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ILLEGALLY OBTAINED EVIDENCE IN INTERNATIONAL ARBITRATION

ABSTRACT

The question of how to deal with illegally obtained evidence remains one of the most unsettled issues from both a theoretical and practical perspective. Despite the absence of a unified standard, such evidence continues to appear in arbitral proceedings. Thus, important questions about fairness, integrity and procedural flexibility are raised. What makes this topic particularly intriguing is the nature of arbitration itself, which is a system built on the free will of the parties. Yet, this very freedom generates a tension between fundamental principles, such as due process and good faith, on the one hand, and the inherent flexibility of arbitration on the other. This paper explores how relevant legal instruments and arbitral tribunals have approached this dilemma and considers whether there is room for at least a modest step toward a more consistent approach to the admissibility of such evidence in international arbitration.

Keywords: *international arbitration, illegally obtained evidence, practice, standard*

1. INTRODUCTION

In the absence of explicit rules and persistent prevailing approach, illegally obtained evidence almost invariably raises the same procedural question of whether it should be admitted or not. This imposes a burden on the process of adjudication. The decision ultimately turns on whether pursuit of truth should be prioritized for the cost of the illegal manner in which the evidence was obtained.

Arbitration is distinguished from judicial proceedings by its nature and characteristics. Parties choose arbitration as an alternative dispute resolution method due to its consensual foundation enabling party control over the resolution process, its procedural flexibility, as well as its perceived integrity. Thus, arbitration provides insight into a new dimension of the approach to illegally obtained evidence. On the one hand, in the lack of established rules, it may be argued that arbitrators enjoy greater discretion in the assessment of evidence obtained illegally. On the other hand, admitting illegally obtained evidence may be perceived as incitement to illegal activities which could impair some of

arbitration's greatest attributes – its reputation and integrity. Therefore, arbitrators seem to refer to fundamental principles, such as the good faith principle and equality of arms, when deciding whether such evidence should be admitted.

It is certain that there is no consensus on this matter, either from a theoretical or a practical perspective. Moreover, the rules of arbitral institutions provide no uniform answer. Nevertheless, the appearance of illegally obtained evidence in arbitral practice has allowed various tribunals to address these matters. Therefore, the first objective of this paper is to analyze the arbitration rules relating to the collection and admissibility of evidence, focusing on whether the use of illegally obtained evidence is regulated. In the absence of such rules, the aim is to identify the principles contained in the provisions which may serve as guidance for tribunals when deciding on its admissibility and use. Subsequently, an analysis will be conducted of several landmark arbitral awards in which the arbitrators addressed the use of such evidence. Due to the confidentiality of commercial arbitration, the focus of the research will be investment arbitration cases. The relevant cases are chosen because of their illustrative value in demonstrating diverse categories of illegality and consequently, various approaches to the admissibility of illegally obtained evidence. In order to identify underlying principles and patterns in arbitral practice, the analysis will focus on tribunals' reasoning and highlight the similarities and differences. The ultimate goal is to draw a conclusion regarding the tribunals' stance – whether it is consistent, justified and which specific characteristics define it.

2. LEGAL FRAMEWORK FOR ARBITRAL INSTITUTIONS REGARDING ADMISSIBILITY OF (ILLEGALLY) OBTAINED EVIDENCE

Owing to its flexibility, arbitration rules tend to ensure broad discretion in conducting the proceedings, including the taking of evidence, to the extent that parties may arguably be 'left in the dark' about the protection afforded to their rights when the use of illegally obtained evidence is in question.¹ When existent, the regulation of the evidence gathering and its admissibility is rather superficial, purposely leaving a gap for the parties to fill according to their disposition.² In the

¹ Diora Ziyaeva, Antonio Celso Pugliese Dentons, Hacking the system: admissibility of evidence from cyberattacks in arbitration, *Global Arbitration Review*, 18 July 2025, <https://globalarbitrationreview.com/review/the-arbitration-review-of-the-americas/2026/article/hacking-the-system-admissibility-of-evidence-cyberattacks-in-arbitration>, 23 February, 2026.

² *Ibid.*

See also: IBA Task Force for the Revision of the IBA Rules on the Taking of Evidence in International Arbitration, Commentary on the revised text of the 2020 IBA Rules on the Taking of Evidence in International Arbitration, January 2021, p. 2, <https://www.ibanet.org/MediaHandler?id=4F797338-693E-47C7-A92A-1509790ECC9D>, 23 February, 2026.

course of analyzing different arbitration rules, they can be categorized into three different groups: (i) rules providing guided discretion, (ii) rules granting broad, but unguided discretion and (iii) rules categorized by regulatory silence.³

In the first group, the tribunals are encouraged, but not required to take certain evidentiary principles into account when determining the admissibility of evidence. A representative example is the American Arbitration Association's Commercial Arbitration Rules,⁴ which entitle the arbitrators with discretion in conducting arbitration, providing that 'the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case'.⁵ The arbitrators shall determine, *inter alia*, the admissibility of the evidence and may exclude them if they deem to be 'cumulative or irrelevant',⁶ however, 'conformity to legal rules of evidence shall not be necessary'.⁷

In the second group, the rules give power to the tribunals to determine admissibility of evidence without express reference to applicable evidentiary rules. For example, the UNCITRAL Arbitration Rules⁸ prescribe that it shall, *inter alia*, determine the admissibility and weight of the evidence offered.⁹ This confirms that arbitrators are 'freed from having to observe the strict legal rules of evidence'.¹⁰ However, they should conduct the arbitration by treating the parties with equality, in a fair and efficient process in which they will be given a reasonable opportunity of presenting their case.¹¹ The PCA Arbitration Rules,¹² based on the 2010 UNCITRAL Arbitration Rules, also prescribe wide discretionary powers in determining the admissibility, relevance, materiality and weight of the evidence offered, while ensuring equality and fair treatment between the parties.¹³ The LCIA Rules¹⁴ give the arbitral tribunal the power 'to decide whether or not to apply

³ Ziyaeva, Dentons, *op.cit.* note 2.

⁴ American Arbitration Association's Commercial Arbitration Rules, <https://www.adr.org/rules-forms-and-fees/commercial/>, hereinafter: AAA Arbitration Rules.

⁵ AAA Arbitration Rules, R-33(a).

⁶ AAA Arbitration Rules, R-35(c),

⁷ AAA Arbitration Rules, R-35(a).

⁸ United Nations Commission on International Trade Law, UNCITRAL Arbitration Rules, Vienna, 2021, hereinafter: UNCITRAL Arbitration Rules.

⁹ UNCITRAL Arbitration Rules, Article 27.

¹⁰ Report of the Secretary-General: preliminary draft set of arbitration rules for optional use in ad hoc arbitration relating to international trade (UNCITRAL Arbitration Rules) (A/CN.9/97), Yearbook of the United Nations Commission on International Trade Law, Volume VI, 1975, p. 176.

¹¹ UNCITRAL Arbitration Rules, Article 17.

¹² Permanent Court of Arbitration, PCA Arbitration Rules with Optional Protocols adopted in 2024, <https://pca-cpa.org/en/services/arbitration-services/pca-arbitration-rules/>, hereinafter: PCA Arbitration Rules.

¹³ PCA Arbitration Rules, Articles 17 and 27.

¹⁴ London Court of International Arbitration, LCIA Rules 2020, https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx, hereinafter: LCIA Rules.

any strict rules of evidence (or any other rules) as to the admissibility, relevance or weight of any material tendered by a party on any issue of fact or expert opinion'.¹⁵ The SCC Arbitration Rules¹⁶ fall within this category of rules as well.¹⁷ Further, the SIAC Arbitration Rules¹⁸ take a similar approach and add that 'the Tribunal is not required to apply the rules of evidence of any applicable law in making such a determination'.¹⁹ The HKIAC Arbitration Rules also confer broad discretion upon the admissibility of evidence, 'including whether to apply strict rules of evidence'.²⁰ Thus, the arbitral tribunal has 'the power to admit or exclude any documents, exhibits or other evidence'.²¹ Under the ICSID framework, Article 43 of the ICSID Convention²² is the only provision that expressly addresses evidence, while the ICSID Arbitration Rules²³ (Rules 36–40) provide further procedural detail on the tribunal's handling of evidence.²⁴ Under these rules, the tribunal possesses a large measure of discretion – whether certain evidence should be admitted or excluded, whether certain weight should be given, whether it would prefer to see specific kind of evidence on any matter arising in the case.²⁵ However, the tribunals are not bound by any specific rules. The common ground for all of these rules is that they all give the Tribunals broad discretion in determining the admissibility of evidence, without referencing any specific rules. However, as a procedural safety net, some of the general provisions reflect adherence to some fundamental principles while conducting the arbitration. Consequently, as it will be demonstrated, the broad discretion of the tribunals becomes even broader when deciding on admissibility of illegally obtained evidence.

In the third group, the admissibility of evidence is not expressly regulated, and tribunal authority remains largely implicit. For example, the ICC Arbitration

¹⁵ LCIA Rules, Article 22.

¹⁶ Arbitration Rules of the SCC Arbitration Institute, Adopted by the Stockholm Chamber of Commerce and in force 1 January 2023, hereinafter: SCC Arbitration Rules.

¹⁷ SCC Arbitration rules, Article 31, para. 1: 'The admissibility, relevance, materiality, and weight of evidence shall be for the Arbitral Tribunal to determine.'

¹⁸ Arbitration Rules of the Singapore International Arbitration Centre SIAC Rules 7th Edition, 1 January 2025, <https://siac.org.sg/siac-rules-2025>, hereinafter: SIAC Arbitration Rules.

¹⁹ SIAC Arbitration Rules, Article 32.2.

²⁰ Hong Kong International Arbitration Centre, 2024 Administered Arbitration Rules, <https://hkiac.org/arbitration/rules-and-practice-notes/2024-administered-arbitration-rules/>, Article 22, hereinafter: HKIAC Arbitration Rules.

²¹ HKIAC Arbitration Rules, Article 22.

²² Convention on the settlement of investment disputes between States and nationals of other States, Washington, 1965, hereinafter: ICSID Convention.

²³ International Centre for Settlement of Investment Disputes (ICSID) (2022) ICSID Rules and Regulations. Washington, DC: World Bank Group.

²⁴ See: Schreuer's Commentary on the ICSID Convention: A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. 3rd edn. Schill, S.W. et al. (eds.) Cambridge: Cambridge University Press, 2020, p. 909

²⁵ *Ibid*, p. 913.

Rules²⁶ only generally provide that the arbitral tribunal must conduct the arbitration fairly and impartially and guarantee 'that each party has a reasonable opportunity to present its case'.²⁷ The VIAC Arbitration Rules also fall under this category. They do not provide explicit admissibility rules in the sense of which kinds of evidence shall be rejected or accepted.²⁸ However, it is stipulated that 'the parties shall act in good faith, fairly and respectfully'.²⁹ Therefore, this category of evidence does not remotely regulate the admissibility of evidence, much less if they are obtained illegally.

It is evident that most of the rules do not address the use of illegally obtained evidence, but rather 'embrace broad permissive admissibility powers'.³⁰ Of course, it is not uncommon for national courts to use free evaluation when deciding on the (in)admissibility of certain evidence. However, in arbitration, this intentional gap may result in difficulties, especially due to opposing views of the parties, their different cultures or legal backgrounds.³¹ In an attempt to bridge the gap, the IBA Rules on Evidence were designed as a mechanism 'to supplement the legal provisions and the institutional, ad hoc or other rules that apply to the conduct of the arbitration'.³² Many investment and commercial arbitration tribunals agreed that they can serve as appropriate guidance, even in situations where the parties have not consented that they are formally applicable.³³ The Preamble itself calls upon fair process for the taking of evidence, conducted on the principle of good faith.³⁴ Further, the tribunal has the discretion to decide on the 'admissibility, relevance, materiality and weight of evidence'³⁵ and the power to exclude evidence in exhaustively enumerated cases.³⁶ However, the criteria for excluding

²⁶ International Chamber of Commerce, 2021 Arbitration Rules, <https://iccwbo.org/dispute-resolution/dispute-resolution-services/arbitration/rules-procedure/2021-arbitration-rules/#block-accordion-22>, ICC Arbitration Rules.

²⁷ ICC Arbitration Rules, Article 22 para. 4.

²⁸ See: VIAC Arbitration Rules, Articles 12 and 29.

²⁹ VIAC Arbitration Rules, Article 9, para. 5.

³⁰ Ashford, P., *The Admissibility of Illegally Obtained Evidence*, Arbitration, 2019, 85(4), p. 6.

³¹ IBA Task Force for the Revision of the IBA Rules on the Taking of Evidence in International Arbitration, Commentary on the revised text of the 2020 IBA Rules on the Taking of Evidence in International Arbitration, January 2021, p. 2, <https://www.ibanet.org/MediaHandler?id=4F797338-693E-47C7-A92A-1509790ECC9D>, 23 February, 2026.

³² IBA Rules on the Taking of Evidence in International Arbitration, Adopted by a resolution of the IBA Council 17 December 2020 International Bar Association, <https://www.ibanet.org/MediaHandler?id=def0807b-9fec-43ef-b624-f2cb2af7cf7b>, Preamble, p. 7.

³³ Schreuer's Commentary on the ICSID Convention: A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, p. 912, footnote 15: 'eg Metal-Tech v Uzbekistan, Award (4 October 2013) para 245'.

³⁴ IBA Rules on Evidence, Preamble.

³⁵ IBA Rules on Evidence, Article 9 para. 1.

³⁶ IBA Rules on Evidence, Article 9 para. 1: '(a) lack of sufficient relevance to the case or materiality to its outcome; (b) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable (see Article 9.4 below); (c)

evidence appears to be stringent, as the arbitral tribunal is responsible for conducting fair proceedings.³⁷ Nonetheless, the greatest novelty is that arbitral tribunals now 'may, at the request of a Party or on its own motion, exclude evidence obtained illegally'.³⁸ The Commentary of the revised text of the 2020 IBA Rules on Evidence,³⁹ provides one example: 'if the law of a country where a recording of a conversation was made prohibits recording conversations without permission of those involved, such recording may be considered to have been obtained illegally and therefore the tribunal may exclude it from the evidence.'⁴⁰ However, apart from this provision, the IBA Rules on Evidence do not provide guidelines or exemplary circumstances in which illegally obtained evidence should be excluded. This is due to the variations in national laws, as well as the variety in the arbitral tribunals' conclusions.⁴¹ Hence, the rules themselves make a gradation: the tribunal 'shall' exclude evidence in the situations provided for in Article 9(2), but 'may' exclude illegally obtained evidence under Article 9(3).

To sum up, most of the arbitration rules give broad discretion by providing that the arbitral tribunal shall determine the admissibility, relevance, materiality, and weight of the evidence without requiring any specific rules to be applied. Some arbitration rules refrain from even remotely establishing admissibility rules but provide that the whole arbitral process should be conducted according to the principles of fairness and equality of the parties. In any case, the IBA Rules on Evidence can be applied supplementarily. The provision stipulating that illegally obtained evidence 'may' be excluded attests to its presence in practice. However, since the provision is scarce, it is far from clarifying its use to any meaningful extent.

Therefore, it is necessary to make an overview of the practice in which illegally obtained evidence has appeared and the approaches which the tribunals have

unreasonable burden to produce the requested evidence; (d) loss or destruction of the Document that has been shown with reasonable likelihood to have occurred; (e) grounds of commercial or technical confidentiality that the Arbitral Tribunal determines to be compelling; (f) grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution) that the Arbitral Tribunal determines to be compelling; or (g) considerations of procedural economy, proportionality, fairness or equality of the Parties that the Arbitral Tribunal determines to be compelling.'

³⁷ Ahern William, Admissibility of Evidence, 2025, https://jusmundi.com/en/document/publication/en-admissibility-evidence?login_success=true&login_success=true&login_success=true&login_success=true, 23 February, 2026.

³⁸ IBA Rules on Evidence, Article 9 para. 3.

³⁹ IBA Task Force for the Revision of the IBA Rules on the Taking of Evidence in International Arbitration, Commentary on the revised text of the 2020 IBA Rules on the Taking of Evidence in International Arbitration, January 2021, p. 30, <https://www.ibanet.org/MediaHandler?id=4F797338-693E-47C7-A92A-1509790ECC9D>, 23 February, 2026.

⁴⁰ Ibid.

⁴¹ Ibid.

adopted addressing them. The following analysis of selected investment arbitration awards illustrates how various tribunals apply different principles in practice.

3. ARBITRAL TRIBUNALS' APPROACH IN PRACTICE

Another consequence of the tribunal's flexibility and wide discretion is the absence of unified approach when assessing (illegally obtained) evidence.⁴² By making an overview of the leading cases which dealt with this matter, it is important to identify the principles they used in reaching their decisions.

A pivotal case which initially set the contours in the context of illegally obtained evidence in arbitration is *Methanex Corporation v United States of America* (*Methanex v USA*).⁴³ Methanex alleged that the State of California's environmental regulation infringed upon its NAFTA-guaranteed investment treaty rights.⁴⁴ It therefore hired a private investigator who obtained documents by trespassing on a private property and conducting 'dumpster-diving' activities in internal trashcans.⁴⁵ This was an ongoing operation carried out over a period of months. Documentation contained private correspondence, materials subject to legal professional privilege, personal notes and a private address-book.⁴⁶ Having established *prima facie* that the evidence was obtained unlawfully, the USA shifted the burden of proof to Methanex, which did not demonstrate the lawfulness of the documents' acquisition.⁴⁷ In the final award, the Tribunal held that the documents obtained before the proceedings began were in violation of the general duty of good faith which is 'incumbent on all who participate in international arbitration'.⁴⁸ The documents obtained after the commencement of the proceedings, aside from violating the principle of good faith, also offended the 'principles of justice and fairness required of all parties in every international arbitration'.⁴⁹ Thus, the Tribunal held that the evidence was of 'marginal evidential

⁴² See: Ahern William, *Admissibility of Evidence*, 2025, https://jusmundi.com/en/document/publication/en-admissibility-evidence?login_success=true&login_success=true&login_success=true&login_success=true, 23 February, 2026.

⁴³ *Methanex Corporation v United States*, Final Award on Jurisdiction and Merits, (2005) 44 ILM 1345, Inside US Trade, 19 August 2005, 12, IIC 167 (2005), 3rd August 2005, Ad Hoc Tribunal (UNCITRAL), hereinafter: *Methanex v USA*.

⁴⁴ *Methanex v USA*, para. 2.

⁴⁵ *Methanex v USA*, para. 37: 'Mr McAnish stated that, every weekday morning at about 6.00 a.m., he visited the building and accessed the dumpsters from the public walkway in front of the doors to the dumpster area. He stated that the doors were never locked and, at times, were open or ajar.'; Ashford, *op. cit.* note 31, p.7.

⁴⁶ *Methanex v USA*, para. 4.

⁴⁷ *Methanex v USA*, para. 55.

⁴⁸ *Methanex v USA*, para. 58.

⁴⁹ *Methanex v USA*, para. 59.

significance in support of Methanex's case.⁵⁰ This is an example of a direct involvement of the party in illegal evidence gathering.

Another case demonstrating party involvement is EDF v Romania,⁵¹ where the Claimant knew and agreed to illegally record a conversation with a Romanian witness, therefore violating her right to privacy.⁵² Relying upon the findings in Methanex v USA, the tribunal held that admitting the secretly recorded audio tape 'would be contrary to the principles of good faith and fair dealing required in international arbitration'.⁵³ Thus, the audiotape was incomplete, as it was missing a portion of the original soundtrack, which raised authenticity concerns. This was another reason for not admitting it as evidence.⁵⁴ Interestingly enough, although the Tribunal emphasized that admission of evidence in arbitration is governed by international law, it found that the taping was unlawful under Romanian law, as it breached the right to privacy.⁵⁵ Referring to the Corfu Channel Case, as a leading case in this matter, the Tribunal underlined 'that admissibility of unlawfully obtained evidence is to be evaluated in the light of the particular circumstances of the case, as in the case of the ICJ Judgment in the Corfu Channel Case'.⁵⁶

Another example of a party involvement is Libananco Holdings Co. Limited v. Republic of Turkey.⁵⁷ The Respondent, while exercising its sovereign powers to obtain evidence in a criminal investigation, accessed 'hundreds, or even thousands', of communications with the Claimant's counsel and potential witnesses.⁵⁸ Although Turkey argued that the aim of the surveillance was to prevent money laundering, the Tribunal held that it 'could not allow its process to be used as the cover for a mere fishing expedition'.⁵⁹ It therefore weighed procedural fairness, confidentiality, legal privilege and parties' immunities against Turkish sovereign policing powers.⁶⁰ It called upon the parties' obligation to

⁵⁰ Methanex v USA, para. 56.

⁵¹ EDF (Services) Limited v. Romania, ICSID Case No. ARB/05/13.

⁵² S Ng, N., *Illegally Obtained Evidence in International Arbitration: Protecting the Integrity of the Arbitral Process*, Singapore Academy of Law Journal 32, no. 2, September 2020, 747-770, p. 754.

⁵³ EDF (Services) Limited v. Republic of Romania, ICSID Case No. ARB/05/13, Procedural Order No. 3, para. 38. More precisely, the Tribunal referred to the IBA Rules, Article 9, para. 2(g).

⁵⁴ Gupta, K., *Admissibility of Unlawfully Obtained Evidence in International Arbitration*, NLIU Law Review, Issue II, Vol XI, 2022, p. 101.

⁵⁵ EDF (Services) Limited v. Republic of Romania, ICSID Case No. ARB/05/13, Procedural Order No. 3, para. 36, 47.

⁵⁶ EDF (Services) Limited v. Republic of Romania, ICSID Case No. ARB/05/13, Procedural Order No. 3, para. 38.

⁵⁷ Libananco Holdings Co. Limited v. Republic of Turkey, ICSID Case No. ARB/06/8, hereinafter: Libananco v Turkey.

⁵⁸ Libananco Holdings Co. Limited (Claimant) v the Republic of Turkey (Respondent) (ICSID Case No. ARB/06/8), Decisin on Preliminary Issues, 23 June 2008, para. 72, hereinafter Libananco v Turkey, Decisin on Preliminary Issues, 23 June 2008.

⁵⁹ *Ibid*, para. 70.

⁶⁰ *Ibid*, para. 78.

arbitrate fairly and in good faith.⁶¹ It was ordered that the Respondent not 'intercept or record communications between legal counsel for the Claimant on the one hand and representatives of the Claimant and other persons in Turkey on the other hand';⁶² to destroy all intercepted emails and communications which in any way related to the arbitration;⁶³ to exclude all privileged documents and information which have been disclosed to the Tribunal;⁶⁴ that the Respondent must ensure that no information or documents obtained by 'its criminal investigation authorities shall be made available to any person having any role in the defense of this arbitration'.⁶⁵ This is a rather firm standing on the protection of confidential and privileged information for a party, although, arguably, not applied equally to both categories.⁶⁶ In the case, some of the audio recordings were not admitted as 'neither of the Parties' experts was able to confirm that the audio recordings in question were authentic'.⁶⁷

In *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan* (*Caratube v Kazakhstan*), a slightly different approach was taken. Firstly, the case demonstrates that if the evidence or information is publicly accessible, there is limited basis for excluding it from consideration.⁶⁸ Namely, Caratube initiated the arbitral proceedings due to an alleged seizure of their oil exploration and production rights. The Tribunal had to decide on the admissibility of eleven documents which were hacked and leaked on 'Kazakhleaks' alongside 60,000 other documents. The Claimant argued that the Tribunal could not be "placed in a sterile environment or a bubble detached from the real world and ignore these documents or pretend they don't exist".⁶⁹ The Respondent, on the other hand, contended that the documents are infringing the principle of equality of arms and legal privilege. Nevertheless, the Tribunal successfully illustrated that

See also: Ireton, J., *The Admissibility of Evidence in ICSID Arbitration: Considering the Validity of WikiLeaks Cables as Evidence*, ICSID Review, Vol. 30, No. 1, 2015, doi:10.1093/icsidreview/siu029, p. 238; Bertrou, G., Alekhin, S., *The Admissibility of Unlawfully Obtained Evidence in International Arbitration: Does the End Justify the Means?*, Les Cahiers de l'Arbitrage, 2018-4, pp. 11-71.

⁶¹ *Libananco v Turkey*, Decisin on Preliminary Issues, 23 June 2008, para. 78.

⁶² *Ibid*, para. 82, 1.1.1.

⁶³ *Ibid*, para. 82, 1.1.3.

⁶⁴ *Ibid*, para. 82, 1.1.6.

⁶⁵ *Ibid*, para. 82, 1.2.

⁶⁶ Ireton, *op. cit.* note 61, p. 238; Bertrou, Alekhin, *op. cit.* note 61, p. 29.

⁶⁷ *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award, 2 Sept 2011, para. 383.

⁶⁸ Sahu, R. K., *Inadmissible but irresistible: navigating standards of admissibility of illegally obtained evidence against an arbitrator*, International Arbitration Law Review, 2025, 28(1), p. 2.

⁶⁹ Alison Ross, Tribunal rules on admissibility of hacked Kazakh emails, September 2015, <https://globalarbitrationreview.com/article/tribunal-rules-admissibility-of-hacked-kazakh-emails>.

it is possible to split the illegally obtained evidence into admissible and rejected.⁷⁰ It held that the risk of an award that would be "artificial and factually wrong when considered in light of the publicly available information" was considered to outweigh concerns relating to cybercrime and potential unfairness and admitted the non-privileged documents.⁷¹ However, four privileged documents were rejected, as the lawyer-client privilege was not waived with the hacking of the documents and could only be disregarded in "rather extreme circumstances."⁷²

ConocoPhillips v Venezuela is a case in which, *inter alia*, a total of three requests of reconsideration of the Decision on jurisdiction and merits⁷³ and two reconstitutions of the tribunal took place. After rendering the award, Wikileaks cables were submitted as evidence on behalf of the Respondent. In their Request for reconsideration, they requested a new hearing in light of the new facts discovered in the cables, proving that contrary to the findings in the decision, the Respondent negotiated in good faith with the Claimant. The Tribunal denied their request, stating that it does not have the power to open up the award.⁷⁴ In his dissenting opinion, Professor Abi-Saab contested to the tribunal's decision as it follows: "In these circumstances, I don't think that any self-respecting Tribunal that takes seriously its overriding legal and moral task of seeking the truth and dispensing justice according to law on that basis, can pass over such evidence, close its blinkers and proceed to build on its now severely contestable findings, ignoring the existence and the relevance of such glaring evidence. It would be shutting itself off by an epistemic closure into a subjective make believe world of its creation; a virtual reality in order to fend off probable objective reality; a legal comedy of errors on the theatre of the absurd, not to say travesty of justice, that makes mockery not only of ICSID arbitration but of the very idea of adjudication."⁷⁵ Shortly after Professor Abi-Saab's resignation, the Respondent submitted a new request for reconsideration which was rejected on the same

⁷⁰ Drahanov, D., *The issue of admissibility of evidence in the investment arbitration Should the tribunal use hacked and illegal documentation?*, Master Thesis, Uppsala Universitet, 2019, p. 30.

⁷¹ Bertrou, Alekhin, *op. cit.* note 61, p. 35.

⁷² Although the Tribunal noted that the rejection of the privileged documents could lead to a "regrettable but inescapable and acceptable" risk of an ultimate decision "inconsistent with the privileged leaked documents in the public domain.", *Ibid.*

⁷³ ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/30, 13 December 2007.

⁷⁴ ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/07/30), Decision on Respondent's Request for Reconsideration, March 10, 2014, para. 22.

⁷⁵ Professor Abi-Saab's Dissenting Opinion to Decision on Jurisdiction and Merits dates February 19, 2015, nearly 1.5 years after the date of the underlying Decision. As explained in the introductory paragraphs of the Dissenting Opinion, the delay was caused by Professor Abi-Saab's ill health (ConocoPhillips Dissenting Opinion of Georges Abi-Saab, para. 2).

procedural grounds.⁷⁶ Professor Bucher, in line with his predecessor, Professor Abi-Saab, highlighted in his Dissenting opinion that the tribunal had power to reconsider its previous decision based on the newly discovered facts.⁷⁷ After the resignation of the Tribunal's Chairman, the Respondent submitted its third request for reconsideration, which was once again rejected. Intriguingly enough, the Tribunal emphasized that the leaked cables were "not always easy to understand", even though it did not elaborate on its (in)admissibility. This is peculiar, considering that international arbitration is characterized with decisions 'of staggering length in which every argument raised by the parties is often reproduced verbatim in the body of the award'.⁷⁸ The illegality of the documents was not objected to by the Claimant either. Therefore, one cannot help but wonder whether, if the evidence had been presented in a timely manner, the tribunal might not have objected to it.⁷⁹

In the landmark Yukos arbitrations,⁸⁰ the Tribunal heavily relied on confidential diplomatic cables from the US State Department that were made public by WikiLeaks.⁸¹ This was to prove that the Respondent exerted pressure on Claimant's auditor 'to withdraw the audits in order to bolster the legitimacy of the destruction of Yukos'.⁸² However, the Respondent did not dispute the admissibility or authenticity of said evidence and neither did the Tribunal take explicit position on the matter.

From the overview, it can be seen that illegally obtained evidence is not automatically inadmissible. Two dominant circumstances that tribunals take into account are the involvement of the parties in obtaining the evidence and its availability in the public domain. At the same time, due to the specificities of each individual case, additional factors are also considered. For example, *Methanex v the USA*, *EDF v Romania* and *Libananco v Turkey* are cases in which the parties

⁷⁶ *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/30), Decision on the Respondent's Request for Reconsideration, February 9, 2016, para. 27-28, 37.

⁷⁷ *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/30), Dissenting Opinion by Arbitrator Andreas Bucher, February 9, 2016, para. 34; Bertrou, Alekhin, *op. cit.* note 61 p. 32.

⁷⁸ Boykin, J. H., Havalic, M., *Fruits of the Poisonous Tree: The Admissibility of Unlawfully Obtained Evidence in International Arbitration*, October 2014, https://www.iadclaw.org/assets/1/7/6_Bassiri_Boykin_and_Havalic_Fruits_of_the_Poisonous_Tree_-_Admissibility_of_Unlawfully_Obtained_Evidence.pdf, 23 February, 2026, p. 9.

⁷⁹ Drahanov, *op. cit.* note 71, p. 33.

⁸⁰ *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, PCA Case No. 2005-04/AA227, hereinafter *Yukos v Russia*; *Hulley Enterprises Ltd. v. Russian Federation*, PCA Case No. 2005-03/AA226; *Veteran Petroleum v. Russian Federation*.

⁸¹ Blair, C., Vidak Gojkovic, E., *WikiLeaks and Beyond: Discerning an International Standard for the Admissibility of Illegally Obtained Evidence*, ICSID Review, ICSID Review - Foreign Investment Law Journal, Volume 33, Issue 1, Winter 2018.

⁸² *Yukos v Russia*, H. The Withdrawal of PWC's Audit Opinions.

themselves were involved in obtaining the evidence. However, despite this shared characteristic, the tribunals relied on different considerations in determining inadmissibility, particularly in *Libananco v Turkey*, where the tribunal balanced the competing interests of the parties in assessing admissibility. A common feature in *Caratube v Kazakhstan*, *ConocoPhillips v Venezuela* and *Yukos* is the availability of the evidence in the public domain, which constitutes a particularly relevant factor in favour of admissibility. Nevertheless, this too does not amount to a general rule, as tribunals in each case take into account different circumstances leading to different outcomes. For instance, *Caratube v Kazakhstan* suggests that privileged documents occupy a 'qualified position' compared to other types of evidence, while *ConocoPhillips v Venezuela* and *Yukos* leave the question of admissibility open: in the former, inadmissibility is based on procedural preclusion for late submission of evidence rather than a substantive assessment of the issue, whereas in the latter the matter is not addressed at all.

It follows that there is neither a uniform approach nor a consistent methodology in the tribunals' reasoning. Moreover, even when invoking specific grounds, it remains unclear how illegally obtained evidence violates the principles relied upon by the tribunals. Therefore, while such evidence is evidently present in arbitral practice and certain lines of reasoning have begun to emerge, these do not yet amount to a coherent approach. Nonetheless, they signal a gradual evolution toward greater consistency in the future.

4. CONCLUSION

In light of the analyzed provisions and the case-law of the arbitral tribunals, two main conclusions may be drawn.

Firstly, the arbitration rules generally confer broad discretionary powers to tribunals to determine admissibility of evidence. Although some of the rules give tribunals authority to exclude the evidence, none of them stipulate illegally obtained evidence as a ground for exclusion. The IBA Rules on Evidence, as a soft law instrument, introduced an important novelty, namely that tribunals may exclude evidence obtained in an illegal manner. However, the application of this rather vague and broadly formulated provision will continue to depend on the specific circumstances of each case and the tribunal's approach, much as it did prior to its adoption.⁸³

Secondly, the overview of the landmark cases in this area demonstrates some patterns, *i.e.* overlapping elements and principles that the Tribunals rely upon. Regarding the common elements, it can be seen that: illegally obtained evidence are not automatically excluded from the proceedings; it is particularly important

⁸³ See: Khodykin, R., Mulcahy, C., and Fletcher, N., *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, Oxford Law Pro, 2019, <https://doi.org/10.1093/law/9780198818342.001.0001>, p. 415.

whether the party itself was involved in the illegal obtaining of the evidence or if it was obtained by a third party; arbitrators take into consideration whether the documents are publicly available; and privileged documents constitute a category of evidence which enjoy special protection. With respect to the applied principles, the Tribunals usually rely upon basic fundamental principles, such as good faith, fairness and equality of arms, justice, confidentiality, privilege, as well as the right to privacy of the parties, materiality or authenticity of evidence. However, their invocation often remains abstract and inconsistently applied, without clearly demonstrating how the illegally obtained evidence infringes upon them.

Accordingly, given the wide discretion conferred by the applicable rules and in view of the approaches adopted by tribunals in practice, the most appropriate guiding framework directed towards a more coherent methodological approach would be the following three-step test:

- (i) Has the evidence been obtained unlawfully by a party who seeks to benefit from it?
- (ii) Does public interest favor rejecting the evidence as inadmissible?⁸⁴
- (iii) Do the interests of justice favor the admission of evidence?⁸⁵

However, Tribunals would still have to consider the authenticity, reliability and persuasiveness of the evidence, especially in times of high technological development.⁸⁶ Additionally, the test should be applied cautiously, evaluating each step individually and in combination, taking into consideration the circumstances of the case. The proposed test may be used as a flexible analytical tool for different procedural contexts that helps tribunals decide on the admissibility of evidence and determine the weight and probative value to be given to such evidence when necessary. Namely, a mechanical application could lead to risks in practice. As it was demonstrated by the case-law, tribunals generally exclude evidence that is privileged or illegally obtained by the party itself, while confidential evidence and evidence obtained from third parties is usually admitted. Therefore, in some cases, the party's involvement shouldn't be the sole decisive reason for excluding the evidence. This should not be understood as encouraging wrongdoing, because excluding highly important facts and evidence could undermine the fairness of the proceedings.⁸⁷ All of the circumstances of the case must be carefully considered, in order to avoid, in the words of Professor Ali-Saab - 'travesty of justice'. This approach shall be seen as a guide to balance the need to uphold procedural fairness while avoiding rigid rules that could exclude important evidence.

⁸⁴ Example: legal privilege (attorney-client communications), diplomatic immunity and inviolability, state secrecy, see: Blair, Vidak Gojkovic, *op. cit.* note 82, p. 257.

⁸⁵ The 3-step test is proposed by Cherie Blair and Ema Vidak Gojkovic, see: Blair, Vidak Gojkovic, *op. cit.* note 82.

⁸⁶ Example: principles of fairness, justice, procedural integrity, equality of arms, *Ibid*, p. 257, 259.

⁸⁷ *Ibid*, p. 258.

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