discovery request and declare that it will not execute Letters of Request issued for the purposes of obtaining pre-trial discovery of documents as known in Common Law countries. In this regard, some signatory countries (The Netherlands, the United Kingdom, France and some other countries) declared that they would not execute Letters of Request issued for obtaining

718. Id.
719. See, Gary Born op cit, 713, pp.898-903
pretrial discovery of documents. Some countries also have enacted “blocking statutes” that forbid the release of information or documents by their courts.\textsuperscript{720}

The Hague Evidence Convention as a treaty between the parties has created a legal platform for all parties to cooperate about evidence.\textsuperscript{721} Nevertheless, as was discussed Article 23 of the Hague Evidence Convention allows a contracting State to make a declaration that “it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents”, however that declaration can be modified or withdrawn at any time. Reservations introduced by some countries impose a significant constraint on the development of an effective system for discovery of evidence.\textsuperscript{722}

2.4. Judicial Assistance in Arbitration Proceedings

The laws of some countries provide for legal assistance to obtain evidence in international arbitration. Besides, as provided by Article 26 of the IUSCT rules a party may request an internal court for interim measures, in that case. “A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate or as a waiver of that agreement”.

For example, in the United States civil litigation a liberal and somehow extensive discovery of evidence is the main element of a fair proceeding.\textsuperscript{723} While in many civil-law countries, judges and lawyers believe otherwise and brand the US discover of evidence as an administrative issue only.\textsuperscript{724}

\textsuperscript{720} E.g., French Penal Code Law No. 80-538.


\textsuperscript{722} Ibid. Gary Born op. cit, 713, pp.899,900 and 915.


Section 1782 of title 28 of the United States Code generally allows a party to apply to an US court to obtain evidence for use in the non-US proceeding. A recent US federal court decision has created a clear legal platform for the discovery of evidence in international arbitration as well.

In *Roz Trading* case, the US court held that section 1782 of the United States Code could be used by a party to a private commercial arbitration pending in the Austrian Federal Economic Chamber in Vienna.\(^{725}\)

As of 1 January 2004 also, specific regulations apply on the taking of evidence between EU member States, with the exception of Denmark.\(^{726}\) The regulation applies in civil and commercial cases where a court of a member State requests the competent court of another member State to *obtain evidence*. The regulation creates a new system of direct and rapid transmission and execution of requests for the performance of taking evidence between courts.

In addition, the new Treaty on the Functioning of the European Union (TFEU)\(^ {727}\) provides the legal basis for measures in the field of judicial cooperation in civil matters. Article 81 TFEU (1&2) clearly instructs all Members to develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases and shall adopt measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring:

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725. Case Application of Roz Trading Ltd, Case no. 1:06-cv-0 305-wSD (19 Dec 006).
726 The Council of the European Union approved on 28 May 2001 Regulation (EC) No 1206/2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial mattera.
(a) The mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases;  
(b) The cross-border service of judicial and extrajudicial documents; 
(c) The compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction; and, 
(d) Cooperation in the taking of evidence.

3. WTO Members’ Contractual Obligation to Disclose Information

The WTO is authorized to implement measures and ensure compliance with all agreements by each Member. In this respect, the WTO acts as a platform or umbrella to host trade negotiations and settling trade dispute among Members. The WTO agreements are legal tools of international trade, which articulate the code of conduct of all Members and are the constitutional framework of international trade. To ensure efficiency and predictability of the system, the WTO agreements contain provisions that require all member States to cooperate and disclose all trade-related information, measures and regulations promptly.

There are different instruments that constitute the foundation for implementing the WTO agreements. For example, transparency, notification, review, consultation, and the implementation of the DSB rulings and recommendations. For example, Article 6 of TRIMs compels each member to accord sympathetic attention to requests for evidence and information, and provide opportunity for consultation, on any matter about investment measures raised by another member. The same paragraph states that Members are under any obligation to disclose information the disclosure of which be contrary to the public interest or may prejudice the legitimate commercial interests of companies, public or private.

729 For more details see,: WTO Appellate Body Repertory of Reports and Awards(1995-2006) & WTO Analytical Index Online and WTO Analytical Index supra note 595.
730 Article 6 paragraph 3
My discussion here is about the obligation of Members to provide the WTO or DSU with evidence and necessary information as mentioned in various WTO Agreements.731

To the extent that is possible, this part aims to stress the importance of procedural rules governing the adjudication process before the DSB, mainly rules related to the fact-finding process and can have a substantive impact on the outcome of a case. 732

3.1. Providing Information Under the Anti-Dumping Agreement

The Agreement on Implementation of Article VI of GATT (Anti-dumping Agreement) provides all procedural rules for the conduct of antidumping (AD) investigations in a country. Article 6 establishes detailed rules regarding the gathering evidence and the general procedures for antidumping investigations. In accordance with Article 6.1 of the AD Agreement “[a]ll interested parties in an antidumping investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question”. This article requires that interested parties be given notice of the information that the authorities require.733

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731. For example see, Agreement on the Application of Sanitary and Phytosanitary Measures, Art 11.2; Agreement on Technical Barriers to Trade, Art, 14.2 through 14.4, Annex 2; Agreement on Implementation of Article VI of GATT 1994 17.4 through 17.7; Agreement on Subsidies and Countervailing Measures 4.2 through 4.12, 6.6, 7.2 through 7.10, 8.5; General Agreement on Trade in Services, Agreement on Textiles and Clothing Arts,2., 5,6, and 8. Agreement on Implementation of Article VII of GATT 1994 Art 19;
732. See, also previous chapters about WTO agreements and DSU
733. For details see, Antidumping Agreement provisions at: WTO Appellate Body Repertory of Reports and Awards(1995-2006) & WTO Analytical Index Online
Article 6.1.2 requires that the authorities make “available promptly” evidence submitted by each “interested party [. . .] to other interested parties participating in the investigation.” Typically, these provisions are interpreted to require that all legal and evidentiary submissions be served on all parties, and that each party should have the opportunity to examine and comment on submissions of the other parties.

Regarding the meaning of “access to the file” in this Article, in *Guatemala–Cement II* the panel discussed about how evidence and information can be made available in an investigation without parties having access to the files. The panel ruled that Article 6.1.2 does not necessarily State that a party should have access to the file to comply with this provision. From panel’s viewpoint in an investigation the authority can require each interested party to serve its documents on all other interested parties; or, an investigating authority can itself provide copies of documents, which were provided by each interested party to other parties.\(^{734}\) The panel on *Guatemala–Cement II* then stated that “[i]n principle, a 20-day delay is inconsistent with ... Article 6.1.2 obligation [of Guatemala's authority] to make [the subject] submission available to [other interested parties] ‘promptly’.”\(^{735}\)

Article 6.4 States that investigating authorities provide opportunities for the parties “to see all information that is relevant [. . .] and that is used by the authorities in an anti-dumping investigation, and to prepare presentations on the basis of this information.” In Korea –Anti-Dumping case, the panel discussed that under Article 6.4 all interested parties in an anti-dumping investigation have the right to see the information contained on the record to prepare their defense policy in the investigation. Therefore, upon request of a party to review that information, Article 6.4 requires that they must be allowed to see information. The panel makes it clear that this right does not extend to confidential


\(^{735}\) Ibid para. 8.142.
information on the record. Therefore, to prove the other party’s failure to comply with the provision of this Article, the Claimant party must show that it requested to see non-confidential evidence and information that was used by the investigating authorities in its determinations but its request was denied. In brief, to prove the failure by a party with respect to a particular claim, the requesting party or the Claimant has to establish a *prima facie* case that it requested to see non-confidential information on the record of the investigation at issue and that the other party declined such request.\(^{736}\)

Article 6.8 and Paragraph 3 of Annex II of AD Agreement encouraging cooperation and establish a clear balance between the need for accurate information and consequence of parties’ failure to cooperate. Paragraph 3 provides that information must be accepted which can be used without “undue difficulties”. Article 6.8, clearly, provides that in cases in which any interested party does not provide necessary information within a reasonable period, affirmative or negative, may be made on the basis of the facts available”. Paragraph 7 of Annex II, provides that, if an interested party fails to cooperate the authorities can finalize their findings, based on information from a other source. However, in that case they should first check the credibility of the information from other independent sources. Paragraph 7 determines that it is clear, however, that failure of a party to cooperate can justify a result, which is less favorable to that party.\(^{737}\)

In the application of 6.8 of the AD Agreement, all provisions of Annex II must be observed. Annex II is an integral part of the AD Agreement and it introduces conditions on recourse to Article 6.8. Paragraph 3 of Annex II requires the investigating authority to take into account “All information which is verifiable, which is


appropriately submitted so that it can be used in the investigation without undue difficulties” With regard to the terms and condition of in this article there are some panel findings elaborating the meaning and concept of evidence and information.738

To say the least, the AD rules compel national authorities, before making a final determination, to inform all interested parties of the essential facts under consideration, which form the base for the determination, in sufficient time for the parties to defend their interests.739

In this regard, the panel in Guatemala–Cement II, considered the provisions of AD agreement in particular Article 6.1 of the said agreement and rules that “these provisions impose substantive obligations, without requiring those obligations to be met through any particular form .... What counts is whether, in practice, sufficient opportunity was provided...”740

The rules aim to furnish the panel and the investigating authorities to decide the issue based on the reliable evidence. Nevertheless, those rules provide that in case where evidence and information is missing from the record or, it was provided late, or investigating authorities cannot verify the information, then they can make their determinations based on all evidence on record. In this regard, the panel for example can make determinations by weighing all the available evidence and information to determine that which is most probative of the issue under consideration and by drawing reasonable inferences from the evidence and facts it finds most persuasive.741

However, to avoid imposing an unreasonable burden on a party, Article 6.13 provides that a panel or investigating authorities shall

738. See, ARGENTINA-CERAMIC FLOOR, WT/DS189/R (2001), Para 4.548-52
739. Article 6.9.
take due account of difficulties experienced by parties, in particular small companies in supplying requested evidence and information, and shall provide practicable assistance.

3.2. Mandatory Cooperation for Development of Evidence in the SCM

Under the Subsidies and Countervailing Measures Agreement (SCM), all Members have the rights to request consultations when a part has reason to believe that a prohibited subsidy is being granted or maintained by another member. In that case, it shall include a statement of available evidence with regard to the existence and nature of the subsidy in question. With the submission of a written complaint “the application” by the domestic industry to the importing-country authorities that injurious subsidization is taking place, a countervailing duty claim generally starts. Article 11 of the SCM contains all necessary requirements for the contents of this application. The SCM provisions provide due process rights of interested parties. Under Article 22 in case of an investigation, Members the products of which are subject to such investigation shall be notified and a public notice shall be given, and a public notice of the initiation of an investigation should contain, all required information.

Article 6.6 clearly states that each Member in the market of which serious prejudice is alleged to have arisen shall, make available to the parties to a dispute arising under Article 7, and to the panel established pursuant to paragraph 4 of Article 7, all relevant information that can be obtained as to the changes in market shares of the parties to the dispute as well as concerning prices of the products involved.

Article 12.3 states that, the authorities shall whenever practicable provide timely opportunities for all interested Members and

742. SCM, Art 4.1. For more details see, UNCTAD/EDM/Misc.232/Add.15 (2003)
743. Ibid, Art 4.2. See also Art 7.2.
interested parties to see all information that is relevant to the presentation of their cases.

In this regard, the Appellate Body in *Japan–Countervailing Duties* stated that the party who request consultations must have some “interest” related to the investigation. However, as the report indicates, “that interest may be in the outcome of the investigation, a consideration of the interest should also take account of the perspective of the investigating authority”. Nonetheless, about the interested parties, the report States that an investigating authority should consider the burden that such designation may entail for other interested parties.745

Article 12.4 of the SCM provides that, in case of confidential evidence and information, which their disclosure would have a significantly adverse effect upon a party supplying that information or which are provided on a confidential basis by parties shall, be treated as such by the authorities and shall not be disclosed without specific permission of the party submitting it. Article, 12.4.1 provides that the authorities shall require interested parties providing confidential information to provide meaningful non-confidential summaries thereof. Article 12 include provisions about presenting evidence in writing (Article 12.1), right of access to the file (Article 12.1.2 and. 12.3), the right to a hearing (Article 12.2) and the right to be timely informed of the essential facts under consideration which form the basis for the decision whether to apply definitive measures ( disclosure; Article 12.8). Article 12.7 provides that “In cases where an interested member or party refuses access to, or otherwise does not provide necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available”746


According to Annex V, the process is initiated to obtain information necessary “to analyze the adverse effects caused by the subsidized product”, and “shall be completed within 60 days of the date on which the matter has been referred to the DSB”.

In fact, Annex V to the SCM sets out detailed rules and procedures about information concerning serious prejudice in dispute-settlement proceedings. It permits a panel to draw adverse inferences if a party fails to cooperate. To facilitate the information-gathering process paragraph 4 provides that “to ensure the timely development of the information necessary to facilitate expeditious subsequent multilateral review of the dispute”.

A party can use the Annex V process to obtain all necessary evidence that it needs to argue its case before to the panel that the other party’s non-cooperation in the information-gathering process under Annex V justify that other party may draw an adverse inference from non-compliance with the rule. In the case Canada - Civilian Aircraft, the Appellate Body held that the parties must comply with the panel’s order and submit the all evidence and documents requested by other party or the panels. The Appellate Body found that if the parties fail to provide the requested information panels have the right to draw adverse inferences from the parties’ failure. This finding was based on the procedure set out in Annex V of the SCM Agreement, even though Annex V is expressly restricted to proceedings under Article 7 of the SCM Agreement.

However, Annex V is not about to alter the general principle of burden of proof. Therefore, this Annex is not an ultimate ground for shifting the burden of proof from the complainant to other the party. Article 6.8 of the SCM Agreement provides that “the existence of serious prejudice should be determined on the basis of the information submitted to or obtained by the panel, including

748. Annex V Para 5.
information submitted in accordance with the provisions of Annex V”. Thus, the “record” includes, but is not limited to, information developed through the Annex V process. 752

In the Korea - Measures Affecting Trade in Commercial Vessel Shipbuilding case,753 the parties and panel discussed extensively many aspect of Annex V of SCM. The European Communities requested the DSB to initiate the procedures provided for in Annex V of the SCM Agreement pursuant to paragraph 2 of that Annex. In brief, in cases involving subsidies and in particular serious prejudice arising from subsidies, panels can be active in seeking evidence and information from all parties.

In Shipbuilding the panel used its power under Article 13 of the DSU and Article 6.8 of the SCM Agreement to request specific evidence from Korea. Nevertheless, Korea refused to provide copies of some requested agreements because it believed that the EC was making a fishing expedition by asking for documents, which were irrelevant to the present dispute.754 Further, Korea argued that the panel should exclude from its consideration under Part II of the SCM Agreement any evidence or information obtained under the Annex V procedure. Korea also argued that the panel could decide to exclude any evidence and information obtained in the context of the Annex V process from the evidence considered by it in reaching its decision as to the EC's claims under both Part II and Part III of the SCM Agreement.755 Korea also asserted that the EC's alleged lack of prima facie evidence before bringing its case might be inconsistent with Article 3.7 of the DSU.756

Since Korea failed to produce requested evidence and information, the EU requested the panel to draw adverse inferences from

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754. Ibid, para 70 Korea submission.

755. See Korea Annex V Response Attachments 3.

Korean's failure to adduce evidence. The EU argued that Korea failed to rebut the *prima facie* case put forth by the European Communities. While Korea argued that, an adverse inference could not be drawn solely based on that provision in the context of claims brought under Part II of the SCM Agreement. The panel considered it necessary to resolve this legal issue, and stated, “in any event it is well established that WTO dispute settlement panels retain a residual authority to draw adverse inferences outside of the circumstances set forth in Annex V”.

Summarily, the Appellate Body and panels have ruled in several cases, that all parties must cooperate in the course of a dispute. In fact, cases regarding the subsidies often involve complex economic facts and evidence, which are under control of national authorities that may not be easily accessible to the complaining party. Therefore, under Article 13 of the DSU panels have the power to seek information from the Respondent relating to export subsidies. As the EC argued in its submission and arguments in *Shipbuilding* case (see above reference), the fact-gathering procedure under Annex V of the SCM or other provisions is a mechanism to get all required evidence and information in advance of a dispute rather than later in the panel process.

3.3. **Answering all Reasonable Enquiries in the TBT**

The Agreement on Technical Barriers to Trade (TBT) aims to improve efficiency of production and facilitating the conduct of international trade between the parties and to ensure that national technical regulations and standards do not create unnecessary obstacles to international trade. Under Article 2.5 of TBT a member may request other Members to explain the justification of a

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757. The panel report para 7.161—7.162. See, also ANNEX B, WT/DS273/R, para 5· SUMMARY.
technical regulation that has significant impact on trade. The Appellate Body in EC - Sardines ruled that Article 2.5 establishes a mechanism requiring the supplying of information and the Article provide parties with the right and opportunities to obtain information about the objectives of technical regulations. The Appellate Body further recalled the principle of *pacta sunt servanda* articulated in Article 26 of the Vienna Convention and noted that all parties of the WTO will abide by their treaty obligations in good faith.\(^{759}\)

Article 10 of TBT provides that: each member shall ensure that an enquiry point exists which is able to answer all reasonable enquiries from other Members and interested parties in other Members, as well as to provide the relevant documents regarding: technical regulations; any standards adopted within its territory and any conformity assessment procedures; the location of notices published pursuant to this Agreement and provide reasonable information on the provisions of bilateral and multilateral arrangements within the scope of this Agreement. Article 10 Paragraph 5 of TBT States that a member State shall also be able to provide reasonable information on the provisions of any bilateral and multilateral arrangements as well as Membership and participation in international and regional standardizing bodies and conformity-assessment systems.\(^{760}\)

Annex 2 of the TBT Agreement empowers the technical expert groups to consult and request information and technical advice from any source they deem appropriate. In this case, any member shall respond promptly and fully to any request by a technical expert group for such information, as the technical expert group considers necessary and appropriate. Paragraph 5 of the same Annex provides that, the parties to a dispute shall have access to all relevant information provided to a technical expert group, unless it is of a confidential nature.\(^{761}\)

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\(^{760}\) For more details, see, *WTO Appellate Body Repertory of Reports and Awards*; and, *WTO Analytical Index: Guide to WTO Law and Practice*, (2007), op cit.746 and *WTO Analytical Index Online*.

\(^{761}\) ANNEX 2 TECHNICAL EXPERT GROUPS para 4.
3.4. **Obligation for Providing Information in the SPS**

The Sanitary and Phytosanitary Measures (SPS) Agreement outlines the rules to improve the human health, animal health and phytosanitary situation in all Members and prevents Members adopting or enforcing measures which cause restriction on international trade. SPS allows countries to set their own standards or use international standards, and recommendations if required. However, Members may use measures that result in higher standards if there is scientific justification.\(^{762}\)

Under Annex B about the transparency measures, “Members shall ensure that all sanitary and phytosanitary regulations which have been adopted are published promptly in such a manner as to enable interested Members to become acquainted with them”. In this regard, a committee has elaborated recommended procedures for implementing the transparency obligations of the SPS Agreement.\(^{763}\)

Paragraph 3 of Annex B provides that “Each Member shall ensure that one enquiry point exists which is responsible for the provision of answers to all reasonable questions from interested Members”.\(^{764}\)

The Committee on SPS provided for in paragraphs 1 and 4 of Article 12 is a forum where WTO Members exchange information on all aspects related to the implementation of the SPS Agreement. The Committee is responsible for reviewing compliance with the agreement, monitoring of the process of international harmonization.

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763. G/SPS/7/Rev.2 2 April 2002, Recommended procedures for implementing the transparency obligations of the SPS Agreement (ARTICLE 7)

764 See, WTO Analytical Index Online. WTO Trade Topics Online. SPS. INTRODUCTION.
and coordinate efforts in this regard with the relevant international organizations.\textsuperscript{765}

To help Members, to implement the transparency obligations, the secretariat has prepared a handbook titled: How to Apply the Transparency Provisions of the SPS Agreement.\textsuperscript{766} It includes detailed about how to set up and operate Enquiry Points and National Notification Authorities, how to notify and models for letters of response.

3.5. Disclosure of Evidence in the TRIPS

Agreement on Trade-Related Aspects of Intellectual Property Rights TRIPs is to promote effective and adequate protection of intellectual property rights. It contains provision about setting effective and expeditious procedures for settlement of disputes between governments, reducing tensions by reaching strengthened commitments to resolve disputes on trade-related intellectual property issues. TRIPS also States that judicial procedures must be available in respect of any activity infringing intellectual property rights covered by the agreement.\textsuperscript{767}

Under Article 63, all Laws and regulations, and final judicial decisions and administrative rulings pertaining to the subject matter of this Agreement, shall be published. Paragraph 2 States that in order to assist that Council for TRIPS in its review of the operation of the Agreement, Members shall notify all related law and decisions to the Council. Under paragraph 3 of this Article, in response to a written request from another party, a member shall supply information of the sort referred to in paragraph 1. All parties are entitled to substantiate their claims and to present all relevant evidence, while confidential information must be identified and

\textsuperscript{765} For more details, see, \textit{WTO Appellate Body Repertory of Reports and Awards: and, WTO Analytical Index: Guide to WTO Law and Practice}, (2007), op cit.746 and \textit{WTO Analytical Index Online.}

\textsuperscript{766} Available at : \url{www.wto.org/english/tratop_e/sps_e/spshand_e.pdf}

\textsuperscript{767} For more details see, \textit{WTO Analytical Index: and WTO Trade Topics Online .TRIPS}. 
protected. Paragraph 3 of Article 40 provides that “The Member addressed shall accord full and sympathetic consideration to, and shall afford adequate opportunity for, consultations with the requesting Member, and shall cooperate through supply of publicly available non-confidential information of relevance to the matter in question and of other information available to the Member, subject to domestic law and to the conclusion of mutually satisfactory agreements concerning the safeguarding of its confidentiality by the requesting Member”.

In principle, it is the obligation of each party in litigation to provide all necessary evidence to prove its claim.

Article 43 of TRIPs contains an obligation of the parties to produce documents. The Article States that if a party presents sufficient evidence to support its claim, however it claims that some evidence relevant to its claims lies in the control of the opposing party, the judicial authorities shall have the authority to order that this evidence be produced by the opposing party.

In *India–Patents (EC)*, the European Communities the same as the United States’ claim in the earlier case *India–Patents (US)* that India had failed to provide an exclusive marketing system pursuant to its obligation under Article 70.9 of the TRIPS Agreement. In that case, panel stated that:

India argues that the panel in dispute WT/DS50 did not examine the context of Article 70.9 fully. To support its argument, India cites provisions of Articles 42 to 48 of the TRIPS Agreement, for instance, where the judicial authorities of Members "shall have authority" to order certain actions and contrasts this wording with that of Article 70.9, which provides that marketing rights "shall be granted" when certain conditions are met.

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768. For more details, see, WTO Appellate Body Repertory of Reports and Awards; and, WTO Analytical Index: Guide to WTO Law and Practice, ( 2007), op cit.746 and WTO Analytical Index Online. See also, WTO Online Sources, Trade Topic. TRIPS
We do not share India's view that it can be deduced from the use of these words in those Articles that a system of general availability is not called for under Article 70.9. To infer this, one would have to hold that the omission of the words 'shall have the authority' in Articles 42-48 [sic] (so that a court was required to act in a certain way when prescribed conditions were met, rather than merely having the authority to do so) would mean that a Member would not be expected to give its judicial authorities in advance the authority to act in this way, for example to award an injunction, but could legislate to this effect when a specific occasion arose. Such an inference would obviously be absurd. Rather the function of the words ‘shall have the authority’ is to address the issue of judicial discretion, not that of general availability.\(^{769}\)

Article 43 grants the national judicial authorities to order a limited discovery. In particular, this article deals with disclosure of evidence for the judicial procedures. The article gives judicial authorities the authority to order a party to provide the requested evidence. However, this authority is subject to two conditions. First, the party should present a *prima facie* case and convince the court that specifies evidence is relevant to substantiation of its claims and lies in the control of the opposing party. Second, the party must ensure the protection of confidential information.

If a party fails to comply with the court’s order to produce evidence and information without good reason, Article 43(2) States that Member “may accord judicial authorities the authority to make preliminary and final determinations, affirmative or negative, on the basis of the information presented to them, including the complaint or the allegation presented by the party adversely affected by the denial of access to information, subject to providing the parties an opportunity to be heard on the allegations or evidence”.

3.6. Providing Evidence and Information in the GATS

In accordance with GATS preamble, the Agreement wishing to establish a multilateral framework of principles and rules for trade in services and desiring the early achievement of progressively higher levels of liberalization of trade in services. GATS promoting the interests of all participants on a mutually advantageous basis and at securing an overall balance of rights and obligations.

In accordance with Article III of GATS, all Members shall publish or make otherwise publicly available all relevant evidence and information and even international agreements, which pertain to or affect the operation of the GATS. Each member must inform the Council for Trade in Services of the introduction of any new, or any changes to existing, laws, regulations or administrative guidelines that significantly affect trade in services covered by its specific commitments under this agreement. Under Paragraph 4 of Article III ‘ Each member is obliged to respond promptly to all requests by any other member for specific information on any of its measures of general application or international agreements within the meaning of Paragraph 1.770

The obligations under Article III on transparency apply to all laws and regulations affecting GATS.771 Article III compels all Members to be transparent and publish promptly, all relevant measures of which may affect the operation of this GATS. However, under Article III bis, Members are not under any obligation to disclose confidential information, the disclosure of which would be contrary to the public interest, or which would prejudice legitimate commercial interests public or private parties. Article III provides

770. See, R.Thompson and K. Lida, op.cit.691 p94 ff. WTO Analytical Index Online and WTO Trade Topics Online. GATS. Article III

that the requirement to publish relevant measures at the latest by the time of their entry into force can be waived in emergencies.

The primary focus of Article VI is to ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner. In this regard, the Council for Trade in Services adopted the Disciplines on Domestic Regulation in the Accountancy Sector (S/C/M/32). One very important aspect of this article is that the right of service suppliers to information on regulatory and administrative decisions, and to judicial and administrative review and appeals processes, is explicitly recognized (Article VI: 2 and 3).

Article VII addresses the recognition of education and experience obtained in another country. Article VIII contains a provision whereby the Council for Trade in Services may, at the request of a member, orders another Member to supply specific information concerning a monopoly supplier of that member, and a requirement to notify the council of new monopoly rights regarding the supply of a service covered by a member's specific commitment. Article IX obliges a member to enter into bilateral consultations when another member requests it to do so in order to eliminate “those practice that may restrain competition and restrict trade in services. The member subject of such a request shall co-operate through the supply of publicly available non confidential information” and “provide other information subject to its domestic law and to the conclusion of a satisfactory agreement concerning the safeguarding of confidentiality.” 772
4. Balancing Rights and Obligations

Complying with contractual obligations of the parties before international courts and tribunals, enhances the adjudicator’s ability to access to all relevant evidence and information promote the rule of law, and securing peace and justice in the world. However, disagreement about the interpretation of laws concerning access to evidence and information held by the States or private parties can create inequality within the international community. As a result, the scope of a party’s responsibility to comply with disclosure requests from other parties on a contractual basis is a debated issue.773

In any event, the international courts and tribunals enjoy a rather broad scope of authority and they should manage the proceedings with a comprehensible set of laws, and legal principles. For example, under Article V of the Claims Settlement Declaration, as it was incorporated in Article 33 of the Tribunal Rules, “[t]he arbitral tribunal shall decide all cases on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the arbitral tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances” [Emphasis added].774

Nonetheless, the principle of good faith as a main applicable principle in international litigation requires the parties to all contracts or disputes to deal with honestly and fairness.775 Prohibiting the abuse of rights in the international litigation means, that parties should exercise their legitimate right in a way, which is solely motivated by the desire to take advantage of a special

774. IUSCT Rules of Procedures.
situation of a case.\textsuperscript{776} This means that in international litigation with the clear contractual obligation to disclose evidence and information, if parties decide to take advantage of the discovery and go too far, the abuse of right can be the result.\textsuperscript{777}

A way of overcoming all those concerns is to ask whether the request for obtaining evidence is necessary to establish and support a claim, counterclaim or parties’ defense in a case.

In this regard, the party should present a \textit{prima facie} case and convince the court that specifies evidence is relevant to its claims lies in the control of the opposing party. This standard forces the party who requests a tribunal to compel the other party to disclose evidence to provide a well-reasoned ground for convincing that the requested documents are relevant to the procedure. However, when the Claimant met all required criteria including taking all reasonable steps to get the requested information and documents, a defendant party could not justify its failure to produce documents by invoking some general and loose arguments.

To say the least, the efficiency of international dispute settlement mechanism depend on their determination to terminate all cases justly. This goal can be achieved, if those bodies equipped with sound procedures and have authorities to compel parties to a dispute to comply with document production orders and that the failure of a party to do so may lead to an adverse inferences being drawn.

However, if the abuse occurs during international litigation, laws and regulation permit a court or tribunal to award sanctions against the party who frustrates the process of implementation of justice.

\textsuperscript{776} See, E. Reid, \textit{The Doctrine of Abuse of Rights: Perspective from a Mixed Jurisdiction} 8(3)EJCL,(2004).

\textsuperscript{777} For more study about evidence and proof see, Kazazi Kazazi, op.cit.277, and, Amerasinghe,op.cit.178.
Chapter VII: Evidentiary Privileges, Exception Clauses and Powers of Revision of International Courts and Tribunals

Justice is best served when all relevant evidence and information are available to a dispute-settlement body. Nonetheless, the protection of certain interests through respect for confidentiality of States or individuals information in certain cases exists. Some national laws and regulations discourage or even prohibit some people such as lawyers or medical workers from testifying about confidential information or communications with their clients.778

Thus, even where the GATT or other agreements provide legal ground and the right of accessing to evidence and information there are often countervailing claims for legitimate restrictions about that right. Limitations may include the power to deny a request for documents or a refusal of a request because the information is exempt from disclosure under the law.779

In this part, I will discuss the concept of confidentiality of documents as an exception to the general understanding of party-evidentiary obligations and the power of international courts and tribunals to revise decisions by national authorities.780

1. Evidentiary Privileges

Evidentiary privilege and exemption from disclosure of certain documents and information on the grounds of confidentiality, national security or public policy are an essential part of international dispute settlement process. However, the question is what is the boundary between rules and exceptions under the applicable laws and regulations? In spite of the fact that, the boundary is not clear, however, few guiding principles exist.  

1.1. Recourse to Exception Clauses

International agreements sometimes include exception clauses such as ‘necessity’, ‘proportionality’, and ‘reasonableness’.

These norms or clauses appear in many international legal texts such as treaties, agreements and conventions. In fact, those exceptions introduce considerable flexibility into the process of implementation of those accords.


782. See, e.g. GATT, Art. XX(b); International Covenant on Civil and Political Rights, 16 Dec. 1966, 999 UNTS 171 (ICCPR), Art. 19(3); Geneva Convention relative to the Protection of Civilian Persons in Time of War, 12 Aug. 1949, 75 UNTS 287, Art. 53.

783. See, e.g. UNCLOS, Art. 221(a); Additional Protocol to the Geneva Conventions of 12 Aug. 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3, Art. 57(b).


785. For more details, see, Shany, Y, *Toward a General Margin of Appreciation Doctrine in International Law*, 16(5) European Journal of International Law (November, 2005), pp 907-040. See p914
Relevant to this discussion is Article 2(4) of the U.N. Charter, which states that in international relations, all Members must refrain from the threat or use of force against other States. However, under some circumstances a State may recourse to self-defense to justify its decisions to apply force.\textsuperscript{786} Certainly, States have no absolute discretion to determine whether to apply force in the first place and the scope of such force, rather all determinations are subject to review by various international courts and tribunals.\textsuperscript{787}

Sometimes, parties to international accords condition the application of their accord on the exercise of discretion the parties. For example, the national-security exception to the GATT permits certain trade restrictions, which the contracting parties “consider necessary”.\textsuperscript{788}

However, resorting to exception clauses in international relations reduces legal certainty and empowers national decision-makers at the expense of international community.\textsuperscript{789}

In this regard, international courts and tribunals can provide some important guidance on how to apply international law, by maintaining some degree of supervision over the application of standards by the parties, some degree of uncertainty however, will always remain.\textsuperscript{790}


\textsuperscript{787} See, e.g. Shany, op. cit,\textsuperscript{785} p. 934.


1.2. National Security and National Interest

Actually, there is no a common understanding among States about the best definition of the concept of national security. Nonetheless, the concept of national security generally refers to ensuring the survival of a State through the exercise of its power in national and international levels.

The meaning of national security will be different for any given State depending on their approach and understanding of this concept in particular circumstances. The application of national security and public interest as an excuse to derogate from general provisions of international agreement is a contested issue. Nonetheless, the adjustability of national security or public policy allows some States to invoke claims of self-defense to justify their unilateral actions against other countries. Some States may even link their national security and national interest to issues such as the protection of human rights and using unilateral measures such as economic sanctions to prevent violations of human rights in foreign countries.

In the context of international trade and cooperation, the WTO allows States to challenge each other’s laws and regulations. However, Article XXI of the GATT provides that a State cannot be prevented from taking any action it considers necessary for the protection of its essential security interests. As such, Article XXI is

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793. See, e.g. Buzan, op.cit.791. p. 25.
an exception that provides Members States with this possibility to define for themselves their “essential security interests”. 796

Sovereignty concerns may be invoked by Member State as a justification to argue that disagreement related to Article XXI are outside the jurisdiction of WTO dispute settlement bodies. 797

The ' Helms–Burton Act of the United States, which caused a dispute between the United States and the European Union, is as an example of how Article XXI acts as both a sword and a shield in this context by permitting States to invoke it as a means of protection and also to fear a formal adjudication on its invocation, possibly limiting State sovereignty as a matter of international law.

On 12 March 1996, the United States passed the Cuban Liberty and Solidarity Act, popularly known as the Helms-Burton Act. Many countries labeled it as an attempt to impose United States law extraterritorially. 798 The EU challenged the Helms–Burton Act by initiating a case before the WTO dispute settlement body. 799 The United States defended the legislation on national security grounds, and threatened to invoke Article XXI. 800 Eventually, the United States and the EU settled their differences outside of the WTO dispute settlement system. 801

2. Exception Clauses and Power of Judicial Review

International courts and tribunals dealing with different issues, and in many cases, they must implement laws and regulations which

796. Hannes L. Schloemann & Stefan Ohlhoff, , op.cit790, 424.
800. Ibid. See e.g.,Lindsay op.cit.792, pp1302-6.
contain provisions regarding national security exception, and the privilege of secrecy for self-incriminating testimony in international criminal tribunals. Relevant to this discussion is respect for State secrets and the exercise of State power to protect national security. Those are recognized standards, which are respected by all actors in international community. However, the question is what is the solution when a State or an individual believes that a decision by other State-party’s national authorities violates or deprives that person or government of its international rights? In addition, what is the practical consequence of a determination that the national authority’s decision was unlawful?

Judicial review in international law is a procedure by which courts supervise national authorities in the exercise of their powers and rights. However, the power of an international adjudicatory body to review national authorities’ decisions is a debated issue. There is no clear rule or binding jurisprudence to determine the applicable standard for international bodies to conduct a judicial review. However, there are two general approaches: a judicial restraint standard; which may limit the international forum from reviewing the decisions of national authorities, and de novo review; which grant international bodies’ latitude of freedom to come to a different conclusion than a national authority.

2.1. Judicial Deference

Under the judicial deference approach, international bodies exercise a degree of judicial restraint and respect a national authority's discretion on the manner of executing its international legal obligations and refrain from reviewing the decisions of national authorities.

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803. For more details see, Shany, op. cit, 785, pp.907-040.

804. Shany, op. cit, 785, pp. 909, 935, 940.
The ICJ in some case including *LaGrand* and *Avena* discussed this issue. However, in those cases, the ICJ did not review the United States national authorities’ decision. The Court held that foreign defendants should have been notified of their right to consular assistance, therefore, directed the US authorities to re-open the judicial proceeding. In *LaGrand*, the Court held:

> In the case of such a conviction and sentence, it would be incumbent upon the United States to allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention. This obligation can be carried out in various ways. The choice of means must be left to the United States.

In *Avena*, the issue was about criminal proceedings before the courts of the United States. The ICJ held that it is for the national authority to determine the process of reviewing their decision. In that case, the Court concluded that, the margin of discretion afforded to national authorities is not unlimited:

> It should be underlined, however, that this freedom in the choice of means for such review and reconsideration is not without qualification [...]. such review and reconsideration has to be carried out by taking account of the violations of the rights set forth in the Convention.

The IUSCT jurisprudence also indicates that the Tribunal is reluctant to review issues related to a State-party’s sovereign rights,

805. LaGrand Case (*Germany v United States of America*) (Judgment) ICJ Rep (2001) 466, 475
128.
808. LaGrand, Ibid, at 514.
810. Avena Ibid., at para. 131.
because from the Tribunal point of view the exercise of a sovereign right is not subject to judicial review and such review itself infringes upon State sovereignty.

Paragraph nine of the General Declaration between Iran and the United States known as Algiers Accords\textsuperscript{811} obliges the United States to "arrange for the transfer to Iran" of all Iranian properties subject to the provisions of U.S. law applicable prior to November 14, 1979.\textsuperscript{812} In \textit{Case B1(claim IV)}\textsuperscript{813} before the Iran-United States Claims Tribunal, Iran argued that the purpose of the General Declaration was to ensure the transfer of all Iranian properties held by the United States including military properties.\textsuperscript{814} Iran argued that Paragraph 9 imposes an obligation upon the United States to transfer the military items, and the United States’ refusal to do so constituted a breach of this obligation.\textsuperscript{815} The United States on the other hand argued that the proviso was “subject to the provisions of U.S. law applicable prior to November 14, 1979”\textsuperscript{816} and that the Iranian properties would be exportable to Iran only to the extent that such export was consistent with United States export control laws in effect prior to 14 November 1979.\textsuperscript{817}

\begin{footnotesize}
\begin{enumerate}
\item Paragraph 9 states: “Commencing with the adherence by Iran and the United States to this Declaration and the attached Claims Settlement Agreement and the making by the Government of Algeria of the certification described in Paragraph 3 above, the United States will arrange, subject to the provisions of U.S. law applicable prior to November 14, 1979, for the transfer to Iran of all Iranian properties which are located in the United States and abroad and which are not within the scope of the preceding paragraphs.”
\item Ibid. paras.10-15
\item Ibid. paras. 17-18.
\item Ibid. para.20.
\item Ibid.
\end{enumerate}
\end{footnotesize}
The United States asserted that the provisions of the Arms Export Control Act (the Act), and the regulations issued pursuant to the Act, precluded the export of military items to Iran. In support of its assertion, the United States referred to Section 38 of the Act, which authorizes the President of the United States to control the import and export of defense articles “in furtherance of world peace and the security and foreign policy of the United States.”

The Tribunal, in its Award in B1(claim IV), ruled that the wording of the relevant proviso in the deceleration means that the United States “was not obliged to arrange for the transfer of the properties at issue, to the extent that such a transfer was prohibited by United States law.” From the Tribunal’s perspective, Paragraph 9 of the General Declaration clearly authorized the United States to invoke its domestic law to avoid arranging for the transfer to Iran of Iranian properties, insofar as the law prohibiting such transfer was applicable prior to 14 November 1979. In response to the Iranian arguments that the United States’ commitments under Paragraph 9 of the General Declaration should be read to preclude the President from exercising this discretion, the Tribunal noted that such contention ignores the fact that the right to use such discretion was a remarkable and well-known aspect of the United States law applicable prior to 14 November 1979. The Tribunal noted that in the absence of any specific phrase in the Declaration excluding this right, the “subject to” proviso effectively preserved the discretion granted to the President by Section 38 of the Act.

The Tribunal found that the President’s exercise of this discretion amounted to a sovereign right, which “is not subject to review by an international Tribunal”. Since the United States has not
renounced or waived this sovereign right, and in the absence of any rule of customary international law, which would limit the President’s freedom of decision in this regard, the United States could not be deprived of this sovereign right. The Tribunal did not consider the President’s decision to withhold export of the military articles at issue in this case to be unlawful. 825

The Tribunal stated that the conduct of foreign affairs and the use of armed forces are areas in which international adjudicatory bodies have traditionally exercised a high degree of judicial restraint.

In brief, judicial deference approach can be a solution in international law only if the provision related to exception in an international accord is properly intercepted and implemented. Indeed, the solution is a well-reasoned judicial approach to the concept of proportionality concerning the unilateral action or other excuses invoked by national authorities. However, the interpretive obligation of supranational body such international court or tribunal can empower it to review a unilateral action and declare a national decision incompatible with applicable law.826

2.2. Reviewing the Decisions of National Authorities

When deciding a dispute international courts and tribunals are authorized to review and determine whether the national authorities acted in conformity with their international commitments.827 International organizations do not grant an unlimited discretion to the national authorities. Because, a State may unilaterally define or determine conditions to invoke exception clauses in international relations.828 In many cases, the ICJ ruled that “necessity” could only be invoked under certain strictly defined

825. Ibid. para 62
826. Shany, op. cit,785, p.910 ff.
conditions.\textsuperscript{829}

In the \textit{Nicaragua} case,\textsuperscript{830} for example the ICJ held that Article XXI of the FCN treaty,\textsuperscript{831} in force between two States, does not provide the parties’ absolute discretion in invoking a security exception.\textsuperscript{832} The Court ruled that:

Whether a measure is necessary to protect the essential security interests is not, as the Court has emphasized [....] purely a question for the subjective judgment of the party.\textsuperscript{833}

In the \textit{Oil Platforms} case\textsuperscript{834}, the ICJ reviewed the legality of the United States’ military attacks against Iranian oil platforms. The United States claimed that it considered its military attacks against the Iranian platforms were necessary to protect its essential security interests, therefore, a measure of discretion should be afforded to a party's good faith in such a determination.\textsuperscript{835} The Court rejected that argument, and held:

The Court does not however have to decide whether the United States interpretation of Article XX, paragraph 1(d), [of the applicable Friendship, Commerce and Navigation Treaty] on this point is correct, since the requirement of international law that measures taken avowedly in self-defence must have been necessary for that purpose is strict and objective, leaving no room for any ‘measure of discretion’.\textsuperscript{836}

\textsuperscript{829} Gabcikovo/Nagymaros (Hungary/Slovakia), 1997 ICJ Report 7, at 40.

\textsuperscript{830} Case Concerning Military and Paramilitary Activities in and against Nicaragua. Merits (\textit{Nicaragua v. USA}), ICJ Reports 14, (1986) Jurisdiction and Admissibility) op .cit.

\textsuperscript{831} Treaty of Friendship, Commerce and Navigation between the Parties signed at Managua on January 21, 1956.

\textsuperscript{832} Ibid. Nicaragua, at para. 282.

\textsuperscript{834} Oil Platforms (\textit{Islamic Republic Of Iran v. United States Of America}) ICJ Rep(2003) 90.

\textsuperscript{835} Ibid. Oil Platforms, at para. 76.

\textsuperscript{836} Ibid. Oil Platforms, at para. 73.
In contrast to the decision of the IUSCT in case B1 (IV), the ICJ in Oil Platforms gave no discretion to the national authorities to decide the necessity of using force against another sovereign State since such discretion has no place under international law, in the absence of specific treaty language.

The jurisprudence of international courts and tribunals also support this notion that those bodies give no an absolute discretion to national authorities when deciding the necessity of using force against another State. Indeed, judicial review is most useful when it can operate in a way that exposes disputing State-parties to close and effective judicial scrutiny, creating the incentive for full cooperation and even consensual resolution.

2.3. Standard of Review Before the WTO

The issue of standard of review is an important element in the judicial review of national authorities’ measures in both domestic and international jurisdictions. Standards of review as a monitoring instrument of WTO deal with issues that balance the power between Members States’ authorities responsible for taking a measure and the WTO as an international body reviewing it.

Article 11 of the Dispute Settlement Understanding (DSU) provide this body with power of review of national authorities’ decisions and measures.\textsuperscript{842}

In several cases including the \textit{EU–Hormones} case\textsuperscript{843} before the WTO, the Appellate Body discussed the standard of review in WTO proceedings, and ruled that an objective assessment is the proper standard of review in cases before the panel.\textsuperscript{844} However, in that case the Appellate Body further noted that the panel should limit itself only to the question of whether the procedural rules laid down in the WTO Agreements had been followed.\textsuperscript{845} The Appellate Body stated:

\textit{The standard of review [...] must reflect the balance established in [the SPS] Agreement between the jurisdictional competences conceded by the Members to the WTO and the jurisdictional competences retained by the Members for themselves. To adopt a standard of review not clearly rooted in the text of the SPS Agreement itself, may well amount to changing that finely drawn balance; and neither a panel nor the Appellate Body is authorized to do that}\textsuperscript{846}

Considering the nature of WTO agreements, the Appellate Body took into consideration the member States’ expectations and what they had in their mind when they joined the WTO.\textsuperscript{847}

\begin{footnotes}
\footnote{842}{For more details, see, Mavroidis, p. 386,ff, in R. Wolfrum, P.Tobias ,K. Kaiser ( eds)op.cit.599. See, Ibid, Rufus, Y and Wilson,B, , pp 161-164. See also. J. H. Jackson, et.al op.cit840. p 364 ff.}
\footnote{844}{Ibid.}
\footnote{845}{Ibid, para. 111.}
\footnote{846}{Ibid para. 115.}
\end{footnotes}
2.4. DSB Discretion to Review Exception Clauses

The exception under Article XXI GATT provides Members States, with a broad authority while the Article did not any definition about “necessary,” and “national security”. Consequently, there is a great risk that some Members of WTO may misunderstand those terms and assume that the exception under Article XXI would permit them to avoid legitimate WTO obligations.848

In accordance with the provisions of international accords, e.g. the WTO agreements or the Algerian Declaration, international courts and tribunals have the power to interpret substantive law, by resorting to some legal tools such as the Vienna Convention on the Law of Treaties.849

The DSB has clearly ruled that the GATT and other covered agreements must be clarified “in accordance with customary rules of interpretation of public international law.”850 In several cases, the Appellate Body has determined that portions of the Vienna Convention on the Law of Treaties constitute customary rules of interpretation of public international law.851 In this regard, while the DSB has the authority to interpret all WTO agreements, there is no reasonable justification for excluding this power under the security exception.852


850. DSU, Art. 3.2 This Function is further addressed by Art.3.2 Sentence3 and Art3.8 and 3.9.


The question of the exception clause has been discussed in many other cases, including in the *EC–Banana III* (Ecuador) case. In that case, when the EC failed to withdraw a measure for the importation of bananas, Ecuador suspended concessions under the TRIPS agreement. Ecuador argued that DSU Articles 22.3(b) and (c) allows it to determine whether it was practicable to suspend concessions within the same agreement or under another agreement. The EC argued that Article 22.3(b) required Ecuador to submit reviewable evidence explaining why it cannot suspend concessions within the same agreement. Ecuador claimed that the language and the term of “party considers,” in the said provision support its decision; therefore, the arbitrators should only decide whether the procedural requirements of Article 22.3 had been met.

The arbitrators dismissed the Ecuador’s arguments, and concluded that the phrase “party considers” leaves a certain margin of appreciation to the complaining party. However, with respect to the effectiveness of suspending concessions by the Ecuador in another sector or agreement, the arbitrators decided that the “margin of appreciation by the complaining party is subject to review by the Arbitrators.”

The arbitrators also decided that “the margin of review by the Arbitrators implies the authority to broadly judge whether the complaining party in question has considered the necessary facts objectively and whether, on the basis of these facts, it could plausibly arrive at the conclusion that it was not practicable or effective to seek suspension within the same sector under the same conditions.”

854. Ibid, para 65-68.
855 Ibid, para, 48 and 87. See also, Lindsay P, op. cit, 792, pp 1289
856. Ibid. para, 87
857. Ibid, para 52.
agreements”. The arbitrators finally decided that they had authority to review national authorities’ decision to suspend concessions under the TRIPS agreement, despite the deferential language implied by the “party considers” clause.

The arbitrators’ conclusion in *EC–Banana III* case support the idea that international judicial bodies have discretion to review exception clauses and might also interpret the provision of exception clauses such as the “it considers” proviso within the Article XXI exception, providing some basis for a panel to reject an argument that a defense based on Article XXI is outside of its jurisdiction.

### 2.5. Balance of Power Between National and International fora

The exception clauses in international accords are intended to ensure that a party is not prevented from taking some action that it considers necessary and reasonable to protect its security interests. Although exception clauses in international agreements provide the parties with considerable discretion to invoke those clauses in case of their essential security interests are affected, but the existence of procedures for reviewing unilateral decisions are necessary.

These exceptions, however, if given a broad interpretation could undermine the international cooperation. On the other hand, national security is obviously extremely important to all nations, therefore in cases when an international court or arbitration may review national security of the parties, it could lead many countries to reconsider their stands in international cooperation.

In the contemporary world, resorting to national security as an exception to fulfilling international obligations is subject to certain limitations. As was discussed, some international courts and

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858 Ibid.

859 For more details, see, e.g. Lindsay P, op. cit., 792, pp 1288-90. See, also Hannes L. Schloemann & Stefan Ohlhoff, op.cit.790, p. 424 ff.
tribunals recognize national authorities’ discretion to determine their own security interests. At the same time, it is possible that a tribunal is authorized for an international judicial examination of a decision adopted by a State.

However, in cases, where a State or a private party refuses to cooperate with an international adjudicator, that body normally is authorized to take formal note of this non-cooperation. In those circumstances, a court or tribunal should adopt a balanced approach between respecting State sovereignty and national security on the one hand and properly fulfilling its juridical function on the other hand. In so doing, it is clear that, within the limits of its mandate a court or tribunal has the freedom to consider various elements and situations that could allow that body to serve justice.

3. Discovery of Confidential Information by International Courts and Tribunals

The consensual nature of international courts and tribunals is the main element that enables the parties to determine the rules of procedural and applicable law of dispute settlement bodies. Moreover, the right to withhold evidence and information cannot be determined by the parties or even by rules of procedures; rather, it is the substantive applicable law, which determines parties’ rights and responsibilities regarding the evidence and information. For example, the privilege of secrecy for self-incriminating testimony before international criminal tribunals, or some privileges regarding professionals are issues protected by substantive law. In either case, in many occasions a court or tribunal is not able to compel the production of certain documents or witnesses because the


parties may enjoy some degree of freedom to decide on matters relating to their national security.

3.1. **International Court of Justice and State Secrets**

Under the Statute and the Rules of the International Court of Justice, under certain condition the parties have the right to avoid from disclosing documents, which may reveals confidential information. This right is conditional; therefore, the Court can take formal note if a party fails to comply with the Court's order to produce the requested a document.  

In the *Corfu Channel* case, the ICJ discussed the discretion of a party to determine the latitude of disclosures of evidence, which that party considers, to be so important to its interests.  

Pursuant to Article 49 of its Statute and the Court's Rules of Procedure, the ICJ called upon the United Kingdom to produce certain documents. Nevertheless, the United Kingdom refused to comply with the order and argued that the requested documents are related to its naval secrecy. The ICJ considered the argument and accepted the United Kingdom's explanation, and stated that the Court could not draw an adverse inference from the non-production of the documents. In that case, the Court concluded that:

Those documents were not produced, the Agent pleading naval secrecy; and the United Kingdom witnesses declined to answer questions relating to them. It is not therefore possible to know the real content of these naval orders. The Court cannot, however, draw from this refusal to produce the orders any conclusions differing from those to which the actual events gave rise.

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862. The relevant provisions are Article 49 of the Statute of the Court and Article 64 of the Rules of Court.


864. Ibid.p. 32.

865. Ibid.

The issue of confidential documents and a party’s refusal to produce the requested documents with secret character has been discussed in several other cases. In the *Bosnia Genocide* case, 867 the Serbian government submitted some documents requested by the Court, but certain sensitive parts of those documents had been blacked out to be illegible. The Supreme Defence Council of the Respondent had classified the documents as military secrets, while the Council of Ministers had characterized the documents as a matter of national security interest.868

Bosnia argued that the Serbian Government’s refusal to produce the full text of documents in its possession, make it very complicate for the Applicant to prove the attributability of alleged acts of genocide to Serbia, therefore the *onus of proof* should be shifted.869 Bosnia requested the Court to exercise its powers under Article 49 of the Statute and to take formal note of the Serbian refusal to produce complete versions of the secret documents.870

In the hearing of the case, Bosnia–Herzegovina elaborated its argument in the following terms:

Serbia and Montenegro should not be allowed to respond to our quoting the redacted SDC reports if does not provide at the very same time the Applicant and the Court with copies of entirely underacted versions of *all* the SDC shorthand records and of *all* of the minutes of the same. Otherwise, Serbia and Montenegro would have an overriding advantage over Bosnia and Herzegovina with respect to documents, which are apparently, and not in the last place in the Respondent’s eyes, of direct relevance to winning or losing the present case. We explicitly, Madam President, request the Court to instruct the Respondent accordingly.871

868. Ibid, para 205.
869. Ibid., para 204.
870. Ibid, para 205.
871. Ibid, para 205.
The Court ruled that Bosnia–Herzegovina has substantive documents available to it, especially from other sources such as ICTY, therefore the Court rejected the applicant’s arguments in this matter, and it declined to request unredacted copies of the documents from the Serbia. On the other hand, the Court acknowledged that it has the authority, to draw its own conclusions from the failure of the Respondent to comply with its Order to produce full and unredacted copies of the documents.\textsuperscript{872}

3.2. **Confidential Information in International Criminal Litigation**

The ICTY also reviewed the concept of State power to refuse producing document and information by resorting to the national security.\textsuperscript{873} In the *Prosecutor v. Blaskic* case, Croatia appealed a trial chamber decision upholding a subpoena directing it to produce documents, which Croatia claimed, the documents contain national security information.\textsuperscript{874} Trial Chamber II in paragraphs 126 and 132 of its decisions found that:

> Considering that under international and national law, there is a general acceptance of claims concerning the security of the State, it is also important to examine whether States, in the legislation which they have enacted to cooperate with the International Tribunal, specifically envisaged this privilege in relation to their cooperation with the International Tribunal[…..]

The obligations of States to the International Tribunal as a Chapter VII mechanism take precedence over any national laws or

\textsuperscript{872} Ibid, para. 206.


claims of national security, since States, upon signing the United Nations Charter, relinquish certain aspects of their sovereignty in relation to international peace and security.\textsuperscript{875}

The Appeals Chamber of the ICTY recognized that a “customary international rules do protect the national security of States by prohibiting every State from interfering with or intruding into the domestic jurisdiction, including national security matters, of other States”.\textsuperscript{876} The Appeals Chamber held that the Statute of the ICTY, adopted pursuant to Chapter VII of the U.N. Charter, “clearly and deliberately derogates from the customary international law rules upon which Croatia relies”.\textsuperscript{877} It was therefore empowered to implement a special procedure for the \textit{in camera} review of documents claimed to be privileged.\textsuperscript{878}

The Appeal Chamber upheld that, “to allow national security considerations to prevent the International Tribunal from obtaining documents that might prove of decisive importance to the conduct of trials would be tantamount to undermining the very essence of the International Tribunal’s functions”.\textsuperscript{879}

The authority of the international tribunals like the Iran-United States Claims Tribunal under Article 24(3) of the Tribunal Rules and even Article 49 of the ICJ Statute and Article 54 of the ICJ Rules are much narrower than that of the ICTY. In accordance with Article 29 of the ICTY Statute, the Tribunal has its own authority with regard to the production of documents. However, as affirmed by the ICTY, this does not mean that international courts and tribunals should be "unmindful of legitimate State concerns related to national security"\textsuperscript{880}

\textsuperscript{875} Persecutor v. Blaskic, Case No. IT-95-14-PT, Trial Chamber II, Decision of July 18, 1997 at 11 126, 132 and 147.

\textsuperscript{876} Prosecutor v. Blaskic, Case No. IT-95-14-AR 8bis, Appeals Chamber, Judgment of Oct. 29, 1997 at 64.

\textsuperscript{877} Ibid.

\textsuperscript{878} Ibid., at 68.

\textsuperscript{879} Ibid, Persecutor v. Blaskic, Case para. 64; see, also the Decision of Trial Chamber II on the Objection of the Republic of Croatia to the Issuance of Subpoena Duces Tecum of 18 July 1997, para. 115.

\textsuperscript{880} Ibid. Appeals Chamber, Judgment of Oct. 29, 1997 para. 67.
3.3. Protection of State Secrets Before the ICSID

The unilateral assertion of confidentiality of requested documents to justify withholding some documents from tribunals or arbitrators is contrary to many arbitral rules.

Rule 34 of the ICSID Arbitration Rules provides that “Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value”. Tribunal can also call upon the parties to produce documents, witnesses and experts. Rule 34(3) lays down a duty of cooperation with the tribunal. A refusal by a party to comply with the tribunal’s order will lead to negative inferences by the tribunal.

In *Pope & Talbot v. Canada*, Canada refused to comply with the Tribunal’s order and argued that the requested documents are confidential. The tribunal said:

> It is not in dispute that a ground that may justify refusal of a party to produce documents to an international arbitral tribunal may be the protection of State secrets. But any reasonable evaluation of the quality of that justification must depend in large part on having some idea of what those documents are. A determination by a tribunal that documents sufficiently identified deserve protection is a very different matter from acquiescence to a simple assertion, without any identification, that they deserve protection.

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881. ICSID RULES OF PROCEDURE FOR ARBITRATION PROCEEDINGS (ARBITRATION RULES) at: http://www.worldbank.org/icsid/basicdoc/partF.htm


884. Ibid, p 100 para. 1.4.
The Tribunal called upon Canada to furnish it with some information about the requested documents and an indication of the aspects of the dispute if any to which each document related. It also asked for reasons as to the secrecy of particular documents.  

In the *UPS* case, which was under NAFTA, Canada relied on domestic legislation to support its claim of privilege. The Tribunal pointed out that “Canada may not have the advantage of its own law if it is more generous than the law governing the Tribunal.” The tribunal did not accept general assertion that the documents contained State secrets. The Tribunal ruled that, “the materials available to the tribunal, including national freedom of information laws, indicate that State practice does not support the protection of information falling within deliberative and policy-making processes at high levels of government.”

The Tribunal ruled that Canada should establish confidentiality of the requested document by reference to particular public interests, which justify protection. A failure to disclose evidence may lead the tribunal drawing adverse inferences on the subject.

### 3.4. Confidentiality and National Security Before the WTO

The WTO’s mandates would indeed be jeopardized if a member could unilaterally decide its “national security interest”, and thereby preventing the DSB from exercising its functions. In fact, the

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885. At para. 1.7.
887. This case has been initiated under Chapter Eleven of the NAFTA and is governed by the UNCITRAL Arbitration Rules. See also, Weiler, Todd, op.cit 662, p 169
888. Ibid, para. 7.
889. Ibid, para. 11.
891. Ibid, para. 15.
decisions of the Appellate Body and the Panels indicate the DSB’s policy about confidentiality of document in case.  

In *Canada - Measures Affecting the Export of Civilian Aircraft*, the panel confirmed that Canada was under obligation to provide information relating to the dispute. While Canada had alleged it was not obliged to provide the information requested, because:

- Brazil, the Respondent State, had not made out *a prima facie* case; and
- The information in question was confidential in character.

Concerning the first point, the Appellate Body noted that:

There is [...] earlier, nothing in either the DSU or the SCM Agreement to support Canada’s assumption. To the contrary, a panel is vested with ample and extensive discretionary authority to determine when it needs information to resolve a dispute and what information it needs. A panel may need such information before or after a complaining or a responding Member has established its complaint or defence on a prima facie basis. A panel may, in fact, need the information sought in order to evaluate evidence already before it in the course of determining whether the claiming or the responding Member, as the case may be, has established a prima facie case or defence. Furthermore, a refusal to provide information requested on the basis that a *prima facie* case has not been made implies that the Member concerned believes that it is able to judge for itself whether the other party has made a *prima facie* case. However, no Member is free to determine for itself whether a prima facie case or defence has been established by the other party. That competence is necessarily vested in the panel under the DSU, and not in the Members that are parties to the dispute. We are not, therefore, persuaded by the [892] For more details, see, WTO Appellate Body Repertory of Reports and Awards; and, WTO Analytical Index: Guide to WTO Law and Practice, (2007), op cit.746 and WTO Analytical Index Online.

first justification Canada gave for its refusal to provide the information requested by the Panel.\textsuperscript{894}

With regards to the Canada’s second justification for its refusal to comply with the panel’s order to provide document, the Appellate Body rejected the Canada’s argument and noted that the panel had adopted, in the first instance, certain procedures for the protection of such information and considered that “[t]he Panel's decision to adopt the additional confidentiality procedures was in the nature of an interlocutory ruling made in the course of the proceedings before it.”\textsuperscript{895}

In \textit{Guatemala–Cement II} case also the panel rejected Guatemala's argument that its failure to provide information was justified because the submission contained confidential information. The panel noticed that:

Guatemala has not demonstrated, or even argued, that \textit{Cementos Progreso} [the applicant] requested confidential treatment for its ... submission, or that ‘good cause’ for confidential treatment was otherwise shown.\textsuperscript{896} The Article 6.1.2 proviso regarding the ‘requirement to protect confidential information’, when read in the context of Article 6.5, cannot be interpreted to allow an investigating authority to delay making available evidence submitted by one interested party to another interested party for 20 days simply because of the possibility – which is unsubstantiated\textsuperscript{897} by any request for confidential treatment

\textsuperscript{894} Ibid. 192.
\textsuperscript{895} Ibid. para 195
\textsuperscript{896} (footnote original) Even if Cementos Progreso had requested confidential treatment, the Ministry should (consistent with 6.5.1) have required it to furnish a non-confidential version thereof which could have been made available to Cruz Azul "promptly", or to provide "a statement of the reasons why [non-confidential] summarization is not possible".
\textsuperscript{897} (footnote original) The Cementos Progreso submission at issue was made at a public hearing on 19 December 1996. Guatemala argues that, although the Ministry authorized parties to make submissions in writing, the Ministry had not specified whether such written submissions could contain confidential information or not. According to Guatemala, this justified the Ministry in assuming that the Cementos
from the party submitting the evidence – that the evidence contains confidential information. We do not believe that the specific requirement of Article 6.1.2 may be circumvented simply by an investigating authority determining that there is a possibility that the evidence at issue contains confidential information. Such an interpretation could undermine the purpose of Article 6.1.2, since in principle there is a possibility that any evidence could contain confidential information (and therefore not be ‘made available promptly’ to interested parties). Accordingly, we find that the Ministry violated Article 6.1.2 of the AD Agreement by failing to make Cementos Progresso's 19 December 1996 submission available to Cruz Azul until 8 January 1997.898

Altogether, parties to a dispute or other WTO Members all are under obligation to be more cooperative about requests for document. However, in conformity with Article X of GATT 1994 Members are not required to disclose information of which its disclosure would be contrary to the public interest.

3.5. Confidentiality of Evidence Before the IUSCT

The approaches of IUSCT in cases of non-compliance with document production orders on the grounds of confidentiality and national

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security depend on the circumstances and the subject of the issue in a case and the nature of the requested documents as well.

3.5.1. **Filing a Joint Report**

Case No. *A15 (II:A and II:B)* before the Tribunal was about whether the United States had breached its obligations under the Paragraph 9 of the General Declarations. Iran argued that the Respondent did not arrange for the transfer of all Iranian tangible properties subject to the jurisdiction of the United States. In the process of litigating the case, Iran requested the Tribunal to order the United States to provide it with two official census reports it had collected in 1980 and 1982. Iran argued that these census reports would help the Tribunal identify Iranian properties subject of the case. In its response to the request by Iran, the United States argued that it was not in a position to submit the census reports because; they contained privileged and confidential information.

After considering the parties’ arguments regarding the issue of document production including the US arguments about the confidentiality of the requested documents, the Tribunal instructed the parties to file a joint report on the Iranian properties.

In compliance with the Tribunal’s order, each party filed a separate report identifying all properties and indicating owner of each item and the location. The Tribunal received and reviewed those reports, which were prepared by the each party.

This has been one of the Tribunal’s practical solutions in case of confidential information.

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902. Ibid,para 2


3.5.2. **Appointing an Expert to Inspect the Documents**

In order to be able to bring a case before the Tribunal and satisfy the jurisdictional requirements, the Claimant must first prove that it is national of Iran or the United States. Article VII, paragraph 1- B, States that ; National of Iran or United States means: a corporation or other legal entity which is organized under the laws of Iran or the United States, if, collectively, natural persons who are citizens of such country hold, directly or indirectly, an interest in such corporation or entity equivalent to fifty per cent or more of its capital stock.\(^{905}\)

In *Bechtel INC*, Case No 181, the claimants asserted that the two Bechtel companies, which had brought claims, OBI and ABI, were United States nationals.\(^{906}\) With regard to the nationality of the Claimants, they submitted some affidavits to prove their both are US nationality. However, at the hearing, the Claimants argued that the stock of these companies is not publicly traded therefore, for reasons supported by the United States law and regulations; they cannot disclose the names of their stockholders.\(^{907}\) As an alternative, the Claimants suggested that if the Tribunal appoint a firm of certified public accountants, it could make available for inspection such corporate books and records of these three corporations, or other evidence, sufficient to show that fifty percent or more of their stock during the relevant periods was beneficially owned by natural persons who were citizens of the United States.\(^{908}\)

In an order issued after the hearing, the Tribunal requested the claimants to make the material available for inspection by a Dutch accounting firm.

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905. Ibid, General Declaration.
907. Ibid, para 27.
908. Ibid.
Subsequently, that firm reported to the Tribunal that it had carried out the inspections prescribed by the order and submitted that more than fifty percent of the stock of Bechtel Group, Inc.–Bechtel Petroleum, Inc. and Bechtel Power Corporation, respectively was beneficially owned during the relevant periods by natural persons who were citizens of the United States.909

In the light of that report and some other evidence at the record, the Tribunal concluded that the claimants were nationals of the United States within the meaning of Article VII, Paragraph 1, of the Claims Settlement Declaration.910

Nevertheless, in an international dispute, the litigants use all kind of documents including sensitive documents to support pleadings or as evidence. However, parties to international disputes always are concern about disclosure of sensitive information. In fact, if a hearing or the court’s record is open to the public, the confidentiality and contents of sensitive documents and trade data are in risk. To remove that legitimate concern the parties must be assured that valuable sources and materials will not be compromised.

4. Protection Measures for the Submitted Evidence

A confidential procedure prevents unauthorized person from reviewing evidence and information that have been submitted by the parties in a proceeding. As a result, the international rules of procedure should provide a predictable set of standards to assure all parties about the consequences of disclosing some sensitive and confidential information.911

909. Ibid, para. 28.
910. Ibid, para. 79 a.
Many international dispute settlement proceedings are governed by confidentiality agreements or clauses that impose a restriction on disclosure of any information provided in the course of the litigations. For example, the ICTY Rules of Procedure provide an exception to disclosure of information that was provided to the prosecutor on a confidential basis by a State. The ICC rules also provide that "[t]he Arbitral Tribunal may take measures for protecting trade secrets and confidential information"

4.1. Privacy in International Arbitration

International arbitral jurisprudence shows that confidentiality is an important facet of the process. In fact, the process of arbitration is generally a private and confidential process, and thus the parties can determine that the process to be held in camera. For example, the IUSCT Rules expressly hold that unless the parties agree otherwise, all hearings shall be held in camera and the final award may be made public only with the consent of both parties.

The confidentiality of disclosures made during the arbitration also has been mentioned in paragraph B, Article 67 of the WIPO Expedited Arbitration Rules, which provides that:

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917. Id. Article 25.

918. Id., Article 32.
For the purposes of this Article, a witness called by a party shall not be considered to be a third party. To the extent that a witness is given access to evidence or other information obtained in the arbitration in order to prepare the witness's testimony, the party calling such witness shall be responsible for the maintenance by the witness of the same degree of confidentiality as that required of the party.

Where the arbitration agreement or the rules of procedure rules are silent as to confidentiality of the arbitration, the parties can look into applicable law on the merits of a case.  

4.2. Confidentiality of Deliberations

The secrecy of procedure before international courts and tribunals, especially the confidentiality of deliberations of arbitrators, is a fundamental issue. Article 54(3) of ICJ Statute, States that the deliberations of the Court shall take place in private and remain secret.

This fundamental principle has been also enshrined in Article 31, Note 2 of the IUSCT Rules, which States in relevant part:

The arbitral tribunal shall deliberate in private. Its deliberation; shall be and remain secret. Only the Members of the arbitral tribunal shall take part in the deliberations.

The IUSCT has in several cases recognized the importance of confidentiality of deliberations. In the Uiterwyk Case No 381, for the IUSCT concluded that the confidentiality of deliberations forms part

of “customary arbitral and judicial practice.” The Tribunal Appointing Authority in his decision dated May 7, 2001 also confirmed that it is a well-established rule that the deliberations of an international court or arbitral tribunal are confidential.

Under the Tribunal’s rules, hearings shall be held in camera, and the confidentiality of deliberations is to regain the parties’ confidence. Therefore, disclosure of the Tribunal deliberations by an arbitrator can be as a ground to justifiable doubts as to that persons’ independence and impartiality.

However, there is a strict confidentiality of deliberations in almost all international courts and tribunal. However, someone may argue that a strict confidentiality of deliberations may be in conflict with the requirements of transparency. In any case, the confidentiality of deliberation is not limited to issues concerning the merits of a case; it includes all aspect of deliberative process, including the scope, evidence, timing, and legal arguments. As Article 31.2, of the IUSCT Rules provides, arbitral tribunal shall deliberate in private, therefore arbitrators should not disclose any information relevant to the deliberation of a case.


922. In accordance with Para 2 Article 6 of the Tribunal’s Rule the Secretary- General of the Permanent Court of Arbitration designated a appointing authority to appoint sole arbitrator; decide about challenges Against any arbitrator (Articles 9-10 of the Tribunal’s Rule).


924. Ibid.


927. For more study see, e.g., Valéry Denoix de Saint Marc, Confidentiality of Arbitration and the Obligation to Disclose Information on Listed Companies or During Due Diligence Investigations, 20 (2) Journal of International Arbitration, (2003) p 211.

4.3. Protection of Confidential Information Before the WTO

Parties to international agreements might be unwilling to provide sensitive and trade data and information, which are often protected under domestic law and regulations.929

The parties to an agreement often set conditions to minimize the negative impact of disclosing information. For example, Paragraph 3 of Appendix 3: Panel Working Procedures930 provides that the deliberations of the panel and the documents submitted to it shall be kept confidential. Article 18 of the DSU, states that all written submissions to the panel or the Appellate Body of the WTO shall be treated as confidential.931 Furthermore, Articles 5.2, 4.6 and 14 of the DSU provide that, the process dispute settlement, including conciliation, mediation and deliberation are confidential. However, these rules do not preclude a party to a dispute from disclosing Statements of its own positions to the public. Under the said rules, all Members should treat as confidential information submitted by a party to the panel, which that party has designated as confidential. Article 18:2 DSU provides that, where a party to a dispute submits a confidential version of its written submissions to the panel, it must also, upon request of a member, provide a non-confidential summary of the information contained in its submissions that can be disclosed to the public.932

The AD Agreement also sets out rules about disclosure of information and access to public information in AD investigations. Moreover, all Members should observe and recognize the

930 Understanding on Rules and Procedures Governing the Settlement of Disputes, XXX. Appendix 3: Panel Working Procedures
931. Article 18: Communications with the panel or Appellate Body.
932 .For more details,see, WTO Appellate Body Repertory of Reports and Awards: and, WTO Analytical Index: Guide to WTO Law and Practice, (2007), op cit 746 and WTO Analytical Index Online.
requirement to “appropriately protect the confidential information” as identified in Article 6 and Article 12 of the AD Agreement.

Article 6.1.2 states that “Subject to the requirement to protect confidential information, evidence presented in writing by one interested party shall be made available promptly to other interested parties participating in the investigation.” In this regards in Guatemala – Cement II the Panel Ruled that:

However, insofar as confidentiality is concerned, Article 6.1.2 must be read in the context of Article 6.5, which governs the treatment of confidential information. [...] We have noted that Article 6.5 reserves special treatment for ‘confidential’ information only ‘upon good cause shown’, and we have determined that the requisite ‘good cause’ must be shown by the interested party which submitted the information at issue. Guatemala has not demonstrated, or even argued, that Cementos Progreso [the applicant] requested confidential treatment for its … submission, or that ‘good cause’ for confidential treatment was otherwise shown.933

The Appellate Body and Panels have extensively discussed the concept of protecting disclosed evidence and information. 934

5. Balance Between Rules of Evidence and Confidentiality

The secrecy and confidentiality of evidence and information is an essential part of international litigation. In international adjudication, parties sometime may decide not to be transparent about evidentiary obligation based on confidentiality, State secrecy


and national security. These circumstances create many difficulties for the international courts and tribunals in their assessment of the evidence relevant to a case.

There are, some standard and regulations or exception clauses, which protect information relating to national security, personal privacy, commercial confidentiality. In this regard, special attention must be given to the privacy of individuals, companies, and national trade and business data, which are always protected under some rules and principles.935

The exceptional clauses, however, may cause uncertainty when a request for document production is refused, when the authorities determine that the information is exempt from disclosure.

Furthermore, in a situation where a party refuses to comply with a tribunal’s order to disclose evidence by resorting to its national security, a tribunal can examine all aspects of the case in order to be able to adopt a reasoned decision. In this situation, a tribunal normally calls upon the party to furnish it with descriptions and explanations about each document and to provide reasons regarding the secrecy of particular documents. In any case, the confidence of the parties about the tribunal’s responsibility to protect the submitted evidence and information can make the process of fact finding in international litigation more efficient.

For example, when the PCIJ adopted the Rules of Court in 1922, it agreed that the rule requiring each witness to make a solemn declaration before giving evidence before the Court did not oblige that witness to violate professional secrecy.936

To conclude this part, it is clear that, fostering the concept of transparency and disclosure of evidence and information in international litigation and promoting confidences of all parties, obviously assist international courts and tribunals to manage the procedural aspect of the cases more efficiently.

935. For more details, see http://www.transparency.org/working_papers/martin-feldman/3-elements.html
However, one must take into account that a very liberal approach to the concept of transparency and access to all evidence and information, as well as very low standards of evidence may threaten a fair procedure in the course of international litigations. Therefore, to avoid uncertainty in international litigations there must be a balance between promotion of openness, disclosure of document and transparency and maintaining the highest possible degree of protection of procedural rights and privacy of all the parties before international courts and tribunals.
Chapter VIII: Document Production and the Consequences of Non-Compliance

To satisfy principle of justice, the procedural laws and jurisprudence of international courts and tribunals would need to be clear and comprehensible. In this regard, parties must conduct themselves in such a manner to avoid bringing into question the reliability and impartiality of the court or tribunal. The question that remains is how an international court or tribunal, and the DSB in particular, may impose sanctions on a party whose conduct is incompatible with the proper functioning of the dispute settlement process?

1. Conditions Precedent to Ordering of Document Production

A request by one party for an order directing another party to produce certain documents must meet certain standards. As will be discussed, there must be some requirements and standard for all kind of requests for production of documents, otherwise the requesting party may take advantage of the situation and based its claim on the requested documents only. In fact, pre-requirements enable both parties to decide whether they want to comply voluntarily or want to raise objections to a request. The standers also make it possible for the arbitral tribunal to reach a decision on whether it should grant or reject the request. In general, the following criteria must be met in order to make a party’s request for document production assessable by the court or tribunal.


1.1. Submitting a *Prima Facie* Case

The international courts and tribunals have generally recognized that a claimant is required to prove all facts and legal points, which support its claim. In a case where a claimant fails to meet its initial burden of evidence to support facts and sometime legal points in its claim, a dispute settlement body should not expose a respondent to the claims that are not properly evidenced.

When a claimant can make a *prima facie* case on the merits of its claim, then he can request the tribunal to compel a respondent to produce evidence. Nonetheless, the Claimant must, satisfy the Tribunal that the claim is really standing and if the Claimant could not come forward with *prima facie* evidence, the Respondent is not under any obligation to submit evidence. A key consequence of this situation is that the parties would be in a position to request the court or tribunal for an order for discovery of evidence.

Therefore, in international litigations the Respondent should not provide any evidence and information unless the Claimant presents at least *prima facie* evidence in favor of its claim.

In fact, *prima facie* case means that evidence and arguments are sufficient to convince the tribunal to hear a claim. This is the minimum standard for a court or tribunal to compel other party to comply with document production order then, it would be the duty of the respondent party to comply with the tribunal’s order regarding the production of evidence.

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943. For further study see, Kazazi, op.cit.277.pp 321-332 , see also, Amerasinghe, op.cit.178.
1.2. Identification of Documents

A request for production of a document should not be broad and open-ended and a general request for all information; rather it must clearly identify the requested document. Tribunals normally reject requests for production of general documents when the party gives only a broad description of the requested documents.

In Case B1 the IUSCT ruled that “[t]he Tribunal’s practice is not to order production of documents in response to generalized and expensive requests”. The Tribunal ruled that the Respondent did not identify the requested documents, but rather it only sought “all documents relating to the United States FMS Program left in Iran by its former Military Advisory Group (AAG)”

The ICSID Tribunal also dealt with production of evidence in the Aguas del Tunari–Bolivia Case. In its procedural order of 8 April 2003, the tribunal stated that the parties’ arguments as to the necessity of requests for production of documents were insufficiently developed to make an order upon them.

The Tribunal denied requests for production of documents when it found the requests too broad. In Noble Ventures the Tribunal ruled:

The Tribunal is not in a position to identify, within the many and broad requests submitted by Claimant, which documents must be

946. Iran v. U.S. Case B1 (Claims 2 & 3) order of 13 March 1998 (Doc. no. 1551) para.5.
947. Ibid, Para 2.
950. The decision is available at: http://ita.law.uvic.a/documents/AguasdelTunari-jurisdiction-eng000.pdf
considered relevant and material for the Tribunal to decide on the relief sought.\textsuperscript{951}

In \textit{Noble Ventures}, the Tribunal supported the idea of ordering the production of documents, which may be helpful in establishing facts of the case relevant for the issues to be decided, however, the Tribunal held that:

\begin{quote}
The process of discovery and disclosure may be time-consuming, excessively burdensome and even oppressive and that unless carefully limited, the burden may be disproportionate to the value of the result, and
\end{quote}

\begin{quote}
1) Parties may have a legitimate interest of confidentiality.\textsuperscript{952}
\end{quote}

In this regard, the WTO Agreements also establish some requirements, which all WTO Members are required to implement. Annex II of the WTO Anti-Dumping Agreement provides that

\begin{quote}
“[A]s soon as possible after the initiation of the investigation, the investigating authorities should specify in detail the information required from any interested party.”
\end{quote}

In the \textit{Argentina–Ceramic} Case, one question was about the failure of a party to specify in detail the information required and obligation concerning the evidence-gathering process for the investigating authorities. The panel held that:

\begin{quote}
[A] basic obligation concerning the evidence-gathering process is for the investigating authorities to indicate to the interested parties the information they require for their determination, as set forth in Article 6.1 of Anti-dumping Agreement’’\textsuperscript{953}
\end{quote}

\textsuperscript{951} ICSID Cases, \textit{Noble Ventures v. Romania}, Award, 12 October 2005 citing the Order of 3 June 2003 in para 20 of the Award, ( para. 7 of the Order).

\textsuperscript{952} Ibid. Order of 3 June 2003.

\textsuperscript{953} Panel Report, \textit{Argentina – Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy}, WT/DS189/R, ( November 2001), paras. paras. 6.53–6.54. For more study see, see, \textit{WTO Analytical Index}; (Cambridge University Press, 2007) p 611.
The panel concluded that:

Independently of the purpose for which the information or documentation is requested, an investigating authority may not fault an interested party for not providing information it was not clearly requested to submit.”\(^{954}\)

The panel further clarified:

In our view, the inclusion, in an Annex relating specifically to the use of best information available under Article 6.8, of a requirement to specify in detail the information required, strongly implies that investigating authorities are \textit{not} entitled to resort to best information available in a situation where a party does not provide certain information if the authorities failed to specify in detail the information which was required.\(^{955}\)

The panel followed this principle that an investigating authority cannot disregard the evidence because a party has failed to provide sufficient supporting documentation, unless the investigating authority has clearly requested that the party provide such supporting documentation.\(^{956}\)

The required standard for identification of the requested documents may vary according to the subject and the \textit{forum} where adjudication takes place. In any case, all requests shall identify issues such as, the date on which the document was prepared; name of the person who issued or keeps the document; the nature and substance of the document; the document’s physical location.\(^{957}\)

\(^{954}\) Ibid. Panel Report paras. 6.53-6.54.

\(^{955}\) Panel Report, para. 6.55.

\(^{956}\) Panel Report, Id, paras. 6.55 and 6.58.

\(^{957}\) See, Article 3 of the IBA Rules on the Taking of Evidence in International Commercial Arbitration.
Nonetheless, general requests for discovery of evidence and information, which may be considered beyond a fair procedure, is forbidden in all international litigations.\textsuperscript{958}

\subsection*{1.3. Justification for Ordering Production of General Documents}

The practice of international courts and tribunals show that there are situations where a party is not in such a position to identify all details of the requested documents.

In the \textit{INA Corporation} Case, the Claimant failed to outline the details of the requested documents, but the Tribunal ordered the Respondent, to produce the requested material.\textsuperscript{959}

From the Tribunal’s viewpoint the circumstances the case, the nature of the requested documents and the parties’ situation, were the reasonable grounds for compelling the Respondent to submit documents. The Respondent failed to provide the books and records, which were requested by the Tribunal, it also gave no any description of the document, which prevented the Claimant to inspect the books and records. The Respondent argued that the materials were “too voluminous to be conveniently assembled” for submission, but the Tribunal in its award stated that, the argument was not convincing. The Tribunal stated that it “must draw negative inferences from the Respondent’s failure to submit the documents which it was ordered to produce.”\textsuperscript{960}

In some other case including in, \textit{Iranian Ministry of Oil}, Case No. B4, and \textit{Telecommunications Company of Iran}, Case No. B44, while the requests were not clear, the Tribunal, ordered the claimants to

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{958} See, Klaus Peter Berger, \textit{International Economic Arbitration} (Kluwer: Deventer/Boston, 1993)- p. 430 ff.
\item \textsuperscript{959} \textit{INA Corporation, v, I.R. Iran}, Award No. 184-161-1 reprinted in 8 Iran-U.S. C.T.R. pp 373, 377. See also Order of 21 January 1983 para. 5.
\item \textsuperscript{960} Ibid. at 377 and 382.
\end{itemize}
\end{footnotesize}
produce all evidence and relevant documents left in Iran by the Respondent. The Tribunal stated that:

In order to ascertain what, if any, documents of the Respondent relating to the subject matter of this case remain in existence, the [...] requests the Claimant, to file [...] any information and copies of all relevant documents .......

In fact, the request was very general and the claimants stated that it was not in possession of Respondent's alleged documentary evidence, but the Tribunal ordered the claimants to produce documents.

The jurisprudence of international tribunals’ show that in some circumstances, a tribunal may order for the production of general documents, considering all facts surrounding the issue and the nature of the documents.

1.4. Necessity and Relevancy of Document

As stipulated in procedural rules such as Article 24 of the IUSCT Rules or Article 41(2) of the ICSID Arbitration (Additional Facility) Rules, a tribunal may, if it deems necessary at any stage of the proceeding, call upon the parties to produce documents. If a party requests production of documents, it must convince the Tribunal that the documents are necessary and related to the case. When a party identifies particular document and claims that the documents is within the custody of the other party, the Tribunal will consider the request for the production of such documents.

In Case No B61, the Claimant requested some HRT Census forms. The Tribunal in its order ruled that the United States should provide information contained in certain census forms only insofar as that information related to “items of property that have already

962. For more details, see, Brower, and J. Sharpe, op cit. 938.
been made the subject of a claim in these Cases.” In that Order, the Tribunal authorized the United States to “withhold any information concerning property that is not the subject of a claim in these Cases.” The Tribunal further noted that “this limitation is dictated in particular, by reasons of fairness,” and it imposed the same limitation with respect to information ordered to be produced by Iran.

In those circumstances, the Tribunal should take into consideration that it would be against fair proceedings and the principle of equality of the parties if it grants a request for production of unnecessary documents.

However, the unilateral assertion of irrelevance and unnecessary by the party to justify its refusal to comply with the tribunal’s order, is against the established rules and principles which empower the Tribunal to decide the admissibility of submitted evidence.

With reference to the ICSID rules, in the ADF Group, Inc. Case, the Tribunal held that there are at least two main aspects of “necessity” in the context of a request for document production. The Tribunal held that:

\[
\text{[t]he first aspect relates to a substantive inquiry into whether the documents requested are relevant to, and in that sense}
\]

965. Ibid. See also, Order of 20 December 2005 Doc No 501 in Case No B61.
966. ICSID rules 34 reads as follows: (1) The Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value.
(2) The Tribunal may, if it deems it necessary at any stage of the proceeding:
(a) call upon the parties to produce documents, witnesses and experts; and
(b) Visit any place connected with the dispute or conduct inquiries there.
Rule 34(3) lays down a duty of cooperation with the Tribunal. A refusal by a party on the pretext of "irrelevance and lack of materiality" will lead to negative inferences by the Tribunal and will create the impression that the party refusing to produce the documents does so because it believes that the documents in question would have a negative impact on its case.
necessary for, the purposes of the proceedings where the documents are expected to be used. Inquiry into the relevancy of the documents requested needs to be done on a category-by-category basis.

The second aspect concerns a procedural inquiry into the effective and equal availability of the documents requested to both the requesting party and the party requested. Where only one party has access to requested documents relevant to the proceeding at hand, we consider that the party with access should be required to make the documents available to the other party. Where, however, the documents requested are in the public domain and equally and effectively available to both parties, we believe that there would be no necessity for requiring the other party physically to produce and deliver the documents to the former for inspection and copying. Where, however, the requesting party shows it would sustain undue burden or expense in accessing the publicly available material, the other party should be required to produce and deliver the documents.968

An application for discovery of evidence must outline the categories of the requested documents together with the reasons why those documents are necessary. A tribunal also should take into account whether the requested documents are relevant to, and necessary for, the purposes of the proceedings.969

However, in case of request for discovery or document production, a requesting party should convince the tribunal that it has taken all reasonable steps to get the relevant documents, but its efforts failed for reasons not attributable to that party.

968. Ibid. para. 29.
1.5. Taking Reasonable Steps to Obtain Document

An essential prerequisite to obtaining a document production order is to convince tribunal that a party has made reasonable efforts to obtain the requested documents. Arbitral tribunals may refuse to issue an order for document production when the requesting party itself likely has access to the evidence.

In this regard, the IUSCT jurisprudence shows that before the Tribunal can consider such a request for documents, the Respondent must show that it has taken all reasonable steps to get these documents itself. The Tribunal has dismissed several requests when it found that the party could not convince the Tribunal that the Claimant has made efforts to get the requested documents.

For example, in Vera-Lo Miller Aryeh, et al., Cases No 842/3/4, the Claimants filed a request for the production of documents. The Tribunal reviewed the request and then dismissed it. From the Tribunal’s viewpoint, the claimants failed to convince the tribunal that they have taken all reasonable steps to secure the requested documents.

To use discovery of evidence in international litigation, a party must prove, on a balance of probabilities, that it took all reasonable steps to obtain requested documents. All reasonable steps mean that a party must identify documents and search for documents, and then it must convince the Tribunal that it took all reasonable steps to get the relevant documents.

1.6. Sole Control of the Requested Documents

The requesting party must also show that the requested documents are within the sole control of the requested party and are not available or accessible to it.\(^{976}\) Public availability of the requested documents is a legitimate ground for a tribunal to dismiss requests for production of those documents.\(^{977}\)

The IBA Guidelines on Conflicts of Interest in International Arbitration\(^{978}\) determines that: In order to comply with general standards of arbitration, a party shall provide all information already available to it and shall perform a reasonable search of publicly available information as well.\(^{979}\)

The IUSCT also has clarified this point in the *Hilt* Case No. 10427.\(^{980}\) In that case, the Claimant filed a claim for damages arising from a terminated employment contract, including damages for a twenty-five percent salary increase to which she claimed entitlement. The Claimant argued that she had no access to some evidence while the Respondent had access to information within its records, but it refused to provide the requested evidence.\(^{981}\) In general, the Claimant expected that the Tribunal takes note of the Respondent’s failure to provide the requested evidence, but the Tribunal did not draw adverse inferences. The Tribunal ruled that


\(^{979}\) Approved on 22 May 2004 by the Council of the International Bar Association. p15.


\(^{981}\) Ibid. p. 160.
the Claimant herself “had access to corroborating evidence but failed to present it or offer any explanation as to its absence”.982

1.7. Unforeseen Condition and Mutual Cooperation

A party, who makes allegations about certain facts or events, a tribunal, expects the party to adduce sufficient evidence to establish its contentions. Moreover, under the doctrine of sanctity of contract, parties should honor their obligations under that contract; therefore, all foreseeable risks of contract performance are assigned to the performing party unless the parties decide otherwise.983

However, where the contractual obligations could not be excused due to unforeseen conditions, international tribunals sometimes order the respondents to cooperate with the claimants in obtaining or securing the relevant and necessary evidence.984 For example, in some cases before the Tribunal some of the Claimants alleged that in the course of the Iranian Revolution they left Iran without always being able to take along their records and documents, the Tribunal in various cases examined the arguments to determine that which party could have adduced the evidence.

In Harold Birnbaum, 985, Case No. 967 the Tribunal quoted a previous finding made by Chamber One in Sola Tiles, Inc., Case No. 317986:

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982. Ibid.
While the Claimant must shoulder the burden of proving the value of the expropriated concern by the best available evidence, the Tribunal must be prepared to take some account of the disadvantages suffered by the Claimant, namely its lack of access to detailed documentation, as an inevitable consequence of the circumstances in which the expropriation took place.  

The Tribunal found that in some cases parties may face with specific difficulties, because during the Iranian Revolution they might have left behind documentation or other material that could prove their claim. The Tribunal therefore, decided that it would be unfair to apply a rigorous standard of evidence on a claimant in such circumstances. However, the Tribunal was careful not to expose the Respondent to claims, which has not been properly evidenced.

There is no a clear definition or jurisprudence by the Tribunal about these concerns. In some cases, for example, the Tribunal took into consideration the claimant’s situation, while in others; the Tribunal did not accept the claimant’s allegation that it could not gain access to documents in support of its ownership interests in a property. For example, in Hakim Kamran, Case No 943, the Claimant stated that because he fled Iran, he left behind the documents evidencing his ownership of the Vanak property. Chamber Two examined his allegation and noted that:

The Tribunal also notes where a Claimant alleges a proprietary interest of the magnitude at issue here, it would be reasonable to expect the Claimant to have with him in the United States some documentation, which would have evidenced his ownership interest in that property. The Claimant here has proffered nothing of the kind”.

987. Ibid. at 238 para 52.
990. Ibid. at 88.
In brief, a party may be entitled to an order compelling the opposing party to cooperate, if the party proves that the non-performance or failure to carry out its burden of evidence was due to some situation or event beyond its control.991

1.8. Non-Burdensome Requests

While a court or tribunal considers a request for document production, it should bear in mind that complying with discovery order requires considerable time, effort, and costs by the requested party. Whether a request imposes an undue burden on the other party depends on the nature of the document requested. In electronically stored information or software, many data, can be discovered without undue burden.992

In any case, it is quite reasonable for a court or tribunal to impose pre-requirements that must be exhausted by the requesting party, in order to avoid unreasonable and egregiously burdensome requests.993 Therefore, a party wishing to obtain an order for production of documents and material must consider some pre-requirements before submitting its request.

2. Drawing Adverse Inferences from Refusals to Produce Documents

Given the contractual nature of international dispute settlement mechanisms courts and tribunals have the discretion to impose

991. In Article 7.1.7, of the Principles of International Commercial contracts published by the International Institute for the Unification of Private Law,( UNIDROIT) defined force majeure.
sanctions against a party who fails to comply with their order.\footnote{See, Philippe Fouchard, Emmanuel Gaillard, John Savage, Berthold Goldman (eds), Fouchard Gaillard Goldman on International Commercial Arbitration, (Kluwer 1999) p. 697, para. 1273.} If a party refuses to disclose documents without giving reason, a court or tribunal is likely to infer that the party has something to hide.\footnote{See, C. Brower and J. Sharpe, op.cit.508 pp. 217, 240.} Judge Jessup, in his separate opinion in the Barcelona Traction case before the ICJ, stated that

If a party fails to produce on demand a relevant document, which is in its possession, there may be an inference that the document ‘if brought, would have exposed facts unfavorable to the party [...]’\footnote{Case Concerning the Barcelona Traction, Light and Power Company, Limited, 1970 ICJ 3, p. 215, para. 97.} 

In this regard, Judge Buergenthal a former judge of at the Inter-American Court of Human Right stated, “it is appropriate to make adverse inferences against a party that has not produced documents exclusively available to it”.\footnote{Thomas Buergenthal, Judicial Fact-Finding: The Inter-American Human Rights Court, in Lillich, (ed), Fact-Finding before International Tribunals, 1992, p. 266. See, also, ICJ- CR 2006/3, Para 21}

Adverse inferences thus help to ensure the efficacy, as well as the fairness, of international litigation. However, the adjudication body must justify the adverse inferences by the evidence and arguments submitted by the parties.\footnote{See, Brower op.cit.76. pp 194-196.} Thus, before drawing any adverse inferences, arbitrators or judges in a court must satisfy themselves of the proportionality of drawing any adverse inferences in the circumstances of each case. \footnote{Canada - Measures Affecting the Export of Civilian Aircraft, op. cit., para. 200.}

Many institutional arbitral rules authorize arbitrators, implicitly or explicitly, to draw adverse inferences from parties’ non-production of
discoverable evidence.\textsuperscript{1000} However, exercising the right to draw adverse inferences by a court or tribunal is always a complex issue, which may causing difficulty.\textsuperscript{1001}

2.1. Power of Drawing Adverse Inference

A court or tribunal may impose sanctions on the parties to prevent abuses of the judicial process by a party.\textsuperscript{1002} Thus, a tribunal has the legal authority and the discretion to draw inferences from the facts before it, including the circumstance where a party refuses to cooperate with the tribunal and fails to provide the requested information.\textsuperscript{1003} However, the authority of international courts and tribunals to impose sanctions and to draw inferences deriving from their inherent power is not absolute.\textsuperscript{1004} In this regard, Sandifer clearly pointed out that:

\begin{quote}
Ad hoc tribunals have frequently asserted the existence of a rule empowering them to draw adverse inferences from the failure of a party to produce evidence known or presumed to be in its possession, and have given judgment based upon the application of such a rule.\textsuperscript{1005}
\end{quote}

Article 49 of the ICJ Statute and Article 66 of the ICJ’s Rules empower the court decide at any time either \textit{proprio motu}, or at the request of a party, to exercise its functions with regard to the obtaining of evidence, subject to some conditions. In the absence of a specific provision at the rules of procedures, international tribunals

\begin{footnotesize}
\begin{enumerate}
\item See, e.g. Amerasinghe,op.cit.178. p 354-7
\item Kazazi, op.cit.277.p313. See, also Sandifer, op cit.358. pp-18, 147-62 .
\item Canada - Measures Affecting the Export of Civilian Aircraft, op. cit. para. 203.
\item For more study see, Amerasinghe C.F., \textit{Presumptions and Inferences in Evidence in International Litigation,} 3(3)The Law and Practice of International Courts and Tribunals,(2004) 395 – 410.
\item Sandifer, op cit.358.p 150.
\end{enumerate}
\end{footnotesize}
always have the power to draw adverse inferences from the failure or refusal of a party to comply with the order to produce evidence.\textsuperscript{1006}

As a matter of principle, drawing an adverse inference in a case can be justified only when a tribunal reaches to the point that a party is in possession of documents and information but he/she refused to produce without providing any justification. Thus, reasons provided by a party for not producing requested documents should be weighed by the tribunal and taken into account before any adverse inference is drawn.\textsuperscript{1007}

There are, however, circumstances where it is not proper for an adjudication body to draw an adverse inference if a party failed to comply with the production order.

\textbf{2.2. Express Authority to Draw Adverse Inference}

In addition to their inherent power, some international tribunals have been granted express authority to consider proper response to a party’s failures to produce relevant documents or material.

Article 49 of the Statute of the ICJ authorizes the court to take “formal note” of any refusal to produce documents or explanations it has requested. Article 61 of the Rules also states that the Court may indicate any points or issues to which it would like the parties to address and may ask the parties for explanations. Under the authorization of Article 49, if a party fails to comply with the Court’s order and refuses to produce the requested evidence and information it is appropriate for the Court to draw an adverse inference against, that party and support the applicant’s version of the disputed facts.\textsuperscript{1008}

\textsuperscript{1006} Sandifer, op cit.358, p153. The issue of inherent power has been discussed in several cases before the IUSCT. Henry Morris v. I.R. Iran, Decision No. DEC 26-200-1 (16 Sept. 1983), reprinted in 3 Iran-U.S. C.T.R. 364, 364-65.

\textsuperscript{1007} See, Kazazi, op.cit.277, p.276 ff and 321. See also, J. K. Sharpe, op.cit.1000

\textsuperscript{1008} For more details see, Andreas Zimmermann, Christian Tomuschat, Karin Oellers-Frahm op.cit.562. Evidence, comments about Articles 49, 50, and Rules, 66. See also BIILC Project, op.cit. 202.
When it comes to the matter of documents production in a case before the Tribunal, the Claim Settlement Deceleration and IUSCT rules and the Claims Settlement Decoration authorizes the Tribunal to manage the proceeding, if necessary draws adverse inferences against a party who failed to comply with its order.

Article V of the Claims Settlement Declaration, as incorporated in Article 33 of the Tribunal Rules, States that, “The Tribunal shall decide all cases on the basis of rules and principles of commercial and international law as the arbitral tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions, and changed circumstances” (emphasis added).1009

2.3. The Practice of International Tribunals

It is quite understandable that international tribunals draw adverse inferences from a party’s refusal to produce documentary evidence, which it could submit.

In Protiva Case No 316, the Tribunal determined that the Government of Iran was responsible for the deprivation of the Claimants’ interests in a parcel of real property. In that case, the Respondent failed to comply with the Tribunal’s order to produce some documents. The Tribunal considered the Respondent failure and this fact that the Respondent could not introduce any evidence to rebut the substance of the Claimants' evidence.1010

In its argument about the deprivation of the properties, the Claimants relied mainly on letters written to various Iranian organizations by their lawyers in Iran. The Tribunal held that this contemporaneous documentation was sufficient to shift the burden of proof to the Respondent.1011 The Tribunal concluded that the

1009. For more study, see, K.H. Ameli, op.cit98 p 272.
1011. Ibid. Para 61.
Respondent had not met its burden, in part, because it did not introduce any evidence to rebut the substance of the Claimant’s documents. While the Tribunal accepted that the Claimant did not provide all required document but concluded that; “Moreover, in the circumstances of this Case, the failure of the Respondent to produce evidence available to it justifies the Tribunal’s drawing inferences from that failure”.1012

Similar results were reached by the Tribunal in some other cases, including the Birnbaum Case No 967.1013 In that case, the Claimant produced evidence supporting its claim and did create a strong presumption that the account in question was due and collectible. The Respondent did not produce evidence to rebut this presumption, therefore, the Tribunal held that “although the Respondent presumably would have had access to such evidence if it existed in the files”.1014

The Tribunal reached the similar conclusion in Fritz Case No 273, where it noted that “it is an accepted principle that an adverse inference may be drawn from a party’s failure to submit evidence likely to be at its disposal”.1015

2.4. Adverse Inference in the WTO Agreements

Fulfilling the burden of proof requirements is not limited to presenting facts and documents to prove a claim. Rather, it requires the parties to be more cooperative and collaborate in the process of production of information that is exclusively within control of one of the parties.

The WTO agreements also to some extent impose a particular obligation on member States to provide documents and information

1012. Ibid., at para 68.
1014. Ibid. at para 80.
during a dispute settlement proceeding. However, as was discussed, in many cases parties are reluctant to cooperate with the panels, or the opponent party, therefore, panels, Appellate Body or other party are often unable to obtain all relevant facts to expedite the process and reach a reasoned decision.

In the course of dispute settlement proceedings, panels and the Appellate Body have been granted broad authority to seek information from parties, and some the WTO agreements outline the consequences if a party fails to provide the panel with requested information. 1016

For example, information and documents concerning State subsidies are in the hands of the member providing the subsidies and often will not be publicly available.1017 In this regard, Annex V of the SCM Agreement contains detailed provisions about the parties’ obligations to cooperate in the development of evidence to be examined by the panel in a case before it. Annex V addresses, in more detail, the power of drawing of adverse inferences under certain circumstances.1018 Paragraph 7 of Annex V also provides explicitly that “the panel should draw adverse inferences from instances of non-cooperation by any party involved in the information-gathering process”.

Article 12.7 of the Agreement on SCM States that “In cases in which any interested Member or interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available”.1019

1016. For more details see, WTO Appellate Body Repertory of Reports and Awards (1995-2006) & WTO Analytical Index op.cit.746, and WTO Analytical Index Online.
1017. See supra chapter 6.
To say the least, WTO agreements generally provide the panels and the Appellate Body with the authority to draw inferences.1020

2.5. Adverse Inference Before the DSB

In the Canada–Aircraft Case,1021 the Appellate Body discussed the issue of panel’s authority to draw adverse inferences from a party’s refusal to provide information.

In that case, Canada refused to provide Brazil with information about the financial activities of a particular agency that Brazil had requested during consultations and which was subsequently also requested by the panel but the Canadian authorities refused to comply with the requests. However, in its final report the panel did not draw inference from Canadian authorities’ refusal. On appeal, Brazil argued that the panel erred by not drawing the inference. The Appellate Body ruled that:

Clearly, in our view, the panel had the legal authority and the discretion to draw inferences from the facts before it—including the fact that Canada had refused to provide information sought by the Panel. [...] Yet, we do not believe that the record provides a sufficient basis for us to hold that the panel erred in law, or abused its discretionary authority, in concluding that Brazil had not done enough to compel the panel to make the inferences requested by Brazil. For this reason, we let the Panel’s finding of not proven remain, and we decline Brazil’s appeal on this issue.1022

About Brazil’s argument regarding the panel’s authority to draw adverse inferences the Appellate Body ruled that: “The drawing of inferences is, in other words, an inherent and unavoidable aspect of

1020. For more details see; WTO Appellate Body Repertory of Reports and Awards (1995-2006) & WTO Analytical Index Online (SCM) op.cit.746, and WTO Analytical Index Online.
1022. Ibid. paras. 202—203 and 205.
a panel’s basic task of finding and characterizing the facts making up a dispute”.  

The Appellate Body referred to Part III and Annex V of the SCM Agreement, which specifically address the drawing of adverse inferences in “actionable subsidies” cases when a party refuses to provide the panel with requested information. However, the Appellate Body did not reverse the Panel's decision which it did not draw an adverse inference.

The Appellate Body argued that the procedures set forth for drawing adverse inferences in subsidies cases were equally applicable to cases involving prohibited subsidies, and ruled that:

[t]here is no logical reason why the Members of the WTO would, in conceiving and concluding the SCM Agreement, have granted panels the authority to draw adverse inferences in cases involving actionable subsidies that may be illegal if they have certain trade effects, but not in cases that involve prohibited export subsidies for which the adverse effects are presumed.”

Finally, the Appellate Body stated that parties’ refusal to comply with the panel and Appellate Body requests for information had the “potential to undermine the functioning of the dispute settlement system” and instructed future panels to take “all steps open to them

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1023. Ibid. para. 198
1024. Part III is titled "Actionable Subsidies," and includes articles 4 to 7 of the SCM Agreement.
1025. Annex V is titled "Procedures for Developing Information Concerning Serious Prejudice." Serious prejudice is a necessary element in proving a case of "actionable subsidies" under the SCM Agreement.
1026. For more details see,; WTO Appellate Body Repertory of Reports and Awards(1995-2006) & WTO Analytical Index op.cit.746, and WTO Analytical Index Online.DSU
1027. The SCM Agreement provides different rules for dealing with three types of subsidies: prohibited subsidies (Part II); actionable subsidies (Part III) and non-actionable subsidies. See id.
to induce the parties to the dispute to comply with their duty to provide information deemed necessary for dispute settlement.”

In several cases, the Appellate Body has confirmed that Article 13 of the DSU created a legal obligation for the parties to submit whatever document or evidence a panel may seek from them. Therefore, the panels have the right to draw adverse inferences from a member’s refusal to provide the requested information.

In the *US–Wheat Gluten* Case for example, the United States failed to provide the panel with information, but the panel did not draw adverse inferences from the US failure. The Appellate Body declined the appeal and ruled that:

> We ... characterized the drawing of inferences as a ‘discretionary task falling within a panel's duties under Article 11 of the DSU. In *Canada-Aircraft*, which involved a similar factual situation, the panel did not draw any inferences ‘adverse’ to Canada's position. On appeal, we held that there was no basis to find that the panel had improperly exercised its discretion since ‘the full *ensemble* of the facts on the record’ supported the panel's conclusion.

The Appellate Body in its arguments affirmed the finding of the panel, which it refused to draw “adverse” inferences from the refusal of the United States to provide certain allegedly confidential information requested from it by the panel under Article 13.1 of the DSU. In its decision, the Appellate Body considered the US argument that it refused to submit the requested document on confidential grounds.

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1029. Ibid. par 204.
1032. Ibid. para 187 G.iii.
1033. Ibid. at 205.
1034. Ibid. at 182.
As was discussed at the previous chapters, parties may refuse to disclose classified national security documents in international litigation. Further, the Appellate Body linked the authority of the panels to draw adverse inferences to Annex V of the Agreement on SCMs, which contains some details about the circumstances in which it would be appropriate for a panel to draw an adverse inference.1035

2.6. Adverse Inference in Criminal Proceedings

International criminal proceedings are somehow different from commercial arbitration, because in criminal proceedings, judges must examine all facts, evidence and argument more carefully.1036 As a result, the nature of adverse inferences in criminal proceedings is different from what is being implemented in the WTO system or before the investment and commercial tribunals.1037

In fact, no adverse inference can be drawn from a defendant’s refusal to answer questions or testify at a criminal procedure1038, because it would support a presumption of guilt motive for such non-compliance.1039

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1035. Ibid, at 201.
1037. See, for example, Article 14 (3) (g) of the International Covenant on Civil and Political Rights (ICCPR), which provides that a person is "[n]ot to be compelled to testify against himself or to confess guilt".
1038. The right of the accused "not to be compelled to testify against himself or to confess guilt" set forth in Article 21, sub-paragraph 4(g) of the Statute, to the provisions of Article 14, sub-paragraph 3(g), of the International Covenant on Civil and Political Rights ("ICCPR"); Article 8, sub-paragraph 2(g) of the American Convention on Human Rights ("ACHR") and, implicitly, to Article 6 of the European Convention of Human Rights ("ECHR").
1039. See, Prosecutor v. Zejin Delalic, Zdravko Mucic also known as “Pavo”, Hazim Delic, Esad Landzo also known as “Zenga”, Judgement in the Trial Chamber, 16 November 1998.
Decisions of the European Court of Human Rights (ECHR) in some cases contain arguments about negative inferences.

In *Murray v U.K.*, the ECHR decided that the right to remain silent were not absolute. However, in that case the court held that denial of access to a lawyer, combined with the trial court’s right to draw adverse inferences from his silence while he did not have the benefit of legal advice, violated the detainee’s rights under Article 6 of the ECHR.

However, in criminal proceedings, an accused shall be presumed innocent, but the drawing of adverse inferences from the defendant’s silence may be justified if the prosecution could establish its case by presenting significant evidence and arguments.

In accordance with Rule 87(A) of the ICTY Rules, the Prosecutor bears the burden of establishing the guilt of the Accused and must do so beyond a reasonable doubt. In determining whether the prosecution has established its case, the court must consider whether there is any reasonable ground for interpretation of the evidence admitted as probative of the guilt of the Accused. Any uncertainty should be resolved in favour of the accused in accordance with the principle of in *dubio pro reo*.

However, non-compliance by States or individuals to cooperate with the court to provide requested documents and information are two different issues.

In case of non-compliance by a State with a binding order for the production of documents, the Appeals Chamber of the ICTY in the

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1040. *John Murray v UK* (1996) 22 EHRR 29, The case was heard by the European Court of Human Rights in 1996 and it was about the right to be silence in the United Kingdom legal system. The Court discussed about the legality and the right to allow adverse inferences to be made.

1041. Ibid.

1042. Article 21(3) of the ICTY Statute. See also, Bohlander, op.cit.944


Blaskic Case stated that: “However, the International Tribunal is endowed with the inherent power to make a judicial finding concerning a State’s failure to observe the provisions of the Statute or the Rules”.  

In reality, in all courts and tribunals or WTO dispute settlement body, it is the adjudicator’s responsibility to manage the proceeding more efficiently. The words of the British Commissioner in the Mexico City Bombardment Claims (1930) supports this conclusion:

If, after giving due weight to all these considerations, it [the Commission] feels a reasonable doubt as to the truth of any alleged fact, that fact cannot be said to be proved. But if the Commissioners, acting as reasonable men of the world and bearing in mind the facts of human nature, do feel convinced that a particular event occurred or State of affairs existed, they should accept such things as established.

2.7. Reasonable Inference from Submitted Documents

All parties before international courts and tribunals must comply with orders and requests for necessary and information that are highly relevant to the case. However, when a party fails to comply with an order for the production of documents the Tribunal’s inference should not be based on the party’s action alone, but it must be supported by substantive and un-rebutted evidence, which have been filed in that case as well.

In Atomic Energy Organization of Iran (AEOD) (Case No. B/7) before the IUSCT, the Claimant sought reimbursement of advance payments made under two 1974 contracts with the United States.

Atomic Energy Commission, as well as interest on those amounts and alleged incidental damages. 1047

The Agreements, between the parties in 1974, were the subject of successive written extensions by agreements as well. The last written extension, dated 25 September 1977, amended the contracts by extending the relevant date to 30 September 1978. 1048

The Claimant, relied on the terms of the contracts, argued that since no subsequent Agreements for Cooperation were signed, the two contracts terminated automatically on 30 September 1978. The Claimant requested the Tribunal to order the United States to refund the advance payments in accordance with Article II, paragraph 1(b) of the Agreements for Cooperation. 1049

The Respondent argued that the 1974 agreements had not automatically terminated on September 30, 1978. It argued that the actions of the parties after that date demonstrated that they continued to consider the 1974 contracts as being text. However, no documentary evidence was submitted in support of the argument. With regard to the advance payments themselves, however, the United States argued that it was unable to declassify and submit several documents, which, could prove that the Respondent is not responsible et al. 1050

Since the United States refused to disclose evidence in support of its argument, in its order of 7 February 1984, the Tribunal stated that it intended to decide the question of the advance payments based on the documents submitted. The Tribunal found that the Claimant has adduced sufficient evidence to establish, in the absence of evidence to the contrary, its right to reimbursement of the advance payment.

1048. Ibid. Para 1.
1049. Ibid. Para 4-5.
1050. Ibid. Para 4-5.
The Tribunal in its award in the *B7 Case* stated that:

> It is in the Tribunal’s view a reasonable inference, in the absence of any evidence to the contrary, that the Parties had adopted the practice of extending the contracts by written agreement.\(^{1051}\)

The award indicates that the Tribunal’s inference was not based on the Respondent’s action or failure alone, but it was supported by some other undisputed documents in that case as well. The Tribunal thus ordered the United States to pay US$7,933,951.04 to the claimant.\(^{1052}\)

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1051. Ibid, p145.
1052. Ibid.
Conclusion of Part Two

In international litigation, all parties should be transparent about their actions and make all efforts to prepare their cases in advance of the hearing so that it can be resolved promptly and justly by the dispute settlement body. The parties should cooperate in the exchange of documents and information to speed up the process of dispute settlement as well.

Where a party is compelled by an order to provide the tribunal or another party, with some documents, the production must be made in the manner as has been determined by the tribunal. As was discussed in chapter 7 supra, some forums or procedural rules set some conditions for the parties and arbitrators about types of documents may or may not be produced by the parties in a case. However, all requests for evidence and information, which are allowed in a proceeding, must be limited to the claim and the issues in that case.

In any case, international courts and tribunals usually have the authority and wide margin of discretion to issue an order, for production of documents and determine any other issues, which would expedite the arbitration proceedings. However, all requests for documents and information should be reasonable and should not require exhaustive answers or work for the other party.\footnote{1053 See supra, chapter VIII.}

In general, drawing an adverse inference by a tribunal in response to a party’s failure to produce documents is always conditional. Courts and tribunals can draw an adverse inference from the failure of parties, nonetheless, in case of refusal of a party to submit the requested documents, an international court or tribunal should not make a substantial part of the reasoning of its final award on the adverse inference only.\footnote{1054 For more study see relevant sections at, Kazazi, op.cit.277. See, e.g. Thomas Buckles, Laws of Evidence, (Thomson Delmar Learning, 2003) pp 39-40. See, also J. K. Sharpe, op.cit.1000, pp 565–571.}
For example, in the Nemazee Case No 4, the Resonant refused to submit the requested documents, but the Tribunal did not draw an adverse inference against that refusal. The Tribunal ruled that, “given the crucial gaps in the Claimant’s documentary evidence and the troubling questions raised by his contentions, as well as inconsistencies in his evidence, it would not be appropriate to draw such inferences in this Case.”

This means that the international courts and tribunals should work proactively to enhance the efficiency of proceedings and to help ensure that discovery orders are honored. Further, the adverse inference cannot be used in a way that may relieve a party from his basic duty of carrying his burden of proof in a case. However, the practice of international tribunals indicates that those bodies are very cautious to draw an adverse inference from a party’s failure to comply with their order only. Nevertheless, no one can deny the negative impact of a party’s refusal to comply with a tribunal’s order on the conclusions and final award.

- **Supportive Pillars of Drawing an Adverse Inference**

  There is no question about a court or tribunal’s power to draw an adverse inference against a party, which has not produced documents in its possession without justification. Certainly, this power is not absolute. Rather, any inference or presumption of a fact or event must be based on some pre-conditions:

  1. As was discussed, before requesting document production, a claimant should have already presented the basic, *prima facie case* and all necessary evidence to support its claim. This means that in cases without *prima facie evidence* the Claimant cannot expect that the tribunal to draw adverse inferences from the non-production of the documents only. This

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1056. See also, Amerasinghe, op.cit.178. For more details see, also J. K. Sharpe, op.cit.1000, p 549ff.
expectation is against the jurisprudence of international courts and tribunals. However, all requests for production of documents in litigations must be relevant and necessary for the proceedings,\textsuperscript{1057} and must contribute to the fair termination of the case.\textsuperscript{1058} In any event, the claim must be substantiated with evidence and made out a \textit{prima facie} case.\textsuperscript{1059}

2. In addition to a \textit{prima facie} case, there must be significant evidence to support the assumption that a party’s action or refusal is against the rules and principles of justice and fair trial. As former IUSCT Judge Holtzmann stated, “[t]he unspoken premise that justifies drawing such an inference is that a party in possession of evidence that supports its claim or defense, or which cast doubts or disproves its opponent’s position, will submit that evidence to the Tribunal, or provide some reasonable explanation for its failure to supply it.”\textsuperscript{1060} In the \textit{Parker} Case, the U.S.-Mexican General Claims Commission stated that “where evidence which would probably influence [the Commission’s] decision is peculiarly within the knowledge of the Claimant or of the Respondent Government, the failure to produce it, unexplained, may be taken into account of the Commission in reaching a decision.”\textsuperscript{1061} Thus, explanations provided by a party for not producing the requested documents should be considered by the tribunal before drawing any adverse inference.\textsuperscript{1062} In this regard, the parties should be given sufficient time to comply with the


\textsuperscript{1058} Matti Pellonpää and David D. Caron, \textit{The UNCITRAL Arbitration Rules as Interpreted and Applied: Selected Problems in Light of the Practice of the Iran-United States Claims Tribunal} (Finnish Lawyer's Publishing, Helsinki 1994), p 485

\textsuperscript{1059} See, Kazazi, op.cit.277..p 374. Brower, Charles. N. and J. Sharpe, op.cit,508 and Sharpe,op. cit,1000


\textsuperscript{1062} Kazazi, op.cit.277..pp 317- 321.
order, and if a party fails to comply with the order without reasonable explanation for such failure, then the tribunal may consider an inference from that failure.\textsuperscript{1063}

3. When the tribunal is convinced that the requested documents are at the disposal of the requested party, and the party is reluctant to cooperate with the court or tribunal, the tribunal may make an inference and comes to this conclusion that there is no reasonable explanation for a party's refusal to cooperate. In that situation, generally international tribunals such as the IUSCT have drawn adverse inferences in numerous cases. In fact, if a party fails to show a very convincing reason for not producing the requested evidence in its possession, it could be a ground for an adverse decision.\textsuperscript{1064}

Clearly, when an issue is pending before an international court or tribunal, all, parties are expected to cooperate and furnish the dispute settlement forum with all available evidence together with their pleadings. Beyond the general implicit responsibility to disclose the evidence available to a party, each party to the proceedings before a court or tribunal must observe utmost good faith as a legal doctrine during the dispute settlement process.

Suffice it to say; submitting a case or dispute to international courts or tribunals implies an undertaking by the parties to cooperate with each other and the dispute settlement body regarding all facts, legal issues and any other elements, which may be determined by the court or tribunal in a case.

\textsuperscript{1063} See, Kazazi, op.cit.277.p.266 ff, and 321.. See also Amerasinghe op.cit.178, p 227

• Final Remarks and Propositions

In today's world of inter-dependence and international cooperation, all States and individuals have now recognized the necessity of having predictable, clear and transparent set of rules. In fact, strengthening international cooperation, maintaining justice and fostering peace and security require more cooperation and efficient mechanisms of settling disputes.

There could be some perception that in contemporary world State sovereignty can no longer be defined as absolutely as it once was. For example, the former Secretary-General of the United Nations Mr. Kofi Annan once addressed the impact of globalization and international cooperation in redefining the concept of sovereignty and he stated that:

State sovereignty, in its most basic sense, is being redefined not least by the forces of globalization and international cooperation.\textsuperscript{1065}

However, there is no doubt that despite of all changes and developments in international community; States still play a fundamental role in international law and relations.

Nevertheless, the world is entering a new stage of development in which it is necessary for all countries and even individuals to enhance efficient methodologies for maintaining peace.\textsuperscript{1066} This situation may reflect this view that some traditional legal norms no longer are as significant as they once were. Most notably, some scholars have argued that the consequences of new technology, e.g. cyberspace cannot be legitimately governed by territorially based

\textsuperscript{1065} Kofi A. Annan, Two concepts of sovereignty, The Economist, 18 September 1999.

rules, and that the online world should create its own legal jurisdiction.\textsuperscript{1067}

1. Efficient Dispute Settlement

The principle of peaceful settlement of international disputes is the main element of almost all international organizations and conventions.\textsuperscript{1068} Although there are several methods, in which the parties may settle their disagreement peacefully, but the parties to international disputes always look for more efficient and fair institutions, which can adequately resolve disputes in a fast and peaceful manner. This has led to an almost endless range of possibilities at the disposal of the parties for dealing with their disputes.

Many factors must be considered when planning the structure of an international dispute settlement body, including, how a dispute settlement body operates, or manage a case. In brief, there are issues which require more consideration when parties intent to articulate and create a reliable and efficient mechanism or process of international dispute settlement.\textsuperscript{1069}

1.1. Administration of Justice

The ability to serve justice is the most demanding element in the process of all adjudication bodies; thus, any obstacle, which may undermine justice, must be addressed in more details.\textsuperscript{1070}


\textsuperscript{1068} See, e.g, \textit{Case Concerning Military and Paramilitary Activities in and against Nicaragua. Merits (Nicaragua v. USA)}, ICJ Reports 14, para. 290. (1986).


The general understanding of fairness and due process is associated with impartiality of a tribunal and the equality of all parties in litigation to present all required evidence to make their claims. Effective international courts and tribunals have the authorities to manage a case and conduct an independent fact-finding process, and issue their awards and decisions based on the principles and high-quality legal arguments.\textsuperscript{1071}

However, the process of dispute settlement mechanisms such as arbitration, courts, or WTO panels, are not without problems and shortcomings.\textsuperscript{1072}

For example, there are arguments or suggestions for and against this assumption that for whatever reasons international adjudication bodies such as the ICJ, WTO, ICSID, PCA, NAFTA Arbitration and the IUSCT may try to just settle down international disputes and to some extent satisfying all parties.\textsuperscript{1073}

How could all those concerns be addressed in the process of international litigations?

Some may argue that when international tribunals or panels are depend on the goodwill of the parties, their effectiveness may be undermined because the arbitrators are appointed by the parties for

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resolving a particular dispute.\textsuperscript{1074} Therefore, there are some concerns that arbitrators or panelists who were appointed by the parties may consider the appointing party’s concerns more. To address this concern, and enhance the legitimacy of international courts and tribunals the process of appointing of all arbitrators should be more independent.\textsuperscript{1075}

Today, all parties and international organizations support this idea that arbitrators or panelists, including party-appointed arbitrators, should be fully independent and impartial. Actually, an arbitrator or panelist must follow all applicable standard and rules of procedure and must be absolutely independent and impartial in a proceeding. All decision makers, including party-appointed arbitrators must respect and follow the same ethical rules and standards, which are applicable to all arbitrators in a case.

Suffice to say, that new international rules procedures such as the UNCITRAL model laws try to introduce a uniform set of standards of impartiality for all members of the tribunals and panels.\textsuperscript{1076}

\textbf{1.2. Harmonization of Rule of Procedures}

In the era of the internet, recourse to traditional rules, norms and jurisprudence still are the main sources of international dispute settlement proceedings. Model Laws such as the UNCITRAL, IBA Rules or even DSU only suggest some steps towards having efficient procedural rules to settle disputes.

It is possible, however, to argue that in some cases the traditional rules and solutions do not suit the present realities of the


\textsuperscript{1076} Ibid. See, Chapter I and II.
contemporary world. As was discussed, many rules of procedure do not contain clear guidelines and definition about issues such as process of document production or adverse inference, therefore arbitrators or panelists use their discretion to manage a case.\(^{1077}\)

To propose a set of procedural rules to meet contemporary requirements, lawyers and parties need to realize and balance between the various elements that may arise in international settlement bodies. For example, despite efforts by international jurists to find common ground, there are yet fundamental differences in the way of approaching the concept of evidence, irrespective of legal systems such as common law or civil law.\(^{1078}\) However, diversity of rules of procedure is associated with the nature of international courts and tribunals. As a result, a regulatory reform to harmonize rules of procedures is necessary.

Harmonization of rules of procedures of international tribunals can pave the way for more international cooperation.\(^{1079}\) Model laws such as the 1983 and the 1999 IBA Rules of Evidence, ICC Arbitration Rules or the UNCITRAL Rules represent only some steps towards the unification of laws and regulation governing procedural aspects of international-dispute settlement.

In any event, however, legal diversities may often be as an obstacle in the process of unification of the rules of procedures in international litigations. As a result, the direction towards harmonization of procedural rules, which combine the advantages of civil and common-law systems, is the best solution that can meet the needs of the international community.\(^{1080}\)


\(^{1078}\) See, Jan Paulsson. p 113, in Albert.jan.van.den.berg (ed) op cit 210.


1.3. Discovery of Evidence Requires Comprehensive Study

It was the core of discussion that the issue of document production or the so-called discovery of evidence is not an exceptional procedural issue in international litigation. Nonetheless, there are still some misunderstandings among decision-makers or parties from different legal backgrounds. Now, because of the recent proliferation of internal and international transactions the attitude toward the implementation of discovery of evidence has been changed. In addition, once, the evidence, and information were exclusively in the form of hard copies and paper, but due to fundamental technological developments, electronic document and e-discovery is a reality of current international litigation.1081

Overall, a comprehensive discussion about the advantages of discovery in international litigation and the methods of presenting evidence is necessary. The rules of procedure or arbitration agreements can facilitate the discovery of evidence.1082 When an agreement provides that all parties should cooperate about evidence and information, it provides the parties and the tribunal with the right to request production of documents. However, in all kind of arbitration agreements or rules of procedures, parties should consider that they could request for documents, which are relevant and necessary for the process of settling the disputes.1083

1.4. Transparency and Efficiency of a Court or Tribunal

Because of internationalization of law and the economy, which caused involvement of more actors in the international transactions there is growing emphasis on transparency including the disclosure

1082. See, Chapter V.
1083. See e.g. O'Malley, Nathan D., and Shawn C. Conway, op.cit555 p371 ff See also Amerasinghe, op.cit.178 (2005).
of evidence and information that encourages the parties to an agreement to comply with their obligations. Consequently, transparency measures and openness can enhance the international community’s capacity to promote compliance in all aspects of international relations including evidentiary obligations in dispute resolution systems.

Briefly, transparency and the availability of all relevant evidence and information can promote the ability of dispute settlement bodies to achieve a fair and sound decision and will promote compliance by all parties.

1.5. Balance Between Confidentiality and Transparency

Justice is best served when all relevant evidence and information are available to a dispute-settlement body, nonetheless, evidentiary privileges do exist as well. Thus, even in case of absolute right of accessing to evidence and information there are often some exception to that principle. Well-drafted rules about evidentiary privileges always include the right of a party to avoid disclosure of some documents. Therefore, in case of discovery of evidence, a person or government may refuse to comply with the court or tribunal’s order to provide the requested document because the information is exempt from disclosure under the law.

1084. See Chapter VI.
However, in the course of international litigation an excessive promotion of the disclosure of evidence and information may pose an important threat to the confidentiality of fundamental documents and information such as, business secrets, information related to the national security of a State and private information. On the other hand, also, a very restrictive interpretation of provisions of confidentiality and exception clauses could unnecessarily shield the requested party to an international litigation from disclosing relevant and necessary evidence and information.

Therefore, there must be always a balance between transparency and openness in international litigations and the parties’ rights to protect their business secrets, privacy and information related to the national security.

1.6. Request for Discovery Must be Just

A dispute-settlement process should be managed by a comprehensible set of regulations and legal principles selected either by the parties or by the dispute settlement body. Among applicable principles in international litigation are the doctrine of good faith and general principle prohibiting the abuse of rights.1089 Prohibiting the abuse of rights means, a party should exercise what is otherwise a legitimate right in a way, to take advantage of a situation in a process.1090 This means that in the course of contractual obligation to disclose evidence and information if the parties go too far, and request unnecessary and burdensome discovery, abuse of rights can be the result. This is because in international litigation sometime the line between active advocacy and unacceptable abuse of procedure is not well defined.1091

1091. See, Chapter VIII.
A way of overcoming all those concerns is to determine whether the request for obtaining evidence is necessary to establish a fact and prove a claim or counterclaim. This means, parties who wish to use the procedures for discovery of evidence, must provide a well-reasoned ground for their requests. However, as was discussed, a defendant party is not allowed to justify failure to produce necessary documents by invoking some general excuses and arguments about provisions of confidentiality and exception clauses, when the other party has met all required criteria.1092

To say the least, the efficiency and fairness of international organizations and mainly dispute settlement process depend on their ability to terminate a case with a well-reasoned decision. This goal can be achieved, if those bodies are equipped with: legal instruments and authorities to compel parties to comply with their duty to provide evidence and information; and if a party fails to do so, in some circumstances the tribunal can draw an adverse inferences from party’s unjustified failure. However, where an abuse occurs during litigation, laws and regulation permit a court or tribunal to impose sanctions against the party who frustrates a fair and sound dispute settlement procedure.

2. Propositions

The above discussion explored various aspects of parties’ obligations to cooperate, and their different methods of compliance with international obligations. In particular, it sought to highlight various compliance strategies employed in different spheres of international procedural law. Evidently, the main principle sustaining compliance in international law is that of *pacta sunt servanda*. That is, the notion that countries having accepted international treaties promoting their own national interests, and to carry out obligations. Consequently;

1. Transparency in international relations requires regulatory attention of States. Both States and individuals should comply with all obligations derived from international agreements, contracts and treaties without recourse to unilateral interpretations that would excuse non-compliance. In fact, a party to a treaty cannot impose its own particular understanding of the provisions on the other parties and disregard its obligation. If a party does so, sanctions are the preferred remedy to induce compliance.

2. To satisfy principles of justice and fair procedure, the procedural laws and jurisprudence of international courts and tribunals need to be clear and comprehensible. Such rules should, at the least, specify the circumstances leading to requirements for disclosure of evidence and information, and the level of information needed from the party who should submit the requested document and the consequences of a failure to follow the tribunal’s order.

3. As a matter of due process, an international court or tribunal, and the DSB in particular, should, impose sanctions on a party whose conduct may weaken respect for cooperation in the international judicial process. A party whose conduct is incompatible with the proper functioning of the dispute settlement process ought not to be able to abuse that process for its own interest. At the same time, all parties are entitled to fair treatment such that a court or tribunal considers all facts
and evidence before ordering the discovery of evidence or even before drawing an inference from the circumstances.

4. In the 21st century, the existence of different legal and cultural systems should not impede efforts to overcome obstacles to harmonizing arbitration rules and procedures. However, accepting the concept of discovery, the integrity of an adjudication body, will depend on its ability to compel parties to comply with its orders and its ability to sanction the failure of a party to do so by drawing an adverse inference. Admittedly, international courts and tribunals are often reluctant to draw an adverse inference in response to a party’s failure to produce documents. However, international tribunals and panels should recognize that in the absence of a general power to compel the production of evidence, recourse to reasoned adverse inferences could facilitate appropriate disclosure.

5. As new technology and cyberspace increasingly dominate the international community, traditional international rules of procedures may not be able to handle the current realities. In order to respond to the current developments, created by more digital world and economic cooperation, there must be a shift in the manner of managing proceedings before international courts and tribunals from a traditional to a functional manner.

6. To address, this concern that the parties’ appointed arbitrators or panelists may be guided by the appointing party, all international judges, arbitrators and panelists must be granted a level of independency. That sort of independency exists when they have fixed terms of office such as the ICJ judges and are not appointed by the parties to a dispute.
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• Dissertation Summary

Evidentiary Obligations in Contemporary International Litigation: With special references to the practice of the World Trade Organization and the Iran-United States Claims Tribunal

Z. A. Marossi

This thesis focused on the analysis of the evidentiary obligation of parties in international litigation, particularly in the context of international trade and commercial disputes. It explored different approaches to, and conceptions of, discovery of evidence; the availability of discovery, as well as the scope, conditions and limitations of the access to discovery in international litigation. It is only with a clear understanding of the scope of both types of discovery, de jure and de facto, that parties can make informed choices, including the choice of the forum for their litigation, i.e. whether to avail themselves of international arbitration, or to proceed with traditional national court litigation.

This thesis is divided into two parts, each consisting of four interconnected chapters. The first part, comprising Chapters I to IV, deals with introductory issues related to dispute settlement mechanisms generally, and with the issues of evidence and the burden of proof applicable in various international fora.

Chapter I: Serves as a background to this study. It discusses the subjects of international business transactions, dispute settlement mechanisms, and their legal structures, particularly those of the IUSCT and the DSB.

Chapter II: Examines the significance and potential impact on the outcome of cases, rules of procedure and evidence in several international dispute settlement mechanisms. This study underscores the fact that a functionally progressive, updated and well drafted set of procedural rules plays a crucial role in facilitating
dispute settlement and thereby fostering justice in international relations.

**Chapter III**: Deals with the issue of the burden of proof including situations where the burden of proof may shift in the course of a dispute settlement process. The burden of proof regularly stays with the claimant, and it shifts to the Respondent where the prima facie claim is supported by sufficient evidence or arguments that were submitted by the parties. In many cases, the decision of who bears the burden of proof is a matter of significant debate. This chapter aims to examine those debates with reference to the practice of international courts and tribunals.

**Chapter IV**: Discusses issues related to the standards of evidence in international litigation. An analytical study of the concept of standard of proof can contribute to a better understanding of evidence and the burden of proof. Rules of procedure are always silent as to which kind of standard of proof an arbitral tribunal should apply. Consequently, standards of proof may vary between institutions even where the matters before them are similar. This chapter addresses the different standards of evidence, accepted thresholds that must be met by the parties to the dispute and the amount of evidence that parties must present in order to prevail.

The Second Part of the thesis discusses issues surrounding document production, and the parties' responsibilities to cooperate with courts and tribunals. International dispute settlement bodies adopted different approaches to, and have different understandings of, the concept of document production and transparency. Despite efforts to standardize practice in this respect, issues related to the concept of discovery of evidence are still the subject of serious debate.

**Chapter V**: Presents an analysis of the subject of document production or discovery of evidence with reference to the practice of international courts and tribunals. This chapter puts forward suggestions based on the practice of international arbitrators, for
transnational solutions to strike a proper balance between efficiency and fairness.

**Chapter VI:** Discusses about parties' contractual obligations to cooperate with international courts and tribunals, and to disclose the required evidence and information. A contract, or treaty, is an exchange of enforceable promises between the parties to do, or refrain from: doing an act. Transparency, as used in a legal context, implies openness, communication, and accountability. This chapter also analyzes the concept of transparency and the contractual obligations of parties from an international law point of view.

**Chapter VII:** discusses exceptions to rules governing the discovery of evidence. The scope of information that a party or tribunal can compel a party to reveal is very broad. However, there are some limits. Rules and regulations that provide the right of access to evidence and information may exempt some document on grounds of confidentiality, State interest, or public policy. This chapter will focus on the nature of these ‘exception’ clauses, *inter alia* national security, and confidentiality of evidence as a bar to the disclosure of evidence and information, as well as a limitation of the evidentiary obligation of the litigant parties. This chapter also discusses the discretion and power of judicial review of international courts and tribunals.

**Chapter VIII:** Examines in more detail how best to draft a request for document production as well as the consequences of non-compliance with document production orders and other significant issues to be observed and addressed in formulating and presenting claims and defenses in different kinds of cases.

**Conclusions,** this work seeks to promote a model of discovery of evidence based on cost effectiveness, a fundamental issue meriting particular attention when drafting procedural rules. In addition to some analytical comments at the end of each chapter, some observations are presented at the end of parts one and two.
Final remarks summarize the issues that have been discussed and analyzed in all eight chapters. This section further highlights the impact of new technological advancements on international dispute settlement and the need to develop a regulatory framework, including an effective body of procedural rules matching the nature and meeting the demands of the contemporary international dispute settlement. Among the features required for such a structure are adequate unified systems of gathering evidence and information as well as the establishment of norms that can harmonize the understanding of the obligations of parties to cooperate with each other in international litigation.
Bewijs Verplichtingen in Tegenwoordige Internationale Processen
Met bijzondere verwijzing bij de uitvoering van de Wereld
Handels Organisatie en de Iraanse-Amerikaanse Geschillen
Tribunaal

DESSERTATIE SAMENVATTING

Z.A. Marossi

Deze dissertatie heeft de aandacht gevestigd op de analyse van de
duidelijke verplichtingen bij partijen in internationale processen, in
het bijzonder in samenhang met internationale handel en
commerciële geschillen. Het is gericht om de verschillende
benaderingen (aannames) onderzoeken, de ontwerpen ervan, de
exhibitieplicht, als zowel de omvang, condities en beperkingen tot de
toeang hiervoor in internationale processen. Het is slechts met een
duidelijk in kennis stellen van de spanwijdte van de exhibitieplicht ,
de jure of defacto, dat partijen duidelijke uit de ter kennisgestelde
keuzes kunnen stellen, indien mogelijk om zichzelf te helpen bij
internationale bemiddelingen of om in een traditionele nationale
rechtsproces te kunnen voortgaan.

Deze dissertatie bestaat uit twee delen, elk bevat vier aan elkaar
gekoppelde hoofdstukken. Het eerste deel, Hoofdstuk I tot IV, geeft
onderwerpen aan gerelateerd om mechanisme in de reglementering
te betwisten, bv. het bewijs en de bewijslast toegepast in
verscheidene internationale gerechtsgangen

Hoofdstuk I dient als achtergrond voor deze studie. Het
bediscussieert de onderwerpen over internationale handels
transacties, betwist de mechanismen in de reglementering en hun
legale structuren, voornamelijk die van de IUSCT en de DSB.

Hoodstuk II onderzoekt de betekenis en mogelijke eventuele effect
van de partijen op de uitslag van elk geval. Verder bekijkt het de
regels van de procedures en bewijs en hun draagwijdte op welke
internationale mechanismen voor het regelen van betwisten met het
zicht op de eindresultaten van de gevallen. Deze discussie onderstreept het feit dat een progressieve, laats bewerkte en goed ontworpen stelsel van procedurele regels een cruciale kan spelen in rol van versterken van justitie in internationale betrekkingen.

**Hoofdstuk III** behandelt de onderwerpen van de zwaarte van bewijs, inbegrepen situaties waarin de bewijslast gedurende de route van de beslechting in het proces verschuift. In vele gevallen zal de bewijslast in het beginfase rusten op de eiser, slechts om dan te verschuiven naar de andere kant, als de vordering wordt gedragen met bewijsstukken. Wanneer aan deze last is voldaan, zal de eiser, aangenomen dat zij de waarheid bezit, mits niet het tegenover bewezen, een vordering neerleggen. In vele gevallen de motie wie de bewijslast moet dragen een heel belangrijke punt in het debat is. Dit hoofdstuk onderzoekt zulke debatten, referent naar de praktijk van de internationale gerechtshoven.

**Hoofdstuk IV** bediscussieert de onderwerpen die gerelateerd zijn aan de bewijsstandaarden van de internationale processen. Een analytische discussie van het ontwerp van de standaard bewijs kan bijdragen tot een beter begrip over het bewijs en de bewijslast en gekoppeld aan de verlichtingen van de partijen. Internationale regels geven niet aan welke standaard bewijs een arbitraire tribunaal moet toepassen, alhoewel, er zijn zekere voorwaarden voor de bewijslast nodig om het gerechtshof of tribunaal te overtuigen dat de claim gerechtvaardigd is. De benodigde mate van overtuiging kan van forum tot forum verschillen, afhankelijke wat aan de orde is. Hierbij opgeteld mogen internationale gerechtshoven en tribunalen verschillende standaarden voor bewijslasten gebruiken. Bijgevolg zal de standaarden voor bewijslast tussen de verschillende instituten variëren, zelfs als de voor hen liggende stukken gelijk zijn. Dit hoofdstuk behandelt de verschillende bewijs standaarden, de in het algemene aanvaarde drempels dat opgelegd dient te worden aan de partijen voor een dispuut en hoeveelheid bewijslast dat de partijen dienen te brengen om te kunnen overreden.

Het tweede deel van de thesis bediscussieert de onderwerpen omtrent het produceren van documenten en de
verantwoordelijkheden van de partijen om met de gerechtshoven of tribunals te kunnen samenwerken. Internationale organen voor het regelen van twisten hebben verschillende benaderingen van en diverse kennis over de transparantie en ontwerpen en productie van documenten. Desondanks de pogingen om de praktijk hierover te standaardiseren, zijn de onderwerpen met betrekking tot de exhibitieplicht toch nog aanleiding tot serieuze debat voeren.

Hoofdstuk V geeft een analyse weer van de onderwerpen van documenten producties of bewijslast, referent naar de praktijk van de internationale gerechtshoven en tribunals. Dit hoofdstuk geeft suggesties weer gebaseerd op de praktijk van de internationale bemiddelaars voor transnationale oplossingen om een juiste bevindingen te vinden tussen efficiency en rechtvaardigheid.

Hoofdstuk VI handelt over onderwerpen van contractuele verplichtingen van de partijen om samen te werken met de internationale gerechtshoven en tribunals en om de benodigde bewijs en informatie bij te voegen. Een verdrag is een uitwisseling van beloften tussen twee of meer partijen, die door de wet opgelegd wordt in een gerechtshof om een actie uit te voeren of te onthouden. Transparant zijn, toegepast in een legale context houdt in openheid, communicatie en afrekening. Dit hoofdstuk analyseert de transparantie en contractuele verplichtingen van de partijen vanuit een internationale kijk van wetgeving.

Hoofdstuk VII bediscussieert de uitzonderingen met betrekking tot de algemene regels van grote exhibitieplicht. Het soort informatie dat een partij of een tribunaal kan eisen om aan te tonen is in het algemeen heel groot, hoewel, er zijn beperkingen. Regels en statuten die het recht tot toegang van bewijs en informatie verschaffen kunnen tegelijkertijd bepaalde vermeldingen op basis van vertrouwelijkheden, staats belangen of publieke beleid uitsluiten. Dit hoofdstuk zal richt focussen op de eigenschappen van deze "uitzonderingen" clausules, *inter alia* nationale veiligheid en vertrouwelijkheid van de bewijslast als een handvat voor de onthulling van bewijs en informatie. Dit hoofdstuk bediscussieert
ook de discretie en macht van de justitiële overzicht van de internationale gerechtshoven en tribunalen.

**Hoofdstuk VIII** onderzoekt met meer details hoe op de beste manier een ontwerp voor een verzoek voor het produceren van documenten als voor de gevolgen van niet voldoen aan de productie opdrachten en andere belangrijke onderwerpen, die bekeken en zakelijk opgesteld in het formuleren en aanbieden van de claims en verdedigingen in de verschillende gevallen.

**Conclusies:** in het kort, dit papier is slechts bedoeld om de model voor bewijslastvoering op een effectieve manier; een fundamentele onderwerp die de bijzondere aandacht verdient als er regels voor de procedure ontworpen worden. Bij het leiden van dit onderzoek heb ik de relevante onderwerpen en commentaren bediscussieerd op die punten waar het nodig was. Ik heb enige analytische commentaren bijgevoegd aan het einde van elke hoofdstuk en ook aan het einde van deel 1 en deel 2.

De laatste opmerkingen bevatten conclusies met betrekking tot de onderwerpen die bediscussieerd en geanalyseerd zijn in alle acht hoofdstukken. Deze sectie zal de impact van nieuwe technologische vooruitgang op het internationale disput in het voetlicht zetten en het noodzaak om een regelgevende raamwerk te ontwikkelen met inbegrip van een effectieve orgaan voor regels voor procedures, hetwelk past met de natuur en op de eisen van een actuele wereld ingaat. Tussen al de voorzieningen nodig voor zo’n raamwerk is een universeel systeem nodig voor het vergaren van bewijs en informatie als het neerzetten van een norm dat het begrijpen van de verplichtingen van de partijen homogeen maakt om met elkaar te kunnen samenwerken in de actuele internationale procesvoering.
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