

CITATION: Vento Motorcycles, Inc. v. United Mexican States, 2023 ONSC 5964
COURT FILE NO.: CV-20-00649664-0000
DATE: 20231023

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
VENTO MOTORCYCLES, INC.) *John Terry and Myriam Seers, for the*
) Applicant)
)
- and -)
)
THE UNITED MEXICAN STATES) *Vincent DeRose, Jennifer Radford and*
) *Stephanie Desjardins, for the Respondent*
 Respondent)
)
)
)
)
) **HEARD:** May 2, 2023

2023 ONSC 5964 (CanLII)

VERMETTE J.

REASONS FOR JUDGEMENT

[1] The Applicant, Vento Motorcycles, Inc. (“**Vento**”), has brought this application to set aside an award dated July 6, 2020 (“**Award**”) rendered by an arbitral tribunal (“**Tribunal**”) in an arbitration administered by the International Centre for Settlement of Investment Disputes (“**ICSID**”) pursuant to the ICSID Arbitration (Additional Facility) Rules (“**ICSID Rules**”).

[2] Vento seeks to set aside the Award on two grounds:

- a. Vento was unable to present its case because the Tribunal refused to allow one of its witnesses, Mr. José Alberto Ortúzar Cárcova, to testify in response to a recording used to impeach his credibility; and
- b. there is a reasonable apprehension that one of the arbitrators, Mr. Hugo Perezcano, was biased because while the arbitration was ongoing, the Respondent (“**Mexico**”) offered opportunities to him that were not disclosed.

[3] After considering the evidence and the parties' submissions, I decline to set aside the Award. With respect to the first ground raised by Vento, Vento has not established that the Award should be set aside for reasons of fairness or natural justice. Vento was able to present its case and the conduct of the Tribunal about which Vento complains does not offend our most basic notions of morality and justice. With respect to the second ground, I find that Vento has demonstrated a reasonable apprehension of bias in relation to Mr. Perezcano. However, I exercise my discretion not to set aside the Award because the reasonable apprehension of bias did not undermine the reliability of the result and did not produce real unfairness or real practical injustice. The Award was unanimous and the other two arbitrators were not "tainted" by Mr. Perezcano.

A. FACTUAL BACKGROUND

1. The arbitration and the constitution of the Tribunal

[4] Vento is a U.S.-based manufacturer of motorcycles. In 2001, it entered into a joint venture agreement with a Mexican company for the sale and marketing of motorcycles in Mexico.

[5] Vento brought the arbitration claim in issue in this case pursuant to Chapter 11 of the North American Free Trade Agreement ("NAFTA"). The dispute between the parties is described as follows in the Award:

The dispute relates to Mexico's denial of NAFTA preferential *ad valorem* import tariffs to motorcycles assembled by [Vento] in the United States and exported to Mexico, which allegedly culminated in the impairment and ultimate destruction of [Vento's] business under a joint venture agreement that it entered into with MotorBike, S.A. [...] for the sale and marketing of motorcycles in Mexico [...].

[6] In accordance with Article 1123 of NAFTA, the Tribunal was comprised of three arbitrators: one arbitrator appointed by each of the parties, and the third arbitrator – the presiding arbitrator – appointed by agreement of the parties.

[7] On November 3, 2017, Vento appointed Professor David Gantz, a national of the United States of America, as arbitrator. Professor Gantz accepted the appointment on November 10, 2017. On November 17, 2017, Mexico appointed Mr. Hugo Perezcano, a national of Mexico, as arbitrator. Mr. Perezcano accepted the appointment on December 5, 2017. Dr. Andrés Rigo Sureda, a national of Spain, was subsequently appointed as the President of the Tribunal by the Secretary-General of ICSID following an agreed-upon strike-and-rank selection process. Dr. Sureda accepted his appointment on January 18, 2018, and the Tribunal was constituted on January 19, 2018.

[8] Article 13 of the ICSID Rules requires that an arbitrator, before or at the first session of the arbitral tribunal, provide a statement of: (a) the arbitrator's past and present professional, business and other relationships (if any) with the parties; and (b) any other circumstance that

might cause the arbitrator's reliability for independent judgment to be questioned by a party. The arbitrator is also required to sign a declaration that, among other things, acknowledges the arbitrator's continuing obligation to notify the Secretary-General of the ICSID promptly of any relationship with the parties or any circumstance that arises during the proceeding and that might cause the arbitrator's reliability for independent judgment to be questioned by a party.

[9] All three arbitrators provided the parties with a declaration of their independence and impartiality and, if applicable, a disclosure statement. Mr. Perezcano's statement disclosed that, because of his professional career, he knew officials of Mexico's Ministry of Economy (*Secretaría de Economía*) ("SE"). Mr. Perezcano also disclosed that he had a friendly relationship with one of Vento's counsel and one of the other arbitrators (Professor Gantz). He stated the following:

[...] This group of persons are well acquainted with my professional career, specifically my having acted as lead counsel for Mexico on trade and investment matters from 1994 through 2006, including in several North American Free Trade Agreement (NAFTA) Chapter Eleven and similar dispute settlement cases; my having been the head of Mexico's trade remedy authority at the Secretariat of the Economy from 2007 to the end of 2011; and my having advised private and public clients on international trade and investment matters from 2012 up to May 2017. I did not act as counsel for any client on any dispute settlement proceedings since I left the Mexican government.

I ceased working for the Mexican government more than 7 years ago. [...]

[10] Vento did not take issue with Mr. Perezcano's disclosure statement at the time that it was made.

2. Procedural Order No. 1 and filing of materials

[11] On April 2, 2018, the Tribunal issued Procedural Order No. 1. ("**P.O. #1**") recording the agreement of the parties on procedural matters and the decision of the Tribunal on disputed issues. P.O. #1 provided, among other things, that:

- a. Toronto was going to be the place of arbitration.
- b. The arbitration proceedings were to be conducted in accordance with the ICSID Rules in force as of April 10, 2006, except to the extent that they were modified by Section B of NAFTA Chapter 11.
- c. Direct examination was to be given in the form of witness statements and expert reports.
- d. Witness statements, expert reports and their supporting documentation were to be filed as exhibits to the parties' pleadings.

- e. There would be two rounds of pleadings, with the following sequence: Vento's Memorial, Mexico's Counter-Memorial, Vento's Reply and Mexico's Rejoinder.
- f. Neither party would be permitted to submit additional or responsive documents after the filing of its respective last written submission, unless the Tribunal were to determine that exceptional circumstances existed based on a reasoned written request followed by observations from the other party.
- g. Neither party would be permitted to submit any testimony that had not been filed with the written submissions, unless the Tribunal were to determine that exceptional circumstances existed based on a reasoned written request followed by observations from the other party.
- h. A party could be called upon by the opposing party to produce at the hearing for cross-examination any factual or expert witness whose written testimony was advanced with the pleadings. A party was to notify the opposing party with respect to which witnesses and experts it intended to call for cross-examination within four weeks after the completion of the written procedure. Shortly after the parties' notifications, the Tribunal was to indicate which witnesses or experts, not called by the parties, it wished to question, if any.

[12] Pursuant to Article 41(1) of the ICSID Rules, the Tribunal was to "be the judge of the admissibility of any evidence adduced and of its probative value."

[13] On July 23, 2018, Vento filed its Memorial, accompanied by 38 exhibits, 106 legal authorities, 5 witness statements and 3 expert reports. One of the arguments advanced by Vento was that Mexico's conduct was arbitrary and discriminatory. According to Vento, officials of Mexico's Tax Administration Service¹ ("SAT"), acting under express "marching orders" (or *linea*), specifically targeted Vento and the joint venture operations, to the exclusion of Vento's competitors in Mexico, in order to reach a predetermined outcome for the purpose of driving Vento out of the Mexican motorcycle market.

[14] On November 12, 2018, Mexico filed its Counter-Memorial, accompanied by 84 exhibits, 34 legal authorities, 3 witness statements and 2 expert reports.

[15] On March 15, 2019, Vento filed its Reply, accompanied by 22 exhibits, 52 legal authorities, 4 second witness statements, 6 additional witness statements, 2 second expert reports and 3 additional expert reports. One of the additional witness statements was from Mr. José Alberto Ortúzar Cárcova ("**Mr. Ortúzar**"). Mr. Ortúzar is a former SAT official. He was the team leader of the audit team that carried out the verifications of origin for Vento. In his witness

¹ *Servicio de Administracion Tributaria.*

statement, Mr. Ortúzar refers to “the pressure we had on our bosses”, the pressure exerted by AMIA (Mexican Association of the Automotive Industry), as well as “the controversial nature of the case”. He also states the following:

In my opinion, my team and I were under unusual pressure and undue to resolve negatively the case of Vento because it was a foreign company that was distorting the market for low-capacity motorcycles in the Mexican market. This pressure, in my opinion, was due to the political environment generated at the time by some Japanese companies and AMIA itself.

[16] In addition, Mr. Ortúzar mentions in his witness statement that “during the month of October 2018, representatives of the Mexican government informed me that there was interest in giving my testimony in the Vento arbitration case, which I refused to do.”

[17] Mr. Ortúzar concludes his witness statement as follows:

Based on the foregoing, considering all the background and circumstances described in this testimony, in my opinion there is evidence of inconsistent or differentiated treatment by the Mexican government regarding the application of rule 2 (a) for similar cases in which There [sic] is import of motorcycle parts, to the detriment of a single company that is Vento and, consequently, for the benefit of the rest.

[18] On March 19, 2019, Vento transmitted two additional witness statements.

[19] On August 2, 2019, Mexico filed its Rejoinder, accompanied by 64 exhibits, 11 legal authorities, 3 second witness statements, 3 additional witness statements, 2 second expert reports and one additional expert report. One of the additional witness statements was from Ms. Itzel Ivón Martínez Hernández (“**Ms. Martínez**”). This witness statement attached a recording of a telephone conversation that Ms. Martínez and others had with Mr. Ortúzar on October 31, 2018 (“**Recording**”) and a transcription of the Recording. In its Rejoinder, Mexico took the position that Mr. Ortúzar’s credibility was undermined by the Recording.

[20] Among other things, Mexico states the following in its Rejoinder with respect to Mr. Ortúzar:

169. In fact, in the case of Mr. José Alberto Ortúzar Cárcova, the Respondent initially sought his Witness Statement in October 2018 through Mrs. Georgina Estrada Aguirre. According to the Witness Statement of Ms. Itzel Martínez, Mr. Ortúzar Cárcova said that he did not have time for the case and that he did not feel safe about the details of the events that happened a long time ago. It is not credible that Mr. Ortúzar later remembered so the relevant facts and events, as detailed in its statement of March 5, 2019. Particularly because he contradicts what was discussed by telephone with the officials of the Ministry of Economy in

the context of its potential participation as a witness. His Witness Statement is not credible.

[...]

176. The foregoing coincides with that indicated by Ortúzar himself in the telephone call he had with the officials of the Ministry of Economy, according to which, “[in] n [sic] the paper, the company devised a compliance scheme for a rule of origin based on the treaty, which looked pretty good on paper. Operationally and the way the operation was done is how the strategy was neglected. That could only be proven from the moment, not from a visit to the exporter that was Vento, but a visit to the supplier of the engine that was the AED company, and that had to be done at a later time”.

[...]

182. A weak claim based on the opinion of four individuals who now repudiate the work done in the exercise of their public functions, despite the fact that the documents, actions and the decisions of the Mexican courts themselves establish without a doubt that they adhered to the law, should not prosper. Even more when the statement of one of them [i.e., Mr. Ortúzar] contradicts not only with what has been explained to the officials of the Ministry of Economy, but with the documents officially signed under its responsibility.

3. Vento’s motion to strike the Recording and related evidence

[21] On August 28, 2019, Vento filed a request to strike the Recording and its transcription from the record, as well as references to the Recording in Ms. Martínez’s witness statement and in the body of Mexico’s Rejoinder memorial (i.e., the three paragraphs reproduced in paragraph 20 above). In the alternative, Vento requested that Mr. Ortúzar be allowed to testify further. Vento’s submissions in support of its request included the following paragraphs:

3. Mr. Ortúzar did not consent to the recording of this conversation. Indeed, at no time did Ms. Martínez, or any other MoE [Ministry of Economy] official listening to or participating in the call, inform Mr. Ortúzar that it was being recorded. Moreover, not only has Respondent only submitted an unauthenticated copy of this surreptitious recording, the copy submitted is obviously not a faithful recording of the entirety of the conversation held by Ms. Martínez, Mr. Pacheco, and Mr. Ortúzar on that day.

[...]

11. The surreptitiously recorded but incomplete audio file and transcript that Ms. Martínez attached to her witness statement should be considered inadmissible in these proceedings because:

- i. Allowing these documents – and any references to them – to remain in the record would be contrary to international public policy protecting Mr. Ortúzar’s right to privacy;
- ii. These documents were obtained in a manner inconsistent both with applicable ethical rules and with Respondent’s obligation to conduct itself in good faith; and
- iii. Respondent has failed to authenticate what it claims to be a complete recording of the conversation with Mr. Ortúzar.

[...]

32. In the further alternative, should the Tribunal determine that Respondent’s incomplete recording of Mr. Ortúzar’s telephone conversation with Mr. Pacheco and Ms. Martínez may remain on the record, the principles of procedural fairness and equality of arms require – at a minimum – that Mr. Ortúzar be afforded an opportunity to appear before the Tribunal and address Respondent’s allegations based on that partial recording of him in conversation with its counsel.

[...]

Conclusion

37. Allowing Respondent to use a manifestly incomplete and illicitly obtained recording in these proceedings would be inconsistent with international public policy, applicable international law, its obligation to act in good faith, and the principles of fairness and equality of arms. The Tribunal doubtless possesses the authority to strike such evidence from the record and prevent Respondent from being able to rely upon it.

[...]

[22] Together with its request to strike the Recording, Vento submitted a short witness statement from Mr. Ortúzar in which he stated, in part:

In this regard, I hereby declare that I was never informed at any time, nor was I aware that the telephone conversation was being recorded and much less my consent was sought either to have said telephone conversation recorded or reproduced.

I declare that I have always considered and I have the firm conviction that the telephone conversation I had with Mr. [sic] Martínez and Mr. Francisco Diego Pacheco was private and confidential in consideration to the topics discussed

therein. From the partially exhibited audio and transcription, it is clear that Respondent has taken various issues out of context and misunderstood what I commented. Of course, knowing that I was subjected to a surreptitious recording by Mexican government officials causes me a great surprise and profound annoyance.

Based on the foregoing, I hope to have the opportunity to appear before the Arbitral Tribunal to clarify and timely contextualize my testimony and answer any questions or questions [sic] that the arbitrators may have.

[23] I note that Vento's request in the alternative that Mr. Ortúzar be afforded an opportunity to appear before the Tribunal to address Mexico's allegations based on the Recording was not consistent with the procedure set out in P.O. #1. Further, Vento did not expressly argue that there were exceptional circumstances justifying the submission of additional testimony that had not been filed with the written submissions (see paragraph 11(g) above).

[24] Mexico filed submissions in response to Vento's request to strike the Recording on September 12, 2019. The submissions included the following paragraphs, among others:

[...]

31. The testimony of Lic. Martínez provides authenticity of the recording. Moreover, Mr. Ortúzar does not argue that the recording does not contain his words, but merely claims that it was taken out of context. The Tribunal can judge for itself the weight to be given to the evidence, specifically after reviewing the associated emails and text messages submitted by the Lic. Estrada together with her Witness Statement.

32. In terms of Article 41 of the ICSID Additional Facility Rules, "[t]he Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value." The Tribunal has broad discretion to determine the probative value of the evidence presented by both parties.

VI. Request to Testify

33. Claimant requests that Mr. Ortúzar be permitted to testify before the Tribunal to clarify "*Respondent's allegations based on that partial recording of him in conversation with its counsel*". That is not permitted under the procedures governing this arbitration. If every witness that has been aggrieved by being contradicted were given the right to testify, the parties would be deprived of control over the presentation of their own positions.

34. Additionally, it is significant that Claimant waited until the Reply stage to submit Mr. Ortúzar's Witness Statement. That was its choice, so its claims

relating to the impossibility of submitting an additional rebuttal to the Witness Statement of Lic. Martínez are unwarranted.

VII. Summary and conclusion

[...]

38. Respondent also notes that, if the Tribunal were to reject any aspect of Lic. Martínez and were to keep Mr. Ortúzar’s testimony on the record, there would be an imbalance in the treatment of the parties with respect to the presentation of evidence.

[...]

4. Procedural Order No. 7

[25] On October 2, 2019, the Tribunal ruled on Vento’s request to strike evidence in its Procedural Order No. 7 (“**P.O. #7**”). The Tribunal denied Vento’s request. P.O. #7 is short and is reproduced in its entirety below:

I. Introduction

1. Whereas,
2. On August 28, 2019, the Claimant requested that the Tribunal strike from the record in this arbitration Annexes 4 and 5 of the Witness Statement of Itzel Ivón Martínez Hernández; paragraph 13 of the Witness statement of Itzel Ivón Martínez Hernández; and paragraphs 169, 176 and 182 of Respondent’s Rejoinder Memorial.
3. The Claimant alleged that Ms. Martínez Hernández had recorded a telephone conversation that she and others had with Mr. Ortúzar, a witness for the Claimant, without his knowledge and consent, which was illegal and contrary to international public order because it infringed on Mr. Ortúzar’s right to privacy. The Claimant also questioned the authenticity of the recording. The Claimant added that, therefore, the Respondent had not acted in good faith in submitting the evidence in question. The Claimant requested, in the alternative, that Mr. Ortúzar be allowed to testify further in order to respond to the Respondent’s allegations.
4. On September 12, 2019, the Respondent requested that Claimant’s request be denied because in Mexico the recording of a conversation by a person who participated in that conversation is not illegal and does not infringe on the right to privacy, which does not apply as between persons participating in a conversation, even if some of the participating parties are public

officials, Mr. Ortúzar does not question the correctness of what he said but that it was taken out of context, and the request for further testimony of Mr. Ortúzar is not permissible in this proceeding.

II. Analysis

5. The Tribunal observes that the conversation took place in Mexico and according to the evidence provided by the Respondent, recording a conversation in Mexico by one of the participating parties is not prohibited or otherwise illegal, even if the recording was made without other participating parties' knowledge.
6. The Tribunal is persuaded by the Respondent's explanation of why the recording was made and why it saw a need to seek testimony from Ms. Martínez regarding what Mr. Ortúzar had told her and to provide her testimony, the recording and the transcript as evidence.
7. Ms. Martínez herself testified that she participated in the conversation and recorded it.
8. Therefore, the Tribunal has decided as follows.

III. Order

9. To deny the Claimant's request to strike Annexes 4 and 5 of the Witness Statement of Itzel Ivón Martínez Hernández, paragraph 13 of the Witness statement of Itzel Ivón Martínez Hernández, and paragraphs 169, 176 and 182 of the Respondent's Rejoinder.
10. To deny the request for an additional witness statement of Mr. Ortúzar.

[26] The Tribunal did not directly address in its analysis Vento's request that Mr. Ortúzar be allowed to testify before the Tribunal to respond to Mexico's allegations. This may be because P.O. #1 provides that direct examination was to be given in the form of witness statements. The Tribunal expressly did not allow the filing of an additional witness statement of Mr. Ortúzar.

5. The Tribunal's Award

[27] The hearing of the arbitration took place on November 18-22, 2019 in Washington, D.C. Thirteen witnesses were cross-examined during the hearing. Vento elected not to call Ms. Martínez for cross-examination and Mexico elected not to call Mr. Ortúzar for cross-examination. The parties submitted post-hearing briefs on February 12, 2020.

[28] The Tribunal issued its Award on July 6, 2020. The Award contains 340 paragraphs and is more than 100 pages long. The Tribunal unanimously found that Mexico did not breach its

obligations under NAFTA and it dismissed Vento's claims on the merits. Among other things, the Tribunal rejected Vento's claim of breach of NAFTA Article 1105 for lack of due process, arbitrariness or discriminatory treatment. The Tribunal did not accept Vento's arguments regarding "marching orders" and found that "[t]here was no mysterious hand that rocked the cradle."

[29] After the arbitration, the parties were provided with a statement of costs. The fees claimed by each arbitrator were as follows: (1) Dr. Sureda (President) – \$97,250.00; (2) Professor Gantz – \$64,312.50; and (3) Mr. Perezcano – \$203,250.00.

6. Communications between Mexican officials and Mr. Perezcano during the arbitration

[30] After the Award was released, Vento found out through various means – including through access to information requests and this proceeding – that Mexican officials had had undisclosed communications with Mr. Perezcano during the arbitration. The communications in issue all involved Mr. Orlando Pérez Gárate ("**Mr. Pérez**"), who is listed in the Award as Mexico's lead counsel (his name appears first in the list of persons present at the hearing for Mexico). At the relevant time, Mr. Pérez was the Director General of the Legal Office of International Trade at the Subsecretaría de Comercio Exterior of SE.

[31] In January 2019, a couple of months after Mexico filed its Counter-Memorial, Mr. Perezcano called Mr. Pérez to congratulate him on his new position in Mexico's SE and to wish him the best of luck with his mandate.

[32] On May 13, 2019, a couple of months after Vento filed its Reply and a few months before Mexico filed its Rejoinder, Mr. Pérez sent the following e-mail to Mr. Perezcano, with the subject line "CPTPP – Roster of Panel Chairs nomination":

Dear Hugo:

I would like to send you the format of Curriculum Vitae that we are requesting from you in order to present you as a candidate of Mexico in the List of Chairpersons for arbitration panels in dispute settlement proceedings under Article 28 of the Comprehensive and Progressive Agreement on Trans-Pacific Partnership (CPTPP).

Article 28.11 of the CPTPP provides for the establishment of a list of 15 persons, designated by the Parties, who can serve as chairpersons in the event of a possible establishment of a panel.

We would very much appreciate your support in sending us your updated CV in English, preferably in the attached form, which we will forward to the other members of the CPTPP.

To avoid spam problems I am including my personal email address ([...].com).

We look forward to hearing any questions or clarifications on this issue.

Orlando Pérez Gárate

[33] Mr. Pérez's e-mail had an attachment that was a blank form entitled "Summary Curriculum Vitae for Persons Appointed for the Roster of Panel Chairs Provided in the Comprehensive and Progressive Agreement for Trans-Pacific Partnership".

[34] A few days later, on May 16, 2019, Mr. Perezcano responded to Mr. Pérez's e-mail and wrote to him both at his work address and his personal gmail address. He stated as follows:

Dear Orlando,

Thank you very much for your email. I confirm my willingness to be a candidate of Mexico to serve on the List of Chairpersons for arbitration panels in dispute settlement proceedings under Chapter 28 of the Comprehensive and Progressive Agreement on a Trans-Pacific Partnership.

Please find enclosed my curriculum vitae in the requested format.

I am honored and grateful.

Best regards,

Hugo Perezcano

[35] Mr. Perezcano's e-mail attached the completed Summary Curriculum Vitae form that Mr. Pérez had sent to him.

[36] The Tribunal issued P.O. #7 approximately 4½ months after this exchange of e-mails, i.e., on October 2, 2019. As stated above, the hearing took place on November 18-22, 2019.

[37] On March 17, 2020, approximately one month after the parties submitted their post-hearing briefs and four days after they submitted their statements of costs, Mr. Antonio Nava Gómez ("**Mr. Nava**"), Area Director of SE's Legal Office of International Trade, sent an e-mail to Mr. Perezcano with a copy to Mr. Pérez. The e-mail's subject line was "T-MEC: Panelist Rosters – Chapter 31 (Dispute Settlement)". Mr. Nava wrote as follows:

Dear Hugo Perezcano:

I am writing on the instructions of Orlando Pérez Gárate, Director General of the International Trade Legal Consultancy of the Ministry of Economy, as part of the

selection process within the Federal Government to establish the lists of panelists for Chapter 31 (Dispute Settlement) of the Agreement between Mexico, the United States and Canada (T-MEC).

In this regard, Chapter 31 (Dispute Settlement) of the T-MEC establishes the obligation to form lists of panelists to hear proceedings initiated under the dispute settlement mechanism of the T-MEC, and the Ministry of Economy is in the process of forming such lists, which was initiated through consultations by the Secretary Graciela Marquez with various business councils and chambers.

However, this office considers it relevant to collect updated *curricula vitae* of potential interested persons. Therefore, [sic] in view of your extensive background and experience in international trade and other matters covered by the T-MEC, we would be pleased if you could submit, no later than 23 March 2020, the information on your professional and educational experience requested in the attached curriculum vitae format.

The request for this information is made without prejudice to the decision to be taken within the Federal Government regarding the composition of the lists of panelists referred to above.

Finally, I would like to take this opportunity to share with you the list of Chairpersons' panelists adopted in the framework of the Comprehensive and Progressive Trans-Pacific Partnership Treaty (PDF attachment), which can be consulted on the following website: [...]

We remain attentive.

Regards,

Antonio Nava Gómez

[38] Mr. Nava's e-mail had two attachments: (1) Decision by the Commission of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership regarding the Establishment of a Roster of Panel Chairs under Chapter 28 on Dispute Settlement; and (2) a blank form entitled "Summary of *Curricula Vitae* of Persons Interested in Being Considered for the Roster of Panellists Under Chapter 31 of the Treaty Between Mexico, the United States and Canada (USMCA)". The first attachment confirmed that Mr. Perezcano had been appointed as a member of the Roster of Panel Chairs pursuant to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership.

[39] Six days later, on March 23, 2020, Mr. Perezcano responded to Mr. Nava's e-mail, with a copy to Mr. Pérez. His e-mail stated the following:

Dear Antonio,

Thank you very much for your email and the attached list of panel chairs.

In accordance with your request, I attach my CV in the required format. Thank you very much for considering me.

Best regards,

Hugo Perezcano

[40] Mr. Perezcano's e-mail attached the completed Summary of *Curricula Vitae* form that Mr. Nava had sent to him.

[41] On July 2, 2020, Mr. Nava sent another e-mail to Mr. Perezcano, with a copy to Mr. Pérez. He stated:

Dear Hugo Perezcano:

I am writing on the instructions of Orlando Pérez Gárate, Director General of the International Trade Legal Consultancy of the Ministry of Economy, as part of the selection process within the Federal Government to establish the lists of panelists for Chapter 31 (Dispute Settlement) of the Agreement between Mexico, the United States and Canada (T-MEC).

In this regard, we are pleased to inform you that you have been appointed by Mexico, by Decision No. 1 of the Free Trade Commission (FTC) of the T-MEC, to the list of panelists who may hear disputes arising under section A of Chapter 31 of the T-MEC.

We are convinced that your extensive experience and expertise in international trade and other issues covered by the T-MEC, as well as your objectivity, reliability, independence and sound judgment, will contribute positively to the proper functioning of the overall State-State dispute settlement mechanism of the T-MEC.

Please find attached the list of Chapter 31 panelists, which can also be consulted in the publication of the FTC Decision No. 1 of the T-MEC at the following website: [...].

Thank you for your interest in participating in this process and for accepting this appointment.

We remain attentive.

Regards,

Antonio Nava Gómez

[42] Later on July 2, 2020, Mr. Perezcano sent a short e-mail to Mr. Nava, with a copy to Mr. Pérez, stating as follows:

Thank you very much Antonio. Very honoured to be on the list.

Best regards,

Hugo

[43] Mr. Perezcano and the other two arbitrators signed the Award on the same day, i.e., on July 2, 2020.

B. DISCUSSION

[44] As stated above, Vento seeks to set aside the Award on two grounds:

- a. Vento was unable to present its case because the Tribunal refused to allow one of its witnesses, Mr. Ortúzar, to testify in response to the Recording used to impeach his credibility; and
- b. there is a reasonable apprehension that one of the arbitrators, Mr. Hugo Perezcano, was biased because while the arbitration was ongoing, Mexico offered opportunities to him that were not disclosed.

[45] Vento’s application to set aside the Award is made pursuant to Article 34 of the UNCITRAL Model Law on International Commercial Arbitration (“**Model Law**”), which has force of law in Ontario: see section 5 and Schedule 2 of the *International Commercial Arbitration Act, 2017*, S.O. 2017, c. 2, Sched. 5.

[46] Article 34 of the Model Law reads, in part:

*Article 34: Application for setting aside as exclusive recourse
against arbitral award*

(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.

(2) An arbitral award may be set aside by the court specified in article 6 only if:

- (a) the party making the application furnishes proof that:
 - (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not

valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or

- (ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
- (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or
- (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

(b) the court finds that:

- (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or
- (ii) the award is in conflict with the public policy of this State.

[47] Vento also relies on Article 18 of the Model Law which provides that the parties to arbitral proceedings “shall be treated with equality and each party shall be given a full opportunity of presenting his case.” Article 12 of the Model Law, while not directly applicable, is also relevant. It states:

Article 12: Grounds or challenge

(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him.

(2) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

[48] Reviewing courts must accord a high degree of deference to the awards of international arbitral tribunals under the Model Law. They cannot set aside an international arbitral award simply because they believe that the arbitral tribunal wrongly decided a point of fact or law. See *Consolidated Contractors Group S.A.L. (Offshore) v. Ambatovy Minerals S.A.*, 2017 ONCA 939 at paras. 23-24 (“*Consolidated Contractors*”); application for leave to appeal dismissed: 2018 CanLII 99661 (S.C.C.). The standard to be applied by a reviewing court depends on the specific Model Law grounds on which the application is based: see *Consolidated Contractors* at para. 25.

[49] Even where grounds may exist for the setting aside of an arbitral award, the court may exercise its discretion not to set aside the award: see *Aroma Franchise Company Inc. v. Aroma Espresso Bar Canada Inc.*, 2023 ONSC 1827 at para. 23 (“*Aroma*”). The scope of the discretion under Article 34(2) of the Model Law also depends on the ground upon which the award could be set aside: *Popack v. Lipszyc*, 2016 ONCA 135 at para. 30 (“*Popack*”).

[50] I will discuss Vento’s two grounds to set aside the Award in turn.

1. **Whether the Award should be set aside on the basis that Vento was unable to present its case**

a. *Submissions of the parties*

i. *Submissions of Vento*

[51] Vento submits that the Tribunal allowed Mexico to impeach the credibility of Vento’s key and most important witness in writing, through an incomplete telephone recording made without the witness’ knowledge or consent and admitted into evidence without context. It is Vento’s submission that by doing so and by refusing to allow the witness to provide evidence in response, the Tribunal prevented Vento from presenting its case in three key ways:

- a. The Tribunal failed to give Vento an opportunity to respond to Mexico’s arguments based on the Recording that impugned Mr. Ortúzar’s credibility.
- b. The Tribunal failed to allow Mr. Ortúzar to respond directly to the attacks on his credibility.
- c. The Tribunal failed to admit evidence that went to the important issue in the case of whether there were “marching orders” against Vento.

[52] With respect to the first point, Vento argues that it was unable to present its case as a result of the Tribunal's P.O. #7. Vento submits that the Tribunal prevented Vento from putting the Recording in context and providing Mr. Ortúzar's explanations of the circumstances under which he had made the statements in his telephone call with Mexican officials. Vento states that it could not provide these explanations absent Mr. Ortúzar's evidence.

[53] With respect to the second point, Vento refers to the rule in *Browne v. Dunn* and the long-recognized principle of procedural fairness that holds that a party who intends to impeach the credibility of a witness must give that witness the opportunity to explain themselves. Vento argues that the Tribunal denied Mr. Ortúzar and Vento that opportunity, and allowed Mexico to impugn Mr. Ortúzar's credibility in writing while refusing Vento's request that Mr. Ortúzar be allowed to respond, both in writing through an additional witness statement and by testifying at the hearing.

[54] With respect to the third point, Vento submits that by rejecting Mr. Ortúzar's explanatory evidence, the Tribunal refused to admit relevant evidence that went to the critically important issue in the case of whether there were "marching orders" against Vento. Vento states that refusing to admit relevant evidence that goes to an important issue in the case amounts to a breach of procedural fairness. According to Vento, Mr. Ortúzar's evidence responding to the Recording was unambiguously relevant to the core issue in the case of whether there had been "marching orders", and by denying Mr. Ortúzar the opportunity to explain, the Tribunal was deprived of evidence critical to the core issue in the case.

[55] Vento submits that it does not need to show that the breach of procedural fairness had a decisive impact on the Award. It argues that where a sufficiently serious violation of due process is shown, there is no additional requirement of demonstrating a causal link between the violation and the decision of the arbitral tribunal. According to Vento, the only qualification to this is that the court may exercise its discretion and not set aside the arbitral award if it is clear beyond doubt that the arbitral decision could not have been different had the violation not occurred.

ii. Submissions of Mexico

[56] Mexico argues that Vento has failed to establish that it was unable to present its case or was not given an opportunity to respond to arguments made by Mexico. Mexico submits that Vento is attempting to reargue the merits of the case by cloaking its re-argument in a claim for a breach of procedural fairness. It is Mexico's position that there is no evidentiary basis to conclude that the conduct of the Tribunal was sufficiently serious to offend the most basic notions of morality and justice.

[57] Mexico states that the Tribunal's P.O. #7 was consistent with: (a) the evidentiary process and procedure established in P.O. #1: and (b) the parties' agreement that a party could not call its own witness to testify and that no evidence could be filed after the last round of pleadings.

[58] Mexico submits that there is no support for Vento’s allegation that Mr. Ortúzar’s evidence was not considered credible by the Tribunal. Mexico points out that the Tribunal relied on Mr. Ortúzar’s evidence and described it as persuasive at one point.

[59] Mexico also argues that Mr. Ortúzar’s testimony did not go to the “core issue” of whether there were “marching orders” against Vento. It notes that the Tribunal found that neither Mr. Ortúzar nor Mr. Ortiz Nashiki testified that they were under “marching orders”. According to Mexico, the Tribunal’s findings were entirely unrelated to P.O. #7 or the credibility of Mr. Ortúzar.

[60] Mexico points out that even where grounds may exist for the setting aside of an arbitral award, the Court may exercise its discretion not to set aside the award. It submits that the grounds raised by Vento do not result in circumstances of real unfairness and real practical injustice and, as a result, this Court should exercise its discretion not to set aside the Award. Mexico states that P.O. #7 had no impact on the result of the proceedings because, as stated above, the Tribunal relied on Mr. Ortúzar’s evidence, which it qualified as “persuasive”.

b. Analysis

i. Standard of review

[61] The parties agree on the standard of review to be applied under Article 34(2)(a)(ii) of the Model Law. To justify setting aside an award under that provision for reasons of fairness or natural justice, the conduct of the Tribunal must be sufficiently serious to offend our most basic notions of morality and justice. Judicial intervention for alleged violations of the due process requirements of the Model Law will be warranted only when the arbitral tribunal’s conduct is so serious that it cannot be condoned under Ontario law. See *Consolidated Contractors* at para. 65 and *All Communications Network of Canada v. Planet Energy Corp.*, 2023 ONCA 319 at paras. 42, 48.

[62] Vento also made reference to the recent decision of the Judicial Committee of the Privy Council (“JCPC”) in *Gol Linhas Aereas SA v. MatlinPatterson Global Opportunities Partners (Cayman) II LP*, [2002] UKPC 21 (“*Gol Linhas*”). This case relates to the enforcement of an arbitral award under the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (“**New York Convention**”).² Article V(1)(b) of the New York Convention provides that recognition and enforcement of an award may be refused if the party against whom the award is invoked was “unable to present his case”. This is the same language as in Article 34(2)(a)(ii) of the Model Law. The grounds for refusing recognition or enforcement of an international arbitral award under the New York Convention are substantially the same as the grounds to set aside

² The New York Convention has force of law in Ontario: see section 2 and Schedule 1 of the *International Commercial Arbitration Act, 2017*, S.O. 2017, c. 2, Sched. 5.

such an award set out in Article 34 of the Model Law: see *Costco Wholesale Corporation v. TicketOps Corporation*, 2023 ONSC 573 at para. 46.

[63] The principles set out in *Gol Linhas* regarding what it means for a party to be “unable to present its case” are consistent with the principles set out by the Court of Appeal for Ontario. The JCPC stated that to justify the conclusion that a party was unable to present its case, what was required was not merely the adoption of a procedure that was irregular or undesirable, but proof of fundamental unfairness that went to the essence of the right to be heard: see *Gol Linhas* at para. 106. According to the JCPC, the applicable standard is one of due process capable of application to any international arbitration whatever the procedural law applicable and the nationality of the participants. This does not mean that the court should be seeking to identify the lowest common denominator of standards required by different national systems. Rather, the court should be seeking to identify and apply basic minimum requirements that would generally, even if not universally, be regarded throughout the international legal order as essential to a fair hearing. See *Gol Linhas* at para. 76.

[64] The JCPC expressed the view that where a sufficiently serious violation of due process was shown, there should not be an additional requirement of demonstrating a causal link between the violation and the decision of the arbitral tribunal because: (a) such an approach would dilute the right to a fair hearing; and (b) it would require the court to engage in an evaluation of the merits of the dispute which is contrary to the principle that this is exclusively the province of the arbitral tribunal. However, the JCPC stated that a court might properly exercise its discretion not to refuse enforcement if it was clear beyond doubt that the arbitral decision could not have been different had the violation not occurred. See *Gol Linhas* at para. 78.³

ii. *Application to the facts of this case*

[65] For ease of reference, I reproduce the three grounds on which Vento relies to argue that the Tribunal prevented it from presenting its case:

- a. The Tribunal failed to give Vento an opportunity to respond to Mexico’s arguments based on the Recording that impugned Mr. Ortúzar’s credibility.
- b. The Tribunal failed to allow Mr. Ortúzar to respond directly to the attacks on his credibility.

³ I note that this part of the JCPC’s decision in *Gol Linhas* may not be entirely consistent with the Court of Appeal’s decision in *Popack* where the Court of Appeal concluded that a court can exercise its discretion not to set aside an award if a procedural error did not produce any real unfairness or real practical injustice. The Court of Appeal stated that the potential impact of a breach on the result was a proper factor to consider in making that determination. See *Popack* at paras. 31-36.

- c. The Tribunal failed to admit evidence that went to the important issue in the case of whether there were “marching orders” against Vento.

[66] Grounds (b) and (c) can be dealt with summarily. Ground (b) is subsumed in ground (a). Mr. Ortúzar has no independent right in this Application, and he had no independent right in the arbitration. The issue before me is whether Vento was unable to present its case as a result of the attack on Mr. Ortúzar’s credibility.

[67] I reject ground (c) to the extent that it is not subsumed in ground (a). Vento had ample opportunity to present its case on the issue of “marching orders”. The request that Vento made of the Tribunal after the Recording was filed was to give to Mr. Ortúzar the opportunity to “contextualize” the Recording and to address Mexico’s allegations based on the Recording. This was not a request to adduce new evidence on the issue of “marching orders”, but, rather, a request to respond to the argument that less credibility and weight should be given to Mr. Ortúzar’s evidence in light of the Recording. This point is subsumed in ground (a).

[68] I now turn to ground (a) (interpreted in light of the other grounds). In support of its position, Vento relies heavily on the rule in *Browne v. Dunn*.

[69] The rule in *Browne v. Dunn* reflects a confrontation principle in the context of cross-examination of a witness for a party opposed in interest on disputed factual issues. If a party intends to impeach a witness called by an opposite party, the party who seeks to impeach must give the witness an opportunity, while the witness is in the witness box, to provide any explanation the witness may have for the contradictory evidence. See *R. v. Quansah*, 2015 ONCA 237 at paras. 75-76 (“*Quansah*”); application for leave to appeal dismissed: 2016 CanLII 61675 (S.C.C.).

[70] The rule in *Browne v. Dunn* is rooted in considerations of fairness. However, as a rule of fairness, it is not a fixed rule. The extent of its application lies within the sound discretion of the trial judge and depends on the circumstances of each case. Compliance with the rule in *Browne v. Dunn* does not require that every scrap of evidence on which a party desires to contradict the witness for the opposite party be put to that witness in cross-examination. The cross-examination should confront the witness with matters of substance on which the party seeks to impeach the witness’ credibility and on which the witness has not had an opportunity of giving an explanation because there has been no suggestion whatever that the witness’ story is not accepted. See *Quansah* at paras. 77, 80-81.

[71] Whether the rule in *Browne v. Dunn* is offended by failure to cross-examine on a specific matter in a particular case cannot be determined in the abstract: see *Quansah* at para. 101. Where the subjects not touched in cross-examination but later contradicted are of little significance in the conduct of the case and the resolution of critical issues of fact, the failure to cross-examine is likely to be of little significance. The confrontation principle is not violated where it is clear, in all the circumstances, that the cross-examiner intends to impeach the witness’ story. See *Quansah* at paras. 85-86.

[72] The principles set out above are reflected in the following two observations made by the Court of Appeal in *Quansah* at paras. 89-90:

[89] First, it is too easily overlooked that the rule in *Browne v. Dunn* is not some ossified, inflexible rule of universal and unremitting application that condemns a cross-examiner who defaults to an evidentiary abyss. The rule is grounded in fairness, its application confined to matters of substance and very much dependent on the circumstances of the case being tried [...].

[90] Second, and as a consequence of the fairness origins of the rule, a trial judge is best suited to take the temperature of a trial proceeding and to assess whether any unfairness has been visited on a party because of the failure to cross-examine. [...]

[73] Breaches of the rule in *Browne v. Dunn* do not attract a single or exclusive remedy. The effect that a court should give to a breach of the rule depends on a number of factors and the circumstances of the case. Two potential options to rectify a breach of the rule are: (1) the trial judge can take into account the breach of the rule when assessing a witness' credibility and deciding the weight to attach to that witness' evidence; and (2) the trial judge can allow counsel to recall the witness whose evidence was impeached without notice. See *Quansah* at paras. 117-121 and *Curley v. Taafe*, 2019 ONCA 368 at para. 31. In a situation where there has been a breach of the rule in *Browne v. Dunn*, a trial judge can allow the testimony impeaching the credibility of a witness, decline a request to recall the witness whose credibility is being impeached, and take the breach of the rule into consideration when assessing the reliability of the evidence: see, e.g., *Liu v. Huang*, 2020 ONCA 450 at paras. 22-24 ("*Liu*").

[74] In my view, Vento has failed to establish that it was unable to present its case and that the Tribunal's conduct was so serious that it cannot be condoned under Ontario law: see *Consolidated Contractors* at para. 65. Vento has not shown that the basic requirements that would generally be regarded throughout the international legal order as essential to a fair hearing were not met in this case: see *Gol Linhas* at para. 76. The Award shows that Vento was able to adduce substantial evidence and make arguments in support of its position on all the issues on which the Tribunal made rulings.

[75] P.O. #7 does not offend our most basic notions of morality and justice, especially when it is considered in light of the following points:

- a. P.O. #7 is consistent with P.O. #1 and the parties' agreement on procedural matters.
- b. Mr. Ortúzar's witness statement was submitted in reply and parties are not generally entitled to submit evidence endlessly in reply to other parties.
- c. At the time that Mr. Ortúzar's witness statement was submitted, Vento knew that Mexico disputed its position and evidence regarding alleged "marching orders".

- d. Mr. Ortúzar refers in his witness statement to the fact that he had conversations with representatives of the Mexican government in October 2018 about giving evidence in the arbitration and that he refused to do so. He also refers to some of the things that he was allegedly told during these conversations. Thus, the fact that Ms. Martínez’s witness statement refers to such conversations with Mr. Ortúzar is not surprising.
- e. Vento had the right to cross-examine Ms. Martínez with respect to the Recording, but it chose not to do so. This clearly was a tactical decision.
- f. Under Article 41 of the ICSID Rules, the arbitral tribunal may, if it deems it necessary at any stage of the proceeding, call upon the parties to produce documents, witnesses and experts (emphasis added). Had Vento chosen to cross-examine Ms. Martínez and raised a serious issue regarding the Recording, the Tribunal may have asked that Mr. Ortúzar be produced as a witness.
- g. Vento had the opportunity to make submissions to the Tribunal after the evidentiary record was complete, including on the issue of “marching orders” and the weight to be given to the evidence.

[76] In my view, the rule in *Browne v. Dunn* does not assist Vento in this case. As stated above, this rule is very flexible and highly dependent on the specific circumstances of the case. The trial judge – here, the Tribunal – is best suited to assess whether any unfairness has been visited on a party because of the failure to cross-examine. In addition, there are various ways in which any unfairness related to the failure to cross-examine can be remedied in the course of a hearing. Given this and the fact that the rule in *Browne v. Dunne* is a nuanced rule, not an absolute one, it is by no means a foregone conclusion that a breach of this rule will offend our most basic notions of morality and justice and justify setting aside an arbitral award under the Model Law.

[77] In this case, I find that, when considering the Award in its entirety, “the subjects not touched in cross-examination but later contradicted are of little significance in the conduct of the case and the resolution of critical issues of fact”: see *Quansah* at para. 85. There is no reference to the Recording or to Mr. Ortúzar’s telephone conversation with Ms. Martínez and others in the Award. In any event, it is unnecessary to decide whether there was a breach of the rule in *Browne v. Dunn* because, ultimately, any breach was remedied by the Tribunal by giving significant weight to Mr. Ortúzar’s evidence and not making any adverse credibility findings against him. Without creating unfairness, it was open to the Tribunal to decline Vento’s request to allow Mr. Ortúzar to testify, allow the witness statement of Ms. Martínez and the Recording, and take into account Mr. Ortúzar’s inability to address the Recording when assessing the reliability of the evidence: see *Liu* at paras. 22-24.

[78] The Tribunal made an adverse credibility finding about Vento’s main witness on the existence of “marching orders”, Gabriel Arriaga Callejas (“**Mr. Arriaga**”). In contrast, the

Tribunal did not make any adverse finding of credibility against Mr. Ortúzar. To the contrary, the Tribunal noted that the testimony of Mr. Arriaga was at odds with the testimony of Mr. Ortúzar on some points, and the Tribunal accepted the evidence of Mr. Ortúzar (see, e.g., paragraphs 308 and 326 of the Award). The Tribunal also positively commented on Mr. Ortúzar's evidence and stated, for instance, that "José Alberto Ortúzar Cárcova persuasively articulates that the auditors' [sic] modified and refined their thinking and reasoning as the verification progressed" (paragraph 310 of the Award).

[79] Vento refers to the following paragraph of the Award in support of its position (paragraph 304):

The Claimant relies principally on the witness statements of Gabriel Arriaga Callejas and Guillermo Massieu Urquiza. It also submitted the witness statements of José Alberto Ortúzar Cárcova and Daniel Ortiz Nashiki. The latter two, along with Gabriel Arriaga Callejas, were three of the four SAT officials who conducted the verification visits to Vento's and AED's plants in Laredo, Texas in 2003. Notably, however, neither Mr. Ortúzar Cárcova nor Mr. Ortiz Nashiki testified that they were under "marching orders."

[80] Vento argues that this paragraph means that the Tribunal did not agree with Mr. Ortúzar that there were marching orders. I disagree. The Tribunal states that Mr. Ortúzar did not testify that he was under "marching orders", and it is true that Mr. Ortúzar does not use this expression in his witness statement. It is also clear from the Award that Mr. Arriaga's evidence regarding "marching orders" was very different in nature from Mr. Ortúzar's evidence, which only includes statements about "pressure". The Tribunal addressed the issue of line of authority or command in the Award as follows at paragraph 312:

In every hierarchical structure there is an inherent line of authority or command. The executive branch of essentially all governments is organized in this manner. Instructions are given, received and executed as a matter of course. To say that officials lower in the hierarchy receive and execute instructions or orders given by higher-ranking officials is nothing more than to describe one aspect of how governments – at least their executive branches – operate. Nonetheless, it is not unusual for governments to introduce checks and balances into these lines of authority or command. Both the Claimant's and the Respondent's witnesses have shown that SAT operated in this manner. Some of the key decisions were taken in a collegiate manner. For instance, the decision to initiate the origin verifications was presented to, and authorized by, the Audit Programming Committee; and the application of Rule 2(a) was the result of internal deliberations and agreed to jointly by the officials involved in the verification proceedings, including Mr. Ortúzar Cárcova. Private parties are generally not privy to government agencies' internal deliberations and decision-making processes, but that does not make them "secretive," in the sense that they are covert or deliberately concealed from interested persons and the public. And

SAT's decisions were ultimately subject to scrutiny by independent tribunals. There was no mysterious hand that rocked the cradle.

[81] The Tribunal also found that the fact that authorities respond to complaints filed by local businesses does not establish complicity (paragraph 319 of the Award).

[82] Thus, the Tribunal did not make credibility findings to deal with the allegations of “pressure” because it addressed these allegations through legal and commonsense findings. The Tribunal did not disregard or reject Mr. Ortúzar’s evidence, and it is not the role of this Court to review the merits of the Tribunal’s decision and overall interpretation of the evidence.

[83] Vento also relies on the decision of the England and Wales’ High Court of Justice in *P. v. D.*, [2019] EWHC 1277 (“*P. v. D.*”). In that case, the arbitral award was challenged under section 68 the United Kingdom’s *Arbitration Act, 1996*. Section 68 provides that an arbitral award may be challenged on the ground of a “serious irregularity” which the court considers has caused or will cause substantial injustice to the claimant: see *P. v. D.* at para. 35. The claimant’s challenge in *P. v. D.* was based on the following propositions (see para. 27): (a) where there is a challenge to a witness on a core issue as to credibility, it ought to be put in cross-examination to that witness, or the party not so challenging may be precluded from relying on their case not so put (essentially, the rule in *Browne v. Dunn*); and (b) the arbitrators may not base their decision against a party upon a case not argued against it.

[84] The judge found that these two propositions applied to the facts of the case. With respect to the first proposition, the judge noted that the claimant had been put on notice of the defendant’s case to some extent, but he concluded that such notice was insufficient. He stated at para. 34:

But the suggestion that such notice was sufficient might have been appropriate in the days when witnesses gave evidence-in-chief, so that they could then give their evidence from scratch orally, knowing what was alleged against them, but that would not be enough where, as in the present system, they had put their evidence into a witness statement and expected to be challenged, but were not. Whereas there may be cases such as those adumbrated by Foskett J where not every point required to be challenged, nevertheless this was the core issue, it was one where, as I have referred to in paragraph 15 above, the Chairman had specifically expected it to be dealt with in cross-examination.

[85] In my view, *P. v. D.* can be distinguished on several grounds, including the following:

- a. *P. v. D.* was not decided under the Model Law or the New York Convention. It was decided under section 68 the United Kingdom’s *Arbitration Act, 1996*.
- b. The two grounds relied upon by the claimant to challenge the arbitral award were intertwined, and the failure to cross-examine the witness with respect to a particular meeting also supported the conclusion that the arbitrators did not act

fairly in reaching a conclusion that had never been argued or dealt with during the hearing before the arbitrators. The judge in *P. v. D.* expressly stated that the fact that the two propositions applied made it the more difficult for him to consider the question of the exceptions to the rule in *Browne v. Dunn*: see *P. v. D.* at para. 34. In this case, there is no allegation that the Tribunal based its decision upon a case that was not argued before the Tribunal.

- c. Based on the parties' witness statements in *P. v. D.*, it was clear that there was a contest of credibility between the two prime participants: see *P. v. D.* at para. 14. The situation in this case is different as numerous people were involved in the factual matrix, and a number of witnesses gave evidence regarding the issue of "marching orders".
- d. It does not appear that the parties in *P. v. D.* had an agreement similar to the agreement in this case regarding the witnesses who could be cross-examined at the hearing.
- e. In this case, Vento had the option to examine Ms. Martínez about the impeaching testimony, but it made the tactical decision not to do so. There does not appear to have been similar tactical decisions on the part of the claimant in *P. v. D.*

[86] While I find that Vento has failed to establish a breach of procedural fairness, I wish to address Vento's submission that it does not need to show that the alleged breach of procedural fairness had a decisive impact on the Award. Vento relies, among other things, on the decision of the Supreme Court of Canada in *Université du Québec à Trois-Rivières v. Larocque*, [1993] 1 S.C.R. 471 ("*Larocque*"), a case dealing with judicial review of a grievance arbitrator's decision. In *Larocque* (at p. 493), the Supreme Court rejected an argument that the arbitrator's decision would have been the same had the evidence in issue not been rejected. Lamer C.J. stated, among other things, that the application of the rules of natural justice should not depend on speculation as to what the decision on the merits would have been had the rights of the parties not been denied.

[87] While speculation as to whether the decision on the merits would have been the same had there been no breach of procedural fairness may not be allowed in an application for judicial review, this does not mean, as Vento appears to suggest, that the decision on the merits cannot be considered to determine whether there was a breach of procedural fairness and, if so, its extent. The Supreme Court of Canada did just that in *Larocque*, i.e., it considered the reasons of the arbitrator to assess the significance of the evidence that was rejected and conclude that there was a breach of natural justice: see pp. 491-492.

[88] Similarly, in this case, it is not possible to determine whether there was a breach of procedural fairness that would justify setting aside the Award without considering the Award. As stated by the Court of Appeal in *Quansah* at para. 101, whether the rule in *Browne v. Dunn* is offended by failure to cross-examine on a specific matter in a particular case cannot be

determined in the abstract. The considerations of fairness underlying the rule in *Browne v. Dunn* are highly dependent on the circumstances of the case being tried, and it is necessary to look at the Award in this case to determine, among other things, whether the matters not touched in cross-examination are matters of substance or of little significance.

[89] Further, and in any event, the potential impact of the breach on the Award is a proper consideration for the court when considering whether it should exercise its discretion not to set aside an award under the Model Law. It is not possible to determine whether a procedural error produced any real unfairness or real practical injustice without looking at the ultimate decision: see *Popack* at paras. 31-36.

[90] In light of the foregoing, I conclude that Vento has not established that the Award should be set aside for reasons of fairness or natural justice. The conduct of the Tribunal does not offend our most basic notions of morality and justice. Vento was able to present its case.

2. Whether the Award should be set aside on the basis that there is a reasonable apprehension that Mr. Perezcano was biased

[91] Vento's position is that the Award should be set aside pursuant to Article 34(2)(iv) of the Model Law because the composition of the Tribunal was not in accordance with the agreement of the parties as a result of the existence of justifiable doubts as to Mr. Perezcano's impartiality and independence.

[92] The test for reasonable apprehension of bias applicable to an arbitrator acting in a judicial or quasi-judicial capacity is the same as the test that applies to judges: see *Jacob Securities Inc. v Typhoon Capital B.V.*, 2016 ONSC 604 at paras. 35-37 ("*Jacob Securities*"). The test has been formulated as follows: What would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude? Would the person think that it is more likely than not that the decision-maker, whether consciously or unconsciously, would not decide fairly? See *Peart v. Peel Regional Police Services*, 2006 CanLII 37566 at paras. 36-37 (Ont. C.A.).

a. *Submissions of the parties*

i. *Submissions of Vento*

[93] It is Vento's position that the following circumstances give rise to a reasonable apprehension that Mr. Perezcano was biased:

- a. During the course of the arbitration, Mexico offered and awarded Mr. Perezcano prestigious and potentially lucrative opportunities to be listed on panels of arbitrators under two different trade agreements.
- b. Neither Mexico nor Mr. Perezcano disclosed these to Vento.

- c. Vento only found out about them either through public sources after the Award was rendered, through access to information requests, through document requests in this proceeding or through cross-examinations in this proceeding.

[94] Vento submits that a failure to disclose can give rise to justifiable doubts as to an arbitrator's impartiality. It points out that the courts have found in many cases that *ex parte* communications between an arbitrator and a party, which were not disclosed to the other party, gave rise to a reasonable apprehension of bias.

[95] According to Vento, the reasonable apprehension of bias arises not only from the undisclosed *ex parte* communications themselves, but from the fact that they concerned prestigious and potentially lucrative appointments which were actually awarded to Mr. Perezcano during key phases of the arbitration without being disclosed to Vento. Vento submits that the apprehension of bias is compounded by the fact that Vento had to fight to obtain disclosure of the communications, which neither Mr. Perezcano nor Mexico disclosed in a forthright manner. Vento also submits that the reasonable apprehension of bias is further compounded by the fact that Mr. Perezcano appears to have written the lion's share of the award.

[96] In light of the foregoing, Vento argues that a reasonable person, informed of this state of affairs, viewing the matter realistically and practically, would conclude that Mr. Perezcano would not decide the case fairly, whether consciously or unconsciously.

ii. *Submissions of Mexico*

[97] Mexico argues that the absence of disclosure did not give rise to a reasonable apprehension of bias. Its position is that Mr. Perezcano did not have an obligation to disclose that: (a) he was exchanging correspondence with Mexico during the arbitration for the purposes of a potential appointment to two rosters; or (b) he was appointed to the rosters. According to Mexico, there was no obligation to disclose these circumstances as they were not likely to give rise to justifiable doubts as to Mr. Perezcano's impartiality or independence, nor would they cause his reliability for independent judgment to be questioned by a party.

[98] Mexico refers to the *IBA Guidelines on Conflicts of Interest in International Arbitration* (London: International Bar Association, 2014) ("*IBA Guidelines*") and points out that having one's name added to a roster of panelists for disputes under a trade agreement – as opposed to being appointed as an arbitrator – is not expressly listed in any of the three "stop-light categories". Mexico states that the determination of whether a reasonable apprehension of bias exists is extremely fact-specific and that context is critical.

[99] Mexico submits that the circumstances in this case did not give rise to a reasonable apprehension of bias requiring disclosure. Mexico notes that prior to the commencement of the arbitration, the parties were well aware of Mr. Perezcano's background and relationship with Mexico. Mexico emphasizes that it did not appoint Mr. Perezcano as an arbitrator in another proceeding, but that Mr. Perezcano's name was merely included on the roster of potential

panelists for disputes under two trade agreements. Mexico argues that the distinction is significant because: (a) an appointment to a roster of panelists does not mean that one will actually be appointed to a panel; (b) there is no financial compensation associated with the appointment to a roster; and (c) appointments to rosters of potential panelists for disputes under the two trade agreements in question are announced publicly and done through a process that is mandated by the text of the trade agreements themselves. Mexico also notes that the e-mail communications between Mr. Perezcano and Mexico were very generic in nature.

[100] Mexico submits that even if Mr. Perezcano was under an obligation to disclose that he was exchanging correspondence with Mexico for the purposes of potential appointments to two rosters, nondisclosure of such communications does not, in itself, give rise to a reasonable apprehension of bias. Mexico states that the focus of the court's examination should be on the facts or circumstances that were not disclosed, and those did not give rise to a reasonable apprehension of bias.

[101] Mexico argues that Vento's allegation that Mr. Perezcano wrote the lion's share of the Award is based on mere suspicion. It points out that, in any event, the decision was signed unanimously by all three arbitrators.

[102] Mexico disagrees with Vento's allegation that any "apprehension of bias is compounded by the fact that Vento had to fight to obtain the communication documentation which neither Mr. Perezcano nor Mexico disclosed in a forthright manner." Mexico notes that Mr. Perezcano is not a party to this Application and that it is not aware of any disclosure request made to Mr. Perezcano. Mexico also submits that it has disclosed all of the e-mail communications, and that Vento's allegation that it had to fight for the disclosure is not accurate and is inconsistent with the fact that Vento's motion for refusals was amicably settled.

[103] Mexico states that Vento has failed to meet its onus to demonstrate that Mr. Perezcano would not bring an impartial mind to the proceedings, and that none of Vento's arguments raise beyond mere suspicion.

[104] Mexico notes that even where grounds may exist for the setting aside of an arbitral award, the court may exercise its discretion not to set aside the award. Mexico submits that the grounds raised by Vento do not result in circumstances of real unfairness and real practical injustice and, as a result, this Court should exercise its discretion not to set aside the Award. Mexico argues that Mr. Perezcano's failure to disclose his communications with Mexico had no impact on the result and did not result in any unfairness because the decision by the three arbitrators was unanimous.

[105] According to Mexico, the potential prejudice flowing from the need to redo the arbitration if the Award is set aside cannot be overstated in terms of wasted time, wasted resources, wasted legal fees, and the impact of the significant passage of time on witnesses' recollections, which would result in real and practical injustice.

b. Analysis

i. Authorities

[106] The parties have cited a number of authorities. I will review the main ones briefly.

[107] As stated above, the parties referred to the *IBA Guidelines*. The *IBA Guidelines* are widely recognized as an authoritative source of information as to how the international arbitration community may regard particular fact situations in reasonable apprehension of bias cases: see *Jacob Securities* at para. 41. Among other things, the *IBA Guidelines* state the following:

- a. An arbitrator shall refuse to continue to act as an arbitrator if facts or circumstances have arisen since the arbitrator's appointment which, from the point of view of a reasonable third person having knowledge of the relevant facts and circumstances, would give rise to justifiable doubts as to the arbitrator's impartiality or independence (General Standard 2(b) Conflicts of Interest).
- b. Doubts are justifiable if a reasonable third person, having knowledge of the relevant facts and circumstances, would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching the arbitrator's decision (General Standard 2(c) Conflicts of Interest).
- c. Arbitrators have a duty of disclosure. If facts or circumstances exist that may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence, the arbitrator shall disclose such facts or circumstances to the parties, the arbitration institution or other appointing authority and the co-arbitrators, if any, prior to accepting the appointment or, if thereafter, as soon as the arbitrator learns of them (General Standard 3(a) Disclosure by the Arbitrator).
- d. Any doubt as to whether an arbitrator should disclose certain facts or circumstances should be resolved in favour of disclosure (General Standard 3(d) Disclosure by the Arbitrator). This is based on the principle that the parties have an interest in being fully informed of any facts or circumstances that may be relevant in their view (Explanation to General Standard 3, paragraph (a)).
- e. However, disclosure does not imply the existence of a conflict of interest. An arbitrator who has made a disclosure to the parties considers themselves to be impartial and independent of the parties, despite the disclosed facts, or else the arbitrator would have declined the nomination or resigned. It is the purpose of disclosure to allow the parties to judge whether they agree with the evaluation of the arbitrator and, if they so wish, to explore the situation further (Explanation to General Standard 3, paragraph (c)).

- f. Nondisclosure cannot by itself make an arbitrator partial or lacking independence. Only the facts or circumstances that the arbitrator failed to disclose can do so (paragraph 5 of Part II – Practical Application of the General Standards).

[108] The *IBA Guidelines* provide that a party also has a duty to disclose “any relationship, direct or indirect, between the arbitrator and the party”, and that “[t]he party shall do so on its own initiative at the earliest opportunity” (General Standard 7(a) Duty of the Parties and the Arbitrator). This is an ongoing obligation (Explanation to General Standard 7, paragraph (c)).

[109] The *IBA Guidelines* contain three lists of situations that are meant to provide guidance as to which situations do or do not constitute conflicts of interest, or should or should not be disclosed: a Red List (including a Non-Waivable Red List and a Waivable Red List), an Orange List, and a Green List. It is recognized that the lists do not and cannot cover every situation and that, in all cases, the general standards should control the outcome. Being nominated to a roster is not a situation that appears in any of the lists.

[110] The parties also discussed the decision of Justice Steele in *Aroma*. In that case, Justice Steele found that the arbitrator’s failure to disclose a subsequent retainer from the respondent’s counsel while the case was ongoing gave rise to a reasonable apprehension of bias, and she set aside the arbitral awards. She emphasized the importance of the particular context of the case in coming to her conclusion. After noting that the situation before her was not listed on the *IBA Guidelines*’ Orange List, she stated that an arbitrator needs to assess on a case-by-case basis whether a given situation, even though not included on a list, is nevertheless one that ought to be disclosed given the circumstances: see *Aroma* at para. 38. Justice Steele then discussed the following factors: the expectations of the parties in the selection of the arbitrator (including the arbitration agreement and the correspondence between counsel), the existence of overlapping issues between the two arbitrations, and the fact that the arbitrator was the sole arbitrator (and therefore controlled the outcome). Justice Steele also reviewed additional authorities, including the decision of the U.K. Supreme Court in *Halliburton Company v. Chubb Bermuda Insurance Ltd.*, [2020] UKSC 48 (“*Halliburton*”).

[111] Like in *Aroma*, the particular situation in this case is not included on the *IBA Guidelines*’ lists and, as a result, a case-specific assessment is required to determine whether the conduct of Mexico and Mr. Perezcano gives rise to a reasonable apprehension of bias. However, the context of this case is different from the context in *Aroma*. Among other things, the Award was made by three arbitrators instead of one, and the parties did not have the same concerns as in *Aroma* regarding prior relationships between the arbitrators and the parties or their counsel.

[112] The parties also relied on *Halliburton*. While the factual situation in that case is also different from this case, the U.K. Supreme Court’s detailed discussion regarding arbitrator impartiality and the duty of disclosure is helpful.

[113] In *Halliburton*, the appellants moved to remove one of the three arbitrators, the chair of the arbitral tribunal, and asked for the appointment of another arbitrator to chair the tribunal in

his place. The arbitrator had accepted appointments in multiple references concerning the same or overlapping subject matter with only one common party, and he had done so without disclosure.

[114] The U.K. Supreme Court confirmed that the objective test of the fair-minded and informed observer inquiring whether there was a real possibility of bias applied equally to judges and all arbitrators: see *Halliburton* at para. 55. However, it stated that in applying the test to arbitrators, it was important to bear in mind the differences in nature and circumstances between judicial determination of disputes and arbitral determination of disputes. One of the differences mentioned by the U.K. Supreme Court was related to remuneration. Lord Hodge stated the following:

Thirdly, a judge is the holder of a public office, is funded by general taxation and has a high degree of security of tenure of office and therefore of remuneration. An arbitrator is nominated to act by one or both of the parties to the arbitration either directly or by submitting names to the appointing body, whether an institution or the court, for appointment. The arbitrator is remunerated by the parties to the arbitration in accordance with the terms set out in the reference, and often is ultimately funded by the losing party. He or she is appointed only for the particular reference and, if arbitral work is a significant part of the arbitrator's professional practice, he or she has a financial interest in obtaining further appointments as arbitrator. Nomination as an arbitrator gives the arbitrator a financial benefit. There are many practitioners whose livelihood depends to a significant degree on acting as arbitrators. [...] [Emphasis added.]

[115] According to the U.K. Supreme Court, the particular characteristics of international arbitration highlight the importance of proper disclosure as a means of maintaining the integrity of international arbitration: see *Halliburton* at para. 69. The Court found that, in English law, arbitrators have a legal duty to make disclosure of facts and circumstances which would or might reasonably give rise to the appearance of bias, unless the parties to the arbitration otherwise agree. The legal obligation can arise when the matters to be disclosed fall short of matters which would cause the informed observer to conclude that there was a real possibility of a lack of impartiality. It is sufficient that the matters are such that they are relevant and material to such an assessment of the arbitrator's impartiality and could reasonably lead to such an adverse conclusion. See *Halliburton* at paras. 116, 136. The failure of an arbitrator to make disclosure is a factor for the fair-minded and informed observer to take into account in assessing whether there is a real possibility of bias: see *Halliburton* at paras. 118, 136, 155.

[116] The U.K. Supreme Court found that where an arbitrator accepts appointments in multiple references concerning the same or overlapping subject matter with only one common party, this may, depending on the relevant custom and practice, give rise to an appearance of bias. Based on the particular facts before it, the Court concluded that the arbitrator had breached his legal duty of disclosure, but that, at the time of the hearing to remove the arbitrator (which was the

relevant time under the applicable statute), the fair-minded and informed observer would not conclude that there was a real possibility of bias. See *Halliburton* at paras. 147, 149.

ii. *Application to the facts of this case*

[117] In my view, the conduct of Mr. Perezcano in this case gave rise to a reasonable apprehension of bias.

[118] While it is true that the appointments of Mr. Perezcano to the rosters of panelists did not involve any direct financial compensation and did not constitute an actual appointment to a panel, I agree with Vento that these appointments were valuable professional opportunities for Mr. Perezcano. From a reputational perspective, these appointments can only be seen as being advantageous, as demonstrated by Mr. Perezcano's statement in his e-mail of May 16, 2019 that he was "honored and grateful". Further, as Vento put it, these appointments to rosters were the "gateway" to future work and remunerative appointments to panels. Thus, the appointments of Mr. Perezcano to the rosters of panelists conferred upon him a professional benefit and the potential for future financial benefits.

[119] In its communications with Mr. Perezcano, Mexico indicated its intention to put forward Mr. Perezcano's name for these valuable opportunities, but Mexico had the discretion to change its mind and not to do so after communicating with Mr. Perezcano. From the perspective of an informed person, Mr. Perezcano had an incentive to please Mexico after he was informed that he was being considered for these appointments, pending the confirmation that he had been appointed. Such confirmation only came on the day that the Award was issued with respect to Mr. Perezcano's appointment to the list of panelists under the Canada-United States-Mexico Agreement.

[120] As a result of Mexico holding out the possibility of the appointments to the rosters during the arbitration, I find that an informed person, viewing the matter realistically and practically, would conclude that it is more likely than not that Mr. Perezcano, whether consciously or unconsciously, would have "a leaning, inclination bent or predisposition towards" Mexico, or that he could be influenced by factors other than the merits of the case as presented by the parties in reaching his decision. See *Wewaykum Indian Band v. Canada*, 2003 SCC 45 at para. 58 ("*Wewaykum*") and General Standard 2 of the *IBA Guidelines*.

[121] In light of this, Mr. Perezcano had a duty to disclose Mexico's "offers"⁴ to appoint or nominate him to the rosters during the arbitration because these offers were likely to give rise to

⁴ While I use the word "offers" as a shortcut to describe Mexico's communications with Mr. Perezcano, I recognize that the communications from Mexico were not true offers, especially the communications in relation to the Canada-United States-Mexico Agreement, which were more in the nature of a communicated intention to consider Mr. Perezcano for an appointment.

justifiable doubts as to his impartiality or independence: see Article 12 of the Model Law, General Standard 3(a) of the *IBA Guidelines* and *Halliburton* at para. 136. While the offers made by Mexico for Mr. Perezcano's benefit were sufficient in themselves to give rise to a reasonable apprehension of bias, the finding of a reasonable apprehension of bias is compounded by the failure of both Mr. Perezcano and Mexico to disclose such offers and the related communications that took place during the arbitration. While the communications were not related to the arbitration,⁵ they involved Mexico's lead counsel and some of the e-mails were exchanged after the hearing and submissions were completed but before the Tribunal issued its Award.⁶ I agree with the holding in *Halliburton* that the failure of an arbitrator to make disclosure is a factor for the informed observer to take into account in assessing whether there is a reasonable apprehension of bias: see *Halliburton* at paras. 118, 136, 155.

[122] While a finding of a reasonable apprehension of bias provides a ground to set aside the Award under Article 34(2) of the Model Law, this Court may exercise its discretion under that provision not to set aside the Award: see *Popack* at paras. 30-36 and *Aroma* at paras. 23-24.

[123] In determining whether the Court should exercise its discretion to set aside an arbitral award under Article 34(2) of the Model Law based on grounds involving procedural errors in the arbitration process, the essential question to consider is: what did the procedural error do to the reliability of the result, or to the fairness, or the appearance of fairness of the process? The procedural errors must have produced real unfairness or real practical injustice: *Popack* at paras. 31-36, 45. In considering whether to exercise its discretion, the court can examine factors such as the seriousness of the breach, the potential impact of the breach on the result, and the potential prejudice flowing from the need to redo the arbitration were the award to be set aside: see *Popack* at para. 36.

[124] The second factor is the most important one in this case because Mr. Perezcano was part of a three-arbitrator panel. The parties did not refer me to any cases dealing with the issue of a reasonable apprehension of bias on the part of an arbitrator in similar circumstances, after the arbitral award has been issued (i.e., at the setting aside stage rather than the removal stage before the issuance of the arbitral award).

⁵ The cases cited in Vento's Factum regarding *ex parte* communications all involved communications that were directly related to the case before the arbitrators. Such communications raise different issues than the situation in this case.

⁶ The fact that Mr. Pérez provided his personal gmail address to Mr. Perezcano is also troubling, especially since the reason for doing so (“[t]o avoid spam problems”) does not appear to make sense *a priori*. However, there is no evidence that Mr. Perezcano communicated with Mr. Pérez using exclusively his personal e-mail address.

[125] The fact that there was a reasonable apprehension of bias with respect to one of the members of the panel does not necessarily “taint” the Award and the entire panel. In *Wewaykum*, the Supreme Court of Canada stated the following on this issue at paras. 91-93:

91 We thus conclude that no reasonable apprehension of bias is established and that Binnie J. was not disqualified in these appeals. The judgment of the Court and the reasons delivered by Binnie J. on December 6, 2002, must stand. It is unnecessary to examine the question whether, in the event that the Court had found that Binnie J. was disqualified, the judgment of the Court in these appeals would have been undermined. Nevertheless, because of the importance of the issue, we offer a few comments in this respect.

92 The decision-making process within the Supreme Court of Canada, while not widely known, is a matter of public record. [...] For present purposes, it is enough to say the following. Each member of the Supreme Court prepares independently for the hearing of appeals. All judges are fully prepared, and no member of the Court is assigned the task to go through the case so as to “brief” the rest of the panel before the hearing. After the case is heard, each judge on the panel expresses his or her opinion independently. Discussions take place on who will prepare draft reasons, and whether for the majority or the minority. Draft reasons are then prepared and circulated by one or more judges. These reasons are the fruit of a truly collegial process of revision of successive drafts. In that sense, it can be said that reasons express the individual views of each and every judge who signs them, and the collective effort and opinion of them all.

93 Here, the nine judges who sat on these appeals shared the same view as to the disposition of the appeals and the reasons for judgment. Cases where the tainted judge casts the deciding vote in a split decision are inapposite in this respect. In the circumstances of the present case, even if it were found that the involvement of a single judge gave rise to a reasonable apprehension of bias, no reasonable person informed of the decision-making process of the Court, and viewing it realistically, could conclude that it was likely that the eight other judges were biased, or somehow tainted, by the apprehended bias affecting the ninth judge.

[126] While the decision-making process of the Supreme Court of Canada may be known, I do not have before me any evidence regarding the decision-making process of the Tribunal. It is true that, based on the statement of costs, Mr. Perezcano appears to have spent significantly more time on the case than the other two arbitrators and, inferentially, may have done a significant part of the drafting of the Award. However, this does not mean that the other two arbitrators were not involved in the drafting and passively accepted Mr. Perezcano’s views. Adopting such a view would be contrary to the strong presumption of impartiality and independence that applies with respect to Professor Gantz and Dr. Sureda: see *Wewaykum* at para. 76. It would also be inconsistent with the role of the President of the Tribunal (i.e., Dr. Sureda) under the ICSID

Rules. Among other things, the President of the Tribunal “shall preside at its deliberations”: see Article 22.

[127] I also note that the three arbitrators were appointed separately for this one arbitration. There is no evidence that they were regularly sitting together. As a result, tasks could not be rotated among the arbitrators and it appears unlikely that the Tribunal would have adopted a process where one arbitrator would have been assigned the task to go through the case to brief the other arbitrators. Ultimately, all arbitrators signed the Award, and the reasonable conclusion is that all three arbitrators shared the same view as to the disposition of the arbitration and the reasons set out in the Award: see *Wewaykum* at para. 93.

[128] In my view, no reasonable person informed of the circumstances of this arbitration – including the rules under which it was proceeding and the manner in which the arbitrators were appointed – would, viewing the matter realistically, come to the conclusion that Professor Gantz and Dr. Sureda were biased or “tainted” by Mr. Perezcano. Given this, I conclude that the reasonable apprehension of bias in relation to Mr. Perezcano did not undermine the reliability of the result and did not produce real unfairness or real practical injustice.

[129] The other two factors mentioned above – the seriousness of the breach and the potential prejudice flowing from the need to redo the arbitration were the award to be set aside – are not as important in the context of this case, but they also support this Court exercising its discretion not to set aside the Award.

[130] Aside from the two appointments to rosters and the e-mail communications related to these appointments, there is no suggestion that Mr. Perezcano’s conduct during the arbitration gave rise to a reasonable apprehension of bias. There is also no evidence that Mr. Perezcano had *ex parte* communications with Mexico regarding the arbitration. I agree with Mexico that the e-mail communications between Mr. Perezcano and Mr. Pérez were generic in nature. Some of the points raised by Mexico in support of its position that there was no reasonable apprehension of bias also soften the seriousness of the breach, i.e., (a) there is no financial compensation associated with the appointment to a roster; and (b) appointments to rosters of potential panelists for disputes under the two trade agreements in question are announced publicly and done through a process that is mandated by the text of the trade agreements themselves.

[131] The potential prejudice flowing from the need to redo the arbitration is not insignificant. The arbitration took approximately 5 years to complete, from the request for arbitration to the issuance of the Award. The statement of costs shows that the arbitration costs were more than US\$625,000. This does not include the parties’ own legal fees and costs. Further, and more importantly, the events underlying the dispute between the parties took place approximately 20 years ago. In light of the foregoing, I agree with Mexico that ordering the parties to redo the arbitration would result in significant wasted time, resources and fees, and would raise serious concerns regarding the impact of a considerable amount of time on witnesses’ recollections.

[132] Consequently, I decline to set aside the Award based on a reasonable apprehension of bias with respect to Mr. Perezcano.

C. CONCLUSION

[133] The Application is dismissed.

[134] In accordance with the parties' agreement, I fix Mexico's costs of this Application at \$100,000.00, all inclusive. Vento is ordered to pay these costs to Mexico within 30 days.

Vermette J.

Released: October 23, 2023

