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By Equal Contest of Arms: Jurisdictional Proof in Investor-State Arbitrations

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By Equal Contest of Arms: Jurisdictional Proof in Investor-State Arbitrations

Cover Page Footnote

International Law; Commercial Law; Law

By Equal Contest of Arms: Jurisdictional Proof in Investor-State Arbitrations

Frédéric G. Sourgens†

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I. Introduction

Investor-state arbitration is the nearly exclusive international forum for international investors to pursue claims against the host state of an investment. Investor-state arbitration is principally established by international framework agreements like the International Convention on the Settlement of Investment Disputes (ICSID Convention) but also derives from over 3150 bilateral and multilateral investment treaties.¹ A recent survey of investment arbitration proceedings established that the mean amount claimed in ICSID disputes exceeds \$420 million.² There are currently 162 ICSID claims pending.³

The jurisdiction of investor-state tribunals is often the central issue in investor-state arbitrations. Investor-state arbitration tribunals are not courts of general jurisdiction; they are *ad hoc* bodies appointed by the parties to a particular dispute and limited in their powers by the extent of the specific consent given by the

¹ See U.N. CONF. TRADE & DEV., WORLD INVESTMENT REPORT, at xx, U.N. Doc. UNCTAD/WIR/2012, U.N. Sales No. E.12.II.D.3 (2012). In addition, some investors benefit from arbitration clauses in concessions, production sharing agreements, power purchase agreements, and other similar agreements with host governments or host government instrumentalities.

² See Susan D. Franck, *The ICSID Effect? Considering Potential Variations in Arbitration Awards*, 51 VA. J. INT'L L. 825, 856 (2011).

³ See *List of Pending Cases*, INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListPending> (last visited Oct. 15, 2012).

state.⁴ The international investment agreement serves as the vehicle by which an investor can bring a claim to arbitration.⁵ Host states typically argue against jurisdiction by claiming that an interpretation of the consent instrument permitting the exercise of jurisdiction would be an impermissible expansion of the express limitations of the consent instrument, and thereby infringe the state's sovereignty.⁶ Investors, on the other hand, submit that consents must be read consistently with the goal of permitting access to justice for foreign investors pursuing claims of international wrongdoing that would otherwise go unheard and uncompensated.⁷

Current scholarship seeks to resolve such conflicting interpretive submissions on the basis of formal legal rules governing jurisdiction of investor-state tribunals.⁸ These formal legal rules attempt to interpret agreements, particularly the meaning of "investment," through traditional legal analysis influenced by prior decisions.⁹ Formalism-based scholarship likewise looks to the stated legal rationales adopted by investor-state arbitral tribunals as a basis for establishing these rules.¹⁰

Formalism faces significant difficulties. Recent jurisdictional decisions have adopted incompatible legal rationales to justify diametrically opposed results in facially similar cases.¹¹ Further, even in decisions consistent with prior jurisprudence, well-reasoned dissents have pointed to significant potential flaws in the logic adopted by the majority.¹² The increase of inconsistent

⁴ See *infra* note 268.

⁵ See Jeswald W. Salacuse, *The Emerging Global Regime for Investment*, 51 HARV. INT'L L.J. 427, 427-28 (2010).

⁶ See discussion *infra* note 243.

⁷ See sources cited *infra* note 249.

⁸ See W. Michael Reisman, *The Breakdown of the Control Mechanism in ICSID Arbitration*, 4 DUKE L.J. 739, 764-65 (1989).

⁹ See, e.g., Ole Kristian Fauchald, *The Legal Reasoning of ICSID Tribunals – An Empirical Analysis*, 19 EUR. J. INT'L L. 301, 317-19 (2008).

¹⁰ See *id.*

¹¹ Compare *Impreglio S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award ¶ 5 (June 21, 2011), with *Brandes Investment Partners, LP v. Venezuela*, ICSID Case No. ARB/08/3, Award (Aug. 2, 2011).

¹² See *Impreglio S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Concurring and Dissenting Opinion (June 21, 2011).

decisions and well-reasoned dissents is deeply problematic for a formalist approach. This inconsistency undercuts the authority of formal rules of law to resolve jurisdictional disputes between the parties: parties will submit that their rival interpretations are supported by rival precedent expressed in conflicting jurisprudence.

Inconsistency in jurisprudence regresses rather than resolves the jurisdictional problem. Formalism is salvageable only if a "correct" formal rule could be divined from a source superior to inconsistent precedent. Absent such a source, the principal submission of current scholarship, that formal rules can be established on the basis of a line of prior to consistent decisions, is impossible due to disagreement between tribunals.¹³

Thus, the currently prevalent formalism unwittingly exacerbates attacks that jurisdictional decisions, in particular, demonstrate investor-state arbitration's lack of legitimacy.¹⁴ The current system provides detractors with fuel for the argument that the scope of jurisdiction of investor-state tribunals should be limited, or eliminated altogether.¹⁵ These critics of investor-state arbitration draw support from the inconsistency of jurisdictional decisions by asserting that these inconsistent decisions reveal the entire process to be arbitrary and therefore untrustworthy.¹⁶

The current environment of inconsistent decisions, combined with the growing attacks on the legitimacy of investor-state arbitration, require a paradigm shift.¹⁷ Rather than looking to

¹³ See discussion *infra* Part III.E.

¹⁴ See discussion *infra* Part III.D.

¹⁵ One way of achieving this goal has been withdrawal from international investment treaties, including the ICSID Convention. For a discussion of the repercussion of recent withdrawals, see Frédéric G. Sourgens, *Keep the Faith, Investment Protection Following the Denunciation of International Investment Agreements*, 11 SANTA CLARA J. INT'L L. (forthcoming 2013).

¹⁶ See sources cited *infra* note 328.

¹⁷ Cf. THOMAS KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1970) (analyzing the history of science). Kuhn's work has been influential outside of the context of the philosophy of science, specifically influencing the study of public international law. See, e.g., Richard Falk, *A New Paradigm for International Legal Studies: Prospects and Proposals*, 84 YALE L.J. 969, 978 (1975) (applying Kuhnian paradigm shift analysis because "the old juridical paradigm no longer 'works,' that it no longer seems responsive to the main problems on the international agenda"). For a discussion of historical paradigm shifts in international investment law, see, e.g., Stephan

establish formal legal rules, the focus must be on understanding jurisdictional decisions as a result of the process of jurisdictional decision-making, governed by international law. This process consists of evaluating both legal and factual elements: a tribunal must ascertain the meaning of the instrument relied upon by the investor and, further, must establish whether the factual predicates for jurisdiction, set out in the consent instrument, are met.¹⁸

The International Court of Justice (ICJ) explained that under international law, “there is no burden of proof to be discharged in the matter of jurisdiction”; a tribunal instead must determine from the record “whether the force of the arguments militating in favour of jurisdiction is preponderant.”¹⁹ The ICJ thus imposes a balancing test, taking into consideration two factors that address both the legal and factual elements involved. The tribunal must balance the fact that exercise of jurisdiction provides the claimant with the sole access to justice for claims against the respondent state with the reality that the respondent state made a policy decision to limit jurisdiction according to the terms of the consent instrument.²⁰ This balance does not turn on the existence of any formal rule of law but rather upon the relative merit of the positions of the parties when viewed in their entirety.²¹

As current scholarship demonstrates, the interpretation of consent instruments can and does lead to facially inconsistent results.²² This inconsistency is not a result of incompetent arbitrators, nor an inherent and insurmountable arbitrariness of investment law. Rather, it results from the open-ended, “indeterminate” nature of advanced consents to arbitration by participating states.²³ An interpretation of the consent instrument

W. Schill, *W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law*, 22 EUR. J. INT’L L. 875 (2011). The new paradigm for international investment law necessitated by the current explosive growth of the field is the subject of my work in progress *Out of the Fog, Developing The Common Law of International Investment Protection*.

¹⁸ See Schill, *supra* note 17.

¹⁹ Fisheries Jurisdiction (Spain v. Can.), 1998 I.C.J. 439, 450 (Dec. 4).

²⁰ See *id.* at 450-51.

²¹ See *id.* at 453.

²² See discussion *infra* Part III.E.

²³ Paul B. Stephan, *Privatizing International Law*, 97 VA. L. REV. 1573, 1635 (2012).

that is neither excessively expansive nor prohibitively restrictive balances the arguments raised by the parties in support of their respective readings and determines which of them prevails. Such an approach determines which argument better reflects the necessary balance between granting investors access to justice and providing the state with a limitation on arbitral incursion into its regulatory domain.²⁴ For this reason, tribunals cannot apply burdens of proof or persuasion to determine whether the factual predicates for jurisdiction have been met, but rather must independently establish the facts of the case from the record.

Application of an even-handed balancing test to the jurisdiction of investor-state tribunals addresses complaints that investor-state arbitration lacks legitimacy by, in part, determining which party's jurisdictional case is closer to the jurisdictional equilibrium point. A broad majority of investor-state decisions follow this approach,²⁵ under which a losing party, generally, should find fault in its own jurisdictional case, rather than in the reasoning of a tribunal.

Inversely, failure to apply such a balancing test would turn investor-state arbitration into an exercise in arbitrariness, just as critics claim. As inconsistent decisions on key jurisdictional questions demonstrate, it is not possible to determine in the abstract a formally correct, precise legal rule on jurisdictional questions.²⁶ Jurisdictional instruments by their nature permit multiple, plausible interpretations in most cases.²⁷ Adopting one interpretation over another by means other than a balancing test of the parties' arguments in light of record facts would be guided by arbitrary preference, rather than reasoned evaluation of the record. Such decision-making does, in fact, threaten the legitimacy of investor-state arbitration as a fair and even-handed dispute resolution mechanism.

Jurisdictional decisions issued in 2011 and 2012 that have failed to follow a balancing test vividly demonstrate the threats to legitimacy of the investor-state arbitration mechanism when

²⁴ See Fauchald, *supra* note 9, at 317-19.

²⁵ See cases cited *infra* note 255 and accompanying text.

²⁶ See *infra* note 256 and accompanying text.

²⁷ See *infra* Part III.C.2.

tribunals abandon a balancing test.²⁸ These decisions for the first time have imposed burdens of jurisdictional proof by clear and convincing evidence on investors.²⁹ In doing so, these decisions reached facially absurd results.³⁰

This article, in Part II, presents four recent examples of such miscarriages of the jurisdictional decision-making process, drawing on decisions from 2011 and 2012 and explains how these decisions achieved facially absurd results. Then, Part III examines the balancing test that governs jurisdictional analysis and applies it to the interpretation of the consent-to-jurisdiction clauses in international investment agreements. Finally, Part IV explains how the balancing test is applied at the jurisdictional stage by imposing an informal burden of production upon both parties to substantiate their respective factual positions rather than imposing a dispositive burden of proof on any one party.

II. A Thumb on the Jurisdictional Scale

Common sense is the first safeguard against the caprice of abstract legal argument. The four cases examined in this section highlight the commonsense problem of the current academic paradigm of investor-state arbitration that is reflected in a growing number of investor-state awards: each decision seeks to engage in a larger scholarly debate about most-favored nation clauses, consent provisions, good faith investment, or the meaning of “control” in investment treaties.³¹ But in engaging in grand-scale scholarly debate, the tribunals ultimately lost sight of the specific dispute before them.³² Rather than assist tribunals in interpreting the consent instruments in question, jurisdictional rules developed in these decisions cause the tribunals to abandon interpretation of

²⁸ See *infra* Parts II.A-B.

²⁹ See *infra* Parts II.A-B.

³⁰ See discussion *infra* Parts II.A-B.

³¹ See *Impreglio S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award, ¶ 5 (June 21, 2011) [hereinafter *Impreglio Award*]; *Brandes*, ICSID Case No. ARB/08/3; *Libananco Holdings Co. Ltd. v. Republic of Turk*, ICSID Case No. ARB/06/8, Award, ¶¶ 121-26, 536 (Aug. 21, 2011), IIC 506 (2011); *Caratube Int’l Oil Co., LLP v. Kazakhstan*, ICSID Case No. ARB/08/12, Award, ¶ 394-96 (June 5, 2012); see also discussion *infra* Parts II A-B.

³² See discussion *infra* Part II.C.

the governing documents altogether.³³ Instead of assisting tribunals in making factual findings to determine whether the legal requirements laid out in the instruments of consent have been satisfied, the decisions rely on jurisdictional rules that permit the tribunals to avoid making any relevant factual findings that would support ultimate disposition of the case.³⁴

As a matter of common sense, the current paradigm's focus on the development of legal rules and formal jurisdictional precedent is leading investor-state arbitration down the wrong path. Common sense requires that disputes be resolved on their merits; the parties are entitled to a decision interpreting the key legal instruments and making findings of fact supporting the ultimate determination of the case. A dispute resolution paradigm that permits, or even encourages, a tribunal to decide a case removed from the parties' legal arguments and record thus reveals a need for reform and refocus.

A. Proof of Consent

The existence and scope of state consent to jurisdiction of an international tribunal is considered a question of law.³⁵ Jurisdictional objections raised in investor-state proceedings typically assert that the investor's stated basis for state consent is legally defective.³⁶ These defects in consent include: the document in question does not in fact express the state's consent to arbitrate (objection *ratione voluntatis*);³⁷ the subject matter of

³³ See discussion *infra* Part II.C.

³⁴ See, e.g., *Brandes*, ICSID Case No. ARB/08/3 ("This Tribunal sees no reason to depart from the conclusions reached by these two tribunals in comparable cases . . .").

³⁵ See *Fisheries Jurisdiction (Spain v. Can.)*, 1998 I.C.J. 439, 450-51 (Dec. 4) (citing *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1984 I.C.J. 392, 437 (Nov. 26) and *Border and Transborder Armed Actions (Nicar. v. Hond.)*, 1988 I.C.J. 69, 76 (Dec. 20)).

³⁶ See William W. Park, *Determining an Arbitrator's Jurisdiction: Timing and Finality in American Law*, 8 NEV. L.J. 135, 140-42 (2008).

³⁷ See *Mobil Corp. v. Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, ¶¶ 67-141 (June 10, 2010) (analyzing whether Article 22 of Venezuela's Investment Law is a consent to ICSID jurisdiction); see also CHRISTOPHER DUGAN ET AL., *INVESTOR-STATE ARBITRATION* 219-45 (2008) (outlining the law of consent to arbitration); see generally Michael D. Nolan & Frédéric G. Sourgens, *Limits of Consent - Arbitration without Privity and Beyond*, in LIBER AMICORUM BERNARDO CREMADES 873-911 (M. Á. Fernández-Ballesteros & David Arias eds., 2010) (discussing development of

the dispute does not fall within the terms of the consent instrument (objection *ratione materiae*),³⁸ the claimant is not an investor within the scope of the consent (objection *ratione personae*);³⁹ and the claim is a legal dispute that predates the effectiveness of consent (objection *ratione temporis*).⁴⁰

Every decision on the existence or scope of consent relies on legal proof demonstrated by interpretation of the consent document and reliance on substantive rules of international law that provide the context for interpretation.⁴¹ Investor-state awards

the law of state consent in international law generally).

³⁸ See *Romak S.A. v. Uzbekistan (Switz.)*, PCA Case No. AA280, Award, ¶ 56 (Nov. 26, 2009) (dismissing claims relating to a wheat supply contract as not qualifying as an “investment”); *Global Trading Resource Corp. v. Ukraine*, ICSID Case No. ARB/09/11, Award, ¶ 242 (Nov. 23, 2010) (dismissing claims relating to trading contracts as not qualifying as an “investment”); see also Julian D Mortenson, *The Meaning of ‘Investment’: ICSID’s Travaux and the Domain of International Investment Law*, 51 HARV. INT’L L.J. 257 (2010) (discussing the meaning of investment in the context of the ICSID Convention); Dev Krishan, *A Notion of ICSID Investment*, in INVESTMENT TREATY ARBITRATION AND INTERNATIONAL LAW (Todd Grierson-Weiler ed., 2008) (discussing the broad meaning of the term investment in international treaties); Emmanuelle Cabrol, *Pren Nreka v. Czech Republic and the Notion of Investment Under Bilateral Investment Treaties: Does ‘Investment’ Really Mean ‘Every Kind of Asset’?*, Y.B. INT’L INVESTMENT L. & POL’Y 217-31 (2009-2010) (submitting that the definition of investment in treaties must be narrowed by reference to objective criteria not included expressly in the treaty); CAMPBELL MCLACHLAN ET AL., INTERNATIONAL INVESTMENT ARBITRATION, SUBSTANTIVE PRINCIPLES 45-76 (2007) (discussing typical dispute resolution provisions in BIT and how they are interpreted).

³⁹ See, e.g., *Yukos Universal Ltd. v. Russian Federation*, Interim Award on Jurisdiction and Admissibility, PCA Case No. AA 227, ¶¶ 456-601 (Nov. 30, 2009) (rejecting invocation of a denial of benefits clause in a treaty due to ownership structure of the investment); see generally MCLACHLAN ET AL., *supra* note 38, at 131-62 (discussing requirements of nationality in BIT jurisprudence).

⁴⁰ See *Empresas Lucchetti S.A. v. Peru*, ICSID Case No. ARB/03/4, Jurisdiction Award (Feb. 7, 2005) (dismissing claim because legal dispute arose prior to vesting of treaty protections); Stanimir Alexandrov, *The “Baby Boom” of Treaty-Based Arbitrations and the Jurisdiction of ICSID Tribunals: Shareholders as Investors and Jurisdiction Ratione Temporis*, 4 L. & PRAC. INT’L CTS. & TRIBUNALS 19, 49-55 (2005) (discussing the problems of temporal jurisdiction with regard to claims that relate to conduct of a continuing nature); see generally RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 41-45 (2008) (outlining principles of international law and foreign investments).

⁴¹ See Vienna Convention on the Law of Treaties art. 31(3)(c), May 23, 1969, 1155 U.N.T.S. 331; compare MARK E. VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 433 (2009) (“The rules to be resorted to may be general, regional or local customary rules, as well as bilateral or multilateral treaties, and

do not typically state on their face that a party has a burden of proving a legal proposition supporting its ultimate conclusion that there is (or is not) consent to arbitration and do not otherwise discuss how proof of consent must proceed.⁴²

This underdevelopment of how proof of consent must proceed has led to an increasing array of problems. Instead of developing a process of proof of consent, tribunals implicitly rely on substantive rules of law that act as significant burdens of persuasion,⁴³ for example, presumptions.⁴⁴ Recent decisions have

even general principles of international law. It is assumed that in entering treaty obligations, the parties did not intend to act inconsistently with other previous obligations. The applicable rules are those in force at the time of the interpretation of the treaty. Furthermore, the rules will have to be relevant, i.e., concern the subject matter of the treaty term at issue. In the case of customary rules, these may even be identical with, and run parallel to, the treaty rule. Non-identical customary rules on the same subject matter may lead to a modification of the treaty term as a result of subsequent practice running counter to the treaty provision.” (footnotes omitted) with Campbell McLachlan, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, 54 INT'L & COMP. L.Q. 279, 311 (2005) (“[T]he principle of systemic integration will apply, and may be articulated as a presumption with both positive and negative aspects: (a) *negatively* that, in entering into treaty obligations, the parties intend not to act inconsistently with generally recognized principles of international law or with previous treaty obligations towards third states; and, (b) *positively* that the parties are taken ‘to refer to general principles of international law for all questions which [the treaty] does not itself resolve in express terms or in a different way[.]’”).

⁴² See NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 387 (5th ed. 2009) (limiting burden of proof in international arbitration to proof of facts).

⁴³ See Miguel A. Méndez, *Presumptions and Burden of Proof: Conforming the California Evidence Code to the Federal Rules of Evidence*, 38 U.S.F. L. REV. 139, 140-41 (2003) (using the California definition of an “obligation of a party to introduce evidence sufficient to avoid a ruling against him on the issue” as instructive for adoption in the Federal Rules of Evidence and Uniform Rules of Evidence with minor adjustments) (quoting CAL. EVID. CODE § 110 (West 1995)); cf. Robert Pietrowski, *Evidence in International Arbitration*, 22 ARB. INT'L 373, 378-80 (2006) (analyzing use of burdens and standards of proof in international arbitration); Joost Pauwelyn, *Evidence, Proof and Persuasion in WTO Dispute Settlement, Who Bears the Burden?* 1 J. INT'L ECON. L. 227, 230 (1998) (common and civil law share that “[e]ach party will bear the burden to prove the claims and facts it alleges[.]” meaning that in the absence of such proof, the claim will be dismissed or defense denied); see also David Unterhalter, *Allocating the Burden of Proof in WTO Dispute Settlement Proceedings*, 42 CORNELL INT'L L.J. 209 (2009); Philip M. Nichols, *GATT Doctrine*, 36 VA. J. INT'L L. 379, 412, 434-36 (1996); Andrew D. Mitchell & David Heaton, *The Inherent Jurisdiction of WTO Tribunals: The Select Application of Public International Law Required by the Judicial Function*, 31 MICH. J. INT'L L. 559, 582 (2010); Roger Alford, *Evidentiary Practices*

set the burden of persuasion so high that a party can no longer overcome it in seeking an interpretation of the underlying consent instrument.⁴⁵ The current paradigm of investment jurisprudence thus seriously risks putting the cart before the horse by supplanting interpretation of the consent instruments through use of formal rules of law, specifically presumptions, derived from prior jurisprudence.⁴⁶ The 2011 dissent in *Impregilo v. Argentina*⁴⁷ and the decision in *Brandes v. Venezuela*⁴⁸ are examples of jurisprudence that displaces the need for interpretation by using formal rules of law as de facto burdens of persuasion.

1. *Impregilo v. Argentina (dissent)*

Impregilo decided that jurisdiction of arbitral tribunals under a bilateral investment treaty can be extended through incorporation of consent to arbitration in third-party treaties through a most-favored nation clause (MFN).⁴⁹ The treaty at issue was the bilateral investment treaty (BIT) between Argentina and Italy.⁵⁰

Before the Iran-US Claims Tribunal, in THE IRAN-U.S. CLAIMS TRIBUNAL AT 25 165, 165-97 (Christopher R. Drahozal & Christopher Gibson eds., 2007).

⁴⁴ See, e.g., Hersch Lauterpacht, *Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties*, 26 BRIT. Y.B. INT'L L. 48, 60 (1949) (critiquing the use of canons of interpretation to achieve a restrictive interpretation of international legal obligations). As discussed in Part IV.B.2.ii, the use of factual presumptions of good faith conduct of the parties is appropriate to evaluate the parties' evidentiary case. It is the indiscriminate use of legal presumptions that is problematic.

⁴⁵ See *Impregilo Award*, *supra* note 31; *Brandes*, *supra* note 11; *Libananco Holdings*, *supra* note 31; *Caratube*, *supra* note 31.

⁴⁶ See Pauwlyn, *supra* note 43, at 252-58.

⁴⁷ *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Concurring and Dissenting Opinion (June 21, 2011) [hereinafter *Impregilo Dissent*].

⁴⁸ *Brandes Investment Partners, LP v. Venezuela*, ICSID Case No. ARB/08/3, Award (Aug. 2, 2011). The author acted as counsel for claimant in the case.

⁴⁹ See, e.g., Yas Banifatemi, *The Emerging Jurisprudence on the Most-Favored-Nation Treatment in Investment Arbitration*, in 3 INVESTMENT TREATY LAW: CURRENT ISSUES 241 (Andrea Bjorklund et al. eds., 2009) (advocating a jurisdictional extension of consent by means of MFN clauses when they are worded so as to apply to the entire subject matter of the treaty); see also Stephan W. Schill, *Multilateralizing Investment Treaties Through Most-Favored Nation Clauses*, 27 BERKELEY J. INT'L L. 496, 548-65 (2009); ZACHARY DOUGLAS, *THE INTERNATIONAL LAW OF INVESTMENT CLAIMS* 344-62 (2009) (advocating against jurisdictional extension of consent by means of MFN clauses).

⁵⁰ *Impregilo Award*, *supra* note 31, ¶ 5.

The *Impregilo* tribunal held that the Argentina-Italy BIT conditioned Argentina's consent to arbitration on prior submission of a dispute to the Argentine courts for a period of eighteen months.⁵¹ The claimant failed to submit the dispute to the Argentine courts and thus failed to comply with a condition of Argentina's consent to arbitration.⁵² The majority of the *Impregilo* tribunal nevertheless exercised jurisdiction on the basis of the MFN clause in the Argentina-Italy BIT invoked by the claimant.⁵³ The majority states:

Article 3(1) of the Argentina-Italy BIT provides that [e]ach Contracting Party shall, within its own territory, accord to investments made by investors of the other Contracting Party . . . a treatment that is no less favorable than that accorded to its own investors or investors from third-party countries.⁵⁴

The majority argued that Article 3(1) of the BIT could be invoked because "the term treatment is in itself wide enough to be applicable also to procedural matters such as dispute settlement" and, in any event, "the wording all other matters regulated by this Agreement is certainly wide enough to cover dispute settlement rules."⁵⁵ On this basis, the majority incorporated Article 3(1) of the US-Argentina BIT, which allowed the investor to submit the dispute to domestic courts, administrative tribunals, or after a six months delay, to international arbitration, in order to avoid the condition of an eighteen-month period for submission of disputes to local courts.⁵⁶

In an influential dissent, Professor Brigitte Stern sought to clarify the formal rules of law governing MFN clauses, referring in particular to an UNCTAD study on the topic which concluded that there were strong arguments on both sides when deciding to apply the MFN clause to dispute settlement.⁵⁷ She also stated that

⁵¹ See *id.* ¶¶ 12, 90 (quoting Article 8(2) of the Argentina-Italy BIT).

⁵² See *id.* ¶¶ 13-35.

⁵³ See *id.* ¶¶ 107-09.

⁵⁴ *Id.* ¶ 96 (internal quotation marks omitted).

⁵⁵ *Id.* ¶ 99 (internal quotation marks omitted).

⁵⁶ See *Impregilo Award*, *supra* note 31, ¶ 95.

⁵⁷ See *Impregilo Dissent* *supra* note 47; accord *Hochtief A.G. v. Argentina*, ICSID Case No. ARB/07/31, Decision on Jurisdiction, ¶¶ 35-42 (Oct. 24, 2011) (reasoning like the dissent). On the controversial role of dissents in investor-state arbitration, see Albert Jan van den Berg, *Dissenting Opinions by Party Appointed Arbitrators in Investment*

the “issue may need further clarification by international investment jurisprudence.”⁵⁸ The implication that no ultimately satisfying formal rules of law have been articulated regarding the applicability of MFN clauses to jurisdictional issues is reflected not only in the split in jurisprudence addressed squarely in the dissent, but also in a split in the secondary literature.⁵⁹

The dissent’s scholarly engagement of MFN jurisprudence and the secondary literature is an exemplary exercise of seeking to distil formal jurisdictional rules of law. Surveying the “hundreds of years of activity of international courts and tribunals”⁶⁰ as well the jurisprudence of BIT tribunals, the dissent finally sides with the conclusions of the *Salini v. Jordan*⁶¹ and *Plama v. Bulgaria*⁶² tribunals, which rejected the application of MFN clauses to jurisdictional issues.⁶³ Stern does so after critiquing the various legal rationales provided to justify this result, noting that all approaches failed to account for true distinction between substantive protections and consent provisions in bilateral investment treaties.⁶⁴ It is this fundamental distinction that ultimately justifies the result reached in those cases.⁶⁵

Stern is also quick to point out the limitations of the rule she proposes to establish. If the intention to include the dispute settlement mechanism within the scope of the MFN clause is expressly stated, “there is no need for an interpretation” and the MFN clause does apply to jurisdiction.⁶⁶ However, if such an intention is not clearly stated, the MFN clause must be

Arbitration, in LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN 821, 821-43 (Mahnoush Arsanjani et al. eds., 2010).

⁵⁸ Impregilo Dissent, *supra* note 47, ¶ 3 (quoting BILATERAL INVESTMENT TREATIES 1995–2006: TRENDS IN INVESTMENT RULEMAKING, U.N. Doc. UNCTAD/ITE/IIA/2006/5, at 42 (2007)).

⁵⁹ See sources cited *supra* note 41.

⁶⁰ Impregilo Dissent, *supra* note 47, ¶ 6.

⁶¹ *Salini Costruttori S.p.A. v. Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction (Nov. 9, 2004).

⁶² *Plama Consortium Ltd. v. Bulgaria*, ICSID Case No. ARB/03/24, Award (Aug. 27, 2008).

⁶³ See, e.g., Impregilo Dissent, *supra* note 47, ¶¶ 6, 7, 45.

⁶⁴ See *id.* ¶¶ 14-32, 44-68.

⁶⁵ See *id.* ¶¶ 44-68.

⁶⁶ *Id.* ¶ 17.

interpreted,⁶⁷ and, Stern argues, any “interpretation” of an MFN clause must conclude that the MFN clause cannot apply to the consent provisions of the BIT.⁶⁸

According to Stern, MFN clauses, as a matter of international law cannot apply to dispute resolution, because “rights and means of protecting rights are two different ‘legal animals.’”⁶⁹ Applying a canon of construction, she explains that “the substantive treatment and the jurisdictional treatment are to be treated differently under the *ejusdem generis* principle, precisely because the qualifying conditions to benefit from each treatment are not the same.”⁷⁰ The use of the *ejusdem generis* canon of construction is justified because

on the international level, most rights cannot be enforced through a jurisdictional process, it is only when, exceptionally, the State has given its consent—consent to other States for accepting the jurisdiction of the ICJ or consent to foreign investors for accepting international arbitration—that such “jurisdictional treatment” complements the substantive treatment by the international rules.⁷¹

This reasoning sheds light on a basic difference between rights and fundamental conditions for access to rights,⁷² a distinction that, in turn, creates a presumption against jurisdiction.⁷³ This presumption can only be overcome if the intent to confer jurisdiction is “expressly stated or clearly ascertained.”⁷⁴ Thus, an investor’s legal argument that an MFN clause can apply to a jurisdictional undertaking must be clearly indicated in the agreement itself, a higher standard of proof.

Unfortunately, Stern’s reasoning does not offer up the clarification it set out provide. It can be reduced to the exceptional nature of consent to investor-state arbitration, that is, the special

⁶⁷ *Id.*

⁶⁸ See Impregilo Dissent, *supra* note 47, ¶¶ 14-17.

⁶⁹ *Id.* ¶ 31.

⁷⁰ *Id.* ¶ 38.

⁷¹ *Id.* ¶ 45.

⁷² See *id.* ¶ 47.

⁷³ See *id.* ¶ 45.

⁷⁴ Impregilo Dissent *supra* note 47, 17.

status of access to rights in international law.⁷⁵ This rationale could lend support to the dissent's argument that MFN clauses cannot be invoked jurisdictionally. But it could equally support the opposite interpretation—that MFN clauses *can* be invoked jurisdictionally. This contradiction cannot be remedied in the abstract, as the dissent sought to establish.

Stern's premise, on its face, supports an investor's argument in favor of applying the MFN clause to jurisdictional undertakings. The consent's exceptional nature makes it the single most important investor protection included in bilateral investment treaties that, per force, must be extended by an MFN clause. As the dissent admits, her reasoning "goes against a strong common perception that, in investment law, the availability of arbitration is probably the most important part of the 'treatment' the foreign investor is looking for."⁷⁶

For this reason, Stern's argument is not only under-determining,⁷⁷ but is also substantively unconvincing. It is a basic principle of public international law that individuals, as opposed to states, acquire international legal rights through their ability to redeem them.⁷⁸ If an MFN clause expands an investor's

⁷⁵ See *id.* ¶ 45.

⁷⁶ *Id.* ¶ 32.

⁷⁷ See Martti Koskenniemi, *Hierarchy of International Law: A Sketch*, 8 EUR. J. INT'L L. 566, 574 (1997) (explaining that under-determined rules are those that "fail to cover some cases that we would want to cover").

⁷⁸ See HANS Kelsen, *PRINCIPLES OF INTERNATIONAL LAW* 143 (1952) ("If 'rights' are to be conferred on individuals by an international agreement, the latter must impose upon the state parties to the agreement the obligation to recognize the jurisdiction of a tribunal to which the individuals have access in case of a violation of the rights on the part of the state, as well as the obligation to comply with the decision of the tribunal."); see also Stephan, *supra* note 23, at 1608-10, 1623 (discussing the development of private rights of action in the human rights and investment protection context as founding private rights); Julien Cantegreil, *The Audacity of the Texaco/Calasiatic Award: René-Jean Dupuy and the Internationalization of Foreign Investment Law*, 22 EUR. J. INT'L L. 441, 442 (2011) (discussing the internationalization of concession agreements through inclusion of an arbitration clause); Margarita T.B. Coale, *Stabilization Clauses in International Petroleum Transactions*, 30 DENV. J. INT'L INVESTMENT L. & POL'Y 217, 227 (2002) (noting that "[a]s a result of the interaction between the [arbitration and choice of law] clauses of the agreement, the Court of Arbitration determined for the first time that a contract between a private party and a sovereign state might be internationalized"). Current jurisprudence is split whether the investors have direct rights under international investment treaties or whether their rights are as third-party beneficiaries of their home state. See *Corn Products Int'l Inc. v. Mexico*, ICSID Case

substantive rights, it can do so only if it also extends all rights equally, including the consent to arbitration.⁷⁹ Because the dissent admits that the MFN clause extends the scope of an investor's substantive treaty rights, it cannot deny its applicability to the consent to arbitration consistently with the rules of public international law governing the creation of individual rights in absolute terms.⁸⁰

Rather than provide a cogent formal rule of law governing MFN clauses and foreclosing the need for further textual interpretation, Stern effectively creates a burden of persuasion to be carried by the investor.⁸¹ She acknowledges that some MFN clauses do cover consents to investor-state arbitration, meaning that proof in some instances must be successful.⁸² According to the proposed burden, a claimant must prove that an MFN clause applies to consent by clear and convincing evidence, such that there is no longer a need to interpret the MFN provision.⁸³ Recourse to textual interpretation of an MFN clause to discharge

No. ARB(AF)/04/1, Decision on Responsibility, ¶ 176 (Jan. 15, 2008) (holding that investors have direct rights under NAFTA Chapter XI); *Archer Daniels Midland Co. v. Mexico*, ICSID Case No. ARB(AF)/04/05, Award and Separate Opinion, ¶ 157 (Sept. 16, 2007) (holding that investors "do not hold independent substantive rights" under NAFTA Chapter XI). Irrespective of which of the positions is adopted, the manner in which the investor becomes either the holder of rights or a beneficiary of rights held by the state is the dispute resolution clause.

⁷⁹ See, e.g., *EDF International S.A. v. Argentina*, ICSID Case No. ARB/03/23, Award, ¶ 929 (June 11, 2012) (introducing a new cause of action for breach of an umbrella clause by means of an MFN clause); compare *Paushok v. Mongolia*, UNCITRAL, Award on Jurisdiction and Liability, ¶ 254 (Apr. 28, 2011) (broadening the scope of fair and equitable treatment claims available under the Russia-Mongolia BIT) with Tony Cole, *The Boundaries of Most Favored Nation Treatment in International Investment Law*, 33 MICH. J. INT'L L. 537, 568-84 (2012) (discussing limitations of substantive uses of an MFN clause).

⁸⁰ Compare Impregilo Dissent, *supra* note 47, ¶ 47, with ¶¶ 58, 64, 66-67.

⁸¹ See Impregilo Dissent, *supra* note 47, ¶¶ 57-66.

⁸² See *id.* ¶ 17.

⁸³ See Méndez, *supra* note 43, at 140 (setting out burdens of persuasion in U.S. proceedings); Pietrowski, *supra* note 43, at 378-79 (concluding that proof in a convincing manner used with regard to allegations *contra bonos mores* imposes a higher burden of persuasion than the balance of probability ordinarily used in international proceedings); Eduardo Valencia-Ospina, *Evidence Before the International Court of Justice*, 1 INT'L L.F. D. 202, 203-04 (1999) (noting that the practice of the International Court of Justice is not to impose a heightened standard of proof but instead to require only that the court be persuaded).

this burden is viewed as proof that the claimant has failed to discharge its burden.⁸⁴ Almost any response to a jurisdictional objection regarding invocation of an MFN clause requires some interpretation of the clause; therefore burdens can be used to decide a dispute against an investor in nearly every contested case. As a matter of common sense, the dissent's approach becomes arbitrary.

2. *Brandes v. Venezuela*

The tribunal in *Brandes* applied the same premise deployed by the *Impregilo* dissent, but in the context of proof of consent generally.⁸⁵ It consciously extended the MFN jurisprudence discussed in *Impregilo* and its position regarding the nature of consent and sought to derive a formal rule of consent to arbitration to assist in determining the existence of consent to arbitration in a particular situation.⁸⁶ Rather than succeed at this task, the rule developed in *Brandes* obviated the need to interpret an alleged consent to arbitration and allowed determination of the dispute by default.⁸⁷

The tribunal in *Brandes* resolved a jurisdictional challenge to a claim introduced by a U.S. investment adviser after the Venezuelan government nationalized its telephone carrier.⁸⁸ The U.S. investor invoked Article 22 of Venezuela's Investment Law as the basis for jurisdiction.⁸⁹ Venezuela objected on the grounds that it had not consented to ICSID jurisdiction by means of Article 22 of the Venezuelan Investment Law, which states:⁹⁰

⁸⁴ See *supra* note 83 and accompanying text.

⁸⁵ See *Brandes*, *supra* note 48, ¶¶ 110-18.

⁸⁶ See *id.*

⁸⁷ See *id.* ¶¶ 87-118.

⁸⁸ See *id.* ¶¶ 9-17.

⁸⁹ See *id.* ¶ 27.

⁹⁰ *Id.* For a discussion of the appropriate construction of unilateral acts, see generally W. Michael Reisman & Mahnouch Arsanjani, *The Question of Unilateral Governmental Statements as Applicable Law in Investment Disputes*, in *VÖLKERRECHT ALS WERTORDNUNG – COMMON VALUES IN INTERNATIONAL LAW*, Festschrift für / Essays in Honour of Christian Tomuschat (P.M. Dupuy et al. eds., 2006) (“[W]hether, and under what conditions, international legal rules with respect to binding unilateral declarations by States may analogously make such unilateral statements by governments directed to potential investors part of the applicable law for the relations between investors who rely upon the statements, and the governments, who issue

Disputes arising between an international investor, whose country of origin has in effect with Venezuela a treaty or agreement for the promotion and protection of investments, or disputes to which are applicable the provisions of the Multilateral Investment Guarantee Agency (MIGA), or the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID), shall be submitted to international arbitration, according to the terms of the respective treaty or agreement, if it so provides, without prejudice to the possibility of using, if appropriate, the dispute resolution means provided for under the Venezuelan legislation in effect, when applicable.⁹¹

In its decision, the tribunal imported the holding of *Plama*, and

them.”); David D. Caron, *The Interpretation of National Foreign Investment Laws as Unilateral Acts Under International Law*, in LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN (Mahnoush H. Arsanjani et al. eds., 2011) (“[r]eexam[in]g the rise and evolution of the contemporary international legal regime governing international investment in light of the insights of the New Haven School”). Prior to the *Brandes* decision, two tribunals denied jurisdiction over claims premised in part on Article 22 of the Investment Law. See *Mobil*, *supra* note 37, ¶¶ 97-141 (interpreting Article 22 as an insufficient basis for ICSID jurisdiction over Venezuela); *Cemex Caracas Investments BV and Cemex Caracas II Investments BV v. Venezuela*, ICSID Case No. ARB/08/15, Decision on Jurisdiction, ¶¶ 63-139 (Dec. 30, 2010), IIC 470 (2010) [hereinafter *Cemex*] (interpreting Article 22 as an insufficient basis for ICSID jurisdiction over Venezuela, but ultimately finding jurisdiction on other grounds). In both cases, the tribunal determined that Article 22 had to be interpreted as a unilateral act made pursuant to the ICSID Convention. See *Mobil*, *supra* note 37, ¶¶ 83-96, 140; *Cemex*, *supra*, ¶¶ 90-139. The parties did not plead the case on this basis of this legal framework. See *Mobil*, *supra* note 37, ¶¶ 26, 38, 45-46, 52-53, 57-60 (noting that the parties focused on Venezuela’s consent, or lack thereof, to adhere to ICSID jurisdiction); *Cemex*, *supra*, ¶¶ 24-28, 32-38, 45-48 (briefing the *Mobil* decision in the Rejoinder on Jurisdiction). Both decisions were dismissed on jurisdiction for failing to submit sufficient evidence to meet the standard deemed applicable by the respective tribunals. See *Mobil*, *supra* note 37, ¶ 140 (“[T]he Tribunal has arrived to the conclusion that Article 22 does not constitute consent to jurisdiction with respect to any of the claimants.”); *Cemex*, *supra*, ¶ 138-39 (“[T]he Tribunal has arrived at the conclusion that Article 22 does not constitute consent to jurisdiction by Venezuela.”). A conclusion that the parties did not submit sufficient evidence with regard to the standard they failed to plead is not surprising, and it significantly reduces the authority of arbitration tribunals such as in *Brandes* in which the unilateral act theory had been briefed extensively by the parties. Compare *Brandes*, *supra* note 48, ¶¶ 9-17, 27, with *Mobil*, *supra* note 37, ¶¶ 83-96, 140, and *Cemex*, *supra*, ¶¶ 90-139.

⁹¹ *Brandes*, *supra* note 48, ¶ 32 (citing Ley de Promoción y Protección de Inversiones, ch. 4, art. 22, Decree No. 356, Official Gazette of the Bolivarian Republic of Venezuela No. 5,390 (Oct. 3, 1999)).

dismissed the jurisdictional invocation of an MFN clause relied upon by Venezuela in favor of creating a more general formal rule-governing jurisdiction:⁹² “[I]t is self-evident that such consent should be expressed in a manner that leaves no doubts.”⁹³ The tribunal justified this standard by reference to the extraordinary nature of state consent to arbitration.⁹⁴ Given this high bar, the *Brandes* tribunal dismissed the claim.⁹⁵ The logic of *Brandes* is the same as that of the *Impregilo* dissent: the investor must prove jurisdiction, and must do so “in a manner that leaves no doubt”⁹⁶ because of the exceptional nature of state consent to arbitration.⁹⁷

Rather than decide the jurisdictional objection on the basis of an interpretation of the consent document, the *Brandes* tribunal relied on its development of formal rules governing consent to avoid interpretation all together.⁹⁸ It concluded that “the wording of Article 22 of the LPPI is confusing and imprecise, and that it is not possible to affirm, based on a grammatical interpretation, whether or not it contains the consent of the Bolivarian Republic of Venezuela to ICSID jurisdiction.”⁹⁹ It did not further construe

⁹² *Id.* ¶ 72; *Plama Consortium Ltd. v. Bulgaria*, ICSID Case No. ARB/03/24, Award (Aug. 27, 2008).

⁹³ *Id.* ¶ 113.

⁹⁴ *Id.* ¶ 111.

⁹⁵ *See id.* ¶¶ 111-18 (“[T]his Tribunal lacks competence to resolve the dispute that has been submitted to it.”).

⁹⁶ *Compare* Méndez, *supra* note 43, at 140 (discussing burdens of persuasion in civil and criminal law in the United States), *with* Pietrowski, *supra* note 43, at 378-79 (discussing burdens of persuasion in international law), *and* Valencia-Ospina, *supra* note 83, at 203-04 (arguing that international law has adopted a civil law approach to burden of persuasion, where there is no identifiable standard and the only requirement is that the judge be persuaded).

⁹⁷ *Compare* *Brandes*, *supra* note 48, ¶ 111, *with* Part II.A.1.

⁹⁸ *Brandes*, *supra* note 48, ¶¶ 111-18 (“This Tribunal sees no reason to depart from the conclusions reached by these two tribunals in comparable cases . . .”).

⁹⁹ *Id.* ¶ 86. The award further does not present the grammatical interpretation presented by the parties because the tribunal considered “it to be unnecessary.” *Id.* ¶ 85. All that is provided is that “*Brandes* has asserted that this article provides for Venezuela’s consent to ICSID jurisdiction,” that “despite [claimant’s] assertion that it is clear, it devotes many pages and much time to reinforce its conclusion that the article contains the Republic’s consent to ICSID arbitration,” and that “Venezuela also offers a grammatical interpretation and reaches the opposite conclusion.” *Id.* ¶¶ 83-84.

the meaning of Article 22 in its award.¹⁰⁰

The common sense problem with applying the proposed rule is more obvious in *Brandes* than in *Impregilo*. The *Brandes* tribunal rejected Venezuela's explanation for the wording of Article 22 as a mere acknowledgment of concluding an arbitration clause: Venezuela's historical hostility to arbitration.¹⁰¹ The tribunal stated that "[t]here are other valid arguments to support the contention that Article 22 of the LPPI does not provide for such consent, but such alleged hostility toward arbitration is not one of them."¹⁰² Paradoxically, it thus appears that the investor won the litigation but lost the dispute: the investor provided a more plausible interpretation of the consent instrument than the respondent did; unfortunately, the tribunal did not provide any interpretation of the instrument and nevertheless denied jurisdiction.¹⁰³ This formal rule-of-law reasoning has nearly

¹⁰⁰ *Id.* ¶¶ 103, 115. The tribunal did not use contextual material to overcome the confusion and imprecision in the drafting of Article 22. *Id.* ¶ 103. Instead, the tribunal concluded that each piece of contextual proof on its own also failed to meet the standard of proof for the existence of consent to arbitration. *Id.* For example, the tribunal concluded that contemporaneous documentary evidence from a person involved in the drafting of Article 22 could not "provide the basis for finding that Article 22 of the LPPI contains the consent," making it "unnecessary, for purposes of resolving this dispute, to establish the actual role played" by that person "in the drafting of the LPPI, his knowledge of the issue under discussion and the relevance of his publications about this issue." *Id.*

¹⁰¹ Compare *id.* ¶¶ 40, 48, 75, with *Mobil*, *supra* note 37, ¶ 45.

¹⁰² *Brandes*, *supra* note 48, ¶ 106.

¹⁰³ See *id.* ¶¶ 79-118 ("Based on the findings [of the Tribunal], it is obvious that Article 22 of the Law on Promotion and Protection of Investments does not contain the consent of the Bolivarian Republic of Venezuela to ICSID jurisdiction."). The search for formal jurisdictional rules in practice has led to a "super-restrictive" interpretation of consent instruments such that the need to interpret is seen as a sufficient reason to dismiss, exceeding even "ordinary" restrictive interpretation, which permits the parties to consult context, object, and purpose of the instrument as the basis for rival arguments. Compare *Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations, with Commentaries Thereto*, 2 Y.B. INT'L L. COMM'N 369, 377 (2006) [hereinafter *Guiding Principles*] ("A unilateral declaration entails obligations for the formulating State only if it is stated in clear and specific terms. In the case of doubt as to the scope of the obligations resulting from such a declaration, such obligations must be interpreted in a restrictive manner. In interpreting the content of such obligations, weight shall be given first and foremost to the text of the declaration, together with the context and the circumstances in which it was formulated."), with *id.* at 371 ("To determine the legal effects of such declarations, it is necessary to take account of their content, of all the factual circumstances in which they were made, and of the

obviated the need for any interpretation of the governing documents and has led to purposeful non-engagement of the governing consent documents by tribunals.¹⁰⁴

B. *Proof of Facts*

A significant and growing number of arbitral decisions do not turn on treaty interpretation, but instead turn on the conclusions of a tribunal regarding contested jurisdictional facts.¹⁰⁵ A proof of facts approach is relevant when the host state has raised objections that the allegations made by the claimant to sustain jurisdiction are false.¹⁰⁶ For example, the host state could raise an objection that the claimant does not in fact own or control the investment as asserted in its submissions,¹⁰⁷ or that the claimant does not in fact have the nationality it purports to hold.¹⁰⁸ But proof of fact is also

reactions to which they gave rise.”), and Luigi Crema, *Disappearance and New Sightings of Restrictive Interpretation(s)*, 21 EUR. J. INT’L L. 681, 681-82 (2010) (submitting that restrictive interpretation is a general value choice in favor of a heightened role of state sovereignty).

¹⁰⁴ See Guiding Principles, *supra* note 103, at 377 (noting the effects of restrictive law reasoning on interpretation by and behavior of tribunals).

¹⁰⁵ See, e.g., *Saba Fakes v. Republic of Turk.*, ICSID Case No. ARB/07/20, Award, ¶¶ 51, 147 (July 12, 2010), IIC 439 (2010); *Cementownia “Nowa Houta” S.A. v. Republic of Turk.*, ICSID Case No. ARB(AF)/06/2, Award, ¶ 149 (Sept. 11, 2009), IIC 390 (2009) [hereinafter *Cementownia*]; *Europe Cement Inv. & Trade S.A. v. Republic of Turk.*, ICSID Case No. ARB(AF)/07/2, Award, ¶¶ 139-45 (Aug. 13, 2009), IIC 385 (2009) [hereinafter *Europe Cement*]; *Hussein Nuaman Soufraki v. U.A.E.*, ICSID Case No. ARB/02/7, Award, ¶¶ 45-46 (July 7, 2004), IIC 131 (2004); *Champion Trading Co. and Ameritrade Int’l, Inc. v. Egypt*, ICSID Case No. ARB/02/9, Decision on Jurisdiction, 288 (Oct. 21, 2003), IIC 56 (2003) [hereinafter *Champion Trading*].

¹⁰⁶ See, e.g., *Saba Fakes*, *supra* note 105, ¶¶ 51, 147; *Cementownia*, *supra* note 105, ¶ 149; *Europe Cement*, *supra* note 105, ¶¶ 139-45; *Hussein Nuaman Soufraki v. U.A.E.*, ICSID Case No. ARB/02/7, Award, ¶¶ 45-46 (July 7, 2004), IIC 131 (2004); *Champion Trading* *supra* note 105, ¶ 288.

¹⁰⁷ See, e.g., *Saba Fakes v. Republic of Turk.*, ICSID Case No. ARB/07/20, Award, ¶¶ 51, 147 (July 12, 2010), IIC 439 (2010) (finding that claimant purchased less than full ownership of shares and as such was not entitled to bring a claim under the investment treaty); *Cementownia* *supra* note 105, ¶ 149 (finding that the claimant did not own or hold the shares on which the claim was premised); *Europe Cement*, *supra* note 105, ¶¶ 139-45 (finding that the claimant did not own or hold the shares on which the claim was premised).

¹⁰⁸ See, e.g., *Hussein Nuaman Soufraki v. U.A.E.*, ICSID Case No. ARB/02/7, Award, ¶¶ 45-46 (July 7, 2004), IIC 131 (2004) (finding that the claimant was not an Italian national at the relevant times and therefore not covered by the treaty); *Champion Trading Co. and Ameritrade Int’l, Inc. v. Egypt*, ICSID Case No. ARB/02/9, Decision on

relevant when the respondent raises affirmative defenses to jurisdiction, such as when a host state asserts that the claimant is not entitled to protection because it was corrupt, it invested in violation of host-state law,¹⁰⁹ or, in an increasingly popular turn of phrase, it did not invest in good faith.¹¹⁰ Cases that raise such objections turn on proof of fact.¹¹¹ The burden of proof regarding

Jurisdiction, 288 (Oct. 21, 2003), IIC 56 (2003) (finding that individual claimants were dual United States and Egyptian nationals and therefore could not bring claims against Egypt under the treaty); *but see, e.g.*, *Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Decision on Jurisdiction, ¶¶ 200-01 (Apr. 11, 2007), IIC 288 (finding that the claimants had Italian nationality at the relevant times); *Ioan Micula, Viorel Micula, S.C. European Foods S.A., S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Rom.*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, ¶¶ 104-06 (Sept. 24, 2008), IIC 339 [hereinafter *Micula*] (finding that the individual claimants had acquired Swedish nationality).

¹⁰⁹ *See, e.g.*, *World Duty Free Co. Ltd. v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award, ¶¶ 173-74, 179 (Sept. 25, 2006), IIC 277 (2006) [hereinafter *World Duty Free*] (dismissing claims because of proof of corruption on the part of the claimant); *Inceysa Vallisoletane S.L. v. Republic of El Sal.*, ICSID Case No. ARB/03/26, Award, ¶¶ 230-57 (Aug. 2, 2006), IIC 134 (2006) [hereinafter *Inceysa*] (dismissing claims because of fraud, breach of good faith, violation of international public policy, and unjust enrichment in the acquisition of the investment); *Plama, supra* note 62, ¶¶ 144-46 (dismissing claims because of proof of misrepresentation and breach of good faith in the acquisition of the investment); *but cf. Fraport AG Frankfurt Airport Services Worldwide v. Republic of Phil.*, ICSID Case No. ARB/03/25, Decision on the Application for Annulment, ¶¶ 218-47 (Dec. 23, 2010), IIC 478 (2010) [hereinafter *Fraport Annulment*] (annulling the decision that the claimant had violated the Anti-Dummy Law for failure to accord the claimant due process). *See also* Rakhum Moloo & Alex Khachaturian, *The Compliance with the Law Requirement in International Investment Law*, 34 *FORDHAM INT'L L.J.* 1473, 1475 (2011) (“[I]t has become commonplace for [host countries] to allege that investors have not complied with the law in making their investment, and accordingly, should be prevented from pursuing their claims.”); Jason Webb Yakee, *Investment Treaties and Investor Corruption: An Emerging Defense for Host States?*, 52 *VA. J. INT'L L.* 723, 725-26 (2012) (analyzing the relevance of public corruption to private arbitral jurisprudence to determine the likely availability of private corruption as a defense for host states).

¹¹⁰ *See, e.g.*, *Phoenix Action Ltd. v. Czech*, ICSID Case No. ARB/06/5, Award, ¶¶ 144-46 (Apr. 9, 2009), IIC 367 (2009) [hereinafter *Phoenix*] (holding that the restructuring of an investment was done in bad faith because no economic activity was planned to be conducted following the restructuring); *but cf. Mobil, supra* note 37, ¶¶ 20-26 (holding that the restructuring was not performed in bad faith); Paul M. Blyschak, *Access and Advantage Expanded: Mobil Corporation v. Venezuela and Other Recent Arbitration Awards on Treaty Shopping*, 4 *J. W. ENERGY L. & BUS.* 32, 32-33 (2011) (investigating the possibility of treaty shopping as an abuse of process, and, therefore, a breach of good faith).

¹¹¹ *See infra* Part III.

relevant facts is rarely discussed in investor-state decisions on jurisdiction and, thus, is significantly underdeveloped.¹¹²

The underdevelopment of burdens of proof and persuasion with regard to jurisdictional facts has led to increasing problems. In response to jurisdictional objections that an investment had not been made in good faith by an investor, the 2011 decision in *Libananco v. Turkey*¹¹³ and the 2012 decision in *Caratube v. Kazakhstan*¹¹⁴ imposed a burden on the investor to prove by clear and convincing evidence that he had in fact owned or controlled the investment. This burden of persuasion creates a legal presumption that investments are not made in good faith simply because the host state raises the issue.¹¹⁵ Both decisions thus appear to permit the development of a nascent law of international investment protection that interferes with a tribunal's task of establishing the facts of a case.¹¹⁶ These flaws appear to be caused by the same conception of investor-state arbitration as the truly exceptional remedy that was central to the *Impregilo* dissent and the *Brandes* award.

1. *Libananco v. Turkey*

The first decision concerns the question of whether the claimant proved a qualifying investment.¹¹⁷ In *Libananco*, a Cypriot holding company asserted claims against Turkey stating that the seizure of two vertically integrated electrical utility companies, Çukurova Elektrik Anonim Şirketi (ÇEAŞ) and Kepez Elektrik Turk Anonim Sirketi (Kepez), by Turkish military and

¹¹² See *infra* Part III.B.

¹¹³ *Libananco Holdings Co. Ltd. v. Republic of Turk.*, ICSID Case No. ARB/06/8, Award, ¶¶ 121-26, 536 (Aug. 31, 2011), IIC 506 (2011) [hereinafter *Libananco*] (“[I]n relation to the issue of whether Libananco acquired timely ownership of the share certificates in question . . . the [investor] has the burden of proof.”).

¹¹⁴ See *Caratube Int'l Oil Co., LLP v. Kazakhstan*, ICSID Case No. ARB/08/12, Award, ¶ 394-96 (June 5, 2012) [hereinafter *Caratube*] (“[T]he Tribunal concludes that jurisdiction cannot be denied for the mere reason that [the investor] has not fully complied with its burden of proof regarding ownership by the U.S. national.”).

¹¹⁵ See *Libananco*, *supra* note 113, ¶¶ 121-26, 536 (inferring that once the host country alleges lack of good faith, the investor has the burden of proving good faith to establish jurisdiction).

¹¹⁶ See *id.*

¹¹⁷ See *id.* (requiring the investor to prove good faith, or that he actually owned the shares in question, in a bifurcated hearing before proceeding to further fact finding).

police forces on June 12, 2003, and the cancellation of their concessions, violated the Energy Charter Treaty.¹¹⁸ The *Libananco* decision addressed whether “Libananco in fact owned ÇEAŞ and Kepez” at the relevant time.¹¹⁹ Ultimately, the tribunal dismissed the case for lack of jurisdiction because “Libananco ha[d] not proved that it owned shares in ÇEAŞ and Kepez before 12 June 2003.”¹²⁰ The tribunal’s conclusions were not premised upon factual findings to this effect, but instead relied upon burdens of proof and persuasion:

Although some of the evidence submitted by the Claimant tends to support certain aspects of its case, the Tribunal finds that, in the light of the various inconsistencies, conflicts and changes in the Claimant’s account of the events that occurred, its final description and account of how it came to own shares in ÇEAŞ and Kepez is not persuasive. *The Claimant has therefore not discharged its burden to show positively* that it had acquired, by 12 June 2003, ownership of any of the large quantity of shares in issue in the manner alleged, or at all. Accordingly, the Tribunal finds that the Claimant has not proved that it owned the shares in ÇEAŞ and Kepez, which represent the “Investment” in this arbitration, by the critical date of 12 June 2003.¹²¹

Libananco was able to demonstrate key factual elements demonstrating ownership, despite the fact that it could not produce the bearer shares in ÇEAŞ and Kepez.¹²² It further proved that the possession of the shares by Libananco would have been physically impossible after the critical date because the government had seized the facility where the shares were housed.¹²³

Through relentless allegations of fraud, Turkey successfully

¹¹⁸ *Id.* ¶¶ 95-96.

¹¹⁹ *Id.* ¶ 105.

¹²⁰ *Id.* ¶ 570.1.

¹²¹ *Libananco*, *supra* note 113, ¶ 536 (emphasis added).

¹²² *See id.* This objection proved successful in the two other proceedings relating to ÇEAŞ and Kepez shares because the claimants could not produce the shares upon which they were claiming. *See Cementownia*, *supra* note 105, ¶¶ 149, 159; *see also Europe Cement*, *supra* note 105, ¶¶ 144, 175-76. After originally raising the same objection, Libananco was able to prove that possession of the bearer shares in question. *Libananco*, *supra* note 113, ¶ 145.

¹²³ *See Libananco*, *supra* note 113, ¶¶ 146.6, 155.2 (stating that the share certificates were removed from the buildings where they were housed before July 2003).

refuted clear evidence supporting the investor's claims.¹²⁴ Turkey relied upon contradictions between witness statements and documentary evidence and the absence of documents that would have existed if the transfer had occurred when Libananco claimed as evidence of this fraud.¹²⁵ The purported contradictions turned on such issues as the testimony that a witness took a non-stop flight when only a direct flight had flown on the day in question.¹²⁶ Despite the fact that the claimant submitted immigration records of the witness's departure from and return to Jordan,¹²⁷ the tribunal deemed it not credible that the witness indeed flew to Cyprus at the time asserted.¹²⁸ Turkey further submitted a fax and an email from the prior beneficial owners of the shares, the Uzan family, which were purported to have circulated around both companies after the critical date.¹²⁹ Turkey represented that it obtained these documents as part of police investigations conducted after the seizure of other Uzan businesses.¹³⁰

Based on the information contained in these documents, the authenticity of which had been "vigorously disputed,"¹³¹ the tribunal rejected Libananco's assertion that it owned the shares at the relevant time,¹³² after previously ordering Turkey to cease and desist from using its police apparatus to benefit itself in the

¹²⁴ *Id.* ¶¶ 98-104.

¹²⁵ *See id.* ¶¶ 147-59 (citing multiple instances in which investors changed their defenses during the course of arbitration).

¹²⁶ *Id.* ¶ 414.4 ("[T]he evidence before the Tribunal is that Royal Jordanian operated only one flight from Amman to Cyprus on 1 April 2002, and that flight had a stopover in Beirut, Lebanon. When confronted with this fact, Mr Türkkan testified that it was a 'non-stop' flight because he 'didn't get out from the plane' when it landed in Beirut.").

¹²⁷ *Id.* ¶ 411.7.

¹²⁸ *See id.* ¶ 414.4-15 (pointing to contradictory evidence).

¹²⁹ Libananco, *supra* note 113, ¶¶ 218, 440.

¹³⁰ *Id.*

¹³¹ *Id.* ¶ 441.

¹³² *See id.* ¶ 456 (noting that the Tribunal found the conflicting evidence irreconcilable in ruling against Libananco). The tribunal appeared to base its conclusion in part upon the ultimate distribution of dividends, which it linked to ownership. *Id.* ¶¶ 218, 440, 456. This conclusion is not dispositive of share ownership within a corporate holding structure. The ultimate beneficial owners of the holding structure logically would be the ultimate recipients of dividends. A break out of such an ultimate dividend statement between the ultimate beneficial owners therefore is not surprising.

arbitration.¹³³

The burden of persuasion in the case proved critical. The tribunal considered proof of possession of the bearer shares at the requisite point in time merely to be “evidence submitted by the Claimant [that] tends to support certain aspects of its case.”¹³⁴ “Various inconsistencies, conflicts and changes in the Claimant’s account of the events that occurred” refuted this proof.¹³⁵ Such inconsistencies in witness evidence regarding events taking place approximately eight years prior were capable of defeating jurisdiction only because proof of ownership had to be “discharged . . . positively.”¹³⁶ This implies that the burden of persuasion to refute objections to jurisdiction must be carried by clear and convincing evidence.¹³⁷

This application of the burden of persuasion accomplished an extreme result. But for the assertion of fraud, production of the bearer shares themselves would have proved jurisdiction; however, because fraud had been asserted, testimony was required in addition to the shares to prove jurisdiction.¹³⁸ Inconsistencies in this additional evidence supported dismissal because the possibility of a simple mistake in testimony, of honest reasons for discrepancies that would be consistent with Libananco’s possession of the bearer shares, was discarded.¹³⁹ What is never explained is how Libananco could have come into possession of the bearer shares—absent proof of the fraud that respondent had merely asserted and, as the tribunal explains, never proved.¹⁴⁰

Libananco presents the same common sense issues with regard to proof of fact that arose in *Brandes* and the *Impregilo* dissent

¹³³ *Libananco Holdings Co. Ltd. v. Republic of Turk.*, ICSID Case No. ARB/06/8, Decision on Preliminary Issues, ¶ 79 (June 23, 2008), IIC 327 (2008) [hereinafter *Libananco, Preliminary Issues*].

¹³⁴ *Libananco*, *supra* note 113, ¶ 536.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *See id.*

¹³⁸ *See id.* (explaining that the inconsistencies in the testimony were fatal when taken together with the burden on the investor).

¹³⁹ *See id.* ¶¶ 530-36 (“There are many evidential gaps in the Claimant’s case, as well as serious discrepancies for which no satisfactory explanation has been given.”).

¹⁴⁰ *See Libananco*, *supra* note 113, ¶ 126.

with regard to proof of law.¹⁴¹ The tribunal used a heightened burden of persuasion to avoid making findings of a critical jurisdictional fact—who owned the shares in ÇEAŞ and Kepez at issue on June 12, 2003.¹⁴² The heightened burden of persuasion is deployed to defeat, in piecemeal fashion, each element of proof submitted by the claimant. This piecemeal use of the burden of persuasion strains against the weight of the totality of evidence surveyed in the award that it is more likely than not that Libananco owned the shares in question at the requisite time. The tribunal stated no reason supporting the use of a heightened burden of persuasion on the claimant.¹⁴³ By implication, it applied the same concept of jurisdiction underlying the *Brandes* and *Impregilo* decisions, one that seeks to police the exceptional nature of consent to international dispute resolution.¹⁴⁴ In light of the circumstances, its use appears arbitrary to the common sense reader.

2. *Caratube v. Kazakhstan*

The tribunal in *Caratube v. Kazakhstan*¹⁴⁵ followed a similar path to dismissal as *Libananco*.¹⁴⁶ In *Caratube*, the locally incorporated project company, CIOC, brought a claim against Kazakhstan claiming expropriation by the Kazakh government of its oil concession and oil and gas operations.¹⁴⁷ From the time of

¹⁴¹ See *supra* note 49.

¹⁴² See *Libananco*, *supra* note 113, ¶¶ 121-26 (placing high burden of proof on the investor, Libananco).

¹⁴³ See *id.* (failing to provide any reasoning for high burden of the investor).

¹⁴⁴ See *id.* (noting that the decision does not expressly refer the reader to a reason for this one-sided use of burdens of proof and persuasion). The decision does however refer in its discussion to the *Phoenix Action v. Czech Republic* award as its principal authority. *Id.* ¶ 122. The *Phoenix Action* decision employed the burdens of proof in question in order to derive the obligations under the Israel-Czech Republic BIT and the ICSID Convention to invest in good faith. See, e.g., *Phoenix*, *supra* note 110, ¶¶ 100, 106-13. This decision is consistent with the broader tenor of the *Impregilo* dissent and *Brandes* decision. See, e.g., Ian A. Laird, Borzu Sabahi, Frédéric G. Sourgens & Sobia Haque, *International Investment Law and Arbitration 2008/2009 in Review*, Y.B. INT'L INVESTMENT L. & POL'Y 87, 107-08 (Karl Sauvant ed., 2010).

¹⁴⁵ See *Caratube*, *supra* note 114, ¶¶ 383-96.

¹⁴⁶ See *id.* (dismissing due to the investor's failure to satisfy the requisite burden of proof regarding ownership).

¹⁴⁷ *Id.* ¶ 2.

the expropriation of its operations, CIOC had been subject to multiple raids of its offices, seizure of its documents, and detention and interrogation of its officers and stakeholders.¹⁴⁸ CIOC stated its claims based on a provision in the U.S.-Kazakh BIT allowing project companies that are investments of a U.S. national to bring claims directly in their own capacity.¹⁴⁹

The *Caratube* tribunal dismissed CIOC's claims because, in the tribunal's estimation, CIOC had not proved that it met the BIT requirements of "control" and that CIOC was an "investment of" a U.S. national.¹⁵⁰ The tribunal relied upon Article VI(8) of the U.S.-Kazakh for its dismissal,¹⁵¹ summarizing the dispositive question as follows: The "requirement of Article VI(8), as identified in paragraph 361, namely, whether immediately before the occurrence of the events that gave rise to the dispute Claimant was an 'investment' owned or controlled by a U.S. national."¹⁵²

The *Caratube* dismissal was premised exclusively on the perceived absence of evidence.¹⁵³ First, "the Tribunal conclude[d] that [CIOC] ha[d] not provided sufficient proof for control" of the U.S. national, Mr. Hourani, over the company.¹⁵⁴ The evidence of control the tribunal would have required was evidence of actual control over the company.¹⁵⁵ Second, CIOC "failed to discharge its burden of proof with regard to the fact that CIOC was an investment of U.S. national (Devincci Hourani) as required by Article VI(8) of the BIT."¹⁵⁶ It required proof of actual contribution by Mr. Hourani into the project.¹⁵⁷

The burden of persuasion was so high that CIOC could not discharge it, even supported by an applicable presumption.¹⁵⁸ The

¹⁴⁸ *Id.* ¶¶ 2, 15, 171, 194.

¹⁴⁹ *Id.* ¶¶ 5, 316.

¹⁵⁰ *Id.* ¶¶ 407, 457.

¹⁵¹ *Caratube*, *supra* note 114, ¶ 374. (setting out the legal question for what follows in the dispositive analysis of the award as Article VI(8) of the US-Kazakhstan BIT).

¹⁵² *See id.*

¹⁵³ *Id.* ¶ 407 (finding that the investor failed to provide sufficient proof of ownership or control).

¹⁵⁴ *Id.* ¶ 407.

¹⁵⁵ *See id.*

¹⁵⁶ *See id.* ¶ 457.

¹⁵⁷ *See Caratube*, *supra* note 114, ¶ 455.

¹⁵⁸ *See id.* ¶¶ 383-96, 421-57 (analyzing the issues of control and ownership, and,

tribunal determined that Mr. Hourani owned 92% of the shares in CIOC,¹⁵⁹ and held that “if majority ownership is shown, such a finding implies a presumption of control.”¹⁶⁰ Such a presumption ordinarily would have reversed the burden of proof.¹⁶¹ The tribunal ruled that the presumption was not a sufficient indication of control because of the absence of direct evidence in corporate records to corroborate it.¹⁶² The tribunal essentially refused to reverse the burden of proof, despite the presence of an applicable presumption in CIOC’s favor.¹⁶³

The burden of persuasion required CIOC to submit evidence that the tribunal’s rulings ultimately rendered irrelevant.¹⁶⁴ The *Caratube* award states, “the origin of capital used to make an investment is immaterial for jurisdiction purposes.”¹⁶⁵ The documents, upon the non-production of which the tribunal made its ruling, concerned “the source of funds invested in the project.”¹⁶⁶ In what can be viewed only as a complete contradiction, the tribunal pointed particularly to the lack of financial documentation as dispositive to its ruling.¹⁶⁷

The burdens of proof and persuasion were dispositive because the tribunal rejected Kazakhstan’s factual theory,¹⁶⁸ that Mr.

ultimately, determining that the investor had failed to meet its burden of proof).

¹⁵⁹ *Id.* ¶ 396.

¹⁶⁰ *Id.* ¶ 382.

¹⁶¹ Pietrowski, *supra* note 43, at 381 (“In the absence of direct evidence, international tribunals often presume or infer facts on the basis of other proven or accepted facts (such proven or accepted facts constitute indirect evidence). A presumption or inference in favour of one party in effect puts the burden of proof on the other party.”).

¹⁶² *See Caratube, supra* note 114, ¶¶ 401-07 (“[T]he Tribunal is not satisfied that a legal capacity to control a company, without evidence of actual control, is enough.”).

¹⁶³ *See id.* (noting that the investor had the capacity for control, resulting in a presumption of control, but without any showing of actual control the presumption is not enough to clear the burden).

¹⁶⁴ *See id.* ¶ 355 (finding that proof of the source of ownership was immaterial to the jurisdiction issue, but necessary to prove ownership).

¹⁶⁵ *Id.* ¶ 355.

¹⁶⁶ *Id.* ¶ 425(a).

¹⁶⁷ *See Id.* ¶ 439-57.

¹⁶⁸ *See Caratube, supra* note 114, ¶ 468 (“[T]he Tribunal concludes that the facts presented and proved by [the investor] do not satisfy [the investor’s] burden of proof to establish jurisdiction of this Tribunal.”).

Hournai's brother created CIOC for purposes of corporate raiding.¹⁶⁹ CIOC allegedly received the concession contract at issue in the arbitration by raiding a prior joint venture partner of Mr. Hourani's brother.¹⁷⁰ Kazakhstan's submission was that CIOC continued to be controlled by Mr. Hourani's brother as the mastermind behind the corporate raid in question.¹⁷¹ The tribunal rejected that theory outright, considering that such "a raid has neither been shown nor does it seem probable."¹⁷²

The burden of persuasion placed on the investor in *Caratube* in fact was not even overcome fully by party agreement on jurisdictional facts. CIOC submitted that Mr. Hourani was a 92% shareholder in the company.¹⁷³ Kazakhstan agreed with the statement and similarly submitted that Mr. Hourani in fact purchased 92% of stock in the company.¹⁷⁴ The tribunal's conclusion was that, with regard to ownership of the 92% shares, "jurisdiction cannot be denied for the mere reason that Claimant has not fully complied with its burden of proof regarding ownership by the U.S. national, Devincci Hourani."¹⁷⁵

The burden of proof used in *Caratube* appears even more excessive than the one in *Libananco*, as the factual submission of Kazakhstan was expressly rejected.¹⁷⁶ Presumptions in favor of jurisdiction had been deemed applicable but not actually applied based on lack of evidence corroborating them.¹⁷⁷ One reason the burden of proof may not have been considered discharged is the absence of documents deemed legally irrelevant.¹⁷⁸ Even stipulated facts did not meet this burden, simply because the tribunal could still raise its own doubts as to the lack of evidence in addition to the stipulation by the parties.¹⁷⁹ This treatment of

¹⁶⁹ *Id.* ¶ 419.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* ¶ 420.

¹⁷² *Id.* ¶ 462.

¹⁷³ *Id.* ¶ 318.

¹⁷⁴ *Caratube*, *supra* note 114, ¶ 394, n.38.

¹⁷⁵ *Id.* ¶ 396.

¹⁷⁶ *Id.* ¶ 462.

¹⁷⁷ *Id.* ¶ 382.

¹⁷⁸ *Id.* ¶¶ 355, 425.

¹⁷⁹ *Id.* ¶¶ 394, nn. 38, 396.

evidence is deeply troubling in its illogic. It, in effect, permits the tribunal unfettered discretion to dismiss claims on jurisdictional grounds based on factual evidence essentially because it does not feel the claimant to be sufficiently worthy of protection.

The inequality of the parties created by such burdens of proof and persuasion is evident to a commonsense observer from the *extremis* of the Tribunal's ultimate decision. The Award is express that CIOC was under police investigation by Respondent and its record seized.¹⁸⁰ With all corporate records in hand, Respondent failed to prove (and the Tribunal did not find) that someone other than Devincci Hourani owned and controlled it.¹⁸¹ Notwithstanding that the party with all records failed to prove control by another person, the Tribunal concludes that a 92% shareholding and directorship in a company could not establish that he had a controlling investment in it.¹⁸² Whatever presumption the Tribunal applied, it was decidedly not that a majority shareholder controlled the company he had bought.¹⁸³ To the contrary, it appears to have been the same presumption that the exceptional nature of state consent to arbitration requires a restrictive approach to proof of jurisdiction already on display in the *Impregilo* dissent, and the *Brandes* and *Libananco* decisions.

C. Distorting Access to Justice

The dissent in *Impregilo v. Argentina*, and the awards in *Brandes v. Venezuela*, *Libananco v. Turkey*, and *Caratube v. Kazakhstan* show a willingness on the part of tribunals to avoid interpreting consent instruments and to abstain from making findings of fact on the basis of fully developed records.¹⁸⁴ In the case of the *Impregilo* dissent and *Brandes*, formal rules of law deemed to be applicable required the investor to prove consent by clear and convincing evidence were too great a burden to overcome.¹⁸⁵ The same burden of persuasion was applied in

180 *Caratube*, *supra* note 114, ¶ 171.

181 *Id.* ¶ 291.

182 *Id.* ¶¶ 407, 457.

183 *Id.* ¶ 382.

184 *See Impregilo Dissent*, *supra* note 47, ¶ 57-66; *see also Brandes*, *supra* note 48, ¶ 111; *Libananco*, *supra* note 113, ¶¶ 121-26; *Caratube*, *supra* note 114, ¶¶ 383-96.

185 *See supra* Part I.A.

Libananco and *Caratube* to the proof of jurisdictional facts when the host state had objected that the investment had not been made in good faith.¹⁸⁶ The stated justification for applying such high burdens of persuasion was the exceptional nature of state consent to dispute resolution leading to a heightened gate-keeping function for investor-state tribunals.¹⁸⁷

The development of this heightened gate-keeping function by investor-state tribunals significantly distorts access to justice particularly when the requirements are viewed cumulatively. Taken together, these cases establish a three step approach, with a significant caveat, that places an insurmountable burden for an investor wishing to arbitrate. First, an investor must demonstrate proof of consent through contextual material that demonstrate intent and through a provision that is free of uncertainty.¹⁸⁸ Second, once consent by the state is established, the scope of the consent must include the claim at hand.¹⁸⁹ Finally, the factual proof must fall within the scope of the claim and the parties must meet, at times extraordinary, burdens of persuasion and proof. Furthermore, a state can seize evidence from the investor without changing the burden of proof.¹⁹⁰

Proof of consent must be carried by the investor by clear and convincing evidence.¹⁹¹ The text of the jurisdictional clause itself is given pride of place.¹⁹² On its face, it must be drafted in such a way that leaves no doubt that the host state intended to submit a dispute to arbitration.¹⁹³ Further, contextual materials are unlikely to prove consent; to the extent that the provision itself does not clearly consent to arbitral jurisdiction on its face, the intent of the state must be otherwise proved with similar clarity.¹⁹⁴ Intent

¹⁸⁶ See *supra* Part I.B.

¹⁸⁷ See *id.*

¹⁸⁸ See *Libananco*, *supra* note 113, ¶¶ 121-26; *Caratube*, *supra* note 114, ¶¶ 383-96, 421-57.

¹⁸⁹ See *Libananco*, *supra* note 113, ¶¶ 121-26; *Caratube*, *supra* note 114, ¶¶ 383-96, 421-57.

¹⁹⁰ See *Libananco*, *supra* note 113, ¶¶ 121-26; *Caratube*, *supra* note 114, ¶¶ 383-96, 421-57.

¹⁹¹ See *Impregilo*, Dissent, *supra* note 47, ¶ 17.

¹⁹² See *id.*

¹⁹³ *Brandes*, *supra* note 48, ¶ 113.

¹⁹⁴ See *id.* ¶¶ 87-106.

cannot be inferred from the context of the document in which it is included; to allow such an inference, the remainder would have to be clear.¹⁹⁵ But, as the *Brandes* tribunal stated, such contextual clarity speaks against jurisdiction as the state was capable of drafting a clear provision,¹⁹⁶ and drafting materials are similarly irrelevant to establish consent.¹⁹⁷ These cases have made clear that there is no dependable manner in which an investor can prove consent contextually.

The second step of the cumulative approach, proof of the scope of consent, also carries a clarity requirement.¹⁹⁸ This clarity requirement requires that the consent be applicable to the dispute with a similar level clarity on its face.¹⁹⁹ Jurisdictional requirements appearing on the face of the provision will be read against the investor unless there is clear proof in the form of a similarly authoritative statement.²⁰⁰

The third step requires the factual proof of jurisdictional facts to fall within the scope of the instrument of consent proved with the requisite level clarity.²⁰¹ To the extent that the state respondent asserts fraud or lack of good faith with regard to any element, the claimant's burden of persuasion to prove its investment automatically increases to proof by clear and convincing evidence.²⁰² Fraud allegations further require the tribunal to go beyond principal transaction documents to ascertain that the transaction was performed in good faith.²⁰³ Inconsistencies in the additional proof will not be read to confirm the primary documentary proof when two interpretations are possible, but will

¹⁹⁵ See Impregilo Dissent, *supra* note 47, ¶ 17.

¹⁹⁶ *Brandes*, *supra* note 48, ¶ 92.

¹⁹⁷ *Id.* ¶ 103.

¹⁹⁸ *Tidewater Inc. and Others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Procedural Order No. 1, ¶ 20 (Mar. 29, 2011), IIC 486 (2011) [hereinafter *Tidewater*].

¹⁹⁹ *See id.*

²⁰⁰ Because the state benefits from the absence of the material in question, it is best advised by keeping the record clear. *Id.* (explaining its position, Venezuela “states that it has no such documents” relating to the drafting of Article 22 of the Investment Law).

²⁰¹ *See Libananco*, *supra* note 113, ¶ 117.

²⁰² *See id.*

²⁰³ *See id.*

instead be read against the claimant.²⁰⁴

Finally, the state can seize all corporate and financial records of the project company and its principals without changing the investor's burden of persuasion.²⁰⁵ Any document presented by the state will be assumed to stand for the proposition for which it is submitted.²⁰⁶ The state's failure to submit seized evidence that should exist in corporate records will be used to draw inferences against the investor.²⁰⁷

The method of proof established by the foregoing cases cumulatively is not consistent with any reasonable system of dispute resolution.²⁰⁸ It practically gives the host state every opportunity possible to frustrate jurisdiction of an investor-state tribunal once a dispute has actually arisen by objecting to the clarity of the consent instrument and raising the specter of fraud or lack of good faith on the part of the investor. The method applies to investor-state arbitration as a fully apologist model of international law: jurisdiction is non-existent because the state sued has objected to it.²⁰⁹ It thus deprives the claimant of access to justice precisely when it is needed and invoked.²¹⁰

²⁰⁴ See *id.* ¶ 536.

²⁰⁵ See *id.* ¶ 456.

²⁰⁶ See *id.* ¶ 456. The tribunal appears to base its conclusion in part upon the ultimate distribution of dividends. See *id.* ¶ 450. This conclusion is not dispositive of share ownership within a corporate holding structure. The ultimate beneficial owners of the holding structure logically would be the ultimate recipients of dividends. A break out of such an ultimate dividend statement between the ultimate beneficial owners therefore is not surprising.

²⁰⁷ See Caratube, *supra* note 114, ¶¶ 431-32. This approach is notably inconsistent with the approach to proof in the WTO context. See Pauwelyn, *supra* note 43, at 234 (explaining the principle of cooperation in WTO merits proceedings as requiring submission of evidence in the sole possession of the party without the burden of proof following a good faith effort by the party with the burden to prove its case).

²⁰⁸ See *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Concurring and Dissenting Opinion (June 21, 2011); *Brandes Investment Partners, LP v. Venezuela*, ICSID Case No. ARB/08/3, Award (Aug. 2, 2011); *Libananco Holdings Co. Ltd. v. Republic of Turk.*, ICSID Case No. ARB/06/8, Award, ¶¶ 121-26, 536 (Aug. 31, 2011), IIC 506 (2011); *Caratube Int'l Oil Co., LLP v. Kazakhstan*, ICSID Case No. ARB/08/12, Award, ¶ 394-96 (June 5, 2012).

²⁰⁹ See MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA* 60-70 (2d ed. 2005) [hereinafter KOSKENNIEMI, *APOLOGY TO UTOPIA*].

²¹⁰ *But see* W. MICHAEL REISMAN, *THE SUPERVISORY JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE: INTERNATIONAL ARBITRATION AND INTERNATIONAL*

It is unsurprising that the approach taken by the four decisions in question not only distorts access to justice as a matter of common sense, but also as a matter of international law.²¹¹ Late nineteenth and early twentieth century authors insisted on the distinction between the adjudication of rights for which arbitration could be invoked and the resolution of differences of interests, for which it could not.²¹² These authors submitted that every time a dispute became politically significant, it could no longer be adjudicated because it attached to the vital interests of the state.²¹³ The doctrine was repeatedly invoked in order to deprive tribunals of jurisdiction over disputes deemed inexpedient for resolution by the respondent state's government.²¹⁴

The nineteenth-century apologist model is functionally equivalent to the cumulative approach to jurisdiction developed in this section. Rather than asserting that vital interests of the state are at stake, the host state now must only claim lack of good faith by the investor.²¹⁵ Its justification for restricting jurisdiction is the

ADJUDICATION 41-42 (1997) ("In virtually all of the matters submitted to public international arbitration, each participating State understood the costs – and limits – of losing and discounted them before undertaking the arbitration.") [hereinafter REISMAN, SUPERVISORY JURISDICTION]. Professor Reisman's observation could be employed to support an apologist model. If effectiveness of arbitration in public international law arbitration requires the discounting of losses prior to the arbitration beginning, any objection to jurisdiction would indicate that the matter presented for arbitration falls outside of the scope of matters for which such a discounting had been conducted. This means in turn that the condition of effectiveness of the consent is not satisfied. As such, there is no valid consent. This of course is not the conclusion to which Professor Reisman's study is directed.

²¹¹ See Impregilo Dissent, *supra* note 47; Brandes Investment Partners, LP v. Venezuela, ICSID Case No. ARB/08/3, Award (Aug. 2, 2011); Libananco Holdings Co. Ltd. v. Republic of Turk., ICSID Case No. ARB/06/8, Award, ¶¶ 121-26, 536 (Aug. 31, 2011), IIC 506 (2011); Caratube Int'l Oil Co., LLP v. Kazakhstan, ICSID Case No. ARB/08/12, Award, ¶ 394-96 (June 5, 2012); MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS, THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960 366-69 (2001) [hereinafter KOSKENNIEMI, RISE AND FALL OF INTERNATIONAL LAW].

²¹² See KOSKENNIEMI, RISE AND FALL OF INTERNATIONAL LAW, *supra* note 211; DOUGLAS JOHNSTON, THE HISTORICAL FOUNDATIONS OF WORLD ORDER, THE TOWER AND THE ARENA 633-42, 654-56 (2008).

²¹³ See, e.g., JOHN WESTLAKE, INTERNATIONAL LAW 357-61 (1910); see also KOSKENNIEMI, RISE AND FALL OF INTERNATIONAL LAW, *supra* note 211, at 443-44.

²¹⁴ See WESTLAKE, *supra* note 213, at 357-61.

²¹⁵ See HERSCH LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY 359-90 (2011).

same: the historically exceptional nature of international dispute resolution.²¹⁶ The difference between the “buzz words” to frustrate jurisdiction is functionally irrelevant: the simple use of the “buzz word” forecloses further inquiry.

This apologist theory has been roundly refuted. Sir Hersch Lauterpacht demonstrated both that divergences of interests always can be translated into a contest of legal rights and that such significant legal disagreements were routinely submitted to arbitration without resulting in absurd or ineffectual results.²¹⁷ From the realist perspective, Carl Schmitt and Hans Morgenthau reduced all legal rights to divergences of interest.²¹⁸ The dichotomy on the basis of which jurisdiction so easily could be defeated thus was thoroughly dismantled. The inconsistency of the current investor-state arbitration paradigm’s embrace of the apologist model (either as part of substantive law governing jurisdiction or as part and parcel of burdens of proof) with the public international law dispute resolution process confirms that an adjustment in the investor-state decision making process is urgently needed.

III. Proof of Consent

The current academic paradigm’s focus on formal jurisdictional rules risks seriously distorting access to justice in investor-state arbitration. This potential distortion can be corrected by adoption of the jurisdictional jurisprudence of the ICJ, and its predecessor, the Permanent Court of International Justice.²¹⁹ As discussed below, most investor-state decisions now implicitly follow this approach in their analysis of consent instruments, thus leading to the inconsistency in the ultimate decision they adopt that so threatens the cohesion of the current paradigm. Because the practice of investor-state tribunals is already principally in accord with the jurisprudence of the

²¹⁶ *See id.*

²¹⁷ *See id.*

²¹⁸ *See* KOSKENNIEMI, RISE AND FALL OF INTERNATIONAL LAW, *supra* note 211, at 426-36, 442-45; *see also* CARL SCHMITT, DER BEGRIFF DES POLITISCHEN (1933), translated in THE CONCEPT OF THE POLITICAL (George Schwab trans.) (1996).

²¹⁹ *See* Bingbin Lu, LL.M., *Reform of the International Court of Justice—A Jurisdictional Perspective*, PERSPECTIVES, Vol. 5, No. 2, June 30, 2004.

International Court of Justice, the necessary paradigm shift is essentially one of perspective, or “*Selbstverständnis*,”²²⁰ rather than one that requires a substantive reinvention of the jurisdictional exercise in investor-state arbitration.

Instead of examining the substantive rules developed by the ICJ and its predecessor, this analysis focuses on their approach to interpretation of consent instruments. This starting point is necessary because

to assess fairness in the complex procedures of international arbitration, the scholar must develop an additional and very detailed focus on the public international arbitration process on the issues, litigant tactics, and cameral tribunal dynamics of particular cases. Without this, it is virtually impossible to appreciate the options actually available to parties at critical junctures.²²¹

In determining and commenting upon rules of decisions for legal comparison, comparative law suggests a similar methodology. As Ole Lando explains, Professor Schlesinger, the father of comparative law in the United States:

used problems and cases so that the different legal concepts and methods of the systems would not hide the similarities of the results. His idea was that it was only in viewing a legal system’s treatment of a problem as illustrated by cases that the impact of the rule on that legal system could be analyzed and a common core discovered. This functional approach has since been approved and used by legal scholars as an appropriate method for comparative research.²²²

Given the amount of legal systems represented in investor-state arbitration, this approach is particularly apt to discover a common method of jurisdictional decision-making.

The first step of proving jurisdiction in an arbitration proceeding is the submission of a writing upon which jurisdiction

²²⁰ According to a German-English translator, the word “*Selbstverständnis*” means “self-image, self-conception, self-understanding, or conception of oneself.” English-German Translation for: *Selbstverständnis*, DICT.CC ENGLISH-GERMAN DICTIONARY, <http://www.dict.cc/german-english/Selbstverst%C3%A4ndnis.html> (last visited Feb. 5, 2013).

²²¹ REISMAN, SUPERVISORY JURISDICTION, *supra* note 210, at 376.

²²² Ole Lando, *The Common Core of European Private Law and the Principles of European Contract Law*, 21 HASTINGS INT’L & COMP. L. REV. 809, 809 (1998).

is based—a treaty, legislation, or contractual agreement.²²³ The authenticity of the writing or its attributability to the state need rarely be contested in investor-state arbitration. To the extent contested, proof will turn on the cumulative weight of government documents such as the official gazette of the state,²²⁴ notifications sent by the state (whether to other states, institutions or at large),²²⁵ drafting documents,²²⁶ and, occasionally, forensic document experts.²²⁷ The assessment by a tribunal of record evidence follows the same principles of factual proof.²²⁸

A common problem arises when the host state concedes the authenticity and attributability of the writing, but contests that it in fact includes an applicable “consent” to arbitration. The question becomes one of scope and the legal proof to be carried concerning the interpretation of the instrument as a matter of international law.²²⁹ This section addresses “the relevant rules of interpretation of the Arbitration Agreement which govern [the tribunal’s] competence.”²³⁰

²²³ See *ICSID Convention, Regulations, and Rules, Article 25(1)*, ICSID (Apr. 10, 2006), <https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partA-chap02.htm>; see also Georges Delaume, *Consent to ICSID Arbitration*, in *THE CHANGING WORLD OF INTERNATIONAL LAW IN THE TWENTY-FIRST CENTURY: A TRIBUTE TO THE LATE KENNETH R. SIMMONDS* 155-78 (Joseph J. Norton et al. eds., 1998).

²²⁴ See *Ceskoslovenska Obchodni Banka, A.S. (CSOB) v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, ¶¶ 33-48 (May 24, 1999) (holding that publication in the Official Gazette of the host state is not sufficient proof for entry into force of a treaty that requires exchange of instruments of ratification to enter into force); *Kılıç Insaat İthalat İhracat Sanvi ve Ticaret Anonim Sirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, Decision on Article VII.2 of the Turkey-Turkmenistan Bilateral Investment Treaty, ¶ 7.9 (May 7, 2012) [hereinafter *Kılıç*] (deeming a Turkish version of a bilateral investment treaty as not authentic because, “[h]ad a Turkish version existed and been signed at that time, one would expect it to have been published in its executed format in the Turkish Official Gazette. However, this did not occur.”).

²²⁵ See *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Decision on Jurisdiction, ¶ 112 (Apr. 14, 1988) (relying upon promotional literature to establish existence of consent); cf. *CSOB*, *supra* note 224, ¶¶ 33-48.

²²⁶ See *Kılıç*, *supra* note 224, ¶ 7.14.

²²⁷ See *Libananco*, *supra* note 113, ¶¶ 350-56.3.

²²⁸ See United Nations Conference on Trade and Development, *Latest Developments in Investor-State Dispute Settlement*, 9-12, IIA Issues Note No. 1 (2010).

²²⁹ See *Fraport Annulment*, *supra* note 109, ¶ 68.

²³⁰ *Id.* ¶ 76 (quoting Arbitral Award of 31 July 1989 (Guinea-Bissau v. Sen.), 1991

*A. Good Faith Reading of Jurisdictional Instruments –
Factory at Chorzów*

The Permanent Court of International Justice in *Factory at Chorzów*²³¹ first developed the general rule of proof of law in the jurisdictional context.²³² A court or tribunal must establish that the arguments in favor of jurisdiction succeed by a preponderance:

It has been argued repeatedly in the course of the present proceedings that in case of doubt the Court should decline jurisdiction. It is true that the Court's jurisdiction is always a limited one, existing only in so far as States have accepted it; consequently, the Court will, in the event of an objection-or when it has automatically to consider the question-only affirm its jurisdiction provided that the force of the arguments militating in favour of it is preponderant. The fact that weighty arguments can be advanced to support the contention that it has no jurisdiction cannot of itself create a doubt calculated to upset its jurisdiction. When considering whether it has jurisdiction or not, the Court's aim is always to ascertain whether an intention on the part of the Parties exists to confer jurisdiction upon it.²³³

The general rule from *Factory at Chorzów* has been nearly universally adopted in international law and paraphrased by the International Court of Justice in its jurisprudence.²³⁴

The key element of the *Factory at Chorzów* approach is its admittance of legal uncertainty in questions of jurisdiction.²³⁵ The law of jurisdiction in any given case can support arguments advocating diametrically opposed outcomes. Neither of these arguments is manifestly false or even implausible if viewed on its

I.C.J. 53, 69 (July 31)).

²³¹ *Factory at Chorzów* (Ger. v. Pol.), 1927 P.C.I.J. (Ser. A) No. 9 (July 26).

²³² See BIN CHENG, *GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* 275-78 (George W. Keeton & Georg Schwarzenberger eds., 1953) [hereinafter CHENG, *GENERAL PRINCIPLES*] (providing a history of jurisdictional competence in international law ending in the Chorzow Factory decision).

²³³ *Factory at Chorzów* (Ger. v. Pol.), 1927 P.C.I.J. (Ser. A) ¶ 89.

²³⁴ See, e.g., *Fisheries Jurisdiction* (Spain v. Can.), 1998 I.C.J. 439, 450-51 (Dec. 4) (“[T]here is no burden of proof to be discharged in the matter of jurisdiction. Rather, it is for the Court to determine from all the facts and taking into account all the arguments advanced by the Parties, whether the force of the arguments militating in favour of jurisdiction is preponderant, and to ascertain whether an intention on the part of the Parties exists to confer jurisdiction upon it.”) (internal quotations omitted).

²³⁵ See *Factory at Chorzów* (Ger. v. Pol.), 1927 P.C.I.J. (Ser. A) ¶¶ 60-89.

own. Rather, each argument will draw more heavily on the competing functions of consent as a gateway to an exclusive access to justice and as a narrow limitation of sovereignty of the host state.²³⁶

At its core, the approach is premised upon the understanding that jurisdiction is subject to “indeterminacy,”²³⁷ meaning that “it is based on contradictory premises.”²³⁸ The contradictory premises in any given case are the positions taken by the parties about the nature of consent to arbitration. This indeterminacy is overcome by a comparison of the arguments made by the parties for and against jurisdiction and declaring the more plausible one of the two (rather than the “correct” one) the winner of the jurisdictional exchange.²³⁹

The *Factory at Chorzów* approach demonstrates that “[p]ublic international arbitration has evolved so differently from its private counterpart that analogies between the two forms of dispute resolution, while tempting, are perilous.”²⁴⁰ In most commercial

²³⁶ See *supra* Part II.A.

²³⁷ See KOSKENNIEMI, APOLOGY TO UTOPIA, *supra* note 209, at 60-67, 590-614.

²³⁸ *Id.* at 590.

²³⁹ See *Factory at Chorzów* (Ger. v. Pol.), 1927 P.C.I.J. (Ser. A) ¶ 32; cf. KOSKENNIEMI, APOLOGY TO UTOPIA, *supra* note 209, at 467-73.

²⁴⁰ REISMAN, SUPERVISORY JURISDICTION, *supra* note 210, at 41. The role of the courts as part of the jurisdictional decision-making process is a key difference between public international law arbitration (which does not have such a supervisory function as a matter of course) and commercial arbitration. See also George Bermann, *The “Gateway” Problem in International Commercial Arbitration*, 37 YALE J. INT’L L. 1, 2-3 (2012) (discussing the critical role of courts in the function of commercial arbitration); William W. Park, *Determining an Arbitrator’s Jurisdiction: Timing and Finality in American Law*, 8 NEV. L.J. 135 (2008) (describing the role of the courts in policing jurisdiction in US and non-US law); compare EMMANUEL GAILLARD, ASPECTS PHILOSOPHIQUES DU DROIT DE L’ARBITRAGE INTERNATIONAL (2008) (arguing for an internationalization of the control regime for international arbitration), with Giorgio Sacerdoti, *Investment Arbitration Under the ICSID and UNCITRAL Rules: Prerequisites, Applicable Law, Review of Awards*, 19 ICSID REV.1, 27-40 (2004) (discussing court supervision in investor-state disputes outside of the ICSID Convention); see also Thomas W. Wälde, *Improving the Mechanisms for Treaty Negotiations and Investment Disputes: Competition and Choice as the Path to Quality and Legitimacy*, Y.B. INT’L INVESTMENT L. & POL’Y. 505, 512-13 (2009) (noting the very limited scholarship on the function of investment arbitration in its own right); Piero Bernardini, *Investment Protection under Bilateral Investment Treaties and Investment Contracts*, 2 J. WORLD INVESTMENT 235 (2001) (discussing the relationship between the treaty and contract claims); Robert von Mehren & David Rivkin, *Contracts for the*

arbitration settings, the “indeterminacy” experienced in public international law arbitration would have been overcome by a mandated policy in favor of arbitration.²⁴¹ An approach applied in a public arbitration forum must reject adoption of a single policy regarding arbitration, reflecting the ambivalence in international law and investment arbitrations towards arbitration (or adjudication) as a dispute resolution mechanism.²⁴²

A key reason for the difference between commercial arbitration and public international law arbitration, including investor-state arbitration, is the absence of a forum with general jurisdiction to which the investor could turn with its dispute.²⁴³ The dissent in *Abaclat v. Argentina*²⁴⁴ aptly describes the unique feature of international investment arbitration:

In international law, all tribunals—not only arbitral, but even judicial - are tribunals of attributed, hence limited jurisdiction (*juridictions d'attribution*). There is no tribunal or system of tribunals of plenary or general jurisdiction (*jurisdiction de droit commun*) that covers all cases and subjects, barring exceptions falling under—or attributed to—the jurisdiction of a specialized tribunal. This is because, in the absence of a centralized power

International Sale of Minerals, 2 J. INT'L ARB. 49 (1985); Doak Bishop, *International Arbitration of Petroleum Disputes: The Development of a Lex Petrolea*, 23 Y.B. COM. ARB. 1131 (1998); Antonio R. Parra, *Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Instruments on Investment*, 12 ICSID REV. 287 (1997).

²⁴¹ See, e.g., Edward M. Morgan, *Contract Theory and the Sources of Rights: An Approach to the Arbitrability Question*, 60 S. CAL. L. REV. 1059, 1061 n.11 (1987) (noting that the “United States Arbitration Act, 9 U.S.C. §§ 1-208 (1982), is said to evidence a strong policy in favor of arbitration, such that all doubts in questions regarding arbitrability or the proper scope of an arbitration clause are resolved in favor of arbitration”).

²⁴² See *id.* at 1063.

²⁴³ The courts of the host state are not such a court of general jurisdiction. Courts in the host state routinely will limit access to courts by means of sovereign immunity. In the United States, sovereign immunity is principally waived by the Tucker Act. See Tucker Act, ch. 359, 24 Stat. 505 (1887) (codified at 28 U.S.C. §§ 1491-1503 (2005)). The invocation of sovereign immunity will routinely defeat claims for causes of action of the regulatory impairment of investments that fall short of a taking and do not sound in contract. Such impairment claims are by far the most frequent claims in the context of treaty arbitrations.

²⁴⁴ *Abaclat v. The Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, Dissenting Opinion (Aug. 4, 2011), IIC 504 (2011).

on the international level that exercises the judicial function through a judicial system empowered from above (or rather incarnating the judicial power as part of the centralized power), all international adjudicatory bodies are empowered from below, being based on the consent and agreement of the subjects (i.e. the litigants, *les justiciables*) themselves (with the very limited exception of tribunals created by international organizations in the exercise of their powers under their constitutive treaties, which are also ultimately based on the consent of the subjects that concluded or adhered to these constitutive treaties).²⁴⁵

The dissent in *Abaclat* describes tribunals as required to hear specific disputes, emphasizing the importance of staying within the confines of the consent instrument.²⁴⁶

Other tribunals have implicitly noted the same feature of tribunals as the only access to justice for the resolution of investor-state disputes.²⁴⁷ As one tribunal put it:

In the present case, the question is whether a particular claimant is undeserving of having its claim heard because of the circumstances surrounding that claim. A false positive finding that the claim was estopped or brought for improper purpose would therefore have the Tribunal deny jurisdiction because the Claimants had not been able to disprove doubts regarding the exercise of its right to submit a claim. Meanwhile, a false negative finding that the claim was not abusive would simply allow the claim to proceed on its merits where the Respondent may continue to object on this basis and apply for costs to compensate for the false negative finding The potential for unfairness in this situation weighs in favor of diminishing the risk of a false positive finding by shifting the burden to the Respondent.²⁴⁸

The nature of investor-state arbitrations as the sole means of dispute resolution crystallizes two contradictory, rival goals.²⁴⁹ On

²⁴⁵ *Id.* ¶ 7.

²⁴⁶ *See id.*

²⁴⁷ *See* Chevron Corp. v. The Republic of Ecuador, Interim Award (Dec. 1, 2008), IIC 355 (2008).

²⁴⁸ *Id.* at ¶ 141.

²⁴⁹ These rival goals are apparent in the negotiation of the ICSID Convention. *See* 2 HISTORY OF THE ICSID CONVENTION 1, 5, 22, 91, 93, 148, 567, 622, 956 (1970). For a list of contractual arbitrations between states and investors with regard to which the state reneged on consent, see John T. Schmidt, *Arbitration Under the Auspices of the*

the one hand, arbitration serves as the exclusive access to justice for investors asserting claims that the host state violated an international obligation.²⁵⁰ This goal supports an expansive reading of consent per the *Chevron* rationale.²⁵¹ On the other hand, consent to arbitration is a policy choice by a state to provide for a limited potential of direct international liability to international investors.²⁵² This goal supports a restrictive reading of consent per the rationale of the *Abaclat* dissent.²⁵³ Thus, jurisdictional proof is a balancing act between these two rival goals of investor-state arbitration: both excess application of jurisdiction and failure to exercise jurisdiction are impermissible

International Centre for the Settlement of Investment Disputes (ICSID): Implications of the Decision on Jurisdiction in Alcoa Minerals of Jamaica, Inc. v. Government of Jamaica, 17 HARV. INT'L L.J. 90, 90 n.1 (1976).

²⁵⁰ In terms of Koskenniemi's terminology, this is a "descending" justification. KOSKENNIEMI, APOLOGY TO UTOPIA, *supra* note 209, at 59 ("One argument traces them down to justice, common interests, progress, nature of the world community or other similar ideas to which it is common that they are anterior, or superior, to State behaviour, will or interest. They are taken as a given normative code which precedes the State and effectively dictates how a State is allowed to behave, what it may will and what its legitimate interests can be."); *see also* Ernst-Ulrich Petersmann, *Dispute Settlement in International Economic Law—Lessons for Strengthening International Dispute Settlement in Non-Economic Areas*, 2 J. INT'L ECON. L. 189 (1999) (adopting a descending theory of jurisdiction). *But see* Jan Paulsson, *Arbitration Without Privity*, 10 ICSID REV. 232, 254-57 (1995); Jan Paulsson, *The Power of States to Make Meaningful Promises to Foreigners*, J. INT'L DISP. SETTLEMENT 341, 349 (2010); Jeswald W. Salacuse, *The Emerging Global Regime for Investment*, 51 HARV. INT'L L.J. 427, 439, 446-48 (2010) ("In sum, as global economic expansion began to accelerate in the years following World War II, the existing international law on foreign investment was, for most foreign investors, incomplete, vague, contested, and without an effective enforcement mechanism.").

²⁵¹ *See Chevron*, *supra* note 247, ¶ 141.

²⁵² In terms of Koskenniemi's terminology, this is an "ascending" justification. KOSKENNIEMI, APOLOGY TO UTOPIA, *supra* note 209, at 59 ("Another argument bases order and obligation on State behaviour, will or interest. It takes as given the existence of States and attempts to construct a normative order on the basis of the 'factual' State behaviour, will and interest."). For a recent discussion of current ascending theories in investor-state arbitration, *see* José E. Alvarez, *The Return of the State*, 20 MINN. J. INT'L L. 223 (2011); *see also* GUS VAN HARTEN, *INVESTMENT TREATY ARBITRATION AND PUBLIC LAW* (2007); MICHAEL WAIBEL ET AL., *THE BACKLASH AGAINST INVESTMENT ARBITRATION* (2010); William W. Burke-White & Andreas von Staden, *Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations*, 35 YALE J. INT'L L. 283 (2010).

²⁵³ *See Abaclat*, *supra* note 244, ¶¶ 16-24.

excesses of powers by the tribunal.²⁵⁴

The vast majority of investor-state tribunals implicitly follow the *Factory at Chorzów* approach and its analysis of arbitral jurisdiction as the investor's only and specifically limited remedy.²⁵⁵ The plausibility of party arguments for and against

²⁵⁴ See *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Annulment Decision, ¶ 86 (Jul. 3, 2002), IIC 70 (2002); *Malaysian Historical Salvors, SDN, BHD v. Malaysia*, ICSID Case No. ARB/05/10, Annulment Decision, ¶ 80 (Oct. 30, 2007), IIC 372 (2009); cf. Christoph H. Schreuer, *Three Generations of ICSID Annulment Proceedings*, in ANNULMENT OF ICSID AWARDS 17-42 (Emmanuel Gaillard & Yas Banifatemi eds., 2004); W. Michael Reisman, *The Breakdown of the Control Mechanism in ICSID Arbitration*, 4 DUKE L.J. 739, 764-66 (1989); David D. Caron, *Reputation and Reality in the ICSID Annulment Process: Understanding the Distinction Between Annulment and Appeal*, 7 ICSID REV. 21, 38-40 (1992); Stanimir A. Alexandrov, *The Vivendi Annulment Decision and the Lessons for Future ICSID Arbitration—The Applicants' Perspective*, in ANNULMENT OF ICSID AWARDS 97-121 (Emmanuel Gaillard & Yas Banifatemi eds., 2004); Bernardo M. Cremades, *Litigation Annulment Proceedings, The Vivendi Matter: Contract and Treaty Claims*, in ANNULMENT OF ICSID AWARDS 87-95 (Emmanuel Gaillard & Yas Banifatemi eds., 2004); see also Convention on the Settlement of Investment Disputes between States and Nationals of Other States art. 42(2), Oct. 17, 1966, 575 U.N.T.S. 159 [hereinafter ICSID Convention] (“The Tribunal may not bring in a finding of *non liquet* on the ground of silence or obscurity of the law”); cf. BLACKABY, *supra* note 42, at 571; LAUTERPACHT, *supra* note 216, at 71-77. The same tension underlies bilateral investment treaty programs in general. See, e.g., José E. Alvarez, *The Once and Future Investment Regime*, in LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN 607 (Mahmoud Arsanjani et al. eds., 2010).

²⁵⁵ See, e.g., *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, ¶ 129 (Aug. 18, 2008), IIC 333 (2008); see also *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, Decision on Treaty Authenticity and Interpretation (May 7, 2012), IIC 544 (2012); *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award, ¶ 867 (Dec. 7, 2011), IIC 516 (2011); *Austrian Airlines v. Slovakia*, Final Award, ¶ 121 (Oct. 9, 2009), IIC 434 (2009); *Renta 4 SVSA v. Russian Federation*, SCC Case No. 24/2007, Award on Preliminary Objections, Dissent ¶¶ 7-10 (Mar. 20, 2009), IIC 369 (2009); *Noble Energy Inc. v. Ecuador*, ICSID Case No. ARB/05/12, Decision on Jurisdiction, ¶ 196 (Mar. 5, 2008), IIC 320 (2008); *Inceysa*, *supra* note 109, at ¶ 176; *Metalpar SA y Buen Aire SA v. Argentina*, ICSID Case No. ARB/03/5, Decision on Jurisdiction, ¶ 92 (Apr. 27, 2006), IIC 164 (2006); *Duke Energy International Peru Investments No. 1 Ltd. v. Peru*, ICSID Case No. ARB/03/28, Decision on Jurisdiction, ¶ 78 (Feb. 1, 2006), IIC 30 (2006); *Ceskoslovenska Obchodni Banka, A.S. (CSOB) v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Jurisdiction, ¶ 35 (May 24, 1999); *Ethyl Corporation v. Canada*, Decision on Jurisdiction, ¶ 55 (Jun. 24, 1998), IIC 95 (1998); *Southern Pacific Properties (Middle East) v. The Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Decision on Jurisdiction (Apr. 14, 1988) 3 ICSID Reports

jurisdiction is measured ultimately by approximation of the equilibrium point between the competing premises of consent. It is not decided on the basis of ratiocination from axiomatic absolutes.²⁵⁶

Given this task of approximation, it is not surprising and, in fact, is potentially desirable that different tribunals will reach formally inconsistent results. These formally inconsistent results reflect the discretion of the tribunal in balancing the specific records, arguments and authorities relied upon by the respective parties to different arbitral proceedings.²⁵⁷

B. Innocent Tribunals—Arbitration and Iura Novit Curia

Application of the *Factory at Chorzów* approach in investor state arbitration is complicated by the absence of the principle of *iura novit curia*. According to this principle, the ICJ and other similar public international law tribunals know and develop public international law.²⁵⁸ Consequently, the burden of proving public

143/4; *SOABI v. Senegal*, ICSID Case No. ARB/82/1, Award, ¶ 4.10 (Feb. 25, 1988); *Amco Asia Corp. v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Award, ¶ 14 (Sept. 25, 1983); CHRISTOPH SCHREUER, *THE ICSID CONVENTION: A COMMENTARY* 246-52 (2001); Ole Kristian Fauchald, *The Legal Reasoning of ICSID Tribunals – An Empirical Analysis*, 19 EUR. J. INT'L L. 301, 317-19 (2008).

²⁵⁶ The international legal process of jurisdictional proof overcomes the indeterminacy of law posited by Koskeniemi by embracing it. See KOSKENIEMI, *APOLOGY TO UTOPIA*, *supra* note 209, at 60-67, 590-614. In any given dispute, jurisdictional proof precisely does not posit that there is a single, doctrinally correct outcome that could be established in the abstract. Rather, the approach taken in *Factory at Chorzów* admits precisely the need to compare the competing arguments and establish by a preponderance which of them best reconciles the competing goals. See *Factory at Chorzów* (Ger. v. Pol.), 1927 P.C.I.J. (Ser. A) No. 9, ¶ 24 (July 26). By limiting the input, jurisdictional proof becomes determinate in the same manner as baseball arbitration is determinate: it is coherently and “reasonably” possible to pick a winner between two contesting positions in a given factual circumstance even if it is impossible to define an absolute rule that resolves the case.

²⁵⁷ *Factory at Chorzów* (Ger. v. Pol.), 1927 P.C.I.J. (Ser. A) No. 9, ¶ 64 (July 26).

²⁵⁸ See, e.g., *Fisheries Jurisdiction (U.K. v. Ice.)*, 1974 I.C.J. 175, ¶ 17 (July 25) (“The Court however, as an international judicial organ, is deemed to take judicial notice of international law and is therefore required in a case falling under Article 53 of the Statute, as in any other case, to consider on its own initiative all rules of international law which may be relevant to the settlement of the dispute.”); cf. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 14); Robert Kolb, *General Principles of Procedural Law*, in *THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, A COMMENTARY* 820-22 (Andreas Zimmermann et al. eds., 2006); James D. Fry, *Non-*

international law does not rest on the litigant parties that come before these organs.²⁵⁹ Rather, international courts and standing tribunals can adopt their own international legal rationales, such that they are the ultimate sources for the substance upon which their legal analysis is premised.²⁶⁰ In applying the *Factory at Chorzów* approach, the ICJ has stated that it may consult non-record legal materials to assist in determining the appropriate jurisdictional equilibrium point due to the principle of *iura novit curia*.²⁶¹ When applied to the situations discussed here, this principle could harmonize the jurisdictional conclusions reached across different investor-state arbitrations irrespective of the specific arguments and authorities advanced by the parties.

The principle of *iura novit curia* empowers standing courts to *develop* the law which they are tasked to administer.²⁶² In part, this means that such courts and tribunals are “deemed to take judicial notice of international law.”²⁶³ The “knowledge of law” at issue is creative or “synthetic”; it exceeds the knowledge of every

Participation in the International Court of Justice Revisited: Change or Plus Ça Change?, 49 COLUM. J. TRANSNAT'L L. 35 (2010) (discussing recent cases of non-participation by respondents in ICJ proceedings). For the use of *iura novit curia* in civil law jurisdictions, see, e.g., Mo Zhang, *Codified Choice of Law in China: Rules, Processes and Theoretic Underpinnings*, 37 N.C. J. INT'L L. & COM. REG. 83, 114 (2011).

²⁵⁹ See *Fisheries Jurisdiction (F.R.G. v. Ice.)*, Judgment, 1974 I.C.J. at 181.

²⁶⁰ See *Free Zones of Upper Savoy and the District of Gex (Fr. v. Switz.)*, 1932 P.C.I.J. (ser. A/B) No. 46, at 138 (June 7) (“From a general point of view, it cannot lightly be admitted that the Court, whose function it is to declare the law, can be called upon to choose between two or more constructions determined beforehand by the Parties, none of which may correspond to the opinion at which it may arrive.”); see also BIN CHENG, *GENERAL PRINCIPLES*, *supra* note 232.

²⁶¹ See Kolb, *supra* note 258, at 820-22.

²⁶² See REISMAN, *SUPERVISORY JURISDICTION*, *supra* note 210, at 52 (“Article 92 of the United Nations Charter designates the Court as the principal judicial organ of the United Nations. A number of international judges have invested special meaning in those words. The late Judge Singh, a former President of the International Court, believed that the Court, in its decisions, had a law-making as well as law applying function, analogizing the Court to the mandate of the International Law Commission to engage, *inter alia*, in ‘the progressive development’ of international law. Sir Robert Jennings, also a former President of the Court, has written ‘[a]d hoc tribunals can settle particular disputes: but the function of the established “principal judicial organ of the United Nations” must include not only the settlement of disputes but also the scientific development of general international law’”).

²⁶³ *Fisheries Jurisdiction (F.R.G. v. Ice.)*, Judgment, 1974 I.C.J. at 181.

discrete rule of law by permitting the court to analogize those rules to disputes to which they have never been applied. As comparative law research has established, this ability to synthesize and analogize is precisely what creates the knowledge of law:

We should not think, however, that we understand a legal system when we know only how courts have actually resolved cases. Knowledge of a legal system entails knowledge of factors present today which determine how cases will be resolved in the near future. We must know not only how courts have acted but consider the influences to which judges are subject.²⁶⁴

This mandate is reflected in the constitutions that bind courts and tribunals, and arises out of the qualifications required by constituent instruments for election to the bench.²⁶⁵ Furthermore, it is consistent with the guideline “not only that the persons to be elected should individually possess the qualifications required, but also that in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured.”²⁶⁶ This type of judicial makeup gives the court legitimacy in developing law. It demonstrates to those affected by the court’s decisions that the members serving on the court indeed have sufficient knowledge of the law to make proper decisions and that the legal development reflected in decisions is the result of a dialogue between representatives of the main legal cultures. As a result, decisions are neither substantively nor culturally preposterous.

The principle of *iura novit curia* has limited application in the context of investor-state arbitration.²⁶⁷ It thus cannot be used to

²⁶⁴ Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, 39 AM. J. COMP. L. 1, 23 (1991).

²⁶⁵ See, e.g., Statute of the International Court of Justice art. 2, June 26, 1945, 59 Stat. 1055, 3 Bevens 1153 (stating that qualifications include “competence in international law”); Rome Statute of the International Criminal Court art. 36(3), July 17, 1998, 2187 U.N.T.S. 90 (stating that qualifications include “established competence in criminal law and procedure” and “established competence in relevant areas of international law”); see also Stanimir A. Alexandrov, *Non-Appearance Before the International Court of Justice*, 33 COLUM. J. TRANSNAT’L L. 41, 58-60 (1995) (discussing the principle of *iura novit curia* in the context of Article 53 of the ICJ Statute).

²⁶⁶ Statute of the International Court of Justice art. 9, 59 Stat. 1055, 3 Bevens 1153.

²⁶⁷ See Romak, *supra* note 38, at ¶ 171 (“It is for the legal doctrine as reflected in

harmonize results across different arbitrations with different records. Tribunals that are constituted *ad hoc* by consent of two disputing parties are not empowered to consider the coherent development of the law in the same manner that standing international courts and tribunals are.²⁶⁸ To engage in the development of the law independent from the submissions of the parties would be an impermissible excess of their powers.²⁶⁹ Such tribunals therefore have the right to request further commentary from the parties on salient legal issues they deem underdeveloped, but they are not empowered to disregard the parties' submissions in their final analysis.²⁷⁰

articles and books, and not for arbitrators in their awards, to set forth, promote or criticize general views regarding trends in, and the desired evolution of, investment law.”); Valentina Sara Vadi, *Investing in Culture: Underwater Cultural Heritage and International Investment Law*, 42 VAND. J. TRANSNAT'L L. 853, 891 (2009) (“While national judges know and apply the applicable international law, disregarding the different rules invoked by the parties (*iura novit curia*), arbitrators generally consider only the legal arguments expressly made by the parties (*secundum alligata et probata*).”); Gabrielle Kaufmann-Kohler, *Globalization of Arbitral Procedure*, 36 VAND. J. TRANSNAT'L L. 1313, 1331-33 (2003) (discussing the limited use of *iura novit curia* in international commercial arbitrations); Stephan W. Schill, *Glamis Gold Ltd. v. United States*, 104 AM. J. INT'L L. 253, 258 (2010) (arguing that it would have been more “fair and equitable” for the tribunal in *Glamis Gold, Ltd. v. United States* to apply the *iura novit curia* standard with regard to customary international law due to the information asymmetry between the investor and the state).

²⁶⁸ See Romak, *supra* note 38, ¶ 171; see also William W. Park, *Arbitrators and Accuracy*, 1 J. INT'L DISP. SETTLEMENT 25, 43 (2010) (“As creatures of consent, arbitrators are law-appliers rather than law-makers, and must show special fidelity to the litigants' shared *ex ante* expectations as expressed in contract or treaty.”); Audley Sheppard, *Mandatory Rules in International Commercial Arbitration – An English Perspective*, 18 AM. REV. INT'L ARB. 121, 144 (2007) (“[A] tribunal is not generally under a duty to independently research the law and is entitled to rely upon counsel representing the parties.”).

²⁶⁹ REISMAN, SUPERVISORY JURISDICTION, *supra* note 210, at 52-53.

²⁷⁰ The International Law Commission's 1955 Commentary on the Draft Arbitration Code provides the following scenario as an example of a tribunal acting in excess of its powers: “The maxim of Roman law *arbitrator nihil extra compromissum facere potest* has been adopted in international law. . . . One of the first instances in which the validity of an arbitral award was attacked, namely, the *Northeastern Boundary* dispute between the United States and Canada, raised this issue. In this case, the King of the Netherlands was asked to choose as an arbiter between two boundary lines as claimed respectively by the parties. Instead, refraining from giving a decision, he recommended by award of 10 January 1931 a third line.” *Commentary on the Draft Convention on Arbitral Procedure*, 107-08, Int'l Law Comm'n, 5th Sess., U.N. Doc. A/CN.4/92 (Apr. 1955); see also Arbitral Award of 31 July 1989 (Guinea-Bissau v.

The notion that investor-state tribunals lack the authority of *iura novit curia* is also reflected in the rules governing their constitution. For example, the qualifications established for ICSID arbitrators do not require appointees to have expertise in international law.²⁷¹ Diversity of legal backgrounds is decidedly not a mandatory consideration for choice of arbitrators. Consequently, there is no procedural safeguard in place to ensure that a tribunal asserting the authority of *iura novit curia* is in fact qualified to discharge the burden of the principle with the requisite legitimacy.²⁷²

This conclusion is apparent in investor-state proceedings, where jurisdiction is affected by several different legal systems.²⁷³ For example, contracts containing ICSID arbitration clauses can

Sen.), 1991 I.C.J. 53, ¶ 49 (Nov. 12) (“[W]hen States sign an arbitration agreement, they are concluding an agreement with a very specific object and purpose: to entrust an arbitration tribunal with the task of settling a dispute in accordance with the terms agreed by the parties”); Park, *supra* note 268, at 44 (“[T]he fact that arbitrators may engage in direct study of legal authorities does not mean their award should contain surprises. Providing an opportunity for the litigants to comment on the law remains vital both to the arbitrator getting it right and to the parties’ sense of being treated justly.”); Yasuhei Taniguchi, *The WTO Dispute Settlement as Seen by a Proceduralist*, 42 CORNELL INT’L L.J. 1, 20-21 (2009) (“The adage *iura novit curia* (‘the court knows the law’) is dangerous when applied without concern for due process. In municipal law, due process at the level of application of law is increasingly recognized as the applicable law becomes more complex. For example, the French Code of Civil Procedure now provides, in effect, that the judge cannot apply a law by her own motion without first giving an opportunity to the parties to comment on it. The same principle should govern WTO dispute settlement procedure. An unexpected ‘completion of analysis’ by the Appellate Body can surprise a party in such a way as to raise justifiable concerns over due process. Member states should remedy the lack of remand power by a proper amendment to the DSU.”).

²⁷¹ See ICSID Convention, *supra* note 254, at art. 14(1).

²⁷² See W. Laurence Craig, *The Arbitrator’s Mission and the Application of Law in International Commercial Arbitration*, 21 AM. REV. INT’L ARB. 243, 256 (2010) (“When a judge relies on the adage *iura novit curia* (the court knows the law) he indicates not only whether and to what extent proof of law will be required, but also that he is the state’s ultimate instrument to apply national law which he possesses the skills and training to do. An international arbitral tribunal may well represent that it will follow the precepts of courts on the procedures for the determination of the content of applicable substantive law (that is that the contents of applicable law need not be proved as fact but may be determined independently by the tribunal) but it will not have the culture and formation which will permit it to find the same application of national law that a national judge would instinctively discover.”).

²⁷³ See *id.* at 243, 291-92.

be governed by international law for determining the consent as well as by municipal law for defining the scope of obligations.²⁷⁴ Acquisition of a claimant's nationality is a personal jurisdiction requirement, and it is governed by the municipal law of the home state.²⁷⁵ Upon consent, tribunals may invoke *renvoi*, applying municipal law as part of the determination of subject jurisdiction.²⁷⁶ And finally, BIT interpretation itself may lead to the conclusion that a treaty obligation is *lex specialis*, requiring further examination of the intent of the treaty parties.²⁷⁷ In each of these instances, a tribunal would not be well versed in the law to be applied.²⁷⁸ Importantly though, this undeniable legal innocence makes a tribunal no less qualified to determine its own jurisdiction.

C. Application of the Factory at Chorzów Approach in Investor-State Arbitrations

1. The Structure of Proof of Consent in Investor-State Arbitration

The tribunal and the parties share the responsibility of faithfully applying the parties' consent to arbitration.²⁷⁹ Defining these shared duties is critical to understanding the process of jurisdictional proof, as they set the framework for striking the *Factory at Chorzów* balance between the competing jurisdictional goals.

In order for the *Factory at Chorzów* approach to be effective, the tribunal must be the master of the jurisdictional proof process. The investor-state tribunal is "the judge of its own competence."²⁸⁰

²⁷⁴ *See id.*

²⁷⁵ *See, e.g.,* Hussein Nuaman Soufraki v. The United Arab Emirates, ICSID Case No. ARB/02/7, Annulment Decision, ¶ 55 (June 5, 2007).

²⁷⁶ *See, e.g.,* Fraport Annulment, *supra* note 109, ¶ 117 ("The Tribunal's Members were not experts in Philippine law. Therefore the interpretation and construction of the Philippine law, to the extent it was relevant, should have been based on the evidence and research as to the actual application of that law by the competent Philippines' organs.")

²⁷⁷ *See, e.g.,* CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Annulment Decision, ¶¶ 124-26 (Sept. 25, 2007).

²⁷⁸ *See, e.g.,* Fraport Annulment, *supra* note 109, ¶ 117.

²⁷⁹ *See* ICSID Convention, *supra* note 254, at art. 26.

²⁸⁰ *Id.* at art. 41(1). The power of ICSID tribunals is functionally similar to that of

This jurisdictional competence includes the right of the tribunal “on its own initiative [to] consider . . . whether the dispute . . . is within the jurisdiction of the Centre and within its own competence.”²⁸¹ This means that the tribunal “has the power to interpret for this purpose the instruments which govern that jurisdiction.”²⁸² Under the *Factory at Chorzów* approach, the tribunal determines which question should be the focus of the jurisdictional balancing test.²⁸³

But the tribunal is not the master of the substance of jurisdictional proof.²⁸⁴ Rather, the parties in their submissions supply the substance of jurisdictional proof.²⁸⁵ The tribunal’s jurisdictional competence means that a tribunal “is entitled to interpret the submissions of the parties” and as the International Court of Justice explained, the tribunal “in fact is *bound* to do so.”²⁸⁶ The tribunal thus is not free to establish jurisdiction beyond the parties’ submissions, but instead must “interact” with the

the International Court of Justice with respect to their limited jurisdictions. See generally Stanimir A. Alexandrov, *The Compulsory Jurisdiction of the International Court of Justice: How Compulsory Is It?*, 5 CHINESE J. INT’L L. 29 (2006) (surveying the limits of jurisdictional competence of the International Court of Justice).

²⁸¹ Rules of Procedure for Arbitration Proceedings Rule 41(2), International Centre for Settlement of Investment Disputes, 1967, ICSID/15 (amended April 10, 2006) [hereinafter ICSID Arbitration Rules].

²⁸² Arbitral Award of 31 July 1989 (Guinea-Bissau v. Sen.), 1991 I.C.J. 53, ¶ 46 (Nov. 12).

²⁸³ Fisheries Jurisdiction (Spain v. Can.), 1998 I.C.J. 439, ¶ 31 (Dec. 4) (“The Court will itself determine the real dispute that has been submitted to it.”).

²⁸⁴ An engagement in the substance of jurisdictional proof would either tilt the analysis in favor of one of the two competing premises of jurisdiction or involve the tribunal in contradictory reasoning by virtue of the inherent tension between both premises. Choosing one of the premises over the other is an impermissible excess of powers by over- or under-reaching the scope of the jurisdictional instrument. See REISMAN, SUPERVISORY JURISDICTION, *supra* note 210. Attempting to independently balance the competing premises would likely cause the tribunal to employ self-contradictory reasoning. See KOSKENNIEMI, APOLOGY TO UTOPIA, *supra* note 209, at 345-55 (explaining the dilemma in context to the *Nuclear Tests* case).

²⁸⁵ See Fisheries Jurisdiction (Spain v. Can.), 1998 I.C.J. 439, ¶ 30 (describing the content provided by the parties upon which the tribunal based its decision regarding jurisdiction).

²⁸⁶ Nuclear Tests (N.Z. v. Fr.), Judgment, 1974 I.C.J. 457, ¶ 30 (Dec. 20) (emphasis added); Fisheries Jurisdiction (Spain v. Can.), 1998 I.C.J. 439, ¶ 30 (emphasis added); see also IAN BROWNIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 641 (7th ed. 2008).

parties to do so.²⁸⁷

The consequence of the *Factory at Chorzów* approach is that the tribunal is not limited verbatim to the positions taken by the parties, but instead can “consider ways in which an ambiguous or unclear objection may bear on jurisdiction and to restate such objections, as appropriate, so as to allow a full examination of jurisdiction.”²⁸⁸ But in the final analysis, the tribunal’s decision must remain an “interpretation of the submissions” rather than formulate an entirely fresh submission not raised by the parties.²⁸⁹ As the *Vieira v. Chile*²⁹⁰ annulment committee explained:

It is inaccurate to submit that the Tribunal lacks the competence to evaluate the issues presented by the claimant and infer from

²⁸⁷ The tribunal has the power to request evidence and legal arguments from the parties, but it cannot establish facts and law independent from them. See Piero Bernardini, *The Role of the International Arbitrator*, 20 ARB. INT’L 113, 114-17 (2004) (discussing the scope of the international arbitrator’s role); “The idea that, given the source of his or her powers, the arbitrator is bound to respect the parties’ will in exercising his or her role . . . is still a widespread view The arbitrator’s powers and functions must be evaluated in a context which sees the arbitrator co-operating in finding solutions which would allow the parties, in the majority of cases, to continue their business relations. . . . Rather than talking of adversarial versus inquisitorial procedures, this process of communication may be more aptly characterized as ‘interactive arbitration’, meaning the search by the arbitrator for continuous dialogue with the aim of overcoming the difficulties caused by the parties’ conflicting approaches.” Bernardo Cremades, *Overcoming the Clash of Legal Cultures: The Role of Interactive Arbitration*, 14 ARB. INT’L 157 (1998).

²⁸⁸ *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent’s Objections to Jurisdiction, ¶ 78 (Oct. 21, 2005) [hereinafter *Aguas del Tunari*].

²⁸⁹ See *Occidental Exploration and Prod. Co. v. Republic of Ecuador*, LCIA Case No. UN 3467, Final Award, ¶¶ 72-3 (July 1, 2004) [hereinafter *Occidental*] (“Although, as also explained, the *Claimant has not invoked* here contract-based rights, . . . the *Respondent itself appears to accept* that there is a dispute concerning the observance and enforcement of the Contract, which brings the tax dispute squarely within the exceptions of Article X and hence within the jurisdiction of the Tribunal. There is here a typical situation of *forum prorogatum*. That being so, and as the *Tribunal has a duty to examine the submissions by both parties*, it can only come to the conclusion that a tax matter associated with an investment agreement has been submitted to it for its consideration.”) (emphasis added); see generally ARON BROCHES, *The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, SELECTED ESSAYS: WORLD BANK, ICSID, AND OTHER SUBJECTS OF PUBLIC AND PRIVATE INTERNATIONAL LAW, 188, 209-13 (1995) (discussing *forum prorogatum* in the ICSID context).

²⁹⁰ *Sociedad Anónima Eduardo Vieira v. República de Chile*, ICSID Case No. ARB/04/7, Annulment Decision (Dec. 10, 2010).

the conclusions distinct from those submitted by the claimant in order to determine the competence of the tribunal and the jurisdiction of the International Centre for the Settlement of Investment Disputes. A tribunal may perfectly initiate an analysis of the issues presented by a party to draw its own conclusions including with respect to the importance or lack of importance of some of those issues.²⁹¹

The parties supply the issues, substance (evidence and authorities), and proof from which the tribunal's competence is established.²⁹² But the determination of whether based on the substance, jurisdiction has been established remains within the competence of the tribunal.

This assignment of roles in proving jurisdiction conforms with common sense. In determining whether jurisdiction exists, the tribunal must balance the serious and competing interests of safeguarding access to justice and enforcing the limits of the specific consent instrument. The tribunal must perform this balancing act without putting a thumb on the scales either for or against jurisdiction. As a result, the tribunal cannot lend an unduly helping hand to either party in its presentation of jurisdictional proof, but instead must faithfully adjudicate the jurisdictional contest as it unfolds.

2. *The Process of Jurisdictional Proof of Consent in Investor-State Arbitration*

The *Factory at Chorzów* decision applies a preponderance standard to issues of legal proof in jurisdictional matters, based on materials submitted by the parties.²⁹³ To establish jurisdiction, the tribunal must consider a number of factors, including “the historical development of arbitration treaties, as well as of the

²⁹¹ *Id.* at ¶ 322.

²⁹² See Iurii Bogdanov, *Agurdino-Invest Ltd. and Agurdino-Chimia JSC v. Republic of Moldova*, SCC, Arbitral Award, at 14 (Sept. 22, 2005) (“Swedish arbitral practice recommends that the parties are invited to comment on new legal sources introduced by the arbitrator.”); see also *Fraport Annulment*, *supra* note 109, ¶ 245 (“[T]he Tribunal . . . ought to have provided a further opportunity to the parties to submit evidence on Philippine law and to make submissions thereon relative to this specific question. Its failure to do so underscores the serious departure from a fundamental rule of procedure.”).

²⁹³ See *Factory at Chorzów* (Ger. v. Pol.), 1927 P.C.I.J. (Ser. A) No. 9, ¶ 89 (July 26).

terminology of such treaties . . . the grammatical and logical meaning of the words used . . . [and] the function which, in the intention of the contracting Parties, is to be attributed to [the jurisdictional instrument].”²⁹⁴ These factors continue to serve as the baseline for jurisdictional decision-making in investor-state arbitration,²⁹⁵ and the interpretation of both the instrument and parties’ intent will be considered below.

Arbitral tribunals begin jurisdictional analysis by engaging the text of the jurisdictional instrument, comparing the parties’ positions in good faith through a process of progressive analysis:

Interpretation under Article 31 of the Vienna Convention is a process of progressive encirclement where the interpreter starts under the general rule with (1) the ordinary meaning of the terms of the treaty, (2) in their context and (3) in light of the treaty’s object and purpose, and by cycling through this three step inquiry iteratively closes in upon the proper interpretation. In approaching this task, it is critical to observe two things about the general rule of interpretation found in the Vienna Convention. First, the Vienna Convention does not privilege any one of these three aspects of the interpretation method. The meaning of a word or phrase is not solely a matter of dictionaries and linguistics. As Schwarzenberger observed, the word “meaning” itself has at least sixteen dictionary meanings. Rather, the interpretation of a word or phrase involves a complex task of considering the ordinary meaning of a word or phrase in the context in which that word or phrase is found and in light of the object and purpose of the document.²⁹⁶

The ordinary meaning of terms carries significant weight when the jurisdictional analysis uses signal terms expressing an obligation, like “shall,”²⁹⁷ or those expressing a condition, like “if.”²⁹⁸

²⁹⁴ *Id.* at ¶ 64.

²⁹⁵ *See id.*

²⁹⁶ Aguas del Tunari, *supra* note 288, ¶ 91. Article 31 of the Vienna Convention reflects the common denominator of textual interpretation in international law irrespective whether a tribunal uses the Vienna Convention on the Law of Treaties as such or uses it in the interpretation of unilateral acts of state. *See* Frédéric G. Sourgens, *Keep the Faith, Investment Protection Following the Denunciation of International Investment Agreements*, 11 SANTA CLARA J. INT’L L. (forthcoming 2013).

²⁹⁷ *See, e.g.,* RosInvestCo UK Ltd. v. The Russian Federation, SCC Case No. V079/2005, Award on Jurisdiction, ¶ 72 (Oct. 1, 2007).

²⁹⁸ *See* Impregilo Dissent, *supra* note 47, ¶ 81.

Typically, both parties in a jurisdictional dispute rely on interpretations of the consent document that are semantically and grammatically possible.²⁹⁹ The stronger of the two interpretations cannot be ascertained solely based on the ordinary meaning of the fragment of text, but instead requires a broad inquiry through contextual interpretation.³⁰⁰ In this way, the tribunal addresses the respective interpretations of the relevant portion in light of the entire agreement, creating the potential for contradictions between a party's interpretation and other provisions in the treaty.³⁰¹ More likely though, contextual analysis would lead to inconsistencies between the term to be interpreted and other terms used in the treaty.³⁰²

After addressing the text and context of the provision at issue, a tribunal considers the conflict in light of other decisions by investor-state arbitral tribunals.³⁰³ Tribunals frequently refer to past arbitration decisions to test the parties' theories, either by distinguishing or confirming present positions through analogies

²⁹⁹ See ULF LINDERFALK, ON THE INTERPRETATION OF TREATIES 101-31 (2007).

³⁰⁰ See *id.*

³⁰¹ *Id.* at 125 (“If it can be shown that interpretation of a treaty provision in accordance with interpretation rule no. 1 leads to conflicting results, and that somewhere in the text of said treaty a norm is expressed, which – in light of the provision interpreted – in one of the two ordinary meanings can be considered to involve a logical contradiction, while in the other it cannot, then the latter meaning shall be adopted.”).

³⁰² For example, the interpretation of the term “controlled” to mean “managed” could be inconsistent with the use of the word “management” in the same instrument without reference to the word “control.” *Aguas del Tunari*, *supra* note 288, ¶¶ 233-34. Tribunals turn to preparatory works of jurisdictional instruments to overcome particularly evenly balanced interpretations submitted by the parties, but even that is often not helpful in resolving the dispute due to the lack of definition of the critical issue during negotiations. See *id.* ¶ 235.

³⁰³ See, e.g., *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Decision on Jurisdiction, ¶ 210 (Apr. 11, 2007) (relying on precedent to reject the submission that the consent terms impose an “origin of capital” requirement); *ADC Affiliate Ltd. and ADC & ADMC Mgmt. Ltd. v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award of the Tribunal, ¶ 360 (Oct. 2, 2006) (relying on precedent to reject the submission that the consent terms impose an “origin of capital” requirement) [hereinafter *ADC*]; *Sempra Energy Int’l v. The Argentine Republic*, ICSID Case No. ARB/02/16, Decision on Objections to Jurisdiction, ¶¶ 91-94 (May 11, 2005) (relying on precedent to reject the submission that minority shareholders do not have direct claims for impairment of a company in which they own stock).

to prior decisions.³⁰⁴

This mode of interpretation gives flesh to the preponderance standard in a jurisdictional analysis. Often, neither party proposes an interpretation that is wholly superior to the other.³⁰⁵ Each approach is typically incongruous with some parts of the instrument by drawing more heavily on the opposing functions of jurisdiction in international law (providing effective access to justice and limiting jurisdictional grant to the narrow terms agreed to by the host state). The decision generally boils down to which interpretation is the *more* reasonable reading of the text of the consent instrument; it does not necessarily provide the true construction of the instrument.³⁰⁶

D. Clarity Presumptions Are Inconsistent with the Factory at Chorzów Approach

The *Factory at Chorzów* approach to jurisdictional proof differs markedly from the *Impregilo* dissent and the *Brandes* award.³⁰⁷ *Impregilo* and *Brandes* imposed one-sided presumptions against jurisdiction,³⁰⁸ which turn the *Factory at Chorzów* balancing approach on its head.

The *Factory at Chorzów* approach also differs functionally from *Impregilo* and *Brandes*.³⁰⁹ The key concern, and starting point, for the *Impregilo* and *Brandes* tribunals was the establishment of international investment law rules, not the interpretation of the consent instrument.³¹⁰ Having established jurisdictional rules beyond the framework of the consent instrument, these tribunals concluded that nothing more than a cursory review of the instrument was necessary.³¹¹ As a result, the

³⁰⁴ See *id.*

³⁰⁵ See, e.g., *Libananco*, *supra* note 113 at ¶¶ 121-26.

³⁰⁶ See *id.*

³⁰⁷ See *Factory at Chorzów*, *supra* note 231; *Impregilo* Dissent, *supra* note 47; *Brandes*, *supra* note 48.

³⁰⁸ See *supra* Part II.A. (“This formal rule-of-law reasoning has nearly obviated the need for any interpretation of the governing documents and has led to purposeful non-engagement of the governing consent documents by tribunals.”).

³⁰⁹ See *supra* Part III.A.

³¹⁰ See *supra* Part III.A.

³¹¹ See *supra* Part III.A.

jurisdictional rules supplanted the consent instrument.³¹²

The *Factory at Chorzów* approach considers the question from the opposite point of view, reaching the question of other rules of law only after having analyzed the possible meanings of an undertaking in its own specific context.³¹³ The rules of law are one of many factors that help determine which of these meanings is most plausible.³¹⁴ Rather than supplanting the interpretive exercise, the consideration of the rules derived from investment law jurisprudence should be secondary to the task of interpretation.³¹⁵

The *Factory at Chorzów* approach to jurisdictional proof is substantively at odds with the presumptions of clarity in the *Impregilo* dissent and *Brandes*.³¹⁶ The difference goes beyond the surface: *Impregilo* and *Brandes* reject the premise that jurisdiction in international proceedings is indeterminately articulated in the *Factory at Chorzów* approach, concluding instead that it is predicated upon fundamentally inconsistent premises.³¹⁷ The rejection of the premise of jurisdictional proof means that the common sense concern arising out of *Impregilo* and *Brandes* is justified, because they distort the jurisdictional enterprise of investor-state tribunals.³¹⁸

This strategy fundamentally fails because it is blind to the competing concerns of jurisdictional consent.³¹⁹ Rather than balancing access to justice and limitation of sovereignty through even-handed interpretation of the consent instrument in light of the submissions, it is premised exclusively on the limitation of sovereignty.³²⁰ Tribunals reject this approach as ill-founded because it disregards the opposing premise of access to justice.³²¹

³¹² See *supra* Part II.A.

³¹³ See *supra* Part II.B.

³¹⁴ See *supra* Part II.B.

³¹⁵ See *supra* Part II.B.

³¹⁶ See *supra* Part III.A.

³¹⁷ See generally KOSKENNIEMI, APOLOGY TO UTOPIA, *supra* note 209, at 60-67, 590-615 (discussing the nature of the indeterminacy).

³¹⁸ See *supra* Part II.A.

³¹⁹ See *supra* Part II.A.

³²⁰ See *supra* Part II.A.

³²¹ See, e.g., *Ethyl Corp. v. Gov't of Canada*, UNCITRAL, Award on Jurisdiction, ¶ 55 (June 24, 1998) (“The erstwhile notion that in case of doubt a limitation of

As stated in *Factory at Chorzów*, “[t]he fact that weighty arguments can be advanced to support the contention that [the Court] has no jurisdiction cannot of itself create a doubt calculated to upset its jurisdiction.”³²² Clarity presumptions that only instruments free from interpretive doubt can constitute consent are procedurally, functionally, and substantively at odds with the *Factory at Chorzów* approach.³²³

E. Reevaluating Jurisdictional Decisions in Light of the Proof of Law

The process of jurisdictional proof, like the approach articulated in *Factory at Chorzów*, is an important corrective measure for understanding jurisdictional decisions that, at first glance, may appear inconsistent.³²⁴ Jurisdictional decisions do not, and should not, develop a single correct legal rule as current scholarship assumes.³²⁵ Rather, individual decisions stand for the

sovereignty must be construed restrictively has long since been displaced . . .”) (internal quotations omitted).

³²² *Factory at Chorzów* (Ger. v. Pol.), 1927 P.C.I.J. (Ser. A) No. 9, ¶ 89 (July 26).

³²³ *See id.*

³²⁴ A core component of various strains of legal scholarship for academic commentary on legal decisions involves focus on the process of decision-making as a corrective measure. *See generally* Myres S. McDougal & W. Michael Reisman, *The Prescribing Function in World Constitutive Process: How International Law is Made*, 6 YALE STUD. WORLD PUB. ORD. 249 (1979-1980) (using process to critique natural law and applying positivist positions to international law); Sacco, *supra* note 264 (treating process as a key component of comparative law research); David Kennedy, *The Politics and Methods of Comparative Law*, in THE COMMON CORE OF EUROPEAN PRIVATE LAW: 131 (Mauro Bussani & Ugo Mattei eds., 2003); Ronald A. Cass, *Judging: Norms and Incentives of Retrospective Decision-Making*, 75 B.U. L. REV. 941 (1995) (discussing the process of decision-making in law and economics).

³²⁵ *See Saipem S.p.A. v. People’s Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction, ¶ 67 (Mar. 21, 2007) [hereinafter *Saipem*] (“[The Tribunal] is of the opinion that it must pay due consideration to earlier decisions of international tribunals. . . . It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law.”); Salacuse, *supra* note 250, at 467 (“Despite the decentralized and privatized decisionmaking processes of the regime, the resulting decisions by arbitral tribunals demonstrate a surprisingly high degree of uniformity and consistency.”); Gabrielle Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse?*, 23 ARB. INT’L 357, 357 (2007) (“[I]t is common knowledge that international arbitration lacks a

relative merits of the arguments for and against jurisdiction in a particular case.³²⁶ Each decision makes a determination of which position advanced by a party more closely approximates the equilibrium point between the competing interests advanced by the parties in light of the specific circumstances, and the particular instrument addressed, in the case.³²⁷

Value is derived from jurisdictional decisions through the reasoning employed to reject the losing jurisdictional argument, not from the adoption of a particular rationale or result.³²⁸ Prior decisions thus provide parties with a source for defeating opposing arguments through analogy, rather than serve as abstract corroboration of parties' assertions in arbitration. Because case law includes pairs of arguments that have relative merit to each other, case law is an important source for explaining why the opposing position is less plausible than the one advanced by that particular party.

The academic value of jurisdictional decisions likewise does not stem from the specific interpretation applied to a provision in any particular case. Rather, by carefully unearthing the methods

doctrine of precedent, at least as it is formulated in the common-law system. Regardless, arbitrators increasingly appear to refer to, discuss and rely on earlier cases.”); *see also* MCLACHLAN, *supra* note 38, at 18-23 (noting the trend of treating legal rationales adopted by tribunals as jurisprudence constante but noting the need to strive for a balance between state and investor rights); DOLZER & SCHREUER, *supra* note 40, at 35-38 (surveying the value of past arbitral decisions as quasi-precedents).

³²⁶ Fisheries Jurisdiction (Spain v. Can.), 1998 I.C.J. 439, ¶ 36-38 (Dec. 4); Border and Transborder Armed Actions (Nicar. v. Hond.), 1988 I.C.J. 69, ¶ 16 (Dec. 20); Factory at Chorzów (Ger. v. Pol.), 1927 P.C.I.J. (Ser. A) No. 9, ¶ 89 (July 26).

³²⁷ *But see generally* George K. Foster, *Striking a Balance Between Investor Protections and National Sovereignty: The Relevance of Local Remedies in Investment Treaty Arbitration*, 49 COLUM. J. TRANSNAT'L L. 201 (2011) (discussing the emerging trend of requiring the exhaustion of local remedies in international investment agreements).

³²⁸ Thus, concern for inconsistent outcomes in investor-state decisions is inapposite, at least in the jurisdictional context. For a discussion of the problem of inconsistent decisions adopted by investor-state tribunals, *see* Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521 (2005); Anne van Aaken, *Fragmentation of International Law: The Case of International Investment Law*, 17 FINNISH Y.B. INT'L L. 91 (2006). *But see* David D. Caron, *Investor-State Arbitration: Strategic and Tactical Perspectives on Legitimacy*, 32 SUFFOLK TRANSNAT'L L. REV. 513, 517-18 (2009) (explaining inconsistency in investor-state arbitration as an incidence of arbitral dispute resolution).

employed by tribunals of triangulation between the parties' contentions and the winning position, academic researchers will better be able to establish a statement of the equilibrium point than that which is advanced by the individual cases themselves. This triangulation will permit academic researchers to identify the true substantive rules of decisions made by tribunals independent of stated legal bases. In short, it will shed light on the "why" rather than the "how" of jurisdictional decision-making.

F. Jurisdictional Proof in Investor-State Disputes and U.S. Court Review of BIT Arbitral Awards

The jurisdictional balancing test required by international law is currently on a direct collision course with United States jurisprudence governing the vacation of awards rendered in the United States. In the recent decision of *Republic of Argentina v. BG Group PLC (BG Group)*,³²⁹ the U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit) set aside an award rendered by a United Nations Commission on International Trade Law (UNCITRAL) tribunal pursuant to the United Kingdom-Argentina BIT.³³⁰

The *BG Group* Court would have required the arbitral tribunal to deny jurisdiction prior to the exhaustion of an eighteen-month local remedies period, because it would not have been empowered to decide jurisdiction by clear and unmistakable evidence before the end of the remedies period.³³¹ The U.S. Court of Appeals for the Second Circuit (Second Circuit) applied the same clear and unmistakable evidence test in *Schneider v. Kingdom of Thailand*.³³² However, this test is inconsistent with the *Factory at Chorzów* approach to jurisdictional proof, which these tribunals were required to follow as a matter of international law.³³³ If the

³²⁹ 665 F.3d 1363 (D.C. Cir. 2012).

³³⁰ *Id.* For a short discussion of *BG Group*, see John R. Crook, *D.C. Circuit Vacates Investment Arbitration Award Against Argentina*, 106 AM. J. INT'L L. 393 (2012).

³³¹ *BG Group*, 665 F.3d at 1371.

³³² 688 F.3d 68 (2d Cir. 2012).

³³³ *BG Group*, 665 F.3d at 1370-71 ("Under Article 8(3), if the parties do not agree on an arbitration forum or procedure, the UNCITRAL Rules will govern resolution of the dispute; the UNCITRAL Rules grant the arbitrator the power to determine issues of arbitrability.").

United States is to remain a viable forum for conducting investor-state arbitration outside of the scope of the ICSID Convention, which includes, most notably, NAFTA Chapter 11 arbitration,³³⁴ this collision of approaches must be avoided.

As part of its motion to vacate the award in *BG Group*, Argentina asserted that the arbitral tribunal lacked jurisdiction over the dispute because the investor did not abide by the condition precedent to the arbitration consent requiring submission of the dispute in question to the host state's courts for a period of eighteen months.³³⁵ The D.C. Circuit acknowledged the rationale behind granting jurisdiction, based on Article 32 of the Vienna Convention. "[T]he Panel concluded that because Argentina by emergency decrees had restricted access to its courts and had excluded from the renegotiation process any licensee that sought redress, a literal reading of the Treaty would produce an 'absurd and unreasonable result.'"³³⁶ However, the D.C. Circuit found that the tribunal was not empowered to decide that the eighteen-month submission period had effectively been waived by Argentina's conduct.³³⁷ Consequently, the D.C. Circuit ruled that "BG Group was required to commence a lawsuit in Argentina's courts and wait eighteen months before filing for arbitration pursuant to Article 8(3) if the dispute remained" and vacated the award.³³⁸

The approach adopted by the D.C. Circuit contradicts the inquiry required by international law. The *Factory at Chorzów* approach compels a tribunal to read an arbitration provision that requires submission of a dispute to local courts in the broader context of the treaty as a whole.³³⁹ To do so, a tribunal must determine whether a proposed interpretation is reasonable in light of the entire treaty.³⁴⁰ Canons of construction must not prevent

³³⁴ North American Free Trade Agreement, U.S.-Can.-Mex., art. 1120, ¶ 1, Dec. 17, 1992, 32 I.L.M. 289 (1993).

³³⁵ *BG Group*, *supra* note 329, at 1365.

³³⁶ *Id.* at 1367-68.

³³⁷ *Id.* at 1371 ("Because the Treaty provides that a precondition to arbitration of an investor's claim is an initial resort to a contracting party's court, and the Treaty is silent on who decides arbitrability when that precondition is disregarded, we hold that the question of arbitrability is an independent question of law for the court to decide.").

³³⁸ *Id.* at 1373.

³³⁹ *See supra* Part II.B.

³⁴⁰ *See supra* Part II.B.

such an interpretation because consent to arbitration need not be demonstrated by clear and convincing evidence.³⁴¹ For investor-state arbitrations governed by international law and subject to the Federal Arbitration Act, either international law or the interpretation of the Federal Arbitration Act adopted by the D.C. Circuit must give way.

The Second Circuit, in its most recent decision to confirm an investor-state arbitration award, *Schneider v. Kingdom of Thailand*,³⁴² did not resolve the potential collision between U.S. oversight requirements for international arbitration and the jurisdictional process of decision mandated by international law.³⁴³ In that decision, the Second Circuit confirmed that U.S. courts must review *de novo* the question of whether clear and convincing evidence has demonstrated that a decision on arbitrability was delegated to the arbitrators.³⁴⁴ The Second Circuit concluded that clear and convincing evidence standard arose out of the inclusion of the choice of the UNCITRAL Arbitration Rules in the treaty.³⁴⁵

This holding does not resolve the fundamental challenge posed by the *BG Group* court: that “the Treaty’s incorporation of the UNCITRAL Rules has a temporal limitation: the Rules are not triggered until *after an investor has first, pursuant to Article 8(1) and (2), sought recourse, for eighteen months, in a court of a contracting party where the investment was made.*”³⁴⁶ This temporal limitation is potentially applicable with regard to any dispute in which the investor relies upon a most-favored nation clause to expand the scope of jurisdiction.³⁴⁷ As a practical matter, a better solution is needed to resolve the collision between the Federal Arbitration Act and international law, both to resolve the normative clash between the legal systems and to maintain the United States as a viable forum for investor-state arbitrations.³⁴⁸

³⁴¹ See *supra* Part III.C.

³⁴² *Schneider v. Kingdom of Thailand*, 688 F.3d 68 (2d Cir. 2012).

³⁴³ *Id.*

³⁴⁴ See *id.* at 71-72.

³⁴⁵ See *id.* at 72-74 (citing *Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384, 393 (2d Cir. 2011)).

³⁴⁶ *BG Group*, *supra* note 329, at 1371 (emphasis added).

³⁴⁷ See *Daimler Financial Services AG v. Argentina*, ICSID Case No. ARB/05/1, Award, ¶ 200 (Aug. 22, 2012), IIC 560 (2012).

³⁴⁸ On the potential clash between U.S. law and international law in U.S. statutory

The United States Supreme Court, in *Howsam v. Dean Witter Reynolds Inc.*, limited questions of arbitrability to “the kind of narrow circumstances where contracting parties would have expected a court to have decided the gateway matter.”³⁴⁹ Submitting the gateway question to the courts of the host states has every chance of frustrating the very availability of arbitration as a dispute resolution mechanism.³⁵⁰ As a matter of international law, there is no court of general jurisdiction to decide the gateway matter.³⁵¹ International law clearly recognizes that arbitral tribunals have competence to decide jurisdictional questions.³⁵² By including an arbitration clause in a treaty, the treaty parties thus would have expected the gateway issue to be decided by the arbitral tribunal. Instead of referring to the provisions in the arbitration rules that govern the competence of a tribunal to determine its own jurisdiction, U.S. courts should look to these international law principle of competence when addressing issues of arbitrability.

Additionally, current U.S. case law looks to arbitration rules as clear and unmistakable evidence that arbitrability questions are to be decided by the arbitrators because when “parties explicitly incorporate rules that empower an arbitrator to decide issues of arbitrability, the incorporation serves as a clear and unmistakable evidence of the parties’ intent to delegate such issues to an

interpretation, see Stephan, *supra* note 23, at 1634-38.

³⁴⁹ *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002); see generally *John Wiley & Sons v. Livingston*, 376 U.S. 543 (finding that failure to follow a grievance procedure before commencement of arbitration was a procedural question rather than a question of arbitrability); Bermann, *supra* note 240, at 42-43 (concluding after review of U.S. case law that the arbitrator should determine all considerations of legitimacy and efficacy initially, thus excluding *BG Group*-like situations from being included in arbitrability); Mark Berger, *Arbitration and Arbitrability*, 56 BAYLOR L. REV. 753, 791-92 (2004).

³⁵⁰ See *infra* note 351 and accompanying text.

³⁵¹ See *supra* Part III.A. This is an instance in which the treaty parties would in fact be more likely to have “considered the arcane question of arbitrability” not because of the broad language of the arbitration clause or the arbitration rules referenced in the arbitration clause, but because it is a fundamental legal expectation that arbitrators over an international law dispute arising under a treaty would have that power. See, e.g., Joseph Franco, *Casually Finding the Clear and Unmistakable: A Re-Evaluation of First Options in Light of Recent Lower Court Decisions*, 10 LEWIS & CLARK L. REV. 443, 465-74 (2006).

³⁵² See *supra* Part II.

arbitrator.”³⁵³ BIT consent does not only incorporate a set of arbitration rules, but also incorporates the international law of arbitral procedure.³⁵⁴ This incorporation of the international law competence principle is strengthened further by the requirement that the presence of clear and unmistakable evidence is to be “construed by the relevant state law,” here international law.³⁵⁵ International law as a matter of necessity assigns the question of arbitrability of a dispute to the arbitral panel.³⁵⁶

Review of arbitral awards by the U.S. courts premised upon the international law rules of competence do not abdicate all review powers over investor-state awards. The *Factory at Chorzów* approach is consistent with current Supreme Court jurisprudence that “[i]t is only when [an] arbitrator strays from interpretation and application of the agreement and effectively ‘dispense[s] his own brand of industrial justice’ that his decision may be unenforceable.”³⁵⁷ It is in that circumstance, and only in that circumstance, that an issue of arbitrability arises because only in such a circumstance does an arbitrator “commit the parties to a fundamentally different type or category of arbitration which [they] have not ‘agreed to authorize.’”³⁵⁸ It is only in that limited circumstance that U.S. courts should set aside investor-state arbitral decisions that result from failure in the jurisdictional

³⁵³ See, e.g., *Contec Corp. v. Remote Solution, Co., Ltd.*, 398 F.3d 205, 208 (2d Cir. 2005); cf. Bermann, *supra* note 240, at 38-40 (surveying U.S. case law on point).

³⁵⁴ See *supra* Part III.A. This is an instance in which the treaty parties would in fact be more likely to have “considered the arcane question of arbitrability” not because of the broad language of the arbitration clause or the arbitration rules referenced in the arbitration clause, but because it is a fundamental legal expectation that arbitrators over an international law dispute arising under a treaty would have that power. See, e.g., Franco, *supra* note 351.

³⁵⁵ *Contec*, 398 F.3d at 208 (citing *Bell v. Cendant Corp.*, 293 F.3d 563, 566 (2d Cir. 2002)).

³⁵⁶ See *supra* Part II.A.

³⁵⁷ *Stolt Nielsen S.A. v. Animalfeeds Int’l Corp.*, 130 S. Ct. 1758, 1767 (2010) (quoting *Major League Baseball Players Assn. v. Garvey*, 532 U.S. 504, 509 (2001)). For a discussion of *Stolt Nielsen*, see generally S.I. Strong, *Resolving Mass Legal Disputes Through Class Arbitration*, 37 N.C. J. INT’L L. & COM. REG. 921 (2012) (discussing *Stolt Nielsen*); S.I. Strong, *Does Class Arbitration ‘Change the Nature’ of Arbitration? Stolt-Nielsen, AT&T, and a Return to First Principles*, 17 HARV. NEGOT. L. REV. 201 (2012).

³⁵⁸ *Central West Virginia Energy, Inc. v. Bayer Cropscience LP*, 645 F.3d 267, 275 (4th Cir. 2011) (quoting *Stolt Nielsen*, 130 S. Ct. at 1776).

decision-making process.

IV. Proof of Facts

Because of the circumstantial nature of the proof of law in jurisdiction, proof of facts becomes significant. The jurisdictional equilibrium will shift, depending upon the actual circumstances of the dispute, as the invocation of legal doctrines is given greater or lesser plausibility by the actual events at issue in the case. Proof of these facts is, therefore, the most important part of proof of jurisdiction before investor-state tribunals.

A. *A Level Playing Field—Jurisdiction Before the International Court of Justice*

The *Factory at Chorzów* approach applies not only to issues surrounding proof of law, but also to issues of proof of jurisdictional facts.³⁵⁹ According to the *Factory at Chorzów* approach, a tribunal must provide an interpretation of the jurisdictional instruments based on the submissions of the parties.³⁶⁰ Likewise, this same approach applies to proof of facts; a tribunal cannot avoid its duty of providing its interpretation by reference to a burden of proof on either party.³⁶¹

The *Fisheries Jurisdiction*³⁶² decision, adopting the *Factory at Chorzów* approach, was clear that the rule of *onus probandi actori incubit*³⁶³ is displaced in the jurisdictional context:

Although a party seeking to assert a fact must bear the burden of proving it, *this has no relevance for the establishment of the Court's jurisdiction*, which is a “question of law to be resolved in the light of the relevant facts.”³⁶⁴

In both *Fisheries Jurisdiction* and *Border and Transborder*

³⁵⁹ See *supra* Part II.B.

³⁶⁰ See generally *Factory at Chorzów* (Ger. v. Pol.), 1927 P.C.I.J. (Ser. A) No. 9 (July 26) (discussing tribunal actions with regard to jurisdiction).

³⁶¹ *Id.*

³⁶² *Fisheries Jurisdiction* (Spain v. Can.), 1998 I.C.J. 439 (Dec. 4).

³⁶³ CHENG, GENERAL PRINCIPLES, *supra* note 232, at 326-35 (discussing that the burden of proof rests on the claimant).

³⁶⁴ *Fisheries Jurisdiction* (Spain v. Can.), 1998 I.C.J. at 450-51 (emphasis added). On the taking of evidence by the International Court of Justice in the merits context, see Valencia-Ospina, *supra* note 83.

*Armed Action*³⁶⁵, the ICJ distinguished its earlier dicta in *Military and Paramilitary Activities*,³⁶⁶ which stated that, eventually, the party seeking to establish a fact bears the burden of proving it.³⁶⁷ The court clarified that the statement about the burden of proof of facts in *Military and Paramilitary Activities* concerned eventual proof of the merits of the case and did not directly concern jurisdiction.³⁶⁸

The approach adopted by the ICJ in both cases expressly referenced the *Factory at Chorzów* approach,³⁶⁹ explaining that jurisdiction is a question of law to be resolved in light of the relevant facts.³⁷⁰ Proof of facts therefore is a relevant part of the legal inquiry into which legal position advanced by the parties regarding the consent instrument is more plausible.³⁷¹ In other words, the ICJ has signaled that factual determinations are part and parcel with the task of establishing law on jurisdiction.³⁷² Different facts may, and often do, affect the success of legal propositions advanced by either party.

Although not referenced in the jurisdictional decisions discussed above, the prior practice of the ICJ had come under severe scrutiny for an inequitable use of dispositive burdens of proof:

It has been suggested by a writer of authority [Sir Gerald Fitzmaurice] that if the first view is accepted—the view that a State's freedom of action is absolute unless specifically limited—then it might be sufficient for a State to 'manoeuvre itself into the position of defendant' in order to benefit from the presumption of legality and freedom of action, a presumption which could be displaced only by proof that the action of the

³⁶⁵ Border and Transborder Armed Action, *supra* note 35.

³⁶⁶ Military and Paramilitary Activities, *supra* note 35.

³⁶⁷ *See id.*

³⁶⁸ Fisheries Jurisdiction (Spain v. Can.), 1998 I.C.J. 439, ¶¶ 37-38.

³⁶⁹ Fisheries Jurisdiction (Spain v. Can.), 1998 I.C.J. 439, ¶ 38; Border and Transborder Armed Actions (Nicar. v. Hond.), 1988 I.C.J. 69, ¶ 16 (Dec. 20).

³⁷⁰ Fisheries Jurisdiction (Spain v. Can.), 1998 I.C.J. 439, ¶ 38; Border and Transborder Armed Actions (Nicar. v. Hond.), 1988 I.C.J. 69, ¶ 16 (Dec. 20).

³⁷¹ Fisheries Jurisdiction (Spain v. Can.), 1998 I.C.J. 439, ¶ 38; Border and Transborder Armed Actions (Nicar. v. Hond.), 1988 I.C.J. 69, ¶ 16 (Dec. 20).

³⁷² Fisheries Jurisdiction (Spain v. Can.), 1998 I.C.J. 439, ¶ 38; Border and Transborder Armed Actions (Nicar. v. Hond.), 1988 I.C.J. 69, ¶ 16 (Dec. 20).

defendant State was contrary to international law. Such proof, it has been pointed out, would be difficult to adduce while, by comparison, the burden of proof—assuming that it rests upon the defendant—that the action was not contrary to international law, would be relatively easy in view of the unsettled and controversial character of many of the rules of international law.³⁷³

Sir Gerald Fitzmaurice was rightfully weary of the heavy use of burdens. Burdens of proof bestow enormous advantages upon the respondent because that party need not prove any facts.³⁷⁴ The respondent can theoretically rest entirely upon unsubstantiated denials and targeted attacks of evidence submitted by the petitioner.³⁷⁵

Combining the concern of Fitzmaurice and the goal of the *Factory at Chorzów* approach, the problems that can develop by imposing factual burdens of proof become apparent. In such an analysis, the tribunal is asked to make a determination between competing jurisdictional theories, a determination that depends upon facts.³⁷⁶ If burdens are applied, the fact finding mission of a tribunal is significantly impeded because it may lack relevant evidence from the responding party; the party that does not have a burden and can strategically introduce evidence.³⁷⁷ The tribunal or court therefore would not have sufficient information from which to make a plausibility determination between rival factual theories and, consequently, would not have a clear field to determine the legal significance that attach to the facts in dispute. This frustrates its ultimate mission of making a legal determination of jurisdiction to be carried by a simple preponderance.³⁷⁸

³⁷³ HERSCH LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT* 362 (1982). The remainder of the chapter goes through difficulties to disprove the role of burdens in early decisions by the International Court of Justice. *Id.* at 362-67.

³⁷⁴ *Id.*

³⁷⁵ See *Noble Ventures Inc v. Romania*, ICSID Case No. ARB/01/11, Award, ¶ 20(7) (Oct. 5, 2005) (“Finally the Tribunal notes that, insofar as a Party has the burden of proof, it is sufficient for the other Party to deny what the respective Party has alleged and then, later in the procedure, respond to and rebut the evidence provided by that respective Party to comply with its burden of proof.”).

³⁷⁶ See *supra* note 256.

³⁷⁷ See, e.g. *supra* notes 134-140 and accompanying text.

³⁷⁸ Cf. Pauwelyn, *supra* note 43, at 234 (discussing the duty of cooperation in the

B. *The Practice of Investment Tribunals*

ICSID jurisprudence does not expressly adopt the approach articulated by the ICJ, but review of ICSID tribunal practice reveals that jurisdictional review in practice reflects the analysis.³⁷⁹ ICSID practice falls into two broad categories: decisions that do not on their face assign a burden of proof and decisions that purport to apply a burden of proof.³⁸⁰ Both sets of cases in fact apply an informal burden of production on both parties and, consistent with *Fisheries Jurisdiction*, do not in fact employ a determinative burden of proof on either party.³⁸¹

The implicit adoption of the *Fisheries Jurisdiction* is consistent with broader practice of ICSID tribunal, guided by ICJ decisions on the rules governing their jurisdictional analysis.³⁸² This reference to ICJ decisions is appropriate because jurisdiction of ICSID tribunals must be determined in accordance with international law.³⁸³ The absence of a burden of proof concerning facts asserted to establish jurisdiction posited by the ICJ applies with equal force and is binding upon ICSID tribunals by virtue of the broad approaches already applied by them.³⁸⁴

1. *No Burden of Proof of Jurisdictional Facts*

i. *General Practice of Investment Tribunals*

The general practice of ICSID tribunals follows an approach

WTO merits proceedings to achieve the same result).

³⁷⁹ See *infra* note 382.

³⁸⁰ See generally Pauwelyn, *supra* note 43, (discussing generally the question of who bears the burden of proof in international disputes).

³⁸¹ See *id.* at 232-34 (discussing the burden of proof with reference to *Fisheries Jurisdiction*).

³⁸² See Mobil, *supra* note 37, ¶¶ 62-96; Impregilo S.p.A. v. Pakistan, ICSID Case No. ARB/03/3, Decision on Jurisdiction, ¶ 241 (Apr. 22, 2005) (summarizing jurisprudence of adoption of the Oil Platforms test); Saipem, *supra* note 325, at n. 14 (providing summary of arbitral decisions following Impregilo); cf. ADF Group Inc. v. United States, ICSID Case No. ARB(AF)/00/1, Award, ¶ 145 (Jan. 9, 2003).

³⁸³ See, e.g., CSOB, *supra* note 224, ¶ 35 (“The question of whether the parties have effectively expressed their consent to ICSID jurisdiction is not to be answered by reference to national law. It is governed by international law as set out in Article 25(1) of the ICSID Convention.”); see Mobil, *supra* note 37, ¶¶ 84-85.

³⁸⁴ See *supra* Part IV.A (discussing the broad trends concerning burdens of proof with respect to the issue of jurisdiction).

similar to *Fisheries Jurisdiction*, even if it does not expressly abandon burdens of factual proof.³⁸⁵ ICSID decisions thus accept that “[t]he Tribunal should therefore not assume as true the facts alleged . . . for purposes of jurisdiction but should itself determine whether the threshold jurisdictional requirements, including the *ratione temporis* limitation, were satisfied.³⁸⁶ Another ICSID tribunal explained that,

To avoid engaging in a partial or subjective analysis . . . any analysis of jurisdiction must be made with meticulous care, without starting from presumptions in favor or against the jurisdiction Any presumption would corrupt the analysis and would unduly limit or expand the original consent given by the parties.³⁸⁷

The practice of investor-state tribunals addressing contested jurisdictional facts is to resolve the factual dispute on the basis of record evidence to the extent necessary to decide upon their jurisdiction.³⁸⁸ Such findings are made after a review of record evidence, guided by the submission of the parties.³⁸⁹ This

³⁸⁵ See *Industria Nacional de Alimentos SA and Indalsa Perú v. Peru*, ICSID Case No. ARB/03/4, Annulment Decision, ¶ 60 (Aug. 13, 2007), IIC 300 (2007) (discussing the court’s treatment of burdens of factual proof).

³⁸⁶ See *id.*

³⁸⁷ *Inceysa*, *supra* note 109, ¶ 176 (emphasis added).

³⁸⁸ See *Inmaris Perestroika Sailing Maritime Services GmbH and Ors v. Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction, ¶¶ 57-59 (Mar. 8, 2010), IIC 431 (2010) (“At the jurisdictional stage, the Tribunal must satisfy itself that it has jurisdiction to hear the merits of the dispute. This requires the Tribunal to make definitive findings of any facts that are directly determinative of its jurisdiction Accordingly, the Tribunal may well proceed to weigh the evidence and make factual findings at this stage, though it will do so solely to the extent necessary to make the conclusive jurisdictional determinations.”); *cf. Joy Mining Machinery Ltd. v. Egypt*, ICSID Case No. ARB/03/11, Award, ¶ 30 (July 30, 2004), IIC 147 (2004).

³⁸⁹ See, e.g., *Plama*, *supra* note 62, ¶¶ 116-29 (determining that the investor fraudulently misrepresented the nature of its proposed investment to the government after review of record evidence and party submissions without recourse to a burden of proof on either party); *Toto Costruzioni Generali S.p.A v. Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction, ¶ 77 (Sept. 8, 2009), IIC 391 (2009) (“The Tribunal finds, rather, that the criteria as set forth by legal scholars and jurisprudence following *Salini v. Morocco* are met in the present case.”); *Duke Ecuador*, *supra* note 255, ¶¶ 171-89 (determining that customs complained of constituted taxation measures within a jurisdictional exception of the BIT); *Société Générale v. Dominican Republic*, LCIA Case No. UN 7927, Decision on Jurisdiction, ¶¶ 31-52 (Sept. 19, 2008), IIC 366 (2008) (establishing that an “investment” for purposes of the BIT existed despite

approach is fully consistent with *Fisheries Jurisdiction*.³⁹⁰

Similarly, the *Fisheries Jurisdiction* approach is followed when the record does not contain information for the tribunal to make the requisite findings of fact to resolve the dispute.³⁹¹ In these instances, tribunals have requested additional evidence and joined the question to a later stage in the proceedings.³⁹² This

payment of nominal price after full review of factual record rather than upon the basis of presumptions or burdens); *Rumeli Telekom AS and Telsim Mobil Telekomikasyon Hizmetleri AS v. Kazakhstan*, ICSID Case No. ARB/05/16, Award, ¶ 322 (July 21, 2008), IIC 344 (2008) [hereinafter *Rumeli*] (rejecting allegations of fraud advanced by Respondent on the basis of specific findings to the contrary); *Occidental*, *supra* note 289, ¶¶ 72-73 (“[Jurisdiction established because claim concerned a] tax matter associated with an investment agreement has been submitted to its consideration” after it “examine[d] the submissions of both parties” because “the objective fact is that the Contract is central to the dispute.”); *World Duty Free*, *supra* note 109, ¶¶ 135-36 (finding a bribe to have been made after review of the full record and placing particular emphasis on claimant’s documentary and testimonial evidence).

³⁹⁰ See *Fisheries Jurisdiction (Spain v. Can.)*, 1998 I.C.J. 439, 450-51 (Dec. 4).

³⁹¹ See *Vannessa Ventures Ltd. v. Venezuela*, ICSID Case No. ARB(AF)/04/6, Decision on Jurisdiction, ¶¶ 73-74 (Aug. 22, 2008), IIC 335 (2008) (joining the jurisdictional objection of compliance with host state law to the merits because based on the facts the tribunal did not make a finding on the ownership or control issues under Venezuelan law as required to determine jurisdiction); *Perenco Ecuador Ltd. v. Ecuador and Empresa Estatal Petróleos del Ecuador*, ICSID Case No. ARB/08/6, Decision on Jurisdiction, ¶ 106 (June 30, 2011), IIC 499 (2011) [hereinafter *PetroEcuador*] (“Therefore, the Claimant is directed to file further evidence in support of its averment that it is controlled by Mr. Perrodo’s heirs. In particular, evidence should be filed to prove: (i) that the shares of what is now called Perenco International Limited in fact form part of the estate under French law and are being or will be distributed to the heirs of Mr. Perrodo in accordance with that law; and (ii) the means and instrument(s) through which the heirs have exercised control over the Claimant. The Tribunal recognizes that the heirs may wish to maintain matters pertaining to the estate confidential. The Claimant is at liberty to apply for an order to protect the confidentiality of any testimony and/or any supporting documents.”); *EnCana Corporation v. Ecuador*, LCIA Case No. UN3481, Decision on Jurisdiction, ¶ 38 (Feb. 27, 2004), IIC 90 (2004) (“For these reasons the Tribunal is not satisfied that it has sufficient material before it to enable it to definitively decide the disputed issue of characterization on which its jurisdiction depends. To put it another way, it is arguable that at least certain aspects of the claim are not exempted from the scope of the BIT by Article XII(1), yet on the material available to it the Tribunal is not able to determine whether or to what extent this is so. In these circumstances the Tribunal does not think it desirable to discuss the meaning of the relevant provisions in detail, and in particular the meaning of the term ‘taxation measures’ in Article XII(1). These must be a matter for subsequent briefing and argument.”).

³⁹² See sources cited *supra* note 208.

practice confirms that no burden is imposed on either party because there is no final adverse consequence drawn against either party from the absence of record evidence.³⁹³

The *Fisheries Jurisdiction* approach is employed when there is insufficient evidence thus respecting the procedural roles of the parties.³⁹⁴ It is mindful of the overall purpose of jurisdiction in the context of investor-state arbitration as established so far in this article, and thus is an essential component to the patchwork of jurisdictional analysis.

ii. *“Burden of Proof” Held Applicable in Practice is not Dispositive*

The general practice of investor-state tribunals is not upset by a number of inconsistent outlier cases that appear to impose a burden of proof.³⁹⁵ These cases are not consistent regarding with whom the burden of proof should be placed and why.³⁹⁶ Some cases state that the burden of proving jurisdiction falls on the claimant,³⁹⁷ while others place the burden of proving a jurisdictional objection on the respondent.³⁹⁸ This tension in jurisprudence assigning a burden of proof indicates that burdens of proof are, in fact, not used in the majority of cases, as this clear

³⁹³ See Méndez, *supra* note 43, at 140-41.

³⁹⁴ See sources cited *supra* note 391 (discussing cases that have followed *Fisheries Jurisdiction*).

³⁹⁵ See generally *infra* notes 397-98 (discussing applicable case law).

³⁹⁶ See *id.*

³⁹⁷ African Holding Company of America Inc. (AHL) and the African Society of Construction in Congo (SARL) v. The Democratic Republic of the Congo, ICSID Case No. ARB/05/21, Decision on Jurisdiction, ¶ 42 (July 23, 2008), IIC 332 (2008) [hereinafter African Holding]; GEA Group Aktiengesellschaft v. Ukraine, ICSID Case No. ARB/08/16, Award, ¶¶ 117-18 (Mar. 31, 2011), IIC 487 (2011); *Paushok*, *supra* note 79, ¶ 200; Perenco Ecuador Ltd. v. Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador), ICSID Case No. ARB/08/6, Decision on Jurisdiction, ¶ 98 (June 30, 2011), IIC 499 (2011) [hereinafter Perenco]; Tradex Hellas SA v. Albania, ICSID Case No. ARB/94/2, Decision on Jurisdiction, ¶¶ 124-25 (Dec. 24, 1996), IIC 262 (1996); Pey Casado and Président Allende Foundation v. Chile, ICSID Case No. ARB/98/2, Decision on Jurisdiction, ¶¶ 36, 105 (May 8, 2002), IIC 186 (2002) [hereinafter Pey Casado Jurisdiction].

³⁹⁸ See Rompetrol Group NV v. Romania, ICSID Case No. ARB/06/3, Decision on Jurisdiction, ¶ 75 (Apr. 18, 2008), IIC 322 (2008) [Rompetrol]; see Rumeli, *supra* note 389, ¶¶ 168, 320-21; see Micula, *supra* note 108, ¶¶ 87, 95; see *Fakes*, *supra* note 107, ¶ 128.

split in decisions would otherwise have been addressed as a dispositive disagreement between members of the arbitration bar and bench.

In fact, in most instances the burden referred to by the tribunal is irrelevant to the outcome of the case.³⁹⁹ It is circumvented through legal holdings making the factual issue to be proved irrelevant.⁴⁰⁰ The tribunal often reaches its decision through a factual finding from the evidence before it, rather than the naked application of burdens of proof that would decide the case based on the inability to make requisite factual findings.⁴⁰¹ Finally, and most tellingly, tribunals do not reach their decisions in these cases on issues of fact, but instead they delay a decision on the issue for which they lack evidence in order to obtain evidence.⁴⁰²

In these circumstances, it is clear that, practically, there is no “burden of proof” employed by the tribunal because there is no adverse consequence for the absence of evidence in the record.⁴⁰³ Whatever the tribunal seeks to accomplish by assigning “burdens,” it is not assigning burdens of proof for the purposes of determining the jurisdictional issue at hand. Thus this practice still, to a significant extent, remains consistent with the *Fisheries Jurisdiction* approach.

2. *De Facto Burden of Production on Both Parties*

Some would argue that, without burdens of proof, a tribunal does not have sufficient means to ensure that parties submit the necessary evidence. However, this issue is resolved quite simply. Rather than imposing burdens of proof, with adverse

³⁹⁹ See *Romp petrol*, *supra* note 398, ¶ 110 (noting that because the jurisdictional decision was reached as a matter of law there was no need to reach a decision on whether the Respondent had met its burden regarding the factual issues); see *Paushok*, *supra* note 79, ¶¶ 202-04 (rejecting the legal theory of origin of capital on which the objection in question was premised).

⁴⁰⁰ See *Romp petrol*, *supra* note 398, ¶ 110 (noting that because the jurisdictional decision was reached as a matter of law there was no need to reach a decision on whether the Respondent had met its burden regarding the factual issues); see *Paushok*, *supra* note 79, ¶¶ 202-04 (rejecting the legal theory of origin of capital on which the objection in question was premised).

⁴⁰¹ See *Rumeli*, *supra* note 389, ¶ 322; *African Holding*, *supra* note 397, ¶ 43.

⁴⁰² See *Perenco*, *supra* note 397, ¶ 106; *Pey Casado Jurisdiction*, *supra* note 397, ¶ 110.

⁴⁰³ See *supra* Part IV.B.

consequences should it not be met, tribunals apply informal burdens of production.⁴⁰⁴ This, informal, burden of production is not the typical burden to produce evidence, which results in an adverse ruling should insufficient evidence be submitted.⁴⁰⁵ It is a burden of production in the opposite sense, in that record evidence is needed in order to support a factual finding for a party; it is thus not the threat of an adverse finding that drives the informal burden of production, but the need for both parties to make out their affirmative jurisdictional case in order to succeed.

i. Burdens of Production in General

The jurisdictional burdens of production reflect the respective interests of the parties.⁴⁰⁶ The claimant has an interest in submitting evidence that would allow the tribunal to make the factual findings necessary to uphold jurisdiction.⁴⁰⁷ This can include submitting evidence both supporting the claimant's affirmative case and rebutting potential affirmative defenses raised by the respondent.⁴⁰⁸ The respondent, on the other hand, would submit evidence to rebut claimant's factual case on jurisdiction

⁴⁰⁴ See Méndez, *supra* note 43, at 140-41.

⁴⁰⁵ See *id.* at 140.

⁴⁰⁶ See *infra* Part IV.B.2.ii.

⁴⁰⁷ It is in this far less remarkable way that tribunals state that the "Claimant must demonstrate that it has made an investment in [the host state] in order to rely on the protections contained in the Treaty." *Pantechniki SA Contractors and Engineers v. Albania*, ICSID Case No. ARB/07/21, Award, ¶ 32 (July 28, 2009), IIC 383 (2009). Sole Arbitrator Jan Paulsson in elegant, and brief, fashion summarized the appropriate back and forth of a shifting *de facto* burden of production (as opposed *de jure* burden of proof):

The Claimant's Project Manager (Ms Pinelopi Dourou) testified vividly about the shortage of materiel and skilled personnel in Albania at the time. She said that everything from cement to guardrails had to be imported from Greece. She easily countered Albania's attempt to minimize the Claimant's work as mere repairs rather than true construction by describing the work required to rehabilitate roads built during the Italian presence in Albania in the 1940s. There is no need to use one's imagination to list the possible risks associated with the Contracts; one need only consider what actually happened. The Contracts envisaged aggregate remuneration to the Claimant of some US\$7 million. The expectation of a commercial return is self-evident. The objection is unsustainable.

Id. ¶ 49.

⁴⁰⁸ See *supra* Part IV.B.

and to support affirmative defenses to jurisdiction.⁴⁰⁹ Thus, the parties have *de facto* burdens of production to prove their respective cases on jurisdiction to an “unburdened” tribunal.

The proof required in a case for each party to succeed on jurisdiction will change as the case progresses.⁴¹⁰ As one party introduces additional evidence, an opponent may see the need to further bolster its own case or discredit that of its counterparty. This can be referred to, imprecisely, as a burden shift.⁴¹¹ It is not a burden shift in the true sense, because the tribunal precisely makes a factual finding in order to support a legal conclusion rather than drawing a legal conclusion from the absence of evidence.⁴¹² Rather, the “shift” refers to the see-sawing of persuasive force of each party’s argument as they provide additional evidence in the case.⁴¹³ Thus, the burden of production itself never decides the case—the evidence made available to the tribunal on the basis of

⁴⁰⁹ Cf. *Pey Casado Jurisdiction*, *supra* note 397, ¶¶ 36, 105 (placing a general burden of proof for jurisdictional questions on the claimant and the burden of proving specific objections on the respondent). The *Pey Casado Jurisdiction* approach is more consistent with an “unburdened” jurisdictional analysis than one with such potentially contradictory burdens. *Id.* ¶ 110. The tribunal has to establish on the evidence and arguments whether it has jurisdiction. *Id.* In essence, the competing burdens cancel each other out leaving the parties with an interest to prove their respective case rather than a formal obligation under threat of default of doing so. *Id.* Put differently, the Tribunal in *Pey Casado Jurisdiction* could not rule that it has jurisdiction because respondent did not carry its objections, but by its own logic still would have to confirm that the claimant established jurisdiction to proceed and vice versa. *Id.* This is consistent with the tribunal’s decision on nationality – when it lacked proof to determine the issue, it joined the question to the merits rather than ruling by default against either party for failing to meet their respective burdens. *Id.*

⁴¹⁰ See *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award, ¶ 236 (Oct. 20, 2010), IIC 464 (2010) (“[O]nce a party adduces sufficient evidence in support of an assertion, the burden ‘shifts’ to the other party to bring forward evidence to rebut it.”).

⁴¹¹ See *Alpha Projektholding GmbH v. Ukraine*, *supra* note 410, ¶ 236 (“[O]nce a party adduces sufficient evidence in support of an assertion, the burden ‘shifts’ to the other party to bring forward evidence to rebut it.”).

⁴¹² See, e.g., *Micula*, *supra* note 108, ¶ 95; *Rumeli*, *supra* note 389, ¶ 322. Such findings could include that the claimant is a national of the treaty home state and therefore an “investor” protected by the treaty, or that the investment was made in compliance with host state law and therefore an “investment” protected by the treaty.

⁴¹³ See *Alpha Projektholding GmbH v. Ukraine*, *supra* note 410, ¶ 236 (discussing the burden shift that occurred between the parties).

which it makes the requisite findings does.⁴¹⁴

ii. Burden of Production and Factual Presumptions

The absence of a formal burden of proof or production regarding facts of a case does not displace factual presumptions. The key assumption underlying all factual presumptions is that the parties acted in good faith unless shown otherwise,⁴¹⁵ based on the belief that, both in business dealings and governmental action, parties typically do not act with malice. When a dispute arises, parties are keen to see deception and fraud at every turn because they feel they have been subjected to some wrong.⁴¹⁶ Factual presumptions used by tribunals assume that the parties acted normally, going about their ordinary affairs, rather than beginning with a premise of mistrust between the parties.⁴¹⁷

This use of factual presumptions is part and parcel of the duty of impartiality. Impartiality is a “cardinal characteristic[] of a juridical process” which protects “the juridical equality of the parties in their capacity as litigants.”⁴¹⁸ Impartiality requires that a tribunal begin on a clean slate; it may not from the outset distrust a party simply on account of allegations of misconduct made by an opponent.⁴¹⁹

⁴¹⁴ Compare *Chevron*, *supra* note 247, at ¶ 111 (“This approach is not inconsistent with either the jurisprudence of the Iran-United States Claims Tribunal or the recent decision in *Canadian Cattlemen for Fair Trade v. United States* ‘The type of evidence to be submitted by a Claimant depends on the circumstances of each particular case, as viewed by the Chamber. In this case, the evidence described below will, *prima facie*, be considered sufficient as to corporate nationality Respondent will be free to offer rebuttal evidence. From the totality of such evidence the Chamber will draw reasonable inferences and reach conclusions as to whether the Claimant was, or was not, a national of the United States.’”), with *Champion Trading Company and ors v. Egypt*, ICSID Case No. ARB/02/9, Decision on Jurisdiction, ¶¶ 36-37 (Oct. 21, 2003), IIC 56 (2003).

⁴¹⁵ See, e.g., CHENG, GENERAL PRINCIPLES, *supra* note 232, at 106.

⁴¹⁶ See, e.g., BLACKABY ET. AL., *supra* note 42, at 134.

⁴¹⁷ Cf. Pauwelyn, *supra* note 43, at 235, 256-58 (discussing the use of factual presumptions in WTO proceedings as a typical means for a party to persuade the WTO dispute resolution bodies).

⁴¹⁸ CHENG, GENERAL PRINCIPLES, *supra* note 232, at 290.

⁴¹⁹ Compare BLACKABY ET. AL., *supra* note 42, at 267-68 (“the concept of ‘impartiality’ is considered to be connected with actual or apparent bias of an arbitrator—either in favour of one of the parties or in relation to the issues in dispute”), with William W. Park, *Arbitrator Integrity: The Transient and the Permanent*, 46 SAN

The presumption of good faith is most directly implicated when a party asserts fraud or illegality. Without a good-faith presumption, a party would reap significant benefit from making unsubstantiated assertions of fraud or illegality from the outset. The assertion would immediately remove the accused party from the context of ordinary business affairs and place that party at a distinct disadvantage, under an obligation to prove normalcy.⁴²⁰

The immediate advantage given to the party asserting fraud is irreconcilable with the juridical equality of the parties in their capacity as litigants—unless a presumption operates in favor of good faith.⁴²¹

Presumptions of good faith by parties are common in international jurisprudence, in a variety of situations.⁴²² Tribunals presume that certificates of nationality or naturalization are indeed genuine and afford a presumption to the person submitting such

DIEGO L. REV. 629 (2009).

⁴²⁰ CHENG, *supra* note 232, at 305-06 (“If good faith and the observance of law may be regarded as the general rule and not the exception, as indeed they should be, the above presumptions may be said to belong to a still wider principle that what exists as a general rule will be presumed while he who alleges an exception to this general rule incurs the burden of substantiating his allegation”); *see also* Margaret K Lewis, *Presuming Innocence, or Corruption, in China*, 50 Colum. J. Transnat’l L. 287, 349 (2012) (noting in a related context that, “Using an extreme example, suppose a corpse is found and a person is charged with murder. Telling the defendant that he is presumed guilty unless he can present evidence to rebut this presumption would put him in the unenviable position of having to prove a negative. This might not be difficult if an innocent defendant has a strong alibi or evidence identifying the actual murderer, but it could be extremely problematic if he was alone at the time of the murder without any evidence of his whereabouts other than his own testimony. The defendant would be in an even worse position if, as with the case of Zhao Zuohai, the defendant was seen quarreling with the alleged murder victim. In Zhao’s case, he was convicted of murder in China—even without a reverse-onus provision being used—and then exonerated a decade later when the murder ‘victim’ returned to the village.”).

⁴²¹ *See* Chevron, *supra* note 247, ¶¶ 136-41; *cf.* Wintershall Aktiengesellschaft v. Argentina, ICSID Case No. ARB/04/14, Award, ¶ 125 (Nov. 8, 2008), IIC 357 (2008) (“There can be no presumption, as between Contracting States, that a particular stipulation is *ex facie* oppressive or that, for any other reason, it should be dispensed or disregarded.”); RosInvest Co. UK Ltd. v. Russian Federation, SCC Case No. 075/2009, Final Award, ¶ 620 (Sept. 12, 2010), IIC 471 (2010) (discussing the ordinary presumption of good faith imposition of taxation measures); *Fakes*, *supra* note 107, ¶ 134.

⁴²² *See generally infra* notes 424-25 (discussing situations in which a presumption of good faith operates).

documentation that he or she is a national of the respective state.⁴²³ They also presume that majority shareholders control the company in which they hold stock,⁴²⁴ and that the date of purchase of shares recorded in a share registry is the actual date of the transaction in question.⁴²⁵ Finally, tribunals presume “that ‘effective management’ once established is not readily lost, especially since the effect will be the loss of treaty protection.”⁴²⁶ Therefore, an application of a good-faith presumption in the issues at hand is not inconsistent with current analyses.

C. Rigidly Imposing Factual Burdens of Proof Is Inconsistent with International Law

International law is fundamentally at odds with the imposition of rigid burdens of proof in *Libananco* and *Caratube*.⁴²⁷ The rigid imposition of burdens of proof prevented the tribunals in those matters from making factual findings necessary in order to support a jurisdictional determination.⁴²⁸ Rather, the tribunals premised their determinations on nothing more than the absence of evidence.⁴²⁹

The imposition of rigid burdens of proof cannot be reconciled with the special position of international tribunals. Burdens of proof create a default position either in favor of or against the exercise of jurisdiction.⁴³⁰ A burden of proof, in other words, reintroduces through the backdoor a preference for one of the two rival functions of limited consent, access to justice and limitation

⁴²³ See *Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Annulment Decision, ¶ 66 (June 5, 2007), IIC 297 (2007) (“The certificates exhibited by them being made in due form, have for themselves the presumption of truth; but when it becomes evident that the statements therein contained are incorrect, the presumption of truth must yield to truth itself.”); *Micula*, *supra* note 108, ¶ 87.

⁴²⁴ See *Maffezi v. Spain*, ICSID Case No. ARB/97/7, Decision on Objections to Jurisdiction, ¶ 77 (Jan. 25, 2000), IIC 85 (2000); *ADC*, *supra* note 303, ¶¶ 339, 358.

⁴²⁵ See *Gallo v. Canada*, PCA Case No. 55798, Award, ¶¶ 286-87 (Sept. 15, 2011), IIC 522 (2011).

⁴²⁶ *Yaung Chi Oo Trading Pte Ltd. v Myanmar*, ASEAN Case No. ARB/01/1, Award, ¶ 52 (Mar. 31, 2003), IIC 278 (2003).

⁴²⁷ See *supra* notes 113-14 and accompanying text.

⁴²⁸ See *id.*

⁴²⁹ See *supra* Part IV.B.

⁴³⁰ See *supra* Part II.A.

of international liability to a predetermined set of cases.⁴³¹ By endorsing one of these rival functions, tribunals distort the role of public international law dispute resolution as recognized in the case law of the international court of justice and the overwhelming number of investor-state tribunals that have addressed themselves to the issue.⁴³²

The imposition of the rigid burdens of proof further violates the duties of impartiality and equality of the parties.⁴³³ By use of signal allegations, it permits one party to force its opponent to prove a negative and casts doubt as to that party's credibility without a shred of evidence. This leads to the absurd result in *Caratube*, namely, that the party in the possession of all corporate and private documents of the principals in the project company, through use of its coercive powers, failing to submit any plausible explanation for its jurisdictional objection that the owner of a company did not control it, nevertheless succeeded with its objection premised on that allegation.⁴³⁴ The practical consequence is a significant thumb on the scales against jurisdiction—i.e., precisely that which the *Factory at Chorzów* approach expressly rejects.⁴³⁵

D. Reevaluating Jurisdictional Decisions in Light of Proof of Fact

The process of proof of facts further aids in understanding jurisdictional decisions. Legal proof of jurisdiction tests the relative merits of the opposing arguments for and against jurisdiction in a given case. This test depends crucially upon approximation of the equilibrium point between the competing premises of the jurisdictional arguments advanced by the respective parties in light of the specific circumstances of the case.⁴³⁶ Because proof of law is performed through approximating

⁴³¹ *See id.*

⁴³² *Id.*

⁴³³ *See supra* Part IV.B.2.

⁴³⁴ *See supra* Part II.B.

⁴³⁵ *See Factory at Chorzów* (Ger. v. Pol.), 1927 P.C.I.J. (Ser. A) No. 9, at 32 (July 26).

⁴³⁶ *See Fisheries Jurisdiction* (Spain v. Can.), 1998 I.C.J. 439, 450-51 (Dec. 4); *Border and Transborder Armed Actions* (Nicar. v. Hond.), 1988 I.C.J. 69, ¶ 16 (Dec. 20); *Factory at Chorzów* (Ger. v. Pol.), 1927 P.C.I.J. (Ser. A) No. 9, at 32.

an equilibrium rather than discovery of an absolute, the factual circumstances of each case are critical to determining both jurisdictional facts and law.⁴³⁷ Jurisdiction hinges upon the factual findings in which a legal equilibrium could at all operate.

The process of proof of jurisdictional facts refines understanding of their use value. The comparison of the respective legal theories by a tribunal occurs in the context, and is guided by the comparison of the respective evidence advanced by each party.⁴³⁸ The value of a case depends upon an understanding of not only the respective merit of legal theories advanced by the parties, but also the evidence upon which a legal theory swayed the equilibrium analysis of a tribunal.⁴³⁹

The academic process of triangulation of the jurisdictional equilibrium point across a body of jurisdictional decisions depends critically on understanding the factual findings and the evidence on which they were based. It is through this deeper analysis of the case law—which evidence led to what result—that it is possible to provide a more meaningful functional analysis of jurisdiction in investor-state disputes that unearths the actual rule of decision motivating jurisdictional determinations and standing behind the stated legal basis for decision.

V. Conclusion

Jurisdictional proof in an investor-state arbitration is an equal contest of arms between the investor and the host state. A tribunal has to decide the jurisdictional dispute by interpreting the submission of the parties and by making determinations of jurisdictional facts on the basis of the arbitration record. The resulting decision is conditioned by the specific arguments marshaled by the parties and the specific pieces of evidence contained in the record. Consequently, no absolute rules of jurisdiction can be deduced from any one jurisdictional decision. Such rules can only be established by examining the entire body of jurisdictional decisions in light of the specific circumstances of each case.

Jurisdictional proof gives flesh to the abstract purpose of

⁴³⁷ Cf. *supra* note 240 and accompanying text.

⁴³⁸ See *supra* Part IV.B.

⁴³⁹ See *id.*

investor-state arbitral tribunals. The abstract purpose is a balance, or equilibrium, between the competing and inconsistent axioms of securing access to justice for an investor and enforcing the limitations of liability contained in the consent instrument. This tension can only be overcome through a dynamic process of jurisdictional proof rather than strict legal deduction.

Understanding the process of jurisdictional proof is the single most critical aspect of investor-state arbitration that has remained, thus far, underdeveloped. This article seeks to provide guideposts to rectify this fundamental oversight. In the process, it demonstrates not only that inconsistencies between decisions involving similar issues is in fact proof that tribunals appropriately discharge their mandates, but also provides the appropriate manner in which to reconcile these decisions by understanding them as a result of an equal contest bounded by their respective records and thus triangulating the common rule of decision between these cases. It is by this process of triangulation, mindful of the appropriate process of jurisdictional decision making, not by imposing blind uniformity on tribunals in the exposition of substantive rules, that the future of jurisdictional scholarship must lie.