

# Michigan Journal of International Law

---

Volume 14 | Issue 3

---

1993

## Burdens of Proof

Jose E. Alvarez

*George Washington University, National Law Center*

Follow this and additional works at: <https://repository.law.umich.edu/mjil>



Part of the [Courts Commons](#), [Evidence Commons](#), and the [International Law Commons](#)

---

### Recommended Citation

Jose E. Alvarez, *Burdens of Proof*, 14 MICH. J. INT'L L. 399 (1993).

Available at: <https://repository.law.umich.edu/mjil/vol14/iss3/1>

This Book Review is brought to you for free and open access by the Michigan Journal of International Law at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Journal of International Law by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact [mlaw.repository@umich.edu](mailto:mlaw.repository@umich.edu).

# BURDENS OF PROOF

FACT-FINDING BEFORE INTERNATIONAL TRIBUNALS. Edited by Richard B. Lillich. Ardsley-on-Hudson: Transnational Publishers, Inc., 1992. xvi + 338 pp.

*Reviewed by Jose E. Alvarez\**

This compilation of papers presented at the University of Virginia's Eleventh Sokol Colloquium is not, as is duly noted in its preface, a "comprehensive treatise" on evidentiary issues before international tribunals.<sup>1</sup> It is, however, according to its editor, "the most thought-provoking as well as practical treatment of the subject yet to appear" and "should become the seminal work" in the field.<sup>2</sup> These claims are not fulfilled. This volume does not rise above its symposium origins. Its fifteen chapters are likely to be equally frustrating to its two intended readerships: international litigators and academics. This is neither the nuts and bolts guide nor the comprehensive compendium of evidentiary rules drawn from practice which international litigators might find useful.<sup>3</sup> Neither is it a jurisprudential treatment of interest to those with a more philosophical bent. Further, its proposals for reform are not particularly surprising or innovative. The editor's claims are nonetheless plausible in one sense: this is the most complete reexamination of the subject since Durward Sandifer's in 1975.<sup>4</sup> Given the renewed interest and expectations for international adjudication—as well as the relative dearth of writing (at least in English) on the subject of how these tribunals engage in finding facts<sup>5</sup>—*Fact-Finding Before International Tribunals* is likely

---

\* Associate Professor of Law, George Washington University, National Law Center. The author expresses his gratitude to the Law Center's Dean Jack Friedenthal whose generous summer research program made this review possible and to readers Lucy Reed and Susan Damplo for their helpful suggestions.

1. FACT-FINDING BEFORE INTERNATIONAL TRIBUNALS (Richard B. Lillich ed., 1992).

2. *Id.*

3. Compare, for example, some of the prior work of some of the authors here which can provide more practical hands-on guidance. See, e.g., Keith Highet, *Evidence, the Court, and the Nicaragua Case*, 81 AM. J. INT'L L. 1 (1987); Jamison M. Selby & David P. Stewart, *Practical Aspects of Arbitrating Claims Before the Iran-United States Claims Tribunal*, 18 INT'L LAW. 211 (1984); Thomas M. Franck & H. Scott Fairley, *Procedural Due Process in Human Rights Fact-Finding by International Agencies*, 74 AM. J. INT'L L. 308 (1980).

4. DURWARD SANDIFER, *EVIDENCE BEFORE INTERNATIONAL TRIBUNALS* (rev. ed. 1975).

5. Despite the proliferation of tribunals and cases, particularly in the commercial setting, there has been little systematic attention to evidentiary issues. Among the articles and books are Michael Reisman & Eric E. Freedman, *The Plaintiff's Dilemma! Illegally Obtained Evidence and Admissibility in International Adjudication*, 76 AM. J. INT'L L. 737 (1982); Anker, *The Use of Tribunal Appointed Experts*, MEALEY'S LITIGATION REPORTS (Iranian

to be widely cited despite its inadequacies.

The structure of this book is altogether different from Sandifer's treatment. Sandifer dealt with the subject as if he were rewriting, for the international litigator, McCormick's<sup>6</sup> or Weinstein's<sup>7</sup> respective treatises on evidence. Sandifer's 1975 edition, an update of his 1939 doctoral dissertation published under the same title,<sup>8</sup> is an orderly distillation, organized around evidentiary principles familiar to domestic lawyers, of the practice of such bodies as the Permanent Court of Justice, the International Court of Justice and diverse arbitral tribunals. In grand hornbook manner, Sandifer purported to present in "systematic and codified form a statement of the law of evidence as it stands today in international procedure."<sup>9</sup> Accordingly, Sandifer addressed the "function and nature" of evidentiary rules,<sup>10</sup> the "order and time of the submission of evidence,"<sup>11</sup> and the rules applied to production and admission,<sup>12</sup> documentary versus testimonial evidence,<sup>13</sup> ex parte evidence such as affidavits,<sup>14</sup> authentication,<sup>15</sup> evidence by interested persons and hearsay,<sup>16</sup> and judicial notice.<sup>17</sup> Sandifer's book has been useful to international practitioners because of its old fashioned claim to completeness; those who sought to make an advocate's argument on, for example, the evidentiary weight to be accorded a sovereign's assertions of fact could find in it a ready reference. There was also comfort in Sandifer's claim

---

Claims), Mar. 16, 1984, at 254; Colin Tapper, *Evidence Reform in an International Context*, 22 U. W. AUSTRALIAN L. REV. 31 (1992); GILLIAN MARY WHITE, *THE USE OF EXPERTS BY INTERNATIONAL TRIBUNALS* (1990). See also SANDIFER, *supra* note 4. There has been greater attention to procedures within the ICJ. See, e.g., Neill H. Alford, Jr., *Fact Finding by the World Court*, 4 VILL. L. REV. 37 (1958); Keith Highet, *Evidence, the Court, and the Nicaragua Case*, 81 AM. J. INT'L L. 1 (1987). See generally, *THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS* (Lori F. Damrosch ed., 1987); SHABTAI ROSENNE, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT* (1965); SHABTAI ROSENNE, *PRACTICE AND METHODS OF INTERNATIONAL LAW* (1984); SHABTAI ROSENNE, *PROCEDURE IN THE INTERNATIONAL COURT: A COMMENTARY TO THE 1978 RULES OF THE INTERNATIONAL COURT OF JUSTICE* (1983).

6. MCCORMICK ON EVIDENCE (Edward W. Cleary ed., 3rd ed. 1984).

7. JACK B. WEINSTEIN & MARGARET A. BERGER, *WEINSTEIN'S EVIDENCE* (1992).

8. SANDIFER, *supra* note 4, at xiii.

9. *Id.* at xiv.

10. SANDIFER, *supra* note 4, at 1-34.

11. *Id.* at 46-94.

12. *Id.* at 95-196.

13. *Id.* at 197-240.

14. *Id.* at 240-69.

15. *Id.* at 269-84.

16. *Id.* at 349-81.

17. *Id.* at 382-97.

that despite the variety of (often ad hoc) tribunals, there has been doctrinal continuity. Sandifer discerned a harmonious pattern tantamount to a "customary law of evidence" amidst the clutter of the reported cases.<sup>18</sup>

By contrast, *Fact-Finding Before International Tribunals* is not a standard reference work, and it lacks a unifying voice to make sense of the clutter. For the most part, each of the authors of its fifteen chapters confines himself or herself to a particular international forum or type of forum. The International Court of Justice (ICJ), the Iran-United States Claims Tribunal, the European Court of Justice, administrative tribunals, human rights tribunals, and other human rights fora are each given attention in turn. With the exceptions of an all-too short chapter by Richard Bilder which questions whether "facts" can be so easily distinguished from the "law," and an essay by Thomas Carbonneau which critiques many of the recommendations made in the other papers, the chapters are largely self-contained and show little evidence of cross-fertilization. Each author marches to the beat of his or her own drummer, to the detriment of any possible insights that might apply across the diverse tribunals discussed. Moreover, due to the limited range of each author's contribution, when such generalizations are made, they prove to be of dubious value.

Most of the fifteen chapters of the book are briefly surveyed in Part I below. The premises of the book come under fire in Parts II and III, which challenge the book's titular claim that it constitutes a survey of "fact-finding" by "international tribunals."

## I. SYNOPSIS

The major recommendations emerging from *Fact-Finding Before International Tribunals* are simply put by Lillich in his preface: that arbitrators and judges should have some fact-finding expertise, that they should be more aggressive about finding facts, and that they should avoid ducking the facts through legal determinations.<sup>19</sup> These themes are applied to the International Court of Justice (ICJ) in the first four chapters by Stephen Schwebel, Thomas Franck, Keith Highet, and Pierre-Marie Dupuy.

Schwebel, Judge on the International Court of Justice, comments on "Three Cases of Fact-Finding By the International Court of Justice." The

---

18. *Id.* at 457-58.

19. FACT-FINDING BEFORE INTERNATIONAL TRIBUNALS, *supra* note 1, at xi.

cases chosen are the well-known *ELSI*<sup>20</sup> and *Nicaragua*<sup>21</sup> cases as well as the less familiar case of Mr. Yakimetz,<sup>22</sup> a USSR national who, after his resignation from Soviet government service and a request for asylum in the United States, was denied continued U.N. employment. While Schwebel takes issue with the factual conclusions reached by the chamber deciding the *ELSI* Case, he praises the chamber's handling of the facts, and contrasts it with the too timid approach to fact-finding taken by the full Court in the *Nicaragua* and *Yakimetz* cases. To Schwebel, the latter cases illustrate the Court's tendency to play only a "passive" role in fact-finding, particularly in failing to probe witnesses. Thus, Schwebel criticizes the *Yakimetz* Court's failure to reconsider a crucial issue of fact: the Administrative Tribunal's finding that the Secretary-General had indeed given reasonable consideration to a career appointment for Yakimetz. Schwebel also castigates the *Nicaragua* Court for failing to probe deeply enough, at the merits phase, El Salvador's claims of collective self defense, particularly its claim that Nicaragua had been supplying arms to insurgents in El Salvador. As he did in his dissent in that case, Schwebel disparages the Court's finding that Nicaragua had never supplied arms to the Salvadoran insurgents.<sup>23</sup>

Thomas Franck, in his chapter on "Fact-Finding in the I.C.J.," compares the *Nicaragua* Court's handling of the facts to the Court's fact-finding in three other instances: the *Miniquiers and Ecrehos*<sup>24</sup> case, the *Temple of Preah Vihear*,<sup>25</sup> and the advisory opinion in the *Western*

---

20. *Elettronica Sincula S.p.A. (ELSI) (U.S. v. Italy)*, 1989 I.C.J. 15 (July 20) [hereinafter *ELSI* Case] (involving U.S. allegations that the requisition by Italian authorities of a factory, whose operating company's stock was wholly owned by U.S. companies, was in violation of a 1948 Treaty of Friendship, Commerce and Navigation between Italy and the United States).

21. *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27) [hereinafter *Nicaragua* Case] (involving Nicaraguan claims of U.S. activity or sponsorship of activity in and around Nicaragua).

22. Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal, 1987 I.C.J. 18 (Advisory Opinion of May 27) (in which a USSR national who, after his resignation from Soviet government service and a request for asylum in the United States, was denied continued U.N. employment).

23. See also *Nicaragua* Case, 1987 I.C.J., at 330-31 (dissenting opinion of Judge Schwebel).

24. *The Miniquiers and Ecrehos Case (Fr. v. U.K.)*, 1953 I.C.J. 47 (Nov. 17) (concerning a dispute between France and Great Britain over two land masses in the English Channel).

25. *Temple of Preah Vihear (Cambodia v. Thai.)*, 1962 I.C.J. 6 (June 15) (concerning a determination of the Thai-Cambodian border and an assessment of the relevance of cliffs and a watershed for purposes of a boundary).

*Sahara*.<sup>26</sup> Franck's thesis is that all these cases illustrate the Court's desire to bypass "real" fact-finding through various stratagems, such as reliance on a paper record or reliance on legal rules that make the resolution of controverted issues of fact irrelevant. To Franck, the risks inherent to the Court's approach become apparent in the majority opinion in the *Nicaragua* Case which minimized the significance of key factual findings by suggesting that Nicaraguan intervention in the El Salvadoran civil war, had it occurred, would not in any case have entitled the United States to respond in kind. Franck claims this controversial reading of international law suggests "expansive law-making in lieu of narrower decisions based mainly on the facts," unduly favors litigant regimes who can stop their citizens from going to the Hague to testify, and produces "incredible" findings of fact which only undermine the credibility of the Court once the truth emerges.<sup>27</sup> For these reasons, Franck, echoing a theme noted by other contributors to this volume, advocates further study of the ways in which the Court can strengthen its fact-finding abilities.

The next chapter, by Keith Highet, counsel to Italy in the *ELSI* Case, uses that case to puncture the "myth" that the ICJ is constitutionally unable to handle complex fact-finding in a commercial setting. Highet praises "the broad scope and substantial depth of the fact-finding" accomplished by the *ELSI* Chamber and finds "exemplary" the "exceeding care with which it picked its way through complex, contradictory, and sometimes misleading facts and evidence . . . ."<sup>28</sup> Highet finds little to criticize regarding the Chamber's handling of the burden of proof and specific types of evidence and concludes that the chamber approach is so congenial to the handling of commercial matters that the Court should consider forming a specialized chamber to handle these matters.<sup>29</sup> By way of reform, he suggests that parties be permitted to agree in advance to "general principles concerning the method and manner of production of evidence," including provisions for time saving devices such as depositions and written interrogatories.<sup>30</sup>

---

26. *Western Sahara (Advisory Opinion)*, 1975 I.C.J. 12 (Oct. 16) (concerning whether the Western Sahara was *terra nullius* at the time of the Spanish colonization and, if not, a determination of the legal relationship between the Western Sahara and the Kingdom of Morocco and the Mauritanian entity).

27. Thomas M. Franck, *Fact-Finding in the I.C.J.*, in *FACT-FINDING BEFORE INTERNATIONAL TRIBUNALS* 21, 31 (Richard B. Lillich ed., 1992).

28. Keith Highet, *Evidence, the Chamber and the ELSI Case*, in *FACT-FINDING BEFORE INTERNATIONAL TRIBUNALS* (Richard B. Lillich ed., 1992).

29. *Id.* at 74.

30. *Id.* at 61.

Pierre-Marie Dupuy next focuses on the Court's 1986 judgment in the *Case Concerning the Frontier Dispute* (Burkina Faso v. Mali).<sup>31</sup> Like Hight, he uses that Chamber decision to illustrate the Court's approach to evidentiary issues, particularly its faithfulness to the classical view that "maps cannot, by themselves, have any legal value."<sup>32</sup> Dupuy briefly canvasses the Chamber's attempt to answer a key factual issue: what had been the delimitation between the French Sudan and Upper Volta when both of these territories were placed under French governmental authority? While Dupuy argues that the Chamber in this case adhered to the "classical principles established by earlier international jurisprudence,"<sup>33</sup> and carefully mastered the difficult facts before it, he suggests that the Chamber was asked to find a boundary line which may have never existed in reality and that in doing so, it may have responded to the parties' wishes more as an equitable arbitral body than as a court of law.<sup>34</sup>

The two chapters addressing the Iran-United States Claims Tribunal, authored by Howard Holtzmann, presently a judge on the Tribunal, and Jamison Selby, the former U.S. Deputy Agent to the Tribunal, are more broadly focused than the three chapters on the ICJ. Holtzmann provides a Sandifer-like overview of the Tribunal's evidentiary practice to date. He begins by addressing key provisions of the UNCITRAL rules<sup>35</sup> (as modified by the Tribunal) including the emphasis on early production of the documentary evidence and the rule permitting the Tribunal to appoint experts who may be cross-examined by the parties.<sup>36</sup> He then uses two tribunal decisions concerning the proof needed to show U.S. corporate nationality, the famous orders in *Flexi-Van* and *General Motors*,<sup>37</sup> to illustrate what Holtzmann describes as the Tribunal's "high-watermark" of judicial activism regarding evidentiary issues. To Holtzmann the

---

31. *Case Concerning the Frontier Dispute* (Burk. Faso v. Mali), 1986 I.C.J. 554 (Dec. 22).

32. Pierre-Marie Dupuy, *Fact-Finding in the Case Concerning the Frontier Dispute* (Burkina Faso/Republic of Mali), in *FACT-FINDING BEFORE INTERNATIONAL TRIBUNALS* 81, 88-89 (Richard B. Lillich ed., 1992).

33. *Id.* at 92.

34. *Id.* at 91, 93.

35. UNCITRAL Arbitration Rules, adopted by the United Nations Commission on International Trade Law on April 28, 1976, reprinted in 15 I.L.M. 701 (1976).

36. Howard M. Holtzmann, *Fact-Finding by the Iran-United States Claims Tribunal*, in *FACT-FINDING BEFORE INTERNATIONAL TRIBUNALS* 101, 102-04 (Richard B. Lillich ed., 1992) (citing UNCITRAL Arbitration Rules, arts. 18, 19, 15 and 27).

37. Order of December 20, 1982, reprinted in *Flexi-Van Leasing, Inc. v. Islamic Republic of Iran*, 1 IRAN-U.S. CL. TRIB. REP. 455 (1982); Order of January 21, 1983, reprinted in *General Motors Corp. v. Government of the Islamic Republic of Iran*, 3 IRAN-U.S. CL. TRIB. REP. 1 (1983).

creativity shown by the Chamber in these instances—including its use of publicly available proxy statements to show the numbers of U.S. shareholders, the taking of judicial notice concerning statistics on the extent of foreign ownership within publicly owned companies in the United States, and the drawing of inferences based on this information in the absence of rebuttal evidence to show non-U.S. ownership—admirably resolved what would otherwise have been a massive fact-finding dilemma.<sup>38</sup> Holtzmann cites other instances of the Tribunal's flexible approach to fact-finding, an approach he praises as responsive to the need to expedite case processing, to compensate for the difficulty one party may have in obtaining certain types of evidence particularly in post-revolutionary Iran, or to maintain business confidentiality. Holtzmann also deals with issues long familiar to readers of Sandifer, including the handling of statements by interested parties (admissible as "representatives" of a party, with appropriate weight to be determined by the tribunal), remedies for failure to produce (drawing an adverse inference, with tribunal orders to compel discovery sometimes rendered for very specific requests), and the admissibility of expert evidence (reliance on tribunal-appointed experts). Holtzmann concludes by providing the same comfort as Sandifer: these rules are "not *sui generis*, but are rather a likely source of guidance in other arbitrations."<sup>39</sup> Like Sandifer, he sees this as an exercise "in comparative procedural law" with clear evidentiary patterns emerging between fora faced with similar circumstances. Like Hight, Franck, and Schwebel, Holtzmann recommends that arbitrators take an activist role in fact-finding, guiding the parties to the proper evidence rather than relying on what the parties choose to present.

Jamison Selby echoes many of the same points. She examines the arbitrator's role under the UNCITRAL rules ("not only judge and jury, but also judge of the first instance and final appeal")<sup>40</sup> as well as relevant tribunal procedures including the use of pre-hearing conferences, orders

---

38. In those instances Chamber One of the Tribunal indicated that affidavits by corporate officers were insufficient to show the elements needed to demonstrate U.S. corporate nationality, namely, incorporation in the United States and a showing that, collectively, natural persons who were U.S. citizens held 50% or more of the stock of the corporation continuously from the date the claim arose until the date the Claims Settlement Declaration (which established the Tribunal) came into force. Instead of dismissing these claims for failure to state a claim, Chamber One indicated what evidence would establish a prima facie showing of U.S. corporate nationality. See *Flexi-Van Leasing, Inc. v. Islamic Republic of Iran*, 1 IRAN-U.S. CL. TRIB. REP. 455; *General Motors Corp. v. Government of the Islamic Republic of Iran*, 3 IRAN-U.S. CL. TRIB. REP. 1.

39. Holtzmann, *supra* note 36, at 132.

40. Jamison M. Selby, *Fact-Finding Before the Iran-United States Claims Tribunal: The View From the Trenches*, in *FACT-FINDING BEFORE INTERNATIONAL TRIBUNALS* 135, 137 (Richard B. Lillich ed., 1992).



to clarify the proof needed or to mandate production, short, simplified hearings, the acceptance of affidavits and live witnesses, and the questioning of witnesses. She draws the same general conclusions as Sandifer regarding the unique features of international arbitration that lead to liberal admission of evidence and a strong presumption against "technical" exclusionary rules.<sup>41</sup> For Selby, this liberality relates to an arbitral decision's ultimate legitimacy:

The creation of an international tribunal, or the decision to refer a dispute to such a tribunal—particularly by sovereign States—is a relatively major undertaking, a last resort for a dispute which must be finally resolved. In this context, the resolution of the dispute is only "final," in a political if not legal sense, if the parties accept it as final, while a decision turning on technical rules of evidence or procedure seems generally to be perceived as unsatisfactory. The ultimate decision will derive more acceptable weight from the perception that it rests on legal authority, factual accuracy, or, at least, fairness.<sup>42</sup>

This insight leads Selby to suggest that the absence of "technical" rules of exclusion should not be equated with maintaining unfettered discretion for the arbitrator. In fact, she suggests that uncertainty regarding the applicable rules of evidence may lead to unnecessary surprise for the parties. Accordingly, she argues that there is a need for "supplementary rules of evidence and procedure," including means to more effectively compel evidence, in order to enhance the credibility of arbitral decisions.<sup>43</sup> Charles Brower, in a subsequent chapter, agrees with this sentiment but would apply it not to the production or admission of evidence but instead to the evaluation of evidence already admitted. He suggests that we are seeing the emergence of a *lex evidentiaria* embracing common principles for the evaluation of evidence by international tribunals and proposes that these rules be compiled.

Georg Ress' examination of "Fact-finding at the European Court of Justice" also comes to the conclusion that this court, despite powers given to it under its rules of procedure, has, at least through the first thirty years of its existence, generally avoided or used only sparingly its extensive

---

41. Compare SANDIFER, *supra* note 4, at 176 ("the history of international arbitration shows that whatever may be the merits of the Strict Common Law rules regulating the admissibility and burden of proof, it is not practicable to follow them in international litigation.") (quoting Lauterpacht) and Selby, *supra* note 40, at 141-42 ("[The Iran-U.S. Claims] Tribunal practice developed in the direction of liberally admitting evidence, despite more restrictive, albeit differently restrictive, rules of civil and common law systems. This approach is consistent with . . . the traditional practice of international tribunals to admit virtually anything").

42. Selby, *supra* note 40, at 143.

43. *Id.* at 145.

powers to request information and production, appoint experts, and hear oral testimony.<sup>44</sup> He suggests that the European Court has employed a mix of accusatorial or inquisitorial techniques. He then details the Court's approach to fact-finding in the various types of proceedings over which the court has jurisdiction: actions for annulment of decisions or recommendations taken by the European Commission; claims for reduction of penalties imposed by the Commission (primarily pecuniary sanctions for infringement of competition law); and, in connection with antidumping procedures, preliminary ruling proceeding by national courts interpreting the EEC Treaty, the validity of Community acts, or the interpretation of certain Council statutes. Ress concludes with a look at the recent (1989) establishment of the Court of First Instance of the European Communities. Ress' survey suggests that the European Court's fact-finding practice throughout these various types of actions is difficult to categorize; whereas the Court usually defers to others' fact-finding in antidumping cases, it need not and does not defer to national courts' findings of facts in the course of at least some requests for preliminary rulings.<sup>45</sup>

C.F. Amerasinghe's review of the "Problems of Evidence Before International Administrative Tribunals" largely focuses on these tribunals' reactions to "confidential" evidence and the appointment of experts. He concludes that in the majority of cases dealing with private litigants' claims for disclosure of "confidential" documents held by organizations, administrative tribunals have found ways to refuse these requests for production.<sup>46</sup> Amerasinghe also concludes that these tribunals have assumed the inherent power to use or appoint experts even in the absence of provision in their statutes, and have not hesitated to use experts or to evaluate expert findings.<sup>47</sup>

The book's final four chapters deal with fora for the resolution of human rights disputes. Jochen A. Frowein, writing on the European Commission of Human Rights, finds that the Commission primarily relies on documentary evidence and has not frequently heard live witnesses. Moreover, the nature and extent of questioning of these live witnesses in those few instances in which this occurred has varied "according to the

---

44. Georg Ress, *Fact-Finding at the European Court of Justice*, in *FACT-FINDING BEFORE INTERNATIONAL TRIBUNALS* 177, 183 (Richard B. Lillich ed., 1992).

45. *Id.* at 191-92, 197.

46. C.F. Amerasinghe, *Problems of Evidence Before International Administrative Tribunals*, in *FACT-FINDING BEFORE INTERNATIONAL TRIBUNALS* 210-22 (Richard B. Lillich ed., 1992).

47. *Id.* at 223, 232.

specific national traditions which may have influenced a procedure."<sup>48</sup> Frowein also briefly considers the special problems associated with visits by Commission delegates to such sites as military detention centers, suggests that the standard of proof employed ("beyond a reasonable doubt") should not be regarded as identical to the Anglo-Saxon standard for criminal cases or its special evidentiary rules, and closes with a brief look at the burden of proof.<sup>49</sup> Tom Farer does the same for the Inter-American Commission of Human Rights, focusing on, among other things, the arguments in favor of the Commission's long-established practice of drawing an adverse inference from a government's failure to produce evidence required under the American Convention of Human Rights.

Thomas Buergenthal's look at the Inter-American Human Rights Court surveys the evidentiary rules emerging from that Court's meager, but growing, case law. Buergenthal argues that any simple statement concerning whether that Court is an appellate body or one which sits in de novo review of facts found by the Inter-American Commission of Human Rights is likely to be misleading. He contends that while the American Convention and the Court's statute anticipated that the Commission would primarily undertake fact-finding, in fact the Inter-American Court is free to perform the functions of a trial court, as it did in the *Honduran Disappearance Cases*, when the necessary fact-finding does not take place or is inadequate.<sup>50</sup> Buergenthal argues that the Inter-American Court has been more influenced by the evidentiary rules applied by the International Court of Justice than by the European Court of Human Rights (which generally has been able to leave fact-finding to the European Commission). Buergenthal also argues that the Inter-American Commission ideally should follow the European example since it is better equipped than the Inter-American Court for fact-finding, but that the Court will continue to assume this role in the absence of thorough and impartial findings by the Commission. Buergenthal also canvasses the Inter-American Court's innovative decision in the *Disappearance Cases* to shift the burden of going forward with proof to the

---

48. Jochen A. Frowein, *Fact-Finding by the European Commission of Human Rights*, in *FACT-FINDING BEFORE INTERNATIONAL TRIBUNALS* 242 (Richard B. Lillich ed., 1992).

49. The burden of proof is on the Commission to establish the truth, with the State party required to furnish "all necessary assistance." *Id.* at 242.

50. Thomas Buergenthal, *Judicial Fact-Finding: The Inter-American Human Rights Court*, in *FACT-FINDING BEFORE INTERNATIONAL TRIBUNALS* 261, 264 (Richard B. Lillich ed., 1992). See, e.g., *Velasquez Rodriguez Case*, 4 INTER-AM. CT. H.R. (ser. C) (July 29, 1988); *Godinez Cruz Case*, 5 INTER-AM. CT. H.R. (ser. C) (Jan. 20, 1989); *Fairen Garbi and Solis Corrales Case*, 6 INTER-AM. CT. H.R. (ser. C) (Mar. 15, 1989).

respondent State once the claimant had established that there existed both a governmental practice of causing the disappearances of individuals and a link between the particular individual and the practice.<sup>51</sup> To Buergenthal, this creation of a rebuttable presumption regarding the disappearance of an individual who may have been last seen in the hands of a government which has caused the disappearance of other individuals obviously puts the burden on the party best able to prove the fact, solves an evidentiary dilemma, and can easily be applied to other issues in other human rights contexts. Buergenthal also surveys other aspects of the *Disappearance Cases*, including the Court's rejection of arguments challenging the admissibility of the testimony of certain "disloyal" witnesses, its rejection of the applicability of domestic evidentiary rules, and its holding that a finding of the existence of a governmental policy of disappearances requires a standard of proof "capable of establishing the truth of the allegations in a convincing manner,"<sup>52</sup> and not merely proof by a preponderance of the evidence. Like many of the other authors in this collection, Buergenthal argues that there is a need for a "model set of rules of evidence and related rules of procedure for the use of international tribunals" since the current ad hoc approach creates confusion and probably unfairness.<sup>53</sup>

The final two chapters address fact-finding not by international tribunals but by nongovernmental human rights organizations (NGOs) and national governments acting in the human rights area. Hurst Hannum addresses the very different purposes and intended audiences of NGO activities since their goal is not to prepare a case for a formal hearing before an international court. He concludes with some recommendations to improve the reliability and accuracy of NGO fact-finding, including the identification of sources, the clarification of roles (watchdog/impartial fact-finder/political advocate), and the willingness to apply standards evenhandedly.

Finally, David A. Martin surveys the techniques for fact-finding employed by national governments and critiques fact-finding in asylum determination cases heard before the U.S. Board of Immigration Appeals (BIA). Martin argues that BIA asylum determinations evince the same tendency to opt for legal resolutions over factual determinations which Franck sees evident in ICJ cases, and he contends that this leads to

---

51. Velasquez Rodriguez Case, 4 INTER-AM. CT. H.R. (ser. C) para. 125.

52. Buergenthal, *supra* note 50, at 271, citing Godinez Cruz Case, 5 INTER-AM. CT. H.R. (ser. C) para. 150; (Fairen Garbi & Solis Corrales Case, 6 INTER-AM. CT. H.R. (ser. C) para. 132.

53. Buergenthal, *supra* note 50, at 274.

erroneous denials of asylum.

## II. FAULT-FINDING "FACT-FINDING"

The title of this book suggests one of its shortcomings. As Richard Bilder suggests in his brief (three page) chapter, the very notion that "fact-finding" is a neatly compartmentalized aspect of judicial activity has long been subject to challenge for a variety of reasons, not the least of which is that most (some would say all) issues worth addressing are mixed questions of fact and law.<sup>54</sup> By contrast, the very premise of this book, indeed the starting point of almost every chapter except Bilder's, is reminiscent of Sandifer's charmingly old-fashioned first sentence to his 1975 work: "[t]he primary concern of this study is the process or mode of presenting evidence before international tribunals rather than the determination of what constitutes evidence."<sup>55</sup> Much of modern scholarship, whether in the field of evidence or otherwise, is devoted to showing the difficulties of any such demarcations. As Bilder suggests, the more important question may not be what the bulk of the chapters in this book concern themselves with—how courts find "facts"—but why they feel compelled to make the fact/law distinction in the first place. As Bilder and others who have examined the issue in terms of domestic courts have suggested, domestic courts feel a special need to make a distinction between "facts" and "law" because they need to give judges and juries something different to do, to give trial courts something different to do than appellate courts, to restrain the potential abuse of power by judges vis-a-vis other co-equal branches of government, or to limit the precedential effect of different kinds of determinations.<sup>56</sup>

---

54. Richard B. Bilder, *The Fact/Law Distinction in International Adjudication*, in *FACT-FINDING BEFORE INTERNATIONAL TRIBUNALS* 95, 95–98 (Richard B. Lillich ed., 1992). Carbonneau, in his chapter, also argues that "[a]djudication includes an irreducible normative and subjective dimension at every stage of its operation that transforms all considerations into mixed questions of fact and law." Thomas E. Carbonneau, *Darkness and Light in the Shadows of International Arbitral Adjudication*, in *FACT-FINDING BEFORE INTERNATIONAL TRIBUNALS* 158 (Richard B. Lillich ed., 1992). As one of the contributors to this volume put it in another context, "[l]awyers know that there are few 'pure' facts." Franck & Fairley, *supra* note 3, at 309. See also Walter Wheeler Cook, "Facts" and "Statements of Fact," 4 U. CHI. L. REV. 233 (1936–37); Kim L. Scheppele, *Facing Facts in Legal Interpretation*, 30 REPRESENTATIONS 42 (1990); JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT COMMON LAW 183 (1893); Nathan Isaacs, *The Law and the Facts*, 22 COLUM. L. REV. 1, 1–13 (1922); A.W.B. Simpson, *The Analysis of Legal Concepts*, 80 LAW Q. REV. 535, 535–58 (1964); Francis H. Bohlen, *Mixed Questions of Law and Fact*, 72 U. PA. L. REV. 111, 111–22 (1923–24); George C. Christie, *Judicial Review of Findings of Fact*, 87 NW. UNIV. L. REV. 14 (1992).

55. SANDIFER, *supra* note 4, at 1.

56. Bilder, *supra* note 54, at 96; See also, e.g., Scheppele, *supra* note 54.

Unexamined in this book is the question Bilder raises but does not answer: whether international tribunals face the same or comparable need to make the fact/law distinction. On the one hand, one could suggest that international tribunals do not face as great a need to make the fact/law distinction because they need not worry about a jury, an appellate court structure, or, arguably,<sup>57</sup> the effects of precedent. If so, the importance of the issues addressed by the other contributors to this volume, particularly the significance attached by many to strengthened "fact" finding, becomes dubious. Alternatively, one could argue that given the international legal system's exceptional need to maintain the fragile legitimacy of international adjudication, the fact/law distinction—and fact-finding generally—assumes an even greater importance among international tribunals. On this view, the fact/law distinction serves somewhat different ends for international tribunals: it creates or perpetuates a *perception* that the process is fair, impartial, and thorough. It is, in the end, this perception of fairness that permits the tribunal's conclusions to be given effect.<sup>58</sup> As some fact/law critics would put it, an international tribunal's finding of the "facts," when credibly done, provides, as does an account rendered by a domestic appellate court, a conclusive determination which resonates both as an account of what "actually" happened and as a narrative which fits into generalized legal categories.<sup>59</sup>

The book fails to address such fundamental theoretical questions, despite their relevance to the subject at hand. Thus, Franck's and Schwebel's two-prong attack on the *Nicaragua* Court's fact-finding is essentially that there was too little fact-finding and what there was of it was poorly done. The assumption both authors make is most clearly put by another author in this collection: "that the law can only be applied wisely when the facts are first clearly established."<sup>60</sup> Undiscussed by either is the extent to which the Court's and the parties' views of the relevant "law" helped to determine the "factual" findings and, whether

---

57. The argument would be that the ICJ, for example, need not concern itself with precedent given the interpretation of article 59 of its statute which suggests that it is not subject to a doctrine of *stare decisis*. Of course, article 59 may only mean that a case is only *res judicata* as between parties to a case. As for other tribunals, nothing in article 38 of the Statute of the Court authorizes giving their decisions a *stare decisis* effect; judicial decisions provide at most evidence of what the other sources of law mean or contain. In these respects international tribunals are less concerned with the precedential effects of their decisions. Of course, this assumes that all such tribunals are alike, a view challenged *infra* at discussion accompanying notes 66–73.

58. To this extent, the fact/law distinction serves the same legitimizing purpose as the presumption against technical exclusion of evidence. See Selby, *supra* note 40, at 141–43.

59. See Scheppele, *supra* note 54, at 63.

60. Dupuy, *supra* note 32, at 93.

given the legal categories, a call for further "factual" probing by the Court would have made much difference. The brief one-sided views presented here concerning the *Nicaragua Case* fail to do justice to the complexity of either the merits decision in that case,<sup>61</sup> or to the variety of views that have been expressed concerning it.<sup>62</sup>

More generally the ICJ chapters do not address the mixed fact/law findings that pervade the World Court's opinions under both its contentious and advisory jurisdictions. What would the contributors to this volume make of the Court's determination, made in the course of the *Fisheries Case*,<sup>63</sup> that economic interests, among other things, should be a general "consideration" in determining whether a state's delimitation of its territorial sea is lawful? Although this ruling has been cited as part of the substantive law, as have the requisites for a lawful claim of prescription enunciated in the *Eastern Greenland Case*,<sup>64</sup> both also constitute determinations of what evidence was relevant to prove the underlying claims in the respective cases. Both courts' descriptions of the "facts" were obviously colored by these determinations. One can multiply the examples manifold. Are the rules regarding the materials one can properly consider in the interpretation of treaties, often cited in the Court's practice,<sup>65</sup> more properly viewed as rules of substantive law or evidentiary rules? What about the use of the institutional practice of an international organization to determine the meaning of a Charter provision?<sup>66</sup>

Similar issues arise in connection with human rights tribunals.

61. The Franck and Schwebel chapters do not address "fact" findings by the Nicaragua Court far more favorable to the United States, such as the Court's crucial finding that actions of the Nicaraguan Contras could not be attributed to the United States. *Nicaragua Case*, 1986 I.C.J. at 314-16. Nor do they address those findings by the Court—such as its finding that the United States mined harbors without warning to international shipping or distributed a manual which called for acts in violation of the laws of war—which would appear to ground liability quite apart from the findings these authors do address. *Id.* at 316-18.

62. See, e.g., Fernando R. Tesón, *Appraisals of the ICJ's Decision: Nicaragua v. United States (Merits)*, 81 AM. J. INT'L L. 77 (1987).

63. *Fisheries Case (U.K. v. Nor.)*, 1951 I.C.J. 116 (Dec. 18).

64. *Legal Status of Eastern Greenland*, 1933 P.C.I.J. (ser. A/B) No. 53 at 22 (Apr. 5).

65. Articles 31-32 of the Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, U.N. Doc. A/Conf. 39/27, 8 I.L.M. 679 (entered into force Jan. 27, 1980), *cited in* *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Sen.)*, 1991 I.C.J. 53 (Nov. 12).

66. Compare, e.g., Judge Spender's views on the relevance of institutional practice to the Charter interpretation in *Certain Expenses of the United Nations*, 1962 I.C.J. 151, 184-97 (July 20) (separate opinion of Judge Spender), with Judge Alvarez' views in *Competence of the General Assembly for the Admission of a State to the United Nations*, 1950 I.C.J. 4, 15-19, 23-24 (March 3) (dissenting opinion of Judge Alvarez).

Buergethal's discussion of the shifting burdens of proof in the *Disappearance Cases* in this volume, as well as other commentators' analyses of these cases elsewhere,<sup>67</sup> suggest the interrelated nature of the various evidentiary, procedural, and substantive law determinations in those cases. Thus, the Inter-American Court's "evidentiary" decisions as to the degree of proof required in this type of case ("convincing" but not "beyond a reasonable doubt"<sup>68</sup>), the scope of admissibility (going beyond material formally submitted by the parties), reliance on circumstantial evidence, and the exhaustion of domestic remedies requirement (theoretical availability of local remedies not enough) are inextricably linked to its interpretation of the substantive legal requirements under the American Convention of Human Rights. Discussions of these and other evidentiary issues in human rights fora solely under the rubric of "fact"-finding is at best misleading.

The problematic fact/law distinction is evident in the Iran-United States Tribunal as well. The Tribunal's dual nationality cases, not discussed in this volume, illustrate the problem well. The case of Ms. Shahnaz Mohajer-Shojaee, one of the claimants in the Tribunal's award of October 5, 1990, decided by Chamber One, is instructive. The tribunal majority summarily dismissed Ms. Mohajer-Shojaee's claim on the basis that she had failed to prove that she was dominantly and effectively a United States national.<sup>69</sup> The claimant had presented a U.S. passport issued Nov. 28, 1977, documentary evidence that she was a resident of the United States at least as of 1972, and affidavits of her husband indicating that she had been a U.S. resident since 1969. Chamber One found this evidence, in the absence of additional documentary evidence, insufficient to prove U.S. nationality. The U.S. judge, Judge Holtzmann, one of the contributors to this volume, dissented in part, indicating that documentary evidence is generally required to establish naturalization because the official documents are readily available but that the other elements of dominant and effective nationality, including proof of

---

67. See, e.g., Dinah L. Shelton, *Judicial Review of State Action by International Courts*, 12 *FORDHAM INT'L L.J.* 361 (1989); Linda Drucker, *Governmental Liability for "Disappearances": A Landmark Ruling by the Inter-American Court of Human Rights*, 25 *STAN. J. INT'L L.* 289 (1989).

68. *Velasquez Rodriguez Case*, 4 *INTER-AM. CT. H.R.* (ser. C) para. 129, 134.

69. Under the Algiers accords, as interpreted by many cases before the Tribunal, claimants who are nationals of both the United States and Iran under those countries' respective laws may still present claims against Iran provided they establish they have dominant and effective U.S. nationality from the date their claim arose to Jan. 19, 1981. See Case No. A18, 5 *IRAN-U.S. CL. TRIB. REP.* 251 (1984); *Mohajer-Shojaee v. Iran*, 25 *IRAN-U.S. CL. TRIB. REP.* 196 (1990).



residence and center of interests, may be demonstrated by affidavit evidence.<sup>70</sup> He further argued that threshold proof of naturalization creates a presumption of dominant and effective nationality flowing from the naturalization oath and he concluded that “proof of naturalization, when coupled with proof of prolonged residence in the United States, invariably leads to a conclusion in favor of dominant U.S. nationality, absent other compelling circumstances.”<sup>71</sup> For these reasons, Holtzmann contended that Ms. Mohajer-Shojaee had made an un rebutted prima facie showing that her habitual residence and family ties were in the United States since 1969 and that she therefore had standing to bring a claim. Significantly, later dual nationality cases decided in Chamber One of the tribunal have seemingly adopted Holtzmann’s test.<sup>72</sup> It is clear that Holtzmann’s dissent appeared to make Chamber One more willing to consider the merits of claims brought by dual nationals. Yet the categorization of this change in the caselaw of the Tribunal is not simple. Is it a change in the Tribunal’s growing substantive law regarding dominant and effective nationality, a “mere” change in its evidentiary rules favoring the types of evidence which benefit these claimants, or both? In the end we are left with a mixed fact/law holding which has transformed some persons holding dual nationalities into dominantly U.S. nationals in later cases.

The Tribunal’s approach in the dual nationality cases, as in the corporate nationality cases which Holtzmann discussed in this volume, appears to cast the question more in evidentiary terms: as a change in the burdens of proof or in terms of shifting presumptions. Whether this is the view outside observers ought to take of it—whether this question should be seen as part of “fact” finding or “law” finding—remains very much in doubt, yet is outside the purview of this book. This is so despite the fact that several chapters here, including Franck’s and Martin’s, inadvertently supply abundant evidence of the skill with which courts, both international and domestic, manipulate the fact/law distinction to achieve desired results. In these cases, as in others in this volume, the authors simply choose one side of the chicken/egg proposition without inquiring into the significance of the game being played, or even acknowledging that a game is being played at all. Yet possibly more

---

70. Mohajer-Shojaee v. Iran, 25 IRAN-U.S. CL. TRIB. REP. 197, 202–10 (separate opinion of Judge Holtzmann).

71. *Id.* at 205.

72. See, e.g., Monemi v. Iran, Award No. 533-274-1, (July 1, 1992); Etezadi v. Iran, 25 IRAN-U.S. CL. TRIB. REP. 264 (1990); Riahi v. Iran, Award No. ITL 80-485-1 (June 10, 1992).

significant than the ways the tribunals categorize these issues is the question of whether these categorizations really matter for purposes of precedent.

Beyond ignoring the difficulties with the fact/law distinction, the commentators here also ignore the fundamental issue of whether all international tribunal decisions, especially arbitrations and ICJ decisions involving determinations of territorial and boundary disputes, necessarily involve the application of "law" at all.<sup>73</sup> In this volume, Pierre-Marie Dupuy finds in the Burkina Faso case "an application of equity, *lato sensu*," but blithely dismisses this as a debate for another day (and presumably another book).<sup>74</sup> This raises the well-worn question of whether international judges or arbitrators, even when not authorized to act as *amiable compositeurs* or *ex aequo et bono*, in fact do so even though they say they are acting pursuant to law.<sup>75</sup> To the extent such an accusation is accurate, this adds another layer to the "fact-finding" issue. A tribunal capable of fudging the "law" side of the equation may be just as willing to fudge the "facts." No one here asks, for example, whether an institutionalized dispute settlement process, such as the Iran-United States claims process, contains elements that encourage non-legal decisions and whether this impacts its "fact-finding." Does the laconic manner in which Tribunal decisions state both the facts and the law facilitate (sub rosa) determinations that no more than a certain percentage of "U.S." victories, as in the dual nationality cases, are desirable to keep Iran involved in the process?<sup>76</sup>

---

73. For a survey of the criteria applied by tribunals to resolve territorial disputes, see Athene L. W. Munkman, *Adjudication and Adjustment—International Judicial Decision and the Settlement of Territorial and Boundary Disputes*, 46 BRIT. Y.B. INT'L L. 1 (1972-73). As Munkman acknowledges, whether the resulting generalizations evince "political" or "legal" factors or merely a "penumbra of equities" is difficult to say. *Id.* at 105. Munkman prefers to call the criteria applied in these cases "guidelines" as opposed to "rules." *Id.* at 109.

74. Dupuy, *supra* note 32, at 91.

75. See generally, William W. Park, *National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration*, 63 TUL. L. REV. 647 (1989); Louis B. Sohn, *The Function of International Arbitration Today*, 108 RECUEIL DES COURS 1, 41-59 (1963). Such a charge might be made, for example, of the World Court's "equitable demarcation" in the Gulf of Maine Case or in connection with the Iran-United States Claims Tribunal's "split the baby" decisions in the choice of forum cases. Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.), 1984 I.C.J. 246 (Oct. 12); T.C.S.B., Inc. v. Iran, 1 IRAN-U.S. CL. TRIB. REP. 261 (Nov. 5, 1982). On the latter, see Ted L. Stein, *Jurisprudence and Jurists' Prudence: The Iranian-Forum Clause Decisions of the Iran-U.S. Claims Tribunal*, 78 AM. J. INT'L L. 1 (1984). For a debate on whether there is a distinction between deciding a case *ex aequo et bono* and deciding a case under the "equitable" application of law, see Munkman, *supra* note 73, at 105.

76. Compare Stein, *supra* note 75.

No one in this book discusses the possibility that at least in certain instances, arbitrators or international judges might see themselves primarily as solvers of the dispute before them and not necessarily as conclusive finders of the "real" facts or applicers of "real" law.<sup>77</sup> A particular arbitral or judicial decision might be crafted, on the contrary, to conceal the real elements of the dispute (both legal and factual) in favor of a compromise solution pleasing to the parties or for other reasons.<sup>78</sup> To the extent that this is happening, the search for coherent and consistent evidentiary rulings might prove an ultimately unrewarding, self-delusional task.

### III. IS THERE AN INTERNATIONAL *Lex Evidentia*?

If the first half of the title of this book raises undiscussed problems, the second half of the title is nearly as troubling. What are the "international tribunals" with which we are concerned? To the extent that an "international tribunal" can be defined in the negative—a forum for adjudication not encompassed by the term "domestic tribunal"—it is clear that this book does not purport to discuss adjudicative fora within international organizations (e.g., the GATT and the International Labor Organization),<sup>79</sup> other types of dispute settlement (e.g., within the Law of the Sea Convention<sup>80</sup> or the United States-Canada Free Trade Agreement),<sup>81</sup> U.N. Fact-Finding,<sup>82</sup> or the most common form of international

77. Compare Charles de Visscher's view that:

Settlement *ex aequo et bono* definitely fits the arbitral function better than the properly judicial one. The arbitrator has to a very high degree the confidence of both parties . . . . This occurs, for instance, when the parties express a desire to end old conflicts which have been overtaken by the march of events. At such a moment, the insistence upon the strict application of law must pass to the second rank; the parties envisage the possibility of a new adjustment of their interests; their minds leave the past to turn toward the future. In those cases they often resort to an arbitrator or an amiable compositor rather than a judge.

Charles de Visscher, *Cours Général des Principes de Droit International Public*, 86 RECUEIL DES COURS 445 (1954-II) (text in French), as quoted and translated by Sohn, *supra* note 75, at 87.

78. See, e.g., Munkman, *supra* note 73, at 28–33 (discussing the arbitration decision in Cordillera of the Andes Boundary, 9 R.I.A.A. 31 (1902)).

79. For a survey of GATT dispute settlement, see JOHN H. JACKSON & WILLIAM J. DAVEY, *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 332–57 (2d ed. 1986). For a survey of the ILO's adjudicative bodies, see WALTER GALENSON, *THE INTERNATIONAL LABOR ORGANIZATION: AN AMERICAN VIEW* (1981).

80. United Nations Convention on the Law of the Sea, UN Doc. A/CONF.62/122 of October 7, 1982, arts. 186–191.

81. Canada-United States Free Trade Agreement, 27 I.L.M. 281 (1988), Chapter 19 and annexes.

adjudications: the hundreds of ad hoc arbitrations conducted in commercial settings under established rules such as UNCITRAL.<sup>83</sup> To the extent that this book ignores commercial arbitrations between non-State parties, it reflects a long-standing categorical distinction between public and private international dispute resolution which may no longer be viable.<sup>84</sup> Certainly a book which aspires to be a worthy successor to Sandifer's should either seek out all reported cases, regardless of forum, explain why the tribunals chosen are representative of cases or fora not discussed, or distinguish the fora chosen for inclusion from those which are not.

Without these explanations we are left with a grab-bag of examples, in which the choices made for inclusion are sometimes as puzzling as the exclusions,<sup>85</sup> and which raise questions apart from comprehensiveness. Even the limited range of international tribunals discussed in these pages differ in many ways, including: by subject matter addressed (from traditional "public" international law subjects, including human rights, to commercial law, to administrative institutional law); by type of party (States, corporations, international organizations, individuals); by nature of forum (ad hoc, institutional, regional, or part of universal institution); and by nature of process (amicable, adversarial, or something in-between). Despite this range, there is little basis given here for the suggestion made by numerous contributors that there is a *lex evidentiaria* either emerging or established.<sup>86</sup> Although Sandifer had made a similar claim, he also suggested that evidentiary rules were functionally based. He argued that his emerging *lex evidentiaria* stemmed from the "distinctive character" of international adjudication; thus, he suggested that international judges' reluctance to base a decision on technical exclusionary grounds and their liberal admission of all types of evidence was due to the complexity of issues raised in the international setting, the lapse of time between international claims and any subsequent resolution, the long

---

82. See, e.g., *Declaration on Fact-Finding by the United Nations in the Field of the Maintenance of International Peace and Security*, G.A. Res. 46/59, U.N. GAOR, 46th Sess., Agenda Item 131, U.N. Doc. A/RES/46/59 (1992).

83. For a thought-provoking discussion of the Iran-United States Tribunal as compared to commercial international arbitration between private entities, see David D. Caron, *The Nature of the Iran-United States Claim Tribunal and the Evolving Structure of International Dispute Resolution*, 84 AM. J. INT'L L. 104 (1990).

84. See *id.* at 156. See also Ralph Steinhardt, *The Privatization of Public International Law*, 25 GEO. WASH. J. INT'L L. & ECON. 523 (1991) (casting doubt on "public"/"private" international law distinctions).

85. Thus, we have a chapter on NGO fact-finding which scarcely involves a "tribunal" as traditionally understood, and a chapter on domestic courts, which similarly stretches the term "international."

86. See, e.g., *supra* text accompanying note 53 (quote from Buergenthal); Holtzman, *supra* note 36, at 132-33.

distances between fora, documents and witnesses, and the involvement of sovereign states and a corresponding desire to be sensitive to sovereign pride.<sup>87</sup> He acknowledged that claims commissions where individuals were claimants might prompt different evidentiary concerns.<sup>88</sup>

Presumably, Sandifer would have been the first to recognize what most of the contributors to this volume fail to acknowledge:<sup>89</sup> that many of the tribunals discussed here do not share the common characteristics which facilitated Sandifer's original generalizations, and some do not involve the participation of States as parties, nor implicate complex issues, nor necessitate discovery over large distances of time and space.<sup>90</sup> To the extent that international adjudication may generate generalizable evidentiary rules at all, different types of tribunals may generate different sets of rules in response to differing needs. The special needs and circumstances of the Iran-United States Claims Tribunal, for example, may facilitate the "judicial activism" which Holtzmann praises in connection with Tribunal decisions on corporate nationality.<sup>91</sup> On the other hand, a tribunal not faced with the pressure of settling hundreds of corporate nationality claims might be less willing to depart from the traditionally timid approach many arbitrators have taken regarding such doctrines as judicial notice.<sup>92</sup> A tribunal which does not routinely deal with sovereign assertions of fact, compared to one asked to adjudicate inter-State complaints, may employ less deferential approaches to the impeachment and cross-examination of witnesses generally and may also be less reluctant to engage in its own fact-finding or to appoint its own

---

87. SANDIFER, *supra* note 4, at 3-5, 24-26. Interestingly, Franck, in his chapter on the ICJ, distinguishes that Court from domestic courts on similar grounds. Franck, *supra* note 27, at 21-22. Not all international tribunals discussed in this volume share the ICJ's distinctive qualities.

88. SANDIFER, *supra* note 4, at 4.

89. One exception to this is Ress' chapter on the European Court of Justice. Ress explicitly refuses to make evidentiary generalizations even within one tribunal across the different types of actions discussed.

90. Thus, Sandifer indicated that "[i]t is of primary importance to keep in mind these unique features of international judicial proceedings in examining the rules of evidence applied by international tribunals. Rules drawn from the general practice of these tribunals can be generalized only with caution." SANDIFER, *supra* note 4, at 35. His book often distinguishes between evidentiary rules applied by different types of international tribunals. See, e.g., *id.* at 119-208.

91. See Holtzmann, *supra* note 36, at 106-10. It is not clear whether generalizations can be validly made regarding the likelihood of evidentiary judicial activism by institutionalized as opposed to ad hoc arbitrations. Munkman, for example, found that institutionalized courts sometime displayed "greater caution in their reasoning or in their decisions" regarding territorial or boundary disputes and for that reason suggested that ad hoc or regional arbitrations might be preferable in some instances. Munkman, *supra* note 73, at 114.

92. Compare SANDIFER, *supra* note 4, at 382-97.

experts.<sup>93</sup> One which faces a situation in which all the evidence is in the control of only one party might be inclined to adopt more stringent rules of discovery, particularly when the material is otherwise not accessible.<sup>94</sup> On the other hand, a tribunal with specialized expertise might have less need to rely on party-generated evidence or on the appointment of experts,<sup>95</sup> and may provide a reviewing court with little opportunity for review of evidentiary issues.<sup>96</sup> One could go on and on. Despite suggestions made in this volume, the jury is still out on whether it is feasible to generate a "model set of evidentiary rules" for general use by international tribunals.<sup>97</sup> Nor is it clear, especially given Thomas Carbonneau's chapter in this collection, that it is advisable to do so.

Carbonneau argues, contrary to the suggestions made in particular by Selby, that it is *not* advisable to have a more regularized set of procedures for handling evidence in the arbitral setting.<sup>98</sup> Carbonneau opposes the "adversarialization" of international arbitration because of the threat posed to the advantages offered by arbitration: flexibility, informality, and speed.<sup>99</sup> Carbonneau's arguments echo those offered by U.S. courts for rejecting the applicability of either the federal rules of civil procedure or the federal rules of evidence to arbitral proceedings.<sup>100</sup> Carbonneau takes a dim view of the U.S. adversarial process, suggesting that its

---

93. Compare Sandifer's discussion of sovereign assertions. *Id.* at 397-402.

94. See Monica P. McCabe, *Arbitral Discovery and the Iran-United States Claims Tribunal Experience*, 20 INT'L LAW. 499, 510-11 (1986). See also FED. R. CIV. P. 26(b)(1).

95. Schwebel and Highet suggest as much in their praise of Chamber proceedings. See Stephen M. Schwebel, *Introduction: Three Cases of Fact-Finding by the International Court of Justice*, in FACT-FINDING BEFORE INTERNATIONAL TRIBUNALS 1, 4 (Richard B. Lillich ed., 1992); Highet, *supra* note 28, at 47.

96. GABRIEL M. WILNER, *DOMKE ON COMMERCIAL ARBITRATION* 367 (rev. ed. 1991).

97. A more promising route may be to encourage further work on evidentiary rules among certain types of international tribunals with common features, and specifically on particular evidentiary issues within that subset of fora. See, e.g., Michael Straus, *The Practice of the Iran-U.S. Claims Tribunal in Receiving Evidence from Parties and from Experts*, 3 J. INT'L ARB. 57 (1986); James R. Holbein, *Evidentiary Issues Under the U.S.-Canada Free Trade Agreement and the Proposed North American Free Trade Agreement*, in *Workshop Materials for Annual Spring Meeting*, American Bar Association (1993) (forthcoming) (copy on file with author).

98. In so limiting his target, Carbonneau argues that ICJ adjudication "is completely different from the private forms of international adjudication." Carbonneau, *supra* note 54, at 160 n.11. Carbonneau is also presumably taking issue with the notion that there is one *lex evidentiaria* which governs all these tribunals.

99. For a decidedly less enthusiastic portrayal of arbitration with respect to these factors, see Samuel V. Goekjian, *The Conduct of International Arbitration*, 2 LAW. AMERICAS 409 (1979).

100. See, e.g., W. Michael Tupman, *Discovery and Evidence in U.S. Arbitration: The Prevailing Views*, ARB. J., Mar. 1989, at 27 and cites contained therein.

sole objective is to have the client's interests triumph essentially without regard to the financial, ethical, and human costs that might accompany the litigation. It is not merely a form of debate or a means of expressing disagreement, but rather a single-minded, unrelenting, and strident advocacy for the unilateral disposition of the case. It breeds distrust among all the actors involved, and—as a consequence—demands elaborate procedures and numerous opportunities for challenge . . . . This unique brand of trial procedures has literally paralyzed the administration of justice in the United States. It has made justice financially prohibitive and inaccessible, and has undermined the integrity of law and of the legal profession.<sup>101</sup>

Carbonneau argues that the plea to have more refined rules of procedure is really an attempt to “align arbitral proceedings with adversarial practices,”<sup>102</sup> and that this would flood international tribunals with advocacy-generated facts, turning arbitrators into “mere managers of the parties' adversarial disagreement.”<sup>103</sup> He contends that arbitral rules such as UNCITRAL's were the product of an “already existing international consensus on arbitral procedure” and do not require supplementation or modification.<sup>104</sup> He argues that nothing needs fixing since there is a “sufficient track record of arbitral performance” showing “sound procedural judgment” and little evidence of abuses in terms of discovery, fact-finding, or award.<sup>105</sup>

Carbonneau's chapter enlivens *Fact-Finding Before International Tribunals* because it is virtually the only instance in which one author manages to engage the other contributors in a battle of orthodoxies. Nonetheless, Carbonneau's strident dissent is less illuminating than it could have been simply because he appears to be fighting a straw man. Neither Selby nor anyone else in this volume is proposing the use of technical exclusionary evidentiary rules, such as those excluding hearsay, in any international tribunal. Selby herself argues against “merely technical solutions.”<sup>106</sup> What Selby and some of the other contributors are proposing are mere supplementary rules of evidence and procedure to compel evidence more effectively and to assess credibility more reliably

---

101. Carbonneau, *supra* note 54, at 163–64.

102. *Id.* at 165.

103. *Id.* at 166.

104. *Id.* at 165.

105. *Id.* at 166.

106. Selby, *supra* note 40, at 143.

and consistently.<sup>107</sup> Carbonneau's assertion that this modest goal is "a first step in the direction of acquiescing to the adversarial ethic's insatiable and self-aggrandizing logic" is neither convincing nor an argument.

His further blanket assertion, unsupported by any evidence—that all is well with the procedure followed by international arbitrators—flies in the face of abundant criticism of international arbitrations by numerous academics and practitioners. As anyone who has examined the decisions of the Iran-United States Claims Tribunal, the "most significant arbitral body in history,"<sup>108</sup> can attest, not all of those decisions or the underlying procedures evince the efficiency and fairness which Carbonneau acknowledges are the ultimate goals. Legitimately dissatisfied claimants before that Tribunal exist, as is evidenced by the decisions on dual nationality rendered prior to Judge Holtzmann's dissent in *Mohajer-Shojaee v. Iran*.<sup>109</sup> The lax, and some would say unequal, application of evidentiary rules at the Tribunal, such as with respect to sanctions for non-compliance with discovery orders, has often worked to the detriment of U.S. claimants unable to secure documentary or other evidence left in Iran.<sup>110</sup> Tribunal decisions as to evidentiary issues have not always been consistently applied in the Tribunal's practice, and its overall track record as to "sound procedural judgement" still remains to be compiled.<sup>111</sup>

107. *Id.* at 145. See also Louis H. Willenken, *Discovery in Aid of Arbitration*, LITIG., Winter 1980, at 16; McCabe, *supra* note 94.

108. FACT-FINDING BEFORE INTERNATIONAL TRIBUNALS, *supra* note 1, at vii.

109. *Mohajer-Shojaee v. Iran*, 25 IRAN-U.S. CL. TRIB. REP. at 201-11.

110. See, e.g., McCabe, *supra* note 94, at 519 n.124.

111. See, e.g., Seismograph Service Corp. NIOC, Case No. 443, Awd. No. 420-443-3 (Dec. 22, 1988)(concurring and dissenting opinion of Judge Brower complaining of the chamber's "clear and unexplained departure from rigorous evidentiary standards" which had been applied in other cases). For the ICJ's occasionally severe criticisms of the way arbitrators interpreted and carried out their mandate in a particular instance, see *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Sen.)*, 1991 I.C.J. 53 (Nov. 12). As for the ICJ itself, there is no shortage of criticism of its evidentiary and procedural practices. Schwebel and Franck (in this volume) are not the only ones who have cast doubt on the Court's abilities to handle complex facts. See, e.g., Tesón, *supra* note 62. And not all commentators have been as laudatory about the Court's fact-finding in the ELSI Case as Hightet. Compare Sean D. Murphy, *The ELSI Case: An Investment Dispute at the International Court of Justice*, 16 YALE J. INT'L L. 391 (1991) (but note that Mr. Murphy, who appeared on behalf of the United States in that case, is arguably as partisan as Hightet who appeared on behalf of Italy). Nor has the World Court been especially adept with respect to the handling of non-documentary forms of evidence. See, e.g., SANDIFER, *supra* note 4, at 341-42, 466-67 (critiquing the Court's handling of expert evidence in the South-West Africa Cases). For a severe critique of the Court's procedural decision to dismiss El Salvador's action to intervene at the early jurisdictional stages of the Nicaragua Case, see Christine Chinkin & Romana Sadurska, *The Anatomy of International Dispute Resolution*, 7 OHIO ST. J. DISP. RESOL. 39, 71-72 (1991).



Moreover, evidentiary flaws may undermine the subsequent enforcement of arbitration awards, particularly apart from the Iran-United States claims process, whenever domestic courts have the power to overturn arbitral awards for certain errors.<sup>112</sup>

To the extent that Carbonneau fears that supplementary rules would undermine arbitrator autonomy, the answer to the question of whether parties or arbitrators have greater autonomy in these proceedings is in the eye of the beholder. Not all evidentiary practices point in one direction on this issue. Sandifer has argued, for instance, that international tribunals' liberal admission of evidence puts parties in greater control of evidentiary issues as compared to domestic courts (with the "disadvantage of opening the door to carelessness and looseness" in dealing with these issues).<sup>113</sup>

Carbonneau also discusses arbitration as an undifferentiated mass—as if all arbitral settings present the same choices between adversarial and non-adversarial processes. Neither he nor those whose views he opposes<sup>114</sup> discuss the possibility that the Iran-United States Claims Tribunal, an admittedly unique institution, may present a different set of challenges. In particular, Carbonneau's view that "trust must be vested in the arbitrators to control the process and to provide sanctions for a party's breach of its adjudicatory commitment and duty"—while perhaps sound as applied to some bilateral ad hoc arbitrations between consenting parties—sounds far-fetched as applied to the Iran-United States Claims Tribunal. That Tribunal was created in an atmosphere of severe mistrust and its institutionalization reflects its origins. The Tribunal is today an institutionalized process for the resolution of thousands of disputes among three separate chambers of arbitrators in existence for over a decade. The dynamics of such an institutionalized mechanism—where arbitrators might be tempted to trade off one case for another, where entire categories of claims might be decided by one procedural or evidentiary decision, where no possible alternative fora exist, where enforcement of any subsequent award is reasonably certain with little possibility for resort

---

112. Alan R. Gilbert, Annotation, *Refusal of Arbitrators to Receive Evidence, or to Permit Briefs or Arguments, on Particular Issues, as Grounds for Relief From Award*, 75 A.L.R.3d 132 (1977). Compare UNCITRAL art. 36(1) (permitting correction of award due to "errors in computation, any clerical or typographical errors, or any errors of a similar nature"); McCabe, *supra* note 94, at 528. See also Park, *supra* note 75, at 707 (arguing in favor of such review by domestic courts on the grounds that the "goals of speed and finality sought by winners" should not be pursued at "the expense of procedural fairness expected by losers").

113. SANDIFER, *supra* note 4, at 42.

114. See, e.g., BARRY E. CARTER & PHILLIP R. TRIMBLE, *INTERNATIONAL LAW* 56-75 (1991).

to power external to the Tribunal,<sup>115</sup> and where the parties are conditioned to make arguments based on prior Tribunal (or at least Chamber) precedents—are perhaps more similar to those operating in domestic tribunals than to those governing non-institutionalized arbitrations.<sup>116</sup> Further, the full Tribunal already modified the UNCITRAL rules in light of comments by the United States and Iran when the Tribunal was first established;<sup>117</sup> that these rules might need to be further modified for use by that Tribunal in light of its extensive practice and to create the conditions for more consistent application of evidentiary rules appears unexceptional. Indeed, the argument that the current version of the UNCITRAL rules now in use by the Tribunal is somehow sacrosanct goes against the consensual nature of arbitration; there are few limitations on parties' choices with respect to procedural or evidentiary rules.<sup>118</sup>

Whether similar or radically differing supplementation of the evidentiary rules before other international tribunals is advisable or needed can only be resolved on a tribunal by tribunal basis. Neither Carbonneau's overstated arguments against such changes nor other commentators' sometimes over-generalized arguments in favor of supplementary rules for *all* international tribunals are convincingly made.

Carbonneau's arguments are also unfortunate in that they discourage comparisons between domestic and international approaches to evidentiary issues. Since, for Carbonneau, arbitrators have little or nothing to learn from the "American-born due process cancer"<sup>119</sup> that pervades domestic adversarial proceedings, there is little point in engaging in comparisons between, for example, the Iran-United States Claims Tribunal's handling of hearsay and a U.S. federal court's, and no such discussions appear in this book. Most of the commentators here approach their tribunal's evidentiary questions as if they were unconnected to the domestic legal systems in which they operate or in which the arbitrators or judges were trained. Such a perspective deprives the book of a richness evident in

---

115. See Caron, *supra* note 83, at 129.

116. Nor is the Iran-United States Claims Tribunal the only institutionalized arbitral mechanism. For example, the United States-Canada Free Trade Agreement also contains such dispute settlement provisions. United States-Canada Free Trade Agreement, *reprinted in* JOHN D. RICHARD & RICHARD G. DEARDEN, *THE CANADA-U.S. FREE TRADE AGREEMENT: FINAL TEXT AND ANALYSIS* (1988). Cf. Holtzmann's claim that the Tribunal's fact-finding procedures "are not *sui generis*, but are rather a likely source of guidance in other arbitrations." Holtzmann, *supra* note 36, at 132.

117. See Caron, *supra* note 83, at 142-43.

118. Cf. *Petroleum Separating Co. v. Interamerican Refining Corp.*, 296 F.2d 124 (2d Cir. 1962) (suggesting that the parties should not have chosen to submit their dispute to arbitration had they wished to have exclusionary rules for hearsay apply).

119. Carbonneau, *supra* note 54, at 166.

Sandifer's text which is replete with references to whether international evidentiary rules more closely resemble common law or civil law approaches to the same question. Sandifer's justification for these references is that:

International tribunals, however, no matter how liberal they may be in the treatment of evidence as to matters of form, submission, and admissibility, are undoubtedly inclined to subject it to the tests the members of the tribunal are accustomed to use in evaluating its weight in the countries from which they come.<sup>120</sup>

The extensive practice of the Iran-United States Claims Tribunal and its diverse body of arbitrators would have been a productive place to test Sandifer's provocative thesis, and it is a shame that no such attempt is made here. In addition, Sandifer gives a general breakdown of the comparative influence of "Anglo-American" and "civil law" evidentiary concepts, suggesting that international tribunals' approaches to the admission of hearsay, the type of evidence preferred (written versus oral), the burden of proof, the taking of testimonial evidence, and the use of experts more closely parallels civil law procedure but that common law approaches prevail in the use of affidavits, the deference to party autonomy in the free production of evidence, the best evidence rule, and concepts of judicial notice.<sup>121</sup> Whether Sandifer's sweeping generalizations still hold true, at least in terms of the particular tribunals discussed here, would also have been an interesting question to address.<sup>122</sup> Carbonneau's harsh condemnation of the U.S. adversarial approach notwithstanding, this reviewer is not convinced that international judges and arbitrators have nothing to learn from, for example, U.S. courts' handling of evidentiary issues. As Wigmore once noted, both domestic

---

120. SANDIFER, *supra* note 4, at 13.

121. *Id.* at 468-69. The assumption that domestic rules influence international proceedings is not an unusual one. The International Bar Association's "Supplementary Rules Governing the Presentation and Reception of Evidence in International Commercial Arbitration" are expressly intended to apply to cases where "on party and its counsel come from a country whose system of law and procedure has its origins in the common law, and where the other party and its counsel come from a civil law and procedure country." *International Bar Association: Supplementary Rules Governing the Presentation and Reception of Evidence in International Commercial Arbitration*, 1 J. INT'L ARB. 349 (1984). Yet the closest one gets to domestic analogies in *Fact-Finding Before International Tribunals* are Selby's and Holtzmann's brief acknowledgements that Tribunal procedures owe something to both the common law and civil law traditions of the arbitrators. Holtzmann, *supra* note 36, at 133; Selby, *supra* note 40, at 137.

122. Useful comparative work such as Mirjan Damaska's *Of Hearsay and Its Analogues* at the international level would also lessen the current divide between groups of scholars (international/comparative, domestic/international) so detrimental to useful insight. Mirjan Damaska, *Of Hearsay and Its Analogues*, 76 MINN. L. REV. 425 (1992).

and international tribunals share the same basic underlying principles.<sup>123</sup> The purposes of the U.S. Federal Rules of Evidence, after all, are the same as those which Carbonneau affirms for international arbitration; they too are intended to avoid unjustifiable expense and delay, secure fairness, and promote a just resolution.<sup>124</sup> It would appear that all of us could learn even from the ways the operation of the Federal Rules of Evidence fall short of these goals.

\* \* \*

*Fact-Finding Before International Tribunals* is not a path-breaking book. The book is premised on distinctions between facts and law and between domestic and international adjudicative fora which raise more questions than the commentators attempt to answer. Despite the symposium format, most of the contributors in this volume cross in the night, without engaging one another or drawing comparisons across the various tribunals discussed. The authors of the ICJ chapters, for example, while sharing certain assumptions, do not challenge one another even when the opportunity presents itself. Surprisingly, notwithstanding the presumed differences between Schwebel and Highet concerning the relevant facts in the ELSI Case,<sup>125</sup> these two contributors' do not address their differences, despite the ostensible importance to the issue of accurate fact-finding by that Court. Moreover, the ICJ authors make no attempt to discuss the unique aspects of the ICJ in light of the contributions by others in this volume. Such comparisons probably would have been more intriguing than the subjects which are addressed here. Certainly, it is plausible to assume that the ICJ's jurisdiction, including its presumptive mandate to interpret the constitutive instrument of the world's foremost deliberative body, the United Nations, and that Court's special prestige and history, may impact on its fact-finding potential, as compared to a tribunal with a more limited, or a more "commercial" mandate, such as the Iran-United States Claims Tribunal or a binational panel under the Canada-U.S. Free Trade Agreement. The contributors' failure to take up the challenge of talking across these traditional divides, namely the one separating "commercial" arbitration of "private" international law from

---

123. SANDIFER, *supra* note 4, at 31 n.78, citing JOHN H. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 4n (3d ed. 1940). See also Holtzmann, *supra* note 36, at 132 ("[i]nternational arbitration is typically an exercise in comparative procedural law").

124. FED. R. EVID. 102.

125. Compare Schwebel's view of the facts in the ELSI Case, *Elettronica Sincula S.p.A. (ELSI)* (U.S. v. Italy), 1989 I.C.J. 15 (July 20) (dissenting opinion of Judge Schwebel) with Highet's views of these facts. Highet, *supra* note 3, at 33-79.

ICJ adjudication of “public” international law, casts doubt on the general conclusion that a *lex evidentiaria*, shared by all international tribunals, awaits discovery.

Nevertheless, because *Fact-Finding Before International Tribunals*, like Sandifer’s work, raises anew the possibility of such a *lex evidentiaria* lying in wait for those patient enough to wade in the relatively uncharted waters at the intersection of evidence and international law, the book is likely to prove tantalizing even to the skeptical. It is, after all, difficult not to be sympathetic about anything which could improve the prospects of international adjudication.

For the reasons suggested in this review, the dilemmas standing in the way of the approach taken by the contributors to this volume (and previously by Sandifer) are daunting. It may not be wise or feasible to begin the search for generalizable rules from the ground up, based on inductive analysis of recorded (and perhaps purposefully misleading) decisions rendered across diverse settings. As discussed here, it is also troublesome to premise the search on the simplistic assumption that rules which let the judges get the “facts” right are necessarily the best rules with which to encourage international adjudication or to improve compliance with existing decisions.

But as Selby and others in this volume, including Carbonneau, sometimes imply, we might begin from a different standpoint. We might assume that international adjudicative processes gain greater acceptance, credibility or legitimacy to the extent those subject to these processes regard them as procedurally fair. And if the process by which arbitrators or judges reach their outcomes is either as significant or more significant than the actual outcomes reached (i.e., whether the judge got the “facts” or the “law” right), perhaps a better way to discover generalizable rules might be deductive, inferring these rules from those factors most likely to produce proceedings which would be *perceived* as fair. Why not, then, look to those who have long been engaged in wide-ranging empirical work in social psychology designed to test the hypothesis that adjudicative decisions gain acceptance because of subjective judgments of procedural justice? At the very least, some of this work, which tests different procedures and techniques for resolving disputes from the perspective of peoples from different cultures, might provide us with valuable alternative perspectives on the types of evidentiary rules or procedures which might be expected to impact most positively on judgments about procedural justice. Tyler and Lind’s path-breaking survey of studies in this field, *The Social Psychology of Procedural*

*Justice*,<sup>126</sup> might be a useful starting point. Existing empirical work might suggest, for example, that among the factors likely to prompt favorable reactions to an adjudicative process are confidence in the competence of the judges, predictability in the rules, a high degree of party participation in the process, finality, low adjudication costs, and consistency. It might also suggest, alternatively, that even such conclusions at the highest levels of generality can only be made concerning some types of cases and under some types of circumstances. Either way, an analysis of how these factors relate to fact-finding procedures followed in international tribunals may ultimately lead to a worthy successor to Sandifer's work as well as to this volume.

---

126. E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988).