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Markus Benzing, Das Beweisrecht vor internationalen Gerichten und Schiedsgerichten in zwischenstaatlichen Streitigkeiten

Summary

I. Aim and Scope of the Study

The present study seeks to describe the law of evidence in inter-state disputes as applied by international courts from an analytical and systematic perspective. The purpose of the study is to provide a comprehensive overview of the current law of evidence, to clarify and critically comment on it, and finally, to propose ways in which the law might be further developed. To this end, the study analyses the various applicable statutes, the relevant rules of procedure, other procedural instruments and the case law of the main permanent international courts and tribunals which determine inter-state disputes. These include the International Court of Justice (ICJ), its predecessor, the Permanent Court of International Justice (PCIJ), the International Tribunal for the Law of the Sea (ITLOS) and the WTO Dispute Settlement Body (DSB). In addition, the decisions of the main arbitral tribunals and mixed claims commissions are included.

Other international courts, such as the Iran-US Claims Tribunal (IUSCT) the two active regional human rights courts (the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (IACtHR)), the *ad hoc* international criminal tribunals (International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR)) and the International Criminal Court (ICC) primarily deal with cases that do not involve two states as parties, but rather pronounce on individual rights or individual responsibility and hence operate in a different procedural setting. Nevertheless, their procedural documents and case law are also examined in this study in order to be able to draw a comparison to the procedural rules applied in inter-state disputes.

The study seeks to identify common evidentiary rules and principles applicable in all inter-state judicial disputes, regardless of which international court or tribunal may be seized of the matter. In doing so, the starting point for the study is an analysis of the traditional sources of international law, i.e. international treaties (the statutes of the courts, including inherent or implied powers under such treaties) and the secondary procedural law made by the judicial bodies pursuant to those

treaties (the rules of procedure and other instruments, such as practice directions and codes of conduct), as well as customary international law and general principles of law. In addition, the study specifically examines the role of judicial law-making in procedural law in general and in evidentiary law in particular.

II. The Status of the International Law of Evidence in Inter-State Disputes

While many academic commentators and practitioners past and present conclude that the law of evidence in inter-state disputes consists of a more or less complete and coherent set of rules, an analysis of the case law of the main permanent international courts and tribunals, as well as of arbitral decisions, reveals that there is no uniform and consistent understanding of the international law of evidence, or in fact of international procedural law in general. Some areas of the law of evidence may be considered settled and extensively analysed, whilst others remain hotly debated or have yet to be analysed in depth. One possible reason for this may be that the constitutive instruments and procedural rules of international courts and tribunals are fragmentary in relation to evidentiary questions. In addition, international courts and tribunals have in the past either not been frequently called upon to decide on issues of evidence or have avoided ruling on such matters out of concern that this may impair the willingness of states to accept such judgments. An alternative explanation for the absence of a coherent approach to evidentiary law in inter-state disputes may be that international courts and parties traditionally have attached particular importance to flexibility in the application of international procedural law.

Therefore it is only with caution that one may refer to a truly uniform law of evidence valid for and binding on all international courts and arbitral tribunals seized of inter-state disputes. In many areas, the case law is only just beginning to slowly move towards a common approach. Some issues have only been addressed by individual courts, while other courts have not been confronted with, or have avoided pronouncing on, such issues. Consequently, the treatment of the law of evidence before international courts and tribunals is often inconsistent and unpredictable, which is particularly problematic from the point of view of the principles of a fair trial and a proper administration of justice. In addition, inconsistent and imprecise use of evidentiary terminology, as well

as the lack of comparative procedural analysis, exacerbate the difficulties in reaching consensus on a uniform body of evidentiary rules.

Nevertheless, a clear and steady trend can be discerned to the effect that international courts and tribunals are increasingly addressing evidentiary questions in greater depth and detail. The main reason for this may be a change in perception towards international judicial dispute settlement. In the past it may have seemed inappropriate for a state party to international judicial proceedings to challenge the arguments of the opposing party not only on legal, but also on factual grounds. However, in more recent cases, states are no longer simply contesting legal interpretations but have begun to question factual assertions put forward by the other side. This, together with a greater willingness of international courts to engage with evidentiary issues, and more animated academic debate, has given greater momentum to the development of the international law of evidence.

III. The Significance and Function of International Evidentiary Law

The law of evidence regulates the fact-finding process of international courts and tribunals. The fact-finding task is a fundamental element of the function of international courts. It enables courts to decide cases even when the parties cannot agree on the factual basis of the dispute. The aim of the law is to ensure that an international court has or may gain knowledge of all material facts in order to reach a well-reasoned decision and to establish rules which define when a fact may be regarded as proven. International evidentiary law, as international procedural law in general, has an auxiliary function in that it ultimately facilitates the enforcement of substantive international law.

Questions of evidence have increasingly gained in significance in recent years in international dispute settlement. The most controversial cases before the ICJ have involved heavily disputed factual grounds, such as the *Armed Activities on the Territory of the Congo* and the *Application of the Genocide Convention* cases. As the international legal system evolves into an increasingly consolidated and comprehensive set of rights and obligations, and as its subject matter scope expands, the role played by facts in determining a resolution to any case is likely to increase and consequently evidentiary questions will become subject to more intensive dispute between the parties.

A consistent and well-developed system of evidence contributes to a fair trial and the sound administration of justice. It is necessary for the legitimacy of international judgments and the effectiveness of international dispute settlement as a whole. If a judgment is rendered on the basis of a set of incomplete or insufficient facts, this may impair the willingness of states generally to abide by the rulings of an international court.

IV. Sources of the Law of Evidence in Inter-State Disputes

Up to now, the issue of the sources of the law of evidence in international law has not been extensively explored. While it is commonly agreed among academic commentators that treaties have the most potential to play a significant role in clarifying evidentiary law, most constitutional instruments of international courts and tribunals are silent as to this aspect. Some gaps left by treaty law can potentially be filled by reference to inherent or implied powers, with most international courts preferring to speak of inherent rather than implied powers when discussing their unwritten competences. Whichever term is used, the requirements for such powers are the same: A power is only inherent if it is necessary for the exercise of the jurisdiction of the court or tribunal, that is, the settlement of international disputes, and can only be recognised if it is not inconsistent with the object and purpose of the treaty establishing the court or tribunal. Inherent powers may be a useful tool in establishing a common law of evidence for international courts, as procedural competences and rules developed by one court under the doctrine of inherent powers may well be transferred to other courts of a similar jurisdictional type, e.g. from one court deciding inter-state disputes to another.

Many commentators suggest that the gaps in the international law of evidence which are left by treaty law may be filled by customary international law. However, the nature of customary international law means that it is ill-suited to fulfil such a purpose. On the one hand, procedural practice – including the gathering and assessment of evidence – is often made by international courts rather than states. On the other hand, the procedural practice of states is normally directed at the international court, not other states. Hence, one of the necessary elements of international customary law, that is the interaction between states (state practice), does not exist in the area of procedural law.

General principles of law are traditionally regarded as one of the main sources of the law of evidence in international disputes. Nevertheless, they also face considerable criticism. For instance, it is argued that the varying approaches which individual national legal orders take in their treatment of evidential principles prevents the establishment of a clear set of common rules. The case law of international courts has, however, made ample use of general principles of law in this area.

Judge-made law plays a pivotal role as a separate source of international evidentiary law. The main form of judge-made law is that of secondary procedural law enacted by international courts, whether in the form of "rules of procedure" or other instruments, such as practice directions or codes of conduct. Most international courts are vested with the authority to lay down rules of procedure (see Article 30 of the ICJ Statute, Article 16 of the ITLOS Statute, or Art. 17 (9) of the WTO Dispute Settlement Undertaking (DSU)). In addition, the case law of international courts plays a crucial role in the development of international procedural law generally, and the law of evidence in particular. Whilst most commentators agree that such case law is important for understanding evidentiary law, most would also concur with the traditional opinion that the judgments of international courts are not in themselves sources of international law. Such opinion seems to be supported by Article 38 (1) (d) of the ICJ Statute, which characterises judicial decisions as a "subsidiary means for the determination of rules of law". It is clear that an individual judgment of an international court cannot have the status of a source of international procedural law as there is no doctrine of precedent in international law. Nonetheless, a consistent procedural practice of international courts may well constitute a separate source of international procedural law in its own right, if states expressly or implicitly follow this consistent practice, for example by making reference to procedural precedents in their written and oral submissions.

V. General Principles of International Procedural Law

Inter-state international litigation is based on several generally accepted fundamental principles which also impact on the admissibility of the taking of evidence. International courts often refer to these tenets as "general principles of international procedural law". The most fundamental of these principles is the right to a fair trial which also applies to the inter-state process. Its basic element is the procedural equality of the

parties which is a consequence of the sovereign equality of states, and the right to be heard (*audiatur et altera pars*). Each party must be given the opportunity to present its legal and factual arguments and given the chance to adequately respond to the arguments of the opposing party. In terms of the law of evidence, this generally means that each party has a right to submit all relevant evidence, and must be granted access to the evidence of the opposing party in order to analyse it and formulate counter-arguments.

Unlike in international criminal law where the Prosecutor as an international organ decides to initiate proceedings, the principle of party autonomy in inter-state litigation means that it is the parties, rather than the international court or an independent organ, who bring a case to court and define the scope of the dispute. The international court must not go beyond what is requested by the parties (*ne ultra petita*). The parties also have the right to consensually end the proceedings.

The parties have a right to have their dispute decided by the international court, and to have access to the judicial reasoning which was relied on in order to reach the decision. Most international procedural systems also acknowledge the principle of public hearings (see, e.g., Article 46 ICJ Statute, Article 26 (2) ITLOS Statute). However, the same is not generally true for the WTO dispute settlement mechanism and international arbitral proceedings. Paragraph 2 of Appendix 3 to the DSU ("Working Procedures" for panels) states that the panel shall meet in closed session. However, panels have recently begun to open selected proceedings to the public.

Whilst all of the procedural principles described above are relevant to the taking of evidence, the pivotal question for the international law of evidence is how to allocate responsibilities and duties with respect to the gathering of evidence between the international court and the parties. Commentators and international judges alike have long disagreed as to whether international inter-state court proceedings follow an "adversarial" or "inquisitorial" model. National civil procedural models by and large offer three types of principles for determining the allocation of responsibility for fact-finding between the court and the parties: The first is a strictly adversarial model, where the court's role is mainly that of an impartial referee that will not seek to complete or otherwise influence the factual record. The second, the inquisitorial model, lies at the opposite side of the spectrum and generally gives the court the authority to gather evidence even on facts that the parties have not presented. Moreover, the court has the duty to actively investigate the factual circumstances of a case in order to achieve the most complete and accurate

understanding possible of the facts. The third model is a compromise between the adversarial and inquisitorial systems and is referred to as the modified adversarial model. It is based on the adversarial model in that the primary responsibility for gathering evidence lies with the parties, but at the same time the courts are given considerable competence with regard to eliciting the factual basis of the dispute. The modified adversarial model allows the court to discuss the legal and factual situation with the parties, to indicate which aspects of the dispute require further clarification and, more importantly, to order the production of evidence *ex officio*. The main difference to the inquisitorial model is that the court is not obliged to actively investigate the facts.

The procedural instruments and case law of international courts allow one to draw the conclusion that international procedural law in inter-state disputes largely follows a modified adversarial model. It is the parties who define the scope of the dispute and bear the primary responsibility for asserting and proving specific facts. Nevertheless, international courts have ample power to influence the taking of evidence *ex officio*; generally, all means of evidence gathering available in inter-state litigation can be invoked by the court of its own motion. For example, it is not required that the parties first enter a specific motion to order production of a document or hearing of a witness. Notwithstanding this, international courts are bound to the factual matrix as defined by the parties. This means that in general, the courts may not take into account facts that have not been presented by either party to the proceedings, are bound by mutually agreed facts, and must decide whether contested facts are sufficiently established by evidence.

Courts have a largely unfettered discretion in deciding whether to make use of their *ex officio* competences to gather evidence, that is, they may decide if and when to exercise their authority to request the parties to provide documents, to make use of experts or to call witnesses. They should, however, make more active use of their powers if the dispute in question relates to the interests of the international community as a whole, given that in such cases the dispute is not a merely a bilateral issue between the parties, but rather concerns multiple actors, both state and individual.

VI. Cooperation Duties in International Procedural Law

It is widely agreed that parties to inter-state disputes are obliged to cooperate in good faith. This duty, however, is too vague to have any

meaningful relevance in specific procedural situations, especially for the law of evidence. Nevertheless, the court may, in specific cases, define concrete duties of cooperation by issuing procedural orders. Such orders may also be made in relation to fact-finding. The most important example is that of discovery orders, i.e. orders directed to a party, at the request of the opposing party, to produce a particular document. Individual state legal systems have taken varying approaches to duties of cooperation in general, in particular to discovery obligations. Common law legal systems have more extensive disclosure obligations, while many civil law systems tend to adhere to the Roman law principle that no one is under an obligation to produce documents against his own interests (*nemo tenetur edere contra se*).

Early arbitral jurisprudence, especially of the American-Mexican General Claims Commission (*Parker* case), advocated a virtually unlimited duty on the parties to disclose all relevant facts and evidence. This rule, however, has not become incorporated in international procedural law. Instead, the duty to disclose documents adverse to a party's own interests has been defined more restrictively. In more recent international case law, it seems that a rule has begun to emerge to the effect that a party may be required by the court to produce a document even if it is detrimental to that party's case. A request for the production of documents by one party will, however, only be granted by the international court if that party has first made all necessary and reasonable efforts to secure possession of the relevant document itself. In addition, the other party may rely on evidentiary privileges. Such privileges, the applicability of which to a given case must be determined by the international court, include national security interests, confidential business information and attorney-client privilege. However, the case law and procedural practice of international courts are far from settled in this area. Requests for the production of documents are often treated in a relatively arbitrary manner. One recent example is the request made by Bosnia-Herzegovina for the production of unredacted documents by Serbia in the *Genocide* case. Needless to say, it is expected that inter-state disputes and academic literature will contribute to a further clarification of this area in the future.

VII. Implementation and Enforcement of the Law of Evidence

International procedural law in inter-state disputes recognises neither a generally accepted catalogue of duties of cooperation applicable to par-

ties or third states by international courts or tribunals, nor mechanisms for the enforcement of such duties. As a result, inter-state dispute settlement stands in contrast to international criminal law, where both the procedural law of the ad hoc tribunals and the ICC includes provisions for the cooperation between the court and UN member states or the parties to the ICC Statute. The only means of enforcing the law of evidence in inter-state disputes is generally made by drawing adverse inferences, for instance where a party does not produce a document that it has been ordered to disclose. However, international courts and tribunals have only rarely made use of this means of enforcement.

VIII. Taking of Evidence

1. Flexibility of International Courts and Tribunals in the Taking of Evidence

Traditionally, international courts and tribunals have adopted a flexible approach to the admission and taking of evidence. However, some international courts have in recent times made efforts to formalise their proceedings. One example is the ICJ, which has issued several practice directions. The parameters for the taking of evidence set by the procedural instruments of international courts and tribunals are scarce and are essentially set out by the courts individually in specific cases.

2. Issues that Need to be Proved before International Courts and Tribunals

Issues that need to be proved before international courts and tribunals are primarily the facts asserted by the parties. Facts which are not disputed between the parties, or are agreed upon by the parties, do not need to be proved. The same is true where the court takes judicial notice of the fact in question as it is of common knowledge, or where the party contesting a particular fact is estopped from doing so. It is generally accepted that courts are not bound by the facts established by other international courts or international organisations. This does not preclude that the conclusions of these international organs may have a high probative value and thus be influential on the decision making process.

According to the principle of *iura novit curia*, it is only the facts that need to be proved, while the law is already known to the court. While many international courts and academic commentators contend that

this principle is also one of international procedural law, a closer look reveals that such statements do not sufficiently take into consideration the structure of international law. Exceptions are required already when referring to the best-documented source of international law: treaties. The validity, scope and, to a certain extent, interpretation of an international treaty may be subject to proof. The question may also arise as to whether a party to a proceeding is bound by a specific provision of a treaty. With regard to customary international law, if the rule has not yet been recognised by international courts, a party asserting a rule is required to prove its constitutive elements, state practice and *opinio juris*. For regional international custom, it has long been accepted that a party relying on such a rule must prove its existence and scope.

IX. Means of Proof

There is no exhaustive list of means of proof in international procedural law. In principle, all types of evidence are admissible in international litigation, and it is for the judge to assess the evidentiary value of each individual piece of evidence. Equally, there is no hierarchy of different means of proof in international law.

The most common means of proof in international litigation resemble those used in most national legal systems. The most important and most frequently used is documentary evidence. Documentary evidence may range from media reports, reports by international organisations and NGOs, and maps to factual findings reached in the decisions of other international courts.

While the use of witness evidence has traditionally been scarce in inter-state litigation, it is increasingly gaining in importance, as demonstrated in the recent *Genocide* case decided by the ICJ. In this context, international courts and tribunals have generally considered hearsay evidence to be admissible. The fact that the witness cannot give first-hand evidence may, however, influence the probative weight given to such evidence. Written witness statements and affidavits are also admissible means of evidence in international litigation, even though their evidentiary value may be limited depending on the circumstances in which they were taken.

National legal systems disagree on the question of whether a party to the proceedings may be heard as a witness. However, the problem does not arise frequently in inter-state litigation, as heads of state, or other

organs representing the state, are rarely called upon to give testimony. International procedural law does not, however, contain a clear rule to the effect that parties or their legal representatives may not give testimony. Nevertheless, some international courts (especially the IUSCT) differentiate between the testimony given by so-called "interested persons", i.e. those who have a close relationship with one party, and others who appear to be neutral. The testimony of interested persons is often regarded as less reliable. Such a tendency can also be discerned in inter-state litigation. Public servants of states who are parties to the dispute are often regarded as potentially biased and hence their testimony, as well as written documentation prepared by them, may be subject to intense scrutiny by the international court.

Expert evidence is a traditional means of proof in international litigation and is mainly used in cases where scientific issues are in dispute. Different rules apply depending on whether the expert is one selected by a party or is called upon by the court itself. International courts generally have the authority to ask for an expert opinion *proprio motu*. The role of these experts is to assist the court in giving judgment upon the issues submitted to it for decision. The parties to the case are generally required to cooperate with the experts by providing them with all relevant information that they may request from them. International courts have emphasised, however, that the duty of deciding the case must in no way be delegated to the expert. The report prepared by the expert is merely to be considered and weighed by the court, taking into account all other available evidence. Nevertheless, evidence given by court-appointed experts will normally carry significant weight. Expert reports prepared for one party are more closely scrutinised by international courts as to their appropriate expertise and the conclusions they have reached.

Besides being a separate mechanism of international dispute settlement, inspections are also a recognised means of proof in international litigation (see, e.g., Article 50 of the ICJ Statute, and Article 82 of the ITLOS Statute). If the court requests a third party to undertake the inspection, the inspection bears great resemblance to the contribution of court-appointed experts. If the court itself conducts the inspection, the inspection is effectively a site visit, which is also an accepted, but equally rarely used means of proof.

In recent years, *amici curiae* have gained importance in international litigation. An *amicus curiae* may be defined as a person or institution with no legal interest in the dispute, but who provides the court with factual or legal information for academic, idealistic or economic inter-

ests, in order to assist the court in solving the dispute. The function of *amici curiae* is often regarded as being limited to addressing legal issues, but they may also play a role in fact-finding. Given that *amici curiae* generally have no legal interest in a dispute, there is no right of a person or institution to be heard as an *amicus*. The significance of *amicus curiae* submissions differs widely between international courts. While human rights courts, international criminal tribunals and ICSID tribunals have made increasingly frequent use of such submissions, the ICJ has only accepted briefs in advisory, not contentious proceedings.

X. Assessment and Evaluation of Evidence, Standard of Proof, Probative Value

1. Evaluation of Evidence

The evaluation and assessment of evidence is a field of international procedural law that has traditionally received little attention both from international courts and in the literature. The constitutional instruments and secondary procedural law of international courts typically do not contain any provisions on the issue. In the past, courts and commentators have often been satisfied to point out that international courts have a large discretion in evaluating the probative value of individual pieces of evidence. Recent years have witnessed a rising importance of evidentiary questions in international litigation; international courts have devoted more attention and consideration to the standards and procedure of evaluating evidence. There is also a growing sensitivity among international courts as to the need to justify their assessment and, in particular, to give reasons in the judgment. The basic rule agreed between international courts is that international courts may freely weigh the evidence before them, meaning that formal rules which would ascribe a particular evidentiary value to a defined means of evidence are lacking in the international legal system.

2. Standard of Proof

The question of the standard of proof in international litigation remains in a state of flux. The ICJ, for example, has recently leaned towards a standard of "clear and convincing evidence" as a default rule, whereas the facts underlying claims against a state involving charges of exceptional gravity (such as genocide) require the full conviction of the court,

which may arguably be taken to come close to a "beyond reasonable doubt" standard, normally found in national criminal law. WTO dispute settlement follows a somewhat singular route amongst international courts dealing with inter-state disputes. It first requires the complaining party to establish a *prima facie* case, which is defined as a "case which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the *prima facie* case"; a successful establishment of a *prima facie* case will raise a presumption in favour of its claim. The defending party then has to rebut this presumption. The case law of panels and the Appellate Body is not, however, entirely clear as to the standard of proof necessary to establish such a *prima facie* case. An analysis of the case law reveals that the WTO dispute settlement mechanism normally operates with a "preponderance of the evidence" or "balance of probabilities" test. Statements on the applicable standard of proof of other international courts and tribunals vary between the balance of probabilities and the full conviction of the court. Whatever standard of proof is adopted, the common underlying rule is that none of the tests refer to a statistical or mathematical probability, but rather focus on the personal conviction of the judge of the truth of the fact asserted.

3. Probative Value

While all courts make it clear that the assessment of evidence is not a rigidly defined procedure subject to strict formal rules, they have gradually developed certain parameters by which the probative value of individual pieces of evidence may be determined. How influential each piece of evidence is in proving particular facts will mainly depend on the reliability and neutrality of the source of such evidence. The testimony of an eyewitness will thus be of greater value than a hearsay statement. A document drafted immediately after the events in question will be more persuasive than one written long after the fact. Media reports may accordingly be of only limited value, depending on the quality of their underlying research and the reliability of their sources. Neutrality may be a decisive factor where persons interested in a particular version of the story give testimony, write press articles or compile NGO reports.

XI. Burden of Proof

1. Existence and Allocation of the Burden of Proof

Contrary to statements made in early arbitral awards, international procedural law clearly contains rules on the burden of proof. The burden of persuasion defines how the international court must decide if a fact cannot be proved, that is, when the court, having regard to the applicable standard of proof, is neither convinced of the existence nor the non-existence of a fact. In such a case, the court will decide the issue against the party who bears the burden of proof. The adversary principle prevailing in international litigation implies that each party also bears the burden of producing or presenting evidence in relation to those facts for which it has the burden of proof.

In principle, the allocation of the burden of proof follows the well-established principle of *actori incumbit probatio*. However, this generally accepted rule requires further clarification. First, it is clear that the allocation of the burden of proof is not influenced by the formal role of the parties in the proceedings, that is, it is independent from the role of the plaintiff or the respondent, as otherwise this would lead to arbitrary results. It is equally unsatisfactory to merely make the burden of proof dependent on which party alleges a particular fact. While this rule may lead to the correct outcome in most cases, the allocation of the burden of proof must be independent from both the formal status as well as the procedural behaviour of the parties.

A comparative analysis of national laws reveals that the burden of proof is generally determined by examining the substantive rule of law that the court is called upon to apply. A party will have to prove all facts essential or necessary to its case, that is, the facts which need to be established so that a rule favourable to that party can operate. The interpretation of which elements of a rule are essential or necessary in the way just described will begin with the text and structure of the norm as well as its context, but will also take into consideration certain normative criteria. Such criteria include an appraisal of the general probability of certain facts, as well as an analysis of which party invoked the judicial process, which party will benefit from a change in the existing state of affairs, and which party is in possession of the relevant information.

2. Alleviation and Shift of the Burden of Proof

Alleviation of the burden or standard of proof is a generally accepted feature in international procedural law; however, in practice international courts are inconsistent in their recognition and application of it. One definite rule that can be distilled from the case law of international courts is that a state may be held responsible by an international court for grave violations of international law even where the evidence is only of an indirect nature, for instance if the material evidence is located on the territory of the defendant.

A general lowering of the standard of proof to "*prima facie* evidence" can not be established from the case law of international courts in inter-state disputes. It occurs more frequently in dispute settlement mechanisms where an individual and a state are parties. The regional human rights courts, for instance, normally place a less onerous burden of proof on the individual in situations where he or she is typically not in the possession of the kind of proof necessary to meet the full burden of proof. In inter-state litigation, a party lacking information on facts with regard to which it bears the burden of proof may instead apply to the court for discovery. However, international courts have not yet developed a consistent approach to the requirements for such discovery requests.

The procedural tool available to courts of a "shifting of the burden of proof" in the sense of shifting the burden of persuasion is frequently referred to in the case law of international courts and in the literature; however, its meaning and requirements remain opaque. Most instances where courts or individual commentators perceive a shift in the burden of proof, upon closer inspection it turns out to be a lowering of the applicable standard of proof or another comparable technique. This holds particularly true for the so-called "*prima facie* case" as referred to by the WTO dispute settlement institutions. A genuine shift of the burden of persuasion does not occur if the complaining party has established a *prima facie* case. The international environmental law precautionary principle equally does not effect a shift in the burden of persuasion, but leads to a lowering of the required standard of proof.

XII. Outlook

The role of the law of evidence before international courts and tribunals in inter-state litigation will, in all likelihood, continue to gain in impor-

tance for international litigation. More and more cases coming before international courts involve a widely disputed factual basis – which is often politically sensitive – and international courts themselves are showing a growing awareness of the fact that sound evidentiary principles are essential prerequisites to fair and just proceedings and judgments.

In this context it will be a major task for international courts and literature to further clarify and develop those aspects of the international law of evidence in inter-state litigation which remain vague and ill-defined. In particular, aspects such as discovery requests by a party, the enforcement of evidentiary and other procedural decisions by international courts (including the question of the scope of cooperation duties of parties and third states), the existence and extent of evidentiary privileges, the standard of proof and a systematically sound theory of the allocation of the burden of proof will need to be addressed. Accordingly, the question of how to deal with a disparity of information between the parties is of particular importance.

Clarification of such questions is not to be expected from states. It is for international courts and tribunals to interpret and make use of their extensive powers in relation to fact-finding and the evaluation of evidence in a consistent manner. In doing so, they should place less emphasis on a construction of their procedural texts so as to intrude as little as possible on state sovereignty, and more emphasis on applying the principles of the sound administration of justice and fair trial more consistently to the evidentiary field. Several instruments which are already commonly used in other procedural settings may contribute to such development. For example, international courts dealing with inter-state disputes may be inspired by their international criminal law counterparts and enhance the evidentiary clarity and fairness of their proceedings by holding case or status conferences in which important procedural questions could be discussed in detail. Parties may be subsequently instructed as to the court's current view of the evidentiary situation, including the standard of proof applicable to different aspects of the case. Such an approach would not only be beneficial to procedural fairness but may well also contribute to reducing the length of proceedings. Important conclusions or further procedural advice by the court could be documented in separate procedural decisions. It is vital that all actors in international litigation are aware that the international law of evidence is of paramount importance for the legitimacy of international judgments and the international dispute settlement system as a whole. The further

development and clarification of international evidentiary law is thus a fundamental task of international courts and academic commentators.