CORRECTNESS AND DEFERENCE IN THE REVIEW OF ARBITRAL JURISDICTION: MEXICO v. CARGILL INC. [i]

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The decision of the Ontario Court of Appeal in the case of *United Mexican States v. Cargill Inc.*[ii] ("*Mexico v Cargill"*) which was released in March, 2011 is the latest word [iii] from an appellate court on a distinctively Canadian concept of judicial deference to decisions of international arbitral tribunals on questions of their own jurisdiction.[iv] In the result, while the Court of Appeal adopted the more usual international standard of "correctness" for judicial review of arbitral jurisdiction, the characteristically Canadian impulse towards deference remains strong and has found new expression in *Mexico v Cargill*. One might go further and say that the decision of the Court of Appeal to uphold the award of the arbitrators in that case is more easily explained by a standard of deference than by the standard of correctness which the Court ostensibly adopted.

Perhaps more importantly, *Mexico v Cargill* presents an ideal opportunity to consider just what correctness and deference mean in the context of court review of arbitral jurisdiction, or indeed in a the broader context of court review of the decisions of adjudicative bodies outside the court system and whether those standards focus on the right issues and provide a satisfying explanation of the outcome.

THE BACKGROUND

Cargill is a US producer of high fructose corn syrup ("HFCS") which it manufactures in the United States. It distributes HFCS through its Mexican subsidiary. In response to measures taken by Mexico to protect its sugar industry from competition from HFCS, Cargill initiated an arbitration for breaches of Chapter 11 of the *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States* ("NAFTA"). The arbitral tribunal held in favour of Cargill and awarded damages both for lost sales by Cargill's Mexican subsidiary and lost sales by Cargill from its US manufacturing plant to its Mexican subsidiary.

There had been no issue regarding the jurisdiction of the arbitral tribunal to hear the dispute and no effort was made to attack or set aside the tribunal's determination that Mexico's actions had

been in breach of NAFTA. However, Mexico complained that the award as rendered went beyond the tribunal's jurisdiction which Mexico maintained, was limited to awarding damages relating to Cargill's losses in Mexico ("the downstream losses") and not to losses sustained by Cargill in the United States ("the upstream losses"). Mexico argued that, since its "breaches" of the Treaty could only relate to Cargill's investment in Mexico, damages sustained by Cargill's US operation were beyond the damages that could be awarded. Indeed, there is no doubt that the upstream losses would not have been compensable under the terms of NAFTA if they had occurred without Cargill's specific investment in creating its subsidiary and distribution facilities in Mexico. The specific arguments in support of Mexico's position are not relevant to the present discussion which will focus on the issue of the methodology and standard of review applied by the Court to the decision of a tribunal that rejected Mexico's argument.

The fact that Mexico's submission had substantial merit can be briefly supported by the observation that another tribunal dealing with the same issue and a NAFTA based complaint in relation to the Mexican business of another HFCS manufacturer, Archer Daniels Midland, had previously reached the very conclusion for which Mexico advocated in the Cargill case. Furthermore, when the matter was argued in the Ontario courts, Mexico's interpretation of the jurisdictional limit was supported by all three State Parties to NAFTA, i.e. the three governments that had entered into the treaty which gave Cargill the rights which it successfully asserted.

In seeking to have the arbitral award set aside by the Courts of Ontario, the arbitration having taken place in Ontario, Mexico relied on Article 34(2)(iii) of the UNCITRAL Model Law[v] which is in effect in all Canadian provinces and federally. Relying on the language of that Article and arguments that were accepted by the tribunal in the *Archer Daniels* case, Mexico asserted that "the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration".

As one would expect, given that Mexico's argument had not persuaded the arbitral tribunal itself, Mexico argued that the standard of review on issues of jurisdiction is correctness. Equally predictably, Cargill argued that the standard was one of deference.

It will be noted at the outset that, as the decision of the arbitral tribunal was not overturned on the basis that it was incorrect, the question of what standard of review should be applied played no effective part in the decision, from a *stare decisis* perspective. Presumably, an arbitral tribunal's decision that is upheld based on a standard of correctness would also be upheld on a standard of deference.

Nevertheless, perhaps inspired by the many intervenors from which it heard, the Court of Appeal addressed the issue and commented upon a rather well entrenched series of decisions, particularly in Ontario Courts, which had held not only that international arbitral tribunals are entitled to deference with respect to issues of jurisdiction but that there exists a "powerful presumption" that such tribunals have acted within their jurisdiction. Such decisions stood for the proposition that out of respect for international comity and the global market place, courts should use their powers to interfere with exercise of jurisdiction by international arbitral tribunals only sparingly.

ONTARIO COURT DECISIONS IN MEXICO v. CARGILL

The application judge in *Mexico v. Cargill* concluded that Mexico's objection did not go to the jurisdiction of the panel, but was an attack on the merits of the decision relating to the scope of damages to be awarded for a breach of the treaty which it was admittedly within the jurisdiction of the tribunal to find. She held that the tribunal in *Mexico v. Cargill* was not bound by the decision in the *Archer Daniels* case and was free to reach a different conclusion which was not reviewable by the court.

In the course of making her decision, the application judge evaluated Mexico's alternative argument that the panel's decision on jurisdiction was not within a range of reasonable outcomes and should therefore be overturned on the basis of a standard established by the Supreme Court of Canada in *New Brunswick (Board of Management) v. Dunsmuir*, [2008] 1 S.C.R. 190 which was developed in the context of reviewing jurisdictional decisions of administrative boards and inferior tribunals in the Canadian, rather than the international, context. The application judge found that the decision of the tribunal in *Mexico v. Cargill* met this test and was, in fact, within a range of reasonable outcomes. Of course, if a court holds that a matter is within the jurisdiction

of the tribunal, as the application judge did, then the unreasonableness of the award would not provide a ground for setting it aside under Article 34. Also, if the tribunal's decision is characterized as one going to jurisdiction, a finding that the decision of an inferior tribunal was outside the range of reasonable outcomes would be the same as a finding that it was incorrect. So it is not clear what the analogy to the law relating to the review of decisions of administrative tribunals was intended to accomplish or did accomplish.

In the Court of Appeal, Mexico abandoned the reference to administrative law standards of review and only argued that the award should be set aside on the application of the correctness standard and on the basis that the award of upstream damages went beyond the matters that were submitted to arbitration pursuant to the NAFTA treaty, properly interpreted. The Ontario Court of Appeal observed that importing and directly applying domestic Canadian concepts of standard of review, both from administrative law and the law relating to appeals within the court system, may not be helpful when conducting a review of international awards under Article 34 of the Model Law. It then went on to consider a number of the Canadian cases which applied the "powerful presumption" in favour of an international arbitral tribunal having acted within its authority as well as decisions that had applied the more internationally accepted "correctness" standard. The Court of Appeal summarized the Canadian law on standard of review up to that time as follows:

> 33. Canadian reviewing courts have consistently stated that courts should accord international arbitration tribunals a high degree of deference and that they should interfere only sparingly or in extraordinary cases: *Quintette*; *Karpa*; *Canada (Attorney General) v. S.D. Myers Inc.*, [2004] 3 F.C.R. 368 (F.C.). **In some cases, even on questions of jurisdiction, it has been said that the courts should apply "a powerful presumption" that an expert international arbitral tribunal acted within its authority**: *Bayview Irrigation District No. 11 v. United Mexican States*, [2008] O.J. No. 1858 (Ont. S.C.J.), at para. 63; *Corporacion Transnacional de Inversiones S.A. de C.V. v. STET International S.p.A.* (1999), 45 O.R. (3d) 183 (Ont. S.C.J. [Commercial List]), at p. 192, quoting concurring reasons in *Quintette*. **Other courts have said that on questions of the tribunal's jurisdiction, the standard of review is correctness, but then have broken down the issues to be decided into questions of law, where the panel had to be correct, and questions of fact or mixed fact and law, where the panel had only to be reasonable**: *Myers*, at paras. 58, 60 and 61.
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> [Emphasis added.[vi]]

The Court of Appeal also considered, in support of the latter approach, the decision of the Supreme Court of the United Kingdom (formerly known as the House of Lords) in *Dallah Real*

Estate & Tourism Holding Co. v. Pakistan 2010, [2011] 1 A.C. 763. In *Dallah* the court held that the tribunal's own view of its jurisdiction had no legal or evidential value and that the court's role was to reassess the issue itself.

The Ontario Court of Appeal distinguished the precise question that was before the Court in Dallah from the one which it confronted in following terms:

> 38 In *Dallah*, the jurisdiction issue did not challenge the content of the award itself, but, rather, the ability of the tribunal to adjudicate: in particular, whether one party had committed to the arbitration process. In that context, the English Supreme Court's approach was to address the issue *de novo*, rather than as a review of the decision of the tribunal. One could view this approach as a variant of applying the correctness standard. As the Court pointed out, the decision of the tribunal is given *prima facie* credit, because the onus is on the challenging party to set it aside. But because the court was deciding the validity of the agreement issue *de novo*, it heard evidence, including expert evidence on the French law governing the issue of the validity of the agreement, The court concluded that the agreement was not valid and therefore, the arbitration panel had no jurisdiction.
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> 39 In this case, the jurisdiction issue is quite different under Article 34 (2)(a)(iii). The issue is whether the award itself complies with the submission to arbitration and, in particular, whether it "contains decisions on matters beyond the scope of the submission to arbitration". Under this subsection, the court is charged with reviewing the award and the submission to determine whether the tribunal stayed within its jurisdiction, based on the content of the submission, and the application of Chapter 11 of the NAFTA.

Nevertheless, the Ontario Court of Appeal concluded that the correctness standard applied equally to the issue before it. In writing for the court, Justice Feldman summarized her conclusion on the standard of review as follows:

> 41 The tribunal therefore had to be correct in the sense that the decision it made had to be within the scope of the submission and the NAFTA provisions. Its authority to make any decision is circumscribed by the submission and the provisions of the NAFTA as interpreted in accordance with the principles of international law. It has no authority to expand its jurisdiction by incorrectly interpreting the submission or the NAFTA, even if its interpretation could be viewed as a reasonable one.
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> 42 I conclude that the standard of review of the award the court is to apply is correctness, in the sense that the tribunal had to be correct in its determination that it had the ability to make the decision it made.

Having determined that the correctness standard is to be applied in reviewing questions of jurisdiction for international arbitral tribunals and explicitly affirming the formulations of the standard of review in the *Dallah*, *Metalclad* and *Myers* cases the Court of Appeal immediately described some special limitations or cautions on the application of that standard in the context of international arbitral tribunals.

The court noted that interventions in the decisions of international arbitral tribunals should only occur in "rare circumstances where there is a true question of jurisdiction". The court noted that as with domestic cases involving questions of jurisdiction, the court should "resist broadening the scope of the issue to effectively decide the merits of the case". Justice Feldman stated that the need for these precautions is "magnified" in the international arbitration context:

> 46 This latter approach is magnified in the international arbitration context. Courts are warned to limit themselves in the strictest terms to intervene only rarely in decisions made by consensual, expert, international arbitration tribunals, including on issues of jurisdiction. In my view, the principle underlying the concept of a "powerful presumption" is that courts will intervene rarely because their intervention is limited to true jurisdictional errors. To the extent that the phrase "powerful presumption" may suggest that a reviewing court should presume that the tribunal was correct in determining the scope of its jurisdiction, the phrase is misleading. If courts were to defer to the decision of the tribunal on issues of true jurisdiction, that would effectively nullify the purpose and intent of the review authority of the court under Article 34(2)(a)(iii).
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> 47 Therefore, courts are to be circumspect in their approach to determining whether an error alleged under Article 34(2)(a)(iii) properly falls within that provision and is a true question of jurisdiction. They are obliged to take a narrow view of the extent of any such question. And when they do identify such an issue, they are to carefully limit the issue they address to ensure that they do not, advertently or inadvertently, stray into the merits of the question that was decided by the tribunal.
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> [Emphasis added.]

Recognizing that the issue in *Dallah* was different in that it related to jurisdiction over a non-signatory to the arbitration agreement, one senses that the Court of Appeal advocated in *Mexico v Cargill* a higher level of judicial restraint in the application of the correctness standard to issues of jurisdiction than one can detect in language adopted by the Supreme Court of the United Kingdom.

The repeated emphasis by the Court of Appeal of the notion that the question of jurisdiction must be narrowly defined in relation to international tribunals, raises the question as to what difference that makes, either in general or on the facts of *Mexico v*

Cargill.

Does the application of the narrowing principle mean that that there can be cases in which a tribunal may be found to have acted either within or outside its jurisdiction depending only on whether or not the court is dealing with an international tribunal? Similarly, how does the warning to "intervene only rarely" change the outcome of the analysis? In particular, how does this caution line up with the correctness standard given that it is premised on the tribunal being "consensual"? If the Court finds, on a broad view of jurisdiction, that the tribunal is not consensual or has exercised its jurisdiction beyond that conferred on it by the agreement of the parties, should it reach a different conclusion based on a narrow view of jurisdiction? On the facts of *Mexico v Cargill*, would a broad view of jurisdiction include the question of whether or not the tribunal had jurisdiction to award upstream damages, while a narrow view would be limited to the question of whether the tribunal had jurisdiction to decide whether or not it had jurisdiction to award upstream damages? Or would it be the opposite?

Or does the warning mean that the Court should try its best to find a basis for the jurisdiction and then, if it can do so, turn away any arguments to the contrary? If so, there may not be much difference between the modified standard of correctness explained by the Court of Appeal in *Mexico v Cargill* and the "powerful presumption" in favour of jurisdiction espoused by earlier cases.

In summarizing the effect of these principles, the Ontario Court of Appeal held that the role of the reviewing court is to identify and narrowly define any true question of jurisdiction and, in relation to that issue, to ask the following three questions:

(a) What was the issue the tribunal decided?

(b) Was that issue within the submission to arbitration made under Chapter 11 of the NAFTA? and

(c) Is there anything in the NAFTA, properly interpreted, that precluded the tribunal from making the award it made?

On this approach, the Court of Appeal concluded, in effect that the narrow basis for the exercise of jurisdiction and awarding damages was the allegation by Cargill, and ultimately a finding by the tribunal, that Mexico was in breach of the treaty. Thereafter, all issues relating to the scope of the damages to be awarded fell within this narrowly defined jurisdiction.

Having determined to use a narrow definition of jurisdiction under the NAFTA Treaty, the Court of Appeal essentially engaged in a negative exercise as to whether it could find any basis for limiting the jurisdiction that was exercised by the tribunal.

This approach is well summarized in the following statement by Justice Feldman:

> 72 Clearly there is an argument as to whether lost capacity in Cargill's U.S. plants constitutes damages by reason of, or arising out of, Mexico's breaches to the extent that those breaches affected [its Mexican subsidiary]. However, this is a quintessential question for the expertise of the tribunal, rather than an issue of jurisdiction. 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 not such limiting language.

Applying this approach, the Court of Appeal determined that neither the language of the treaty (which imposed no specific limitation on "upstream" damages), nor the decision of the prior arbitral tribunal in the *Archer Daniels* case (which was not binding) nor the agreement of the three State Parties to the treaty that "upstream damages" were not intended to be within the power of NAFTA tribunals (because it was not clearly stated in any previous material issued by the three parties) amounted to any jurisdictional limitation.

Since the Court of Appeal upheld the determination as to jurisdiction made by the arbitral tribunal, its decision can equally well be supported on the basis of a standard of deference or indeed on the basis of a standard of "powerful presumption" in favour of arbitral tribunal's determinations of jurisdiction.

In the circumstances of the case, had the correctness standard been applied with full vigor to the question of whether the awarding of upstream damages was within the jurisdiction of the tribunal, one would expect to have seen a ground up analysis of all of the relevant provisions of

NAFTA including *ab initio* considerations as to its objectives in promoting cross border investment and trade with full reflections on the definitions of investment and the interpretive statements made by the three Parties to the treaty. The actual thrust of the decision is to define the challenge to the award as not going to jurisdiction at all.

Correctness v Deference

Given that the conclusion of the Court of Appeal in *Mexico v. Cargill* could have been justified either on the basis of a correctness standard or on the basis of a deference standard, with or without a "powerful presumption" in favour of jurisdiction, an interesting question arises as to which was the better route to the final destination – or, indeed, whether another route might be better.

The most important thing to observe about the correctness standard is that it does not necessarily lead to or guarantee a correct result. All that the correctness standard accomplishes is to give the judge or court that is conducting the review permission to fully substitute its own opinion for that of the lower court or arbitral tribunal. That opinion may later be rejected by a higher or later court as incorrect. The opinion of the public at large or of the community particularly affected by the decision may be vocally contrary to the decision. Courts of other jurisdictions called upon to enforce the award may not agree. It might be overturned by subsequent legislation.

Certainly court decisions are, and need to be, authoritative within their realm of operation. But what do we add to the process by suggesting that they are "correct".

The *Mexico v. Cargill* case dramatically illustrates the point that other solutions to a given jurisdictional question are likely to be possible and defensible. For example, there is no rational reason why an objective, informed observer may not prefer the reasoning and conclusion in the *Archer Daniels* case. Furthermore, to the extent that all of the Parties to the NAFTA Treaty appeared to have taken a different position on jurisdictional limits, one might venture to suggest that their collective view is more likely to be "correct" given that the goal of the exercise of interpreting the treaty, in large if not exclusive measure, is to determine their collective intent.

The Court of Appeal dismisses the difference between the result in *Archer Daniels* and *Cargill* on the basis that the difference is on a matter which it was within the jurisdiction of the two

tribunals to decide[vii]. However, this rationale for the decision only works if the standard of review being applied by the court to the issue it is addressing is one of deference rather than correctness. If the Court of Appeal is actually saying that the tribunal in Cargill was correct in finding that it had jurisdiction to award upstream damages, then (subject always to fact based distinctions) it would have to say that the tribunal in another case that did not award those damages because it found it did not have jurisdiction to do so was wrong and the Court of Appeal would presumably have had to set aside the earlier award in that respect had the earlier award come before it for review.[viii] It is by no means clear that the Court of Appeal intended to make a definitive decision on that point. At paragraph 74 of its decision the Court of Appeal says the following:

> 74 Whether or not the tribunal's distinction of the *ADM* case is a reasonable one is not an issue for the court. The only issue is whether the tribunal was correct in its determination that it had jurisdiction to decide the scope of damages suffered by Cargill by applying the criteria set out in the relevant articles of Chapter 11, and that there is no language in Chapter 11, or as agreed by the NAFTA Parties, that imposes a territorial limitation on those damages. Once the court concludes that the tribunal made no error in its assumption of jurisdiction, the court does not go on to review the entire analysis to decide if the result was reasonable. As I have determined that the tribunal acted within its jurisdiction, there is no review of the merits of the decision.
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> [Emphasis added.]

As previously stated, the Court of Appeal defined the issue (scope of damages to be awarded and whether upstream damages are included in the scope) as one that did not go to jurisdiction and then deferred to the decision of the tribunal on that issue. In doing so, the Court of Appeal appears to have given effect to its stated approach of defining issues of jurisdiction narrowly. One may pose the question as to whether the Court of Appeal would have been similarly deferential had the decision of the tribunal in *Archer Daniels* arbitration come before it?

In the *Dallah* case, as the Ontario Court of Appeal pointed out, the Supreme Court of the United Kingdom applied a correctness standard to arrive at a conclusion that the jurisdictional question in that case was governed by French law which, as interpreted by the UK Supreme Court, did not support a finding of jurisdiction. However, French courts subsequently applied their own law to the opposite effect.[ix] Once again, this illustrates that the application of a correctness standard does not lead ineluctably to a singular result which can always be taken to be correct.

Another way to say this is that the "correctness" that results from the application of the correctness standard is a normative or conventional, rather than an objective form, of correctness. There is a judicial, social and constitutional need to regard the final decisions of the court as being correct. *Res publicae sit finis litium*.[x] When the review is taking place within a single court system as with appeals from trial decisions the application of standards of review also put into effect a division of labour and functionality between different levels of court. Trial courts deal with facts and appeal courts deal with law and how the law is applied to the facts as with issues of mixed fact and law, including contract interpretation. There is also the aspect of overall quality control in which higher courts supervise lower courts to ensure the quality of the service delivered to the public by the institution of which both levels of court are a part. There can only be one result for the case at any given level of adjudication within a single court system and the last court to deal with the matter on its merits within the court system takes responsibility for the overall result.

The same paradigm generally holds true for administrative tribunals that are supervised by the courts of the territory in which they operate. The division of labour between the courts and the subordinate tribunals, as defined by statute, leads to a standard of deference. But keeping administrative tribunals within their statutory bounds and ensuring that they operate judiciously requires court supervision. Defining the standard of review for administrative tribunals has led to much debate and verbal contortion.[xi] However, as both the tribunals and the courts are operating within the same legal system, the overall need to have only one correct result at a time, ultimately determined by the court of the jurisdiction in question, is unarguable.

The same paradigm does not apply when one is dealing with international arbitration awards, or for that matter, the judgments of foreign courts.[xii] As both the *Mexico v Cargill* and *Dallah* cases dramatically illustrate multiple court systems and multiple outcomes are entirely foreseeable and defensible. This has led the courts quite naturally and properly to the notion of judicial comity in the context of foreign judgments and deference in the context of international arbitral tribunals. These principles should not be understood as stemming from an impulse to goodwill, diplomacy or *politesse* in the international context, but to the understanding that different solutions may exist to the same legal dispute and that there is a great deal of merit in deferring to a prior solution that has been offered by a foreign court or international tribunal,

unless the reviewing court considers it to be clearly wrong or not in keeping with public policy in its own territory.

There is a strong impulse to move away from this pluralistic perspective when issues of jurisdiction are involved. As one highly regarded academic and friend of the author put it, if the court finds that the tribunal did not have jurisdiction then he tribunal "did not exist" and there is nothing for the court to defer to. This binary approach to jurisdiction is fully justified when one is operating entirely within a single legal system.

The same is not true in the international context.

As illustrated in *Dallah*, the application of the correctness standard by both the English and French Courts led to the tribunal existing and not existing simultaneously in different jurisdictions.

In *Mexico v Cargill*, if one considers that the Court of Appeal was deferring to the decision of the tribunal on the issue as to whether it had jurisdiction to award upstream damages (having decided that the tribunal was correct on the narrow jurisdictional issue of whether it had jurisdiction to award damages of any kind) then any other court that is similarly deferential will reach the same result. However, if another court in which Cargill might try to enforce the same award were to decide to apply the correctness standard to the upstream damages issue and reach a different result, then the power of the tribunal to award such damages would exist and not exist at the same time.

The potential for conflicting decisions is in part due to the fact that a value judgment is involved in each court as to which of many applicable but possibly conflicting legal principles ought to control the outcome in the case as at hand. This normative aspect of the "correctness" standard is well illustrated by the tale of the three umpires who meet in bar. After a few drinks the first umpire says "I call them like I see them." Not to be outdone, the second umpire replies "I call them like they are." The third umpire ends the discussion by saying "They aren't anything until I call them."[xiii]

Once the batter has been called out, no useful purpose is served by asserting or denying the correctness of the call – unless of course one has access to instant replay and an objective

determination is available to settle the dispute.

Is there a way to build into the process of judicial review, a recognition of the pluralistic, probabilistic nature of arbitral jurisdiction, especially in a global and multicultural legal environment – an approach that will avoid the courts of any one country (or multiple countries) operating on the basis that their views must always be preferred those of the tribunal under review, or those of other courts, on matters of jurisdiction?

One possibility is that a reviewing court should not be asking itself only the question "What do I/we think is the right answer on jurisdiction?" but rather the question "Is the decision of the arbitral tribunal on jurisdiction clearly wrong and, if not, what purpose is served by substituting my/our opinion for that of the arbitral tribunal?". If the determination of the arbitral tribunal is within a range of possibilities that reasonable and objective observers might consider to be correct then the court is just as likely to substitute a wrong decision for a correct one by applying the correctness standard. On the other hand, asking the question as to what purpose is served by substituting one possibly correct answer for another leads to potentially very interesting and useful analysis which is well illustrated by both the *Mexico v. Cargill* and *Dallah* cases.

In *Mexico v. Cargill*, the fact that the decision of the tribunal was inconsistent with the decision of another tribunal thereby creating potential confusion on a very important aspect of the remedial scope of the NAFTA treaty could be one reason why the court may wish to arrive at and substitute its own conclusion for that of the arbitral tribunal. If the Court is acting for that reason, a *de novo* review may serve a very useful purpose. In those circumstances, it would be better if no deference were paid in any way to the views of any of the tribunals with conflicting decisions as to the extent of their jurisdiction. There is no reason, for example, why the views of the specific tribunal under review should be given greater deference on the point than those of an earlier tribunal on the same point under the same treaty or contract, and no particular reason why jurisdiction should be given a deliberately narrow definition. As confusion would have already been found to exist with respect to the extent of jurisdiction based on the findings of different tribunals under the same treaty, the court where the arbitration was located may well have a special role and justifiable basis for doing its own analysis and providing its own solution.

Another reason for substituting the Court's opinion for that of the tribunal in *Cargill* might have

been to consider a solution that is better aligned with the stated public policy of three governments that actually created the treaty regime, especially given that subsequent agreements by the parties to a treaty as to its interpretation have interpretive relevance.[xiv]

In Dallah, the fact that the tribunal held that it had jurisdiction over the Government of Pakistan even though it was not a signatory to the arbitration agreement could have been justified by the Court on the basis it was one possibly correct answer to the jurisdictional issue, and an answer which ought not to be displaced in circumstances in which the actual signatory to the arbitration agreement was entirely a creature of the Pakistani government and ceased to exist at the whim of that government – a government which provided the entire substance of the signatory's existence, acted as its effective principal throughout the contractual process and guaranteed its obligations. By applying a correctness standard, the Supreme Court of the United Kingdom in the *Dallah* case limited its own options. Had it considered *whether* to substitute its own opinion for that of the tribunal, the UK Supreme Court would have given itself an additional opportunity to avoid what arguably proved to be an incorrect result.

Of course, the usefulness of this approach to reviewing questions of arbitral jurisdiction depends in practice upon the reviewing court recognizing that its view is not the only one that can be correct. This may not have been the case in *Dallah* in which every English judge who considered the issue came to the same conclusion, namely that the assumption of jurisdiction by the tribunal was in error.

The suggested approach would not prevent a Court from substituting its opinion for that of the tribunal on an issue of jurisdiction when it finds that decision to be clearly wrong but would otherwise require a court to exercise restraint in substituting its own analysis for that of the tribunal unless there is a very good reason for doing so. I submit that a close reading of the Court of Appeal's decision in *Mexico v Cargill* is implicitly consistent with this approach.[xv] However, it is to be hoped that it will not be the last word from Canadian appellate courts[xvi] on the subject.

[i] This is a revised an edited version of a report presented to the NAFTA 2022 Committee in Puebla, Mexico on October 29, 2012.

[ii] [2011] ONCA 622

[iii] On May 10, 2012, the Supreme Court of Canada dismissed an application for leave to appeal from the judgment of the Ontario Court of Appeal.

[iv] See Professor Frederic Bachand "*Kompetenz-Kompetenz*, Canadian Style", Arbitration International (LCIA) Volume 25 Number 3 2009. The issue of correctness v deference as a standard of review for decisions of international arbitration tribunals in Canada has many parallels to the discussions of "arbitrating arbitrability" that are now taking place in American jurisprudence: See Marc J. Goldstein, "Revisiting Second Circuit Arbitrability Jurisprudence: A Midsummer Night's Dream?", August 2012, www.lexmarc.us. In *Morgan Keegan & Co. v Garrett* WL 5209985 (5th Cir. Oct. 23, 2012) the Fifth Circuit Court of Appeal held that arbitrators' decisions as to the scope of arbitrable issues is entitled to the same high level of deference as arbitrators' decisions about the merits of the dispute.

[v] Cf. Article 5 (c) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards

[vi] The author was counsel in the *STET International* case.

[vii] See paragraph 74 of the decision.

[viii] Under Ontario law, a tribunal's determination that it has no jurisdiction will be set aside as a "wrongful declining of jurisdiction" if the Court is of the view that the tribunal's decision is wrong. See: Donald J.M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada*, looseleaf (Toronto: Canvasback Publishing, 1998) at 14-3 to 14-4 and *Advocacy Centre for Tenants-Ontario v. Ontario Energy Board*, 2008 CanLII 23487 (ON SCDC), 293 DLR (4th) 684; 238 OAC 343.

[ix] "*Dallah v. Pakistan*: Vive la différence?" Global Arbitration Review (April 20, 2011) at www. globalarbitrationreview.com. For an excellent and detailed discussion of the differences between the decisions of the English Supreme Court and the French Court of Appeal see Jacob Grierson and Dr. Mireille Taok, *"Dallah: Conflicting Judgments from the U.K.Supreme Court and the Paris Cour d'Appel"*, Journal of International Arbitration (2011) 28 *J. Int. Arb.* 3 (http://www.mwe.com/info/pubs/JOIA_conflicting.pdf).

[x] Translation: "There is a public interest in the finality of lawsuits."

[xi] In a speech given by Justice Thomas Cromwell of the Supreme Court of Canada in Halifax on October 25,2012 at a conference of the ADR Institute of Canada he made comments of an ironic nature along the following lines: *" When I was a labour arbitrator, the judicial standard for overturning my decisions was whether they were 'patently unreasonable', a standard that I met on one occasion. When the standard was changed to 'clearly irrational', one of my decisions met that standard as well. When I was on the Court of Appeal, I only had to be found to be 'wrong' and, once again, I was so found from time to time. Now that I am on the Supreme Court of Canada, the worst that can happen is that I am outnumbered."*

[xii] Apart from statutory rights to seek a court review, which may be contractually waived in most Canadian provinces, the same may be said of non-international arbitrations given that the Supreme Court of Canada has stated on more than one occasion that arbitration is not part of the court system of any country: *Desputeaux c. Éditions Chouette* (1987) inc. [2003] SCC 17, 223 D.L.R. (4th) 407 at para. 41 "However, an arbitrator's powers normally derive from the arbitration agreement. In general, arbitration is not part of the state's judicial system, although the state sometimes assigns powers or functions directly to arbitrators. Nonetheless, arbitration is still, in a broader sense, a part of the dispute resolution system the legitimacy of which is fully recognized by the legislative authorities."

[xiii] "According to quantum theory, the very act of our observing the world forces it into terms we can relate to…". *The Universe Within: From Quantum to Cosmos*, Neil Turok, Anansi, Toronto, 2012 p.93

[xiv] Article 31 of the *Vienna Convention on the Law of Treaties*, 23 May 1969.

[xvi] I will leave it to the reader to decide whether the decision of Justice A.C.R Whitten (Ontario Superior Court of Justice) in *Telestat Canada v Juch-Tech, Inc, May 3, 2012 (unreported)* which found that an arbitral tribunal had jurisdiction to decide the case but that its award of costs exceeded its jurisdiction falls within either the letter or spirit of *Mexico v Cargill*. This case illustrates, if nothing else, that the line between jurisdiction and merits, where both are based on an interpretation of the agreement, is not easy to draw. See endnote iv above.