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Fruits of the Poisonous Tree: The Admissibility of Unlawfully Obtained Evidence in International Arbitration

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Fruits of the Poisonous Tree: The Admissibility of Unlawfully Obtained Evidence in International Arbitration[1]

James H. Boykin
Malik Havalic

One of the most interesting features of the three awards handed down in the arbitrations brought by the Yukos majority shareholders against the Russian Federation (hereinafter referred to as the "Yukos Majority Awards") was the tribunal's extensive reliance on illegally obtained evidence. Specifically, the tribunal relied on confidential diplomatic cables from the United States Department of State that had been published on WikiLeaks. WikiLeaks first began publishing confidential diplomatic cables on November 28, 2010, nearly three months after the first investment treaty tribunal to analyze the Russian Federation's tax assessments against Yukos issued its award finding that the tax assessments constituted an unlawful expropriation.[2]

The WikiLeaks website describes the release of 251,287 leaked cables from 274 embassies, consulates and diplomatic missions over a period of 44 years as "the largest set of confidential documents ever to be released into the public

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1. "Fruit of the poisonous tree" refers to a U.S. evidentiary doctrine which precludes the introduction of evidence obtained illegally and in violation of the 4th Amendment's prohibition of unconstitutional searches. *See Nardone v. U.S.*, 308 U.S. 338, 341 (1939). Because of its relationship with the 4th Amendment, however, the doctrine is limited to criminal proceedings. *See*, *e.g., Townes v. City of New York*, 176 F.3d 138, 145 (2d Cir. 1999).

2. *RosInvestCo UK v. Russian Federation*, Award, ¶ 208 (12 September 2010). One of the authors participated in the representation of the claimant in the RosInvestCo case.

domain."[3] WikiLeaks obtained the confidential cables from Private Bradley Manning, who was convicted in July 2013 of violating the United States' Espionage Act, among other charges, and sentenced to 35 years of confinement.[4] Private Manning was acquitted of the most serious charge of aiding the enemy, for which she could have faced the death penalty.[5] Secretary of State Hillary Clinton described Private Manning's disclosure and WikiLeaks's publication of the confidential diplomatic cables as nothing short of "an attack against the international community."[6]

In the Yukos Majority Awards, the tribunal relied upon the cables to resolve the parties' factual dispute about why Yukos's auditor chose to withdraw its audit reports of Yukos for the years 1995 to 2004.[7] The claimants in the various Yukos proceedings argued that the decision was the result of the Russian Federation's putting improper pressure on the auditor.[8] The Russian Federation countered that the auditor's decision to withdraw its audit opinions arose "out of the genuine

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3. *Secret US Embassy Cables*, WikiLeaks, https://wikileaks.org/cablegate.html.

4. Private Manning is a trans-gender female. Shortly after her conviction on August 21, 2013, she issued a statement that she had always felt that she was a woman and wished to begin hormone therapy. On April 23, 2014, a Kansas judge granted Private Manning's request to change her first name to Chelsea.

5. Copies of charging sheets available at http://cryptome.org/manning-charge.pdf and http://www.washingtonpost.com/wp-srv/lifestyle/magazine/2011/manning/manning_charges.pdf. *See also* The Guardian, 2 March 2011, Bradley Manning may face death penalty.

6. Stephen Erlanger, *Europeans Criticize Fierce U.S. Response to Leaks*, The New York Times (Dec. 9, 2010), http://www.nytimes.com/2010/12/10/world/europe/10wikileaks-react.html?_r=0.

7. *Hulley Enterprises Limited v. Russian Federation*, Award, ¶ 1185-86.

8. *Id.* ¶ 1218.

concern that they were tainted by newly-discovered misrepresentations" and, thus, supported the Respondent's defense that its actions against Yukos were nothing more than an exercise of its right to enforce its tax laws.[9]

In their awards, the arbitral tribunal resolved the dispute over what conclusion it was to draw from the auditor's withdrawal as follows:

> The record before the Tribunal is abundantly clear. [The auditor's] treatment improved significantly once it started to cooperate with the authorities and then withdrew its audits. Almost overnight, charges were dropped against [the auditor's] personnel. [The auditor's] own legal problems started to be resolved. At the same time, some cases took longer to resolve, and concerns by [the auditor] over loss of its license were real. It is clear that cooperation from [the auditor], once given, was expected to be enduring.[10]

The record to which the tribunal referred included confidential diplomatic cables that had been published by WikiLeaks. Those confidential cables plainly influenced the tribunal's interpretation of events:

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

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9. *Id.*

10. *Hulley Enterprises Limited v. Russian Federation*, Award, ¶ 1221.

> "pressure tactic." The Embassy considered [the auditor] to be under duress and concluded that "the political and legal concerns that are driving the heightened scrutiny of [the auditor's] accounting practices appear to have taken on a life of their own."[11]

If Secretary Clinton was right when she characterized the disclosure of the cables as "an attack against the international community", then it is surprising that an international arbitral tribunal – constituted under an international treaty – would rely upon such evidence as heavily as the tribunal did in the Yukos Majority Awards.[12] After all, whether or not one agrees with Secretary Clinton's characterization, it is beyond dispute that Private Manning's disclosure of the cables was illegal under United States law.[13] At a minimum, one would have expected at least some discussion of the compatibility of relying on such evidence with principles of international law and an articulation of a standard under which the admissibility of such evidence should be analyzed. Should the tribunal have relied on such evidence, particularly if it was not necessary for it to reach its ultimate holding? After all, even without the benefit of the WikiLeaks cables, the *RosInvestCo* tribunal found that the Russian Federation's tax assessments "can

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11. *Id.* ¶ 1223 citing U.S. Department of State Cable No. 07MOSCOW1028, 12 March 2007 (Unclassified) (available at https://wikileaks.org/cable/2007/03/07MOSCOW1028.html); U.S. Department of State Cable No. 07MOSCOW5403, 15 November 2007 (Confidential) (available at https://wikileaks.org/cable/2007/11/07MOSCOW5403.html); U.S. Department of State Cable No. 07MOSCOW5083 (Confidential) (available at https://wikileaks.org/cable/2007/10/07MOSCOW5083.html).

12. The arbitral tribunal cited WikiLeaks at least 20 times.

13. Manning was found guilty of multiple violations of Articles 92 and 134 of the Uniform Code of Military Justice. *See*: Ernesto Londono, Rebecca Rolfe and Julie Tate, *Verdict in Bradley Manning case*, The Washington Post (Aug. 21, 2013), http://www.washingtonpost.com/wp-srv/special/national/manning-verdict/.

only be understood as steps under a common denominator in a pattern to destroy Yukos and gain control over its assets."[14] But the Yukos Majority Awards are silent as to the propriety of admitting into evidence and relying on the WikiLeaks cables. Rather, they seem to assume that reliance on such unlawfully obtained evidence is unproblematic. But should investment treaty tribunals make such assumptions? Are there certain circumstances when unlawfully obtained evidence should be excluded? The purpose of this article is to survey investment treaty awards and judicial decisions from national courts that have grappled with the question of the admissibility of the WikiLeaks cables in search of guidance as to the appropriate circumstances under which investment treaty tribunals should admit and rely upon unlawfully obtained evidence.

I. The Standard of Admissibility of Unlawfully Obtained Evidence under International Law

The most prominent arbitration award to have considered the issue of the admissibility of unlawfully obtained evidence is, of course, the decision of the tribunal in *Methanex Corporation v. United States of America*.[15] The award in *Methanex* was issued long before the WikiLeaks cables were published, but its analysis of the question of whether unlawfully obtained evidence should be admitted into evidence in an international arbitration provides a useful point of

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14. *RosInvestCo UK v. Russian Federation*, Award ¶ 621 (12 September 2010).

15. *Methanex Corporation v. United States of America*, Award, ¶ 55 (NAFTA Ch. 11 Arb. Trib. 2005).

departure into the survey of cases involving the WikiLeaks cables. In *Methanex*, the tribunal was asked to admit into evidence "documentation [that] was obtained by successive and multiple acts of trespass committed by Methanex over five and a half months in order to obtain an unfair advantage over the USA as a Disputing Party to these pending arbitration proceedings."[16] The *Methanex* tribunal reasoned that, "[a]s a general principle, therefore, just as it would be wrong for the USA *ex hypothesi* to misuse its intelligence assets to spy on Methanex (and its witnesses) and to introduce into evidence the resulting materials into this arbitration, so too would it be wrong for Methanex to introduce evidential materials obtained by Methanex unlawfully."[17] After evaluating Methanex's conduct, the tribunal held that "it would be wrong to allow Methanex to introduce this documentation into these proceedings in violation of its general duty of good faith and, moreover, that Methanex's conduct, committed during these arbitration proceedings, offended basic principles of justice and fairness required of all parties in every international arbitration."[18]

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16. *Id*. Part II, Chapter I, ¶ 59.

17. *Id*., ¶ 54.

18. *Id*., ¶ 59.

The *Methanex* tribunal's reasoning was firmly grounded in the duty of good faith that parties to an arbitration owe each other and the tribunal.[19] The obvious distinction between *Methanex* and the Yukos Majority Awards is that – by relying on the WikiLeaks cables – none of the claimants in the Yukos arbitrations breached the duty of good faith. If neither party participates in the unlawful actions that led to the disclosure of the evidence, should both parties be free to use that evidence as they see fit? Or, should the answer to that question depend on whether one of the parties to the arbitration was the victim of the unlawful theft of its confidential electronic documents, albeit not through the fault of any other party to the arbitration? Stated another way, should the evidence have been presumptively admissible because the Russian Federation does not have an interest in preserving the confidentiality of diplomatic cables sent from the United States' Department of State?[20] What should the standards be for the admissibility of such unlawfully obtained evidence?

One might understandably jump to the conclusion that the disclosure of the WikiLeaks cables would primarily benefit claimants in treaty arbitrations. After

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19. *Id.* at ¶ 54.

20. The Russian Federation made very clear its level of regard for the United States' interest in enforcing its laws concerning the confidentiality and secrecy of certain government information when it granted Edward Snowden asylum. *See* Steven Lee Myers and Andrew E. Kramer, *Defiant Russia Grants Snowden Year's Asylum*, The New York Times (Aug. 1, 2013), http://www.nytimes.com/2013/08/02/world/europe/edward-snowden-russia.html?pagewanted=all. *See also:* Michael Birnbaum, *Russia grants Edward Snowden residency for three more years*, The Washington Post (Aug. 7, 2014), http://www.washingtonpost.com/world/europe/russia-grants-edward-snowden-residency-for-3-more-years/2014/08/07/8b257293-1c30-45fd-8464-8ed278d5341f_story.html.

all, the cables often reflect the contents of confidential conversations between U.S. diplomats and foreign officials.[21] But such an assumption would be misplaced; at least two Respondent states have tried to use the WikiLeaks cables in ICSID arbitrations.[22] In *ConocoPhillips v. Venezuela*, Venezuela sought to persuade the tribunal to revisit its decision on liability that had found that Venezuela had breached its obligation to negotiate in good faith with the claimants.[23] A majority of the tribunal denied Venezuela's request for reconsideration, and Venezuela responded by challenging the majority's impartiality.[24] As the decision of the Chairman of the World Bank's Administrative Council rejecting Venezuela's challenge makes clear, Venezuela's challenge was based on the tribunal's failure to consider U.S. Embassy cables submitted with its application for reconsideration:

> 20. Venezuela also refers to U.S. Embassy cables – part of the WikiLeaks released after the hearing on the merits held in 2010 – submitted by the Respondent with the September 8 [2013] letter, to demonstrate that the Claimants made misrepresentations of fact at the hearing that proved decisive to the Challenged Arbitrators. Venezuela claims that these cables prove that the Claimants made false

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21. *See, e.g.,* U.S. Dep't of State Cable, Kazakhstan: *Minister of Economy Supports Closer Cooperation with U.S. Government*, Astana, January 27, 2009, which describes the substance of a 90 minute meeting between the U.S. Ambassador and Kazakhstan's Minister of Economy in which the Minister gave assurances that U.S. companies "will be protected" from the implementation of a new tax code that abrogated pre-existing contractual tax stabilization guarantees for everyone else.

22. *See 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 Proposal to Disqualify a Majority of the Tribunal, 5 May 2014, ¶ 20; and *Kilic Insaat Ithalat Ihracat Sanayi ve Ticaret Anonim Sirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, Award, 2 July 2013, ¶ 4.3.16.

23. *Id*. at ¶ 8.

24. *Id*. at ¶ 9-10.

> representations to the Tribunal, upon which the decision of the Challenged Arbitrators on the lack of good faith negation was based.
>
> 21. Venezuela asserts that a decision based on misrepresentations would not comport with basic principles concerning the administration of justice and could not be made by arbitrators having the requisite impartiality under the ICSID Convention. Venezuela adds that "no legal system can endorse the position that an arbitrator has no power in a case still pending before him to rectify an obvious mistake, irrespective of whether its original opinion was based on misrepresentation, fraud, forged documents, false testimony or any other egregious misconduct" and that "this is the effect of the Challenged Arbitrator's blanket refusal to even consider the facts on Respondent's Application for Reconsideration."[25]

The majority's decision denying reconsideration was indeed silent about the cables and their contents. In a field in which one has grown accustomed to decisions of staggering length in which every argument raised by the parties is often reproduced verbatim in the body of the award, one might infer from such silence an implicit decision by the majority regarding the suitability of such evidence. The majority's silence about the evidence is especially difficult to explain in light of the dissenting arbitrator's contention that "the revelations of the WikiLeaks cables submitted to the Tribunal as annexes to the Respondent's letter of 8 September 2013…[changes] the ground or cause for reconsideration [] radically in dimension and importance."[26]

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25. *ConocoPhillips v. Venezuela*, Decision on the Proposal to Disqualify a Majority of the Tribunal, 5 May 2014, ¶¶ 20-21.

26. *ConocoPhillips v. Venezuela*, Decision on Respondent's Request for Reconsideration, Dissenting Opinion of George Abi-Saab, ¶ 24. The majority noted only in its Decision on Respondent's Request for Reconsideration

While the utility of the WikiLeaks cables to both claimants and respondents in investment treaty arbitrations will diminish as time goes by, there will almost certainly be more disclosures of confidential government documents in the future.[27] Future tribunals will almost certainly be called upon to consider evidence from such sources. How should they consider objections regarding the admissibility of confidential documents illegally obtained from government files?

The few publicly available arbitration awards that have referred to the WikiLeaks cables do not offer much in the way of guidance. This article will survey judicial decisions in proceedings that have presented national courts (and international judicial bodies) with the opportunity to consider the question of whether the Department of State cables disclosed by WikiLeaks should be admissible to determine whether any guidance may be found there.

II. State Judicial Decisions to Have Considered the Admissibility of the WikiLeaks Cables

Perhaps the most logical point of departure for a survey of judicial decisions analyzing the admissibility of the WikiLeaks cables are decisions from courts in

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that "this decision is limited to answering the question whether the Tribunal has the power which the Respondent would have it exercise. The decision does not address the grounds the Respondent invokes for reconsidering the part of the Decision which it challenges and the evidence which it sees as supporting those grounds. The power must be shown to exist before it can be exercised." *ConocoPhillips v. Venezuela*, Decision on Respondent's Request for Reconsideration, ¶ 9.

27. Mark Mazzetti and Michael S. Schmidt, *Officials Say U.S. May Never Know Extent of Snowden's Leaks*, The New York Times (Dec. 14, 2013), http://www.nytimes.com/2013/12/15/us/officials-say-us-may-never-know-extent-of-snowdens-leaks.html?pagewanted=all.

the United States because those courts presumably have the greatest interest in protecting their government's legitimate expectations with regard to secrecy and confidentiality of its confidential communications. We therefore first look at how the United States federal courts have treated the admissibility of unlawfully obtained evidence published on WikiLeaks. After that, we turn to a survey of decisions from the judicial systems of other nations and to the decisions of international tribunals, such as the European Court of Justice and the European Court of Human Rights.

1. The Admissibility of WikiLeaks Cables in U.S. Federal Court

Disclosures through the WikiLeaks forum have directly prompted both civil and criminal litigation in the United States federal courts. The information contained in the cables is of keen interest to a variety of litigants. In litigation to which the U.S. government is party, it routinely refuses to either confirm or deny the cables' authenticity. Should a United States federal judge admit the evidence in such circumstances or should she affirmatively require the government to object to its authenticity?

One case illustrates the U.S. government's predicament. The American Civil Liberties Union submitted requests for the cables to the U.S. Department of State under the United States' Freedom of Information Act, even though the same

cables were already available through WikiLeaks.[28] The Department of State refused to produce (or produced redacted portions of) twenty-three of the requested cables on the basis that they fell within a statutory exemption to disclosures.[29] In a subsequent lawsuit brought by the ACLU to compel the Department of State to produce the requested cables, the court granted summary judgment in favor of the Department of State, finding that it had discharged its burden of demonstrating that the documents were exempt from disclosure. The court rejected the ACLU's argument that the prior public disclosure of the cables prevented the Department of State from complaining about further disclosure. The court reasoned that:

> No matter how extensive, the WikiLeaks disclosure is no substitute for an official acknowledgement and the ACLU has not shown that the Executive has officially acknowledged that the specific information at issue was a part of the WikiLeaks disclosure. Although the ACLU points to various public statements made by Executive officials regarding the WikiLeaks disclosure, it has failed to tether those generalized and sweeping comments to the specific information at issue in this case – the twenty-three embassy cables identified in its request.[30]

The holding in this case – which directly resulted from the illegal leaks – is hardly surprising. After all, it effectively involved an application to force the

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28. *American Civil Liberties Union v. Department of State,* 878 F. Supp. 2d 215 (D.D.C. 2012).

29. The Freedom of Information Act contains nine categories of matters which are exempted from disclosure. 5 U.S.C §. 552(b). In *ACLU v. Department of State*, the Department of State successfully invoked the first exemption, precluding disclosure of materials pertaining to matters that are "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and . . . are in fact properly classified pursuant to such Executive Order"). 5 U.S.C §. 552(b)(1)

30. *ACLU v. Dep't of State*, 878 F. Supp. 2d at 224.

government into confirming the authenticity of the documents and the federal court was understandably deferential to the executive branch's prerogative to continue to consider the documents confidential and not to be compelled to admit to their contents. It is therefore perhaps more interesting to consider how the courts treat such evidence in litigation that does not directly implicate the leaks or force the government to take a position with regard to the authenticity or veracity of the unlawfully disclosed cables. This most often occurs in litigation by third parties who had nothing to do with the disclosure of the cables, but who nevertheless seek to rely upon them. To some extent, a U.S. court's treatment may depend on whether the government is being forced to take a position with respect to the authenticity of the unlawfully disclosed cables.

a. Cases in which the United States is a Party

An early instance in which a federal court was asked to admit the Department of State cables into evidence occurred in the course of the criminal prosecution of Viktor Bout, an infamous arms trafficker.[31] In that case, the defense challenged the legality of Mr. Bout's extradition from Thailand. The defense relied on WikiLeaks cables for indications that his prosecution in the United States was vindictively motivated. The cables showed that he supplied the United States military with equipment in Iraq despite the fact that the federal government had

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31. *U.S. v. Bout*, No. 08 Cr. 365 (SAS), 2011 WL 3369797, at *2 (S.D.N.Y. Aug. 2, 2011).

prohibited any transaction between him and U.S. nationals. According to the defense, the embarrassment caused to the Department of Defense prompted the government to pursue his prosecution through other agencies. Judge Shira Scheindlin considered the WikiLeaks cables and rejected the defense on the merits. Her decision, however, was entirely silent on the issue of the admissibility of the cables, perhaps due to the fact that the government raised no objection, stating only that the government took no position as to the authenticity of the cables. It is hard to escape the impression that the cables, even if their contents were true, were not sufficient to substantiate the defendant's allegation of prosecutorial misconduct. Such evidentiary deficiencies may ultimately explain the prosecution's decision not to object to the admissibility of the cables and Judge Scheindlin's apparent decision to take them at face value.

The case of *Mobley v. C.I.A.* is illuminating because it illustrates that the U.S. government's objection to the admissibility of unlawfully obtained evidence that is published on sites like WikiLeaks has nothing to do with the dubious manner in which such evidence came into the public domain.[32] In that case, the plaintiffs had brought suit against the Central Intelligence Agency based on its denial of their request under the Freedom of Information Act for information concerning the CIA's activities abroad. The plaintiffs relied heavily on private

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32. *Mobley v. C.I.A.*, 924 F. Supp. 2d. 24, 50-51 (D.D.C. 2013).

emails from Strategic Forecasting, Inc. that were stolen from that companies computers and subsequently published by WikiLeaks.[33] The court was not asked to consider the diplomatic cables, but it was asked to consider evidence published illegally on the same forum. The government declined to object to the admissibility of the WikiLeaks evidence. In fact, the government went so far as to downplay the sensitivity of the information. The court noted that "[t]he Government has assured the Court that 'it is unnecessary to treat as presumptively classified here an unofficial, non-government document obtained from the public domain,' and therefore 'the Government has no objection to the filing of this email on the public record.'"[34]

A case from the U.S. District Court for the District of Columbia presented a more difficult situation.[35] The *Rimi* case involved a habeas corpus petition that Mohammad Rimi filed while he was a detainee at Guantanamo Bay.[36] After Rimi was transferred from Guantanamo Bay to a prison in Libya, the court dismissed his petition as moot. After the cables became public, a "next friend" sought

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33. The Strategic Forecasting, Inc. ("Stratfor") documents were reported to have been unlawfully obtained by the Anonymous hacker collective and released to WikiLeaks.

34. *Mobley v. C.I.A.*, 924 F. Supp. 2d. 24, at 51, n. 19

35. *Rimi v. Obama*, CV 13-0908 (RJL), 2014 WL 3640794, at *2 n.5 (D.D.C. July 23, 2014). *See also Amanatullah v. Obama,* 904 F. Supp. 2d 45, 56-57 (D.D.C. 2012) (Here a habeas corpus petitioner introduced WikiLeaks evidence that the U.S. was deliberately using Bagram air base as a detention site in order to avoid constitutional jurisdiction, the court considered and rejected the argument on the merits without regard for the source of the evidence).

36. The writ of habeas corpus permits an incarcerated person to challenge the basis for their detention. *See* 28 U.S.C. § 2241.

reinstatement of the petition on his behalf on the grounds that the WikiLeaks cables directly contradicted the government's earlier testimony in the prior proceedings, because they demonstrated that he was in the constructive custody of the United States. The district court described the evidence in its decision:

> The first document is a purported March 2006 Department of Defense "Detainee Assessment" regarding Rimi, which includes a recommendation concerning transferring him to another country and the circumstances of such a transfer. Next, two purported State Department cables from December 2007 and February 2009 appear to document visits to Rimi by U.S. government personnel during his detention in Libya and reference an "MOU," or memorandum of understanding, between the U.S. and Libya regarding Rimi's detention.[37]

From the court's description, the evidence would appear to support the petitioner's argument that the petitioner's habeas corpus petition was no longer moot because he was in the constructive custody of the United States. The materiality of the evidence and its probative value to the issue before the court were much higher than the evidence the before the court in *U.S. v. Bout*.[38] The enormous probative value of the evidence threatened to force the government into having to comment on the information in the cables. The government's case would be much weaker if its response to this evidence was limited to neither confirming nor denying the authenticity of the cables.

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37. *Rimi v. Obama*, 2014 WL 3640794, at *2.

38. 2011 WL 3369797, at *2 (S.D.N.Y. Aug. 2, 2011). See supra, n 31, at 13 and accompanying discussion.

Judge Richard Leon's decision describes some "procedural back-and-forth" regarding the admissibility of the cables while Rimi's case was stayed during consideration of a similar matter by the Court of Appeals for the D.C. Circuit. However, Judge Leon ultimately was able to avoid opining on the probative value of the evidence or the merits of the petition, because in the meantime, the petitioner escaped when political opponents of the Libyan government stormed the prison. Because Rimi was no longer in custody, the court decided that the petition was indeed moot. Judge Leon was able to avoid the complicated question of whether the court should grant the petition and order the release of a person from prison based on evidence the government could not comment upon. In his decision Judge Leon wrote the following passage that suggests sensitivity to the government's position:

> The Government "neither confirm[s] nor den[ies] the authenticity of [the purported Department of Defense and State Department documents relied on by petitioner], including allegedly classified documents published by outside entities such as WikiLeaks." … Because the three documents are marked with a "Secret" classification and because the details of their contents are not essential to my decision today, I refer to them only in general terms.[39]

b. Cases in which the United States is not a party

The United States courts have, however, been receptive to the use of confidential documents unlawfully disclosed by WikiLeaks in cases in which the

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39. *Rimi* at *2 n.5 (internal citation omitted).

U.S. government was not a party. Even before Private Manning's leak and the publication by WikiLeaks of the Department of State cables, a group of banks had sought unsuccessfully to enjoin WikiLeaks from posting confidential and personal banking documents.[40] They were unsuccessful.

In *Wultz v. Bank of China*, the relatives of a suicide bombing victim tried to compel the Bank of China to produce documentation in an effort to show Bank of China's knowledge that a terrorist group was using its accounts.[41] The Bank of China resisted the Wultzes' attempt to introduce State Department cables.[42] This effort proved to be counterproductive for Bank of China, because the court ultimately compelled the defendant to produce the documents at issue on the grounds that alternative evidence necessary to establish a critical element of the plaintiff's claim was unavailable.[43]

In *Bible v. United Student Aid Funds, Inc.*, defendant USA Funds moved to strike portions of the plaintiff's complaint based on information that had been improperly disclosed and hosted by WikiLeaks.[44] The information in question, a Guarantee Services Agreement between USA Funds and Sallie Mae, had been

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40. *Bank Julius Baer & Co. v. Wikileaks*, 535 F. Supp. 2d 980 (N.D. Cal. 2008).

41 *Wultz v. Bank of China Ltd.*, 942 F. Supp. 2d 452, 467 (S.D.N.Y. 2013).

42 *Id*. at 467 n.68.

43 *Id*. at 467.

44. *Bible v. United Student Aid Funds, Inc.*, 1:13-CV-00575-TWP, 2014 WL 1048807 (S.D. Ind. Mar. 14, 2014).

posted to WikiLeaks by a party in a previous litigation in direct violation of that party's agreement that documents would be produced for "attorney's eyes only." In that previous litigation, USA Funds successfully moved for the sanction of dismissal on the basis of the improper disclosure.[45] USA Funds was not successful in excluding the evidence in *Bible*. Instead, the *Bible* court emphasized the plaintiff's clean hands and the wide public dissemination of the information contained in the documents:

> Ms. Bible obtained these documents from [publicly] available online sources, not from the parties in the [previous litigation]. The documents have been available in the public domain for more than five years, and this Court does not have the power or ability to limit its access. … Ms. Bible's complaint does not put this material "in the public eye" any more than the internet has already done so.[46]

One might have expected the judiciary of the United States to share the sense of outrage over the disclosure of the cables expressed by members of the executive branch, such as the sentiments expressed by Secretary Clinton, and to take a dim view of the use of evidence that was – without a doubt – obtained in violation of federal law. Instead, the decisions of the federal courts mostly reflect the pragmatic reality summed up by the well-known saying that "you can't put the genie back in the bottle." But when judicial proceedings threaten to force the executive branch to take a position about the authenticity of the evidence, then the

45. *Id.* at *4; *see also Salmeron v. Enterprise Recovery Systems, Inc.*, 579 F.3d 787 (7th Cir. 2009).

46. *Bible*, 2014 WL 1048807, at *4.

U.S. federal courts exhibit some reluctance to consider such evidence. It remains to be seen whether that reluctance would persist in the face of highly material probative evidence.

2. The Admissibility of WikiLeaks Cables in Foreign and International Courts

One might expect foreign and international courts to take an approach similar to the courts of the country directly injured by the unlawful disclosure of the WikiLeaks cables. If the United States courts do not appear terribly concerned about relying on such evidence, then a similarly relaxed attitude would seem likely to prevail before international tribunals and the courts of foreign jurisdictions.

a. The admissibility of WikiLeaks cables before international tribunals

International tribunals perhaps have been the most receptive to the admissibility of the Department of State cables as evidence. In the prosecution of former Liberian President Charles Taylor, the defense moved to admit a series of documents, including the leaked diplomatic cables. According to the defense, one cable cast doubts on the impartiality of the court by suggesting that one of the judges may have deliberately slowed court proceedings to ensure that she headed the trial chamber when the court delivered his sentence.[47] The defense also argued, based on other cables, that Mr. Taylor's prosecution was political. For example,

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47. *See* U.S. Department of State Cable (Netherlands), SCSL's Taylor Trial Meets Key Milestone, But SCSL Still Faces Serious Hurdles, April 15, 2009.

one classified cable written by U.S. Ambassador Linda Thomas-Greenfield contained the following passage:

> The best we can do for Liberia is to see Taylor is put away for a long time and we cannot delay for the results of the present trial to consider next steps. All legal options should be studied to ensure that Taylor cannot return to destabilize Liberia. Building a case in the United States against Taylor for financial crimes such as wire fraud would probably be the best route.[48]

The prosecution opposed the cables' admission on grounds of relevance. The prosecution did not object to the cables based on the unlawful manner in which they were disclosed. The court admitted the cables on the grounds that the court's evidentiary rules allowed the admission of evidence if it was relevant and its "reliability [was] susceptible of confirmation."[49]

WikiLeaks cables have also been introduced in proceedings before the European Court of Human Rights. In *El Masri v. F.Y.R. Macedonia*, an applicant to the ECtHR raised claims against Macedonia for Macedonia's participation in the Central Intelligence Agency's "extraordinary rendition" of the applicant to a secret

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48. Ian Cobain, *CIA Rendition: more than a quarter of countries 'offered covert support'*, The Guardian (Feb. 5, 2013), available at http://www.theguardian.com/world/2013/feb/05/cia-rendition-countries-covert-support.

49. *Prosecutor v. Taylor*, Case No. SCSL-03-01-T-1171, Decision on the Urgent and Public with Annexes A-C Defence Motion to Re-Open its Case in Order to Seek Admission of Documents Relating to the Relationship between the United States Government and the Prosecution of Charles Taylor (SCSL TCII, Jan. 27, 2011). Justice Sebutinde recused herself from consideration of the motion to admit the cables.

detention facility.[50] Among the documents submitted to the court were various WikiLeaks cables in which U.S. embassies "reported to the U.S. Secretary of State about the applicant's case and/or the alleged CIA flights and the investigations in Germany and Spain."[51] In one cable, the German Deputy National Security Advisor is quoted as saying that "the facts are clear, and the Munich prosecutor has acted correctly" by seeking to have international arrest warrants issued for participants in the "rendition."[52] While the court did not subsequently refer to the particular evidence in the cables, it also made no indication that the evidence was improper nor did it otherwise qualify its inclusion in the record.

The European Court of Justice expressly ruled in favor of a party seeking to introduce leaked cables. In *Persia International Bank v. Council*, the applicants were banking entities challenging restrictive measures applied to them as part of the sanctions regime against the Islamic Republic of Iran.[53] As part of their argument, they used leaked cables to suggest that the European Union member states were pressured by the United States to adopt the measures, claiming that it "cast doubt on the lawfulness of the measures adopted and of the procedure for

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50. The concept of "extraordinary rendition" or "irregular rendition" is often "used to refer to the extrajudicial transfer of a person from one State to another." Garcia, Congressional Research Service, Renditions: Constraints Imposed by Laws on Torture, September 8, 2009.

51. *El-Masri v. Former Yugoslav Republic of Macedonia*, Judgment, 39630/09 (2012).

52. U.S. Department of State Cable, Al-Masri Case – Chancellery Aware of USG Concerns, February 6, 2007.

53. Case T-493/10, *Persia International Bank v. Council*, 2013 E.C.R.

their adoption."[54] The European Council and Commission both disputed the merits and argued that "no account should be taken of the diplomatic cables."[55] The ECJ ruled in favor of the applicant stating that "the prevailing principle of European Union law is the unfettered evaluation of evidence."[56] It continued: "In the present case, since the applicant was not involved in the disclosure of the diplomatic cables, the possibly unlawful nature of that disclosure cannot be held against it. Further, the evidence in question is relatively credible since its authenticity has not been disputed by the United States Government."[57] As in *Bible*, the ECJ stressed the clean hands of the party seeking to introduce the evidence.

b. The admissibility of WikiLeaks cables in national courts (other than the United States)

In contrast to international tribunals, the national courts of some states have found the cables inadmissible as evidence regardless of whether or not the party seeking to introduce the evidence was involved with the unlawful disclosure. For example, in Spain, the Audiencia Nacional refused to admit WikiLeaks evidence.[58] The case involved a public contract to build a solar power plant. Two companies

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54. *Id.* at 89.

55. *Id.* at 90.

56. *Id.* at 95.

57. *Id.*

58. S.A.N., Jun. 26, 2013 (No. 2830/2013).

who were not chosen for the contract brought an action seeking to annul the decision awarding the contract to Solar Reserve, a competitor. They claimed that the conditions of the competition had been drafted in such a way so as to ensure that Solar Reserve would obtain the contract. The plaintiffs introduced a Department of State cable released by WikiLeaks that reflected the contents of a discussion between the Spanish Minister of Energy and the United States Ambassador to Spain in which the Ambassador "urged the Minister and the Secretary to look at the company's arguments again and see if anything could be done."[59] Despite the fact that the particular cable at issue was designated by the United States Department of State as "Unclassified", the Audiencia Nacional nevertheless stressed the unlawful manner in which the cable had become public:

> The mere information reflected in a major newspaper [like El Pais], which claims that it is merely repeating the cables made public by WikiLeaks, cannot be taken into account. Not only do we reject the authenticity of such information, but the disclosure of cables coming from the US Embassy is evidence obtained unlawfully whose consideration is forbidden in accordance with article 11 of LOPJ [Ley Organica del Poder Judicial], as has been highlighted multiple times by the Constitutional Court. The Court has reiterated that the use of evidence that was obtained through a violation of fundamental rights, in this case communications that were subject to secrecy, is inconsistent with the right to an effective remedy and to a fair trial (Article 24 of the EC).[60]

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59. U.S. Department of State Cable, Ambassador Solomont's January 25 Call on Industry, Tourism, Commerce, January 26, 2010, *available at* http://www.wikileaks.org/plusd/cables/10MADRID86_a.html.

60. S.A.N., Jun. 26, 2013 (No. 2830/2013) at 5 (authors' translation).

In this case, the evidence contained in the cable was not particularly compelling. One is left to wonder whether the Audiencia Nacional would have reached the same conclusion if the cable clearly had demonstrated illegal conduct on the part of the government officials. Could the court have ignored highly probative evidence of a significant offense?

There are other examples of courts outside the U.S. refusing to admit the cables into evidence. In Turkey, the People's Liberation Party filed a complaint against Prime Minister Erdogan that alleged he had received improper benefits from eight accounts held with Swiss banks. One of those cables contained the following statement by the United States Ambassador to Turkey:

> We have heard from two contacts that Erdogan has eight accounts in Swiss banks; his explanations that his wealth comes from the wedding presents guests gave his son and that a Turkish businessman is paying the educational expenses of all four Erdogan children in the U.S. purely altruistically are lame.[61]

The Ankara Chief Prosecutor's Office of Parliamentarians dismissed the complaint. In its dismissal it referred to the cables as "gossip material" and that admitting such evidence "may lead to unacceptable results in terms of universal

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61. U.S. Department of State Cable, Erdogan and AK Party after two years in power: to get a grip on themselves, on Turkey, on Europe, December 30, 2004, *available at* https://www.wikileaks.org/plusd/cables/04ANKARA7211_a.html.

legal principles."[62] The Prosecutor did not specify which "universal legal principles" he relied upon.

Courts in other countries have reached the opposite conclusion and admitted the WikiLeaks cables with little apparent concern for how those cables became public. For example, Argentine members of a human rights organization brought suit against the Argentine military for the alleged slaughter in 1974 of unarmed guerrillas who had surrendered to the army. Reports indicate that complainants in that case will be allowed to introduce into evidence at trial Department of State cables that confirm the military's involvement in the execution of the guerrillas.[63] In Australia, two separate petitioners for immigration protection used WikiLeaks evidence of paramilitary activity in Sri Lanka, and the Australian courts evaluated and considered that evidence.[64]

c. The *Bancoult* Cases

It is the courts of the United Kingdom that have produced the most detailed decisions to have grappled with the question of the admissibility of the leaked cables. *R. (on the application of Bancoult) v. Secretary of State for Foreign and*

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62. *WikiLeaks 'gossip material'*, Hurriyet Daily News (Jan. 12, 2013), http://www.hurriyetdailynews.com/wikileaks-gossipmaterial.aspx?pageID=238&nID=38900&NewsCatID=338.

63. *Sumarán cables de Wikileaks al juicio de la Masacre de Capilla del Rosario*, EL ESQUIU (April 17, 2013), http://www.elesquiu.com/notas/2013/4/17/policiales-278564.asp.

64. *SZTDQ v. Minister for Immigration, Multicultural Affairs and Citizenship*, [2014] FCCA 537; *SZRCD v. Minister for Immigration and Citizenship* [2012] FMCA 1190.

Commonwealth Affairs (hereinafter "*Bancoult I"*), involved a suit by an indigenous group from the Chagos Archipelago in the British Indian Ocean Territory. In 1966, the United States and the United Kingdom entered into an agreement under which the area would be used for a U.S. naval base. The U.K. ordered and facilitated the removal and exclusion of the population from the islands. The action resulted in protracted litigation in the United Kingdom. In *Bancoult I*, the plaintiffs alleged that the U.K.'s 2010 designation of the islands as a Marine Protected Area (MPA) was illegal, in part because it was specifically intended to continue the exclusion of displaced islanders.[65]

The English High Court of Justice was faced with the plaintiff's introduction of a leaked cable from the U.S. embassy in London which memorialized discussions between the U.S. and U.K. governments about the MPA proposal.[66] The Secretary of State opposed admitting the cable. The court observed that "[f]or reasons that are entirely understandable, it is not the policy of the Secretary of State to admit or dispute that documents leaked by WikiLeaks such as those relied on upon in this case are or are not genuine."[67] The Secretary of State also "submitted that it would be wrong to order cross examination on the basis of

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65. See generally *R. (on the application of Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs* ("*Bancoult II*"), [2013] EWHC 1502 (Admin), ¶¶ 4-20, for the factual background of the dispute.

66. *R. (on the application of Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs)* ("*Bancoult I*"), [2012] EWHC 2115 (Admin), ¶¶ 3, 6.

67. *Id.* ¶ 8.

documents that had been unlawfully obtained by WikiLeaks. To do so would be to further WikiLeaks's improper purposes."[68] The court ultimately disagreed, concluding:

> 15. I also **acknowledge that the WikiLeaks documents must have been obtained unlawfully**, and in all probability by the commission of a criminal offence or offences under the law of the United States of America. I understand why it is the policy of HM Government neither to confirm nor to deny the genuineness of leaked documents, save in exceptional circumstances, particularly where, as here, the documents in question are not those produced or received by the UK Government.
>
> 16 However, the documents in question have been leaked, and **indeed widely published**. No claim has been made to the effect that the documents should not be considered by the Court on the grounds of public interest immunity or the like. They are before the Court. The Court will have to decide whether or not they are genuine documents, that they are copies of what they purport to be. The memorandum … appears to be a detailed record, which could fairly be the basis of cross examination.
>
> 17. I do not see how the present claim can be fairly or justly determined without resolving the allegation made by the Claimant, based on the WikiLeaks documents, as to what transpired at the meeting…[69]

In 2013, however, the High Court revisited the issue (hereinafter, "*Bancoult II*"). The High Court took a closer look at the admission of WikiLeaks evidence in response to new arguments by the Secretary of State and a superseding ruling interpreting the Vienna Convention on Diplomatic Relations 1961 (the "Vienna Convention"). The High Court began with a few assumptions: (1) that the

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68. *Id.* ¶ 13.

69. *Id.* ¶¶ 15-17 (emphases added).

documents were genuine for the sake of argument, but without making a finding of fact on the issue, and (2) that the documents were obtained by illicit means from a U.S. storage facility *other than* the U.S. embassy in London.[70] The court considered the first of the defendant's new arguments by querying whether the court's use of the documents constituted a Crown servant's "damaging disclosure, without lawful authority, of any information document or other article relating to defence or international relations" under the Official Secrets Act.[71] The High Court concluded that such a disclosure could not be damaging because "[e]xtensive prior disclosure of the document and of the information contained in it means that the further disclosure effected by its use in these proceedings is not damaging."[72]

The High Court next considered the Secretary of State's objection based on the Vienna Convention that admitting the cables would violate the Diplomatic Privileges Act of 1964, which enacted the provisions of the Vienna Convention on Diplomatic Relations. Specifically, the Secretary of State contended that admitting the cables into evidence would constitute a breach of Articles 24 and 27 of the Vienna Convention, which make diplomatic records "inviolable".[73] The High Court considered itself bound by a 1988 decision of the House of Lords in

70. Bancoult II, ¶ 30.

71. *Id.* ¶¶ 31-36.

72. *Id.* ¶ 36.

73. *Id.* ¶ 37.

Shearson Lehman Brothers v. Maclaine Watson & Co. In that case, an international organization that enjoyed the privileges guaranteed under the Vienna Convention sought to prevent the use of materials illicitly obtained from its archives in litigation. The *Shearson Lehman* court found that "inviolability" under the Vienna Convention meant freedom from "executive or judicial action by the host state," which included its use in judicial proceedings.[74] The High Court also found irrelevant the fact that the leaked cables were most likely stored on servers outside of the U.K.[75] After considering other cases, including *El-Masri* and the Iranian banks, the High Court concluded:

> Nothing in this material persuades us that we should depart from what appears to be, by now, a settled principle of public international and municipal law, that the inviolability of diplomatic communications requires that judicial authorities of states parties to the 1961 Convention should, in the absence of consent by the sending state, exclude illicitly obtained diplomatic documents and correspondence from judicial proceedings. Accordingly, we consider the document to be inadmissible as evidence in these proceedings.[76]

It was not long before the High Court's decision in *Bancoult II* was reviewed by the Court of Appeal ("*Bancoult III*").[77] The Court of Appeal held that it was not bound by the decision in *Shearson Lehman* and also distinguished that decision

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74. *Id.* ¶¶ 40, 46.

75. *Id.* ¶ 45.

76. *Id.* ¶ 51.

77. *R. (on the application of Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs)* ("*Bancoult III*"), [2014] EWCA Civ. 708.

on the grounds that it was "not addressing a case (such as the present case is assumed to be) where the document has not been obtained from the mission illicitly or by improper means, is in the public domain for the whole world to see and the party wishing to adduce the document in evidence has not been complicit in the publication of the document."[78] Furthermore, after thorough analysis, the Court of Appeal analyzed the concept of "inviolability" under the Vienna Convention and held that "inviolability" did not encompass the passive use of already disclosed documents as evidence, but rather that:

> Inviolability involves the placing of a protective ring around the ambassador, the embassy and its archives and documents which neither the receiving state nor the courts of the receiving state may lawfully penetrate. If, however, a relevant document has found its way into the hands of a third party, even in consequence of a breach of inviolability, it is *prima facie* admissible in evidence. The concept of inviolability has no relevance where no attempt is being made to exercise compulsion against the embassy. Inviolability, like other diplomatic immunities, is a defence against an attempt to exercise state power and nothing more.[79]

The Court of Appeal upheld the High Court's ruling as to the absence of a "damaging" disclosure under the Official Secrets Act.[80] Unfortunately for the plaintiffs, however, the court ultimately ruled that lower court's refusal to admit

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78. *Id.* ¶ 37.

79. *Id.* ¶ 58.

80. *Id.* ¶ 73.

the cable "had no effect on the proceedings" and declined to allow the appeal on the merits to go forward on that basis.[81]

III. Discerning a Standard

Europeans were mostly critical of the ferocity of the response by the United States to the disclosure of the cables.[82] Yet courts in Europe (notably Spain and Turkey) are the only ones to have refused to admit the cables into evidence on the basis of the manner in which the cables were obtained. And it was an English court that took a hard look at whether the admissibility of the cables was consistent with principles of international law. In contrast, the United States federal courts have taken a nonchalant approach, except in those few cases in which the proceeding threatens to force the executive branch to take a position with regard to the authenticity of the evidence.

It is difficult to discern from the cases surveyed any clear standard for analyzing the admissibility of the WikiLeaks cables or documents obtained through similarly unlawful means. However, there would appear to be one common thread running through the cases. In order to see that thread, it helps to recall one particular paragraph in the Methanex decision:

> The second issue is materiality. The Tribunal considered the content of the Vind Documents carefully, assisted by the submissions from Methanex's

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81. *Id.* ¶ 93. Indeed, the appeal was ultimately rejected in its entirety on a number of grounds. *Id.* ¶ 159.

82. Stephen Erlanger, *Europeans Criticize Fierce U.S. Response to Leaks*, The New York Times (Dec. 9, 2010), http://www.nytimes.com/2010/12/10/world/europe/10wikileaks-react.html?_r=0.

> Counsel as to their relevance to its case. By the time of the main hearing in June 2004, the Vind Documents were of only marginal evidential significance in support of Methanex's case. There was other direct oral and documentary evidence relating to the meeting of 4th August 1998 between Mr Davis and ADM and other contacts between Mr Vind and Mr Davis; and the Vind Documents, as explained by Methanex's Counsel at the main hearing, could not have influenced the result of this case. Insofar as Methanex was seeking to discredit Mr Vind as a factual witness by using the Vind Documents during his cross-examination at the main hearing, it need only be said that, in all the circumstances, no such attempt could ever have succeeded in the manner originally intended by Methanex.[83]

The *Methanex* decision was unequivocal in its criticism of the claimant for "trespassing onto private property and rummaging through dumpsters inside the office-building for other persons' documentation" and in its holding that such conduct had no place in international arbitration. But by including an element of materiality in its analysis, the *Methanex* tribunal implicitly acknowledged that the manner in which evidence is obtained would not always justify excluding the evidence. As with the decision in *Methanex*, the materiality of the evidence to be introduced plays an important role in many of cases surveyed above, although it does not serve to predict how any particular court will rule. One might distill from these cases the following means of analyzing whether unlawfully obtained evidence should be admitted in international arbitration:

1. Did the party seeking to introduce the evidence participate in unlawful activity that led to its disclosure? If no, proceed to the next step. If

83. *Methanex Corporation v. United States of America*, Award (NAFTA Ch. 11 Arb. Trib. 2005), Part II, Chapter I, ¶ 56.

yes, then the evidence is presumptively inadmissible. Such a presumption would serve to deter undesirable conduct. Of course, complicated questions may arise regarding the exact extent of the party's involvement in the unlawful activity through which the evidence was obtained. Similarly, one cannot simply ignore the nature of the allegedly unlawful activity. Not every technical legal violation should result in the exclusion of the evidence, although such violations may justify a heightened showing by the party seeking to introduce the evidence of its materiality and relevance (see step two). In addition, cases in which the evidence is obtained by breaching the laws of states with which the arbitrators may not agree, such as the laws of some authoritarian states, present similar complications. In such cases, regard should be paid to the timing of the unlawful activity that led to the discovery of the evidence. If it occurred during the arbitration, a very strong presumption against its admissibility should apply. That presumption might be relaxed depending on how long before the arbitration the offense occurred and how serious the offense. There are doubtless other issues that might arise.

2. Is the evidence material to an issue in the case which the tribunal is required to decide? If the answer to that question is no, then the

evidence should not be admitted. In such circumstances, the tribunal's need for evidence does not justify the tribunal implicitly endorsing the illegal activity by including within its award any "fruits of the poisonous tree." If it is relevant and material, its admissibility should be further analyzed with regard to the interests of the other parties to the arbitration who may have been victims of the unlawful conduct.

3. Was the evidence unlawfully obtained from the files of a party to the arbitration, although at no fault of the party seeking to introduce the evidence? If no, the evidence should be admissible. If yes, the evidence should be presumptively inadmissible unless it is the only evidence available and absolutely necessary to the party to prove its case.

Of course, there is no way to prevent an international arbitral tribunal from seeing such evidence. Once it is put before the tribunal, the tribunal cannot forget what it has seen, especially if it is highly relevant. Indeed, parties to arbitral proceedings will often have tactical reasons for deciding not to object to the admissibility of such evidence. For example, a party might decide that it does not wish to draw the tribunal's attention to the evidence or risk suggesting that it is worried about what conclusions the tribunal might draw from it. As a practical

matter, a party might be more likely to raise an objection to the evidence where the objection is based on its opponent's unlawful conduct when it obtained the evidence. The intention underlying such an objection would be, of course, to show the tribunal that its opponent is not to be trusted.

Even in the absence of such objections, international tribunals may wish to think critically about whether or not to publish such unlawfully obtained evidence in their awards. Does showcasing such evidence incentivize future unlawful disclosures by placing the arbitral tribunal's imprimatur on the evidence? In the context of arbitration under international treaties involving sovereign states, should arbitral tribunals show deference to a sovereign state's legitimate expectation of secrecy even after that secrecy has been breached by not publishing such evidence in their awards? Some might argue that arbitral tribunals should think twice before relying on such evidence. If so, then is a different level of deference due to the state's interest for the state that is a party to the arbitration than is due to a third state that is not a party to the arbitration?

Tribunals have at their disposal the tools to balance such interests against the need for the evidence and its materiality. Article 9(2)(f) of the IBA Rules on the Taking of Evidence in International Arbitration (2010) expressly empowers arbitral tribunals to "exclude from evidence or production any Document" on the "grounds of special political or institutional sensitivity (including evidence that has been

classified as secret by a government or a public international institution) that the Arbitral Tribunal determines to be compelling[.]" It is worth bearing in mind that this provision was also found in the previous version of the IBA Rules. One tribunal, constituted under NAFTA, described the application of Article 9(2)(f) in the following terms:

> [I]n view of an evolving *jurisprudence constante* by prior NAFTA tribunals, [] any refusal to produce documents based on their political or institutional sensitivity requires a balancing process, weighing, on the one hand, the compelling nature of the requested party's asserted sensitivities and, on the other, the extent to which disclosure would advance the requesting party's case.[84]

Many of the WikiLeaks cables were designated "secret" by the United States, and therefore satisfied the requirements of Article 9(2)(f). Yet despite the availability of tool like Article 9(2)(f) of the IBA Rules, one finds very few examples of their application in arbitrations in which the WikiLeaks cables were introduced as evidence.

As noted above, there are likely practical explanations as to why parties in those cases have not objected to the admissibility of the cables. But Article 9(2)(f) permits an arbitral tribunal to exclude such evidence "on its own motion", and no tribunal appears to have raised state secrecy concerns on its on motion in cases involving the WikiLeaks cables. Modern information technology makes it seem

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84. *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon Delaware Inc. v. Government of Canada,* PCA Case No. 2009-04, Procedural Order No. 13, 11 July 2012, ¶ 22.

inevitable that future tribunals will be called upon to evaluate classified evidence stolen from government servers, even if not called upon to consider the WikiLeaks cables themselves. One need only recall that Edward Snowden has leaked only a fraction of what he took.

Perhaps future tribunals, particularly in investment treaty cases, may make take the initiative to use provisions (like Article 9(2)(f)) that allow them to balance the competing interests of state secrecy and confidentiality against the evidence's value in the resolution of the dispute. The three step analysis outlined above is offered as an example of how one might try to balance those competing interests. There are surely other ways to go about it. But one can hope that tribunals that are confronted with such questions in the future will choose to offer more insight into how they reached the balance of interests than is currently found in the texts of investment treaty awards. Such transparency would be a most welcome development.

END