

Search term

"kinnear bjorklund" AND
"investment disputes under
nafta" AND "1136"

Document information

Author

Andrea K. Bjorklund (IAI
profile)
John F.G. Hannaford (IAI
profile)
Meg N. Kinnear (IAI profile)

Publication

Investment Disputes under
NAFTA: An Annotated Guide to
NAFTA Chapter 11

Topics

Investment Arbitration



Bibliographic reference

'Article 1136 - Finality and
Enforcement of an Award', in
Meg N. Kinnear, Andrea K.
Bjorklund, et al., Investment
Disputes under NAFTA: An
Annotated Guide to NAFTA
Chapter 11, Supplement No. 1
(© Kluwer Law International;
Kluwer Law International
2006) pp. 1136-1 - 1136-41

Article 1136 - Finality and Enforcement of an Award

Article 1136 Finality and Enforcement of an Award

I Negotiating Text

- The first draft of NAFTA had a single article on investor-state dispute settlement, which was proposed by the United States. Paragraph 3 of that article provided that an award resulting from an arbitration under the  UNCITRAL Arbitration Rules, the ICSID Additional Facility or any other Rules used for the matter would be “final and binding on the parties to the dispute.” Each Party undertook to carry out the award without delay and to provide for enforcement in its territory. (1)
- This provision was modified in the May 1, 1992, text to delete the reference to arbitration being conducted pursuant to rules other than the ICSID and UNCITRAL Rules. (2)
- The May 13, 1992, draft added a paragraph stipulating that an investment dispute would be considered to arise out of a commercial relationship for purposes of the New York and Inter-American Conventions. (3) This version stated that an award would be final and binding, would be carried out without delay, and that the Parties would provide enforcement mechanisms for such awards, subject to the Inter-American, New York and ICSID Conventions. (4) A provision was included stating that no Party would give diplomatic protection or bring a claim for damages or restitution of property unless the other Party had failed to abide by the award pursuant to the New York Convention. (5)
- The previous draft of the article governing awards was repeated in the June 4, 1992, text. In addition, Canada proposed a separate article addressing all aspects of dispute settlement. Like the U.S. proposal, the new Canadian text allowed an investor to commence arbitration against a NAFTA State under the ICSID Convention, ICSID Additional Facility, or UNCITRAL Rules. It also stated that an award was binding only on the parties to the dispute. However, the Canadian draft gave a disputing party an option to commence arbitration of investment obligations before the North American Trade Commission (NATC) or the International Chamber of Commerce (ICC). Awards rendered by either of those bodies were to be binding not only on the disputing parties but also on other panels arbitrating the same matter. (6)
- A single, and significantly revised, text on dispute settlement was included in the draft of August 4, 1992. Article 2132 of that text, entitled “Finality and Enforcement of Award,” consisted of seven paragraphs and was similar in approach to final Article 1136. It provided that: an arbitral award would be binding only in respect of the particular case; Parties would comply with awards once they became final; the Free Trade Commission could examine a Party's failure to comply with a final award; investors could seek enforcement under the ICSID, New York, or Inter-American Conventions; an ICSID Convention award would become final upon completion of annulment proceedings or expiry of the time for annulment; an UNCITRAL or ICSID Additional Facility award would become final  on the completion of all set-aside and appeal options or after 3 months had elapsed without such proceedings having been commenced; and each Party would undertake to provide for enforcement in its territory of arbitral awards. (7)
- This article was further redrafted in the September 2, 1992, text. The wording of paragraph 1 was simplified and amended to state that an award (rather than a final award) had no binding force except between the disputing parties and in the particular case. Several paragraphs were footnoted, giving an indication of discussions between the negotiators. Paragraph 2 required a party to comply with an award without delay. A footnote to this paragraph stated: “[o]riginal idea included only a final award, subject to review. If it includes interim awards, must also be subject to review.” (8) Paragraph 5, which required a Party to undertake to provide for enforcement in its territory of an award, was accompanied by a footnote commenting that this obligation “should not place on a Party an extra-territorial obligation.” (9) Paragraph 8, providing that a claim is deemed to have arisen out of a commercial relationship for the purposes of the New York and Inter-American Conventions, was also accompanied by a footnote querying whether “this should be accomplished by Canada and the U.S. removing the commercial reservation.” (10) Minor wording changes were made to the rest of the article, but its content was essentially the same as in the final article. (11)
- The October 2, 1992, draft brought this article into its final form. Paragraph 1 was simplified to provide that an award has no binding force except between the disputing parties and in respect of that particular case. The footnote to paragraph 2 was removed but the article was amended to refer to “the applicable review procedure for an interim award.” All other footnotes were removed without consequential changes to the text. (12)

▲
P 1136-
1



▲
P 1136-
2

A Introduction

Article 1136 is entitled “Finality and Enforcement of an Award.” It addresses matters affecting the award after it has been rendered, and particularly enforcement of awards. Article 1136 makes clear that the drafters intended disputing parties to comply with awards without delay, but it also preserves their ability to challenge awards under the applicable law.



B Precedential Value of Awards

Article 1136(1) makes clear that the rule of *stare decisis* does not apply to awards rendered under Chapter 11. It reads: “[a]n award made by a Tribunal shall have no binding force except between the disputing parties and in respect of the particular case.” This is generally true of decisions made by international tribunals – Article 59 of the Statute of the International Court of Justice provides that decisions of the ICJ are binding only with respect to the parties before the Court and only with respect to that particular case – and it is true in investor-State arbitration as well. (13) The principle that international tribunal decisions are not precedential stems in part from the role they play in the hierarchy of international law established by Article 38 of the Statute of the International Court of Justice, which assigns them a subsidiary role in the development of international law. (14) In addition, investment treaty arbitration takes place under numerous treaties pursuant to which host states may have undertaken different obligations. Thus a legal standard from one BIT is not necessarily instructive in the case of another BIT. (15) Moreover, decisions are often very fact-specific.


 Although 1136(1) makes clear that no rule of *stare decisis* applies in Chapter 11 proceedings, decisions of other international tribunals often have  persuasive effect. The tribunal in *Grand River v. United States* set forth its approach as follows:

The materials provided by the Parties have identified awards in some other NAFTA cases, as well as various court decisions and arbitral awards, that help to illuminate some of the unusual issues presented here. As NAFTA Article 1136 makes clear, NAFTA arbitral awards do not constitute binding precedent, and in any event are rooted in their specific facts. The Tribunal has given such authorities due consideration. However, it has decided the preliminary issue of limitation based upon the law and its independent assessment of the peculiar facts of the case. (15a)

NAFTA Chapter 11 tribunals refer frequently to the decisions of other Chapter 11 tribunals. Indeed, in some cases, the awards of one tribunal have been considered sufficiently important to warrant a specific exchange of pleadings. For example, in *Mondev International Ltd. v. United States*, the tribunal, through a letter dated June 28, 2002, granted the disputing parties the opportunity to make known their views concerning the *Pope & Talbot* tribunal's decision of May 31, 2002. (16) Article 1128 submissions on point were also made by Mexico and Canada. (17) In *Feldman v. Mexico*, the tribunal suggested that it sought guidance from other Chapter 11 awards because the parties relied on them in argument. (18) It also noted the consistency of its ruling with the *S.D. Myers* Award's finding on a similar issue. (19)


 The tribunal in *Canadian Cattlemen Claims* addressed explicitly what it viewed as the proper use of decisions rendered in other cases. First, it emphasized that its role was to interpret the relevant NAFTA provisions in the context in which they appear. (19a) Second, it noted that the Vienna Convention on the Law of Treaties, in Article 32, permits the consideration of supplementary means of interpretation in determining the meaning of treaty provisions, and that judicial decisions, which are subsidiary means of determining public international law  under Article 38 of the Statute of the International Court of Justice, qualify as supplementary means of interpretation. (19b) After establishing that other awards might have some role in interpreting the applicable treaty provisions, the tribunal emphasized that it was not bound by other tribunal decisions. Citing *Bayindir v. Pakistan*, however, it said it would consider such decisions “to the extent that it may find that they throw useful light on the issues that arise for decision in this case.” (19c)

The *Canadian Cattlemen Claims* tribunal was charged with determining whether, as a preliminary matter, NAFTA Chapter 11 could apply if the investors making a claim had made an investment only in their home territory, rather than in the territory of the respondent NAFTA Party. The bulk of the tribunal's analysis concerned the language of the treaty itself, interpreted in light of the object and purpose of the agreement. In the course of that analysis the *Canadian Cattlemen Claims* tribunal considered the decisions of other tribunals, where relevant. Three of those awards were based on NAFTA Chapter 11 (*Ethyl*, *Methanex*, and *Bayview Irrigation*), while one was based on the Pakistan – Turkey BIT. The tribunal determined that the *Ethyl* award's statements regarding territorial restrictions were inconclusive for purposes of *Cattlemen*. (19d) As far as *Methanex* was concerned, the *Canadian Cattlemen Claims* tribunal concluded that the *Methanex* tribunal's decision did not provide guidance because of the significantly different circumstances of the case. (19e) Though the *Methanex* tribunal had considered whether filings by the NAFTA Parties could amount to a subsequent agreement for purposes of Vienna Convention Article 31.3(a), it had not decided that matter because the FTC's Notice of Interpretation, which the *Methanex* Tribunal accepted as a subsequent agreement, made the point moot. (19f) The *Canadian Cattlemen Claims* tribunal was more open to looking at the filings of NAFTA Parties as subsequent practice under Article 31.3(b) of the Vienna

Convention. (19g) As for *Bayview Irrigation*, the tribunal did not accept its order of reasoning on the grounds that it had started its examination of the territoriality issues also present in that case with an analysis of the *travaux préparatoires*, rather than proceeding in the order prescribed by the Vienna Convention. (19h) It also noted some factual differences with respect to water that is supplied across the border and the export of meat in an integrated market, but it noted with approval the *Bayview* tribunal's ultimate conclusion that a claimant need demonstrate that it had made a cross-border investment to sustain a NAFTA Chapter 11 case. (19i)

The *Canadian Cattlemen Claims* tribunal also referred to the award in the ICSID case *Gruslin v. Malaysia*, which had been cited by both respondent and claimants. (19j) That arbitration was based on an intergovernmental agreement between the Belgo-Luxembourg Economic Union and Malaysia, an agreement with different language from NAFTA Chapter 11, and a vastly different scope. The tribunal thus found it to be of limited assistance in construing NAFTA Chapter 11. (19k)

Other Chapter 11 tribunals have also referred to decisions in non-NAFTA investment cases. For example, in *Metalclad Corporation v. Mexico*, the tribunal compared *Biloune v. Ghana Investment Centre*, which related to the expansion of a resort in Ghana and the need to comply with local permitting requirements, issues similar to those presented in *Metalclad*. (20) "Although the decision in *Biloune* does not bind this Tribunal, it is a persuasive authority and the Tribunal is in agreement with its analysis and its conclusion." (21) Other tribunals have proceeded in a similar manner, and have compared, relied on, and distinguished decisions of other international tribunals, including decisions of the ICJ, and of other investor-State tribunals. (22)

Tribunals have also referred to decisions by WTO/GATT tribunals when those tribunals have been interpreting issues similar to those found in Chapter 11. The *Methanex* tribunal made clear that it was not authorized to decide claims that the GATT had been violated under the auspices of a NAFTA Chapter 11 tribunal. (23) Yet the tribunal indicated that it "would be open to persuasion based on legal reasoning developed in GATT and WTO jurisprudence, if relevant." (24)

C Compliance with Awards

Article 1136(2) states that, "subject to paragraph 3 and the applicable review procedure for an interim award, a disputing party shall abide by and comply with an award without delay." This directive to comply does not mean that disputing parties are unable to challenge awards rendered against them. Paragraph 3 details the period of time that a disputing party must wait before seeking enforcement of a final award. The procedures detailed therein all assume that awards are subject to applicable set-aside proceedings. After those proceedings have been completed, or after the award has been rendered and a sufficient time period has elapsed and no set-aside proceeding has been instituted, a disputing party may seek enforcement of a final award. To date, disputing parties have complied with the awards against them without the commencement of formal enforcement proceedings.

Article 1136(2) also assumes that interim awards may be subject to challenge, and that a disputing party is required to comply with the interim award after any challenge to that award is completed. Neither "award" nor "interim award" is defined in the ICSID Convention, the ICSID Additional Facility Rules, or the UNCITRAL Rules. There is often confusion, also, between an "award" and an "order." An award "dispose[s] finally of the issues [it] decides." (25) A procedural order is concerned with the conduct of the arbitration, and does not have the status of an award. (26)

Arbitral proceedings are often bifurcated between matters of jurisdiction and the merits, and between the merits and quantum. (27) Partial awards are often issued at the end of one of those stages, even when another stage in the proceedings has yet to be heard. The UNCITRAL Arbitration Rules explicitly give tribunals the authority to issue interim awards: "[i]n addition to making a final award, the arbitral tribunal shall be entitled to make interim, interlocutory, or partial awards." (28) Neither the ICSID Convention nor the ICSID Additional Facility Rules explicitly address the question of interim awards, but each assumes that jurisdictional questions may be decided as a preliminary matter. Disposition of certain aspects of the case at the jurisdictional stage would necessitate the issuance of a partial award. (29)

Such awards, to the extent that they finally dispose of an issue, may be subject to set-aside before any final award is rendered, but the exact procedure depends on the law of the place of arbitration. (30) Under the ICSID Convention, however, there is a careful distinction between jurisdictional awards that dismiss a case in its entirety, which are subject to the ICSID annulment process, and jurisdictional awards that do not dismiss the entire case, which may not be the subject of the annulment process. (31) Because the status of a given award may be unclear, disputing parties may have an incentive to challenge partial awards. The time limit to challenge an award in set-aside proceedings under the law of the place of arbitration usually begins to run from the date the award is made.

[I]mportant consequences flow from a ruling or decision of the arbitral tribunal that has the status of an award. The time-limit for challenge of the award will begin to run; and, once the final award has been made, it may be impossible for a party to challenge some element of that

award if it follows from an earlier interim or partial award which was not challenged. (32)

On the other hand, challenging interim awards may delay the arbitral proceedings. A challenge may also co-exist with ongoing proceedings. (33) The question of set-aside of an interim award arose in *S.D. Myers v. Canada*, in which Canada challenged the tribunal's partial award; this issue is discussed in Part D.3.a, below. (34)

▲ P 1136-8a
A similar issue arose in the *Canfor* consolidation proceedings. One of the claimants, Tembec Inc., attempted to set aside the decision by the consolidation tribunal that Tembec's case should be consolidated with those of Terminal Forest Products and Canfor. Tembec filed its set-aside petition in the U.S. District Court for the District of Columbia. The proceeding could have raised such interesting issues as whether a consolidation order is a final award subject to set-aside proceedings; whether one of the parties to a consolidation order can decline to participate in consolidated proceedings while maintaining their independent proceedings; (34a) and what role domestic courts play in these determinations. As part ▲ of the Softwood Lumber Agreement concluded between the United States and Canada in September 2006, Tembec withdrew its Chapter 11 claim and asked the U.S. District Court to dismiss the set-aside petition, which it did. (34b) The stipulation of dismissal was subject to the terms and conditions of the Softwood Lumber Agreement. The U.S. District Court thus did not answer those questions. Tembec later asked the court to reinstate the set-aside petition on the ground that it had been misled by the United States in agreeing to the Softwood Lumber Agreement of 2006, but the court denied Tembec's request. (34c) ▲ Specifically, Tembec argued that it had signed on to the Softwood Lumber Agreement on the understanding that the United States would not seek costs or attorneys' fees related to Tembec's Chapter 11 claim. The court found, however, that the language of the Softwood Lumber Agreement and the accompanying Settlement of Claims Agreement was quite clear, and that neither it nor the stipulation of dismissal prevented the United States from seeking fees and costs. (34d)

D Set-Aside and Annulment of Awards

Arbitration, including investor-State arbitration, is a consensual process that takes place largely outside the purview of municipal courts. Most arbitrations are not, however, entirely delocalized. (35) The exception is arbitration under the ICSID Convention. (36) Other arbitrations, including ICSID Additional Facility Arbitrations and UNCITRAL Arbitrations, have a designated "place of arbitration." (37) The law of the place of arbitration, the *lex arbitri*, has a role to play in the arbitration, as do municipal courts implementing that law. The "place of arbitration," or "juridical seat" of the arbitration, is not necessarily a geographic choice; most or even all of the proceedings may take place away from the juridical seat, although it is preferable that some take place there. (38)

What then is the law governing the arbitration? It is ... a body of rules which sets a standard external to the arbitration agreement, and wishes of the parties, for the conduct of the arbitration. The law governing the arbitration comprises the rules governing interim measures (e.g. Court orders for the preservation or storage of goods), the rules empowering the exercise by the Court of supportive measures to assist an arbitration which has run into difficulties (e.g. filling a vacancy in the composition of the arbitral tribunal if there is no other mechanism) and the rules providing for the exercise by the Court of its supervisory jurisdiction over arbitrations (e.g. removing an arbitrator for misconduct). (39)

The *lex arbitri* thus governs judicial assistance to arbitration – the amount of support a court will lend an arbitration. Judicial assistance may include issuing subpoenas to witnesses, for example, or ordering conservatory measures. (40)

▲ P 1136-9
The *lex arbitri* also has a role to play in governing the integrity of the arbitral process, including that process as exemplified in the award. Thus, the law of the place of arbitration provides for review of arbitral awards rendered in the place of arbitration. This review is referred to in various ways, such as "set-aside," "statutory review," and "vacatur." NAFTA Article 1136(3) directs disputing parties to avail themselves of annulment proceedings under the ICSID Convention or set-aside proceedings in the place of arbitration for arbitrations under the ICSID Convention. (40a) ▲ Additional Facility Rules or the UNCITRAL Rules. (40a) Proceedings in which a party seeks the set-aside of an award should be distinguished from procedures in which a party resists the enforcement of an award as discussed in Part E, *infra*.

1 Time Periods for Disputing Parties to Seek Set-Aside or Annulment

Article 1136(3) provides that disputing parties may not seek enforcement of an award for a certain time after its issuance. That time period varies depending on the regime under which the arbitration took place. Thus, in the case of the ICSID Convention, a disputing party may not seek enforcement of the award until 120 days after the date on which the award was rendered in the event that no party has sought revision or annulment of the award under the ICSID Convention. (41) If a disputing party has sought annulment or revision of the award, the party must wait to enforce the award until after annulment or revision proceedings are completed.

In the case of an arbitration under the ICSID Additional Facility or UNCITRAL Rules, a disputing party seeking to enforce an award must wait until three months have elapsed after the date on which the award is rendered in the event that no proceeding to revise, set-aside, or annul the award has been commenced. If such a proceeding is instituted, a disputing party must wait until a court has acted on the petition to revise, set aside, or annul the award, and until no further appeal is possible.

2 Annulment or Revision under the ICSID Convention

P 1136-10
The ICSID Convention provides for “de-localised” arbitration; it is entirely self-contained and the proceedings are not governed by any external *lex arbitri*. “The Centre oversees the appointment of arbitrators to the tribunal, the tribunal handles provisional measures, and an ICSID-appointed ad hoc committee conducts annulment proceedings.” (42) ICSID awards are not subject to set-aside procedures in municipal courts; rather, a disputing party may request that the award be annulled on one of the limited grounds set forth in the ICSID Convention.

The disputing parties in an ICSID Convention proceeding may also request that the award be revised under Article 51 of the ICSID Convention, but only on the ground “of discovery of some fact of such a nature as decisively to affect the award, provided that when the award is rendered that fact was unknown to the Tribunal and the applicant.”

The annulment process in the ICSID Convention was the result of a careful balance between ensuring the integrity of the awards and promoting the finality of the arbitration proceedings. (43) Selecting annulment over appeal necessarily means foregoing certain benefits that can be derived from an appellate process. In the plainest terms, parties may be said to sacrifice correctness in favor of finality. (44) This is not to say that arbitral tribunals are in the habit of making unjust decisions; on the contrary, many are of the highest quality. Nevertheless, they can and do make mistakes. But annulment is designed to balance these objectives in favor of finality; it “provide[s] emergency relief for egregious violations of a few basic principles while preserving the finality of the decision in most respects.” (45)

Article 52 of the ICSID Convention provides that awards may be annulled on one or more of the following grounds:

- (a) that the Tribunal was not properly constituted;
- (b) that the Tribunal has manifestly exceeded its powers;
- (c) that there was corruption on the part of a member of the Tribunal;
- (d) that there has been a serious departure from a fundamental rule of procedure; or
- (e) that the award has failed to state the reasons on which it is based. (46)

The review of an *ad hoc* committee is thus very limited. It does not review the merits of the original awards, and is meant “to guard the integrity, not the outcome, of ICSID arbitration proceedings.” (47)

P 1136-11
A request for annulment must be made within 120 days after the date on which the award was rendered, unless the basis for annulment is corruption, in which case the application must be made within 120 days after the discovery of the corruption, but in no case later than three years after the award is rendered. (48) The annulment proceeding is heard by an *ad hoc* committee of three arbitrators who are chosen by the Chairman of ICSID. None of the members of the *ad hoc* committee can have been on the panel that rendered the award, and none must share the nationality of any member of the panel that rendered the award or of the disputing State or of the State whose national is a Party to the dispute. The members of the *ad hoc* committee must not have been appointed to the ICSID Panel of Arbitrators by either of those States, and none must have been involved in any conciliation proceedings with respect to the same dispute. (49)

The *ad hoc* committee may stay the enforcement of the award pending its consideration of the annulment petition. (50) An *ad hoc* committee has only the power to annul an award; it may not remand for further proceedings. (51) It also may not substitute its views for those of the panel. “The effect of annulment, instead, is to erase the preclusive effect of the award and provide the parties with a second chance to arbitrate the same issues again before an entirely new ICSID tribunal.” (52) In the event an award is annulled, the dispute may be submitted to a new tribunal at the request of either party. (53)

Because neither Canada nor Mexico is Party to the ICSID Convention, arbitration under the Convention is not currently available for cases brought under NAFTA Chapter 11. (54) Canada signed the ICSID Convention in December 2006, and is in the process of ratifying it. The House of Commons has tabled legislation that would enact the Convention. If and when Canada ratifies it, Convention arbitration will be available to U.S. investors in Canada and Canadian investors in the United States.

3 Set-Aside or Revision under the ICSID Additional Facility Rules or the UNCITRAL Rules

P 1136-12
Set-aside motions in arbitrations convened under either the ICSID Additional Facility Rules or the UNCITRAL Rules will be governed by the applicable law of the place of arbitration. Article 1130 provides that NAFTA Chapter 11 arbitrations will take place in the territory of one of the NAFTA Parties, unless the disputing parties to an arbitration agree otherwise. Thus, it is theoretically possible for a Chapter 11 arbitration to take place in a country not Party to NAFTA. As of October 2007, however, no Chapter 11 arbitration has had its juridical seat outside the territory of a NAFTA Party; indeed, so far all juridical seats of arbitration have been in either Canada or the United States. The commentary below will thus address set-aside laws in the three NAFTA Parties.

a. Set-Aside in Canada

Canada has been the most active venue for set-aside petitions in Chapter 11 cases. Canada has a federal arbitration law, but it applies only when Canada is a party to the arbitration. (55) In other arbitrations, whether domestic or commercial, the applicable provincial law governs. One set-aside petition has involved a case against Canada, and was governed by federal law. Two of the set-aside petitions have involved cases against Mexico in which the juridical seats of the arbitration were Vancouver, British Columbia and Ottawa, Ontario. The set-aside petitions in those cases were brought in provincial superior courts in British Columbia and Ontario, respectively. Thus, each of the three Canadian set-aside cases has been governed by a different *lex arbitri*. Yet the *lex arbitri* applied in each of the courts of first instance was based on the UNCITRAL Model Law. The tribunals took different approaches to the interaction of the Model Law and principles for reviewing domestic arbitrations.

The first set-aside petition was filed in *Metalclad Corporation v. Mexico*. (56) *Metalclad* involved a dispute between a U.S.-owned corporation in Mexico, COTERIN, which sought to build a hazardous waste disposal facility in the State of San Luis Potosi and local government officials. At issue were the types of permits needed to build the facility. COTERIN pursued relief locally, but eventually brought a claim under NAFTA Chapter 11 after attempts to resolve the matter failed. (57) *Metalclad* won its NAFTA case. (58)

Because the place of arbitration in *Metalclad* had been designated as Vancouver, British Columbia, neither party contested the jurisdiction of the B.C. Supreme Court over the review initiated by Mexico. The Attorney General of Canada and the Province of Quebec both moved successfully to intervene in the set-aside proceeding. (59) Several NGOs also attempted to intervene, but their petitions were denied. (60)

The threshold question for the B.C. Court was which statutory regime – the International Commercial Arbitration Act (“ICAA”) (61) or the Commercial Arbitration Act (“CAA”) (62) – should govern the set-aside proceedings. Which law governed the set-aside proceedings dictated the standard of review to be employed by the Court. If the CAA applied, the Court would review the award for errors of law, whereas if the ICAA applied, the Court would review the award more restrictively. (63) The ICAA is based upon the UNCITRAL Model Law, and applies to the exclusion of the CAA. In other words, if the ICAA applies to a given review, then the CAA does not. The Government of Mexico, supported by the Government of Canada as intervener, argued that the CAA applied, while *Metalclad* contended that the more restrictive provisions of the ICAA properly governed. (64)

Neither Mexico nor *Metalclad* contended that the arbitration to which they were party was not international – the sole question was whether it was “commercial” for the purposes of the ICAA. The ICAA is based on the UNCITRAL Model Law and defines commercial arbitrations as those arising out of a “relationship of a commercial nature,” including “investing.” (65) The ICAA also provides that the relationship need not be contractual in nature. Judge Tysoe remarked that the drafters of the UNCITRAL Model Law had understood that “[t]he term ‘commercial’ should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature.” (66) Mexico had contended that the relationship between itself and the investor had been “regulatory” rather than “commercial.” This distinction was rejected by Judge Tysoe, who found that the relationship was one of investing and therefore fit within the definition of “commercial” prescribed by the ICAA. (67) He stated:

It is true that the dispute between *Metalclad* and the municipality arose because the Municipality was purporting to exercise a regulatory function. However, the primary relationship between *Metalclad* and Mexico was one of investing and the exercise of a regulatory function by the Municipality was incidental to that primary relationship. (68)

He thus found that the ICAA governed the proceedings. (69)

The ICAA provides limited grounds on which an award may be set aside. Section 5 of the ICAA directs that in matters governed by the Act, a court “must not intervene unless so provided in this Act.” (70) It further provides: “an arbitral proceeding of an arbitral tribunal or an order, ruling or arbitral award made by an arbitral tribunal must not be questioned, reviewed or restrained by a proceeding under the Judicial Review Procedure Act or otherwise except to the extent provided in this Act.” (71) For purposes of the *Metalclad* set-aside proceeding, those grounds were found in subsection 34(2) of the ICAA. Three of the subsections were at issue. Section 34(2)(a)(iv) provides that “[i]f the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration,” it may be set aside. Section 34(2)(a)(v) provides that “[i]f the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties,” the award may be set aside. Section 34(2)(b)(ii) provides that “[i]f the arbitral award is in conflict with the public policy in British Columbia,” it may be set aside. (72) According to Judge Tysoe, the leading B.C. authority on the review of arbitral awards is *Quintette Coal Limited v. Nippon Steel Corporation*, wherein the Court of Appeal held that “it is meet ... as a matter of policy, to adopt a standard which seeks to preserve the autonomy of the forum selected by the parties and to minimise judicial intervention when reviewing international commercial awards in British Columbia.” (73) A simple error is not, in other words, sufficient grounds for setting aside an award.

Mexico and the Attorney General of Canada had argued that the pragmatic and functional approach to review, enunciated by the Supreme Court of Canada in the administrative law context, was appropriate in these circumstances. (74) In the view of Judge Tysoe, this was not a question he needed to address in the context of the CAA, since he had decided that

statute did not govern the review. (75) With respect to the ICAA, given that the Act stipulated the applicable standard of review in sections 5 and 34, he determined “it would be an error for me to import into that Act an approach which has been developed as a branch of statutory interpretation in respect of domestic tribunals created by statute.” (76) He also noted that the pragmatic and functional approach had not been applied in the context of international commercial arbitrations. (77)

Many of Mexico's challenges to the award were based on allegations that the *Metalclad* tribunal had dealt with matters outside the scope of the submission to arbitration. Judge Tysoe noted that counsel had in their submissions frequently referred to an “excess of jurisdiction,” which he described as “the standard which was previously applied to decisions of administrative tribunals and arbitral bodies.” (78) Instead, he would use the language under the ICAA.

Judge Tysoe then addressed Mexico's allegation that the *Metalclad* tribunal had acted outside the scope of the submission to arbitration in determining that Mexico had breached its obligations under Article 1105 of the NAFTA. Under Article 1105, the NAFTA Parties agreed to accord investments of investors of another Party “treatment in accordance with international law, including fair and equitable treatment and full protection and security.” The *Metalclad* tribunal had determined that Mexico violated Article 1105 because the applicable regulations and procedures were insufficiently clear, thereby “fail[ing] to ensure a transparent and predictable framework for Metalclad's business planning and investment.” (79)

The B.C. Court analyzed the scope of Article 1105, and concluded that the phrase “minimum standard of treatment in accordance with international law” had its “usual meaning” and meant treatment in accordance with *customary* international law. (80) Customary international law was distinguished from conventional international law, comprising treaties into which countries had entered. The *Metalclad* tribunal had based its decision on transparency obligations purportedly found in Articles 102 and 1802 of the NAFTA; neither of those was an obligation actionable under Chapter 11. (81) Furthermore, the Court noted that the *Metalclad* tribunal had not tried to find a customary international requirement of transparency. (82) That determination led the Court to conclude that the *Metalclad* tribunal had indeed acted outside the scope of the submission to arbitration “because there are no transparency obligations contained in Chapter 11.” (83)

In making this decision, the Court rejected the determination by a tribunal in another Chapter 11 case, *Pope & Talbot Inc. v. Government of Canada*. The *Pope & Talbot* tribunal had concluded that Article 1105 entitled investments of NAFTA investors the international law minimum standard of treatment *plus* what it described as “the fairness elements.” (84) The British Columbia Court rejected that interpretation, remarking that to accept it would require “interpreting the word ‘including’ in Article 1105 to mean ‘plus’, when it has a virtually opposite meaning.” (85)

Metalclad argued that Mexico could not challenge alleged excesses of jurisdiction on the part of the tribunal because it had not raised these objections when the issues arose in the arbitration, as Metalclad argued was required under section 16(3) of the ICAA. Judge Tysoe dismissed this objection on the grounds that Mexico had “raised sufficient objection during the arbitration. It submitted in its counter-memorial that there was no authority for interpreting Article 1105 to extend to transparency requirements and it pointed out that transparency matters are addressed in Chapter 18 of the NAFTA.” (86)

Judge Tysoe's decision as to the tribunal's mistaken interpretation of Article 1105 led him to set aside the *Metalclad* tribunal's expropriation determination insofar as it was based on a violation of the transparency obligation that the tribunal had erroneously imported into Article 1105. (87) The tribunal had concluded that the unfair treatment accorded Metalclad had prevented the company from operating the landfill, thereby resulting in an indirect expropriation or a measure tantamount to expropriation. (88)

However, the tribunal had also made an alternative expropriation determination on the basis of an ecological decree announced by the Governor of San Luis Potosi, which the tribunal found constituted a measure tantamount to expropriation under Article 1110. That decree, issued in September 1997, after the NAFTA proceeding had started, prevented any development on a large land area, including the site of the landfill, in order to protect several species of cacti.

The Government of Mexico argued that because the governmental act in question postdated the commencement of the NAFTA Chapter 11 proceedings, it could not properly have been before the tribunal because the procedural requirements found in Section B of Chapter 11 had not been met. (89) The Court rejected that argument, basing its decision on Article 48 of the ICSID Additional Facility Rules, which permits parties to an arbitration under those rules to present incidental or additional claims no later than the reply. (90) Because Metalclad had raised the issue in its memorial, the Court declined to find error in the tribunal's consideration of the claim based on the Ecological Decree. (91) Mexico also argued that the decision based on the Ecological Decree was *obiter dicta* only, and could not form the basis for liability. The Court concluded, however, that while the determination was *obiter dicta* given the rest of the tribunal's decision, it could stand on its own after the primary holding had been set aside. (92) Furthermore, it found that the tribunal's decision based on the ecological decree rested on grounds independent from a lack of transparency, and thus was not beyond the scope of the submission to arbitration. (93)

Mexico also argued that other alleged deficiencies on the part of the tribunal decision warranted setting aside the award. (94) The Court decided that the tribunal's decision had not been patently unreasonable with respect to the Ecological Decree, and that therefore it need not consider whether such a conclusion would be a ground for setting aside an arbitral award under the ICAA. (95) The Court determined that the tribunal's definition of expropriation was "extremely broad," and extended beyond the conventional notion of taking property to include "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 of a reasonably-to-be-expected economic benefit of property." (96) The Court stated that the definition was "sufficiently broad to include a legitimate rezoning of property by a municipality or other zoning authority." (97) The Court noted that the definition of expropriation was a question of law with which the Court was not entitled to interfere under the ICAA, and concluded that the tribunal's conclusions were not patently unreasonable. (98)

The Court also rejected Mexico's contention that the award should be set aside on the ground that it violated the public policy of British Columbia. Mexico alleged two improprieties: that Metalclad had bribed government officials when it was seeking permits for its proposed landfill operation and that Metalclad had deliberately deceived the tribunal by claiming damages in excess of those it had actually suffered. (99) The Court, however, concluded that no improper acts had been shown. The Court similarly dismissed Mexico's corruption argument. Judge Tysoe did not dispute Mexico's assertion that corruption would warrant setting aside the award. (100) Judge Tysoe stated that, having reviewed the evidence, "I am not persuaded that Mexico proved any corruption in which Metalclad participated." (101) As to the excess damages claim, concerning which Mexico had cited *Société Européenne des Gaz Turbines SA v. Westman International Ltd.*, (102) Judge Tysoe found that this objection should fail. In the *Gas Turbines* case, the award had been partially set-aside following revelations of fraud, but in that case the fraud had formed part of the basis for the arbitral award. In *Metalclad*, the tribunal had not accepted the excessive claim. Furthermore, in *Gas Turbines* the Paris Court set aside only the part of the award relating to the fraud, not the entire award. "I do not read s. 34(2)(b) (ii) of the International CAA to mean that arbitral awards should be set aside in their entirety whenever it is shown that there was a deception which was not relied upon by the arbitral tribunal in making its award." (103) In any case, the judge was not convinced that Metalclad had sought to deceive the tribunal. (104)

In addition, Mexico argued that the tribunal had erred in failing to address all questions submitted to it by Mexico. This argument was based on three annulment cases brought under the ICSID Convention, which Mexico claimed stood for the proposition that a tribunal's failure to decide all questions submitted to it was grounds for annulment under the ICSID Convention. (105) Mexico argued that ICSID Convention cases were relevant because Article 53(1) of the ICSID Additional Facility Rules was analogous to ICSID Article 48(3) in that both required tribunals to decide all questions presented to them. Judge Tysoe rejected this line of argument, stating:

[t]o the extent that these three decisions of the annulment committees have interpreted the phrase 'every question submitted to the Tribunal' to mean 'every argument made to the Tribunal which could have changed the outcome of the award', it is my opinion that the interpretation is overly broad. Where there is a submission to arbitration, there are questions or basic issues which the arbitral tribunal is asked to answer, and this is the type of question to which Article 53 refers. (106)

In the case before him, Judge Tysoe found that the tribunal had "explicitly or implicitly dealt with each argument that had been made." (107)

In any event, the judge noted that the decisions of the annulment committees "have not been universally accepted" and that the cases cited by Mexico had to do with annulment under the ICSID Convention rather than statutory review by the B.C. Court. Article 52(1) of the ICSID Convention prescribes among the grounds for annulling an award "that there has been a serious departure from a fundamental rule of procedure; or that the award has failed to state the reasons on which it is based." The ICAA, on the other hand, contains only one possibly relevant provision, which is that "the arbitral procedure was not in accordance with the agreement of the parties." (108) At least one B.C. case had suggested that this does not require that a tribunal set out its reasons. (109) While not endorsing this earlier decision, Judge Tysoe stated that he did agree that "the seriousness of the defect in the arbitral procedure should be considered when this Court is deciding whether to exercise its discretion to either set aside an award under s. 34 or refuse to enforce an award under s. 36." (110) Judge Tysoe then found that the tribunal had adequately addressed the principal issues before it. (111) Judge Tysoe also noted that, pursuant to Article 58 of the Additional Facility Arbitration Rules, Mexico could have requested that the tribunal decide questions which it had omitted to decide in the award. (112)

Setting aside two of the three grounds on which the arbitral tribunal had based its award caused the Court to reduce the interest awarded by the tribunal. The tribunal had calculated interest on the damages award dating from December 5, 1995, the date on which the municipality had denied Metalclad's application for the construction permit. The Court disallowed interest from that date, ordering that it be calculated instead from September 20, 1997, the date of the ecological decree. (113) He also directed that the matter be remitted to

the tribunal if the parties could not agree on the interest calculation. (114) The Court also awarded Metalclad 75 percent of the costs of the set-aside proceedings, given that it had resisted successfully Mexico's application to set aside the award *in toto*. (115)

Judge Tysoe stated, however, that he “should not be taken as holding that there was no breach of Article 1105 and no breach of Article 1110 until the issuance of the Ecological Decree.” (116) Rather, he set aside the arbitral awards with respect to those matters based on the tribunal's reasoning. He thus held that “if Metalclad wishes to pursue the portion of the interest contained in the Award which I have set aside, by establishing a breach of Article 1105 or Article 1110 prior to the issuance of the Decree without regard to the concept of transparency, the matter is remitted to the Tribunal.” (117)

P 1136-
18

This latter “remission” gave rise to a supplementary decision from Judge Tysoe. Metalclad requested, via ICSID, that the tribunal reconsider Metalclad's entitlement to interest during the period December 5, 1995, to September 20, 1997. The tribunal responded that the conditions for remission had, it seemed, not been met, because Metalclad had at no stage requested that the B.C. Court adjourn the proceedings to permit the tribunal to reconsider the matter. (118) Under the ICAA, the B.C. Court has the authority, “if it is appropriate and it is requested by a party,” to adjourn the proceedings for a period of time to “give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside the arbitral award.” (119) A few months after the tribunal questioned the status of the proceedings, counsel for Metalclad petitioned the Court requesting that it vary the order that had accompanied the award specifically to adjourn the proceedings, either generally or for a specified time. (120) In the interim, Mexico had appealed the B.C. court's refusal to set aside the award in its entirety, and Metalclad had cross-appealed the referral back to the tribunal based on its conclusions with respect to Article 1105 and the pre-Ecological Decree portion of Article 1110. (121)

Mexico and Metalclad went before the registrar to agree on the form any such order would take, and the Court concluded that it had the authority to correct the order flowing from the reasons for judgment. Judge Tysoe rejected Mexico's suggestion that he not vary the order until the appeal was heard, but concluded that the issuance of supplementary reasons would avoid disrupting the “pre-appeal” proceedings. (122) Judge Tysoe acknowledged that he had issued an order more in keeping with remission under the CAA, rather than with the ICAA and the UNCITRAL Model Law it incorporates. The latter envisaged a remission process taking place under the framework of the set-aside proceedings, which would be adjourned until the tribunal dealt further with the matter remitted to it. Judge Tysoe rejected Mexico's argument that adjournment and remission under the Model Law was limited to rectifying procedural defects. (123) He also declined Mexico's request that he set aside the award in its entirety, or that the tribunal be directed to resume its deliberations with respect to the Ecological Decree. (124) He thus varied the order that had accompanied his initial decision, and adjourned the proceedings for 18 months, rather than generally, which in his view was not permitted by the ICAA. (125)

Mexico and Metalclad dismissed their cross appeals when they settled the case. (126)

P 1136-
19

On February 8, 2001, Canada filed a set-aside motion challenging the Partial Award given by the arbitral tribunal in *S.D. Myers Inc. v. Canada*. (127) The application for judicial review was made pursuant to Article 34 of the Commercial Arbitration Code, which is based on the UNCITRAL Model Law on International Commercial Arbitration. The Commercial Arbitration Act is applicable to the statutory review of NAFTA Chapter 11 arbitrations involving the Government of Canada. (128) Canada challenged the *S.D. Myers* tribunal's award on the grounds that it had exceeded the scope of the arbitration agreement by dealing with disputes not contemplated by Chapter 11, and that it contravened the public policy of Canada. (129)

S.D. Myers involved a challenge to Canada's ban on the export of polychlorinated biphenyls (“PCBs”) by *S.D. Myers Incorporated* (“SDMI”), a U.S. company owned by four brothers. SDMI alleged that it had an investment in Canada in the form of a company called Myers Canada. SDMI had a PCB remediation facility in Ohio, and alleged that it was denied the ability to export PCBs for remediation while the ban was in effect. SDMI claimed that the ban breached Articles 1102, 1105, 1106, and 1110, and that it suffered loss or damage by reason of those breaches.

With respect to the Partial Award, Canada alleged that the tribunal had acted outside its authority in finding that SDMI was an “investor of a Party” and Myers Canada was an investment of an investor of a Party; thus, SDMI had advanced claims for damages sustained by parties other than itself. (130) It also alleged the tribunal had acted outside its authority in finding that SDMI and Myers Canada were “in like circumstances” with Canadian-owned PCB remediation facilities; moreover, SDMI should have been considered a provider of cross-border services under Chapter 12 of the NAFTA, rather than an investor entitled to invoke the protections of Chapter 11. (131) Canada also challenged the tribunal's conclusion that establishing a breach of Article 1102 established a breach of 1105, and the conclusion that the investor was injured by a breach of 1105, which by its terms applies to investments, not to investors. (132) Finally, Canada claimed that the award conflicted with the public policy of Canada by failing to consider Canada's commitment under the Basel Convention to be able to

P 1136-
20

dispose of PCB wastes within Canada. (133)

After Canada filed its challenge to the Partial Award, it requested that the *S.D. Myers* tribunal stay the next stage of the arbitral proceedings, which would address quantum of damages, pending the outcome of the set-aside petition. (134) Article 15.1 of the UNCITRAL Arbitration Rules gave the tribunal the authority to stay the proceedings, but no applicable rule of law required that such a stay be issued; thus the matter was entirely within the tribunal's discretion. (135) The starting point in the tribunal's analysis was the presumption that the claimant was entitled to have the claim go forward "at a normal pace." (136) The burden of proof was on Canada to show that the proceedings should be stayed, and Canada did not meet that burden. (137) Canada had argued that *S.D. Myers* would not be prejudiced by such a delay, and that in the event the Federal Court set aside the award, the tribunal could find that any damages award it rendered had been mooted. (138) For its part, *S.D. Myers* suggested that Canada needed to show its set-aside petition had a reasonable chance of success, and that it could not do so given the limited grounds on which awards can be set aside. (139) The tribunal considered the fact that if the Federal Court set aside the award, there were alternate grounds on which the tribunal might make a determination in favor of *Myers* and against Canada; (140) the implication was that the damages award would not necessarily be mooted by a Federal Court decision to set aside the partial award. The tribunal further suggested that the parties reflect "on the rhetorical question as to whether common sense might indicate that any judicial review of the Tribunal's determinations of the overall issues between the parties should await the Final Award?" (141) The tribunal thus denied Canada's application for a stay. (142)

Before the Federal Court had acted on Canada's challenge to the partial award, the *S.D. Myers* tribunal issued its awards on damages and costs. Canada moved to set aside those awards, too, and the cases were consolidated in the Federal Court. (143) Canada moved to set aside the damages award on the grounds ▲▼ that it was based on the same errors that underlay the partial award. (144) Canada further alleged that the tribunal had erred in including in its award damages sustained by *S.D. Myers* on PCB waste disposal work it had planned to do without the involvement of *Myers Canada*; such damages were not due to *S.D. Myers*' status as an "investor" and could not form the basis for an award under Chapter 11 of NAFTA. (145) Furthermore, Canada alleged that the tribunal had included in its damages award fees allegedly lost after the border had reopened; since those fees could not have been lost as a result of the breach, their award fell outside the scope of the submission of the claim to arbitration under Chapter 11. (146) Finally, Canada claimed that the costs award could not stand since it was based on an allegedly successful claim that Canada was moving to set aside. (147)

The Federal Court issued one decision respecting Canada's challenge to all three awards. (148) Judge Kelen emphasized that under Article 34 of the Commercial Arbitration Code the court had very limited jurisdiction to review the award of a NAFTA Chapter 11 tribunal. The Court determined that the "pragmatic and functional" approach, used by courts in review of decisions by administrative tribunals, could not be used to create a standard of review outside those specified in Article 34. The Court quoted several decisions emphasizing the very limited role the court should play in review under the Commercial Arbitration Code: "[i]t is noteworthy, that Article 34 of the Code does not allow for judicial review if the decision is based on an error of law or an erroneous finding of fact if the decision is within the jurisdiction of the Tribunal." (149)

Under Article 34(2)(a)(iii) of the Commercial Arbitration Code, the Court could only set aside an award if it dealt with a dispute "not contemplated by or not falling within the terms of the submission to arbitration," or if it contained decisions on matters "beyond the scope of the submission to arbitration." With respect to the first, the Court concluded that the terms of the submission to arbitration were "whether Canada breached Articles 1102 and 1105 of NAFTA in relation to the respondent." (150) Thus, the Court did not believe that the award dealt with a dispute outside those terms. The second question the Court found "more difficult."

The Court characterized Canada's allegation that *S.D. Myers* was not an "investor" of a Party and thus without standing to bring a claim under Chapter 11 as going to jurisdiction. It also concluded that the argument submitted by Canada and by Mexico (as intervener) that the tribunal had improperly applied Chapter 11 obligations to cross-border trade in services, which were properly governed by Chapter 12, as jurisdictional. The Court noted that Article 21 of the UNCITRAL Arbitration Rules requires that a party make a clear objection to the jurisdiction of an arbitral tribunal as soon as possible, and not later than the filing of the ▲▼ statement of defense. It found that Canada had not done so; although Canada had challenged SDMI's "standing" to bring the claim, it had not specifically referred to the issue as jurisdictional, and the issue had been treated as a mixed question of fact and law. (151) The Court analogized to the requirement that a Party give notice of a jurisdictional challenge to the requirement that a party give timely notice when challenging the constitutionality of a law. (152)

Judge Kelen also determined that the *S.D. Myers* tribunal's decision did not violate the public policy of Canada. The judge described public policy as referring to "fundamental notions and principles of justice." (153) The judge noted that a tribunal's exceeding its jurisdiction could violate principles of public policy, but only in rare cases, and in the case at bar the tribunal's findings with respect to the two jurisdiction questions were not "patently unreasonable," clearly irrational, "totally lacking in reality," or "a flagrant denial of justice," and thus did not amount to a violation of public policy. (154)

Judge Kelen made alternative findings with respect to the definition of investor in NAFTA and the scope of Chapter 12 in the event he was found to be wrong about his decision that Canada was barred from seeking judicial review of those matters it had not challenged at the jurisdictional stage. He determined to review pure questions of law for correctness, and mixed questions of law and fact for reasonableness. (155)

Judge Kelen upheld the tribunal's determination that SDMI was an investor of a Party, based on its investment in SDMI. Judge Kelen noted that the definition of investment of an investor of a Party used the "broad words 'indirectly controlled' – an open-ended, vague definition." (156) SDMI was a family corporation, and the president of SDMI had "the power of directing" Myers Canada. (157) Thus, even though SDMI did not itself own shares in Myers Canada, the tribunal nonetheless found that SDMI indirectly controlled Myers Canada because its president "controlled every decision, every investment, every move by Myers Canada, and Mr. Myers did so as chief executive officer of SDMI." (158) Judge Kelen criticized the Attorney General's position on the definition of investor as a "narrow, legalistic, restrictive interpretation" contrary to the objectives of NAFTA, and concluded that the tribunal's interpretation of the pertinent definition was correct, and its application to the facts reasonable. (159)

P 1136-23

As for the argument with respect to Chapter 12, Judge Kelen stated "The court is of the view that the different chapters of NAFTA overlap, and that the NAFTA rights are cumulative, unless there is a direct conflict." (160)

Judge Kelen then addressed two other claims that Canada had raised with respect to the partial award: one was whether the tribunal had acted outside the scope of the submission of the claim to arbitration in determining that SDMI and Myers Canada were in like circumstances with the Canadian companies that had allegedly received more favorable treatment and thus had been denied national treatment in accordance with Article 1102; the second was whether the tribunal had acted beyond the scope of the submission of the claim in determining that a violation of Article 1102 established a violation of Article 1105. Judge Kelen noted that he had determined review of these matters was not appropriate as they were evidently within the terms of the submission to arbitration, but in the event he was wrong he reviewed them according to the same standards he had set out before. He thus determined that the tribunal had not acted unreasonably in its like circumstances decision, as it had been open to the tribunal to use a "broad comparator." (161) He also determined that he did not need to review the question of the relationship between Articles 1102 and 1105; because the same damages flowed from Article 1102, the tribunal's finding with respect to Article 1105 was redundant. (162) Judge Kelen thus upheld the *S.D. Myers* tribunal's partial award. He did not address any of the challenges Canada had made to the award on damages or the award on costs.

The place of arbitration in *Feldman v. Mexico* was Ottawa, Ontario. Mexico thus moved to set-aside the arbitral award in the Superior Court of Ontario in Ottawa. *Feldman* involved a U.S. investor, Marvin Feldman, who owned a cigarette reselling/exporting business in Mexico called CEMSA. The *Feldman* tribunal determined that Mexico violated Article 1102 of the NAFTA by refusing to rebate excise taxes applied to cigarettes exported by CEMSA when such rebates were granted to domestic reseller/exporters in like circumstances with CEMSA. Although it may have been true that Mexican law did not entitle either company to the rebates, the *Feldman* tribunal held that the fact that Mexico granted rebates to the Mexican companies meant that it was obliged also to grant them to CEMSA. (163) By not doing so, Mexico had engaged in *de facto* discrimination and had denied national treatment under Article 1102. (164)

P 1136-24

The law of Ontario governed the set-aside petition. The UNCITRAL Model Law on International Commercial Arbitration is a schedule to Ontario's International Commercial Arbitration Act, and the disputing parties agreed that it was the law applicable to the dispute. (165) In the *Feldman* set-aside, Mexico claimed that it was not given proper notice of the proceedings or was otherwise unable to present its case in violation of section 34(2)(a)(ii); that the arbitral procedure was not in accordance with the agreement of the disputing parties in violation of section 34(2)(a)(iv) and that the award conflicted with the public policy of Ontario in violation of section 34(b)(ii). (166) The applicant bears the burden of establishing that the grounds for set-aside are present, although the Court may, on its own, conclude that the award is in conflict with the public policy of Ontario. (167) Judge Chilcott emphasized that the jurisdiction of the Court to review the award was strictly limited to those grounds set forth in the Model Law "which allows for a very limited opportunity for the courts to provide any recourse against an award." (168)

The Court considered Mexico's claim that the tribunal had adopted an arbitral procedure not in accordance with the agreement of the Parties to the NAFTA by failing to consider NAFTA Article 2105, which provides that "[n]othing in this Agreement shall be construed to require a Party to furnish or allow access to information the disclosure of which would impede law enforcement or would be contrary to the Party's law protecting personal privacy...." Mexico claimed that it had been unable to provide information relevant to the Article 1102 comparative analysis of the *Feldman* tribunal by virtue of Mexican law, which requires that taxpayer information be kept confidential. According to Mexico, the tribunal had drawn an adverse inference from Mexico's refusal to produce the taxpayer records of other cigarette seller/exporters allegedly in like circumstances with CEMSA, and such an adverse inference was not permissible when the failure to disclose information was excused by Article 2105.

The Attorney General of Canada, as intervener, supported Mexico's argument with respect to

Article 2105, and argued that the tribunal had failed to respect governing law and had thereby exceeded its jurisdiction in two ways. First, it should have considered Article 2105 to be part of the agreement to arbitration, and second it should have considered Article 2105 to be one of the applicable rules of international law. (169) Canada argued that these failures meant that the tribunal had determined matters outside the submission of the claim to arbitration under section 34(2)(a)(iii) of the Model Law. (170)

▲ P 1136-25 Judge Chilcott first addressed Canada's argument. Judge Chilcott noted that Mexico had not raised Article 2105 as a defense to its conduct before the tribunal; thus, the tribunal had made no ruling with respect to that issue. In such a circumstance, the Court considered it "improper to raise the Article 2105 argument on this review." (171) The Court noted that the tribunal had made no requests to Mexico for information confidential by virtue of Mexican law, and that Mexico could have provided the information about how many corporations were getting rebates, and related questions about which corporations were undergoing audits, ▼ without disclosing confidential information. The Court thus concluded that the tribunal did not exceed the scope of the submission to arbitration, as Canada had argued. (172)

Judge Chilcott also concluded that the same logic disposed of Mexico's argument that the tribunal had not acted in accordance with the arbitral procedure designated by the Parties to NAFTA. Judge Chilcott reviewed the reasoning of the *Feldman* majority, and concluded that the majority had found that Feldman had established a "presumption and a *prima facie* case" that CEMSA had been treated in a different and less favorable manner than Mexican-owned cigarette resellers, and that Mexico had failed to introduce any credible evidence to rebut the presumption. (173) "In reading the award and the documentation filed there is no evidence before this court by which I can conclude that Article 69 [of Mexican law] would have prevented Mexico from leading evidence it wanted to lead and which would have perhaps satisfied Feldman." (174) In the set-aside proceeding, the disputing parties introduced conflicting affidavits about the status of the Mexican law on privacy at the time of the arbitration. The Court did not consider the affidavits in its reasons, as it thought it improper that they be admitted at that stage, that they had not been tested by cross-examination, and that there must be some finality to the arbitral proceeding. (175)

The Court noted that it felt bound to give a high degree of deference to the arbitral tribunal, and suggested that Mexico was "in reality challenging a finding of fact." (176) The Court noted the importance of deferring to arbitral panels when the parties submitted their disputes to international commercial arbitration, and cited the list of factors set out in *Pushpanathan v. Canada* as to where a given tribunal decision lies on the spectrum of judicial deference:

(i) the presence of absence of a privative clause; (ii) the relative expertise of the tribunal; (iii) the purpose of the Act of jurisdiction-conferring enactment as a whole; and (iv) the nature of the problem on judicial review and whether it involves a question of law or fact. (177)

▲ P 1136-26 The test in *Pushpanathan* is the "pragmatic and functional" approach to review of delegated decision applied in domestic cases. The Court did not directly address the interplay between *Pushpanathan* and the ICAA, but to some extent construed the ICAA within the rubric of the *Pushpanathan* test. The Court did not address the factors *seriatim*, but concluded that the UNCITRAL Model Law, taken in conjunction with the ICSID Additional Facility Rules, were examples of ▲▼ privative clauses owed deference, and that the arbitrators were highly respected individuals whose expertise had not been called into question. (178)

Judge Chilcott also found unavailing Mexico's argument that it had been unable to present its case because the *Feldman* tribunal had informed the disputing parties that it would draw adverse inferences only in the event that a disputing party failed to comply with its orders. Mexico claimed that the tribunal never issued an order compelling Mexico to provide taxpayers information about those cigarette reseller/exporters competing with CEMSA, and thus should not have drawn an adverse inference against Mexico for its failure to provide the information. (179) Rather, the evidence showed that the *Feldman* tribunal invited the parties to exchange specific requests for documents, and that if a disputing party believed documents could not or should not be produced it should give the requesting party the reason for its refusal; the tribunal would then decide any dispute. (180) Furthermore, the tribunal pointed out that if a disputing party did not comply with a request from the tribunal to produce documents, the tribunal could draw appropriate inferences. (181) Mexico had chosen not to present evidence about the rebates granted to other cigarette reseller/exporters, but it did not argue that it was unable to present the evidence it wanted by reason of Mexican law on taxpayer privacy or Article 2105. Mexico was thus not unable to present its case as provided by the Model Law; it had simply "failed to present evidence to rebut the *prima facie* case of discrimination established by the Respondent Feldman." (182)

Finally, Judge Chilcott found that the award did not violate the public policy of Ontario. Mexico had claimed that the award violated public policy because the tribunal had acknowledged that the law of Mexico did not require that CEMSA be paid rebates, but it awarded CEMSA rebates because others who were also not entitled to the rebates had been paid them. (183) The lack of entitlement had hinged on the inability to show appropriate invoices. (184) Judge Chilcott determined that the payment of damages was not against public policy and that the measures used by the tribunal's majority to assess the damages was "fair and proper." (185) "In no way did the quantum or the method of assessing damages offend in a fundamental way the principles of justice as they exist in the Province of Ontario." (186)

Judge Chilcott also issued an award on costs. Feldman had argued that he should receive costs

on a “partial indemnity” scale up to the time he offered to settle the case, and on a “substantial indemnity” scale after Mexico had refused his offer of settlement. (187) Mexico countered that Feldman's offer had not been a “genuine offer of compromise” and did not warrant a departure from the usual scale of costs. (188) Mexico also challenged the disbursements paid for expert witnesses whose affidavits Judge Chilcott had expressly determined not to consider and for consulting Mexican counsel. (189) Judge Chilcott rejected Feldman's request for “substantial indemnity” on the grounds that the offer to settle had not been significant enough to trigger costs on a substantial indemnity basis. (190) The Court did, however, award Feldman the costs for the affidavits: “It is very simple after the fact to say that they were not necessary, but in my view proper case presentation would require and even demand that both these steps be taken.” (191)

Mexico appealed the Superior Court's ruling to the Court of Appeal for Ontario. The three-judge panel first addressed the appropriate standard of review. It concluded that the domestic law of Canada, in addition to international principles of comity, directed a high degree of deference to the awards of “specialty tribunals generally and for awards of consensual arbitration tribunals in particular.” (192) It noted the four factors in the “pragmatic and functional” approach to review as applied in *Pushpanathan*. First, it concluded that the ICSID Additional Facility Rules did not contain a full “privative clause” and thus did not exclude judicial review, but noted that the judicial review was limited to the grounds set forth in section 34 of the Model Law. (193) It concluded that insofar as the expertise of the arbitral tribunal was concerned, no evidence in the record described the particular expertise of the arbitrators, but noted that Mexico had not challenged the expertise of any of the tribunal members. (194) The Court further found that the purpose of the governing legislation was to remove the matters in question from the hands of domestic courts, although the tribunals were deciding matters in a manner not dissimilar to that of courts. This suggested a high degree of deference was appropriate. (195) Finally, the Court concluded that the matters to be decided by the Court were heavily fact-laden. (196) Taken together, all of the factors suggested a standard of review “at the high end of the spectrum of judicial deference.” (197)

The Court treated Mexico first two objections as “different sides of the same coin.” (198) Mexico argued that the arbitral procedure had been contrary to the agreement of the Parties because the tribunal had drawn adverse inferences from Mexico's failure to provide information about domestic taxpayers; the tribunal should have conducted the procedure in such a manner as to include Article 2105, which provides that NAFTA should not be construed so as to require Parties to provide information protected by, *inter alia*, personal privacy laws. (199) On the other hand, Mexico claimed that it was not permitted to state its case before the tribunal because the tribunal had not suggested that the evidence submitted by Mexico – two affidavits from a Mexican tax official – was inadequate, and that it proposed to draw adverse inferences from Mexico's having failed to provide more information. (200) Mexico argued that pursuant to Procedural Order No. 2, the tribunal could only draw adverse inferences if a disputing party was requested to provide information but did not do so. (201)

The Court noted that Mexico had not raised Article 2105 during the course of the arbitration, but had done so only in requesting a correction and interpretation of the award, and that all three members of the tribunal had agreed that Mexico was effectively seeking a new decision. Mexico had, however, raised Article 69 of the Mexican Fiscal Code and suggested that it limited the information Mexico could provide about taxpayers. Mexico had suggested in its reply memorial, however, that this line of argument need not be pursued, and pointed to the evidence Mexico had proffered to show that other companies in like circumstances with CEMSA were being investigated “in the same manner.” (202) The Court suggested that it saw some merit in Mexico's argument that the tribunal should not draw adverse inferences from Mexico's failure to provide information that the tribunal was without authority to compel. (203) Yet the Court concluded that something different happened in the actual case: Mexico was not required to submit information that it did not want to produce; rather, it chose to produce information that failed to satisfy the tribunal, which concluded that Mexico would have produced more convincing evidence had it been available. (204) The Court concluded that Procedural Order No. 2 was irrelevant given that the tribunal had never sought to compel information from Mexico. The Court also remarked that the issue as defined by the arbitral tribunal was essentially one of fact, and that there was support in the evidence for the tribunal's finding, which meant the Court must defer to the tribunal. Thus, the Court was unable to conclude that the tribunal majority “acted in breach of NAFTA article 2105 or Procedural Order No. 2.” (205) Thus, the tribunal procedure was not contrary to the agreement of the parties and Mexico was not prevented from presenting its case.

The Court of Appeal also rejected Mexico's challenge on the grounds of public policy. The Court described the public policy concern as guarding “against enforcement of an award which offends our local principles of justice and fairness in a fundamental way ... or where there was ignorance or corruption on the part of the tribunal which could not be seen to be tolerated or condoned by our courts.” (206) The Court found nothing unfair about the award, which it found to be “a logical quantification of the harm caused to CEMSA by the discriminatory conduct.” It was not persuaded by Mexico's argument that the tribunal had effectively awarded CEMSA tax rebates to which it was not entitled only because the Mexican tax authorities had awarded another investor rebates to which it was not entitled. (207) It was also not persuaded that the tribunal had miscalculated the damages award based on inflated claims. Finally, given its

conclusions with respect to public policy, it did not consider Mexico's argument that Judge Chilcott had misapprehended Mexico's public policy argument by considering it to be based only on CEMSA's inability to provide invoices, rather than on CEMSA's being awarded recovery based on illegal tax rebates. (208)

The claimants in *Bayview Irrigation v. Mexico* moved to set-aside the tribunal award dismissing their claims for lack of jurisdiction because they did not have an investment in Mexico, as required by the treaty. (208a) The claimants challenged the arbitral award on the grounds that the tribunal had not adhered to fundamental legal principles in arriving at its decision. In particular, claimants alleged that, contrary to settled arbitral practice on jurisdictional motions, Mexico challenged the facts alleged by the claimants; that the tribunal itself made findings of fact at the jurisdictional stage rather than accepting the facts as alleged by the claimants; and that the tribunal did not have a complete evidentiary record before it when it made factual determinations adverse to the claimants. (208b)

The Ontario Superior Court heard the set-aside petition because Toronto was the place of arbitration. The Ontario court emphasized the extremely deferential standard of review it was directed to employ by Article 5 of the UNCITRAL Model Law, which specifies that the only grounds on which the court can set-aside an arbitration award are those found in Article 34 of the UNCITRAL Model Law, and that the burden lies on the applicant to prove that one of the grounds is present. (208c) The court also noted the importance for international comity and international trade in observing a deferential standard of review: "In the interest of comity among nations, predictability in decisions and respect for autonomy of the parties' chosen panel, it is only in exceptional circumstances that an arbitral decision will be set aside."

(208d) Thus, the Court is obliged to ensure that the parties have received equal treatment, that minimal procedural standards were observed, and that the decision does not offend public policy – matters that touch on "principles of fundamental justice." (208e)

The *Bayview Irrigation* claimants were unable to demonstrate that the arbitral award failed to accord them fundamental justice. The Ontario court dealt with the public policy argument first, which it described as the claimants' "least persuasive ground for review." (208f) The claimants' arguments on this point were not fully developed, but in any event they had not alleged that the tribunal's conduct was tainted by corruption, bribery, or fraud, or contrary to essential morality, which would be required to support *vacatur* on the grounds of public policy. (208g) The court also found unpersuasive the argument that the tribunal changed the agreed-upon rules of procedure, thereby depriving claimants of the opportunity to present their case. The claimants knew that Mexico's challenge to the jurisdiction of the tribunal was based on the alleged lack of an investment by the claimants in Mexican territory, and they had the opportunity to present documentary evidence and expert witness testimony. (208h) The claimants could have requested the opportunity to submit more testimony under Article 44 of the ICSID Additional Facility Rules, but did not do so. (208i) Thus, the claimants failed to demonstrate any violation of a principle of fundamental justice. (208j)

The last argument made by claimants was similarly unavailing. They argued that the tribunal acted contrary to settled international arbitral practice of assuming the correctness of claimants' factual allegations in considering a jurisdictional objection. But, according to the Court, the question was whether claimants had made an investment in Mexico, which the claimants conceded was a mixed question of law and fact (Mexico had always maintained it was a question of law). (208k) The Court, citing *Methanex*, concluded that it was within the tribunal's authority to decide whether it had jurisdiction pursuant to Article 1101(1) on the facts alleged by the claimant. (208l) Here the tribunal came to the conclusion that the rights owned by the claimants did not amount to an investment in Mexico, a conclusion with which the Court would not interfere. (208m)

Canadian set-aside practice arose in the decision on place of arbitration in *Gallo v. Canada*, which involves a challenge to Ontario legislation preventing the operation of a landfill on the Adams Mine site. (208n) The disputing parties could not agree on the place of arbitration, and one of the arguments made by claimants against Canada as a situs for the arbitration was the possibility of an adverse set-aside ruling on public policy grounds because of Ontario legislation extinguishing any cause of action in respect of the Adams Mine site. (208o) Canada, arguing in favor of a Canadian place of arbitration, submitted that the Ontario legislation could not itself constitute grounds for setting aside the award on grounds of public policy; rather, the focus must be on the award itself, and whether it violates public policy because it offends fundamental principles of justice and fairness. (208p)

The arbitral tribunal agreed with Canada that the mere existence of the Ontario legislation would not support vacating an award on the basis of public policy. It cited with approval the *Bayview Irrigation* set-aside decision, which made clear that the public policy ground for set-aside required that a tribunal's conduct be "marked by corruption, bribery or fraud or contrary to the essential morality." (208q) Moreover, the tribunal noted that all legal systems permit set-aside on grounds of public policy; if there was indeed such a ground for setting aside the award, it would not matter where the arbitration was sited. (208r) There was thus no objection in principle to the arbitration's being sited in Canada. The tribunal also noted Canada's statement that "a public policy challenge, therefore, cannot be brought on the basis of a statute as the [Act]" and suggested it would be estopped from bringing any such claim. (208s)


a Set-Aside in Mexico

Mexico is a federal republic, and commercial law is a matter of federal law governed by the

Federal Commercial Code. (209) Mexico has adopted the UNCITRAL Model Law on International Commercial Arbitration, with some modifications, and set-aside petitions are governed by that law. The Model Law provisions with respect to enforcement were not amended when Mexico enacted the Model Law. The law governing set aside is found in Article 1457 of the Model Law:

Arbitral Awards may only be set aside by the competent court when:

I. The party making the application furnishes proof that:

- a) A party to the arbitration agreement was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the Mexican law;
- b) The party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case;
- c) The award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration. However, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or
- d) The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Title from which the parties cannot derogate, or failing such agreement, was not accordance with this Title; or

P 1136-
30b

II. The court finds that the subject-matter of the dispute is not capable of settlement by arbitration or that the award is contrary to public policy. (210)

Article 1460 of the Federal Code of Civil Procedure is also relevant. It provides that a set-aside proceeding under the Model Law shall be incidentally substantiated in accordance with Article 260 of the Federal Code of Civil Procedure, and that such a decision is not subject to appeal. (211)

There have been no set-aside proceedings of NAFTA Chapter 11 cases in Mexico. Mexico has yet to be the place of arbitration in any Chapter 11 case.

c Set-Aside in the United States

The Federal Arbitration Act ("FAA") governs international commercial arbitration in the United States. The FAA applies to agreements to arbitrate maritime transactions or transactions involving commerce. (212) The FAA preempts state law when it applies, but it is not a detailed statute. State arbitration laws may thus fill in the interstices of the Federal Arbitration Act. (213) In the area of set-aside, however, the Federal Arbitration Act sets out the criteria which a reviewing Court should use in considering an award.

One question has been whether or not NAFTA investor-State arbitration is "commercial" for purposes of the FAA. Article 1136(7) specifies that awards are deemed to "arise out of a commercial relationship or transaction" for purposes of enforcement under the New York and Inter-American Conventions, but does not contain the same specification for set-aside proceedings. The United States did not amend the FAA to specify that NAFTA Chapter 11 awards were to be deemed "commercial" for purposes of the FAA. (214) Some Chapter 11 arbitrations clearly involve commercial matters; others less so. If an arbitration were not deemed "commercial," the local law on arbitration would apply. The United States has consistently maintained that the FAA would govern NAFTA awards when the question has arisen in selecting the place of arbitration. (215)

P 1136-
31

Domestic arbitrations are governed by Chapter 1 of the Federal Arbitration Act ("FAA"). (216) Arbitration under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards is governed by Chapter 2, (217) and arbitration under the Inter-American Convention on International Commercial Arbitration is governed by Chapter 3. (218) Both Chapters 2 and 3 provide that the provisions of Chapter 1 apply to actions and proceedings brought under those chapters to the extent Chapter 1 does not conflict with the obligations in either of the conventions. (219)

Chapter 1 of the FAA sets out grounds for the vacatur of arbitral awards. The U.S. federal district court for the jurisdiction in which the award was made may vacate an award:

- (1) Where the award was procured by corruption, fraud, or undue means.
- (2) Where there was evident partiality or corruption in the arbitrators, or either of them.
- (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
- (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(5) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators. (220)

These statutory standards are supplemented by the possibility of vacatur based on an arbitral tribunal's "manifest disregard of the law," which derives from Supreme Court *obiter dicta*. (221) The "manifest disregard" standard has been subject to a great deal of criticism, based largely on the ground that certain courts have interpreted it expansively and reviewed arbitral awards for mistakes of law, thereby effectively engaging in a review of the merits of an arbitral award and undermining the purposefully restrictive review set forth in the FAA. (222)

It has been suggested that Chapter 1 of the FAA should not apply to the set-aside of awards that are "foreign" under the New York Convention. (223) The New York Convention provides for the enforcement of "foreign" arbitral awards, which are defined in two ways. The first definition of "foreign" award is that it is an award is made in a place outside the territory in which enforcement is being sought. (224) The second definition of "foreign" award is that it is an award not considered "domestic" in the State in which recognition and enforcement are sought. (225) Under U.S. law, "[a]n agreement or award arising out of such [commercial] relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states." (226) Thus, even an award made between two U.S. entities could in certain circumstances be considered non-domestic and could fall under the grounds for denying recognition and enforcement as set out in the New York Convention, rather than under the grounds for vacatur as set forth in Chapter 1. Some U.S. jurisdictions have rejected this argument and have concluded that the grounds for vacatur under Chapter 1 apply to an award rendered in the United States, (227) while others have accepted it. (228) Which set-aside regime applies will thus depend on the jurisdiction in which one is seeking judicial review of an award.

The set-aside petition in *Loewen v. United States* was brought in U.S. District Court for the District of Columbia, as Washington, D.C. was the place of arbitration. Both parties treated Chapter 1 of the F.A.A., and the judicial ground of manifest disregard of the law, as setting forth the standard of review applicable in the case. (229) Raymond Loewen claimed that the tribunal acted in manifest disregard of the law and that it violated, at the least, sections 10(3) and 10(4) of the F.A.A. in that the tribunal was guilty of misconduct and of other misbehavior, and that it exceeded its powers or so imperfectly executed them that it did not make a mutual, final, and definite award. (230) Raymond Loewen requested that the Court set aside the arbitral award on three grounds.

First, Raymond Loewen alleged that the Loewen arbitrators manifestly disregarded the law applicable to the dispute with respect to the issue of exhaustion of local remedies, and that it engaged in arbitral misconduct with respect to that issue in violation of section (1)(3) of the F.A.A. The *Loewen* tribunal had found that the principle of "finality" meant that a court decision could not be considered wrongful under international law until the court of last resort had spoken, and that Loewen had not demonstrated that recourse to such a court was unavailable.

According to Loewen's set-aside petition, the tribunal had set forth an "objective" standard – were remedies objectively available? – but had disposed of the matter on a "subjective" standard – did Loewen believe that it had any reasonably available alternative to settlement? (231) Despite recognizing the legal standard as an objective measure, the tribunal failed to consider evidence that went to the reasonable availability of Loewen's remedies, and in so doing it engaged in arbitral misconduct as well as in manifest disregard of the legal principle that the tribunal "hear and fairly consider unchallenged, uncontested, clear and uncorroborated evidence." (232)

Second, Raymond Loewen alleged that the tribunal engaged in misconduct and misbehavior because the award was incomplete. According to the petition, the tribunal did not dispose of Raymond Loewen's claim that he brought on his own behalf pursuant to Article 1116. The United States had not challenged Raymond Loewen's standing to bring such a claim on jurisdictional grounds. It was thus not disposed of by any of the tribunal's decisions with respect to jurisdiction. The *Loewen* tribunal had denied the request of the United States to issue a supplementary decision explaining the effect of its award on Raymond Loewen's claim, but explained its view of what it had done in the award. It said that its decision to dismiss the award in all respects necessarily disposed of Raymond Loewen's Article 1116 claim on the merits when it dismissed all claims "in their entirety." In his set-aside petition, Raymond Loewen argued that this explanation was based on an "ex post facto rationalization" and that tribunal's claim to have resolved his Article 1116 claim on the merits was "intellectually dishonest and clearly false." (233) The set-aside petition claimed that in rendering an incomplete award, and in subsequently refusing to remedy that misconduct, the tribunal engaged in substantial misbehavior that prejudiced Raymond Loewen's rights. (234)

Raymond Loewen's third allegation was that the award should be vacated because it was contradictory on its face. According to Raymond Loewen, the *Loewen* Award had said nothing directly about Mr. Loewen's Article 1116 claim, but had disposed of the case on jurisdictional grounds. The denial of the request for a supplementary decision, on the other hand, stated that the tribunal had resolved the claim on the merits. He also alleged a contradiction in that the explanation stated that the tribunal had considered all evidence with respect to the availability of local remedies, whereas the initial award made clear it never considered such

evidence. This contradictory award allegedly evidenced tribunal misbehavior that prejudiced Raymond Loewen's rights. (235)

Raymond Loewen also asked that the court remand to a new tribunal. He alleged that remanding to the same tribunal would preclude him from obtaining fair and impartial review. (236)

▲ P 1136-33a The United States objected to Raymond Loewen's petitions to vacate on the grounds that it is time-barred. The FAA requires that set-aside petitions be ▲ made three months from the date of the award. (237) The *Loewen* tribunal issued its award on June 26, 2003. The United States requested a supplementary decision under Article 58 of the ICSID Additional Facility Arbitration Rules on August 11, 2003, and specifically asked that the tribunal clarify its disposition of Raymond Loewen's claims under Article 1116. The tribunal denied that request on September 13, 2004, and Raymond Loewen filed his petition to set aside the award on December 13, 2004. The United States argued that the June 26 award was final, and that any set-aside petition should have been filed within three months of the date of that award. (238) The United States also argued that, in the event that the request for a supplementary decision tolled the running of the limitation period in the FAA, Raymond Loewen's petition was still untimely. Forty-five days had elapsed from the date of the award until the date that the United States requested the supplementary decision. Thus, according to the United States, only 45 days of the limitation period remained when the *Loewen* tribunal denied the request for a supplementary decision on September 13. The petition for set-aside was not filed until 90 days after the tribunal's denial of the U.S. request for a supplementary decision, and was thus untimely. (239) The United States also opposed the petition for set-aside on its merits. (240)

The U.S. district court issued its opinion in the *Loewen* set-aside application in October 2005. The court determined that the petition was time-barred, as the United States had argued. The court found that the ICSID Additional Facility Rules, which governed the arbitration, make clear that an award was final and binding on the date it is rendered, notwithstanding any subsequent request for a supplemental decision. (240a) Thus, the petitioner needed to file any petition to set aside the award no later than September 26, 2003, given that the award had been rendered on June 26, 2003. Since the petitioner had not done so, his motion was time-barred. (240b)

International Thunderbird Gaming Corporation involved a challenge by the claimant to Mexico's regulation of gambling. Mexico won the NAFTA arbitration, defeating Thunderbird's arguments that Mexico had discriminated against Thunderbird by first issuing an opinion approving its operation of certain video gaming equipment but then rescinding that opinion by closing down its gaming operations, and that Mexico's acts had expropriated Thunderbird's property. The *Thunderbird* tribunal also awarded Mexico costs and partial fees in the amount of USD 1,242,862. Thunderbird requested that the U.S. District Court for the District of Columbia, the place of arbitration, set aside the award. Mexico responded by moving for confirmation, recognition, and enforcement of the award.

▲ P 1136-34 Thunderbird's primary argument was that the tribunal had acted in manifest disregard of the law by establishing the burden of proof that the claimant need ▲ meet but then failing to apply that standard. The *Thunderbird* tribunal announced the following standard:

The Tribunal shall apply the well-established principle that the party alleging a violation of international law giving rise to international responsibility has the burden of proving its assertion. If said Party adduces evidence that *prima facie* supports its allegation, the burden of proof may be shifted to the other Party, if the circumstances so justify. (240c)

Thunderbird claimed that it had provided sufficient evidence of *prima facie* violations of international law, and that the tribunal should have required Mexico to provide evidence to rebut that showing. (240d)

The court summarily rejected this argument. It reiterated the conventional view that in the United States judicial review of an arbitration award is extremely limited, and that the claimant bears a "heavy burden" of establishing that set-aside of an award is appropriate. (240e) It concluded that the tribunal's decision evidenced that it had determined that Thunderbird failed to carry its burden. The court briefly reviewed Thunderbird's claim in the underlying case, which it described as one of "detrimental reliance," and concluded that Thunderbird's evidence failed to show a violation of international law. Because it was not "plainly manifest" from the award that the tribunal had (1) determined that Thunderbird met its *prima facie* burden and (2) refused to require Mexico to overcome the resulting presumption of violation of international law, the court could not disturb the award. (240f) Doing otherwise would require the court to reassess the factual question of whether the burden had been met in the first place, which would plainly violate the very limited standard of review employed by U.S. courts when hearing motions to set aside arbitral awards. (240g)

Thunderbird also argued that the tribunal had erred by failing to require Mexico to submit expert evidence that Mexican officials had not intended to mislead Thunderbird about the licensing requirements for Thunderbird's gambling machines, and that the tribunal had exceeded its authority by determining that Thunderbird's machines were illegal under Mexican law. Again the district court summarily rejected these arguments. It noted that Mexico would only have been required to submit such evidence had Thunderbird established the opposite proposition, and that the tribunal had carefully not taken a position on the legality or illegality of the gaming machines in question. (240h) The court also rejected ▲ Thunderbird's

claim that the tribunal's finding that Thunderbird had engaged in bribery was improper; the court noted that the tribunal had specifically not made such a finding. (240i)

The final head of Thunderbird's objection was that the tribunal had improperly assessed costs and fees against it. Thunderbird claimed that prior NAFTA cases demonstrated that such awards went against the claimant in only limited circumstances. The court also rejected this argument. After reviewing the relevant rules, it determined that the tribunal had broad discretion in awarding fees and costs. (240j) Moreover, even if Thunderbird had been able to establish that precedent limited the discretion in the rules, its claim would still fail under the relevant standard of review, as Thunderbird would have to demonstrate that the tribunal had recognized the precedent as controlling but had failed to apply it anyway. (240k)

The court therefore dismissed with prejudice Thunderbird's claim and granted Mexico's motion to confirm the award. (240l)

The cases involving the lumber trade between the United States and Canada have been heard in a number of different fora; the United States District Court for the District of Columbia is one of them, but it has declined on two occasions to render the relief sought by Tembec Inc. Neither is a set-aside case in the ordinary sense.

Tembec first filed a motion in U.S. District Court to vacate the order made by an Article 1126 consolidation tribunal consolidating its claim with those of Terminal Forest Products and Canfor, as introduced on page 1136.8, *supra*, in the discussion on setting aside interim awards. (240m) The United States and Canada signed the Softwood Lumber Agreement on September 12, 2006, ending the then-current lumber dispute between the two governments. Part of that agreement involved the discontinuance of litigation filed by individual claimants, including arbitrations pending under NAFTA Chapter 11, through a Termination of Litigation Agreement ("TLA") requiring each party to bear its own costs in relation to any discontinued litigation. Final details of the arrangement were not worked out until later in October, and the initial TLA was abandoned and replaced by a less comprehensive Settlement of Claims Agreement ("SCA"), which dismissed four claims but which did not include Tembec's Chapter 11 case. (240n) Tembec saw and signed the SCA the night before it filed its stipulation of dismissal in U.S. District Court, which was "with prejudice, subject to the terms of the conditions of the Softwood Lumber Agreement of 2006." (240o)

On October 13, 2006, the day after Tembec and the United States filed the stipulation of dismissal, the United States sought costs from Tembec in the NAFTA Chapter 11 proceeding. P 1136-36 Tembec then sought to re-open the set-aside proceeding on the ground that it had been misled by the United States into stipulating the dismissal. Tembec claimed that it had not known the SCA replaced the TLA, and thus had not realized that the SLA no longer contained a provision respecting the allocation of costs in its case.

The tribunal dismissed Tembec's reinstatement motion. First, it held that the plain language of the stipulation must govern. Even though Tembec claimed it had not understood the SLA's terms had been changed and no longer included the TLA, the language in the stipulation was clear – it was subject to the terms and conditions of the SLA of 2006, and the SLA contained the SCA, but not the TLA. (240p) Second, Tembec maintained the United States had knowingly misled it about the contents of the SLA, but Tembec offered no evidence that such was the case; indeed, it was the Government of Canada that presented the SCA to Tembec, not the U.S. Government. Moreover, the Court held that the United States had no duty to explain the terms of the SLA or the SCA to Tembec. (240q)

Third, Tembec claimed that it did not know the SCA replaced the TLA, but the Court found this argument disingenuous, as Tembec had had time to review the SCA, which was only two pages long, before it signed it. (240r) Further, Tembec should have known that the SCA replaced the TLA because it referred to several of the same cases, and there would be no need to refer to the same cases twice. Finally, Tembec was informed by a confidential source that if the governments could not satisfy some of the terms in the TLA they would have to take other action, such as the substitution of the SCA for the TLA, to ensure its entry into force. (240s) The Court refused to give any weight to the fact that other private claimants were treated differently with respect to costs. The plain language of the agreements called for their difference in treatment, and the United States was free to seek fees and costs against Tembec. (240t) There were thus no grounds for setting aside the stipulation of dismissal under Federal Rule of Civil Procedure 60(b). (240u)

The consolidation tribunal ordered Tembec to pay attorneys' fees and costs to the United States in the amount of \$271,844.24, and to pay costs to Canfor and Terminal Forest Products in the amount of \$32,628.15 each. (240v) Tembec then moved the District Court to set aside the costs award. The U.S. District Court for the District of Columbia dismissed the motion on grounds of *res judicata* and collateral estoppel. The Court held that Tembec was seeking to revisit the earlier decision that refused to set aside the stipulation of dismissal, notwithstanding Tembec's argument that it was challenging an award never before at issue. (240w) The Petition did not ask to modify or amend the amount of fees and costs, but sought to vacate the Costs Award based on the same "nucleus of facts" raised in the first petition to set-aside the stipulation of dismissal. (240x) Tembec had accepted \$242 million in refunds of duties assessed by the United States as part of the settlement agreement, and had chosen to settle rather than to litigate the dispute, which it could have done in 2005. (240y) The Court also found that certain issues were barred by collateral estoppel because they had been litigated and decided in the 2005 case: the United States had not misrepresented the terms of

the SLA, the SCA, or the stipulation of dismissal; the United States had not misled Tembec, and the SLA did not prevent the United States from seeking the costs award. (240z)

E Enforcement of Awards

Article 1136(4) states that each Party “shall provide for the enforcement of an award in its territory.” The recognition and enforcement of arbitral awards is essential in making arbitration, including international arbitration, function. Once an award is given the imprimatur of a national authority – usually a court – the arbitral award is enforceable in the same way that a court decision of that jurisdiction is enforceable.

All three NAFTA Parties are signatories to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The New York Convention is widely recognized as having established an extremely successful regime for the enforcement of arbitral awards. (241) Mexico and the United States are both Party to the Inter-American Convention. The Inter-American Convention in most respects resembles the New York Convention, and signaled in Latin American countries a reversal from their traditional resistance to international arbitration. The Parties would thus seem to have abided by their obligation to establish an effective regime for the enforcement of awards. (241a)

1 NAFTA Chapter 20

▲
P 1136-
36b

Article 1136(5) provides that if a disputing Party fails to abide by or comply with a final award, the Party whose investor was a disputing party may request the establishment of a panel under Article 2008. The relief sought in such a proceeding could be “a determination that the failure to abide by or to comply with the final ▲ award is inconsistent with the obligation of this Agreement,” and “a recommendation that the Party abide by or comply with the final award.” Implementation of those recommendations would presumably be governed by the procedures in Chapter 20, including Article 2018, which provides that Parties should agree on the resolution of the dispute, usually in conformity with the determinations and recommendations of the panel, and Article 2019, which provides for the suspension of benefits in the event that the Parties do not agree on the resolution of the dispute. No Party has yet requested the establishment of such a panel; the disputing Parties who have had awards rendered against them have abided by their obligations to comply with the awards.

The establishment of a panel under Article 2008 does not preclude a disputing investor from seeking enforcement under the New York or Inter-American Conventions.

2 Enforcement of Awards under the New York Convention

▲
P 1136-
36c
P 1136-
36d

There are currently 137 Parties to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. (242) Mexico ratified the Convention without taking any reservations. Canada ratified the New York Convention, but declared “that it would apply the Convention only to differences arising out of legal relationships, whether contractual or not, that were considered commercial under the laws of Canada, except in the case of the Province of Quebec where the law did not provide for such limitation.” (243) The United States made two statements respecting its acceptance of the Convention. The first was that it would “apply the Convention only to recognition and enforcement of awards made in the territory of another contracting State.” (244) The second was that it would “apply the Convention only to differences arising out of legal relationships, whether contractual or not, that are considered commercial under the national law.” (245) ▲▲ The NAFTA itself states that awards rendered by Chapter 11 tribunals will be “deemed” commercial for the purposes of the New York Convention.

The New York Convention establishes a presumption that awards will be enforced, and sets forth a limited number of grounds on which an authority can refuse to recognize or enforce a judgment. Article V(1) of the New York Convention provides that recognition and enforcement of an award may be refused only if the party against whom the award is invoked supplies to the competent authority proof that:

- (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the awards was made; or
- (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
- (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced; or
- (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
- (e) The award has not yet become binding on the parties, or has been set aside or suspended

by a competent authority of the country in which, or under the law of which, that award was made.

Article V(2) also sets forth two additional grounds for refusal. The competent authority may refuse recognition and enforcement if the “subject-matter of the difference is not capable of settlement by arbitration under the law of that country” or if recognition and enforcement “would be contrary to the public policy of that country.”

3 Enforcement of Awards under the Inter-American Convention

The United States and Mexico are Party to the Inter-American Convention on International Commercial Arbitration. Mexico did not take any reservations to the convention. The United States took three reservations. First, it specified that in the absence of an agreement to the contrary, when the requirements of both the Inter-American Convention and the New York Convention are met and a majority of the parties to an arbitration agreement are citizens of a State or States that have ratified the Inter-American Convention and are Member States of the Organization of American States, the Inter-American Convention would apply. (246) Second, it provided that the United States would apply the rules of procedure of the Inter-American Convention that were in effect when the United States deposited its instrument of ratification, unless it made a later official determination to any subsequent amendments. (247) Finally, the United States said that it would apply the Inter-American Convention, on the basis of reciprocity, to the recognition and enforcement of only those awards made in the territory of another contracting State. (248)

The provisions of the Inter-American Convention are very similar to those of the New York Convention. Article 5(1) of the Convention provides that the recognition and execution of a decision may be refused, at the request of the party against which it is made, only if the party is able to prove to a competent authority of the State in which recognition and enforcement are requested:

- a. That the parties to the agreement were subject to some incapacity under the applicable law or that the agreement is not valid under the law to which the parties have submitted it, or, if such law is not specified, under the law of the State in which the decision was made; or
- b. That the party against which the arbitral decision has been made was not duly notified of the appointment of the arbitrator or of the arbitration procedure to be followed, or was unable, for any other reason, to present his defense; or
- c. That the decision concerns a dispute not envisaged in the agreement between the parties to submit to arbitration; nevertheless, if the provisions of the decision that refer to issues submitted to arbitration can be separated from those not submitted to arbitration, the former may be recognized and executed; or
- d. That the constitution of the arbitral tribunal or the arbitration procedure has not been carried out in accordance with the terms of the agreement signed by the parties or, in the absence of such agreement, that the constitution of the arbitral tribunal or the arbitration procedure has not been carried out in accordance with the law of the State where the arbitration took place; or
- e. That the decision is not yet binding on the parties or has been annulled or suspended by a competent authority of the State in which, or according to the law of which, the decision has been made.

Like the New York Convention, the Inter-American Convention, in Article 5(2), sets forth two other grounds on which enforcement may be refused if the competent authority finds:

- a. That the subject of the dispute cannot be settled by arbitration under the law of that State; or
- b. That the recognition or execution of the decision would be contrary to the public policy ('*ordre public*') of that State.

There have been no set-aside proceedings in NAFTA Chapter 11 Awards governed by the Inter-American Convention. Given the similarity in the grounds for set-aside, a proceeding governed by the Inter-American Convention would not likely differ significantly from one under the New York Convention.

III Cross-References

- Article 1130 addresses the place of arbitration in Chapter 11 cases.
- Article 1134 gives NAFTA tribunal the authority to order interim measures of protection.
- Article 1135 addresses final awards.
- Article 2008 governs the establishment of arbitral tribunals in State-to-State dispute resolution proceedings.

IV Secondary Material

Alexandroff, Alan S. & Ian A. Laird, *Compliance and Enforcement*, in The Oxford Handbook of

International Investment Law (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds., 2008).

Alford, Roger P., Federal Courts, *International Tribunals and the Continuum of Deference*, 43 Va J. Int'l L. 675 (2003)

Alvarez, Guillermo Aguilar and William W. Park, *The New Face of Investment Arbitration: NAFTA Chapter 11*, 28 Yale. J. Int'l L. 365 (2003).

Bagner, Hans, *Confidentiality – A Fundamental Principle in International Commercial Arbitration?* 18 J. Intl Arb. 243 (2001).

Balaš, Vladimír, *Review of Awards*, in The Oxford Handbook of International Investment Law 1125 (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds., 2008).

Baldwin, Edwin, Mark Kantor & Michael Nolan, *Limits to Enforcement of ICSID Awards*, 23 J. Int'l Arb. 1 (Jan. 2006).

Ball, Markham, *The Essential Judge: the Role of the Courts in a System of National and International Commercial Arbitration*, 22 Arb. Int'l 74 (2006).

Beraudo, Jean-Paul, *Egregious Error of Law as Grounds for Setting Aside an Arbitral Award*, 23 J. Int'l Arb. 351 (2006).

Bishop, Doak, W. Michael Reisman & James Crawford, *Foreign Investment Disputes: Cases, Materials, Commentary* (2005).

Bjorklund, Andrea K., *Casenote: The United Mexican States v. Metalclad*, 30:3 Int'l L. News 23 (Summer 2001).

Bjorklund, Andrea K., *Investment Treaty Arbitral Decisions as Jurisprudence Constante*, in International Economic Law: The State and Future of the Discipline (Colin Picker, Isabella Bunn & Douglas Arner eds., 2008).

Bjorklund, Andrea K., *The Continuing Appeal of Annulment: Lessons from Amco Asia and CME*, in International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law 471 (Todd Weiler ed., 2005).

Bjorklund, Andrea K., *State Immunity and the Enforcement of Investor-State Arbitral Awards*, in International Investment Law for the 21st Century: Liber Amicorum Christoph Schreuer 302 (Oxford University Press, 2009).

Boivin, Richard & Nicola Mariani, *International Arbitration in Canada – Highest Court Rules in Favour of Broad Interpretation of Arbitrability*, 20 J. Int'l Arb. 507 (2003).

Broches, Aron, *Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution*, 2 ICSID Rev.-F.I.L.J. 287 (1987).

Broches, Aron, *Observations on the Finality of ICSID Awards*, 6 ICSID Rev.-F.I.L.J. 376 (1991).

Broches, Aron, *On the Finality of Awards: A Reply to Michael Reisman*, 8 ICSID Rev.-F.I.L.J. 92 (1993).

Brower, II. Charles H., *Beware of the Jabberwock: A Reply to Mr. Thomas*, 40 Colum. J. Transnt'l L. 465 (2002).

Brower, II, Charles H., *Investor-State Disputes Under NAFTA: The Empire Strikes Back*, 40 Colum. J. Transnt'l L. 43 (2001).

Brower II, Charles H., *S.D. Myers Inc. v. Canada and Attorney General of Canada v. S.D. Myers, Inc.*, 98 Am. J. Int'l L. 339 (2004).

Caron, David D, *Reputation and Reality in the ICSID Annulment Process: Understanding the Distinction between Annulment and Appeal*, 7 ICSID Rev.-F.I.L.J. 21 (1992).

Cheng, Tai-Heng, *Precedent and Control in Investment Treaty Arbitration*, 30 Fordham L. J. 1014 (2007).

Cheng, Tai-Heng, *Precedent and Control in Investment Treaty Arbitration*, in Investment Treaty Law – Current Issues III – Remedies in International Investment Law; The Emerging Jurisprudence of International Investment Law 149 (Andrea K. Bjorklund, Ian A. Laird & Sergey Ripinsky eds., 2009).

Chibueze, Remigius Oraeki, *The Adoption and Application of the Model Law in Canada – Post Arbitration Challenge*, 18 J. Int'l Arb. 191 (2001).

Choudhary, Bernali, *Determining the Appropriate Level of Deference for Domestic Court Reviews of Investor-State Arbitral Awards*, 32 Queen's L. J. 602 (2007).

Commission, Jeffery P., *Precedent in Investment Treaty Arbitration* 24 J. Int'l Arb. 129 (2007).

Commission, Jeffery P., *Precedent in Investment Treaty Arbitration: The Empirical Backing*, 4 Transnat'l Disp. Mgmt. (Sept. 2007).

Craig, Lawrence W, *The Final Chapter in the Pyramids Case: Discounting an ICSID Award for Annulment Risk*, 8 ICSID Rev.-F.I.L.J. (1993).

P 1136-39

Coe, Jr., Jack J., *Domestic Court Control of Investment Awards: Necessary Evil or Achilles Heel Within NAFTA and the Proposed FTA*, 19:3 J. Int'l Arb. 185 (2002).

P 1136-40

Dhooge, Lucien J., *The North American Free Trade Agreement and the Environment: The Lessons of Metalclad Corporation v. United Mexican States*, 10 Minn. J. Global Trade 209 (2001).

Dodge, William S., *Metalclad Corp. v. Mexico*, 95 Am. J. Int'l L. 910 (2001).

Dugan, Christopher F., Don Wallace, Jr., Noah D. Rubins & Borzu Sabahi, *Investor-State Arbitration* 87–89; 627–700 (2008).

Eklund, Cheri D., *A Primer on the Arbitration of NAFTA Chapter Eleven Investor-State Disputes*, 11 J. Int'l Arb. 135 (1994).

Fouchard Gaillard Goldman on International Arbitration 709ff (Emmanuel Gaillard & Johns Savage eds., 1999).

Gaillard, Emmanuel, *Prima Facie Review of Existence, Validity of Arbitration Agreement*, 225: 125 New York L. J. (Dec. 1, 2005).

Gaillard, Emmanuel, *The Enforcement of Awards Set-Aside in the Country of Origin*, 16 ICSID Rev.–F.I.L.J. 264 (1999).

Gantz, David A., *An Appellate Mechanism for Review of Arbitral Decisions in Investor-State Disputes: Prospects and Challenges*, 39 Vand. J. Transnat'l L. 39 (2006).

Gantz, David, *Pope & Talbot Inc. v. Canada*, 97 Am. J. Int'l L. 937, 949 (2003).

Goodman, Charity L., *Uncharted Waters: Financial Crisis and Enforcement of ICSID Awards in Argentina*, 28 U. Pa. J. Int'l Econ. L. 449 (2007).

Griffith, Gavan, *Reflections on Investment Awards: Annulment, Enforcement and Appeals*, 6 Transnat'l Disp. Mgmt (Mar. 2009).

Hamida, Walid Ben, *Two Nebulous ICSID Features: The Notion of Investment and the Scope of Annulment Control*, 24 J. Int'l Arb. 287 (2007).

Harris, Troy L., *The "Public Policy" Exception to Enforcement of International Arbitration Awards Under the New York Convention*, 24 J. Int'l Arb. 9 (2007).

Heuman, Lars & Goran Millquist, *Swedish Supreme Court Refuses to Enforce an Arbitral Award Pursuant to the Public Policy Provision of the New York Convention*, 20 J. Intl Arb. 493 (2003).

Horvath, Gunther, *The Duty of the Tribunal to Render an Enforceable Award*, 18 J. Int'l Arb. 135 (2001).

Hulbert, Richard W., *Further Observations on Chromalloy: A Contract Misconstrued, A Law Misapplied and an Opportunity Foregone*, 13 ICSID Rev.–FILJ 124 (1996).

Investment Disputes and NAFTA Chapter 11, Panel, 95 Am. Soc. Int'l L. Proc. 196 (2001).

Jugran, Ajay, *Meaning of "Public Policy,"* 3 Transnat'l Disp. Mgmt. (Dec. 2006).

Karamanian, Susan L., *The Road to the Tribunal and Beyond: International Commercial Arbitration and United States Courts*, 34 Geo. Wash. Int'l L. Rev. 17 (2002).

Kaufmann-Kohler, Gabrielle, *The 2006 Freshfields Lecture – Arbitral Precedent: Dream, Necessity, or Excuse?*, 23 Arb. Int'l 357 (2007).

Kessedjian, Catherine, *Court Decisions on Enforcement of Arbitration Agreements and Awards*, 18 J. Intl Arb. 1 (2001).

Kishoiyian, Bernard, *The Utility of Bilateral Investment Treaties in the Formulation of Customary International Law*, 14 Nw. J. Int'l L. & Bus. 327 (1994).

P 1136-41

Landolt, Philip, *Limits on Court Review of International Arbitration Awards Assessed in Light of States' Interests and in particular in light of EU Law Requirements*, 23 Arb. Int'l 63 (2007).

Lazic, Vesna, *Enforcement of an Arbitral Award Annulled in the Country of Origin*, 13 Croat. Arbit. Yearb. 179 (2006).

Legum, Barton, *The Introduction of an Appellate Mechanism: The U.S. Trade Act of 2002, in Annulment of ICSID Awards* 289 (Emmanuel Gaillard & Yas Banifatemi eds., 2005).

Legum, Barton, *Visualizing an Appellate System, 2005, in 1 Investment Treaty Law: Current Issues* 121 (Federico Ortino, Audley Sheppard & Hugo Warner eds., 2006).

Lew, Julian, D.M., Loukas Mistelis & Stefan Kröll, *Comparative International Commercial Arbitration* 632 (2003).

Park, William W. & Alexander A. Yanos, *Treaty Obligations and National Law: Emerging Conflicts in International Arbitration*, 58 Hastings L. J. 251 (Dec. 2006).

Park, William W., *The Specificity of International Arbitration: The Case for FAA Reform*, 36 Vand. J. Transnat'l L. 1241 (2003).

- Park, William W., *Why Courts Review Arbitral Awards*, in *Law of International Business and Dispute Settlement in the 21st Century* (Robert Briner et al. eds., 2001).
- Paulsson, Jan, *ICSID's Achievements and Prospects*, 6 ICSID Rev.-F.I.L.J. 380 (1991).
- Pearce C. & Jack J. Coe, Jr., *Arbitration under NAFTA Chapter 11: Some Pragmatic Reflections Upon the First Case Filed Against Mexico*, 23 Hastings Int'l & Comp. L. Rev. 311 (2000).
- Platte, Martin, *An Arbitrator's Duty to Render Enforceable Awards*, 20 J. Intl. Arb. 307 (2003).
- Poulton, Edward & Alexis Martinez, *Can a Commercial Arbitral Award be Enforced Through ICSID Proceedings? The Case of Saipem v. Bangladesh*, 22-6 Mealey's Int'l Arb. Rep. 17 (2007).
- Raghavan, Vikram, *Heightened Judicial Review of Arbitral Awards*, 15 J. Int'l Arb. 103 (2003).
- Redfern, Alan, *Dangerous Dissents*, 3 Transnat'l Disp. Mgmt. (Apr. 2006).
- Reed, Lucy, Jan Paulsson & Nigel Blackaby, *Guide to Arbitration Under the ICSID Convention* (2004).
- Reisman, W. Michael, *Repairing ICSID's Control System: Some Comments on Aron Broches' "Observations on the Finality of ICSID Awards"*, 7 ICSID Rev.-F.I.L.J. 196 (1992).
- Rubins, Noah, *Judicial Review of Investment Arbitration Awards*, in *NAFTA Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects* 359 (Todd Weiler ed., 2004).
- Rutledge, Peter Bowman, *On the Importance of Institutions: Review of Arbitral Awards for Legal Errors*, 19 J. Int'l Arb. 81 (2002).
- Sampliner, Gary H, *Enforcement of Nullified Foreign Arbitral Awards*, 14 J. Int'l Arb. 140 (1997).
- Saunders, Matthew & Claudia Salomon, *Enforcement of Arbitral Awards Against States and State Entities*, 23 Arb. Int'l. 467 (2007).
- Schnabl, Marco & Timothy G. Nelson, *Nothing Left to Chance: Thunderbird v. Mexico and the Power of a Domestic U.S. Court to Review a NAFTA Investment Arbitration Award*, 22-3 Mealey's Int'l Arb. Rep. 30 (2007).
- Schreuer, Christoph H., *Diversity and Harmonisation of Treaty Interpretation in Investment Arbitration*, 3 Transnat'l Disp. Mgmt. (2006).
- Schreuer, Christoph H., *The ICSID Convention: A Commentary* (2001).
- Schreuer, Christoph H., *Conversations Across Cases- Is there a Doctrine of Precedent in Investment Arbitration?*, 5 Transnat'l Disp. Mgmt. (May 2008).
- Schreuer, Christoph & Matthew Weiniger, *A Doctrine of Precedent?*, in *The Oxford Handbook of International Investment Law* (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds., 2008).
- Eric A. Schwartz, *Finality at What Cost? The Decision of the Ad Hoc Committee in Wena Hotels v. Egypt*, in *Annulment of ICSID Awards* 43, 49 (Emmanuel Gaillard & Yas Banifatemi eds., 2004).
- Seymour, Courtney N., *Comment, The NAFTA Metalclad Appeal – Subsequent Impact or Inconsequential Error? ... Only Time Will Tell*, 34 U. Miami Inter-Am. L. Rev. 189 (2002).
- Should International Arbitration Awards Be Reviewable?* 94 Am. Soc. Int'l L. Proc. 126 (2000).
- Thomas, J.C., *Investor-State Arbitration under NAFTA Chapter 11*, [1999] Cdn. Y.B. Int'l L. 99.
- Thomas, J.C., *A Reply to Professor Brower*, 40 Colum. J. Transnt'l L. 433 (2002).
- Trousdale, Jennifer, *The International Investor's Guide to Retaining a Successful NAFTA Chapter 11 Award on Appeal*, 13 L. & Bus. Rev. Am. 217 (2007).
- Vadi, Valentina Sara, *Towards Arbitral Path Coherence & Judicial Borrowing: Persuasive Precedent in Investment Arbitration*, 5 Transnat'l Disp. Mgmt. (May 2008).
- Van den Berg, Jan, *Some Recent Problems in the Practice of Enforcement under the new York and ICSID Conventions*, 2 ICSID Rev-F.I.L.J. 439 (1987).
- van Haersolte-van Hof, Jacomijn J. & Anne K. Hoffman, *The Relationship between International Tribunals and Domestic Courts*, in *The Oxford Handbook of International Investment Law* 962 (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds., 2008).
- Webster, Thomas H., *Review of Substantive Reasoning of International Arbitral Awards by National Courts: Ensuring One-Stop Adjudication*, 22 Arb. Int'l 431 (2006).
- Weiler, Todd, *Metalclad v. Mexico: A Play in Three Parts*, 2 J. World Investment 685 (2001).
- Weiniger, Matthew, *Special issue on Precedent in Investment Arbitration*, 5 Transnat'l Disp. Mgmt. (May 2008).
- Werner, Jacques, et al. *Reconsidering a Key Tenet of International Commercial Arbitration: Is Finality of Awards What Parties really Need?* 16 J Intl. Arb. 57 (1999).
- Wiwen-Nilsson, Tore, *Invalidity and Setting Aside of an Arbitral Award – Arbitrability and Ordre*

P 1136-42

P 1136-43

References

- 1) December 1991, 9, Art. XX07(6).
- 2) INVEST.501, Chapultepec Composite (May 1, 1992) 18, Art. XX07(8).
- 3) INVEST.513, Toronto Composite (May 13, 1992) 26, Art. XX07(6).
- 4) *Id.* at 25, Art. XX07(9).
- 5) *Id.* at 26, Art. XX07(12).
- 6) INVEST.604, Virginia Composite (June 4, 1992) 22–24, Art. XX07(8)(7), Art. XX07(9)(7), Art. XX07(12)(2).
- 7) INVEST.810, Watergate Daily Update (Aug. 4, 1992) 21–22, Art. 2132.
- 8) INVEST-F.904, Lawyers' Revision (Sept. 4, 1992) 12, Art. 1135(2) n. 14.
- 9) *Id.* at Art. 1135(5) n. 15.
- 10) *Id.* at 13, Art. 1135(8) n. 16.
- 11) *Id.* at 12–13, Art. 1135.
- 12) INVEST.O02 (Oct. 2, 1992) 11–21–11–22, Art. 1136.
- 13) See Doak Bishop et al., *Foreign Investment Disputes: Cases, Materials, Commentary* 704–705 (2005).
- 14) Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, Art. 38(1)(d).
- 15) See generally Bernard Kishoiyian, *The Utility of Bilateral Investment Treaties in the Formulation of Customary International Law*, 14 Nw. J. Int'l L. & Bus. 327 (1994).
- 15a) *Grand River Enterprises Six Nations, Ltd. et al. v. United States*, (UNCITRAL) ¶ 36 (Decision on Objections to Jurisdiction) (July 20, 2006). Many scholars are starting to turn their attention to the use of investment treaty awards as precedent. See Andrea K. Bjorklund, *Investment Treaty Arbitral Decisions as Jurisprudence Constante*, in *International Economic Law: The State and Future of the Discipline* (Colin Picker, Isabella Bunn & Douglas Arner eds., Hart Publishing, forthcoming 2008); Jeffrey Commission, *Precedent in Investment Treaty Arbitration*, 24 J. Int'l Arb. 129 (2007); Gabrielle Kaufmann-Kohler, *The 2006 Freshfields Lecture—Arbitral Precedent: Dream, Necessity, or Excuse?*, 23 Arb. Int'l 357 (2007); Schreuer, Christoph H., *Diversity and Harmonisation of Treaty Interpretation in Investment Arbitration*, 3 Transnat'l Disp. Mgmt. (2006).
- 16) *Mondev Int'l Ltd. (Can.) v. United States*, ICSID (W. Bank) ARB(AF)/99/2, ¶¶ 35–36 (Award) (Oct. 22, 2002).
- 17) *Id.* at ¶¶ 108–109. Both Canada and Mexico criticized the position that the *Pope & Talbot* tribunal had taken.
- 18) *Marvin Roy Feldman Karpa (U.S.) v. Mexico*, ICSID (W. Bank) ARB(AF)99/1 ¶ 107 (Award) (Dec. 16, 2002) [hereinafter *Feldman Award*].
- 19) *Id.* at ¶ 96.
- 19a) *Canadian Cattlemen Claims – de Boer et al. (Can.) v. United States*, (UNCITRAL) ¶ 49 (Award on Jurisdiction) (Jan. 28, 2008) [hereinafter *Canadian Cattlemen Claims Jurisdictional Award*].
- 19b) *Id.* at ¶ 50.
- 19c) *Id.* at ¶ 51 (citing *Bayindir Insaat Turizm Ticaret ve Sanayi A.S. (Turkey) v. Islamic Republic of Pakistan*, ICSID (W. Bank) ARB/03/29 (Decision on Jurisdiction) (Nov. 14, 2005) [hereinafter *Bayinder Decision on Jurisdiction*]). The *Bayinder* tribunal stated that it was not bound by earlier decisions, “but will certainly carefully consider such decisions whenever appropriate.” *Bayinder Decision on Jurisdiction*, ¶ 76.
- 19d) *Id.* at ¶¶ 200–202.
- 19e) *Id.* at ¶¶ 208–209 (in particular, the *Methanex* case did not involve the same territorial issues, and the *Methanex* tribunal was not obliged to consider whether investments outside the territory of the disputing party could have a legally significant connection to support the exercise of jurisdiction).
- 19f) *Id.* at ¶¶ 208–09.
- 19g) *Id.* at ¶ 209. See also *id.* at ¶¶ 188–89 (using subsequent practice to confirm the tribunal's conclusion as to the meaning of NAFTA Article 1101(1)(a)).
- 19h) *Id.* at ¶ 219.
- 19i) *Id.* at ¶¶ 220–221.
- 19j) *Philippe Gruslin (Belg.) v. Malaysia*, ICSID (W. Bank) Case ARB/99/3 (Award) (Nov. 27, 2000).
- 19k) *Canadian Cattlemen Claims Jurisdictional Award*, *supra* note 19a, at ¶¶ 214–15.
- 20) *Metalclad Corp. (U.S.) v. Mexico* (UNCITRAL), ¶ 108 (Award) (April 30, 2000) (citing *Biloune, et al. v. Ghana Investment Centre, et al*, 95 ILR 183, 207–210 (1993)) [hereinafter *Metalclad Award*].
- 21) *Id.*

- 22) “NAFTA tribunals do pay attention to other tribunals’ decisions interpreting and applying the same provisions, including not only NAFTA cases, but also those of the GATT and WTO, usually because the parties invoke these prior cases as being both relevant and instructive.” David Gantz, *Pope & Talbot v. Canada*, 97 Am. J. Int’l L. 937, 949 (2003). Other international tribunals, such as WTO panels and the appellate body, are also tending to pay more attention to previously decided cases. See, e.g., Raj Bhala, *The Myth About Stare Decisis and International Trade Law (Part One of a Trilogy)*, 14 Am. U. Int’l L. Rev. 845, 849–932 (1999) (discussing the *de facto* precedential value accorded to GATT panels and WTO panel and appellate body decisions); Dana T. Blackmore, *Eradicating the Long Standing Existence of a No-Precedent Rule in International Trade Law – Looking Toward Stare Decisis in WTO Dispute Settlement*, 29 N.C.J. Int’l L. & Com. Reg. 487, 512–514 (2004) (describing importance, but non-binding nature, of GATT panel reports); Jiayang Hu, *The Role of International Law in the Development of WTO Law*, 7 J. Int’l Econ. L. 143, 159–160 (2004) (explaining that the Appellate Body may pay deference to decisions of other international tribunals, but is not necessarily bound by them).
- 23) *Methanex Corp. (Can.) v. United States*, (UNCITRAL) Part II, Ch. B. ¶ 6 (Final Award of the Tribunal on Jurisdiction and Merits) (Aug. 7, 2005) [hereinafter *Methanex Award*].
- 24) *Id.* The tribunal rejected the GATT like products analysis as appropriate guidance in the context of an Article 1102 like circumstances analysis. *Id.* at Part IV, Ch. B. ¶¶ 29–37.
- 25) Alan Redfern & Martin Hunter, et al., *Law and Practice of International Commercial Arbitration* 352 (4th ed. 2004).
- 26) *Id.* at 354. It is not always easy to distinguish between an award and an order; the mere fact that the decision is denominated one or the other is not dispositive. *Id.* at 354–355. See the commentary to Article 1135 for discussion of the various types of awards and their definitions.
- 27) See the commentary under Article 1135 for a more complete discussion of bifurcation.
- 28) UNCITRAL Arbitration Rules, Art. 32.1.
- 29) ICSID Convention Art. 41(2); ICSID Convention Arbitration Rules, R. 41(4) & (5); ICSID Arbitration (Additional Facility) Rules, R. 45(5) & (6).
- 30) Redfern & Hunter, *supra* note 25, at 354; Fouchard Gaillard Goldman on International Arbitration 741 (Emmanuel Gaillard & Johns Savage, eds., 1999); Julian D. M. Lew, et al, *Comparative International Commercial Arbitration* 632 (2003) (“The term ‘final’ is used to describe awards which only settle certain severable parts of the dispute with a binding effect on the parties. An award is final in this sense if it produces res judicata effect between the parties and can be challenged or enforced without necessarily terminating the complete arbitration proceedings.”) (internal citations omitted).
- 31) Fouchard Gaillard Goldman, *supra* note 30, at 739–740.
- 32) Redfern & Hunter, *supra* note 25, at 354.
- 33) *Id.* at 375.
- 34) A similar issue with respect to the time bar for challenging awards arose in *The Loewen Group Inc. et al. (Can.) v. United States*, ICSID (W. Bank) ARB(AF)/98/3 (Award) (June 26, 2003). The United States requested that the tribunal issue a supplementary decision, which the tribunal declined to do more than a year after it had issued its award. Three months after that decision, Raymond Loewen requested that the award be set aside; one question for the U.S. court hearing the set-aside proceedings was whether the set-aside motion was out of time. See the discussion in part D.3.c, *infra*.
- 34a) For further discussion of this issue, see the commentary to Article 1126.
- 34b) *Tembec Inc. et al. v. United States*, No. 05-2345, 2007 U.S. Dist. LEXIS 28952, *1 (Apr. 19, 2007).
- 34c) *Id.* at *14. See the discussion in section 3.a. below for further details of this case.
- 34d) *Id.* at *9.
- 35) For a description of the view that de-localization of an arbitration is desirable in certain circumstances, see Redfern & Hunter, *supra* note 25, at 89–91. See also Albert Jan van den Berg, *Some Recent Problems in the Practice of Enforcement under the New York and ICSID Conventions*, 2 ICSID Rev.-F.I.L.J. 439 (1987).
- 36) ICSID Convention Art. 5. See Lucy Reed, et al., *Guide to ICSID Arbitration* 97–100 (2004); Christoph H. Schreuer, *The ICSID Convention: A Commentary* 889 (2003).
- 37) See the commentary on place of arbitration in Article 1130.
- 38) Redfern & Hunter, *supra* note 25, at 84–85.
- 39) *Id.* at 79–80 (quoting *Smith Ltd. v. H & S Int’l* [1991] 2 Lloyd’s Rep. 127, 130).
- 40) See generally Fouchard Gaillard Goldman *supra* note 30, at 709ff. See the commentary under Articles 1120 and 1134 for a discussion of the those issues in the context of NAFTA Chapter 11.

- 40a) The investment chapters of several recent U.S. trade agreements have called for the establishment of a committee to discuss the institution of an appellate mechanism for the review of an award rendered by an investment tribunal. ICSID considered whether it should amend the ICSID rules to include such a mechanism, but the measure was rejected as premature. Thus, no appellate mechanism has yet been established to hear appeals from investment treaty awards. See generally David A. Gantz, *An Appellate Mechanism for Review of Arbitral Decisions in Investor-State Disputes: Prospects and Challenges*, 39 Vand. J. Transnat'l L. 39 (2006); Legum, Barton, *Visualizing an Appellate System, 2005*, in *Investment Treaty Law* 121 (Federico Ortino, Audley Sheppard & Hugo Warner eds., 2006); Andrea K. Bjorklund, *The Continuing Appeal of Annulment: Lessons from Amco Asia and CME*, in *International Investment Law and Arbitration: Leading Cases From the ICSID, NAFTA, Bilateral Treaties and Customary International Law* 471 (Todd Weiler ed., 2005).
- 41) Article 59 of the ICSID Convention permits parties to request an "interpretation" of the award, but provides no deadline for such a request. A request for interpretation does not affect the finality of an award, and as of January, 2003, ICSID had never received a request for interpretation. Reed, *supra* note 36, at 98. The lack of precision and use of the provision may be why the NAFTA does not include a request for interpretation as an event that would delay enforcement of the award.
- 42) Reed, *supra* note 36, at 8.
- 43) See generally W. Michael Reisman, *Systems of Control in International Adjudication and Arbitration: Breakdown and Repair* 45–60 (1992), Andrea K. Bjorklund, *The Continuing Appeal of Annulment: Lessons from Amco Asia and CME*, in *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* 77 (Todd Weiler ed. 2005).
- 44) Schreuer, *supra* note 36, at 893 (2001).
- 45) *Id.* at 894.
- 46) ICSID Convention Art. 52(1).
- 47) Reed, *supra* note 36, at 99.
- 48) ICSID Convention Art. 52(2).
- 49) ICSID Convention Art. 52(3).
- 50) ICSID Convention Art. 52(5).
- 51) Reed, *supra* note 36, at 99.
- 52) *Id.* at 99.
- 53) ICSID Convention Art. 52(6).
- 54) For a discussion of annulment under the ICSID Convention, see Schreuer, *supra* note 36, at 881ff; Reed, *supra* note 36, at 99–105; Aron Broches, *Observations on the Finality of ICSID Awards*, 6 ICSID Rev.–F.I.L.J. 376 (1991); W. Michael Reisman, *Repairing ICSID's Control System: Some Comments on Aron Broches' "Observations on the Finality of ICSID Awards"*, 7 ICSID Rev.–F.I.L.J. 196 (1992); Aron Broches, *On the Finality of Awards: A Reply to Michael Reisman*, 8 ICSID Rev.–F.I.L.J. 92 (1993); Jan Paulsson, *ICSID's Achievements and Prospects*, 6 ICSID Rev.–F.I.L.J. 380 (1991). For a more complete list of articles on the subject, see Eric A. Schwartz, *Finality at What Cost? The Decision of the Ad Hoc Committee in Wena Hotels v. Egypt*, in *Annulment of ICSID Awards* 43, 49 n. 15 (Emmanuel Gaillard & Yas Banifatemi, eds. 2004) and Schreuer, *supra* note 36, at 885–887.
- 55) Commercial Arbitration Act, R.S. 1985, c. 17 (2d Supp.), ss. 5(2) & 5(4).
- 56) *Mexico v. Metalclad Corp.*, 2001 BCSC 664 (May 2, 2001) [hereinafter *Metalclad Set-Aside Decision*].
- 57) *Id.* at ¶¶ 3–16.
- 58) *Metalclad Award*, *supra* note 20.
- 59) *Metalclad Set-Aside Decision*, *supra* note 56.
- 60) See *Attorney General of Canada v. S.D. Myers*, 2001 FCT 317, ¶ 22 (April 11, 2001) (noting that B.C. Court had denied NGOs the right to intervene).
- 61) R.S.B.C. 1996, c. 233.
- 62) R.S.B.C. 1996, c. 55.
- 63) *Metalclad Set-Aside Decision*, *supra* note 56, at ¶ 39.
- 64) *Id.* at ¶¶ 53–55.
- 65) *Id.* at ¶ 41.
- 66) *Id.* at ¶ 43. The UNCITRAL Model Law was part of a larger report and accompanied by a commentary explaining the law's provisions, and Section 6 of the ICAA specifically authorizes a court to refer to the report and the commentary in construing the legislation. *Id.* ¶ 42.
- 67) *Id.* at ¶ 44.
- 68) *Id.* at ¶ 46.
- 69) *Id.* at ¶ 49.
- 70) International Commercial Arbitration Act, R.S.B.C. 1996, c. 233 s. 5(a).
- 71) *Id.* at s. 5(b).
- 72) *Id.* at ¶ 50 (citing R.S.B.C. 1996, c. 233 § 34(2)). For a complete excerpt of the factors for which set-aside is permitted under the UNCITRAL Model Law, see section D.3.b, *infra*.
- 73) [1991] 1 WWR 219, 229 (B.C.C.A.), cited in *Metalclad Set-Aside Decision*, *supra* note 56, at ¶ 51.
- 74) The "pragmatic and functional" approach has evolved in Canadian administrative law in cases such as *UES*, *Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048 and *Pushpanathan v. Canada* (Minister of Citizenship and Immigration) [1998] 1 S.C.R. 982.

- 75) *Metalclad Set-Aside Decision*, *supra* note 56, at ¶ 54.
- 76) *Id.* Judge Tysoe did note that some of the principles in the “pragmatic and functional” line of authorities might be useful in applying sections 5 and 34 of the ICCA. In *Mexico v. Feldman*, the Ontario Court of Appeal referred to the “pragmatic and functional” line of cases in its analysis. *Mexico v. Marvin Roy Feldman Karpa*, No. C41169 (Ont. Ct. App.) (Jan. 11, 2005). See the discussion accompanying notes 190–206, *infra*.
- 77) *Metalclad Set-Aside Decision*, *supra* note 56, at ¶ 54 (citing *Corporacion Transnacional de Inversiones, S.A. de C.V. v. STET International S.p.A.*, [1999] 45 O.R. (3d) 183 (Ont. S.C.J.), *affirmed* [2000] 49 OR (3d) 41; *D.L.T. Holdings Inc. v. Grow Biz International Inc.*, [2000] 194 Nfld. & P.E.I.R. 206 (P.E.I.S.C.T.D.)).
- 78) *Metalclad Set-Aside Decision*, *supra* note 56, at ¶ 55.
- 79) *Id.* at ¶¶ 70–73.
- 80) *Metalclad Set-Aside Decision*, *supra* note 56, at ¶ 62, 68 (emphasis added).
- 81) *Id.* at ¶¶ 71–72.
- 82) *Id.* at ¶¶ 68–69. The Court suggested that if the tribunal had based its decision on an alleged customary international law obligation of transparency it would not have had the ability to set aside the award under standard of review set out in the ICAA, even if such a determination would have been flawed. *Id.* at ¶ 69.
- 83) *Id.* at ¶ 72.
- 84) *Id.* at ¶ 64.
- 85) *Id.* at ¶ 65. Judge Tysoe said he would have come to the same conclusion even had he accepted the *Pope & Talbot* tribunal's reasoning; even under a broader interpretation of Article 1105, a finding of breached based on the concept of “transparency” would not have fallen within the scope of the submission to arbitration. *Id.* at ¶ 74.
- 86) *Id.* at ¶ 75.
- 87) *Id.* at ¶¶ 77–78.
- 88) *Id.* at ¶ 79.
- 89) *Id.* at ¶¶ 81, 87–88.
- 90) *Id.* at ¶¶ 89–91.
- 91) *Id.* at ¶¶ 89.
- 92) *Id.* at ¶¶ 81–84.
- 93) *Id.* at ¶¶ 93–95.
- 94) *Id.* at ¶¶ 96.
- 95) *Id.* at ¶ 97. The judge noted, however, that other cases had suggested that the domestic test of “patently unreasonable error” did not apply in the context of the ICAA.
- 96) *Id.* at ¶ 99.
- 97) *Id.*
- 98) *Id.* at ¶¶ 99–104.
- 99) *Id.* at ¶ 107.
- 100) Mexico cited the UNCITRAL Report and *Transport de Cargaison (Cargo Carriers) (Kasc-Co) Ltd. v. Industrial Bulk Carriers*, [1990] RDJ418 (Que. C.A.) as support for the proposition that awards are contrary to public policy if they compensate for bribes. *Id.* at ¶ 108.
- 101) *Id.* at ¶ 110.
- 102) 2 *Revue de l'arbitrage* 359 (Paris C.A.) (1994).
- 103) *Metalclad Set-Aside Decision*, *supra* note 56, at ¶ 116.
- 104) *Id.* at ¶ 117.
- 105) Article 48(3) of the ICSID Convention requires a tribunal to deal with every question addressed to it by the parties, but failure to decide all questions presented is not an explicit ground for annulment under Article 52 of the ICSID Convention. Parties have argued, however, that failure to deal with every question either departs from fundamental rule of procedure constitutes a failure to state the reasons for the award. See Schreuer, *supra* note 36, at 924. Mexico cited three ICSID Cases in support of its argument: *Klöckner v. Cameroon*, 2 ICSID Rep. 95 (May 3, 1985), *Amco v. Indonesia*, 1 ICSID Rep. 508 (May 16, 1986); *MINE v. Guinea*, 4 ICSID Reports 79 (Dec. 22, 1989).
- 106) *Id.* at ¶ 121.
- 107) *Id.* at ¶ 122.
- 108) *Id.* at ¶ 126 (citing s. 34(2)(a)(v) of the ICAA).
- 109) *Food Service of America Inc. v. Pan Pacific Specialities Ltd.* (1997), 32 BCLR (3d) 225.
- 110) *Metalclad Set-Aside Decision*, *supra* note 56, at ¶ 129.
- 111) *Id.* at ¶ 130.
- 112) *Id.* at ¶ 131.
- 113) *Id.* at ¶¶ 134–135.
- 114) *Id.* at ¶ 135. The parties were able to agree on the interest recalculation.
- 115) *Id.* at ¶ 137.
- 116) *Id.* at 136.
- 117) *Id.*
- 118) *United Mexican States v. Metalclad Corporation*, 2001 BCSC 1529, ¶ 6 (Supplementary Reasons for Judgment) (Jan. 31, 2001) [hereinafter *Metalclad Set-Aside – Supplementary Reasons*].
- 119) International Commercial Arbitration Act, s. 34(4).
- 120) *Metalclad Set-Aside – Supplementary Reasons*, *supra* note 118, at ¶ 7.
- 121) *Id.* at ¶ 5.
- 122) *Id.* at ¶ 12.
- 123) *Id.* at ¶ 14.
- 124) *Id.* at ¶ 16.

- 125) *Id.* at ¶ 19.
- 126) *Mexico v. Metalclad*, CA038568 (Notice of Abandonment of Appeal) (B.C.C.A.) (Oct. 30, 2001).
- 127) *Attorney General of Canada v. S.D. Myers Inc.*, T-225-01 (Federal Court) (Notice of Application) (Feb. 8, 2001).
- 128) Commercial Arbitration Act, R.S. 1985, c. 17 (2d Supp.) ss. 5(2) & 5(4).
- 129) *Attorney General of Canada v. S.D. Myers Inc.*, 2004 FC 38, ¶ 25 (Reasons for Order) (Jan. 13, 2004) [hereinafter *S.D. Myers Set-Aside Decision*]. The Council of Canadians, the Sierra Club of Canada, and Greenpeace applied for leave to intervene in the set-aside proceedings, but the trial court refused them leave on the grounds that the proposed interveners had no particular expertise in interpreting treaty obligations, that they would put forth no point of view materially different from the parties, and that their social policy concerns would not assist in determining legal issues and were largely outside scope of the proceedings. 2001 FCT 317 (April 11, 2001). This decision was upheld on appeal, 2002 FCA 39 (Jan. 22, 2002), and the Supreme Court of Canada did not grant leave to appeal the appellate court's decision on intervention. The Council of Canadians, The Sierra Club of Canada, and *Greenpeace v. Attorney General of Canada*, No. 29147 (Judgment) (S.C.C.) (Oct. 17, 2002).
- 130) *Attorney General of Canada v. S.D. Myers Inc.*, T-225-01, ¶¶ 152–172 (Federal Court, Trial Division) (Amended Memorandum of Fact and Law of the Applicant, the Attorney General of Canada).
- 131) *Id.* at ¶¶ 173–198.
- 132) *Id.* at ¶¶ 199–208.
- 133) *Id.* at ¶¶ 209–223.
- 134) *S.D. Myers Inc. (U.S.) v. Canada*, (UNCITRAL) ¶ 1 (Procedural Order No. 18) (Feb. 26, 2001).
- 135) *Id.* at ¶ 6. Article 15(1) of the UNCITRAL Arbitration Rules provides that “[s]ubject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.”
- 136) *Id.* at ¶ 8.
- 137) *Id.* at ¶ 15.
- 138) *Id.* at ¶¶ 9–10.
- 139) *Id.* at ¶¶ 12–13.
- 140) *Id.* at ¶ 14.
- 141) *Id.* The Federal Court hearing Canada's set-aside petition in *S.D. Myers* did not address whether Canada would have foregone its opportunity to challenge the Partial Award in the event that it had not challenged it within the requisite time period after it was issued. Article 34(3) of the UNCITRAL Model Law (and of the Commercial Arbitration Act) provides that “An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award....”
- 142) *Id.* at ¶ 17.
- 143) *Attorney General of Canada v. S.D. Myers Inc.*, T-225-01 (Federal Court) (Order) (Feb. 12, 2003).
- 144) *Attorney General of Canada v. S.D. Myers Inc.*, T-81-03, ¶ 233 (Memorandum of Fact and Law of the Applicant, the Attorney General of Canada).
- 145) *Id.* at ¶ 234.
- 146) *Id.* at ¶ 235.
- 147) *Id.* at ¶ 236.
- 148) *S.D. Myers Set-Aside Decision*, *supra* note 129.
- 149) *Id.* at ¶ 42.
- 150) *Id.* at ¶ 45.
- 151) *Id.* at ¶¶ 52–53. The Court contrasted Canada's challenge to the jurisdiction of the tribunal in *Ethyl Corp. v. Canada*, which it described as having been “clearly and expressly stated.” *Id.* at ¶ 50.
- 152) *Id.* at ¶ 54.
- 153) *Id.* at ¶ 55.
- 154) *Id.* at ¶ 55.
- 155) *Id.* at 58.
- 156) *Id.* at 63.
- 157) *Id.* at ¶ 64.
- 158) *Id.* at ¶ 67. Judge Kelen also dismissed Canada's claim that the tribunal's decision that SDMI was an investor was *ex aequo et bono*; the finding was based on the language of the NAFTA, and thus was not *ex aequo et bono*.
- 159) *Id.* at ¶¶ 69–70.
- 160) *Id.* at ¶ 71.
- 161) *Id.* at 74.
- 162) *Id.* at ¶ 75.
- 163) *Feldman Award*, *supra* note 18, at ¶ 169.
- 164) *Id.*
- 165) *Mexico v. Marvin Roy Feldman Karpa*, No. 03-CV-23500 (Sup. Ct. Ontario) (Dec. 3, 2003) [hereinafter *Feldman Set-Aside Decision*].
- 166) *Id.* at ¶¶ 13–25.
- 167) *Id.* at ¶ 11.

- 168) *Id.* at ¶ 53.
- 169) *Id.* at ¶ 32.
- 170) *The United Mexican States v. Marvin Roy Feldman Karpa*, No. 03-CV-23500, ¶ 42 (Factum of the Intervener, the Attorney General of Canada) (Oct. 27, 2003). The Attorney General of Canada took no position on other issues raised in the litigation.
- 171) *Feldman Set-Aside Decision*, *supra* note 165, at ¶ 43.
- 172) *Id.* at ¶ 47.
- 173) *Id.* at ¶ 67.
- 174) *Id.* at ¶ 68.
- 175) *Id.* at ¶ 76.
- 176) *Id.* at ¶ 77.
- 177) *Id.* at ¶ 82 (citing *Pushpanathan v. Canada* (Minister of Citizenship and Immigration) [1998] 1 S.C.R. 982, ¶¶ 29–38). The B.C. Court had determined in the *Metalclad* set-aside proceedings that the “pragmatic and functional” approach did not set forth the appropriate standard for review under the B.C. International Commercial Arbitration Act. *See supra* notes 71–76 and accompanying text.
- 178) *Feldman Set-Aside Decision*, *supra* note 165, at ¶¶ 85–86.
- 179) *Id.* at ¶ 3.
- 180) *Id.* at ¶ 89.
- 181) *Id.* at ¶ 90.
- 182) *Id.* at ¶ 192.
- 183) *Id.* at ¶ 3.
- 184) *Id.* at ¶ 94.
- 185) *Id.* at ¶ 95.
- 186) *Id.* at ¶ 96.
- 187) *United Mexican States v. Marvin Roy Feldman Karpa*, No. 03-CV-23500 ¶ 2–3 (Marvin Karpa’s Reply Submissions on Costs) (Dec. 17, 2003).
- 188) *United Mexican States v. Marvin Roy Feldman Karpa*, No. 03-CV-23500, ¶ 2 (Submissions on Costs of the Applicant, the United Mexican States) (Dec. 16, 2003).
- 189) *Id.* at 6–8.
- 190) *The United Mexican States v. Marvin Roy Feldman Karpa*, No. 03-CV-23500, ¶ 5 (Decision Re Costs) (Dec. 18, 2003).
- 191) *Id.* at ¶ 8.
- 192) *The United Mexican States v. Marvin Roy Feldman Karpa*, No. C41169 (Ont. Ct. App.) (Jan. 11, 2005) [hereinafter *Feldman Set-Aside Appeal*].
- 193) *Id.* at ¶ 39.
- 194) *Id.* at ¶ 40. The Court did refer to the president of the tribunal’s having been selected from a roster of 45 arbitrators who were, pursuant to Article 1124(4) of the NAFTA, required to be “experienced in international law and investment matters.” *Id.* This reference is somewhat perplexing, given that the roster called for by Article 1124(4) has never been established. *See* the commentary to that article. The president of the *Feldman* tribunal, Professor Konstantinos D. Kerameus, was appointed by the Secretary General of ICSID. *Feldman Award*, *supra* note 18, at ¶ 25. Professor Kerameus was presumably chosen from the ICSID Panel of Arbitrators, as required by Article 1124(3) of the NAFTA.
- 195) *Feldman Set-Aside Appeal*, *supra* note 192, at ¶ 41.
- 196) *Id.* at ¶ 42.
- 197) *Id.* at ¶ 43.
- 198) *Id.* at ¶ 53.
- 199) *Id.* at ¶¶ 44–47.
- 200) *Id.* at ¶¶ 49–52.
- 201) *Id.* at ¶ 51. In Procedural Order No. 2, the *Feldman* tribunal had set forth its approach to production of documents and the drawing of adverse inferences in the event that parties failed to comply with tribunal orders in that regard. *Marvin Roy Feldman Karpa (U.S.) v. Mexico*, ICSID (W. Bank) ARB(AF)/99/1, ¶ 8 (Procedural Order #2) (May 3, 2000).
- 202) *Id.* at ¶ 56.
- 203) *Id.* at ¶ 58.
- 204) *Id.* at ¶ 58.
- 205) *Id.* at ¶ 61.
- 206) *Id.* at ¶ 66.
- 207) *Id.* at ¶¶ 63, 67.
- 208) *Id.* at ¶¶ 65, 69.
- 208a) *Bayview Irrigation District #11 et al. v. Mexico*, 07-CV-340139-PD2 (May 5, 2008).
- 208b) *Id.* at ¶ 41.
- 208c) *Id.* at ¶ 11.
- 208d) *Id.* at ¶ 13.
- 208e) *Id.* at ¶¶ 14–15.
- 208f) *Id.* at ¶ 64.
- 208g) *Id.* at ¶¶ 50, 64.
- 208h) *Id.* at ¶¶ 67–73.
- 208i) *Id.* at ¶ 72.
- 208j) *Id.* at ¶ 74.
- 208k) *Id.* at ¶ 75.
- 208l) *Id.* at ¶ 76.

- 208m)** *Id.* at ¶ 77.
- 208n)** *Vito G. Gallo (U.S.) v. Canada*, (UNCITRAL) (Tribunal Letter on Place of Arbitration) (Jun. 4, 2008).
- 208o)** *Id.* at ¶¶ 18–19.
- 208p)** *Id.* at ¶¶ 20–21.
- 208q)** *Id.* at ¶ 23 (quoting *Bayview Set-Aside Decision*, *supra* note 208a, ¶ 64).
- 208r)** *Id.* at ¶ 24 & n. 11.
- 208s)** *Id.* at ¶ 26 (“Canada is bound by its own submission, and the Tribunal expects Canada to stand by it.”).
- 209)** José Luis Siqueiros & Alexander C. Hoagland, *Mexico*, in *III International Handbook on Commercial Arbitration 1* (Jan Paulsson ed., 2003).
- 210)** *Id.* at Annex I-11-12.
- 211)** *Id.* at 22; Annex I-12.
- 212)** Federal Arbitration Act, 9 U.S.C. § 2 (2004).
- 213)** William W. Park, *The Specificity of International Arbitration: The Case for FAA Reform*, 36 *Vand. J. Transnat'l L.* 1241, 1245 & n. 16 (2003).
- 214)** Canada amended its Federal Commercial Arbitration Act to “deem” Chapter 11 awards commercial for purposes of review under that Act. *Commercial Arbitration Act*, R.S. 1985, c. 17 (2d Supp.), s. 5(4).
- 215)** See, e.g., *ADF Group Inc. (Can.) v. United States*, ICSID (W. Bank) ARB(AF)/00/1 (Submission on Place of Arbitration of Respondent United States of America) (Mar. 19, 2001).
- 216)** Federal Arbitration Act, 9 U.S.C. ss. 1–16 (2004).
- 217)** *Id.* at ss. 201–208.
- 218)** *Id.* at ss. 301–307.
- 219)** *Id.* at s. 208, s. 307.
- 220)** *Id.* at s. 10.
- 221)** The language is from *Wilko v. Swan*, 346, U.S. 427, 436–437 (1953). For discussion of the issue, see Park, *supra* note 213, at 1249–1254; Gary B. Born, *International Commercial Arbitration* 798, 810–813 (2nd ed. 2001).
- 222)** Born, *supra* note 221, at 810–811.
- 223)** See, e.g., Park, *supra* note 213, at 1246–1248.
- 224)** New York Convention, Art.I(1).
- 225)** *Id.* Certain countries took reservations from this latter definition; the United States did not. Park, *supra* note 213, at 1246–1247 n. 23.
- 226)** 9 U.S.C. § 202. The United States does, however, require that the award be made in the territory of another contracting State for the Convention to apply. See *infra* note 244 and accompanying text.
- 227)** See, e.g., *Yusuf Ahmed Alghanim & Sons v. Toys 'R' US*, 126 F.3d 15, 23–25 (2d Cir. 1997). See also cases collected in Park, *supra* note 213, at 1247 n. 27.
- 228)** *Industrial Risk Insurance v. M.A.N. Gutehoffnungshutte G.m.b.H.*, 141 F.3d 1434 (11th Cir. 1998).
- 229)** *Raymond L. Loewen v. United States*, No. 1:04CV02151(RWR), 37–41 (D.D.C.) (Motion to Vacate and Remand Arbitration Award) (Feb. 25, 2004) [hereinafter *Loewen Set-Aside Petition*]; *Raymond L. Loewen v. United States*, No. 1:04CV02141(RWR), 22, 28–31, 42–44 (Opposition to Petitioner's Motion to Vacate and Remand Arbitration Award) (March 25, 2005) [hereinafter *U.S. Opposition to Loewen Set-Aside Petition*].
- 230)** *Loewen Set-Aside Petition*, *supra* note 229. Only Raymond Loewen moved to set aside the award. The other claimant in the arbitration, The Loewen Group International, was not party to the set-aside proceedings.
- 231)** *Id.* at 21–27.
- 232)** *Id.* at 27–28.
- 233)** *Id.* at 21.
- 234)** *Id.* at 43.
- 235)** *Id.* at 44.
- 236)** *Id.* at 44–45.
- 237)** 9 U.S.C. § 12 (“Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered.”)
- 238)** *U.S. Opposition to Loewen Set-Aside Petition*, *supra* note 229, at 18–20.
- 239)** *Id.* at 21–22.
- 240)** *Id.* at 22ff.
- 240a)** *Raymond L. Loewen v. United States*, No. 94–2141, slip op. at 5–6 (D.D.C. Oct. 31, 2005).
- 240b)** *Id.*, at 8–9.
- 240c)** *In re Arbitration between International Thunderbird Gaming Corp. v. United Mexican States*, 473 F. Supp. 2d 80, 84 (D.D.C. 2007).
- 240d)** *Id.*
- 240e)** *Id.* at 83.
- 240f)** *Id.*
- 240g)** *Id.* The court assumed that the “manifest disregard” standard employed by U.S. courts in the review of domestic arbitral awards also applied to international arbitral awards, although the matter has not been definitively decided. See Marco E. Schnabl & Timothy G. Nelson, *Nothing Left to Chance: Thunderbird v. Mexico and the Power of a Domestic U.S. Court to Review a NAFTA Investment Arbitration Award*, 22:3 *Mealey's Int'l Arb. Rep.* 15 (2007); see also *supra* notes 221–28 and accompanying text.
- 240h)** *International Thunderbird*, 473 F. Supp. 2d at 84–85.

- 240i) *Id.* at 85.
- 240j) *Id.*
- 240k) *Id.*
- 240l) *Id.* at 85–86.
- 240m) *Tembec Inc. et al. v. United States*, Case 1:05-cv-02345-RMC (D.D.C. Apr. 19, 2007).
- 240n) Tembec had actually revised the provisions of the TLA regarding its lawsuit in a manner more favorable to itself, but the United States had never executed the revised version.
Id. at 5 & n.2.
- 240o) *Id.* at 3–4.
- 240p) *Id.* at 4–5.
- 240q) *Id.* at 5–6.
- 240r) *Id.* at 6.
- 240s) *Id.* at 6–7.
- 240t) *Id.* at 7–8.
- 240u) *Id.* at 9.
- 240v) *Consolidated Softwood Lumber Cases*, (UNCITRAL) 89–90 (Joint Order on the Costs of Arbitration and for the Termination of Certain Proceedings) (Jul. 19, 2007).
- 240w) *Tembec Inc. v. United States*, 1:07-CV-01905-RMC (D. D.C. Aug. 14, 2008).
- 240x) *Id.* at 7. The Court also noted that the tribunal had reserved on the issue of fees and costs in January of 2006 nine months before the stipulation of dismissal. *Id.*
- 240y) *Id.* at 6.
- 240z) *Id.* at 8.
- 241) Redfern & Hunter, *supra* note 25, at 440–441.
- 241a) Recent developments in the United States with respect to the enforcement of awards undercut that commitment. Three different federal circuits have issued decisions suggesting that an award can only be enforced or recognized under the New York Convention if the court in which enforcement or recognition is sought has personal jurisdiction over the party resisting enforcement. *Base Metal Trading, Ltd. v. OJSC “Novokuznetsky Aluminium Factory,”* 283 F.3d 208 (4th Cir. 2002); *Glencore Grain Rotterdam V.B. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1122 & n.5 (9th Cir. 2002); *Monegasque de Reassurances S.A.M. v. NAK Naftogaz of Ukraine*, 311 F.3d 488, 498–501 (2d Cir. 2002). For an in-depth examination of these issues, see William W. Park & Alexander A. Yanos, *Treaty Obligations and National Law: Emerging Conflicts in International Arbitration*, 58 *Hastings L. J.* 251 (2006). These matters have not yet arisen in Chapter 11 arbitrations.
- 242) <www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html> (last visited Oct. 22, 2007).
- 243) *Id.*
- 244) *Id.*
- 245) *Id.*
- 246) Reservation of the United States, *available at* <www.sice.oas.org/dispute/comarb/iacac/ iacac2e.asp> (last visited October 14, 2005).
- 247) *Id.*
- 248) *Id.*

© 2017 Kluwer Law International BV (All rights reserved).

Kluwer Arbitration Law is made available for personal use only. All content is protected by copyright and other intellectual property laws. No part of this service or the information contained herein may be reproduced or transmitted in any form or by any means, or used for advertising or promotional purposes, general distribution, creating new collective works, or for resale, without prior written permission of the publisher.

If you would like to know more about this service, visit www.kluwerarbitration.com or contact our Sales staff at sales@kluwerlaw.com or call +31 (0)172 64 1562.