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"You're like a judge. You're called on to decide the matter. In good conscience, you have to be able to look at yourself and say, 'It's my decision. I know the law and the facts exhaustively.'" Marc Lalonde[1]

Abstract

International investment arbitration has been described as a private system of justice addressing matters of high public policy. Yet, despite the very high stakes involved—in terms of both policy room and monetary implications—tribunal awards are sometimes difficult to reconcile. This conflict usually is explained with reference to the fact that these are ad hoc tribunals addressing specific disputes arising under particular investment treaties. Not so easily explained are conflicting tribunal awards drawing on virtually identical facts, invoking the same treaty text, where arbitrators seemingly change their minds from one case to the next without any explanation. This paper takes up a sequence of three tribunal awards issued against Argentina as a result of actions taken during the meltdown of the Argentinian economy in 2001. Two different arbitrators signed onto conflicting awards, each appearing to have changed their minds about whether Argentina was entitled to take advantage of the defense of necessity in the face of this economic crisis. Drawing on work in judicial politics, the paper brings in a number of non-legal variables into the analysis—such as social background, attitudinal behavior, strategic behavior, and institutional concerns—in order to illuminate aspects of arbitral decision making in the investment law context. I conclude that both strategic and institutional approaches better explain arbitral dispositions, allowing arbitrators to act in ways inconsistent with their preferred

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[1] Marc Lalonde, *quoted in* Julius Melnitzer, *The New Peacekeepers*, CANADIAN LAWYER 18, 21 (Aug. 2004).

outcomes but also to self-correct.

Judge Posner has observed that judicial behavior "cannot be understood in the vocabulary that judges themselves use."[2] If legalism's resources (things such as facts, text, and persuasive precedent) can be expected to guide judicial behavior at least some of the time,[3] it becomes even more difficult to sustain an appeal to legalism in the international investment context. How can one otherwise explain conflicting outcomes in international investment arbitration awards concerning almost identical facts, text and context? A sequence of three awards against the Republic of Argentina (*CMS*, *LG&E*, and *Enron*)[4]—a tranche of almost fifty cases that have been filed against Argentina to recoup losses suffered by foreign investors after the collapse of the Argentinian peso in 2001—precipitate the question. Two of the three tribunals, *CMS* and *Enron*, found that Argentina could not take advantage of the defense of necessity (under the relevant treaty or customary international law) as an excuse for failing to live up to international obligations owed to these investors.[5] The third tribunal (*LG&E*), held otherwise, partially excusing Argentina for its conduct until such time as it was in a position to begin living up to its prior commitments, some time around the election of the first President Kirchner.[6]

All three tribunal awards draw on virtually identical facts and invoke the same text of a U.S.-Argentine BIT.[7] In which case, it is hard to explain why two of the arbitrators participating in these three awards[8] would have

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[2] RICHARD A. POSNER, HOW JUDGES THINK 11 (2008).

[3] *Id.* at 42.

[4] CMS Gas Transmission Company v. Argentine Republic, ICSID (W. Bank) Case No. ARB/01/8, Award (May 12, 2005), IIC 65 (2005), *available at* http://ita.law.uvic.ca/documents/CMS_FinalAward.pdf [hereinafter *CMS*]; LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic, ICSID (W. Bank) Case No. ARB/02/1, Decision on Liability (October 3, 2006), *available at* http://ita.law.uvic.ca/documents/ARB021_LGE-Decision-on-Liability-en.pdf [hereinafter *LG&E*]; and Enron Corporation and Ponderosa Assets, LP v. Argentine Republic, ICSID (W. Bank) Case No. ARB/01/3, Award (May 22, 2007), IIC 292 (2007), *available at* http://ita.law.uvic.ca/documents/Enron-Award.pdf [hereinafter *Enron*].

[5] Waibel explains the origins of the defense of necessity as growing out of state practice on the use of force and right of self-defense, a context which is "difficult to transpose to the economic area." *See* Michael Waibel, *Two Worlds of Necessity in ICSID Arbitration: CMS and LG&E*, 20 LEIDEN J. OF INT'L L. 637, 641–42 (2007).

[6] *See infra* note 40 and associated text.

[7] Treaty Between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Arg., Nov. 14, 1991, S. TREATY DOC. NO. 103-2 (1993), *available at* http://www.unctad.org/sections/dite/iia/docs/bits/argentina_us.pdf.

[8] Bishop and Luzi report that the Secretary General of ICSID sought to overlap the personnel of tribunal members participating in the disputes against Argentina in order to avoid contradictory rulings. *See* R. Doak Bishop & R.J. Aguirre Luzi, *Investment Claims—*

changed their minds without any further explanation (see Table 1 below).[9]

This paper aims to understand this divergence by drawing on work in judicial politics, principally authored by U.S. political scientists seeking to explain inconsistent outcomes issuing out of the U.S. Supreme Court. Political scientists mostly remain unconvinced that the conventional modes of judicial constraint—text, precedent, structure, and history—help to determine judicial outcomes.[10] They serve as weak constraints and are poor predictors, they argue.[11] Instead, other variables are brought into the analysis, such as (a) social background,[12] (b) attitudinal behavior,[13] (c) strategic behavior,[14] and (d) institutional contexts.[15] Scholars have explored each of these domains in order to better explain judicial outcomes, which move from agency-centered models (social background and attitudinal behavior)[16] to an increasing emphasis on structural constraints (strategic behavior and new institutionalism).[17] In the following pages, I turn to a discussion of each of these approaches, though it might be preferable to

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First Lessons From Argentina, *in* INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW 425, 440 (Todd Weiler ed., 2005). This results in a scenario of inconsistency not contemplated by Susan D. Franck in *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1545–46 (2005). Franck is prompted to worry about a legitimacy crisis by reason of conflicting tribunal rulings in 2001 against the Czech Republic arising out of identical facts (CME Czech Republic BV v. Czech Republic, UNCITRAL, Partial Award (Sept. 13, 2001), IIC 61 (2001), *available at* http://ita.law.uvic.ca/documents/CME-2001PartialAward.pdf [hereinafter *CME*]; and Lauder v. Czech Republic, UNCITRAL, Final Award, Ad hoc (Sept. 3, 2001), IIC 205 (2001), *available at* http://ita.law.uvic.ca/documents/LauderAward.pdf) [hereinafter *Lauder*]. In *CME*, initiated by the foreign company under a Netherlands-Czech BIT, the state was held liable for the devaluation of the investment interest. In *Lauder*, brought by the principal investor under a U.S.-Czech BIT, no liability flowed from the same state action. See discussion in Thomas Wälde, *Introductory Note to SVEA Court of Appeals: Czech Republic v. CME Czech Republic B.V.*, 42 I.L.M. 915, 918 (2001) (describing the results as not "unnatural").

[9] It is not that the case that there are no references to earlier decisions. Schill, for one, describes the *LG&E* tribunal's selective use of the *CMS* precedent as "objectionable." *See* Stephan W. Schill, *International Investment Law and the Host State's Power to Handle Economic Crises: Comment on the ICSID Decision in LG&E v. Argentina*, 24 J. OF INT'L ARB. 265, 285 (2007).

[10] *See* Nancy Maveety, *The Study of Judicial Behavior and the Discipline of Political Science*, *in* THE PIONEERS OF JUDICIAL BEHAVIOR 1 (Nancy Maveety ed., 2003); *see generally*, THE OXFORD HANDBOOK OF LAW AND POLITICS (Keith Whittington, R. Daniel Keleman & Gregory A. Caldeira, eds., 2008).

[11] Maveety, *supra* note 10.

[12] *See infra* notes 81–109 and accompanying text.

[13] *See infra* notes 110–150 and accompanying text.

[14] *See infra* notes 151–185 and accompanying text.

[15] *See infra* notes 186–234 and accompanying text.

[16] *See infra* notes 76–145 and accompanying text.

[17] *See infra* notes 146–229 and accompanying text.

understand them, instead of in competition with each other, as "interacting"[18] or "interconnecting"[19] descriptors of complex legal behavior. Not only might these tools of analysis provide some explanation for the conflicting outcomes in these three cases, doing so neatly underscores a point made elsewhere: that the investment rules regime has constitution-like features, in which case, it is helpful to draw on constitutional law analogues for both descriptive and analytical purposes.[20] There are differences, of course, between judges and arbitrators and so one of the burdens of this paper is to locate some of the salient differences and similarities. There is, nevertheless, sufficient play in the joints of these models that they should illuminate some aspects of arbitral decision making in the investment law context. They do not, however, provide anything more than a rough guide to behavior that is difficult to explain without further elaboration by arbitrators themselves. This is why I turn, in the final part, to a discussion of arbitral habitus[21] to argue that the *LG&E* case, where the defense of necessity was made available, likely will be looked upon as an aberration rather than as persuasive arbitral authority.[22]

I turn, first, to a brief discussion of the three cases against Argentina. For those familiar with this set of cases, I would suggest moving on to the subsequent parts of the paper, where I take up the four approaches to the explanation of judicial behavior in the hope that these might shed light on

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[18] Mark A. Graber, *Legal, Strategic or Legal Strategy: Deciding to Decide During the Civil War and Reconstruction*, *in* THE SUPREME COURT AND AMERICAN POLITICAL DEVELOPMENT 33 (Ronald Kahn & Ken I. Kersch eds., 2006).

[19] Rogers Smith, *Political Jurisprudence, the "New Institutionalism," and the Future of Public Law*, 82 AM. POLI. SCI. REV. 89, 103 (1988).

[20] DAVID SCHNEIDERMAN, CONSTITUTIONALIZING ECONOMIC GLOBALIZATION: INVESTMENT RULES AND DEMOCRACY'S PROMISE 5 (2008) [hereinafter SCHNEIDERMAN], or as Van Harten describes it, the investment treaty arbitration system is a "unique form of public law adjudication." *See* GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW 10 (2007) [hereinafter VAN HARTEN].

[21] PIERRE BOURDIEU, OUTLINE OF A THEORY OF PRACTICE 78-87 (Richard Nice trans., 1977).

[22] Two subsequent cases in the sequence, *Sempra* (Sempra Energy International v. Argentine Republic, ICSID (W. Bank) Case No. ARB/02/16, Award (Sept. 28, 2007), IIC 304 (2007), *available at* http://ita.law.uvic.ca/documents/SempraAward.pdf [hereinafter *Sempra*]) and *Continental Casualty* (Continental Casualty Co. v. Argentine Republic, ICSID (W. Bank) Case No. ARB/03/9, Award (Sept. 5, 2008), IIC 336 (2008), *available at* http://ita.law.uvic.ca/documents/ContinentalCasualtyAward.pdf [hereinafter *Continental Casualty*]), do not fully bear out this hypothesis. In *Sempra*, with Vicuña as president and Lalonde as claimant's appointee, the tribunal virtually replicated their reasons in *CMS*, though the matter was, admittedly, "examined anew." *Sempra* at para. 346. The tribunal in *Sempra* wrote, "[it] is not any more persuaded than the *CMS* and *Enron* tribunals about the crisis justifying the operation of emergency and necessity." *Id.* In *Continental Casualty*, the tribunal accepted Argentina's defense of necessity. Applying a more relaxed WTO/GATT-like standard of review, the tribunal found the emergency measures taken to be "inevitable, or unavoidable, in part indispensable" and undoubtedly having a "genuine relationship" between ends and means. *Continental Casualty* at para.197.

conflicting outcomes in the investment law context.

I. THE CASES

All three cases concern commitments made by the Argentine Republic to licensees and other investors in the course of privatizing public enterprise in the 1990s.[23] In all three cases, tariffs collected by Argentinian subsidiaries were to be calculated in U.S. dollars, converted into pesos at the time of billing, and adjusted periodically in accordance with the U.S. Producer Price Index.[24] Tying profits to U.S. currency might have seemed sensible at the time given that Argentina's currency board in 1991 had fixed the value of the peso at par with the U.S. dollar.[25]

Promised vast profits were stalled by the meltdown of the Argentinian economy in 2000 precipitated, in part, by the Brazilian currency crisis. This economic emergency—events that *The Economist* likened to the Great Depression of the 1930s[26]—resulted in a variety of measures for societal self-protection.[27] In most cases, measures involved a temporary suspension of prices and then a freezing of profits converted into dollars. Subsequent to the devaluation of the peso, Argentina would no longer convert tariffs into U.S. dollars.[28]

Rather than sharing in the burden of reconstruction, Michigan-based CMS Gas filed a claim for damages under a U.S.-Argentina BIT. CMS had participated in the wave of privatization by purchasing almost 30% of the public company Transportada de Gas del Norte ("TGN").[29] The license secured by TGN guaranteed profits in U.S. dollars so that convertibility to the peso reduced profit margins considerably.[30] CMS insisted that the government had guaranteed a rate of return on its investment via the TGN license regardless of financial hardship to the state and its citizens.[31] These actions, the company claimed, amounted to the indirect expropriation of the company's assets and, in addition, a failure to comply with the standard of 'fair and equitable treatment' mandated under the treaty, all of which

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[23] Parts of this section are drawn from SCHNEIDERMAN, *supra* note 20, at 99–101. For a more thorough discussion of these three cases, including *Sempra*, *supra* note 22, see José Alvarez & Kathryn Khamsi, *The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime*, *in* YEARBOOK ON INTERNATIONAL INVESTMENT LAW AND POLICY 379 (Karl P. Sauvant, ed., 2008/2009) [hereinafter Alvarez & Khamsi].

[24] Alvarez & Khamsi, *supra* note 23, at 388–89.

[25] Law No. 23.928 of March 1991; Decree No. 2128/91.

[26] Bill Emmott, *A Survey of Capitalism and Democracy: Liberty's Great Advance*, THE ECONOMIST (June 28, 2003) at 4.

[27] *See generally* Andrew Powell, *Argentina's Avoidable Crisis: Bad Luck, Bad Economics, Bad Politics, Bad Advice*, BROOKINGS TRADE FORUM: 2002, at 158 (2002).

[28] *Id.*

[29] *CMS*, *supra* note 4, para. 58.

[30] *Id.* at para. 69.

[31] *Id.* at para. 68.

entitled CMS to some $260 million (U.S.) in damages.[32] Though the tribunal likened the guarantees accorded to CMS as if they were a property right,[33] they found no indirect or regulatory expropriation here.[34] The tribunal unanimously found, however, a denial of fair and equitable treatment.[35] Interpreting the clause in light of the treaty preamble—to maintain a "stable framework for investment"—there could be little doubt "that a stable legal and business environment is an essential element of fair and equitable treatment" and no different from the minimum standard required by international law.[36] The operative legal framework, together with the operating license, was in the nature of a "guarantee" that these undertakings would bind the state far into the future.[37]

Argentina sought to shelter its actions by reason of a state of necessity, exceptions to investment disciplines available under both customary international law and Article XI of the U.S.-Argentine BIT. Necessity is an "exceptional" excuse available to a state if it is "the only means for the State to safeguard an essential interest against a grave and imminent peril," according to Article 25 of the Articles on State Responsibility, which the tribunal took as an accurate summary of customary international law.[38] A plea of necessity, however, will not be available where other means, even those more costly or less convenient, are available—a formulation the tribunal borrowed from the International Law Commission's comment on Article 25.[39] Though none are elaborated by the *CMS* tribunal, alternative means presumably were available to Argentina.[40] In addition, the tribunal

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[32] *Id.* at para. 464.

[33] Stephan Schill, *From Calvo to CMS: Burying an International Law Legacy? Argentina's Currency Reform in the Face of Investor Protection: The ICSID Case CMS v. Argentina*, 3 ZEITSCHRIFT FÜR SCHIEDSVERFAHREN/ GERMAN ARB. J. 285–292 (2005), *reprinted in* 3(2) TRANSNAT'L DISPUTE MGMT, 7 (April 2006).

[34] *Id.* at para. 263. Applying similar considerations as in *Pope & Talbot* (Pope & Talbot Inc. v. Canada, UNCITRAL (NAFTA), Sept. 6, 2000, *available at* http://ita.law.uvic.ca/documents/DecisionSeptember6_Pope_001.pdf), the tribunal concluded that the investor was still in control of its investment and the government did not manage the day-to-day operations of the company, while the investor retained full ownership and control of the company.

[35] *CMS*, *supra* note 4, at para. 281.

[36] *Id.* at paras. 274, 284; Occidental Exploration and Production Co. v. Ecuador, UNCITRAL, LCIA Case No. UN3467, Final Award at para. 183 (July 1, 2004), *available at* http://ita.law.uvic.ca/documents/Oxy-EcuadorFinalAward_001.pdf. The fair and equitable treatment standard clause at issue in *CMS*, unlike the NAFTA standard, was not tied in the BIT to the minimum standard required by customary international law.

[37] *CMS*, *supra* note 4, at para. 161.

[38] *Id.* at paras. 316–17.

[39] UNITED NATIONS INT'L LAW COMM'N, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT, AND COMMENTARIES 218–30 (JAMES CRAWFORD ED., 2002).

[40] *CMS*, *supra* note 4, at para. 324. Indeed, all of the tribunals can be charged with having failed to seriously consider specific alternative means available. *See* Alvarez & Khamsi,

concluded that Argentina had "significantly contributed" to the economic crisis and this, too, disentitled the state from relying on the customary international law of state of necessity.[41] The roots of the crisis, it suggested, "extend both ways and include a number of domestic as well as international dimensions."[42] The policy positions taken by successive administrations stretching back to the 1980s, reaching its "zenith in 2002," amounted to a significant contribution to the economic meltdown.[43]

Neither were events in Argentina dramatic enough to warrant triggering Article XI of the BIT. The clause was intended to protect state action in the event of "total economic and social collapse" rather than merely a "severe crisis."[44] In any event, the obligation to pay would have resumed as soon as conditions that gave rise to the emergency had subsided.[45] The tribunal, Schill notes, denied "any margin of appreciation to the host state when it comes to choosing reactions to a state of emergency."[46] Where breaches resulted in "important long-term losses," the government's conduct justified a damage award equivalent to the fair market value of the investment—the usual standard of compensation in the case of a taking.[47] The tribunal awarded CMS $132.2 million (U.S.) together with interest.[48] The company also was entitled to $2.1 million (U.S.) upon transfer of its shares in TGN to Argentina.[49]

All of this seems a harsh and unnecessary outcome. Schreuer argues that the fair and equitable principle need not require the host state "to freeze

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supra note 23, at 399 and ANDREW NEWCOMBE & LLUÍS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT, 519 (2009). Only the tribunal in *Continental Casualty* can be said to have taken up a substantive discussion of this issue.

[41] *CMS, supra* note 4, at para. 329.

[42] *Id.* at para. 328. Frenkel reports that the convertibility law originally was "intended to encourage the repatriation of Argentinian capital, allowing their owners to make deposits in dollars in domestic banks." Roberto Frenkel, *Benefits and Costs of Convertibility, in* ARGENTINA IN COLLAPSE? THE AMERICAS DEBATE 43–44 (Michael Cohen & Margarita Gutman eds., 2002) [hereinafter Frenkel]. It became, with the passage of time, "sacred dogma not to be discussed in rational terms." *Id.* at 48. This was not an entirely indigenous initiative. International financial institutions and foreign investors both encouraged and supported the policy, giving their "seal of approval" to this "unsustainable" policy. *Id.* at 42.

[43] *CMS, supra* note 4, at para. 329.

[44] *Id.* at paras. 354–55.

[45] *Id.* at para. 382.

[46] Schill, *supra* note 33, at 14; Schill, *supra* note 9, at 281. On adopting the European Court of Human Rights formulation of margin of appreciation in the context of determining state of necessity, see William W. Burke-White & Andreas von Staden, *Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties*, 48 VA. J. INT'L L. 307, 370–76 (2008) and the critique of their proposal in Alvarez & Khamsi, *supra* note 23.

[47] *CMS, supra* note 4, at para. 410.

[48] *Id.* at para. 468.

[49] *Id.* at para. 469.

its legal system for the investor's benefit."[50] He suggests, for instance, that "a breach of contract resulting from serious difficulties on the part of the government to comply with its financial obligations cannot be equated with unfair and inequitable treatment."[51] As we have seen, this is not how the CMS tribunal interpreted what Schreuer calls a "relatively imprecise" standard.[52] The *CMS* ruling also rendered the necessity defense "practically unavailable."[53] According to Reinisch, states usually will have various abstract means available to them in the face of grave and imminent peril, any number of which could be viewed as not amounting to wrongful conduct under international law.[54]

It might be that the harshness of the outcome in *CMS* was due, in part, to the BIT 'umbrella clause,' which ensured that the license's specific terms could be enforced via the treaty.[55] A breach of the BIT fair and equitable treatment standard under the U.S.-Argentine BIT was identified by the *LG&E* tribunal, however, on almost identical facts, referring not to a license or contract but to the 1992 Argentine legal framework and regulations on which the investor had relied in making the investment.[56] In a claim for damages by Kentucky-based LG&E suffered as a result of the same emergency measures that were taken up by the Argentinian government and challenged by CMS, the tribunal unanimously found that "the stability of the legal and business framework in the State party is an essential element in the standard of what is fair and equitable treatment."[57] The *LG&E* tribunal, however, accepted that Argentina could rely on the necessity defense in Article XI of the BIT.[58] Responding to the interests of foreign investors with measures for societal self-protection "was a legitimate way of protecting its social and economic system."[59] Applying Article 25 of the International Law Commission's Draft Articles on State Responsibility to facts identical to those discussed in *CMS*, the tribunal found no evidence to suggest Argentina had contributed to the crisis and that

> an economic recovery package was the only means to respond to the

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[50] Christoph Schreuer, *Fair and Equitable Treatment in Arbitral Practice*, 6 J. OF WORLD INVESTMENT & TRADE 357, 374 (2005).

[51] *Id.* at 380.

[52] *Id.* at 364.

[53] August Reinisch, *Necessity in International Investment Arbitration—An Unnecessary Split of Opinions in Recent ICSID Cases? Comments on* CMS v. Argentina *and* LG&E v. Argentina, 8 J. WORLD INVESTMENT & TRADE 191, 200 (2007).

[54] *Id.*

[55] Article II (2)(c) in BIT, *supra* note 7.

[56] *LG&E*, *supra* note 4, at paras. 132–39. The violation of these specific statutory commitments also gave rise to an abrogation of the BIT's umbrella clause in *LG&E*. *Id.* at para. 175.

[57] *Id.* at para. 125.

[58] *Id.* at para. 266.

[59] *Id.* at para. 239.

> crisis. Although there may have been a number of ways to draft the economic recovery plan, the evidence before the Tribunal demonstrates that an across-the-board response was necessary, and the tariffs on public utilities had to be addressed.[60]

Argentina was relieved of any obligation to pay damages from the period the crisis began, in December 2001, until the election of the first President Kirchner on 26 April 2003 when, in the Tribunal's view, the volatility came to an end.[61] It is noteworthy that Judge Francisco Rezek was a member of both the *CMS* (appointed by the respondent state on November 9, 2001) and *LG&E* tribunals (appointed by the respondent state on 26 August 2002).[62]

By contrast, the *Enron* tribunal unanimously rejected Argentina's necessity defense and, on virtually identical facts as in *CMS*, found there to be a denial of fair and equitable treatment and awarded damages in the amount of U.S. $106.2 million.[63] Argentina failed to satisfy the "very strict conditions" under which the defense of necessity is available under customary international law and the U.S.-Argentina BIT.[64] The tribunal was not convinced that the emergency measures invoked were the "only way for the State to safeguard an essential interest"[65]: "A rather sad world comparative experience in the handling of economic crises, shows that there are always many approaches to address and correct such critical events, and it is difficult to justify that none of them were available in the Argentine case."[66] Argentina also was disentitled from invoking the necessity defense as it had contributed to the conditions giving rise to the defense. Here the tribunal concluded that "there has been a substantial contribution of the state to the situation of necessity and that it cannot be claimed that the burden falls entirely on exogenous factors."[67] As in *CMS*, the tribunal paid only lip service to the economic hardship experienced by ordinary

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[60] *Id.* at para. 257.

[61] *Id.* at paras. 229–30. The damage award in *LG&E* (U.S. $57.4 million) (LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic, ICSID (W. Bank) Case No. ARB/02/1, Award at para. 109 (July 25, 2007), IIC 295 (2007), *available at* http://ita.law.uvic.ca/ documents/LGEEnglish_006.pdf) was significantly less than the other two cases under discussion. This, for the most part, was not a consequence of the *LG&E* tribunal ruling on the availability of necessity but was a result of the investor failing to satisfy the tribunal's heavier burden of proving future losses with "certainty." *See* discussion in Alvarez & Khamsi, *supra* note 23, at 406–07.

[62] Schill observes that a significant difference between the *CMS* and *LG&E* treatments of the necessity defense turned on the burden of proof. For the *CMS* tribunal, the burden of satisfying elements of the defense rested on the host state while, in *LG&E*, it was upon the claimant. While Schill applauds the more flexible application of the defense in LG&E, he sensibly argues that the "burden of proof has to fall on the party invoking the exception." *See* Schill, *supra* note 9, at 280.

[63] *Enron*, *supra* note 4, at paras. 268, 450.

[64] *Id.* at paras. 304, 313, 339.

[65] CRAWFORD, *supra* note 39, at art. 25C.

[66] *Enron*, *supra* note 4, at para. 308.

[67] *Id.* at para. 312.

Argentinians.[68] Investors could not be expected to share in the burden of a failed economic experiment—one that all of the claimants actively would have endorsed. It is significant that Professor Albert Jan van den Berg was a member of both the *LG&E* (appointed by the claimant on 20 June 2002) and *Enron* tribunals (appointed by ICSID to replace the respondent's appointee, Héctor Gros Espiell on 26 May 2006).[69] It also is noteworthy that Professor Francisco Orrego Vicuña presided over both the *CMS* and *Enron* tribunals (appointed by ICSID in the latter case).[70]

Table 1

Case	President	Claimant's Appointee	Respondent's Appointee	Denial of Fair Equitable Treatment	Expro-priation	Necessity Defense	Unan-imous
CMS	Francisco Orrego Vicuña	Marc Lalonde	Francisco Rezek	Yes	No	No	Yes
LG&E	Tatiana B. de Maekelt	Albert Jan van den Berg	Francisco Rezek	Yes	No	Yes	Yes
Enron	Francisco Orrego Vicuña	Pierre-Yves Tschanz	Albert Jan van den Berg	Yes	No	No	Yes

The *CMS* award ultimately was reviewed by an annulment committee established under the auspices of the International Centre for Settlement of Investment Disputes ("ICSID").[71] The Committee concluded that the tribunal's finding that CMS could take advantage of the treaty's umbrella clause had to be annulled because CMS had no legal "obligations" with Argentina that could give rise to liability under this part of the treaty (CMS was not party to the license held by TGN).[72] As liability was owed to CMS under other treaty provisions (i.e. fair and equitable treatment) this finding

[68] *CMS*, *supra* note 4, at para. 355.

[69] *Id.* at para. 39.

[70] *CMS*, *supra* note 4, at para. 11; *Enron*, *supra* note 4, at para. 12.

[71] CMS Gas Transmission Company v. Argentine Republic, ICSID, Annulment Proceeding (Sept. 25, 2007) [hereinafter *CMS Gas*] (annulling principally on the grounds that the tribunal "manifestly exceeded its powers" and that "the award has failed to state reasons on which it is based" in a variety of matters), *available at* http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC687_En&caseId=C4; *see also* INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, ICSID CONVENTION, REGULATIONS AND RULES, art. 52(b), (e) (Apr., 2006), *available at* http://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp.

[72] *CMS Gas*, *supra* note 71, at para. 95.

made no difference to the final outcome.[73] The annulment committee's other significant finding, however, could have had such an effect. They found that the *CMS* tribunal made a "manifest error of law" by treating the necessity defense in the BIT as equivalent to that available under customary international law—among other things, the former excluded altogether Argentinian breach of the BIT while the latter excused identified breaches of the BIT.[74] Even though the tribunal may have misapplied the necessity defense under the treaty, the annulment committee concluded that it did not amount to a "manifest excess of power" and grounds for annulment under the ICSID Convention.[75]

It should also be mentioned that Argentina sought judicial review of an award arising under a U.K.-Argentina BIT on which Albert Jan van den Berg also sat as an arbitrator.[76] Argentina challenged Van den Berg's appointment on the basis that his "arbitrary and abrupt change of mind between the time of the *LG&E* and *Enron* decision, which Berg never even tried to explain through a separate opinion" had disqualified him.[77] The challenge was rejected initially by the International Court of Arbitration,[78] after which Van den Berg joined in a unanimous ruling against Argentina for identical "misconduct" against the claimant, awarding damages in the amount of $185 million.[79] The tribunal found that, in this instance, the treaty text implicitly precluded the defense of necessity and that, in any event, Argentina had not met the "very restrictive conditions" that give rise to the defense.[80]

II. JUDICIAL POLITICS AND INTERNATIONAL INVESTMENT ARBITRATION

In this part, I turn to four different explanations for conflicting

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[73] *Id.* at paras. 85, 99.

[74] *Id.* at paras. 130–34; *see also* Andrea K. Bjorklund, *Emergency Exceptions: State of Necessity and Force Majeure*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 459, 494–95 (Peter Muchlinski, Frederico Ortino & Christoph Schreuer eds. 2008); *but see* Alvarez & Khamsi, *supra* note 23, at 427–40 (arguing that the annulment committee misinterpreted the BIT clause as being distinct from customary international law).

[75] *CMS Gas*, *supra* note 71, at para. 136.

[76] BG Group Plc. v. Argentine Republic, UNCITRAL, Final Award, *ad hoc* (Dec. 24, 2007), IIC 321 (2007), *available at* http://ita.law.uvic.ca/documents/BG-award_000.pdf [hereinafter *BG Group*]; Luke Eric Peterson, *Secret $185 Million award against Argentina comes to light in D.C. Court*, INVESTMENT TREATY NEWS (April 1, 2008); *see also* Republic of Argentina v. BG Group PLC, UNCITRAL, U.S. District Court for the District of Columbia, Case No. 08-0485 (RBW), Petition to Vacate or Modify Arbitration Award at paras. 69–78 (Mar. 21, 2008), *available at* http://ita.law.uvic.ca/documents/BG-PetitiontoVacateorModifyAward.pdf [hereinafter *Argentina*].

[77] *Argentina*, *supra* note 76, at para. 75.

[78] *BG Group*, *supra* note 76, at para. 11.

[79] *Id.* at para. 444.

[80] *Id.* at para. 411.

outcomes suggested by the judicial politics literature. This is a body of work authored by political scientists in the United States studying judicial outcomes on the United States Supreme Court. The first two are associated with the behavioralist tradition in the social sciences and are largely agency-centered: judicial outcomes are determined by (a) educational and professional backgrounds or (b) individual attitudes (the "attitudinal model"). The second group involves more dynamic models that bring in structural constraints. According to this group, judicial outcomes can be explained by (c) the strategic choice of individual judges or (d) institutional complexes that are both enabling and constraining. It is in the context of discussing new institutionalist approaches that I turn, lastly, to Bourdieu's social theoretical account, which helps to situate arbitral decision making within larger social processes.

A. The Social Background Model

Social background considerations are traceable to the work of the early-twentieth century legal realists. Legal sociologist Eugene Ehrlich observed that the "personal element" in the administration of justice was a far more significant force "than . . . the principles according to which [justice] is administered."[81] Referring to a 1916 study which showed that 92% of persons charged with intoxication were convicted in one court while 79% were dismissed in another, Haines came to the inescapable conclusion "that justice is a personal thing, reflecting the temperament, the personality, the education, environment, and personal traits of the magistrates."[82] This model suggests that it would be fruitful to examine the backgrounds of the various arbitrators in order to get a sense of the persons who have charge of decision making in international investment law.

Scholars operating in this terrain look to pre-appointment experiences as constitutive of judicial make-up.[83] Biographical factors include such

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[81] Eugene Ehrlich, *Judicial Freedom of Decision: Its Principles and Objects*, *in* SCIENCE OF THE LEGAL METHOD 47, 47 and 74 (Various Authors, Ernest Bruncken & Layton B. Register trans., 1917).

[82] Charles G. Haines, *General Observations on the Effects of Personal, Political, and Economic Influences in the Decisions of Judges*, 17 U. ILL. L. REV. 96, 105 (1922).

[83] *See* Stuart S. Nagel, *Political Party Affiliations and Judges' Decisions*, 55 AM. POL. SCI. REV. 843, 843–50 (1961); John R. Schmidhauser, *Stare Decisis, Dissent, and the Background of the Justices of the Supreme Court of the United States*, 14 U. TORONTO L.J. 194, 199–212 (1962); Kenneth N. Vines, *Federal District Court Judges and Race Relations Cases in the South*, 26 J. OF POL. 337, 337–57 (1964); S. Sidney Ulmer, *Dissent Behavior and Social Background of Supreme Court Justices*, 32 J. OF POL. 580 (1970); S. Sidney Ulmer, *Social Background as Indicator to the Votes of Supreme Court Justices in Criminal Cases: 1947-1956 Terms*, 17 AM. J. OF POL. SCI. 622 (1973); S. Sidney Ulmer, *Are Social Background Models Timebound?*, 80 AM. POL. SCI. REV. 957 (1986); C. Neal Tate, *Personal Attribute Models of Voting Behavior of U.S. Supreme Court Justices*, 75 AM. POL. SCI. REV. 355 (1981); C. Neal Tate & Roger Handberg, *Time Binding and Theory Building in Personal Attribute Models of Supreme Court Voting Behavior*, 35 AM. J. OF POL. SCI. 460 (1991).

matters as race, gender, religion, age, education, professional experience, and political party affiliation.[84] Brudney, Schiavoni, and Merritt, for instance, examined appellate court rulings in National Labor Relations Act matters and code for these and other characteristics.[85] They found that judges "who graduated from elite colleges were significantly more likely to support union claims than judges who lacked that experience" and that "elected office experience, law school background, age, religion, and race" were reliable predictors in some appellate matters.[86]

In contrast to federal appointees in the United States, there is far less information available to undertake social background analysis of investment arbitrators. Work that Professor Costa has undertaken in regard to the top ten investment arbitrators is extremely helpful here, but limited in its scope.[87] There are, nevertheless, some easily identifiable factors common to most arbitrators, including the ones under consideration here. Most are male and senior lawyers with a great deal of prior professional experience, usually in the area of commercial arbitration.[88] We can presuppose that most arbitrators also will have a common orientation. They will believe that developing countries require private investment, which can only be secured by providing heightened legal protections to individual investors.[89] They will believe, moreover, that economic rights of the sort protected by BITs are equivalent to human rights.[90]

The arbitrators in the three cases under consideration are of Chilean (Vicuña), Canadian (Lalonde), Brazilian (Rezek), Venezuelan (Maekelt), Dutch (Van den Berg), and Swiss (Tschanz) nationality (more details are provided in "Appendix A," on which this summary draws). All attended elite law schools in their own countries and prestigious finishing schools

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[84] Maveety, *supra* note 10, at 10 (describing "group interests, social background orientations, and ideological preferences" as relevant independent variables).

[85] James J. Brudney, Sara Schiavoni & Deborah J. Merritt, *Judicial Hostility Toward Labor Unions? Applying the Social Background Model to a Celebrated Concern*, 60 OHIO ST. L.J. 1675 (1999).

[86] *Id.* at 1681.

[87] José Augusto Fontoura Costa, *International Investment Arbitrators—A Duty or a Career?* (2007) (unpublished paper delivered at the International Conference on Law and Society in the 21st Century: Joint Annual Meetings of the Law and Society Association and Research Committee on Sociology of Law (ISA), July 25–28, 2007, Berlin, on file with author).

[88] *See* Susan D. Franck, *Empirically Evaluating Claims about Investment Treaty Arbitration*, 86 N.C. L. REV. 1, 75–83 (2007); *see also infra* Appendix A and discussion *infra* notes 102–105.

[89] Francisco Orrego Vicuña, *Changing Approaches to the Nationality of Claims in the Context of Diplomatic Protection and International Dispute Settlement*, *in* LIBER AMICORUM IBRAHIM F.I. SHIHATA 503, 507 (Sabine Schlemmer-Schulte & Ko-Yung Tung eds., 2001) [hereinafter Vicuña 2001]; JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 232–33 (2005) [hereinafter PAULSSON].

[90] *Id.*

such as LSE (Vicuña), Oxford (Lalonde and Rezek), Sorbonne (Rezek), Goethe University, Frankfurt am Main (Maekelt), Rotterdam and Aix-en-Provence (Van den Berg).

Among the six arbitrators who participated in these three decisions under consideration, four currently are or have been university professors. Vicuña has been a distinguished Professor of International Law at the University of Chile since 1970.[91] He is a somewhat prolific author, delivering a course at the Hague Academy of International Law in 1986 and the Sir Hersch Lauterpacht Memorial Lectures in 2001.[92] Rezek taught international law at the University of Brazilia from 1971 to 1997, before taking up a judicial appointment. He continued teaching at the Rio Branco Institute (the official diplomatic school of Brazil) from 1976-97.[93] Maekelt is Professor of International Private Law at Universidad Central de Venezuela while also a partner in her own law firm.[94] Van den Berg is Professor at Law (arbitration chair) at Erasmus University in Rotterdam and editor of the annual *Yearbook: Commercial Arbitration*.[95] His book on the New York Convention for the enforcement of arbitration awards is considered essential reading on the topic.[96]

Four of the six have public service experience: Vicuña served as Chilean ambassador to Great Britain under Pinochet.[97] Rezek was Attorney of the Republic before the Supreme Court of Brazil in 1972 and Deputy Attorney-General of the Republic from 1979 to 1983, serving in the former post while General Figueiredo's military government was in power.[98] Maekelt served as under-secretary of legal affairs at the Organization of American States (OAS) (1978-84), and consultant to the ministries of external affairs and education of the government of Venezuela (pre-

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[91] *See* Heidelberg Center for Latin America website, http://www.heidelberg-center.uni-hd.de/english/cv_orrego.html.

[92] Francisco Orrego Vicuña, *La zone économique exclusive: régime et nature juridique dans le droit international*, 199 RECUEIL DES COURS 9 (1986) (containing a published outline of the course Vicuña taught while at the Hague Academy).

[93] *See* Francisco Rezek, Sociedade de Advogados website, http://www.franciscorezek.com.br/.

[94] *See* Tatiana B. De Maekelt website, http://www.zur2.com/objetivos/leydip1/tatiana.htm.

[95] *See* United Nations Treaty Collection website, http://www.*untreaty.un.org/cod/avl/pdf/ha/notewriters/van-den-berg.pdf.*

[96] ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION (1981).

[97] *See* Heidelberg Center for Latin America website, *supra* note 91. On the complicity of lawyers in Pinochet's Chile, see YVES DEZALAY & BRYANT G. GARTH, THE INTERNATIONALIZATION OF PALACE WARS: LAWYERS, ECONOMISTS, AND THE CONTEST TO TRANSFORM LATIN AMERICAN STATES 144–45, 227 (University of Chicago Press 2002); LISA HILBINK, JUDGES BEYOND POLITICS IN DEMOCRACY AND DICTATORSHIP: LESSONS FROM CHILE (2007).

[98] Francisco Rezek, Sociedade de Advogados website, *supra* note 93.

Chavez).[99] Lalonde had an impressive career in the Canadian federal government, elected as Member of Parliament and serving as Minister of Justice and Minister of Finance, among other portfolios, in the administration of Prime Minister P.E. Trudeau.[100] Only Rezek has served as a judge in a national court system. He is a former Justice of the Supreme Court of Brazil and former member of the International Court of Justice.[101]

Most will have had a background in international commercial arbitration, the "generally accepted private legal process applicable to transnational business disputes."[102] The perceived reputation of arbitrators within the arbitration community "plays a large role" in determining appointment.[103] What might be considered a "solid reputation" in the community, according to the study conducted by Onyema, was established by the "tested means" of (i) publication and (ii) "attendance at relevant conferences, seminars, meetings and dinners."[104] Considering that investment arbitration mostly is a post-1989 phenomenon, a background in commercial arbitration—membership in this "mafia," "club," or "elite corps"[105]—appears to be a signifier of investment arbitration competence.

The social background indicators do not reveal much about the inclinations of individual arbitrators.[106] Marc Lalonde, for instance, who served in some of the most important federal Canadian ministries and so might be more favorably inclined to sympathize with Argentina's plight, read strictly the treaty and customary rules on necessity.[107] Nor, as the data in the next section reveals, has he found for a respondent country in any

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[99] Tatiana B. De Maekelt website, *supra* note 94.

[100] *See* Parliament of Canada, http://www2.parl.gc.ca/Parlinfo/Files/Parliamentarian.aspx?Item=729f0dd2-a100-4731-8437-ddbdf67f4884&Language=E&Section=FederalExperience.

[101] Francisco Rezek, Sociedade de Advogados website, *supra* note 93.

[102] YVES DEZALAY & BRYANT G. GARTH, DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER 59 (1996).

[103] Thomas W. Wälde, *The Specific Nature of Investment Arbitration*, *in* NEW ASPECTS OF INTERNATIONAL INVESTMENT LAW 43, 51 (P. Kahn & T. W. Wälde eds., 2007).

[104] Emilia Onyema, *Empirically Determined Factors in Appointing Arbitrators in International Commercial Arbitration*, 73 ARBITRATION 199, 205 (2007).

[105] DEZALAY & GARTH, *supra* note 97, at 10; M. SORNARAJAH, THE SETTLEMENT OF FOREIGN INVESTMENT DISPUTES 160 (2000); Jan Paulsson, *Ethics, Elitism, Eligibility*, 14 J. OF INT'L ARB. 13, 19 (1997) [hereinafter Paulsson 1997].

[106] This is consistent with Franck's empirical investigation of whether the development status of presiding arbitrators made a difference to outcomes. She concludes that it does not. *See* Susan D. Franck, *Development and Outcomes of Investment Treaty Arbitration*, 50 HARV. INT'L. L.J. 435 (2009). Franck does not, however, consider the effect of arbitral disposition or habitus in determining outcomes. *See infra* notes 137–63 and accompanying text. *Id.* This would neutralize many of the putative distinctions between arbitrators from the global North or South.

[107] *CMS*, *supra* note 4, at paras. 315–331; Reinisch, *supra* note 53.

investment arbitration on which he has sat.[108] Rezek, who sat as a national high court judge, also might be expected to be sensitive to traditional concerns about sovereignty and the separation of powers, yet he was inconsistent, finding for the claimant on the question of necessity in *CMS* and for the state in *LG&E*.[109] So there is little in social background analysis to help explain conflicting outcomes and, in particular, the variance in decision making in the two cases by arbitrators Rezek and Van den Berg. This material proves to be more helpful, however, when turning to the more contextual, institutionalist analysis in the last part of the paper.

B. The Attitudinal Model

The attitudinal model is most associated with the work of Segal and Spaeth,[110] though they credit Schubert with having originated the methodology.[111] Drawing on a comprehensive database of U.S. Supreme Court decision making, Segal and Spaeth argue that ideological attitudes toward various policy outcomes drive Supreme Court decision making and that policy preferences are aligned with the political affiliation of the appointing president.[112] Judicial voting behavior, it turns out, is best explained by sincere judicial policy preferences. It follows that legal norms and structures do not drive judicial outcomes. "Simply put," they write, "[the late Chief Justice] Rehnquist votes the way he does because he is extremely conservative; [Associate Justice Thurgood] Marshall voted the way he did because he is extremely liberal."[113]

Frustrated with complaints that their work dispensed entirely with legal norms,[114] Segal and Spaeth undertook, in a subsequent volume, to test whether U.S. Supreme Court justices adhered to precedent and, in particular, whether dissenting justices later changed their voting behavior so as to defer to earlier precedent.[115] Would initial disagreement, they ask, be overcome in progeny cases by respect for precedent? They show that justices generally adhere to their earlier line of thinking and so do not respect precedent. Though there are instances where precedential behavior

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[108] As of the date of writing in June 2008.

[109] *See CMS*, *supra* note 4, at para. 331; *LG&E*, *supra* note 4, at para. 266.

[110] JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL (1993) [hereinafter SEGAL & SPAETH 1993]; JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002) [hereinafter SEGAL & SPAETH 2002].

[111] SEGAL & SPAETH 1993, *supra* note 110, at 68; Jeffrey A. Segal, *Glendon Schubert: The Judicial Mind*, *in* THE PIONEERS OF JUDICIAL BEHAVIOR 78 (Nancy Maveety ed., 2003).

[112] Keith E. Whittington, *Once More Unto the Breach: Post-Behavioralist Approaches to Judicial Politics*, 25 L. & SOC. INQUIRY 601, 606 (Spring 2000).

[113] SEGAL & SPAETH 1993, *supra* note 110, at 32–33.

[114] Howard Gillman, *What's Law Got to Do With It? Judicial Behavioralists Test the 'Legal Model' of Judicial Decision Making*, 26 L. & SOC. INQUIRY 465, 476 (2001).

[115] SEGAL AND SPAETH 2002, *supra* note 110.

is greater, "justices are rarely influenced by *stare decisis*"—"only preferential models . . . appear to be in the right ball park."[116]

There are many problematic assumptions associated with the attitudinal model.[117] Among them, the assumption that U.S. Supreme Court justices typically are bound by the force of precedent turns out not to be the case.[118] Gillman argues that justices of the U.S. Supreme Court "are not considered politically subordinate to their colleagues and thus under no obligation to gravitate toward the disputed position of their colleagues."[119] Gerhardt similarly concludes that there is "no norm that obligates justices to defer to precedents to which they dissented."[120] Gerhardt instead proposes a model of precedent that functions like a "golden rule"—"justices will generally recognize the value and utility of giving to the precedents of others the respect they would like for their preferred precedents to receive."[121] Any norms, such as those of a golden rule, simply are not admissible under the attitudinal model.

It appears initially difficult to transpose the attitudinal model to the investment tribunal context. There is no appointing president from one of two political parties with whom we can associate a tribunal member's attitudes. Two of three tribunal members typically are appointed, however, by the parties and so might be expected to vote in favor of their appointing side. Wälde admits that "party-appointees will often be selected for their sympathy towards the appointing party and the legal concepts and approaches that counsel expect to be supportive of the appointing party's case and their expected ability to influence the president."[122] Former Deputy Secretary of the International Chamber of Commerce ("ICC") Court of Arbitration reports that, in international commercial arbitration, the practice is that co-arbitrators decide cases in ways favorable to the party that nominated the appointee.[123] This is confirmed by other accounts: of the 21 dissents in 2001 and 31 dissents in 2002 in ICC commercial arbitration,

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[116] *Id.* at 86.

[117] *See* Cornell W. Clayton, *The Supreme Court and Political Jurisprudence: New and Old Institutionalisms*, *in* SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES 15, 25–29 (Cornell W. Clayton & Howard Gillman eds., 1999).

[118] *See* CBOCS West, Inc. v. Humphries, 128 S. Ct. 1951 (2008); Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992). As Tamanaha argues, it is federal appellate courts that typically show a fidelity to legal, as opposed to ideological, considerations. See his review of the evidence in Brian Z. Tamanaha, *The Distorting Slant in Quantitative Studies of Judging*, 50 B.C.L. REV. 685, 736 (2009).

[119] Gillman, *supra* note 114, at 482.

[120] MICHAEL J. GERHARDT, THE POWER OF PRECEDENT 74 (2008).

[121] *Id.* at 5.

[122] Wälde, *supra* note 103, at 51.

[123] Jennifer Kirby, *With Arbitrators, Less Can be More: Why the Conventional Wisdom on the Benefits of Having Three Arbitrators May be Overrated*, 26 J. INT'L. ARB. 337, 347 (2009) (arguing, in light of her experience at the ICC, that three-member arbitration panels are not superior to single-member panels).

only one did not favor the appointing party of the dissenting arbitrator.[124] Empirical work on tripartite labour arbitration panels reveals that appointees often will be expected to perform advocacy functions,[125] in addition to the performance of other functions, such as that of negotiator, sounding board, and conduit for local context.[126] The tribunal President, however, is not expected to follow the flag, so to speak.[127] The attitudinal model does little to illuminate the direction, then, that international investment arbitration will take in one case over another.

Like the U.S. Supreme Court, however, international investment law has no doctrine of binding precedent.[128] Rather, arbitral jurisprudence is characterized as producing contingent outcomes issuing out of *ad hoc* tribunals concerning disputes arising under specific investment treaties. [129] Nevertheless, Wälde characterizes international investment law as sufficiently general to generate an emergent jurisprudence.[130] Schreuer and

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[124] Jan Paulsson, *Awards—and Awards*, *in* INVESTMENT TREATY LAW: CURRENT ISSUES III 97, 99 (2009).

[125] Peter A. Veglahn, *Grievance Arbitration by Arbitration Boards: A Survey of the Parties*, 42 ARB. J. 47 (1987); David C. McPhillips, *The Role of the Nominee at Grievance Arbitration*, *in* LAB. ARB. Y.B. 45 (W. Kaplan, J. Sack & M. Gunderson eds., 1993).

[126] Tom Kuttner, *Is the Doctrine of Bias Compatible with the Tripartite Labour Tribunal?*, 19 ADMIN. L. REV. 81 (1986); Paulsson 1997, *supra* note 105, at 20.

[127] Kuttner, *id.*

[128] NAFTA, art. 1136(1) is explicit about this: an "award made by a Tribunal shall have no binding force except between the disputing parties and in respect of the particular case." There is a flourishing body of literature addressing the role of precedent in international investment arbitration. *See, e.g.*, Andrea Bjorklund, *Investment Treaty Arbitral Decisions as Jurisprudence Constante*, in INTERNATIONAL ECONOMIC LAW: THE STATE AND FUTURE OF THE DISCIPLINE 265 (Colin Picker, Isabella Bunn & Douglas Arner eds., 2008); Tai-Heng Cheng, *Precedent and Control in Investment Treaty Arbitration*, INVESTMENT TREATY LAW: CURRENT ISSUES III 149 (2009), Catherine Kessedjian, *To Give or Not to Give Precedential Value to Investment Arbitration Awards?*, *in* THE FUTURE OF INVESTMENT ARBITRATION 43 (Catherine A. Rogers & Roger P. Alford, eds., 2009); Gabriele Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse?*, 23 ARB. INT'L. 357 (2007); Andrés Rigo Sureda, *Precedent in Investment Treaty Arbitration*, *in* INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY 830 (Christina Binder, Ursula Kriebaum, August Reinisch & Stephan Wittich eds., 2009); August Reinisch, *The Role of Precedent in ICSID Arbitration*, AUSTRIAN ARB Y.B. 495 (2008); Christoph Schreuer & Matthew Weiniger, *A Doctrine of Precedent?*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 1188 (Peter Muchlinski, Frederico Ortino & Christoph Schreuer eds., 2008) [hereinafter Schreuer & Weiniger]; *Special Issue on Precedent in Investment Arbitration*, 5 (3) TRANSNAT'L. DISP. MGMT. (2008).

[129] AES Corporation v Argentine Republic, ICSID (W. Bank) Case No. ARB/02/17, Decision on Jurisdiction at para. 23 (April 26, 2005), HC 04 (2005), *available at* http://ita.law.uvic.ca/documents/AES-Argentina-Jurisdiction_001.pdf; *Enron*, *supra* note 4, at para. 25.

[130] International Thunderbird Gaming Corporation v. Mexico, UNCITRAL (NAFTA), Separate Opinion (Thomas Wälde) at para. 15 (Dec. 2005), *available at* http://ita.law.uvic.ca/documents/ThunderbirdSeparateOpinion.pdf [hereinafter *International Thunderbird*]; Wälde, *supra* note 103, at 116.

Weiniger similarly claim that a "*de facto* practice of precedent certainly exists" in which "individual tribunal decisions have persuasive force and compel the respectful attention of tribunals confronted with similar cases."[131] For these reasons, the *Enron* panel, after acknowledging the absence of "compulsory precedent," chose to "follow the same line of reasoning" as earlier cases confronted with an almost identical jurisdictional question concerning the standing of minority shareholders.[132] Jan Paulsson, who has participated in nearly thirty ICSID cases as either lawyer or arbitrator, argues that, even without a rule of precedent, there is no crisis of unpredictability in investment law.[133] Rather than expecting the regime to produce binding precedent, arbitrator's opinions should be considered "no more or less interesting than those of commentators. What we really want to know is the reason which they said led them to the outcome for which they have taken personal responsibility. That is where, we may reasonably surmise, they exhibit particular care."[134]

Arbitrators' reputations rest partly on their skill at issuing convincing reasons. This renders some arbitral awards "influential, others best forgotten."[135] Nor are conflicting outcomes unexpected as findings of fact might differ: "That is untidy, but no catastrophe, nor indeed surprising: such things happen when a story is told in different ways on different occasions to different people."[136] In this way, the conflicting outcomes in the *CME* and *Lauder* cases against Czechoslovakia can be explained away as "not at all incompatible."[137]

The conflicting outcomes here cannot be so easily explained. The facts on the ground—the exigencies giving rise to the economic crisis precipitating emergency measures—are common to all three of the cases as is the U.S.-Argentine treaty text. Moreover, personnel overlap in the three cases. Nor is there place in the attitudinal model for Paulsson's explanations. Those working with the model show little interest in reasons offered or their ability to convince.[138] All that counts is judicial voting—

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[131] Schreuer & Weiniger, *supra* note 128, at 1196.

[132] *Enron*, *supra* note 4, at para. 25.

[133] Jan Paulsson, *Avoiding Unintended Consequences*, *in* APPEALS MECHANISM IN INTERNATIONAL INVESTMENT DISPUTES 241 (Karl P. Sauvant ed., 2008) [hereinafter Paulsson 2008].

[134] *Id.* at 246; *see also* Paulsson, *supra* note 124, at 104.

[135] Paulsson 2008, *supra* note 133, at 247.

[136] *Id.*; *Accord* Alvarez & Khamsi, *supra* note 23, at 467 (arguing that there is a surprising degree of uniformity among the published decisions issued to date and that the regime does not face a grave legitimacy crisis because of inconsistent interpretations arising out of the same investment agreement).

[137] Paulsson 2008, *supra* note 133, at 247. *See* discussion of *CME* and *Lauder* cases *supra* note 8.

[138] *See* Guillermo Aguilar Alvarez & W. Michael Reisman, *How Well Are Investment Awards Reasoned?*, *in* THE REASONS REQUIREMENT IN INTERNATIONAL INVESTMENT ARBITRATION: CRITICAL CASE STUDIES 1 (Guillermo Aguilar Alvarez & William Michael

rulings represent raw political preferences—while discussion of legal norms turn out "only to cloak—to conceal—the motivations that cause the justices to decide as they do."[139]

In order to look for patterns of arbitral behavior suggesting reliance exclusively on personal policy preferences, I draw here on a database of some 81 awards as of August 2007.[140] Among the cases under discussion here, Vicuña was one of the top arbitrators, having participated in eight awards.[141] Van den Berg also had a high profile and sat on seven tribunals.[142] Lalonde sat on four tribunals, and Rezek registered on three.[143] Maekelt appeared only in the *LG&E* case and Tschanz appeared only in the *Enron* case.[144] If the results in these awards are an indication that ideological preferences drive decision making, rather than treaty text or legal norms, then Vicuña's reputation of being pro-investor is well deserved. In six of eight awards he found in favor of the investor.[145] In two cases he found for the respondent, but in one of those cases he was appointed by the respondent country.[146] Lalonde's record is four for four in favor of claimants, serving as the claimant's appointee in every case.[147] Rezek is three for four (in part or in full) in favor of respondents, serving as that side's appointee in each case.[148] Only in *CMS* did he find fully for a claimant. Van den Berg has the least predictable record. Of seven awards on jurisdiction or on the merits, he has found for the respondent (in part or in whole) on four occasions and for the claimant (in part or in whole) on three other occasions.[149] He has been appointed by both sides and has also been appointed presiding chair by ICSID.

The attitudinal model turns out to have little explanatory value in these cases other than to confirm, as an empirical matter, a tilt in favor of investors on the part of Vicuña and Lalonde and in favor of respondent states on the part of Rezek. This hardly explains Rezek's or Van den

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Reisman eds., 2009).

[139] SEGAL & SPAETH 1993, *supra* note 110, at 1.

[140] These are principally ICSID and some UNCITRAL awards available publicly online. Many thanks to Mauricio Salcedo for developing this database. For the purposes of the analysis that follows, I count only final awards unless the tribunal has only issued an award on jurisdiction, in which case the jurisdictional award is counted.

[141] Database of investment arbitration decision making (Aug. 2007) [on file with the author].

[142] *Id.*

[143] *Id.*

[144] *Id.*

[145] *Id.*

[146] *Id.*

[147] Database of investment arbitration decision making, (Aug. 2007) [on file with the author].

[148] *Id.*

[149] *Id.*

Berg's inconsistencies.[150]

C. The Strategic Model

Moving beyond raw policy preferences, the strategic account builds on the rational choice model by understanding actors as operating strategically within specific institutional environments. The work of Pritchett[151] and Murphy[152] laid the foundation for this genre of positivist political science. Murphy concluded that the "complex judicial system" within which judges function "compels a Justice who wishes to act rationally in terms of achieving his policy goals to weigh a number of factors in addition to the specific legal issues in individual cases."[153] Epstein and Knight describe the strategic account as holding that: (i) social actors make choices in order to achieve certain goals; (ii) social actors act strategically in the sense that their choices depend on their expectations about the choices of other actors; and (iii) these choices are structured by the institutional setting in which they are made.[154] Rather than judges expressing unvarnished policy preferences as in the attitudinal model, the strategic account understands that rationality is bounded by a variety of agency and institutional factors.[155] Goal-oriented decision making—what Posner describes as "just common sense"[156]—is a feature of rational actor modelling common in a variety of institutional settings and so could prove fruitful in the investment arbitration context.

This approach relies, once again, on no internal account of decision making. Legal norms feature in this account only on the margins.[157] The emphasis here is on the agency of judicial and other actors that frame judicial output. For instance, Epstein and Knight apply game theoretic models to Chief Justice Marshall's famous opinion in *Marbury* and conclude that Marshall's unconstrained preferences did not drive his behavior (in which case he would have given Marbury his commission to be justice of the peace) but that he was a strategic and "sophisticated" actor

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[150] It may be that with a larger sample of arbitrators, more obvious patterns of behavior will be observed.

[151] C. HERMAN PRITCHETT, THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES 1937-1947 (1948).

[152] WALTER F. MURPHY, CONGRESS AND THE SUPREME COURT (1962); WALTER F. MURPHY, ELEMENTS OF JUDICIAL STRATEGY (1964) [hereinafter MURPHY 1964].

[153] MURPHY 1964, *id.* at 199.

[154] Lee Epstein & Jack Knight, *Toward a Strategic Revolution in Judicial Politics: A Look Back, A Look Ahead*, 53 POL. RES. Q. 625, 626 (2000); Lee Epstein, Jack Knight & Andrew D. Martin, *The Political (Science) Context of Judging*, 47 ST. LOUIS U. L.J. 783, 798 (2003) [hereinafter Epstein et al. 2003].

[155] JON ELSTER, RATIONAL CHOICE (1986).

[156] POSNER, *supra* note 2, at 29.

[157] Epstein et al. 2003, *supra* note 154, at 789–90.

aware of the executive conflict pending with President Thomas Jefferson.[158] Eskridge explains judicial outcomes in civil rights cases issuing out of the relatively conservative Burger Court as determined by anticipated congressional and executive reactions.[159] If the justices wished to issue rulings as close as possible to their preferences, Eskridge maintains, they would have to take into account the preferences of the other branches in order to avoid congressional overrides.

There is little doubt that international investment arbitrators have acted in a strategic fashion. The threat of review by national courts or annulment by an ICSID committee,[160] however, is not very serious. Both occur infrequently and usually review is conducted on very narrow legal grounds (see *CMS* discussion, above). Other actors, however, are within the contemplation of arbitrators. Bryan Schwartz, for instance, admitted in *S.D. Myers* that a "reasonable argument" could be made that Canada's actions in that case were expropriatory with regard to the claimant's goodwill.[161] The panel was reluctant to so find given the temporary nature of the measure and the absence of a transfer of wealth from the claimant to the government or a third party.[162] In any event, having found there to be a denial of fair and equitable treatment, this would have made little practical difference in the award of damages. A finding of expropriation, on the other hand, "might contribute to public misunderstanding and anxiety" about the decision and the wider implications of NAFTA.[163] Rather than risk this confusion and attract public vitriol from social movement actors, Schwartz was content to reject the expropriation claim.[164]

Judge Abner Mikva, recounting his service as member of the *Loewen*[165] arbitration tribunal,[166] made pointed references to the strategic role of investment arbitrators.[167] After agreeing to serve on the Loewen

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[158] Jack Knight & Lee Epstein, *On the Struggle for Judicial Supremacy*, 30 L. & SOC. REV. 87, 111–12 (1996); Marbury v. Madison, 5 U.S. 137 (1803).

[159] William N. Eskridge, *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L. J. 331 (1991).

[160] PAULSSON, *supra* note 89, at 229.

[161] S.D. Myers, Inc. v. Canada, UNCITRAL (NAFTA), Separate Concurring Opinion at para. 218 (Nov. 13, 2000), *available at* http://ita.law.uvic.ca/documents/PartialAwardSeperateOpinion_Myers.pdf [hereinafter *S.D. Myers*].

[162] *Id.* at paras. 220–21.

[163] *Id.* at para. 222.

[164] *Id.*

[165] Loewen Group, Inc. and Raymond L. Loewen v. United States, ICSID (NAFTA) Case No. ARB (AF)/98/3, Award on Merits (June 26, 2003), IIC 254 (2003), *available at* http://ita.law.uvic.ca/documents/Loewen-Award-2.pdf [hereinafter *Loewen*].

[166] Challenging the state of Mississippi requirement that appellants post a bond in the amount of 125% of the damages owed concerning the largest civil damages award in state history.

[167] Judge Abner Mikva, Audiotape: Symposium on Environmental Law and the

tribunal by the U.S. Department of Justice ("DOJ"), Mikva, a retired DC circuit court judge, met with DOJ officials prior to the panel being constituted.[168] "You know, judge," he was told by DOJ, "if we lose this case we could lose NAFTA."[169] "Well, if you want to put pressure on me," Mikva replied, "then that does it."[170] NAFTA's investment chapter and dispute resolution mechanism generated, for Mikva, an alarming breadth of authority without the checking mechanisms provided by the U.S. Constitution.[171] He described himself as being "on the dissenting side of a difficult problem."[172] His fellow panellists, Sir Anthony Mason and Lord Mustill, were determined to find for Loewen due to fatal procedural flaws at trial, including "appeals to local favoritism as against a foreign litigant."[173] Loewen's corporate reorganization, following bankruptcy proceedings under the other Chapter Eleven of the U.S. Bankruptcy Code, provided an opening for all three tribunal members ultimately to reject the claim on jurisdictional grounds.[174] Reincorporating under U.S. law and assigning the NAFTA claim to a newly formed Canadian corporation, though "owned and controlled by an American corporation,"[175] was fatal to securing the tribunal's jurisdiction.

This remarkably honest recounting of the *Loewen* proceedings from the perspective of a single arbitrator is best viewed through the lens of the strategic model. Though advancing the position associated with the appointing party—a hallmark of the attitudinal approach—it would seem that Judge Mikva was not pursuing mere personal policy preferences. Rather, it would seem that he was convinced by DOJ that finding against the United States would generate immense heat and opposition and that this could jeopardize the future of NAFTA and the investment rules regime, more generally. This appeared to be, in other words, a strategic calculation that took into account the anticipated views of other actors. We can surmise that Mikva shared these concerns with his fellow tribunal members and that this sort of strategic calculation may have played a role in the final result. After all, the tribunal found Loewen's complaints to be warranted—"[w]hat clearer case than the present could there be for the ideals of NAFTA to be given some teeth?" they asked[176]—yet ruled against the investor.

Judiciary, Pace Law School (Dec. 6–8, 2004). I am grateful to Professor Robert Stumberg for bringing Judge Mikva's address to my attention.

[168] *Id.*

[169] *Id.*

[170] *Id.*

[171] *Id.*

[172] *Id.*

[173] *Loewen*, *supra* note 165, at para. 136.

[174] Noah Rubins, *Loewen v. United States: The Burial of an Investor-State Arbitration Claim*, 21 ARB. INT'L 1 (2005).

[175] *Loewen*, *supra* note 165, at para. 1.

[176] *Id.* at para. 240.

A similar concern with Congressional and public opinion helps to explain, I would suggest, the result in *Methanex* where the tribunal narrowed the scope of NAFTA's takings rule to exclude "non-discriminatory regulation for a public purpose" outside of specific commitments made to an investor.[177] This is a ruling which has confounded "most experts on the customary international law of expropriation"[178] but might be explained in light of the strategic actions of arbitrators to avoid finding liability against the United States.[179] Indeed, to date no investment tribunal has found U.S. conduct to breach NAFTA's investment chapter or any other investment treaty.

The strategic model also could help to explain the conflicting opinions of Van den Berg. According to a report provided by Peterson, his motivations may have had to do with institutional considerations having to do with arbitral harmony. In the context of the *BG Group* case (2007), where Van den Berg's impartiality was challenged by Argentina (discussed above), Peterson reports that Van den Berg "informed the parties that he takes the view that collegiality demands that arbitrators sitting on three-member tribunals reach a common view as to how the case should be resolved."[180] The empirical data supports his view—Van den Berg has not issued dissenting reasons in any of the cases in our database (even though commercial arbitration practice suggests otherwise).[181] Only when he was president of the *Thunderbird* tribunal was a non-unanimous decision reached, with arbitrator Wälde issuing lengthy dissenting reasons expounding on the incorporation of legitimate expectations doctrine in the fair and equitable treatment standard.[182] So it could be that for the strategic reason of arbitral harmony that Van den Berg joined his fellow arbitrators on the *LG&E* panel in finding for Argentina on the defense of necessity and against Argentina on this point in *Enron*.[183] This penchant for "dissent aversion" is curious. As Posner observes, the phenomenon arises in circumstances where a judge hopes for "reciprocal consideration in some future case in which he has a strong feeling and the other judges do not."[184] Posner is describing, however, a situation where judges sit as repeat players

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[177] Methanex Corp. v. United States, UNCITRAL (NAFTA), Final Award on Jurisdiction and Merits at IV.D. para. 7 (Aug. 7, 2005), IIC 167 (2005), *available at* http://ita.law.uvic.ca/documents/MethanexFinalAward.pdf.

[178] Todd J. Weiler, *Methanex Corp. v. U.S.A.: Turning the Page on NAFTA Chapter Eleven?*, 6 J. WORLD INVESTMENT & TRADE 903, 918 (2005).

[179] VAN HARTEN, *supra* note 20, at 146.

[180] Luke Eric Peterson, *Analysis: Decrying Past "Contradictory" Rulings, Argentina Challenges Arbitrator*, INVESTMENT TREATY NEWS, Apr. 1, 2008, *available at* http://www.iisd.org/pdf/2008/itn_april1_2008.pdf; *see BG Group*, *supra* note 76.

[181] Kirby, *supra* note 123.

[182] *International Thunderbird*, *supra* note 130, at paras. 21–58.

[183] *See LG&E*, *supra* note 4, at para. 266; *Enron*, *supra* note 4, at paras. 313, 321, 341.

[184] *See* POSNER, *supra* note 2, at 32.

as part of a relatively constant bench and not on *ad hoc* tribunals—one-off arbitrations—with less likelihood of repeat panel composition (although this does occur, as the sequence of the Argentinean cases suggests) and little reasonable expectation of reciprocity.

This version of the strategic model might also explain Judge Rezek's behavior. He chose to join unanimous opinions in both cases, as he did in the other available rulings in our data base. But for a single ruling on jurisdiction, Rezek in each case joined unanimous rulings in favor of the respondent state. If in *CMS* (with Vicuña as President) Rezek did not find the necessity defense available, at the time of *LG&E* he concluded that it was viable together with Van den Berg and President Maekelt. Seeing as he has otherwise joined opinions favoring respondents, we can surmise that his later reversal represents Rezek's preferred position. Conversely, Van den Berg with Rezek in *LG&E* found the necessity defense available and ruled otherwise in *Enron* (with Vicuña as President). Given his more ambivalent record in other cases, Van den Berg's preference is not revealed but we can surmise that strategic calculations played a role in his less than ideal position at either time. The one constant is Vicuña, whose preferences are clear. He did not find the necessity defense available in either of his cases and neither did his fellow arbitrators. We can surmise that Vicuña was a powerful and determinative presence on both panels and that he might have convinced either Rezek or Van den Berg to vote against their preference as revealed in either of the two cases.[185] We can conclude, in other words, that something else was going on other than law and that it likely was strategic decision making.

D. New Institutionalism

Work associated with the new institutionalism understands decision making as both enabled and constrained by the institutions within which actors operate.[186] Institutions, according to this account, represent not bricks and mortar but "stable, valued, recurring patterns of behavior."[187] These practices shape actors' conduct just as actors' give institutions shape through their actions. This constitutive approach to decision making seeks to overcome the duality of agency and structure by attending to the "dialectic of meaningful actions and structural determinants."[188] In the U.S.

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[185] Christoph Schreuer, seeking to explain these "irreconcilable" decisions, surmises that the "personal dynamics within a tribunal among the usually three people may also be a very strong contributing factor towards a particular result" in *Forum Panel Discussion: Precedent in Investment Arbitration*, INVESTMENT TREATY LAW: CURRENT ISSUES III 313, 321 (2009).

[186] Cornell Clayton & David May, *A Political Regimes Approach to the Analysis of Legal Decisions*, 32 POLITY 233, 234 (1999).

[187] Smith, *supra* note 19, at 91 (quoting SAMUEL P. HUNTINGTON, POLITICAL ORDER IN CHANGING SOCIETIES 12 (1968)).

[188] *Id.* at 90 (quoting THEDA SKOCPOL, VISION AND METHOD IN HISTORICAL SOCIOLOGY 4 (1984)).

Supreme Court context, this suggests that the legal structures associated with high court judicial decision-making are not likely the result of unconstrained judicial preferences or mere strategic calculations but are the product of a complex ensemble of practices, expectations, and legal norms. Not merely concerned with counting votes or imagining strategic calculations (though the latter "can be quite illuminating"),[189] the new institutionalist orientation is interested in how political behavior is "given shape, structure, and direction by particular institutional arrangements and relationships."[190] Robert Dahl, for instance, who is credited with some of the early work in the field, described Supreme Court decision making as reflecting a dominant national consensus already existing in Congress.[191] For these reasons, Dahl surmised,[192] it was unlikely that the U.S. Supreme Court would run ahead of the national electoral returns except in periods where the dominant ruling alliance was in transition.

Of particular interest here are the social and political contexts in which decision makers operate.[193] Gillman, for instance, has done some pioneering work around the Lochner-era Court, situating judicial decision-making within a legal discourse of "class legislation" and a socio-economic context of a brand of capitalism that helps to explain much that went on under the rubric of *Lochner*.[194] Graber's book on the pre-civil war Supreme Court convincingly illuminates the political compromise between North and South that was upset by President Lincoln's election and which the U.S. Supreme Court sought to vindicate in the infamous *Dred Scott* case.[195] The value of this work is its attempt to contextualize decision making within parameters that are larger than the decision makers themselves or other actors having power over them.

We might think about the Argentinean cases with this wider view of personnel, practices, norms, and politics in mind. In doing so, we are no better able to explain the particular outcomes in the three cases under

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[189] Howard Gillman, *The New Institutionalism Part I, More and Less than Strategy: Some Advantages to Interpretive Institutionalism in the Analysis of Judicial Politics*, 7 LAW & COURTS 6, 7 (1996–97).

[190] Howard Gillman & Cornell W. Clayton, *Beyond Judicial Attitudes: Institutional Approaches to Supreme Court Decision-Making*, *in* SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES 1, 5 (Cornell W. Clayton & Howard Gillman eds., 1999).

[191] Robert Dahl, *Decision-Making in a Democracy: The Supreme Court as National Policy-Maker*, 6 J. PUB. L. 279, 293 (1957). For a recent study advancing the hypothesis that the U.S. Supreme Court "serves ruling political coalitions," *see* LUCAS A. POWE, JR., THE SUPREME COURT AND THE AMERICAN ELITE 1789-2008 IX (2009).

[192] Dahl, *supra* note 191, at 293.

[193] Gillman, *supra* note 114, at 490–91.

[194] HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE 241 (1993).

[195] MARK A. GRABER, DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL 149 (2006).

consideration; rather, we might better understand the *LG&E* case as aberrant. It is useful at this point to return to Judge Mikva's account of the *Loewen* proceedings. He described President Mason's and Lord Mustill's agitated reactions to the Mississippi court proceedings in this way: a "wrong had been committed that had to be righted."[196] He described his fellow tribunal members as anticipating not only the reactions of the parties to the dispute but the reactions of the principal audience for international investment arbitration, "an amorphous constituency of international law specialists, experts."[197] "My colleagues," Mikva recounted, "told me that 'so and so would think this dreadful' or 'another would have no sympathy.'"[198] This is a constituency, Mikva admitted, which he knew nothing about nor would have Congress, he added, when they approved NAFTA.[199] This is the small audience of international investment lawyers—operating within the legal academy and legal practice—who serve as commentators, arbitrators, and counsel and giving rise to apparent, if not real, conflicts of interest.[200] These are the self-styled "barons"[201] who possess a distinct bias in favor of commercial solutions to public problems.[202] They are described by Dezalay and Garth as "a very select and elite group of individuals" who have the "symbolic capital acquired through a career of public service or scholarship."[203]

Though the new institutionalists mostly eschew sociological terminology, a turn to Bourdieu's social theory is fitting in this context and reveals the merits of such an approach to the study of international investment arbitration. For Bourdieu, the juridical field is a "site of a competition for monopoly of the right to determine the law."[204] Bourdieu here describes a struggle, fought amongst judges, lawyers, and commentators,[205] to control (or monopolize) interpretation of the legal

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[196] Mikva, *supra* note 167.

[197] *Id.*

[198] *Id.*

[199] *Id.*; Adam Liptak, *NAFTA Tribunals Stir U.S. Worries*, N.Y. TIMES, Apr. 18, 2004, at N20 ("'If Congress had known that there was anything like this in Nafta,' [Judge Mikva] said, 'they would never have voted for it.'").

[200] Judith Levine, *Dealing with Arbitrator "Issue Conflicts" in International Arbitration*, 61 DISP. RESOL. J. 60, 62 (Feb.–Apr. 2006); Luke Eric Peterson, *Analysis: Arbitrator Challenges Raising Tough Questions as to Who Resolves BIT Cases*, INVESTMENT TREATY NEWS (Int'l Inst. for Sustainable Dev., Geneva, Switzerland), Jan. 17, 2007, at 4.

[201] Melnitzer, *supra* note 1, at 21.

[202] Thomas W. Wälde, *Remedies and Compensation in International and Investment Law*, 2(5) TRANSNAT'L DISPUTE MGMT. 9 (Nov. 2005).

[203] DEZALAY & GARTH, *supra* note 97, at 8. Their sentence continues to say that their symbolic capital "is translated into a substantial cash value in international arbitration."

[204] Pierre Bourdieu, *The Force of the Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 805, 817 (1987).

[205] *Id.* at 821. Bourdieu includes "solicitors" (drawing on a distinction now abandoned in many parts of the world) which I have substituted with "commentators." He includes

text.[206] Judicial utterances, once proffered, have a symbolic authority that is immediately legitimate and universally recognized.[207] This is a power to both name and legitimate a certain version of reality[208] that becomes common sense for everyone else.[209] Judges, for Bourdieu, possess the symbolic capital necessary to construct their own reality.[210] Yet the judiciary does not have complete independence—it has (one might say) only relative autonomy as it sits in close proximity to other power holders by virtue of family and educational backgrounds. "Consequently," Bourdieu writes, "the choices which those in the legal realm must constantly make between differing or antagonistic interests, values, and world views are unlikely to disadvantage dominant forces."[211]

Judicial actors, then, are predisposed to act in ways that give expression to their position and status. These dispositions produce what Bourdieu calls "habitus"[212]—durable "principles which generate and organize practices and representations that can be objectively adapted to their outcomes" without being mechanically predetermined.[213] There is, in other words, a realm of freedom within habitus. Nevertheless, certain practices are excluded, considered "unthinkable," or beyond the logic of a particular field[214]—there is endless variability and "permanent revision" but it can never be "too radical."[215] The habitus in any field, then, need not be entirely coherent—it can reveal contradiction and "internal division."[216] Constancy in this field, as elsewhere, is not guaranteed but habitus makes it more likely.

In a similar vein, the investment rules regime's structural tilt ensures that arbitral choices will be more likely to favor investment promotion over the interests of state parties who wish to pursue countervailing social policy

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scholars as actors within this field.

[206] *Id.* at 818, 821.

[207] *Id.* at 828, 838.

[208] PIERRE BOURDIEU, LANGUAGE AND SYMBOLIC POWER 106, 236 (Gino Raymond & Matthew Adamson trans., 1991).

[209] David Schneiderman, *Common Sense and the Charter*, 45 SUP. CT. L. REV. (2d) 3 (2009).

[210] Symbolic capital is a form of accumulation of honor, reputation, and power for which "economism has no name." *See* BOURDIEU, *supra* note 21, at 171–83.

[211] Bourdieu, *supra* note 204, at 842; Mauricio García Villegas, *On Pierre Bourdieu's Legal Thought*, 56–57 DROIT ET SOCIETE 57, 61 (2004).

[212] BOURDIEU, *supra* note 21, at 214.

[213] PIERRE BOURDIEU, THE LOGIC OF PRACTICE 53 (Richard Nice trans., 1980).

[214] *Id.* at 54–55. This is because the "practical rationality" associated with habitus is itself "socially structured." *See* Loïc Wacquant, *Symbolic Power in the Rule of "State Nobility," in* PIERRE BOURDIEU AND DEMOCRATIC POLITICS 133, 137 (Loïc Wacquant ed., 2005).

[215] PIERRE BOURDIEU, PASCALIAN MEDITATIONS 161 (2000).

[216] *Id.* at 160.

initiatives, though this outcome will not always be guaranteed.[217] The *CMS* tribunal described Argentina's BIT commitments in these investor-friendly terms: as guaranteeing a stable and predictable environment for investments in which changes in the direction of policy would not be condoned nor would the defense of necessity be available except in the strictest of circumstances.[218] The *LG&E* tribunal agreed with *CMS* that there was a denial of investment treaty commitments but, applying a less strict test and placing the burden of proof on the claimant,[219] found that the defense of necessity was available to excuse Argentina's conduct for a period of fifteen months.[220] Arbitral dispositions allow some play at the joints but nothing too radical will be permitted. The habitus occupied by arbitrators Rezek and Van den Berg allowed them to act in ways inconsistent with their preferred outcomes but also to self-correct.[221] The world was turned right for each of them at differing times but continues to spin on investor-friendly axes.

Two more observations arise in this social-theoretical context. First, it is revealing that the arbitrators discussed in this paper principally were drawn to investment law from the world of international commercial arbitration. "The paradigms of commercial arbitration," Wälde writes, "are deeply ingrained in the mind of most or all participants in the investment arbitration process."[222] It was there that they developed the reputational authority—the symbolic capital—to merit appointment to the new legal order of international investment. These arbitrators, as have so many others operating in the investment law field, cut their teeth in the exalted atmosphere of privatized international contractual dispute resolution,[223] which has been described so evocatively by Dezalay and Garth.[224] The move to the contestable field of investment arbitration must have been a rude awakening for many of these decision makers. Preferring to resolve disputes according to the commercial-style with which they were accustomed[225]—*in camera, ad hoc*, with little national judicial oversight or

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[217] SCHNEIDERMAN, *supra* note 20, at 72; David Schneiderman, *Transnational Legality and the Immobilization of Local Agency*, 2 ANN. REV. OF L. & SOC. SCI. 387, 404 (2006).

[218] *CMS*, *supra* note 4, at paras. 274, 323.

[219] Schill, *supra* note 9, at 280.

[220] *LG&E*, *supra* note 4, at para. 266.

[221] As Paulsson puts it, "[s]ome awards are influential, others best forgotten." *See* Paulsson 2008, *supra* note 133, at 247.

[222] Wälde, *supra* note 103, at 54.

[223] *See, e.g.*, Thomas E. Carbonneau, *The Ballad of Transborder Arbitration*, 56 U. MIAMI L. REV. 773 (2002).

[224] *See generally* DEZALAY & GARTH, *supra* note 97 (exploring the national/international linkages in international commercial arbitration).

[225] Wälde, *supra* note 103, at 112; *see* Charles H. Brower II, *Investor-State Disputes under NAFTA: The Empire Strikes Back*, 40 COLUM. J. TRANSNAT'L L. 43, 88 (2001) (examining the propriety of judicial review of arbitral awards in NAFTA investor-dispute cases).

publicity,[226] and "meticulously aside from the place of all the social relations that produced the actual conflict"[227]—they would have found themselves in a different political and social reality.[228] That this would generate defensive posture on the part of arbitrators helps to explain the accusatory tone and name-calling of the international investment bar in response to threats emanating from the public sphere. The leading investment lawyer and arbitrator Paulsson, for instance, characterizes as "shrill voices"—"true believers" who float "propaganda," "producing much rhetoric but less informed judgment"—those who take issue with investment rules' operating precepts.[229] "Dialogue is pointless; no evidence is admissible if it does not conform to the ultimate truth," he writes.[230] Yet the notables of international investment arbitration continue to maintain the confidence of their home governments and leading determinants of public opinion in the media. The heightened level of intemperate discourse suggests that international investment lawyers feel real anxiety that their symbolic authority is under threat. It also helps to explain why divergence from dominant arbitral opinion, such as that in *LG&E*, occasionally will arise as a result of reflexive shifts of disposition.[231]

A related matter concerns questionable arbitral claims to universality. Here, again, Paulsson is instructive. Seeking to disarm critics of the regime, Paulsson charges those who disparage international investment law's order with showing a disdain for the "international rule of law."[232] States all around the world—evinced by the web of over 2700 BITs—have signed onto commitments that give expression to the international protection of property rights.[233] The regime promotes values and protects interests understood everywhere as rising to the level of the universal. Investment arbitration's symbolic authority is premised exactly on this calculation: that finding a breach of investment rules (no matter how vague and unforeseen, as in the laconic "fair and equitable treatment" standard) gives rise to international obligations that are immediately recognizable as universal in character. Yet this universality, as Bourdieu would put it, is "misrecognized": "[a]s the quintessential form of legitimized discourse, the law can exercise its specific power only to the extent that the element of arbitrariness at the heart of its functioning (which may vary from case to

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[226] *See* VAN HARTEN, *supra* note 20, at 152–84.

[227] DEZALAY & GARTH, *supra* note 97, at 69.

[228] *See* David Schneiderman, *Constitution or Model Treaty? Struggling over the Interpretive Authority of NAFTA*, *in* THE MIGRATION OF CONSTITUTIONAL IDEAS 294, 311–12 (Sujit Choudhry ed., 2006).

[229] PAULSSON, *supra* note 89, at 229, 233–36.

[230] *Id.* at 236. These are among some of the more polite rejoinders one finds in the literature.

[231] BOURDIEU, *supra* note 215, at 160–61.

[232] PAULSSON, *supra* note 89, at 233.

[233] *Id.* at 232.

case) remains unrecognized."[234] Recognizing the privileged access accruing to international arbitrators in defining that which rises to the level of the universal is a principal task for those "shrill voices" that take issue with this regime.

III. CONCLUSION

Having applied models developed by political scientists to explain U.S. Supreme Court judicial outcomes, it turns out that not one of these models fully explains conflicting outcomes concerning the defense of necessity in the three Argentinean cases. The strategic model of behavior turns out to have some explanatory force in so far as arbitrators may be concerned with the anticipated reactions of other actors, including arbitrators, state parties or public opinion, more generally. The institutionalist account, which situates decision making within larger contexts, suggests why investment arbitration tilts on investor-friendly axes but can hardly explain inconsistent decision making. The institutional approach does, however, hint at why the outcome in *LG&E* may remain an outlier in international investment arbitration. These hypotheses are unverifiable but tantalizing in their explanatory power, even if the underlying causes for arbitral inconsistency among single tribunal members remains somewhat mysterious.

Following Bourdieu's social theoretical approach, I have suggested that conflicting outcomes might be explained away as the inevitable but aberrant expressions of arbitral power. The question that remains is whether this power will be resilient enough to develop autonomously, following its own logic and common sense,[235] or whether it will continue to be challenged and threatened by voices from outside of the field so much so that it will disrupt substantially the direction international investment law will take in the future.

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[234] BOURDIEU, *supra* note 213, at 70.

[235] An argument made most fully by Wälde, *supra* note 103, at 119.

APPENDIX A

Francisco Orrego Vicuña is a Chilean national and has been a Professor of International Law at the Universidad de Chile School of Law since 1970 and director and then professor at the University's Institute of International Studies since 1974.[236] He is the author of numerous articles and books on international law, investment law, and arbitrations. He is Chair of the World Bank's administrative tribunal and Chairman of the Chilean Academy of Social, Political and Moral Sciences. Vicuña's professional affiliations truly are impressive—he has visited and lectured at major institutions all over the world.[237] In 2001 he delivered the prestigious Sir Hersch Lauterpacht Memorial Lectures at the Cambridge Research Centre of International Law. Professor Vicuña received his law degree from the Universidad de Chile School of Law in 1965 and a Ph.D. (International Law) from the London School of Economics and Political Science, University of London.[238] He obtained the LSE degree in 1986,[239] after having served as the Chilean ambassador to Great Britain under the military dictatorship of Pinochet.[240] Vicuña is considered pro-investor, and this is borne out by the statistics discussed above.

Marc Lalonde, a Canadian national, served as the investor-side appointee in the *CMS* tribunal. Lalonde had a distinguished career in Canadian politics, having served as a Member of Parliament for eleven years and taking up some of the most important portfolios in the 1970s and early 1980s, including Minister of Health and Welfare, Minister of Justice, Minister of State for Federal-Provincial relations and Minster of Finance.[241] He joined the Montreal law firm of Stikeman, Elliott in 1984, practicing in the area of foreign investment and international commercial arbitration, subsequently leaving the firm in 2006[242] to become a sole practitioner.[243] Lalonde was educated at the Universitè de Montreal, receiving undergraduate and masters of law degrees in 1954 and 1955, respectively, a master of Arts from Oxford in 1957 and D.E.S. from Ottawa in 1959.[244] He returned to Montreal to teach commercial law and economics at the Universitè de Montreal from 1957 to 1959. Lalonde has vast experience as

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[236] Heidelberg Center for Latin America website, *supra* note 91.

[237] *Id.*

[238] *Id.*

[239] *See* International Tribunal for the Law of the Sea, http://www.itlos.org/general_information/judges/vicuna_en.shtml.

[240] Heidelberg Center for Latin America website, *supra* note 91.

[241] Parliament of Canada website, *supra* note 100.

[242] *See* The Canadian Chamber of Commerce, www.chamber.ca/images/uploads/Arbitrator-Profiles/Lalonde.pdf.

[243] *See* ADR Chambers International, http://www.adrchambersinternational.com/cvlalonde.htm.

[244] The Canadian Chamber of Commerce website, *supra* note 242.

a commercial and investment arbitrator and was ranked among the Top 10 Arbitrators in the world by the American Lawyers in 2005.[245] Lalonde, together with Yves Fortier,[246] is one of Canada's top arbitrators.[247] Canadians are viewed as "ideal neutrals," Fortier has said, by reason of Canada's bilingual and bijural tradition.[248] Lalonde has capitalized on this appearance of neutrality.

Francisco Rezek is a Brazilian national and a former Justice of the Supreme Court of Brazil and former member of the International Court of Justice.[249] Rezek had a teaching career at the University of Brazilia from 1971 to 1997 teaching international law and constitutional law and at the Instituto Rio Branco (the official diplomatic school of Brazil) from 1976 to 1997. Rezek earned his LL.B and D.E.S from the Universidade Federal de Minas Gerais (Belo Horizonte), obtained a Ph.D. from l'Université de Paris-Sorbonne in the 1970s and a Diploma in Law at Oxford University in 1979 (Wolfson College).[250]

Rezek held important political posts as well. He became Attorney of the Republic before the Supreme Court of Brazil in 1972 and Deputy Attorney-General of the Republic from 1979 to 1983,[251] serving in the former post while a military government was in power. We surmise that, as a member of an exclusive caste of Brazilian diplomats and former ministry of foreign affairs officials, Rezek has had some influence in the development of Brazilian policy regarding the ratification of BITs (Brazil has signed, but has not yet ratified, fourteen BITs). It also is worthy of note that the Argentinean crisis, though precipitated by the East Asian financial crisis of 1997, was compounded by Brazil's, Argentina's largest trading partner, devaluation of the *real* in response to its own financial crisis. This diminished export of Argentinean products, further depressing the *peso*. Argentineans were flooded with Brazilian imports, creating a problem in the balance of payments.[252] It is ironic that Rezek, as a player in Brazilian foreign policy, would play a role in the resolution of disputes against Argentina related to the Argentinean crisis, when many people considered the crisis to be an act of god—the Brazilian god.[253]

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[245] ADR Chambers International website, *supra* note 243.

[246] *See* Who's Who Legal, http://www.whoswholegal.com/profiles/21109/0/Fortier%20CC%20QC/l-yves-fortier-cc-qc/.

[247] ADR Chambers International website, *supra* note 243.

[248] Julius Melnitzer, *Canadians Tops in International Arbitration*, LAW TIMES, Feb. 13, 2006, *available at* http://www.lawtimesnews.com/20060213404/Headline-News/Canadians-tops-in-international-arbitration.

[249] Francisco Rezek, Sociedade de Advogados website, *supra* note 93.

[250] *Id.*

[251] *Id.*

[252] JOSEPH E. STIGLITZ, MAKING GLOBALIZATION WORK 221–22 (2006).

[253] Thanks to Mauricio Salcedo for this anecdote.

Tatiana Maekelt is a Venezuelan national and is a Professor of International Private Law at Universidad Central de Venezuela and partner in her own law firm.[254] She has served as Under Secretary of legal affairs at the Organization of American States (1978–84), and consultant to the ministries of external affairs and education of the government of Venezuela (pre-Chavez). She has been involved as consultant in numerous privatization processes in Venezuela and Ecuador.[255]

Maekelt received her law degree in 1959 from the Universidad Central de Venezuela and her Ph.D. in law in 1961 from Goethe University, Frankfurt am Main, Germany and a second Ph.D. in Sciences, Law from the Universidad Central de Venezuela in 1978. She has an active publication record, authoring books and articles on subjects associated with private international, *lex mercatoria*, and international arbitration.[256]

Albert Jan van den Berg is a Dutch national and a partner in the Brussels-based law firm Hanotiau & Van den Berg (previously, he was a partner at Freshfields).[257] Van den Berg is the consummate lawyer-academic. He is Professor at Law (arbitration chair) at Erasmus Universiteit Rotterdam and editor of the annual *Yearbook: Commercial Arbitration* (Kluwers).[258] He publishes actively—his book on the New York Convention for enforcement of arbitration awards is considered a classic in the field.[259] The book arose out of the Doctor of Laws he earned in 1981 at Erasmus Universiteit Rotterdam. Previously, he had been awarded a Master of Laws from the Universiteit von Amsterdam Faculty of Lawin 1973 and a Docteur en droit from Université Aix-en-Provence, writing a thesis under the supervision of Professor René David in 1977.[260] Van den Berg's expertise is in the realm of commercial arbitration. He is one of a number of commercial arbitrators who have successfully migrated to the field of investment arbitration.

Pierre-Yves Tschanz is a Swiss national and a partner in the law firm Tavernier Tschanz, a business law firm in Geneva.[261] Tschanz earned his Licence en droit from the University Geneva Law School in 1975 and served time working for White & Case in Paris and New York. He publishes regularly in professional periodicals, largely about international commercial arbitration matters in Switzerland.[262]

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[254] Tatiana B. De Maekelt website, *supra* note 94.

[255] *Id.*

[256] *Id.*

[257] VAN DEN BERG, *supra* note 96.

[258] *Id.*

[259] *See supra* note 97.

[260] VAN DEN BERG, *supra* note 96.

[261] *See* Tavernier Tschanz, http://www.taverniertschanz.com/index.php.

[262] *See* Tavernier Tschanz, *available at* http://www.taverniertschanz.com/team/pierre-yves_tschanz.php.