NOTE

The Adverse Inference in ICSID Practice

Michael Polkinghorne¹ and Charles B. Rosenberg²

I. INTRODUCTION

Domestic courts generally have the ability to hold a litigant in contempt and fine or even imprison the litigant to encourage cooperation with a court order and ensure the orderly administration of justice.³ Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention)⁴ arbitration, however, is self-contained and denationalized, operating outside the realm of domestic courts.⁵ As such, unlike domestic courts, International Centre for Settlement of Investment Disputes (ICSID) tribunals lack the authority to fine or throw a party in the ‘World Bank penitentiary’ to encourage the party to cooperate in the arbitration.⁶ A party in an ICSID arbitration therefore risks being unable to fully present its case, as the evidence required for a party to prove its case ‘often rests exclusively in the hands of adverse parties, which lack obligation or incentive to divulge harmful information’.⁷

However, an ICSID tribunal is not entirely without remedies; an ICSID tribunal may make an adverse or negative inference if a party refuses to...

¹ Partner, White & Case LLP, Paris, France. Email: mpolkinghorne@whitecase.com.
² Associate, White & Case LLP, Washington, DC, USA. Email: charles.rosenberg@whitecase.com.

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³ See eg 18 USC s 401(3) ('A court of the United States shall have power to punish by fine or imprisonment, or both, at its discretion, such contempt of its authority, and none other, as...[d]isobedience or resistance to its lawful writ, process, order, rule, decree, or command.'); Fed R Civ P 37(b)(2)(A)(vii) ('If a party or a party's officer, director, or managing agent...fails to obey an order to provide or permit discovery...the court where the action is pending may issue further just orders...[including] treating as contempt of court the failure to obey any order...').


⁵ See Christoph Schreuer et al, The ICSID Convention: A Commentary (2nd edn, CUP 2009) 351–2 ('The [ICSID] Convention provides for an elaborate process designed to make arbitration independent of domestic courts. Even in the face of an uncooperative party, ICSID arbitration is designed to proceed independently without the support of domestic courts.'). This article also discusses arbitrations conducted under the ICSID Additional Facility Rules (see Section III.B), even though the ICSID Convention does not apply to such proceedings. See ICSID Arbitration (Additional Facility) Rules (ICSID AF Arbitration Rules) (April 2006) art 3 ('Since the proceedings envisaged by Article 2 are outside the jurisdiction of the Centre, none of the provisions of the Convention shall be applicable to them or to recommendations, awards, or reports which may be rendered therein.').

⁶ See Simon Greenberg and Felix Lautenschlager, ‘Adverse Inferences in Arbitral Practice’, in Stefan Kröll and others (eds), International Arbitration and International Commercial Law: Synergy, Convergence and Evolution (Kluwer Law International 2011) 179 ('Arbitral tribunals can and often do order the production of documents, yet they lack the power to enforce orders for production in the same way that courts can. For example, an arbitral tribunal is not empowered to charge a party or individual with contempt of court for failing to comply with an order....'); Jeremy K Sharpe, ‘Drawing Adverse Inferences from the Non-production of Evidence’ (2006) 22(4) Arb Intl 549, 549 (noting that arbitrators ‘typically cannot compel parties to produce evidence’).

⁷ See Sharpe (n 6) 549.
comply with a tribunal’s order, such as if the party refuses to produce documents ordered by the tribunal. In making an adverse inference, the tribunal presumes that if the document or witness had been produced, it would have been in the other party’s favour. Properly applied, the adverse inference does not, according to modern parlance, shift a party’s burden of proof but rather alleviates the standard (or quantum) of proof by allowing the party to discharge its burden of proof using indirect or circumstantial evidence rather than direct or primary evidence. The adverse inference thus acts as a deterrent to non-compliance with a tribunal’s order and contributes to the administration of justice by not preventing a party from fully presenting its case when evidence is withheld by the other party.

This article explores the adverse inference in ICSID practice. Section II discusses the rationale for an adverse inference and explains how this tool encourages parties to cooperate with a tribunal’s orders and, failing such cooperation, may enable a party to discharge its burden of proof. Section III explores the legal authority of an ICSID tribunal to make an adverse inference and then discusses recent ICSID jurisprudence in which tribunals have addressed requests for adverse inferences. Section IV concludes.

II. RATIONALE FOR THE ADVERSE INFERENCE

An ICSID tribunal generally has two options if a party fails to comply with its order. First, the tribunal may impose the costs of the arbitration

8 See ICSID Rules of Procedure for Arbitration Proceedings (ICSID Arbitration Rules) (April 2006) art 34(3). See also Sharpe (n 6) 570–1 (‘In the absence of a general power to compel parties to produce evidence, arbitrators rely on adverse inferences, both to induce parties to produce critical evidence and to ensure that litigants are not fatally disadvantaged by their adversaries’ unjustified refusal to produce discoverable evidence exclusively in their possession.’).
10 In earlier cases, however, tribunals occasionally shifted the burden of proof against negligent or recalcitrant parties based on their perceived guardianship of certain documents. See generally Michael Polkinghamorne, ‘The Withholding of Documentary Evidence in International Arbitration: Remedies for Dealing with Uncooperative Parties’ (2005) 2(5) Transnatl Dispute Mgmt 1, 6–7 (discussing decisions of the Mexican Claims Commission, an unpublished 1989 ICC Award and Amco Asia Corporation and others v Republic of Indonesia, ICSID Case No ARB/81/1, Award (20 November 1984)).
11 See eg Sharpe (n 6) 552 (observing that the ‘ultimate burden of proof (or onus probandi) never shifts between the parties during the arbitration’); van Houtte (n 9) 197–9 (noting that the ‘effect [of an adverse inference] should not be overestimated by the claimant, who keeps the burden of proof, even if he may have managed to load the burden of production onto the respondent’).
12 See Sharpe (n 6) 571 (‘Adverse inferences, therefore, not only facilitate appropriate disclosure, but also enable parties to prevail on their claims and defences in the absence of evidence otherwise sufficient to carry their burdens of proof’); Nathan D O’Malley, Rules of Evidence in International Arbitration: An Annotated Guide (Informa 2012) 193 (‘An adverse inference is a tool available to arbitrators that has the dual function of both enforcing procedural discipline as well as serving as a means for arriving at specific findings on the merits of the dispute.’); Greenberg and Lautenschlager (n 6) 204

‘[A] very important aspect of adverse inferences is their deterrent effect. In order to ensure compliance with orders in general, parties should be made to feel genuinely concerned that if they do not produce relevant documents without a properly proved, plausible excuse, then the case could turn against them for that reason’.
13 In addition, a tribunal always can admonish a party for failing to comply with its order. See David W Rivkin, ‘2014 Seoul Arbitration Lecture: Ethics in International Arbitration’ (Seoul, 9 December 2014) 21–22 <http://www.debevoise.com/~media/files/insights/news/2014/davidrivkineseoularbitrationlecture.pdf> accessed 14 June 2015: ‘Tribunals could reduce the level of attorney misconduct through very simple interventions. Too often, when presented with clear evidence that a party has misstated the record or a legal authority, or has failed to undertake a reasonably diligent document review, tribunals remain silent. If instead a tribunal simply turned to the counsel involved, raised an eyebrow, and stated that they expect in the future there shall be no more
against the party.\(^{14}\) The ICSID Convention expressly provides that, unless the parties agree otherwise, an ICSID tribunal has the discretion to allocate the costs of the arbitration, including the parties’ expenses, the tribunal’s fees and expenses, and the costs of the ICSID Secretariat.\(^{15}\) However, this option may be ‘too little, too late’, as the costs of an ICSID arbitration generally are significantly less than the amount in controversy\(^ {16}\) and usually are allocated at the end of the proceeding, after the parties have pled their cases.\(^ {17}\)

The other main option is the adverse inference, which has been recognized since at least the beginning of last century when Durward Sandifer called it the ‘most effective sanction [arbitrators] have to impose upon parties negligent or recalcitrant in the production of evidence’.\(^ {18}\) If a party refuses to comply with a tribunal order to produce documents or present witnesses, the tribunal may make an adverse inference and presume that if the document or witness had been produced, it would have been in the other party’s favour.\(^ {19}\) The adverse inference thus enables a party to discharge its burden of proof in the absence of evidence otherwise sufficient to make its case.\(^ {20}\) In other words, the adverse inference acts as a ‘gap filler’ to ‘substitute for a piece of essential evidence’.\(^ {21}\)

A recent survey of ICC awards rendered between 2004 and 2010 indicated that the most common reasons for a party to request an adverse inference were the misrepresentations, it would deter a substantial amount of such activity. Counsel and their client would not want to risk further criticism from the tribunal and even further loss of their credibility.

\(^{14}\) See Greenberg and Lautenschlager (n 6) 180; O’Malley (n 12) 193.

\(^{15}\) See ICSID Convention (n 4) art 61(2):

In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.

See also IBA Rules on the Taking of Evidence in International Arbitration (IBA Rules) (29 May 2010) art 9(7):

If the Arbitral Tribunal determines that a Party has failed to conduct itself in good faith in the taking of evidence, the Arbitral Tribunal may, in addition to any other measures available under these Rules, take such failure into account in its assignment of the costs of the arbitration, including costs arising out of or in connection with the taking of evidence.

\(^{16}\) For example, in Tidewater v Venezuela, the Claimants had quantified their damages in excess of $200 million; the Tribunal awarded $46.4 million to the Claimants; and the parties each had incurred fees and expenses amounting to less than $10 million. See Tidewater Investment SRL and Tidewater Caribe, CA v Bolivarian Republic of Venezuela, ICSID Case No ARB/10/5, Award (13 March 2015) paras 53, 211 and 217(3).

\(^{17}\) The ICSID Arbitration Rules authorize an ICSID tribunal, unless the parties agree otherwise, to decide ‘at any stage of the proceeding, the portion [of arbitration costs] which each party shall pay’. See ICSID Arbitration Rules (n 8) art 28(1). In practice, however, cost decisions normally are reserved to the end of the proceeding. See eg Muhammet Çap ve Sehil Inaat Endustri ve Ticaret Ltd Sti v Turkmenistan, ICSID Case No ARB/12/6, Decision on Respondent’s Objection to Jurisdiction Under Article VII(2) of the Turkey–Turkmenistan Bilateral Investment Treaty (13 February 2015), para 287(a) (‘In light of the foregoing, the Tribunal decides as follows:…[t]he allocation of costs is reserved for subsequent determination.’).

\(^{18}\) See Durward V Sandifer, Evidence before International Tribunals (The Fountain Press 1939) 101. See also Thomas H Webster, ‘Obtaining Documents from Adverse Parties in International Arbitration’ (2001) 17(1) Arb Intl 41, 56–7 (‘The typical sanction for failure to comply with a documentary production order is the potential adverse inference by the tribunal. In most cases, that will provide sufficient incentive for compliance.’); Levit v Islamic Republic of Iran, Iran-USCTR, Award No 520-210-3, Concurring and Dissenting Opinion of Richard C Allison (3 September 1991), 10.

(‘In my view the Tribunal would have achieved a more accurate and equitable result in this Case if it had been willing to apply the rule of negative inferences in the face of Respondents’ failure to comply with Tribunal Orders calling for production of evidence…A firm stance by the Tribunal would have sent a clear message to parties before this body that its orders are to be taken seriously.’).

\(^{19}\) See eg van Houtte (n 9) 198; Marossi (n 9) 528.

\(^{20}\) See Sharpe (n 6) 550.

\(^{21}\) See Greenberg and Lautenschlager (n 6) 184.
non-production of documents (53 percent) and the failure to call a witness for direct examination or present a witness for cross-examination (25 percent).22 Other reasons included the failure to present expert evidence on the quantum of damages, the refusal to allow the inspection of evidence that was the subject matter of the dispute, and the failure of a witness to remember key facts.23

In practice, however, arbitral tribunals rarely make adverse inferences.24 The recent survey of ICC awards referred to above concluded that ‘arbitral tribunals are in fact pretty reluctant to rely on [adverse inferences].’25 In nearly 60 percent of the subject cases in which a party asked an ICC tribunal to make an adverse inference, the tribunal found that making the requested inference was not necessary to reach its conclusion because, for example, the direct evidence on the record was sufficient to decide the issue.26 Another explanation for the infrequency of adverse inferences is that ‘[t]he very threat of adverse inferences can impel recalcitrant parties to produce unfavourable evidence’.27

III. THE ADVERSE INFERENCE IN ICSID PRACTICE

A. Legal Authority

The authority of an ICSID tribunal to make an adverse inference is based on Article 34(3) of the ICSID Arbitration Rules, which provides:

The parties shall cooperate with the Tribunal in the production of the evidence and in the other measures provided for in paragraph (2). The Tribunal shall take formal note of the failure of a party to comply with its obligations under this paragraph and of any reasons given for such failure.28

The references to ‘formal note’29 and ‘any reasons’ in Article 34(3) imply that the tribunal has the discretion to make an adverse inference or alternatively to excuse or at least mitigate a party’s refusal to comply.30

In some ICSID arbitrations, an initial procedural order expressly authorizes the tribunal to make an adverse inference.31 In other cases, the initial procedural order

22 See ibid 190.
23 See ibid 191–2.
24 See Gary B Born, International Commercial Arbitration (Kluwer Law International 2009) 1919: ‘In reality, although this is a risk, international arbitral tribunals appear to be hesitant, often overly hesitant, to draw adverse inferences from non-production of evidence and non-compliance with disclosure orders.’
25 See Greenberg and Lautenschlager (n 6) 179 (noting that ‘quite often arbitrators—striving to be pragmatic—skirt around the adverse inference contention, “to be safe”, and rather rely on other evidence’). See also Charles N Brower and Jason D Brueschke, The Iran–United States Claims Tribunal (Nijhoff 1998) 195 (observing that the Iran–United States Claims Tribunal ‘has been surprisingly reluctant to draw adverse inferences’).
26 See Greenberg and Lautenschlager (n 6) 184, 189–90; see also van Houtte (n 9) 199 [quoting Mojtaba Kazazi, Burden of Proof and Related Issues: A Study on Evidence Before International Tribunals (Kluwer Law International 1996) 322] (“If the tribunal is able to base its decision on other documents and grounds, it should do so.”).
27 See Sharpe (n 6) 550. See also Charles N Brower, Evidence Before International Tribunals: The Need for Some Standard Rules’ (1994) 28 Intl L 47, 57 (“The potential that adverse inferences may be drawn by the [Iran–United States Claims] Tribunal is an effective tool in compelling the parties to produce evidence.”).
28 ICSID Arbitration Rules (n 8) art 34(3) (emphasis added).
29 The reference to ‘formal note’ in art 34(3) of the ICSID Arbitration Rules (n 8) can be traced back to the Hague Convention of 1899. See Convention for the Pacific Settlement of International Disputes (opened for signature 29 July 1899, entered into force 4 September 1900) 32 Stat 1779, art 44 (“The Tribunal can, besides, require from the agents of the parties the production of all Acts, and can demand all necessary explanations. In case of refusal, the Tribunal takes note of it.”).
30 See The Rompetrol Group NV v Romania, ICSID Case No ARB/06/3, Award (6 May 2013) para 185.
31 See eg Poštová banka, as and ISTROKAPITAL SE v Hellenic Republic, ICSID Case No ARB/13/8, Procedural Order No 1 (20 December 2013) para 15.3 (“The failure to produce [documents] as ordered may result in adverse
instead references the 2010 International Bar Association (IBA) Rules on the Taking of Evidence in International Arbitration (IBA Rules). Article 9(5) of the IBA Rules allows a tribunal to make an adverse inference if a party fails to produce a document:

If a Party fails without satisfactory explanation to produce any Document requested in a Request to Produce to which it has not objected in due time or fails to produce any Document ordered by the Arbitral Tribunal, the Arbitral Tribunal may infer that such document would be adverse to the interests of that Party.

Similarly, Article 9(6) of the IBA Rules allows a tribunal to make an adverse inference if a party fails to produce other evidence, such as witness testimony:

If a Party fails without satisfactory explanation to make available any other relevant evidence, including testimony, sought by one Party to which the Party to whom the request was addressed has not objected in due time or fails to make available any evidence, including testimony, ordered by the Arbitral Tribunal to be produced, the Arbitral Tribunal may infer that such evidence would be adverse to the interests of that Party.

In an often cited article, Jeremy Sharpe reviewed the jurisprudence of the Iran–United States Claims Tribunal and formulated the following five-prong test for drawing an adverse inference:

1. the party seeking the adverse inference must produce all available evidence corroborating the inference sought;
2. the requested evidence must be accessible to the inference opponent;
3. the inference sought must be reasonable, consistent with facts in the record and logically related to the likely nature of the evidence withheld;
4. the party seeking the adverse inference must produce prima facie evidence; and
5. the inference opponent must know, or have reason to know, of its obligation to produce evidence rebutting the adverse inference sought.

Implicit in this list is the requirement that counsel must specify the precise inference that they are asking the tribunal to make. For example, in Europe Cement v Turkey, the Respondent argued that since the Claimant had failed to produce certain documents, ‘the adverse inference must be drawn that the copies of the share certificates and the share purchase agreements submitted with the inferences drawn by the Tribunal as regards the credibility of a witness or the merits of the defaulting party’s case.’; Churchill Mining Plc v Republic of Indonesia, ICSID Case No ARB/12/14, Procedural Order No 1 (6 December 2012) para 15.9 (‘The failure to produce [documents] as ordered may result in adverse inferences drawn by the Tribunal as regards the merits of the defaulting party’s case.’).  

33 IBA Rules (n 15) art 9(5).

34 See eg Churchill Mining (n 31) para 15.3 (‘Articles 3 and 9 of the International Bar Association Rules on the Taking of Evidence in International Arbitration (2010) shall guide the Tribunal and the parties regarding document production.’) (emphasis added); Metal-Tech Ltd v Republic of Uzbekistan, ICSID Case No ARB/10/13, Award (4 October 2013) para 245 (noting that ‘the Tribunal may look [to the IBA Rules on the Taking of Evidence in International Arbitration] for guidance pursuant to the Minutes of the First Session’) (emphasis added).

35 See Sharpe (n 6) 551. See also O’Malley (n 12) 217–21 (describing the five-prong test).

36 See Greenberg and Lautenschlager (n 6) 198: [T]he requesting party must make clear what inference it wishes to be drawn. In practice, this is not always done... One arbitral tribunal refused even to consider the drawing of adverse inferences because the party seeking the inference did not identify exactly what inference relating to which precise fact it wished to be drawn.
Claimant’s Memorial were fabricated’. As another example, in a recent ICSID arbitration in which one of the authors was counsel, the Chairman of the Tribunal pointedly asked opposing counsel, ‘Just what is it that you would like us to infer?’ Generally asserting that the other party ‘must have something to hide’ by refusing to produce documents or witnesses is insufficient for a tribunal to make an adverse inference.

Critically, ICSID tribunals must exercise caution in making adverse inferences to avoid precluding a party from presenting its case and thereby potentially subjecting the award to challenge. Although it is generally recognized that the scope of review of ICSID awards is limited, a losing party in an ICSID Convention arbitration may have grounds to annul an award on the basis that the tribunal ‘manifestly exceeded its powers’ by incorrectly making an adverse inference or that such inference constituted a ‘serious departure from a fundamental rule of procedure’. Similar concerns arise with ICSID Additional Facility awards, which are subject to challenge before domestic courts rather than ICSID ad hoc committees. For example, in Feldman v Mexico, the majority of the Tribunal made an adverse inference against Mexico due to its failure to produce certain taxpayer information, held that Mexico had discriminated against the Claimant in violation of the North American Free Trade Agreement (NAFTA) and rendered an award in the amount of 16 million Mexican pesos. Mexico applied to the Canadian courts to set aside the award, arguing that ‘by drawing adverse inferences from [Mexico’s] failure to present evidence of the position of other taxpayers, the tribunal effectively prevented Mexico from presenting its defence’. While the Ontario Court of Appeal rejected Mexico’s challenge (reasoning that, since Mexico had voluntarily produced certain taxpayer information, it was reasonable for the Tribunal to conclude that Mexico also would have produced taxpayer information disproving the Claimant’s discrimination claim if such information existed), it does go to show that an ICSID ad hoc committee or domestic court may well look into this issue, and that ICSID tribunals ignoring the Sharpe test, for example, do so at risk to their awards.

37 See Europe Cement Investment & Trade SA v Republic of Turkey, ICSID Case No ARB(AF)/07/2, Award (13 August 2009) para 99. See also ibid para 103:

[T]he Respondent argued that in the face of the failure of Europe Cement to comply with the orders of the Tribunal for the productions of documents, the appropriate inference for the Tribunal to draw was that Europe Cement did not own the shares in question and that its claim was fraudulent.

38 See Schreuer (n 5) 901:

[A]nnulment is only concerned with the legitimacy of the process of decision; it is not concerned with its substantive correctness. Appeal is concerned with both. Annulment is based typically on a very limited number of fundamental standards.

39 ICSID Convention, art 52(1)(b), (d).

40 ICSID Additional Facility Rules, art 3 (providing that the ICSID Convention, including its annulment mechanism, does not apply to ICSID Additional Facility arbitrations).


42 See Marvin Roy Feldman Karpa v United Mexican States, ICSID Case No ARB(AF)/99/1, Award (16 December 2002).


44 See ibid para 58:

Mexico was not required at the hearing to produce information it did not wish to produce. It decided, however, to produce certain taxpayer information. That information failed to satisfy the tribunal which, in turn, led the tribunal to conclude that if Mexico had evidence that a domestic taxpayer had “been treated in a manner equivalent to the claimant…[it] would have provided that evidence.” In my view, the tribunal was entitled to come to such a conclusion.
B. Recent ICSID Jurisprudence

In recent years, several tribunals constituted under the ICSID Convention and ICSID Additional Facility Rules have addressed requests for adverse inferences, mainly in the context of the failure to produce documents. As explained below, some ICSID tribunals have drawn the requested adverse inference while others have not.

(i) Metal-Tech v Uzbekistan (2013)

In Metal-Tech v Uzbekistan, the Tribunal drew an adverse inference that no legitimate services at the time of the establishment of the Claimant’s investment were performed by consultants due to the Claimant’s failure to produce evidence ordered by the Tribunal. During the hearing on jurisdiction and liability, it came to light that the Claimant had paid $4 million to consultants for ‘lobbyist activity’ pursuant to a consulting agreement. To enable the Respondent to substantiate its corruption defence, the Tribunal ordered the Claimant to produce documents and witness testimony relating to the services performed by the consultants. However, the Claimant did not produce documents to substantiate its contention that actual services had been carried out for legitimate purposes in return for the payments. The Tribunal therefore held:

While the Tribunal does not believe that the Claimant sought to conceal evidence, the inference that inexorably emerges from this dearth of evidence is that the Claimant can provide no evidence of services, because no services, or at least no legitimate services at the time of the establishment of the Claimant’s investment, were in fact performed. The Tribunal will bear this inference in mind when further assessing the facts.

The Tribunal ultimately concluded that it lacked jurisdiction due to corruption in violation of Uzbek law.

(ii) Europe Cement v Turkey (2009)

In Europe Cement v Turkey, the Respondent challenged the authenticity of copies of share transfer agreements and copies of bearer share certificates that the Claimant had submitted to prove that the Claimant was a shareholder in the local project companies. The Tribunal ordered the Claimant to produce the originals of these documents or other documents that would prove their authenticity, but the Claimant did not produce the documents ordered by the Tribunal. The Respondent therefore argued that the Tribunal must draw an adverse inference that the copies of the share certificates and the share purchase agreements submitted with the Claimant’s memorial were fabricated, the Claimant did not own the shares and the Claimant’s claim was fraudulent. The Tribunal reviewed
the evidence and made an adverse inference that the Claimant had never obtained the shares and that its claim was fraudulent:

[T]he circumstances of this case as outlined above give rise to a strong inference that there was no transfer of shares in CEAS and Kepez to Europe Cement in May 2003 and that the Respondent is correct in its assertion that not only did the Claimant fail to prove that it had purchased the shares but that it never purchased the shares in fact. This carries with it the clear implication that the claim to share ownership was based on inauthentic documents and that the claim was fraudulent…The Claimant could have rebutted this inference. It could have produced the originals of the share agreements. It could have produced the share certificates that it claimed it owned…But it never produced any documents. This contributed to the inference that the originals of the documents copied in its Memorial and on which its claim was based were never in the Claimant's possession or would not stand forensic analysis, in which case the claim that Europe Cement had shares in CEAS and Kepez at the relevant time was fraudulent.54

The Tribunal dismissed the case for lack of jurisdiction because it determined that the Claimant did not own the shares in the local project companies at the relevant date.55

(iii) OPIC Karimun v Venezuela (2013)

In OPIC Karimun v Venezuela, the parties disagreed as to whether Article 22 of the Venezuelan Investment Law provided Venezuela's consent to ICSID jurisdiction.56 In support of its interpretation, the Claimant provided witness statements from a former Venezuelan government official who had been involved in drafting the Investment Law.57 The witness testified that the practice of the Venezuelan Government at the time was to prepare an administrative dossier concerning the Investment Law.58 While the Claimant had requested documents related to the Investment Law in the document production phase of the arbitration, the Respondent had not produced contemporaneous documents responsive to the requests.59 The Tribunal therefore made an adverse inference that the requested documents did not support the Respondent’s position:

On the basis of the evidence that was put before the Tribunal regarding the process for administrative decision-making in Venezuela, the Tribunal concludes that it would be most surprising if files and documents of the kind requested by the Claimant had not existed at the time of enactment of the Investment Law. In the absence of a more detailed explanation than that provided by the Respondent, the Tribunal considers it likely that

54 ibid paras 163–4.
55 See ibid para 170.
56 See OPIC Karimun Corp v Bolivarian Republic of Venezuela, ICSID Case No ARB/10/14, Award (28 May 2013) para 68. Article 22 of the Venezuelan Investment Law provided:

Disputes between an international investor whose country of origin has in effect with Venezuela a treaty or agreement on the promotion and protection of investments, or disputes to which are applicable the provisions of the Convention Establishing the Multilateral Investment Guarantee Agency (OMIGI-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 making use, when appropriate, of the dispute resolution means provided for under the Venezuelan legislation in effect.

ibid para 66.
57 See ibid paras 109, 114.
58 See ibid para 138.
59 See ibid paras 124, 144.
such files and documents are still in existence today, in a form allowing for their discovery and production, or alternatively to be the subject matter of claims for privilege... In these circumstances, the Tribunal considers that it might draw certain inferences from the failure to produce requested documents... namely that the requested contemporaneous documents that relate to the preparation of the investment law (and likely to be in the possession of the Respondent) do not assist the Respondent in support of its arguments in these proceedings.

However, despite making an adverse inference, the majority of the Tribunal held that it lacked jurisdiction on the basis that ‘inferences alone, absent direct evidence’ are insufficient to establish that Venezuela consented to ICSID arbitration in Article 22 of the Venezuelan Investment Law.

(iv) Rompetrol Group v Romania (2013)
In Rompetrol Group v Romania, the Tribunal ordered the Respondent to produce certain documents relating to the tapping of a witness’s telephone and government requests for information from banking institutions. The Respondent refused to produce the requested documents but set out in detail the reasons why it was not able to make further disclosure, including that production would alert the bank account holders that they were under investigation which might result in the destruction or concealment of important evidence and that the documents would reveal sensitive information that bore a high level of security classification. The Respondent further explained that a significant number of the requested documents were available under the normal operation of internal procedures. The Claimant asked the Tribunal to infer prosecutorial misconduct due to the Respondent’s refusal to produce the requested documents, but the Tribunal refused:

It suffices to note that the reasons put forward by the Respondent, in some detail, are serious ones, of a kind that have been recognized by other arbitral tribunals, and that they therefore fall comfortably within the ‘reasons’ of which an ICSID Tribunal is required ‘formally to take note’ under Arbitration Rule 34(3)...

(v) Apotex v United States (2014)
In Apotex v United States, the Claimants asked the Tribunal to draw an adverse inference against the Respondent due to the paucity of evidence tendered in support of its case. The Respondent had explained to the Tribunal that the US Food and Drug Administration was and remained precluded by US law from disclosing certain third-party information even to counsel for the

60 See ibid paras 144–5.
61 See ibid para 146. Professor Tawil dissented on the basis that ‘denial of jurisdiction for lack of consent based in the absence of ‘direct evidence’ that could only take the form of documents in possession, custody or control of the Respondent, duly requested and not produced, appears in my view as a threshold too high for the Claimant to comply with.’ See OPIC Karinum Corp v Bolivarian Republic of Venezuela, ICSID Case No ARB/10/14, Dissenting Opinion of Professor Dr Guido Santiago Tawil (16 May 2013) para 13.
62 See The Rompetrol Group (n 30) 186.
63 See ibid.
64 See ibid paras 238, 270.
65 ibid para 186.
66 See Apotex Holdings Inc & Apotex Inc v United States of America, ICSID Case No ARB(AF)/12/1, Award (25 August 2014) para 8.72.
Respondent.\(^{67}\) The Tribunal accepted the Respondent’s explanation and refused to draw an adverse inference.\(^{68}\) However, the Tribunal explained that its determination did not alleviate the Respondent from satisfying its burden of proof:

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\text{[I]n such circumstances the Tribunal does not consider that it should draw any positive inferences in favour of the Respondent in discharging its evidential burden of proof. To the contrary, while the Respondent is not to be blamed for these missing evidential pieces in its jigsaw defence, the fact remains that its jigsaw is materially incomplete with a likely mass of documentation and numerous factual witnesses unavailable to be heard by the Tribunal in this arbitration, as to which the Respondent must accept the legal consequences.}\(^{69}\)
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(vi) Gemplus v Mexico (2010)

In Gemplus v Mexico, the Claimants’ witness testified that he attended a meeting with Mr de Erice and Mr Creel.\(^{70}\) However, the evidence presented in the arbitration, including the written and oral testimony of Mr de Erice, indicated that the third person was not Mr Creel.\(^{71}\) The Respondent therefore requested that because the Claimants’ witness had ‘lied’ regarding the identity of the third person, an adverse inference should be drawn by the Tribunal against all of the witness’s testimony on all the issues in the arbitration.\(^{72}\) However, the Tribunal refused to draw an adverse inference:

The Tribunal accepts the honesty of Mr Tajariol’s testimony (albeit incorrect) as regard this third person’s identity; his mis-recollection does not impeach him as an honest witness or otherwise work to discredit him… The Claimants made it plain that their case did not depend in any way upon the identity of this third person; and the Tribunal has placed no reliance on this third person’s identity for the purpose of its decisions in this arbitration.\(^{73}\)

These decisions suggest that, in addition to (in fact in tandem with) the test proposed by Jeremy Sharpe, ICSID tribunals have in the past considered—and in the future may care to bear in mind—the following questions when considering a request for an adverse inference:

1. Has there in fact been concealment or refusal to produce evidence?\(^{74}\)
2. Was the non-production of evidence flagrant, such as in the face of an order of the tribunal?\(^{75}\)

\(^{67}\) See ibid paras 3.205, 8.72.

\(^{68}\) See ibid para 8.72.

\(^{69}\) ibid. Greenberg and Lautenslager agree that ‘the mere absence of evidence filed by the Respondent on its own violation’ is not an adverse inference issue but rather a question of whether that party has proved its case or not. See Greenberg and Lautenslager (n 6) 181–2.

\(^{70}\) See Gemplus SA, SLP SA, & Gemplus Industrial SA de CV v United Mexican States, ICSID Case No ARB(AF)/04/3, Award (16 June 2010) para 4-141.

\(^{71}\) See ibid.

\(^{72}\) See ibid para 4-142.

\(^{73}\) ibid.

\(^{74}\) See ibid (refusing to make an adverse inference where a witness merely ‘mis-recollect[ed]’ a fact). See in this regard, element (2) in the Sharpe test outlined above.

\(^{75}\) See Metal-Tech (n 32) (making an adverse inference due to the Claimant’s failure to produce documents and witness testimony ordered by the Tribunal). Query whether a failure to make available evidence in the absence of a tribunal order (eg when evidence is merely requested by the other party or when dealing with a point on which one reasonably would have expected the other party to have produced evidence) can in similar fashion give rise to an adverse inference. In many cases it may be a question of degree, but there must come a point when one slips into the realm of dangerous speculation. This in a way is a reiteration of element (5) in the Sharpe test, albeit with an accent on the notion that the inference be easier, or less difficult, to assert when the refusal or failure to produce cannot be justified on the basis of a misunderstanding.
(3) Was the non-production of evidence intentional? 

(4) Were valid reasons provided for the non-production of evidence? 

(5) Did the applicant formulate a suitable adverse inference? 

(6) What effects will making an adverse inference have on the final award? 

(7) What effects will refusing the adverse inference have on the final award? 

Such considerations may assist a tribunal in correctly drawing an adverse inference and thereby preserve the sanctity of the arbitral award by limiting a party’s ability to successfully challenge the award on the basis that the adverse inference inappropriately precluded the party from presenting its case.

IV. CONCLUSION

Adverse inferences are infrequently requested by parties and even less frequently granted by tribunals. Nevertheless, the adverse inference is an important tool to ensure compliance with an ICSID tribunal’s orders and contribute to the administration of justice by enabling a party to satisfy its burden of proof when evidence is withheld by the other party. Given these important objectives, ICSID tribunals should not shy away from making an adverse inference upon request and in accordance with the considerations discussed in this article. At the same time, however, ICSID tribunals must exercise caution to avoid precluding a party from presenting its case and thereby potentially subjecting the award to challenge.

76 See ibid (making an adverse inference even though the Tribunal did not believe that the Claimant sought to conceal evidence).

77 See Apotex (n 66) (refusing to draw an adverse inference because the Tribunal accepted the Respondent’s explanation that the US Food and Drug Administration was precluded by US law from disclosing certain third-party information even to counsel for the Respondent); The Rompetrol Group (n 30) (refusing to draw an adverse inference because the Tribunal accepted the Respondent’s explanation that production would reveal sensitive information that bore a high level of security classification).

78 Compare Europe Cement (n 37) (making the requested adverse inference that the copies of the share certificates and the share purchase agreements submitted with the Claimant’s memorial were fabricated), with Gemplus (n 70) (refusing to make the requested adverse inference that because the Claimants’ witness had ‘lied’ regarding one issue, an adverse inference should be drawn by the Tribunal against the witness’s testimony on all the issues in the arbitration). Here one may care to note elements (1), (3), and (4) in the Sharpe test.

79 Compare Metal-Tech (n 32) (finding no jurisdiction due to corruption after making the Respondent’s requested adverse inference), with OPIC Karimun (n 56) para 68 (finding no jurisdiction due to lack of consent after making the Claimant’s requested adverse inference).

80 See Gemplus (n 70) (finding that the Respondent had breached the bilateral investment treaties after rejecting the Respondent’s requested adverse inference).