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ILLEGALLY OBTAINED EVIDENCE IN INTERNATIONAL ARBITRATION

Protecting the Integrity of the Arbitral Process

The admissibility of illegally obtained evidence in international arbitration raises competing concerns: the tribunal should seek to form an accurate picture of the material facts, but it should not incentivise illegal activities. In addressing these concerns, some tribunals have offered the rationales of good faith and the equality of arms. These rationales, however, do not fully account for the existing legal principles governing admissibility. This article submits that the rationale of protecting the integrity of the arbitral process best explains the existing principles and helps to shed light on unresolved issues.

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I. Introduction

1 Illegally obtained evidence can shape the factual narratives on which international arbitral tribunals base their decisions. In which of the following scenarios should an international arbitral tribunal exclude the evidence?

(a) An investor hires private investigators, who trespass onto private property to take discarded documents from a dumpster. The investor wishes to use the documents in an arbitration against a state, one of whose witnesses had created the documents.[2]

(b) A journalist contacts an official of the Fédération Internationale de Football Association ("FIFA"), posing as a lobbyist supporting a particular bid for a FIFA World Cup. The journalist secretly records a meeting in which the official agrees to help bribe other officials. Upon learning of the meeting,

1 I would like to thank Prof Jeffrey Waincymer for his thought-provoking questions and comments during a course on comparative evidence in international arbitration. I am also grateful to Mr Tan Jun Hong and Ms Keziah A Simon for their helpful comments.

2 *Methanex Corp v United States of America*, Final Award of the Tribunal on Jurisdiction and Merits (2005) 44 ILM 1345.

FIFA obtains the recording from the journalist and uses it in disciplinary proceedings against the official.[3]

(c) Party A relies on a contract between Party B and a third party which the third party had independently posted on WikiLeaks in breach of its own agreement.[4]

(d) An investor relies on diplomatic cables of State A, which are available on WikiLeaks, to establish its claim against State B.[5]

(e) Party A discovers that e-mails by Party B have been leaked on a website and pays a fee to access them. Party A relies on them in proceedings against Party B.

2 The admissibility of illegally obtained evidence raises competing concerns. On the one hand, international arbitral tribunals seek to decide disputes based on an accurate picture of the material facts. In doing so, they need not consider domestic laws in the same way as domestic courts because they are not organs of any state. On the other hand, the admission of illegally obtained evidence can incentivise cybercrime and other illegal activities and can be seen to ignore or condone the violation of domestic laws. In addressing these competing concerns, some tribunals have relied on the rationales of enforcing the duty to arbitrate in good faith and of upholding the equality of arms between the parties.

3 This article considers whether these rationales adequately guide tribunals' exercise of their power to exclude evidence in cases such as the scenarios described above. Part II[6] of this article gives a brief overview of the admissibility of evidence in international arbitration. Drawing on published arbitral awards, Part III[7] seeks to identify existing legal principles governing the admissibility of illegally obtained evidence. Part IV[8] discusses the inadequacy of the rationales of good faith and the equality of arms. It proposes that the existing principles are more coherently and completely explained by the rationale of protecting the integrity of the arbitral process. Using this rationale, Part V[9] explores

3 *Ahongalu Fusimalohi v Fédération Internationale de Football Association* Case No CAS 2011/A/2425 (8 March 2012); see similarly *Amos Adamu v Fédération Internationale de Football Association* Case No CAS 2011/A/2426 (24 February 2012).

4 *Bryana Bible v United Student Aid Funds, Inc* 2014 WL 1048807 at 7–8 (SD Indiana, 14 Mar 2014).

5 *Hulley Enterprises Ltd (Cyprus) v The Russian Federation* PCA Case No AA 226, Final Award (18 July 2014).

6 See paras 4–5 below.

7 See paras 6–20 below.

8 See paras 21–36 below.

9 See paras 37–57 below.

some unresolved questions: which jurisdiction's laws are relevant to ascertaining whether evidence has been obtained illegally; whether and how different kinds of illegality should be distinguished; and whether and on what basis a tribunal should exclude evidence bought from a third party who had independently obtained it illegally.

II. Overview of the admissibility of evidence

4 Arbitral rules often provide that arbitral tribunals have the power to determine the admissibility of evidence. For example, Art 27(4) of the United Nations Commission on International Trade Law ("UNCITRAL") Arbitration Rules[10] states that the tribunal "shall determine the admissibility, relevance, materiality and weight of the evidence offered".[11]

5 Some arbitral rules expressly highlight the tribunal's broad discretion. For instance, rule 19.2 of the Singapore International Arbitration Centre Arbitration Rules[12] states:[13]

> The Tribunal shall determine the relevance, materiality and admissibility of all evidence. The Tribunal is not required to apply the rules of evidence of any applicable law in making such determination.

The parties may nevertheless agree on rules to govern the taking of evidence, such as the International Bar Association Rules on the Taking of Evidence in International Arbitration[14] ("IBA Rules"). In addition, the tribunal's discretion is limited by mandatory procedural rules, which in most jurisdictions include the requirement that the parties be treated with equality.[15]

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10 GA Res 65/22, adopted at the United Nations General Assembly, 65th Session (2010).

11 See similarly Art 19(2) of the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration (UN Doc A/40/17, annex I; UN Doc A/61/17, annex I) (21 June 1985; amended 7 July 2006) (hereinafter "UNCITRAL Model Law"); Art 9.1 of the International Bar Association Rules on the Taking of Evidence in International Arbitration (29 May 2010) (hereinafter "IBA Rules"); rule 34(1) of the International Chamber of Commerce Arbitration Rules; and Art 31(1) of the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (effective 1 January 2017).

12 6th Ed, 1 August 2016.

13 See similarly Art 22.2 of the the Hong Kong International Arbitration Centre Administered Arbitration Rules (effective 1 November 2018); Art 22.1(vi) of the London Court of International Arbitration Arbitration Rules (effective 1 October 2014); rule 34 of the American Arbitration Association Commercial Arbitration Rules (effective 1 October 2013).

14 29 May 2010.

15 Gary B Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at p 2164. See, *eg*, Art 18 of the UNCITRAL Model Law; and s 3(1) of

(cont'd on the next page)

III. Admissibility of illegally obtained evidence

6 In this article, illegally obtained evidence refers to evidence that has been procured in breach of legal prohibitions or obligations. This encompasses both violations of criminal law, such as violations of US law in relation to some WikiLeaks publications,[16] as well as conduct giving rise to civil liability, such as trespass to land.[17]

7 This article analyses published awards in investment arbitration and sports arbitration in which tribunals gave reasons for admitting or excluding illegally obtained evidence. Although the public interests that arise in investor-State disputes and sports disciplinary proceedings do not arise in international commercial arbitration, the relevant legal principles apply equally to international commercial arbitration. Since the principles are informed by general concerns in international arbitration, commentators do not distinguish between illegally obtained evidence in international commercial arbitration and in other kinds of arbitration.[18]

8 The principles developed in arbitral awards, discussed below, may be summarised as follows:

(a) as a starting point, tribunals should admit illegally obtained evidence, like any other evidence, unless there are grounds for exclusion;

(b) where the party seeking to admit the evidence was involved in its illegal procurement, this is a ground for exclusion; and

(c) whether the evidence is widely and freely available to the public is a relevant but not decisive factor.

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the International Arbitration Act (Cap 143A, 2002 Rev Ed). See also *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 at [42].

16 See, *eg*, *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2012] EWHC 2115 (Admin) at [15]; *ConocoPhillips Petrozuata BV v Bolivarian Republic of Venezuela* ICSID Case No ARB/07/30, Decision on Respondent's Request for Reconsideration (10 March 2014).

17 See, *eg*, *Methanex Corp v United States of America*, Final Award of the Tribunal on Jurisdiction and Merits (2005) 44 ILM 1345.

18 See, *eg*, Nathan D O'Malley, *Rules of Evidence in International Arbitration: An Annotated Guide* (Informa, 2012) at pp 321–323; Cherie Blair & Ema Vidak Gojković, "WikiLeaks and Beyond: Discerning an International Standard for the Admissibility of Illegally Obtained Evidence" (2018) 33(1) ICSID Review 235; and Grégoire Bertrou & Sergey Alekhin, "The Admissibility of Unlawfully Obtained Evidence in International Arbitration: Does the End Justify the Means?" (2018) *The Paris Journal of International Arbitration* 11.

Other exclusionary grounds, such as legal privilege and a lack of sufficient relevance or materiality, apply equally to both legally and illegally obtained evidence.[19]

A. Tribunals' liberal approach to admitting illegally obtained evidence

9 In exercising their broad discretion to determine the admissibility of illegally obtained evidence, arbitral tribunals tend to take a more liberal approach than domestic courts. Tribunals tend to admit virtually any evidence.[20] They address any concerns about the evidence by giving it appropriate weight.[21] For example, tribunals readily admit hearsay evidence.[22] This liberal approach is reflected in Art 9.2 of the IBA Rules, which are used in the majority of international arbitrations as guidelines or as binding rules.[23] Article 9.2 lists grounds on which the tribunal may

19 See Art 9.2 of the IBA Rules. See, *eg*, *Caratube International Oil Co LLP v The Republic of Kazakhstan* ICSID Case No ARB/13/13, Decision on the Claimants' Request for the Production of 'Leaked Documents' (27 July 2015), reported in Alison Ross, "Tribunal Rules on Admissibility of Hacked Kazakh Emails" *Global Arbitration Review* (22 September 2015); and *Methanex Corp v United States of America*, Final Award of the Tribunal on Jurisdiction and Merits (2005) 44 ILM 1345 at Part II – Ch I, [56].

20 *William A Parker (USA) v United Mexican States* (1926) 4 RIAA 35 at 39, [5]; Charles N Brower, "Evidence before International Tribunals: The Need for Some Standard Rules" (1994) 28(1) Int'l Law 47 at 48; Frédéric Gilles Sourgens, Kabir Duggal & Ian A Laird, *Evidence in International Investment Arbitration* (Oxford University Press, 2018) at p 237; Nathan D O'Malley, *Rules of Evidence in International Arbitration: An Annotated Guide* (Informa, 2012) at p 269.

21 Thomas H Webster, *Handbook of UNCITRAL Arbitration* (Sweet & Maxwell, 2010) at p 404. See, *eg*, ICC Case 12124: Procedural Order of 23 November 2004 in *ICC International Court of Arbitration Bulletin – 2010 Special Supplement, Decisions on ICC Arbitration Procedure: A Selection of Procedural Orders Issued by Arbitral Tribunals Acting under the ICC Rules of Arbitration (2000–2004)* (2010) at p 33. See also Edna Sussman, "The Arbitrator Survey – Practices, Preferences and Changes on the Horizon" (2015) 26(4) Am Rev Int'l Arb 517 at 521 (only 11% of arbitrators surveyed said that, 50% or more of the time, they excluded evidence that would be inadmissible under national evidentiary standards rather than admitting the evidence and giving it such weight as they deemed appropriate).

22 Nathan D O'Malley, *Rules of Evidence in International Arbitration: An Annotated Guide* (Informa, 2012) at p 267; Nigel Blackaby *et al*, *Redfern and Hunter on International Arbitration* (Oxford University Press, 6th Ed, 2015) at p 393.

23 Michael W Bühler & Thomas H Webster, *Handbook of ICC Arbitration: Commentary, Precedents, Materials* (Sweet & Maxwell, 3rd Ed, 2014) at pp 376–377; Queen Mary University of London & White & Case, *2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process* (2012) at p 11 <http://www.arbitration.qmul.ac.uk/research/2012/> (accessed 2 January 2020) (60% of arbitrations covered in survey adopted the International Bar Association Rules on the Taking of Evidence in International Arbitration (29 May 2010) as guidelines or binding rules).

exclude evidence, thus implicitly presuming that evidence is admissible unless there are grounds for exclusion.[24]

10 One reason for the presumption of admissibility is that a discretion to include rather than exclude evidence "would put a large burden on the arbitral tribunal to assess each piece of evidence for potential inclusion".[25] More significantly, tribunals take a liberal approach so as to find the whole truth about the claim.[26] Arbitral tribunals are reluctant to exclude evidence partly because, compared to domestic courts, they have limited means to secure evidence.[27] Further, the exclusion of evidence is viewed as generally impoverishing the quality of the tribunal's factual findings and thus its ultimate decision: the exclusion reduces direct evidence that is already scarce or deprives the tribunal of indirect evidence to weigh alternative inferences.[28]

11 Tribunals apply the same liberal approach to illegally obtained evidence. They consider whether there are any reasons to exclude illegally obtained evidence, rather than whether there are any reasons to admit it.[29]

B. Evidence is excluded where the adducing party was involved in the illegal procurement

12 Where the party seeking to submit illegally obtained evidence had been directly or indirectly involved in its illegal procurement, tribunals have consistently declined to admit the evidence. In *Caratube International Oil Co LLP v The Republic of Kazakhstan*[30] ("*Caratube v Kazakhstan*"), a tribunal constituted under the International Centre for Settlement of Investment Disputes ("ICSID") stated that the party's

24 Peter Ashford, *The IBA Rules on the Taking of Evidence in International Arbitration: A Guide* (Cambridge University Press, 2013) at p 146.

25 Peter Ashford, *The IBA Rules on the Taking of Evidence in International Arbitration: A Guide* (Cambridge University Press, 2013) at p 146.

26 *William A Parker (USA) v United Mexican States* (1926) 4 RIAA 35 at [5].

27 *Public Joint-Stock Co "Football Club Metalist" v Union des Associations Européennes de Football (UEFA)* Case No CAS 2013/A/3297 (29 November 2013) at [8.11]; *Sivasspor Kulübü v Union of European Football Association (UEFA)*, Case No CAS 2014/A/3625 (3 November 2014, operative part of 7 July 2014) at [142].

28 Frédéric Gilles Sourgens, Kabir Duggal & Ian A Laird, *Evidence in International Investment Arbitration* (Oxford University Press, 2018) at p 238.

29 See, *eg*, *EDF (Services) Ltd v Romania* ICSID Case No ARB/05/13, Procedural Order No 3 (29 August 2008) at [47]; *Amos Adamu v Fédération Internationale de Football Association* Case No CAS 2011/A/2426 (24 February 2012) at [70].

30 ICSID Case No ARB/13/13, Decision on the Claimants' Request for the Production of 'Leaked Documents' (27 July 2015).

involvement is "an irresistible reason to bar that party from profiting from its own misconduct".[31]

13 An example of direct involvement is *Libananco Holdings Co Ltd v Republic of Turkey*[32] ("*Libananco v Turkey*"). Turkish public prosecutors had intercepted communications sent to and received from Libananco Holdings Co Ltd's ("Libanco's") counsel in the arbitration.[33] According to Turkey, the purpose of the interceptions was to investigate money laundering unrelated to the arbitration.[34] Although the ICSID tribunal did not hold that Turkey's conduct was illegal, it ordered the exclusion of all such privileged communications.[35] This was justified not only by the need to protect legal privilege but also by the parties' obligation to arbitrate fairly and in good faith; by the need to preserve basic procedural fairness; and by respect for the tribunal as the body freely chosen by the parties to adjudicate their dispute.[36] Although the tribunal declined to decide whether the interceptions had in fact prejudiced Libananco in the arbitration, it reasoned that the exclusion was appropriate for justice to be seen to be done.[37]

14 Another example is *Methanex Corp v United States of America*[38] ("*Methanex v USA*"). Private investigators, engaged by a law firm on behalf of Methanex Corporation ("Methanex"), had trespassed onto private property and rummaged through dumpsters for documents of one of the witnesses for the US.[39] The *ad hoc* tribunal excluded the documents because it would be "wrong for Methanex to introduce evidential materials obtained by Methanex unlawfully".[40] Specifically, Methanex would violate its legal duty, owed to the other party and the tribunal, to conduct itself in good faith during the proceedings and to

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31 Alison Ross, "Tribunal Rules on Admissibility of Hacked Kazakh Emails" *Global Arbitration Review* (22 September 2015).

32 ICSID Case No ARB/06/8, Award (2 September 2011).

33 *Libananco Holdings Co Ltd v Republic of Turkey* ICSID Case No ARB/06/8, Decision on Preliminary Issues (23 June 2008) at [74].

34 *Libananco Holdings Co Ltd v Republic of Turkey* ICSID Case No ARB/06/8, Decision on Preliminary Issues (23 June 2008) at [45]

35 *Libananco Holdings Co Ltd v Republic of Turkey* ICSID Case No ARB/06/8, Decision on Preliminary Issues (23 June 2008) at [82].

36 *Libananco Holdings Co Ltd v Republic of Turkey* ICSID Case No ARB/06/8, Decision on Preliminary Issues (23 June 2008) at [78].

37 *Libananco Holdings Co Ltd v Republic of Turkey* ICSID Case No ARB/06/8, Decision on Preliminary Issues (23 June 2008) at [79]–[80].

38 Final Award of the Tribunal on Jurisdiction and Merits (2005) 44 ILM 1345.

39 *Methanex Corp v United States of America*, Final Award of the Tribunal on Jurisdiction and Merits (2005) 44 ILM 1345 at Part II – Ch I, [40] and [55].

40 *Methanex Corp v United States of America*, Final Award of the Tribunal on Jurisdiction and Merits (2005) 44 ILM 1345at Part II – Ch I, [54].

respect the equality of arms between the parties.[41] In addition, the illegal conduct during the arbitration offended "basic principles of justice and fairness required of all parties in every international arbitration".[42]

15 Where the party knew of and consented to the illegal procurement before it occurred, this indirect involvement also warrants excluding the evidence. In the ICSID case of *EDF (Services) Ltd v Romania*[43] ("*EDF v Romania*"), a third party closely related to EDF (Services) Ltd ("EDF") had illegally recorded a conversation with a witness for Romania. The third party had done so with EDF's knowledge and consent.[44] In excluding the recording, the tribunal stated that its discretion to admit evidence was limited by the principles of good faith and procedural fairness.[45] As in *Methanex v USA*, admitting the evidence would be contrary to good faith and fair dealing.[46]

16 Conversely, where a party has sought to submit evidence that a third party had independently obtained illegally, tribunals have admitted the evidence, subject to other exclusionary grounds. A justification was given by the Court of Arbitration for Sport ("CAS") in *Ahongalu Fusimalohi v Fédération Internationale de Football Association*[47] ("*Fusimalohi v FIFA*") and *Amos Adamu v Fédération Internationale de Football Association*[48] ("*Adamu v FIFA*"). Both cases arose after the *Sunday Times* published an article containing verbatim excerpts of covert recordings of meetings between its undercover journalists and FIFA officials.[49] After obtaining the recordings from the *Sunday Times*, FIFA used them in disciplinary proceedings against the officials.[50]

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41 *Methanex Corp v United States of America*, Final Award of the Tribunal on Jurisdiction and Merits (2005) 44 ILM 1345 at Part II – Ch I, [58].

42 *Methanex Corp v United States of America*, Final Award of the Tribunal on Jurisdiction and Merits (2005) 44 ILM 1345 at Part II – Ch I, [59].

43 ICSID Case No ARB/05/13, Procedural Order No 3 (29 August 2008).

44 *EDF (Services) Ltd v Romania* ICSID Case No ARB/05/13, Procedural Order No 3 (29 August 2008) at [45].

45 *EDF (Services) Ltd v Romania* ICSID Case No ARB/05/13, Procedural Order No 3 (29 August 2008) at [47].

46 *EDF (Services) Ltd v Romania* ICSID Case No ARB/05/13 Procedural Order No 3 (29 August 2008) at [38].

47 Case No CAS 2011/A/2425 (8 March 2012).

48 Case No CAS 2011/A/2426 (24 February 2012).

49 *Ahongalu Fusimalohi v Fédération Internationale de Football Association* Case No CAS 2011/A/2425 (8 March 2012) at [20]; *Amos Adamu v Fédération Internationale de Football Association*, Case No CAS 2011/A/2426 (24 February 2012) at [23].

50 *Ahongalu Fusimalohi v Fédération Internationale de Football Association* Case No CAS 2011/A/2425 (8 March 2012) at [31]; *Amos Adamu v Fédération Internationale de Football Association*, Case No CAS 2011/A/2426 (24 February 2012) at [33].

17 On appeal, the CAS held in both cases that the recordings were admissible even if the *Sunday Times*'s journalists had obtained them illegally.[51] Given the general duties of good faith and respect for the arbitral process, the CAS could exclude evidence where one party had "cheat[ed]" the other party and illegally obtained the evidence.[52] But the CAS distinguished *Libananco v Turkey* and *Methanex v USA*: FIFA itself had not acted illegally, and neither FIFA nor anyone close to FIFA had prompted or supported the *Sunday Times*'s investigation. Because FIFA transparently solicited the recordings from the *Sunday Times* after the article had disclosed important parts of their content, FIFA did not violate "the duties of good faith and respect for the arbitral process incumbent on all who participate in international arbitration".[53] FIFA was simply "confronted with evidence derived from a *fait accompli*".[54]

18 Similarly, in *Alejandro Valverde Belmonte v Comitato Olimpico Nazionale Italiano (CONI)*[55] ("*Valverde v CONI*"), the CAS admitted an analysis of a blood sample originally obtained by Spanish police and later relied on by Italian sports authorities in disciplinary proceedings. The Italian sports authorities had obtained the analysis from the Italian judicial police, who had arguably accessed the evidence in breach of rules relating to judicial co-operation between Spain and Italy. In balancing the interests involved, the CAS emphasised that the alleged breaches would not be "an untenable violation of the sentiment of justice" and that the breaches had not been committed by the Italian sports authorities.[56]

C. Wide availability or unavailability of evidence is relevant but not decisive

19 Illegally obtained evidence may be admitted even if it is not widely available. In *Fusimalohi v FIFA*, *Adamu v FIFA* and *Valverde v*

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51 *Ahongalu Fusimalohi v Fédération Internationale de Football Association* Case No CAS 2011/A/2425 (8 March 2012) at [82]; *Amos Adamu v Fédération Internationale de Football Association* Case No CAS 2011/A/2426 (24 February 2012) at [78].

52 *Ahongalu Fusimalohi v Fédération Internationale de Football Association* Case No CAS 2011/A/2425 (8 March 2012) at [73]; *Amos Adamu v Fédération Internationale de Football Association* Case No CAS 2011/A/2426 (24 February 2012) at [69].

53 *Ahongalu Fusimalohi v Fédération Internationale de Football Association* Case No CAS 2011/A/2425 (8 March 2012) at [74]; *Amos Adamu v Fédération Internationale de Football Association* Case No CAS 2011/A/2426 (24 February 2012) at [70].

54 *Ahongalu Fusimalohi v Fédération Internationale de Football Association* Case No CAS 2011/A/2425 (8 March 2012) at [86]; *Amos Adamu v Fédération Internationale de Football Association* Case No CAS 2011/A/2426 (24 February 2012) at [82].

55 Case No CAS 2009/A/1879 (15 March 2010).

56 *Alejandro Valverde Belmonte v Comitato Olimpico Nazionale Italiano (CONI)* Case No CAS 2009/A/1879 (15 March 2010) at [136].

CONI, where the evidence was available only to third parties who in turn made it available to a party to the arbitration, the evidence was admitted.

20 Conversely, the fact that evidence is widely available to the public does not automatically render it admissible. In *Caratube v Kazakhstan*, unknown hackers had published government documents on a website dubbed "Kazakhleaks". The tribunal excluded those of the leaked documents that were privileged. Still, the wide availability of illegally obtained evidence that is not privileged reinforces a tribunal's decision to admit it. When admitting the non-privileged documents, the tribunal in *Caratube v Kazakhstan* reasoned that it should avoid rendering an award which would be factually wrong based on documents that were widely, freely, and lawfully available online.[57]

IV. Rationale for the principles governing admissibility

21 Although the basic principles identified above are reasonably clear, the rationale underlying them is less so. The rationale is crucial to provide principled guidance in novel cases. Some tribunals identify a concept, such as good faith or the equality of arms, and conclude that admitting certain evidence does or does not run contrary to that concept. However, an analysis of good faith and the equality of arms shows that they provide an inadequate account of the principles applied by tribunals.

A. Duty to arbitrate in good faith

22 Some tribunals state the issue as whether admitting the illegally obtained evidence would be contrary to good faith. For example, the tribunals in *Methanex v USA*, *Libananco v Turkey*, *EDF v Romania* and *Fusimalohi v FIFA* referred to a general duty in international arbitration to arbitrate fairly and in good faith.[58] In the first three cases, that duty would have been breached if the party involved in the illegality could have relied on the evidence; in *Fusimalohi v FIFA*, that duty was not

57 Alison Ross, "Tribunal Rules on Admissibility of Hacked Kazakh Emails" *Global Arbitration Review* (22 September 2015).

58 *Methanex Corp v United States of America*, Final Award of the Tribunal on Jurisdiction and Merits (2005) 44 ILM 1345 at [54]; *Libananco Holdings Co Ltd v Republic of Turkey* ICSID Case No ARB/06/8, Award (2 September 2011) at [78]; *EDF (Services) Ltd v Romania* ICSID Case No ARB/05/13, Procedural Order No 3 (29 August 2008) at [38]; *Ahongalu Fusimalohi v Fédération Internationale de Football Association* Case No CAS 2011/A/2425 (8 March 2012) at [73].

breached because FIFA did not "cheat the other party and illegally obtain some evidence".[59]

23 But this rationale carries little explanatory force. The cases listed above use good faith as a conclusory label without justifying why the duty of procedural good faith should encompass a duty not to procure evidence illegally. As Gary Born observes, the precise contours of the duty to arbitrate in good faith are unsettled.[60] This duty follows from the nature of the arbitral process and the parties' agreement to arbitrate, which entails a commitment to co-operate in resolving the dispute.[61]

24 At its core, the duty of procedural good faith means that, if the arbitral process can proceed only with a party's participation, that party must participate in rather than obstruct or delay the process. It has been held that, where the duty has not been modified by contract, a party must participate in the constitution of the tribunal; pay the arbitrators' fees; obey confidentiality obligations relating to the arbitration; co-operate with any tribunal-appointed expert; produce evidence in a manner and timing that allow the opposing party and the tribunal to properly use it;[62] take reasonable steps to avoid submitting forged documents or other corrupted evidence; comply with the tribunal's procedural directions; and avoid conduct aimed at delaying the arbitral process.[63] The admission of illegally obtained evidence does not undermine the duty at its core as it does not necessarily obstruct or delay arbitral proceedings.

25 So the question is whether the duty should encompass a duty not to procure evidence illegally or even a duty not to use evidence that was originally obtained illegally. One may argue that it should: when parties agree to arbitration, they generally expect that, just as their disputes will be resolved according to principles of law,[64] evidence will be gathered in accordance with the law.

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59 *Ahongalu Fusimalohi v Fédération Internationale de Football Association* Case No CAS 2011/A/2425 (8 March 2012) at [73].

60 Gary B Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at p 1262.

61 Gary B Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at pp 1257–1258.

62 See, *eg*, *EDF (Services) Ltd v Romania* ICSID Case No ARB/05/13, Procedural Order No 3 (29 August 2008) at [40] and [48].

63 Gary B Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at pp 1262–1263; Nathan D O'Malley, *Rules of Evidence in International Arbitration: An Annotated Guide* (Informa, 2012) at pp 223–224.

64 Unless parties authorise the tribunal to decide the dispute *ex aequo et bono* or as *amiable compositeur*: see Art 28(3) of the UNCITRAL Model Law.

26 But the duty of procedural good faith does not explain why the cases distinguish between a party involved in the illegal conduct and a party confronted with a *fait accompli*. It is unclear how illegally obtaining evidence amounts to "cheating" the other party, while legally obtaining evidence that was originally obtained illegally does not. The party confronted with a *fait accompli* could be said to "cheat" the other party by exploiting the availability of illegally obtained evidence. Further, from the viewpoint of the other party, the effect in both situations is the same: the evidence was gathered in violation of the law and possibly of that party's legal rights.

27 Further, the language of good faith may tend to limit a reasoned consideration of all the circumstances because it focuses on one party's duty. Some tribunals have implicitly or explicitly balanced considerations such as pursuing the truth and avoiding an incentive for parties to break the law.[65] But where the language of good faith is used, it does not lend itself to explicitly balancing such considerations.

B. Equality of arms

28 The equality of arms between parties is another rationale invoked by parties to exclude illegally obtained evidence. In *Methanex v USA*, the tribunal viewed good faith and respect for the equality of arms as forming one general duty.[66]

29 The principle of the equality of arms, however, does not fully account for the exclusion of illegally obtained evidence. The equality of arms requires that each party be afforded "a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent".[67] This concept has three aspects:

> (a) First, the equality of arms may be undermined by the untimely introduction of witness evidence that could have been

65 See, *eg*, Alison Ross, "Tribunal Rules on Admissibility of Hacked Kazakh Emails" *Global Arbitration Review* (22 September 2015) and *Alejandro Valverde Belmonte v Comitato Olimpico Nazionale Italiano (CONI)* Case No CAS 2009/A/1879 (15 March 2010) at [136].

66 *Methanex Corp v United States of America*, Final Award of the Tribunal on Jurisdiction and Merits (2005) 44 ILM 1345 at [54].

67 *Dombo Beheer BV v The Netherlands* Application No 14448/88 (European Court of Human Rights) (27 October 1993) at [33], quoted in Nathan D O'Malley, *Rules of Evidence in International Arbitration: An Annotated Guide* (Informa, 2012) at p 321.

submitted earlier.[68] This aspect is not unique to illegally obtained evidence.

(b) Second, the equality of arms requires parties to refrain from relying on documents which the other party cannot access and from manipulating or threatening the other party's access.[69] For example, a party should not introduce incomplete transcripts of a conversation, and a state party should not use its police powers to impede the investor's ability to interview witnesses.[70] This aspect arguably supports the admission rather than the exclusion of evidence. As long as one party makes the illegally obtained evidence in its hands equally available to the other, there is no cause for complaint on this basis.

(c) Third, the equality of arms may be implicated where a party has obtained the evidence through powers that the other party lacks. This can arise, as in *Libananco v Turkey*, where a state party procures evidence using its sovereign powers. The "unfair deployment of … police powers, in the preparation of [the state's] case"[71] creates an "informal inequality and imbalance of power".[72] This aspect does not account for cases such as *Methanex v USA* and *EDF v Romania* where the investor was the party precluded from relying on illegally obtained evidence.

Further, tribunals have not adopted the broader proposition that a party cannot adduce favourable evidence of a type which has no corresponding unfavourable evidence. In *Caratube v Kazakhstan*, Kazakhstan argued that, because Kazakhstan lacked access to the investor's confidential e-mails, admitting the leaked e-mails of the Kazakh government would

68 Frédéric Gilles Sourgens, Kabir Duggal & Ian A Laird, *Evidence in International Investment Arbitration* (Oxford University Press, 2018) at p 258; see, *eg*, *South American Silver Ltd (Bermuda) v Plurinational State of Bolivia* PCA Case No 2013-15, Procedural Order No 15 (9 April 2016) at [29]–[36].

69 *Standard Chartered Bank (Hong Kong) Ltd v Tanzania Electric Supply Co Ltd (TANESCO)* ICSID Case No ARB/10/20, Procedural Order No 6 (6 July 2012) at [13]; *Caratube International Oil Co LLP v The Republic of Kazakhstan* ICSID Case No ARB/08/12, Decision Regarding Claimant's Application for Provisional Measures (31 July 2009) at [100]; Nathan D O'Malley, *Rules of Evidence in International Arbitration: An Annotated Guide* (Informa, 2012) at p 225.

70 Nathan D O'Malley, *Rules of Evidence in International Arbitration: An Annotated Guide* (Informa, 2012) at p 225; Frédéric Gilles Sourgens, Kabir Duggal & Ian A Laird, *Evidence in International Investment Arbitration* (Oxford University Press, 2018) at p 259; *Libananco Holdings Co Ltd v Republic of Turkey* ICSID Case No ARB/06/8, Award (2 September 2011) at [375] and [384].

71 Nathan D O'Malley, *Rules of Evidence in International Arbitration: An Annotated Guide* (Informa, 2012) at p 322.

72 Frédéric Gilles Sourgens, Kabir Duggal & Ian A Laird, *Evidence in International Investment Arbitration* (Oxford University Press, 2018) at p 259.

create an imbalance between the parties. This argument failed.[73] If the objection were simply to an imbalance arising from one party's access to favourable evidence, one solution would be to permit both parties to rely on illegally obtained evidence – a solution promoting illegal conduct that tribunals surely would not contemplate.

C. Integrity of the arbitral process

30 The principles developed in the arbitral awards are more thoroughly explained by the rationale of protecting the integrity and thus legitimacy of the arbitral process than by the duty of procedural good faith or the equality of arms principle.

31 To uphold the integrity and legitimacy of the arbitral process, tribunals seek to adjudicate disputes based on an accurate picture of the material facts. For the consensual process of international arbitration to have legitimacy, losing parties must trust arbitration as a fair mechanism; and the exclusion of evidence that sheds light on the truth may create a sense of procedural unfairness.[74] In *Caratube v Kazakhstan* the tribunal highlighted its need to access the leaked information, which was widely and freely available in the public domain, to avoid the risk of an award that would be "artificial and factually wrong".[75] In *ConocoPhillips Petrozuata BV v Bolivarian Republic of Venezuela*[76] ("*ConocoPhillips v Venezuela*"), Georges Abi-Saab in dissent noted that an adjudicative body has a duty to "safeguard the efficiency, credibility and integrity of the adjudicative function" and that its "foremost task is to seek the truth and to dispense justice according to law on that basis".[77] In exercising its power under the relevant arbitral rules to determine the admissibility of illegally obtained evidence, the tribunal should be guided by a concern to protect the integrity of the arbitral process.

32 One might object that the integrity of the arbitral process is a vague concept. But it is no vaguer than an expanded notion of procedural good faith or of the equality of arms. In ascertaining whether

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73 Alison Ross, "Tribunal Rules on Admissibility of Hacked Kazakh Emails" *Global Arbitration Review* (22 September 2015).

74 Frédéric Gilles Sourgens, Kabir Duggal & Ian A Laird, *Evidence in International Investment Arbitration* (Oxford University Press, 2018) at pp 238–239.

75 Alison Ross, "Tribunal Rules on Admissibility of Hacked Kazakh Emails" *Global Arbitration Review* (22 September 2015).

76 ICSID Case No ARB/07/30, Decision on Respondent's Request for Reconsideration (10 March 2014).

77 *ConocoPhillips Petrozuata BV v Bolivarian Republic of Venezuela* ICSID Case No ARB/07/30, Decision on Respondent's Request for Reconsideration (10 March 2014) at pp 20–21.

admitting or excluding the evidence would undermine the integrity of the arbitral process, perhaps a starting point is to ask: "If tribunals generally were to reach this decision in this type of situation, would they tend to bring international arbitration into disrepute?" In holding that certain WikiLeaks cables should have been admitted in *ConocoPhillips v Venezuela*, Abi-Saab summed up the concept as follows:[78]

> 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 … ignor[e] 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 [*sic*] not only of ICSID arbitration but of the very idea of adjudication.

33 This rationale explains why tribunals start from the position that illegally obtained evidence is admissible. It also explains why illegally obtained evidence, like legally obtained evidence, may be excluded where serious doubts arise as to its completeness or authenticity.[79] For example, the tribunal in *Libananco v Turkey* excluded partial transcripts obtained from surveillance activities on the basis that they could not be authenticated and were incomplete.[80] Similarly, the tribunal in *EDF v Romania* excluded EDF's copied recording not only because EDF was involved in the illegality, but also because part of the conversation was missing and the copy could not be authenticated.[81] Still, as in *Caratube v Kazakhstan*, a tribunal may prefer to admit the evidence where a party merely questions authenticity without submitting any evidence to challenge authenticity.[82]

34 Nevertheless, the quest for truth has its limits. Tribunals preserve the integrity and legitimacy of the arbitral process not only by rendering awards based on the true facts, but also by avoiding a perverse incentive for parties to break the law to obtain evidence. If parties who obtained

78 *ConocoPhillips Petrozuata BV v Bolivarian Republic of Venezuela* ICSID Case No ARB/07/30, Decision on Respondent's Request for Reconsideration (10 March 2014) at p 24.

79 See Nathan D O'Malley, *Rules of Evidence in International Arbitration: An Annotated Guide* (Informa, 2012) at pp 81–82.

80 *Libananco Holdings Co Ltd v Republic of Turkey* ICSID Case No ARB/06/8, Award (2 September 2011) at [375] and [384].

81 *EDF (Services) Ltd v Romania* ICSID Case No ARB/05/13, Procedural Order No 3 (29 August 2008) at [35].

82 Alison Ross, "Tribunal Rules on Admissibility of Hacked Kazakh Emails" *Global Arbitration Review* (22 September 2015).

evidence illegally were allowed to rely on it, parties might prefer to obtain evidence illegally – rather than legally through avenues such as the discovery process.[83] This accounts for the distinction between parties obtaining evidence illegally and parties obtaining evidence from a third party who had independently acted illegally.

35 *Caratube v Kazakhstan* illustrates how a tribunal balances various aspects of the integrity of the arbitral process where the party submitting the evidence was not involved in the illegality. On the one hand, the tribunal needed to avoid rendering an award that would be factually wrong in light of publicly available information and to uphold a party's right to prove its case. On the other hand, the tribunal acknowledged the need to deter cybercrime and the unfairness of admitting the confidential evidence against Kazakhstan's legitimate expectations. Balancing these concerns, the tribunal admitted those of the leaked documents that were not privileged.[84]

36 The rationale is also consistent with the other exclusionary grounds that apply to both legally and illegally obtained evidence. For example, tribunals exclude legally privileged evidence to protect an established category of communications between counsel and client. Although the scope of legal privilege in international arbitration can be unclear,[85] the need to respect privilege is sufficiently widely accepted for the IBA Rules to recognise "legal impediment or privilege" as an exclusionary ground.[86] Legal privilege serves to "ensure that every person must be able, without constraint, to consult a lawyer whose profession entails the giving of independent legal advice" and is therefore "closely linked to the concept of the lawyer's role as collaborating in the administration of justice".[87] The tribunals in *Caratube v Kazakhstan* and *Libananco v Turkey* stated that legal privilege protects the fundamental right of parties to a fair trial, and more broadly their right to seek advice and advance their cases freely.[88] Thus, protecting the integrity of the arbitral process involves protecting legally privileged evidence.

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83 See Grégoire Bertrou & Sergey Alekhin, "The Admissibility of Unlawfully Obtained Evidence in International Arbitration: Does the End Justify the Means?" (2018) *The Paris Journal of International Arbitration* 11 at 13.

84 Alison Ross, "Tribunal Rules on Admissibility of Hacked Kazakh Emails" *Global Arbitration Review* (22 September 2015).

85 See Gary B Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at p 2377.

86 IBA Rules, Art 9.2(b).

87 *Akzo Nobel Chemicals Ltd v European Commission* [2008] All ER (EC) 1 at [121].

88 *Libananco Holdings Co Ltd v Republic of Turkey* ICSID Case No ARB/06/8, Award (2 September 2011) at [78]; Alison Ross, "Tribunal Rules on Admissibility of Hacked Kazakh Emails" *Global Arbitration Review* (22 September 2015).

V. Some unresolved questions

A. Which jurisdiction's law is relevant to determining illegality?

37 A method of obtaining evidence may be illegal under the laws of one jurisdiction yet legal under the laws of another. Which jurisdiction's law should tribunals look to when deciding whether evidence has been obtained illegally?

38 The arbitral awards do not directly address this issue. In the majority of the published awards, the evidence was obtained, or was assumed to be obtained, illegally according to the law of the place of procurement.[89] An exception is *Adamu v FIFA*, where the conduct was legal in England where it occurred but assumed to be illegal under the law of Switzerland, the seat of the arbitration.[90]

39 The answer to a similar question regarding legal privilege provides a useful starting point because the scope of legal privilege varies from one jurisdiction to another. O'Malley identifies two approaches that tribunals use to identify which jurisdiction's law provides the relevant rule of privilege.

40 First, arbitrators may survey relevant sources of law to identify principles affirmed by multiple jurisdictions.[91] This is arguably unsuitable for illegally obtained evidence. The rationale for excluding illegally obtained evidence is to protect the arbitral process from being seen to condone or incentivise unscrupulous conduct, which may or may not be illegal in all the jurisdictions considered.

41 Second, a tribunal may use the closest connection or centre of gravity test to choose one of the following laws:[92]

> (a) the law of the place where the lawyer with whom the communication occurred is admitted to practice;

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89 See *Methanex Corp v United States of America*, Final Award of the Tribunal on Jurisdiction and Merits (2005) 44 ILM 1345; *EDF (Services) Ltd v Romania* ICSID Case No ARB/05/13, Procedural Order No 3 (29 August 2008); *Hulley Enterprises Ltd (Cyprus) v The Russian Federation* PCA Case No AA 226, Final Award (18 July 2014); and *Alejandro Valverde Belmonte v Comitato Olimpico Nazionale Italiano (CONI)* Case No CAS 2009/A/1879 (15 March 2010).

90 *Amos Adamu v Fédération Internationale de Football Association* Case No CAS 2011/A/2426 (24 February 2012) at [38] and [75].

91 Nathan D O'Malley, *Rules of Evidence in International Arbitration: An Annotated Guide* (Informa, 2012) at p 288.

92 Nathan D O'Malley, *Rules of Evidence in International Arbitration: An Annotated Guide* (Informa, 2012) at pp 286–287.

(b) the law of the place where the lawyer–client relationship has its predominant effects;

(c) the law of the place where the document is located;

(d) the law of the place where the document was created;

(e) the law of the place to which the document was sent; and

(f) the law of the domicile of the party claiming the privilege.

The first and second options do not have counterparts in the context of identifying illegally obtained evidence. The third, fourth, and fifth options broadly correspond to the law of the place where the illegal procurement occurred. The last one corresponds to the law of the domicile of the party seeking to exclude the evidence. Four other candidates are the law of the domicile of the adducing party, the law of the domicile of the victim (who is not necessarily party to the arbitration),[93] the law of the arbitral seat and the law governing the arbitration agreement.

42 The closest connection approach identifies the relevant law or laws using choice-of-law categories. A possible concern is that arbitrators themselves may not agree with the content of the laws that have been breached.[94] For example, a law might conceivably infringe on a right to freedom of association by prohibiting a party to the arbitration from contacting a given potential witness. But if arbitrators were allowed to assess – absent an agreement between the parties – the desirability of a given domestic law in deciding whether evidence was obtained illegally, this would create significant difficulties. Absent party agreement, what qualifies arbitrators to pronounce on the normative desirability of a domestic law? What legal principles should they apply to assess its content? If a law could be challenged on this basis, the uncertainty and complexity of international arbitration would increase.

43 As illustrated in several arbitral awards,[95] evidence should be considered illegally obtained if it was obtained in breach of the law of

93 For example, the victim of the WikiLeaks hacks in *Hulley Enterprises Ltd (Cyprus) v The Russian Federation*, PCA Case No AA 226, Final Award (18 July 2014) was the US, not Russia.

94 James H Boykin & Malik Havalic, "Fruits of the Poisonous Tree: The Admissibility of Unlawfully Obtained Evidence in International Arbitration" (2015) 12(5) TDM 1 at 34.

95 *Methanex Corp v United States of America*, Final Award of the Tribunal on Jurisdiction and Merits (2005) 44 ILM 1345; *EDF (Services) Ltd v Romania* ICSID Case No ARB/05/13, Procedural Order No 3 (29 August 2008); *Hulley Enterprises Ltd (Cyprus) v The Russian Federation* PCA Case No AA 226, Final Award (18 July 2014); *Alejandro Valverde Belmonte v Comitato Olimpico Nazionale Italiano (CONI)*, Case No CAS 2009/A/1879 (15 March 2010).

the place of procurement.[96] Had that law been obeyed, the evidence would not have reached the hands of the adducing party in the first place. Further, where the opposing party is the victim, it would likely expect the tribunal to recognise its interests that were protected by the law where the procurement occurred.

44 It may be argued that the place of procurement can be fortuitous in international dealings, like the place where an allegedly privileged communication is made.[97] However, the inquiry for illegally obtained evidence differs from the inquiry for legal privilege in an important way. Only one jurisdiction's law can govern legal privilege under the closest connection test. In contrast, a tribunal may classify evidence as illegally obtained so long as it was obtained in breach of the law of one of several jurisdictions. Since the rationale for excluding illegally obtained evidence is to uphold the integrity of the arbitral process, tribunals should err on the side of classifying evidence as illegally obtained where it has been obtained in violation of the law of the place of procurement.

45 In relation to privilege, Born considers that the law of the arbitral seat and the law governing the arbitration agreement are not relevant because legal privileges reflect substantive national policies.[98] This reasoning does not apply to illegally obtained evidence. The context of Born's argument is that substantive national policies would likely be undercut by applying the law of the seat or the law governing the arbitration agreement to the exclusion of the relevant national law. As explained above, the approach for illegally obtained evidence allows multiple jurisdictions to be considered.

46 Still, the law governing the arbitration agreement should not be relevant. It governs matters such as the formation, validity, and interpretation of the arbitration agreement,[99] but it has no particular connection to the gathering of evidence. Similarly, the domiciles of the parties or the victim are not relevant.

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96 It is beyond the scope of this article to discuss how to identify the place of procurement in the case of hacking. The hacker and the victim may be in different countries, multiple hackers may collaborate out of different countries, and the servers used may be in different countries.

97 See Gary B Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at p 2385.

98 Gary B Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at p 2385.

99 Gary B Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at p 489.

47 In contrast, evidence should generally be considered illegally obtained if it was obtained in violation of the law of the seat, as in *Adamu v FIFA*. Under the UNCITRAL Model Law on International Commercial Arbitration,[100] an award may be set aside on the ground that it violates the public policy of the jurisdiction where it was rendered.[101] Although this public policy ground is often construed narrowly, it may apply where the evidence was obtained in violation of human rights or procedural public policy.[102] So a tribunal should not ignore illegality under the law of the seat. This proposition naturally does not apply where the award cannot be set aside on the ground of a jurisdiction's public policy, such as in arbitration under the ICSID Convention on the Settlement of Investment Disputes between States and Nationals of Other States.[103]

B. Should every kind of illegality be treated the same?

48 Another question is whether illegally obtained evidence should always be excluded on the ground of the party's involvement, regardless of the nature of the breach of law. In *EDF v Romania*, the tribunal stated that whether evidence illegally obtained by a party is admissible depends on the particular circumstances of the case.[104] Commentators suggest that not every "technical" breach justifies excluding the evidence.[105] This view is reflected in *Valverde v CONI*, where the CAS stated that the alleged

100 UN Doc A/40/17, annex I; UN Doc A/61/17, annex I (21 June 1985; amended 7 July 2006).

101 UNCITRAL Model Law Arts 34(2)(b)(ii) and 36(1)(b)(ii).

102 See generally Gary B Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at pp 3321–3325. See, *eg*, Judgment of 20 April 2005, 11 Sch 01/05 (*Oberlandesgericht Dresden*); Judgment of 14 September 2001, 10 Sch 04/01 (Oberlandesgericht Karlsruhe); and *Chrome Resources SA v Léopold Lazarus Ltd* (8 February 1978) XI YB Comm Arb (1986) 538 at 540 (Swiss Federal Tribunal).

103 575 UNTS 159 (18 March 1965; entry into force 14 October 1966). Nartnirun Junngam, "Public Policy in International Investment Law: The Confluence of the Three Unruly Horses" (2016) 51(1) Tex Int'l LJ 45 at 95. See Art 52(1) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States 575 UNTS 159(18 March 1965; entry into force 14 October 1966); and Lucy Ferguson Reed, Jan Paulsson & Nigel Blackaby, *Guide to ICSID Arbitration* (Kluwer Law International, 2010) at pp 162–163 and 181.

104 *EDF (Services) Ltd v Romania* ICSID Case No ARB/05/13, Procedural Order No 3 (29 August 2008) at [36] and [38].

105 James H Boykin & Malik Havalic, "Fruits of the Poisonous Tree: The Admissibility of Unlawfully Obtained Evidence in International Arbitration" (2015) 12(5) TDM 1 at 34; Cherie Blair & Ema Vidak Gojković, "WikiLeaks and Beyond: Discerning an International Standard for the Admissibility of Illegally Obtained Evidence" (2018) 33(1) ICSID Review 235 at 256.

breach of rules relating to judicial co-operation between Spain and Italy would not be "an untenable violation of the sentiment of justice".[106]

49 The rule that evidence is inadmissible where the adducing party was involved in the illegality should not be absolute. Some breaches, which this article will term "minor breaches", may not undermine the integrity of the arbitral process. Although arbitral tribunals must decide disputes according to legal principles unless the parties agree otherwise, arbitral tribunals are not organs of a state; it is for the domestic legal system to police "minor breaches".

50 It is difficult to determine in advance what kinds of breaches are "minor". But as a starting point, breaches that reduce the reliability of the evidence arguably undermine the integrity of the arbitral process and are not "minor". To take an example from Singapore's domestic law, if the police have recorded an accused's statement in breach of procedural rules and the breach renders its reliability questionable, the court may exclude the statement because its prejudicial effect outweighs its probative value.[107]

51 It is unclear what the consequence of a "minor breach" would be. According to James Boykin and Malik Havalic, a merely technical breach "may justify a heightened showing by the party seeking to introduce the evidence of its materiality and relevance".[108] This reflects the balance that tribunals seek to strike between finding the truth and avoiding an incentive for illegal conduct.

52 Boykin and Havalic's reference to "a heightened showing" may suggest that the adducing party must meet some raised threshold. Ordinarily, however, the adducing party strictly does not bear a legal burden of proof to show that the evidence is relevant and material; rather, a lack of sufficient relevance to the case or materiality to its outcome is a ground for excluding evidence.[109] So the rule regarding involvement may be refined to reverse the burden. Where the party seeking to submit

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106 *Alejandro Valverde Belmonte v Comitato Olimpico Nazionale Italiano (CONI)* Case No CAS 2009/A/1879 (15 March 2010) at [136].

107 *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [55]-[56].

108 James H Boykin & Malik Havalic, "Fruits of the Poisonous Tree: The Admissibility of Unlawfully Obtained Evidence in International Arbitration" (2015) 12(5) TDM 1 at 34.

109 IBA Rules Art 9.2(a). On the meanings of relevance and materiality, see Nathan D O'Malley, *Rules of Evidence in International Arbitration: An Annotated Guide* (Informa, 2012) at pp 269–273 and Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law International, 2012) at pp 858–860. See, *eg*, *Methanex Corp v United States of America*, Final Award of the Tribunal on Jurisdiction and Merits (2005) 44 ILM 1345 at [56].

illegally obtained evidence was involved in its illegal procurement, the evidence should be inadmissible unless the illegality was "minor" and the party shows that the evidence has sufficient relevance to the case and materiality to its outcome.

C. Does buying independently procured evidence amount to involvement in illegal procurement?

53 Hackers sometimes sell hacked information to those who find it valuable.[110] Where the buyer did not instigate the hacking but rather learned of the information and bought it after the fact, can the buyer adduce the evidence on the basis that it was not involved in the illegal procurement?

54 The buyer's conduct is distinguishable from that of the adducing parties in *Libananco v Turkey*, *Methanex v USA* and *EDF v Romania* because the buyer had no hand in the illegal procurement. But admitting the evidence on the basis that the buyer was not involved in the illegal conduct would undermine the integrity of international arbitration by creating a market for the sale of such evidence. Although the buyer was not involved in creating the illegal conduct, it was involved in financially rewarding that conduct after the fact, thus encouraging the repetition of such conduct.

55 To address this issue, it may be helpful to focus on the status of the person who procured the evidence illegally. The tribunal should exclude the evidence where the procurer is not a disinterested person. Cherie Blair and Ema Vidak Gojković use the definition of a disinterested witness given by the International Court of Justice in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA) (Merits)*:[111] a disinterested person is "one who is not a party to the proceedings and stands to gain or lose nothing from its outcome".[112] But if this definition is adopted, the evidence will be admissible as long as the third-party illegal procurer does not care whether the illegally obtained evidence helps the buyer win the case.

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110 Kayla Matthews, "What Do Hackers Do with Your Stolen Data?" *American Machinist* (2 May 2019).

111 [1986] ICJ Rep 14.

112 Cherie Blair & Ema Vidak Gojković, "WikiLeaks and Beyond: Discerning an International Standard for the Admissibility of Illegally Obtained Evidence" (2018) 33(1) ICSID Review 235 at 256, quoting *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v USA) (Merits)* [1986] ICJ Rep 14 at [69].

56 Blair and Gojković's proposition may be modified as follows. A disinterested person is one who is not a party to the proceedings and *who does not stand to gain financially from giving the adducing party access to the evidence*. A third-party procurer who sells the evidence to the adducing party is not a disinterested person because payment is a condition for giving the adducing party access to the evidence. This definition would allow the admission of evidence in the WikiLeaks cases and in cases such as *Fusimalohi v FIFA* and *Adamu v FIFA*, where the news publisher received no payment for giving FIFA the recordings and thus was a disinterested person. Even if the news publisher had its own motivations for giving FIFA the recordings, such as to promote its journalism, these motivations would not lead to a market for the sale of evidence. In such a scenario, the pursuit of truth is sufficient justification not to exclude the evidence.

57 It should not matter whether the procurer who sold the evidence knew, before or after the procurement, the adducing party or the purpose for which the evidence would be used. It should be sufficient that he was paid after the fact because the payment constitutes his reward for procuring the evidence. Neither should the amount of the payment matter. If it did, tribunals would need some reasoned basis to distinguish acceptable from unacceptable amounts of payment. Further, admitting evidence where even small payments are made would signal to potential illegal procurers that, with economies of scale, one can earn money from selling illegally obtained information.

VI. Conclusion

58 The common thread in the arbitral awards on illegally obtained evidence is the protection of the integrity of the arbitral process, which also features in codes of ethics for arbitrators.[113] Unlike the rationale of good faith, which focuses on a party's duty, the rationale of the integrity of the process focusses on the tribunal's role. Thus, it allows the tribunal to weigh competing considerations, such as the search for the truth and a disincentive to the breach of domestic laws. It accounts for tribunals' liberal approach to admitting illegally obtained evidence where the adducing party was not involved in the illegality. It also provides some guidance in refining existing legal principles and developing new ones to answer unresolved questions. In a world where the risk of hackers stealing information is real and where such information can make the

113 See American Arbitration Association Code of Ethics for Arbitrators in Commercial Disputes (effective 1 March 2004) Canon I; JAMS Arbitrators Ethics Guidelines (2003) Guideline I.

difference between knowing the truth or believing a falsehood, there may not always be simple answers, but there are principled ones.