## Contents

Table of Cases	xvii
List of Abbreviations	xxxiii
· **	
Introduction	1
I. Background	1
II. Outline of the Book	4
1 Optimizing the Process of Fact-Finding	9
Introduction	9
<ul> <li>I. Legal Adjudication and the Process of Fact-Finding</li> <li>A. The goals of legal adjudication 10</li> <li>B. Optimization of goals 17</li> </ul>	10
C. Managing uncertainty and the risk of error 19 II. The WTO Dispute Settlement System	21
<ul> <li>A. A system of legal adjudication 21</li> <li>B. The goals/values of the system 28</li> <li>C. The institutional and procedural framework 42</li> </ul>	
Concluding Remarks	66
2 Basic Concepts	68
Introduction	68
I. The Concept of the Burden of Proof	70
<ul> <li>A. General scope 70</li> <li>B. Differences between the common law and the civil law</li> <li>C. Proceedings before international courts and tribunals</li> <li>D. Does the burden of proof shift? 83</li> </ul>	(E)
II. Standard of Proof	86
<ul> <li>A. General scope 86</li> <li>B. Differences between common law and civil law systems</li> <li>C. Proceedings before international courts and tribunals</li> </ul>	
III. Presumptions	93
<ul><li>A. General scope 93</li><li>B. International law including WTO law 96</li></ul>	
Concluding Remarks	101
3 Functioning of the Burden of Proof	103
Introduction	103
I. The 'Prima Facie Case' or 'Presumption' Approach	105

	A. Exploring the meaning of 'prima facie case' 105	
	B. The uses of a 'prima facie case' in WTO dispute settlement 108	
	C. Concluding remarks on the meaning of 'prima facie case' 132	
	II. The 'holistic' or 'weighing of all evidence' approach	132
	A. What is the holistic approach? 132	
	B. The favoured approach for WTO dispute settlement 135	
	III. The Standard of Proof for WTO Dispute Settlement	137
		13/
	A. The importance of setting a standard of proof 137	
	B. Considerations when setting the standard of proof 138	
	C. Is the <i>prima facie</i> case standard ever optimal? 142	1 /0
	Concluding Remarks	149
4	The Allocation of the Burden of Proof	151
	Introduction	151
	I. The Current Status of the WTO Rules	152
	A. The problem at issue 152	1 ) 2
	B. The WTO jurisprudence 155	
	II. Critique of the WTO Jurisprudence	168
	A. Have panels and the Appellate Body been consistent? 168	100
	B. Are the criteria relied upon effective? 179	
	III. What are the Alternatives?	190
	A. A look at domestic and international law 190	1)0
	B. Can law and economics analysis help? 199	
	C. What are the options for the WTO dispute settlement system? 20	2
	D. India—Additional Import Duties: a paradigm shift? 215	
	IV. Allocation of the Burden of Proof in Article 21.5 of the DSU	
		217
	Compliance Cases	217
	A. 'Regular' Article 21.5 proceedings 218	
	B. Post-suspension of concessions Article 21.5 proceedings 219	222
	Concluding Remarks	223
	Annex: Text of Relevant Provisions from WTO Agreements	225
5	The Main Actors in the Process of Fact-Finding and the	
)	Development of the Factual Record	231
	Introduction	231
	I. The Panel as a Reviewer	233
	A. Trade remedies agreements 233	
	B. SPS and TBT Agreements 239	
	C. Final considerations 245	
	II. The Panel as the Original-Trier-of-Facts	246
	A. Context: institutional and procedural framework 246	
	B. The role of the disputing parties 250	

Conclusion	
The route to optimizing the process of fact-finding	
Conceptual clarity	
The prima facie case requirement	
The standard of proof for WTO dispute settlement	
Determining that the standard of proof is met	
Allocation of the burden of proof	
Burden of pleading	
Avoiding decisions based on the burden of proof	
Duty of cooperation	
The role of the panel in promoting cooperation	
Alternatives to managing asymmetries of information	
Confidential information	
Panel-controlled disclosure	
Active panel	
Final considerations and way forward	
Appendix: Understanding on Rules and Procedures Governing	
the Settlement of Disputes	
Bibliography	
Index	4