The Review of International Commercial Arbitral Awards and the New York Convention: Breaking the Link to Administrative Law

Maureen Irish

THE ENFORCEMENT OF international commercial arbitral awards in Canada takes place pursuant to Canada’s obligations in the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Review of these awards in Canadian courts should be mindful of this basis in an international treaty. Standards of review should not be drawn from Canadian administrative law, as has happened in some recent cases. The Vavilov decision of the Supreme Court of Canada in 2019 confirms the unsuitability of domestic administrative law for the review of international arbitral awards. Analysis and decisions in Canadian courts are not solely for a domestic audience, but are part of a global exchange with courts in other jurisdictions subject to the same treaty obligations.

LA MISE EN application des sentences arbitrales commerciales internationales au Canada s’effectue conformément aux obligations du Canada en vertu de la Convention pour la reconnaissance et l’exécution des sentences arbitrales étrangères de 1958. L’examen de ces sentences par les tribunaux canadiens doit tenir compte de son fondement dans un traité international. Les normes de contrôle judiciaire ne devraient pas être tirées du droit administratif canadien, comme cela a été le cas dans certaines affaires récentes. L’arrêt Vavilov rendu par la Cour suprême du Canada en 2019 ne fait que confirmer que le droit administratif intérieur ne peut pas servir adéquatement de base à la révision des sentences arbitrales internationales. Les analyses et les décisions des tribunaux canadiens ne sont pas uniquement destinées à un public national, mais font également partie d’un échange mondial avec les tribunaux d’autres autorités qui sont soumises aux mêmes obligations conventionnelles.
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**I. INTRODUCTION**

In 1986, Canada acceded to the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (New York Convention or Convention). Both large and small businesses are increasingly involved in cross-border transactions. Arbitration is often chosen as the method of dispute settlement in international contracts, as an alternative to litigation. An arbitration clause or agreement can be drafted as the parties wish. Arbitration can follow procedures suitable to the parties’ needs and can be before arbitrators with expertise relevant to the area of the contract. In a cross-border context, arbitration has the advantage of neutrality since involvement with the courts of either party is minimal. Courts may be called upon to ensure

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that the parties respect their agreement to arbitrate. As well, domestic courts have the role of enforcing an eventual award in the case of non-compliance or overturning an award that is successfully contested.

This article discusses the approaches taken by Canadian courts to the review of international commercial arbitral awards, especially after the 2011 decision of the Ontario Court of Appeal in Mexico v Cargill, Incorporated, a dispute in international investment law brought by a private investor. As explained below, the international commercial arbitration procedure is an option available in certain investment treaties for dispute settlement between investors and states. Canadian courts have used administrative law standards of review to deal with investment awards against states. For example, in United Mexican States v Feldman Karpa, in 2005, the Ontario Court of Appeal upheld an investment arbitral award after applying analysis from administrative law to determine that the tribunal was entitled to a “high degree of deference,” one of three standards in use at the time.

Canadian administrative law changed in 2008 as a result of the Dunsmuir v New Brunswick decision, which reduced the standards of review to just two: reasonableness and correctness. There was a further major reform of administrative law in the Canada (Minister of Citizenship and Immigration) v Vavilov decision of the Supreme Court of Canada in 2019. In the Cargill investment decision, the Ontario Court of Appeal adopted the correctness standard of review, while expressing hesitation about the application of domestic administrative law standards to an investor-state award. After Cargill, the use of administrative law has continued, and is now appearing in decisions on international commercial arbitral awards when both sides are private parties.

This article argues that the use of administrative law standards of review is not appropriate for international commercial awards. As international arbitral tribunals are not Canadian domestic administrative agencies, Canadian administrative law should not apply. Instead, approaches to interpretation should reflect the treaty-based framework supporting

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2 2011 ONCA 622, leave to appeal to SCC refused, 34559 (10 May 2012) [Cargill].
3 (2005), 74 OR (3d) 180 at paras 38, 41, 248 DLR (4th) 443 (Ont CA) [Feldman] (under this standard, an agency’s decision would be upheld unless it was patently unreasonable; see discussion below under Administrative Law and Interpretation in the International Context).
4 2008 SCC 9 [Dunsmuir].
5 2019 SCC 65 [Vavilov].
6 Supra note 2 at para 42.
7 Ibid at para 30.
international commercial arbitration. In a treaty-based structure, the approach to interpretation should not depend on factors that are too specific to the domestic Canadian system. Our treaty partners are also interpreting the same treaty language. As we are all participating in a common undertaking, the methodology used should be suitable for the task of co-operative interpretation. If we would not expect courts in other jurisdictions to change their approaches to interpretation in response to each new development in Canadian administrative law, we should not base our decisions on standards of review drawn from that domestic area of law.

The Part below outlines selected provisions of the *New York Convention*. Decisions on investor-state awards are addressed in Part III, as this is the area in which the link to administrative law appeared. Part IV then examines Canadian court decisions on international commercial arbitral awards between private parties since the implementation of the *New York Convention*, including analysis of recent cases that have begun to use administrative law standards of review. The next section discusses Canadian administrative law in more detail, presenting arguments on its lack of suitability for reviewing international commercial arbitral awards and the preferred approach to interpretation in the international context. After a brief survey of recent domestic arbitration cases in Canada, a final Part concludes and offers general remarks.

## II. BACKGROUND

The *New York Convention* promotes the use of arbitration for international commercial disputes between private parties. Under the *Convention*, if the parties have agreed on arbitration in their contract, then domestic courts are to hold them to that bargain. If one side attempts to undermine the agreement with litigation in a domestic court, that court is to refer the parties instead to arbitration, subject to some exceptions.\(^8\) Once an arbitral tribunal has made an award, it can be enforced in domestic courts if the losing party fails to comply.\(^9\) The *Convention* sets out grounds on which the losing party can resist such enforcement in Article V:

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party

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8. *New York Convention*, supra note 1, art II(3).
furnishes to the competent authority where the recognition and enforcement is sought, proof that:

a. The parties to the agreement...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 award 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 recognized 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.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

a. The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

b. The recognition or enforcement of the award would be contrary to the public policy of that country.¹⁰

The domestic court is to enforce the award, subject to a limited set of defences in Article V. The defences are largely jurisdictional and procedural. Was this a proper tribunal, set up under a binding agreement? Did it follow appropriate procedure? Did it respect its mandate? If so, the award is enforced. There is no review for alleged errors of fact or substantive law relating to the merits. In international commercial arbitration agreements,

¹⁰ Ibid, art V.
a choice of law clause often determines the applicable law governing the contract, which could easily be different from the law of a court asked to enforce an award. There is no reason to give the enforcing court the task of hearing appeals on the substantive law of the contract. Rather, the role of the enforcing court is to consider whether the award is from a properly established tribunal, operating fairly and in accordance with its mandate. As well, in the New York Convention, enforcement is subject to the fundamental public policy of the domestic court. There is no enforcement if this sort of dispute is not arbitrable in accordance with domestic law or if enforcement would be contrary to public policy as determined by that court.

As a treaty, the New York Convention attracts the public international law presumption of consistency and can be used as an aid to interpretation, since courts presume that legislators do not intend to put Canada in breach of its international obligations. Judges can also consider decisions of the courts of our treaty partners, by way of persuasive authority, giving the treaty framework a horizontal dynamic. All state parties will have an interest in implementation and compliance by others, in line with their goals in joining the treaty.

Interpretation distinguishes between the grounds for review listed in the New York Convention and the standards of review that set the approach to interpretation. There is clearly some intended room in the New York Convention for the domestic law of the enforcing court concerning matters of arbitrability and public policy. Canadian courts may have begun to add an extra domestic gloss to overall interpretation by borrowing standards of review from administrative law.

A party wishing to contest an award would defend any enforcement action on the basis of the grounds listed in Article V. As well, the party has the option of applying to have the award set aside, usually before a court at the place of arbitration, which has the role of supervising and supporting the arbitration process. If an award is set aside there, another court may refuse to recognize and enforce, pursuant to Article V(1)(e). This decision is discretionary, as the Article confirms, by use of the word “may.” Some domestic courts can choose to enforce despite a set-aside award.

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11 Vavilov, supra note 5 at para 182.
12 New York Convention, supra note 1, art V(1).
When Canada implemented the New York Convention, it did so through use of the Model Law drafted by the United Nations Commission on International Trade Law (UNCITRAL). The Model Law is not a treaty or an amendment to the Convention, but merely recommended legislation that has been adopted in some states party to the Convention. It forms the basis of legislation across the common law provinces and territories, at the federal level, and in the Quebec Code of Civil Procedure. The Model Law builds on the Convention. The grounds for refusing recognition and enforcement in Article 36 of the Model Law are taken from the Convention. In Article 34, the Model Law expands on the New York Convention by explicitly listing those same grounds as the ones used by a domestic court in a set-aside application.

The next Part discusses the review of investor-state awards in Canada. The 2011 Ontario Court of Appeal decision in the Cargill investment dispute is examined in some detail. There are significant differences between investor-state dispute settlement and international commercial arbitrations involving only private parties. Both are treaty-based and approaches to interpretation need to be suitable for the global context, but the system for investment claims differs from ordinary commercial arbitration. Investment treaties and chapters in free trade agreements often involve similar obligations about non-discrimination, fair treatment, limits on performance requirements, and limits on expropriation. There is a tendency to refer to prior decisions and thus a certain expectation of substantive

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14 UNCITRAL Model Law on International Commercial Arbitration, UNCTRALOR, 18th Sess (with amendments adopted at 39th Sess), Annex 1, Agenda Item 1, 2, UN Doc A/40/17 (amendments UN DOC annex 2), A/61/17 (annex 1) (1985, with amendments as adopted in 2006) at 1 [Model Law]. See also ICAA 2017, supra note 1 at Schedule 2.


16 Model Law, supra note 14, art 36. See also New York Convention, supra note 1, art V.

17 Model Law, supra note 14, art 34.
coherence in dispute settlement, to enhance predictability for all parties.\textsuperscript{18} On the other hand, international commercial arbitration between private parties has its own policy context. The business contracts between the parties could relate to any agreements or ventures. There is no expectation of similarity in substantive obligations, and no push for harmonization or coherence in result. Despite the differences, Canadian courts have begun to mix the interpretation of the \textit{Model Law} concerning investor-state awards, with the interpretation of the \textit{Model Law} in international commercial arbitration between private parties.

\section*{III. INVESTOR-STATE AWARDS IN CANADIAN COURTS}

Investment claims are brought pursuant to bilateral investment treaties or chapters of trade agreements that are entered into by the governments of the home state of the investor and the host state receiving the investment. The investor brings the claim against the host state. The process is an alternative to dispute settlement through diplomatic negotiations between the two states over the alleged breach of treaty obligations.

Most reviews of investor-state awards by Canadian courts have been decisions on applications to set aside awards made under the \textit{North American Free Trade Agreement (NAFTA)}\textsuperscript{19} when the place (or “seat”) of arbitration was in Canada.\textsuperscript{20} The substantive provisions on investment in Chapter 11 of NAFTA were much like those of other investment treaties: non-discrimination, fair and equitable treatment, controls on expropriation, and controls on performance requirements.\textsuperscript{21} In 2020, NAFTA was

\begin{footnotes}
\item[18] See Charles N Brower, “W(h)ither International Commercial Arbitration? The Goff Lecture 2007” (2008) 24:2 Arb Intl 181 (“[s]ince investment treaty arbitration...invariably involves the interpretation and application of treaty obligations common to hundreds, if not thousands, of such treaties...the widely published decisions and awards of prior tribunals will...be looked to by parties and tribunals alike for guidance” at 188).


\item[20] But see \textit{Crystallex International Corp v Bolivarian Republic of Venezuela}, 2016 ONSC 4693 (enforcement application for an award made in Washington, DC, under the bilateral investment treaty between Canada and Venezuela); \textit{Russia Federation v Luxtona Ltd}, 2019 ONSC 7558, leave to appeal granted, 2020 ONSC 4668 (whether fresh evidence can be admitted in an application to set aside an interim award made by a tribunal established under the Energy Charter Treaty 34:2 ILM 381).

\item[21] \textit{NAFTA, supra} note 19, arts 1102–1103, 1105–1106, 1110.
\end{footnotes}
replaced by the *Canada-United States-Mexico Agreement* (*CUSMA*).\textsuperscript{22} Under *CUSMA*, investor-state dispute settlement is significantly limited, and is unavailable between the United States and Canada after a transition period of three years for legacy claims.\textsuperscript{23} Investor-state dispute settlement is still possible in other treaties involving Canada, such as the *Comprehensive and Progressive Trans-Pacific Partnership*,\textsuperscript{24} the *Comprehensive Economic and Trade Agreement* with the European Union (if it comes fully into effect),\textsuperscript{25} other free trade agreements, and many bilateral investment treaties.\textsuperscript{26} Canada might be chosen as the seat of an arbitration even if it is neither the respondent nor the home state of the investor.\textsuperscript{27}

*NAFTA* gave the claimant investor a choice of procedures for the arbitration. Pursuant to Article 1120(1)(a) of *NAFTA*, the arbitration could be brought under the *ICSID Convention* of the World Bank.\textsuperscript{28} That Convention established the International Centre for the Settlement of Investment Disputes (ICSID) to conduct arbitrations between investors and host states. The main mechanism for recourse against an award of an ICSID

\textsuperscript{22} See Protocol Replacing the North American Free Trade Agreement with the Agreement Between Canada, the United States of America, and the United Mexican States, 30 November 2018, Can TS 2020 No 5 (entered into force 1 July 2020, amended by Can TS 2020 No 6 10 December 2019) [*CUSMA*].

\textsuperscript{23} Ibid, Annex 14-C, clause 3.


\textsuperscript{25} See Canada-European Union Comprehensive Economic and Trade Agreement, 30 October 2016, EU 2018 No 6 (provisionally entered into force 21 September 2017, parts of c 8 on investment not yet in force).

\textsuperscript{26} See generally Government of Canada, “Trade and Investment Agreements”, online: <www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/index.aspx?lang=eng>. For a full list of Canada’s bilateral investment treaties, see the drop-down menu options under “Foreign Investment Promotion and Protection Agreements” and “Free Trade Agreements.”

\textsuperscript{27} In the Canadian court decisions examined below, Canada was the respondent state in: Canada (AG) v SD Myers Inc, 2004 FC 38 [Myers]; Canada (AG) v Mobil et al, 2016 ONSC 790 [Mobil]; and Canada (AG) v Clayton, 2018 FC 436 [Bilcon]. Canada was the place of arbitration for claims by US investors against Mexico in: *United Mexican States v Metalclad Corp*, 2001 BCSC 664 [Metalclad], supplementary reasons provided in *United Mexican States v Metalclad Corp*, 2001 BCSC 1529; Feldman, supra note 3; Bayview Irrigation District #1 v United Mexican States, [2008] OJ No 1858, 167 ACWS (3d) 991 (Ont Sup Ct) [Bayview]; Cargill, supra note 2; and *United Mexican States v Burr*, 2020 ONSC 2376, aff’d 2021 ONCA 64 [Burr].

\textsuperscript{28} Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 18 March 1965, Can TS 2013 No 24 (entered into force 14 October 1966, accession by Canada 1 December 2013) [*ICSID Convention*]. The US was an original party, while Mexico acceded to the Convention on August 26, 2018.
arbitral tribunal is an application for annulment, in whole or in part. In the ICSID, annulments are heard by special *ad hoc* Committees. Once all recourse is completed, if the award still stands, it is enforced in domestic courts of member states, subject only to their domestic laws on sovereign immunity. The ICSID option is only available if both the host state and the state of the investor are ICSID members. When NAFTA took effect in 1994, only the United States was also an ICSID member country. Since Canada did not join until 2013, NAFTA disputes involving Canada could not use the full ICSID procedure until that time.

As is not uncommon in investment treaties, other procedures were available for a NAFTA investor to choose. Article 1120(1)(b) permitted claimants to use the ICSID Additional Facility Rules if either the host state or the state of the investor, but not both, was a member of ICSID. As well, NAFTA Article 1120(1)(c) allowed an investor to piggy-back on procedures for private international commercial arbitrations by choosing the arbitration rules from the UNCITRAL. These other two available procedures relied on review of tribunal awards in domestic courts. In Canadian courts, actions to set aside or enforce tribunal awards follow the 1958 *New York Convention* and the UNCITRAL *Model Law*, as described in Part II above.

Article 34(2) of the *Model Law* lists the grounds for set-aside applications:

An arbitral award may be set aside by the court... only if:

(a) the party making the application furnishes proof that:

(i) 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 law of this State; or

(ii) 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; or

(iii) 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

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29 See e.g. *Sempra Energy International v Argentine Republic* (2010), ICSID Case No ARB/02/06 (International Centre for Settlement of Investment Disputes) (Arbitrators: Francisco Orrego Vicuna, Marc Lalonde, Sandra Morelli Rico) (in the Decision on the Argentine Republic’s Application for Annulment of the Award, an error in interpretation resulted in a full annulment due to failure to apply the applicable law, and thus a manifest excess of power by the arbitral tribunal).

30 *ICSID Convention, supra* note 28, arts 54(1), 54(3).
arbitration, provided that, 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

(iv) 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 Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

(b) the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State, or

(ii) the award is in conflict with the public policy of this State.\(^{31}\)

In the *Model Law*, the grounds of review for a set-aside application in Article 34 are substantially the same as grounds for refusing to enforce in Article 36. There is no review on the merits, on either law or fact. For both set-asides and enforcement applications, the *Model Law* has grounds that refer to the local court at the seat concerning arbitrability and public policy.

Canadian cases reviewing investor-state tribunal awards have taken differing approaches on the standard of review to apply. The grounds are set out in the *Model Law*, but what is the standard of review? The first decision, in 2001, was in *United Mexican States v Metalclad Corp*,\(^ {32}\) involving a complaint by a US company stymied in its plan to operate a waste treatment facility in Mexico. The set-aside application was brought by Mexico in British Columbia, which was the seat of the arbitration. Justice Tysoe of the British Columbia Supreme Court stated that since the standard of review was included in the statute that adopted the *Model Law*, “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.”\(^ {33}\) Lawyers for Mexico and Canada, the intervenor, argued in favour of using a standard drawn from administrative law,\(^ {34}\) given the public nature of investor-state dispute settlement. The Attorney General of Canada submitted that this approach would result in less deference to

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31. *Model Law*, *supra* note 14, art 34(2). In addition, if a tribunal makes an interim award on jurisdiction, a party may request a court ruling on the question under Article 16 of the *Model Law*.

32. *Supra* note 27.

33. *Ibid* at para 54.

the tribunal’s award than would be accorded in international commercial arbitration cases.\(^{35}\) In the result, the NAFTA award was partially set aside due to the failure to apply the applicable law, but partially upheld on other reasoning. The Court responded to counsels’ submissions, but declined to use Canadian administrative law, noting that courts dealing with commercial arbitral awards between private parties under the *Model Law* had not adopted the administrative law standards of review.\(^{36}\)

In 2004, in *Canada (AG) v SD Myers Inc*,\(^ {37}\) the Federal Court decided a set aside application by Canada concerning a NAFTA award in favour of a US corporation over a temporary ban on the export of certain PCB waste. The Court quoted the passage from *Metalclad* in which Justice Tysoe refused to use Canadian administrative law to create standards of review not provided for in the *Model Law*.\(^ {38}\) In its findings, however, the Federal Court in *Myers* adopted vocabulary from the three standards of review present in administrative law at the time. The Court held that the tribunal’s award was not patently unreasonable,\(^ {39}\) indicating that the tribunal was shown a high degree of deference. In addition, the Court held, in

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35 See “In the Matter of an Arbitration Pursuant to Chapter Eleven of the North American Free Trade Agreement ("NAFTA") Between Metalclad Corporation and the United Mexican States, Outline of Argument of Intervenor Attorney General of Canada” (16 February 2001) at para 18, online (pdf): <www.gob.mx/cms/uploads/attachment/file/1472/escrito_canada_Metalclad.pdf>: “[T]here appear to be two approaches this Court could take... The first would be to apply the lines of authority that have developed... concerning review of decisions of commercial arbitrators. The second would be to take the ‘pragmatic and functional’ approach to review of subordinate bodies developed in the jurisprudence of the Supreme Court of Canada.” The Attorney General submitted that, following the pragmatic and functional approach, tribunal awards “should not attract extensive judicial deference and should not be protected by a high standard of judicial review” (*ibid* at para 30). The Attorney General noted that Chapter 11 tribunals have limited remedial powers (*ibid* at para 27), are appointed *ad hoc*, unlike administrative agencies (*ibid* at para 25), and are not sheltered from judicial review by a privative clause (*ibid* at para 26). I thank Professor Cara Cunningham Warren of the University of Detroit Mercy School of Law for discussion on this issue.


37 *Myers*, supra note 27 at para 3.


39 *Myers*, supra note 27 at para 56 (the tribunal’s decision was also not “clearly irrational,” “totally lacking in reality,” or “a flagrant denial of justice” and thus was not contrary to Canadian public policy).
the alternative, that the award also met the standards of correctness and reasonableness.\textsuperscript{40} The British Columbia Supreme Court in \textit{Metalclad} had made significant reference to the investment law context, citing investor-state cases decided through the World Bank ICSID process on various subsidiary arguments presented by Mexico. The focus of the Federal Court in \textit{Myers} was on Canadian jurisprudence.

In \textit{Feldman}, in 2005, the Ontario Court of Appeal dealt with a set aside application by Mexico from an award relating to the treatment of a US investor’s claim to tax rebates on exports.\textsuperscript{41} In rejecting Mexico’s arguments, the Ontario Court of Appeal used analysis drawn from Canadian administrative law and determined that a high degree of deference should be shown to the arbitral tribunal’s decision.\textsuperscript{42} \textit{Bayview Irrigation District #11 v United Mexican States}, in 2008, was a decision of the Ontario Superior Court of Justice on a set-aside application brought by US holders of water rights to the allocation of cross-border water between the United States and Mexico.\textsuperscript{43} The NAFTA arbitral tribunal had ruled that it lacked jurisdiction because the claimants did not have investments in Mexico. In dismissing the set-aside application, the Court referred to \textit{Feldman}, according a high degree of deference to the NAFTA arbitral panel.\textsuperscript{44} The Court also noted that the Supreme Court of Canada had recently reduced the standards of review in Canadian administrative law to two: correctness and reasonableness.\textsuperscript{45} By this time, the use of Canadian administrative law standards of review was firmly established, and the path laid out in \textit{Metalclad} had been rejected.

The \textit{Cargill} dispute dealt with a complaint by a US investor over Mexico’s treatment of products sent to its distribution facility in Mexico.\textsuperscript{46} The tribunal ruled in favour of the complaint and awarded damages that included the loss to the distribution facility, as well as losses from closures of related production and export facilities in the United States. In the set-aside application, Mexico argued that the losses incurred in the territory of the United States were outside the jurisdiction of the tribunal,

\begin{itemize}
  \item \textit{Ibid} at para 70.
  \item \textit{Supra} note 3 at para 1.
  \item \textit{Ibid} at paras 37–38, 41, 43.
  \item \textit{Bayview}, \textit{supra} note 27 at paras 5–6.
  \item \textit{Ibid} at para 11, citing \textit{Feldman}, \textit{supra} note 3 at para 41.
  \item \textit{Dunsmuir}, \textit{supra} note 4 at para 34. For further discussion of \textit{Dunsmuir}, see the section below on Canadian Administrative Law and Interpretation in the International Context.
  \item \textit{Supra} note 2 at para 1.
\end{itemize}
under *Model Law* Article 34(2)(a)(iii). The award was upheld by both the Ontario Superior Court and the Ontario Court of Appeal. The judgment in the Superior Court followed precedent and used a standard of reasonableness, showing deference to the tribunal. The Ontario Court of Appeal agreed in the result, but used different reasoning that adopted a correctness standard. An application for leave to appeal to the Supreme Court of Canada was refused.

Much of the reasoning in the Court of Appeal judgment is a welcome move away from overly broad deference, but the continuing link to Canadian administrative law remains problematic. The Court expressed hesitation about the use of domestic law stating that “importing and directly applying domestic concepts of standard of review, both from administrative law and from domestic review by appeal courts of trial decisions, may not be helpful to courts when conducting their review process of international arbitration awards under Article 34 of the *Model Law*.” The Court rejected a reasonableness standard which “inevitably leads to a review of the merits of the decision.” Instead the approach adopted was correctness, applied with a narrow view, as courts should only rarely intervene in decisions by expert tribunals. The standard was drawn from Canadian administrative law at the time relating to true questions of jurisdiction, which “arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter.” The Court gave, as examples of jurisdictional errors, a hypothetical award for damages suffered in 2009 and 2010 when the submission for arbitration only covered damages suffered in 2007 and 2008, as well as a hypothetical *NAFTA* award in favour of an investor from Brazil, which was not a party to *NAFTA*.55

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47 *Ibid* at paras 15–16.
48 *See United Mexican States v Cargill, Inc*, 2010 ONSC 4656 at para 55.
49 *Cargill*, *supra* note 2 at para 42.
50 In its reasons, the Court of Appeal referred to a publication by a well-known Canadian arbitrator: Henri C Alvarez, “Judicial Review of NAFTA Chapter 11 Arbitral Awards” in Frédéric Bachand, ed, *Fifteen Years of NAFTA Chapter 11 Arbitration* (New York: JurisNet, 2011) 103 (“[w]hile the domestic judicial review concepts influenced by Canadian administrative law may be familiar to Canadian courts, they are not relevant, nor appropriate, for the review of international awards, and their application creates confusion and uncertainty” at 157).
51 *Cargill*, *supra* note 2 at para 30.
52 *Ibid* at para 51.
55 *Cargill*, *supra* note 2 at para 49.
Applying the standard of review analysis, the Court stated that “the inquiry under Article 34(2)(a)(iii) is restricted to whether the tribunal dealt with a matter beyond the submission to arbitration, not how the tribunal decided issues within its jurisdiction.”\textsuperscript{56} The tribunal held that the full damages to Cargill flowing from Mexico’s breaches included the losses suffered in the United States, due to the business model adopted. The Court ruled that the tribunal correctly determined that it had jurisdiction to decide the scope of damages, and there was no language in the relevant NAFTA provisions to impose a territorial limit.\textsuperscript{57}

It is precisely at this point that the analysis shows the strong influence of Canadian administrative law thinking, which has tended in the last few decades to limit jurisdictional review, as is outlined in the discussion below on Canadian administrative law and the international context. International investment law does not share this same history or the same reticence around jurisdiction. Here, Mexico argued that the tribunal lacked jurisdiction to include the extraterritorial losses. The argument called for an answer. In investment law, as applied to the Court’s hypothetical examples, when a reviewing court must decide whether an award deals with a dispute outside the terms of the submission to arbitration, the court is required to rule that the tribunal has the wrong year and the wrong investor—not whether the tribunal had jurisdiction to identify the year or the investor’s home country. As Marc Gold has suggested, the question in \textit{Cargill} did not have to be what damages flowed from Mexico’s breach, but could just as easily have been what damage was done to the investor in relation to the investment.\textsuperscript{58} When a court reviews an investor-state tribunal award on an issue of jurisdiction, there must be an answer.

In \textit{Cargill}, the Court of Appeal in fact did continue with a jurisdictional review and found that the tribunal was not in error in its exercise of jurisdiction. The United States and Canada intervened in support of Mexico’s position in favour of a territorial limit on damages. The three countries argued that there was subsequent practice of the NAFTA governments establishing their agreement to this effect pursuant to Article 31(3)(b) of

\textsuperscript{56} Ibid at para 66.  
\textsuperscript{57} Ibid at para 74.  
\textsuperscript{58} See Marc Gold, “Judicial Review of International Arbitrations in Canada: Notes on \textit{Mexico v Cargill}” (2013) 90:3 Can Bar Rev 717 at 724. See also NAFTA, \textit{supra} note 19 (“[t]his Chapter applies to measures adopted or maintained by a Party relating to:…(b) investments of investors of another Party in the territory of the Party,” art 1101(1)(b)).
the Vienna Convention on the Law of Treaties. The Court examined the documentary record at the time of the Cargill arbitration and rejected this argument.

The Court would have decided against the award if there had been language in NAFTA that set a territorial limit:

Had there been language in the Chapter 11 provisions that prohibited awarding any damages that were suffered by the investor in its home business operation, even if those damages related to and were integrated with the Mexican investment, that would have been a jurisdictional limitation that would have precluded the arbitration panel from awarding such damages, even if in its view, they otherwise flowed from the breaches. But there is no such limiting language.

This step forms a logical part of a review, with the caveat that it is not solely the explicit words of the treaty that govern, since treaties are to be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”

The analysis by the Ontario Court of Appeal in Cargill is welcome, as it moves away from very broad deference and applies more precision to arguments based on jurisdiction. The analysis, however, continues to rely on administrative law standards of review, despite hesitation about their suitability for this context. In Canadian administrative law, courts hear litigants contesting the merits of agency decisions on questions of law and sometimes also questions of fact. Neither of these grounds for review are available in the New York Convention and the Model Law.

In two subsequent set-aside applications, Canada (AG) v Mobil et al and Canada (AG) v Clayton (Bilcon), arguments based on jurisdiction were unsuccessful before Canadian courts. In Bilcon, when the Federal Court addressed the jurisdictional argument, the Court phrased this in

59 23 May 1969, 1155 UNTS 331, art 31(3)(b) (entered into force 27 January 1980) [VCLT].


60 Cargill, supra note 2 at para 84.

61 Ibid at para 72.

62 VCLT, supra note 59, art 31(1).

63 Mobil, supra note 27 at para 4.

64 Bilcon, supra note 27 at para 6.
the language of “true questions of jurisdiction,”65 quoting from Cargill that jurisdiction referred to “whether or not the tribunal had the authority to make the inquiry.”66 The Court found that “the Tribunal clearly had jurisdiction to embark on its inquiry.”67 This approach is unfortunate, as it invites a court to find a wide description of the matter at issue and then fall into an overly deferential analysis of a tribunal’s actual decision. If concepts from administrative law were no longer used, then perhaps this step of initial categorization would be abandoned, and review could proceed on a full correctness or de novo standard. In Bilcon, the jurisdictional argument was about whether the tribunal had relied excessively on Canadian domestic law and thus failed to apply the applicable international law of NAFTA. The Court concluded that the tribunal’s reasoning was squarely within the four corners of the submission to arbitration,68 and declined to set aside the award. As in Cargill, the reference to true questions of jurisdiction was ultimately unhelpful in the reasoning.

This summary of Canadian decisions on investor-state awards demonstrates that administrative law standards of review have been unhelpful to courts. The resulting approaches have ranged across low and high deference and correctness with no deference on a matter of jurisdiction. In a thorough study discussing these cases and comparing them to developments in the United States and Europe, Céline Lévesque opts for correctness review, which “appears to strike the right balance between preventing courts from overreaching while exercising the duty of control under the Model Law.”69 The correctness standard is, for the moment, linked to “true questions of jurisdiction” in the Cargill decision of the Ontario Court of Appeal. In response to new developments, courts reviewing investor-state awards have an opportunity to break the link to administrative law and focus more appropriately on the context of international investment law, following the example of the Lévesque study.70

65 Ibid at para 72.  
66 Ibid, citing Cargill, supra note 2 at para 40, citing Dunsmuir, supra note 4 at para 59.  
67 Bilcon, supra note 27 at para 159.  
68 Ibid at para 199.  
70 In a recent decision on the jurisdiction of an investor-state tribunal, the Ontario Superior Court mentioned the concept of true questions of jurisdiction, but applied a correctness standard directly to the tribunal’s reasoning without initially categorizing the tribunal’s authority to address the issues: see Burr, supra note 27 at paras 41–43, 53–118, 122–39, 147–220.
The Vavilov decision of the Supreme Court of Canada removes from Canadian administrative law the category of true questions of jurisdiction. In Vavilov, reasonableness is the presumed standard for judicial review applications, while correctness is retained for certain matters. The Supreme Court will no longer recognize true questions of jurisdiction as a category for correctness review. This change in domestic administrative law makes it especially unsuitable for reviewing international arbitral awards. Indeed, the Court indicates that it is difficult to distinguish questions of jurisdiction from questions of law. Review under the New York Convention and the Model Law, however, depends on just such a distinction being made between tribunal jurisdiction and the provisions of the applicable law. Future Canadian courts will need to decide how much of the Cargill decision survives this change.

A particular difficulty flowing from Cargill is that the Court of Appeal’s decision is now bringing administrative law into the review of international commercial arbitral awards between private parties. It is not necessary to assume that the approach to interpretation must be the same for investor-state decisions and private commercial arbitral awards simply because they share a procedural option for review and enforcement. Even when investment treaties rely on domestic courts for control of arbitral tribunals under the ICSID Additional Facility or the UNCITRAL Rules, investment law differs from private commercial arbitration. Public international law has a strong influence in investor-state disputes, as it governs the treaties establishing the obligations and the consent of the state parties to arbitration. Investment treaties tend to contain similar provisions concerning non-discrimination, fair and equitable treatment, limits on performance requirements, and limits on expropriation. Where the treaty obligations are similar, the tendency is to promote analytical consistency by referring to decisions of other tribunals. Advocates acting on set-aside or enforcement applications for investor-state awards may present arguments based on international investment law and general public international law.

71 Supra note 5 paras 30–31. As discussed more fully in the section below on Canadian Administrative Law and Interpretation in the International Context, the presumed reasonableness standard does not apply if the legislature has indicated an intent to the contrary—either explicitly or by providing for a statutory right of appeal from an administrative agency. The conclusion that a statutory right of appeal calls for the standards of appellate review in civil litigation is contested in the minority opinion in the decision.

72 Ibid at paras 53–64.
73 Ibid at para 65.
can be expected that ICSID tribunals and *ad hoc* Committees will continue to have a strong influence on the jurisprudence relating to investor-state disputes.

In contrast, in international commercial arbitration between private parties, there is no such expectation of harmonized underlying substantive rights, no relevant customary international law between the disputing parties, and a diversity of international dispute settlement centres and processes. While some investment disputes against host states could also involve commercial arbitration claims, the *New York Convention* does not assume that the respondent would typically be a state. Using the *Model Law* as a procedural alternative for investment claims under NAFTA drew these two areas together, but there is no reason why international commercial arbitration between private parties cannot be treated separately from investor-state dispute settlement.

### IV. INTERNATIONAL COMMERCIAL ARBITRATION

In most jurisdictions in Canada, a distinction is made between the system for international commercial arbitration and the domestic arbitration statutes. The federal government and Quebec blend the two together. When Canada implemented the *New York Convention*, most provinces adopted new legislation and kept the existing statutes for domestic arbitrations. A key difference between the international and domestic systems is that, in addition to set-aside procedures, the domestic statutes often provide for appeals to courts either as of right or with leave, as explained below in the Part on domestic commercial arbitration.

In the last Part, it was argued that standards of review borrowed from Canadian administrative law are out of place for investor-state awards. The same reasoning applies to awards in international commercial arbitrations. International arbitral tribunals are not Canadian administrative agencies. For example, an arbitration could be held in Singapore over a dispute between businesses from Australia and Malaysia, and then lead to an enforcement action in Canada if a recalcitrant losing party has Canadian assets. These are not public decision-makers entrusted with certain tasks pursuant to Canadian governmental authority. It would be preferable to reject the link to administrative law, build on earlier Canadian case law, and

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and develop approaches that are suitable to the context of international commercial arbitration and the New York Convention.

This Part first surveys Canadian decisions on applications to set aside or enforce international commercial arbitral awards. A second section considers developments in Canadian administrative law including the 2019 decision of the Supreme Court of Canada in Vavilov and comments on the approach to interpretation in the international context.

A. Review of International Arbitration Awards

Canadian legislation incorporating the Model Law governs recognition and enforcement of international commercial arbitral awards. The Model Law defines an international arbitral award as follows:

Article 1(3)
An arbitration is international if:
(a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or
(b) one of the following places is situated outside the State in which the parties have their places of business:
(i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;
(ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or
(c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.76

In dealing with international arbitration awards, prior to the 1980s, Canadian courts would first require that the award be confirmed by a foreign court, and would then recognize the foreign court’s judgment. This changed as arbitration gained greater acceptance and Canada joined the New York Convention. For recognition of arbitral awards, there continues to be a close analogy to the enforcement of foreign judgments. In Canadian conflicts law, recognition of a judgment requires that the foreign

76 Model Law, supra note 14, art 1(3). Art 1(3)(c) permitting opting in by express agreement was not in force in Ontario’s original implementation of the Model Law, which took effect on June 8, 1988 (see International Commercial Arbitration Act, RSO 1990, c I-9, s 2(3), as repealed by ICAA, supra note 1, s 15). The provision is now in force, since 2017, in ICAA, supra note 1, Schedule 2.
court have had jurisdiction, by presence, submission, or real and substantial connection. A foreign judgment will be recognized and enforced unless one of the defences is present: based on fraud, natural justice, or public policy. Once jurisdiction is established, there is no review of the substance of the judgment, unless one of the defences is raised. Similarly, for recognition and enforcement of arbitration awards, the New York Convention and Model Law focus on jurisdiction and defences, while matters of substantive law and fact in the award are not reviewed. Article 36(1) of the Model Law sets out the circumstances in which recognition and enforcement of an award may be refused:

> Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:
> (a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:

> (i) 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 law of the country where the award was made; or

> (ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

> (iii) the 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, 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 recognized and enforced; or

> (iv) the composition of the arbitral tribunal 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

78 Ibid at 179–87.
(v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or

(b) if the court finds that:
   (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or
   (ii) the recognition or enforcement of the award would be contrary to the public policy of this State.

The *New York Convention* and *Model Law* use review of tribunal awards by domestic courts for applications to enforce awards, or to set them aside in the case of a party wishing to contest a tribunal’s decision. In both situations, courts review and control commercial arbitrations on certain agreed grounds: jurisdiction, procedure, contract validity, and the views of the domestic court on arbitrability and public policy. Is this a proper arbitration, set up by agreement, acting within its mandate and using fair procedure? There is no review of questions of fact or governing law. The system relies on participation by domestic courts and thus allows space for the operation of domestic law on arbitrability and public policy. Recent decisions influenced by the *Cargill* case have begun to give Canadian domestic administrative law a somewhat wider scope, applying it as a gloss on other defences listed in Article 36(1)(a).

The material in this section summarizes court reviews of international commercial arbitral awards, in set-aside and enforcement actions. A few early cases are outlined and decisions since 2000 are summarized.

After adoption of the *Model Law* in the 1980s and 1990s across the Canadian provinces, interpretation of the grounds of review was done without a mediating step involving Canadian administrative law. In *Quintette Coal Ltd v Nippon Steel Corp*, the British Columbia Court of Appeal found that the arbitrators had stayed within jurisdiction when they interpreted a price adjustment clause. The application for a set-aside was unsuccessful at trial and at the Court of Appeal. In the majority judgment, Justice Gibbs

79 *Model Law, supra* note 14, art 36(1).

80 *Supra* note 36. There were other decisions of courts of appeal at about the same time: *Transport de cargaison (Cargo Carriers) (Kasc-Co) Ltd v Industrial Bulk Carriers Inc*, [1990] RDJ 418, 18 ACWS (3d) 22 (Qc CA) (public policy, ransom payment); *Aamco Transmissions Inc v Kunz* (1991), 97 Sask R 5, 29 ACWS (3d) 138 (Sask CA) (unconscionability and agreement to arbitrate); *MA Industries Inc v Maritime Battery Ltd* (1991), 123 NBR (2d) 305, 310 APR 305 (NBCA) (reciprocal application); *Kanto Kogyo Kabushiki-Kaisha v Can-Eng Manufacturing Ltd* (1992), 7 OR (3d) 779, 40 CPR (3d) 451 (Ont SC), aff’d (1995), 22 OR (3d) 576, 60 CPR (3d) 417 (Ont CA) (signature absent on agreement). See also, on an
(Justice Proudfoot concurring) cited passages from several US sources including Justice Blackmun in *Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc.* Since this was first set-aside action under the new legislation, Justice Gibbs expressed views on the approach to interpretation:

> It is important to parties to future such arbitrations and to the integrity of the process itself that the court express its views on the degree of deference to be accorded the decision of the arbitrators. The reasons advanced in the cases discussed above for restraint in the exercise of judicial review are highly persuasive. The “concerns for international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes” spoken of by Blackmun J. are as compelling in this jurisdiction as they are in the United States or elsewhere. It is meet therefore, as a matter of policy, to adopt a standard which seeks to preserve the autonomy of the forum selected by the parties and to minimize judicial intervention when reviewing international commercial arbitral awards in British Columbia.

In a concurring judgment in *Quintette*, Justice Hutcheon concluded that there is a “powerful presumption” that the arbitral board acted within its mandate. The two judges in the majority judgment did not adopt this language which, strictly speaking, applies only to the jurisdictional ground for review.

Cases shortly after *Quintette* also involve courts approaching their task directly rather than through a standard of review analysis borrowed from administrative law. In *Schreter v Gasmac Inc*, the Ontario Court (General

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82 *Ibid* at 217.

83 *Ibid* at 211.

84 The mention of this presumption was criticized as too deferential in the Ontario Court of Appeal’s decision in *Cargill*, supra note 2 at para 46. Indeed, it would be difficult to reconcile this presumption with the correctness standard adopted by the Court of Appeal in that decision, assuming that a strong presumption amounts to more than a mere allocation of the burden of proof. Frédéric Bachand argues against this powerful presumption, particularly for jurisdictional issues, stating that such deference to the tribunal is not appropriate since the defendant/respondent is denied access to the regular judicial system: see Frédéric Bachand, “*Kompetenz-Kompetenz, Canadian Style*” (2009) 25(3) Arb Intl 431 at 447–48.
Division) enforced an award even though it did not have written reasons.\textsuperscript{85} The Court concluded that the applicant had not proved that it suffered a denial of natural justice going to jurisdiction or that recognition would be contrary to public policy. In \textit{Dunhill Personnel System Inc v Dunhill Temps Edmonton Ltd}, the Alberta Court of Queen’s Bench quoted from \textit{Quintette} when it enforced an award in a franchise and trademark dispute that covered tort damages as well as contract damages.\textsuperscript{86} The dispute in \textit{Corporacion Transnacional de Inversiones, SA de CV v STET International, SpA} (\textit{COTISA}) concerned an agreement among companies based in Italy, the Netherlands, and Mexico for an indirect investment in the Cuban national telephone company.\textsuperscript{87} The Ontario Superior Court of Justice rejected arguments based on jurisdiction, procedure, and public policy, denied the set-aside application, and enforced the award. The Court referred to several international and Canadian sources, including the judgments in \textit{Quintette}.\textsuperscript{88} The Court noted that the party applying to set aside an award bears the onus of proof and that the grounds for refusing enforcement would be narrowly construed.\textsuperscript{89} These early decisions developed case law in response to the new acceptance of arbitral awards. Courts interpreted the grounds of review directly, while trying to respect the autonomy of the arbitral forum and minimize judicial intervention.

Decisions in the early 21st century adopted the same approach. The statutory provisions and grounds of review are applied directly. In most decisions, there is little explicit reasoning over deference, or a case might simply refer to the \textit{Dunhill} or \textit{COTISA} decisions and perhaps the presumption in favour of finding jurisdiction. Appellate level courts during this period dealt with disputes over the requirement of a written agreement to arbitrate,\textsuperscript{90} a change in identity of the arbitral institution,\textsuperscript{91} non-enforcement against a non-party,\textsuperscript{92} absence of reasons when both parties wanted them,\textsuperscript{93} non-arbitrability under the law of the forum,\textsuperscript{94} defence

\textsuperscript{85} Schreter, supra note 13.
\textsuperscript{86} (1993), 144 AR 272, 13 Alta LR (3d) 241 (Alta QB) [\textit{Dunhill}].
\textsuperscript{87} \textit{COTISA}, supra note 36.
\textsuperscript{88} Ibid at 191–92.
\textsuperscript{89} Ibid.
\textsuperscript{90} See \textit{Proctor v Schellenberg}, 2002 MBCA 170.
\textsuperscript{91} See \textit{Dalimex Ltd v Janicki} (2003), 64 OR (3d) 737, 228 DLR (4th) 179 (Ont CA).
\textsuperscript{92} See \textit{Javor v Francoeur}, 2004 BCCA 134.
\textsuperscript{93} See \textit{Smart Systems Technologies Inc v Domotique Secant Inc}, 2008 QCCA 444.
\textsuperscript{94} See \textit{Jean Estate v Wires Jolley LLP}, 2009 ONCA 339. This case was a question of reference to arbitration, rather than enforcement or set aside, but the majority of the Court of Appeal provided fairly definitive analysis of arbitrability of a dispute over a contingency fee. The
of death threats preventing a party from presenting its case,\textsuperscript{95} and the continuation of competing litigation elsewhere.\textsuperscript{96} The Yugraneft Corp \textit{v} Rexx Management Corp dispute on the application of limitations periods was fully litigated through trial and appellate levels in Alberta and at the Supreme Court of Canada,\textsuperscript{97} without reference to an administrative law standard of review analysis.

Interpretation among trial courts in the first decade of this century is similarly direct, generally without the use of administrative law.\textsuperscript{98} As at the appellate level, some deference is accorded to the arbitrators. Disputes during this period dealt with a wide range of issues: unconscionability,\textsuperscript{99} specific performance,\textsuperscript{100} public policy and an allegation of champerty,\textsuperscript{101} enforcement of a default award,\textsuperscript{102} setoffs and public policy,\textsuperscript{103} an improper attempt to vary an award,\textsuperscript{104} collateral action, res judicata, and abuse of process,\textsuperscript{105} and enforcement as an international commercial arbitral award despite a foreign judgment confirming the award and despite the absence of reasons.\textsuperscript{106}

By the end of the decade, the approach to interpretation was established in the case law. Interpretation is direct, with respect demonstrated for the choice of arbitration and the wish to minimize judicial intervention. As in \textit{COTISA}, the party arguing against the award has the burden of proof

\textsuperscript{95} See Znamensky Seleccione-Gribidny Center LLC \textit{v} Donaldson International Livestock Ltd, 2010 ONCA 303.

\textsuperscript{96} See Accentuate Ltd \textit{v} Asigra Inc, 2011 ONCA 99.

\textsuperscript{97} 2010 SCC 19.

\textsuperscript{98} In one case, administrative law standards of review were considered in addition to the deferential approach that the Court regarded as the favoured approach in international commercial arbitration: see \textit{Ace Bermuda Insurance Ltd \textit{v} Allianz Insurance Company of Canada}, 2005 ABQB 975 at para 51 (dispute concerning the place of arbitration).

\textsuperscript{99} See Grow Biz \textit{v} DLT Holdings Inc, 2001 PESC 27.

\textsuperscript{100} See Adams Management \& Services \textit{v} Aurado Energy, 2004 NBQB 342.

\textsuperscript{101} See Banglar Pragoti Ltd \textit{v} Ranka Enterprises Inc (2009), 176 ACWS (3d) 927, [2009] OJ No 1470 (Ont Sup Ct).

\textsuperscript{102} See West Plains Company \textit{v} Northwest Organic Community Mills Co-Operative Ltd, 2009 SKQB 162.

\textsuperscript{103} See Abener Energia SA \textit{v} SunOpta Inc (2009), 61 BLR (4th) 313, 178 ACWS (3d) 302 (Ont Sup Ct).

\textsuperscript{104} See Min Mar Group Inc \textit{v} Belmont Partners LLC, 2010 ONSC 1814.

\textsuperscript{105} See New World Expedition Yachts LLC \textit{v} PR Yacht Builders, 2011 BCSC 78.

\textsuperscript{106} See Activ Financial Systems Inc \textit{v} Orbixa Management Services Inc, 2011 ONSC 7286.
and the grounds of review are interpreted narrowly. One advantage of arbitration is that arbitrators may be selected for their relevant expertise in commercial law or perhaps in some other area related to the dispute.\textsuperscript{107} Some deference to expertise would be anticipated, reflecting the choice of the parties for arbitration. It should be noted as well that an international arbitral tribunal may have applied foreign law that is beyond the limits of judicial notice for a domestic court. The tribunal in \textit{COTISA}, for example, was applying the law of Mexico.\textsuperscript{108} In conflicts law, if foreign law applies as a result of a choice of law analysis in litigation before the court, that foreign law must generally be proven through expert testimony as a question of fact.\textsuperscript{109} In this respect, an application on an international commercial arbitral award differs from review of an investor-state matter, in which arguments relating to international investment law and treaty interpretation can be presented to the court by counsel. The private nature of international commercial arbitration distinguishes it from investor-state disputes. Although the \textit{Model Law} may be used in both contexts, the task of a reviewing court is not the same.

Even after the \textit{Cargill} decision in 2011, most enforcement and setting-aside applications continued to use the approach of direct interpretation. Various matters have been addressed: non-enforcement against non-parties,\textsuperscript{110} time for enforcement,\textsuperscript{111} jurisdiction of the arbitrator,\textsuperscript{112} adjournment pending an annulment application at the seat of the arbitration,\textsuperscript{113} public policy and alleged conflict of interest,\textsuperscript{114} enforcement of a default award,\textsuperscript{115} and service and proper notice of an arbitration.\textsuperscript{116} In \textit{Tianjin v Xu}, the respondent raised an issue of jurisdiction, arguing that the award was domestic in China and was not international as defined in Article 1(3) of the \textit{Model Law}.\textsuperscript{117} Without referring to Canadian administrative law, the

\textsuperscript{107} See e.g. \textit{Xerox Canada Ltd v MPI Technologies Inc} (2006), 153 ACWS (3d) 1029, [2006] OJ No 4895 (Ont Sup Ct) (the appointment of an expert in computer software as a tribunal member).

\textsuperscript{108} \textit{COTISA}, supra note 36 at 188.

\textsuperscript{109} Pitel & Rafferty, supra note 77 at 239–41.

\textsuperscript{110} See \textit{Rusk Renovations Inc v Dunsworth}, 2013 NSSC 179.

\textsuperscript{111} See \textit{NYSE v Orbixa}, 2013 ONSC 5521.


\textsuperscript{113} See \textit{Empresa Minera Los Quenuales SA v Vena Resources}, 2015 ONSC 4408.

\textsuperscript{114} See \textit{Entes v Kyrgyz Republic}, 2016 ONSC 7221. See also \textit{Belokon et al v The Kyrgyz Republic}, 2016 ONSC 4506, aff’d 2016 ONCA 981, leave to appeal to SCC refused, 37463 (15 June 2017).

\textsuperscript{115} See \textit{Parrish & Heimbecker Ltd v Bukurak}, 2017 SKQB 322.

\textsuperscript{116} 2019 ONSC 628.

\textsuperscript{117} \textit{Ibid} at paras 45–51.
Ontario Superior Court of Justice found that the award met Article 1(3) since the respondent did not have a place of business in China at the relevant time and was habitually residing in Ontario.\textsuperscript{118}

Recent cases have continued to cite to earlier authorities, especially \textit{COTISA}, in support of a policy of review with general deference, without the use of Canadian administrative law. In \textit{Subway Franchise Systems of Canada Ltd v Laich}, the Saskatchewan Court of Queen’s Bench refused to enforce an arbitration award on public policy grounds, as the franchisor had continued to work with the franchisee and received usual profits and royalties from the operation of the store.\textsuperscript{119} The Court referred to \textit{COTISA} for the idea of narrow construction of the grounds to refuse recognition.\textsuperscript{120} Sources from conflicts law, however, supported the domestic public policy against double recovery. The British Columbia Supreme Court in \textit{CE International Resources Holdings LLC v Yeap Soon Sit} relied on the authorities concerning deference to arbitral awards in enforcing an award against an individual as well as a corporate respondent.\textsuperscript{121} In \textit{Assam Company India Limited v Canoro Resources Ltd}, the British Columbia Supreme Court discussed extensively the authorities supporting the policy of respect for international arbitral tribunals, and recognized and enforced most of an award, despite the regulatory dissolution of the respondent company.\textsuperscript{122} Similarly, recent decisions continue to give deference to arbitral tribunals, usually citing \textit{COTISA}, and recognize awards dealing with various issues: alleged double recovery and public policy,\textsuperscript{123} attempt to re-argue the merits,\textsuperscript{124} alleged conflict of interest,\textsuperscript{125} and arbitration clause and jurisdiction.\textsuperscript{126}

Recall that in \textit{Cargill}, the Ontario Court of Appeal adopted a standard of review of correctness, while also saying that using standards drawn from domestic administrative law “may not be helpful.”\textsuperscript{127} The Court of Appeal said that courts will seldom interfere with investor-state tribunal decisions, because intervention is limited to true questions of jurisdiction.

\textsuperscript{118} \textit{Ibid} at paras 47–51.
\textsuperscript{119} 2011 SKQB 249.
\textsuperscript{120} \textit{Ibid} at para 16.
\textsuperscript{121} 2013 BCSC 1804.
\textsuperscript{122} 2014 BCSC 370.
\textsuperscript{123} See \textit{Depo Traffic v Vikeda International}, 2015 ONSC 999.
\textsuperscript{124} See \textit{Sanum Beteiligungsgesellschaft MbH v PDC Biological Health Group Corporation}, 2015 BCSC 570.
\textsuperscript{125} See \textit{Jacob Securities Inc v Typhoon Capital BV}, 2016 ONSC 604.
\textsuperscript{126} See \textit{Profoto AB v Blazes Photographic}, 2017 ONSC 6455.
\textsuperscript{127} \textit{Supra} note 2 at para 30.
which “arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter.”

It was argued above that the administrative law analysis led the Court away from international investment law. This borrowing from Canadian administrative law has continued for investor-state disputes, as outlined earlier. As well, the adoption of administrative law language is beginning to spill over on reviews of international commercial arbitral awards.

Administrative law standards of review are considered in some recent international commercial arbitration cases, in decisions that refer to *Cargill*. Telestat Canada v Juch-Tech, Inc, a decision of the Ontario Superior Court of Justice, involved a dispute over satellite services that went to arbitration in New York. The Court referred to *Cargill* for the initial presumption that the arbitral tribunal acted within its jurisdiction and the principle that jurisdiction would be judged on a correctness standard. The Court enforced an award of damages. After a full review of the evidence and the agreement, the Court found that the arbitrators did not have jurisdiction to award attorney’s fees. The tribunal’s decision to the contrary on the award of fees was incorrect and was not enforced. In this decision, the treatment of the attorney’s fees was clearly a jurisdictional issue and the Court had no difficulty applying the correctness standard. In SMART Technologies ULC v Electroboard Solutions Pty Ltd, the Alberta Court of Queen’s Bench cited *Cargill* and a number of other investor-state decisions in its reasoning. The dispute involved an international distributorship for whiteboards and associated technology in Australia and New Zealand. The arbitration agreement had two levels of dispute settlement: before an arbitrator, and then an Appeal Tribunal. The Appeal Tribunal had jurisdiction over “clear errors of law or clear and convincing factual errors” in the arbitrator’s decision, a wide mandate covering both law

128 Ibid at para 40, citing Dunsmuir, supra note 4 at para 59.
129 In a decision at about the same time as *Cargill*, the Federal Court of Canada applied administrative law standards to enforce an arbitral award dealing with a shipment of frozen fish from Halifax to Antwerp. The Court ruled that the award would be enforced whether the standard was correctness or reasonableness: see Orient Overseas Container Line Limited v Sogelco International, 2011 FC 1466. The decision was released December 13, 2011, shortly after the release of the *Cargill* decision by the Ontario Court of Appeal on October 4, 2011.
130 2012 ONSC 2785.
131 Ibid at paras 48–49.
132 Ibid at para 65.
133 2017 ABQB 559.
134 Ibid at para 8.
and fact. By a majority, the Appeal Tribunal overturned the arbitrator’s decision. The Court determined with “some hesitation” that the Appeal Tribunal majority had acted within its jurisdiction and the Tribunal’s decision was not set aside.\textsuperscript{135} Oddly, the Court stated that the Appeal Tribunal did not have to be correct in interpreting “clear errors of law or clear and convincing factual errors” as a mistake would only be an error of law, not an error of jurisdiction.\textsuperscript{136} Administrative law and the correctness standard of review were probably not helpful to the Court in this case. It would have been simpler to maintain the earlier jurisprudence, from \textit{COTISA}, to the effect that the party seeking to resist enforcement has the burden of proof and the grounds of review should be construed narrowly.

The \textit{Consolidated Contractors Group SAL (Offshore) v Ambatovy Minerals SA}\textsuperscript{137} decision of the Ontario Court of Appeal brings \textit{Cargill} squarely into the review of international commercial arbitral awards. The dispute involved the construction of a slurry pipeline for a mine in Madagascar. The contractor applied to set aside the arbitrator’s decision, which had gone largely in favour of the respondent.\textsuperscript{138} The unanimous Court rejected the contractor’s argument that certain counterclaims by the respondent were not properly covered by the submission to arbitration, because they had not gone through an initial adjudication process set out in the contract. The Court held as follows:

The respondent’s counterclaims were clearly the proper subject of arbitration under the contract. The only question…was when they would be arbitrated. It was open to the Tribunal to find that the pre-arbitration dispute resolution process did not apply to claims of one party that were closely connected to the claims already submitted to arbitration by the other party.\textsuperscript{139}

The last sentence quoted above effectively rejected the contractor’s jurisdictional claim under \textit{Model Law} Article 34(2)(a)(iii). The Court then went on to make a second finding, saying that the issue was not reviewable under Article 34 because it was not a true question of jurisdiction.\textsuperscript{140} It is not clear what this second finding added to the initial conclusion that the

\textsuperscript{135} Ibid at para 90.
\textsuperscript{136} Ibid at paras 8, 91.
\textsuperscript{137} 2017 ONCA 939, leave to appeal to SCC refused, 37942 (25 October 18).
\textsuperscript{138} Ibid at para 14.
\textsuperscript{139} Ibid at para 52.
\textsuperscript{140} Ibid at para 54.
tribunal had acted within jurisdiction. The mention of true questions of jurisdiction from administrative law seems to have been somewhat beside the point or, at least, unhelpful.

The Court refused to set aside the award on jurisdictional grounds and also rejected the contractor’s additional arguments concerning procedure and Ontario public policy relating to penalty clauses. In the Bilcon investor-state decision, the Federal Court of Appeal cited Consolidated Contractors several times with approval, confirming the link between investor-state dispute settlement and international commercial arbitration reviews. Thinking in both areas will be affected by the disappearance of the category of true questions of jurisdiction in the Supreme Court’s Vavilov decision.

The Cargill approach introduced more rigour into the review of investor-state awards, but did so by borrowing the methodology of true questions of jurisdiction from domestic administrative law. This is not the only way to interpret the grounds of review in Articles 34 and 36 of the Model Law with deference appropriate to a particular context. It is not clear why review of international commercial arbitral awards would adopt a methodology developed for appeals from domestic administrative agencies that could potentially deal with an agency’s decisions on law and fact. Courts reviewing under the New York Convention and the Model Law have a narrower mandate. International commercial arbitral tribunals are not Canadian administrative agencies. A court is not at risk of over-reaching or engaging in illegitimate judicial activism if it interprets a contract between two private parties to determine what they agreed to submit to arbitration. As the Supreme Court of Canada has abandoned the category of true questions of jurisdiction that was adopted in Consolidated Contractors as the basis for correctness review, courts now have an opportunity to re-examine the link to domestic administrative law.

B. Administrative Law and Interpretation in the International Context

Judicial review in Canadian administrative law developed as a gradual move away from the views of the House of Lords in Anisminic Ltd v Foreign

141 Bilcon, supra note 27 at paras 78, 152, 173.
142 Vavilov, supra note 5 at paras 65, 67.
Compensation Commission.\footnote{1969] 2 AC 147, [1969] 1 All ER 208 (HL).} That case involved the decision of a Foreign Compensation Commission set up to make awards of compensation from a settlement negotiated by the United Kingdom after Egypt expropriated foreign-owned property in 1956. The Commission had rejected a claim by Anisminic. The House of Lords invalidated the Commission’s decision, ruling that the Commission had acted outside its jurisdiction.\footnote{Ibid at 175, 206, 214.} Two well-known passages from the judgments illustrate the House of Lords’ approach to jurisdictional review of administrative agencies:

\textit{per} Lord Reid:

But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account...If it is entitled to enter on the inquiry and does not do any of those things which I have mentioned in the course of the proceedings, then its decision is equally valid whether it is right or wrong.\footnote{Ibid at 171.}

\textit{per} Lord Pearce:

Lack of jurisdiction may arise in various ways. There may be an absence of those formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an inquiry. Or the tribunal may at the end make an order that it has no jurisdiction to make. Or in the intervening stage, while engaged on a proper inquiry, the tribunal may depart from the rules of natural justice; or it may ask itself the wrong question; or it may take into account matters which it was not directed to take into account. Thereby it would step outside its jurisdiction. It would turn its inquiry into something not directed by Parliament and fail to make the
inquiry which Parliament did direct. Any of these things would cause its purported decision to be a nullity.\textsuperscript{146}

\textit{Anisminic} was the highwater mark of the expansive view of what was jurisdictional, requiring that an administrative agency’s decision be ruled correct on many facets of its reasoning. Canadian law at first followed \textit{Anisminic},\textsuperscript{147} but judges gradually developed a more deferential approach, in light of legislative choices to establish specialized administrative agencies and delegate decision-making power to them.\textsuperscript{148} In the 1970s and 1980s, courts began to review agency decisions on the basis of three standards of review: correctness, reasonableness, and absence of patent unreasonableness.\textsuperscript{149} By the time of the judgment in \textit{Pushpanathan v Canada (Minister of Citizenship and Immigration)}, courts were using a pragmatic and functional analysis based on several factors relating to the context of the administrative decision to determine which of the three standards of review would apply in each case.\textsuperscript{150} The minority opinion in \textit{Vavilov} summarizes the list of factors from \textit{Pushpanathan}: “(1) whether there was a privative clause, or conversely, a right of appeal; (2) the expertise of the decision-maker on the matter in question relative to the reviewing court; (3) the purpose of the statute as a whole, and of the provision in particular; and (4) the nature of the problem, \textit{i.e.}, whether it was a question of law, fact, or mixed law and fact.”\textsuperscript{151} This was the state of the law at the time of the decisions in \textit{Myers} and \textit{Feldman}, which brought into investor-state disputes the three standards of review ranging from no deference, through some deference, to a high level of deference.

As mentioned, the 2008 decision in \textit{Bayview} noted that the Supreme Court of Canada reduced those three standards to two, correctness and reasonableness, in the landmark \textit{Dunsmuir} decision.\textsuperscript{152} In that decision, the Court responded to the concern that determining the standard of review was too complex and unpredictable. While maintaining the possibility of

\begin{itemize}
\item \textsuperscript{146} Ibid at 195.
\item \textsuperscript{147} See \textit{Metropolitan Life Insurance v International Union of Operating Engineers}, [1970] SCR 425, 11 DLR (3d) 336.
\item \textsuperscript{148} \textit{Vavilov}, supra note 5 at paras 26–29, 206–229. See Paul Daly, “The Unfortunate Triumph of Form Over Substance in Canadian Administrative Law” (2012) 50:2 Osgoode Hall LJ 317.
\item \textsuperscript{149} See \textit{CUPE v New Brunswick Liquor}, [1979] 2 SCR 227, 97 DLR (3d) 417; \textit{National Corn Growers Association v Canada (Import Tribunal)}, [1990] 2 SCR 1324, 74 DLR (4th) 449; \textit{Canada (Director of Investigation and Research) v Southam Inc}}, [1997] 1 SCR 748, 144 DLR (4th) 1.
\item \textsuperscript{150} [1998] 1 SCR 982, 160 DLR (4th) 193.
\item \textsuperscript{151} \textit{Vavilov}, supra note 5 at para 218, citing \textit{ibid} at paras 29–37.
\item \textsuperscript{152} \textit{Bayview}, supra note 27, citing \textit{Dunsmuir}, supra note 4 at paras 44–49.
\end{itemize}
full contextual analysis, the Court introduced a presumption of review on a standard of reasonableness for some issues such as an agency’s interpretation of its enabling statute. As well, correctness review would apply to matters in certain listed categories, in order to preserve the rule of law. In Vavilov, the Supreme Court of Canada decided that the general presumptive standard of review for decisions of administrative agencies is reasonableness. Correctness is retained as the standard of review for the listed categories: “constitutional questions, general questions of law of central importance to the legal system as a whole and questions related to the jurisdictional boundaries between two or more administrative bodies.” True questions of jurisdiction had been on this list in Dunsmuir, but were dropped in Vavilov as there were doubts about the need for this separate category, and it was difficult to distinguish such questions from an agency’s interpretation of its enabling statute, which would be reviewed on a reasonableness standard.

As part of the revision of administrative law, the Supreme Court in Vavilov abandoned the contextual analysis that had been previously used to determine the standard of review. Instead of weighing agency expertise and other factors to decide the standard, the Court ruled that the level of expertise is reflected in the legislative choice to establish an administrative agency, and courts will follow legislative direction. Assessment of relative expertise is no longer part of the standard of review analysis. Instead, for review of administrative action, the standards of reasonableness and correctness apply so long as the statute does not provide to the contrary. If the legislation establishes a statutory appeal mechanism, then the appellate standards of review apply as they would in regular civil litigation. For questions of law (including extricable questions of law), the appellate standard is correctness. For questions of fact or mixed fact and law, the appellate standard is palpable and overriding error.

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153 Ibid at para 54.
154 Ibid at paras 58–61.
155 Vavilov, supra note 5 at paras 10, 23.
156 Ibid at para 17.
157 Ibid at paras 65–68. See also Alberta (Information and Privacy Commissioner) v Alberta Teachers’ Association, 2011 SCC 61.
158 Vavilov, supra note 5 at para 47.
159 Ibid at paras 17, 30, 44–46.
160 Ibid at para 31.
161 Ibid at para 33.
162 Ibid at para 37.
newly enhanced effect given to statutory rights of appeal was somewhat unexpected in the Court’s decision. It is sharply criticized in the concurring opinion of Justices Abella and Karakatsanis, who state that the Court’s judgment on this point adds complexity and rejects established precedent.163

Although true questions of jurisdiction are no longer part of administrative law, could the current standards of review still be used for applications under the Model Law? This paper suggests that the best answer is that international commercial arbitral tribunals are not Canadian administrative agencies, and Canadian administrative law does not apply. If, in the alternative, there is an attempt to use the Vavilov analysis, the standards remain unsuitable and may cause confusion. As applications for set-asides or enforcement under the New York Convention or Model Law are not called “appeal” mechanisms, the presumptive standard to consider would be reasonableness. In Vavilov, the Court quotes from Dunsmuir that reasonableness “is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process,” and is also concerned “with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.”164 In Cargill, the Ontario Court of Appeal stated that a reasonableness standard was inappropriate for review of the investor-state award in question, because reasonableness leads inevitably to a review of the merits.165 Certainly, the mention of “outcomes…defensible in respect of the facts and law” in the Dunsmuir description of reasonableness, quoted in Vavilov, does not match the restricted grounds of review in the Model Law, which do not cover review of facts or substantive law. The Vavilov description of reasonableness as “including both the rationale for the decision and the outcome to which it led”166 is likely to be as misleading and unhelpful for applications under the Model Law, as was the previous attempt at borrowing for true questions of jurisdiction. The grounds for review in the Model Law are narrow, and do not include review of the merits.

As well, the correctness standard adopted in Vavilov for constitutional matters and other questions is also unsuitable for the context of

163 Ibid at paras 245–54, Abella and Karakatsanis JJ (“[t]his Court is overturning a long line of well-established and recently-affirmed precedents in a whole area of law, including several unanimous or strong majority judgments. There is no principled justification for such a dramatic departure from this Court’s existing jurisprudence” at para 278).
164 Ibid at para 86, citing Dunsmuir, supra note 4 at para 47.
165 Supra note 2 at para 51.
166 Supra note 5 at para 83.
commercial arbitration. The correctness standard rejects deference. The court comes to its own conclusions. In contrast, earlier Canadian decisions reviewing international commercial arbitral awards had developed a policy of minimizing judicial intervention and demonstrating “respect for the capacities of foreign and transnational tribunals.” The party opposing enforcement of the arbitral award would bear the burden of proof and grounds of review were to be interpreted narrowly. The decision in Vavilov to reject agency expertise as a factor in determining the standard for interpretation is inconsistent with the original Canadian approach to international commercial arbitral awards.

The Vavilov decision from the Supreme Court should lead to a reassessment of the borrowing of review standards from administrative law for international commercial arbitrations. This is an appropriate time to break that link and return to earlier Canadian approaches of general deference in interpretation of the Model Law that remain in use in current decisions.

Our treaty partners in the New York Convention do not all use a uniform standard of review for international commercial arbitral awards. Conflicting decisions have occurred. The United States applies the New York Convention through the Federal Arbitration Act. The usual presumption is in favour of enforcement and grounds of review are construed narrowly. In the United Kingdom, the UK Supreme Court rejected this deferential view in Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan. The Court refused to enforce a commercial arbitral award against the Government of Pakistan concerning a dispute over the construction of accommodations for pilgrims on a Hajj to Mecca. The arbitration agreement was signed between Dallah Real Estate and Awami Hajj Trust. The Trust was established through a temporary Ordinance of the Pakistani government in February 1996. The Ordinance was renewed in May and August of 1996 but expired by December 1996. The Court refused enforcement as the agreement was with the

167 Ibid at para 54.
169 See COTISA, supra note 36 at 190–192.
170 9 USC § 201 (2012).
Trust, not the Government of Pakistan. Both US jurisprudence and the Canadian *Quintette* case were cited to the Court as authority to show a presumption in favour of an award. The UK Supreme Court rejected this deferential approach, stating that “[t]hese cases are of no assistance in the context of a challenge based on the initial jurisdiction of the tribunal and in particular when it is said that a party did not agree to arbitration.” The French Cour d’Appel de Paris, however, took a different view of the matter and enforced the same award against the Government of Pakistan. The Cour d’Appel determined that the contract was actually with the government, as it had behaved as if it was the real contracting party throughout. These differing results have generated debate and the decision of the UK Supreme Court has been subject to some criticism, as France was the seat of the arbitration and the applicable law.

Disagreements between domestic courts are not always as extreme as the clash over the *Dallah Real Estate* award, but it is understood that such exchanges and comparisons are a normal part of international commercial arbitration practice. When Canadian courts interpret obligations derived from a major multinational treaty such as the *New York Convention*, the decisions become part of this global exchange. The *Model Law* in fact calls for an international approach, in Article 2A:

(1) In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

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173 *Ibid* at para 100.
176 *Ibid* (“le Gouvernement de la République, Ministère des Affaires Religieuses, s’est comporté comme si le Contrat était le sien...le Gouvernement du Pakistan, Ministère des Affaires Religieuses...s’est comporté comme la véritable partie pakistanaise lors de l’opération économique” at 6).
This provision was added to the Model Law during revisions that took effect in 2006. The UNCITRAL Secretariat reports that the amendment was intended to “facilitate interpretation by reference to internationally accepted principles and is aimed at promoting a uniform understanding of the Model Law.”

The promotion of uniformity relates to interpretation of the text of the Model Law, based on the New York Convention. There is no expectation that the underlying contracts between private parties involved in an arbitration contain harmonized or similar obligations.

In the last few decades, clauses emphasizing uniformity and the international context have appeared in several initiatives aimed at the harmonization of private commercial law. In 1998, Michael Van Alstine discussed the interpretation of such clauses, dealing specifically with Article 7 of the United Nations Convention on Contracts for the International Sale of Goods. He identified both a backward-looking component of uniformity, in which previous decisions from other jurisdictions are given considerable weight, as well as a forward-looking component, in which courts “consider the likelihood that a particular interpretation will find international

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179 Model Law, supra note 14, art 2A.
182 11 April 1980, 1489 UNTS 3, Can TS 1992 No 2 (entered into force 1 January 1988, accession by Canada 23 April 1992): “Article 7(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade, (2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.”
acceptance.”183 This dynamic process of communication and interaction is intended to counteract the tendency of domestic courts to turn to familiar local law. Article 2A mentions uniformity, the international origin of the Model Law and its general principles, which will be used to fill any gaps. As explained by Martin Gebauer, these are indications calling for autonomous interpretation that is independent from any particular domestic legal system.184 Autonomous interpretation emphasizes purposive and contextual approaches in addition to literal interpretation. General principles to fill a gap can be identified through reasoning by analogy or through abstract generalization from specific provisions viewed in their context within the full document.185 Autonomous interpretation is suitable for private law harmonization that is based on an agreed text. As with backward and forward-looking dynamic interpretation, the intent is to limit the homeward-bound impulse, the tendency to disregard the international source, and interpret the uniform text so as to fit with a court’s local law.186 Domestic legal cultures cannot be displaced entirely,187 but uniform interpretation of an agreed text requires a methodology that prioritizes the international framework.

Frédéric Bachand supports an international approach to interpretation, which he considers was implicit in the Model Law even before the addition of Article 2A in 2006.188 UNCITRAL provides a wealth of resources to facilitate international interpretation, including a database of Case Law on UNCITRAL Texts (CLOUT), with case abstracts and citations or links to full court decisions from countries around the world.189 Bachand argues that the effect of Article 2A is not merely to encourage courts to

183 Van Alstine, supra note 181 at 787–88.
185 Ibid at 697.
187 Gebauer, supra note 184 at 704.
consult decisions from other jurisdictions. Since Article 2A stipulates that “regard is to be had” to the international origin of the Model Law and the need for uniformity, there is an obligation on domestic courts to adopt this approach, in his view. If a survey of decisions from domestic courts reveals a consensus on the interpretation of a provision of the Model Law, that interpretation may not be binding on a Canadian court, but it would be entitled to significant weight.190 For the interpretation of legislation based on a multilateral treaty, the Supreme Court of Canada supports consideration of decisions of courts in other state parties. In Office of the Children’s Lawyer v Balev, the Court interpreted legislation that implemented the Convention on Civil Aspects of International Child Abduction (Hague Convention).191 The Court explained its approach to interpretation as follows:

A clear purpose of multilateral treaties is to harmonize parties’ domestic laws around agreed-upon rules, practices, and principles. The Hague Convention was intended to establish procedures common to all the contracting states that would ensure the prompt return of children...To avoid frustrating the harmonizing purpose behind the Hague Convention, domestic courts should give serious consideration to decisions by the courts of other contracting states on its meaning and application.192

The growth of globalization and the negotiation of numerous multilateral treaties have increased the likelihood of litigation in which international law is relevant. Reem Bahdi surveyed constitutional and human rights decisions from several courts around the world in which judges relied on international law.193 Among the reasons expressed for consulting international sources were the use of comparative materials to demonstrate universal values and progressive egalitarian views, as well as a certain global self-awareness: a “realization that the world is watching” and a wish to “avoid feeling ashamed before members of the international community.”194 It should not be assumed that international norms are ideal in

190 Bachand, supra note 188 at 232. For a decision supporting this argument in customs tariff law, see Canada (AG) v Suzuki Canada Inc, 2004 FCA 131, leave to appeal to SCC refused, 30362 (21 October 2004).
192 Balev, supra note 191 at para 33.
194 Ibid at 589–90.
all fields or that openness to knowledge of judicial decisions from elsewhere is incompatible with critical evaluation. Myra Tawfik cautions that the review of decisions of other domestic courts should be done with a tolerance for differences. In some areas, such as intellectual property, governments may have negotiated treaties with leeway for a range of policies suitable for particular countries and uniformity may not necessarily be the goal. 195 Karen Knop argues for a comparative approach to the use of public international law by domestic courts, in which courts are expected to test their views against those of other courts and anticipate that their decisions could be of persuasive value in other jurisdictions. 196 A comparative approach emphasizes the insights of judges applying international law in their diverse circumstances. Meaning and any resolution of differences arise through dialogue.

When they are interpreting a uniform text, courts should be especially attentive to the international context, to foreign decisions, and to their own responsibility for forward-looking interpretation that could influence decisions in other jurisdictions. The practice of international commercial arbitration law in Canada involves frequent references to judgments from non-Canadian courts. 197 It is not by happenstance that laws in these other jurisdictions contain rules that are the same as or similar to the provisions in Canadian legislation. The approach to interpretation should be mindful of the treaty-based framework. Standards of review drawn from Canadian administrative law change frequently and can be obscure to foreign lawyers. They are not suited to the limited mandate under the New York Convention, which does not include review on questions of fact or substantive law. Administrative law is not applicable or easily transferable to


foreign legal systems. As well, after the Vavilov decision, it no longer takes account of the decision-maker’s level of expertise in determining the standard of review. Courts reviewing international commercial arbitral awards between private parties should break the link to administrative law and return to the deferential standard of review in earlier Canadian cases.

V. DOMESTIC COMMERCIAL ARBITRATION

A major difference between domestic arbitrations and international commercial arbitrations across Canada is the presence of appeals in the common law provinces for domestic awards.\(^\text{198}\) Appeals are usually on a question of law with or without leave. For example, Ontario legislation allows appeals on questions of law with leave, unless the parties have provided otherwise in their arbitration agreement.\(^\text{199}\) Appeals are possible on questions of fact or mixed fact and law if the agreement so stipulates.\(^\text{200}\) The Ontario legislation also provides for set-aside applications on limited grounds, which the parties cannot exclude by contract.\(^\text{201}\) Awards are enforceable, including awards made elsewhere in Canada.\(^\text{202}\)

This section outlines a few recent cases dealing with domestic arbitrations and the potential effect of the Supreme Court’s decision in Vavilov. If there is a place in Canadian commercial arbitration law for a link to administrative law standards of review, it might be for some domestic arbitrations, particularly if a statute makes arbitration compulsory for certain disputes. This issue is solely within the domestic realm as the New York Convention and Model Law do not apply and there is no question of consistency with a public international law obligation. The use of administrative law standards of review would be open to debate, as most commercial arbitral tribunals could not be considered administrative agencies and arbitrators chosen \textit{ad hoc} by private parties are not in the same position as administrators who have been assigned decision-making roles by governments.

The distinction between domestic and international arbitrations may be established in statutes, such as subsection 2(1) of the Ontario Arbitration Act, which provides that the Act applies unless the arbitration

\(^{198}\) Quebec’s Code of Civil Procedure uses a Model Law-type system for both international and domestic awards. See CCP, supra note 15, arts 642–55.

\(^{199}\) See Arbitration Act, 1991, SO 1991, c 17, s 45(1).

\(^{200}\) Ibid, s 45(3).

\(^{201}\) Ibid, ss 46, 3(1)(iv).

\(^{202}\) Ibid, s 50.
is international pursuant to the *International Commercial Arbitration Act*.\(^{203}\)

Sometimes it may not make a difference whether an arbitration is domestic or international, on a public policy matter, for example, or an issue such as unconscionability and the resulting invalidity of the agreement to arbitrate.\(^{204}\)

The Supreme Court of Canada dealt with a domestic commercial arbitration in 2017 in *Teal Cedar Products Ltd v British Columbia*.\(^{205}\) This was a claim against the government of British Columbia over compensation for reductions in allowable harvest areas for Crown timber. Under the BC legislation, the arbitrator’s award could be appealed on a question of law with leave. In a 5 to 4 decision, the Court found that part of the award involving statutory interpretation raised a question of law and was subject to appeal.\(^{206}\) The Court used the reasonableness standard from administrative law and determined that the arbitrator’s decision met that standard.\(^{207}\) The Court noted that the arbitration was statutorily imposed, but that the parties in this case had had full control over the choice of the arbitrator.\(^{208}\)

In *Teal Cedar*, the Supreme Court applied analysis from its 2014 *Sattva Capital Corp v Creston Moly Corp* decision, which involved a dispute over a finder’s fee for a mining investment.\(^{209}\) That case was also from British Columbia, under the same statute permitting appeals on a question of law with leave. An application for leave to appeal was unsuccessful, as the Court ruled that the claimant had presented only questions of mixed fact and law.\(^{210}\) In discussing the standard of review, the Court noted distinctions between reviews of commercial arbitration awards and reviews of statutory tribunals:

> Appellate review of commercial arbitration awards takes place under a tightly defined regime specifically tailored to the objectives of commercial arbitrations and is different from judicial review of a decision of a statutory tribunal. For example, for the most part, parties engage in arbitration

\(^{203}\) Occasionally this issue may be in dispute between parties. See 1551955 *Ontario Inc v Lakeside Produce Inc*, 2017 ONSC 4933. See also ICAA, supra note 1.

\(^{204}\) See *Uber Technologies Inc v Heller*, 2020 SCC 16.

\(^{205}\) 2017 SCC 32.

\(^{206}\) *Ibid* at para 50.

\(^{207}\) *Ibid* at para 74.

\(^{208}\) *Ibid* at para 82.

\(^{209}\) 2014 SCC 53.

\(^{210}\) *Ibid* at para 66.
by mutual choice, not by way of a statutory process. Additionally, unlike statutory tribunals, the parties to the arbitration select the number and identity of the arbitrators. These differences mean that the judicial review framework developed in *Dunsmuir v New Brunswick*...is not entirely applicable to the commercial arbitration context.\(^{211}\)

The Court stated that there were similarities as well, since both areas require some deference to expertise. Accordingly, the standard of review for a question of law would usually be reasonableness.\(^{212}\) Other recent decisions have applied the reasonableness standard for appeals of questions of law in an arbitrator’s award.\(^{213}\) In *Intact Insurance Company v Allstate Insurance Company of Canada*, the Ontario Court of Appeal discussed the choice between the administrative law framework and the regular appellate framework for a dispute that was subject to mandatory arbitration under the relevant statute.\(^{214}\) The arbitrator’s decision was overturned, based on the reasonableness standard from administrative law.

Following *Sattva*, reasonableness has been the dominant standard of review for domestic arbitration appeals. The situation will be subject to change if the *Vavilov* decision from administrative law is found to apply. In the *Vavilov* analysis, these would be statutory appeal mechanisms and the appellate framework will apply. For questions of law, a court would decide on the correctness standard, with no deference to the arbitral award. This conclusion might not be what parties wanted when they chose arbitration for dispute settlement, as they may have picked arbitrators with particular expertise relevant to the area of the contract. A few early decisions have reached differing results.\(^{215}\) Future disputes are likely unless there are statutory amendments.

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211 Ibid at para 104.
212 Ibid at para 106.
213 See Ottawa (City) v Coliseum Inc, 2016 ONCA 363; Ledore Investments Ltd (Ross Steel Fabricators & Contractors) v Ellis-Don Construction Ltd, 2017 ONCA 518; PQ Licensing SA v LPQ Central Canada Inc, 2018 ONCA 331.
214 2016 ONCA 609, leave to appeal to SCC refused, 37206 (9 February 2017) (concerning the two frameworks, the Court cites *Mouvement laïque québécois v Saguenay (City)*, 2015 SCC 16).
215 Two cases decided that the appellate framework applied, due to *Vavilov: Buffalo Point First Nation et al v Buffalo Point Cottage Owners Association*, 2020 MBQB 20; *Allstate Insurance Company v Her Majesty the Queen*, 2020 ONSC 830. In contrast, two cases determined that a reasonableness standard continued to apply, despite *Vavilov: Cove Contracting Ltd v Condominium Corporation No 012 5598 (Ravine Park)*, 2020 ABQB 106; *Ontario First Nations (2008) Limited Partnership v Ontario Lottery and Gaming Corp*, 2020 ONSC 1516.
A further possible source of change for domestic arbitrations is the proposed *Uniform Arbitration Act (2016)* from the Uniform Law Conference of Canada. That Act proposes that access to appeals should be restricted (Section 65) and that the main procedure for contesting a domestic arbitration award should be the set-aside application, on grounds similar to those of the *Model Law* (Section 66). Recent case law is ambivalent on the standard of review in domestic set-aside actions. The reasonableness standard is used in some set-aside decisions, although *Gargill* and the correctness standard have also been mentioned for review of jurisdiction. In *Alectra Utilities Corporation v Solar Power Network Inc*, the Ontario Court of Appeal dealt with a set-aside action based solely on jurisdiction. The Court found that the arbitrator had acted within jurisdiction, as determined on a correctness standard pursuant to *Cargill* and that, in a set-aside application, a court cannot review the merits of the arbitrator’s interpretations within jurisdiction. If the *Vavilov* decision from administrative law is found to apply to set-asides, there would be a change. The presumptive standard of review would be reasonableness, as a set-aside application is not an appeal. One early case reached this conclusion and applied a reasonableness standard. Again, there may be future litigation on this question, unless there are statutory amendments.

In response to the *Vavilov* decision or other recommendations, the standard of review for appeals and set-asides of domestic commercial arbitral awards is likely to be subject to some uncertainty. These cases do not apply the *Model Law* and *New York Convention*, but discussion over the use of administrative law standards of review in domestic arbitrations can be expected to resonate in litigation dealing with international awards as well.

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218 See *Fuego Digital Media Inc v DAC Group (Holdings) Limited*, 2018 ONSC 2897 at para 24; *FCA Canada Inc v Reid-Lamontagne*, 2019 ONSC 364 at paras 46–54. See further *Newfoundland and Labrador v ExxonMobil Canada Properties*, 2017 NLTD(G) 147.

219 2019 ONCA 254, leave to appeal to SCC refused, 38665 (7 November 2019).

220 The decision on this point is very close to the reasoning of the Supreme Court of Canada in *Desputeaux v Éditions Chouette (1987)* Inc, 2003 SCC 1. In *Desputeaux*, the Court emphasized that the procedure in Art 946 CCP is not an appeal on an error of law and that the legislature intended to respect the autonomy of arbitration. Art 946 CCP is a set-aside procedure based on the *Model Law*.

221 See *Freedman v Freedman Holdings Inc*, 2020 ONSC 2692.
VI. CONCLUSION

This article has discussed the review of international arbitral awards in Canadian courts, arguing against the use of standards of review drawn from domestic Canadian administrative law. The legislation governing applications for enforcement and set-aside of awards is based on the New York Convention. Decisions concerning investor-state arbitral awards were examined initially, as this is the area in which administrative law standards were first adopted in Canadian courts for arbitrations. The use of these domestic standards of review did not prove helpful and did not produce consistent analysis of investor-state awards.

Administrative law standards of review have begun to appear in decisions on applications to enforce or set aside international commercial arbitral awards between private parties. International commercial arbitral tribunals whose members are chosen ad hoc by the disputing private parties have little in common with domestic administrative agencies assigned responsibilities by levels of Canadian government. Standards of review developed for decisions of administrative agencies that are subject to review on questions of law and possibly questions of fact are not suitable for the more limited mandate for review of international commercial arbitral awards. As well, neither of the two current standards of review in administrative law (reasonableness and correctness) match the deferential standard that has been applied to private commercial arbitrations since Canada acceded to the New York Convention. Courts hearing applications to enforce or set aside awards of international commercial arbitral tribunals should break the link to domestic administrative law. The administrative standards of review are inappropriate in the context of a multilateral treaty such as the New York Convention that is being implemented by Canada and all the other countries who are party to the treaty.

In response to recent changes in administrative law, courts have the opportunity to return to and build on earlier approaches to international commercial arbitral awards in Canadian case law and draw inspiration from decisions from international sources, as set out in Model Law Article 2A. To the extent possible, judges should avoid a homeward-bound mindset and should anticipate that their decisions will be of interest to courts in other jurisdictions applying the New York Convention and Model Law, to enhance predictability for international commercial arbitration pursuant to the terms of the treaty.
Justice Gérard La Forest has discussed the growing presence of international law in cases before the Canadian court system. In deciding these matters, he notes that:

[O]ur courts— and many other national courts— are truly becoming international courts in many areas involving the rule of law. They will become all the more so as they continue to rely on and benefit from one another’s experience. Consequently, it is important that, in dealing with interstate issues, national courts fully perceive their role in the international order and national judges adopt an international perspective.222

The New York Convention is a major multilateral treaty operating within the international system. Analysis and decisions in Canadian courts are not solely for a domestic audience, but are part of the global exchange among all those involved in international arbitrations. Increasingly, in many areas, a modern technique of co-operation is the negotiation of major multilateral treaties with many state parties. The approach to interpreting the statutes that implement those treaties should respect their source and should support the purposes the multilateral agreements were intended to serve.
