Appendix I Evidentiary Principles in Investor-State Arbitration

Part I— The Burden of Proof

§1 Actori Inucbit Onus Probandi

(1) Either party asserting a fact in order to establish an element of a claim, counter-claim, affirmative defence or propriety of a remedy must:

a. present admissible, relevant and material direct evidence to support such assertion;

b. present admissible, relevant and material circumstantial evidence sufficient to support such assertion;

c. sustain that sufficient evidence has been submitted to support an inference of the truth of the assertion, or

d. sustain that a presumption renders proof of the fact in question by admissible, relevant and material evidence unnecessary.

(2) A finding by the arbitral tribunal that a party failed to present such evidence or sustain the applicability of a presumption entails that the event or occurrence submitted as a fact did not take place.

§3 Burden of Proof Merits and Remedies

(1) The party seeking a remedy must submit evidence that, if unrebutted, would meet the relevant standard of proof that the remedy requested is appropriate.

(2) The party seeking damages must submit evidence that, if unrebutted, would meet the relevant standard of proof that the remedy requested is not speculative.
(3) The respondent may submit evidence to rebut submissions made by its opponent pursuant to sub-sections (1) and (2).

(4) The respondent bears the burden of proving its submission pursuant to sub-section (3).

Part III— Direct and Circumstantial Evidence

§9 Circumstantial Evidence (Hearsay)\(^\text{10}\)

(1) A tribunal may make findings of fact premised upon hearsay evidence.

(2) In the investor-state arbitration context, hearsay evidence is a statement made by a declarant not subject to cross-examination submitted for the truth of the matter asserted.

(3) To the extent an arbitral tribunal relies upon hearsay evidence, it must corroborate the hearsay evidence in question with other direct or indirect evidence or by way of an inference.

(4) To the extent credible direct evidence is available, an arbitral tribunal must not rely upon hearsay evidence to contradict the direct evidence in question.

Part V— Presumptions

§20 Judicial Presumptions (Praesumptiones hominis)\(^\text{21}\)

(1) A judicial presumption is an assumption that as a matter of fact, the facts of the given case follow habitual, routine, or general practices applicable to the transactions, circumstances, or relationships in question.

(2) Unless expressly displaced by a rule of applicable law, a judicial presumption is rebuttable.

§21 Proof of Judicial Presumptions\(^\text{22}\)

(1) An arbitral tribunal’s determination of the existence of a judicial presumption constitutes a finding of fact.

(2) An arbitral tribunal has discretion to make such a finding consistent with the principles of evidence governing proof of facts.
§22 Factors Relevant in Establishing Judicial Presumptions

In determining whether a judicial presumption should be established, the following circumstances are significant:

(a) Evidence of a general usage, custom, or practice in the relevant industry;

(b) Relationship between the transaction and the general usage, custom or practice;

(c) Statements made by the parties during negotiations or prior to the making of the investment;

(d) Evidence of past conduct by one or both of the parties consistent with the proposed presumption; and

(e) The course of performance between the parties.

Part VIII—Exclusionary Rules of Evidence

§36 Attorney Client Privilege

(1) The arbitral tribunal may exclude evidence falling under the attorney-client relationship or information or evidence derived therefrom.

(2) Communications between natural persons or juridical persons and their attorney are privileged under attorney-client privilege when the communications in question arise:

a. to seek legal advice without interference, or

b. to advance a legal claim without interference.

(3) The privilege extends to communications with third parties acting as agents for attorney if:

a. the agents act to facilitate the provision of legal advice by the attorney; and

b. the communications were made pursuant to the broader agency relationship.

1 For a discussion see ch 2.
2 ibid.
7 For a discussion see ch 8.
10 For a discussion see ch 10.
21 ibid.
22 ibid.
23 ibid.
37 ibid.

Referring Principles:

XII.1 - Distribution of burden of proof
XII.3 - Circumstantial evidence

XII.6 - Attorney-client privilege