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Announcements

Victoria University of Wellington Student and Alumni Subseries Issue XXI: Issues in International Arbitration and Dispute Resolution

State Power and Accountability is the fourth in 2017 of several issues of The Student/Alumni sub-Series of the VUW Legal Research Papers.

The Student/Alumni sub-Series was launched in 2015. It publishes a selection of honours and postgraduate papers from Victoria University of Wellington Law School.

The sub-Series includes both general and thematic issues.

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"REMOVED FROM SSRN"
Victoria University of Wellington Legal Research Paper, Student/Alumni Paper No. 14/2017

VUW LAW RPS SUBMITTER, *affiliation not provided to SSRN*

The equality of the parties is a fundamental procedural norm. The proper application of this principle has faced novel challenges in investor-State arbitration and World Trade Organisation dispute settlement, particularly in regulating the presentation of evidence and the exercise of State sovereign authority. While parties in these fora are nominally equal, there is often a vast discrepancy between their respective coercive and economic power. In light of this, the principle of equality of the parties must be given more substantive content, rather than limited to a strict notion of formal equality. Tribunals should have regard to these wider considerations as part of their inherent power and duty to safeguard the integrity of their proceedings.

"The Preclusive Effect of National Court Decisions in International Investment Arbitration – Res Judicata or Issue Estoppel Applicable or Not?"

Victoria University of Wellington Legal Research Paper, Student/Alumni Paper No. 15/2017

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It is accepted that a breach of an international investment agreement does not necessarily constitute a breach or violation of an investment treaty or international law norm applicable between an international investor and a host state. It is common that the adjudication of breaches of these agreements be determined by the host state's national courts or private tribunals. These national courts and tribunals determine issues of law and fact and these issues may again be pertinent in international investment arbitration – in the context of an alleged violation by a host state of the relevant investment treaty or international law norm. The view held in some investment awards is that the international investment tribunal is bound by these national court judgements under the principles of res judicata or issue estoppel, unless these determinations were made in breach of the relevant investment treaty or international law. The view held in other awards is that it is not bound. This paper investigates the law, literature and awards on the question as to what extend the international investment tribunal should be bound by these national determinations. It concludes that in the absence of any express agreement between the parties otherwise, the international investment tribunal is bound by these national court determinations, and hence res judicata or issue estoppel applies – subject only to review under general principles or customary rules of international law.

"Groups of Companies and Subject-Matter Jurisdiction in Investor-State Arbitration: Investment 'Unveiled'?"

Victoria University of Wellington Legal Research Paper, Student/Alumni Paper No. 16/2017

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Increasingly, investor-state arbitral tribunals have found themselves faced with claims by holding companies, subsidiaries or ultimate beneficiaries within "corporate groups," where the basis of the claim concerns property acquired in, or from, a fellow group member. Whilst the primacy of the state of incorporation for the purposes of nationality jurisdiction remains fundamentally intact, the question remains as to whether the shifting of assets entirely within a group can be considered an 'investment' in terms of a tribunal's ratione materiae jurisdiction. This paper offers an analysis of corporate groups predicated on their observed economic behaviour, with a view to how this might impinge on the economic conception of investment proffered in the jurisprudence of arbitral tribunals since Salini v Morocco. The author suggests that the activities of closely-held subsidiaries cannot technically be classed as investments, lacking a sufficient independent contribution and expectation of a pecuniary return. However, the outcome which is more consistent with the purposes and the consensus of prior awards is that such transactions still amount to an investment by reference to the underlying commitment of the parent company. This paper concludes with a brief discussion of whether such claims nevertheless represent an abuse of process.

"Proving Corruption Allegations in International Arbitration"

Victoria University of Wellington Legal Research Paper, Student/Alumni Paper No. 17/2017

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With the convergent of international anti-corruption conventions, corruption is increasingly condemned, prevented and adjudicated on both international and national levels. However, international arbitration is allegedly becoming a safe harbour which countenances and validates transnational contracts tainted by corruption. Despite the prevalence of corruption worldwide, corruption findings in international arbitral

awards is questionably scarce. In addition, international arbitrators have adopted noticeably divergent approaches to the adjudication of corruption allegations. Subject to the particular evidentiary rules applied by each arbitral tribunal, same allegations supported by evidence of similar nature could lead to contradictory interpretation and conclusions in different arbitral awards. The rules of evidence with respect to corruption allegations therefore are considered as the most controversial topic in international arbitration.

Arbitrators who proactively fight against corruption permit the burden of proof to be reversed from an alleging party to an alleged party in order to increase the chance of corruption findings. On the other hand, arbitrators who are more conservative and cautious about the severity of corruption allegations and their consequences insist on a heightened standard of proof. Instead of applying the general standard of 'balance of probabilities', they specifically require corruption allegations must be substantiated 'beyond reasonable doubt' or at least with 'clear and convincing' evidence. Based on the reported cases, none of the aforesaid approaches is practicable and balanced enough to ensure a fair chance of substantiating corruption allegations in international arbitration.

Thus, this research paper aims to address the question of what are the appropriate rules of evidence with respect to corruption allegations in international arbitration. Considering that international arbitration, by nature, is subject to the party autonomy and the arbitral discretion, it is not the purpose of this paper to determine any rigid and universally accepted rules of evidence to handle corruption allegations. Alternatively, it is more crucial for international arbitrators to achieve a common understanding of and a consistent approach to the adjudication of corruption allegations in the context of international arbitration.

Ultimately, the applicable evidentiary rules should be able to maintain the appropriate equipoise between the pursuit of parties' commercial interests and the integrity of truth seeking process. Regardless of whether international arbitrators consider themselves as the guarantor of the truth or the servant of the parties, they are always responsible for addressing and adjudicating corruption allegations appropriately. Therefore, the applicable evidentiary rules must enable international arbitrators and dispute parties to substantiate corruption allegations in a balanced, fair and practicable manner. It should be always kept in mind that corruption is intrinsically difficult to prove while international arbitration is devoid of power and resources to investigate, prosecute and pursue evidence. Thus, the persistence of the burden of proof on alleging parties, alongside the 'balance of probabilities' standard is an optimal solution to the existing dilemma in international arbitration. The aforesaid evidentiary rules are practicable but stringent enough to ensure that international arbitration is serving its commercial purposes in the compliance with international anti-corruption framework.

"Negotiating Price Reopener Clauses in Long-Term Sales of Natural Gas"
Victoria University of Wellington Legal Research Paper, Student/Alumni Paper No. 18/2017

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This paper examines the use of arbitration for resolving disputes about price formulae in contracts regarding long-term gas supply agreements. Arbitration is preferred because it results in binding awards enforceable under the New York Convention. However, arbitrators frequently treat the dispute as adversarial and put significant weight on the technical language of reopener clauses. A closer look at the nature of gas price disputes and their contractual underpinnings suggests that standard arbitral process and values are inappropriate. Reopener clauses are tools of co-operation designed to preserve the original bargain over a long period of time. They are typically drafted in a context of significant uncertainty about future economic trends and neither of the parties are at fault for failing to agree how to apply their contract to the facts surrounding a price review. Another process is needed which emphasises the distinctive nature of gas price arbitration. A possible solution arises in the form of "conciliation-arbitration". Conciliation- arbitration is a process where arbitrators deliberately attempt to encourage settlement through informal evaluation of the dispute, and only use standard adversarial processes if parties still fail to reach settlement. Conciliation- arbitration poses nominal ethical risks that are managed by giving parties the power to opt out at the end of the conciliatory stage. Not every arbitral regime will permit use of this process but the decision should be one for the parties to make.

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About this eJournal

Victoria University of Wellington Legal Research Papers Series primarily contains scholarly papers by members of the **Faculty of Law at Victoria University of Wellington**. Some issues collect a number of papers on a similar theme to form a suite of papers on a single topic. Others issues are general or distribute

mainly recent work.

The Student/Alumni Series is a subseries of the Victoria University of Wellington Legal Research Paper Series. The subseries started in 2015 and publishes papers by students and alumni of Victoria University of Wellington, comprising primarily work for honours and postgraduate courses. Papers are collected into thematic or general issues.

The Victoria University of Wellington was founded in 1899 to mark the Diamond Jubilee of the reign of Queen Victoria of Great Britain and of the then British Empire. Law teaching started in 1900. The Law Faculty was formally constituted in 1907. The first dean was Richard Maclaurin (1870-1920), an eminent scholar of both law and mathematics. Maclaurin went on to lead the Massachussetts Institute of Technology as President in its formative years. Early professors included Sir John Salmond (1862-1924), still one of the Common Law's leading scholars. His texts on jurisprudence and torts have gone through many editions and remain in print.

Alumni include Sir Robin Cooke (1926-2006), one of the leading judges of the British Commonwealth. As Baron Cooke of Thorndon, he sat on over 100 appeals to the Appellate Committee of the House of Lords, one of very few Commonwealth judges ever appointed to do so.

Since 1996 the Law School has occupied the Old Government Building in central Wellington. Designed by William Clayton and opened in 1876 to house New Zealand's then civil service, the building is a particularly fine example of Italianate neo-Renaissance style. Unusually among large colonial official buildings of the time it is constructed of wood, apart from chimneys and vaults.

The School is close to New Zealand's Parliament, courts, and the headquarters of government departments. Throughout Victoria's history, our law teachers have contributed actively to policy formation and to law reform. As a result, in addition to many scholarly articles and books, the Victoria SSRN pages include a number of official reports.

Victoria graduates approximately 230 LLB and LLB(Hons) students each year, and about 60 LLM students. The faculty has an increasing number of doctoral students. Ordinarily there are ten to twelve students engaged in PhD research.

Victoria University observes the British system of academic ranks. In North American terms, lecturers and senior lecturers are tenured doctrinal scholars, not legal writing teachers. A senior lecturer corresponds approximately to a North American associate professor in rank.

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