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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[7] See n 18.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[28] See n 27.

[29] ibid.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[47] ibid.

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

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

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

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

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

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

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

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

[53] ibid.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[60] See n 59.

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

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

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

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

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

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

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

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

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

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

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

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

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[68] ibid.

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

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

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

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

[73] ibid.

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

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

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

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

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

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

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

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

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

[79] ibid.

[80] ibid.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[87] ibid.

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

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

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

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

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

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

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

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

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

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

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

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

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

[94] *Soufraki* (n 18) [39] – [41].

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[127] See ibid.

[128] Wälde and Sabahi (n 149) 1110.

[129] See ibid.

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

A tribunal has summarized this in the following manner:

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

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

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

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

[131] Marboe (n 150) 107.

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

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

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

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

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

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

[136] See ibid.

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

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

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

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

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

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

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

[140] See ibid.

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

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

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

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

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

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

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

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

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

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

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[145] See ibid.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VI. CONSEQUENCE OF FAILURE TO DISCHARGE A BURDEN OF PROOF

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[173] ibid.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[184] ibid.

[185] ibid.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(C) *Other Problems on Simultaneous Pleadings?*

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

VIII. CONCLUSION

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

The following conclusions can be drawn from the thesis:

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

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

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

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

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

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

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

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

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

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

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

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

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

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