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

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CHAPTER 5—EVIDENTIARY PRESUMPTIONS AS APPLIED IN INVESTOR-STATE ARBITRATION

I. INTRODUCTION AND PRESUMPTIONS IN GENERAL

The research question seeks to understand whether there is any evidentiary principle in relation to presumptions as an evidentiary principle or does it merely fall with a tribunal's discretionary powers to determine when to apply a presumption. As an initial remark, tribunals can make findings of fact by reference to presumptions. The use of a presumption means that the tribunal makes a determination of fact that is not premised upon direct evidence or project-specific circumstantial evidence. It is my argument that through a presumption, the tribunal is, instead, convinced of the truth of a fact premised upon the proof of relevant general surrounding circumstances (*e.g.*, large, unexplained payments may be construed to be a bribe) or based upon the applicable law (*e.g.*, children are presumed to be the lawful heirs of their parents). Presumptions are also usually rebuttable by the other party.[1] The use of presumptions is ubiquitous in investor-state arbitrations, as it is in other domestic and international disputes, because the predicate of a legal claim typically is the asserted deviation by one or both the parties of relevant general practices or expected background circumstances by the other.

This Chapter seeks to examine how investor-state tribunals have recognized and applied presumptions and what the consequences for falling the apply the presumption would be. First, I note that most tribunals do not explain or articulate their reliance on presumptions or inferences. This is in sharp contrast with Chapters in Part I above dealing with burdens and standards of proof, where we observe articulations by investor-state tribunals, albeit not always in a consistent or clear manner. In Part II, therefore, the research aims to focus on situations where a tribunal has, in fact, relied on a presumption or inference. A judicial presumption or an inference, in particular,

[1] Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge University Press 1956) 304 ("Proof may also be dispensed with as regards facts, the truth of which, though not within judicial knowledge, is presumed by the tribunal. Without going so far as to holding them to be true, it is legitimate for a tribunal to presume the truth of certain facts or certain state of affairs, leaving it to the party alleging the contrary to establish its contention. These presumptions serve as an initial premises of legal reasoning.").

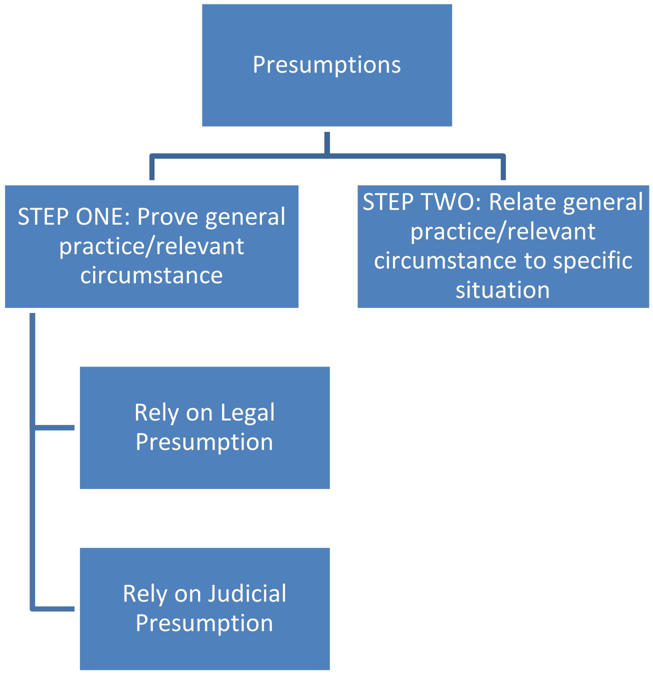
would depend entirely on the facts of a case and, therefore, tribunals do not articulate standards for judicial presumptions or inferences. These Chapters, therefore, have illustrations to identify the application of these concepts. This approach is consistent with the overall research question, *i.e.*, to observe how investor-state tribunals have recognized and applied evidentiary principles, including presumptions and inferences.

Towards appreciating the broad scope of presumptions, this Chapter has been divided into V Sections. Section I provides a background to the notion of presumptions. Section II then discusses how presumptions operate in relation to arbitral rules. Section III and IV discuss the two types of presumptions—"Legal Presumptions" and "Judicial Presumptions" respectively. Section V discusses the consequences for failing to apply the presumptions. Section VI provides a brief conclusion in light of the overall thesis.

Since a tribunal can make legal findings by relying on presumptions, it is my submission that a party can affirmatively invoke a presumption and the opposing party may seek to rebut such a presumption.

For a party to rely upon or rebut a presumption, a two-step process must be adopted. First, it is necessary to prove that a general practice or relevant circumstance exists. This first step can be satisfied by proving a legal presumption by reference to the law applicable to the dispute. Alternatively, this first step can be satisfied through proof of fact that certain general practices or circumstances exist (*i.e.*, through a "judicial" presumption). Second, it is necessary to relate that general practice or relevant circumstance to the particular dispute. This second step requires a showing that the relevant question in dispute is a specific instance that would typically be governed by the general practice or circumstance proved as part of the first step.

Figure 5.1: Types of Presumptions



This distinction between legal and judicial presumptions has another significance for the purposes of an arbitration. A legal presumption flows from the applicable law and, therefore, the failure to apply a legal presumption may be the basis for an annulment motion on the grounds that the tribunal "manifestly exceeded" its powers by failing to applying the applicable law. A judicial presumption, on the other hand, is a conclusion that is drawn from the general facts and situations in the light of the totality of evidence. This falls within a tribunal's general decision making powers which is, as a general rule, not the basis for an annulment.[2] The limited exception here might be a situation where a tribunal fails to permit a party to be heard and thereby falls within the annulment provision that there is a "serious departure from a fundamental rule of procedure."

(A) *Introduction and Types of Presumptions Commonly Recognized in International Law*

Before I discuss how investor-state tribunals have recognized and applied presumptions, this section provides a brief introduction as to how international courts and tribunals have looked at presumptions. As an initial remark, it is my initial

[2] See Chapter 2 for further discussion.

submission that international courts and tribunals habitually use presumptions to resolve disputed questions of fact.[3] Like the burden of proof, or the permissibility of using specific inferences to make determination of facts, the use of presumptions has been recognized as legitimate by the ICJ, WTO dispute settlement panels, and other international dispute resolution bodies.[4]

Commentators note that there are two kinds of presumptions in public international law.[5] The first kind of a presumption is a "legal presumption."[6] Legal presumptions, also known by the Latin phrase *praesumptiones iuris*, refer to situations in which "a legal norm supposes (automatically) that certain facts are established in a given situation."[7] In the context of a legal presumption, the applicable law permits the drawing of certain rebuttable conclusions without need to adduce additional facts.[8] Examples of this in international law would be the legal presumption that a state acts in good faith but the presumption can be rebutted by the other party.[9]

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[3] In the ICJ context, see generally Robert Kolb, *The Elgar Companion to the International Court of Justice* (Edward Elgar 2014) 241-3; in the WTO context, see generally Michelle Grando, *Evidence, Proof, and Fact-Finding in WTO Dispute Settlement* (Oxford University Press 2009) 104. In the context of other international tribunals, see Durward V. Sandifer, *Evidence Before International Tribunals* (University Press of Virginia 1975) 143.

[4] See authorities cited in n 3 above. See also Chittharanjan F. Amerasinghe, *Evidence in International Litigation* (Martinus Nijhoff Publishers 2005) 214 ("The sources of evidentiary presumptions are the recognized sources of international law or of international law applicable by the particular tribunal. The sources in a particular case may be different for arbitral tribunals, the ICJ and IATs. By that they emanate from the relevant sources may be accepted.").

[5] See Durward V. Sandifer (n 3) 107, 142.

[6] Robert Kolb (n 3) (Edward Elgar 2014) 936-937 ("there are ordinary legal presumptions (*praesumptiones juris*). . . . Here, a legal norm automatically supposes that certain facts are established in a given situation. So, if a particular state of affairs exists, certain connected facts are deemed by the applicable law to exist likewise, without the need to prove them. . . . In municipal law it is presumed that the child of a married couple is their issue. The law creates such presumptions for reasons of justice and/or for the sake of legal certainty. . . . That does not mean that the presumed fact is definitively proved. It is only a presumption. It is then for the opposing party to show that, in the particular case the court is considering, the presumption is not justified—that the fact in dispute does not exist."); Chittharanjan F. Amerasinghe (n 4) 211 ("Presumptions prescribed by law requiring conclusions of facts from established facts are generally described as 'legal presumptions' . . .").

[7] See n 6 above.

[8] ibid.

[9] See eg Bin Cheng (n 1) 305 ("according to another general principle of law, good faith is to be presumed, whilst an abuse of right is not."); *Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Award (18 November 2014), ¶ 637 ("En esta labor, el punto de partida debe ser el principio de que todos los actos emanados de un Estado

The second kind of presumptions is "judicial" or "human" presumptions.[10] Judicial presumptions permit the drawing of inferences on the basis of regular practice in a certain field rather than through the applicable law.[11] Judge Kreća explained the use of judicial presumptions, also known by the Latin phrase *praesumptiones hominis*, in international law in his separate opinion in the *Case Concerning Legality of Use of Force* as follows:

> Judicial presumption, along with legal presumption, is one of the main sorts of presumption in international law. <u>It means that a certain fact or state of affairs, even though it has not been proved, is taken by an international tribunal as truthful</u>. As such it does not necessarily coincide with, or is not equivalent to, the fact or the state of affairs. As far as the reasoning of the existence of judicial presumption is concerned, considerations of a practical nature are prevalent. Judicial presumption is <u>a weapon to avoid waiting to get to know precisely the facts</u> and situation on which is dependent the existence, content or cessation of the right that would have adverse consequences for interested subjects or that would render difficult due course of legal proceedings.[12]

Thus, a judicial presumption would permit a conclusion that when a person places cash on the register at a grocery store that the person intends to use the bill for payment of the goods placed on the conveyer belt.

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gozan de una presunción de legalidad, y es el que alega la denegación de justicia a quien compete la carga de probarla."); *Asian Agricultural Products LTD (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award (27 June 1990), ¶ 56 ("Rule (J) - The international responsibility of the State is not to be presumed. The party alleging a violation of international law giving rise to international responsibility has the burden of proving the assertion") (internal citations omitted).

[10] See Durward V. Sandifer (n 3) 107, 142.

[11] See Robert Kolb (n 3) 937 ("there are presumptions of fact or reasonable inference (*praesumptiones hominis*). . . . As a function of his experience of life and awareness of its realities, the judge concludes that certain facts which *have* been established, give him reasonable grounds for thinking that certain other facts must also exist. The result is that he accepts those further facts for the purpose of the case, on the basis of what the French call his 'intimate conviction' (*intime conviction*)."); Chittharanjan F. Amerasinghe (n 4) 211-212 ("there are situations also in which courts draw inferences from established facts. These are not prescribed by law but are tools of reasoning used by judges. They are sometimes described as "judicial presumptions." They are, in fact, and are better described as, inferences drawn by judges.").

[12] *Legality of Use of Force (Prelim.) (Serbia and Montenegro v U.K.)*, 2004 I.C.J. Rep. 1307, 1394, 1400-1 (15 December) (Kreća J., concurring) (emphasis added).

(B) *Function of Presumptions in General*

Before I discuss how investor-state tribunals have recognized and applied presumptions, I would like to provide a brief discussion on why the doctrine of "presumptions" is a useful tool for tribunals and parties. This can help give context to the tribunal's reliance on presumptions. The discussions below are based on decisions by international courts and tribunals.

It is my first submission that presumptions serve an efficiency or prudential function. It would, indeed, be highly impractical to require litigants to prove every fact with direct or even circumstantial evidence. As the ICJ noted in the *Corfu Channel* case, "[i]t would be going too far for an international court to insist on direct and visual evidence and to refuse to admit, after reflection, a reasonable amount of human presumptions with a view to reaching that state of moral, human certainty with which, despite the risk of occasional errors, a court of justice must be content."[13]

This efficiency permits litigants to prove their case in both an expeditious and cost-sensitive manner, granting the parties effective judicial relief. In other words, the "law, however much it tends to establish the truth and to be truthful, actually pays more attention to finding useful and suitable solutions for the given situation, rather than allowing, in an attempt to establish truth as such, the rights and obligations that exist to fall through or to be harmed."[14] The concern for expeditious and cost-sensitive proof – justice delayed is justice denied – is the greater in the context of a flexible dispute resolution mechanism such as arbitration.

In some instances, particularly in the investor-state context, the function of presumptions may have an additional function beyond the prudential concerns of being expeditious. Rather, it concerns the basic fairness of proceedings. In the absence of presumptions, the use of burdens of proof would mean that the mere allegation of the absence of a necessary jurisdictional element or element of claim could cause such a

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[13] *Corfu Channel Case (Merits) (U.K. v Albania)*, 1949 I.C.J. Rep. 4, 78, 91 (9 April) (Azevedo J., dissenting).

[14] *Legality of Use of Force (Prelim.) (Serbia and Montenegro v U.K.)*, 2004 I.C.J. Rep. 1307, 1394, 1401 (15 December).

claim to fail. In such circumstances, the defendant would make artful offensive use of burdens of proof for instance by requiring the opponent to prove a negative.[15]

In those circumstances, the availability of presumptions addresses the absurdity of a burden of production that would be hard to meet with any kind of specificity. Such a use of presumptions "draws on the common experience to make a reasonable inference from what is known to what is unknowable."[16] The availability of presumptions thus provides an alternative, and general, means by which a party can satisfy its requisite burdens of proof and production.

II. ARBITRATION RULES AND THE APPLICATION OF PRESUMPTIONS IN GENERAL

Investor-state tribunals have different grants of authority with regard to their invocation of legal and judicial presumptions. Legal presumptions are codified as a matter of the applicable law.[17] To apply this law is to give effect to the presumption it prescribes. In the context of ICSID proceedings, Article 42(1) of the Convention codifies that ICSID tribunals must determine and apply the applicable law to the dispute and most domestic (and indeed international) systems recognize presumptions:

> Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.[18]

In the context of UNCITRAL proceedings, the same power is codified in Article 35 of the 2013 Arbitration Rules and Article 33 of the 1976 Arbitration Rules.[19]

The nature of legal presumptions as forming part of the applicable law has significant consequence for the power of tribunals and the review of arbitral awards.

[15] Robert Kolb (n 3) 241 (discussion proof of negative facts in ICJ jurisprudence).

[16] *Sovereignty over Pulau Ligitan and Pulau Sipidan (Indonesia v Malaysia)*, 2002 I.C.J. 625, 691, 692 (Franck J., dissenting).

[17] See Durward V. Sandifer (n 3) 107, 142.

[18] ICSID Convention, Article 42.

[19] 1976 UNCITRAL Arbitration, Article 33; 2013 UNCITRAL Arbitration, Article 35.

The tribunal does not have any discretion with regard to the application of legal presumption once the tribunal has established its existence in the applicable law. The tribunal rather is duty bound to apply them. Consequently, the determination of the existence of any legal presumption, as well as its application, is reviewable not as a matter of the general evidentiary powers of the tribunal but rather pursuant to its application (or failure to apply) the relevant applicable law. Indeed, the failure to apply the relevant applicable law can be the basis for a party to seek the annulment of the award. Several arbitral tribunals have noted that the failure to apply the applicable law can be a "manifest excess of powers" under Article 52 of the ICSID Convention, however, it cannot be a mere error in the application of the applicable law.[20]

In contrast, a tribunal's use of judicial presumptions – presumptions based upon factual proof of a general practice or circumstance – falls within the scope of the tribunal's discretionary powers within the context of evidence. In the context of the ICSID proceedings, it squarely falls within the scope of ICSID Arbitration Rule 34.[21] ICSID Arbitration Rule 34(1) states that "[t]he Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value."[22] In the context of a judicial presumption, the tribunal deems that the probative value of a fact about general

[20] See eg *Wena Hotels LTD. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Annulment Proceeding (5 February 2002), ¶ 22 ("The Committee is mindful of the views expressed *Klöckner* I, *Amco* I, and *MINE* to the effect that the failure to apply the proper law may constitute a manifest excess of power and a ground for annulment."); *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No.ARB/01/7, Decision on Annulment (21 March 2007), ¶ 47 ("An award will not escape annulment if the tribunal while purporting to apply the relevant law actually applies another, quite different law. But in such a case the error must be 'manifest,' not arguable, and a misapprehension (still less mere disagreement) as to the content of a particular rule is not enough."); *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the Ad Hoc Committee on the Application for Annulment of Mr Soufraki (5 June 2007), ¶ 85 ("ICSID ad hoc committees have commonly been quite clear in their statements – if not always in the effective implementation of these statements – that a distinction must be made between the failure to apply the proper law, which can result in annulment, and an error in the application of the law, which is not a ground for annulment."); *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Annulment (30 December 2015), ¶ 58 ("The provisions on applicable law are an essential element of the parties' agreement to arbitrate. The application of a law other than that agreed to by the parties may constitute an excess of powers and can be a ground for annulment. An error in the application of the proper law, even if it leads to an incorrect decision, is not a ground for annulment. Therefore, the misapplication of a particular rule, which is part of the correctly identified applicable law, does not amount to an excess of powers.").

[21] ICSID Arbitration Rule 34(1).

[22] ibid.

practices in a specific area permits the drawing of an inference that this practice was followed in the instance at bar.[23] It is expressly authorized to do so by the terms of Arbitration Rule 34(1).[24] Tribunals have similar powers in the context of UNCITRAL proceedings.[25] Therefore, the power of a tribunal to make conclusions on the basis of presumptions flows from the arbitration rules. In this circumstance, it is hard to seek the annulment of an award because a tribunal has the ability to make such determinations based on the facts.

The notion of presumptions as an evidentiary principle is also very closely linked to other evidentiary principles. As noted in Chapter 1, one of the purposes of this research is to observe how evidentiary principles interact with each other.[26] These are discussed below in greater detail.

(A) *The Relationship Between Presumptions and Burdens of Proof*

Presumptions and burdens of proof interact very closely with each other. The application of a presumption functionally reverses the burdens of proof and production.[27] When a tribunal determines that a presumption applies to the case, and that the case fits within the scope of the presumption, it effectively requires the party seeking to move the case outside of the presumption to produce relevant and probative evidence why the presumption should not govern the dispute.[28]

It is again important carefully to distinguish the decision of a tribunal to rely upon legal and judicial presumptions. In the context of a legal presumption, the presumption

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[23] For further discussion on inferences, see chapter 6.

[24] ICSID Arbitration Rule 34(1).

[25] David D. Caron & Lee Caplan, *The UNCITRAL Arbitration Rules* (2nd ed. Oxford University Press 2013) 580-1 (excerpting Iran-US Claims Tribunal jurisprudence to this effect).

[26] See Chapter 1, § II above.

[27] See eg Christoph Schreuer *et al*, *The ICSID Convention: A Commentary* (Cambridge University Press, 2nd ed. 2009) 669 ("if a party adduces that proves *prima facie* the facts alleged, the burden of proof may shift to the other party, who needs to produce evidence to rebut the presumption."); Mojtaba Kazazi, *Burden of Proof and Related Issues: A Study on Evidence Before International Tribunals* (Kluwer 1996) 239 (relating presumptions to "a fact [which] is held to be true indiscriminately in all cases unless the contrary is proven."); Robert Kolb (n 3) 242 (discussing the burden of proof on parties seeking to rebut legal presumptions).

[28] See Durward V. Sandifer (n 3) 146 ("While certain presumptions, therefore, may affect the responsibility of a party for the production of evidence, they are seldom strictly applied by international tribunals.").

in fact assigns the relevant burden of proof.[29] It determines which party is considered to be the "movant" with regard to the proof or disproof of specific elements of claim or defense.[30] A failure by a tribunal to determine and apply the burden of proof correctly when purporting to rely upon a legal presumption constitutes an error of law, or failure to apply the applicable law, depending upon the circumstance of the specific case just as much as removing an element or factor from a claim or defense as requiring proof or substantiation does.[31]

In the context of a judicial presumption, the question lies differently. Proof that the tribunal should refer to a judicial presumption does not determine who should be viewed as a moving party for purposes of determining the assignment of burdens of proof.[32] Rather, it is a determination that the party carrying the burden of evidence and production has satisfied both, meaning that the non-moving party must rebut the application of the presumption to the case at hand.[33] In the context of judicial presumptions, what shifts is solely the burden of evidence because the judicial presumption facially satisfies the moving party's burden of proof.

(B) *The Relationship Between Presumptions and Inferences*

Presumptions and inferences are closely linked concepts and operate closely with one another. Indeed, all presumptions use inferences to find application in tribunal

[29] See Robert Kolb (n 3) 242 ("The consequence of applying a [legal] presumption is to assist the administration of law by shifting the burden of proof to the other party, where the law considers that it should more conveniently lie.").

[30] See Bin Cheng (n 1) 332 ("Indeed, it may be said that the term *actor* in the principle *onus probandi actori incumbit* is not to be taken to mean the plaintiff from the procedural standpoint, but the real claimant in view of the issues involved. The ultimate distinction between the claimant and the defendant lies in the fact that the claimant's submission requires to be substantiated, whilst that of the defendant does not.") The use of a legal presumption precisely determines that in a certain circumstance, as a matter of law, a submission does not require independent substantiation. For a discussion of the basic principle regarding *actori incumbit onus probandi*, see Chapter 2.

[31] See R. Doak Bishop & Silvia Marchili, *Annulment under the ICSID Convention* (Oxford University Press 2012) 92-3 (discussing the distinction between erroneous application and non-application of law in the context of a partial application of the relevant law).

[32] See Robert Kolb (n 3) 243 (noting that in the context of judicial presumptions "there is no shift in the burden of proof.").

[33] ibid.

decision-making.[34] Presumptions relate the specific dispute to a general context established either as a matter of law (*i.e.*, for legal presumptions) or as a matter of factual proof (*i.e.*, for judicial presumptions).[35] As noted above, in the context of a legal presumption, the general context is established by authoritative prescription – the applicable law.[36] In the context of a judicial presumption, the general context is established by factual proof (potentially through contemporaneous documents or expert testimony).[37] The question in both instances is whether the dispute at bar follows the general rule established by the presumption or whether it has been shown to deviate from that general rule by other record evidence.[38]

To determine whether an issue falls within the general rule set out by a presumption requires the same kind of plausibility analysis as the drawing of a record inference.[39] For a tribunal to rule upon an inference is to determine that the record as a whole makes it more plausible than not that the relevant conduct followed the general rule.[40] To make such a plausibility determination, the tribunal will need to establish how closely related the general practice is to the conduct at issue in the dispute and whether there exists any proof in the record (direct or circumstantial) that one or both of the parties did not follow general practice.[41] The closer the link of general practice to the disputed issue, the more plausible the conclusion that the general practice was followed.[42]

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[34] Mojtaba Kazazi (n 27) 239. Cf. Christoph Schreuer *et al* (n 27) 669; see Robert Kolb (n 3) 243.

[35] ibid ("Presumptions are conclusions drawn from known facts about unknown facts. The known facts serving as the basis for a presumption could be either a particular proven fact related to the case at issue, or a fact which is to be held true indiscriminately in all cases unless the contrary is proven.").

[36] Robert Kolb (n 3) 241 ("a legal norm supposes (automatically) that certain facts are established in a given situation. Thus, if a factual situation arises, certain facts, which are linked to it, are by law considered to exist without need to prove them.").

[37] ibid 243.

[38] See Mojtaba Kazazi (n 27) 239.

[39] For further discussions on inferences, see chapter 6.

[40] ibid.

[41] ibid.

[42] ibid.

III. LEGAL PRESUMPTIONS

As noted above, legal presumptions are derived from the applicable law. In investor-state arbitrations, the legal presumptions could be derived from the relevant applicable law, general international law, or from municipal law depending on the case.

(A) *General International Law Presumptions in Investor-State Arbitration*

Every investor-state arbitration implicates international law in some way.[43] International law can be applicable because the cause of action arises in connection with an international legal obligation of the host state such as an obligation contained in a bilateral investment treaty.[44] International law might be applicable because of the choice of law rules included in the law governing the arbitration – such as would be the case in the context of ICSID arbitration pursuant to Article 42 of the ICSID Convention or, in the case of UNCITRAL arbitration would be the case under Article 35 of the 2013 UNCITRAL Arbitration Rules.[45]

There is debate whether international law has (or can) give rise to truly legal presumptions.[46] The argument raised by skeptics of international legal presumptions is that international law is too insufficiently developed to give rise to independent

[43] See Christopher Dugan *et al*, *Investor-State Arbitration* (Oxford University Press 2008) 213 ("As investment treaty decisions multiply, it is likely that most tribunals will routinely test host state laws and actions taken pursuant to them against the standards of international law."); Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press 2d ed., 2012) 288.

[44] See Campbell McLachlan, Laurence Shore & Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford University Press 2008) 6-7 ("Even where the arbitration involves a sovereign State, public international law is only one potentially applicable source of law. However, the conventional approach to applicable law in commercial arbitration is displaced in the context of a claim founded upon an investment treaty. In that case, the treaty itself forms the basis for the parties' applicable rights and duties. The treaty is itself 'governed by international law'. As such it must be 'applied and interpreted against the back-ground of the general principles of international law.").

[45] ICSID Convention, Article 42; 2013 UNCITRAL Arbitration Rules, Article 35; David D. Caron & Lee Caplan, *The UNCITRAL Arbitration Rules: A Commentary* (Oxford University Press 2d ed. 2013) 116 ("Public international law fulfils the criteria of 'law' within the meaning of Article 35(1), regardless of any disagreement surrounding the concept of *lex mercatoria*. Although public international law in relations between private enterprises is not likely to provide the most appropriate legal framework, in relations between a state or a state entity on the one hand and a private enterprise on the other, a non-domestic law such as public international law may be the suitable applicable substantive law. In practice, certain significant state contracts have included choice of law clauses that combine domestic law, international law and general principles of law.").

[46] See Durward V. Sandifer, (n 3) 141-2; Mojtaba Kazazi, *Burden of Proof and Related Issues: A Study on Evidence Before International Tribunals* (Kluwer 1996) 241.

presumptions.[47] This debate now appears resolved in practice in favor of establishing international legal presumptions.[48] Thus, the International Court of Justice has applied such legal presumptions in the disposition of disputes brought before its bar.[49] To the extent that international law is the applicable law to an investor-state arbitration, an investor-state tribunal could similarly be bound by those presumptions. Some of these presumptions are discussed below.[50]

(B) *Municipal Law Presumptions in Investor-State Arbitration*

Many investor-state arbitrations are governed not only by international law, but also by municipal law with regard to certain aspects of the dispute.[51] This can be the case in the context of a *renvoi* in the international legal obligation at issue in a dispute to the municipal law of the host state.[52] This can also be the case because the choice of law rules included in the law governing the law of the arbitration point to the application of municipal law alongside international law.[53] To the extent that a municipal legal question is relevant to the tribunal's resolution of an investor-state dispute, municipal law presumptions would also be applicable.[54]

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[47] See Durward V. Sandifer (n 3) 142 ("This legal concept involves a superior authority and a precision not yet present in international law. Presumptions cannot, therefore, in the present stage of the development of international law, occupy a role comparable to that which they play in municipal law.").

[48] Compare Robert Kolb (n 3) 241-3 (laying out the jurisprudence supporting the creation of true international law legal presumptions) with Mojtaba Kazazi, *Burden of Proof and Related Issues: A Study on Evidence Before International Tribunals* (Kluwer 1996) 243 ("Given the present status of international procedure, the answer to the question could vary depending on what is meant by legal presumptions in international law."). Notably, Kazazi similarly resolves that legal presumptions, properly understood, are typically part of international law dispute resolution. ibid, 244-5.

[49] See eg *Maritime Delimitation and Territorial Question Between Qatar and Bahrain (Qatar v Bahrain)*, 2001 I.C.J. 40, 145, 166 (Bedjaoui, Ranjeva & Koroma JJ., dissenting) (discussing the legal presumption that "islands situated within the territorial sea of the coastal State appertain to that State"). For a discussion of early jurisprudence, see Robert Kolb (n 3) 243.

[50] See Section IIID below.

[51] Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press 2d ed., 2012) 81-2 (discussing choice-of-law considerations in investment contracts).

[52] *Fraport AG Frankfurt Airport Services Worldwide v Philippines*, ICSID Case No ARB/03/25, Award (16 August 2007), IIC 299 (2007) [394].

[53] ICSID Convention, Article 42.

[54] See *Yukos Universal Limited (Isle of Man) v The Russian Federation*, PCA Case No AA 227, Final Award (18 July 2014), IIC 652 (2014) [306-7] (applying the presumption in the context of applicable domestic tax law).

If the tribunal discovers that the legal presumptions of municipal law and international law cannot both be applied in a given case, the tribunal will have to make a determination of which presumption to follow. Although an argument might be raised that primacy must be given to international law in the context of a conflict between municipal and international law at least in ICSID arbitration, a careful contextual and functional analysis will be necessary to determine which presumption most fits the circumstances of the case at bar.[55] In some circumstances, this may require the rejection of a proposed legal presumption premised in international law despite the applicability of international law as a constitutive element of the applicable law.[56]

(C) *Rebuttal Nature of Legal Presumptions*

Legal presumptions typically remain rebuttable (unless the applicable law treats the presumption as being irrebuttable).[57] They represent default positions assumed by the law.[58] In order to rebut a legal presumption, the party moving against the application of the presumption must do more than displace a reasonable inference. It bears the burden of proof that the legal presumption is not applicable with regard to the dispute at bar either because of direct evidence contradicting the default assumption of the law or because of circumstantial evidence to the same effect.[59]

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[55] Compare Prosper Weil, 'The State, the Foreign Investor and International Law: The No Longer Stormy Relationship of a Menage A Trois', l5 ICSID Review 401 (2000) with W. Michael Reisman, 'The Regime for Lacunae in the ICSID Choice of Law Provision and the Question of Its Threshold', 15 ICSID Review 362 (2000).

[56] See eg *Fraport AG Frankfurt Airport Services Worldwide v Philippines*, ICSID Case No ARB/03/25, Decision on Annulment (23 December 2010), IIC 478 (2010) [192-193] (rejecting application of the international law presumption of innocence in investor-state arbitration: "The maxim '*in dubio pro reo*' also encapsulates an important human rights protection that —'[e]veryone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.' But such a principle cannot be applied in the context of international arbitral proceedings instituted by an investor against a state. Indeed, the application of such a presumption could itself, in the context of ICSID proceedings, amount to a failure of due process since it may unbalance the essential equality between the parties. The principle in dubio has proper application as a right of the defence in criminal proceedings, because it counterbalances the coercive power of the state. It cannot, however, be transposed into the context of international arbitral proceedings because to do so would be inconsistent with the principle of equality of the parties.").

[57] Robert Kolb (n 3) 242.

[58] ibid.

[59] ibid.

In exceptional circumstances, legal inferences can be non-rebuttable.[60] Legal presumptions that are not rebuttable include that all parties are charged with knowledge of the law (*ignorantia juris non excusat*).[61] In the context of investor-state arbitration, even such typically non-rebuttable presumptions have been deemed in some cases to be rebuttable. The observations of the tribunal in the Fraport v. Philippines case are a good example to demonstrate this:

> When the question is whether the investment is in accordance with the law of the host state, considerable arguments may be made in favour of construing jurisdiction *ratione materiae* in a more liberal way which is generous to the investor. In some circumstances, the law in question of the host state may not be entirely clear and mistakes may be made in good faith. An indicator of a good faith error would be the failure of a competent local counsel's legal due diligence report to flag that issue. Another indicator that should work in favour of an investor that had run afoul of a prohibition in local law would be that the offending arrangement was not central to the profitability of the investment, such that the investor might have made the investment in ways that accorded with local law without any loss of projected profitability. This would indicate the good faith of the investor."[62]

An illustration of this can be seen in the *Quiborax v. Bolivia* case.[63] In this case, the question before the tribunal was whether the investor did indeed possess the appropriate nationality to qualify as an "investor." The investor stated that its shareholder status is proved "exclusively by reference to the shareholders registry."[64] Bolivia challenged this noting that the shareholder registry merely created a presumption of shareholder status, which could be rebutted by other evidence to show who the real shareholders were and, in the present case, the shareholder registry was

[60] ibid [243].

[61] ibid (discussing the legal non-rebuttable legal presumption of *ignorantia juris nocet*).

[62] *Fraport AG Frankfurt Airport Services Worldwide v Philippines*, ICSID Case No ARB/03/25, Award (16 August 2007), IIC 299 (2007) [396].

[63] *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction (27 September 2012).

[64] ibid 82.

filled with multiple irregularities.[65] The tribunal agreed with the Respondent: "The Tribunal therefore agrees with the Respondent's legal expert, Prof. Salame, that the shareholders registry 'merely creates a rebuttable presumption . . . in favour of the person therein, and 'does not exhaust the discussion over who really is the shareholder of the corporation'."[66] Therefore, the tribunal noted that the presumption may be rebutted by other evidence.[67]

(D) *Illustrations for Legal Presumptions as Recognized and Applied by Investor-State Tribunals*

Tribunals have recognized and applied legal presumptions in relation to certain matters. For example, the submission of audited financial statements implies the inference that the financial information included in the statements is accurate and reliable. The *Aucoven* tribunal faced an instance in which the respondent challenged the financial information contained in audited financial statements.[68] The tribunal permitted review of these statements but noted that "the very reason why financial statements are audited is to verify their reliability. Hence in the Tribunal's view, audited financial statements benefit from a *prima facie* presumption of reliability."[69] The underlying rationale is that under domestic laws audited financial reports are typically deemed to be reliable. It was not sufficient to rebut this presumption to submit isolated errors in the statement.[70] Although not clearly stated in the decision, rebutting the

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[65] ibid 82-83.

[66] ibid 119 (ellipsis in original).

[67] The *Methanex v. Mexico* case offers an example of how this would operate when the tribunal stated: "Accordingly, these materials can be *only* assumed facts for the purpose *only* of the Tribunal's decision in this Award on the USA's challenges on jurisdiction and admissibility - and nothing more. Given that the legal burden of proving its disputed factual allegations remains to be discharged by Methanex, together with the legal presumptions of innocence and the legal doctrine of omnia praesumuntur rite esse acta, nothing in our recital of factual materials below should be taken as casting the slightest shadow over the targets of Methanex's allegations. Nor should this Award indicate any conclusions held by the Tribunal as to the eventual proof of these assumed facts because we have formed no view at all as to their merits, one way or the other."). *Methanex Corporation v. United States of America*, UNCITRAL, Partial Award (7 August 2002), ¶ 45.

[68] *Autopista Concesionada de Venezuela CA (Aucoven) v Bolivarian Republic of Venezuela*, ICSID Case No ARB/00/5, Award (23 September 2003) [248].

[69] ibid.

[70] ibid ('In the case at hand, Venezuela's criticism of the reliability of the financial statements does not provide sufficient elements to rebut that presumption. Hence, subject to rectifying the errors mentioned

presumption would require proof of material error in the statements either by expert evidence or comparison of the statements to otherwise available recorded evidence.

Similarly, proof that the government took certain official action implies an inference that the government acted in a valid manner. A line of cases has recognized a presumption of the validity of official government acts.[71] This presumption inures both in favor of the host state in defending against allegations of wrongdoing,[72] and in favor of investors relying upon official acts as a predicate for their claims.[73] This jurisprudence is premised in a well-known public international law presumption.[74] This presumption is consistent with the burden of proof being placed on the party seeking to prove a violation of law.

Further, proof that the investment was made in the context of a specific regulatory regime alone does not imply the inference that the investor had a reasonable

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above, the Tribunal will rely on the financial statements on record in order to establish the amount of out-of-pocket costs owing to Aucoven.').

[71] *Sistem Mühendislik İnşaat Sanayi ve Ticaret AŞ v Kyrgyz Republic*, ICSID Case No ARB(AF)/06/1, Award (9 September 2009) [82]; Paushok v Government of Mongolia, interim measures (Sept. 2, 2008), IIC 351 (2008), ¶ 81; Int'l Thunderbird Gaming Corp. v United Mexican States, UNCITRAL-NAFTA, Separate Opinion of Thomas Wälde (26 January 2006) [60], [91].

[72] *Sistem Mühendislik İnşaat Sanayi ve Ticaret AŞ v Kyrgyz Republic*, ICSID Case No ARB(AF)/06/1, Award (9 September 2009) [82]; *Paushok v Government of Mongolia*, Decision on Interim Measures (2 September 2008) [81] ("Every year, governments around the world propose the adoption of tax measures which constitute either new initiatives or amendments to existing fiscal legislation. There is a presumption of validity in favor of legislative measures adopted by a State and the burden of the proof is upon those who challenge such measures to demonstrate their invalidity.").

[73] *Int'l Thunderbird Gaming Corp. v United Mexican States*, UNCITRAL-NAFTA, Separate Opinion of Thomas Wälde (26 January 2006) [60], [91] ("In light of the differing opinions on the legal value and meaning of the 'Oficio', one needs to bear in mind the burden of proof situation: Thunderbird has to prove that the Oficio conveyed to it, from the perspective of a reasonable foreign businessman in the gambling industry and in the specific context of the interaction between Thunderbird and SEGOB, the message that it could operate the software-driven video poker machines it imported. Mexico, on the other hand, has to prove that the Oficio was tainted by insufficient, but mandatory disclosure by Thunderbird. This is a high threshold because, first, Mexico has to counter the presumption of the validity of official acts of government which respect for government requires; secondly, it has total control over all the documentation and witnesses — its own past and present SEGOB officials who alone can testify about what they knew and did not know. We therefore have to measure the evidence to see if Thunderbird has met this burden of proof, and, if so, Mexico has met its burden of proof. [. . .] There is a presumption — both in international and in comparative administrative law — of the legitimacy of official acts. That is the risk that the government, as price for the due respect to official acts, has to bear.").

[74] See Mojtaba Kazazi (n 27) 246 ("there are many precedents founding rebuttable presumptions on general principles of law such as . . . *regularity and validity of acts of sovereigns to international law*.") (emphasis in original).

expectation that the regulatory framework would never change, except if there is a stabilization clause. A line of decisions has concluded that a presumption exists that investors expect some regulatory changes when making an investment without entering into a stability agreement.[75] As the *Micula* tribunal stated, "[w]hen the alleged legitimate expectation is one of regulatory stability, the reasonableness of the expectation must take into account the underlying presumption that, absent assurance to the contrary, a state cannot be expected to freeze its laws and regulations."[76]

Another legal presumption in the jurisdictional context is the submission of a certificate of nationality which will lead to the legal presumption that the person held the certified nationality on the date of the certificate.[77] Similarly, proof of majority ownership

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[75] See eg *Al Bahloul v Republic of Tajikistan*, SCC Case No 064/2008, Partial Award (2 September 2009) [185] ("Neither of these criteria is intended however to go so far as to require the State to freeze its legal framework, but rather to act in an open manner and consistent with commitments it has undertaken"); *Plama Consortium Ltd v Republic of Bulgaria*, ICSID Case No ARB/03/24, Award (27 August 2008) [219] ("[T]he Tribunal believes that the ECT does not protect investors against any and all changes in the host country's laws. Under the fair and equitable treatment standard the investor is only protected if (at least) reasonable and justifiable expectations were created in that regard. It does not appear that Bulgaria made any promises or other representations to freeze its legislation on environmental law to the Claimant or at all"); *PSEG Global Inc. v Republic of Turkey*, ICSID Case No ARB/02/5, Award (19 January 2007) [240]; *CMS Gas Transmission Co v Argentine Republic*, ICSID Case No ARB/01/8, Award (25 April 2005) [277] ("It is not a question of whether the legal framework might need to be frozen as it can always evolve and be adapted to changing circumstances, but neither is it a question of whether the framework can be dispensed with altogether when specific commitments to the contrary have been made. The law of foreign investment and its protection has been developed with the specific objective of avoiding such adverse legal effects.").

[76] *Micula v Romania*, ICSID Case No ARB/05/20, Award (11 December 2013) [673].

[77] See eg *Soufraki v United Arab Emirates*, ICSID Case No ARB/02/7, Decision on Annulment (5 June 2007) [60]-[63]; *Arif v Republic of Moldova*, ICSID Case No ARB/11/23, Award (8 April 2013) [356], [n126] (certificate of nationality is *prima facie* evidence of nationality); *Ambiente Ufficio SpA v Argentine Republic*, ICSID Case No ARB/08/9, Decision on Jurisdiction (8 February 2013) [318] ("In general, the finding of the Annulment Committee in *Soufraki v United Arab Emirates* that '[i]t is only in exceptional cases […] that ICSID tribunals have to review nationality documentation issued by state officials', may be taken as a guidance in that regard."); *Tza Yap Shum v Republic of Peru*, ICSID Case No ARB/07/6, Decision on Jurisdiction (19 June 2009) [63]; *Micula v Romania*, ICSID Case No ARB/05/20, Decision on Jurisdiction (24 September 2008) [87] ("Indeed, it is well established that the acquisition of nationality must not be inconsistent with international law. The burden of proving that nationality was acquired in a manner inconsistent with international law lies with the party challenging the nationality. In that respect, there exists a presumption in favour of the validity of a State's conferment of nationality. The threshold to overcome such presumption is high."); *Siag v Arab Republic of Egypt*, ICSID Case No ARB/05/15, Decision on Jurisdiction (11 April 2007) [153] ("[a]pplication of international law principles requires an application of the Egyptian nationality laws with reference to international law as may be appropriate in the circumstances. Both Egyptian law and the practice of international tribunals is that the documents referred to by the Respondent evidencing the nationality of the Claimants are prima facie evidence only. While such documents are relevant they do not alleviate the requirement on the Tribunal to apply the Egyptian nationality law, which is the only means of determining Egyptian nationality.").

in an enterprise leads to a legal presumption of control over that enterprise. Indeed, a line of investor-state cases have concluded that a proof of majority ownership gives rise to a presumption of control of an enterprise.[78] The legal presumption of control is strengthened the greater majority stake in ownership.[79]

These are but a few instances of legal presumptions that have developed in the investor-state context. It is worth noting that tribunals are not always fully clear in their articulation of the applicable law from which the legal presumption is derived, although it appears that the tribunals appear to rely on some general principle of international law or on municipal law.[80]

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[78] See eg *Aguas del Tunari SA v Republic of Bolivia*, ICSID Case No ARB/02/3, Decision on Jurisdiction (21 October 2005) [264]; *Autopista Concesionada de Venezuela CA v Bolivarian Republic of Venezuela*, ICSID Case No ARB/00/5, Decision on Jurisdiction (27 September 2001) [183]-[186]; *Compañía del Desarrollo de Santa Elena SA v Republic of Costa Rica*, ICSID Case No ARB/96/1, Award (17 February 2000) [26]; *Maffezini v Kingdom of Spain*, ICSID Case No ARB/97/7, Decision on Jurisdiction (25 January 2000) [77]; *Caratube Int'l Oil Co. LLP v Republic of Kazakhstan*, ICSID Case No ARB/08/12, Decision on Annulment (21 February 2014) [193] (limiting the presumption); *Tulip Real Estate Investment & Development Netherlands BV v Republic of Turkey*, ICSID Case No ARB/11/28, Award (10 March 2014) [289] (rejecting the presumption).

[79] See *Aguas del Tunari SA v Republic of Bolivia*, ICSID Case No ARB/02/3, Decision on Jurisdiction (21 October 2005) [264] ("The Tribunal, by majority, concludes that the phrase 'controlled directly or indirectly' means that one entity may be said to control another entity (either directly, that is without an intermediary entity, or indirectly) if that entity possesses the legal capacity to control the other entity. Subject to evidence of particular restrictions on the exercise of voting rights, such legal capacity is to be ascertained with reference to the percentage of shares held.").

[80] There are also presumptions that a tribunal cannot make. For example, tribunals have clarified that they cannot rely on a presumption either for or against its jurisdiction. See eg *Sociedad Anónima Eduardo Vieira v Republic of Chile*, ICSID Case No. ARB/04/7, Award (21 August 2007), ¶ 191 ("A este respecto, se ha establecido que todo el análisis sobre la jurisdicción debe realizarse con meticuloso cuidado, sin partir de presunciones a favor o en contra de la jurisdicción del Centro."). Similarly consent cannot be presumed under international law. See eg *Daimler Financial Services AG v Argentine Republic*, ICSID Case No. ARB/05/1, Award (22 August 2012), ¶ 175 ("it is not possible to presume that consent has been given by a state. Rather, the existence of consent must be established."); *Inceysa Vallisoletana S.L. v Republic of El Salvador*, ICSID Case No. ARB/03/26, Award (2 August 2006), ¶ 191 ("As indicated when analyzing the scope of consent, for this purpose it is necessary to apply the principles of good faith, identification of the will of the parties and absence of a presumption in favor or against consent."); *ICS Inspection and Control Services Limited (United Kingdom) v Argentine Republic*, PCA Case No. 2010-9, Award on Jurisdiction (10 February 2012), ¶ 280 ("a State's consent to arbitration shall not be presumed in the face of ambiguity. Consent to the jurisdiction of a judicial or quasi-judicial body under international law is either proven or not according to the general rules of international law governing the interpretation of treaties."). Similarly the presumed intention of the parties cannot override the plain language under international law. See eg *Ping An Life Insurance Company of China, Limited and Ping An Insurance (Group) Company of China, Limited v Kingdom of Belgium*, ICSID Case No. ARB/12/29, Award (30 April 2015), ¶ 166 ("The ordinary meaning approach has been adopted in many investor-State arbitrations to confirm that the presumed intentions of the parties should not be used to override the explicit language of a BIT (*Fraport v Philippines* at [340]) or to override the agreed upon

IV. JUDICIAL PRESUMPTIONS

Judicial presumptions rely upon the existence of some general practice or habit, which a tribunal can rely on in their capacity as "judges." If it has been proved that a business follows a specific protocol in the loading of trucks in hundreds of documented instances, there is a presumption that in a specific instance, the business followed the same approach even if it lost the loading documents.[81] Similarly, if there is a widespread practice in the business community as to permissible variances, it is presumed that a party that forms part of that community would have followed such widespread practice. The general practice must be proved by the party relying upon it, including in relevant circumstances by means of expert testimony.

Judicial presumptions are also rebuttable by contesting the proof of a general practice proffered by the moving party, showing that the moving party acted inconsistently with general practice, or that the general practice does not bear upon the issue for which it is being invoked.

(A) *The Constitutive Function of the Legal Presumption of Good Faith in Formulating Judicial Presumptions*

It is my submission that judicial presumptions arise because of the legal presumption of good faith. The legal presumption of good faith is a general principle of law and as such a rule of international law, as well.[82] The presumption of good faith contains two prongs – honesty-in-fact and reasonableness.[83]

framework (*Daimler Financial Services v Argentina* at [164]), or be used as an independent basis of interpretation (*Wintershall v Argentina* at [88]).").

[81] *Mobil Exploration & Production U.S. Inc. v Cajun Construction Services*, Inc. 45 F.3d 96 (5th Cir. 1995).

[82] See Bin Cheng (n 1) 106 ("Contracting parties are always assumed to be acting honestly and in good faith. That is a legal principle, which is recognized in private law and cannot be ignored in international law." (quoting the PCIJ *Lighthouse Case*)).

[83] See ibid (good faith as honesty-in-fact); see also Richard Gardiner, *Treaty Interpretation* (Oxford University Press 2008), 157 (reasonableness as good faith); for a theoretical discussion regarding the relationship between honesty-in-fact and reasonableness premised in municipal law, see Frédéric G. Sourgens, *Reason and Reasonableness: The Necessary Diversity of the Common Law*, 67(1) *Maine Law Review* 73 (2014).

The legal presumption of good faith as honesty-in-fact assumes that all parties acted without deception of subterfuge.[84] This legal presumption is relevant in framing judicial presumptions of specific party expectations. A judicial presumption would permit a party to plead general practice to discharge a burden of proof to show that a contrary conclusion implies conduct with less than honesty-in-fact.[85] Such judicial presumptions operate against the background of the legal presumption of good faith.

The legal presumption of good faith as reasonableness assumes that "one party should be able to place confidence in the words of the other, as a reasonable man might be taken to have understood them in the circumstances."[86] Such a reasonableness standard implies that parties operate consistently with relevant customs, practices and usages.[87] A legal presumption of reasonableness is relevant in framing judicial presumptions. Where there is a question of fact how one of the parties conducted itself, it is assumed that it would have conducted itself in keeping with industry standards, or reasonably, thus closing relevant gaps of proof by inference from general practice (as opposed to proved record facts alone).[88] Such judicial

[84] Bin Cheng (n 1) 106.

[85] See *HICEE BV v The Slovak Republic*, PCA Case No 2009-11, Partial Award (23 May 2011), IIC 514 (2011) [129] ("The Claimant invited the Tribunal to disregard the Explanatory Notes entirely, largely on the ground that they were arguably inconsistent with the terms in which other, similar, BITs had been presented to the Dutch Parliament, and should therefore be regarded as an aberration. This the Tribunal feels unable to do — in part because of the categorically precise terms in which the passage in the Explanatory Notes is cast, and in part also because the Explanatory Notes are a formal, public document that engages the honesty and good faith of the Dutch Minister, and the Tribunal does not believe that it is its place to call that into question, even implicitly"); *Gemplus S.A., SLP S.A., Gemplus Industrial S.A. de C.V. v The United Mexican States* ICSID Case No ARB(AF)/04/2, Award (16 June 2010), IIC 488 (2010) [4-142] (applying the presumption of honesty even in the context of witness mis-recollection); *ADC Affiliate Limited and ADC & ADMC Management Limited v The Republic of Hungary*, ICSID Case No ARB/03/16, Award (2 October 2006), IIC 1 (2006) [475] ("However when, after receiving top class international legal advice, Hungary enters into and performs these agreements for years and takes the full benefit from them, it lies ill in the mouth of Hungary now to challenge the legality and/or enforceability of these Agreements. These submissions smack of desperation.").

[86] Bin Cheng, (n 1) 107.

[87] See Klaus Peter Berger, *The Creeping Codification of the New Lex Mercatoria* (Wolters Kluwer 2d ed. 2010),198-199.

[88] See *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v Romania*, ICSID Case No ARB/05/20, Award (11 Decision 2013), IIC 621 (2013) [673] (addressing presumptions of regulatory stability by reference to reasonableness criteria); *Phoenix Action Ltd. v Czech Republic*, ICSID Case No ARB/06/5, Award (15 April 2009), IIC 367 (2009) [127] (looking to the practice of purchasing bankrupt companies to reorganize them for a profit to determine whether an investor had assumed risk); *CDC Group Public Ltd. Co. v Seychelles*, ICSID Case NO ARB/02/14, Award

presumptions similarly operate against the background of the legal presumption of good faith.

In the first instance, the judicial presumption translates the legal presumption of good faith from its lofty abstraction to concrete application. This concrete application requires factual proof of a specific practice against which to judge party conduct. This factual proof must be required of the party seeking to invoke a specific application of the judicial presumption – and thus keep intact the original assignment of burdens of proof.[89] This proof of a practice, custom, or usage in its own right is subject to challenge.[90] The transformation of the legal presumption of good faith into judicial presumptions renders the legal presumption testable by concrete evidence.

In the second instance, the relationship between judicial presumptions and the legal presumption of good faith explains why judicial presumptions are not available with regard to conduct that otherwise violates principles of good faith and international public policy. Thus, it may well be possible to prove that every actor in a certain jurisdiction pays bribes to government officials in order to secure investment opportunities.[91] This, however, cannot be the predicate for the conclusion that an investment so-secured was "in accordance with host state law" simply because it complied with general investor practice. Rather, practices in violation of international public policy cannot give rise to

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(17 December 2003), IIC 47 (2003) [47] (addressing the "common practice of lenders in charging for time spent and expenses incurred in connection with the investigation and processing of applications for loans."); *BRIDAS SAPIC v Turkmenistan*, ICC Case No 9058/FMS/KGA, partial Award (24 June 1999), IIC 35 (1999) [139] (footnote 13) (relying upon usage of trade to explain the good faith nature of a transaction structure).

[89] See Mojtaba Kazazi (n 27) 239.

[90] See *Joseph Charles Lemire v Ukraine*, ICSID Case No ARB/06/18, Award (28 March 2011), IIC 485 (2011) [169] ("If it can be proven that in the normal cause of events a certain cause will produce a certain effect, it can be safely assumed that a (rebuttable) presumption of causality between both events exists, and that the first is the proximate cause of the other.").

[91] See *World Duty Free Co. Ltd. v Kenya*, ICSID Case No. ARB/00/7, Award (25 September 2006), IIC 277 (2006), [110] ("The Claimant submits that the facts as laid out in Mr. Ali's witness statement do not amount to a confession of bribery; it stresses that "bribery is not a strict liability offence, mens rea is relevant". Mr. Ali made a payment to President Moi that he believed lawful. At that time, it was routine practice to make such donations in advance of doing business in Kenya; said practice had cultural roots and was buttressed by the "Harambee" system, one which mobilized resources through private donations for public purposes.").

judicial presumptions because they run counter to the function of the legal presumption of good faith.[92]

(B) *The Evidentiary Predicate for Judicial Presumptions*

To benefit from a judicial presumption, the party invoking such a presumption must prove that there exists a practice, usage, or custom on the basis of which an inference relevant for the disposition of the dispute could be drawn.[93] The typical form in which such a submission could be made is by means of expert testimony.[94] Such expert testimony would set out for the tribunal what actors in a sector typically do and how their actions inure to the level of a custom, practice, or usage. The more specific the expert testimony is with regard to the immediate context of the dispute, and the more data points immediately relevant to the dispute it can provide, the more probative the relevant custom, practice, or usage will be.

The evidentiary predicate for a judicial presumption does not need to be proved by expert evidence. Other sources of potential corroboration of a custom, practice, or usage include best practices published by relevant trade organizations, academic surveys conduct of the sector for instance in the context of business review case studies, or journalist reporting on an industry.[95] The benefit of the arbitral dispute resolution mechanism is that arbitrators themselves will have a significantly greater expertise in the subject matter of the dispute than a judge of general jurisdiction in a municipal legal system.[96] As such, arbitral tribunals can be expected in many

[92] ibid [138-188].

[93] Mojtaba Kazazi (n 27) 239.

[94] Nigel Blackaby *et al*, *Redfern and Hunter on International Arbitration* (Oxford University Press 6th ed. 3015) 394-398.

[95] See Nigel Blackaby *et al*, *Redfern and Hunter on International Arbitration* (Oxford University Press 6th ed. 3015) 213-4 (discussing establishment of trade usages in commercial arbitration); Klaus Peter Berger, *The Creeping Codification of the New Lex Mercatoria* (WoltersKluwer 2d ed. 2010) 214 (discussing the relevance of self-regulation and best practices in establishing trade usage).

[96] David D. Caron & Lee M. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* (Oxford University Press 2d ed. 2013) 635 ("International arbitration allows the parties to choose an arbitrator whose specialized skill or knowledge regarding a particular legal, financial, or technical field can aid in resolving the dispute most accurately and efficiently.").

circumstances to establish for themselves that a relevant custom, practice, or usage exists without need of recourse to an expert.[97]

No matter the proposed manner of proof of a custom, practice, or usage, the question of its existence is a question of factual evidence.[98] This question falls to the tribunal to establish according to its fact-finding powers.[99] The proof of a custom, practice, or usage does not differ in any meaningful way from the ordinary fact finding process in which the tribunal routinely is engaged.

An illustration for this is the decision on jurisdiction in the *Burlington Resources v. Ecuador* case, where the investor proved that it was industry practice in Ecuador for an operator of an oil and gas project to communicate with the government on behalf of itself and all other project members. This proof created a judicial presumption that letters sent by the operator of a specific block in that jurisdiction to the government were sent on behalf of that operator and the other block project members.[100] The tribunal, therefore, concluded that the letters were sent on behalf of all participants.[101]

(C) *Application of Judicial Presumptions to the Arbitration Record*

Once a custom, practice, or usage has been established, the tribunal must apply it to the arbitration record. It does so by drawing an inference – the specific transaction at bar followed the established general practice.[102] The fact that a general practice exists makes the conclusion that, the parties to a dispute followed this practice sufficiently reasonable for a court or tribunal to use it as a factual predicate for decision (even if the link between practice and specific instance is not in fact proved with direct evidence).[103]

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[97] See ibid.

[98] Robert Kolb (n 3) 243.

[99] See ICSID Arbitration, Rule 34(1).

[100] *Burlington Resources Inc v Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction (2 June 2010), IIC 436 (2010) [327-329].

[101] ibid 327-330.

[102] See Mojtaba Kazazi (n 27) 239; Chittharanjan F. Amerasinghe, *Evidence in International Litigation* (Brill 2005), 257; Durward V. Sandifer (n 3) 107.

[103] See *Corfu Channel Case (Merits) (U.K. v Albania)*, 1949 I.C.J. Rep. 4, 78, 91 (9 April) (Azevedo J., dissenting); Robert Kolb (n 3)243.

(D) *The Rebuttable Nature of Judicial Presumptions*

Judicial presumptions are rebuttable because they only give rise to reasonable inferences.[104] Thus, a ministerial order accepting an investment by a foreign investor gives rise to the reasonable inference that the investment was made in a lawful manner. If the record permits only the drawing of a single reasonable inference, a tribunal must adopt this inference as plausible and resolve the case in line with the presumption.[105] If the record contains only the ministerial order accepting the investment, the lawful nature of the acquisition of the investment is the only factual finding open to the tribunal. This means that a party seeking to rebut the presumption must provide an alternate account – it must produce evidence of some sort.[106] It can introduce direct, credible, and probative evidence contradicting the inference.[107] A respondent could show for instance that the foreign investor paid large sums of money to the official responsible for the order accepting the investment. In such an instance, the inference that a specific instance followed general practice is not in fact reasonable because of directly contrary evidence.[108] It can also introduce indirect evidence supporting an alternative reasonable inference.[109] A respondent could show that the foreign investor paid a large sum of money to the brother of the minister just prior to the investment authorization and that shortly before the payment in question, the ministry had raised significant doubts about the legality of the investment. In such an instance, the party would show that a contrary inference is more plausible in light of the record as a whole than the inference premised upon general custom, practice, or usage.

Understanding judicial presumptions as giving rise to a certain kind of implied reasonable inference – namely the inference that specific cases follow general practice – explains what it means that judicial presumptions are rebuttable.[110] They establish an

[104] For a discussion of the distinction between reasonable and plausible inferences, see Chapter 7.

[105] ibid.

[106] ibid.

[107] ibid.

[108] ibid.

[109] ibid.

[110] See Chittharanjan F. Amerasinghe (n 102) 257; Durward V. Sandifer (n 3) 173.

evidentiary predicate on the basis of which a disposition of the case, without more, is possible.[111] As such, it makes it possible to prove facts related to the case that would otherwise elude specific demonstration.[112] And once a presumption has been established, its establishment in its own right calls upon the opposing party to act and produce evidence to the tribunal explaining why such a disposition would not be plausible or appropriate.[113] Importantly, it does so *without* displacing burdens of proof.[114] Rebutting the presumption does not mean to carry a burden as a moving party with regard to a proposition.[115] It instead means simply to rebut the drawing of a specific inference in light of particular record facts.

V. CONSEQUENCES OF FAILING TO APPLY PRESUMPTIONS

In this section, the consequences of failing to apply presumptions are discussed. As noted above, if a tribunal fails to apply a legal presumption that is clearly based on domestic or international law, it can be the basis for an annulment challenge on the basis that the tribunal manifestly exceeded its powers.[116] Judicial presumptions, on the other hand, would be much more difficult to challenge via the annulment procedure since a judicial presumption is based on the facts and circumstances surrounding the case and a tribunal has a very wide discretion to make such rulings. If a tribunal has acted in a manner that is inconsistent with other prior decisions in making a judicial presumption, while the consequences cannot be annulment, it may result in personal reputational costs to the arbitrator.

However, a party may still bring a motion for annulment for a failure to treat the parties equally or with equality of arms, which is recognized as a “serious departure

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[111] See *Corfu Channel Case (Merits) (U.K. v Albania)*, 1949 I.C.J. Rep. 4, 78, 91 (9 April) (Azevedo J., dissenting).

[112] See Robert Kolb (n 3) 244-5.

[113] See Durward V. Sandifer (n 3) 173.

[114] See Robert Kolb (n 3) 243.

[115] See Durward V. Sandifer (n 3) 173.

[116] See n 20 above.

from a fundamental rule of procedure” under Article 52(1)(d) of the ICSID Convention.[117] A unilateral failure to accord a party its right to be heard on a material issue in the case arguably implies a treatment of the parties with less than equality.[118] The focus upon the equality of the parties does not seek to establish whether the tribunal reached a result that was appropriate or even fair in the context of the arbitration record.[119] Rather, it asks whether fundamental rules governing how proof is taken were applied in an even-handed manner.[120] The focus is upon whether one of the parties was given an impermissible benefit of the doubt. Such an extra-evidentiary benefit of the doubt, in the words of the *Fraport* annulment committee

> cannot be applied in the context of international arbitral proceedings instituted by an investor against a state. Indeed, the application of such a presumption could itself, in the context of ICSID proceedings, amount to a failure of due process since it may unbalance the essential equality between the parties. The principle *in dubio* has proper application as a right of the defence in criminal proceedings, because it counterbalances the coercive power of the state. It cannot, however, be transposed into the context of international arbitral proceedings because to do so would be inconsistent with the principle of equality of the parties.[121]

[117] *Daimler Financial Services AG v Argentine Republic*, ICSID Case No ARB/05/1, Decision on Annulment (7 January 2015) [280]; *Caratube Int’l Oil Co LLP v Republic of Kazakhstan*, ICSID Case No ARB/08/12, Decision on Annulment (21 February 2014) [87]; *Impregilo SpA v Argentine Republic*, ICSID Case No ARB/07/17, Decision on Annulment (24 January 2014) [165]; *Malicorp Ltd v Arab Republic of Egypt*, ICSID Case No ARB/08/18, Decision on Annulment (3 July 2013) [36]; *Libananco Holdings Co Ltd v Republic of Turkey*, ICSID Case No ARB/06/8, Decision on Annulment (22 May 2013) [88]; *Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines*, ICSID Case No ARB/03/25, Decision on Annulment (23 December 2010) [193]; *Maritime Int’l Nominees Establishment v Republic of Guinea*, ICSID Case No ARB/84/4, Decision on Annulment (22 December 1989) [5.06]; *Wena Hotels Ltd v Arab Republic of Egypt*, ICSID Case No ARB/98/4, Decision on Annulment (28 January 2002) [57]; *Azurix Corp v Argentine Republic*, ICSID Case No ARB/01/12, Decision on Annulment (1 September 2009) [213]; *CDC Group plc v Republic of Seychelles*, ICSID Case No ARB/02/14, Decision on Annulment (29 June 2005) [49].

[118] *Malicorp Ltd v Arab Republic of Egypt*, ICSID Case No ARB/08/18, Decision on Annulment (3 July 2013) [36].

[119] *Enron Corp v Argentine Republic*, ICSID Case No ARB/01/3, Decision on Annulment (30 July 2010) [177]-[178].

[120] See *Compañía de Aguas del Aconquija SA v Argentine Republic*, ICSID Case No ARB/97/3, Decision on Annulment (10 August 2010) [251].

[121] *Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines*, ICSID Case No ARB/03/25, Decision on Annulment (23 December 2010) [193].

The most obvious manner in which a tribunal could run afoul of the equality of the parties by giving a party an inapposite benefit of the doubt relates to the tribunal's failure to apply relevant burdens of proof and presumptions.[122] To the extent that the applicable burden or legal presumption can be identified, a failure to apply it (barring other reasons) may be actionable in annulment.[123] But, it is worth emphasizing that judicial presumptions as a general rule are very difficult considering the wide latitude provided to arbitral tribunals in making decisions.

VI. CONCLUSION

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

The following conclusions can be drawn from the thesis:

First, presumptions play an important role in investor-state arbitration because it reduces the need for a party to produce evidence based on the law or regular practice. Presumptions serve an efficiency or prudential function because it would be impractical to require litigants to prove every fact with direct or even circumstantial evidence.

[122] Christoph Schreuer et al, *The ICSID Convention, A Commentary* (Cambridge University Press 2001) 982; *Klöckner Industrie-Anlagen GmbH and otrs v United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No ARB/81/2, Decision on Annulment (17 May 1990) [6.80].

[123] *Daimler Financial Services AG v Argentine Republic*, ICSID Case No ARB/05/1, Decision on Annulment (7 January 2015) [285] (allowing that the imposition of an improper burden of proof could amount to a serious departure from a fundamental rule of procedure but that 'the Tribunal did not impose an improper burden of proof on Daimler that amounts to a serious departure from a fundamental rule of procedure'); *Caratube Int'l Oil Co LLP v Republic of Kazakhstan*, ICSID Case No ARB/08/12, Decision on Annulment (21 February 2014) [97]; *Impregilo SpA v Argentine Republic*, ICSID Case No ARB/07/17, Decision on Annulment (24 January 2014) [165]; *Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines*, ICSID Case No ARB/03/25, Decision on Annulment (23 December 2010) [193]; *Wena Hotels Ltd v Arab Republic of Egypt*, ICSID Case No ARB/98/4, Decision on Annulment (28 January 2002) [60]; *Klöckner Industrie-Anlagen GmbH and otrs v United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No ARB/81/2, Decision on Annulment (17 May 1990) [6.80]. On the distortive effect of an inappropriate use of burdens of proofs and presumptions in international law in general, see Hersch Lauterpacht, *The Development of International Law by the International Court* (first published 1958, Cambridge University Press 1982) 362.

Further, presumptions by their very nature are typically rebuttable with appropriate evidence to be proffered by the opposing party. In order to apply a presumption a two-step process needs to be applied. First, it is necessary to prove that a general practice or relevant circumstance exists. Second, it is necessary to relate that general practice or relevant circumstance to the particular dispute. This can help establish the existence of a presumption.

Second, investor-state tribunals recognize that presumptions can derive from the applicable law (legal presumptions) or from surrounding facts and circumstances (judicial or human presumptions). For a legal presumption, the applicable law permits the drawing of certain rebuttable conclusions without need to adduce additional facts. Legal presumptions typically remain rebuttable (unless the applicable law treats the presumption as being irrebuttable) because they represent default positions assumed by the law. For a judicial presumptions, an arbitral tribunal can draw an inferences on the basis of regular practice in a certain field rather than through the applicable law. Judicial presumptions are also rebuttable by contesting the proof of a general practice proffered by the moving party, showing that the moving party acted inconsistently with general practice, or that the general practice does not bear upon the issue for which it is being invoked.

Third, arbitral tribunals have noted that the failure to apply the applicable law can be a "manifest excess of powers" under Article 52 of the ICSID Convention, however, it cannot be a mere error in the application of the applicable law. A tribunal's use of judicial presumptions, however, falls within the scope of the tribunal's discretionary powers within the context of evidence. This is expressly provided in ICSID Arbitration Rule 34(1) which states that "[t]he Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value."

The distinction between legal presumptions and judicial presumptions is critical because the failure to apply a legal presumption *may* result in annulment while the failure to apply a judicial presumption will typically not lead to annulment since it falls within a tribunal's discretionary powers in relation to evidence. Therefore, while it will be difficult to seek annulment for both legal and judicial presumptions, it will be much harder for a judicial presumption since it involves a discretionary component.