4. SPECIAL DIFFICULTIES OF INTERNATIONAL TRIBUNAL PROCEDURE

B. The Burden of Proof

Article 24(1) of the UNCITRAL Rules, which the Tribunal adopted intact, provides that "Each party shall have the burden of proving the facts relied on to support his claim or defence." This language leaves open the question: what is the burden of proof? Article 24(6), as noted above, provides that the arbitrators "shall determine the admissibility, relevance, materiality and weight of the evidence offered." Under these circumstances, the concept of a quantum of proof required is elusive, if not illusory. The fact seems to be that, as stated by a former president of the Tribunal, "the burden of proof is that you have to convince me." Sandifer quotes Umpire Duffield in the Faber case, before the German-Venezuelan Mixed Claims Commission of 1903, to similar effect, that "he would feel disposed to act upon whatever evidence satisfied his mind as to the actual facts."25

This ultimate primacy of the arbitrator's judgment is not simply a question of failure to articulate standards or develop procedures. It also reflects the nature of arbitration, in which the award is "final and binding" and not subject to appeal. Sandifer argues persuasively for the existence of a general rule, whether or not specifically expressed in governing rules procedure, that arbitrators may use their discretion in freely evaluating the evidence.26 He cites, for example, a case in which there was a form of appeal-Nicaragua's challenge to an arbitral award rendered by the King of Spain, brought before the International Court of Justice. The Court viewed the arbitrator's factual judgment as essentially unreviewable:

"The instances of "essential error" that Nicaragua has brought to the notice of the Court amount to no more than evaluation of documents and of other evidence submitted to the arbitrator. The appraisal of the probative value of documents and evidence appertained to the discretionary power of the arbitrator and is not open to question."27

25 D. SANDIFER, supra note 22, at 9-10.
26 Id. at 15-22.
27 Id. at 22, quoting from Arbitral Award Made by the King of Spain on 23 December 1906, 1960 I.C.J. 192, 215-16 (Judgment of November 10).
XII.1 - Distribution of burden of proof