# Evidence in Arbitration

## *Does it Pay Off to Play Dirty?*

Victoria Pernt

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# Does It Pay Off to Intimidate Witnesses?

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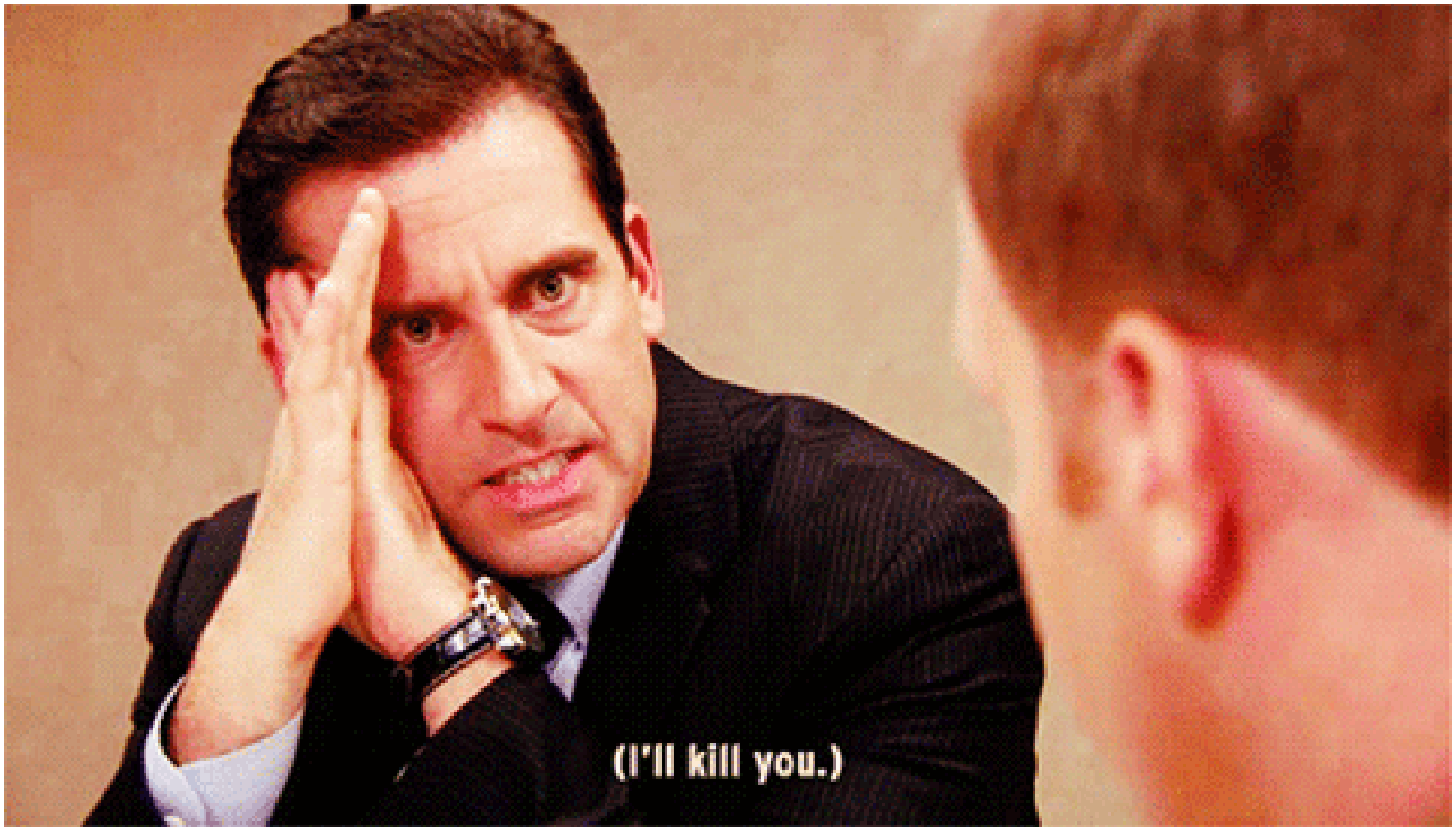


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# Does It P[illegible]f to Invalidate Warranties?


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# Does It Pay Off to ‘Hack’ the Opponent?

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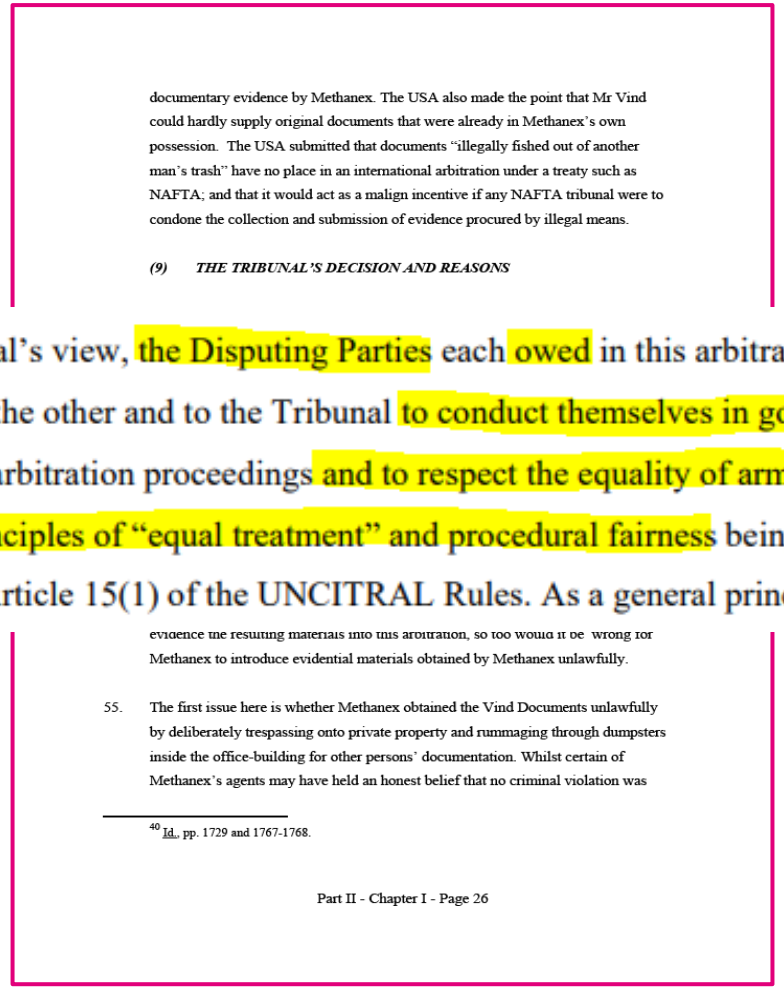
# Does It Pay Off to ‚Hack' the Opponent?
*Methanex v. United States*

# Does It Pay Off to ‚Hack' the Opponent?
## *Methanex v. United States*



documentary evidence by Methanex. The USA also made the point that Mr Vind could hardly supply original documents that were already in Methanex's own possession. The USA submitted that documents "illegally fished out of another man's trash" have no place in an international arbitration under a treaty such as NAFTA; and that it would act as a malign incentive if any NAFTA tribunal were to condone the collection and submission of evidence procured by illegal means.

***(9) THE TRIBUNAL'S DECISION AND REASONS***

In the Tribunal's view, the Disputing Parties each owed in this arbitration a general legal duty to the other and to the Tribunal to conduct themselves in good faith during these arbitration proceedings and to respect the equality of arms between them, the principles of "equal treatment" and procedural fairness being also required by Article 15(1) of the UNCITRAL Rules. As a general principle,

evidence the resulting materials into this arbitration, so too would it be wrong for Methanex to introduce evidential materials obtained by Methanex unlawfully.

55. The first issue here is whether Methanex obtained the Vind Documents unlawfully by deliberately trespassing onto private property and rummaging through dumpsters inside the office-building for other persons' documentation. Whilst certain of Methanex's agents may have held an honest belief that no criminal violation was

[40] Id., pp. 1729 and 1767-1768.

Part II - Chapter I - Page 26

**Methanex Corporation v. United States of America** (UNCITRAL), Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005; Part II - Chapter I, para 54

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***(9) THE TRIBUNAL'S DECISION AND REASONS***

its agent or agents did to obtain these documents during this first period. In all the circumstances, the Tribunal decided that this documentation was procured by Methanex unlawfully; and that it would be wrong to allow Methanex to introduce this documentation into these proceedings in violation of a general duty of good faith imposed by the UNCITRAL Rules and, indeed, incumbent on all who participate in international arbitration, without which it cannot operate.

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**Methanex Corporation v. United States of America** (UNCITRAL), Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005; Part II - Chapter I, para 58

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## *ConocoPhilips v. Venezuela*

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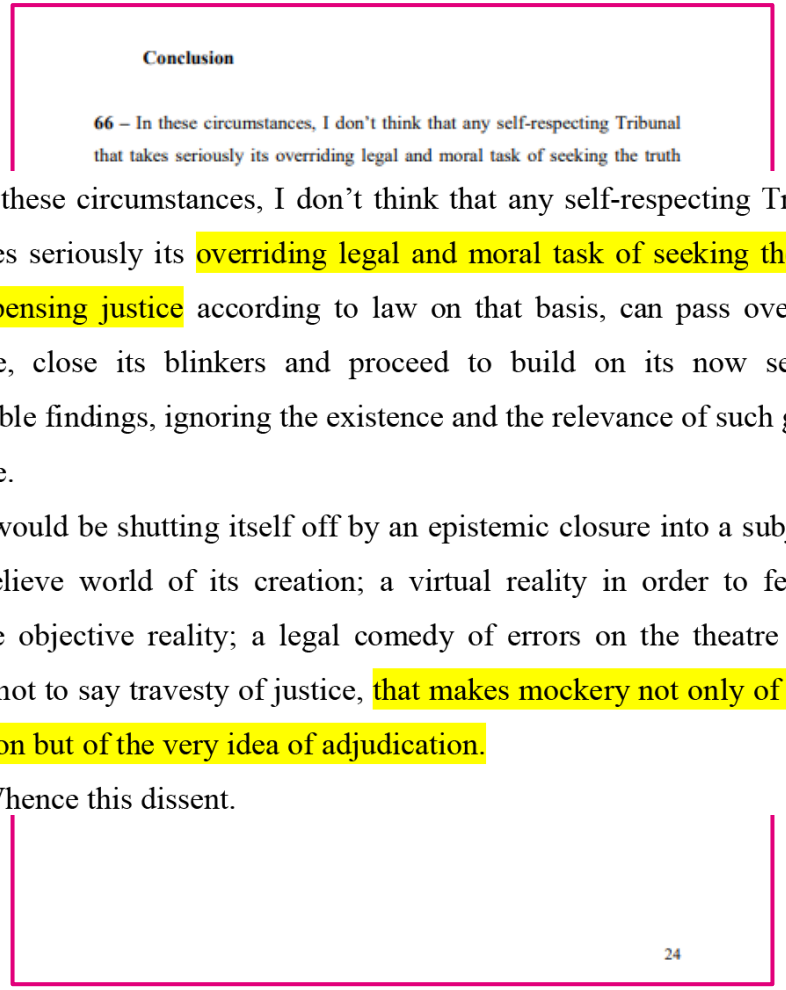

**Conclusion**

**66** – In these circumstances, I don't think that any self-respecting Tribunal that takes seriously its overriding legal and moral task of seeking the truth

**66** – In these circumstances, I don't think that any self-respecting Tribunal that takes seriously its overriding legal and moral task of seeking the truth and dispensing justice according to law on that basis, can pass over such evidence, close its blinkers and proceed to build on its now severely contestable findings, ignoring the existence and the relevance of such glaring evidence.

**67** – It would be shutting itself off by an epistemic closure into a subjective make-believe world of its creation; a virtual reality in order to fend off probable objective reality; a legal comedy of errors on the theatre of the absurd, not to say travesty of justice, that makes mockery not only of ICSID arbitration but of the very idea of adjudication.

Whence this dissent.

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**ConocoPhillips Petrozuata BV et al v Bolivarian Republic of Venezuela** (ICSID Case No. ARB/07/30)
Professor Abi-Saab's Dissenting Opinion to the Decision on Respondent's Request for Reconsideration; paras 66 and 67

# Does It Pay Off to ‚Hack' the Opponent?
*Caratube II v. Kazakhstan*

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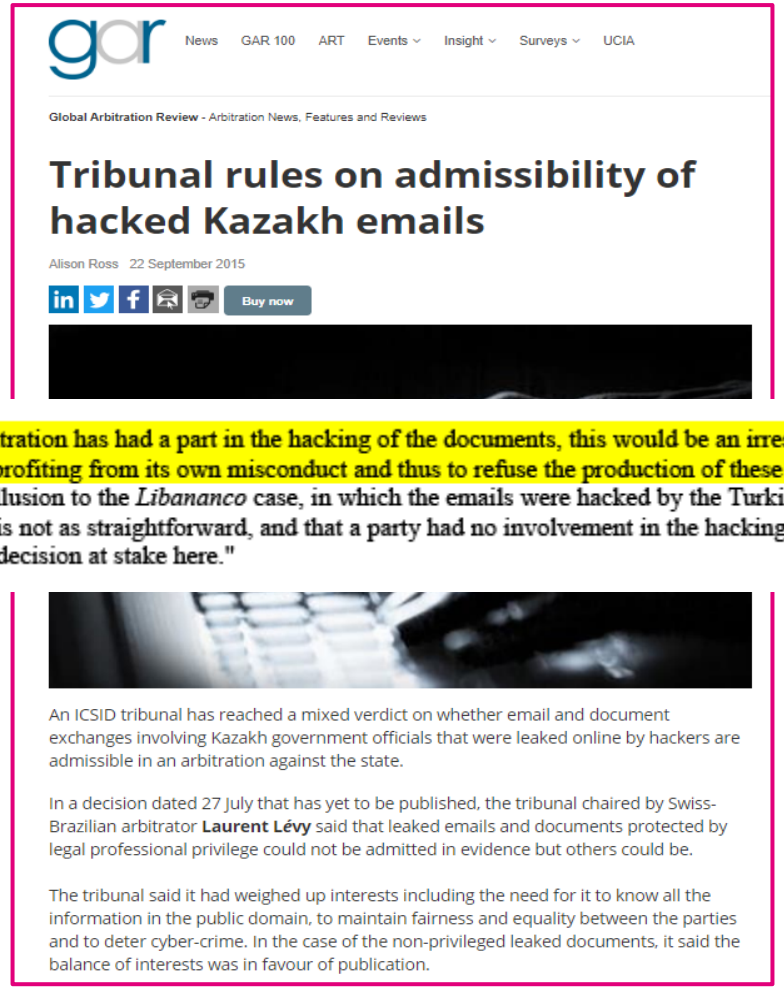

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**Tribunal rules on admissibility of hacked Kazakh emails**

Alison Ross 22 September 2015

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"If a party to an arbitration has had a part in the hacking of the documents, this would be an irresistible reason to bar that party from profiting from its own misconduct and thus to refuse the production of these documents," the tribunal said in an allusion to the *Libananco* case, in which the emails were hacked by the Turkish state. "But the reverse proposition is not as straightforward, and that a party had no involvement in the hacking does not carry that much weight in the decision at stake here."

An ICSID tribunal has reached a mixed verdict on whether email and document exchanges involving Kazakh government officials that were leaked online by hackers are admissible in an arbitration against the state.

In a decision dated 27 July that has yet to be published, the tribunal chaired by Swiss-Brazilian arbitrator **Laurent Lévy** said that leaked emails and documents protected by legal professional privilege could not be admitted in evidence but others could be.

The tribunal said it had weighed up interests including the need for it to know all the information in the public domain, to maintain fairness and equality between the parties and to deter cyber-crime. In the case of the non-privileged leaked documents, it said the balance of interests was in favour of publication.

***Caratube International Oil Company LLP v. The Republic of Kazakhstan*** (ICSID Case No. ARB/08/12)
Decision on Claimants' Request for the Production of 'Leaked Documents', 27 July 2015
Decision unpublished – source: Global Arbitration Review

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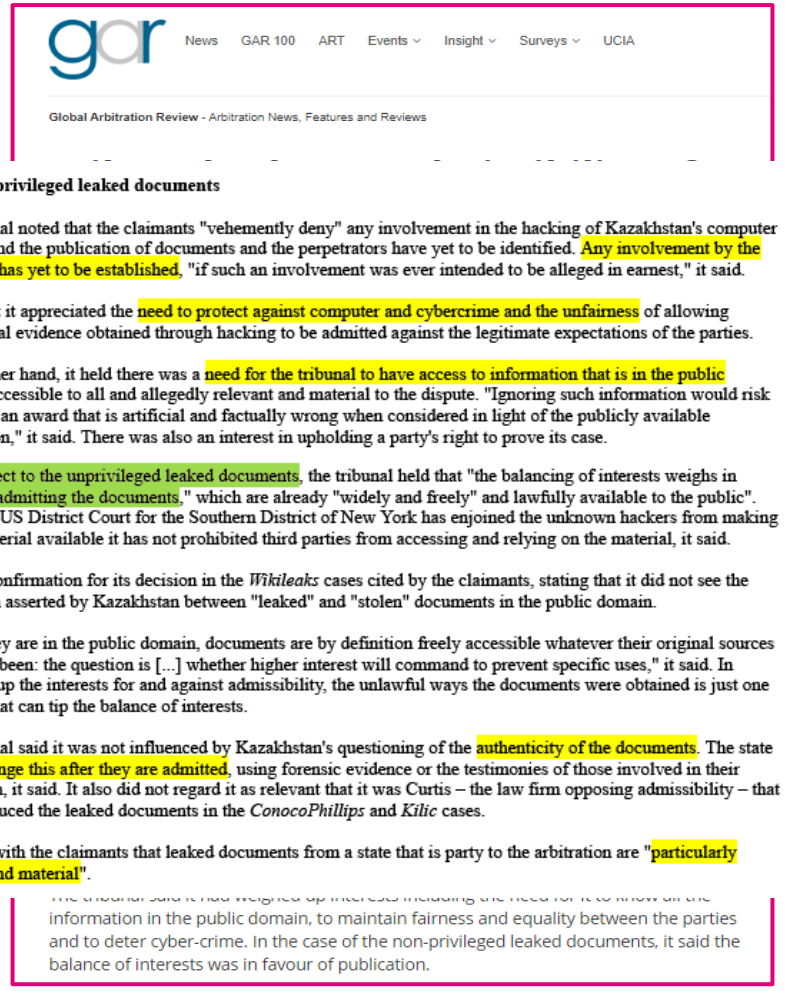

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**The non-privileged leaked documents**

The tribunal noted that the claimants "vehemently deny" any involvement in the hacking of Kazakhstan's computer network and the publication of documents and the perpetrators have yet to be identified. Any involvement by the claimants has yet to be established, "if such an involvement was ever intended to be alleged in earnest," it said.

It said that it appreciated the need to protect against computer and cybercrime and the unfairness of allowing confidential evidence obtained through hacking to be admitted against the legitimate expectations of the parties.

On the other hand, it held there was a need for the tribunal to have access to information that is in the public domain, accessible to all and allegedly relevant and material to the dispute. "Ignoring such information would risk leading to an award that is artificial and factually wrong when considered in light of the publicly available information," it said. There was also an interest in upholding a party's right to prove its case.

With respect to the unprivileged leaked documents, the tribunal held that "the balancing of interests weighs in favour of admitting the documents," which are already "widely and freely" and lawfully available to the public". While the US District Court for the Southern District of New York has enjoined the unknown hackers from making stolen material available it has not prohibited third parties from accessing and relying on the material, it said.

It found confirmation for its decision in the *Wikileaks* cases cited by the claimants, stating that it did not see the distinction asserted by Kazakhstan between "leaked" and "stolen" documents in the public domain.

"When they are in the public domain, documents are by definition freely accessible whatever their original sources may have been: the question is [...] whether higher interest will command to prevent specific uses," it said. In weighing up the interests for and against admissibility, the unlawful ways the documents were obtained is just one element that can tip the balance of interests.

The tribunal said it was not influenced by Kazakhstan's questioning of the authenticity of the documents. The state can challenge this after they are admitted, using forensic evidence or the testimonies of those involved in their production, it said. It also did not regard it as relevant that it was Curtis – the law firm opposing admissibility – that had introduced the leaked documents in the *ConocoPhillips* and *Kilic* cases.

It agreed with the claimants that leaked documents from a state that is party to the arbitration are "particularly relevant and material".

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← pro admission

← against admission

← pro admission

← legal privilege prevails

← irrelevant consideration

← pro admission

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*EDF v. Romania*

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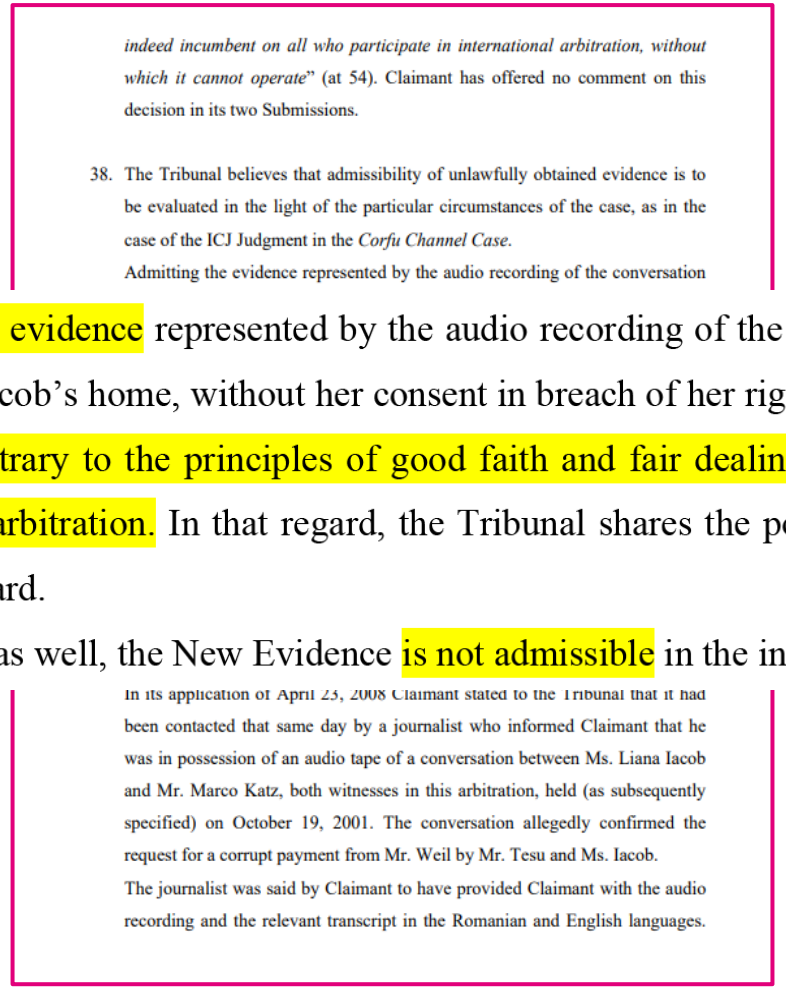


*indeed incumbent on all who participate in international arbitration, without which it cannot operate*" (at 54). Claimant has offered no comment on this decision in its two Submissions.

38. The Tribunal believes that admissibility of unlawfully obtained evidence is to be evaluated in the light of the particular circumstances of the case, as in the case of the ICJ Judgment in the *Corfu Channel Case*.
Admitting the evidence represented by the audio recording of the conversation

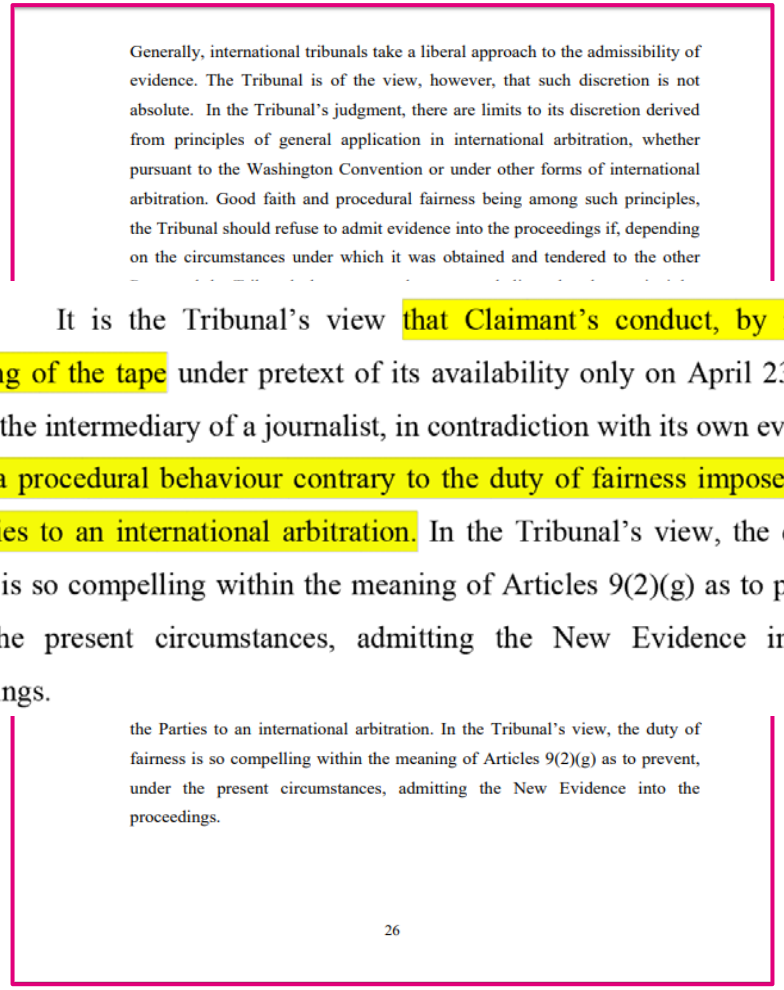
Admitting the evidence represented by the audio recording of the conversation held in Ms. Iacob's home, without her consent in breach of her right to privacy, would be contrary to the principles of good faith and fair dealing required in international arbitration. In that regard, the Tribunal shares the position of the *Methanex* award.

On that basis as well, the New Evidence is not admissible in the instant case.

In its application of April 23, 2008 Claimant stated to the Tribunal that it had been contacted that same day by a journalist who informed Claimant that he was in possession of an audio tape of a conversation between Ms. Liana Iacob and Mr. Marco Katz, both witnesses in this arbitration, held (as subsequently specified) on October 19, 2001. The conversation allegedly confirmed the request for a corrupt payment from Mr. Weil by Mr. Tesu and Ms. Iacob.
The journalist was said by Claimant to have provided Claimant with the audio recording and the relevant transcript in the Romanian and English languages.

**EDF (Services) Limited v. Romania** (ICSID Case No. ARB/05/13)
Procedural Order No. 3, 29 August 2008; para 38

# Does It Pay Off to Hold Off Evidence?
## *EDF v. Romania*



Generally, international tribunals take a liberal approach to the admissibility of evidence. The Tribunal is of the view, however, that such discretion is not absolute. In the Tribunal's judgment, there are limits to its discretion derived from principles of general application in international arbitration, whether pursuant to the Washington Convention or under other forms of international arbitration. Good faith and procedural fairness being among such principles, the Tribunal should refuse to admit evidence into the proceedings if, depending on the circumstances under which it was obtained and tendered to the other

[...] It is the Tribunal's view that Claimant's conduct, by its late proffering of the tape under pretext of its availability only on April 23, 2008 through the intermediary of a journalist, in contradiction with its own evidence, reveals a procedural behaviour contrary to the duty of fairness imposed upon the Parties to an international arbitration. In the Tribunal's view, the duty of fairness is so compelling within the meaning of Articles 9(2)(g) as to prevent, under the present circumstances, admitting the New Evidence into the proceedings.

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**EDF (Services) Limited v. Romania** (ICSID Case No. ARB/05/13)
Procedural Order No. 3, 29 August 2008; paras 47 and 48

# Does It Pay Off to Hold Off Evidence?
## *Fraport v. Philippines*

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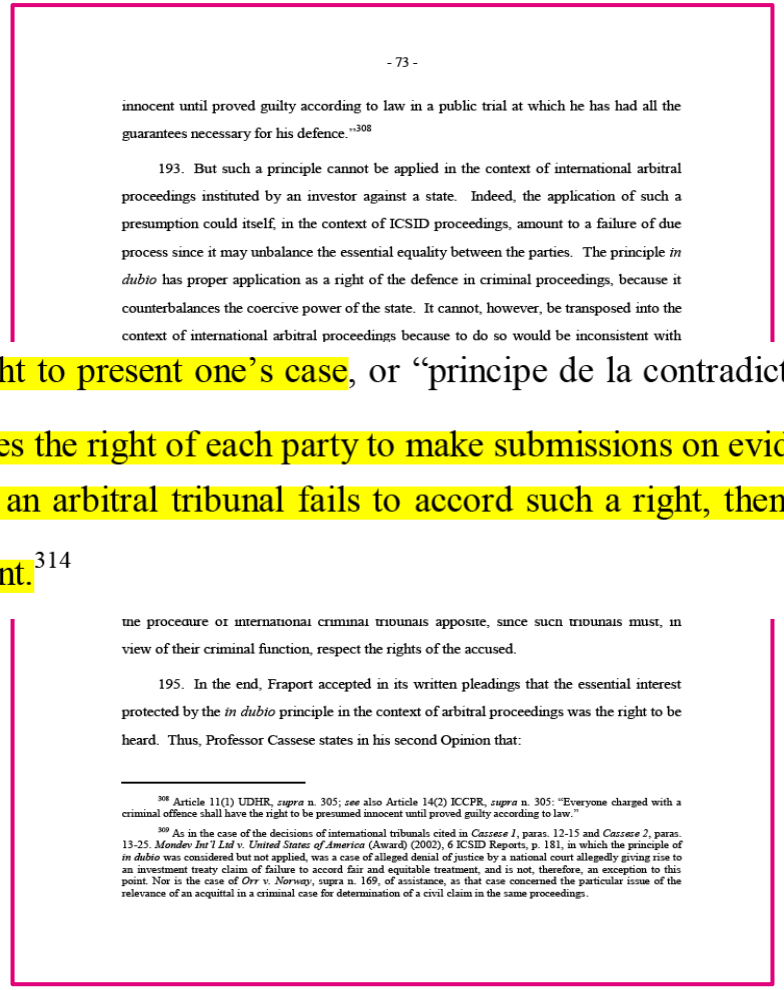

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innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence."[308]

193. But such a principle cannot be applied in the context of international arbitral proceedings instituted by an investor against a state. Indeed, the application of such a presumption could itself, in the context of ICSID proceedings, amount to a failure of due process since it may unbalance the essential equality between the parties. The principle *in dubio* has proper application as a right of the defence in criminal proceedings, because it counterbalances the coercive power of the state. It cannot, however, be transposed into the context of international arbitral proceedings because to do so would be inconsistent with

200. The right to present one's case, or "principe de la contradiction,"[312] in arbitral proceedings includes the right of each party to make submissions on evidence presented by its opponent.[313] If an arbitral tribunal fails to accord such a right, then its award will be subject to annulment.[314]

the procedure of international criminal tribunals apposite, since such tribunals must, in view of their criminal function, respect the rights of the accused.

195. In the end, Fraport accepted in its written pleadings that the essential interest protected by the *in dubio* principle in the context of arbitral proceedings was the right to be heard. Thus, Professor Cassese states in his second Opinion that:

[308] Article 11(1) UDHR, *supra* n. 305; *see* also Article 14(2) ICCPR, *supra* n. 305: "Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law."

[309] As in the case of the decisions of international tribunals cited in *Cassese 1*, paras. 12-15 and *Cassese 2*, paras. 13-25. *Mondev Int'l Ltd v. United States of America* (Award) (2002), 6 ICSID Reports, p. 181, in which the principle of *in dubio* was considered but not applied, was a case of alleged denial of justice by a national court allegedly giving rise to an investment treaty claim of failure to accord fair and equitable treatment, and is not, therefore, an exception to this point. Nor is the case of *Orr v. Norway*, supra n. 169, of assistance, as that case concerned the particular issue of the relevance of an acquittal in a criminal case for determination of a civil claim in the same proceedings.

**Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines** (ICSID Case No. ARB/03/25)
Decision on the Application for Annulment of Fraport AG
AG Frankfurt Airport Services Worldwide, 23 December 2010; paras 197, 198 and 200

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Victoria Pernt

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