Judicial Politics and International Investment Arbitration: Seeking an Explanation for Conflicting Outcomes

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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 mind 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 2000-01. 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 outcomes but also to self-correct.
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By David Schneiderman*

“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

Judge Posner has observed that judicial behavior “cannot be understood in the vocabulary that judges themselves use.” 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, it becomes even more difficult to sustain an appeal to legalism in the international investment context. How else to 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) – 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 panels (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. The third award (LG&E),

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1 Quoted in Julius Melnitzer, The New Peacekeepers, CANADIAN LAWYER 18, 21 (August 2004).
3 Id. at 42.
5 Waibel explains the origins of the defense of necessity as growing out of state practice on the use of
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.

All three awards draw on virtually identical facts and invoke the same text of a U.S.-Argentine BIT. In which case, it is hard to explain why two of the arbitrators participating in these three awards would have changed their minds without any further explanation (see Table 1 below).

This paper aims to understand this divergence by drawing on work in judicial politics, principally authored by US political scientists seeking to explain inconsistent outcomes issuing out of the US Supreme Court. Political scientists mostly remain unconvinced that the conventional modes of judicial constraint – text, precedent, structure, and history – help to determine judicial outcomes. They serve as weak constraints and are poor predictors, they argue. Instead, other variables are brought into the analysis, such as (a) social background, (b) attitudinal behavior, (c) strategic behavior, and (d) institutional contexts. 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) to an increasing emphasis on structural constraints (strategic behavior and new institutionalism). In the following pages, I turn to a discussion of each of these approaches, though it might be preferable to understand them, instead of in competition with each other,
as “interacting” or “interconnecting” 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 analogies for both descriptive and analytical purposes. 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 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.

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 conflicting outcomes in the investment law context.

## I. The Cases

8 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).


10 DAVID SCHNEIDERMAN, CONSTITUTIONALIZING ECONOMIC GLOBALIZATION: INVESTMENT RULES AND DEMOCRACY’S PROMISE 5 (2008), 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].


12 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 Vicipa 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 ¶ 346). The tribunal in *Sempra*, they wrote, “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 ¶ 197).
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. In all three cases, tariffs collected by Argentinian subsidiaries were to be calculated in US dollars, converted into pesos at the time of billing, and adjusted periodically in accordance with the US Producer Price Index. Tying profits to US 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 US dollar.

Promised vast profits were stalled by the melt down of the Argentinian economy in 2000 precipitated, in part, by the Brazilian currency crisis. This economic emergency – events which *The Economist* likened to the Great Depression of the 1930s – resulted in a variety of measures for societal self-protection. 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 US dollars.

Rather than sharing in the burden of reconstruction, Michigan-based CMS Gas filed a claim for damages under a US-Argentina BIT. CMS had participated in the wave of privatization by purchasing almost 30 per cent of the public company Transportada de Gas del Norte (TGN). The license secured by TGN guaranteed profits in US dollars so that convertibility to the peso reduced profit margins considerably. 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. 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 entitled CMS to some $260 million (US) in damages.

Though the tribunal likened the guarantees accorded to CMS as if they were a property right, they found no indirect or regulatory expropriation here. The tribunal unanimously found, 

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13 Parts of this section are drawn from SCHNEIDERMAN, supra note 10, at 99-101. For a more thorough discussion of these three cases, including Sempra, supra note 11, see José Alvarez & Kathryn Khamisi, *The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime*, in 1 YEARBOOK ON INTERNATIONAL INVESTMENT LAW AND POLICY 379 (Karl P. Sauvant, ed., 2008/2009) [hereinafter Alvarez & Khamsi].


15 CMS at ¶ 464.

16 Id. at ¶ 263. Applying similar considerations as in Pope & Talbot (Pope & Talbot Inc. v. Canada, UNCITRAL (NAFTA), Decision (Sept. 6, 2000), available at
however, a denial of fair and equitable treatment. 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. 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.

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 US-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. 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. Though none are elaborated by the CMS tribunal, alternative means presumably were available to Argentina. In addition, the tribunal 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. The roots of the crisis, it suggested, “extend both ways and include a number of domestic as well as international dimensions.”

http://ita.law.uvic.ca/documents/DecisionSeptember6_Pope_001.pdf, the tribunal concluded that the investor was still in control of its investment, government did not manage the day-to-day operations of the company, while the investor retained full ownership and control of the company.

19 CMS at ¶ 274, 284; Occidental Exploration and Production Co. v. Ecuador, UNCITRAL, LCIA Case No. UN3467, Final Award at ¶ 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.

20 CMS at ¶ 161.

21 Id. at ¶ 316-17.


23 CMS at ¶ 324. Indeed, all of the tribunals can be charged with having failed to seriously consider specific alternative means available. See Alvarez & Khamsi, supra note 13, at 399 and ANDREW NEWCOMBE AND LLUIS 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.

24 CMS at ¶ 329.

25 Id. 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.” See
administrations stretching back to the 1980s, reaching its “zenith in 2002”, amounted to a significant contribution to the economic meltdown.26

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.”27 In any event, the obligation to pay would have resumed as soon as conditions that gave rise to the emergency had subsided. The tribunal, Schill notes, denied “any margin of appreciation to the host state when it comes to choosing reactions to a state of emergency.”28 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.29 The tribunal awarded CMS $132.2 million (US) together with interest. The company also was entitled to $2.1 million (US) upon transfer of its shares in TGN to Argentina.30

All of this seems a harsh and unnecessary outcome. Schreuer notes that the fair and equitable principle need not require the host state “to freeze its legal system for the investor’s benefit.”31 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.”32 This is not how the CMS tribunal interpreted this “relatively imprecise” standard.33 The CMS ruling also rendered the necessity defense “practically unavailable.” 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

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” (Frenkel, 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 (Frenkel, id. at 42).

26 CMS at ¶ 329.
27 Id. at ¶ 355.
29 CMS at ¶ 410.
30 CMS at ¶ 468-69.
31 Christoph H. Schreuer, Fair and Equitable Treatment in Arbitral Practice, 6 J. OF WORLD INV. & TRADE 357, 374 (2005).
32 Id. at 380.
33 Id. at 364.
as not amounting to wrongful conduct under international law.\textsuperscript{34}

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. A breach of the BIT fair and equitable treatment standard under the US-Argentine BIT was identified by the \textit{LG&E} (2006) 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.\textsuperscript{35} 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.”\textsuperscript{36} The \textit{LG&E} tribunal, however, accepted that Argentina could rely on the necessity defense in Article XI of the BIT. Responding to the interests of foreign investors with measures for societal self-protection “was a legitimate way of protecting its social and economic system.”\textsuperscript{37} 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 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.”\textsuperscript{38} 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 Kirchener on 26 April 2003 when, in the Tribunal’s view, the volatility came to an end.\textsuperscript{39} It is noteworthy that Judge Francisco Rezek was a member of both the CMS (appointed by the respondent state on November 9, 2001) and \textit{LG&E} tribunals (appointed by the respondent state on 26 August 2002).\textsuperscript{40}


\textsuperscript{35} \textit{LG&E} at ¶ 119. The violation of these specific statutory commitments also gave rise to an abrogation of the BIT’s umbrella clause in \textit{LG&E} (at ¶ 175).

\textsuperscript{36} \textit{LG&E} at ¶ 125.

\textsuperscript{37} Id. at ¶ 239.

\textsuperscript{38} Id. at ¶ 257.

\textsuperscript{39} Id. at ¶ 229-30. The damage award in \textit{LG&E} (US $57.4 million) was significantly less than the other two cases under discussion. This mostly was not a consequence of the \textit{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 Álvarez & Khamsi, \textit{supra} note 13, at 406-07.

\textsuperscript{40} Schill observes that a significant difference between the CMS and \textit{LG&E} treatments of the
By contrast, the *Enron* tribunal (2007) 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 US $106.2 million. Argentina failed to satisfy the “very strict conditions” under which the defense of necessity is available under customary international law and the US-Argentina BIT.\footnote{Enron at ¶¶ 304, 313, 339.} The tribunal was not convinced that the emergency measures invoked were the “only way for the State to safeguard an essential interest”:\footnote{ILC Art. 25C in Crawford, supra note 22.} “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.”\footnote{Enron at ¶ 308.} 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.”\footnote{Id. at ¶ 312.} As in *CMS*, the tribunal paid only lip service to the economic hardship experienced by ordinary Argentinians. 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).\footnote{Id. at ¶ 39.} It also is noteworthy that Professor Francisco Orrego Vicuña presided over both the *CMS* and *Enron* tribunals (appointed by ICSID in the latter case).

<table>
<thead>
<tr>
<th>Case</th>
<th>President</th>
<th>Claimant’s Appointee</th>
<th>Respondent’s Appointee</th>
<th>Denial of Fair Equitable Treatment</th>
<th>Expropriation</th>
<th>Necessity Defense</th>
<th>Unanimous</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>CMS</em></td>
<td>Francisco Orrego Vicuña</td>
<td>Marc Lalonde</td>
<td>Francisco Rezek</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td><em>LG&amp;E</em></td>
<td>Tatiana B. de Mackelt</td>
<td>Albert Jan van den Berg</td>
<td>Francisco Rezek</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td><em>Enron</em></td>
<td>Francisco Orrego Vicuña</td>
<td>Pierre-Yves Tschanz</td>
<td>Albert Jan Van den Berg</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
</tr>
</tbody>
</table>

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.”\footnote{See Schill, supra note 7, at 280.}  

\footnote{Enron at ¶¶ 304, 313, 339.} \footnote{ILC Art. 25C in Crawford, supra note 22.} \footnote{Enron at ¶ 308.} \footnote{Id. at ¶ 312.} \footnote{Id. at ¶ 39.}
The CMS award ultimately was reviewed by an annulment committee established under the auspices of ICSID.\textsuperscript{46} 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).\textsuperscript{47} As liability was owed to CMS under other treaty provisions (i.e. fair and equitable treatment) this finding made no difference to the final outcome. The annulment committee’s other significant finding, however, could have had such an effect. The CMS tribunal, the annulment committee found, 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.\textsuperscript{48} Even though the tribunal may have misapplied the necessity defense under the treaty, the annulment committee concluded, it did not amount to a “manifest excess of power” and grounds for annulment under the ICSID Convention.\textsuperscript{49}

It should also be mentioned that Argentina has 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.\textsuperscript{50} 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.\textsuperscript{51} The challenge was rejected initially by the International Court of Arbitration after which Van den Berg joined in a unanimous ruling against

\textsuperscript{46} 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. See International Centre for Settlement of Investment Disputes [ICSID], ICSID Convention, Regulations and Rules, articles 52(b) and (e), ICSID/15 (Apr. 10, 2006), available at http://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp.

\textsuperscript{47} CMS at ¶ 95.

\textsuperscript{48} Id. at ¶ 130-34. Further see 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). For an argument that the Annulment Committee misinterpreted the BIT clause as being distinct from customary international law, see Alvarez & Khamsi, supra note 13, at 427-40.

\textsuperscript{49} Id. at ¶ 136.


\textsuperscript{51} Argentina at ¶ 75.
Argentina for identical “misconduct” against the claimant, awarding damages in the amount of $185 million. 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.\(^5\)

II. Judicial Politics and International Investment Arbitration

In this part, I turn to four different explanations for conflicting 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 largely agency-centred: 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. The “personal element” in the administration of justice, observed legal sociologist Eugen Ehrlich, was a far more significant force “than … the principles according to which [justice] is administered.”\(^5\) Referring to a 1916 study in which 92 per cent of persons charged with intoxication were convicted while, in one magistrate’s court, 79 per cent were dismissed, 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.”\(^5\) 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.\(^5\) Biographical factors include such matters as race, ethnicity, religion, and sexual orientation. The 1985-1990 data gathered by the INSITUS was the first major attempt to collect such detailed information for international arbitrators.\(^5\) The initial effort to construct a dataset on the performance of arbitrators is an attempt to document the ‘personality’ of an individual arbitrator.

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\(^5\)BG Group at ¶ 411.


gender, religion, age, education, professional experience, and political party affiliation. Brudney, Schiavoni and Merritt, for instance, examine appellate court rulings in National Labor Relations Act matters and code for these and other characteristics. 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.\textsuperscript{56}

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.\textsuperscript{57} 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. 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. They will believe, moreover, that economic rights of the sort protected by BITs are equivalent to human rights.\textsuperscript{58}

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 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, four currently are or have been university

\textsuperscript{56} James J. Brudney, Sara Schiavoni & Deborah J. Merritt, Judicial Hostility Toward Labor Unions? Applying the Social Background Model to a Celebrated Concern, 60 OHIO STATE L.J. 1675, 1681 (1999).


professors. Vicuña has been a distinguished Professor of International Law at the University of Chile since 1970. 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. 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. Maekelt is Professor of International Private Law at Universidad Central de Venezuela while also a partner in her own law firm. Van den Berg is Professor at Law (arbitration chair) at Erasmus University in Rotterdam and editor of the annual Yearbook: Commercial Arbitration. His book on the New York Convention for the enforcement of arbitration awards is considered essential reading on the topic.

Four of the six have public service experience: Vicuña served as Chilean ambassador to Great Britain under Pinochet. 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. 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-Chavez). 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. 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.

Most will have had a background in international commercial arbitration, the “generally accepted private legal process applicable to transnational business disputes.” The perceived reputation of arbitrators within the arbitration community “plays a large role” in determining appointment. 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.” Considering that investment

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59 Francisco Orrego Vicuña, _La zone économique exclusive: régime et nature juridique dans le droit international_, 199 RECUEIL DES COURS 9 (1986); Vicuña 2001, _supra_ note 58.


64 Emilia Onyema, _Empirically Determined Factors in Appointing Arbitrators in International Commercial_
arbitration mostly is a post-1989 phenomenon, a background in commercial arbitration – membership in this “mafia,” “club” or “elite corps” – appears to be a signifier of investment arbitration competence.

The social background indicators do not reveal much about the inclinations of individual arbitrators. 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. Nor, as the data in the next section reveals, has he found for a respondent country in any investment arbitration on which he has sat. 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. 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, though they credit Schubert with having originated the methodology. Drawing on a comprehensive database of US 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. Judicial voting behavior, it turns out, is best explained by sincere judicial policy preferences. It follows that legal norms and structures do

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66 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, discussed further in text associated with footnotes 137-53 infra, in determining outcomes. This would neutralize many of the putative distinctions between arbitrators from the global North or South.

67 As of the date of writing in June 2008.


not drive judicial outcomes. “Simply put,” they write, 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.”

Frustrated with complaints that their work dispensed entirely with legal norms, Segal and Spaeth undertook, in a subsequent volume, to test whether US Supreme Court justices adhered to precedent and, in particular, whether dissenting justices later changed their voting behavior so as to defer to earlier precedent. 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 is greater, “justices are rarely influenced by stare decisis” – “only preferential models . . . appear to be in the right ball park.”

There are many problematic assumptions associated with the attitudinal model. Among them, the assumption that US Supreme Court justices typically are bound by the force of precedent turns out not to be the case. Gillman argues that justices of the US Supreme Court “are not considered politically subordinate to their colleagues and thus under no obligation to gravitate toward the disputed position of their colleagues.” Gerhardt similarly concludes that there is “no norm that obligates justices to defer to precedents to which they dissented.” 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.” 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 favour of their appointing side. Wälde admits that “party-appointees will often be selected for their sympathy towards the appointing party.

71 SEGAL & SPAETH 1993, supra note 68, at 32-33.
76 Gillman, supra note 72, at 482.
78 Id. at 5.
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.”

Former Deputy Secretary of the International Chamber of Commerce International (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. This is confirmed by other accounts: of the 21 dissents in 2001 and 31 dissents in 2002 in ICC commercial arbitration, only one did not favor the appointing party of the dissenting arbitrator.

Empirical work on tripartite labour arbitration panels reveals that appointees often will be expected to perform advocacy functions, in addition to the performance of other functions, such as that of negotiator, sounding board, and conduit for local context.

The tribunal President, however, is not expected to follow the flag, so to speak. The attitudinal model does little to illuminate the direction, then, that international investment arbitration will take in one case over another.

Like the US Supreme Court, however, international investment law has no doctrine of binding precedent. Rather, arbitral jurisprudence is characterized as producing contingent outcomes issuing out of ad hoc tribunals concerning disputes

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79 Wälde, supra note 63, at 51.
80 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). In light of her experience at the ICC, she argues that three-member arbitration panels are not superior to single-member panels.
84 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, for example, 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 Excess?, 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 Reinsich, & Stephan Wittich eds., 2009); August Reinsich, The Role of Precedent in ICSID Arbitration, AUSTRIAN ARB Y.B. 495 (2008); Christoph Schreuer and 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) TRANS’L DISP’T. M’GMT. (2008).
arising under specific investment treaties. Nevertheless, Wälde characterizes international investment law as sufficiently general to generate an emergent jurisprudence. Schreuer and 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.” 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. 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. 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.

Considering the reputation and skill of an arbitrator at stake to issue convincing reasons, some arbitral awards “are influential, others best forgotten.” 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.” In this way, the conflicting outcomes in the CME and Lauder cases against Czechoslovakia can be explained away as “not at all incompatible.”

The conflicting outcomes here cannot be so easily explained. The facts on the ground – the exigencies giving rise to the economic crisis precipitating

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87 Schreuer & Weiniger, supra note 84, at 1196.
88 Enron, supra note 4, at ¶ 25.
89 Jan Paulsson, Avoiding Unintended Consequences, in APPEALS MECHANISM IN INTERNATIONAL INVESTMENT DISPUTES 241, 246 (Karl P. Sauvant ed., 2008) [hereinafter Paulsson 2008]; and also Paulsson, supra note 81, at 104.
90 Paulsson 2008, id. at 247.
91 Id. Similarly, Alvarez & Khamsi, supra note 13, 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).
emergency measures – are common to all three of the cases as is the US-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. All that counts is judicial
voting – 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.”

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. Including the cases under discussion here, Vicuña was

one of the top arbitrators, having participated in eight awards. Van den Berg also had

a high profile and sat on seven tribunals. Lalonde sat on four tribunals, and Rezek

registered on three. Mackelt appeared only in the LG&E case and Tschanz appeared

only in the Enron case. 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 favour of the investor. In two cases he found for the respondent, but in one

of those cases he was appointed by the respondent country. Lalonde’s record is four

for four in favour of claimants, serving as the claimant’s appointee in every case.

Rezek is three for four (in part or in full) in favour of respondents, serving as that

side’s appointee in each case. 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. 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 favour of investors on the part

of Vicuña and Lalonde and in favour of respondent states on the part of Rezek. This

hardly explains Rezek’s or Van den Berg’s inconsistencies.

(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 and Murphy laid the

93 SEGAL & SPAETH 1993, supra note 68, at 1.

94 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.

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

96 C. HERMAN PRITCHETT, THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES
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.” 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. 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. Goal-oriented decision making – what Posner describes as “just common sense” – 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. 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 aware of the executive conflict pending with President Thomas Jefferson. Eskridge explains judicial outcomes in civil rights cases issuing out of the relatively conservative Burger Court as determined by anticipated congressional and executive reactions. 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, however, is not very serious. Both occur infrequently and usually

97 WALTER F. MURPHY, CONGRESS AND THE SUPREME COURT (1962); WALTER F. MURPHY, ELEMENTS OF JUDICIAL STRATEGY (1964) [hereinafter MURPHY 1964].
98 MURPHY 1964, id. at 199.
100 JON ELSTER, RATIONAL CHOICE (1986).
101 POSNER, supra note 2, at 29.
105 PAULSSON, supra note 58, at 229.
review is conducted on very narrow legal grounds (see discussion above re CMS).

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.\textsuperscript{106} 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.\textsuperscript{107} 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.\textsuperscript{108} Rather than risk this confusion and attract public vitriol from social movement actors, Schwartz was content to reject the expropriation claim.

Judge Abner Mikva, recounting his service as member of the \textit{Loewen}\textsuperscript{109} arbitration tribunal,\textsuperscript{110} made pointed references to the strategic role of investment arbitrators.\textsuperscript{111} After agreeing to serve on the Loewen tribunal by the US Department of Justice (DOJ), Mikva, a retired DC circuit court judge, met with DOJ officials prior to the panel being constituted. “You know, judge,” he was told by DOJ, “if we lose this case we could lose NAFTA.” “Well, if you want to put pressure on me,” Mikva replied, “then that does it.” NAFTA’s investment chapter and dispute resolution mechanism generated, for Mikva, an alarming breadth of authority without the checking mechanisms provided by the US constitution. He described himself as being “on the dissenting side of a difficult problem.” 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 favouritism as against a foreign litigant.”\textsuperscript{112} Loewen’s corporate reorganization, following bankruptcy proceedings under the other Chapter Eleven of the US Bankruptcy Code, provided an opening for all three tribunal members ultimately to reject the claim on jurisdictional grounds.\textsuperscript{113} Reincorporating under US law and assigning the NAFTA

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\textsuperscript{107} \textit{Id.} at ¶¶ 220-21.
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\textsuperscript{108} \textit{Id.} at ¶ 222.
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\textsuperscript{109} 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 \textit{Loewen}].
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\textsuperscript{110} 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.
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\textsuperscript{111} Judge Abner Mikva, Audiotape: Symposium on Environmental Law and the Judiciary, Pace Law School (Dec. 6-8, 2004). I am grateful to Professor Robert Stumberg for bringing Judge Mikva’s address to my attention.
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\textsuperscript{112} \textit{Loewen} at ¶ 136.
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claim to a newly formed Canadian corporation, though “owned and controlled by an American corporation,” 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 US 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 – “What clearer case than the present could there be for the ideals of NAFTA to be given some teeth?” they asked114 – yet ruled against the investor.

A similar concern with Congressional and public opinion helps to explain, I would suggest, the result in Methanex (2005) 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.115 This is a ruling which has confounded “most experts on the customary international law of expropriation” but might be explained in light of the strategic actions of arbitrators to avoid finding liability against the United States.116 Indeed, to date no investment tribunal has found U.S. conduct to breach NAFTA 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 due to institutional considerations having to do with arbitral harmony. In the context of the BG 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.”118 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

114 Loewen at ¶ 241.
117 VAN HARTEN, supra note 10, at 146.
otherwise). Only as 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. 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. 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.” Posner is describing, however, a situation where judges sit as repeat players 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 Argentinian 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 favour 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. 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

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119 Kirby, supra note 80.
120 See POSNER, supra note 2, at 32.
121 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).
as both enabled and constrained by the institutions within which actors operate. Institutions, according to this account, represent not bricks and mortar but “stable, valued, recurring patterns of behavior.” 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.” In the US 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”), the new institutionalist orientation is interested in how political behavior is “given shape, structure, and direction by particular institutional arrangements and relationships.” 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. For these reasons, Dahl surmised, it was unlikely that the US 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. 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 

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123 Smith, supra note 9, at 91, quoting SAMUEL P. HUNTINGTON, POLITICAL ORDER IN CHANGING SOCIETIES 12 (1968).
124 Smith, supra note 9, at 90, quoting THEDA SKOCPOL, VISION AND METHOD IN HISTORICAL SOCIOLOGY 4 (1984).
128 Gillman, supra note 72, at 490-91.
Lincoln’s election and which the US Supreme Court sought to vindicate in the infamous *Dred Scott* case. 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 Argentinian 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 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.” 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.” “My colleagues,” Mikva recounted, “told me that ‘so and so would think this dreadful’ or ‘another would have no sympathy.’” This is a constituency, Mikva admitted, which he knew nothing about nor would have Congress, he added, when they approved NAFTA. 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. These are the self-styled “barons” who possess a distinct bias in favour of commercial solutions to public problems. 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.”

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.” Bourdieu here describes a struggle, fought amongst judges, lawyers and commentators, to control (or monopolize) interpretation of the legal text.

131 Mikva, supra note 111.
134 Melnitzer, supra note 1, at 21.
136 Dezalay & Garth, supra note 62, at 8. Their sentence continues to say that their symbolic capital “is translated into a substantial cash value in international arbitration.”
138 Bourdieu includes “solicitors” (drawing on a distinction now abandoned in many parts of the
Judicial utterances, once proffered, have a symbolic authority which is immediately legitimate and universally recognized. This is a power to both name and legitimate a certain version of reality that becomes common sense for everyone else. Judges, for Bourdieu, possess the symbolic capital necessary to construct their own reality. Yet the judiciary do not have complete independence – they have (one might say) only relative autonomy as they sit 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.”

Judicial actors, then, are predisposed to act in ways that give expression to their position and status. These dispositions produce what Bourdieu calls “habitus” – durable “principles which generate and organize practices and representations that can be objectively adapted to their outcomes” without being mechanically predetermined. 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 – there is endless variability and “permanent revision” but it can never be “too radical.” The habitus in any field, then, need not be entirely coherent – it can reveal contradiction and “internal division.” Constancy in this field, as elsewhere, is not guaranteed but habitus makes more likely.

In a similar vein, the investment rules regime’s structural tilt ensures that arbitral choices will be more likely to favour investment promotion over the interests of state parties who wish to pursue countervailing social policy initiatives, though this outcome will not always be guaranteed. The CMS tribunal described

world) which I have substituted for “commentators.” He includes scholars as actors within this field, see Bourdieu, id. at 823-24. Bourdieu, supra note 137, at 818, 821. Id. at 828, 838.

PIERRE BOURDIEU, LANGUAGE AND SYMBOLIC POWER 106, 236 (Gino Raymond and Matthew Adamson trans., 1991).


Symbolic capital is a form of accumulation of honour, reputation, and power for which “economism has no name.” See BOURDIEU, supra note 11, at 171-83.


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).

PIERRE BOURDIEU, PASCALIAN MEDITATIONS 161 (2000).

Id. at 160.

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. 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, found that the defense of necessity was available to excuse Argentina’s conduct for a period of fifteen months. 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. 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. The first is that 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.” 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 which has been described so evocatively by Dezalay and Garth. 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 – in camera, ad hoc, with little national judicial oversight or publicity, and “meticulously aside from the place of all the social relations that produced the actual conflict” – they would have found themselves in a different political and social reality. 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

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151 CMS at ¶ 274, 323.
152 Schill, supra note 7, at 280.
153 As Paulsson puts it, “[s]ome awards are influential, others best forgotten.” See Paulsson, supra note 89, at 247.
154 Wälde, supra note 63, at 54.
156 DEZALAY & GARTH, supra note 62.
158 VAN HARTEN, supra note 10, at 152-84.
159 DEZALAY & GARTH, supra note 62, at 69.
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. 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.

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 as showing a disdain for the “international rule of law.” 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. 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”: “As 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 case) remains unrecognized.” 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 US Supreme Court judicial outcomes, it turns out that no one of these models fully explains conflicting outcomes concerning the defense of necessity in the three Argentinian 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

161 PAULSSON, supra note 58, at 229, 233-36.
162 Id. at 236. These are among some of the more polite rejoinders one finds in the literature.
163 BOURDIEU, supra note 148, at 160-61.
164 PAULSSON, supra note 58, at 233.
165 Id. at 232.
166 BOURDIEU, supra note 148, at 70.
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, 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.

167 An argument made most fully by Wälde, *supra* note 63.
Appendix A

Francisco Orrego Vicuña is a national of Chile 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. 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. 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 University of Chile in 1965 and a Ph.D. (International Law) from the London School of Economics and Political Science, University of London (see http://www.heidelberg-center.uni-hd.de/english/cv_orrego.html). He obtained the LSE degree while serving as Chilean ambassador to Great Britain under the military dictatorship Pinochet. 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 Minister of Finance (http://www2.parl.gc.ca/Parlinfo/Files/Parliamentarian.aspx?Item=729f0dd2-a100-4731-8437-ddbd67f48848&Language=E&Section=FederalExperience). He joined the Montreal law firm of Stikeman, Elliott in 1984, practising in the area of foreign investment and international commercial arbitration, subsequently leaving the firm in 2006 to become a sole practitioner (http://www.adrchambersinternational.com/cvlalonde.htm). Lalonde was educated at the University of Montreal, receiving undergraduate and masters of law degrees in 1954 and 1955, respectively, a masters of Arts from Oxford in 1957 and D.E.S. from Ottawa in 1959. He returned to Montreal to teach commercial law and economics at the Universite de Montreal from 1957-59. Lalonde has vast experience as a commercial and investment arbitrator and was ranked among the Top 10 Arbitrators in the world by the American Lawyers in 2005. Lalonde, together with Yves Fortier, is one of Canada’s top arbitrators. Canadians are viewed as “ideal neutrals,” Fortier has said, by reason of Canada’s bilingual and bi-jural tradition.168 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. Rezek had a teaching career at the University of Brazil from 1971 to 1997 teaching international law and constitutional law and at the Rio Branco Institute (the official diplomatic school of Brazil) from 1976-97. Rezek earned his LL.B and D.E.S from the Federal University of Minas Gerais (Belo Horizonte), obtained a PhD from l'Université de Paris-Sorbonne in the 1970s and a Diploma in Law at Oxford University in 1979 (Wolfson College).

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

168 Julius Melnitzer, Canada Tops in International Arbitration, LAW TIMES 13 (February 13 2006).
from 1979 to 1983, 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 Argentinian products, further depressing the peso. Argentinians were flooded with Brazilian imports, creating a problem in the balance of payments. 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.

Tatiana Maekelt is of Venezuelan nationality and is a Professor of International Private Law at Universidad Central de Venezuela and partner in her own law firm. 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.

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 PhD. 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 (see http://www.zur2.com/objetivos/leydip1/tatiana.htm).

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). Van den Berg is the consummate lawyer-academic. He is Professor at Law (arbitration chair) at Erasmus University in Rotterdam and editor of the annual Yearbook: Commercial Arbitration (Kluwers). He publishes actively – his book on the New York Convention for enforcement of arbitration awards is considered a classic (Van den Berg 1981). The book arose out of the Doctor of Laws he earned in 1981 at Erasmus University in Rotterdam. Previously, he had been awarded a master of laws from the University of Amsterdam Faculty of Law in 1973 and a docteur en droit from University of Aix-en-Provence, writing a thesis under the supervision of Professor René David in 1977. 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 (http://www.tavernier-tschanz.com/index.php). 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.

170 Thanks to Mauricio Salcedo for this anecdote.