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Acknowledgments

More so than many other fields of law, international law is situated at the confluence of theoretical research, policy-making, adjudicating, and practice. Mentors and colleagues engaged in these tasks provided gentle encouragement and frank observations throughout my research for this book. I am grateful to them all, and hope that inadvertently-omitted friends will forgive my imperfect recordkeeping over the five years it took to write this book. These friends are in my heart even if their names are not on paper.

Judges Rosalyn Higgins, Stephen M. Schwebel, and Christopher G. Weeramantry provided insights on drafts of the book. I will be forever grateful for their candor and generosity.


From among those who are charged with shaping appropriate conduct of decisionmakers through their policy-making and practice of law, I am especially indebted to Gary Born, Patrick Bumatey, Steven Hill, Devashish Krishan, and Lucy Reed for their comments.

A special note of gratitude is owed to my research assistants over the years: Robert Trisotto, Stuart Barden, Brian Kochisarii, Jeremy Neil, Raymond Girnys, Christopher Harrison, Cynthia Claytor, Colette Siesholtz, Nicholas Turner, Kieran Christianson, Jason Richland, Christoph Dodelfeld, and Aaron Julka.
Arbitrators

I. THEORY

This chapter applies the justificatory theory of the international law to decisionmaking by arbitrators in international disputes. It explores the extent to which the theory provides a framework of analysis for guiding arbitrators in their decisions and for helping observers and elites understand and explain the decisions that arbitrators make.

In order to justify international legal regulation, which limits the freedom of actors to do whatever they want, when deciding what to do and what claims to make in international problems, decisionmakers ought to balance several considerations. As set out in Chapter Three, these are: (1) their institutional responsibilities and the limits of authority allocated to them, (2) the general morality of promoting the common good through prescriptions and dispensaries, (3) the specific morality of promoting the values directly at stake in an international problem, and (4) the effectiveness of their decision in controlling the actions of other decisionmakers.

These factors should also generally apply to guide arbitrators in deciding disputes before them. However, to provide more useful guidance to arbitrators, a more granular analysis is necessary to develop and apply the theory to the specific context of arbitration involving nation states. Specifically, this chapter considers the weight of each factor, how they relate or conflict with each other, and possible ways to balance a conflict when it occurs.

A. Arbitral Functions

The responsibilities of an arbitrator and the limits of his authority are prescribed and proscribed by the arbitral functions in disputes. These functions are in turn closely tied to the interests of the constituencies in arbitrations, which are the parties in the dispute who pay for the arbitration, as well as, arguably, other actors who look to arbitral awards for guidance on appropriate conduct and the meaning of prescriptions.

A primary function of international arbitrators is to resolve disputes before them. International arbitration is a privately sponsored system of dispute resolution designated through arbitration agreements and paid for by the parties in the dispute. The responsibilities and, correspondingly, the limits of arbitrators' decision function, ought to be determined in large part by the parties who appoint them and pay for their services. Such a view of arbitration is grounded in the basic value of freedom of choice of decisionmakers in a dispute in seeking and structuring dispute resolution by agreement. This view also supports the common truth that promoting minimum order through private dispute settlement, which is ultimately contingent on decisionmakers having confidence that arbitrators will do what they are paid and agreed to do, and no more.

There is a view that another function of an arbitrator is to interpret prescriptions not just to settle disputes between the parties in the arbitration, but also to consolidate expectations among decisionmakers not involved in that dispute about appropriate standards of conduct expressed through prescriptions and arbitral awards interpreting and applying them. Although awards are formally binding only on parties in those disputes, there is some shared expectation among decisionmakers, including arbitrators, judges, practitioners, and government officials, that awards help them understand and apply prescriptions to generally guide their actions in future disputes.

This shared expectation for arbitrators to develop the law generally is minimal when awards are confidential between the parties, which are therefore unavailable to influence third parties in later disputes. In any event, the parties who pay for the


2. See also Tom Ginsburg, Sounding Discretion in International Judicial Lawmaking, 45 VA. J. Int'l L. 631, 651 (2004–05) (noting that when the WTO appellate body authorizes sanctions, "it is playing a coordinating role by setting a focal level of retaliation").

services of arbitrators often have no interest in developing the law. Even though clarifying the law promotes the common good for the parties and everyone else, parties are justifiably uninterested in bearing a disproportionate burden—in terms of arbitration expenses—in order to reap these positive externalities for society at large.

Conversely, the shared expectation that arbitrators ought to clarify the meaning of prescriptions increases where arbitral awards are public. This is the case with many investor-state arbitrations under the North American Free Trade Agreement and other investment treaties. This is also the case with WTO arbitration. If the reality is that decisionmakers and practitioners look to those public awards for guidance in future disputes, it would be irresponsible for arbitrators to completely ignore the broader impact of their awards on the common good when they make decisions.

In many disputes, these two functions of arbitrators are complementary. If arbitrators decide disputes on narrow grounds, they will spend less time deliberating about and charging for decisions on extraneous issues. The holdings of their awards will both discharge their dispute resolution responsibilities and influence—but not necessarily control—interpretations of prescriptions in future disputes.

There are, however, instances when the two functions are in conflict. When arbitrators strive to set aside dicta, their statements are not strictly necessary to resolve the dispute. Although the dicta may be wise interpretations of prescriptions generally, the parties did not pay for that dicta and did not necessarily want them. The conflict between the two functions is especially strong when extraneous dicta diminish the likelihood that the award will resolve the dispute. For example, where dicta implicitly or explicitly criticize a holding and leave it intact, the dicta may encourage the losing party to not pay or to look for other forums that may block enforcement.

Ultimately, the proper balance between the functions when they conflict may depend on an arbitrator’s appraisal of his responsibilities. An arbitrator who appreciates his job as focused on dispute resolution will criticize dicta that undermine the persuasiveness of the holding, even if it preserves its formal authority. An arbitrator who believes his job is to also develop the law even for those who did not pay for his services, or who believes that he was paid to fully explain his reasoning (including dissenting reasons) will tend to appraise more favorably dicta that serve these functions.

B. General Morality

Arbitrators have a strong moral duty to take prescriptions as they are and interpret them strictly according to legalism. This duty is often stronger than the duty of government officials and legal advisors to generally promote the common good through legalism. Because freedom is a basic good, no arbitrator should claim to constrain the parties in dispute through their procedural orders and awards, unless there is a justification to do so. Unlike government officials and legal advisors to whom constituents have allocated general authority to make decisions in a broad range of problems, the authority of arbitrators is entirely contingent on the consent of the parties in a dispute and is limited to that dispute. Except in very rare instances

when the parties explicitly request a tribunal to decide a dispute according to a sense of justice and not according to law, the parties expect those arbitrators to decide the disputes by interpreting and applying prescriptions in a legalist fashion.4

Arbitrators also have a special duty to promote the common good. Decisionmakers look to their awards, especially those that are public, as authoritative or persuasive interpretations of prescriptions for future disputes. Therefore, arbitral awards have a special place in maintaining the minimum world order established through prescriptions and legalism, which promotes stability and coherence, in order for the legal system to serve its function of promoting the common good to enable governing elites to reasonably pursue their constituents’ interests.

C. Specific Morality

The moral reason for arbitrators to promote the common good through fidelity to prescriptions and legalism does not exhaust the moral calculus that arbitrators ought to conduct when deciding disputes. In a specific international dispute, the moral obligation to promote the common good through legalism may not carry the day.

In a specific dispute, the range of reasonable interpretations of applicable legal prescriptions may not permit a course of action necessary to optimally, or even minimally, secure basic goods at stake.5 International prescriptions do not necessarily promote the most normatively desirable outcomes. This is because prescriptions are also the product of imperfect legalist procedures, partisan interests, and power.

Further, where there is only a weak shared expectation of appropriate conduct expressed as a prescription, the general morality of interpreting that prescription according to legalism is correspondingly weak because there are fewer settled expectations that would be disrupted by a novel interpretation of the prescription. For example, the obligation to accord foreign investments "fair and equitable treatment" was in the past ambiguous, and early arbitral awards justifiably reached different conclusions about its meaning.6

Even positivist Alexander Orakhelashvili acknowledges that international law involves margins of appreciation,7 equity,8 proportionality, and legitimate expectations, as well as basic values. Legalist interpretative methods, by his reckoning, "cannot

5 See John Finnis, Natural Law and Natural Rights 318 (1996) ("[T]he moral obligation to obey each law is variable in force. It will vary according to the subject-matter of the law and the circumstances of a possible violation.").
8 See id. at 222-34.
provide a straightforward definition of the relevant terms,” and can only provide guidance that the adjudicator ought to act in “good faith” and to ensure the “effectiveness” of international law.9 Because legalism permits various interpretations of legal prescriptions10 and only provides vague guidance on how to resolve ambiguity, arbitrators cannot avoid applying exogenous considerations in their interpretation of prescriptions.

Therefore, it is often the case that an arbitrator cannot discharge his duties of good faith and cannot ensure international law will be effective without engaging in moral reasoning. Practical moral reasoning, which identifies the basic values and interests at stake and balances competing moral considerations, is one way to resolve the ambiguities in legalism. It is preferable to randomly selecting an outcome for no reason at all, or uncritically adopting an outcome that an arbitrator personally likes more than the other outcomes.

In any event, many legal prescriptions explicitly require governing elites to balance the values at stake, and legalism requires the arbitrator to engage in moral reasoning to interpret those prescriptions. Article 31 of the Vienna Convention on the Law of Treaties (the VCLT) instructs interpreters of treaties to read the ordinary words of a treaty in light of its objects and purposes, which invariably are directed at allocating values among different constituents.11 For example, most, if not all, investment treaties explain in their preambles that the purpose of the treaty is to promote investment.12

D. Effectiveness

An international legal system that does not achieve some degree of effectiveness does not promote the common good or any basic value. An arbitrator concerned with promoting basic values must therefore be concerned with the effectiveness of his decisions as well as the values promoted in his award. On the one hand, a decision that reaches an optimal balance of values but which the parties reject will be ineffective, and is hardly worth the arbitrator’s fees. On the other hand, a decision that is pragmatically drafted to secure compliance without regard for the damage that pragmatic accommodations inflict on relevant values or the common good secured through legalism is perhaps no better than an idealistic award that is not followed.

Concerns about effectiveness in arbitral decisions are significantly alleviated in private commercial international arbitrations because of strongly shared expecta-

9 See id. at 586.
10 See id.
12 See, e.g., Agreement on Encouragement and Reciprocal Protection of Investments, Czechoslovak-Neth., Aug. 1, 1975 (“Desiring to extend and intensify the economic relations between them particularly with respect to investments by the investors of one Contracting Party in the territory of the other Contracting Party.”).
14 Id. art. XII.
15 See also Federal Arbitration Act, 9 U.S.C. §§ 201 (“The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter.”) (enacting the NY Convention into domestic law).
16 Washington Convention, supra note 4, arts. 53-54.
An award that departs too far from legalist reasoning and procedures or which adopts an interpretation of substantive prescriptions that strays too far from shared expectations of what the prescription means also risks becoming ineffective if the parties reject the award as invalid, a court refuses to enforce it, or an ad hoc committee convened by the administering institution to review the award annuls it.19

II. PRAXIS

Applying the account of the international legal system offered in this book, arbitrators are called to exercise their judgment about the appropriate balance among the competing considerations discussed above.

In some disputes, the considerations do not conflict with each other to any significant degree. In these easy cases, arbitrators should strive to render awards that optimize the values at stake without deviating too far from legalism that promotes the common good and which the parties expect the arbitrators to apply, triggering their shared expectation that the award is authoritative. The United States-Stainless Steel (Mexico) arbitration award by Florentino Feliciano is an illustrative case, as explained below.

Other cases are more difficult because some of the considerations that an arbitrator ought to promote in his decisionmaking conflict with each other. In such cases, the arbitrators are called upon to exercise their best judgment, and they have significant discretion in determining the best balance among competing considerations. Observers may disagree about whether their decisions provide international law with its best justification. Because these disagreements often implicate choices that are not obviously right or wrong, such as the views about the functions of arbitration, the account of international law here does not provide a way to determine the best justification for international law in arbitral awards, if indeed there is even a "best" justification. Instead, this account simply provides a framework of analysis for arbitrators to reach a reasonable justification for international law that identifies and seeks to balance competing considerations.

A. United States-Stainless Steel (Mexico), Implementing Award

The award that Feliciano rendered in the United States-Final Anti-dumping Measures on Stainless Steel from Mexico WTO dispute ("the Implementing Award"), dated October 31, 2008,20 is an easy case. It is also a good test case because it is one of the few international decisions by Feliciano alone, and this is a practical application of his stated jurisprudential approach. Because his approach to adjudication also calls for a balance of competing policy concerns, along with legalist imperatives, his award in this dispute also serves as a proxy for testing the account of international law presented in this book.

In Feliciano's view, a judge should consider broader community values when making decisions. He stated in his 1990 Sherrill lecture:

The most important task of the judge is to become very clear as to what community values or interests are engaged, and in what degree, in the case before him, given the facts provisionally designated as operative and the legal norms tentatively deemed applicable. ...[T]he task of clarifying and specifying community interests requires the judge to consider both competing interests and to choose and give effect to the requirements of the interest deemed more insistent and important in the total circumstances of the case.21

However, he also has explicitly counselled:

Where the community values involved are less urgent or less dramatic and immediate in their requirements—the reliability and efficiency of the legal system, for instance—he should comply with his oath of office and apply the legal norm because it was authoritatively prescribed.22

In other words, in disputes where it is possible to find an interpretation of prescriptions within legalist limits that acceptably harmonizes the values at stake, the arbitrator ought not to stray from legalism in order to promote the common good that requires stability in the international legal system.

The United States-Stainless Steel (Mexico) award he rendered illustrates this point. In the Implementing Award, the Appellate Body of the World Trade Organization had found that the United States violated the General Agreement on Tariffs and Trade of 1994 (GATT) and its associated anti-dumping agreement, through its anti-dumping determinations by the U.S. Department of Commerce concerning Mexican steel exports.23 The Appellate Body ordered the United States to change its anti-dumping measures so that they complied with GATT and the anti-dumping agreement.24

Under Article 21.3(c) of the Dispute Settlement Understanding, the sole issue for Feliciano to decide was how much time the United States was permitted to comply with the decision of the WTO appellate panel. The legal prescription he was bound to apply provided limited guidance. Article 21.3 states in relevant part:

3. At a DSB [the Dispute Settlement Board] meeting held within 30 days after the date of adoption of the panel or Appellate Body report, the Member concerned shall inform the DSB of its

19 Washington Convention, supra note 4, art. 52(1)(a).
21 Feliciano, supra note 1, at 42, 52.
24 Id.
intentions in respect of implementation of the recommendations and rulings of the DSB. If it is impracticable to comply immediately with the recommendations and rulings, the Member concerned shall have a reasonable period of time in which to do so. The reasonable period of time shall be:

[...]

(c) a period of time determined through binding arbitration within 90 days after the date of adoption of the recommendations and rulings. In such arbitration, a guideline for the arbitrator should be that the reasonable period of time to implement panel or Appellate Body recommendations should not exceed 15 months from the date of adoption of a panel or Appellate Body report. However, that time may be shorter or longer, depending upon the particular circumstances.\(^{25}\)

Article 21.3(c) thus provides that Feliciano was to set the period of time for implementation, and the only guidance it gave was that the time should be "reasonable," "depending on the particular circumstances."\(^{26}\) It did not state what facts are relevant considerations of the circumstances and how those facts were to be interpreted to decide what was reasonable.

As one would expect, the United States and Mexico both advocated their respective interests. The United States argued that Feliciano was only to determine what a reasonable time was and was not mandated to determine how the United States was to implement the Appellate Body's decision.\(^{27}\) The United States could choose whether to do so through legislative amendment or administrative regulations.\(^{28}\) The United States contended that Feliciano was required to consider the complexity of U.S. legislative and administrative processes and the delays that would be caused by the 2008 presidential elections.\(^{29}\) In light of these considerations, the United States requested 15 months to implement the decision of the Appellate Body.\(^{30}\)

Mexico conceded that Feliciano should account for the legal system of the United States, but argued that he should determine a reasonable time as the "shortest possible time within the legal system,"\(^{31}\) using "all the flexibility and discretion available within the legal system."\(^{32}\) It also argued that Feliciano should take into account the fact that there had been similar anti-dumping cases brought against the United States by other states, and the United States had been under an obligation since at least May 9, 2006, to comply with anti-dumping rulings in U.S.-Zeroing (EC).\(^{33}\)

Feliciano decided that the United States had a little over 11 months to comply with the Appellate Body decision and ordered the United States to implement the decision by April 30, 2009.\(^{34}\) He accepted that he was not authorized to decide how the United States was to implement the decision but only the time in which it was to do so. However, he reasoned that in order to decide the time period, he needed to consider how the United States proposed to do so, consistent with the approach taken by the arbitrators in Japan—DRAMs (Korea).\(^{35}\) Although the United States had discretion to choose the method of implementation, its discretion was not "unfettered," based on the decision in the Brazil—Retreaded Tyres and other awards.\(^{36}\) The United States was required to use the method requiring the shortest time possible.\(^{37}\)

Applying these principles, Feliciano decided that the United States could not claim it would need more time to make legislative changes because it could use administrative measures that would take less time,\(^{38}\) and that it could begin making those changes immediately, without waiting for the new Congress and President to take office, even if the changes would need to be completed under the new administration.\(^{39}\) Finally, Feliciano explained that it was inappropriate to take into account prior anti-dumping cases against the United States because they were insufficiently similar to the present dispute.\(^{40}\) In light of these considerations, Feliciano decided that the United States would have until April 30, 2009, to implement the Appellate Body decision.\(^{41}\)

This award is a straightforward example of how arbitrators should interpret and apply prescriptions. A function in this arbitration was to contribute to the resolution of the dispute between the United States and Mexico. Another function was to develop the shared expectations of WTO signatory states about appropriate reasoning to determine deadlines for implementing WTO decisions. Although WTO arbitration is contingent on the consent of signatory states, and states finance the operations of the WTO, there is some expectation among decisionmakers that WTO decisions should not just address the dispute at hand, and that they should also contribute to the consolidation of trade norms that promote the common good.

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\(^{26}\) Id.

\(^{27}\) United States—Final Anti-Dumping Measures on Stainless Steel From Mexico, Award of the Arbitrator, WT/D/S34/15, 55 1–3 (Oct. 31, 2008) [hereinafter United States—Stainless Steel Award].

\(^{28}\) Id. at § 11.

\(^{29}\) Id. at § 12–20.

\(^{30}\) Id. at § 21.

\(^{31}\) Id. at § 25.

\(^{32}\) See id.

\(^{33}\) See id. at § 26; United States—Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing"), Appellate Body Report, WT/DS294/R (May 9, 2006).

\(^{34}\) See id. at § 55.

\(^{35}\) See id. at § 41; Japan—Countervailing Duties on Dynamic Random Access Memories From Korea, Award of the Arbitrator, WT/D/S36/16, 55 25 (May 5, 2008) [hereinafter Japan—DRAMs].

\(^{36}\) United States—Stainless Steel Award, supra note 26, § 42 (citing Brazil—Measures Affecting Imports of Retreaded Tyres, Award of the Arbitrator, WT/D/S32/16, 55 48 (Aug. 29, 2008)); EC—Measures Concerning Meat and Meat Products (Hormones), Award of the Arbitrator, WT/D/S26/15 & WT/D/S48/13, 55 38 (May 9, 1996); Japan—DRAMs, supra note 34, § 27).

\(^{37}\) United States—Stainless Steel Award, supra note 26, at § 43.

\(^{38}\) See id. at § 53.

\(^{39}\) See id. at § 62.

\(^{40}\) See id. at § 64.

\(^{41}\) See id. at § 65.
through stabilizing international trade relations. Feliciano discharged both these functions by balancing the values at stake, promoting the common good through legalism, and accommodating the interests of the parties to ensure a minimum degree of effectiveness.

The common good was satisfied through legalism because Feliciano reached his decision relying on Article 29 of the DSU and prior awards interpreting what that provision meant.

In addition to the stability necessary for the common good, Feliciano’s award also promoted relevant values. Detailed economic analysis of the trade goals of GATT are beyond the scope of this book. However, assuming that the substantive outcomes required under GATT generally promote the common good by creating conditions for trade that allow constituents worldwide to pursue their preferred values, then this award increasing the practical effectiveness of GATT was substantively moral, even if it did not secure the immediate compliance of the United States with the underlying WTO decision. It was also moral because it promoted the common good by ensuring that the award was consistent with prior awards, even though Feliciano was not formally bound by precedent, and by adhering to the procedures of the DSU. In this fashion, it promoted stability in the international legal system that is necessary for the common good.

Sovereignists who argue that judges must account for the interests of states involved should also be content. Feliciano accommodated U.S. interests by making allowances for complex and slow U.S. legislative and administrative processes. He also protected Mexico’s interests by requiring the United States to use the method that was the swiftest, rather than to leave the choice entirely up to the United States.

Although his award did not result in the United States necessarily complying with the time limits he set, it did achieve a minimum degree of effectiveness. At the time this book was drafted in December 31, 2010, the dispute was ongoing, and Mexico had commenced compliance proceedings.45 Superficially, this suggests that the award was ineffective. However, although the award was not fully effective, Mexico and the United States remained within the WTO system of dispute resolution and are utilizing its legal mechanisms to resolve their trade dispute in an orderly manner, which is ultimately one of the key goals of the WTO. The better view is that the award discharged its function within a broader and customarily lengthy dispute resolution process in the WTO.46

In addition to being an easy case, it is a useful case for the present study of the international legal system. In disputes such as the U.S.-Stainless Steel (Mexico) case, arbitrators can reach decisions that reasonably harmonize the competing considerations that justify the regulatory demands of international law. The ability of such a decision to promote effectiveness depends in part on satisfying elites that a minimum quantum of their respective preferred values are protected. Effectiveness here also depends on whether the arbitral decision defends legalism and its attendant virtues of stability, coherence, and adherence, all of which, in turn, depend on confining a decision within the bounds of legalist reasoning and procedures. Finally, an effective decision is one that is not so substantively unjust that the judge should not enforce it. It appears that the bulk of international disputes can be resolved in a manner that accommodates these considerations, and it is incumbent upon arbitrators to do so.

B. Loeven Group, Inc. v. United States of America

Not all cases are easy. There are also hard cases where legalism, moral concerns, interests, and functions of arbitration are sufficiently divergent or ambiguous to make decision-making difficult for arbitrators. Loeven Group, Inc. v. United States of America is one such case.47

The Canadian Loeven Group was embroiled in a dispute with Mississippi companies owned by the O’Keefe over contracts worth around $1 million and the exchange of two O’Keefe funeral homes worth $2.5 million, for a Loeven insurance company valued at $4 million.48 At the end of the trial, the jury awarded to the U.S. plaintiff $500 million in damages, including $75 million in emotional distress and $400 million in punitive damages.49 The Mississippi court that adjudicated the dispute allowed racial and class biases to infect the trial.50 Unable to appeal this decision without going into bankruptcy because the bond for appeal under Mississippi law was $625 million, Loeven settled the case for $175 million.51 The Loeven Group, comprising the Loeven Group, Inc. and Loeven Group International, Inc., as well as Raymond Loeven, then brought a proceeding against the United States under NAFTA for breaching its obligations to provide Loeven’s investment in the United States with the “minimum standard of treatment,” including “fair and equitable treatment and full protection and security.”52

The award was surprising. The tribunal comprised Sir Anthony Mason, the former Chief Justice of the Australia High Court; Judge Abner J. Mikva, a former federal judge on the U.S. Court of Appeals for the D.C. Circuit; and Lord Michael Mustill.

48 Loeven Award, supra note 44, at ¶ 8.
49 See id. at ¶ 9.
50 See id. at ¶ 10.
51 See id. at ¶ 11.
52 NAFTA, art. 1105, ¶ 1.
a retired English law lord. They found that Loewen had been completely denied a fair trial. They stated:

By any standard of measurement, the trial involving O'Keefe and Loewen was a disgrace. By any standard of review, the tactics of O'Keefe's lawyers, particularly Mr. Gary, were impermissible. By any standard of evaluation, the trial judge failed to afford Loewen the process that was due.\textsuperscript{56}

However, the tribunal stated that the United States was not responsible for what appeared to be breaches of NAFTA. It reasoned that Loewen failed to exhaust local remedies, which in its view was a precondition to pursuing a NAFTA claim. Although the tribunal acknowledged Loewen's claim that it was unable to post the $625 million bond,\textsuperscript{51} the tribunal reasoned that Loewen nonetheless failed to exhaust local remedies because Loewen could have gone into Chapter 11 bankruptcy and appealed against the state court decision.\textsuperscript{52} Alternatively, the tribunal decided Loewen could have petitioned to the U.S. Supreme Court with an application for a stay of execution of the judgment against the bond requirement.\textsuperscript{53}

The tribunal additionally found that it did not have jurisdiction over the Loewen Group. After the initial hearing on the merits in Mississippi, the Loewen Group, Inc. had filed for Chapter 11 bankruptcy.\textsuperscript{54} It had been reorganized as a U.S. corporation, and its NAFTA claims were assigned to a Canadian corporation, Naicenco, created to pursue this claim. The tribunal concluded that since Loewen Group, Inc. was no longer a Canadian corporation, and NAFTA claims could only be brought against the United States by Canadian or Mexican corporations, the tribunal lacked jurisdiction to hear the claims of the Loewen Group, Inc.\textsuperscript{55}

With remarkable non-legalist candor, the tribunal ended its award with a lengthy dictum explaining its hyper-technical decision that consciously avoided correcting the injustice in the case:

We think it right to add one final word. . . . There was unfairness here towards the foreign investor. Why not use the weapons at hand to put it right? What clearer case than the present could there be for the ideals of NAFTA to be given some teeth?

This human reaction has been present in our minds throughout but we must be on guard against allowing it to control our decision. Far from fulfilling the purposes of NAFTA, an intervention on our part would compromise them by obscuring the crucial separation between the international obligations of the State under NAFTA, of which the fair treatment of foreign investors in the judicial sphere is but one aspect, and the much broader domestic responsibilities of every nation towards litigants of whatever origin who appear before its national courts. . . . Too great a readiness to step from outside into the domestic areas, attributing the shape of an international wrong to what is really a local error (however serious), will damage both the integrity of the domestic judicial system and the viability of NAFTA itself. The natural instinct, when someone observes a miscarriage of justice, is to step in and try to put it right, but the interests of the international investing community demand that we must observe the principles which we have been appointed to apply, and stay our hands.\textsuperscript{57}

Some scholars and arbitrators have soundly criticized the tribunal's reasoning. The tribunal's finding that Loewen could have petitioned to the Supreme Court to reconsider the Mississippi court's application of the bond requirement on due process grounds, which was unlikely to succeed, rather than settle for a third of the verdict, prompted Swiss arbitrator Jacques Werner to exclaim: "In what world does the Arbitral Tribunal live?"\textsuperscript{58} The notion that an international law claim can only be pursued by going into bankruptcy similarly bears no relation to commercial realities or business practices, and many scholars think the tribunal simply got the law wrong.\textsuperscript{59}

Allegations have now arisen about the United States' actions behind the scenes, and about the tribunal's deliberations, which raise graver concerns.\textsuperscript{60} According to one academic, the U.S.-appointed arbitrator, Judge Milka, apparently revealed at an academic conference in 2004 that after he agreed to serve on the Loewen tribunal, he was later approached by a member of the U.S. government who told him that he had been "withholding" his vote in favor of the US.\textsuperscript{61} The claim that Judge Milka said at a conference that he had ex parte conversations was first made by David Schneiderman. See David Schneiderman, Judicial Politics and International Investment Arbitration: Seeking an Explanation for Conflicting Outcomes, 30 N.W. J. INT'L & BUS. 383, 404-05 (2010). Other scholars have since referred to Schneiderman's claim in their own scholarship. See Jason Webb Yackee, Book Review, 103 AM. J. INT'L L. 629, n.12 (2009) (reviewing The Reasons Requirement in International Investment Arbitration: Critical Case Studies (Guillermo Aguilar Alvarez & W. Michael Reisman eds., 2008)); Susan D. Frank, Development of Outcomes of Investment Treaty Arbitration, 51 HARV. INT'L L.J. 435, 468, n.7 (2009). However, the transcripts and audio tapes of Judge Milka's remarks at the conference are no longer publicly available, and the accuracy of Schneiderman's claims is difficult to assess.

\textsuperscript{56} Loewen Award, supra note 44, ¶119. See also id. ¶ 138 ("We take the view that the judge, for reasons which do not clearly appear, failed to discharge his paramount duty to ensure that Loewen received a fair trial.").

\textsuperscript{57} See id. at ¶ 6.

\textsuperscript{58} See id. at ¶ 209.

\textsuperscript{59} See id. at ¶ 217.

\textsuperscript{60} See id. at ¶ 234.

\textsuperscript{61} See id. at ¶ 240(2). The tribunal also found it had no jurisdiction over Raymond Loewen because he failed to prove that he owned any stock in the Loewen Group when at the time when NAFTA proceedings were brought. See id. at ¶ 259.
If, however, the ex parte conversation with Judge Milka never occurred, the Loewen award presents a harder case under this book's account of international law, contrary to criticisms that have been made against the award, including some criticisms that this author made in an earlier work. The outcome of the case was unfair to Loewen and perhaps failed to properly balance the values at stake. Had the tribunal found against the United States, such a finding could have been, by the tribunal's own reckoning, mere just. Such a finding would also have been faithful to legalism. The tribunal could have decided that it had jurisdiction over the Loewen Group because it was Canadian when it commenced its claim, or that Nacanco was a proper successor to the claim because it was Canadian. It could also have held that Loewen did not need to exhaust local remedies, as other awards have held.

It is not clear, however, that the tribunal damaged the common good by excessively departing from legalist reasoning. The award was perhaps at the outer margins of legal reasoning but probably did not cross the line into illegality and depart too far from shared expectations that arbitrators should make decisions using legalist reasoning. Lord Mustill and Sir Mason, who served on their respective countries' highest courts, would not have signed off on an award that was completely indefensible on legalist grounds.

In an important way, the award protected the common good by reducing the risk that the United States would withdraw from NAFTA, which is a basic strut of regional economic order. Unlike domestic law, which is mandatorily applied, NAFTA allows any party to withdraw from it. Even absent an intervention from the Department of Justice with Judge Milka, the tribunal would have known that some domestic elites in the United States opposed NAFTA, and a decision against the United States would risk agitating those elites to undermine NAFTA or withdraw from it. While it is far less than ideal to have to accommodate powerful interests to ensure that the international legal system maintains a modicum of effectiveness to achieve any regulation at all (and contrary to some conceptions of the rule of law), that pragmatic accommodation may be the least suboptimal alternative in some situations. Whatever one's views of the extent to which law can accommodate power and interests before it ceases to be law, reasonable minds can disagree about the extent to which arbitrators should be concerned with effectiveness of their rulings when deciding what outcomes to prescribe in their awards.

NAFTA benefits Mexico, the United States, and Canada. If the tribunal in good faith believed that a finding that U.S. courts acted improperly, unless there was no

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49 Schneiderman, supra note 39 at 405.
50 See id.
51 See Loewen Award, supra note 44, at § 21.
52 See Paulson, supra note 57, at 9.
53 For other examples of states applying improper pressure on arbitrators, see id. at 2–5.
54 Schneiderman, supra note 57, at 2 (“Ultimately, if there is no faith in the legitimacy of adjudication—which we all surely accept as better than violence or corruption—suppliers of goods, services, and know how will prefer to disengage.”).
55 See Paulson, supra note 57, at 2 (stating that there was a "miscarriage of justice" and they instinctively wanted "to try to put it right").
56 See id. (stating that there was a "miscarriage of justice" and they instinctively wanted "to try to put it right").
57 See id. (stating that there was a "miscarriage of justice" and they instinctively wanted "to try to put it right").
58 See id. (stating that there was a "miscarriage of justice" and they instinctively wanted "to try to put it right").
other liberal alternative, would “damage . . . the viability of NAFTA itself.”\textsuperscript{69} then it is at least debatable that their decision was appropriately made to protect the common good within the technical limits of legalism.

On final analysis, if it is true that the Department of Justice tried to influence Judge Mikva ex parte, his failure to recuse himself or at least disclose the conversation rendered the award illegitimate under this book’s account of international law. However, if the Department of Justice had not contacted Judge Mikva ex parte, he and his co-arbitrators could have independently decided that it was necessary to accommodate the U.S. interests by insulating its domestic legal system from NAFTA, in order to achieve minimum effectiveness and to protect the stability of the regional economic order. Judge Mikva could also have persuaded his co-arbitrators that this was an overriding consideration, and it was in any event consistent with liberal reasoning, so such a finding would not damage the integrity of international law. For these reasons, the Loewen award was a hard case, but a good illustration of how this book’s justificatory theory would provide guidance to arbitrators.

C. CMS Gas Transmission Co. v. Argentine Republic, Decision on Annulment

Another hard case, and a good test of this book’s theory of international law, is the annulment decision of the ad hoc committee in CMS Gas Transmission Co. v. Argentine Republic.\textsuperscript{70} After the arbitration tribunal found that Argentina had violated the U.S.-Argentina bilateral investment treaty (BIT),\textsuperscript{71} an ad hoc committee annulled a portion of the award and left another portion intact, after harshly criticizing it. For the reasons discussed below, the ad hoc decision to both find the standard for annulment had not been met but nevertheless criticize the award is a hard case because it turns on contested views about the appropriate function of arbitrators.

During Argentina’s financial crisis, it took emergency financial measures to protect its economy that resulted in losses to foreign investors.\textsuperscript{72} CMS Gas Transmission Company was one such foreign investor. CMS filed an ICSID arbitration against Argentina under the Argentina-U.S. BIT. In the tribunal’s award of May 12, 2005, the tribunal found that Argentina had breached the fair and equitable treatment standard and umbrella clauses of the BIT, and that Argentina did not have a valid necessity defense. The tribunal awarded CMS $133.2 million.\textsuperscript{73}

Argentina requested that an ad hoc committee annul the award under Article 52 of the ICSID Convention. Article 52 provides that a party “may request annulment of the award by an application in writing addressed to the Secretary-General (of ICSID) on one or more of the following grounds . . . that the award has failed to state reasons on which it is based.”\textsuperscript{74}

The ad hoc committee explained that the possibility of annulment for failure to state reasons did not open the door for appellate review and to reverse the award on the merits. The “failure to state reasons” basis for annulment was a high threshold requiring that the tribunal had failed to provide reasons to enable the parties to understand the award. If reasons were provided and the award could be understood, the award could not be annulled even if the reasons were wrong.\textsuperscript{75}

Applying this high threshold for annulment to the award, the ad hoc committee annulled the portion of the award finding that the umbrella clause of the BIT had been violated but rejected all other requests for annulment.\textsuperscript{76} This effectively left the award intact because the breach of the fair and equitable treatment standard was sufficient to justify the damages awarded.\textsuperscript{77}

The portion of the CMS decision that presents a hard case is its denial of the request to annul the portion of the award that rejected Argentina’s necessity defense alongside its harsh criticism of that holding. Article XI of the Argentina-U.S. BIT provided a defense of necessity that absolved Argentina of responsibility for breaches of the BIT if Argentina took only measures that were deemed necessary under the BIT.\textsuperscript{78} The tribunal found that Argentina did not meet the criteria for necessity under Article XI because it did not satisfy the conditions for necessity under the general customary law of necessity, as expressed in Article 25 of the ILC’s Articles on State Responsibility.\textsuperscript{79}

The ad hoc committee found that the tribunal had made “manifest errors of law.”\textsuperscript{80} The tribunal had essentially conflated Article 25 of the ILC Articles with Art XI of the BIT. The ad hoc committee thus stated that the tribunal “should have been more explicit in specifying, for instance, that the very same reasons that disqualified Argentina from relying on the general law of necessity meant that measures it took could not be considered ‘necessary’ for the purposes of Article XI either.”\textsuperscript{81} The committee held, however, that it was possible to follow the tribunal’s implicit reasoning, and therefore there was no failure to state reasons, and the tribunal’s manifest errors of law were insufficient to annul its rejection of Argentina’s necessity defense.

\textsuperscript{69} Loewen Award, supra note 44, at ¶ 242.
\textsuperscript{70} CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Annulment Proceeding (Sept. 1, 2006) [hereinafter CMS Annulment Decision].
\textsuperscript{71} CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/6, Award (May 12, 2005) [hereinafter ICSID Award].
\textsuperscript{72} Id. at ¶ 359–67.
\textsuperscript{73} Id. at ¶ 668.
\textsuperscript{74} Id. at ¶ 95.
\textsuperscript{75} Washington Convention, supra note 4, art. 52(1)(c).
\textsuperscript{76} CMS Annulment Decision, supra note 70, at ¶ 97.
\textsuperscript{77} Id. at ¶ 100.
\textsuperscript{78} Id.
\textsuperscript{79} Id. at ¶ 161.
At first glance, the CMS annulment decision may seem appropriate. It appears sufficiently faithful to legalism and the moral obligation to promote the common good through legalism. Its high standard for annulment is consistent with many, although not all, other annulment decisions. Because the standard for annulment is not uniform, and the CMS committee associated itself with the high threshold for annulment adopted by other committees, it did not deviate from shared expectations about the standard for annulment. There also does not appear to be grave imbalances in allocating the values at stake and in protecting the vital interests of CMS, the United States, or Argentina.

However, the CMS annulment decision presents a hard case because the committee's obiter criticisms of the tribunal's findings on necessity greatly reduced the effectiveness of the tribunal's decision—and indeed the entire arbitration process—in resolving the dispute between CMS and Argentina. Had Argentina succeeded in raising the necessity defense, it would not have had any responsibility for damages. Thus, criticizing the tribunal's findings on necessity greatly increased the opposition of Argentinian constituencies to paying an award that an eminent committee of arbitrators had found made manifest errors of law on a crucial holding. Even though the award was left formally intact, the statements of the ad hoc committee unsettled shared expectations that Argentina should have paid the award, which could otherwise have coalesced more easily. Critics who made this argument would say that the ad hoc committee's decision failed to adequately promote effectiveness, which under this book's general theory of law, is one of the key considerations in proper decision making.

This aspect of the ad hoc committee's decision presents a hard case because whether or not its failure to adequately account for effectiveness reduced the justificatory power of the decision depends on one's view of the function of arbitrators in general and ad hoc committees in particular. From one view, the arbitral function is dispute resolution. From this standpoint, the ad hoc committee's decision was indeed lacking because it undermined the effectiveness of an award that it chose to leave essentially intact as a formal matter. From another view, the arbitral function, especially that of an ad hoc committee, is to clarify the law that the parties paid the committee to deliberate and, crucially, to fully provide the reasons for its decision. From this standpoint, effectiveness is a secondary consideration, if at all. Although the author sees merit in the view that emphasizes effectiveness, it cannot be said that that view is necessarily correct and the other necessarily wrong. Accordingly, the CMS ad hoc decision presents a hard case.

III. CONCLUSION

The foregoing analysis has shown that the general justificatory account of the international legal system applies to arbitrators. The chapter has also demonstrated how that account provides guidelines to help arbitrators make decisions and to identify easy and hard cases. That approach neither eliminates the arbitrator's discretion in making difficult moral and normative decisions in hard cases, nor is it intended to. However, it provides a framework of analysis to puzzle through competing considerations in international arbitration involving states.