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

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CHAPTER 3—SHIFTING THE BURDEN OF EVIDENCE

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

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

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

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

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

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

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

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

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

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

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

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

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

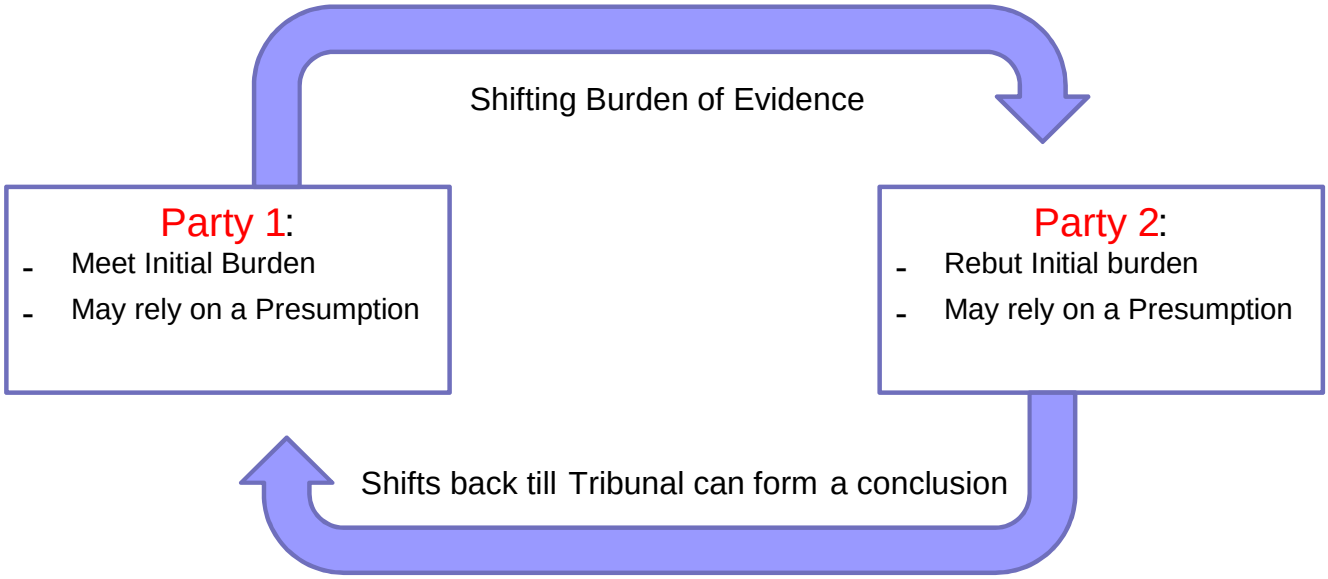
> [W]hen the claimant has established a *prima facie* case and the respondent has offered no evidence in rebuttal the latter may not insist that the former pile up evidence to establish its allegations beyond a reasonable doubt without pointing out some reason for doubting. While ordinarily it is encumbent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

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

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

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

Figure 3.1: Shifting the Burden of Evidence



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

II. THE SHIFTING PRINCIPLE IN INVESTOR-STATE ARBITRATION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[19] Mojtaba Kazazi (n 13) 273.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

V. CONSEQUENCES OF THE SHIFTING PRINCIPLE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[28] ibid [266-267].

[29] ibid [269].

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

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

VI. PROBLEMS IN THE APPLICATION OF THE SHIFTING PRINCIPLE

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

[30] ibid [271].

[31] ibid [272].

[32] ibid [274].

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

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

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

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

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

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

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

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

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

VII. CONCLUSION

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

The following conclusions can be drawn from the thesis:

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

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

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

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

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

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