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ARTICLE

WikiLeaks and Beyond: Discerning an International Standard for the Admissibility of Illegally Obtained Evidence

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Abstract—There is no clear view in international arbitration law as to whether illegally obtained evidence should be admitted and relied on by tribunals. Because arbitral tribunals do not employ a formal evidentiary filter to exclude all inadmissible evidence from the outset, but rather possess a wide margin of appreciation in weighing and assessing evidence, each decision made on the admissibility of evidence is inevitably fact-driven. This predisposition brings with it a danger that different tribunals will reach strikingly different results on seemingly similar questions. By exploring existing case law it is possible to gain a closer understanding of a common standard on the admission and weighing of illegally obtained evidence.

Based on a review of selected prominent cases heard before the International Court of Justice (ICJ), the Court of Justice of the European Union (CJEU), the European Court of Human Rights (ECtHR) and international tribunals established under International Centre for Settlement of Investment Disputes (ICSID) or the United Nations Commission on International Trade Law (UNCITRAL) rules, it can be concluded: First, the fact that evidence is obtained illegally will not automatically disqualify such evidence as inadmissible. Second, while a common test for deciding the admissibility of unlawfully obtained evidence still remains to be defined, at least some common legal and policy elements may be distinguished, and serve as much needed guidance.

This article analyses the common elements which are often taken into account when deciding admissibility of illegally obtained evidence. It proposes a three-step approach to evaluating evidence that should assist tribunals to reach decisions which are both justifiable and aligned, to the extent possible, with the reasoning expressed in previous international cases.

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I. NEW EVIDENTIAL FRONTIERS AND EXISTING LEGAL FRAMEWORK

A. *Introduction*

The rule of law and access to justice in international legal proceedings requires that all relevant evidence is available to the tribunal. Over the last few years, the arbitration community has witnessed a renewed interest in the procedural approach to evidence, as new technological frontiers continue to expand, bringing with them previously unknown opportunities for abuse. The issue of unlawfully obtained evidence lies at the forefront of such considerations.

There are many unanswered questions about the extent to which this unlawfully obtained 'evidence' can be admitted before an international court or tribunal. In the quest for clarity on how the unlawfully obtained evidence fits into legal paradigms, the starting point should be the existing body of law and cases.

In this article, the authors endeavour to provide an overview of the practice of different courts and tribunals in dealing with unlawfully obtained evidence, identifying and extracting the common denominators and tendencies.

Section I maps out the current legal framework governing the tribunal's work with reference to relevant provisions. Section II analyses the case law of various international fora in search for common legal and policy factors. Section III builds on the analysis to set out a proposed admissibility test for illegally obtained evidence. Section IV offers brief conclusions on admissibility of illegally obtained evidence.

B. *WikiLeaks: New Evidentiary Frontier?*

In October 2010, WikiLeaks released over 250,000 confidential diplomatic cables from 274 embassies, consulates and diplomatic missions. The disclosure represents the largest set of confidential documents ever to be released to the public. The US Government has neither admitted nor denied the authenticity of the WikiLeaks documents; however, the State Department has acknowledged that the WikiLeaks documents are 'leaked cables'. Many documents published on WikiLeaks are classified as state secrets.

Undoubtedly, the cables were obtained in breach of US laws. Private Bradley Manning, who played a crucial part in leaking the documents, was convicted in July 2013 of violating the United States' Espionage Act and sentenced to 35 years imprisonment.[2] Then-Secretary of State Hillary Clinton described WikiLeaks's publication of the confidential diplomatic cables as 'an attack against the international community'.[3]

In stark contrast to the US authorities, in the words of WikiLeaks founder, Julian Assange, WikiLeaks is:

[2] Ed Pilkington, 'Bradley Manning Verdict: Cleared of "Aiding the Enemy" but Guilty of Other Charges' The Guardian (2013) <https://www.theguardian.com/world/2013/jul/30/bradley-manning-wikileaks-judge-verdict> accessed 20 October 2017.

[3] CNN Wire Staff, 'WikiLeaks contributes to Manning defense, support group says' *CNN* (2011) <http://edition.cnn.com/2011/US/01/13/ wikileaks.manning.defense/index.html> accessed 20 October 2017.

> [a] great library built from the courage and sweat of many [that] has had a five-year confrontation with a power without losing a single 'book'. At the same time, these 'books' have educated many, and in some cases, in a literal sense, let the innocent go free.[4]

WikiLeaks' team further describes the 'library' in the following words:

> WikiLeaks is a multi-national media organization and associated library. [. . .] WikiLeaks specializes in the analysis and publication of large datasets of censored or otherwise restricted official materials involving war, spying and corruption. It has so far published more than 10 million documents and associated analyses.[5]

WikiLeaks, its publisher and its journalists have won nominations for the UN Mandela Prize (2015) and the Nobel Peace Prize (2010–15), as well as multiple media awards. While questions about the legality of WikiLeaks disclosures remain extremely current,[6] the impact of releases from WikiLeaks has been felt by the arbitration community. Some parties have already asked tribunals to admit WikiLeaks cables in evidence, with varying degrees of success.

Advances in information technology and the ability to access data, whether legally or illegally, make it inevitable that future tribunals will be called upon to evaluate unlawfully obtained evidence. Unfortunately, the question of how tribunals should rule when faced with such questions remains far from clear.

C. *General Legal Framework for Evidentiary Matters*

The rules of evidence in international arbitration comprise rules which have either been agreed by the parties or, absent such agreements, chosen by international tribunals. Certain general principles are, however, applicable to all international arbitrations.[7] In the words of Professor Gary Born, '[a]rbitral tribunals frequently apply "international" principles to issues concerning the admissibility and weight of evidence'.[8] These principles are stipulated in numerous arbitration treaties, model rules and model laws, as well as in the rules of international institutions.

One such rule is a tribunal's wide discretion to deal with evidence.[9] The parties to an international arbitration are generally free to submit any evidence they wish

[4] WikiLeaks, 'What is WikiLeaks' (0000) <https://wikileaks.org/What-is-Wikileaks.html> accessed on 19 October 2017.

[5] ibid.

[6] WikiLeaks' ongoing legal cases are described in detail in a report by the Center for Constitutional Rights (CCR), submitted to help guide the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye, in preparing a report addressing the international standards on the protection of sources of information and whistleblowers. The CCR's report is available at: <https://ccrjustice.org/sites/default/files/attach/ 2015/06/CCR%20Whistleblower%20 Submission%20Final%20(2).pdf> and the UN Special Rapporteur's report is available at <http://www.un.org/en/ga/search/view_doc.asp?symbol=A/70/361> both accessed 19 October 2017.

[7] Gary Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International 2014) 2309. See also Robert Pietrowski, 'Evidence in International Arbitration' (2006) 22 Arb Intl 373, 374 and *Report of the Secretary-General on the Preliminary Draft Set of Arbitration Rules for Optional Use in Ad Hoc Arbitration Relating to International Trade* (1975) 176 (arbitrators are 'freed from having to observe the strict rules of evidence' under domestic legal regimes). Both references were cited at Born fn 1017.

[8] Pietrowski (n 7) 374.

[9] Revised Uniform Arbitration Act, §15 (2000) ('The authority conferred upon the arbitrator includes the power to . . . determine the admissibility, relevance, materiality and weight of any evidence'); English Arbitration Act, 1996, §§34(1),(2) ('It shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter'; 'evidential matters' include 'whether to apply strict rules of evidence (or any other rules) as to the admissibility, relevance, or weight of any material (oral, written or other) sought to be tendered on any matters of fact and opinion'); French Code of Civil Procedure, §1467 ('The arbitral tribunal shall take all necessary steps concerning evidentiary and procedural matter, unless the parties authorize it to delegate such tasks to one of its members. The arbitral tribunal may call upon any person to provide testimony.'); German ZPO, §1042(4); Austrian

to rely on in support of their case. Evaluating such evidence remains within the full discretion of arbitral tribunals. Consequently, an arbitral tribunal may admit and evaluate even such evidence as was obtained unlawfully—a freedom alien to many domestic courts.

Article 19(2) of the UNCITRAL Model Law[10] provides that '[t]he power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence'. Similarly, Article 27(4) of the UNCITRAL Arbitration Rules[11] states that '[t]he arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered'. Article 9 of the IBA Rules on the Taking of Evidence in International Arbitration[12] follows the same rationale, stating that '[t]he Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of evidence'.

Institutional rules also typically provide the tribunal with discretion over admissibility and weight of evidence. ICSID Arbitration Rules[13] state that '[t]he Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value' (Rule 34), as well as that '[t]he Tribunal shall make the orders required for the conduct of the proceeding' (Rule 19).

The London Court of International Arbitration (LCIA) Rules[14] are more explicit, noting that:

> The Arbitral Tribunal shall have the power, upon the application of any party or [. . .] upon its own initiative, but in either case only after giving the parties a reasonable opportunity to state their views and upon such terms (as to costs and otherwise) as the Arbitral Tribunal may decide: [. . .] (vi) to decide whether or not to apply any strict rules of evidence (or any other rules) as to the admissibility, relevance or weight of any material tendered by a party on any issue of fact or expert opinion; and to decide the time, manner and form in which such material should be exchanged between the parties and presented to the Arbitral Tribunal.

Finally, 'even in the absence of such provisions, arbitral tribunals clearly have the implied authority to resolve issues of admissibility, weight and relevance of the evidence'.[15]

Despite wide discretion when it comes to the treatment of evidence, tribunals rarely exclude evidence as inadmissible. The reason for such reluctance is well defined in the words of Professor Jeff Waincymer:

> Tribunals are concerned to preclude arguments that exclusionary decisions have impacted on a party's right to be heard, although the right to a full opportunity to

ZPO, §599(1); Hong Kong Arbitration Ordinance, 2013, §47(3) ('When conducting arbitral proceedings, an arbitral tribunal is not bound by rules of evidence and may receive any evidence that it considers relevant to the arbitral proceedings, but it must give the weight that it considers appropriate to the evidence adduced in the arbitral proceedings'). Cited according to Born (n 5) 2306 (fn 1000).

[10] UNCITRAL Model Law on International Commercial Arbitration (UNCITRAL Model Law) (21 June 1985) art 19(2).

[11] Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL Arbitration Rules) (1976) art 27(4). In the 2010 revised rules, the text of the article remained unchanged.

[12] IBA Rules on the Taking of Evidence in International Arbitration (IBA Rules) (29 May 2010) art 9.

[13] ICSID Rules of Procedure for Arbitration Proceedings (ICSID Arbitration Rules) (April 2006) r 34, 19.

[14] LCIA Arbitration Rules (LCIA Rules) (1 October 2014) art 22(1)(vi).

[15] Born (n 7) 2310.

> present a case and to adversarial proceedings does not presumptively override a tribunal's power to determine admissibility or weight of evidence.[16]

Because of that, '[d]efects in evidence are therefore usually taken into account in evaluating its credibility, weight and value, rather than in rulings on admissibility'.[17]

This principle is particularly sensible given that arbitral awards typically represent decisions not only of first, but also of last instance. Under Article 53 of the ICSID Convention,[18] '[t]he award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention'. UNCITRAL Rules similarly provide in Article 34(2) that '[a]ll awards shall be made in writing and shall be final and binding on the parties'.

Because there is so little space for appeal or other remedies against the arbitral award, tribunals tend to allow access to as much evidence as possible to help them reach just and well-supported decisions.

However, wide evidentiary discretion does not shield tribunals from all objections to admissibility. Although insignificant, barriers to the admission of evidence are not entirely absent from the arbitral process, as will be seen in Section II.

II. ADMISSIBILITY OF ILLEGALLY OBTAINED EVIDENCE IN THE PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS

International law rules on evidence are generally considered to be very broad. Perhaps unsurprisingly, there is a lack of definition on the admissibility of illegally obtained evidence. Analysing existing case law is therefore an important step to discerning an international standard.

This section assesses prominent cases before the ICJ (Section II.A), the CJEU (Section II.B), the ECtHR (Section II.C), the Special Tribunal for Lebanon (Section II.D), and international tribunals established under ICSID or UNCITRAL rules (Section II.E), in order to show the different approaches taken to the admissibility of evidence.

A. *Admissibility of Illegally Obtained Evidence in Rules and Practice of the International Court of Justice*

The rules governing the evidentiary procedure of the International Court of Justice (ICJ) are generally considered liberal. They contain neither a formal hierarchy of evidence, nor specific rules about weighing the probative value of evidence.[19] Instead, the ICJ has full discretion and unfettered freedom to weigh the evidence bearing in mind the circumstances of each particular case.

[16] Jeff Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law International 2012) s 10.17.10.
[17] Born (n 7) 2310.
[18] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966) (ICSID Convention) art 53.
[19] Peter Tomka and Vincent-Joël Proulx, 'The Evidentiary Practice of the World Court' (December 2015) NUS Law Working Paper 2015/010, available at <http://law.nus.edu.sg/wps/pdfs/010_2015%20_Vincent-Joel%20Proulx_Tomka.pdf> accessed 19 October 2017.

This evidentiary model has been described by the former President of the ICJ, Peter Tomka, as:

> [t]he rigidity of evidentiary rules found in some municipal legal systems has not been transposed integrally to the international legal order. Quite the contrary, the rule of thumb for evidentiary matters before the Court is flexibility.[20]

Article 48 of the Statute of the ICJ contains a simple provision that the ICJ shall 'make all arrangements connected with the taking of evidence'.[21] There are no further, formalised rules of procedure which would limit the submission of evidence in any detailed fashion. There are also no restrictions on the types of evidence admissible before the ICJ. Accordingly, the general tendency of the ICJ is to admit evidence rather than declare it inadmissible.

Parties before the ICJ may rely on both written and oral evidence.[22] However, similar to international arbitration, parties are required to submit all of the evidence on which they rely in the course of the written phase of proceedings. Practically this means exhibiting all evidence relied upon alongside the written pleadings, and in any event before the closing of the written proceedings. Evidence submitted after that milestone would generally be considered inadmissible.[23] This is the only statutory rule for inadmissibility of evidence presented before the ICJ. Tellingly it relates to timing rather than the origin of evidence.

Besides this limitation, the trend for the ICJ remains to favour admitting evidence rather than declaring it inadmissible. There are no rules in the Statute of the ICJ or the Rules of Court (1978) which would mandate the exclusion of evidence obtained illegally.

The famous *Corfu Channel* case,[24] heard before the ICJ between 1947 and 1949, laid the foundations for the treatment of illegally obtained evidence in international law. In *Corfu Channel*, the United Kingdom sought to prove its claims against Albania by relying on evidence obtained in violation of international law.

As to the background, the Corfu Channel is a narrow waterway between Albania and the Greek island of Corfu. Having sailed through the Channel in October 1946, a number of British warships were struck by submerged mines, causing severe damage and loss of life. Contrary to its international law obligations, Albania had not given any warning to the United Kingdom about the mines. Consequently, the United Kingdom brought a case against Albania, claiming that Albania was responsible for the mines and the damage caused.

In the event, the British Royal Navy conducted a minesweeping operation in Albanian waters, without Albania's permission, to find evidence in support of its case; following which the United Kingdom sought to produce the illegally recovered mines to the ICJ in order to demonstrate Albania's responsibility.

[20] Tomka and Proulx (n 19) 3.
[21] Statute of the International Court of Justice (signed on 26 June 1945, entered into force on 24 October 1945) (Statute of the ICJ) art 48.
[22] Statute of the ICJ art 43.
[23] Rules of Court (signed on 14 April 1978, entered into force on 1 July 1978) (Rules of the ICJ) art 56. The article states that 'no further document may be submitted as evidence without the consent of the other party, after the written proceedings have concluded, unless the Court directs its production as necessary. A contrary production would deem the document inadmissible.'
[24] *Corfu Channel Case (UK v Albania)* (Merits) [1949] ICJ Rep 4.

The ICJ held that the Royal Navy's minesweeping operation had violated the sovereignty of Albania and condemned the United Kingdom's actions as an internationally wrongful act.[25] However, other than declaring the activities unlawful, the Court refused to apply any material sanction against the United Kingdom. Moreover, the Court did not exclude the evidence that had been obtained unlawfully.

The conclusion that may be drawn about the practice of the ICJ from *Corfu Channel* is that, even when evidence is obtained illegally in violation of international law, such evidence would not automatically be considered inadmissible and may be relied on by the Court.

The case of the *Iranian Hostages* from 1980 shows a different approach to illegally obtained evidence.[26] In 1979, the US Embassy in Tehran was overrun by Iranian militants who took hostages and seized documents. At the time when the ICJ heard the case, US diplomats were still illegally detained and the fragile situation was considered to be a grave threat to regional stability and world peace.[27]

The illegal seizure of the Embassy presented the Iranian Government with access to documents which were (arguably) favourable to the Iranian position. Although Iran took no formal part in the ICJ proceedings, neither filing pleadings nor attending hearings, it did submit two letters to the Court.

The ICJ never directly ruled on the admissibility of the illegally obtained evidence.[28] However implicitly, by ordering that Iran 'must immediately place in the hands of the Protecting power the premises, property, archives and documents of the United States Embassy in Tehran and of its Consulates in Iran',[29] the Court suggested that evidence obtained unlawfully should not be considered admissible.

In the opinion of the authors, the facts of *Iranian Hostages* are unique. The case is therefore of limited applicability to future cases. In particular, the driving force behind the Court's decision was undoubtedly 'the particular gravity of the case'[30] and the need to send a strong signal as a means to counter a perceived threat 'vital for the security and well-being of the international community'.[31] As such the Court found:

> it essential to reiterate the observations it made in its Order of 15 December 1979 on the importance of the principles of international law governing diplomatic and consular relations. After stressing the particular gravity of the case, arising out of the fact that it is not any private individuals or groups that have set at naught the inviolability of an embassy, but the very government of the State to which the mission is accredited, the Court draws the attention of the entire international community to the irreparable harm that may be caused by events of the kind before the Court. Such events cannot fail to

[25] The Court declared 'that the action of the British Navy constituted a violation of Albanian sovereignty', but refused to apply any serious sanction against the United Kingdom. It decided unanimously that its declaration of the unlawfulness of the United Kingdom's act 'is in itself appropriate satisfaction'. See *Corfu Channel* (n 24) para 35.

[26] *Case Concerning United States Diplomatic and Consular Staff in Tehran (US v Iran)* [1980] ICJ Rep 3 (*Iranian Hostages*).

[27] *Iranian Hostages* (n 26) 106.

[28] ibid 107: 'Iran took no part in the part in the proceedings. It neither filed pleadings nor was represented at the hearing, and no submissions were therefore presented on its behalf. Its position was however defined in two letters addressed to the Court by its Minister for Foreign Affairs on 9 December 1979 and 16 March 1980 respectively. In these the Minister maintained inter alia that the Court could not and should not take cognizance of the case.'

[29] ibid 108.

[30] ibid.

[31] ibid.

> undermine a carefully constructed edifice of law, the maintenance of which is vital for the security and well-being of the international community.[32]

Moreover, while the Court may have implied that evidence obtained unlawfully should not be admissible, the Court never expressed that this be considered a rule.

While the ultimate decision of the Court may be of limited value, the factors that affected the Court's reasoning are illuminating:

(i) The wrongdoer (ultimately responsible for the seizure of the Embassy) was the same entity that sought to benefit from the unlawfully obtained evidence.
(ii) The Court, by its own judgment, had before it 'a massive body of information from various sources'[33] of illegality, rendering further evidence less material.
(iii) The Court was faced with an overwhelming public interest of protecting the 'security and well-being of the international community'.[34]

These elements will be revisited in the admissibility test proposed in Section III of this article.

B. *Inadmissibility of Illegally Obtained Evidence in Rules and Practice of the Trial Chamber of the Special Tribunal for Lebanon*

The Trial Chamber of the Special Tribunal for Lebanon (Lebanon Tribunal) analysed the issue of illegally obtained evidence directly.[35] The evidentiary rules applicable to the Lebanon Tribunal proceedings, however, contain more guidance than is typical with arbitration.

Article 162 of the Lebanon Tribunal's Rules of Procedure and Evidence[36] explicitly permits the exclusion of evidence obtained by methods which may cast doubts on its reliability, or damage the integrity of the proceedings: '[n]o evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings'.[37]

Other relevant provisions include Article 149(C), pursuant to which the Trial Chamber may receive evidence 'which it deems to have probative value', Article 149(D), which allows for the exclusion of evidence if 'its probative value is substantially outweighed by the need to ensure a fair trial', and Article 149(E), according to which the Trial Chamber 'may request verification of the authenticity of evidence obtained out of court'.

The Lebanon Tribunal was guided by this regulatory framework when it faced questions of admissibility concerning two WikiLeaks cables describing meetings between Lebanese politicians and American diplomats. After long deliberation, the

[32] ibid.
[33] ibid 107.
[34] ibid.
[35] *Decision on the Admissibility of Documents Published on the WikiLeaks Website* STL-11-01/T/TC (21 May 2015).
[36] Rules of Procedure and Evidence of the Special Tribunal for Lebanon (adopted 20 March 2009, last amended 3 April 2014) (Rules of the Special Tribunal for Lebanon).
[37] Rules of the Special Tribunal for Lebanon, art 162.

Lebanon Tribunal concluded that the WikiLeaks documents should be considered inadmissible because they did not furnish the necessary 'indicia of reliability'.

The Lebanon Tribunal stated:

> In deciding whether to admit the WikiLeaks documents into evidence, the Trial Chamber must consider whether they contain adequate indicia of reliability. This includes authenticity and accuracy.[38]

Consequently, when evaluating the evidence, the Lebanon Tribunal found it was not satisfied that the WikiLeaks documents demonstrated sufficient authenticity.[39] As a result the motion to admit into evidence the two WikiLeaks cables was denied, even though the Trial Chamber considered the documents relevant and material.[40]

Interestingly, Rules 89(C), (D) and (E) of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia (ICTY) are identical to the Lebanon Tribunal's Rules 149(C), (D) and (E).

In *Milosevic* and *Karadzic and Milosevic*,[41] WikiLeaks documents were submitted to support allegations of interference in the administration of justice. Regrettably for the purposes of precedent, the ICTY neither formally admitted the WikiLeaks documents into evidence, nor made any findings on admissibility.

C. *Admissibility of Illegally Obtained Evidence in Rules and Practice of the Court of Justice of the European Union*

Unlike the Lebanon Tribunal, the Court of Justice of the European Union (CJEU) has expressly allowed the admission of WikiLeaks cables into evidence while emphasising the clean hands of the party relying on such evidence.

In *Persia International Bank v Council*,[42] the applicant was a bank incorporated in the United Kingdom, 60 percent owned by Bank Mellat. In July 2010, the European Council listed Bank Mellat and Persia International Bank (PIB) among the entities said to be involved in Iranian nuclear proliferation.[43] Both banks were subsequently included in an Annex to the Council Regulation Concerning Restrictive Measures against Iran (2007).[44] As a result of being listed, PIB had its funds and economic assets frozen.

After PIB requested more information from the Council about the reasons for adopting the restrictive measures, the Council responded that it considered Bank Mellat's 60 percent stake in PIB to be a sufficient grounds for the listing. In respect of Bank Mellat, the Council explained that it is a 'state owned Iranian Bank [. . .] which engages in a pattern of conduct which supports and facilitates Iran's nuclear and ballistic missile programmes'.[45]

[38] *Decision on the Admissibility of Documents Published on the WikiLeaks Website* (n 35) para 38.
[39] ibid paras 40–43.
[40] ibid paras 15–21.
[41] *Prosecutor v Slobodan Milosevic* (Decision on the Initiation of Contempt Investigations) ICTY-02-54-Misc.5 & ICTY-02-54-Misc.6 (18 July 2011); *Prosecutor v Radovan Karadzic* MICT-13-55-R90.1 and *Prosecutor v Slobodan Milosevic* MICT-13-58-R90.1 (Decision on Karadzic Requests to Appoint an Amicus Curiae Prosecutor to Investigate Contempt Allegations against Former ICTY Prosecutor Carla Del Ponte) (27 November 2013).
[42] Case T-493/10 *Persia International Bank v Council* ECLI:EU:T:2013:398.
[43] Annex II to Council Decision (CFSP) 2010/413/CFSP of 26 July 2010 Concerning Restrictive Measures against Iran and repealing Common Position 2007/140/CFSP [2010] OJ L195/39.
[44] Annex V to Council Regulation (EC) No 423/2007 of 19 April 2007 Concerning Restrictive Measures Against Iran [2007] OJ L103/1.
[45] *Persia International Bank v Council* (n 42) para 5.

PIB then brought the case before the CJEU, asking to be removed from the Council Regulation list, because the statement of reasons in support of the contested measure was 'inadequate', 'defective' and 'overly vague'.[46] PIB further asserted that diplomatic cables made public through WikiLeaks evidenced the fact that the United Kingdom and Ireland were pressured by the US Government to ensure the adoption of restrictive measures against the Iranian entities.[47] The Council and the Commission contested these arguments, and submitted that the cables should not be considered by the CJEU.[48]

The CJEU ruled in favour of the applicant, citing *Dalmine v Commission*[49] and stating that 'the prevailing principle of European Union law is the unfettered evaluation of evidence'.[50] The Court confirmed that the 'sole criterion relevant in that evaluation is the reliability of the evidence'.[51]

The CJEU further emphasised the importance of the party seeking to rely on the relevant evidence having clean hands, concluding that since the PIB 'was not involved in the disclosure of the diplomatic cables, the possibly unlawful nature of that disclosure [could not] be held against it'. Moreover, 'the evidence in question [was] relatively credible since its authenticity ha[d] not been disputed by the United States Government'.[52]

Ultimately, the Court decided that 'the fact that some Member States may have been subject to diplomatic pressure does not imply, by itself, that such pressure affected the contested measures which were adopted by the Council or the assessment carried out by the Council when they were adopted',[53] and rejected that argument. However, it upheld PIB's other arguments relating to the defects in the Council's assessment, and annulled the Council decisions regarding the bank.

The Court reached a similar conclusion in the twin-cases of two other Iranian banks (Bank Saderat as the applicant in cases T-494/10 dated 5 February 2013[54] and T-495/10 dated 20 March 2013[55]; Bank Mellat in Case T-496/10 dated 29 January 2013[56]).

The case of *Fahed Mohamed Sakher Al Matri*[57] presents a further interesting example of reliance on WikiLeaks disclosures to establish unlawfulness. Mr Al Matri, a Tunisian individual, was subjected to restrictive measures (freezing of assets) by the European Council and sought to have the measures lifted. In this instance, it was the Council which relied on the content of WikiLeaks sourced diplomatic cables.

The applicant alleged that the basis for the Council's decision to freeze his assets was not a recognised ground listed in Article 1(1) of the Council's decision. The Council claimed that '[the applicant] was subject to judicial investigation by the Tunisian authorities in respect of acts carried out as part of money-laundering

[46] ibid para 45.
[47] ibid para 89.
[48] ibid para 90.
[49] Case T-50/00 *Dalmine v Commission* [2004] ECR II-2405.
[50] *Persia International Bank v Council* (n 42) para 95.
[51] *Dalmine v Commission* (n 49) para 72.
[52] *Persia International Bank v Council* (n 42) para 95.
[53] ibid para 96.
[54] Case T-494/10 *Bank Saderat Iran v Council* ECLI:EU:T:2013:59.
[55] Case T-495/10 *Bank Saderat plc v Council* ECLI:EU:T:2013:142.
[56] Case T-496/10 *Bank Mellat v Council* ECLI:EU:T:2013:39.
[57] Case T-200/11 *Al Matri v Council* ECLI:EU:T:2013:275.

operations' which could be linked to the misappropriation of Tunisian State funds.[58]

To justify its position, the Council argued that its decision to freeze the applicant's assets should be assessed in its factual context, taking into account the information available to the Council at the time of the decision. This included information published by WikiLeaks[59] which evidenced that the applicant 'had had "an enormous and garish mansion" that was expropriated from its owner by the Government of Tunisia for the water authority, and which had subsequently been granted to the applicant for his private use'.[60] Another diplomatic cable explained that the applicant 'had also been very active within the diplomatic community' and had attempted to serve as a 'point of contact between the regime and key ambassadors'.[61]

While the Council did not specifically mention that the diplomatic cables in question had been obtained through WikiLeaks, it pointed to relevant documents that could be viewed 'on the pages of an internet site mentioning the date of 8 December 2010'.[62] As it happens, the diplomatic cables concerning Mr Al Matri were released by WikiLeaks on 7 December 2010 and reproduced on several websites in the following days. It therefore seems likely that the Council relied on, and then directed the Court to consider as evidence, information published on WikiLeaks.

The Court did not consider the reliance on the diplomatic cables to be problematic and proceeded to analyse whether diplomatic cables could have been accessed at the time of the Council's decision, since 'the legality of a decision to freeze assets is to be assessed in the light of the information available to the Council when the decision was adopted'.[63]

The Court concluded that: (i) it could not be established that the diplomatic cables were available to the Council at the date of its decision to freeze the applicant's assets;[64] and (ii) in any case, even if the facts described in the diplomatic cables in question had been brought to the Council's attention prior to its decision, they would not suffice to establish that the money laundering activities were linked to the misappropriation of State funds.[65] Accordingly, the Court annulled the Council's decision.

D. *Admissibility of Illegally Obtained Evidence in Rules and Practice of the European Court of Human Rights*

Applicants have introduced WikiLeaks cables in proceedings before the European Court of Human Rights (ECtHR) as well. While the Court has not explicitly ruled on the admissibility of the WikiLeaks' cables concerned, neither has it given any indication that such evidence should be considered inadmissible.

In *El Masri v Macedonia*[66] an applicant brought claims against Macedonia for its part in a CIA orchestrated rendition of the applicant to a secret detention facility.

[58] *Al Matri* (n 57) para 47.
[59] ibid para 71.
[60] ibid.
[61] ibid.
[62] ibid para 72.
[63] ibid.
[64] ibid para 72.
[65] ibid para 73.
[66] *El-Masri v Former Yugoslav Republic of Macedonia* (App no 39630/09) ECHR 13 December 2012.

Mr El-Masri, a German citizen, was travelling to Skopje when he was intercepted and detained in Macedonia for 23 days. While he was being held he was offered a deal to confess that he was a member of Al-Qaeda (which he declined), was tortured and later flown to Afghanistan to another secret facility where he was tortured again. On 28 May 2004, the US recognised that he had been seized by mistake and eventually released him. A month later, Mr El-Masri filed a case with the ECtHR.

Mr El-Masri relied on several diplomatic cables, published by WikiLeaks, in which the US diplomatic missions in Macedonia, Germany and Spain had reported his case to the US Secretary of State.[67] In one cable, the German Deputy National Security Advisor is quoted as saying that 'the facts are clear, and the Munich prosecutor has acted correctly' by seeking to have international arrest warrants issued for the participants in the 'rendition'.[68]

The Court found that Macedonia had breached Articles 3 (prohibition of torture), 5 (right to liberty and security), 8 (right to respect for private and family life) and 13 (right to an effective remedy) of the European Convention on Human Rights (ECHR). The Court relied upon the credibility of the applicant's statement, including his description of CIA tactics, and his recollection of earthquakes in Afghanistan which supported his account and timeline.[69]

While the Court did not explicitly refer to the WikiLeaks cables, it made no indication that the evidence was improper or otherwise, or qualify the inclusion of the evidence on the record before the Court.

The facts of the case are strikingly similar to the case of *Al-Nashiri v Poland*.[70] Mr Al-Nashiri, a Saudi national, was a victim of a joint US–Polish rendition operation. In October 2002, Mr Al-Nashiri was captured in Dubai. In December 2002, he was taken to a secret CIA prison in Poland with the connivance of the Polish authorities. There, US interrogators tortured Mr Al-Nashiri before flying him to the US in July 2003.

In May 2011, Mr Al-Nashiri filed an application before the ECtHR against Poland. In his application, he relied upon a diplomatic cable leaked by WikiLeaks to show that the Polish authorities were implicated in his rendition and transfer to secret 'CIA prisons'.[71]

The Court found that Poland had violated the ECHR through its complicity in the CIA programme. Just as in *El Masri*, the Court made no particular mention of the use of WikiLeaks material in Mr Al-Nashiri's application. However, the Court also raised no objection to its use or suggested that the use of such evidence would be improper or should be excluded.

In light of the ECtHR's track record dealing with WikiLeaks sourced evidence, it seems likely that the ECtHR would not consider evidence obtained from WikiLeaks to be automatically inadmissible, or limited in value.

[67] *El Masri* (n 66) para 77.
[68] Embassy of Berlin to Secretary of State of the United States of America, 'Al-Masri Case- Chancellery Aware of USG Concerns' (6 February 2007) <https://wikileaks.org/plusd/cables/07BERLIN242_a.html> accessed 19 October 2017.
[69] *El Masri* (n 66) para 157.
[70] *Al Nashiri v Poland* (App no 28761/11) ECHR 24 July 2014.
[71] *Al Nashiri v Poland* (App no 28761/11) Application, ECHR, 6 May 2011 [126].

E. *Admissibility of Illegally Obtained Evidence in Practice of the International Arbitration Investment Tribunals*

Yukos v Russia[72] is a landmark case in the field of investment arbitration. Yukos' former majority shareholders and management filed an arbitration claim against Russia under the Energy Charter Treaty (ECT) before the Permanent Court of Arbitration (PCA), alleging that Russia had unlawfully expropriated their investment through taxation and other means. Russia's actions ultimately led to the transfer of Yukos' assets to two State-owned companies, Rosneft and Gazprom. The PCA Tribunal ruled in favour of the investors, awarding damages in excess of USD 50 billion.

In *Yukos*, the Tribunal relied extensively on confidential diplomatic cables from the US State Department published by WikiLeaks. These documents contained various communications between the US Embassy and PricewaterhouseCoopers (PwC), which had served as an auditor to Yukos. Yukos depended on WikiLeaks cables to prove that Russia had put improper pressure on PwC to the detriment of Yukos.

At issue was the question of why PwC has withdrawn its audit opinions for Yukos. PwC publicly stated that it had doubts about the accuracy of information provided to it by Yukos' former management and that its audit reports between 1996 and 2004 should no longer be relied upon. The Claimants argued that PwC's decision was the result of Russia's placing unlawful pressure on the auditor, whereas Russia alleged that the auditor's decision was a reflection of a 'genuine concern that [the reports] were tainted by newly-discovered misrepresentations' by Yukos' management.[73]

The diplomatic cables published by WikiLeaks clearly influenced the Tribunal's understanding of facts. In the words of the Tribunal:

> [T]he candid views expressed by [the auditor's] officials in the U.S. Embassy's cables published by WikiLeaks confirm that [the auditor] was under pressure. The cables demonstrate that [the auditor] was concerned not to aggravate its difficulties with the Government ('better not raise the public profile of the case in ways that could come back to hurt the prospects for a reasonable solution'); that [the auditor] was anxious not to lose its license or its business in Russia; that it considered the Yukos cases to be politically motivated and saw some connections between the withdrawal of the audit opinions and [the auditor's] treatment by the Russian Government; and that it felt that criminal charges in the expatriate tax case were being used as a 'pressure tactic.' The Embassy considered [the auditor] to be under duress and concluded that 'the political and legal concerns that are driving the heightened scrutiny of [the auditor's] accounting practices appear to have taken on a life of their own.[74]

[72] Yukos majority shareholders brought claims before the Permanent Court of Arbitration (PCA) under the Energy Charter Treaty (ECT). See *Hulley Enterprises Limited (Cyprus) v The Russian Federation*, PCA Case No AA 226, Final Award (18 July 2014) (*Hulley Enterprises*), *Yukos Universal Limited (Isle of Man) v The Russian Federation*, PCA Case No AA 227, Final Award (18 July 2014) and *Veteran Petroleum Limited (Cyprus) v The Russian Federation*, PCA Case No AA 228, Final Award (18 July 2014). The minority shareholders also filed two arbitrations before the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) under bilateral investment treaties: *RosInvestCo UK Ltd v The Russian Federation*, SCC Case No V079/2005, Final Award (12 September 2010), and *Quasar de Valors SICAV SA, Orgor de Valores SICAV SA, GBI 9000 SICAV SA v The Russian Federation*, SCC No 24/2007, Final Award (20 July 2012).

[73] *Hulley Enterprises Limited* (n 72) para 1218.

[74] ibid para 1223, citing Embassy of Moscow to Department of Commerce, Department of the Treasury, Germany Frankfurt, National Security Council and Secretary of State, 'GOR agencies visit PWC Moscow Office March 9' *WikiLeaks* (12 March 2007) <https://wikileaks.org/cable/2007/03/07MOSCOW1028.html> accessed 19 October

Interestingly, even though it is beyond doubt that WikiLeaks' disclosure of the cables was illegal under US law, the Tribunal relied on such evidence to reach conclusions on the facts of Yukos's demise, but offered no view on the issue of admissibility of the cables or treatment as illegally obtained evidence.

While the *Yukos* awards do not offer an explicit analysis of admissibility, the Tribunal's conclusion in *Hulley Enterprises* implied that unlawfully obtained evidence is admissible before, and may be relied on by, investment tribunals.[75]

In *ConocoPhillips v Venezuela*,[76] the former holders of oil development rights and related assets in Orinoco claimed damages for expropriation by Venezuela. The claims arose out of Venezuela's nationalisation of three oil projects in which the Claimants had interests. The Tribunal ruled in the investors' favour, finding that Venezuela had unlawfully expropriated their investment. Amongst other things, the Tribunal found that Venezuela had breached its obligation to negotiate in good faith and failed to offer or pay prompt compensation on the basis of fair market value.

The Respondent Government suggested that the Tribunal's Decision of 3 September 2013, in which the Tribunal expressed its ruling on liability, was not an 'award' in terms of the ICSID Convention. The Respondent instead characterised the Decision as 'interim' or 'preliminary' and, accordingly, sought to have it reconsidered.

Venezuela claimed that under Article 44 of the ICSID Convention,[77] and the inherent powers reflected in it, the Tribunal had the power to reconsider its previous decision and reverse it. In relation to ICSID Arbitration Rule 38(2),[78] Venezuela claimed that 'if an ICSID Tribunal has the power to reopen even a closed proceeding, [then] there can be no question that it has the power to reconsider an interim decision rendered far before the closing of the proceedings'.[79]

The request for reconsideration was based on the discovery of a new fact. To establish the new fact in question, Venezuela relied on WikiLeaks derived cables, and specifically communications from the US Embassy in Caracas. The cables showed that Venezuela attempted to negotiate in good faith with the Claimant, including about compensation for the expropriation. In this respect, the content of

2017; Embassy of Moscow to Department of Commerce, Department of the Treasury, 'PWC's Travails in Russia Worsen' (15 November 2007) <https://wikileaks.org/cable/2007/11/07MOSCOW5403.html> accessed 19 October 2017; Embassy of Moscow to Department of Commerce, Department of the Treasury U.S. Department of State, 'Update on PWC's Yukos, Russian Tax Cases' (19 October 2007) <https://wikileaks.org/cable/2007/10/07MOSCOW5083.html)> accessed 19 October 2017.

[75] For a detailed discussion, see James H Boykin and Malik Havalic, 'Fruits of the Poisonous Tree: The Admissibility of Unlawfully Obtained Evidence in International Arbitration' (2015) 5 Transnatl Disp Mgmt <https://www.transnational-dispute-management.com/article.asp?key=2255> accessed 19 October 2017.

[76] *ConocoPhillips Petrozuata BV, ConocoPhillips Hamaca BV and ConocoPhillips Gulf of Paria BV v Bolivarian Republic of Venezuela*, ICSID Case No ARB/07/30, Decision on Jurisdiction on Jurisdiction and Merits (3 September 2013).

[77] ICSID Convention (n 18) art 44: 'Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.'

[78] ICSID Arbitration Rules (n 13) r 38(2)(2): '[e]xceptionally, the Tribunal may, before the award has been rendered, reopen the proceeding on the ground that new evidence is forthcoming of such a nature as to constitute a decisive factor, or that there is a vital need for clarification on certain specific points'.

[79] *ConocoPhillips Petrozuata BV, ConocoPhillips Hamaca BV and ConocoPhillips Gulf of Paria BV v Bolivarian Republic of Venezuela*, ICSID Case No ARB/07/30, Decision on Respondent's Request for Reconsideration (10 March 2014) para 14.

the WikiLeaks cables directly contradicted the previous factual findings of the Tribunal.

The Chairman of the World Bank's Administrative Council, rejecting Venezuela's challenge, analysed the application in the following words:

> Venezuela also refers to U.S. Embassy cables – part of the WikiLeaks released after the hearing on the merits held in 2010 – submitted by the Respondent with the September 8 [2013] letter, to demonstrate that the Claimants made misrepresentations of fact at the hearing that proved decisive to the Challenged Arbitrators. Venezuela claims that these cables prove that the Claimants made false representations to the Tribunal, upon which the decision of the Challenged Arbitrators on the lack of good faith negation was based.
>
> Venezuela asserts that a decision based on misrepresentations would not comport with basic principles concerning the administration of justice and could not be made by arbitrators having the requisite impartiality under the ICSID Convention. Venezuela adds that 'no legal system can endorse the position that an arbitrator has no power in a case still pending before him to rectify an obvious mistake, irrespective of whether its original opinion was based on misrepresentation, fraud, forged documents, false testimony or any other egregious misconduct' and that 'this is the effect of the Challenged Arbitrator's blanket refusal to even consider the facts on Respondent's Application for Reconsideration.[80]

Interestingly, while it is clear that WikiLeaks evidence formed a crucial part of Venezuela's application, the majority's decision remained silent on its admissibility. Commenting on the case, J. H. Boykin and M. Havalic noted that:

> In a field in which one has grown accustomed to decisions of staggering length in which every argument raised by the parties is often reproduced verbatim in the body of the award, one might infer from such silence an implicit decision by the majority regarding the suitability of such evidence.[81]

Instead, the Tribunal analysed the right to reconsider a prior decision (or award)[82] under the ICSID Rules, concluding that decisions that resolve points in dispute between the parties have *res judicata* effect and may not be reconsidered.[83] The Tribunal rejected Venezuela's application.

Unfortunately, as Venezuela submitted the WikiLeaks cables for the first time in the request for reconsideration, they came too late in the process to receive a detailed assessment. The majority's decision denying reconsideration was silent on the admissibility of WikiLeaks cables.

Professor Georges Abi-Saab, however, published a strong dissent calling the ignorance of the WikiLeaks cables a 'travesty of justice':

> The revelations of WikiLeaks cables change the situation radically in dimension and seriousness. Here we have a full narrative of the negotiations, with a high degree of credibility, given the level of detail that tallies perfectly with what we know of the rest of the record. It is a narrative that radically confutes the one reconstructed by the Majority,

[80] *ConocoPhillips Petrozuata BV, ConocoPhillips Hamaca BV and ConocoPhillips Gulf of Paria BV v Bolivarian Republic of Venezuela*, ICSID Case No ARB/07/30, Decision on the Proposal to Disqualify a Majority of the Tribunal (5 May 2014) paras 20–21.
[81] See Boykin and Havalic (n 75) 9.
[82] *ConocoPhillips* (n 80) para 20.
[83] ibid para 21.

> relying almost exclusively on the assertions of the Claimants throughout their pleadings that the Respondent did not budge from its initial offer (see paragraphs 24–29 above).[84]
>
> [. . .] In these circumstances, I don't think that any self-respecting Tribunal that takes seriously its overriding legal and moral task of seeking the truth and dispensing justice according to law on that basis, can pass over such evidence, close its blinkers and proceed to build on its now severely contestable findings, ignoring the existence and the relevance of such glaring evidence.
>
> It would be shutting itself off by an epistemic closure into a subjective make-believe world of its creation; a virtual reality in order to fend off probable objective reality; a legal comedy of errors on the theatre of the absurd, not to say travesty of justice, that makes mockery not only of ICSID arbitration but of the very idea of adjudication.[85]

Professor Abi-Saab's opinion stands as a resounding reminder of how important it is to preserve the balance between the interests of justice, on the one hand, and of procedural integrity, on the other.

While *Methanex v United States*,[86] a case under the North American Free Trade Agreement (NAFTA), was decided before the WikiLeaks cables were published, the Tribunal's reasoning proves useful for the analysis at hand.

In *Methanex*, the Tribunal considered the State of California's environmental regulations and whether they violated a Canadian company's (Methanex) investment treaty rights guaranteed under NAFTA. Methanex, the world's largest producer of methanol, claimed that California's ban on the use or sale of the gasoline additive MTBE (a methanol product) destroyed its investment.

Methanex filed a claim against the US under Chapter 11 of NAFTA, alleging that the ban constituted a breach of Article 1102 (national treatment obligation), Article 1105(1) (minimum standard of treatment) and Article 1110(1) (expropriation and compensation). Ultimately, the Tribunal found that there was no breach of NAFTA's provisions, and Methanex's claims failed on the merits.

In the proceedings, Methanex attempted to rely on documents obtained through 'dumpster diving', an activity that brings a new meaning to the concept of clean hands, by going through the waste paper and rubbish—in this instance of a particular lobbying organisation. The unlawful acts were therefore committed by the Claimant.

The three-member Tribunal unanimously found the unlawfully obtained documents were inadmissible:

> Just as it would be wrong for the USA [. . .] to misuse its intelligence assets to spy on [the investor] and to introduce into evidence the resulting materials into this arbitration, so too would it be wrong for [the investor] to introduce evidential materials obtained by [the investor] unlawfully.[87]

The Tribunal emphasised the general duty of good faith and the basic principles of justice and fairness:

[84] *ConocoPhillips Petrozuata BV, ConocoPhillips Hamaca BV and ConocoPhillips Gulf of Paria BV v Bolivarian Republic of Venezuela*, ICSID Case No ARB/07/30, Decision on Respondent's Request for Reconsideration, Dissenting Opinion of George Abi-Saab (10 March 2014) para 64.
[85] ibid paras 66–67.
[86] *Methanex Corporation v United States of America*, UNCITRAL, Final Award (3 August 2005) para 55.
[87] ibid (n 86) para 54.

> It would be wrong to allow Methanex to introduce this documentation into these proceedings in violation of its general duty of good faith and, moreover, that Methanex's conduct, committed during these arbitration proceedings, offended basic principles of justice and fairness required of all parties in every international arbitration.[88]

What is noteworthy about this case, and differentiates it from *Yukos* and *ConocoPhillips*, is that it was Methanex that engaged in the unlawful activity to obtain evidence which it then sought to rely on and which the Tribunal considered to 'offend[] basic principles of justice and fairness'. In *Yukos* and *ConocoPhillips*, none of the parties actually did anything illegal themselves but simply relied on the product of a third party's illegal activity.

Moreover, when deciding whether to admit the unlawfully obtained evidence, the Tribunal in *Methanex* recognised:

> [t]he second issue is materiality. The Tribunal considered the content of the Vind Documents carefully, assisted by the submissions from Methanex's Counsel as to their relevance to its case. By the time of the main hearing in June 2004, the Vind Documents were of only marginal evidential significance in support of Methanex's case.
>
> There was other direct oral and documentary evidence relating to the meeting of 4th August 1998 between Mr Davis and ADM and other contacts between Mr Vind and Mr Davis; and the Vind Documents, as explained by Methanex's Counsel at the main hearing, could not have influenced the result of this case.
>
> Insofar as Methanex was seeking to discredit Mr Vind as a factual witness by using the Vind Documents during his cross-examination at the main hearing, it need only be said that, in all the circumstances, no such attempt could ever have succeeded in the manner originally intended by Methanex.[89]

The fact that evidence was obtained unlawfully by a party was itself not sufficient to exclude the evidence from consideration. The Tribunal in *Methanex* introduced one further element to the admissibility analysis: the *materiality* of evidence obtained.[90]

EDF v Romania[91] sheds additional light on the issue. EDF formed a joint venture with two state-owned companies to provide duty-free and other retail services at Romanian airports and on-board Romanian airlines. After the partner companies declined to renew the commercial contracts, EDF commenced ICSID arbitration for US$132 million in damages. EDF claimed that Romania expropriated its investment and subjected it to unfair and inequitable treatment as well as arbitrary and discriminatory measures.

EDF's main allegation was that a number of state entities had executed a concerted attack to damage EDF's investment in Romania as a result of EDF's refusal to pay a bribe to the then Prime Minister of Romania. In support of its claims, EDF submitted an audiotape recording of a meeting between an agent of EDF and a member of the Prime Minister's staff. The recording allegedly confirmed that Romania requested that EDF pay a bribe to be permitted to continue its business in Romania. EDF produced the audiotape only a few weeks before the oral hearing, and over seven years after its recording in 2001.

[88] ibid para 59.
[89] ibid para 56.
[90] Other commentators drew similar conclusions. See eg Boykin and Havalic (n 75) 7.
[91] *EDF (Services) Limited v Republic of Romania*, ICSID Case No ARB/05/13 (*EDF v Romania*).

Romania objected to the admissibility of the evidence, claiming that:

(i) EDF acted in bad faith by waiting seven years to produce a recording which was available to it from the time when it was first recorded, considering that the on-the-body recorder was worn by EDF's agent.
(ii) The recording was not authenticated and is 'in any case heavily manipulated'.[92]
(iii) The recording was obtained illegally, because it had been created without the knowledge of the person being recorded, which violated Article 26(1) of the Constitution of Romania, Article 12 of the Universal Declaration of Human Rights, and Article 8 of the European Convention on Human Rights.

The Tribunal found that the audiotape was obtained illegally, in violation of Romanian law. Moreover, the Tribunal considered EDF's conduct and the circumstances under which it proffered the audiotape to be against the principles of good faith and procedural fairness.[93] The Tribunal accordingly excluded the audiotape evidence.

Analysing the admissibility of unlawfully obtained evidence, the Tribunal held:

> [a]dmission of evidence in an ICSID arbitration is a procedural matter, not governed by municipal law but only by international law, in this case the Washington Convention of 1965 and such principles of public international law as may be applicable.
>
> Generally, international tribunals take a liberal approach to the admissibility of evidence. The Tribunal is of the view, however, that such discretion is not absolute. In the Tribunal's judgment, there are limits to its discretion derived from principles of general application in international arbitration, whether pursuant to the Washington Convention or under other forms of international arbitration. Good faith and procedural fairness being among such principles, the Tribunal should refuse to admit evidence into the proceedings if, depending on the circumstances under which it was obtained and tendered to the other Party and the Tribunal, there are good reasons to believe that those principles of good faith and procedural fairness have not been respected.
>
> The Tribunal believes that admissibility of unlawfully obtained evidence is to be evaluated in the light of the particular circumstances of the case, as in the case of the ICJ Judgment in the *Corfu Channel* case. Admitting the evidence represented by the audio recording of the conversation held in Ms. Iacob's home, without her consent in breach of her right to privacy, would be contrary to the principles of good faith and fair dealing required in international arbitration. In that regard, the Tribunal shares the position of the *Methanex* award.[94]

Turning to the recording's reliability, the Tribunal explained that:

> [t]he absence in the recording of a substantial part of the conversation between Mr. Katz and Ms. Iacob and the possibility that the recorded part was manipulated make the audio file unreliable in the absence of its authentication through the original recording [which was unavailable].[95]

[92] *EDF v Romania* (n 91) Procedural Order No 3 (29 August 2008) para 15.
[93] ibid para 48.
[94] ibid para 47.
[95] ibid para 35.

In sum, it was both: (i) EDF's unclean hands and bad faith; as well as (ii) the unreliability of illegally obtained evidence that drove the Tribunal's decision. One further consideration should be underlined: EDF's case revolved around a corruption allegation. It is clear that the Tribunal's decision was influenced by '[t]he seriousness of a corruption charge', which 'requires that the utmost care and sense of responsibility be taken to ascertain the truthfulness and genuine character of the evidence that the party intends to offer in support of its claim.' The Tribunal concluded that EDF failed to adhere to this standard of conduct when requesting the admission of the new evidence. Moreover, EDF failed to satisfy the requisite burden of proof with respect to the truthfulness and genuine character of the new evidence.[96]

Ultimately, the Tribunal concluded that the admissible evidence submitted by EDF was far from 'clear and convincing'. The Tribunal unanimously dismissed all of EDF's claims against Romania.

Libananco v Turkey[97] and *Caratube v Kazakhstan*[98] are two additional cases where Tribunals considered the admissibility of illegally obtained evidence.

Libananco, a Cyprus corporation, held shares in two Turkish utility companies, Cukarova Elektrik Anonim Sirketi (CEAS) and Kepez Elektrik Turk Anonim Sirketi (Kepez), which benefited from concession agreements with the Government of Turkey.

In June 2003, Turkey cancelled the concession agreements and took over certain facilities belonging to the concessionaires. Turkey sought to justify its conduct by arguing that CEAS and Kepez had breached their obligations under the concession agreements, and had refused to co-operate with the Turkish authorities.

Libananco brought an investment claim before ICSID in February 2006, alleging that Turkey had breached ECT guarantees. The Tribunal found it lacked jurisdiction over the case and dismissed the claims. However, while the case was in progress, it became apparent that the Turkish authorities were intercepting Libananco's electronic communications, including between Libananco and its legal counsel. It transpired that in this way Turkey obtained around 2000 legally privileged and confidential e-mails.[99] Turkey asserted that such surveillance was in relation to a money laundering investigation unrelated to the arbitration.

Libananco was unimpressed, and submitted that Turkey had created an untenable situation by abusing its sovereign powers to gain an unfair procedural advantage.[100] Libananco emphasised Turkey's unclean hands in the following terms:

> [The Claimant] has undoubtedly been prejudiced as the Sisli Prosecutor has reviewed hundreds upon hundreds of emails sent to, by and between the Claimant's counsel during the course of this arbitration. The Sisli Prosecutor is a part of the Turkish Government, performs functions of a governmental nature, and is controlled by the Turkish Government. [. . .] The Respondent intended to prejudice, or knowingly

[96] ibid para 28.
[97] *Libananco Holdings Co Limited v Republic of Turkey*, ICSID Case No ARB/06/8 (*Libananco v Turkey*).
[98] *Caratube International Oil Company LLP v Republic of Kazakhstan*, ICSID Case No ARB/08/12 (*Caratube v Kazakhstan*).
[99] *Libananco v Turkey* (n 97), Decision on Preliminary Issues (23 June 2008) para 72.
[100] ibid para 44.

> prejudiced, the Claimant's rights in this arbitration by commencing the surveillance. [. . .] Regardless of the Respondent's intention, the effect of the Respondent's surveillance has been that the Claimant has been prejudiced in this arbitration. [. . .] The exclusion of the Respondent from this phase of the arbitration process is the only means for the tribunal to equalize the playing field.[101]

Turkey maintained that the surveillance activities had nothing to do with the investment arbitration, and that the files intercepted (including, for example, draft versions of the legal submissions) were never shared with the department within the State Attorney's office handling the arbitration.[102] As a result, Turkey submitted that Libananco had not been prejudiced.[103] The Tribunal found that:

> These allegations and counter-allegations strike at principles which lie at the very heart of the ICSID arbitral process, and the Tribunal is bound to approach them accordingly. Among the principles affected are: basic procedural fairness, respect for confidentiality and legal privilege (and indeed for the immunities accorded to parties, their counsel, and witnesses under Articles 21 and 22 of the ICSID Convention); the right of parties both to seek advice and to advance their respective cases freely and without interference; and no doubt others as well. For its own part, the Tribunal would add to the list respect for the Tribunal itself, as the organ freely chosen by the Parties for the binding settlement of their dispute in accordance with the ICSID Convention. It requires no further recital by the Tribunal to establish either that these are indeed fundamental principles, or why they are.
>
> Nor does the Tribunal doubt for a moment that, like any other international tribunal, it must be regarded as endowed with the inherent powers required to preserve the integrity of its own process – even if the remedies open to it are necessarily different from those that might be available to a domestic court of law in an ICSID Member State. The Tribunal would express the principle as being that parties have an obligation to arbitrate fairly and in good faith and that an arbitral tribunal has the inherent jurisdiction to ensure that this obligation is complied with; this principle applies in all arbitration, including investment arbitration, and to all parties, including States (even in the exercise of their sovereign powers).[104]

The Tribunal considered the importance of confidentiality and legal privilege and the obligation of all parties to arbitrate fairly and in good faith. Perhaps unsurprisingly, the Tribunal recognised the need to exclude all privileged and confidential communication and concluded:

> The Tribunal attributes great importance to privilege and confidentiality, and if instructions have been given with the benefit of improperly obtained privileged or confidential information, severe prejudice may result. If that event arises, the Tribunal may consider other remedies available apart from the exclusion of improperly obtained evidence or information.[105]

The Tribunal decided that:

[101] ibid para 48.
[102] ibid para 75. The Respondent alleged that obtained documents, 'including a draft of the Claimant's Memorial in this case, bore headings that indicated they were privileged. Counsel did not read the documents in question and advised the Prosecutor that they were privileged and should be destroyed.'
[103] ibid para 46.
[104] ibid para 79.
[105] ibid para 80.

> All privileged documents and information which have been tendered or disclosed to the Tribunal in connection with the Claimant's application of February, 29, 2008 will be excluded from the evidence to be received in this arbitration.
> Any privileged documents or information which may be introduced into evidence in future proceedings of this arbitration will be excluded as well as any evidence derived from possession of privileged documents or information.[106]

Accordingly, the Tribunal made an order that any communication in relation to the arbitration which had been intercepted by the State Attorney must be destroyed.[107]

Caratube v Kazakhstan dealt with Caratube's claims for compensation arising out of the Government's termination of a licence for an oilfield in Kazakhstan.

In 2000, an oil exploration and production contract for the Caratube oilfield was concluded between the Kazakh Ministry of Energy and Mineral Resources and Consolidated Contractors Oil & Gas Company SAL (CCC), a Lebanese company. Two years later, CCC assigned the contract to Caratube International Oil Company (CIOC), a Kazakh company with a US majority shareholder.

The contract was terminated in 2008 by the Ministry of Energy, alleging that CIOC was in breach of its obligations under the contract. CIOC then filed for arbitration under the Kazakhstan—US BIT, claiming that the Ministry of Energy had expropriated its investment, and that the Kazakh authorities had repeatedly harassed CIOC, its employees, and other individuals. The Tribunal ruled in favour of Caratube, awarding it USD 39.2 million damages.

During the proceedings, Caratube sought to produce documents that had been made publicly available on the internet as a consequence of certain hacking of Kazakhstan's Government IT systems. The hackers uploaded around 60,000 documents onto a website known as 'KazakhLeaks'.[108] Caratube, which was not involved in the hack, attempted to rely on 11 of these documents, including some (at least four) that were covered by legal privilege.

Kazakhstan objected to the submission of the leaked documents, which they referred to as 'stolen documents'. The Respondent requested that the Tribunal declare all of the 'stolen documents' inadmissible in the arbitration, including the 11 documents submitted by Caratube, and specifically the four documents that were privileged.[109] Each party submitted legal opinions on the admissibility of the leaked documents.

In July 2015, the Tribunal handed down its decision allowing the admission of all non-privileged leaked documents, but excluding from the record all legally privileged leaked documents.

In *Caratube,* in contrast to *Libananco*, the wrongdoing (unlawful hacking) was committed by a third party. This may well explain why the conclusion of the Tribunal was different from that in *Libananco.* The *Caratube* Tribunal allowed that illegally obtained evidence may be admitted, even if the Tribunal must 'afford privileged documents the utmost protection'.[110]

[106] ibid para 82 (1.1.6–7).
[107] ibid para 82 (1.1.3).
[108] *Caratube v Kazakhstan* (n 98) Award (27 September 2017) para 150.
[109] ibid para 152.
[110] ibid paras 669, 1259.

III. EVALUATIVE ADMISSIBILITY TEST FOR UNLAWFULLY OBTAINED EVIDENCE

As seen in Section II, a thorough analysis of representative cases fails to define a clear standard for deciding the admissibility of unlawfully obtained evidence; yet the authors believe that at least some common elements and trends can be distinguished.

First, one clear conclusion is that the evidence obtained illegally will not be automatically disqualified as inadmissible. This principle goes hand-in-hand with the wide discretion afforded to arbitration tribunals when handling evidence.

Second, the case law suggests that there are three questions which play an important role informing how tribunals reach decisions on the admissibility of illegally obtained evidence:

(i) *Has the evidence been obtained unlawfully by a party who seeks to benefit from it?*

A positive response to this first question of admissibility should raise an onerous rebuttable presumption that the evidence is inadmissible.

The clean hands approach has been applied in many international cases,[111] and seems reasonable in light of deterring overzealous litigants from pursuing unlawful means to obtain a procedural advantage. Moreover, allowing a party to rely on evidence which that party has procured unlawfully would run counter to the principle of *ex turpi causa non oritur actio* (a right cannot stem from a wrong).

If, however, a relevant document has found its way to the tribunal through the hands of a third ('disinterested') party, even if originally obtained through unlawful conduct, an argument could be made that such evidence should be considered *prima facie* admissible.

In terms of defining the 'disinterested party', the definition of the ICJ in a *Military and Paramilitary Activities in and against Nicaragua* of a 'disinterested witness' seems instructive. The ICJ's definition includes 'one who is not a party to the proceedings and stands to gain or lose nothing from its outcome'.[112]

Certain related questions may also arise when considering this first limb of the 'admissibility test', such as the nature of the allegedly unlawful activity. Naturally, not every technical breach of applicable rules should result in the exclusion of evidence. Proportionality has a role to play.

As seen in the ICJ's ruling in *Iranian Hostages*, when the nature of the breach is particularly grave (in that case it included the physical occupation of the US Embassy with diplomats held hostage),[113] the court or the tribunal may show less tolerance or willingness to engage in any discussion on admissibility of evidence.

However, if the party seeking to benefit from unlawfully obtained evidence comes with clean hands, the evidence will likely pass the first threshold, and fall to be considered under the second and third limbs.

[111] See *Iranian Hostages* (n 26); *Persia International Bank v Council* (n 42) para 95; and *Methanex* (n 86) para 54.
[112] *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 392 para 69.
[113] *Iranian Hostages* (n 26) 106.

(ii) *Does public interest favour rejecting the wrongfully disclosed document as inadmissible?*

Because the admissibility of evidence is largely a discretionary matter for tribunals, policy arguments will play a large role in shaping decisions. Tribunals should take into account public policy considerations, such as legal professional privilege, diplomatic immunity and inviolability.

Tribunals already have at their disposal the tools to balance different policy interests against the need to find the truth.

Article 9(2)(f) of the IBA Rules on the Taking of Evidence in International Arbitration (2010) empowers the tribunals to 'exclude from evidence or production any Document' on the 'grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution) that the Arbitral Tribunal determines to be compelling [. . .]'.

Since many of the WikiLeaks cables were designated 'secret' by the US, they would therefore satisfy the requirements of Article 9(2)(f), and it would be possible for tribunals to exclude any WikiLeaks derived evidence on that ground.

Further, documents obtained unlawfully which are protected by legal privilege, would attract a strong presumption against admissibility. Certain types of privilege, notably attorney-client privilege, should be considered as protecting the document absolutely from being used in proceedings, even if it had been revealed by the wrongful conduct of a third party.

The reason for such absolute protection lies in the need to ensure honest and transparent communication between an attorney and a client, confidentiality of which should not be threatened by wrongful acts of others (including 'disinterested' parties). In the words of Professor Waincymer:

> Where legal privilege is concerned, the rational is that justice is served if there is an entitlement to seek legal advice knowing that confidences will be maintained. Absent any privilege, clients might withhold adverse information from their legal advisers or not seek advice at all. A related policy justification is that counsel can provide cautionary advice if the communication is protected. The more that a party is forthcoming and receives accurate advice, the more likely that settlement will be achieved and that the transaction costs of formal dispute settlement can be avoided or at least minimised.[114]

Moreover, some jurists have argued that certain categories of privilege are sufficiently well respected to constitute general principles of law or transnational public policy.[115] Confidential communications between counsel and clients have been considered integral to the right to a fair trial under Article 6 of the European Convention on Human Rights.[116]

The IBA Rules of Evidence 2010 also include mechanisms for determining questions of privilege. Article 9(2)(b) of the 2010 Rules indicates that evidence shall be excluded where it is subject to a 'legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable . . . '

[114] Waincymer (n 16) 809–10.

[115] Charles Brower and Jeremy Sharpe, 'Determining the Extent of Discovery and Dealing with Requests for Discovery: Perspectives from the Common Law' in Lawrence Newman and Richard Hill (eds), *Leading Arbitrators' Guide to International Arbitration* (2nd edn, Juris Publishing 2008) 378–81.

[116] A submission to this effect was made but not ruled upon in *Campbell v UK* (App no 13590/88) ECHR 25 March 1992 [46].

Under Article 9.3 the tribunal is to consider:

(a) Any need to protect the confidentiality of a Document created or statement or oral communication made in connection with and for the purpose of providing or obtaining legal advice.
(b) Any need to protect the confidentiality of a Document created or statement or oral communication made in connection with and for the purpose of settlement negotiations.
(c) The expectations of the Parties and their advisers at the time the legal impediment or privilege is said to have arisen.
(d) Any possible waiver of any applicable legal impediment or privilege by virtue of consent, earlier disclosure, affirmative use of the Document, statement, oral communication or advice contained therein, or otherwise.
(e) The need to maintain fairness and equality as between the Parties, particularly if they are subject to different legal or ethical rules.

Moreover, it is generally accepted that documents exchanged in the course of 'without prejudice' and similar settlement discussions would not be admissible before a tribunal.[117] The same was confirmed by the ICJ in *Chorzow Factory*.[118]

The final question that falls to be considered is as follows.

(iii) *Does the interest of justice favour the admission of the wrongfully disclosed document?*

In relation to this limb of the admissibility test, tribunals will need to balance the multitude of principles and interests which may clash on the facts of any particular case. Principles such as the need to discharge the tribunal's function fairly and justly, and in a way that results in a manifestly right decision, as well as interests of procedural integrity and equality of arms, would all need to be weighed.

While it would be understandable if arbitrators tended towards dismissing illegally-obtained evidence so as not to encourage wrongdoing in the future, it would be a disappointing outcome if, in the end, this caused offence to basic notions of justice because important facts were discounted. There is certainly a tightrope to be walked when tribunals are invited to reach decisions based on all available evidence, which may include WikiLeaks-type documents and other illicitly-obtained evidence.

It was precisely this that led Professor Georges Abi-Saab in *ConocoPhillips v Venezuela* to describe the majority decision as a 'travesty of justice'.[119]

There will be occasions when simply ignoring evidence will not make for a just solution, and would lead to an award that is factually wrong in light of publicly available information. As Lord Hewart observed, 'it ... is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.'[120]

[117] Jason Fry, 'Without Prejudice and Confidential Communications in International Arbitration (When Does Procedural Flexibility Erode Public Policy?)' (1998) 1 IntALR 209.
[118] *Case Concerning the Factory at Chorzów (Germany v Poland)* (Merits) PCIJ Rep Series A No 17 para 51.
[119] *ConocoPhillips* (n 80) para 67.
[120] *R v Sussex Justices, ex parte McCarthy* [1924] 1 KB 256, 259.

IV. ADMISSIBILITY AND RELIABILITY OF EVIDENCE

The test proposed by the authors may not provide clear-cut definitive answers to questions of admissibility in respect of all evidence of illegal origin; however, it should at least provide some much needed guidance. There is, however, one further consideration to bear in mind: Documents that are obtained illegally, including those obtained through sources such as WikiLeaks, may still be considered of limited evidentiary value if their authenticity is disputed.

The Lebanon Tribunal dealt with this issue directly. Ultimately, it declined to admit WikiLeaks documents into evidence due to a perceived lack of reliability and authenticity. In its 2015 Decision, the Lebanon Tribunal held that in order for WikiLeaks evidence to be admissible, the party from which the documents were taken must have acknowledged their authenticity or other evidence must corroborate the documents' accuracy or authenticity.[121]

The Tribunal in *EDF v Romania* similarly considered evidence's authenticity a condition for its admissibility:

> Considering that today's sophisticated technology may permit easy manipulation of audio recordings, proven authenticity is in fact an essential condition for the admissibility of this kind of evidence [. . .] An obvious condition for the admissibility of evidence is its reliability and authenticity. It would be a waste of time and money to admit evidence that is not and cannot be authenticated.[122]

It is to be expected that in any given case, tribunals would be asked to evaluate the authenticity, reliability and persuasiveness of the evidentiary material before it, and remain free to be persuaded or dissuaded by many factors, including the origin of evidence. In today's time of 'alternative facts' and 'fake news', the tribunal's role as a just and fair adjudicator of facts seems more important than ever.

V. CONCLUSION

In the absence of clear rules on the admissibility of illegally obtained evidence, a trend may be discerned based on existing case law. The authors draw a two-fold conclusion: first, the fact that evidence is obtained illegally will not automatically disqualify such evidence as inadmissible; and second, while a common test for deciding admissibility of unlawfully obtained evidence is still to be defined, some common legal and policy elements may be distinguished and serve to guide tribunals.

The legal and policy elements which have been taken into account when deciding admissibility of illegally obtained evidence include:

(i) Has the evidence been obtained unlawfully by a party who seeks to benefit from it?
(ii) Does public interest favour rejecting the evidence as inadmissible?
(iii) Do the interests of justice favour the admission of evidence.

The authors hope that this three-step approach might serve to assist future tribunals reach decisions which are both justifiable and aligned, to the extent possible, with the reasoning expressed in previous international cases.

[121] *Decision on the Admissibility of Documents Published on the WikiLeaks Website* (n 35) para 35.
[122] *EDF v Romania* (n 91) para 29.