INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Global Telecom Holding S.A.E.

v.

Canada

(ICSID Case No. ARB/16/16)

PROCEDURAL ORDER NO. 5
DECISION ON OUTSTANDING ISSUES OF LEGAL PRIVILEGE

Members of the Tribunal
Prof. Georges Affaki, President of the Tribunal
Prof. Gary Born, Arbitrator
Prof. Vaughan Lowe, Arbitrator

Secretary of the Tribunal
Ms. Frauke Nitschke

13 December 2018

I. BACKGROUND

1. On 13 June 2017, the Tribunal issued Procedural Order No. 1, setting forth the procedural rules governing this arbitration. The Procedural Timetable was attached as Annex A of Procedural Order No. 1 and set out a schedule for the document production phase of the proceeding.

2. In accordance with Section 15.1 of Procedural Order No. 1 and the Procedural Timetable, on 28 March 2018, each Party served on the other Party a request for the production of documents. Subsequently, each Party set forth its objections to the other Party's requests for documents and then its responses to the other Party's objections. On 14 May 2018, each Party submitted its document production schedule to the Tribunal.

3. On 1 June 2018, the Tribunal issued Procedural Order No. 3, which set forth the Tribunal's decision on each of the Parties' respective requests for document production. In Procedural Order No. 3, the Tribunal stated that it was "not ordering the production of any document subject to legal privilege."[1]

4. On 9 October 2018, the Claimant submitted a letter to the Tribunal in which it objected to certain categories of privilege claimed by the Respondent. On 17 October 2018, the Respondent submitted its response to the Claimant's objections. The Respondent also informed the Tribunal that there were outstanding issues related to the Claimant's production of documents and privilege claims, but it made no application to the Tribunal in this regard.

5. On 2 November 2018, the Respondent submitted a letter in which it argued that the "Claimant's document production is incomplete and inadequate, and that the Claimant withheld or redacted information on the basis of overly-broad and inappropriate privilege claims."[2] The Respondent requested that the Tribunal order the Claimant to conduct a document-by document review and to produce several categories of documents over which

[1] Procedural Order No. 3, § 14.

[2] Respondent's letter of 2 November 2018, p. 11.

the Claimant had asserted privilege. The Respondent also asked the Tribunal to "modify the procedural timetable by placing a stay on further proceedings, including submission deadlines and the hearing, until the Tribunal has an adequate opportunity to address these issues."[3]

6. On 3 November 2018, the Tribunal issued Procedural Order No. 4, setting forth its decision on the Claimant's objections to the Respondent's privilege claims. The Tribunal instructed the Respondent to conduct a review of withheld and redacted documents, and to produce any documents that did not fall within Article 9.2(b) or 9.2(f) of the IBA Rules in light of the guidance provided by the Tribunal in that Order.

7. In the cover email to Procedural Order No. 4, the Tribunal invited the Claimant to comment on the Respondent's letter of 2 November 2018, regarding both the Respondent's objections and the proposed stay. The Tribunal also asked for an update with respect to the outstanding issue of publication of the procedural orders.

8. On 5 November 2018, the Claimant submitted its Reply on Merits and Damages & Counter-Memorial on Jurisdiction and Admissibility.

9. By letter of 8 November 2018, the Respondent (a) sought an extension to the deadline for its compliance with Procedural Order No. 4; (b) informed the Tribunal that the Parties had reached agreement on the redaction and publication of Procedural Order No. 3; and (c) identified a number of disagreements between the Parties regarding the designation of information as Confidential or Restricted Access Information in Procedural Order No. 2 and the Parties' submissions.

10. On 10 November 2018, the Tribunal wrote to the Parties in response to the Respondent's letter of 8 November 2018. The Tribunal (a) granted the extension requested by the Respondent; (b) confirmed that Procedural Order No. 3 would be published without its Annexes as agreed by the Parties; and (c) set a pleading schedule for the issue of the designation of information as Confidential or Restricted Access Information.

[3] Respondent's letter of 2 November 2018, p. 1.

11. One 12 November 2018, the Claimant submitted two letters. The first letter responded to the Respondent's letter of 2 November 2018 concerning the Claimant's production of documents and privilege claims. The second letter was in response to the Respondent's letter of 8 November 2018 concerning the designation of information as Confidential or Restricted Access Information.

12. By email of 14 November 2018, the Respondent sought leave to respond to the Claimant's letter of 12 November 2018 concerning the Claimant's privilege claims.

13. On 15 November 2018, the Tribunal wrote to the Parties, noting its concern with the multiplication of submissions and replies in relation to privilege claims at this stage of the proceeding. The Tribunal informed the Parties that it had decided not to grant the Respondent leave for a further submission, and would instead convene a procedural telephone conference to discuss with the Parties a means to ensure the production of responsive documents within a useful time period while retaining the agreed hearing dates in April 2019.

14. On 16 November 2018, the Respondent submitted its reply on the issue of confidentiality, in accordance with the Tribunal's instructions of 10 November 2018.

15. On 19 November 2018, the President held the case management teleconference with the Parties. An audio recording of the teleconference was made available to the Parties and the Tribunal following the call. During the teleconference, at the invitation of the President, the Parties agreed to take a number of steps aimed at completing the document production phase as efficiently as possible.

16. By email of 21 November 2018, the Claimant provided a list of in-house counsel who appear on the documents disclosed on the Claimant's privilege logs, identifying the jurisdictions in which they are qualified.

17. By letter of 22 November 2018, the Tribunal reminded the Parties of the various steps agreed during the case management teleconference.

18. In accordance with the Tribunal's letter of 22 November 2018, the Claimant submitted a letter on 25 November 2018 in which it confirmed its view that each of the in-house attorneys listed in its email of 21 November 2018 was qualified in at least one jurisdiction that recognizes that attorney-client privilege attaches to communications with in-house counsel.

19. Also in accordance with the Tribunal's letter of 22 November 2018, the Respondent submitted a letter on 25 November in which it provided a more detailed explanation regarding the two remaining documents over which it asserts privilege under the Investment Canada Act.

20. On 29 November 2018, the Respondent submitted the Parties' Stern Schedule addressing their respective positions on the disputed issues regarding Claimant's assertion of legal privilege. The Respondent noted that in accordance with the Tribunal's instructions, the Claimant first completed its entries in the Stern Schedule and the Respondent then replied to the Claimant's submissions. The Respondent noted that the Claimant had reserved the right to seek the Tribunal's leave to respond to new arguments raised in the Respondent's submissions.

21. On 2 December 2018, the Claimant wrote further to the Respondent's message of 29 November 2018. The Claimant noted that its positions in the Stern Schedule did not take account of the Respondent's new arguments or Annex I, and that the Claimant would be available if the Tribunal wished to hear Claimant's position on these matters.

22. On 3 December 2018, the Claimant wrote on behalf of the Parties in response to the Tribunal's request to receive an update on the Parties' discussions concerning the redactions to Procedural Order No. 2. The Claimant informed the Tribunal that the Parties were in the process of negotiating the scope of issues that will remain confidential during the course of the proceedings. The Claimant stated that, in the event the Parties were unable to reach an agreement in this regard, they expected to narrow the issues for the Tribunal's consideration by 7 December 2018.

23. On 7 December 2018, the Claimant confirmed that the Parties had agreed to the redactions for Procedural Order No. 2, and provided the non-confidential version of the Order. The Tribunal commends the Parties for their efforts at reaching a consensus on this matter.

24. The Tribunal has considered the outstanding issues of legal privilege as set forth in the Parties' Stern Schedule. Following its deliberations, the Tribunal has decided on each issue and included its decision in the Schedule.

25. With regard to the Respondent's assertion of privilege under the Investment Canada Act, the Tribunal has taken note of the Respondent's further explanation in its letter of 25 November 2018. In light of that explanation, and considering that the Tribunal has not been asked to determine any dispute regarding the Respondent's assertion of this privilege, the Tribunal has decided to reverse its order in paragraph 56 of Procedural Order No. 4 with respect to the two remaining documents that the Respondent has withheld under the Investment Canada Act. The Respondent is no longer obligated to produce these two documents.

II. DECISION

26. The Tribunal holds as follows:

a. The Tribunal decides on each issue of privilege as stated in the final row of the Stern Schedule attached as Annex A. This Annex forms an integral part of the present Order.

b. The Parties shall confer and attempt to agree on the deadline for the Claimant's production of documents in accordance with the Tribunal's decisions in Annex A. In doing so, the Parties should ensure that the hearing dates (Step N on the Procedural Timetable) are maintained. Absent notification by Thursday, 20 December 2018 to the Tribunal of an agreed production date, each Party shall submit what it considers to be a realistic date (keeping in mind Step N) and the Tribunal will set the deadline. In any event, the Claimant is expected to start its review forthwith.

c. The Respondent is not obligated to produce the remaining two documents with respect to which it asserts privilege under the Investment Canada Act.

d. The non-confidential version of Procedural Order No. 2 shall be published on the ICSID website.

On behalf of the Tribunal,

[signed]

Prof. Georges Affaki
President of the Tribunal
Date: 13 December 2018

ANNEX A

Global Telecom Holding v. Government of Canada

Stern Schedule of Disputed Issues Regarding the Claimant's Assertions of Legal Privilege

5 December 2018

Outstanding Issue 1[1]	Applicable law with respect to the scope and waiver of attorney-client privilege, including with respect to each of the following issues: i) Extension of attorney-client privilege to in-house counsel under each applicable law; ii) Waiver of attorney-client privilege through disclosure of legal advice across separate legal entities, and exceptions for common interest, if any, under each applicable law; and iii) Waiver of attorney-client privilege through disclosure of legal advice to third parties, and limited waiver protections, if any, under each applicable law.
Summary of Claimant's Position	GTH's position with respect to this Issue is set out in its 12 November Letter at ¶¶ 20-34. In summary, international law, the ICSID Arbitration Rules, and the Tribunal's Procedural Orders govern this Arbitration, including with respect to privilege. Section 1.4(a) of Procedural Order No. 1 states that the Tribunal will be guided by the IBA Rules in relation to the exchange of documents in this Arbitration. Articles 9.2 and 9.3 of the IBA Rules are of particular relevance here. In addition to the recognition of legal privilege in Article 9.2(b), Article 9.3 identifies well-accepted principles in respect of privilege in document disclosure and recognizes at sub-paragraph (e) "*the need to maintain fairness and equality as between the Parties, particularly if they are subject to different legal or ethical rules*." This comports with Article 9.2(g), which states that the Tribunal can exclude from production documents on the basis of "*considerations of procedural economy, proportionality, fairness or equality of the Parties that the Arbitral Tribunal determines to be compelling*." The Commentary to the IBA Rules explains "*Article 9.2(g) is a catch-all provision, intended to assure procedural economy, proportionality, fairness and equality in the case. For example, documents that might be considered to be privileged within one national legal system may not be considered to be privileged within another. If this situation were to create an unfairness, the arbitral tribunal may exclude production of the technically non-privileged documents pursuant to this provision. In general, it is hoped that this provision will help ensure that the arbitral tribunal provides the parties with a fair, as well as an effective and efficient, hearing*." Procedural Order No. 1, which reflects the Parties' agreement, requires this principle to guide the Tribunal's decision.

[1] The Outstanding Issues identified in this Stern Schedule are reflected as articulated by Canada.

	Other international tribunals have similarly recognized the unique circumstances inherent in international arbitration proceedings, and have applied a most favored nation approach to privilege where multiple privilege regimes could be applied. This approach—one which acknowledges the array of domestic legal principles at issue and applies a uniform standard to all parties involved in the proceedings—is the most appropriate approach in this case. As Canada has well observed, the documents in question involve (sometimes in the same communication) events, entities, and attorneys with connections to multiple jurisdictions. The application of Canada's proposed closest connection test would be inconclusive or otherwise threaten to introduce inconsistency in the treatment of documents within GTH's own disclosure as well as between the Parties. Canada would be able to rely without restraint on its own domestic laws to claim privilege while GTH (an entity with several in-house Canadian qualified attorneys, dealing with matters of Canadian law, in respect of a business in Canada) would be prohibited from doing so. It is precisely in circumstances such as the one here where Canada's proposed approach is unacceptable and violates the requirements of fairness and equal treatment set out in the IBA Rules and well-recognized in international law. Even in the context of international commercial arbitrations where it could be argued a "*closest connection*" test is more appropriate due to the relevance of a particular domestic law (*e.g.*, the seat of the arbitration), commentators (citing to the overriding significance of ensuring equality and fairness between the parties) have observed that an adjustment to a closest connection analysis must be made in cases where it would result in applying different privilege rules across parties or between different groups of documents (*see, e.g.*, **Exhibit CL-189**; **Exhibit CL-190; Exhibit CL-191**). In addition to Procedural Order No. 1 and the IBA Rules, the Tribunal may refer to the following authorities: **Exhibit CL-184**, IBA Rules, *Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration*, pp. 25-26; **Exhibit CL-185**, *Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic*, ICSID Case No. ARB/13/8, Procedural Order No. 6, 20 July 2014, ¶¶ 14, 16; **Exhibit CL-186**, *Philip Morris Asia Limited v. Commonwealth of Australia*, PCA Case No. 2012-12, Procedural Order No. 12: Regarding the Parties' Privilege Claims, ¶ 4.6; **Exhibit CL-187**, Diana Kuitkowski, *The Law Applicable to Privilege Claims in International Arbitration*, 32(1) J. INT'L ARB. 65 (2015), p. 97; **Exhibit CL-188**, *Carlos Rios and Francisco Javier Rios v. Republic of Chile*, ICSID Case No. ARB/17/16, Procedural Order No. 7, 4 October 2018 (Unofficial English Translation), ¶ 26; **Exhibit CL-189**, Fabian von Schlabrendorff & Audley Sheppard, *Conflict of Legal Privileges in International Arbitration: An Attempt to Find a Holistic Solution, in* GLOBAL REFLECTIONS ON INTERNATIONAL LAW, COMMERCE AND DISPUTE RESOLUTION: LIBER AMICORUM IN HONOUR OF ROBERT BRINER (2005), Sections 8.5 and 10;

	Exhibit CL-190, Klaus Peter Berger, *Evidentiary Privileges: Best Practice Standards versus/and Arbitral Discretion*, 22(4) ARB. INT'L 501 (2006), pp. 512-13, 515-19; **Exhibit CL-191**, Jeffrey Waincymer, PROCEDURE AND EVIDENCE IN INTERNATIONAL ARBITRATION (2012), pp. 805-806; **Exhibit CL-192**, Jennifer Kirby, *Evolution and the Discoverability of In-House Counsel Communications*, 35(2) J. INT'L ARB. 147 (2018).
Summary of Canada's Position	The Claimant must establish that its assertions of attorney-client privilege qualify under the applicable law. The applicable law is that of the jurisdiction with the closest connection to the communication: The choice of the applicable law with respect to attorney-client privilege should be determined by considering the domestic law of the jurisdiction with the "closest connection" to the communication over which privilege is claimed. The closest connection test has received wide acceptance in the international arbitration community and been frequently applied by international arbitral tribunals, either explicitly or by applying the relevant domestic law (**RL-256**; **RL-257**, **RL-258**, **RL-251**, **RL-248**, **RL-247**, **RL-260**, **RL-261**). Article 9.3(c) of the IBA Rules provides that the Tribunal may take into account "the expectations of the Parties and their advisors at the time the legal impediment or privilege is said to have arisen" (emphasis added). The Commentary to Article 9 of the IBA Rules states: "Article 9.3(c) expresses the guiding principle that expectations of the parties and their advisors at the time the legal impediment or privilege is said to have arisen should be taken into consideration. Often, these expectations will be formed by the approach to privilege prevailing in the home jurisdiction of such persons." (**CL-184**). With respect to communications between a corporation and its in-house counsel located and providing advice in that same jurisdiction, the applicable law on attorney-client privilege is undoubtedly the law "prevailing in the home jurisdiction": Dutch law for communications between Vimpelcom and its in-house counsel; Egyptian law for communications between GTH and its in-house counsel (for much of the relevant period i.e. until GTH's move to the Netherlands); and Canadian law for communications between Wind and its in-house counsel.[2] With respect to communications between one of the corporations and its outside counsel in another jurisdiction, the applicable law should be considered on a case-by-case basis. The applicable law will inform issues related to scope, waiver, and the application of common interest privilege. The MFN standard is inadequate and inappropriate: The application of an amorphous MFN standard is unjustified and would result in an unpredictable and unfair result inconsistent with the parties' expectations: (1) The application of an MFN standard to attorney-client privilege has received virtually no support in the jurisprudence in international investment or commercial arbitration. The Claimant's assertion that "investment treaty tribunals have

[2] For VimpelCom, the headquarters, base of business operations, and key personal are located in the Netherlands. [redacted] The place of incorporation is not necessarily the place of a corporation's domicile; thus it is not decisive that Veon is incorporated in Bermuda.

	overwhelmingly moved towards the MFN approach" (Claimant's Letter of November 12, 2018, ¶ 25) relies on two cases, and one, *Philip Morris*, did not endorse the MFN approach. (2) Article 9.3(c) of the IBA Rules refers to the expectations of the parties when the advice was provided and the duty of confidentiality of privilege arose. It does not refer to the expectations of the Parties at the time of litigation. This approach would undermine predictability and introduce uncertainty at the time of communications between lawyer and client. (3) Far from ensuring the equality of the parties, the application of a MFN approach to privilege would have the opposite result: it would result in the Claimant being able to claim privilege beyond what is available to Canada under Canadian law. It would be unfair for a Party to benefit from a higher protection than the relevant national laws, as this would create a kind of "super privilege". For such reasons, as Arbitrator Born notes, the MFN approach: "*lacks a satisfactory analytical basis. Privileges are only applied at all because they are created, like other legal rights, by national law. It is very difficult to justify granting one party legal rights that it does not otherwise possess, merely because its counter-party enjoys them. That same logic, applied to matters of capacity, authority, corporate organization, impossibility, force majeure and the like, would produce arbitrary and irrational results; <u>there is no more cogent reason to adopt this analysis for privileges</u>*." (**RL-256**) This overly broad interpretation of privilege has led the Claimant to withhold from production more than three times the number of documents it produced. <u>The jurisdiction of Counsel's bar of call is not the determining factor</u>: The client's domicile is more appropriate for determining the closest connection than the jurisdiction of the counsel's bar of call: (1) The client's interest is of prime importance in an arbitration proceeding when the non-disclosure of a document is at stake (**RL-256**, **RL-259**). The issue in this privilege dispute is not counsel's assertion of confidentiality and expectation of privilege, but the client's. (2) Using the counsel's bar of call to determine applicable law means that different laws may apply to the same client, depending on which counsel it contacted for legal advice (**RL-256**). In contrast, relying on the client's domicile ensures a consistent and predictable standard for each client. (3) Many of the Claimant's counsel are admitted to multiple bars, creating uncertainty over which law applies (**RL-256**, **RL-259**). Relying on the client's domicile avoids these issues. **i) Extension of attorney-client privilege to in-house counsel under each applicable law** Applying the closest connection test, the Claimant must demonstrate that communications with in-house counsel qualify as privileged under the law of the client's home jurisdiction. (1) Dutch law requires in-house counsel to be admitted to the Dutch Bar for attorney-client privilege to protect communications between a corporation and its in-house counsel (**C-415**). Since VimpelCom's headquarters and key management and legal functions are located in the Netherlands, its communications with in-house counsel that are admitted to the bar in other jurisdictions, but not the Dutch Bar, are not privileged. Thus VimpelCom's communications

	with the following in-house counsel is not privileged: [redacted] (admitted: New Zealand, England and Wales), [redacted] (Illinois, USA), [redacted] (Egypt), [redacted] (England and Wales), [redacted] (New York and D.C., USA), and [redacted] (New York, USA). To the extent that GTH's communications with the following in-house counsel occurred after the move to the Netherlands, they are not privileged: [redacted] (New Zealand, England and Wales), [redacted] (Egypt), [redacted] (England and Wales, France), [redacted] (England and Wales), [redacted] (Alberta, Canada), and [redacted] (Texas and New York, USA). (2) With respect to GTH's communications with in-house counsel prior to the move to the Netherlands, Canada notes that Egyptian law does not recognize a distinct doctrine of 'privilege'. Under Article 65 and Article 79 of the Egyptian Advocacy Law No. 17 of 1983, lawyers are required to not disclose any confidential information of their client at the client's request. This is an obligation on counsel regarding confidential information. Although a party has a right to prevent disclosure of confidential information to the general public, in international arbitration proceedings such as this one, a tribunal can order one party to share confidential information to the other party with a requirement to not disclose it generally. Under Article 20 of the Evidence in Civil and Commercial Matters Law, a party may request the court to order the other party to produce any written document in the course of the dispute, "if the law permits requesting it". The governing law of these proceedings enables the Tribunal to order each Party to produce documents responsive to the issues in the case. Accordingly, if Egyptian law applies to the Claimant, there is no separate protection for attorney-client privilege. The result would be the same with respect to communications between GTH and [redacted], who is admitted in Egypt, if the Tribunal adopts the counsel's bar of call instead of the client's domicile to determine the applicable law. (3) Canada does not contest that attorney-client privilege may extend to in-counsel admitted to the bar in Canada, the U.S., England and Wales, France, and New Zealand. Yet as discussed below, all of these jurisdictions extend the privilege only to communications of in-house counsel providing legal advice, not business advice, and provided certain specific conditions are met. **ii) Waiver of attorney-client privilege through disclosure of legal advice across separate legal entities, and exceptions for common interest, if any, under each applicable law** Canada objects to the Claimant's claim of privilege over extensive communications that were shared between separate corporations, as summarized below and in Canada's letter to the Tribunal dated November 2, 2018 (see Section II.B). Privileged communication shared with a third party is no longer confidential, and the privilege is presumed waived. Article 9(3)(d) of the IBA Rules provides that the Tribunal may consider "any possible waiver of any applicable legal impediment or privilege by virtue of consent, earlier disclosure, affirmative use of the Document, statement, oral communication or advice contained therein, or otherwise". The Commentary to the IBA Rules provides that "Article 9.3(d) encapsulates an important exception to privilege in many countries, namely waiver." (**CL-184**) The Claimant asserts that because of a "common interest privilege" there is no waiver of attorney-client privilege over the communications shared between different related corporations. Article 9(3) of the IBA Rules does not recognize an exception to the waiver of privilege

	for common interest in the case of commercial transactions, but only recognizes in Article 9(3)(b) an exception with respect to settlement negotiations. The onus is on the Claimant to demonstrate: (1) the applicable law of privilege for each communication recognizes common interest privilege, including any conditions to qualify for it; and (2) that the communication qualifies for common interest privilege under the applicable law. The Claimant has failed to meet this burden. Canada notes that the recognition of, and rules on, common interest privilege vary across jurisdictions. For example, the New York Court of Appeals recently affirmed that common interest privilege does not extend to commercial transactions. Three of the Claimant's counsel are admitted to the bar in New York State: [redacted] If the Tribunal applies the domestic law of the counsel's bar of call, the Claimant may not protect communications with these counsel from disclosure. In other U.S. jurisdictions, the "community of-interest" (or common-interest) privilege is limited to sharing information between attorneys rather than sharing with or among clients, which destroys the privilege. In Canada, common interest privilege may protect communications to allow parties to pursue commercial transactions. Yet the parties must have a "sufficient common interest" (**R-294**). In both Canada and the U.S., the parties must not be adverse in interests. If a subsidiary is not wholly owned, there may be no common interest with the parent, particularly where the parent does not have a controlling interest in the subsidiary (**R-303**, **R-304**). Furthermore, Dutch law does not appear to recognize any the concept of common interest privilege. **iii) Waiver of attorney-client privilege through disclosure of legal advice to third parties, and limited waiver protections, if any, under each applicable law** A communication is only privileged if it is made in confidence. If persons other than the client, its attorney, or possibly persons integral to the attorney-client relationship are present, the communication is not made in confidence, and the privilege does not attach or is waived. In order for attorney-client privilege to apply to communications shared with third parties, the Claimant must demonstrate: (1) the applicable law for each correspondence nevertheless treats such communications as privileged, or protected by limited waiver; and (2) the correspondence qualifies for these protections under the applicable law. The Claimant has failed to meet this burden. Canada notes that not all jurisdictions recognize limited waiver or other protections against disclosure following waiver to third parties. In Canada, a third-party communication may be privileged only if it is "performing a service on the client's behalf which is integral to the client-solicitor function." (**R-305**). The third party must act as a "translator" or conduit directly between the client and solicitor, effectively to interpret the meaning of a corporation's technical materials into terms that are understandable to the lawyer so as to enable the provision of the legal advice. If the third party's work is related to a business function – for instance, as a financial advisor, tax advisor, or public relations firm – but is only ancillary to the solicitor's function, the communications are not privileged (**R-306**). In the U.S., courts tend to restrict the privilege to those agents who are

	closely involved and of great importance in facilitating the attorney-client relationship, such as situations analogous to interpretation (**R-307**). The concept of "limited waiver" – where it is recognized at all – is even more restrictively applied. In Canada, the two main cases to address limited waiver involved disclosure to only auditors (**C-406** and **R-308**). Limited waiver does not extend to other third-parties, such as investment banks. In the U.S., the concept of "selective waiver", which is similar to Canada's "limited waiver", has been rejected in most circuit courts (**R-310**, **R-311**, **R-312**). Dutch law does not appear to recognize a concept of "limited waiver". The Supreme Court of the Netherlands recently held that attorney-client privilege may be waived when communications are sent to a third party, including a professional entrusted with privileged information. On this issue, we refer the Tribunal to the following exhibits and legal authorities: **RL-256**, Annabelle Möckesch, *Attorney-client Privilege in International Arbitration* (Oxford: Oxford University Press, 2017) ("*Möckesch*"), ¶¶ 8.110, 8.141, 8.148, 8.202, 8.203; **RL-257**, *Jürgen Wirtgen and others v. Czech Republic* (PCA Case No. 2014-03) Final Award, 11 October 2017, ¶ 168; **RL-258**, *BSG Resources Limited v. Republic of Guinea* (ICSID Case No .ARB/14/22) Procedural Order No. 4, 25 November 2015, ¶ 6(c); **RL-251**, *Vito G. Gallo v. The Government of Canada* (UNCITRAL) Procedural Order No. 3, 8 April 2009, ¶ 41: ("domestic legal concepts of solicitor-client privilege are recognized and protected by international law.") **RL-248**, *Glamis Gold, Ltd. v. United States of America* (UNCITRAL) Decision on Parties' Requests for Production of Documents Withheld on the Grounds of Privilege, 17 November 2005, ¶ 20; **RL-247**, *Pope & Talbot Inc. v. Government of Canada* (UNCITRAL) Decision by Tribunal, 6 September 2000, ¶ 1.9; **RL-260**, *Merrill & Ring Forestry L.P. v. Government of Canada* (UNCITRAL) Decision of the Tribunal on Production of Documents in Respect of Which Cabinet Privilege Has Been Invoked, 3 September 2008, ¶ 15; **RL-261**, *Windstream Energy LLC v. Government of Canada* (UNCITRAL) Procedural Order No. 4, 23 February 2015, ¶ 3.1; **CL-186**, *Philip Morris Asia Limited v. Commonwealth of Australia* (UNCITRAL) Procedural Order No. 12 Regarding the Parties' Privilege Claims, 14 November 2014, ¶ 4.6 (in fact, the tribunal in *Philip Morris* declined to rely on any national law at all in determining the applicable privilege standard); **RL-259**, Steven Bradford, *Conflict of Laws and the Attorney-Client Privilege: A Territorial Solution* (1991), pp. 909, 948, 951; **CL-184**, IBA Rules Commentary, p. 25;

	C-415, Decision No. ECLI:NL:HR:2013:BY6101, Dutch Supreme Court, Judgment, 15 March 2013 (Unofficial English Translation; **R-295**, *Teleglobe*, pp. 28, 29, 37-38: ("The *Teleglobe* court explained: "[t]he attorney-sharing requirement helps prevent abuse by ensuring that the common interest privilege only supplants the disclosure rule when attorneys, not clients, decide to share information in order to coordinate legal strategies."); **R-299**, Delaware Uniform Rules of Evidence, Rule 510; **R-300**, *Ambac Assurance Corp. v. Countrywide Home Loans Inc.*, 36 N.Y.S.3d 838 (Ct. App., 2016); **R-301**, *Ramada Inns, Inc. v. Dow Jones & Co*., 523 A.2d 968, 972 (Del. Super. Ct. 1986); **C-409**, *Maximum Ventures Inc. v. de Graaf*, 2007 BCCA 510, 409 W.A.C. 215, ¶ 14; **R-294**, *Iggillis Holdings Inc v Canada (Minister of National Revenue)*, 2018 FCA 51 (FCA), ¶ 41; **R-302**, *Pitney Bowes [Pitney Bowes of Canada v. Her Majesty the Queen*, 2003 FCT 214, 225 D.L.R. (4th) 747]; **R-303**, *Trenwick America Litigation Trust v. Ernst & Young, L.L.P*., 906 A.2d 168 **R-304**, *Neuberger Berman Real Estate Income Fund, Inc. v. Lola Brown Trust No. 1B, et al.*, 230 F.R.D. 398 **R-305**, *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. 3d 321 (Can. Ont. C.A.); **R-306**, *Camp Dev. Corp. v. S. Coast Greater Vancouver Transp. Auth*., 2011 BCSC 88 (CanLII) (Can. B.C. Sup. Ct.); **R-309**, Kathryn Chalmers and Andrew Cunningham, *Privilege from Canadian and U.S. Perspectives: Reverence vs. Skepticism*, in Law and Business Review of the Americas, Volume 19, Number 3 (2013), pp. 305, 314; **R-307**, *Cavallaro v. United States*, 284 F.3d 236, 247 (1st Cir. 2002); **R-313**, *United States v. Kovel*, 296 F.2d 918, 921 (2d Cir. 1961); **C-406**, *Philip Servs. Corp. v. Ontario Sec. Comm'n* (2005), 77 O.R. 3d 209 (Can. Ont. Div. Ct.); **R-308**, *Canada (Minister of Nat'l Revenue) v. Grant Thornton et al.*, 2012 FC 1313, para. 48 (Fed. Ct.). **R-310**, *United States v. Mass. Inst. of Tech*., 129 F.3d 681, 685 (1st Cir. 1997); **R-311**, *Westinghouse Elec. Corp. v. Philippines*, 951 F.2d 1414, 1424-27 (3d Cir. 1991); **R-312**, *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 302 (6th Cir. 2002).

Arbitral Tribunal's Order	The abundant, and often contradictory, authorities exhibited by the Parties in support of their arguments in this Schedule are a reminder that the nature and the scope of legal privilege differ across jurisdictions. Even though the principle of legal privilege is recognized in most jurisdictions, there is no generally recognized standard at an international level to which this Arbitral Tribunal could refer. Likewise, there is no consensus on the characterization of legal privilege in terms of procedural or substantive rules. That said, in the present proceedings, the issue arises in the context of a procedural matter, namely, the production of documents as ordered in PO 3. Consequently, legal privilege shall be examined as a procedural matter. However, the practical consequences of that distinction should not be overestimated. As can be seen in the Tribunal's decision below, it is of little importance for the ultimate outcome of the disputed entitlement to legal privilege whether that issue would have been considered as a substantive matter. Although the onus of establishing the grounds for legal privilege seems not to be in dispute, the Tribunal confirms for the avoidance of doubt that claiming an exception to the general duty to produce documents responsive to the Tribunal's production order must be established by the party claiming that exception, here GTH. In deciding on this first Outstanding Issue, the Arbitral Tribunal will first determine the law applicable to legal privilege. It shall then address each of the three sub-questions identified by the Parties under this Outstanding Issue 1. **(i) The law applicable to legal privilege** Canada claims that legal privilege should be determined pursuant to the domestic law of the jurisdiction with the closest connection to the communication over which privilege is claimed.

	The conflict of laws rule submitted by Canada follows a functional approach. It has been applied by many tribunals, including in CL-188 submitted by Claimant.[3] The attractiveness of this test stems from its reliance on the closeness of the relevant connecting factor – an objective standard – rather than on State interests. This makes it particularly relevant in international arbitration. The Tribunal notes with appreciation that the Parties have not indulged in assessing every possible connecting factor, and they are legion.[4] Instead, GTH claims the application of a most favored nation (**MFN**) approach to legal privilege, with the consequence that a unique standard would thus apply to the communications of all in-house counsel asserting legal privilege, regardless of their bar of call or of the law otherwise applicable to the communication giving rise to the privilege claim. Canada counters by claiming the application of the law prevailing in the home jurisdiction of each counsel as being the jurisdiction with the closest connection to the relevant communication. The Tribunal has difficulty in accommodating GTH's argument that seeks to disconnect legal privilege from *any* national law, for legal privilege is first and foremost an entitlement created by national law just like capacity and authority. It arises only in relation to legal advice extended by counsel pursuant to a license to practice conferred by her bar of call, the rules or law of which also protect that practice by conferring legal privilege on communications consisting of legal advice or counsel work product. If MFN were to be applied on the basis of granting "*the broadest protection*" to all in-house counsel as claimed by

[3] CL-188, *Carlos Rios and Francisco Javier Rios v. Republic of Chile*, ICSID Case No. ARB/17/16, Procedural Order No. 7, 4 October 2018 (Unofficial English Translation), §25. See more broadly RL-256, Annabelle Möckesch, *Attorney-client Privilege in International Arbitration* (Oxford: Oxford University Press, 2017) ("*Möckesch*"); RL-257, *Jürgen Wirtgen and others v. Czech Republic* (PCA Case No. 2014-03) Final Award, 11 October 2017; RL-258, *BSG Resources Limited v. Republic of Guinea* (ICSID Case No. ARB/14/22) Procedural Order No. 4, 25 November 2015; RL-251, *Vito G. Gallo v. The Government of Canada* (UNCITRAL) Procedural Order No. 3, 8 April 2009 ("*Gallo v. Canada*"); RL-248, *Glamis Gold, Ltd. v. United States of America* (UNCITRAL) Decision on Parties' Requests for Production of Documents Withheld on the Grounds of Privilege, 17 November 2005; RL-247, *Pope & Talbot Inc. v. Government of Canada* (UNCITRAL) Decision by Tribunal, 6 September 2000; RL-260, *Merrill & Ring Forestry L.P. v. Government of Canada* (UNCITRAL) Decision of the Tribunal on Production of Documents in Respect of Which Cabinet Privilege Has Been Invoked, 3 September 2008; RL-261, *Windstream Energy LLC v. Government of Canada* (UNCITRAL) Procedural Order No. 4, 23 February 2015 (as submitted by Canada).

[4] RL-256, *Möckesch* (the chapter reviewing the multiple possible connecting factors, outside the exhibited excerpts).

	GTH, it would lead to the entitlement of any in-house counsel to assert legal privilege even where that counsel is not admitted in a jurisdiction which allows for privilege to be asserted over in-house communications, or is not admitted to legal practice in any bar at all. The Arbitral Tribunal considers that the recommendation set out in the IBA Rules for tribunals to take into account fairness and equality as between the parties that are subject to different legal or ethical rules[5] cannot lead *ipso facto* to bestowing upon all in-house counsel an identical entitlement to asserting legal privilege even though, in different circumstances, other tribunals might have preferred a different reasoning.[6] This Arbitral Tribunal considers that applying such an autonomous standard in the abstract would negate the very foundation of this Tribunal's decision that each claim for legal privilege should be determined on the basis of the domestic law applicable in the particular communication over which privilege is claimed. The fact that international law applies in this arbitration[7] does not preclude the Arbitral Tribunal from applying domestic law to a privilege claim. This is all the more so given that domestic principles of legal privilege are recognized and protected by international law.[8] The Tribunal is satisfied that fairness and equality, as recommended in the IBA Rules, are maintained where the Tribunal decides, for instance, that Canadian law attaches legal privilege to in-house counsel legal advice subject to that law *and* upholds the entitlement of in-house Canadian qualified counsel to legal privilege regardless of whether the relevant communication involves claimant or respondent, corporate or government in-house counsel. Conversely, the Tribunal considers that there no convincing justification, in the particular facts of the present situation, for the claimed application in the name of equity or the

[5] Article 9(3)(e).

[6] *See* CL-185, *Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic*, ICSID Case No. ARB/13/8, Procedural Order No. 6, 20 July 2014, §16.

[7] PO 1, §1.1.

[8] RL 251, *Gallo v. Canada* at §41.

	principle of equal treatment a one-size-fits-all "*broadest protection*" autonomous standard to all in-house counsel, regardless of the privilege rules that apply in their bar of call.[9] The Tribunal is likewise not persuaded by GTH's argument that an autonomous common standard should be applied to avoid the complexities due to the disparity amongst domestic laws pertaining to legal privilege. Having to consider different laws in relation to a given situation is but a corollary of cross-border business realities in which GTH thrives. In particular, the Tribunal does not consider that there is evidence that an autonomous legal standard governing privilege claims has yet crystallized in international law. Moreover, there is no evidence that Canada has broadened its national legal privilege rules to disadvantage GTH in these proceedings.[10] Therefore, there is no superior interest to protect by discarding the national approach rule in favour of the MFN standard. In coming to this conclusion, the Tribunal notes that, as of today, an MFN approach to legal privilege is far from being upheld as an international principle of law.[11] As such, applying such a standard could defeat the Parties' expectations, which is a key feature in the IBA Rules as further discussed in the next paragraph.[12] Indeed, were the Tribunal to indulge in devising a standard of legal privilege *after* a communication is issued, instead of referring to pre-existing domestic standards, the parties could be deprived of the possibility to predict *at the time* of their communication whether it will be protected.

[9] R-293, *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v. European Commission*, Case C-550/07, Court of Justice of the European Union ("*Akzo Nobel*"), 14 September 2010, §58.

[10] *See* GTH Letter of 12 November 2018, §27.

[11] The Tribunal notes GTH's contradictory reference in the same sentence to an "*overwhelming*" move by tribunals towards the MFN approach to privilege and to an "*emerging*" consensus, *cf.* GTH Letter of 12 November 2018, §25.

[12] Interestingly, the CJEU reviewed the domestic laws of the Member States of the European Union when devising the privilege standard in *AM & S* and *Akzo Nobel*.

	In selecting the law of the jurisdiction with the closest connection to the situation, the Tribunal is mindful of IBA Article 9(3)(c) which recommends that the tribunal takes into account when considering issues of legal privilege, the expectation of the parties and their advisors at the time the legal privilege is said to have arisen.[13] The Tribunal considers that, of the many connecting factors that could be considered to establish a claim to legal privilege, the law of the jurisdiction of the counsel's bar of call is the more convincing because it is the more predictable at the time when privilege attaches. Every other factor could be incidental or manipulatable. Often, that law will be the one prevailing in the home jurisdiction of the relevant counsel, as pointed out in the Commentary to article 9 of the IBA Rules.[14] As Canada submits, Dutch law would be expected to apply in relation to asserting privilege on communications between Vimpelcom and its in-house counsel, and Egyptian law would be expected to apply to communications between GTH and its in-house counsel. The above should remain constant even where counsel offering the legal advice is based in a different jurisdiction from her bar of call or from the place where the recipient of the advice is situated. In such a case, the law applicable to privilege in the jurisdiction where counsel is admitted and which allows counsel to extend the relevant legal advice, should apply as being the closest to the Parties' expectation at the relevant time. This is because legal privilege attaches to the rules of professional secrecy that rest on the admission to the bar rather than to the client receiving the advice. Accordingly, the Tribunal declines to follow Canada's submission to the contrary. If there are limitations to that privilege, counsel is expected to so indicate to her client given that the client is entitled to assume that it can transmit protected information to its counsel. Upholding the law of counsel's bar of call in relation to legal advice given by counsel pursuant to her admission to that bar is all the more convincing given that lawyers practicing across borders can be disciplined before their bar of call if they infringe their ethical obligations when rendering legal services outside of their home jurisdiction. Referring to the relevant bar rules pursuant to which counsel is offering

[13] Canada refers to subparagraph (c) of Article 9(3)(c) while, surprisingly, GTH omits any reference thereto, preferring instead referring only to subparagraph (e).

[14] CL-184, IBA Rules, *Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration*.

	the particular legal advice over which privilege is claimed likewise sets aside the risk of confusion or of unpredictability if counsel were to be admitted to legal practice in several jurisdictions. The presumption that the applicable law is the law of the bar of call of counsel asserting legal privilege under which the disputed communication was issued, may be set aside in favour of another national law if it is established that, in the specific circumstances, that the other national law presents a manifestly closer connection with the situation. The Arbitral Tribunal found no such evidence in the Parties' submissions in relation to Claimant's assertion of legal privilege in respect of in-house counsel's communications. **(ii) Extension of attorney-client privilege to in-house counsel under each applicable law** GTH claims privilege for the communications of its in-house counsel admitted in the jurisdictions listed in Appendix A to GTH's letter of 25 November 2018, namely, Canada, Egypt, the Netherlands, the United States, England and Wales, and New Zealand.[15] Canada denies that any such privilege exists for in-house counsel in the EU or in Egypt, but does not contest privilege for the other jurisdictions listed above.[16] The Tribunal needs therefor only to determine the entitlement of in-house counsel communications to legal privilege in the EU (in effect, the Netherlands) and Egypt. As concerns the EU, Canada bases its argument on the Judgment of the Court of Justice of the European Union (**CJEU)** in the *Akzo Nobel* case.[17] In that Judgment, the scope of the authority of which is disputed by the Parties, CJEU confirmed an earlier judgment of the Court in *AM & S Europe Limited v.*

[15] GTH Letter of 12 November 2018, §30 *et seq.*

[16] Canada's Submission of 2 November 2018, p. 7, and Canada's submissions in this Schedule, *supra*.

[17] R-293, *Akzo Nobel*.

	Commission[18] and rejected the claim for attorney-client privilege in relation to communications with in-house counsel admitted to the bar in the Netherlands. The Court found that the requirement of independence, which is inherent to the entitlement to legal privilege, "*means the absence of any employment relationship between the lawyer and his client*."[19] The Court went on to assert in general terms: "*An in-house lawyer, despite his enrolment with a Bar or Law Society and the professional ethical obligations to which he is, as a result, subject, does not enjoy the same degree of independence from his employer as a lawyer working in an external law firm does in relation to his client. Consequently, an in-house lawyer is less able to deal effectively with any conflicts between his professional obligations and the aims of his client*."[20] GTH contested the general scope that Canada sought to grant to the *Akzo Nobel* Judgment of the CJEU. Relying on the Opinion of Advocate General Kokott,[21] GTH submitted that the Judgment "*applies only to competition proceedings and investigations conducted by the Commission; it does not affect the law governing national proceedings*."[22] GTH also referred the Tribunal to a decision of the Hoge Raad rendered on 15 March 2013[23] which decided that the scope of the CJEU Judgment in *Akzo Nobel* is restricted to competition investigations by the EU Commission under European law, but recognized outside that situation in-house counsel's entitlement to assert legal privilege where those counsel are admitted to the bar and have their employment contracts guarantee their independence.

[18] Case 155/79 [1982] E.C.R. 01575, referred to approvingly by the CJEU in R-293, *Akzo Nobel* at §50.

[19] Ibid. at §44.

[20] Ibid. at §45.

[21] C-411, *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v. European Commission*, Court of Justice of the European Union, Case C-550/07, Opinion of Advocate General Kokott, 29 April 2010, §186.

[22] GTH Letter of 12 November 2018, §30(a).

[23] C-415, Decision No. ECLI:NL:HR:2013:BY6101, Dutch Supreme Court, Judgment, 15 March 2013 (Unofficial English Translation).

	While aware of the Hoge Raad decision and referring to it elsewhere in this Schedule, Canada chose not to address its relationship with the CJEU Judgment in *Akzo Nobel.* After examining the relevant authorities, the Tribunal notes that several paragraphs of the *Akzo Nobel* Judgment support its limited scope interpretation advocated by GTH. They include the following excerpts: – In §101: "(…) *the General Court's interpretation in the judgment under appeal that exchanges within an undertaking or group with in-house lawyers are not covered by legal professional privilege* ***in the context of an investigation carried out by the Commission*** *does not give rise to any legal uncertainty as to the scope of that protection.*" – In §102: "***The Commission's powers under Regulation No 17 and Regulation No 1/2003 may be distinguished from those in enquiries which may be carried out at national level. Both types of procedure are based on a division of powers between the various competition authorities. The rules on legal professional privilege may, therefore, vary according to that division of powers and the rules relevant to it***." – In §103: "***The Court has held in that connection that restrictive practices are viewed differently by European Union law and national law. Whilst Articles 101 TFEU and 102 TFEU view them in the light of the obstacles which may result for trade between the Member States, each body of national legislation proceeds on the basis of considerations peculiar to it and considers restrictive practices solely in that context***." – In §114: "*However, in the present case, the Court is called on to decide on the legality of a decision taken by an institution of the European Union* ***on the basis of a regulation adopted at European Union level****, which, moreover, does not refer back to national law.*" – In §115: "The *uniform interpretation and application of the principle of legal professional privilege at European Union level are essential in order* ***that inspections by the Commission in anti-trust proceedings*** *may be carried out under conditions in which the undertakings concerned are treated equally. If that were not the case, the use of rules or legal concepts in national law and deriving from the legislation of a Member State would adversely affect*

	the unity of European Union law. ***Such an interpretation and application of that legal system cannot depend on the place of the inspection or any specific features of the national rules***." – In §117: "*In accordance with the provisions of Article 103 TFEU,* ***it is for the European Union to lay down the regulations or directives to give effect to the principles in Articles 101 TFEU and 102 TFEU concerning the competition rules applicable to undertakings****. That power aims, in particular, to ensure observance of the prohibitions referred to in those articles by the imposition of fines and periodic penalty payments and to define the Commission's role in the application of those provisions.*" All the above lend credence to GTH's contention that the *Akzo Nobel* Judgment is of a limited scope: it only applies to investigations carried out by the Commission under Regulation No. 17 and Regulation No. 1/2003 (i.e., EU competition investigations under articles 101 & 102 TFEU). Importantly, this reading of the ECJ's judgment – and of the scope of EU legal privilege – is the only reading that would be consistent with the Hoge Raad decision and, although not contested by Canada, by English case law as well.[24] If the CJEU's principle denying in-house lawyers legal privilege was applicable to all kinds of legal proceedings on EU territory, the decisions of the Dutch and English courts upholding such privilege for in-house lawyers would be contrary to EU law. The Tribunal saw no indication that this is the case. Accordingly, the Tribunal decides that the Hoge Raad decision in C-415, not the CJEU in *Akzo Nobel*, applies in this arbitration, outside any EU competition law aspect, for the purpose of determining whether legal privilege can be claimed by in-house counsel admitted to practice in the Netherlands. However, GTH's entitlement to claim legal privilege is predicated on its evidencing that (a) the two relevant in-house counsel listed in Appendix A were admitted to the bar in the Netherlands as established by the production of a bar certificate contemporaneous to the date of each communication over which privilege is claimed, and (b) the employment contract of those counsel provides for guarantee of independence clauses in compliance with the rules of ethics of the bar in the Netherlands. Absent such an evidence, GTH is ordered to produce without delay communications with in-house counsel who are only admitted to the bar in the Netherlands, as ordered in the Tribunal's PO 3.

[24] *ENRC v SFO* [2018] EWCA Civ 2006.

	As concerns GTH's claim for legal privilege under Egyptian law, the Arbitral Tribunal agrees with Canada's argument[25] that GTH fails to evidence that Egyptian law accords legal privilege to in-house counsel. In fact, Egyptian Law 17 of 1983 on the Profession of Advocacy[26] deals only with the legal practice of Advocates, i.e., external counsel, as shown *passim* in the Law. As concerns the territorial scope of such privilege, the Arbitral Tribunal does not accept that only a lawyer entitled to practice in the State where privilege has attached to the communication, may invoke privilege. For the same reasons discussed above in relation with *Akzo Nobel*, this position held by the CJEU in in *AM & S* is limited to EU competition investigations and has no bearing on the present dispute.[27] The Tribunal notes that Canada does not contest the entitlement to legal privilege of in-house counsel who are members of the Law Society of England and Wales, and of New Zealand. Based on the above, and after reviewing Appendix A to GTH's letter of 25 November 2018, the Arbitral Tribunal upholds the entitlement to legal privilege of in-house counsel admitted in Canada, the USA, England and Wales, the Netherlands, and New Zealand, subject to other causes leading to the loss of that privilege as discussed below. Conversely, the Tribunal rejects legal privilege claims by in-house counsel who are only admitted in Egypt. Accordingly, the Arbitral Tribunal orders GTH to produce without delay communications with in-house counsel who is only admitted to the bar in Egypt, as ordered in the Tribunal's PO 3.

[25] Canada's Submission of 2 November 2018, p. 7, footnote 15.

[26] C-403, Law Governing the Profession of Lawyers, Law No. 17 of 1983 (Egypt) (Unofficial English Translation).

[27] Case 155/79 *AM & S Europe Limited v. Commission* [1982] E.C.R. 01575, §22 ("Viewed in that context Regulation No 17 must be interpreted as protecting, in its turn, the confidentiality of written communications between lawyer and client subject to those two conditions, and thus incorporating such elements of that protection as are common to the laws of the Member States.").

	(iii) Waiver of attorney-client privilege through disclosure of legal advice across separate legal entities, and exceptions for common interest, if any, under each applicable law It is uncontested that GTH shared legal advice with separate persons who were not the recipient of said advice. Yet, GTH claims that the privileged nature of the same remains unchanged.[28] Canada disagrees and claims that such sharing should lead to a finding that GTH has waived legal privilege because a shared communication is no longer made in confidence. The Tribunal notes support for Canada's position in the exhibited authorities holding that sharing privileged communications signals that the client does not intend to keep counsel's communication secret, and the privilege ceases to apply.[29] GTH's advocating for a MFN approach to legal privilege has been dismissed by the Arbitral Tribunal earlier in this Order. Accordingly, it is with reference to the domestic law applicable to the claimed privilege that the Tribunal shall determine whether a waiver may be found in the present instance. In that respect, Canada recognises that certain jurisdictions – including Canada – recognise an exception to the waiver of privilege where parties have a common (or joint) interest in the outcome of the proceedings or a commercial transaction.[30] However, Canada claims that the interests of VimpelCom, GTH, Wind Mobile and Wind Canada are adverse, with the result that there is no exception to the waiver once given.[31] Canada avers an additional separate argument, namely, that the IBA Rules do not recognise

[28] Canada's Annex 1.

[29] R-295, *Teleglobe USA Inc v. BCE Inc* (2007) U.S. Court of Appeal, Third Circuit, 06-2915 ("*Teleglobe*") at p. 29.

[30] Canada's Submission of 2 November 2018, p. 9, citing R-294, *Iggillis Holdings Inc v Canada (Minister of National Revenue),* 2018 FCA 51 (FCA) ("*Iggillis*"). See also Canada's submission in this Schedule.

[31] R-295, *Teleglobe*.

	an exception to the waiver of privilege for common interest in the case of commercial transactions, but only in relation to settlements as stated in Article 9(3)(b). The Arbitral Tribunal notes GTH's denial of the existence of adverse interests between the various entities. Without going as far as endorsing the proposal for "*very obviously aligned economic interests*" postulated by GTH,[32] the Tribunal is not convinced that the use by VimpelCom and Wind Canada of different counsel for the sale agreement or [redacted] constitutes of itself compelling evidence of adverse interests as Canada claims. In the absence of evidence of adverse interests, the Tribunal is left with (a) the certainty that privileged information was shared beyond the strict counsel-client relationship as listed in Canada's Annex 1 and (b) the contention by GTH that no waiver should result therefrom given the commonality of interest between the persons sharing such information. As Canada submits, the onus is on GTH to demonstrate that the law applicable to privilege for each communication recognises common interest privilege *and* that the communication qualifies for common interest privilege. The Tribunal considers that R-294 demonstrates that Canadian law accords common interest privilege as does R-295 in relation to the United States. Given that the Tribunal has decided above that in-house counsel admitted in Egypt is not entitled to assert legal privilege in this arbitration, GTH is only required to demonstrate the two-pronged qualification as concerns the attachment of common interest privilege for the relevant communications under the law of England and Wales and, separately, the law of the Netherlands and that of New Zealand. GTH is granted leave to present such evidence to the Arbitral Tribunal but this must be done without delay. In the absence of such evidence, common interest privilege will not attach to communications involving in-house counsel admitted in England and Wales, in the Netherlands, and in New Zealand, with the result that the relevant communications must be produced without delay in accordance with PO 3.

[32] GTH Letter of 12 November 2018, §34.a.

	On a final note on this issue, the Arbitral Tribunal finds no reason to limit its finding above on the basis of Canada's argument in relation to Article 9(3)(b) of the IBA Rules. The reason is two-fold. First, those Rules do not provide an exhaustive set of conditions for upholding a claim for privilege. Secondly, common interest privilege as recognised by courts today is already a significant expansion of the original concept that initially arose in criminal proceedings to allow co-defendants to coordinate their defense. The fact that a number of national laws, including in Canada and the United States,[33] accept that common interest privilege protects all communications shared within a "community of interest" both in civil and in criminal proceedings permits the Arbitral Tribunal to infer, absent an evidence of a statutory exclusion, that Article 9(3)(b) of the IBA Rules is not meant to rule out common interest in the case of commercial transactions.[34] **(iv) Waiver of attorney-client privilege through disclosure of legal advice to third parties, and limited waiver protections, if any, under each applicable law** The Arbitral Tribunal expects that its determinations above in relation to (a) in-house counsel entitled to assert legal privilege and (b) the attachment of legal privilege to the sharing of information with third persons under the common interest exception, also deal with the substance of this sub-question of outstanding Issue 1. To the extent that the Parties were to consider that it does not, the Arbitral Tribunal requires better particularised pleadings in this respect. Indeed, the Tribunal found no specific arguments of GTH in relation to limited or selective waiver. Canada has not addressed this issue either in its submission on 2 November 2018, but added limited developments in this Schedule and a number of authorities (R-305 to R-312) without referring the Tribunal to the relevant extracts or indicating how it purports to rely thereon.

[33] Respectively R-294, *Iggillis* and R-295, *Teleglobe*.

[34] R-295, *Teleglobe* at p. 37, citing the Restatement (third) of the Law Governing Lawyers § 76, as opposed to Canada's affirmation about the law of New York, see Canada's submission earlier in this Schedule.

	Pending the Parties' indication whether they seek guidance or a determination from the Tribunal in relation to limited waivers of legal privilege, the Tribunal provides its general thoughts as follows: outside the sharing of information amongst counsel, which is deemed to safeguard the initial legal privilege (assuming such a privilege attached in the first place), and save for specific statutory exceptions or exceptions derived from case law that similarly allow legal privilege to persist if the information is disclosed only to a specifically-identified category of recipients such as auditors,[35] the Tribunal is reluctant to uphold privilege when the shared information is no longer confined to the confidence of the attorney/solicitor-client relationship. It is open to the Parties to provide evidence that privilege has not been waived in total or in part by such disclosure of information under the relevant applicable law in the case of each disputed communication. Such evidence can only be contemplated in relation to the rules of privilege in Canada, the United States, England and Wales, the Netherlands, and New Zealand, as the Tribunal has already determined that privilege rules in Egypt do not allow in-house counsel to claim privilege, let alone to claim entitlement thereto following disclosure to third persons.

Outstanding Issue 2	Scope and application of attorney-client privilege to the facts and issues in this case: distinction between business/strategic advice and communication with the dominant purpose of soliciting, providing, or discussing legal advice, in particular as it relates to the following issues: i) Correspondence with in-house counsel, including in-house counsel whose responsibilities were not limited to the provision of legal advice, such as (but not limited to) [redacted] ii) Correspondence with UBS on business matters and presentations prepared by UBS regarding Wind, including with respect to the sale process;

[35] C-406, *Philip Services Corp. (Receiver of) v. Ontario (Securities Commission)*, 2005, CarswellOnt 3934; R-308, *Canada (Minister of Nat'l Revenue) v. Grant Thornton et al.*, 2012 FC 1313.

	iii) Memos and presentations to the Supervisory Board and the Finance Committee, including the redacted sections reflecting the resolutions or recommendations for the Supervisory Board, as well as minutes of Board of Director meetings; iv) [redacted] v) Documents discussing the planned restructuring of VimpelCom, GTH, or Wind; vi) Documents discussing the regulatory framework and regulatory risk, including submissions and communications related to consultations on the Transfer Framework between March and June 2013; and vii) Documents discussing the *Investment Canada Act* review process.
Summary of Claimant's Position	With respect to the distinction between business advice and legal advice, GTH confirms that with respect to the entirety of its disclosure exercise (including, but not limited to, documents responsive to those specific categories identified by Canada above) Integreon and Gibson Dunn attorneys were instructed to classify a document as privileged only in instances where: (*i*) the document contained legal advice, (*ii*) contained the substantive discussion of legal advice, or (*iii*) solicited legal advice. In cases where only a portion of that communication fell into these categories, Integreon and Gibson Dunn attorneys were instructed to mark a document partially privileged and therefore subject to redaction. If the Tribunal takes the position that the in-house counsel privilege is governed for each specific attorney by her or his jurisdiction of qualification, GTH refers to its correspondence to the Tribunal of 21 November 2018 and 25 November 2018, in which it has identified the in-house counsel who appear in its privilege logs and confirms that each are qualified in jurisdictions that recognize attorney-client privilege applies for in-house counsel involved in communications containing legal advice, discussing legal advice, or soliciting legal advice. The Tribunal may refer to the following authorities already on the record: **Exhibit C-403**, Law Governing the Profession of Lawyers, Law No. 17 of 1983 (Unofficial English Translation), Articles 65 and 79 (Egypt); **Exhibit C-405**, *Pritchard v. Ontario (Human Rights Commission)*, Supreme Court of Canada, 2004 S.C.C. 31, ¶¶ 19-21 (Canada); **Exhibit C-411**, *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v. European Commission*, Court of Justice of the European Union, Case C-550/07, Opinion of Advocate General Kokott, 29 April 2010, ¶ 186 (EU); **Exhibit C-415**, Decision No. ECLI:NL:HR:2013:BY6101, Dutch Supreme Court, Judgment, 15 March 2013 (Unofficial English Translation), ¶ 5.5 (Netherlands); **Exhibit C-429**, *Alfred Crompton Amusement Machines Ltd v Commissioners of Customs and Excise (No 2)* [1972] 2 QB 102, [1972] 2 All ER 353, 376 (England & Wales);

	Exhibit C-430, *Bain v Minister of Justice* [2013] NZHC 2123 (21 August 2013), ¶¶ 59-73 (New Zealand); **Exhibit C-431**, *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754 (2014), 758-60 (US).
Summary of Canada's Position	Canada maintains its objections to the Claimant's assertions of attorney-client privilege as identified in Section II.B.2 of Canada's letter to the Tribunal, dated November 2, 2018, and reiterates Canada's Request Numbers 1, 2, and 4 in that letter, as they relate to overly-broad and inappropriate assertions of attorney-client privilege in the Claimant's First Privilege Log, Amended Privilege Log, and redactions. The Claimant has made overly broad assertions of privilege, as it failed to follow a rigorous process and apply the proper test: (1) The Claimant's counsel did not review all of the assertions of privilege in this arbitration and appears to have left many determinations to a third party vendor not familiar with the issues in dispute and the Claimant's business. The Claimant states "Integreon and Gibson Dunn attorneys" received instructions on privilege without detailing these instructions. The reviewers were not provided sufficiently clear instructions or lacked the ability to make appropriate privilege determinations, as evidenced by the recent further productions made by Gibson Dunn. For example about 30 presentations to Supervisory Board of Director meetings and Finance Committee meetings – which were plainly not legal advice – were produced to Canada on October 28 after a further review of documents withheld in the First Privilege Log. A comprehensive review of privilege assertions by Gibson Dunn counsel is necessary. (2) To determine if attorney privilege is applicable, the guidance provided by the Tribunal in *Vito G Gallo v Canada* (**RL-251**) should be applied. The Claimant has not demonstrated that in its review it considered whether: a lawyer drafted the document in his or her capacity as a lawyer; a solicitor-client relationship based on trust existed as between the lawyer and client; or the lawyer and client acted with the expectation that the advice would be kept confidential. The fact that the Amended Privilege Log contains many entries with over 100 participants creates a strong presumption that there was no intention to keep advice confidential. Furthermore, factual information should be generally separated from legal advice, where it is not inextricably intertwined with privileged content (**RL-248**). The Claimant appears to withhold or redact communications made mainly for business purposes, as Canada documents in its letter of November 2, 2018 (See Section II.B.2) and in the following sub-sections to Outstanding Issue 2. Finally, it does not appear that the Claimant instructed its reviewing counsel that privilege is generally waived when shared with separate corporations or third parties that are not party to the solicitor-client relationship. **i) Correspondence with in-house counsel, including in-house counsel whose responsibilities were not limited to the provision of legal advice, such as (but not limited to)** [redacted] The Claimant makes overly-broad assertions of attorney-client privilege over communications involving in-house counsel, many of which Canada identifies in Annexes 1 to 4 of its letter dated November 2. Although those Annexes concerned the Claimant's First Privilege Log, Canada maintains that the Amended Privilege Log likely contains so many instances of communications

	mainly for business advice that the Claimant must review all of its assertions of privilege over in-house counsel communications. In-house counsel must act in a legal capacity for the privilege to apply (Canada's Letter dated November 2, 2018, Section II.B.2(a)ii). Acting as a corporate officer disfavors the privilege, as communications are essentially business, not legal. Moreover, determining whether the privilege extends to in-house counsel is best done on a case-by-case basis. In *Pritchard*, Canadian Supreme Court Justice Major noted, "[o]wing to the nature of the work of in-house counsel, often having both legal and non-legal responsibilities, each situation must be assessed on a case-by-case basis to determine if the circumstances were such that privilege arose. Whether or not the privilege will attach depends on the nature of the relationship, the subject matter of the advice, and the circumstances in which it is sought and rendered." (**C-405**). In its privilege logs, the Claimant makes sweeping privilege assertions over communications with in-house counsel involving hundreds of documents. This does not offer a reasonable way to assess each assertion of privilege on a case-by-case basis. Canada maintains that the Claimant must: (1) ensure counsel from Gibson Dunn reviews the Claimant's privilege assertions to ensure that legal advice was confidentially sought and provided between attorney and client; (2) describe the circumstances in which legal advice was sought and rendered for each document on the privilege logs; (3) demonstrate that the Claimant's assertions of attorney-client privilege qualify under the applicable law; and (4) disclose any communications that originated for the purpose of seeking business advice. **ii) Correspondence with UBS on business matters and presentations prepared by UBS regarding Wind, including with respect to the sale process** Canada notes that the subject matter at issue in communications between UBS and Vimpelcom regarding Wind by its nature does not qualify for attorney-client privilege, as it consists of strategic business advice. In fact the retainer letter for UBS specifically excludes the provision of legal advice. None of the material produced by UBS or communications between UBS and Vimpelcom consist of legal advice and are therefore not privileged (the issue of limited waiver with respect to legal advice shared with UBS is addressed below). **iii) Memos and presentations to the Supervisory Board and the Finance Committee, including the redacted sections reflecting the resolutions or recommendations for the Supervisory Board, as well as minutes of Board of Director meetings** Memos, presentations, resolutions, recommendations, and meeting minutes to the Supervisory Board, the Board of Directors, or the Finance Committee generally do not constitute legal advice. The nature of these materials is strategic business facts and decision-making. Redactions should be strictly limited to the contents of legal advice. Given that it is unlikely that the redacted resolutions or recommendations for the Supervisory Board in these documents constitute legal advice, they should be disclosed.

	For example, Canada wishes to refer the Tribunal to the following documents in the Claimant's production: (**R-315, R-316, R-317, R-318**) [redacted]For instance, in its press release on September 21, 2015 announcing GTH's plan to move its operations out of Egypt and into the Netherlands, the Claimant described this as a "strategic move", because the move to Amsterdam would allow GTH to further leverage "the benefits and economies of scale of being part of VimpelCom group." (**R-064**). [redacted] **v) Documents discussing the planned restructuring of VimpelCom, GTH, or Wind** Restructuring an enterprise is a business decision based on financial and strategic considerations and facts that may be separable from any legal advice involved in reaching that decision. [redacted] such communication does not receive protection for attorney-client privilege, because it does not involve the solicitation or provision of legal advice. The Claimant must disclose any of these materials except the information that constitutes legal advice. **vi) Documents discussing the regulatory framework and regulatory risk, including submissions and communications related to consultations on the Transfer Framework between March and June 2013** Communications concerning the regulatory framework, changes to the regulatory framework, and regulatory risk do not necessarily involve legal advice. Correspondence between VimpelCom and in-house counsel or law firms acting in a non-legal capacity in relation to certain regulatory matters are not protected for privilege. The distinction between legal and non-legal advice as it relates to regulatory risk can be particularly difficult for counsel not familiar with the issues. To avoid any strategic disclosure, a careful review of these privilege claims by Claimant's counsel is necessary given that redactions disclose a broad, inconsistent approach of some but not all information with respect to regulatory risk. In addition, Canada notes that the Claimant provided minimal information concerning its internal discussions on and reactions to the Transfer Framework. These communications would generally relate to business considerations regarding the applicable regulatory framework. The Claimant withholds documents it describes as, "relating to GTH's expectations about the five-year moratorium."(Claimant's Amended Privilege Log, Appendix A to Canada's November 2 submission, p. 67 of pdf, Participant List 103). GTH's expectations about the five-year moratorium do not constitute either the solicitation or provision of legal advice, and cannot be protected for attorney-client privilege. Much of Wind's submission on the Transfer Framework represented its views on a public policy proposal. This is a business fact separable from legal advice. The Claimant must disclose any of these materials except what is strictly legal advice.

	vii) Documents discussing the *Investment Canada Act* review process GTH's application to acquire voting control of Wind Mobile and its decision to withdraw its application were business decisions. The strategic considerations regarding those decisions, the discussions regarding the regulatory process and communications with the regulator do not constitute legal advice irrespective of whether a lawyer was involved. Although GTH may have received legal advice in reaching this decision, only that advice is protected, not the business factors leading to the decision. The Claimant must disclose any of these materials except what is strictly legal advice. On this issue, we refer the Tribunal to the following exhibits and legal authorities: **RL-248**, *Glamis Gold, Ltd. v. United States of America* (UNCITRAL) Decision on Parties' Requests for Production of Documents Withheld on the Grounds of Privilege, 17 November 2005, ¶¶ 35-36; **R-314**, *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); **C-405**, *Pritchard v. Ontario (Human Rights Commission)*, [2004] 1 S.C.R. 809 at ¶ 818; **R-315**, Supervisory Board Meeting, August 6, 2013, p. 4; **R-316**, Supervisory Board Meeting - TELENOR, August 6, 2013, p. 4; **R-317**, Supervisory Board Meeting, January 13, 2014, slides 8-9, 13-14; **R-318**, Supervisory Board Meeting, April 29, 2014, slides 6-7; **R-064**, Press Release, Global Telecom Holding S.A.E., "GTH To Move Its Place Of Operations To Amsterdam" (Sep. 21, 2015).
Arbitral Tribunal's Order	**(i) Correspondence with in-house counsel** The Arbitral Tribunal notes that GTH asserts without any qualifications that documents responsive to the production order in PO 3 were only classified as privileged where: (*i*) the document contained legal advice, (*ii*) contained the substantive discussion of legal advice, or (*iii*) solicited legal advice. In cases where only a portion of that communication fell into these categories, GTH asserts that it marked a document partially privileged and therefore subject to redaction. Canada contests GTH's scope of assertion of privilege and claims that it is overly broad. After reviewing Canada's arguments, the Tribunal declines to uphold a presumption that GTH acted deliberately to withhold responsive documents or that counsel representing GTH in this arbitration have

	fabricated groundless privilege arguments. Should any evidence to the contrary surface, it should be brought forthwith to the Arbitral Tribunal's attention at any stage of the proceedings for the appropriate measures to be taken. In particular, the Tribunal notes GTH's unqualified assertion that it only withheld "*legal advice*". The fact that in-house counsel delivering that advice might also hold non-legal responsibilities within the company as pointed out by Canada does not, of itself, justify an inference or a presumption that GTH's assertion is disingenuous or that GTH, or its counsel, sought to cover under a privilege blanket all communications of whatever nature, including business or strategic advice involving that in-house counsel. Specific evidence to the contrary is required to override the privilege claimed in this respect. The onus of providing such evidence falls on the contesting party, here Canada. It is open to Canada to petition the Arbitral Tribunal to apply Article 3.8 of the IBA Rules and organise the tendering by GTH of non-disclosed unredacted documents either to a Tribunal-appointed neutral expert or to the Tribunal itself (if the Parties so agree) to determine whether the alleged privilege is warranted. The allocation of the resulting costs will depend on the result of the determination. In the meantime, GTH is directed to review thoroughly its withheld or redacted responsive documents in light of the Arbitral Tribunal's decisions above in relation to those in-house counsel who are entitled to assert privilege and are deemed not to have waived privilege. New documents that emerge from the review as being responsive to PO 3 should be produced by GTH without delay. To that end, the Parties in this arbitration should consider as relevant guidance for the review exercise the four prerequisites defined by the tribunal in *Gallo v Canada* for the application of legal privilege.[36] They are as follows: "- *The document has to be drafted by a lawyer acting in his or her capacity as lawyer;* - *A solicitor-client relationship based on trust must exist as between the lawyer (in-house or external legal advisor) and the client;*

[36] RL-251, *Gallo v. Canada*, §47.

	- *The document has to be elaborated for the purpose of obtaining or giving legal advice;* - *The lawyer and the client, when giving and obtaining legal advice, must have acted with the expectation that the advice would be kept confidential in a contentious situation.*"[37] **(ii) Correspondence with UBS on business matters and presentations prepared by UBS regarding Wind, including with respect to the sale process** The Arbitral Tribunal has no further guidance to offer or determination to make in addition to what it has ruled above in this schedule. The Arbitral Tribunal will presume the truthfulness of GTH's assertion that documents responsive to the production order in PO 3 were only classified as privileged where: (*i*) the document contained legal advice, (*ii*) contained the substantive discussion of legal advice, or (*iii*) solicited legal advice. Again, the prerequisites laid out in *Gallo v Canada* are relevant guidance for the Parties.[38] Obviously, if correspondence of any type with UBS does not strictly fall within the scope of GTH's claimed privilege in light of those prerequisites, those documents must be produced forthwith. The Arbitral Tribunal notes GTH's bold submission that Article 9.3(c) of the IBA Rules should be understood as covering advisors "*generally*", not only legal advisors.[39] The Tribunal cannot accept this contention absent a supporting authority. Legal privilege only arises in relation to a communication in confidence with legal counsel enjoying an entitlement to privilege under the applicable bar rules. Unqualified as it is, the reference to "*advisors*" in Article 9.3(c) should be read in the context of the relationship giving rise to legal privilege which is the very subject of Article 9.3, the matching reference to "*legal advice*" in Article 9.3(a), and four references to "*legal advisors*" elsewhere in the IBA Rules. No reference to a different category of "advisors" may be found in the IBA Rules. In short, GTH has not demonstrated that legal privilege can attach to communications of non-legal advisors.

[37] Ibid.

[38] Ibid.

[39] GTH Letter of 12 November 2018, §35.

	In that respect, the Tribunal notes with perplexity the reference by GTH to "*mostly*" when referring to documents involving PwC and outside counsel.[40] The Tribunal cannot accept imprecise standards of diligence of this type. GTH is ordered to produce forthwith any documents that do not *exclusively* fall within the scope of the assertion that it made as to withheld or redacted documents. In case of doubt, GTH is granted leave to request the Tribunal's guidance. The Arbitral Tribunal repeats *mutatis mutandis* its reasoning and decision as concerns items **(iii)** through **(vii)** as listed in Canada's submission in this Schedule under Outstanding Issue 2.

[40] Ibid., §37.

Outstanding Issue 3	Waiver of attorney-client privilege or exceptions for common interest, if any, under the applicable law, with respect to communication shared with or between separate corporations, including the following:[41] i) VimpelCom and GTH; ii) VimpelCom and OTH; iii) VimpelCom, GTH, and Wind; and iv) VimpelCom and its shareholders, Altimo and Telenor.
Summary of Claimant's Position	GTH's position with respect to this Issue is set out in its 12 November Letter to the Tribunal at ¶¶ 31-34. Canada cites to the mere fact that GTH is a separate entity from VimpelCom and the other entities identified above to assert that there is no common interest privilege. Canada has sought documents involving the entities listed above on the basis of the alleged inter-relationship between GTH and these entities, and the Tribunal ordered such documents to be produced. Canada has in fact used this relationship between GTH and VimpelCom (in particular, GTH's alleged connection to the Netherlands after the acquisition by VimpelCom) affirmatively in respect of its jurisdictional objections. Moreover, a key component of the merits of this dispute relates to Canada's decision to reject GTH's Voting Control Application, which Canada itself states was due to GTH's parent companies and shareholders like Altimo and Telenor. Canada's position in respect of common interest is not only inconsistent with its previous arguments, but wrong as a matter of fact. For all of the issues relevant in this Arbitration, the entities identified by Canada shared a common interest and their interests were not adverse. Canada's arguments to the contrary are entirely speculative. The Tribunal may refer to the following authorities addressing the scope of common interest privilege in Canada: **Exhibit C-405**, *Pritchard v. Ontario (Human Rights Commission)*, Supreme Court of Canada, 2004 S.C.C. 31, ¶¶ 23-24; **Exhibit C-409**, *Maximum Ventures Inc. v. de Graaf*, British Columbia Court of Appeal, 2007 B.C.C.A. 510, 2007 CarswellBC 3231, ¶ 11.
Summary of Canada's Position	Canada maintains its objections to the Claimant's assertions of an exception to waiver of attorney-client privilege, as identified in Section II.B.2(b) of Canada's letter to the Tribunal, dated November 2, 2018, and maintains Canada's Request Number 3, regarding waiver through disclosure of communications to separate corporations, as indicated in the Claimant's First Privilege Log, Amended Privilege Log, and redactions.

[41] Certain other corporations in the Veon group, such as Wind-it, France Télécom, and OTAlgeria, are not identified in separate subsections to Issue No. 3 because they appear in communications shared with the corporations listed in those subsections. However, the same issues arise concerning waiver of attorney-client privilege or exceptions for common interest, if any, under the applicable law.

	(1) As a matter of law, the Claimant fails to demonstrate that it can benefit from any exception for common interest privilege under the applicable law. (2) As a question of fact, the Claimant provides a sparse summary with no support for its conclusory statements that all of the entities involved and to whom communications were disclosed, shared a common interest and their interests were not adverse. (3) The issue of whether documents from other entities should be produced and whether communications with these other entities at the time are privileged are distinct. The Commentary to the IBA Rules observes that "[a]ccording to some of the most frequently used general rules, arbitral tribunals are to establish the facts of the case 'by all appropriate means'." (**CL-184**). This includes producing documents that are relevant and material to the determination of the case. Given the important role played by the Claimant's affiliated corporate entities with respect to key material facts related to the dispute, and the fact that the Claimant itself relied on evidence from VimpelCom, producing only the documents in GTH's possession, custody, and control would have deprived Canada of a meaningful opportunity to defend itself against the Claimant's allegations. The Tribunal agreed in Procedural Order No. 3, Annex B, Tribunal Decision on Document Request No. 4. In contrast, the law on attorney-client privilege protects only legal advice sought by and provided to the "client" on a confidential basis. Due to the separate legal personality of corporations, the "client" does not extend to corporate affiliates. For the Tribunal's reference, Canada attaches to this Stern Schedule Annex I, which identifies the categories of documents in the Claimant's Amended Second Privilege Log shared with certain separate corporations or third parties, as identified below.[42] To avoid repetition, Canada does not include in Annex I categories of documents from the First Privilege Log shared with these separate corporations or third parties. **i) VimpelCom and GTH** VimpelCom and GTH lacked sufficient common interest with respect to a number of issues. For instance, in both the decision to move GTH's headquarters out of Cairo and to exit the Canadian market, VimpelCom and GTH appear to have had divergent interests. **ii) VimpelCom and OTH** VimpelCom and OTH lacked sufficient common interest with respect to a number of issues. [redacted] (for further detail, see Appendix M of Canada's November 2 submission). The parties were patently adverse in interests in

[42] A list of the categories of documents shared with GTH or OTH has not been included given the number of entries but it would cover approximatively over 8000 documents, in contrast to about 300 such communications produced to Canada.

	this respect: [redacted] No common interest privilege can protect communications between these entities. **iii) VimpelCom, GTH, and Wind** Common interest privilege would not protect communications shared between VimpelCom or GTH and Wind in numerous instances. VimpelCom, GTH, and Wind had separate legal counsel each providing legal advice to its own client. GTH was a non-controlling shareholder in Wind. VimpelCom was a lender to Wind and a parent of GTH. These enterprises were not part of a "deal team". The Claimant's documents show extensive discussion about the potential different interests of the enterprises and VimpelCom presentations refer to not sharing information with Wind's local management. Moreover, the entities lacked common interest in issues critical to this case, including participation in the 700Mhz auction, consultations on the Transfer Framework, Wind becoming a fourth player, the national security review, and the sale of Wind. VimpelCom's interests seem to have been to minimize funding needs and exit Canada at the best price possible, whereas Wind's interests were to maximize its long term economic success in Canada. For instance, documents indicate that it was in Wind's interests to participate in the 700Mhz auction. On the Transfer Framework, Wind represented its interests for the Canadian government to promote competition in order to pursue the establishment of a fourth player, such as Wind, something that the Claimant is complaining of in this dispute. On the sale of Wind, a vendor company and the company being sold have distinct interests. If VimpelCom sold Wind to an Incumbent, there was a possibility that an Incumbent would sit on the spectrum to reduce competition, rather than grow Wind as a competitor. This would not serve the best economic interests of Wind or some of its stakeholders, such as its employees. All of these factors demonstrate a lack of commonality among the interests of VimpelCom or GTH and Wind, such that communications between them do not qualify for an exception to waiver. Please see Annex I, Section A for a list of the categories of documents on the Amended Privilege Log disclosed to Wind Mobile. **iv) VimpelCom and its shareholders, Altimo and Telenor** The Claimant has not established common interest between VimpelCom and its shareholders, Altimo and Telenor to qualify for an exception to waiver for sharing communications to separate corporations. Please see Annex I, Section B for a list of the categories of documents on the Amended Privilege Log disclosed to Altimo or Telenor.
Arbitral Tribunal's Order	The Arbitral Tribunal has determined the common interest exception under Outstanding Issue 1 above.

Outstanding Issue 4	Waiver of attorney-client privilege or limited waiver protections, if any, under the applicable law, with respect to communication shared with or between third parties, including the following: i) Rogers; ii) UBS; iii) PWC; iv) Earnscliffe and other public relations firms; and v) Genuity.
Summary of Claimant's Position	GTH's position with respect to this Issue is set out in its 12 November Letter to the Tribunal at ¶¶ 35-41. For the avoidance of doubt, Gibson Dunn attorneys have reviewed each of the documents identified in the privilege logs involving these third parties. In all cases, GTH has claimed privilege over these documents where the third party was (*i*) included on a communication disclosing confidential legal advice for a particular and limited purpose and/or (*ii*) that third party played a role in "*furtherance of a function essential to the solicitor-client relationship*." Specifically: (*i*) UBS was privy to privileged communications only through its role as a financial advisor in relation to the sale of their interest in Wind Mobile; (*ii*) PWC was privy to privileged communications relating to tax advice only through its role as a tax advisor; and (*iii*) Earnscliffe was privy to privileged communications only through its role as a government and public relations advisor. The Tribunal may refer to the following authorities addressing the waiver of privilege: **Exhibit C-428**, *Redhead Equipment v. Canada (Attorney General)*, 2016 S.K.C.A. 115, ¶ 45(d); **Exhibit C-406**, *Philip Services Corp. (Receiver of) v. Ontario (Securities Commission)*, 2005 CarswellOnt 3934, ¶ 57; **Exhibit C-404**, Internal Revenue Service Restructuring and Reform Act of 1998, 26 U.S.C.A. § 7525.
Summary of Canada's Position	Canada maintains its objections to the Claimant's assertions of an exception to waiver of attorney-client privilege, as identified in Section II.B.2(b) of Canada's letter to the Tribunal, dated November 2, 2018, and maintains Canada's Request Number 3, regarding waiver through disclosure of communications to third parties, as indicated in the Claimant's First Privilege Log, Amended Privilege Log, and redactions. **i) Rogers** Given the Claimant's representations, Canada withdraws its objection. **ii) UBS**

	Attorney-client privilege does not extend to investment banks or financial advisors when counsel was not relying on the advisor to translate or interpret information given to counsel by the client (**R-319**) As an investment bank, UBS's communications with VimpelCom cannot receive protection for attorney privilege. UBS was hired to provide financial advice to VimpelCom. There is no evidence that UBS translated the meaning of VimpelCom's technical materials into terms that were understandable to the lawyer for the purpose of informing the provision of legal advice. Instead, most of the Claimant's redactions over correspondence from UBS concerns slideshows on financial and strategic matters for the Board of Directors of VimpelCom or various VimpelCom committees. Moreover, many of the communications were not with or copied to counsel. That is, UBS's services for VimpelCom were not integral to the client-solicitor function. At most, UBS's services were ancillary to the solicitor-client relationship, and cannot qualify for the privilege. Further, the Claimant has failed to establish that UBS qualified for limited waiver under the applicable law. Please see Annex I, Section C for a list of the categories of documents on the Amended Privilege Log disclosed to UBS. **iii) PWC** PWC provided tax advice to VimpelCom. Tax advice does not constitute legal advice when it is not provided by a lawyer. In the U.S., courts have held that if the client seeks an accounting service but not legal advice, or if the advice sought is the accountant's rather than the lawyer's, no privilege exists (**R-313**). In fact, privilege does not apply where an accountant is hired merely to give additional legal advice about complying with the tax code, and not to assist counsel in understanding the financial information (**R-320**). There is no evidence that PWC provided legal advice, interpreted material facts for counsel, or somehow facilitated the attorney-client relationship between VimpelCom and its counsel. At most, PWC's services were ancillary to the solicitor-client relationship, and cannot qualify for the privilege. Nor could legal advice shared with PWC qualify for limited waiver, because PWC was not engaged to provide auditing services. Any attorney-client privilege that once existed over documents shared with PWC was waived and must be disclosed. Please see Annex I, Section D for a list of the categories of documents on the Amended Privilege Log disclosed to PWC. **iv) Earnscliffe and other public relations firms** Earnscliffe and other firms such as GCI provided public relations services. This does not involve translating legal advice or serving a role that is integral to the solicitor-client relationship. There is no indication that Earnscliffe's services were even ancillary to the solicitor-client relationship, which still cannot qualify for the privilege. Moreover, limited waiver does not apply. Any attorney-client privilege that once existed over documents shared with Earnscliffe and other public relations firms was waived and must be disclosed. Please see Annex I, Section E for a list of the categories of documents on the Amended Privilege Log disclosed to Earnscliffe and other public relations firms. **v) Genuity**

	Given the Claimant's representations, Canada withdraws its objection. **vi) Other** Furthermore, the Claimant engaged in subject-matter waiver in the course of this arbitration. As Canada explains in Section II.B.2(b) of its letter dated November 2, 2018, the Claimant has alleged that it relied on the advice of [redacted] as part of its due diligence efforts that informed its expectations prior to investing in Wind Mobile. It implies that the content of the advice supports its allegations. By disclosing the subject matter of legal advice, the Claimant has waived any attorney-client privilege that may have applied to the documents relating to this issue. On this issue, we refer the Tribunal to the following exhibits and legal authorities: **R-319**, *United States v. Ackert,* 169 F.3d 136 (2d Cir. 1999); **R-313**, *United States v. Kovel*, 296 F.2d 918, 921 (2d Cir. 1961); **R-320**, *United States v. Chevron Texaco Corp.*, 241 F. Supp. 2d 1065 (N.D. Cal. 2002).
Arbitral Tribunal's Order	The Arbitral Tribunal has determined the absence of entitlement of non-legal advisors' to privilege under Outstanding Issue 2 above.