CITATION: Grace et al v. The United Mexican States, 2026 ONSC 2104
COURT FILE NO.: CV-24-00727935-00CL
DATE: 20260410

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

RE: ALICIA GRACE; AMPEX RETIREMENT MASTER TRUST; APPLE OAKS PARTNERS, LLC; BRENTWOOD ASSOCIATES PRIVATE EQUITY PROFIT SHARING PLAN; CAMBRIA VENTURES, LLC; THE ESTATE OF CARLOS WILLIAMSON-NASI IN ITS OWN RIGHT AND ON BEHALF OF AXIS SERVICES; AXIS HOLDING; CLUE AND F. 305952; CAROYLN GRACE BARING; DIANA GRACE BEARD; FLORADALE PARTNERS, LLC; FREDERICK GRACE; FREDERICK J. WARREN; FREDERICK J. WARREN IRA; GARY OLSON; GENEVIEVE T. IRWIN; GENEVIEVE T. IRWIN 2002 TRUST; GERALD L. PARSKY; GERALD L. PARSKY IRA; JOHN N. IRWIN III; JOSE ANTONIO CAÑEDO-WHITE IN HIS OWN RIGHT AND ON BEHALF OF AXIS SERVICES; AXIS HOLDING AND F. 305952; NICHOLAS GRACE; OLIVER GRACE III; ON5 INVESTMENTS, LLC; RAINBOW FUND, L.P.; ROBERT M. WITT; ROBERT M. WITT IRA; VISTA PROS, LLC; VIRGINIA GRACE

v.

THE UNITED MEXICAN STATES

BEFORE: Justice J. Dietrich

COUNSEL: *John Terry*, *Emily Sherkey*, *Natasha Williams*, for the Applicants

Vincent Derose, *Jennifer Radford*, *Michelle Folinas* for the Respondent

HEARD: March 4 and 5, 2026

REASONS FOR DECISION

Introduction

[1] The Applicants are investors in the Mexican companies defined below as Oro Negro. The Applicants have asserted claims under the *North American Free Trade Agreement*, 17 December 1992, Can TS 1994 No 2 (Canada, Mexico, and US) (the “**NAFTA**”) alleging that the Respondent, the United Mexican States (“**Mexico**”) drove Oro Negro out of business because, among other things, Oro Negro refused to participate in the bribery of Mexican officials.

[2] To pursue their claims, the Applicants commenced an arbitral proceeding which was administered by the International Centre for Settlement of Investment Disputes ("**ICSID**") pursuant to the *Arbitration Rules of the United Nations Commission on International Trade Law*, adopted by the United Nations General Assembly on December 15, 1976 (the "**UNCITRAL Rules**"), bearing ICSID Case No. ARB UNCT/18/4 (the "**Arbitration**").

[3] The Arbitration proceeded over four years before a three-member tribunal (the "**Tribunal**") who issued an award in August of 2024 (the "**Award**"). The Award, among other things, held that the Tribunal did not have jurisdiction over the matter because (i) two of the Applicants were dual nationals of both the United States of America (the "**U.S.**") and Mexico; and (ii) the losses claimed by the remaining Applicants were determined to be 'indirect losses' not covered by Art. 1116 of the NAFTA.

[4] The Applicants now seek to set aside the Award on the basis that the Tribunal incorrectly determined both jurisdictional issues referenced above and on the basis that one of the members of the Tribunal has a reasonable apprehension of bias.

[5] Mexico disputes the relief sought.

[6] For the reasons set out below, the Application is granted.

Background

<u>The Underlying Claim</u>

[7] The underlying claim is not at issue in this application, but provides context for the live issues before the Court.

[8] The Applicants are a group of individuals and entities that own approximately 43.2% of Integradora de Servicios Petroleros Oro Negro S.A.P.I. de C.V. ("**Integradora**"), a Mexican holding company. Integradora and its subsidiaries are jointly referred to as "**Oro Negro**").

[9] Oro Negro owned five offshore oil rigs. Between 2013 and 2015, Oro Negro entered into contracts to lease its oil rigs to Petróleos Mexicanos ("**Pemex**"), Mexico's state-owned oil company. The Arbitration arose from steps which the Applicants allege were taken by Pemex that led to Oro Negro's demise.

[10] At a high level, the Applicants allege that (i) in 2015 and 2016, Pemex unilaterally and improperly amended the contracts to cut Oro Negro's revenues by half and suspended two of the contracts; (ii) despite promising these amendments would be temporary, in 2017, Pemex forced further adverse amendments and then terminated the contracts without compensation; and (iii) this conduct drove Oro Negro out of business.

<u>The Arbitration</u>

[11] On June 19, 2018, the Applicants commenced the Arbitration under Chapter 11 of the NAFTA. The place of arbitration was Toronto.

[12] The Applicants appointed Mr. Andrés Jana Linetzky as arbitrator, Mexico appointed Mr. Gabriel Bottini as arbitrator, and Professor Diego P. Fernández Arroyo was appointed as President. Together, those three individuals comprised the Tribunal.

[13] All of the Applicants brought claims under Art. 1116 of the NAFTA which provides that, an "investor of a Party" may submit an arbitral claim against "another Party" for damages or losses it suffered as a result of an alleged breach of the NAFTA.

[14] Two of the Applicants, the estate of Mr. Carlos Williamson-Nasi (who passed away before the arbitration hearing) and Mr. Jose Antonio Cañedo White, are dual nationals of both the U.S. and Mexico (the "**Dual National Applicants**"). They also brought claims under Art. 1117 of the NAFTA which provides an investor may bring claims on behalf of an enterprise that it owns or controls for loss or damage suffered by that enterprise.

[15] The hearing was held from April 24-30, 2022. The Tribunal heard testimony from 13 witnesses. The parties then submitted post-hearing briefs on September 9, 2022. Both Canada and the U.S. also submitted briefs as non-disputing parties in the Arbitration.

<u>The Award</u>

[16] The Tribunal issued the Award on August 19, 2024.

[17] The Tribunal determined they had no jurisdiction on two bases:

a. *Dual Nationality*: the Tribunal held that it did not have jurisdiction over the two Dual National Applicants by importing a dominant and effective nationality requirement into the NAFTA. The Tribunal then determined that each of the Dual National Applicants' dominant and effective nationality is or was that of Mexico, not the U.S.;

b. *Indirect Loss*: the Tribunal held it did not have jurisdiction over the claims of the remaining Applicants under Art. 1116 of the NAFTA as the Tribunal interpreted that section as providing recourse for only direct loss and found that the remaining Applicants' claims were for indirect loss.

<u>Dual Nationality</u>

[18] The essence of the dual nationality issue is whether under the NAFTA, dual nationals may bring claims against one of the States of their own nationality.

[19] Mr. Williamson-Nasi was a citizen of Columbia, Mexico and the U.S.

[20] Mr. Cañedo White is a permanent resident of the U.S. and a Mexican national. It is not disputed before me that Mr. Cañedo White is considered a dual national for purposes of

the NAFTA as Art. 201 of the NAFTA provides that "…national means a natural person who is a citizen or permanent resident of a Party…".

[21] Accordingly, the question, as expressed by the Tribunal in para. 460 of the Award, was "…can Messrs Williamson-Nasi and Cañedo White proceed against Mexico as US nationals, regardless of the Mexican citizenship?".

[22] In considering the issue, the Tribunal recognized that the ability of dual nationals to bring investment claims in such arbitration proceedings must take into account the terms of the relevant treaty. The Tribunal also recognized that conflicting decisions of other tribunals existed on the matter: see Award, at paras. 463-466.

[23] The Tribunal noted that under the NAFTA, claims may be brought under the UNCITRAL Rules or the ICSID Convention at the applicant's choice: see Award, at para. 467. The parties acknowledge that the text of the ICSID Convention prohibits claims by dual nationals, but the Applicants chose here to proceed under the UNCITRAL Rules which do not contain a similar textual prohibition on claims of dual nationals: see Award, at para. 468.

[24] The Tribunal looked at the text of Art. 1116 and 1117 which provides that "an investor of a Party" is allowed to submit a claim for a breach of a NAFTA obligation of "another Party": see Award, at para. 469. The Tribunal found that the language of Art. 1116 and 1117 by itself did not prohibit claims from dual nationals against one state of their nationality: see Award, at para. 470.

[25] The Tribunal then considered the position of the U.S. and Canada on the issue, who had participated in the Arbitration as non-disputing parties. The Tribunal characterized the U.S. and Canada's position as one where a dual national can submit a claim under the NAFTA to the extent that such claim is presented against a NAFTA Party other than that of the dual national's 'dominant and effective nationality': see Award, at para. 471.

[26] The Tribunal found that the dominant and effective nationality test was the appropriate interpretation based on the 'subsequent practice' of the NAFTA states: see Award, at paras. 472-477.

[27] The Tribunal then performed an analysis of the dominant and effective nationality of each of Mr. Williamson-Nasi and Mr. Cañedo White and found both to be Mexico.

[28] Accordingly, the Tribunal found that it lacked jurisdiction *ratione personae* to hear the claims submitted by the Dual National Applicants: see Award, at paras. 491 and 499.

Indirect Loss

[29] The Tribunal found that it lacked jurisdiction to hear the remaining Applicants' claims because those claims were submitted under Art. 1116(1) of the NAFTA, which the Tribunal found was not the appropriate avenue to submit claims for indirect loss: see Award, at paras. 543-545. Specifically, the Tribunal found that Art. 1116 of NAFTA was meant to

address allegations of direct interference with investors' rights and that Art. 1117 of NAFTA was meant to address allegations of indirect interference with such rights: see Award, at para. 541.

[30] It is acknowledged by all parties that the Applicants (other than the Dual National Applicants) are minority investors in Integradora and not in a position to make a claim on behalf of Integradora under Art. 1117.

[31] The Tribunal did not base its decision on the specific wording of investor or loss or damages in Art 1116, but rather on what the Tribunal found was a consistent and longstanding subsequent interpretive practice by the NAFTA Parties with regard to Art. 1116 and 1117: see Award, at para. 539.

Allegations of Reasonable Apprehension of Bias

[32] The Applicants allege that their appointee to the Tribunal, Mr. Jana took certain actions following his appointment which have led to a reasonable apprehension of bias on his part.

[33] Specifically, it is not disputed that Mr. Jana accepted a mandate to act as counsel on behalf of Honduras in an arbitration referred to as *Juan Carlos Arguello and Ernesto Arguello v. Republic of Honduras* ("***Arguello***"). The *Arguello* arbitration was commenced in September of 2022 and Mr. Jana and his firm first appeared on record for Honduras in March of 2024 while deliberations on the Award were ongoing.

[34] The Applicants allege that in the *Arguello* arbitration, an issue similar to the indirect loss issue set out above exists. Specifically, like the Applicants here, the *Arguello* claimants have brought claims on their own behalf for harm to them as shareholders in a local entity based on Art. 10.16 of the *Dominican Republic-Central America-United States Free Trade Agreement* (the "**CAFTA-DR**"), which the Applicants allege is identical to Arts. 1116 of the NAFTA. In brief, the Applicants allege that there is a reasonable apprehension of bias in that Mr. Jana's fiduciary duties as counsel to Honduras in defending an indirect loss claim in *Arguello,* conflict with his obligation to impartially decide a similar indirect loss claim in the Arbitration.

[35] The Applicants also allege that when they appointed Mr. Jana in 2018, he had a diverse practice representing both foreign investors and sovereign states in international arbitrations. However, in early 2022, Mr. Jana opened his own boutique law firm and he and his firm have since been retained by the governments of Honduras, Panama and Chile to defend them in multiple investor-state arbitrations. The Applicants claim, that based on publicly available information, Mr. Jana's firm has only done work for states since its founding.

[36] The Applicants further allege that Mr. Jana did not disclose to the Applicants (i) that he had formed a boutique firm whose practice orientation had shifted to representing sovereign states; or (ii) any of his or his firm's state-side appointments, nor his pursuit of them, including the *Arguello* arbitration. As a result, the Applicants argue they had no opportunity to seek further information about those developments, including whether and

the extent to which they raise overlapping issues, and if necessary, to seek Mr. Jana's recusal.

Issues

[37] The three issues to be decided are:

a. whether the Tribunal properly declined jurisdiction in respect of the Dual National Applicants;

b. whether the Tribunal properly declined jurisdiction on the basis that the remaining Applicants' claims were for indirect loss and therefore not covered by Art. 1116; and

c. whether Mr. Jana suffers from a reasonable apprehension of bias?

Analysis

Legal Framework

[38] The arbitral proceeding was administered by ICSID pursuant to the UNCITRAL Rules. The place of arbitration was Toronto. As a result, it is not disputed that this Court exercises supervisory jurisdiction over the Arbitration, which is governed by the *International Commercial Arbitration Act, 2017*, S.O. 2017, c. 2, Sched. 5, (the "**ICAA**") to which is appended as Schedule 2 the *UNCITRAL Model Law on International Commercial Arbitration* (the "**Model Law**").

[39] Under Art. 16.2 of the Model Law, a Tribunal may rule on its own jurisdiction. Pursuant to s. 11(1) of the ICAA, if a Tribunal does so, a party may apply to this Court to decide the matter. The Award may also be set aside by the Court for jurisdictional reasons under Art. 34(2) of the Model Law, but for the purposes of this application, the parties agree that, with respect to the jurisdictional issues, there is no difference in a review under Art. 16.2 and Art. 34(2) of the Model Law.

[40] Further Art. 34(2)(a)(iv) of the Model Law provides that the Court may set aside the Award if the Applicants furnish proof that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties. It is under this provision that the allegations of reasonable apprehension of bias are made.

Jurisdictional Issues

[41] In *Mexico v. Cargill*, 2011 ONCA 622, 107 O.R. (3d) 528 [***Cargill***], at para. 48, the Court of Appeal held that "when deciding its own jurisdiction, the tribunal has to be correct."

[42] The fact that the standard of review on jurisdictional questions is correctness does not, however, give courts a broad scope for intervention in the decisions of international arbitral tribunals. To the contrary, courts are expected to intervene only in rare circumstances where there is a "true jurisdictional question": see *Cargill*, at para. 44. Where a "true jurisdictional question" is identified, Courts are to carefully limit the issue they address to ensure that they do not, advertently or inadvertently, stray into the merits of the question that was decided by the tribunal: see *Cargill*, at para. 47.

[43] In *Russian Federation v. Luxtona Limited*, 2023 ONCA 393, 483 D.L.R. (4th) 493 [***Luxtona***], at para. 40, the Court of Appeal noted that an application to set aside an arbitral award for lack of jurisdiction is a proceeding *de novo*, not a review of the tribunal's decision. In *Luxtona*, at para. 52, the Court of Appeal also confirmed that there is no difference in the nature of the proceedings with respect to jurisdiction under Art. 34 and Art. 16 of the Model Law.

[44] Accordingly, regard must be had to Art. 1131(1) of the NAFTA which provides that the issues in dispute are to be decided in accordance with the applicable rules of international law. The parties agree that those applicable rules include the *Vienna Convention of the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331 [***Vienna Convention***] which provides at Art.31:

> Article 31. GENERAL RULE OF INTERPRETATION
>
> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
>
> (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> 3. There shall be taken into account, together with the context:
>
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>
> (c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

[45] The arguments before the Court focused on Art. 31.1 and 31.3 of the *Vienna Convention* in respect of the dual nationality issue and no submissions were made specifically in respect of Art. 31.2. With respect to the indirect loss issue, the parties made submissions under each of Art. 31.1, 31.2 and 31.3 of the *Vienna Convention*.

[46] Art. 31.1 of the Vienna Convention "requires consideration of: a) the "ordinary meaning" of the treaty's terms; b) the context; and c) the object and purpose of the treaty": see *The United Mexican States v. Burr*, 2020 ONSC 2376 [***Burr***], at para. 63, referring to *Febles v. Canada (Citizenship and Immigration)*, 2014 SCC 68, [2014] 3 S.C.R. 431.

[47] As recognized in *Burr*, at para. 80 "there is no *stare decisis*: the tribunal is to find the terms of the treaty as they are and in accordance with the *Vienna Convention* regardless of whether other tribunals have arrived at a different interpretation of the same mandate." As such, as set out in para. 154 of *Burr*, "this court is not bound by any decision of any NAFTA or international tribunal, however, it is bound by decisions of the Court of Appeal for Ontario, such as *Cargill*."

[48] As noted in *Cargill* at para. 84, if Canada, Mexico and the U.S. have a clear, well-understood, agreed common position, it is to be taken into account under Art 31.3 of the *Vienna Convention* as subsequent practice.

Dual Nationality

[49] Articles 1116 and 1117 of the NAFTA provide that "an investor of a Party" is allowed to submit claims for breaches of NAFTA obligations "by another Party". The parties acknowledge that there are decisions from relevant tribunals that decide that investment claims by dual nationals (i) are permitted against either state of their nationality; (ii) are not permitted against either state of their nationality; and (iii) are only permitted against a state other than that of the dominant and effective nationality. There is no consensus in those decisions and as noted by the Tribunal, case law referred to by the parties has not dealt with the standing of dual nationals consistently: see Award, at para. 464.

[50] Mexico's primary argument before the Tribunal (and its alternative argument before this Court) is that the words of the relevant provisions require a diversity of nationalities between a claimant investor and a respondent state. As Mexico argues, the Dual National Applicants do not fulfill this requirement because they are both investors of Mexico and therefore are only entitled to bring claims against another Party (being a party other than Mexico). Put differently, Mexico argues that as citizens and residents of Mexico, the Dual National Applicants do not have standing to file an international investment claim against Mexico.

[51] In this regard, I agree with the Tribunal that words used in Art. 1116 and 1117 themselves do not prohibit dual nationals from submitting claims against one of the States of their nationality: see Award, at para. 470. The Dual National Applicants can satisfy the words

of the articles in issue in that they are both Investors of one Party - the U.S. - and are submitting a claim against 'another Party' being Mexico.

[52] The parties and the Tribunal also recognized that UNCITRAL Rules (unlike the ICSID Convention) do not contain any restrictions on claims being advanced by dual nationals.

[53] After considering the language of the provision and the inconsistency of previous decisions on the matter, the Tribunal focussed on Art. 31.3(b) of the *Vienna Convention* and specifically found that the positions of Canada and the U.S. as non-disputing parties in the Arbitration, alongside those of Mexico, amounted to subsequent practice to be taken into account under that provision: see Award, at para. 473.

[54] There is no dispute between the parties that legal submissions on the matter may amount to subsequent practice. However, to do so, they must meet the level required by *Cargill* of a clear, well-understood, agreed common position: at para. 84. None of Mexico, Canada or the U.S. argued before the Tribunal that their positions on the dual national issue rose to this level such as to amount to subsequent practice.

[55] The position of Canada before the Tribunal was: "In the absence of specific language addressing claims by dual nationals, NAFTA and other investment tribunals have considered whether certain claims by dual nationals are allowed by reference to the concept of predominant nationality under customary international law. Under the rule, a dual national's standing is determined on the basis of the dominant and effective nationality, i.e. a claimant is prohibited from making a claim against their State of dominant and effective nationality": see para. 9 of the Article 1128 Submissions of Canada dated August 24, 2021 in the Arbitration [***Article 1128 Submissions of Canada***] (citations and emphasis omitted).

[56] The U.S. took a slightly different position in its submissions before the Tribunal. In its submissions it stated that claims under Chapter Eleven of the NAFTA by dual nationals should be addressed by the dominant and effective nationality test, with the *proviso* that under customary international law permanent residents are not considered nationals. Therefore, according to the U.S. submissions "under applicable rules of international law, a State Party to the NAFTA is not responsible for a claim asserted against it under Chapter Eleven by an investor of another Party who is a permanent resident of another Party but a citizen of the respondent State Party": see para. 8 of the Article 1128 Submissions of the U.S. dated August 24, 2021 in the Arbitration [***Article 1128 Submissions of the U.S.***].

[57] The differences between the States' positions become even more pronounced when Mexico's submissions are considered. Mexico's primary position was that no claims by Dual Nationals are permitted.

[58] Mexico only argued for the use of a dominant and effective nationality test as an alternative position. Alternative positions may be common in legal argument, however, expressing a position in the alternative does not equate to a clear, well understood and agreed common position as required by *Cargill*, at para. 84.

[59] Accordingly, I am not satisfied that the submissions of Mexico, the U.S. and Canada before the Tribunal amounted to a subsequent practice of a dominant and effective nationality test for purposes of Art. 31.3(b) of the *Vienna Convention*.

[60] Mexico also argued that the dominant and effective nationality test was a separately well-established customary rule of international law that should be taken into account under Art. 31.3(c) of the *Vienna Convention*. However, in this respect, I agree with the Tribunal at para. 466 of the Award, that no definitive or consensual position on that proposition was established.

[61] Accordingly, I am not persuaded that the dominant and effective nationality test was the appropriate lens through which the Tribunal was to assess its jurisdiction over the Dual National Applicants. As such, an analysis of how the Tribunal applied the dominant and effective nationality test to the Dual National Applicants is not required.

[62] Nor, for the reasons set out above, am I persuaded that Mexico's primary position before the Tribunal was correct.

[63] In summary, under Art. 31.1 of the *Vienna Convention* the ordinary interpretation of the relevant language in the NAFTA and the UNCITRAL Rules do not restrict dual nationals from submitting claims against one of the states of their nationality. As well, I am not persuaded that under Art. 31.3 of the Vienna Convention, any subsequent practice or relevant rules of international law require otherwise. Accordingly, I find that the Tribunal erred in determining that it lacked jurisdiction to hear the claims submitted by the Dual National Applicants.

Indirect Loss

[64] The relevant provisions of the NAFTA in respect of the indirect loss issue are Art. 1116 and 1117:

> **Article 1116: Claim by an Investor of a Party on Its Own Behalf**
>
> 1. <u>An investor of a Party</u> may submit to arbitration under this Section a claim that another Party has breached an obligation under:
>
> (a) Section A or Article 1503(2) (State Enterprises), or
>
> (b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A,
>
> <u>and that the investor has incurred loss or damage by reason of, or arising out of, that breach</u>.
>
> 2. An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired,

knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.

Article 1117: Claim by an Investor of a Party on Behalf of an Enterprise

1. An investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that the other Party has breached an obligation under:

(a) Section A or Article 1503(2) (State Enterprises), or

(b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A, and that the enterprise has incurred loss or damage by reason of, or arising out of, that breach.

2. An investor may not make a claim on behalf of an enterprise described in paragraph 1 if more than three years have elapsed from the date on which the enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the enterprise has incurred loss or damage.

3. Where an investor makes a claim under this Article and the investor or a non-controlling investor in the enterprise makes a claim under Article 1116 arising out of the same events that gave rise to the claim under this Article, and two or more of the claims are submitted to arbitration under Article 1120, the claims should be heard together by a Tribunal established under Article 1126, unless the Tribunal finds that the interests of a disputing party would be prejudiced thereby.

4. An investment may not make a claim under this Section. (Emphasis added.)

[65] Article 1139 of the NAFTA also contains certain relevant definitions:

investor of a Party means a Party or state enterprise thereof, or a national or enterprise of such Party, that seeks to make, is making or has made an investment;

investment of an investor of a Party means an investment owned or controlled directly or indirectly by an investor of such Party;

investment means …(b) an equity security of an enterprise, …(e) an interest in an enterprise that entitles the owner to share in income or profits of the enterprise; (emphasis added.)

[66] Mexico’s position is that claims submitted by an investor on their own behalf under Art. 1116 of the NAFTA can only include claims for direct loss or damage – i.e. loss or damage to the direct investment (for example the shares) held by the investor who is making a claim. Mexico submits that indirect loss or damage– i.e. a loss or damage to, in this case,

Oro Negro, is an indirect investment of the relevant Applicants and cannot be properly claimed under Art. 1116. Rather, Mexico submits, Art. 1117 of the NAFTA exists to provide investors who have the ability to submit claims on behalf of an enterprise with relief for indirect loss suffered by the investors as damage to underlying enterprise.

[67] In support of its position, Mexico also relies on the alleged subsequent interpretative practice of the NAFTA Parties under Art. 31.3(b) of the *Vienna Convention*.

[68] Further, Mexico put forward the analysis of the tribunal in *Bilcon of Delaware et al. v Government of Canada*, (10 January 2018), PCA Case No. 2009-04 (Permanent Court of Arbitration), Award on Damages [***Bilcon***]. Although not binding, Mexico urges that the reasoning in *Bilcon* is persuasive and should be followed.

[69] In *Bilcon*, the tribunal's reasoning at paras. 371 – 389 can be summarized as follows:

a. The starting point for interpretation is the words of Art. 1116 of the NAFTA under Art. 31.1 of the *Vienna Convention*, however the words of Art. 1116 do not make clear whether they are limited to direct loss or can include indirect loss;

b. Article 1116 must be read in the 'context' of Art. 1117 of the NAFTA. Article 1117 of the NAFTA provides a specific method for recovery by an investor of reflective or indirect loss.

c. Interpreting Art. 1116 of the NAFTA as prohibiting a claim for indirect loss is consistent with subsequent practice of the NAFTA Parties in the submissions to tribunals;

d. The distinction between Art. 1116 and 1117 has been interpreted by a number of tribunals, but, there has been no consistent position in the scope of Art. 1116 and Art. 1117 of the NAFTA;

e. To allow an investor to recover damages that belong to its investment under Art. 1116 could have an impact on other stakeholders, including other investors in the investment. That is the reason why recovery of monetary damages in respect of claims made under Art. 1117 are to be paid to the investment vehicle and not to the investor pursuant to Art 1135(2)(b) of the NAFTA. The lack of any equivalent provision in relation to Art. 1116 carries the implication that reflective loss was not contemplated under Art. 1116.

[70] Accordingly, in *Bilcon* at para. 389, the tribunal concluded that "Articles 1116 and 1117 are to be interpreted to prevent claims for reflective loss from being brought under Article 1116. This follows from the wording of Article 1116 in its context, which includes Articles 1121 and 1135. Moreover, the Tribunal takes account of the common position of the NAFTA Parties in their submissions to Chapter Eleven tribunals."

[71] However, in *Bilcon*, the tribunal went on to find that certain claims being asserted in that case were permitted. Specifically, the tribunal described the claims as being for

"compensation in an amount equivalent to the value of the opportunity lost by the investors" and determined they were not prohibited claims for indirect loss: see para. 390 and 396.

[72] The Applicants disagree with Mexico's position and submit:

a. In *Cargill* at para. 67-68, the Ontario Court of Appeal identified the "jurisdictional limits" of Art. 1116(1) of the NAFTA on an award of damages as only being that the "investment" alleged to be harmed meet the definition under the NAFTA and that the loss or damage be causally connected to the breach;

b. The definition of 'investment of an investor of a Party' under Art. 1139 of the NAFTA specifically includes both direct and indirect investments;

c. Permitting indirect loss claims under Art. 1117 does not make Art. 1116 redundant as found by the Tribunal. Minority investors are not able to commence claims on behalf of the enterprise under Art. 1117 of the NAFTA. Accordingly, interpreting Art. 1116 of the NAFTA in a manner to prohibit claims for indirect loss and require such claims be pursued under Art. 1117 makes protection of a minority investor's investment illusory.

[73] In part, the Applicants rely on the reasoning in *Kappes v. Guatemala*, (13 March 2020) ICSID Case No. ARB/18/43, Decision on Respondent's Preliminary Objections [***Kappes***], at paras. 130-149. *Kappes* was decided under the CAFTA-DR.

[74] CAFTA-DR, Art. 10.16.1(a) and 10.16.1(b) contain similar language to Art. 1116 and 1117 of NAFTA. Article 10.16.1(a) of CAFTA-DR pertains to claims by investors (similar to Art. 1116 of the NAFTA) and Art. 10.16.1(b) of CAFTA-DR pertains to claims on behalf of an enterprise (similar to Art. 1117 of the NAFTA).

[75] In *Kappes*, the state respondent took the position (similar to that which Mexico takes here) that the two articles together require the claims for indirect injury – i.e. that the shares lost value as a result of injury to the company – must be brought on behalf of the enterprise rather than by the investor directly.

[76] The tribunal in *Kappes*, however, disagreed, finding (i) nothing in the text of the sections to support such a restriction; (ii) that reading Art 10.16.1(a) in the context of Art 10.16.1(b) of CAFTA-DR does not impose such limitations; and (iii) that although a broad reading of Art. 10.16.1(a) has been held by other tribunals (i.e. *Bilcon*) to perhaps render Art. 10.16.1(b) inutile, it is not clear this is the case and there may be reasons for investors to bring a claim on behalf of an enterprise rather than bring such claims directly, including those set out in paras. 146-148 of *Kappes*.

[77] In this respect, I agree with the submissions of the Applicants and the reasoning set out in *Kappes*, that the context of Art. 1117 of the NAFTA does not itself limit Art. 1116 of the NAFTA to indirect loss claims.

[78] The Tribunal also found that the NAFTA States had expressed a consistent and longstanding subsequent interpretive practice with respect to Art. 1116 and 1117 of the NAFTA. As noted above, positions taken in litigation may amount to subsequent practice for purposes of Art. 31.3(b) of the *Vienna Convention*, however, it is important to carefully consider the positions asserted to determine if they satisfy the standard set out in *Cargill* at para. 84 of a clear, well-understood, agreed common position.

[79] While the NAFTA Parties each articulated a view in their submissions before the Tribunal that Art. 1116 of the NAFTA should not allow claims for some form of indirect or reflective loss, in doing so the NAFTA Parties offered different interpretations of what is covered by Art. 1116 and what would constitute indirect loss.

[80] The U.S. argued at para. 18 of the *Article 1128 Submissions of the U.S.* that in determining whether a loss is indirect or direct for these purposes, the issue is whether the right that has been infringed belongs to the shareholder or the corporation. Examples are provided in para. 19 of the *Article 1128 Submissions of the U.S.* as to what would amount to direct loss suffered by shareholders and covered by Art. 1116 of the NAFTA. The examples provided include where an investor alleges its right to a declared dividend, to vote its shares or to share in residual assets of an enterprise upon winding up have been infringed or "where the disputing State wrongfully expropriates the shareholders' ownership interests – whether directly through expropriation of the shares or indirectly by expropriating the enterprise as a whole".

[81] In contrast, Canada asserted in paras. 14-15 of the *Article 1128 Submissions of Canada* that a loss would be direct to shareholders if that loss is distinct from the treatment of the enterprise. The loss, as submitted by Canada, must not be 'inseparable from the general loss of the corporation for wrongs done to it".

[82] Mexico's position, however, focussed on whether the shares were directly or indirectly held by the investor. As an example, the Applicants here have asserted that the loss claimed by them is for indirect expropriation – a type of loss specifically recognized as a direct loss by the U.S. Mexico, in submissions before me, however, took the position that such loss is in fact an indirect loss, as the enterprise in question was not directly held by the Applicants investors, but rather held indirectly held.

[83] As in *Cargill*, I am concerned that the NAFTA States' positions do not provide specific enough agreement between them as to what exactly is meant by indirect or reflective losses not covered by Art. 1116 of the NAFTA.

[84] As well, as noted in *Burr* at para. 213 and 217, when considering whether repeat legal submissions made by the NAFTA Parties before other tribunals amount to subsequent practice, the history of success of those submissions is a matter to consider. If the submissions have not been accepted by other tribunals, it is difficult to see how they could meet the standard of a clear and well-understood position as set out in *Cargill* at para. 84. Here, the evidence before me is that, other than *Bilcon*, no tribunal has accepted the prohibition on indirect loss under Art. 1116 of the NAFTA. Accordingly, I am not

persuaded that Mexico has established the subsequent practice alleged regarding a jurisdictional restriction to direct loss under Art. 1116 of the NAFTA.

[85] Accordingly, I am also not persuaded, in considering the principles set out in Art. 31 of the *Vienna Convention*, recoverable loss under Art. 1116 of the NAFTA, is restricted to 'direct loss'. Rather, I agree with the Court of Appeal in *Cargill* at para. 68 and 69 that,

> 68. The investment must meet the definition and not be excluded as merely selling product to buyers in the affected Party territory. Finally, the investor's loss must have been incurred "by reason of, or arising out of" the breach. Those are the jurisdictional limits on the award of damages.
>
> 69. It is up to the tribunal to make findings of fact, apply the facts to the definitions and determine whether, in any particular case, the claimed damages fall within the defined criteria. [Emphasis added].

[86] As such, I find that the Tribunal erred in determining that it lacked jurisdiction to hear the claims submitted by the Applicants (other than the Dual National Applicants) under Art. 1116 of the NAFTA on the basis that the claims were for indirect loss.

Reasonable Apprehension of Bias

[87] The Ontario Court of Appeal in *Aroma Franchise Company, Inc. v. Aroma Espresso Bar Canada Inc.*, 2024 ONCA 839 [***Aroma***] recently addressed claims of reasonable apprehension of bias in the context of international arbitrations. Under the Model Law, as noted at para. 13 of *Aroma*, the "test for a reasonable apprehension of bias on the part of an arbitrator is objective – like the legal test for disclosure, it considers the relevant circumstances from the standpoint of a fair-minded and informed observer, applied against the backdrop of a strong presumption that an arbitrator is impartial."

[88] At para. 2 of *Aroma*, the Court of Appeal stated:

> The Model Law contains provisions that promote the core principle of arbitral impartiality. Article 12(1) imposes a duty on an arbitrator to disclose – before appointment and as the arbitration proceeds – any circumstance likely to give rise to justifiable doubts about the arbitrator's impartiality. Article 12(2) permits a challenge to the arbitrator or the award that was made if circumstances exist that give rise to justifiable doubts about the arbitrator's impartiality, as long as the person making the challenge was unaware of the circumstances when they participated in the arbitrator's appointment. Justifiable doubts about impartiality is an equivalent phrase to reasonable apprehension of bias.

[89] The duty of an arbitrator to disclose covers a wider range of circumstances than those that will justify disqualification of an arbitrator or setting aside an award for a reasonable apprehension of bias: see *Aroma*, at para. 121. However, the duty to disclose is aimed at the same kind of circumstances that give rise to a challenge for reasonable apprehension of bias, and a finding that an arbitrator breached their duty to disclose is relevant, but not

determinative of whether a reasonable apprehension of bias has been shown: *Aroma* at para. 122.

[90] The International Bar Association Guidelines on Conflicts of Interest in International Arbitration (the "*IBA Guidelines*"), which the parties agree are instructive, set up a red/orange/green "stop-light" system. Situations on the "Red" list are, subject to waiver where possible, ones in which an arbitrator should not act. Situations on the "Green" list mean there is no problem: see *Aroma*, at para. 52.

[91] The Orange List is "a non-exhaustive list of specific situations that, depending on the facts of a given case, may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence … with the consequence that the arbitrator has a duty to disclose such situations.": *Aroma*, at footnote 6. The parties agree that the matters at issue in the present case are not explicitly set out on the Orange List.

[92] However, as noted in para. 53 of *Aroma*, the court states that the *IBA Guidelines*:

> …note that situations not on the Orange List or that fall outside the time limits used in its situations are not generally subject to disclosure, <u>but</u> there are situations that need to be assessed for disclosure on a case-by-case basis against the standard of whether they give rise to justifiable doubts about the arbitrator's impartiality or independence. The Guidelines give examples – repeat appointments by the same counsel beyond the three-year period, <u>the arbitrator acting as counsel in an unrelated case with similar issues,</u> or "an appointment made by the same party or the same counsel appearing before an arbitrator, while the case is ongoing, [which] <u>may also have to be disclosed, depending on the circumstances</u>." [Emphasis added.]

[93] The Applicants allege that the *Arguello* case falls within the example underlined above in that Mr. Jana, an arbitrator in this case, is counsel in the *Arguello* case to the respondent Honduras, which raises an issue similar to the indirect loss issue addressed by the Tribunal. The Applicants also rely on the reasoning in the recent decision of *Deutsche Lufthansa AG (Germany) v. Venezuela*, (March 19, 2026) PCA Case No. AA842 (Permanent Court of Arbitration), Decision on the Challenge to Prof. Kaj Hobér. That challenge was decided by the Secretary General of the Permanent Court of Arbitration who found that where an arbitrator accepts and fails to disclose a mandate as counsel in another matter potentially involving overlapping issues, the arbitrator is shown to suffer from justifiable doubts regarding impartiality.[1]

[94] Mexico argues that there are no significant overlapping issues as the *Arguello* arbitration is brought under the CAFTA-DR and this Arbitration proceeded under the NAFTA. However, as noted by the tribunal in *Kappes* referred to above, the provisions under the

[1] The *Deutsche Lufthansa AG (Germany) v. Venezuela*, (March 19, 2026) PCA Case No. AA842 (Permanent Court of Arbitration), Decision on the Challenge to Prof. Kaj Hobér, decision was released while I had this decision under reserve. Both the Applicants and respondent made written submissions on the applicability of this decision.

NAFTA at issue in respect of indirect loss (Art. 1116 and 1117) are substantially similar to those at issue under the CAFTA -DR (Art. 10.16.1(a) and 10.16.1(b)).

[95] A reading of the *Kappes* decision shows the similar structure of the provisions and references reasoning under various NAFTA tribunals in terms of claims for indirect loss when deciding a similar matter under the CAFTA-DR: see for example paras. 69-71, 141, 155-157 of *Kappes*. Accordingly, I am not persuaded that simply because two different treaties are involved the issues raised in *Arguello* are not similar to those in this proceeding.

[96] Mexico also claims that the information before this Court in respect of the *Arguello* arbitration is limited to the notice of intent, notice of arbitration and waiver document and therefore no evidentiary basis for the Applicants claim has been established. However, a reading of the pleadings before me in *Arguello* refer to claims for damages by investors in a Honduras enterprise relating to actions taken by the state against the enterprise which are alleged to have caused the enterprise to deteriorate in value. Payment is sought by the investors under the equivalent of Art. 10.16.1(b) of the CAFTA-DR, (the Art. 1116 equivalent of the NAFTA).

[97] Mexico, further claims that there is no evidence as to what position Honduras may take on the issue of indirect loss in *Arguello*, and therefore the issue is speculative. However, the duty to disclose, which the Applicants allege Mr. Jana violated, exists to give the parties an opportunity to ask questions about matters once disclosed. The fact that Mr. Jana did not disclose the matter which has hampered the Applicants' inability to get further information about the matter cannot be a basis to dismiss the claim that Mr. Jana had a duty to disclose or a claim of reasonable apprehension of bias.

[98] Accordingly, I find that there is a significant risk that the *Arguello* arbitration raised similar issues to those in the Arbitration and that Mr. Jana had a duty to disclose that he was acting as counsel for Honduras in that matter while the Arbitration was proceeding.

[99] Further, Mr. Jana was counsel on record for Honduras during the time when the Tribunal was deliberating on the Award. Following that Award, other members of Mr. Jana's firm have been named as counsel to Honduras in the *Arguello* proceeding, but that does not remedy the issue. Based on Mr. Jana acting as counsel for Honduras, and thus defending a claim similar to the indirect loss claim he was required to impartially decide in this Arbitration, at the time that the decision was under reserve in this Arbitration, I find that a fair-minded and informed observer would conclude that Mr. Jana had a reasonable apprehension of bias.

[100] Given my conclusion in that regard, it is not necessary for me to consider the claims by the Applicant of Mr. Jana's failure to disclose other mandates.

Disposition

[101] For the reasons set out above, I grant the application and set aside the Award.

[102] During the hearing the parties advised me that they had agreed that costs would be awarded to the successful party of $100,000 inclusive of HST. Accordingly, the Respondent is ordered to pay the Applicants costs of $100,000 inclusive of HST within 30 days.

The Honourable Justice J. Dietrich

Date: April 10, 2026