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. 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 …”. 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.” I propose to do so with respect to investment arbitrations because many of the awards and dissenting opinions have been made available publicly, including party-appointed arbitrators’ dissenting opinions.

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 Invest-

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


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)).
ment Disputes (ICSID): “Any member of the Tribunal may attach his individual opinion to the award, whether he dissents from the majority or not, or a statement of his dissent.”

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. In contrast, civil law states generally disallow dissenting opinions, principally because of their emphasis on collegiality in the dispensation of justice. Similarly, the 1899 Hague Convention on the Pacific Settlement

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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.