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Principles of evidence in investor-state arbitration: burden, standards, presumptions & inferences

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CHAPTER 6—INFERENCES FROM EVIDENCE OR ITS ABSENCE AS APPLIED IN INVESTOR-STATE ARBITRATION

I. INTRODUCTION: INFERENCES IN GENERAL

The research question seeks to understand whether there is any evidentiary principle in relation to inferences as an evidentiary principle or does it merely fall with a tribunal's discretionary powers to determine when to apply an inference.

As an initial remark, investor-state tribunals often make findings of facts by means of inferences. The use of inferences means that the tribunal made a determination of fact that is not premised upon direct evidence. The tribunal thus is convinced of the truth of a fact despite the absence of a document or witness testimony that would establish that fact first hand. Such findings of fact are relatively frequent, especially when documents are scarce or when witness testimony is self-serving.

An inference refers to a conclusion that, as a matter of *plausibility* of a fact, must be concluded to be true in light of other relevant and probative record evidence as well as party conduct in the arbitral proceedings.

As will be developed below, my core argument here is that plausibility (as opposed to reasonableness) is the core guiding principle to permit the application of an inference. My second argument is that a tribunal may also draw adverse inferences based on the conduct of the party in the arbitration, particularly in relation to failing to comply with an order in relation to document production. Although extremely difficult, this option is permissible on the presumption that tribunal does not possess any judicial or police powers and this is one way to ensure that the parties participate in the arbitration proceeding in good faith.

Figure 6.1: Two theories on Inferences

The notion of inferences is closely linked to other evidentiary principles. For example, as discussed in Chapter 5, a judicial presumption can also be described as an inference. Further, an inference does not permit a relaxation of the principles of burden of proof or standard of proof described in Chapters 2 and 4 above. In other words, the plausibility of an inference is governed by the same standard of proof as the proof of the relevant fact by direct evidence, *i.e.*, the record as a whole leads to a plausible conclusion that meets the appropriate standard of proof. Finally, just as in the context of proof by direct evidence, a tribunal must ideally give all parties a reasonable opportunity to comment – its right to be heard – before drawing an inference, otherwise it may give rise to an annulment challenge.

This Chapter seeks to understand how and when have investor-state tribunals recognized and applied inferences in investor-state arbitrations. Towards this end, this Chapter is divided into 6 Sections. Section I provides an introduction to the notion of "inferences" while Section II provides a discussion of inferences in the context of an investor-state arbitration. Section III discusses the difficulty of prove through direct evidence in an investor-state arbitration while Section IV deals with the circumstances to rebut the drawing of inferences. Section V discusses how tribunals have drawn inferences from a party's misconduct, specifically, in investor-state arbitrations from the failure to produce documents while Section VI deals with the consequences of failing to apply inferences. Section VII provides the conclusion in light of the overall thesis.

(A) *Background to Inferences*

A tribunal may conclude that a party has discharged its burden or standards of proof relying upon inferences.[1] Indeed, an inference permits a tribunal to draw a conclusion on the basis of circumstantial evidence. This principle is not unique to investor-state arbitration.[2] Like the burden of proof, the power of a court or tribunal to draw inferences has been recognized by the ICJ,[3] WTO dispute settlement panels,[4] and other international dispute resolution bodies.[5] Canonically, the International Court of Justice noted in the *Corfu Channel Case* that

> the fact of this exclusive territorial control exercised by a State within its frontiers has a bearing upon the methods of proof available to establish the knowledge of that State as to such events. By reason of this exclusive control, the other State, the victim of a breach of international law, is often unable to furnish direct proof of facts giving rise to responsibility. Such a State should be allowed a more liberal recourse to inferences of fact and circumstantial evidence. This indirect evidence is admitted in all systems of law, and its use is recognized by international decisions. It must be regarded as of special weight when it is based on a series of facts linked together and leading logically to a single conclusion.[6]

[1] Christoph H. Schreuer, Loretta Malintoppi, August Reinisch and Antony Sinclair, *The ICSID Convention: A Commentary* (first published 2001, Cambridge University Press 2009) 656 (discussing drafting history of power of tribunals to draw inferences in the context of the ICSID Convention); Chittharanjan F. Amerasinghe, *Evidence in International Litigation* (Brill 2005), 248 (discussing adverse inferences in the context of public international arbitral jurisprudence); Durward V. Sandifer, *Evidence Before International Tribunals* 115 (same); Mojtaba Kazazi, *Burden of Proof and Related Issues: A Study on Evidence Before International Tribunals* 259 ("the existence of judicial presumptions or inferences in international procedure cannot be disputed.").

[2] See n 1 above.

[3] For ICJ jurisprudence, see eg *Corfu Channel Case (Merits) (U.K. v Albania)*, 1949 I.C.J. Rep. 4, 18 (9 April).

[4] For a discussion of WTO jurisprudence relying upon the drawing of adverse inferences, see WTO Analytical Index: Dispute Settlement Understanding on Rules and Procedures Governing the Settlement of Disputes, Article 11 [558-563], available at https://www.wto.org/english/res_e/booksp_e/analytic_index_e/dsu_05_e.htm#fnt904.

[5] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina v Serbia & Montenegro), 2007 I.C.J. 47, 310, 576-7 (Separate opinion of Judge Tomka) (discussing the use of inferences by the ICTY to establish genocidal intent with regard to the Srebrenica massacre and laying out the international legal requirements for the drawing of inferences).

[6] *Corfu Channel Case (Merits) (U.K. v Albania)*, 1949 I.C.J. Rep. 4, 18 (9 April) (emphasis added).

The *Corfu Channel Case*, as noted above, crystallizes the inference principle and its purpose.[7] Direct, probative evidence frequently will be unavailable to an international court or tribunal.[8] The unavailability of evidence may simply have to do with the nature of the dispute – the events may be too distant or remote for any direct evidence to have survived so as to be brought before the trier of fact.[9] But, the unavailability of direct evidence may also have to do with the procedural posture of the dispute – the party with the most access to relevant direct evidence may be the least interested in finding it.[10] Alternatively, the party with the relevant evidence in question may not have the resources available to it to find the evidence on its own initiative.[11]

Given these constraints upon the availability of direct evidence, an insistence that facts be proved by means of direct credible evidence would place international justice outside the reach of many parties. Such parties may, however, be able to adduce circumstantial evidence upon which an inference could be based.[12] Consequently, if it is the function of international tribunals to grant meaningful access to justice, it is a compelled conclusion that such tribunals must be able to use inferences to make factual determinations.[13]

At the same time, it is important to remember that the function of international tribunals is not just to provide access to justice to the claimant (or counterclaimant) –

[7] ibid.

[8] See Aloysius P. Llamzon, *Corruption in Investment Arbitration* (Oxford University Press 2014) 230-1 ("circumstantial evidence, particularly when direct evidence of corruption is unavailable, is widely, albeit cautiously, accepted as a tool to evaluate allegations of corruption by international tribunals").

[9] See *Compañía del Desarrollo de Santa Elena SA v Costa Rica*, ICSID Case No ARB/96/1, Award (17 February 2000), IIC 73 (2000) [7, 17] (underlying decree of expropriation issued in 1978 with first session of the tribunal taking place in 1997).

[10] See *Corfu Channel Case (Merits) (U.K. v Albania)*, 1949 I.C.J. Rep. 4, 18 (9 April).

[11] See *Pac Rim Cayman LLC v Republic of El Salvador*, ICSID Case No ARB/09/12, Decision on Jurisdiction (1 June 2012), IIC 543 (2012) [6.26] (discussing assertions regarding litigation strategies to deplete limited litigation resources of the arbitral parties); Aloysius P. Llamzon (n 8) 197-8 (discussing the inadequate prosecution of corruption allegations by Argentina against Siemens in the arbitral proceedings).

[12] See I.(C) of this Chapter below.

[13] On access to justice concerns as policy motivating investor-state dispute resolution, see Frédéric Gilles Sourgens, *By Equal Contest of Arms, Jurisdictional Proof in Investor-State Arbitrations*, 38 North Carolina Journal of International Law and Commercial Regulation 875 (2013).

they must safeguard against making findings of liability, recognizing the limited nature of its jurisdiction and the exceptional nature of these disputes, without a firm factual foundation.[14] The international dispute resolution framework depends upon consent (*ratione voluntatis*).[15] Parties are unlikely to consent *ex ante* to an infrastructure yielding a large risk of "false positives" because of an aggressive use of inferences by tribunals.[16] To provide sustainable international access to justice, international courts and tribunals are judicious in their use of inferences. The principles set out in this Chapter balance these countervailing policy needs in the formulation of its rules of inferences.

(B) *Inferences under Arbitration Rules*

The principle that tribunals have the right and ability to make determinations of fact by inference is reflected in relevant arbitral rules governing investor-state arbitrations. This is not explicitly provided in the arbitral rules but may be inferred from the general evidentiary provision. For example, in the context of ICSID arbitrations, ICSID Arbitration Rule 34(1) states that "[t]he Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value."[17] Therefore, Rule 34(1) codifies the principle that "ICSID tribunals have full discretion in assessing the probative value of any piece of evidence introduced before them."[18] This full discretion includes the drawing of inferences.

The UNCITRAL Arbitration Rules similarly in Article 27(4) provide that "[t]he arbitral tribunal shall determine the admissibility, relevance, materiality, and weight of the evidence offered."[19] As a leading commentary on the UNCITRAL Arbitration Rules

[14] See David Collins, *The BRIC States and Outward Foreign Direct Investment* (Oxford University Press 2013) 87 (discussing the Indian reaction to the White Industries arbitration holding India liable for BIT violations due to delay in domestic litigation proceedings).

[15] For discussion on the burden of proof, see Chapter 2.

[16] See David Collins, *The BRIC States and Outward Foreign Direct Investment* (Oxford University Press 2013) 87 (discussing the Indian reaction to the White Industries arbitration holding India liable for BIT violations due to delay in domestic litigation proceedings).

[17] ICSID Arbitration Rule 34(1) (emphasis added).

[18] Christoph H. Schreuer et al (n 1) 666.

[19] UNCITRAL Arbitration Rules (2010), Article 27(4).

confirms, this power also includes the discretion to draw reasonable inferences from evidence.[20] Therefore, under the common rules for arbitration, the power of a tribunal to draw inferences as a part of its probative value is recognized.

(C) *Inferences and Indirect/Circumstantial Evidence*

Before delving into how investor-state tribunals have applied inferences, a brief discussion on the relationship of indirect/circumstantial evidence with the principle of inference is necessary. This will help clarify how indirect or circumstantial evidence plays a critical role when it comes to inference. As discussed in Chapter 4 above, the drawing of inferences is inextricably intertwined with determining a case premised upon indirect or circumstantial evidence.[21] Indirect evidence refers to "evidence tending to establish the fact in dispute by proving another."[22] Circumstantial evidence is the more typically used terminology for the same type of evidence today.[23] In the municipal context, circumstantial evidence is clearly distinguished from direct evidence:

> Direct evidence is that which is applied to the fact to be proved, immediately and directly, and without the aid of any intervening fact or process: as where, on a trial for murder, a witness positively testifies he saw the accused inflict the mortal wound, or administer the poison. Circumstantial evidence is that which is applied to the principal fact, indirectly, or through the medium of other facts, from which the principal fact is inferred. The characteristics of circumstantial evidence, as distinguished from that which is direct, are, first, the existence and presentation of one or more evidentiary facts; and, second, a process of inference, by which these facts are so connected with the fact sought, as to tend to produce a persuasion of its truth.[24]

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[20] David D. Caron & Lee Caplan, *The UNCITRAL Arbitration Rules* (2nd ed. Oxford University Press 2013) 580-1 (excerpting Iran-U.S. Claims Tribunal jurisprudence to this effect).

[21] See *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v Republic of Kazakhstan*, ICSID Case No ARB/05/16, Award (21 July 2008), IIC 344 (2008) [444] (discussing the relationship between circumstantial evidence and the drawing of record inference and adverse inferences premised upon conduct of the parties in the proceedings themselves).

[22] See B. E. Witkin, *California Evidence* (5th ed. Thompson West 2012) 358.

[23] ibid; see also Mojtaba Kazazi (n 1) 259 ("A common form of inference is drawn on the basis of the circumstances and usually is referred to as circumstantial evidence.").

[24] B. E. Witkin (n 22) 358-9 (quoting *People v. Goldstein* 139 C.A.2d 146 (1956)) (emphasis added).

Circumstantial or indirect evidence, thus, does not directly speak to the ultimate factual predicate to be proved.[25] To draw an inference is to conclude as to the existence of a fact on the basis of evidence of other facts.[26] The quality of an inference, in short, depends upon the probative value of the record evidence in establishing the contextual facts on the basis of which the inference is drawn and the inductive acuteness of the finder of fact in drawing an inference as to some other fact that also must be the case in light of the state of the record.

II. INFERENCES IN INVESTOR-STATE ARBITRATION & THE DOCTRINE OF PLAUSIBILITY

Investor-state tribunals may draw inferences in every context of an arbitral tribunal, recognizing the appropriate burden and standard of proof, in light of the factual record. To be fully clear, the problem giving rise to the need for inferences is not limited to the merits context. It could also arise in the context of jurisdiction – *e.g.*, was an investment made and accepted in accordance with host state law?[27] If, for example, a state expressly approved an investment at the time of an investment, a tribunal could infer that the investment was accepted in accordance with host state laws (barring any allegations for bribery or corruption). It could further arise in the context of remedies – *e.g.*, would the award of *restitutio in integrum* be feasible under the circumstances?[28] The question also could arise in the context of annulment of ICSID awards – *e.g.*, did a tribunal state reasons for its decisions permitting the parties to follow the tribunal from point A to point B?[29] The manner in which inferences are drawn in all contexts look to

[25] ibid.

[26] ibid.

[27] Aloysius P. Llamzon (n 8) 230-1.

[28] Irmgard Marboe, *Calculation of Compensation in International Investment Law* (Oxford University Press 2009) 74 (discussing the consequence of impractibility of inadvisability of restitution). See however *Mr. Franck Charles Arif v Republic of Moldova*, ICSID Case No. ARB/11/23, Award (April 8, 2013) [566-572] (where the tribunal permitted 60 days for Respondent to make a proposal for restitution); *Bernhard von Pezold and Others v Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award (28 July 2015) [670-744](where the tribunal orders restitution of farm properties).

[29] R. Doak Bishop & Silvia M. Machili, *Annulment Under the ICSID Convention* (Oxford University Press 2012) 160 ("An important distinction that should be drawn under Article 52(1)(e) is that between express and implicit reasons. Some committees have held that when the reasons can be inferred from the award, even if not expressly stated, the award does not need to be annulled").

the same significant factors. The manner in which these factors are weighed against each other to arrive at the plausible explanation will be dependent upon the functional task the tribunal is engaged in when drawing the inference in question. This is discussed below in further detail.[30]

The most typical form of inference arises from the record. There is no simple rule governing the drawing of inferences from the record. Rather, the drawing of inferences requires a tribunal to exercise its sound judgment and discretion in evaluating the record evidence. In drawing record inferences, the following circumstances are typically significant: (i) the difficulty of proving the fact by direct evidence; (ii) the relationship between the inference to be drawn and the facts proved by direct evidence; (iii) the strength of the direct evidence supporting the inference; (iv) the number of different pieces of proof supporting the same inference; and (v) the significance of the inference for the satisfaction of the requisite standard of proof. Inferences that are drawn from the record fall within the mandate of a tribunal to resolve the dispute. Therefore, a tribunal has wide discretion in dealing with evidence on the record. Annulment would therefore be very unlikely in such a circumstance.

The traditional way in which a tribunal will draw an inference is by assessment of the record. There are two broad categories of concerns that are relevant to the tribunal's task in drawing inferences. On the one hand, the tribunal is tasked with making finding on the facts to resolve the dispute.[31] It is not permitted to refuse to find facts because of the lack of direct evidence. Directly linked to its fact-finding mission is the task to determine what, on the record, is the most likely explanation of what occurred.

At the same time, the tribunal's mission to determine the facts is similarly bounded by the access to justice concerns. Thus, the tribunal must keep in mind that certain facts would be implausibly difficult for one party to prove by direct evidence, all things considered. This may impact the tribunal's willingness to rely upon inferences to make relevant findings even in the comparatively sparser record.

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[30] See Section IIA below.

[31] *Hussein Nuaman Soufraki v The United Arab Emirates*, ICSID Case No ARB/02/7, Decision on Annulment (5 June 2007), IIC 297 (2007) [44] ("It is not contested that the Tribunal shall be the primary fact-finder.").

At the same time, the tribunal must be careful not to overstep its powers and effectively discharge a party from carrying its respective burden and standard of proof. The significance of an inference to a party's ability to meet the standard of proof thus is similarly relevant outside of the comparatively simple task for the tribunal to make relevant factual findings.

The *Europe Cement v. Turkey* is illustrative where the claimant, sought to show ownership of shares in a company for purposes of establishing the existence of covered investment. Respondent, on the other hand, alleged that claimant never acquired the shares because there was no transfer and the claim was, therefore, fraudulent.[32] The tribunal noted that the claimant could have "rebutted this presumption" by producing the originals of the share agreements.[33] However, the claimant did not submit copies of the share certificates for inspection when ordered to do so and admitted that it could not do so (*i.e.*, it failed to provide critical direct evidence).[34] Circumstantial evidence is not probative of ownership and the existence of a qualifying investment.[35] The tribunal, therefore, dismissed the case for lack of jurisdiction:

> The Claimant's failure to provide any serious rebuttal to the Respondent's arguments strongly suggests that it never had such ownership, at least at the relevant time for jurisdiction and that perhaps it never had ownership at all. The burden to prove ownership of the shares at the relevant time was on the Claimant. It failed completely to discharge this burden.[36]

In such a case, a tribunal cannot rely on an inference because of the issue in case.

(A) *Plausibility As Measure For The Drawing Of Inferences*

International doctrinal writing is imprecise in its determining the measure or criterion for the drawing of inferences. International legal sources sometimes refer to the

[32] *Europe Cement Investment & Trade SA v Turkey*, ICSID Case No. ARB(AF)/07/2, Award (13 August 2009), IIC 385 (2009) [163].

[33] ibid [163]

[34] ibid.

[35] ibid [166-167].

[36] ibid [121-122, 166].

"reasonableness" of an inference.[37] Closer analysis of the jurisprudence reveals that the standard actually applied in case law is not reasonableness but "plausibility." Plausibility refers to the likelihood that something is more likely to have happened or not happened in the light of the totality of the evidence. Reasonableness, on the other hand, is one step removed merely requiring that the inference is sensible.

A contextual analysis of jurisprudence reveals the linguistic imprecision in current jurisprudence. When a tribunal draws an inference, both parties typically request that the arbitrators draw different inferences from record evidence.[38] This can be illustrated by an investor-state case. In *Metal-Tech*, the respondent submitted that record evidence of payment of several million dollars in consulting fees should give rise to an inference that the payments were not legitimate but were instead a bribe.[39] The claimant submitted that the record evidence in question should instead lead the tribunal to draw the opposite inference – namely that the investor had engage in ordinary

[37] See Mojtaba Kazazi (n 23) 259 ("Inference is a judicial instrument at the disposal of international tribunals which if applied correctly could facilitate their functioning. Similar to municipal fora, it is the common practice of international tribunals to rely, in each particular case, on reasonable inferences drawn from facts."); see also Chittharanjan F. Amerasinghe (n 1) 248; Durward V. Sandifer (n 1) 154.

[38] See eg *The Rompetrol Group NV v Romania*, ICSID Case No ARB/06/3, Award (6 May 2013), IIC 591 (2013) [232] (discussing the inferences to be drawn from the timing of initiation of criminal investigations); *Cambodia Power Co. v Kingdom of Cambodia*, ICSID Case No ARB/09/18, Award (22 March 2011), IIC 586 (2011), [82-3, 94-5] (setting out disputing views whether the inference could be drawn that multiple contracts formed part of a single transaction for purposes of consolidation under one consent to arbitration); *Waguih Elie George Siag and Clorinda Vecchi v The Arab Republic of Egypt*, ICSID Case No ARB/05/15, Award (1 June 2009), IIC 374 (2009), [12] ("There was no real dispute as to the primary facts and the sequence of events relevant to the dispute as opposed to the inferences and legal conclusions to be drawn from those facts."); *Tokios Tokelès v Ukraine*, ICSID Case No. ARB/02/18, Award (29 June 2007), IIC 331 (2007) [3] (stating the record was by and large clear but that the parties sought contradictory inferences as to the ultimate facts in dispute); *Methanex Corporation v United States of America*, Award(3 August 2005), IIC 167 (2005) [III.52-57] ("The Tribunal can understand Methanex's conviction that all of these 'dots,' if (i) they were to be taken as the only dots; (ii) they were to be accepted at face value as submitted by Methanex; and, moreover, (iii) they were carefully connected as Methanex proposes, would show that the 'real' reason Governor Davis enacted Executive Order D-5-99 was to favour ethanol and to harm Methanex and methanol. Methanex's difficulties, however, are manifold. [. . .] The Tribunal is not averse to trying to 'connect the dots' as a way of testing Methanex's hypothesis, but the dots Methanex has provided and which it affects to find so vivid, have all but faded into chiaroscuro in the course of this adversarial procedure."); *CDC Group Public Ltd. Co. v Seychelles*, ICSID Case No ARB/02/14, Award (17 December 2003), IIC 47 (2003) [45-51] (discussing the inferences to be drawn from commercial conduct of the claimant); *Feldman v Mexico*, ICSID Case No ARB(AF)/99/1, Award (16 December 2002), IIC 157 (2002), Dissent [32-37] (setting out both the disagreement within the tribunal and between the parties regarding the relevant inferences to be drawn from record evidence).

[39] *Metal-Tech Ltd. v Uzbekistan*, ICSID Case No. ARB/10/3, Award (4 October 2013), IIC 619 (2013) [229].

lobbying activities.[40] The tribunal was tasked not with establishing reasonableness of either inference of corruption or the absence of corruption in a vacuum but with comparing which of the inferences proposed by the parties should be deemed more convincing towards meeting the appropriate standard of proof.[41] The tribunal ultimately concluded that the respondent was correct. Therefore, while two reasonable explanations were available, one was more plausible in the light of the totality of the evidence. And, therefore, the inference cannot be drawn as a matter of reasonableness.

Further, investor-state tribunals have examined the issue at hand and seen whether the evidence would meet the standard of proof. This can pose enormous practical problems because different arbitrators looking at the same evidence may arrive at opposite conclusions. For example, investor-state tribunals have been reluctant to infer "consent" unless the appropriate standard of proof was met. This was the very issue before the tribunal in the *OPIC v. Venezuela* case and the question was whether the Venezuela investment law provided for an unqualified consent to arbitration because the language in the investment law was ambiguous.[42] The investor produced a witness statement (Mr. Corrales) who claimed to have drafted the Venezuelan investment law and testified that it provided for state consent to arbitration.[43] Venezuela did not provide a witness statement but questioned whether Corrales was, in fact, the drafter of the investment law. The majority refused to infer that the views of Mr. Corrales that the dispute resolution clause provided for clear state consent was present in the actual language of the investment law (*i.e.*, direct evidence):

> The Tribunal by majority does not consider that the direct evidence before it establishes with sufficient certainty that the intention of Messrs Corrales and Capriles for Article 22 to be a specific consent to ICSID jurisdiction under Article 25

[40] See ibid [217].

[41] See ibid ("The tribunal has found that none of the documents on which the Claimant relies (whether under the December 2000 contract or otherwise) convincingly show that the Consultants rendered any legitimate services at the time of establishment of the Claimant's investment.") (emphasis added).

[42] *Opic Karimum Corp. V. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/14, Award (28 May 2013), IIC 618 (2013).

[43] ibid 147-154.

> of the ICSID Convention was conveyed to, and then accepted and acted upon, by either the Economic Cabinet or the Council of Ministers. . . .
>
> The Tribunal considers by a majority that there is no direct evidence before it that establishes the intention of the legislator (in this instance, the Economic Cabinet and the Council of Ministers chaired by the President of Venezuela) to grant consent to ICSID jurisdiction by the terms of Article 22 of the Investment Law. In this regard, inferences that the Tribunal might be able to draw from the lack of evidence put forward by Venezuela, and the failure of Venezuela to produce documents requested by the Claimant, cannot be sufficient to establish the requisite intention.[44]

In contrast to the approach above, tribunals might alternatively make a finding that the evidence is credible as far as it goes.[45] In such a case, it would fall to the other, non-moving party to rebut the direct evidence (*i.e.*, evidence of Mr. Corrales in the *OPIC* case) submitted by the moving party. The non-moving party might do so by means of direct evidence of its own providing a different, fuller or more precise explanation of events. Non-moving parties rarely do so. The non-moving party alternatively might do so by means of circumstantial evidence such as comparison of the current with event with other examples of conduct. When the non-moving party does so, the tribunal is asked to make an inference that the witness' testimony – though credible – is incomplete. The dissenting arbitrator in the *OPIC* case made a finding to this effect:

> my fellow arbitrators have concluded that, absent direct evidence of Respondent's intention to consent to ICSID jurisdiction, such negative inference is not enough to determine on its own that Article 22 was intended by Venezuela to be the consent to jurisdiction required by Article 25 of the ICSID Convention. I am unable to agree with such conclusion. The record evidences that while the Claimant has made substantial efforts to prove that Article 22 of the Investment Law provides consent to arbitrate, the Respondent provided no assistance in determining the purpose and intention of such provision, notwithstanding its

[44] ibid 170, 178.

[45] See ibid. [112].

> duty to "cooperate with the Tribunal in the production of the evidence" under Rule 34(3) of the Arbitration Rules.[46]

Leaving aside the difficulties of trying to infer state consent, the *OPIC* case highlights the practical difficulties in relying on inferences in a case. A consequence of the process of decision-making applied by investor-state tribunals is that more than one inference might at the same time be reasonable. If one were to see a drenched youth enter a room on a sunny day in the summertime, one might reasonably infer that the person went for a swim. Or one might reasonably infer that the person fell victim to a prank. Or that the person was caught in rain. More facts might make one more likely to draw one inference over the other. But in such instances, it is not that one inference was not reasonable.

The measure applied by investor-state tribunals thus is not "reasonableness" of an inference expressed as a sufficiently probable event given the evidence. "Probability" would speak to "a relative frequency, propensity, logical probability, or a belief state under highly specified conditions" and is an extrapolation of a data set expressed numerically as a number between 0.0 to 1.0.[47] Thus, a probability assessment could set a threshold for the drawing of an inference – say a probability of 0.5 or higher that the asserted event took place. The problem of such an approach to inferences becomes readily visible in the context of our example. We might assign a probability of 0.4 to the inference that our youth went swimming and a probability of 0.3 that the youth fell victim to a prank. Applying our reasonableness model, no inference would obtain as neither swimming nor a prank had a probability of 0.5 or higher. Alternatively, we might lower the minimum threshold for the reasonableness of inferences to 0.3. In that case, a tribunal could reasonably arrive at two inferences. But the rule of decision would not without more require that the tribunal compare the probabilities of each event to each other.

[46] *Opic Karimum Corp.v Bolivarian Republic of Venezuela*, ICSID Case No ARB/10/14, Award (28 May 2013), Dissenting Opinion of Dr. Guido Santiago Tawil [10-11].

[47] Ronald J. Allen & Alan E. Guy, 'Conley as Special Case of Twombly and Iqbal: Exploring the Intersection of Evidence and Procedure and the Nature of Rules' (2010) 115 Penn State Law Review 35.

Tribunals do not look to the reasonableness of inferences in the strict probabilistic statistical analysis. Rather than determining in the abstract whether an inference can appropriately be drawn, tribunals make determinations by weighing the plausibility of the competing submissions made by the parties.[48] Such plausibility involves reasoning by "inference to the best explanation" meaning that one must determine "which of the possible explanation of events is 'best,' where 'best' means some complex mix of coherence, consistency, coverage, consilience, efficiency and so on. The intellectual task involves comparing and contrasting the various explanations to determine which is the best in terms of the various variables."[49] Once the tribunal has determined whether an inference is plausible, it must still determine whether the predicate for the inference is sufficient to meet the requisite burden and standard of proof.

[48] See eg *The Rompetrol Group NV v Romania*, ICSID Case No ARB/06/3, Award (6 May 2013), IIC 591 (2013) [232] ("As to the coincidence in time, by contrast, the Tribunal would itself have inclined to the view that the thrust of the Talpes report, taken together with the bodies and authorities to whom it was in due course forwarded, made it more probable than not that there was a connection of some kind between the report and the initiation of the original investigation by the PNA into the Petromidia privatization. But even with that connection as the working hypothesis, it carries one nowhere, in the Tribunal's opinion."); *Cambodia Power Co. v Kingdom of Cambodia*, ICSID Case No ARB/09/18, Award (22 March 2011), IIC 586 (2011) [82-3, 94-5] (setting out disputing views whether the inference could be drawn that multiple contracts formed part of a single transaction for purposes of consolidation under one consent to arbitration); *Waguih Elie George Siag and Clorinda Vecchi v The Arab Republic of Egypt*, ICSID Case No ARB/05/15, Award(1 June 2009), IIC 374 (2009) [12] ("There was no real dispute as to the primary facts and the sequence of events relevant to the dispute as opposed to the inferences and legal conclusions to be drawn from those facts."); *Tokios Tokelès v Ukraine*, ICSID Case No. ARB/02/18, Award (29 June 2007), IIC 331 (2007) [3] (stating the record was by and large clear but that the parties sought contradictory inferences as to the ultimate facts in dispute); *Methanex Corp. v United States of America*, Award (3 August 2005), IIC 167 (2005) [II.52-57] ("The Tribunal can understand Methanex's conviction that all of these "dots," if (i) they were to be taken as the only dots; (ii) they were to be accepted at face value as submitted by Methanex; and, moreover, (iii) they were carefully connected as Methanex proposes, would show that the "real" reason Governor Davis enacted Executive Order D-5-99 was to favour ethanol and to harm Methanex and methanol. Methanex's difficulties, however, are manifold. . . . The Tribunal is not averse to trying to "connect the dots" as a way of testing Methanex's hypothesis, but the dots Methanex has provided and which it affects to find so vivid, have all but faded into chiaroscuro in the course of this adversarial procedure."); *CDC Group Public Ltd. Co. v Seychelles*, ICSID Case No ARB/02/14, Award (17 December 2003), IIC 47 (2003) [45-51] (discussing the inferences to be drawn from commercial conduct of the claimant); *Marvin Roy Feldman Karpa v United Mexican States*, ICSID Case No ARB(AF)/99/1, Award (16 December 2002), IIC 157 (2002), dissent [32-37] (setting out both the disagreement within the tribunal and between the parties regarding the relevant inferences to be drawn from record evidence).

[49] *Marvin Roy Feldman Karpa v United Mexican States*, ICSID Case No ARB(AF)/99/1, Award (16 December 2002), IIC 157 (2002), dissent [36].

1. Inferences and Burden of Proof

The use of inferences facially overlaps with the application of burden of proof. As discussed above, it appears that some tribunals follow a principle that the burden of proof with regard to certain important or extraordinary facts (*e.g.*, state consent to arbitration) could only be discharged by reference to direct evidence.[50] The reasoning behind such pronouncements appears to be that permitting the discharge of the burden of proof by inference implicitly but impermissibly reverses burdens of proof. And, as noted in Chapter 2 above, the burden of proof cannot be reversed.

This line jurisprudence, if assessed outside its proper context, is dangerously misleading. Burden of proof requires a party with the burden to provide sufficient evidence to satisfy the requisite standard of proof. As noted in Chapter 2, once a party submits evidence that on its face meets this standard of proof, that party has discharged its initial burden of evidence thus requiring its counterparty to contest or rebut the moving party's proof with evidence of its own or through impeachment of the evidence proffered by the moving party (*i.e.*, the shifting principle).

An inference or circumstantial evidence, on the other hand, is simply a means of proving the existence of one fact by the existence of another, related fact. For example, it would be possible to prove that Alex murdered Bill by showing that (A) Alex was found holding a gun seconds after witnesses heard a shot being fired; (B) Bill died of a gunshot wound; (C) the gun that fired the deadly bullet was the one in Alex's hand; (D) Bill died of wounds he would have sustained at a time Alex was in the room with Bill; and (E) Alex had gunpowder residue on the hand holding the gun. These facts together build a composite picture of a fact not witnessed by anyone or otherwise reflected in any piece of evidence directly: Alex shot Bill.

The proposition that burdens of proof cannot be discharged if a party requires an inference to do so is reasonably absurd. Applied to our murder scenario, it would mean that only a confession or an eyewitness account could be result in a murder conviction.

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[50] *Opic Karimum Corp.v Bolivarian Republic of Venezuela*, ICSID Case No ARB/10/14, Award (28 May 2013), IIC 618 (2013) [146]; *Niko Resources (Bangladesh) Ltd. v People's Democratic Republic of Bangladesh*, ICSID Case No ARB/10/11, Decision on Jurisdiction (13 August 2013), IIC 603 (2013) [424].

This would result in a lowering of the standard of proof for murder as both confessions and eyewitness testimony can be notoriously unreliable while at the same time making it more difficult to prosecute a person for the crime as many murders are committed in secluded places without witnesses.

Fortunately, investor-state arbitration does not subscribe to such an extreme position. Indeed, as discussed above, tribunals may draw inferences in favour of the non-moving party. The statement that inferences are not a permissible means to discharge a burden of proof therefore should be understood as a conclusion that the circumstantial evidence produced by the moving party was insufficient to displace a presumption in favour of the non-moving party. It should not be understood as an exception to the ordinary operation of burdens of proof discussed in Chapter 2.

2. Inferences and Standards of Proof

This leaves the question whether the use of inferences modifies otherwise applicable standard of proof.[51] To the extent that a point is proved by proffer of direct evidence, a tribunal must determine whether the evidence so submitted is actually probative of the question with respect to which it has been offered – for instance, a tribunal could determine that a document has been taken out of context meaning that the document as a whole did not stand for the proposition for which it had been cited by the proffering party. To the extent that a point is to be proved by proffer of direct evidence, a tribunal must further determine whether the evidence so submitted is credible.

In the context of a proof by inference, the requisite standard of proof still applies – but applies with regard to an extended evidentiary predicate. To the extent that a point is proved through the submission of an inference, the tribunal still must determine whether the direct evidence used as a foundation for the inference is probative and credible – *i.e.*, it must determine whether the evidence states what the party relying upon it submit it does and must further determine whether the evidence is credible.

[51] See Chapter 4 above for a discussion on Standard of Proof.

This part of a party's submission remains subject to the same standard of proof as before.

Proof by inference further requires that the tribunal make a leap that although there is no direct evidence speaking to a fact, in context, the record plausibly nevertheless requires such a finding. This contextual analysis remains subject to the same standard of proof applicable to proof by direct evidence as discussed in Chapter 4 above.

In the context of a standard of proof of preponderance, the plausibility standard against which an inference will be judged is simple: is one side's submission slightly preponderant?[52] In the context of a heightened standard of proof, the plausibility standard increases in commensurate proportion: for instance, is one side's submission clear and convincing?[53]

III. DIFFICULTY OF PROOF THROUGH DIRECT EVIDENCE IN INVESTOR-STATE ARBITRATION

It is, all things considered, preferable to prove a fact through direct evidence when doing so is possible.[54] When the record does not contain direct evidence, it becomes relevant for a tribunal in the first instance to establish why such direct evidence is absent.[55] Determining the reason for the absence of direct evidence is the first threshold question, the first step to be undertaken by a tribunal, to establish the propriety of drawing inferences.

In this context, it significant if the evidence in question is unavailable due to a general difficulty in obtaining direct evidence under the circumstances,[56] or due to the

[52] See Chapter 4, Section IV.2 for preponderence standard.

[53] See Chapter 4, Section IV.3 for the heightened standard.

[54] See *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v Republic of Kazakhstan*, ICSID Case No ARB/05/16, award (July 21, 2008), IIC 344 (2008) [444, 709] (noting that reliance upon circumstantial evidence is particularly appropriate when "direct evidence of fact is unavailable.").

[55] See ibid.

[56] See *Alpha Projektholding GmbH v Ukraine*, ICSID Case No. ARB/07/16, Award (8 November 2010), IIC 464 (2010) [373] ("The Tribunal recognizes that there is no clear documentary trail, no "smoking gun," demonstrating directly that Ukraine ordered the stop in payments. The Tribunal was not, for example, presented with any minutes of meetings of the Supervisory Board recording any such instruction. The Tribunal was informed, however, that there is no internal Ukrainian regulation requiring the recording of

fact that the party with the greatest interest in producing the evidence in question is not in fact in control of the evidence.[57] The jurisprudence of the International Court of Justice (ICJ) deemed both factors relevant in determining whether it could rely upon circumstantial evidence and inferences from circumstantial evidence in making findings of act.[58] The ICJ further distinguished such situations from instances in which it might draw adverse inferences from the non-production of evidence in its own right.[59]

The jurisprudence of investor-state tribunals by and large has followed suit. The *Rumeli v. Kazakhstan* case is illustrative.[60] Rumeli, the claimant, sought to show that the local partner to a venture colluded with the host state, Kazakhstan, to prove the factual predicate of an expropriation claim. Rumeli sought to prove collusion by reference to international reports and widely published articles to show the general lack of impartiality of the organs of respondent and collusion between powerful groups of the ruling family in Kazakhstan. The tribunal noted that "it is in the nature of such an

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decisions by such bodies"); *Tokios Tokelės v Ukraine*, ICSID Case No ARB/02/18, Award (29 June 2007), IIC 331 (2007) [14] ("For this purpose the Tribunal must in practice form an idea, necessarily based on secondary and circumstantial evidence since direct evidence is out of reach, not so much about the identity of the prime mover but about whether it was a person or group of persons whose actions were, for the purposes of the Treaty, those of the State.").

[57] See *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No ARB/05/16, Award (21 July 2008), IIC 344 (2008) [444, 709]; *Zeevi Holdings v Republic of Bulgaria*, UNCITRAL Case No UNC 39/DK, Award (25 October 2006), IIC 360 [944-5] ("As evidence for the alleged damage of USD 5 million due to outstanding unpaid vacation days, Claimant has only submitted circumstantial evidence in addition to Mr. Frank's testimony which is more general and does not provide a detailed calculation. The Tribunal accepts that, since it did not any more have access to the personnel files of the Company, it had difficulties to provide detailed proof. The Tribunal further accepts that the rebuttal evidence submitted late by Respondents by way of documents allegedly signed by Mrs. Docheva could not be put on cross-examination to that witness. . . . In view of this, even 30% of the sought after USD 2 400 000 would be high, but given the lack of objective possibility for the Claimant to prove its claim, and the evidentiary circumstances just referred to, the Tribunal considers it appropriate to make use of its discretion regarding the quantification of damages to accept that 30% of the claim raised in this respect shall be accepted, i.e. an amount of USD 720,000.00.").

[58] See *Corfu Channel Case (Merits) (U.K. v Albania)*, 1949 I.C.J. Rep. 4, 18 (9 April); Michael P. Scharf & Margaux Day, 'The International Court of Justice's Treatment of Circumstantial Evidence and Adverse Inferences,' 13 Chicago Journal of International Law 123, 131 (2012) (discussing *Corfu Channel*).

[59] Michael P. Scharf & Margaux Day, 'The International Court of Justice's Treatment of Circumstantial Evidence and Adverse Inferences', (2012)13 Chicago Journal of International Law 123, 131 ("to date, the ICJ has taken a softer approach to nonproduction than either shifting the burden of proof or making adverse findings of fact, using nonproduction instead as a license to resort liberally to circumstantial evidence where direct evidence would otherwise be preferred.").

[60] *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v Republic of Kazakhstan*, ICSID Case No ARB/05/16, Award (21 July 2008), IIC 344 (2008).

allegation that direct evidence of a conspiracy is unlikely to be available. The [t]ribunal therefore considered the evidence with particular care, reminding itself that an allegation such as this must, if it is to be supported only by circumstantial evidence, be proved by evidence which leads clearly and convincingly to the inference that a conspiracy has occurred."[61]

Relying upon "a number of documents, mostly in the form of press reports, which tend to establish that the whole country, the whole political system and the whole economy of [the host state] are controlled by [the] President . . . and his family,"[62] UN documents to the same effect,[63] as well as the beneficial ownership structure of the local partner for the investment,[64] the tribunal concluded "the material summarised above is consistent with and positively supports the Tribunal's finding that there was improper collusion between the Investment Committee and [the local partner] with regard to the decision to terminate the Contract."[65] This does not mean that general or uncorroborated statements would permit inferences.[66]

Investor-state jurisprudence has also borne out the opposite conclusion.[67] Thus, inferences will rarely be drawn when evidence, all things considered, was not difficult to obtain for the party having the burden to prove the fact in question. For instance, a tribunal may assume, as the *Metal-Tech* tribunal did, that a company would be able to

[61] ibid [709].

[62] ibid [710].

[63] ibid

[64] ibid [711].

[65] ibid [715].

[66] *Vannessa Ventures Ltd. v Bolivarian Republic of Venezuela*, ICSID Case No ARB(AF)/04/6, Award (16 January 2013), IIC 572 (2013) [228] ("Allegations of a lack of independence and impartiality are more difficult to deal with. They often amount to allegations of violations of professional rules, or even of criminal laws, and it is not to be expected that evidence will be readily available. Such allegations would, if proven, constitute very serious violations of the State's treaty obligations. But they must be properly proved; and the proof must, at least ordinarily, relate to the specific cases in which the impropriety is alleged to have occurred. Inferences of a serious and endemic lack of independence and impartiality in the judiciary, drawn from an examination of other cases or from anecdotal or circumstantial evidence, will not ordinarily suffice to prove an allegation of impropriety in a particular case.").

[67] *Europe Cement Investment & Trade SA v Turkey*, ICSID Case No. ARB(AF)/07/2, Award (13 August 2009), IIC 385 (2009)[166-7]; *Metal-Tech v Uzbekistan*, ICSID Case No ARB/10/3, Award (4 October 2013), IIC 619 (2013) [258].

account for the business reason supporting the conclusion of a seven figure consulting contract in the ordinary course – and would particularly be tempted to do so if most transactions of a similar scale in fact were supported with internal meeting minutes or memoranda.[68]

(A) *The Relationship of the Inference to Direct Record Evidence*

Once the tribunal has established that it may be able to excuse the absence of direct evidence and the evidence is plausible the next threshold question is whether the inference to be drawn has a sufficient relationship to the evidentiary record before the tribunal. This factor tests how far of an inference – how much of a leap – is required in order to determine from record evidence that another fact is proved circumstantially.[69] It

[68] *Metal-Tech v Uzbekistan*, ICSID Case No ARB/10/3, Award (4 October 2013), IIC 619 (2013) [256]: "the Tribunal made a considerable effort to ensure that it had all the relevant evidence that it needed to decide on the corruption allegations. In fact, even before the January Hearing, the Tribunal had already addressed allegations of payments made by the Claimant to Uzbek Government officials. In PO 3 of 13 December 2011, in the context of the Respondent's allegations against Mr. Ibragimov, the Tribunal directed the Claimant to conduct a "further comprehensive search" for documents evidencing payment to any official or employee of the Government since 1994 and to 'report on the actions taken in conducting the search.' In spite of the Tribunal's efforts after the January Hearing to establish the facts related to the payments about which Mr. Rosenberg had testified, the Claimant was unable to substantiate its contention that actual services had been carried out for legitimate purposes in return for those payments. The Claimant's explanations for its non-compliance with the Tribunal's directions to provide additional evidence . . . remain unconvincing."

[69] See eg *SGS Société Générale de Surveillance SA v The Republic of Paraguay*, ICSID Case no ARB/07/29, Decision on Jurisdiction (12 February 2010), IIC 525 (2010) [106] ("To the extent the question is one of development, Respondent itself characterized the services of SGS and BIVAC as constituting a "transitional measure" to be used until the State reaches the point where "national customs authorities are able to carry out these tasks on their own"—in other words, until the State's capabilities develop sufficiently. It is no great leap to see the "transitional measure" (the Contract) as facilitating and contributing to that development, based not only on technical assistance (the existence and sufficiency of which is a disputed issue between the Parties); *Waguih Elie George Siag and Clorinda Vecchi v The Arab Republic of Egypt*, ICSID Case No ARB/05/15, Award (1 June 2009), IIC 374 (2009) [350] ("it is the task of Egypt to prove that Mr Siag acquired Lebanese nationality through fraud. Even if Mr Siag's sole motivation in acquiring Lebanese nationality was to avoid military service, the Tribunal considers that it would require a large leap of logic to infer from those facts that Mr Siag would commit fraud in order to achieve that end") but also on the inspection and certification services themselves."); *International Thunderbird Gaming Corporation v Mexico*, Award (26 January 2006), IIC 136 (2006) [136] (drawing the inference that "operation of these video game machines with a built-in and modifiable random number generator involves a considerable degree of chance, and that by adjusting the payout rate, the machine operator can manipulate the odds for winning regardless of the skill of the player" from manuals stating that the pay rate "can be changed to a value within the range of 50%-95%" and testimony that "the machine's percentage of payout is not visible or otherwise known to the player"). The issue whether an inference requires too much of a leap occasionally leads to controversy. See eg *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v Bolivarian Republic of Venezuela*, ICSID Case No ARB/07/30, Dissenting Opinion of Georges Abi-Saab on Reconsideration (10 March 2014), IIC 643 (2014) [23] ("The error committed by the Majority Decision as

is my submission that the further away the inference is from the record evidence, the more tenuous the inference becomes.[70] Once the inference becomes too tenuous to satisfy the requisite standard of proof, it would be inappropriate without more to draw an inference from the record.[71] In such circumstances of a tenuous inference, it may be possible to rely upon other modes of proof outlined above further to support the inference.

A helpful tool to determine the relative distance of the inference from evidentiary record is to determine what other reasonable inferences also could be drawn from the record and the support in the form of trade,[72] scholarly,[73] or international organizational literature for the probable correlation between the inference to be drawn and the evidentiary predicate present in the case.[74]

Two cases are illustrative in this regard. In *World Duty Free v. Kenya*,[75] the respondent, sought to show that the claimant's representative paid a bribe to the former President of Kenya in order to obtain approval for a project. The parties agreed that a representative of the claimant made a significant payment to Kenya's President by leaving a briefcase containing a large amount of money unattended during a presidential meeting and retrieving the briefcase only when he noted that the money

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described above, was easily detectable from the record at the disposal of the Tribunal at the time that Decision was issued. It confounds the third step covered by the leap of faith of the Majority Decision i.e. denying any significance and effect to the Confidentiality agreement").

[70] See *Lao Holdings N.V. v Lao People's Democratic Republic*, ICSID Case No ARB(AF)/12/6, Decision on Provisional Measures (12 May 2014), IIC 646 (2014) [62] (treating an inference that is at a significant remove from the evidence upon which it is based is tenuous); *Libananco Holdings Co Ltd. v Republic of Turkey*, ICSID Case No ARB/06/8, Award (31 August 2011), IIC 506 (2011) [525.1].

[71] See *Waguih Elie George Siag and Clorinda Vecchi v The Arab Republic of Egypt*, ICSID Case No ARB/05/15, Award (1 June 2009), IIC 374 (2009) [350].

[72] See *Ceskoslovenska Obchodni Banka AS v The Slovak Republic*, ICSID Case No ARB/97/4, Award (29 December 2004), IIC 51 (2004) [282] (noting that CSOB had failed to submit convincing evidence of a common business practice that otherwise could have been used to draw an inference in CSOB's favor); *BRIDAS SAPIC v Turkmenistan*, ICC Case No 9058/FMS/KGA, Partial Award And Dissent (24 June 1999), IIC 35 (1999), footnote 13 (relying for an inference on "relevant trade usage").

[73] On the drawing of inferences from scientific evidence, see generally *Methanex Corporation v United States of America*, Award (19 August 2005), IIC 167 (2005), passim.

[74] See *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v Republic of Kazakhstan*, ICSID Case No ARB/05/16, Award (21 July 2008), IIC 344 (2008) [709].

[75] *World Duty Free Company Limited v Kenya*, ICSID Case No ARB/00/7, Award (4 October 2006), IIC 277 (2006).

had been removed from the briefcase. Kenya requested the inference that the payment is a bribe. The investor submitted that the payment is a "gift of protocol or a personal donation to the President to be used for public purposes within the framework" of host state custom.[76] Based upon the sizeable payment made, and the manner in which the payment was made, the tribunal drew the inference that the payment was a bribe.[77] As the tribunal concluded:

> Under these circumstances, such as described by Mr. Ali himself, the Tribunal has no doubt that the concealed payments made by Mr. Ali on behalf of the House of Perfume to President Moi and Mr. Sajjad could not be considered as a personal donation for public purposes. Those payments were made not only in order to obtain an audience with President Moi (as submitted by the Claimant), but above all to obtain during that audience the agreement of the President on the contemplated investment. The Tribunal considers that those payments must be regarded as a bribe made in order to obtain the conclusion of the 1989 Agreement.[78]

Another illustrative case is *Al-Bahloul v. Tajikistan*.[79] Al Bahloul, the claimant, sought to show that an area in question in the arbitration contained proven hydrocarbon reserves by relying upon exploration expenditures of approximately US$ 500 million by a major regional oil and gas company. The tribunal refused to draw an inference as to the existence of proven reserves on this basis. It noted that "the decision to explore an oil field is not based on the Probability of Success, but is also dependent on the reserves hoped for . . ." The inference thus was defeated by the existence of another, equally or more plausible explanation of the circumstantial evidence relied upon by claimant.[80]

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[76] ibid [133].

[77] ibid [136].

[78] ibid.

[79] *Mohammad Ammar Al-Bahloul v The Republic of Tajikistan*, SCC Case No 064/2008, Award (8 June 2010), IIC 475 (2010).

[80] ibid [89].

(B) *The Quality and Quantity of Direct Evidence Supporting the Inference*

Another relevant factor in determining whether an inference should be drawn is the strength of the direct evidence upon which an inference would be based. As an inference extends the direct evidence submitted beyond its facial scope to make a factual conclusion that another event plausibly also occurred, a tribunal should only do so to the extent that it is satisfied that the direct evidence itself is sufficiently probative in its own right.[81] Thus, even the most reasonable inference may be defeated if the evidence upon which the inference would be based were deemed not credible by the tribunal.[82] This assessment of the quality of the direct evidence supporting the inference follows the general principles of examination of evidence otherwise used by the tribunal.[83]

A further factor relevant to support an inference is the quantity of direct evidence supporting it. Investor-state tribunals frequently seek to rely on more than one source of direct evidence to support an inference.[84] The quantity of pieces of direct evidence that a party can submit in support of the proposed inference thus can have significant bearing upon whether the inference is in fact drawn. The absence of a significant number of pieces of evidence supporting the same inference does not of itself defeat an inference. Rather, the absence of multiple pieces of direct evidence supporting an inference affects the manner in which a tribunal will weigh the other factors relevant to its drawing of an inference.

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[81] See *Waguih Elie George Siag and Clorinda Vecchi v The Arab Republic of Egypt*, ICSID Case No ARB/05/15, Award (1 June 2009), IIC 374 (2009) [211-215].

[82] *Europe Cement Investment & Trade SA v Turkey*, ICSID Case No ARB(AF)/07/2, Award (11 August 2009), IIC 385 (2009) [158].

[83] See *Marvin Roy Feldman Karpa v United Mexican States*, ICSID Case No ARB(AF)/99/1, Award (12 December 2002), IIC 157 (2002) [131] (determining how to deal with a he-said-he-said situation of contradictory direct evidence); *Middle East Cement Shipping and Handling Co. SA v Arab Republic of Egypt*, ICSID Case No ARB/99/6, Award (12 April 2002), IIC 169 (2002) [94]; *Tradex Hellas SA v Republic of Albania*, ICSID Case No ARB/92/2, Award (29 April 1999), IIC 263 (1999) [84]; *Asian Agricultural Products Ltd. v Republic of Sri Lanka*, ICSID Case No ARB/87/3, Award (27 June 1990) [56].

[84] See *Fireman's Fund Insurance Company v The United Mexican States*, ICSID Case No ARB(AF)/02/01, Award (14 July 2006), IIC 291 (2006) [213]; *International Thunderbird Gaming Corporation v Mexico*, Award (26 January 2006), IIC 136 (2006) [136]; *Rompetrol Group NV v Romania*, ICSID Case No ARB/06/3, Award (6 May 2013), IIC 591 (2013) [224] (noting that testimonial evidence required further external corroboration due to questions of credibility).

The significance of an inference for a party's ability to discharge meet the standard of proof will also be relevant.[85] There is no rule prohibiting the proof of a case entirely by circumstantial evidence;[86] but the larger the role of circumstantial evidence in the case, the greater the scrutiny whether the circumstantial evidence is sufficient to hold the weight the party carrying the burden places upon it.[87]

The *Quasar v. Russia* case is illustrative.[88] In that case, the claimant alleged, that respondent imposed taxation upon the investment as a means of political retaliation to destroy the investment. Claimant submitted direct evidence that Respondent previously had audited company taxes and issued certificates of tax compliance. Claimant further submitted that the Russian Federation had been paid a substantial amount of the taxes which even respondent admitted to be grossly disproportionate to the remaining tax liability. Respondent submitted that company in fact failed to file appropriate tax returns and understated its tax liability for the period in question. The tribunal inferred that confiscatory intent and bad faith central to claimant's claim.[89]

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[85] Aloysius P. Llamzon (n 8) 230-1 (noting the cautious embrace of proof by circumstantial evidence in the corruption context).

[86] See Chapter 4, Section VIII above for a discussion on circumstantial evidence. See also *Rompetrol Group NV v Romania*, ICSID Case No ARB/06/3, Award (6 May 2013), IIC 591 (2013) [182] ("The guidance which the Tribunal draws from the cases is that there may well be situations in which, given the nature of an allegation of wrongful (in the widest sense) conduct, and in the light of the position of the person concerned, an adjudicator would be reluctant to find the allegation proved in the absence of a sufficient weight of positive evidence — as opposed to pure probabilities or circumstantial inferences. But the particular circumstances would be determinative, and in the Tribunal's view defy codification. The matter is best summed up in general and non-prescriptive terms by Judge Higgins, 'the graver the charge the more confidence must there be in the evidence relied on'.").

[87] ibid.

[88] *Quasar de Valores SICA SA v Russian Federation*, SCC Case No 24/2007, Award (20 July 2012), IIC 557 (2012).

[89] ibid [175] ("The Respondent may have marshalled arguments since then as to why Yukos was not as solid as is contended by its old owners, but what is missing — and thus supports the plain inference that the Respondent's objective was the subjugation of Yukos, not the orderly collection of normal taxes — is its inability to show such an investigation preceding its decision, in effect, to dismantle Yukos. Indeed, as the Claimants stress, Yukos had almost entirely paid off the 2000 tax assessment, i.e. the raison d'être of the seizure in the first place, by the time YNG was auctioned off. The valuation commissioned by the Respondent itself suggested that YNG was worth many multiples of the Yukos assessment on account of TY2000.").

IV. CIRCUMSTANCES SIGNIFICANT IN REBUTTING THE DRAWING OF RECORD INFERENCES

There are two ways in which a party can seek to rebut the drawing of record inferences. First, a party may wish to contest solely the evidentiary case of the other party. It can do so by positing that there is no direct evidence to prove the point in question.[90] Alternatively, it could submit that the link between the direct evidence and the inference to be drawn is too tenuous.[91] Further, it could attack the probative weight of the direct evidence in support of the inference. In combination, it frequently would submit that there are too few pieces of direct evidence to warrant an inference.[92] Finally, it would submit that the inference is too significant for the case to be warranted and that the drawing of the inferences in question would effectively reverse burdens of proof.[93] This strategy essentially only tests the sufficiency of the submission of the party seeking an inference and, thus adds only analysis, not more evidence.

For example, in *Brandes v. Venezuela*, the claimant argued that Venezuela consented to arbitration by means of a domestic investment law that on its face is ambiguously worded. Brandes submitted contemporaneous evidence that the investment law was intended to take the place of a bilateral investment treaty and that

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[90] See *Bayindir Insaat Turizm Ticaret ve Sanayi A Ş v Islamic Republic of Pakistan*, ICSID Case No ARB/03/29, Award (27 August 2009), IIC 387 (2009) [238-9].

[91] See *Waguih Elie George Siag and Clorinda Vecchi v The Arab Republic of Egypt*, ICSID Case No ARB/05/15, Award (1 June 2009), IIC 374 (2009) [352] ("While the Tribunal accepts that US$5,000 may be a large amount of money in Egypt, it is not convinced that it is so large a sum when it is taken into account that Mr Khouly's travel and accommodation costs were included. 439 In any event the payment made to Mr Khouly was certainly not so great as to justify the inference that it would only have been paid in consideration of fraudulent activity. The suggested inference that this payment evidences fraud is rejected"); *Railroad Development Corporation v Republic of Guatemala*, ICSID Case No ARB/07/23, Decision on Provisional Measures (15 October 2008), IIC 352 (2008) [23] (Respondent arguing that the newspaper reports submitted by the claimant with the exception of one report concerned the actions of an earlier government irrelevant to the current head of claim); *Tokios Tokelés v Ukraine*, ICSID Case No ARB/02/18, Award (26 July 2007), IIC 331 (2007) [31] ("This is a question of inference, requiring a choice between two fundamentally different narratives. One, presented by the Claimant, describes the interaction between Taki spravy, its officers and the STA. The other views the history in the context of investigations carried on by State agencies at and around the time in question, and whilst not directly challenging the Claimant's bare recital of events, treats it as incomplete and potentially misleading."); *Inmaris Perestroika Sailing Maritime Services GmbH v Ukraine*, ICSID Case No ARB/08/8, Decision on Jurisdiction (8 March 2010), IIC 431 (2010) [74].

[92] *Opic Karimum Corporation v Bolivarian Republic of Venezuela*, ICSID Case No ARB/l0/14, Award (28 May 2013), IIC 618 (2013) [125, 146].

[93] ibid.

persons associated with the drafting of the law considered that the law should contain a standing consent to arbitration. Respondent did not submit any direct evidence of contrary intent but instead attacked the credibility of Brandes' evidence and the plausibility of the inference sought by Brandes. The tribunal agreed with the Venezuela that Brandes failed to submit sufficient evidence to permit the inference that Respondent intended to consent to international arbitration by means of its investment law.[94] The Respondent, therefore, rebutted the inference that Claimant was seeking.

Second, a party seeking to rebut an inference can also submit additional evidence that would call into question the inference requested by the other party. This evidence could either be direct, such as a document or testimony that directly speaks to the ultimate fact to be proved. This evidence further could support the drawing of alternative inferences from the record more favorable to the party seeking to rebut the inference. In this second case, it is important that a tribunal does not of necessity have to determine that the alternative inference is warranted – just that the inference requested by the party assigned the burden with regard to the fact to be proved has not sufficiently accounted for the alternative explanations provided by the other side. A tribunal can only choose this second route if it cannot otherwise determine which of the inferences to be drawn is plausible, *i.e.*, more reasonable than the others. If a tribunal can exclude the inferences suggested by the rebutting party as less plausible than the inference proposed by the party requesting an inference, the tribunal is bound by the logic of its own conclusions.

This is borne out in investor-state arbitration. For example, in *Feldman v. Mexico*, the investor asserted by means of direct testimony that its preferred manner to calculate rebates was expressly approved by the government. Mexico pointed out that the direct testimony is implausible because of the violation of existing statutory provisions this method would otherwise entail. Mexico further submitted direct testimonial evidence contradicting the claimant's witness. The tribunal agreed with the Respondent and refused to draw any inferences as requested by Claimant. In other words, the evidence

[94] *Brandes Investment Partners, LP v The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/3, Award (2 August 2011) [79-118].

was rebutted by Respondent.[95] In such an instance, it was not plausible to draw an inference in the light of the express statutory provision.

V. INFERENCES ARISING FROM THE MISCONDUCT OF THE PARTIES IN ADDUCING EVIDENCE (E.G., FAILURE TO PRODUCE DOCUMENTS) IN ARBITRAL PROCEEDINGS

As recognized in jurisprudence, investor-state tribunals are empowered to draw adverse inferences premised upon party misconduct in the arbitration such as spoliation of evidence.[96] For instance, a tribunal may make a finding that a party failed reasonably to preserve documents, also known as a finding of spoliation of evidence.[97] If a tribunal makes a finding of spoliation, it is the party's misconduct of failing to preserve documents that lends plausibility to an inference requested by the other party of what the documents would have contained. If a tribunal draws such an inference, it does not

[95] *Marvin Roy Feldman Karpa v United Mexican States*, ICSID Case No ARB(AF)/99/1, Award (12 December 2002), IIC 157 (2002) [131].

[96] See eg *Yukos Universal Ltd. v Russia*, PCA Case No. AA/227, Award (18 July 2014), IIC 652 (2014) [51]; *Poštová banka, a.s. and ISTROKAPITAL SE v Hellenic Republic* ICSID Case No Arb/13/8, Procedural Order (22 January 2014), IIC 631 (2014) [15.3]; *Metal-Tech Ltd. v Uzbekistan*, ICSID Case No ARB/10/3, Award (4 October 2013), IIC 619 (2013) [245]; *Mesa power Group LLC v Canada*, PCA Case No. 2012-17, Procedural Order (23 August 2013), IIC 611 (2013) [29]; *Opic Karimum Corp. v Venezuela*, ICSID Case No ARB/10/14, Award (28 May 2013), IIC 618 (2013) [145]; *Rompetrol Group NV v Romania*, ICSID Case No ARB/06/3, Award (6 May 2013), IIC 591 (2013) [181]; *Caratube International Oil Co. v Kazakhstan*, ICSID Case No ARB/08/12, Award (5 June 2012), IIC 562 (2012) [47]; *Deutsche Bank AG v Sri Lanka*, ICSID Case No ARB/09/02, Award (21 October 2012), IIC 578 (2012) [111]; *Liman Caspian Oil BV v Kazakhstan*, ICSID Case No ARB/07/14, Award (22 June 2010), IIC 590 (2010) [26.4]; *Glamis Gold, Ltd. v The United States of America*, UNCITRAL, Award (14 May 2009), IIC 380 (2009) [253-5]; *Rumeli Telekom AS v Kazakhstan*, ICSID Case No ARB/05/16, Award (21 July 2008), IIC 344 (2008) [444]; *Libananco Holdings Co. Ltd. v Turkey*, ICSID Case No ARB/06/8, Preliminary Decision (23 June 23 2008), IIC 327 (2008) [72-82]; *Fraport AG Frankfurt Airport Services Worldwide v Philippines*, ICSID Case No ARB/03/25, Award (16 August 2007), IIC 299 (2007) [47]; *Yury Bogdanov v Republic of Moldova*, Award (22 September 2005), IIC 33 (2005) [60-1]; *United Parcel Service of America, Inc. v Canada*, Procedural Order (8 October 2004), IIC 267 (2004) [15]; *Feldman v Mexico*, ICSID Case ARB(AF)/99/1, Award (16 December 2002), IIC 257 (2002) [178]. For a discussion of the principle in the secondary literature, see Durward Sandifer, *Evidence Before International Tribunals* (University Press of Virginia 1975) 147; Chittharanjan Amerasinghe, *Evidence in International Litigation* (Brill 2005), 247-8; Aloysius P. Llamzon (n 8) 231; Christoph Schreuer *et al*, *The ICSID Convention: A Commentary* (Cambridge University Press 2009) 657.

[97] For a discussion of spoliation in the arbitration context, see Steven Hammond, 'Spoliation in International Arbitration: Is It Time to Reconsider the 'Dirty Wars' of the International Arbitral Process?', Dispute Resolution International (Vol. 3(1) 2009) 5; Peter Ashford, *Document Production in International Arbitration*, 10 Loyola University Chicago International Law Review (2012) 1, 9. See also *Lao Holdings NV v Lao People's Democratic Republic*, ICSID Case No ARB(AF)/12/6, Decision on Provisional Measures (12 May 2014), IIC 646 (2014) [70].

look to the arbitration record but to arbitration conduct. This is the second prong of my argument.

In determining whether an inference is made plausible by the conduct of one of the parties in the arbitral proceedings, the following circumstances are significant: (i) the severity of the party's misconduct in the arbitral proceedings, (ii) the relationship between the misconduct and the fact to be proved by means of an inference, (iii) the procedural good faith of the party seeking the inference, (iv) the plausibility of drawing the same inference from the record absent consideration of party misconduct, and (v) the overall significance of the inference requested.

(A) *Good Faith in Investor-State Arbitration*

Arbitral tribunals lack general contempt powers.[98] Tribunals, therefore, are not able to compel the good faith participation of all parties to the arbitral proceedings (barring a cost order), even though good faith is presumed in evidentiary matters.[99] In light of the applicable burden and standards of proof, it may therefore be tempting for arbitration parties to conduct in arbitral proceedings in less than good faith. These parties would then plead the burden and standard of proof as a bar to a claim or affirmative defence all the while depriving its counterparty of the ability to submit sufficient evidence to make out the claim or affirmative defence.[100] If arbitral tribunals rewarded such conduct, parties would be further incentivized to participate in arbitral proceedings in less than good faith.[101] The arbitral process would have an implicit but necessary bias in favour

[98] See Blackaby *et al*, *Redfern and Hunder on International Arbitration* (Oxford University Press 2015) 311.

[99] See Durward Sandifer (n 1) 147. The IBA Rules on the Taking of Evidence also envision that the parties act in good faith. See eg Preamble, ¶ 3 ("The taking of evidence shall be conducted on the principles that each Party shall act in good faith and be entitled to know, reasonably in advance of any Evidentiary Hearing or any fact or merits determination, the evidence on which the other Parties rely."), Article 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.").

[100] See *Rompetrol Group NV v Romania*, ICSID Case No ARB/06/3, Award (6 May 2013), IIC 591 (2013) [181] (rejecting such a strategy).

[101] See ibid; see also Durward Sandifer (n 1) 147.

of the party who could invoke a burden of proof in its defence.[102] Such a state of affairs would significantly erode the authority of arbitral decision because participants would expect the decisions to be less than fair, manipulated, and one-sided. To incentivize good faith party participation – and thus the integrity and authority of the arbitral decision-making process – it is thus necessary for the tribunal to have recourse to party conduct immediately affecting the integrity of the arbitral record as an independent means of proof in the drawing of inferences.[103]

(B) *Severity of Procedural Bad Faith and its Relationship to the Facts to be Proved*

Although litigants habitually request the drawing of adverse inferences, tribunals do not use this procedural tool lightly.[104] Rather, the use of adverse inferences typically follows upon particularly serious procedural misconduct by one of the parties.

The typical context for a request for adverse inferences arises when one party submits that the document disclosures made by the other party as part of the arbitral proceedings are insufficient.[105] One manner in which this can occur is a blanket denial that documents responsive to a document disclosure request exist without conduct a good faith search for the document.[106] Further, a party may repeatedly deny the

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[102] For further discussion, see Chapter 2 discussing the burden of proof.

[103] See Christoph Schreuer *et al*, (n 1) 657.

[104] See eg *Clayton v Canada*, PCA Case No 2009-04, Decision on Jurisdiction and Liability (17 March 2015), IIC 688 (2015) [118] ("the Tribunal is confident that it was put in a position where it was able to reach an informed determination of the facts, without the need to have recourse (as the Parties' have invited the Tribunal to do) to the drawing of adverse inferences."); *Opic Karimum Corp. v Bolivarian Republic of Venezuela*, ICSID Case No ARB/10/14, Award (28 May 2013), IIC 618 (2013) [145-6] (rejecting use of adverse inferences to support ultimate jurisdictional finding of consent); *Plama Consortium Ltd. v Bulgaria*, ICSID Case No ARB/03/24, Decision on Jurisdiction (8 February 2005), IIC 189 (2005) [178] (sidestepping the issue of inferences by joining the issue of legal ownership and control to the merits). See also Christoph Schreuer *et al*, (n 1) 657 (noting that "In a number of cases, tribunals have indicated that they would draw adverse inferences from a party's failure to supply documents" without providing an example in which a tribunal actually drew an adverse inference premised upon party misconduct); Aloysius P. Llamzon (n 8) 231-2 (citing *Metal-Tech* as the paradigmatic example of a case in which the threat of adverse inferences proved fruitful).

[105] See references as cited in n 96 above.

[106] This is what Opic Karimum asserted in the context of its assertion that Article 22 of the Venezuelan Investment Law constitutes a consent to ICSID arbitration. The issue related to documents from Mr. Capriles who Claimant alleged had drafted Venezuela's Investment Law and therefore Claimant sought those documents to see whether he intended the statute to provide for international arbitration. See *Opic Karimum Corp. v Venezuela*, ICSID Case No ARB/10/14, Award (28 May 2013), IIC 618 (2013) [135,

existence of a document only later to make public responsive documents in a different context.[107] Precisely because adverse inferences are routinely requested, tribunals reserve the use of this device for cases in which repeated violations of disclosure obligations can be proved,[108] or for cases in which the tribunal has made clear the importance of the specific documents in question for instance by threatening the use of adverse inferences should incomplete disclosures with regard to a certain point be proved.[109]

Relatedly, if it can be proved that evidence disclosed or relied upon by one of the parties were forged or otherwise falsified, tribunals may be asked to draw adverse inferences.[110] As the step of forging or falsifying evidence requires some form of action

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145] ("By this Order the Tribunal noted that the Respondent asserted that it did not have the requested documents in its possession custody or control, and directed the Respondent to produce them or provide a statement in writing to confirm that, after a thorough and careful search for the documents, it had ascertained that they were not in its possession, custody or control. The Tribunal also offered the Respondent an opportunity to make submissions on privilege, to the extent necessary. In its response to Procedural Order No. 1, the Respondent advised that, after a thorough and careful search, the documents requested had not been found and that any question of privilege was moot. The Claimant has subsequently asserted that the Respondent's failure to produce the requested documents should lead the Tribunal to draw adverse inferences against the Respondent, in relation to the matters that would be addressed in the requested documents. [. . .] The Tribunal considers that the explanations offered by counsel for the Respondent as to Venezuela's failure to follow up the production of Mr. Capriles' files are less than fully convincing."). The tribunal did not, however, find in the investor's favor ultimately because it was unable to establish Respondent's consent to arbitration in a clear and convincing manner.

[107] *Pope & Talbot Inc. v Canada*, Award on Costs (26 November 2002), IIC 196 (2002) [13] ("One other matter of concern to the Tribunal is that Canada, despite requests by the Investor and by the Tribunal, did not produce any Travaux Preparatoires in relation to the relevant Articles of NAFTA, in particular 1105, until virtually the end of the arbitration, having previously asserted they did not exist.").

[108] *Metal-Tech Ltd. v Uzbekistan*, ICSID Case No ARB/10/3, Award (4 October 2013), IIC 619 (2013) [245-266]. For a discussion of the importance of the availability of adverse inference for the tribunal's decisionmaking in *Metal-Tech*, see Aloysius P. Llamzon (n 8) 231.

[109] *Fraport AG Frankfurt Airport Services Worldwide v Philippines*, ICSID Case No ARB/03/25, Award (16 August 2007), IIC 299 (2007) [47]. For a discussion of the importance of the availability of adverse inference in for the tribunal's decisionmaking in *Fraport*, see Christoph Schreuer *et al*, *The ICSID Convention: A Commentary* (Cambridge University Press 2009), 657.

[110] See *Europe Cement Investment & Trade SA v Turkey*, ICSID Case No ARB(AF)/07/2, Award (11 August 2009), IIC 385 (2009) [141-3] (addressing claims that copies of shareholder certificates submitted to the tribunal were not authentic); see also *Gemplus SA v Mexico*, ICSID Case No. ARB(AF)/04/3, Award (16 June 2010), IIC 488 (2010), [4-142] (refusing to draw an adverse inference because a witness testimony relied upon recollection that was incorrect because the tribunal deemed the witness to be honest); *Plama Consortium Ltd. v Bulgaria*, ICSID Case No ARB/03/24, Decision on Jurisdiction (8 February 2005), IIC 189 (2005) [178] (holding that "the fact remains that Mr. Vautrin testified under cross-examination before the Tribunal at the September hearing; his testimony remained unequivocal on the relevant issues; and on the existing materials, the Tribunal would not wish to reject his evidence as false at this stage of the proceedings). But see *Libananco Holdings Co Ltd. v Turkey*, ICSID Case No

(as opposed to an omission to disclose), tribunals are typically more willing to consider forgery or fraud in the proceedings to be severe even if it is not repeated.[111]

Other context for a request for inferences includes the use of surveillance technology to undermine the attorney-client privilege.[112] The use of any means affirmatively to gain an unfair advantage in arbitral proceedings likely going to be met by tribunal rebuke.[113]

The procedural bad faith must be closely related to the fact to be proved. Adverse inferences are not available to issue a form of default judgment against one of the parties. Thus, the inference lies only to the extent that it is plausibly the case that a fact would have been proved but for the procedural misconduct of the party to be charged with an adverse inference. The more immediate the link between the misconduct and the fact to be proved, the more likely the adverse inference.

The *Rumeli v. Kazakhstan* case is on point. Here, Kazakhstan submitted that parties affiliated with the claimants have been indicted for fraudulent activity in the United States. Without more, there was not a sufficient link to conclude that the claimant similarly engaged in criminal activity in the territory of the Respondent and, therefore, no such inference could be drawn.[114]

ARB/06/8, Award (2 September 2011), IIC 506 (2011) [414.4] (ruling against the claimant on a critical issue in the case because it did "not find this explanation [by a witness of his witness testimony relating to having been on a direct flight] persuasive and is likewise unable to accept" his testimony.) For a discussion of the *Libananco* decision, see Frédéric Gilles Sourgens, *A Nascent Common Law* (Brill Nijhoff 2015) 173-4.

[111] See *Europe Cement Investment & Trade SA v Turkey*, ICSID Case No ARB(AF)/07/2, Award (11 August 2009), IIC 385 (2009) [141-3].

[112] *Libananco Holdings Co. Ltd. v Turkey*, ICSID Case No ARB/06/8, preliminary decision (June 23, 2008), IIC 327 (2008) [79].

[113] ibid.

[114] See *Rumeli Telekom AS v Kazakhstan*, ICSID Case No. ARB/05/16, Decision on Annulment (25 March 2010), IIC 420 (2010) [96-7]. The case did not involve a request for an adverse inference. Rather, the question arose whether the evidence of a relevant third court judgment involving one of the parties to the transaction of its own implies criminal conduct relevant to the treaty claim.

(C) *The Importance of Procedural Clean Hands of the Party Seeking an Inference*

Parties seeking an adverse inference for procedural misconduct of its opponents must come to the tribunal with reasonable clean hands.[115] The ability of the tribunal to draw inferences due to procedural misconduct protects the good faith cooperation of the parties in the arbitral proceedings.[116] A party seeking to receive the benefit of such an inference therefore must meet the basic requirements of any action sounding in good faith at general international law (albeit applied to the process of arbitration as opposed to the conduct giving rise to the arbitration in the first place). One element for relief sounding in good faith in general international law is the clean hands of the party seeking the relief.[117] In the context of a showing of procedural bad faith of the party seeking the inference, a tribunal is likely to leave the parties where they lie as opposed to giving aid or relief to either of them by drawing any inferences premised upon arbitration conduct.[118]

An illustration from Bin Cheng's classical treatise has been modified to explain this point.[119] A claimant requests internal government documents to show that criminal

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[115] Notably, the tribunal in *Fraport* did not draw adverse inferences against Fraport with regard to the late production of documents despite indicating that it might to do so. *Fraport AG Frankfurt Airport Services Worldwide v Philippines*, ICSID Case No ARB/03/25, Award (16 August 2007), IIC 299 (2007) [47]; Christoph Schreuer *et al*, *The ICSID Convention: A Commentary* (Cambridge University Press 2009) 657. The tribunal's decision stands in the context of the following statement by the tribunal about the proceedings: "this has been a bitterly fought case since the constitution of the Tribunal on 11 February 2004. The mere fact that, more than 14 months after the end of the oral hearing on jurisdiction and liability, the parties were still exchanging letters and submitting reports and documents to the Tribunal attests to the unusual nature of the present arbitration and explains why the Tribunal's decision has only been made now." *Fraport AG Frankfurt Airport Services Worldwide v Philippines*, ICSID Case No. ARB/03/25, Award (16 August 2007), IIC 299 (2007) [75].

[116] See Durward Sandifer (n 1) 147; Christoph Schreuer et al (n 1) 656.

[117] See Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge University Press, 2006) 129 ("the principle of good faith governing the exercise of rights, sometimes called the theory of abuse of rights, while protecting the legitimate interests of the owner of the right, imposes such limitations upon the rights as will render its exercise compatible with that party's treaty obligations, or, in other words, with the legitimate interests of the other contracting party.").

[118] See Aloysius P. Llamzon (n 8) 215-6 (discussing the principle of clean hands in the context of international law good faith principles); *Niko Resources (Bangladesh) Ltd. v People's Democratic Republic of Bangladesh*, ICSID Case No ARB/10/11, Decision on Jurisdiction (19 August 2013), IIC 603 (2013) [483] (noting the importance of reciprocity in the context of the international application of the clean hands doctrine).

[119] See Bin Cheng, General Principles of Law as Applied by International Courts and Tribunals (Cambridge University Press 2006) 121-136.

prosecutions commenced in country were premised upon political directions to harangue the investor rather than reasonable suspicion of wrongdoing. Respondent requests documents to show that the claimant in fact acted in conscious disregard of the foreign investment regime. Both claimant and respondent object to the respective disclosure requests. The tribunal orders production of documents responsive to both sets of requests, having rejected the objection raised by the respective other party. Both claimant and respondent refuse to produce responsive documents. All else being equal, neither is likely to be successful in seeking an adverse inference premised upon non-production of the documents.

(D) *The Relationship of Inferences Arising from Party Misconduct and Inferences Arising from the Record*

Parties frequently argue *both* that the tribunal can infer a fact from the record and on the basis of the conduct of its opponent in the arbitration.[120] Tribunals typically will refrain from drawing adverse inferences from arbitration conduct to the extent that it is possible to draw the same conclusion by reference to a record inference.[121] A conclusion would thus only be drawn in one of two circumstances in which such record inferences were not available. *First*, an adverse inference would be necessary if the same conclusion could not reasonably be drawn on the basis of the arbitration record, in the sense that there is an insufficient predicate to support the proposed inference on its

[120] See eg *Yukos Universal Ltd. v Russia*, PCA Case No. AA/227, Award (18 July 2014), IIC 652 (2014) [250, 982] (asking for adverse and record inferences relating to the status of Baikal Finance Group as a "dummy" and "mask for Russian State interests"); *Metal-Tech Ltd. v Uzbekistan*, ICSID Case No ARB/10/3, Award (4 October 2013), IIC 619 (2013) [229, 265] (combining the use of adverse and record inferences relating to corruption allegations); *Opic Karimum Corp. v Bolivarian Republic of Venezuela*, ICSID Case No ARB/10/14, Award (28 May 2013), IIC 618 (2013) [145] (combining the use of adverse and record inferences).

[121] See Robert Kolb, *The Elgar Companion to the International Court of Justice* (Edward Elgar 2014) 246 ("In the Corfu Channel case (1949), the Court allowed recourse to indirect evidence for same reason: the United Kingdom could not secure sufficient evidence because the relevant facts were within the territorial sphere of Albania, to which it had no access) Note that the drawing of adverse inference as such premised upon the non-production of evidence by Albania would have been complicated by the United Kingdom's own refusal to produce evidence on the basis of naval secrecy despite clear requests by the International Court of Justice for the evidence in question. See W. Michael Reisman, *The Quest for World Order and Human Dignity in the Twenty-First Century: Constitutive Process and Individual Commitment* (Hague Academy of International Law 2012) 455-8.

face.[122] Such adverse inferences are extreme precisely because they tend to reverse established burdens of proof – and in some instances punish a party for failing to prove a negative.[123] Such pure adverse inferences having no other reasonable record support apart from party speculation therefore are exceedingly rare.[124]

Second, a tribunal logically would have to resort to an adverse inference if it considered that there was reasonable record support for an inference but that, based only upon the record as whole, this inference was not plausible. In such a case, party misconduct in the arbitration would be a factor considered in the drawing of an inference – but it would not be the only factor. Such consideration of arbitration conduct alongside record evidence in the making of plausibility determinations is regularly reflected in arbitral decision-making – even if it is hard to prove with certainty what role arbitration conduct ultimately played in the tribunal's decision-making.[125]

In either instance, adverse inferences should only be drawn to the extent that the procedural bad faith is commensurate to the evidentiary gap it is meant to fill.[126] The

[122] This problem could arise in the corruption context, if there no information on the record other than that the claimant employed unnamed consultants in the run up to the acquisition of an investment. In such a context, on the record as it stood, there would be no evidence to support that the funds were used as a bribe or in an otherwise corrupt manner. See Aloysius P. Llamzon (n 8) 230 (discussing the notion of burden-shifting as a proposed means to address corruption allegations in just such a context thus institutionalizing the most extreme form of adverse inference).

[123] See ibid.

[124] *Caratube v Kazakhstan* is one case, in which such an adverse inference arguably was drawn. *Caratube International Oil Co. LLP v Kazakhstan*, ICSID Case No ARB/08/12, Award (5 June 2012), IIC 562 (2012). The relevant issue was whether Mr. Hourani, the owner of 92% in the company, in fact controlled the company. ibid, [396]. Having expressly rejected the factual theory of the respondent as to who in fact controlled the Claimant, the tribunal nevertheless ruled in the apparent complete absence of evidence that Mr. Hourani in fact did not control the claimant due to his failure to produce evidence. ibid [462, 468].

[125] Robert Kolb, *The Elgar Companion to the International Court of Justice* (Edward Elgar 2014) 246 ("This practice shows the ratio inherent in the rules relating to proving negative facts applies more generally to cases where the actor faces particular problems in establishing the evidence, provided such problems are beyond its reach and no fault is imputable to the actor. The point is that the true position of the parties must be considered in order not to impose undue hardship, and ultimately injustice.").

[126] See Michelle T. Grando, *Evidence, Proof, and Fact-Finding in WTO Dispute Settlement* (Oxford University Press 2009) 268 (in drawing an adverse inference, a "panel must give adequate consideration to the evidence which is (or is not) on the record.").

more implausible the record inference, the more egregious the arbitral misconduct must be nevertheless to justify an adverse inference to stand in its stead.[127]

(E) *The significance of such adverse interference*

The significance of an adverse inference is similarly relevant. An inference could be drawn as to a single element of proof.[128] An inference also might be required for more than one or even all elements of a cause of action or affirmative defence.[129] The more significant the inference in replacing affirmative proof of a cause of action or affirmative defence, the graver misconduct must be to support it.[130]

Jurisprudence shows that tribunals are reasonably reluctant to draw adverse inferences outright. In the context of adverse inferences that would dispose of the case in its entirety tribunals are particularly reluctant to do so. The approach of *Europe Cement v. Turkey* referenced above in this Chapter is particularly instructive in this regard.[131] The claimant originally submitted copies of share certificates to prove its ownership of the relevant investment.[132] Turkey objected that the claimant lacked authentic share certificates with regard to the shareholdings upon which the claimant had initiated its claim.[133] The tribunal ordered production of the original share

[127] ibid.

[128] See ibid 268-9 ("Moreover, where the inference which can be drawn from non-production is one of the links in a chain of auxiliary propositions leading to proof of a claim, the other auxiliary propositions of the chain must be supported by evidence. For example, in *Korea-Commercial Vessels*, the panel refused to draw an inference from the failure of Korea to provide information on the terms of certain transactions because there was no evidence on the record demonstrating that those transactions actually took place.").

[129] ibid.

[130] It may be that a party is not in a position to convince the tribunal on basis of record inferences with regard to every element of a claim or defence – even though it is able to make a reasonable case as to multiple of these elements. Under those circumstances, arbitration conduct may well be taken into account with regard to the plausibility of each element. See Robert Kolb, *The Elgar Companion to the International Court of Justice* (Edward Elgar 2014), 246. With each time that the tribunal relies upon an adverse inference to close the gap, it should more carefully scrutinize the procedural misconduct to determine whether the misconduct warrants such repeated use to assist in the making out of multiple elements of a claim or defense.

[131] *Europe Cement Investment & Trade SA v Turkey*, ICSID Case no ARB(AF)/07/2, Award (13 August 2009), IIC 385 (2009).

[132] ibid [27].

[133] ibid [28].

certificates for inspection and set a schedule for the filing of requests for adverse inferences as requested by Turkey should claimant fail to comply.[134] The claimant was unable to produce the documents.[135] Turkey requested that the tribunal draw an adverse inference from non-production.[136] The tribunal studiously avoided making such inference the basis for a jurisdictional dismissal, holding instead that the evidentiary record as it stood was sufficient to dismiss the case for lack of jurisdiction even in the absence of a claim of forgery of the copied share certificates advanced by Turkey.[137] The dismissal of the claimant's claims therefore was made independently of the inference requested by Turkey.[138]

The same tribunal was willing to draw inferences from the non-production of the shares in question when determining whether to make an award of moral damages to Turkey for abuse of process by the claimant.[139] The adverse inference in that case supported the presence of an abuse of process by the claimant.[140] The adverse inference was insufficient to give rise to a claim for moral damages in its own right: the tribunal needed to have jurisdiction over the parties to issue such relief and the claimant of moral damages must make out exceptional circumstances such as duress.[141] Turkey failed to prove these additional elements, meaning that the adverse inference was insufficient of its own to provide the ultimate relief requested by Turkey in this instance.[142]

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[134] ibid [48-53].

[135] ibid [91].

[136] ibid [63].

[137] ibid [143].

[138] The tribunal affirmed that the adverse inference was an independent basis for a dismissal after it concluded that the record in its own right support the same conclusion. ibid [144]. Given the sequencing of decision, this conclusion constitutes obiter dicta.

[139] ibid [181].

[140] ibid [180].

[141] ibid [181].

[142] ibid.

Finally, the case also makes apparent the obvious link between circumstances that might lead to the drawing of an adverse inference and a cost order. In *Europe Cement*, the tribunal reasoned:

> where the Tribunal has reached the conclusion that the claim to jurisdiction is based on an assertion of ownership which the evidence suggests was fraudulent, an award to the Respondent of full costs will go some way towards compensating the Respondent for having to defend a claim that had no jurisdictional basis and discourage others from pursuing such unmeritorious claims.[143]

VI. CONSEQUENCES OF FAILING TO APPLY INFERENCES OR APPLYING AN INFERENCE INCORRECTLY

An inference is the ability of a tribunal to draw plausible conclusions on the basis of the totality of the evidence produced. An inference is, at its core, a decision-making function and, as a general matter, the decision-making process fall squarely within a tribunal's discretionary process. Therefore, as a general matter, inferences (either based on the evidence or on the conduct during the arbitration) cannot be the basis for a party to seek annulment of an award. However, this is not to imply that inferences are completely free from the annulment process.

Materials gaps in a tribunal's reasoning can be the basis for an annulment challenge. An inference necessarily requires a gap in the evidence and if the leap made through the evidence is too far (which would be a factual question), a party might be tempted to bring a motion for annulment. Indeed, the admonition that tribunals frequently seek to balance competing factual theories to arrive at a conclusion of what actually occurred can lead to an appearance that key steps in logic are missing from the award.[144] The task thus again is whether there is a reasonable inference, which is possible in light of the record as a whole, the submissions of the parties, and the findings made by the tribunal in the award and elsewhere that would permit a

[143] ibid [185].

[144] *Compañía de Aguas del Aconquija SA v Argentine Republic,* ICSID Case No ARB/97/3, Decision on Annulment (3 July 2002) [65].

reasonably complete account of the tribunal's ratiocination.[145] If such a complete account is possible without running into self-contradiction, the award should be maintained. It is only if any inference that might save an award from gaps would, if adopted, lead to an annullable self-contradiction that annulment for material gaps in reasoning is the appropriate remedy.[146]

Therefore, as inferences fall with a tribunal's discretionary power, they are often very difficult to establish barring severe material gaps in a tribunal's reasoning.

VII. CONCLUSION

The research question for this thesis states: ***"Whether there are any principles of evidence as recognized and applied by investor-state tribunals or do the principles of evidence merely fall within a tribunal's discretionary powers?"*** The evidentiary principle that has been considered here is inferences and, therefore, the relevant question is whether there are any principles relating to inferences as recognized and applied by investor-state tribunals?

The following conclusions can be drawn from the thesis:

First, investor-state tribunals often make findings of facts by means of inferences, where a tribunal made a determination of fact that is not premised upon direct evidence.

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[145] *Libananco Holdings Co Ltd v Republic of Turkey*, ICSID Case No ARB/06/8, Decision on Annulment (22 May 2013) [94]; *Rumeli Telekom AS v Republic of Kazakhstan*, ICSID Case No ARB/05/16, Decision on Annulment (25 March 2010) [138]; *CMS Gas Transmission Co v Argentine Republic*, ICSID Case No ARB/01/8, Decision on Annulment (25 September 2007) [123]-[125]; *Industria Nacional de Alimentos, SA v Republic of Peru*, ICSID Case No ARB/03/4, Decision on Annulment (5 September 2007) [129]; *CMS Gas Transmission Co v Argentine Republic*, ICSID Case No ARB/01/8, Decision on Annulment (21 August 2007) [56]; *Wena Hotels Ltd v Arab Republic of Egypt*, ICSID Case No ARB/98/4, Decision on Annulment (28 January 2002) [144].

[146] Decisions that recently have cast a wider net with regard to the failure to state reasons have come under significant scrutiny in the literature as having been wrongly decided and representing a threat to the integrity of ICSID arbitration. See eg *Mitchell v Republic of Congo*, ICSID Case No ARB/99/7, Decision on Annulment (1 November 2006) [38]-[40]; *Enron Corp v Argentine Republic*, ICSID Case No ARB/01/3, Decision on Annulment (30 July 2010) [376]. For a discussion of *Enron*, see Christoph Schreuer, *From ICSID Annulment to Appeal, Half Way Down the Slippery Slope*, available at http://www.univie.ac.at/intlaw/wordpress/pdf/icsid_annulment_appeal.pdf (accessed 17 May 2017), p. 9 ("This reasoning of the ad hoc committee is truly baffling. The Tribunal had correctly identified the governing law. It had also correctly identified the relevant rule and had applied it. But the ad hoc Committee found an excess of powers because it disagreed with the way the Tribunal had interpreted that rule.").

An inference refers to a conclusion that, as a matter of *plausibility* of a fact, must be concluded to be true in light of the record evidence as well as party conduct in the arbitral proceedings. Plausibility refers to the likelihood that something is more likely to have happened or not happened in the light of the totality of the evidence. The quality of an inference depends upon the probative value of the record in establishing the contextual facts on the basis of which the inference is drawn and the inductive acuteness of the finder of fact in drawing an inference.

Second, a tribunal can draw a record inference. In drawing an inference, a tribunal must determine how tenuous the inference is based on the overall record--the further away the inference is from the record evidence, the more tenuous the inference becomes. Indeed, there are two ways in which a party can seek to rebut the drawing of record inferences. First, a party may wish to contest solely the evidentiary case of the other party. It can do so by positing that there is no direct evidence to prove the point in question. Alternatively, it could submit that the link between the direct evidence and the inference to be drawn is too tenuous.

Third, in order to draw a record inference, the following points have to be considered: (i) the difficulty of proving the fact by direct evidence; (ii) the relationship between the inference to be drawn and the facts proved by direct evidence; (iii) the strength of the direct evidence supporting the inference; (iv) the number of different pieces of proof supporting the same inference; and (v) the significance of the inference for the satisfaction of the requisite standard of proof.

Fourth, investor-state tribunals are empowered to draw adverse inferences based party misconduct in the arbitration. If a tribunal draws such an inference, it does not look to the arbitration record but to arbitration conduct. It is worth emphasizing that the drawing of an adverse inferences typically follows upon particularly serious procedural misconduct by one of the parties.

Fifth, in order to an inference based on the conduct of the parties in an arbitration, the following circumstances are significant: (i) the severity of the party's misconduct in the arbitral proceedings, (ii) the relationship between the misconduct and the fact to be proved by means of an inference, (iii) the procedural good faith of the party seeking the

inference, (iv) the plausibility of drawing the same inference from the record absent consideration of party misconduct, and (v) the overall significance of the inference requested.

Sixth, an inference is, at its core, a decision-making process fall squarely within a tribunal's discretionary process. Therefore, as a general matter, inferences (either based on the evidence or on the conduct during the arbitration) cannot generally be the basis for a party to seek annulment of an award. Materials gaps in a tribunal's reasoning can be the basis for an annulment challenge. An inference necessarily requires a gap in the evidence and if the leap made through the evidence is too far, a party might be tempted to bring a motion for annulment. But, as inferences fall with a tribunal's discretionary power, they are often very difficult to establish barring severe material gaps in a tribunal's reasoning.