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

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# CHAPTER 4—STANDARD OF PROOF AS RECOGNIZED AND APPLIED BY INVESTOR-STATE ARBITRAL TRIBUNALS

## *I. INTRODUCTION*

After having discussed the principles relating to burden of proof and shifting the burden of evidence in investor-state arbitration, a related issue that needs to be discussed is "standard of proof." The research question seeks to understand whether there is any evidentiary principle in relation to standard of proof or does it merely fall with a tribunal's discretionary powers to determine the burden of proof.

To do so, this Chapter seeks to understand the concept of "standard of proof" and why issues relating to standard of proof remain so contentious in investor-state arbitration. Further, it is important to understand how standard of proof is to be understood in relation to burden of proof. Finally, this Chapter seeks to understand the different standards of proof as recognized and applied by investor-state tribunals and, in doing so, create a typology and evaluate the consequences of failing to meet the standard of proof.

Issues relating to standard of proof are particularly significant because of the confusing terminology and that sometimes practitioners tend to equate burden of proof with standard of proof. It is my leading argument that standard of proof is a distinct but related concept from burden of proof and standard of proof informs how much evidence needs to be provided by the party that has the burden or to whom the burden of evidence has been shifted. Further, it is my submission that there is not one standard but a few different standards of proof that are available in an investor-state arbitration and it is the nature of issue in dispute that will determine the applicable standard. Finally, the failure to meet the standard of proof may result in annulment. A tribunal does have some amount of discretion in determining which standard would apply but an egregious application of the standard of proof may warrant annulment.

Towards addressing this, the Chapter has divided into the following sections. Section II provides the introduction and examines the notion of standard of proof and its relation to burden of proof. Section III seeks to provide a reason as to why standard of

proof remains so contentious in investor-state arbitration. Section IV discusses the different standards of proof and discusses, in particular, the *pro tem* principle, the balance of probabilities/preponderance of evidence principle, and the heightened standard of proof as recognized and applied by investor-state tribunals. Section V examines the evidentiary standard in the specific case of wrongdoings while Section VI discusses problems associated with the notion of standard of proof. Section VII examines the use of circumstantial evidence as a means for meeting the standard of proof and Section VIII provides a few concluding remarks in the light of the overall thesis in light of the overall thesis.

This Chapter will primarily focus on how investor-state tribunals have recognized and applied standards of proof. However, at the appropriate stages, the views of commentators and of other international courts and tribunals are also provided to help provide further context to the analysis.

## *II. STANDARD OF PROOF AND ITS RELATIONSHIP WITH BURDEN OF PROOF*

Standard of proof can be understood as the amount of evidence that must be provided by the party that has the burden (*i.e.*, the party making the allegation). Leading commentators have also explained standard of proof in similar terms. For example, Professor Amerasinghe has explained the standard of proof as follows: "The standard of proof relates to the quantum or degree of proof, i.e. by what measure is what the claimant has to prove to be judged."[1] Like in the context of the burden of proof, the term "claimant" must be understood as the party making an allegation rather than a technical understanding of "claimant" as the investor. Similarly, according to Nathan D. O'Malley: "The standard of proof is used to determine whether the evidence

[1] Chittharanjan F. Amerasinghe, *Evidence in International Litigation* (Martinus Nijhoff Publishers 2005) 232. Riddell and Plant explain the standard of proof in the context of the ICJ as follows: "The standard of proof is the measure against which 'the value of each piece of evidence as well as the overall value of the evidence in a given case should be weighed and determined', and justice generally requires that all evidence be treated equally and subjected to the same measure. It is noteworthy that the Court must not only evaluate whether each particular fact has been established, but must also assess whether the case as a whole has been made out on the basis of these proven facts, as well as any facts agreed by the parties, or judicially noted." Anna Riddell and Brendan Plant, *Evidence Before the International Court of Justice* (British Institute of International and Comparative Law 2009) 123.

a party has produced in support of its factual allegations is sufficient to establish the facts in question."[2]

As apparent from the definitions above, standard of proof is very closely related to burden of proof. Therefore, the first issue that needs to be examined is the relationship between burden of proof and standard of proof. Since the distinction between burden and standard of proof remains so contentious in investor-state arbitration, the table below distinguishes the two concepts:[3]

Figure 4.1: Distinguishing Burden and Standard of Proof

| Burden of Proof | Standard of Proof |
|---|---|
| *Who* must prove?<br>(notion of responsibility) | *How much* needs to be proved?<br>(notion dealing with degree of conviction) |

The two concepts are, however, very closely related since the standard of proof helps explain how much evidence needs to be proffered by the party that has the burden of proving any particular issue in question. Further, at every stage and for every motion in any arbitral proceeding, the question of standard is relevant. This is because the standard of proof helps inform the party with the burden on what it needs to do. Professor Kazazi has explained this in the following manner:

> The scope of the standard of proof, considered broadly, may be formulated in the question, "how should the burden of proof be discharged?" This question covers a wide range of issues related to the details of production, admissibility and evaluation of evidence, such as time, order, language, and type of evidence to be produced.[4]

[2] Nathan D. O'Malley, *Rules of Evidence in International Arbitration: An Annotated Guide* (Informa 2012) 207. See also Kabir Duggal, 'Evidentiary Principles in Investor-State Arbitration' (2017) The American Review of International Arbitration (Vol. 28(1)) 40.

[3] See generally Riddell and Plant (n 1) 80 ("Proof has two elements: • Burden of proof-indicates which of the parties to a dispute must furnish the court with evidence on a certain matter; and • Standard of proof-the level of proof required to convince the court that a given proposition or fact is true, the degree required being dependent on the circumstances of the proposition.").

[4] Mojtaba Kazazi, Burden of Proof and Related Issues: A Study on Evidence Before International Tribunals (Kluwer Law International 1996) 323-324.

Investor-state arbitral tribunals have also recognized and explained the distinction between burden and standard of proof. For example, the *Rompetrol v. Romania* tribunal explained the difference in the following manner:

> [T]he Tribunal thinks that a word of clarification is in order, specifically as to the burden of proof vs. the standard of proof. The Tribunal believes that the distinction between the two can be stated quite simply: the burden of proof defines which party has to prove what, in order for its case to prevail; the standard of proof defines how much evidence is needed to establish either an individual issue or the party's case as a whole. As soon as the distinction is stated in that way, it becomes evident that the burden of proof is absolute, whereas the standard of proof is relative.[5]

The *Rompetrol* tribunal clarifies another important point. Burden of proof is "absolute"—*i.e.*, the party with the burden has the burden and is not relaxed even in extreme situations of hardships. This was discussed in Chapter 2 above. The standard of proof, in contrast, is "relative." This means that issues relating to standard of proof will vary based on the nature of the allegation being put forward by the party with the burden. Indeed, the party with the burden may have to meet several different types of standards which will correspond to the different allegations that it is making.

In international commercial arbitration, the distinction between burden and standard of proof also takes another dimension as to whether standard of proof is a procedural law question or a substantive law question. Waincymer explains the difference as follows:

> Burden of proof simply deals with responsibility, but does not indicate the *level* of proof that is required. *Standard of proof* deals with the degree of conviction that the adjudicator must have to be satisfied that the burden the burden has been met. . . . common law legal systems treat it as procedural, while civilian systems see it as substantive.[6]

We notice right at the outset that there is a difference in how civil and common lawyers approach standard of proof as being procedural versus substantive with the

[5] *The Rompetrol Group N.V. v Romania* [2013] ICSID Case No. ARB/06/3 [178] (emphasis added).

[6] Jeffrey Waincymer, Procedure and Evidence in International Arbitration (Wolters Kluwer 2012) 766.

former permitting greater discretion by the arbitral tribunal than the latter.[7] The question of whether standard of proof is procedural or substantive has a lot of significance in commercial arbitration because, in addition to the proper law of the contract, the arbitral "seat" can also help provide guidance on "procedural" matters.[8] In ICSID arbitrations, which remains the preferred choice for investor-state arbitration, this distinction between procedure and substance is less important because there is no role for the arbitral seat[9] and, therefore, the law of the seat cannot provide any guidance on procedural matters.[10] Therefore, for the purposes of this research that focuses on investor-state arbitration, this distinction between substantive versus procedural law will not be explored.[11]

## *III. THERE IS A LACK OF CLARITY ON STANDARD OF PROOF*

Like burden of proof, most arbitral rules are silent on principles relating to standard of proof and do not provide much guidance. This is, however, not unique to investor-state arbitration but international law more generally.[12] Indeed, statutes creating

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[7] Ibid.

[8] See eg Gary B. Born, *International Arbitration: Law and Practice* (Wolters Kluwer 2012) 108 (where Born discusses situations where the "Internal Procedures" in an arbitration are subject to the "due process requirements of the arbitral seat.").

[9] See eg Georges R. Delaume, 'ICSID Arbitration Proceedings', International Tax and Business Lawyer (1986, Vol. 4) 221-222 ("In ICSID proceedings, the situs of the arbitration proceedings does not have the same importance as it does in ad hoc or other institutional arbitration. In fact, the seat of the proceedings has no legal significance whatsoever in ICSID arbitration. Because ICSID rules are strictly international, the law of the seat of arbitration can have no bearing at all on the proceedings. Thus the situs of ICSID proceedings is purely a matter of convenience.").

[10] See Piero Bernardini, 'ICSID versus Non-ICSID Investment Treaty Arbitration', available at http://www.arbitration-icca.org/media/4/30213278230103/media012970223709030bernardini_icsid-vs-non-icsid-investent.pdf accessed on 5 May 2017 19 ("As already mentioned, ICSID most relevant feature is that, contrary to non-ICSID cases, the proceeding is regulated only by the Convention and the rules issued thereunder and, to the extent allowed, by the will of the parties. There being no seat of the proceeding in the legal sense, the rules of procedure of the place where ICSID tribunals or annulment committees hold meetings and hearings have no room for application.").

[11] For a distinction between substantive and procedural law, see generally Mauro Rubino-Sammartano, 'Investment Arbitration—Substantive and Procedural Issues in Investment', 2 Yearbook on International Arbitration (2012) 225.

[12] See generally Michelle Terezinha Grando, *The Process of Fact-Finding before International Tribunals: A Study of the WTO Dispute Settlement System*, Graduate Department of Law—University of Toronto (2008) 85 ("The question of the standard of proof has been similarly neglected in proceedings before international courts and tribunals. The statutes and rules of international courts and tribunals such as the ICJ and the Iran-United States Tribunal are silent on the issue. Nor has the jurisprudence of those bodies elaborated on the standard of proof that must be satisfied to prove a proposition.").

international courts and tribunals do not often spell out the standard of proof or provide too much guidance on what such a court or tribunal should do in varied circumstances.[13] For example, a commentator has noted in the context of the ICJ:

> Interestingly, the only guidance offered by the Statute with respect to the standards of proof is Article 53, which provides that in the case of a party's failure to appear or defend its case, the Court may rule in favour of the other party, but only after it has satisfied itself that it has jurisdiction, and "that the claim is *well founded in fact and law*" [emphasis added].[14]

While Article 53 of the Statute of ICJ cannot properly be described as an articulation of any standard of proof, it is interesting to note that it remains the "only guidance" offered in the Statute. When it comes to the practice of the ICJ, Professor Kolb notes that the ICJ has applied different standards of proof for different issues and that there is no single standard of proof which would apply in all situations:

> What is the standard of proof required, that is, what degree of evidential precisions does the Court consider sufficient? There can be no one answer to this question, because it depends on a large number of variable circumstances. It also depends on the applicable substantive law, whose requirements in this regard are subject to change. Various

[13] A limited circumstance might be international criminal courts where there is an articulation that the allegations against an accused must be proven beyond reasonable doubt. See eg Article 66(3) of the Rome Statute creating the International Criminal Court: "In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt." These limited instances of the standard of proof could probably be spelled out because it is consistent with international human rights obligations and more generally with fundamental conceptions of criminal justice.

[14] Eduardo Valencia-Ospina, *Evidence before the International Court of Justice* (International Law Forum du Droit International 1999) 203-204 (emphasis added). Article 53 of the Statute of the ICJ provides in full: "1. Whenever one of the parties does not appear before the Court, or fails to defend its case, the other party may call upon the Court to decide in favor of its claim. 2. The Court must, before doing so, satisfy itself, not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim is well founded in fact and law."). See also Anna Riddell and Brendan Plant (n 1) 123 ("If the matter of the burden of proof seems complicated in the context of the ICJ, the standard of proof is even more so. The difficulties have their root once again, in the contrasts of the common and civil legal traditions. Whilst there is general agreement in both traditions as to the ultimate rule on the burden of proof, and merely an additional stage or element to the common law burden, with regard to the standard of proof the difference is far more pronounced, and this is apparent throughout the jurisprudence of the Court. Naturally, the matter is of much importance to States who litigate before the Court, and certainty, or at least some general indication as to the appropriate standard, would be desirable. It appears however that the Court prefers not to provide a definitive standard, most probably because the Judges from the different legal traditions cannot agree.").

> standards can be imagined" for example, beyond reasonable doubt; the balance of probabilities; or prima facie. The Court's practice shows that there is no single standard valid for all relevant legal facts. It all depends on the legal norms in question and the Court's reasonable appreciation of this situation. In this field, the scope of the Court's margin of appreciation is thus quite considerable.[15]

The next related point that exists in this regard is that international adjudicatory bodies have not articulated the standard of proof in a clear or doctrinal manner.[16] For example, Amerasinghe observes:

> It would seem that both the ICJ and other international tribunals, including arbitral tribunals, which have adjudicated numerous international claims have usually not discussed in detail the matter of the standard of proof to be applied to the evaluated evidence and have not clearly explained the underlying standard they have applied in their decisions. On account of this a judge of the Iran-US Claims Tribunal was prompted to remark: "It is regrettable that the Tribunal has never discussed the standard of proof it imposes on parties." In some cases, however, international tribunals have addressed this question, in order to provide a general guideline for the evidentiary requirements in the cases being decided by them. It may appear that the answer to the question, what is an acceptable standard of proof for international tribunals, depends to some extent on the fact that in this regard there is subjectivity in judgment.[17]

Amerasinghe's statement can be verified by the observations of investor-state tribunals have sometimes refused to articulate or engage with the standard of proof in any meaningful manner. The *Tokios Tokelės* tribunal, for example, stated, "we shall not propose a solution for the current uncertainty about the standard of proof to be applied

[15] Robert Kolb, *The International Court of Justice* (Hart Publishing 2013) 944 (emphasis added). Kolb provides an interesting example to prove this point: "[The ICJ] has shown itself even more strict when the facts alleged are evidence of grave international crimes such as genocide. These accusations are of exceptional gravity when made against a State. In such cases, the Court has to be 'fully convinced' of the relevant facts; they must be 'clearly demonstrated' or 'certain.' When the accusation is only that steps have not been taken to prevent or punish genocide, the standard of proof can, according to the Court, be a little more relaxed, that is, 'a high degree of certainty'." ). ibid.

[16] Michelle Terezinha Grando (n 12) 87 ("The DSU and the dispute settlement organs have not defined the standard of proof applicable to WTO disputes either.").

[17] Chittharanjan F. Amerasinghe (n 1) 232-233 (emphasis added).

in a case such as the present."[18] Similarly, the Annulment Committee in the *Continental Casualty v. Argentina* case noted:

> The Committee notes that the ICSID Convention and the Arbitration Rules contain no provisions with respect to the burden of proof or standard of proof. Accordingly, there cannot be any requirement that a tribunal expressly apply a particular burden of proof or standard of proof in determining the dispute before it. Indeed, the tribunal is not obliged expressly to articulate any specific burden of proof or standard of proof and to analyse the evidence in those terms, as opposed simply to making findings of fact on the basis of the evidence before it.[19]

This is clearly not a desirable state of affairs. Standard of proof plays a pivotal role because the failure to meet the standard of proof will necessarily mean rejection of the allegation being made by the party. But, this begs the very question against what standard must the party's evidence be judged? For example, if a moving party believes the appropriate standard of proof for an allegation is "*prima facie*" evidence but the tribunal concludes that the standard of proof is "balance of probabilities," then the case may get dismissed because the moving party has produced lower evidence that what the tribunal deemed was appropriate. This is far from ideal in any dispute resolution mechanism. Kazazi makes a similar observation when he notes:

> [T]he fact that the standard of proof is usually not discussed by international tribunals is not justifiable. Even ongoing arbitral institutions which have adjudicated numerous international claims have normally refrained from providing a comprehensive discussion in this regard, or from explaining the underlying standard they have applied in their decisions.[20]

A commonly held view for why tribunals have not expounded principles relating to standard of proof is because of the belief that tribunal has very broad discretion to deal

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[18] *Tokios Tokelės v Ukraine* [2007] ICSID Case No. ARB/02/18 [124].

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

[20] Mojtaba Kazazi (n 4) 325 (emphasis added).

with evidentiary matters.[21] Standard of proof appears to be an area where this discretion seems to get greater emphasis because of the belief that parties can submit any evidence they deem appropriate and after receiving all the evidence will the tribunal decide the issue. This discretion is generally true for most issues relating to evidence as noted by Gary Born:

> [L]eading institutional rules generally grant arbitral tribunals broad discretion over evidence-taking in international arbitration, although typically without expressly referring to the power to order the parties to provide discovery or disclosure.[22]

Under this view, the fact that the arbitral rules do not provide for any clear standard would permit the arbitral tribunal to rely on its own discretion. This happens in other international law bodies as well. For example, the Inter-American Court of Human Rights has stated in the *Velásquez Rodríguez* case:

> [I]nternational jurisprudence has recognized the power of the courts to weigh the evidence freely, although it has always avoided a rigid rule regarding the amount of proof necessary to support the judgment. The standards of proof are less formal in an international legal proceeding that in a domestic one. The latter recognize different burdens of proof, depending upon the nature, character and seriousness of the case.[23]

The first prong of my argument in this regard is that it is correct to observe that there is a wide extent of discretion for an arbitral tribunal when it comes to the evaluation of

[21] See Annex A which outlines the different evidentiary standards under various rules.

[22] See eg Gary Born, *International Commercial Arbitration* (Kluwer Law International 2009), p. 1890 (emphasis added). See also M. Aghahosseini, *Evidence before the Iran-United States Claims Tribunal* (International Law Forum Du Droit International 1999), p. 208 ("any point not specifically addressed by the Tribunal Rules falls within the Tribunal's discretion, subject only to the parties' right to receive equal treatment and to be heard. The [UNCITRAL] Rules, like most modern arbitration rules, contain only a handful of evidence-related provisions, dealing with such matters as hearings, witnesses and experts, and inspection of goods or other property. With respect to other salient matters such as burden of proof and standard of proof, the Tribunal has, in its case law, exercised its broad procedural discretion, where necessary, to fill gaps in and interpret the Rules.") (emphasis added).

[23] *Case of Velásquez-Rodríguez v Honduras* [1988] Inter-American Court of Human Rights [127-128] (internal citations omitted) (emphasis added). See also Robert Kolb (n 15) 944-945 ("[The ICJ's] flexibility is justified under the general principle of the free assessment of evidence. . . . Overall, the absence of a single standard of proof sits well with the flexibility of the international regime on evidence. A monograph study on these questions would be appropriate and welcome"). Indeed, the same can be said for investor-state arbitration and this research attempts to fill in the void.

evidence. For example, the ICSID Arbitration Rules also leaves evidentiary matters to the discretion of the tribunal. ICSID Arbitration Rule 34(1) states: "The Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value." Article 9(1) of the IBA Rules on the Taking of Evidence similarly provides: "The Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of evidence." Article 27(4) of the 2013 UNCITRAL Rules of Arbitration likewise states: "The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered."

Relatedly, investor-state arbitral tribunals regularly recognize the broad discretion that they have when dealing with investor-state arbitration. For example, the tribunal in *Unglaube* noted:

> The degree or standard of proof is not as precisely defined. Whichever party bears the burden of proof on a particular issue and presents supporting evidence "must also convince the Tribunal of [its] truth, lest it be disregarded for want, or insufficiency, of proof." The degree to which evidence must be proven can generally be summarized as a "balance of probability," "reasonable degree of probability" or a preponderance of the evidence. Because no single precise standard has been articulated, tribunals ultimately exercise discretion in this area.[24]

[24] *Marion Unglaube and Reinhard Unglaube v Republic of Costa Rica* [2012] ICSID Case No. ARB/08/1 and ICSID Case No. ARB/09/20 [34] (emphasis added). See also George M. von Mehren and Claudia T. Salomon, 'Submitting Evidence in an International Arbitration: The Common Lawyer's Guide' (Journal of International Arbitration 2003), p. 291 ("One can distinguish three basic standards of proof generally applied in international arbitrations. A general, underlying standard, an elevated burden of proof, and a very low standard or insufficient explanation of the reasoning. Regarding the first, a general standard is one that is better explained to common law lawyers as a balance of probabilities, i.e., the evidence must be something more likely true than not true but not so high as required for criminal convictions. Civil lawyers, in contrast, are more accustomed to what may be a higher burden of proof referring to the inner conviction of the judge. In any event, the strategic mind of the counsel must remember that in all cases, the real general standard is and must be a test of preponderance of evidence. Certain matters, however, do in fact require a higher standard of proof that will certainly change the advocate's approach. Both common law and civil law systems recognize elevated standards of proof for bribery and other types of fraud. The lower standard of proof is applied generally when establishing damages. Many times, arbitrators ignore the substantive law they find applicable and refer instead to nonlegal equitable standards."); M. Aghahosseini (n 22), p. 213 ("As is the case with the UNCITRAL Rules, the Tribunal Rules are silent with respect to the required standard of proof. In purely civil matters, the Tribunal has consistently imposed, as it should have, the standard of proof on the preponderance of evidence, alternatively described as on the balance of probability. Where, on the other hand, the allegations have had a criminal flavour, the Tribunal's pronouncements have been not only inconsistent, but legally flawed.").

A detailed exposition of the tribunal's discretion and power to deal with evidentiary issues, including matters relating to the standard of proof, was discussed in the *Rompetrol v. Romania* case:

> [The Tribunal] starts from the position that in international arbitration – including investment arbitration – the rules of evidence are neither rigid nor technical. If further confirmation of that were necessary, in the specific ICSID context, it can be found in Articles 43-45 of the Washington Convention, the intention behind which is plainly that a tribunal should possess a large measure of discretion over how the relevant facts are to be found and to be proved – a general principle which finds strong reinforcement in the Arbitration Rules, notably in paragraphs (1) and (3) of Rule 34. The overall effect of these provisions is that an ICSID tribunal is endowed with the independent power to determine, within the context provided by the circumstances of the dispute before it, whether particular evidence or kinds of evidence should be admitted or excluded, what weight (if any) should be given to particular items of evidence so admitted, whether it would like to see further evidence of any particular kind on any issue arising in the case, and so on and so forth. The tribunal is entitled to the cooperation of the parties in that regard, and is likewise entitled to take account of the quality of their cooperation. When paragraph (2) of Rule 34 lays down that "[t]he tribunal shall take formal note of the failure of a party to comply with its obligations under [that] paragraph and of any reasons given for such failure," it no doubt intends, among other things, that a given tribunal is specifically authorized to draw whatever inferences it deems appropriate from the failure of either party to produce evidence which that party might otherwise have been expected to produce.[25]

An important point worth highlighting is that this discretion is not absolute and is subject to certain limits. This is the second prong of my argument. A tribunal does not

[25] *The Rompetrol Group N.V. v Romania* [2013] ICSID Case No. ARB/06/3 [181] (emphasis added). See also *Saipem S.p.A. v The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Award (30 June 2009) [112] ("Pursuant to ICSID Arbitration Rule 34(1), the Tribunal has full discretion in assessing the probative value of the evidence before it."); *Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v Romania*, ICSID Case No. ARB/10/13, Decision on the Admissibility of the Third Objection to Jurisdiction and Admissibility (26 July 2013), ¶ 84 ("the issue raised by the Motion is not the admissibility of the evidence related to criminal proceedings. The issue is rather the probative value of such evidence for the purposes of this arbitration, which the Tribunal is empowered to weigh and determine. In assessing this value, the Tribunal shall be guided, among other things, by consideration of the presumption of innocence as a rule of public international law.").

possess unfettered discretion when it comes to dealing with standard of proof. Indeed, an arbitral decision on standard of proof must be appropriate and, as will discussed below, reasonable for there is the risk that the ultimate award could be challenged or even annulled. This is consistent with the views of Kazazi who notes:

> What constitutes a given standard of proof to be applied by an international tribunal is ultimately subject to its sole discretion. Needless to say, similar to other aspects of international procedure, the standard applied by a given tribunal should be adopted with due regard to the generally accepted trends in the practice of major international tribunals. It should be emphasized, on the other hand, that there are limits to the freedom of international tribunals in this regard, and that the standard of proof to be chosen in each given case should be appropriate and reasonable under the prevailing circumstances of that case.[26]

Indeed, while a tribunal does possess wide discretion, it is, therefore, my submission that this discretion is not absolute and the failure to apply the appropriate standard of proof could have serious consequences for the arbitration as will be discussed below. More fundamentally, the failure to articulate clear standards of proof implicates broader questions of justice and due process because the party's fail to appreciate against what standard has their evidence been evaluated. Professor Amerasinghe has similarly observed that the need to articulate the standard of proof more clearly is essential to ensure that justice is done in any particular case:

> To frame the matter in terms of "moral conviction" or "convincing or satisfying the judge" may not always reveal the ultimate test which is being applied. There may be, in order to do justice, a need to have a more concrete standard. In any case tribunals have not hesitated, where necessary, to indicate standards of proof in different and specific terms, although sometimes no more than those general terms have been used.[27]

Further, the contention that there is no standard of proof is plainly false considering that the arbitral rules envision the annulment of an award that has not applied or improperly applied the standard of proof. This will be discussed in greater detail below.

[26] Mojtaba Kazazi (n 4) 352.

[27] Chittharanjan F. Amerasinghe (n 1) 233 (emphasis added).

## *IV. A TYPOLOGY ON THE DIFFERENT STANDARDS OF PROOF IN INVESTOR-STATE ARBITRATION*

With the growing prominence of investor-state arbitration, issues of standard of proof have acquired special importance. It is my submission that there are three broad standards of proof that can be distilled from the decisions of investor-state tribunals:

(i) the *prima facie* standard at the jurisdictional phase;

(ii) the balance of probabilities or preponderance of evidence standard, along with a discussion of the related civil-law standard—the 'inner conviction' test; and

(iii) the heightened standard of proof, with a discussion on allegations of wrongdoing that are increasingly invoked.

Annex B summarizes presents this typology in a tabular format.

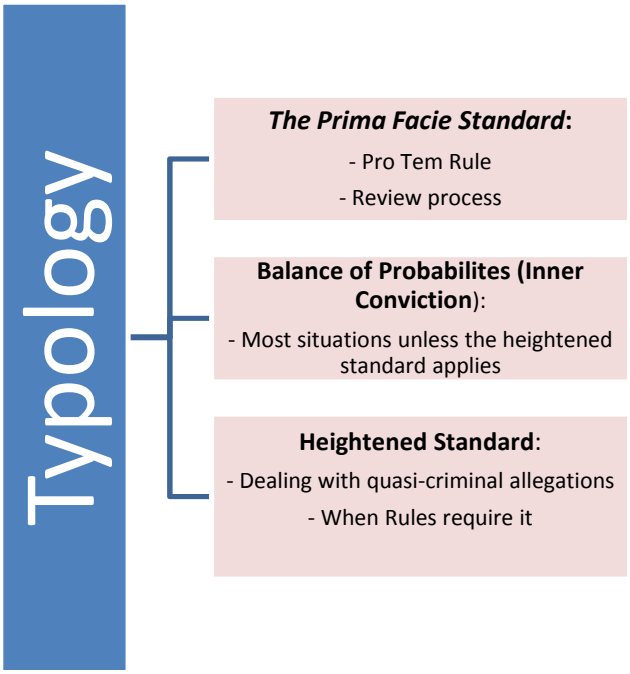


Figure 4.2: Typology on Standard of Proof

### (A) *The "Prima Facie" Standard*

The *prima facie* standard is the first standard and this applies in a few limited situations in investor-state arbitration. The underlying rationale of this standard is that a tribunal or decision maker will subsequently have an opportunity to consider the

evidence more fully and therefore the *prima facie* standard primarily serves a gatekeeper function.

One instance where this standard applies is the *pro tem* principle that is applied at the jurisdictional phase has been discussed above in Chapter 2. In summary, my argument here is that an investor must allege (but not prove) facts that relate to the merits of the case at the jurisdictional stage (the *pro tem* rule). Then, a tribunal can examine and see whether these allegations, if proven at the appropriate stage, will fall within the tribunal's jurisdiction. Investor-state tribunals have applied a "*prima facie*" standard to examine the evidence when dealing with the *pro tem* principle.[28]

There are two exceptions to this principle. First, if a matter concerns a tribunal's jurisdiction (*e.g.*, a question concerning nationality of the investor, or a state's consent), such a matter would have to be proved fully at the jurisdictional stage itself.[29] Second,

[28] See eg *Achmea BV v Slovak Republic*, PCA Case No. 2013-12, Award on Jurisdiction and Admissibility (20 May 2014) [206] ("Since the Claimant does not raise any dispute regarding an investment approval or an investment agreement, but places itself exclusively under the umbrella of the BIT, an essential element of the Tribunal's jurisdiction *ratione materiae* is to determine whether the claims put forward by the Claimant are capable of coming within the reach of these provisions. The so-called *prima facie* test has been applied by numerous international courts and tribunals."); *KT Asia Investment Group BV v Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award (17 October 2013) [91] ("At the jurisdictional stage, the Claimant must establish (i) that the jurisdictional requirements of Article 25 of the ICSID Convention and of the Treaty are met, which includes proving the facts necessary to meet these requirements, and (ii) that it has a *prima facie* cause of action under the Treaty, that is that the facts which it alleges are susceptible of constituting a treaty breach *if* they are ultimately proved to be true."); *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction (14 November 2005) [197] ("the Tribunal's first task is to determine the meaning and scope of the provisions which Bayindir invokes as conferring jurisdiction and to assess whether the facts alleged by Bayindir fall within those provisions or are capable, if proved, of constituting breaches of the obligations they refer to. In performing this task, the Tribunal will apply a *prima facie* standard, both to the determination of the meaning and scope of the BIT provisions and to the assessment whether the facts alleged may constitute breaches. If the result is affirmative, jurisdiction will be established, but the existence of breaches will remain to be litigated on the merits.") (emphasis added to each of the authorities referred).

[29] See eg *Conocophillips Petrozuata BV Conocophillips Hamaca BV and Conocophillips Gulf of Paria BV v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Jurisdiction and the Merits (3 September 2013) [254] ("In the words of the International Court of Justice in considering the very first challenge made to its jurisdiction, the consent must be "voluntary and indisputable", and in the words of both ICSID tribunals "clear and unambiguous". The necessary consent is not to be presumed. It must be clearly demonstrated.") (emphasis added); *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. The burden of proof for the issue of consent falls squarely on a given claimant who invokes it against a given respondent. Where a claimant fails to

as will be discussed below, if a tribunal's jurisdiction is contingent on a matter that is of a quasi-criminal nature (*e.g.*, allegations of corruption, blackmail, bribery, other forms of wrongdoing etc.), then to determine such issue, a heightened standard of proof will apply. The argument relating to the heightened standard of proof is discussed below in further detail.

The *prima facie* standard might also apply in a few other limited situations that relate to the arbitral process. For example, in some instances, a party is obligated to undertake a review process before an arbitration can be commenced, for example, Article 21 of the Energy Charter Treaty requires a reference to the competent authorities within a country before the arbitral process can commence. For such references, the appropriate standard would again be the *prima facie* evidentiary standard because the arbitral tribunal will subsequently have a chance to evaluate the evidence applying the appropriate evidence.[30] Similarly, for the same reason, the screening process that is undertaken by the ICSID Secretary General prior to registering a case pursuant to Article 36(3) of the ICSID Convention would apply a *prima facie* standard.[31]

It is my argument here that the underlying rationale for applying a *prima facie* standard in such situations is because a tribunal will subsequently look at the issue in fuller detail applying the appropriate standard. Indeed, such screening processes are intended to ensure that the motion is not frivolous on its face and therefore provide a gateway function. It would be pointless to have a submission before such bodies that apply the appropriate standard and then have to reapply the appropriate standard again before the arbitral tribunal.

### (B) *The Most Common Standard—Balance of Probabilities or Preponderance of Evidence as Recognized And Applied by Investor-State Arbitration*

#### *1. Introduction –Is the Evidence more likely than not to be true?*

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prove consent with sufficient certainty, jurisdiction will be declined.") (emphasis added); *Ioan Micula Viorel Micula and others v Romania*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility (24 September 2008) [91] ("nationality is an objective jurisdiction-requirement of the ICSID Convention and the Tribunal must make sure that this requirement is satisfied.") (emphasis added).

[30] The Energy Charter Treaty, Article 21(5).

[31] The ICSID Convention, Article 36(3).

It is my submission that the most common standard of proof in investor-state arbitration is the "balance of probabilities" or "preponderance of evidence" standard.[32] Indeed, the classical treaties by Redfern and Hunter has noted that: "The degree of proof that must be achieved in practice before an international arbitral tribunal is not capable of precise definition, but it may be safely assumed that it is close to the 'balance of probability'."[33]

Investor-state arbitral tribunals have made similar observations. For example, the tribunal in *Kardassopoulos v. Georgia* stated: "The Tribunal finds that the principle articulated by the vast majority of arbitral tribunals in respect of the burden of proof in international arbitration proceedings applies in these concurrent proceedings and does not impose on the Parties any burden of proof beyond balance of probabilities."[34]

The next question is what does the balance of probabilities standard entail practically? In other words, what is a party required to do when it is applying this standard? My argument here is that 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. My argument is also reflected in the writings of Nathan D. O'Malley, who describes the balance of probabilities standard as follows:

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[32] James Headen Pfitzer and Sheila Sabune, 'Burden of Proof in WTO Dispute Settlement: Contemplating Preponderance of Evidence' (2009) International Centre for Trade and Sustainable Development, Issue Paper No. 9, 23 ("International tribunals have often accepted claims on the basis of prima facie evidence in instances where it remains unrebutted; however, the most common standard of proof applied in international tribunals is the preponderance of the evidence standard."). This was also identified by Beck in 1949 when he observed: "The 'preponderance of evidence' standard applied in arbitrations which do not involve fraudulent or criminal conduct seems justified. Standards of proof greater than this, if applied objectively, would place an almost impossible burden on the employer." Kenneth Beck, 'Evidence, Burden and Quantum of Proof' (1949) Washington University Law Review 91.

[33] Nigel Blackaby *et al*, *Redfern and Hunter on International Arbitration* (6th edn, Oxford University Press 2015) 388. See also Kabir Duggal (n 2) 42-43.

[34] *Ioannis Kardassopoulos and Ron Fuchs v The Republic of Georgia*, ICSID Case No. ARB/05/18 and ICSID Case No. ARB/07/15, Award (3 March 2010) [229]. See also *Bernhard von Pezold and others v Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award (28 July 2015) [177] ("In general, the standard of proof applied in international arbitration is that a claim must be proven on the 'balance of probabilities.' There are no special circumstances that would warrant the application of a lower or higher standard of proof in the present case.").

> The standard predominantly applied is quite often the *balance of probabilities* test, as was confirmed by an ICSID tribunal composed of well-experienced arbitrators [referring to the *Kardassopoulos* case discussed above]. The balance of probabilities standard generally calls for a claim to be upheld if the Tribunal is convinced by the evidence that the claim is more likely than not true.[35]

The alternative formation of "preponderance of evidence" is sometimes also discussed. Professor Amerasinghe has explained "preponderance of evidence" by noting that the evidence by both parties on a particular issue would be compared towards identifying whether the claim by the investor is more likely than not true. The formulation and the test to apply the standard is normatively no different than the balance of probabilities test discussed above:

> 'Preponderance of evidence' means generally that there is evidence greater in weight in comparison with the evidence adduced by the other party on the basis of reasonable probability rather than possibility. What tribunals do is to weigh the evidence proffered by both parties (and the facts judicially noted by the tribunal itself), in order to determine whether the more weighty evidence is in favour of the *actor* (the claimant or party bearing the burden of proof). The tribunal determines whether it is a reasonably probable that the *actor's* claim is correct. Surprisingly, but perhaps understandably, where this moderate standard has been applied the non-*actor* may often claim, if he loses, that too light a standard of proof was applied, while, on the other hand, where the *actor* loses, he will probably claim that a stricter standard of proof than the "preponderance of evidence" has been applied.[36]

To take an example, suppose the investor alleges that a meeting took place on a particular date and respondent alleges that such a meeting did not take place, the tribunal would have to evaluate the evidence proffered by both parties to see which view is more likely to be true. If the evidence is unclear or conflicting, a tribunal might ultimately have to determine that it cannot resolve that particular issue on the basis of

[35] Nathan D. O'Malley (n 2) 208 (emphasis added).

[36] Amerasinghe (n 1) 242 (emphasis added).

the evidence before it and will have to reject any arguments that relate to the existence of that meeting.[37]

The author Kazazi explained how this standard would work in practice:

> Preponderance of evidence, though meaning generally evidence greater in weight in comparison with the evidence adduced by the other party, does not necessarily imply a standard less than that of conclusive proof. In applying this standard, an international tribunal should weigh the evidence proffered by both parties, and the facts judicially noted by the tribunal itself, in order to determine the party in whose favour the more weighty evidence is available.[38]

*2. The Standard would Apply to Most Situations in An Investor-State Arbitration*

My argument here is that this standard would extend to most situations in investor-state arbitration, except the limited categories where a heightened standard of proof would apply. Indeed, my argument is supported by the findings of investor-state tribunals that have applied this standard to a wide range of issues, such as establishing disputed facts at the jurisdictional phase,[39] claim for damages,[40] and for breaches of standard of protection (assuming there is no allegation of wrongdoing and the

[37] The findings of a tribunal seems to reflective this. See eg *Lao Holdings NV v Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/12/6, Decision on the Merits (10 June 2015) [10] ("the Tribunal is of the view that even accepting *arguendo* the interpretation of the Deed of Settlement most favourable to the Claimant, the evidence fails to establish on a balance of probabilities that the Government itself, directly or indirectly, 'approved and granted' permission for a rival casino contrary to the Claimant's contractual entitlement.").

[38] Mojtaba Kazazi (n 4) 350 (emphasis added).

[39] *Pac Rim Cayman LLC v El Salvador*, ICSID Case No ARB/09/12, Decision on the Respondent's Jurisdictional Objections (1 June 2012) [2.10] ("in regard to all disputed facts relevant to the jurisdictional issues under CAFTA not to apply the lesser 'prima facie' standard in favour of the Claimant; but, rather, the higher standard of proof applicable to both Parties' cases, whether it be described as the preponderance of the evidence or a standard based on a balance of probabilities.") (emphasis added); *Anatolie Stati, Gabriel Stati, Ascom Group S.A. and Terra Raf Trans Traiding Ltd v Republic of Kazakhstan*, SCC Case No. V116/2010, Memorandum Opinion of the US District Court for the District of Columbia and Order (5 August 2016) [28] ("All that is required is that the petitioner make a 'prima facie showing that there was an arbitration agreement by producing the [treaty] and the notice of arbitration.' Once petitioner makes this showing, the burden shifts to the respondent 'to demonstrate by a preponderance of the evidence that the [treaty] and the notice to arbitrate did not constitute a valid arbitration agreement between the parties'.") (emphasis added).

[40] This is discussed below in greater detail. See Section IIB(4) below.

circumstances do not otherwise warrant a heightened standard of proof).[41] As Nathan D. O'Malley has noted:

> The standard has been applied to the great majority of categories of claims in international arbitration, including causes of action arising from a breach of contract or other obligation, interpretation of contractual clauses or the intent of the parties to the contract, and claims based on breach of international treaties regulating the treatment afforded to investors (a modified prima facie standard of proof has been adopted in regard to jurisdictional objectives by some tribunals).[42]

To summarize my argument, the default rule in investor-state arbitration is the balance of probabilities/preponderance of evidence test, which will generally apply unless there is a specific exception calling for a heightened standard.

*3. Similarity to the Civil-Law "Inner Conviction" Test*

Some commentators (correctly) point out that the "balance of probabilities" or "preponderance of evidence" adopts a common-law formulation. Civil lawyers often allude to the "inner conviction" test, where an arbitrator must be personally convinced of the evidence produced. Under this test, an arbitrator must, therefore, decide an issue based on the personal, inner conviction on the basis of the evidence produced. In other words, the arbitrator must be personally satisfied with the evidence in order to resolve any issue. Nathan D. O'Malley has explained this as follows:

> A standard derived from civil law jurisdictions sometimes mentioned as an alternative to the *balance of probabilities test* is the *inner conviction* test. This test is centered on the personal reaction to the evidence given by the arbitrator and is a matter of whether the arbitrator regards the evidence to have reached a level where he or she is personally satisfied of the veracity of the allegation. It has been suggested that the *inner conviction* test may impose a somewhat higher level of proof than that which is often otherwise applied by

[41] See eg *Joseph Charles Lemire v Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability (21 January 2010) [369] ("After due consideration, and not without some hesitation, the Tribunal comes to the conclusion that there is a preponderance of evidence showing that the National Council's decisions indeed were arbitrary and discriminatory.").

[42] Nathan D. O'Malley (n 2) 208 (emphasis added).

> international arbitrators; however, this conclusion is debatable. As noted, this test is customarily regarded as an alternative to the more widely used *balance of probabilities* standard.[43]

There has been a suggestion that the civil law standard is higher than the balance of probabilities standards under common law formulations. The question that, therefore, arises is whether the inner convention test varies from the balance of probabilities test. Investor-state tribunals have not addressed this issue in any meaningful manner—this can perhaps be because tribunals do not want to engage in a civil versus common law debate on the issue. However, my argument is that there is no real difference between both standards and an application of the standard under either formulation will take you to the same result. My argument is supported by views of other commentators who agree that there is no difference in the application of the common (balance of probabilities) and civil law (inner conviction) standard.[44] As Waincymer stated:

> There is unlikely to be any difference between the civil and common law standards as expressed, notwithstanding some comments to the contrary. Reiner has suggested that continental law establishes a higher standard than common law, nothing the use in Austrian law of the term "full conviction" (*volle Überzeugung*) although he concludes that the practical result seems the same in both systems. He concludes that the real test in each system "must be a test of preponderance of evidence." Von Mehren and Saloman also speaks of a higher civilian burden but again argue that the ultimate test is a preponderance of evidence.[45]

[43] ibid 210 (emphasis added).

[44] There is one case where an investor-state tribunal equates the balance of probabilities test with the inner conviction test. See *Churchill Mining and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Award (6 December 2016) [244] ("the Tribunal considers that the Respondent carries the burden of proving forgery and fraud, which proof will be measured on a standard of balance of probabilities or *intime conviction* taking into account that more persuasive evidence is required for implausible facts . . . ") (emphasis added).

[45] Jeffrey Waincymer (n 1) 767 (emphasis added). See also Riddell and Plant (n 1) 125 ("In the civil legal tradition, the concept of a standard of proof is different. It is not a question of probability, as in the common law, but is a matter for the personal appreciation of the judge, or 'l'intime conviction du juge'. If the judge considers himself to have been persuaded by the argument on a certain matter, then the standard of proof has been met. This was succinctly stated by the former President of the Iran-United States Claims Tribunal who said: 'the burden of proof is that you have to convince me.' A civil law judge generally see less need for a specific standard which must be met, as the question of whether the party bearing the burden of proof has established their case is essentially a subjective one, which can be answered with reference to the 'inner, deep-seated, personal conviction of the judge.' Thus not only do

Other commentators have highlighted that even if there might be academic differences, the practical results between the two formulations remain the same:

> None of the above-mentioned rules for international arbitration fix a standard of proof, however. The required standard of proof is often expressed by international arbitrators in terms of the jurisdiction from which they come. Whereas civil lawyers generally use the concept of the *intime conviction* of the arbitrator, common law lawyers talk in terms of a "preponderance of the evidence" or "a balance of probability". However, "in practice, the result is the same".[46]

Thus, while there might be a difference in terminology and a difference in how civil and common lawyers might approach the issue, the practical consequence is the same: you evaluate the evidence produced and be convinced that the evidence is more likely than not true.

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the two predominant legal traditions have different rules on the standard of proof, but their entire conceptual basis is different. '[T]he concept of an identifiable or quantifiable standard of proof emanates from the common law system', and does not exist in the civil legal tradition. However, on closer examination, it is not dear that this difference is as marked as one might think. The objective standards of the common law in fact allow of a degree of subjectivity in the weighing up of two cases when deciding on the balance of probabilities. Nevertheless, it is likely that this conceptual division is the source of the confusion on the matter which seems to exist in the ICJ"). Other commentators use civil and common law terminologies interchangeably. See eg Julian D.M. Lew, 'Document Disclosure, Evidentiary Value of Documents and Burden of Evidence' in Teresa Giovannini and Alexis Mouree (eds), *Written Evidence and Discovery in International Arbitration: New Issues and Tendencies* (Dossiers ICC Institute of World Business Law 2009) 22 ("In practice, the standard of proof in arbitration requires a level that persuades the tribunal in one's favour. This will inevitably be a balance of probabilities. In practice, this will be whether the tribunal is satisfied, or believes, on the basis of the evidence, that the claims or defences are substantiated."); A.T. Martin, *International Arbitration and Corruption: An Evolving Standard* (2004) Transnational Dispute Management 7 available at https://www.transnational-dispute-management.com/article.asp?key=88 accessed on 15 January 2017 ("The standard of proof for civil litigation in England is the 'balance of probabilities.' In civil law jurisdictions, the judge seeks an 'inner conviction' in determining the facts. These various standards are viewed as having little difference."). The actual of von Mehren and Saloman states: "A general, underlying standard, an elevated burden of proof, and a very low standard or insufficient explanation of the reasoning. Regarding the first, a general standard is one that is better explained to common law lawyers as a balance of probabilities, i.e., the evidence must be something more likely true than not true but not so high as required for criminal convictions. Civil lawyers, in contrast, are more accustomed to what may be a higher burden of proof referring to the inner conviction of the judge. In any event, the strategic mind of the counsel must remember that in all cases, the real general standard is and must be a test of preponderance of evidence." George M. von Mehren and Claudia T. Salomon (n 24) 285, 291.

[46] Vera Han Houtte, 'Adverse Inferences in International in International Arbitration,' in Teresa Giovannini and Alexis Mouree (eds), *Written Evidence and Discovery in International Arbitration: New Issues and Tendencies* (Dossiers ICC Institute of World Business Law 2009) 198 (emphasis added).

### *4. Standard of Proof at the Damages Phase: Prove the Facts of Damage but Don't Need to Prove Damages with Absolute Certainty*

While the balance of probabilities/preponderance test can be applied to the jurisdictional or merits phase of a case, it raises an interesting wrinkle at the damages phase of the proceeding. This is because most of the damages analysis takes place in a counter-factual world ignoring any potential breach by the state. Therefore, requiring a party to prove damages with certainty would be almost always impossible. Relatedly, there is recognition of the fact that the computation of damages is, by its very nature, not a pure science and requires some flexibility in its application.

Investor-state tribunals typically apply the balance of probabilities test at the damages phase because they acknowledge that it is impossible to establish damages with complete certainty but, at the same time, they refuse to award damages if the damages are purely speculative or hypothetical.[47] The investor has to, therefore, establish: (i) the fact of the breach of the applicable instrument to the satisfaction of the tribunal; (ii) the damages arising from the breach must be reasonably ascertained for

[47] *Ioannis Kardassopoulos* (n 34) [229] ("The Tribunal finds that the principle articulated by the vast majority of arbitral tribunals in respect of the burden of proof in international arbitration proceedings applies in these concurrent proceedings and does not impose on the Parties any burden of proof beyond a balance of probabilities. With respect to proof of damages in particular, the Tribunal finds the following passage quoted by the Claimants in their written submissions from the award in *Sapphire International Petroleums Ltd v National Iranian Oil Co* to be apposite: 'It is not necessary to prove the exact damage suffered in order to award damages. On the contrary, when such proof is impossible, particularly as a result of the behaviour of the author of the damage, it is enough for the judge to be able to admit with sufficient probability the existence and extent of the damage'."); *Khan Resources Inc Khan Resources BV and CAUC Holding Company Ltd v Government of Mongolia*, UNCITRAL, Award on the Merits, 2 March 2015 [375] ("The burden of proof falls on the Claimants to show that they have suffered the loss they claim. The standard of proof required is the balance of probabilities. This, of course, means that damages cannot be speculative or uncertain. However, scientific certainty is not required and it is widely acknowledged by investment treaty tribunals and publicists that the assessment of damages is often a difficult exercise and will usually involve some degree of estimation and the weighing of competing (but equally legitimate) facts, valuation methods and opinions, which does not of itself mean that the burden of proof has not been satisfied."); *Hrvatska Elektroprivreda dd v Republic of Slovenia*, ICSID Case No. ARB/05/24, Award (17 December 2015) [175] ("the Tribunal recalls that the burden of proof falls on the Claimant to show it suffered loss. The standard of proof required is the balance of probabilities and damages cannot be speculative or uncertain. However, scientific certainty is not required. Naturally, some degree of estimation will be required when considering counterfactual scenarios and this, of itself, does not mean that the burden of proof has not been satisfied. When faced with competing methodologies and opinions the Tribunal has done its conscientious best, greatly assisted by the expertise of Mr Jones, to determine the loss (if any) that was suffered by the Claimant as a result of the Respondent's breach."). (emphasis added to each of the authorities). See also Mehren and Salomon (n 24) 285, 291 ("The lower standard of proof is applied generally when establishing damages. Many times, arbitrators ignore the substantive law they find applicable and refer instead to nonlegal equitable standards.").

the breach; but (iii) the damages sought cannot be speculative or purely hypothetical. The tribunal in *Crystallex v. Venezuela* summarized the standard of proof at the damages phase:

> [T]he Tribunal considers that, in the exercise of its discretion granted to it in relation to issues of evidence, it should be guided by the following principles.
>
> First, the *fact* (i.e., the existence) of the damage needs to be proven with certainty. In that sense, there is no reason to apply any different standard of proof than that which is applied to any other issue of merits (e.g., liability). Second, once the fact of damage has been established, a claimant should not be required to prove its exact *quantification* with the same degree of certainty. This is because any future damage is inherently difficult to prove. As the tribunal in *Lemire v. Ukraine* observed, "[o]nce causation has been established, and it has been proven that the in bonis party has indeed suffered a loss, less certainty is required in proof of the actual amount of damages; for this latter determination Claimant only needs to provide a basis upon which the Tribunal can, with reasonable confidence, estimate the extent of the loss." The tribunal is of the view that the emphasis should be put on the phrase "with reasonable confidence" which seems to strike a wholesome and pragmatic approach, prone to satisfy common law and civil law minds. . . .
>
> Thus, an impossibility or even a considerable difficulty that would make it unconscionable to prove the amount (rather than the existence) of damages with absolute precision does not bar their recovery altogether. Arbitral tribunals have been prepared to award compensation on the basis of a reasonable approximation of the loss, where they felt confident about the fact of the loss itself.[48]

*5. Problems Associated with the Balance of Probabilities Standard*

The application of the standard has been the subject of considerable debate, sometimes even between different members of the arbitral tribunal. For example, Kazazi observes that: "Complaints about the standard of proof applied by an international tribunal are commonly among the grounds adduced in separate and

[48] *Crystallex International Corporation v Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award (4 April 2016) [867-869, 871] (emphasis added).

dissenting opinions of judges or arbitrators. In the Iran-United States Claims Tribunal, for instance, American arbitrators have usually complained that the standard adopted has been too heavy, and arbitrators have usually complained that it has been too light."[49]

In other words, while the balance of probabilities standard sounds good in theory, it is possible that different people might arrive at different conclusions looking at the same evidence. More generally, this problem would apply even in a domestic setting and might appropriately fall within the arbitral tribunal's discretion. In other words, while a tribunal cannot insist on a different standard of proof without getting a potential challenge on the merits, a tribunal does have discretion on how it applies the standard itself.

### (C) *Heightened Standard of Proof For "Serious" Issues As Recognized and Applied by Investor-State Arbitration*

#### *1. Heightened Standard for "Serious" or Quasi-Criminal Issues*

For matters that implicate "serious" issues or issues that might touch on criminal law matters, it is my argument that the balance of probabilities/preponderance test will not be appropriate, instead a heightened standard of proof would apply in such circumstances.[50] Redfern and Hunter have explained this in their treatise as follows:

> In general, the more startling the proposition a party seeks to prove, the more rigorous the arbitral tribunal will be in requiring that proposition to be fully established. A classic example of this general rule is that an arbitral tribunal will be reluctant to find an executive of a company guilty of fraudulent activity in the exercise of his ordinary commercial activities, unless this is proved conclusively. In deciding what evidence to produce, and the means by which it should be presented, the practitioner should therefore make an evaluation of the *degree* of proof that the tribunal is likely to

[49] See eg Mojtaba Kazazi (n 4) 350.

[50] Alan Redfern, Claude Reymond, Andreas Reiner, Bernard Hanotiau, Edward Lord Eveleigh, Ian W Menzies, Allan Philip, 'The Standards and Burden of Proof in International Arbitration', (vol 10, No. 5, Arbitration International 1994) 335-336 ("Both, the Anglo-Saxon and the continental systems require higher standards of proof for particularly important or delicate questions such as bribery or other types of fraud."). See also Kabir Duggal (n 2) 43-45.

> require, before being sufficiently satisfied to make a finding of fact that his client is seeking.[51]

Investor-state tribunals agree with my argument. For example, the majority tribunal in *Siag v. Egypt* stated: "It is common in most legal systems for serious allegations such as fraud to be held to a high standard of proof."[52] The heightened standard of proof has assumed special importance in matters concerning wrongdoings such as allegations of corruption, fraud, impropriety or breaches of international public policy—these are discussed in further detail in the section below.

The underlying rationale for seeking a heightened standard seems apparent. Allegations that can have a serious impact by virtue of the nature of the allegation on the opposing party, including a potential dismissal of the arbitration proceeding. Therefore, additional care is warranted through a heightened standard of evidence. Further, these allegations are often easy to make but may not always be easy to prove. Indeed, applying any other standard would therefore not be appropriate considering both the risks associated with these allegations and the fact that these allegations are easy to make but difficult to prove. Nathan D. O'Malley has explained the heightened standard of proof as follows:

> For those allegations of particular gravity, a tribunal may find it necessary to apply a higher standard of proof. One finds examples of this in sports arbitrations convened to consider questions over the use of performance-enhancing drugs, where tribunals often will, as a matter of practice, require more than the general balance of probabilities standard of proof applicable to most commercial and contract claims, but less than the standard of *beyond reasonable doubt* applied

[51] Blackaby *et al*, Redfern and Hunter (n 33) 388 (emphasis added).

[52] *Waguih Elie George Siag & Clorinda Vecchi v Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award (1 June 2009) [326]. The dissenting arbitrator in the case disagreed with the standard of proof applied by the majority preferring instead to apply a discretionary standard of proof. *Waguih Elie George Siag and Clorinda Vecci and the Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Dissenting Opinion of Professor Francisco Orrego Vicuña (1 June 2009) [13] ("In this context I also disagree about the applicable standard of proof. While the Award has chosen the United States standard of clear and convincing evidence, it is my view that arbitration tribunals, particularly those deciding under international law, are free to choose the most relevant rules in accordance with the circumstances of the case and the nature of the facts involved, as it has been increasingly recognized. The facts of this case, difficult as they are to establish with absolute certainty, could be best judged under a standard of proof allowing the Tribunal 'discretion in inferring from a collection of concordant circumstantial evidence (*faisceau d'indices*) the facts at which the various indices are directed'.") (internal citations omitted).

> in criminal proceedings. Other claims, such as those brought on the basis of fraud or forgery, will attract a higher standard of proof which is articulated as requiring evidence that is *clear and convincing* or higher. The gravity of a claim is determined according to the nature of the allegation, not according to personage of the party against whom it is levelled.[53]

Investor-state tribunals have also applied a heightened standard of proof for a wide range of issues such as illegality of the investment,[54] breach of good faith,[55] allegations of forgery,[56] and claims for lost profits.[57] These activities are of a quasi-criminal nature or might have serious consequences for the opposing party and, therefore, the balance of probabilities or preponderance of evidence test discussed above would not be appropriate.

Indeed, if an allegation is that a senior state official received a bribe, deciding the evidence on a mere balance of probabilities could pose enormous problems because all that the moving party would need to establish is that the opposing party more likely than not received a bribe. This will now require the opposing party to prove that it did not receive a bribe which, by its very nature, can be perverse (particularly if it did not indeed receive a bribe) because it will require proof for a negative. Further, as noted above, these allegations are often easy to make but difficult to prove. All these reasons warrant a heightened scrutiny of the evidence.

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[53] Nathan D. O'Malley (n 2) 210-211 (emphasis added).

[54] *Energoalians SARL v Republic of Moldova*, UNCITRAL, Award (23 October 2013) [261].

[55] *ConocoPhillips* (n 29) [275] ('It will do that bearing in mind how rarely courts and tribunals have held that a good faith or other related standard is breached. The standard is a high one.").

[56] Richard M. Mosk, *The Role of Facts in International Dispute Resolution* (Recueil Des Courts 2003) 137 ("The Iran-United States Claims Tribunal did state that because 'allegations of forgery' are "'particularly grave', to establish such an allegation requires 'an enhanced standard of proof'.").

[57] *Anatolie Stati Gabriel Stati Ascom Group SA and Terra Raf Trans Traiding Ltd v Republic of Kazakhstan*, SCC Case No. V116/2010, Award (19 December 2013) [1688] ("This Tribunal does not need to go into these legal issues because it considers that, in any event, Claimants have not been able to provide sufficient factual proof for the lost profits they claim. In this context, Respondent has rightly referred to the comments in Prof. Crawford's Commentaries on the ILC Articles on State Responsibility and to respective comments in earlier awards that the investor must meet a high standard of proof to establish a claim for lost profits, especially due to the degree of economic, political, and social exposure of longterm investment projects. To meet this standard, an investor must show that their project either has a track record of profitability rooted in a perennial history of operations, or has binding contractual revenue obligations in place that establish the expectation of profit at a certain level over a given number of years. This is true even for projects in early stages.").

Finally, for matters like a state's consent (*ratione voluntatis*), tribunals have refused to infer or presume consent instead requiring the consent to be clear.[58] This is because a tribunal can only make a ruling if it has jurisdiction and because of this limited mandate, the jurisdiction needs to be clear.

*2. Heightened Standard when the Arbitral Rules Calls for It*

Investor-state tribunals also apply a heightened standard of proof it the provision expressly call for it. Indeed, this is a direct application of what the plain language of the arbitration rules. For example, several articles in the ICSID Convention use the term "manifest" and tribunals emphasize that this calls for a heightened standard. For example, Article 57 of the ICSID Convention states that an arbitrator can be challenged when there is a "manifest" lack of qualifications.[59]

> Under Article 57, the burden is on the challenging party to establish the existence of the required fact or facts and to prove that such fact or facts indicate a "manifest lack" of the quality required of an arbitrator, that is, that such an arbitrator lacks the quality of being a person who can be relied upon to exercise independent judgment and impartiality of judgment. The standard of proof required is that the challenging party must prove not only facts

[58] *ICS Inspection and Control Services Ltd (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. The burden of proof for the issue of consent falls squarely on a given claimant who invokes it against a given respondent. Where a claimant fails to prove consent with sufficient certainty, jurisdiction will be declined.'); *Conocophillips Petrozuata BV, Conocophillips Hamaca BV and Conocophillips Gulf of Paria BV v Bolivarian Republic of Venezuela*, ICSID Case No ARB/07/30, Decision on Jurisdiction and the Merits (3 September 2013) [254] ('In the words of the International Court of Justice in considering the very first challenge made to its jurisdiction, the consent must be 'voluntary and indisputable', and in the words of both ICSID tribunals 'clear and unambiguous'. The necessary consent is not to be presumed. It must be clearly demonstrated.').

[59] Article 57 of the ICSID Convention states: "A party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14." Article 14 of the ICSID Convention states: "Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators."

indicating the lack of independence, but also that the lack is "manifest" or highly probable, not just possible.[60]

Similarly, investor-state tribunals have called for a heightened standard of proof for a preliminary motion to dismiss under ICSID Arbitration Rule 41(5) where the standard is "manifestly without legal merit."[61] This provision was introduced in 2006 as a part of the amendment to the ICSID Arbitration Rules and was intended to provide respondent state to seek an early dismissal of the case for cases that were manifestly without any legal merit.[62] Investor-state tribunals have noted that because Rule 41(5) uses the term

[60] *Abaclat and Others v Argentine Republic*, ICSID Case No. ARB/07/05, Recommendation on Proposal for Disqualification of Prof. Pierre Tercier and Prof. Albert Jan van den Berg, PCA Case No. IR 2011/1 and ICSID Case No. ARB/07/5, PCA Decision (19 December 2011) [50] (emphasis added). See also *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A v Argentine Republic*, ICSID Case No. ARB/03/19, Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal (12 May 2008) [29] ("The term 'manifest' means 'obvious' or evident. Christoph Schreuer, in his Commentary on the ICSID Convention observes that the word manifest imposes '… a relatively heavy burden on the party making the proposal . . .' to disqualify an arbitrator.") (ellipsis in original); *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v Argentine Republic*, ICSID Case No. ARB/03/23, Challenge Decision Regarding Professor Gabrielle Kaufmann-Kohler (25 June 2008) [68] ("Something is 'manifest' if it can be 'discerned with little effort and without deeper analysis'."); *Alpha Projektholding GmbH v Ukraine*, ICSID Case No. ARB/07/16, Decision on Respondent's Proposal to Disqualify Arbitrator Dr. Yoram Turbowicz (19 March 2010) [37] ("Further, in keeping with the rules of interpretation of the Vienna Convention, the Two Other Members must perforce assign significance to the use of the adjective 'manifest' in the language of Article 57 of the ICSID Convention describing the standard that a challenge must meet in order to prevail. According to Webster's Dictionary, the word 'manifest' connotes something that is 'obvious' to one's understanding and that is 'readily perceived by the senses' and 'easily understood or recognized by the mind.' The Shorter Oxford English Dictionary correspondingly defines the term 'manifest' as something which is '[c]learly revealed to the eye, mind or judgement; open to view or comprehension; obvious'."); *Conocophillips Petrozuata B.V., Conocophillips Hamaca B.V. and Conocophillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on the Proposal to Disqualify L. Yves Fortier, Q.C., Arbitrator (27 February 2012) [56] ("The decisions also recognise that the term "manifest" in Article 57 means 'obvious' or 'evident' and highly probable, not just possible, and that it imposes a relatively heavy burden on the party proposing disqualification. Further, the manifest lack of the required qualities, here independence and impartiality of judgment, must appear from objective evidence."); *Blue Bank International & Trust (Barbados) Ltd. v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20, Decision on the Parties Proposal to Disqualify a Majority of the Tribunal (12 November 2013) [61] ("regarding the meaning of the word 'manifest' in Article 57 of the Convention, a number of decisions have concluded that it means 'evident' or 'obvious,'. and that it relates to the ease with which the alleged lack of the qualities can be perceived.").

[61] Rule 41(5) of the ICSID Arbitration Rule: "Unless the parties have agreed to another expedited procedure for making preliminary objections, a party may, no later than 30 days after the constitution of the Tribunal, and in any event before the first session of the Tribunal, file an objection that a claim is manifestly without legal merit."

[62] See eg "Manifest Lack of Legal Merit—ICSID Convention Arbitration, ICSID Website, available at https://icsid.worldbank.org/en/Pages/process/Manifest-Lack-of-Legal-Merit.aspx accessed on 8 May 2017.

"manifest" to describe the criteria, there is a heightened burden on the state with the burden to prove such allegation:

> Several ICSID tribunals have found that "manifest," as used in Rule 41(5), is equivalent to "obvious" or "clearly revealed to the eye, mind or judgment." Under Rule 41(5), the respondent must establish its objection "clearly and obviously, with relative ease and despatch." The Rule is intended to capture cases which are clearly and unequivocally unmeritorious, and as such, the standard that a respondent must meet under Rule 41(5) is very demanding and rigorous. In the opinion of the Tribunal, a case is not clearly and unequivocally unmeritorious if the Claimant has a tenable arguable case. . . . Respondent's Rule 41(5) objections concern both matters of jurisdiction and merits, the Tribunal notes that it agrees with the decisions of other tribunals to the effect that Rule 41(5) allows for objections related both to jurisdiction and the merits of the case. Nonetheless, the very demanding standard of proof outlined above applies no less to jurisdictional than other matters.[63]

Similarly, two of the ICSID Annulment criteria use terms that warrant a heightened standard—when a tribunal "manifestly exceeded its power"[64] and when there "has been a serious departure from a fundamental rule of procedure."[65] Investor-state arbitral tribunals have recognized the need for a heightened standard here by emphasizing that the arguments must be clear on their face.[66]

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[63] *PNG Sustainable Development Program Ltd v Independent State of Papua New Guinea*, ICSID Case No. ARB/13/33, The Tribunal's Decision on the Respondent's Objections Under Rule 41(5) of the ICSID Arbitration Rule (28 October 2014) [88, 91] (emphasis added); *Trans-Global Petroleum, Inc. v Hashemite Kingdom of Jordan*, ICSID Case No. ARB/07/25, Decision on the Respondent's Objection under Rule 41(5) of the ICSID Arbitration Rules (12 May 2008) [86] ("The word 'manifest' is used Article 57 of the ICSID Convention, permitting a party to propose the disqualification of a tribunal's member on account of any fact indicating a 'manifest lack of the qualities' required under Article 14(1) of the ICSID Convention. As explained by Professor Schreuer, Article 57 imposes 'a relatively heavy burden of proof on the party making the proposal'; and Reed et al concur: 'Article 57 of the Convention sets an extremely high bar for challenging an arbitrator . . .' Accordingly, the word is here intended to impose a high test for challenging an ICSID arbitrator, consistent with the need to prove an obvious and clearly disqualifying deficiency." (ellipsis in original).

[64] Article 52(1)(b) of the ICSID Convention (emphasis added).

[65] Article 52(1)(d) of the ICSID Convention (emphasis added).

[66] See eg *Total SA v Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Annulment (1 February 2016) [159] ("The Committee notes that the usage of qualifiers such as 'manifest,' 'serious,' and 'fundamental' suggest that the powers of an *ad hoc* committee to annul an ICSID award were intended to be limited within the grounds for annulment under Article 52(1) of the Convention. As one commentator

### *3. The Appropriate Heightened Standard is Above the Balance of Probabilities but Lower than Criminal Law Standard*

It is my submission that the heightened standard of proof is lower than the criminal law standard of "proof beyond reasonable doubt."[67] Indeed, this criminal law standard is not appropriate in any investor-state arbitration proceeding more generally, since the proceedings are not criminal in nature. As Kazazi explained:

> Proof beyond reasonable doubt is, presumably, the favourite standard with international tribunals since it relieves them of the task of searching for other standards which may be appropriate in the context of a given case. Unfortunately, it is a luxury that the party which carries the burden of proof in international proceedings cannot always afford. It may happen that in some cases access to evidence that would prove a claim conclusively is not easy, or not possible at all; or that it is excessively costly or time-consuming to procure such evidence. Thus, it is neither realistic nor practical for international tribunals to insist on receiving proof beyond reasonable doubt, indiscriminately, in all cases before them. As stated by Lauterpacht, "the degree of burden of proof . . . to adduced ought not to be so stringent as to render the proof unduly exacting.[68]

Therefore, the heightened standard has to be above the balance of probabilities standard but below the criminal law standard of proof beyond reasonable doubt. Since there is no clear terminology for this (and indeed terminology here can be tricky), it can

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indicated, annulment is an exceptional remedy."); *TECO Guatemala Holdings LLC v Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment (5 April 2016) [77] ("the Committee considers that an excess of powers is 'manifest' if it is plain on its face, evident, obvious, or clear."); *SGS Société Générale de Surveillance SA v Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Annulment (19 May 2014) [122] ("the Committee insists that for an excess of power to be 'manifest' it has to be textually obvious and substantively serious.").

[67] M. Aghahosseini, *Evidence before the Iran-United States Claims Tribunal* (International Law Forum du Droit International 1999) 213 ("But the standard of proof *beyond reasonable doubts* belongs to criminal prosecutions only, where the conventional policy holds that the evil of convicting an innocent person is by far greater than that of a guilty person escaping conviction. The standard of proving guilt is hence raised to a degree sufficient to meet this concern. There is no such consideration, and therefore no room for this standard, in civil proceedings. Here, on the contrary, the dispute must be resolved in favour of one or the other party and, because of the equality of the parties' rights, the requirement of any degree of proof other than the preponderance of evidence - 51% - will simply disturb that equality in favour of one and against the other."); Cecily Rose, 'Questioning the Role of International Arbitration in the Fight Against Corruption' [2014] Journal of International Arbitration 195 ("The most frequently employed standard is that of clear and convincing proof, which tribunals have described as lying somewhere in between balance of probabilities and beyond a reasonable doubt.").

[68] Mojtaba Kazazi (n 4) 348 (emphasis added).

be appropriately described as a "heightened" standard to show that the evidence has to be above the usual balance of probabilities/preponderance of evidence.

## *V. THE SPECIAL CASE OF WRONGDOINGS*

### (A) *Introduction*

Allegations of wrongdoings have assumed great significance in investor-state arbitration and are invoked by investors against states and increasingly by states against investors.[69] As an initial remark, I would like to clarify the terminology. I have used the word "wrongdoings" as a convenient placeholder to encompass a wide range of activities including allegations of fraud, corruption, bribery, and other such related activities.[70] As noted above, these allegations, therefore, require a heightened standard of proof.[71] But, considering how significant these allegations have become in investor-

[69] Professor Wälde in the dissenting opinion in *Thunderbird v Mexico* has noted that allegations of wrongdoing have been increasing and they should be ignored unless there is sufficient evidence to establish the allegations. *International Thunderbird Gaming Corporation v The United Mexican States*, Separate Opinion of Professor Wälde, UNCITRAL (1 December 2005) [20]: "The same applies to the corruption hint insinuated by respondent in its submission . . . Such insinuations are now frequently employed by both claimant investors and respondent governments. They should be disregarded-explicitly submitted to the tribunal, substantiated with a specific allegation of corruption and subject to proper legal and factual debate for the tribunal. That is simply the implication of the 'fair hearing' principle. If a tribunal should be influenced by insinuations, there is no appeal instance (at present) in the NAFTA arbitral system which can correct a factual finding or assumption that has a bearing on the ultimate award. It is therefore particularly important for a tribunal not to get influenced, directly or indirectly, by 'insinuations' meant to colour and influence the arbitrators' perception and activate a conscious or subconscious bias, but to make the decision purely on grounds that have been subject to a full and fair hearing by both parties." (Emphasis added). See also *Himpurna California Energy Ltd v PT (Persero) Perusahaan Listruik Negara*, Final Award (1999) [114, 118] ("Precedents in the field of international arbitration show that such arguments [on illegality] are most often raised by States or State entities in the wake of important economic or political events which have resulted in major policy changes . . . they must be treated with great circumspection. . . . The arbitrators believe that cronyism and other forms of abuse of public trust do indeed exist in many countries. . . . But such grave accusations must be proven.") (emphasis added).

[70] Indeed, the Oxford Dictonary defines the term "wrongdoing" as "illegal or dishonest behaviour." See Definition of "Wrongdoing" Oxford Dictionary, available at https://en.oxforddictionaries.com/definition/wrongdoing.

[71] J. N. Summerfield, 'The Corruption Defense in Investment Dispute: A Discussion of the Imbalance between International Discourse and Arbitral Decisions'(2009) 6(1) Transnational Dispute Management 17 available at https://www.transnational-dispute-management.com/article.asp?key=1357 accessed on 15 January 2017 ("There is an apparent disconnect in the discourse against 'petty' corruption and the exchanges that move international investments forward. The corruption defense operates on a myth system, nobly assuming that there is an injustice, but without considering whether causation and benefits were 'undue' and without asking why that inquiry is conducted. Arbitral decisions on corruption should move closer to the normative discussions that revolve around 'petty' corruption and closer to an operational code (how the world operates on the ground).").

state arbitration, these issues warrant some special consideration.

The need for a heightened standard of proof is particularly acute in dealing with allegations of wrongdoings considering how easy these arguments are to make and that it can facilitate manipulative behavior in an arbitration, especially when one of the parties might come from an area that is more prone to corruption:

> It is recognized in international arbitration and, in particular, in the jurisprudence of arbitral tribunals and courts that 'mere suspicion' or 'baseless allegations' should not suffice to prove misconduct such as corruption. Otherwise, an unscrupulous party could easily characterize itself as a victim of corruption in order to seek advantages in its arbitration with an opponent of less than stellar reputation with regard to corruption.[72]

Similarly, Waincymer has explained the need of heightened evidence in allegations of wrongdoing:

> Approaches to standard of proof may also vary if the issue is a complex economic or scientific question, a complex question of causation or a serious allegation of impropriety such as lack of good faith or fraud. In all of these situations, the legal articulation of the standard of proof remains constant but the body of evidence that might be required can vary. Proving that a drug is safe as contractually warranted may require clinical trials that must come close to certainty. Where an allegation of fraud is concerned, a significant body of evidence might be required to justify a conclusion that fraud is present and that the person under consideration cannot have their behaviour readily explained on other bases. This can also impact on the evidence that might be needed. Documents evidencing fraud may need to be more compelling.[73]

[72] Stephan Wilske and Todd J. Fox, 'Corruption in International Arbitration and Problems with Standard of Proof: Baseless Allegations or Prima Facie Evidence?' in Vikki M. Rogers, Pilar Perales Viscasillas, *et al* (eds), *International Arbitration and International Commercial Law: Synergy, Convergence and Evolution* (Kluwer Law International 2011) 502 (emphasis added).

[73] Jeffrey Waincymer (n 6) 768-769 (emphasis added).

(B) *Additional Principles Clarified by Investor-State Tribunals: Mere Insinuations or Vague Allegations will not Suffice*

Since most arbitral rules are silent on the standard of proof[74] and since wrongdoings typically do not involve a lot of direct evidence, a careful examination of the jurisprudence is necessary, in order to distil the relevant standards of proof applicable in such situations. The following principles can be distilled from the decisions of investor-state tribunals.

My first argument is that the evidentiary standard is "high" and therefore mere insinuations of wrongdoings or general allegations would not meet the "high" evidentiary standard.[75] Hwang and Lim explain this high standard, albeit in the context when it was invoked by investors as follows:

> [I]n a survey of arbitral case law on corruption, it was found that in just one out of twenty-five cases, a —"*low*" standard of proof was applied, whereas in fourteen cases, a — "*high*" standard of proof applied, which were variously described as — "*certainty*", — "*clear proof*", — "*clear and convincing*

[74] Cecily Rose, 'Questioning the Role of International Arbitration in the Fight Against Corruption' [2014] Journal of International Arbitration 193 ("The procedural rules of ICSID, ICC, and UNCITRAL leave the standard of proof to the discretion of the tribunal, and in practice tribunals have varied in their views on how stringently they should assess evidence of corruption. The instruments that regulate arbitral proceedings provide relatively little guidance on evidentiary matters, such as which party has the burden of proof, what sort of evidence the parties should present, and the standard of proof by which tribunals should evaluate the evidence before them. . . . While these instruments offer somewhat varying levels of guidance to tribunals on evidentiary matters, they uniformly omit any mention of the standard of proof. Thus, under each set of procedural rules, tribunals have considerable freedom to adopt the standard of proof that they consider appropriate in the given circumstances.").

[75] Prof. Dr. Richard Kreindler, 'Application for 'Revision' in Investment Arbitration: Selected Current Issues', in M.Á. Fernández-Ballesteros and David Arias, *Liber Amicorum Bernardo Cremades* (Wolters Kluwer 2010) 691 ("The legal standards applicable to allegations of corruption and bribery must, in light of the seriousness of such allegations, be yet even more stringent than those in ICSID revision proceedings not based on allegations of corruption or bribery. It is beyond doubt that corruption and bribery are a serious offense which violates international law. Allegations of corruption thus are a highly serious matter, to be approached with the greatest of scrutiny and circumspection, both in terms of concluding that corruption has been proven and in concluding that corruption has not been proven. At the same time, precisely because of the seriousness of an alleged offense of corruption or bribery, it is likewise a well-established principle in public international law, as well as in civil law, that the standard of proof respecting allegations of corruption is elevated, and cannot be justified by mere speculation. Especially criminal allegations or quasi-criminal allegations of corruption demand a high standard of evidence; the existence of corruption must be proven beyond a reasonable doubt."); Wilske and Fox (n 72) 495 ("There is no uniform standard of proof regarding allegations of corruption in international arbitration, even though it is fair to say that the standard is rather high.").

> *evidence*", and — "*conclusive evidence*." Other cases can be cited for the same proposition.[76]

Investor-state tribunals have also supported this. Blanket condemnations or references to a general state of corruption without any specific allegation will almost invariably fail. Investors often points to general reports that mention that a state is corrupt, however, tribunals have routinely rejected such general allegations. For example, in a case involving the Czech Republic, the investor alleged that the state sought a bribe but was not able to offer any direct evidence. The investor further alleged that the local entity had "close links with local politicians" and then argued general levels of corruption in the Czech Republic.[77] The tribunal refused to make any finding of corruption noting:

> The Tribunal must begin by stating that it finds to be deeply unattractive an argument to the effect that 'everyone knows that the Czech Republic is corrupt; therefore, there was corruption in this case. . .'. The Tribunal acknowledges that some effort was made to adduce specific evidence of corruption, but it did feel that there was a strain of the 'everyone knows' argument in the overall case, for example in the reliance on reports of NGOs as to the general presence of corruption within the Czech Republic. The Tribunal does not close its eyes to the fact that the Czech Republic, like other countries, has had, and reportedly still has, problems with corruption. <u>But the Tribunal remains vigilant against blanket condemnatory allegations which can have the appearance of an attempt to 'poison the well' in the hopes of making up for a lack of direct proof</u>. Reference to other instances of alleged corruption may prove that corruption exists in the State, but it does little to advance the argument that corruption existed in the specific events giving rise to the claim. Nor do allegations of this kind, however seriously advanced, give rise to a burden on the Respondent to 'disprove' the existence of corruption. While the present Tribunal is therefore willing to "connect the dots", if that is

[76] Michael Hwang SC and Kevin Lim, 'Corruption in Arbitration—Law and Reality', Herbert Smith-SMU Asian Arbitration Lecture (2011) 15 available at http://www.arbitration-icca.org/media/0/13261720320840/corruption_in_arbitration_paper_draft_248.pdf accessed on 15 January 2017.

[77] See ECE Projektmanagement International GmbH and Kommanditgesellschaft PANTA Achtundsechzigste Grundstücksgesellschaft mbH & Co v Czech Republic, PCA Case No. 2010-5, Award (19 September 2013) [4.874 et seq.].

> appropriate, the dots have to exist and they must be substantiated by relevant and probative evidence relating to the specific allegations made in the case before it.[78]

Other cases are to the same effect. For example, the *European Media v. The Czech Republic* case is illustrative. In that case, the Czech Republic argued that the investor had allegedly sought to blackmail the Deputy Chairman of the Czech Chamber of Deputies to have him use his influence over the Czech Media Council to grant them additional frequencies. To support this allegation, the Czech Republic provided, as evidence, the jottings in a diary where the company noted that it was "contemplating the use of information discreditable to the Deputy Chairman of the Chamber of Deputies of the Czech Parliament."[79] The tribunal refused to make a finding of blackmail just on this evidence:

> An allegation of blackmail, or even of a contemplation of it, is very serious, especially in the public domain, and the ground for it must be scrupulously laid, because of the obvious risk of unfairness. . . . To justify its allegation of bribery or conduct contrary to public policy, what the Respondent has to show is a sufficiently high degree of wrongdoing to rank as a breach of international law, actually having a disqualifying impact on the investment in question. The Tribunal has no doubt that in this it has totally failed.[80]

The second argument is that investor-state tribunals have also applied the heightened standard when allegations of corruption relate to the judiciary and have rejected to find corruption through a vague inference. The observations of the tribunal below provide a good illustration of this point:

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[78] ibid [4.879] (emphasis added).

[79] *European Media Ventures SA v Czech Republic*, UNCITRAL, Partial Award on Liability (8 July 2009) [30].

[80] ibid [32, 35] (emphasis added). On the allegation of blackmail, the tribunal specifically rejected the argument noting: "The Respondent shows no more than scribbled jottings by Mr. [name redacted] of which he was unable to give a convincing account when faced with them years later. True, this might on one view be said to show him in a poor light, but his general character and credibility are not in issue here. True also, this episode might have been relevant to a case under Article 2, but no such case is before the Tribunal, because of the earlier decision on jurisdiction. To justify its allegation of bribery or conduct contrary to public policy, what the Respondent has to show is a sufficiently high degree of wrongdoing to rank as a breach of international law, actually having a disqualifying impact on the investment in question. The Tribunal has no doubt that in this it has totally failed.").

> Corruption, if found, would constitute a grave violation of the standard of fair and equitable treatment under ECT Article 10(1), second sentence. The Tribunal emphasizes that corruption is a serious allegation, especially in the context of the judiciary. The Tribunal notes that both Parties agree that the standard of proof in this respect is a high one. Therefore, generalized allegations of corruption in the Republic of Kazakhstan do not meet Claimants' burden of proof. The Tribunal is aware that it is very difficult to prove corruption because secrecy is inherent in such cases. Corruption can take various forms but in very few cases can reliable and valid proof of it be brought which is sufficient as a basis for a resulting award declaring liability. However, the Tribunal considers that this cannot be a reason to depart from the general principle that Claimants must fully comply with their undisputed burden to prove that in the case at hand there was corruption. It is not sufficient to present evidence which could possibly indicate that there might have been or even probably was corruption. Rather, Claimants have to *prove* corruption. The issue is not one of inference, and the Tribunal considers that Claimants have not met their burden of proof in this regard.[81]

Third, the question of what would this high standard be in the context of wrongdoings has led to some controversy and warrants some and warrants some careful consideration. Initially, it appeared that the "clear and convincing" test was frequently alluded to in both cases and commentary. For example, the tribunal in *EDF v. Romania* stated:

> There is general consensus among international tribunals and commentators regarding the need for a high standard of proof of corruption. The evidence before the Tribunal in the instant case concerning the alleged solicitation of a bribe is far from being clear and convincing.[82]

[81] *Liman Caspian Oil BV and NCL Dutch Investment BV v Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Excerpts of Award (22 June 2010) [422-424] (internal punctuations omitted) (emphasis added). While the judgment of the tribunal on this point is available, the entire award itself has not been made public and all facts relating to this argument have been redacted. What can be reasonably discerned from this quotation is that the investor made general allegations of corruption of the judiciary without establishing facts to the satisfaction of the tribunal.

[82] *EDF (Services) Limited v Romania*, ICSID Case No. ARB/05/13, Award (8 October 2009) [221] (emphasis added). See also *European Media Ventures* (n 79) [35] ("To justify its allegation of bribery or conduct contrary to public policy, what the Respondent has to show is a sufficiently high degree of wrongdoing to rank as a breach of international law, actually having a disqualifying impact on the investment in question. The Tribunal has no doubt that in this it has totally failed."); *Europe Cement*

In *EDF v. Romania*, the investor argued that the contractual arrangements for an airport project were "not extended beyond their ten-year terms" because the company representatives "refused to pay a USD2.5 million bribe to secure the extension."[83] The tribunal noted that the company decided to go publicly with this information in an article published in a German newspaper after it realized that there was no possibility of an extension.[84] The tribunal then examined the testimony of a witness for the investor and noted that his testimony was of a "doubtful value."[85] This is because the witness denied any knowledge of the person who solicited the bribe before the Romanian authorities in 2002, however, in the proceedings before the tribunal in 2007, the witness provided the name of the person who sought the bribe. The tribunal, therefore concluded that it was not clear "in which of these statements" was he telling the truth: "There is no way to know. The evidence is not clear and convincing."[86]

The need for "clear and convincing" evidence was also espoused by Iran-U.S. Claims Tribunal in the *Dadras v. Iran* case, although the tribunal noted that the terminology itself was less important than the need for a heightened standard of proof:

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*Investment & Trade SA v Republic of Turkey*, ICSID Case No. ARB(AF)/07/2, Award (13 August 2009) [166-167] ("The Claimant's failure to provide any serious rebuttal to the Respondent's arguments strongly suggests that it never had such ownership, at least at the relevant time for jurisdiction and that perhaps it never had ownership at all. The burden to prove ownership of the shares at the relevant time was on the Claimant. It failed completely to discharge this burden. In the Tribunal's view the circumstantial evidence points strongly to the conclusion that Europe Cement did not own shares in CEAS and Kepez at the relevant time. In view of the failure of the Claimant to produce the documents ordered, the Tribunal has no direct evidence that any particular document placed before it was or was not authentic, but the implication of lack of authenticity is overwhelming. All of the evidence placed before the Tribunal, and not contradicted by the Claimant, is that the share transfer agreements are not what they claim to be and that no transfer of CEAS and Kepez shares to Europe Cement took place at least before 12 June 2003. Indeed, the evidence points to the conclusion that the claim to ownership of the shares at a time that would establish jurisdiction was made fraudulently."). Some authors are critical of the "clear and convincing" formulation as advocated by the *EDF* tribunal. See eg C. Partasides, 'Proving Corruption in International Arbitration: A Balanced Standard for the Real World' (2013) 10(3) Transnational Dispute Management 56-57 available at https://www.transnational-dispute-management.com/article.asp?key=1949 accessed on 15 January 2017 ("The *EDF (Services) v Romania* Award is not the first time that one can find reference to the heightened standard of 'clear and compelling' evidence. This same formulation has been referred to and applied in a number of corruption arbitrations over the years. . . . The following is my first proposition: whilst the standard of proof should not be relaxed for allegations of corruption, by the same token it need not be made more severe.").

[83] *EDF (Services) Limited* (n 82) [221].

[84] ibid [222].

[85] ibid [223].

[86] ibid.

> 123. In these Cases, the Tribunal is confronted with allegations of forgery that, because of their implications of fraudulent conduct and intent to deceive, are particularly grave. The Tribunal has considered whether the nature of the allegation of forgery is such that it requires the application of a standard of proof greater than the customary civil standard of "preponderance of the evidence." Support for the view that a higher standard is required may be found in American law and English law, both of which apply heightened proof requirements to allegations of fraudulent behavior. In American law the burden imposed is described as "clear and convincing" evidence, and English law speaks of a flexible civil standard that raises the burden of proof where the commission of a fraud or a crime is alleged in civil proceedings.
>
> 124. The allegations of forgery in these Cases seem to the Tribunal to be of a character that requires an enhanced standard of proof. Consistent with its past practice, the Tribunal therefore holds that the allegation of forgery must be proved with a higher degree of probability than other allegations in these Cases. The minimum quantum of evidence that will be required to satisfy the Tribunal may be described as "clear and convincing evidence," although the Tribunal deems that precise terminology less important than the enhanced proof requirement that it expresses.[87]

Other tribunals have noted the high standard but used different formulations, without emphasizing the "clear and convincing standard."[88] This could probably be because the

[87] Dadras International and Per-Am Construction Corporation v The Islamic Republic of Iran and Tehran Redevelopment Company [1995] Award No. 567-213/215-3 (emphasis added).

[88] Some authors state that the application of the clear and convincing proof actually misses the point. S Nappert, 'Public Interest in a Private Procedure—What Burden of Proof Allegations of Corruption in International Arbitration' (2013) Transnational Dispute Management 2-3 available at https://www.transnational-dispute-management.com/article.asp?key=1979 accessed on 15 January 17 ("This treatment of allegations of corruption ('clear and convincing proof') in both *Himpurna* and *EDF v Romania* arguably misses the point. The requirement for 'clear and convincing' evidence, apart from the fact that it elevates the civil burden of proof of the balance of probabilities for no apparent reason, looks at corruption as a series of past events that must be proven. That is not the real issue. The real issue is this: in many cases the nemesis of corruption is pervasive, it is endemic, it is like an oil spill, except that it leaves no trace. It is part of the fabric of certain societies, of the historical ways of doing business, it is polyform, it reinvents itself, it is continuing. In short, it often requires a *prospective* look at the evidentiary process, rather than the usual backwards glance. The point being missed by the proponents of the clear and convincing evidence is that, where a particular act of corruption proves intractable to evidence, to what degree can a party seek to show, and what will be the requisite burden to meet, the existence of a pervasive culture of corruption? Is this even relevant? Sufficient for the tribunal to draw an inference? Sufficiently cogent to meet the civil standard of the balance of probabilities?").

"clear and convincing" standard appears to get very close to the criminal law standard of "beyond reasonable doubt." Commentators have therefore made clear that this formulation would be less than the criminal law standard. Professor Amerasinghe describes this as "proof in a convincing manner" and explains the scope as follows: "Reference has also been made to a high standard of proof, impliedly perhaps, less than proof beyond a reasonable doubt but more than probability."[89]

Other tribunals have noted that the standard is "demanding" without adding any further descriptions. For example, the *Bayindir v. Pakistan* tribunal noted: "The Tribunal further considers that, as argued by the Respondent, the standard for proving bad faith is a demanding one, in particular if bad faith is to be established on the basis of circumstantial evidence."[90] It is my submission that using the term "heightened" evidence is preferred rather than getting into any of these descriptions because the "heightened" terminology makes clear what is expected without getting heavily into pedantic discussions on terminology.

Some tribunals approach this issue from another perspective. Instead of demanding a heightened standard *per se*, they rather emphasize that "more" persuasive evidence is needed. For example, the tribunal noted in the *Churchill v. Indonesia* case: "the Tribunal considers that the Respondent carries the burden of proving forgery and fraud, which proof will be measured on a standard of balance of probabilities or *intime* conviction taking into account that more persuasive evidence is required for implausible facts, it being specified that intent or motive need not be shown for a finding of forgery or fraud but may form part of the relevant circumstantial evidence."[91] Two points are worth emphasizing here. First, even though the tribunal paid lip-service to the "balance of probabilities" rule, it noted that "more persuasive evidence" would be necessary which could be seen as elevating the standard of proof. Second, the tribunal noted that

[89] Amerasinghe (n 1) 239.

[90] *Bayindir Insaat* (n 28) [143]. This was cited by approval in the *Chemtura v Canada* case. See *Chemtura Corporation (formerly Crompton Corporation) v Government of Canada*, UNCITRAL/NAFTA Arbitration, Award (2 August 2010) [137].

[91] *Churchill Mining PLC and Planet Mining Pty Ltd v Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Award (6 December 2016) [244].

intent or motive does not to be proven. This is often important in a criminal law context but tribunals perhaps do not require it considering that the cases are not criminal in nature.

The *Libananco v. Turkey* tribunal made a similar finding to the *Churchill v. Indonesia* case:

> In relation to the Claimant's contention that there should be a heightened standard of proof for allegations of "fraud or other serious wrongdoing", the Tribunal accepts that fraud is a serious allegation, but it does not consider that this (without more) requires it to apply a heightened standard of proof. While agreeing with the general proposition that "the graver the charge, the more confidence there must be in the evidence relied on", this does not necessarily entail a higher standard of proof. It may simply require more persuasive evidence, in the case of a fact that is inherently improbable, in order for the Tribunal to be satisfied that the burden of proof has been discharged.[92]

One final comment is necessary in this regard. As noted in Chapter 2 above, it is worth remembering that the burden will be on the party making the allegation and there will be no shifting of the burden of proof to the other party in the context of allegations of wrongdoings.[93]

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[92] *Libananco Holdings Co Limited v Republic of Turkey*, ICSID Case No. ARB/06/8, Award (2 September 2011) [125] (emphasis added).

[93] *Liman Caspian Oil BV and NCL Dutch Investment BV v Republic of Kazakhstan* (n 81) [424] ("It is not sufficient to present evidence which could possibly indicate that there might have been or even probably was corruption. Rather, Claimants have to prove corruption. [T]he issue is not one of interference, and the Tribunal considers that Claimants have not met their burden of proof in this regard."); *Jan Oostergetel and Theodora Laurentius v The Slovak Republic*, UNCITRAL, Final Award (23 April 2012) [303] ("While such general reports are to be taken very seriously as a matter of policy, they cannot substitute for evidence of a treaty breach in a specific instance. . . . Mere insinuations cannot meet the burden of proof which rests on [party making the allegation]."); See also Constantine Partasides, 'Proving Corruption in International Arbitration: A Balanced Standard for the Real World' (2010) 25(1) ICSID Review—Foreign Investment Law Journal, pp. 52-53 ("Karen Mills, a U.S. lawyer who has worked in Indonesia for many years, described in detail the various concealed forms which corrupt payments may take, and then commented as follows: . . . Because of the near impossibility to 'prove' corruption, where there is a reasonable indication of corruption, an appropriate way to make a determination may be to shift the burden of proof to the allegedly corrupt party to establish that the legal and good faith requirements were in fact duly met. Whilst one can understand and sympathize with the sentiment motivating these views—particularly from a lawyer who has practiced for many years in a jurisdiction that has been ravaged by corruption—a simple shifting of the burden of proof, all in one go, is rightly difficult for any lawyer to accept."). The article by Karen Mills referred above had stated: "Because of the near impossibility to 'prove' corruption, where there is a reasonable indication of corruption, an appropriate way to make a

(C) *Circumstantial Evidence is Permissible When Direct Evidence is not Available for Allegations of Wrongdoings*

Circumstantial evidence is defined as:

> Evidence directed to the attending circumstances; evidence which inferentially proves the principal fact by establishing a condition of surrounding and limiting circumstances, whose existence is a premise from which the existence of the principal fact may be concluded by necessary laws of reasoning.[94]

Considering the lack of direct evidence in allegations of wrongdoings, circumstantial evidence might be relied upon, as long as it meets the high standard outlined above. This is because direct evidence will be almost impossible on matters dealing with wrongdoings in any investor-state arbitration. Indeed, commentators have noted:

> Arbitrators must accept that it is almost impossible or unrealistic to collect "direct" evidence, such as cheques, copy of bank transfers, videos, written agreements between the corrupting and the corrupted party, and the like. In exceptional cases, tribunals had the chance to rely on candid and sincere confessions rendered by both parties, but this is extremely rare.
>
> In all other cases, the arbitrators are bound to confront themselves with "circumstantial" evidence or a series of "converging and consistent indicia". Based on the practice,

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determination may be to shift the burden of proof to the allegedly corrupt party to establish that the legal and good faith requirements were in fact duly met. For example, where the allegation is failure to tender, had tender in fact been held it would be a simple matter for the tendering party to produce its tender documents and official notice of award to disprove the allegation. But how can the party not involved 'prove' the negative: that no tender was in fact held? Where the allegation is overpricing, the party handling the payment need only show that the purchase price paid by it and the price charged to the project do not differ by a material amount. Where true, such proof is easy to obtain. But how can the party who did not handle the transaction prove how much 'discrepancy' was pocketed by the contractor?"; K. Mills, 'Corruption and Other Illegality in the Formation and Performance of Contracts and in the Conduct of Arbitration Relating Thereto' (2006) 3(2) Transnational Dispute Management 9 available at https://www.transnational-dispute-management.com/article.asp?key=708 accessed on 15 January 2017. The shifting of burden of proof has not received even traction because of due process concerns.; S. Nappert, 'Nailing Corruption: Thoughts for a Gardener—A Comment on World Duty Free Company Ltd v The Republic of Kenya'(2013) 10(3) Transnational Dispute Management 6 available at https://www.transnational-dispute-management.com/article.asp?key=1948 accessed on 15 January 2017: "Suggestions that the standard of proof should be reversed have been made, and are generally rejected as inconsistent with due process."

[94] See "What is Circumstantial Evidence", The Law Dictionary Featuring Black's Law Dictionary, available at https://thelawdictionary.org/circumstantial-evidence/.

> similar indicia may be found in the parties' behavior and even in some specific clauses of their contract.[95]

Dr. Llamzon summarized the law as follows: ". . . circumstantial evidence, particularly when direct evidence of corruption is unavailable, is widely, albeit cautiously, accepted as a tool to evaluate allegations of corruption by international tribunals."[96] The tribunal in *Fraport v. Philippines II* also noted:

> The Tribunal holds that considering the difficulty to prove corruption by direct evidence, the same may be circumstantial. However, in view of the consequences of corruption on the investor's ability to claim the BIT protection, evidence must be clear and convincing so as to reasonably make-believe that the facts, as alleged, have occurred. Having reviewed the Parties' positions and the available evidence related to the period prior to Fraport's Initial Investment, the Tribunal has come to the conclusion that Respondent has failed to provide clear and convincing evidence regarding corruption and fraud by Fraport.[97]

In the sections below, there is a larger discussion on circumstantial evidence, both to cover allegations of wrongdoings but also other situations where direct evidence is not available.

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[95] A. Crivellaro, 'The Course of Action Available to International Arbitrators to Address Issues of Bribery and Corruption' (2013) 10(3) Transnational Dispute Management 15 available at www.transnational-dispute-management.com/journal-browse-issues-toc.asp?key=48 accessed on 15 January 2017 (emphasis added). See also Carolyn B. Lamm, Hansel T. Pham and Rahim Moloo, 'Fraud and Corruption in International Arbitration', in M.Á. Fernández-Ballesteros and David Arias, *Liber Amicorum Bernardo Cremades* (Wolters Kluwer 2010) 703 ("Accordingly, arbitral tribunals may find indirect or circumstantial evidence of fraud or corruption to be sufficient for a party to discharge the applicable standard of proof. Commentators and cases confirm that, generally, tribunals should recognize circumstances where evidence is difficult to obtain and adjust their approach to weighing the evidence accordingly. As Professor Amerasinghe explains, '[international tribunals have, where a party has genuinely encountered problems beyond its control in securing evidence, more frequently than not recognized its hardship'.").

[96] Aloysius P. Llamzon, *Corruption in International Investment Arbitration* (Oxford University Press 2014) 230.

[97] *Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines [II]*, ICSID Case No. ARB/11/12, Award (10 December 2014) [479] (emphasis added). See also *Mr Saba Fakes v Republic of Turkey*, ICSID Case No. ARB/07/20, Award (14 July 2010) [131] ("The Tribunal considers that the burden of proof of any allegations of impropriety is particularly heavy. This burden of proof was not met in the present case.").

(D) *Evidentiary Techniques to Meet the Standard of Proof for Wrongdoings: "Connecting the Dots" and Red Flags*

Two evidentiary techniques, both as species of circumstantial evidence, have been adopted when direct evidence is not available in cases of wrongdoings. One approach recommended by the tribunal in *Methanex v. United States* is "connecting the dots."[98] The tribunal explained "connecting the dots" methodology in the following manner: "While individual pieces of evidence when viewed in isolation may appear to have no significance, when seen together, they provide the most compelling of possible explanations of events."[99] However, tribunals emphasize that extra care and caution must be applied when making a determination through connecting dots or through other means of circumstantial evidence:

> When considering the Claimants' evidence the Tribunal has borne in mind the difficulties of obtaining evidence of corruption. It is well aware that acts of corruption are rarely admitted or documented and that tribunals have discussed the need to 'connect the dots'. At the same time, the allegations that have been made are very serious indeed. Not only would they (if true) involve criminal liability on the part of a number of named individuals, they also implicate the reputation, commercial and legal interests of various business undertakings which are not party to these proceedings and which are not represented before the Tribunal. Corruption is a charge which an arbitral tribunal must take seriously. At the same time, it is a charge that should not be made lightly, and the Tribunal is bound to express its reservations as to whether it is acceptable for charges of that level of seriousness to be advanced without [sic] either some direct evidence or compelling circumstantial evidence. That said, the Tribunal must of course decide the case on the basis of the evidence before it. If the burden of proof is not discharged, the allegation is not made out. The mere existence of suspicions cannot, in the absence of sufficiently firm corroborative evidence, be equated with proof.[100]

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[98] *Methanex Corporation v United States of America* UNCITRAL Final Award of the Tribunal on Jurisdiction and Merits (3 August 2005) Part III-Chapter B [2].

[99] ibid.

[100] See ECE Projektmanagement International GmbH and Kommanditgesellschaft PANTA Achtundsechzigste Grundstücksgesellschaft mbH & Co v Czech Republic (n 77) [4.876].

Another technique involves the use of "red flags" which provides indicators that can help establish if wrongdoing exists.[101] Red flags are series of actions, typically representative of fraudulent activity, such as locations in tax havens, multiple beneficial owners, multiple transactions through bearer shares, cash transactions etc. In such an instance, the investor will be called upon to provide a rational explanation for the red flag. The failure to provide convincing evidence can lead to the dismissal of the case. This happened in the *Metal-Tech v. Uzbekistan* (discussed below in greater detail) where the tribunal explained the red flags theory as possible:

> For the application of the prohibition of corruption, the international community has established lists of indicators, sometimes called "red flags". Several red flag lists exist, which, although worded differently, have essentially the same content. For instance, Lord Woolf, former Chief Justice of England and Wales, included on his list of "Key Red Flags" among other things" (1) "an Adviser has a lack of experience in the sector;" (2) "non-residence of an Adviser in the country where the customer or the project is located;" (3) "no significant business presence of the Adviser within the country; (4) "an Adviser requests 'urgent' payments or unusually high commissions;" (5) "an Adviser requests payments be paid in cash, use of a corporate vehicle such as equity, or be paid in a third country, to a numbered bank account, or to some other person or entity;" (6) "an Adviser has a close personal/professional relationship to the government or customers that could improperly influence the customer's decision".[102]

[101] Vladimir Khvalei, *Using Red Flags to Prevent Arbitration from Becoming a Safe Harbour for Contracts that Disguise Corruption* [2013] ICC Bulletin Tackling Corruption in Arbitration 15 ("Known as 'red flags', such circumstances relate, inter alia, to the identity of the parties (typically state or publicly-owned entities whose real owners are difficult to identify), the location of the parties' dealings (in a country or a sector prone to corruption), remuneration (timing, excessively high rates of commission, payments overseas), the services to be provided (ill-defined and intangible), the parties' business activity (no evidence of real or prior activity, lack of qualified personnel and actual offices)."). Other's refer to this as the "sniff" of corruption test. See Douglas Thompson, 'Arbitrators and Corruption: Watchdogs or Bloodhounds', Global Arbitration Review, 7 May 2014 ("Style laid out a series of indicators that were capable of giving off a 'sniff' of corruption. These included an unusual contractual structure, often including a middleman with no obvious function; a shell company with no offices or employees that is used as a corporate agent; or payments rendered to an agent with no clear experience in the services he purported to provide. However, some audience members suggested that such sniffs of corruption were insufficient to by themselves encourage a suspicion of corruption. Doug Jones pointed out that the practice of tipping in the United States had, on its face, many features that could be mistaken for corrupt payments without sufficient cultural context.").

[102] *Metal-Tech v The Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award (4 October 2013) [293].

### (E) *The Heightened Standard of Proof Does Make it Difficult to Succeed in Allegations of Wrongdoings Even if Circumstantial Evidence is Permitted*

It is fair to state that allegations of wrongdoings are hard to prove, even though they are frequently invoked in investor-state cases and with the use of circumstantial evidence. As Dr. Llamzon has stated: ". . . of the almost 30 cases . . . in which corruption was insinuated or overtly alleged, the only instances in which a finding of corruption was actually made came in the 2006 *World Duty Free v. Kenya* decision and, more recently, in the 2013 *Metal-Tech v. [Uzbekistan]* award."[103]

Since the *World Duty Free v. Kenya* case and the *Metal Tech v. Uzbekistan* case have assumed specific importance in this regard, they warrant careful examination. Despite the dismissal in both these cases, the fact remains that there were admissions

[103] Llamzon (n 96) [194]. The fact that tribunals have not addressed allegations of wrongdoing in detail could be attributed to the fact that tribunals do not have wide prosecutorial powers. See eg A. Crivellaro (n 95) 13 ("International arbitrators are not, as such, the guardians of international morality, but are charged with the mandate of putting an end to a legal or contractual dispute, which requires them to establish the facts and apply the law thereupon. The difficulty resides on the fact that they are adjudicators, not public prosecutors. They are not vested with coercive powers and this greatly limits their effective ability to acquire the proof that is needed for establishing a case of corruption. In contrast, they have the duty to look for the truth and avoid an award contrary to public policy."). Others argue that arbitrators have a duty to investigate allegations of corruption. See eg Douglas Thompson, 'Arbitrators and Corruption: Watchdogs or Bloodhounds' (Global Arbitration Review, May 7, 2014) ("Singaporean arbitrator Michael Hwang SC observed that parties are often reluctant to make allegations of corruption because of concern that their own hands may not be clean or because they recognise the difficulty of proving such claims. Arbitrators should be prepared to raise the issue of corruption on their own initiative, he said. . . . Polkinghorne suggested that arbitrators not only had a right to address corruption but may have an obligation to do so. He observed that EU directives require members of the legal profession to report suspicions where it appears that an arbitration proceeding is being used as a mechanism for money laundering, meaning that arbitrators could incur liability by failing to act."). Still others point to the difficulties in dealing with claims of wrongdoing.; J. N. Summerfield, 'The Corruption Defense in Investment Dispute: A Discussion of the Imbalance between International Discourse and Arbitral Decisions" 2009 6(1) Transnational Dispute Management 11 available at https://www.transnational-dispute-management.com/article.asp?key=1357 accessed on 15 January 2017 ("How is an arbitrator to distinguish between those transactions 'that are more difficult to catagorise [sic]—' that are a product of acceptable market forces and business practices— and those which transcend that acceptable space into corruption and bribery? Sound investments that can support a national economy and provide essential services and jobs to a nation's people do not necessarily reveal the evils to which most normative arguments against corruption would point. The purpose of an investment, however, may be ambiguous and remain ambiguous throughout the arbitration proceedings. This tension is most apparent with respect to gifts, fees for acquiring permits and the dispersal of other facilitation payments. All are permitted under the FCPA. And yet, the two elements of the defense can still be present: undue influence (causation) and undue benefit (compensation).").

of wrongdoings by the investors or detailed examinations of wrongdoing that ultimately sealed the fact.[104]

In *World Duty Free v. Kenya*, Mr. Ali, the owner of the company admitted he had made a "personal donation" of US$500,000 to a former president of Kenya.[105] In order to make the payment, Mr. Ali testified that he felt a briefcase by a wall in a meeting he had with the president and at the end of the meeting, he took the briefcase where the "money had been replaced with fresh corn."[106] However, Mr. Ali felt that he "did not have a choice" and the donation was "part of the consideration."[107] He also justified his conduct by reference to a cultural practice called as the "Harambee" system, where a person "mobilized resources through private donations for public purposes."[108]

The tribunal rejected these arguments and concluded that the payment was a bribe.[109] The tribunal undertook an analysis under international law and both Kenyan and English Law to conclude that the bribe would violate the public policy of Kenya and therefore dismissed the case.[110]

Further, the tribunal did not penalize Kenya even though the tribunal noted that "it is Kenya which is here advancing as a complete defence to the Claimant's claims the illegalities of its own former President."[111] Indeed, even though the bribe had been initiated by the former President and not by the investor, the tribunal noted that the law "protects not the litigating parties but the public" and that the illegal acts of the former

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[104] Yves Fortier, 'Arbitrators, Corruption and the Poetic Experience' (Kaplan Lecture, Hong Kong, 20 November 2014) 20 ("Heightened standards of proof will, of course, make a finding of corruption very problematic as corruption is notoriously difficult to prove and direct evidence is not often available. It is not surprising that in the two cases where a positive finding of corruption was made, the corrupt conduct was admitted in one and, in the other, the tribunal, on its own, vigorously investigated the indicia of corruption.").

[105] *World Duty Free Company Limited v The Republic of Kenya*, ICSID Case No. ARB/00/7, Award (4 October 2006) [66, 130].

[106] ibid [130].

[107] ibid.

[108] ibid [110].

[109] ibid [136].

[110] ibid [179].

[111] ibid [180].

president could not be attributed to Kenya.[112] However, it was the admission of the personal donation by the owner, rather than the application of any evidentiary standard, that sealed his fate.[113]

Llamzon takes a critical approach of the reasoning by the tribunal and points to the asymmetry that exists in the tribunal's treatment of state responsibility for corruption. He correctly points that in international law, states are routinely held liable under the law of state responsibility, however, when it comes to allegations of wrongdoing in investor-state arbitration, an investor is solely held responsible creating an asymmetry. Indeed, the underlying presumption under international law is that a state can be held liable for breaching rules of state responsibility. Investor-state tribunals have, therefore, created an exception to the rules under international law and while there can be good reasons for tribunal's doing so, it is definitely not consistent with the international framework. The excerpt from Dr. Llamzon is particularly significant in this context:

> In international law, States are held to account for internationally wrongful acts through the law on State responsibility. A State is a juridical entity, after all, and its incorporeal being can only operate through the corporeal acts of the individuals and groups that represent it; these are by necessity deemed the acts of the State itself. In much the same way corporations benefit or are held liable for the acts of their officers under principles of agency found in all national systems of law, States are routinely made

[112] ibid [181, 185].

[113] Cecily Rose, 'Questioning the Role of International Arbitration in the Fight Against Corruption' [2014] Journal of International Arbitration 199-200, 203 ("*World Duty Free* arguably represents the most important exception to the general patterns due to its relatively recent vintage and the tribunal's thorough treatment of the issue of corruption. Yet, *World Duty Free* is an aberration because the arbitral tribunal benefited from direct evidence in the form of testimony by a witness for the claimant, whose counsel appears not to have appreciated the damage that such testimony would do to its case. . . . This case is unusual from an evidentiary perspective because the claimant effectively provided the respondent with proof of bribery, such that the respondent had no need to engage in fact-finding, but only had to assemble its legal arguments based on the evidence already available. The submission of this evidence by World Duty Free, and its apparent decision not to settle the arbitral proceedings, appear to have been strategic miscalculations by counsel for World Duty Free. Counsel may have failed to appreciate the legal consequences of Mr Ali's witness testimony, or may have overestimated the strength of its factual and legal arguments about Mr Ali's 'donation'. Alternatively, counsel may have been pursuing what it understood to be a risky litigation strategy, in the hope that it might prevail."); Wilske and Fox (n 72) 496 ("In many cases of corruption, the burden of proof is not really an issue because of an admission by the party that offered a bribe. This occurred in the seminal ICSID case *World Duty Free Company Ltd v The Republic of Kenya*.").

> responsible for the breaches of international obligations committed by their representatives, and a State is not excused from responsibility for acts perpetrated by its public officials simply because those acts were illegal, unsanctioned, or otherwise outside their scope of authority. When a Head of State or cabinet minister orders measures that are tantamount to the unlawful expropriation of an investment, for example, or a State's domestic courts render judgments that disrupt the financial viability of an investor's investment, the State itself is routinely held liable by arbitral tribunals, and it is no argument that the public official acted in excess of his powers or contrary to national law, or that courts are independent and cannot be controlled by the government and thus could not have been acting on behalf of that State. . . .
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> *World Duty Free* is emblematic of an increasingly asymmetric approach to the question of attribution: whereas the corrupt acts of an investor's corporate officers and intermediaries always generates severe consequences against the investor itself, in the case of public officials of the host State, participation in corruption almost never seems to engage the responsibility of the State. This is true notwithstanding the fact that *all* internationally wrongful acts committed by public officials (*a fortiori* Heads of State) are attributable to the State and thus potentially engage its international responsibility.[114]

One basis for the asymmetry could be the fact that the state did not benefit from bribe taken from the former president of Kenya. However, the fact remains that under

[114] A. P. Llamzon, 'State Responsibility for Corruption: The Attribution Asymmetry in International Investment Arbitration' (2013) 10(3) Transnational Dispute Management 2-3 available at https://www.transnational-dispute-management.com/article.asp?key=1958 accessed on 15 January 2017 (emphasis added). Others have shared this view. Douglas Thompson, 'Arbitrators and Corruption: Watchdogs or Bloodhounds' (2014) Global Arbitration Review available at http://globalarbitrationreview.com/article/1033374/arbitrators-and-corruption-watchdogs-or-bloodhounds accessed on 15 January 2017 ("Cabrol said, it may not always be appropriate to view the state as a victim. She referred to the landmark ICSID decision of 2006 in *World Duty Free v Kenya* – in which a tribunal threw out an investor's contract claim against the state on the basis that the contract was procured through a US$2 million bribe paid to Kenya's then-president, Daniel arap Moi. She said the tribunal had failed to explain why an action of the state's highest official was not attributable to the state, as could be the case, in some circumstances, under public international law. The tribunal also failed to adequately explain its finding that the state had no knowledge of the corruption: if the state did not have sufficient controls to prevent corrupt contracts such as that with World Duty Free from being signed, then that could be a situation for which the state can be blamed, she suggested. Finally, by failing to prosecute Moi over the contract or to recover the bribe, the state had shown a lack of interest in preventing corruption. If a state shows it has no interest in the alleged corruption, should it still have the option of voiding the contract to avoid a claim against it?").

traditional rules of international law, the state would be liable for the actions of the President, even if a President acted outside the scope of its authority. Article 7 of the ILC Articles on State Responsibility provides that a person empowered to exercise elements of governmental authority shall be considered "an act of the State" even if such person "exceeds its authority" or "contravenes instructions."[115] As one commentator Yackee noted:

> The second reason that *World Duty Free* is of both scholarly and practical interest is the willingness of the tribunal to overlook the host state's own substantial involvement in the corrupt scheme. The tribunal was not faced with a contract won through the investor's bribing of a corrupt subaltern Kenyan official. Rather, the bribe directly involved the sitting head of state, acting in the official capacity of awarding a public concession. Under traditional international law concepts governing the attribution of international responsibility, there is little doubt that President Moi's actions — if a violation of public international law — would be attributed to the Kenyan state, even if his actions violated Kenyan law or were otherwise outside the scope of his presidential duties. And indeed, in *World Duty Free*, the investor made a last-ditch attempt to argue that it was inequitable to allow Kenya to benefit from its own corrupt actions. . . . But in *World Duty Free*, one party that benefitted from the underlying corrupt action — President Moi, who received, and kept, a suitcase full of money — was not a "party" to the lawsuit. Indeed, the tribunal held that because the payment to President Moi was "covert," "its receipt is not legally to be imputed to Kenya itself."[116]

It is my submission that the current state of affairs in investor-state arbitration is troubling to say the least. While it is not appropriate to permit an investor to gain access to international dispute resolution if the transaction was sullied by corruption, perhaps tribunals could require the state to bear the costs in order not to condone the state's

[115] ILC Draft Articles on State Responsibility, Article 7. The Commentary to the ILC Articles makes clear that this rule would apply "even when the organ or entity in question has overtly committed unlawful acts under the cover of its official status or as manifestly exceeded its competence. . . . the question is whether they were acting with apparent authority." James Crawford, *The International Law Commission's Articles on State Responsibility—Introduction, Text and Commentaries* (Cambridge University Press 2003) 106, 108.

[116] Jason Webb Yackee, 'Investment Treaties and Investor Corruption: An Emerging Defense for Host States' [2012] Virginia Journal of International Law Association 733-734 (emphasis added).

own corruption. Under arbitral rules, investor-state tribunals have a fair amount of discretion when it comes to awarding costs.[117] In one case involving Uzbekistan that is not in the public domain, although the tribunal dismissed the case for lack of jurisdiction on grounds dealing with corruption implicating the state, it required Uzbekistan to deposit 8 million dollars to the United Nations anti-corruption fund in reliance of its discretionary powers to award costs.[118] Approaches of this nature can help ensure that an investor's participation in corruption is not rewarded but at the same time a state is held responsible in some manner.

The only other known case involving a dismissal of a case on allegations of wrongdoings is *Metal-Tech v. Uzbekistan*. In this case, very large sums of money had been paid to consultants who were people with very close ties to the government and the question was whether these sums of money had been paid as a bribe or had been paid for lawful services.[119] Facts relating to these payments had been the subject of several procedural orders and the tribunal had put claimant "on notice" that, *inter alia*, "contemporaneous documents supporting the facts [relating to the services allegedly

[117] See eg Article 61(2) of the ICSID Convention: "In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award." See also Article 42 of the 2013 UNCITRAL Rules: "The costs of the arbitration shall in principle be borne by the unsuccessful party or parties. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case."

[118] See Luke Eric Peterson and Vladislav Djanic, 'In an innovative award, arbitrators pressure Uzbekistan – under threat of adverse cost order – to donate to UN anticorruption initiative; also propose future treaty drafting changes that would penalize states for corruption' IA Reporter (22 June 2017). The article further noted that: 'the tribunal warned that Uzbekistan's failure to make such a payment would lead to an adverse cost order in the case, with the government held liable for the costs of the proceedings, as well as reimbursing the claimant for 75% of more than $17 million in legal fees and expenses. (Conversely, if Uzbekistan made the contribution, it would bear only its own legal costs, and half the cost of the proceedings.).' Arbitrator Brigette Stern is reported to have dissented on this point: 'According to Ms. Stern, the equal role of the two parties in the corruption should be reflected in both of them equally bearing the consequences. She was of the opinion that this was achieved by both parties losing their claims before the tribunal and that there was therefore no basis for differentiating between them in relation to costs.'

[119] *Metal-Tech* (n 102) [244-266].

performed for the payments] would assist the Tribunal in reaching a conclusion regarding the Respondent's corruption defense."[120]

Further, the tribunal noted that it had "made a considerable effort to ensure that it had all relevant evidence that it needed to decide on the corruption allegations."[121] However, the evidence ultimately produced was minimal and could not provide a satisfactory explanation for the large sums and this led the tribunal to ultimately conclude that the "Claimant was unable to substantiate its contention that actual services had been carried out for legitimate purposes."[122] The tribunal also noted that under Article 1(1) of the applicable Uzbekistan-Israel BIT required that an investment be "implemented in accordance with the laws and regulations of the Contracting Party."

Since there has been corruption in the establishment of the investment "sufficient to violate Uzbekistan law," the tribunal concluded that investment was not implemented in accordance with Article 1(1) of the BIT.[123] The failure to present satisfactory evidence despite being provided an opportunity to do so led to the dismissal of the case.

(F) *Problems Associated With The Heightened Standard of Proof*

While there appears to be agreement of a heightened evidence, there is a debate on what this heightened standard should exactly be (clear and convincing or above balance of probabilities or below the criminal law standard). Further, it is not fully clear how a tribunal might apply the heightened standard and, to what extent, must a tribunal go to uncover any allegation of wrongdoing. This is, in part, because the rules provide wide discretion to an arbitral tribunal in dealing with evidentiary issues.

Further, the jurisprudence has not appropriately addressed the stage to deal with such allegations. Therefore, arguments can be raised as jurisdictional, admissibility, merits, and quantum defenses. This gives the party raising an objection an unfair

[120] ibid [253].

[121] ibid [256].

[122] ibid The question before the tribunal was whether the term "implemented" meant "established" or "established and operated." ibid [185]. Undertaking an interpretative exercise, the tribunal concluded that "asset implemented" referred to the "time when the investment was made" and that "the investment must be legal when it is initially established." ibid [193].

[123] ibid [372].

advantage to take multiple bites at the same issue. This can also result in the arbitral process getting delayed and adding to the overall expense. This is discussed below further.

### (G) *Evidentiary Consequences Of Wrongdoings—It Can Give Rise to A Series of Challenges*

Arguments of wrongdoing could give rise to both jurisdictional objections as well as substantive arguments.[124] The jurisprudence has not provided a satisfactory answer to neatly categorize wrongful acts into the arbitral process and it is common to see the arguments being invoked at every opportunity possible.[125] From a costs and efficiency perspective, this is not desirable. It is hoped tribunals would address this issue in some manner, perhaps by recourse to *res judicata* principle although this may only apply if a tribunal has indeed considered an issue and dismissed it on the merits.

The potential consequences for wrongdoings are discussed below:

#### *1. Potential Jurisdictional Challenges*

Some commentators have argued that when an investor is involved in acts dealing with corruption, it forfeits its right to invoke the tribunal's jurisdiction.[126] This is premised

[124] A. C. Smutny and P. Polášek, 'Unlawful or Bad Faith Conduct as a Bar to Claims in Investment Arbitration' (2012) 9(3) Transnational Dispute Management 296 available at https://www.transnational-dispute-management.com/article.asp?key=1794 accessed on 15 January 2017 ("One may observe from the above that issues relating to the establishment of an investment may give rise to both jurisdictional objections and defenses on the merits, and also may give rise to issues under both the ICSID Convention and the investment treaty or contract at issue."). See also *Yukos Universal Limited (Isle of Man) v The Russian Federation*, UNCITRAL, PCA Case No. AA 227, Final Award (18 July 2014) [1273] (where the state argue that because of the investor's "unclear hands": "(a) theTribunal does not have jurisdiction over Claimants' claims; (b) Claimants' claims are inadmissible; and/or (c) Claimants should be deprived of the substantive protections of the ECT.").

[125] The dissenting opinion of arbitrator Cremades in the Fraport arbitration, for example, notes that "gross illegality" can result in lack of jurisdiction or inadmissibility of the claim. See *Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines*, ICSID Case No. ARB/03/25, Dissenting Opinion of Mr. Bernardo M. Cremades (16 August 2007) [40.2] ("In cases of gross illegality there may also be other reasons for the inadmissibility of a claim. In some cases, for example, the principles of good faith and public policy may bar a claim. . . . Alternatively, illegality might have consequences for jurisdiction peculiar to the circumstances of a particular dispute, as for example, where the illegality connects the dispute to events before the treaty entered into force, and therefore deprives the tribunal of *jurisdiction rationae temporis*.") (internal citations omitted).

[126] A. Crivellaro (n 95) 14 ("In the oldest international arbitration dealing with corruption, the sole arbitrator - J Lagergren - declined jurisdiction holding that when the parties have opted for corruptive practices, they have also forfeited any right to seek for assistance of the machinery of justice, be it before national courts or arbitral tribunals, for resolving disputes arising from their illicit contracts. He concluded that the dispute

on the notion that investor-state arbitration is a specialized, exceptional remedy that is available only if the investor has clean hands. Indeed, it has been observed that:

> In dismissing claims arising from an investment obtained unlawfully, some ICSID tribunals have grounded their decision on 'in accordance with law' provisions contained in many BITs; other ICSID tribunals have relied on an implicit legality requirement in Article 25(1) of the ICSID Convention; still others have invoked general principles of international law and transnational public policy. Regardless of the approach taken, however, ICSID tribunals consistently have recognized that illegality in the making of the investment, including corruption, fraud, misrepresentation, and serious violations of domestic law, will lead to the dismissal of the claim, and many of these tribunals also have awarded costs to the respondent.[127]

Further, investor-state tribunals have recognized that wrongdoings could be a bar to its jurisdiction, particularly if the treaty provides for a legality clause ("in accordance with host state laws").[128] The *Metal Tech v. Uzbekistan* case is one example where a case was dismissed on jurisdiction because of corruption, even though the tribunal

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before it was not arbitrable."). The author does go further to note: "In investment arbitration, a specific consequence of an illegality award is the investor's loss of the right to claim protection under international treaties or international law. The investor loses any procedural protection, namely the right to rely on the State's consent to arbitrate the investment disputes before a treaty-based tribunal, and equally loses any substantive protection, namely the enjoyment of the treaty benefits, on the ground that whoever invests in breach of the laws of the host country is precluded or estopped from invoking any treaty protection. In conclusion, the 'clean hands' requirement applies to every claimant also in international arbitration, be it commercial or an investor-to-State arbitration." ibid 22. Zachary Douglas, on the other hand, proposes an alternative theory to deal with jurisdictional objections based on corruption. Zachary Douglas, 'The Plea of Illegality in Investment Treaty Arbitration' (ICSID Review, vol 29(1), 2014) 156, 178 ("The host State's consent to international arbitration is obviously a prerequisite for the tribunal's jurisdiction. But for jurisdictional purposes it is sufficient that the claimant has acquired an asset that is cognizable by the law of the host State and the circumstances surrounding the acquisition satisfies the aforementioned economic characteristics of an investment. If the asset is not recognized under the host State's laws then there is no investment. If the foreign national has purported to acquire property rights in a manner that is not effective to pass title or another legal interest under the host State's laws then there is no investment. This is the extent of the inquiry into compliance with the host State's laws that is relevant to establish the tribunal's jurisdiction. This, as has already been explained, is the meaning of the common provision that the assets constituting an investment must be acquired in accordance with the laws of the host State, but the same principle would apply in the absence of such a provision.").

[127] Lamm, Greenwald and Young (n 95) 342.

[128] See eg *Gustav F. W. Hamester GmbH & Co KG v Republic of Ghana*, ICSID Case No. ARB/07/24, Award (18 June 2010) [123] ("An investment will not be protected if it has been created in violation of national or international principles of good faith; by way of corruption, fraud, or deceitful conduct; or if its creation itself constitutes a misuse of the system of international investment protection under the ICSID Convention. It will also not be protected if it is made in violation of the host State's law.").

acknowledged the asymmetry in its decision.[129] In this situation, a challenge on jurisdiction is more appropriate because the BIT expressly requires that an investment must be in accordance with host state laws, which in turn would not permit corruption or wrongdoings.

### *2. Potential Admissibility Challenges*

Another basis to challenge wrongdoing is that the claims are not admissible by virtue of such corruption,[130] and, therefore the tribunal should dismiss the case. The

[129] *Metal-Tech* (n 102) [389] ("the Tribunal lacks jurisdiction over Metal-Tech's treaty claims as well as over Metal-Tech' claims based on Uzbek law. While reaching the conclusion that the claims are barred as a result of corruption, the Tribunal is sensitive to the ongoing debate that findings on corruption often come down heavily on claimants, while possibly exonerating defendants that may have themselves been involved in the corrupt acts. It is true that the outcome in cases of corruption often appears unsatisfactory because, at first sight at least, it seems to give an unfair advantage to the defendant party. The idea, however, is not to punish one party at the cost of the other, but rather to ensure the promotion of the rule of law, which entails that a court or tribunal cannot grant assistance to a party that has engaged in a corrupt act."). See also *Inceysa Vallisoletana S.L. v Republic of El Salvador*, ICSID Case No. ARB/03/26, Award (2 August 2006) [247-248] ("the inclusion of the clause 'in accordance with law' in the agreements for reciprocal protection of investments follows international public policies designed to sanction illegal acts and their resulting effects. It is uncontroversial that respect for the law is a matter of public policy not only in El Salvador, but in any civilized country. If this Tribunal declares itself competent to hear the disputes between the parties, it would completely ignore the fact that, above any claim of an investor, there is a meta-positive provision that prohibits attributing effects to an act done illegally."); *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award (27 August 2008) [144, 146] ("The Tribunal finds that Claimant's conduct is contrary to the principle of good faith which is part not only of Bulgarian law . . . but also of international law - as noted by the tribunal in the *Inceysa* case. The principle of good faith encompasses, inter alia, the obligation for the investor to provide the host State with relevant and material information concerning the investor and the investment. This obligation is particularly important when the information is necessary for obtaining the State's approval of the investment.").

[130] One tribunal has discussed the difference between jurisdiction and admissibility as follows: "International decisions are replete with fine distinctions between jurisdiction and admissibility. For the purpose of the present proceedings it will suffice to observe that lack of jurisdiction refers to the jurisdiction of the Tribunal and inadmissibility refers to the admissibility of the case. Jurisdiction is the power of the tribunal to hear the case; admissibility is whether the case itself is defective—whether it is appropriate for the tribunal to hear it. If there is no title of jurisdiction, then the tribunal cannot act." *Waste Management Inc. v United Mexican States*, ICSID Case No. ARB(AF)/98/2, Dissenting Opinion of Keith Highet (2 June 2000) [57-58]. See also *Oil Platforms (Iran v United States of America)*, Judgment (6 November 2003), ICJ Rep 2003 161 p 29 ("Objections to admissibility normally take the form of an assertion that, even if the Court has jurisdiction and the facts stated by the applicant State are assumed to be correct, nonetheless there are reasons why the Court should not proceed to an examination of the merits."); *HOCHTIEF Aktiengesellschaft v Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Liability (29 December 2014) [206] ("The Tribunal considers that the principles governing the admissibility of claims are rooted not only in the notion of a claim that is inherently ripe and properly made, but also in the proper administration of justice. Admissibility is concerned both with the claim itself and with the arbitral process. In a case where an allegation of impropriety, made in the context of a plea of inadmissibility, is based upon facts that are inextricably bound up with the range of facts upon which the substantive claim is based, it will usually not be practicable to decide upon the question as a preliminary issue. If the tribunal has jurisdiction to hear the case, it should in such circumstances do so."). This is

argument here is that an investor who has not complied with host state laws (particularly in situations where the treaty does not contain an express legality clause) or international public policy and therefore cannot have its case be admissible. As noted by a commentator:

> First, where there is an explicit "in accordance with host State law", clause which have the effect of depriving foreign investments from treaty protection and, in principle, such clause should therefore operate as a bar to the jurisdiction of an investment treaty tribunal facing with the finding of investor corruption in investor –state disputes. . . .
>
> Second, even in the absence of an explicit 'in accordance with host State law' clause, a strong argument can be made that the finding of investor corruption which will similarly deprive the investor from treaty protection. However, unlike the cases where the explicit 'in accordance with host State clause' is present, the proper place to deal with such investor corruption is at the admissibility or at the merits phase of the arbitral proceedings, not at the stage of jurisdiction.[131]

Other cases have raised wrongdoings objections as both jurisdictional and admissibility challenges although tribunals are not fully clear on how they would treat the issue.[132]

### *3. Potential Merits or Damages Arguments*

Finally, allegations of wrongdoing could be arguments at the merits phase[133] either a defence to reject a substantive argument or as a counterclaim. As an author has suggested:

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true even though both the ICSID Convention and the UNCITRAL Rules on Arbitration are silent on admissibility. See for ICSID Convention: *CMS Gas Transmission Company v Republic of Argentina*, ICSID Case No. ARB/01/8, Award on Jurisdiction (17 July 2003) [41] ("The distinction between admissibility and jurisdiction does not appear quite appropriate in the context of ICSID as the Convention deals only with jurisdiction and competence."); for UNCITRAL Arbitration: *Methanex Corporation v United States of America* UNCITRAL, Partial Award (7 August 2002) [107] ("It follows from the text of Article 21(1) of the UNCITRAL Rules that the Tribunal has the express power to rule on objections that it has "no jurisdiction". This text, however, confers no separate power to rule on objections to "admissibility.").

[131] T. Sinlapapiromsuk, 'The Legal Consequences of Investor Corruption in Investor-State Disputes: How Should the System Proceed?' 2013 10(3) Transnational Dispute Management 28 available at https://www.transnational-dispute-management.com/article.asp?key=1959 accessed on 15 January 2017.

[132] See eg *Yukos Universal Limited* (n 124) [1273] (where the issue of "unclean hands" was pleaded as both a jurisdictional issue as well as an admissibility issue).

> Taken together with the relevant provisions in the investment contract or the applicable law, such rights may constitute the conceptual basis for the admissibility of treaty-based counterclaims. This statement holds true especially in cases involving corruption where the host-State may be interested in being awarded damages to compensate for the negative consequences of the failed-corrupted investment.[134]

The application of counterclaims for potential actions of wrongdoings is subject to the general practice in investor-state arbitration whereby counterclaims are typically restricted only if it relates to the same subject matter.

> [T]wo conditions must be met for an ICSID tribunal to entertain a counterclaim: (i) the counterclaim must be within the jurisdiction of the Centre, which includes the requirement of consent, and (ii) it must "aris[e] directly out of the subjectmatter of the dispute", the second requirement also being known as the "connectedness" requirement. Essentially, the second requirement supposes a connection between the claims and the counterclaims. It is generally deemed an admissibility and not a jurisdictional requirement.[135]

If the alleged unlawful act relates to misconduct, it may be a potential basis to reduce damages under the doctrine of contributory fault. The *Yukos* case and the

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[133] See eg *Wena Hotels LTD v Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award( 8 December 2000) [111] ("Tribunal considers Egypt's contention that 'Claimant improperly sought to influence the Chairman of EHC with respect to the award of the leases' for the Luxor and Nile hotels. If true, these allegations are disturbing and ground for dismissal of this claim. As Egypt properly notes, international tribunals have often held that corruption of the type alleged by Egypt are contrary to international *bones mores*."); *Hesham Talaat M Al-Warraq v Republic of Indonesia*, UNCITRAL, Award on Respondent Preliminary Objections to Jurisdiction and Admissibility of the Claims (21 June 2012) [99] ("the Tribunal must look closely at the Parties' claims concerning the allegations of criminal conduct, which include the corruption and money laundering allegations against the Claimant on the one hand, and the solicitation of bribes allegations against the Respondent on the other hand. This is not a question of jurisdiction but of the merits, to be dealt with at the merits phase of this arbitration.").

[134] S. Dudas and N. Tsolakidis, 'Host-State Corruption: A Remedy for Fraud or Corruption in Investment-Treaty Arbitration' (2013) 10(3) Transnational Dispute Management 7 available at https://www.transnational-dispute-management.com/article.asp?key=1962 accessed on 15 January 2017 .

[135] *Metal-Tech* (n 102) [407] (the tribunal ultimately stated it did not have jurisdiction over the counterclaims). See also ICSID Convention, Article 46: "Except as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counterclaims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre."

*Occidental* case were instances where the tribunal relied on the doctrine of contributory fault to reduce damages.[136]

### *4. Interim Conclusions on Allegations of Wrongdoings*

What the exact consequences of an unlawful act might depend on the language in the applicable treaty or contract or on specific factual circumstances. For example, if a treaty has a legality clause ("investments must be made in accordance with host state laws") and the allegation of wrongdoings relates to breach of domestic law, then it is likely to be raised as a jurisdictional objection. If not, it can be an issue for admissibility and/or the merits. What is unsatisfactory at this stage is allegations of wrongdoings are often invoked at all three stages which increases the costs and reduces efficiency of the process. It is hoped that tribunals will devise techniques to deal with the consequences of wrongful acts in a manner that balances the significant issues at stake but also preserves the integrity of the arbitral process. For example, tribunals could state in the award that its findings on wrongdoings are *res judicata* and cannot be raised at subsequent stages of the proceeding, provided the tribunal has made a finding after having considered the merits.

Further, as discussed above, the ruling of the *World Duty Free* tribunal appears to be inconsistent with general principles of international law wherein wrongdoing of state actors does not provide a general exemption to the state. It remains to be seen how future tribunals will address similar situations.

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[136] *Yukos Universal Limited* (n 124) [1637] ("Having considered and weighed all the arguments which the Parties have presented to it in respect of this issue the Tribunal, in the exercise of its wide discretion, finds that, as a result of the material and significant misconduct by Claimants and by Yukos (which they controlled), Claimants have contributed to the extent of 25 percent to the prejudice which they suffered as a result of Respondent's destruction of Yukos. The resulting apportionment of responsibility as between Claimants and Respondent, namely 25 percent and 75 percent, is fair and reasonable in the circumstances of the present case."); *Occidental Petroleum Corporation and Occidental Exploration and Production Company v Republic of Ecuador*, ICSID Case No. ARB/06/11, Award(5 October 2012) [678, 680] ("The Tribunal agrees that an award of damages may be reduced if the claiming party also committed a fault which contributed to the prejudice it suffered and for which the trier of facts, in the exercise of its discretion, considers the claiming party should bear some responsibility. . . . In the view of the Tribunal, the Claimants should pay a price for having committed an unlawful act which contributed in a material way to the prejudice which they subsequently suffered when the *Caducidad* Decree was issued.").

## *VI. PROBLEMS AND CRITICISMS ASSOCIATED WITH THE CONCEPT OF "STANDARD OF PROOF"*

The concept of standard of proof is wrought with problems and is relatedly criticized for several reasons. It is worth examining these criticisms before we examine the different types of standards of proof because this can help provide some context on how investor-state tribunals operate.

The first criticism is that investor-state tribunals have not consistently applied principles relating to standard of proof. This can perhaps be because there are differences between the civil and common law conceptions on standard of proof, for example, whether the concept of standard of proof is procedural or substantive in nature. All these varying conceptions can result in different formulations for the standard of proof and this has led to a fair dealing of confusion. As noted by Waincymer:

> Arbitral statutes and rules rarely articulate the principles of standard of proof in any detail. The Eritrea-Ethiopia Claims Commission noted that international adjudication rules do not typically "articulate the quantum or degree of proof that a party must present to meet this burden of proof." Standard of proof is seen as being more problematic as it not only may have issues of characterization in terms of procedural versus substantive law but might "also reflect subjective standards ("inner conviction") of arbitrators.[137]

While this criticism is true, it is perhaps a direct consequence of the international nature of these disputes where both civil law and common law conceptions on evidence are likely to collide. This is also true for the ICJ where standard of proof has not been clarified meaningfully.[138] For example, the Separate Opinion of Judge Burgenthal in the

[137] Jeffrey Waincymer (n 6) 767.

[138] See generally Riddell and Plant (n 1) 130 ("there appears to be a divide between the Judges from the different legal traditions on the question of the standard of proof. Those with a common law background have repeatedly called for clarification of this issue in order to introduce some certainty for the parties, and it is perhaps predictable that the majority of judges advocating a particular standard are from a common law background. . . . Those with a civil law background do not consider that there is anything amiss with the way the Court deals with the matter at present, being accustomed to the matter being 'internal' to the individual judge, and not something which needs to be publicly articulated, and they do not consider it necessary to adopt a rigid standard. In addition, there may be those amongst the common law lawyers who believe that a concrete standard is inappropriate in the ICJ because it may deny the Court some of its usual flexibility of approach to matters of evidence and proof, which is important to retain on

*Oil Platforms case* highlights the problems that come up in dealing with issues dealing with standard of proof and how the ICJ has not clarified the appropriate standard of proof:

> One might ask, moreover, where the test of "insufficient" evidence comes from and by reference to what standards the Court applies it? What is meant by "insufficient" evidence? Does the evidence have to be "convincing", "preponderant", "overwhelming" or "beyond a reasonable doubt" to be sufficient? The Court never spells out what the here relevant standard of proof is.[139]

Judge Higgins similarly provided a detailed exposition relating to the lack of clarification by the ICJ on matters dealing with standard of proof in her dissent in the *Oil Platforms* case:

> 30. . . . it may immediately be noted that neither here nor elsewhere does the Court explain the standard of proof to be met. That a litigant seeking to establish a fact bears the burden of proving it is a commonplace, well-established in the Court's jurisprudence. But in a case in which so very much turns on evidence, it was to be expected that the Court would clearly have stated the standard of evidence that was necessary for a party to have discharged its burden of proof.
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> 31. As to standard of proof in previous cases, the Court's prime objective appears to have been to retain a freedom in evaluating the evidence, relying on the facts and circumstances of each case.
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> 32. In *Corfu Channel*, the Court simultaneously rejected evidence "falling short of conclusive evidence" and referred to the need for "a degree of certainty." In *Military and Paramilitary Activities in and against Nicaragua*, the Court did not even attempt to articulate the standard of proof it relied on, merely holding from time to time that it found there was "insufficient" evidence to establish various points.
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> 33. Beyond a general agreement that the graver the charge the more confidence must there be in the evidence relied on, there is thus little to help parties appearing before the Court

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this issue given the wide range of subjects of varying degrees of importance which are disputed in the ICJ.").

[139] *Oil Platforms (Islamic Republic of Iran v United States of America)*, Separate Opinion of Judge Burgenthal [2003] [41] (emphasis added).

> (who already will know they bear the burden of proof) as to what is likely to satisfy the Court. Other judicial and arbitral tribunals have of necessity recognized the need to engage in this legal task themselves, in some considerable detail. The principal judicial organ of the United Nations should likewise make clear what standards of proof it requires to establish what sorts of facts. Even if the Court does not wish to enunciate a general standard for non-criminal cases, it should in my view have decided, and been transparent about, the standard of proof required in this particular case.[140]

The views of Judge Higgins reflect the reality even in the investor-state context where the underlying rationale for lack of clarity on standards of proof tends to be explained by the notion of free evaluation of evidence by the arbitral tribunal. However, Judge Higgins also notes that the Court should have ideally expressed the standard of proof in the case at hand. This can help create a consistent and harmonious development of the law more generally but can also help the parties in a case appreciate the appropriate amount of evidence that it has to provide. The options before the ICJ against an ICJ decision are fairly limited but, in the investor-state context, the possibility of annulment exists. More generally, as discussed above, there is fortunately a high degree of agreement on the standard of proof in many areas.

The second criticism is that reliance on arbitral discretion or notions of free evaluation of evidence can be highly subjective and unfair to a litigant in the dispute resolution process. As a commentator has noted: "It may appear that the answer to the question, what is an acceptable standard of proof for international tribunals, depends to some extent on the fact that in this regard there is subjectivity in judgment."[141] This is a serious argument.

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[140] Oil Platforms (Islamic Republic of Iran v United States of America), Separate Opinion of Judge Higgins [2003].

[141] Chittharanjan F. Amerasinghe (n 1) 233. As noted above, the author goes further to state: "To frame the matter in terms of 'moral conviction' or 'convincing or satisfying the judge' may not always reveal the ultimate test which is being applied. There may be, in order to do justice, a need to have a more concrete standard. In any case tribunals have not hesitated, where necessary, to indicate standards of proof in different and specific terms, although sometimes no more than those general terms have been used." ibid 233. See also George C. Economou, *Admissibility and Presentation of Evidence in International Commercial Arbitration*, available at http://www.cyprusarbitration.com.cy/userfiles/files/Seminars/Nov2012/AdmissibilityAndPresentationOfEvid

## *VII. CONSEQUENCES OF FAILING TO APPLY THE APPROPRIATE STANDARD OF PROOF*

Failure to apply the appropriate standard of proof will result in the dismissal of an allegation being made by a party as being "not proved." The query is whether a party could potentially seek annulment of an arbitral award on grounds that a tribunal failed to apply the appropriate standard of proof.

An investor could bring a challenge under Article 52(1)(d) on the grounds that there has been a "serious departure from a fundamental rule of procedure."[142] A tribunal seriously departs from a fundamental rule of procedure, if it denies the parties' their respective right to be heard or fails to treat them with equality. A tribunal denies the parties their respective right to be heard if it denies to one or both of the parties the right to make submissions with respect to core issues in dispute in derogation of applicable evidentiary principles or if it purposefully disregards evidence or submissions before it. If a tribunal, therefore, permitted a party to present its evidence and made a finding, there can be no challenge on this ground in relation to the standard of proof.

But, the failure to hear parties can be a potential basis for the challenge on this ground. In order to demonstrate how this ground would work in practice, an illustrative case is discussed. In *Fraport v. Philippines*, after the close of proceedings, respondent submitted additional documents, purporting to be the prosecutorial record of domestic criminal proceedings relating to the dismissal of charges against persons related to the company in which the claimant held an investment.[143] Claimant sought to submit additional evidence to show that the prosecutorial record included more documents than

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ence_Nov2012.pdf, p. 3 ("As a general rule, a party has the burden of proving the facts necessary to establish its claim or defense. As regards the standard of proof, however, i.e., the quantum or degree of proof used to determine whether this burden has been discharged has not evolved into a general rule. There is very little precedent on the subject. This fact is in part a reflection of the general rule that a tribunal has discretion to determine the value of all evidence submitted by the parties. Such discretion is inherently subjective; the tribunal must decide whether, based on evidence submitted by the parties, a particular claim or defence has been established. This discretionary authority by its nature invites an entirely personal assessment of evidence by the tribunal.").

[142] See Chapter 2 for a further discussion on annulment.

[143] *Fraport AG Frankfurt Airport Services Worldwide v Philippines*, ICSID Case No ARB/03/25, Decision on Annulment (23 December 2010) [120(b)].

were produced by Respondent.[144] The tribunal instructed the parties not to submit any further evidence with regard to domestic criminal proceedings but relied on the evidence submitted by Respondent in dismissing the case. Here, the failure to produce additional evidence directly impacted the applicable standard of proof in issue. The *ad hoc* committee concluded that the decision not to permit additional submissions on the prosecutorial record constitutes a violation of the right to be heard. It noted in particular:

> The Convention does not define "a fundamental rule of procedure." . . . The *travaux* of the ICSID Convention show a consensus that not all rules of procedure contained in the ICSID Arbitration Rules would fall under this concept. Rather, the concept was restricted to the principles of natural justice, including the principles that both parties must be heard and that there must be adequate opportunity for rebuttal. . . .
>
> In view of the fact that the information as to what documents were in the possession of the Prosecutor had been shown to be unreliable, the Tribunal could not properly, in the Committee's view, have made such a determination, without hearing both parties on the adequacy and effect of the record before the Prosecutor and considering such further evidentiary enquiries or proceedings as may have been necessary in light of those submissions. Despite this, the Tribunal had pre-emptively, and before it had even received the additional factual material, directed by letter dated 14 February 2007 that "the Tribunal does not wish to receive any submissions with respect to this material from either party." . . .
>
> The Tribunal ought not to have proceeded to analyse and consider this evidence itself in its deliberations without having afforded the parties the opportunity to make submissions on it, and availed itself of the benefit of those submissions.[145]

On the application of the standard of proof, however, it is to be recalled that a tribunal has broad discretion to freely evaluate the evidence and therefore arguments that a tribunal did not apply the appropriate standard to the facts is likely to be difficult. It is worth emphasizing here that a tribunal does not possess absolute, free discretion.

[144] ibid [127-129].

[145] ibid [181, 186, 227-228, 230].

As noted above, an annulment committee can never be asked to re-evaluate the evidence on its merits and, itself, apply guided discretion to the underlying dispute at bar in the arbitration. Rather, annulment applications test whether the exercise of discretion was guided by the fundamental principles of due process, natural justice or the rule of law and will control for decisions in which tribunals have become unmoored from those principles.[146] In other words, there will be a high deference accorded to the decisions of a tribunal unless it can be shown that the failure to apply the standard of proof violated a rule of due process, natural justice, or the rule of law. Further, the finding of the arbitral tribunal needs to be outcome determinative to meet the "serious" requirement in the criteria.

## *VIII. THE USE OF CIRCUMSTANTIAL EVIDENCE AS RECOGNIZED AND APPLIED BY INVESTOR-STATE ARBITRATION*

On several issues in investor-state arbitration, particularly (as noted above) for allegations relating to wrongdoing, direct evidence may not be available.[147] In such instances, tribunals have permitted the use of circumstantial evidence, wherein the tribunal would accept indirect evidence or rely an inference to decide an issue.[148] This is not unique to investment arbitration and is recognized by other international courts and tribunals. The underlying rationale for this is that it would be very hard to possess direct evidence to prove everything in any case. The problem is particularly acute in the investor-state context. Unlike a domestic court, arbitral tribunals do not have police powers to demand additional evidence from the parties or from third parties. Therefore,

[146] *Daimler Financial Services AG v Argentina*, ICSID Case No ARB/05/1, Decision on Annulment (7 January 2015) [265] ("With respect to the rules of procedure that are to be considered fundamental, the Committee considers that they are the rules of natural justice i.e., rules concerned with the essential fairness of the proceeding.").

[147] Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge University Press 1956) 322 ("In cases where direct evidence of a fact is not available, it is a general principle of law that proof may be administered by means of circumstantial evidence. In the *Corfu Channel Case* (Merits) (1949), before the International Court of Justice, Judge Azevedo said in his dissenting opeinion: 'A condemnation, even to the death penalty, may be well-founded on indirect evidence and may nevertheless have the same value as a judgment by a court which has founded its conviction on the evidence of witnesses'.").

[148] For further discussions on inference, see chapter 6.

an international body may not be able to insist on direct evidence in all situations. Indeed, commentators have opined in the context of the ICJ that:

> Over the years, the ICJ has taken a flexible approach to the admissibility of evidence. The Court evaluates the authenticity, reliability, and persuasiveness of the materials submitted by the parties. One possible reason for the Court's malleable approach, according to the ICJ's former Registrar, Eduardo Valencia- Ospina, is the Court's perceived ability to "ascertain the weight and relevance of particular evidence" due to the judges 'qualifications and experience.' The Court, therefore, permits the parties to submit many types of direct and circumstantial evidence. Because of this flexible approach, the Court has not found the need to articulate its evidence policy in many cases.[149]

The mere fact that circumstantial evidence is permitted does not imply that the party would not have to meet the requisite burden and standard of proof.[150] The only implication here is that the party could rely on indirect evidence or on an inference to prove the issue.[151]

Further, investor-state arbitral tribunals have noted that circumstantial evidence could be admissible, particularly in situations where direct evidence might be difficult,

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[149] Michael P Scharf and Margaux Day, 'The International Court of Justice's Treatment of Circumstantial Evidence and Adverse Inferences' [2012] Chicago Journal of International Law 123, 125 (emphasis added). See also Bin Cheng (n 147) 322 ("In cases where direct evidence of a fact is not available, it is a general principle of law that proof may be administered by means of circumstantial evidence.").

[150] See eg *Lao Holdings* (n 37) [11] ("The Tribunal notes the Claimant's contention that against a sovereign state a Claimant 'is often unable to furnish direct proof of facts giving rise to responsibility' because, as the Claimant argues, such evidence is often 'exclusively within the control of the Government'. Nevertheless where, as here, the Claimant's case is based on 'inferences of fact and circumstantial evidence' . . . a Tribunal must be careful not to shift the onus of proof from the Claimant to the Respondent Government or to bend over backwards to read in inferences against 'the sovereign state' that are simply not justified in the context of the whole case.").

[151] Tribunals have used circumstantial evidence to make findings of fraud. See eg *Europe Cement* (n 82) [167] ("In the Tribunal's view the circumstantial evidence points strongly to the conclusion that Europe Cement did not own shares in CEAS and Kepez at the relevant time. In view of the failure of the Claimant to produce the documents ordered, the Tribunal has no direct evidence that any particular document placed before it was or was not authentic, but the implication of lack of authenticity is overwhelming. All of the evidence placed before the Tribunal, and not contradicted by the Claimant, is that the share transfer agreements are not what they claim to be and that no transfer of CEAS and Kepez shares to Europe Cement took place at least before 12 June 2003. Indeed, the evidence points to the conclusion that the claim to ownership of the shares at a time that would establish jurisdiction was made fraudulently.").

but further corroboration would be necessary and a heightened standard above the balance of probabilities would apply. As noted by the *Tokios Tokelės v. Ukraine*:

> As regards the standard, three possibilities have attracted support. First, the usual standard, which requires the party making an assertion to persuade the decision-maker that it is more likely than not to be true. Second, that where the dispute concerns an allegation against a person or body in high authority the burden may be lower, simply because direct proof is likely to be hard to find. Third, that in such a situation, the standard is higher than the balance of probabilities.[152]

In *Tokios*, the investor had published materials in support of the opposition leader and, therefore, the investor alleged that its investment was destroyed by "a deliberate campaign to punish [the company] for its impertinence in printing materials opposed to the regime."[153] While the tribunal noted that direct evidence might be hard, it still noted that the evidence needed to be proved by the investor. The tribunal noted that the investor's submission was filled with strong descriptions (*e.g.*, "wrongful", "frivolous", "unfounded", "without adequate grounds", "patently unjust", "false" etc.), however, the tribunal ultimately concluded that the investor never established the "campaign" to destroy its business with clear evidence.[154] Therefore, to conclude, in case of allegations of wrongdoings through circumstantial evidence, the evidence must lead to a clear conclusion of the appropriate standard.[155] In other words, the party must convince the tribunal of the heightened standard for wrongdoings even without direct evidence.

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[152] *Tokios Tokelés v Ukraine*, ICSID Case No. ARB/02/18, Award (26 July 2007) [124].

[153] ibid [123].

[154] ibid [137] ("this long and costly dispute turns on a short question of inference. Having reflected with great care, giving full weight to the contrary opinion of our colleague, each of us has come to the firm conclusion that the case for the Claimant on this decisive issue is not made out, and we therefore join in dismissing all the causes of action asserted under the Treaty.").

[155] See eg *Fraport* (n 97) [479] ("The Tribunal holds that considering the difficulty to prove corruption by direct evidence, the same may be circumstantial. However, in view of the consequences of corruption on the investor's ability to claim the BIT protection, evidence must be clear and convincing so as to reasonably make-believe that the facts, as alleged, have occurred. Having reviewed the Parties' positions and the available evidence related to the period prior to Fraport's Initial Investment, the Tribunal has come to the conclusion that Respondent has failed to provide clear and convincing evidence regarding corruption and fraud by Fraport."); *Rumeli Telekom AS and Telsim Mobil Telekomunikasyon Hizmetleri AS v Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award (29 July 2008) [709] ("Claimants, however, advanced a very much broader case than this, founded on an allegation that the

The next form of circumstantial evidence relates to hearsay evidence that might be reflected in the media. In the digital age we live in, several new forms of communication have arisen and data is much more easily assessable through the internet. Parties, therefore, seek to rely on evidence from digital media sources. Investor-state tribunals have general taken a liberal form of admitting such evidence but when the evidence involves "hearsay" (*e.g.*, newspaper articles), tribunals recognize that they would not be of much value in the absence of other forms of corroborating evidence.[156]

The approach of investor-state tribunals when it comes to circumstantial evidence may appropriately be summarized as follows: reliance on circumstantial evidence is permissible but it needs to be corroborated and the appropriate standard of proof must be established. Failure to do so can lead to a dismissal of that claim.

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entire process leading to the expropriation of their shares in Kar-Tel was brought about by a conspiracy between the shareholders of Telcom Invest, the Investment Committee, and the judges of the courts who heard the various stages of the legal proceedings, to bring about a result which benefited members of the family of the President of the Republic of Kazakhstan, and thereby indirectly the President himself. The evidence for this was mainly, if not wholly circumstantial, but it is in the nature of such an allegation that direct evidence of a conspiracy is unlikely to be available. The Tribunal has therefore considered the evidence with particular care, reminding itself that an allegation such as this must, if it is to be supported only by circumstantial evidence, be proved by evidence which leads clearly and convincingly to the inference that a conspiracy has occurred.").

[156] *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC BV v Republic of Paraguay*, ICSID Case No. ARB/07/9, Further Decision on Objections to Jurisdiction (9 October 2012) [234] ("The Claimant also invokes a number of newspaper articles in support of its claims. For example, it refers to an article in *Última Hora* dated 31 July 2001 ("*No se pagarán deudas a las SGS y la BIVAC*"), that reports that Minister Oviedo announced that he will not pay a single *guaraní* to BIVAC without Congress' authorization, as the debt relates to a contract that was entered into by former governments. It invokes an article dated 7 May 2005 in *ABC Color* ("*Hacienda anuncia investigación de deudas con SGS y BIVAC*"), which asserts that the Minister will launch a new investigation, notwithstanding the recent report by the Customs Office vindicating the Claimant. Another article published by the same newspaper on 18 May 2006 ("*Gobierno solo pagará las deudas legítimas*", *ABC Color*) includes a quote from President Duarte, during a visit to France, in which it is alleged that he stated that "I do not have anything to do with previous Governments" and that no debt would be paid that was not clear. The following day a further article was published ("*Deuda con los franceses data de la era Wasmosy*", *ABC Color*), alleging a statement by President Duarte that suggested the obligations had been assumed by a previous Government that may not have accrued them lawfully. Interesting as they may be, the Tribunal is wary about placing too much reliance on newspaper reports, which may provide an incomplete or partial account of what has been said, even assuming that the quotations are accurately recorded and reproduced. The Tribunal has no objection to treating such reports, which are in the public domain as admissible but of limited, if any, probative weight. That said, even assuming such reports to be fully accurate, they do not, in the view of the Tribunal, constitute a repudiation by Paraguay of the Claimant's rights to relief under the Contract, or an exercise of sovereign authority that can reasonably be said to go beyond behaviour that an ordinary contracting party might adopt if it had decided not to make a payment owing under a contractual obligation.").

## *IX. 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 standard of proof and, therefore, the relevant question is whether there are any principles relating to standard of proof as recognized and applied by investor-state tribunals?

The following conclusions can be drawn from the thesis:

***First***, standard of proof can be understood as the amount of evidence that must be provided by the party that has the burden (*i.e.*, the party making the allegation). Indeed, the concept of standard of proof is closely related but distinct from the concept of burden of burden of proof. Burden of proof is a concept dealing with responsibility and answers the question "who must prove?," while standard of proof is a concept dealing with the degree of conviction and answers the question "how much needs to be proved?" A related distinction is that burden of proof is "absolute"—*i.e.*, the party with the burden has the burden and is not relaxed even in extreme situations of hardships. The standard of proof is "relative." This means that issues relating to standard of proof will vary based on the nature of the allegation being put forward by the party with the burden.

***Second***, most arbitral rules are silent on principles relating to standard of proof and do not provide much guidance. Therefore, a tribunal has broad discretion to deal with evidentiary matters, including matters dealing with standard of proof. However, a tribunal does not possess unfettered discretion when it comes to dealing with standard of proof. Indeed, a decision on standard of proof must be appropriate for there is the risk that the ultimate award could be challenged or even annulled.

***Third***, there are three broad standards of proof applied by arbitral tribunals: (i) the *prima facie* standard at the jurisdictional phase (discussed in chapter 2 above); (ii) the balance of probabilities or preponderance of evidence standard; and (iii) the heightened

standard of proof, with a discussion on allegations of wrongdoing that are increasingly invoked.

***Fourth***, the most common standard of proof in investor-state arbitration is the "balance of probabilities" or "preponderance of evidence" standard. 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. This standard would extend to most situations in investor-state arbitration, except the limited categories where a heightened standard of proof would apply. This standard would be similar with the civil law's "inner conviction" test, where an arbitrator must be personally convinced of the evidence produced. Indeed, while there is a difference on how civil and common lawyers might approach the issue, the practical consequence is the same: you evaluate the evidence produced and be convinced that the evidence is more likely than not true.

***Fifth***, for matters that implicate "serious" issues or issues that might touch on criminal law matters, the balance of probabilities/preponderance test will not be appropriate, instead a heightened standard of proof would apply. A heightened standard is warranted because these allegations are often easy to make but may not always be easy to prove. Further, these standards can have very serious consequences and can result in dismissal of the case. The heightened standard has to be above the balance of probabilities standard but below the criminal law standard of proof beyond reasonable doubt.

***Sixth***, in light of the fact there might be a the lack of direct evidence when dealing with allegations of wrongdoings, circumstantial evidence might be relied upon, as long as it meets the high standard outlined above. This is because direct evidence will be almost impossible on matters dealing with wrongdoings in any investor-state arbitration. However, the evidence still need to meet the heightened standard of evidence.

***Seventh***, the failure to apply the appropriate standard of proof can result in a challenge for annulment under Article 52(1)(d) of the ICSID Convention on grounds that there is a "serious departure from a fundamental rule of procedure." But, it is to be recalled that a tribunal has broad discretion to freely evaluate the evidence and

therefore arguments that a tribunal did not apply the appropriate standard to the facts is likely to difficult. It is worth emphasizing here that a tribunal does not possess absolute, free discretion. Further, an annulment committee can never be asked to re-evaluate the evidence on its merits and, itself, apply guided discretion to the underlying dispute at bar in the arbitration. Rather, annulment applications test whether the exercise of discretion was guided by the fundamental principles of due process, natural justice or the rule of law and will control for decisions in which tribunals have become unmoored from those principles. Therefore, it is my conclusion that there will be a high deference accorded to the decision of the arbitral tribunal unless it can be established that the failure to apply the standard of proof violated a rule of due process or rule of law.

# PART II

# EVIDENTIARY PRINCIPLES & THE TRIBUNAL: PRESUMPTIONS AND INFERENCES

## Introduction to Part II

"Despair ruins few, presumptions many."

-Benjamin Franklin

Part II deals with the evidentiary principles as recognized and applied by the arbitral tribunals on evidentiary presumptions and inferences. Unlike Part I, the findings in this Part are made by the tribunal and, therefore, warrant a special part. Indeed, an arbitral tribunal determines when to apply a presumption or inference considering the facts of the case and the evidence before it.

Chapter 6 deals with presumption where the tribunal makes a determination of fact without direct evidence or appropriate project related-circumstantial evidence but the tribunal is convinced of the truth of a fact based on either the relevant general surrounding circumstances (judicial presumption) or based upon the applicable law (legal presumption). Chapter 6 examines the evidentiary principles under which a tribunal may decide to apply a presumption.

Chapter 7 deals with inferences which refers to a conclusion that, as a matter of *plausibility* of a fact, must be concluded to be true in light of other relevant and probative record evidence as well as party conduct in the arbitral proceedings. Chapter 7 examines the evidentiary principles under which a tribunal may decide to apply an inference.

As is noted above, Part II focuses on the role of the arbitral tribunal in determining when to apply a presumption of inference. This is significant because an arbitral tribunal has discretion in determining when to apply these. Therefore, the consequences for falling to apply a presumption or inference would necessarily be subject to a very high degree of deference to the tribunal's discretion. The precise consequences for failing to apply the relevant evidentiary principles are discussed below.