Exceptions to Burden of Proof in Investor-State Arbitration

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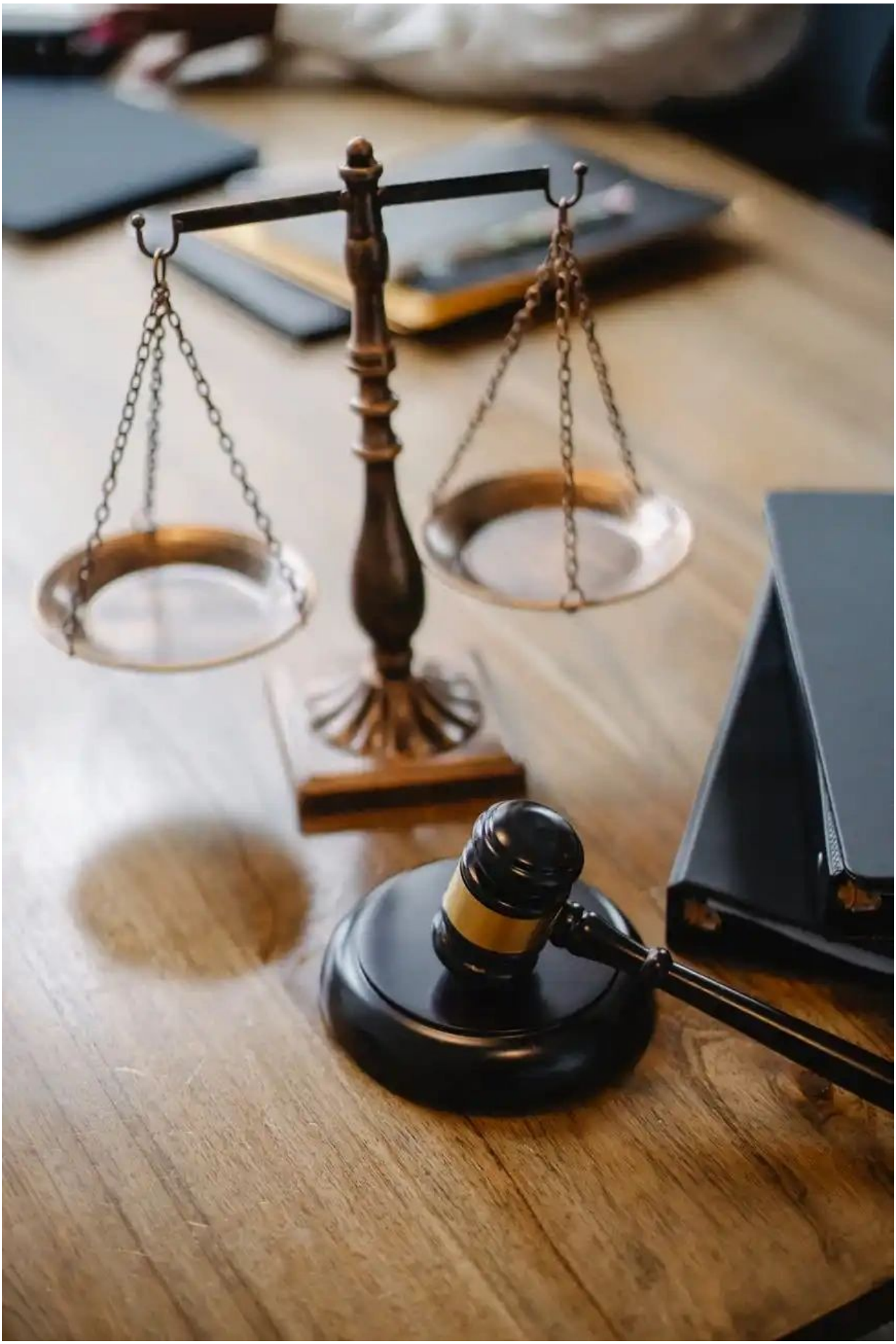

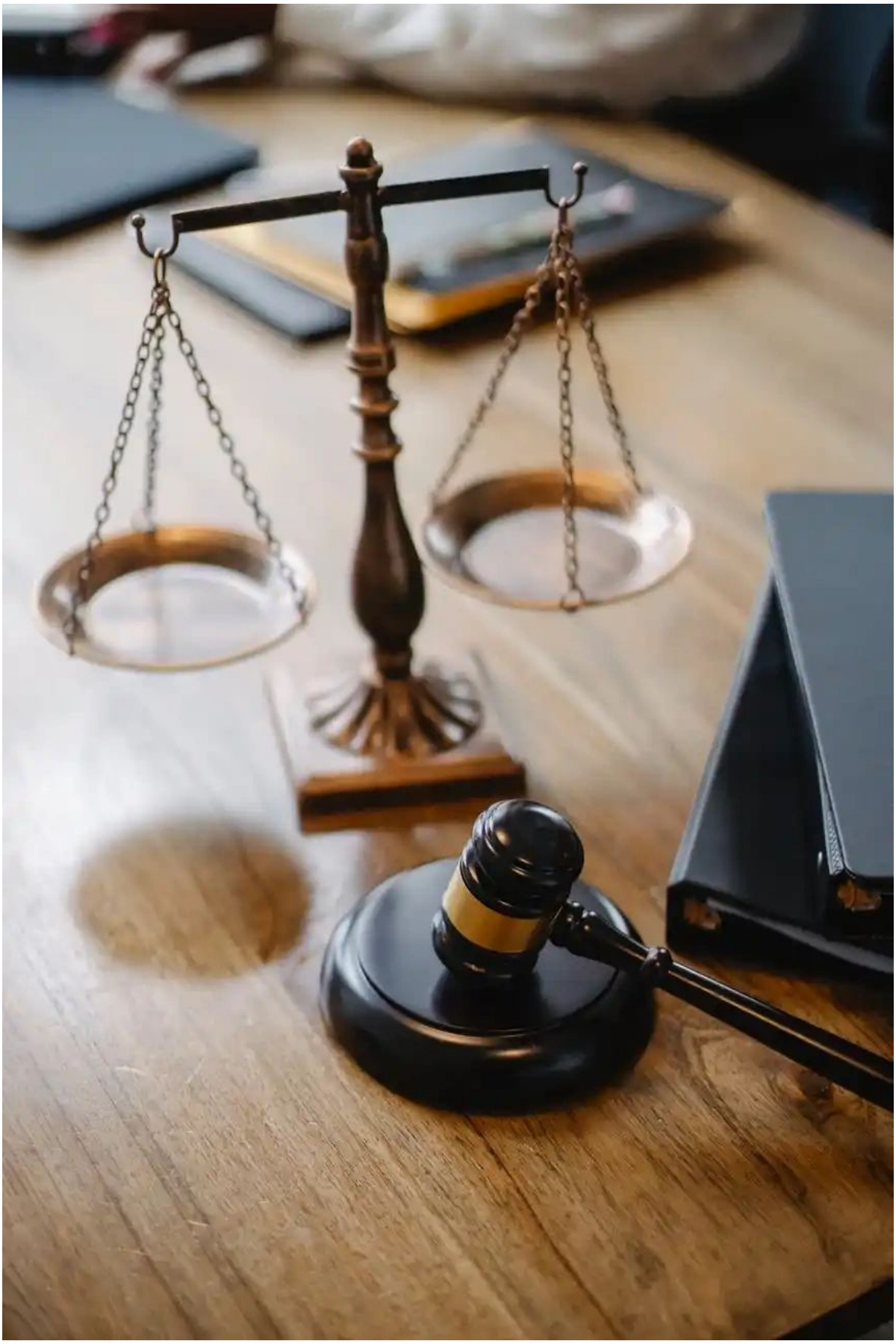

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Introduction

Unlike Chapter VII of the Indian Evidence Act,[1] which codifies the burden of proof, there is no proper codification of the rules for the same in international law. Investor-state arbitration is a special form of dispute resolution involving arbitration between a foreign investor and a host state. Since it involves a sovereign state as one of the parties, arbitrators exercise a public function, and thus they must carefully employ the law of evidence to the dispute. Further, it is interesting to look at the law of evidence from an arbitration perspective. Claims filed by Claimants are almost always responded to by counterclaims by Respondents, causing a continuous shift in both the onus and the burden of proof. This paper picks up from the lacunae of conventional laws or rules governing the burden of proof in Investor-state arbitration. It looks at the exceptions to the generally accepted norms of burden of proof and analyses them specifically from a jurisdictional angle.

The General Burden of Proof in Investment Arbitration

The general rule of the burden of proof flows from the maxim '*Actori incumbit onus probandi*'[2] which means that the 'burden of proof is on the plaintiff'. As per this legal principle, since the Plaintiff or the Claimant is the one alleging that the Respondent State has breached its obligations, it is upon the Claimant to prove the same. Specifically discussing the jurisdiction of an arbitral tribunal, as per this general rule, it would be upon the Claimant to establish a tribunal's jurisdiction. The doctrine is enshrined in the law of evidence across common law and civil law jurisdictions and has been the rule generally accepted by most systems.[3] However, as seen in the subsequent sections, there are multiple exceptions to this rule. It is also important to assess the standard of proof — which deals with the threshold or degree of conviction necessary to convince the tribunal that a burden has been met,[4] and that sufficient evidence has been provided.[5] The general standard of proof in investment arbitration is that a claim must be proven on the "balance of probabilities" or the preponderance of the evidence,[6] also commonly known as the "inner conviction test".[7] The standard of proof has been analysed by Sourgens et al.[8]

'Substantive Plaintiffs'- *The first exception*

As previously stated, the burden of proof is generally on the claimant. Unlike traditional courts, where the Plaintiff makes the claims and the Respondent defends himself, the Respondent in investment arbitration has the opportunity to bring forth counterclaims against the Claimant. In this situation, it would be unfair and unreasonable for the Claimant to bear the burden of proof to disprove claims put forward against them by the Respondent. Thus, the Respondent would bear the burden of proof to counterclaim. This is the logic behind the principle that the burden of proof in investment arbitration cases relies on the party which is trying to make a claim or establish a defence. This principle is codified in Article 27 of the UNCITRAL[9] and Article 27 of the PCA Rules 2012.[10] However, these rules apply only to arbitrations adopting these rules, and not generally to institutional or ad hoc arbitrations.

The idea of shifting the burden of proof to the Respondent is fairly contemporary, and scholars have recently noted the issues with the principle of '*Actori incumbit onus probandi*'.[11] The raison d'être for this concern was that it was difficult to establish who a 'plaintiff' is in investment arbitration. In light of this concern, the decision of the tribunal in *AAPL v. Sri Lanka*[12] becomes relevant. In this case, it was decided that the 'plaintiff' in the principle of *actori incumbit onus probandi* did not refer to the Claimant in a procedural sense, but 'plaintiff' should be understood from a real and substantive perspective. As per this interpretation, the party which is the 'plaintiff', bearing the burden of proof, can be either the Claimant or the Respondent, depending on the issue at hand. Therefore, it can be reasoned that the meaning of 'plaintiff' within the general rule of burden of proof in investment arbitration doesn't refer solely to the Claimant, but to the substantive plaintiff**.** This follows the jurisprudence established by the International Court of Justice ("ICJ") in the *Corfu Chanel*[13] and *Nicaragua*[14] disputes, as well as the World Trade Organization ("WTO") in *US– Shirts and Blouses*[15] and *US – Gasoline*[16]. For the jurisdiction of an arbitral tribunal, the 'substantive plaintiff' could be the Claimant who is asserting the tribunal's jurisdiction, or the Respondent who is challenging the jurisdiction. This understanding is important to determine the burden of proof. A detailed discussion is made in the following section.

Burden of Proof in the Jurisdiction of the Tribunal

Any arbitral tribunal draws its jurisdiction from an investment treaty to which the Respondent State, and the State to which the Claimant belongs are parties. The jurisdiction of the tribunal can be classified into personal jurisdiction (*ratione personae*), territorial jurisdiction (*ratione loci*), temporal jurisdiction (*ratione temporis*), and subject-matter jurisdiction (*ratione materiae*).[17] Any Respondent State would not want an aggrieved foreign investor to succeed in bringing claims against them. Thus, as a preliminary strategy, they would try to establish that the arbitral tribunal has no jurisdiction to adjudicate the dispute brought forth by the Claimant. If the jurisdiction of the tribunal is established, its award would usually have a binding effect on both parties (determined as per the governing arbitration rules). [18] Therefore, the Respondent raises challenges to the jurisdiction of the tribunal. This section discusses the entity which shall have the burden of proof in establishing or rejecting the jurisdiction of the tribunal,[19] and how these scenarios act as exceptions to the rule of burden of proof.

The Claimant bearing the burden of proof

Various arbitral tribunals are of the view that the Claimant bears the initial burden of proof to establish the jurisdiction of the tribunal so that it may entertain the dispute. This directly flows from the notion that the party 'asserting' jurisdiction should have the burden of establishing it.[20] Further, the tribunal in *Tulip v. Turkey*[21]held that even after the jurisdiction of the tribunal has been preliminarily established, if the Respondent has challenges to such jurisdiction, it lies upon the Claimant to prove that the jurisdiction is in fact in line with the relevant agreement. In *Caratube v. Kazakhstan*,[22] the argument of the Claimants that there exists a 'quasi-irrefutable presumption' favouring the jurisdiction of the tribunal was rejected by the tribunal. It was decided that the burden of proof would

be on the claimant to disprove challenges. This can be seen as a deviation from the substantive plaintiff rule, as the Claimant bears the burden even though the Respondent asserts the challenges to jurisdiction.

The Respondent bearing the burden of proof

A few tribunals have gone ahead and held that it is the Respondent who bears the burden of *disproving* the jurisdiction of the tribunal, without imposing a burden on the Claimant.[23] However, this has not been popular, as only a few tribunals have rendered concurring decisions.[24]

The Tribunal bearing the burden of proof

The '*Kompetenz-Kompetenz* principle'[25] acts as an important exception to both rules of burden of proof: neither the Claimant nor the "substantive plaintiff" or Respondent, bears the burden of proof for jurisdiction. This burden rests with the tribunal itself. It has been argued that since jurisdiction is a point of law, the burden of proof rules do not apply to it.[26]This has been held across avenues such as the ICJ[27] or the WTO.[28] In the context of investment arbitration, the tribunal in *Muhammet Cap*[29] held that it has the responsibility to determine its jurisdiction after considering both parties' arguments and evidence. Similarly, in *Grand River v. USA*,[30] when the parties disagreed on the burden of proof, the tribunal held that both parties only had the responsibility to produce sufficient evidence before the tribunal to make its decision on jurisdiction. Hence, it is conclusive that neither the Claimant have the positive burden to establish the jurisdiction of the tribunal nor does the Respondent have the burden to prove its obligations. Both burdens rest upon the tribunal's decision based upon the perusal of necessary evidence.[31]

Either of the Parties bearing the burden of proof

Even in situations where the tribunals decide not to acquire the burden upon themselves, they have held that *either* party can bear the burden of proof, thus not imposing an excessive burden upon a single party. For example, in *Ambiente v Argentina*,[32] the tribunal opined that while the Claimant bears the burden of proof, the Respondents bears the burden to disprove. It implies that the Claimants have the burden to establish the conditions for the jurisdiction of the tribunal, whereas the Respondent has the burden to establish the jurisdictional objections.[33] In this regard, the tribunal in *Pac Rim Cayman*[34] held that the Claimant's burden is to assert a positive right whereas the Respondent's burden is to assert a positive answer. This section acts as a conformer as well as an exception to the rule of burden of proof. It is an exception as it imposes no burden on a single party, and is the rule as it imposes the burden on both the Claimant and the substantive plaintiff.

Notwithstanding the above, it is important to note that although the Claimant has procedural obligations towards the establishment of jurisdiction, the failure to satisfy them does not result in an *ab initio*absence of jurisdiction.[35] Further, it is also important to take note of the debate on whether the Claimant must prove the requisite facts to establish the jurisdiction of the tribunal, or whether the tribunal can make a *prima facie*

ruling on jurisdiction based on the facts presented. In *Phoenix Action v. Czech Republic*, the Tribunal ruled that although facts could provisionally be accepted at face value, the Claimant has the burden of proof concerning "particular circumstances constituting a critical element for the establishment of the jurisdiction itself".[36]

The Burden of Proof in Specific Jurisdictional Challenges

Irrespective of a presumption in favour of, or against the jurisdiction of an arbitral tribunal, the Respondents in investor-state arbitrations generally raise objections to the jurisdiction of the tribunals. There are multiple grounds on which the Respondent State can rely to object to the jurisdiction of the tribunal. These include challenges such as the absence of a protected investment, the violation of the legality requirement, the abuse of process, *res judicata*, *forum non conveniens, lis pendens*, availability of local remedies, etc.[37] These challenges are usually raised by the Respondent, and the burden of proof with respect to some of the specific challenges is discussed below.[38]

Nature of the Claimant

As discussed, investment arbitration is a dispute settlement mechanism between a 'foreign' investor and a host state. Thus, one challenge to jurisdiction by the Respondent can be that the Claimant before the tribunal is not a 'foreign' investor, as the natural persons might not be nationals of a different State, or of a State with which the Respondent State does have a bilateral or multilateral investment agreement. In these situations, tribunals have held that although the initial *prima facie* burden of proving the nationality might lie on the Claimant, it would eventually lie on the Respondent to establish that the Claimant does not qualify as a 'foreign' investor.[39] It is important to note that the 'initial' burden of proving nationality usually lies with the Claimant, capable of being shifted at later stages.[40]

Nature of the Claim

Arbitral tribunals do not have jurisdiction over *any* dispute between a foreign investor and a host state. Jurisdiction is usually limited to claims that arise from an "investments" within the meaning of the investment treaty. The analysis of what qualifies as an 'investment' is a complex legal issue that involves evolving jurisprudence employing the *Salini test* and the *Double-barrelled test*.[41] Most arbitral tribunals have held that the burden to establish that the claim arises from a valid 'investment' lies upon the Claimant,[42] who must produce *prima facie* evidence that their investment is in accordance with the established legal standards.[43]

Nature of the Dispute

Often, investment treaties contain provisions on circumstances under which the Claimant is precluded from submitting claims to the tribunal. For example, as per Article 1901(3) of the NAFTA,[44] claimants are barred from submitting disputes related to antidumping and countervailing duties to an arbitral tribunal established under the NAFTA. The Respondent may object to the jurisdiction of the tribunal on the ground that the Claimant's

dispute is related to such barred areas. As per *Canfor v. USA*,[45] in situations like these, the burden of proof is upon the Respondent to establish that the dispute of the Claimant is barred by the governing investment agreement.

From this analysis, it can be understood that usually, Claimant bears the initial burden of proof to disprove the specific jurisdictional objections raised by the Respondent. However, this burden of proof subsequently shifts to the Respondent after the Claimant has surfaced prima facie evidence. Nevertheless, in some scenarios, even the Respondent can bear the initial burden of proof. Thus, these act as exceptions to the general rule of the burden of proof, as well as the substantive plaintiff rule.

It is important to note here that the context of the burden of proof in this section is about the specific jurisdictional challenges and not the overall jurisdiction of the tribunal. This element is important, because even if one of the parties bears the burden of proof for a specific jurisdictional challenge, the tribunal may apply the *Kompetenz-Kompetenz* principle to its overarching jurisdiction. The analysis is even more important when there are multiple jurisdictional challenges with a dynamic burden of proof. This is the reason why the interplay between the law of evidence and international arbitration becomes complex and extremely technical.

Conclusion and the Way Forward

A study conducted by McArthur and Ormachea analysed jurisdictional challenges in investor-state arbitrations. They concluded that in approximately 15% of the cases, the challenges to the jurisdiction of the tribunal are accepted, and subsequently, the tribunal declines its jurisdiction; whereas 85% of the cases, the jurisdictional challenges are declined, and the arbitral tribunal retains its jurisdiction.[46] This indicates that most parties fail to meet the burden placed upon them to disprove the jurisdiction of the tribunal. It can be argued here that having specific rules or conventions incorporated within agreements, or institutional rules which could be binding upon arbitrations, is the way forward. This would assist in resolving the lacunae created by the absence of such rules. The rules can be based on common principles of the law of evidence, which can expressly state who bears the burden of proof with respect to the jurisdiction of the tribunal and concerning specific jurisdictional challenges. This would also assist in narrowing the gap that exists between evidence law and international arbitration law.

[1]The Indian Evidence Act 1872, Chapter VII.

[2]Herbert Broom, *A Selection of Legal Maxims* (T. & J.W. Johnson 1845).

[3]Chittharajan F. Amerasinghe, *The Principle Actori Incumbit Onus Probandi*(Nijhoff 2005).

[4]Jeffrey Waincymer, 'Approaches to Evidence and Fact Finding', *Procedure and Evidence in International Arbitration* (Wolters Kluwer 2012) 766.

[5]Frédéric G. Sourgens, Kabir Duggal and Ian A. Laird, *Evidence in International Investment Arbitration* (OUP 2018).

[6] *LSF-KEB Holdings SCA and others v. Republic of Korea*, ICSID Case No. ARB/12/37, Award (30 August 2022), para 672.

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

[8]Frédéric G. Sourgens, Kabir Duggal and Ian A. Laird, *Evidence in International Investment Arbitration* (OUP 2018).

[9]UNCITRAL Arbitration Rules, Article 27 UN Doc A/31/98 (2021).

[10]PCA Arbitration Rules, Article 27 (2012).

[11]Frédéric G. Sourgens, Kabir Duggal and Ian A. Laird, *Evidence in International Investment Arbitration* (Oxford University Press 2018).

[12] *AAPL v Sri Lanka*, ICSID Case No. ARB/87/3, Award (27 June 1990).

[13] *The Corfu Channel Case (UK v Albania)*, Merits, ICJ Rep 4 (1949).

[14] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of*

America), Jurisdiction and Admissibility, ICJ Rep 392 (1984).

[15]WTO, *United States - Measures Affecting Imports of Woven Wool Shirts and Blouses from India - Appellate Body Report and Panel Report - Action by the Dispute Settlement Body* (WT/DS33/5, 27 May 1997).

[16]WTO, *United States - Standards for Reformulated and Conventional Gasoline-Appellate Body Report and Panel Report - Action by the Dispute Settlement Body* (WT/DS2/9, 20 May 1996).

[17]Dr. Zia Ullah Ranjha, 'Jurisdiction of Arbitral tribunals' (*Jus Mundi*, 4 May 2022) <https://jusmundi.com/en/document/wiki/en-jurisdiction-of-arbitral-tribunals#:~:text=The%20jurisdiction%20of%20arbitral%20tribunals,the%20provisions%20of%20investment%20treaties> accessed 29 August 2022.

[18] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (14 October 1966) ('ICSID Convention') art 53(1).

[19]Giulio Alvaro Cortesi, *Proof and the Burden of Proof in International Investment Law* (Springer Nature 2022).

[20] *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award (27 August 2009).

[21] *Tulip Real Estate and Development Netherlands B.V. v Republic of Turkey*, ICSID Case No. ARB/11/28, Award (10 March 2014).

[22] *Caratube International Oil Company LLP and Devincci Salah Hourani v Republic of Kazakhstan,* ICSID Case No. ARB/13/13, Award, (27 September 2017).

[23] *The Rompetrol Group N.V. v Romania*, ICSID Case No. ARB/06/3, Award (6 May 2013).

[24] *Desert Line Projects LLC v The Republic of Yemen*, ICSID Case No. ARB/05/17, Award (6 February 2008); *Lao Holdings N.V. v Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/12/6, Award (6 August 2019).

[25]Ashley Cook, 'Kompetenz-Kompetenz: Varying Approaches and a Proposal for a Limited Form of Negative Kompetenz-Kompetenz' (2014) 42 Pepperdine Law Review 17.

[26]Robert Kolb, *The Elgar Companion to the International Court of Justice*(Edward Elgar Pub. Ltd. 2014).

[27] *Fisheries Jurisdiction (Spain v Canada)* (1998) I.C.J. 432 (Dec. 4)

[28] WTO, *United States - Section 110(5) of US Copyright Act - Report of the Panel* (WT/DS160/R, 15 June 2000).

[29] *Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Sti. v Turkmenistan*, ICSID Case No. ARB/12/6, Award (12 June 2015).

[30] *United States v Grand River Dam Authority* 363 U.S. 229 (1960).

[31] *Saipem S.p.A. v The People's Republic of Bangladesh,* ICSID Case No. ARB/05/07, Award (30 June 2009).

[32] *Ambiente Ufficio S.p.A. and others v Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility (8 February 2013).

[33] *Philip Morris Asia Limited v The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility (17 December 2015).

[34] *Pac Rim Cayman LLC v Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections (1 June 2012).

[35] *Ethyl Corporation v. The Government of Canada,* UNCITRAL, Award on Jurisdiction, (24 June 1998); 38 I.L.M. 1999 at 724*; Waste Management, Inc. v. United Mexican States (I),* ICSID Case No. ARB(AF)/98/2, Dissenting Opinion of Keith Highet (Arbitral Award) (2 June 2000).

[36] *Phoenix Action Ltd v. Czech Republic,* ICSID Case No. ARB/06/5, Award (15 April 2009).

[37]Dr. Zia Ullah Ranjha (n 17).

[38]Baiju S Vasani, Timothy L Foden, and Hafsa Zayyan, 'Burden and Standard of Proof at the Jurisdictional Stage' in Katia Yannaca-Small (ed.), *Arbitration Under International Investment Agreements :A Guide to the Key Issues* (2ndedn, OUP 2010)

[39] *Hussein Nuaman Soufraki v The United Arab Emirates*, ICSID Case No. ARB/02/7, Award (7 July 2004).

[40] *Caratube International Oil Company LLP and Devincci Salah Hourani v Republic of Kazakhstan,* ICSID Case No. ARB/13/13, Award (27 September 2017).

[41]Alex Grabowski, 'The Definition of Investment under the ICSID Convention: A Defense of Salini' (2014) 15(1) CJIL 287.

[42] *Mihaly International Corporation v Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/00/2, Award (15 March 2002).

[43] *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction (8 February 2005).

[44]North American Free Trade Agreement (1 October 2002) 48 CFR 25.405.

[45] *Canfor Corporation v United States of America*, 15(5) World Trade Arbitration Materials 171, Order of the Consolidation tribunal (2005).

[46]Kathleen S. McArthur and Pablo A. Ormachea, 'International Investor - State Arbitration: An Empirical Analysis of ICSID Decision on Jurisdiction' (2009) 28(3) The Review of Litigation 559.