CHAPTER 7

Establishment of Jurisdictional Facts

The interpretation of jurisdictional instruments in investor-state arbitration is inherently indeterminate.\(^1\) To resolve indeterminacy, tribunals have to take into account not only classical interpretive tools, but also the respective mutual reliance interests created by the instrument in question.\(^2\) To determine these reliance interests, it is critically important to establish jurisdictional 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.

In addition, the establishment of jurisdictional facts is of particular significance in cases that do not involve significant legal problems. \textit{Libananco} is one such case.\(^3\) There was little legal question that a shareholder was indeed a protected investor.\(^4\) The question was whether the claimant held shares at the relevant point in time.\(^5\)

The establishment of jurisdictional facts therefore is at the heart of the jurisdictional decisionmaking process. The establishment of facts drives the interpretation of the jurisdictional instrument invoked by the claimant. It further determines its application in the specific case at bar. Understanding how establishment of fact operates is central to understanding investor-state arbitration as well as the broader transnational law process of decisionmaking.

Problematically, as discussed in Chapter 5, the establishment of jurisdictional facts is not transparently developed by investor-state tribunals. Reference to burdens and ex officio powers appears to cloud the normal operation of how tribunals actually establish jurisdictionally relevant facts. This chapter provides


\(^{2}\) See Chapter 6, section 6.4.

\(^{3}\) See Chapter 5, section 5.1.2.

\(^{4}\) See Chapter 5, section 5.1.2.

\(^{5}\) See Chapter 5, section 5.1.2.
a rationale for how tribunals in fact do so premised in the same *Factory at Chorzów* approach relevant to interpretation of consent instruments.  

### 7.1 A Level Playing Field—Proof of Jurisdictional Facts 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. According to the *Factory at Chorzów* approach, a tribunal must provide an interpretation of the jurisdictional instruments based on the submissions of the parties. 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.

The *Fisheries Jurisdiction* decision, adopting the *Factory at Chorzów* approach, was clear that the rule of *onus probandi actori incubit* [the burden of proof lies with the moving party] 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.”

In both *Fisheries Jurisdiction* and *Border and Transborder Armed Action*, the ICJ distinguished its earlier dicta in *Military and Paramilitary Activities*, which stated that, eventually, the party seeking to establish a fact bears the burden of proving it. The court clarified that the statement about the burden of proof

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7. 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).
8. Id.
9. Id.
11. Cheng, at 326–35 (discussing that the burden of proof rests on the claimant).
15. See id.