THE INVESTMENT TREATY ARBITRATION REVIEW

FIFTH EDITION

Editor
Barton Legum

THE LAWREVIEWS

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This article was first published in June 2020
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Published in the United Kingdom
by Law Business Research Ltd, London
Meridian House, 34–35 Farringdon Street, London, EC4A 4HL, UK

www.TheLawReviews.co.uk

ISBN 978-1-83862-471-2

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

4 NEW SQUARE CHAMBERS

ANWALTSBÜRO WIEBECKE

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PREFACE

This year's edition of *The Investment Treaty Arbitration Review* goes to press under particular circumstances. Measures to contain the covid-19 pandemic around the world have confined authors to quarters. Despite these constraints, the authors of this volume have delivered their chapters. The result is a new edition providing an up-to-date panorama of the field. This is no small feat given the constant flow of new awards, decisions and other developments over the past year.

Many useful treatises on investment treaty arbitration have been written. The relentless rate of change in the field rapidly leaves them out of date.

In this environment of constant change, *The Investment Treaty Arbitration Review* fulfils an essential function. Updated every year, it provides a current perspective on a quickly evolving topic. Organised by topic rather than by jurisdiction, it allows readers to access rapidly not only the most recent developments on a given subject, but also the debate that led to and the context behind those developments.

This fifth edition adds new topics to the *Review*, increasing its scope and utility to practitioners. It represents an important achievement in the field of investment treaty arbitration. I thank the contributors for their fine work in developing the content for this volume under the difficult conditions prevailing today.

Barton Legum
Dentons
Paris
May 2020

Part II

Admissibility and Procedural Issues

Chapter 10

BURDEN AND STANDARD OF PROOF IN INVESTMENT ARBITRATION

Mladen Stojiljković and Daniele Favalli[1]

I INTRODUCTION

Matters relating to the burden and the standard of proof have increasingly been receiving scholarly attention in the past years in both investment[2] and commercial arbitration.[3] Likewise, in the practice of arbitration, parties tend to spend more time arguing the applicable evidentiary rules, particularly regarding complex issues such as corruption allegations and the substantiation of future damages. Arbitral tribunals, too, increasingly try to address the applicable rules of evidence in their awards. This chapter provides an overview of the pertinent issues and recent developments regarding the burden and the standard of proof in investment arbitration.

1 Mladen Stojiljković is a counsel and Daniele Favalli a partner at VISCHER in Zurich, Switzerland.

2 See, e.g., Kabir Duggal & Wendy W Cai, *Principles of Evidence in Public International Law as Applied by Investor-State Tribunals: Burden and Standards of Proof* (2019); Nathan D. O'Malley, *Rules of Evidence in International Arbitration: An Annotated Guide* (2nd edn, 2019); Frédéric G. Sourgens, Kabir AN Duggal & Ian A Laird, *Evidence in International Investment Arbitration 2.02* (2018); Gary Born, On Burden and Standard of Proof, in: Meg Kinnear et al. (eds) *Building International Investment Law: The First 50 Years of ICSID* 43-54 (2015).

3 See, e.g., Philipp Alfter, *The Standard of Proof in International Commercial Arbitration, Effects of the Best Practice of Document Production on Proof* (2019); Mateus Aimoré Carreteiro, Burden and Standard of Proof In International Arbitration: Proposed Guidelines for Promoting Predictability, *49 Revista Brasileira de Arbitragem 82-109* (2016); Richard Kreindler, Practice and Procedure Regarding Proof: The Need for More Precision, in: *18 ICCA Congress Series 156-182* (2015).

II BURDEN OF PROOF

i Principle

The basic rule on the legal burden of proof in international law is *actori incumbit probatio*: he or she who asserts must prove.[4] The word 'actor' in this context is 'not to be taken to mean the plaintiff from the procedural standpoint but the real claimant in view of the issues involved'.[5] Accordingly, the claimant bears the burden of proof with regard to all elements of its claim. If the respondent raises a defence, the respondent is to prove the facts on which that defence is based.[6] In other words, each party bears the burden of proof for the facts on which it relies for its claim or defence.[7]

If a party fails to meet its burden of proof on a particular claim, the tribunal will decide against that party, because the party bearing the burden of proof is to bear the consequences of failing to prove its claim.[8] The claimant fails to meet its burden of proof not only when the tribunal is more convinced of the other party's case but also when the tribunal is unable to form a view on the facts. The tribunal's decision in *Plasma Consortium v. Bulgaria* illustrates this principle: given the conflicting evidence, the tribunal was unable to form any firm view as to what really transpired, and, therefore, ruled against the party bearing the burden of proof, in that case the claimant.[9]

The above has been applied not only with respect to the merits of the dispute, but also to the jurisdictional and damages phases of a dispute, in security-for-costs motions, challenges of arbitrators, interim measures, and other claims or motions that may come up in proceedings.[10]

4 See, e.g., *SolEs Badajoz GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/38, Award, 31 July 2019, para. 335 ('Each Party bears the burden of proving that the facts that it alleges'); *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, 16 March 2016, para. 668 ('In international law, the general principle is actori incumbit probatio: the party who alleges a certain fact has the burden of proving it.'); Bin Cheng, *General Principles of Law As Applied By International Courts And Tribunals 327* (2006); Frédéric G. Sourgens, Kabir AN Duggal & Ian A Laird, *Evidence in International Investment Arbitration 2.02* (2018).

5 See *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/2, Final Award, 27 June 1990, para. 56.

6 Cf. the maxim *reus excipiendo fit actor* – the defendant, by raising an exception, becomes a claimant.

7 Cf. Article 27(1) UNCITRAL Rules (2013) ('Each party shall have the burden of proving the facts relied on to support its claim or defence.'); Nathan O'Malley, *Rules of Evidence in International Arbitration: An Annotated Guide 7.20* (2nd edn, 2019); *Sapiem SpA v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/7, Award 113 (30 June 2009) ('It is well a well established rule in international adjudication that the burden of proof lies with the party alleging a fact, whether it is the claimant or the respondent.').

8 Kabir Duggal & Wendy W. Cai, *Principles of Evidence in Public International Law as Applied by Investor-State Tribunals: Burden and Standards of Proof 29* (2019).

9 *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, para. 249.

10 Frédéric G. Sourgens, Kabir A. N. Duggal & Ian A. Laird, *Evidence in International Investment Arbitration 2.22* (2018).

The burden of proof rule does not apply with regard to 'obvious or notorious facts'[11] and to facts that are already 'within the knowledge of the tribunal'.[12] Tribunals, however, have rarely qualified facts as obvious or notorious, particularly when they are disputed between the parties.

The rule on the burden of proof applies also with regard to the arbitral tribunal's jurisdiction. In ICSID arbitration, for example, it is on the claimant to prove all facts necessary to establish the arbitral tribunal's jurisdiction under Article 25 of the ICSID Convention and the relevant treaty, and to show a *prima facie* cause of action under the treaty. If the claimant has discharged these burdens, the respondent bears the burden of proving that an exception is to apply.[13]

The respondent bears the burden of proof where it not merely challenges the veracity of claimant's allegations or sufficiency of the evidence submitted by the claimant but raises an exception (or affirmative defense) to jurisdiction.[14] Such exceptions or defences include, among other things, the issue of whether the investment was procured in an illegal manner or whether the investor has acted with unclean hands.[15] In the same vein, where respondent disputes the validity of the claimant's nationality (e.g., by alleging that it was acquired fraudulently), tribunals have held that respondents bear the burden of proof for that contention.[16]

ii Shifting

While the burden of proof discussed above (also called the 'legal burden of proof') rests on the asserting party and does not shift,[17] tribunals have found that the burden to produce evidence, sometimes called the 'evidential burden of proof',[18] may shift to the other party under certain circumstances.[19]

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11 *Reinhard Hans Unglaube v. Republic of Costa Rica*, ICSID Case No. ARB/09/20, Award, 11 November 2009, para. 33.

12 Kabir Duggal & Wendy W Cai, *Principles of Evidence in Public International Law as Applied by Investor-State Tribunals: Burden and Standards of Proof 30* (2019).

13 Cf. Gary Born, On Burden and Standard of Proof, in: Meg Kinnear et al. (eds) *Building International Investment Law: The First 50 Years of ICSID 43-54*, 49 (2015).

14 Frédéric G. Sourgens, Kabir AN Duggal & Ian A Laird, *Evidence in International Investment Arbitration 2.48* (2018).

15 Frédéric G. Sourgens, Kabir AN Duggal & Ian A Laird, *Evidence in International Investment Arbitration 2.49* (2018).

16 See, e.g., *Ioan Micula, Viorel Micula and others v. Romania (I)*, ICSID Case AERB/05/20, Decision on Jurisdiction and Admissibility, 24 September 2008, para. 87 ('The burden of proving that nationality was acquired in a manner inconsistent with international law lies with the party challenging the nationality.').

17 *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award (25 August 2014, para. 8.8).

18 See Gary Born, On Burden and Standard of Proof, in: Meg Kinnear et al. (eds.) *Building International Investment Law: The First 50 Years of ICSID 43-54*, 44 (2015).

19 See, e.g., *Churchill Mining and Planet Mining PTY Ltd. v. Republic of Indonesia*, ICSID Case No. ARB/12/40 and 12/14, Decision on Annulment, 18 March 2019, para. 215 ('placing the initial onus on a party presenting an application does not obviate the requirement, once it adduces proof of the facts on which its claims are based, that the opposing party present proof to the contrary, supporting its denial of the claim.'); *Mercer International Inc. v. Canada*, ICSID Case ARB(AF)/12/3, Award, 6 March 2018, paras. 7.14 and 7.16; *Apotex Holdings Inc. and Apotex Inc. v United States of America*, ICSID Case No. ARB(AF)/12/1, Award, 25 August 2014, para. 8.8 – 8.10; *Asian Agricultural Products Limited v.*

Such a shifting can occur when the party bearing the initial evidential burden (namely the party bearing the legal burden of proof, typically the claimant) has adduced sufficient evidence to support its allegation; the burden to produce evidence shifts to the other party to rebut the evidence put forward or to concede the point.[20]

Tribunals increasingly describe this 'shifting principle'[21] as 'well accepted'.[22] It is also not uncommon that parties in investment arbitrations are in agreement that the evidential burden can shift, at least, in principle.[23] They more often disagree, however, on whether a shifting is justified in the specific case.

The 'shifting principle' is sometimes misunderstood to imply a reversal of the legal burden of proof. But such is not the case. Inaccurate use of terminology may occasionally facilitate such misunderstandings – it is not the 'burden of proof' that shifts, but the burden to produce evidence. The notion that the evidential burden of proof can shift back and forth during the proceedings should not be foreign to either civil law or common law jurists, as similar concepts exist in jurisdictions of both legal traditions.[24]

The shifting of the burden to produce evidence 'envisions an engagement of the evidence by the parties to the dispute' similar to a 'ping-pong'.[25] There is no formal event within the procedure when the burden shifts.[26] The goal of this process of engagement is to provide the arbitral tribunal with all necessary materials on a particular issue. It enables the arbitral tribunal to decide the case on a broad evidentiary basis.[27] The better an arbitral tribunal knows the relevant facts, the more likely it will be in a position to decide the issues before it. In this regard, the tribunal takes into account that often it is not the party bearing the burden of proof who is in possession of the relevant evidence. It is also a way of avoiding complicated evidence production procedures. This encourages the parties to provide relevant evidence in their possession.

As in all evidentiary matters, tribunals have considerable discretion in deciding how much evidence is needed to give rise to a presumption, and how much evidence is necessary to rebut the presumption and shift the evidential burden back to the party who originally bore it. Some tribunals have required the party bearing the initial evidential burden to adduce

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Democratic Socialist Republic of Sri Lanka, ICSID Case No. ARB/87/3, Award, 27 June 1990, para. 56 ('In a case a party adduces some evidence which prima facie supports his allegations, the burden of proof shifts to his opponent.').

20 Frédéric G Sourgens, Kabir AN Duggal & Ian A Laird, *Evidence in International Investment Arbitration 3.01* (2018) ('shifting principle').

21 Frédéric G Sourgens, Kabir AN Duggal & Ian A Laird, *Evidence in International Investment Arbitration 3.01* (2018).

22 See, e.g., *Churchill Mining and Planet Mining PTY Ltd. v. Republic of Indonesia*, ICSID Case No. ARB/12/40 and 12/14, Decision on Annulment, 18 March 2019, para. 215 ('well accepted').

23 See, e.g., *Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration & Production Company Limited and Bangladesh Oil Gas and Mineral Corporation*, ICSID Case No. ARB/10/11 and No. ARB/10/18, Decision on the Corruption Claim, 25 February 2019, para. 790-791.

24 See Philipp Alfter, *Das Beweismass der internationalen Handelsschiedsgerichtsbarkeit, Auswirkungen der best practice der document production auf den Beweis 43*, 59 (2019) (discussing the concept of 'prima facie proof' or 'Anscheinsbeweis' in German law, and the similar 'burden of producing evidence' in common law).

25 Frédéric G Sourgens, Kabir AN Duggal & Ian A Laird, *Evidence in International Investment Arbitration 3.07* (2018).

26 Nathan O'Malley, *Rules of Evidence in International Arbitration: An Annotated Guide 7.35* (2nd edn 2019)

27 Frédéric G Sourgens, Kabir AN Duggal & Ian A Laird, *Evidence in International Investment Arbitration 3.11* (2018).

'evidence that prima facie supports [the asserting party's] allegation'.[28] In *Apotex Holdings v. United States*, however, the tribunal required evidence that, 'in the absence of [a] rebuttal', would be sufficient for claimants to succeed with their claim.[29] It is not clear whether the difference in wording also implies a different standard.

If *prima facie* evidence is evidence that, if unrebutted, would establish the contention, this means that the evidential burden does not shift before the evidence on record meets the applicable standard of proof. Only then would failure to produce rebuttal evidence be 'fatal to the case'[30] of the party to whom the evidential burden has shifted. As a result, parties should not expect the shifting principle to help them in discharging their respective burden of proof.

Recent cases illustrate how the shifting principle is argued by parties and how it is applied by tribunals. In *Niko Resources v. Bangladesh*, one of the issues was whether showing a sufficient number of 'red flags' of corruption would be sufficient to shift the evidential burden on the party denying corruption. The tribunal carefully examined the alleged acts of corruption and ultimately did not have to decide the question whether the evidential burden had shifted because 'the facts as they emerged from the record were at odds with the respondent's allegations'.[31]

In *Gavrilovic v. Croatia*, the claimants argued that they had been treated less favourably than a Croatian national in like circumstances, and that this violated clause 3(1) of the BIT. To establish 'likeness', they argued, it was sufficient for them to point out at least one Croatian national who was *prima facie* in like circumstances (or a *prima facie* comparator), at which point the evidential burden to rebut the claimants' allegation would shift to the respondent.[32] The tribunal found, however, that the claimants were not successful in showing that a certain Croatian national was, *prima facie*, in like circumstances; even if claimants had proven like circumstances, the tribunal argued, they would have been unsuccessful in proving that the investor was accorded less favourable treatment.[33]

28 See, e.g., *International Thunderbird Gaming Corporation v. The United Mexican States*, NAFTA Arbitration under the UNCITRAL Rules, Award, 26 January 2006, para. 95. See also *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990, para. 56 ('In a case a party adduces some evidence which prima facie supports his allegations, the burden of proof shifts to his opponent.').

29 *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award, 25 August 2014, para. 8.65. See also Nathan O'Malley, *Rules of Evidence in International Arbitration: An Annotated Guide 7.31* (2nd edn, 2019) ('prima facie evidence is proof that is sufficient, if not contradicted, to establish the contention').

30 Frédéric G Sourgens, Kabir AN Duggal & Ian A Laird, *Evidence in International Investment Arbitration 3.32* (2018).

31 *Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration & Production Company Limited and Bangladesh Oil Gas and Mineral Corporation*, ICSID Case No. ARB/10/11 and No. ARB/10/18, Decision on the Corruption Claim, 25 February 2019, para. 1998.

32 *Georg Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, Award, 26 July 2018, ICSID Case paras 1192–1193.

33 id., paras 1204–05.

III STANDARD OF PROOF

i Ordinary standard

The standard of proof determines the level of evidence needed to establish either an individual issue or the party's case as a whole.[34] If the party bearing the burden of proof cannot establish a fact under the applicable standard of proof, the allegation will be qualified as unproven.[35]

Unlike the burden of proof, the standard of proof is relative and will depend on the particular issue before the arbitral tribunal.[36] There are different standards of proof. Though, even where the standard of proof may be the same, tribunals may require more evidence for certain allegations than for others before they are persuaded that the standard of proof is met.[37] This is not to be confused, however, with the standard of proof as such.

In investment arbitration, the general standard of proof is the 'balance or probabilities' or 'preponderance of the evidence'.[38] The standard requires a showing that the factual allegation is 'more likely than not true'.[39] This appears to be a lower standard than the 'inner conviction' test typically applied in state courts in civil law jurisdictions, though some believe that the results under the two standards are the same.[40]

ii Heightened standard

It is controversial whether it is justified, in certain specific cases, to apply a heightened standard of proof. In the common law, the elevated standards of proof are justified on the ground that they 'help to avoid the high social costs of false positives, as in convicting the innocent'.[41] By contrast, the preponderance-of-the-evidence standard leaves the fact-finder 'indifferent as between false negatives and false positives'.[42] Investment tribunals and commentators have justified elevated standards of proof on similar grounds. In *Lao Holdings v. Laos (I)*, for example, the tribunal cited the 'seriousness of the charge' and the 'severity of the consequences to the individuals involved'.[43]

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34 *The Rompetrol Group NV v. Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013, para. 178; Frédéric G Sourgens, Kabir AN Duggal & Ian A Laird, *Evidence in International Investment Arbitration 3.21* (2018).

35 *Reinhard Hans Unglaube v. Republic of Costa Rica*, ICSID Case No. ARB/09/20, Award, 11 November 2009 para. 34 ('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."').

36 Kabir Duggal & Wendy W Cai, *Principles of Evidence in Public International Law as Applied by Investor-State Tribunals: Burden and Standards of Proof 37* (2019);

37 See, e.g., *Churchill Mining and Planet Mining Pty Ltd. v. Republic of Indonesia*, ICSID Case Nos. ARB/12/14 and 12/40, Award, 6 December 2016, para. 244 ('more persuasive evidence is required for implausible facts').

38 *Reinhard Hans Unglaube v. Republic of Costa Rica*, ICSID Case No. ARB/09/20, Award, 11 November 2009, para. 33; Gary Born, On Burden and Standard of Proof, in: Meg Kinnear et al. (eds.), *Building International Investment Law: The First 50 Years of ICSID 43-54*, 50 (2015).

39 Nathan O'Malley, *Rules of Evidence in International Arbitration: An Annotated Guide 7.27* (2nd edn, 2019)

40 See, e.g., Vera Van Houtte, Adverse Inferences in International Arbitration, in: Teresa Giovannini and Alexis Mourre (eds.), *Written Evidence and Discovery in International Arbitration: New Issues and Tendencies 198* (2009).

41 Kevin M Clermont, Standards of Proof Revisited, *Vermont Law Review 469*, 486 (2008-2009).

42 ibid.

43 *Lao Holdings N.V. Lao People's Democratic Republic (I)*, ICSID Case No. ARB(AF)/12/6, Award, 6 August 2019, para. 109 ('seriousness of the charge', 'severity of the consequences to the individuals

Continental European civil laws do not generally distinguish between standards of proof for civil and criminal law matters. In both civil and criminal cases, the applicable standard of proof is, in principle, the full conviction of the judge that the alleged facts are true.[44] This implies a higher standard than a mere preponderance of the evidence such that, to civil lawyers, there is little need to discuss circumstances under which elevated standards would be justified. Indeed, in civil law jurisdictions, the ordinary standard of proof can be sometimes lowered (e.g., for allegations that are notoriously difficult to prove), but it is never elevated above the high level set by the ordinary standard of proof.[45]

With regard to allegations of wrongdoing, there is no uniform approach. Allegations of corruption, some tribunals have held, need to be 'clear and convincing'.[46] Interpretations differ, however, with some tribunals noting that the standard is 'elevated' or 'high'[47], while others simply describe it as 'demanding' without further analysis.[48] Recently, in *Lao Holdings v. Laos (I)*, the tribunal decided that there need not be clear and convincing evidence of every allegation of corruption, but such clear and convincing evidence must point clearly to corruption; but, on the whole, the alleged act of corruption has to be established to a standard higher than the balance of probabilities but less than the criminal standard of beyond reasonable doubt.[49]

A number of tribunals, however, have declined to elevate the standard of proof on certain issues; instead, they required more persuasive evidence.[50] To be sure, this does not necessarily lead to different results. But it is an attractive way of reasoning because it allows tribunals to avoid abstract doctrinal discussions and moves the analysis to the persuasiveness of the evidence, an area in which tribunals enjoy wide discretion. For example, more recently, the tribunals in *Niko Resources v. Bangladesh* seemed to have followed such an approach. They '[did] not find much assistance in terms such as "preponderance of evidence" and "heightened standard of proof"', as '[i]n the end the question is whether the tribunals are

involved'); see also Frédéric G Sourgens, Kabir AN Duggal & Ian A Laird, *Evidence in International Investment Arbitration 5.34* (2018) ('serious consequences').

44 See, e.g., Mark Schweizer, The civil standard of proof—what is it actually?, *The International Journal of Evidence & Proof* 217-234 (2016).

45 This is because the ordinary standard of proof – 'full conviction' – is described as requiring near certainty. See Mark Schweizer, 'The civil standard of proof—what is it actually?', *The International Journal of Evidence & Proof* 220 (2016) ('the exceptions – and the considerable doctrinal effort required for their justification – prove the rule').

46 See, e.g., *EDF (Services) Ltd. v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, para. 221; *Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009, para. 317.

47 *Ioan Micula, Viorel Micula and others v. Romania (II)*, ICSID Case No. ARB/14/29, Award 5 March 2020, para. 378 ('allegations of bad faith require a high standard of proof').

48 Kabir Duggal & Wendy W Cai, *Principles of Evidence in Public International Law as Applied by Investor-State Tribunals: Burden and Standards of Proof* 46 (2019).

49 *Lao Holdings N.V. Lao People's Democratic Republic (I)*, ICSID Case No. ARB(AF)/12/6, Award, 6 August 2019, paras. 109-110.

50 See, e.g., *Libananco Holdings Co., Limited v. Republic of Turkey*, ICSID Case No. ARB/06/08, Award, 2 September 11, para. 125; *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/10/3, Award, 6 May 2013, para. 183; Kabir Duggal & Wendy W Cai, *Principles of Evidence in Public International Law as Applied by Investor-State Tribunals: Burden and Standards of Proof* 46-47 (2019).

persuaded that the [agreements] were procured by corruption or not'.[51] Consequently, rather than raising the standard of proof, the tribunals considered that '[b]ecause corruption is a serious charge with serious consequences attached, the degree of confidence a tribunal should have in the evidence of that corruption must be high'.[52] Other tribunals have applied the ordinary balance-of-probabilities standard, without openly requiring more persuasive evidence for allegations of corruption.[53] In *Union Fenosa v. Egypt*, for example, the tribunal explained, citing *Libananco v. Turkey*, that there was no reason to heighten the standard as 'this is not a criminal proceeding'.[54] Such decisions, however, remain in the minority.[55]

How to deal with allegations of corruption remains a hot topic.[56] The burden and standard of proof play an important role in addressing such issues appropriately. It is worth mentioning in this context the 'Corruption and Money Laundering in International Arbitration: A Toolkit for Arbitrators' (the Guide) issued in June 2019 by the Basel Institute on Governance.[57] The Guide is meant to help arbitrators in both investment and commercial arbitration to address and deal with issues of corruption and money laundering. Regarding the applicable standard of proof, the Guide states that the arbitrators have three options: (1) the balance of probabilities or preponderance of the evidence standard, which means that the arbitrator will decide in favour of the party whose claims are more likely to be true; (2) the clear-and-convincing evidence standard, which is more severe than the balance of probabilities; and (3) 'another feasible option', the arbitrator's inner conviction. The latter standard, the Guide explains, is met if the arbitrator is convinced that there is 'enough evidence to substantiate the corruption allegations or suspicions'. To treat the different standards of proof as equal 'options' is an approach that is unlikely to find wide acceptance at least in investment arbitration. While it is important which standard is adopted, the reason why it is adopted may even be more important. In this regard, however, the Guide offers little guidance.

51 *Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration & Production Company Limited and Bangladesh Oil Gas and Mineral Corporation*, ICSID Case No. ARB/10/11 and No. ARB/10/18, Decision on the Corruption Claim, 25 February 2019, para. 805.

52 ibid.

53 *Union Fenoisa Gas, S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/14/4, Award, 31 August 2018, para. 7.52 ('although
these allegations amount to serious criminal misconduct, the Tribunal considers that the standard of proof remains "the balance of probabilities"').

54 *Union Fenoisa Gas, S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/14/4, Award, 31 August 2018, para. 7.52.

55 See Brody Greenwald & Jennifer Ivers, *Addressing Corruption Allegations in International Arbitration* 31 (2019) (citing *Union Fenosa v. Egypt* and *Chevron v. Ecuador*).

56 See, e.g., more recently, Emmanuel Gaillard, The emergence of transnational responses to corruption in international arbitration, *35 Arbitration International 1-19* (2019); Domitille Baizeau & Tessa Hayes, The Arbitral Tribunal's Duty and Power to Address Corruption Sua Sponte, in: AndreaMenaker (ed.), *International Arbitration and the Rule of Law: Contribution and Conformity*, ICCA Congress Series, Volume 19, 225-265 (2017).

57 Toolkit for Arbitrators on Corruption and Money Laundering, www.baselgovernance.org/sites/default/files/2019-05/a_toolkit_for_arbitrators_29_05_2019.pdf (last visited on 24 March 2020); see also Kathrin Betz, Nadia Darwazeh, Mark Pieth & Stéphane Bonifassi, Navigating Through Corruption and Money Laundering in International Arbitration: A Toolkit for Arbitrators and Counsel, 36/6 *Journal of International Arbitration* 671–678 (2019).

iii Standard of proof and damages

The standard of proof raises particular questions in the context of damages calculations, because most of the damages analysis requires the tribunal to compare the existing scenario with a hypothetical scenario in which one refers to a situation without the breach.[58]

In *Crystallex v. Venezuela*, the tribunal applied different standards for establishing the existence of a loss and the quantification of a future damage. For the former, it applied the general preponderance of the evidence standard. For the latter, it considered, citing the *Lemire v. Ukraine* tribunal, that, because future damage is inherently difficult to prove, the claimant only needed to prove 'a basis upon which the tribunal can, with reasonable confidence, estimate the extent of the loss'.[59]

More recently, this approach was also followed by the tribunal in *Watkins Holdings v. Spain*, noting, among other things, that proving the amount of damages is a notoriously difficult task.[60] Thus, it held, the claimant has to establish the loss with 'sufficient certainty' and, then, provide a 'reasonable basis' for the tribunal to determine the amount of that loss.[61]

IV CONCLUSION

This chapter has provided an overview of recent developments and case law relating to the burden and standard of proof in investment arbitration. While the rule *actori incumbit probatio* is generally accepted, the more intriguing question is when the evidential burden of proof can shift. This continues to raise questions in practice, as recent cases illustrate. Even though parties often argue that the evidential burden should shift to the opposing party, this has not helped them discharge their burden of proof.

The ordinary standard of proof in investment arbitration is the balance of probabilities. Here, too, the more controversial question relates to the exceptions. While many tribunals have heightened the standards for allegations of wrongdoing (corruption, fraud, etc.), others have applied the ordinary standard but required more persuasive evidence. Damages calculations raise special evidentiary issues. Here, tribunals have applied the preponderance of the evidence standard to the existence of a loss, and a 'reasonable basis' for the quantum of the loss.

As tribunals continue to focus on and explain their rationales for burden and standard-of-proof issues, arbitral practice evolves and will, over time, contribute to the development of evidence law in investment arbitration.

58 Frédéric G Sourgens, Kabir AN Duggal & Ian A Laird, *Evidence in International Investment Arbitration* 5.22 (2018).

59 *Crystallex International Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, para. 868.

60 *Watkings Holdings S.à.r.l. and others v. Kingdom of Spain*, ICSID Case No. ARB/15/44, Award, 21 January 2020, para. 648.

61 ibid.

Appendix 1

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ISBN 978-1-83862-471-2