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Dissenting and Separate Opinions in Investment Treaty Arbitration – Revisiting the Debate

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RÉSUMÉ

Cet article traite de l'usage des opinions dissidentes et individuelles dans l'arbitrage relatif aux traités d'investissement. Il propose de revisiter un débat fascinant sur ce sujet qui a été exposé à travers deux articles publiés en 2008. L'article distingue l'arbitrage commercial, qui se situe dans un ordre juridique national de l'arbitrage relatif aux traités d'investissement qui occupe un espace constitutionnel différent, appartenant à l'ordre juridique du droit international public. Il soutient que les décisions des tribunaux constitués en vertu de traités d'investissement peuvent être considérées comme une source subsidiaire de droit international public. En s'appuyant sur l'exemple du débat portant sur l'application des clauses de la nation la plus favorisée aux clauses de règlement des différends dans les traités, l'article montre que les opinions dissidentes et individuelles dans l'arbitrage relatif aux traités d'investissement contribuent au développement et à la compréhension du droit international public. Il note également la contribution positive des opinions dissidentes et individuelles dans l'arbitrage relatif aux traités d'investissement en ce qu'elles augmentent la transparence du processus de raisonnement juridique.

SUMMARY

This article discusses the use of dissenting and separate opinions in investment treaty arbitration. It offers to revisit a fascinating debate on this topic, which was set out in two influential articles published in 2008. The article distinguishes commercial arbitration, which is located within the municipal legal order, from investment treaty arbitration, which occupies a constitutionally different space within the legal order of public international law. It explains that decisions of investment treaty tribunals can be considered as a subsidiary source of public international law. Through the example of the debate on the application of most-favoured nation clauses to dispute settlement provisions in treaties, the

1. Robert Volterra gratefully acknowledges the assistance of Clementine Lietar, associate at Volterra Fietta, in the preparation of this article.

article demonstrates that dissenting and separate opinions in investment treaty arbitration also play a constructive role in the development and understanding of public international law. It also notes the positive role of dissenting and separate opinions in investment treaty arbitration in increasing the transparency of the process of judicial reasoning.

I. Introduction

Investment treaties are, by definition, instruments of public international law that govern relationships between two or more States.[2] As instruments of public international law, the rights and obligations contained in them flow between their parties. As such, in substance, investment treaties invariably deal with issues of State Responsibility. Their interpretation and application must be understood according to public international law, including the law of treaties,[3] even when they contain references to municipal law.

Under many investment treaties, the resolution of disputes arising from their interpretation and application is directed to be resolved, *inter alia*, by reference to binding third-party dispute resolution. Notably and unusually for public international law, many investment treaties contain dispute resolution procedures that enable non-State entities (usually individual or corporate investors) from one State party to pursue the other State party directly for compensation for alleged breaches by that other State party of its obligations under the treaty. Most often, this is by way of international arbitration.

A decade and a half or so ago, such investment treaty arbitrations began to proliferate in number.[4] Commercial arbitration lawyers eventually began to act as counsel and arbitrators in investment treaty cases, alongside public international lawyers. These cases captured the attention of the international commercial arbitration community, perhaps because of the attractiveness of the global and domestic public policy issues underlying them, perhaps because they were more apt to be conducted according to public and not confidential procedures, or perhaps for other reasons. Despite superficial similarities in the conduct of their procedures, they are fundamentally different creatures from commercial arbitrations. Today, investment treaty arbitrations remain fascinating enigmas to most in the international commercial arbitration community.

The use of dissenting and separate opinions by arbitrators in investment treaty arbitrations is a topic that gives rise to a fascinating debate. There are those who deplore it, pointing out that it is a habit looked upon with little favour in the world of commercial arbitration, that it fosters rancour in the unsuccessful party, and that it is procedurally redundant. On the other hand, there are those who applaud it,

2. For example, see James Crawford, *Brownlie's Principles of Public International Law*, 8. ed. Oxford University Press (2012), p. 741 ; Robert Jennings and Arthur Watts, *Oppenheim's International Law*, 9. ed. Longman (1996), Vol. 1, p. 1199.

3. See the Vienna Convention on the Law of Treaties, Articles 1 and 31.

4. For example, see Nigel Blackaby, Constantine Partasides, Alan Redfern, and Martin Hunter, *Redfern and Hunter on International Arbitration*, 5. ed. Oxford University Press (2009), 8.10.

pointing out that it is a practice that has a long and distinguished history in the annals of public international law litigation, that it assists in developing public international law consistently with the provisions of Article 38(1)(d) of the Statute of the International Court of Justice, and that the public policy aspects of investment treaty arbitration call for more transparency in the understanding of the judicial process and outcome than private commercial arbitration.

The virtues and shortcomings of dissenting and separate opinions by arbitrators in investment treaty arbitrations were publicly debated in two thoughtful and deeply influential articles published in December 2008. The authors of the two discourses, learned and experienced lawyers each, adopted opposing viewpoints on the debate.[5]

Laurence Shore and Kenneth Juan Figueroa praised the contribution of dissenting opinion in investment arbitration to the development of public international law and investment treaty disputes. They argued that the dissenting arbitrators in such cases should not bend their views merely with the objective of achieving unanimity.

On the other hand, Albert Jan van den Berg criticised the practice. He took the view that dissenting opinions do not contribute to the development of international law. He thus proposed that tribunals should aspire to unanimous decisions unless there are truly exceptional circumstances.

This briefest of summaries of the 2008 debate cannot do justice to its subtleties and the elegance of expression in their authors' observations. Readers are strongly encouraged to read the articles for themselves. With apologies to those authors, this present article contributes no more than a small postscript to their debate. It revisits the 2008 dialogue in light of developments in investment treaty arbitration during the five years since the original two articles were written.

II. The constitutional role of dissenting and separate opinions in public international law

Commercial arbitrations by definition involve private disputes over the interpretation or application of a commercial contract. Almost invariably, these contracts are governed by one or more form of municipal law.[6] Commercial arbitration tribunals therefore apply municipal laws. The authoritative sources for municipal laws are domestic legislatures and courts. Municipal laws are principally applied and interpreted, in an authoritative and binding way, by the domestic courts of the State of the relevant municipal law. The awards of commercial arbitration tribunals therefore cannot become a source of, or alter the meaning and scope of, the municipal laws upon which they resolve private disputes.

5. Laurence Shore and Kenneth Juan Figueroa, "Dissents, Concurrences and a Necessary Divide Between Investment and Commercial Arbitration", 3 Global Arb. Rev. 18, 20 (2008); 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* Arsanjani et al. ed. (2008).

6. Included in this is the so-called *lex mercatori*, which is shorthand for an attempt to conceive of norms of commercial and contractual law at a generalised level in common between different systems of municipal laws.

The legal ecosystem in which investment treaty arbitration is located is fundamentally different. That is to say, investment treaty arbitration tribunals and their awards occupy a constitutionally different space within the legal order of public international law, than do commercial arbitration tribunals and their awards within the relevant municipal legal order. Investment treaty arbitration tribunals interpret and apply public international law. The authoritative sources for public international law are conventional and customary international law.[7] Not only is the act of discerning the principles of public international law an art not quickly learnt or easily accomplished. To do it effectively requires acknowledge of the entire ecosystem.

The sources of public international law can include the decisions of international courts and tribunals.[8] The decisions of public international law tribunals, including investment treaty tribunals, can thus properly be considered a subsidiary source of public international law. Within the ecology of public international law, their constitutional role includes potentially influencing the development of public international law, in particular aspects of the law of State Responsibility.[9] This is a markedly different character from the decisions of commercial arbitration tribunals within municipal legal orders.

Not surprisingly, a number of arbitrators who have drafted dissenting and separate opinions in investment treaty cases have identified the development of the law as being a motivation for their having written their opinion. For example, Bryan Schwartz, in his separate opinion in the *SD Myers Incorporated v. Canada* case, explained that he did so:

> "to provide some distinctive insights or suggestions that may be of some use in the longer run, as well as in the immediate disposition of this case."[10]

In his dissenting opinion in the partial award on jurisdiction in the *Mytilineos Holdings SA v. Serbia and Montenegro and Serbia* case, Dobrosav Mitrović stated that it is a:

> "professional and ethical duty of an arbitrator, in case he disagrees with the arbitral award rendered by the majority of arbitrators, to inform the parties of his legal opinion and the arguments that prevented him from accepting the arbitral award."[11]

So too, Franklin Berman, in his dissenting opinion in the *Indústria Nacional de Alimentos SA and Indalsa Perú v. Peru* annulment proceeding, stated that arbitrators who write dissenting opinions do so "in the interests of the ICSID system as a

7. For example, see James Crawford, *Brownlie's Principles of Public International Law*, 8. ed. Oxford University Press (2012), p. 20-22; Robert Jennings and Arthur Watts, *Oppenheim's International Law*, 9. ed. Longman (1996), Vol. 1, p. 24.

8. See Article 38(1)(d) of the Statute of the ICJ. This is not inconsistent, of course, with the principle that there is no *stare decisis* in public international law (thus, Article 38(1)(d)'s reference to Article 57 of the Statute of the ICJ).

9. It is thus surprising, given this role, that States have to date paid so little attention to the idea of including in investment treaties minimum standards of public international law credentials to be required of those nominated to sit as arbitrators under them. Recently, however, a number of States have begun proposing such concepts in their investment treaty negotiations.

10. *SD Myers Incorporated v. Canada* (UNCITRAL) Partial Award (13 November 2000) Separate Opinion by Bryan Schwartz, para. 2.

11. *Mytilineos Holdings SA v. Serbia and Montenegro and Serbia* (UNCITRAL) Partial Award on Jurisdiction (8 September 2006) Dissenting Opinion of Dobrosav Mitrović, para. 1.

whole, and as a pointer for future Tribunals."[12] In her concurring and dissenting opinion in the *Impregilo SpA v. Argentina* case, Brigitte Stern stated that she hoped her opinion:

> "will contribute in a modest and constructive manner to the ongoing debate on the way MFN clauses should be applied" since the question is "intimately linked with the essence of international law."[13]

Quite a number of dissenting and separate opinions in investment treaty arbitrations are as detailed as and on occasion even longer than the award itself.[14] This would seem to support the view that, although they are drafted with the aim of contributing to the resolution of the specific case at hand, dissenting and separate opinions may also on occasion be drafted with a consciousness of the constitutional role that the decisions of international courts and tribunals play in developing and contextualising public international law.

At this point, it must be acknowledged that a dissenting or separate opinion does not constitute the decision of the tribunal itself. It is open to argument that, therefore, they do not fit literally within the definition of Article 38(1)(d) of the Statute of the International Court of Justice. Nonetheless, the guidance of the International Court of Justice itself, which embraces the use of dissenting and separate opinions, argues that such opinions have a certain role as a source of public international law.

It is possible that dissenting and separate opinions in investment treaty cases can contribute particularly meaningful to the development of the public international law of State responsibility in its specific relationship to international investment. The International Court of Justice dealt with this issue, in all of its history, only two times.[15] In each of these cases, the Court issued a seminal judgment that greatly assisted the international legal community in the understanding of the issue. At the same time, aspects of the judgments seem to suggest that the Court as a body found itself addressing complex commercial issues and legal concepts that did not necessarily fall within the habitual experience of all of the members of its bench.

Of course, to be fair, many of the counsel and arbitrators involved in the practice of investment treaty arbitration are as strangers to any profound and meaningful understanding of the architecture of the public international law ecosystem as the judges of the International Court of Justice are to the practical details of international trade and commerce. Perhaps what the system of investment treaty arbitration really needs is more public international lawyers who are commercially

12. *Indústria Nacional de Alimentos SA and Indalsa Perú v. Peru* (ICSID/ARB/03/4) Decision on Annulment, 5 September 2007, Dissenting Opinion of Franklin Berman, para. 1.

13. *Impregilo SpA v. Argentina* (ICSID/ARB/07/17) Final award (21 June 2011) (hereinafter "*Impregilo*") Concurring and Dissenting Opinion of Brigitte Stern, para. 3.

14. For example, the dissenting opinion in *Abaclat and others v. Argentina* (ICSID/ARB/07/5) Decision on Jurisdiction and Admissibility (4 August 2001) is 106 pages long; in *Ambiente Ufficio SpA and others v. Argentina*, (ICSID/ARB/08/9) Decision on Jurisdiction and Admissibility (8 February 2013), it is 162 pages long; in *Lemire v. Ukraine* (ICSID/ARB/06/18) Award (28 March 2011), it is 173 pages long while the award is 107 pages long; in *Impregilo*, *supra* note 12, it is 32 pages long; in *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Ecuador* (ICSID/ARB/06/11) Award (5 October 2012), it is 48 pages long.

15. *Barcelona Traction, Light and Power Company, Limited*, Judgment, I.C.J. Reports 1970, p. 3; *Elettronica Sicula S.P.A. (ELSI)*, Judgment, I.C.J. Reports 1989, p. 15.

experienced practitioners and commercial arbitration lawyers who are profoundly knowledgeable in public international law. It is interesting to reflect upon the question of the category into which the authors of dissenting and separate opinions in investment treaty arbitrations might be placed.[16]

In his 2008 article, Albert Jan van den Berg expressed the view that dissenting and separate opinions do not contribute to the development of public international law. He pointed out, with reference to the awards of the investment treaty cases which he had reviewed, that "[w]ith one curious exception, in none of the investment cases did the arbitrators refer to a dissent in a previous investment case."[17] This suggested that dissenting and separate opinions were not contributing in the constitutional sense of Article 38(1)(d) of the Statute of the International Court of Justice as a source of public international law or to its development.

Since 2008, however, the landscape appears to have shifted somewhat. A number of awards in investment treaty arbitrations since 2008 have referred to or taken into account, directly or indirectly, dissenting and separate opinions. For example, in *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan*, the tribunal held that "the majority in *Abaclat* fell into legal error", "to the extent that it was seeking to make a general proposition that went beyond the terms of the BIT at issue in that case." Notably, the tribunal in the *Kilic* case then proceeded to rely on the dissenting opinion of Professor Georges Abi-Saab in that case.[18]

This phenomenon is by no means inconsistent with the principle that there is no system of *stare decisis* or precedent in public international law. The awards of earlier investment treaty tribunals are only useful to the extent that their analysis may assist a later tribunal in reaching its own conclusions on the law. There is no reason why a well-reasoned dissenting or separate opinion that more accurately identifies the correct legal standard or its application than does the decision of the majority should be any less persuasive than if its reasoning had constituted part of the award. It is entirely possible to imagine a situation where a tribunal is presented with both the award and the dissenting opinion in a case, in which the dissent focused on a complex issue of public international law and was written by a learned and experienced public international lawyer. There is no reason why that dissent should not be more persuasive than the decision of the majority, to the later tribunal.[19]

16. From the public domain, so far, the following arbitrators have submitted dissenting and separate opinions in investment treaty arbitrations: Georges Abi-Saab, Yawovi Agboyibo, José Luis Alberro–Semerena, Grant D. Aldonas, Samuel K.B. Asante, Domingo Bello Janeiro, Franklin Berman, Torres Bernárdez, Laurence Boisson de Chazournes, Gary B. Born, Charles N. Brower, Ian Brownlie, Ronald A. Cass, José María Chillón Medina, Jorge Covarrubias Bravo, Bernardo M. Cremades, Antonio Crivellaro, Susana Czar de Zalduendo, Jan Hendrik Dalhuisen, Mohamed Anim El Madhi, Heribert Golsong, Todd J. Grierson-Weiler, Horacio A. Grigera Naón, Jaroslav Hándl, Keith Highet, Kamal Hossain, Marc Lalonde, Andreas F. Lowenfeld, Kéba Mbaye, Dobrosav Mitrović, Omar Nabulsi, Pedro Nikken, Francisco Orrego Vicuña, William W. Park, Daniel M. Price, Jerzy Rajski, Arthur W. Rovine, Guido Santiago Tawil, Dominique Schmidt, Bryan P. Schwartz, Mohamed Shahabuddeen, Ian Sinclair, Muthucumaraswamy Sornarajah, Brigitte Stern, David Suratgar, Attila Tanzi, Christopher Thomas, Robert Volterra, Jürgen Voss, Thomas W. Wälde, Prosper Weil, Otto L.O. de Witt Wijnen and Ivan S. Zykin.

17. Albert Jan van den Berg, *supra* note 5, p. 826.

18. *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan* (ICSID/ARB/10/1) Award (2 July 2013) para. 6.3.4.

19. This is so particularly if the majority in the earlier case was not composed of learned and experienced public international lawyers.

III. The recent example of the influence of dissenting opinions in the MFN debate

In recent years, a number of dissenting and separate opinions have addressed one of the most hotly debated topics in international investment arbitration, namely the application of most-favoured nation ("MFN") clauses to dispute settlement procedures. As highlighted by Brigitte Stern, there is almost a balance between the number of arbitrators in favour of the application of MFN clauses to dispute resolution procedures and the number of those against.[20] The argument centres on whether an investor can use an MFN clause to circumvent purported preconditions to arbitration (such as a requirement to submit a dispute to local courts prior to international arbitration) by importing dispute settlement provisions from other investment treaties which do not contain such conditions.

Following the decision in *Maffezini v. Spain*,[21] a number of investment treaty tribunals have decided in favour of extending MFN clauses to dispute settlement procedures. Other tribunals have decided against such an interpretation, on the ground that MFN clauses relate to the substantive protections afforded to investors and investments but not to procedural protections for dispute resolution as contained in the treaty in question.

Dissenting or separate opinions addressing this issue have been issued in six cases dealing with this aspect of MFN clauses.22 In four of them, the majority had declined to use the MFN clause to expand the scope of the treaty's dispute settlement provision.23 In two of these cases, the majority had decided in favour of the extension.24

Similarly, in *Garanti Koza LLP v. Turkmenistan*, the tribunal recognised that "the consideration of whether the MFN clause of a BIT may be used to vary the terms of the investor-state arbitration article of the same BIT" had been explored "in dissents authored by some of the most eminent authorities on international law and investment arbitration."[25] The tribunal in the *Garanti* case went on to refer approvingly several times to Brigitte Stern's dissenting opinion in *Impregilo*.[26]

20. *Impregilo, supra* note 12, para. 5.

21. *Emilio Agustín Maffezini v. The Kingdom of Spain* (ICSID Case No. ARB/97/7) Decision of the Tribunal on Objections to Jurisdiction (25 January 2000).

22. *Berschader v. Russian Federation* (SCC Case No. 080/2004) Award (21 April 2006) (hereinafter "*Berschader*") Separate Opinion of Todd J. Grierson-Weiler; *Renta 4 SVSA and others v. Russian Federation* (SCC Case No. 24/2007) Award on Preliminary Objections (20 March 2009) (hereinafter "*Renta 4*") Separate Opinion of Charles N. Brower; *Austrian Airlines v. Slovakia* (UNCITRAL) Final Award (9 October 2009) (hereinafter "*Austrian Airlines*") Separate Opinion of Charles N. Brower; *Impregilo, supra* note 12; *Hochtief AG v. Argentina* (ICSID/ARB/07/31) Decision on Jurisdiction (24 October 2011) (hereinafter "*Hochtief*") Separate and Dissenting Opinion of J. Christopher Thomas QC; *Daimler Financial Services AG v. Argentina* (ICSID/ARB/05/1) Award (22 August 2012) (hereinafter "*Daimler*") Dissenting Opinion of Charles N. Brower.

23. *Berschader; Renta 4; Austrian Airlines; Daimler*. See *supra* note 16.

24. *Impregilo, supra* note 12; *Hochtief, supra* note 16.

25. *Garanti Koza LLP v. Turkmenistan* (ICSID/ARB/11/20) Decision on the objection to jurisdiction for lack of consent and dissenting opinion (3 July 2013) paras. 29, 40 and 45.

26. In her dissenting opinion in the *Impregilo* case, Brigitte Stern considered that the majority's acceptance that an MFN clause could alter dispute settlement provisions presented "great dangers" because it undermined the importance of State consent, one of the basic principles of public international law. *Impregilo, supra* note 12, Concurring and Dissenting Opinion of Brigitte Stern, para. 99.

In *Hochtief AG v. Argentina*, the majority went so far as to include in the award a response to a comment in Brigitte Stern's dissenting opinion in *Impregilo*.[27] The majority expressly recognised that, when using an MFN clause, the clause of another treaty must be imported as a whole; a party cannot use an MFN clause to import only components from different clauses.

The 2012 award in the *ICS Inspection and Control Services Ltd (United Kingdom) v. Argentine Republic* case was issued one year after the *Impregilo* and *Hochtief* cases.[28] In *ICS*, the tribunal adopted an approach that was consistent with the dissenting opinions in *Impregilo* and *Hochtief*, deciding against the extension of the MFN clause to dispute settlement provision. It is difficult to conclude that the *ICS* tribunal was not influenced in its thinking, in turn, by those dissenting opinions.

IV. The influence of dissenting and separate opinions and arbitrator neutrality

In his 2008 article, Albert Jan van den Berg took the position that it is hard to see how dissenting and separate opinions enhance the quality of arbitral decision-making in investment treaty arbitrations. He argued that tribunals should aspire to unanimous decisions unless there were exceptional circumstances, which could be either that "something went fundamentally wrong in the arbitration process", such as a very serious violation of due process, or "the arbitrator has been threatened that, absent a dissent, he or she will be in physical danger."[29] These are very constrained exceptions, of course. In contrast with that view, Laurence Shore and Kenneth Juan Figueroa argued in 2008 that an investment treaty arbitrator should "not bend his or her view to achieve unanimity" and "should dissent where he or she discerns a principled basis to do so."[30]

These two opposing views represent considered and valuable perspectives. Given the context and process of public international law third-party dispute resolution, however, it is difficult to conclude that the absolutist ban proposed by Albert Jan van den Berg should prevail. Even if their contribution were restricted to specific issues, such as the use of MFN clauses in investment treaties, a survey of awards since 2008 appears to confirm an evolving practice. It appears that dissenting and separate opinions have contributed to the development and understanding of the relevant law.

After reviewing all dissenting and separate opinions in investment treaty arbitrations that were in the public domain as of December 2008, Albert Jan van den Berg observed that a party-appointed arbitrator had issued a dissenting opinion in 34 cases.[31] He further observed that nearly all of those 34 dissenting opinions were issued by the arbitrator appointed by the party that lost the case in

27. *Hochtief*, *supra* note 16, para. 98 of the decision responding to *Impregilo*, *supra* note 12, Concurring and Dissenting Opinion of Brigitte Stern, paras. 106 – 107 and 12.

28. *ICS Inspection and Control Services Limited (United Kingdom) v. The Argentine Republic*, (UNCITRAL, PCA/2010-9) Award on Jurisdiction (10 February 2012).

29. Albert Jan van den Berg, *supra* note 5, p. 831.

30. Laurence Shore and Kenneth Juan Figueroa, *supra* note 5.

31. Albert Jan van den Berg, *supra* note 5, p. 824.

whole or in part and favoured the party that appointed the dissenter.[32] This was a significant observation. It raised the question of whether dissenting and separate opinions were somehow being misused in a partisan and inappropriate fashion by arbitrators in favour of the party that had appointed them.[33]

In an effort to see if this trend has changed, the preparation of this present article included a review of all publicly available investment treaty arbitration awards since 1 January 2009. That research shows that party-appointed arbitrators issued dissenting or separate opinions in 21 investment treaty cases. In each of these cases, as with most of those identified in the 2008 study, the dissenting or separate opinions were also issued by the arbitrator appointed by the party that lost the case in whole or in part. The phenomenon identified by Albert Jan van den Berg in 2008 has thus appeared to continue unchanged over the intervening five years. The question is what these statistics mean.

In 2008, Albert Jan van den Berg argued that they raise suspicions about the neutrality of party-appointed arbitrators. He concluded that they invited the conclusion that they reflect partiality over principle. Laurence Shore does not appear to reach the same conclusion. In a presentation to the Investment Treaty Forum of the British Institute of International and Comparative Law during which he discussed the two 2008 articles, he expressed the view that the list of arbitrators who had issued the dissenting and separate opinions was composed, in significant part, of senior public international law and commercial arbitration practitioners who were of unchallenged reputation and integrity. He concluded that bias toward the party that appointed them was an unsatisfactory explanation for their motivation in writing a dissenting or separate opinion.

The motivations that have been professed of the authors of dissenting and separate opinions in investment treaty arbitrations, including those discussed elsewhere in this article, would seem to support the Shore position over the van den Berg position.[34] One example that is difficult to refute are the dissenting opinions of Charles Brower in a number of cases in which the question of the effect of MFN clauses on dispute resolution procedures was at issue.

Charles Brower was appointed by the Claimant as a member of the tribunal in the *Siemens* case.[35] That tribunal issued an award that decided unanimously in favour of the extension of the MFN clause to a dispute resolution provision.[36] He was then appointed by five claimants in five different investment treaty arbitrations that had to decide the same issue.[37] In three of those cases, the majority decided against the extension of the MFN clause. In each of those three cases, Charles Brower issued a dissenting opinion. Each dissenting opinion expressed his consistent view on this

32. *Ibid*, p. 824 – 825.

33. There is similar speculation presently circulating inside the investment arbitration mafia as to the possible existence of a class of arbitrator that cynically cultivates a profile to attract appointments as president of investment treaty arbitrations, by always finding jurisdiction (thus keeping in the good graces of the claimant class) but then always awarding modest compensation (thus keeping the good graces of the respondent class).

34. In the interest of transparency, the author must declare that he wrote a partial dissenting opinion in the *Eastern Sugar v. Czech Republic* case. As for his motivation in writing the opinion, the author refers any curious readers to the opinion itself.

35. *Siemens v. Argentina* (ICSID/ARB/02/8) Decision on Jurisdiction (3 August 2004).

36. The dissenting opinion of Domingo Bello Janeiro only concerned damages and costs of arbitration.

37. *Renta 4*; *Austrian Airlines*; *Impregilo*; *Hochtief*; *Daimler*. See *supra* note 16.

issue.[38] In the two other cases, he decided with the majority in favour of the extension of the MFN clause, again consistent with his view. In his dissenting opinions, Charles Brower adopted the same stance with respect to this issue as he did when he was with the majority. The facts raise no question of Charles Brower's neutrality toward the party that appointed him; he was clearly acting on a principled interpretation of the law.

It would surely make more sense to conclude that most – if not all – arbitrators who issue dissenting or separate opinions take the positions that they express in those opinions for the same reasons that Charles Brower did. Given the public nature of awards and opinions in investment treaty arbitration, the authors of dissenting and separate opinions are aware that they will be exposed to public scrutiny and their opinions dissected with as much rigour as those expressed in the award itself. Dissenting and separate opinions in investment state arbitrations are assessed on their intrinsic merits in the same way that awards are.

Since parties try to anticipate and take into account arbitrators' individual opinions when appointing an arbitrator in investment treaty arbitration, and given the implications for international and domestic public policy that such cases have, surely it is a positive thing for arbitrators to be open about their views and analysis. Such transparency would increase the general knowledge in the field about the views and opinions of the potential pool of decision-makers in investment treaty disputes. It is difficult to criticise an arbitrator in such a case for setting out his or her views transparently; it should be embraced and welcomed, unless it can be shown to cause mischief (a subject that will be examined briefly below). Indeed, this would contribute to the view that one of the prime motivations for an arbitrator in an investment treaty arbitration to issue a dissenting or separate opinion must surely be questions of principle and a recognition of the role of the decisions of international courts and tribunals in the ecology of public international law.

Again, the MFN cases are illuminating in this respect. Charles Brower was a co-arbitrator with Domingo Bello Janeiro in both the *Daimler* and the *Siemens* cases. In his dissenting opinion in the *Daimler* case, Charles Brower criticised his co-arbitrator for departing from his previously stated position of principle in the *Siemens* case, in which the tribunal unanimously reached a decision on this point that was the opposite to the one reached by the majority in the *Daimler* case.[39] In *Daimler*, Domingo Bello Janeiro submitted a separate opinion to summarise the reasons why he had his changed his opinion on this issue. Again, it is difficult to conclude that Charles Brower acted improperly in setting out his views in a dissenting opinion. t is also difficult to conclude that such transparency was harmful, either.

V. Do dissenting and separate opinions cause systemic mischief?

As noted above, one legitimate reason to be concerned about dissenting and separate opinions would be if they caused systemic mischief. That is to say, if

38. *Renta 4*; *Austrian Airlines*; *Daimler*. See *supra* note 16.
39. *Daimler*, *supra* note 16, Dissenting Opinion of Charles N. Brower, paras. 39 – 42.

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40. Albert Jan van den Berg
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42. *Fraport* AG *Frankfurt Ai*
ARB/03/25) Decision on the App

they encouraged or interfered in challenges and annulments of an award. In that case, it might be possible to say that any benefit they provide to the system of investment treaty arbitration is diminished by the harm that they could do to the post-award process. To arrive at a view on this question, it is necessary to examine the available evidence. This article examines the evidence in relation to the ICSID system, only.

According to Albert Jan van den Berg, dissenting and separate opinions "weaken the authority of the award" and may "incentivize a dissatisfied party to move to annul the award."[40] ICSID awards are, of course, not subject to appeal and may only be annulled on a specific set of grounds provided for in Article 52 of the ICSID Convention. Apart from the constitution of the tribunal and the question of fraud, the substantive grounds of annulment focus exclusively on the intrinsic logic and internal coherence of an award. An ICSID *ad hoc* committee reviews an award in order to determine whether the tribunal has manifestly exceeded its powers (Article 52(1)(b)), whether there has been a serious departure from a fundamental rule of procedure (Article 52(1)(d)) or whether the award has failed to state the reasons on which it is based (Article 52(1)(e)). It follows from this, therefore, that dissenting and separate opinions are not themselves susceptible to annulment proceedings.

The question then is whether they can taint or otherwise affect the analysis of the award. Given the terms of Article 52, it is difficult to see how this might be. It is not unknown for an applicant to refer to a dissenting or separate opinion, during pleadings in an annulment procedure.[41] However, there is no evidence of annulment committees relying on a dissenting or separate opinion as the basis to annul awards.

In its decision on annulment in the *Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines* case, the *ad hoc* committee confirmed that the relevant grounds for annulment set out in Article 52 require an analysis of the award on its own. The committee observed, in response to one of the applicant's argument that the award had failed to state the reasons on which it is based:

> "Such allegation is only an affirmation inspired by the Dissenting Opinion. While such a view was expressed in the Dissenting Opinion, the point formed no part of the reasoning of the Tribunal whose award cannot therefore be criticized on this ground."[42]

It is, of course, possible that a dissenting or separate opinion might inspire an annulment application. However, given the irrelevance of such an opinion to Article 52, well-advised parties would not find inspiration from that source. And, if a party chose to do so in the face of the clear legal standards for annulment, then the chances are that such a party would seek out any excuse to bring an annulment claim, regardless of the merits. Out of 62 ICISD cases in which annulment

40. Albert Jan van den Berg, *supra* note 5, p. 828.

41. In October 2012, Ecuador announced that it would seek the annulment of the award rendered in *Occidental Petroleum Corporation and Occidental Exploration and Production Company v Ecuador*, and that the request for annulment would rely on three grounds for annulment and upon the points raised in Brigitte Stern's dissenting opinion submitted with the award. See http://www.lexology.com/library/detail.aspx?g=2832ab9a-1bda-4c89-9cf5-50c9bbec265c.

42. *Fraport AG Frankfurt Airport Services Worldwide v The Republic of the Philippines* (ICSID/ARB/03/25) Decision on the Application for Annulment (23 December 2010) para. 278.

proceedings have been started so far, there was a dissenting or separate opinion in the award of which the annulment was sought in 15 cases. In two of them, the dissent only concerned the calculation of interests. Therefore, only a small number of the ICSID cases that were accompanied by a dissenting or separate opinion were subject to annulment proceedings.

VI. Conclusion

Over the past five years, the use of dissenting and separate opinions in investor treaty arbitrations has continued apace. The terms of the debate that was identified by Albert Jan van den Berg, Laurence Shore and Kenneth Juan Figueroa in 2008 remain unchanged. The evidence of awards and opinions issued since then appears to support the view that such opinions do play a constructive role in public international law. Issuing dissenting or separate opinions is not uncommon in public international law litigation. It contributes to the development of public international law consistently with the provisions of Article 38(1)(d) of the Statute of the International Court of Justice. The public policy aspects of investor treaty arbitration mean that an increase in the transparency of the process of judicial reasoning must be considered positive.

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