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# A Defense of Dissents in Investment Arbitration

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## ARTICLES

## A Defense of Dissents in Investment Arbitration

Pedro J. Martinez-Fraga\*  
and  
Harout Jack Samra<sup>+</sup>

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*As darkness was to hide the parties from the judges of the Areopag, in our court it would at least serve the purpose of hiding from the parties judges who shy from the light.*

- Anselm von Feuerbach<sup>1</sup>

*Gentlemen, I take it we are all in complete agreement on the decision here. . . . Then I propose we postpone further discussion of this matter until our next meeting to give ourselves time to develop disagreement and perhaps gain some understanding of what the decision is all about.*

- Alfred P. Sloan, Jr.<sup>2</sup>

## I. INTRODUCTION AND BACKGROUND

The increasingly commonplace practice of filing dissenting opinions in investment arbitration awards has come under considerable scrutiny in recent years.<sup>3</sup> Are dissenting opinions symp-

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1. Kurt H. Nadelmann, *The Judicial Dissent: Publication v. Secrecy*, 8 Am. J. Comp. L. 415, 429-430 (1959) (citing Anselm von Feuerbach, *Betrachtungen fiber die Offentlichkeit und Mfindlichkeit der Gerechtigkeitspflege* 145 (1821)).

2. PETER F. DRUCKER, *MANAGEMENT: TASKS, RESPONSIBILITIES, PRACTICES* 472 (1974) (quoting Alfred P. Sloan, Jr.).

3. Although we limit our comments in this article to international investment arbitration (as most commentators on this issue have), the controversy related to dissenting opinions also extends to commercial arbitration. However, as numerous commentators have noted, the more widespread confidentiality in commercial arbitration makes any analysis inherently impractical. The greater transparency and development of persuasive precedent in investment arbitration, as shall be more fully elaborated, renders that arena a more ripe field for inquiry. See Tai-Heng Cheng, *Precedent and Control in Investment Treaty Arbitration*, 30 *FORDHAM INT'L L. J.* 1014, 1014-15 (2006-2007) ("Unlike international commercial arbitrations between two private corporations, which are generally confidential; investment treaty arbitrations

toms of a systematic dysfunction arising from a flawed party-appointed arbitrator rubric, or rather a reflection of the increasing maturity of investment arbitration as an institution of global dispute resolution? Is an assessment of the role of the doctrine of dissent in public international law possible without considering the doctrine's standing as part of customary public international law? Are dissents necessary to a jurisprudence of arbitral decisional law wanting in precedential value? Can the viability of the doctrine of dissent be meaningfully assessed without considering the role of arbitrators in public international law?

Numerous commentators, including the noted arbitrator practitioner Albert Jan van den Berg in a recent article, have reignited this debate.<sup>4</sup> In his critical study, van den Berg relies exclusively on a descriptive-empirical analysis in an effort to curtail a perceived "leniency" in the issuance of dissenting opinions within the ambit of investor-state arbitration.<sup>5</sup> His contribution raises the question of whether such a methodology is at all helpful to a doctrinal evaluation of dissenting opinions within the framework of public international law.

In many ways, investment arbitration's vertiginous and omnidirectional growth over the past two decades has been remarkably organic, marked by gradual, barely-noticeable evolutions at times, but jarred occasionally by raucous reformations and counter-reformations.<sup>6</sup> Indeed, it is reasonable and accurate

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are subject to lower levels of confidentiality. In many investment treaty arbitrations, parties have either unilaterally published the awards or consented to the administering arbitral institution publishing the awards. With disclosure comes public scrutiny.").

4. See, e.g., Albert Jan van den Berg, *Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration*, in *LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN* 821-843 (M. Arsanjani, J. Katz Cogan, R. Sloane, & S. Wiessner eds.) (2010).

5. *Id.* at 821.

6. The proliferation of arbitral jurisprudence arguably has spawned more questions than answers to pivotal issues defining the very contours of international investment law. Indeed, the discipline of investment-state arbitration is witnessing the issuance of reasoned awards leading either to doctrinally inconclusive results, or even flatly to conflicting findings of law and the application of law to fact. Compare *SGS v. Pakistan*, Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction, 6 August 2003, with *SGS v. Philippines*, Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004 (regarding the scope of umbrella clauses); and *Saipem v. Bangladesh*, ICSID Case No. ARB/0517, Award, 30 June 2009, with *GEA v. Ukraine*, ICSID Case No. ARB/08116, Award, 31 March 2011 (regarding whether commercial arbitration award constitutes an "investment" under the ICSID framework as well as customary and conventional international law). These cases are but a few of a universe of numerous examples. Because of the nature

to assert that investment arbitration is in a state of constant reorganization. As this dispute resolution component of a network of approximately 3,000 bilateral, regional, and multilateral treaties continues to attain institutional status as a necessary counterpart to economic globalization, important developments become discernible. Among these newly emerging principles, perhaps the most significant is the use of investment arbitration awards as authority or precedent - a practice that commands sustained analysis.

Arbitral jurisprudence is not generated within a framework that bestows on it the normative value of precedent, or *stare decisis*. Despite this anomaly, the inexorable trend appears to be in favor of according greater attention to prior decisions issued by investment arbitration tribunals.<sup>7</sup> Describing this development, one commentator observed that “although arbitrators in investment treaty arbitration are not formally bound by precedent in the same manner as common-law judges, there is an informal, but powerful, system of precedent that constrains arbitrators to account for prior published awards and to stabilize international investment law.”<sup>8</sup> Similarly, the ICSID tribunal in *Saipem v. Bangladesh* described this phenomenon as follows:

The Tribunal considers that it is not bound by previous decisions. At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals. It believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of

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of the issues addressed, however, and the starkly inapposite rulings, they are eloquent examples of the “multidirectional” proliferation of arbitral decisional law.

7. See W. Mark C. Weidemaier, *Toward of Theory of Precedent in Arbitration*, 51 W. & M. L. REV. 1985 (2010).

8. Tai-Heng Cheng, *Precedent and Control in Investment Treaty Arbitration*, 30 FORDHAM INT’L L. J. 1014, 1016 (2006-2007). Notably, Cheng concludes that this informal system “imperfectly supports the relevant policy goals” of investment arbitration. *Id.* Consequently, he proposes that: (a) the system of precedent is clarified and publicized to enable the global community to appraise awards and the arbitrators who render them; (b) investors and States exercise care in their selection of arbitrators; and (c) the community of international arbitrators exercises sufficient informal self-regulation and self-selection. *Id.* Although precedent in investment arbitration, *per se*, is not the subject of this article, Cheng’s proposals are inseparable from the thesis of this article, developed *infra*.

States and investors towards certainty of the rule of law.<sup>9</sup>

Assuming that arbitrators must “pay due consideration” to prior awards in order, among other goals, to “contribute to the harmonious development of investment law,” there is little doubt that the proliferation of investment arbitration awards, particularly in the ICSID context, has led to fundamental transformations as to advocacy and arbitral deliberation. This development is rendered all the more astonishing when considering the previous resistance and hostility to the use of “awards as legitimate sources of authority and arbitrators as legitimate producers of law.”<sup>10</sup> As shall be discussed, not being “bound” by previous decisions, but vested with an imperative to consider prior awards, carves out a unique normative space for investor-state arbitral awards, much like the doctrine of comity.

The welcome dialogue regarding the desirability of dissenting or separate opinions in investment arbitration awards may represent a further development in arbitration’s advancement, undoubtedly correlated with the rise of precedent-based reasoning and argument in investment arbitration. This contribution seeks to explore the following premises: (i) the extent to which the development of arbitral decisional law in a new normative space interfaces with the doctrine of dissent; (ii) how the role of arbitrators dispensing justice in the administration of public international law relates to dissenting opinions; (iii) the effect of customary international law on the normative standing of dissents; and (iv) the connection between dissents and principles of transparency that are common in and attendant to public international law. It is here assumed that a descriptive, empirically grounded exploration of the role of dissents in public international law, without more, is limited in its ability to assess the doctrine’s proper workings. As a predicate to exploring these propositions, a review of the history of dissenting opinions in the Anglo-American system and a brief survey of the use of dissents in non-common law legal systems is necessary if the doctrine of dissents is to be properly contextualized.

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9. *Saipem v. Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures ¶ 67 (Mar. 21, 2007). Notably, the *Saipem* panel included among the most noted luminaries in the investment arbitration firmament: Gabrielle Kaufmann-Kohler, Christoph H. Schreuer, and Sir Philip Otton.

10. See *Weidemaier*, *supra* note 6, at 1938.

## II. THEORIES OF DISSENT

A surprising number of commentators qualify the appearance of dissenting opinions in international arbitration as an unwelcome importation of Anglo-American common law doctrine and practices. Even a surface review of the emergence and development of modern dissenting opinions in the Anglo-American legal systems reveals a much more complex and cross-cultural landscape.<sup>11</sup> Indeed, even though the promulgation of dissenting or separate opinions is now commonplace in the administration of justice by judicial tribunals, the practice has waxed and waned parallel to the judiciary's institutional needs. In order to canvas the significance of contemporary judicial dissenting opinions, it is helpful to consider the manner in which the doctrine developed. This narrative reveals the multifaceted effects that dissents have on decision-making authority.

### A. *The Anglo-American Experience*

Dissents have attained considerable stature in the Anglo-American legal tradition. This status, however, should not be construed as supporting the proposition that this hallowed place is the product of consistency. The opposite is true. No fewer than three methods of decision-making alternatively have prevailed among judicial tribunals in the United States and England over the last three hundred years:

The first is the seriatim delivery of the judgment of each judge individually. This practice prevailed in Great Britain for nearly all of its history, from the time of William the Conqueror to the present day. It also was common in U.S. courts (both state and federal) at the Founding. The second is delivering an "opinion of the court," with no publicly revealed vote or separate opinions. This practice has been used twice: by Lord Mansfield of the King's Bench in England and (more or less) by John Marshall of the U.S. Supreme Court. Finally, the modern practice in the United States is a hybrid, in which an opinion of a majority of the court is issued, but judges decide individually whether to "write separately."<sup>12</sup>

Throughout their recent history, Anglo-American courts intermit-

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11. See generally BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1922); OLIVER WENDELL HOLMES, *THE COMMON LAW* (1909).

12. M. Todd Henderson, *From Seriatim to Consensus and Back Again: A Theory of Dissent*, 2007 SUP. CT. REV. 283, 292 (2007) (internal citations omitted).

tently have entertained each of these methods, alternating between periods of consensus and unanimity and phases of increasing public division.<sup>13</sup> Significantly, in each instance these shifts, regardless of direction, were intended “to increase the power of the Court specifically and the law generally.”<sup>14</sup>

Chief Justice John Marshall’s abandonment of seriatim opinions and adoption of “unanimous and anonymous opinions” elevated the fledgling Court, permitting more effective management of its public and political image, giving its opinions greater authority, and shielding individual justices from harsh scrutiny.<sup>15</sup> Although the total unanimity of the earlier Marshall years would be short-lived, the consensus imperative remained in place for over 100 years until 1941, with the rate of dissents remaining less than 10% during that period.<sup>16</sup>

Just as the chief justiceship of John Marshall is credited for the “unanimity norm”, the chief justiceship of Harlan Stone is considered responsible for the rise of dissents.<sup>17</sup> Considering this development a product of Chief Justice Stone’s leadership, Henderson observed:

Law was now more like politics, and Stone was willing to assert the Supreme Court as a political branch. Stone achieved this revolution in part by encouraging the use of dissenting opinions, just as Marshall implemented his revolution by introducing consensus. The means were different, but the ends were the same.

Stone increased the power of the Court, and thus achieved the same results as Marshall, but for different reasons and in different circumstances. Both Marshall and Stone sought a more active role for the Court. To increase the power of the Court specifically and the law generally, Stone encouraged debate and controversy, rather than suppressing it as Marshall was required to do, to accomplish the same end.<sup>18</sup>

This critical association between the authority of judicial decision-making institutions and the manner in which their decisions are reasoned is precisely the subject that must be considered in the

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13. *See id.* at 292.

14. *Id.* at 329.

15. *Id.* at 319.

16. *Id.* at 322.

17. *Id.* at 326 (citing Thomas Walker, et al., *On the Mysterious Demise of Consensual Norms in the United States Supreme Court*, 50 J. POL. 361, 362 (1988)).

18. Henderson, *supra* note 12, at 330.

context of investment arbitration. Only by underscoring this connection can the doctrine of dissents be appropriately contextualized. To conclude that division must inherently lead to diminished authority is both overtly and excessively simplistic. The experience of the U.S. Supreme Court (the authority of which has ebbed and flowed throughout its history despite its varying approaches to the question of unanimity<sup>19</sup>) demonstrates that the relationship between dissents and the authority and/or normative foundation afforded to decision-makers is exceptionally complex and varies depending on the circumstances.

Despite the widespread acceptance of judicial dissents, scholars continue to ask whether “dissent [is] a symptom of a dysfunctional Court or of a healthy one.”<sup>20</sup> Historical opposition to the airing of dissenting judicial opinions in the United States has a notable pedigree. The prevalence of such opinions has fluctuated throughout the American judiciary’s history. As the judiciary gradually emerged from its post-Marshall Court emphasis on unanimity, skepticism abounded. Former President and later-Chief Justice William Howard Taft pointedly observed, “I don’t approve of dissents generally, for I think in many cases where I differ from the majority, it is more important to stand by the Court and give its judgment weight than merely to record my individual dissents where it is better to have the law certain than to have it settled either way.”<sup>21</sup> Presaging the arguments of contemporary opponents of dissenting opinions in investment arbitration, Chief Justice Charles Evans Hughes explained to a colleague on the Court his reluctance to dissent in a lethally disarming tone: “I choke a little at swallowing your analysis; still I do not think it would serve any useful purpose to expose my views.”<sup>22</sup>

In contrast to these concerns, Justice William J. Brennan acknowledges the drawbacks of dissenting opinions, while nevertheless studiously describing them as a “duty.”<sup>23</sup> “Some contend,” he notes, “that the dissent is an exercise in futility, or, worse still, a ‘cloud’ on the majority decision that detracts from the legitimacy

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19. THE FEDERALIST NO. 78, at 428 (Alexander Hamilton) (Robert A. Ferguson ed., 2006). See also ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1986).

20. Henderson, *supra* note 12, at 285.

21. WALTER F. MURPHY, ELEMENTS OF JUDICIAL STRATEGY 61 (1964).

22. HENRY J. ABRAHAM, THE JUDICIAL PROCESS: AN INTRODUCTORY ANALYSIS OF THE COURTS OF THE UNITED STATES, ENGLAND, AND FRANCE 224 (1986)

23. William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 438 (1985-1986).

that the law requires and from the prestige of the institution that issues the law.”<sup>24</sup> Nevertheless, Justice Brennan observes, “unanimity in itself is not a virtue.”<sup>25</sup>

As Justice Brennan notes, Chief Justice Hughes ultimately developed a rather nuanced view of dissents:

When unanimity can be obtained without sacrifice of conviction, it strongly commends the decision to public confidence. But unanimity which is merely formal, which is recorded at the expense of strong, conflicting views, is not desirable in a court of last resort, whatever may be the effect upon public opinion at the time [the case is announced]. This is so because what must ultimately sustain the court in public confidence is the character and independence of the judges. They are not there simply to decide cases, but to decide them as they think they should be decided, and while it may be regrettable that they cannot always agree, it is better that their independence should be maintained and recognized than that unanimity should be secured through its sacrifice.<sup>26</sup>

While this statement would seem to stand in stark contrast with Chief Justice Hughes’ earlier remarks, the two are easily reconciled. In fact, Chief Justice Hughes shines light upon the thought process of the responsible dissenter. While not explicitly engaged in a defense of dissents, Chief Justice Hughes amply establishes that dissents are *defensible*, particularly when employed judiciously.

In the course of his own defense of dissents, Justice Brennan identifies three models of dissent in the United States Supreme Court. The first “demonstrates the flaws the author perceives in the majority’s legal analysis” and is offered “in the hope that the Court will mend the error of its ways.”<sup>27</sup> Such dissents, Brennan argues, are premised on the belief that “vigorous debate improves the final product by forcing the prevailing side to deal with the hardest questions urged by the losing side.”<sup>28</sup> The second model of dissent, used to “emphasize the limits of a majority decision that sweeps, so far as the dissenters are concerned, unnecessarily broadly,” may serve “to furnish litigants . . . with practical gui-

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24. Brennan, *supra* note 23, at 429.

25. *Id.* at 432.

26. CHARLES EVANS HUGHES, *THE SUPREME COURT OF THE UNITED STATES* 67-68 (1928), *quoted in* Brennan, *supra* note 23, at 434.

27. Brennan, *supra* note 23, at 430.

28. *Id.*

dance – such as ways of distinguishing subsequent cases.”<sup>29</sup>

The third model of dissent Justice Brennan identifies “seek[s] to sow seeds for future harvesting.”<sup>30</sup> These, he notes, are often the “most enduring.”<sup>31</sup> Undoubtedly, several such dissents have entered the pantheon of American jurisprudence, perhaps most famously Justice John Marshall Harlan’s dissent in *Plessy v. Ferguson*, where the Justice emphatically rejected the majority’s adoption of the “separate but equal” doctrine regarding racial segregation.<sup>32</sup> Although this third model of dissent would seem to have no place in a world without binding precedent, the opposite may in fact be true. Alternatively, the first two models identified by Justice Brennan could be very impactful to the extent that they permit more thorough analysis and thus more fully reasoned decisions in whatever context.

### B. Globalized Dissents

Opponents have attempted to label dissenting opinions purely as creatures of the Anglo-American legal culture, thereby elevating the supposedly “general” civil law approach, which disallows dissenting opinions purportedly “because of their emphasis on collegiality in the dispensation of justice.”<sup>33</sup> However, it is apparent that attempts to dismiss dissents as a parochial common law carry-over fall far short of the mark.<sup>34</sup> The universality of dissents cannot be meaningfully challenged. The record demonstrates that just as Anglo-American courts have long experimented with different approaches to dissenting opinions, so too have the courts of civil law jurisdictions. Unfortunately, the literature opposing dissents in arbitration is rife with such general assertions that

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29. *Id.*

30. *Id.* at 431.

31. *Id.* at 430.

32. See *Plessy v. Ferguson*, 163 U.S. 537 (1896) (Harlan, J., dissenting).

33. Van den Berg, *supra* note 4, at 822. See also Alan Redfern, *Dissenting Opinions in International Commercial Arbitration: The Good, the Bad, and the Ugly*, 20 *ARB. INT’L* 223, 224 (2004) (“There is no tradition of dissenting opinions in the civil law. It was thought that a court’s decision should appear as the decision of the court as a whole, rather than as a mathematical process by which one party emerged as the winner, having gained more votes than his or her adversary. Dissenting opinions have come to international commercial arbitration as a gift of the common law. Many may rejoice at the way in which different legal procedures and traditions are mixed together to build what Sir Michael Kerr called ‘the emerging common procedural pattern in international arbitration.’ It is doubtful, however, whether the dissenting opinion has added much, if anything, of value to the arbitral process.”)

34. *Id.*

largely remain untested.<sup>35</sup>

In his influential and early comparative study of dissenting opinions, Kurt Nadelmann analyzed the evolution of dissents in numerous legal systems.<sup>36</sup> Nadelmann's study is particularly revealing as it demonstrates a more widespread and pronounced usage of dissenting opinions beyond the former British Commonwealth and Empire.<sup>37</sup> Indeed, far from being a new development, public decision-making and judgments were the norm under early Germanic and Roman procedure.<sup>38</sup> Secrecy of deliberation and result, Nadelmann asserts, originated in "later Roman and later canonist procedure."<sup>39</sup>

At the time of Nadelmann's study, German courts strictly observed a rule requiring them to keep deliberations, and therefore dissents, secret.<sup>40</sup> In the intervening years, however, the German Constitutional Court has returned to the practice of issuing dissenting opinions.<sup>41</sup> In what actually constitutes an anomalous practice, the courts of several Swiss Cantons maintained the early Germanic custom of "deliberating and voting in public."<sup>42</sup> Scandinavian courts have a long-standing tradition of separate opinions. Surveying that region, Nadelmann found that Norway's Supreme Court has employed separate opinions since 1864, while Sweden, Finland, and Denmark permit judges to dissent.<sup>43</sup> Spanish courts also have a mechanism through which a dissenting judge may register her opposing vote.<sup>44</sup>

French courts, often held as representing the most consistent and committed paradigm of unanimous and anonymous opinion writing,<sup>45</sup> briefly departed from this custom in the immediate

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35. *See id.*

36. Nadelmann, *supra* note 1, at 417-418.

37. *Id.* at 417-418 (With respect to the former British Commonwealth and Empire, Nadelmann observes that the writing of separate opinions remains "in operation in all parts of the British Commonwealth and Empire, even where, as in Quebec, the civil law prevails. India and Pakistan have retained the practice.").

38. *Id.* at 415.

39. *Id.*

40. *Id.*

41. Van den Berg, *supra* note 4, at 822 n.7.

42. Nadelmann, *supra* note 1, at 416.

43. *Id.* at 418. "In Sweden and Finland, a judge may announce his dissent and give the reasons for it. In Denmark, dissents have been noted in the judgment since 1937, and the names of the dissenters since 1958." *Id.*

44. *Id.* at 420 (citing, e.g., Ley de Enjuiciamiento Criminal, art. 156 (2), 157 (1882)).

45. United States Supreme Court Justice Ruth Bader Ginsburg relates the following story regarding a meeting held in Paris between her and two other Supreme Court colleagues and members of the Conseil d'Etat:

aftermath of the French Revolution, even though they promptly returned to it a few short years later.<sup>46</sup> Echoing the diverse views expressed in the modern debate concerning dissents in arbitration, the abandonment of secret deliberations in France following the Revolution was driven by “distrust of the courts by the masses,” and the return to secrecy only a few years later was motivated by concerns regarding “undignified scenes” caused by open deliberations.<sup>47</sup> The French secrecy model also was adopted in other European jurisdictions, including the Netherlands, Belgium, and Italy.<sup>48</sup>

In addition to the apparent widespread adoption of dissenting or separate opinions as a matter of domestic judicial decision-making in both civil and common law jurisdictions, commentators also point to the widespread adoption of dissents by international courts and other quasi-judicial decision making bodies. These institutions include: ICSID, the Iran–United States Claims Tribunal, the International Court of Justice (and its predecessor, the Permanent Court of International Justice), the International Tribunal for the Law of the Sea, the International Criminal Court, the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, the Special Tribunal for Lebanon, the Extraordinary Chambers in the Courts of Cambodia, the Inter-American Court of Human Rights, and the European Court of Human Rights.<sup>49</sup>

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Early in our second session, Justice O'Connor described the doctrine current in the United States concerning the respect or deference courts owe to decisions or rules made by expert administrative agencies or officials. Courts are bound to accept an administrative agency's construction of the statute the agency is charged to enforce, Justice O'Connor reported, so long as the agency's reading is a plausible one, even if not the only plausible reading or, in the judge's view, the more or most plausible reading.' How can that be, a French colleague asked. How can the law have more than one plausible meaning? Or, more accurately, how can a court judgment openly so acknowledge? The law is the law There can be but one officially correct reading. Shouldn't judges, at least in their official pronouncements, make it appear so to the public? Isn't it the court's responsibility to identify by judgment the (one and only) correct interpretation?

Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133 (1990).

46. See Nadelmann, *supra* note 1, at 422-423.

47. *Id.*

48. *Id.*

49. See Charles N. Brower & Charles B. Rosenberg, *The Death of the Two-Headed Nightengale: Why the Paulsson-Van Den Berg Presumption that Party Appointed*

One facet of van den Berg's meticulous compilation of ICSID cases in which dissents have been filed bears more careful consideration.<sup>50</sup> To the extent that one accepts the wobbly premise that dissenting opinions in investment arbitration are yet another pestilence originating in common law practice, would it not be reasonable to anticipate common law lawyers to dissent more frequently than their civilian counterparts? With respect to this query, careful analysis of the cases assembled by van den Berg is revealing. Of the 34 dissenting arbitrators cited, a clear majority originate from non-common law jurisdictions.<sup>51</sup> Further undercutting the effort to narrowly characterize dissents as a common law offshoot, many of the first dissents submitted in ICSID arbitrations were by arbitrators from non-common law jurisdiction.<sup>52</sup>

That dissenting or separate opinions are not solely a creature of the Anglo-American legal tradition is beyond cavil. Not only have dissenting opinions become a widely accepted element of domestic judicial decision making in numerous non-common law jurisdictions, such opinions also have become commonplace in international adjudication. Thus, the proposition that dissenting opinions reflect key cultural differences is but another element of the "myth of culture clash in international arbitration."<sup>53</sup>

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Arbitrators are Untrustworthy is Wrongheaded, at 25-26 (available at <http://www.cailaw.org/ita/2012winforum/browerrosenbergv2.pdf>) (internal citations omitted).

50. See van den Berg, *supra* note 4, at 837-843. Van den Berg's table compiling dissenting opinions in ICSID tribunal decisions has been adapted to reflect the nationality of the identified arbitrators (as designated by ICSID) and is included as the "Appendix" to this article.

51. These include: Grant Aldonas (U.S.A.), Guido Tawil (Argentina), Pedro Nikken (Venezuela), Otto L.O. de Witt Wynen (Netherlands), Gary Born (U.S.A.), Franklin Berman (U.K.), Marc Lalonde (Canada), Bernardo Cremades (Spain), Daniel Price (U.S.A.), Ronald A. Cass (U.S.A.), Francisco Orrego Vicuña (Chile), Robert Volterra (Canada), Domino Bello Janeiro (Spain), Todd Weiler (Canada), Horacio Grigera Naón (Argentina), Ian Sinclair (U.K.), Thomas W. Walde (Germany), Jose Luis Alberro-Semerana (Mexico), Jerzy Rajski (Poland), Yawovi Agboyibo (Togo), Antonio Crivellaro (Italy), Ian Brownlie (U.K.), Jorge Covarrubias Bravo (Mexico), Bryan P. Schwartz (U.S.A.), David Suratgar (U.K.), Jaroslav Handl (Czech Republic), Don Wallace Jr. (U.S.A.), Keith Highet (U.S.A.), Ivan Zykin (Russia), Heribert Golsong (Germany), Keba Mbaye (Senegal), Mohamed Anim El Mahdi (Egypt), Samuel K.B. Asante (Ghana), Dominique Schmidt (France). Country of origin was determined based upon the national designations determined by ICSID.

52. These include: Herbert Golsong (Germany) (*AMT v. Zaire*) (February 21, 1997); Keba Mbaye (Senegal) (*AMT v. Zaire*) (February 21, 1997); Mohamed Anim El Mahdi (Egypt) (*SPP v. Egypt*) (May 20, 1992); Dominique Schmidt (France) (*Klockner v. Cameroun*) (October 21, 1983).

53. See generally John M. Barkett, *The Myth of Culture Clash in International Commercial Arbitration*, 5 FIU L. REV. 1 (2009).

### C. *Debating Dissents in Arbitration*

Given the widespread acceptance of dissents in arbitration, both in the rules and practice of numerous arbitration institutions, it is apparent that a convergence, likely less arduous than most critics of dissenting opinions have anticipated, has *already* occurred.<sup>54</sup> To this end, much of the commentary surrounding the role of dissents in arbitration seeks to achieve a “more perfect” model of dissent, rather than to cast aside the practice altogether, even though the most recent literature all but states that the doctrine of dissent finds no home in public international law.

Suggestive of Justice Brennan’s identification of three categories of dissenting opinions in the jurisprudence of the United States Supreme Court, Redfern also endeavors to divide dissents in international arbitration into three categories, labeling each “the Good, the Bad, and the Ugly.”<sup>55</sup> Although generally critical of the effect of dissenting opinions, Redfern’s rubric provides genuine insights as to the status of dissenting opinions among arbitration practitioners. “Good” dissents, Redfern notes, “may be short, polite, and above all restrained so that the dissenter says: ‘It is with regret that I must dissent from the views of my learned colleagues,’ followed by a few short, sharp sentences.”<sup>56</sup> The advantage of “Good” dissents, so the argument goes, “is that they permit an arbitrator to express disagreement, without what may be seen as a show of conceit or petulance. And without imperiling the authority of the award.”<sup>57</sup>

Although Redfern does not specifically define “Bad” dissents, he suggests that such dissents would include those that more pointedly attack the majority’s reasoning.<sup>58</sup> As one example of such a dissent, Redfern cites an American appellate decision in which the dissenting judge complained, “[i]n essence, what these four judges have done here is to blindly announce a . . . rule which not only finds no support in history, precedent, experience, custom, practice, logic, reason, common sense or natural justice, but

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54. See van den Berg, *supra* note 4, at 821 (citing Redfern, *supra* note 30, at 242) (“Dissenting opinions appear to have become an accepted practice in international arbitration. The current debate concentrates on their procedure, form, and content. 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.’”)

55. See Redfern, *supra* note 30, at 224-225.

56. *Id.* at 225.

57. *Id.* at 227.

58. *Id.*

is in utter defiance of each and all of these standards.”<sup>59</sup> In contrast to “Good” and merely “Bad” dissents, “Ugly” dissents are those:

. . . in which the dissenting arbitrator – and it is almost always an arbitrator, not a judge – does not merely disagree with his or her colleagues on issues of fact or law, or on their reasoning, but takes the opportunity of issuing a dissenting opinion to attack the way in which the arbitration itself was conducted. The dissenting arbitrator complains, unrestrainedly and in print, that his or her views were ignored, that he or she was never properly consulted, that the majority arbitrators were ignorant of the law and biased from the outset, and so forth. In short, the dissenting arbitrator complains that the proper procedures were not followed and that the majority arbitrators have failed to behave as they should have behaved.<sup>60</sup>

Redfern’s concerns regarding “Ugly” dissents, rooted in preserving the enforceability of awards, are perhaps most viable when considering the kind of improper arbitrator conduct that van den Berg conjures in his own critical analysis.<sup>61</sup> Brower and Rosenberg, however, directly challenge this contention, rightfully noting that “[u]njust arbitral awards based on manifest violations of the parties’ procedural rights, for example, deserve no such protection from annulment or non-enforcement.”<sup>62</sup> Indeed, such a dissenting opinion may have significant ameliorative effects:

A dissenting opinion that correctly discloses such a defect will have served a useful purpose of preventing an unjust award . . . where the dissenting opinion reveals serious flaws which, otherwise, would have remained undisclosed, is it really a bad thing that the parties and the appellate or enforcement courts are able to vacate the award or to refuse its enforcement?<sup>63</sup>

Notably, there is also ample evidence to suggest that an arbitrator’s failure to dissent may *also* subject the award to enforcement

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59. *Id.* (citing Stanley H. Fuld, *The Voices of Dissent*, 62 COLUM. L. REV. 923, 924 (1962)).

60. Redfern, *supra* note 30, at 228.

61. See van den Berg, *supra* note 4, at 828 (“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.”).

62. Brower & Rosenberg, *supra* note 43, at 44-45.

63. *Id.* (citing Peter J. Rees & Patrick Rohn, *Dissenting Opinions: Can they Fulfill a Beneficial Role?*, 25 ARB. INT’L 329, 338-39 (2009)).

challenges.<sup>64</sup>

That the debate regarding the propriety of dissenting opinions in arbitration generally, and investment arbitration in particular, has commenced is apparent given the diversity of well-articulated views on the issue. Some commentators have struck a forceful position in favor of such opinions by arguing, for example, that dissents foster legitimacy in international arbitration,<sup>65</sup> while others have argued that dissents may in fact be improper, ineffectual, if not actually deleterious.<sup>66</sup> Van den Berg's recent article, *Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration*, clearly falls into the latter camp, and – given the considerable debate it has reignited – merits careful consideration.

### III. THE RISK OF MIXING APPLES AND ORANGES

In his treatment of the subject of dissents, van den Berg explains that he “would like to explore the cautionary note with which Redfern concluded his seminal article, namely, that the ‘time has perhaps come to inquire whether the present leniency towards dissenting opinions . . . has gone too far.’”<sup>67</sup> Van den Berg's descriptive-empirical analysis of the practice of dissent in investor-state arbitrations may readily comport with Kant's pronouncement that “experience without theory is blind, but theory without experience is but a meaningless intellectual exercise.”<sup>68</sup>

The effort undertaken in perusing this objective is primarily premised on a case study of 150 publicly reported ICSID decisions (jurisdictional and merits), of which 34 included dissenting opinions. These dissenting opinions, he argues, in turn reflect that dissents “are almost universally issued in favor of the party that appointed the dissenter.”<sup>69</sup> Engaging in only limited analysis concerning the content of the 34 dissents, van den Berg goes on to

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64. Brower & Rosenberg, *supra* note 43, at 45-48.

65. See, e.g., Laurence Shore & Kenneth Juan Figueroa, *Dissents, Concurrences and a necessary divide between investment and commercial arbitration*, 3 GLOBAL ARB. REV., 18, 20 (2008); Brower & Rosenberg, *supra* note 43, at 24-25; Richard M. Mosk and Tom Ginsburg, *Dissenting Opinions in International Arbitration*, 15-4 MEALEY'S INT'L ARB. REP. 16 (2000).

66. See van den Berg, *supra* note 4; Redfern, *supra* note 30.

67. *Id.* at 821.

68. IMMANUEL KANT, PROLEGOMENA TO ANY FUTURE METAPHYSICS 5 (James W. Ellington trans., Hackett Pub. Co. 2d ed. 2002) (1783). In that very same passage Kant recalls confessing “that [his] remembering David Hume was the very thing that many years ago first interrupted [Kant's] dogmatic slumber and gave [Kant's] investigations in the field of speculative philosophy a quite new direction.” *Id.*

69. *Id.* at 824.

argue against the four historically foundational propositions supporting the use of dissenting opinions: (i) dissenting opinions are conducive to better awards; (ii) the possibility of a dissenting opinion ensures the majority's commitment to act responsibly; (iii) party confidence in the system is bolstered by dissenting opinions; and (iv) dissenting opinions nurse the development of arbitral decisional law.<sup>70</sup> Although superficially seductive, sustained analysis demonstrates that van den Berg's article, despite its title and repeated pronouncements on the effects of dissents in investor-state arbitrations, is not about the doctrine of dissent at all, but rather with the contention that party-appointed arbitrators are less than impartial.

This descriptive and empirical formulation fails to comment in any determinative manner on the objective utility of dissents because it does not segregate the issue of party-appointed arbitrator *neutrality* from the viability of dissent in the realm of public international law. If van den Berg has at all identified a shortcoming, the insufficiency is in no way linked to the customary international law practice of dissenting opinions. Even within the confines of the basic inferences drawn from the 34 dissents in the operative case study, it becomes readily apparent that the dysfunction rests with the inference that party-appointed arbitrators might be independent but certainly are not impartial. Pursuant to this argument, dissent craftsmanship is therefore merely a symptom of a very deep and perhaps irreparable pathology.

Van den Berg relies on untested premises and assumptions that further complicate his descriptive account of the world of dissenting opinions in investment-state arbitrations. An eloquent example is advanced in the author's struggle to assert that "[o]ne of the major problems with dissents by party-appointed arbitrators is that they might inhibit the deliberative process."<sup>71</sup> In order to support the proposition, van den Berg layers one assumption after the next, constructing a theoretical 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."<sup>72</sup> Without the assumption of bias, the premise that dissents by party-appointed arbitrators might inhibit or otherwise enervate the deliberative process simply cannot be sustained.

The corollary to van den Berg's "straw arbitrator" who opines

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70. *Id.* at 823.

71. *Id.* at 829.

72. *Id.*

that “he or she should support (or even improve) the case advanced by the party that appointed him or her,”<sup>73</sup> is singularly revealing: the “neutral and impartial arbitrator” does not perceive herself as charged with the imperative of advancing an interest other than the equitable administration of justice based upon applicable law. This arbitrator applies her impartial judgment to determine whether and how to dissent, free from any of the ills of bias.

Van den Berg’s empirical analysis merely provides a factual foundation from which it may be inferred that where a party-appointed arbitrator is not impartial or objective in evaluating substantive and procedural merits, a dissent will reveal that arbitrator’s lack of partiality. It must be underscored that the same impartiality ascribed to the non-prevailing party-appointed arbitrator is shared by the prevailing party-appointed arbitrator.

The descriptive analysis that van den Berg advances is equally unavailing in shedding light on the contributions of dissenting arbitrators to the majority opinion. It compellingly suggests that dissenting arbitrators are either biased in favor of the party who appointed them or otherwise misguided fundamentally with respect to the standard that should govern their analysis and deliberations. The extent to which van den Berg’s exegesis on the doctrine of dissent diverts to arbitral partiality or misapplication of standards is captured in the following pronouncement: “In 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.”<sup>74</sup> Again, irrespective of whether the proposition accurately captures a cultural development or expectation in the realm of investor-state arbitral practice, this purely descriptive account is certainly hapless as to any revelation directly or indirectly related to the nature or character of dissenting opinions. It does, however, quite emphatically capture what might be a cultural partiality or misunderstanding concerning the broader role and responsibility of arbitrators that regrettably *may* pervade the practice.

Significantly absent from van den Berg’s treatment of dissents is any rigorous analysis regarding the role of arbitrators in public international law and the doctrine of dissent. The difference between an arbitrator in an investor-state arbitration apply-

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73. *Id.*

74. *Id.* at 830.

ing public national law and a judge in a domestic national proceeding militates in favor of application of dissents because of the greater public policy responsibility engrafted upon the arbitrator that in many ways dwarfs the national policy imperative attendant to a judge presiding over a national judicial contention. Van den Berg, however, only makes fleeting reference to this analytically helpful analogy. Specifically, his three sentence analysis merely concludes that “[i]n contrast [to a judge], a party-appointed arbitrator does not have the expectation that his or her dissent would contribute to the development of investment law because, as noted above, those dissents virtually never are relied upon in subsequent investment cases.”<sup>75</sup> Even assuming this proposition to be accurate, which hardly can be determinative because a conceptual or doctrinal reliance on a dissent may be most effective when not explicitly stated for a number of reasons, the proposition is circular. An inquiry into the nature of dissents must be free of underlying assumptions of partiality used to reconcile a consistent and empirical phenomenon, i.e., that dissents are authored by party-appointed arbitrators where the party that appointed them did not prevail.

#### IV. TOWARDS A MORE MATURE CULTURE OF INVESTMENT ARBITRATION: THE ROLE OF THE ARBITRATOR IN INVESTOR-STATE ARBITRATION AND THE DOCTRINE OF DISSENT

Park recently asked whether arbitration had reached its “autumn.”<sup>76</sup> We ask instead whether investment arbitration, arguably in its teenage years if measured from the boom of the mid-1990s, finally has bloomed into adolescence. Even if one accepts the criticisms asserted against dissenting opinions by commentators such as van den Berg, can they be simply labeled “growing pains”?

The central role of dissents cannot be severed from the workings of investor-state arbitration in an environment of economic globalization. Although, as described, critics of dissenting opinions assert that separate writings undermine the authority of investment arbitration awards (often with just a single sentence “discussion” of the proposition<sup>77</sup>), it is apparent that this reasoning may

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75. *Id.* at 831.

76. William W. Park, *Arbitration in Autumn*, 2 J. INT’L DISPUTE SETTLEMENT 1, 1 (2011).

77. *See, e.g.,* van den Berg, *supra* note 4, at 831.

be somewhat short-sighted, narrow, and unduly draconian. Indeed, taking a more deliberate view, some commentators have observed, and we agree, that dissenting opinions can play a “critical role in fostering the legitimacy of international arbitration, particularly investment arbitration.”<sup>78</sup> This theory is supported by at least two premises, each of which has ample standing when considering the historical development of dissents. First, the public will have greater confidence in a system in which dissent is publicly aired because transparency provides greater assurances of a fair and equitable process. Second, dissents will facilitate the development of legal principles, which is otherwise handicapped by a dearth of precedential (even if only persuasive) guidance.<sup>79</sup>

Among the most elementary criticisms of dissenting opinions in investment arbitration is that judicial and arbitral decision-making are not equivalent. This observation ostensibly is potent when considering that much of the doctrinal support for dissents relates to their prevalence in institutions such as the U.S. Supreme Court, which are tribunals of last resort. The critics, however, fail to consider the evolution of investment arbitration in modern international law while simultaneously either ignoring or providing perfunctory recognition to the political and economic exigencies that public international law imposes on arbitration. When considered in this light – even though it may seem remarkable because of the significant attention accorded to investment arbitration over the last decade – the law of nations only recently has come to terms with the implications of international investment arbitration. In very short order investment arbitration has crafted and occupied a previously non-existing space, formerly only modestly regulated by diplomatic channels.<sup>80</sup> Although not formally tribunals of “last resort”, investor-state tribunals functionally represent the only remedy available to parties seeking relief in the form of international investment protection.

Irrespective of the forum (ad hoc or treaty based), international public acceptance and trust remains the *sine qua non* of a credible and legitimate system of investment arbitration. Trust, however, is not simply satisfied by transparency and confidence in fairness. Predictability is also required. The less than narrow uni-

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78. Brower & Rosenberg, *supra* note 43, at 25.

79. See van den Berg, *supra* note 4, at 826-27.

80. Rodrigo Polanco Lazo, *International Arbitration in Times of Change: Fairness and Transparency in Investor-State Disputes*, 104 AM. SOC'Y INT'L L. PROC. 591, 592 (2010).

verse of material issues shall doubtless contribute to some constant level of uncertainty. The presence of this uncertainty will not diminish merely because the grounds deliberated are ultimately published in the form of a dissenting opinion. Yet, total and systemic iron-clad unanimity not only inhibits doctrinal development, but also raises the specter of “smoke-filled” room decision-making.<sup>81</sup>

In formulating and evaluating premises on the viability of a dissent rubric in international treaty-based arbitration, commentators have neglected to consider the very particular and singular role of arbitrators processing disputes within the framework of public international law. This omission is material to the dialogue. The paucity of meaningful scholarship on this point perhaps has its genesis in the very foundations of international investment arbitration, which in large measure is predicated on international *commercial* arbitration with respect to arbitral practice. Accordingly, the role of arbitrators in international commercial arbitration and international treaty-based arbitral proceedings often is blurred.<sup>82</sup> This ill-conceived equivocation is central to understanding the connection between the role of arbitrators in investor-state arbitration and the doctrine of dissent.

The development of international commercial arbitration is most saliently characterized by its promise to provide efficient and expeditious practical solutions to disputes arising from commercial relationships within the ambit of private international law.<sup>83</sup> International commercial arbitration is organized around precepts of party-autonomy, privacy, and virtually absolute lack of transparency as to the arbitral panel’s “justice dispensing” deliberation. This lack of transparency extends to the premises underlying findings of fact, application of law to facts, and the weighing of legal authority by the panel.

Central to the configuration of international commercial arbitration is its unique character pursuant to which disputes are

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81. Brower & Rosenberg, *supra* note 43, at 44-48.

82. See, e.g., A. REDFERN AND M. HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 66 (4th Ed. 2004) (identifying bilateral investment treaties as a network of international investment law that configures commercial arbitration).

83. Indeed, one of the principal badges of prejudice that hampered the development of international commercial arbitration so that it would be deemed to be *in pari materia* with judicial actions was the general proposition that international commercial arbitration was designed to resolve only simple commercial disputes arising between private parties and not controversies arising from complex cross-border transactions. See PEDRO J. MARTINEZ-FRAGA, THE AMERICAN INFLUENCE ON INTERNATIONAL COMMERCIAL ARBITRATION 14 (2009).

processed beyond the realm of the state's exercise of sovereignty through a judicial system—in fact, parallel to the workings of the sovereign's judicial branch of government and intersecting only when absolutely necessary.<sup>84</sup> The imperatives that private international law engrafts on arbitrators do not require that they consider: (i) public policy concerning applicable legislation, (ii) national policy, (iii) micro or macroeconomic consequences, (iv) the effects of the award in the development of an arbitral jurisprudence, (v) the manner in which an award may shape a particular industry sector, or (vi) the workings of a particular award within a system of international law constituted by an intricate and seemingly unrelated network of bilateral and regional investment treaties.

Viewed through this prism, the orthodox role of arbitrators is that of an impartial and independent decision maker who aspires to craft a practical commercial resolution to a private dispute pursuant to a process of deliberation that shall never be disclosed to the parties or rendered susceptible to public scrutiny, let alone forever reduced to writing to form part of the public domain.<sup>85</sup> Consequently, wrested from the arbitrator is any imperative to further the public welfare or otherwise contribute to the development of a *corpus* of jurisprudence.<sup>86</sup>

Within the sphere of international commercial arbitration, framed by private international law and the substantive law of a particular state, the principles governing the enforceability of an award are accorded primacy over the *ratio decidendi* and the deliberative process. Because jurisdiction is premised on a contractual relationship between private parties, the state's welfare and public policy are wholly segregated from the process. Also, the subject matter of disputes commonly aired within a matrix of international commercial arbitration *generally* does not concern the administrative or regulatory space of states. Commercial contractual concerns, and less frequently business torts, envelope the standard fare of issues duly explored.

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84. Most notably these intersections typically occur (i) when injunctive relief is sought pre-panel constitution, (ii) as part of compulsory practice in the gathering of evidence or presentation of witnesses, and (iii) at the recognition and enforcement phase.

85. See, e.g., Mohammed Bedjaoui, *The Arbitrator: One Man-Three Roles: Some Independent Comments on the Ethical and Legal Obligations of an Arbitrator*, 5 J. Int'l Arb. 1, 7 (1988).

86. *Id.*

A. *Of Dissents and Other Disinfectants: Transparency and Public International Law*

As noted, treaty-based arbitration stands in sharp relief to its international commercial arbitration counterpart. Investor-state arbitral proceedings rest on public international law, specifically a constellation of approximately 3,000 bilateral, multilateral, and regional investment treaties mostly individually and independently negotiated within an over-arching structural framework in order to impose uniformity of terms and purpose<sup>87</sup>. Investment treaties serve as fundamental normative premises for jurisdiction, adopting a malleable principle of *consent* pursuant to which a host-state's offer to settle a dispute with an investor is memorialized in a dispute-resolution clause within a treaty.<sup>88</sup> Consequently, the subject matter of investor-state arbitration is eminently and inextricably intertwined with the host-state's exercise and application of its regulatory authority, administrative jurisprudence, public policy, and positive law.<sup>89</sup> It follows that the processing of a treaty-based arbitration necessarily must be conducted within the parameters of a deliberative process framed by public policy and state welfare considerations that generally encompass fundamental tenets of international investment law. In this context, the arbitrator is hardly charged with a strictly commercial agenda devoid of political, let alone transnational, public policy concerns.<sup>90</sup>

The role of arbitrators in investor-state arbitration commands transparency as to premises supporting final conclusions of fact, law, and the application of law to fact embodied in a particular arbitral award. The exigencies of public international law on the role of arbitrators additionally require the crafting of arbitral awards that are primarily premised on objective doctrinal considerations. These parallel the subjective concerns typified by a commercial solution perceived to be in the best interest of all parties to a private commercial dispute. The international dispute resolution framework predicated on public international law nourishes its legitimacy from the pristine and academic objectivity of doctri-

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87. As shall be discussed, this configuration also is material to the doctrine of dissent and must form part of any discussion on the subject.

88. Charles N. Brower & Stephen W. Schill, *Is Arbitration a Threat or a Boom to the Legitimacy of International Investment Law?*, 9 *CHI. J. INT'L L.* 471, 483-489 (2008-2009).

89. *Id.* at 490.

90. *See van den Berg, supra* note 4, at 824, 831.

nal precepts underlying arbitration awards fashioned as part of a normative system of arbitral jurisprudence.

In addition, the role of arbitrators in public international law requires arbitrators to sift through an elaborate corpus of arbitral precedent so that they may imbue general causes of action—based upon such vague and undefined terms as “denial of justice”, “full protection and security”, “fair and equitable treatment”, “public purpose”, and “national treatment”—with particular meaning purporting to reconcile the proactive regulatory space of the State with the policy objectives of public international law in the arena of foreign investment protection. This exercise of interpretation must be public, objective, and analytical if it is at all to aspire to be legitimate. Normativity, legitimacy, and objectivity in turn are deeply connected to the transparency of the deliberation process and recourse to conventional and customary public international law.

Because “mechanical jurisprudence”<sup>91</sup> is shunned in favor of transparency of process and analysis in the creation of arbitral jurisprudence, it behooves the framework here described to underscore dissents as an integral and necessary part of its architecture. The jurisprudence of dissenting opinions bolsters the tenets of (i) transparency of process in connection with the final findings, i.e., transparency generally, and (ii) objectivity in the identification, interpretation, and application of principles of international customary conventional law.<sup>92</sup> Because the *ratio decidendi* is not hidden or obscured somewhere behind the four corners of an award, the parties to treaty-based arbitration, in stipulating to non-discriminatory treatment, have subscribed to a process that envisions full disclosure (complete and not insubstantial transparency) and objectivity as guiding principles within a rubric of existing arbitral jurisprudence that defies *stare decisis* but remains as a persuasive non-binding juridical standard.

Consequently, the majority of investment instruments, including treaties and State contracts, are mere points of departure in the process of adjudicating a treaty-based investor-state arbitration in accordance with parties’ expectations. The role of arbitrators in the complex and organic domain of public international law is one that necessarily entails more than the rote application of static concepts. At the same time this task is tempered with readily available jurisprudence preventing arbitrators from

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91. See Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908).

92. Brower & Rosenberg, *supra* note 50, at 43-48.

morphing into Dworkin's metaphoric "Judge Hercules", an ideal jurist who is charged with contemplating the practically infinite universe of data so as to identify *the* single just and true answer.<sup>93</sup>

The role of arbitrators in treaty-based arbitration requires that arbitrators borrow from the milieu of arbitral jurisprudence and international law, as identified in Article 38 of the Statute of the I.C.J. in order to synthesize jurisprudence within the confines of the specific factual matrix presented by a particular dispute. If a critical aspect of an arbitrator's role in investor-state arbitration is to generate arbitral jurisprudence, this function cannot be dissociated from the fashioning of a well-reasoned award where the governing principles and applicable facts can be reduced to a dissenting opinion having a rational foundation that is comparable to or greater than the award's prevailing majority view.

In his noted survey of the American common law system, Karl N. Llewellyn observed:

were the public ever to harbor a suspicion that courts were not acting aboveboard, the dissenting opinion guarantees the public that any bending of the law will see the light of day. And not just that. The dissenting opinion also guarantees the public that judges are on the job, that in the chambers where a panel's deliberations take place, judges join battle over the law, each judge feeling individually responsible for the panel's decisions.<sup>94</sup>

United States Supreme Court Justice Louis D. Brandeis more concisely stated the same principle when he observed, "[s]unlight is said to be the best of disinfectants."<sup>95</sup> The general premise that dissenting opinions elevate the authority of decision-making tribunals by conveying to the public that a fair process has been undertaken and stands parallel to Llewellyn's assertion that "judges *have no need whatsoever* to present a united front to the outside world *in order for the law and the courts to be held in high esteem*."<sup>96</sup>

Thus considered, one might conclude that van den Berg's own study is a consequence of the very transparency it eschews and may in fact foster further refinement in the process of selecting

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93. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 105 (1977). See also JURGAN HABERMAS, *FAKTIZITAT UND ALL GELTUNG* 258 (1st ed. 1992).

94. Karl N. Llewellyn, *The Case Law System in America*, 88 COLUM. L. REV. 989, 1002-1003 (1988) (P. Gewirtz ed.) (M. Ansaldi trans.).

95. Louis D. Brandeis, *What Publicity Can Do*, *Harper's Weekly*, Dec. 20, 1913, at 10, available at <http://www.law.louisville.edu/library/collections/brandeis/node/196>.

96. Llewellyn, *supra* note 81, at 1002 (emphasis in original).

impartial arbitrators (not the doctrine of dissent) in investment arbitration. Were van den Berg's conclusions regarding the correlation between party appointments and the authorship of dissenting opinions accepted,<sup>97</sup> it becomes apparent that light will have been shed on an unfortunate phenomenon that has little to do with dissents but a great deal to say on the "impartiality" of arbitrators that function within a system that is party-appointment driven and premised on the precept of impartiality. Van den Berg's inquiry merely begs the question whether the equitable administration of justice suffers equally with the doctrine of dissent where the fundamental assumption of impartiality is wanting.

Light, the disinfectant, is doing its work. Far from undercutting the phenomenon of dissenting opinions, van den Berg's study may serve as a boon to their long term development by permanently extracting a cancerous cause that he may not have sought to identify in the first instance.

### *B. The Rule of Reason*

The normative or constructive function of arbitrators operates in tandem with an obligation to identify reasoned arguments that bestow legitimacy to the arbitration process itself. Significantly, that this "reasoning" requirement finds a home in the role of arbitrators applying public international law is hardly new, yet it continues to stir the imagination of commentators analyzing international investment law.<sup>98</sup> What seems to have been omitted from the literature, however, has been the necessary connection between the tenets of *transparency*, *reason*, and *objectivity*, and the jurisprudence of dissents. Transparency of the grounds analyzed during the deliberation process and the primacy of the process itself simply cannot be attained if arbitrators are proscribed from articulating and publishing reasoned dissents. Foreclosing dissenting opinions as part of an arbitration award would be equivalent to the adoption of privacy and secrecy doctrines as determinative in proceedings governed by application of public international law.

The force of reason as embodied in an arbitration award would be vastly diminished, if not altogether eviscerated, were

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97. Although the correlation that van den Berg reveals is troubling, it does not necessarily, as Brower and Rosenberg point out, conclusively establish causation.

98. See, e.g., *THE REASONS REQUIREMENT IN INTERNATIONAL INVESTMENT ARBITRATION* (G. Aguilar Alvarez and W. M. Reisman eds. 2008).

arbitrators compelled to refrain from issuing dissents. Similarly, the normative foundation that a guiding rule of reason imparts on arbitral jurisprudence would be meaningfully lessened if dissents had to be carved out of arbitration awards. The articulation of reasoned propositions that were considered but not adopted by a majority of panel members broadens and completes the scope of perennial internal dialogue that is endemic to decisional law. Therefore, the role of arbitrators applying public international law must necessarily comprise the dissent methodology if a rule of reason is to be rigorously observed and applied as a basis of normative standing.<sup>99</sup>

The role of the arbitrators in investor-state arbitrations is materially more *akin* to that of a judge in a judicial system than to international commercial arbitration to the extent that both judge and investor-state arbitrator must weigh public policy and social welfare principles germane to applicable substantive law. An investor-state proceeding requires compliance with international expectations of legitimacy, which are more far-reaching and diverse than even the national expectation of legitimacy that national courts must meet.<sup>100</sup> The public nature of an investor-state arbitral proceeding is international and not national. International arbitration concerns States despite the “investor-state” standing configuration, where an investor-claimant seeks relief from a host-state respondent. The process of adjudication in an investor-state arbitration entails consideration of international standards pertaining to the definition of “investments” and even the nature and character of property, the policies and objectives of international investment law, as well as public findings on issues within the exclusive ambit of national-domestic law.

The intimate and inextricable connection between a supernational forum applying public international law, the particular relevant States and the more general policies incident to a transnational network of bilateral and multilateral investment

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99. Significantly, the ICSID system contemplates the former requirement of a reasoned opinion upon penalty, at least theoretically, of annulment. Article 52 (1)(e) reads:

(1) Either party may request annulment of the award by an application in writing addressed to the Secretary General on one or more of the following grounds:

. . . .  
e) that the award has failed to state the reasons on which it is based.

100. See discussion of authority of arbitral awards in Brower & Rosenberg, *supra* note 43, at 44-48.

treaties compels the issuance of dissents in arbitration awards if in fact the legitimacy arising from *predictability* is to be preserved and enhanced. The role of arbitrators in this domain entails a duty to issue awards that address the expectations of a public that surpasses the narrow universe of just the parties to the arbitral proceeding. This responsibility certainly is not shared by arbitrators presiding over international commercial arbitration cases within the sphere of private international law. In these latter proceedings, predictability, which still remains a formidable challenge to international commercial arbitration and a promise that it has yet to redeem, is circumscribed to the parties to the dispute as the award does not contemplate an imperative to contribute to an arbitral jurisprudence, nor does it seek to address or redress public policy considerations.

The heightened responsibility imposed upon arbitrators laboring to enforce “fair and equitable treatment” and non-discriminatory application of justice in the relationship between States and investors undeniably involves a heightened commitment to the principle of predictability. Obscuring or altogether omitting a holistic treatment of issues and possible conclusions, which necessarily includes the publication of dissents, can hardly be contemplated if the requisite level of predictability and expectations are to be met.<sup>101</sup>

### *C. Customary International Law*

The literature discussing the propriety of dissents in investor-state arbitration has elected to ignore that the role of arbitrators, which includes authoring dissents, forms part of customary international law. It is here asserted that the undertaking of dissent craftsmanship rests in a normative space that far exceeds loose customary practice. Because of this standing, any effort to modify

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101. Achieving predictability of result remains a goal that international commercial arbitration has yet to achieve. The promotion of secrecy and non-transparency as integral principles of the deliberation process, the absence of an imperative to articulate fully and comprehensively the issues considered and reasons for the adoption of specific principles to the detriment of competing precepts, less than uniform and conventional rules for procedure, the virtual non-existence of evidentiary rules, the absence of discovery in view of a restrictive and developing rubric facilitating the gathering of evidence, and meaningful disparity in the skills of arbitrators, in the view of many are conducive to lack of predictive value attendant to results. This absence of predictability, which arises from the very structure of international commercial arbitration, cannot be imported to international arbitration (investor-state arbitral proceedings) without meaningfully impairing the entire systems' legitimacy.

the practice, let alone eviscerate it, must be balanced against the consequences of disavowing a legitimately established and accepted norm of public international law.<sup>102</sup>

It is hardly disputed that States have assented to the practice of arbitrators authoring dissenting opinions when sitting in super-national fora and applying public international law. This practice has been both *constant* and uniform. Article 38(1)(b) of the Statute of the I.C.J. explicitly references international custom “as evidence of a general practice accepted as law.” In addition, Art. 38(1)(c) speaks to “the general principles of law recognized by civilized nations,” as a standard of international law to be considered in the adjudication of disputes. The elements defining the sufficiency of State practice so as to give rise to binding customary international law has been eloquently and succinctly articulated in the *Asylum* and *Rite of Passage* cases: “The party which relies on custom. . . must prove that this custom is established in a manner that has become binding on the other party. . . that the rule invoked. . . is in accordance with a *constant* and *uniform* usage, practiced by the State. . .”<sup>103</sup>

The elements of “constancy” and “uniformity” of usage identified in the ICJ’s opinion, which materially concern frequency and duration, are amply met concerning the practice of issuing dissenting opinions.<sup>104</sup> State practice in the fashioning of investor-

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102. Van den Berg, in the very first sentence of his carefully reasoned contribution, remarks that “[d]issenting opinions *appear* to have become an accepted practice in international arbitration.” Van den Berg, *supra* note 4, at 821 (emphasis supplied). Even though the author’s studious use of the word “appears” lessens just a shade the proposition’s claim and is somewhat inexplicable, just paragraphs later the doctrine of dissent’s legitimate place in customary international law is amply vindicated with direct references to the Permanent Court of International Justices’, and its successor, the International Court of Justices’ adoption of the dissent doctrine. *Id.* at 822-23. Similarly, the author details the conventional history of dissents with respect to the 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. *See Id.* at 822 n.5 (emphasis supplied). The treatment or possible amendment of the doctrine, however, as a modification or deletion of a settled norm of customary international law is not one that the author elects to explore or at all consider.

103. *See* IOANA TUDOR, THE FAIR AND EQUITABLE TREATMENT STANDARD IN THE INTERNATIONAL LAW OF FOREIGN INVESTMENT 69 (2008) (citing *Asylum* (Colombia v. Peru), 1950 I.C.J. 276 (Nov. 20); *Rite of Passage* (Portugal v. India), 1960 I.C.J. 40 (April 12)) (emphasis added).

104. Frequency and duration as critical elements in the formation and transformation of customary international law have been relaxed, in the views of most commentators, as a result of information, globalization, and the efficiencies and expediencies that characterize contemporary international relations. Accordingly, absolute or “complete uniformity” is not required. Fact-specific determinations arising from the idiosyncrasies of specific factual cases shall be deemed to be controlling. *See*

state arbitral awards can be inferred from State action at different phases of the process, commencing with acceptance of dispute resolution clauses in treaties contemplating that dissents form part of the arbitral process. Indeed, the *opinio juris* component to customary international law requires manifest evidence of a State's subjective conviction, and the conclusion of a treaty itself constitutes acceptance of a customary practice.<sup>105</sup>

The question of whether dissents are viable and have a place in investor-state arbitration cannot be comprehensively and meaningfully addressed without properly contextualizing dissents as a State practice that forms part of customary international law. Amending this practice entails abandoning the legitimacy that customary international law bestows upon a specific practice that it embraces. Thus, any deliberate modification in State practices acknowledged to form part of customary international law must be balanced against the negative implications that generally flow from such amendments. The particular case concerning issuance of dissents, to the extent that the publication of dissenting opinions is to be viewed as an international acceptance of a process committed to transparency of the premises considered in the fashioning of an arbitration award, constitutes a stark shift from transparency and disclosure to privacy and secrecy as preferred general principles of public international law. The consequences of such a shift are beyond the purview of this contribution.

#### *D. Dissents and the Development of Legal Principles: Precedent and a New Normative Space*

The absence of precedent (*stare decisis*) as a distinct and unique feature of arbitral jurisprudence grants particular normative significance to the customary international practice of dissent craftsmanship. Arbitral awards occupy a very unique normative space that, very much like the principle of *comity*, can be viewed as a type of imperative that has greater weight than a mere *courtesy* to be followed, but less than an *obligation* that must be applied.<sup>106</sup> The persuasive but non-binding nature of treaty-based arbitral awards certainly invites, if not altogether requires, a com-

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United States Nationals in Morocco case (U.S. v. Morocco), 1952 I.C.J. Reports 176 (August 27).

105. See Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, at 99-101 (June 2007).

106. *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895). See also PEDRO J. MARTINEZ-FRAGA, THE NEW ROLE OF COMITY IN PRIVATE PROCEDURAL LAW (2007).

prehensive account of the legal reasoning supporting a specific finding. The articulation of the premises and structure giving rise to a particular decision can best serve and nourish customary international law where a corresponding antinomy to premises and conclusions is fully presented. The normative space that “persuasive authority” occupies is maximized in its legitimacy when coupled with a reasoned antithesis. The adoption, as persuasive authority, of a majority view expressed in an arbitration award is most compelling (i.e., persuasive) as to both form and substance in cases where the proponent of the *authority* can publicly communicate having considered thoroughly a diverging view by dint of citing to analysis that thoroughly articulates such a view in the form a dissent.

In addition, from a merely structural perspective, customary international law in the form of arbitral jurisprudence can best serve its organic and flexible characteristics pursuant to a constant and uniform practice that renders ubiquitous the possibility of doctrinal change or amendment. The majesty of “a common law of arbitral jurisprudence” rests precisely in being capable of creating a body of authority capable of yielding systemic and gradual, but still meaningful, conceptual and doctrinal change. The customary international practice of fashioning dissents in arbitration awards is indispensable to this purpose. In this regard, the queries incident to the practice of authoring dissents compel reformulation to include the role and contributions of the practice of dissents to the normative rubric of decisional jurisprudence. A comprehensive examination of the issue can hardly be exhausted merely by engaging in a less—than—complete empirical analysis that principally relies on a correlation between the non-prevailing party and the appointment of arbitrators. The concerns being explored are slightly more complex and far-reaching.

In this regard, Llewellyn engaged in an experiment that merits reconsideration in the context of investment arbitration:

When two asserted rules are in conflict, it will usually involve a situation in which both opinions have something right and something not right about them, and where both disputants have made the *same methodological error*, namely, framing a single rule so broadly that it encompasses unlike fact situations. The specific cases that actually occur to one judge are correctly decided under his rule. It is just that he has phrased his rule so broadly that the language encompasses the specific cases that occurred to the other judge too, which might have been decided better

under the latter's rule. In every conflict, people think in terms of antinomies, of overbroad generalizations, of thesis and antithesis. Happily, though, it is easier to devise a needed synthesis, the third (and, until this point in the process, unrecognized) possible solution, if the antinomies are accentuated and fought over right at the very start, rather than if the judges wait until later to figure out what they are. A judge needing to decide a case which poses a novel issue for him gains more insight if he has two previously decided cases to peruse rather than only one. This gain in insight is especially evident when the earlier cases the judge come from states other than his own, so that he need not regard the majority view taken in those cases as having the force of precedent.<sup>107</sup>

Given the final caveat, this remarkable insight into the decision-maker's reasoning would apply with equal force in investment arbitration where previous decisions, though retaining considerable persuasive authority, lack the force of *stare decisis*.

## V. CONCLUSION

Dissents will play an important role in the continued development of investment arbitration. The current debate regarding the use of dissents in investment arbitration awards cannot be separated from the rise of precedent-based reasoning and argument in investment arbitration. Despite the persistent objections of critics, a modern theory of dissent continues to develop that merges the shared experience of the common and civil law systems, both of which share a history of openness with regard to dissenting opinions in judicial decision-making. Although it remains true that arbitral jurisprudence lacks binding precedential authority, the increasing prevalence of dissenting opinions may serve to elevate the precedential authority of arbitral decisions and foster greater confidence in the process. Moreover, a thorough evaluation of the dissent doctrine must address the nature of dissents as forming part of customary international law, and the role of arbitration in the realm of public international law. Absent these considerations, any evaluation or re-evaluation of dissent theory would be incomplete.

To be sure, consideration of an amendment to or elimination

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107. Llewellyn, *supra* note 81, at 1001 (emphasis in original) (Llewellyn's comments here are not limited to dissenting opinions, but separate opinions generally).

of the doctrine of dissent presents multifaceted challenges that are systemic and therefore overarching with respect to a framework of international dispute resolution premised on public international law. Taking into account the firmly planted position of dissents both in the national legal systems of common and civil law jurisdictions, and its widespread adoption in international practice, however, it would seem that such efforts would be of limited utility if not entirely fruitless. The never dissent principle is daunting and perhaps even discouraging to a serious effort seeking to bring into being the perfect workings of the dissent doctrine. Instead, as we have here asserted, dissents will play an important role in the continued development of international arbitration. Given this promise, does not the very scope of this challenge compel the undertaking of the task?

## APPENDIX

## DISSENTING ARBITRATORS AND COUNTRY OF ORIGIN

<b>ICSID Case</b>	<b>Dissenting Arbitrator(s)</b>	<b>Dissenting Arbitrator's Country of Origin</b>
TSA Spectrum v. Argentina December 19, 2008	Grant Aldonas	U.S.A.
Duke v. Peru August 18, 2008	1. Guido Tawil 2. Pedro Nikken	1. Argentina 2. Venezuela
African Holding v. Congo July 29, 2008	Otto L.O. de Witt Wynen	Netherlands
Biwater v. Tanzania July 24, 2008	Gary Born	U.S.A.
RosInvestCo v. Russia October 2007	Franklin Berman	U.K.
Sempra v. Argentina September 28, 2007	Marc Lalonde	Canada
Vieira v. Chile August 21, 2007	Bernardo Cremades	Spain
Tokios Tokeles v. Ukraine July 26, 2007	Daniel Price	U.S.A.
UPS v. Canada May 24, 2007	Ronald A. Cass	U.S.A.
Siag v. Egypt April 11, 2007	Francisco Orrego Vicuña	Chile
Eastern Sugar v. Czech Rep. March 27, 2007	Robert Volterra	Canada
Siemens v. Argentina February 6, 2007	Domino Bello Janeiro	Spain
Berschader v. Russia April 6, 2006	Todd Weiler	Canada
EnCana v. Ecuador February 3, 2006	Horacio Grigera Naón	Argentina
Salini v. Jordan January 31, 2006	Ian Sinclair	U.K.
Thunderbird v. Mexico January 26, 2006	Thomas W. Walde	Germany

Aguas del Tunari v. Bolivia October 21, 2005	Jose Luis Alberro-Semerana	Mexico
Eureko v. Poland August 19, 2005	Jerzy Rajski	Poland
Mitchell v. Congo February 9, 2004	Yawovi Agboyibo	Togo
SGS v. Philippines January 29, 2004	Antonio Crivellaro	Italy
CME v. Czech Republic March 14, 2003	Ian Brownlie	U.K.
Feldman v. Mexico December 16, 2002	Jorge Covarrubias Bravo	Mexico
SD Myers v. Canada December 30, 2002	Bryan P. Schwartz	U.S.A.
Mihaly v. Sri Lanka March 15, 2002	David Suratgar	U.K.
CME v. Czech Republic September 13, 2001	Jaroslav Handl	Czech Republic
Wena v. Egypt December 8, 2000	Don Wallace Jr.	U.S.A.
SD Myers v. Canada November 13, 2000	Bryan P. Schwartz	U.S.A.
Waste Management v. Mexico June 2, 2000	Keith Highet	U.S.A.
Sedlmayer v. Russia July 7, 1998	Ivan Zykin	Russia
AMT v. Zaire February 21, 1997	1. Heribert Golsong 2. Keba Mbaye	1. Germany 2. Senegal
SPP v. Egypt May 20, 1992	Mohamed Anim El Mahdi	Egypt
AAPL v. Sri Lanka June 27, 1990	Samuel K.B. Asante	Ghana
Klockner v. Cameroun October 21, 1983	Dominique Schmidt	France