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RESEARCH ARTICLE / ARAŞTIRMA MAKALESİ

Application of The Burden and Standard of Proof in Corruption Allegations Under ICSID Arbitration

ICSID Tahkiminde İspat Yükü ve Sartlarının Yolsuzluk Suçlamaları Özelinde Uygulamaları

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Abstract

Corruption allegations are a frequently-encountered issue in international investment arbitration. These allegations are mainly used as a defense mechanism by states, aiming to dismiss investors' assertions in arbitral proceedings, because if corruption is upheld, the tribunal will be deprived of jurisdiction. Adjudicating corruption, on the other hand, is a very challenging task to accomplish for tribunals. This is mainly due to the lack of means and mechanisms to conduct serious investigations and fact finding in order to establish corruption. Because adjudicators cannot abstain from rendering a verdict even though they doubt facts or evidence, legal systems have adopted some tools to aid this process. The concepts of burden and standard of proof are two the main tools that have been used for this purpose. However, even though there are a few clauses regarding the standards of evidence in UNCITRAL Rules or IBA Rules, there is a lack of binding regulation of standards of evidence in international arbitration law. Also, there are no rules under the ICSID Convention regarding the allocation of burden and standards of proof. In this context, the analysis of the application and allocation of the burden and standard of proof in international investment law becomes an essential issue for resolving such disputes.

Keywords

International Investment Arbitration, ICSID, Burden of Proof, Standard of Proof, Corruption Allegation

Öz

Tarafların yolsuzluk suçlamaları uluslararası yatırım tahkiminde sıklıkla karşılaşılan bir meseledir. Bu suçlamalar tahkim surecinde çoğunlukla devletler tarafından bir savunma olarak öne sürülmekte olup yatırımcıların taleplerinin reddini amaçlamaktadır. Çünkü eğer yolsuzluk hükmü sabit hale gelirse tahkim kursusunun yetkisi ortadan kalkar. Öte yandan yolsuzluk hususunda hükme varmak tahkim kürsüleri için hayli zorlu bir görev teşkil etmektedir. Bunun ana sebebi de tahkim kürsülerinin yerel mahkemelerin aksine yolsuzluk hükmü kurmak için ellerinde yeteri kadar tahkikat yapma gücü bulunmamasıdır. Modern hukukta yargıçlar uyuşmazlığa ilişkin esaslardan ya da kanıtlardan şüphe etseler dahi hüküm kurmaktan kaçınamazlar. Bu sebeple hukuk sistemleri hüküm kurma surecinde yargıçlara yardımcı olması amacıyla belirli kurumları kullanmaktadırlar. Bu kurumlardan ispat yükü ve ispat şartı bu amaçla kullanılan kurumların en temel olanlarındandır. Buna rağmen her ne kadar bu hususta UNCITRAL, IBA ve ICSID kuralları içerisinde birkaç hüküm bulunsa dahi uluslararası tahkim hukukunda ispat yükü ve şartına ilişkin bağlayıcı ve genel kabul görmüş kural eksikliği mevcuttur. Buna ek olarak, ICSID Konvansiyonunda da ispat yükü ve ispat şartlarının taraflar arasında nasıl tahsil edileceğine ilişkin bir kural bulunmamaktadır. Bu bağlamda söz konusu ispat yükü ve ispat şartı kurumlarının uluslararası yatırım hukukunda nasıl uygulandığının incelenmesi yolsuzluk gibi ciddi tahkikat gerektiren hususlarda uyuşmazlık çözümü için önem arz etmektedir.

Anahtar Kelimeler

Uluslararası Yatırım Tahkimi, ICSID, İspat Yükü, İspat Şartı, Yolsuzluk Suçlamaları

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Application of The Burden and Standard of Proof in Corruption Allegations Under ICSID Arbitration

I. Introduction

Corruption[1] is an unfortunate fact of our world,[2] and also a frequently-encountered issue in international arbitration.[3] Allegations of corruption in international arbitration can be divided into allegations of corruption in commercial arbitration and in investment arbitration. In international investment arbitration, states generally allege that investors engage in corruption in the process of making the investment.[4] These allegations are mainly used as a defense mechanism by states, aiming to disperse investors' assertions in arbitral proceedings,[5] because if corruption is upheld, the tribunal will be deprived of jurisdiction.

Adjudicating corruption, on the other hand, is a very challenging task to accomplish for tribunals. This is because, firstly, assessing corruption requires a serious investigation of facts. Arbitral tribunals contrarily, do not have the same means and mechanisms as national courts to fact find and establish corruption.[6] Secondly, this process requires an extensive assessment of facts to determine whether those facts can be accepted as evidence and to what extent they prove a corruption claim. Even though there are a few clauses regarding the standards of evidence in UNCITRAL Rules or IBA Rules, there is a lack of binding regulation of standards of evidence in international arbitration law.[7] Also, there are no rules under the ICSID Convention regarding the allocation of burden and standards of proof.

Considering that, most of the time, the ICSID Rules are chosen by the parties to be applied to investor-state disputes, establishing corruption without following any generally applicable rules on assessment of evidence and allocations of the burden and standard of proof can create uncertainties for all parties involved in the arbitration process. Uncertainty on the matter of standard and burden of proof can generate significant risks for parties and create consequential problems for the whole arbitration process.[8] In spite of this risk, Gary Born states that there is only "little authority on the allocation of burdens of proof in arbitral contexts."[9]

1 Corruption is defined in this essay as the fraudulent conduct of both public officials and private investors.

2 To see Transparency International's 2020 corruption perception index in more detail < https://www.transparency.org/en/news/cpi-2020-global-highlights > accessed on 13 February 2021

3 Moloo R, Lamm CB and Pham HT, 'Fraud and Corruption in International Arbitration' (TDM, 2018) < https://www.transnational-dispute-management.com/article.asp?key=1952# > accessed 31 December 2020.

4 Singarajah F, 'Corruption in International Arbitration'(ciarb, 8 November 2018) < https://hardwicke.co.uk/corruption-in-international-arbitration > accessed 30 December 2020

5 Alexandrov SA, 'Corruption in International Investment Arbitration.' (2015) 109(3) Am J Int'l L 702

6 ibid. 703

7 Brower CN, 'Evidence before International Tribunals: The Need for Some Standard Rules.' (1994) 28(1) Int'l L 47

8 Andreas R, 'Burden and general standards of proof.' (1994) 10(3) Arb. Int'l 330.

9 Born G, 'International commercial arbitration.' (2014) Hague: Kluwer Law Int'l 2312 as cited in (Carreteiro M, 'Burden and Standard of Proof in International Arbitration: Proposed Guidelines for Promoting Predictability.' (2016) Ano XIII Revista Brasileira de Arbitragem 49 83)

In order to analyze this risk, this paper will first try to look at what the concepts of burden and standard of proof are and the approaches from the Common law and Civil law jurisdictions. It will also consider the distinction in the application of those concepts under civil and criminal cases. Then, it will examine specific ICSID cases where tribunals applied the burden and standard of proof on corruption and fraud allegations. Finally, this paper will try to deduce if there is a need for generally applicable rules on the issue of standard and burden of proof for the resolution of corruption allegations under ICSID arbitration.

II. Application of Burden and Standards of Proof

Adjudicators in modern law conception cannot abstain from rendering a verdict even though they doubt the facts or the evidence in a dispute.[10] Due to the fact that adjudicators have to decide one way or another, legal systems have adopted some legal tools to make this process easier and more straightforward. Standard and burden of proof are two of the tools that help this purpose. Research shows that applying standard and burden of proof to the case affects the conclusion of the arbitration most of the time.[11]

Even though the concepts of burden of proof and standard of proof are sometimes used in the same context, they are different. The burden of proof basically addresses the party's obligation to prove a certain event or assertion, while the standard of proof indicates the expected level of persuasion of a proof. The tribunal of the ICSID case of *Rompetrol Group N.V. v. Romania* described these concepts. The tribunal stated that, "the burden of proof defines which party has to prove what, in order for its case to prevail; the standard of proof defines how much evidence is needed to establish either an individual issue or the party's case as a whole."[12]

That being said, it is also important to consider different approaches from civil law and common law systems on the matter. While the burden of proof is prevalent in both systems, the concept of standard of proof is mostly evolved in the common law.[13] This does not mean that the standard of proof is not existent or not applied in civil law, just that it has different content.

On the matter of the burden of proof, common law jurisdictions generally follow the Latin maxim of *affirmant incumbit probatio* (the person who asserts bears the burden

10 Alfredo RM, 'Non Liquet: From Modern Law to Roman Law.' (1974) 9 Isr. L. Rev. 63

11 Carreteiro M, 'Burden and Standard of Proof in International Arbitration: Proposed Guidelines for Promoting Predictability.' (2016) Ano XIII Revista Brasileira de Arbitragem 83

12 The Rompetrol Group N.V. v. Romania. ICSID Case no ARB/06/3, Award, 6 May 2013 ¶178

13 Macnair MRT, 'The Law of Proof in Early Modern Equity, Comparative Studies in Continental and Anglo-American Legal History.' (1999) Band 20, Duncker & Humblot, 322

of proof).[14] While that is the rule, there are some exemptions in corruption cases. For instance, the Court of Appeal in *R v Webster* accepted that, in some cases, it is possible to reverse the legal burden of proof from the asserting party to the other. [15]

Civil law countries, on the other hand, codify their rules on the burden of proof most of the time.[16] For example, Article 190(1) of the Turkish Code of Civil Procedure regulates the burden of proof as, "unless otherwise implied by the law, the party that favors the legal result of an asserted claim bears the burden of proof."[17] From this, we can understand that even though the methodology on the regulation of the burden of proof is different in civil-common law systems, it is easy to see that the basic logic behind it is very similar.

On the other hand, the concept of standard of proof is more confusing. This is mainly because, first, in the civil law system the context of the standard of proof is different than in the common law system. The second reason is that in the common law system there is a distinction between the applied standard of proof in civil and criminal litigations.

As an example of the application of the standard of proof in common law systems, the Supreme Court of the United States, in *Addington v. Texas,* [18] explained that there are three different standards which apply to a case depending on the facts and evidence. From lowest standard to highest, the three standards are "balance of probabilities," "clear and convincing," and "beyond a reasonable doubt."[19] In the "balance of probabilities" standard, the expectation of evidence for an assertion to be proved is "more likely than not to be true." Because of this, one can argue that the common law approach to the standard of proof is "statistical" or "quantitative."[20]

The "balance of probabilities" applies to most civil cases. In criminal litigation, where alleged wrongdoing is more serious, like corruption and fraud, the expected standard of proof is generally higher. The principle behind this is that, "if the seriousness of an allegation increases, the likelihood of that event diminishes."[21] As a result, the standard applied to the corruption allegations most of the time is "clear and convincing."[22]

14 Waincymer J, 'Procedure and evidence in international arbitration.' (2012) Hague: Kluwer L. Int'l 761

15 R v Webster [2010] EWCA Crim 2819, The Court of Appeal in its ruling accepted that in case of corruption the court can reverse the legal burden of proof to the not moving party, despite of the Human Rights Act 1998 3

16 Carreteiro M (n 11) 86

17 Hukuk Muhakemeleri Kanunu, Kanun Numarası: 6100, Kabul Tarihi: 12.1.2011, RG 4.2.2011/27836

18 Addington v. Texas, 441 U.S. (1979)

19 Addington v. Texas, 441 U.S. (1979) 418, 422–25

20 Taruffo M, 'Rethinking the Standards of Proof.' (2003) 51(3) Am J Comp L 659

21 Cooper J, 'Burden and Standard of Proof' (judiciary.uk, January 2016) < https://www.judiciary.uk/wp-content/uploads/2016/01/cooper-burden-standard-of-proof-spring2008.pdf > accessed on 6 January 2021

22 Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan, Award, 22 August 2017 ¶ 492

In civil law jurisdictions, contrarily, the approach to the standard of proof is more "logical."[23] The level of the cogency of proof is evaluated by the "inner conviction" of an adjudicator.[24] The inner conviction standard can be described as "establishing sufficient probability to convince the adjudicator of a specific disputed fact."[25] Despite that is the fact that some items which are regulated *in priori* as a proof by the law precludes the rule of free evaluation of proof. In these cases, adjudicators have no authority in assessing the proof.[26] For example, Article 198 of the Turkish Code of Civil Procedure enunciates the judge's power to freely evaluate the proof but reserves the exemptions that are born from the law on the other hand.[27] Another point is that in most of the European civil law countries there is no difference in civil-criminal litigations in terms of standard of proof.[28] This means the aforementioned principles apply to both civil and criminal litigations.

Despite the above-mentioned differences in the standard and burden of proof between civil and common law jurisdictions, there are scarcely any distinctions regarding the practical results. This is mainly because the aim of balancing the right to a fair trial between parties and reaching just verdicts is the same even though the methods or applications are different.

III. ICSID Tribunal Approaches on the Issue

It is important to point out that, when dealing with corruption allegations, ICSID tribunals followed a similar path to the Common Law and Civil Law Courts with regards to the standard and burden of proof. As the "similar path," in most of the cases, tribunals applied the principle of "the one who asserts has the burden of proving" on the burden of proof,[29] and "clear and convincing" standard as the standard of proof .[30]

For instance, on the burden of proof, the tribunal in *Wena Hotels v Egypt*, explicitly affirmed that the party alleging corruption bears the burden of proof.[31] In *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines [II],* the tribunal stated that since the decision on the corruption allegation affects the investor's ability to claim BIT protection, it must be proved by the standard of "clear and convincing."[32] In another case, the Tribunal of *EDF (Services) Limited v. Romania* also sought the

23 Taruffo M, (n 20) 659

24 Lew JDM, Mistelis LA and Kröll SM, 'Comparative Commercial Arbitration' (Kluwer Law International, 2003) 561

25 Carreteiro M, (n 11) 89

26 Taruffo M, 'Admission and presentation of evidence.' (2004) BIICL 173

27 (n 17) art.198

28 Clermont KM and Sherwin E, 'A Comparative View of Standards of Proof.' (2002) 50(2) Am J Comp L 243

29 Foster CE, 'Burden of Proof in International Courts and Tribunals.' (2010) 29 Aust YBIL 27

30 Carreteiro M, (n 11) 94

31 Wena Hotels Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/98/4 ¶¶ 77,117

32 Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines [II], ICSID Case No. ARB/11/12, Award, 10 December 2014 ¶ 479

standard of "clear and convincing." But their reasoning was "the seriousness of the accusation towards the officials of the highest level in respondent's government, requires clear and convincing evidence."[33]

In *Siag v. Arab Republic of Egypt*, the tribunal, while assessing the claimant's submission of a heightened standard of proof regarding a fraud allegation by Egypt, accepted that in most legal systems a higher standard of proof is held for consequential allegations such as fraud. The higher standard was specified as "clear and convincing."[34] Also, the tribunal noted a long-standing approach in international arbitration with regards to the burden of proof. It is that,

> (a) "the Claimant bears the burden of proof with respect to the facts it alleges and the Respondent carries the burden of proof with respect to its defenses."[35]

In *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan,* the tribunal highlighted the gravity of corruption allegations in a judicial sense. Although the tribunal noted the fact that due to the clandestine nature of corruption in most cases it is very challenging to prove it with hard and valid evidence, it still agreed that the seriousness of such allegations outweighs that hardship and therefore decided to apply a higher standard of proof in the case.[36]

In another significant case on the issue, *Lao Holdings N.V. v. Lao People's Democratic Republic,* the tribunal stated that while it is not necessary that every piece of evidence is clear and convincing, still, the overall position must indicate a clear and convincing case on corruption allegation. Accordingly, the tribunal suggested that an evaluation must be made with regards to which aspects were proven by clear and convincing evidence and which aspects were left to just and sensible presumptions.[37] As can be seen from these examples, even though justifications differ, most of the time the applied standard and burden of proof are the same.

In some cases, though, tribunals interpreted the matter differently and this resulted in contrasting applications of the standard and burden of proof. For example, an interesting approach by a tribunal on the issues of evidential standard and burden of proof can be seen in the case of *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*. Firstly, the tribunal agreed that in case of an utmost hardship to directly prove a claim due to lack of available evidence a tribunal might be satisfied with less decisive

33 EDF (Services) Limited v. Romania, ICSID Case No. ARB/05/13, Award, 8 October 2009 ¶221

34 Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt, ICSID Case No. ARB/05/15, Award, 1 June 2009 ¶ 326

35 ibid, ¶ 315 (citing Rosell and Prager, Illicit Commission and Question of Proof, 15 Arbitration International 329, 335 (1999); ICC Award 6653 (1993), reprinted in 1993 JDI 1053; and also, Article 24 UNCITRAL Arbitration Rules)

36 Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan, ICSID Case No. ARB/07/14, Excerpts of the Award, 22 June 2010 ¶ 422-423

37 Lao Holdings N.V. v. Lao People's Democratic Republic, ICSID Case No. ARB(AF)/12/6, Award, 6 August 2019 ¶ 110

evidence, such as *prima facie* evidence.[38] Even though the tribunal was not referring specifically to a corruption allegation, in this case, it can still be argued that the abovementioned difficulty to prove corruption with direct evidence is highly likely to arise because of its secretive nature. Therefore, in such a situation, this is an indication that the evidential standard can be lowered. Although this does not necessarily prompt a lower standard of proof directly it still indirectly lowers the standard in terms of practice. Secondly, the tribunal, on the issue of burden of proof, emphasizes the rule of "free evaluation of evidence by international tribunals," a commonly regarded rule in international arbitration, and notes that *prima facie* evidence is enough evidence to shift the burden of proving to the other party.[39]

In *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt*, the tribunal decided to apply the standard of "balance of probabilities," which is unusual for a corruption allegation. The reasoning of the tribunal followed a more practical approach. In the award, it was stated that because corruption is mostly proved with "circumstantial evidence" rather than "direct evidence," these two have the same effect, and since this arbitration is not a "criminal proceeding" the "balance of probabilities" is the standard of proof.[40]

Similarly, the tribunal in *Tokios Tokeles v. Ukraine,* after thoroughly analyzing different standards of proof, notes that for the corruption allegation issue at hand the set standard is not clear and convincing but the balance of probabilities. The tribunal's justification is rather an interesting one, as it considers that the root of a higher standard is based on whether the alleged party is a "person or body of high authority." According to this, the tribunal defends the idea that evidentiary standards cannot be raised just because of courtesy for the status of the alleged party.[41]

Another interesting interpretation, although in contrast with the interpretation in *Asian Agricultural Products Ltd. v. Republic of Sri Lanka,* is in *Libananco Holdings Co. Limited v. Republic of Turkey*. In the case, the tribunal, when referring to a fraud allegation, accepted that it is a serious accusation but also noted that this "does not necessarily prompt a higher standard of proof, instead it only requires more convincing evidence."[42]

On the matter of burden of proof, the tribunal, in *Metal-Tech Ltd. v. Republic of Uzbekistan*, departed from the generally applied principle of *affirmant incumbit probatio* and reversed the burden of proving to the claimant. The tribunal's ground for the reversal was explained as "emerging of the facts in the case." The tribunal also noted that there is no obligation to apply the principle to the burden of proof as much

38 Asian Agricultural Products Ltd. v. Republic of Sri Lanka, ICSID Case No. ARB/87/3, Award, 27 June 1990, 550

39 ibid. 550

40 Unión Fenosa Gas, S.A. v. Arab Republic of Egypt, ICSID Case No. ARB/14/4, Award, 31 August 2018 ¶ 7.52

41 Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18, Award, 26 July 2007, ¶124

42 Libananco Holdings Co. Limited v. Republic of Turkey, ICSID Case No. ARB/06/8, Award, 2 September 2011 ¶125

as the duty to resolve the "present dispute."[43] It is clear that while the application of standard and burden of proof to the corruption allegations is similar most of the time, different interpretations and applications also exist.

IV. Conclusion

Almost all of the international conventions, national laws. and rules on investment arbitration choose to be silent on the matter of the application of the standard of proof.[44] Allocation of the burden of proof, on the other hand, is a slightly more regulated subject. It is important to note that even though they are different notions, their application to a specific case is interconnected.

Therefore, when ICSID tribunals' interpretations and applications of standard and burden of proof on cases are examined, it is hard to say that there is a need for generally applicable rules on the matter. This is mainly because instead of governing a subjective matter with general rules, giving adjudicators flexibility to apply the necessary standard and burden of proof is, in fact, a more practical and logical approach.

On this issue, the tribunal of *Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration ("Bapex") and Bangladesh Oil Gas and Mineral Corporation ("Petrobangla"),* in its decision on the corruption claim, stated that in complex situations of facts and allegations, what really matters is whether tribunals are persuaded of the alleged act or not.[45] In this sense, it can be argued that leaving more freedom to tribunals to apply a more reasonable standard depending on the facts of the case might help both ease the adjudicating process and solve the case at hand.

In our opinion, the problematic part is not the lack of governance on the matter but rather not regulating the consequences of the wrongful application of standard and burden of proof, because it is almost never possible to annul an arbitral award on the grounds of wrong application of the standard and burden of proof.[46]

In conclusion, even though not regulating the application of burden and standard of proof is a more logical approach, it is important to govern the possibility of wrongful application and create a rule which will pave a way for an examination of the applied standard and burden of proof in the annulment process. Otherwise, this can cause serious consequences on the parties' right to a fair trial.

43 Metal-Tech Ltd. v. Republic of Uzbekistan, ICSID Case No. ARB/10/3, Award, 4 October 2013 ¶¶ 237-241

44 Pietrowski R, 'Evidence in International Arbitration' (2006) 22 Arb. Int'l 264

45 Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration & Production Company Limited ("Bapex") and Bangladesh Oil Gas and Mineral Corporation ("Petrobangla"), ICSID Case No. ARB/10/18, Decision on the Corruption Claim, 25 February 2019 ¶¶ 804-806

46 Carreteiro M, (n11) 97

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