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Illegal and Inappropriate Evidence in International Investment Law: Balancing Admissibility

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Abstract

The question of the admissibility of illegal or inappropriate evidence tests the limits of procedural flexibility of the arbitral process. Balancing admissibility requires a case-by-case approach. Tribunals will have to balance (or 'weigh') the substance of such documents with procedural fairness and general principles of law. In other words, the relevance of the evidence is weighed against the adverse and unfair effect that admission would have on the opponent. From an empirical perspective, reliance solely on the substance of the evidence rarely succeeds in outweighing procedural fairness. Exceptionally, however, publicly available documents, such as diplomatic cables leaked by WikiLeaks, have better chances of being admitted. The severity of the wrongfulness or unfairness may always tilt the balance in the opposite direction. Tribunals also unconditionally resist the admissibility of legally privileged documents. In any case, attempts to admit tainted evidence do not leave the opponent unprotected. The doctrine of equality of arms, good faith, and, debatably, the principle of clean hands safeguard them against unfairness. Finally, arbitrators have tools to tilt the scales of admissibility if the evidence is highly relevant. They may draw on the coercive powers of domestic courts through

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judicial assistance or order the production of documents to level the playing field for both parties.

Keywords: investment arbitration, international law, evidence, admissibility, procedural fairness

I. Introduction

One of the most eagerly cited advantages of arbitration is the flexibility of the process compared with litigation.[1] Tribunals generally have broad freedom to determine the procedural aspects of their cases. Despite clear advantages to the efficiency of proceedings, this flexibility can become a double-edged sword. Admissibility of evidence is one example. Arbitral tribunals, free from the requirements of civil procedure rules, might feel inclined to consider evidence that is inadmissible under domestic laws or *vice versa*. The treatment of such tainted evidence is further complicated by investment law being nested at the crossroads of public and private international law, and the principles from both influence the findings of tribunals.[2] The subject is particularly complex when the investor-sovereign State relationship is added to the discussion. Nonetheless, even in such complex circumstances, there must exist some principles on the admissibility of evidence to guide the tribunals.

This article analyses a narrow area of admissibility of evidence in investment arbitration — namely, the admissibility of illegally and inappropriately obtained evidence. It is clear that the process by which such tainted evidence is admitted is a weighing or balancing exercise — balancing the substantive relevance of the evidence with procedural fairness. The tainted evidence might be, after all, highly relevant to the dispute. On the other hand, the methods by which the evidence was procured may have been illegal or inappropriate. States have vast intelligence services, military technologies, and spying techniques to assist them. Investors, on the other hand, might be global corporations that are far more powerful and wealthy than some of the less economically developed respondent States. Such considerations of the balance of powers would fall into the procedural fairness analysis. In the end, tribunals balance these two considerations in deciding admissibility. This article takes a closer look at this process.

This article relies heavily on case law. The question asked is whether a common test for admissibility can be inferred from arbitral decisions, given that

1 William Park, 'Two Faces of Progress: Fairness and Flexibility in Arbitral Procedure' (2007) 23(3) Arbitration International 499, 499.

2 Andrea Brojklund and others, 'Investment Law at the Crossroads of Public and Private International Law' in August Reinisch, Mary Footer and Christina Binder (eds), International Law and… *Select Proceedings of the European Society of International Law* (Hart Publishing 2016) 151.

no clear test has been laid down in the applicable procedural rules or treaties. In addition, the article considers the procedural principles enshrined in Bilateral Investment Treaties (BITs), arbitration rules, and rules on the taking of evidence. This article focuses on the International Centre for Settlement of Investment Disputes (ICSID) Convention and Arbitration Rules and the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules since they are the most widely used procedural rules in investment law. Case law is relevant because, although there is no doctrine of precedent in investment law, tribunals are prompted to follow a harmonious interpretation of international law and previous cases are clearly deemed highly authoritative.[3] In addition, the 2020 International Bar Association (IBA) Rules on the Taking of Evidence (IBA Rules) as well as the 2018 Rules on the Efficient Conduct of Proceedings in International Arbitration (Prague Rules) will be considered. They are frequently referred to by arbitral tribunals, despite being non-binding by themselves.[4]

The rationale for the research originates from the fact that rules on the admissibility of illegal and inappropriate evidence are scattered. Tribunals appear to lack a systematic approach to the issue and hence its resolution has been taken on a case-by-case basis. The situation is similar within the jurisprudence of the International Court of Justice (ICJ) and other international courts. This article hence considers whether any general tribunal practice may emerge from cases, hinting at the considerations which would or should be taken into account by future tribunals in admitting or rejecting tainted evidence. This is a complex question. Hence, the article takes a broad approach to the narrow issue of the admissibility of illegal and inappropriate evidence in investment arbitration.

Firstly, the article briefly discusses the ability of arbitral tribunals, which are not criminal courts, to analyse matters of illegality and impropriety associated with tainted evidence. Investment tribunals are arguably not created for that purpose, so this question of arbitrability deserves a mention.

Secondly, the article analyses the considerations for the balancing exercise. In particular, the relevant arbitration rules as well as case law are considered. Arbitration rules are relevant because they contain the framework of the tribunals' procedural powers, granted to the tribunals by the consent of States or party agreement. The extent of wrongfulness associated with admitting evidence

[3] AES Corp*oration v Argentina*, ICSID Case No ARB/02/17, Award (26 April 2005) [17]–[33]; Saipem *SpA v Bangladesh*, ICSID Case No ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures (21 March 2007) [67].

[4] See Cambodia Power v Cambodia, ICSID Case No ARB/09/18, Decision on the Claimant's Application to Exclude Mr Lobit's Witness Statement and Derivative Evidence (29 January 2012) [1]; Hrvatska Elektroprivreda *DD v Republic of Slovenia*, ICSID Case No ARB/05/24, Order Concerning the Participation of Counsel (6 May 2008) [19].

remains an important consideration for this element. Therefore, the different types of wrongfulness in international law are discussed, many of which are neither legal nor illegal when referring to the conduct of sovereign States. The more wrongful the conduct of one party, the less likely it is that their tainted evidence will be admitted.

Thirdly, the admissibility of tainted evidence likely stems from domestic laws. Hence, another consideration is the issue of admissibility of illegal and inappropriate evidence in domestic legal systems for comparative purposes. The discussed English and Austrian laws are most familiar to the author and illustrate the approach of common law and civil law traditions respectively. United States federal law, on the other hand, might reflect a general principle of law[5] and hence could indicate the direction of future developments.

In section IV, the article turns to procedural principles and how disadvantaged parties may be protected by investment law from tainted evidence being introduced against them. These considerations are used by tribunals if an imbalance is created by the new evidence. In such situations, investment law and general public international law might step in. That is because tribunals have to engage with broad international law considerations in ruling on admissibility, including particularly three principles of relevance: equality of arms, good faith, and clean hands.

The final section of the article analyses the limited tools tribunals can use to preserve the fairness of the arbitral process. Most relevant to the subject are judicial assistance requests and document production orders.

II. Arbitrability of Illegal and Inappropriate Conduct

The preliminary question is whether arbitral tribunals are a competent forum to address the impropriety or criminality of evidence. If illegality can be considered as part of the weighing exercise, this suggests that arbitrators have to engage with a task similar to domestic criminal courts. As will be seen, this is particularly true for circumstances of corruption.

The arguable function of investment law and investment tribunals is the protection of international trade. Mourre opines that arbitrators are "natural guardians of ethics and good morals in international commerce" and are "better placed than national judges to combat international fraud".[6] Although he refers to commercial arbitration, the statement is even truer for investment tribunals.

[5] Statute of the International Court of Justice, Article 38(1)(c).

[6] Alexis Mourre, 'Arbitration and Criminal Law: Jurisdiction, Arbitrability and Duties of the Arbitral Award' (2009) 19 International and Comparative Perspectives, International Arbitration Law Library 207, 207.

BITs are aimed primarily at promoting transnational trade, which should also be the ultimate goal of investment arbitration. As a result, although tribunals are not criminal courts, they may consider civil law consequences of criminal conduct.[7]

One of the most dominant types of unlawful conduct is corruption. It was addressed in detail in the *World Duty Free v Kenya* arbitration, where the tribunal stated that "bribery or influence peddling, as well as both active and passive corruption, are sanctioned by criminal law in most, if not all, countries".[8] In this case, the arbitrators did find evidence of corruption following a detailed analysis. The question of whether the prohibition of corruption constitutes a general principle of law is a separate discussion, but clearly it amounts to a violation of international public policy that tribunals enforce.[9] The tribunal quoted Judge Lagergren, who described international public policy as follows:

> "[w]hether one is taking the point of view of good government or that of commercial ethics it is impossible to close one's eyes to the probable destination of amounts of this magnitude, and to the destructive effect thereof on the business pattern with consequent impairment of industrial progress. Such corruption is an international evil; it is contrary to good morals and to an international public policy common to the community of nations".[10]

The *World Duty Free* case hence directly applied this analysis to investment arbitration, with a particular emphasis on corruption. Investment tribunals hence not only *may* consider illegal or inappropriate conduct, but should in fact do so. Bonifatemi adds that the issue of jurisdiction of tribunals in analysing corruption is a "non-issue".[11]

In the later case of *EDF v Romania*, the tribunal agreed with this conclusion, applying it to considerations of the admissibility of evidence.[12] In the case, corruption

[7] Dragor Hiber and Vladimir Pavic, 'Arbitration and Crime' (2008) 25(4) Journal of International Arbitration 461, 462.

[8] *World Duty Free v The Republic of Kenya*, ICSID Case No ARB/00/7, Award (4 October 2006) [142].

[9] ibid [138-41].

[10] J Gillis Wetter, 'Issues of Corruption before International Arbitral Tribunals: The Authentic Text and True Meaning of Judge Gunnar Lagergren's 1963 Award in ICC Case No. 1110' (1994) 10(3) Arbitration International 277, 294.

[11] Yas Bonifatemi, 'The Impact of Corruption on "Gateway Issues" of Arbitrability, Jurisdiction, Admissibility and Procedural Issues' in Domitille Baizeau and Richard Kreindler (eds) *Addressing Issues of Corruption in Commercial and Investment Arbitration* (ICC 2015) 18.

[12] EDF (S*ervices) Limited v Romania*, ICSID Case No ARB/05/13, Award (8 October 2009) [221].

was unsuccessfully argued by the claimant. Since the allegations concerned persons at the height of the Romanian Government, the tribunal pointed at the high standard of proof for such allegations.[13] In *Yukos v Russia*, the WikiLeaks evidence proved the misconduct of the respondent towards the claimant's auditors. These cases point towards the interplay between criminal considerations by the tribunals and the admissibility of evidence. The two frequently appear simultaneously and cannot be disentangled. Finally, in the *Awdi v Romania* arbitration, the tribunal used the criminal law language of a "presumption of innocence"[14] as a starting point for tribunals in assessing the culpability of parties for criminal allegations.

III. Weighing Exercise

Dolzer and Schreuer state that evidence in arbitration consists of documents, witness testimonies, and expert opinions.[15] The admissibility of such evidence is covered by the arbitration rules applicable to the dispute. Those would be mentioned explicitly in the BIT, subsequent party agreements or tribunal decisions, thus rendering them binding.

The ICSID Arbitration Rules stipulate in Article 34(1) that "the Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value". The Rules therefore leave wide discretion to the tribunal in considering factors for admissibility. Article 34(1) also mentions "probative value", prompting the arbitrators to look at the substance and usefulness of the evidence.

Article 25(6) of the UNCITRAL Arbitration Rules reads: "[t]he arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered". Caron and Caplan in the Commentary to the UNCITRAL Rules state that admissibility under the Article is "liberal pursuant to the spirit and practice", with the only exceptions being the evidence's "relevance, materiality and weight".[16] It should be noted that the passage does not explicitly mention that the manner in which the evidence was obtained is relevant, nor does it mention the legality or appropriateness of the evidence as a factor. This interpretation leaves the arbitrators with a wide discretion to consider those factors by themselves.

In a similar spirit, the IBA Rules, which are often applied in conjunction with the ICSID or UNCITRAL Arbitration Rules, mention in Article 9(1) that

[13] ibid.

[14] *Mr Hassan Awdi, Enterprise Business Consultants, Inc and Alfa El Corporation v Romania*, ICSID Case No ARB/10/13, Decision on the Admissibility of the Respondent's Third Objection to Jurisdiction and Admissibility of Claimant's Claims (26 July 2013) [84].

[15] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd edn, OUP 2012) 285; ICSID Arbitration Rules, Articles 33–35.

[16] David Caron and Lee Caplan, *The UNCITRAL Arbitration Rules: A Commentary* (2nd edn, OUP 2013) 573.

"[t]he Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of evidence". Following the 2020 revision of the Rules, Article 9(3) was added that expressly applies to tainted evidence and reads: "[t]he Arbitral Tribunal may, at the request of a Party or on its own motion, exclude evidence obtained illegally". The precatory word "may" suggests tribunal discretion. The Prague Rules do not contain provisions on the admissibility of evidence at all, leaving it fully to the discretion of the tribunal. Although these rules are soft law, tribunals have consistently referred to them as authoritative.[17] Parties' agreements, BITs or decisions of tribunals may render these Rules binding.[18] The UNCITRAL Arbitration Rules as well as the soft law IBA Rules on the Taking of Evidence are particularly broad. The former provide no further guidance while the latter only list factors which the tribunal "shall" consider.[19] As a result, arbitrators have engaged in the exercise of balancing substantive and procedural fairness with little assistance from the arbitration rules, taking into consideration different factors in their cases.

It seems that arbitration rules do not concern the matter of admissibility — or, at the very least, do not provide obstacles or restrictions to admissibility. A more accurate statement would be to conclude that the admissibility of tainted evidence rests with the tribunals' autonomy or arbitral discretion.[20] Regardless, putting the rules to the side, it seems that the tribunals have developed their own respective criteria for admissibility within the framework of the broad arbitration rules. Accordingly, relevance,[21] credibility,[22] materiality, and also legality[23] were mentioned in the case law as separate criteria. Blair and Gojković suggest a threefold test: (a) has the evidence been obtained unlawfully by a party who seeks to benefit

[17] Cambodia Power (n 4); Hrvatska Elektroprivreda *DD* (n 4); EDF (Services) *Limited v Romania*, ICSID Case No ARB/05/13, Procedural Order No 3 (29 August 2008) [47]–[48].

[18] The IBA Arbitration Guidelines and Rules Subcommittee, *Report on the reception of the IBA Arbitration Soft Law Products* (International Bar Association 2016) 19.

[19] E.g., lack of sufficient relevance to the case or materiality to its outcome; legal impediment or privilege; unreasonable burden to produce the requested evidence; loss or destruction of the documents.

[20] Dolzer (n 15) 285.

[21] Aguas del Tunari, *SA v Republica of Bolivia*, ICSID Case No ARB/02/3, Decision on Respondent's Objections to Jurisdiction (21 October 2005) [25].

[22] ADC Affiliate *Limited and ADC & ADMC Management Limited v The Republic of Hungary*, ICSID Case No ARB/03/16, Award of the Tribunal (2 October 2006) [257]; Rumeli *Telekon AS and Telsim Mobil Telekomunikasyon Hizmetleri v Republic of Kazakhstan*, ICSID Case No ARB/05/16, Award (29 July 2008) [442]–[448].

[23] Methanex Corporation v U*nited States of America*, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits (3 August 2005) pt II ch I [1]–[60].

from it?; (b) does public interest favour rejecting the evidence as inadmissible? And; (c) do the interests of justice favour the admission of evidence?[24]

The authors do note that no common test can be drawn for the admissibility of evidence and that the questions only serve as assistance to future tribunals.[25] Although these questions should certainly be asked by the tribunals, they are not broad enough to cover the entirety of the subject. Firstly, many acts in international law, particularly those of States, would not be deemed unlawful but rather inappropriate or unfriendly. This distinction is discussed below. Further, it is not an interest of justice that renders evidence inadmissible but rather procedural principles and various doctrines stemming from them. For these reasons this article will present the admissibility of tainted evidence as a balancing or weighing exercise between substantive fairness and procedural fairness — an approach which appears to be consistently employed by tribunals.

The difficulty is that the considerations of admissibility are scattered throughout the case law. Furthermore, no compact list of the criteria exists, which suggests that the test is not carved in stone but is flexible. This is further supported by the lack of a doctrine of precedent in investment law and the divergent views from other international and domestic courts and tribunals. To deduce a possible test for admissibility, the case law on this matter will be analysed further.

A. Weight of substance

At the outset, it is certain that illegality is not fatal to the admissibility of evidence *per se*. Whilst tribunals have frequently rejected tainted evidence, illegality was never the sole factor for such a decision. In fact, the practice of tribunals seems to be to look at the substantive value of the evidence regardless of its illegality.

Firstly, it should be noted that the practice of taking into account illegal or inappropriate evidence may not necessarily originate from arbitration or investment law, but rather from public international law. This stems from the early ICJ case of *Corfu Channel*.[26] The case concerned trespass by the British fleet in 1946 into the Corfu Channel, which was a territory claimed by Albania. The Albanian government demanded the British to obtain their consent before entry to the Channel. Prior to the trespass, and unbeknown to the British, the Channel had been mined, hence resulting in a loss of life and property to the fleet. This loss and the legality of passage over the waters triggered the dispute. The fleet entered

[24] Cherie Blair and Ema Vidak Gojković, 'WikiLeaks and Beyond: Discerning an International Standard for the Admissibility of Illegally Obtained Evidence' (2018) 33 ICSID Review: Foreign Investment Law Journal 252, 259.

[25] ibid.

[26] *Corfu Channel (UK v Albania)* (Merits) [1949] ICJ Rep 4.

the Channel on one more occasion to collect evidence. Unlike the first trespass, the second trespass was deemed outright illegal; the Court held that the United Kingdom was not allowed to collect the evidence unilaterally.[27] Interestingly, despite this holding, the ICJ then relied upon the evidence revealed in the course of the second trespass without objection from either party. One of the findings concerned the German origin of the mines which pointed at Albanian liability, given that Albania was in possession of similar mines following the Second World War.[28] In other words, although the ICJ did not make an explicit statement concerning the evidence, the Court nevertheless relied on it. Hence, the principle that all evidence can be admissible, regardless of legality or appropriateness, could originate from public international law and not arbitration. That being said, the ICJ uses neither the principle on the hierarchy of evidence nor the principle on weighing evidence. The Court's former president Judge Peter Tomka suggested the reason for this uncertainty is that the domestic principles on admissibility were never transposed into the international legal order.[29] The ICJ consequently relied solely on a broad procedural wording of the ICJ Statute in Article 48, stating that the Court "shall make all arrangements connected with the taking of evidence".

Looking at the approach taken by tribunals, one of the best examples is the *Slovenian Border Dispute*. In this inter-State Permanent Court of Arbitration case between Croatia and Slovenia, the issue was the possession of a narrow stretch of land along the two states' maritime border near the Gulf of Piran.[30] In the course of the proceedings, Croatia discovered that the Slovenian-appointed arbitrator had *ex parte* talks with one of the Slovenian counsel, discussing information about the ongoing arbitration. Such conduct pointed at the arbitrator's lack of impartiality and independence. This evidence was procured at the very least inappropriately — through the tapping of the arbitrator's phone by the Croatian intelligence.[31] Nonetheless, the arbitrator and the counsel resigned and provided apologies accordingly.

On the one hand, the *Slovenian Border Dispute* case is one of the clearest cases on the point that illegal evidence may be admissible. On the other hand, it indicates that political tensions are the supervening consequences of engaging in illegal activities, although those may be more significant in inter-State arbitrations than

[27] ibid 35.

[28] ibid.

[29] Peter Tomka and Vincent Proulx, 'The Evidentiary Practice of the World Court' in Juan Carlos Sainz-Borgo (ed), *Liber Amicorum Gudmundur Eiriksson* (San José, University for Peace Press 2016) 3.

[30] *Republic of Croatia v Republic of Slovenia*, PCA Case No 2012-04, Partial Award (30 June 2016) [80], [171], and [219].

[31] *Methanex* (n 23) pt II ch I [55].

in investment law. Tribunals hence seem to be prompted to look at the substance of the evidence as part of the balancing exercise for its admissibility.

A pivotal investment arbitration case concerning the admissibility of illegal evidence is that of *Methanex v USA*, decided under the UNCITRAL Arbitration Rules. This was a NAFTA dispute brought by a Canadian investor, alleging harm to its methanol distribution business. In the case, California imposed bans on MTBE, an additive to gasoline, because it was discovered to be a harmful carcinogen. The manufacturing of the chemical was one of the claimant investor's main activities. The claimant argued that the measure was aimed at supporting its American competitors. The tribunal, however, disagreed and found that the measure was based on legitimate scientific evidence. In this case, it was the claimant who introduced tainted evidence obtained by trespass and document theft. The documents were rejected for reasons of procedural fairness and the weight of illegality surrounding their acquisition. However, despite this finding, the tribunal did consider the question of substance of the evidence. It was stated that "the […] Documents were of only marginal evidential significance in support of Methanex's case", adding that they "could not have influenced the result of this case".[32] It is unclear if better materiality of evidence could have tilted the balance in favour of admissibility despite the extent of illegality involved. Other cases suggest it could have had this effect.

Methanex is a leading case on the admissibility of illegal and inappropriate evidence. The fact that the tribunal rendered the evidence inadmissible can create a misconception that this would be the general rule. Given the reasoning of the tribunal, however, this is not the case and the reasoning can be distinguished from other cases, both in relation to the extent of illegality (in this case there was lasting and persistent inappropriate conduct by the claimant) and in relation to the materiality of the evidence (in this case the documents had marginal relevance). *Methanex* is nonetheless authority for the proposition that substance of evidence will always be considered.

The materiality of evidence was critical in the *EDF v Romania* case. There, the British investor owned a stake in Romanian government-owned joined ventures providing airport duty-free retail services. The dispute concerned revocation of concessions given to those enterprises to provide services at several Romanian airports. The allegation here was that of inducing corruption. The claimant argued that the reason for the revocation of concessions was their failure to pay the demanded bribes, and that the revocation thus amounted to a breach of the fair and equitable treatment (FET) standard of protection in the BIT. The witness of the incident of corruption has made contradictory statements in the course of

[32] ibid [56].

proceedings. The claimant attempted to introduce new audio recordings of that witness to prove their allegation. The tribunal refused to admit such evidence on the grounds that it "lacked authenticity"[33] and that the evidence demonstrating corruption is "far from being clear and convincing" and of "doubtful value".[34] Two points are worth noting from the Award. Firstly, it confirms that the materiality of evidence is a factor in admissibility. Secondly, it mentions a requirement of authenticity. The tribunal dived deeply into the evidence's authenticity, requesting an expert opinion. The opinion reiterated that the recording was incomplete, edited, and rearranged. It was also illegal under Romanian law.[35]

Although this was a case under the ICSID Arbitration Rules, the tribunal's reasoning behind the inadmissibility was not derived from any provision found in those Rules. It could be concluded that the requirements of authenticity and materiality hence apply regardless of the applicable arbitration rules and rather stem from the arbitrators' discretion in admitting evidence. In fact, this is exactly what the tribunal agreed with when it stated:

> "[…] [s]uch discretion [to admit or reject evidence] 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".[36]

Good faith and procedural fairness will be discussed below. By recognising that, on the one hand, the exercise of admitting evidence is within the arbitrators' discretion. On the other hand, this discretion is not absolute and the tribunal did point at the importance of the weighing exercise. On one end of the scales lies substantive fairness; on the other end lies procedural fairness.

The *Libananco v Turkey* arbitration concerned different circumstances.[37] The dispute arose after Turkey seized electricity production and distribution companies of which the Cypriot investor Libananco possessed shares. Turkey attempted to rely on the evidence obtained by intercepting communication between the claimant's counsel and representatives. The tribunal deemed such documents to be covered

[33] *EDF* (n 12) [225].
[34] ibid [221]-[225].
[35] ibid [30]-[36].
[36] ibid [47].
[37] *Libananco Holdings Co Limited v Republic of Turkey*, ICSID Case No ARB/06/8, Decision on Preliminary Issues (23 June 2008).

by legal privilege and therefore inadmissible.[38] In particular, it was stated that "[t]he 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".[39]

The decision points at an exception to considering substance: legal privilege. If the documents are privileged, tribunals will not consider their substantial value. The tribunal emphasised this by further adding that if a breach of confidentiality is found, "[t]hey may consider other remedies available apart from the exclusion of improperly obtained evidence or information".[40]

Finally, the *Awdi v Romania*[41] arbitration concerned a claim by an American investor holding shares in a printing company. The company held concessions from Romania to operate kiosks, which were subsequently deemed unlawful by domestic courts, therefore giving rise the claim.[42] The respondent objected to the admissibility of the claim on the grounds that the claimant was involved in actions involving human trafficking, looting of assets and businesses, crimes of running a criminal organisation, embezzlement, tax evasion, and money laundering. The evidence for the assertion was taken from ongoing, and hence confidential, Romanian domestic criminal proceedings.[43] The tribunal distinguished between the admissibility of evidence for the purpose of criminal proceedings and the probative value of the evidence for the purpose of the current arbitration:

> "[t]he issue raised by the Motion is not the admissibility of the evidence related to criminal proceedings. The issue is rather the probative value of such evidence for the purposes of this arbitration, which the tribunal is empowered to weigh and determine. In assessing this value, the tribunal shall be guided, among other things, by consideration of the presumption of innocence as a rule of public international law".[44]

In this case, the tribunal deemed the evidence to be inadmissible.[45] This suggests that when documents are obtained from ongoing domestic criminal

38 ibid [82].
39 ibid [80].
40 ibid.
41 *Mr Hassan Awdi, Enterprise Business Consultants, Inc and Alfa El Corporation v Romania*, ICSID Case No ARB/10/13, Decision on the Admissibility of the Respondent's Third Objection to Jurisdiction and Admissibility of Claimant's Claims (26 July 2013).
42 ibid [1]–[11].
43 ibid [15].
44 ibid [84].
45 ibid [1]–[11].

proceedings and are hence highly confidential, their substance will not be considered. Further, *Awdi* proves that arbitrators may be required to consider criminal concepts such as the presumption of innocence. It should be added that the tribunal in the *Awdi case* consisted of Professor Schreuer who, in his monograph cited previously, supported broad discretion of tribunals in admitting evidence by weighing the criteria of relevance, credibility, materiality, and legality.[46] This case supports his assertions, but other authorities should be referred to as well to conclude if the rules apply universally.

To conclude the point, the weighing exercise includes both substantive and procedural fairness. The materiality of evidence will always be considered with the exception of legally privileged or highly confidential documents. It is generally difficult to introduce evidence purely based on its substantive value due to procedural fairness considerations that follow. In some situations, however, the opposite is true.

B. Publicly available evidence

Having said that illegal or inappropriate evidence may, as a general rule, be admissible, there could be different reasons for this outcome. The aforementioned authorities looked at different elements of substantive fairness. There may, however, be circumstances in which procedural fairness considerations are significantly weaker and the focus of tribunals would rest on substantive fairness. If the evidence is already in the public domain, there are no interests left to be protected by the tribunals. For that reason, it is possible that the sole existence of public evidence is decisive for admissibility. Authorities suggest that this is the case. In *Gambrinus v Venezuela*, the tribunal neither considered the question of illegality nor discussed the weighing exercise.[47] The leaked Embassy Cables were quoted in the Award with no explanation as to their standing. However, given the position of public international law discussed below, outright admissibility of publicly available evidence might be inaccurately deemed a general rule as well.

In the UNCITRAL *Yukos v Russia* cases, the tribunal did rely directly on the Wikileaks evidence.[48] The string of cases, resulting in the highest investment arbitral award ever rendered at 60 billion USD, concerned the dissolution of the Russian oil company Yukos. The claims were brought by foreign shareholders alleging that the bankruptcy of Yukos was induced by the conduct of the Russian

[46] Dolzer (n 15) 285.

[47] *Gambrinus, Corp v Bolivarian Republic of Venezuela*, ICSID Case No ARB/11/31, Award of the Tribunal (15 June 2015) 44.

[48] *Hulley Enterprise Ltd v Russian Federation*, PCA Case No 2005-03/AA 226, Final Award (18 July 2014) [1218].

Federation, namely by arrests, taxation, and auctioning of assets. One of the allegations concerned the duress of Yukos' auditors, PwC, discovered in the US embassy cables by WikiLeaks. In particular, it demonstrated harassment of PwC by the Russian government in order to stop audits of Yukos and hence legitimise the latter's bankruptcy. Curiously, although neither of the parties in the case called witnesses from the company, the tribunal formed the view that the analysis of their role in the case was essential.[49] The WikiLeaks evidence was relied upon, but no view was taken on the admissibility of such evidence. The authorities quoted by the tribunal in demonstrating misconduct towards PwC were found on the WikiLeaks' website. By implication it can be concluded that such evidence can be relied upon since it was publicly available.

In the ICSID case of *ConocoPhillips v Venezuela*, one of the alleged breaches concerned Venezuela's bad faith during the negotiations between the parties about compensation for the expropriation of ConocoPhillips' assets.[50] The tribunal, however, faced an issue of a Confidentiality Agreement covering that negotiation period. Accordingly, both the claimant and the respondent were unable to provide any evidence on the matter. Venezuela, however, pointed the tribunal to the WikiLeaks US embassy cable which discussed the negotiations. It was submitted that such evidence was not covered by the Confidentiality Agreement.[51] However, the evidence was introduced at the wrong moment — after the merit phase, in the quantum phase (albeit before the Final Award). The tribunal hence rejected the respondent's Request for Reconsideration.[52]

This Decision came with a strong dissent from the arbitrator Georges Abi-Saab. He stated that failing to admit the evidence which had "a high degree of credibility"[53] constituted a "travesty of justice".[54] Not only does that statement reaffirm that inappropriate evidence should be in some circumstances admissible, it also suggests that evidence which is in the public domain cannot be omitted

[49] ibid [1184]–[1186].

[50] Con*ocoPhillips Petrozuata BV, ConocoPhillips Hamaca BV and ConocoPhillips Gulf of Paria BV v Bolivarian Republic of Venezuela*, ICSID Case No ARB/07/30, Interim Decision (17 January 2017) [70].

[51] ibid [75].

[52] Con*ocoPhillips 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) [24].

[53] Con*ocoPhillips Petrozuata BV, ConocoPhillips Hamaca BV and ConocoPhillips Gulf of Paria BV v Bolivarian Republic of Venezuela*, ICSID Case No ARB/07/30, Dissenting Opinion of Georges Abi-Saab (10 March 2014) [64].

[54] ibid [67].

at any stage of the proceedings, regardless of timing requirements. In fact, as Professor Abi-Saab stated,

> "if [the Arbitrators] become aware, before the final award, that they have made a crucial error of fact or of law that led them astray in their findings, or of new evidence or changing circumstances to the same effect, they may not hesitate to revisit their decisions".[55]

If so, the dissent strongly argues why inappropriate evidence should be admitted if it is relevant. The commentators on the case agree with this view, concluding that even the majority Decision acknowledged the suitability and significance of the evidence they rejected.[56] It makes little difference that it was an ICSID case, given that the rules of the ICSID Convention were not relied upon in arriving at Professor Abi-Saab's and the commentators' conclusion. It would equally apply in UNCITRAL arbitrations.

It should be noted that both in *ConocoPhillips v Venezuela* and in *Yukos v Russia*, the tribunals did not engage deeply with the weighing of the evidence. The arguably illegal (and certainly somewhat inappropriate) evidence obtained by WikiLeaks was simply relied upon — in *ConocoPhillips*, without success due to wrong timing; in *Yukos*, directly by the tribunal and at its own initiative. Nevertheless, it cannot be correct that evidence present in the public domain outright renders other principles on admissibility redundant. There must be a limit. Otherwise, the party which has obtained the illegal evidence would simply leak it to the public domain, hence rendering it admissible. Perhaps this would point to the principles of procedural fairness, which could come into play in such circumstances. These principles will be discussed further.

Given the indeterminacy of the authorities in public international law, outright admissibility of publicly available evidence also seems incorrect. The ICJ seems not to have formed a position on the issue, despite having parties which pleaded WikiLeaks-derived evidence in certain cases. Such arguments were raised on a number of occasions in the oral hearings — for example, in *Costa Rica v*

[55] ibid [51].

[56] James Boykin and Malik Havalic, 'Fruits of the Poisonous Tree: The Admissibility of Unlawfully Obtained Evidence in International Arbitration' (2015) 5 TDM 1, 9.

Nicaragua,[57] *Macedonia v Greece*,[58] and *Croatia v Serbia.*[59] In all these cases, the ICJ did not raise the issue of the admissibility of the evidence, nor did the Court draw upon the evidence in its own judgments.[60] One possible exception could be the recent *Chagos Archipelago* case, although the ICJ merely cited the approval of the admissibility of WikiLeaks cables by the UK Supreme Court without taking any position on the matter, nor relying on the evidence.[61] In contrast, an investment tribunal may introduce publicly available evidence *sua sponte* — at its own motion — if it deems it to be relevant to the submissions which were introduced by the parties. As a consequence, it would be instantly admitted into the arbitration with the only limitation being that it must relate to the submissions which the parties have already made to afford the opponents a right to be heard.[62] There are, however, exceptions to the rule of the general admissibility of publicly available evidence.

Caratube v Kazakhstan is another Award concerning the admissibility of illegal documents, referred to as "stolen documents"[63] by the respondent. The claimants asserted that a contract for the installation and exploitation of an oil field in Kazakhstan was duly performed, with the claimants even exceeding their contractual obligations.[64] The respondent disagreed and argued that the claimants "systematically committed material breaches throughout the life of the Contract and [were] in a persistent state of material breach […] affecting virtually all areas of its activity".[65] This resulted in the revocation of the licence to exploit the oilfield,

[57] *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v Nicaragua)* ICJ Verbatim Record 2017/15, 24 <www.icj-cij.org/public/files/case-related/157/157-20170713-ORA-01-00-BI.pdf> accessed 10 March 2021.

[58] *Application of the Interim Accord of 13 September 1995 (The Former Yugoslav Republic of Macedonia v Greece)* ICJ Verbatim Record 2011/6 footnotes 44 and 108 <www.icj-cij.org/public/files/case-related/142/142-20110322-ORA-01-00-BI.pdf> accessed 13 March 2021.

[59] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)* ICJ Verbatim Record 2014/14 [3] and [10] <www.icj-cij.org/public/files/case-related/118/118-20140311-ORA-01-00-BI.pdf> accessed 13 March 2021.

[60] Gregoire Bertrou and Sergey Alekhin, 'The Admissibility of Unlawfully Obtained Evidence in International Arbitration: Does the End Justify the Means?' (2018) 4 The Paris Journal of International Arbitration 11, 22.

[61] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) [2019] ICJ Rep 95 [130].

[62] *Daimler Financial Services AG v Argentine Republic*, ICSID Case No ARB/05/1, Decision on Annulment (7 January 2015) [295].

[63] *Caratube International Oil Company LLP and Devincci Salah Hourani v Republic of Kazakhstan*, ICSID Case No ARB/13/13, Award of the Tribunal (27 September 2017) [152].

[64] ibid [38]–[50].

[65] ibid [45].

the termination of the contract, and subsequent investigations of Caratube by the governmental authorities.

The claimants made an application to the tribunal to obtain leave to introduce evidence available on the internet, such evidence being a part of around 60,000 documents leaked from the respondent's computer servers in what was known as "KazakhLeaks".[66] Although the Decision on the request is not public, the Final Award reiterates its conclusions. The tribunal did allow the claimants to produce that evidence in the arbitration. There was, however, one limitation: the tribunal explicitly protected the communications covered by the attorneyclient privilege.[67]

C. Weight of wrongfulness

In admitting evidence, the tribunals will also weigh the extent of wrongfulness. There exist, however, a number of borderline cases in international law where the scope of illegality cannot be accurately determined. Conduct that would appear criminal in domestic laws may frequently not be prohibited in international law. Three examples can be mentioned: espionage, unfriendly acts, and corruption. The more tainted the evidence, the less likely tribunals will admit the evidence into the proceedings. In addition, highly tainted evidence will prompt tribunals to ensure procedural fairness is afforded to the opponents.

A good example of the weight of illegality resulting in inadmissibility of tainted evidence is the *Methanex* case.[68] The illegal activities included "deliberate trespass onto private property and rummaging through dumpsters inside the office-building for other persons' documentation".[69] Although the conduct was not criminal under Californian law, it was a civil breach. The tribunal ruled against the admissibility of the evidence, basing its decision on the principles of good faith, justice, and fairness.[70] The tribunal's reasoning seems to centre around the scope and extent of illegal activities; the outcome of the case can hence be isolated to the particular facts. Concerning the tainted evidence, it was stated that "this documentation was obtained by successive and multiple acts of trespass committed by Methanex over five and a half months in order to obtain an unfair advantage over the USA as a Disputing Party to these pending arbitration proceedings".[71]

66 ibid [150].
67 ibid [156].
68 *Methanex Corporation v United States of America*, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits (3 August 2005).
69 ibid [55].
70 ibid [60].
71 ibid [59].

In the case, the extent of illegality was simply so high that it would outweigh any substantive value of the evidence. The tribunal further noticed that the conduct took place both before and after the arbitration was constituted. Presumably, in cases where the breaches were not as heinous and persistent with an obvious objective to influence the arbitration, the evidence could indeed be admitted.

Moving on to espionage, it is a frequent method of obtaining evidence by States. The investment case of *Libonanco v Turkey* explicitly labelled "surveillance and interception of communications" as amounting to possible espionage.[72] Obtaining documents through espionage was also exactly what happened in the ICJ case of *Tehran Hostages*.[73] Iran obtained a number of confidential USA Embassy documents in the course of seizure of its premises.[74] Despite this wrongful conduct, the Court did not condemn espionage committed by Iran to be an illegal act. The possible explanation could be that of Professor Schaller, who wrote:

> "[e]spionage is regarded by States as a necessary tool for pursuing their foreign policy and security interests, and for maintaining the balance of power at the inter-State level […]. Accordingly, there is no general prohibition of espionage in international law, and it is unlikely that such a prohibition will emerge in the future".[75]

In accordance with this statement, espionage is inherently a tool of States, not private entities. For similar reasons, while espionage is a criminal offence under domestic laws, it would not be in public international law. This is not, however, equivalent to saying that the tribunals would disregard the use of espionage altogether. It could still be deemed an unfriendly act, as will be discussed below, and hence it would still be wrongful and proof of impropriety.[76] In other words, it would be relevant for the balancing exercise, although carrying a smaller weight for the tribunal.

It is clear that there is no customary rule of friendship between States in international law. Therefore, acts of States cannot be deemed unfriendly without

[72] *Libananco Holdings Co Limited v Republic of Turkey*, ICSID Case No ARB/06/8, Excerpts of Decision on Annulment (22 May 2013) [170].

[73] *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* (Judgment of 24 May 1980) [1980] ICJ Rep 3.

[74] ibid [82].

[75] Christian Schaller, 'Spies', *Max Planck Encyclopedia of Public International Law* (2015) <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e295> accessed 16 December 2020.

[76] *Military and Paramilitary Activities in and against Nicaragua Case (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, [272]-[274].

a legal basis. The ICJ in the *Military and Paramilitary Activities in and against Nicaragua* case stated:

> "[s]uch a duty might of course be expressly stipulated in a treaty, or might even emerge as a necessary implication from the text; but as a matter of customary international law, it is not clear that the existence of such a far-reaching rule is evidenced in the practice of States".[77]

Most investment treaties, however, would contain a fair and equitable standard of treatment of investors.[78] Investment tribunals would take unfriendly acts into consideration both as a part of FET violations,[79] as well as independently, even if the conduct is not a breach of the investment treaty.[80] In short, such conduct would be considered by tribunals in assessing the admissibility of evidence, despite not being wrongful under public international law.

It was previously said that corruption is illegal in most, if not all, legal systems.[81] Equally, it can be a breach of international public policy. However, such a breach is not illegal *per se*, although the tribunal in *Hamester v Ghana* did state that an investment created by means of corruption will lose protection.[82] There are neither cases nor doctrine addressing evidence that was obtained directly through corruption. However, following from the aforementioned case, such evidence would be tainted with a high degree of impropriety for the sake of balancing its admissibility. Given that corruption may refute the protection of an investment altogether in investment law, it is likely that evidence procured though corruption would be outright inadmissible — something that would never be the case for other

[77] ibid [273].

[78] More than 2000 BITs contain the FET standard. See UNCTAD, 'World Investment Report 2002' (*UNCTAD*, 12 June 2003) <https://unctad.org/system/files/official-document/wir2002_en.pdf> accessed 18 January 2020.

[79] *Mondev International Ltd v United States of America*, [2002] ICSID Case No ARB(AF)/99/2, Award [118]–[119].

[80] MCI Power Group *LC and New Turbine, Inc v Republic of Ecuador*, ICSID Case No ARB/03/6, Award (31 July 2007) [371].

[81] *World Duty Free* (n 8).

[82] *Gustav F W Hamester GmbH & Co KG v Republic of Ghana*, ICSID Case No ARB/07/24, Award (18 June 2010) [123]-[124].

types of illegality and impropriety. Such a strict approach is consistent with some, but not all, domestic laws.

D. Position under comparative law

Domestic procedural legal systems are inconsistent concerning the issue of admissibility of illegal or inappropriate evidence. Some jurisdictions seem to be liberal, while others appear to be strict. The so called 'unified legal system' doctrine states that domestic substantive law may not be inconsistent with procedural law. If a jurisdiction did employ this doctrine, illegally obtained evidence would be frequently deemed inadmissible due to its illegality. The converse principle is that of the 'theory of segregation', whereby substantive and procedural laws are distinguished and separated.[83] Again, different jurisdictions take divergent views on whether and to what extent such principles are applicable. It should be noted, however, that the discussion is moot in arbitration where most of the procedural aspects of conducting the arbitration (and hence admissibility) are in the exclusive competence of the arbitrators.

Most European legal systems do not explicitly regulate the handling of illegally obtained evidence.[84] This appears to follow the European Court of Human Rights' (ECtHR) judgment in the *Schenk v Switzerland* case, where the ECtHR stated that there is no general prevention on the admissibility of such evidence under the European Convention on Human Rights (ECHR), although in specific circumstances it may breach the Convention rights.[85] Under English law, for instance, there is also no provision that excludes the admissibility of illegally obtained evidence. It seems that English judges would be more concerned with the materiality of such evidence, much like arbitral tribunals, although their tolerance in doing so is not as high. The major factor for the weighing exercise in English law seems to be public policy.

The British Human Rights Act 1998 transposes certain articles of the ECHR into domestic law. Tapping phones and hacking communications are listed as possible interferences with the rights pursuant to it.[86] This approach was taken

[83] Bettina Nunner-Krautgasser and Philipp Anzenberger, 'Inadmissible Evidence: Illegally Obtained Evidence and the Limits of the Judicial Establishment of the Truth' in Vesna Rijavec, Tomaž Keresteš and Tjaša Ivanc (eds) *Dimensions of Evidence in European Civil Procedure* (Kluwer Law International 2016) 198.

[84] ibid.

[85] *Schenk v Switzerland* App no 10862/84 (ECtHR, July 12 1988) [46].

[86] Anupreet Amole and Jane Colston, 'Fruit from A Poisoned Tree: Unlawfully Obtained Evidence' (*The Law Society Gazette*, 30 August 2017) <www.lawgazette.co.uk/commentary-and-opinion/fruit-from-a-poisoned-tree-unlawfully-obtained-evidence/5062566.article> accessed 22 August 2019.

in the case of *Jones v University of Warwick*, in which a breach of the right to privacy was found and the evidence obtained using a hidden camera was not admitted by the court.[87] Lord Woolf CJ, giving the judgment, acknowledged that the test was that of reconciling "conflicting public policies" which accordingly have to be balanced against each other.[88] In doing so, he stated that the leading notion is that of achieving justice.[89] This principle can be, however, restricted to the circumstances, given that the case concerned insurance entitlement and the illegal evidence was aimed at refusing the claimant's right to such insurance.[90] It hence carried a strong public policy implication that could have been the reason for the refusal of its admissibility. In *Rall v Hume*, a personal injury case also concerning video evidence, the court did admit the inappropriate evidence and allow the defendant to confront the claimant with such evidence in cross-examination.[91] Personal injury is still a public policy-heavy area. It can therefore be concluded that in purely commercial cases, the materiality of the evidence would be weighed and likely admitted by the court due to fewer public policy considerations. Such considerations, however, add to legal uncertainty. Burrough J in *Richardson v Mellish* contended that public policy is "a very unruly horse, and once you get astride of it you never know where it will carry you".[92] Lord Denning, however, later responded that "with a good man in the saddle, the unruly horse can be kept in control. It can jump over obstacles".[93]

A possibly common approach between the English courts and the ICJ concerns the admissibility of publicly available evidence. The British Supreme Court recently admitted leaked diplomatic cables in a case concerning the challenge to the UK government's handling of decolonisation of the Chagos Archipelago.[94] The suit was brought by native Chagossians who were by English law prohibited from returning to their ancestral homes on the islands. This approach was quoted a year later, but not discussed, on appeal to the ICJ in the Advisory Opinion.[95]

Turning to civilian jurisdictions, the Austrian Civil Procedure Code does not contain provisions regulating the admissibility of illegal evidence. The general

87 *Jones v University of Warwick*, [2003] EWCA Civ 151.
88 ibid [21].
89 ibid.
90 ibid [23].
91 *Rall v Hume* [2001] 3 All ER 248, 254.
92 Richardson v M*ellish* [1824] 2 Bing 229, 252 (Borrough J).
93 *Enderby Town Football Club Ltd v The Football Association Ltd* [1971] Ch 591, 606 (Denning MR).
94 *R (on the application of Bancoult No 3) v Secretary of State for Foreign and Commonwealth Affairs* [2018] UKSC 3 [9].
95 *Chagos Archipelago* (n 61). The ICJ misquoted the British Supreme Court by stating that evidence in the diplomatic cables was held by them to be inadmissible. In fact, the opposite was true. There is hence a mistake in the Advisory Opinion although this does not impact the conclusions of the ICJ.

position is that such evidence should be considered.[96] Austria therefore leans towards the aforementioned theory of segregation, whereby procedural law is separated from substantive law, although no such definitive statements were made by the courts or commentators. This seems to be particularly the case for civil proceedings — although in other areas, such as under data protection law, the outcome of the analysis would be different.[97] In the latter circumstances, the courts are in fact inclined to take a similar policy-balancing exercise as English courts do and take into account the adverse party's right of personality and right to data protection. When it comes to criminal proceedings, Austria also does not deem illegal evidence to be outright inadmissible. Quite to the contrary, consideration of all evidence is an obligation imposed on the courts as part of the principles of truth-finding and freedom of evidence.[98] The EU Commission Panel, monitoring Member States compliance with fundamental rights, summarised that Austria does not know the American rule of the "fruit of the poisonous tree".[99]

In the USA, contrary to the position in common law jurisdictions which follow the English model, questions on the admissibility of illegal and inappropriate evidence do not exist. Illegally obtained evidence, e.g., evidence procured through a criminal act, such as corruption or fraud, would not be legal in itself and would not be admissible. In the USA, the doctrine of the fruit of the poisonous tree is applied, stating that the manner in which evidence was acquired ('the tree') taints the evidence ('the fruit'), and that this, in turn, will render the evidence inadmissible.[100]

The doctrine is by no means limited to the USA. It possibly exists in ECtHR's jurisprudence as formulated in the *Gäfgen v Germany* case,[101] although it contrasts with the earlier judgment of *Schenk v Switzerland*.[102] Turning to investment law, some commentators also argue that the fruit of the poisonous tree principle could have been the reason for the decision on the inadmissibility of evidence in

[96] Patrick Mittlboeck, 'Austria: Use Of Unlawfully Obtained Evidence In Austrian Civil Proceedings?' (*Mondaq*, 5 April 2019) <www.mondaq.com/Austria/x/796414/Civil+Law/Use+Of+Unlawfully+Obtained+Evidence+In+Austrian+Civil+Proceedings> accessed 26 August 2019.

[97] 6 Ob 16/18y (The Austrian Supreme Court of Justice 2018).

[98] 15 Os 3/92-8 (The Austrian Supreme Court of Justice 2018).

[99] EU Network of Independent Experts on Fundamental Rights, 'Opinion on the status of illegally obtained evidence in criminal procedures in the Member States of the European Union' (*EU Commission*, 30 November 2003) <https://sites.uclouvain.be/cridho/documents/Avis.CFR-CDF/Avis2003/CFR-CDF.opinion3-2003.pdf> accessed 26 August 2019.

[100] *Silverthorne Lumber Co v United States* 251 US 385, 385 (1920).

[101] *Gäfgen v Germany* App no 22978/05 (ECtHR, 18 March 2009) [29] (evidence was obtained in breach of another Convention right).

[102] *Schenk v Switzerland* App no 10862/84 (ECtHR, 7 December 1988) [46] (the case concerned pre-internet evidence so may be distinguished from circumstances in more recent cases cited).

the *Methanex v USA* case. Both parties quoted American law extensively and the tribunal appears to have contended that the actions of the claimant were illegal as a matter of United States law.[103] The fruit of the poisonous tree could therefore well become a general principle of law recognised by States, pursuant to Article 38(1) of the ICJ Statute — although as was discussed above, it is by no means a ubiquitous principle across jurisdictions.

To conclude the point, the approaches of different jurisdictions and legal systems are inconsistent. They form a patchwork of practices and tests that provide little indication about any notion of a general principle of law.

IV. Procedural Principles

In light of the discussion above, it is clear that parties against whom tainted evidence is used may be at a significant disadvantage. Since materiality is relevant and can trump the means of obtaining evidence, stronger parties in investment cases can utilise their vast resources to obtain favourable evidence and conceal unfavourable evidence. Furthermore, although States and investors are considered equal parties once an investment case has been brought,[104] they are inherently different entities. On the one hand, a powerful superstate has greater resources at their disposal than a private investor. On the other hand, an international corporation may be more powerful in the proceedings than a small, less economically developed State. Further, as was mentioned, States have a variety of international practices which would be unavailable or illegal for the investors, particularly in the field of espionage and other domestically criminal activity. The scope of international legal personality (and hence the capacity to possess rights and obligations in international law) as well as the capacity to act in international law (which presupposes legal personality and includes the standing to bring a claim in international law) are different for States and investors.[105] Individual subjects of international law differ in the nature, extent, or existence of their rights.[106]

This is where principles of procedural fairness, good faith, and clean hands come into play—they ensure, to an extent, that both parties are on a level playing field. Procedural fairness in particular contains the principle of equality of arms, which would be triggered in circumstances of attempts to introduce illegal evidence.

[103] Bertrou (n 60).

[104] See the 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'), Article 25.

[105] Malcolm Shaw, *International Law* (8th edn, CUP 2017) 166–170.

[106] *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174, 178; *LaGrand (Germany v United States of America)* (Judgment of 27 June 2001) [2001] ICJ Rep 466, 494.

Since such actions include one party taking inappropriate measures against the other, considerations of good faith and clean hands are simultaneously triggered. These principles will be analysed in turn, but the starting point is the weight of wrongfulness that tribunals attach to the evidence in determining its admissibility.

A. Procedural Fairness and Equality of Arms Doctrines

Article 15(1) UNCITRAL Arbitration Rules contains the requirement of procedural fairness:

> "[s]ubject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case".

The tribunal in *Methanex* was clear that equality of arms is both required pursuant to the above procedural provision, and also as a "general legal duty" owed by the disputing parties to one another and to the tribunal.[107]

The ICSID Convention contains a similar requirement. Article 52 states that the breach of a fundamental rule of procedure forms one of the grounds for a request for annulment of the award:

> "(1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds: […] (d) that there has been a serious departure from a fundamental rule of procedure".

The 1958 New York Convention contains similar grounds for reusal of recognition and enforcement of awards.[108] It was clarified in *Wena Hotels v Egypt* that a departure is "serious" where it is "substantial and [is] such as to deprive a party of the benefit or protection which the rule was intended to provide".[109] Equally, "fundamental" in the above provision refers to the "set of minimal standards of procedure to be respected as a matter of international law".[110] Even marginal departure from procedural standards can therefore subject an award to

[107] *Methanex* (n 23) pt II ch I [54].

[108] 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Article V(1)(d).

[109] Wena Hotels L*td v Arab Republic of Egypt*, ICSID Case No ARB/98/4, Decision (Annulment Proceeding) (5 February 2002) [58].

[110] ibid [57].

annulment.[111] In *Giovanni Alemanni v Argentina*, the tribunal not only stated that a "fundamental rule of procedure" in the provision includes the equality of arms, but also noted that the principle would apply even in the absence of Article 52 since it is "fundamental to the judicial process".[112] The *Giovanni Alemmani* case instead concerned due process,[113] but the tribunal nonetheless deemed it necessary to reiterate equality of arms as well. This only demonstrates the fundamental importance of the doctrine.

In investment arbitration, contrary to commercial arbitration, the parties to proceedings are significantly different from one another. The respondent is always a sovereign State. States have at their disposal resources which claimants would not have. This includes capital, intelligence, or different rights in international law. Investors can be individuals — or, more frequently, multinational corporations with revenue greater that some of the world's States. Given that illegally and inappropriately obtained evidence is not automatically inadmissible, an argument could be made that investment law encourages resorting to illegitimate means to obtain such evidence to the disadvantage of the opposing party. In *Libananco v Turkey*, the State engaged in "surveillance and interception of communications"[114] of the claimant. This gave the respondent State access to "hundreds, or even thousands, of counsel's communications with their clients",[115] which the State then tried to use as evidence. This feat could not have been achieved without the resources at the State's disposal. The tribunal noted that admitting such evidence would cause "irrevocable prejudice to [claimant's] position in this arbitration".[116]

The parties against whom tainted evidence is used, however, are not unprotected against such misconduct. The principle of equality of arms would be

[111] Further examples: Klöckner Industrie-Anlagen GmbH and others v *United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No ARB/81/2, Decisions of the Ad Hoc Committee (Unofficial English Translation) (3 May 1985) [82]–[113]; CDC Group plc v Republic of Seychelles, ICSID Case No ARB/02/14, Decision on Annulment (29 June 2005) [48]–[49]; Azurix Corporation v *The Argentine Republic*, ICSID Case No ARB/01/12, Decision on the Application for Annulment of the Argentine Republic (1 September 2009) [49]–[52] and [234]; Enron Corporation and Ponderosa Assets, *LP v The Argentine Republic*, ICSID Case No ARB/01/3, Decision on the Application for Annulment of the Argentine Republic (30 July 2010) [70]–[71].

[112] Giovanni Alemanni and Others v *The Argentine Republic*, ICSID Case No ARB/07/8, Decision on Jurisdiction and Admissibility (17 November 2014) [323].

[113] ibid [321]–[325].

[114] *Libananco* (n 72).

[115] ibid [72].

[116] ibid.

applied by tribunals to recognise the imbalance between parties. Article 9(2)(g) of the IBA Rules on the Taking of Evidence reads:

> "The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any Document, statement, oral testimony or inspection for any of the following reasons: […] (g) considerations of procedural economy, proportionality, fairness or equality of the Parties that the Arbitral Tribunal determines to be compelling".

In a Commentary to the above Rules, Article 9(2)(g) is labelled as a "catch-all" provision.[117] One example given is that it would apply in situations of inconsistencies between jurisdictions concerning privileged documents. One party cannot take advantage of softer laws on document privilege in one jurisdiction.[118] Undoubtedly, the same reasoning would apply to a State using its own inherent resources which are unavailable to the other party to produce evidence. Article 9(2)(g) is intended to "help ensure the arbitral tribunal provides the parties with a fair, as well as an effective and efficient, hearing".[119] Tribunals should be particularly alert to the consequences of illegality of evidence given that, under the recently-added Article 9(3) in the 2020 IBA Rules, they may reject such evidence.

The Prague Rules on the Efficient Conduct of Proceedings in International Arbitration — a civil law competitor of the IBA Rules — have a similar thrust.[120] Article 1(4) of the Prague Rules states that "[a]t all stages of the arbitration and in implementing the Prague Rules, the arbitral tribunal shall ensure fair and equal treatment of the parties and provide them with a reasonable opportunity to present their respective cases". Although the Prague Rules do not apply procedural fairness as clearly to the admissibility of evidence as the IBA Rules, the application of "fair and equal treatment of the parties" during "all stages of the arbitration" would carry a similar result.

Such an approach to admissibility in procedural rules is a good starting point to explain the decisions of tribunals to admit or refuse evidence. The aforementioned *Slovenian Border Dispute* case can hence be easily distinguished.

[117] 1999 IBA Working Party and 2010 IBA Rules of Evidence Review Subcommittee, 'Commentary on the Revised Text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration', (2011) 5(1) Dispute Resolution International 45, 77–78.

[118] ibid.

[119] ibid.

[120] Sol Argerich, 'A Comparison of the IBA and Prague Rules: Comparing Two of the Same' (*Kluwer Arbitration Blog*, 2 March 2019) <http://arbitrationblog.kluwerarbitration.com/2019/03/02/a-comparison-of-the-iba-and-prague-rules-comparing-two-of-the-same/> accessed 12 December 2019.

There, the evidence was admitted because the issues of equality of arms would never arise; it was an inter-State arbitration between parties of comparable wealth (Croatia and Slovenia). In such circumstances, it would be more demanding to demonstrate that the admission of Slovenian evidence breached equality of arms when Croatia had the same tools at their disposal.

Equality of arms arguments were developed more deeply in investment cases. In the aforementioned *Methanex v USA* arbitration, the respondent argued the converse — that good faith should prevent the claimant from having its evidence admitted since it was obtained in the course of burglaries. The tribunal agreed and quoted the principle of equality of arms.[121] The principle of equality of arms hence protects both States and investors. In fact, the tribunal clearly stated that "just as it would be wrong for the USA *ex hypothesi* to misuse its intelligence assets to spy on Methanex (and its witnesses) and to introduce into evidence the resulting materials into this arbitration, so too would it be wrong for Methanex to introduce evidential materials obtained by Methanex unlawfully".[122]

A similar conclusion was reached in the *Caratube II v Kazakhstan* arbitration.[123] In attempting to convince the tribunal that illegal, publicly available evidence is not admissible, the respondent used the argument that they did not have access to the claimant's emails.[124] The need to preserve the truthfulness of the award was deemed to outweigh the potential unfairness that might have resulted in admission.[125] When protecting State parties, slightly different considerations would apply. The *Caratube* tribunal noted explicitly that the fact that the respondent is a State is relevant and that tribunals must "be mindful when issuing provisional measures not to unduly encroach on the State's sovereignty and activities serving public interests".[126] Needless to say, a request for provisional measures can include decisions on admissibility and hence the application of States' interests in preserving sovereignty and public interests is an overarching aim for arbitral

[121] *Methanex* (n 23) pt II ch I [1] and [53].
[122] ibid [54].
[123] Decision not public but was reported in secondary sources: see Bertrou (n 60).
[124] ibid.
[125] ibid.
[126] *Caratube International Oil Company LLP and Devincci Salah Hourani v Republic of Kazakhstan*, ICSID Case No ARB/13/13, Decision on the Claimants Request for Provision Measures (4 December 2014) [121].

tribunals. This view seems to be supported by the tribunals' and domestic courts' consistent practice of considering State sovereignty in treaty interpretation.[127]

There is, however, a significant exception to the principle of equality of arms. In the *Daimler v Argentina* case, the tribunal stated that once the parties received the opportunity to make submissions, the tribunal could, *sua sponte*, introduce evidence that is in the public domain.[128] The arbitrators clarified that such an exercise of their authority would not violate any principle of due process,[129] which encompasses the equality of arms. This is an important exception because it outlines the limits of equality of arms — it relates only to the 'combatants' who raise their arms against one another and not the arbitrators themselves *vis-a-vis* the parties. Given that a tribunal ultimately renders an award binding on both parties, there can be no equality between the two.

B. Good faith and clean hands doctrines

Good faith is a general principle of law.[130] The clean hands doctrine is arguably a general principle of law as well, although recent authorities speak against its existence.[131] However, the two will be discussed in parallel, given that, in relation to the admissibility of tainted evidence, a breach of one of these principles would frequently be a breach of the other, and arbitral tribunals have often not distinguished them.

The clean hands doctrine would be applicable in considerations of admissibility, both of the entire claims and of evidence.[132] In the *Factory at Chorzów* case, the Permanent Court of International Justice stated that clean hands is a "principle generally accepted […] if the former party has by some illegal act

[127] See El Paso Energy International Company v *The Argentine Republic*, ICSID Case No ARB/03/15, Decision on Jurisdiction (27 April 2006) [70]; Pan American Energy LLC and BP Argentina Exploration Company v *The Argentine Republic*, ICSID Case No ARB/03/13 and BP America Production Company, Pan American Sur SRL, Pan American Fueguina, SRL and Pan American Continental SRL v Argentine Republic, ICSID Case No ARB/04/8, Decision on Preliminary Objections (27 July 2006) [99]; Sanum Investments Limited v Lao People's Democratic Republic PCA Case No 2013-13, Judgment of Singapore High Court (20 January 2015) [124].

[128] *Daimler Financial Services* (n 62).

[129] ibid.

[130] *Nuclear Tests (Australia v France)* (Judgment of 20 December 1974) [1974] ICJ Rep 253, 253 and 267.

[131] South American Silver Limited v Bolivia, PCA Case No 2013-15, Award (30 August 2018) [436]–[453]; Hesham Talaat M A*l-Warraq v The Republic of Indonesia*, UNCITRAL, Final Award (15 December 2014) [646].

[132] See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, 163. It was one of the arguments raised by Israel. The ICJ, however, did not rely on the principle in their Opinion, nor disagreed with its application. The case nonetheless illustrates that the argument of clean hands is raised at the stage of admissibility.

prevented the latter from fulfilling its obligation in question".[133] This seems to be a rather restricted and old statement of the Court and may no longer apply.

In *Methanex*, the tainted evidence also was rejected for breaches of good faith and the clean hands doctrine, along with a breach of equality of arms.[134] Therefore, such considerations appear to be highly relevant to the admissibility of evidence. It is supported by the statement in *Awdi v Switzerland*, which deemed public international law to be part of the weighing exercise of admissibility of tainted evidence.[135] Given that the good faith and clean hands doctrines stem from public international law, they would fall under the weighing exercise considerations on the admissibility of tainted evidence. On the other hand, in the *Slovenian Border Dispute*, the tribunal did not proceed to consider any of these principles.[136]

Based on *Methanex*, *Awdi* and the *Slovenian Border Dispute*, the relationship between procedural fairness, good faith, and clean hands can be established. Tribunals would first look at procedural fairness. This practice is consistent with the approach of public international law to general principles of law. General principles of law are subsidiary authorities and will be considered in the ICJ jurisprudence "for filing a gap in the treaty or customary rules available to settle a particular dispute and […] will decline to invoke them when such other rules exist".[137] It was previously discussed that procedural fairness stems from arbitration rules and hence treaties. In *Methanex,* it was not conclusive for the tribunal to have the evidence rejected based on equality of arms alone. The arbitrators hence also added the principles of unclean hands and good faith to their reasoning.

V. Tools for Solving the Imbalance

The above sections discussed the balancing exercise. In some cases, however, the imbalance that would lead to the inadmissibility of evidence might be addressed by the arbitrators themselves using the tools available to them, that is, judicial assistance and production of document orders. Exercising such powers

[133] Case concerning the Factory at *Chorzów* (Judgment of 26 July 1927) PCIJ Series A No 9 31.
[134] *Methanex* (n 23) pt II ch I [1] and [53].
[135] *Mr Hassan Awdi* (n 14) [1]–[11].
[136] *Croatia* (n 30).
[137] Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary* (3rd edn, OUP 2012) 780; *Right of Passage over Indian Territory (Portugal v India)* (Merits) [1960] ICJ Rep 6, 43.

might assist the tribunals in ensuring a just outcome of the case without striking out relevant information.

A. Judicial assistance

Arbitral tribunals are inherently ill-equipped for dealing with matters of illegality in proceedings. Not only is the standard of proof high for such issues, but arbitrators also lack the coercive powers that domestic courts would have when facing criminal charges.

Emanuele pointed that tribunals lack a number of competences:

> Power to order the production of evidence in possession, custody or control of a person who is not a party to the arbitration;
>
> Powers to impose criminal sanctions against parties who fail to comply with document production and evidentiary orders and;
>
> Powers to compel the attendance of witnesses under the penalty of fines or imprisonment and under oath.[138]

As was demonstrated by the aforementioned cases, the introduction of inappropriate evidence frequently prompts the tribunals to consider criminal or allegedly illegal behaviour. Hence, it becomes apparent that the coercive powers of the tribunals are deficient. A solution to this issue is judicial assistance. A tribunal, on its own motion or at the request of a party, would petition a domestic court to use its coercive powers in evidence production. It is therefore a method that arbitrators may use to preserve the procedural fairness between the parties to the dispute. It could be particularly useful where the inappropriate evidence is materially relevant, but its admissibility would breach equality of arms. In such circumstances, the tribunal could seek judicial assistance in finding counterarguments for the other party.

Enforcing criminal laws is ultimately the competence of national courts. It is hence in circumstances when such issues arise that the courts should be most willing to grant assistance. Judicial assistance is not, however, limited to assistance with criminal findings.

The source of competences to request assistance rests with the applicable *lex arbitri*. It is, for instance, permissible under the Swiss Private International Law

[138] Ferdinando Emanuele and others, 'State Court Assistance in the Taking of Evidence' in Ferdinando Emanuel and others (eds) *Evidence in International Arbitration: The Italian Perspective and Beyond* (Thomson Reuters 2016) 138–139.

Act (Article 184) as well as the English Arbitration Act (Section 43). The latter states:

> "[a] party to arbitral proceedings may use the same court procedures as are available in relation to legal proceedings to secure the attendance before the tribunal of a witness in order to give oral testimony or to produce documents or other material evidence".

It should be noted that granting judicial assistance is ultimately a question of domestic law. This was well demonstrated in the recent English case of *A and B v C, D and E* where the Commercial Court refused to compel a UK-based third party to submit evidence on the basis that it was not party to the arbitration agreement in a New York-seated arbitration. Consequently, the Commercial Court held that it lacked jurisdiction to compel third parties to give evidence.[139] At the same time, it was noted that the decision would be different under the laws of Hong Kong,[140] suggesting that the English approach is not shared by other common law jurisdictions.

Further, tribunals should take care not to exceed its powers by permitting such a request for evidence, which could be deemed to be *ultra petita* — that is, exceeding what the parties requested of the tribunal. Binder concluded that the tribunals should "act with great delicacy" when exercising this competence.[141]

B. Production of documents

Another method of preserving fairness between parties is prompting document production. It could be useful because it would preserve the materiality of the illegal evidence, hence allowing the tribunals to avoid refusing admissibility of potentially relevant materials while protecting the equality of arms between parties. This can be achieved in two ways. Firstly, it may be used to prompt the party which did not introduce illegal evidence to bring forward its own counterevidence on the matter. In other words, a tribunal may assist the party in providing both perspectives on an issue. However, this would be redundant in most cases, given that a party would have provided such evidence on its own motion and would not need encouragement from the tribunal. That being said, it may prompt the party to search for evidence in sources which they did not previously consider, such as

[139] A *and B v C, D and E* [2020] EWHC 258 (Comm) [32]–[33].
[140] ibid [18].
[141] Peter Binder, *International Commercial Arbitration and Mediation in UNCITRAL Model Law Jurisdictions* (4th edn, Kluwer Law International 2019) 388–396.

in the public domain. The second reason for document production is to prompt the party introducing the illegal evidence to provide further evidence. This may be particularly useful in the weighing exercise. Further evidence will provide a more complete picture of the newly introduced documents. In particular, tribunals may request an explanation of how the illegal evidence was obtained.

Using the tool of document production as mentioned is warranted by the arbitration rules. Under the ICSID and UNCITRAL Arbitration Rules, it is a basic competence of tribunals. The ICSID Rules state in Article 34:

> "(2) The Tribunal may, if it deems it necessary at any stage of the proceeding:
> (a) call upon the parties to produce documents, witnesses and experts; and
> (b) visit any place connected with the dispute or conduct inquiries there.
> (3) The parties shall cooperate with the Tribunal in the production of the evidence and in the other measures provided for in paragraph (2). The Tribunal shall take formal note of the failure of a party to comply with its obligations under this paragraph and of any reasons given for such failure".

The proposition that tribunals may call for production of documents in order to ensure equality between parties is supported by the passage quoted above. A number of observations can be made.

Firstly, the tribunal may only exercise the power to request document production under Article 34 if it "deems it necessary". Ensuring equality of arms would certainly be such a situation. If equality of arms was not observed, the entire award could be subject to annulment as was discussed in *Libananco v Turkey*.[142] It should be noted, however, that the tribunal being merely selective of the evidence provided — even disregarding some evidence entirely — should not immediately give rise to a situation of necessity. Tribunals also fulfil a "judicial function of choosing which evidence it finds relevant and which it does not".[143] But the considerations of equality of arms, even given arbitrators' wide discretion in admissibility of evidence, would prompt the tribunal to consider the questions. After all, a tribunal has a primary obligation to ensure the enforceability of the

[142] *Libananco* (n 72) [226] (applied ICSID Arbitration Rules (2006)).

[143] *Tulip Real Estate and Development Netherlands BV v Republic of Turkey*, ICSID Case No ARB/11/28, Decision on Annulment (30 December 2015) [149].

award — or, more precisely, to ensure that the award is not outright susceptible to a challenge.[144]

Secondly, the ICSID Rules explicitly mention that document production requests can be given "at any stage of proceedings". As it was discussed previously, the timing of the introduction of the tainted evidence is critical for its admissibility. Tribunals could, instead of rejecting these documents, prompt the other party to introduce its own counterevidence or request clarifications.

Further, there is a wide variety of evidence that tribunals can order. It would not be limited to written evidence and would even cover site visits. The possibility to call witnesses and conduct site visits would be particularly useful for retaining equality of arms since it introduces an objective perspective into the evidence. This in turn assists tribunals in the weighing exercise by making the assessment fairer.

Finally, on this point, paragraph 3 of Article 34 of the aforementioned provision gives arbitrators an extent of coercive powers in document production. Not only does it stipulate that the "parties shall cooperate" with tribunals in exercising this power but also that a "formal note" will be taken in cases of lack of cooperation. A failure to comply with a document production order will in and of itself constitute evidence.

Turning to the UNCITRAL Arbitration Rules, Article 24 states the following:

> "2. The arbitral tribunal may, if it considers it appropriate, require a party to deliver to the tribunal and to the other party, within such a period of time as the arbitral tribunal shall decide, a summary of the documents and other evidence which that party intends to present in support of the facts in issue set out in his statement of claim or statement of defence.
>
> 3. At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the tribunal shall determine".

Contrary to the ICSID Arbitration Rules, the UNCITRAL Rules do not explicitly confer on tribunals coercive powers in ordering document production. Instead, they allow tribunals to first request a period of notice before new evidence

[144] Considering, for example, the decision in Achmea in Eskosol SpA in liquidazione v Italian Republic, ICSID Case No ARB/15/50, Decision on Respondent Request for Immediate Termination and Respondent Jurisdictional Objection based on Inapplicability of the Energy Charter Treaty to Intra-EU Disputes (7 May 2019) [231]–[232]; PL Holdings *Sàrl v Republic of Poland*, SCC Case No V2014/163, Judgment of the Svea Court of Appeal (22 February 2019) [175]–[176].

is introduced. This power, however, is only limited to the statements of claim and defence. In that case, the provision would not be of use in many instances in which the question of admitting illegal evidence arises long after the arbitration has commenced. In *Methanex v USA*, the illegal evidence was collected in the course of arbitral proceedings, not before them.[145] This was also the case in *Slovenian Border Dispute*, where the evidence obtained by tapping the arbitrator's phone was introduced long after the statements of claim and defence.[146]

Paragraph 3 of Article 24 of the UNCITRAL Rules parallels more the general power to order document production. Much like the ICSID Rules, the request can be given "at any time". The timeframe for producing such evidence, however, is different. A tribunal may order the evidence to be produced within a period of time that it will determine. Offering a longer period of time to the more vulnerable party would be a method of ensuring equality of arms. It also strikes at the very source of the problem in the admissibility of inappropriate evidence—one party may lack the resources or capacity to obtain similar evidence. Moving the deadlines may be one way of solving the problem.

For those reasons, the ICSID Rules might be better suited in preserving equality of arms by conferring a wider document production competence on tribunals.

An example of the application of document production by a tribunal under the ICSID Rules can be seen in the *Caratube v Kazakhstan* case.[147] Document production was used specifically to assist with the admissibility of illegal, publicly available evidence. At the request of the claimant, the tribunal would only order the production of documents which were not covered by client-attorney privilege. In doing so, the respondent was ordered to produce a list of documents which were covered by the privilege.[148] This gave the claimant an opportunity to comment on the admissibility, ensuring that the tribunal made a fairer decision. This is an example of the arbitrators balancing the interests between the parties. The case further explained the consequences of failing to produce requested evidence. The

[145] *Methanex* (n 23) pt II ch I [59].
[146] *Croatia* (n 30).
[147] *Caratube* (n 63).
[148] ibid [174].

tribunal stated that "negative inferences may be drawn as a result of a Party's failure to abide with their burden to produce specific, relevant documents".[149]

VI. Conclusion

The possibility to consider illegal and inappropriate evidence is by no means an invention of investment law. It appears that such practice originates from domestic laws, which are broad enough to allow its introduction, and likely also from public international law, despite the ICJ never addressing the issue directly.

The balancing exercise inevitably includes the arbitrators considering criminal issues, illegality, and impropriety. It seems accepted that such matters are arbitrable. Where particularly serious illegality is alleged, arbitrators should consider such arguments due to the existence of international public policy.

Investment tribunals approach the subject of admissibility carefully. Arbitrators will engage in a balancing or weighing exercise to decide whether the substantive relevance of the evidence outweighs procedural considerations originating from its illegality or the method of procurement. It is a case-by-case approach. For the *Methanex* tribunal, multiple acts of trespass over five months tilted the balance against admissibility. In the *EDF* arbitration, the doubtful authenticity of evidence led to its inadmissibility. The *Libonanco* tribunal suggested that evidence covered by the attorney-client privilege is not admissible regardless of materiality. In *Awdi*, evidence obtained from an ongoing domestic criminal case was inadmissible.

Although the introduction of tainted evidence is an uphill struggle that rarely succeeds, the opposite is true if the evidence is publicly available. Such documents would be generally admissible since there are fewer interests left to protect. In fact, the admissibility of public evidence is so evident that arbitrators have relied on WikiLeak documents on their own motion (*sua sponte*). The admissibility of public evidence, however, is not absolute. Their late introduction to the proceedings can prove fatal, which was the view taken by the *ConocoPhillips* tribunal, albeit with a strong dissent from one of the arbitrators. This approach is likely to be departed from in the future and limited to the facts of the case. Further, privileged attorney-client documents are also inadmissible, as was held in the *Caratube v Kazakhstan* arbitration. The approach of investment law towards admitting public evidence also diverges from public international law, where the ICJ generally ignores such evidence even despite parties consistently pleading them in submissions.

Turning to domestic law provides few answers. In English law, the admissibility of tainted evidence is possible, subject to public policy. Conversely,

[149] ibid [319].

the American 'fruit of the poisonous tree' renders evidence outright inadmissible. Neither of them nor any other approach can conclusively reflect a general principle of law. The American approach, however, has also been applied by the ECtHR and, arguably, by some investment tribunals. Further, no consistent principles can be derived from within and between the civilian and common law traditions.

The issue of the disadvantage which admitting tainted evidence creates against the opposite party remains. Tribunals attach importance to the weight of wrongfulness. The difficulty is that some types of wrongful conduct are not necessarily illegal in international law. Borderline cases exist—cases that would be clearly criminal under domestic law but not illegal under international law, including espionage. Further, the concept of unfriendly acts encompasses broader wrongfulness. Tribunals will also aggressively impede breaches of international public policy, such as corruption. This extent of illegality or impropriety will influence the weighing exercise of tribunals in admitting tainted evidence.

Further, investment law and arbitration rules developed principles of procedural fairness. These include the principle of equality of arms, good faith, and clean hands. These principles ensure some measure of having a level playing field between the parties. The non-observation of these principles may result in the unenforceability of arbitral awards for breach of procedural rules.

Tribunals also have other tools for the protection of procedural fairness other than refusing admission of evidence. Judicial assistance helps to evidence the criminality and illegality of conduct. They may also order the production of documents on their own motion. In other words, there are a variety of tools that may protect equality between parties on the one hand with the need for a just and full consideration of the evidence to resolve the dispute on the other.

This article analysed how tribunals, as well as select international courts, approach the issue of admissibility of tainted evidence. By distilling principles and distinguishing case law, the implications of the findings are practical. Admitting tainted evidence creates a domino effect, bringing into play other considerations. These include procedural fairness, good faith, and clean hands. Equally important are the questions of arbitrability of criminal laws and the ability of arbitrators to preserve the balance between parties.

The consideration of the latest developments in international law facilitates a doctrinal, normative discussion. Some authorities suggest that conduct which would be deemed domestically illegal would not be such if committed by a State. Others suggest that there is no doctrine of clean hands in international law. Such questions are entangled with the practical findings of this work and require deeper analysis. Future research is necessary to allow for a more harmonious development of investment law in the area. More importantly, there is a need for more case

law from international courts and tribunals. Until then, investment tribunals and practitioners will have to conduct a careful case-by-case balancing exercise of substantive and procedural fairness of tainted evidence.