WHIOCE PUBLISHING PTE. LTD.
PROVIDING FIRST-CLASS SCIENTIFIC INFORMATION FOR TOP SCHOLARS

2026 Volume 4, Issue 2
Lecture Notes in Education, Arts, Management and Social Science
ISSN(Online): 2705-053X

The Application Dilemma and Regulatory Path of Dissenting Opinions in International Investment Arbitration

Zhengzhong Han*
Shandong Sport University, Rizhao 276826, Shandong, China

**Author to whom correspondence should be addressed.*

Abstract: Sudden dissenter's opinions are becoming more evident in investor-state dispute settlement (ISDS); there remains a controversy over the legal foundation, functions, and system effects. Based on recent empirical research results and reforms by the United Nations Commission on International Trade Law (UNCITRAL)'s Working Group III under this background, this paper argues that because the issue of dissenting opinions has not been solved as a whole, it should also be traced back to some structural problems such as party nomination arrangements and the absence of legal precedents for trial, which are conducive to tactical decisions made during trials. The three regulatory pathways assessed were the 2023 UNCITRAL/ICSID Code of Conduct for Arbitrators, an ongoing appeal process, and the proposed Multilateral Investment Court. Therefore, this paper puts forward a step-by-step regulatory system based on these measures and designs it to fit with the pace of reform goals.

Keywords: Dissenting Opinions; Investor-State Dispute Settlement Mechanism; Party-Appointed Arbitrators; ISDS Reform; Appellate Mechanism; Multilateral Investment Court

Online publication: February 26, 2026

1. Introduction

Recently, the increase in international investment dispute settlements involving dissenting opinion cases has also led to an expansion. As the caseload of ISDS procedures has increased—according to the International Centre for the Settlement of Investment Disputes (ICSID), more than 1,000 cases were filed between early 2024 and now[1]—so many arbitration committees have become dissatisfied with the results they received from majority judgments or decisions. Dissenting opinions occur approximately once every ten articles or so in the International Centre for Settlement of Disputes' decisions; therefore, it is both academically and practically fascinating[2].

There are also some difficult-to-answer norms or real problems arising from such a situation. On the other hand, separate opinions have always been recognized as an essential aspect of international adjudication for some time now; they are explicitly acknowledged by both the International Court of Justice and various domestic human rights courts in China, and there is a consensus among scholars that this form can promote legal development[3]. On the other hand, international investment dispute settlement also has its own special institutional space—that is to say, it mainly includes party-appointed

arbitrators and lacks formal precedents.

Based on this, examine the problems of applying dissenting judgments in ISDS and put forward regulatory paths to solve them. Section two establishes the legal basis of dissenting opinions, as well as their types, to distinguish sincere from tactical discontents. Section 3 has identified three interlocked structuring problems: The party-appointments-divergence chain, the divergent-misunderstanding loop, and a wider legitimacy issue. Section four assesses the three main regulatory pathways currently being explored in this period of reform. In Section 5, propose a graded regulatory approach and offer conclusions.

2. The Legal Framework and Typology of Dissenting Opinions in ISDS

The primary basis is given in Article 48(4) of the Convention for attachment by a member: Dissenting opinions will be published alongside the final judgment unless unanimous approval by all members is obtained first. There is no similar express right mentioned in the UNCITRAL Arbitration Rules, the Stockholm Chamber of Commerce Rules, and the Permanent Court of Arbitration's arbitration rules—institutions through which a large number of investment treaty disputes are resolved. However, in the international arbitration community, there exists a kind of tacit negative consensus on this issue.

There is a useful distinction between genuine dissent and tactical dissent. As shown in Figure 1 below: Genuine dissent comes from an individual's sincere intellectual disagreement about new or unresolved issues such as the scope of the fair and equitable treatment standard or the limits on the most-favored nation clause transfer. Such a negative outcome contributes to enhancing the effectiveness and relevance of international investment law through preserving minority opinions that can serve as reference cases[4]. Tactical dissents, conversely, are usually directed at opposing parties' interests; they indicate that an arbitrator who was supposed to act well has done so without fault, strengthen perceptions of partisanship among those involved, and possibly serve as a reference plan for future applications to overturn[2].

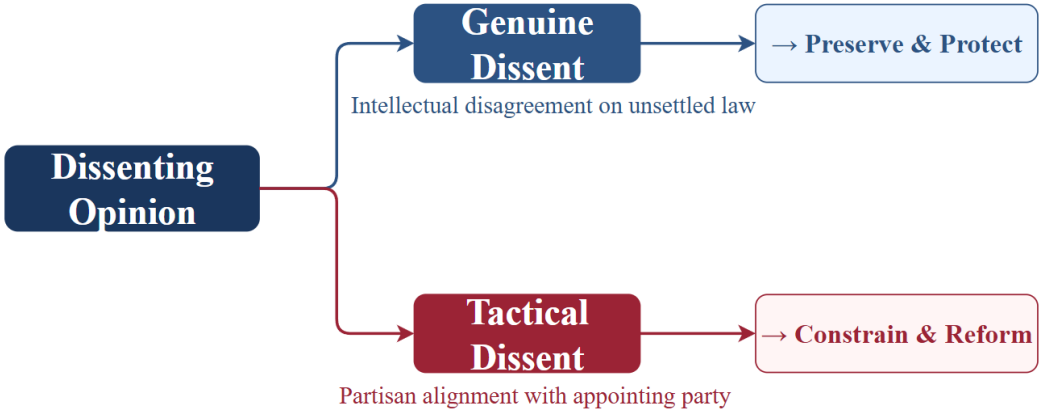

Figure 1. Typology of Dissenting Opinions in International Investment Arbitration

The empirical record strongly suggests that tactical dissents are disproportionately common in ISDS. Shown in Table 1 are the patterns of disapproval over various stages of court procedures at different times according to relevant materials cited by scholars[1, 2]. **Table 1**'s statistics indicate that there are no actual cases; instead, a specific pattern emerges from the data: losing parties frequently issue more than half of their dissents, which accounts for approximately 80% to nearly 90% across all tested periods.

Table 1. Dissent Rates of Investor-State Arbitration by Forum and Period (2005-2023).

Forum/Instrument	Period	Total Awards	Awards w/ Dissent	Dissent Rate	% Dissents by Losing-Party Arbitrator
ICSID Convention Cases	2005–2010	~ 78	~ 12	15.4 %	~ 87%
ICSID Convention Cases	2011–2015	~ 124	~ 22	17.7 %	~ 89%
ICSID Convention Cases	2016–2020	~ 152	~ 31	20.4 %	~ 88%
ICSID Convention Cases	2021–2023	~ 91	~ 16	17.6 %	~ 85%
Non-ICSID (UNCITRAL/SCC/ PCA)	2011–2015	~ 44	~ 5	11.4 %	~ 80%
Non-ICSID (UNCITRAL/SCC/ PCA)	2016–2020	~ 62	~ 9	14.5 %	~ 78%
Non-ICSID (UNCITRAL/SCC/ PCA)	2021–2023	~ 38	~ 5	13.2 %	~ 80%

3. Structural and Normative Challenges

3.1. The Party-Appointment-Dissent Nexus

Gáspár-Szilagyi and Letourneau-Tremblay[2] collected 117 dissenting judgments from eighty-seven different arbitral tribunals, including five international and one national; they concluded that arbitrators who were not part of the losing party showed a slightly higher frequency of dissent than those on the same tribunal (about 3%). This result was robust in many analytical specifications; nationalities, genders, and the investors-vs.-states axes of appointments were not found to be associated statistically significantly with dissent frequencies. Losing-people variables were consistent results.

Still has doubts about the results at present. Rogers[5] gave the most intellectual support for the party-appointing system—and won CPR 2023 outstanding professional paper award—by stating that the parties have given arbitration powers to individuals who are structurally independent from any potential cognitive biases affecting all arbiters across every tribunal. Based on this basis, the function of party designation should refrain from promoting partisanship; rather, it introduces an instance of disciplined epistemological doubt capable of restraining excessive agreement. A higher proportion of losing-party dissenters may reflect that function, not necessarily its absence. It is credible: Groupthink and confirmation bias can be seen as real threats to small deliberative groups; According to the existing research of judicial behavior at domestic court venues, ideological and professional preconceptions also affect judgments.

This argument is not, however, fully responsive to the perception problem that dissenting opinions create. Brekoulakis and Howard[6] carried out in-depth interviews with ISDS arbiters, counsel, and institutional administrators from 2018 to 2022. They concluded that trust in ISDS arbitrators' decisions is based on an entirely new foundation compared with the basis of trust in judges. Party-and-counsellor parties' expectations are generally that the appointed arbitrator should consider their side more favorably than an impartial arbiter, although these requirements fall short of demanding complete bias. Under such circumstances, a dissent proposed by the losing party's arbitrator is likely to be regarded as confirmation of partisanship without regard for its own rationality.

3.2. Inconsistency and the Dissent Cycle

A second structural flaw lies in how jurists' inconsistent judgments are produced by judicial inconsistency. Arato et al. have provided a comprehensive account of how the ISDS tribunals have delivered material discrepancies in their interpretation of basic provisions such as the MFN clause, FET obligation, and protection standard for invested enterprises among similar factual situations. These scholars point out that the issue is neither simply divergent due to varying facts nor problematic inconsistency: they call it "problematic incoherence"; different tribunals have applied materially different legal reasonings on identical or nearly identical interpretive issues. UNCTAD's 2022 review[1]states that dissident views appeared most frequently during this time on issues such as FET and MFN clause coverage, legitimate expectations, and

their impact on renewables—exactly those areas with the greatest inconsistency between legal interpretation outcomes among scholars.

Figure 2 both manifests and influences such inconsistency. This part will first analyze that under a real competitive situation for arbitrators, core standards such as FET and MFN may have some variations in interpretation to create new bases for regulation later on; Then, taking into account the factors of other parties or oneself when obtaining relevant information about these changes, litigants select different arbiters according to their own gains and losses, thereby beginning an automatic self-enhancing process driven by pre-planned interpretation prejudice resulting in frequent selections against rivals. Since there is no binding precedent system in ISDS and Article 52 of the ICSID Convention only provides for revocation as a procedural ground without broader scope, none of these factors break the loop.

The "dissent cycle," as shown in the UNCITRAL Working Group III reform discussion , has deepened rather than resolved this inconsistency issue; parties choose arbiters with a history of support for their favored interpretations, leading to more disputes and increasing dissent. There is no form of precedent rule for ISDS provisions to strengthen this effect; under the ICSID convention article 53 prohibition on appeal, any mistake or inconsistency becomes a final decision and will not be reviewed outside the narrow scope of Article 52.

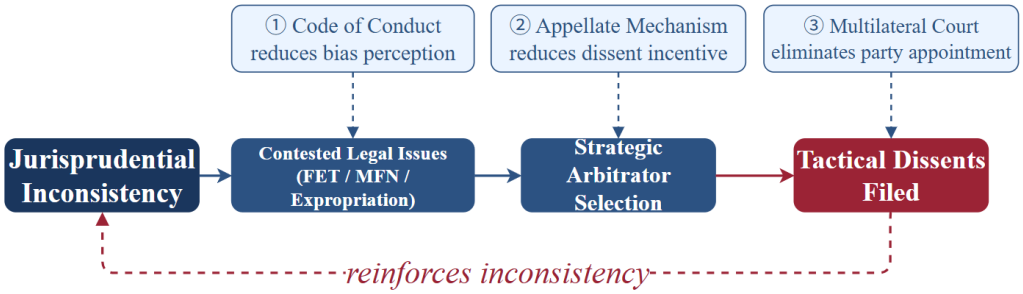

Figure 2. Self-Reinforcing Dissent Cycle in ISDS and Reform Entry Points.

3.3. The Legitimacy Problem

Thirdly, there is a problem of systemic legitimacy. Over the past decade, there have been persistent and continuous criticisms of the ISDS regime's perceived pro-foreigner bias, democratic deficiencies, and lack of impartiality in its judges[3, 7]. Table 1 presents empirical research results on the dissent patterns of the losing parties, providing institutional forms that solidify previously scattered ideas. The states parties to UNCITRAL's Working Group III have already recognized that "the lack or appearance of independence and impartiality among ISDS tribunal judges" is at the heart of why there needs to be reform currently[8].

At present, in terms of the reform process at hand, it is arranged to address three issues simultaneously: costs and durations of procedures, decisions' uniformity, and arbitral institutions' diversity, independence, and impartiality. The opposite view intersects with all three aspects at once: it is an indication of inconsistency. It raises issues related to fairness; As tactical weapons in the processes of annulment and execution, they extend both the length and expenses of resolving disputes far exceeding what was initially expected. Therefore, dealing with the dissension problem is not an issue of procedures but rather one part of the reform on legitimacy for all aspects of ISDS[7].

4. Regulatory Pathway

At present, the regulatory choices for working group three at UNCITRAL cover both targeting prohibited behaviors and promoting system reforms. As shown in **Table 2** below: A comparison of these three main paths. Addressing the dissenter problem in different ways, they have their own strengths and weaknesses.

Table 2. Comparison and Analysis of the Three Principal Regulatory Pathways for Dissenting Opinions in ISDS.

Regulatory Pathway	Primary Mechanism	Effect on Tactical Dissents	Enforcement Basis	Principal Limitation
2023 UNCITRAL/ ICSID Code of Conduct [8]	Independence/impartiality obligations; disclosure of conflicts; double-hatting regulation	Indirect — reduces perceived bias but does not alter dissent incentives structurally	Voluntary adherence or institutional rule incorporation; no binding treaty obligation	No express dissent regulation; significant enforcement gap; double-hatting not prohibited
Permanent Appellate Mechanism (UNCITRAL WG III) [9]	Merits and/or legal-error review of first-instance awards	Direct — provides legitimate alternative to tactical dissent; reduces annulment roadmap function	Treaty-based statute negotiated among participating states	Compatibility with ICSID Convention Art. 53 (no appeal); risk of adding a third procedural layer
Multilateral Investment Court (EU Model) [10]	Structural replacement of ad hoc arbitration; standing judges on non-renewable terms	Eliminates source — party appointment abolished, removing structural basis for losing-party dissent pattern	International convention; self-contained enforcement regime	Political feasibility; enforceability under NY Convention; geographical diversity; appointment politicization

The 2023 UNCITRAL/ICSID Code of Conduct for Arbitrators[8] is the first multilateral agreement to address arbitrator behavior specifically under ISDS. The main content stipulates that there are wide-ranging duties of independence and objectivity; requires disclosing conditions that may lead to a justifiable suspicion of impartiality for arbitrators; and does not prohibit the practice of "double-hatting," i.e., serving as both an arbitrator in a certain case and a lawyer or agent in another related dispute. The Code specifically refers to the IBA Guidelines for Conflicts of Interest in International Arbitration as an operational reference. The limitation of this law is obvious in terms of regulating dissent: it lacks explicit regulations for dissidents' expressions; The implementation mechanism also depends mainly on voluntary compliance or approval by each case, and double hatting does not align with the structural reforms sought after by people linking the party-appointment-dissent chain back to incentives.

There is an existing appellate procedure for addressing the tactic of dissent in courts. According to Langford et al.'s (2018) more rigorously analysable model of current design for appellate mechanisms, after proper structure has been established, the loss-making party will obtain legitimacy through a valid merits review route by means of this arrangement. When a party is dissatisfied with the majority decision of a tribunal, its rational response has transformed into an appeal; it does not rely on the dissenting opinion as evidence for application or as notification to an ad hoc annulment committee. The appellee system can effectively protect genuine dissents, allowing them to maintain their own importance in clarifying new legal issues for the courts. At this time, the tactical use of dissenters is reduced as much as possible. In general, how to conform with the provisions in articles 52 and 53 of the convention during implementation remains unsolved. Resolving this requires either Convention amendment or creative architectural arrangements that permit appellate review to substitute for, rather than supplement, the existing annulment process[9].

The multilateral investment court, initiated by the European Union to provide an all-encompassing long-term structural solution, is currently being promoted. Replacing ad hoc arbitration with a permanently established standing court consisting of paid personnel serving non-renewable terms can avoid the party's right to appoint and reduce the system's inherent tendency towards losing-party dissent. The EU investment court system, currently in use based on CETA and confirmed to be consistent with independent state party conditions through the Court of Justice of the European Union, offers a demonstration model. Brodlija[10] also notes, however, some severe threats to the MIC's survival that must not be underestimated: politicization of the judicial appointment procedure and doubt over its enforcement power within the current framework of ICSID and the New York Convention; it is difficult for this judiciary to achieve genuine geographical

and occupational diversity from its members; in addition, there are difficulties guaranteeing effective participation in both capital-exporting and capital-importing countries as two sides. The governance risks of concentrated international adjudicative authority, as illustrated by the paralysis of the WTO Appellate Body, counsel against treating the MIC as a near-term solution to the dissent problem[10].

5. Toward a Graded Regulatory System

Based on the analysis given in previous sections, none of them can address all aspects of the dilemmas arising from regulatory efforts described here comprehensively. The code of conduct addresses behavior but does not adjust the incentive system, while the second-instance procedure fails to reshape institutions to tackle the political economic foundation issue. Therefore, what is needed is an increasing-regulatory mechanism that employs each instrument successively and sets its implementation time frame according to the actual timetable for reform in the UNCITRAL Working Group III.

At present, the top priorities are strengthening implementation in terms of both this year's code of conduct and future work. The enforcement method needs to be implemented by incorporating it into the procedure of the main arbitration institutions—ICSID, UNCTCRA, SCSC, etc.—as proposed in the course of consultation on the Code's revision. If not taken at this stage, there will be no obligation for that arbitrator to appear in a certain case. Secondly, it is proposed that a supplementary clause be added stipulating that arbitral tribunals that have made separate dissenting judgments on the same disputed matter in consecutive reviews of identical issues shall inform them during future trials; This kind of disclosure responsibility will not hinder dissent by preserving its genuine sense; however, it is visible in terms of revealing patterns of disagreement, thereby allowing parties and organizations to identify systematic thinking participation from purely tactical alliances for the appointment party's interests.

Short-term reforms focus on strengthening the review system; longitudinal incentive structures have not been established by laws such as the Code for addressing issues of structural incentives. According to Langford et al.'s research[9], it provides a more scientific basis for analysis. It is argued that this system should include only the determination of erroneous applications of laws or regulations in its scope of review; As in contrast to traditional annulments, it does not need to completely eliminate but only limit some strategies through partial supplements. The critical design question—How to coordinate appeal review with Clause thirty-three of the New Delhi convention—is likely solved by creating an international agreement (such as a bilateral investment agreement or BIT) stipulating that non-member states must join and agree to allow for further examination in order for their decisions to have effect[10].

In terms of the long-term appropriateness for continued use, especially considering that there is now rich empirical data from the EU to inform us about how a permanent investment court functions under CETA. According to Arato, Claussen and Langford's observation in[3], after the UNCTAD reform process identified problems and began drafting laws , political agreement was still lacking for structural reform ideas. The more concrete short-term objective is to make sure that reforms in terms of codes of conduct and appeal mechanisms are introduced smoothly so as to generate an institutional guarantee for building a systemic reform foundation.

6. Conclusion

According to the losing-party dissent pattern documented by Gáspár-Szilagyi and Letourneau-Tremblay, as well as the inconsistency mapping of Arato, Brown, and Ortino and the reform landscape charted by Arato, Claussen, and Langford, all these data show an institutional demand for clear conclusions that are both analytically precise but also very strict about implementation; that is to say, resolving issues solely on their own may not be sufficient. Tactical dissenting forces—such as party-designated officials, a lack of authoritative precedents, and no right of appeal to an inferior court—should all be

tackled concurrently.

As shown in Figure 1 above, introducing a typological framework along with an iterative system of self-reinforcing dissent into this regulatory project provides theoretical support. In Section 5, the gradation framework suggested deploying the code of conduct, an appeal procedure, and a subsequent long-term MIC option one by one, serving as a blueprint for transforming from ideal into reality and ensuring institutional consistency. The political determination to push forward this path ultimately depends on whether or not there is a serious attitude towards the legitimacy crisis of ISDS among states, institutions, and practitioners in defining its direction moving forward. From the empirical data summarized in Table 1 and the comparison made in Table 2, it shows that the cost of doing nothing—reflected by jurisprudence's inconsistent interpretation, lost adjudicatory legitimacy, and strategic distorting arbitration—is not insignificant.

Disclosure statement

The author declares no conflict of interest.

References

[1] UNCTAD, 2022, Review of 2020 Investor-State Arbitration Decisions. UNCTAD Investment Policy Discussion Paper. visited on January 21, 2026, https://unctad.org/system/files/official-document/diaepcbinf2022d5_en.pdf

[2] Gáspár Szilágyi S, Létourneau-Tremblay L, 2019, A Question of Impartiality: Who are the Dissenting Arbitrators in Investment Treaty Arbitration?. PluriCourts Research Paper.

[3] Arato J, Claussen K, Langford M, 2023, The investor-state dispute settlement reform process: Design, dilemmas and discontents. Journal of International Dispute Settlement, 14(2): 127-133.

[4] Brown C, Ortino F, Arato J, 2019, Lack of Consistency and Coherence in the Interpretation of Legal Issues. Blog of the European Journal of International Law, EJIL: Talk.

[5] Rogers CA, 2023, Reconceptualizing the Party-Appointed Arbitrator and the Meaning of Impartiality. Harv. Int'l LJ, 64: 137.

[6] Brekoulakis S, Howard A, 2023, Impartiality and the construction of trust in investor-state dispute settlement. ICSID Review-Foreign Investment Law Journal, 38(3): 644-669.

[7] Behn D, Fauchald OK, Langford M, 2022, Introduction: The legitimacy crisis and the empirical turn. Behn et al, supra note, 14: 36.

[8] UN General Assembly, 2023, Code of Conduct for Arbitrators in International Investment Dispute Resolution and Code of Conduct for Judges in International Investment Dispute Resolution with respective commentary of the United Nations Commission on International Trade Law resolution/adopted by the General Assembly.

[9] Kucik J, Puig S, 2023, Towards an effective appellate mechanism for ISDS tribunals. World Trade Review, 22(5): 562-583.

[10] Brodlija F, 2024, The Multilateral Investment Court: Necessary ISDS Reform or Self-Fulfilling Prophecy?. Arb. L. Rev., 15: 1.