SETTING ASIDE PUBLIC POLICY: 
THE PEMEX DECISION AND THE CASE FOR 
ENFORCING INTERNATIONAL ARBITRAL 
AWARDS SET ASIDE AS CONTRARY TO 
PUBLIC POLICY 

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ABSTRACT

In the recent Pemex case, a U.S. district court recognized an international arbitral award which had been “set aside” or annulled by a court in Mexico, the place of arbitration, on the ground that the award was contrary to public policy. To reach its decision, the U.S. court relied on the permissive language of the New York and Panama Conventions, but ignored its obligation to refuse recognition of the award under the U.S. Federal Arbitration Act (FAA). This Note argues that the FAA should be amended to preclude U.S. courts from refusing to recognize awards which have been set aside on public policy grounds. Under this amendment, the Pemex court would have reached the desirable result without bypassing its obligations under the FAA.

I. INTRODUCTION .................................... 826
II. THE ARCHITECTURE OF RECOGNITION AND ENFORCEMENT IN THE 
INTERNATIONAL ARBITRAL SYSTEM ............... 827
   A. Grounds for Refusal of Recognition and Enforcement of 
Arbitral Awards under the New York Convention and the 
UNCITRAL Model Law ................................. 827
   B. Refusing Recognition and Enforcement When the Award has 
been Set Aside by Courts of the Arbitral Seat .......... 830
   C. Setting Aside Awards that Violate the Public Policy of the 
Arbitral Seat ......................................... 831
   D. Refusal is Permissive Under the New York Convention .... 833
   E. Refusal is Obligatory Under the Federal Arbitration Act . . . 835
III. THE PEMEX DECISION ............................ 837

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This Note will argue that the U.S. Federal Arbitration Act (FAA), which implements the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), should be amended to mandate the enforcement of arbitral awards that have been “set aside” or annulled by courts in the place of arbitration when those awards have been set aside solely for being contrary to public policy. Such an amendment would advance the purposes of the New York Convention and other international instruments related to international arbitration, as well as U.S. policy goals related to arbitration. This Note also contends that such an amendment will not have a detrimental effect on U.S. courts’ ability to assert U.S. public policies when ruling on arbitral awards made in the United States.
Part II of this Note will discuss the international framework for the enforcement of arbitral awards and how it creates a situation in which a court may have to rule on enforcing an award set aside for public policy reasons, examining in particular the New York Convention and the UNCITRAL Model Law. This Part will include an explanation of how the FAA implements the New York Convention. To see how the preceding legal regime can create problems for U.S. courts asked to enforce annulled arbitral awards, Part III of the Note will consider the recent Pemex case, in which a federal court decided to recognize an arbitral award that had been set aside for public policy reasons, and discuss the incentives such a decision creates for litigants seeking or resisting recognition of an annulled award. In Part IV, I will propose language for the suggested amendment and discuss how such an amendment is consonant with the goals of arbitration, the policies underlying the international instruments addressing international arbitration, the policies of the U.S. regarding arbitration, as well as the practice in other countries and U.S. case law. I will conclude in Part V by addressing possible objections to the suggested amendment, including whether the amendment would limit U.S. courts’ ability to ensure procedural fairness, whether the United States has an obligation to respect the public policy decisions of foreign courts, and whether annulled arbitral awards retain the legal existence necessary for recognition.

II. THE ARCHITECTURE OF RECOGNITION AND ENFORCEMENT IN THE INTERNATIONAL ARBITRAL SYSTEM

A. Grounds for Refusal of Recognition and Enforcement of Arbitral Awards under the New York Convention and the UNCITRAL Model Law

If there can be said to be a system of international commercial arbitration, then the keystone in that system is the New York Convention, to which most countries in the world are parties. The committee established by the United Nations Economic and Social Council to draft the New York Convention did not envision an agreement that would sacrifice any state’s ability to formulate and protect its own public policy, but rather an agreement that would “facilitat[e] the enforcement of foreign arbitral awards [and] at the same time main-
tain generally recognized principles of justice and respect the sovereign rights of States.”

Under the New York Convention, foreign arbitral awards shall be enforced by the state parties. Thus, in Article II:

Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

The language in Article III is also compulsory:

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles.

The compulsory nature of the language in Articles II and III is contrasted with the permissive nature of Article V, in which state parties may refuse to recognize and enforce awards in a limited number of enumerated exceptions: “Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if” one of seven enumerated exceptions is met. The first five are those for which the party requesting the refusal must provide proof:

(a) The parties... were, under the law applicable to them, under some incapacity, or the said [arbitration] agreement is not valid under the law to which the parties have subjected it...

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the


3. New York Convention, supra note 1, art. II(1); see also Inter-American Convention on International Commercial Arbitration art. 4, Jan. 30, 1975, O.A.S.T.S. No. 42, 1438 U.N.T.S. 245 (hereinafter Panama Convention) (“An arbitral decision or award... shall have the force of a final judicial judgment.”).

4. New York Convention, supra note 1, art. III.

5. Id. art. V(1); see also Panama Convention, supra note 3, art. 5(1) (“The recognition and execution of the decision may be refused... only if...”).
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 . . .
(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or . . . 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.6

Article V(2) lists two other reasons recognition of an award may be refused by the courts in the country where recognition is sought:
(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.7

The above language from the New York Convention established a standard in international commercial arbitration, and Article V was meant to restrict the refusal of enforcement solely to these seven options.8 These seven enumerated reasons why a court may refuse to recognize or enforce an international arbitral award are repeated in an almost identical form in subsequent international instruments related to international arbitration. In addition to the New York Convention, the United States is a party to the Inter-American Convention on International Commercial Arbitration (the Panama Convention).9 For all practical purposes, both conventions are interpreted to reach the same results and “achieve a general uniformity.”10 The seven enumerated reasons for refusing awards given in Article V of the

6. New York Convention, supra note 1, art. V(1).
7. Id. art. V(2).
9. Panama Convention, supra note 3.
10. Productos Mercantiles E Industriales, S.A. v. Faberge USA, Inc., 23 F.3d 41, 45 (2d Cir. 1994) (“Legislative history . . . demonstrates that Congress intended the [Panama] Convention to reach the same results as . . . the New York Convention.”).
Another important and very influential instrument of international arbitration is the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, which provides the template for the domestic arbitration laws of over forty countries and represents an expression of international consensus regarding how the international arbitration framework should be structured. The Model Law mirrors the New York Convention exactly in giving the same seven reasons why a state may refuse to recognize or enforce an arbitral award in Article 36.

B. Refusing Recognition and Enforcement When the Award has been Set Aside by Courts of the Arbitral Seat

This Note is largely concerned with Art V(1)(e) of the New York Convention, which creates an exception for arbitral awards which have been “set aside” in the country in which the award was made. The New York Convention itself does not define or limit the term “set aside,” and an application of setting aside an award is entirely determined by the domestic law of the place of arbitration. With the exception of those states who have adopted the Model Law, there is no uniformity between domestic arbitration laws, and an award may be set aside under the domestic laws of the place of arbitration for reasons that would not provide a justification for not enforcing an award in the country where enforcement is sought.

11. Panama Convention, supra note 3, art. 5.
14. New York Convention, supra note 1, art. V(1)(e); see also Panama Convention, supra note 3, art. 5(1)(e) (largely borrowing the language from the New York Convention); see also UNCITRAL Model Law, Art. 36(1)(a)(v).
For countries which have adopted it, the UNCITRAL Model Law provides more conformity by designating an application to set aside an arbitral award in the courts of the place of arbitration as the exclusive recourse against an arbitral award. Where Article 34 of the Model Law gives an enumerated list of limited reasons why a court in the place of arbitration may set aside an arbitral award, that list mirrors exactly the list of reasons provided in Article V of the New York Convention and Article 5 of the Panama Conventions for which a court may refuse to enforce a foreign arbitral award, with the obvious exception of the award having been set aside or suspended.

Applications to set aside arbitral awards are not common and successful nullifications of arbitral awards are in fact quite rare. Reliable data is difficult to locate, but one tally found that between 1981 and 1990 only seventy-four applications to set aside were filed with the Court of Appeal in Paris, which has jurisdiction over the International Chamber of Commerce’s International Court of Arbitration in Paris, of which only twelve awards were nullified.

Even in countries not adopting the Model Law, the first four grounds for vacating awards under Article V of the Convention—incapacity or invalidity, lack of proper notice or inability of a party to present its case, awards outside the terms or scope of the arbitration agreement, and improper composition of the tribunal or procedure—have achieved “uniform acceptance.”

C. Setting Aside Awards that Violate the Public Policy of the Arbitral Seat

Despite the lack of uniformity in domestic arbitration laws, one ground for set aside that is contemplated both in the Model Law and in some domestic laws in countries which have not adopted the Model Law is that the award is contrary to the public policy of the place of arbitration. Article 34(2)(b)(ii) of the Model Law provides that “[a]n arbitral award may be set aside by the court... only if” the enumerated reasons detailed above occur, including if “the award is in conflict with the public policy of this State.” The Model Law does not define

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17. UNCITRAL Model Law, supra note 13, art. 34.
18. Id. art. 34(2).
21. UNCITRAL Model Law, supra note 13, art. 34.
“public policy” or explain which aspects of public policy might provide grounds for set aside in domestic courts.

The potential problems of an undefined or unrestricted term “public policy” did not go unconsidered during the drafting of the Model Law. Extensive debate about the inclusion or potential exclusion of the term “public policy” or the public policy ground for set aside occurred during the drafting of Article 34.22 Some states, such as Canada, advocated not having set aside at all, and relying entirely on refusal of enforcement as the recourse against arbitral awards.23 Yugoslavia noted that “contemporary trends towards restrictive interpretation of public policy” were incompatible with an interpretation that “an award could be set aside on a ground which did not influence the decision on the merits of the case.”24 The United Kingdom argued vigorously for set aside, and for the public policy justification as an important catchall for defects in the arbitral process which do not fall within the preceding four justifications, giving as examples perjury, corruption, mistake by the arbitrators, or discovery of fresh evidence.25

The Secretary-General noted that the Model Law was designed “to reduce the impact of the place of arbitration” with a recognition that the “effect of traditional concepts and rules familiar and peculiar to the legal system ruling at the place of arbitration is not limited to the State where the arbitration takes place but extends to many other States by virtue of . . . [A]rticle V(1)(e) of the 1958 New York Convention.”26 Nevertheless, the public policy justification for set aside was retained with an understanding that awards “set aside for whatever reasons recognized by the competent court . . . would not be recognized and enforced abroad.”27

24. Id.
27. Id. at 73.
D. Refusal is Permissive Under the New York Convention

The Secretary-General’s confidence that set aside awards would not be enforced may have been misplaced. As noted earlier, the plain language of Article V of the New York Convention states that courts may refuse to recognize or enforce awards which have been set aside, it does not obligate them as it might have if it stated that courts shall refuse to enforce such awards.\textsuperscript{28} Despite this plain language, the amount of discretion intended by the drafters of the Convention has been debated, most notably because the official French version of the New York Convention employs language that appears less discretionary.\textsuperscript{29} One influential scholar of international arbitration has, however, compared the five official versions of the Convention, finding that the English, Spanish, Chinese and Russian versions all agree and “clearly leave room for judicial discretion,” while the text of the French version “is not in explicit contradiction” and cannot therefore govern our interpretation of the New York Convention.\textsuperscript{30}

In addition to the plain language of the text, the “legislative history” of the New York Convention supports the inference that the drafters intended Article V to provide parties with discretion when deciding whether or not to refuse recognition or enforcement of awards.\textsuperscript{31} The New York Convention was intended to supplant the Geneva Convention, an earlier treaty on the enforcement of international arbitral awards, and the language in the Geneva Convention was clearly mandatory: “the award shall be refused if the Court is satisfied: (a) That the award has been annulled in the country in which it was made . . . .”\textsuperscript{32} The draft version of the New York Convention submitted by the International Chamber of Commerce retained the mandatory language of refusal: “Recognition and enforcement of the award shall be

\textsuperscript{28} See supra Part II.A.


\textsuperscript{31} HERBERT KRONKE ET AL., RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION 309 (2010).

refused if the competent authority to whom application is made establishes: . . . (e) that the award the recognition or enforcement of which is sought, has been annulled in the country in which it was made.”

However, this mandatory language was clearly rejected by the ad hoc committee established by the U.N. Economic and Social Council to study the ICC’s proposal. Their draft convention—eventually evolving into the New York Convention—states that “recognition and enforcement of the award may only be refused if the competent authority in the country where recognition of enforcement is sought, is satisfied: . . . [including] (e) that the award the recognition or enforcement of which is sought, has been annulled in the country in which it was made . . . .” The permissive nature of the text was not lost on signatories either. West Germany, for instance, submitted a proposed amendment to Article IV of the draft amendment replacing “may only be refused” with “shall be refused.” Needless to say, this amendment was not adopted in the final text of the convention.

The plain text and the travaux préparatoires both indicate that the drafters of the New York Convention decisively chose to provide parties with the discretion to refuse to recognize and enforce awards in limited circumstances. This discretion creates the possibility that an award set aside or nullified by a domestic court in the place of arbitration might still be recognized and enforced by a court in another country relying on the discretionary language of Article V. It is an issue with which courts are rarely faced, but the possibility that nullified awards would still be enforced has been considered by UNCITRAL as a “topic of high priority” which was “potentially a source of serious concern . . . [which] could adversely affect the smooth functioning of international commercial arbitration.”


E. **Refusal is Obligatory Under the Federal Arbitration Act**

In the United States, the New York Convention and the Panama Convention are implemented through legislation, specifically through amendments to the Federal Arbitration Act (FAA) of 1925. According to the plain language of the FAA, the New York and Panama Conventions are not to be interpreted and applied independently, but rather they “shall be enforced in the United States in accordance with” their respective chapters in the FAA.

Regarding the enforcement of nullified awards, the FAA replaces the permissive language of both Conventions with more compulsory language, ostensibly reducing the discretion judges have to enforce nullified awards: “The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.” Nominally at least, U.S. courts therefore have no discretion and must refuse to enforce awards that have been set aside by a competent authority of the country in which the award was made, regardless of the legal justification which that authority relied upon to set aside the award.

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40. U.S. court decisions, however, reflect an interpretation that U.S. courts do have discretion when choosing whether to refuse recognition of nullified awards, as I will discuss later. Legislative history reveals that annulled international awards were to be treated similarly to vacated domestic arbitral awards, confirming an intention to deny judges the discretion to enforce them. In forwarding the draft of the 1970 amendment to the FAA which implemented the New York Convention to the House of Representatives, the Department of State equated § 207, dealing with foreign arbitral awards, to § 9 of the original FAA of 1925, dealing with domestic awards. H.R. Rep. 91-1181, at 3604 (1970). Rather than adopting the permissive text of the New York Convention art. V, the text of § 207 reads:

Within three years after an arbitral award . . . is made, any party to the arbitration may apply to any court . . . for an order confirming the award as against any other party to the arbitration. The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention, 9 U.S.C. § 207 (2012).

This language is clearly modeled on § 9, the provision dealing with enforcement of domestic awards:

> Within one year after the award is made any party to the arbitration may apply to the court . . . for an order confirming the award, and thereupon the court must grant such
Because the domestic laws of many states—particularly those following the UNCITRAL Model Law—allow for the set aside of awards which are contrary to the public policy of the place of arbitration, this means that U.S. courts must statutorily refuse to recognize awards which have been set aside in service of the public policy of the place of arbitration, which may have little or no resonance with U.S. public policy, or may in fact be contrary to U.S. public policy.41

In contrast, the FAA provides grounds that U.S. district courts may use to vacate—that is, to set aside—arbitral awards made in the United States, and they do not include public policy:
1. where the award was procured by corruption, fraud, or undue means;
2. where there was evident partiality or corruption in the arbitrators, or either of them;
3. where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
4. where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.42

The statutory language has been interpreted as exclusive.43 As a result, public policy should not be relied upon by U.S. courts to vacate an arbitral award.44 U.S. district courts may only set aside arbitral awards unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. 9 U.S.C. § 9 (2012).

41. See Yusuf Ahmed Alghanim and Sons, W.L.L. v. Toys R Us, Inc., 126 F.3d 15, 21 (2d Cir. 1997) (noting that applications for set aside were controlled by the law of the arbitral seat which indirectly extended the grounds for refusal of enforcement to “all grounds contained in the arbitration law of [the place of arbitration], including the public policy of that country”).
42. 9 U.S.C. § 10(a) (2012) (residually applying to international awards under the New York Convention under § 208 and the Panama Convention under § 307).
43. Jacksonville Area Ass’n for Retarded Citizens v. Gen. Serv. Emps. Union, Local 73, 858 F. Supp. 791, 792 (C.D. Ill. 1994) (“A district court may only vacate the award of an arbitrator if the award was procured by fraud, corruption, or misconduct on the part of the arbitrator or if the arbitrator exceeded his powers in making his decision.”); see also Wilko v. Swan, 346 U.S. 427, 436-37 (1953). The statutory wording may suggest otherwise, however. See 9 U.S.C. § 10(a) (2012) (“In any of the following cases the United States court . . . may make an order vacating the award . . . .”).
44. The notable exception to this is arbitral awards made pursuant to collective bargaining contracts, which are excluded from the FAA under 9 U.S.C. § 1 (2012). In these cases, the
awards made in the United States for procedural reasons similar to, though not identical with, those procedural reasons provided in Article 34(2)(a) of the UNCITRAL Model Law. This creates a situation, at least statutorily, where other countries will not be called upon to refuse to recognize or enforce arbitral awards made in the United States which have been set aside on public policy grounds, while U.S. courts may be asked to refuse to recognize or enforce awards set aside for public policy in a country whose domestic arbitration law is based on the UNCITRAL Model Law. In other words, the FAA may create situations in which U.S. courts are obligated to enforce the public policy of another country which will never have to enforce U.S. public policy in a similar situation.

III. THE PEMEX DECISION

A. A Federal Court Relies on the Discretion Provided by the New York Convention to Enforce an Award Set Aside for Public Policy

The District Court for the Southern District of New York was recently asked to enforce an arbitral award which had been set aside for public policy reasons in Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. Pemex-Exploración y Producción (the Pemex case). The arbitration took place pursuant to two contracts between PEMEX-Exploración y Producción (PEP), a subsidiary of Pemex, the state-owned oil company of Mexico, and Corporación Mexicana de Mantenimiento Integral (COMMISA), a Mexican subsidiary of the U.S. construction company KBR, Inc., which was to build two offshore natural gas platforms in the Gulf of Mexico. Under the agreement to arbitrate in the contracts, arbitration would be held in Mexico City, under the rules of the International Chamber of Commerce, and Mexican law would govern the contract. Both contracts also allowed

Supreme Court has held that arbitral awards may be vacated on public policy grounds, citing the common law doctrine that courts may refuse to enforce contracts that violate public policy because “the public’s interests in confining the scope of private agreements to which it is not a party will go unrepresented unless the judiciary takes account of those interests when it considers whether to enforce such agreements.” United Paperworkers Int’l Union, AFL-CIO v. Misco, Inc., 484 U.S. 29, 42 (1987).

45. UNCITRAL Model Law, supra note 13, art. 34(2)(a)-(iv).
47. Id. at *2.
48. Id.
for PEP to issue an “administrative rescission” of the contract in certain situations and, two weeks after COMMISA filed a demand for arbitration, PEP decided to proceed with an administrative rescission.\textsuperscript{49} Extensive parallel litigation regarding the administrative rescission of the contract occurred as the arbitral tribunal formed, and two key issues that emerged were whether an agreement to settle all disputes by arbitration applied to disputes over the administrative rescission, and if administrative rescissions were arbitrable at all under Mexican law.\textsuperscript{50} A new Mexican law stated that administrative rescissions issued after May 28, 2009 were not arbitrable, and if an administrative rescission was not arbitrable, then additional changes in Mexican law mandated that the dispute be taken to a different court than contemplated at the time of the contract, one which had much a shorter statute of limitations.\textsuperscript{51}

The arbitral tribunal decided largely in favor of COMMISA on the merits. In addition, the tribunal held that the parallel litigation opposing the rescission addressed different claims and thus did not bar the arbitral award by \textit{res judicata} and that the law barring administrative rescissions from arbitration did not apply.\textsuperscript{52} As COMMISA sought to enforce the award in the United States, PEP made several attempts to have the award set aside in Mexico and eventually succeeded at the Eleventh Collegiate Court for the Federal District, which held that administrative rescissions implicated public policy because they safeguarded the financial resources of the state and that private parties in arbitration could not rule on acts of authority.\textsuperscript{53} The court claimed not to be applying the new law barring administrative rescissions from arbitration retroactively, citing it instead as evidence of the public policy against arbitration of administrative rescissions, and remanded the case to the district court which nullified the award, distinctly framing the issue in terms of public policy: “it would be ‘unacceptable and contrary to the country’s legal system’ to allow arbitrators ‘to resolve a matter of public policy and general interest.’”\textsuperscript{54}

\begin{footnotes}
49. Id.
50. Id. at *4-5.
51. Id. The effective statute of limitations for COMMISA’s claim was reduced from ten years to forty-five days.
52. Id. at *5.
\end{footnotes}
Nonetheless, COMMISA petitioned the District Court for the Southern District of New York to confirm the award under the Panama Convention.\(^{55}\) While noting that the use of the word “may” in Article 5(e) of the Convention appeared to grant him discretion to confirm an award deemed invalid by the courts of the originating state, Judge Hellerstein embarked on an analysis of Second Circuit and D.C. Circuit precedent interpreting this discretion in U.S. cases, noting along the way that enforcement of vacated awards would encourage claimants to follow respondents with actions “from country to country until a court is found, if any, which grants the enforcement.”\(^{56}\)

Ultimately, relying largely on *Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd.*\(^{57}\) and *TermoRío S.A. E.S.P. v. Electranta S.P.*,\(^{58}\) the court determined that, due to the pro-enforcement bias of the New York Convention, vacated awards could only be enforced in extraordinary circumstances; the standard for enforcement in those extraordinary circumstances was that the nullification proceedings violated “basic notions of justice.”\(^{59}\) Applying this standard to COMMISA’s enforcement action, the court found that “basic notions of justice” were violated because the new Mexican law barring administrative rescission from arbitration—or, as the court also notes, the policy to bar administrative rescission from arbitration—had been applied retroactively, with the result that COMMISA had been left without a remedy to litigate the merits of its case in Mexican courts.\(^{60}\) The court confirmed the award.\(^{61}\)

To summarize: an arbitration occurred in Mexico, under Mexican arbitration law and applying Mexican substantive law, between two Mexican companies, one a subsidiary of a U.S. corporation. That award was nullified in Mexican courts on the grounds that the award violated Mexican public policy. Subsequently, the award was enforced in the United States, on the grounds that the Mexican nullification violated U.S. public policy. Notably, U.S. courts held for the claimant, ultimately an American entity, while the Mexican court held for the respondent, which was Mexican or, arguably, Mexico itself.

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55. *Id.* at *10; *Panama Convention*, supra note 3.
57. *Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd.*, 191 F.3d 194 (2d Cir. 1999).
60. *Id.* at *16-17.
61. *Id.* at *18.
While both countries acted in accordance with their international rights and obligations under the Panama and New York Conventions, the U.S. court’s decision is in direct contradiction with U.S. domestic law. While the court relied on the discretion to enforce awards granted to contracting parties by the Panama Convention, the Federal Arbitration Act—the domestic implementing legislation for the Panama and New York Conventions—does not grant district courts such discretion. The FAA mandates that the court shall enforce the award unless it finds one of the grounds for dismissal specified in the Convention. Here, there was clearly a ground for dismissal under the Panama Convention Article 5(1)(e) due to the award having been set aside by the Mexican court. The court appears to be obligated to refuse to enforce the award under domestic law.

Judge Hellerstein anchors his decision on the concept of “basic notions of justice,” and maintains that he is “neither deciding, nor reviewing Mexican law,” objecting only to the Mexican court “applying a law and policy that were not in existence at the time of the parties’ contract, thereby denying COMMISA an opportunity to obtain a hearing on the merits of its claims.” Much is unsatisfying about this explanation; if parties have agreed to arbitrate, then is it not their intention to have the merits of the case heard by the arbitral tribunal, rather than a court? Do not all procedural rules effectively deny hearing on the merits? Did not COMMISA consent to arbitrate and forego litigation with the inherent and widely known risk that the award could be set aside without a hearing on the merits in a court? These issues arise because the court frames the question in terms of its ability to recognize and enforce an annulled arbitral award, rather than the real inquiry it is making, which is whether to recognize a foreign judgment—a question the entire international arbitral regime was designed to avoid.

62. Id. at *14; Panama Convention, supra note 3, art. 5(1), (“The recognition and enforcement . . . may be refused . . . only if . . . .”). Judge Hellerstein described this as a “wee small area of discretion.” Pemex, 2013 WL 4517225 at n.22.
63. 9 U.S.C. § 207 (2012) (incorporated by reference to apply to the Panama Convention by 9 U.S.C. § 302 (2012)) (“The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.”).
64. Id.
65. Panama Convention, supra note 3, art. 5(1)(e).
B. Pemex Creates Uncertainty Regarding the Enforcement of Arbitral Awards and Promotes Recourse to Courts

While the outcome in Pemex appears desirable, the court’s reasoning simply bypasses U.S. law.67 The precedential effect created by Pemex, both in the United States and internationally, would be negative regardless of how the court had decided. As it is, it encourages those whose arbitral awards have been nullified by courts at the seat of arbitration to seek to enforce them in the United States anyway. In this case, COMMISA was successful in enforcing an award which had been set aside. The reasoning of the court focuses on COMMISA having been denied an opportunity to have the merits of its case heard in Mexican courts. Because arbitral tribunals are charged with hearing the merits and deciding substantive law in disputes that have been submitted to arbitration, it is foreseeable that claimants will attempt to enforce set aside awards after any initial setbacks in subsequent litigation, citing the Pemex case as authority. U.S. courts would be put in the unenviable position of determining to what degree claimants have exhausted their available remedies in foreign courts.

Had the Pemex court decided differently and refused to recognize the award, it would have created an incentive for aggressive litigation in the arbitral seat to have the award set aside under any conceivable “public policy” theory—regardless of the lack of any procedural defect in the agreement to arbitrate or the arbitration itself—as the respondent PEP did in this case. Neither outcome benefits the international arbitral regime, and neither serves “basic notions of fairness,” though this catch-22 is guaranteed by the permissive possibility of public policy set asides within the current framework of international law.

C. Other Jurisdictions Avoid the Pemex Issue by Prohibiting Refusal

So far, this Note has shown that the current text of the FAA, together with the New York Convention and the domestic laws of those countries who have adopted the Model Law, creates an obligation for U.S. courts to enforce the public policy of other countries—even when that policy may be contrary to U.S. policy—while the courts of other countries will never be asked to enforce U.S. policy in a reciprocal way. The recent

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67. As discussed in Part II. E above, the FAA makes refusal obligatory, so the court’s analysis and application of the New York and Panama Conventions was inapposite, though its motivation to do so may have been revealed in its discussion of “basic notions of justice.”
Pemex case demonstrates that a U.S. court faced with this dilemma may disregard the clear language of the FAA in order to find the discretion to enforce an award set aside on public policy grounds, and embark upon a comparison between the public policy concerns of the place of arbitration and those of the United States.

The same dilemma would not be faced by courts in the thirty-one countries that are parties to the European Convention on International Commercial Arbitration (the European Convention)—which include France, Germany, Russia, Italy, Poland, Turkey, Belgium, and Austria, as well as some countries not in Europe, such as Cuba, Burkina Faso and Kazakhstan—at least if the award being considered for enforcement was made in another country also a party to the European Convention. Article IX of the European Convention addresses set aside and provides an exclusive list of four options for setting aside of an award which shall constitute grounds for refusal of recognition and enforcement. These are identical to those listed in Article V(1) of the New York Convention: incapacity of the parties or invalid agreement to arbitrate, lack of notice or opportunity to present one’s case, the issues arbitrated were beyond the arbitration agreement, and defects in the composition of the tribunal or arbitral procedure.

Importantly, the European Convention does not provide for refusal based upon infringement of one state’s public policy or even a more restrictive version of ordre public. Drafters of the Convention felt that there would be no reason for the arbitrators to consider the public policy of the place of arbitration if enforcement would not be sought there and that to do so would impair the international currency of the award. To make this point clear and explicit, Article IX(2) of the European Convention bluntly states that “[i]n relations between Contracting States that are also parties to the New York Convention... paragraph 1 of this Article limits the application of Article V(1)(e) of the New York Convention solely to the cases of setting aside set out...”

70. Id.
71. Id.
under paragraph 1 above.” This effectively eliminates the public policy set aside between parties to the European Convention.

Because the language of the New York Convention Article V is discretionary, it is compatible with the European Convention’s blanket exclusion of one of the grounds of refusal of recognition of an award. While the European Convention is only effective between parties and creates no obligations for the parties to enforce or refuse to enforce arbitral awards set aside on grounds of public policy in nonparty states, Article IX(2) of the European Convention is still instructive in drafting a potential solution for U.S. courts faced with similar enforcement proceedings.

The domestic arbitration laws of some countries bypass considerations of set aside all together. France, in addition to being a party to the European Convention, has perhaps the most liberal laws regarding the enforcement of set aside awards. French law does not provide for the refusal to recognize and enforce awards which have been set aside by courts of the place of arbitration at all, arbitral awards are recognized and enforced unless they are contrary to “international public policy.” The French system relies on Article VII of the New York Convention, which provides that the Convention shall not deprive parties of rights they may have under domestic laws to avail themselves of awards, to ensure compliance with that convention. The French Court of Cassation has held that French courts have the duty to enforce awards under the more-favorable-right provision of Article VII, even if enforcement might otherwise be refused under the set aside justification of Article V(1)(e). An arbitral award which had been set aside at the place of arbitration for public policy grounds will be enforceable in France, even if the arbitral seat is not a member of the European Convention.

73. European Convention, supra note 69, art. IX(2).
74. Code de Procedure Civile [C.P.C.] art. 1514 (Fr.) (“Les sentences arbitrales sont reconnues ou exécutees en France si leur existence est établie par celui qui s’en prévaut et si cette reconnaissance ou cette exécution n’est pas manifestement contraire à l’ordre public international.”).
75. New York Convention, supra note 1, art. VII (providing that the Convention “shall not . . . deprive any interested party from any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.”).
Courts in China also cannot refuse to enforce an arbitral award because it has been set aside by the courts of the place of arbitration. This is true regardless of the reason for set aside, including the public policy of the place of the arbitration.

IV. AMENDING THE FAA TO PROHIBIT THE REFUSAL OF RECOGNITION OF AWARDS ANNULLED SOLELY ON PUBLIC POLICY GROUNDS

A. Amending the FAA Would Clarify U.S. Enforcement Law, Remove Judicial Discretion, and Disincentivize Resort to Courts

This Note suggests that the FAA should be amended to include an explicit rule barring U.S. courts from refusing to recognize or enforce an international commercial arbitral award which has been set aside solely on the grounds of being contrary to the public policy of the place of arbitration.

The amendment would fit most naturally in § 207 of the FAA, titled “Award of arbitrators; confirmation; jurisdiction; proceeding,” which is incorporated by § 302 to apply to the Panama Convention as well. Section 207 states in its entirety:

> Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration. The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.

The amended language this Note proposes adds a sentence prohibiting courts from refusing to enforce awards which have been set aside on public policy grounds:

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78. Li Hu, Enforcement of the International Commercial Arbitration Award in the People’s Republic of China, 16 J. Int’l Arb. 1, 15 (1999) (“The situation that the award . . . has been suspended by the competent authority does not exist under the Chinese arbitration system.”).


Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration. The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in Article V of the said Convention. The court shall refuse to recognize an award which has been set aside or suspended by a competent authority in the country in which, or under the laws of which, that award was made only if the competent authority set aside or suspended the award on the grounds specified in Article V(1)(a-d).

Such a rule would have allowed the Pemex court to easily dispose of the case. In ruling on the action to enforce the annulled award, the court would have needed only to consider why the award had been annulled. Since the award in Pemex was not annulled on a ground specified under Article V(1)(a-d)—(a) incapacity of parties or invalidity of the arbitration agreement, (b) lack of notice of arbitration or inability of party to present its case, (c) the dispute was outside the terms of the agreement or the decision was beyond the scope of submission to arbitration, or (d) the composition of the tribunal or the procedure of the arbitration was improper—the court would have easily ruled that the award would be recognized. With this proposed amendment, there would have been no need for the court to analyze, and essentially rule on, the decisions of the Mexican court. It would not have been necessary for the court to weigh Mexican public policy against U.S. public policy or rely on “basic notions of justice,” an uncomfortably malleable term.

More importantly, both parties would have been spared considerable time and expense litigating the set aside actions. PEP, the party resisting enforcement, simply would not have had any incentive to seek set aside if U.S. domestic law clearly stated that the award would still be enforced. Looking forward, such a rule would discourage disgruntled respondents from seeking set aside in the absence of the procedural defects contemplated by the New York Convention in the first four subparts of Article V. Ultimately, it may discourage set aside actions altogether when enforcement is sought in the United States, because the same procedural issues used to challenge an award through set aside under Article 34 of the UNCITRAL Model Law are available to challenge the recognition and enforcement of awards under the New York Convention. Therefore, parties might simply raise those
issues when resisting the enforcement action. Such a rule would serve the goals of arbitration in general by providing a clear guide to when set aside awards could be enforced in the United States.

In addition to no longer ruling on the decisions and reasoning of foreign judiciaries, U.S. courts would no longer need to avoid the clear statutory language of the FAA when asked to refuse to recognize an award when doing so appears to violate “basic notions of fairness.”

B. The Proposed Amendment Would Be Consonant with the Goals of U.S. Policy and with U.S. Precedent

The proposed amendment to the FAA would reflect U.S. courts’ historical approach to suits to enforce international arbitral awards. Such a rule also serves U.S. public policy: by ensuring enforcement of awards set aside on public policy grounds, it reflects the clear U.S. policy in favor of enforcement of awards.

While U.S. courts have not used public policy to justify vacating arbitral awards, they have used public policy in favor of enforcement to justify enforcing arbitral awards. Shortly after the United States acceded to the New York Convention in 1970, the pro-enforcement U.S. policy towards international awards was articulated when the Southern District of New York was asked to refuse to enforce an international arbitral award. In Parsons and Whittemore, Overseas, a U.S. construction company, had contracted with RAKTA, an Egyptian corporation, to construct and operate a paperboard mill in Egypt. Shortly after the outbreak of the Six Day War in 1967, the Egyptian government expelled American citizens and Overseas stopped construction on the mill when it was close to completion, citing force majeure. RAKTA undertook to complete the work and, arguing that special visas were available, initiated arbitration to seek damages for breach of the contract.

With the award issued in its favor, RAKTA sought to enforce it in the United States and Overseas resisted offering a number of arguments against enforcement, including that enforcement of the award violated U.S. public policy, that the award contemplated matters that were not

83. Id. at 973.
84. Id.
arbitrable, that Overseas had been denied an adequate opportunity to present its case, and that the award addressed issues outside the scope of agreement to arbitrate. The Second Circuit upheld the enforcement of the award, finding that there was a strong pro-enforcement bias in the New York Convention, which had been adopted in an effort to remove preexisting obstacles to enforcement, and that this pro-enforcement bias pointed to a narrowing of the public policy defense. The court noted that embracing a liberal public policy defense would lead to less enforcement of US awards abroad and that extensive judicial review of arbitral awards “frustrates the basic purpose of arbitration, which is to dispose of disputes quickly and avoid the expense and delay of extended court proceedings.”

This pro-enforcement bias alone is not enough to ensure enforcement of awards that have been set aside, however. While the Pemex court relied on the discretion of the Panama and New York Conventions to enforce an annulled award, U.S. courts did not initially interpret the New York Convention as granting them the discretion to enforce annulled arbitral awards. In Spier v. Calzaturificio Tecnica, S.p.A., Spier was an engineer who entered into a contract with an Italian shoemaker regarding the manufacture of footwear. After the Italian arbitral tribunal issued an award in favor of the engineer, he initiated an action to enforce it in the United States and the Italian manufacturer subsequently attempted to have the award set aside by the Italian courts. The court ultimately relied on Article VI of the New York Convention to defer the proceedings, avoiding what has been referred to in arbitration literature as “double control.” Prior to

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85. Id. at 973-74.
86. Id.
87. Id. at 977 (quoting Saxis S.S. Co. v. Multifacs Int’l Traders, Inc., 375 F.2d 577, 582 (2d Cir. 1967)).
89. Id.
90. New York Convention, supra note 1, art. VI (“If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(c), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.”); see also Gerald W. Ghikas, Principled Approach to Adjourning the Decision to Enforce under the Model Law and the New York Convention, 22 ARB. INT’L 53, 53 (2006) (“‘Double control’ refers to a situation where two different courts may be asked concurrently to determine the same issues, one in the context of an application to enforce an award, and one in the context of an application to set aside the same award.”).
reaching this conclusion, however, the court noted that the New York Convention, itself a compromise between national interests and international aspirations, “specifically provides that the foreign award will not be enforced if the award has been set aside . . . even if . . . the foreign award is facially binding on the parties.”

This attitude changed with the Chromalloy case. Perhaps the most infamous U.S. case regarding the enforcement of arbitral awards, it was also the first in which an annulled award was enforced. In Chromalloy, a U.S. company entered into a contract with the Egyptian Air Force in which it would maintain and repair helicopters. After three years, Egypt cancelled the contract and Chromalloy initiated arbitration as agreed in the contract. The arbitral tribunal, sitting in Egypt, issued an award in Chromalloy’s favor, and Chromalloy sought to enforce the award in the United States. Egypt subsequently sought and obtained a set aside of the award by an Egyptian court. Writing that this was the first time a U.S. court had been requested to refuse to enforce a valid arbitral award, the U.S. district court noted the discretion it had under the New York Convention permitting, but not requiring, it to refuse to enforce the award. Basing its reasoning on the “unmistakable” U.S. public policy in favor of final and binding arbitration of commercial disputes, the court found that recognizing the Egyptian court’s decision would violate U.S. public policy, and instead enforced the arbitral award. In its opinion, the court did not expound or analyze the reasoning of the Egyptian court. Instead, it interpreted Article VII of the New York Convention to permit the plaintiff to enforce the award as if it were a domestic award under the FAA. Chromalloy has been

91. Spier, 663 F. Supp. at 875 (internal quotation marks omitted).
93. Id.
94. The reported case does not discuss the reasoning of the Egyptian Court of Appeals, but does state that “the [U.S. District] Court assumes that the decision of the Court of Appeal at Cairo is proper under applicable Egyptian law.” Id. at 914 n.6. Later scholarship, however, revealed that the decision was based on the arbitral tribunal’s failure to apply Egyptian administrative law. Stephen T. Ostrowski & Yuval Shany, Chromalloy: United States Law and International Arbitration at the Crossroads, 73 N.Y.U. L. Rev. 1650, 1667-68 (1998).
96. Id. at 913.
97. Id. at 909 (interpreting New York Convention art. VII which states that the Convention “shall not deprive any interested party of any right he may have to avail himself of an arbitral award . . . to the extent allowed by the law or the treaties of the country where the award is sought to be relied upon”). The court effectively interprets the New York Convention to eliminate itself. Id. at 910 (“Under the Convention, [Chromalloy] maintains all rights to the enforcement of this
criticized, both for analyzing the case under the act of state doctrine and international comity, and for misapplying Article VII to effectively apply domestic arbitration law.

Despite the U.S. public policy favoring enforcement of international awards, *Chromalloy* did not usher in an era of enforcement of set aside arbitral awards, and U.S. courts were not soon directly faced with the question of recognizing and enforcing arbitral awards set aside on public policy grounds. Later cases addressing the issue of annulled awards dealt with awards which were set aside for procedural grounds more resonant with the grounds listed in Article V(1)(a-d) of the New York Convention. The amendment proposed by this Note would be consistent with those decisions.

In *Baker Marine*, for example, a barge company operating in Nigeria obtained an arbitral award from a Nigerian arbitral tribunal which was subsequently set aside by a Nigerian court. The award was set aside for a variety of reasons that were largely procedural, including that the arbitral tribunal had “improperly awarded punitive damages, gone beyond the scope of the submissions, incorrectly admitted parole evidence, and made inconsistent awards.” Nothing in the U.S. opinions suggests that the Nigerian court had set the award aside for more substantive or public policy reasons. Relying on Article V(1)(e) of the New York Convention, the U.S. District Court declined to enforce the award and the Second Circuit affirmed this decision. In its argument to the Second Circuit, *Baker Marine* noted that the language of Art. V(1)(e) was permissive and that the District Court had discretion to enforce the award despite its nullification. The Second Circuit rejected this: “It is sufficient answer that *Baker Marine* has shown no adequate reason for refusing to recognize the judgments of the Nigerian court.” The award in *Baker Marine*, having been set aside for, among other things, the arbitrators having made a decision beyond the scope of the submission to arbitrate, would still be refused enforcement under the proposed amendment.
More directly anticipating the court’s analysis in the *Pemex* case, *TermoRio* framed the inquiry of courts in suits to recognize and enforce set aside awards as an examination, under U.S. public policy, of foreign courts’ decisions, rather than of recognition and enforcement of the awards themselves.105 In *TermoRio*, an Oregon company contracted with a state-owned utility in Colombia to build a power plant; through subsidiaries the U.S. company would produce electricity that the public utility would in turn purchase.106 As a result of Colombia privatizing its utility company, the public utility was left without resources to purchase electricity under its obligations and the parties entered arbitration.107 The arbitration took place in Colombia and, after an award was issued in favor of the U.S. company, Colombia had the award set aside by Colombian courts on the basis that Colombian law did not permit the use of ICC rules in arbitration.108 The U.S. company and its subsidiary sought to have the award enforced in a U.S. district court despite the fact that it had been set aside in Colombia.109 The U.S. district court noted that, following *Baker Marine*, the arbitral award could not be enforced “unless the Colombian courts’ decisions violated U.S. public policy,” and that a foreign court’s decisions are only contrary to U.S. public policy if they are “repugnant to fundamental notions of what is decent and just in the [United States].”110 The U.S. court concluded that, though the Colombian court’s decision was “results-oriented,” its decision did not reach this standard, and therefore the U.S. court found that it could not enforce the arbitral award due to the Colombian nullification.111 The Court of Appeals affirmed the district court following similar reasoning.112 The amendment to the FAA proposed in this Note would also be consistent with the decision in *TermoRio*: the award here was set aside because the agreement to arbitrate was invalid under Columbian law. Under the proposed amendment, this is one of the limited, procedural grounds for set aside under which a U.S. court would be obligated to refuse recognition.

105. *Cf.* New York Convention, *supra* note 1, art. V(2)(b) (“The recognition or enforcement of the award would be contrary to the public policy of that country.”).


107. Id.

108. Id.

109. Id. at 91.

110. Id. at 101 (quoting Tahan v. Hodgson, 662 F.2d 862, 864 (D.D.C.1981)) (internal quotation marks omitted).

111. Id. at 102.

U.S. public policy regarding arbitral awards is dominated by the pro-enforcement bias announced in *Parsons and Whittemore*, which consistently outweighs other putative public policies asserted by litigants opposing enforcement, even those that might be argued to touch upon “basic notions of justice.” In *Karaha Bodas*, a Cayman Islands company contracted with state-owned utilities to build and operate a geothermal plant in Indonesia. The government of Indonesia postponed the project indefinitely, ultimately resulting in the state-owned utilities not purchasing the electricity as specified in the contract, and the construction company initiated arbitration. The tribunal issued an award in favor of the construction company, which then sought to enforce the award in Texas. The utility company opposed the enforcement under Article V(1)(d), arguing that the composition of the arbitral tribunal was not as contemplated in the arbitration agreement; under Article V(1)(b), arguing that it was not given proper notice of the appointment of the arbitrators; and under Article V(2)(b), arguing that enforcing the award would violate U.S. public policy because it violated “the doctrine of abuse of rights”—akin to “good faith”—and would hold the company liable for refusing to violate Indonesian law. The court enforced the award, finding that the record did not support the allegations of procedural defects. In addressing the public policy issues, the court found the abuse of rights argument completely unfounded, concluding that the award did not hold the utility liable for refusing to violate the law. Instead the tribunal found that the contract had allocated the risk of an adverse “government related event” and that the award properly respected the contractual obligations.

Other appeals to public policy in support of refusing an award have underscored the dominance of the U.S. pro-enforcement policy and illuminated the limited scope of potentially successful public policy arguments against enforcement. In *Chevron*, Chevron and Texaco contracted with Ecuador to allow them to extract crude oil from that country’s reserves in exchange for providing reduced prices for crude

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114. *Id. at 940.
115. *Id. at 942.
116. *Id. at 945.
117. *Id. at 952.
118. *Id. at 957.
119. *Id. at 957.
oil to meet Ecuador’s domestic needs. After a dispute arose, the oil companies initiated arbitration, an arbitral tribunal in the Hague awarded them significant damages, and they sought to enforce the award in the United States. Ecuador sought unsuccessfully to have the award set aside by the Dutch district court, and subsequently opposed the enforcement of the award in the United States. In addition to arguing that the award dealt with issues outside of the scope of the arbitration agreement per New York Convention Article V(1)(c), Ecuador made an argument that the award should not be enforced under the public policy grounds of Article V(2)(b), contending both that enforcing arbitral awards beyond the scope of arbitration agreements and that flouting Ecuador’s sovereignty by enforcing the award while litigation was still pending in Ecuadorian courts would be contrary to U.S. public policy. Repeating the standard that the public policy defense applies “only where enforcement would violate the forum state’s most basic notions of morality and justice,” the court enforced the award, finding that the threshold for refusing the enforcement of arbitral awards on public policy grounds was “extraordinarily high” and “extremely narrow[,]” and that Ecuador’s arguments did not meet that standard.

These cases demonstrate that a strong pro-enforcement bias is enough to decide every case considered by U.S. courts, with the caveat that U.S. courts are willing to respect foreign courts’ determination of the standards of procedural fairness within their jurisdiction. The proposed amendment to the FAA is consistent with this precedent in that it enshrines the U.S. pro-enforcement policy by further reducing the opportunity for refusal of enforcement of awards, without changing the substantive law so much that previous cases would have been decided differently.

The amendment however improves upon the law in two ways. First, in the preceding review of the case law it is noteworthy that, while the combined language of the current FAA and the New York Convention clearly prohibits recognition and enforcement of awards which have been set aside by competent authorities of the place of arbitration, U.S. courts nevertheless entertain arguments to recognize and enforce these awards and are occasionally convinced by them. The proposed

121. Id.
122. Id.
123. Id. at 60.
124. Id. at 69.
amendment to the FAA would correct this misapplication of domestic law by clearly delineating when arbitral awards set aside by courts of the place of arbitration will be enforced and when they will not.

Second, when deciding suits to recognize or enforce annulled awards, U.S. courts have not limited their public policy analysis to the recognition and enforcement of the award, but have extended it to the decisions of foreign courts. In the recent Pemex case Judge Hellerstein reported that “I base my decision not on the substantive merit of a particular Mexican law, but on its application to events that occurred before that law’s adoption.”125 Beyond the added time and expense, making such inquiries is counterproductive in the field of international commercial arbitration, as the New York Convention was motivated, in part, by a desire to avoid the problems related to the recognition of foreign judgments.126 The amendment proposed in this Note would save U.S. judges from having to make this sort of inquiry, as they would need to consider neither the substantive law of the arbitral seat, nor its application. All that would be required is a quick review of the foreign court’s justification for setting aside an award.

C. The Proposed Amendment Would Be Consonant with the Goals of Arbitration, the New York Convention, and UNCITRAL

Two main reasons why parties to an international commercial contract choose to arbitrate are neutrality and enforcement.127 The promise of a neutral tribunal in a neutral forum rendering a decision which can be readily enforced in almost any jurisdiction is designed to encourage confidence in contracting parties who may be deeply suspicious of each other’s legal systems and uncertain that judgments from their home country would be enforceable in any foreign country where the opposing party’s assets might be located.128


126. See, e.g., NEW YORK CONVENTION: CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS OF 10 JUNE 1958 COMMENTARY, supra note 15, at 12 (“The 1927 Geneva Convention [the predecessor to the New York Convention]... conferred a major role on the courts in the Contracting state in which the arbitral award was made... such a reliance on domestic laws... allowed the parties against whom enforcement was sought to raise numerous objections and hence to delay or avoid enforcement of the award.”).

127. NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 31 (5th ed. 2009).

128. Id. at 31-32.
If evaluated under these twin goals of international arbitration—neutrality and enforceability—the inquiry into Mexican law that the Pemex court was forced to make in order to reach its decision was counterproductive: it is easy to read the decisions of the U.S. district court and the Mexican court of appeals, as essentially partisan and biased to their own nationals. A cynical observer might conclude that the U.S. court was dodging its responsibility to refuse enforcement under the FAA, and applying a vague standard like “basic notions of justice,” in order to find for the U.S. claimant and score one for the home team. A clear, and clearly articulated, rule would put any aspersions of bias in U.S. courts to rest. Likewise, though the award ultimately ended up being enforceable, its enforcement did not appear reasonably certain at any point before the confirmation of the award. If the goal is for foreign arbitral awards to be reliably enforceable, then this case is evidence that things are more uncertain than the New York Convention contemplates.

The relationship between the parties and courts in the Pemex case underlines the potential lack of neutrality that an arbitral regime favoring recourse to courts might create. If the situation were different than the Pemex case and the party seeking enforcement in U.S. courts was not a U.S. national, the potential for a lack of neutrality might be much less, but the reliability of enforcement remains questionable: if one party has had the award set aside as contrary to the public policy of the arbitral seat and its opponent seeks enforcement of the annulled award in U.S. courts, will it be enforced? Following Pemex, the answer is unclear and seems to entail a fact-intensive inquiry under a vague standard. Under the amendment recommended by this Note, the answer is clearly yes.

It is clear that parties agree to arbitrate if and when disputes arise in order to avoid recourse to courts—this may be due to a belief that courts will not be impartial, because the parties may choose which substantive law or procedural rules will apply to resolving the dispute, or so that the parties may dictate other relevant factors such as language, location or the expertise of the decision makers.129 If the U.S. legal regime governing the enforcement of international arbitration awards incentivizes both seeking set aside at the place of arbitration for indefinite “public policy” reasons and seeking to enforce awards that have been set aside, then recourse to courts is not only not

avoided, but encouraged, and arbitration risks become a prelude—rather than an alternative—to litigation.

Arbitration is also often chosen as a dispute resolution method because it is thought to be cheaper and faster than resolving disputes in court.\textsuperscript{130} If the award might or might not be enforced after a fact-intensive inquiry by a court under a vague standard, parties are encouraged to pursue applications for set aside and to pursue the recognition of nullified awards. This increased recourse to courts, however, may destroy the advantages of economy and speed by drawing out the dispute and racking up litigation costs on both sides.

The amendment proposed by this Note would disincentivize recourse to courts, at least when enforcement is ultimately sought in the United States, by providing a clear rule that parties to a dispute may rely on. A clear rule would then exist under U.S. law that enforcement of a set aside award will only be refused if the award was set aside under the limited procedural reasons of Article V(1)(a-d) of the New York Convention (or Article 5(1)(a-d) of the Panama Convention), unhappy parties would only seek set aside in those limited cases—which incidentally could also be relied upon by the party to resist enforcement in U.S. courts without set aside—and there would be nothing to encourage them to seek set aside under any other theory. The facts of the Pemex case show the respondent PEP making several attempts to have a Mexican court set aside the arbitral award before they were successful. Each attempt required both parties to litigate. If PEP had clearly known that its eventual success in acquiring a set aside on public policy grounds would not have precluded enforcement in the United States, it would not have undertaken such effort. Likewise, a clear rule would have saved both parties time and money in the U.S. litigation, as there would have been no need to pursue refusal if no uncertainty existed about the fate in U.S. courts of an award set aside on public policy grounds.

V. IS PUBLIC POLICY STILL PROTECTED? POSSIBLE COUNTERARGUMENTS TO THE PROPOSED AMENDMENT

Several objections might be made to the FAA amendment proposed in this Note. I will briefly address three: that having no discretion to refuse to enforce awards set aside for public policy might limit U.S. courts’ ability to correct other procedural faults not covered by the grounds in Article V(1)(a-d) of the New York Convention; that the

\textsuperscript{130} Id.
public policy interests of the place of arbitration should be respected by U.S. courts; and that arbitral awards do not have a legal existence once they have been set aside and therefore nothing remains to be enforced.

A. Is Discretion to Refuse Enforcement Necessary to Preserve Procedural Fairness?

First, it might be argued that U.S. courts should retain discretion to refuse recognition and enforcement of awards set aside on public policy grounds because the foreign court setting aside the award could have done so on a “public policy” ground that really protects basic procedural fairness. In other words, the award has been set aside on a public policy ground that is consonant with U.S. public policy and would be supported by U.S. courts. This idea is reminiscent of the United Kingdom’s concerns with abandoning set aside on public policy grounds during the drafting of the Model Law: that public policy could be used to catch procedural faults which were not covered by the other grounds for set aside.131 Examples were arbitrator mistake, perjury, or discovery of new evidence.132 This is much less of a concern in the United States, because “the United States Arbitration Act contains no provision for judicial determination of legal issues such as is found in the English law.”133 Matters of evidence and witness credibility, questions of fact or law on the merits, are all determined by the arbitrators and will not be reviewed by the courts.134 U.S. courts defer to arbitrators’ determinations of the issues that might be bundled up under the U.K.’s version of public policy.

Though it is less of a concern in the United States, additional concerns over procedural fairness beyond those in Article V(1)(a-d) have proven determinative in U.S. rulings on the enforcement of arbitral awards, as they did in the Pemex case with the court’s concern for “basic notions of justice.” The simplest response to this objection is that, under the New York Convention Article V(2)(b), U.S. courts will always have the option to refuse to recognize and enforce an award.

132. Id.
which is contrary to U.S. public policy. Under my proposed amendment, if procedural defects existed in an arbitration which were serious enough to implicate “basic notions of justice” and yet were not covered under Article V(1)(a-d), U.S. courts would still be able to refuse to enforce the arbitral award, even if it was set aside on a public policy ground. The court in that situation would be free to refuse recognition and enforcement of the award without considering the set aside at all. The fact that a court in the place of arbitration had set the award aside on similar grounds would be independent of the U.S. inquiry. The sole effect of the amendment would be to relieve U.S. courts of the obligation to enforce the public policy of another state.

B. Should U.S. Courts Respect the Public Policy of Foreign States?

Second, it might be argued that the public policy interests of the place of arbitration should be respected by U.S. courts, particularly because many countries may have ratified the New York Convention with an understanding that they retained an ability to annul awards which were contrary to their public policy, and that such annulment would be honored by other parties to the Convention. If this is true, and the United States adopts a rule that awards set aside on public policy grounds will be enforced, then it may appear that the United States is not honoring its obligations under the Convention. A first response to this objection is again that under Article V(2)(b) of the New York Convention every country has the right to refuse to recognize and enforce an award if it is contrary to that country’s public policy. In the Pemex case, the Mexican court’s set aside of the arbitral award effectively prohibited the enforcement of the award in Mexico, a ruling completely in line with Mexico’s rights under the Convention. Nothing about a proposed amendment to U.S. law interferes with another

135. New York Convention, supra note 1, art. V(2) (b) (“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: . . . The recognition or enforcement of the award would be contrary to the public policy of that country.”).

136. See, e.g., U. N. Comm’n on Int’l Trade Model Law on Int’l Commercial Arbitration, Explanatory Note by the UNCITRAL Secretariat on the Model Law on Int’l Commercial Arbitration, ¶ 46 (1985) (“The setting aside of an award at the place of origin prevents enforcement of that award in all other countries by virtue of article V(1)(c) of the 1958 New York Convention and article 36(1) (a) (v) of the Model Law.”). Article 36 of the UNCITRAL Model Law, supra note 13, also employs the word “may” rather than “shall,” so such an unequivocal statement by the Secretariat is evidence that the word “may” was not widely interpreted as granting discretion.
country's ability to assert its public policy when deciding on recognition of foreign arbitral award. A second response to this objection is that, as discussed above, the text and history of the New York Convention demonstrate that the discretion provided under Article V was conscious and intentional, and parties to the Convention ratified it as it was written, so a country which chooses to enforce set aside awards does so within its rights under the Convention. As discussed earlier, the United States would not be the only country to do so.137

C. Do Set Aside Awards Still Legally Exist?

Third, it might be argued that an arbitral award no longer legally exists to be enforced after it has been set aside, regardless of the justification, and therefore there is nothing for a court considering enforcement of an annulled award to enforce. Debate over the continued legal existence of an annulled award divides legal theorists into roughly three camps. The two contrasting poles of the spectrum are the “territorialist” or “monolocal” camp, holding that the courts of the place of arbitration have the ultimate authority over arbitral awards and that an annulled award is non-existent and unenforceable, and the “internationalist” or “delocalized” camp, holding that awards have an existence independent of the place of arbitration and are enforceable despite being annulled there.138 In the middle, there is the “Westphalian” view, under which the award is neither controlled solely by the law of the place of arbitration nor by an international order with a legal regime separable from any specific country; under this view, each country has equal claim to impose its own legal norms on the arbitral award when acting within its jurisdiction.139

A view of arbitral awards having a distinct existence separate from domestic law has a realist slant, as the rights of the parties are not technically determined by the law of the seat but may vary considerably in relation to the same dispute depending on the national system ruling on an award.140 One prominent commentator notes, “it is difficult in today’s world reasonably to resist the conclusion that the transnational arbitral process is something apart from purely national

137. See supra Part III.C.
139. EMMANUEL GAILLARD, LEGAL THEORY OF INTERNATIONAL ARBITRATION 118 (2010).
Despite the legal or philosophical issues the practice raises, case law reveals that U.S. courts can and do enforce nullified arbitral awards, and that courts of other countries can and do enforce nullified awards.

At least empirically, the Westphalian model best describes actual practice: whether a nullified award exists after nullification is determined by domestic law in the country where enforcement is sought. France is the leading jurisdiction holding that nullified awards continue to exist, and that international arbitral awards are solely international in nature. Chinese law attaches no significance to set aside, so in China they must also exist. In Belgium, nullified awards continue to exist, as well as in the Netherlands and Austria.

Because U.S. courts have entertained suits to recognize nullified arbitral awards and occasionally have recognized them (Chromalloy, Pemex), domestic law holds that these awards have an independent legal existence. The indirect codification of this existence that would accompany amending the FAA to mandate recognition of awards annulled only on public policy grounds would make this fact explicit and more predictably applied. The amendment proposed by this Note would thereby agree with the Westphalian interpretation which has been adopted, albeit indirectly, by U.S. courts.

VI. CONCLUSION

This Note has argued that the FAA should be amended to preclude courts from refusing to recognize and enforce foreign arbitral awards which have been set aside as contrary to public policy by courts in the place of arbitration. Such an amendment would address the problems illustrated by the recent Pemex case in which the court was asked to...
recognize and enforce an arbitral award which had been set aside by a court in Mexico. The court in that case chose to ignore its obligation to refuse enforcement under the FAA as it currently stands and to focus instead on Mexican law and its application to that particular dispute, ultimately grounding its decision in a vague standard, “basic notions of justice.” By articulating a clear rule, the proposed amendment would spare courts from embarking on this line of investigation, and would discourage litigants from spending the time and money seeking set aside or seeking enforcement of an annulled award. The amendment is also consonant with U.S. precedent, well-established U.S. public policy, and the practice of many other countries.