

NAFTA

**Investment Law
and Arbitration:
Past Issues,
Current Practice,
Future Prospects**

Edited by

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CHAPTER 15

JUDICIAL REVIEW OF INVESTMENT ARBITRATION AWARDS

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A. INTRODUCTION

Many consider the finality of awards to be one of the primary advantages of arbitration. After a final award has been rendered, international arbitration systems lack the multi-tiered appeals mechanisms of most national courts. In addition, international treaties usually prevent the re-litigation of issues in different foreign courts resolved by arbitration tribunals, whereas the loser in a court case may still be able to persuade a judge elsewhere to disregard the findings of his foreign colleagues. Hyperbolically describing the immunity of arbitration awards from judicial review on the merits, one 19th-century Scottish judge remarked that an arbitrator “may believe what nobody else believes, and he may disbelieve what all the world believes. He may overlook or flagrantly misapply the most ordinary principles of law, and there is no appeal for those who have chosen to submit themselves to his despotic power.”¹ In fact, however, the modern system of international arbitration—including certain forms of investment arbitration—reserves a limited but very real role for national courts in assessing the rectitude of awards.

Where a defeated host government is dissatisfied with the arbitrators’ decision,² it normally has one opportunity to set aside the arbitral award. This process is also known as “*vacatur*” or “annulment.” If the arbitration was conducted under the auspices of the International Center for the Settlement of Investment Disputes, the losing state can only request annulment under Article 52 of the Washington Convention,³ which calls for the establishment of an “*ad hoc* panel” of arbitra-

¹ *Mitchell v. Cable*, [1848] 10 D. 1297.

² In theory, a claimant who has lost his case could also seek to set aside the award of dismissal. In practice, however, losing investors rarely seek to overturn awards, since success in such an effort would simply put the claimant back at square one, obliged to restart the arbitration from the beginning with a new tribunal.

³ Convention on the Settlement of Investment Disputes Between States and Nationals of Other States of March 18, 1965, 4 I.L.M. 524 (1966).

tors. The *ad hoc* panel⁴ is empowered to examine the procedural propriety of the award, and if it finds one of the defects enumerated in Article 52 to partially or completely annul it.⁵

However, many investment arbitration cases take place outside the self-contained Washington Convention system, instead conducted pursuant to the ICSID Additional Facility Rules, UNCITRAL's *ad hoc* arbitration rules, or under the auspices of one of the prominent commercial arbitration institutions. Most commonly, dispute resolution is kept out of ICSID because at least one of the states involved in the dispute (the host state and the investor's home state) is not a party to the Convention. Neither Mexico nor Canada is a party, for example, and therefore all NAFTA cases are administered under the ICSID Additional Facility or UNCITRAL Arbitration Rules. Second, the project underlying the dispute may not qualify as an "investment" for purposes of Article 25 of the Washington Convention, but might still fall within the scope of the investment treaty or other document evidencing consent to arbitration. Investment treaties and national laws that provide private parties access to arbitration against the host state often provide very broad coverage, including some categories of assets (such as commercial contracts, trade rights, and short-term debt) that might be excluded from the subject-matter jurisdiction of ICSID.⁶ Finally, the claimant may have a range of options open to him, and could decide that the International Chamber of Com-

⁴ A great deal has been written about the process and jurisprudence of *ad hoc* annulment panels under the Washington Convention. After initial concern that panels were interpreting the procedural grounds for annulment too broadly, recent decisions in *Wena Hotels v. Arab Republic of Egypt* and *Aguas de Aconquija & Vivendi v. Argentina* indicate the emergence of a new, cautious, conservative approach to ICSID annulment. See generally M. Feldman, *The Annulment Proceedings and the Finality of ICSID Arbitral Awards*, 2 ICSID REV.—F.I.L.J. 85 (1987); D. Caron, *Reputation and Reality in the ICSID Annulment Process: Understanding the Distinction Between Annulment and Appeal*, 7 ICSID REV.—F.I.L.J. 92 (1993); A. Giardina, *ICSID: A Self-Contained, Non-National Review System*, INTERNATIONAL ARBITRATION IN THE 21ST CENTURY (R. Lillich & C. Brower eds. 1994).

⁵ The permissible grounds for annulment under Article 52 of the Washington Convention are: (1) the tribunal was not properly constituted; (2) the tribunal has manifestly exceeded its powers; (3) there is corruption of a tribunal member; (4) there has been a serious departure from a fundamental rule of procedure; and (5) the award does not state the reasons on which it is based.

⁶ Some contracts for the sale of goods, for example, may fall within the definition of "investment" for purposes of a BIT, but such a transaction would not likely be an investment under Article 25(1) of the Washington Convention. See, e.g., Agreement among the Government of Brunei Darussalam, Republic of Indonesia, Malaysia, Republic of the Philippines, Republic of Singapore, and the Kingdom of Thailand for the Promotion and Protection of Investments, signed Dec. 15, 1987 (ASEAN Investment Agreement), art. I(3) ("every kind of asset" qualifies as investment), but compare *Asian Express v. Greater Colombo Economic Commission*, described in Ibrahim Shihata & Antonio Parra, *The Experience of the International Centre for Settlement of Investment Disputes*, 14 ICSID REV.—F.I.L.J. 299, 308 (1999); ICSID ANNUAL REPORT 6 (1985) (investment arbitration refused registration by the ICSID Secretariat on grounds that the claim arose out of a contract for the sale of goods and therefore did not arise out of an investment for purposes of the Washington Convention).

merce, Stockholm Chamber of Commerce, or *ad hoc* arbitration under UNCITRAL Rules best suits the dispute at hand and the investor's strategic interests. The ICSID Arbitration Rules, for instance, do not provide for enforceable interim relief—a major shortcoming in disputes involving intellectual property, shipping, commodities, and other time-sensitive areas. As a result, the increase in ICSID's caseload has been accompanied by a similar proliferation of sizable investment arbitration cases decided pursuant to the UNCITRAL, ICC, Stockholm Chamber of Commerce, and other international commercial arbitration rules.

Where arbitration is not conducted within the self-contained ICSID system, awards can be challenged under the normal commercial arbitration framework established by national law, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and other relevant treaties. Indeed, NAFTA Article 1136(3)(b) expressly provides for the possibility of actions in national courts to “revise, set aside or annul” awards, requiring the victorious party to refrain from enforcement until the losing side has had the opportunity to pursue such relief. So, generally speaking, the losing party in the NAFTA or other non-ICSID investment arbitration can bring a lawsuit in the courts of the place of arbitration, requesting that a judge apply the local arbitration law to vacate the arbitration award. While most countries have implemented legislation that tightly limits the proper grounds on which such relief will be given, the opportunity remains in some cases to reopen the merits of the case, either by application of a broad arbitration statute or broad interpretation of a narrow one.⁷ Particularly in investment arbitration, where public policy concerns and popular pressure can sometimes loom large, there is a real possibility that national courts will overturn the arbitrators' substantive decision.

A number of recent cases have demonstrated that a final award does not necessarily mean speedy payment for the investor. Increasingly, governments ordered to pay substantial sums for violation of investment protection treaties or investment agreements are prepared to use all avenues available to them to challenge international investment arbitration awards, pushing the investor-state struggle into national courts. This trend may become particularly strong in NAFTA arbitration, the only active investment arbitration system where industrialized, capital-importing countries (Canada and the United States) have so far become respondents.⁸ While developing countries that sign bilateral investment treaties

⁷ Professor Brower insists that the NAFTA parties' agreement to “final” and “binding” arbitration precludes judicial review of the merits of NAFTA awards, even if local law at the place of arbitration allows a full appeal. Charles H. Brower, II, *Structure, Legitimacy, and NAFTA's Investment Chapter*, 36 VANDERBILT J. TRANSNAT'L L. 37, at 83 (2003); Charles H. Brower, II, *Beware the Jabberwock: A Reply to Mr. Thomas*, 40 COLUM. J. TRANSNAT'L L. 465, at 479–84 (2002). This is, however, a minority view.

⁸ The Energy Charter Treaty (ECT), like the NAFTA, binds capital-exporting states to one another and contains investor-state dispute resolution provisions similar to those found in the NAFTA and bilateral investment treaties. Its subject matter, however, is limited to the energy

probably view the occasional defeat in arbitration as part of the cost of increased foreign direct investment, neither Canada nor the United States appears to have been prepared to be haled before international tribunals under the NAFTA.⁹ The realization that international law is a two-way street has engendered sharp political pressure in Canada and the United States to scale back the power of NAFTA tribunals—a campaign that may lead to additional challenges of NAFTA awards.

In this chapter, we will first examine some of the standards of review to which non-ICSID investment arbitration awards may be subjected in national courts. Next, we will take a look at what happens to such an award if it is annulled by the courts at the place of arbitration. Finally, I will describe how these standards have been applied in recent cases.

B. THE STANDARD OF JUDICIAL REVIEW

1. Generally

Once again, where an investment arbitration proceeding takes place outside the boundaries of the Washington Convention system, the national law at the place of arbitration—and the courts of that jurisdiction—control the losing party's quest to set aside the award. There are no international treaties restricting a state's approach to the review of arbitration awards that take place in their territory.¹⁰ There is a great deal of variation between national legislation on arbitration around the world, although harmonization is improving. Most modern arbitration statutes, including those in force in the three NAFTA countries, provide a very short list of grounds for annulling international arbitration awards. Most of these grounds are equivalent to the exceptions to recognition and enforcement of awards contained in Article V of the New York Convention.

The UNCITRAL Model Law on International Commercial Arbitration,¹¹ while adopted verbatim in only a few countries,¹² has served as a guidepost for many jurisdictions seeking to modernize and harmonize legislation on arbitration. In particular, both Canada and Mexico drew inspiration from the Model Law in

sector, and to date the dispute resolution provisions have been little used. One case, against Hungary, was registered at ICSID and later withdrawn due to settlement. A second case is now pending.

⁹ William Park, *NAFTA Chapter 11: Capital Exporters as Host States*, INVESTMENT TREATIES AND ARBITRATION 9, at 18 (2002) ("when the shoe is on the other foot perceptions of fairness may be quite different, and the industrialized countries may not be enthusiastic about playing by the same rules").

¹⁰ W. Craig, *Uses and Abuses of Appeal from Awards*, 4 ARB. INT'L 174 (1988); HAMID GHARAVI, THE INTERNATIONAL EFFECTIVENESS OF THE ANNULMENT OF AN ARBITRATION AWARD 29 (2002).

¹¹ Available at <http://www.uncitral.org/english/texts/arbitration/ml-arb.htm>.

¹² The UNCITRAL website, at <http://www.uncitral.org/english/status/status-e.htm>, provides a list of "enactments" of the Model Law, but this list is deceptive. Many of the countries noted there introduced legislation based on the Model Law, but with substantial modifications.

creating their current statutes. UNCITRAL Model Law Article 34(2) establishes six bases for setting aside awards at the arbitral *situs*: (1) invalidity of the agreement to arbitrate; (2) lack of notice to a party or other inability to present the case; (3) inclusion in the award of matters outside the scope of submission; (4) irregularity in the composition of the tribunal or the arbitral procedure; (5) non-arbitrability of the subject matter; and (6) violation of domestic public policy.

Of these, the first defect is practically impossible to make out in investment arbitration initiated under investment treaties, since the agreement to arbitrate is composed of an international agreement between sovereign states (which is either in force or not), and the claimant's request for arbitration. None of the bases for invalidity common in the commercial arbitration context, such as coercion, fraud, lack of identity of the parties, and so forth, can apply where arbitration is "without privity," as well-known commentator Jan Paulsson describes investment arbitration.¹³ In practice, the most common of the Model Law grounds that losing parties use to challenge arbitration awards, are that the arbitrators decided issues outside the scope of their authority, and that the award violates public policy. Non-arbitrability of the subject matter and procedural irregularity are grounds for challenge that have yet to appear prominently in cases related to investment arbitration awards, but which could find increasing currency should challenges become more common.

2. GROUNDS FOR SETTING ASIDE WITH RELEVANCE TO INVESTMENT ARBITRATION

a. *Excess of Authority*

It has often been said that the consent of the parties is the cornerstone of arbitration. Commercial arbitrators' power to adjudicate disputes normally emerges not from operation of law, but directly out of the contractual delegation of authority from the parties.¹⁴ The particular contours of this delegation are found in the parties' agreement to arbitrate. As a result, nearly all national arbitration laws recognize¹⁵ that tribunals only have jurisdiction to decide issues that the parties have agreed to submit to them, and according to the parameters the parties specify (most commonly in advance). Where arbitrators go beyond the scope of this "mandate," their awards may be subject to annulment by national courts at the place of arbitration as an "excess of authority."¹⁶

¹³ Jan Paulsson, *Arbitration Without Privity*, 10 ICSID REV.—F.I.L.J. 232 (1995).

¹⁴ This is in contrast with the common institution of "statutory arbitration," as in labor disputes in the United States, removed by operation of law from the purview of courts and into the competence of arbitrators.

¹⁵ See, e.g., UNCITRAL Model Law, art. 34(2)(iii); Bulgarian Law on International Commercial Arbitration, art. 47(5); Estonian Arbitration Act, art. 7(4); Mexico Civil Code, art. 1457(1)(c).

¹⁶ ALAN REDFERN & MARTIN HUNTER, *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 3–8 (3d ed. 1999); *Waste Management, Inc. v. United Mexican States*, Award (June 2, 2000) at para. 16.

The range of issues that losing parties may bring to court under the “excess of powers” rubric is extremely broad, and therefore difficult to characterize generally. The subjects complained of fall most commonly into one of two categories. First, the defeated party may assert that the arbitrators’ departure from the agreed-upon rules of procedure is so serious that the parties’ agreement to arbitrate has been subverted. The most frequently cited defect of this kind is consolidation, where disputes between a single party on one side and multiple parties on the other are merged into one proceeding. In *Oxford Shipping Co. Ltd. v. Nippon Yusen Kaisha*,¹⁷ an English court ruled that arbitrators may not consolidate without the consent of the parties involved. Many commentators agree that consolidation can amount to a rewriting of the arbitration agreement, since the parties agreed to arbitrate disputes between themselves, not between themselves and several other parties.¹⁸ Nevertheless, courts have refused to annul on this ground where the complaining party could be deemed to have accepted the procedure. In the *OIAETI v. SOFIDIF* case, the French Court of Cassation reversed a Paris court’s decision annulling an award against several Iranian public companies where the arbitrators had consolidated various disputes.¹⁹ Likewise, in the American case of *Karaha Bodas Company v. Pertamina*,²⁰ a UNCITRAL tribunal consolidated claims that Karaha Bodas Company (KBC) had brought against Pertamina and PLN, two Indonesian state-owned entities, under closely related project agreements. Pertamina eventually opposed enforcement of the award, in part on grounds that this consolidation was in excess of the arbitrators’ mandate. The court rejected the challenge, finding that the two parties were closely related and suffered no detriment from consolidation. The issue of consolidation is less likely to be a troublesome one for NAFTA tribunals, since the treaty provides a unique, detailed procedure for merging related claims. But with multiple treaty claims now arising more and more frequently out of a single government measure, as in the Argentina financial crisis,²¹ challenges based on procedural excess of powers may also become more common.

The second class of “excess of mandate” challenges are those dealing with the subject matter of issues the arbitral tribunal has decided, and whether they fall within the scope of the agreement to arbitrate. In the investment context, this kind of challenge could be mounted where the tribunal has accepted jurisdiction over issues beyond the scope of consent, for example tort claims or purely commercial disputes unrelated to an “investment” as required by most investment treaties.

¹⁷ [1984] 2 Lloyd’s Rep. 374.

¹⁸ T. CARBONNEAU, CASES AND MATERIALS ON THE LAW AND PRACTICE OF ARBITRATION 27 (2000).

¹⁹ Court of Cassation, Decision of Mar. 8, 1988, *reprinted at* 1987 REVUE DE L’ARBITRAGE 339.

²⁰ Unpublished, 2000.

²¹ As of summer 2003, at least 12 ICSID cases had been filed against Argentina as a result of its “emergency measures,” including the forced conversion of contracts from dollars to devaluated pesos at an artificial one-to-one rate (known as pesification).

Frequently, losing parties try to open the merits of the dispute to judicial review by asserting that the arbitrators were mistaken in their choice of law or incorrectly applied the law to the facts at hand. Under most legal systems, arbitrators must decide according to the law chosen by the parties. Unless the parties expressly agree otherwise, the arbitrators exceed their powers when they rule as *amiable compositeurs*,²² according to general principles of justice and equity.²³ In *Bridas S.A.P.I.C. et al. v. Turkmenistan et al.*, the claimant was awarded compensation for lost profits in breach of contract, with damages determined by discounted cash flow method at a discount rate of about 10 percent.²⁴ Turkmenistan moved to set aside the award in U.S. court (the *situs* of the arbitration had been Houston, Texas), contending that neither party had argued for that particular rate, and that the arbitrators had in fact “split the baby,” setting the discount rate between the parties’ estimates without any basis in law. The court rejected this challenge, finding that the arbitrators had provided sufficient reasoning to conclude that they applied the law in their deliberations. “It is not th[e] Court’s role,” it concluded, “to sit as the panel did and reexamine the evidence under the guise of determining whether the arbitrators exceeded their powers.”²⁵

b. Non-Arbitrability

Countries differ widely as to what kinds of disputes may be submitted to arbitration. In many jurisdictions, certain areas of law are considered too laden with public welfare concerns to permit private adjudication.²⁶ Even in the United States, which espouses a strong pro-arbitration policy, antitrust and securities disputes were not arbitrable until relatively recently. Today, courts in most developed countries tend to rule in favor of arbitrability when in doubt, as did the Second Circuit in *Kerr-McGee Refining Corp. v. M/T Triumph*,²⁷ reviewing the annulment of an award based on the RICO racketeering statute. Nevertheless, in some coun-

²² “Amiable composition” is a concept that originated in French law, referring to arbitrators who decided disputes on the basis of general equitable principles, rather than on specific rules of law.

²³ *Inter-Arab Investment Guarantee Corp. v. Banque Arabe d’Investissements*, Paris Cour d’Appel, decision of Oct. 23, 1997 (“the arbitrators had to decide in law and to give reasons for their decision”). In other jurisdictions, *amiable composition* is permitted as long as the parties do not prohibit it. This is the case in the United States, where arbitrators need not even provide written reasons for their award unless the parties expressly require it.

²⁴ *Bridas S.A.P.I.C., Bridas Energy Int’l, Intercontinental Oil & Gas Ventures, and Bridas Corp. v. Turkmenistan, Balkanbebitgazsenagat and Turkmenneft*, Civil Action No. H-99-2171 (S.D. Tex. Oct. 1, 2001).

²⁵ *Id.* at *27 (citing *National Oil Corp. v. Libyan Sun Oil Co.*, 733 F. Supp. 800, 819 (D. Del.).

²⁶ See, e.g., the problems raised by limitations on the French government’s authority to consent to ICSID arbitration in connection with the construction and operation of Euro Disneyland. Jacques Ribs, *Ombres et incertitudes de l’arbitrage pour les personnes morales de droit publique français*, 64 JURIS-CLASSEUR PÉRIODIQUE I.3465 (1990).

²⁷ 924 F.2d 467 (2d Cir. 1991).

tries certain fields of law—such as antitrust disputes,²⁸ securities transactions²⁹ and intellectual property³⁰—are, for policy reasons, still within the exclusive jurisdiction of local courts.³¹ In many jurisdictions, however, local law still demands that disputes involving state contracts be resolved exclusively in administrative courts. For example in Brazil, the 1996 Arbitration Act limits the subject matter of arbitration to “equity rights of which the parties can freely dispose.”³² These “equity rights” are broadly defined, as any rights susceptible to economic valuation.³³ This provision leaves open the possibility that an investment arbitration award rendered in Brazil would be challenged because the investor cannot “freely dispose” of his rights under an investment treaty or contract.

It is somewhat surprising that no investment arbitration award has yet been challenged on the basis of non-arbitrability. This may be due to the accident of fate, that to date the *situs* of challenged awards has been in countries with broad local rules on arbitrability (Canada and Sweden). The proliferation of arbitration proceedings in Latin America, however, may eventually break this trend, and several European countries, notably France, also maintain remarkably tight limits on the arbitration of government-related disputes.

c. Public Policy

In most jurisdictions, awards that violate public policy can be subject to court annulment. Some arbitration statutes specify that *vacatur* is possible where international public policy is offended,³⁴ while others make domestic public policy the relevant set of norms.³⁵ Still other national statutes are unclear whether local or international public policy should serve as the basis for challenge, leading to a great deal of confusion and debate.³⁶ Within the international commercial arbi-

²⁸ Ludwig von Zumbusch, *Arbitrability of Antitrust Claims under U.S., German, and E.E.C. Law: the International Transaction Criterion and Public Policy*, 22 TEX. INT'L L. J. 291, at 304–12 (1987).

²⁹ Hans van Houtte, *Arbitration Involving Securities Transactions*, 12 ARB. INT'L 405 (1996).

³⁰ Marc Blessing, *The Arbitrability of Intellectual Property Disputes*, 12 ARB. INT'L 191 (1996).

³¹ Karl-Heinz Böckstiegel, *Public Policy and Arbitrability*, ICCA CONGRESS SERIES 177, 180–82 (1986).

³² Brazil Arbitration Act 1996, art. 1, available at <http://www.sulcom2000.com.br/elian/lei9307.htm>.

³³ Andre Emrich, *The Evolving Nature of Arbitration in Brazil*, INT'L ARB. REP., at 30, n.81 (Sept. 1998).

³⁴ French Civil Code, art. 1504.

³⁵ UNCITRAL Model Law, art. 36(1). No such statutory ground exists under the U.S. Federal Arbitration Act, but has been ruled by courts to be “specific application of the more general doctrine, rooted in the common law, that a court may refuse to enforce contracts that violate law or public policy.” *United Paperworkers Int’l Union v. Misco, Inc.*, 484 U.S. 29, 42 (1987).

³⁶ Swiss Law on Private International Law, art. 190(2).

tration context, courts in developed countries around the world have been hesitant to set aside awards on this basis, given the vagueness of the standard and the potential for its abuse. In the words of England's Court of Appeal, public policy

is never argued at all but when other points fail. It has to be shown that there is some element of illegality or that the enforcement of the award would be clearly injurious to the public good or, possibly, that enforcement would be wholly offensive to the ordinarily reasonable and fully informed member of the public.³⁷

Most frequently cited as possible cognizable violations of public policy are contracts or concessions obtained by bribery, and illegal or immoral agreements, or denial of due process in the conduct of arbitration. In some cases, an award could be subject to public policy challenge if the award or underlying transaction creates a monopoly or overly dominant market position for the winning party.³⁸ According to the law in most jurisdictions, the mere violation of local law by the arbitrators³⁹ or minor defects in the arbitral process⁴⁰ will not be enough to set aside the resulting award. Instead, it must be fundamentally unconscionable for the national court to give effect to the arbitration award—a test that is rarely, if ever, met.

In *Parsons and Whittemore Overseas Co. v. Société Générale de l'Industrie du Papier*,⁴¹ the losing party sought relief from an award rendered against it for failing to complete a project in Egypt as a result of U.S. government actions against Egypt during the Six Day War. The Second Circuit found despite the United States policy supporting the losing party's position, this was not enough to avoid the award. Public policy could only be invoked "where enforcement would violate the forum State's most basic notions of morality and justice," since the exception was "not meant to enshrine the vagaries of international politics."⁴² European courts have been similarly suspicious of public policy challenges, stating that non-recognition or *vacatur* of international arbitration awards is appropriate only when "the arbitral procedure suffered from a serious deficiency affecting the bases of civil and economic life."⁴³

³⁷ *Deutsche Schachtbau- und Tiefbohrgesellschaft GmbH v. Ras Al Khaimah National Oil Co.*, [1987] 2 All E.R. 769, 779 (Ct. App. 1987).

³⁸ *DO Zdravilisce Radenska v. Kajo-Erzeugnisse Essenzen GmbH*, Supreme Court of Slovenia, decision of Oct. 20, 1993, reprinted at 24 Y.B. COMM. ARB. 920 (1999) (annulling arbitration award rendered in Yugoslavia on grounds that the contract in dispute violated competition law and therefore Slovenian public policy).

³⁹ *General Electric Co. v. Renusagar Power Co. Ltd.*, [1994] 81 Company Cases 171 (India S.C.).

⁴⁰ See, e.g., *Moscow City Court*, Decision of Nov. 10, 1994, Model Arb. Law Case No. 146.

⁴¹ 508 F.2d 969 (2d Cir. 1974).

⁴² *Id.* at 974.

⁴³ *German Bundesgerichtshof Judgment* of May 15, 1986, published in N.J.W., Nov. 26, 1986, at 3027.

Nevertheless, in less developed countries that have a less favorable attitude towards arbitration in general, broader concepts of public policy could find application. Furthermore, the subject matter of investment arbitration may lend itself to a finding that an award against a government violates international public policy, or national public policy if the courts of the defendant state are reviewing the award. Often governments are forced to compensate for harm caused to private investors by regulations dealing with the environment, safety, subsidies, or the exploitation of natural resources. It is therefore not difficult to imagine a court finding that the harm to the general public in the defendant state is sufficient to support a challenge on the basis of public policy. For now, no investment arbitration award has been challenged in this way, although in the commercial arbitration case of *Karaha Bodas Company v. Pertamina*, the Indonesian government-owned oil company made a similar argument and lost.⁴⁴

Like “excess of powers,” the public policy challenge is frequently used by losing respondents, particularly states, to draw courts closer to the merits of their dispute. By arguing that the arbitrators have made a substantive decision that leads to an unjust or morally unconscionable result, respondents hope national courts at the place of arbitration will be reluctant to place their imprimatur on the resulting award, and will effectively act as a court of appeal on the merits. Most courts in developed countries, however, have refused to take the bait. In one such action to set aside an award, the Swiss Supreme Court rebuffed the respondent, refusing to “decide as an appellate instance; the merits of an award cannot be reviewed under the cover of public policy.”⁴⁵

d. *Procedural Irregularity*

Perhaps the most diverse ground for challenge of international arbitration awards under nearly all national arbitration statutes is related to the proper conduct of the proceedings. Courts in most countries will set aside an award if the arbitration was carried out in a fundamentally arbitrary or unfair way. This principle is closely related to public policy concerns, and claims of procedural irregularity are frequently combined with a public policy challenge, as well. A wide range of questionable practices could subject an award to *vacatur* at the place of arbitration, including *ex parte* communications, manifestly unequal treatment of the parties, unauthorized consolidation of proceedings, bias or corruption of one or more arbitrators, or denial of basic due process.

Generally speaking, however, courts do not tend to hold arbitrators to the same formal procedural formalities as would bind judges in court litigation. In particular, arbitrators enjoy broad powers to arrange hearings as they see fit, including the examination of witnesses, submission of briefs, and timing of oral

⁴⁴ 190 F. Supp. 936, 954–57 (S.D. Tex. 2001).

⁴⁵ Swiss Federal Tribunal, Judgment of Jan. 8, 1995, *reprinted at* 22 Y.B. COMM. ARB. 789 (1997).

hearings. This is particularly true in the international context, where a fusion of civil law and common law elements has engendered flexible practices that sometimes bear little resemblance to court procedures in either civil or common law countries. Furthermore, in many jurisdictions it is not enough that there has been a fundamental defect of procedure; the moving party must also show that, but for the irregularity, the arbitrators' decision would have been different.

In the American case of *Generica v. Pharmaceutical Basics*, for example, the losing side claimed that the arbitrators had denied it the opportunity to cross-examine a particularly damaging witness.⁴⁶ Insisting that this decision violated fundamental due process, the losing party sought to block enforcement of the award in federal district court. The court dismissed the motion on three grounds, each illustrative of the limits of the procedural defects ground for annulment. First, it confirmed the arbitral tribunal's broad freedom to organize and conduct the arbitration. The arbitrators' mode of evidence gathering was therefore "not such a fundamental procedural defect that it violated our due process jurisprudence." Second, the court found that to closely examine the testimony of the damaging witness, and the arbitrators' decision not to allow cross-examination, would "amount[] to an impermissible request that this Court review the arbitrator's fact-finding." Finally, the court determined that, in any case, the outcome of the arbitration was unlikely to have been affected by the limitation on cross-examination.

Investment arbitration tribunals have rarely provided ammunition to losing states who seek *vacatur* on grounds of procedural defect. The arbitrators involved in these often massive cases are among the most experienced and qualified in the world. Acutely aware of the criticisms leveled against the NAFTA and other investment arbitration regimes as "anti-democratic" and arbitrary, these tribunals have proven themselves as a general rule meticulous in their observance of procedural rules, proper techniques of communication with the parties, and thorough evidence collection. In addition, because the stakes in these cases are usually high, witness statements are usually voluminous and evidentiary hearings lengthy, further undermining any attack on the procedural fairness of the arbitration.

e. *"Manifest Disregard of the Law" and Other "Substantive" Grounds*

In the United States, the international provisions of the Federal Arbitration Act allow the refusal of confirmation on the same grounds as those established in the New York Convention, as long as the award in question was rendered outside the United States.⁴⁷ Where the arbitral *situs* is within the United States, both the domestic and international sections of the FAA apply, including extra-statutory grounds for *vacatur* such as "manifest disregard of the law."⁴⁸ This standard

⁴⁶ 1996 U.S. Dist. Lexis 13716 (E.D. Ill. Sept. 18, 1996).

⁴⁷ 9 U.S.C. § 201, *et seq.*

⁴⁸ *Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc.*, 126 F.3d 15, 24–25 (2d

was drawn from *Wilko v. Swan*, where the United States Supreme Court remarked, in *dicta*, that under normal circumstances “the interpretations of the law by the arbitrators *in contrast to manifest disregard* are not subject, in the federal courts, to judicial review for error in interpretation.”⁴⁹ While the Supreme Court gave little or no guidance as to the contours of “manifest disregard” or when such behavior by arbitrators would justify annulling an award, the federal circuit courts of appeal have one by one incorporated the idea into arbitration jurisprudence. Arbitration awards in the United States are rarely vacated under the manifest disregard standard, and even less frequently in the international context. However, courts have occasionally set awards aside on the merits, particularly where they found “no rational basis” for the arbitrators’ decision.⁵⁰

In most other countries, the merits of an arbitral tribunal’s reasoning and decision are beyond the pale of challenge, unless they can be fit within one of the permissible “procedural” defect categories, such as excess of powers or public policy. In some jurisdictions, however, local courts are given some authority to act as appeals courts over arbitration proceedings that take place within their territory. The English Arbitration Act 1996, for example, allows losing parties a full appeal as to points of law, but not issues of fact, as long as certain prerequisites are met.⁵¹ However, English courts are given a great deal of discretion in dismissing challenges to arbitration awards, and presumably often do so where the respondent seeks to set aside an international award on the merits. The Argentine Civil Code permits appeal of both law and facts, providing that “the same appeal may be instituted against an arbitral award as may be instituted against court judgments, as long as such appeal has not been waived in the agreement to arbitrate.”⁵² Other statutes take a middle position, similar to “manifest disregard” in the United States, allowing *vacatur* where the arbitrators have failed to apply the law chosen by the parties to govern their dispute.⁵³

The adoption and adaptation of the UNCITRAL Model Law has sharply reduced the number of countries where judicial appeal of arbitration awards on the merits is expressly permitted by local law. In particular, most of the new states of the former Soviet Union have excluded judicial review of law and fact, and

Cir. 1997); *Industrial Risk Insurers v. M.A.N. Guttehoffnungshutte GmbH*, 141 F.3d 1434, 1441 (11th Cir. 1998); *Spector v. Torenberg*, 852 F.Supp. 201, 205–206 (S.D.N.Y. 1994).

⁴⁹ 363 U.S. 427, 436–437 (1953) overruled on other grounds by *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989).

⁵⁰ *Ainsworth v. Kurnick*, 960 F.2d 939 (11th Cir. 1992); *Shearson Lehman Brothers, Inc. v. Hedrich*, 639 N.E.2d 228 (Ill. App. 1994)

⁵¹ English Arbitration Act 1996, art. 69.

⁵² Argentine Civil Code, art. 758. *See also* Iraqi Civil Code, arts. 273–274.

⁵³ Oman Arbitration Act, art. 53(4), available at <http://www.gccarbitration.com/english/rules/oman-2.htm>.

many countries in Latin America have amended their legislation as traditional hostility to international arbitration has faded. This leaves losing respondent states in investment arbitration with decidedly fewer options, particularly where the parties have carefully chosen the place of arbitration with regard to the *vacatur* provisions of national arbitration law.

3. Agreements to Narrow the Grounds for Annulment

It is generally accepted that the parties to an arbitration clause may to some extent narrow the grounds upon which an arbitral award may be set aside by national courts.⁵⁴ Although in some jurisdictions parties may not be able to waive their right to some form of judicial review of arbitration awards,⁵⁵ the choice of certain arbitration rules may effect such a waiver. In particular, the London Court of International Arbitration Rules (rarely used in investment arbitration) provides that in choosing arbitration under that system “the parties also waive irrevocably their right to any form of appeal, review or recourse to any state court or other judicial authority, insofar as such waiver may be validly made.”⁵⁶ Neither the ICSID Additional Facility nor the UNCITRAL Rules contain a similar provision. Even where arbitral rules are silent, many legal systems recognize the validity of “exclusion agreements,” by which the parties voluntarily restrict judicial review or eliminate it altogether.⁵⁷ Furthermore, as noted above, failure to object to procedural irregularities during the arbitration may effect an implied waiver of recourse under some legal systems.

While some jurisdictions, like Switzerland, allow for a waiver of the right to set aside arbitral awards at the place of arbitration, it is doubtful that most legal systems would allow the parties to waive the right to object to confirmation of the award at the place of *enforcement*. The significance of the Swiss and former Belgian legislation is that it is intended to shift the locus of control from the arbitral *situs*, which often has little connection with the parties or their transaction, to

⁵⁴ Robert Fischer & Roger Haydock, *International Commercial Disputes: Drafting an Enforceable Arbitration Agreement*, 21 WM. MITCHELL L. REV. 941, at 973 (1996).

⁵⁵ In New York, for instance, the right to cross-examination has been deemed a fundamental element of due process, and therefore probably unwaivable. STEIN & WOTMAN, *INTERNATIONAL COMMERCIAL ARBITRATION IN NEW YORK* 87–96 (1986). Professor Park suggests that at least in three areas, judicial review should be impossible to waive, in the interests of fairness and integrity of the arbitral system: (1) arbitrability; (2) the right to be heard; and (3) international public policy. William Park, *Safeguarding Procedural Integrity in International Arbitration*, 63 TUL. L. REV. 647, at 707 (1989).

⁵⁶ LCIA Rules (1998), art. 26.9.

⁵⁷ See, for example, Swiss federal law on arbitration, the Loi Fédéral de Droit International Privé (LDIP), which allows express waiver of all judicial review where all parties are non-Swiss, in art. 192. The most extreme expression of limited judicial review was under the Belgian arbitration law in force until 2000, which as a default rule allowed no action for annulment of arbitral awards rendered in Belgium in disputes between foreign parties. Law of Mar. 27, 1985 (Belg.) enacting Code Judiciaire, art. 1717.

the place of enforcement, which is likely to be where one of the parties has substantial assets. Public policy, codified in the New York Convention, demands that states be able to withhold police power where enforcement would contravene their fundamental interests or societal goals.

For NAFTA arbitration, where there is rarely, if ever, a single agreement to arbitrate, the issue of contractually narrowed judicial review is purely academic. Many other investment arbitration cases, however, arise out of concession agreements, which could theoretically contain such a clause. If more UNCITRAL and Additional Facility investment arbitration awards come to be challenged in national courts, private concessionaires may begin to consider pushing their government counterparts for language restricting the scope of judicial review to an absolute minimum.

4. Waiver of Objections

Under the law of many jurisdictions, certain otherwise permissible grounds for setting aside international arbitration awards may be unavailable to the challenging party, because it failed to object to the alleged defect during the arbitration itself. This rule is particularly applicable in connection with jurisdictional objections, based on the principle that “a party may not submit a claim to arbitration and then challenge the authority of the arbitrator to act after receiving an unfavorable result.”⁵⁸

Some arbitration statutes are explicit in this regard. The Swedish Arbitration Act, for example, separates grounds for *vacatur* into two separate categories, the waivable and the unwaivable. Under the Act, an award can be declared void regardless of the losing party’s behavior only where the award is not in writing, violates Swedish public policy, or deals with inarbitrable subject matter.⁵⁹ As for all other grounds for *vacatur*, the Act states,

A party shall not be entitled to rely upon a circumstance which, through participation in the proceedings without objection, or in any other manner, he may be deemed to have waived.⁶⁰

From the prevailing claimant’s perspective, the rule that grounds for *vacatur* may be waived is particularly useful in blocking challenges based on alleged procedural defects. From respondent counsel’s point of view, the rule serves as a warning to bring all possible objections during the arbitration, despite the possibility that this kind of aggressive stance could alienate the arbitral tribunal and negatively impact the respondent’s case on the merits.

⁵⁸ *Fortune, Alsweet and Eldridge, Inc. v. Daniel*, 724 F.2d 1355 (9th Cir. 1983).

⁵⁹ Swedish Arbitration Act, art. 33, available at http://www.chamber.se/arbitration/english/laws/skiljedomslagen_eng.html.

⁶⁰ Swedish Arbitration Act, art. 34.

C. THE EFFECT OF ANNULLED INVESTMENT ARBITRATION AWARDS

Where a respondent in investment arbitration successfully annuls an award at the place of arbitration, the effectiveness of this victory is unclear. A court *vacatur* in one country may not be honored by judges in other jurisdictions.⁶¹ While the New York Convention clearly designates the arbitral *situs* as the most appropriate venue for judicial challenge to international arbitration awards, success before a local court in seeking *vacatur* does not firmly close the book on enforcement outside that jurisdiction. Because the New York Convention exception to enforcement based on annulment or *vacatur* at the place of arbitration is worded permissively,⁶² some courts have enforced awards that were annulled in foreign courts.

In *Hilmarton Limited v. Omnium de Traitement et de Valorisation*,⁶³ the French Cour de Cassation upheld a lower court's decree confirming a foreign arbitral award despite the fact that the award had been set aside by a court in Switzerland, the arbitral *situs*. The court held that although the Swiss court had applied Swiss arbitration law in deciding to deprive the award of legal force in Switzerland, the award "remains in existence even if set aside, and its recognition in France is not contrary to international public policy." This is not the first time that French courts have held that courts at the place of arbitration and the place of enforcement are equally competent to assess the validity of international arbitration awards.⁶⁴

Similarly, in *In re Chromalloy Aeroservices Inc. v. Arab Republic of Egypt*,⁶⁵ the United States District Court for the District of Columbia granted the plaintiff's motion to confirm an arbitration award rendered in Egypt against the Egyptian Air Force, although the defendant had successfully moved to set aside the award in the Egyptian courts. The federal district court relied largely on the parties' explicit waiver of judicial review in their agreement to arbitrate and the possible lack of independence of the Egyptian courts, both somewhat unusual and important considerations. However, the court also stated in more general terms that in the United States, because under the domestic provisions of the Federal Arbitration Act foreign court judgments are not a ground for *vacatur*, Article VII

⁶¹ A comprehensive and thoughtfully written commentary on the problem of enforcing annulled arbitration awards can be found in HAMID GHARAVI, *THE INTERNATIONAL EFFECTIVENESS OF THE ANNULMENT OF AN ARBITRAL AWARD* (2002).

⁶² New York Convention, art. V(1)(e) ("recognition and enforcement of the award may be refused . . . if . . . the award . . . has been set aside or suspended by a competent authority of the country in which . . . the award was made").

⁶³ Decision No. 484, French Cour de Cassation, First Civil Chamber (1994); *Award Upheld in France Despite Annulment by Swiss Court*, INT'L ARB. REP., May 1994.

⁶⁴ See, e.g. *Pabalk Ticaret Sirkeri v. Norsolor*, French Cour de Cassation, Decision of Oct. 9, 1984, reprinted at 1985 REV. ARB. 430.

⁶⁵ 939 F.Supp. 907 (D.D.C. 1996).

of the New York Convention allows U.S. courts to ignore such foreign decisions and enforce awards despite Article V(1)(e) of the Convention.

Except in France, the status of annulled awards remains undetermined in most jurisdictions; in many countries the issue has yet to be confronted.⁶⁶ Many commentators have supported *Hilmarton*, *Chromalloy*, and similar court decisions as evidence of a growing trend around the world bolstering the enforceability of international arbitration awards.⁶⁷ To be sure, such cases tend to improve the currency of international awards and ensure against corrupt courts at the arbitral *situs*. However, within the context of investment arbitration, as opposed to the commercial variety, the utility of an annulled award is questionable, despite the cases described above. Where the award is against a sovereign state, widely accepted rules of sovereign immunity make forced compliance extremely difficult: in most jurisdictions, the judgment creditor may only execute upon the government's commercial assets, a rule that normally excludes the vast majority of property that states hold outside their own territory.⁶⁸ Taking an enforcement campaign to the local courts of the defendant state is even less likely to succeed, given the lack of judiciary independence and extensive immunity conferred by national law in most capital-importing countries. Collection on investment arbitration awards therefore rests largely on voluntary compliance, both inside and outside the Washington Convention system. While voluntary compliance has not been perfect, breaking down in cases like *LETCO v. Liberia*⁶⁹ and *SOABI v. Senegal*,⁷⁰ losing respondent states have generally paid awards against them.

D. CASE STUDIES

The preceding analysis of the most commonly recognized bases for annulling international arbitration awards, it might seem as though courts have narrowed the grounds beyond all hope for the respondent to prevail. To be sure, in many coun-

⁶⁶ See P. Ramaswamy, *Enforcement of Annulled Awards: An Indian Perspective*, 19 J. INT'L ARB. 461, at 472 (2002) ("an Indian court is unlikely to enforce an award annulled abroad because of the "territorial" view that the Indian courts have taken").

⁶⁷ Emmanuel Gaillard & Jenny Edelstein, *Baker Marine and Spier Strike a Blow to the Enforceability in the United States of Awards Set Aside at the Seat*, 3 INT. ARB. L. REV. 37 (2000). But compare GHARAVI, THE INTERNATIONAL EFFECTIVENESS OF THE ANNULMENT OF AN ARBITRAL AWARD (2002) (suggesting that enforcement of annulled arbitration awards is contrary to the goals of predicatbility and harmonization of arbitration law).

⁶⁸ Indeed, most industrialized countries own very little commercial property at all, particularly after the massive privatizations of the 1990s. It is difficult to imagine, for example, how an investor who wins an award against the United States under the NAFTA would ever be able to force compliance by execution on assets.

⁶⁹ *Liberian Eastern Timber Company v. Republic of Liberia*, 650 F. Supp. 73 (S.D.N.Y. 1987) (enforcement of ICSID award blocked by Liberia's claims of sovereign immunity).

⁷⁰ *Société Ouest Africaine de Bétons Industriels v. Sénégal*, French Cour de Cassation, (June 11, 1991) (ICSID award enforceable, but question of sovereign immunity reserved for future ruling).

tries the review of international arbitral awards is one of the narrowest known to the law. It is presumed that an exceedingly narrow approach to judicial review is in keeping with the expectations of the parties, who—at least in the commercial context—have expressly chosen to remove their dispute from the jurisdiction of national courts. But no matter how long the odds, motions to set aside awards are by no means uncommon. The more the respondent stands to lose by paying the award, the more likely he is to seek annulment, even if the chances of success are small. Not only are investment arbitration awards frequently large, even by international arbitration standards, they are also colored by issues of sovereignty and political ideology. These concerns may create domestic political pressure on losing host governments that compel them to challenge the awards against them, if only to prove to constituents at home that all possible avenues have been explored. In part as a result of these considerations, three well-known investment arbitration awards have been challenged by respondent governments in the last two years alone. In one case, the government's petition was partially granted, in the second the case was dismissed, and the third has yet to be decided.

1. *Metalclad v. United Mexican States*

a. *Facts*

The *Metalclad* case⁷¹ arose out of the American claimant company's purchase of a site in San Luis Potosí, Mexico, to operate as a hazardous waste landfill. The Mexican federal authorities repeatedly approved the project, and assured Metalclad that no further permits were required. Local opposition to building the waste disposal facility grew, along with intense pressure on state and local authorities to prevent the landfill from going online. Meanwhile, Metalclad invested several million dollars in preparing the site for use, obtaining additional assurances from officials in Mexico City that operations would be in compliance with all regulatory requirements. Nevertheless, the local municipality obtained a court order preventing the opening of the facility. While the court order was eventually vacated, the governor of San Luis Potosí ultimately issued an Ecological Decree designating the landfill site a natural preserve for the protection of rare cactus. Metalclad requested arbitration against Mexico under the NAFTA, to be conducted pursuant to the ICSID Additional Facility Arbitration Rules. The official, agreed-upon place of arbitration was Vancouver, British Columbia, Canada, although most of the proceedings actually took place in Washington, D.C.

In its August, 2000 award, the tribunal awarded Metalclad \$16,685,000, finding that Mexico had violated Metalclad's rights under the substantive provisions of the NAFTA. Most importantly, the arbitrators held that Mexico's federal authorities had led Metalclad to believe that it had obtained all permits necessary to begin construction of the landfill. The tribunal found that Mexico had therefore breached its obligation under the NAFTA to provide American investors "fair

⁷¹ *Metalclad Corporation v. United Mexican States*, Award (Aug. 30, 2000).

and equitable treatment” by failing “to ensure a transparent and predictable framework for Metalclad’s business planning and investment.” Furthermore, the arbitrators determined that the local authorities’ deprivation of the economic benefit of its investment constituted expropriation, requiring prompt, adequate, and effective compensation under NAFTA Article 1110.⁷²

b. The Annulment Action

Soon after the award was rendered, Mexico sued Metalclad in the Supreme Court of British Columbia (which is actually the trial-level court), asking it to set aside the award. After receiving extensive briefings and oral argument, Mr. Justice Tysoe rendered an opinion on May 2, 2001, a decision which is analyzed below.⁷³

i. Which Statute Applies

An important threshold issue that the Court faced was the determination as to which of two local arbitration statutes applied. The British Columbia International Commercial Arbitration Act (BCICAA) applies to all arbitrations considered both international and commercial. The ICAA, based largely on the UNCITRAL Model Law, establishes a relatively narrow scope of judicial review, limiting annulment exclusively to cases of serious procedural defects. The British Columbia Commercial Arbitration Act (BCCAA), meanwhile, which applies in all other cases, allows courts to re-examine the merits of the dispute, and set aside an award for misapplication of law. Review for errors of law (and sometimes fact) is a common feature of domestic arbitration statutes, particularly in Commonwealth countries. Mexico contended that the CAA was the governing legislation, since investment arbitration deals with government regulations and therefore cannot be considered “commercial.”⁷⁴

Judge Tysoe disagreed. Investment, he held, is an inherently commercial activity, and therefore falls squarely within the ambit of the ICAA. As the UNCITRAL Model Law drafters advised in a footnote to the definitions section of the Law, “[t]he term ‘commercial’ should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature.”⁷⁵ As a result, the international, rather than domestic statute was to be applied to Mexico’s challenge, excluding mistakes of law as an acceptable basis for *vacatur*. As quickly became clear, however, this ruling did not prevent the Court from delving deeply into the merits of the *Metalclad* dispute.

⁷² *Id.* at paras. 102-112.

⁷³ *United Mexican States v. Metalclad Corp.*, 2001 B.C.S.C. 664 (2001). *See also* Yelena Faynblyum, *The Metalclad Appeal: A Pyrrhic Victory?* available at <http://www.cba.org/cba/newsletters/Environmental-06-2001/eco3.asp>.

⁷⁴ *United Mexican States v. Metalclad*, *id.* at paras. 44-45.

⁷⁵ UNCITRAL Model Law, art. 1(1), n.1.

ii. Excess of Mandate

Since it failed in its attempt to break through directly to the merits of the case on appeal by application of British Columbia's domestic arbitration statute, Mexico's challenge rested largely on the argument that the *Metalclad* tribunal had exceeded its authority in a variety of ways. In particular, Mexico argued that the arbitrators had created a new basis for liability under Article 1105 of the NAFTA, namely the violation of a "transparency" requirement found elsewhere in the treaty.⁷⁶ After receiving these arguments, Judge Tysoe explained:

the Tribunal . . . set out its understanding of transparency and it then reviewed the relevant facts. After discussing the facts and concluding that the Municipality's denial of the construction permit was improper, the Tribunal stated its conclusion which formed the basis of its finding of a breach of Article 1105; namely, Mexico had failed to ensure a transparent and predictable framework for Metalclad's business planning and investment. Hence, the Tribunal made its decision on the basis of transparency. This was a matter beyond the scope of the submission arbitration because there are no transparency obligations contained in Chapter 11.⁷⁷

In so doing, Judge Tysoe stressed that he did not view the arbitrators' decision as merely giving content to Article 1105:

In the present case, . . . the Tribunal did not simply interpret the wording of Article 1105. Rather, it misstated the applicable law to include transparency obligations and it then made its decision on the basis of the concept of transparency.⁷⁸

Because the arbitrators had decided that Mexico's actions prior to the issuance of the Ecological Decree constituted a violation of the NAFTA due to a lack of transparency, Judge Tysoe set aside that portion of the award.

This decision engendered a great deal of controversy.⁷⁹ To be sure, the transparency obligation is contained in Article 102 of the NAFTA, and is not among Chapter 11's substantive standards of treatment, and therefore it could reasonably be rejected as a proper independent ground for State liability under the treaty. But the *Metalclad* tribunal's task, as it saw it, was simply to give content to the elu-

⁷⁶ United Mexican States v. Metalclad, *supra* note 73, at para. 66.

⁷⁷ *Id.* at para. 68.

⁷⁸ *Id.* at para. 70.

⁷⁹ See, e.g., Todd Weiler, *Metalclad and the Government of Mexico: A Play in Three Parts*, 2 *J. WORLD INVESTMENT* 685 (2001); and Ian A. Laird, "The Weakening of the International Rule of Law in the NAFTA Zone," presentation prepared for May 3, 2002, CD Howe/Munk Center Conference on NAFTA Chapter 11, at 12-14.

sive notion of “fair and equitable treatment” contained in Article 1105. For them, a lack of regulatory transparency seemed a clearly unfair circumstance, and reference to the term in Article 102 was simply to underline that the NAFTA parties appeared to share this view. Surely it was just as logical for the arbitrators to seek examples of unfair conduct within the four corners of the NAFTA, rather than drawing on general principles of law or their own subjective sense of justice.

iii. Procedure Not in Accordance with Parties' Agreement

Mexico also argued that in considering the Ecological Decree as the primary basis for a finding of expropriation, it had violated the parties' agreed procedures, and that the part of the award dealing with expropriation should therefore be set aside. In Mexico's submission, the allegations relating to the Ecological Decree constituted separate claims, because the Decree was implemented after Metalclad had initiated arbitration against Mexico, and therefore should not have been considered together with the main claims related to the revocation of Metalclad's license.⁸⁰ The tribunal ruled that allegations connected to the Ecological Decree were “ancillary or additional claims,” covered by ICSID Additional Facility Rules, Article 48. Under that provision, ancillary or additional claims can be added into an ongoing arbitration as long as they are “within the scope of the agreement to arbitrate” and presented no later than the reply brief.⁸¹

Judge Tysoe gave rather short shrift to Mexico's procedural defect argument. Metalclad had complied with the requirements of the Additional Facility Rules, and he agreed with the arbitrators' assessment that the Ecological Decree arguments constituted an additional claim. Furthermore, Mexico had been given an ample opportunity to defend the Ecological Decree. As a result, Judge Tysoe concluded that “no error has been demonstrated in the arbitral procedure as a result of the Tribunal considering the claim based on the Ecological Decree.”⁸²

iv. Violation of Canadian Public Policy

In an additional attempt to further open the merits of the dispute to judicial review, Mexico argued that a “patently unreasonable error” by the arbitrators violated Canadian public policy, and therefore provided grounds for setting aside the award under the ICAA. Having failed to show that the tribunal exceeded its authority in ruling that the Ecological Decree constituted an indirect expropriation, Mexico relied on the case of *Navigation Sonamar Inc. v. Algoma Steamships, Ltd.*⁸³ to insist that this was an error rising to an abuse of the arbitrators' authority and a violation of *ordre public*.⁸⁴

⁸⁰ *United Mexican States v. Metalclad*, *supra* note 73, at para. 88.

⁸¹ ICSID Additional Facility Arbitration Rules, arts. 48(1)-(2).

⁸² *United Mexican States v. Metalclad*, *supra* note 73, at paras. 89-91.

⁸³ [1987] R.J.Q. 1346.

⁸⁴ Canada submitted a brief in support of Mexico's petition to set aside the *Metalclad*

Judge Tysoe first stated that the expropriation decision was not sufficiently egregious to be “patently unreasonable,” although it is clear that he disagreed with the tribunal’s reasoning on the point. More interestingly, however, he noted that such a ground for challenge should in any case be restricted to the domestic context, and had no place in the construction of the ICAA.

The Tribunal gave an extremely broad definition of expropriation for the purposes of Article 1110. In addition to the more conventional notion of expropriation involving a taking of property, the Tribunal held that expropriation under the NAFTA includes covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property. This definition is sufficiently broad to include a legitimate rezoning of property by a municipality or other zoning authority. However, the definition of expropriation is a question of law with which this Court is not entitled to interfere under the International CAA.⁸⁵

Judge Tysoe thus rejected Mexico’s frontal assault on the tribunal’s substantive rulings. This decision, clearly in line with the reasonable interpretation of Canada’s statute and practices in most developed countries, is difficult to reconcile with his investigation of points of law related to Article 1105. Most likely, this language was devised by Judge Tysoe to deflect criticism of his partial annulment on excess of authority grounds.

c. *The Aftermath*

Because the British Columbia court upheld the *Metalclad* award on most points, and in particular declined to overturn the tribunal’s finding that Mexico had expropriated the claimant’s property, the modification of the damages award against Mexico was relatively insignificant. Criticism of the partial annulment was nevertheless fierce, and there was widespread confidence that *Metalclad*’s appeal to the Canadian Supreme Court would be successful and lead to the reinstatement of the award. Shortly after the appeal was filed, the parties agreed to a settlement, whereby Mexico paid \$16 million to *Metalclad*, which abandoned all further litigation.⁸⁶ The B.C. court’s decision, however, continues to reverberate

award, arguing that Canadian courts should give no deference to NAFTA awards and allow full appeals on the merits. *United Mexican States v. Metalclad*, Outline of Argument of Intervenor Attorney General of Canada (Feb. 16, 2001), at para. 30, available at www.dfait-maeci.gc.ca/tna-nac/canada_submission-e.pdf (“Given the characteristics of NAFTA Chapter Eleven dispute settlement, and applying the pragmatic and functional approach, it is clear that in interpreting NAFTA, Chapter Eleven tribunals should not attract extensive judicial defence and should not be protected by a high standard of judicial review”). This position presages the one Canada took on its own behalf in its *S.D. Myers* challenge, see below.

⁸⁵ *United Mexican States v. Metalclad*, *supra* note 73, at para. 99.

⁸⁶ *Metalclad to Receive \$ 16 Million NAFTA: Mexico Pays the Newport Beach Company to End 5-Year Dispute Over Dump Site*, L.A. TIMES, Oct. 27, 2001, at C8.

in the investment community worldwide. While many believe that the judge's approach was far too intrusive into the merits of the case, respondent states may be emboldened to seek to set aside awards against them, hoping local judges at the place of arbitration will, like Justice Tysoe of the B.C. Supreme Court, give less deference in such cases than in the commercial arbitration context.

2. CME v. Czech Republic

a. Facts

The *CME* case arose out of investments in the broadcasting sector by American magnate Ronald S. Lauder (of Estée Lauder fame). In 1994, CME, a Dutch Antilles company controlled by Lauder, acquired CNTS, a Czech company that ran the first independent television station in the Czech Republic, TV Nova. Innovative and sometimes controversial programming (including the famous naked weathergirl) made TV Nova wildly successful. After a falling out with Lauder, CME's local director, Dr. Zelezny, used his connections with the state media regulatory body, the Media Council, to deprive the company of its exclusive licensing arrangement. As a result, CME's business was seriously harmed. Lauder first initiated arbitration in London in his capacity as an individual investor under the United States-Czech Republic BIT, and six months later CME filed a claim against the government under the Netherlands-Czech Republic BIT, which resulted in the formation of a tribunal in Stockholm.

In September 2001, the Stockholm tribunal issued an award on liability, finding for CME and holding that the Czech Republic had violated a range of obligations under the Netherlands-Czech Republic BIT.⁸⁷ In preparation for a future phase of the arbitration to determine the amount of damages due to CME, the tribunal ruled that the breaches in question gave rise to an obligation upon the Czech Republic to compensate CME for the "full market value" of its investment.⁸⁸

b. Annulment Proceeding

Shortly after the liability award was issued, the Czech Republic applied to the Svea Court of Appeal in Stockholm to set aside the award. As part of the filing of that action, the Czech government posted a bond for the full amount of the award, such that CME would promptly receive payment on its claim should the Czech

⁸⁷ *CME Czech Rep. B.V. v. Czech Republic*, Partial Award (Sept. 13, 2001), available at <http://www.mfcr.cz/Arbitraz/en/PartialAward.doc>.

⁸⁸ In the final phase of the arbitration on the quantification of damages, which proceeded simultaneously with the Czech Republic's challenge of the Partial Award, the tribunal awarded CME \$269 million plus 10 percent interest per annum. *CME Czech Rep. B.V. v. Czech Republic*, Final Award (Mar. 13, 2003), available at http://www.cetv-net.com/ne/articlefiles/439-Final_Award_Quantum.pdf.

challenge fail.⁸⁹ The Swedish Arbitration Act, which governed the annulment action, roughly tracks the UNCITRAL Model Law in this area, with a few important modifications. Most significantly, the Swedish statute specifically bars challenges on several of the permissible grounds if the moving party can be deemed to have waived the objection by not raising it in the course of the arbitration proceedings. On May 15, 2003, the Swedish Court issued its opinion, rejecting the Czech Republic's motion to set aside the award.⁹⁰

i. Procedural Irregularity

The Czech Republic first put forward the argument that the Stockholm arbitration was procedurally defective, because Jaroslav Hándl, its appointed arbitrator, had been excluded from much of the deliberations that led to the drafting of the award. After Hándl had expressed his disagreement with the other two arbitrators (Wolfgang Kühn and Stephen Schwebel) at the first post-hearing deliberation session, he was allegedly marginalized in the subsequent process, did not receive all drafts of the award in a timely fashion, and did not have enough time to review and comment on those drafts before the next draft was prepared. Ultimately, Hándl refused to sign the award, submitted a separate opinion, and then resigned from the tribunal.⁹¹

After hearing extensive testimony from the arbitrators themselves, the Swedish court rejected this argument.⁹² The court explained that the parties and Swedish law delegate a great deal of authority to the arbitrators, within the framework of applicable rules, to organize their deliberations as they see fit. The lack of restriction under Swedish law and the UNCITRAL Arbitration Rules were designed precisely to secure the flexibility necessary to defeat any attempts by a dissenting arbitrator to stall the process and block the issuance of an award adverse to the party that appointed him. Furthermore, the court concluded from the evidence presented that arbitrator Hándl had not in fact been excluded from deliberations in any significant way, and suggested that if he was marginalized at all, this was the natural consequence of his minority opinion:

[The Chairman] appears the whole time to have treated Hándl correctly and Hándl appears to have been afforded an opportunity to submit his comments to the extent which reasonably may be dictated by considera-

⁸⁹ Czech Republic Will Pay Immediately If Stockholm Court Upholds Award, PRN EWSWIRE-FIRSTCALL, Mar. 31, 2003, available at <http://www.finanznachrichten.de/nachrichten/artikel-1931445.asp>.

⁹⁰ Czech Republic v. CME Czech Republic B.V., Svea Court of Appeal, Case No. T 8735-01, decision of May 15, 2003 (Stockholm Court Decision), available at http://www.cetv-net.com/ne/articlefiles/439-english_translation_of_the_svea_judgment.pdf.

⁹¹ Hándl was replaced by Ian Brownlie during the final damages phase. Brownlie also ended up in the minority, issuing a lengthy separate opinion but also signing the final award.

⁹² Stockholm Court Decision, *supra* note 90, at 85-90.

tions of courtesy between colleagues. Hándl's feeling of having been excluded is probably, in all essential regards, connected to the fact that the award did not meet with support for his opinion in the case.⁹³

The court added that Hándl had received ample time to review drafts, and in fact the schedules he proposed for redacting the award were unjustifiably slow.⁹⁴

ii. Excess of Mandate

The Czech Republic advanced several reasons why the Stockholm tribunal exceeded its mandate in issuing the award on liability. Perhaps the central argument presented was that the tribunal had ignored the terms of the submission to arbitration by ignoring the proper system of applicable law. The choice-of-law clause of the Netherlands-Czech BIT called for application of the terms of the BIT, Czech law, and international law, with no indication which body of law, if any, should take precedence. The Czech Republic asserted that the arbitrators had completely disregarded Czech law, and had invoked rules not part of international law. Therefore, it argued, the entire award was the result of an impermissible decision on the basis of general equity (*ex aequo et bono* or *amiable composition*) and should be annulled. The Swedish court disagreed, noting that the arbitrators had spent a great deal of time discussing whether the BIT required them to apply Czech law, and had ultimately decided that the clause provided a "menu" of options from which they had full discretion to choose. Under the Swedish Arbitration Act, it stated, "an excess of mandate may be involved only where the arbitrators' interpretation of the choice of law clause proves to be baseless such that their assessment may be equated with . . . having ignored a provision regarding applicable law."⁹⁵ The tribunal's decision to apply primarily international law, the court concluded, was perfectly reasonable, in light of the BIT language. The court refused to delve into various sections of the Stockholm award to see which sources of law the tribunal applied in each instance, since "it is sufficient to clarify whether the arbitral tribunal applied any of the [applicable] sources of law. . . . The fact that each legal statement in the award is not directly derived citing a rule of law cannot be deemed to mean that the tribunal conducted a general assessment of reasonableness."⁹⁶

The Czech Republic next argued that the Stockholm tribunal had exceeded its mandate because the principles of *res judicata* and *lis pendens* barred the proceedings due to the pendency of Ronald Lauder's parallel arbitration in London. The Stockholm court rejected this challenge as well, for two reasons. First, there was no identity of parties, since the claimants were different in the two arbitra-

⁹³ *Id.* at 89.

⁹⁴ *Id.* at 90.

⁹⁵ *Id.* at 91.

⁹⁶ *Id.* at 94.

tions, and therefore the doctrines had no effect on the Stockholm tribunal. Second, the Czech Republic waived any possible challenge on this ground at the annulment stage by refraining from making the same argument before the arbitral tribunal. Excess of mandate, the court underlined, like all other challenges not based on public policy, is subject to the rule that “a party is not entitled to invoke a circumstance which, through participating in the arbitration proceedings without objection or otherwise, he may be deemed to have waived.”⁹⁷ During the arbitration, the Czech Republic “expressly waived raising an objection of *lis pendens* or *res judicata*,” and therefore could not interpose that argument during the annulment case in court.⁹⁸

The third “excess of mandate” argument was that the tribunal had erroneously invoked a theory of “joint tortfeasors” in order to find that the Republic was liable for injury to CME despite the intervening actions of a private party, Dr. Zelezny. “Without the conclusion that there existed joint tortfeasors, the Republic could not have been held liable for the injury incurred by CME’s investment and the outcome of the case would have been different.”⁹⁹ This argument, more perhaps than any of the others, clearly attacked the tribunal’s reasoning and factual findings on the merits, rather than the scope of the parties’ agreement to arbitrate. Nevertheless, the Stockholm court dismissed the challenge on its own terms, finding that the arbitrators’ decision in fact did not depend upon any “joint tortfeasors” concept, and that this notion was introduced only in passing as a response to objections the Czech Republic itself had raised.¹⁰⁰

iii. Violation of Swedish Public Policy

As a last resort, the Czech Republic also argued that the *CME* award violated Swedish public policy, or, in the words of the Swedish arbitration statute, that the Stockholm award and the manner in which it came about were “manifestly incompatible with the principles on which the legal system of Sweden is based.”¹⁰¹ The Czech Republic’s position in this regard was that the same defects, particularly the exclusion of the Czech arbitrator from deliberations and the tribunal’s assumption of jurisdiction despite the pendency of parallel proceedings in London, when taken together also constituted a public policy breach sufficient to annul the award. The court rejected this submission with minimal discussion, simply

⁹⁷ *Id.* at 96.

⁹⁸ On the same grounds of waiver, the court dismissed two additional Czech “excess of mandate” arguments, namely that the tribunal had impermissibly included preliminary decisions on damages in an award that was expressly limited to liability and that the arbitrators had found the Republic liable for treaty violations that occurred before CME acquired its investment. *Id.* at 100–104.

⁹⁹ *Id.* at 41.

¹⁰⁰ *Id.* at 100–101.

¹⁰¹ Sweden Arbitration Act, art. 33.

stating that the Czech Republic had “no shown ample reason for why the arbitration award or the manner in which it came about should be in violation of *ordre public* and thereby invalid based on the grounds asserted.”¹⁰²

It is surprising that the Czech Republic offered no additional grounds for public policy violation. Once the Swedish court had found that the defects complained of were too insignificant to justify setting aside the award under the “excess of powers” rubric, it was a foregone conclusion that the identical facts would not support the public policy ground, either. The Czech Republic might have tried to assert that the overwhelming size of the award, more than \$300 million with interest, would have a crippling effect on the functioning of the Czech government and a devastating effect on public welfare in the country. Given that the Swedish statute concentrated on national, rather than international public policy, it is unlikely that this argument would have won the day, either. But given widespread grass-roots outcry concerning the negative effects of large investment arbitration awards on development, the heavy burden of large investment arbitration awards on the host state’s populace will probably play a major role in future public policy challenges.

3. S.D. Myers v. Canada

a. Facts

An export control mechanism was the source of the dispute in *S.D. Myers v. Canada*.¹⁰³ In that case, SDMI was a U.S. corporation engaged in the treatment and disposal of PCB wastes. It established a Canadian subsidiary to contract for the export of these wastes to SDMI’s U.S.-based facilities for treatment. In the interest of promoting a homegrown Canadian PCB handling industry, the Canadian government implemented a ban on the export of the materials from Canada.¹⁰⁴ SDMI claimed that this export ban violated several substantive provisions of the NAFTA, including national treatment, fair and equitable treatment, the prohibition on performance requirements, and compensation for expropriation. SDMI also argued that these violations led to the destruction of its business in Canada, and therefore constituted an indirect expropriation of the company’s property.¹⁰⁵

The tribunal ruled that while the goal of maintaining a domestic PCB-processing capacity was a legitimate goal, it was achieved in a way that unnecessarily compromised Canada’s NAFTA obligation to treat American investors no less favorably than Canadian investors, and therefore violated Article 1102. A major-

¹⁰² Stockholm Court Decision, *supra* note 90, at 105.

¹⁰³ *S.D. Myers, Inc. v. Government of Canada*, Partial Award (Nov. 13, 2000) [hereinafter *Myers* Partial Award].

¹⁰⁴ *Id.* Partial Award at paras. 122–23.

¹⁰⁵ *Id.* Partial Award at paras. 130–44.

ity of the arbitrators also considered Canada's actions in blocking the export of PCB wastes to breach Article 1105, largely due to the arbitrary and unjust manner in which the measures discriminated against SDMI. Arbitrator Chiasson dissented on this point, insisting that violation of the anti-discrimination clause of Article 1102 could not, standing alone, also be deemed a breach of the obligation to provide fair and equitable treatment under Article 1105. The tribunal denied SDMI's expropriation claim, however, noting that

[e]xpropriations tend to involve the deprivation of ownership rights; regulations a lesser interference. The distinction between expropriation and regulation screens out most potential cases of complaints concerning economic intervention by a state and reduces the risk that governments will be subject to claims as they go about their business of managing public affairs.¹⁰⁶

b. The Annulment Action

Apparently emboldened by the *Metalclad* court decision, on February 8, 2001, Canada applied to the Federal Court of Canada in Ottawa¹⁰⁷ pursuant to the federal Commercial Arbitration Code, seeking judicial review of the tribunal's decision. Canada contended that the tribunal purported to resolve disputes not properly before it, thereby acting beyond the scope of their jurisdiction. Canada also argued that the tribunal misinterpreted the NAFTA's jurisdictional provisions by extending the benefits of Chapter 11 to a company that was not an investor in the relevant investment. Canada also contended that the Tribunal had misapplied the NAFTA's substantive provisions, Articles 1102 and 1105. The federal court is scheduled to hold hearings on the annulment request in October 2003, and the proceedings will doubtless be followed closely by investors, attorneys, and host governments worldwide. For now, the arguments in Canada's petition provide interesting reading. In some ways, these papers echo the positions taken by Mexico and the Czech Republic in their attempts to set aside investment arbitration awards, and in other ways they represent a novel approach that may signal a more aggressive attack on the investment arbitration system.

i. Standard of Review

At the outset, Canada argued in its papers for a very liberal standard of review for NAFTA awards, relying on the British Columbia court's *Metalclad* decision and a line of Canadian caselaw on the *vacatur* of domestic and statutory arbitration awards. Canada's position took direct aim at the legitimacy of the NAFTA system in general, arguing essentially that the issues in dispute were too important to the Canadian public to allow arbitrators full discretion.

¹⁰⁶ *Id.* Partial Award at para. 184.

¹⁰⁷ The *Myers* arbitration was sited in Toronto, Canada, also in the province of Ontario.

NAFTA Chapter Eleven arbitrations differ substantially from a private commercial arbitration in terms of the extent to which their decisions might affect interests beyond those of the immediate parties to the dispute. Claims under NAFTA Chapter Eleven are not contractual disputes but challenges to government “measures,” [defined as] “any law, regulation, procedure, requirement or practice. . . . The decisions of NAFTA Chapter Eleven Tribunals have important public policy implications that impact upon, and are of interest to Canadians generally.”¹⁰⁸

Canada further suggested that NAFTA arbitration tribunals are not necessarily qualified to properly decide the momentous issues they face, as they “are not standing tribunals with established or recognized expertise in trade matters.”¹⁰⁹

As a result, Canada argued that NAFTA awards “do not attract extensive judicial deference where the issue is whether the award under review falls within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration.”¹¹⁰ The standard of review in such matters, according to Canada, should be “correctness,” that is, a complete *de novo* review of the tribunal’s decisions and replacement of the arbitrators’ discretion with that of the court. Canada insisted that the “patently unreasonable” standard, the most commonly applied level of deference in the judicial review of administrative decision-making (and that which is more akin to the standard of review for international commercial arbitration awards under Canadian law),¹¹¹ should be discarded in NAFTA cases.

ii. Excess of Powers

The thrust of Canada’s assault on the *S.D. Myers* award was that the tribunal had acted outside the scope of its mandate in several ways. Most of these grounds for *vacatur* were based on the tribunal’s allegedly erroneous finding that it had jurisdiction to decide the dispute before it. For example, Canada argued during the arbitration that the claimant was not an “investor” as defined in the NAFTA, and therefore the Chapter 11 dispute resolution provisions could not apply to its claim against Canada. The annulment brief describes in great detail the corporate structure of the American claimant and its related Canadian enterprise, arguing that the two were not directly affiliated, and therefore not linked closely enough

¹⁰⁸ Attorney General of Canada v. *S.D. Myers, Inc.*, Court File No. T-80-03, (Memorandum of Fact and Law of the Applicant Attorney General of Canada) (undated) (hereinafter *Myers* Motion to Set Aside) at paras. 137-38.

¹⁰⁹ *Id.* at para. 136.

¹¹⁰ *Id.* at para. 134.

¹¹¹ Under this standard, a court will interfere only if a careful review of the factual and legislative record demonstrates that the decision under review violates the most basic notions of justice, is clearly irrational or is unsustainable on the evidence. *National Corn Growers Ass’n v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324 at 1370.

to make Myers an “investor.”¹¹² This line of argumentation seems to rely on the court’s willingness to reopen the factual as well as legal findings of the arbitrators, which Canada hopes will result from the adoption of the more lenient “correctness” standard of review.¹¹³

Other arguments in the Canadian papers are even more thinly disguised attempts to reopen the merits of the dispute. Clearly taking inspiration from the Czech Republic’s positions in *CME*, Canada argues that the arbitrators exceeded their authority by awarding damages to Myers for injuries or harm falling outside the treaty’s scope. Since Myers was not a real “investor,” the argument goes, Canada’s actions had little to do with any harm that Myers sustained, which was largely felt in the company’s main United States facilities. In the words of the Canadian submission, “[b]y awarding damages to a person other than the investor or the investment and for damages beyond those related to the investment, the Tribunal’s awards deal with a dispute not falling within the terms of the submission to arbitration.”¹¹⁴

Despite Canada’s schooled excision of the word, this argument is nothing more than a disagreement over the arbitrators’ causation decision—a key element of the liability holding of the arbitration award. Just as the Czech Republic argued that an excess of authority resulted from the finding of jurisdiction despite the intervening actions of private party Mr. Zelezny, Canada seeks here to recast substance as procedure, liability as jurisdiction. Canada attempts the same trick later in its brief, framing a challenge of the tribunal’s discrimination finding as an allegation of excess of powers. The tribunal found that Canada had breached NAFTA Article 1102 by treating Myers differently than it treated Canadian operators in the same industry. Canada argues that the discrimination holding resulted in an excess of powers, because Article 1102 applies only where better treatment is accorded to local companies in “like circumstances,” and that the comparators used by the tribunal simply were not comparable. At its core, this is an argument about the substantive legal criteria for finding that Article 1102 was violated, and not about the scope of submission to arbitration at all. As Myers argued in its response to Canada’s court submission,

Canada’s approach would transform [the ‘excess of mandate’ provision of the Arbitration Act] from a narrow jurisdictional ground for setting aside an award into a broad right of appeal, that would effectively transfer to the courts in the place of arbitration the jurisdiction intended to be vested in the arbitrators.¹¹⁵

¹¹² *Myers* Motion to Set Aside, *supra* note 108, at paras. 147–175.

¹¹³ It is also worthwhile to note that Canada never objected to Myers’ standing as an investor to bring the claim as a matter of jurisdiction.

¹¹⁴ *Myers* motion to set Aside, *supra* note 108, at para. 179.

¹¹⁵ *Attorney General of Canada v. S.D. Myers*, Respondent’s Memorandum of Fact and Law (June 16, 2003), at 26.

iii. Public Policy

While Canada insisted that the *Myers* award should also be set aside on public policy grounds, it offered no independent basis for this conclusion. Instead, it argued simply that the defects complained of under the rubric of “excess of powers” also contravened Canadian public policy, and should therefore lead to *vacatur* on the additional ground as well.¹¹⁶ The connection between the two grounds for *vacatur* arose from the assertion that “the ‘fundamental principles of law and justice’ inherent in the use of the term ‘public policy’ in the [UNCITRAL] Model Law include[s] the principle that a tribunal could not exceed its jurisdiction in the course of the inquiry.”¹¹⁷

Given the effective identity between Canada’s excess of powers and public policy challenges, it is not entirely clear what purpose the latter argument can serve. Indeed, the Czech Republic took the same approach in *CME*, using the identical facts to support both an excess of powers and public policy grounds for *vacatur*, to no avail. In most states, as discussed previously, the public policy exception to enforcement is very narrowly construed, while the arbitrators’ obligation to remain within the bounds of the parties’ consent to arbitration is taken quite seriously. Further, the *Metalclad* court provided some (albeit shaky) support for an attack on the merits through the excess of powers category, but rejected a similar challenge on public policy grounds. In light of the sensitive regulatory issues at stake in the *Myers* arbitration, it is particularly surprising that Canada did not invoke public policy more creatively, arguing that the government’s export ban on dangerous chemicals served a vital public purpose, both domestically and internationally. While the success of this approach is far from certain, it would at the very least better conceal (and advance) Canada’s true goal—to place investment arbitration awards in a separate category, entitled to far less deference than international commercial arbitration awards.

E. CONCLUSION: STRATEGY AND THE FUTURE OF JUDICIAL REVIEW

The ever-more frequent challenges of investment arbitration awards in national courts by defeated state respondents underlines the continuing role of the arbitral *situs* in international arbitration.¹¹⁸ While the ICSID system has done a great deal to “delocalize” most investment disputes, insulating awards from potentially unpredictable, politically driven judicial review, NAFTA arbitration and a range of important cases continue to be decided within the nationally bound commercial arbitration framework. Although some non-governmental organizations view this continued court intervention with relief, there can be little doubt that judicial review of investment arbitration awards defeats many of the purposes for which this innovative system was created. For now, most of the applications to

¹¹⁶ *Myers* Motion to Set Aside, *supra* note 108, at paras. 171, 232, 236.

¹¹⁷ *Id.* at para. 146.

¹¹⁸ Noah Rubins, *The Arbitral Seat is No Fiction*, INT’L ARB. REP., Jan. 2001, at 23.

annul treaty-based investment arbitration awards have failed, as courts have faithfully construed the narrow, procedural grounds for *vacatur* codified in modern international arbitration laws. In all three of the investment arbitration award challenges, respondent states developed an old commercial arbitration technique to a new level of complexity, recasting disagreement with the arbitrators' liability rulings as allegations that the tribunal exceeded its mandate. Such a tactic may prove more effective in investment arbitration than it has been in the commercial situation, since the jurisprudence of the NAFTA and other treaties is still underdeveloped, as is the line between jurisdiction and liability.

Only time will tell whether the growing grass-roots opposition to investor-state dispute resolution in regulatory matters will induce courts to examine the merits of these awards more closely than they would run-of-the-mill commercial awards. Of particular concern in the NAFTA context is the possibility that an award will be reviewed by the respondent state's own courts. In other arbitration contexts, private parties normally insist on a neutral arbitral *situs*, due to apprehension that local law in developing countries may be antiquated and suspicion that local courts may lack independence. NAFTA cases, meanwhile, most often take place in the large cities of the United States and Canada (primarily Washington, Vancouver, and Toronto), also potential respondents in arbitration. While the arbitration laws of Canada and the United States are relatively predictable (particularly the Canadian federal law), the availability of public policy as an annulment ground raises the possibility that courts will be swayed to set aside awards against their government. In this regard, the appeal in *S.D. Myers* will likely serve as an important test case, as the first time a NAFTA award will be reviewed by a losing respondent's own judiciary.

Strategically, the discussion in this chapter underlines the importance of carefully choosing the arbitral *situs* in the NAFTA and other cases where the Washington Convention does not apply. While in ICSID arbitrations this issue is reduced to a consideration largely of convenience and efficiency, NAFTA claimants must seriously consider the domestic arbitration law at various places of arbitration, and should insist on a jurisdiction that reduces the scope of judicial review to a minimum. Regardless of the state of the law, it would seem to be tempting fate to choose Vancouver as the arbitral *situs* for a case against Canada, or Washington in arbitration against the United States. Already two tribunals have commented that Canada's lack of deference to investment arbitration awards militate against holding NAFTA proceedings there.¹¹⁹

According to professor and Metalclad counsel Jack Coe, the continued possibility of judicial review on the merits "encourages participants to 'forum shop'

¹¹⁹ Pope & Talbot v. Canada, Ruling Concerning the Investor's Motion to Change the Place of Arbitration (Mar. 14, 2002), at para. 20; UPS v. Canada, Decision of the Tribunal on the Place of Arbitration (Oct. 17, 2001), at para. 11.

[and] promotes inefficiency” in investment arbitration.¹²⁰ It is difficult to take issue with this conclusion. But from a practical standpoint, national arbitration laws and court procedures will continue to play an important role in the enforcement of investment awards for years to come. There is little sign that Mexico and (particularly) Canada are moving towards ratification of the Washington Convention. The fact that each has challenged a NAFTA award against it in court suggests that neither is now sufficiently confident of proper outcomes in investment arbitration to put faith in the self-contained ICSID annulment system. The well-prepared lawyer in the field, therefore, whether he represents an investor or respondent state, must still be prepared to descend from the heights of international law to wade knee-deep in the vagaries of the forum state’s courts and laws.

EDITOR’S NOTE:

Following the completion of this chapter, two of the judicial review proceedings mentioned in it, *S.D. Meyers v. Canada* (in the Federal Court of Canada) and *Feldman v. Mexico* (in the Provincial Court of Ontario) were decided. In both cases the reviewing judges showed much greater deference to what they acknowledged was the specialized international law expertise of the tribunal members. Accordingly, both review applications—supported and launched reciprocally by Canada and Mexico—were dismissed in their entirety.

¹²⁰ Jack J. Coe, Jr., *Domestic Court Control of Investment Awards: Necessary Evil or Achilles Heel Within NAFTA and the Proposed FTAA?* 19 J. INT’L ARB. 185, at 187 (2002).