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Principles of evidence in investor-state arbitration: burden, standards, presumptions & inferences

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PRINCIPLES OF EVIDENCE IN INVESTOR-STATE ARBITRATION

Burden, Standards, Presumptions, & Inferences

Kabir A.N. Duggal

PRINCIPLES OF EVIDENCE IN INVESTOR-STATE ARBITRATION:

Burden, Standards, Presumptions, & Inferences

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Prof. dr. C.J. Tams (University of Glasgow, U.K.)

Opdracht

To my parents who always wanted me to undertake research

and

To Dr. Joseph F. Moll who has encouraged me to do so

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CHAPTER 1—INTRODUCTION AND BACKGROUND TO EVIDENTIARY PRINCIPLES IN INVESTOR-STATE ARBITRATION

I. BACKGROUND

Investor-state arbitration, as a species of international dispute resolution, has acquired special significance in recent years. On the one hand, the recent US$50 billion award against Russia in the *Yukos* arbitration demonstrates the far-reaching powers of an investor-state arbitral tribunal.[1] On the other hand, there is an ongoing debate relating to the power of (typically) three unelected individuals—the arbitral tribunal—who review decisions of lawfully-elected representatives in matters that touch upon a state's sovereignty.[2]

Evidentiary principles are emblematic of discretion that an arbitral tribunal possesses. Indeed, most international arbitral rules do not provide detailed guidance on evidentiary standards[3] leaving it to the discretion of the arbitral tribunal.[4] The

[1] See generally *Yukos Universal Limited (Isle of Man) v The Russian Federation*, UNCITRAL, PCA Case No. AA 227, Final Award (18 July 2014).

[2] See eg '*Profiting From Injustice: How Law Firms, Arbitrators And Financiers Are Fuelling An Investment Arbitration Boom*' (Corporate Europe Observatory and the Transnational Institute 2012) 11 ("These cases take place before an international tribunal of arbitrators, three people who decide whether private profits or the public interest are the most important. Across the world these tribunals have granted big business millions of dollars from taxpayers' pockets – often in compensation for the alleged impact on company profits of democratically made laws that protect the environment, public health or social well-being.").

[3] The lack of evidentiary rules is not unique to investor-state arbitration but to international law more generally. The International Law Commission (ILC) in considering the need to study evidentiary rules before international courts and tribunals noted: "The rules of international courts and tribunals and their constitutive instruments do not address evidence in detail. They make only a general reference to evidence in the form of timelines and presentation. They do not contain any reference to the kinds of evidence, presentation, handling, assessment and conclusions to be drawn from the evidence. Judicial practices of different courts and tribunals have developed rules of evidence that go beyond existing rules of international courts and tribunals." See Report on the work of the sixty-ninth session (2017), A/72/10, International Law Commission, Annex B (Evidence Before International Courts and Tribunals), ¶ 6.

[4] This could perhaps be a consequence of the belief that arbitration rules should be flexible. Flexibility is often reflected as one of the principle advantages of arbitration over domestic litigation. See eg *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration* (2015), Queen

International Center for the Settlement of Investment Disputes (ICSID), for example, is a popular institution for resolving investor-state disputes.[5] Article 43 of the ICSID Convention is the only provision of the ICSID Convention dealing with evidentiary matters and states that the arbitral tribunal may, provided the parties have not agreed otherwise, "call upon the parties to produce documents or other evidence" and "visit the scene connected with the dispute and conduct such inquiries there as it may deem appropriate."[6] The ICSID Arbitration Rules, which supplement the ICSID Convention, add that the tribunal "shall be the judge of the admissibility of any evidence adduced and of its probative value" and that the tribunal "shall take formal note of the failure of a party to comply with its [evidentiary] obligations."[7] Therefore, the ICSID Convention and the ICSID Arbitration Rules, in essence, leave evidentiary matters, dealing with issues such as the admissibility of evidence, or the probative value of evidence, or document production requests, to the discretion of the arbitral tribunal.

Other arbitration rules are to the same effect. For example, the 2010 United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules has only one provision dealing with evidence, that provides, *inter alia*, that the arbitral tribunal "may require the parties to produce documents, exhibits or other evidence within such period of time as the arbitral tribunal shall determine" and "[t]he arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered."[8] Similarly, the 2012 International Chamber of Commerce (ICC) Arbitration Rules provides that the arbitral tribunal "may summon any party to provide additional evidence" and that "after

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Mary University of London, p. 6 ("The popularity of arbitration may better be understood by reference to the specific characteristics of international arbitration that respondents find most valuable. Unsurprisingly, 'enforceability of awards' and 'avoiding specific legal systems/national courts' were most frequently chosen, followed by 'flexibility' and 'selection of arbitrators'.") (emphasis added). Detailed rules of evidence might, therefore, constrain the very flexibility arbitration promises to provide.

[5] See generally *About ICSID*, available at https://icsid.worldbank.org/en/Pages/about/default.aspx (last accessed 21 May 2017) ("ICSID is the world's leading institution devoted to international investment dispute settlement. It has extensive experience in this field, having administered the majority of all international investment cases. States have agreed on ICSID as a forum for investor-State dispute settlement in most international investment treaties and in numerous investment laws and contracts.").

[6] ICSID Convention, Article 43. See also Annex A to this Research which presents the evidentiary provisions under the leading arbitration rules.

[7] ICSID Arbitration Rules 34(1), (3). See also Annex A to this Research.

[8] 2013 UNCITRAL Arbitration Rules, Article 27(3)-(4). See also Annex A to this Research.

the proceedings are closed" no further evidence may be produced "unless requested or authorized by the arbitral tribunal."[9]

Finally, the 2017 Stockholm Chamber of Commerce (SCC) Arbitration Rules provides, *inter alia*, that the tribunal shall determine the "admissibility, relevance, materiality, and weight of evidence" and that the arbitral tribunal may "exceptionally" "order a party to produce any documents or other evidence that may be relevant to the case and material to its outcome."[10] Therefore, a common leitmotif in the arbitral rules is that evidentiary matters are left to the discretion of the arbitral tribunal that can determine the weight to be attached to evidence produced by parties and can call upon parties to produce additional evidence, if needed. No further guidance is provided on evidentiary issues.

Considering the lack of guidance on evidentiary issues, the International Bar Association (IBA) prepared the IBA Rules on the Taking of Evidence in International Arbitration (the IBA Rules on Evidence) towards providing certain baseline guidance to assist the evidentiary process.[11] In particular, the IBA Rules on Evidence offer guidance on matters such as "documents," "witness of facts," "party-appointed" and "tribunal-appointed" experts[12] and, further, provide some guidance to assist the tribunal on admitting and assessing evidence in general terms.[13] The IBA Rules of Evidence do

[9] 2017 ICC Arbitration Rules, Articles 25(5), Article 27. See also Annex A to this Research.

[10] 2017 Stockholm Chamber of Commerce Arbitration Rules, Article 31. See also Annex A to this Research.

[11] See Preamble to the International Bar Association (IBA) Rules on the Taking of Evidence in International Arbitration, Section 1, available at http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx# ("The IBA Rules on the Taking of Evidence in International Arbitration are intended to provide an efficient, economic and fair process for the taking of evidence in international arbitration, particularly those between Parties from different legal traditions."). The IBA Rules were first published in 1999. The revised version was published on 29 May 2010 (last accessed 20 May 2017). **Stop Press**: There is a current civil law attempt to create the Prague Rules on the Taking of Evidence as a civil law response to the IBA Rules. The Prague Rules are still in a draft form and, therefore, the research does not focus in any great detail on it, however, like the IBA Rules, the Prague Rules do not provide any guidance on evidentiary principles. Rather, they focus on similar ideas like the IBA Rules do but with a civil law perspective. See generally the Draft Prague Rules, available at http://praguerules.com/.

[12] See IBA Rules on Evidence: Article 3 on "Documents," Article 4 on "Witness of Facts," Article 5 on "Party-Appointed Experts," Article 6 on "Tribunal-Appointed Experts."

[13] See IBA Rules on Evidence, Article 9 (Admissibility and Assessment of Evidence).

not, however, address burdens or standards of proof or matters such as presumptions or inferences. For such matters, the IBA Rules on Evidence again provides for arbitral discretion noting that the arbitral conduct can "conduct the taking of evidence as it deems appropriate, in accordance with the general principles of the [IBA Rules]."[14]

There are two points worth discussing in relation to the wide discretion provided to a tribunal on evidentiary matters. First, even a cursory examination of investor-state cases demonstrate that they are frequently dismissed or determined on solely evidentiary grounds.[15] A few illustrations can help illustrate this point. In *Generation Ukraine v. Ukraine*, the tribunal dismissed the case because the investor—who had the burden of proof to establish damage caused to its investment by the actions of Ukraine—failed to meet its burden.[16] In *Lemire v. Ukraine*, the tribunal concluded that the evidence by the investor met the appropriate "preponderance" standard of proof to conclude that the Ukrainian state entity's actions were arbitrary and discriminatory.[17] Further, the *Atlantic Partners v. Poland* tribunal refused to infer any abuse of process by

[14] See IBA Rules on Evidence, Article 1(5) (emphasis added).

[15] The ILC notes this as well albeit in the context of international courts and tribunals more generally. See Report on the work of the sixty-ninth session (2017), A/72/10, International Law Commission, Annex B (Evidence Before International Courts and Tribunals), ¶ 3 ("Evidence could play a determinative role in an adjudicative process. According to Sir Gerald Fitzmaurice, the outcome of international litigation may in fact 'depend upon the accidents of large procedural or formal situations'.").

[16] *Generation Ukraine, Inc. v Ukraine*, ICSID Case No. ARB/00/9, Award (16 September 2003) [19.4] ("The Claimant thus embarks on its quest to discharge its burden of proof well and truly on the back foot and must make up significant ground before the factual reality of its investment can be accepted by this Tribunal. In these circumstances, one would expect that the Claimant would have done everything in its power to furnish the Tribunal with other forms of evidence to corroborate its statements on the nature and quantum of its expenditure in Ukraine. It transpired that the Claimant both comprehensively and conclusively failed to meet this expectation, and thus by the close of these proceedings was actually further from discharging its evidential burden than at the starting point.") (emphasis added).

[17] *Joseph C. Lemire v Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability (21 January 2010) [369] ("The Tribunal must decide whether the National Council's decision in May 26, 2004, denying Gala the AM frequency in Kyiv, and then immediately thereafter retendering the frequency, and awarding it in December 2004 to NART TV, violates the FET standard, by constituting an arbitrary or discriminatory measure. After due consideration, and not without some hesitation, the Tribunal comes to the conclusion that there is a preponderance of evidence showing that the National Council's decisions indeed were arbitrary and discriminatory.") (emphasis added). See also *Tulip Real Estate Investment and Development Netherlands B.V. v Republic of Turkey*, ICSID Case No. ARB/11/28, Award (10 March 2014) [323-324] ("There is also no evidence that the decision to terminate the Contract was made under the direction, instructions or control of Turkey's Supreme Audit Board (an entity that the Parties accept is an organ of the State). Rather, the Tribunal concludes that Emlak [state entity] was acting in what it perceived to be its commercial best interest in terminating the Contract.") (emphasis added).

the investor, when the state has itself admitted that there was no such abuse.[18] Finally, the *Quasar v. Russia* tribunal noted that state conduct is *presumed* to be *bona fide* unless contrary evidence can be established.[19] All these decisions were decided on evidentiary principles even though the arbitral rules themselves do not provide for specific rules on burden of standard of proof, inferences, or presumptions respectively. However, critics point out that the lack of guidance on evidentiary matters can be problematic because it provides a tribunal with broad discretion.[20] The risk that one has with providing a tribunal with such broad discretion is that it may be exercised in an *ad hoc* manner with like cases being decided differently.

The second point is that the approach to evidence in investor-state arbitration is in sharp contrast to that in domestic law. Indeed, domestic law often provides for detailed and comprehensive rules of evidence. The U.S. Federal Rules of Evidence is comprised of 67 rules divided into 11 articles covering a whole host of evidentiary issues including judicial notice, rules relating to relevance, privileges, witnesses, opinions/expert testimony, hearsay, authentication and identification rules, and miscellaneous rules.[21] Importantly, for the purposes of this research, the Federal Rules

[18] *Vincent J. Ryan, Schooner Capital LLC, and Atlantic Investment Partners LLC v Republic of Poland*, ICSID Case No. ARB(AF)/11/3, Award (24 November 2015) [204] ("Having carefully considered the evidence tendered by the Parties, the Tribunal concludes that there is no evidence on the record of any abuse of international investment protection in the present case. In fact, the Respondent itself appears to have conceded this point by admitting that 'the shareholding of Atlantic has not been intended by the Claimants to open a path to an international treaty claim, but instead to interfere in the domestic legal proceedings in Poland.' The Tribunal is, therefore, not persuaded by and dismisses the Respondent's first objection to the Tribunal's jurisdiction.")

[19] *Quasar de Valors SICAV S.A. et al. v Russian Federation*, SCC Case No. 24/2007, Award (20 July 2012) [181] ("the presumption must be that measures are bona fide, unless there is convincing evidence that, upon a true characterisation, they constitute a taking. Given the infinite variety of forms which can be given to a process having the result of expropriation, the effectiveness of the rule of international law in this regard necessarily requires, in each case, a comprehensive assessment of the factual circumstances that have led to the loss of which a claimant complains.") (emphasis added).

[20] See eg '*Profiting From Injustice: How Law Firms, Arbitrators And Financiers Are Fuelling An Investment Arbitration Boom*' (Corporate Europe Observatory and the Transnational Institute 2012) (n 2) 22 ("It is this 'lack of rules and regulations to consult' that leaves many young lawyers who enter the field of international arbitration 'feeling almost queasy,' according to [Global Arbitration Review]. 'They're disoriented to be in a world where case procedure can be entirely *ad hoc*.' International arbitration does not even look like a legal proceeding.").

[21] See U.S. Federal Rules of Evidence, available at https://www.law.cornell.edu/rules/fre (last accessed 20 May 2017).

of Evidence provide guidance on burdens, standards, presumptions, and inferences.[22] Similarly, the Indian Evidence Act of 1872 is divided into three parts, 11 chapters, and 167 sections and has specific provisions, *inter alia*, addressing burdens, standards, presumptions, and inferences.[23] Civil law countries are no different in this regard.[24] In

[22] For example, the Federal Rules of Evidence provides for a presumption in relation to the burden of proof. For example, Rule 301 provides: "In a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally." Article III of the Federal Rules of Evidence deals with "Presumptions" under Rules 301 and 302, while Rule 52 deals with "Findings and Conclusions by the Court, Judgment on Partial Findings," which enables a court to make findings through inferences. The standard of proof is often spelled out in the provision addressing a particular evidentiary topic, for example, Rule 501, for example, provides that the standard of proof for privileges shall be determined according to state law. The standard of proof is often further supplemented by court decisions (as with most common law countries), and by the U.S. Constitution (particularly for criminal matters).

[23] See Indian Evidence Act (1872), available at http://ncw.nic.in/Acts/THEINDIANEVIDENCEACT1872.pdf (last accessed 20 May 2017). The Indian Evidence Act defines burden of proof under Section 101 as follows: "Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person." Sections 102 to 111 explain burden of proof in different situations. Section 4 of the Indian Evidence Act deals with three kinds of presumptions: Discretionary presumptions, Mandatory presumptions, and Conclusive Proof. Further, several provisions addressing different kinds of presumptions are found in Sections 111A to 114A. Section 114(g) deals with an adverse inference when it provides: "The Court may presume . . . (g) that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it." The standard of proof is spread across different provisions and is further supplemented by court decisions, as a common law country, and by the Constitution of India, particularly for criminal matters. For example, for a civil matter, a "Fact is said to be proved" when, *inter alia*, "its existence [is] so probable that prudent man" would agree on its existence. See Indian Evidence Act, Section 3 (emphasis added). This definition, therefore, encapsulates the "balance of probabilities" test.

[24] See eg German Code of Civil Procedure, Section 292 (dealing with "Legal Presumptions"), Section 286 (dealing with the "inner conviction" standard for civil matter). See Code of Civil Procedure as promulgated on 5 December 2005, available at https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html (last accessed 28 May 2017). Commentators have also clarified that the burden of proof is on the party making the allegation under the German Code of Civil Procedure. See eg Christian Wolf and Nicola Zeibeg, *Evidence in Civil Law—Germany* (Lex Localis 2015) 31 ("There is a general rule on the burden of proof in German civil procedure that each party shall have the burden of proving the facts it relied on to support its claim or defense. In the situation that the taking of evidence does not lead to a clear result the court has nevertheless to decide the case. Hence, in such a non-liquet situation the court has to rule according to the objective burden of proof ('*objektive Beweislast*') and decide against the party who bears the objective burden of proof."). See also Swiss Civil Procedure Code, Article 154 (which requires a court to indicate which party has the burden of proof or counter-proof), Article 21 (dealing with declaration of *presumed* death), Article 162 (stating that a court cannot *infer* that a fact is proven by a party's refusal to cooperate), available at https://www.admin.ch/opc/en/classified-compilation/20061121/201701010000/272.pdf (last accessed 28 May 2017).

contrast, the arbitration rules, as noted above, do not address evidentiary matters in any detail, often leaving these matters to a tribunal's discretion.[25]

Practically speaking, the term "evidence" could encompass three broad sets of issues: (i) the first are issues that relate to the presentation of evidence to the decision-maker. These would deal with matters such as documentary evidence and or witness/expert testimony and how these matters may be presented to the arbitral tribunal. These issues may appropriately fall entirely within a tribunal's discretion pursuant to the various arbitration rules discussed above because a tribunal can determine these issues on the specific needs of a case (*e.g.*, a tribunal may accept only electronic copies if the amount in dispute is not too large or if there are not too many documents). These matters may also receive clarifications through the IBA Rules on Evidence.[26] Therefore, for such issues, there is sufficient guidance available.

(ii) The second set of issues that fall within the scope of the term "evidence" are those relating to the admissibility and assessment of evidence by the decision-maker. As discussed above, the arbitral rules leave these matters to the discretion of the tribunal and again guidance is also available under the IBA Rules of Evidence.

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[25] Commentators have also made similar findings. See eg Mojtaba Kazazi, *Burden of Proof and Related Issues: A Study on Evidence Before International Tribunals* (Kluwer Law International 1996) 3 ("Contrary to municipal law, there are no detailed and complex rules of evidence in international procedure, nor is there a supreme power to impose such rules on states as parties to international proceedings."); Nigel Blackaby *et al*, *Redfern and Hunter on International Arbitration* (6th edn, Oxford University Press 2015) [1.77] ("There are no compulsory rules of procedure in international arbitration, no volumes containing 'the rules of court' to govern the conduct of the arbitration."); David D. Caron & Lee Caplan, *The UNCITRAL Arbitration Rules: A Commentary* (Oxford University Press 2013) 571-572 ("Article 27(4) is a cornerstone evidentiary rule, which appears in identical form in both the 1976 and 2013 UNCITRAL Rules. This provision makes clear that rigid rules of evidence are unsuitable for international arbitral proceedings. Instead, as emphasized in the *travaux préparatoires* of the 1976 UNCITRAL Rules, '[i]n making rulings on the evidence, arbitrators should enjoy the greatest possible freedom and they are therefore freed from having to observe the strict legal rules of evidence'."); Charles N. Brower, 'Evidence Before International Tribunals: The Need for Some Standard Rules', 28 International Law 1994 47 ("International law has no hard and fast rules governing the character or weight of evidence in international arbitrations. Further, proceedings before arbitral tribunals are subject to no 'international rules of evidence' that in any manner resemble the technical rules often followed in proceedings before domestic courts-in particular, courts of the Anglo-American tradition.").

[26] Commentators have made similar observations. Chittharanjan F. Amerasinghe, *Evidence in International Litigation* (Martinus Nijhoff Publishers 2005) 11 ("attached are Rules of or for arbitral tribunals. These written provisions, it is apparent, are generally confined to specific matters such as documentation and its production, witnesses (whether they give evidence in writing or orally), use of experts and inquiry. They do not, as a rule, deal with such fundamental matters as the burden of proof (or, if relevant, the burden of evidence).").

(iii) The third set of issues are principles of evidence that help a tribunal ultimately decide issues and resolve the dispute. These would be evidentiary matters such as burdens and standards of proof, presumptions, inferences and the like. There is very little guidance on these matters from either arbitral rules or from soft law rules such as the IBA Rules on Evidence. Domestic law, as noted above, often addresses these issues in considerable detail.

The table below demonstrates how the leading arbitral rules address these evidentiary principles:

Figure 1.1: **Arbitration Rules and Evidentiary Principles**

CATEGORY	**Tribunal's ability to order production of evidence**	**Tribunal's free assessment of Evidence**	**Burden of Proof**	**Standard of Proof**	**Presumptions or Inferences**
ICSID	Yes (Convention, Art. 43; Rule 34)	Yes (Rule 34)	Not addressed	Not addressed	Not addressed
2013 UNCITRAL Rules	Yes (Art. 27)	Yes (Art. 27)	Yes (Art. 27)	Not addressed	Not addressed
2017 ICC Rules	Yes (Art. 25)	Not addressed	Not addressed	Not addressed	Not addressed
2017 SCC Rules	Yes (Art. 31(2))	Yes (Art. 31(1))	Not addressed	Not addressed	Not addressed

The research is concerned with this third category of issues that fall within the scope of the term "evidence," because as is evident from the chart above, these matters have

not been addressed in the arbitration rules. For these matters, however, there do appear to be certain general principles of evidence beyond those expressly spelled out in the arbitral rules. Professor Schreuer, in his leading commentary to the ICSID Convention, for example notes:

> The taking and evaluation of evidence is a crucial aspect of fair and impartial judicial proceedings. Failure to abide by the relevant standards, as contained in the Arbitration Rules but also in general principles of law, may expose an award to annulment on the ground that there has been a serious departure from a fundamental rule of procedure in accordance with Art. 52(1)(d) of the Convention.[27]

There are two noteworthy points that can be derived from Professor Schreuer's commentary. First, evidentiary matters are not restricted merely to arbitral rules but are also subject to certain "general principles," which as noted above, are reflected in the decisions of investor-state arbitral tribunals. And, second, the failure to respect these evidentiary principles may have severe consequences for an award, including the non-recognition and enforcement of the arbitral award. This could be annulment in the context of the ICSID Convention or non-recognition or non-enforcement of an arbitral award under the New York Convention. For example, the ICSID annulment mechanism deems awards a nullity to the extent that they have failed to grant the parties their right to be heard or treated them with anything but true equality.[28] Professor Schreuer further notes that reversing the burden of proof or applying incorrect evidentiary standards

[27] Christoph H. Schreuer *et al*, *The ICSID Convention: A Commentary* (Cambridge University Press 2009) 642 (emphasis added).

[28] See Article 52 of the ICSID Convention. See also R. Doak Bishop & Silvia Machili, *Annulment Under The ICSID Convention* (Oxford University Press 2012) 130-1 (discussing the pedigree of ICSID annulment for serious departure from a fundamental rule of procedure to apply to "only rules such as the 'right to be heard, including due opportunity to present proofs and arguments', as well as the 'right of parties to equal and impartial treatment' qualified as 'fundamental' for the purposes of that ground for annulment.); Christoph H. Schreuer *et al* (n 27) 903 ("Review of arbitral awards is designed to preserve the interests of the parties to the arbitration. Due to the essentially private nature of arbitration, this requirement may be satisfied through a control mechanism that ensures that the decision has remained within the framework of the parties' agreement to arbitrate and was reached by a process that was in accord with the basic requirements of a fair procedure."). The rationale for doing so is obvious—it ensures that a party is entitled to a "fair trial" which remains a core goal in any dispute resolution forum. See eg Chittharanjan F. Amerasinghe (n 26) 13 ("The broad basic general principle in respect of establishing facts, i.e., evidence, applied implicitly by international tribunals of whatever kind, is that the parties are entitled to a 'fair' trial.").

could be the basis for an annulment challenge.[29] Investor-state tribunals have made similar findings, for example, attempts to reverse the appropriate burden of proof,[30] or rely on inferences that are not clearly explained in the arbitral award,[31] can all be basis for a party to seek annulment. In a similar vein, the New York Convention, like the ICSID Convention, provides remedies to protect procedural and evidentiary principles.[32] Indeed, while tribunals do possess broad discretion, they are subject to certain general principles, which include evidentiary principles, as reflected in the famous observation by Bin Cheng:

> "[w]hile international tribunals are thus 'entirely free to estimate the value of statements made by the Parties', their activity in this regard is nevertheless governed by a number of general principles of law recognized by States *in foro domestico*."[33]

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[29] See Christoph H. Schreuer *et al* (n 27) 992 ("The [ICSID] Convention knows no formal rules of evidence. But parties have repeatedly attacked awards in annulment proceedings for the way they dealt with evidence and the burden of proof, alleging a serious departure from a fundamental rule of procedure.").

[30] See eg *Caratube International Oil Co v Kazakhstan*, ICSID Case No ARB/08/12, Decision on Annulment (21 February 2014) [97] ("A breach of the general principles on burden of proof can also lead to an infringement of Article 52(1)(d) [dealing with annulment on the grounds of a serious departure from a fundamental rule of procedure] of the Convention.").

[31] See eg *El Paso Energy International Co v Argentina*, ICSID Case No ARB/03/15, Decision on Annulment (22 September 2014) [220] ("the requirement to state reasons is intended to ensure that the Parties can understand the reasoning of the Tribunal, and also that a well-informed reader can understand the facts and the law by which the tribunal reached its conclusions."). Investor-state tribunals have recognized the risks in relying on inferences or circumstantial evidence more generally in this regard. See eg *Lao Holdings N.V. v Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/12/6, Decision on the Merits (10 June 2015) [11] ("The Tribunal notes the Claimant's contention that against a sovereign state a Claimant 'is often unable to furnish direct proof of facts giving rise to responsibility' because, as the Claimant argues, such evidence is often "exclusively within the control of the Government". Nevertheless where, as here, the Claimant's case is based on 'inferences of fact and circumstantial evidence' . . . a Tribunal must be careful not to shift the onus of proof from the Claimant to the Respondent Government or to bend over backwards to read in inferences against 'the sovereign state' that are simply not justified in the context of the whole case.") (emphasis added).

[32] See Article V of the New York Convention. See generally Nathan D. O' Malley, *Rules Of Evidence In International Arbitration: An Annotated Guide* (Informa 2012) 4-5 ("Starting with the fundamentals, it may be said that the very basic rules of evidence are those principles providing the definition of due process generally in international arbitration, which include a party's right to equal treatment and an opportunity to be heard. These principles are applied to most cases by virtue of the *lex arbitri*, and have been recognized by various *ad hoc* annulment committees in the ICSID system as fundamental principles of international procedure generally.").

[33] See Bin Cheng, *General Principles Of Law As Applied By International Courts And Tribunals* (Cambridge University Press 1987) 303 (emphasis added). Bin Cheng's Treatise discusses several such "general principles of law" which would squarely fall within the ambit of evidentiary principles. For

But, herein lies another problem—how is one to discern such general principles? Indeed, general principles are by their very nature vague and imprecise and may, therefore, not be able to offer ready guidance when real evidentiary problems arise.[34]

Further, statutes creating other international courts and tribunals do not offer much guidance on evidentiary principles as noted in the table below.

Figure 1.2: **International Bodies and Evidentiary Issues**

CATEGORY	Institution's Ability to Order Production of Evidence	Institution's Free Assessment of Evidence	Burden of Proof	Standard of Proof
Permanent Court of International Justice (PCIJ)[35]	Yes (Art. 48, 52)	Not addressed	Not addressed	Not addressed
International Court of Justice (ICJ)[36]	Yes (Art. 62, 66)	Not addressed	Not addressed	Not addressed
World Trade Organization (WTO)[37]	Yes (Art. 13)	Not addressed	Not addressed[38]	Not addressed

example, Chapter 13 is entitled "*Nemo Debet Esse Judex in Propria Sua Causa*" while Chapter 16 is entitled "Proof and Burden of Proof." Similarly, Sandifer notes that: "The ad hoc character of most international tribunals has further contributed to this slow development of a definite body of rules relating to evidence." Durward V. Sandifer, *Evidence Before International Tribunals* (University of Virginia Press 1975) 8 (emphasis added); Nathan D. O' Malley (n 32) 4 ("the leading institutional and *ad hoc* arbitration rules often give little more than cursory guidance concerning evidentiary procedure. That being said, there exists in international arbitration evidentiary rules that are commonly understood and applied despite the paucity of direct references to them in institutional and *ad hoc* arbitration rules.") (emphasis added).

[34] See eg Bin Cheng (n 33) 2-5 (discussing the wide debates on the term "general principles of law."

[35] Statute of the Permanent Court of International Justice (PCIJ), 16 December 1920 (Amended by the Protocol of September 14, 1929), *available at* http://www.icj-cij.org/files/permanent-court-of-international-justice/serie_D/D_01_4e_edition.pdf.

[36] Statute of the International Court of Justice (ICJ), 14 April 1978 (Amended on 14 April 2005).

[37] World Trade Organization (WTO), Dispute Settlement Understanding (DSU) Annex 2, Understanding on Rules and Procedures Governing the Settlement Of Disputes, *available at* https://www.wto.org/english/Tratop_e/dispu_e/dsu_e.htm.

Arbitral tribunals have, therefore, attempted to address evidentiary matters in a casuistic manner by articulating and substantiating the general principles on evidentiary matters. The object of the research is to examine how arbitral tribunals, faced with real, concrete cases, have resolved evidentiary issues, despite the lack of specific guidance in the arbitral rules. Indeed, examining the decisions of arbitral tribunals can meaningful shed light on these evidentiary principles. This can also help provide predictability in an area of the jurisprudence that is both uncertain and underappreciated. The question, therefore, is are there any evidentiary principles or does the entire evidentiary ambit fall within a tribunal's discretion. This is discussed in the Research Question below.

II. THE RESEARCH QUESTION

The research question of this thesis revolves around one central but fundamental inquiry: ***"Whether there are any principles of evidence as recognized and applied by investor-state tribunals or do the principles of evidence merely fall within a tribunal's discretionary powers?"***

There are several consequences that flow from this research question.

First, the research question seeks to identify and evaluate evidentiary principles relating to burden of proof, standard of proof, presumptions and inference. To extent such principles can be identified, the research question envisions evaluating and systematizing such principles towards providing predictability to the parties and guidance to arbitrators.[39]

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[38] See James H. Pfitzer & Sheila Sabune, Burden of Proof in WTO Dispute Settlement: Contemplating Preponderance of the Evidence, 9 ICTSD Dispute Settlement and Legal Aspects of Int'l Trade 6 (April 2009) (explaining that WTO DSU "incorporated at least two rules relevant to the burden of proof. . . [f]irst, the complaining party is required to prove all violations alleged by it. Second, a respondent who invokes general exceptions . . . is obliged to prove that the necessary requirements for the exceptions are satisfied."). See also Legal issues arising in WTO dispute settlement proceedings, WTO website, available at https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c10s6p1_e.htm ("The DSU does not include any express rule concerning the burden of proof in panel proceedings.").

[39] For the purpose of this research, the focus is to discern these principles as they are recognized and applied by investor-state tribunals. The research does not focus on the underlying reasons for the general principles (*e.g.*, are they basing it on logic or on some other basis) because tribunals often do not provide any reasons.

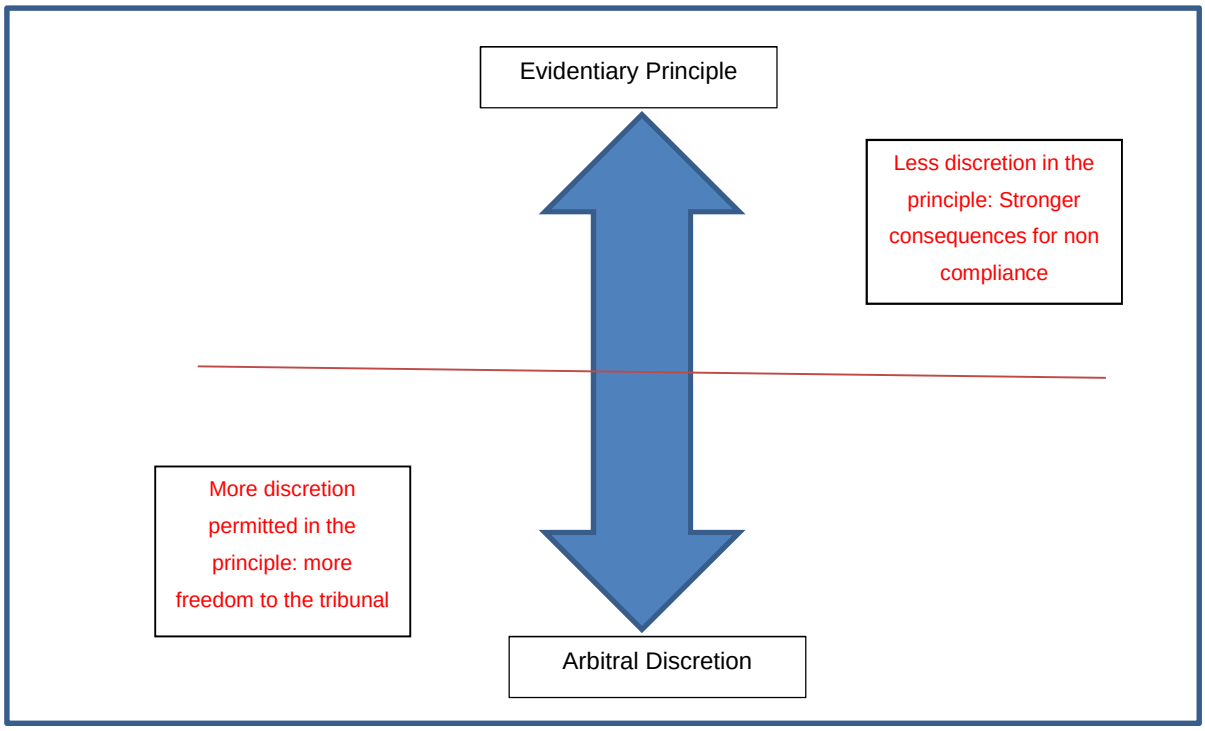
Second, the research question will interplay the relationship between evidentiary principles and arbitral discretion. By this I mean that if a particular issue does indeed have a relevant evidentiary principle, does it mean that the entire issue can be resolved solely on the basis of the evidentiary principle or does the application of the evidentiary principle provide the tribunal with some discretion. For example, if a tribunal is to apply a particular standard of proof as recognized by arbitral tribunals, is the application of the particular principle absolute or does it permit some amount of discretion?

Third, related to the earlier point, to the extent any such evidentiary principles exist, the next question that arises is whether there are any consequences for falling to apply the evidentiary principles. Indeed, if there are no consequences for a tribunal to apply such principles, then the evidentiary principles fall within the realm of arbitral discretion. The research therefore intends to examine if there are any consequences for falling to apply the evidentiary principles.

The Second and Third point listed above must be considered together. One of my hypothesis is that there are certain principles of evidence that are "absolute" (*i.e.*, failure to apply the principle will have severe consequences) while there are other principles that do exist but still permit a tribunal's discretionary powers (*e.g.*, a tribunal may decide to draw an inference considering the totality of the evidence). In such a circumstance, a tribunal may not decide to draw an inference in exercise of its discretionary powers and that is permissible under the evidentiary principles dealing with inferences.

Figure 1.3 describes this diagrammatically. One can imagine a sliding scale with one end being "evidentiary principle" and the other end being "arbitral discretion." The stronger the principle is, the less discretion a tribunal has and, therefore, non-compliance with the principle will have more severe consequences. If, on the other hand, there is a principle, but the principle itself permits some amount of arbitral discretion, then provided a tribunal acts with the appropriate discretion that is permitted, there will be no severe consequences for non-compliance because the principle itself permits arbitral discretion.

Figure 1.3: **Evidentiary Principle versus Arbitral Discretion**



Fourth, the research will primarily focus on case law to evaluate and identify evidentiary principles as opposed to doctrinal or academic scholars on what the evidentiary principles should be. This is because the research seeks to evaluate what arbitral tribunals actually say and do as opposed to what the evidentiary principles should be. This is not to suggest that doctrinal or academic scholarship will be ignored. Indeed, where appropriate, the research will examine doctrinal or commentators on their observations on a particular evidentiary principle to supplement the findings of arbitral tribunals. However, the primary focus of the research will be on the decisions of investor-state tribunals. This is discussed in the section dealing with Research Methodology below.

Related to this Research Question, there are a few other observations that are necessary on terminology and scope of the research.

First, for the purposes of this research, I propose to make a difference between the "evidentiary process" and "evidentiary principles."[40] While these terms might appear to be a tautology to a layperson, the difference for the purpose of this research cannot be understated. This distinction is based on a common understanding of both these terms. The evidentiary process relates to the process of proving one's case. This would involve an examination of evidentiary issues relating to witnesses, experts, documents, document production, and the like which help a party prove its case. These are matters that the IBA Rules on Evidence, for example, address.[41] Further, it is also concerned with the admissibility and assessment of evidence by the tribunal based on what the parties have produced, including, for example, whether a document produced by a party belatedly should be admitted into the record and other such questions. These would be matters that I describe as falling within the ambit of the "evidentiary process." "Evidentiary principles," on the other hand, relate to the questions of evidence that help a tribunal resolve the dispute. Evidentiary principles, therefore, allocate burdens and standards, clarify principles relating to presumptions and inferences, and are protected, *inter alia*, through mechanisms within the arbitral process such as the annulment process (as provided for under the ICSID Convention) or non-enforcement process (pursuant to the New York Convention which would apply for non-ICSID cases). These are matters that are not addressed in the IBA Rules on Evidence.

This research will focus on "evidentiary principles" and not on the "evidentiary process." There are a few reasons for doing so. First, the evidentiary process typically attracts a fair deal of attention from practitioners. Indeed, there are several conferences and books by practitioners that deal with the evidentiary process (*e.g.*, dealing with

[40] The term "evidence" more generally would encompass both these terms within its scope. See eg "Evidence 'includes all the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved'." Richard T. Farrell, *Prince, Richardson on Evidence* (Brooklyn Law School, 11th Ed.) 1. The usage of the phrase "all means" would relate in my definition to "the evidentiary process" while the phrase "submitted to investigation" would deal with evidentiary principles.

[41] See IBA Rules on Evidence, Article 3 (Documents), Article 4 (Witness of Fact), Article 5 (Party-Appointed Experts), Article 6 (Tribunal-Appointed Experts), Article 7 (Inspection), Article 8 (Evidentiary Hearing), and Article 9 (Admissibility and Assessment of Evidence).

issues such as document production, Redfern schedules and the like).[42] Practitioners in investor-state arbitration prefer such topics because it is unlikely that anything that is said at this stage can hamper one in an actual arbitration by attributing what was said in the writings or conferences and thus these issues are overemphasized. Therefore, as an intellectual pursuit, these issues remain unstimulating.

Second, as noted above, matters relating to the evidentiary process have been addressed in some way in the arbitral rules and in the IBA Rules on Evidence. There is, therefore, at least some foundational basis in black letter law to assist the parties and the tribunal on such issues. Evidentiary principles, on the other hand, are often derived from general principles and are, therefore, not articulated in the arbitral rules. From an academic lens, these issues become more interesting. Relatedly, the consequences for failing to respect such evidentiary principles can be severe—for a party, it can be dismissal of the proposition being alleged and, for a tribunal, it can be the basis for potential annulment or non-enforcement of the arbitral award.

The research question discussed above can be further sub-divided into four questions that will be discussed in subsequent chapters. These questions principally address different players within any arbitration. The first two questions discussed focus on the role of the parties in relation to evidentiary principles while questions three and four focus on the role of the arbitral tribunal in relation to evidentiary principles. The goal in each of the Chapters is to examine arbitral awards and identify whether any discernable principles of evidence can be inferred or does everything fall within arbitral discretion more generally. Each of these Chapters will also include a section that outlines the consequences for failing to comply with any principles of evidence that have been identified in that Chapter.

(1) A fundamental principle on evidence centers on the question--which party must prove the allegation being alleged—is it the party making the allegation or is it the party refuting the allegation or is it the party in the best position to prove the allegation? The

[42] See eg Peter Ashford, The IBA Rules on the Taking of Evidence in International Arbitration: A Guide (Cambridge University Press 2013); Jeffrey Waincymer, Procedure and Evidence in International Arbitration (Wolters Kluwer 2012); Nathan D. O' Malley (n 32).

question focusing on "who" must prove is technically referred to as the "burden of proof."[43] This is the first question.

The significance of this question as an evidentiary matter cannot be understated because the evidentiary process can only commence if there are clear principles on which party must discharge the burden. Logically, the "burden of proof" must be the first major evidentiary principle that needs to be expounded and these principles are addressed in Chapter 2. A subsequent but related question is: when a party with the initial burden meets that burden, how does the evidentiary process continue? Issues relating to "shifting the burden of evidence" and how it operates are discussed in Chapter 3. This evidentiary principle permits the parties to engage with each other on the same issue and, thereby, enable the tribunal to make a determination based on a fuller consideration of the facts.[44]

(2) After it is clear which party has the burden of proof, the question of "how much" evidence needs to be produced by the party with the burden would be the next logical step. Technically termed as "standard of proof," this helps the parties appreciate the amount of evidence that needs to be provided for a tribunal to ultimately rule on the issue.[45] Questions such as whether there is any standard of proof and, if so, what standards may apply in different situations are all critical to the arbitral process. Without a reasonable understanding of the standards of proof, a party would be forced to argue a case beyond reasonable doubt lest the case get dismissed because of the failure to do so which may present a heavy burden on the parties. These questions are discussed in Chapter 4.

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[43] *Case Concerning the Temple of Preah Vihear (Cambodia v Thailand)* (Merits) [1962] ICJ Rep 6, 15–16 ("The burden of proof in respect of these will of course lie on the Party asserting them or putting them forward."). See also Chapter 2 for further details.

[44] One of the goals of international dispute resolution is to provide the trier of facts with all the necessary evidence. See eg Bin Cheng (n 33) 302 ("It may be said that the aim of an international tribunal is to arrive at a moral conviction of the truth and reality of all the relevant facts of the case upon which its decision is to be based.").

[45] *The Rompetrol Group N.V. v Romania* [2013] ICSID Case No. ARB/06/3 [178] ("the standard of proof defines how much evidence is needed to establish either an individual issue or the party's case as a whole."). See also Chapter 4 for further details.

(3) In what circumstances may a tribunal not insist on evidence (direct or circumstantial) to prove certain facts? It is trite to observe that not everything needs to be proved in any dispute resolution mechanism (for example, a tribunal will not insist that a party prove that a day indeed does have 24 hours) and, therefore, a tribunal can *presume* these facts to be true.[46] Presumptions, therefore, play a critical role in the evidentiary process and the different forms of presumptions in addition to the various ways in which the opposing party may rebut these presumptions are discussed in Chapter 5.

(4) In what circumstances can a tribunal make a finding even though direct evidence might not be present or, even if direct evidence is present, the evidence does not necessarily lead to the conclusion made by the tribunal. The use of an "inference" as an evidence principle would enable a tribunal to make a conclusion based on the probative evidence and the party conduct in the arbitral proceedings. The principles relating to inferences as recognized and applied by arbitral tribunals are discussed in Chapter 6.

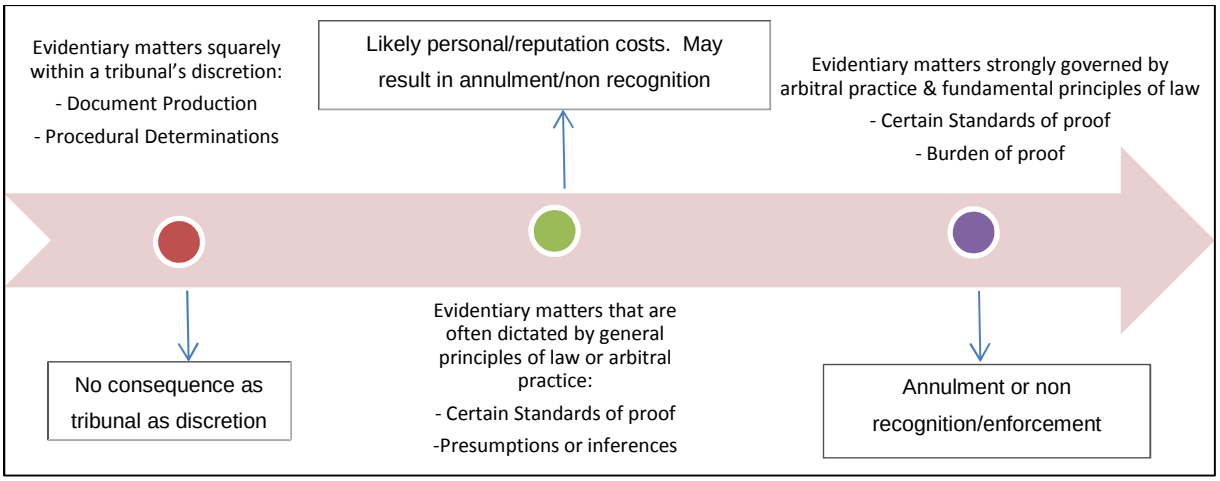
The research will, therefore, be restricted to the following evidentiary principles: burdens of proof, standards of proof, presumptions, and inferences.

These evidentiary principles interact closely with one another and have to be understood in relation to each other. For example, burdens (who must prove?) and standards of proof (how much proof?) are to be understood together, while presumptions and inferences as related concepts can be understood together. But, even more generally, a presumption may not require the party with the initial burden to prove the case and, to that extent, presumptions and burdens may interact with each other. Further, in relying on a presumption or inference, a tribunal must ensure that the appropriate standard of proof is met. The research, therefore, focusses on such evidentiary principles that overlap and have to be understood in conjunction.

[46] See generally Bin Cheng (n 33) 304 ("Proof may also be dispensed with regard facts, the truth of which, though not within judicial knowledge, is presumed by the tribunal. Without going so far as to holding them to be true, it is legitimate for a tribunal to presume the truth of certain facts or of certain state of affairs, leaving it to the party alleging the contrary to establish its contention.").

In each of Chapters, the consequences of failing to meet the evidentiary standards will be discussed. As is apparent from the topics above, the research will be covering four evidentiary issues (burdens, standards, presumptions and inferences). I present a hypothesis based below to describe the consequences for falling to meet the evidentiary principles. The chart below describes the spectrum of the consequences of failing to meet the evidentiary standard as my hypothesis:

Figure 1.4: Spectrum of the Consequences of Failing to Meet Evidentiary Principles



At the most basic level, it is my submission that there are certain of these evidentiary matters that squarely fall within a tribunal's discretion. Issues such as document production orders or procedural determinations on matters such as the determination of a hearing date or witness sequestration would fall within this category. These are matters that fall purely within a tribunal's discretion and are inherent to a tribunal's decision-making function. A party will not be able to argue that a tribunal has failed to apply evidentiary principles for these matters for this reason. There are some other matters, such as the determinations of whether the burden of evidence has shifted to the other party. As a general matter, this falls with a tribunal's evaluation of the evidence and would ordinarily fall within the tribunal's discretionary powers.

The second category would be evidentiary matters that are governed by general principles of law or by arbitral practice. Principles dealing with presumptions,

inferences, and certain standards of proof would fall within these categories. These are matters where the parties expect that a tribunal would act a certain way because the evidentiary principles are derived from general principles of law or by arbitral practice. The failure to apply these principles can, at a basic level, probably have personal and reputation consequences for the arbitrators for failing to respect the expectations of the parties. However, there might be a risk that the award might not be enforced or recognized.

The final category of evidentiary matters is those matters based on very strong arbitral practice coupled with the fact that they are accompanied with fundamental principles of law. Evidentiary principles dealing with burden of proof and certain standards of proof would fall within these categories. Considering the strong sensitivities of the principles, the failure to respect these principles would likely always result in the annulment or non-recognition or enforcement of the arbitral award. The thesis will test this hypothesis against actual arbitral practice to examine the consequences of failing to meet the relevant evidentiary principles that have been identified.

III. INTEREST OF THE RESEARCH QUESTION

The research question discussed above is of both a theoretical and a practical interest.

From a theoretical perspective, questions relating to evidentiary principles in investor-state arbitration have been woefully ignored. Indeed, there is no monograph of any kind dealing with evidentiary principles in investor-state arbitration.[47] There are, however, certain works that have been written in the context of international courts and tribunals more generally.[48] The research will, therefore, examine the treatises written by

[47] For the avoidance of any doubt, I note that the evidentiary principles that are discussed in this thesis has been recently published in a book by Oxford University Press. See generally Frédéric G. Sourgens, Kabir Duggal, Ian Laird, Evidence in International Investment Arbitration (Oxford University Press 2018). The portions of this book that deal with Burden of Proof, Standard of Proof, Presumptions, and Inferences flow from my research here.

[48] It is worth pointing out that evidentiary principles in international law have not received too much attention. Indeed, the International Law Commission in its 2016 Report identified "six potential topics" for further study and two of these six topics were "(a) general principles of law," and (f) "Principles of

Professors Bin Cheng,[49] Durward V. Sandifer,[50] V.S. Mani,[51] Mojtaba Kazazi,[52] and Chittharanjan F. Amerasinghe.[53] While these treatises are helpful, there are significant limitations in what they offer in relation to the research question. First, the majority of these books are very old and, therefore, do not always reflect recent/ongoing developments in law. For example, Bin Cheng's treatise was written in 1953, Sandifer's in 1975, Mani's in 1980, Kazazi's in 1996, and Amerasinghe's in 2005. Therefore, even the most recent book here is over a decade old. This is particularly significant in the investor-state context because a proliferation of decisions began to emerge only in 2000s and the case load has only really increased in the last few years.[54] Therefore, these treatises are primarily relied upon to provide a historical foundation and the background for the evidentiary principles that will be discussed.

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evidence in international law." See Report on the work of the sixty-eighth session (2016), International Law Commission, ILC Annual Report, Chapter XIII, available at http://legal.un.org/docs/?path=../ilc/reports/2016/english/chp13.pdf&lang=EFSRAC (last accessed 21 May 2017) [313]. In 2017, the ILC included evidence before international courts and tribunals as one of the two areas for further study highlighting a criteria for the selection as well. See Report on the work of the sixty-ninth session (2017), A/72/10, International Law Commission, Chapter 3, ¶ 32 ("The Commission decided to include in its long-term programme of work two new topics, namely (a) general principles of law; and (b) evidence before international courts and tribunals. In the selection of those topics, the Commission was guided by the following criteria that it had agreed upon at its fiftieth session (1998), namely that the topic: (a) should reflect the needs of States in respect of the progressive development and codification of international law; (b) should be at a sufficiently advanced stage in terms of State practice to permit progressive development and codification; (c) should be concrete and feasible for progressive development and codification; and (d) that the Commission should not restrict itself to traditional topics, but could also consider those that reflect new developments in international law and pressing concerns of the international community as a whole. The Commission would welcome the views of States on those new topics.").

[49] Bin Cheng, *General Principles Of Law As Applied By International Courts And Tribunals* (first published 1953, Cambridge University Press 2006). There has been a recent attempt to (loosely) update Bin Cheng's book in 2017. See Charles T. Kotuby Jr. and Luke A. Sabota, *General Principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes* (Oxford University Press 2007). This book, however, treats evidence more briefly than Bin Cheng did. In this book, only 7 pages have been devoted to evidentiary matters. See Charles T. Kotuby Jr. and Luke A. Sabota, pp. 190-197.

[50] Durward V. Sandifer, *Evidence Before International Tribunals* (University of Virginia Press 1975).

[51] V.S. Mani, *International Adjudication: Procedural Aspects* (Martinus Nijhoff Publishers 1980).

[52] Mojtaba Kazazi, Burden of Proof and Related Issues: A Study on Evidence Before International Tribunals (Kluwer Law International 1996).

[53] Chittharanjan F. Amerasinghe, *Evidence in International Litigation* (Martinus Nijhoff Publishers 2005).

[54] See eg Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties* (Wolters Kluwer 2009) 59 (noting that the bulk of the investor-state cases have been filed since 2001).

But, there is an additional limitation that exists in these treatises. The bulk of these books were written in the context of state-to-state arbitrations or in a traditional public international setting and do not address investor-state jurisprudence in any meaningful way. For the purposes of the research, this has two implications.

First, the number of cases before traditional international bodies, dealing with state-to-state disputes, like the International Court of Justice (ICJ), for example, is not even remotely close to those in the investor-state context. Consider that, as of 2017 there have been a total of 168 contentious cases before the ICJ, however, UNCTAD reports at least 817 publicly-known cases before investor-state tribunals till date.[55] Therefore, the number of investor-state cases is close to 5 times as great as that of the ICJ cases. Similarly, the International Tribunal for the Law of the Sea lists 25 contentious cases.[56] Since the research purports to rely on general principles relating to evidence as recognized and applied by arbitral tribunals, it is important to have a wide array of cases that would have examined these principles because as Professor Amerasinghe notes "[t]hese principles have emerged almost entirely from the decisions and practice of tribunals."[57] Further, these books do not even discuss investor-state jurisprudence, which may be in part explained by the fact that these books have been written long ago.

Second, there are several practical differences that exist between state-to-state dispute resolution and investor-state dispute resolution. For example, international law is premised on a central notion that all states are sovereign and equal,[58] therefore, international courts and tribunals would recognize and apply this. In contrast, investor-

[55] See '*Special Update on Investor-State Dispute Settlement: Facts and Figures*' UNCTAD Issue Notes (November 2017, Issue Three) 1 ("During the first 7 months of this year, investors initiated at least 35 treaty-based investor–State dispute settlement (ISDS) cases, bringing the total number of known cases to 817."). The list of ICJ cases is available on the ICJ website at http://www.icj-cij.org/docket/index.php?p1=3&p2=2 (last accessed 15 February 2018).

[56] See *Contentious Cases*, International Tribunal for the Law of the Sea, *available at* https://www.itlos.org/en/cases/contentious-cases/ (last accessed 15 February 2018).

[57] See Chittharanjan F. Amerasinghe (n 26) 4.

[58] See eg United Charters, Article 2(1) ("The Organization is based on the principle of the sovereign equality of all its Members."); General Assembly Resolution 2625 on Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, A/RES/25/2625 (24 October 1970) ("All States enjoy sovereign equality. They have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature.").

state arbitration has unequal actors and this can have particular consequences for the evidentiary process. For example, a state has police powers that can compel or restrict the evidence that an investor may have access to—this can have a major impact on the investor's burden of proof. Therefore, these early treatises may not always factor such realities in their analysis. This is not to suggest that they have no utility but it is appropriate to restrict reliance on them for providing a background or the framework for the analysis in the investor-state context. More generally, from a theoretical perspective, the growing investor-state jurisprudence coupled by the lack of any monograph makes the issue ripe for research, which will examine in careful detail the evidentiary principles as recognized and applied by investor-state tribunals.

But, the research is also of real, practical significance. For both practitioners and for arbitral tribunals, there is no real scholarly examination of evidentiary principles. Therefore, the research can help provide meaningful guidance to those involved in an actual arbitration.[59] For example, an early instance in my professional career illustrates the need for evidentiary principles. In a large dispute against Venezuela, opposing counsel introduced a blog post on the creation of a new state "Bolizuela," which involved an imminent merger of Bolivia and Venezuela.[60] Indeed, the blog had the following line at the end: "For the full New York Times report on the proposed Venezuela/Bolivia merger, read here" and clicking on that URL took you to a new page that had the image of a joker with the words "Happy April Fool's Day (*dia de los inocentes*)." This had been admitted as evidence to show a potential merger between Bolivia and Venezuela towards meeting the standard of proof for challenges to

[59] Charles N. Brower (n 25) 58 ("a need persists in international arbitration for some degree of standardization of rules of evidence. Although the flexibility of evidentiary regimes in the context of international arbitral proceedings allows arbitrators to tailor evidentiary requirements for a particular case, often those requirements are not communicated clearly to the parties who however unwittingly take comfort in the adequacy of their evidentiary submissions. . . . Yet, some form of standard rules could answer some basic evidentiary question that far too frequently ensnare those upon whom burdens of proof are placed.").

[60] *See* The Democracy Center, *Chavez and Morales Announce Plan to Merge Venezuela and Bolivia into One Country by 2011*, *available at* http://democracyctr.org/blogfrombolivia/chavez-and-morales-announce-plan-to-merge-venezuela-and-bolivia-into-one-country-by-2011/ (last accessed 15 January 2017).

arbitrators and certainly not as a joke. Such instances are not uncommon in investor-state arbitrations.

But, the significance of the research goes even further. Right now, all evidentiary matters are presumed to fall within the discretion of an arbitral tribunal.[61] But, it is precisely broad discretion that arbitral tribunals have that has become a constant source of criticisms for investor-state arbitration. The research can be one basis to restrict the absolute discretion towards a more guided discretion of an arbitral tribunal requiring arbitral tribunals to justify deviations from commonly recognized and regarded evidentiary principles, to the extent the research identifies such evidentiary principles.[62]

IV. RESEARCH METHODOLOGY

In order to answer the research question, the following methodologies shall be adopted:

First, as noted above, most arbitration rules provide insufficient guidance on evidentiary principles, therefore, the research will have to identify alternative sources. The core methodology will, therefore, be to examine the decisions of investor-state tribunals towards identifying the appropriate evidentiary principles.[63] This approach

[61] See eg *Adem Dogan v. Turkmenistan*, ICSID Case No. ARB/09/9, Decision on Annulment (15 January 2016) [165] ("A tribunal has broad discretion when evaluating the probative value of evidence."); *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award (6 May 2013) [181] ("The overall effect of these provisions is that an ICSID tribunal is endowed with the independent power to determine, within the context provided by the circumstances of the dispute before it, whether particular evidence or kinds of evidence should be admitted or excluded, what weight (if any) should be given to particular items of evidence so admitted, whether it would like to see further evidence of any particular kind on any issue arising in the case, and so on and so forth."); *Saipem S.p.A. v. People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Award (30 June 2009) [112] ("the Tribunal has full discretion in assessing the probative value of the evidence before it.").

[62] The ILC notes similar objectives in conducting the study of evidence before international courts and tribunals. See Report on the work of the sixty-ninth session (2017), A/72/10, International Law Commission, Annex B (Evidence Before International Courts and Tribunals), ¶ 7 ("In the absence of rules of evidence, courts and tribunals have been relying on jurisprudence developed by each other. This practice gives flexibility to the adjudicating body, but introduces uncertainty and inconsistency of the rules that are or would be applied. It would be a part of fair administration of justice that the parties to a dispute are aware, beforehand, which rules would be applied on evidence. Inconsistent application of rules of evidence would inevitably result in inconsistent outcomes although based on same pieces of evidence. It would facilitate the work of all adjudicating bodies if the Commission would undertake this topic.").

[63] The ILC has identified case law as the core approach in undertaking the study on evidence before international courts and tribunals. See Report on the work of the sixty-ninth session (2017), A/72/10, International Law Commission, Annex B (Evidence Before International Courts and Tribunals), ¶ 14 ("The

deals with the "inductive" component of the research, *i.e.*, where principles of evidence will be carefully culled from the observations and findings of investor-state tribunals. More generally, understood in its proper context, the research question does not intend to develop an evidentiary code or replace a party's autonomy to determine the applicable law. Further, the research question is not specifically premised on either the common-law approach of precedence or the civil-law approach of *jurisprudence constante*. Instead, the focus is to identify the principles already applied by investor-state tribunals.[64] The more consistently a principle is applied by investor-state tribunals, the stronger the force of the evidentiary principle will be.

The examination of cases, will in turn, involve two approaches. *First*, it involves a careful examination of publicly available investor-state awards to see how tribunals have described evidentiary principles and whether they applied them in a consistent, coherent manner. In the chapters dealing with burden of proof or the different standards of proof (Part I of the Research), for example, a lot of the principles derived are based on the various formulations put forward by tribunals. *Second*, in certain evidentiary areas, tribunals do not articulate or explain the principles of evidence that they apply. In such instances, the approach is to examine what the tribunal has actually done towards deducing such principles. This is done in the chapters dealing with presumptions and inferences (Part II of the Research), where illustrations are presented

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topic has a close affinity to adjudication; hence, reliance on judicial practice is obvious and inevitable. Most of the rules of evidence would be drawn upon the jurisprudence of various international courts and tribunals."). The Report further notes that the reliance on case law is often based on arguments put forward by states and may represent state practice: "In most cases, the rules of evidence applied by the courts and tribunals are based upon the arguments presented by the States in the judicial proceedings. States, in turn, have relied upon those rules in their pleadings before international courts and tribunals. Thus, developing continuity in the use of these rules. Pleadings of States before international courts and tribunals could constitute state practice."). ibid.

[64] Commentators have recognized that decisions of international tribunals are particularly significant in the development of these evidentiary principles. See eg Chittharanjan F. Amerasinghe (n 26) 11 ("While principles relating to matters such as witnesses and documentation which appear in written provisions must be included for a matter of consideration, equally important are the more general principles . . . These principles have emerged almost entirely from the decisions and practice of tribunals.") (emphasis added); Graham Cook, *A Digest of WTO Jurisprudence on Public International Law Concepts and Principles* (Cambridge University Press 2015) 121 ("The written rules governing dispute settlement before international courts and tribunals are largely silent with regard to evidentiary issues. As a consequence, pronouncements by international courts and tribunals have become a primary source for guidance on the principles that govern the treatment of evidence in international dispute settlement proceedings.") (emphasis added).

to understand and see what tribunals actually do. Indeed, the evidentiary principles here provide guidance based on the circumstances of a case towards making an informed decision on presumption, inferences, and annulment. Failure to apply these evidentiary principles in the context of the case will have the same consequences of annulment or non-recognition of an arbitral award.

Therefore, Chapters 2 to 4 (*i.e.*, Part I) dealing with burdens and standards of proof will primarily seek to examine what arbitral tribunals have said when it comes to burdens and standards of proof while chapters 5 and 6 (*i.e.*, Parts II) seek to examine how arbitral tribunals have applied presumptions and inferences, even though they may not spell this out explicitly.

The approach of the research aims to be exhaustive when it comes to examining investor-state cases.[65] This is particularly true for Chapters 2 to 4 (*i.e*., Part I) dealing with burdens and standards of proof, where an attempt has been made to examine as all publicly available cases towards identifying the relevant evidentiary principles. The exhaustive nature of the research serves an important end—the investor-state regime is not a monolith regime and there can be significant differences between the various over 3,000 bilateral and multilateral treaties under which cases are decided. The rationale of being exhaustive, therefore, helps appreciate how tribunals have recognized and applied certain evidentiary principles across the board by looking at as many investor-state cases towards evaluating consistency across decisions. It will therefore enable an analysis towards identifying trends on evidentiary principles, establishing areas of convergences and divergences, identifying if there is consensus or if the opinion is split or whether there is a majority of minority view, and the like. Further, it will also help in the construction of evidentiary typologies that can help explain how certain issues are likely to be determined.

[65] It is true that there is no formal system of "precedence" in investor-state arbitration, the way it would apply in a common law jurisdiction. See eg Article 53 of the ICSID Convention which provides that an arbitral award is only "binding on the parties." But, for the purpose of this research it has specific relevance because case law clarifies evidentiary principles in a manner that the normative sources (*i.e*., arbitral rules or applicable treaties) fail to provide sufficient guidance. Further, a central premise of this research is that tribunal's already apply evidentiary principles with a reasonable amount of consistency.

There are a few important caveats that need to be made in relation to the exhaustive approach to the cases. First, the jurisprudence of investor-state cases is constantly increasing, therefore the research will focus only on cases that are in the public domain as of May 2017.[66] Second, the research does not distinguish between majority opinions and dissenting or separate opinions but rather seeks to rely on both of them, when appropriate. By this I mean that when there are key differences on evidentiary points between the majority and dissenting arbitrators, the research aims to capture such differences to appreciate the differences on the same evidentiary issue in question. Third and finally, the research will necessarily focus on certain cases more than others. This can be either because the case has articulated the evidentiary principles more clearly or is a landmark/seminal decision on point or is a good illustration of how the evidentiary issue at hand has been applied. But, in all cases, attempts are made to identify what investor-state tribunals have stated on that issue more generally. Therefore, case law, as the primary source of materials, remains the preferred choice for the research.

Second, as the investor-state regime is a creation of international law, some fundamental principles of evidence are common to all international courts and tribunals.[67] Therefore, another methodological technique is to identify such common principles of evidence applicable to most international courts and tribunals.[68] This will help provide a background and a framework for the evidentiary principles under which the findings of arbitral tribunals maybe assessed.[69] In order to do so, the research will

[66] For the avoidance of any doubt, if the case was issued prior to May 2017 but was not available in the public domain as of that date, the research will not focus on such cases.

[67] For a discussion on the public international law basis for investor-state arbitration, see generally Eric de Brabandere, *Investment Treaty Arbitration as Public International Law: Procedural Aspects and Implications* (Oxford University Press 2014) 7-11.

[68] See generally Jeffrey Waincymer (n 42) 753 ("The approach of evidence and fact-finding in public international law may be directly relevant in investment arbitration. Evidentiary norms in public international law are also generally consent based and derive from statute and treaty. It is also possible that court behavior over time can lead to the development of customary norms. Brower suggested that a *lex evidentia* may thus develop.").

[69] Commentators have recognized that the principles of evidence have been influenced by the jurisprudence of international tribunals. See Nathan D. O' Malley (n 32) 1-2 ("what becomes evident from a study of the rules of evidence in international arbitration is that many of the principles invoked today have featured in the jurisprudence of international tribunals stretching back more than a hundred years. In modern practice, these principles are utilised by arbitrators with a wide variety of legal backgrounds,

examine the leading treatises in international law discussed in the prior section as well as any seminal decisions on evidentiary principles by other international courts and tribunals. However, the goal here is not intended to provide a critical analysis of the principles under public international law, which can be an interesting endeavor but is beyond the scope of this research. Rather, the goal here is to create a background or a framework of evidentiary principles that are common to most international courts and tribunals and examine how these have been applied by investor-state tribunals.[70] Relatedly, there is a cross-pollination of certain evidentiary principles across international courts and tribunals. For example, as discussed in Chapter 2, the *pro tem* principle stated by the ICJ has been consistently recognized and applied by investor-state tribunals. Therefore, each of the chapters dealing with the substantive principles of evidence (*i.e.*, chapters on burden of proof, shifting the burden of evidence, standard of proof, presumptions, and inferences) begin the discussion by examining the observations of leading commentators and discussing seminal cases from international courts and tribunals more generally.

Third, even though there is no comprehensive literature addressing the evidentiary principles, the research will also examine any existing literature on specific topics. This will help provide a doctrinal underpinning for the research and can also help evaluate

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with the somewhat surprising yet satisfying result that they are applied with general consistency."). For the avoidance of any doubts, it is worth emphasizing that the goal of the research is not to rely on case law to create any form of impermissible, *de facto* precedence. Rather, the research seeks to examine the case law to see areas of convergences and divergences in the jurisprudence. Indeed, as Nathan D. O' Malley observes these decisions "are applied with general consistency." See also Chittharanjan F. Amerasinghe (n 53) 47 ("Whether arbitral tribunals are established permanently or *ad hoc*, they enjoy considerable freedom in adopting, interpreting and applying evidentiary rules. The existence of a certain freedom in the choice and application of rules of evidence in these circumstances has not in fact lead to a diversity in the general characteristics of such rules and basic principles as applied by different international judicial and arbitral tribunals.") (emphasis added).

[70] A brief clarification is in order here. The research does not purport to examine the jurisprudence of international criminal courts and tribunals like the International Criminal Court, the International Criminal Tribunal for the former Yugoslavia (ICTY), or the International Criminal Tribunal for Rwanda (ICTR). The reason for doing so is that evidentiary principles under criminal law are more demanding in light of human rights principles (*e.g.*, presumption of innocence) considering the severe consequences they can have. Further, the rules of evidence are also better spelled out in the constitutive documents here. For example, the Rome Statute creating the International Criminal Court has special Rules of Procedure and Evidence. The 93 pages PDF discussing this is available here: https://www.icc-cpi.int/iccdocs/pids/legal-texts/rulesprocedureevidenceeng.pdf (last accessed 21 May 2017). Since investor-state tribunals are civil (as opposed to criminal) bodies, the research does not examine such international criminal jurisprudence.

whether the observations of tribunals are consistent with the literature. The research focuses on three such sets of writings. First, the literature will examine the seminal works that address evidentiary principles, albeit in the context of international courts and tribunals. As noted above, these include the classical works by Cheng, Sandifer, Mani, Amerasinghe, and Kazazi. Further, leading commentaries on international courts and tribunals are also examined when appropriate to supplement these classical works noted above.[71] Second, the research will examine the commentaries written on evidence in international arbitration more generally.[72] Third, although there is no real commentary on evidentiary principles in investor-state arbitration, the research will examine some of the leading books dealing with investor-state arbitration more generally.[73] The examinations of works dealing with evidence in international (commercial) arbitration and on investor-state arbitration more generally may also provide meaningful guidance on the research.

The research will also examine articles[74] and other scholarly works that might look at some of the discrete topics in further detail. For example, the scholarship of A. Llamzon

[71] See eg Anna Riddell and Brendan Plant, *Evidence Before the International Court of Justice* (British Institute of International and Comparative Law 2011); Robert Kolb, *The International Court of Justice* (Hart Publishing Ltd 2013).

[72] See eg Peter Ashford, The IBA Rules on the Taking of Evidence in International Arbitration: A Guide (n 42); Jeffrey Waincymer, Procedure and Evidence in International Arbitration (n 42); Nathan D. O'Malley, Rules of Evidence in International Arbitration: An Annotated Guide (n 32); Christopher F. Dugan et al, Investor-State Arbitration (Oxford University Press 2008). It is worth pointing out that these books are of limited utility because these books largely comment on the IBA Rules on Evidence, which as noted above, does not discuss evidentiary principles.

[73] See eg Christoph H. Schreuer *et al* (n 27); Eric de Brabandere (n 67); Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (2nd edn, Oxford University Press 2012).

[74] See eg George M. von Mehren and Claudia T. Salomon, 'Submitting Evidence in International Arbitration: The Common Lawyer's Guide' (2003) Journal of International Arbitration 285; Yves Fortier, 'Arbitrators, Corruption and the Poetic Experience' (Kaplan Lecture, Hong Kong, 20 November 2014); Carolyn B. Lamm Brody K. Greenwald and Kristen M Young, 'From *World Duty Free* to *Metal-Tech*: A Review of International Investment Treaty Arbitration Cases Involving Allegations of Corruption', (2014) 29(2) ICSID Review 342; Carolyn B. Lamm, Hansel T. Pham and Rahim Moloo, 'Fraud and Corruption in International Arbitration', in M. Á. Fernández-Ballesteros and David Arias, *Liber Amicorum Bernardo Cremades* (Wolters Kluwer 2010); Julian D. M. Lew, 'Document Disclosure, Evidentiary Value of Documents and Burden of Evidence' in Teresa Giovannini and Alexis Mourre (eds), *Written Evidence and Discovery in Intl Arbitration: New Issues and Tendencies* (Intl Chamber of Commerce 2009).

is examined on issues dealing with allegations of corruption and wrongdoings which form a substantial part of the analysis in Chapter 4 dealing with standard of proof.[75]

There is another important clarification that needs to be made on the language of the materials examined. The research will primarily focus on English sources and there are several reasons for doing so. First, English has gained *de facto* predominance in legal writings on evidentiary matters, even outside most traditional English-speaking countries and, indeed, the classical works on this topic discussed above have been written in English. Second, the English-speaking works here include writings of authors who come from civil law countries and, therefore, reflect those traditions. For example, Mojtaba Kazazi was a judge in Tehran, Iran. Similarly, the writings are not merely focused on western academic scholars. Professor V.S. Mani was an Indian scholar while Professor Chittharanjan F. Amerasinghe has a Sri Lankan background. Therefore, the literature remains representative of the international enterprise that this research focuses on. Relatedly, the research will occasionally draw on Spanish cases and French cases as appropriate but the focus will remain on the English language because the majority of the investor-state cases are decided in English.

This approach for research methodology also appears consistent with the approach adopted by other scholars dealing with evidentiary issues in international arbitration. For example, Nathan D. O'Malley describes the sources for such principles of evidence as follows:

> In the practice of international commercial arbitration, investor-state arbitration and state-to-state arbitration, there is continued proof in the case law of these tribunals of the existence of rules of evidentiary procedure. Further, academic writings and compilations of views of leading arbitrators show that there is an identifiable consensus on what the rules of evidence are and, moreover, how they should be generally applied. Thus, these sources of jurisprudence and commentary provide sufficient proof of the

[75] Aloysius Llamzon, *Corruption in International Investment Arbitration* (Oxford University Press 2014).

continued existence of rules of evidence in international arbitration.[76]

V. NOTE ON TERMINOLOGY

A few remarks on the terminology to be adopted are in order. For the purpose of this research, the preferred terminology is to use the terms "principles of evidence" or "evidentiary principles" as opposed to "rules of evidence." The reason for doing so is that the term "rule" connotes a more formal, binding legal precept and is contrary to the enterprise of this research project.[77] Indeed, the focus here is to focus on arbitral decisions (both examining what arbitral tribunals say and what tribunals actually do) towards discerning principle(s) of evidence. Therefore, the research will use the term "principles of evidence."

Similarly, the investor-state regime is often referred to by different terms. Some call it "investment arbitration," or "investment treaty arbitration," others call it "investor-state arbitration," while even others refer to it as "investor-state dispute settlement" or "ISDS" more generally. While there is no real difference in any of these terminologies, the research will principally use "investor-state arbitration" to describe the regime because it captures the key players directly involved in the evidentiary process (*i.e.*, the investor, the state, and the arbitral tribunal).

For the chapters dealing with evidentiary principles, the terminology is not clear and consistent and various authors/cases use different terms to convey the same idea or conflate different ideas within the same terminology. To avoid any confusion, the

[76] Nathan D. O' Malley (n 32) 4 (emphasis added). Amerasinghe makes a similar finding in his treatise: "The general rules of evidence in international law . . . consists of those rules which have usually either been accepted by the parties in the settlement of their disputes, or in the absence or irrelevance of direct agreement on specific rules, those that have generally been adopted and applied in practice by international tribunals. This applies to rules which may be written or not. . . . Further, the writings of international jurists and common sense *per se* have had an influence on the formulation of the rules applied, whether they are written or not." Chittharanjan F. Amerasinghe (n 26) 49.

[77] For a difference between "rule" and "principle," see generally Niels Petersen, 'Customary Law without Custom? Rules, Principles, and the Role of State Practice in International Norm Creation' (2007) American University International Law Review (Vol. 23(2)) 275, 287 ("Most often the term principles is used for the more general, fundamental norms of a lega order, while concerete provisions are called rules.").

research will use the term “burden of proof” to describe which party must provide the evidence to support the proposition being made, while the term “burden of evidence” will be used to describe the shifting process when the party with the initial burden provides evidence. These terminologies are appropriate in my submission because the “burden of proof” never shifts but the “burden of evidence” is constantly moving among the parties and is discussed further in Chapter 3. Relatedly, the term “standard of proof” will be used to describe the amount of evidence that needs to be produced by a party with the burden of proof as discussed in Chapter 4.

VI. STRUCTURE

This research is divided into 2 parts with 6 Chapters in total towards answering the research question discussed. The goal in each Chapter is to identify evidentiary principles as recognized and applied by investor-state tribunals.

Chapter 1 is entitled “Introduction and Background to Evidentiary Principles in Investor-State Arbitration.” This Chapter discusses the background, the research question and its interest, the research methodology and the structure, and the thesis of the research.

The remaining parts expound the evidentiary principles and explain how the arbitral process seeks to protect them. Part I deals with “Burden and Standard of Proof” and has four chapters. These Chapters answer “who” needs to provide the evidence and “how much” evidence needs to be produced. Chapter 2 discusses the principles relating to burden of proof while Chapter 3 discusses the principles of shifting the burden of evidence. Chapter 4 introduces the notion of standard of proof and discusses the different standards of proof in investor-state arbitration. Part I, therefore, focusses centrally on principles as they relate to the parties in the dispute.

Part II, on the other hand, focuses principally on the arbitral tribunal. Chapter 5 deals with presumptions while Chapter 6 deals with inferences. The use of these two principles help a tribunal resolve an issue without insisting on evidence for every matter and thereby facilitate the resolution of the dispute in an efficient manner.

VII. THE THESIS OF THIS RESEARCH

In this thesis, I will argue that investor-state tribunals have recognized and applied evidentiary principles on burden of proof, standard of proof, presumptions, and inferences. These principles do not always flow from the generally accepted view on arbitral discretion. Rather, these principles have been generally recognized under the rubric of general principles of law.

I will also argue that the failure to meet the evidentiary principle can have consequences, although the consequence will be determined on the nature of the evidentiary principle in question. Therefore, the failure to meet some of the principles (*e.g.*, burden of proof) can have very severe consequences (*e.g.*, annulment of an ICSID award) but for other principles like whether or not a tribunal should draw an inference would depend on a tribunal's assessment of the evidence and, would, without more, not have severe consequences.

PART I

EVIDENTIARY PRINCIPLES & THE PARTIES: BURDEN AND STANDARD OF PROOF

Chapter 2: **Burden of Proof as Recognized and Applied by Investor-State Arbitral Arbitration**

Chapter 3 **Shifting the Burden of Evidence**

Chapter 4 **Standard of Proof as Recognized and Applied by Investor-State Arbitral Arbitration**

Introduction to Part I

"Shrines! Shrines! Surely you don't believe in the gods. What's your argument? Where's your proof?"

- Aristophanes, *The Knights*

As noted in Chapter 1 above, the research is divided into Part I. Part I focusses on the parties and the evidentiary role that they play in an arbitration. This Part examines the principles dealing with burden of proof (Chapter 2), shifting the burden of evidence (Chapter 3), and standards of proof (Chapter 4).

Chapter 2 deals answers the question "Who needs to prove?" --this is the first evidentiary principle that a party needs to know. Chapter 3 deals with shifting the burden of evidence to the other party once the party with the burden of proof has satisfied its initial burden. Chapter 4 deals with the different standards of proof that a party with the burden of proof must meet.

Chapters 2 to 4 focus on the parties to an arbitration and have to be considered together. Therefore, it is meaningful to examine these Chapters together.

CHAPTER 2—BURDEN OF PROOF AS RECOGNIZED AND APPLIED BY INVESTOR-STATE ARBITRAL TRIBUNALS

I. INTRODUCTION AND POSITION IN INTERNATIONAL LAW—THE PARTY MAKING AN ASSERTION HAS THE BURDEN OF PROOF

Burden of proof plays an important role in any dispute resolution procedure because it answers a fundamental evidentiary question—who must prove a factual allegation? Burden of proof, therefore, places the evidentiary requirement on one or more of the parties to any dispute. The question that naturally arises is whether and how have investor-state tribunals recognized and applied principles relating to burden of proof in different context?

The research question seeks to understand whether there is any evidentiary principle in relation to burden of proof or does it merely fall with a tribunal's discretionary powers to determine the burden of proof. My core argument on burden of proof is that investor-state tribunals have consistently applied a principle (albeit with sometimes differing reasons), that the party (either the investor or the state) putting forward a proposition has the burden to support that proposition. Indeed, this principle is so entrenched and so pervasive that tribunals apply this to every phase of the arbitration proceeding and have refused to carve out exceptions of any kind. Finally, it is my submission that the failure to apply the principles of burden of proof or reversing these principles can result in the annulment of any award as violation of "a fundamental rule of procedure" under Article 52(1)(d) of the ICSID Convention. Therefore, burden of proof principles are so firmly established that the failure to do so will fall the most severe consequences for an arbitral award.

In order to develop my core argument, this Chapter is divided into 8 sections that are developed below in further detail. Section I provides an introduction and examines burden of proof under international dispute resolution bodies, which may help inform the analysis in investor-state arbitration. Section II then discusses the basic principle relating to burden of proof as applied by certain traditional international dispute resolution bodies. Sections III and IV examine how investor-state tribunals have recognized and applied the burden of proof in the context of the jurisdictional phase and

damages phase of a case respectively because these are the two of the most important stages of an arbitral proceeding. In any arbitral proceeding, a tribunal needs to decide whether it has the ability to hear the case (*i.e.*, jurisdiction) and, in the event of a breach, whether any damages must be awarded—for these reasons, principles of burden of proof in both these situations are examined separately. Section V discusses the time-frame in which a party must discharge its burden while Section VI examines the consequences that investor-state tribunals have applied when a party fails to meet the burden. Section VII seeks to evaluate some of the potential limitations that have been identified when discussing burden of proof and evaluates the merits of these problems. Finally, Section VIII provides a conclusion in the light of the overall thesis.

As noted in Chapter 1, before examining how investor-state tribunals have recognized and applied burden of proof, it is worth examining burden of proof as it is understood in certain international law contexts to provide some background and context to the analysis. The Latin phrase "*actori incumbit onus probandi*"[1] reflects the basic principle regarding the burden of proof in international law—that the party who makes an assertion must prove it (the "basic principle"). The principle has its origins in the traditions of Roman, common and civil law countries,[2] and is, therefore, not exceptional or unique to investor-state arbitration. In fact, this principle has been widely recognized by the Permanent Court of International Justice (PCIJ), International Court of Justice (ICJ), and World Trade Organization (WTO) dispute settlement panels, as

[1] This Latin maxim appears in several different forms. Some refer to it as *actor incumbent onus probandi*; others call it the *onus probandi* rule; still others refer to it as *actori incumbit probatio*. However, despite the variance in its appearance, there is unanimity on what it means.

[2] Bin Cheng, *General Principles Of Law As Applied By International Courts And Tribunals* (first published 1953, Cambridge University Press 2006) 327 ("With regard to the incidence of the burden of proof in particular, international judicial decisions are not wanting which expressly hold that there exists a general principle of law placing the burden of proof upon the claimant and that this principle is applicable to international judicial proceedings. In *The Queen Case* (1872), for instance, it was held that:- 'One must follow, as a general rule of solution, the principle of jurisprudence accepted by the law of all countries, that it is for the claimant to make the proof of his claim'."). See also V.S. Mani, *International Adjudication: Procedural Aspects* (Martinus Nijhoff Publishers 1980) 202; Mojtaba Kazazi, *Burden of Proof and Related Issues: A Study on Evidence Before International Tribunals* (Kluwer Law International 1996) 51; Chittharanjan F. Amerasinghe, *Evidence in International Litigation* (Martinus Nijhoff Publishers 2005) 61–62; Anna Riddell and Brendan Plant, *Evidence Before the International Court of Justice* (British Institute of International and Comparative Law 2011) 87; Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* (Wolters Kluwer 2012) 762–64.

well as other international dispute resolution bodies.[3] The PCIJ had clarified the issue of burdens of proof in at least three cases, in which it required the party making the factual proposition to prove it.[4] Similarly, as discussed below, the ICJ has always placed the burden of proof on the party putting forth the factual proposition.[5]

The WTO Appellate Body has also adopted this basic principle, noting that "it is a generally-accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence."[6] Therefore,

[3] See Anna Riddell, 'Evidence, Fact-Finding, and Experts' in Cesare P. R. Romano, Karen J. Alter and Yuval Shany (eds), *The Oxford Handbook of International Adjudication* (Oxford University Press 2014) 858–59 ("Since Roman times, courts of law have relied on the maxim *actori incumbit onus probandi* or "the claimant carries the burden of proof. . . . Despite a variety of approaches and differences of opinions as to the degree of applicability of the rule, various international adjudicative bodies, including several arbitral tribunals, the PCIJ, the ICJ, and human rights bodies have consistently applied the *actori incumbit probatio* rule.").

[4] For the application of this principle by the PCIJ, see Mojtaba Kazazi (n 2) 75–83; Riddell and Plant (n 2) 89 ("The PCIJ considered the matter on three occasions, and on each it was concluded that the party who had raised an issue was the one on whom the burden of proof shall fall."). The three cases cited were *Legal Status of Eastern Greenland* [1933] PCIJ 49 Series A/B ("Norway has argued that in the legislative and administrative acts of the XVIIIth century on which Denmark relies as proof of the exercise of her sovereignty, the word 'Greenland' is not used in the geographical sense, but means only the colonies or the colonized area on the West coast. This is a point as to which the burden of proof lies on Norway. . . . If it is alleged by one of the Parties that some unusual or exceptional meaning is to be attributed to it, it lies on that Party to establish its contention."); *The Case of the S.S. "Lotus"* [1927] PCIJ 18-26 Series A No. 10 (requiring the argument put forward by the French Government that the burden of proof was on Turkey to prove that it possessed the requisite jurisdiction to institute criminal proceedings); *The Mavrommatis Jerusalem Concessions* [1925] PCIJ 5 Series A No 25 (requiring the party putting forward a contention to prove it, for example, "[i]n the first place, M. Mavrommatis, who in the concessions was described as an Ottoman subject, would have had to prove his Greek nationality . . .").

[5] See eg *Case Concerning the Temple of Preah Vihear (Cambodia v Thailand)* (Merits) [1962] ICJ Rep 6, 15–16 ("The burden of proof in respect of these will of course lie on the Party asserting them or putting them forward."); *Case Concerning Application of the Convention of the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43 [204] ("On the burden or onus of proof, it is well established in general that the applicant must establish its case and that a party asserting a fact must establish it . . ."). For further discussion on ICJ cases, see nn 15, 82 below.

[6] WTO, *United States—Measure Affecting Imports of Woven Wool Shirts and Blouses from India* (25 April 1997) WT/DS33/AB/R [14]. See also Joost Pauwelyn, 'Evidence, Proof and Persuasion in WTO Dispute Settlement: Who Bears the Burden?' (1998) 1 Journal of International Economic Law 227, 237-38 ("The first rule: it is for the complaining party to prove GATT violations it alleges . . . The second rule: it is for the party invoking an exception or defence to prove it."); Michelle T. Grando, 'Allocating The Burden of Proof in WTO Disputes: A Critical Analysis' (2006) 9(3) Journal of International Economic Law 615, 618 ("[I]t would seem that the question of the allocation of the burden of proof would have been settled: the complainant would have to prove the violations of the agreements that he alleged, and the defendant would have the burden of proving any exceptions contained in those agreements." The author then

several traditional international dispute resolution bodies recognize the *actori incumbit onus probandi* as a principle of evidence.

The fundamental question that naturally arises is how have investor—state tribunals recognized and applied principles relating to burden of proof in different context and whether they do so in a consistent and coherent manner?

II. APPLICABILITY AND PREVALENCE OF THE BASIC PRINCIPLE IN INTERNATIONAL ARBITRATION

There are at least three sources where principles relating to burden of proof can be inferred in the investor-state context: arbitration rules, arbitration decisions, and writings of commentators. While my core argument focuses on the decisions of investor-state tribunals, it is worth examining initially the position under various arbitration rules, as the primary source for an arbitration, to see whether they provide any guidance.

Not every set of arbitration rules explicitly includes the basic principle, even though there is near unanimity by tribunals and commentators in its application.[7] In fact, most arbitration rules do not provide any guidance on burden of proof. There are, however, a few arbitration rules that do explicitly spell out the basic principle--for example--Article 24 of the 1976 UNCITRAL Rules provides: "Every party shall have the burden of proving the facts relied on to support his claim or defence."

The negotiating history of UNCITRAL Rules confirms that this provision was added at the behest of the USSR delegate who argued: "Mr. Lebedev (Union of Soviet Socialist Republic) proposed that a new paragraph should be added before the present paragraph 1, setting forth clearly the general principle that each party was obliged to present the evidence referred to in the claim or objection."[8] A virtually identical provision is present in the latest iteration of the UNCITRAL Rules – the 2013

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describes how the application of this maxim in the WTO context poses serious problems in identifying the "general rule" and the "exception" but does not call into question the validity of the maxim itself.).

[7] See n 18.

[8] UNCITRAL Ninth Session, Summary Record of the 8th Meeting, A/CN.9/9/C.2/SR.8, 20 April 1976 [45].

UNCITRAL Rules.[9] Another example is Article 24 of the Iran-US Claims Tribunal Rules of Procedure, which was based on the UNCITRAL Arbitration Rules, and states: "Each party shall have the burden of proving the facts relied on to support his claim or defence."[10]

However, barring these few limited instances, most other arbitration rules that are frequently applied in the investor-state context such as the ICSID, ICC, or SCC Rules are, for example, silent on burden of proof. Yet, even where arbitration rules do not explicitly include the basic principle, commentators have recognized its applicability by inferring the basic principle into those rules.[11]

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[9] Article 27(1) of the 2013 UNCITRAL Rules: "Each party shall have the burden of proving the facts relied on to support its claim or defence." See also Peter Binder, *Analytical Commentary to the UNCITRAL Arbitration Rules* (Sweet and Maxwell 2013) 262 (discussing the negotiating history where the inclusion of the phrase, before the text of Article 27(1): "save as otherwise provided by the applicable law . . ." was rejected because the draft of Article 27(1) did not prevent the application of regulations on the burden of proof in the applicable law."); Sophie Nappert, *Commentary on the UNCITRAL Arbitration Rules 2010: A Practitioner's Guide* (JurisNet LLC 2012) 103–04 ("This statement of principle [referring to Article 27(1)] had proven useful, notably in investor-to-State arbitration. It was also found in a number of institutional arbitration rules.").

[10] Iran-United States Claims Tribunal Rules of Procedure (3 May 1983), Article 24. Although not directly an investor-state arbitration rule, certain domestic statutes dealaing with the recognition and enforcement of arbitral awards also provide for the basic principle. For example, Article 103(2) of the UK Arbitration Act, 1996 states: "Recognition or enforcement of the award may be refused if the person against whom it is invoked proves—…" This provision would apply for the enforcement of non-ICSID awards in the United Kingdom.

[11] See Julian D. M. Lew, 'Document Disclosure, Evidentiary Value of Documents and Burden of Evidence' in Teresa Giovannini and Alexis Mourre (eds), *Written Evidence and Discovery in International Arbitration: New Issues and Tendencies* (International Chamber of Commerce 2009) 22 ("Generally, the party that makes the allegation must prove it; one should only have to defend what can be proven. Practically speaking, if sufficient evidence to satisfy the tribunal is not offered to shift the burden to the respondent, the tribunal will find in favour of the respondent."); Vera van Houtte, 'Adverse Inferences in International Arbitration' in Teresa Giovannini and Alexis Mourre (eds), *Written Evidence and Discovery in International Arbitration: New Issues and Tendencies* (International Chamber of Commerce 2009) 196 ("As regards the burden of proof (*onus probandi*), arbitrators, like judges, cannot freely decide upon its allocation. They are bound by the applicable law, i.e. substantive applicable law, which in most legal systems puts the burden on the claimant (whether for the principal claim or for the counterclaim): *actori incumbit probation*. Each party (whether claimant or respondent) has the burden of proving the facts necessary to establish its claim, its defence or its counterclaim."); Nigel Blackaby *et al*, *Redfern and Hunter on International Arbitration* (Oxford University Press 2009) 387 ("In litigation in national courts the usual rule is that the claimant bears the burden of proof. The practice of nearly all international arbitrations is to require each party to prove the facts upon which it relies in support of its case."); Christoph H. Schreuer *et al*, *The ICSID Convention: A Commentary* (Cambridge University Press 2009) 669 ("ICSID tribunals have applied several rules regarding the burden of proof considering facts upon which the parties rely. These rules are well established in international adjudication. The rules are as follows: · normally the burden of proof is with the claimant; · the burden of proof lies with the party asserting a fact, whether it is the claimant or the respondent.") (bullets in original).

It is my core argument that investor-state tribunals have recognized and applied the basic principle that a party making an assertion has the burden to support that proposition outlined above. This core argument can be divided into a few further arguments based on the rulings of investor-state tribunals that will be discussed below. My first sub-argument is that investor-state tribunals have imposed the basic principle to any party (*i.e.*, the investor or the state) making an assertion. My second sub-argument is that investor-state tribunals have refused to relax the basic principle in any situation and have applied to all stages of the arbitration process. My third and final sub-argument is that the reason that the basic principle is so pervasive because it establishes a firm factual starting point to help the tribunal ultimately resolve the dispute. Each of these sub-arguments is discussed below.

(A) *The Basic Principle Applies to the Factual Allegations of the Party Making the Assertion— Whether Claimant or Respondent*

The basic principle is sometimes incorrectly argued to suggest that the "claimant"—the investor—has the burden of proof for the entire case. The reason underpinning this sentiment could be the view that investor-state arbitration is an exceptional remedy that can be initiated only by the investor and, therefore, the investor has the burden of proof.[12] However, authors and investor-state tribunals alike have clarified that this does not mean "claimant" in a literal sense, but rather the party putting forward the proposition.[13] The analysis on this point begins with an examination under principles of

[12] See eg *Pac Rim Cayman LLC. v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on Jurisdictional Objections (1 June 2012) [2.11] ("As far as the burden of proof is concerned, in the Tribunal"s view, it cannot here be disputed that the party which alleges something positive has ordi-narily to prove it to the satisfaction of the Tribunal. At this jurisdictional level, in other words, the Claimant has to prove that the Tribunal has jurisdiction.").

[13] See Durward V Sandifer, *Evidence Before International Tribunals* (The Foundation Press 1939) 126 127 ("This burden may rest on the defendant, if there be a defendant, equally with the plaintiff, as the former may incur the burden of substantiating any proposition he asserts in answer to the allegations of the plaintiff."); V.S. Mani (n 2) 205 ("A reversal of burden of proof from the claimant to the other party is warranted 'only if it had been sufficiently shown that the defendant held documents of evidential value which it refused to submit'."); Mojtaba Kazazi (n 2) 51 ("[T]he '*actori*' is the party who alleges a fact, not necessarily always the party who instituted the proceedings."); Riddell and Plant (n 2) 87 ("[I]n practical terms, the burden does not always lie on the claimant, for example, where a defence is put forward, the defendant bears the burden of proving the elements necessary to establish the defence."); Nathan D. O'Malley, *Rules of Evidence in International Arbitration: An Annotated Guide* (Informa 2012) 203 (From a procedural standpoint, the burden of proof under the principle of *onus probandi incumbit* attaches to both the claimant and respondent, who must substantiate their factual allegations."); Jeffrey Waincymer (n 2) 763–64 ("The references to claimant/plaintiff and respondent/defendant can be misleading as it is clear

international law more generally.[14] The ICJ, in the oft-cited ruling in the *Temple of Preah Vihear* case, stated:

> As concerns the burden of proof, it must be pointed out that though, from a formal standpoint, Cambodia is the plaintiff, having instituted the proceedings, Thailand also is a claimant because of the claim which was presented by her in the second Submission of the Counter-Memorial and which relates to the sovereignty over the same piece of territory. Both Cambodia and Thailand base their respective claims on a series of facts and contentions which are asserted or put forward by one party or the other. The burden of proof in respect of these will of course lie on the Party asserting them or putting them forward.[15]

Investor-State tribunals have also recognized that a party making a proposition needs to prove what is alleged even when the term "claimant" is used. In the seminal *Asian Agricultural Products Ltd v. Sri Lanka* ruling, the tribunal summarized the rules

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that the burden is on the party seeking to prove some fact. Thus claimants must prove claims, but defendants then must prove defences and counterclaims or set-off rights."); Robert Kolb, *The International Court of Justice* (Hart Publishing Ltd 2013) 931 ("When it comes to the application of this rule, the question of who is the applicant and who is the respondent is not decisive. . . . Thus if the respondent invokes certain objections or defences, the same party, the respondent, has the burden of showing that the objections or defences are well founded. Here, the fact that it happens to be the respondent in the overall case is irrelevant in relation to the particular argument in question, it is the actor.").

[14] See generally Kabir Duggal, 'Evidentiary Principles in Investor-State Arbitration' (2017) The American Review of International Arbitration (Vol. 28(1)) 3, 30-38.

[15] Case Concerning the Temple of Preah Vihear (Cambodia v Thailand) (Merits) [1962] ICJ Rep 6, 15–16 (emphasis added). Other ICJ decisions have also recognised this. See Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v USA) (Jurisdiction and Admissibility, Judgment) [1984] ICJ Rep 392 [101] ("Ultimately, however, it is the litigant seeking to establish a fact who bears the burden of proving it . . ."); Case Concerning Oil Platforms (Iran v USA) (Judgment) [2003] ICJ Rep 161 [57] ("the Court has simply to determine whether the United States has demonstrated that it was the victim of an 'armed attack' by Iran such as to justify it using armed force in self-defence; and the burden of proof of the facts showing the existence of such an attack rests on the United States."); Case Concerning Avena and Other Mexican Nationals (Mexico v USA) (Judgment) [2004] ICJ Rep 12 [55] ("Both parties recognize the well-settled principle in international law that a litigant seeking to establish the existence of a fact bears the burden of proving it."); Case Concerning Application of the Convention of the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment) [2007] ICJ Rep 43 [204] ("On the burden or onus of proof, it is well established in general that the applicant must establish its case and that a party asserting a fact must establish it . . ."). These rulings have been cited approvingly by investor-state tribunals. See Salini Construttori SpA and Italstrade SpA v Hashemite Kingdom of Jordan, ICSID Case No ARB/02/13, Award (31 January 2006) [72] ("The Permanent Court of International Justice and the International Court of Justice applied this principle in many cases and the Court stated explicitly in 1984 in the case concerning military and paramilitary activities in and against Nicaragua that 'it is the litigant seeking to establish a fact who bears the burden of proving it'.").

relating to burden of proof "following established international law rules".[16] The first two rules identified by the Tribunal were:

> Rule (G) — "There exists a general principle of law placing the burden of proof upon the claimant".
>
> Rule (H) — "The term actor in the principle *onus probandi actori incumbit* is not to be taken to mean the plaintiff from the procedural standpoint, but the real claimant in view of the issues involved". Hence, with regard to "the proof of individual allegations advanced by the parties in the course of proceedings, the burden of proof rests upon the party alleging the fact".[17]

Subsequent investor-state tribunals have followed this approach.[18]

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[16] *Asian Agricultural Products Ltd v Republic of Sri Lanka*, ICSID Case No ARB/87/3, Final Award (27 June 1990) [56] (emphasis added).

[17] ibid. The tribunal in *Chevron v Ecuador* clarified that the shifting of the burden of proof to the respondent exists, *inter alia*, because of the presumption of good faith. *Chevron Corp and Texaco Petroleum Corp v Republic of Ecuador*, UNCITRAL, PCA Case No 34877, Interim Award (1 December 2008) [139] ("The nature of these defenses as exceptions to a general rule that lead to the reversal of the burden of proof stem from, among other factors, the presumption of good faith. A claimant is not required to prove that its claim is asserted in a non-abusive manner; it is for the respondent to raise and prove an abuse as a defense. A respondent whose defense overcomes the presumption of good faith reveals the hierarchy between these norms, as even a well-founded claim will be rejected by the tribunal if it is found to be abusive.").

[18] See *Hussein Nuaman Soufraki v The United Arab Emirates*, ICSID Case No ARB/02/7, Award (7 July 2004) [58] ("In accordance with accepted international (and general national) practice, a party bears the burden of proof in establishing the facts that he asserts."); *Chevron* (n 17) [138] ("As a general rule, the holder of a right raising a claim on the basis of that right in legal proceedings bears the burden of proof for all elements required for the claim. However, an exception to this rule occurs when a respondent raises a defense to the effect that the claim is precluded despite the normal conditions being met. In that case, the respondent must assume the burden of proof for the elements necessary for the exception to be allowed."); *Waguih Elie George Siag and Clorinda Vecchi v The Arab Republic of Egypt*, ICSID Case No ARB/05/15, Award (1 June 2009) [315] ("As to the burden of proof, the general rule, well established in international arbitrations, is that the Claimant bears the burden of proof with respect to the facts it alleges and the Respondent carries the burden of proof with respect to its defences."); *Saipem SpA v The People's Republic of Bangladesh*, ICSID Case No ARB/05/7, Award (30 June 2009) [113] ("It is a well-established rule in international adjudication that the burden of proof lies with the party alleging a fact, whether it is the claimant or the respondent."); *RosInvestCo UK Ltd v The Russian Federation*, SCC Case No V079/2005, Final Award (12 September 2010) [250] ("the Tribunal notes that the Parties seem to agree on the principle that the burden of proof generally lies with the Claimant to establish the facts on which the claim is based. The Tribunal confirms that view and only adds that, however, the burden of proof can shift to the Respondent with regard to any exception on which the Respondent relies in its defence."); *Alpha Projektholding Gmbh v Ukraine*, ICSID Case No ARB/07/16, Award (8 November 2010) [236] ("The Tribunal agrees with the standard articulated by the *AAPL* tribunal that, with regard to 'proof of individual allegations advanced by the parties in the course of proceedings, the burden of proof rests upon the party alleging the fact.'"); *Vito G. Gallo v The Government of Canada*, UNCITRAL, PCA Case No 55798, Award (15 September 2011) [277] ("the principle *actori incumbit probatio* is a coin with two sides: the Claimant has to prove its case, and without evidence it will fail; but if the Respondent raises

The application of this sub-principle is that the initial burden of establishing a tribunal's jurisdiction and demonstrating a breach of the treaty rests on the claimant. This is a natural consequence of how investor-state arbitration works, where the investor initiates the case against a state. Indeed, in *Tradex v. Albania*, the tribunal acknowledged this by noting that it "can be considered as a general principle of international procedure—and probably also of virtually all national civil procedural laws—, namely that it is the claimant who has the burden of proof for the conditions required in the applicable substantive rules of law to establish the claim."[19] However, the corollary of this sub-argument would equally hold true. Therefore, while the claimant bears the initial burden to establish the claim, respondent state has to prove its

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defences, of fraud or otherwise, the burden shifts, and the defences can only succeed if supported by evidence marshalled by the Respondent."); *Société Générale de Surveillance S.A. v The Republic of Paraguay*, ICSID Case No ARB/07/29, Award (10 February 2012) [79] ("Claimant bears the initial burden of proof in substantiating its claims, and Respondent bears the burden of proving its defenses."); *Churchill Mining PLC and Planet Mining Pty Ltd v Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Award (6 December 2016) [238] ("Starting with the burden of proof, the Tribunal deems it appropriate to apply international law to this issue, since the claims brought in this arbitration seek to establish the responsibility of a State for breach of the latter's international obligations. It is a well-established rule in international law that each Party bears the burden of proving the facts which it alleges (*actori incumbit onus probandi*). Since the Respondent alleges that the Survey and Exploration Licenses and related documents are forged and that the Exploitation Licenses were obtained through deception, the Respondent bears the burden of proving its allegations of forgery and deception.").

[19] *Tradex Hellas S.A. v Republic of Albania*, ICSID Case No ARB/94/2, Award (29 April 1999) [74]. A subsequent tribunal has adopted a similar reasoning. *Middle East Cement Shipping and Handling Co SA v Arab Republic of Egypt*, ICSID Case No ARB/99/6, Award (12 April 2002) [89] ("The respective provisions of the BIT confirm what can be considered as a general principle of international procedure—and probably also of virtually all national procedural laws—namely that it is the Claimant who has the burden of proof for the conditions required in the applicable substantive rules of law to establish the claim."). See also *CME Czech Republic BV (The Netherlands) v The Czech Republic*, UNCITRAL, Partial Award (13 September 2001) [285] ("In respect to the breach of the Treaty as alleged, the burden of proof is on the Claimant to demonstrate that both the breach and the responsibility of the Czech State is engaged."); *Noble Ventures, Inc v Romania*, ICSID Case No ARB/01/11, Award (12 October 2005) [100] ("There are two separate aspects to the Claimant's claim with regard to the slag pile. The first depends upon the Claimant establishing that SOF was guilty of fraudulent misrepresentation of the position in relation to the slag pile. On that issue, the burden of proof (i.e., the risk of non-persuasion of the Tribunal) rests on the Claimant."); *Salini Costruttori* (n 15) [70] ("It is a well established principle of law that it is for a claimant to prove the facts on which it relies in support of his claim – 'Actori incumbat probatio'."); *Tokios Tokelės v Ukraine*, ICSID Case No ARB/02/18, Award (26 July 2007) [121] ("the burden of demonstrating the impact of the state action indisputably rests on the Claimant. The principle of onus *probandi actori incumbit* – that a claimant bears the burden of proving its claims – is widely recognized in practice before international tribunals."); *Bayindir Insaat Turizm Ticaret Ve Sanayi AŞ v Islamic Republic of Pakistan*, ICSID Case No ARB/03/29, Award (27 August 2009) [140] ("The Parties concur that the burden of proving treaty breaches lies upon Bayindir."); *Señor Tza Yap Shum v The Republic of Peru*, ICSID Case No ARB/07/6, Award (7 July 2011) [151] ("*El Demandante, por supuesto, tiene la carga de la prueba de sus alegaciones*.").

defenses, counter-claims or any factual premise that it may advance.[20] The *Rompetrol v. Romania* tribunal summarized the basic principle as it applies in an investor-state arbitration in the following manner:

> [T]he Tribunal finds that it can safely rest, so far as the burden of proof is concerned, on the widely accepted international principle that a party in litigation bears the burden of proving the facts relied on to support its claim or defence. This is often put as a maxim: he who asserts must prove (*onus probandi incumbit actori*). A claimant before an international tribunal must establish the facts on which it bases its case or else it will lose the arbitration. The respondent does not in that sense bear any 'burden of proof' of its own, but if it fails where necessary to throw sufficient doubt on the claimant's factual premises, it runs the risk in turn of losing the arbitration; but only 'the risk,' because the particular factual premise may not in the event turn out to be decisive in the legal analysis. Conversely, if the respondent chooses to put forward fresh allegations of its own in order to counter or undermine the claimant's case, then by doing so the respondent takes upon itself the burden of proving what it has alleged.[21]

A related, brief final point on this sub-argument. As the plain language of the sub-principle above makes clear, the burden of proof extends only to questions of fact and not to legal questions under public international law, because the tribunal is presumed to know this.[22]

(B) *Investor-State Tribunals Have Refused To Relax The Basic Principle and have applied at all stages of the Arbitration Process*

The second sub-argument is that the basic principal has been treated as so fundamental and so pivotal to a proceeding that investor-state tribunals have applied

[20] For cases discussing this, see n 18.

[21] *The Rompetrol Group NV v Romania*, ICSID Case No ARB/06/3, Award (6 May 2013) [179].

[22] Jeffrey Waincymer (n 2) 762–63 ("Burden of proof relates to factual matters and not questions of legal interpretation, although the party with the burden must be able to identify a legal basis for the claim."). See also Chittharanjan F. Amerasinghe (n 2) 50 ("A clear distinction is made between fact and law. A claim, whether relating to jurisdiction or merits, generally relies on facts and rules or principles of law in order to be sustained. The burden of proof is applicable only to the facts underlying a claim. The law is deemed to be known by the tribunal: *iura novit curia*."). Parties are therefore not required to prove general international law because the tribunal is presumed to know the law following the *iura novit cura* principle. Domestic law would, however, be treated as a fact before international tribunals.

the basic principle to every stage of the arbitration process and have refused to relax the basic principle even in situations of extreme hardship or distress. Indeed, investor-state tribunals treat the basic principle of burden of proof not as an equitable doctrine or prudential concern but rather a rule of law doctrine. This means that there are no circumstances of convenience or judicial equity that would excuse a party from discharging its burden of proof. Even in instances where a tribunal is able to rely on a presumption or an inference to prove a fact, the argument is not that the party with the burden of proof is relaxed from the burden but rather that the burden of proof has already been met by virtue of the presumption or inference. This is discussed further in Part II below.

In support of this sub-argument, listed below are some instances where tribunals have refused to relax burden of proof despite inequities or hardships:

1. *The burden of proof is not altered because of the hardships suffered in obtaining and submitting evidence by the party upon which it is placed*

Investor-state tribunals have insisted that the basic principle would apply even in situations where documentary evidence would pose enormous difficulties for the party with the burden. This is particularly significant in the investor-state context because an investor might not always have access to documents in situations where it has been expelled from a country or if a state has seized documents in exercise of its police powers. None of these situations would however relax the basic principle. For example, in *Al-Bahoul v. Tajikstan*, the tribunal noted that even if an investor no longer has access to the documents, even if it was because of the state's own actions, this would not permit a tribunal to relax the rules relating to burden of proof:

> Claimant has represented to the Tribunal that extensive efforts were made to obtain further documentary evidence in support of his case, but were not successful since such evidence is located in Tajikistan where Claimant and his representatives no longer have access to it. While the Tribunal can understand that currently Claimant may have no or very limited access to documents in Tajikistan, this

> does not allow the Tribunal to make far-reaching assumptions to the detriment of Respondent.[23]

In such an instance, while direct evidence might be hard to acquire, the investor could rely on circumstantial evidence as discussed in Chapter 4 but is still expected to meet the initial burden of proof. Further, even in situations where a party may be able to rely on a presumption or inference to meet its burden, tribunals are careful to ensure that the burden of proof is not reversed, thereby highlighting the importance of the basic principle. In a case involving Laos, the investor argued that since the documents were under the control of the Government, the tribunal could not infer factual propositions because this would lead to an impermissible reversal of the burden of proof:

> The Tribunal notes the Claimant's contention that against a sovereign state a Claimant "is often unable to furnish direct proof of facts giving rise to responsibility" because, as the Claimant argues, such evidence is often "exclusively within the control of the Government." Nevertheless where, as here, the Claimant's case is based on "inferences of fact and circumstantial evidence" . . . a Tribunal must be careful not to shift the onus of proof from the Claimant to the Respondent Government or to bend over backwards to read in inferences against "the sovereign state" that are simply not justified in the context of the whole case.[24]

In other words, even if a Respondent has access to all documents, an investor cannot argue that because the Respondent has all the documents, the case must be determined in its favor. Such inferences are impermissible and the investor would still have to meet its burden through alternative methods.

2. *The burden of proof is not altered or relaxed because the non-moving party has greater ease of access to probative evidence*

Related to the earlier point, investor-state tribunals have refused to move the burden of proof to the other party even if there are allegations to the effect that the party (often

[23] *Mohammad Ammar Al-Bahloul v Republic of Tajikstan*, SCC Case No V (064/2008), Partial Award On Jurisdiction And Liability (2 September 2009) [115] (emphasis added).

[24] *Lao Holdings N.V. v Lao People's Democratic Republic*, ICSID Case No ARB(AF)/12/6, Decision on the Merits (10 June 2015) [11] (emphasis added).

the state) is in a better position to deal with the evidence must produce it.[25] The annulment committee in *Azurix v. Argentina*, for example, noted:

> In its letter dated August 2, 2004, Argentina refers to what it claims is "*a general principle of law that the party that is in a better position to prove a fact bears the burden of proof*". The Committee does not accept that such general principle exists in ICSID proceedings: to the contrary, the Committee considers the general principle in ICSID proceedings, and in international adjudication generally, to be that "who asserts must prove", and that in order to do so, the party which asserts must itself obtain and present the necessary evidence in order to prove what it asserts.[26]

While the party would be expected to meet the initial burden, it can seek additional, supplementary documents at the document production phase or make a motion to the tribunal to seek documents. But, a party with the initial burden of proof or initial burden relating to any defence would be expected to do everything it can to meet such initial burden. While this may appear harsh, the underlying rationale for doing so remains sound, *i.e.*, reversal of the burden would require the non-moving party to respond to allegations that have not been made out. This is not appropriate in the investor-state context where a tribunal's mandate is limited and without police powers that judicial courts might possess.

3. *Burden of proof and default: The burden of proof is not discharged by the non-moving party's failure to participate in arbitral proceedings*

Both the ICSID Arbitration Rules and the UNCITRAL Arbitration Rules contemplate party default, *i.e.*, situations where one party (in our case, the respondent state) fails to participate in the arbitration proceedings.[27] Both sets of rules do not contemplate

[25] See eg Richard M. Mosk, *The Role of Facts in International Dispute Resolution* (Recueil Des Courts 2003) 136 ("The Rule that the burden of proof lies on him who affirms a fact and not on him who denies it (*ei qui affirmat. non ei qui negat incumbit probantio*) admits of no exception – none whatsoever. Nor is there any room under the Rule for a shift in the burden of proof at any of the middle stages of the proceeding. Throughout the case and at the end of the day, the duty to prove an asserted fact remains with him who makes it. In the absence of satisfactory proof on his part, he can never succeed in his assertion on the basis of his adversary's failure to carry a shifted burden.").

[26] *Azurix Corp v Argentine Republic*, ICSID Case No ARB/01/12, Decision on the Application for Annulment of Argentine Republic (1 September 2009) [215] (emphasis added).

[27] ICSID Rules of Procedure for Arbitration Proceedings ('ICSID Arbitration Rules') (April 2006), Rule 42; UNCITRAL Arbitration Rules (2010), Article 30.

default awards in the sense of a default judgment being issued as a matter of course to the non-defaulting party.[28] Instead, both sets of rules require that the arbitral tribunal still examine the claim before it and determine its jurisdiction, the merits of the claim, or claims and the appropriate remedy to be granted to the non-defaulting claimant.[29]

Investor-state tribunals dealing with default situations have similarly required that the investor is expected to meet its burden even if the respondent state fails to participate in the legal proceeding. In other words, a tribunal still needs to be satisfied that the claim is with merit before it makes an adverse finding against the non-participating party:

> The principal difficulty we have encountered in the present case relates not to the law or the applicable legal standards, but to the factual evidence submitted in support of Claimant's legal positions. The Tribunal has repeated on a number of occasions during this arbitration that Claimant bears the burden of proving the factual allegations essential to support its legal claims, notwithstanding Respondent's non-appearance in the proceedings. Although Swedish law, the applicable procedural law in this arbitration, does not contain any specific statutory provisions dealing with allocation of the burden of proof or rules concerning the standard of proof required, it is generally accepted that a party who raises a claim needs to prove the circumstances which form its legal and factual basis.[30]

Non-participation, therefore, does not create a presumption that the investor has a "better" case on jurisdiction or that the state has indirectly admitted to the investor's claims on the merits by failing to participate. In such situations, the tribunal will ensure that the investor is able to appropriately meet the burden of proof and the failure to do so to the satisfaction of the tribunal can result in dismissal of the case.

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[28] See n 27.

[29] ibid.

[30] *Mohammad Ammar Al-Bahloul* (n 23) [113] (emphasis added).

4. *Burden of Proof Applies throughout the Arbitral Process including Various Motions that might be brought*

Tribunals have applied the basic principle relating to burden of proof to all the motions that might be brought during an arbitration. In other words, each party must prove the allegation it makes through the life cycle of the arbitration process.

Indeed, as will be discussed below in further details, tribunals have applied the basic principle to the jurisdictional, merits, and the damages phase of a proceeding, although there are slight nuances in the way the basic principle is applied and there are differing reasons as to why the basic principle is applied in those situations.[31] It has also been applied to a series of different claims and motions that come up in an investor-state arbitration: claims of denial of justice,[32] corruption,[33] discrimination,[34] challenges to

[31] For further discussion on the application of the basic principle to jurisdictional matters, see Section III below and for damages, see Section IV below. On damages, see also *Československá Obchondni Banka AS v Slovak Republic*, ICSID Case No ARB/97/4, Award (29 December 2004) [225] ("The Tribunal shares the Parties' view that as a matter of principle, the burden of proof for CSOB's damage is on CSOB."). See also *Generation Ukraine, Inc v Ukraine*, ICSID Case No ARB/00/9, Award (16 September 2003) [19.1] ("The Claimant has the burden of demonstrating the nature and quantum of its expenditure relating to the Parkview Project in accordance with internationally acceptable accounting practices."); *Grand River Enterprises Six Nations, Ltd v United States of America*, UNCITRAL, Award (12 January 2011) [237] ("Under NAFTA Article 1116, an investor of a Party may submit to arbitration a claim that another NAFTA Party has breached specified NAFTA obligations 'and that the investor has incurred loss or damage by reason of, or arising out of, that breach.' Under UNCITRAL Rule 24(1) (which applies in this proceeding), a claimant has the burden of proving both the breach and the claimed loss or damage."); *Khan Resources Inc., et al v Government of Mongolia*, UNCITRAL, Award (2 March 2015) [375] ("The burden of proof falls on the Claimants to show that they have suffered the loss they claim.").

[32] See eg *Mr Jan Oostergetel and Mrs Theodora Laurentius v The Slovak Republic*, UNCITRAL, Final Award (23 April 2012) [274] ("[T]he question is whether the judicial system of the Slovak Republic breached the BIT by refusing to entertain a suit, subjecting it to undue delay, administering justice in a seriously inadequate way, or by an arbitrary or malicious misapplication of the law. The burden of proof is on the Claimants to demonstrate such a systematic injustice."); *Swisslion DOO Skopje v The Former Yugoslav Republic of Macedonia*, ICSID Case No ARB/09/16, Award (6 July 2012) [268] ("Although in its Reply the Claimant attempted to impugn the court proceedings as a denial of justice, in the Tribunal's view, it failed to discharge its burden of proof to show that the courts failed to meet international law's requirements for the conduct of a civil proceeding. The Claimant was unable to point to any serious procedural unfairness in the conduct of the legal proceedings and, other than general evidence relating to the alleged lack of independence of the Macedonian courts not shown to be related to the facts of the present case, there was no evidence of a lack of judicial independence or other judicial misconduct in the litigation that Swisslion sought to impugn.").

[33] See eg *Wena Hotels Ltd v Arab Republic of Egypt*, ICSID Case No ARB/98/4, Award (8 December 2000) [77] ("[A]lthough Egypt has raised serious allegations of misconduct and corruption, the Tribunal finds that Egypt (which bears the burden of proving such an affirmative defense) has failed to prove its allegations.").

[34] See eg *EDF International SA, SAUR International SA, and Leon Participaciones Argentinas S.A. v Argentine Republic*, ICSID Case No ARB/03/23, Award (11 June 2012) [920] ("The Tribunal laid down no

arbitrators,[35] security for costs,[36] changes of custom,[37] continued stay of the enforcement of an award,[38] document production privileges,[39] provisional/interim measures,[40] and claims that local remedies have not been exhausted.[41]

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general requirement of discrimination as a basis for liability under relevant treaty provisions, but simply stated that any allegations of treaty breach based on discrimination would need to be proven by Claimants.").

[35] See eg *SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan*, ICSID Case No ARB/01/13, Decision on Claimant's Proposal to Disqualify Arbitrator (19 December 2002) [20] ("The party challenging an arbitrator must establish facts, of a kind or character as reasonably to give rise to the inference that the person challenged clearly may not be relied upon to exercise independent judgment in the particular case where the challenge is made. The first requisite that facts must be established by the party proposing disqualification, is in effect a prescription that mere speculation or inference cannot be a substitute for such facts. The second requisite of course essentially consists of an inference, but that inference must rest upon, or be anchored to, the facts established. An arbitrator cannot, under Article 57 of the Convention, be successfully challenged as a result of inferences which themselves rest merely on other inferences.").

[36] See eg *Rachel S Grynberg, Stephen M Grynberg, Miriam Z Grynberg, and RSM Production Corp v Grenada*, ICSID Case No ARB/10/6, Tribunal's Decision On Respondent's Application For Security For Costs (14 October 2010) [5.17] ("It is beyond doubt that a recommendation of provisional measures is an extraordinary remedy which ought not to be granted lightly. . . . It is also beyond doubt that the burden to demonstrate why a tribunal should grant such an application is on the applicant."); *RSM Production Corp and others v Grenada [II]*, ICSID Case No ARB/10/6, Decision on Respondent's Application for Security for Cost (14 October 2010) [5.17-5.18] ("It is also beyond doubt that the burden to demonstrate why a tribunal should grant such an application is on the applicant. In cases of security for costs, Arbitrators (and courts in jurisdictions which are prepared to make such an order) will rarely think it right to grant such an application if the party from whom security is sought appears to have sufficient assets to meet such an order, and if those assets would seem to be available for its satisfaction.").

[37] See eg *Glamis Gold, Ltd v United States of America*, UNCITRAL, Award (8 June 2009) [21] ("As an evidentiary matter, the evolution of a custom is a proposition to be established. The Tribunal acknowledges that the proof of change in a custom is not an easy matter to establish. In some cases, the evolution of custom may be so clear as to be found by the tribunal itself. In most cases, however, the burden of doing so falls clearly on the party asserting the change."); *Cargill, Inc v United Mexican States*, ICSID Case No ARB(AF)/05/2, Award (18 September 2009) [271] ("The content of a particular custom may be clear; but where a custom is not clear, or is disputed, then it is for the party asserting the custom to establish the content of that custom.").

[38] See eg *SGS Société Générale de Surveillance S.A. v The Republic of Paraguay*, ICSID Case No ARB/07/29, Decision on Paraguay's Request for the Continued Stay of Enforcement of the Award (22 March 2013) [86] ("Based on the plain language of Rule 54(4) of the ICSID Arbitration Rules, it is also clear to the Committee that the party interested in the continued stay bears the burden of proof to demonstrate the existence of circumstances that warrant said continuation. Indeed, Rule 54(4) provides that '[a] request [for a stay of enforcement] . . . shall specify the circumstances that require the stay . . .' In the present case, the burden of establishing circumstances justifying a continued stay clearly falls on Paraguay.") (ellipses in original).

[39] See eg *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon Delaware Inc. v Government of Canada*, PCA Case No 2009-04, Procedural Order No 13 (11 July 2012) [25] ("The burden of establishing the validity of a claim is on the party asserting it, and the Tribunal will make the final decision with respect to determining a party's privilege claims within the framework of the legal issues particular to the case, the evidence otherwise available, and in light of the applicable law. A demonstration of good faith and diligence in applying the appropriate legal standard, however, is a factor

This basic principle is subject to the obvious exception that a party does not need to prove obvious or notorious facts. As commentators have noted: "The only exceptions relate to propositions that are so obvious, or notorious, that proof is not required."[42] This is because these are facts where a tribunal can take judicial notice: these are, therefore, presumed to be true.

Below, a brief discussion on the function of the basic principle is provided.

(C) *Function of the Basic Principle: It Aids In Decision-Making From Firm Factual Presumptions*

Considering how significant and critical the basic principle is and further considering its pervasive nature to the arbitration proceeding, it is worth trying to discern reasons for

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that may be considered by the Tribunal in arriving at its determination, A [sic] party claiming privilege is expected to make a diligent and skillful effort to describe the contents of a contested document, although the institutional sensitivity that underpins a meritorious claim may limit the level of descriptive detail that the asserting party can provide. . . . In a close case, the credibility of a party's consideration of the issue may be significant in concluding that the privilege claim should be sustained."); *Apotex Holdings Inc. and Apotex Inc. v United States of America*, ICSID Case No ARB(AF)/12/1, Procedural Order on Privileged Document Production (5 July 2013) [33] ("the Tribunal observes that the factual burden of proof under both the IBA Rules and US law lies with the party asserting attorney-client privilege so as to exclude communications from the rule otherwise favouring disclosure, for which specific evidence is required by US courts.").

[40] See eg *Sergei Paushok, CJSC Golden East Co and CJSC Vostokneftegaz Co v Government of Mongolia*, UNCITRAL, Order on Interim Measures (2 September 2008) [40] ("In requests for interim measures, it is incumbent upon Claimants to demonstrate that their request is meeting the standards internationally recognized as pre-conditions for such measures"); *Churchill Mining and Planet Mining Pty Ltd v Republic of Indonesia*, ICSID Case No ARB/12/14 and 12/40, Procedural Order No 9 (8 July 2014) [71] ("the Tribunal stresses that the applicant must establish the requirements with sufficient likelihood, without however having to actually prove the facts underlying them. Moreover, the Tribunal's assessment is necessarily made on the basis of the record as it presently stands and any conclusion reached in this order could be reviewed if relevant circumstances were to change.").

[41] See eg *Chevron Corp (U.S.A.) and Texaco Petroleum Corp (U.S.A.) v Republic of Ecuador*, PCA Case No AA 277, Partial Award on the Merits (30 March 2010) [329] ("A respondent State must prove that remedies exist before a claimant will be required to prove their ineffectiveness or futility or that resort to them has been unsuccessful.").

[42] Blackaby et al, Redfern and Hunter (n 11) 387. See also *Marion Unglaube v Republic of Costa Rica*, ICSID Case No ARB/08/1, Award (16 May 2012) [33] ("[T]here is a nearly universal practice among international arbitration tribunals to require each party to prove the facts which it advances in support of its own case. Exceptions to his [sic] general rule only apply to obvious or notorious facts."). Indeed, these are instances where a tribunal will take "judicial notice" of the fact. See eg Durward V. Sandifer (n 45) 382 (defining "judicial notice" as "propositions in a party's case, as to which he will not be required to offer evidence, . . . [being] taken for true by the tribunal without the need for evidence.") (ellipsis and parenthetical in original); Bin Cheng (n 1) 303 ("certain allegations of the parties that are within the knowledge of the tribunal need no evidence in support. "*Judicial notice*" is taken of the facts averred. Proof may thus be dispensed with as regards facts which are of common knowledge or public notoriety or which, in the circumstances, of the case, are self-evident.").

why arbitral tribunal take the basic principle seriously. The sub-argument underpinning the decisions of investor-state tribunals is that by insisting on the basic principle, the tribunal is establishing an initial presumption that the proposition being put forward by the claimant is well-founded. Indeed, this presumption is rebuttable by the other party and to that extent this argument highlights how the notion of burden of proof and the notion of presumptions (discussed further in Chapter 5) are closely linked concepts.

The decision-making process requires a tribunal to resolve claims presented by the parties on the basis of the arbitral record, and forbids it from resorting to an obscurity of law or fact to resolve a dispute.[43] Accordingly, a tribunal cannot avoid its decision-making function by stating that the record is not sufficiently complete to permit legal resolution of the dispute.[44] A tribunal must, therefore, set cognizable and predictable starting points for its analysis in order to resolve the dispute.[45]

This starting point, or presumption, for the tribunal's factual inquiry is that all facts in the dispute follow the "ordinary course" of events in similar transactions.[46] It is at this point that the burden of proof arises as a central tool for tribunals to exercise their decision-making role. When a party asserts a deviation from that ordinary course of events which the tribunal has assumed as the default, that asserting party must present

[43] The common law, in particular, places a lot of emphasis on the fact that a case must be resolved on the basis of the factual pleadings of the parties. See eg *Model Code of Evidence as Adopted and Promulgated by the American Law Institute* (15 May 1942) 3 ("The court has no machinery for discovering sources of information unknown to the parties or undisclosed by them. It must rely in the main upon data furnished by interested parties. . . . The trier of fact an get no more than the adversaries are able and willing to present.").

[44] Indeed, as purely legal matter, if the record isn't complete, the tribunal must dismiss those claims or defences as being not proven.

[45] See Thomas M. Mengler, 'The Theory of Discretion in the Federal Rules of Evidence' (1989) 74 Iowa Law Review 413, 465–66 (linking the importance of rules of evidence to the values of fairness in adjudication and predictability). See also Durward V Sandifer (n 13) 126 ("Cappelletti and Perillo attribute the importance of the burden of proof in Italian Law to the obligation incumbent upon the judge to come to a decision. He cannot, as in classical Roman times, refuse to decide a case if neither party could convince him (non liquet judgment). The broad basic rule of burden of proof adopted, in general, by international tribunals resembles the civil law rule.").

[46] For a comparative law engagement of the policy choices underlying the setting of "default" presumptions representing the assumed ordinary course of events and their implications for the law of evidence, see Linda Hamilton Krieger, 'The Burdens of Equality: Burdens of Proof and Presumptions in Indian and American Law' (1999) 47 American Journal of Comparative Law 89, 118–27 (discussing the policy choice of what constitutes normalcy—and thus sets the background for presumptions—in discrimination cases).

evidence that the dispute does in fact involve such a deviation.[47] Reversing the burden of proof is, by its nature, perverse because it would require the other party to negate a statement that has not been backed by evidence. The combination of burdens of proof and presumptions of the ordinary meet the function of establishing a firm factual starting point that nothing extra-ordinary occurred between the claimant and the respondent.[48] Failure to adduce evidence that discharges a burden of proof would thus mean that the tribunal would make a finding that what occurred between the parties coincided with the ordinary course that it presumed.

The relationship between burdens of proof and presumptions brings to the forefront what is meant by the maxim *actori incumbit onus probandi*. Burden of proof practically arises when a party makes a factual allegation needed to prove an element of a claim or defence that deviates from normal or reasonable conduct by a reasonable person in a similar situation.[49] All legal claims, by their very nature, require claimants to advance at least one such factual allegation.[50] Burden of proof highlights the extraordinary nature of the claim.

Practically, this means that a defence is subject to a burden of proof only when the defence invokes a set of facts that are not ordinarily found to be the case. Such defenses are treated in some legal systems as "affirmative" defenses.[51] The distinction

[47] ibid.

[48] See Ronald J. Allen, 'Burdens of Proof, Uncertainty, and Ambiguity in Modern Legal Discourse' (1994) 17 Harvard Journal of Law and Public Policy 627, 633 ("The defining trait of litigation is decision under uncertainty. In virtually all cases, decision is reached by uninvolved third parties (judge or jurors) evaluating reports of events rather than by viewing the events themselves. In all such cases, the reports might be in error, and in many cases the reports offered at trial conflict. Indeed, that is usually why there is a trial. Even when primary data exist, such as exhibits or videos, typically those data must be interpreted, so again there is often a considerable distance between the actual event and the decision about that event. Consequently, decision must be taken under uncertainty, and the burden of persuasion merely provides the decision rule under uncertainty.").

[49] See Bin Cheng (n 2) 129.

[50] This rule operates almost by definition because a failure to abide by legal obligations on the part of one of the parties that has become so generalized to become the new norm (and thus operate by presumption) would also shift the risk of loss.

[51] See eg U.S. Federal Rules of Civil Procedure, Rule 8(c): "In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including: • accord and satisfaction; • arbitration and award; • assumption of risk; • contributory negligence; • duress; • estoppel; • failure of consideration; • fraud; • illegality; • injury by fellow servant; • laches; • license; • payment; • release; • res judicata; • statute of frauds; • statute of limitations; and • waiver."

between “ordinary” and “affirmative” defenses is perfectly understandable on the basis of the function of burdens of proof – a respondent must go beyond the good faith presumption in order to establish a factual element of its defence – or challenge that the good faith presumption the tribunal is asked to apply recognizes the relevant public policies in establishing default rules for adjudication. As to that factual element, the respondent now has to disprove the presumption, and is, therefore, saddled with a burden of proof.

This functional understanding of the burden of proof also explains why the burden can be discharged through pleading a presumption. At their core, presumptions are an assumption of the “good faith” of the litigants.[52] Such a “good faith” presumption means that the parties are deemed to have been honest and reasonable in their dealings.[53] The reasonableness of their dealings is measured against the relevant market standard, *i.e.*, what risks each party ordinarily assumes and should have anticipated.[54] The reasonableness prong of the good faith presumption in particular is an essential fact finding tool for tribunals to deem that the parties acted reasonably towards each other in light of the relevant context – *i.e.*, they acted like typical actors do in like circumstances.[55]

Indeed, this perspective also permits a more granular understanding of how and why the burden of proof in international arbitration is inextricably interrelated to the concept of presumptions, as opposed to the sometimes mechanical invocation of the burden of proof in the jurisprudence.[56] However, such a jurisprudential use of burdens is a

[52] See Bin Cheng (n 2) 106.

[53] ibid.

[54] See Frédéric Gilles Sourgens, ‘Reason and Reasonableness, the Necessary Diversity of the Common Law’(2014) 67 Maine Law Review 73.

[55] See Bin Cheng (n 2) 129.

[56] A mechanical invocation of the burden of proof suggests that absent affirmative proof to the contrary, a tribunal can abdicate itself of decisionmaking responsibilities by pleading that one of the parties has failed to present sufficient record evidence to permit legal disposition of the case. The case then is resolved by a naked invocation of burdens rather than upon the basis of a predicate of relevant factual determinations. Such a mechanical use of the burden of proof comes dangerously close to a resolution of the dispute on the basis of non liquet. For a discussion of such cases in investor-state jurisprudence, see Frédéric Gilles Sourgens, *A Nascent Common Law, The Process of Decisionmaking Between States and Foreign Investors* (Brill Nijhoff 2015) 207–52.

functional perversion, as the burden of proof is a tool for a tribunal to make factual determinations—not to avoid them.

III. BURDEN OF PROOF AS RECOGNIZED AND APPLIED BY INVESTOR-STATE ARBITRATION AT THE JURISDICTION PHASE

In this section, the application of the basic principle is examined in the particular context of the jurisdictional phase of a case. This raises interesting legal questions because the arguments on jurisdiction are made before all the relevant facts on the merits are presented.[57] This means that, for a case that has bifurcated the jurisdictional phase or for a case that is not bifurcated but has to address jurisdictional arguments first, the tribunal may not have all the facts that relate to the merits. The question that therefore arises is who and how much evidence needs to be provided at the jurisdictional stage. Indeed, at the jurisdictional stage, issues relating to burden of proof (who must prove) and standard of proof (how much evidence needs to be produced by the party with the burden of proof) will interact closely with each other and are, therefore, discussed together. More generally, the application of the burden of proof during the jurisdictional stage of the proceedings is both contentious and potentially misunderstood, both because of the how the basic principle is applied and the reasons for doing so. In an investor-state proceeding, a tribunal has a limited mandate that is provided by states. It is, therefore, important to ensure that the tribunal has the appropriate jurisdictional mandate. For the purposes of the research, examining the basic principle in the context of the jurisdictional phase is a worthwhile endeavor.

My argument for burden of proof at the jurisdictional phase, as recognized and applied by investor-state tribunals, can be summarized in two sub-principles: (i) facts that relate to the jurisdiction of a tribunal must be established by the investor at the jurisdictional phase of the case and if the Respondent seeks to rely on defenses to jurisdiction, it must prove such defenses at the jurisdictional stage itself; however (ii)

[57] *Plama Consortium Ltd v Republic of Bulgaria*, ICSID Case No ARB/03/24, Decision on Jurisdiction (8 February 2005) [167] ("the burden of proof on the merits is significantly different from the burden applied to a jurisdictional issue."). For a general discussion on burden of proof at the jurisdiction stage, see Kabir Duggal (n 14) 33-37.

facts that relate to the merits must be raised by the investor but not proved so a tribunal can determine at the jurisdictional phase whether they would fall within its jurisdiction and thereby assume the veracity of these facts. There will, however, be no opinion formed on these facts at the jurisdictional stage rather these will be appropriately decided at the merits stage, if the case is not dismissed on jurisdiction. These sub-principles are discussed below in further detail:

(A) *The Investor has the Burden of Proof in The Initial Establishment of Jurisdiction*

The starting premise of my argument is that the creation of a record permitting the initial establishment of jurisdiction is a task that must fall to the party invoking the jurisdiction of an arbitral tribunal.[58] Indeed, this first part of the burden of proof on jurisdiction follows immediately from the attributory nature of international jurisdiction.[59] There is no general right to invoke the jurisdiction of investor-state tribunals, only a specific right enjoyed by specifically listed persons.[60]

The specific nature of jurisdiction in international legal proceedings applies at the level of whether there is consent in the first place. In the terminology used in jurisprudence, jurisdiction must be established first *ratione voluntatis*.[61] This requires an analysis of whether the state party to a BIT or MIT have granted power to the tribunal to

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[58] See *AMTO LLC v Ukraine*, SCC Case No 080/2005, Final Award [64]; *Europe Cement Investment & Trade SA v Republic of Turkey*, ICSID Case No ARB(AF)/07/2, Award (11 August 2009) [166]; *Cementownia 'Nowa Huta' SA v Turkey*, ICSID Case No ARB(AF)/06/2, Award (17 September 2009) [112]; *Ambiente Ufficio SpA and others (Case formerly known as Giordano Alpi and others) v Argentine Republic*, ICSID Case No ARB/08/9, Decision on Jurisdiction and Admissibility (8 February 2013) [312] ("[T]he burden of proof that the Claimants are Italian nationals falls on the Claimants themselves, while the burden to disprove the negative elements –i.e. of not being Argentine (or, for that matter, dual) nationals and of not have been domiciled in Argentina for more than two years – would fall on the Respondent's side."); *Apotex Inc v United States*, UNCITRAL, Award on Jurisdiction and Admissibility (14 June 2013) [150] ("Apotex (as Claimant) bears the burden of proof with respect to the factual elements necessary to establish the Tribunal's jurisdiction.").

[59] See *Abaclat v Argentina*, ICSID Case No ARB/07/5, Dissenting Opinion to Decision on Jurisdiction and Admissibility (4 August 2011) [7]; see also *Impregilo SpA Impregilo SpA v Argentine Republic*, ICSID Case No ARB/07/17, Concurring and Dissenting Opinion of Prof. Brigitte Stern (21 June 2011) [53].

[60] See n 59.

[61] See *RSM Production Corp v Central African Republic*, ICSID Case No ARB/07/2, Decision on Jurisdiction and Liability (7 December 2010) [21]; *Garanti Koza LLP v Turkmenistan*, ICSID Case No ARB/11/20, Decision on the Objection to Jurisdiction for Lack of Consent (3 July 2013) [29]; *Convial Callao SA v Peru*, ICSID Case No ARB/10/2, Award (21 May 2013) [476]–[478].

resolve a specific set of disputes.[62] Then *ratione personae*, *ratione materiae*, and *ratione temporis* must be established – meaning that it must be shown that the specific disputes factually falls within the confines of grant of jurisdictional power.[63]

The party invoking the jurisdiction of an investor-state tribunal – typically the investor – will thus need to submit evidence that there is, in fact, consent to arbitration by the host state.[64] It must then submit evidence that the dispute which the investor is proposing to resolve by arbitral means falls within this consent.[65] Absent a submission by the investor, the tribunal would not be empowered to act and the exceptional nature of jurisdiction would prevent the tribunal from proceeding further. The burden to establish jurisdiction *ratione voluntatis*, therefore, falls on the investor.

The principles on party default (*i.e.*, non-participation by respondent state) can help clarify and confirm the principles relating to burden of proof at the jurisdictional stage outlined above.[66] The investor in case of default must establish to the satisfaction of a tribunal that the tribunal has jurisdiction to hear the case.[67] In the context of a default, there are no factual allegations being advanced against the jurisdictional case since the

[62] See eg *Phoenix Action, Ltd v Czech Republic*, ICSID Case No ARB/06/5, Award (15 April 2009) [54].

[63] ibid ("in order for the Centre to have jurisdiction over a dispute, three – wellknown– conditions must be met, according to Article 25, to which one must add a condition resulting from a general principle of law, which is the principle of non retroactivity:− first, a condition *ratione personae*: the dispute must oppose a Contracting State and a national of another Contracting State; − second, a condition *ratione materiae*: the dispute must be a legal dispute arising directly out of an investment; − third, a condition *ratione voluntatis*, i.e. the Contracting State and the investor must consent in writing that the dispute be settled through ICSID arbitration; − fourth, a condition ratione temporis: the ICSID Convention must have been applicable at the relevant time.") (dashes in original). This research would perhaps place a slightly greater premium on *ratione voluntatis* as the first element recognizing the limited nature of an investor-state tribunal's jurisdiction.

[64] See *Mobil Corp, Venezuela Holdings, BV v Bolivarian Republic of Venezuela*, ICSID Case No ARB/07/27, Decision on Jurisdiction (10 June 2010) [138], [140]. It is worth highlight that such consent would need to be clear and convincing otherwise no consent exists.

[65] See *Hussein Nuaman Soufraki v United Arab Emirates*, ICSID Case No ARB/02/7, Decision of the ad hoc Committee on the Application for Annulment of Mr Soufraki (5 June 2007) [76] (discussing the probative value of certificates of nationality submitted by the claimant).

[66] But see David D. Caron and Lee Caplan, *The UNCITRAL Arbitration Rules: A Commentary* (2nd edn, Oxford University Press 2013) 673 (default "has no effect on the parties' evidentiary burdens, although it may alter the arbitral tribunal's general approach to gathering evidence. The non-defaulting party may not profit from a lighter evidentiary standard simply because its adversary is absent from some or all of the proceedings.").

[67] *Iurii Bogdanov, Agurdino-Invest Ltd and Agurdino-Chimia JSC v Republic of Moldova*, SCC, Arbitral Award (22 September 2005) [28]–[43].

respondent is not a party to the proceeding.[68] Nevertheless, the tribunal must satisfy itself that it has jurisdiction even in this context and thus test the sufficiency of the factual predicate of the claimant's case.[69] As noted above, there is no punishment for non-participation in international legal proceedings – *i.e.*, there is no rule that non-participation in legal proceedings alters the exceptional nature of consent – default rules set the floor of jurisdiction proof which the investor must overcome.[70]

This floor requires a tribunal to assess the proof submitted by the investor (and the investor alone) and determine whether if this proof were unrebutted it would satisfy the tribunal that it had jurisdiction.[71] If on the basis of that record – and that record alone – the investor meets the applicable standard of proof, the investor's burden has been discharged.[72] In other words, the burden does not remain on the investor because of something the respondent submits.[73] Any burden resting on the investor is fully independent of objections to jurisdiction raised by a respondent and operates as a matter of law even before any such objections are recorded.[74] To summarize my argument, the argument is initial establishment of a tribunal's jurisdiction falls on the investor, as the party invoking a tribunal's (specialized and exceptional) jurisdiction.

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[68] ibid.

[69] ibid. See also ICSID Arbitration Rules, Rule 42(4) ("The Tribunal shall examine the jurisdiction of the Centre and its own competence in the dispute and, if it is satisfied, decide whether the submissions made are well-founded in fact and in law. To this end, it may, at any stage of the proceeding, call on the party appearing to file observations, produce evidence or submit oral explanations.").

[70] ICSID Convention, Article 45 ("(1) Failure of a party to appear or to present his case shall not be deemed an admission of the other party's assertions. (2) If a party fails to appear or to present his case at any stage of the proceedings the other party may request the Tribunal to deal with the questions submitted to it and to render an award. Before rendering an award, the Tribunal shall notify, and grant a period of grace to, the party failing to appear or to present its case, unless it is satisfied that that party does not intend to do so.").

[71] ICSID Arbitration Rules, Rule 42(4); Schreuer et al (n 11) 721.

[72] Iurii Bogdanov, Agurdino-Invest Ltd and Agurdino-Chimia JSC v Republic of Moldova (n 67) [28] – [43].

[73] ibid.

[74] ICSID Arbitration Rules, Rule 42(4); *Société Générale* (n 117) [59]; *Mytilineos Holdings* (n 117) [114]; *Azurix Corp* (n 117) [68].

(B) *The Investor has the Burden of Proof in The Initial Establishment of a Cognizable Claim*

The second prong of my argument is that after the investor has established a tribunal's initial jurisdiction, the investor has the burden to establish a cognizable claim under the BIT or MIT. Indeed, part of the jurisdictional analysis of any arbitral tribunal is whether the claim raised by the claimant is one for which relief may be granted it.[75] In the first instance, the claimant must submit a "legal dispute."[76] Further, the legal dispute in question must be one for which the tribunal is empowered to grant relief.[77]

Both aspects of the analysis at the jurisdictional stage set out rules for pleadings.[78] The pleading must be sufficient to allow the tribunal to determine, at the jurisdictional stage, whether any eventual finding on the merits would fall within the scope of its jurisdictional mandate.[79] If there is no legal dispute arising out of the pleadings, there is nothing for the tribunal to do. Similarly, if the request for arbitration does not state a claim that, if true, falls within the scope of the tribunal's remit, then it is clear at the outset that the tribunal has no task to perform and no merits to determine. Indeed, the tribunal is not making a determination at the jurisdictional stage or prejudging the merits but rather only determining if the matter falls within the jurisdictional mandate.

As a jurisdictional question, the issue does not concern the truth of the matter asserted in the pleadings. It just concerns the logically anterior question whether the pleadings trigger the tribunal's scope of arbitral authority.[80] The assertions thus need not be proved at this stage of the proceedings.

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[75] Audley Sheppard, 'The Jurisdictional Threshold of a Prima-Facie Case' in Peter T. Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press 2008) 932–960.

[76] *Mavromatis Palestine Concessions* [1924] PCIJ Rep Series A No 2, 11; *Certain Property (Liechtenstein v Germany)* [2005] ICJ Rep 6, 18; *Lao Holdings NV v Lao People's Democratic Republic*, ICSID Case No ARB(AF)/12/6, Decision on Jurisdiction (21 February 2014) [120]–[121].

[77] For a discussion of jurisprudence, see Sheppard (n 75) 932, 944–954.

[78] See *Case Concerning Oil Platforms* (*Iran v USA*) (Separate Opinion of Judge Higgins) [1996] ICJ Rep 847, paras 32–34.

[79] ibid.

[80] ibid.

My argument in this regard has long support in international law. Fundamentally, this approach has been adopted in ICJ and followed in investor-state arbitral jurisprudence. The most common approach has been to follow the "*pro tem*" principle wherein a claimant invoking the jurisdiction of the international body alleges facts at the jurisdictional phase and the international body will examine these facts to see, whether if proven subsequently, such facts would fall within the jurisdictional scope of the applicable treaty.[81] The *pro tem* rule was explained in the oft-cited quote by Judge Higgins in the *Oil Platforms Case*.

> The only way in which, in the present case, it can be determined whether the claims of Iran are sufficiently plausibly based upon the 1955 Treaty is to accept *pro tem* the facts as alleged by Iran to be true and in that light to interpret Articles I, IV and X for jurisdictional purposes, that is to say, to see if on the basis of Iran's claims of fact there could occur a violation of one or more of them.[82]

Several investor-state tribunals have adopted this reasoning.[83]

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[81] The ICJ has on at least one occasion noted that evidence at the jurisdictional phase need not be proved by either party when it involves pure questions of law. *Fisheries Jurisdiction Case* (*Spain v Canada*) (Judgment) [1998] ICJ Rep 432, para 37–38 ("The Court points out that the establishment or otherwise of jurisdiction is not a matter for the parties but for the Court itself. Although a party seeking to assert a fact must bear the burden of proving it, this has no relevance for the establishment of the Court's jurisdiction, which is a 'question of law to be resolved in the light of the relevant facts'. That being so, there is no burden of proof to be discharged in the matter of jurisdiction. Rather, it is for the Court to determine from all the facts and taking into account all the arguments advanced by the Parties, 'whether the force of the arguments militating in favour of jurisdiction is preponderant, and to 'ascertain whether an intention on the part of the Parties exists to confer jurisdiction upon it''.") (internal citations omitted). This may be a consequence of the "*iura novit cura*" principle or the belief that a court knows the law. For the purpose of the research, one may argue, based on this ruling, that if the jurisdictional question is a purely legal issue of international law where the factual allegations have no bearing on the outcome, there is no burden of proof on either party.

[82] *Oil Platforms* case (n 78) [32] (emphasis added). This view is echoed in subsequent ICJ decisions as well. *Case Concerning Legality of Use of Force* (*Yugoslavia v Italy*) (Request for the Indication of Provisional Measures) [1999] ICJ Rep 481 [25] ("[T]he Court must ascertain whether the breaches of the Convention alleged by Yugoslavia are capable of falling within the provisions of that instrument and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain pursuant to Article IX . . .").

[83] *Methanex Corp v United States of America*, UNCITRAL, Partial Award (7 August 2002) [116] ("The *Oil Platforms* case is a recent and important decision as to how contested issues of fact and legal interpretation can be treated in jurisdictional challenges. It is not of course the only example of the problem and it does not provide the only possible solution to every case. In our view, however, it does help point the way towards the answers required in the present case."); *SGS Société Générale de Surveillance SA v Republic of the Philippines*, ICSID Case No ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction (29 January 2004) [26] ("It is not enough that the Claimant raises an issue

under one or more provisions of the BIT which the Respondent disputes. To adapt the words of the International Court in the *Oil Platforms* case, the Tribunal 'must ascertain whether the violations of the [BIT] pleaded by [SGS] do or do not fall within the provisions of the Treaty and whether, as a consequence, the dispute is one which the [Tribunal] has jurisdiction *ratione materiae* to entertain' pursuant to Article VIII(2) of the BIT."); *Salini Construttori SpA and Italstrade SpA v Hashemite Kingdom of Jordan*, ICSID Case No ARB/02/13, Decision on Jurisdiction (9 November 2004) [139] – [151] (citing with approval the ICJ cases mentioned above); *Plama Consortium* (n 57) [119] ("This Tribunal does not understand that Judge Higgins' approach is in any sense controversial, either at large or as between the parties to these proceedings. Accordingly, the Tribunal applies this approach to the jurisdictional issues considered below."); *Desert Line Projects LLC v Republic of Yemen*, ICSID Case No ARB/05/17, Award (6 February 2008) [129] ("As to the burden of proof with respect to the Respondent's jurisdictional objection, the Arbitral Tribunal – like many others – adopts the test proffered by Judge Higgins in her separate opinion in the *Oil Platforms Case* . . ."); *Pac Rim* (n 118) [2.5] ("At an early jurisdictional stage of an arbitration, as regards facts alleged by a claimant in its pleadings but not admitted or even denied by a respondent, the Tribunal acknowledges that it is often said that an arbitration tribunal is required to test the factual basis of claimant's claim by reference only to a 'prima facie' standard – as regards the merits of such claim. That standard was most clearly expressed by Judge Higgins in the well-known passage from her separate opinion in *Oil Platforms*; and it has been applied, as a general practice, by many tribunals in applying jurisdictional objections made in many investor-state arbitrations."). See also *Emilio Agustín Maffezini v The Kingdom of Spain*, ICSID Case No ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction (25 January 2000) [70] ("In the Tribunal's view, Claimant has sustained that burden. He is an Argentine investor in a Spanish company, who brings this action ostensibly to protect his investment in that company and for losses incurred by him due to injurious acts he attributes to Respondent. If proved, these facts would entitle Claimant to invoke the protection of the BIT in his personal capacity. Accordingly, Claimant can be said to have made out a *prima facie* case that he has standing to file this case.") (internal citations omitted); *CMS Gas Transmission Co v Republic of Argentina*, ICSID Case No ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction (17 July 2003) [35] ("For the time being, the fact that the Claimant has demonstrated *prima facie* that it has been adversely affected by measures adopted by the Republic of Argentina is sufficient for the Tribunal to consider that the claim, as far as this matter is concerned, is admissible and that it has jurisdiction to examine it on the merits."); *PSEG Global Inc, The North American Coal Corp, and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v Republic of Turkey,* ICSID Case No ARB/02/5, Decision on Jurisdiction (4 June 2004) [64] ("The Tribunal is aware that the *prima facie* test has been applied in a number of cases, including ICSID cases such as *Maffezini* and *CMS*, and that as a general approach to jurisdictional decisions it is a reasonable one. However, this is a test that is always case-specific. If, as in the present case, the parties have views which are so different about the facts and the meaning of the dispute, it would not be appropriate for the Tribunal to rely only on the assumption that the facts as presented by the Claimants are correct."); *Saipem SpA v People's Republic of Bangladesh*, ICSID Case No ARB/05/7, Decision on Jurisdiction and Recommendation on Provisional Measures (21 March 2007) [83] ("In accordance with accepted international practice (and generally also with national practice), a party bears the burden of proving the facts it asserts. For instance, an ICSID tribunal held that the Claimant had to satisfy the burden of proof required at the jurisdictional phase and make a *prima facie* showing of Treaty breaches."); *Alasdair Ross Anderson et al v Republic of Costa Rica,* ICSID Case No ARB(AF)/07/3, Award (19 May 2010) [44] ("For the Tribunal to have jurisdiction in this case, each of the Claimants, under Article XII(2) has the burden to demonstrate, inter alia that he or she is 'an investor' as defined in Article I(h) of the BIT."); *Gustav F W Hamester GmbH & Co KG v Republic of Ghana*, ICSID Case No ARB/07/24, Award (18 June 2010) [143] ("In order to clarify the distinction between a jurisdictional question and a merits' question, it is useful to consider the different burden of proof required for each. If jurisdiction rests on the existence of certain facts, they have to be proven at the jurisdictional stage. However, if facts are alleged in order to establish a violation of the relevant BIT, they have to be accepted as such at the jurisdictional stage, until their existence is ascertained (or not) at the merits stage."); *Liman Caspian Oil BV and NCL Dutch Investment BV v Republic of Kazakhstan*, ICSID Case No ARB/07/14, Award (22 June 2010) [194] ("The Tribunal agrees with the authorities cited by the Parties that it does not have jurisdiction over investments made in violation of international public policy. However, the burden of proving fraud and bribery regarding the making of the original investment lies with Respondent. The

As noted above, the *pro-tem* principle does not apply to any factual question relating to jurisdiction of the tribunal which must be appropriately proved at the jurisdictional phase of the case by the investor. As the *Pac Rim v. El Salvador* tribunal noted:

> [T]he Tribunal considers that it is impermissible for the Tribunal to found its jurisdiction on any of the Claimant's CAFTA claims on the basis of an assumed fact (i.e. alleged by the Claimant in its pleadings as regards jurisdiction but disputed by the Respondent). The application of that "prima facie" or other like standard is limited to testing the merits of a claimant's case at a jurisdictional stage; and it cannot apply to a factual issue upon which a tribunal's jurisdiction directly depends, such as the Abuse of Process, Ratione Temporis and Denial of Benefits issues in this case. In the context of factual issues which are common to both jurisdictional issues and the merits, there could be, of course, no difficulty in joining the same factual issues to the merits. That, however, is not the situation here, where a factual issue relevant only to jurisdiction and not to the merits requires more than a decision *pro tempore* by a tribunal. . . .

Tribunal considers that Respondent has not provided sufficient proof for its allegations that the Licence was acquired by fraudulent misrepresentation to the Ministry of Energy and/or by fraud on the minority shareholders. Therefore, the Tribunal concludes that Respondent was not able to satisfy its burden of proof of facts showing a breach of international public policy."); *Sergei Paushok, CJSC Golden East Co and CJSC Vostokneftegaz Co v Government of Mongolia,* UNCITRAL, Award On Jurisdiction And Liability (28 April 2011) [200] ("First of all, the Tribunal agrees with Respondent that Claimants bear the burden of the proof to demonstrate that their investment is protected by Article 6 of the Treaty."); *Perenco Ecuador Ltd v The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador*, ICSID Case No ARB/08/6, Decision on Jurisdiction (30 June 2011) [97] – [98] (Where an investment is owned and/or controlled by the investor/claimant through a series of corporations, typically the claimant will adduce evidence as to how it owns or controls such investment. . . . The burden of proof to establish the facts supporting its claim to standing lies with the Claimant."); *Abaclat* (n 104) [678] ("Indeed, it is Claimants who bear the burden to prove that all conditions for the Tribunal's jurisdiction and for the granting of the substantive claims are met."); *Libananco Holdings Co Ltd v Republic of Turkey*, ICSID Case No ARB/06/8, Award (2 September 2011) [122]; *Caratube International Oil Co LLP v Republic of Kazakhstan*, ICSID Case No ARB/08/12, Award (5 June 2012) [367] ("the Tribunal concludes that the burden is on Claimant to show that it fulfils the criteria set out by Article 25(2)(b) of the ICSID Convention and Article VI(8) of the BIT."); *Teinver SA, Transportes de Cercanías SA and Autobuses Urbanos del Sur SA v Argentine Republic*, ICSID Case No ARB/09/1, Decision on Jurisdiction (21 December 2012) [324] ("Respondent has failed to demonstrate that Claimants, as a factual matter, committed illegalities in the process of *acquiring* their investment in the Argentine Airlines. In this respect, the onus is on Respondent."); *Emmis International Holding, BV, Emmis Radio Operating, BV, MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft v Hungary*, ICSID Case No ARB/12/2, Award (16 April 2014) [151] ("These questions go to jurisdiction and must therefore be finally determined by the Tribunal, not decided on a *prima facie* basis. The Tribunal so held, citing Judge Higgins in her Separate Opinion in the International Court of Justice in *Oil Platforms* . . .").

> Accordingly, this Tribunal is here required to determine finally whether it has jurisdiction over the Claimant's CAFTA claims on the proven existence of certain facts because all relevant facts supporting such jurisdiction must be established by the Claimant at this jurisdictional stage and not merely assumed in the Claimant's favour.[84]

As a comparison to municipal litigation, this leaves the question of whether pleadings must be assessed against a notice-pleading standard, a fact-pleading standard, or a heightened fact-pleading standard.[85] A notice-pleading standard is the lowest of all cognizable standards.[86] It simply needs to put the respondent on notice that a legal dispute exists and that there is a cause of action that would be available to the claimant following full documentary disclosures and taking of evidence.[87] A fact-pleading standard requires that the pleading aver facts that if true would make out the elements of a legal claim within the court or tribunal's remit.[88] A heightened fact-pleading standard requires that the pleading avers facts with specificity that if true would make out the elements of a legal claim.[89] Heightened fact-pleading standards may be reserved for particular causes of action, such as allegations of fraud, to police the use of legal proceedings to raise serious allegations of moral turpitude against the respondent or the investor.

In the context of investor-state arbitration, the standard applied at the jurisdictional stage most resembles fact-pleading jurisdictions. The request for arbitration must

[84] *Pac Rim Cayman LLC v El Salvador*, ICSID Case No ARB/09/12, Decision on the Respondent's Jurisdictional Objections (1 June 2012) [2.8-2.9] (emphasis added).

[85] See *Global Trading Resource Corp v Ukraine*, ICSID Case No ARB/09/11, Award (23 November 2010) (making relevant the pleading standard in a summary dismissal proceeding); John P Sullivan, 'Twombly and Iqbal: The Latest Retreat from Notice Pleading' (2009) 43 Suffolk University Law Review 1 (discussing pleading standards).

[86] Robert G. Bone, 'Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v Iqbal' (2010) 85 Notre Dame Law Review 849, 864–67 (discussing the notice pleading standard in the historical context of its adoption in U.S. federal civil procedure).

[87] ibid.

[88] See Richard L. Marcus, 'The Revival of Fact Pleading Under the Federal Rules of Civil Procedure' (1986) Columbia Law Review 433.

[89] On the fact pleading versus heightened fact pleading distinction, see Scott Dodson, 'Comparative Convergences in Pleading Standards' (2010) 158 University of Pennsylvania Law Review 441, 456.

assert facts that if true would give rise to a cause of action, not provide notice of claims that if true would permit it relief.

This argument is particularly significant in the context of early disposition mechanisms such as ICSID Arbitration Rule 41(5).[90] These rules seek to permit tribunals to dismissed claims that are "manifestly without legal merit" at the earliest pleading stage.[91] To the extent that the relevant analysis for jurisdictional purposes would follow notice pleading standards, ICSID Arbitration Rule 41(5) could be avoided with impunity by depriving the tribunal of sufficient factual information at the outset of the case to make an earlier determination at the request-for-arbitration stage.[92]

In a fact-pleading context, rules like ICSID Arbitration Rule 41(5) make inherent sense because the claimant is required at the earliest possible time to aver facts that if true would raise a claim.[93] This does not mean that the claim would remain locked into the assertions made at the earliest pleading stage – but rather requires that even at that stage, it is clear that there is, in fact, a sufficient legal dispute for the tribunal to resolve.

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[90] ICSID Arbitration Rules, Rule 41(5): "Unless the parties have agreed to another expedited procedure for making preliminary objections, a party may, no later than 30 days after the constitution of the Tribunal, and in any event before the first session of the Tribunal, file an objection that a claim is manifestly without legal merit. The party shall specify as precisely as possible the basis for the objection. The Tribunal, after giving the parties the opportunity to present their observations on the objection, shall, at its first session or promptly thereafter, notify the parties of its decision on the objection. The decision of the Tribunal shall be without prejudice to the right of a party to file an objection pursuant to paragraph (1) or to object, in the course of the proceeding, that a claim lacks legal merit." On the link between ICSID Arbitration Rule 41(5) and U.S. civil procedure on early disposition of cases, see Campbell McLachlan, Larry Shore and Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford University Press 2008) 50.

[91] ICSID Arbitration Rules, Rule 41(5).

[92] See Chester Brown and Sergio Puig, 'The Power of ICSID Tribunals to Dismiss Proceedings Summarily: An Analysis of Rule 41(5) of the ICSID Arbitration Rules' Sydney L School Research Paper No 11/33, 12 <http://ssrn.com/abstract=1859446> accessed 24 July 2015 (discussing pleading standards and its interaction with Rule 41(5) dismissal).

[93] See eg *Global Trading* (n 85) [34] ("The present Tribunal accordingly posed itself the question, what other materials might either Party (specifically the Claimants) bring to bear if the question at issue were to be postponed until a later stage in the proceedings? Having posed itself that question, the Tribunal was unable to see what further materials relevant to the question at issue, be it in the shape of legal argument or authority or in the shape of witness or documentary evidence, either Party might wish to, or be able to, bring forward at a later stage. The Tribunal is accordingly satisfied that the conditions are met for it to dispose of the Respondent's objection pursuant to Article 41(5) of the ICSID Rules.").

(C) *The Respondent has the Burden of Proof in Rebutting Factual Questions in the Establishment of Jurisdiction*

In an investor-state arbitration, a respondent can have the burden of proof in certain contexts: (i) first, the respondent may seek to rebut factual questions put forward by the investor and for every such argument that the respondent seeks to rebut, the respondent has the burden. This is discussed below in this section. (ii) second, in certain instances, a respondent may raise affirmative defences on the tribunal's jurisdiction. These arguments are not in response to any arguments by the investor but rather are de novo arguments on the tribunal's jurisdiction. This is discussed in the section below.

Respondents can and frequently do submit evidence to rebut factual questions in the establishment of jurisdiction. The corollary of my argument is that the respondent state has the burden to submit evidence to challenge submissions made by the investor, for instance to challenge the nationality of the investor.[94] These factual submissions at times may also concern the fact of consent itself and thus challenge jurisdiction *ratione voluntatis*.[95] Respondents are clearly entitled to submit such rebuttal evidence.[96]

Respondents in many investor-state arbitrations have also raised jurisdictional defenses that do not concern the sufficiency of the evidence submitted by the claimants, as such, but open a new factual question whether the tribunal has jurisdiction under the consent instrument. In many instances, respondents will allege that the investment was procured other than in a legal manner or that the investor has acted with unclean hands.[97] In common law systems, such defenses are typically treated under the

[94] *Soufraki* (n 18) [39] – [41].

[95] See eg *Mobil Corp* (n 64) [45] ("Venezuela then contends that the language of Article 22 does not support Claimants' position on jurisdiction. It submits that Venezuelan law is necessarily part of the analysis of that article. Under the law of Venezuela, as well as under international law, consent to arbitrate must be clear and unequivocal. Article 22 does not contain such consent.").

[96] Christopher F. Dugan *et al*, *Investor-State Arbitration* (Oxford University Press 2008) 147–53 (discussing the procedural mechanisms of jurisdictional objections in investor-state arbitrations).

[97] See eg *Inceysa Vallisoletane, SL v Republic El Salvador*, ICSID Case No ARB/03/26, Award (2 August 2006) [48]; *World Duty Free Co Ltd v Kenya*, ICSID Case No ARB/0/7, Award (4 October 2006) [105]; *Plama Consortium Ltd v Bulgaria*, ICSID Case No ARB/03/24, Award (27 August 2008) [101] – [105]; *Phoenix Action* (n 62) [34] – [43]; *Metal-Tech Ltd v Uzbekistan*, ICSID Case No ARB/10/3, Award (4 October 2013) [278] – [280].

heading of “affirmative defenses” – they affirm or assert a new relevant fact or state of affairs rather than merely question the veracity or probative value of the submissions made by the claimant.[98] Respondents are similarly entitled to raise such affirmative defenses.

In most instances, the line between the denial of facts established by the claimant and the assertion of an affirmative defence is blurred in practice. Questions regarding the legality in the establishment of an investment may, for instance, also affect whether the investor was in fact in control of an investment at the right time.[99] A distinction between ordinary and affirmative defenses therefore is analytically enlightening for the study of investor-state arbitration from a scholarly perspective as it provides a useful typology.[100] It is, however, less helpful as an operative distinction for advocates and arbitrators because the basic principle would apply in either situation—the party invoking a defense has the burden of proof.

Instead of distinguishing between affirmative and ordinary defenses, the appropriate question from that vantage point is whether a respondent merely raises questions about the evidentiary record assembled by the claimant or whether the respondent introduces new facts not in evidence in order to assess jurisdiction and the jurisdictional record assembled by the claimant. In the first case, the respondent assists the tribunal in identifying questions that would plausibly arise from the record, even if factually unrebutted. These are questions that must fit the legal framework submitted by the claimant and test the sufficiency of the documentation against that framework. As such,

[98] William Hart and Roderick D Blanchard, *Litigation and Trial Practice* (6th edn, Thomson 2007) 128 (discussing pleading of affirmative defenses in municipal legal proceedings).

[99] See *Libananco Holdings* (n 82) [104].

[100] See Aloysius Llamzon, *Corruption in International Investment Arbitration* (Oxford University Press 2014) 271 (“In the case of corruption, principles of waiver and acquiescence can go both ways: for the host State, a claim that corruption existed at the time the investment was made, depriving the tribunal of jurisdiction to hear the case in its entirety, is an affirmative defence that can be likened to assertion of a legal right. As such, the investor would potentially be able to respond that the host State has either waived the right to make such a claim or had acquiesced in the corrupt act. On the other hand, the host State would likely invoke waiver or acquiescence corruption as a response to investor claims that the host State’s public officials had solicited or extorted bribes from the investor, a far less frequent occurrence based on the case law surveyed.”).

the respondent seeks to assist the tribunal in identifying problems with its own jurisdiction.

In the second case, the respondent changes the relevant framework of decision-making whether by introducing new facts outright or by introducing a different framework against which facts must be assessed – as for instance when the respondent introduces a new host state law relevant to the registration or acceptance requirements.[101]

(D) *The Respondent bears the Burden of Proof for any Assertions that it makes at the Jurisdictional Stage*

The respondent bears the burden of proof with regard to any assertions that alters the record from what was the investor's jurisdictional case. Specifically, respondent cannot introduce new materials into the tribunal's jurisdictional analysis and yet continue to insist that it remains claimant's burden to overcome respondent's objections. Respondents could raise such arguments pointing to the limited nature of international jurisdiction. While such an approach would be permissible if the sovereign limits placed upon jurisdiction were the only concern, however, this significantly undermines the claimant's access to justice and the benefits bestowed upon the sovereign through investor reliance.

The respondent's burden of proof applies fully to all new materials and requires that the respondent carry proof to the same standard as the claimant. The respondent is thus not privileged solely because of its arbitration posture as responding to an invocation of jurisdiction. As a tribunal noted:

> The general rule is that the party asserting the claim bears the burden of establishing it by proof. Where claims and counterclaims go to the same factual issue, each party bears the burden of proof as to its own contentions. There is no general notion of shifting of the burden of proof when jurisdictional objections are asserted. The Respondent in this case therefore bears the burden of proving its objections. Conversely, the Claimants must prove any facts

[101] See Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press 2012) 88–90 (discussing the different relevant treaty regimes).

> asserted in response to the Respondent's objections and bear the overall burden of establishing that jurisdiction exists.[102]

The respondent's burden of proof means that a tribunal can find that it has jurisdiction even if the respondent has created significant factual issues and raised some doubts as to the tribunal's jurisdiction.[103] If the respondent makes submissions that are facially plausible but not sufficiently well supported to meet the standard of proof the sheer creation of doubt in the tribunal's mind should not lead to a rejection of jurisdiction. Such a conclusion would impermissibly reverse applicable burdens of proof. As is discussed below, such conduct could in the right circumstances entail annullable error.

(E) *Function of the Jurisdictional Burden of Proof—It Reconciles the Limited Nature of a Tribunal's Jurisdiction with Concerns for Access to Justice*

The final part of my argument relates to the function of the jurisdictional burden of proof. Indeed, the function of the burden of proof in the jurisdictional setting differs somewhat from the function of the burden of proof in the merits context. The overarching functional issue at the jurisdictional stage is related not just to the nature of evidence in international legal proceedings, but the nature of jurisdiction in international legal proceedings itself.[104]

Jurisdiction in any investor-state arbitration serves two competing policy purposes.[105] On the one hand, jurisdiction in international legal proceedings is limited.

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[102] *Bernhard von Pezold and others v Republic of Zimbabwe*, ICSID Case No ARB/10/15, Award (28 July 2015) [174] (emphasis added).

[103] *Plama Consortium* (n 57) [177] – [178]; *Ioan Micula, Viorel Micula, SC European Food SA, SC Starmill SRL and SC Multipack SRL v Romania*, ICSID Case No ARB/05/20, Decision on Jurisdiction and Admissibility (24 September 2008) [95]; *Soufraki* (n 65) [28]; but see *Brandes Investment Partners, LP v Bolivarian Republic of Venezuela*, ICSID Case No ARB/08/3, Award (2 August 2011) [113].

[104] On this notable feature, see eg, the exchange between the majority and dissent in the Abaclat proceedings. *Abaclat v Argentine Republic*, ICSID Case No ARB/07/5, Decision on Jurisdiction and Admissibility (4 August 2011). See also *Impregilo SpA v Argentine Republic*, ICSID Case No ARB/07/17, Concurring and Dissenting Opinion of Prof. Brigitte Stern (21 June 2011) [53].

[105] For further discussion, see Frédéric G. Sourgens, 'By Equal Contest of Arms: Jurisdictional Proof in Investor-State Arbitrations' (2013) 38 North Carolina Journal of International Law & Commercial Regulation 875, 875–81.

There is no court or tribunal of general jurisdiction.[106] Instead, a state party has to consent ***specifically*** to the resolution of disputes through arbitral or judicial processes. The limited jurisdiction of courts and tribunal that ensues is known as *jurisdiction* or *compétence d'attribution*.[107]

Burdens of proof in the jurisdictional setting safeguard the limited nature of jurisdiction in international law: they must ascertain that only those proceedings for which there is consent to proceed in fact are resolved through a limited arbitral or judicial mechanism. On the other hand, jurisdiction in international legal proceedings is often the exclusive means of access to justice for the party invoking the legal proceedings in question.[108] The alternative to the jurisdiction of international legal proceedings is a metaphorical, if not sometimes a real, trial at arms.[109] In either instance, there are legitimate doubts that such a trial would favour justice over expediency, merit over force.[110]

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[106] *Abaclat v Argentina*, ICSID Case No ARB/07/5, Dissenting Opinion to Decision on Jurisdiction and Admissibility (4 August 2011) [7] ('In international law, all tribunals - not only arbitral, but even judicial - are tribunals of attributed, hence limited jurisdiction (*juridictions d'attribution*). There is no tribunal or system of tribunals of plenary or general jurisdiction (*juridiction de droit commun*) that covers all cases and subjects, barring exceptions falling under - i.e. attributed to – the jurisdiction of a specialized tribunal. This is because, in the absence of a centralized power on the international level that exercises the judicial function through a judicial system empowered from above (or rather incarnating the judicial power as part of the centralized power), all international adjudicatory bodies are empowered from below, being based on the consent and agreement of the subjects (i.e. the litigants, *les justiciables*) themselves (with the very limited exception of tribunals created by international organizations in the exercise of their powers under their constitutive treaties, which are also ultimately based on the consent of the subjects that concluded or adhered to these constitutive treaties).").

[107] *Abaclat* (n 106) [7]; see also *Impregilo SpA* (n 104) [53].

[108] *Chevron* (n 17) [141] ("In the present case, the question is whether a particular claimant is undeserving of having its claim heard because of the circumstances surrounding that claim. A false positive finding that the claim was estopped or brought for improper purpose would therefore have the Tribunal deny jurisdiction because the Claimants had not been able to disprove doubts regarding the exercise of its right to submit a claim. Meanwhile, a false negative finding that the claim was not abusive would simply allow the claim to proceed on its merits where the Respondent may continue to object on this basis and apply for costs to compensate for the false negative finding . . . . The potential for unfairness in this situation weighs in favor of diminishing the risk of a false positive finding by shifting the burden to the Respondent.").

[109] See Antonio R. Parra, *The History of the ICSID Convention* (Oxford University Press 2012) 11 (detailing the origin of the ICSID Convention and the role of the World Bank in resolving the dispute relating to the nationalization of the Suez canal by Egypt, and failed invasion of the Suez area by the British and French in 1956).

[110] See Santiago Mott, *State Liability in Investment Treaty Arbitration* (Hart Publishing 2012) 33 (noting with regard to diplomatic protection exercised by European powers vis-à-vis Latin American states in the

In the investor-state arbitration setting, the concern regarding access to justice is particularly acute.[111] There are significant objective and subjective reliance interests at stake on the side of the investor.[112] At the very least one would expect that a reasonable investor might take the existence of the option of investor-state arbitration into account when calculating the minimum rate of return on investment justifying the making of the investment in the first place.[113] Denying the investor access to justice might create a windfall for the host state or host state nationals.[114] Burdens of proof in the jurisdictional setting must be drawn specifically so as to avoid the use of legal process to do substantive injustice.[115] However, this does not imply that jurisdiction can be presumed or any benefit can be provided to an investor who fails to meet its burden. Rather, burdens of proof require a careful examination of which party bears the burden

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nineteenth century, that "the insurmountable military imbalance between European and Latin American countries made diplomatic protection an intrinsically illegitimate process. Both actual military interventions and mere' credible threats,' forced the region to accept many compensation schemes and arbitration agreements which would have been clearly rejected otherwise.").

[111] See Stephan W. Schill, 'Allocating Adjudicatory Authority: Most-Favoured-Nation Clauses as a Basis of Jurisdiction – A Reply to Zachary Douglas' (2011) 2 Journal of International Dispute Settlement 335, 362 (noting that "the allocation of adjudicatory authority between domestic courts and international arbitral tribunals is a question relating to access to justice and thus ultimately a question of substantive investment protection.").

[112] See Susan D. Franck, 'The Nature and Enforcement of Investor Rights Under Investment Treaties: Do Investment Treaties Have a Bright Future' (2005) 12 UC Davis Journal of International Law and Policy 47, n 72 ("[I]n the case of investment arbitration, there is evidence that investors and Sovereigns rely on these decisions – and the possibility of recovery or liability – in planning their activities.").

[113] See Anatole Boute, 'Challenging the Re-Regulation of Liberalized Electricity Prices Under Investment Arbitration' (2011) 32 Energy Law Journal 497, 538 (further detailing how reliance interests are reflected in pricing structures).

[114] For a detailed theoretical discussion of windfalls in the law, see Eric Kades, 'Windfalls' (1999) 108 Yale Law Journal 1489, 1506 (noting that "[a]fter the fact, many gains will look like windfalls. Prospectors may seem to stumble across gold mines; investors may appear to have "lucked out" by purchasing IBM stock in 1950 or Microsoft stock in 1985; real estate speculators often look like fortuitous beneficiaries of regional population movements. Yet speculators devote considerable skill and effort to searching for gold; investors devote time to collecting information and take considerable risks; and land speculators closely study growth patterns and commit resources to assembling parcels of useful size and shape in desirable locations. Examined from an ex ante perspective that properly values planning, these are all productive activities that the law generally aims to encourage.").

[115] ibid 1514–15 ("If buyers know the rule barring suit, they will pay a reduced price reflecting the lower value of heavily regulated land. Conversely, if buyers know that they may sue, they will bid up the price closer to the full value of the land, possibly discounted for the cost and risk of the necessary lawsuit. Windfalls will exist only when the courts surprise the parties. If a buyer purchases when the general opinion is that suits do not run with the land and subsequently convinces courts to alter the rule, then the buyer arguably receives a windfall. As long as legal rules are predictable, prudent planning that accounts for those rules cannot lead to windfalls.").

and whether such burden has been met. To summarize, neither party gains a "discount" or a "benefit" for any reason.

Burden of proof in the jurisdictional setting must, therefore, be in equipoise due to the competing interests of sovereign limitation of external judicial or arbitral review on the one hand, and access to justice on the other.[116] Given the competing nature of these two functional concerns that operate with particular force at the jurisdictional level, it is natural that the expression given to jurisdictional burden of proof in arbitral decisions run the gamut. In very few contexts, tribunals have noted that the duty to determine the jurisdiction vests with the tribunal that must be satisfied that it has the appropriate mandate to hear the case.[117] Other tribunals insist that jurisdiction must be

[116] *cf* Myers S. McDougal and W. Michael Reisman, 'The Prescribing Function in World Constitutive Process: How International Law is Made' (1980) 6 Yale Studies in World Public Order 249, 271 (noting that reason's "adequate performance demands, however, the disciplined employment of a comprehensive set of procedures, including: specifying each of the opposing claims about prescription in terms of the interests sought to be protected and the particular demands for authoritative decision; formulating the different options open to the relevant decision-maker or other evaluator (which may be more extensive than the decisions demanded by the opposing parties); estimating the consequences of alternative choices upon the aggregate inclusive interests of the general community and the exclusive interests of the particular parties; and choosing the option which promises to promote the largest aggregate long-term common interest, inclusive and exclusive.").

[117] *Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd Sti v Turkmenistan*, ICSID Case No ARB/12/6, Decision On Respondent's Objection To Jurisdiction Under Article VII(2) Of The Turkey-Turkmenistan Bilateral Investment Treaty (13 February 2015) [119] ("The Tribunal does not accept that the burden of proof in respect of jurisdiction is on either Party. Rather, the Tribunal must determine whether it has jurisdiction, and the scope of its jurisdiction, on the basis of all the relevant facts and arguments presented by the Parties."). See also *Azurix Corp v Argentina*, ICSID Case No ARB/01/12, Decision on Jurisdiction (8 December 2003) [68] ("While the Tribunal agrees that the objection has been filed out of time, it considers that the issues it raises are such that they should be considered upon at the Tribunal's own initiative under Arbitration Rule 41(2). The Tribunal is assisted in its consideration by the fact that this point has been fully argued by the parties since the Claimant responded 'out of an abundance of caution.'"); *Iurii Bogdanov, Agurdino-Invest Ltd and Agurdino-Chimia JSC v Republic of Moldova* (n 67) [27] ("An independent investigation carried out by the Arbitral Tribunal showed that the Russian Ministry of Foreign Affairs, being the last contracting party that ratified the BIT [Bilateral Investment Treaty], sent to the other contracting party the notice confirming ratification on 18 July 2001"); *Mytilineos Holdings SA v The State Union of Serbia and Montenegro and Republic of Serbia*, UNCITRAL, Partial Award on Jurisdiction (8 September 2006) [114] ("ICSID tribunals have to satisfy themselves that a Claimant has made an "investment" under both the applicable BIT (or other instrument containing consent) and the ICSID Convention."); *Société Générale In respect of DR Energy Holdings Ltd and Empresa Distribuidora de Electricidad del Este, SA v The Dominican Republic*, UNCITRAL, LCIA Case No UN 7927, Award on Preliminary Objections to Jurisdiction (19 September 2008) [59] ("The Respondent has again correctly invoked the jurisprudence of the International Court of Justice to the effect that the Court must satisfy itself that 'the dispute is one which the Court has jurisdiction ratione materiae to entertain', as it would be a total loss of time to consider a dispute which it believes falls outside its jurisdictional ambit."); *Metal-Tech Ltd v Uzbekistan* (n 97) [241] ("The payment of such substantial sums having been admitted, the Tribunal considered it its duty to inquire about the reasons for such payment. First, at the January

proved by the claimant invoking the limited jurisdiction of the tribunal.[118] Functionally, both sets of tribunals are right but incompletely state their reasoning, doubtlessly driven by their role as decision maker in the context of a specific dispute with a specific record as opposed to an armchair academic analyzing the functioning of burdens of proof at the jurisdictional stage.[119]

The principles espoused in my argument here provide a practical reconciliation of the competing functions of jurisdictional proof in a practically relevant form. It explains who at what point must discharge what specific function to affect the jurisdiction of the tribunal. Each of the steps in question is narrowly tailored to the competing policy purposes that international jurisdiction simultaneously serves.

Hearing itself, the Tribunal observed that, given the disclosure of facts unknown until then, it needed more information from the Parties. In the exercise of its *ex officio* powers under Article 43 of the ICSID Convention, the Tribunal therefore invited the Parties in PO 7 to provide that information. In PO 10, the Tribunal once again exercised its *ex officio* powers to call for additional testimony and evidence."). For additional discussion of earlier jurisprudence, see Christoph Schreuer, 'Belated Jurisdictional Objections in ICSID Arbitrations' in M.A. Fernandez-Ballesteros and D Arias (eds), *Liber Amicorum Bernardo Cremades* (Wolters Kluwer España; La Ley 2010) 1081, 1090–91.

[118] See *AMTO LLC v Ukraine* (n 58) [64] ("The burden of proof of an allegation in international arbitration rests on the party advancing the allegation, in accordance with the maxim *onus probandi actori incumbit*. In application of this principle, a claimant has the burden to prove that it satisfies the definition of an Investor . . . However, when a respondent alleges that the claimant is of the class of Investors only entitled to defeasible protection, so that the respondent can exercise its power to deny, then the burden passes to the respondent to prove the factual prerequisites of Article 17 on which it relies."); *Chevron* (n 17) [112] ("The ultimate result of the above presumption is that the Respondent bears the burden of proof to disprove the Claimants' allegations. This means that, if the evidence submitted does not conclusively contradict the Claimants' allegations, they are to be assumed to be true for the purposes of the *prima facie* test."); *Europe Cement Investment & Trade SA v Republic of Turkey* (n 58) [166] ("The burden to prove ownership of the shares at the relevant time was on the Claimant. It failed completely to discharge this burden."); *Cementownia 'Nowa Huta' SA v Turkey* (n 58) [112] ("It is undisputed that an investor seeking access to international jurisdiction pursuant to an investment treaty must prove that it was an investor at the relevant time, i.e., at the moment when the events on which its claim is based occurred."); *Vito G Gallo* (n 18) [277]; *Pac Rim Cayman LLC v El Salvador*, ICSID Case No ARB/09/12, Decision on the Respondent's Jurisdictional Objections (1 June 2012) [2.11] ("As far as the burden of proof is concerned, in the Tribunal's view, it cannot here be disputed that the party which alleges something positive has ordinarily to prove it to the satisfaction of the Tribunal. At this jurisdictional level, in other words, the Claimant has to prove that the Tribunal has jurisdiction. Of course, if there are positive objections to jurisdiction, the burden lies on the Party presenting those objections, in other words, here the Respondent.").

[119] On the importance of such a difference in perspective, see John L. Austin, *How to do Things with Words* (Oxford University Press 1962) 7 (distinguishing between descriptive and performative uses of language). On the relevance of John L. Austin for international jurisprudence, see Winston P. Nagan and Craig Hammer, 'Communications Theory and World Public Order, Jurisprudential Foundations of International Human Rights' (2007) 47 Virginia Journal of International Law 725, 767–71.

IV. BURDEN OF PROOF AS RECOGNIZED AND APPLIED BY INVESTOR-STATE ARBITRATION AT THE DAMAGES PHASE

The next stage is to examine burden of proof as applied in the context of damages. The starting point of my argument is that investor-state tribunals have applied the basic principle when it comes to issues relating to damages. Indeed, in *SOABI v. Senegal*, the tribunal clarified that the burden of proof on establishing factual premises that have implications for the damages phase is on the party putting forward the proposition.[120] Therefore, the investor has to establish the market value of the investment as the tribunal in the *Tecmed v. Mexico* case noted: "the burden to prove the investment's market value alleged by the Claimant is on the Claimant."[121] If the respondent wants to challenge the fair market value, the burden falls on it to satisfy the tribunal.

There are some important distinctions in the way the burden of proof is applied. For example, the failure to prove damages with absolute certainty is not treated as being a failure to discharge the burden and the tribunal will assess the damages on the evidence available before it,[122] probably because damage assessment is not a pure science.[123]

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[120] *Société Ouest Africaine des Bétons Industriels v Senegal*, ICSID Case No ARB/82/1, Award (25 February 1988) [9.23] ("The statement made by SOABI's accountant, to the effect that the loan agreement nowhere stipulates that the loan is intended for anything but the housing project, mistakes the role of the Tribunal or of the expert in these proceedings. It is incumbent on SOABI, not the Tribunal or the expert, to establish that the loan was indeed intended for the housing project.").

[121] *Técnicas Medioambientales Tecmed, SA v United Mexican States*, ICSID Case No ARB (AF)/00/2, Award (29 May 2003) [190]. See also *Hrvatska Elektroprivreda d.d. v Republic of Slovenia*, ICSID Case No ARB/05/24, Award, 17 December 2015 [243] ("The burden of proving that costs had been passed onto consumers lies with the party asserting this fact. It is therefore the responsibility of the Respondent in this instance to prove the allegation if it wishes the Tribunal to accept it. The Respondent might have proved the allegation by relying on any direct evidence cited by Mr Jones or by producing its own evidence. The Tribunal notes that it is not the responsibility of the Claimant to disprove allegations to this effect made without evidence."); *Crystallex International Corp v Bolivarian Republic of Venezuela*, ICSID Case No ARB(AF)/11/2, Award (4 April 2016) [864] ("as a general matter, it is clear that it is the Claimant that bears the *burden* of proof in relation to the fact and the amount of loss."); *AIG Capital Partners, Inc and CJSC Tema Real Estate Co v Republic of Kazakhstan*, ICSID Case No ARB/01/6, Award (7 October 2003) [10.6.4(4)] ("The onus of proof on the issue of mitigation is always on the person pleading it – if he fails to show that the Claimant or Plaintiff ought reasonably to have taken certain mitigating steps, then the normal measure of damages will apply.").

[122] See eg *Southern Pacific Properties (Middle East) Ltd v Arab Republic of Egypt*, ICSID Case No ARB/84/3, Award (20 May 1992) [215] ("This determination [referring to the fact that the Tribunal has to determine the amount by which the value of claimants investment exceeded the expenses] necessarily involves an element of subjectivism and, consequently, some uncertainty. However, it is well settled that

The burden of proof at the damages stage raises interesting legal questions because the arguments here do not center on the establishment of facts alone but rather on broader questions as to whether certain arguments would result in over- or under-compensation. Indeed, the functional purpose of burden of proofs at the damages phase is different from those at the jurisdictional stage, where the focus is on the exceptional and limited nature of a tribunal's jurisdiction.

The various sub-arguments relating to burden of proof at the damages phase are discussed below.

(A) *Determining The Appropriate Remedy—The Investor's Burden*

First, tribunals must choose between a variety of different legal remedies which can be awarded to a claimant. The question can be broken down into two relevant triptychs. The first triptych divides remedies into *restitutio in integrum* (or specific performance), compensation, or satisfaction.[124]

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the fact that damages cannot be assessed with certainty is no reason not to award damages when a loss has been incurred."); *Archer Daniels Midland Co and Tate & Lyle Ingredients Americas, Inc v United Mexican States*, ICSID Case No ARB(AF)/04/05, Decision on the Requests for Correction, Supplementary Decision and Interpretation (10 July 2008) [38] ("Firstly, the claimant has the burden of proving the quantum of damages. Nevertheless, the failure of a claimant to prove its damages with certainty, or to establish its right to the full damages claimed, does not relieve the tribunal of its duty to assess damages as best it can on the evidence available . . ."); *Ioannis Kardassopoulos and Ron Fuchs v The Republic of Georgia*, ICSID Case Nos ARB/05/18 and ARB/07/15, Award (3 March 2010) [594] ("The Tribunal's duty is to make the best estimate that it can of the amount of the loss, on the basis of the available evidence. That must be done even if there is no absolute documentary proof of the precise amount lost."); *Antoine Goetz & Others and SA Affinage des Metaux v Republic of Burundi*, ICSID Case No ARB/01/2, Award (21 June 2012) [298] ("*En outre, il est de jurisprudence constante en droit international que les difficultés rencontrées dans l'évaluation d'un dommage ne sauraient priver la victime de ce dommage de son droit à indemnisation. En pareil cas, il appartient au tribunal d'évaluer le dommage au mieux, à la lumière du droit applicable et des données fournies et discutées par les parties.*"). This is discussed below in greater detail.

[123] See *ADC Affiliate Ltd and ADC & ADMC Management Ltd v The Republic of Hungary*, ICSID Case No ARB/03/16, Award of the Tribunal (2 October 2006) [521] ("the Tribunal feels bound to point out that the assessment of damages is not a science. . . . But at the end of the day, the Tribunal can stand back and look at the work product and arrive at a figure with which it is comfortable in all the circumstances of the case."); *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic*, ICSID Case No ARB/97/3, Award (20 August 2007) [8.3.16] ("[T]here is useful evidence on the record and it is well settled that the fact that damages cannot be fixed with certainty is no reason not to award damages when a loss has been incurred. In such cases, approximations are inevitable; the settling of damages is not an exact science.").

[124] Dugan et al (n 96) 564–65 (noting the potential applicability of the principle remedies for international wrongful acts at international law in the investor-state context).

The question of appropriateness of remedy is relevant with regard to the first triptych. What choice of remedy should the tribunal make? The burden of proof in this regard affects a hybrid of factual and legal questions. It must be established that the tribunal is authorized by the relevant consent instruments to order a certain remedy.[125] Next, it must be determined what the consequence of awarding a certain remedy would be for either of the parties – in practice, will awarding a specific remedy over or under-compensate the claimant and whether the remedy remains feasible?[126] Finally, is the remedy prayed for the most appropriate remedy when compared to the other alternatives?[127]

The initial burden of proof lies on the claimant to protect the award debtor.[128] That means that the award creditor must submit evidence that, if unrebutted, would satisfy the tribunal that the remedy prayed for is, in fact, appropriate pursuant to the applicable legal standards.[129]

Because it is the award creditor who comes to the tribunal seeking a remedy, this initial assignment of the burden of proof is intuitive. The party seeking redress, *i.e.*, the investor, should in the first instance be able to demonstrate to the satisfaction of the tribunal pursuant to the relevant standard of proof that it is in fact entitled to the relief

[125] ibid 569. See also *Mohammad Ammar Al-Bahloul v The Republic of Tajikistan*, SCC Case No V (064/2008), Final Award (8 June 2010) [47] – [48] (establishing that "[t]he Tribunal considers that specific performance is a permissible remedy in international law. An international tribunal has the power to grant specific performance. The Energy Charter Treaty does not preclude this power."); *Micula and ors* (n 103) [166] ("Under the ICSID Convention, a tribunal has the power to order pecuniary or non-pecuniary remedies, including restitution, i.e., re-establishing the situation which existed before a wrongful act was committed"); *BRIDAS SAPIC and ors v Turkmenistan*, ICC Case No 9058/FMS/KGA, Partial Award (24 June 1999) [373] ("The JV Agreement is not such a contract. While it is unlikely that a tribunal would order specific performance, there is no legal impediment to it doing so. A repudiation to be effective must be accepted. If it were not, the contract remains in full force and effect as do the performance rights and obligations of the parties.").

[126] See *Petrobart Ltd v Kyrgyzstan*, SCC Case No 126/2003, Arbitral Award (29 March 2005), p. 36 ("While specific performance is the primary remedy for a breach, it is no longer materially possible in this case."); Martin Endicott, 'Remedies in Investor-State Arbitration: Restitution, Specific Performance and Declaratory Awards' in Kahn and Wälde (eds), *New Aspects of International Investment Law* (Nijhoff 2007) 540–41.

[127] See ibid.

[128] Wälde and Sabahi (n 149) 1110.

[129] See ibid.

prayed for. In this sense, the burden is not on the party making a submission but on the party asking a tribunal to exercise its powers in a certain way.

A tribunal has summarized this in the following manner:

> It is a basic tenet of investment arbitration that a claimant must prove its pleaded loss, must show, in other words, what alleged injury or damage was caused by the breach of its legal rights. This is partly a consequence of the general principle in international judicial proceedings that each party bears the burden of establishing the allegations on which it relies. The International Court of Justice refers to this as a well-established rule which has been consistently upheld by the Court. The same rule has regularly been followed by investment tribunals. But equally it follows directly from the principles of State responsibility in international law reflected in Article 31 of the ILC Articles, under which the duty to make reparation is 'for the injury caused by' the internationally wrongful act; and 'injury' for these purposes is damage 'caused by' the internationally wrongful act. The International Law Commission explains that this definition is deliberately limitative, excluding merely abstract concerns or general interests, and further that material damage has to be understood as damage which is assessable in financial terms.
>
> It is thus axiomatic that this Tribunal (like the First Tribunal before it) is only competent to award reparation in the form of financial compensation to the extent that it has been duly established before it that the compensation represents a fair assessment of the alleged damage suffered by the Claimants that has actually been caused by the Respondent's breach of its international obligation towards them under the BIT.[130]

(B)*Awarding Non-Speculative Damages—The Investor's Burden*

The second triptych subdivides the remedy of damages. It follows a division that is typical in the municipal law of damages and distinguishes between the expectation interest (or compliance interest), the reliance interest or the restitutionary interest of the injured party.[131] The expectation (or compliance) interest measures damages from the

[130] *Victor Pey Casado and Foundation "Presidente Allende" v Republic of Chile*, ICSID Case No. ARB/98/2, Award (13 September 2016) [205-206] (emphasis added).

[131] Marboe (n 150) 107.

"but-for" perspective of what a party would have received but-for the breach.[132] The reliance interest measures damages from a change-in-position perspective: what damages did a party incur by relying upon the transaction or relationship.[133] The restitutionary interest fully unwinds the transaction or relationship so as to prevent an unjust enrichment in the defaulting party.[134]

The question of speculativeness in the damages context is relevant with regard to the second triptych.[135] Investor-state tribunals again must ascertain any damages award neither over- or undercompensate the investor.[136] In this regard, the calculation again often involves hybrid questions of law and fact. As a legal matter, the rules on damages in international law prescribe a certain order of preference of remedy.[137] At the same time, the preferred remedy must be feasible in any given case without calling on the tribunal to make a remedy determination without sufficiently concrete factual assumptions.[138] Importantly, as remedies are forward looking, it is not possible to determine the sufficiency of the factual assumptions in the same way as determining the

[132] ibid ("Compliance or positive interest, by contrast, represents the entire financial loss suffered by the contracting party as a consequence of the breach of the other party.").

[133] ibid ("Reliance or negative interest is the financial harm suffered by the contracting party in the form of expenses undertaken in reliance on the contract.").

[134] Lon Fuller and William R. Perdue, 'The Reliance Interest in Contract Damages' (1936) 46 Yale Law Journal 52, 53.

[135] McLachlan, Shore and Weiniger (n 90) 333 (discussing the appropriateness of use of discounted cash flow valuation).

[136] See ibid.

[137] Marboe (n 150) 27 (noting the preference for compliance/expectation interest damages if they can be ascertained).

[138] Wälde and Sabahi (n 149) 1076 ("Almost every tribunal now repeats the mantra that 'speculative profits' or 'speculative elements' should be discounted in valuation."); for tribunal's findings, see *Talsud SA v The United Mexican States*, ICSID Case No ARB(AF)/04/4, Award (16 June 2010) s 12-56 ("Under international law and the BITs, the Claimants bear the overall burden of proving the loss founding their claims for compensation. If that loss is found to be too uncertain or speculative or otherwise unproven, the Tribunal must reject these claims, even if liability is established against the Respondent"); *Gold Reserve Inc v Bolivarian Republic of Venezuela*, ICSID Case No ARB(AF)/09/1, Award (22 September 2014) [682] ("the fair market value of the investment is influenced by a number of different factors that each party's experts have addressed. As noted above, the Tribunal has already found that the Brisas Project did not include the North Parcel of land to which no legal title existed. The Tribunal therefore considers that the fair market value should be calculated without reference to that parcel. While a willing buyer might have thought it could have acquired rights to this land in the future, it could not be certain of doing so and therefore it would be speculative of the Tribunal to assume a buyer would have valued the Brisas Project as if the legal right had been acquired.").

facts relating to liability.[139] The facts of the dispute lie in the past, not in the future.[140] The exercise of determining what constitutes a speculative damages amount thus applies a slightly different lens – even if it does not apply a different burden or standard of proof.[141]

(C) *Questioning The Appropriate Remedy—The Respondent's Burden*

The respondent often challenges the submissions of the claimant not only as matter of internal coherence. Instead, the respondent may also introduce other concerns.[142] In the context of a host state respondent, the state may well plead that sovereign concerns make certain remedies inappropriate and may not focus entirely upon economic assessments.[143]

With regard to each submission, the respondent bears the burden of proof.[144] Having been found liable – and having assigned the burden of proving propriety of a remedy in the first instance on the claimant – the respondent must bear the burden of its

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[139] See McLachlan, Shore and Weiniger (n 90) 322 ("The value of an income-producing capital asset can only be ascertained by valuing the cash the asset is expected to generate in the future.") (emphasis added).

[140] See ibid.

[141] See eg *Mohammad Ammar Al-Bahloul* (n 125) [39] ("total certainty should not be required in order to assess damages if the existence of damages has been established, on the other hand, the assessment of damages cannot be based on conjecture or speculation. A persuasive factual basis for the assessment must be shown."); *Achmea B.V. (formerly Eureko B.V.) v The Slovak Republic*, PCA Case No 2008-13, Award (7 December 2012) [323] ("It is for Claimant to prove its case regarding the 'damage caused'. That said, the requirement of proof must not be impossible to discharge. Nor must the requirement for reasonable precision in the assessment of the quantum be carried so far that the search for exactness in the quantification of losses becomes disproportionately onerous when compared with the margin of error."); *Impregilo S.p.A. v Argentine Republic* ICSID Case No ARB/07/17, Award (21 June 2011) [371] ("In principle, it is incumbent on Impregilo to prove that it suffered the damage for which it asks to be compensated. However, it cannot be established with certainty in what situation AGBA – and thus Impregilo – would have been, had the Argentine Republic's breach of the fair and equitable treatment standard not occurred. Consequently, it would be unreasonable to require precise proof of the extent of the damage sustained by Impregilo. Instead, reasonable probabilities and estimates have to suffice as a basis for claims for compensation.").

[142] See *Petrobart Ltd* (n 126) [175] ("While specific performance is the primary remedy for a breach, it is no longer materially possible in this case."); Endicott (n 126) 540–41.

[143] McLachlan, Shore and Weiniger (n 90) 341 ("An order to a State to carry out a particular act would be seen as a far greater infringement of State sovereignty than an award of compensation.").

[144] Irmgard Marboe, *Calculation of Compensation and Damages in Investment Law* (Oxford University Press 2009) 7 125 (discussing jurisprudence in which the tribunal relied upon a reversal of the burden of proof in the context of respondent assertions that the claimant failed to mitigate appropriately).

own objections.[145] Failing to place the burden on the respondent creates a systemic risk of claimant under-compensation. The appropriate sharing of the burden of proof on remedies questions significantly mitigates the risk.

(D) *Challenges to the Investor's Claim for Damages on Grounds that they are Speculative—The Respondent's Burden*

Similarly, the question whether damages are speculative are likely going to require the balancing of multiple different factors in any given case.[146] This thus typically requires the host state to put in issue factual questions not central to the claimant's damages calculations. One such example is the appropriate country-risk component of the discount rate applied in a discounted cash flow damages calculation, if any.[147]

When the respondent submits such new factual elements, it is again necessary to place the burden of proof with regard to propriety of the new inputs on the respondent.[148] A failure to appropriately assign the burden of proof on the respondent again creates a systemic under-compensation risk. This under-compensation risk is particularly problematic in the damages context given that it was the respondent who brought about the breach in the first place. It would thus lie ill in the mouth of the respondent to complain of the speculative nature of damages it itself caused without having to provide further proof of such a submission.

(E) *Function of the Burden of Proof at the Damages Phase—It Prevents Under- or Over-Compensation*

The final prong of my argument is to understand the function of burden of proof at the damages phase of a case. The function of burdens of proof at the damages phase again differs slightly from the function of burdens of proof in the context of establishing

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[145] See ibid.

[146] McLachlan, Shore and Weiniger (n 90) 322.

[147] *Gold Reserve* (n 138) [840]. Although formally, the Gold Reserve tribunal ruled that the burden of proof regarding damages was on the claimant, its actual analysis of the country risk issue suggests a change to the rate from the one suggested by claimant because it "accepts Dr. Burrows' (CRA) explanation" (that is respondent's expert) regarding the undervaluation of country risk by claimant's expert. ibid. [683] – [686], [842].

[148] Marboe (n 144) 125 (discussing jurisprudence in which the tribunal relied upon a reversal of the burden of proof in the context of respondent assertions that the claimant failed to mitigate appropriately).

the jurisdiction of a tribunal or the merits of a claim. In the context of the damages stage of the proceedings, the concern is not exclusively or even principally to establish certain facts *as such*.[149] Instead, the purpose of the arbitration is to provide an appropriate remedy given the findings of liability.[150]

In order to understand how burdens of proof become relevant at the remedies stage, it is thus important first to understand what concerns drive the determination of what is the best available position. First, a tribunal must be concerned whether it awards a remedy that is appropriate to the case.[151] For example, a tribunal may determine that an award requiring specific performance may not be feasible in the investor-state context. Second, a tribunal must also be concerned that it not award a windfall to either of the parties before.[152] Combined, the goal at the remedies stage of the proceedings is to limit the assignment of a windfall to either of the litigant parties arising out of the underlying liability event.

Burden of proof at the remedies stage is critical for the tribunal to achieve this mission.[153] Burden of proof thus again play a dual role; in this case of securing against patent over- and patent under-compensation. Much like at the jurisdictional stage, this means that proceedings at the remedies stage require a balancing of various potentially incommensurate values. The principles on burden of proof set out above permit tribunals to do so in a predictable and even-handed manner.

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[149] Thomas W. Wälde and Borzu Sabahi, 'Compensation, Damages, and Valuation' in Peter Muchlinski and others (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press 2008) 1049, 1070–72 (discussing the manner in which facts are used to compare and project valuations).

[150] See Marboe (n 144) ("The calculation of compensation and damages pursues the aim of transforming legal claims into concrete amounts of money. In order to fulfil this task adequately, the scope and purpose of the legal claims must be taken into account appropriately. It is, therefore, decisive to establish the function of compensation and damages within the relevant legal frameworks.").

[151] Nigel Blackaby *et al*, *Redfern and Hunter on International Arbitration* (n 11) 527 (discussing various remedies tribunals may be able to award).

[152] See Wälde and Sabahi (n 149) 1053 ("Compensation not only indemnifies the victim for losses suffered; but also ensures that the perpetrator—the tortfeasor—does not profit from breaching the law by becoming unjustly enriched.").

[153] ibid 1110 ("The allocation of the burden of proof is an essential and not satisfactorily developed part of investment arbitration.").

V. TIMEFRAME IN WHICH A BURDEN MUST BE DISCHARGED AS RECOGNIZED AND APPLIED BY INVESTOR-STATE ARBITRATION

(A) *The Burden must be Discharged at the Time the Party Makes the Allegation*

The next phase of my argument seeks to understand the timeframe within which the party with the burden must discharge its burden of proof. My argument in this regard is that the party bearing the burden of proof must present probative evidence to discharge at the earliest time feasible, *i.e.*, at the stage when the party is raising an allegation or a defence. The failure to discharge the burden of proof at the appropriate time would require the non-moving party to prove an allegation that has still not been made. Therefore, investor-state tribunals would dismiss allegations when the party with the burden of proof fails to act in a prompt and timely manner. Relatedly, the timeliness obligation would also require a party with the burden to meet its burden appropriately and belated arguments by the party with the burden would not be permitted.

The decision by the tribunal in the *Oostergetel v. Slovak Republic* is illustrative of the timeliness principle at the damages phase, where the investor failed to meet its burden and then requested the appointment of a tribunal-appointed expert. The tribunal denied such a motion:

> As for the Claimants' request for tribunal-appointed experts, the Tribunal observes that the Claimants have submitted this request in their post-hearing brief, the main aim of which was to summarize the positions of the Parties after the evidentiary hearing with a view to assisting the Tribunal in its deliberation. This was specifically set forth at Article 3.2 of P.O. No. 18 as was the rule that no new evidence should accompany the post-hearing briefs subject to leave of the Tribunal (Article 3.5, P.O. No. 18). More importantly, the Tribunal notes that the Claimants had ample opportunity throughout the arbitration to discharge their burden of proof concerning damages, including by presenting a damage expert report and oral testimony. Their attention was expressly drawn to this in several procedural orders. They were equally on notice on the time limitations for the submission of expert evidence. In light of these

considerations, the Claimants' request for the appointment of Tribunal-appointed quantum experts is denied.[154]

(B) *Consequences of Timeliness—It Facilitates a Fair and Speedy Resolution of the Dispute*

As set out above, burden of proof constitutes a legal rule rather than a prudential doctrine. The failure to abide by the burdens of proof thus has significant implications for both the parties and the tribunal. There is no tribunal discretion ***whether*** the burden of proof is applied. Such discretion is relevant only to ***how*** the burden has been determined to have been discharged. The party with the burden of proof must discharge its burden in a timely manner as a part of the good administration of justice and the failure to discharge it can add to the overall time and expense. For this reason, the failure to meet the burden in a timely manner can be fatal for either party.

In other words, the timeliness with which a burden must be discharged arises immediately out of the concerns for the fair and speedy resolution of disputes in arbitration. To the extent that a party requires more time in order to discharge its burden of proof, the appropriate procedural point at which to adjust timeframes is during the first procedural conference with the tribunal. Once the timeframes set by the tribunals have expired, the tribunal must have the means at its disposal to close the case or part of the case upon full consideration of the current obstacles standing in the way of the parties. This is not to suggest that a tribunal cannot consider special circumstances warranting an extension of time but, as a general matter, the failure to meet the burden in a timely manner can have serious consequences for the party with the burden of proof.

VI. CONSEQUENCE OF FAILURE TO DISCHARGE A BURDEN OF PROOF

Having examined the various principles for burden of proof in several situations, the next prong of my argument is to understand the consequences for failing to discharge the burden of proof. My argument here is that the failure of a party to carry a burden of proof assigned to it results in a finding or holding adverse to the submission

[154] *Mr Jan Oostergetel* (n 32) [171]_[172] (emphasis added).

for which the party failed to discharge that burden. My argument is consistent with the views of Professor V.S. Mani who has pointed to three consequences that flow from the basic principle:

> International practice appears to project at least three propositions on burden of proof: (1) A party making an allegation has a *prima facie* duty to bear the burden of proof. (2) If a party fails to prove the existence of facts it alleges as the basis of the case, its case is liable to be dismissed. (3) The principle of burden of proof applies "with particular strength" if a party alleges the existence of facts "which imply a departure from the normal state of affairs or a violation of international law by the other party".[155]

The various sub-arguments relating to the consequences for failing to meet the burden of proof are discussed below.

(A) *Consequences for the Parties—The Allegation will be Dismissed*

The failure to put forward evidence supporting its claim can result in the tribunal disregarding the claim, which could in certain instances be fatal to the case.[156] In *Plama v. Bulgaria*, the tribunal had to resolve the contradictory factual evidence relating to rioting of workers on a refinery.[157] The tribunal concluded: "Given this conflicting evidence, the Arbitral Tribunal is unable to form any firm view as to what really transpired. The burden of proof being on Claimant, the Tribunal cannot, therefore, rule in its favor concerning these allegations, including with respect to its claim under Article 12 of the ECT."[158] Other tribunals have dismissed claims where a party has merely made assertions but not met their burden of proof by producing evidence to support the factual allegations. This happened in the *Salini v. Jordan* case, where the tribunal rejected part of the claim because claimant did not meet its burden of proof.

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[155] V.S. Mani (n 2) 204 (emphasis added).

[156] See generally Kabir Duggal (n 14) 37.

[157] *Plama Consortium* (n 97) [248].

[158] ibid [249]. See also Bin Cheng (n 2) 334-335 ("the burden of proof rests upon the party alleging the fact, unless the truth of the fact is within judicial knowledge or is presumed by the Tribunal. In the absence of convincing evidence, the Tribunal will disregard the allegation.").

> [T]he Claimants, on this point, base their treaty claims exclusively on the way in which the Contract was implemented by the Engineer and by JVA. But they explain no where how the alleged facts could constitute not only a breach of the contract, but also a breach of Article 2(3) of the BIT. They only quote that article and assert that it has been violated. They present no argument, and no evidence whatsoever, to sustain their treaty Claim and they do not show that the alleged facts are capable of falling within the provisions of Article 2(3). The Tribunal, therefore, has no jurisdiction to consider this first treaty claim.[159]

As noted above, when it comes to jurisdictional issues, the failure of the investor to establish the facts necessary to prove the elements of jurisdiction can be fatal to the case.[160] The failure to meet the burden at the damages phase will result in no damages or reduced damages being awarded.[161]

(B) *Consequences for an Award Issued in Derogation of Burdens of Proof—It can be the Basis for Annulment*

In the ICSID context, one the major consequences when a tribunal derogates from the basic principle is that it can be the basis for annulment of an award. As annulment

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[159] *Salini Construttori* (n 15) [163] (emphasis added).

[160] *Caratube* (n 82) [457], [468] ("Claimant insisted throughout the proceedings that it presented all necessary evidence to prove that the Tribunal has jurisdiction. The Tribunal disagrees. Claimant failed to discharge its burden of proof with regard to the fact that CIOC was an investment of U.S. national (Devincci Hourani) as required by Article VI(8) of the BIT. At the least, the Tribunal is not satisfied that Claimant has established the fact of that investment. . . . Resulting from the above considerations, the Tribunal concludes that the facts presented and proved by Claimant do not satisfy Claimant's burden of proof to establish jurisdiction of this Tribunal."); *ICS Inspection and Control Services Ltd v Argentine Republic*, PCA Case No 2010-9, Award on Jurisdiction (10 February 2012) [280] ("The burden of proof for the issue of consent falls squarely on a given claimant who invokes it against a given respondent. Where a claimant fails to prove consent with sufficient certainty, jurisdiction will be declined."); *Emmis International* (n 82) [171] ("The Claimants bear the burden of proof. If the Claimants' burden of proving ownership of the claim is not met, the Respondent has no burden to establish the validity of its jurisdictional defences."); *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v USA)* (n 15) [101] ("Ultimately, however, it is the litigant seeking to establish a fact who bears the burden of proving it; and in cases where evidence may not be forthcoming, a submission may in the judgment be rejected as unproved . . ."). See also Bin Cheng (n 2) 307 ("Those which are not proved need not be taken into consideration by the tribunal: *Idem est non probari non esse*."); V.S. Mani (n 2) 204 ("The success or failure of a party's case is dependent upon the effect the whole body of evidence adduced before the tribunal gives rise to.").

[161] *Víctor Pey Casado and President Allende Foundation v Republic of Chile*, ICSID Case No. ARB/98/2, Award (13 September 2016) [234] ("The Tribunal has therefore no option but to find that the Claimants have failed to prove any material injury caused to either of them as the sufficiently direct result of the Respondent's breach of Article 4 of the BIT. The Tribunal cannot therefore, on principle, make any award of damages.").

is the consequence for failing to meet the burden of proof, it is necessary to provide a brief overview of the annulment process and how it operates. Without this background, it will be hard to understand the application of the annulment process in relation to evidentiary principles.

1. Brief Introduction to the Annulment Process in Investor-State Arbitration

In the context of ICSID arbitration, annulment is the exclusive remedy a party may have against a final decision of an ICSID arbitral tribunal.[162] Article 52(1) of the ICSID Convention provides five categories for annulment:

> (1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:
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> (a) that the Tribunal was not properly constituted;
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> (b) that the Tribunal has manifestly exceeded its powers;
>
> (c) that there was corruption on the part of a member of the Tribunal;
>
> (d) that there has been a serious departure from a fundamental rule of procedure; or
>
> (e) that the award has failed to state the reasons on which it is based.[163]

[162] ICSID Convention, Article 53(1) ("The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention.") The remedies provided for the Convention are interpretation, revision and annulment. Both requests for interpretation and revision are, if possible, submitted to the same tribunal issuing the original award. ICSID Convention, Articles 50(2), 51(3). Only annulment applications are submitted to a separate body, an *ad hoc* Committee to determine the merit of the annulment application. ICSID Convention, Article 52(3) ("(3) On receipt of the request the Chairman shall forthwith appoint from the Panel of Arbitrators an *ad hoc* Committee of three persons. None of the members of the Committee shall have been a member of the Tribunal which rendered the award, shall be of the same nationality as any such member, shall be a national of the State party to the dispute or of the State whose national is a party to the dispute, shall have been designated to the Panel of Arbitrators by either of those States, or shall have acted as a conciliator in the same dispute. The Committee shall have the authority to annul the award or any part thereof on any of the grounds set forth in paragraph (1).").

[163] ICSID has clarified the key features of the annulment process in a paper prepared in 2011 and updated in 2016. See World Bank, *Background Paper on Annulment for the Administrative Council of ICSID* (ICSID Secretariat 2016) 32 ("ICSID *ad hoc* Committees have also affirmed these principles in their decisions. These decisions have clearly established that: (1) the grounds listed in Article 52(1) are the only grounds on which an award may be annulled; (2) annulment is an exceptional and narrowly circumscribed remedy and the role of an *ad hoc* Committee is limited; (3) *ad hoc* Committees are not courts of appeal, annulment is not a remedy against an incorrect decision, and an *ad hoc* Committee cannot substitute the Tribunal's determination on the merits for its own; (4) *ad hoc* Committees should

Further, it has been noted that the framers of the ICSID Convention intended annulment to be an extraordinary remedy.[164] This limitation indicates the premium placed by the drafters of the ICSID Convention on the finality of ICSID awards.[165] As the *Total v. Argentina ad hoc* committee noted:

> Article 53 of the ICSID Convention provides for the fundamental features of an arbitration award and confirms the well-established doctrine of finality in arbitration and the binding effect of the awards on the parties. The said article confirms also that the only recourse against the award available to the parties is limited to what is set out in Article 52 of the ICSID Convention and that no appeal is allowed. Therefore, it is also undisputed that an annulment committee should not review the merits. It is not the duty of an ad hoc committee under the ICSID Convention to revisit the merits of the case, or to comment on what it would have decided on the merits had it acted as an arbitral tribunal. Annulment is an exceptional recourse that should consider the finality of the award.[166]

The application of the annulment process is also subject to an additional principle. Annulment in the ICSID context controls the process of arbitral decision-making rather

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exercise their discretion not to defeat the object and purpose of the remedy or erode the binding force and finality of awards; (5) Article 52 should be interpreted in accordance with its object and purpose, neither narrowly nor broadly; and (6) an *ad hoc* Committee's authority to annul is circumscribed by the Article 52 grounds specified in the application for annulment, but an a*d hoc* Committee has discretion with respect to the extent of an annulment, i.e., either partial or full.").

[164] See eg *Impregilo SpA v Argentina*, ICSID Case No ARB/07/17, Decision on Annulment (24 January 2014) [118] ("Given this framework, this Committee concludes that in balancing these principles and interests, annulment is an exceptional recourse that should respect the finality of the award."); R Doak Bishop and Silvia Marchili, *Annulment Under the ICSID Convention* (Oxford University Press 2012) 13 ("The drafters of the ICSID Convention sought, like the ILC, to reconcile finality of the award with the need to prevent flagrant cases of excess of jurisdiction and injustice"). See also World Bank (n 163) 32 ("The drafting history of the ICSID Convention also demonstrates that annulment 'is not a procedure by way of appeal requiring consideration of the merits of the case, but one that merely calls for an affirmative or negative ruling based upon one [of the grounds for annulment].' It does not provide a mechanism to appeal alleged misapplication of law or mistake in fact. The Legal Committee confirmed by a vote that even a 'manifestly incorrect application of the law' is not a ground for annulment. The limited and exceptional nature of the annulment remedy expressed in the drafting history of the Convention has been repeatedly confirmed by ICSID Secretary-Generals in Reports to the Administrative Council of ICSID, papers and lectures.").

[165] See Bishop Marchili (n 164) 13.

[166] *Total SA v Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Annulment (1 February 2016) [164-165] (emphasis added).

than its result.[167] Assertions of legal or factual error, error *in judicando*, no matter how egregious are – or should be – beyond the scope of annulment review.[168] As the *Rumeli v. Kazakhstan ad hoc* committee noted:

> According to Rule 34 of the Arbitration Rules, the Tribunal is the judge of the admissibility of any evidence adduced and of its probative value. An *ad hoc* committee is not a court of appeal and cannot therefore enter, within the bounds of its limited mission, into an analysis of the probative value of the evidence produced by the parties. . . . An *ad hoc* committee will not annul an award if the tribunal's approach is reasonable or tenable, even if the committee might have taken a different view on a debatable point of law. Where, as here, the question of jurisdiction depends not on a question of law but rather on an appreciation of the evidence, it would not be proper for an *ad hoc* committee to overturn a tribunal's treatment of the evidence to which it was referred.[169]

Rather, the question is whether the arbitrators committed errors *in procedendo*, accorded the parties fundamental rights bestowed upon by the arbitral process, faithfully executed their arbitral mandate, and gave the parties a decision that permits them to establish that the tribunal in fact reasoned its way through the record assembled by the parties as well as their legal submissions.[170] Based on this general fact, an immediate

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[167] W. Michael Reisman, *The Breakdown of the Control Mechanism in ICSID Arbitration*, 1989 Duke Law Journal 743, 738; David D. Caron, 'Reputation and Reality in the ICSID Annulment Process: Understanding the Distinction Between Annulment and Appeal' (1992) 7 ICSID Rev 21; 24; Christoph Schreuer *et al*, *The ICSID Convention: A Commentary* 903 (2nd edn, 2009) ("*Ad hoc* committees have emphasized that the annulment process is concerned with the 'process of decision' or 'whether the manner in which the Tribunal carried out its functions met the requirements of the ICSID Convention'"(quoting *Luchetti Annulment*, [97]); Elihu Lauterpacht, *Aspects Of The Administration Of International Justice* 103 (1991)(annulment is a "device built into the ICSID system essentially for review of the procedural aspects of the case"); Jan Paulsson, *ICSID's Achievements and Prospects*, 6 ICSID Rev 380, 388 (1991).

[168] See eg *Duke Energy International Peru Investments No 1 Ltd v Peru*, ICSID Case No ARB/03/28, Decision on Annulment (1 March 2011) [96]; *Fraport AG Frankfurt Airport Services Worldwide v Philippines*, ICSID Case No ARB/03/25, Decision on Annulment (23 December 2010) [183]; *MCI Power Group LC v Ecuador*, ICSID Case No ARB/06/6, Decision on Annulment (19 October 2009) [54]; *Repsol YPF Ecuador SA v Ecuador*, ICSID Case No ARB/01/10, Decision on Annulment (8 January 2007) [39]; *Wena Hotels Ltd v Egypt*, ICSID Case No ARB/98/4, Decision on Annulment (28 January 2002) [22]; Bishop (n 164) 94, 130.

[169] *Rumeli Telekom AS and Telsim Mobil Telekomunikasyon Hizmetleri AS v Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Decision of the ad hoc Committee (25 March 2010) [96] (emphasis added).

[170] *Fraport* (n 168) [183]; Bishop (n 164) 130.

conclusion that can be drawn is that evidentiary matters that fall clearly with a tribunal's discretionary powers can almost never be the basis for a successful annulment challenge. For example, the evaluation of evidence by a tribunal is a matter which, under the arbitral rules, fall within the discretion of the tribunal. Generally, this cannot, therefore, form the basis for a successful challenge.

Further, the question for annulment review is not whether the tribunal made correct factual findings.[171] Challenging evidentiary findings on the basis that they were wrong is unavailing. The tribunal is given the sole power to make factual determinations.[172] This power entails that the tribunal may well have erred in its assessment.[173] Decisions of the probative nature of evidence, therefore, are fully final and beyond annulment review. As the tribunal noted in the *Alapi v. Turkey* case:

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[171] See eg *El Paso Energy International Co v Argentina*, ICSID Case No ARB/03/15, Decision on Annulment (22 September 2014) [191] ("Regarding the alleged violation related to the evidence that Argentina submitted about the nature of Article XI of the BIT (subparagraph (a) of paragraph 189 above), the Committee must, once again, reiterate that it is not an appeal tribunal and therefore cannot or should not decide whether evidence was well or ill-considered or not considered at all by the Tribunal. Rule 34 (1) of the Arbitration Rules is clear when it indicates that the Tribunal alone is empowered to decide on two fundamental issues related to the allegation of Argentina: the admissibility of evidence and its probative value."); *Rumeli Telekom* (n 169) [96] ("An *ad hoc* committee is not a court of appeal and cannot therefore enter, within the bounds of its limited mission, into an analysis of the probative value of the evidence produced by the parties."); *Duke Energ*y(n 168) [214] (following *Rumeli*); *Wena Hotels*(n 168) [65] ("it is in the Tribunal's discretion to make its opinion about the relevance and evaluation of the elements of proof presented by the parties"); *Hussein Nuaman Soufraki v United Arab Emirates*, ICSID Case No ARB/02/7, Decision on Annulment (5 June 2007)[111] (following *Wena*); *Compañía de Aguas del Aconquija SA v Argentina*, ICSID Case No ARB/97/3, Decision on Annulment (3 July 2002) [249] (similar finding); *Helnan International Hotels AS v Egypt*, ICSID Case No ARB/05/19, Decision on Annulment (14 June 2010) [27] (similar finding).

[172] See eg *Adem Dogan v Turkmenistan*, ICSID Case No. ARB/09/9, Decision on Annulment (15 January 2016) [214-215]: "The Committee shall not review the probative value attributed by the Tribunal to the evidence on which it has relied to reach its Decision on Jurisdiction. This is a matter of appreciation and evaluation of evidence. It is repetitious to observe that it is beyond the mandate of this Committee to revisit the conclusions reached by the Tribunal in such matters, considering that it is not acting as an appellate body. This applies in particular to the Respondent's reference to the Participation Agreement being 'unauthentic', 'backdated' and 'recreated', and to its allegation that the Tribunal refused to consider the evidence regarding the forgery of the Participation Agreement. It equally applies to the allegation that the Tribunal ignored evidence establishing that the Claimant was a seller of poultry equipment to Şöhrat-Anna and Samşyt, not an investor (including the Claimant's own testimony before the Turkmen courts stating that he was a seller of equipment). Without going into the details of the Tribunal's assessment of the evidence, the Committee is of the view that the Tribunal duly considered the above issues in the light of the available evidence. The Tribunal identified the evidence it considered relevant to reject the allegation of forgery of the Participation Agreement, found that the Claimant had financed the equipment for the Farm and was not a seller of the same, and examined the different position that the Claimant had taken before the Turkmen courts."

[173] ibid.

> With respect to the failure to apply the applicable law, at the risk of repeating itself, the Committee wishes to stress that it is not the role of an annulment committee to verify whether the tribunal's interpretation of the law or assessment of the facts was correct. As long as the tribunal correctly identified the applicable law, and strove to apply it to the facts that it established, there is no room for annulment. Moreover, pursuant to Arbitration Rule 34(1), the tribunal is the judge of the admissibility of any evidence adduced and of its probative value. It is certainly not the role of an annulment committee to verify whether a tribunal correctly established the facts of a case. Not only is such an analysis not warranted by the language of Article 53(1) of the ICSID Convention, but also the tribunal, having first-hand knowledge of the evidence before it, is best situated to interpret it. What is more, a tribunal has considerable discretion in its evaluation of the evidence.[174]

2. Application of the Annulment Process to the Basic Principle of Burden of Proof

The discussions above does not mean that annulment is not concerned with principles of evidence. Indeed, evidentiary principles implicate how a tribunal may arrive at its decision even if viewed from this perspective. This is particularly significant in the context of the basic principle of burden of proof. *Ad hoc* committees have noted that a reversal or misapplication of the basic principle relating to burden of proof can be a ground for seeking annulment under the ICSID Convention. As the *Caratube v. Kazakhstan* annulment committee noted:

> A breach of the general principles on burden of proof can also lead to an infringement of Article 52(1)(d) of the Convention. As the committee in Klöckner II stated, "a

[174] *Alapli Elektrik BV v Republic of Turkey*, ICSID Case No. ARB/08/13, Decision on Annulment (10 July 2014) [234] (emphasis added). See also *Adem Dogan v. Turkmenistan* (n 172) [149-150]: "At the risk of repeating itself, the Committee observes that it does not have the authority to sit in judgment on the Tribunal's appreciation and evaluation of the evidence and its conclusion, 'not without hesitation but eventually by a balance of the evidence', that the Gurbannazarovs did likely agree that the Claimant 'would have an entitlement to the Farm's profits', with the enforceability of such entitlement depending 'to a significant degree on the good will of the Gurbannazarovs'. The Respondent's allegation regarding the Tribunal's disregard of Turkmen law, including the alleged unenforceability of the Participation Agreement, have been examined by the Committee when dealing with the finding of jurisdiction. Even assuming that the Tribunal made an error in applying or omitting to apply individual provisions of Turkmen law, a mere error or omission would not be a ground for annulment of the Award. In any event, this is merely an assumption. The record before the Committee does not support such an assumption."

> reversal of the burden of proof could well lead to a violation of a fundamental rule of procedure. It all depends on the importance, for the decision of the Tribunal, of the subject regarding which the burden has been reversed."[175]

Therefore, failing to apply the appropriate burden of proof can be the basis for a party to challenge the decision of the tribunal on the basis that a tribunal has violated a "fundamental rule of procedure."[176] Aron Broches, the general counsel of the World Bank, stated that this ground for annulment protects basic principles of due process such as the right to be heard.[177] A serious departure from a fundamental rule of procedure is present when a tribunal's treatment (or non-treatment) of evidence runs afoul of such basic expectations of natural justice and the rule of law.[178] Indeed, a party to any arbitral tribunal expects that a tribunal will respect the basic rule because it is such a fundamental rule of procedure.

However, related to the earlier point, despite the fact that the basic principle of burden of proof is not explicit in arbitral rules, a tribunal is not under an obligation to state these principles. This could perhaps be a consequence of the reality that there is such wide acceptance of the basic principle that the parties are expected to know of its existence. As one commentator has noted:

> (1) It places both parties on notice that they are bound to substantiate their factual allegations with evidence; (ii) it makes clear that both parties may bear the risk of failing on their allegations if they do not do so; and (3) because the parties are on notice, a tribunal is not under a procedural

[175] *Caratube* (n 82) [97] (emphasis added).

[176] See Chapter 4.VIII for a further discussion on "fundamental rule of procedure."

[177] Aron Broches, *Observations on the Finality of ICSID Awards*, 6 ICSID Review (1991) 321, 331 ("In reply to these comments which he thought reflected a misunderstanding of the term 'fundamental rules of procedure,' the President pointed out that that term, as used in the Preliminary Draft, should be understood as having a wider connotation than that of specific rules to be adopted by the Administrative Council. 'Fundamental rule' would comprise, for instance, the so-called principles of natural justice, e.g. both parties must be heard and that there must be adequate opportunity for rebuttal.").

[178] Investor-state tribunals have also recognized this. See eg *Impregilo SpA v Argentina*, ICSID Case No ARB/07/17, Decision on Annulment (24 January 2014) [163-165] ("With a view to defining the scope of this ground for annulment, other Committees have identified the following 'fundamental rules of procedure': the equal treatment of the parties, the right to be heard, an independent and impartial tribunal, the treatment of evidence and burden of proof, and deliberations among members of the Tribunal. This Committee agrees with such formulations of the fundamental rules of procedure.") (emphasis added).

> duty to inform each side at various stages of the proceedings as to whether the risk of non-production of evidence is placed or has shifted to them.[179]

A practical application of this could be implicitly found in decision of the annulment committee in the *Continental Casualty v. Argentina* case, where the annulment committee noted:

> The Committee notes that the ICSID Convention and the Arbitration Rules contain no provisions with respect to the burden of proof or standard of proof. . . . Indeed, the tribunal is not obliged expressly to articulate any specific burden of proof or standard of proof and to analyse the evidence in those terms, as opposed simply to making findings of fact on the basis of the evidence before it.[180]

Therefore, failure of the arbitral tribunal to notify the parties of the basic principle of burden of proof is not a ground for annulment; reversal or ignoring the basic principles would likely be. Although there does not appear to be a case where an *ad hoc* committee has actually annulled a case on this basis, as noted above, it has been identified as the basis of a potential challenge by both *ad hoc* committees and commentators.

3. Comparing the Annulment Process with Enforcement Pursuant to the New York Convention

The next question that arises is what are the safeguards that exist for a non-ICSID awards, which are recognized and enforced pursuant to the New York Convention.[181] Article V of the New York Convention governs recognition enforcement of arbitral awards in a non-ICSID context. It provides in relevant part as follows:

> 1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent

[179] Nathan D. O'Malley (n 13) 206 (emphasis added).

[180] *Continental Casualty Co v Argentine Republic*, ICSID Case No ARB/03/9, Decision on the Application for Partial Annulment of Continental Casualty Company and the Application for Partial Annulment of the Argentine Republic (16 September 2011) [135] (emphasis added).

[181] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (United Nations [UN]) 330 UNTS 3 ("New York Convention").

> authority where the recognition and enforcement is sought, proof that:
>
> (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
>
> (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
>
> (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
>
> (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
>
> (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.
>
> 2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
>
> (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
>
> (b) The recognition or enforcement of the award would be contrary to the public policy of that country.

The 2006 UNCITRAL Model Law on Arbitration mirrors the same provisions found in the New York Convention and thus proposes their adoption as part of municipal laws

governing international arbitration.[182] As an initial observation, the comments made above are generally true, with some limitations, in the context of actions to set aside an award in the context of the New York Convention and national legislation consistent with it.[183]

In the context of the New York Convention, review of an award similarly is principally process-based, barring few exceptions.[184] It concerns whether the parties were given notice and opportunity to plead before an impartial tribunal.[185] Courts applying the New York Convention have consistently recognized the deference to be afforded to arbitral tribunals. As the U.S. District Court for Columbia noted in relation to the enforcement challenged in the *Gold Reserve v. Venezuela* case:

> As with claims concerning domestic arbitral awards, courts that are asked to confirm international arbitral decisions do so recognizing the substantial deference they owe to arbitral tribunals under the [Federal Arbitration Act]: "Consistent with the 'emphatic federal policy in favor of arbitral dispute resolution' recognized by the Supreme Court[,] . . . the FAA affords the district court little discretion in refusing or deferring enforcement of foreign arbitral awards."

[182] UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006, E08V4 (2008) 35 ("As a further measure of improvement, the Model Law lists exhaustively the grounds on which an award may be set aside. This list essentially mirrors that contained in article 36 (1), which is taken from article V of the New York Convention. The grounds provided in article 34 (2) are set out in two categories. Grounds which are to be proven by one party are as follows: lack of capacity of the parties to conclude an arbitration agreement; lack of a valid arbitration agreement; lack of notice of appointment of an arbitrator or of the arbitral proceedings or inability of a party to present its case; the award deals with matters not covered by the submission to arbitration; the composition of the arbitral tribunal or the conduct of arbitral proceedings are contrary to the effective agreement of the parties or, failing such agreement, to the Model Law. Grounds that a court may consider of its own initiative are as follows: non-arbitrability of the subject-matter of the dispute or violation of public policy (which is to be understood as serious departures from fundamental notions of procedural justice).").

[183] Bishop and Marchili (n 164) 262-4 ("The UNCITRAL Model Law grounds for vacatur reflect the bases on which a court may refuse to recognize or enforce an award under the New York Convention. As Gary Born explained, most national arbitration legislation permits the annulment of international arbitral awards if '(a) there was no valid arbitration agreement; (b) the award-debtor was denied an adequate opportunity to present its case; (c) the arbitration was not conducted in accordance with the parties' agreement or, failing such agreement, the law of the arbitral seat; (d) the award dealt with matters not submitted by the parties to arbitration; (e) the award dealt with a dispute that is not capable of settlement by arbitration; or (f) the award is contrary to public policy'.'").

[184] ibid.

[185] ibid.

> A further constraint is that courts "may refuse to enforce the award [brought under the New York Convention] only on the grounds explicitly set forth in Article V of the Convention." The party resisting confirmation — in this case, Venezuela — bears the heavy burden of establishing that one of the grounds for denying confirmation in Article V applies.[186]

The review of New York Convention awards at the seat of arbitration may facially appear to exceed the grounds set out in the ICSID Convention.[187] Most vividly, set aside may well be available on public policy grounds – public policy grounds that are measurable against both result of an award, as well as the process arriving at it.[188] The question would in that instance not focus upon the arbitral process as such, but the pre-arbitration conduct at issue in the arbitration.[189]

Leaving aside the desirability or validity of such challenges in the New York Convention context, concerns that are beyond the purview of this Research, they appear at times to be successful.[190] As the focus of this research is on evidence – and

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[186] *Gold Reserve Inc. v Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Memorandum Opinion of U.S. District Court for District of Columbia on Enforcement of the Award (20 November 2015) [13-14] (internal citations omitted; emphasis added). See also *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon Delaware Inc. v Government of Canada*, PCA Case No. 2009-04, Federal Court of Canada Order (22 February 2017) [24] ("I agree with the Investors that Courts normally afford deference to arbitration decisions.") (internal citations omitted); *AWG Group Ltd. v The Argentine Republic*, UNCITRAL, Memorandum Opinion of the US District Court for the District of Columbia (30 September 2016) [16] ("Review of arbitral awards is 'extremely limited' and is 'not an occasion for *de novo* review'.") (internal citations omitted).

[187] See Nigel Blackaby *et al*, *Redfern and Hunter on International Arbitration* (n 13) ("The extent of court intervention permitted by different states may be viewed as a spectrum. At one end of the spectrum are states such as France and Switzerland, which exercise a very limited control over international arbitral awards and permit certain parties to 'contract out' of control by the courts of the seat altogether. In the middle of the scale, a large number of states have adopted (either in full or with some modifications) the limited grounds of recourse laid down in the Model Law, which mirror the grounds for refusal of enforcement under the New York Convention. The United States also exercises a similar level of control over awards in its territory. At the other end of the spectrum are countries such as England, which operate a range of controls, including a limited right of appeal on questions of law, which the parties may agree to waive. The examples that follow illustrate the different approaches, including the systems adopted by some of the major countries selected as seats for international arbitration.").

[188] Bishop (n 164) 262-4.

[189] *Compare* Nigel Blackaby (n 13) 597-600 (set aside available with regard to awards offending international public policy) *with* Aloysius P Llamzon, *Corruption in International Investment Arbitration* (Oxford University Press 2014) 109 (discussing jurisprudence that bribery violates international public policy).

[190] Even there some courts note that the public policy ground would be construed narrowly. See eg *Crystallex International Corporation v Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Memorandum of Opinion of the United States District Court for the District of Columbia, 25 March 2017

the process by which a tribunal turns evidentiary submissions into the predicate of its award, this Chapter will focus exclusively on the process-based understanding of arbitral review. There are two reasons for doing so: (i) the New York Convention review involves examining decisions by local courts and for any meaningful study to be conducted court decisions in several countries will need to be examined, and (ii) the ICSID system remains a preferred option for investor-state arbitration cases. Therefore, the Research is primarily focused on the ICSID Convention but will also look at the New York Convention, wherever appropriate. It does so in the hope that by articulating a process-based rationale for review in the ICSID Convention context, it can be understood to raise the same logic for purposes of New York Convention review of similar awards – review that, on some interpretation of the Convention, permits a more searching scrutiny than its ICSID cousin.[191] Indeed, even in the context of the New York Convention, courts and domestic statutes relating to the enforcement of arbitral awards have recognized the basic principle.[192]

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[44] ("The 'public policy' escape-hatch of Article V(2)(b) is 'construed narrowly' and 'merits vacating an award only when the award 'would violate the forum state's most basic notions of morality and justice'.'").

[191] See Nigel Blackaby (n 13) 583-590 (outlining the sister grounds to manifest excess of powers and serious departure from a fundamental rule of procedure).

[192] See eg UK Arbitration Act, 1996, Section 103(2) ("Recognition or enforcement of the award may be refused if the person against whom it is invoked proves . . ."); Indian Arbitration Act, 2015, Section 34(2) ("An arbitral award may be set aside by the Court only if—(a) the party making the application furnishes proof that . . ."). Case law is to the same effect. See eg (United States) *Balkan Energy Limited and Balkan Energy (Ghana) Limited v. Republic of Ghana*, 17-cv-00584 (APM), US District Court, District of Columbia (22 March 2018), p. 19 (quoting precedence "The burden of establishing the requisite factual predicate to deny confirmation of an arbitral award rests with the party resisting confirmation."); (United Kingdom) *Zavod Ekran OAO v. Magneco Metrel UK Ltd*, CL-2016-000720, [2017] EWHC 2208 (Comm) (9 June 2017) [12] (quoting precedence "the onus of proof being on the party raising it as a ground of refusal of enforcement of the award, as expressly specified in s. 103(2) [of the UK] Arbitration Act 1996."); (India) *Sideralba SpA v. Shree Precoated Steels Ltd*, Arbitration Petition No. 84 of 2013, High Court of Bombay (India) (13 October 2015) [94] ("In my view, the respondent has not furnished any proof before this Court as to why enforcement of the foreign award may be refused. The said award dated 8th June, 2011 is enforceable under Part-II and is binding on all the parties under section 46 of the [India] Arbitration Act. I am therefore, of the view that the foreign award already stands as a decree . . .").

VII. POTENTIAL PROBLEMS IN THE APPLICATION OF THE BASIC PRINCIPLE?

Despite the near universal acceptance of the basic principle, commentators and some tribunals have noted problems in its application.[193] Indeed, as noted in the section above, failure to apply the burden of proof can have very severe consequences for the award. The final prong of the research is to examine such criticisms and evaluate their merits to see whether such criticisms may weaken the application of the basic principle in the future. It is my submission that none of the criticisms on the practical problems are particularly well-founded. Indeed, as will be discussed below, some of the criticisms are intrinsic to the very nature of dispute resolution while others are intrinsic to the nature of investor-state arbitrations.

(A) *Identification of the "Claimant" May Result in Problems?*

One of the arguments put forward is that it might not always be easy to identify who is the party that has the burden in any given situation. It is easy when an investor initiates a case and when a respondent raises initial defenses but as the arguments get more complex and granular, the question of who is the "Claimant" can be challenging.

In the *Ambiente Ufficio v. Argentina* case, for example, on the issue of proof of nationality, the majority noted that: "the burden of proof that the Claimants are Italian nationals falls on the Claimants themselves, while the burden to disprove the negative elements – *i.e.*, of not being Argentine (or, for that matter, dual) nationals and of not having been domiciled in Argentina for more than two years – would fall on the Respondent's side."[194]

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[193] See eg Amerasinghe (n 2) 90 (the author identifies five "possible policy arguments" against this maxim: "(1) It is difficult to distinguish between parties as claimant and respondent in international procedure. (2) Simultaneous submission of pleadings by parties is permitted in international procedure. (3) The basic texts of international tribunals are silent as regards the burden of proof. (4) The rules of evidence in international procedure are non-technical. (5) It is the duty of the parties to co-operate with international tribunals so as to establish the truth of a case."); Mojtaba Kazazi (n 2) 234 (identifying the same five arguments); V.S. Mani (n 2) 203 ("the arguments against the principle of burden of proof in international procedure are chiefly three-fold: impossibility of distinction between claimant and defendant, the rule of simultaneous presentation of pleadings, and silence of the texts.").

[194] *Ambiente Ufficio* (n 58) [312].

This view was not shared by the dissenting arbitrator who disagreed with the burden of proof analysis undertaken by the majority and in fact went forward to argue that the reasoning would be a ground for annulment under the ICSID Convention as there was a disregard for the fundamental rules of procedure:

> [T]he Claimants are the Party which seeks to establish the fact of being "protected investors" and, therefore, by the operation of international law, the burden of proof of all positive and negative relevant elements confirming in the case the nationality and domicile requirements set forth by the applicable law, as well as of the validity of their consent to ICSID arbitration and of being a "protected investor" at the time of the filing of the Request for Arbitration at ICSID corresponds to them in the first place.
>
> The non-existence of a "documentation obligation" concerning nationality in Rule 2 of the ICSID Institution Rules is irrelevant for the determination of the burden of proof which is a matter regulated by international law. Now, when does the burden of proof correspond to the Respondent? When in the process of rebutting evidence submitting by Claimants, the Respondent asserts affirmatively a fact or facts in defence, as the United States did in the Avena case when it contended that particular arrested persons of Mexican nationality were, at the relevant time, also United States nationals. . . .
>
> In the instant case, however, the applicable ICSID Convention imposes on a natural person private investor the burden to prove that s/he is a national of a Contracting State on the given dates and in addition, that on these dates s/he does not have the nationality of the Contracting State party to the dispute (Article 25(2)(a)); and point 1 of the Additional Protocol to the Argentina-Italy BIT, inter alia that at the time of making the investment s/he has not maintained domicile for more than two years in the territory of the Contracting Party where the investment was made.
>
> Thus, the Majority Decision erred when in its paragraph 312 it allocated to the Respondent's side the burden of proof: "of (the Claimants) not being Argentine (or, for the matter, dual) nationals and of not having been domiciled in Argentina for more than two years". I consider further that Rule 34(1) of the ICSID Arbitration Rules does not allow ICSID arbitrators

> to disregard fundamental rules of procedure of international law when weighing evidence in a given case.[195]

The views of the dissenting arbitrator do not seem fully appropriate or consistent with the jurisprudence. It would be impossible for an investor to prove a negative, *i.e.*, they were "not" domiciled in Argentina for more than two years. The investor did establish that it had "Italian" citizen (*i.e.*, a positive obligation) thereby creating a presumption that the investor was a citizen of Italy. It would be on Argentina to rebut this presumption with the appropriate evidence and it failed to do so. Therefore, at least in this particular instance, the arguments against burden of proof were not particularly convincing.

Similarly, commentators have also pointed to the problems that can exist in the application of the basic principle and the burden of proof rules that exist under the substantive law. Under domestic law, there may be situation where the burden of proof may be reversed for specific policy reasons. A reversal of burden of proof would not apply in the investor-state context, as discussed above. This may result in a conflict between domestic law (permitting reversal) and law in investor-state arbitration (not permitting reversal). Indeed, one commentator has stated for example: "The better view is to see burden of proof as always being on a party seeking to establish a position, but note that the substantive law will commonly impact upon this by indicating what must be proven and by whom."[196] In the ICSID context, the substantive law (which may refer to domestic law and therefore reversal rules on burden of proof) would not apply to evidentiary principles. Therefore, the concern of the conflict between domestic law and investor-state law would be of lesser significance in the investor-state context. Indeed, the evidentiary principles relating to would appropriately fall within the international framework of a tribunal's jurisdiction and, therefore, domestic rules relating to burden of

[195] *Ambiente Ufficio SpA and others (Case formerly known as Giordano Alpi and others) v Argentine Republic*, ICSID Case No ARB/08/9, Dissenting Opinion of Santiago Torres Bernardez (2 May 2013) [141] – [145].

[196] Jeffrey Waincymer (n 2) 765. See also Nathan D. O'Malley (n 13) 207 ("the customary approach in international arbitration is for the tribunal to apply the procedural rules on the burden of proof chosen by the parties, but to also give regard to any provisions of the substantive law influencing allocation of the burden.").

proof would have no application. Therefore, this argument is not particularly well-founded.

More generally, if the general premise that a party making a proposition must prove such proposition is followed strictly, a lot of concerns about which party has the burden of proof can be mitigated.

(B) *The Respondent's Procedural Advantage?*

The principles regarding burden of proof are noted to be particularly onerous on the claimant. As a commentator has noted: "In claims cases, the onus of the claimant appears to be particularly onerous, for it consists in presentation of evidence with respect to several jurisdictional and factual elements of the claim involved such as proprietary interest, damage or injury, nationality, imputability and so on."[197]

Indeed, since the respondent is a state or a state-entity with police-powers, it might have access to information that a claimant would never be able to gain access to. This could have severe impact on the equality of arms and good faith principles.

Despite the real concerns that this might raise, these arguments would still remain misplaced because the remedies available under investor-state arbitration remain an exceptional one and can only exist when a state consents to a tribunal's jurisdiction.[198] Therefore, even though the rules may appear harsh and may be more advantageous to respondent, that is just the nature of an investor-state proceeding.

[197] V.S. Mani (n 2) 205. See also *Mohammad Ammar Al-Bahloul* (n 141) [39] ("The Tribunal recognizes that, in investment treaty cases, the behaviour of the respondent State sometimes may make if difficult for the Claimant to establish the precise amount of damages suffered. This being said, we consider that the following standard should nonetheless apply."). But see *Ioannis Kardassopoulos* (n 122) [227] ("the Tribunal does not understand [the *Salini v Jordan*] award (nor the cases on which the tribunal in *Salini* in turn relied) to support the proposition that the burden on the claimant is especially "onerous" or "heavy". It simply confirms the well-accepted principle that the claimant must prove the facts on which it relies in support of its claim.").

[198] See generally Eric de Brabandere, Investment Treaty Arbitration as Public International Law: Procedural Aspects and Implications (Oxford University Press 2014) 21-24.

(C) *Other Problems on Simultaneous Pleadings?*

Others have also pointed to problems that can arise when there is a simultaneous submission of pleadings by the parties.[199] While this is not commonplace in relation to the main memorials, it is common in several motions (*e.g.*, document production/post hearing briefs etc.) for the parties to make concurrent submissions and the application of the maxim can present practical problems as to who possesses the burden. This argument, however, does not seem particularly convincing because even in the situation of a concurrent or simultaneous submission or pleading, each party would still be bound by the basic principle, *i.e.*, if you are saying something, prove it.[200]

VIII. CONCLUSION

The research question for this thesis states: ***"Whether there are any principles of evidence as recognized and applied by investor-state tribunals or do the principles of evidence merely fall within a tribunal's discretionary powers?"*** The first evidentiary principle that has been considered is burden of proof and, therefore, the relevant question is whether there are any principles of burden of proof as recognized and applied by investor-state tribunals?

The following conclusions can be drawn from the thesis:

First, investor-state tribunals have consistently recognized and applied the Latin maxim "*actori incumbit onus probandi*" which means that the person who asserts must prove (the "basic principle"). This basic principle is common to Roman, civil, and common law traditions and can be classified as a general principle of law. This is despite the fact that most arbitration rules are not explicit about the basic principle. However, the acceptance of the basic principle is so ubiquitous that there has been no disagreement about its application.

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[199] Mojtaba Kazazi (n 2) 227-228. However, the author concludes that there would be no real problem even in such an instance: "Even assuming that simultaneous submission is an established rule of international proceedings, it would still not prevent the application of the rule *actori incumbit probatio*. For even in cases involving simultaneous submission of pleadings, international tribunals would be able to apply that rule." ibid.

[200] See generally Chittharanjan F. Amerasinghe (n 2) 93 ("even assuming that simultaneous submissions take place in a particular international proceeding, it would still not prevent the application of the rule *actori incumbit onus probandi*.").

Second, investor-state tribunals have recognized and applied the notion that the basic principle to any party that is putting forward a proposition--be it the investor or the state. This is a direct corollary of the basic principle. The application of this sub-principle is that the initial burden of establishing a tribunal's jurisdiction and demonstrating a breach of the treaty rests on the claimant. At the same time, the respondent state has to prove its defenses, counter-claims or any factual premise that it may advance.

Third, the basic principle is not relaxed even in situations of extreme hardship or distress. Indeed, a party that has the burden must utilize every option it has available to meet its burden even in cases of extreme hardships by relying on witness testimony if no documents are available, for example. A related point that arises is in the case a respondent state refuses to participate in the arbitration. Even in such circumstance, the basic principle is not relaxed and the tribunal must be In other words, a tribunal still needs to be satisfied of its jurisdiction before it makes an adverse finding against the non-participating party.

Fourth, the basic principle has been applied to every claim and for every motion in an investor-state proceeding including claims of denial of justice, corruption, discrimination, challenges to arbitrators, security for costs, changes of custom, continued stay of the enforcement of an award, document production privileges, provisional/interim measures, and claims that local remedies have not been exhausted. This is because the burden of proof helps establish an initial presumption that the proposition being put forward is well-founded in fact.

Fifth, the basic principle has been applied to the jurisdictional phase of a case. This is significant because the arguments on jurisdiction are made before all the relevant facts on the merits are presented to the tribunal. Investor-state tribunals have adopted the *pro-tem* rule for burden of proof and it involves two sub-principles: (i) facts that relate to the jurisdiction of a tribunal must be established by the investor at the jurisdictional phase of the case and if the Respondent seeks to rely on defenses to jurisdiction, it must prove such defenses at the jurisdictional stage itself; however (ii) facts that relate to the merits must be raised by the investor but not proved so a tribunal

can determine at the jurisdictional phase whether they would fall within its jurisdiction. There will, however, be no opinion formed on these facts at the jurisdictional stage rather these will be appropriately decided at the merits stage, if the case is not dismissed on jurisdiction. The application of the burden of proof at the jurisdictional stage gives effect to a tribunal's exceptional and limited nature of its jurisdiction. Indeed, in an investor-state proceeding, a tribunal has a limited mandate that is provided by states.

Sixth, the basic principle has been applied to the damages phase but the investor does not have to prove damages with absolute certainty as it is recognized that damage assessment is not a pure science. If a Respondent state argues that the investor's attempts to seek damages will result in overcompensation of the investor, then the state has the burden to satisfy the tribunal of its argument--a clear application of the basic principle.

Seventh, the party with the burden of proof must meet its burden at the earliest time feasible, *i.e.*, at the stage when the party is raising an allegation or a defence. The failure to discharge the burden of proof at the appropriate time would require the non-moving party to prove an allegation that has still not been made. Therefore, investor-state tribunals would dismiss allegations when the party with the burden of proof fails to act in a prompt and timely manner.

Eight, the basic principle is so fundamental to an arbitral proceeding that failure to apply the burden of proof or an improper reversal of the burden of proof will have the most severe consequences for an award--annulment in the context of an ICSID award or rejection of enforcement in the context of a non-ICSID award.

One of the research goals is to identify whether a tribunal retains any discretion in when it comes to the application of the relevant evidentiary principle. In light of the views of prior cases and commentators alike, it can be concluded that there is no tribunal discretion ***whether*** the burden of proof is applied. This is a firmly entrenched general principle of law common to every legal system. There is a related point in this regard, despite the fact that the basic principle of burden of proof is not explicit in arbitral rules, a tribunal is not under an obligation to state these principles. This could

perhaps be a consequence of the reality that there is such wide acceptance of the basic principle that the parties are expected to know of its existence. Indeed, the rationale for the basic principle appears to be so sound that even criticisms of the basic principle when properly considered do not appear to have much merit.

Therefore, the basic principle describes the evidentiary principle in relation to burden of proof and failing to apply the basic principle will have the most severe consequence for an award--non recognition or enforcement or annulment.

CHAPTER 3—SHIFTING THE BURDEN OF EVIDENCE

I. INTRODUCTION—WHEN A PARTY WITH THE INITIAL BURDEN PROVIDES EVIDENCE, THE BURDEN OF EVIDENCE SHIFTS TO THE OTHER PARTY

After having examined burden of proof in Chapter 2, the next principle to be examined relates to shifting the burden of evidence. The research question of this thesis states: *"Whether there are any principles of evidence as recognized and applied by investor-state tribunals or do the evidentiary principles merely fall with a tribunal's discretionary powers?"* My core argument in this regard is that when a party who bears the initial burden puts forward *prima facie* evidence in support of its allegation, the burden of evidence (alternatively also termed as the "burden of production" or "burden of persuasion" or "burden of proceeding") will shift to the other party to rebut the evidence put forward or concede the point. This is referred to as "shifting the burden of evidence" (the "shifting principle").[1] However, as the shifting of evidence would depend on a tribunal's assessment of whether the party has put forward *prima facie* evidence, a tribunal retains a degree of discretion in this regard. Therefore, a party that seeks to challenge an award on the grounds that a tribunal failed to shift the burden of evidence will face a serious challenge in establishing that the matter would not ordinarily fall within a tribunal's discretion.

[1] Some scholars describe this as shifting the "burden of proof." Other point out that the burden of proof never shifts, it is only the burden of evidence or burden of persuasion which shifts. See eg Chittaranjan F. Amerasinghe, *Evidence in International Litigation* (Martinus Nijhoff Publishers 2005) 253-254 ("The burden which is shifted from the proponent of an allegation of fact to the opposing party is only the burden of evidence, and it is not accurate to use the term 'burden of proof' in place of the 'burden of evidence.' The burden of proof stays with the proponent until such time as the claim is proved."); Anna Riddell and Brendan Plant, *Evidence Before the International Court of Justice* (British Institute of International and Comparative Law 2009) 111 ("the point that the true burden of proof, or the 'legal' burden as it is termed in common law countries, never actually shifts in practice but only the duty to provide the court with evidence which is termed in the common law the 'burden of evidence'."). See also *Apotex Holdings Inc. and Apotex Inc. v United States of America*, ICSID Case No. ARB(AF)/12/1, Award (25 August 2014) [8.8] ("The Tribunal considers such a distinction exists between the legal burden of proof (which never shifts) and the evidential burden of proof (which can shift from one party to another, depending upon the state of the evidence)."). As a purely legal matter, it appears appropriate that the burden of proof itself never shifts and, therefore, this Chapter uses the terminology "shifting the burden of evidence." See also n 20 for further references on this point. Kabir Duggal, 'Evidentiary Principles in Investor-State Arbitration' (2017) The American Review of International Arbitration (Vol. 28(1)) n 117.

The starting premise for my argument is that shifting the burden of evidence is to be read in conjunction with the basic principle (*actori incumbit onus probandi*) discussed in Chapter 2 above because shifting occurs only after the party with the initial burden provides evidence.[2] In order to understand the myriad issues that relate to the shifting principle and how investor-state tribunals have recognized and applied it, this Chapter has been divided into 7 sections. Section I provides an introduction and a brief overview of the genesis of the shifting principle by looking its application by a few international dispute resolution bodies more generally. Section II examines how investor-state tribunals have recognized and applied the shifting principle. In Section III, the shifting principle is understood in the context of presumptions while in Section IV, the peculiarity of the shifting principle as it applies to the jurisdictional phase of the case is discussed. As noted in Chapter 2 above, burden of proof at the jurisdictional phase follows a modified application of the basic principle and this impacts the shifting principle and therefore warrants a special consideration. Section V discusses the consequences of the shifting principle for investor-state arbitration and Section VI examines some of the criticisms observed in the application of the shifting principle. Finally, Section VII provides the conclusion in light of the overall thesis.

The argument on shifting the burden of evidence is not unique to investor-state arbitration and been recognized for a long time. Indeed, Sandifer quotes Sherman's treaties on Roman Law which notes the genesis of this principle as a tenant of Roman law: "It was a fundamental Roman rule as to the production of evidence that the burden

[2] Julian D. M. Lew, 'Document Disclosure, Evidentiary Value of Documents and Burden of Evidence' in Teresa Giovannini and Alexis Mourre (eds), *Written Evidence and Discovery in International Arbitration: New Issues and Tendencies* (ICC Institute of World Business Law 2009) 22 ("Generally, the party that makes the allegation must prove it; one should only have to defend what can be proven. Practically speaking, if sufficient evidence to satisfy the tribunal is not offered to shift the burden to the respondent, the tribunal will find in favour of the respondent."); Vera Van Houtte, 'Adverse Inferences in International Arbitration', in Teresa Giovannini and Alexis Mourre (eds) *Written Evidence and Discovery in International Arbitration: New Issues and Tendencies* (ICC Institute of World Business Law 2009) 196 ("Arbitrators may also shift the burden when the claimant has a prima facie case creating a presumption: 'that is, if the party carrying the burden of proof adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption'."); Richard M. Mosk, 'The Role of Facts in International Dispute Resolution' (2003) 304 Recueil des Cours de l'Académie de Droit International 9, 131 ("Once the party has put in a prima facie case, the burden of going forward shifts to the other party.").

of proof rests on him who alleges or asserts a fact, and that the burden of proceeding may shift during the trial from one party to another."[3]

International dispute resolution bodies have also recognized and applied the shifting principle. For example, the WTO's Appellate Body in the *Case concerning Imports of Woven Shirts and Blouses from India* highlighted the basic principle of burden of proof and how once such basic principle is met, the burden of evidence shifts to the other party:

> In addressing this issue, we find it difficult, indeed, to see how any system of judicial settlement could work if it incorporated the proposition that the mere assertion of a claim might amount to proof. It is, thus, hardly surprising that various international tribunals, including the International Court of Justice, have generally and consistently accepted and applied the rule that the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof. Also, it is a generally-accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. <u>If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption</u>.[4]

[3] Durward V. Sandifer, *Evidence Before International Tribunals* (University Press of Virginia 1975) 125. Similarly, Sandifer quotes Ralston's treaties as stating: "Undoubtedly the burden of proof falls upon the claimants before commissions as in other cases, except insofar as such burden may be removed by the provisions of the protocol. The claimant's case once made out, the burden is transferred to the defendant." ibid 130, n 111, citing Jackson H. Ralston, *The Law and Procedure of International Tribunals: Being a Résumé of the Views of Arbitrators upon Questions Arising Under the Law of Nations and of the Procedure and Practice of International Courts* (rev edn, Stanford University Press 1926) 220.

[4] WTO, United States—Measure Affecting Imports of Woven Wool Shirts and Blouses from India (25 April 1997) WT/DS33/AB/R [14] (emphasis added). See also WTO, EC Measures Concerning Meat and Meat Products (Hormones) (16 January 1998) WT/DS26/AB/R and WT/DS48/AB/R [98] ("The initial burden lies on the complaining party, which must establish a prima facie case of inconsistency with a particular provision of the SPS Agreement on the part of the defending party, or more precisely, of its SPS measure or measures complained about. When that prima facie case is made, the burden of proof moves to the defending party, which must in turn counter or refute the claimed inconsistency.").

This ruling by the Appellate Body has been cited with approval by the *Feldman v. Mexico* tribunal.[5]

The next issue that arises is how does the shifting principle operate? My argument here is that the shifting principle envisions an engagement through evidence by the parties to the dispute and can be analogized to a ping-pong between the parties. This process of engagement continues throughout the arbitral process till an arbitral tribunal is ultimately able to rule on the issue. How does the shifting principle enable that? It does so by helping the tribunal appreciate the totality of evidence and prevents the burden from solely falling on one party. Indeed, a common goal of international dispute resolution is that the parties must provide the adjudicator with all the necessary evidence to help it make the best and most-informed decision possible. This is reflected in the decision of the Mexican-U.S. General Claims Commission in the *Parker* case, which noted the need for every party to produce evidence within its possession:

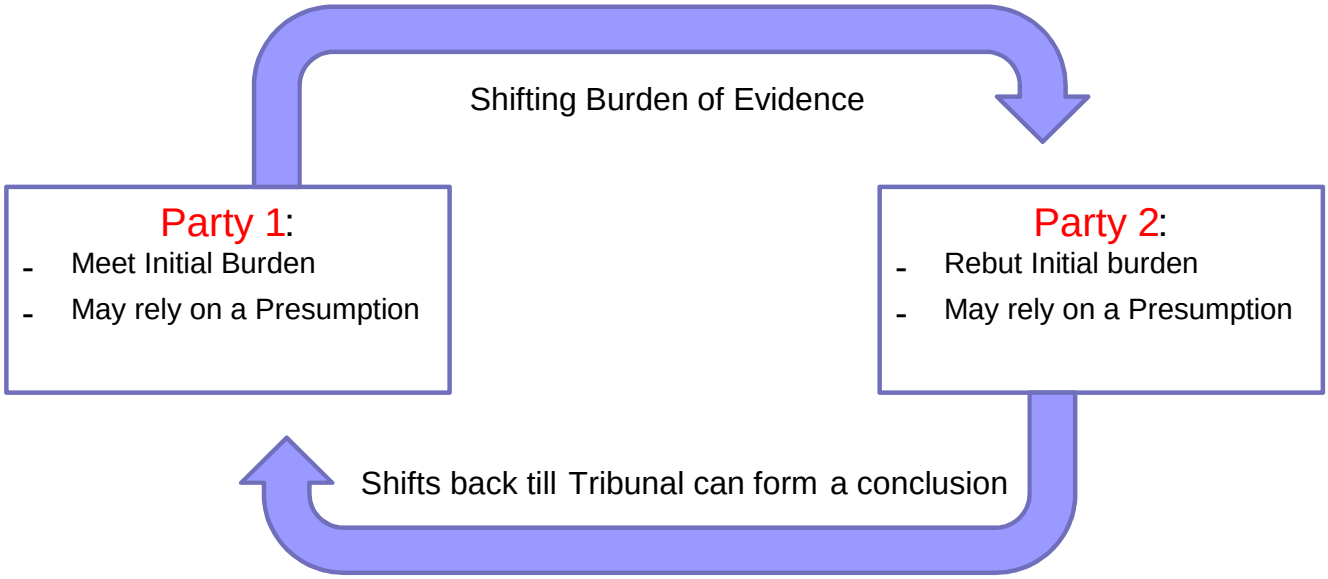
> [W]hen the claimant has established a *prima facie* case and the respondent has offered no evidence in rebuttal the latter may not insist that the former pile up evidence to establish its allegations beyond a reasonable doubt without pointing out some reason for doubting. While ordinarily it is encumbent [sic] upon the party who alleges a fact to introduce evidence to establish it, yet before this Commission this rule does not relieve the respondent from its obligation to lay before the Commission all evidence within its possession to establish the truth, whatever it may be.[6]

The chart below explains my argument on how the shifting principle would work in practice:

[5] *Marvin Feldman v Mexico*, ICSID Case No ARB(AF)/99/1, Award (16 December, 2002) [177]. The tribunal then concluded: "the Claimant in our view has established a presumption and a *prima facie* case that the Claimant has been treated in a different and less favorable manner than several Mexican owned cigarette resellers, and the Respondent has failed to introduce any credible evidence into the record to rebut that presumption."

[6] William A Parker (USA) v United Mexican States (1926) 4 RIAA 39.

Figure 3.1: Shifting the Burden of Evidence



The goal of the shifting principle is, therefore, to provide the tribunal with all the necessary materials (and relatedly, all the relevant arguments) on a particular issue that will help the tribunal ultimately decide on the issue.

II. THE SHIFTING PRINCIPLE IN INVESTOR-STATE ARBITRATION

(A) *Even though not Always Explicit, Investor-State Tribunals have Recognized and Applied the Shifting Principle*

The next question that arises is whether the shifting principle exists in investor-state arbitration and, if so, how have tribunals applied it? As an initial remark, it is worth noting that investor-state tribunals do not often discuss the shifting principle in awards.[7] This is perhaps because the shifting principle is primarily a process of engagement of the evidence between the parties and, therefore, by the time an award is issued by a tribunal, the shifting principle is for all effective purposes, a moot question.

However, the jurisprudence does indeed notice some recognition for the shifting principle. For example, the Iran-U.S. Claims jurisprudence seems to recognize the shifting principle. In *Reza Said Malek*, for example, the tribunal noted:

[7] There are some exceptions like the *Feldman* tribunal referred to in n 5 above.

> It goes without saying that it is the Claimant who carries the initial burden of proving the facts upon which he relies. There is a point, however, at which the Claimant may be considered to have made a sufficient showing to shift the burden of proof to the Respondent.[8]

Similarly, in the seminal *Asian Agricultural Products Limited v. Sri Lanka* ruling, the tribunal explained the shifting principle as follows:

> *Rule (L)*--In exercizing [sic] the "free evaluation of evidence" provided for under the previous Rule, the international tribunal "decided the case on the strength of the evidence produced by both parties", and in case a party "adduces some evidence which *prima facie* supports his allegation, the burden of proof shifts to his opponent.["][9]

Indeed, the shifting of the evidentiary burden continues until a tribunal is ultimately able to form an opinion of the particular issue in question. The shifting principle can be also seen as one that promotes due process because it enables both parties to examine an issue and comment on it and thereby enables a tribunal to ultimately rule on the basis of the evidence before it.[10]

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[8] *Reza Said Malek v Iran* (1992) Iran-USCTR Award No 534-193-3 [111] (emphasis added). While the tribunal uses the phrase "sufficient showing to shift the burden of proof to the Respondent," perhaps a better phrasing would have been "sufficient showing to shift the burden of evidence to the Respondent."

[9] *Asian Agricultural Products Ltd v Republic of Sri Lanka*, ICSID Case No ARB/87/3, Final Award (27 June 1990) [56] (citations omitted) (emphasis added). This has been cited with approval by subsequent tribunals. See, eg, *Middle East Cement Shipping and Handling Co SA v Arab Republic of Egypt*, ICSID Case No ARB/99/6, Award (12 April 2002) [94]; *Alpha Projektholding GMBH v Ukraine*, ICSID Case No ARB/07/16, Award (8 November 2010) [236]. See also *International Thunderbird Gaming Corporation v United Mexican States*, UNCITRAL/NAFTA Arbitral Award (26 January 2006) [95] ("If said Party adduces evidence that prima facie supports its allegation, the burden of proof may be shifted to the other Party, if the circumstances so justify."); *Tokios Tokelės v Ukraine*, ICSID Case No. ARB/02/18, Dissenting Opinion of Daniel M. Price, 26 July 2007 [19] ("with respect to the criminal proceedings against Mr. Danylov, Claimant presented evidence that the proceeding was first initiated to punish Taki spravy for assisting BYT and later reopened to coerce Claimant into withdrawing its treaty claim. In my view, this evidence shifted the burden to Respondent to demonstrate the existence of a legal justification consistent with applicable treaty norms. It refused to do so.").

[10] See eg Nathan D. O'Malley, *Rules of Evidence in International Arbitration: An Annotated Guide* (Informa Law 2012) 215 ("this [shifting] principle permits a tribunal to accept the veracity of the primary evidence brought to support the allegation, if rebuttal evidence that should otherwise have been brought was not.").

(B) *At least Prima Facie Evidence needs to be Provided for the Burden of Evidence to Shift*

An interesting question arises as to how much evidence needs to be presented before the burden of evidence is shifted. It is my submission that a party needs to provide at least "*prima facie*" evidence before the burden of evidence shifts but the shifting of such burden of evidence does not imply that the party with the initial burden has met the appropriate evidentiary standard.

The requirement for *prima facie* evidence is common in the WTO jurisprudence, wherein the burden of evidence shifts when the party with the initial burden adduces "*prima facie*" evidence:

> As regards the required level of proof, the Appellate Body has clarified that the party bearing the burden of proof must put forward evidence sufficient to make a prima facie case (a presumption) that what is claimed is true. When that prima facie case is made, the onus shifts to the other party, who will fail unless it submits sufficient evidence to disprove the claim, thus rebutting the presumption. Precisely how much and precisely what kind of evidence will be required to establish a presumption that what is claimed is true (i.e. what is required to establish a prima facie case) varies from measure to measure, provision to provision, and case to case.[11]

Nathan D. O'Malley also notes that the *prima facie* evidence would generally apply to international arbitration for the evidence to shift: "In international arbitration, it is generally considered that evidence that establishes a contention to a level of prima facie certainty is sufficient to move that burden of proof from one party to the other."[12] Similarly, Amerasinghe opines that shifting the burden of evidence applies in all instances when a party with the initial burden provides *prima facie* evidence:

> The real effect of *prima facie* evidence or a *prima facie* case is on the burden of evidence; i.e., who should provide

[11] Legal issues arising in WTO Dispute Settlement Proceedings, Dispute Settlement System Training Module, available at https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c10s6p1_e.htm (emphasis added).

[12] Nathan D. O'Malley (n 10) 212–13. See also Karl-Heinz Böckstiegel, 'Presenting Evidence in International Arbitration' (2001) 16 (1) ICSID Review 1, 3 ("*prima facie* evidence may have similar effects in establishing or shifting the burden of proof and in deciding on the standard of proof.").

evidence thereafter. *Prima facie* evidence shifts the burden of evidence from the proponent of the burden of proof to the other party. This is the effect in all instances. Before this stage the opposing party is not bound to respond to the allegation, and its silence would not result in the tribunal's holding that the alleged fact has been proved. In effect after one party has provided *prima facie* evidence, it has in fact discharged the burden of evidence laid upon it, and it is not *required* to carry its burden of proof any further before the other party rebuts the *prima facie* evidence already established by the proponent. Consequent upon this, if the adversary rebuts the *prima facie* evidence, then undoubtedly the burden of evidence will shift back to the proponent, and it has to carry this burden further. This is apparently the approach followed by international tribunals. Some national courts do the same. The question which remains is whether the tribunal *must* accept the *prima facie* evidence provided by the proponent as sufficient for discharging the *burden of proof*, where the opposing party does not respond to the claim or its defence is not strong enough to rebut the *prima facie* evidence.[13]

[13] Chittaranjan F. Amerasinghe (n 1) 251 (italics in original; emphasis added in bold). The author goes further and lists four possible outcomes where a *prima facie* case is made by the actor: "there are four possible outcomes of a proceeding in which a *prima facie* case is made by the *actor*. (a) Where the respondent offers no response, the tribunal eventually finds that the evidence produced by the *actor* satisfies the applicable standard of proof and holds for the *actor*. (b) Where the respondent offers no response, the tribunal eventually finds that the evidence produced by the *actor* does not satisfy the applicable standard of proof and holds against the *actor*. (c) Where the respondent offers a response by producing evidence or an explanation or both, the tribunal eventually finds that the response is insufficient to preclude the evidence of the *actor* from satisfying the applicable standard of proof and that the actor's evidence, therefore, satisfies the standard of proof and holds for the actor. (d) Where the respondent offers a response by producing evidence or an explanation or both, the tribunal finds that the actor's evidence does not satisfy the applicable standard of proof and holds against the actor." Chittaranjan F. Amerasinghe, (n 1) 257-258. Kazazi explains the effects of *prima facie* evidence in similar terms to Amerasinghe: "Two different effects are conceivable for prima facie evidence: its effect can be inevitable, or else only probable. Its primary effect is on the burden of evidence. Wherever provided, *prima facie* evidence shifts the burden of evidence from the proponent of the burden of proof to the other party. This is the effect in all instances. Before this stage the opposing party is not bound to respond to the case, and its silence may prove to be sufficient. But after one party has provided *prima facie* evidence it has in fact discharged its burden of evidence, and it is not required to carry its burden of proof any further before the other party rebuts the *prima facie* evidence already established by the proponent. This is apparently the rule followed by both international tribunals and some municipal courts. . . . The secondary effect of prima facie evidence is in fact dependent on the action of the opposing party in the case, and whether or not it succeeds in introducing elements of doubt with respect to the claimant's prima facie case. If the adversary rebuts the prima facie evidence, then undoubtedly the burden of evidence will shift back to the proponent, and it has to carry its burden further." Mojtaba Kazazi, *Burden of Proof and Related Issues: A Study on Evidence Before International Tribunals* (Kluwer Law International 1996) 332-333.

Therefore, as a general matter, the party with the initial burden must produce at least *prima facie* evidence before the burden of evidence can be said to have shifted. Indeed, in Rule (L) in the *Asian Agricultural* case discussed above as well, the tribunal seems to suggest that the evidence shifts when a party produces *prima facie* evidence in support of its allegation.

Therefore, the shifting of evidence seems to operate when a party makes a *prima facie* case in support of its allegation. But, here is where the second prong of my argument sets in. By this I mean that providing *prima facie* evidence to shift the burden of evidence is not to be equated with evidence to meet the appropriate standard of proof—both these remain separate and independent questions. As will be discussed in Chapter 4 below, the most common standard of proof is the balance of probabilities or preponderance of evidence standard. There might be exceptions to this common standard for certain discrete topics such as corruption, bribery, allegations of fraud and other such matters where a heightened standard would apply.[14]

Taking my sub-argument forward means that the burden of evidence might shift even if the appropriate standard of proof might not have been met. In other words, for the purposes of shifting the evidence, a party must adduce at least *prima facie* evidence and then the burden shifts thereby permitting the parties to engage with each other's arguments. This *prima facie* evidence does not, however, mean the appropriate standard of proof has been met.[15] The failure to meet the appropriate standard of proof

[14] Professor Caron and Caplan have explained this in their treatise on the UNCITRAL Arbitration Rules as follows: "[W]here the types of claims alleged where of a serious or criminal nature, ie, forgery of documents, the Tribunal has at times agreed to apply a heightened standard of proof, such as 'clear and convincing' or 'beyond a reasonable doubt.' The dissenting or concurring American judges [in the context of Iran-U.S. Claims Tribunal] seemed, in some cases, to consider that, due to the special nature of the arbitration in question, *prima facie* evidence submitted by the claimant is generally sufficient to shift the burden of proof onto the respondent. The main awards, however, have not adopted a general assumption of this kind. Nevertheless, in some circumstances, *prima facie* evidence clearly was regarded as sufficient to satisfy the initial burden of proof." David D. Caron and Lee M. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* (2nd edition, Oxford University Press 2013) 559. This is discussed in further detail in Chapter 5 below.

[15] See Nathan D. O'Malley (n 10) 215 ("if a party fails to provide sufficient evidence to substantiate its position, it runs the risk that it will not satisfy the tribunal of its case, be it claimant or respondent. For the responding party such risk only comes alive once the allegation or a presumption exists permitting the tribunal to regard the allegation as established. It is self-evident that an allegation must be established before a responding party is liable for failing to substantiate its response to it.") (emphasis added).

may result in the dismissal of the case or the defence.[16] The purpose of shifting principle (*i.e.*, to facilitate the engagement between the parties to provide tribunal with all necessary evidence) is different from the purpose of standard of proof (*i.e.*, to provide appropriate evidence for the tribunal) and this distinction remains significant.

III. THE SHIFTING PRINCIPLE AND PRESUMPTIONS: WHEN THE INITIAL BURDEN IS MET BY VIRTUE OF A PRESUMPTION, THE BURDEN OF EVIDENCE SHIFTS TO THE OTHER PARTY

The doctrine of presumptions plays an important role when it comes to the shifting principle.[17] This is because an initial presumption is predicated on the assumption that the party with the initial burden has already met its burden (by virtue of a presumption) and, therefore, the burden of evidence shifts to the other party.[18] In other words, the proponent of a proposition who can rely on a presumption for an allegation does not need to prove that allegation and the matter is, therefore, shifted to the opposing party to either rebut or admit. As explained by Kazazi:

> Legal presumption affects the burden of proof in so far as it creates *prima facie* evidence in favour of or against the proponent of the burden of proof. A party to whose benefit a legal presumption exists is relieved from providing proof of the presumed fact at the initial stage of the proceeding, and thus legal presumption shifts the burden of evidence. This

[16] Even other commentators seem to recognize this point. See eg Nathan D. O'Malley (n 10) 215 ("it should be noted that the relationship between the prima facie evidence rule and the standard of proof in international arbitration may be best described as follows: prima facie evidence is evidence that provides the tribunal with the lowest level of certainty permissible to justify a finding that an allegation is more likely than not to be true. However, in many instances this may not be enough to establish the contention on the balance of probabilities where countervailing evidence or doubts are raised regarding the reliability of the evidence. Irrespective of how the evidence is characterised, it should not be forgotten that in order for a party to carry the ultimate burden of proof and prevail in the dispute, it must persuade the tribunal of the correctness of its case.") (emphasis added).

[17] Böckstiegel (n 12) 3 ("presumptions play a major role in this context either in establishing a burden of proof or in shifting the burden of proof from one party to another."); Anna Riddell and Brendan Plant (n 1) 109 ("Presumptions and shifting the burden of proof are often linked.").

[18] Although the notion of shifting burden of evidence may not apply fully in the context of the ICJ, Riddell and Plant have noted the principle applies in the context of the ICJ when dealing with presumptions, "unlike many other courts, the notion of a separable burden of evidence does not sit well in the jurisprudence of the ICJ. However, in the context of presumptions it can be seen to have a place. Parties bear the burden on facts they wish to prove, unless that fact has already been presumed, in which case, it is for the other party to rebut. The legal burden does not move and remains on the proponent, but is automatically fulfilled unless disproven by the other party." Riddell and Plant (n 1) 110.

> effect could prove to be very valuable in cases where the opposing party is unable to rebut the presumption that operates against it.[19]

In most instances, the presumption is rebuttable and the party to whom the evidence has shifted can indeed rebut such allegation. This was explained by Judge Franck in his dissenting opinion in the *Pulau Ligitan and Pulau Sipadan* case:

> A presumption of law draws on the common experience to make a reasonable inference from what is known to what is unknowable. Such inferences are crystallized in well-known principles or legal maxims, such as *res ipsa loquitur*. Any rebuttable presumption can be contradicted by evidence demonstrating its opposite, or by application of a stronger evidentiary presumption such as the principle of absolute liability. In a sense, then, a rebuttable presumption shifts the onus of proof to the party seeking to disprove the deduction derived from it.[20]

The *Iran National Airlines company v. USA* applied the shifting principle in practice, when the failure of a party to rebut the presumption led to a dismissal of the claim:

> On Invoice No. 154219, the Tribunal concludes that the evidence submitted by the Respondent is sufficient to establish a rebuttable presumption that payment was made

[19] Mojtaba Kazazi (n 13) 273.

[20] *Case Concerning Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v Malaysia)* (Dissenting Opinion of Judge Franck) [2002] ICJ Rep 692 [4] (emphasis added). Authors commenting on this decision note that while the burden shifts, it does not shift completely. See eg Riddell and Plant (n 17) 110 ("[Judge Franck] is correct to say that it is only in a certain sense that the burden of proof shifts, and it does not shift completely. Presumptions do not in fact reverse the burden of proof. They simply relieve the proponent of the burden from having to initiate proof or adduce evidence on the fact to be presumed. This does however shift the burden of evidence to the other party."). Another commentator has noted that the burden of proof never shifts while the burden of evidence shifts. Mojtaba Kazazi (n 13) 36 ("the burden of evidence being a procedural issue, it may shift from the proponent to the opposing party during the proceedings; but the burden of proof as a fundamental obligation does not shift, and remains on the party that bears it throughout the proceedings."). See also *Dadras International and Per-Am Construction Corporation v The Islamic Republic of Iran and Tehran Redevelopment Company* (1995) Iran-USCTR Award No 567-213/215-3 101 ("The legal burden of persuading the trier of fact never shifts. What is sometimes shifted, and what is intended by any reference to a shifted burden, is the burden on the defendant to produce evidence when the claimant's evidence has attained the level of persuasion. In the words of Lord Denning: "The burden of proof on each of the separate issues is a legal burden which never shifts.") (emphasis added). The question of terminology does, however, lead to some confusion. See eg Riddell and Plant (n 1) 81–82 ("The literature is full of confused terminology and doubts as to the continued adherence to the dichotomy [between burden of proof and burden of evidence]. In some works it is noted as being the part of the burden which can shift between the parties depending on the issues, in others it is described as a purely tactical burden which shifts between stages of the trial.").

> on this invoice. The Claimant has not submitted any evidence, such as bank records, sufficient to rebut this presumption. The Tribunal therefore dismisses the claim based on Invoice No. 154219.[21]

To conclude this point, Professor Kazazi has explained the relationship between presumptions and shifting the evidence as follows:

> In international procedure, legal presumption derives from the main sources of international law and in particular from general principles of law. A legal presumption could either be judicially noticed by the tribunal or could be invoked by the proponent of the burden of proof. Legal presumption affects the burden of proof in so far as it creates *prima facie* evidence in favour of or against the proponent of the burden of proof. A party to whose benefit a legal presumption exists is relieved from providing proof of the presumed fact at the initial stage of the proceeding, and thus legal presumption shifts the burden of evidence. This effect could prove to be very valuable in cases where the opposing party is unable to rebut the presumption that operates against it.[22]

In such case, the party has the burden to establish the existence of a presumption (barring matters for which a tribunal can take judicial notice) but once the existence of a presumption is established, the burden of evidence shifts to the other party.

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[21] *Iran National Airlines Company v the Government of the United States of America*, Award No. 333-B8-2 (30 November 1987), reprinted in 17 Iran-U.S. CTR, 187 at pp. 209-210 as cited in Mojtaba Kazazi (n 13) 252 (emphasis added).

[22] Mojtaba Kazazi (n 13) 252 (emphasis added). See also Riddell and Plant (n 17) 110–11 ("Parties bear the burden on facts they wish to prove, unless that fact has already been presumed, in which case, it is for the other party to rebut. . . . 'If the burden of proof is shifted then the opposing party must provide evidence to satisfy the standard of proof on the basis that he must now prove his case. If the burden of proof remains with the claimant, all the other party needs to do is to provide such evidence that its effect is to prevent the other party from having discharged the burden of proof according to the applicable standard. In the case of presumptions the burden of proof in its real sense never shifts, and thus, technically the effect of presumptions is confined to the procedure relating to evidence.'"); Dr Aristidis Tsatsos, 'Burden of Proof in Investment Treaty Arbitration: Shifting?' [2009] Humboldt Forum Recht s 91, s 96 ("Legal presumptions play an important role in shifting the burden of proof from a party to a dispute to the other one. Usually, on account of a norm, legal presumptions suppose mechanically that certain facts are given in a specific situation, without requiring them to be proved. If a presumption in favour of the proponent is established, then, the burden of proof shifts and, consequently, the opponent bears the burden to refute that presumption.").

IV. THE SHIFTING RULE PRINCIPLE AND THE JURISDICTIONAL PHASE OF THE CASE FOLLOWS THE SAME PRINCIPLES FOR BURDEN OF PROOF AT THE JURISDICTIONAL STAGE

As noted in Chapter 2, the burden of proof at the jurisdictional phase presents an interesting twist when it comes to the basic principle: the investor has to only prove the facts that relate to the jurisdictional phase at that stage and, for facts that relate to the merits, the investor has to only allege but not definitively prove those facts at the jurisdictional stage.

It is my argument that these principles would apply equally to the shifting principle. Therefore, if an investor argues that it has a qualifying investment and respondent is able to establish that the investment does not meet local law requirements, the burden of evidence shifts back to the investor to either concede the point or put further evidence to show why the local law requirement was inapplicable or was met. Indeed, the failure to do so would necessarily result in a dismissal of the case as there would be no "investment."

However, there will be no shifting of evidence for matters that relate to the merits because, as noted in Chapter 2, the investor only needs to allege facts that relate to the merits. Since these propositions are not yet "proved," there will be no shifting at the jurisdictional stage.

The shifting principle therefore only applies to jurisdictional facts. This is a logical consequence of the application of the basic principle relating to burden of proof. This is consistent with the views of Professor Sourgens who has noted that the "shift" in evidence at the jurisdictional phase will help the tribunal determine if it has jurisdiction by considering the totality of evidence produced by the parties:

> The proof required in a case for each party to succeed on jurisdiction will change as the case progresses. As one party introduces additional evidence, an opponent may see the need to further bolster its own case or discredit that of its counterparty. This can be referred to, imprecisely, as a burden shift. It is not a burden shift in the true sense, because the tribunal precisely makes a factual finding in order to support a legal conclusion rather than drawing a legal conclusion from the absence of evidence. Rather, the

> "shift" refers to the see-sawing of persuasive force of each party's argument as they provide additional evidence in the case. Thus, the burden of production itself never decides the case—the evidence made available to the tribunal on the basis of which it makes the requisite findings does.[23]

V. CONSEQUENCES OF THE SHIFTING PRINCIPLE

(A) *Consequences for the Parties: Failure to Respond to Evidence that Has Shifted can have Serious Consequences*

My argument here is that in order for the arbitral process to move smoothly and in order for the tribunal to gain all the necessary information, shifting the burden of evidence is essential. If the party to whom the evidence shifts fails to produce rebuttal evidence that argument would practically be conceded and, if that issue is sufficiently important, it could be fatal to the case.[24] This is an important consequence of the shifting principle.

A good illustration is provided in the excerpt from the *Methanex* case below which demonstrates that when the United States offered *prima facie* proof that the evidence proffered by Methanex had been procured unlawfully, the burden shifted to Methanex. Methanex's failure to engage with this evidence ultimately led to an adverse conclusion by the tribunal:

> The first issue here is whether Methanex obtained the Vind Documents unlawfully by deliberately trespassing onto private property and rummaging through dumpsters inside the office-building for other persons' documentation. Whilst certain of Methanex's agents may have held an honest belief that no criminal violation was committed under the City of Brea's Ordinance, given the legal advice allegedly proffered by the un-named DC law firm, the evidence demonstrates at least a reckless indifference by Methanex as to whether civil trespass was committed by its collection-agents in procuring the Vind Documents from Mr Vind's office-building in Brea. Once the USA demonstrated prima facie that the evidence

[23] Frédéric G. Sourgens, 'By Equal Contest of Arms: Jurisdictional Proof in Investor-State Arbitrations' [2013] N Carolina J Int'l L & Com Reg 875, 946–47.

[24] Nathan D. O'Malley (n 10) 213-214 ("one the burden shifts, the party that has presented the evidence has passed the risk of non-production to its opponent, and may prevail on its allegation unless sufficient rebuttal evidence or argument is produced.").

> which Methanex was proffering had been secured unlawfully, if not criminally, the burden of proof with respect to its admissibility shifted to Methanex, yet Methanex elected not to call the relevant partners of the unnamed law firm, whose testimony might have clarified the issue. The Tribunal is unable to see why these partners could not have testified before it. On the materials before the Tribunal, the evidence shows beyond any reasonable doubt that Methanex unlawfully committed multiple acts of trespass over many months in surreptitiously procuring the Vind Documents. Such unlawful conduct is not mitigated by the fact that the doors to the trash-area were not always closed but sometimes ajar: the entry into this area behind the doors remained unlawful; and Methanex made no attempt to distinguish between documents obtained when the doors were ajar and when they were closed.[25]

(B) *Failure of the Tribunal to Shift the Burden of Evidence May Result in Annulment*

The failure of a tribunal to shift the burden of evidence could in few limited situations give rise to a potential challenge under ICSID's annulment procedure. As a general matter, the decision on whether to shift the burden or not would fall within the scope of the tribunal's evaluation of evidence and therefore cannot ordinarily be the basis for an annulment motion. However, if the party with the burden has met its burden and the tribunal yet refuses to shift the burden with no reasons, there may be a possibility to seek annulment. Indeed, the failure to shift the burden of evidence to the other party can be a potential basis for a party to seek the annulment of a decision under Article 52(1)(d) of the ICSID Convention ("there has been a serious departure from a fundamental rule of procedure").[26] Relatedly, it might also be a basis to seek a challenge under the New York Convention.

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[25] *Methanex Corporation v United States of America*, UNCITRAL, Final Award, 3 August 2005 [Part II, Chapter I, paragraph 55].

[26] "Serious departure from a fundamental rule of procedure" is one of the bases to seek annulment of an award under Section 52(1)(d). The *Wena Hotels v. Egypt ad hoc* committee explained this as follows: "In order to be a 'serious' departure from a fundamental rule of procedure, the violation of such a rule must have caused the Tribunal to reach a result substantially different from what it would have awarded had such a rule been observed. In the words of the ad hoc Committee's Decision in the matter of MINE, 'the departure must be substantial and be such as to deprive a party of the benefit or protection which the rule was intended to provide'." *Wena Hotels Ltd v Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Annulment (5 February 2002) [58] (emphasis added).

There is one point that is worth emphasizing here. Since shifting the burden of evidence often is not discussed by tribunals and because the appreciation of evidence falls within the purview of a tribunal's discretion, a challenge by an investor on the ground that the tribunal failed to apply the shifting principle is likely to be very difficult. Matters dealing with the evaluation of evidence are inherently subjective in nature and arbitral rules provide tribunals with broad discretion in this regard. Therefore, the applicant will have to show that the failure to the shift the evidence was more than a tribunal's free evaluation of evidence.

The *Caratube v. Kazakhstan* annulment decision is demonstrative.[27] The investor sought annulment under Article 52(1)(d) of the ICSID Convention. It argued that the original tribunal noted that the claimant had the burden of proof to establish the tribunal's jurisdiction as to whether it owned and controlled the investment. The tribunal noted the investor established through indirect evidence that Mr. Hourani was the owner of 92% of the shares in the investor. This majority ownership may imply "presumption of control" but denied jurisdiction since after "weighing the available evidence" concluded that there was "not sufficient evidence of evidence of exercise of actual control" over the investment and the burden to establish this was on the investor.[28] The investor, therefore, sought an annulment of the tribunal *inter alia* on the ground that since it had produced evidence of ownership, the burden that shifted to the Kazakhstan to produce evidence that it did not control the investment.

The *ad hoc* committee noted that the original tribunal had appropriately noted that the investor had the burden of proving that it owned a 92% stake in the investment. This majority ownership could be presumption of control as established by previous awards.[29] But, the original tribunal noted that this presumption of control could not be applied in the present case because there were "doubts" in the mind of the original tribunal as to whether the presumption even applied in the present case. The *ad hoc*

[27] See *Caratube International Oil Company LLP v Republic of Kazakhstan*, ICSID Case No ARB/08/12, Decision On The Annulment Application Of Caratube International Oil Company LLP (21 February 2014) [268]–[274].

[28] ibid [266-267].

[29] ibid [269].

committee then noted that the presumption "is valid only as long as there are no special elements which create doubts about the owner's actual control and which therefore justify a closer examination of the facts."[30] On the facts, it was only through indirect evidence that the investor's ownership of the shares had been established and this created doubts and these doubts "were further strengthened by the absence of any convincing evidence that he had in reality exercised control over CIOC."[31] Therefore, the *ad hoc* committee did not find any violation of Article 52(1)(d) of the ICSID Convention which could lead to the annulment of the award.[32]

This case highlights that while an investor may be able to challenge an award on the grounds that the tribunal did not appropriately shift the burden of evidence, such a challenge would be very difficult. This is because a tribunal has a lot of discretion on matters relating to the evaluation of evidence including on whether the evidence should be shifted or not. From the investor's perspective, the burden should have shifted to the state to rebut its claim of ownership and control but the tribunal took the view that the burden to establish the tribunal's jurisdiction was on the investor and they failed to meet the burden. These are matters that fall within a tribunal's discretion as they are the ultimate arbiters in relation to the appreciation of evidence and the annulment procedure does not permit an *ad hoc* committee to substitute its own discretion for that of the tribunal.[33] Therefore, for all practical purposes, bringing an annulment motion on the grounds that a tribunal failed to shift the burden of evidence is likely going to be a very difficult task.

VI. PROBLEMS IN THE APPLICATION OF THE SHIFTING PRINCIPLE

While the shifting principle is premised on sound logic, its formulations or discussions by arbitral tribunals has been unsatisfactory at best because most tribunals do not engage with the shifting principle meaningfully and those who do, merely pay lip-service. Indeed, seldom have there been rulings by tribunals on the need for evidence

[30] ibid [271].

[31] ibid [272].

[32] ibid [274].

[33] See Chapter 2, Part VI.B for a general discussion on the annulment procedure.

or the shifting of evidence on specific issues between parties. Rather, the approach of the tribunals has been to permit parties to submit whatever evidence they feel necessary and then decide the case.

Further, it might not always be clear at what point the burden of evidence should shift to the other party. Typically, in the pleading phase of a case, the parties file briefs in a sequential order and have limited interaction with the tribunal during this phase. If the other party contests a particular issue or believes a different standard of proof might apply, that other party may never conclude that the evidence has actually shifted to it. In such situations, it is better for every party to make arguments which take into consideration various possibilities to avoid finding itself in a position that it has not met its evidentiary burden.

Some tribunals have also been critical of the shifting principle because it can be confusing in practice and, therefore, unhelpful:

> Operating within an international system characterised by principle rather than procedural formality, the Tribunal is not enamoured of arguments setting out to show that a burden of proof can under certain circumstances shift from the party that originally bore it to the other party, and then perhaps in appropriate circumstances shift back again to the original party. To the mind of the Tribunal, arguments of that kind confuse, unhelpfully, the separate questions of who has to prove a particular assertion and whether that assertion has in fact been proved on the evidence.[34]

While it may be a fair argument to note that the shifting principle can be confusing, it is hard to argue that such a principle does not exist. Indeed, both the parties and the tribunal are likely to be doing so, in any event, as a practical consequence of legal advocacy.

Finally, the shifting principle might pose problems in the event that the parties are making concurrent filings and on matters such as document production or post-hearing briefs because the shifting principle envisions a consequential sequence of filings. In

[34] *The Rompetrol Group NV v Romania*, ICSID Case No ARB/06/3, Award (6 May 2013) [178] (emphasis added).

such case, it might be appropriate to permit the parties to make a brief submission on the evidence produced by the opposing party to ensure that the tribunal can assess all the information before it.

VII. CONCLUSION

The research question for this thesis states: ***"Whether there are any principles of evidence as recognized and applied by investor-state tribunals or do the principles of evidence merely fall within a tribunal's discretionary powers?"*** The second evidentiary issue that has been considered is shifting the burden of evidence and, therefore, the relevant question is whether there are any principles of shifting the burden of evidence as recognized and applied by investor-state tribunals?

The following conclusions can be drawn from the thesis:

First, investor-state tribunals have recognized that when a party who bears the initial burden puts forward evidence in support of its allegation, the burden of evidence will shift to the other party to rebut the evidence put forward or concede the point (the "shifting principle"). The shifting principle is closely linked to the burden of proof because it is only when the party with the initial evidence puts forth evidence does the burden shift to the other party. Indeed, the purpose of the shifting principle is a means for the parties to engage with the arguments and the evidence put forward by the other party and, in doing so, provide the tribunal with all the information on a particular topic. This will enable a tribunal to ultimately rule on the issue and thereby achieve justice. The shifting principle can be seen as a principle that promotes due process because it enables both parties to examine an issue and comment on it and thereby enables a tribunal to ultimately rule on the basis of the evidence before it.

Second, a party needs to provide at least "*prima facie*" evidence before the burden of evidence shifts but the shifting of such burden of evidence does not imply that the party with the initial burden has met the appropriate evidentiary standard. The purpose of shifting principle (*i.e.*, to facilitate the engagement between the parties to provide tribunal with all necessary evidence) is different from the purpose of standard of proof

(*i.e.*, to provide appropriate evidence for the tribunal) and this distinction remains significant.

Third, the doctrine of presumption is closely linked to the shifting principle. This is because an initial presumption is predicated on the assumption that the party with the initial burden has already met its burden (by virtue of a presumption) and, therefore, the burden of evidence shifts to the other party. In other words, the party has the burden to establish the existence of a presumption (barring matters for which a tribunal can take judicial notice) but once the existence of a presumption is established, the burden of evidence shifts to the other party.

Fourth, the shifting principle would also apply to the jurisdictional phase of the case following an application of the *pro tem* rule. For example, if a respondent state argues with *prima facie* evidence that an investor has not met a jurisdictional requirement, the investor must either rebut the point or the case will get dismissed. However, there will be no shifting of evidence for matters that relate to the merits of the dispute because the investor only needs to allege facts that relate to the merits. Since these propositions are not yet "proved," there will be no shifting at the jurisdictional stage.

Fifth, one of the purposes of the research is to identify the consequences of a tribunal failing to respect the shifting principle. As a purely legal matter, it is possible for a party to challenge an award and seek annulment on the grounds that a tribunal failed to shift the burden of evidence. However, the shifting principle is very closely linked to the free evaluation of evidence because a tribunal has to determine if a party with the original burden has the met the burden to warrant a shifting. The arbitral rules provide the tribunal with very broad discretion on matters dealing with the free evaluation of evidence and, therefore, as a general matter a challenge that the tribunal failed to apply the shifting principle will be very difficult.

CHAPTER 4—STANDARD OF PROOF AS RECOGNIZED AND APPLIED BY INVESTOR-STATE ARBITRAL TRIBUNALS

I. INTRODUCTION

After having discussed the principles relating to burden of proof and shifting the burden of evidence in investor-state arbitration, a related issue that needs to be discussed is "standard of proof." The research question seeks to understand whether there is any evidentiary principle in relation to standard of proof or does it merely fall with a tribunal's discretionary powers to determine the burden of proof.

To do so, this Chapter seeks to understand the concept of "standard of proof" and why issues relating to standard of proof remain so contentious in investor-state arbitration. Further, it is important to understand how standard of proof is to be understood in relation to burden of proof. Finally, this Chapter seeks to understand the different standards of proof as recognized and applied by investor-state tribunals and, in doing so, create a typology and evaluate the consequences of failing to meet the standard of proof.

Issues relating to standard of proof are particularly significant because of the confusing terminology and that sometimes practitioners tend to equate burden of proof with standard of proof. It is my leading argument that standard of proof is a distinct but related concept from burden of proof and standard of proof informs how much evidence needs to be provided by the party that has the burden or to whom the burden of evidence has been shifted. Further, it is my submission that there is not one standard but a few different standards of proof that are available in an investor-state arbitration and it is the nature of issue in dispute that will determine the applicable standard. Finally, the failure to meet the standard of proof may result in annulment. A tribunal does have some amount of discretion in determining which standard would apply but an egregious application of the standard of proof may warrant annulment.

Towards addressing this, the Chapter has divided into the following sections. Section II provides the introduction and examines the notion of standard of proof and its relation to burden of proof. Section III seeks to provide a reason as to why standard of

proof remains so contentious in investor-state arbitration. Section IV discusses the different standards of proof and discusses, in particular, the *pro tem* principle, the balance of probabilities/preponderance of evidence principle, and the heightened standard of proof as recognized and applied by investor-state tribunals. Section V examines the evidentiary standard in the specific case of wrongdoings while Section VI discusses problems associated with the notion of standard of proof. Section VII examines the use of circumstantial evidence as a means for meeting the standard of proof and Section VIII provides a few concluding remarks in the light of the overall thesis in light of the overall thesis.

This Chapter will primarily focus on how investor-state tribunals have recognized and applied standards of proof. However, at the appropriate stages, the views of commentators and of other international courts and tribunals are also provided to help provide further context to the analysis.

II. STANDARD OF PROOF AND ITS RELATIONSHIP WITH BURDEN OF PROOF

Standard of proof can be understood as the amount of evidence that must be provided by the party that has the burden (*i.e.*, the party making the allegation). Leading commentators have also explained standard of proof in similar terms. For example, Professor Amerasinghe has explained the standard of proof as follows: "The standard of proof relates to the quantum or degree of proof, i.e. by what measure is what the claimant has to prove to be judged."[1] Like in the context of the burden of proof, the term "claimant" must be understood as the party making an allegation rather than a technical understanding of "claimant" as the investor. Similarly, according to Nathan D. O'Malley: "The standard of proof is used to determine whether the evidence

[1] Chittharanjan F. Amerasinghe, *Evidence in International Litigation* (Martinus Nijhoff Publishers 2005) 232. Riddell and Plant explain the standard of proof in the context of the ICJ as follows: "The standard of proof is the measure against which 'the value of each piece of evidence as well as the overall value of the evidence in a given case should be weighed and determined', and justice generally requires that all evidence be treated equally and subjected to the same measure. It is noteworthy that the Court must not only evaluate whether each particular fact has been established, but must also assess whether the case as a whole has been made out on the basis of these proven facts, as well as any facts agreed by the parties, or judicially noted." Anna Riddell and Brendan Plant, *Evidence Before the International Court of Justice* (British Institute of International and Comparative Law 2009) 123.

a party has produced in support of its factual allegations is sufficient to establish the facts in question."[2]

As apparent from the definitions above, standard of proof is very closely related to burden of proof. Therefore, the first issue that needs to be examined is the relationship between burden of proof and standard of proof. Since the distinction between burden and standard of proof remains so contentious in investor-state arbitration, the table below distinguishes the two concepts:[3]

Figure 4.1: Distinguishing Burden and Standard of Proof

Burden of Proof	Standard of Proof
Who must prove? (notion of responsibility)	*How much* needs to be proved? (notion dealing with degree of conviction)

The two concepts are, however, very closely related since the standard of proof helps explain how much evidence needs to be proffered by the party that has the burden of proving any particular issue in question. Further, at every stage and for every motion in any arbitral proceeding, the question of standard is relevant. This is because the standard of proof helps inform the party with the burden on what it needs to do. Professor Kazazi has explained this in the following manner:

> The scope of the standard of proof, considered broadly, may be formulated in the question, "how should the burden of proof be discharged?" This question covers a wide range of issues related to the details of production, admissibility and evaluation of evidence, such as time, order, language, and type of evidence to be produced.[4]

[2] Nathan D. O'Malley, *Rules of Evidence in International Arbitration: An Annotated Guide* (Informa 2012) 207. See also Kabir Duggal, 'Evidentiary Principles in Investor-State Arbitration' (2017) The American Review of International Arbitration (Vol. 28(1)) 40.

[3] See generally Riddell and Plant (n 1) 80 ("Proof has two elements: • Burden of proof-indicates which of the parties to a dispute must furnish the court with evidence on a certain matter; and • Standard of proof-the level of proof required to convince the court that a given proposition or fact is true, the degree required being dependent on the circumstances of the proposition.").

[4] Mojtaba Kazazi, Burden of Proof and Related Issues: A Study on Evidence Before International Tribunals (Kluwer Law International 1996) 323-324.

Investor-state arbitral tribunals have also recognized and explained the distinction between burden and standard of proof. For example, the *Rompetrol v. Romania* tribunal explained the difference in the following manner:

> [T]he Tribunal thinks that a word of clarification is in order, specifically as to the burden of proof vs. the standard of proof. The Tribunal believes that the distinction between the two can be stated quite simply: the burden of proof defines which party has to prove what, in order for its case to prevail; the standard of proof defines how much evidence is needed to establish either an individual issue or the party's case as a whole. As soon as the distinction is stated in that way, it becomes evident that the burden of proof is absolute, whereas the standard of proof is relative.[5]

The *Rompetrol* tribunal clarifies another important point. Burden of proof is "absolute"—*i.e.*, the party with the burden has the burden and is not relaxed even in extreme situations of hardships. This was discussed in Chapter 2 above. The standard of proof, in contrast, is "relative." This means that issues relating to standard of proof will vary based on the nature of the allegation being put forward by the party with the burden. Indeed, the party with the burden may have to meet several different types of standards which will correspond to the different allegations that it is making.

In international commercial arbitration, the distinction between burden and standard of proof also takes another dimension as to whether standard of proof is a procedural law question or a substantive law question. Waincymer explains the difference as follows:

> Burden of proof simply deals with responsibility, but does not indicate the *level* of proof that is required. *Standard of proof* deals with the degree of conviction that the adjudicator must have to be satisfied that the burden the burden has been met. . . . common law legal systems treat it as procedural, while civilian systems see it as substantive.[6]

We notice right at the outset that there is a difference in how civil and common lawyers approach standard of proof as being procedural versus substantive with the

[5] *The Rompetrol Group N.V. v Romania* [2013] ICSID Case No. ARB/06/3 [178] (emphasis added).

[6] Jeffrey Waincymer, Procedure and Evidence in International Arbitration (Wolters Kluwer 2012) 766.

former permitting greater discretion by the arbitral tribunal than the latter.[7] The question of whether standard of proof is procedural or substantive has a lot of significance in commercial arbitration because, in addition to the proper law of the contract, the arbitral "seat" can also help provide guidance on "procedural" matters.[8] In ICSID arbitrations, which remains the preferred choice for investor-state arbitration, this distinction between procedure and substance is less important because there is no role for the arbitral seat[9] and, therefore, the law of the seat cannot provide any guidance on procedural matters.[10] Therefore, for the purposes of this research that focuses on investor-state arbitration, this distinction between substantive versus procedural law will not be explored.[11]

III. THERE IS A LACK OF CLARITY ON STANDARD OF PROOF

Like burden of proof, most arbitral rules are silent on principles relating to standard of proof and do not provide much guidance. This is, however, not unique to investor-state arbitration but international law more generally.[12] Indeed, statutes creating

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[7] Ibid.

[8] See eg Gary B. Born, *International Arbitration: Law and Practice* (Wolters Kluwer 2012) 108 (where Born discusses situations where the "Internal Procedures" in an arbitration are subject to the "due process requirements of the arbitral seat.").

[9] See eg Georges R. Delaume, 'ICSID Arbitration Proceedings', International Tax and Business Lawyer (1986, Vol. 4) 221-222 ("In ICSID proceedings, the situs of the arbitration proceedings does not have the same importance as it does in ad hoc or other institutional arbitration. In fact, the seat of the proceedings has no legal significance whatsoever in ICSID arbitration. Because ICSID rules are strictly international, the law of the seat of arbitration can have no bearing at all on the proceedings. Thus the situs of ICSID proceedings is purely a matter of convenience.").

[10] See Piero Bernardini, 'ICSID versus Non-ICSID Investment Treaty Arbitration', available at http://www.arbitration-icca.org/media/4/30213278230103/media012970223709030bernardini_icsid-vs-non-icsid-investent.pdf accessed on 5 May 2017 19 ("As already mentioned, ICSID most relevant feature is that, contrary to non-ICSID cases, the proceeding is regulated only by the Convention and the rules issued thereunder and, to the extent allowed, by the will of the parties. There being no seat of the proceeding in the legal sense, the rules of procedure of the place where ICSID tribunals or annulment committees hold meetings and hearings have no room for application.").

[11] For a distinction between substantive and procedural law, see generally Mauro Rubino-Sammartano, 'Investment Arbitration—Substantive and Procedural Issues in Investment', 2 Yearbook on International Arbitration (2012) 225.

[12] See generally Michelle Terezinha Grando, *The Process of Fact-Finding before International Tribunals: A Study of the WTO Dispute Settlement System*, Graduate Department of Law—University of Toronto (2008) 85 ("The question of the standard of proof has been similarly neglected in proceedings before international courts and tribunals. The statutes and rules of international courts and tribunals such as the ICJ and the Iran-United States Tribunal are silent on the issue. Nor has the jurisprudence of those bodies elaborated on the standard of proof that must be satisfied to prove a proposition.").

international courts and tribunals do not often spell out the standard of proof or provide too much guidance on what such a court or tribunal should do in varied circumstances.[13] For example, a commentator has noted in the context of the ICJ:

> Interestingly, the only guidance offered by the Statute with respect to the standards of proof is Article 53, which provides that in the case of a party's failure to appear or defend its case, the Court may rule in favour of the other party, but only after it has satisfied itself that it has jurisdiction, and "that the claim is *well founded in fact and law*" [emphasis added].[14]

While Article 53 of the Statute of ICJ cannot properly be described as an articulation of any standard of proof, it is interesting to note that it remains the "only guidance" offered in the Statute. When it comes to the practice of the ICJ, Professor Kolb notes that the ICJ has applied different standards of proof for different issues and that there is no single standard of proof which would apply in all situations:

> What is the standard of proof required, that is, what degree of evidential precisions does the Court consider sufficient? There can be no one answer to this question, because it depends on a large number of variable circumstances. It also depends on the applicable substantive law, whose requirements in this regard are subject to change. Various

[13] A limited circumstance might be international criminal courts where there is an articulation that the allegations against an accused must be proven beyond reasonable doubt. See eg Article 66(3) of the Rome Statute creating the International Criminal Court: "In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt." These limited instances of the standard of proof could probably be spelled out because it is consistent with international human rights obligations and more generally with fundamental conceptions of criminal justice.

[14] Eduardo Valencia-Ospina, *Evidence before the International Court of Justice* (International Law Forum du Droit International 1999) 203-204 (emphasis added). Article 53 of the Statute of the ICJ provides in full: "1. Whenever one of the parties does not appear before the Court, or fails to defend its case, the other party may call upon the Court to decide in favor of its claim. 2. The Court must, before doing so, satisfy itself, not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim is well founded in fact and law."). See also Anna Riddell and Brendan Plant (n 1) 123 ("If the matter of the burden of proof seems complicated in the context of the ICJ, the standard of proof is even more so. The difficulties have their root once again, in the contrasts of the common and civil legal traditions. Whilst there is general agreement in both traditions as to the ultimate rule on the burden of proof, and merely an additional stage or element to the common law burden, with regard to the standard of proof the difference is far more pronounced, and this is apparent throughout the jurisprudence of the Court. Naturally, the matter is of much importance to States who litigate before the Court, and certainty, or at least some general indication as to the appropriate standard, would be desirable. It appears however that the Court prefers not to provide a definitive standard, most probably because the Judges from the different legal traditions cannot agree.").

> standards can be imagined" for example, beyond reasonable doubt; the balance of probabilities; or prima facie. The Court's practice shows that there is no single standard valid for all relevant legal facts. It all depends on the legal norms in question and the Court's reasonable appreciation of this situation. In this field, the scope of the Court's margin of appreciation is thus quite considerable.[15]

The next related point that exists in this regard is that international adjudicatory bodies have not articulated the standard of proof in a clear or doctrinal manner.[16] For example, Amerasinghe observes:

> It would seem that both the ICJ and other international tribunals, including arbitral tribunals, which have adjudicated numerous international claims have usually not discussed in detail the matter of the standard of proof to be applied to the evaluated evidence and have not clearly explained the underlying standard they have applied in their decisions. On account of this a judge of the Iran-US Claims Tribunal was prompted to remark: "It is regrettable that the Tribunal has never discussed the standard of proof it imposes on parties." In some cases, however, international tribunals have addressed this question, in order to provide a general guideline for the evidentiary requirements in the cases being decided by them. It may appear that the answer to the question, what is an acceptable standard of proof for international tribunals, depends to some extent on the fact that in this regard there is subjectivity in judgment.[17]

Amerasinghe's statement can be verified by the observations of investor-state tribunals have sometimes refused to articulate or engage with the standard of proof in any meaningful manner. The *Tokios Tokelės* tribunal, for example, stated, "we shall not propose a solution for the current uncertainty about the standard of proof to be applied

[15] Robert Kolb, *The International Court of Justice* (Hart Publishing 2013) 944 (emphasis added). Kolb provides an interesting example to prove this point: "[The ICJ] has shown itself even more strict when the facts alleged are evidence of grave international crimes such as genocide. These accusations are of exceptional gravity when made against a State. In such cases, the Court has to be 'fully convinced' of the relevant facts; they must be 'clearly demonstrated' or 'certain.' When the accusation is only that steps have not been taken to prevent or punish genocide, the standard of proof can, according to the Court, be a little more relaxed, that is, 'a high degree of certainty'."). ibid.

[16] Michelle Terezinha Grando (n 12) 87 ("The DSU and the dispute settlement organs have not defined the standard of proof applicable to WTO disputes either.").

[17] Chittharanjan F. Amerasinghe (n 1) 232-233 (emphasis added).

in a case such as the present."[18] Similarly, the Annulment Committee in the *Continental Casualty v. Argentina* case noted:

> The Committee notes that the ICSID Convention and the Arbitration Rules contain no provisions with respect to the burden of proof or standard of proof. Accordingly, there cannot be any requirement that a tribunal expressly apply a particular burden of proof or standard of proof in determining the dispute before it. Indeed, the tribunal is not obliged expressly to articulate any specific burden of proof or standard of proof and to analyse the evidence in those terms, as opposed simply to making findings of fact on the basis of the evidence before it.[19]

This is clearly not a desirable state of affairs. Standard of proof plays a pivotal role because the failure to meet the standard of proof will necessarily mean rejection of the allegation being made by the party. But, this begs the very question against what standard must the party's evidence be judged? For example, if a moving party believes the appropriate standard of proof for an allegation is "*prima facie*" evidence but the tribunal concludes that the standard of proof is "balance of probabilities," then the case may get dismissed because the moving party has produced lower evidence that what the tribunal deemed was appropriate. This is far from ideal in any dispute resolution mechanism. Kazazi makes a similar observation when he notes:

> [T]he fact that the standard of proof is usually not discussed by international tribunals is not justifiable. Even ongoing arbitral institutions which have adjudicated numerous international claims have normally refrained from providing a comprehensive discussion in this regard, or from explaining the underlying standard they have applied in their decisions.[20]

A commonly held view for why tribunals have not expounded principles relating to standard of proof is because of the belief that tribunal has very broad discretion to deal

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[18] *Tokios Tokelės v Ukraine* [2007] ICSID Case No. ARB/02/18 [124].

[19] *Continental Casualty Company v The Argentine Republic*, ICSID Case No. ARB/03/9 [2011] Decision on the Application for Partial Annulment of Continental Casualty Company and the Application for Partial Annulment of the Argentine Republic [135] (emphasis added).

[20] Mojtaba Kazazi (n 4) 325 (emphasis added).

with evidentiary matters.[21] Standard of proof appears to be an area where this discretion seems to get greater emphasis because of the belief that parties can submit any evidence they deem appropriate and after receiving all the evidence will the tribunal decide the issue. This discretion is generally true for most issues relating to evidence as noted by Gary Born:

> [L]eading institutional rules generally grant arbitral tribunals broad discretion over evidence-taking in international arbitration, although typically without expressly referring to the power to order the parties to provide discovery or disclosure.[22]

Under this view, the fact that the arbitral rules do not provide for any clear standard would permit the arbitral tribunal to rely on its own discretion. This happens in other international law bodies as well. For example, the Inter-American Court of Human Rights has stated in the *Velásquez Rodríguez* case:

> [I]nternational jurisprudence has recognized the power of the courts to weigh the evidence freely, although it has always avoided a rigid rule regarding the amount of proof necessary to support the judgment. The standards of proof are less formal in an international legal proceeding that in a domestic one. The latter recognize different burdens of proof, depending upon the nature, character and seriousness of the case.[23]

The first prong of my argument in this regard is that it is correct to observe that there is a wide extent of discretion for an arbitral tribunal when it comes to the evaluation of

[21] See Annex A which outlines the different evidentiary standards under various rules.

[22] See eg Gary Born, *International Commercial Arbitration* (Kluwer Law International 2009), p. 1890 (emphasis added). See also M. Aghahosseini, *Evidence before the Iran-United States Claims Tribunal* (International Law Forum Du Droit International 1999), p. 208 ("any point not specifically addressed by the Tribunal Rules falls within the Tribunal's discretion, subject only to the parties' right to receive equal treatment and to be heard. The [UNCITRAL] Rules, like most modern arbitration rules, contain only a handful of evidence-related provisions, dealing with such matters as hearings, witnesses and experts, and inspection of goods or other property. With respect to other salient matters such as burden of proof and standard of proof, the Tribunal has, in its case law, exercised its broad procedural discretion, where necessary, to fill gaps in and interpret the Rules.") (emphasis added).

[23] *Case of Velásquez-Rodríguez v Honduras* [1988] Inter-American Court of Human Rights [127-128] (internal citations omitted) (emphasis added). See also Robert Kolb (n 15) 944-945 ("[The ICJ's] flexibility is justified under the general principle of the free assessment of evidence. . . . Overall, the absence of a single standard of proof sits well with the flexibility of the international regime on evidence. A monograph study on these questions would be appropriate and welcome"). Indeed, the same can be said for investor-state arbitration and this research attempts to fill in the void.

evidence. For example, the ICSID Arbitration Rules also leaves evidentiary matters to the discretion of the tribunal. ICSID Arbitration Rule 34(1) states: "The Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value." Article 9(1) of the IBA Rules on the Taking of Evidence similarly provides: "The Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of evidence." Article 27(4) of the 2013 UNCITRAL Rules of Arbitration likewise states: "The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered."

Relatedly, investor-state arbitral tribunals regularly recognize the broad discretion that they have when dealing with investor-state arbitration. For example, the tribunal in *Unglaube* noted:

> The degree or standard of proof is not as precisely defined. Whichever party bears the burden of proof on a particular issue and presents supporting evidence "must also convince the Tribunal of [its] truth, lest it be disregarded for want, or insufficiency, of proof." The degree to which evidence must be proven can generally be summarized as a "balance of probability," "reasonable degree of probability" or a preponderance of the evidence. Because no single precise standard has been articulated, tribunals ultimately exercise discretion in this area.[24]

[24] *Marion Unglaube and Reinhard Unglaube v Republic of Costa Rica* [2012] ICSID Case No. ARB/08/1 and ICSID Case No. ARB/09/20 [34] (emphasis added). See also George M. von Mehren and Claudia T. Salomon, 'Submitting Evidence in an International Arbitration: The Common Lawyer's Guide' (Journal of International Arbitration 2003), p. 291 ("One can distinguish three basic standards of proof generally applied in international arbitrations. A general, underlying standard, an elevated burden of proof, and a very low standard or insufficient explanation of the reasoning. Regarding the first, a general standard is one that is better explained to common law lawyers as a balance of probabilities, i.e., the evidence must be something more likely true than not true but not so high as required for criminal convictions. Civil lawyers, in contrast, are more accustomed to what may be a higher burden of proof referring to the inner conviction of the judge. In any event, the strategic mind of the counsel must remember that in all cases, the real general standard is and must be a test of preponderance of evidence. Certain matters, however, do in fact require a higher standard of proof that will certainly change the advocate's approach. Both common law and civil law systems recognize elevated standards of proof for bribery and other types of fraud. The lower standard of proof is applied generally when establishing damages. Many times, arbitrators ignore the substantive law they find applicable and refer instead to nonlegal equitable standards."); M. Aghahosseini (n 22), p. 213 ("As is the case with the UNCITRAL Rules, the Tribunal Rules are silent with respect to the required standard of proof. In purely civil matters, the Tribunal has consistently imposed, as it should have, the standard of proof on the preponderance of evidence, alternatively described as on the balance of probability. Where, on the other hand, the allegations have had a criminal flavour, the Tribunal's pronouncements have been not only inconsistent, but legally flawed.").

A detailed exposition of the tribunal's discretion and power to deal with evidentiary issues, including matters relating to the standard of proof, was discussed in the *Rompetrol v. Romania* case:

> [The Tribunal] starts from the position that in international arbitration – including investment arbitration – the rules of evidence are neither rigid nor technical. If further confirmation of that were necessary, in the specific ICSID context, it can be found in Articles 43-45 of the Washington Convention, the intention behind which is plainly that a tribunal should possess a large measure of discretion over how the relevant facts are to be found and to be proved – a general principle which finds strong reinforcement in the Arbitration Rules, notably in paragraphs (1) and (3) of Rule 34. The overall effect of these provisions is that an ICSID tribunal is endowed with the independent power to determine, within the context provided by the circumstances of the dispute before it, whether particular evidence or kinds of evidence should be admitted or excluded, what weight (if any) should be given to particular items of evidence so admitted, whether it would like to see further evidence of any particular kind on any issue arising in the case, and so on and so forth. The tribunal is entitled to the cooperation of the parties in that regard, and is likewise entitled to take account of the quality of their cooperation. When paragraph (2) of Rule 34 lays down that "[t]he tribunal shall take formal note of the failure of a party to comply with its obligations under [that] paragraph and of any reasons given for such failure," it no doubt intends, among other things, that a given tribunal is specifically authorized to draw whatever inferences it deems appropriate from the failure of either party to produce evidence which that party might otherwise have been expected to produce.[25]

An important point worth highlighting is that this discretion is not absolute and is subject to certain limits. This is the second prong of my argument. A tribunal does not

[25] *The Rompetrol Group N.V. v Romania* [2013] ICSID Case No. ARB/06/3 [181] (emphasis added). See also *Saipem S.p.A. v The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Award (30 June 2009) [112] ("Pursuant to ICSID Arbitration Rule 34(1), the Tribunal has full discretion in assessing the probative value of the evidence before it."); *Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v Romania*, ICSID Case No. ARB/10/13, Decision on the Admissibility of the Third Objection to Jurisdiction and Admissibility (26 July 2013), ¶ 84 ("the issue raised by the Motion is not the admissibility of the evidence related to criminal proceedings. The issue is rather the probative value of such evidence for the purposes of this arbitration, which the Tribunal is empowered to weigh and determine. In assessing this value, the Tribunal shall be guided, among other things, by consideration of the presumption of innocence as a rule of public international law.").

possess unfettered discretion when it comes to dealing with standard of proof. Indeed, an arbitral decision on standard of proof must be appropriate and, as will discussed below, reasonable for there is the risk that the ultimate award could be challenged or even annulled. This is consistent with the views of Kazazi who notes:

> What constitutes a given standard of proof to be applied by an international tribunal is ultimately subject to its sole discretion. Needless to say, similar to other aspects of international procedure, the standard applied by a given tribunal should be adopted with due regard to the generally accepted trends in the practice of major international tribunals. It should be emphasized, on the other hand, that there are limits to the freedom of international tribunals in this regard, and that the standard of proof to be chosen in each given case should be appropriate and reasonable under the prevailing circumstances of that case.[26]

Indeed, while a tribunal does possess wide discretion, it is, therefore, my submission that this discretion is not absolute and the failure to apply the appropriate standard of proof could have serious consequences for the arbitration as will be discussed below. More fundamentally, the failure to articulate clear standards of proof implicates broader questions of justice and due process because the party's fail to appreciate against what standard has their evidence been evaluated. Professor Amerasinghe has similarly observed that the need to articulate the standard of proof more clearly is essential to ensure that justice is done in any particular case:

> To frame the matter in terms of "moral conviction" or "convincing or satisfying the judge" may not always reveal the ultimate test which is being applied. There may be, in order to do justice, a need to have a more concrete standard. In any case tribunals have not hesitated, where necessary, to indicate standards of proof in different and specific terms, although sometimes no more than those general terms have been used.[27]

Further, the contention that there is no standard of proof is plainly false considering that the arbitral rules envision the annulment of an award that has not applied or improperly applied the standard of proof. This will be discussed in greater detail below.

[26] Mojtaba Kazazi (n 4) 352.

[27] Chittharanjan F. Amerasinghe (n 1) 233 (emphasis added).

IV. A TYPOLOGY ON THE DIFFERENT STANDARDS OF PROOF IN INVESTOR-STATE ARBITRATION

With the growing prominence of investor-state arbitration, issues of standard of proof have acquired special importance. It is my submission that there are three broad standards of proof that can be distilled from the decisions of investor-state tribunals:

(i) the *prima facie* standard at the jurisdictional phase;

(ii) the balance of probabilities or preponderance of evidence standard, along with a discussion of the related civil-law standard—the 'inner conviction' test; and

(iii) the heightened standard of proof, with a discussion on allegations of wrongdoing that are increasingly invoked.

Annex B summarizes presents this typology in a tabular format.

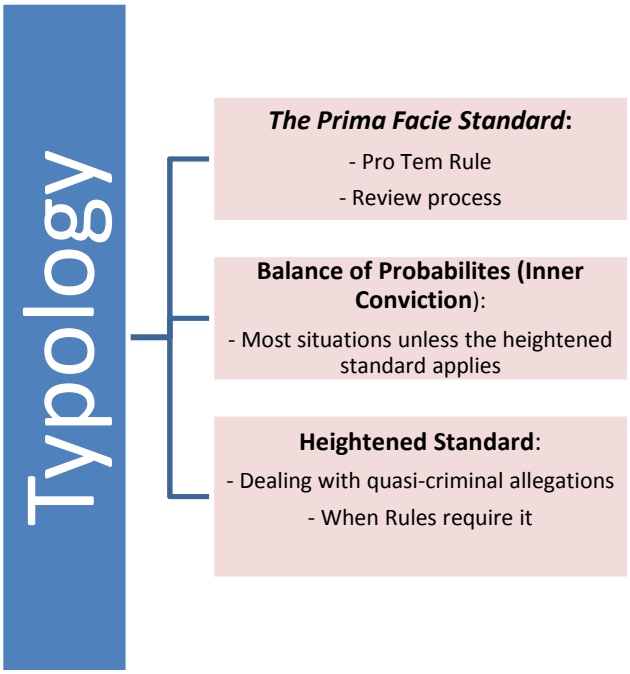

Figure 4.2: Typology on Standard of Proof

(A) *The "Prima Facie" Standard*

The *prima facie* standard is the first standard and this applies in a few limited situations in investor-state arbitration. The underlying rationale of this standard is that a tribunal or decision maker will subsequently have an opportunity to consider the

evidence more fully and therefore the *prima facie* standard primarily serves a gatekeeper function.

One instance where this standard applies is the *pro tem* principle that is applied at the jurisdictional phase has been discussed above in Chapter 2. In summary, my argument here is that an investor must allege (but not prove) facts that relate to the merits of the case at the jurisdictional stage (the *pro tem* rule). Then, a tribunal can examine and see whether these allegations, if proven at the appropriate stage, will fall within the tribunal's jurisdiction. Investor-state tribunals have applied a "*prima facie*" standard to examine the evidence when dealing with the *pro tem* principle.[28]

There are two exceptions to this principle. First, if a matter concerns a tribunal's jurisdiction (*e.g.*, a question concerning nationality of the investor, or a state's consent), such a matter would have to be proved fully at the jurisdictional stage itself.[29] Second,

[28] See eg *Achmea BV v Slovak Republic*, PCA Case No. 2013-12, Award on Jurisdiction and Admissibility (20 May 2014) [206] ("Since the Claimant does not raise any dispute regarding an investment approval or an investment agreement, but places itself exclusively under the umbrella of the BIT, an essential element of the Tribunal's jurisdiction *ratione materiae* is to determine whether the claims put forward by the Claimant are capable of coming within the reach of these provisions. The so-called *prima facie* test has been applied by numerous international courts and tribunals."); *KT Asia Investment Group BV v Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award (17 October 2013) [91] ("At the jurisdictional stage, the Claimant must establish (i) that the jurisdictional requirements of Article 25 of the ICSID Convention and of the Treaty are met, which includes proving the facts necessary to meet these requirements, and (ii) that it has a *prima facie* cause of action under the Treaty, that is that the facts which it alleges are susceptible of constituting a treaty breach *if* they are ultimately proved to be true."); *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction (14 November 2005) [197] ("the Tribunal's first task is to determine the meaning and scope of the provisions which Bayindir invokes as conferring jurisdiction and to assess whether the facts alleged by Bayindir fall within those provisions or are capable, if proved, of constituting breaches of the obligations they refer to. In performing this task, the Tribunal will apply a *prima facie* standard, both to the determination of the meaning and scope of the BIT provisions and to the assessment whether the facts alleged may constitute breaches. If the result is affirmative, jurisdiction will be established, but the existence of breaches will remain to be litigated on the merits.") (emphasis added to each of the authorities referred).

[29] See eg *Conocophillips Petrozuata BV Conocophillips Hamaca BV and Conocophillips Gulf of Paria BV v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Jurisdiction and the Merits (3 September 2013) [254] ("In the words of the International Court of Justice in considering the very first challenge made to its jurisdiction, the consent must be "voluntary and indisputable", and in the words of both ICSID tribunals "clear and unambiguous". The necessary consent is not to be presumed. It must be clearly demonstrated.") (emphasis added); *ICS Inspection and Control Services Limited (United Kingdom) v Argentine Republic*, PCA Case No. 2010-9, Award on Jurisdiction (10 February 2012) [280] ("a State's consent to arbitration shall not be presumed in the face of ambiguity. Consent to the jurisdiction of a judicial or quasi-judicial body under international law is either proven or not according to the general rules of international law governing the interpretation of treaties. The burden of proof for the issue of consent falls squarely on a given claimant who invokes it against a given respondent. Where a claimant fails to

as will be discussed below, if a tribunal's jurisdiction is contingent on a matter that is of a quasi-criminal nature (*e.g.*, allegations of corruption, blackmail, bribery, other forms of wrongdoing etc.), then to determine such issue, a heightened standard of proof will apply. The argument relating to the heightened standard of proof is discussed below in further detail.

The *prima facie* standard might also apply in a few other limited situations that relate to the arbitral process. For example, in some instances, a party is obligated to undertake a review process before an arbitration can be commenced, for example, Article 21 of the Energy Charter Treaty requires a reference to the competent authorities within a country before the arbitral process can commence. For such references, the appropriate standard would again be the *prima facie* evidentiary standard because the arbitral tribunal will subsequently have a chance to evaluate the evidence applying the appropriate evidence.[30] Similarly, for the same reason, the screening process that is undertaken by the ICSID Secretary General prior to registering a case pursuant to Article 36(3) of the ICSID Convention would apply a *prima facie* standard.[31]

It is my argument here that the underlying rationale for applying a *prima facie* standard in such situations is because a tribunal will subsequently look at the issue in fuller detail applying the appropriate standard. Indeed, such screening processes are intended to ensure that the motion is not frivolous on its face and therefore provide a gateway function. It would be pointless to have a submission before such bodies that apply the appropriate standard and then have to reapply the appropriate standard again before the arbitral tribunal.

(B) *The Most Common Standard—Balance of Probabilities or Preponderance of Evidence as Recognized And Applied by Investor-State Arbitration*

1. Introduction –Is the Evidence more likely than not to be true?

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prove consent with sufficient certainty, jurisdiction will be declined.") (emphasis added); *Ioan Micula Viorel Micula and others v Romania*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility (24 September 2008) [91] ("nationality is an objective jurisdiction-requirement of the ICSID Convention and the Tribunal must make sure that this requirement is satisfied.") (emphasis added).

[30] The Energy Charter Treaty, Article 21(5).

[31] The ICSID Convention, Article 36(3).

It is my submission that the most common standard of proof in investor-state arbitration is the "balance of probabilities" or "preponderance of evidence" standard.[32] Indeed, the classical treaties by Redfern and Hunter has noted that: "The degree of proof that must be achieved in practice before an international arbitral tribunal is not capable of precise definition, but it may be safely assumed that it is close to the 'balance of probability'."[33]

Investor-state arbitral tribunals have made similar observations. For example, the tribunal in *Kardassopoulos v. Georgia* stated: "The Tribunal finds that the principle articulated by the vast majority of arbitral tribunals in respect of the burden of proof in international arbitration proceedings applies in these concurrent proceedings and does not impose on the Parties any burden of proof beyond balance of probabilities."[34]

The next question is what does the balance of probabilities standard entail practically? In other words, what is a party required to do when it is applying this standard? My argument here is that this standard requires an evaluation of all the evidence produced by both parties on a particular issue and this evaluation would ultimately result in the tribunal determining which party's evidence was more likely than not to be true. My argument is also reflected in the writings of Nathan D. O'Malley, who describes the balance of probabilities standard as follows:

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[32] James Headen Pfitzer and Sheila Sabune, 'Burden of Proof in WTO Dispute Settlement: Contemplating Preponderance of Evidence' (2009) International Centre for Trade and Sustainable Development, Issue Paper No. 9, 23 ("International tribunals have often accepted claims on the basis of prima facie evidence in instances where it remains unrebutted; however, the most common standard of proof applied in international tribunals is the preponderance of the evidence standard."). This was also identified by Beck in 1949 when he observed: "The 'preponderance of evidence' standard applied in arbitrations which do not involve fraudulent or criminal conduct seems justified. Standards of proof greater than this, if applied objectively, would place an almost impossible burden on the employer." Kenneth Beck, 'Evidence, Burden and Quantum of Proof' (1949) Washington University Law Review 91.

[33] Nigel Blackaby *et al*, *Redfern and Hunter on International Arbitration* (6th edn, Oxford University Press 2015) 388. See also Kabir Duggal (n 2) 42-43.

[34] *Ioannis Kardassopoulos and Ron Fuchs v The Republic of Georgia*, ICSID Case No. ARB/05/18 and ICSID Case No. ARB/07/15, Award (3 March 2010) [229]. See also *Bernhard von Pezold and others v Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award (28 July 2015) [177] ("In general, the standard of proof applied in international arbitration is that a claim must be proven on the 'balance of probabilities.' There are no special circumstances that would warrant the application of a lower or higher standard of proof in the present case.").

> The standard predominantly applied is quite often the *balance of probabilities* test, as was confirmed by an ICSID tribunal composed of well-experienced arbitrators [referring to the *Kardassopoulos* case discussed above]. The balance of probabilities standard generally calls for a claim to be upheld if the Tribunal is convinced by the evidence that the claim is more likely than not true.[35]

The alternative formation of "preponderance of evidence" is sometimes also discussed. Professor Amerasinghe has explained "preponderance of evidence" by noting that the evidence by both parties on a particular issue would be compared towards identifying whether the claim by the investor is more likely than not true. The formulation and the test to apply the standard is normatively no different than the balance of probabilities test discussed above:

> 'Preponderance of evidence' means generally that there is evidence greater in weight in comparison with the evidence adduced by the other party on the basis of reasonable probability rather than possibility. What tribunals do is to weigh the evidence proffered by both parties (and the facts judicially noted by the tribunal itself), in order to determine whether the more weighty evidence is in favour of the *actor* (the claimant or party bearing the burden of proof). The tribunal determines whether it is a reasonably probable that the *actor's* claim is correct. Surprisingly, but perhaps understandably, where this moderate standard has been applied the non-*actor* may often claim, if he loses, that too light a standard of proof was applied, while, on the other hand, where the *actor* loses, he will probably claim that a stricter standard of proof than the "preponderance of evidence" has been applied.[36]

To take an example, suppose the investor alleges that a meeting took place on a particular date and respondent alleges that such a meeting did not take place, the tribunal would have to evaluate the evidence proffered by both parties to see which view is more likely to be true. If the evidence is unclear or conflicting, a tribunal might ultimately have to determine that it cannot resolve that particular issue on the basis of

[35] Nathan D. O'Malley (n 2) 208 (emphasis added).

[36] Amerasinghe (n 1) 242 (emphasis added).

the evidence before it and will have to reject any arguments that relate to the existence of that meeting.[37]

The author Kazazi explained how this standard would work in practice:

> Preponderance of evidence, though meaning generally evidence greater in weight in comparison with the evidence adduced by the other party, does not necessarily imply a standard less than that of conclusive proof. In applying this standard, an international tribunal should weigh the evidence proffered by both parties, and the facts judicially noted by the tribunal itself, in order to determine the party in whose favour the more weighty evidence is available.[38]

2. The Standard would Apply to Most Situations in An Investor-State Arbitration

My argument here is that this standard would extend to most situations in investor-state arbitration, except the limited categories where a heightened standard of proof would apply. Indeed, my argument is supported by the findings of investor-state tribunals that have applied this standard to a wide range of issues, such as establishing disputed facts at the jurisdictional phase,[39] claim for damages,[40] and for breaches of standard of protection (assuming there is no allegation of wrongdoing and the

[37] The findings of a tribunal seems to reflective this. See eg *Lao Holdings NV v Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/12/6, Decision on the Merits (10 June 2015) [10] ("the Tribunal is of the view that even accepting *arguendo* the interpretation of the Deed of Settlement most favourable to the Claimant, the evidence fails to establish on a balance of probabilities that the Government itself, directly or indirectly, 'approved and granted' permission for a rival casino contrary to the Claimant's contractual entitlement.").

[38] Mojtaba Kazazi (n 4) 350 (emphasis added).

[39] *Pac Rim Cayman LLC v El Salvador*, ICSID Case No ARB/09/12, Decision on the Respondent's Jurisdictional Objections (1 June 2012) [2.10] ("in regard to all disputed facts relevant to the jurisdictional issues under CAFTA not to apply the lesser 'prima facie' standard in favour of the Claimant; but, rather, the higher standard of proof applicable to both Parties' cases, whether it be described as the preponderance of the evidence or a standard based on a balance of probabilities.") (emphasis added); *Anatolie Stati, Gabriel Stati, Ascom Group S.A. and Terra Raf Trans Traiding Ltd v Republic of Kazakhstan*, SCC Case No. V116/2010, Memorandum Opinion of the US District Court for the District of Columbia and Order (5 August 2016) [28] ("All that is required is that the petitioner make a 'prima facie showing that there was an arbitration agreement by producing the [treaty] and the notice of arbitration.' Once petitioner makes this showing, the burden shifts to the respondent 'to demonstrate by a preponderance of the evidence that the [treaty] and the notice to arbitrate did not constitute a valid arbitration agreement between the parties'.") (emphasis added).

[40] This is discussed below in greater detail. See Section IIB(4) below.

circumstances do not otherwise warrant a heightened standard of proof).[41] As Nathan D. O'Malley has noted:

> The standard has been applied to the great majority of categories of claims in international arbitration, including causes of action arising from a breach of contract or other obligation, interpretation of contractual clauses or the intent of the parties to the contract, and claims based on breach of international treaties regulating the treatment afforded to investors (a modified prima facie standard of proof has been adopted in regard to jurisdictional objectives by some tribunals).[42]

To summarize my argument, the default rule in investor-state arbitration is the balance of probabilities/preponderance of evidence test, which will generally apply unless there is a specific exception calling for a heightened standard.

3. Similarity to the Civil-Law "Inner Conviction" Test

Some commentators (correctly) point out that the "balance of probabilities" or "preponderance of evidence" adopts a common-law formulation. Civil lawyers often allude to the "inner conviction" test, where an arbitrator must be personally convinced of the evidence produced. Under this test, an arbitrator must, therefore, decide an issue based on the personal, inner conviction on the basis of the evidence produced. In other words, the arbitrator must be personally satisfied with the evidence in order to resolve any issue. Nathan D. O'Malley has explained this as follows:

> A standard derived from civil law jurisdictions sometimes mentioned as an alternative to the *balance of probabilities test* is the *inner conviction* test. This test is centered on the personal reaction to the evidence given by the arbitrator and is a matter of whether the arbitrator regards the evidence to have reached a level where he or she is personally satisfied of the veracity of the allegation. It has been suggested that the *inner conviction* test may impose a somewhat higher level of proof than that which is often otherwise applied by

[41] See eg *Joseph Charles Lemire v Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability (21 January 2010) [369] ("After due consideration, and not without some hesitation, the Tribunal comes to the conclusion that there is a preponderance of evidence showing that the National Council's decisions indeed were arbitrary and discriminatory.").

[42] Nathan D. O'Malley (n 2) 208 (emphasis added).

> international arbitrators; however, this conclusion is debatable. As noted, this test is customarily regarded as an alternative to the more widely used *balance of probabilities* standard.[43]

There has been a suggestion that the civil law standard is higher than the balance of probabilities standards under common law formulations. The question that, therefore, arises is whether the inner convention test varies from the balance of probabilities test. Investor-state tribunals have not addressed this issue in any meaningful manner—this can perhaps be because tribunals do not want to engage in a civil versus common law debate on the issue. However, my argument is that there is no real difference between both standards and an application of the standard under either formulation will take you to the same result. My argument is supported by views of other commentators who agree that there is no difference in the application of the common (balance of probabilities) and civil law (inner conviction) standard.[44] As Waincymer stated:

> There is unlikely to be any difference between the civil and common law standards as expressed, notwithstanding some comments to the contrary. Reiner has suggested that continental law establishes a higher standard than common law, nothing the use in Austrian law of the term "full conviction" (*volle Überzeugung*) although he concludes that the practical result seems the same in both systems. He concludes that the real test in each system "must be a test of preponderance of evidence." Von Mehren and Saloman also speaks of a higher civilian burden but again argue that the ultimate test is a preponderance of evidence.[45]

[43] ibid 210 (emphasis added).

[44] There is one case where an investor-state tribunal equates the balance of probabilities test with the inner conviction test. See *Churchill Mining and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Award (6 December 2016) [244] ("the Tribunal considers that the Respondent carries the burden of proving forgery and fraud, which proof will be measured on a standard of balance of probabilities or *intime conviction* taking into account that more persuasive evidence is required for implausible facts . . . ") (emphasis added).

[45] Jeffrey Waincymer (n 1) 767 (emphasis added). See also Riddell and Plant (n 1) 125 ("In the civil legal tradition, the concept of a standard of proof is different. It is not a question of probability, as in the common law, but is a matter for the personal appreciation of the judge, or 'l'intime conviction du juge'. If the judge considers himself to have been persuaded by the argument on a certain matter, then the standard of proof has been met. This was succinctly stated by the former President of the Iran-United States Claims Tribunal who said: 'the burden of proof is that you have to convince me.' A civil law judge generally see less need for a specific standard which must be met, as the question of whether the party bearing the burden of proof has established their case is essentially a subjective one, which can be answered with reference to the 'inner, deep-seated, personal conviction of the judge.' Thus not only do

Other commentators have highlighted that even if there might be academic differences, the practical results between the two formulations remain the same:

> None of the above-mentioned rules for international arbitration fix a standard of proof, however. The required standard of proof is often expressed by international arbitrators in terms of the jurisdiction from which they come. Whereas civil lawyers generally use the concept of the *intime conviction* of the arbitrator, common law lawyers talk in terms of a "preponderance of the evidence" or "a balance of probability". However, "in practice, the result is the same".[46]

Thus, while there might be a difference in terminology and a difference in how civil and common lawyers might approach the issue, the practical consequence is the same: you evaluate the evidence produced and be convinced that the evidence is more likely than not true.

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the two predominant legal traditions have different rules on the standard of proof, but their entire conceptual basis is different. '[T]he concept of an identifiable or quantifiable standard of proof emanates from the common law system', and does not exist in the civil legal tradition. However, on closer examination, it is not dear that this difference is as marked as one might think. The objective standards of the common law in fact allow of a degree of subjectivity in the weighing up of two cases when deciding on the balance of probabilities. Nevertheless, it is likely that this conceptual division is the source of the confusion on the matter which seems to exist in the ICJ"). Other commentators use civil and common law terminologies interchangeably. See eg Julian D.M. Lew, 'Document Disclosure, Evidentiary Value of Documents and Burden of Evidence' in Teresa Giovannini and Alexis Mouree (eds), *Written Evidence and Discovery in International Arbitration: New Issues and Tendencies* (Dossiers ICC Institute of World Business Law 2009) 22 ("In practice, the standard of proof in arbitration requires a level that persuades the tribunal in one's favour. This will inevitably be a balance of probabilities. In practice, this will be whether the tribunal is satisfied, or believes, on the basis of the evidence, that the claims or defences are substantiated."); A.T. Martin, *International Arbitration and Corruption: An Evolving Standard* (2004) Transnational Dispute Management 7 available at https://www.transnational-dispute-management.com/article.asp?key=88 accessed on 15 January 2017 ("The standard of proof for civil litigation in England is the 'balance of probabilities.' In civil law jurisdictions, the judge seeks an 'inner conviction' in determining the facts. These various standards are viewed as having little difference."). The actual of von Mehren and Saloman states: "A general, underlying standard, an elevated burden of proof, and a very low standard or insufficient explanation of the reasoning. Regarding the first, a general standard is one that is better explained to common law lawyers as a balance of probabilities, i.e., the evidence must be something more likely true than not true but not so high as required for criminal convictions. Civil lawyers, in contrast, are more accustomed to what may be a higher burden of proof referring to the inner conviction of the judge. In any event, the strategic mind of the counsel must remember that in all cases, the real general standard is and must be a test of preponderance of evidence." George M. von Mehren and Claudia T. Salomon (n 24) 285, 291.

[46] Vera Han Houtte, 'Adverse Inferences in International in International Arbitration,' in Teresa Giovannini and Alexis Mouree (eds), *Written Evidence and Discovery in International Arbitration: New Issues and Tendencies* (Dossiers ICC Institute of World Business Law 2009) 198 (emphasis added).

4. Standard of Proof at the Damages Phase: Prove the Facts of Damage but Don't Need to Prove Damages with Absolute Certainty

While the balance of probabilities/preponderance test can be applied to the jurisdictional or merits phase of a case, it raises an interesting wrinkle at the damages phase of the proceeding. This is because most of the damages analysis takes place in a counter-factual world ignoring any potential breach by the state. Therefore, requiring a party to prove damages with certainty would be almost always impossible. Relatedly, there is recognition of the fact that the computation of damages is, by its very nature, not a pure science and requires some flexibility in its application.

Investor-state tribunals typically apply the balance of probabilities test at the damages phase because they acknowledge that it is impossible to establish damages with complete certainty but, at the same time, they refuse to award damages if the damages are purely speculative or hypothetical.[47] The investor has to, therefore, establish: (i) the fact of the breach of the applicable instrument to the satisfaction of the tribunal; (ii) the damages arising from the breach must be reasonably ascertained for

[47] *Ioannis Kardassopoulos* (n 34) [229] ("The Tribunal finds that the principle articulated by the vast majority of arbitral tribunals in respect of the burden of proof in international arbitration proceedings applies in these concurrent proceedings and does not impose on the Parties any burden of proof beyond a balance of probabilities. With respect to proof of damages in particular, the Tribunal finds the following passage quoted by the Claimants in their written submissions from the award in *Sapphire International Petroleums Ltd v National Iranian Oil Co* to be apposite: 'It is not necessary to prove the exact damage suffered in order to award damages. On the contrary, when such proof is impossible, particularly as a result of the behaviour of the author of the damage, it is enough for the judge to be able to admit with sufficient probability the existence and extent of the damage'."); *Khan Resources Inc Khan Resources BV and CAUC Holding Company Ltd v Government of Mongolia*, UNCITRAL, Award on the Merits, 2 March 2015 [375] ("The burden of proof falls on the Claimants to show that they have suffered the loss they claim. The standard of proof required is the balance of probabilities. This, of course, means that damages cannot be speculative or uncertain. However, scientific certainty is not required and it is widely acknowledged by investment treaty tribunals and publicists that the assessment of damages is often a difficult exercise and will usually involve some degree of estimation and the weighing of competing (but equally legitimate) facts, valuation methods and opinions, which does not of itself mean that the burden of proof has not been satisfied."); *Hrvatska Elektroprivreda dd v Republic of Slovenia*, ICSID Case No. ARB/05/24, Award (17 December 2015) [175] ("the Tribunal recalls that the burden of proof falls on the Claimant to show it suffered loss. The standard of proof required is the balance of probabilities and damages cannot be speculative or uncertain. However, scientific certainty is not required. Naturally, some degree of estimation will be required when considering counterfactual scenarios and this, of itself, does not mean that the burden of proof has not been satisfied. When faced with competing methodologies and opinions the Tribunal has done its conscientious best, greatly assisted by the expertise of Mr Jones, to determine the loss (if any) that was suffered by the Claimant as a result of the Respondent's breach."). (emphasis added to each of the authorities). See also Mehren and Salomon (n 24) 285, 291 ("The lower standard of proof is applied generally when establishing damages. Many times, arbitrators ignore the substantive law they find applicable and refer instead to nonlegal equitable standards.").

the breach; but (iii) the damages sought cannot be speculative or purely hypothetical. The tribunal in *Crystallex v. Venezuela* summarized the standard of proof at the damages phase:

> [T]he Tribunal considers that, in the exercise of its discretion granted to it in relation to issues of evidence, it should be guided by the following principles.
>
> First, the *fact* (i.e., the existence) of the damage needs to be proven with certainty. In that sense, there is no reason to apply any different standard of proof than that which is applied to any other issue of merits (e.g., liability). Second, once the fact of damage has been established, a claimant should not be required to prove its exact *quantification* with the same degree of certainty. This is because any future damage is inherently difficult to prove. As the tribunal in *Lemire v. Ukraine* observed, "[o]nce causation has been established, and it has been proven that the in bonis party has indeed suffered a loss, less certainty is required in proof of the actual amount of damages; for this latter determination Claimant only needs to provide a basis upon which the Tribunal can, with reasonable confidence, estimate the extent of the loss." The tribunal is of the view that the emphasis should be put on the phrase "with reasonable confidence" which seems to strike a wholesome and pragmatic approach, prone to satisfy common law and civil law minds. . . .
>
> Thus, an impossibility or even a considerable difficulty that would make it unconscionable to prove the amount (rather than the existence) of damages with absolute precision does not bar their recovery altogether. Arbitral tribunals have been prepared to award compensation on the basis of a reasonable approximation of the loss, where they felt confident about the fact of the loss itself.[48]

5. Problems Associated with the Balance of Probabilities Standard

The application of the standard has been the subject of considerable debate, sometimes even between different members of the arbitral tribunal. For example, Kazazi observes that: "Complaints about the standard of proof applied by an international tribunal are commonly among the grounds adduced in separate and

[48] *Crystallex International Corporation v Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award (4 April 2016) [867-869, 871] (emphasis added).

dissenting opinions of judges or arbitrators. In the Iran-United States Claims Tribunal, for instance, American arbitrators have usually complained that the standard adopted has been too heavy, and arbitrators have usually complained that it has been too light."[49]

In other words, while the balance of probabilities standard sounds good in theory, it is possible that different people might arrive at different conclusions looking at the same evidence. More generally, this problem would apply even in a domestic setting and might appropriately fall within the arbitral tribunal's discretion. In other words, while a tribunal cannot insist on a different standard of proof without getting a potential challenge on the merits, a tribunal does have discretion on how it applies the standard itself.

(C) *Heightened Standard of Proof For "Serious" Issues As Recognized and Applied by Investor-State Arbitration*

1. Heightened Standard for "Serious" or Quasi-Criminal Issues

For matters that implicate "serious" issues or issues that might touch on criminal law matters, it is my argument that the balance of probabilities/preponderance test will not be appropriate, instead a heightened standard of proof would apply in such circumstances.[50] Redfern and Hunter have explained this in their treatise as follows:

> In general, the more startling the proposition a party seeks to prove, the more rigorous the arbitral tribunal will be in requiring that proposition to be fully established. A classic example of this general rule is that an arbitral tribunal will be reluctant to find an executive of a company guilty of fraudulent activity in the exercise of his ordinary commercial activities, unless this is proved conclusively. In deciding what evidence to produce, and the means by which it should be presented, the practitioner should therefore make an evaluation of the *degree* of proof that the tribunal is likely to

[49] See eg Mojtaba Kazazi (n 4) 350.

[50] Alan Redfern, Claude Reymond, Andreas Reiner, Bernard Hanotiau, Edward Lord Eveleigh, Ian W Menzies, Allan Philip, 'The Standards and Burden of Proof in International Arbitration', (vol 10, No. 5, Arbitration International 1994) 335-336 ("Both, the Anglo-Saxon and the continental systems require higher standards of proof for particularly important or delicate questions such as bribery or other types of fraud."). See also Kabir Duggal (n 2) 43-45.

> require, before being sufficiently satisfied to make a finding of fact that his client is seeking.[51]

Investor-state tribunals agree with my argument. For example, the majority tribunal in *Siag v. Egypt* stated: "It is common in most legal systems for serious allegations such as fraud to be held to a high standard of proof."[52] The heightened standard of proof has assumed special importance in matters concerning wrongdoings such as allegations of corruption, fraud, impropriety or breaches of international public policy—these are discussed in further detail in the section below.

The underlying rationale for seeking a heightened standard seems apparent. Allegations that can have a serious impact by virtue of the nature of the allegation on the opposing party, including a potential dismissal of the arbitration proceeding. Therefore, additional care is warranted through a heightened standard of evidence. Further, these allegations are often easy to make but may not always be easy to prove. Indeed, applying any other standard would therefore not be appropriate considering both the risks associated with these allegations and the fact that these allegations are easy to make but difficult to prove. Nathan D. O'Malley has explained the heightened standard of proof as follows:

> For those allegations of particular gravity, a tribunal may find it necessary to apply a higher standard of proof. One finds examples of this in sports arbitrations convened to consider questions over the use of performance-enhancing drugs, where tribunals often will, as a matter of practice, require more than the general balance of probabilities standard of proof applicable to most commercial and contract claims, but less than the standard of *beyond reasonable doubt* applied

[51] Blackaby *et al*, Redfern and Hunter (n 33) 388 (emphasis added).

[52] *Waguih Elie George Siag & Clorinda Vecchi v Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award (1 June 2009) [326]. The dissenting arbitrator in the case disagreed with the standard of proof applied by the majority preferring instead to apply a discretionary standard of proof. *Waguih Elie George Siag and Clorinda Vecci and the Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Dissenting Opinion of Professor Francisco Orrego Vicuña (1 June 2009) [13] ("In this context I also disagree about the applicable standard of proof. While the Award has chosen the United States standard of clear and convincing evidence, it is my view that arbitration tribunals, particularly those deciding under international law, are free to choose the most relevant rules in accordance with the circumstances of the case and the nature of the facts involved, as it has been increasingly recognized. The facts of this case, difficult as they are to establish with absolute certainty, could be best judged under a standard of proof allowing the Tribunal 'discretion in inferring from a collection of concordant circumstantial evidence (*faisceau d'indices*) the facts at which the various indices are directed'.") (internal citations omitted).

> in criminal proceedings. Other claims, such as those brought on the basis of fraud or forgery, will attract a higher standard of proof which is articulated as requiring evidence that is *clear and convincing* or higher. The gravity of a claim is determined according to the nature of the allegation, not according to personage of the party against whom it is levelled.[53]

Investor-state tribunals have also applied a heightened standard of proof for a wide range of issues such as illegality of the investment,[54] breach of good faith,[55] allegations of forgery,[56] and claims for lost profits.[57] These activities are of a quasi-criminal nature or might have serious consequences for the opposing party and, therefore, the balance of probabilities or preponderance of evidence test discussed above would not be appropriate.

Indeed, if an allegation is that a senior state official received a bribe, deciding the evidence on a mere balance of probabilities could pose enormous problems because all that the moving party would need to establish is that the opposing party more likely than not received a bribe. This will now require the opposing party to prove that it did not receive a bribe which, by its very nature, can be perverse (particularly if it did not indeed receive a bribe) because it will require proof for a negative. Further, as noted above, these allegations are often easy to make but difficult to prove. All these reasons warrant a heightened scrutiny of the evidence.

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[53] Nathan D. O'Malley (n 2) 210-211 (emphasis added).

[54] *Energoalians SARL v Republic of Moldova*, UNCITRAL, Award (23 October 2013) [261].

[55] *ConocoPhillips* (n 29) [275] ('It will do that bearing in mind how rarely courts and tribunals have held that a good faith or other related standard is breached. The standard is a high one.").

[56] Richard M. Mosk, *The Role of Facts in International Dispute Resolution* (Recueil Des Courts 2003) 137 ("The Iran-United States Claims Tribunal did state that because 'allegations of forgery' are "'particularly grave', to establish such an allegation requires 'an enhanced standard of proof'.").

[57] *Anatolie Stati Gabriel Stati Ascom Group SA and Terra Raf Trans Traiding Ltd v Republic of Kazakhstan*, SCC Case No. V116/2010, Award (19 December 2013) [1688] ("This Tribunal does not need to go into these legal issues because it considers that, in any event, Claimants have not been able to provide sufficient factual proof for the lost profits they claim. In this context, Respondent has rightly referred to the comments in Prof. Crawford's Commentaries on the ILC Articles on State Responsibility and to respective comments in earlier awards that the investor must meet a high standard of proof to establish a claim for lost profits, especially due to the degree of economic, political, and social exposure of longterm investment projects. To meet this standard, an investor must show that their project either has a track record of profitability rooted in a perennial history of operations, or has binding contractual revenue obligations in place that establish the expectation of profit at a certain level over a given number of years. This is true even for projects in early stages.").

Finally, for matters like a state's consent (*ratione voluntatis*), tribunals have refused to infer or presume consent instead requiring the consent to be clear.[58] This is because a tribunal can only make a ruling if it has jurisdiction and because of this limited mandate, the jurisdiction needs to be clear.

2. Heightened Standard when the Arbitral Rules Calls for It

Investor-state tribunals also apply a heightened standard of proof it the provision expressly call for it. Indeed, this is a direct application of what the plain language of the arbitration rules. For example, several articles in the ICSID Convention use the term "manifest" and tribunals emphasize that this calls for a heightened standard. For example, Article 57 of the ICSID Convention states that an arbitrator can be challenged when there is a "manifest" lack of qualifications.[59]

> Under Article 57, the burden is on the challenging party to establish the existence of the required fact or facts and to prove that such fact or facts indicate a "manifest lack" of the quality required of an arbitrator, that is, that such an arbitrator lacks the quality of being a person who can be relied upon to exercise independent judgment and impartiality of judgment. The standard of proof required is that the challenging party must prove not only facts

[58] *ICS Inspection and Control Services Ltd (United Kingdom) v Argentine Republic*, PCA Case No 2010-9, Award on Jurisdiction (10 February 2012) [280] ('[A] State's consent to arbitration shall not be presumed in the face of ambiguity. Consent to the jurisdiction of a judicial or quasi-judicial body under international law is either proven or not according to the general rules of international law governing the interpretation of treaties. The burden of proof for the issue of consent falls squarely on a given claimant who invokes it against a given respondent. Where a claimant fails to prove consent with sufficient certainty, jurisdiction will be declined.'); *Conocophillips Petrozuata BV, Conocophillips Hamaca BV and Conocophillips Gulf of Paria BV v Bolivarian Republic of Venezuela*, ICSID Case No ARB/07/30, Decision on Jurisdiction and the Merits (3 September 2013) [254] ('In the words of the International Court of Justice in considering the very first challenge made to its jurisdiction, the consent must be 'voluntary and indisputable', and in the words of both ICSID tribunals 'clear and unambiguous'. The necessary consent is not to be presumed. It must be clearly demonstrated.').

[59] Article 57 of the ICSID Convention states: "A party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14." Article 14 of the ICSID Convention states: "Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators."

indicating the lack of independence, but also that the lack is "manifest" or highly probable, not just possible.[60]

Similarly, investor-state tribunals have called for a heightened standard of proof for a preliminary motion to dismiss under ICSID Arbitration Rule 41(5) where the standard is "manifestly without legal merit."[61] This provision was introduced in 2006 as a part of the amendment to the ICSID Arbitration Rules and was intended to provide respondent state to seek an early dismissal of the case for cases that were manifestly without any legal merit.[62] Investor-state tribunals have noted that because Rule 41(5) uses the term

[60] *Abaclat and Others v Argentine Republic*, ICSID Case No. ARB/07/05, Recommendation on Proposal for Disqualification of Prof. Pierre Tercier and Prof. Albert Jan van den Berg, PCA Case No. IR 2011/1 and ICSID Case No. ARB/07/5, PCA Decision (19 December 2011) [50] (emphasis added). See also *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A v Argentine Republic*, ICSID Case No. ARB/03/19, Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal (12 May 2008) [29] ("The term 'manifest' means 'obvious' or evident. Christoph Schreuer, in his Commentary on the ICSID Convention observes that the word manifest imposes '… a relatively heavy burden on the party making the proposal . . .' to disqualify an arbitrator.") (ellipsis in original); *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v Argentine Republic*, ICSID Case No. ARB/03/23, Challenge Decision Regarding Professor Gabrielle Kaufmann-Kohler (25 June 2008) [68] ("Something is 'manifest' if it can be 'discerned with little effort and without deeper analysis'."); *Alpha Projektholding GmbH v Ukraine*, ICSID Case No. ARB/07/16, Decision on Respondent's Proposal to Disqualify Arbitrator Dr. Yoram Turbowicz (19 March 2010) [37] ("Further, in keeping with the rules of interpretation of the Vienna Convention, the Two Other Members must perforce assign significance to the use of the adjective 'manifest' in the language of Article 57 of the ICSID Convention describing the standard that a challenge must meet in order to prevail. According to Webster's Dictionary, the word 'manifest' connotes something that is 'obvious' to one's understanding and that is 'readily perceived by the senses' and 'easily understood or recognized by the mind.' The Shorter Oxford English Dictionary correspondingly defines the term 'manifest' as something which is '[c]learly revealed to the eye, mind or judgement; open to view or comprehension; obvious'."); *Conocophillips Petrozuata B.V., Conocophillips Hamaca B.V. and Conocophillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on the Proposal to Disqualify L. Yves Fortier, Q.C., Arbitrator (27 February 2012) [56] ("The decisions also recognise that the term "manifest" in Article 57 means 'obvious' or 'evident' and highly probable, not just possible, and that it imposes a relatively heavy burden on the party proposing disqualification. Further, the manifest lack of the required qualities, here independence and impartiality of judgment, must appear from objective evidence."); *Blue Bank International & Trust (Barbados) Ltd. v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20, Decision on the Parties Proposal to Disqualify a Majority of the Tribunal (12 November 2013) [61] ("regarding the meaning of the word 'manifest' in Article 57 of the Convention, a number of decisions have concluded that it means 'evident' or 'obvious,'. and that it relates to the ease with which the alleged lack of the qualities can be perceived.").

[61] Rule 41(5) of the ICSID Arbitration Rule: "Unless the parties have agreed to another expedited procedure for making preliminary objections, a party may, no later than 30 days after the constitution of the Tribunal, and in any event before the first session of the Tribunal, file an objection that a claim is manifestly without legal merit."

[62] See eg "Manifest Lack of Legal Merit—ICSID Convention Arbitration, ICSID Website, available at https://icsid.worldbank.org/en/Pages/process/Manifest-Lack-of-Legal-Merit.aspx accessed on 8 May 2017.

"manifest" to describe the criteria, there is a heightened burden on the state with the burden to prove such allegation:

> Several ICSID tribunals have found that "manifest," as used in Rule 41(5), is equivalent to "obvious" or "clearly revealed to the eye, mind or judgment." Under Rule 41(5), the respondent must establish its objection "clearly and obviously, with relative ease and despatch." The Rule is intended to capture cases which are clearly and unequivocally unmeritorious, and as such, the standard that a respondent must meet under Rule 41(5) is very demanding and rigorous. In the opinion of the Tribunal, a case is not clearly and unequivocally unmeritorious if the Claimant has a tenable arguable case. . . . Respondent's Rule 41(5) objections concern both matters of jurisdiction and merits, the Tribunal notes that it agrees with the decisions of other tribunals to the effect that Rule 41(5) allows for objections related both to jurisdiction and the merits of the case. Nonetheless, the very demanding standard of proof outlined above applies no less to jurisdictional than other matters.[63]

Similarly, two of the ICSID Annulment criteria use terms that warrant a heightened standard—when a tribunal "manifestly exceeded its power"[64] and when there "has been a serious departure from a fundamental rule of procedure."[65] Investor-state arbitral tribunals have recognized the need for a heightened standard here by emphasizing that the arguments must be clear on their face.[66]

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[63] *PNG Sustainable Development Program Ltd v Independent State of Papua New Guinea*, ICSID Case No. ARB/13/33, The Tribunal's Decision on the Respondent's Objections Under Rule 41(5) of the ICSID Arbitration Rule (28 October 2014) [88, 91] (emphasis added); *Trans-Global Petroleum, Inc. v Hashemite Kingdom of Jordan*, ICSID Case No. ARB/07/25, Decision on the Respondent's Objection under Rule 41(5) of the ICSID Arbitration Rules (12 May 2008) [86] ("The word 'manifest' is used Article 57 of the ICSID Convention, permitting a party to propose the disqualification of a tribunal's member on account of any fact indicating a 'manifest lack of the qualities' required under Article 14(1) of the ICSID Convention. As explained by Professor Schreuer, Article 57 imposes 'a relatively heavy burden of proof on the party making the proposal'; and Reed et al concur: 'Article 57 of the Convention sets an extremely high bar for challenging an arbitrator . . .' Accordingly, the word is here intended to impose a high test for challenging an ICSID arbitrator, consistent with the need to prove an obvious and clearly disqualifying deficiency." (ellipsis in original).

[64] Article 52(1)(b) of the ICSID Convention (emphasis added).

[65] Article 52(1)(d) of the ICSID Convention (emphasis added).

[66] See eg *Total SA v Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Annulment (1 February 2016) [159] ("The Committee notes that the usage of qualifiers such as 'manifest,' 'serious,' and 'fundamental' suggest that the powers of an *ad hoc* committee to annul an ICSID award were intended to be limited within the grounds for annulment under Article 52(1) of the Convention. As one commentator

3. The Appropriate Heightened Standard is Above the Balance of Probabilities but Lower than Criminal Law Standard

It is my submission that the heightened standard of proof is lower than the criminal law standard of "proof beyond reasonable doubt."[67] Indeed, this criminal law standard is not appropriate in any investor-state arbitration proceeding more generally, since the proceedings are not criminal in nature. As Kazazi explained:

> Proof beyond reasonable doubt is, presumably, the favourite standard with international tribunals since it relieves them of the task of searching for other standards which may be appropriate in the context of a given case. Unfortunately, it is a luxury that the party which carries the burden of proof in international proceedings cannot always afford. It may happen that in some cases access to evidence that would prove a claim conclusively is not easy, or not possible at all; or that it is excessively costly or time-consuming to procure such evidence. Thus, it is neither realistic nor practical for international tribunals to insist on receiving proof beyond reasonable doubt, indiscriminately, in all cases before them. As stated by Lauterpacht, "the degree of burden of proof . . . to adduced ought not to be so stringent as to render the proof unduly exacting.[68]

Therefore, the heightened standard has to be above the balance of probabilities standard but below the criminal law standard of proof beyond reasonable doubt. Since there is no clear terminology for this (and indeed terminology here can be tricky), it can

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indicated, annulment is an exceptional remedy."); *TECO Guatemala Holdings LLC v Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment (5 April 2016) [77] ("the Committee considers that an excess of powers is 'manifest' if it is plain on its face, evident, obvious, or clear."); *SGS Société Générale de Surveillance SA v Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Annulment (19 May 2014) [122] ("the Committee insists that for an excess of power to be 'manifest' it has to be textually obvious and substantively serious.").

[67] M. Aghahosseini, *Evidence before the Iran-United States Claims Tribunal* (International Law Forum du Droit International 1999) 213 ("But the standard of proof *beyond reasonable doubts* belongs to criminal prosecutions only, where the conventional policy holds that the evil of convicting an innocent person is by far greater than that of a guilty person escaping conviction. The standard of proving guilt is hence raised to a degree sufficient to meet this concern. There is no such consideration, and therefore no room for this standard, in civil proceedings. Here, on the contrary, the dispute must be resolved in favour of one or the other party and, because of the equality of the parties' rights, the requirement of any degree of proof other than the preponderance of evidence - 51% - will simply disturb that equality in favour of one and against the other."); Cecily Rose, 'Questioning the Role of International Arbitration in the Fight Against Corruption' [2014] Journal of International Arbitration 195 ("The most frequently employed standard is that of clear and convincing proof, which tribunals have described as lying somewhere in between balance of probabilities and beyond a reasonable doubt.").

[68] Mojtaba Kazazi (n 4) 348 (emphasis added).

be appropriately described as a "heightened" standard to show that the evidence has to be above the usual balance of probabilities/preponderance of evidence.

V. THE SPECIAL CASE OF WRONGDOINGS

(A) *Introduction*

Allegations of wrongdoings have assumed great significance in investor-state arbitration and are invoked by investors against states and increasingly by states against investors.[69] As an initial remark, I would like to clarify the terminology. I have used the word "wrongdoings" as a convenient placeholder to encompass a wide range of activities including allegations of fraud, corruption, bribery, and other such related activities.[70] As noted above, these allegations, therefore, require a heightened standard of proof.[71] But, considering how significant these allegations have become in investor-

[69] Professor Wälde in the dissenting opinion in *Thunderbird v Mexico* has noted that allegations of wrongdoing have been increasing and they should be ignored unless there is sufficient evidence to establish the allegations. *International Thunderbird Gaming Corporation v The United Mexican States*, Separate Opinion of Professor Wälde, UNCITRAL (1 December 2005) [20]: "The same applies to the corruption hint insinuated by respondent in its submission . . . Such insinuations are now frequently employed by both claimant investors and respondent governments. They should be disregarded-explicitly submitted to the tribunal, substantiated with a specific allegation of corruption and subject to proper legal and factual debate for the tribunal. That is simply the implication of the 'fair hearing' principle. If a tribunal should be influenced by insinuations, there is no appeal instance (at present) in the NAFTA arbitral system which can correct a factual finding or assumption that has a bearing on the ultimate award. It is therefore particularly important for a tribunal not to get influenced, directly or indirectly, by 'insinuations' meant to colour and influence the arbitrators' perception and activate a conscious or subconscious bias, but to make the decision purely on grounds that have been subject to a full and fair hearing by both parties." (Emphasis added). See also *Himpurna California Energy Ltd v PT (Persero) Perusahaan Listruik Negara*, Final Award (1999) [114, 118] ("Precedents in the field of international arbitration show that such arguments [on illegality] are most often raised by States or State entities in the wake of important economic or political events which have resulted in major policy changes . . . they must be treated with great circumspection. . . . The arbitrators believe that cronyism and other forms of abuse of public trust do indeed exist in many countries. . . . But such grave accusations must be proven.") (emphasis added).

[70] Indeed, the Oxford Dictonary defines the term "wrongdoing" as "illegal or dishonest behaviour." See Definition of "Wrongdoing" Oxford Dictionary, available at https://en.oxforddictionaries.com/definition/wrongdoing.

[71] J. N. Summerfield, 'The Corruption Defense in Investment Dispute: A Discussion of the Imbalance between International Discourse and Arbitral Decisions'(2009) 6(1) Transnational Dispute Management 17 available at https://www.transnational-dispute-management.com/article.asp?key=1357 accessed on 15 January 2017 ("There is an apparent disconnect in the discourse against 'petty' corruption and the exchanges that move international investments forward. The corruption defense operates on a myth system, nobly assuming that there is an injustice, but without considering whether causation and benefits were 'undue' and without asking why that inquiry is conducted. Arbitral decisions on corruption should move closer to the normative discussions that revolve around 'petty' corruption and closer to an operational code (how the world operates on the ground).").

state arbitration, these issues warrant some special consideration.

The need for a heightened standard of proof is particularly acute in dealing with allegations of wrongdoings considering how easy these arguments are to make and that it can facilitate manipulative behavior in an arbitration, especially when one of the parties might come from an area that is more prone to corruption:

> It is recognized in international arbitration and, in particular, in the jurisprudence of arbitral tribunals and courts that 'mere suspicion' or 'baseless allegations' should not suffice to prove misconduct such as corruption. Otherwise, an unscrupulous party could easily characterize itself as a victim of corruption in order to seek advantages in its arbitration with an opponent of less than stellar reputation with regard to corruption.[72]

Similarly, Waincymer has explained the need of heightened evidence in allegations of wrongdoing:

> Approaches to standard of proof may also vary if the issue is a complex economic or scientific question, a complex question of causation or a serious allegation of impropriety such as lack of good faith or fraud. In all of these situations, the legal articulation of the standard of proof remains constant but the body of evidence that might be required can vary. Proving that a drug is safe as contractually warranted may require clinical trials that must come close to certainty. Where an allegation of fraud is concerned, a significant body of evidence might be required to justify a conclusion that fraud is present and that the person under consideration cannot have their behaviour readily explained on other bases. This can also impact on the evidence that might be needed. Documents evidencing fraud may need to be more compelling.[73]

[72] Stephan Wilske and Todd J. Fox, 'Corruption in International Arbitration and Problems with Standard of Proof: Baseless Allegations or Prima Facie Evidence?' in Vikki M. Rogers, Pilar Perales Viscasillas, *et al* (eds), *International Arbitration and International Commercial Law: Synergy, Convergence and Evolution* (Kluwer Law International 2011) 502 (emphasis added).

[73] Jeffrey Waincymer (n 6) 768-769 (emphasis added).

(B) *Additional Principles Clarified by Investor-State Tribunals: Mere Insinuations or Vague Allegations will not Suffice*

Since most arbitral rules are silent on the standard of proof[74] and since wrongdoings typically do not involve a lot of direct evidence, a careful examination of the jurisprudence is necessary, in order to distil the relevant standards of proof applicable in such situations. The following principles can be distilled from the decisions of investor-state tribunals.

My first argument is that the evidentiary standard is "high" and therefore mere insinuations of wrongdoings or general allegations would not meet the "high" evidentiary standard.[75] Hwang and Lim explain this high standard, albeit in the context when it was invoked by investors as follows:

> [I]n a survey of arbitral case law on corruption, it was found that in just one out of twenty-five cases, a —"*low*" standard of proof was applied, whereas in fourteen cases, a — "*high*" standard of proof applied, which were variously described as — "*certainty*", — "*clear proof*", — "*clear and convincing*

[74] Cecily Rose, 'Questioning the Role of International Arbitration in the Fight Against Corruption' [2014] Journal of International Arbitration 193 ("The procedural rules of ICSID, ICC, and UNCITRAL leave the standard of proof to the discretion of the tribunal, and in practice tribunals have varied in their views on how stringently they should assess evidence of corruption. The instruments that regulate arbitral proceedings provide relatively little guidance on evidentiary matters, such as which party has the burden of proof, what sort of evidence the parties should present, and the standard of proof by which tribunals should evaluate the evidence before them. . . . While these instruments offer somewhat varying levels of guidance to tribunals on evidentiary matters, they uniformly omit any mention of the standard of proof. Thus, under each set of procedural rules, tribunals have considerable freedom to adopt the standard of proof that they consider appropriate in the given circumstances.").

[75] Prof. Dr. Richard Kreindler, 'Application for 'Revision' in Investment Arbitration: Selected Current Issues', in M.Á. Fernández-Ballesteros and David Arias, *Liber Amicorum Bernardo Cremades* (Wolters Kluwer 2010) 691 ("The legal standards applicable to allegations of corruption and bribery must, in light of the seriousness of such allegations, be yet even more stringent than those in ICSID revision proceedings not based on allegations of corruption or bribery. It is beyond doubt that corruption and bribery are a serious offense which violates international law. Allegations of corruption thus are a highly serious matter, to be approached with the greatest of scrutiny and circumspection, both in terms of concluding that corruption has been proven and in concluding that corruption has not been proven. At the same time, precisely because of the seriousness of an alleged offense of corruption or bribery, it is likewise a well-established principle in public international law, as well as in civil law, that the standard of proof respecting allegations of corruption is elevated, and cannot be justified by mere speculation. Especially criminal allegations or quasi-criminal allegations of corruption demand a high standard of evidence; the existence of corruption must be proven beyond a reasonable doubt."); Wilske and Fox (n 72) 495 ("There is no uniform standard of proof regarding allegations of corruption in international arbitration, even though it is fair to say that the standard is rather high.").

> *evidence*", and — "*conclusive evidence*." Other cases can be cited for the same proposition.[76]

Investor-state tribunals have also supported this. Blanket condemnations or references to a general state of corruption without any specific allegation will almost invariably fail. Investors often points to general reports that mention that a state is corrupt, however, tribunals have routinely rejected such general allegations. For example, in a case involving the Czech Republic, the investor alleged that the state sought a bribe but was not able to offer any direct evidence. The investor further alleged that the local entity had "close links with local politicians" and then argued general levels of corruption in the Czech Republic.[77] The tribunal refused to make any finding of corruption noting:

> The Tribunal must begin by stating that it finds to be deeply unattractive an argument to the effect that 'everyone knows that the Czech Republic is corrupt; therefore, there was corruption in this case. . .'. The Tribunal acknowledges that some effort was made to adduce specific evidence of corruption, but it did feel that there was a strain of the 'everyone knows' argument in the overall case, for example in the reliance on reports of NGOs as to the general presence of corruption within the Czech Republic. The Tribunal does not close its eyes to the fact that the Czech Republic, like other countries, has had, and reportedly still has, problems with corruption. <u>But the Tribunal remains vigilant against blanket condemnatory allegations which can have the appearance of an attempt to 'poison the well' in the hopes of making up for a lack of direct proof</u>. Reference to other instances of alleged corruption may prove that corruption exists in the State, but it does little to advance the argument that corruption existed in the specific events giving rise to the claim. Nor do allegations of this kind, however seriously advanced, give rise to a burden on the Respondent to 'disprove' the existence of corruption. While the present Tribunal is therefore willing to "connect the dots", if that is

[76] Michael Hwang SC and Kevin Lim, 'Corruption in Arbitration—Law and Reality', Herbert Smith-SMU Asian Arbitration Lecture (2011) 15 available at http://www.arbitration-icca.org/media/0/13261720320840/corruption_in_arbitration_paper_draft_248.pdf accessed on 15 January 2017.

[77] See ECE Projektmanagement International GmbH and Kommanditgesellschaft PANTA Achtundsechzigste Grundstücksgesellschaft mbH & Co v Czech Republic, PCA Case No. 2010-5, Award (19 September 2013) [4.874 et seq.].

> appropriate, the dots have to exist and they must be substantiated by relevant and probative evidence relating to the specific allegations made in the case before it.[78]

Other cases are to the same effect. For example, the *European Media v. The Czech Republic* case is illustrative. In that case, the Czech Republic argued that the investor had allegedly sought to blackmail the Deputy Chairman of the Czech Chamber of Deputies to have him use his influence over the Czech Media Council to grant them additional frequencies. To support this allegation, the Czech Republic provided, as evidence, the jottings in a diary where the company noted that it was "contemplating the use of information discreditable to the Deputy Chairman of the Chamber of Deputies of the Czech Parliament."[79] The tribunal refused to make a finding of blackmail just on this evidence:

> An allegation of blackmail, or even of a contemplation of it, is very serious, especially in the public domain, and the ground for it must be scrupulously laid, because of the obvious risk of unfairness. . . . To justify its allegation of bribery or conduct contrary to public policy, what the Respondent has to show is a sufficiently high degree of wrongdoing to rank as a breach of international law, actually having a disqualifying impact on the investment in question. The Tribunal has no doubt that in this it has totally failed.[80]

The second argument is that investor-state tribunals have also applied the heightened standard when allegations of corruption relate to the judiciary and have rejected to find corruption through a vague inference. The observations of the tribunal below provide a good illustration of this point:

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[78] ibid [4.879] (emphasis added).

[79] *European Media Ventures SA v Czech Republic*, UNCITRAL, Partial Award on Liability (8 July 2009) [30].

[80] ibid [32, 35] (emphasis added). On the allegation of blackmail, the tribunal specifically rejected the argument noting: "The Respondent shows no more than scribbled jottings by Mr. [name redacted] of which he was unable to give a convincing account when faced with them years later. True, this might on one view be said to show him in a poor light, but his general character and credibility are not in issue here. True also, this episode might have been relevant to a case under Article 2, but no such case is before the Tribunal, because of the earlier decision on jurisdiction. To justify its allegation of bribery or conduct contrary to public policy, what the Respondent has to show is a sufficiently high degree of wrongdoing to rank as a breach of international law, actually having a disqualifying impact on the investment in question. The Tribunal has no doubt that in this it has totally failed.").

> Corruption, if found, would constitute a grave violation of the standard of fair and equitable treatment under ECT Article 10(1), second sentence. The Tribunal emphasizes that corruption is a serious allegation, especially in the context of the judiciary. The Tribunal notes that both Parties agree that the standard of proof in this respect is a high one. Therefore, generalized allegations of corruption in the Republic of Kazakhstan do not meet Claimants' burden of proof. The Tribunal is aware that it is very difficult to prove corruption because secrecy is inherent in such cases. Corruption can take various forms but in very few cases can reliable and valid proof of it be brought which is sufficient as a basis for a resulting award declaring liability. However, the Tribunal considers that this cannot be a reason to depart from the general principle that Claimants must fully comply with their undisputed burden to prove that in the case at hand there was corruption. It is not sufficient to present evidence which could possibly indicate that there might have been or even probably was corruption. Rather, Claimants have to *prove* corruption. The issue is not one of inference, and the Tribunal considers that Claimants have not met their burden of proof in this regard.[81]

Third, the question of what would this high standard be in the context of wrongdoings has led to some controversy and warrants some and warrants some careful consideration. Initially, it appeared that the "clear and convincing" test was frequently alluded to in both cases and commentary. For example, the tribunal in *EDF v. Romania* stated:

> There is general consensus among international tribunals and commentators regarding the need for a high standard of proof of corruption. The evidence before the Tribunal in the instant case concerning the alleged solicitation of a bribe is far from being clear and convincing.[82]

[81] *Liman Caspian Oil BV and NCL Dutch Investment BV v Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Excerpts of Award (22 June 2010) [422-424] (internal punctuations omitted) (emphasis added). While the judgment of the tribunal on this point is available, the entire award itself has not been made public and all facts relating to this argument have been redacted. What can be reasonably discerned from this quotation is that the investor made general allegations of corruption of the judiciary without establishing facts to the satisfaction of the tribunal.

[82] *EDF (Services) Limited v Romania*, ICSID Case No. ARB/05/13, Award (8 October 2009) [221] (emphasis added). See also *European Media Ventures* (n 79) [35] ("To justify its allegation of bribery or conduct contrary to public policy, what the Respondent has to show is a sufficiently high degree of wrongdoing to rank as a breach of international law, actually having a disqualifying impact on the investment in question. The Tribunal has no doubt that in this it has totally failed."); *Europe Cement*

In *EDF v. Romania*, the investor argued that the contractual arrangements for an airport project were "not extended beyond their ten-year terms" because the company representatives "refused to pay a USD2.5 million bribe to secure the extension."[83] The tribunal noted that the company decided to go publicly with this information in an article published in a German newspaper after it realized that there was no possibility of an extension.[84] The tribunal then examined the testimony of a witness for the investor and noted that his testimony was of a "doubtful value."[85] This is because the witness denied any knowledge of the person who solicited the bribe before the Romanian authorities in 2002, however, in the proceedings before the tribunal in 2007, the witness provided the name of the person who sought the bribe. The tribunal, therefore concluded that it was not clear "in which of these statements" was he telling the truth: "There is no way to know. The evidence is not clear and convincing."[86]

The need for "clear and convincing" evidence was also espoused by Iran-U.S. Claims Tribunal in the *Dadras v. Iran* case, although the tribunal noted that the terminology itself was less important than the need for a heightened standard of proof:

Investment & Trade SA v Republic of Turkey, ICSID Case No. ARB(AF)/07/2, Award (13 August 2009) [166-167] ("The Claimant's failure to provide any serious rebuttal to the Respondent's arguments strongly suggests that it never had such ownership, at least at the relevant time for jurisdiction and that perhaps it never had ownership at all. The burden to prove ownership of the shares at the relevant time was on the Claimant. It failed completely to discharge this burden. In the Tribunal's view the circumstantial evidence points strongly to the conclusion that Europe Cement did not own shares in CEAS and Kepez at the relevant time. In view of the failure of the Claimant to produce the documents ordered, the Tribunal has no direct evidence that any particular document placed before it was or was not authentic, but the implication of lack of authenticity is overwhelming. All of the evidence placed before the Tribunal, and not contradicted by the Claimant, is that the share transfer agreements are not what they claim to be and that no transfer of CEAS and Kepez shares to Europe Cement took place at least before 12 June 2003. Indeed, the evidence points to the conclusion that the claim to ownership of the shares at a time that would establish jurisdiction was made fraudulently."). Some authors are critical of the "clear and convincing" formulation as advocated by the *EDF* tribunal. See eg C. Partasides, 'Proving Corruption in International Arbitration: A Balanced Standard for the Real World' (2013) 10(3) Transnational Dispute Management 56-57 available at https://www.transnational-dispute-management.com/article.asp?key=1949 accessed on 15 January 2017 ("The *EDF (Services) v Romania* Award is not the first time that one can find reference to the heightened standard of 'clear and compelling' evidence. This same formulation has been referred to and applied in a number of corruption arbitrations over the years. . . . The following is my first proposition: whilst the standard of proof should not be relaxed for allegations of corruption, by the same token it need not be made more severe.").

[83] *EDF (Services) Limited* (n 82) [221].

[84] ibid [222].

[85] ibid [223].

[86] ibid.

> 123. In these Cases, the Tribunal is confronted with allegations of forgery that, because of their implications of fraudulent conduct and intent to deceive, are particularly grave. The Tribunal has considered whether the nature of the allegation of forgery is such that it requires the application of a standard of proof greater than the customary civil standard of "preponderance of the evidence." Support for the view that a higher standard is required may be found in American law and English law, both of which apply heightened proof requirements to allegations of fraudulent behavior. In American law the burden imposed is described as "clear and convincing" evidence, and English law speaks of a flexible civil standard that raises the burden of proof where the commission of a fraud or a crime is alleged in civil proceedings.
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> 124. The allegations of forgery in these Cases seem to the Tribunal to be of a character that requires an enhanced standard of proof. Consistent with its past practice, the Tribunal therefore holds that the allegation of forgery must be proved with a higher degree of probability than other allegations in these Cases. The minimum quantum of evidence that will be required to satisfy the Tribunal may be described as "clear and convincing evidence," although the Tribunal deems that precise terminology less important than the enhanced proof requirement that it expresses.[87]

Other tribunals have noted the high standard but used different formulations, without emphasizing the "clear and convincing standard."[88] This could probably be because the

[87] Dadras International and Per-Am Construction Corporation v The Islamic Republic of Iran and Tehran Redevelopment Company [1995] Award No. 567-213/215-3 (emphasis added).

[88] Some authors state that the application of the clear and convincing proof actually misses the point. S Nappert, 'Public Interest in a Private Procedure—What Burden of Proof Allegations of Corruption in International Arbitration' (2013) Transnational Dispute Management 2-3 available at https://www.transnational-dispute-management.com/article.asp?key=1979 accessed on 15 January 17 ("This treatment of allegations of corruption ('clear and convincing proof') in both *Himpurna* and *EDF v Romania* arguably misses the point. The requirement for 'clear and convincing' evidence, apart from the fact that it elevates the civil burden of proof of the balance of probabilities for no apparent reason, looks at corruption as a series of past events that must be proven. That is not the real issue. The real issue is this: in many cases the nemesis of corruption is pervasive, it is endemic, it is like an oil spill, except that it leaves no trace. It is part of the fabric of certain societies, of the historical ways of doing business, it is polyform, it reinvents itself, it is continuing. In short, it often requires a *prospective* look at the evidentiary process, rather than the usual backwards glance. The point being missed by the proponents of the clear and convincing evidence is that, where a particular act of corruption proves intractable to evidence, to what degree can a party seek to show, and what will be the requisite burden to meet, the existence of a pervasive culture of corruption? Is this even relevant? Sufficient for the tribunal to draw an inference? Sufficiently cogent to meet the civil standard of the balance of probabilities?").

"clear and convincing" standard appears to get very close to the criminal law standard of "beyond reasonable doubt." Commentators have therefore made clear that this formulation would be less than the criminal law standard. Professor Amerasinghe describes this as "proof in a convincing manner" and explains the scope as follows: "Reference has also been made to a high standard of proof, impliedly perhaps, less than proof beyond a reasonable doubt but more than probability."[89]

Other tribunals have noted that the standard is "demanding" without adding any further descriptions. For example, the *Bayindir v. Pakistan* tribunal noted: "The Tribunal further considers that, as argued by the Respondent, the standard for proving bad faith is a demanding one, in particular if bad faith is to be established on the basis of circumstantial evidence."[90] It is my submission that using the term "heightened" evidence is preferred rather than getting into any of these descriptions because the "heightened" terminology makes clear what is expected without getting heavily into pedantic discussions on terminology.

Some tribunals approach this issue from another perspective. Instead of demanding a heightened standard *per se*, they rather emphasize that "more" persuasive evidence is needed. For example, the tribunal noted in the *Churchill v. Indonesia* case: "the Tribunal considers that the Respondent carries the burden of proving forgery and fraud, which proof will be measured on a standard of balance of probabilities or *intime* conviction taking into account that more persuasive evidence is required for implausible facts, it being specified that intent or motive need not be shown for a finding of forgery or fraud but may form part of the relevant circumstantial evidence."[91] Two points are worth emphasizing here. First, even though the tribunal paid lip-service to the "balance of probabilities" rule, it noted that "more persuasive evidence" would be necessary which could be seen as elevating the standard of proof. Second, the tribunal noted that

[89] Amerasinghe (n 1) 239.

[90] *Bayindir Insaat* (n 28) [143]. This was cited by approval in the *Chemtura v Canada* case. See *Chemtura Corporation (formerly Crompton Corporation) v Government of Canada*, UNCITRAL/NAFTA Arbitration, Award (2 August 2010) [137].

[91] *Churchill Mining PLC and Planet Mining Pty Ltd v Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Award (6 December 2016) [244].

intent or motive does not to be proven. This is often important in a criminal law context but tribunals perhaps do not require it considering that the cases are not criminal in nature.

The *Libananco v. Turkey* tribunal made a similar finding to the *Churchill v. Indonesia* case:

> In relation to the Claimant's contention that there should be a heightened standard of proof for allegations of "fraud or other serious wrongdoing", the Tribunal accepts that fraud is a serious allegation, but it does not consider that this (without more) requires it to apply a heightened standard of proof. While agreeing with the general proposition that "the graver the charge, the more confidence there must be in the evidence relied on", this does not necessarily entail a higher standard of proof. <u>It may simply require more persuasive evidence, in the case of a fact that is inherently improbable, in order for the Tribunal to be satisfied that the burden of proof has been discharged</u>.[92]

One final comment is necessary in this regard. As noted in Chapter 2 above, it is worth remembering that the burden will be on the party making the allegation and there will be no shifting of the burden of proof to the other party in the context of allegations of wrongdoings.[93]

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[92] *Libananco Holdings Co Limited v Republic of Turkey*, ICSID Case No. ARB/06/8, Award (2 September 2011) [125] (emphasis added).

[93] *Liman Caspian Oil BV and NCL Dutch Investment BV v Republic of Kazakhstan* (n 81) [424] ("It is not sufficient to present evidence which could possibly indicate that there might have been or even probably was corruption. Rather, Claimants have to prove corruption. [T]he issue is not one of interference, and the Tribunal considers that Claimants have not met their burden of proof in this regard."); *Jan Oostergetel and Theodora Laurentius v The Slovak Republic*, UNCITRAL, Final Award (23 April 2012) [303] ("While such general reports are to be taken very seriously as a matter of policy, they cannot substitute for evidence of a treaty breach in a specific instance. . . . Mere insinuations cannot meet the burden of proof which rests on [party making the allegation]."); See also Constantine Partasides, 'Proving Corruption in International Arbitration: A Balanced Standard for the Real World' (2010) 25(1) ICSID Review—Foreign Investment Law Journal, pp. 52-53 ("Karen Mills, a U.S. lawyer who has worked in Indonesia for many years, described in detail the various concealed forms which corrupt payments may take, and then commented as follows: . . . Because of the near impossibility to 'prove' corruption, where there is a reasonable indication of corruption, an appropriate way to make a determination may be to shift the burden of proof to the allegedly corrupt party to establish that the legal and good faith requirements were in fact duly met. Whilst one can understand and sympathize with the sentiment motivating these views—particularly from a lawyer who has practiced for many years in a jurisdiction that has been ravaged by corruption—a simple shifting of the burden of proof, all in one go, is rightly difficult for any lawyer to accept."). The article by Karen Mills referred above had stated: "Because of the near impossibility to 'prove' corruption, where there is a reasonable indication of corruption, an appropriate way to make a

(C) *Circumstantial Evidence is Permissible When Direct Evidence is not Available for Allegations of Wrongdoings*

Circumstantial evidence is defined as:

> Evidence directed to the attending circumstances; evidence which inferentially proves the principal fact by establishing a condition of surrounding and limiting circumstances, whose existence is a premise from which the existence of the principal fact may be concluded by necessary laws of reasoning.[94]

Considering the lack of direct evidence in allegations of wrongdoings, circumstantial evidence might be relied upon, as long as it meets the high standard outlined above. This is because direct evidence will be almost impossible on matters dealing with wrongdoings in any investor-state arbitration. Indeed, commentators have noted:

> Arbitrators must accept that it is almost impossible or unrealistic to collect "direct" evidence, such as cheques, copy of bank transfers, videos, written agreements between the corrupting and the corrupted party, and the like. In exceptional cases, tribunals had the chance to rely on candid and sincere confessions rendered by both parties, but this is extremely rare.
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> In all other cases, the arbitrators are bound to confront themselves with "circumstantial" evidence or a series of "converging and consistent indicia". Based on the practice,

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determination may be to shift the burden of proof to the allegedly corrupt party to establish that the legal and good faith requirements were in fact duly met. For example, where the allegation is failure to tender, had tender in fact been held it would be a simple matter for the tendering party to produce its tender documents and official notice of award to disprove the allegation. But how can the party not involved 'prove' the negative: that no tender was in fact held? Where the allegation is overpricing, the party handling the payment need only show that the purchase price paid by it and the price charged to the project do not differ by a material amount. Where true, such proof is easy to obtain. But how can the party who did not handle the transaction prove how much 'discrepancy' was pocketed by the contractor?"; K. Mills, 'Corruption and Other Illegality in the Formation and Performance of Contracts and in the Conduct of Arbitration Relating Thereto' (2006) 3(2) Transnational Dispute Management 9 available at https://www.transnational-dispute-management.com/article.asp?key=708 accessed on 15 January 2017. The shifting of burden of proof has not received even traction because of due process concerns.; S. Nappert, 'Nailing Corruption: Thoughts for a Gardener—A Comment on World Duty Free Company Ltd v The Republic of Kenya'(2013) 10(3) Transnational Dispute Management 6 available at https://www.transnational-dispute-management.com/article.asp?key=1948 accessed on 15 January 2017: "Suggestions that the standard of proof should be reversed have been made, and are generally rejected as inconsistent with due process."

[94] See "What is Circumstantial Evidence", The Law Dictionary Featuring Black's Law Dictionary, available at https://thelawdictionary.org/circumstantial-evidence/.

> similar indicia may be found in the parties' behavior and even in some specific clauses of their contract.[95]

Dr. Llamzon summarized the law as follows: ". . . circumstantial evidence, particularly when direct evidence of corruption is unavailable, is widely, albeit cautiously, accepted as a tool to evaluate allegations of corruption by international tribunals."[96] The tribunal in *Fraport v. Philippines II* also noted:

> The Tribunal holds that considering the difficulty to prove corruption by direct evidence, the same may be circumstantial. However, in view of the consequences of corruption on the investor's ability to claim the BIT protection, evidence must be clear and convincing so as to reasonably make-believe that the facts, as alleged, have occurred. Having reviewed the Parties' positions and the available evidence related to the period prior to Fraport's Initial Investment, the Tribunal has come to the conclusion that Respondent has failed to provide clear and convincing evidence regarding corruption and fraud by Fraport.[97]

In the sections below, there is a larger discussion on circumstantial evidence, both to cover allegations of wrongdoings but also other situations where direct evidence is not available.

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[95] A. Crivellaro, 'The Course of Action Available to International Arbitrators to Address Issues of Bribery and Corruption' (2013) 10(3) Transnational Dispute Management 15 available at www.transnational-dispute-management.com/journal-browse-issues-toc.asp?key=48 accessed on 15 January 2017 (emphasis added). See also Carolyn B. Lamm, Hansel T. Pham and Rahim Moloo, 'Fraud and Corruption in International Arbitration', in M.Á. Fernández-Ballesteros and David Arias, *Liber Amicorum Bernardo Cremades* (Wolters Kluwer 2010) 703 ("Accordingly, arbitral tribunals may find indirect or circumstantial evidence of fraud or corruption to be sufficient for a party to discharge the applicable standard of proof. Commentators and cases confirm that, generally, tribunals should recognize circumstances where evidence is difficult to obtain and adjust their approach to weighing the evidence accordingly. As Professor Amerasinghe explains, '[international tribunals have, where a party has genuinely encountered problems beyond its control in securing evidence, more frequently than not recognized its hardship'.").

[96] Aloysius P. Llamzon, *Corruption in International Investment Arbitration* (Oxford University Press 2014) 230.

[97] *Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines [II]*, ICSID Case No. ARB/11/12, Award (10 December 2014) [479] (emphasis added). See also *Mr Saba Fakes v Republic of Turkey*, ICSID Case No. ARB/07/20, Award (14 July 2010) [131] ("The Tribunal considers that the burden of proof of any allegations of impropriety is particularly heavy. This burden of proof was not met in the present case.").

(D) *Evidentiary Techniques to Meet the Standard of Proof for Wrongdoings: "Connecting the Dots" and Red Flags*

Two evidentiary techniques, both as species of circumstantial evidence, have been adopted when direct evidence is not available in cases of wrongdoings. One approach recommended by the tribunal in *Methanex v. United States* is "connecting the dots."[98] The tribunal explained "connecting the dots" methodology in the following manner: "While individual pieces of evidence when viewed in isolation may appear to have no significance, when seen together, they provide the most compelling of possible explanations of events."[99] However, tribunals emphasize that extra care and caution must be applied when making a determination through connecting dots or through other means of circumstantial evidence:

> When considering the Claimants' evidence the Tribunal has borne in mind the difficulties of obtaining evidence of corruption. It is well aware that acts of corruption are rarely admitted or documented and that tribunals have discussed the need to 'connect the dots'. At the same time, the allegations that have been made are very serious indeed. Not only would they (if true) involve criminal liability on the part of a number of named individuals, they also implicate the reputation, commercial and legal interests of various business undertakings which are not party to these proceedings and which are not represented before the Tribunal. Corruption is a charge which an arbitral tribunal must take seriously. At the same time, it is a charge that should not be made lightly, and the Tribunal is bound to express its reservations as to whether it is acceptable for charges of that level of seriousness to be advanced without [sic] either some direct evidence or compelling circumstantial evidence. That said, the Tribunal must of course decide the case on the basis of the evidence before it. If the burden of proof is not discharged, the allegation is not made out. The mere existence of suspicions cannot, in the absence of sufficiently firm corroborative evidence, be equated with proof.[100]

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[98] *Methanex Corporation v United States of America* UNCITRAL Final Award of the Tribunal on Jurisdiction and Merits (3 August 2005) Part III-Chapter B [2].

[99] ibid.

[100] See ECE Projektmanagement International GmbH and Kommanditgesellschaft PANTA Achtundsechzigste Grundstücksgesellschaft mbH & Co v Czech Republic (n 77) [4.876].

Another technique involves the use of "red flags" which provides indicators that can help establish if wrongdoing exists.[101] Red flags are series of actions, typically representative of fraudulent activity, such as locations in tax havens, multiple beneficial owners, multiple transactions through bearer shares, cash transactions etc. In such an instance, the investor will be called upon to provide a rational explanation for the red flag. The failure to provide convincing evidence can lead to the dismissal of the case. This happened in the *Metal-Tech v. Uzbekistan* (discussed below in greater detail) where the tribunal explained the red flags theory as possible:

> For the application of the prohibition of corruption, the international community has established lists of indicators, sometimes called "red flags". Several red flag lists exist, which, although worded differently, have essentially the same content. For instance, Lord Woolf, former Chief Justice of England and Wales, included on his list of "Key Red Flags" among other things" (1) "an Adviser has a lack of experience in the sector;" (2) "non-residence of an Adviser in the country where the customer or the project is located;" (3) "no significant business presence of the Adviser within the country; (4) "an Adviser requests 'urgent' payments or unusually high commissions;" (5) "an Adviser requests payments be paid in cash, use of a corporate vehicle such as equity, or be paid in a third country, to a numbered bank account, or to some other person or entity;" (6) "an Adviser has a close personal/professional relationship to the government or customers that could improperly influence the customer's decision".[102]

[101] Vladimir Khvalei, *Using Red Flags to Prevent Arbitration from Becoming a Safe Harbour for Contracts that Disguise Corruption* [2013] ICC Bulletin Tackling Corruption in Arbitration 15 ("Known as 'red flags', such circumstances relate, inter alia, to the identity of the parties (typically state or publicly-owned entities whose real owners are difficult to identify), the location of the parties' dealings (in a country or a sector prone to corruption), remuneration (timing, excessively high rates of commission, payments overseas), the services to be provided (ill-defined and intangible), the parties' business activity (no evidence of real or prior activity, lack of qualified personnel and actual offices)."). Other's refer to this as the "sniff" of corruption test. See Douglas Thompson, 'Arbitrators and Corruption: Watchdogs or Bloodhounds', Global Arbitration Review, 7 May 2014 ("Style laid out a series of indicators that were capable of giving off a 'sniff' of corruption. These included an unusual contractual structure, often including a middleman with no obvious function; a shell company with no offices or employees that is used as a corporate agent; or payments rendered to an agent with no clear experience in the services he purported to provide. However, some audience members suggested that such sniffs of corruption were insufficient to by themselves encourage a suspicion of corruption. Doug Jones pointed out that the practice of tipping in the United States had, on its face, many features that could be mistaken for corrupt payments without sufficient cultural context.").

[102] *Metal-Tech v The Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award (4 October 2013) [293].

(E) *The Heightened Standard of Proof Does Make it Difficult to Succeed in Allegations of Wrongdoings Even if Circumstantial Evidence is Permitted*

It is fair to state that allegations of wrongdoings are hard to prove, even though they are frequently invoked in investor-state cases and with the use of circumstantial evidence. As Dr. Llamzon has stated: ". . . of the almost 30 cases . . . in which corruption was insinuated or overtly alleged, the only instances in which a finding of corruption was actually made came in the 2006 *World Duty Free v. Kenya* decision and, more recently, in the 2013 *Metal-Tech v. [Uzbekistan]* award."[103]

Since the *World Duty Free v. Kenya* case and the *Metal Tech v. Uzbekistan* case have assumed specific importance in this regard, they warrant careful examination. Despite the dismissal in both these cases, the fact remains that there were admissions

[103] Llamzon (n 96) [194]. The fact that tribunals have not addressed allegations of wrongdoing in detail could be attributed to the fact that tribunals do not have wide prosecutorial powers. See eg A. Crivellaro (n 95) 13 ("International arbitrators are not, as such, the guardians of international morality, but are charged with the mandate of putting an end to a legal or contractual dispute, which requires them to establish the facts and apply the law thereupon. The difficulty resides on the fact that they are adjudicators, not public prosecutors. They are not vested with coercive powers and this greatly limits their effective ability to acquire the proof that is needed for establishing a case of corruption. In contrast, they have the duty to look for the truth and avoid an award contrary to public policy."). Others argue that arbitrators have a duty to investigate allegations of corruption. See eg Douglas Thompson, 'Arbitrators and Corruption: Watchdogs or Bloodhounds' (Global Arbitration Review, May 7, 2014) ("Singaporean arbitrator Michael Hwang SC observed that parties are often reluctant to make allegations of corruption because of concern that their own hands may not be clean or because they recognise the difficulty of proving such claims. Arbitrators should be prepared to raise the issue of corruption on their own initiative, he said. . . . Polkinghorne suggested that arbitrators not only had a right to address corruption but may have an obligation to do so. He observed that EU directives require members of the legal profession to report suspicions where it appears that an arbitration proceeding is being used as a mechanism for money laundering, meaning that arbitrators could incur liability by failing to act."). Still others point to the difficulties in dealing with claims of wrongdoing.; J. N. Summerfield, 'The Corruption Defense in Investment Dispute: A Discussion of the Imbalance between International Discourse and Arbitral Decisions" 2009 6(1) Transnational Dispute Management 11 available at https://www.transnational-dispute-management.com/article.asp?key=1357 accessed on 15 January 2017 ("How is an arbitrator to distinguish between those transactions 'that are more difficult to catagorise [sic]—' that are a product of acceptable market forces and business practices— and those which transcend that acceptable space into corruption and bribery? Sound investments that can support a national economy and provide essential services and jobs to a nation's people do not necessarily reveal the evils to which most normative arguments against corruption would point. The purpose of an investment, however, may be ambiguous and remain ambiguous throughout the arbitration proceedings. This tension is most apparent with respect to gifts, fees for acquiring permits and the dispersal of other facilitation payments. All are permitted under the FCPA. And yet, the two elements of the defense can still be present: undue influence (causation) and undue benefit (compensation).").

of wrongdoings by the investors or detailed examinations of wrongdoing that ultimately sealed the fact.[104]

In *World Duty Free v. Kenya*, Mr. Ali, the owner of the company admitted he had made a "personal donation" of US$500,000 to a former president of Kenya.[105] In order to make the payment, Mr. Ali testified that he felt a briefcase by a wall in a meeting he had with the president and at the end of the meeting, he took the briefcase where the "money had been replaced with fresh corn."[106] However, Mr. Ali felt that he "did not have a choice" and the donation was "part of the consideration."[107] He also justified his conduct by reference to a cultural practice called as the "Harambee" system, where a person "mobilized resources through private donations for public purposes."[108]

The tribunal rejected these arguments and concluded that the payment was a bribe.[109] The tribunal undertook an analysis under international law and both Kenyan and English Law to conclude that the bribe would violate the public policy of Kenya and therefore dismissed the case.[110]

Further, the tribunal did not penalize Kenya even though the tribunal noted that "it is Kenya which is here advancing as a complete defence to the Claimant's claims the illegalities of its own former President."[111] Indeed, even though the bribe had been initiated by the former President and not by the investor, the tribunal noted that the law "protects not the litigating parties but the public" and that the illegal acts of the former

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[104] Yves Fortier, 'Arbitrators, Corruption and the Poetic Experience' (Kaplan Lecture, Hong Kong, 20 November 2014) 20 ("Heightened standards of proof will, of course, make a finding of corruption very problematic as corruption is notoriously difficult to prove and direct evidence is not often available. It is not surprising that in the two cases where a positive finding of corruption was made, the corrupt conduct was admitted in one and, in the other, the tribunal, on its own, vigorously investigated the indicia of corruption.").

[105] *World Duty Free Company Limited v The Republic of Kenya*, ICSID Case No. ARB/00/7, Award (4 October 2006) [66, 130].

[106] ibid [130].

[107] ibid.

[108] ibid [110].

[109] ibid [136].

[110] ibid [179].

[111] ibid [180].

president could not be attributed to Kenya.[112] However, it was the admission of the personal donation by the owner, rather than the application of any evidentiary standard, that sealed his fate.[113]

Llamzon takes a critical approach of the reasoning by the tribunal and points to the asymmetry that exists in the tribunal's treatment of state responsibility for corruption. He correctly points that in international law, states are routinely held liable under the law of state responsibility, however, when it comes to allegations of wrongdoing in investor-state arbitration, an investor is solely held responsible creating an asymmetry. Indeed, the underlying presumption under international law is that a state can be held liable for breaching rules of state responsibility. Investor-state tribunals have, therefore, created an exception to the rules under international law and while there can be good reasons for tribunal's doing so, it is definitely not consistent with the international framework. The excerpt from Dr. Llamzon is particularly significant in this context:

> In international law, States are held to account for internationally wrongful acts through the law on State responsibility. A State is a juridical entity, after all, and its incorporeal being can only operate through the corporeal acts of the individuals and groups that represent it; these are by necessity deemed the acts of the State itself. In much the same way corporations benefit or are held liable for the acts of their officers under principles of agency found in all national systems of law, States are routinely made

[112] ibid [181, 185].

[113] Cecily Rose, 'Questioning the Role of International Arbitration in the Fight Against Corruption' [2014] Journal of International Arbitration 199-200, 203 ("*World Duty Free* arguably represents the most important exception to the general patterns due to its relatively recent vintage and the tribunal's thorough treatment of the issue of corruption. Yet, *World Duty Free* is an aberration because the arbitral tribunal benefited from direct evidence in the form of testimony by a witness for the claimant, whose counsel appears not to have appreciated the damage that such testimony would do to its case. . . . This case is unusual from an evidentiary perspective because the claimant effectively provided the respondent with proof of bribery, such that the respondent had no need to engage in fact-finding, but only had to assemble its legal arguments based on the evidence already available. The submission of this evidence by World Duty Free, and its apparent decision not to settle the arbitral proceedings, appear to have been strategic miscalculations by counsel for World Duty Free. Counsel may have failed to appreciate the legal consequences of Mr Ali's witness testimony, or may have overestimated the strength of its factual and legal arguments about Mr Ali's 'donation'. Alternatively, counsel may have been pursuing what it understood to be a risky litigation strategy, in the hope that it might prevail."); Wilske and Fox (n 72) 496 ("In many cases of corruption, the burden of proof is not really an issue because of an admission by the party that offered a bribe. This occurred in the seminal ICSID case *World Duty Free Company Ltd v The Republic of Kenya*.").

> responsible for the breaches of international obligations committed by their representatives, and a State is not excused from responsibility for acts perpetrated by its public officials simply because those acts were illegal, unsanctioned, or otherwise outside their scope of authority. When a Head of State or cabinet minister orders measures that are tantamount to the unlawful expropriation of an investment, for example, or a State's domestic courts render judgments that disrupt the financial viability of an investor's investment, the State itself is routinely held liable by arbitral tribunals, and it is no argument that the public official acted in excess of his powers or contrary to national law, or that courts are independent and cannot be controlled by the government and thus could not have been acting on behalf of that State. . . .
>
> *World Duty Free* is emblematic of an increasingly asymmetric approach to the question of attribution: whereas the corrupt acts of an investor's corporate officers and intermediaries always generates severe consequences against the investor itself, in the case of public officials of the host State, participation in corruption almost never seems to engage the responsibility of the State. This is true notwithstanding the fact that *all* internationally wrongful acts committed by public officials (*a fortiori* Heads of State) are attributable to the State and thus potentially engage its international responsibility.[114]

One basis for the asymmetry could be the fact that the state did not benefit from bribe taken from the former president of Kenya. However, the fact remains that under

[114] A. P. Llamzon, 'State Responsibility for Corruption: The Attribution Asymmetry in International Investment Arbitration' (2013) 10(3) Transnational Dispute Management 2-3 available at https://www.transnational-dispute-management.com/article.asp?key=1958 accessed on 15 January 2017 (emphasis added). Others have shared this view. Douglas Thompson, 'Arbitrators and Corruption: Watchdogs or Bloodhounds' (2014) Global Arbitration Review available at http://globalarbitrationreview.com/article/1033374/arbitrators-and-corruption-watchdogs-or-bloodhounds accessed on 15 January 2017 ("Cabrol said, it may not always be appropriate to view the state as a victim. She referred to the landmark ICSID decision of 2006 in *World Duty Free v Kenya* – in which a tribunal threw out an investor's contract claim against the state on the basis that the contract was procured through a US$2 million bribe paid to Kenya's then-president, Daniel arap Moi. She said the tribunal had failed to explain why an action of the state's highest official was not attributable to the state, as could be the case, in some circumstances, under public international law. The tribunal also failed to adequately explain its finding that the state had no knowledge of the corruption: if the state did not have sufficient controls to prevent corrupt contracts such as that with World Duty Free from being signed, then that could be a situation for which the state can be blamed, she suggested. Finally, by failing to prosecute Moi over the contract or to recover the bribe, the state had shown a lack of interest in preventing corruption. If a state shows it has no interest in the alleged corruption, should it still have the option of voiding the contract to avoid a claim against it?").

traditional rules of international law, the state would be liable for the actions of the President, even if a President acted outside the scope of its authority. Article 7 of the ILC Articles on State Responsibility provides that a person empowered to exercise elements of governmental authority shall be considered "an act of the State" even if such person "exceeds its authority" or "contravenes instructions."[115] As one commentator Yackee noted:

> The second reason that *World Duty Free* is of both scholarly and practical interest is the willingness of the tribunal to overlook the host state's own substantial involvement in the corrupt scheme. The tribunal was not faced with a contract won through the investor's bribing of a corrupt subaltern Kenyan official. Rather, the bribe directly involved the sitting head of state, acting in the official capacity of awarding a public concession. Under traditional international law concepts governing the attribution of international responsibility, there is little doubt that President Moi's actions — if a violation of public international law — would be attributed to the Kenyan state, even if his actions violated Kenyan law or were otherwise outside the scope of his presidential duties. And indeed, in *World Duty Free*, the investor made a last-ditch attempt to argue that it was inequitable to allow Kenya to benefit from its own corrupt actions. . . . But in *World Duty Free*, one party that benefitted from the underlying corrupt action — President Moi, who received, and kept, a suitcase full of money — was not a "party" to the lawsuit. Indeed, the tribunal held that because the payment to President Moi was "covert," "its receipt is not legally to be imputed to Kenya itself."[116]

It is my submission that the current state of affairs in investor-state arbitration is troubling to say the least. While it is not appropriate to permit an investor to gain access to international dispute resolution if the transaction was sullied by corruption, perhaps tribunals could require the state to bear the costs in order not to condone the state's

[115] ILC Draft Articles on State Responsibility, Article 7. The Commentary to the ILC Articles makes clear that this rule would apply "even when the organ or entity in question has overtly committed unlawful acts under the cover of its official status or as manifestly exceeded its competence. . . . the question is whether they were acting with apparent authority." James Crawford, *The International Law Commission's Articles on State Responsibility—Introduction, Text and Commentaries* (Cambridge University Press 2003) 106, 108.

[116] Jason Webb Yackee, 'Investment Treaties and Investor Corruption: An Emerging Defense for Host States' [2012] Virginia Journal of International Law Association 733-734 (emphasis added).

own corruption. Under arbitral rules, investor-state tribunals have a fair amount of discretion when it comes to awarding costs.[117] In one case involving Uzbekistan that is not in the public domain, although the tribunal dismissed the case for lack of jurisdiction on grounds dealing with corruption implicating the state, it required Uzbekistan to deposit 8 million dollars to the United Nations anti-corruption fund in reliance of its discretionary powers to award costs.[118] Approaches of this nature can help ensure that an investor's participation in corruption is not rewarded but at the same time a state is held responsible in some manner.

The only other known case involving a dismissal of a case on allegations of wrongdoings is *Metal-Tech v. Uzbekistan*. In this case, very large sums of money had been paid to consultants who were people with very close ties to the government and the question was whether these sums of money had been paid as a bribe or had been paid for lawful services.[119] Facts relating to these payments had been the subject of several procedural orders and the tribunal had put claimant "on notice" that, *inter alia*, "contemporaneous documents supporting the facts [relating to the services allegedly

[117] See eg Article 61(2) of the ICSID Convention: "In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award." See also Article 42 of the 2013 UNCITRAL Rules: "The costs of the arbitration shall in principle be borne by the unsuccessful party or parties. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case."

[118] See Luke Eric Peterson and Vladislav Djanic, 'In an innovative award, arbitrators pressure Uzbekistan – under threat of adverse cost order – to donate to UN anticorruption initiative; also propose future treaty drafting changes that would penalize states for corruption' IA Reporter (22 June 2017). The article further noted that: 'the tribunal warned that Uzbekistan's failure to make such a payment would lead to an adverse cost order in the case, with the government held liable for the costs of the proceedings, as well as reimbursing the claimant for 75% of more than $17 million in legal fees and expenses. (Conversely, if Uzbekistan made the contribution, it would bear only its own legal costs, and half the cost of the proceedings.).' Arbitrator Brigette Stern is reported to have dissented on this point: 'According to Ms. Stern, the equal role of the two parties in the corruption should be reflected in both of them equally bearing the consequences. She was of the opinion that this was achieved by both parties losing their claims before the tribunal and that there was therefore no basis for differentiating between them in relation to costs.'

[119] *Metal-Tech* (n 102) [244-266].

performed for the payments] would assist the Tribunal in reaching a conclusion regarding the Respondent's corruption defense."[120]

Further, the tribunal noted that it had "made a considerable effort to ensure that it had all relevant evidence that it needed to decide on the corruption allegations."[121] However, the evidence ultimately produced was minimal and could not provide a satisfactory explanation for the large sums and this led the tribunal to ultimately conclude that the "Claimant was unable to substantiate its contention that actual services had been carried out for legitimate purposes."[122] The tribunal also noted that under Article 1(1) of the applicable Uzbekistan-Israel BIT required that an investment be "implemented in accordance with the laws and regulations of the Contracting Party."

Since there has been corruption in the establishment of the investment "sufficient to violate Uzbekistan law," the tribunal concluded that investment was not implemented in accordance with Article 1(1) of the BIT.[123] The failure to present satisfactory evidence despite being provided an opportunity to do so led to the dismissal of the case.

(F) *Problems Associated With The Heightened Standard of Proof*

While there appears to be agreement of a heightened evidence, there is a debate on what this heightened standard should exactly be (clear and convincing or above balance of probabilities or below the criminal law standard). Further, it is not fully clear how a tribunal might apply the heightened standard and, to what extent, must a tribunal go to uncover any allegation of wrongdoing. This is, in part, because the rules provide wide discretion to an arbitral tribunal in dealing with evidentiary issues.

Further, the jurisprudence has not appropriately addressed the stage to deal with such allegations. Therefore, arguments can be raised as jurisdictional, admissibility, merits, and quantum defenses. This gives the party raising an objection an unfair

[120] ibid [253].

[121] ibid [256].

[122] ibid The question before the tribunal was whether the term "implemented" meant "established" or "established and operated." ibid [185]. Undertaking an interpretative exercise, the tribunal concluded that "asset implemented" referred to the "time when the investment was made" and that "the investment must be legal when it is initially established." ibid [193].

[123] ibid [372].

advantage to take multiple bites at the same issue. This can also result in the arbitral process getting delayed and adding to the overall expense. This is discussed below further.

(G) *Evidentiary Consequences Of Wrongdoings—It Can Give Rise to A Series of Challenges*

Arguments of wrongdoing could give rise to both jurisdictional objections as well as substantive arguments.[124] The jurisprudence has not provided a satisfactory answer to neatly categorize wrongful acts into the arbitral process and it is common to see the arguments being invoked at every opportunity possible.[125] From a costs and efficiency perspective, this is not desirable. It is hoped tribunals would address this issue in some manner, perhaps by recourse to *res judicata* principle although this may only apply if a tribunal has indeed considered an issue and dismissed it on the merits.

The potential consequences for wrongdoings are discussed below:

1. Potential Jurisdictional Challenges

Some commentators have argued that when an investor is involved in acts dealing with corruption, it forfeits its right to invoke the tribunal's jurisdiction.[126] This is premised

[124] A. C. Smutny and P. Polášek, 'Unlawful or Bad Faith Conduct as a Bar to Claims in Investment Arbitration' (2012) 9(3) Transnational Dispute Management 296 available at https://www.transnational-dispute-management.com/article.asp?key=1794 accessed on 15 January 2017 ("One may observe from the above that issues relating to the establishment of an investment may give rise to both jurisdictional objections and defenses on the merits, and also may give rise to issues under both the ICSID Convention and the investment treaty or contract at issue."). See also *Yukos Universal Limited (Isle of Man) v The Russian Federation*, UNCITRAL, PCA Case No. AA 227, Final Award (18 July 2014) [1273] (where the state argue that because of the investor's "unclear hands": "(a) theTribunal does not have jurisdiction over Claimants' claims; (b) Claimants' claims are inadmissible; and/or (c) Claimants should be deprived of the substantive protections of the ECT.").

[125] The dissenting opinion of arbitrator Cremades in the Fraport arbitration, for example, notes that "gross illegality" can result in lack of jurisdiction or inadmissibility of the claim. See *Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines*, ICSID Case No. ARB/03/25, Dissenting Opinion of Mr. Bernardo M. Cremades (16 August 2007) [40.2] ("In cases of gross illegality there may also be other reasons for the inadmissibility of a claim. In some cases, for example, the principles of good faith and public policy may bar a claim. . . . Alternatively, illegality might have consequences for jurisdiction peculiar to the circumstances of a particular dispute, as for example, where the illegality connects the dispute to events before the treaty entered into force, and therefore deprives the tribunal of *jurisdiction rationae temporis*.") (internal citations omitted).

[126] A. Crivellaro (n 95) 14 ("In the oldest international arbitration dealing with corruption, the sole arbitrator - J Lagergren - declined jurisdiction holding that when the parties have opted for corruptive practices, they have also forfeited any right to seek for assistance of the machinery of justice, be it before national courts or arbitral tribunals, for resolving disputes arising from their illicit contracts. He concluded that the dispute

on the notion that investor-state arbitration is a specialized, exceptional remedy that is available only if the investor has clean hands. Indeed, it has been observed that:

> In dismissing claims arising from an investment obtained unlawfully, some ICSID tribunals have grounded their decision on 'in accordance with law' provisions contained in many BITs; other ICSID tribunals have relied on an implicit legality requirement in Article 25(1) of the ICSID Convention; still others have invoked general principles of international law and transnational public policy. Regardless of the approach taken, however, ICSID tribunals consistently have recognized that illegality in the making of the investment, including corruption, fraud, misrepresentation, and serious violations of domestic law, will lead to the dismissal of the claim, and many of these tribunals also have awarded costs to the respondent.[127]

Further, investor-state tribunals have recognized that wrongdoings could be a bar to its jurisdiction, particularly if the treaty provides for a legality clause ("in accordance with host state laws").[128] The *Metal Tech v. Uzbekistan* case is one example where a case was dismissed on jurisdiction because of corruption, even though the tribunal

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before it was not arbitrable."). The author does go further to note: "In investment arbitration, a specific consequence of an illegality award is the investor's loss of the right to claim protection under international treaties or international law. The investor loses any procedural protection, namely the right to rely on the State's consent to arbitrate the investment disputes before a treaty-based tribunal, and equally loses any substantive protection, namely the enjoyment of the treaty benefits, on the ground that whoever invests in breach of the laws of the host country is precluded or estopped from invoking any treaty protection. In conclusion, the 'clean hands' requirement applies to every claimant also in international arbitration, be it commercial or an investor-to-State arbitration." ibid 22. Zachary Douglas, on the other hand, proposes an alternative theory to deal with jurisdictional objections based on corruption. Zachary Douglas, 'The Plea of Illegality in Investment Treaty Arbitration' (ICSID Review, vol 29(1), 2014) 156, 178 ("The host State's consent to international arbitration is obviously a prerequisite for the tribunal's jurisdiction. But for jurisdictional purposes it is sufficient that the claimant has acquired an asset that is cognizable by the law of the host State and the circumstances surrounding the acquisition satisfies the aforementioned economic characteristics of an investment. If the asset is not recognized under the host State's laws then there is no investment. If the foreign national has purported to acquire property rights in a manner that is not effective to pass title or another legal interest under the host State's laws then there is no investment. This is the extent of the inquiry into compliance with the host State's laws that is relevant to establish the tribunal's jurisdiction. This, as has already been explained, is the meaning of the common provision that the assets constituting an investment must be acquired in accordance with the laws of the host State, but the same principle would apply in the absence of such a provision.").

[127] Lamm, Greenwald and Young (n 95) 342.

[128] See eg *Gustav F. W. Hamester GmbH & Co KG v Republic of Ghana*, ICSID Case No. ARB/07/24, Award (18 June 2010) [123] ("An investment will not be protected if it has been created in violation of national or international principles of good faith; by way of corruption, fraud, or deceitful conduct; or if its creation itself constitutes a misuse of the system of international investment protection under the ICSID Convention. It will also not be protected if it is made in violation of the host State's law.").

acknowledged the asymmetry in its decision.[129] In this situation, a challenge on jurisdiction is more appropriate because the BIT expressly requires that an investment must be in accordance with host state laws, which in turn would not permit corruption or wrongdoings.

2. Potential Admissibility Challenges

Another basis to challenge wrongdoing is that the claims are not admissible by virtue of such corruption,[130] and, therefore the tribunal should dismiss the case. The

[129] *Metal-Tech* (n 102) [389] ("the Tribunal lacks jurisdiction over Metal-Tech's treaty claims as well as over Metal-Tech' claims based on Uzbek law. While reaching the conclusion that the claims are barred as a result of corruption, the Tribunal is sensitive to the ongoing debate that findings on corruption often come down heavily on claimants, while possibly exonerating defendants that may have themselves been involved in the corrupt acts. It is true that the outcome in cases of corruption often appears unsatisfactory because, at first sight at least, it seems to give an unfair advantage to the defendant party. The idea, however, is not to punish one party at the cost of the other, but rather to ensure the promotion of the rule of law, which entails that a court or tribunal cannot grant assistance to a party that has engaged in a corrupt act."). See also *Inceysa Vallisoletana S.L. v Republic of El Salvador*, ICSID Case No. ARB/03/26, Award (2 August 2006) [247-248] ("the inclusion of the clause 'in accordance with law' in the agreements for reciprocal protection of investments follows international public policies designed to sanction illegal acts and their resulting effects. It is uncontroversial that respect for the law is a matter of public policy not only in El Salvador, but in any civilized country. If this Tribunal declares itself competent to hear the disputes between the parties, it would completely ignore the fact that, above any claim of an investor, there is a meta-positive provision that prohibits attributing effects to an act done illegally."); *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award (27 August 2008) [144, 146] ("The Tribunal finds that Claimant's conduct is contrary to the principle of good faith which is part not only of Bulgarian law . . . but also of international law - as noted by the tribunal in the *Inceysa* case. The principle of good faith encompasses, inter alia, the obligation for the investor to provide the host State with relevant and material information concerning the investor and the investment. This obligation is particularly important when the information is necessary for obtaining the State's approval of the investment.").

[130] One tribunal has discussed the difference between jurisdiction and admissibility as follows: "International decisions are replete with fine distinctions between jurisdiction and admissibility. For the purpose of the present proceedings it will suffice to observe that lack of jurisdiction refers to the jurisdiction of the Tribunal and inadmissibility refers to the admissibility of the case. Jurisdiction is the power of the tribunal to hear the case; admissibility is whether the case itself is defective—whether it is appropriate for the tribunal to hear it. If there is no title of jurisdiction, then the tribunal cannot act." *Waste Management Inc. v United Mexican States*, ICSID Case No. ARB(AF)/98/2, Dissenting Opinion of Keith Highet (2 June 2000) [57-58]. See also *Oil Platforms (Iran v United States of America)*, Judgment (6 November 2003), ICJ Rep 2003 161 p 29 ("Objections to admissibility normally take the form of an assertion that, even if the Court has jurisdiction and the facts stated by the applicant State are assumed to be correct, nonetheless there are reasons why the Court should not proceed to an examination of the merits."); *HOCHTIEF Aktiengesellschaft v Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Liability (29 December 2014) [206] ("The Tribunal considers that the principles governing the admissibility of claims are rooted not only in the notion of a claim that is inherently ripe and properly made, but also in the proper administration of justice. Admissibility is concerned both with the claim itself and with the arbitral process. In a case where an allegation of impropriety, made in the context of a plea of inadmissibility, is based upon facts that are inextricably bound up with the range of facts upon which the substantive claim is based, it will usually not be practicable to decide upon the question as a preliminary issue. If the tribunal has jurisdiction to hear the case, it should in such circumstances do so."). This is

argument here is that an investor who has not complied with host state laws (particularly in situations where the treaty does not contain an express legality clause) or international public policy and therefore cannot have its case be admissible. As noted by a commentator:

> First, where there is an explicit "in accordance with host State law", clause which have the effect of depriving foreign investments from treaty protection and, in principle, such clause should therefore operate as a bar to the jurisdiction of an investment treaty tribunal facing with the finding of investor corruption in investor –state disputes. . . .
>
> Second, even in the absence of an explicit 'in accordance with host State law' clause, a strong argument can be made that the finding of investor corruption which will similarly deprive the investor from treaty protection. However, unlike the cases where the explicit 'in accordance with host State clause' is present, the proper place to deal with such investor corruption is at the admissibility or at the merits phase of the arbitral proceedings, not at the stage of jurisdiction.[131]

Other cases have raised wrongdoings objections as both jurisdictional and admissibility challenges although tribunals are not fully clear on how they would treat the issue.[132]

3. Potential Merits or Damages Arguments

Finally, allegations of wrongdoing could be arguments at the merits phase[133] either a defence to reject a substantive argument or as a counterclaim. As an author has suggested:

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true even though both the ICSID Convention and the UNCITRAL Rules on Arbitration are silent on admissibility. See for ICSID Convention: *CMS Gas Transmission Company v Republic of Argentina*, ICSID Case No. ARB/01/8, Award on Jurisdiction (17 July 2003) [41] ("The distinction between admissibility and jurisdiction does not appear quite appropriate in the context of ICSID as the Convention deals only with jurisdiction and competence."); for UNCITRAL Arbitration: *Methanex Corporation v United States of America* UNCITRAL, Partial Award (7 August 2002) [107] ("It follows from the text of Article 21(1) of the UNCITRAL Rules that the Tribunal has the express power to rule on objections that it has "no jurisdiction". This text, however, confers no separate power to rule on objections to "admissibility.").

[131] T. Sinlapapiromsuk, 'The Legal Consequences of Investor Corruption in Investor-State Disputes: How Should the System Proceed?' 2013 10(3) Transnational Dispute Management 28 available at https://www.transnational-dispute-management.com/article.asp?key=1959 accessed on 15 January 2017.

[132] See eg *Yukos Universal Limited* (n 124) [1273] (where the issue of "unclean hands" was pleaded as both a jurisdictional issue as well as an admissibility issue).

> Taken together with the relevant provisions in the investment contract or the applicable law, such rights may constitute the conceptual basis for the admissibility of treaty-based counterclaims. This statement holds true especially in cases involving corruption where the host-State may be interested in being awarded damages to compensate for the negative consequences of the failed-corrupted investment.[134]

The application of counterclaims for potential actions of wrongdoings is subject to the general practice in investor-state arbitration whereby counterclaims are typically restricted only if it relates to the same subject matter.

> [T]wo conditions must be met for an ICSID tribunal to entertain a counterclaim: (i) the counterclaim must be within the jurisdiction of the Centre, which includes the requirement of consent, and (ii) it must "aris[e] directly out of the subjectmatter of the dispute", the second requirement also being known as the "connectedness" requirement. Essentially, the second requirement supposes a connection between the claims and the counterclaims. It is generally deemed an admissibility and not a jurisdictional requirement.[135]

If the alleged unlawful act relates to misconduct, it may be a potential basis to reduce damages under the doctrine of contributory fault. The *Yukos* case and the

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[133] See eg *Wena Hotels LTD v Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award(8 December 2000) [111] ("Tribunal considers Egypt's contention that 'Claimant improperly sought to influence the Chairman of EHC with respect to the award of the leases' for the Luxor and Nile hotels. If true, these allegations are disturbing and ground for dismissal of this claim. As Egypt properly notes, international tribunals have often held that corruption of the type alleged by Egypt are contrary to international *bones mores*."); *Hesham Talaat M Al-Warraq v Republic of Indonesia*, UNCITRAL, Award on Respondent Preliminary Objections to Jurisdiction and Admissibility of the Claims (21 June 2012) [99] ("the Tribunal must look closely at the Parties' claims concerning the allegations of criminal conduct, which include the corruption and money laundering allegations against the Claimant on the one hand, and the solicitation of bribes allegations against the Respondent on the other hand. This is not a question of jurisdiction but of the merits, to be dealt with at the merits phase of this arbitration.").

[134] S. Dudas and N. Tsolakidis, 'Host-State Corruption: A Remedy for Fraud or Corruption in Investment-Treaty Arbitration' (2013) 10(3) Transnational Dispute Management 7 available at https://www.transnational-dispute-management.com/article.asp?key=1962 accessed on 15 January 2017 .

[135] *Metal-Tech* (n 102) [407] (the tribunal ultimately stated it did not have jurisdiction over the counterclaims). See also ICSID Convention, Article 46: "Except as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counterclaims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre."

Occidental case were instances where the tribunal relied on the doctrine of contributory fault to reduce damages.[136]

4. Interim Conclusions on Allegations of Wrongdoings

What the exact consequences of an unlawful act might depend on the language in the applicable treaty or contract or on specific factual circumstances. For example, if a treaty has a legality clause ("investments must be made in accordance with host state laws") and the allegation of wrongdoings relates to breach of domestic law, then it is likely to be raised as a jurisdictional objection. If not, it can be an issue for admissibility and/or the merits. What is unsatisfactory at this stage is allegations of wrongdoings are often invoked at all three stages which increases the costs and reduces efficiency of the process. It is hoped that tribunals will devise techniques to deal with the consequences of wrongful acts in a manner that balances the significant issues at stake but also preserves the integrity of the arbitral process. For example, tribunals could state in the award that its findings on wrongdoings are *res judicata* and cannot be raised at subsequent stages of the proceeding, provided the tribunal has made a finding after having considered the merits.

Further, as discussed above, the ruling of the *World Duty Free* tribunal appears to be inconsistent with general principles of international law wherein wrongdoing of state actors does not provide a general exemption to the state. It remains to be seen how future tribunals will address similar situations.

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[136] *Yukos Universal Limited* (n 124) [1637] ("Having considered and weighed all the arguments which the Parties have presented to it in respect of this issue the Tribunal, in the exercise of its wide discretion, finds that, as a result of the material and significant misconduct by Claimants and by Yukos (which they controlled), Claimants have contributed to the extent of 25 percent to the prejudice which they suffered as a result of Respondent's destruction of Yukos. The resulting apportionment of responsibility as between Claimants and Respondent, namely 25 percent and 75 percent, is fair and reasonable in the circumstances of the present case."); *Occidental Petroleum Corporation and Occidental Exploration and Production Company v Republic of Ecuador*, ICSID Case No. ARB/06/11, Award(5 October 2012) [678, 680] ("The Tribunal agrees that an award of damages may be reduced if the claiming party also committed a fault which contributed to the prejudice it suffered and for which the trier of facts, in the exercise of its discretion, considers the claiming party should bear some responsibility. . . . In the view of the Tribunal, the Claimants should pay a price for having committed an unlawful act which contributed in a material way to the prejudice which they subsequently suffered when the *Caducidad* Decree was issued.").

VI. PROBLEMS AND CRITICISMS ASSOCIATED WITH THE CONCEPT OF "STANDARD OF PROOF"

The concept of standard of proof is wrought with problems and is relatedly criticized for several reasons. It is worth examining these criticisms before we examine the different types of standards of proof because this can help provide some context on how investor-state tribunals operate.

The first criticism is that investor-state tribunals have not consistently applied principles relating to standard of proof. This can perhaps be because there are differences between the civil and common law conceptions on standard of proof, for example, whether the concept of standard of proof is procedural or substantive in nature. All these varying conceptions can result in different formulations for the standard of proof and this has led to a fair dealing of confusion. As noted by Waincymer:

> Arbitral statutes and rules rarely articulate the principles of standard of proof in any detail. The Eritrea-Ethiopia Claims Commission noted that international adjudication rules do not typically "articulate the quantum or degree of proof that a party must present to meet this burden of proof." Standard of proof is seen as being more problematic as it not only may have issues of characterization in terms of procedural versus substantive law but might "also reflect subjective standards ("inner conviction") of arbitrators.[137]

While this criticism is true, it is perhaps a direct consequence of the international nature of these disputes where both civil law and common law conceptions on evidence are likely to collide. This is also true for the ICJ where standard of proof has not been clarified meaningfully.[138] For example, the Separate Opinion of Judge Burgenthal in the

[137] Jeffrey Waincymer (n 6) 767.

[138] See generally Riddell and Plant (n 1) 130 ("there appears to be a divide between the Judges from the different legal traditions on the question of the standard of proof. Those with a common law background have repeatedly called for clarification of this issue in order to introduce some certainty for the parties, and it is perhaps predictable that the majority of judges advocating a particular standard are from a common law background. . . . Those with a civil law background do not consider that there is anything amiss with the way the Court deals with the matter at present, being accustomed to the matter being 'internal' to the individual judge, and not something which needs to be publicly articulated, and they do not consider it necessary to adopt a rigid standard. In addition, there may be those amongst the common law lawyers who believe that a concrete standard is inappropriate in the ICJ because it may deny the Court some of its usual flexibility of approach to matters of evidence and proof, which is important to retain on

Oil Platforms case highlights the problems that come up in dealing with issues dealing with standard of proof and how the ICJ has not clarified the appropriate standard of proof:

> One might ask, moreover, where the test of "insufficient" evidence comes from and by reference to what standards the Court applies it? What is meant by "insufficient" evidence? Does the evidence have to be "convincing", "preponderant", "overwhelming" or "beyond a reasonable doubt" to be sufficient? The Court never spells out what the here relevant standard of proof is.[139]

Judge Higgins similarly provided a detailed exposition relating to the lack of clarification by the ICJ on matters dealing with standard of proof in her dissent in the *Oil Platforms* case:

> 30. . . . it may immediately be noted that neither here nor elsewhere does the Court explain the standard of proof to be met. That a litigant seeking to establish a fact bears the burden of proving it is a commonplace, well-established in the Court's jurisprudence. But in a case in which so very much turns on evidence, it was to be expected that the Court would clearly have stated the standard of evidence that was necessary for a party to have discharged its burden of proof.
>
> 31. As to standard of proof in previous cases, the Court's prime objective appears to have been to retain a freedom in evaluating the evidence, relying on the facts and circumstances of each case.
>
> 32. In *Corfu Channel*, the Court simultaneously rejected evidence "falling short of conclusive evidence" and referred to the need for "a degree of certainty." In *Military and Paramilitary Activities in and against Nicaragua*, the Court did not even attempt to articulate the standard of proof it relied on, merely holding from time to time that it found there was "insufficient" evidence to establish various points.
>
> 33. Beyond a general agreement that the graver the charge the more confidence must there be in the evidence relied on, there is thus little to help parties appearing before the Court

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this issue given the wide range of subjects of varying degrees of importance which are disputed in the ICJ.").

[139] *Oil Platforms (Islamic Republic of Iran v United States of America)*, Separate Opinion of Judge Burgenthal [2003] [41] (emphasis added).

> (who already will know they bear the burden of proof) as to what is likely to satisfy the Court. Other judicial and arbitral tribunals have of necessity recognized the need to engage in this legal task themselves, in some considerable detail. The principal judicial organ of the United Nations should likewise make clear what standards of proof it requires to establish what sorts of facts. Even if the Court does not wish to enunciate a general standard for non-criminal cases, it should in my view have decided, and been transparent about, the standard of proof required in this particular case.[140]

The views of Judge Higgins reflect the reality even in the investor-state context where the underlying rationale for lack of clarity on standards of proof tends to be explained by the notion of free evaluation of evidence by the arbitral tribunal. However, Judge Higgins also notes that the Court should have ideally expressed the standard of proof in the case at hand. This can help create a consistent and harmonious development of the law more generally but can also help the parties in a case appreciate the appropriate amount of evidence that it has to provide. The options before the ICJ against an ICJ decision are fairly limited but, in the investor-state context, the possibility of annulment exists. More generally, as discussed above, there is fortunately a high degree of agreement on the standard of proof in many areas.

The second criticism is that reliance on arbitral discretion or notions of free evaluation of evidence can be highly subjective and unfair to a litigant in the dispute resolution process. As a commentator has noted: "It may appear that the answer to the question, what is an acceptable standard of proof for international tribunals, depends to some extent on the fact that in this regard there is subjectivity in judgment."[141] This is a serious argument.

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[140] Oil Platforms (Islamic Republic of Iran v United States of America), Separate Opinion of Judge Higgins [2003].

[141] Chittharanjan F. Amerasinghe (n 1) 233. As noted above, the author goes further to state: "To frame the matter in terms of 'moral conviction' or 'convincing or satisfying the judge' may not always reveal the ultimate test which is being applied. There may be, in order to do justice, a need to have a more concrete standard. In any case tribunals have not hesitated, where necessary, to indicate standards of proof in different and specific terms, although sometimes no more than those general terms have been used." ibid 233. See also George C. Economou, *Admissibility and Presentation of Evidence in International Commercial Arbitration*, available at http://www.cyprusarbitration.com.cy/userfiles/files/Seminars/Nov2012/AdmissibilityAndPresentationOfEvid

VII. CONSEQUENCES OF FAILING TO APPLY THE APPROPRIATE STANDARD OF PROOF

Failure to apply the appropriate standard of proof will result in the dismissal of an allegation being made by a party as being "not proved." The query is whether a party could potentially seek annulment of an arbitral award on grounds that a tribunal failed to apply the appropriate standard of proof.

An investor could bring a challenge under Article 52(1)(d) on the grounds that there has been a "serious departure from a fundamental rule of procedure."[142] A tribunal seriously departs from a fundamental rule of procedure, if it denies the parties' their respective right to be heard or fails to treat them with equality. A tribunal denies the parties their respective right to be heard if it denies to one or both of the parties the right to make submissions with respect to core issues in dispute in derogation of applicable evidentiary principles or if it purposefully disregards evidence or submissions before it. If a tribunal, therefore, permitted a party to present its evidence and made a finding, there can be no challenge on this ground in relation to the standard of proof.

But, the failure to hear parties can be a potential basis for the challenge on this ground. In order to demonstrate how this ground would work in practice, an illustrative case is discussed. In *Fraport v. Philippines*, after the close of proceedings, respondent submitted additional documents, purporting to be the prosecutorial record of domestic criminal proceedings relating to the dismissal of charges against persons related to the company in which the claimant held an investment.[143] Claimant sought to submit additional evidence to show that the prosecutorial record included more documents than

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ence_Nov2012.pdf, p. 3 ("As a general rule, a party has the burden of proving the facts necessary to establish its claim or defense. As regards the standard of proof, however, i.e., the quantum or degree of proof used to determine whether this burden has been discharged has not evolved into a general rule. There is very little precedent on the subject. This fact is in part a reflection of the general rule that a tribunal has discretion to determine the value of all evidence submitted by the parties. Such discretion is inherently subjective; the tribunal must decide whether, based on evidence submitted by the parties, a particular claim or defence has been established. This discretionary authority by its nature invites an entirely personal assessment of evidence by the tribunal.").

[142] See Chapter 2 for a further discussion on annulment.

[143] *Fraport AG Frankfurt Airport Services Worldwide v Philippines*, ICSID Case No ARB/03/25, Decision on Annulment (23 December 2010) [120(b)].

were produced by Respondent.[144] The tribunal instructed the parties not to submit any further evidence with regard to domestic criminal proceedings but relied on the evidence submitted by Respondent in dismissing the case. Here, the failure to produce additional evidence directly impacted the applicable standard of proof in issue. The *ad hoc* committee concluded that the decision not to permit additional submissions on the prosecutorial record constitutes a violation of the right to be heard. It noted in particular:

> The Convention does not define "a fundamental rule of procedure." . . . The *travaux* of the ICSID Convention show a consensus that not all rules of procedure contained in the ICSID Arbitration Rules would fall under this concept. Rather, the concept was restricted to the principles of natural justice, including the principles that both parties must be heard and that there must be adequate opportunity for rebuttal. . . .
>
> In view of the fact that the information as to what documents were in the possession of the Prosecutor had been shown to be unreliable, the Tribunal could not properly, in the Committee's view, have made such a determination, without hearing both parties on the adequacy and effect of the record before the Prosecutor and considering such further evidentiary enquiries or proceedings as may have been necessary in light of those submissions. Despite this, the Tribunal had pre-emptively, and before it had even received the additional factual material, directed by letter dated 14 February 2007 that "the Tribunal does not wish to receive any submissions with respect to this material from either party." . . .
>
> The Tribunal ought not to have proceeded to analyse and consider this evidence itself in its deliberations without having afforded the parties the opportunity to make submissions on it, and availed itself of the benefit of those submissions.[145]

On the application of the standard of proof, however, it is to be recalled that a tribunal has broad discretion to freely evaluate the evidence and therefore arguments that a tribunal did not apply the appropriate standard to the facts is likely to be difficult. It is worth emphasizing here that a tribunal does not possess absolute, free discretion.

[144] ibid [127-129].

[145] ibid [181, 186, 227-228, 230].

As noted above, an annulment committee can never be asked to re-evaluate the evidence on its merits and, itself, apply guided discretion to the underlying dispute at bar in the arbitration. Rather, annulment applications test whether the exercise of discretion was guided by the fundamental principles of due process, natural justice or the rule of law and will control for decisions in which tribunals have become unmoored from those principles.[146] In other words, there will be a high deference accorded to the decisions of a tribunal unless it can be shown that the failure to apply the standard of proof violated a rule of due process, natural justice, or the rule of law. Further, the finding of the arbitral tribunal needs to be outcome determinative to meet the "serious" requirement in the criteria.

VIII. THE USE OF CIRCUMSTANTIAL EVIDENCE AS RECOGNIZED AND APPLIED BY INVESTOR-STATE ARBITRATION

On several issues in investor-state arbitration, particularly (as noted above) for allegations relating to wrongdoing, direct evidence may not be available.[147] In such instances, tribunals have permitted the use of circumstantial evidence, wherein the tribunal would accept indirect evidence or rely an inference to decide an issue.[148] This is not unique to investment arbitration and is recognized by other international courts and tribunals. The underlying rationale for this is that it would be very hard to possess direct evidence to prove everything in any case. The problem is particularly acute in the investor-state context. Unlike a domestic court, arbitral tribunals do not have police powers to demand additional evidence from the parties or from third parties. Therefore,

[146] *Daimler Financial Services AG v Argentina*, ICSID Case No ARB/05/1, Decision on Annulment (7 January 2015) [265] ("With respect to the rules of procedure that are to be considered fundamental, the Committee considers that they are the rules of natural justice i.e., rules concerned with the essential fairness of the proceeding.").

[147] Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge University Press 1956) 322 ("In cases where direct evidence of a fact is not available, it is a general principle of law that proof may be administered by means of circumstantial evidence. In the *Corfu Channel Case* (Merits) (1949), before the International Court of Justice, Judge Azevedo said in his dissenting opeinion: 'A condemnation, even to the death penalty, may be well-founded on indirect evidence and may nevertheless have the same value as a judgment by a court which has founded its conviction on the evidence of witnesses'.").

[148] For further discussions on inference, see chapter 6.

an international body may not be able to insist on direct evidence in all situations. Indeed, commentators have opined in the context of the ICJ that:

> Over the years, the ICJ has taken a flexible approach to the admissibility of evidence. The Court evaluates the authenticity, reliability, and persuasiveness of the materials submitted by the parties. One possible reason for the Court's malleable approach, according to the ICJ's former Registrar, Eduardo Valencia- Ospina, is the Court's perceived ability to "ascertain the weight and relevance of particular evidence" due to the judges 'qualifications and experience.' The Court, therefore, permits the parties to submit many types of direct and circumstantial evidence. Because of this flexible approach, the Court has not found the need to articulate its evidence policy in many cases.[149]

The mere fact that circumstantial evidence is permitted does not imply that the party would not have to meet the requisite burden and standard of proof.[150] The only implication here is that the party could rely on indirect evidence or on an inference to prove the issue.[151]

Further, investor-state arbitral tribunals have noted that circumstantial evidence could be admissible, particularly in situations where direct evidence might be difficult,

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[149] Michael P Scharf and Margaux Day, 'The International Court of Justice's Treatment of Circumstantial Evidence and Adverse Inferences' [2012] Chicago Journal of International Law 123, 125 (emphasis added). See also Bin Cheng (n 147) 322 ("In cases where direct evidence of a fact is not available, it is a general principle of law that proof may be administered by means of circumstantial evidence.").

[150] See eg *Lao Holdings* (n 37) [11] ("The Tribunal notes the Claimant's contention that against a sovereign state a Claimant 'is often unable to furnish direct proof of facts giving rise to responsibility' because, as the Claimant argues, such evidence is often 'exclusively within the control of the Government'. Nevertheless where, as here, the Claimant's case is based on 'inferences of fact and circumstantial evidence' . . . a Tribunal must be careful not to shift the onus of proof from the Claimant to the Respondent Government or to bend over backwards to read in inferences against 'the sovereign state' that are simply not justified in the context of the whole case.").

[151] Tribunals have used circumstantial evidence to make findings of fraud. See eg *Europe Cement* (n 82) [167] ("In the Tribunal's view the circumstantial evidence points strongly to the conclusion that Europe Cement did not own shares in CEAS and Kepez at the relevant time. In view of the failure of the Claimant to produce the documents ordered, the Tribunal has no direct evidence that any particular document placed before it was or was not authentic, but the implication of lack of authenticity is overwhelming. All of the evidence placed before the Tribunal, and not contradicted by the Claimant, is that the share transfer agreements are not what they claim to be and that no transfer of CEAS and Kepez shares to Europe Cement took place at least before 12 June 2003. Indeed, the evidence points to the conclusion that the claim to ownership of the shares at a time that would establish jurisdiction was made fraudulently.").

but further corroboration would be necessary and a heightened standard above the balance of probabilities would apply. As noted by the *Tokios Tokelės v. Ukraine*:

> As regards the standard, three possibilities have attracted support. First, the usual standard, which requires the party making an assertion to persuade the decision-maker that it is more likely than not to be true. Second, that where the dispute concerns an allegation against a person or body in high authority the burden may be lower, simply because direct proof is likely to be hard to find. Third, that in such a situation, the standard is higher than the balance of probabilities.[152]

In *Tokios*, the investor had published materials in support of the opposition leader and, therefore, the investor alleged that its investment was destroyed by "a deliberate campaign to punish [the company] for its impertinence in printing materials opposed to the regime."[153] While the tribunal noted that direct evidence might be hard, it still noted that the evidence needed to be proved by the investor. The tribunal noted that the investor's submission was filled with strong descriptions (*e.g.*, "wrongful", "frivolous", "unfounded", "without adequate grounds", "patently unjust", "false" etc.), however, the tribunal ultimately concluded that the investor never established the "campaign" to destroy its business with clear evidence.[154] Therefore, to conclude, in case of allegations of wrongdoings through circumstantial evidence, the evidence must lead to a clear conclusion of the appropriate standard.[155] In other words, the party must convince the tribunal of the heightened standard for wrongdoings even without direct evidence.

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[152] *Tokios Tokelés v Ukraine*, ICSID Case No. ARB/02/18, Award (26 July 2007) [124].

[153] ibid [123].

[154] ibid [137] ("this long and costly dispute turns on a short question of inference. Having reflected with great care, giving full weight to the contrary opinion of our colleague, each of us has come to the firm conclusion that the case for the Claimant on this decisive issue is not made out, and we therefore join in dismissing all the causes of action asserted under the Treaty.").

[155] See eg *Fraport* (n 97) [479] ("The Tribunal holds that considering the difficulty to prove corruption by direct evidence, the same may be circumstantial. However, in view of the consequences of corruption on the investor's ability to claim the BIT protection, evidence must be clear and convincing so as to reasonably make-believe that the facts, as alleged, have occurred. Having reviewed the Parties' positions and the available evidence related to the period prior to Fraport's Initial Investment, the Tribunal has come to the conclusion that Respondent has failed to provide clear and convincing evidence regarding corruption and fraud by Fraport."); *Rumeli Telekom AS and Telsim Mobil Telekomunikasyon Hizmetleri AS v Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award (29 July 2008) [709] ("Claimants, however, advanced a very much broader case than this, founded on an allegation that the

The next form of circumstantial evidence relates to hearsay evidence that might be reflected in the media. In the digital age we live in, several new forms of communication have arisen and data is much more easily assessable through the internet. Parties, therefore, seek to rely on evidence from digital media sources. Investor-state tribunals have general taken a liberal form of admitting such evidence but when the evidence involves "hearsay" (*e.g.*, newspaper articles), tribunals recognize that they would not be of much value in the absence of other forms of corroborating evidence.[156]

The approach of investor-state tribunals when it comes to circumstantial evidence may appropriately be summarized as follows: reliance on circumstantial evidence is permissible but it needs to be corroborated and the appropriate standard of proof must be established. Failure to do so can lead to a dismissal of that claim.

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entire process leading to the expropriation of their shares in Kar-Tel was brought about by a conspiracy between the shareholders of Telcom Invest, the Investment Committee, and the judges of the courts who heard the various stages of the legal proceedings, to bring about a result which benefited members of the family of the President of the Republic of Kazakhstan, and thereby indirectly the President himself. The evidence for this was mainly, if not wholly circumstantial, but it is in the nature of such an allegation that direct evidence of a conspiracy is unlikely to be available. The Tribunal has therefore considered the evidence with particular care, reminding itself that an allegation such as this must, if it is to be supported only by circumstantial evidence, be proved by evidence which leads clearly and convincingly to the inference that a conspiracy has occurred.").

[156] *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC BV v Republic of Paraguay*, ICSID Case No. ARB/07/9, Further Decision on Objections to Jurisdiction (9 October 2012) [234] ("The Claimant also invokes a number of newspaper articles in support of its claims. For example, it refers to an article in *Última Hora* dated 31 July 2001 ("*No se pagarán deudas a las SGS y la BIVAC*"), that reports that Minister Oviedo announced that he will not pay a single *guaraní* to BIVAC without Congress' authorization, as the debt relates to a contract that was entered into by former governments. It invokes an article dated 7 May 2005 in *ABC Color* ("*Hacienda anuncia investigación de deudas con SGS y BIVAC*"), which asserts that the Minister will launch a new investigation, notwithstanding the recent report by the Customs Office vindicating the Claimant. Another article published by the same newspaper on 18 May 2006 ("*Gobierno solo pagará las deudas legítimas*", *ABC Color*) includes a quote from President Duarte, during a visit to France, in which it is alleged that he stated that "I do not have anything to do with previous Governments" and that no debt would be paid that was not clear. The following day a further article was published ("*Deuda con los franceses data de la era Wasmosy*", *ABC Color*), alleging a statement by President Duarte that suggested the obligations had been assumed by a previous Government that may not have accrued them lawfully. Interesting as they may be, the Tribunal is wary about placing too much reliance on newspaper reports, which may provide an incomplete or partial account of what has been said, even assuming that the quotations are accurately recorded and reproduced. The Tribunal has no objection to treating such reports, which are in the public domain as admissible but of limited, if any, probative weight. That said, even assuming such reports to be fully accurate, they do not, in the view of the Tribunal, constitute a repudiation by Paraguay of the Claimant's rights to relief under the Contract, or an exercise of sovereign authority that can reasonably be said to go beyond behaviour that an ordinary contracting party might adopt if it had decided not to make a payment owing under a contractual obligation.").

IX. CONCLUSION

The research question for this thesis states: ***"Whether there are any principles of evidence as recognized and applied by investor-state tribunals or do the principles of evidence merely fall within a tribunal's discretionary powers?"*** The evidentiary principle that has been considered here is standard of proof and, therefore, the relevant question is whether there are any principles relating to standard of proof as recognized and applied by investor-state tribunals?

The following conclusions can be drawn from the thesis:

First, standard of proof can be understood as the amount of evidence that must be provided by the party that has the burden (*i.e.*, the party making the allegation). Indeed, the concept of standard of proof is closely related but distinct from the concept of burden of burden of proof. Burden of proof is a concept dealing with responsibility and answers the question "who must prove?," while standard of proof is a concept dealing with the degree of conviction and answers the question "how much needs to be proved?" A related distinction is that burden of proof is "absolute"—*i.e.*, the party with the burden has the burden and is not relaxed even in extreme situations of hardships. The standard of proof is "relative." This means that issues relating to standard of proof will vary based on the nature of the allegation being put forward by the party with the burden.

Second, most arbitral rules are silent on principles relating to standard of proof and do not provide much guidance. Therefore, a tribunal has broad discretion to deal with evidentiary matters, including matters dealing with standard of proof. However, a tribunal does not possess unfettered discretion when it comes to dealing with standard of proof. Indeed, a decision on standard of proof must be appropriate for there is the risk that the ultimate award could be challenged or even annulled.

Third, there are three broad standards of proof applied by arbitral tribunals: (i) the *prima facie* standard at the jurisdictional phase (discussed in chapter 2 above); (ii) the balance of probabilities or preponderance of evidence standard; and (iii) the heightened

standard of proof, with a discussion on allegations of wrongdoing that are increasingly invoked.

Fourth, the most common standard of proof in investor-state arbitration is the "balance of probabilities" or "preponderance of evidence" standard. This standard requires an evaluation of all the evidence produced by both parties on a particular issue and this evaluation would ultimately result in the tribunal determining which party's evidence was more likely than not to be true. This standard would extend to most situations in investor-state arbitration, except the limited categories where a heightened standard of proof would apply. This standard would be similar with the civil law's "inner conviction" test, where an arbitrator must be personally convinced of the evidence produced. Indeed, while there is a difference on how civil and common lawyers might approach the issue, the practical consequence is the same: you evaluate the evidence produced and be convinced that the evidence is more likely than not true.

Fifth, for matters that implicate "serious" issues or issues that might touch on criminal law matters, the balance of probabilities/preponderance test will not be appropriate, instead a heightened standard of proof would apply. A heightened standard is warranted because these allegations are often easy to make but may not always be easy to prove. Further, these standards can have very serious consequences and can result in dismissal of the case. The heightened standard has to be above the balance of probabilities standard but below the criminal law standard of proof beyond reasonable doubt.

Sixth, in light of the fact there might be a the lack of direct evidence when dealing with allegations of wrongdoings, circumstantial evidence might be relied upon, as long as it meets the high standard outlined above. This is because direct evidence will be almost impossible on matters dealing with wrongdoings in any investor-state arbitration. However, the evidence still need to meet the heightened standard of evidence.

Seventh, the failure to apply the appropriate standard of proof can result in a challenge for annulment under Article 52(1)(d) of the ICSID Convention on grounds that there is a "serious departure from a fundamental rule of procedure." But, it is to be recalled that a tribunal has broad discretion to freely evaluate the evidence and

therefore arguments that a tribunal did not apply the appropriate standard to the facts is likely to difficult. It is worth emphasizing here that a tribunal does not possess absolute, free discretion. Further, an annulment committee can never be asked to re-evaluate the evidence on its merits and, itself, apply guided discretion to the underlying dispute at bar in the arbitration. Rather, annulment applications test whether the exercise of discretion was guided by the fundamental principles of due process, natural justice or the rule of law and will control for decisions in which tribunals have become unmoored from those principles. Therefore, it is my conclusion that there will be a high deference accorded to the decision of the arbitral tribunal unless it can be established that the failure to apply the standard of proof violated a rule of due process or rule of law.

PART II

EVIDENTIARY PRINCIPLES & THE TRIBUNAL: PRESUMPTIONS AND INFERENCES

Chapter 5: Evidentiary Presumptions

Chapter 6: Inferences from Evidence or its Absence

Introduction to Part II

"Despair ruins few, presumptions many."

-Benjamin Franklin

Part II deals with the evidentiary principles as recognized and applied by the arbitral tribunals on evidentiary presumptions and inferences. Unlike Part I, the findings in this Part are made by the tribunal and, therefore, warrant a special part. Indeed, an arbitral tribunal determines when to apply a presumption or inference considering the facts of the case and the evidence before it.

Chapter 6 deals with presumption where the tribunal makes a determination of fact without direct evidence or appropriate project related-circumstantial evidence but the tribunal is convinced of the truth of a fact based on either the relevant general surrounding circumstances (judicial presumption) or based upon the applicable law (legal presumption). Chapter 6 examines the evidentiary principles under which a tribunal may decide to apply a presumption.

Chapter 7 deals with inferences which refers to a conclusion that, as a matter of *plausibility* of a fact, must be concluded to be true in light of other relevant and probative record evidence as well as party conduct in the arbitral proceedings. Chapter 7 examines the evidentiary principles under which a tribunal may decide to apply an inference.

As is noted above, Part II focuses on the role of the arbitral tribunal in determining when to apply a presumption of inference. This is significant because an arbitral tribunal has discretion in determining when to apply these. Therefore, the consequences for falling to apply a presumption or inference would necessarily be subject to a very high degree of deference to the tribunal's discretion. The precise consequences for failing to apply the relevant evidentiary principles are discussed below.

CHAPTER 5—EVIDENTIARY PRESUMPTIONS AS APPLIED IN INVESTOR-STATE ARBITRATION

I. INTRODUCTION AND PRESUMPTIONS IN GENERAL

The research question seeks to understand whether there is any evidentiary principle in relation to presumptions as an evidentiary principle or does it merely fall with a tribunal's discretionary powers to determine when to apply a presumption. As an initial remark, tribunals can make findings of fact by reference to presumptions. The use of a presumption means that the tribunal makes a determination of fact that is not premised upon direct evidence or project-specific circumstantial evidence. It is my argument that through a presumption, the tribunal is, instead, convinced of the truth of a fact premised upon the proof of relevant general surrounding circumstances (*e.g.*, large, unexplained payments may be construed to be a bribe) or based upon the applicable law (*e.g.*, children are presumed to be the lawful heirs of their parents). Presumptions are also usually rebuttable by the other party.[1] The use of presumptions is ubiquitous in investor-state arbitrations, as it is in other domestic and international disputes, because the predicate of a legal claim typically is the asserted deviation by one or both the parties of relevant general practices or expected background circumstances by the other.

This Chapter seeks to examine how investor-state tribunals have recognized and applied presumptions and what the consequences for falling the apply the presumption would be. First, I note that most tribunals do not explain or articulate their reliance on presumptions or inferences. This is in sharp contrast with Chapters in Part I above dealing with burdens and standards of proof, where we observe articulations by investor-state tribunals, albeit not always in a consistent or clear manner. In Part II, therefore, the research aims to focus on situations where a tribunal has, in fact, relied on a presumption or inference. A judicial presumption or an inference, in particular,

[1] Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge University Press 1956) 304 ("Proof may also be dispensed with as regards facts, the truth of which, though not within judicial knowledge, is presumed by the tribunal. Without going so far as to holding them to be true, it is legitimate for a tribunal to presume the truth of certain facts or certain state of affairs, leaving it to the party alleging the contrary to establish its contention. These presumptions serve as an initial premises of legal reasoning.").

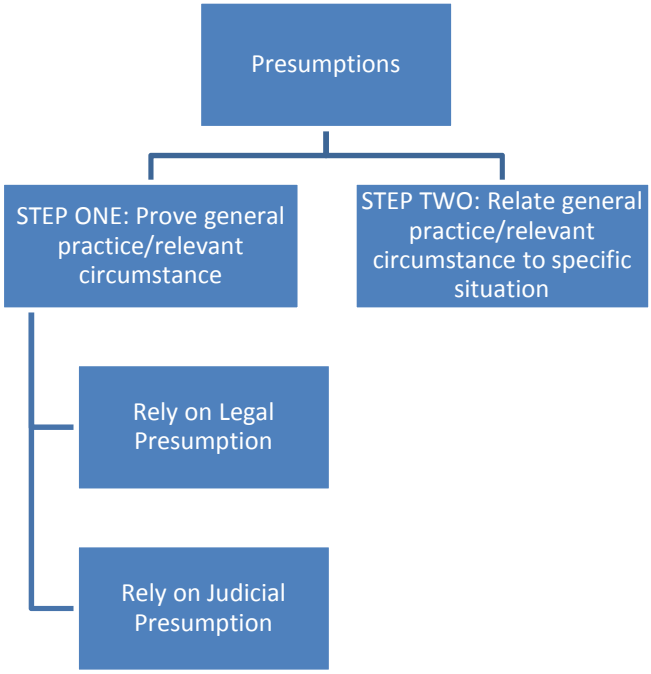
would depend entirely on the facts of a case and, therefore, tribunals do not articulate standards for judicial presumptions or inferences. These Chapters, therefore, have illustrations to identify the application of these concepts. This approach is consistent with the overall research question, *i.e.*, to observe how investor-state tribunals have recognized and applied evidentiary principles, including presumptions and inferences.

Towards appreciating the broad scope of presumptions, this Chapter has been divided into V Sections. Section I provides a background to the notion of presumptions. Section II then discusses how presumptions operate in relation to arbitral rules. Section III and IV discuss the two types of presumptions—"Legal Presumptions" and "Judicial Presumptions" respectively. Section V discusses the consequences for failing to apply the presumptions. Section VI provides a brief conclusion in light of the overall thesis.

Since a tribunal can make legal findings by relying on presumptions, it is my submission that a party can affirmatively invoke a presumption and the opposing party may seek to rebut such a presumption.

For a party to rely upon or rebut a presumption, a two-step process must be adopted. First, it is necessary to prove that a general practice or relevant circumstance exists. This first step can be satisfied by proving a legal presumption by reference to the law applicable to the dispute. Alternatively, this first step can be satisfied through proof of fact that certain general practices or circumstances exist (*i.e.*, through a "judicial" presumption). Second, it is necessary to relate that general practice or relevant circumstance to the particular dispute. This second step requires a showing that the relevant question in dispute is a specific instance that would typically be governed by the general practice or circumstance proved as part of the first step.

Figure 5.1: Types of Presumptions



This distinction between legal and judicial presumptions has another significance for the purposes of an arbitration. A legal presumption flows from the applicable law and, therefore, the failure to apply a legal presumption may be the basis for an annulment motion on the grounds that the tribunal "manifestly exceeded" its powers by failing to applying the applicable law. A judicial presumption, on the other hand, is a conclusion that is drawn from the general facts and situations in the light of the totality of evidence. This falls within a tribunal's general decision making powers which is, as a general rule, not the basis for an annulment.[2] The limited exception here might be a situation where a tribunal fails to permit a party to be heard and thereby falls within the annulment provision that there is a "serious departure from a fundamental rule of procedure."

(A) *Introduction and Types of Presumptions Commonly Recognized in International Law*

Before I discuss how investor-state tribunals have recognized and applied presumptions, this section provides a brief introduction as to how international courts and tribunals have looked at presumptions. As an initial remark, it is my initial

[2] See Chapter 2 for further discussion.

submission that international courts and tribunals habitually use presumptions to resolve disputed questions of fact.[3] Like the burden of proof, or the permissibility of using specific inferences to make determination of facts, the use of presumptions has been recognized as legitimate by the ICJ, WTO dispute settlement panels, and other international dispute resolution bodies.[4]

Commentators note that there are two kinds of presumptions in public international law.[5] The first kind of a presumption is a "legal presumption."[6] Legal presumptions, also known by the Latin phrase *praesumptiones iuris*, refer to situations in which "a legal norm supposes (automatically) that certain facts are established in a given situation."[7] In the context of a legal presumption, the applicable law permits the drawing of certain rebuttable conclusions without need to adduce additional facts.[8] Examples of this in international law would be the legal presumption that a state acts in good faith but the presumption can be rebutted by the other party.[9]

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[3] In the ICJ context, see generally Robert Kolb, *The Elgar Companion to the International Court of Justice* (Edward Elgar 2014) 241-3; in the WTO context, see generally Michelle Grando, *Evidence, Proof, and Fact-Finding in WTO Dispute Settlement* (Oxford University Press 2009) 104. In the context of other international tribunals, see Durward V. Sandifer, *Evidence Before International Tribunals* (University Press of Virginia 1975) 143.

[4] See authorities cited in n 3 above. See also Chittharanjan F. Amerasinghe, *Evidence in International Litigation* (Martinus Nijhoff Publishers 2005) 214 ("The sources of evidentiary presumptions are the recognized sources of international law or of international law applicable by the particular tribunal. The sources in a particular case may be different for arbitral tribunals, the ICJ and IATs. By that they emanate from the relevant sources may be accepted.").

[5] See Durward V. Sandifer (n 3) 107, 142.

[6] Robert Kolb (n 3) (Edward Elgar 2014) 936-937 ("there are ordinary legal presumptions (*praesumptiones juris*). . . . Here, a legal norm automatically supposes that certain facts are established in a given situation. So, if a particular state of affairs exists, certain connected facts are deemed by the applicable law to exist likewise, without the need to prove them. . . . In municipal law it is presumed that the child of a married couple is their issue. The law creates such presumptions for reasons of justice and/or for the sake of legal certainty. . . . That does not mean that the presumed fact is definitively proved. It is only a presumption. It is then for the opposing party to show that, in the particular case the court is considering, the presumption is not justified—that the fact in dispute does not exist."); Chittharanjan F. Amerasinghe (n 4) 211 ("Presumptions prescribed by law requiring conclusions of facts from established facts are generally described as 'legal presumptions' . . .").

[7] See n 6 above.

[8] ibid.

[9] See eg Bin Cheng (n 1) 305 ("according to another general principle of law, good faith is to be presumed, whilst an abuse of right is not."); *Flughafen Zürich A.G. and Gestión e Ingenería IDC S.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Award (18 November 2014), ¶ 637 ("En esta labor, el punto de partida debe ser el principio de que todos los actos emanados de un Estado

The second kind of presumptions is "judicial" or "human" presumptions.[10] Judicial presumptions permit the drawing of inferences on the basis of regular practice in a certain field rather than through the applicable law.[11] Judge Kreća explained the use of judicial presumptions, also known by the Latin phrase *praesumptiones hominis*, in international law in his separate opinion in the *Case Concerning Legality of Use of Force* as follows:

> Judicial presumption, along with legal presumption, is one of the main sorts of presumption in international law. It means that a certain fact or state of affairs, even though it has not been proved, is taken by an international tribunal as truthful. As such it does not necessarily coincide with, or is not equivalent to, the fact or the state of affairs. As far as the reasoning of the existence of judicial presumption is concerned, considerations of a practical nature are prevalent. Judicial presumption is a weapon to avoid waiting to get to know precisely the facts and situation on which is dependent the existence, content or cessation of the right that would have adverse consequences for interested subjects or that would render difficult due course of legal proceedings.[12]

Thus, a judicial presumption would permit a conclusion that when a person places cash on the register at a grocery store that the person intends to use the bill for payment of the goods placed on the conveyer belt.

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gozan de una presunción de legalidad, y es el que alega la denegación de justicia a quien compete la carga de probarla."); *Asian Agricultural Products LTD (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award (27 June 1990), ¶ 56 ("Rule (J) - The international responsibility of the State is not to be presumed. The party alleging a violation of international law giving rise to international responsibility has the burden of proving the assertion") (internal citations omitted).

[10] See Durward V. Sandifer (n 3) 107, 142.

[11] See Robert Kolb (n 3) 937 ("there are presumptions of fact or reasonable inference (*praesumptiones hominis*). . . . As a function of his experience of life and awareness of its realities, the judge concludes that certain facts which *have* been established, give him reasonable grounds for thinking that certain other facts must also exist. The result is that he accepts those further facts for the purpose of the case, on the basis of what the French call his 'intimate conviction' (*intime conviction*)."); Chittharanjan F. Amerasinghe (n 4) 211-212 ("there are situations also in which courts draw inferences from established facts. These are not prescribed by law but are tools of reasoning used by judges. They are sometimes described as "judicial presumptions." They are, in fact, and are better described as, inferences drawn by judges.").

[12] *Legality of Use of Force (Prelim.) (Serbia and Montenegro v U.K.)*, 2004 I.C.J. Rep. 1307, 1394, 1400-1 (15 December) (Kreća J., concurring) (emphasis added).

(B) *Function of Presumptions in General*

Before I discuss how investor-state tribunals have recognized and applied presumptions, I would like to provide a brief discussion on why the doctrine of "presumptions" is a useful tool for tribunals and parties. This can help give context to the tribunal's reliance on presumptions. The discussions below are based on decisions by international courts and tribunals.

It is my first submission that presumptions serve an efficiency or prudential function. It would, indeed, be highly impractical to require litigants to prove every fact with direct or even circumstantial evidence. As the ICJ noted in the *Corfu Channel* case, "[i]t would be going too far for an international court to insist on direct and visual evidence and to refuse to admit, after reflection, a reasonable amount of human presumptions with a view to reaching that state of moral, human certainty with which, despite the risk of occasional errors, a court of justice must be content."[13]

This efficiency permits litigants to prove their case in both an expeditious and cost-sensitive manner, granting the parties effective judicial relief. In other words, the "law, however much it tends to establish the truth and to be truthful, actually pays more attention to finding useful and suitable solutions for the given situation, rather than allowing, in an attempt to establish truth as such, the rights and obligations that exist to fall through or to be harmed."[14] The concern for expeditious and cost-sensitive proof – justice delayed is justice denied – is the greater in the context of a flexible dispute resolution mechanism such as arbitration.

In some instances, particularly in the investor-state context, the function of presumptions may have an additional function beyond the prudential concerns of being expeditious. Rather, it concerns the basic fairness of proceedings. In the absence of presumptions, the use of burdens of proof would mean that the mere allegation of the absence of a necessary jurisdictional element or element of claim could cause such a

[13] *Corfu Channel Case (Merits) (U.K. v Albania)*, 1949 I.C.J. Rep. 4, 78, 91 (9 April) (Azevedo J., dissenting).

[14] *Legality of Use of Force (Prelim.) (Serbia and Montenegro v U.K.)*, 2004 I.C.J. Rep. 1307, 1394, 1401 (15 December).

claim to fail. In such circumstances, the defendant would make artful offensive use of burdens of proof for instance by requiring the opponent to prove a negative.[15]

In those circumstances, the availability of presumptions addresses the absurdity of a burden of production that would be hard to meet with any kind of specificity. Such a use of presumptions "draws on the common experience to make a reasonable inference from what is known to what is unknowable."[16] The availability of presumptions thus provides an alternative, and general, means by which a party can satisfy its requisite burdens of proof and production.

II. ARBITRATION RULES AND THE APPLICATION OF PRESUMPTIONS IN GENERAL

Investor-state tribunals have different grants of authority with regard to their invocation of legal and judicial presumptions. Legal presumptions are codified as a matter of the applicable law.[17] To apply this law is to give effect to the presumption it prescribes. In the context of ICSID proceedings, Article 42(1) of the Convention codifies that ICSID tribunals must determine and apply the applicable law to the dispute and most domestic (and indeed international) systems recognize presumptions:

> Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.[18]

In the context of UNCITRAL proceedings, the same power is codified in Article 35 of the 2013 Arbitration Rules and Article 33 of the 1976 Arbitration Rules.[19]

The nature of legal presumptions as forming part of the applicable law has significant consequence for the power of tribunals and the review of arbitral awards.

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[15] Robert Kolb (n 3) 241 (discussion proof of negative facts in ICJ jurisprudence).

[16] *Sovereignty over Pulau Ligitan and Pulau Sipidan (Indonesia v Malaysia)*, 2002 I.C.J. 625, 691, 692 (Franck J., dissenting).

[17] See Durward V. Sandifer (n 3) 107, 142.

[18] ICSID Convention, Article 42.

[19] 1976 UNCITRAL Arbitration, Article 33; 2013 UNCITRAL Arbitration, Article 35.

The tribunal does not have any discretion with regard to the application of legal presumption once the tribunal has established its existence in the applicable law. The tribunal rather is duty bound to apply them. Consequently, the determination of the existence of any legal presumption, as well as its application, is reviewable not as a matter of the general evidentiary powers of the tribunal but rather pursuant to its application (or failure to apply) the relevant applicable law. Indeed, the failure to apply the relevant applicable law can be the basis for a party to seek the annulment of the award. Several arbitral tribunals have noted that the failure to apply the applicable law can be a "manifest excess of powers" under Article 52 of the ICSID Convention, however, it cannot be a mere error in the application of the applicable law.[20]

In contrast, a tribunal's use of judicial presumptions – presumptions based upon factual proof of a general practice or circumstance – falls within the scope of the tribunal's discretionary powers within the context of evidence. In the context of the ICSID proceedings, it squarely falls within the scope of ICSID Arbitration Rule 34.[21] ICSID Arbitration Rule 34(1) states that "[t]he Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value."[22] In the context of a judicial presumption, the tribunal deems that the probative value of a fact about general

[20] See eg *Wena Hotels LTD. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Annulment Proceeding (5 February 2002), ¶ 22 ("The Committee is mindful of the views expressed *Klöckner* I, *Amco* I, and *MINE* to the effect that the failure to apply the proper law may constitute a manifest excess of power and a ground for annulment."); *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No.ARB/01/7, Decision on Annulment (21 March 2007), ¶ 47 ("An award will not escape annulment if the tribunal while purporting to apply the relevant law actually applies another, quite different law. But in such a case the error must be 'manifest,' not arguable, and a misapprehension (still less mere disagreement) as to the content of a particular rule is not enough."); *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the Ad Hoc Committee on the Application for Annulment of Mr Soufraki (5 June 2007), ¶ 85 ("ICSID ad hoc committees have commonly been quite clear in their statements – if not always in the effective implementation of these statements – that a distinction must be made between the failure to apply the proper law, which can result in annulment, and an error in the application of the law, which is not a ground for annulment."); *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Annulment (30 December 2015), ¶ 58 ("The provisions on applicable law are an essential element of the parties' agreement to arbitrate. The application of a law other than that agreed to by the parties may constitute an excess of powers and can be a ground for annulment. An error in the application of the proper law, even if it leads to an incorrect decision, is not a ground for annulment. Therefore, the misapplication of a particular rule, which is part of the correctly identified applicable law, does not amount to an excess of powers.").

[21] ICSID Arbitration Rule 34(1).

[22] ibid.

practices in a specific area permits the drawing of an inference that this practice was followed in the instance at bar.[23] It is expressly authorized to do so by the terms of Arbitration Rule 34(1).[24] Tribunals have similar powers in the context of UNCITRAL proceedings.[25] Therefore, the power of a tribunal to make conclusions on the basis of presumptions flows from the arbitration rules. In this circumstance, it is hard to seek the annulment of an award because a tribunal has the ability to make such determinations based on the facts.

The notion of presumptions as an evidentiary principle is also very closely linked to other evidentiary principles. As noted in Chapter 1, one of the purposes of this research is to observe how evidentiary principles interact with each other.[26] These are discussed below in greater detail.

(A) *The Relationship Between Presumptions and Burdens of Proof*

Presumptions and burdens of proof interact very closely with each other. The application of a presumption functionally reverses the burdens of proof and production.[27] When a tribunal determines that a presumption applies to the case, and that the case fits within the scope of the presumption, it effectively requires the party seeking to move the case outside of the presumption to produce relevant and probative evidence why the presumption should not govern the dispute.[28]

It is again important carefully to distinguish the decision of a tribunal to rely upon legal and judicial presumptions. In the context of a legal presumption, the presumption

[23] For further discussion on inferences, see chapter 6.

[24] ICSID Arbitration Rule 34(1).

[25] David D. Caron & Lee Caplan, *The UNCITRAL Arbitration Rules* (2nd ed. Oxford University Press 2013) 580-1 (excerpting Iran-US Claims Tribunal jurisprudence to this effect).

[26] See Chapter 1, § II above.

[27] See eg Christoph Schreuer *et al*, *The ICSID Convention: A Commentary* (Cambridge University Press, 2nd ed. 2009) 669 ("if a party adduces that proves *prima facie* the facts alleged, the burden of proof may shift to the other party, who needs to produce evidence to rebut the presumption."); Mojtaba Kazazi, *Burden of Proof and Related Issues: A Study on Evidence Before International Tribunals* (Kluwer 1996) 239 (relating presumptions to "a fact [which] is held to be true indiscriminately in all cases unless the contrary is proven."); Robert Kolb (n 3) 242 (discussing the burden of proof on parties seeking to rebut legal presumptions).

[28] See Durward V. Sandifer (n 3) 146 ("While certain presumptions, therefore, may affect the responsibility of a party for the production of evidence, they are seldom strictly applied by international tribunals.").

in fact assigns the relevant burden of proof.[29] It determines which party is considered to be the "movant" with regard to the proof or disproof of specific elements of claim or defense.[30] A failure by a tribunal to determine and apply the burden of proof correctly when purporting to rely upon a legal presumption constitutes an error of law, or failure to apply the applicable law, depending upon the circumstance of the specific case just as much as removing an element or factor from a claim or defense as requiring proof or substantiation does.[31]

In the context of a judicial presumption, the question lies differently. Proof that the tribunal should refer to a judicial presumption does not determine who should be viewed as a moving party for purposes of determining the assignment of burdens of proof.[32] Rather, it is a determination that the party carrying the burden of evidence and production has satisfied both, meaning that the non-moving party must rebut the application of the presumption to the case at hand.[33] In the context of judicial presumptions, what shifts is solely the burden of evidence because the judicial presumption facially satisfies the moving party's burden of proof.

(B) *The Relationship Between Presumptions and Inferences*

Presumptions and inferences are closely linked concepts and operate closely with one another. Indeed, all presumptions use inferences to find application in tribunal

[29] See Robert Kolb (n 3) 242 ("The consequence of applying a [legal] presumption is to assist the administration of law by shifting the burden of proof to the other party, where the law considers that it should more conveniently lie.").

[30] See Bin Cheng (n 1) 332 ("Indeed, it may be said that the term *actor* in the principle *onus probandi actori incumbit* is not to be taken to mean the plaintiff from the procedural standpoint, but the real claimant in view of the issues involved. The ultimate distinction between the claimant and the defendant lies in the fact that the claimant's submission requires to be substantiated, whilst that of the defendant does not.") The use of a legal presumption precisely determines that in a certain circumstance, as a matter of law, a submission does not require independent substantiation. For a discussion of the basic principle regarding *actori incumbit onus probandi*, see Chapter 2.

[31] See R. Doak Bishop & Silvia Marchili, *Annulment under the ICSID Convention* (Oxford University Press 2012) 92-3 (discussing the distinction between erroneous application and non-application of law in the context of a partial application of the relevant law).

[32] See Robert Kolb (n 3) 243 (noting that in the context of judicial presumptions "there is no shift in the burden of proof.").

[33] ibid.

decision-making.[34] Presumptions relate the specific dispute to a general context established either as a matter of law (*i.e.*, for legal presumptions) or as a matter of factual proof (*i.e.*, for judicial presumptions).[35] As noted above, in the context of a legal presumption, the general context is established by authoritative prescription – the applicable law.[36] In the context of a judicial presumption, the general context is established by factual proof (potentially through contemporaneous documents or expert testimony).[37] The question in both instances is whether the dispute at bar follows the general rule established by the presumption or whether it has been shown to deviate from that general rule by other record evidence.[38]

To determine whether an issue falls within the general rule set out by a presumption requires the same kind of plausibility analysis as the drawing of a record inference.[39] For a tribunal to rule upon an inference is to determine that the record as a whole makes it more plausible than not that the relevant conduct followed the general rule.[40] To make such a plausibility determination, the tribunal will need to establish how closely related the general practice is to the conduct at issue in the dispute and whether there exists any proof in the record (direct or circumstantial) that one or both of the parties did not follow general practice.[41] The closer the link of general practice to the disputed issue, the more plausible the conclusion that the general practice was followed.[42]

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[34] Mojtaba Kazazi (n 27) 239. Cf. Christoph Schreuer *et al* (n 27) 669; see Robert Kolb (n 3) 243.

[35] ibid ("Presumptions are conclusions drawn from known facts about unknown facts. The known facts serving as the basis for a presumption could be either a particular proven fact related to the case at issue, or a fact which is to be held true indiscriminately in all cases unless the contrary is proven.").

[36] Robert Kolb (n 3) 241 ("a legal norm supposes (automatically) that certain facts are established in a given situation. Thus, if a factual situation arises, certain facts, which are linked to it, are by law considered to exist without need to prove them.").

[37] ibid 243.

[38] See Mojtaba Kazazi (n 27) 239.

[39] For further discussions on inferences, see chapter 6.

[40] ibid.

[41] ibid.

[42] ibid.

III. LEGAL PRESUMPTIONS

As noted above, legal presumptions are derived from the applicable law. In investor-state arbitrations, the legal presumptions could be derived from the relevant applicable law, general international law, or from municipal law depending on the case.

(A) *General International Law Presumptions in Investor-State Arbitration*

Every investor-state arbitration implicates international law in some way.[43] International law can be applicable because the cause of action arises in connection with an international legal obligation of the host state such as an obligation contained in a bilateral investment treaty.[44] International law might be applicable because of the choice of law rules included in the law governing the arbitration – such as would be the case in the context of ICSID arbitration pursuant to Article 42 of the ICSID Convention or, in the case of UNCITRAL arbitration would be the case under Article 35 of the 2013 UNCITRAL Arbitration Rules.[45]

There is debate whether international law has (or can) give rise to truly legal presumptions.[46] The argument raised by skeptics of international legal presumptions is that international law is too insufficiently developed to give rise to independent

[43] See Christopher Dugan *et al*, *Investor-State Arbitration* (Oxford University Press 2008) 213 ("As investment treaty decisions multiply, it is likely that most tribunals will routinely test host state laws and actions taken pursuant to them against the standards of international law."); Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press 2d ed., 2012) 288.

[44] See Campbell McLachlan, Laurence Shore & Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford University Press 2008) 6-7 ("Even where the arbitration involves a sovereign State, public international law is only one potentially applicable source of law. However, the conventional approach to applicable law in commercial arbitration is displaced in the context of a claim founded upon an investment treaty. In that case, the treaty itself forms the basis for the parties' applicable rights and duties. The treaty is itself 'governed by international law'. As such it must be 'applied and interpreted against the back-ground of the general principles of international law.").

[45] ICSID Convention, Article 42; 2013 UNCITRAL Arbitration Rules, Article 35; David D. Caron & Lee Caplan, *The UNCITRAL Arbitration Rules: A Commentary* (Oxford University Press 2d ed. 2013) 116 ("Public international law fulfils the criteria of 'law' within the meaning of Article 35(1), regardless of any disagreement surrounding the concept of *lex mercatoria*. Although public international law in relations between private enterprises is not likely to provide the most appropriate legal framework, in relations between a state or a state entity on the one hand and a private enterprise on the other, a non-domestic law such as public international law may be the suitable applicable substantive law. In practice, certain significant state contracts have included choice of law clauses that combine domestic law, international law and general principles of law.").

[46] See Durward V. Sandifer, (n 3) 141-2; Mojtaba Kazazi, *Burden of Proof and Related Issues: A Study on Evidence Before International Tribunals* (Kluwer 1996) 241.

presumptions.[47] This debate now appears resolved in practice in favor of establishing international legal presumptions.[48] Thus, the International Court of Justice has applied such legal presumptions in the disposition of disputes brought before its bar.[49] To the extent that international law is the applicable law to an investor-state arbitration, an investor-state tribunal could similarly be bound by those presumptions. Some of these presumptions are discussed below.[50]

(B) *Municipal Law Presumptions in Investor-State Arbitration*

Many investor-state arbitrations are governed not only by international law, but also by municipal law with regard to certain aspects of the dispute.[51] This can be the case in the context of a *renvoi* in the international legal obligation at issue in a dispute to the municipal law of the host state.[52] This can also be the case because the choice of law rules included in the law governing the law of the arbitration point to the application of municipal law alongside international law.[53] To the extent that a municipal legal question is relevant to the tribunal's resolution of an investor-state dispute, municipal law presumptions would also be applicable.[54]

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[47] See Durward V. Sandifer (n 3) 142 ("This legal concept involves a superior authority and a precision not yet present in international law. Presumptions cannot, therefore, in the present stage of the development of international law, occupy a role comparable to that which they play in municipal law.").

[48] Compare Robert Kolb (n 3) 241-3 (laying out the jurisprudence supporting the creation of true international law legal presumptions) with Mojtaba Kazazi, *Burden of Proof and Related Issues: A Study on Evidence Before International Tribunals* (Kluwer 1996) 243 ("Given the present status of international procedure, the answer to the question could vary depending on what is meant by legal presumptions in international law."). Notably, Kazazi similarly resolves that legal presumptions, properly understood, are typically part of international law dispute resolution. ibid, 244-5.

[49] See eg *Maritime Delimitation and Territorial Question Between Qatar and Bahrain (Qatar v Bahrain)*, 2001 I.C.J. 40, 145, 166 (Bedjaoui, Ranjeva & Koroma JJ., dissenting) (discussing the legal presumption that "islands situated within the territorial sea of the coastal State appertain to that State"). For a discussion of early jurisprudence, see Robert Kolb (n 3) 243.

[50] See Section IIID below.

[51] Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press 2d ed., 2012) 81-2 (discussing choice-of-law considerations in investment contracts).

[52] *Fraport AG Frankfurt Airport Services Worldwide v Philippines*, ICSID Case No ARB/03/25, Award (16 August 2007), IIC 299 (2007) [394].

[53] ICSID Convention, Article 42.

[54] See *Yukos Universal Limited (Isle of Man) v The Russian Federation*, PCA Case No AA 227, Final Award (18 July 2014), IIC 652 (2014) [306-7] (applying the presumption in the context of applicable domestic tax law).

If the tribunal discovers that the legal presumptions of municipal law and international law cannot both be applied in a given case, the tribunal will have to make a determination of which presumption to follow. Although an argument might be raised that primacy must be given to international law in the context of a conflict between municipal and international law at least in ICSID arbitration, a careful contextual and functional analysis will be necessary to determine which presumption most fits the circumstances of the case at bar.[55] In some circumstances, this may require the rejection of a proposed legal presumption premised in international law despite the applicability of international law as a constitutive element of the applicable law.[56]

(C) *Rebuttal Nature of Legal Presumptions*

Legal presumptions typically remain rebuttable (unless the applicable law treats the presumption as being irrebuttable).[57] They represent default positions assumed by the law.[58] In order to rebut a legal presumption, the party moving against the application of the presumption must do more than displace a reasonable inference. It bears the burden of proof that the legal presumption is not applicable with regard to the dispute at bar either because of direct evidence contradicting the default assumption of the law or because of circumstantial evidence to the same effect.[59]

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[55] Compare Prosper Weil, 'The State, the Foreign Investor and International Law: The No Longer Stormy Relationship of a Menage A Trois', l5 ICSID Review 401 (2000) with W. Michael Reisman, 'The Regime for Lacunae in the ICSID Choice of Law Provision and the Question of Its Threshold', 15 ICSID Review 362 (2000).

[56] See eg *Fraport AG Frankfurt Airport Services Worldwide v Philippines*, ICSID Case No ARB/03/25, Decision on Annulment (23 December 2010), IIC 478 (2010) [192-193] (rejecting application of the international law presumption of innocence in investor-state arbitration: "The maxim '*in dubio pro reo*' also encapsulates an important human rights protection that —'[e]veryone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.' But such a principle cannot be applied in the context of international arbitral proceedings instituted by an investor against a state. Indeed, the application of such a presumption could itself, in the context of ICSID proceedings, amount to a failure of due process since it may unbalance the essential equality between the parties. The principle in dubio has proper application as a right of the defence in criminal proceedings, because it counterbalances the coercive power of the state. It cannot, however, be transposed into the context of international arbitral proceedings because to do so would be inconsistent with the principle of equality of the parties.").

[57] Robert Kolb (n 3) 242.

[58] ibid.

[59] ibid.

In exceptional circumstances, legal inferences can be non-rebuttable.[60] Legal presumptions that are not rebuttable include that all parties are charged with knowledge of the law (*ignorantia juris non excusat*).[61] In the context of investor-state arbitration, even such typically non-rebuttable presumptions have been deemed in some cases to be rebuttable. The observations of the tribunal in the Fraport v. Philippines case are a good example to demonstrate this:

> When the question is whether the investment is in accordance with the law of the host state, considerable arguments may be made in favour of construing jurisdiction *ratione materiae* in a more liberal way which is generous to the investor. In some circumstances, the law in question of the host state may not be entirely clear and mistakes may be made in good faith. An indicator of a good faith error would be the failure of a competent local counsel's legal due diligence report to flag that issue. Another indicator that should work in favour of an investor that had run afoul of a prohibition in local law would be that the offending arrangement was not central to the profitability of the investment, such that the investor might have made the investment in ways that accorded with local law without any loss of projected profitability. This would indicate the good faith of the investor."[62]

An illustration of this can be seen in the *Quiborax v. Bolivia* case.[63] In this case, the question before the tribunal was whether the investor did indeed possess the appropriate nationality to qualify as an "investor." The investor stated that its shareholder status is proved "exclusively by reference to the shareholders registry."[64] Bolivia challenged this noting that the shareholder registry merely created a presumption of shareholder status, which could be rebutted by other evidence to show who the real shareholders were and, in the present case, the shareholder registry was

[60] ibid [243].

[61] ibid (discussing the legal non-rebuttable legal presumption of *ignorantia juris nocet*).

[62] *Fraport AG Frankfurt Airport Services Worldwide v Philippines*, ICSID Case No ARB/03/25, Award (16 August 2007), IIC 299 (2007) [396].

[63] *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction (27 September 2012).

[64] ibid 82.

filled with multiple irregularities.[65] The tribunal agreed with the Respondent: "The Tribunal therefore agrees with the Respondent's legal expert, Prof. Salame, that the shareholders registry 'merely creates a rebuttable presumption . . . in favour of the person therein, and 'does not exhaust the discussion over who really is the shareholder of the corporation'."[66] Therefore, the tribunal noted that the presumption may be rebutted by other evidence.[67]

(D) *Illustrations for Legal Presumptions as Recognized and Applied by Investor-State Tribunals*

Tribunals have recognized and applied legal presumptions in relation to certain matters. For example, the submission of audited financial statements implies the inference that the financial information included in the statements is accurate and reliable. The *Aucoven* tribunal faced an instance in which the respondent challenged the financial information contained in audited financial statements.[68] The tribunal permitted review of these statements but noted that "the very reason why financial statements are audited is to verify their reliability. Hence in the Tribunal's view, audited financial statements benefit from a *prima facie* presumption of reliability."[69] The underlying rationale is that under domestic laws audited financial reports are typically deemed to be reliable. It was not sufficient to rebut this presumption to submit isolated errors in the statement.[70] Although not clearly stated in the decision, rebutting the

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[65] ibid 82-83.

[66] ibid 119 (ellipsis in original).

[67] The *Methanex v. Mexico* case offers an example of how this would operate when the tribunal stated: "Accordingly, these materials can be *only* assumed facts for the purpose *only* of the Tribunal's decision in this Award on the USA's challenges on jurisdiction and admissibility - and nothing more. Given that the legal burden of proving its disputed factual allegations remains to be discharged by Methanex, together with the legal presumptions of innocence and the legal doctrine of omnia praesumuntur rite esse acta, nothing in our recital of factual materials below should be taken as casting the slightest shadow over the targets of Methanex's allegations. Nor should this Award indicate any conclusions held by the Tribunal as to the eventual proof of these assumed facts because we have formed no view at all as to their merits, one way or the other."). *Methanex Corporation v. United States of America*, UNCITRAL, Partial Award (7 August 2002), ¶ 45.

[68] *Autopista Concesionada de Venezuela CA (Aucoven) v Bolivarian Republic of Venezuela*, ICSID Case No ARB/00/5, Award (23 September 2003) [248].

[69] ibid.

[70] ibid ('In the case at hand, Venezuela's criticism of the reliability of the financial statements does not provide sufficient elements to rebut that presumption. Hence, subject to rectifying the errors mentioned

presumption would require proof of material error in the statements either by expert evidence or comparison of the statements to otherwise available recorded evidence.

Similarly, proof that the government took certain official action implies an inference that the government acted in a valid manner. A line of cases has recognized a presumption of the validity of official government acts.[71] This presumption inures both in favor of the host state in defending against allegations of wrongdoing,[72] and in favor of investors relying upon official acts as a predicate for their claims.[73] This jurisprudence is premised in a well-known public international law presumption.[74] This presumption is consistent with the burden of proof being placed on the party seeking to prove a violation of law.

Further, proof that the investment was made in the context of a specific regulatory regime alone does not imply the inference that the investor had a reasonable

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above, the Tribunal will rely on the financial statements on record in order to establish the amount of out-of-pocket costs owing to Aucoven.').

[71] *Sistem Mühendislik İnşaat Sanayi ve Ticaret AŞ v Kyrgyz Republic*, ICSID Case No ARB(AF)/06/1, Award (9 September 2009) [82]; Paushok v Government of Mongolia, interim measures (Sept. 2, 2008), IIC 351 (2008), ¶ 81; Int'l Thunderbird Gaming Corp. v United Mexican States, UNCITRAL-NAFTA, Separate Opinion of Thomas Wälde (26 January 2006) [60], [91].

[72] *Sistem Mühendislik İnşaat Sanayi ve Ticaret AŞ v Kyrgyz Republic*, ICSID Case No ARB(AF)/06/1, Award (9 September 2009) [82]; *Paushok v Government of Mongolia*, Decision on Interim Measures (2 September 2008) [81] ("Every year, governments around the world propose the adoption of tax measures which constitute either new initiatives or amendments to existing fiscal legislation. There is a presumption of validity in favor of legislative measures adopted by a State and the burden of the proof is upon those who challenge such measures to demonstrate their invalidity.").

[73] *Int'l Thunderbird Gaming Corp. v United Mexican States*, UNCITRAL-NAFTA, Separate Opinion of Thomas Wälde (26 January 2006) [60], [91] ("In light of the differing opinions on the legal value and meaning of the 'Oficio', one needs to bear in mind the burden of proof situation: Thunderbird has to prove that the Oficio conveyed to it, from the perspective of a reasonable foreign businessman in the gambling industry and in the specific context of the interaction between Thunderbird and SEGOB, the message that it could operate the software-driven video poker machines it imported. Mexico, on the other hand, has to prove that the Oficio was tainted by insufficient, but mandatory disclosure by Thunderbird. This is a high threshold because, first, Mexico has to counter the presumption of the validity of official acts of government which respect for government requires; secondly, it has total control over all the documentation and witnesses — its own past and present SEGOB officials who alone can testify about what they knew and did not know. We therefore have to measure the evidence to see if Thunderbird has met this burden of proof, and, if so, Mexico has met its burden of proof. [. . .] There is a presumption — both in international and in comparative administrative law — of the legitimacy of official acts. That is the risk that the government, as price for the due respect to official acts, has to bear.").

[74] See Mojtaba Kazazi (n 27) 246 ("there are many precedents founding rebuttable presumptions on general principles of law such as . . . *regularity and validity of acts of sovereigns to international law*.") (emphasis in original).

expectation that the regulatory framework would never change, except if there is a stabilization clause. A line of decisions has concluded that a presumption exists that investors expect some regulatory changes when making an investment without entering into a stability agreement.[75] As the *Micula* tribunal stated, "[w]hen the alleged legitimate expectation is one of regulatory stability, the reasonableness of the expectation must take into account the underlying presumption that, absent assurance to the contrary, a state cannot be expected to freeze its laws and regulations."[76]

Another legal presumption in the jurisdictional context is the submission of a certificate of nationality which will lead to the legal presumption that the person held the certified nationality on the date of the certificate.[77] Similarly, proof of majority ownership

[75] See eg *Al Bahloul v Republic of Tajikistan*, SCC Case No 064/2008, Partial Award (2 September 2009) [185] ("Neither of these criteria is intended however to go so far as to require the State to freeze its legal framework, but rather to act in an open manner and consistent with commitments it has undertaken"); *Plama Consortium Ltd v Republic of Bulgaria*, ICSID Case No ARB/03/24, Award (27 August 2008) [219] ("[T]he Tribunal believes that the ECT does not protect investors against any and all changes in the host country's laws. Under the fair and equitable treatment standard the investor is only protected if (at least) reasonable and justifiable expectations were created in that regard. It does not appear that Bulgaria made any promises or other representations to freeze its legislation on environmental law to the Claimant or at all"); *PSEG Global Inc. v Republic of Turkey*, ICSID Case No ARB/02/5, Award (19 January 2007) [240]; *CMS Gas Transmission Co v Argentine Republic*, ICSID Case No ARB/01/8, Award (25 April 2005) [277] ("It is not a question of whether the legal framework might need to be frozen as it can always evolve and be adapted to changing circumstances, but neither is it a question of whether the framework can be dispensed with altogether when specific commitments to the contrary have been made. The law of foreign investment and its protection has been developed with the specific objective of avoiding such adverse legal effects.").

[76] *Micula v Romania*, ICSID Case No ARB/05/20, Award (11 December 2013) [673].

[77] See eg *Soufraki v United Arab Emirates*, ICSID Case No ARB/02/7, Decision on Annulment (5 June 2007) [60]-[63]; *Arif v Republic of Moldova*, ICSID Case No ARB/11/23, Award (8 April 2013) [356], [n126] (certificate of nationality is *prima facie* evidence of nationality); *Ambiente Ufficio SpA v Argentine Republic*, ICSID Case No ARB/08/9, Decision on Jurisdiction (8 February 2013) [318] ("In general, the finding of the Annulment Committee in *Soufraki v United Arab Emirates* that '[i]t is only in exceptional cases […] that ICSID tribunals have to review nationality documentation issued by state officials', may be taken as a guidance in that regard."); *Tza Yap Shum v Republic of Peru*, ICSID Case No ARB/07/6, Decision on Jurisdiction (19 June 2009) [63]; *Micula v Romania*, ICSID Case No ARB/05/20, Decision on Jurisdiction (24 September 2008) [87] ("Indeed, it is well established that the acquisition of nationality must not be inconsistent with international law. The burden of proving that nationality was acquired in a manner inconsistent with international law lies with the party challenging the nationality. In that respect, there exists a presumption in favour of the validity of a State's conferment of nationality. The threshold to overcome such presumption is high."); *Siag v Arab Republic of Egypt*, ICSID Case No ARB/05/15, Decision on Jurisdiction (11 April 2007) [153] ("[a]pplication of international law principles requires an application of the Egyptian nationality laws with reference to international law as may be appropriate in the circumstances. Both Egyptian law and the practice of international tribunals is that the documents referred to by the Respondent evidencing the nationality of the Claimants are prima facie evidence only. While such documents are relevant they do not alleviate the requirement on the Tribunal to apply the Egyptian nationality law, which is the only means of determining Egyptian nationality.").

in an enterprise leads to a legal presumption of control over that enterprise. Indeed, a line of investor-state cases have concluded that a proof of majority ownership gives rise to a presumption of control of an enterprise.[78] The legal presumption of control is strengthened the greater majority stake in ownership.[79]

These are but a few instances of legal presumptions that have developed in the investor-state context. It is worth noting that tribunals are not always fully clear in their articulation of the applicable law from which the legal presumption is derived, although it appears that the tribunals appear to rely on some general principle of international law or on municipal law.[80]

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[78] See eg *Aguas del Tunari SA v Republic of Bolivia*, ICSID Case No ARB/02/3, Decision on Jurisdiction (21 October 2005) [264]; *Autopista Concesionada de Venezuela CA v Bolivarian Republic of Venezuela*, ICSID Case No ARB/00/5, Decision on Jurisdiction (27 September 2001) [183]-[186]; *Compañía del Desarrollo de Santa Elena SA v Republic of Costa Rica*, ICSID Case No ARB/96/1, Award (17 February 2000) [26]; *Maffezini v Kingdom of Spain*, ICSID Case No ARB/97/7, Decision on Jurisdiction (25 January 2000) [77]; *Caratube Int'l Oil Co. LLP v Republic of Kazakhstan*, ICSID Case No ARB/08/12, Decision on Annulment (21 February 2014) [193] (limiting the presumption); *Tulip Real Estate Investment & Development Netherlands BV v Republic of Turkey*, ICSID Case No ARB/11/28, Award (10 March 2014) [289] (rejecting the presumption).

[79] See *Aguas del Tunari SA v Republic of Bolivia*, ICSID Case No ARB/02/3, Decision on Jurisdiction (21 October 2005) [264] ("The Tribunal, by majority, concludes that the phrase 'controlled directly or indirectly' means that one entity may be said to control another entity (either directly, that is without an intermediary entity, or indirectly) if that entity possesses the legal capacity to control the other entity. Subject to evidence of particular restrictions on the exercise of voting rights, such legal capacity is to be ascertained with reference to the percentage of shares held.").

[80] There are also presumptions that a tribunal cannot make. For example, tribunals have clarified that they cannot rely on a presumption either for or against its jurisdiction. See eg *Sociedad Anónima Eduardo Vieira v Republic of Chile*, ICSID Case No. ARB/04/7, Award (21 August 2007), ¶ 191 ("A este respecto, se ha establecido que todo el análisis sobre la jurisdicción debe realizarse con meticuloso cuidado, sin partir de presunciones a favor o en contra de la jurisdicción del Centro."). Similarly consent cannot be presumed under international law. See eg *Daimler Financial Services AG v Argentine Republic*, ICSID Case No. ARB/05/1, Award (22 August 2012), ¶ 175 ("it is not possible to presume that consent has been given by a state. Rather, the existence of consent must be established."); *Inceysa Vallisoletana S.L. v Republic of El Salvador*, ICSID Case No. ARB/03/26, Award (2 August 2006), ¶ 191 ("As indicated when analyzing the scope of consent, for this purpose it is necessary to apply the principles of good faith, identification of the will of the parties and absence of a presumption in favor or against consent."); *ICS Inspection and Control Services Limited (United Kingdom) v Argentine Republic*, PCA Case No. 2010-9, Award on Jurisdiction (10 February 2012), ¶ 280 ("a State's consent to arbitration shall not be presumed in the face of ambiguity. Consent to the jurisdiction of a judicial or quasi-judicial body under international law is either proven or not according to the general rules of international law governing the interpretation of treaties."). Similarly the presumed intention of the parties cannot override the plain language under international law. See eg *Ping An Life Insurance Company of China, Limited and Ping An Insurance (Group) Company of China, Limited v Kingdom of Belgium*, ICSID Case No. ARB/12/29, Award (30 April 2015), ¶ 166 ("The ordinary meaning approach has been adopted in many investor-State arbitrations to confirm that the presumed intentions of the parties should not be used to override the explicit language of a BIT (*Fraport v Philippines* at [340]) or to override the agreed upon

IV. JUDICIAL PRESUMPTIONS

Judicial presumptions rely upon the existence of some general practice or habit, which a tribunal can rely on in their capacity as "judges." If it has been proved that a business follows a specific protocol in the loading of trucks in hundreds of documented instances, there is a presumption that in a specific instance, the business followed the same approach even if it lost the loading documents.[81] Similarly, if there is a widespread practice in the business community as to permissible variances, it is presumed that a party that forms part of that community would have followed such widespread practice. The general practice must be proved by the party relying upon it, including in relevant circumstances by means of expert testimony.

Judicial presumptions are also rebuttable by contesting the proof of a general practice proffered by the moving party, showing that the moving party acted inconsistently with general practice, or that the general practice does not bear upon the issue for which it is being invoked.

(A) *The Constitutive Function of the Legal Presumption of Good Faith in Formulating Judicial Presumptions*

It is my submission that judicial presumptions arise because of the legal presumption of good faith. The legal presumption of good faith is a general principle of law and as such a rule of international law, as well.[82] The presumption of good faith contains two prongs – honesty-in-fact and reasonableness.[83]

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framework (*Daimler Financial Services v Argentina* at [164]), or be used as an independent basis of interpretation (*Wintershall v Argentina* at [88]).").

[81] *Mobil Exploration & Production U.S. Inc. v Cajun Construction Services*, Inc. 45 F.3d 96 (5th Cir. 1995).

[82] See Bin Cheng (n 1) 106 ("Contracting parties are always assumed to be acting honestly and in good faith. That is a legal principle, which is recognized in private law and cannot be ignored in international law." (quoting the PCIJ *Lighthouse Case*)).

[83] See ibid (good faith as honesty-in-fact); see also Richard Gardiner, *Treaty Interpretation* (Oxford University Press 2008), 157 (reasonableness as good faith); for a theoretical discussion regarding the relationship between honesty-in-fact and reasonableness premised in municipal law, see Frédéric G. Sourgens, *Reason and Reasonableness: The Necessary Diversity of the Common Law*, 67(1) *Maine Law Review* 73 (2014).

The legal presumption of good faith as honesty-in-fact assumes that all parties acted without deception of subterfuge.[84] This legal presumption is relevant in framing judicial presumptions of specific party expectations. A judicial presumption would permit a party to plead general practice to discharge a burden of proof to show that a contrary conclusion implies conduct with less than honesty-in-fact.[85] Such judicial presumptions operate against the background of the legal presumption of good faith.

The legal presumption of good faith as reasonableness assumes that "one party should be able to place confidence in the words of the other, as a reasonable man might be taken to have understood them in the circumstances."[86] Such a reasonableness standard implies that parties operate consistently with relevant customs, practices and usages.[87] A legal presumption of reasonableness is relevant in framing judicial presumptions. Where there is a question of fact how one of the parties conducted itself, it is assumed that it would have conducted itself in keeping with industry standards, or reasonably, thus closing relevant gaps of proof by inference from general practice (as opposed to proved record facts alone).[88] Such judicial

[84] Bin Cheng (n 1) 106.

[85] See *HICEE BV v The Slovak Republic*, PCA Case No 2009-11, Partial Award (23 May 2011), IIC 514 (2011) [129] ("The Claimant invited the Tribunal to disregard the Explanatory Notes entirely, largely on the ground that they were arguably inconsistent with the terms in which other, similar, BITs had been presented to the Dutch Parliament, and should therefore be regarded as an aberration. This the Tribunal feels unable to do — in part because of the categorically precise terms in which the passage in the Explanatory Notes is cast, and in part also because the Explanatory Notes are a formal, public document that engages the honesty and good faith of the Dutch Minister, and the Tribunal does not believe that it is its place to call that into question, even implicitly"); *Gemplus S.A., SLP S.A., Gemplus Industrial S.A. de C.V. v The United Mexican States* ICSID Case No ARB(AF)/04/2, Award (16 June 2010), IIC 488 (2010) [4-142] (applying the presumption of honesty even in the context of witness mis-recollection); *ADC Affiliate Limited and ADC & ADMC Management Limited v The Republic of Hungary*, ICSID Case No ARB/03/16, Award (2 October 2006), IIC 1 (2006) [475] ("However when, after receiving top class international legal advice, Hungary enters into and performs these agreements for years and takes the full benefit from them, it lies ill in the mouth of Hungary now to challenge the legality and/or enforceability of these Agreements. These submissions smack of desperation.").

[86] Bin Cheng, (n 1) 107.

[87] See Klaus Peter Berger, *The Creeping Codification of the New Lex Mercatoria* (Wolters Kluwer 2d ed. 2010),198-199.

[88] See *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v Romania*, ICSID Case No ARB/05/20, Award (11 Decision 2013), IIC 621 (2013) [673] (addressing presumptions of regulatory stability by reference to reasonableness criteria); *Phoenix Action Ltd. v Czech Republic*, ICSID Case No ARB/06/5, Award (15 April 2009), IIC 367 (2009) [127] (looking to the practice of purchasing bankrupt companies to reorganize them for a profit to determine whether an investor had assumed risk); *CDC Group Public Ltd. Co. v Seychelles*, ICSID Case NO ARB/02/14, Award

presumptions similarly operate against the background of the legal presumption of good faith.

In the first instance, the judicial presumption translates the legal presumption of good faith from its lofty abstraction to concrete application. This concrete application requires factual proof of a specific practice against which to judge party conduct. This factual proof must be required of the party seeking to invoke a specific application of the judicial presumption – and thus keep intact the original assignment of burdens of proof.[89] This proof of a practice, custom, or usage in its own right is subject to challenge.[90] The transformation of the legal presumption of good faith into judicial presumptions renders the legal presumption testable by concrete evidence.

In the second instance, the relationship between judicial presumptions and the legal presumption of good faith explains why judicial presumptions are not available with regard to conduct that otherwise violates principles of good faith and international public policy. Thus, it may well be possible to prove that every actor in a certain jurisdiction pays bribes to government officials in order to secure investment opportunities.[91] This, however, cannot be the predicate for the conclusion that an investment so-secured was "in accordance with host state law" simply because it complied with general investor practice. Rather, practices in violation of international public policy cannot give rise to

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(17 December 2003), IIC 47 (2003) [47] (addressing the "common practice of lenders in charging for time spent and expenses incurred in connection with the investigation and processing of applications for loans."); *BRIDAS SAPIC v Turkmenistan*, ICC Case No 9058/FMS/KGA, partial Award (24 June 1999), IIC 35 (1999) [139] (footnote 13) (relying upon usage of trade to explain the good faith nature of a transaction structure).

[89] See Mojtaba Kazazi (n 27) 239.

[90] See *Joseph Charles Lemire v Ukraine*, ICSID Case No ARB/06/18, Award (28 March 2011), IIC 485 (2011) [169] ("If it can be proven that in the normal cause of events a certain cause will produce a certain effect, it can be safely assumed that a (rebuttable) presumption of causality between both events exists, and that the first is the proximate cause of the other.").

[91] See *World Duty Free Co. Ltd. v Kenya*, ICSID Case No. ARB/00/7, Award (25 September 2006), IIC 277 (2006), [110] ("The Claimant submits that the facts as laid out in Mr. Ali's witness statement do not amount to a confession of bribery; it stresses that "bribery is not a strict liability offence, mens rea is relevant". Mr. Ali made a payment to President Moi that he believed lawful. At that time, it was routine practice to make such donations in advance of doing business in Kenya; said practice had cultural roots and was buttressed by the "Harambee" system, one which mobilized resources through private donations for public purposes.").

judicial presumptions because they run counter to the function of the legal presumption of good faith.[92]

(B) *The Evidentiary Predicate for Judicial Presumptions*

To benefit from a judicial presumption, the party invoking such a presumption must prove that there exists a practice, usage, or custom on the basis of which an inference relevant for the disposition of the dispute could be drawn.[93] The typical form in which such a submission could be made is by means of expert testimony.[94] Such expert testimony would set out for the tribunal what actors in a sector typically do and how their actions inure to the level of a custom, practice, or usage. The more specific the expert testimony is with regard to the immediate context of the dispute, and the more data points immediately relevant to the dispute it can provide, the more probative the relevant custom, practice, or usage will be.

The evidentiary predicate for a judicial presumption does not need to be proved by expert evidence. Other sources of potential corroboration of a custom, practice, or usage include best practices published by relevant trade organizations, academic surveys conduct of the sector for instance in the context of business review case studies, or journalist reporting on an industry.[95] The benefit of the arbitral dispute resolution mechanism is that arbitrators themselves will have a significantly greater expertise in the subject matter of the dispute than a judge of general jurisdiction in a municipal legal system.[96] As such, arbitral tribunals can be expected in many

[92] ibid [138-188].

[93] Mojtaba Kazazi (n 27) 239.

[94] Nigel Blackaby *et al*, *Redfern and Hunter on International Arbitration* (Oxford University Press 6th ed. 3015) 394-398.

[95] See Nigel Blackaby *et al*, *Redfern and Hunter on International Arbitration* (Oxford University Press 6th ed. 3015) 213-4 (discussing establishment of trade usages in commercial arbitration); Klaus Peter Berger, *The Creeping Codification of the New Lex Mercatoria* (WoltersKluwer 2d ed. 2010) 214 (discussing the relevance of self-regulation and best practices in establishing trade usage).

[96] David D. Caron & Lee M. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* (Oxford University Press 2d ed. 2013) 635 ("International arbitration allows the parties to choose an arbitrator whose specialized skill or knowledge regarding a particular legal, financial, or technical field can aid in resolving the dispute most accurately and efficiently.").

circumstances to establish for themselves that a relevant custom, practice, or usage exists without need of recourse to an expert.[97]

No matter the proposed manner of proof of a custom, practice, or usage, the question of its existence is a question of factual evidence.[98] This question falls to the tribunal to establish according to its fact-finding powers.[99] The proof of a custom, practice, or usage does not differ in any meaningful way from the ordinary fact finding process in which the tribunal routinely is engaged.

An illustration for this is the decision on jurisdiction in the *Burlington Resources v. Ecuador* case, where the investor proved that it was industry practice in Ecuador for an operator of an oil and gas project to communicate with the government on behalf of itself and all other project members. This proof created a judicial presumption that letters sent by the operator of a specific block in that jurisdiction to the government were sent on behalf of that operator and the other block project members.[100] The tribunal, therefore, concluded that the letters were sent on behalf of all participants.[101]

(C) *Application of Judicial Presumptions to the Arbitration Record*

Once a custom, practice, or usage has been established, the tribunal must apply it to the arbitration record. It does so by drawing an inference – the specific transaction at bar followed the established general practice.[102] The fact that a general practice exists makes the conclusion that, the parties to a dispute followed this practice sufficiently reasonable for a court or tribunal to use it as a factual predicate for decision (even if the link between practice and specific instance is not in fact proved with direct evidence).[103]

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[97] See ibid.

[98] Robert Kolb (n 3) 243.

[99] See ICSID Arbitration, Rule 34(1).

[100] *Burlington Resources Inc v Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction (2 June 2010), IIC 436 (2010) [327-329].

[101] ibid 327-330.

[102] See Mojtaba Kazazi (n 27) 239; Chittharanjan F. Amerasinghe, *Evidence in International Litigation* (Brill 2005), 257; Durward V. Sandifer (n 3) 107.

[103] See *Corfu Channel Case (Merits) (U.K. v Albania)*, 1949 I.C.J. Rep. 4, 78, 91 (9 April) (Azevedo J., dissenting); Robert Kolb (n 3)243.

(D) *The Rebuttable Nature of Judicial Presumptions*

Judicial presumptions are rebuttable because they only give rise to reasonable inferences.[104] Thus, a ministerial order accepting an investment by a foreign investor gives rise to the reasonable inference that the investment was made in a lawful manner. If the record permits only the drawing of a single reasonable inference, a tribunal must adopt this inference as plausible and resolve the case in line with the presumption.[105] If the record contains only the ministerial order accepting the investment, the lawful nature of the acquisition of the investment is the only factual finding open to the tribunal. This means that a party seeking to rebut the presumption must provide an alternate account – it must produce evidence of some sort.[106] It can introduce direct, credible, and probative evidence contradicting the inference.[107] A respondent could show for instance that the foreign investor paid large sums of money to the official responsible for the order accepting the investment. In such an instance, the inference that a specific instance followed general practice is not in fact reasonable because of directly contrary evidence.[108] It can also introduce indirect evidence supporting an alternative reasonable inference.[109] A respondent could show that the foreign investor paid a large sum of money to the brother of the minister just prior to the investment authorization and that shortly before the payment in question, the ministry had raised significant doubts about the legality of the investment. In such an instance, the party would show that a contrary inference is more plausible in light of the record as a whole than the inference premised upon general custom, practice, or usage.

Understanding judicial presumptions as giving rise to a certain kind of implied reasonable inference – namely the inference that specific cases follow general practice – explains what it means that judicial presumptions are rebuttable.[110] They establish an

[104] For a discussion of the distinction between reasonable and plausible inferences, see Chapter 7.

[105] ibid.

[106] ibid.

[107] ibid.

[108] ibid.

[109] ibid.

[110] See Chittharanjan F. Amerasinghe (n 102) 257; Durward V. Sandifer (n 3) 173.

evidentiary predicate on the basis of which a disposition of the case, without more, is possible.[111] As such, it makes it possible to prove facts related to the case that would otherwise elude specific demonstration.[112] And once a presumption has been established, its establishment in its own right calls upon the opposing party to act and produce evidence to the tribunal explaining why such a disposition would not be plausible or appropriate.[113] Importantly, it does so *without* displacing burdens of proof.[114] Rebutting the presumption does not mean to carry a burden as a moving party with regard to a proposition.[115] It instead means simply to rebut the drawing of a specific inference in light of particular record facts.

V. CONSEQUENCES OF FAILING TO APPLY PRESUMPTIONS

In this section, the consequences of failing to apply presumptions are discussed. As noted above, if a tribunal fails to apply a legal presumption that is clearly based on domestic or international law, it can be the basis for an annulment challenge on the basis that the tribunal manifestly exceeded its powers.[116] Judicial presumptions, on the other hand, would be much more difficult to challenge via the annulment procedure since a judicial presumption is based on the facts and circumstances surrounding the case and a tribunal has a very wide discretion to make such rulings. If a tribunal has acted in a manner that is inconsistent with other prior decisions in making a judicial presumption, while the consequences cannot be annulment, it may result in personal reputational costs to the arbitrator.

However, a party may still bring a motion for annulment for a failure to treat the parties equally or with equality of arms, which is recognized as a "serious departure

[111] See *Corfu Channel Case (Merits) (U.K. v Albania)*, 1949 I.C.J. Rep. 4, 78, 91 (9 April) (Azevedo J., dissenting).

[112] See Robert Kolb (n 3) 244-5.

[113] See Durward V. Sandifer (n 3) 173.

[114] See Robert Kolb (n 3) 243.

[115] See Durward V. Sandifer (n 3) 173.

[116] See n 20 above.

from a fundamental rule of procedure" under Article 52(1)(d) of the ICSID Convention.[117] A unilateral failure to accord a party its right to be heard on a material issue in the case arguably implies a treatment of the parties with less than equality.[118] The focus upon the equality of the parties does not seek to establish whether the tribunal reached a result that was appropriate or even fair in the context of the arbitration record.[119] Rather, it asks whether fundamental rules governing how proof is taken were applied in an even-handed manner.[120] The focus is upon whether one of the parties was given an impermissible benefit of the doubt. Such an extra-evidentiary benefit of the doubt, in the words of the *Fraport* annulment committee

> cannot be applied in the context of international arbitral proceedings instituted by an investor against a state. Indeed, the application of such a presumption could itself, in the context of ICSID proceedings, amount to a failure of due process since it may unbalance the essential equality between the parties. The principle *in dubio* has proper application as a right of the defence in criminal proceedings, because it counterbalances the coercive power of the state. It cannot, however, be transposed into the context of international arbitral proceedings because to do so would be inconsistent with the principle of equality of the parties.[121]

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[117] *Daimler Financial Services AG v Argentine Republic*, ICSID Case No ARB/05/1, Decision on Annulment (7 January 2015) [280]; *Caratube Int'l Oil Co LLP v Republic of Kazakhstan*, ICSID Case No ARB/08/12, Decision on Annulment (21 February 2014) [87]; *Impregilo SpA v Argentine Republic*, ICSID Case No ARB/07/17, Decision on Annulment (24 January 2014) [165]; *Malicorp Ltd v Arab Republic of Egypt*, ICSID Case No ARB/08/18, Decision on Annulment (3 July 2013) [36]; *Libananco Holdings Co Ltd v Republic of Turkey*, ICSID Case No ARB/06/8, Decision on Annulment (22 May 2013) [88]; *Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines*, ICSID Case No ARB/03/25, Decision on Annulment (23 December 2010) [193]; *Maritime Int'l Nominees Establishment v Republic of Guinea*, ICSID Case No ARB/84/4, Decision on Annulment (22 December 1989) [5.06]; *Wena Hotels Ltd v Arab Republic of Egypt*, ICSID Case No ARB/98/4, Decision on Annulment (28 January 2002) [57]; *Azurix Corp v Argentine Republic*, ICSID Case No ARB/01/12, Decision on Annulment (1 September 2009) [213]; *CDC Group plc v Republic of Seychelles*, ICSID Case No ARB/02/14, Decision on Annulment (29 June 2005) [49].

[118] *Malicorp Ltd v Arab Republic of Egypt*, ICSID Case No ARB/08/18, Decision on Annulment (3 July 2013) [36].

[119] *Enron Corp v Argentine Republic*, ICSID Case No ARB/01/3, Decision on Annulment (30 July 2010) [177]-[178].

[120] See *Compañía de Aguas del Aconquija SA v Argentine Republic*, ICSID Case No ARB/97/3, Decision on Annulment (10 August 2010) [251].

[121] *Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines*, ICSID Case No ARB/03/25, Decision on Annulment (23 December 2010) [193].

The most obvious manner in which a tribunal could run afoul of the equality of the parties by giving a party an inapposite benefit of the doubt relates to the tribunal's failure to apply relevant burdens of proof and presumptions.[122] To the extent that the applicable burden or legal presumption can be identified, a failure to apply it (barring other reasons) may be actionable in annulment.[123] But, it is worth emphasizing that judicial presumptions as a general rule are very difficult considering the wide latitude provided to arbitral tribunals in making decisions.

VI. CONCLUSION

The research question for this thesis states: ***"Whether there are any principles of evidence as recognized and applied by investor-state tribunals or do the principles of evidence merely fall within a tribunal's discretionary powers?"*** The evidentiary principle that has been considered here is presumptions and, therefore, the relevant question is whether there are any principles relating to presumptions as recognized and applied by investor-state tribunals?

The following conclusions can be drawn from the thesis:

First, presumptions play an important role in investor-state arbitration because it reduces the need for a party to produce evidence based on the law or regular practice. Presumptions serve an efficiency or prudential function because it would be impractical to require litigants to prove every fact with direct or even circumstantial evidence.

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[122] Christoph Schreuer et al, *The ICSID Convention, A Commentary* (Cambridge University Press 2001) 982; *Klöckner Industrie-Anlagen GmbH and otrs v United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No ARB/81/2, Decision on Annulment (17 May 1990) [6.80].

[123] *Daimler Financial Services AG v Argentine Republic*, ICSID Case No ARB/05/1, Decision on Annulment (7 January 2015) [285] (allowing that the imposition of an improper burden of proof could amount to a serious departure from a fundamental rule of procedure but that 'the Tribunal did not impose an improper burden of proof on Daimler that amounts to a serious departure from a fundamental rule of procedure'); *Caratube Int'l Oil Co LLP v Republic of Kazakhstan*, ICSID Case No ARB/08/12, Decision on Annulment (21 February 2014) [97]; *Impregilo SpA v Argentine Republic*, ICSID Case No ARB/07/17, Decision on Annulment (24 January 2014) [165]; *Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines*, ICSID Case No ARB/03/25, Decision on Annulment (23 December 2010) [193]; *Wena Hotels Ltd v Arab Republic of Egypt*, ICSID Case No ARB/98/4, Decision on Annulment (28 January 2002) [60]; *Klöckner Industrie-Anlagen GmbH and otrs v United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No ARB/81/2, Decision on Annulment (17 May 1990) [6.80]. On the distortive effect of an inappropriate use of burdens of proofs and presumptions in international law in general, see Hersch Lauterpacht, *The Development of International Law by the International Court* (first published 1958, Cambridge University Press 1982) 362.

Further, presumptions by their very nature are typically rebuttable with appropriate evidence to be proffered by the opposing party. In order to apply a presumption a two-step process needs to be applied. First, it is necessary to prove that a general practice or relevant circumstance exists. Second, it is necessary to relate that general practice or relevant circumstance to the particular dispute. This can help establish the existence of a presumption.

Second, investor-state tribunals recognize that presumptions can derive from the applicable law (legal presumptions) or from surrounding facts and circumstances (judicial or human presumptions). For a legal presumption, the applicable law permits the drawing of certain rebuttable conclusions without need to adduce additional facts. Legal presumptions typically remain rebuttable (unless the applicable law treats the presumption as being irrebuttable) because they represent default positions assumed by the law. For a judicial presumptions, an arbitral tribunal can draw an inferences on the basis of regular practice in a certain field rather than through the applicable law. Judicial presumptions are also rebuttable by contesting the proof of a general practice proffered by the moving party, showing that the moving party acted inconsistently with general practice, or that the general practice does not bear upon the issue for which it is being invoked.

Third, arbitral tribunals have noted that the failure to apply the applicable law can be a "manifest excess of powers" under Article 52 of the ICSID Convention, however, it cannot be a mere error in the application of the applicable law. A tribunal's use of judicial presumptions, however, falls within the scope of the tribunal's discretionary powers within the context of evidence. This is expressly provided in ICSID Arbitration Rule 34(1) which states that "[t]he Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value."

The distinction between legal presumptions and judicial presumptions is critical because the failure to apply a legal presumption *may* result in annulment while the failure to apply a judicial presumption will typically not lead to annulment since it falls within a tribunal's discretionary powers in relation to evidence. Therefore, while it will be

difficult to seek annulment for both legal and judicial presumptions, it will be much harder for a judicial presumption since it involves a discretionary component.

CHAPTER 6—INFERENCES FROM EVIDENCE OR ITS ABSENCE AS APPLIED IN INVESTOR-STATE ARBITRATION

I. INTRODUCTION: INFERENCES IN GENERAL

The research question seeks to understand whether there is any evidentiary principle in relation to inferences as an evidentiary principle or does it merely fall with a tribunal's discretionary powers to determine when to apply an inference.

As an initial remark, investor-state tribunals often make findings of facts by means of inferences. The use of inferences means that the tribunal made a determination of fact that is not premised upon direct evidence. The tribunal thus is convinced of the truth of a fact despite the absence of a document or witness testimony that would establish that fact first hand. Such findings of fact are relatively frequent, especially when documents are scarce or when witness testimony is self-serving.

An inference refers to a conclusion that, as a matter of *plausibility* of a fact, must be concluded to be true in light of other relevant and probative record evidence as well as party conduct in the arbitral proceedings.

As will be developed below, my core argument here is that plausibility (as opposed to reasonableness) is the core guiding principle to permit the application of an inference. My second argument is that a tribunal may also draw adverse inferences based on the conduct of the party in the arbitration, particularly in relation to failing to comply with an order in relation to document production. Although extremely difficult, this option is permissible on the presumption that tribunal does not possess any judicial or police powers and this is one way to ensure that the parties participate in the arbitration proceeding in good faith.

Figure 6.1: Two theories on Inferences

The notion of inferences is closely linked to other evidentiary principles. For example, as discussed in Chapter 5, a judicial presumption can also be described as an inference. Further, an inference does not permit a relaxation of the principles of burden of proof or standard of proof described in Chapters 2 and 4 above. In other words, the plausibility of an inference is governed by the same standard of proof as the proof of the relevant fact by direct evidence, *i.e.*, the record as a whole leads to a plausible conclusion that meets the appropriate standard of proof. Finally, just as in the context of proof by direct evidence, a tribunal must ideally give all parties a reasonable opportunity to comment – its right to be heard – before drawing an inference, otherwise it may give rise to an annulment challenge.

This Chapter seeks to understand how and when have investor-state tribunals recognized and applied inferences in investor-state arbitrations. Towards this end, this Chapter is divided into 6 Sections. Section I provides an introduction to the notion of "inferences" while Section II provides a discussion of inferences in the context of an investor-state arbitration. Section III discusses the difficulty of prove through direct evidence in an investor-state arbitration while Section IV deals with the circumstances to rebut the drawing of inferences. Section V discusses how tribunals have drawn inferences from a party's misconduct, specifically, in investor-state arbitrations from the failure to produce documents while Section VI deals with the consequences of failing to apply inferences. Section VII provides the conclusion in light of the overall thesis.

(A) *Background to Inferences*

A tribunal may conclude that a party has discharged its burden or standards of proof relying upon inferences.[1] Indeed, an inference permits a tribunal to draw a conclusion on the basis of circumstantial evidence. This principle is not unique to investor-state arbitration.[2] Like the burden of proof, the power of a court or tribunal to draw inferences has been recognized by the ICJ,[3] WTO dispute settlement panels,[4] and other international dispute resolution bodies.[5] Canonically, the International Court of Justice noted in the *Corfu Channel Case* that

> the fact of this exclusive territorial control exercised by a State within its frontiers has a bearing upon the methods of proof available to establish the knowledge of that State as to such events. By reason of this exclusive control, the other State, the victim of a breach of international law, is often unable to furnish direct proof of facts giving rise to responsibility. Such a State should be allowed a more liberal recourse to inferences of fact and circumstantial evidence. This indirect evidence is admitted in all systems of law, and its use is recognized by international decisions. It must be regarded as of special weight when it is based on a series of facts linked together and leading logically to a single conclusion.[6]

[1] Christoph H. Schreuer, Loretta Malintoppi, August Reinisch and Antony Sinclair, *The ICSID Convention: A Commentary* (first published 2001, Cambridge University Press 2009) 656 (discussing drafting history of power of tribunals to draw inferences in the context of the ICSID Convention); Chittharanjan F. Amerasinghe, *Evidence in International Litigation* (Brill 2005), 248 (discussing adverse inferences in the context of public international arbitral jurisprudence); Durward V. Sandifer, *Evidence Before International Tribunals* 115 (same); Mojtaba Kazazi, *Burden of Proof and Related Issues: A Study on Evidence Before International Tribunals* 259 ("the existence of judicial presumptions or inferences in international procedure cannot be disputed.").

[2] See n 1 above.

[3] For ICJ jurisprudence, see eg *Corfu Channel Case (Merits) (U.K. v Albania)*, 1949 I.C.J. Rep. 4, 18 (9 April).

[4] For a discussion of WTO jurisprudence relying upon the drawing of adverse inferences, see WTO Analytical Index: Dispute Settlement Understanding on Rules and Procedures Governing the Settlement of Disputes, Article 11 [558-563], available at https://www.wto.org/english/res_e/booksp_e/analytic_index_e/dsu_05_e.htm#fnt904.

[5] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina v Serbia & Montenegro), 2007 I.C.J. 47, 310, 576-7 (Separate opinion of Judge Tomka) (discussing the use of inferences by the ICTY to establish genocidal intent with regard to the Srebrenica massacre and laying out the international legal requirements for the drawing of inferences).

[6] *Corfu Channel Case (Merits) (U.K. v Albania)*, 1949 I.C.J. Rep. 4, 18 (9 April) (emphasis added).

The *Corfu Channel Case*, as noted above, crystallizes the inference principle and its purpose.[7] Direct, probative evidence frequently will be unavailable to an international court or tribunal.[8] The unavailability of evidence may simply have to do with the nature of the dispute – the events may be too distant or remote for any direct evidence to have survived so as to be brought before the trier of fact.[9] But, the unavailability of direct evidence may also have to do with the procedural posture of the dispute – the party with the most access to relevant direct evidence may be the least interested in finding it.[10] Alternatively, the party with the relevant evidence in question may not have the resources available to it to find the evidence on its own initiative.[11]

Given these constraints upon the availability of direct evidence, an insistence that facts be proved by means of direct credible evidence would place international justice outside the reach of many parties. Such parties may, however, be able to adduce circumstantial evidence upon which an inference could be based.[12] Consequently, if it is the function of international tribunals to grant meaningful access to justice, it is a compelled conclusion that such tribunals must be able to use inferences to make factual determinations.[13]

At the same time, it is important to remember that the function of international tribunals is not just to provide access to justice to the claimant (or counterclaimant) –

[7] ibid.

[8] See Aloysius P. Llamzon, *Corruption in Investment Arbitration* (Oxford University Press 2014) 230-1 ("circumstantial evidence, particularly when direct evidence of corruption is unavailable, is widely, albeit cautiously, accepted as a tool to evaluate allegations of corruption by international tribunals").

[9] See *Compañía del Desarrollo de Santa Elena SA v Costa Rica*, ICSID Case No ARB/96/1, Award (17 February 2000), IIC 73 (2000) [7, 17] (underlying decree of expropriation issued in 1978 with first session of the tribunal taking place in 1997).

[10] See *Corfu Channel Case (Merits) (U.K. v Albania)*, 1949 I.C.J. Rep. 4, 18 (9 April).

[11] See *Pac Rim Cayman LLC v Republic of El Salvador*, ICSID Case No ARB/09/12, Decision on Jurisdiction (1 June 2012), IIC 543 (2012) [6.26] (discussing assertions regarding litigation strategies to deplete limited litigation resources of the arbitral parties); Aloysius P. Llamzon (n 8) 197-8 (discussing the inadequate prosecution of corruption allegations by Argentina against Siemens in the arbitral proceedings).

[12] See I.(C) of this Chapter below.

[13] On access to justice concerns as policy motivating investor-state dispute resolution, see Frédéric Gilles Sourgens, *By Equal Contest of Arms, Jurisdictional Proof in Investor-State Arbitrations*, 38 North Carolina Journal of International Law and Commercial Regulation 875 (2013).

they must safeguard against making findings of liability, recognizing the limited nature of its jurisdiction and the exceptional nature of these disputes, without a firm factual foundation.[14] The international dispute resolution framework depends upon consent (*ratione voluntatis*).[15] Parties are unlikely to consent *ex ante* to an infrastructure yielding a large risk of "false positives" because of an aggressive use of inferences by tribunals.[16] To provide sustainable international access to justice, international courts and tribunals are judicious in their use of inferences. The principles set out in this Chapter balance these countervailing policy needs in the formulation of its rules of inferences.

(B) *Inferences under Arbitration Rules*

The principle that tribunals have the right and ability to make determinations of fact by inference is reflected in relevant arbitral rules governing investor-state arbitrations. This is not explicitly provided in the arbitral rules but may be inferred from the general evidentiary provision. For example, in the context of ICSID arbitrations, ICSID Arbitration Rule 34(1) states that "[t]he Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value."[17] Therefore, Rule 34(1) codifies the principle that "ICSID tribunals have full discretion in assessing the probative value of any piece of evidence introduced before them."[18] This full discretion includes the drawing of inferences.

The UNCITRAL Arbitration Rules similarly in Article 27(4) provide that "[t]he arbitral tribunal shall determine the admissibility, relevance, materiality, and weight of the evidence offered."[19] As a leading commentary on the UNCITRAL Arbitration Rules

[14] See David Collins, *The BRIC States and Outward Foreign Direct Investment* (Oxford University Press 2013) 87 (discussing the Indian reaction to the White Industries arbitration holding India liable for BIT violations due to delay in domestic litigation proceedings).

[15] For discussion on the burden of proof, see Chapter 2.

[16] See David Collins, *The BRIC States and Outward Foreign Direct Investment* (Oxford University Press 2013) 87 (discussing the Indian reaction to the White Industries arbitration holding India liable for BIT violations due to delay in domestic litigation proceedings).

[17] ICSID Arbitration Rule 34(1) (emphasis added).

[18] Christoph H. Schreuer et al (n 1) 666.

[19] UNCITRAL Arbitration Rules (2010), Article 27(4).

confirms, this power also includes the discretion to draw reasonable inferences from evidence.[20] Therefore, under the common rules for arbitration, the power of a tribunal to draw inferences as a part of its probative value is recognized.

(C) *Inferences and Indirect/Circumstantial Evidence*

Before delving into how investor-state tribunals have applied inferences, a brief discussion on the relationship of indirect/circumstantial evidence with the principle of inference is necessary. This will help clarify how indirect or circumstantial evidence plays a critical role when it comes to inference. As discussed in Chapter 4 above, the drawing of inferences is inextricably intertwined with determining a case premised upon indirect or circumstantial evidence.[21] Indirect evidence refers to "evidence tending to establish the fact in dispute by proving another."[22] Circumstantial evidence is the more typically used terminology for the same type of evidence today.[23] In the municipal context, circumstantial evidence is clearly distinguished from direct evidence:

> Direct evidence is that which is applied to the fact to be proved, immediately and directly, and without the aid of any intervening fact or process: as where, on a trial for murder, a witness positively testifies he saw the accused inflict the mortal wound, or administer the poison. Circumstantial evidence is that which is applied to the principal fact, indirectly, or through the medium of other facts, from which the principal fact is inferred. The characteristics of circumstantial evidence, as distinguished from that which is direct, are, first, the existence and presentation of one or more evidentiary facts; and, second, a process of inference, by which these facts are so connected with the fact sought, as to tend to produce a persuasion of its truth.[24]

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[20] David D. Caron & Lee Caplan, *The UNCITRAL Arbitration Rules* (2nd ed. Oxford University Press 2013) 580-1 (excerpting Iran-U.S. Claims Tribunal jurisprudence to this effect).

[21] See *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v Republic of Kazakhstan*, ICSID Case No ARB/05/16, Award (21 July 2008), IIC 344 (2008) [444] (discussing the relationship between circumstantial evidence and the drawing of record inference and adverse inferences premised upon conduct of the parties in the proceedings themselves).

[22] See B. E. Witkin, *California Evidence* (5th ed. Thompson West 2012) 358.

[23] ibid; see also Mojtaba Kazazi (n 1) 259 ("A common form of inference is drawn on the basis of the circumstances and usually is referred to as circumstantial evidence.").

[24] B. E. Witkin (n 22) 358-9 (quoting *People v. Goldstein* 139 C.A.2d 146 (1956)) (emphasis added).

Circumstantial or indirect evidence, thus, does not directly speak to the ultimate factual predicate to be proved.[25] To draw an inference is to conclude as to the existence of a fact on the basis of evidence of other facts.[26] The quality of an inference, in short, depends upon the probative value of the record evidence in establishing the contextual facts on the basis of which the inference is drawn and the inductive acuteness of the finder of fact in drawing an inference as to some other fact that also must be the case in light of the state of the record.

II. INFERENCES IN INVESTOR-STATE ARBITRATION & THE DOCTRINE OF PLAUSIBILITY

Investor-state tribunals may draw inferences in every context of an arbitral tribunal, recognizing the appropriate burden and standard of proof, in light of the factual record. To be fully clear, the problem giving rise to the need for inferences is not limited to the merits context. It could also arise in the context of jurisdiction – *e.g.*, was an investment made and accepted in accordance with host state law?[27] If, for example, a state expressly approved an investment at the time of an investment, a tribunal could infer that the investment was accepted in accordance with host state laws (barring any allegations for bribery or corruption). It could further arise in the context of remedies – *e.g.*, would the award of *restitutio in integrum* be feasible under the circumstances?[28] The question also could arise in the context of annulment of ICSID awards – *e.g.*, did a tribunal state reasons for its decisions permitting the parties to follow the tribunal from point A to point B?[29] The manner in which inferences are drawn in all contexts look to

[25] ibid.

[26] ibid.

[27] Aloysius P. Llamzon (n 8) 230-1.

[28] Irmgard Marboe, *Calculation of Compensation in International Investment Law* (Oxford University Press 2009) 74 (discussing the consequence of impractibility of inadvisability of restitution). See however *Mr. Franck Charles Arif v Republic of Moldova*, ICSID Case No. ARB/11/23, Award (April 8, 2013) [566-572] (where the tribunal permitted 60 days for Respondent to make a proposal for restitution); *Bernhard von Pezold and Others v Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award (28 July 2015) [670-744](where the tribunal orders restitution of farm properties).

[29] R. Doak Bishop & Silvia M. Machili, *Annulment Under the ICSID Convention* (Oxford University Press 2012) 160 ("An important distinction that should be drawn under Article 52(1)(e) is that between express and implicit reasons. Some committees have held that when the reasons can be inferred from the award, even if not expressly stated, the award does not need to be annulled").

the same significant factors. The manner in which these factors are weighed against each other to arrive at the plausible explanation will be dependent upon the functional task the tribunal is engaged in when drawing the inference in question. This is discussed below in further detail.[30]

The most typical form of inference arises from the record. There is no simple rule governing the drawing of inferences from the record. Rather, the drawing of inferences requires a tribunal to exercise its sound judgment and discretion in evaluating the record evidence. In drawing record inferences, the following circumstances are typically significant: (i) the difficulty of proving the fact by direct evidence; (ii) the relationship between the inference to be drawn and the facts proved by direct evidence; (iii) the strength of the direct evidence supporting the inference; (iv) the number of different pieces of proof supporting the same inference; and (v) the significance of the inference for the satisfaction of the requisite standard of proof. Inferences that are drawn from the record fall within the mandate of a tribunal to resolve the dispute. Therefore, a tribunal has wide discretion in dealing with evidence on the record. Annulment would therefore be very unlikely in such a circumstance.

The traditional way in which a tribunal will draw an inference is by assessment of the record. There are two broad categories of concerns that are relevant to the tribunal's task in drawing inferences. On the one hand, the tribunal is tasked with making finding on the facts to resolve the dispute.[31] It is not permitted to refuse to find facts because of the lack of direct evidence. Directly linked to its fact-finding mission is the task to determine what, on the record, is the most likely explanation of what occurred.

At the same time, the tribunal's mission to determine the facts is similarly bounded by the access to justice concerns. Thus, the tribunal must keep in mind that certain facts would be implausibly difficult for one party to prove by direct evidence, all things considered. This may impact the tribunal's willingness to rely upon inferences to make relevant findings even in the comparatively sparser record.

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[30] See Section IIA below.

[31] *Hussein Nuaman Soufraki v The United Arab Emirates*, ICSID Case No ARB/02/7, Decision on Annulment (5 June 2007), IIC 297 (2007) [44] ("It is not contested that the Tribunal shall be the primary fact-finder.").

At the same time, the tribunal must be careful not to overstep its powers and effectively discharge a party from carrying its respective burden and standard of proof. The significance of an inference to a party's ability to meet the standard of proof thus is similarly relevant outside of the comparatively simple task for the tribunal to make relevant factual findings.

The *Europe Cement v. Turkey* is illustrative where the claimant, sought to show ownership of shares in a company for purposes of establishing the existence of covered investment. Respondent, on the other hand, alleged that claimant never acquired the shares because there was no transfer and the claim was, therefore, fraudulent.[32] The tribunal noted that the claimant could have "rebutted this presumption" by producing the originals of the share agreements.[33] However, the claimant did not submit copies of the share certificates for inspection when ordered to do so and admitted that it could not do so (*i.e.*, it failed to provide critical direct evidence).[34] Circumstantial evidence is not probative of ownership and the existence of a qualifying investment.[35] The tribunal, therefore, dismissed the case for lack of jurisdiction:

> The Claimant's failure to provide any serious rebuttal to the Respondent's arguments strongly suggests that it never had such ownership, at least at the relevant time for jurisdiction and that perhaps it never had ownership at all. The burden to prove ownership of the shares at the relevant time was on the Claimant. It failed completely to discharge this burden.[36]

In such a case, a tribunal cannot rely on an inference because of the issue in case.

(A) *Plausibility As Measure For The Drawing Of Inferences*

International doctrinal writing is imprecise in its determining the measure or criterion for the drawing of inferences. International legal sources sometimes refer to the

[32] *Europe Cement Investment & Trade SA v Turkey*, ICSID Case No. ARB(AF)/07/2, Award (13 August 2009), IIC 385 (2009) [163].

[33] ibid [163]

[34] ibid.

[35] ibid [166-167].

[36] ibid [121-122, 166].

"reasonableness" of an inference.[37] Closer analysis of the jurisprudence reveals that the standard actually applied in case law is not reasonableness but "plausibility." Plausibility refers to the likelihood that something is more likely to have happened or not happened in the light of the totality of the evidence. Reasonableness, on the other hand, is one step removed merely requiring that the inference is sensible.

A contextual analysis of jurisprudence reveals the linguistic imprecision in current jurisprudence. When a tribunal draws an inference, both parties typically request that the arbitrators draw different inferences from record evidence.[38] This can be illustrated by an investor-state case. In *Metal-Tech*, the respondent submitted that record evidence of payment of several million dollars in consulting fees should give rise to an inference that the payments were not legitimate but were instead a bribe.[39] The claimant submitted that the record evidence in question should instead lead the tribunal to draw the opposite inference – namely that the investor had engage in ordinary

[37] See Mojtaba Kazazi (n 23) 259 ("Inference is a judicial instrument at the disposal of international tribunals which if applied correctly could facilitate their functioning. Similar to municipal fora, it is the common practice of international tribunals to rely, in each particular case, on reasonable inferences drawn from facts."); see also Chittharanjan F. Amerasinghe (n 1) 248; Durward V. Sandifer (n 1) 154.

[38] See eg *The Rompetrol Group NV v Romania*, ICSID Case No ARB/06/3, Award (6 May 2013), IIC 591 (2013) [232] (discussing the inferences to be drawn from the timing of initiation of criminal investigations); *Cambodia Power Co. v Kingdom of Cambodia*, ICSID Case No ARB/09/18, Award (22 March 2011), IIC 586 (2011), [82-3, 94-5] (setting out disputing views whether the inference could be drawn that multiple contracts formed part of a single transaction for purposes of consolidation under one consent to arbitration); *Waguih Elie George Siag and Clorinda Vecchi v The Arab Republic of Egypt*, ICSID Case No ARB/05/15, Award (1 June 2009), IIC 374 (2009), [12] ("There was no real dispute as to the primary facts and the sequence of events relevant to the dispute as opposed to the inferences and legal conclusions to be drawn from those facts."); *Tokios Tokelès v Ukraine*, ICSID Case No. ARB/02/18, Award (29 June 2007), IIC 331 (2007) [3] (stating the record was by and large clear but that the parties sought contradictory inferences as to the ultimate facts in dispute); *Methanex Corporation v United States of America*, Award(3 August 2005), IIC 167 (2005) [III.52-57] ("The Tribunal can understand Methanex's conviction that all of these 'dots,' if (i) they were to be taken as the only dots; (ii) they were to be accepted at face value as submitted by Methanex; and, moreover, (iii) they were carefully connected as Methanex proposes, would show that the 'real' reason Governor Davis enacted Executive Order D-5-99 was to favour ethanol and to harm Methanex and methanol. Methanex's difficulties, however, are manifold. [. . .] The Tribunal is not averse to trying to 'connect the dots' as a way of testing Methanex's hypothesis, but the dots Methanex has provided and which it affects to find so vivid, have all but faded into chiaroscuro in the course of this adversarial procedure."); *CDC Group Public Ltd. Co. v Seychelles*, ICSID Case No ARB/02/14, Award (17 December 2003), IIC 47 (2003) [45-51] (discussing the inferences to be drawn from commercial conduct of the claimant); *Feldman v Mexico*, ICSID Case No ARB(AF)/99/1, Award (16 December 2002), IIC 157 (2002), Dissent [32-37] (setting out both the disagreement within the tribunal and between the parties regarding the relevant inferences to be drawn from record evidence).

[39] *Metal-Tech Ltd. v Uzbekistan*, ICSID Case No. ARB/10/3, Award (4 October 2013), IIC 619 (2013) [229].

lobbying activities.[40] The tribunal was tasked not with establishing reasonableness of either inference of corruption or the absence of corruption in a vacuum but with comparing which of the inferences proposed by the parties should be deemed more convincing towards meeting the appropriate standard of proof.[41] The tribunal ultimately concluded that the respondent was correct. Therefore, while two reasonable explanations were available, one was more plausible in the light of the totality of the evidence. And, therefore, the inference cannot be drawn as a matter of reasonableness.

Further, investor-state tribunals have examined the issue at hand and seen whether the evidence would meet the standard of proof. This can pose enormous practical problems because different arbitrators looking at the same evidence may arrive at opposite conclusions. For example, investor-state tribunals have been reluctant to infer "consent" unless the appropriate standard of proof was met. This was the very issue before the tribunal in the *OPIC v. Venezuela* case and the question was whether the Venezuela investment law provided for an unqualified consent to arbitration because the language in the investment law was ambiguous.[42] The investor produced a witness statement (Mr. Corrales) who claimed to have drafted the Venezuelan investment law and testified that it provided for state consent to arbitration.[43] Venezuela did not provide a witness statement but questioned whether Corrales was, in fact, the drafter of the investment law. The majority refused to infer that the views of Mr. Corrales that the dispute resolution clause provided for clear state consent was present in the actual language of the investment law (*i.e.*, direct evidence):

> The Tribunal by majority does not consider that the direct evidence before it establishes with sufficient certainty that the intention of Messrs Corrales and Capriles for Article 22 to be a specific consent to ICSID jurisdiction under Article 25

[40] See ibid [217].

[41] See ibid ("The tribunal has found that none of the documents on which the Claimant relies (whether under the December 2000 contract or otherwise) convincingly show that the Consultants rendered any legitimate services at the time of establishment of the Claimant's investment.") (emphasis added).

[42] *Opic Karimum Corp. V. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/14, Award (28 May 2013), IIC 618 (2013).

[43] ibid 147-154.

> of the ICSID Convention was conveyed to, and then accepted and acted upon, by either the Economic Cabinet or the Council of Ministers. . . .
>
> The Tribunal considers by a majority that there is no direct evidence before it that establishes the intention of the legislator (in this instance, the Economic Cabinet and the Council of Ministers chaired by the President of Venezuela) to grant consent to ICSID jurisdiction by the terms of Article 22 of the Investment Law. In this regard, inferences that the Tribunal might be able to draw from the lack of evidence put forward by Venezuela, and the failure of Venezuela to produce documents requested by the Claimant, cannot be sufficient to establish the requisite intention.[44]

In contrast to the approach above, tribunals might alternatively make a finding that the evidence is credible as far as it goes.[45] In such a case, it would fall to the other, non-moving party to rebut the direct evidence (*i.e.*, evidence of Mr. Corrales in the *OPIC* case) submitted by the moving party. The non-moving party might do so by means of direct evidence of its own providing a different, fuller or more precise explanation of events. Non-moving parties rarely do so. The non-moving party alternatively might do so by means of circumstantial evidence such as comparison of the current with event with other examples of conduct. When the non-moving party does so, the tribunal is asked to make an inference that the witness' testimony – though credible – is incomplete. The dissenting arbitrator in the *OPIC* case made a finding to this effect:

> my fellow arbitrators have concluded that, absent direct evidence of Respondent's intention to consent to ICSID jurisdiction, such negative inference is not enough to determine on its own that Article 22 was intended by Venezuela to be the consent to jurisdiction required by Article 25 of the ICSID Convention. I am unable to agree with such conclusion. The record evidences that while the Claimant has made substantial efforts to prove that Article 22 of the Investment Law provides consent to arbitrate, the Respondent provided no assistance in determining the purpose and intention of such provision, notwithstanding its

[44] ibid 170, 178.

[45] See ibid. [112].

> duty to "cooperate with the Tribunal in the production of the evidence" under Rule 34(3) of the Arbitration Rules.[46]

Leaving aside the difficulties of trying to infer state consent, the *OPIC* case highlights the practical difficulties in relying on inferences in a case. A consequence of the process of decision-making applied by investor-state tribunals is that more than one inference might at the same time be reasonable. If one were to see a drenched youth enter a room on a sunny day in the summertime, one might reasonably infer that the person went for a swim. Or one might reasonably infer that the person fell victim to a prank. Or that the person was caught in rain. More facts might make one more likely to draw one inference over the other. But in such instances, it is not that one inference was not reasonable.

The measure applied by investor-state tribunals thus is not "reasonableness" of an inference expressed as a sufficiently probable event given the evidence. "Probability" would speak to "a relative frequency, propensity, logical probability, or a belief state under highly specified conditions" and is an extrapolation of a data set expressed numerically as a number between 0.0 to 1.0.[47] Thus, a probability assessment could set a threshold for the drawing of an inference – say a probability of 0.5 or higher that the asserted event took place. The problem of such an approach to inferences becomes readily visible in the context of our example. We might assign a probability of 0.4 to the inference that our youth went swimming and a probability of 0.3 that the youth fell victim to a prank. Applying our reasonableness model, no inference would obtain as neither swimming nor a prank had a probability of 0.5 or higher. Alternatively, we might lower the minimum threshold for the reasonableness of inferences to 0.3. In that case, a tribunal could reasonably arrive at two inferences. But the rule of decision would not without more require that the tribunal compare the probabilities of each event to each other.

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[46] *Opic Karimum Corp.v Bolivarian Republic of Venezuela*, ICSID Case No ARB/10/14, Award (28 May 2013), Dissenting Opinion of Dr. Guido Santiago Tawil [10-11].

[47] Ronald J. Allen & Alan E. Guy, 'Conley as Special Case of Twombly and Iqbal: Exploring the Intersection of Evidence and Procedure and the Nature of Rules' (2010) 115 Penn State Law Review 35.

Tribunals do not look to the reasonableness of inferences in the strict probabilistic statistical analysis. Rather than determining in the abstract whether an inference can appropriately be drawn, tribunals make determinations by weighing the plausibility of the competing submissions made by the parties.[48] Such plausibility involves reasoning by "inference to the best explanation" meaning that one must determine "which of the possible explanation of events is 'best,' where 'best' means some complex mix of coherence, consistency, coverage, consilience, efficiency and so on. The intellectual task involves comparing and contrasting the various explanations to determine which is the best in terms of the various variables."[49] Once the tribunal has determined whether an inference is plausible, it must still determine whether the predicate for the inference is sufficient to meet the requisite burden and standard of proof.

[48] See eg *The Rompetrol Group NV v Romania*, ICSID Case No ARB/06/3, Award (6 May 2013), IIC 591 (2013) [232] ("As to the coincidence in time, by contrast, the Tribunal would itself have inclined to the view that the thrust of the Talpes report, taken together with the bodies and authorities to whom it was in due course forwarded, made it more probable than not that there was a connection of some kind between the report and the initiation of the original investigation by the PNA into the Petromidia privatization. But even with that connection as the working hypothesis, it carries one nowhere, in the Tribunal's opinion."); *Cambodia Power Co. v Kingdom of Cambodia*, ICSID Case No ARB/09/18, Award (22 March 2011), IIC 586 (2011) [82-3, 94-5] (setting out disputing views whether the inference could be drawn that multiple contracts formed part of a single transaction for purposes of consolidation under one consent to arbitration); *Waguih Elie George Siag and Clorinda Vecchi v The Arab Republic of Egypt*, ICSID Case No ARB/05/15, Award(1 June 2009), IIC 374 (2009) [12] ("There was no real dispute as to the primary facts and the sequence of events relevant to the dispute as opposed to the inferences and legal conclusions to be drawn from those facts."); *Tokios Tokelès v Ukraine*, ICSID Case No. ARB/02/18, Award (29 June 2007), IIC 331 (2007) [3] (stating the record was by and large clear but that the parties sought contradictory inferences as to the ultimate facts in dispute); *Methanex Corp. v United States of America*, Award (3 August 2005), IIC 167 (2005) [II.52-57] ("The Tribunal can understand Methanex's conviction that all of these "dots," if (i) they were to be taken as the only dots; (ii) they were to be accepted at face value as submitted by Methanex; and, moreover, (iii) they were carefully connected as Methanex proposes, would show that the "real" reason Governor Davis enacted Executive Order D-5-99 was to favour ethanol and to harm Methanex and methanol. Methanex's difficulties, however, are manifold. . . . The Tribunal is not averse to trying to "connect the dots" as a way of testing Methanex's hypothesis, but the dots Methanex has provided and which it affects to find so vivid, have all but faded into chiaroscuro in the course of this adversarial procedure."); *CDC Group Public Ltd. Co. v Seychelles*, ICSID Case No ARB/02/14, Award (17 December 2003), IIC 47 (2003) [45-51] (discussing the inferences to be drawn from commercial conduct of the claimant); *Marvin Roy Feldman Karpa v United Mexican States*, ICSID Case No ARB(AF)/99/1, Award (16 December 2002), IIC 157 (2002), dissent [32-37] (setting out both the disagreement within the tribunal and between the parties regarding the relevant inferences to be drawn from record evidence).

[49] *Marvin Roy Feldman Karpa v United Mexican States*, ICSID Case No ARB(AF)/99/1, Award (16 December 2002), IIC 157 (2002), dissent [36].

1. Inferences and Burden of Proof

The use of inferences facially overlaps with the application of burden of proof. As discussed above, it appears that some tribunals follow a principle that the burden of proof with regard to certain important or extraordinary facts (*e.g.*, state consent to arbitration) could only be discharged by reference to direct evidence.[50] The reasoning behind such pronouncements appears to be that permitting the discharge of the burden of proof by inference implicitly but impermissibly reverses burdens of proof. And, as noted in Chapter 2 above, the burden of proof cannot be reversed.

This line jurisprudence, if assessed outside its proper context, is dangerously misleading. Burden of proof requires a party with the burden to provide sufficient evidence to satisfy the requisite standard of proof. As noted in Chapter 2, once a party submits evidence that on its face meets this standard of proof, that party has discharged its initial burden of evidence thus requiring its counterparty to contest or rebut the moving party's proof with evidence of its own or through impeachment of the evidence proffered by the moving party (*i.e.*, the shifting principle).

An inference or circumstantial evidence, on the other hand, is simply a means of proving the existence of one fact by the existence of another, related fact. For example, it would be possible to prove that Alex murdered Bill by showing that (A) Alex was found holding a gun seconds after witnesses heard a shot being fired; (B) Bill died of a gunshot wound; (C) the gun that fired the deadly bullet was the one in Alex's hand; (D) Bill died of wounds he would have sustained at a time Alex was in the room with Bill; and (E) Alex had gunpowder residue on the hand holding the gun. These facts together build a composite picture of a fact not witnessed by anyone or otherwise reflected in any piece of evidence directly: Alex shot Bill.

The proposition that burdens of proof cannot be discharged if a party requires an inference to do so is reasonably absurd. Applied to our murder scenario, it would mean that only a confession or an eyewitness account could be result in a murder conviction.

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[50] *Opic Karimum Corp.v Bolivarian Republic of Venezuela*, ICSID Case No ARB/10/14, Award (28 May 2013), IIC 618 (2013) [146]; *Niko Resources (Bangladesh) Ltd. v People's Democratic Republic of Bangladesh*, ICSID Case No ARB/10/11, Decision on Jurisdiction (13 August 2013), IIC 603 (2013) [424].

This would result in a lowering of the standard of proof for murder as both confessions and eyewitness testimony can be notoriously unreliable while at the same time making it more difficult to prosecute a person for the crime as many murders are committed in secluded places without witnesses.

Fortunately, investor-state arbitration does not subscribe to such an extreme position. Indeed, as discussed above, tribunals may draw inferences in favour of the non-moving party. The statement that inferences are not a permissible means to discharge a burden of proof therefore should be understood as a conclusion that the circumstantial evidence produced by the moving party was insufficient to displace a presumption in favour of the non-moving party. It should not be understood as an exception to the ordinary operation of burdens of proof discussed in Chapter 2.

2. Inferences and Standards of Proof

This leaves the question whether the use of inferences modifies otherwise applicable standard of proof.[51] To the extent that a point is proved by proffer of direct evidence, a tribunal must determine whether the evidence so submitted is actually probative of the question with respect to which it has been offered – for instance, a tribunal could determine that a document has been taken out of context meaning that the document as a whole did not stand for the proposition for which it had been cited by the proffering party. To the extent that a point is to be proved by proffer of direct evidence, a tribunal must further determine whether the evidence so submitted is credible.

In the context of a proof by inference, the requisite standard of proof still applies – but applies with regard to an extended evidentiary predicate. To the extent that a point is proved through the submission of an inference, the tribunal still must determine whether the direct evidence used as a foundation for the inference is probative and credible – *i.e.*, it must determine whether the evidence states what the party relying upon it submit it does and must further determine whether the evidence is credible.

[51] See Chapter 4 above for a discussion on Standard of Proof.

This part of a party's submission remains subject to the same standard of proof as before.

Proof by inference further requires that the tribunal make a leap that although there is no direct evidence speaking to a fact, in context, the record plausibly nevertheless requires such a finding. This contextual analysis remains subject to the same standard of proof applicable to proof by direct evidence as discussed in Chapter 4 above.

In the context of a standard of proof of preponderance, the plausibility standard against which an inference will be judged is simple: is one side's submission slightly preponderant?[52] In the context of a heightened standard of proof, the plausibility standard increases in commensurate proportion: for instance, is one side's submission clear and convincing?[53]

III. DIFFICULTY OF PROOF THROUGH DIRECT EVIDENCE IN INVESTOR-STATE ARBITRATION

It is, all things considered, preferable to prove a fact through direct evidence when doing so is possible.[54] When the record does not contain direct evidence, it becomes relevant for a tribunal in the first instance to establish why such direct evidence is absent.[55] Determining the reason for the absence of direct evidence is the first threshold question, the first step to be undertaken by a tribunal, to establish the propriety of drawing inferences.

In this context, it significant if the evidence in question is unavailable due to a general difficulty in obtaining direct evidence under the circumstances,[56] or due to the

[52] See Chapter 4, Section IV.2 for preponderence standard.

[53] See Chapter 4, Section IV.3 for the heightened standard.

[54] See *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v Republic of Kazakhstan*, ICSID Case No ARB/05/16, award (July 21, 2008), IIC 344 (2008) [444, 709] (noting that reliance upon circumstantial evidence is particularly appropriate when "direct evidence of fact is unavailable.").

[55] See ibid.

[56] See *Alpha Projektholding GmbH v Ukraine*, ICSID Case No. ARB/07/16, Award (8 November 2010), IIC 464 (2010) [373] ("The Tribunal recognizes that there is no clear documentary trail, no "smoking gun," demonstrating directly that Ukraine ordered the stop in payments. The Tribunal was not, for example, presented with any minutes of meetings of the Supervisory Board recording any such instruction. The Tribunal was informed, however, that there is no internal Ukrainian regulation requiring the recording of

fact that the party with the greatest interest in producing the evidence in question is not in fact in control of the evidence.[57] The jurisprudence of the International Court of Justice (ICJ) deemed both factors relevant in determining whether it could rely upon circumstantial evidence and inferences from circumstantial evidence in making findings of act.[58] The ICJ further distinguished such situations from instances in which it might draw adverse inferences from the non-production of evidence in its own right.[59]

The jurisprudence of investor-state tribunals by and large has followed suit. The *Rumeli v. Kazakhstan* case is illustrative.[60] Rumeli, the claimant, sought to show that the local partner to a venture colluded with the host state, Kazakhstan, to prove the factual predicate of an expropriation claim. Rumeli sought to prove collusion by reference to international reports and widely published articles to show the general lack of impartiality of the organs of respondent and collusion between powerful groups of the ruling family in Kazakhstan. The tribunal noted that "it is in the nature of such an

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decisions by such bodies"); *Tokios Tokelės v Ukraine*, ICSID Case No ARB/02/18, Award (29 June 2007), IIC 331 (2007) [14] ("For this purpose the Tribunal must in practice form an idea, necessarily based on secondary and circumstantial evidence since direct evidence is out of reach, not so much about the identity of the prime mover but about whether it was a person or group of persons whose actions were, for the purposes of the Treaty, those of the State.").

[57] See *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No ARB/05/16, Award (21 July 2008), IIC 344 (2008) [444, 709]; *Zeevi Holdings v Republic of Bulgaria*, UNCITRAL Case No UNC 39/DK, Award (25 October 2006), IIC 360 [944-5] ("As evidence for the alleged damage of USD 5 million due to outstanding unpaid vacation days, Claimant has only submitted circumstantial evidence in addition to Mr. Frank's testimony which is more general and does not provide a detailed calculation. The Tribunal accepts that, since it did not any more have access to the personnel files of the Company, it had difficulties to provide detailed proof. The Tribunal further accepts that the rebuttal evidence submitted late by Respondents by way of documents allegedly signed by Mrs. Docheva could not be put on cross-examination to that witness. . . . In view of this, even 30% of the sought after USD 2 400 000 would be high, but given the lack of objective possibility for the Claimant to prove its claim, and the evidentiary circumstances just referred to, the Tribunal considers it appropriate to make use of its discretion regarding the quantification of damages to accept that 30% of the claim raised in this respect shall be accepted, i.e. an amount of USD 720,000.00.").

[58] See *Corfu Channel Case (Merits) (U.K. v Albania)*, 1949 I.C.J. Rep. 4, 18 (9 April); Michael P. Scharf & Margaux Day, 'The International Court of Justice's Treatment of Circumstantial Evidence and Adverse Inferences,' 13 Chicago Journal of International Law 123, 131 (2012) (discussing *Corfu Channel*).

[59] Michael P. Scharf & Margaux Day, 'The International Court of Justice's Treatment of Circumstantial Evidence and Adverse Inferences', (2012)13 Chicago Journal of International Law 123, 131 ("to date, the ICJ has taken a softer approach to nonproduction than either shifting the burden of proof or making adverse findings of fact, using nonproduction instead as a license to resort liberally to circumstantial evidence where direct evidence would otherwise be preferred.").

[60] *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v Republic of Kazakhstan*, ICSID Case No ARB/05/16, Award (21 July 2008), IIC 344 (2008).

allegation that direct evidence of a conspiracy is unlikely to be available. The [t]ribunal therefore considered the evidence with particular care, reminding itself that an allegation such as this must, if it is to be supported only by circumstantial evidence, be proved by evidence which leads clearly and convincingly to the inference that a conspiracy has occurred."[61]

Relying upon "a number of documents, mostly in the form of press reports, which tend to establish that the whole country, the whole political system and the whole economy of [the host state] are controlled by [the] President . . . and his family,"[62] UN documents to the same effect,[63] as well as the beneficial ownership structure of the local partner for the investment,[64] the tribunal concluded "the material summarised above is consistent with and positively supports the Tribunal's finding that there was improper collusion between the Investment Committee and [the local partner] with regard to the decision to terminate the Contract."[65] This does not mean that general or uncorroborated statements would permit inferences.[66]

Investor-state jurisprudence has also borne out the opposite conclusion.[67] Thus, inferences will rarely be drawn when evidence, all things considered, was not difficult to obtain for the party having the burden to prove the fact in question. For instance, a tribunal may assume, as the *Metal-Tech* tribunal did, that a company would be able to

[61] ibid [709].

[62] ibid [710].

[63] ibid

[64] ibid [711].

[65] ibid [715].

[66] *Vannessa Ventures Ltd. v Bolivarian Republic of Venezuela*, ICSID Case No ARB(AF)/04/6, Award (16 January 2013), IIC 572 (2013) [228] ("Allegations of a lack of independence and impartiality are more difficult to deal with. They often amount to allegations of violations of professional rules, or even of criminal laws, and it is not to be expected that evidence will be readily available. Such allegations would, if proven, constitute very serious violations of the State's treaty obligations. But they must be properly proved; and the proof must, at least ordinarily, relate to the specific cases in which the impropriety is alleged to have occurred. Inferences of a serious and endemic lack of independence and impartiality in the judiciary, drawn from an examination of other cases or from anecdotal or circumstantial evidence, will not ordinarily suffice to prove an allegation of impropriety in a particular case.").

[67] *Europe Cement Investment & Trade SA v Turkey*, ICSID Case No. ARB(AF)/07/2, Award (13 August 2009), IIC 385 (2009)[166-7]; *Metal-Tech v Uzbekistan*, ICSID Case No ARB/10/3, Award (4 October 2013), IIC 619 (2013) [258].

account for the business reason supporting the conclusion of a seven figure consulting contract in the ordinary course – and would particularly be tempted to do so if most transactions of a similar scale in fact were supported with internal meeting minutes or memoranda.[68]

(A) *The Relationship of the Inference to Direct Record Evidence*

Once the tribunal has established that it may be able to excuse the absence of direct evidence and the evidence is plausible the next threshold question is whether the inference to be drawn has a sufficient relationship to the evidentiary record before the tribunal. This factor tests how far of an inference – how much of a leap – is required in order to determine from record evidence that another fact is proved circumstantially.[69] It

[68] *Metal-Tech v Uzbekistan*, ICSID Case No ARB/10/3, Award (4 October 2013), IIC 619 (2013) [256]: "the Tribunal made a considerable effort to ensure that it had all the relevant evidence that it needed to decide on the corruption allegations. In fact, even before the January Hearing, the Tribunal had already addressed allegations of payments made by the Claimant to Uzbek Government officials. In PO 3 of 13 December 2011, in the context of the Respondent's allegations against Mr. Ibragimov, the Tribunal directed the Claimant to conduct a "further comprehensive search" for documents evidencing payment to any official or employee of the Government since 1994 and to 'report on the actions taken in conducting the search.' In spite of the Tribunal's efforts after the January Hearing to establish the facts related to the payments about which Mr. Rosenberg had testified, the Claimant was unable to substantiate its contention that actual services had been carried out for legitimate purposes in return for those payments. The Claimant's explanations for its non-compliance with the Tribunal's directions to provide additional evidence . . . remain unconvincing."

[69] See eg *SGS Société Générale de Surveillance SA v The Republic of Paraguay*, ICSID Case no ARB/07/29, Decision on Jurisdiction (12 February 2010), IIC 525 (2010) [106] ("To the extent the question is one of development, Respondent itself characterized the services of SGS and BIVAC as constituting a "transitional measure" to be used until the State reaches the point where "national customs authorities are able to carry out these tasks on their own"—in other words, until the State's capabilities develop sufficiently. It is no great leap to see the "transitional measure" (the Contract) as facilitating and contributing to that development, based not only on technical assistance (the existence and sufficiency of which is a disputed issue between the Parties); *Waguih Elie George Siag and Clorinda Vecchi v The Arab Republic of Egypt*, ICSID Case No ARB/05/15, Award (1 June 2009), IIC 374 (2009) [350] ("it is the task of Egypt to prove that Mr Siag acquired Lebanese nationality through fraud. Even if Mr Siag's sole motivation in acquiring Lebanese nationality was to avoid military service, the Tribunal considers that it would require a large leap of logic to infer from those facts that Mr Siag would commit fraud in order to achieve that end") but also on the inspection and certification services themselves."); *International Thunderbird Gaming Corporation v Mexico*, Award (26 January 2006), IIC 136 (2006) [136] (drawing the inference that "operation of these video game machines with a built-in and modifiable random number generator involves a considerable degree of chance, and that by adjusting the payout rate, the machine operator can manipulate the odds for winning regardless of the skill of the player" from manuals stating that the pay rate "can be changed to a value within the range of 50%-95%" and testimony that "the machine's percentage of payout is not visible or otherwise known to the player"). The issue whether an inference requires too much of a leap occasionally leads to controversy. See eg *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v Bolivarian Republic of Venezuela*, ICSID Case No ARB/07/30, Dissenting Opinion of Georges Abi-Saab on Reconsideration (10 March 2014), IIC 643 (2014) [23] ("The error committed by the Majority Decision as

is my submission that the further away the inference is from the record evidence, the more tenuous the inference becomes.[70] Once the inference becomes too tenuous to satisfy the requisite standard of proof, it would be inappropriate without more to draw an inference from the record.[71] In such circumstances of a tenuous inference, it may be possible to rely upon other modes of proof outlined above further to support the inference.

A helpful tool to determine the relative distance of the inference from evidentiary record is to determine what other reasonable inferences also could be drawn from the record and the support in the form of trade,[72] scholarly,[73] or international organizational literature for the probable correlation between the inference to be drawn and the evidentiary predicate present in the case.[74]

Two cases are illustrative in this regard. In *World Duty Free v. Kenya*,[75] the respondent, sought to show that the claimant's representative paid a bribe to the former President of Kenya in order to obtain approval for a project. The parties agreed that a representative of the claimant made a significant payment to Kenya's President by leaving a briefcase containing a large amount of money unattended during a presidential meeting and retrieving the briefcase only when he noted that the money

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described above, was easily detectable from the record at the disposal of the Tribunal at the time that Decision was issued. It confounds the third step covered by the leap of faith of the Majority Decision i.e. denying any significance and effect to the Confidentiality agreement").

[70] See *Lao Holdings N.V. v Lao People's Democratic Republic*, ICSID Case No ARB(AF)/12/6, Decision on Provisional Measures (12 May 2014), IIC 646 (2014) [62] (treating an inference that is at a significant remove from the evidence upon which it is based is tenuous); *Libananco Holdings Co Ltd. v Republic of Turkey*, ICSID Case No ARB/06/8, Award (31 August 2011), IIC 506 (2011) [525.1].

[71] See *Waguih Elie George Siag and Clorinda Vecchi v The Arab Republic of Egypt*, ICSID Case No ARB/05/15, Award (1 June 2009), IIC 374 (2009) [350].

[72] See *Ceskoslovenska Obchodni Banka AS v The Slovak Republic*, ICSID Case No ARB/97/4, Award (29 December 2004), IIC 51 (2004) [282] (noting that CSOB had failed to submit convincing evidence of a common business practice that otherwise could have been used to draw an inference in CSOB's favor); *BRIDAS SAPIC v Turkmenistan*, ICC Case No 9058/FMS/KGA, Partial Award And Dissent (24 June 1999), IIC 35 (1999), footnote 13 (relying for an inference on "relevant trade usage").

[73] On the drawing of inferences from scientific evidence, see generally *Methanex Corporation v United States of America*, Award (19 August 2005), IIC 167 (2005), passim.

[74] See *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v Republic of Kazakhstan*, ICSID Case No ARB/05/16, Award (21 July 2008), IIC 344 (2008) [709].

[75] *World Duty Free Company Limited v Kenya*, ICSID Case No ARB/00/7, Award (4 October 2006), IIC 277 (2006).

had been removed from the briefcase. Kenya requested the inference that the payment is a bribe. The investor submitted that the payment is a "gift of protocol or a personal donation to the President to be used for public purposes within the framework" of host state custom.[76] Based upon the sizeable payment made, and the manner in which the payment was made, the tribunal drew the inference that the payment was a bribe.[77] As the tribunal concluded:

> Under these circumstances, such as described by Mr. Ali himself, the Tribunal has no doubt that the concealed payments made by Mr. Ali on behalf of the House of Perfume to President Moi and Mr. Sajjad could not be considered as a personal donation for public purposes. Those payments were made not only in order to obtain an audience with President Moi (as submitted by the Claimant), but above all to obtain during that audience the agreement of the President on the contemplated investment. The Tribunal considers that those payments must be regarded as a bribe made in order to obtain the conclusion of the 1989 Agreement.[78]

Another illustrative case is *Al-Bahloul v. Tajikistan*.[79] Al Bahloul, the claimant, sought to show that an area in question in the arbitration contained proven hydrocarbon reserves by relying upon exploration expenditures of approximately US$ 500 million by a major regional oil and gas company. The tribunal refused to draw an inference as to the existence of proven reserves on this basis. It noted that "the decision to explore an oil field is not based on the Probability of Success, but is also dependent on the reserves hoped for . . ." The inference thus was defeated by the existence of another, equally or more plausible explanation of the circumstantial evidence relied upon by claimant.[80]

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[76] ibid [133].

[77] ibid [136].

[78] ibid.

[79] *Mohammad Ammar Al-Bahloul v The Republic of Tajikistan*, SCC Case No 064/2008, Award (8 June 2010), IIC 475 (2010).

[80] ibid [89].

(B) *The Quality and Quantity of Direct Evidence Supporting the Inference*

Another relevant factor in determining whether an inference should be drawn is the strength of the direct evidence upon which an inference would be based. As an inference extends the direct evidence submitted beyond its facial scope to make a factual conclusion that another event plausibly also occurred, a tribunal should only do so to the extent that it is satisfied that the direct evidence itself is sufficiently probative in its own right.[81] Thus, even the most reasonable inference may be defeated if the evidence upon which the inference would be based were deemed not credible by the tribunal.[82] This assessment of the quality of the direct evidence supporting the inference follows the general principles of examination of evidence otherwise used by the tribunal.[83]

A further factor relevant to support an inference is the quantity of direct evidence supporting it. Investor-state tribunals frequently seek to rely on more than one source of direct evidence to support an inference.[84] The quantity of pieces of direct evidence that a party can submit in support of the proposed inference thus can have significant bearing upon whether the inference is in fact drawn. The absence of a significant number of pieces of evidence supporting the same inference does not of itself defeat an inference. Rather, the absence of multiple pieces of direct evidence supporting an inference affects the manner in which a tribunal will weigh the other factors relevant to its drawing of an inference.

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[81] See *Waguih Elie George Siag and Clorinda Vecchi v The Arab Republic of Egypt*, ICSID Case No ARB/05/15, Award (1 June 2009), IIC 374 (2009) [211-215].

[82] *Europe Cement Investment & Trade SA v Turkey*, ICSID Case No ARB(AF)/07/2, Award (11 August 2009), IIC 385 (2009) [158].

[83] See *Marvin Roy Feldman Karpa v United Mexican States*, ICSID Case No ARB(AF)/99/1, Award (12 December 2002), IIC 157 (2002) [131] (determining how to deal with a he-said-he-said situation of contradictory direct evidence); *Middle East Cement Shipping and Handling Co. SA v Arab Republic of Egypt*, ICSID Case No ARB/99/6, Award (12 April 2002), IIC 169 (2002) [94]; *Tradex Hellas SA v Republic of Albania*, ICSID Case No ARB/92/2, Award (29 April 1999), IIC 263 (1999) [84]; *Asian Agricultural Products Ltd. v Republic of Sri Lanka*, ICSID Case No ARB/87/3, Award (27 June 1990) [56].

[84] See *Fireman's Fund Insurance Company v The United Mexican States*, ICSID Case No ARB(AF)/02/01, Award (14 July 2006), IIC 291 (2006) [213]; *International Thunderbird Gaming Corporation v Mexico*, Award (26 January 2006), IIC 136 (2006) [136]; *Rompetrol Group NV v Romania*, ICSID Case No ARB/06/3, Award (6 May 2013), IIC 591 (2013) [224] (noting that testimonial evidence required further external corroboration due to questions of credibility).

The significance of an inference for a party's ability to discharge meet the standard of proof will also be relevant.[85] There is no rule prohibiting the proof of a case entirely by circumstantial evidence;[86] but the larger the role of circumstantial evidence in the case, the greater the scrutiny whether the circumstantial evidence is sufficient to hold the weight the party carrying the burden places upon it.[87]

The *Quasar v. Russia* case is illustrative.[88] In that case, the claimant alleged, that respondent imposed taxation upon the investment as a means of political retaliation to destroy the investment. Claimant submitted direct evidence that Respondent previously had audited company taxes and issued certificates of tax compliance. Claimant further submitted that the Russian Federation had been paid a substantial amount of the taxes which even respondent admitted to be grossly disproportionate to the remaining tax liability. Respondent submitted that company in fact failed to file appropriate tax returns and understated its tax liability for the period in question. The tribunal inferred that confiscatory intent and bad faith central to claimant's claim.[89]

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[85] Aloysius P. Llamzon (n 8) 230-1 (noting the cautious embrace of proof by circumstantial evidence in the corruption context).

[86] See Chapter 4, Section VIII above for a discussion on circumstantial evidence. See also *Rompetrol Group NV v Romania*, ICSID Case No ARB/06/3, Award (6 May 2013), IIC 591 (2013) [182] ("The guidance which the Tribunal draws from the cases is that there may well be situations in which, given the nature of an allegation of wrongful (in the widest sense) conduct, and in the light of the position of the person concerned, an adjudicator would be reluctant to find the allegation proved in the absence of a sufficient weight of positive evidence — as opposed to pure probabilities or circumstantial inferences. But the particular circumstances would be determinative, and in the Tribunal's view defy codification. The matter is best summed up in general and non-prescriptive terms by Judge Higgins, 'the graver the charge the more confidence must there be in the evidence relied on'.").

[87] ibid.

[88] *Quasar de Valores SICA SA v Russian Federation*, SCC Case No 24/2007, Award (20 July 2012), IIC 557 (2012).

[89] ibid [175] ("The Respondent may have marshalled arguments since then as to why Yukos was not as solid as is contended by its old owners, but what is missing — and thus supports the plain inference that the Respondent's objective was the subjugation of Yukos, not the orderly collection of normal taxes — is its inability to show such an investigation preceding its decision, in effect, to dismantle Yukos. Indeed, as the Claimants stress, Yukos had almost entirely paid off the 2000 tax assessment, i.e. the raison d'être of the seizure in the first place, by the time YNG was auctioned off. The valuation commissioned by the Respondent itself suggested that YNG was worth many multiples of the Yukos assessment on account of TY2000.").

IV. CIRCUMSTANCES SIGNIFICANT IN REBUTTING THE DRAWING OF RECORD INFERENCES

There are two ways in which a party can seek to rebut the drawing of record inferences. First, a party may wish to contest solely the evidentiary case of the other party. It can do so by positing that there is no direct evidence to prove the point in question.[90] Alternatively, it could submit that the link between the direct evidence and the inference to be drawn is too tenuous.[91] Further, it could attack the probative weight of the direct evidence in support of the inference. In combination, it frequently would submit that there are too few pieces of direct evidence to warrant an inference.[92] Finally, it would submit that the inference is too significant for the case to be warranted and that the drawing of the inferences in question would effectively reverse burdens of proof.[93] This strategy essentially only tests the sufficiency of the submission of the party seeking an inference and, thus adds only analysis, not more evidence.

For example, in *Brandes v. Venezuela*, the claimant argued that Venezuela consented to arbitration by means of a domestic investment law that on its face is ambiguously worded. Brandes submitted contemporaneous evidence that the investment law was intended to take the place of a bilateral investment treaty and that

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[90] See *Bayindir Insaat Turizm Ticaret ve Sanayi A Ş v Islamic Republic of Pakistan*, ICSID Case No ARB/03/29, Award (27 August 2009), IIC 387 (2009) [238-9].

[91] See *Waguih Elie George Siag and Clorinda Vecchi v The Arab Republic of Egypt*, ICSID Case No ARB/05/15, Award (1 June 2009), IIC 374 (2009) [352] ("While the Tribunal accepts that US$5,000 may be a large amount of money in Egypt, it is not convinced that it is so large a sum when it is taken into account that Mr Khouly's travel and accommodation costs were included. 439 In any event the payment made to Mr Khouly was certainly not so great as to justify the inference that it would only have been paid in consideration of fraudulent activity. The suggested inference that this payment evidences fraud is rejected"); *Railroad Development Corporation v Republic of Guatemala*, ICSID Case No ARB/07/23, Decision on Provisional Measures (15 October 2008), IIC 352 (2008) [23] (Respondent arguing that the newspaper reports submitted by the claimant with the exception of one report concerned the actions of an earlier government irrelevant to the current head of claim); *Tokios Tokelés v Ukraine*, ICSID Case No ARB/02/18, Award (26 July 2007), IIC 331 (2007) [31] ("This is a question of inference, requiring a choice between two fundamentally different narratives. One, presented by the Claimant, describes the interaction between Taki spravy, its officers and the STA. The other views the history in the context of investigations carried on by State agencies at and around the time in question, and whilst not directly challenging the Claimant's bare recital of events, treats it as incomplete and potentially misleading."); *Inmaris Perestroika Sailing Maritime Services GmbH v Ukraine*, ICSID Case No ARB/08/8, Decision on Jurisdiction (8 March 2010), IIC 431 (2010) [74].

[92] *Opic Karimum Corporation v Bolivarian Republic of Venezuela*, ICSID Case No ARB/l0/14, Award (28 May 2013), IIC 618 (2013) [125, 146].

[93] ibid.

persons associated with the drafting of the law considered that the law should contain a standing consent to arbitration. Respondent did not submit any direct evidence of contrary intent but instead attacked the credibility of Brandes' evidence and the plausibility of the inference sought by Brandes. The tribunal agreed with the Venezuela that Brandes failed to submit sufficient evidence to permit the inference that Respondent intended to consent to international arbitration by means of its investment law.[94] The Respondent, therefore, rebutted the inference that Claimant was seeking.

Second, a party seeking to rebut an inference can also submit additional evidence that would call into question the inference requested by the other party. This evidence could either be direct, such as a document or testimony that directly speaks to the ultimate fact to be proved. This evidence further could support the drawing of alternative inferences from the record more favorable to the party seeking to rebut the inference. In this second case, it is important that a tribunal does not of necessity have to determine that the alternative inference is warranted – just that the inference requested by the party assigned the burden with regard to the fact to be proved has not sufficiently accounted for the alternative explanations provided by the other side. A tribunal can only choose this second route if it cannot otherwise determine which of the inferences to be drawn is plausible, *i.e.*, more reasonable than the others. If a tribunal can exclude the inferences suggested by the rebutting party as less plausible than the inference proposed by the party requesting an inference, the tribunal is bound by the logic of its own conclusions.

This is borne out in investor-state arbitration. For example, in *Feldman v. Mexico*, the investor asserted by means of direct testimony that its preferred manner to calculate rebates was expressly approved by the government. Mexico pointed out that the direct testimony is implausible because of the violation of existing statutory provisions this method would otherwise entail. Mexico further submitted direct testimonial evidence contradicting the claimant's witness. The tribunal agreed with the Respondent and refused to draw any inferences as requested by Claimant. In other words, the evidence

[94] *Brandes Investment Partners, LP v The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/3, Award (2 August 2011) [79-118].

was rebutted by Respondent.[95] In such an instance, it was not plausible to draw an inference in the light of the express statutory provision.

V. INFERENCES ARISING FROM THE MISCONDUCT OF THE PARTIES IN ADDUCING EVIDENCE (E.G., FAILURE TO PRODUCE DOCUMENTS) IN ARBITRAL PROCEEDINGS

As recognized in jurisprudence, investor-state tribunals are empowered to draw adverse inferences premised upon party misconduct in the arbitration such as spoliation of evidence.[96] For instance, a tribunal may make a finding that a party failed reasonably to preserve documents, also known as a finding of spoliation of evidence.[97] If a tribunal makes a finding of spoliation, it is the party's misconduct of failing to preserve documents that lends plausibility to an inference requested by the other party of what the documents would have contained. If a tribunal draws such an inference, it does not

[95] *Marvin Roy Feldman Karpa v United Mexican States*, ICSID Case No ARB(AF)/99/1, Award (12 December 2002), IIC 157 (2002) [131].

[96] See eg *Yukos Universal Ltd. v Russia*, PCA Case No. AA/227, Award (18 July 2014), IIC 652 (2014) [51]; *Poštová banka, a.s. and ISTROKAPITAL SE v Hellenic Republic* ICSID Case No Arb/13/8, Procedural Order (22 January 2014), IIC 631 (2014) [15.3]; *Metal-Tech Ltd. v Uzbekistan*, ICSID Case No ARB/10/3, Award (4 October 2013), IIC 619 (2013) [245]; *Mesa power Group LLC v Canada*, PCA Case No. 2012-17, Procedural Order (23 August 2013), IIC 611 (2013) [29]; *Opic Karimum Corp. v Venezuela*, ICSID Case No ARB/10/14, Award (28 May 2013), IIC 618 (2013) [145]; *Rompetrol Group NV v Romania*, ICSID Case No ARB/06/3, Award (6 May 2013), IIC 591 (2013) [181]; *Caratube International Oil Co. v Kazakhstan*, ICSID Case No ARB/08/12, Award (5 June 2012), IIC 562 (2012) [47]; *Deutsche Bank AG v Sri Lanka*, ICSID Case No ARB/09/02, Award (21 October 2012), IIC 578 (2012) [111]; *Liman Caspian Oil BV v Kazakhstan*, ICSID Case No ARB/07/14, Award (22 June 2010), IIC 590 (2010) [26.4]; *Glamis Gold, Ltd. v The United States of America*, UNCITRAL, Award (14 May 2009), IIC 380 (2009) [253-5]; *Rumeli Telekom AS v Kazakhstan*, ICSID Case No ARB/05/16, Award (21 July 2008), IIC 344 (2008) [444]; *Libananco Holdings Co. Ltd. v Turkey*, ICSID Case No ARB/06/8, Preliminary Decision (23 June 23 2008), IIC 327 (2008) [72-82]; *Fraport AG Frankfurt Airport Services Worldwide v Philippines*, ICSID Case No ARB/03/25, Award (16 August 2007), IIC 299 (2007) [47]; *Yury Bogdanov v Republic of Moldova*, Award (22 September 2005), IIC 33 (2005) [60-1]; *United Parcel Service of America, Inc. v Canada*, Procedural Order (8 October 2004), IIC 267 (2004) [15]; *Feldman v Mexico*, ICSID Case ARB(AF)/99/1, Award (16 December 2002), IIC 257 (2002) [178]. For a discussion of the principle in the secondary literature, see Durward Sandifer, *Evidence Before International Tribunals* (University Press of Virginia 1975) 147; Chittharanjan Amerasinghe, *Evidence in International Litigation* (Brill 2005), 247-8; Aloysius P. Llamzon (n 8) 231; Christoph Schreuer *et al*, *The ICSID Convention: A Commentary* (Cambridge University Press 2009) 657.

[97] For a discussion of spoliation in the arbitration context, see Steven Hammond, 'Spoliation in International Arbitration: Is It Time to Reconsider the 'Dirty Wars' of the International Arbitral Process?', Dispute Resolution International (Vol. 3(1) 2009) 5; Peter Ashford, *Document Production in International Arbitration*, 10 Loyola University Chicago International Law Review (2012) 1, 9. See also *Lao Holdings NV v Lao People's Democratic Republic*, ICSID Case No ARB(AF)/12/6, Decision on Provisional Measures (12 May 2014), IIC 646 (2014) [70].

look to the arbitration record but to arbitration conduct. This is the second prong of my argument.

In determining whether an inference is made plausible by the conduct of one of the parties in the arbitral proceedings, the following circumstances are significant: (i) the severity of the party's misconduct in the arbitral proceedings, (ii) the relationship between the misconduct and the fact to be proved by means of an inference, (iii) the procedural good faith of the party seeking the inference, (iv) the plausibility of drawing the same inference from the record absent consideration of party misconduct, and (v) the overall significance of the inference requested.

(A) *Good Faith in Investor-State Arbitration*

Arbitral tribunals lack general contempt powers.[98] Tribunals, therefore, are not able to compel the good faith participation of all parties to the arbitral proceedings (barring a cost order), even though good faith is presumed in evidentiary matters.[99] In light of the applicable burden and standards of proof, it may therefore be tempting for arbitration parties to conduct in arbitral proceedings in less than good faith. These parties would then plead the burden and standard of proof as a bar to a claim or affirmative defence all the while depriving its counterparty of the ability to submit sufficient evidence to make out the claim or affirmative defence.[100] If arbitral tribunals rewarded such conduct, parties would be further incentivized to participate in arbitral proceedings in less than good faith.[101] The arbitral process would have an implicit but necessary bias in favour

[98] See Blackaby *et al*, *Redfern and Hunder on International Arbitration* (Oxford University Press 2015) 311.

[99] See Durward Sandifer (n 1) 147. The IBA Rules on the Taking of Evidence also envision that the parties act in good faith. See eg Preamble, ¶ 3 ("The taking of evidence shall be conducted on the principles that each Party shall act in good faith and be entitled to know, reasonably in advance of any Evidentiary Hearing or any fact or merits determination, the evidence on which the other Parties rely."), Article 9(7) ("If the Arbitral Tribunal determines that a Party has failed to conduct itself in good faith in the taking of evidence, the Arbitral Tribunal may, in addition to any other measures available under these Rules, take such failure into account in its assignment of the costs of the arbitration, including costs arising out of or in connection with the taking of evidence.").

[100] See *Rompetrol Group NV v Romania*, ICSID Case No ARB/06/3, Award (6 May 2013), IIC 591 (2013) [181] (rejecting such a strategy).

[101] See ibid; see also Durward Sandifer (n 1) 147.

of the party who could invoke a burden of proof in its defence.[102] Such a state of affairs would significantly erode the authority of arbitral decision because participants would expect the decisions to be less than fair, manipulated, and one-sided. To incentivize good faith party participation – and thus the integrity and authority of the arbitral decision-making process – it is thus necessary for the tribunal to have recourse to party conduct immediately affecting the integrity of the arbitral record as an independent means of proof in the drawing of inferences.[103]

(B) *Severity of Procedural Bad Faith and its Relationship to the Facts to be Proved*

Although litigants habitually request the drawing of adverse inferences, tribunals do not use this procedural tool lightly.[104] Rather, the use of adverse inferences typically follows upon particularly serious procedural misconduct by one of the parties.

The typical context for a request for adverse inferences arises when one party submits that the document disclosures made by the other party as part of the arbitral proceedings are insufficient.[105] One manner in which this can occur is a blanket denial that documents responsive to a document disclosure request exist without conduct a good faith search for the document.[106] Further, a party may repeatedly deny the

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[102] For further discussion, see Chapter 2 discussing the burden of proof.

[103] See Christoph Schreuer *et al*, (n 1) 657.

[104] See eg *Clayton v Canada*, PCA Case No 2009-04, Decision on Jurisdiction and Liability (17 March 2015), IIC 688 (2015) [118] ("the Tribunal is confident that it was put in a position where it was able to reach an informed determination of the facts, without the need to have recourse (as the Parties' have invited the Tribunal to do) to the drawing of adverse inferences."); *Opic Karimum Corp. v Bolivarian Republic of Venezuela*, ICSID Case No ARB/10/14, Award (28 May 2013), IIC 618 (2013) [145-6] (rejecting use of adverse inferences to support ultimate jurisdictional finding of consent); *Plama Consortium Ltd. v Bulgaria*, ICSID Case No ARB/03/24, Decision on Jurisdiction (8 February 2005), IIC 189 (2005) [178] (sidestepping the issue of inferences by joining the issue of legal ownership and control to the merits). See also Christoph Schreuer *et al*, (n 1) 657 (noting that "In a number of cases, tribunals have indicated that they would draw adverse inferences from a party's failure to supply documents" without providing an example in which a tribunal actually drew an adverse inference premised upon party misconduct); Aloysius P. Llamzon (n 8) 231-2 (citing *Metal-Tech* as the paradigmatic example of a case in which the threat of adverse inferences proved fruitful).

[105] See references as cited in n 96 above.

[106] This is what Opic Karimum asserted in the context of its assertion that Article 22 of the Venezuelan Investment Law constitutes a consent to ICSID arbitration. The issue related to documents from Mr. Capriles who Claimant alleged had drafted Venezuela's Investment Law and therefore Claimant sought those documents to see whether he intended the statute to provide for international arbitration. See *Opic Karimum Corp. v Venezuela*, ICSID Case No ARB/10/14, Award (28 May 2013), IIC 618 (2013) [135,

existence of a document only later to make public responsive documents in a different context.[107] Precisely because adverse inferences are routinely requested, tribunals reserve the use of this device for cases in which repeated violations of disclosure obligations can be proved,[108] or for cases in which the tribunal has made clear the importance of the specific documents in question for instance by threatening the use of adverse inferences should incomplete disclosures with regard to a certain point be proved.[109]

Relatedly, if it can be proved that evidence disclosed or relied upon by one of the parties were forged or otherwise falsified, tribunals may be asked to draw adverse inferences.[110] As the step of forging or falsifying evidence requires some form of action

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145] ("By this Order the Tribunal noted that the Respondent asserted that it did not have the requested documents in its possession custody or control, and directed the Respondent to produce them or provide a statement in writing to confirm that, after a thorough and careful search for the documents, it had ascertained that they were not in its possession, custody or control. The Tribunal also offered the Respondent an opportunity to make submissions on privilege, to the extent necessary. In its response to Procedural Order No. 1, the Respondent advised that, after a thorough and careful search, the documents requested had not been found and that any question of privilege was moot. The Claimant has subsequently asserted that the Respondent's failure to produce the requested documents should lead the Tribunal to draw adverse inferences against the Respondent, in relation to the matters that would be addressed in the requested documents. [. . .] The Tribunal considers that the explanations offered by counsel for the Respondent as to Venezuela's failure to follow up the production of Mr. Capriles' files are less than fully convincing."). The tribunal did not, however, find in the investor's favor ultimately because it was unable to establish Respondent's consent to arbitration in a clear and convincing manner.

[107] *Pope & Talbot Inc. v Canada*, Award on Costs (26 November 2002), IIC 196 (2002) [13] ("One other matter of concern to the Tribunal is that Canada, despite requests by the Investor and by the Tribunal, did not produce any Travaux Preparatoires in relation to the relevant Articles of NAFTA, in particular 1105, until virtually the end of the arbitration, having previously asserted they did not exist.").

[108] *Metal-Tech Ltd. v Uzbekistan*, ICSID Case No ARB/10/3, Award (4 October 2013), IIC 619 (2013) [245-266]. For a discussion of the importance of the availability of adverse inference for the tribunal's decisionmaking in *Metal-Tech*, see Aloysius P. Llamzon (n 8) 231.

[109] *Fraport AG Frankfurt Airport Services Worldwide v Philippines*, ICSID Case No ARB/03/25, Award (16 August 2007), IIC 299 (2007) [47]. For a discussion of the importance of the availability of adverse inference in for the tribunal's decisionmaking in *Fraport*, see Christoph Schreuer *et al*, *The ICSID Convention: A Commentary* (Cambridge University Press 2009), 657.

[110] See *Europe Cement Investment & Trade SA v Turkey*, ICSID Case No ARB(AF)/07/2, Award (11 August 2009), IIC 385 (2009) [141-3] (addressing claims that copies of shareholder certificates submitted to the tribunal were not authentic); see also *Gemplus SA v Mexico*, ICSID Case No. ARB(AF)/04/3, Award (16 June 2010), IIC 488 (2010), [4-142] (refusing to draw an adverse inference because a witness testimony relied upon recollection that was incorrect because the tribunal deemed the witness to be honest); *Plama Consortium Ltd. v Bulgaria*, ICSID Case No ARB/03/24, Decision on Jurisdiction (8 February 2005), IIC 189 (2005) [178] (holding that "the fact remains that Mr. Vautrin testified under cross-examination before the Tribunal at the September hearing; his testimony remained unequivocal on the relevant issues; and on the existing materials, the Tribunal would not wish to reject his evidence as false at this stage of the proceedings). But see *Libananco Holdings Co Ltd. v Turkey*, ICSID Case No

(as opposed to an omission to disclose), tribunals are typically more willing to consider forgery or fraud in the proceedings to be severe even if it is not repeated.[111]

Other context for a request for inferences includes the use of surveillance technology to undermine the attorney-client privilege.[112] The use of any means affirmatively to gain an unfair advantage in arbitral proceedings likely going to be met by tribunal rebuke.[113]

The procedural bad faith must be closely related to the fact to be proved. Adverse inferences are not available to issue a form of default judgment against one of the parties. Thus, the inference lies only to the extent that it is plausibly the case that a fact would have been proved but for the procedural misconduct of the party to be charged with an adverse inference. The more immediate the link between the misconduct and the fact to be proved, the more likely the adverse inference.

The *Rumeli v. Kazakhstan* case is on point. Here, Kazakhstan submitted that parties affiliated with the claimants have been indicted for fraudulent activity in the United States. Without more, there was not a sufficient link to conclude that the claimant similarly engaged in criminal activity in the territory of the Respondent and, therefore, no such inference could be drawn.[114]

ARB/06/8, Award (2 September 2011), IIC 506 (2011) [414.4] (ruling against the claimant on a critical issue in the case because it did "not find this explanation [by a witness of his witness testimony relating to having been on a direct flight] persuasive and is likewise unable to accept" his testimony.) For a discussion of the *Libananco* decision, see Frédéric Gilles Sourgens, *A Nascent Common Law* (Brill Nijhoff 2015) 173-4.

[111] See *Europe Cement Investment & Trade SA v Turkey*, ICSID Case No ARB(AF)/07/2, Award (11 August 2009), IIC 385 (2009) [141-3].

[112] *Libananco Holdings Co. Ltd. v Turkey*, ICSID Case No ARB/06/8, preliminary decision (June 23, 2008), IIC 327 (2008) [79].

[113] ibid.

[114] See *Rumeli Telekom AS v Kazakhstan*, ICSID Case No. ARB/05/16, Decision on Annulment (25 March 2010), IIC 420 (2010) [96-7]. The case did not involve a request for an adverse inference. Rather, the question arose whether the evidence of a relevant third court judgment involving one of the parties to the transaction of its own implies criminal conduct relevant to the treaty claim.

(C) *The Importance of Procedural Clean Hands of the Party Seeking an Inference*

Parties seeking an adverse inference for procedural misconduct of its opponents must come to the tribunal with reasonable clean hands.[115] The ability of the tribunal to draw inferences due to procedural misconduct protects the good faith cooperation of the parties in the arbitral proceedings.[116] A party seeking to receive the benefit of such an inference therefore must meet the basic requirements of any action sounding in good faith at general international law (albeit applied to the process of arbitration as opposed to the conduct giving rise to the arbitration in the first place). One element for relief sounding in good faith in general international law is the clean hands of the party seeking the relief.[117] In the context of a showing of procedural bad faith of the party seeking the inference, a tribunal is likely to leave the parties where they lie as opposed to giving aid or relief to either of them by drawing any inferences premised upon arbitration conduct.[118]

An illustration from Bin Cheng's classical treatise has been modified to explain this point.[119] A claimant requests internal government documents to show that criminal

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[115] Notably, the tribunal in *Fraport* did not draw adverse inferences against Fraport with regard to the late production of documents despite indicating that it might to do so. *Fraport AG Frankfurt Airport Services Worldwide v Philippines*, ICSID Case No ARB/03/25, Award (16 August 2007), IIC 299 (2007) [47]; Christoph Schreuer *et al*, *The ICSID Convention: A Commentary* (Cambridge University Press 2009) 657. The tribunal's decision stands in the context of the following statement by the tribunal about the proceedings: "this has been a bitterly fought case since the constitution of the Tribunal on 11 February 2004. The mere fact that, more than 14 months after the end of the oral hearing on jurisdiction and liability, the parties were still exchanging letters and submitting reports and documents to the Tribunal attests to the unusual nature of the present arbitration and explains why the Tribunal's decision has only been made now." *Fraport AG Frankfurt Airport Services Worldwide v Philippines*, ICSID Case No. ARB/03/25, Award (16 August 2007), IIC 299 (2007) [75].

[116] See Durward Sandifer (n 1) 147; Christoph Schreuer et al (n 1) 656.

[117] See Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge University Press, 2006) 129 ("the principle of good faith governing the exercise of rights, sometimes called the theory of abuse of rights, while protecting the legitimate interests of the owner of the right, imposes such limitations upon the rights as will render its exercise compatible with that party's treaty obligations, or, in other words, with the legitimate interests of the other contracting party.").

[118] See Aloysius P. Llamzon (n 8) 215-6 (discussing the principle of clean hands in the context of international law good faith principles); *Niko Resources (Bangladesh) Ltd. v People's Democratic Republic of Bangladesh*, ICSID Case No ARB/10/11, Decision on Jurisdiction (19 August 2013), IIC 603 (2013) [483] (noting the importance of reciprocity in the context of the international application of the clean hands doctrine).

[119] See Bin Cheng, General Principles of Law as Applied by International Courts and Tribunals (Cambridge University Press 2006) 121-136.

prosecutions commenced in country were premised upon political directions to harangue the investor rather than reasonable suspicion of wrongdoing. Respondent requests documents to show that the claimant in fact acted in conscious disregard of the foreign investment regime. Both claimant and respondent object to the respective disclosure requests. The tribunal orders production of documents responsive to both sets of requests, having rejected the objection raised by the respective other party. Both claimant and respondent refuse to produce responsive documents. All else being equal, neither is likely to be successful in seeking an adverse inference premised upon non-production of the documents.

(D) *The Relationship of Inferences Arising from Party Misconduct and Inferences Arising from the Record*

Parties frequently argue *both* that the tribunal can infer a fact from the record and on the basis of the conduct of its opponent in the arbitration.[120] Tribunals typically will refrain from drawing adverse inferences from arbitration conduct to the extent that it is possible to draw the same conclusion by reference to a record inference.[121] A conclusion would thus only be drawn in one of two circumstances in which such record inferences were not available. *First*, an adverse inference would be necessary if the same conclusion could not reasonably be drawn on the basis of the arbitration record, in the sense that there is an insufficient predicate to support the proposed inference on its

[120] See eg *Yukos Universal Ltd. v Russia*, PCA Case No. AA/227, Award (18 July 2014), IIC 652 (2014) [250, 982] (asking for adverse and record inferences relating to the status of Baikal Finance Group as a "dummy" and "mask for Russian State interests"); *Metal-Tech Ltd. v Uzbekistan*, ICSID Case No ARB/10/3, Award (4 October 2013), IIC 619 (2013) [229, 265] (combining the use of adverse and record inferences relating to corruption allegations); *Opic Karimum Corp. v Bolivarian Republic of Venezuela*, ICSID Case No ARB/10/14, Award (28 May 2013), IIC 618 (2013) [145] (combining the use of adverse and record inferences).

[121] See Robert Kolb, *The Elgar Companion to the International Court of Justice* (Edward Elgar 2014) 246 ("In the Corfu Channel case (1949), the Court allowed recourse to indirect evidence for same reason: the United Kingdom could not secure sufficient evidence because the relevant facts were within the territorial sphere of Albania, to which it had no access) Note that the drawing of adverse inference as such premised upon the non-production of evidence by Albania would have been complicated by the United Kingdom's own refusal to produce evidence on the basis of naval secrecy despite clear requests by the International Court of Justice for the evidence in question. See W. Michael Reisman, *The Quest for World Order and Human Dignity in the Twenty-First Century: Constitutive Process and Individual Commitment* (Hague Academy of International Law 2012) 455-8.

face.[122] Such adverse inferences are extreme precisely because they tend to reverse established burdens of proof – and in some instances punish a party for failing to prove a negative.[123] Such pure adverse inferences having no other reasonable record support apart from party speculation therefore are exceedingly rare.[124]

Second, a tribunal logically would have to resort to an adverse inference if it considered that there was reasonable record support for an inference but that, based only upon the record as whole, this inference was not plausible. In such a case, party misconduct in the arbitration would be a factor considered in the drawing of an inference – but it would not be the only factor. Such consideration of arbitration conduct alongside record evidence in the making of plausibility determinations is regularly reflected in arbitral decision-making – even if it is hard to prove with certainty what role arbitration conduct ultimately played in the tribunal's decision-making.[125]

In either instance, adverse inferences should only be drawn to the extent that the procedural bad faith is commensurate to the evidentiary gap it is meant to fill.[126] The

[122] This problem could arise in the corruption context, if there no information on the record other than that the claimant employed unnamed consultants in the run up to the acquisition of an investment. In such a context, on the record as it stood, there would be no evidence to support that the funds were used as a bribe or in an otherwise corrupt manner. See Aloysius P. Llamzon (n 8) 230 (discussing the notion of burden-shifting as a proposed means to address corruption allegations in just such a context thus institutionalizing the most extreme form of adverse inference).

[123] See ibid.

[124] *Caratube v Kazakhstan* is one case, in which such an adverse inference arguably was drawn. *Caratube International Oil Co. LLP v Kazakhstan*, ICSID Case No ARB/08/12, Award (5 June 2012), IIC 562 (2012). The relevant issue was whether Mr. Hourani, the owner of 92% in the company, in fact controlled the company. ibid, [396]. Having expressly rejected the factual theory of the respondent as to who in fact controlled the Claimant, the tribunal nevertheless ruled in the apparent complete absence of evidence that Mr. Hourani in fact did not control the claimant due to his failure to produce evidence. ibid [462, 468].

[125] Robert Kolb, *The Elgar Companion to the International Court of Justice* (Edward Elgar 2014) 246 ("This practice shows the ratio inherent in the rules relating to proving negative facts applies more generally to cases where the actor faces particular problems in establishing the evidence, provided such problems are beyond its reach and no fault is imputable to the actor. The point is that the true position of the parties must be considered in order not to impose undue hardship, and ultimately injustice.").

[126] See Michelle T. Grando, *Evidence, Proof, and Fact-Finding in WTO Dispute Settlement* (Oxford University Press 2009) 268 (in drawing an adverse inference, a "panel must give adequate consideration to the evidence which is (or is not) on the record.").

more implausible the record inference, the more egregious the arbitral misconduct must be nevertheless to justify an adverse inference to stand in its stead.[127]

(E) *The significance of such adverse interference*

The significance of an adverse inference is similarly relevant. An inference could be drawn as to a single element of proof.[128] An inference also might be required for more than one or even all elements of a cause of action or affirmative defence.[129] The more significant the inference in replacing affirmative proof of a cause of action or affirmative defence, the graver misconduct must be to support it.[130]

Jurisprudence shows that tribunals are reasonably reluctant to draw adverse inferences outright. In the context of adverse inferences that would dispose of the case in its entirety tribunals are particularly reluctant to do so. The approach of *Europe Cement v. Turkey* referenced above in this Chapter is particularly instructive in this regard.[131] The claimant originally submitted copies of share certificates to prove its ownership of the relevant investment.[132] Turkey objected that the claimant lacked authentic share certificates with regard to the shareholdings upon which the claimant had initiated its claim.[133] The tribunal ordered production of the original share

[127] ibid.

[128] See ibid 268-9 ("Moreover, where the inference which can be drawn from non-production is one of the links in a chain of auxiliary propositions leading to proof of a claim, the other auxiliary propositions of the chain must be supported by evidence. For example, in *Korea-Commercial Vessels*, the panel refused to draw an inference from the failure of Korea to provide information on the terms of certain transactions because there was no evidence on the record demonstrating that those transactions actually took place.").

[129] ibid.

[130] It may be that a party is not in a position to convince the tribunal on basis of record inferences with regard to every element of a claim or defence – even though it is able to make a reasonable case as to multiple of these elements. Under those circumstances, arbitration conduct may well be taken into account with regard to the plausibility of each element. See Robert Kolb, *The Elgar Companion to the International Court of Justice* (Edward Elgar 2014), 246. With each time that the tribunal relies upon an adverse inference to close the gap, it should more carefully scrutinize the procedural misconduct to determine whether the misconduct warrants such repeated use to assist in the making out of multiple elements of a claim or defense.

[131] *Europe Cement Investment & Trade SA v Turkey*, ICSID Case no ARB(AF)/07/2, Award (13 August 2009), IIC 385 (2009).

[132] ibid [27].

[133] ibid [28].

certificates for inspection and set a schedule for the filing of requests for adverse inferences as requested by Turkey should claimant fail to comply.[134] The claimant was unable to produce the documents.[135] Turkey requested that the tribunal draw an adverse inference from non-production.[136] The tribunal studiously avoided making such inference the basis for a jurisdictional dismissal, holding instead that the evidentiary record as it stood was sufficient to dismiss the case for lack of jurisdiction even in the absence of a claim of forgery of the copied share certificates advanced by Turkey.[137] The dismissal of the claimant's claims therefore was made independently of the inference requested by Turkey.[138]

The same tribunal was willing to draw inferences from the non-production of the shares in question when determining whether to make an award of moral damages to Turkey for abuse of process by the claimant.[139] The adverse inference in that case supported the presence of an abuse of process by the claimant.[140] The adverse inference was insufficient to give rise to a claim for moral damages in its own right: the tribunal needed to have jurisdiction over the parties to issue such relief and the claimant of moral damages must make out exceptional circumstances such as duress.[141] Turkey failed to prove these additional elements, meaning that the adverse inference was insufficient of its own to provide the ultimate relief requested by Turkey in this instance.[142]

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[134] ibid [48-53].

[135] ibid [91].

[136] ibid [63].

[137] ibid [143].

[138] The tribunal affirmed that the adverse inference was an independent basis for a dismissal after it concluded that the record in its own right support the same conclusion. ibid [144]. Given the sequencing of decision, this conclusion constitutes obiter dicta.

[139] ibid [181].

[140] ibid [180].

[141] ibid [181].

[142] ibid.

Finally, the case also makes apparent the obvious link between circumstances that might lead to the drawing of an adverse inference and a cost order. In *Europe Cement*, the tribunal reasoned:

> where the Tribunal has reached the conclusion that the claim to jurisdiction is based on an assertion of ownership which the evidence suggests was fraudulent, an award to the Respondent of full costs will go some way towards compensating the Respondent for having to defend a claim that had no jurisdictional basis and discourage others from pursuing such unmeritorious claims.[143]

VI. CONSEQUENCES OF FAILING TO APPLY INFERENCES OR APPLYING AN INFERENCE INCORRECTLY

An inference is the ability of a tribunal to draw plausible conclusions on the basis of the totality of the evidence produced. An inference is, at its core, a decision-making function and, as a general matter, the decision-making process fall squarely within a tribunal's discretionary process. Therefore, as a general matter, inferences (either based on the evidence or on the conduct during the arbitration) cannot be the basis for a party to seek annulment of an award. However, this is not to imply that inferences are completely free from the annulment process.

Materials gaps in a tribunal's reasoning can be the basis for an annulment challenge. An inference necessarily requires a gap in the evidence and if the leap made through the evidence is too far (which would be a factual question), a party might be tempted to bring a motion for annulment. Indeed, the admonition that tribunals frequently seek to balance competing factual theories to arrive at a conclusion of what actually occurred can lead to an appearance that key steps in logic are missing from the award.[144] The task thus again is whether there is a reasonable inference, which is possible in light of the record as a whole, the submissions of the parties, and the findings made by the tribunal in the award and elsewhere that would permit a

[143] ibid [185].

[144] *Compañía de Aguas del Aconquija SA v Argentine Republic,* ICSID Case No ARB/97/3, Decision on Annulment (3 July 2002) [65].

reasonably complete account of the tribunal's ratiocination.[145] If such a complete account is possible without running into self-contradiction, the award should be maintained. It is only if any inference that might save an award from gaps would, if adopted, lead to an annullable self-contradiction that annulment for material gaps in reasoning is the appropriate remedy.[146]

Therefore, as inferences fall with a tribunal's discretionary power, they are often very difficult to establish barring severe material gaps in a tribunal's reasoning.

VII. CONCLUSION

The research question for this thesis states: ***"Whether there are any principles of evidence as recognized and applied by investor-state tribunals or do the principles of evidence merely fall within a tribunal's discretionary powers?"*** The evidentiary principle that has been considered here is inferences and, therefore, the relevant question is whether there are any principles relating to inferences as recognized and applied by investor-state tribunals?

The following conclusions can be drawn from the thesis:

First, investor-state tribunals often make findings of facts by means of inferences, where a tribunal made a determination of fact that is not premised upon direct evidence.

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[145] *Libananco Holdings Co Ltd v Republic of Turkey*, ICSID Case No ARB/06/8, Decision on Annulment (22 May 2013) [94]; *Rumeli Telekom AS v Republic of Kazakhstan*, ICSID Case No ARB/05/16, Decision on Annulment (25 March 2010) [138]; *CMS Gas Transmission Co v Argentine Republic*, ICSID Case No ARB/01/8, Decision on Annulment (25 September 2007) [123]-[125]; *Industria Nacional de Alimentos, SA v Republic of Peru*, ICSID Case No ARB/03/4, Decision on Annulment (5 September 2007) [129]; *CMS Gas Transmission Co v Argentine Republic*, ICSID Case No ARB/01/8, Decision on Annulment (21 August 2007) [56]; *Wena Hotels Ltd v Arab Republic of Egypt*, ICSID Case No ARB/98/4, Decision on Annulment (28 January 2002) [144].

[146] Decisions that recently have cast a wider net with regard to the failure to state reasons have come under significant scrutiny in the literature as having been wrongly decided and representing a threat to the integrity of ICSID arbitration. See eg *Mitchell v Republic of Congo*, ICSID Case No ARB/99/7, Decision on Annulment (1 November 2006) [38]-[40]; *Enron Corp v Argentine Republic*, ICSID Case No ARB/01/3, Decision on Annulment (30 July 2010) [376]. For a discussion of *Enron*, see Christoph Schreuer, *From ICSID Annulment to Appeal, Half Way Down the Slippery Slope*, available at http://www.univie.ac.at/intlaw/wordpress/pdf/icsid_annulment_appeal.pdf (accessed 17 May 2017), p. 9 ("This reasoning of the ad hoc committee is truly baffling. The Tribunal had correctly identified the governing law. It had also correctly identified the relevant rule and had applied it. But the ad hoc Committee found an excess of powers because it disagreed with the way the Tribunal had interpreted that rule.").

An inference refers to a conclusion that, as a matter of *plausibility* of a fact, must be concluded to be true in light of the record evidence as well as party conduct in the arbitral proceedings. Plausibility refers to the likelihood that something is more likely to have happened or not happened in the light of the totality of the evidence. The quality of an inference depends upon the probative value of the record in establishing the contextual facts on the basis of which the inference is drawn and the inductive acuteness of the finder of fact in drawing an inference.

Second, a tribunal can draw a record inference. In drawing an inference, a tribunal must determine how tenuous the inference is based on the overall record--the further away the inference is from the record evidence, the more tenuous the inference becomes. Indeed, there are two ways in which a party can seek to rebut the drawing of record inferences. First, a party may wish to contest solely the evidentiary case of the other party. It can do so by positing that there is no direct evidence to prove the point in question. Alternatively, it could submit that the link between the direct evidence and the inference to be drawn is too tenuous.

Third, in order to draw a record inference, the following points have to be considered: (i) the difficulty of proving the fact by direct evidence; (ii) the relationship between the inference to be drawn and the facts proved by direct evidence; (iii) the strength of the direct evidence supporting the inference; (iv) the number of different pieces of proof supporting the same inference; and (v) the significance of the inference for the satisfaction of the requisite standard of proof.

Fourth, investor-state tribunals are empowered to draw adverse inferences based party misconduct in the arbitration. If a tribunal draws such an inference, it does not look to the arbitration record but to arbitration conduct. It is worth emphasizing that the drawing of an adverse inferences typically follows upon particularly serious procedural misconduct by one of the parties.

Fifth, in order to an inference based on the conduct of the parties in an arbitration, the following circumstances are significant: (i) the severity of the party's misconduct in the arbitral proceedings, (ii) the relationship between the misconduct and the fact to be proved by means of an inference, (iii) the procedural good faith of the party seeking the

inference, (iv) the plausibility of drawing the same inference from the record absent consideration of party misconduct, and (v) the overall significance of the inference requested.

Sixth, an inference is, at its core, a decision-making process fall squarely within a tribunal's discretionary process. Therefore, as a general matter, inferences (either based on the evidence or on the conduct during the arbitration) cannot generally be the basis for a party to seek annulment of an award. Materials gaps in a tribunal's reasoning can be the basis for an annulment challenge. An inference necessarily requires a gap in the evidence and if the leap made through the evidence is too far, a party might be tempted to bring a motion for annulment. But, as inferences fall with a tribunal's discretionary power, they are often very difficult to establish barring severe material gaps in a tribunal's reasoning.

SUMMARY

The thesis seeks to answer: “Whether there are any principles of evidence as recognized and applied by investor-state tribunals or do the principles of evidence merely fall within a tribunal’s discretionary powers?”

The starting point for the analysis is one of the bedrock principles of international arbitration wherein an arbitral tribunal is not bound by technical rules of procedure or evidence. This is perhaps why arbitral rules do not discuss evidentiary principles in any detailed manner in comparison to the domestic codes on evidence in most countries. The only criteria provided for is that a tribunal has discretion to determine evidentiary matters. On the other hand, investor-state cases are frequently dismissed solely on evidentiary grounds. Further, critics point out that the lack of any guidance relating to evidentiary rules and principles can be problematic because it provides a tribunal with very broad discretion. This discretion can be exercised in an *ad hoc* manner resulting in like cases being decided differently.

The research examines publically known investor-state cases, supplemented by views of leading commentators, to identify evidentiary principles dealing with burden of proof, standard of proof, presumptions and inferences. In this research, I conclude that investor-state tribunals have indeed recognized and applied evidentiary principles on burden of proof, standard of proof, presumptions and inferences. These principles do not always flow from the generally accepted view on arbitral discretion. Rather, these principles have been generally recognized under the rubric of general principles of law.

I conclude that the failure to meet the evidentiary principle can have consequences, although the precise consequence varies based on the principle. For example, the failure to meet some of the principles (*e.g.*, burden of proof) can have very severe

consequences (*e.g.*, annulment of an ICSID award) but for other principles like whether or not a tribunal should draw an inference would depend on its assessment of the evidence and, therefore, as a general matter cannot be the subject of an annulment.

Below is a summary of the key evidentiary principles examined in the research:

Burden of Proof: Principles relating to burden of proof (*i.e.*, who must prove), in the investor-state context, have the clearest principle—a party making a proposition (whether claimant or respondent) has the burden of proof (the "basic principle"). Tribunals have refused to relax or reverse this principle under any circumstances and have applied the burden of proof at all stages of an arbitral proceeding. The application of burden of proof at the jurisdictional phase does recognize and apply this basic principle, however, there is a slight difference in the application. At the jurisdictional stage, a party with the burden only has to allege the facts that relate to the merits of the dispute and does not have to prove them at the jurisdictional stage. This is called the "*pro tem*" principle.

Considering how ubiquitous the principles are relating to burden of proof, the failure to apply the burden of proof, or an improper reversal of the burden of proof, will have the most severe consequences for an award–annulment in the context of an ICSID award or rejection of enforcement in the context of a non-ICSID award. The underlying rationale for the basic principle is the generally accepted view that an investor-state tribunal does not have broad police powers, like a domestic court would have, to demand evidence. Recognizing this limited power, the basic principle requires the party that is putting forward a claim, or a defence to base such claim or defence, on a firm factual foundation.

Shifting the Burden: Investor-state tribunals have recognized that when a party that bears the initial burden puts forward evidence in support of its allegation, the burden of evidence will shift to the other party to rebut the evidence put forward, or concede the point (the "shifting principle"). At a minimum, the party with the burden has to provide *prima facie* evidence before the burden is shifted to the opposite party.

It is possible for a party to challenge an award on the grounds that a tribunal failed to shift the burden of evidence. However, the shifting principle is very closely linked to the free evaluation of evidence because a tribunal has to determine if a party with the original burden has met the initial burden to warrant a shifting. Therefore, the possibility of annulment or non-recognition before domestic courts becomes more difficult in comparison to the basic principle discussed above. The underlying rationale for the shifting principle enables parties to engage with the evidence produced by the other party and provides the tribunal with the best possible information to make a decision. This also explains why challenging an award on the basis that a tribunal failed to shift the burden would be difficult because the shifting process takes place *during* the course of an arbitration, and there is often limited involvement by the tribunal until the hearing. Therefore, it will be difficult for a party to allege that a tribunal failed to shift the burden of proof because the final award might not even factor in all the steps a tribunal took in arriving at its conclusion.

Standard of Proof: Principles relating to standard of proof determine how much evidence needs to be produced by the party with the burden of proof. Most arbitral rules are silent on principles relating to standard of proof and, therefore, do not provide much guidance. There are different standards of proof that apply in different circumstances.

- The most common standard is balance of probabilities, or preponderance test, that applies to most situations, except where the *prima facie* or the

heightened standard applies. This standard is similar to the civil law "inner conviction" test;

- The other standard is the *prima facie* test that applies to the jurisdictional stage for matters that relate to the merits of the dispute (the *pro tem* principle) or for situations in which ICSID or a tribunal merely adopts a "screening" function since a subsequent court or tribunal will look at the issue more carefully and apply the appropriate standard of proof;

- The heightened standard of proof applies to situations in which there are allegations that are of a quasi-criminal nature (*e.g.*, allegations of wrongdoings, bribery, fraud, and the like) or when the rules expressly provide for a heightened standard of proof (*e.g.*, ICSID's reference to particular standards that use the term "manifest").

However, a tribunal has broad discretion to determine which standard of proof will apply to a particular situation but, at the same time, it does not possess unfettered discretion. Indeed, a decision on standard of proof must be appropriate in light of the circumstances of the case, otherwise the award could be challenged or even annulled. For example, if a tribunal decides to apply a heightened standard or a criminal law standard for a breach of contract, a party might be able to successfully challenge the award on the grounds that a tribunal manifestly exceeded its power. However, if a tribunal decides to apply the preponderance standard but in its application dismisses the claim on grounds that a party did not meet the standard, a high degree of deference would be provided to the tribunal's finding.

Presumptions: Tribunals can also make findings of fact by reliance of presumptions. Here, the tribunal makes a determination of fact that is not premised upon direct evidence or project-specific circumstantial evidence. Presumptions can be either "legal" or "judicial". A "legal" presumption is a finding based on the applicable law while a "judicial" presumption is a finding based on regular practice in a specific field. There is another important distinction that flows from this distinction: the failure to apply the applicable law, as a legal presumption, can be a "manifest excess of powers" under Article 52 of the ICSID Convention, however, it cannot be a mere error in the application

of the applicable law. A tribunal's use of judicial presumptions, however, falls within the scope of the tribunal's discretionary powers within the context of evidence. This is expressly provided in ICSID Arbitration Rule 34(1), which indicates that "[t]he Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value." Therefore, a challenge based on judicial presumptions will present a much greater difficulty.

Inferences: Tribunals can also make findings of fact by reliance of inference. An inference refers to a conclusion that, as a matter of *plausibility* of a fact, must be concluded to be true (i) in light of the record evidence as well as (ii) a party conduct in the arbitral proceedings. Inferences can therefore be drawn from a record inference (*i.e.*, derived from the overall record) or an adverse inference based on a party's misconduct in the arbitration. An inference is part of a tribunal's decision-making process and is typically within a tribunal's discretionary process. Therefore, as a general matter, inferences cannot be the basis for a party to seek annulment of an award unless severe material gaps can be identified in the process of drawing the inference.

Bewijsprincipes in investeerder-staat arbitrage:

bewijslast, bewijsstandaarden, vermoedens en gevolgtrekkingen

SAMENVATTING (DUTCH SUMMARY)

Het proefschrift tracht te volgende onderzoeksvraag te beantwoorden: “Zijn er bewijsprincipes die erkend en toegepast worden door investeringstribunalen of vallen de beginselen inzake bewijs louter binnen de discretionaire bevoegdheden van een tribunaal?”

Het uitgangspunt voor de analyse is een van de basisprincipes van internationale arbitrage namelijk dat een arbitragetribunaal niet gebonden is door technische procedureregels or regels omtrent het bewijs. Dit is waarschijnlijk de reden waarom arbitrageregels bewijsprincipes niet op gedetailleerde wijze opnemen, althans in vergelijking met de nationale wetgeving terzake in de meeste landen. De enige regels die vaak voorzien zijn bevestigen enkel de discretionaire bevoegdheid van een tribunaal inzake bewijsregels. Aan de andere kant worden geschillen tussen een staat en een investeerder vaak alleen op grond van (gebrek aan) bewijs afgewezen. Critici wijzen er dan ook op dat het ontbreken van een leidraad met betrekking tot bewijsregels en -principes problematisch kan zijn, omdat het een tribunaal een zeer ruime discretionaire bevoegdheid geeft dienaangaande. Deze discretionaire bevoegdheid wordt *ad hoc* uitgeoefend, waardoor soortgelijke zaken op een verschillende manier bepaald worden.

Het onderzoek richt zich op de publiek beschikbare uitspraken van tribunalen in investeerder-staat geschillen, aangevuld met rechtsleer, om de bewijsprincipes te identificeren betreffende de bewijslast, de bewijsstandaard, vermoedens en gevolgtrekkingen. In dit onderzoek concludeer ik dat investeringstribunalen inderdaad

bewijsprincipes omtrent de bewijsstandaard, vermoedens en gevolgtrekkingen hebben erkend en toegepast. Deze beginselen vloeien niet altijd voort uit de algemeen aanvaarde visie betreffende de discretionaire bevoegdheid van tribunalen. Veeleer worden deze beginselen algemeen erkend als algemene rechtsbeginselen.

Ik concludeer dat het niet respecteren van bewijsprincipes gevolgen kan hebben, hoewel de specifieke gevolgen verschillen in functie van de aard van het principe in kwestie. Bijvoorbeeld, het niet voldoen aan een aantal principes (bvb inzake bewijslast) kan echter zeer verregaande gevolgen hebben (zoals de nietigverklaring van de arbitrale uitspraak onder het ICSID Verdrag). Voor andere principes, zoals het al dan niet gebruik maken van gevolgtrekkingen door een tribunaal, is afhankelijk van de beoordeling door het tribunaal van het bewijs en kan bijgevolg, in beginsel, niet leiden tot een nietigverklaring van de uitspraak.

Hieronder volgt een samenvatting van de belangrijkste bewijsprincipes die in het onderzoek zijn onderzocht:

Bewijslast: Principes met betrekking tot de bewijslast (*wie* moet bewijzen) hebben, in de context van investeringsarbitrage, een van de meest duidelijke basisbeginselen - een partij die een aanspraak of bewering maakt (eiser of verweerder) draagt de bewijslast (het “basisprincipe”). Tribunalen hebben systematisch geweigerd dit principe te versoepelen of de bewijslast om te keren en hebben de principes inzake bewijslast toegepast in alle fases van een arbitrageprocedure. Door de toepassing van de principes inzake bewijslast in de bevoegheidsfase wordt dit principe erkend, maar de toepassing ervan is enigszins anders in de zin dat in de bevoegdheidsfase een partij die de bewijslast draagt enkel de feiten die betrekking hebben op de grond van de zaak moet aanvoeren zonder dat deze in die fase bewezen moeten worden. Dit wordt het *pro tem* principe genoiemd.

Rekening houdend met de alomtegenwoordigheid van de principes inzake de bewijslast, zal het niet toepassen van het principe inzake bewijslast of een onterechte omkering van de bewijslast, de meest verregaande gevolgen hebben, hetzij een mogelijke nietigverklaring in het kader van een ICSID-procedure of een weigering uitvoering te verlenen van de uitspraak in de context van een niet-ICSID-procedure. De onderliggende reden van het basisprincipe is de algemeen aanvaarde opvatting dat een investeringstribunaal geen brede onderzoeksbevoegdheden met betrekking tot bewijs heeft, vergeleken met de nationale rechter. Gezien deze beperkte macht, vereist het basisprincipe dat de partij die een aanspraak maakt of een verweer voorlegt een dergelijke aanspraak of verweer baseert op een stevig onderbouwd feitelijk relaas.

Omkering van de bewijslast: investeringstribunalen hebben erkend dat wanneer een partij die de initiële belasting draagt, bewijsmateriaal ter staving van haar bewering aanbrengt, de bewijslast verschuift naar de andere partij die bijgevolg de aangevoerde bewijzen dient te weerleggen of de bewering als dusdanig dient te aanvaarden (het omkerings- of verschuivingsprincipe of het “shifting principle”). De partij die de last draagt moet tenminste prima facie bewijs leveren opdat de last naar de andere partij verschoven zou worden.

Een partij heeft de mogelijkheid een uitspraak aan te vechten op grond van het feit dat een tribunaal de bewijslast niet heeft omgekeerd. Het verschuivingsprincipe is echter zeer nauw verbonden met de vrijheid van een tribunaal inzake de evaluatie van het voorliggend bewijs, omdat een tribunaal moet bepalen of een partij die de oorspronkelijke bewijslast heeft het nodige bewijs geleverd heeft om een verschuiving van de bewijslast te rechtvaardigen. Om die reden is de mogelijkheid van nietigverklaring of niet-erkenning voor nationale rechtbanken hier moeilijker vergeleken met de bewijslast. De onderliggende reden voor het verschuivingsprincipe is dat het partijen in staat stelt om op de door de andere partij geproduceerde bewijzen in te gaan

en zo het tribunaal de best mogelijke informatie te verstrekken om een uitspraak te vellen. Dit verklaart ook waarom de nietigverklaring van een uitspraak omdat een tribunaal geweigerd heeft de bewijslast om te keren moeilijker is; het omkeringsproces vindt immers plaats *tijdens* de procedure, en er is vaak een beperkte betrokkenheid van het tribunaal tot aan de zitting. Het zal dus moeilijk zijn voor een partij om aan te voeren dat een tribunaal de bewijslast niet omgekeerd heeft, omdat de arbitrale uitspraak niet altijd alle tussenstappen in de einduitspraak opneemt.

Bewijsstandaard: Principes met betrekking tot de bewijsstandaard bepalen hoeveel en welk type bewijs geleverd moet worden door de partij die de bewijslast draagt. De meeste arbitrageregels bevatten geen verwijzingen naar de beginselen met betrekking tot de bewijsstandaard en bieden bijgevolg weinig of geen aanwijzingen dienaangaande. Er zijn verschillende bewijsstandaarden die in verschillende omstandigheden van toepassing zijn.

- De meest gebruikelijke standaard die ook in de meeste situaties van toepassing is, is de zogenaamde *balance of probabilities* of *preponderance* test, behoudens wanneer de *prima facie* of een verhoogde standaard van toepassing is. Deze standaard is gelijkaardig aan de ‘inner conviction’ test die van toepassing is in civielrechtelijk systemen;

- de andere standaard is de prima facie-test die van toepassing is in de jurisdictionele of bevoegdheidsfase voor zaken die betrekking hebben op de grond van de zaak (het *pro tem* principe) of voor situaties waarbij het ICSID of een tribunaal een “screening” -functie heeft omdat een volgende instantie de zaak grondiger bekijkt en alsdan de toepasselijke bewijsstandaard toepast;

- De verhoogde bewijsstandaard is van toepassing op situaties waar sprake is van een quasi-strafrechtelijk karakter (bijvoorbeeld aantijgingen van misdrijven, omkoping, fraude en dergelijke) of wanneer de regels uitdrukkelijk voorzien in een verhoogde bewijsstandaard (zoals de verwijzing in het ICSID naar welomschreven standaarden met de term “manifest”).

Een tribunaal heeft echter een ruime beoordelingsvrijheid inzake de vaststelling en toepassing van de bewijsstandaard, maar een tribunaal beschikt niet over een onbeperkte beoordelingsvrijheid. Een beslissing omtrent de bewijsstandaard moet

inderdaad adequaat zijn in het licht van de omstandigheden van de zaak, omdat anders de finale uitspraak kal worden aangevochten of zelfs geannuleerd. Als een tribunaal bijvoorbeeld beslist om een verhoogde standaard of een strafrechtelijke standaard voor een contractbreuk toe te passen, zal een partij met succes de uitspraak kunnen betwisten op grond van het feit dat het tribunaal kennelijk haar bevoegdheid heeft overschreden. Als een tribunaal echter zou beslissen om de 'preponderance' test toe te passen, maar in de toepassing van deze standaard de vordering zou afwijzen op grond van het feit dat het bewijs aangedragen door een partij niet aan de standaard voldoet, zou aan de uitspraak van het tribunaal een redelijk hoge graad van *deference* gegeven worden.

Vermoedens: Tribunalen kunnen ook feiten vastleggen door gebruik te maken van vermoedens. Het tribunaal maakt dan een vaststelling van feiten die niet gebaseerd zijn op direct of indirect bewijs. Vermoedens kunnen wettelijk or rechterlijk zijn. Een wettelijk vermoeden is een bevinding gebaseerd op het toepasselijke recht, terwijl een rechterlijk vermoeden een bevinding is die is gebaseerd op de gangbare praktijk in een bepaald gebied. Er is nog een ander belangrijk onderscheid dat voortvloeit uit dit onderscheid: het niet toepassen van het toepasselijke recht, zoals wettelijk vermoeden, kan een manifeste overschrijding van de bevoegdheden van een tribunaal uitmaken, in de zin van artikel 52 van het ICSID-Verdrag. Dit betreft echter niet een loutere verkeerde toepassing van het toepasselijke recht. Het gebruik door een rechter van rechterlijke vermoedens valt echter binnen de reikwijdte van de discretionaire bevoegdheden van het tribunaal inzake het bewijs. Dit wordt uitdrukkelijk vermeld in ICSID Regel 34 (1), waarin staat "[t]he Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value." Bijgevolg zal een vordering to nietigverklaring gebaseerd op rechterlijke vermoedens moeilijker zijn.

Gevolgtrekkingen: Tribunalen kunnen ook feiten vastleggen door gebruik te maken van gevolgtrekking. Een gevolgtrekking verwijst naar het oordeel dat, aannemelijk, een feit als juist beschouwd kan worden (i) in het licht van het bewijsmateriaal en (ii) het gedrag

van de partijen in de arbitrageprocedure. Gevolgtrekkingen kunnen dus afgeleid worden uit het dossier in zijn geheel. Een negatieve gevolgtrekking kan gebaseerd worden op het wangedrag van een partij in de procedure. Een gevolgtrekking maakt deel uit van het besluitvormingsproces van een tribunaal en valt normaal gesproken binnen de discretionaire bevoegdheid van een tribunaal. In het algemeen kunnen conclusies daarom, bijgevolg, niet door een partij gebruikt worden om de nietigverklaring van een uitspraak te vorderen, tenzij er ernstige substantiële hiaten in het gevolgtrekking kunnen worden vastgesteld.

ANNEX A

ARBITRATION RULES DEALING WITH EVIDENTIARY PRINCIPLES

Arbitration Rules	Provision
ICSID Convention, Article 43	"Except as the parties otherwise agree, the Tribunal may, if it deems it necessary at any stage of the proceedings, (a) call upon the parties to produce documents or other evidence, and (b) visit the scene connected with the dispute, and conduct such inquiries there as it may deem appropriate."[1]
ICSID Arbitration Rules 34	"(1) The Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value. (2) The Tribunal may, if it deems it necessary at any stage of the proceeding: (a) call upon the parties to produce documents, witnesses and experts; and (b) visit any place connected with the dispute or conduct inquiries there. (3) The parties shall cooperate with the Tribunal in the production of the evidence and in the other measures provided for in paragraph (2). The Tribunal shall take formal note of the failure of a party to comply with its obligations under this paragraph and of any reasons given for such failure."
ICSID Additional Facility Rules, Article 41	"(1) The Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value. (2) The Tribunal may, if it deems it necessary at any stage of the proceeding, call upon the parties to produce documents, witnesses

[1] Article 41(2) of the ICSID Arbitration (Additional Facility) Rules provides for a similar provision. The *ADF v United States of America* tribunal has explained the scope of this clause as follows: "Article 41(2) of the ICSID Arbitration (Additional Facility) Rules state that '[t]he Tribunal may, if it deems it necessary at any stage of the proceeding, call upon the parties to produce documents, witnesses and experts.' There are at least two main aspects of necessity when considered in the context of a request for document production. The first aspect relates to a substantive inquiry into whether the documents requested are relevant to, and in that sense necessary for, the purposes of the proceedings where the documents are expected to be used. Inquiry into the relevancy of the documents requested needs to be done on a category by category basis." *ADF Group Inc. v United States of America*, ICSID Case No. ARB (AF)/00/1, Procedural Order No. 3 (4 October 2001) [3].

Arbitration Rules	Provision
	and experts."
1976 UNCITRAL Arbitration Rules, Article 24	"1. Each party shall have the burden of proving the facts relied on to support his claim or defence. 2. The arbitral tribunal may, if it considers it appropriate, require a party to deliver to the tribunal and to the other party, within such a period of time as the arbitral tribunal shall decide, a summary of the documents and other evidence which that party intends to present in support of the facts in issue set out in his statement of claim or statement of defence. 3. At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the tribunal shall determine."
2013 UNCITRAL Arbitration Rules, Article 27	"1. Each party shall have the burden of proving the facts relied on to support its claim or defence. 2. Witnesses, including expert witnesses, who are presented by the parties to testify to the arbitral tribunal on any issue of fact or expertise may be any individual, notwithstanding that the individual is a party to the arbitration or in any way related to a party. Unless otherwise directed by the arbitral tribunal, statements by witnesses, including expert witnesses, may be presented in writing and signed by them. 3. At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the arbitral tribunal shall determine. 4. The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered."
1998 ICC Rules of Arbitration, Arts. 20, 22	Article 20: "5. At any time during the proceedings, the Arbitral Tribunal may summon any party to provide additional evidence."
	Article 22: "1. When it is satisfied that the parties have had a reasonable opportunity to present their cases, the Arbitral Tribunal shall declare the proceedings closed. Thereafter, no further

Arbitration Rules	Provision
	submission or argument may be made, or evidence produced, unless requested or authorized by the Arbitral Tribunal."
2017 ICC Rules of Arbitration, Arts. 25, 27	Article 25: "5. At any time during the proceedings, the arbitral tribunal may summon any party to provide additional evidence."
	Article 27: "After the proceedings are closed, no further submission or argument may be made, or evidence produced, with respect to the matters to be decided in the award, unless requested or authorized by the arbitral tribunal."
2014 LCIA Arbitration Rules, Arts. 15, 22	Article 15: "6. The Arbitral Tribunal may provide additional directions as to any part of the written stage of the arbitration (including witness statements, submissions and evidence), particularly where there are multiple claimants, multiple respondents or any cross-claim between two or more respondents or between two or more claimants."
	Article 22: "The Arbitral Tribunal shall have the power, upon the application of any party or . . . upon its own initiative, but in either case only after giving the parties a reasonable opportunity to state their views and upon such terms (as to costs and otherwise) as the Arbitral Tribunal may decide: . . . (vi) to decide whether or not to apply any strict rules of evidence (or any other rules) as to the admissibility, relevance or weight of any material tendered by a party on any issue of fact or expert opinion; and to decide the time, manner and form in which such material should be exchanged between the parties and presented to the Arbitral Tribunal."
	Article 31: "(1) The admissibility, relevance, materiality and weight of evidence shall be for the Arbitral Tribunal to determine. (2) The Arbitral Tribunal may order a party to identify the documentary evidence it intends to rely on and specify the

Arbitration Rules	Provision
2017 Stockholm Chamber of Commerce Arbitration Rules, Arts. 29, 31	circumstances intended to be proved by such evidence. (3) At the request of a party, or exceptionally on its own motion, the Arbitral Tribunal may order a party to produce any documents or other evidence that may be relevant to the case and material to its outcome."
	Article 29: "(1) Within the period determined by the Arbitral Tribunal, the Claimant shall submit a Statement of Claim which shall include, unless previously submitted: . . . (iii) any evidence the Claimant relies on. (2) Within the period determined by the Arbitral Tribunal, the Respondent shall submit a Statement of Defence which shall include, unless previously submitted: . . . (v) any evidence the Respondent relies on."

ANNEX B

TABLE SUMMARIZING THE COMMONLY RECOGNIZED STANDARDS OF PROOF IN INVESTOR-STATE ARBITRATION

Standard of Proof	What does the Standard entail?	When is it applied?
The *Prima Facie* Evidence Standard	The standard involves examination of the facts as alleged by the claimant to see whether such facts would amount to a breach of the treaty's and otherwise fall within the jurisdiction of the tribunal.	• Typically at the jurisdictional phase of the case, where the investor must allege facts but not prove facts of the merits to show that they would appropriately fall within a tribunal's jurisdiction. The rule will not apply to factual matters that relate to a tribunal's jurisdiction itself. • It will also apply in preliminary screening activities (such as references to competent authorities or preliminary review by ICSID Secretary General to register cases) because a tribunal can subsequently apply the appropriate standard.

Standard of Proof	What does the Standard entail?	When is it applied?
The Preponderance of Evidence or Balance of Probabilities (Civil lawyers refer to this as the "inner conviction" test)	This standard requires an evaluation of all the evidence produced by both parties on a particular issue and this evaluation would ultimately result in the tribunal determining which party's evidence was more likely than not to be true.	• Typically applies as the default rule in investor-state arbitration. • It extends to a wide range of issues such as claim for damages, allegations of breach of contract, interpretation issues, factual controversies, and for breaches of standard of protection (assuming there is no allegation of wrongdoing and the circumstances do not otherwise warrant a heightened standard of proof).
The Heightened Standard of proof	The standard is higher than a balance of probabilities but lower than the criminal law standard of proof beyond reasonable doubt.	• Typically for matters that are of a quasi-criminal nature and or allegations of wrongdoings (such as bribery, corruption, fraud, impropriety and other such allegations). • When a convention or treaty uses language that calls for a heightened standard (for example, ICSID Convention's usage

Standard of Proof	What does the Standard entail?	When is it applied?
		of the term “manifest” usually requires the evidentiary standard to be higher than a mere balance of probabilities).

FIGURES IN THE THESIS

Figure 1.1: Arbitration Rules and Evidentiary Principles

Figure 1.2: International Bodies and Evidentiary Issues

Figure 1.3: Evidentiary Principle versus Arbitral Discretion

Figure 1.4: Spectrum of the Consequences of Failing to Meet Evidentiary Standard

Figure 3.1: Shifting the Burden of Evidence

Figure 4.1: Distinguishing Burden and Standard of Proof

Figure 4.2: Typology on Standard of Proof

Figure 5.1: Types of Presumptions

Figure 6.1: Two theories on Inferences

Annex A: Arbitration Rules dealing with Evidentiary Principles

Annex B: Table summarizing the commonly recognized standards of proof in investor-state arbitration

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Kabir Duggal is a senior associate in Arnold and Porter's International Arbitration and Public International Law Practice Groups in New York focusing on international investment arbitration, international commercial arbitration and public international law matters. Kabir's experience includes complex disputes under numerous bilateral/multilateral investment treaties and contracts in South Asia, Latin America, Central Asia, Middle East, Europe and Africa. The total value of the disputes he has been involved in exceeds 80 billion dollars. He has facilitated the mediation and negotiation of complex disputes. He also acts as a Consultant for the United Nations Office of the High Representative for Least Developed Countries, Landlocked Developing Countries and Small Island Developing States (UN-OHRLLS). He has also conducted training and capacity-building sessions for several Governments including Colombia, Saudi Arabia, Myanmar, India, among others on public international law and dispute resolution matters.

Kabir is a Lecturer-in-Law at the Columbia Law School, teaching "International Investment Law and Arbitration." He has also taught dispute resolution courses in educational institutions all over the world including Georgetown University Law Center, Fordham Law School, The Graduate Institute (Geneva, Switzerland), National Law University (Jodhpur, India), University of Carlos III (Madrid, Spain), National Research University Higher School of Economics (Moscow, Russia), Government Law College (Mumbai, India) among others.

Kabir has published several articles and books and is regularly invited to speak at conferences globally. He is the Managing Editor for Columbia Law School's "The American Review of International Arbitration" and is an editor for investmentclaims.com hosted by Oxford University Press. He has received the Burton "Law360 Distinguish Legal Writing Award" for his scholarly writings. He also serves on ICSID Review's Peer Review Board and is an Associate Editor for Brill-Nijhoff publisher's international law and arbitration section. He is also a co-chair of the Juris Conference on Investment Treaty Arbitration. He is a Fellow at Columbia Center on Sustainable Development.

Kabir is a graduate of the University of Mumbai (University Medal), University of Oxford (DHL-Times of India Scholar) and NYU School of Law (Hauser Global Scholar). He is admitted to practice law in England and Wales (Solicitor), New York, Washington D.C. and India. Kabir was named as a "Future Leader" in international arbitration by Who's Who Legal (2018, 2019). In 2019, he was ranked as the fourth "Most-Highly Regarded" younger arbitration practitioner in the Americas. He was also awarded the 40 under 40 award by Legal Era.