Exposé

Confidential Information as Evidence
Before International Courts and Tribunals

(working title)

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Table of Contents

1. Overview of the Issue

Research into the rules of evidence in international law is only slowly commencing. There are gaping holes in some fields of international law regarding rules of procedure and evidence that are applied by international courts and tribunals. As international adjudicatory bodies are being used increasingly, they and the procedure they apply are also coming under increasing scrutiny.

All international courts and tribunals adhere to the general principle of the parties' right to a fair trial. The scope of this right is, however, not universally defined. It is generally associated with impartiality of the court and, usually, with equality of arms between the parties.[1] The right to a fair trial is well established in human rights regimes and the relationship between states protecting their national security and individuals' right to a fair trial often turns on aspects of court procedure. Apart from equality of arms, the right to a fair trial may include the admissibility and disclosure of evidence, and freedom from self-incrimination.[2] Furthermore, it is commonly accepted that the right to a fair trial encompasses defendants' right to receive access to relevant documents and other evidence to prepare their case.[3] These procedural aspects are particularly affected when a party relies on confidential information as evidence to assert its claim. Confidential information does not only affect states and individuals but also companies or third parties to a case, such as witnesses. It is information which at least one party considers to be sensitive and which they consider not in their interest to become public knowledge, or even to disclose only to the court or other party.

The ambiguity of many of the rules of procedure of international courts and tribunals regarding the use of confidential information makes it necessary to review and compare international institutions' approach to confidential information and its use as evidence and disclosure, thereby illustrating similarities and differences. This will reduce the uncertainty that parties face when confronted with relevant evidence which at least one party deems to be confidential, and could reduce inconsistencies between courts applying the same or similar rules of procedure and evidence. The aspect of a case's foreseeability is particularly relevant for actors in international law, so as to know how to approach a dispute, and understanding a court or tribunal's methods and reasoning is essential for confidence in that court or tribunal. Lack of transparency leads to a questioning of the court's authority but does enable flexibility to preserve secrecy of information which may be in the interest of all parties.[4] The protection of confidential information is ultimately to at least one of the party's advantage but can lead to an erosion of trust in a court and thereby undermine it work and potentially even lead to its jurisdiction being reduced.

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[1] Chittharanjan Amerasinghe, *Evidence in international litigation* (Martinus Nijhoff, Leiden and Boston 2005) 13 f.

[2] William A. Schabas, *The European Convention on Human Rights: A Commentary* (Oxford University Press, Oxford 2017) 287 – 302, 308 – 310.

[3] Inter-American Commission on Human Rights, Report on Terrorism and Human Rights OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr. 2002, (accessed http://hrlibrary.umn.edu/iachr/humanetreatment.html#D) para 238; e.g. Edwards and Lewis v UK (Applications nos. 39647/98 and 40461/98) ECHR 27 October 2004 para 46; David Harris et al, *Law of the European Convention on Human Rights* (Oxford University Press, Oxford 2018) 415 – 422.

[4] Emilie Hafner-Burton and David Victor, 'Secrecy in International Investment Arbitration: An Empirical Analysis' (2016) 7 Journal of International Dispute Settlement 161, 165 f.

2. Current State of Research and Identified Issues

This thesis analyses the use of confidential information in arbitration before international courts and tribunals, as well as discussing basic related issues such as the production, admissibility and disclosure of evidence before these courts generally. The first part of the thesis discusses specific issues of international procedural law which constitute general principles of international law or which constitute fundamental aspects of the rules of evidence used by international courts and tribunals. The second part of the thesis examines the use and inadmissibility of confidential information as evidence before international courts and tribunals.

As mentioned above, one of the general principles of international adjudication is the parties' right to a fair trial. Procedural aspects such as the production of evidence, the admissibility of evidence and exceptions to the production of evidence need necessarily to be discussed in this context. For the trial and the procedural aspects mentioned it is of paramount importance whether parties are responsible for the production of evidence or whether the adjudicatory bodies may ask for evidence, in which situations and which consequences the withholding of evidence may have for a party. The latter question is a direct result of a tribunal's handling of confidential information and will therefore be addressed in the second part of the thesis, while the former will be deal with in the first part as one of the principles of international adjudication and arbitration. It is assumed that *actori incumbit onus probandi*, i.e. that the burden of proof lies with the plaintiff, is a general principle of international law. This does not mean that a court or tribunal is only allowed to rule on the evidence presented - it may very well demand further evidence.[5]

After answering the question of who must or may produce evidence comes the question of whether there are exceptions to the production of evidence. It is in this step that the matter of confidential information becomes particularly relevant. In which situations must a party produce evidence which has been requested by another party or the tribunal? May a court or tribunal draw adverse effects from a party's refusal to produce evidence?

In situations when evidence is presented one must discuss whether the evidence is even admissible. Can information which has been obtained illegally, whether by violating national or international laws, and which is considered to be confidential, be admitted as evidence? The answering of this question turns on the court or tribunal's approach to fact finding. For example, the International Court of Justice has extensive fact finding powers but only reluctantly uses these power, instead preferring to rely on evidence presented by the parties and using its discretion in assessing the evidence brought before it.[6]

Evidentiary privilege is a legally recognised right to withhold certain information, in the form of testimony or documents, and well established in many national legislations, though accepted privileges differ between legal traditions.[7] Most privileges occur under multiple names

[5] Chittharanjan Amerasinghe, *Evidence in international litigation* (Martinus Nijhoff, Leiden and Boston 2005) 61 – 63.

[6] James Devaney, *Fact-Finding before the International Court of Justice* (Cambridge University Press, Cambridge 2016) 14 – 49.

[7] Richard Mosk and Tom Ginsburg, 'Evidentary Privileges in International Arbitration' (2001) 50 The International and Comparative Law Quarterly 345 – 385.

which focus on various aspects of the same privilege, e.g. confessional privilege is the same as clergy-penitent privilege but is most commonly associated with Christianity, especially Catholicism. Evidentiary privileges, both in national and international law, can be summarised in six broad categories: Privileges for government information, corporate secrets privilege, privileges of international organisations and NGOs, professional privileges, privilege of protection from self-incrimination and family testimony, and finally, privilege resulting from prior settlement discussions or mediation.

The second part of the thesis will, as one of the sub - research questions, focus on the existence of the six categories of evidentiary privilege above.

Some international courts and tribunals have rules of procedure regarding the disclosure of evidence and provisions safeguarding information relating to national security. In some cases[8] the rules of procedure are very clear on these issues, others[9] contain basic rules regarding the right to examine evidence, still other courts do not contain any provisions on the use of confidential information as evidence[10].

So far, there has been little research into comparing different fields of law with regard to international procedure and evidence, and those authors that have done so only discussed the topics of evidentiary privilege and confidentiality briefly, while discussing only of few international courts or international procedure and evidence in general.[11]

3. Research Question and Methodology

The main research question can be summarised as follows:

Which confidential information do international courts and tribunals admit as evidence?

The main research questions encompasses the following subquestions:

I) Do international courts and tribunals acknowledge evidentiary privileges and do certain evidentiary privileges constitute general principles of international law? II) How do courts and tribunals make provision for the use of confidential information, other than evidentiary privilege, as evidence and is there a general principle in international law regarding the use of confidential information in international arbitration? III) Which measures can international courts and tribunals impose to protect the confidentiality of evidence? Courts have a wide range of possibilities at their disposal from not admitting evidence, via *in camera* proceedings, to requiring the information to be disclosed with judgement made public. In this context, does the court admit illegally obtained evidence and how is it treated? IV) When requiring parties to

[8] Arts 103 and 105 Rules of Procedure of the General Court of 4 March 2015 of the Court of Justice of the European Union (OJ 2015 L 105, p. 1); Art 88 Rules of Procedure of the Court of the Eurasian Economic Union.

[9] The Rules of Procedure and Evidence of the ICC, ICTY and ICTR are limited, though there is rich jurisprudence and literature on the subject.

[10] For example, the International Tribunal for the Law of the Sea.

[11] E.g. Markus Benzing, *Das Beweisrecht vor internationalen Gerichten und Schiedsgerichten in zwischenstaatlichen Streitigkeiten* (Springer, Berlin and Heidelberg 2010) 410 – 443.

produce confidential exculpatory information or other confidential evidence, which consequences may a court or tribunal impose following a party's non-compliance?

The research questions will be answered by a comparative study of the statutes, rules of procedure, practice directions, and judicial decisions of international courts and tribunals. Scholarly works will support the clarification of judicial decisions and practice and, where pertinent, treaties will be examined.

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