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

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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 standards³ 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

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” experts¹² 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 Valores 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.

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 Chitharanjan 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

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

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/dispu_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.

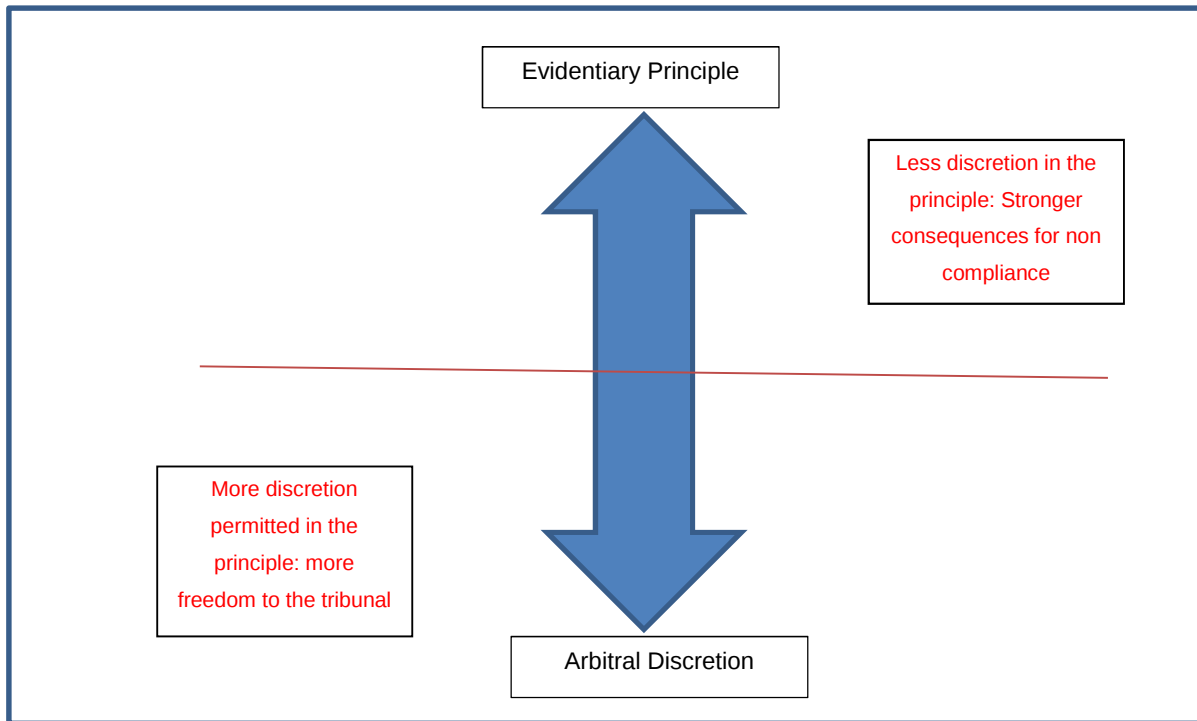
Second, the research question will interplay the relationship between evidentiary principles and arbitral discretion. By this I mean that if a particular issue does indeed have a relevant evidentiary principle, does it mean that the entire issue can be resolved solely on the basis of the evidentiary 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 failing 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 failing 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.

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.

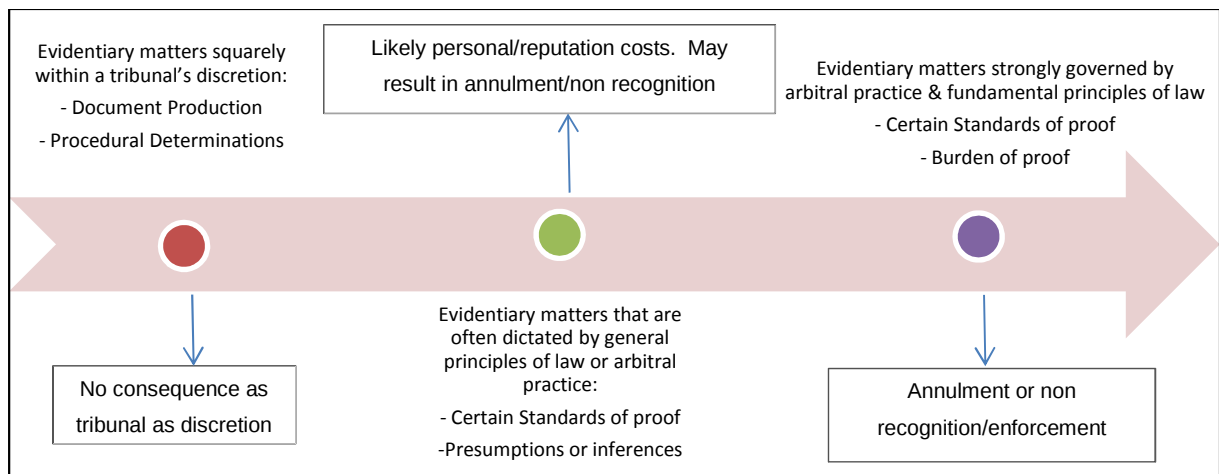
The research will, therefore, be restricted to the following evidentiary principles: burdens of proof, standards of proof, presumptions, and inferences.

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 failing 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.

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=EN> (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 (*día 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

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 may be 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 evidentiaria* 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

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 articles⁷⁴ 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 legal order, while concrete 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.