Chapter 42

Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration

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I. Introduction

Dissenting opinions appear to have become an accepted practice in international arbitration. The current debate concentrates on their procedure, form, and content.[1] Alan Redfern noted that "[a]t present, a generally relaxed attitude towards dissenting opinions seems to be taken not only by the arbitral institutions, but also by the arbitrators themselves … ."[2] In this contribution, I would like to explore the cautionary note with which Redfern concluded his seminal article, namely, that the "[t]ime has perhaps come to inquire whether the present leniency towards dissenting opinions … has gone too far."[3] I propose to do so with respect to investment arbitrations because many of the awards and dissenting opinions have been made available publicly, particularly party-appointed arbitrators' dissenting opinions.[4]

As a legal matter, arbitrators generally may render a dissenting opinion in investment arbitrations. It is even treaty law, at least for those investor-state arbitrations conducted under the auspices of the International Centre for Settlement of Investment Disputes (ICSID): "Any member of the Tribunal may attach his individual opin-

1 Manuel Arroyo believes that the "scientific debate [about dissenting opinions in international arbitration] has become stale and redundant." Manual Arroyo, *Dealing with Dissenting Opinions in the Award: Some Options for the Tribunal*, 26 ASA Bull. 437, 459 (2008).

2 Alan Redfern, *Dissenting Opinions in International Commercial Arbitration: The Good, the Bad and the Ugly*, 20 Arb. Int'l 223, 242 (2004).

3 *Id.* at 242 n.3.

4 Because it is uncommon to publish international commercial awards, "it is difficult to generalize from the sample of published awards," and hence I will not use them as the basis for analysis in this contribution. Christopher Drahozal, *Of Rabbits and Rhinoceri: A Survey of Empirical Research on International Commercial Arbitration*, 20 J. Int'l Arb 23, 25 (2003). Investment arbitration awards, on the other hand, are routinely published, whether in full (on websites and in specialized law reporters) or in redacted form (such as pursuant to ICSID Arbitration Rule 48(4).

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ion to the award, whether he dissents from the majority or not, or a statement of his dissent."[5]

The practice of dissenting opinions originated in the Anglo-American judicial culture in which case law plays a prominent role. England's House of Lords developed a practice whereby judges would give individual speeches, opening the door to the possibility of dissenting opinions. In the United States, after some initial hesitation, individual judges also began to issue dissenting opinions. The Permanent Court of International Justice (PCIJ) and its successor, the International Court of Justice (ICJ), also permit dissenting opinions.[6] In contrast, civil law states generally disallow dissenting opinions, principally because of their emphasis on collegiality in the dispensation of justice.[7] Similarly, the 1899 Hague Convention on the Pacific Settlement

5 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 48(4), June 10, 1966, 17 U.S.T 1270, 575 U.N.T.S. 160 [hereinafter ICSID Convention]. The issue of dissenting opinions was first raised by Mr. Tsai, the Chinese representative, at the Third Session of the Asian Regional Meeting on April 29, 1964. ICSID (W. Bank), History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States 458, 515 (1968). Although the representatives did not discuss this particular issue elaborately during the regional meetings, the Draft Convention of September 11, 1964, prepared for the Legal Committee, provided in draft Article 51(3) that "except as parties agree: (a) the award shall state the reasons upon which it is based; and (b) any arbitrator dissenting from the majority decision may attach his dissenting opinion or a bare statement of his dissent." *Id.* at 610, 624; *see also* Christoph Schreuer et al., The ICSID Convention: A Commentary (2d ed. 2009) 830-34.

6 A draft of Article 56 of the Statute of the Permanent Court of International Justice, prepared by the Advisory Committee of Jurists, provided that "dissenting judges shall be entitled to have the fact of their dissent or reservations mentioned," but to this was added, "[b]ut the reasons for their dissent or reservations shall not be expressed in the judgment." P.C.I.J: Advisory Committee of Jurists, Procès-Verbaux of the Proceedings of the Committee: 16 June-24 July 1920 (1920). The League of Nations did not adopt this proposal. The final version of the Statute provided: "If the judgment does not represent in whole or in part the unanimous opinion of the judges, dissenting judges are entitled to deliver a separate opinion." Statute of the Permanent Court of International Justice art. 57, Dec. 16, 1920, 6 L.N.T.S. 380 (1926).

7 Some exceptions exist today: for example, judges of the German Constitutional Court may issue dissenting opinions.

of International Disputes does not allow dissents.[8] Nor does the European Court of Justice.[9]

II. Dissenting Opinions by Party-Appointed Arbitrators in Practice

Those who favor giving arbitrators the right to issue dissenting opinions in investor-state arbitrations rely mainly on four arguments: (i) it will lead to a better award; (ii) the majority will act more responsibly; (iii) it will bolster party confidence in the process; and (iv) it will contribute to the development of the law.

The first argument presumes that "a well-reasoned dissent can help ensure that the majority opinion deals with the most difficult issues confronting it."[10] That may be true, but is it not the task of any competent tribunal to ensure that it deals with all relevant and important issues, including "the most difficult" ones? The second argument begs the question whether an arbitral tribunal would act less responsibly without (the threat of) a dissenting opinion. Again, that presumption is difficult to verify.

The third and fourth arguments appear to be based on the practices of certain national courts (notably those in common-law states) and international courts (notably

8 During the Third Commission's session (the plenary session charged with adopting the final text of the Hague Convention), M.E. Rolin, a Belgian representing Siam, suggested that "the reasons for the vote of the minority be given in the arbitral award." Chevalier Descamps, representing Belgium, replied that "this would give the appearance of there being two judgments and of laying the dissent of the arbitrators before public opinion. The dissenting arbitrators are allowed to state their dissent, but it would not be safe to go further than that." Mr. Rolin did not press the point, concluding that

> though still of the opinion that it would be preferable if the arbitrators who do not concur in the award were invited to state officially the reasons for their dissent, does not consider this absolutely necessary. Mr. Rolin therefore refrains from presenting a formal amendment. He presumes that the arbitrators who are unable to give the reasons for their views immediately after the rendering of the award will not fail to do so without in their reports to the Governments or even to the press. The drawback of having the dissent of the arbitrators brought to public notice will therefore not be completely prevented, whatever may be the reporter's opinion, and that is why Mr. Rolin deemed it preferable to limit at the outset the object and the scope of the dissent by inviting the arbitrators who do not concur in the award to give on the spot the reasons for their dissenting vote.

THE PROCEEDINGS OF THE HAGUE PEACE CONFERENCES: TRANSLATION OF OFFICIAL TEXTS 616-17 (J.B. Scott ed., 1920) [hereinafter PROCEEDINGS OF THE HAGUE CONFERENCES]. As a result, Article 52(2) of the 1899 Hague Convention on the Pacific Settlement of International Disputes, July 29, 1899, 32 Stat. 1779, 1 Bevans 230, provides: "Those members who are in the minority may record their dissent when signing [the Award]." Article 79 of the 1907 Hague Convention for the Pacific Settlement of International Disputes, Oct. 18, 1907, 36 Stat. 2199, 1 Bevans 577, which is said to have improved upon the 1899 Convention, does not mention dissents at all.

9 Vlad Perju, *Reason and Authority in the European Court of Justice*, 49 VA. J. INT'L L. 307, 308 (2009).

10 Richard Mosk & Tom Ginsburg, *Dissenting Opinions in International Arbitration*, 15 MEALEY'S INT'L ARB. REP. 6 (2000).

the ICJ). Those courts, however, operate in settings and with dynamics that differ to a certain extent from those that prevail in international arbitration. An inquiry into the actual practices of investment arbitrations may therefore be more useful. To that end, one may examine both the Investment Treaty Arbitration (ITA) and ICSID websites, which contain approximately 150 publicly reported decisions, whether jurisdictional or on the merits, in investment cases.[11]

As the 150 decisions show, three-member tribunals decide most investment arbitrations.[12] The prevailing method for selecting the arbitrators is for each party to appoint an arbitrator and then for the two party-appointed arbitrators to appoint the presiding arbitrator. The 150 decisions show that the presiding arbitrator rarely dissents.[13] Given the negligible number of dissents by presiding arbitrators, they can be left aside. The 150 decisions also show that a party-appointed arbitrator issued a dissenting opinion in 34 cases (that is, in approximately 22 percent of the 150 cases under analysis). The Annex to this contribution summarizes them.

The astonishing fact is that nearly all of those 34 dissenting opinions were issued by the arbitrator appointed by the party that lost the case in whole or in part. A nearly 100 percent score of dissenting opinions in favor of the party that appointed the dissenting arbitrator is statistically significant. In a tribunal of three, one could imagine that there is about a 33 percent chance that the dissenting opinions would be in favor of that party; or, if one eliminates the presiding arbitrator, the chance may be about 50 percent. It is said that "the parties are careful to select arbitrators with views similar to theirs."[14] Assuming—generously—that such a factor influences half of dissenters,[15] the percentage could be assessed to be about 75 percent. But the statistics show that dissenting opinions are almost universally issued in favor of the party that appointed the dissenter.[16]

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11 Chronological Listing of ITA Arbitrations, http://ita.law.uvic.ca/chronological_list.htm (last visited July 23, 2009); ICSID Cases, http://icsid.worldbank.org/ICSID/Index.jsp (follow "Cases" hyperlink; then follow "Search Cases" hyperlink) (last visited July 23, 2009). This contribution does not deal with the Iran-US Claims Tribunal's awards and decisions because of that tribunal's *sui generis* circumstances, even though a number of those awards and decisions may be deemed investment disputes. *See infra* nn.53-54.

12 One recent survey of 102 investment arbitration awards found that three-member tribunals rendered 100 of them. Susan Franck, *Empirically Evaluating Claims About Investment Treaty Arbitration*, 80 N.C. L. Rev. 1, 77 (2007).

13 One of those rare examples is Professor Prosper Weil's dissenting opinion in *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18 (Apr. 29, 2004) (Decision on Jurisdiction) (Weil, dissenting), *available at* http://ita.law.uvic.ca/documents/tokios-dissenting_opinion_000.pdf. Having opined that the tribunal lacked jurisdiction, Professor Weil resigned before the tribunal heard the matter on the merits.

14 Mosk & Ginsburg, *supra* note 10, at 9.

15 This is already a generous percentage because normally one would not know how an arbitrator will evaluate the facts, and it is a rule of thumb that in most cases the facts constitute 80% of the case.

16 Arbitrators appointed by the investor have dissented slightly more (nineteen cases) than arbitrators appointed by the host state (sixteen cases), and in one case, *Duke Energy Int'l*

That nearly 100 percent of the dissents favor the party that appointed the dissenter raises concerns about neutrality. While treaty law and arbitration rules allow dissents, they also require that an arbitrator be impartial and independent.[17] That applies not only to the presiding arbitrator but also to the party-appointed arbitrators. Few exceptions for party-appointed arbitrators exist: they may confer ex parte with the party that appointed them about the selection of the presiding arbitrator. It is also an implied duty that they ensure that the tribunal consider the arguments of the party that appointed them. This duty does not, however, mean that the party-appointed arbitrator may act as an advocate for the party that appointed him or her. The nearly 100 percent score is difficult to reconcile with the neutrality requirement.[18]

In view of the foregoing, one wonders whether, in fact, "[d]issents can help build confidence in the process" or "enhance the legitimacy of the process by showing the losing party that alternative arguments were considered, even if ultimately rejected."[19] One also wonders whether (the possibility or threat of) a dissent really does "force the majority to develop sounder arguments."[20] Indeed, it is hard to see how dissenting opinions enhance the quality of arbitral decision-making given that almost 100 percent of the dissents are issued by party-appointed arbitrators and almost 100 percent of them favor the party that appointed the dissenter. Moreover, the arbitral tribunal has a duty to address all relevant and important arguments that a party has advanced. If a tribunal fails to do so, its award may be set aside. Compliance with that duty

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Peru Inv. No. 1, Ltd. v. Peru, ICSID Case No. ARB/03/28 (Feb. 1, 2006) (Decision on Jurisdiction), both party-appointed arbitrators dissented. *See infra* Annex. In another arbitration, both co-arbitrators, one party-appointed and the other appointed by an appointing authority, dissented. AMT v. Zaire, 5 ICSID Rep. 11 (Feb. 21, 1997) (Award). The present contribution does not take the latter arbitrator's dissenting opinion into account statistically because it concerns dissenting opinions by party-appointed arbitrators.

17 *See* ICSID Convention, *supra* note 5, art. 14(1) ("Persons designated to serve on the Panels shall … exercise independent judgment."); *id.* art. 57 (allowing disqualification of panel members who violate art. 14(1)'s requirements); Int'l Chamber of Comm., Rules of Arbitration, art. 7(1) (Jan. 1, 1998) ("Every arbitrator must be and remain independent of the parties involved in the arbitration."); London Ct. Int'l Arb., LCIA Rules, art. 5(1) ("All arbitrators conducting an arbitration under these Rules shall be and remain at all times impartial and independent of the parties; and none shall act in the arbitration as advocates for any party … ."); UNCITRAL Arbitration Rules, G.A. Res. 31/98, art. 9, U.N. Doc. A/31/17 (Dec. 15, 1976) (requiring disclosure by an arbitrator of justifiable doubts as to his impartiality and independence); *Id.* art. 10 (allowing a party to challenge an arbitrator if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence).

18 Recall, however, that dissenting opinions were rendered in 34 of 150 decisions (about 22%). Hence, unanimous outcomes obtained in about 78% of the decisions. Because of the secrecy of deliberations, it is not possible to comment, with anything other than anecdotal experience, upon any real or perceived partisanship on the part of party-appointed arbitrators in unanimous tribunals. This issue is therefore not studied in this contribution.

19 Mosk & Ginsburg, *supra* note 10, at 7.

20 *Id.*

would not seem to require the mechanism or threat of a dissenting opinion.

The argument that dissenting opinions contribute to the development of the law is also contradicted by the 150 reported investment arbitration awards. With one curious exception,[21] in none of the investment cases did the arbitrators refer to a dissent in a previous investment case.[22] Although it cannot be supported empirically, one

21 The sole exception that could be found is *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. 05/19, ¶ 125 (July 3, 2008) (Decision on Award) ("[A]n international tribunal must accept the *res judicata* effect of a decision made by a national court within the legal order where it belongs."), *available at* http://ita.law.uvic.ca/documents/HelnanAward.pdf. In support of that statement, the tribunal referred to a passage in the dissenting opinion in *Fraport AG Frankfurt Airport Services Worldwide v. Philippines*, ICSID Case No. ARB/03/25, § 26 (Aug. 16, 2007) (Award) (Bernardo Cremades, dissenting) ("This Tribunal is bound to apply Philippine law to the interpretation of the Anti-Dummy Law (Art. 42 of the Washington Convention), and it manifestly exceeds its powers if it does not do so. It is not bound by a decision of the Philippine court—even the Supreme Court—but its own judgment on Philippine law must be premised on the Philippine law itself. It is the *res judicata* in Philippine law that the Terminal 3 concession is null and void *ex tunc* and not *ex nunc*, and this must be accepted by the Arbitral Tribunal. In my view, the Tribunal should respect the consequences of the Supreme Court decision. On this basis it is impossible for Piatco, or Fraport, to be guilty of any breach of the Anti-Dummy Law."), *available at* http://ita.law.uvic.ca/documents/FraportAward.pdf. The tribunal's reliance on this dissenting opinion is remarkable because there is a large number of precedents, representing unanimous or majority awards, that make the same point. Actually, in the alphabetical listing of investment awards, one need go no further than the As to find an example of a unanimous award that has been referred to many times in subsequent awards and literature: Azinian, Davitian, & Baca v. Mexico, ICSID Case No. ARB(AF)/97/2 (Nov. 1, 1999) (Award), available at http://ita.law.uvic.ca/documents/Azinian-English.pdf.

22 In one case, a dissenting opinion created a preliminary issue in the sequel of that case. In *Waste Management v. Mexico I*, the majority dismissed jurisdiction because of claimant's failure to provide under Article 1121(2)(b) of the North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 605 (1993), a waiver of the right to initiate or continue, before any tribunal or court, dispute settlement proceedings with respect to the measures taken by the Respondent that are allegedly in breach of NAFTA. *Waste Management v. Mexico I*, ICSID Case No. ARB(AF)/98/2 (June 2, 2000) (Award), *available at* http://ita.law.uvic.ca/documents/WasteMgmt-Jurisdiction.pdf. The dissent disagreed and added that the majority decision had a "drastically preclusive effect," *id.* ¶ 9, with the result that "the entire NAFTA claim has been undone," *id.* ¶ 63. In *Waste Management v. Mexico II*, the respondent relied on the dissenting opinion in *Waste Management I*. Waste Management v. Mexico II, ICSID Case No. ARB(AF)/00/3 (June 26, 2002) (Decision on Mexico's Preliminary Objection concerning Previous Proceedings), *available at* http://ita.law.uvic.ca/documents/WastMgmt2-Jurisdiction.pdf. The Tribunal, which was composed of different arbitrators, rejected the respondent's argument, observing:

> [T]he dissenting arbitrator's characterization of the effect of the decision cannot be decisive, even if the characterization was clear and unambiguous (which it is not). Only a majority of the Tribunal could determine the effect of its decision, and as noted there is no indication on the face of the award that the majority expressed any view on the matter.

Id. ¶ 23.

reason for such a lack of reference may be that tribunals know that dissents in investment arbitrations almost always emanate from the arbitrator appointed by the party that lost the case in whole or in part. In other words, regrettably, dissenting opinions by party-appointed arbitrators in investment arbitrations have become suspicious. Additional factors that could explain why other tribunals have not cited dissenting opinions merit further research.[23]

Some authors nonetheless believe that "dissenting (and concurring) opinions have a significant and beneficial role to play" and that "[t]reaty arbitrators should refrain from elevating collegiality over the expression of individual judgment on a significant point of investment international law."[24] By contrast, the tribunal in Rompetrol Group N.V. v Romania specifically refused to opine on the legal authority of dissenting opinions, declining to follow Professor Weil's approach in Tokios Tokelés v Ukraine.[25]

In this connection, if one studies the thirty-four dissenting opinions, one wonders why a number of them were issued at all. If the test is that "[a]n investment treaty arbitrator should dissent where he or she discerns a principled basis to do so,"[26] few of the thirty-four dissenting opinions seem warranted. Another argument is that dissenting opinions enhance transparency by allowing the parties to see which of the arbitrators favored or disfavored particular positions and that this would, in turn, improve accountability. It depends on one's views of the judicial and arbitral process whether one would like to equate it to a political or a collegial process. Such a comparison will likely never be completely valid, as the principle of the secrecy of deliberations is universally accepted. Nonetheless, those who perceive a higher degree of transparency and accountability for arbitrators in investment arbitrations will find little or no support in dissenting opinions rendered by party-appointed arbitrators in the present situation.

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23 It may be recalled that this contribution does not deal with awards and decisions of the Iran-US Claims Tribunal due to its particular circumstances. *See supra* note 11.

24 Laurence Shore & Kenneth Juan Figueros, *Dissents, Concurrences and a Necessary Divide Between Investment and Commercial Arbitration*, 3 Global Arb. Rev. 18, 20 (2008). It is unclear on what basis the authors choose the dissenting opinions they state are exceptions to dissents issued by "a crude contrarian or a party's puppet" given that many of the opinions so cited were issued by party-appointed arbitrators in favor of the party that appointed them. *Id.* at 19.

25 The Rompetrol Group N.V. v Romania, ICSID Case No. ARB/06/3, ¶ 85 (Apr. 18, 2008) (Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility) ("The Tribunal (which is not, of course, bound by the decisions of other ICSID tribunals) can leave aside the question what authority should be attached to a dissenting opinion in contrast to the Award itself, since (as the Claimant argued) the view expressed by Prof. Weil has not been widely approved in the academic and professional literature, or generally adopted by subsequent tribunals. The Tribunal would in any case have great difficulty in an approach that was tantamount to setting aside the clear language agreed upon by the treaty Parties in favour of a wide-ranging policy discussion."), *available at* http://ita.law.uvic.ca/documents/RomPetrol.pdf.

26 Shore, *supra* note 24, at n.22.

III. Analysis of the Disadvantages of Dissenting Opinionsby Party-Appointed Arbitrators

Doubts about dissenting opinions by party-appointed arbitrators arise not only in relation to the neutrality of the arbitrator and the development of investment law; dissenting opinions may also weaken the authority of the award. In 1899, Descamps described the situation as "the appearance of there being two judgments."[27] Dissents may impair enforcement and incentivize a dissatisfied party to move to annul the award. In the view of some, this argument "underestimates the ability of dissenting opinions, merely by expressing alternative views, to reduce potential challenges to awards"; they reason that "[i]f parties believe their views have been considered and rejected for the best possible reasons, they may be less likely to challenge awards."[28] Those views are not supported by any case. Regrettable though it may be, the contrary is true.

A case in point is Klöckner v. Cameroon, an early ICSID case. Cameroon prevailed in the first arbitration, but there was a detailed dissenting opinion by the arbitrator appointed by Klöckner. Klöckner sought annulment of the award, mainly on basis of the reasons set forth in the dissenting opinion. In a "first generation" annulment decision, the ad hoc committee annulled the award, relying in large part on the dissenting opinion.[29] Klöckner resubmitted the case but lost again. Cameroon's award in the second arbitration, however, was reportedly less favorable to it.[30]

A dissent should not be a platform for preparing for annulment. If there is something wrong with either the award or the procedure leading to it, the award itself and the record of the arbitration should suffice for applying for annulment. Klöckner shows, in the extreme, why that should be so: the dissenting arbitrator, who had been appointed by Klöckner in the first arbitration, became Klöckner's counsel in the second arbitration.[31]

Another example is the case of CME v. The Czech Republic.[32] The majority award was in favor of CME, and the arbitrator appointed by the Czech Republic dissented.[33] Not only did he dissent on points of fact and law but also on the conduct of the ar-

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27 Proceedings of the Hague Conferences, *supra* note 8, at 617.

28 Mosk & Ginsburg, *supra* note 10, at 7.

29 Klöckner v. Cameroon, ICSID Case No. ARB/81/2 (Oct. 21, 1983) (Decision on the Application for Annulment Submitted by Klöckner), *available at* http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC665_En&caseId=C127.

30 The award is not publicly available.

31 A deontological conduct that reportedly was not disapproved by the *Bâtonnier* of the Strasbourg Bar Association, to which Association the arbitrator in question belonged.

32 CME v. The Czech Republic, UNCITRAL Arbitration (Sept. 13, 2001) (Partial Award), *available at* http://ita.law.uvic.ca/documents/CME-2001PartialAward.pdf .

33 CME v. The Czech Republic, UNCITRAL Arbitration (Sept. 13, 2001) (Partial Award) (Jaroslav Hándl, dissenting), *available at* http://ita.law.uvic.ca/documents/CME-2001Dissent.pdf. Notably, the Czech Republic appointed a different arbitrator in the parallel case

bitration and the deliberations themselves. The result was an almost unprecedented parade of arbitrators as witnesses before the Svea Court of Appeal (Sweden being the place of the arbitration), testifying about what happened during the deliberations.[34] Because of their experience, a dissent by a judge or a presiding arbitrator normally does not infringe the principle that deliberations must remain confidential. But the instrument of a dissent in the hands of a party-appointed arbitrator may be another matter, as CME illustrates.[35] The risk of violating the secrecy of deliberations—indeed, the very legitimacy of the process of arbitral decision-making—cannot be ameliorated by a "vigorous tradition of well-reasoned dissent."[36] That tradition is limited to judges and experienced arbitrators, mainly from Anglo-American jurisdictions. But these individuals do not constitute the majority of investment arbitrators.[37]

One of the major problems with dissents by party-appointed arbitrators is that they may inhibit the deliberative process. A party-appointed arbitrator who believes that he or she should support (or even improve) the case advanced by the party that appointed him or her is not likely to engage in meaningful dialogue about the case with his or her colleagues. The party-appointed arbitrator's colleagues, in turn, will

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Ronal S. Lauder v Czech Republic, which favored the Czech Republic. That award was unanimous.

34 See Czech Republic v. CME Czech Republic BV, Case No T 8735-01, 87-90 (May 15, 2003), 42 ILM 919 (Svea Court of Appeals), *available at* http://ita.law.uvic.ca/documents/CME2003-SveaCourtofAppeal_000.pdf. The annulment application was rejected.

35 Some presiding arbitrators, however, seem to have difficulty with the principle. *See, e.g.*, Decision of Appointing Authority to the Iran-U.S. Claims Tribunal (May 7, 2001) (deciding on the challenge brought by the United States against Judge Bengt Broms, Chairman of Chamber One at the Iran-US Claims Tribunal, based on revelations by him of parts of the deliberations in his separate concurring and dissenting opinion); 16-5 Mealey's Int'l Arb. Rep. 2 (2001) ("He has been unable to resist the temptation to continue arguing with his colleagues …" ; "Revelations of such informal discussion and of suggestions made, could be very damaging and seriously threaten the whole deliberation process …" ; "A judge may be strictly and correctly impartial and independent though massively indiscreet and forgetful of the rules." Sir Robert did not accept the challenge but admonished Judge Broms in no uncertain terms: "… after his ill-judged breaches of the secrecy of the deliberations … This was a most serious error … It seems right to make it clear to Judge Broms that he should now resolve on no account to fall into this error again … ."); Redfern, *supra* note 2, at 234-36. Presiding arbitrators' separate opinions can also be confusing. *See, e.g.*, Case Concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v. Sen.), 1991 I.C.J. 53 (Nov. 12), *available at* http://www.icj-cij.org/docket/files/82/6863.pdf; *see also* Stephen Schwebel, *The Majority Vote of an International Arbitral Tribunal*, 2 Am. Rev. Int'l Arb. 402 (1991).

36 Mosk & Ginsburg, *supra* note 10, at 8.

37 Susan Franck notes that out of 145 investment treaty arbitrators, the larger number came from the Civil Law tradition: 31.1% of arbitrators were nationals of the United States of America, United Kingdom and Australia, whereas 34.3% were nationals of Mexico, France, Germany, Sweden, Italy, Switzerland, Ecuador and Spain. Canadian nationals comprised 5.5% of the total number of arbitrators. *See* Susan Franck, *supra* note 12, at 77-78.

soon discover that there is a quasi-advocate among the members of the tribunal.[38] The result may be either that the presiding arbitrator and the other party-appointed arbitrator will no longer take the advocate-arbitrator seriously or that the other party-appointed arbitrator will do the same relative to his or her co-arbitrators. In both cases, the deliberative process breaks down. Moreover, arbitrators cannot freely exchange views with the prospect that a dissenting opinion inspired by party-partisanship may be forthcoming. Yves Derains wrote two instructive articles about the distinction between the harmonious deliberation and the pathological deliberation, in which he described certain pathological deliberations as "le terrorisme arbitral."[39]

There is a third type of deliberative process that may be conducive to dissenting opinions. A number of presiding arbitrators (myself included) attempt to convene with their colleagues after the hearing every day for some 20 to 30 minutes, usually addressing one question only: "What did we learn today?" While some initially react "Nothing!", the ensuing exchange of views assists in seeing where the arbitrators are in their thinking about the case, what needs further study and reflection, and what questions they may wish to explore with the parties. Some presiding arbitrators do not follow this kind of interactive deliberative process. They deliberate by asking each party-appointed arbitrator to write a note on the case and, having received notes from both arbitrators, the presiding arbitrator writes back that he or she prefers the views expressed in one of the notes. There is little or no exchange of views in person. It is therefore unsurprising that the arbitrator whose note is not chosen feels left out and later converts that note into a dissent.

The practice of dissents in investment arbitration may even have reached the point where a party-appointed arbitrator is now expected to dissent if the party that appointed him or her has lost the case entirely or in part. If there is no dissent, commentators emphasize that the award is unanimous, in which case some even express surprise.[40] Pressure for a "mandatory dissent" also seems to be emerging. In my view, this is undesirable. The principle should remain that an award should be presumptively unanimous, which should be unremarkable, and the exception should be a dissent, which should be issued in extreme cases only.[41] Surprise and comment should

38 *See* CME v. Czech Republic, UNCITRAL Arbitration (Sept. 13, 2001), at 88.

39 Yves Derains, *La pratique du délibéré arbitral*, *in* Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Rober Briner 221, 224 (2005); Yves Derains, *The Deliberations of the Arbitral Tribunal—"Retour au délibéré arbitral," in* The Resolution of the Dispute—from the Hearing to the Award: ASA Special Series No. 29, 16 (Markus Wirth ed., 2007).

40 Some commentators even suggest that arbitrators should put their conceptions of intellectual purity over and above the parties' interest in the dispute at hand by issuing a dissenting opinion even when there is no need. In the classic scenario, when a point of law arises in a case and one of the three arbitrators had been a member of a prior tribunal that ruled on a similar point of law, some commentators maintain, the common arbitrator must dissent, whether or not it serves the interests of the parties before the subsequent tribunal.

41 Although dissenting opinions have been rendered in more than 22% of decisions, the number has been increasing. As the Annex shows, fourteen dissenting opinions were

be reserved for those cases where serious procedural misconduct or a violation of fundamental principles occurs; for example, where an arbitrator commits fraud.

Given the foregoing, one may wonder what would justify a dissenting opinion in an investment arbitration. There is a major difference between judicial proceedings and investment arbitration. In judicial proceedings, a judge, who is not appointed by a party, may dissent for reasons of legal principle. Such dissent may promote good law in the future. In contrast, a party-appointed arbitrator does not have the expectation that his or her dissent will contribute to the development of investment law because, as noted above, those dissents are virtually never relied upon in subsequent investment cases. Moreover, as the Annex shows, few dissents involve matters of legal principle. It is fair to say that dissenting opinions have no future in investment arbitration. It therefore seems that dissenting opinions barely serve a legitimate purpose in a system with unilateral appointments.

Why, then, should there be dissenting opinions in international arbitration? At an ABA Conference on October 5, 2007, in London, I gave the following list of possible motives for dissents:

- The arbitrator genuinely believes that the majority is fundamentally wrong on an issue of law or fact. That, however, does not explain why nearly 100 percent of dissenting opinions are drafted by arbitrators appointed by the losing party. Why is there not a percentage of dissenting opinions drafted by arbitrators appointed by the winning party?
- The arbitrator has ventured a different opinion in public (e.g., in scholarship, at a conference, or in a post on the Internet).
- The arbitrator has advocated a different opinion as counsel in a prior case.
- The arbitrator is counsel in a pending case where the majority opinion would be unfavorable to their client.
- The arbitrator wants to show his or her appointing party that such party was right to appoint him or her and that counsel should do so again in the future.
- The arbitrator wants to help his or her appointing party to frustrate enforcement of the award or to provide ammunition that might help get the award set aside.
- The arbitrator suffers from intellectual exhibitionism.
- Something went fundamentally wrong in the arbitral process, for example, there was a very serious violation of due process.
- The arbitrator has been threatened that, absent a dissent, he or she will be in physical danger upon returning to his or her state of nationality or residence. That scenario indeed materialized in at least one case.

I concluded at this conference that only the last two reasons should justify publishing a dissent in an investment arbitration. The research carried out for this contribution does not change my view; to the contrary, it vindicates it.

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rendered in the twenty-one year period from 1983 to 2004, whereas twenty dissenting opinions were rendered in the three-year period between 2005 and 2008.

IV. Possible Solutions

Alan Redfern has categorized dissenting opinions as (1) "good" if they are short, polite, and restrained; (2) "bad" if they argue that the majority is fundamentally misguided or ignorant; and (3) "ugly" if they attack the conduct of the arbitration, and he apparently suggests that only "good" dissents should be issued.[42] Laurent Lévy proposed a code of ethics for dissenting arbitrators.[43] Manuel Arroyo recently came forward with more than twenty options for dealing with dissenting opinions.[44] The question that arises relative to each of these solutions is the same: what is the sanction if an arbitrator issues a "bad" or "ugly" dissent, or violates the putative code of conduct, or bypasses the relevant Arroyo option? Apart from perhaps affecting the dissenting arbitrator's reputation, could the violation also jeopardize the validity of the award?

The International Court of Arbitration (ICC) seems to be reasonably well-equipped to deal with dissents. A working party has issued a detailed report to guide the practice.[45] Moreover, the ICC has at its disposal several mechanisms by which to deal with dissents. It can, for example, (1) filter out inappropriate dissenting opinions at the stage of scrutiny of the draft award; (2) use the more drastic measure of removing an arbitrator (even at a late stage in the proceedings); or (3) refuse to communicate a dissenting opinion to the parties. Furthermore, the arbitral tribunal's chairperson has the power to decide the case alone if no majority opinion emerges.[46] To a certain extent, that power deters arbitrators who consider dissenting and encourages them to cooperate more actively and in good faith with the chairperson.

The ICC's experience is a fairly reliable indicium of the nature of dissents in commercial arbitrations. Alan Redfern reported that, in 2001, there were twenty-four dissents and that, in the twenty-two cases in which identifying the dissenting arbitrator was possible, the dissent favored the party that had appointed him or her.[47] The Secretariat of the ICC kindly provided me with statistics for the years 2004 through 2008. They show that, in general, the use of dissents by party-appointed arbitrators is on the decline in ICC arbitrations: 8.6 percent in 2004; 5.8 percent in 2005; 5.1 percent in 2006; 7.7 percent in 2007; and 5.6 percent in 2008.[48] In nearly every case, the

42 Redfern, *supra* note 2, at 226-30.

43 Laurent Lévy, *Dissenting Opinions in International Arbitration in Switzerland*, 5 Arb. Int'l 34, 41 (1989).

44 Arroyo, *supra* note 1.

45 ICC Commission Working Party, *Final Report on Dissenting and Separate Opinions*, 2 ICC Ct. Bull. 32 (1990) (M. Hunter, Chairman).

46 "When the Arbitral Tribunal is composed of more than one arbitrator, an Award is given by a majority decision. If there be no majority, the Award shall be made by the chairman of the Arbitral Tribunal alone." Int'l Chamber Comm., ICC Rules of Arbitration art. 25(1) (1998)

47 Redfern, *supra* note 2, at 234.

48 The total percentages of dissents (including Chairpersons, unidentified dissenters, and dissenters not clearly in favor of either party) were 10.4% in 2004; 8.3% in 2005; 7.8% in 2006; 9.1% in 2007; and 7.6% in 2008.

losing party's chosen arbitrator rendered the dissent. There are two exceptions: in one case in 2007 and in another in 2008, the dissenting arbitrator issued a dissent adverse to the party that appointed him or her. It therefore seems reasonable to conclude that ICC arbitration is less "polluted" by dissenting opinions by party-appointed arbitrators than investment arbitration where, as mentioned, party-appointed arbitrators dissent in some 22 percent of the reported decisions.

The London Court of International Arbitration's (LCIA) rules contain a provision on the chairperson similar to that in the ICC Rules.[49] Apart from that provision, the LCIA's weaponry against unhelpful dissenting opinions seems to be limited.

Dissents by party-appointed arbitrators recur regularly in ICSID arbitrations, partially because the ICSID Convention expressly allows them. Moreover, the Convention requires a majority voting, without giving the presiding arbitrator a casting vote. Therefore, there appears to be no mechanism to control dissents. In one instance, the award stated that "the Tribunal unanimously decides," without ever mentioning the dissenting opinion attached to the award; the dissenter signed the award on January 11, 2007, and the dissenting opinion on January 30, 2007.[50]

UNCITRAL arbitration is not helpful in this respect either. As the Iran-US Claims Tribunal's experience has shown, one of the main defects in the current version of the UNCITRAL Arbitration Rules is that it requires majority voting, without giving the presiding arbitrator a casting vote.[51] One of its drafters of the Rules explained: "The arbitrators are therefore forced to continue their deliberations until a majority, and probably a compromise solution, has been reached."[52] That may be true in some cases, but at the Iran-US Claims Tribunal the provision led to rather curious "concurring" opinions. Consider two examples: (1) "I concur in the Tribunal's Partial Award. I do so in order to form a majority so that the award can be rendered."[53] (2) "Unfortunately, however, the damages awarded are only about half of what the governing law requires. Why then do I concur in this inadequate Award, rather than dissenting from it? … [S]omething is better than nothing."[54] It would have been preferable, in my view, if these arbitrators had simply agreed and not issued a "concurring" opinion signaling disagreement. The opinions raise doubts as to whether majority awards actually existed.

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49 "Where there are three arbitrators and the Arbitral Tribunal fails to agree on any issue, the arbitrators shall decide that issue by a majority. Failing a majority decision on any issue, the chairman of the Arbitral Tribunal shall decide that issue." London Ct. Int'l Arb., LCIA Rules art. 26.3 (1998)

50 Siemens v. Argentina, ICSID Case No. ARB/02/8, 128 (Feb. 6, 2007) (Award), *available at* http://ita.law.uvic.ca/documents/Siemens-Argentina-Award.pdf; Separate Opinion from Professor Domingo Bello Janiero, ICSID Case No. ARB/02/8 (Feb. 6, 2007), *available at* http://ita.law.uvic.ca/documents/Siemens-Argentina-Opinion.pdf.

51 UNCITRAL, UNCITRAL Arb. Rules art. 31(1) (1976).

52 Pieter Sanders, *Commentary on* UNCITRAL *Arbitration Rules*, II Y.B. Comm. Arb. 172, 208 (1977).

53 Ultrasystems Inc. v. Iran, 2 Iran-U.S. Cl. Trib. Rep. 100 (1975) (Richard Mosk).

54 Economy Forms Corp. v. Iran, 3 Iran-U.S. Cl. Trib. Rep. 42 (1983) (Howard Holtzmann).

The root of the problem is the appointment method. Unilateral appointments may create arbitrators who may be dependent in some way on the parties that appointed them. In an insightful contribution on the subject, Jan Paulsson proposes replacing the method of party-appointed arbitrators with a list-procedure.[55] That, however, is probably still a long way off. As Yves Derains so aptly observes:

> Yet, it is also a fact that only in exceptional cases do the parties waive the right to nominate what they frequently call improperly "their" arbitrators, with the hope that he or she will have, at least, a sympathy for their case. There is an obvious tension resulting from the law of international arbitration and the expectation of many parties. Even if huge progress has been made in this regard during the ten last years, a lot of educational work remains to be done. Moreover, too many co-arbitrators still have difficulties in being fully impartial, as illustrated by the telling fact that the number of dissenting opinions not in favour of the party which nominated their author is statistically negligible. Nowadays, almost all co-arbitrators declare that they are independent and impartial. It will take time until all behave accordingly.[56]

Until that moment has come, investment arbitration would function better and be more credible if party-appointed arbitrators observe the principle: *nemine dissentiente*.

V. Post Scriptum: 2009

The Annex contains an overview of investment cases through 2008. The decisions reported until June 2009 do not differ from those surveyed in the Annex: all dissents issued by party-appointed arbitrators have favored the losing party, either in part or entirely.

There are two dissenting opinions in the 2009 series that merit mention here in light of their expressed justification: one because it confirms this contribution's analysis; the other because it shows that the problem is not as black-and-white as some may think. Both use a caption that is currently perceived (or rather misconceived) as politically correct arbitral language ("Separate Opinion" and "Individual Opinion"). If we call a spade a spade, both are really dissenting opinions.

The first expresses the following justification for the dissent:

> Yet, I choose to articulate my partially differing views for two reasons. First, I believe that by doing so I may contribute usefully to the public debate over the issues addressed by this Tribunal in this case, a debate reflected in past awards of other tribunals and doubtless to be

55 Jan Paulsson, *Are Unilateral Appointments Defensible?*, Kluwer Arb. Blog, Apr. 2, 2009, http://kluwerarbitrationblog.com/blog/2009/04/02/are-unilateral-appointments-defensible/#more-537.

56 Yves Derains, *The Deliberations of the Arbitral Tribunal—"Retour au délibéré arbitral," in* The Resolution of the Dispute—from the Hearing to the Award: ASA Special Series No. 29, 17 (Markus Wirth ed., 2007) (internal footnotes omitted).

> continued in ongoing and future arbitrations. Second, given what we have been informed may be the practical impact of the Award, it may not be amiss to anticipate the possibility of judicial proceedings in due course in which the correctness of the Award is put in issue, in which case I entertain the fond hope that the views I express may further illuminate certain issues for the benefit of any such forum.[57]

The first reason confuses the public academic debate about various issues in investment arbitration with the duty of an arbitral tribunal to render a decision in a dispute between the parties. The second reason raises questions regarding the difference between the role of counsel, who may be instructed to challenge the award in a judicial or other appropriate forum, and the role of an arbitrator who forms part of the tribunal that rendered the award. It is an almost universally accepted principle that an arbitrator cannot act as either party's counsel in any future challenge to the tribunal's award. Is the distinction blurred when an arbitrator expresses views in a dissent that "may further illuminate certain issues for the benefit of" the court where the challenge may be heard and decided?

The justification for the dissenting opinion given in the second case is of a different nature:

> Incidental divergences with fellow arbitrators do not, in my view, necessarily require written expression. I have never before felt impelled to dissent. In this instance, I unfortunately find myself in disagreement with respect to the decisive proposition advanced by my two esteemed colleagues, which as far as I can see could be obtained only by an impermissible rewriting of the Treaty we are bound to apply. Given my duty to exercise independent judgment, I find it impossible to subscribe to the decision, and necessary to record my reasons for differing.[58]

One can sympathize with this "first time" dissenter. I do not know the circumstances of this particular case, but I admit that it makes me think that one day there might be a first time for me too. Yet the reference in the above quote to the arbitrator's "duty to exercise independent judgment" should not be misunderstood. Article 14(1) of the ICSID Convention provides: "Persons designated to serve on Panels shall be persons … who may be relied upon to exercise independent judgment." Article 48(4) of the Convention authorizes dissenting opinions: "Any member of the Tribunal may attach his individual opinion to the award, whether he dissents from the majority or not, or

57 Renta 4 S.V.S.A. et al. v. Russian Federation, Arb. V 024/2007 ¶ 1 (Arb. Inst. Stockholm Chamber Comm. 2009) (Award on Preliminary Objections) (Separate Opinion of Charles N. Brower), *available at* http://ita.law.uvic.ca/documents/Renta.pdf (internal footnotes omitted).

58 Hrvatska Elektroprivreda D.D v. Republic of Slovenia, ICSID Case No. ARB/OS/24, ¶ 1 (June 12, 2009) (Decision on the Treaty Interpretation Issue) (Individual Opinion of Jan Paulsson), *available at* http://ita.law.uvic.ca/documents/Hrvatska-Interpretation-Paulsson.pdf.

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a statement of his dissent." If the duty to exercise independent judgment would be legally relevant for the question whether or not to issue a dissenting opinion, it would mean that in each and every instance that an arbitrator has a view different from his or her colleagues, he or she would have the obligation to write a dissent. I do not believe that the author of the dissent in this case intended to say that, especially since he had never before dissented. But there seem to be certain parties and commentators who believe that an arbitrator should dissent as soon as he or she is not in agreement with the majority. This, however, raises the question where to draw the line in terms of whether to dissent. As long as that line is unclear, and given that dissents raise questions regarding arbitrator neutrality, it reinforces the aspired principle expressed above: nemine dissentiente.

Annex Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitrations

Notes:

(1) This survey excludes dissents by presiding arbitrators,[59] arbitrators appointed by an Appointing Authority in lieu of a party,[60] arbitrators appointed by consent of all parties,[61] and members of ICSID Annulment Committees.[62]
(2) The dissenting arbitrator is underlined.
(3) Concurring opinions are included to the extent that they can be considered a dissenting opinion. A dissenting opinion is one where there is disagreement on the dispositive outcome of the majority holding. Only disagreement on reasoning but concurrence with result is counted as a concurring opinion.[63]
(4) The survey is based on decisions, awards and dissenting opinions in investment arbitrations as published on the freely publicly accessible websites of ITA and ICSID, unless indicated otherwise.
(5) Research was concluded on December 31, 2008.

59 *E.g.*, Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18 (Apr. 29, 2004) (Decision on Jurisdiction).

60 *E.g.*, Mytilineos Holdings SA v Serbia, UNCITRAL Case (Sept. 8, 2006) (Partial Award on Jurisdiction), *available at* ita.law.uvic.ca/documents/MytilineosPartialAward.pdf.

61 *E.g.*, IBM v Ecuador, ICSID Case No. ARB/02/10 (Dec. 22, 2003) (Decision on Jurisdiction); *Archer Daniels et al. v Mexico*, ICSID Case No. ARB(AF)/04/5 (Nov. 21, 2007) (Award). In *SOABI v Senegal*, the original tribunal consisted of Aron Broches (P), Jean van Houtte and Kéba Mbaye; the latter two were appointed by mutual agreement of the parties. After the decision on jurisdiction on August 1, 1984, SOABI appointed Jan C. Schultsz to replace Jean van Houtte for health reasons. On February 25, 1988, the tribunal issued a majority decision with Kéba Mbaye dissenting. SOABI v Senegal, 2 ICSID Rep. 190 (Feb. 25, 1988) (Award).

62 *E.g.*, Soufraki v. United Arab Emirates, ICSID Case No. ARB/02/7 (May 27, 2007) (Separate Opinion and A Statement of Dissent).

63 *E.g.*, Corn Prod. Int'l, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/04/1 (Jan. 15, 2008) (Decision on Responsibility).

Case	Arbitrators	Majority	Dissent
TSA Spectrum v Argentina Award 19-Dec-2008	Hans Danelius (P) *Grant Aldonas* (C) Georges Abi-Saab (R)	Decides that it lacks jurisdiction to examine TSA's claims. Accepts Respondent's third objection to jurisdiction that TSA cannot be treated, for the purposes of Article 25(2) of the ICSID Convention, as a national of the Netherlands because of the absence of foreign control. Finds that, at the time of consent, TSA's ultimate owner is an Argentine national.	Contends that jurisdiction should have been retained. Argues that the majority erred in construing Article 25 of the ICSID Convention by implying a duty to look beyond the ownership of the Dutch company that directly owned TSA's shares.
Duke v Peru Award 18-Aug-2008	L. Yves Fortier (P) *Guido Tawil* (C) *Pedro Nikken* (R)	Awards US$18.44 million to Claimant on account of Respondent's breach of a contractual tax stabilization clause through a Merger Revaluation Assessment.	Tawil disagrees with (i) the majority finding that it has no jurisdiction to construe Peruvian law and to review the correctness of SUNAT's decisions and assessments or of the Tax Court's decisions; and (ii) with the majority ruling rejecting that Respondent's Depreciation Assessment was wrongful. Nikken disagrees with the majority finding that Respondent's conduct amounted to estoppel in respect of the merger.
African Holding v Congo Award on the Lack of Competence and Admissibility 29-Jul-2008	Francisco Orrego Vicuña (P) *Otto L.O. deWitt Wijnen* (C) Dominique Grisay (R)	Decides that it does not have jurisdiction *ratione temporis* regarding disputes that had arisen prior to 2000 and that the facts are such that the dispute arose prior to 2000.	Argues that the ratione temporis requirement was met by the facts of the case.
Biwater v Tanzania Award 24-Jul-2008	Bernard Hanotiau (P) *Gary Born* (C) Toby Landau (R)	Holds that the Respondent had breached its international obligations but dismisses the Claimant's claim for damages for lack of causation.	Disagrees, inter alia, because the majority analysis confuses issues of causation and quantification of damages, which "is ultimately not decisive to the specific outcome in the present case, but it could well be in future cases and I am therefore unable to join it." (¶ 16)
RosInvestCo v Russia Award on Jurisdiction Oct-2007	Karl-Heinz Böckstiegel (P) Johan Steyn (C) *Franklin Berman* (R)	Declines jurisdiction on the basis of Article 8 of the UK-Soviet BIT. Declines jurisdiction on the basis of Article 3(1) read with another BIT. Upholds jurisdiction on the basis of Article 3(2) read with another BIT.	Declares: "I would not want our common conclusion that Article 8 does not confer jurisdiction in this case to be taken in any way as an expression of opinion on how that article or other similar treaty clauses relates [sic] to other claims that might be brought forward in other cases based on an allegation of expropriation." (¶ 123)

Sempra v Argentina Award 28-Sep-2007	Francisco Orrego Vicuña (P) *Marc Lalonde* (C) Sandra Morelli Rico (R)	Awards Claimant US$128.25 million on account of Respondent's breaches of obligations related to fair and equitable treatment and observance of undertakings. Awards compound interest only up to the date of the Award because Claimant had not requested post-award interest in the petitum and memorials.	Disagrees with finding regarding post-award interest and argues that it should have been awarded to Claimant.
Vieira v Chile Award 21-Aug-2007	Claus von Wobeser (P) *Susana Czar de Zalduendo* (C) W. Michael Reisman (R)	Declines jurisdiction ratione temporis and dismisses claims because the real cause of the dispute arose out of Resolution 291 of 1989, beyond the critical date.	Opines that, although the dispute related to Resolution 291 of 1989 is outside jurisdiction ratione temporis, other parts of the dispute arose within jurisdiction ratione temporis.
Fraport v Philippines Award 16-Aug-2007	L. Yves Fortier (P) *Bernardo Cremades* (C) W. Michael Reisman (R)	Accepts Respondent's objection to jurisdiction finding that "Fraport knowingly and intentionally circumvented the [Philippines Anti-Dummy Law] by means of secret agreements. As a consequence, it cannot claim to have made an investment 'in accordance with law' [as required by Arts. 1(1) and 2(1) of the Germany-Philippines BIT]." (¶ 401)	Argues that there was an investment under the BIT, whether or not there was a breach of Respondent's laws, which breach in any event is not established at the preliminary stage. Contends, moreover, that there was no violation of the Anti-Dummy Law. Further asserts that good faith also applies to Respondent's conduct.
Tokios Tokelés v Ukraine Award 26-Jul-2007	Michael Mustill (P) *Daniel Price* (C) Piero Bernardini (R)	Dismisses Respondent's further objection to jurisdiction. Dismisses Claimant's claims under Articles 2, 3 and 5 of the Lithuania-Ukraine BIT.	Contends that Respondent breached fair and equitable treatment obligations in Article 3 of the BIT. Agrees on the applicable standard, but disagrees on the assessment of the evidentiary record (¶ 3).
UPS v Canada Award on the Merits 24-May-2007	Kenneth Keith (P) *Ronald A. Cass* (C) L. Yves Fortier (R)	Dismisses the claim in its entirety on the merits.	Disagrees that Respondent has not violated its national treatment obligation under Article 1102 of NAFTA.
Siag v Egypt Decision on Jurisdiction 11-Apr-2007	David A.R. Williams (P) Michael Pryles (C) *Francisco Orrego Vicuña* (R)	Upholds jurisdiction over claims brought by both Claimants, ruling that Mr. Siag held Italian nationality at all relevant times, as was Ms. Vecchi. Rejects Respondent's objections to jurisdiction that there did not exist an investment.	Disagrees with respect to the majority finding regarding Mr. Siag's nationality, arguing that he is an ineligible Claimant as he maintained Egyptian nationality at the relevant times and did not maintain Italian nationality.
Eastern Sugar v Czech Republic Partial Award 27-Mar-2007	Pierre Karrer (P) *Robert Volterra* (C) Emmanuel Gaillard (R)	Accepts jurisdiction. Awards Claimant €25.4 million because Respondent's Third Sugar Decree violated the Netherlands-Czech and Slovak BIT. Holds that the First and Second Sugar Decrees and related conduct did not violate the BIT.	Argues that the First and Second Sugar Decrees and related conduct of the Respondent violated Article 3.1 of the BIT.

Siemens v Argentina Award 6-Feb-2007	Andrés Rigo Sureda (P) Charles N. Brower (C) *Domingo Bello Janeiro* (R)	Awards Claimant US$9.8 million on account of Respondent's breaches of obligations related to expropriation (Article 4(2) of the Argentina-Germany BIT), fair and equitable treatment and full protection and legal security (Articles 2(1) and 4(1) of the BIT) and arbitrary measures (Article 2(3) of the BIT). Allocates costs 75% to Respondent and 25% to Claimant.	Argues that the Tribunal should have retained an independent expert for the valuation of the damages to Claimant, as had been requested by Respondent. Also contends that costs of arbitration should have been allocated equally.
Berschader v Russia Award, 6-Apr-2006	Bengt Sjövall (P) *Todd Weiler* (C) Sergei Lebedev (R)	Dismisses claims for lack of jurisdiction under the Belgium/Luxembourg-Russia BIT.	Argues that Respondent's preliminary objections should have been dismissed and that the parties should have been ordered to proceed to a hearing of the merits of the claim.
EnCana v Ecuador Award 3-Feb-2006	James Crawford (P) *Horacio Grigera Naón* (C) J. Christopher Thomas (R)	Holds that claims were outside of jurisdiction, except expropriation claims under Article VIII of the Canada-Ecuador BIT. Dismisses claims based on Article VIII, finding that there was no expropriation with respect to the right to VAT refunds under Ecuador law.	Argues that conduct attributable to Respondent had expropriated Claimant's returns on its investment in breach of Article VIII of the BIT.
Salini v Jordan Award 31-Jan-2006	Gilbert Guillaume (P) Bernardo Cremades (C) *Ian Sinclair* (R)	Dismisses Claimant's claims for lack of an agreement binding on it and Respondent. Allocates costs equally between the parties.	Disagrees on the cost decision only. Argues that the costs and expenses of the Tribunal during the merits phase should be in the proportion of one-third to the Respondent and two-thirds to the Claimant, with each Party bearing its own costs.
Thunderbird v Mexico Arbitral Award 26-Jan-2006	Albert Jan van den Berg (P) *Thomas W. Walde* (C) Agustín Portal Ariosa (R)	Dismisses claims in their entirety, finding that Respondent had not breached Articles 1102, 1105 or 1110 of NAFTA. Allocates costs 75% to Claimant and 25% to Respondent.	Contends that Articles 1102 and 1105 of NAFTA were breached and would have awarded as damages US$500,000 versus US$ 100 million claimed (¶ 122). Disagrees also on the allocation of costs.
Aguas del Tunari v Bolivia Decision on Respondent's Objections to Jurisdiction 21-Oct-2005	David Caron (P) Henri C. Alvarez (C) *Jose Luis Alberro-Semerena* (R)	Rejects Respondent's two objections to jurisdiction relating to scope of consent to arbitration under the Bolivia-Netherlands BIT and relating to whether the Claimant, a Bolivian company, was controlled directly or indirectly by Dutch nationals as required by the BIT. Denied Respondent's requests for production of evidence relating to ownership and control over Claimant.	Contends that the dispute is outside the scope of consent under the BIT and that the Claimant was not controlled by Dutch nationals. Disagrees also on the majority's denial of production of evidence.

Eureko v Poland Partial Award 19-Aug-2005	L. Yves Fortier (P) Stephen Schwebel (C) *Jerzy Rajski* (R)	Holds that Respondent had breached its obligations under Articles 3.1, 3.5 and 5 of the Netherlands-Poland BIT.	Argues that the dispute is entirely of a contractual nature and that there is no ground which could entitle Claimant to protection under the BIT, and hence the Respondent could not have breached any of Articles 3.1, 3.5 or 5 of the BIT.
Mitchell v Congo Award 9-Feb-2004 Annulled by Ad Hoc Committee on 1 November 2006 on the grounds of lack of jurisdiction	Andreas Bucher (P) Marc Lalonde (C) *Yawovi Agboyibo* (R)	Declares to have jurisdiction. Finds expropriation under Article III of the Congo-US BIT. Awards Claimant as compensation US$ 750,000. [Award not published; information derived from Annulment Decision.]	Dissenting Opinion is not published.
SGS v Philippines Decision of the Tribunal on Objections to Jurisdiction 29-Jan-2004	Ahmed S. El-Kosheri (P) *Antonio Crivellaro* (C) James Crawford (R)	Upholds jurisdiction over the claims under Article VIII(2) (umbrella clause) of the Philippines-Swiss BIT. Dismisses the claim under Article VI (expropriation) of the BIT. Stays the arbitration, pending a decision on a contractual matter by the forum as contractually agreed.	Disagrees that the arbitration proceedings should be stayed pending a decision on the contractual dispute by the contractually agreed forum.
CME v Czech Republic Final Award 14-Mar-2003 (See also Partial Award of 13 September 2001 below)	Wolfgang Kuhn (P) Stephen Schwebel (C) *Ian Brownlie* (R)	Awards Claimant US$269.8 million. Rules that "just" compensation under the BIT and international law is fair market value and applies the DFC method.	Contends that the standard of "just" compensation is not fair market value but should be subject to legitimate expectations and actual conditions. Argues that in the present case the business plan was best indicator of genuine value, computing it to be US$160.8 million.
Feldman v Mexico Award 16-Dec-2002	Konstantinos D. Kerameus (P) David A. Gantz (C) *Jorge Covarrubias Bravo* (R)	Dismisses claim based on Article 1110 (expropriation) of NAFTA. Finds that Respondent had breached Article 1102 (national treatment) of NAFTA. Awards Claimant 9.5 million Mexican Pesos plus interest.	Argues that there was no discrimination or other violation of Article 1102 of NAFTA.
SD Myers v Canada Final Award 30-Dec-2002 (See also Partial Award of 13-Nov-2000 below)	J. Martin Hunter (P) *Bryan P., Schwartz* (C) Edward C. Chiasson (R)	Awards Claimant CAN$850,000 as costs of arbitration with interest.	Contends that Claimant should have been awarded CAN$1.9 million as costs of arbitration with interest.
Mihaly v Sri Lanka Award 15-Mar-2002	Sompong Sucharitkul (P) *David Suratgar* (C) Andrew Rogers (R)	Declines jurisdiction on *ratione materiae* grounds. Finds that certain agreements did not create binding obligations upon the Respondent and that the characterization of certain expenses as pre-incorporation expenditures was insufficient proof that an "investment" existed.	Argues that expenditures could amount to an investment but there was a lack of proof that the expenditures had been incurred by a Sri Lankan company in which Claimant had a share.

CME v Czech Republic Partial Award 13-Sep-2001 (See also Final Award of 14-Mar-2003 above)	Wolfgang Kuhn (P) Stephen Schwebel (C) *Jaroslav Handl* (R)	Holds that that Respondent breached Articles 3, 5 and 8 of the Czech and Slovak-Netherlands BIT. Declares that the Respondent is obligated to remedy the injury payment of the fair market value of Claimant's investment, to be determined in a second phase of the arbitration.	Contends that there was no jurisdiction over the dispute. Argues that the Claimant should not be protected by the BIT because the investment was made previously by a German company. Disagrees on the appreciation of the factual record and contends that there was no violation of any provision of the BIT.
Wena v Egypt Award 8-Dec-2000	Monroe Leigh (P) Ibrahim Fadlallah (C) *Don Wallace Jr.* (R)	Awards Claimant US$20.6 million on the basis that Respondent had breached Articles 2 and 5 of the Egypt-UK-BIT. Awards post-award interest at 9% compounded quarterly until the date of payment.	The full text of the separate statement reads: "Professor Wallace concurs in the Tribunal's entire award and is persuaded that compound interest should be awarded. However, he is not persuaded that compounding should be quarterly."
SD Myers v Canada Partial Award 13-Nov-2000 (See also Final Award of 30-Dec-2002 above)	J. Martin Hunter (P) *Bryan P. Schwartz* (C) Edward C Chiasson (R)	Holds that Respondent had breached its obligations under Articles 1102 (national treatment) and 1105 (minimum standard of treatment) of NAFTA. Dismisses claims relating to Articles 1106 (performance requirements) and 1110 (expropriation) of NAFTA. Declares that Respondent is to pay Claimant compensation to be determined in the second stage of the proceedings.	Argues that Respondent had also breached Article 1106 of NAFTA.
Waste Management v Mexico I Arbitral Award 2-Jun-2000	Bernardo Cremades (P) *Keith Highet* (C) Eduardo Siqueiros T. (R)	Dismisses jurisdiction because of Claimant's failure to provide under Article 1121(2)(b) of NAFTA a waiver of the right to initiate or continue before any tribunal or court, dispute settlement proceedings with respect to the measures taken by the Respondent that are allegedly in breach of NAFTA.	Disagrees with the majority on the scope of Article 1121 and as to the interpretation of the waiver. Also disagrees that waiver goes to jurisdiction rather than to admissibility of the claim. Opines that the majority decision had a "drastically preclusive effect" (¶ 9) with the result that "the entire NAFTA claim has been undone" (¶ 63). Note: See *Waste Management v Mexico II*, Decision of 26 June 2002, discussed in n. 22 *supra*.

Sedelmayer v Russia Award 7-Jul-1998	Staffan Magnusson (P) Jan Peter Wachler (C) *Ivan Zykin* (R)	Upholds jurisdiction in the case where the German Claimant channeled certain investments into Russia through an American company and that the Procurement Department of the President of the Russian Federation was an appropriate organ to represent the State as Respondent. Awards Claimant US$2.35 million.	Disagrees that the Tribunal has jurisdiction because the Germany/Russia BIT does not cover investments channeled through an American entity and the Procurement Department of the President of the Russian Federation does not represent the Russian Federation. Because the Tribunal "lacks the competence to try the case" there was no need to deal with the further issues (p. 7).
AMT v Zaire Award 21-Feb-1997	Sompong Sucharitkul (P) *Heribert Golsong* (C) *Kéba Mbaye* (Appointing Authority)	Finds that Zaire (Congo) is liable for damages caused by looting to Claimant under the US-Zaire BIT. Awards Claimant US$9 million as compensation.	Golsong argues that Claimant should have prevailed on its claim under Article IV(2) of the BIT concerning expropriation, which the majority had rejected. Mbaye contends that US$9 million compensation exceeded the injuries sustained and would have awarded US$4 million.
SPP v Egypt 20-May-1992	Eduardo Jiménez de Aréchaga (P) Robert F. Pietrowski Jr. (C) *Mohamed Anim El Mahdi* (R)	Awards Claimant US$27.6 million for Respondent's breaches of the contract and applicable law.	Dissents on "the perception of the facts." Contends that the Claimant was not an investor under the ICSID Convention. Asserts also that there was no violation of applicable law. Further argues that amount of compensation should be reduced.
AAPL v Sri Lanka Final Award 27-Jun-1990	Ahmed S. El-Kosheri (P) Berthold Goldman (C) *Samuel K.B. Asante* (R)	Awards Claimant US$460,000 for Respondent's violations of Articles 2 and 4 of the Sri Lanka-UK BIT.	Argues that the Respondent was not liable as none of the provisions of the BIT were breached.
Klockner v Cameroun I 21-Oct-1983 Annulled by Ad Hoc Committee on 18 March 1985 (relying on dissenting opinion)	Eduardo Jimenez de Aréchaga (P) William D. Rogers (C) *Dominique Schmidt* (R)	Upholds jurisdiction finding that an ICC arbitration clause in a related agreement was not a bar to jurisdiction. Dismisses Claimant's claim for the balance of the price of supplying a factory in its entirety on grounds of Claimant's failure of contractual performance.	"The undersigned is under a duty to give a dissenting opinion. He feels that the Award relies on a mistaken assessment of the facts and documents submitted to the Arbitral Tribunal." Disagrees with virtually every aspect of the majority. Published in 1 Arb. Int. 331 (1984)