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

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Propositions relating to the dissertation

PRINCIPLES OF EVIDENCE IN INVESTOR-STATE ARBITRATION:
Burden, Standards, Presumptions, & Inferences

by Kabir Duggal

1. Unlike domestic law, most arbitration rules do not provide any specific guidance on evidentiary matters, often leaving the issue to the discretion of the arbitral tribunal. At the same time, there is consensus that the failure to respect certain basic evidentiary principles can result in the annulment or non-enforcement of an investor-state arbitration award. This must logically imply that there are, indeed, certain evidentiary principles that exist.

2. Investor-state tribunals have recognized and applied evidentiary principles on burden of proof, standard of proof, presumptions, and inferences. However, the principles of evidence fall within a broad range of spectrum on whether or not they permit arbitral discretion. Indeed, some principles permit no arbitral discretion whatsoever (*e.g.*, principles relating to burden of proof) while other principles may permit a degree of arbitral discretion (*e.g*., principles relating to presumptions or inferences).

3. The failure to meet the evidentiary principle can have consequences, although the consequences will be determined on the nature of the evidentiary principle in question by a reviewing court or the *ad hoc* Committee. These consequences protect the evidentiary principle.

4. Evidentiary principles are often general principles of law and often have a common conceptual basis in civil and common law legal traditions. Further, investor-state tribunals often rely on decisions from other international courts and tribunals (most notably the International Court of Justice) to derive evidentiary principles. This does not, however, imply that the tribunals have always been clear and consistent on how they arrived at a particular evidentiary principle.

5. The principles relating to burden of proof, in the investor-state context, is the most clearly articulated evidentiary principle—a party making a proposition has the burden of proof. Tribunals have refused to relax this or reverse this principle under any circumstances and have applied the burden of proof for all stages of an arbitral proceeding. This principle applies with greatest force and, therefore, the reversal of burden of proof will result in annulment.

6. Investor-state tribunals have recognized that when a party who bears the initial burden puts forward evidence in support of its allegation, the burden of evidence will shift to the other party to rebut the evidence put forward or concede the point. This "shifting principle" is very closely linked to the free evaluation of evidence because a tribunal has to determine if a party with the original burden has met the burden to warrant a shifting. Therefore, the possibility of annulment or non-recognition before domestic courts becomes more difficult here than in comparison to burden of proof.

7. When it comes to evidentiary principles relating to standard of proof, the tribunal has some discretion in evaluating the evidence produced by the party but the tribunal has limited discretion in applying the appropriate standard of proof lest the award get annulled.

8. There are three common standards of proof: (i) the *prima facie* standard that applies at the jurisdictional stage wherein an investor must allege (but not prove) facts that relate to the merits of the case at the jurisdictional stage, (ii) the balance of probabilities or preponderance test which applies for virtually even situation except those where the *prima facie* or heightened standard would apply; and (iii) a heightened standard of proof which applies for quasi-criminal allegations or when the arbitration rules call for it.

9. Evidentiary principles relating to presumptions or principles relating to inferences involve appreciation of evidence by the tribunal. These are, therefore, matters where the tribunal enjoys a much greater latitude in deciding whether or not to presume a fact or draw an inference.

10. The evidentiary principles interact closely with one another and have to be understood in relation to each other.