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

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ANNEX A

ARBITRATION RULES DEALING WITH EVIDENTIARY PRINCIPLES

Arbitration Rules	Provision
ICSID Convention, Article 43	“Except as the parties otherwise agree, the Tribunal may, if it deems it necessary at any stage of the proceedings, (a) call upon the parties to produce documents or other evidence, and (b) visit the scene connected with the dispute, and conduct such inquiries there as it may deem appropriate.”¹
ICSID Arbitration Rules 34	“(1) The Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value. (2) The Tribunal may, if it deems it necessary at any stage of the proceeding: (a) call upon the parties to produce documents, witnesses and experts; and (b) visit any place connected with the dispute or conduct inquiries there. (3) The parties shall cooperate with the Tribunal in the production of the evidence and in the other measures provided for in paragraph (2). The Tribunal shall take formal note of the failure of a party to comply with its obligations under this paragraph and of any reasons given for such failure.”
ICSID Additional Facility Rules, Article 41	“(1) The Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value. (2) The Tribunal may, if it deems it necessary at any stage of the proceeding, call upon the parties to produce documents, witnesses

¹ Article 41(2) of the ICSID Arbitration (Additional Facility) Rules provides for a similar provision. The *ADF v United States of America* tribunal has explained the scope of this clause as follows: “Article 41(2) of the ICSID Arbitration (Additional Facility) Rules state that ‘[t]he Tribunal may, if it deems it necessary at any stage of the proceeding, call upon the parties to produce documents, witnesses and experts.’ There are at least two main aspects of necessity when considered in the context of a request for document production. The first aspect relates to a substantive inquiry into whether the documents requested are relevant to, and in that sense necessary for, the purposes of the proceedings where the documents are expected to be used. Inquiry into the relevancy of the documents requested needs to be done on a category by category basis.” *ADF Group Inc. v United States of America*, ICSID Case No. ARB (AF)/00/1, Procedural Order No. 3 (4 October 2001) [3].

Arbitration Rules	Provision
	and experts.”
1976 UNCITRAL Arbitration Rules, Article 24	“1. Each party shall have the burden of proving the facts relied on to support his claim or defence. 2. The arbitral tribunal may, if it considers it appropriate, require a party to deliver to the tribunal and to the other party, within such a period of time as the arbitral tribunal shall decide, a summary of the documents and other evidence which that party intends to present in support of the facts in issue set out in his statement of claim or statement of defence. 3. At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the tribunal shall determine.”
2013 UNCITRAL Arbitration Rules, Article 27	“1. Each party shall have the burden of proving the facts relied on to support its claim or defence. 2. Witnesses, including expert witnesses, who are presented by the parties to testify to the arbitral tribunal on any issue of fact or expertise may be any individual, notwithstanding that the individual is a party to the arbitration or in any way related to a party. Unless otherwise directed by the arbitral tribunal, statements by witnesses, including expert witnesses, may be presented in writing and signed by them. 3. At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the arbitral tribunal shall determine. 4. The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered.”
1998 ICC Rules of Arbitration, Arts. 20, 22	Article 20: “5. At any time during the proceedings, the Arbitral Tribunal may summon any party to provide additional evidence.”
	Article 22: “1. When it is satisfied that the parties have had a reasonable opportunity to present their cases, the Arbitral Tribunal shall declare the proceedings closed. Thereafter, no further

Arbitration Rules	Provision
	submission or argument may be made, or evidence produced, unless requested or authorized by the Arbitral Tribunal.”
2017 ICC Rules of Arbitration, Arts. 25, 27	Article 25: “5. At any time during the proceedings, the arbitral tribunal may summon any party to provide additional evidence.”
	Article 27: “After the proceedings are closed, no further submission or argument may be made, or evidence produced, with respect to the matters to be decided in the award, unless requested or authorized by the arbitral tribunal.”
2014 LCIA Arbitration Rules, Arts. 15, 22	Article 15: “6. The Arbitral Tribunal may provide additional directions as to any part of the written stage of the arbitration (including witness statements, submissions and evidence), particularly where there are multiple claimants, multiple respondents or any cross-claim between two or more respondents or between two or more claimants.”
	Article 22: “The Arbitral Tribunal shall have the power, upon the application of any party or . . . upon its own initiative, but in either case only after giving the parties a reasonable opportunity to state their views and upon such terms (as to costs and otherwise) as the Arbitral Tribunal may decide: . . . (vi) to decide whether or not to apply any strict rules of evidence (or any other rules) as to the admissibility, relevance or weight of any material tendered by a party on any issue of fact or expert opinion; and to decide the time, manner and form in which such material should be exchanged between the parties and presented to the Arbitral Tribunal.”
	Article 31: “(1) The admissibility, relevance, materiality and weight of evidence shall be for the Arbitral Tribunal to determine. (2) The Arbitral Tribunal may order a party to identify the documentary evidence it intends to rely on and specify the

Arbitration Rules	Provision
2017 Stockholm Chamber of Commerce Arbitration Rules, Arts. 29, 31	circumstances intended to be proved by such evidence. (3) At the request of a party, or exceptionally on its own motion, the Arbitral Tribunal may order a party to produce any documents or other evidence that may be relevant to the case and material to its outcome.”
	Article 29: “(1) Within the period determined by the Arbitral Tribunal, the Claimant shall submit a Statement of Claim which shall include, unless previously submitted: . . . (iii) any evidence the Claimant relies on. (2) Within the period determined by the Arbitral Tribunal, the Respondent shall submit a Statement of Defence which shall include, unless previously submitted: . . . (v) any evidence the Respondent relies on.”

ANNEX B

**TABLE SUMMARIZING THE COMMONLY RECOGNIZED STANDARDS OF PROOF
IN INVESTOR-STATE ARBITRATION**

Standard of Proof	What does the Standard entail?	When is it applied?
The <i>Prima Facie</i> Evidence Standard	The standard involves examination of the facts as alleged by the claimant to see whether such facts would amount to a breach of the treaty's and otherwise fall within the jurisdiction of the tribunal.	• Typically at the jurisdictional phase of the case, where the investor must allege facts but not prove facts of the merits to show that they would appropriately fall within a tribunal's jurisdiction. The rule will not apply to factual matters that relate to a tribunal's jurisdiction itself. • It will also apply in preliminary screening activities (such as references to competent authorities or preliminary review by ICSID Secretary General to register cases) because a tribunal can subsequently apply the appropriate standard.

Standard of Proof	What does the Standard entail?	When is it applied?
The Preponderance of Evidence or Balance of Probabilities (Civil lawyers refer to this as the “inner conviction” test)	This standard requires an evaluation of all the evidence produced by both parties on a particular issue and this evaluation would ultimately result in the tribunal determining which party’s evidence was more likely than not to be true.	• Typically applies as the default rule in investor-state arbitration. • It extends to a wide range of issues such as claim for damages, allegations of breach of contract, interpretation issues, factual controversies, and for breaches of standard of protection (assuming there is no allegation of wrongdoing and the circumstances do not otherwise warrant a heightened standard of proof).
The Heightened Standard of proof	The standard is higher than a balance of probabilities but lower than the criminal law standard of proof beyond reasonable doubt.	• Typically for matters that are of a quasi-criminal nature and or allegations of wrongdoings (such as bribery, corruption, fraud, impropriety and other such allegations). • When a convention or treaty uses language that calls for a heightened standard (for example, ICSID Convention’s usage

Standard of Proof	What does the Standard entail?	When is it applied?
		of the term “manifest” usually requires the evidentiary standard to be higher than a mere balance of probabilities).

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Figure 1.1: Arbitration Rules and Evidentiary Principles

Figure 1.2: International Bodies and Evidentiary Issues

Figure 1.3: Evidentiary Principle versus Arbitral Discretion

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Annex A: Arbitration Rules dealing with Evidentiary Principles

Annex B: Table summarizing the commonly recognized standards of proof in
investor-state arbitration

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Kabir Duggal is a senior associate in Arnold and Porter's International Arbitration and Public International Law Practice Groups in New York focusing on international investment arbitration, international commercial arbitration and public international law matters. Kabir's experience includes complex disputes under numerous bilateral/multilateral investment treaties and contracts in South Asia, Latin America, Central Asia, Middle East, Europe and Africa. The total value of the disputes he has been involved in exceeds 80 billion dollars. He has facilitated the mediation and negotiation of complex disputes. He also acts as a Consultant for the United Nations Office of the High Representative for Least Developed Countries, Landlocked Developing Countries and Small Island Developing States (UN-OHRLS). He has also conducted training and capacity-building sessions for several Governments including Colombia, Saudi Arabia, Myanmar, India, among others on public international law and dispute resolution matters.

Kabir is a Lecturer-in-Law at the Columbia Law School, teaching "International Investment Law and Arbitration." He has also taught dispute resolution courses in educational institutions all over the world including Georgetown University Law Center, Fordham Law School, The Graduate Institute (Geneva, Switzerland), National Law University (Jodhpur, India), University of Carlos III (Madrid, Spain), National Research University Higher School of Economics (Moscow, Russia), Government Law College (Mumbai, India) among others.

Kabir has published several articles and books and is regularly invited to speak at conferences globally. He is the Managing Editor for Columbia Law School's "The American Review of International Arbitration" and is an editor for investmentclaims.com hosted by Oxford University Press. He has received the Burton "Law360 Distinguish Legal Writing Award" for his scholarly writings. He also serves on ICSID Review's Peer Review Board and is an Associate Editor for Brill-Nijhoff publisher's international law and arbitration section. He is also a co-chair of the Juris Conference on Investment Treaty Arbitration. He is a Fellow at Columbia Center on Sustainable Development.

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