Public Version

IN THE MATTER OF AN ARBITRATION UNDER THE AGREEMENT BETWEEN THE GOVERNMENT OF CANADA AND THE GOVERNMENT OF THE ARAB REPUBLIC OF EGYPT FOR THE PROMOTION AND PROTECTION OF INVESTMENTS AND THE ICSID CONVENTION

BETWEEN:

GLOBAL TELECOM HOLDING S.A.E.

Claimant

AND

GOVERNMENT OF CANADA

Respondent

GOVERNMENT OF CANADA

REJOINDER ON MERITS AND DAMAGES AND REPLY ON JURISDICTION AND ADMISSIBILITY

February 3, 2019

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I. INTRODUCTION

A. Overview

1. Global Telecom Holding, S.A.E. (the "Claimant") in this arbitration saw the auction of Advanced Wireless Spectrum ("AWS" or "AWS-1") in 2008 ("2008 AWS-1 Auction") as an attractive opportunity to invest in the Canadian telecommunications market. It knew it could not operate a wireless telecommunications service provider in Canada because of existing Canadian ownership and control requirements. The Claimant nevertheless decided to participate, through debt and equity contributions in Wind Mobile, notwithstanding that it could not have control over the company. It knew its investment in Wind Mobile could be profitable, if at all, only in the long term and that there was no guarantee of success. It was nonetheless prepared to take the risk and invest on this basis, because of potentially lucrative returns. Those returns did not materialize. GTH was unprepared for the funding demands and the competition facing New Entrants in the Canadian telecommunications market. The Claimant now seeks to use the FIPA as an insurance policy for its investment to obtain a windfall compensation.

2. In its Reply, the Claimant blames Canada for Wind Mobile's poor returns and GTH's decision to exit the Canadian market. It complains of the delay in the launch of Wind Mobile's operations, which it attributes to the Canadian Radio-Television Commission ("CRTC") ownership and control decision, and of Canada's measures on roaming and tower/site sharing. According to the Claimant, Canada did not do enough to support Wind Mobile and other New Entrants and to promote competition. At the same time, it challenges Canada's efforts to support competition through the introduction of the Transfer Framework, and argues that Canada should have allowed it to sell Wind Mobile to an Incumbent. This is not the only contradiction. While on the one hand the Claimant argues that Canada should have made certain changes to the regulatory framework earlier, as it had advocated, it challenges the Transfer Framework as a change in the applicable regulatory framework. The Claimant also opportunistically portrays its inability to obtain voting control of Wind Mobile as the reason for its decision to exit the Canadian market.

3. As Canada explains in this Rejoinder, the Tribunal has no jurisdiction over GTH's claims and, in any event, the claims are based on a mischaracterization of the relevant facts, unsupported by contemporary evidence, and rely on an incorrect interpretation of the FIPA.

4. At the outset, the Claimant does not accurately represent the basis of its investment in Canada and the applicable regulatory framework. Canada did not seek to induce the Claimant's investment. The telecommunications regulatory framework was not designed to induce foreign investment. Nor was the 2008 AWS-1 Auction: it was designed to foster competition, including through the entry of new wireless service providers. Importantly, the legal framework in which the Claimant invested in Canada did not allow for it to own and control a wireless telecommunications operator. Even when this became *possible* in 2012 as a result of Canada's changes to its Canadian ownership and control requirements in the telecommunications sector, GTH's potential acquisition of voting control of Wind Mobile remained subject to other applicable regulatory requirements and authorizations, including being subject to review under the *Investment Canada Act* ("*ICA*"). GTH never had a right to acquire voting control of Wind Mobile without the Minister's authorization, and it was well aware of this. Yet it would like to have the Tribunal disregard the very basis upon which it invested in Canada, as a non-controlling shareholder.

5. Further, the Claimant has not provided any evidence in support of its claim that a key consideration in making the investment was that it would be able to sell Wind Mobile or transfer Wind Mobile's spectrum licences to an Incumbent. The Claimant never asked for, and Canada never provided, assurances that such a transaction would be allowed. Instead, the documents show that when it decided to invest, GTH contemplated a long-term investment.[1] This objective changed when VimpelCom acquired GTH in 2011. Shortly after, VimpelCom began to take stock of GTH's assets, including the Canadian investment. VimpelCom observed that proper due

[1] [redacted] **C-066**, E-mail from Mike O'Connor to Assad Kairouz, et al. attaching Globalive materials (Feb. 29, 2008), p. 99 ("[redacted]

diligence had not been conducted before GTH made its investment in Canada.[2] After its own in-depth analysis of Wind Mobile, it came to two conclusions: Wind Mobile was heavily indebted and not performing as well as anticipated; and a large amount of funding was needed. Unsatisfied with the prospects of returns and uninterested in funding Wind Mobile further, VimpelCom started to consider options, and decided it would seek to exit the Canadian market.

6. While the Claimant now argues that Wind Mobile's situation was a result of the delay caused by the CRTC ownership and control review and the Government's failure to enforce roaming and tower/site sharing conditions, the documents it produced point to a different explanation: the Claimant underestimated what was required to be successful in the Canadian wireless telecommunications market. Wind Mobile was ill-prepared for the competition from Incumbents and other New Entrants, its business plan had not accounted for the impact of technological changes; and neither GTH, nor VimpelCom after the merger, were prepared to commit the necessary funds to be competitive. VimpelCom's own assessment at the time was that Wind Mobile's poor results were due not to Canada's actions, but to the absence of a rigorous business plan and to mismanagement of Wind Mobile.

7. The Claimant also continues to present Canada's measures as the cause of its exit from the Canadian market. However, the evidence shows that the decision to sell its investment in Wind Mobile pre-dates any of the measures challenged in this arbitration.[3] [redacted]

[2] [redacted] **R-403**, E-mail from Andy Dry, VimpelCom to Henk van Dalen, VimpelCom (Aug. 11, 2011), *attaching* VimpelCom Presentation, "Wind Mobile Canada – Performance Update & Funding Requirement – Supervisory Board Presentation" (Aug. 2011), slide 29.

[3] See below, ¶¶ 377-381.

[4] [redacted].

[redacted] Based on the Claimant's internal documents, it is now clear that the reason the Claimant filed, in October 2012 an *ICA* application to acquire voting control of Wind Mobile was to facilitate a subsequent sale.[6] The decision to exit the Canadian market was not, as the Claimant now suggests, because it was not able to acquire voting control of Wind Mobile. Furthermore, the idea that the lack of control over Wind Mobile played any role in the Claimant's decision to exit the market is contradicted by VimpelCom's own assessment that it essentially had *de facto* control of Wind Mobile.[7]

8. The Claimant's characterization of the *ICA* national security review of its voting control application as a pretense to pursue the Government's telecommunications policy objectives is amply dispelled by the evidence put forward by Canada. The national security review was initiated because of the national security concerns raised by the prescribed investigative bodies, not because of telecommunications policy objectives. In fact, at the time of the initiation of the review, from a telecommunications policy perspective, the proposed transaction appeared to be a positive development, as it could lead to more funding for Wind Mobile and therefore to a more sustainable competitor in the wireless telecommunications market. The record also shows that the national security review was conducted in accordance with the *ICA* and with due process requirements. Notwithstanding the sensitivity of Canada's national security concerns and the need to protect certain information, this was not the opaque or unfair process that the Claimant describes. Government officials described the national security concerns arising from GTH's application in writing as well as during in-person meetings with VimpelCom representatives.

[5] [redacted]

[6] [redacted]

[7] Despite not having voting control, during the time leading up to the alleged breaches VimpelCom's view was they had de facto control through the control of the Board of directors and its ability to appoint "key managers who [had] been managing the business." **R-378**, VimpelCom Presentation, "Wind Canada – Supplement information to SB presentation for meeting 17 December 2013" (Jan. 10, 2014), slide 4; [redacted] **R-380**, Memorandum from Andy Dry & Brigitte van der Maarel to Henk van Dalen, "Re: Wind Mobile Canada – UBS Presentation" (Jan. 27, 2011).

There were also a number of opportunities for the Claimant, VimpelCom, and Government officials (from both Public Safety and Industry Canada) to discuss these concerns.

9. The evidence also contradicts the Claimant's repeated statements that it had a right to sell Wind Mobile to an Incumbent or to transfer Wind Mobile's set-aside licences to an Incumbent at the end of the five-year moratorium, and that Canada "blocked" it from doing so. First, the Claimant did not have ownership and control of Wind Mobile, and therefore had no *right* to sell Wind Mobile.[8] Second, any sale of Wind Mobile would have entailed a transfer of spectrum licences, which would have been subject to Ministerial approval. The conditions of licences ("COLs") clearly set out this requirement for Ministerial approval. Contrary to the Claimant's efforts at reading into the COLs and the regulatory framework an implied representation, there was no indication that licence transfers, including transfers of set-aside licences to Incumbents, would automatically be approved after the expiry of the moratorium. Third, the Claimant incorrectly portrays the Transfer Framework, which was introduced in June 2013, as a prohibition on transfers of set-aside licences to Incumbents. This was not the case. Rather, through the Transfer Framework, the Minister specified the criteria that would be considered in making a determination as to whether to approve licence transfers. Each licence transfer request would continue to be considered on a case-by-case basis, in light of the circumstances prevailing at the time of the request. Neither the Claimant nor Wind Mobile ever requested a licence transfer. Therefore it is inaccurate to suggest that Canada denied such a request.

10. Moreover, the Claimant's challenge of the Transfer Framework as a measure that harmed Wind Mobile, and thereby the Claimant's investment, is incongruent with its position at the time of the public consultations that led to the adoption of the Transfer Framework. The Claimant and Wind Mobile approached the Government on several instances in early 2013 to emphasize the importance of access to spectrum for New Entrants, including by restricting transfers of spectrum to Incumbents. During the consultations, Wind Mobile provided comments which did not fundamentally oppose the Framework. In fact, from the start, Wind Mobile positioned itself as

[8] [redacted].

wanting to be the fourth national operator in Canada and repeatedly indicated that it needed more spectrum to be competitive.

11. The Claimant's allegation that the Transfer Framework was a "reversal" or a "dismantling" of the legal framework that was the basis of the Claimant's investment is based on a self-serving and distorted view of Canada's long-standing efforts to foster competition in the wireless telecommunications market. The Claimant recognizes that the Government put in place measures in the 2008 AWS-1 Auction, including setting aside spectrum for New Entrants, to foster competition in the market. Indeed the Government's objectives were clear from the start.[9] Yet the Claimant argues that it expected to be able to take advantage of the set-aside to enter the market and, as soon as the moratorium ended, to monetize the investment by re-selling it to Incumbents. This was never the purpose of the set-aside. The reality is that Canada consistently pursued its objective to improve and sustain competition in the wireless sector through its various telecommunications policies and actions. The set aside of spectrum licences in the context of the 2008 AWS-1 Auction, mandated roaming and tower/site sharing introduced at the time of the 2008 AWS-1 auction, the Transfer Framework which sought to address spectrum concentration, the legislative cap on roaming costs, and the CRTC's decision to end forebearance and regulate roaming rates were all part of the Government's continuous efforts to achieve the objectives of sustained competition.

12. Finally, the Claimant's attempt to portray Canada's actions as a pattern of conduct to force the Claimant out of the market lacks any basis in fact. Instead, the evidence shows that (1) Canada acted promptly to reverse the CRTC decision on ownership and control, allowing Wind Mobile to launch; (2) Canada delivered on its commitment to introduce mandatory roaming and tower/site sharing rules, made efforts to assist Wind Mobile and other New Entrants where there was evidence that Incumbents were acting contrary to the COLs, and continued to monitor, review, and improve conditions to support competition; (3) the Transfer Framework was not designed to harm Wind Mobile or the Claimant but, instead, was introduced consistently with the Government's objective and previous efforts to sustain competition. The Claimant, Wind

[9] **R-195**, *Telus Communications Company v. Canada (Attorney General)*, 2014 FC 1157, ¶ 58 ("*Telus v. AGC*").

Mobile, and later VimpelCom, were generally supportive of these efforts; and (4) entirely independent of these actions, and based exclusively on national security concerns, the Government initiated a national security review of the proposed acquisition of voting control of Wind Mobile by the Claimant. The Claimant and VimpelCom [redacted] withdrew their application. Neither the Government's actions with respect to telecommunications policy, nor the national security review, constituted an unfair targeting of the Claimant or VimpelCom. There was no concerted effort to force them to sell their investment.

13. Importantly, Canada never took measures that affected the Claimant's ability to either remain as an investor in Wind Mobile or sell its interests in Wind Mobile. Because the Claimant only had non-controlling voting interests in Wind Mobile, it was always free to sell its shares without Government authorization. Further, none of the measures at issue, including the national security review, prevented the Claimant from remaining as an investor on the same basis as it had initially made the investment, and to benefit from any future success of Wind Mobile.

14. In this Rejoinder, Canada maintains its objections to the Tribunal's jurisdiction over the challenged measures.[10] Canada corrects the Claimant's unsustainable interpretation of the FIPA provisions that are relevant to the Tribunal's jurisdiction, and explains that the evidence produced by the Claimant further supports Canada's arguments:

(i) The Tribunal lacks jurisdiction *ratione personae* over this dispute. The Claimant asserts that it qualifies as an "investor" within the meaning of Article I of the FIPA because it was a juridical person of Egypt at the time it submitted its Request for Arbitration dated May 28, 2016. The Claimant's own documents and admissions show clearly that at that time, it had already moved its principal place of management and its operations to Amsterdam, [redacted] Given that under Egyptian Law, the corporation had to maintain its principal place of management in Egypt, it was therefore not established and recognized as a juridical person of Egypt. Nor could it have been, under the circumstances, a permanent resident of Egypt. The fact that GTH does

[10] Canada's Memorial on Jurisdiction and Admissibility and Request for Bifurcation, November 15, 2017 ("Canada's Memorial on Jurisdiction").

not qualify as an "investor" of Egypt within the meaning of the FIPA is fatal to its claim.

(ii) The straightforward application of Article II(4)(b), which excludes from investor-state dispute settlement decisions by either Contracting Party not to permit the establishment of a new business enterprise or the acquisition of an existing business enterprise or a share of such enterprise, leads to the inescapable conclusion that this Tribunal does not have jurisdiction over the Claimant's challenge of Canada's alleged denial of GTH's application to acquire voting control of Wind Mobile, or over the process by which the Government came to that decision.

(iii) The Claimant continues to wrongfully argue that Article IV(2)(d) and its Annex do not exclude the application of national treatment obligations to Canada's measures in the telecommunications sector. However, its arguments ignore the broad exclusion from the application of the national treatment obligation with respect to all services sectors and the absence of any pre-requisite to the application of the exception.

(iv) Notwithstanding the fact that, in its Reply, the Claimant now moves away from the allegation that the CRTC ownership and control review of Wind Mobile and Canada's actions with respect to roaming and tower/site sharing are themselves a breach of the FIPA, any challenge of these measures remains untimely. Moreover, the Tribunal cannot consider these measures as forming part of a "cumulative breach."

(v) Finally, the Claimant has no standing under Article XIII(3) to bring claims in respect of Canada's treatment of Wind Mobile and any indirect loss that GTH incurred following loss incurred by Wind Mobile. As a result, the Tribunal has no jurisdiction over GTH's claims regarding: (i) the Transfer Framework; and (ii) the roaming and tower/site sharing conditions.

15. Not only is the claim, or significant parts of it, outside of the Tribunal's jurisdiction, but it is also based on an erroneous interpretation of the applicable legal standards and on a narrative that is inconsistent with the evidence. Even if the Tribunal concludes that it has jurisdiction over parts of the claim, none of Canada's actions individually or cumulatively breached the FIPA.

16. First, the Claimant's allegations that Canada violated its obligations under Article II(2)(a) pre-suppose the existence of a broad, autonomous fair and equitable treatment ("FET") standard instead of the standard provided by the FIPA, which requires the FET standard at customary

international law. The Claimant's standard would protect any type of expectations by investors, regardless of whether the expectations result from an explicit guarantee provided by a government to induce the investment. It also seeks to insulate investors from any new measure that negatively affects them. No such standard is recognized by international law, and efforts to expand the application of the standard should be rejected. Ultimately, the Claimant is inviting the Tribunal to assess the reasonableness of Canada's policy choices with respect to promoting competition in its telecommunications sector and to second-guess the legitimacy of the national security concerns raised by the acquisition of voting control of Wind Mobile by GTH and its parent company, VimpelCom. This type of review of government action has been squarely rejected by investment tribunals.

17. In any event, the facts do not support the Claimant's allegations of a violation of Article II(2)(a), which are based on representations that do not exist and are derived from a mischaracterization of the regulatory framework. The Transfer Framework was consistent with the Government's long standing objective to foster competition in the wireless telecommunications market. It was neither "political" nor arbitrary. It was introduced after various options were considered and following consultations with stakeholders. It was not contrary to any rights or specific assurances given to the Claimant, and did not represent a dramatic change in the regulatory framework applicable to Wind Mobile's spectrum licences. Similarly, the national security review of the Claimant's application to obtain voting control of Wind Mobile could in no way constitute a breach of Article II(2)(a). It was based on national security concerns identified by prescribed investigative bodies and was carried out in accordance with applicable law and due process. The proposed acquisition was always subject to review and authorization under the *ICA*, and there was never any assurance provided to the Claimant that it would be approved. The fact that the Claimant was not able [redacted] is not subject to review by the Tribunal.

18. Second, none of the Claimant's allegations that Canada breached its obligations under Article II(2)(b) have any merit. The full protection and security ("FPS") standard in Article II(2)(b) does not extend beyond physical protection of an investment. The Claimant's suggestion

that Canada's measures interfered with the legal security of GTH's debt and equity interests in Wind Mobile relies on the same mischaracterizations of the applicable legal framework. Canada did not "dismantle" the legal framework by introducing the Transfer Framework. Not only were Canada's measures consistent with previous Government actions, but the telecommunications policy framework was, by its very nature, subject to change to meet the objectives of the *Radiocommunication Act* and the *Telecommunications Act*. This fact was made clear to all licensees in the 2008 AWS-1 Auction.

19. The Claimant's argument that Canada's measures must be considered together and that they "cumulatively" breached the FET and FPS obligations must also be rejected. The Claimant's theory that Canada forced it to sell its investment through a pattern of conduct is unsupported by the evidence. By their own account, the Claimant and VimpelCom were seeking to acquire voting control of Wind Mobile for the purpose of selling it. Canada wanted to see Wind Mobile and other New Entrants succeed because it wanted more competition in the wireless telecommunications market, regardless of whether foreign investors were funding them. The Claimant's theory is nothing more than an effort to obtain compensation for the losses it suffered, regardless of whether any of Canada's measures constitute a breach or caused the sale or the loss.

20. Third, none of the measures challenged by the Claimant are contrary to the Transfer of Funds obligation in Article IX of the FIPA. The measures at issue did not interfere with the Claimant's ability to transfer returns from its investment to its home country. The Claimant's untenable interpretation of this provision must be rejected.

21. Fourth, Canada did not breach the national treatment obligation in the FIPA by conducting a national security review pursuant to the *ICA*. Article II(4)(b) specifically excludes from investor-state dispute settlement claims that decisions to approve investments breach treaty obligations, including the FIPA's national treatment obligation.

22. None of the measures either individually or cumulatively constitute a breach of Canada's obligations under the FIPA. For the reasons set out in Canada's Counter-Memorial and as further elaborated below, the Tribunal should dismiss all of the claims. However, if the Tribunal were to

find Canada in breach of its obligations, the Claimant is nevertheless not entitled to the damages it seeks.

23. The damages valuations presented by the Claimant are not representative of the loss caused by the measures, nor do they represent a reliable measure of compensation "but-for" the alleged breaches. For example, by claiming compensation on the basis of its investment costs, the Claimant is essentially seeking to use the FIPA as an insurance policy. An award based on investment costs would overcompensate the Claimant by erasing the negative consequences of the Claimant's own investment and management decisions and any other factors that resulted in a diminution in the value of the investment. As the Claimant and VimpelCom itself recognized, well before any alleged breach, Wind Mobile's fair market value was significantly lower than the C$1.8 billion in investment costs, and closer to a range of C$600-800 million. Therefore the Claimant's investment in Wind Mobile was worth significantly less than the amount invested. That diminution in value was not caused by any alleged breach and therefore should not be included in a measure of damages.

24. The proper way to measure damages in this case is to consider the potential loss in fair market value of the investment "but-for" an alleged breach, based on the best available evidence on the date of the breach itself. On this basis, Canada's damages expert, The Brattle Group, has filed a Report in support of Canada's Rejoinder which concludes that, if the Tribunal finds the national security review was a breach of the FIPA, the Claimant is not entitled to any damages. Brattle also concludes that if the Tribunal finds the Transfer Framework was a breach of the FIPA (whether on its own or in combination with other measures), damages could not exceed C$300 million (excluding pre-judgment interest). This reflects the difference between the price that Incumbents and New Entrants were prepared to offer for Wind Mobile at the time of the alleged breach in June 2013. This amount must be further discounted because it does not account for any regulatory risk, including the risk that a sale to an Incumbent may not have been approved by the Competition Bureau and because of the possibility that a transfer to an Incumbent *could* have been approved under the Transfer Framework. While the Claimant ultimately obtained less when it sold to AAL Holdings Corporation ("AAL") in September 2014, as compared to the offers made over a year earlier, this lower value was the result of its own

business decisions. For example, the Claimant's decision to drastically reduce funding to Wind Mobile prevented the company from acquiring the additional spectrum necessary to remain competitive, which made Wind Mobile less attractive to prospective buyers.

25. Finally, the Claimant's fair market valuation models should be rejected outright because they are based on opportunistic assumptions that result in inflated damages claims. They ignore the Claimant's failure to mitigate. They are also fundamentally flawed because they are based on an incorrect valuation date and unreliable *ex-post* information. Given the available evidence, there is no reason in this case to engage in speculation as to what the Claimant *might* have done in the absence of the alleged breaches. The contemporaneous offers to purchase Wind Mobile, from both New Entrants and Incumbents, provide the best available evidence of Wind Mobile's fair market value "but-for" the breaches.

B. Materials Submitted by Canada

26. Along with this Rejoinder and the attached exhibits and legal authorities, Canada has submitted the following documents:

- **Rejoinder Witness Statement of Peter Hill**: as the Senior Director in the Spectrum Management Operations Branch at Industry Canada at the time of the 2008 AWS-1 Auction, Mr. Hill was jointly responsible for designing and implementing the Auction, as well as the roaming and tower/site sharing conditions. Mr. Hill's Witness Statement explains that the regulatory framework applicable to AWS-1 licences did not limit the Minister's discretion with respect to approval or disapproval of spectrum licence transfers after the five-year moratorium, and that Wind Mobile was not granted a right to transfer set-aside spectrum to Incumbents. He also describes how Canada was actively engaged in overseeing the implementation of the roaming and tower/site sharing conditions.

- **Rejoinder Witness Statement of Iain Stewart**: as the Assistant Deputy Minister of the Strategic Policy Sector at Industry Canada from May 2012 to June 2014, Mr. Stewart provided policy advice to the Minister on the design of the Transfer Framework. Mr. Stewart's Witness Statement clarifies that the Transfer Framework did not represent a fundamental change of the regulatory framework. He explains that since well before the 2008 AWS-1 Auction, the Government has consistently pursued the objective of sustained competition in the wireless telecommunications market, and that this has included measures to address spectrum concentration. Mr. Stewart also describes his involvement in the *ICA* review of the Claimant's proposed acquisition of voting control of Wind Mobile, and explains why telecommunications policy considerations became relevant in the consideration of available options.

- **Rejoinder Witness Statement of Jenifer Aitken**: as the Director General of the Investment Review Division ("IRD") at Industry Canada during the net benefit and national security reviews of GTH's proposed acquisition of voting control of Wind Mobile, Ms. Aitken assisted and supported the Director of Investments in discharging his duties under the *Investment Canada Act* and in providing advice to the Minister of Industry. Ms. Aitken's Witness Statement explains that national security concerns identified by prescribed investigative bodies underlay the entire national security process, from its initiation on January 4, 2013 to GTH's withdrawal of its application to acquire voting control of Wind Mobile on June 18, 2013.

- **Rejoinder Expert Report of The Brattle Group**: Mr. Benjamin Sacks and Dr. Coleman Bazelon of The Brattle Group have provided a Second Expert Report that explains the many flaws inherent in the damages valuations put forward by the Claimant's experts, and that lays out the only approach that could be taken to assessing damages in the event that a treaty breach is found in this case.

- **Second Legal Expert Report of Zulficar & Partners**: Professor Mohammed S. Abdel Wahab of Zulficar & Parners has provided a Second Expert Report in response to the Claimant's expert report on Egyptian law. He explains that a Joint Stock Corporation such as GTH must maintain a principal place of management in Egypt. He also explains that maintaining a principal place of management in Egypt is an indispensable prerequisite in order to be considered as a permanent resident of Egypt [redacted] Finally, he also opines on GTH's good standing under Egyptian law.

II. THE CLAIMANT FAILS TO ESTABLISH THAT THE TRIBUNAL HAS JURISDICTION TO DECIDE THE DISPUTE

A. The Tribunal Lacks Jurisdiction As The Claimant Is Not An "Investor" Within The Meaning Of The FIPA

1. Summary of Canada's Position

27. Canada maintains the argument made in its Memorial on Jurisdiction that the Tribunal lacks jurisdiction *ratione personae* over this dispute.[11] The Claimant has still failed to establish that it qualified as an "investor" within the meaning of Article I of the FIPA at the time it submitted its RFA on May 28, 2016. Accordingly, it also does not qualify as a "National of another Contracting State" within the meaning of Article 25(2)b) of the ICSID Convention.

[11] Canada's Memorial on Jurisdiction, ¶¶ 30-108.

28. Not only has GTH failed to discharge its burden, but the documents produced in response to Canada's document requests show that GTH did not, at the relevant time, maintain a principal place of management in Egypt, as required by Egyptian law. It therefore does not qualify as an entity established in accordance with, and recognized as a juridical person by the laws of Egypt. [redacted] The Tribunal therefore lacks jurisdiction over GTH's claim.

29. In its Reply Memorial, GTH takes issue with Canada's interpretation of the definition of "investor" as it applies to juridical persons of Egypt. According to GTH, the sole requirement to qualify as an Egyptian juridical person is for an entity to be "established in accordance with, and recognized as a juridical person by the laws of the Arab Republic of Egypt."[12] It also challenges Canada's contention that GTH does not have permanent residence in Egypt.[13] On the other hand, Canada and GTH seem to agree that if GTH qualifies as an investor within the meaning of the FIPA, it will also qualify as a "National of another Contracting State" within the meaning of the ICSID Convention.[14]

30. The Tribunal must therefore decide (1) whether GTH was at all relevant times an entity established in accordance with, and recognized as a juridical person under Egyptian law that invested in Canada; (2) if so, whether such an entity qualifies *ipso facto* as an Egyptian investor within the meaning of the FIPA, or whether the FIPA also requires it to have a permanent residence in Egypt; and, (3) if the Tribunal finds that permanent residence is an additional requirement that entities must meet to qualify as a "juridical person" under the FIPA, whether GTH in fact satisfies that additional requirement.

[12] Claimant's Reply Memorial on Merits and Damages and Counter-Memorial on Jurisdiction, November 5, 2018 ("Claimant's Reply"), ¶ 105.

[13] Claimant's Reply, ¶ 130.

[14] Claimant's Memorial on Merits and Damages, September 29, 2017 ("Claimant's Memorial"), ¶ 279; Canada's Memorial on Jurisdiction, ¶ 36; Claimant's Reply, ¶ 101.

31. The Tribunal must carry out this task by interpreting the terms of the FIPA in accordance with the interpretative rules set out in the *Vienna Convention on the Law of Treaties* ("VCLT"). Despite GTH's appeals to "logic",[15] whether or not GTH may be considered as Egyptian for statistical or "Fortune 500" type rankings is entirely irrelevant to the task at hand.

2. GTH Does Not Have Standing As An Investor Because It Was Not Established In Accordance With And Recognized As A Juridical Person By The Laws Of Egypt At The Time It Submitted Its Claim To Arbitration[16]

32. The parties are in agreement that Article I(g) of the Canada-Egypt FIPA requires that entities be established in accordance with, and recognized as juridical persons by the laws of Egypt in order to qualify as an investor in the case of Egypt.[17] GTH relies on an extract of the Egyptian Commercial Register to prove that it satisfied these requirements at the time of the filing of its RFA.[18] However, as numerous investor-State tribunals have held,[19] official government documents, such as certificates of registered office or certificates of nationality, are not necessarily conclusive evidence of the facts they purport to prove; and tribunals may, and indeed must, satisfy themselves that the jurisdictional requirements of a treaty have in fact been met before asserting jurisdiction over a claim. In the words of the *Soufraki Annulment Committee*, "[t]he truth has to prevail over the formal appearance"[20] when it comes to arbitral tribunals ascertaining their jurisdiction to settle an investment dispute. In this case, the Tribunal

[15] Claimant's Reply, ¶ 103.

[16] Canada advances this argument for the first time in its Rejoinder because this pleading constitutes Canada's first substantive pleading since the completion of the document production phase of this arbitration. The argument is based on documents produced in response to Canada's document requests that show that GTH is effectively managed from the Netherlands and not Egypt, in breach of the requirements of Egyptian law.

[17] Canada's Memorial on Jurisdiction, ¶ 42, Claimant's Memorial, ¶ 270; Claimant's Reply, ¶ 102.

[18] Claimant's Reply, ¶ 102, citing to **C-397**, Global Telecom Holding S.A.E., *Current Corporate Status of Global Telecom Holding S.A.E*. (May 25, 2016), *attaching* Global Telecom Holding S.A.E. commercial register extract, (May 4, 2016) (Arabic and English translation).

[19] **RL-262**, *CEAC Holdings Limited v. Montenegro* (ICSID Case No. ARB/14/8) Award, 26 July 2016 ("*CEAC – Award*"), ¶ 155; **RL-263**, *Waguih Elie George Siag & Clorinda Vecchi v. Arab Republic of Egypt* (ICSID Case No. ARB/05/15) Decision on Jurisdiction, 11 April 2007 ("*Siag – Decision on Jurisdiction*"), ¶¶ 151-153, 193; **CL-121**, *Hussein Nuaman Soufraki v. United Arab Emirates* (ICSID Case No. ARB/02/7) Award, 7 July 2004, ¶ 63.

[20] **RL-264**, *Hussein Nuaman Soufraki v. United Arab Emirates* (ICSID Case No. ARB/02/7) Decision of the *Ad Hoc* Committee on the Application for Annulment of Mr. Soufraki, 5 June 2007 ("*Soufraki – Annulment Decision*"), ¶ 62.

must apply the relevant rules of Egyptian corporate law which are "the only means"[21] of determining whether GTH is indeed established in accordance with, and recognized as a juridical person by the laws of Egypt.

33. Professor Dr. Mohamed S. Abdel Wahab details in his Expert Report the requirements that must be fulfilled to incorporate a Joint Stock Company ("JSC") in Egypt.[22] Among these requirements is the requirement to maintain a principal place of management in Egypt.[23] This requirement is set out in Article 1 of the Companies Law of Egypt, which provides that "[e]very company incorporated in the Arab Republic of Egypt shall locate its principal place in Egypt."[24] According to Professor Abdel Wahab:

> […] having the *actual* principal place of management in Egypt is a prerequisite to validly incorporate a JSC therein. Moreover, maintaining a principal place of management in Egypt is necessary to maintain the JSC's good standing. Failure to maintain the JSC's principal place of management in Egypt or maintaining a fictitious one renders the JSC null because the validity requirements prescribed by Article 1 of the Egyptian Companies Law are not fulfilled.[25]

34. The Claimant's expert on Egyptian law, Dr. Sarie-Eldin, disagrees with Professor Abdel Wahab and opines that the only requirement imposed on a JSC is to maintain a "principal place" in Egypt that has to be registered in the Commercial Register.[26] Dr. Sarie-Eldin also opines that GTH satisfies the obligation contained in Article 1 of the Companies Law by maintaining a principal office in Egypt.[27] The Claimant's expert's conclusory statement appears to rely on the

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[21] **RL-263**, *Siag – Decision on Jurisdiction*, ¶ 153, finding that documents evidencing the nationality of the Claimants are *prima facie* evidence only and the Tribunal is required to apply the Egyptian nationality law as it is the "only means" of determining Egyptian nationality.

[22] **RER-Zulficar**, ¶¶ 33-37.

[23] **RER-Zulficar**, ¶¶ 20, 58-61, 74-80; **RER-Zulficar-2**, ¶¶ 9-11, 21, 30-31.

[24] Canada notes that the unofficial translation of Article 1 of the Companies Law in exhibit HSE-004 differs from the unofficial translation of the same article in exhibit MSW-005 in that the term "principal office" is used instead of the term "principal place" in the second paragraph of the article. A certified translation of Article 1 of the Companies Law confirms that the English translation of the word المركز الرئيسي (*al-markaz al-raessi*) used in both paragraphs of Article 1 is "principal place". **R-406**, Government of Canada, Translation Bureau, Certified Translation (Arabic-English) of **MSW-005**, Law No. 159 of 1981, issuing the Egyptian Companies Law (1981).

[25] **RER-Zulficar**, ¶ 58.

[26] **CER-Sarie-Eldin**, ¶¶ 21-22.

[27] **CER-Sarie-Eldin**, ¶ 25.

fact that the Commercial Register lists GTH's registered office as being located in Cairo, an inscription which is at risk of being struck, as is further explained below. [28]

35. In his second Expert Report filed in support of Canada's Rejoinder, Professor Abdel Wahab maintains his opinion that a JSC is required to maintain its principal place of management in Egypt. Relying on decisions of the Egyptian Court of Cassation, the highest court in Egypt, as well as scholarly writings, including a prior publication of the Claimant's own expert, Prof. Abdel Wahab explains that the principal place of management of a juridical person "is the physical place where its actual board meetings are held."[29]

36. Professor Abdel Wahab also explains that the location of a JSC's general assembly meetings is irrelevant for the purposes of determining the location of a JSC's principal place of management since "the general assembly is simply a meeting of shareholders and not the directors, who are entrusted with managing and operating the company."[30] The fact that GTH's general assembly meetings are still held in hotels in Egypt[31] is therefore of no avail for the Claimant in this arbitration.

37. Documents produced by the Claimant in response to Canada's document requests reveal that GTH was not effectively managed from Egypt on the date of the submission of the claim to arbitration. Not only were GTH's operations moved outside of Egypt to Amsterdam,[32] but so was the management of the company. The minutes of meetings of GTH's board of directors held since February 24, 2015 reveal that none of the meetings were held in Cairo and that all were either held in Amsterdam or through a conference call.[33] [redacted]

[28] See below, ¶ 39.

[29] **RER-Zulficar-2**, ¶¶ 26, 27-35.

[30] **RER-Zulficar-2**, ¶ 56.

[31] **HSE-014**, GTH, *Minutes of the Extraordinary General Assembly Meeting No. (1) of 2017* (Feb. 6, 2017).

[32] The minutes of a meeting of GTH's board of directors held on September 21, 2015 confirm the information disclosed publicly in a news release on the same day that GTH "no longer has operations in Cairo." **R-407**, GTH, *Minutes of Board of Directors Meeting* (Sep. 21, 2015), p. 2; **R-064**, GTH Press Release, "Global Telecom to move its place of operations to Amsterdam" (Sep. 21, 2015).

[33] **RER-Zulficar-2**, fn. 7.

[redacted]

38. Because GTH no longer had a principal place of management in Egypt at the time of the filing of the RFA, it was no longer established in accordance with Egyptian law, and it consequently did not qualify as an Egyptian investor within the meaning of the FIPA.[35]

39. In light of this evidence, which establishes the truth about GTH's principal place of management, GTH's reliance on the recognition granted by its inscription on the Commercial Register is misplaced. The information contained on the Commercial Register is inaccurate and does not reflect the true location of GTH's principal place of management. As Professor Abdel Wahab explains in his second Expert Report, because GTH has failed to update the information contained in the Commercial Register to reflect the move of its principal place of management to the Netherlands, GTH runs the risk of having the Egyptian courts strike its registration on the Commercial Register.[36] GTH's registration could also be struck if it does not conduct business activities in Egypt, and there is in fact no evidence of any such business activities. Thus, the Tribunal should not let formal appearances prevail over the truth[37] and should not give any legal effect to the information contained on the relevant extracts of the Commercial Register.[38]

3. GTH Does Not Have Standing as an Investor Because It Did Not Have Permanent Residence in Egypt at the Time It Submitted Its Claim to Arbitration

40. Even if GTH was established in accordance with the laws of Egypt at the time it submitted its claim to arbitration, it still does not qualify as an investor of Egypt within the meaning of the

[34] [redacted]

[35] **RER-Zulficar-2**, ¶¶ 19, 42-45.

[36] **RER-Zulficar-2**, ¶¶ 67-70.

[37] **RL-264**, *Soufraki – Annulment Decision*, ¶ 62.

[38] **RER-Zulficar-2**, ¶¶ 72-74.

FIPA because it failed to satisfy the additional requirement found in the definition of "juridical person" that such entities have permanent residence in Egypt.

a) The Definition of "Investor" In The FIPA Only Includes Entities That Have Permanent Residence In Egypt

41. The analytical framework for treaty interpretation set out in the VCLT leads to the conclusion that entities that lack permanent residence in Egypt are not "investors" within the meaning of Article I of the FIPA. Such entities therefore have no standing to bring claims under Article XIII of the FIPA.

42. In its Reply, GTH argues that the ordinary meaning of the definition of "juridical person" as it relates to Egyptian investors in the FIPA does not contain a separate permanent residence requirement.[39] The Claimant also argues that its proposed interpretation is confirmed by supplementary means of interpretation by relying on the models used by Canada and Egypt to negotiate bilateral investment treaties ("BITs").[40] The Claimant errs on both counts.

(i) The Ordinary Meaning Of Egypt's Definition Of "Investor" Requires Permanent Residence In Egypt

43. Although GTH opposes Canada's interpretation of Article I(g)(ii), it does not clearly explain the meaning it actually ascribes to the words "…, and having permanent residence in the territory of the Arab Republic of Egypt" contained in that provision. The Claimant's Reply explains that the words are merely "yet another example of a type of entity that qualifies as an Egyptian juridical person"[41] but also argues, when referring to the French version of the treaty, that the phrase "describes a common characteristic amongst the preceding list of example entities."[42] It is unnecessary for the purposes of Canada's Rejoinder to ascertain which meaning GTH actually endorses, as neither is sustainable in light of a proper interpretation of the relevant provision.

[39] Claimant's Reply, ¶¶ 105-120.

[40] Claimant's Reply, ¶¶ 121-125.

[41] Claimant's Reply, ¶¶ 108, 112.

[42] Claimant's Reply, ¶ 111.

44. GTH's interpretation of the term "juridical person" in the English version of the FIPA is predicated on the placement of the colon in the definition of the term as well as on the use of the words "such as", which introduce a non-exhaustive list of entities that satisfy the requirement of being established in accordance with, and recognized as juridical persons by Egyptian law.[43] The Claimant has correctly and clearly set out in its Reply the grammatical function of colons and Canada does not dispute that the list of entities following the words "such as" in the definition of "juridical person" for Egypt serves to illustrate the type of entities that meet the first requirement in the definition of being "established in accordance with, and recognized as a juridical person by the laws of the Arab Republic of Egypt."[44] However, GTH fails to recognize that the illustrative list stops at the word "organizations", because GTH has not properly considered the overall structure of Article I(g)(ii) of the FIPA, which provides as follows:

> (ii) the term "juridical person" means any entity established in accordance with, and recognized as a juridical person by the laws of the Arab Republic of Egypt: such as public institutions, corporations, foundations, private companies, firms, establishments and organizations, and having permanent residence in the territory of the Arab Republic of Egypt.

45. From a syntactic perspective, the list following the colon in this definition is what *The Chicago Manual of Style*, which the Claimant cites as an authority in its Reply,[45] refers to as a "run-in list".[46] The *Chicago Manual of Style* states that "[i]tems in a list should consist of parallel elements"[47] and provides examples of proper list construction. In each of the examples provided, the "parallel elements" are equivalent grammatical units, with the word "and" separating the last two elements of the list.[48]

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[43] Claimant's Reply, ¶¶ 107, 108.

[44] Claimant's Reply, ¶ 115.

[45] Claimant's Reply, ¶¶ 107, 124, *citing* **CL-134**, *The Chicago Manual of Style* (16th ed.) (Chicago and London: The University of Chicago Press, 2010).

[46] **RL-265**, *The Chicago Manual of Style* (17h ed.) (Chicago and London: The University of Chicago Press, 2017) ("*The Chicago Manual of Style*, 17th ed."), ¶¶ 6.127-6.129.

[47] **RL-265**, *The Chicago Manual of Style*, 17h ed., ¶ 6.127 (emphasis added).

[48] **RL-265**, *The Chicago Manual of Style*, 17h ed., ¶ 6.129 noting, *inter alia*, the following example: ("The qualifications are as follows: a doctorate in physics, five years' experience in a national laboratory, and an ability to communicate technical matter to a lay audience.")

46. The illustrative list introduced by the colon and the words "such as" in Article I(g)(ii) sets out examples of entities that satisfy the first requirement of being established in accordance with, and recognized as a juridical person by the laws of Egypt. It consists of seven equivalent grammatical units, each referring to a different type of entity, starting with "public institutions" and ending with "organizations". As is the case for the run-in lists used as examples in the *Chicago Manual of Style*, the last two elements of the list are separated by the conjunction "and" ("establishment and organizations").[49]

47. On the other hand, the words "…, *and having permanent residence in the territory of the Arab Republic of Egypt*" in Article I(g)(ii) of the FIPA cannot be considered as a "parallel element" of the list introduced by the colon. It is not an equivalent grammatical unit, that is to say a noun referring to a type of entity like all the preceding elements. Rather, it is a participle clause expressing a condition. Because the clause has no separate subject and is preceded by a comma and the coordinating conjunction "and", its subject is the same as the subject of the other two verbs in the first clause of the sentence ("any entity established […] and recognized as […] and having permanent residence in the territory of the Arab Republic of Egypt".[50]

48. The grammatical rules quoted by GTH apply to run-in lists consisting of parallel elements. In the case of Article I(g)(ii) of the FIPA, the run-in list introduced by the colon stops at "organizations", and is followed by a participle clause which introduces an additional condition that entities must satisfy to qualify as "juridical persons" within the meaning of the FIPA. As Canada noted in its Memorial on Jurisdiction, the use of participle clauses to include requirements to the definition of juridical person that are additive to the requirement of having been constituted in accordance with home state laws may be found in other BITs.[51]

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[49] **CL-001**, *Agreement between the Government of Canada and the Government of the Arab Republic of Egypt for the Promotion and Protection of Investments*, 13 November 1996 ("Canada-Egypt FIPA"), Article I(g)(ii).

[50] **CL-001**, Canada-Egypt FIPA, Article I(g)(ii).

[51] Canada's Memorial on Jurisdiction, ¶¶ 47-48. *See also* **RL-262**, *CEAC – Award*, ¶ 201, where a tribunal dismissed a claim because the claimant had failed to establish that the requirement in a similarly constructed participle clause had been met. The relevant BIT in that case defines the term "investor" as including "a legal entity incorporated, constituted or otherwise duly organized in accordance with the laws and regulations of one Contracting Party, having its seat in the territory of that Contracting Party and making investments in the territory of the other Contracting Party" (emphasis added). The tribunal dismissed CEAC's claim, not because it was

49. In its actual form, the ordinary meaning of Article I(g)(ii) can only lead to the conclusion that not every entity established in accordance with, and recognized as a juridical person by the laws of Egypt can be considered as a juridical person within the meaning of the FIPA. To fall within the definition of a juridical person, an entity must satisfy the triple requirements of being established in accordance with, and recognized as a juridical person by the laws of Egypt and having permanent residence in Egypt.

50. The ordinary meaning of Article I(g)(ii) of the French and Arabic versions of the FIPA, which are equally authentic, is to the same effect: the requirement of having permanent residence, or the right of permanent residence in the case of the French version, is an additional and independent requirement to satisfy the definition of juridical person.

51. The Arabic version of the Treaty closely tracks the English text. Its translation into English reads as follows:

> the term "juridical person" means any entity established or created in accordance with the laws of the Arab Republic of Egypt, such as public institutions, private and public corporations, foundations, and organizations, and which have permanent residence in the territory of the Arab Republic of Egypt. [52]

52. Instead of using the present participle "having", it uses the Arabic equivalent of the terms "which have". Again, the use of the conjunction "and" before the word "organizations" signals that the illustrative and non-exhaustive list of entities introduced by the Arabic equivalent of the words "such as" ends at the word "organizations". The requirement contained in the clause introduced with the words "and which have" must therefore be understood as imposing a

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incorporated elsewhere than in Cyprus, but rather because it had failed to prove that it had its seat in that country. In a more recent case interpreting the same treaty as the one at issue in the CEAC dispute, another tribunal confirmed that the requirement introduced by the participle clause is a jurisdictional requirement that is independent from the incorporation requirement also found in the same provision: "[F]or the Claimant to qualify as an investor, it must be a legal entity (i) incorporated, constituted or otherwise duly organized according to the laws of the Republic of Cyprus, (ii) having its seat in the territory of the Republic of Cyprus, and (iii) making investments in the territory of Serbia." (**RL-266**, *Mera Investment Fund Limited v. Republic of Serbia* (ICSID Case No. ARB/17/2) Decision on Jurisdiction, 30 November 2018, ¶ 62).

[52] **R-001**, Government of Canada, Translation Bureau, Certified Translation (Arabic-English) of **RL-059**, *Agreement Between the Government of Canada and the Government of the Arab Republic of Egypt for the Promotion and Protection of Investments*, 13 November 1996 (Arabic version – signed), 2025 U.N.T.S. 289 at 290, Article I(g)(ii).

separate and additional requirement that entities must satisfy to qualify as a "juridical person" of Egypt.

53. The French version of the provision reads as follows:

> Par le terme « personne morale », il faut entendre toute entité constituée en conformité avec les lois de la République arabe d'Égypte et reconnue comme personne morale par ces lois : dont les institutions publiques, les personnes morales proprement dites (ou corporations) les fondations, les compagnies privées, les firmes, les établissements et les associations, ayant le droit de résidence permanente sur le territoire de la République arabe d'Égypte.[53]

54. The Claimant argues in its Reply that the participle clause "*ayant le droit de résidence permanente"*, which translates in English as "having the right to permanent residence", "describes a common characteristic amongst the preceding list of example entities" (i.e. public institutions, juridical persons per se (or corporations), foundations, private companies, firms, establishments and associations).[54] Such an argument is not supported by the Claimant's own expert on Egyptian law. [redacted] However, the factual indicia in question are not all necessarily equally applicable to the types of juridical persons listed in Article I(g)(ii) of the FIPA. For example, Dr. Sarie-Eldin bases his opinion partly on the fact that GTH is listed on Egypt's stock exchange and that it holds general assembly meetings of shareholders in Egypt. However, not all public institutions, corporations, foundations, private companies, firms establishments and organizations are necessarily listed on Egypt's stock exchange or hold general assembly meetings of shareholders in Egypt. The fact that Dr. Sarie-Eldin considers these factors to be relevant to the determination as to whether or not GTH permanently resides in Egypt means that GTH's expert himself does not consider permanent residence to be an inherent characteristic of juridical persons listed in Article I(g)(ii).

[53] **CL-002**, *Agreement between the Government of Canada and the Government of the Arab Republic of Egypt for the Promotion and Protection of Investments (French version)*, Article I(f)(ii).

[54] Claimant's Reply, ¶ 111.

[55] **CER-Sarie-Eldin**, ¶¶ 23-28.

55. Like the English version of the FIPA, the French definition contains the requirement that entities be both constituted in accordance with, and recognized as juridical persons under Egyptian law. This requirement, contained in the first clause of Article I(g)(ii), is followed by an illustrative and non-exhaustive list of entities that satisfy those two requirements. However, as in the English and Arabic versions, this list stops at the words "…*et les associations*", as demonstrated by the use of the coordinating conjunction "*et*" before the word "*association*" as well as the presence of a comma before the participle clause at the end of the sentence.[56] The punctuation rules governing the use of commas in the French language provide that the presence of a comma specifically indicates, for the sake of clarity, that the word following the comma is not attached to the nearest subject preceding the comma: "[f]or clarity reasons, a comma indicates that a term does not need to be attached to what immediately precedes it."[57]

56. Hence, the comma after "*les associations*" must mean that the participle "*ayant…*" is not intended to be attached to the nearest preceding subject "*les associations*", or the other entities forming part of the whole nominal group that must logically be afforded the same treatment as "*les associations*", but rather to the only other possible subject present in the sentence "*toute entité*" ("any entity"). The list of entities introduced by the colon and ending with the comma following "*et les associations*" clearly constitutes an interpolated clause that is merely intended to set out the different possible forms of a "*personne morale*".

57. Given that "*toute entité*" is also the subject of the verbs "*constituée*" and "*reconnue*", and that the participle "*ayant*" is not prefaced with the conjunction "or", as would normally be the case if the condition were an alternative one, the phrase following "*ayant*" must set out an additional attribute that any entity meeting the first two requirements must possess in order to be considered a "juridical person" in the case of Egypt.

58. This interpretation is consistent with the punctuation rules of the French language, as well as with the English and Arabic versions of Article I (g)(ii).

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[56] **RL-267**, Maurice Grevisse and André Goosse, *Le Bon Usage* (16th ed.) (Louvain-la-Neuve : DeBoeck Supérieur, 2016) (with certified translation) ("*Grevisse and Goosse*"), ¶ 126 (b).

[57] **RL-267**, *Grevisse and Goosse*, translation of s. 126 (b) (p. 10 of pdf).

59. The rules of interpretation contained in the VCLT also instruct the treaty interpreter to interpret the definition of "investor" in the case of Egypt in light of its context.[58] This context includes, as Canada has argued, the entire definition of "investor", including the definition of "investor" in the case of Canada.[59] Because Canada's definition only imposes an incorporation requirement to qualify as an "investor" of Canada under the FIPA, in addition to the requirement of making an investment in Egypt, the definition of "investor" for Egypt cannot similarly rely only on an incorporation test as GTH argues or else the treaty drafters would not have used different language and included two separate definitions.

60. Contrary to what GTH argues in its Reply,[60] Canada's interpretation does not undermine the reciprocal promotion and protection of investments or the equal and non-discriminatory treatment of investors.

61. The reciprocal promotion and protection of Egyptian and Canadian investors and their investments in the territory of the other Contracting Party does not mean that the scope of application of the FIPA should be exactly equal. Such a standard would in fact be impossible to meet, especially with respect to the scope of protection of foreign investors who are juridical persons. As the International Court of Justice ("ICJ") observed in its judgement in the *Barcelona Traction* case, international law recognizes the existence of juridical persons but it does not have its own rules of corporate law. International law must, therefore, refer to the relevant rules of municipal law recognizing the separate legal personality of corporate entities "whenever legal issues arise concerning the rights of States with regard to the treatment of companies and shareholders."[61] Because some elements of corporate law differs from one country to another, an expectation that a BIT applies in exactly the same way, to the same types of entities in both jurisdictions would be unrealistic. Such an expectation would presuppose a level of uniformity in domestic corporate law that does not exist.

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[58] **CL-018**, *Vienna Convention on the Law of Treaties* (23 May 1969; in force on 27 January 1980), 1155 U.N.T.S. 331 ("*VCLT*"), Article 31.

[59] Canada's Memorial on Jurisdiction, ¶¶ 50-53.

[60] Claimant's Reply, ¶ 117.

[61] **RL-138**, *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)* Second Phase, Judgment, I.C.J. Reports 1970, 5 February 1970 ("*Barcelona Traction*"), pp. 33-34.

62. It is also worth pointing out that the scope of natural persons who may qualify as investors is also markedly different as between Canada and Egypt. In the case of Canada, the scope of treaty protection encompasses both nationals and foreign nationals who permanently reside in Canada. Egypt, on the other hand, only extends treaty protection to its nationals and specifically excludes from the scope of the treaty its nationals who are also Canadian nationals. Thus, Egypt clearly and unambiguously decided to extend treaty protection to a narrower group of natural persons than the group protected by Canada, just as it similarly adopted a more restrictive definition of juridical person than the one adopted by Canada.

63. These types of asymmetrical definitions of the type of persons that may qualify as investors are not unusual in BITs. For example, in order to be considered as an investor under the Switzerland-Paraguay BIT, Paraguayan legal entities must be constituted in accordance with Paraguayan law and have their seat in Paraguay. Swiss companies must satisfy the same two requirements but must also have "real economic activities" in Switzerland to benefit from treaty protection.[62]

64. Egypt is a Party to a number of treaties that include a definition identical to the definition of "investor" in the case of Egypt in the Canada-Egypt FIPA.[63] It is also a Party to eight BITs that include language nearly identical to that definition but which omit the requirement for

[62] **RL-270**, *Agreement Between the Swiss Confederation and the Republic of Paraguay on the Promotion and Reciprocal Protection of Investments* (1992), Article 1(1)(ii)(b)(c) (definition of "investor"). *See also*, **RL-271**, *Agreement Between the Government of Jamaica and the Government of the Swiss Confederation for the Reciprocal Promotion and Protection of Investments* (1991), Article 1(b) (definition of "companies"); **RL-272**, *Agreement Between the Government of the Kingdom of Saudi Arabia And The Government of Malaysia Concerning the Promotion and Reciprocal Protection of Investments* (2001), Article 1(3) (definition of "investor"); **RL-273**, *Agreement between The Government of the People's Republic of Bulgaria and The Government of the Republic of Cyprus on Mutual Encouragement and Protection of Investments* (1988), Article 1(3) (definition of "investor").

[63] **RL-060**, *Agreement between the Czech Republic and the Arab Republic of Egypt for the Promotion and Protection of Investments* (1993), Article 1(2); **RL-061**, *Agreement for the Promotion and Protection of Investments between the Republic of Ghana and the Arab Republic of Egypt* (1998), Article 1(2); **RL-062**, *Agreement between the Government of the Arab Republic of Egypt and the Government of the Republic of Latvia for the Promotion and Protection of Investments* (1997), Article 1(2); **RL-063**, *Agreement for the Promotion and Protection of Investments between the Government of the Arab Republic of Egypt and the Government of the Republic of Malawi* (1997), Article 1(1)(b); **RL-064**, *Agreement on the Promotion and Protection of Reciprocal Investments between the Government of the Democratic Socialist Republic of Sri Lanka and the Government of the Arab Republic of Egypt* (1996), Article 1(2).

permanent residence and do not contain any further requirement.[64] Other Egyptian BITs that also contain a participle clause introduced by the verb "having" impose multiple different requirements: "having a main office" [65] in Egypt, "having its headquarters"[66] in Egypt, "having a principal place of business" [67] in Egypt, "having a registered office"[68] in Egypt, or "have their seat, together with real economic activities"[69] in Egypt. If the Claimant is correct that the participle clause introduced by the verb "having" in Article I(g)(ii) of the Canada-Egypt FIPA describes a common characteristic of entities that are established in accordance with, and recognized as juridical persons by Egyptian law,[70] then the same would hold true for the characteristics described in these other treaties. It would notably mean that all entities established in accordance with, and recognized as juridical persons by the laws of Egypt need to have "a main office", "a principal place of business" and, "real economic activities" in Egypt. Because

[64] For example, see the 2004 Egypt-Mongolia BIT, Article 1(2)(b): ("a 'juridical person' means with respect to either Contracting Party, any entity established in accordance with and recognized as a juridical person by its laws such as public institutions, corporations, foundations, private companies, firms, establishments and organizations.") (**RL-274**, *The Agreement on the Promotion and Protection of Investments Between The Government of the Arab Republic of Egypt and The Government of Mongolia* (2004), Article 1(2)(b)). *See also* **RL-275**, *Agreement Between the Government of The Republic of Indonesia and The Government of the Arab Republic of Egypt Concerning the Promotion and Protection of Investment* (1994); **RL-276**, *Agreement for the Promotion and Protection of Investments Between the Republic of Italy and The Arab Republic of Egypt* (1989); **RL-277**, *Agreement for the Promotion and Protection of Investments Between the Arab Republic of Egypt and the Government of Jamaica* (1999) (not in force); **RL-278**, *Agreement on the Promotion and Protection of Investments Between the Government of the Arab Republic of Egypt and The Government Democratic People's Republic of Korea* (2000); **RL-279**, *The Agreement on the Promotion and Protection of Investments Between the Government of the Republic of Korea and the Government of the Arab Republic of Egypt* (1997); **RL-280**, *Agreement on The Promotion and Protection of Investments Between the Government of Islamic Republic of Pakistan and The Government of the Arab Republic of Egypt* (2000); **RL-281**, *Agreement on The Promotion and Protection of Investments Between The Government of The Socialist Republic of Vietnam and The Government of the Arab Republic of Egypt* (2002).

[65] **RL-309**, *Agreement between the Portuguese Republic and the Arab Republic of Egypt on the Mutual Promotion and Protection of Investments* (1999), Article 1(3)(b).

[66] **RL-282**, *Agreement between the Government of the Arab Republic of Egypt and the Government of the Republic of Armenia for the Promotion and Protection of Investments* (1996), Article 1(4)(a); **RL-283**, *Agreement Between the Arab Republic of Egypt and Serbia and Montenegro on the Reciprocal Promotion and Protection of Investments* (2005), Article 1(3)(ii); **RL-284**, *Agreement between the Republic of Turkey and the Arab Republic of Egypt Concerning the Reciprocal Promotion and Protection of Investments* (1996), Article 1(1)(b).

[67] **RL-327**, *Agreement between the Arab Republic of Egypt and the Republic of Zimbabwe Concerning the Encouragement and Reciprocal Protection of Investments* (1999), Article I(3)(b) (signed, not in force).

[68] **RL-285**, *Agreement between the Government of the Republic of Finland and the Government of the Arab Republic of Egypt on the Promotion and Protection of Investments* (2004) ("Egypt-Finland BIT"), Article 1(3)(b).

[69] **RL-328**, *Agreement between the Republic of Croatia and the Arab Republic of Egypt Concerning the Promotion and Reciprocal Protection of Investments* (1997), Article 1(1)(b)

[70] Claimant's Reply, ¶ 111.

GTH does not present these characteristics, under the Claimant's own reasoning, GTH cannot be considered as a "juridical person" within the meaning of Article I(g)(ii) of the Canada-Egypt FIPA.[71]

(ii) The Supplementary Means Of Interpretation Do Not Support the Claimant's Interpretation Of Egypt's Definition Of "Investor"

65. GTH relies on Canada's 1994 Model FIPA, which was forwarded to Egypt during the course of the negotiations, to argue that the definition of "juridical person" applicable to Egypt found in Article I(g)(ii) must originate from Egypt's Model BIT. GTH then states that the equivalent definition of "juridical person" in Egypt's Model BIT uses semicolons instead of the commas used in the Canada-Egypt FIPA to separate the examples of entities that satisfy the requirement to be established in accordance with and recognized as a juridical person of Egypt as well as the participle clause setting out the permanent presence requirement. GTH argues that the use of semicolons is further evidence that Egypt intended the last part of the sentence to "serve as another example of a qualifying entity, and not a separate requirement."[72] The Tribunal should not accord any weight to GTH's strained argument.

66. As GTH states in its Reply, the Arabic language does not employ punctuation[73] and it is therefore likely that the semicolons were added by whoever translated the Egypt Model BIT into English, which may or may not have been used during the course of the Canada-Egypt FIPA negotiations. More importantly, the use of commas instead of semicolons in the Canada-Egypt FIPA could lead the treaty interpreter to the exact opposite conclusion than the one that GTH is advocating, namely, that the Parties chose to deviate from Egypt's Model BIT in order to avoid the meaning that GTH seeks to ascribe to Article I(g)(ii).

[71] Claimant's Reply, ¶¶ 108, 112.

[72] Claimant's Reply, ¶ 124.

[73] Claimant's Reply, ¶ 113.

(iii) Interpreting Egypt's Definition Of "Investor" As Requiring Permanent Residence In Egypt Best Reconciles The Three Authentic Versions Of The Treaty

67. Although the grammatical and syntactic construction of the French version of the definition of "juridical person" closely mirrors the English and Arabic versions of the same definition, the French version does depart in one aspect from the other two versions, in that it refers to a "right" of permanent residence, which is a concept that is absent from the two other versions of the treaty.

68. Contrary to what GTH claims in its Reply, the reference to a "right of permanent residence" in Egypt is not consistent with Egyptian law.[74] Indeed, both experts on Egyptian law agree that the concept of "permanent residence" is not recognized in Egyptian law. It is therefore not possible to argue that Egyptian law provides a right to something that it does not recognize and does not define. GTH's contention is based on Dr. Sarie-Eldin's Expert Report which is itself based on Article 53(2)(d) of the Egyptian Civil Code.[75] Yet Article 53(2)(d) does not refer to the concept of "permanent residence" but rather to "domicile". Moreover, it only provides that a juridical person is "entitled to […] an independent domicile."[76] It does not state that a juridical person is entitled to a domicile in Egypt.

69. Also, the Claimant's assertion that it is "simply not possible to equate the phrase 'having the right to permanent residence' with a separate requirement to 'have permanent residence'"[77] is inaccurate. In the context of the right to permanent residence, the phrase can be interpreted as requiring the effective exercise of the right in question. Such an interpretation of the word "right" could therefore accord with the English and Arabic versions of the FIPA which require GTH to have permanent presence in Egypt.

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[74] Claimant's Reply, ¶ 111.

[75] **CER-Sarie-Eldin**, ¶¶ 17, 19.

[76] **MSW-003**, The Egyptian Civil Code issued by Law No. 131 of 1948 ("ECC"), Article 53(2). As Professor Dr. Abdel Wahab explains in his second expert report, independence denotes segregating the legal personality of the juridical person from the legal personality of the natural persons who own that juridical person. **RER-Zulficar-2**, ¶ 37.

[77] Claimant's Reply, ¶ 127.

70. Because all three versions of the FIPA are equally authentic, as stated on the Treaty's signature page, if the Tribunal finds that an interpretation of Article I(g)(ii) in accordance with Articles 31 and 32 of the VCLT does not remove the difference in meaning between the French version and the English and Arabic versions, the Tribunal must adopt the meaning that best reconciles the three versions having regard to the object and purpose of the Treaty.[78] That meaning is the one that requires entities to have permanent residence in the territory of Egypt in order to qualify as a juridical person in the case of Egypt, as it is the interpretation that accords with two out of the three versions of the Canada-Egypt FIPA.

71. Such an interpretation would not "stifle the object and purpose of the BIT", as GTH claims.[79] GTH invites the Tribunal to follow the reasoning adopted in *BG v. Argentina* that dismissed Argentina's interpretation of the jurisdictional requirements of the relevant treaty on the basis that such an interpretation would "considerably restrict the coverage of the treaty, discourage 'greater investment' and defeat the shared aspiration expressed by Argentina and the U.K. in executing this instrument in 1993."[80] The Tribunal should reject such a myopic view of a treaty's object and purpose that would systematically favour investors to the detriment of host States every time interpretive issues need to be resolved. Rather, the Tribunal should recognize that the Parties agreed to promote foreign investments only according to the terms of the FIPA and its scope provisions. Further, the achievement of this objective could actually be jeopardized by overly broad interpretations of the FIPA's scope and coverage. As the *Saluka v. Czech Republic* tribunal observed:

> The protection of foreign investments is not the sole aim of the Treaty, but rather a necessary element alongside the overall aim of encouraging foreign investment and extending and intensifying the parties' economic relations. That in turn calls for a balanced approach to the interpretation of the Treaty's substantive provisions for the protection of investments, since an interpretation which exaggerates the protection to be accorded to foreign investments may serve to dissuade host States from admitting foreign investments and so

[78] **CL-018**, *VCLT,* Article 33(4).

[79] Claimant's Reply, ¶ 128.

[80] Claimant's Reply, ¶ 128.

> undermine the overall aim of extending and intensifying the parties' mutual economic relations.[81]

72. A balanced approach, such as the one called for in the *Saluka* decision among others,[82] should lead the Tribunal to accord full effect to the clearly worded text of the English and Arabic versions of Article I(g)(ii) of the Canada-Egypt FIPA.

b) The Claimant Has Not Discharged Its Burden Of Establishing That It Had Permanent Residence In Egypt At The Time It Submitted Its Claim To Arbitration

73. If the Tribunal accepts that the Claimant must have had a permanent residence in Egypt at the time it filed its RFA, then the Claimant agrees that it bears the burden of proving this fact. It has not met its burden.

(i) Having Permanent Residence in Egypt Requires That GTH Maintain Its Strongest Attachment in Egypt And That it Currently Resides and Intends to Continue Residing In Egypt

74. As Canada explained in its previous submissions, the ordinary meaning of the words "permanent residence", in their context and in the light of the FIPA's object and purpose, refers to the jurisdiction with which an entity has the strongest attachment, and in which it currently resides and intends to continue residing in the future.[83]

75. To be clear, Canada is not attempting to read into the Canada-Egypt FIPA a "dominant and effective" nationality test as the Claimant seems to believe.[84] It is merely asking the Tribunal to give effect to the test provided for in the FIPA. Canada's arguments are based on the ordinary meaning of the words "permanent" and "residence", which the Claimant also refers to in its Reply.[85] The word "permanent" is defined as: "[c]ontinuing or designed to continue or last

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[81] **CL-038**, *Saluka Investments BV (The Netherlands) v. The Czech Republic* (UNCITRAL) Partial Award, 17 March 2006 ("*Saluka – Award*"), ¶ 300.

[82] **CL-061**, *El Paso Energy International Company v. The Argentine Republic* (ICSID Case No. ARB/03/15) Award, 31 October 2011 ("*El Paso – Award*"), ¶ 604.

[83] Canada's Memorial on Jurisdiction, ¶¶ 75-83.

[84] Claimant's Reply, ¶ 136.

[85] Claimant's Reply, ¶ 131.

indefinitely without change; abiding, enduring, lasting; persistent. Opposed to temporary."[86] The word "residence" is, in turn, defined as "[t]he fact of living or staying regularly at or in a specified place for the performance of official duties, for work, or to comply with regulations."[87] By qualifying the word "residence" with the adjective "permanent", the Treaty drafters provided that only entities that stay in Egypt indefinitely without change, (that is to say on a continuous basis), are entitled to the protection of the Canada-Egypt FIPA.

76. Canada agrees that tribunals should be careful about applying nationality requirements to juridical persons that apply to natural persons. However, the particular Treaty requirement of "permanent residence" calls out for an analogy with the rules applying to natural persons, as the requirement is more commonly applied to individuals than it is to juridical persons. Canada therefore disagrees with The Claimant's contention that arbitral Awards interpreting the very same jurisdictional requirement but in the case of natural persons are "inapposite".[88] Rather, these awards are highly instructive, and their analysis of the concept of permanent residence should be applied *mutatis mutandis* to the requirement set out in Article I(g)(ii) of the Canada-Egypt FIPA.

77. In the *Binder v. Czech Republic* case, the tribunal found that "[t]he general purpose of the term 'permanent residence' in the Czech-German BIT must be considered to be that protection in one State should only be given to investors with a strong attachment to the other State."[89] It went on to state that "[a]s regards investors with an attachment to both the Czech Republic and Germany, it would have to be determined to <u>which of these States the investor has the strongest</u>

[86] **RL-076**, *Oxford English Dictionary*, 8th ed., s.v. "permanent".

[87] **RL-077**, *Oxford English Dictionary*, 8th ed., s.v. "residence".

[88] GTH mischaracterizes Professor Abdel Wahab's statement that "reference to 'domicile' and 'habitual residence' for natural persons is irrelevant to the concept of 'permanent residence' for juridical persons". Claimant's Reply, ¶ 39. Professor Abdel Wahab, who only opines on matters of Egyptian law, was merely stating his opinion that the concepts of "domicile" and "habitual residence" of natural persons, as they are defined under Egyptian law, do not shed any light on the concept of "permanent residence" of juridical persons, which is a concept that is undefined in Egyptian law.

[89] **RL-074**, *Binder v. Czech Republic* (UNCITRAL) Award on Jurisdiction, 6 June 2007 ("*Binder – Award*"), ¶ 75.

attachment".[90] These principles, devised from the permanent residence requirement contained in the Czech-Germany BIT, are equally applicable to juridical persons.[91]

78. The Claimant dismisses the relevance of the *Binder* award by arguing that the disputing parties in that case had agreed that the Czech-Germany BIT "envisages a permanent residence in one State only".[92] However, far from calling into question the relevance of the award, the fact that both disputing parties and the three-person arbitral tribunal accepted that an investor could only be a permanent resident of one State should give the finding more weight, not less. The tribunal in that case endorsed the view of the parties, not because it was bound to do so but rather, because it was convinced of the soundness of the principle.[93]

79. The Claimant also challenges Canada's reliance on the *Uzan* tribunal's finding that the words "permanently residing" used in the definition of "investor" in the Energy Charter Treaty ("ECT") requires a factual assessment of an investor's links with the home State.[94] According to the Claimant, because the term "residing" in the ECT is "used as a verb, rather than a noun (i.e. residence)" the *Uzan* tribunal's finding that the claimant must prove that it was permanently residing in an ECT Contracting Party, as a matter of fact, is not relevant to the matter before the Tribunal.[95] However, the Claimant ignores the fact that the requirement contained in Article II(g)(ii) of the Canada-Egypt FIPA is also used as a verb and not as a noun. The provision requires the Claimant to have permanent residence in the territory of Egypt which therefore,

[90] **RL-074**, *Binder – Award*, ¶ 75 [emphasis added].

[91] Article I of the Czech-Germany BIT defines "investor" as "a physical person whose permanent residence is, or a juridical person whose seat is, within the respective areas to which this Treaty applies and which is authorized to perform an investment" (**RL-074**, *Binder – Award*, ¶ 1).

[92] Claimant's Reply, ¶ 138.

[93] **RL-074**, *Binder – Award*, ¶ 73.

[94] **RL-078**, *Cem Cenzig Uzan v. Republic of Turkey* (SCC Case No. V 2014/023) Award on Respondent's Bifurcated Preliminary Objection, 20 April 2016, ¶ 156: ("Regarding the factual component, the Tribunal decides that the structure of the wording "permanently residing" implies that there must also be a determination that an Investor was actually living permanently in the territory of the Contracting Party. This is obvious from the ordinary and natural meaning of the text. If the intention behind Article 1(7)(a)(i) had been to refer solely to the legal status of the natural person as defined by domestic law, the text might have used the words "permanent resident." The use of "permanently residing" appears to require that a natural person should be both permanently residing in the Contracting Party (a factual requirement), and for such status to be recognised by local domestic law (a legal requirement).)"

[95] Claimant's Reply, ¶ 139.

following the same reasoning of the *Uzan* tribunal, requires GTH to prove that it permanently resides in Egypt as a matter of fact and not only that its status in Egypt is recognized by local domestic law.

80. In light of the ordinary meaning of the words "permanent residence", and in light of the analysis in the *Binder* and *Uzan* awards of similar requirements contained in the Czech-Germany BIT and the ECT, the Tribunal should scrutinize whether GTH in fact maintained an attachment with Egypt that is stronger than its attachment with any other jurisdiction. It should also scrutinize the facts to determine whether those attachments are reflective of an intention to reside in Egypt "indefinitely without change".[96]

(ii) The Evidence on Which the Claimant Relies Is Not Sufficient To Establish That It Had Permanent Residence in Egypt at the Time It Submitted Its Claim to Arbitration

81. Requirements that an entity must meet to be validly established and recognized as a juridical person in Egypt cannot also serve as evidence of permanent residence, or the additional requirement of "permanent residence" would serve no useful purpose. [redacted]

[96] **RL-076**, *Oxford English Dictionary*, 8th ed., s.v. "permanent".

[97] **CER Sarie-Eldin**, ¶ 25(2).

[98] **HSE-004**, Companies Law, Law No. 159 of 1981, Article 103.

[99] **R-408**, Law Governing the Profession of Accountancy and Auditing, Law no. 133 of 1951, Articles 1 and 2.

82. [redacted].

[redacted]

[100] **CER Sarie-Eldin**, ¶ 25(3).

[101] **HSE-004**, Companies Law, Law No. 159 of 1981, Articles 105, 106.

[102] **CER-Sarie-Eldin**, ¶ 25; Claimant's Reply, ¶ 147.

[103] **HSE-012**, Executive Regulations on the Companies' Law, Article 214.

[104] **CER Sarie-Eldin**, ¶ 25(4) and (5)

[105] [redacted].

[106] **CER-Sarie-Eldin**, ¶ 29.

[redacted]

(iii) GTH Did Not Have Permanent Residence in Egypt at the Time it Submitted Its Claim to Arbitration

85. As Professor Abdel Wahab explains in his expert report, the maintenance of a principal place of management in Egypt is "an indispensable prerequisite and a condition *sine qua non* of a permanent residence". [redacted]

[redacted]

[redacted]

[107] **RL-285**, Egypt-Finland BIT, Article 1(3)(b): ("The term 'investor' means, for either Contracting Party, the following subjects who invest in the territory of the other Contracting Party in accordance with the laws of the latter Contracting Party and the provisions of this Agreement:

[…]

(b) any legal entity such as a company, corporation, firm, partnership, business association, institution or organisation, incorporated or constituted in accordance with the laws and regulations of the Contracting Party and having its registered office within the jurisdiction of that Contracting Party, whether or not for profit and whether its liabilities are limited or not.")

[108] **RER-Zulficar-2**, ¶¶ 11, 41.

[109] [redacted]

[110] [redacted].

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

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[111] [redacted].

[redacted]

[115] **RER-Zulficar-2**, ¶¶ 14, 42-45.

[116] [redacted].

[redacted]

(iv) Alternatively, A Juridical Person Permanently Resides At The Place Of Its Domicile

94. GTH asserts that Egyptian law may assist the Tribunal in its task of interpreting the terms "permanent residence" notwithstanding the absence of the concept of permanent residence of juridical persons in Egyptian law.[121] If the Tribunal finds that the permanent residence requirement is not an autonomous concept or that Egyptian law may assist the Tribunal in

[117] [redacted].

[118] [redacted]

[119] **R-064**, GTH Press Release, "Global Telecom to move its place of operations to Amsterdam" (Sept. 21, 2015).

[120] Claimant's Submission on Bifurcation, Publication, and Place of Proceeding, April 14, 2017, ¶ 13.

[121] Claimant's Reply, ¶ 142.

understanding the meaning of that requirement, then Canada agrees with GTH[122] that the concept of domicile as understood in Egyptian law is the connecting factor in Egyptian law that more closely resembles "permanent residence" both from a definitional[123] and functional[124] perspective.

95. [redacted]

B. The Tribunal Lacks Jurisdiction over GTH's Claims Challenging the National Security Review of Its Application to Acquire Control of Wind Mobile

1. Summary of Canada's Position

96. As a matter of policy and practice,[126] Canada systematically seeks to protect its ability to screen foreign investments coming into the country through the mechanisms provided in the *ICA*. It has done so by negotiating in its FIPAs, and in its Free-Trade Agreements ("FTAs") containing investment obligations, reservations against treaty obligations or exclusions from treaty dispute settlement, or sometimes both.[127] In the context of the Canada-Egypt FIPA, Canada's ability to continue to screen foreign investments without being challenged by investors is safeguarded through the dispute settlement exclusion contained in Article II(4)(b) which provides that:

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[122] Claimant's Reply, ¶ 145: ("The concept of domicile as a matter of Egyptian law is analogous to the concept of permanent residence used in the BIT").

[123] Black's Law Dictionary definition of "domicile" (v) suggests the establishment of a "true, fixed, principal and permanent" establishment. A "corporate domicile" is the "place considered by law as the center of corporate affairs, where the corporation's functions are discharged; the legal home of a corporation, usually its state of incorporation or the state in which it maintains its principal place of business." **RL-286**, *Black's Law Dictionary* (8th ed,), *s.v.* "domicile".

[124] Prof. Abdel Wahab explains that the concept of domicile is used in Egyptian law to link a juridical person to a particular territory for the purposes of service of process and the application of private international law. (**RER-Zulficar**, ¶ 40; **RER-Zulficar-2**, ¶ 41.

[125] **RER-Zulficar-2**, ¶ 62.

[126] *E.g.*, **RL-287**, Canada, *Canadian Statement on Implementation: North American Free Trade Agreement*, Canada Gazette, Part I, 1 January 1994, p. 148.

[127] **RL-101**, North American Free Trade Agreement, U.S.-Can.-Mex. ("NAFTA"), Article 1138 and Annex I-C-2.

> Decisions by either Contracting Party not to permit establishment of a new business enterprise or acquisition of an existing business enterprise or a share of such enterprise by investors or prospective investors shall not be subject to the provisions of Article XIII of this Agreement.

97. Under a straightforward application of Article II(4)(b) this Tribunal does not have jurisdiction over the Claimant's challenge of Canada's alleged denial of GTH's application to acquire voting control of Wind Mobile, or of the process by which the Government came to that decision.

2. The Exclusion From Investor-State Dispute Settlement Applies to GTH's Proposed Acquisition of Shares and of Voting Control of Wind Mobile

98. To circumvent the clear wording of this provision, GTH argues that its attempt to acquire voting control of Wind Mobile was not an "acquisition" within the meaning of the exclusion because GTH merely sought to convert non-voting shares of Wind Mobile that it already owned into shares granting it voting control of the Canadian enterprise.[128] It argues that it cannot acquire or establish something it already owns.[129] This argument is unpersuasive.

99. The disputing parties agree that GTH sought to acquire Wind Mobile through the conversion of non-voting shares into shares that gave it voting control over the Canadian enterprise. In a letter to Industry Canada transmitting the application to acquire voting control of Wind Mobile, GTH's counsel explained that the "Class D non-voting shares of GIHC [Wind Mobile] currently held by OTHCL [GTH] will be converted into Class B voting shares of GIHC [Wind Mobile]."[130] The Claimant already owned Class D non-voting shares; it did not already own the Class B voting shares it was seeking to acquire through the share conversion process. Pursuant to the share conversion process described in the Amended and Restated Shareholder's Agreement, GTH would have had to first return the original certificate or certificates representing Class D non-voting shares to the secretary of Wind Mobile. The secretary would then have issued to GTH, and GTH would have acquired, Class B voting shares of Wind

[128] Claimant's Reply, ¶ 156.

[129] Claimant's Reply, ¶ 161.

[130] **C-027**, Letter from William G. VanderBurgh to Industry Canada, Director of Investments, *attaching* Voting Control Application (Oct. 24, 2012), p. 3.

Mobile.[131] The process for exercising the conversion rights attached to Class D non-voting shares is set out as follows:

> The conversion right herein provided for may be exercised by notice in writing given to the Secretary of GIHC accompanied by the original certificate or certificates representing Class D Non-Voting Common Shares in respect of which the holder thereof desires to exercise such right of conversion and such notice shall be signed by the person registered on the books of GIHC as the holder of the Class D Non-Voting Common Shares in respect of which such right is being exercised or by his duly authorized attorney and shall specify the number of Class D Non-Voting Common Shares which the holder desires to have converted and the number and Class or Classes of share into which they are to be converted; upon receipt of such notice by the Secretary of GIHC for the Class D Non-Voting Common Shares, GIUC shall issue or cause to be issued certificates representing Class A Voting Common Shares, Class B Voting Common Shares or Class C Voting Common Shares upon the basis above prescribed and in accordance with the provisions hereof to the registered holder of the Class D Non-Voting Common Shares represented by the certificate or certificates accompanying such notice.[132]

100. The share conversion process thus constitutes an acquisition of shares of an existing business enterprise because GTH would have obtained new voting shares of Wind Mobile that it did not previously own. The exclusion in Article II(4)(b) is not limited to certain types of share acquisitions. Conversion of shares is one of the ways of realizing an acquisition of shares, because the shareholder has to return the original certificates (i.e. ceases to own them), and in exchange receives new shares from the company. The fact that the term *conversion* is used does not negate the legal nature of the transaction taking place whereby one set of shares is cancelled in exchange for another set of shares with different attributes.

101. It is also worth noting that the proposed transaction under review was not limited to a share conversion process. As more fully detailed in GTH's application to the Director of Investments

[131] **C-018**, Amended and Restated Shareholders' Agreement between AAL Holdings Corporation and Mojo Investments Corp. and Orascom Telecom Holding (Canada) Limited and Globalive Investment Holdings Corp. (Dec. 15, 2009), pp. 6-7 of Schedule C.

[132] **C-018**, Amended and Restated Shareholders' Agreement between AAL Holdings Corporation and Mojo Investments Corp. and Orascom Telecom Holding (Canada) Limited and Globalive Investment Holdings Corp. (Dec. 15, 2009), p. 5 of Schedule C.

("GTH's Application"),[133] GTH also sought, during a second stage of the transaction, to purchase AAL and thereby acquire AAL's interest in Wind Mobile. This second step was a straight out acquisition of shares. As a result of the two transactions, GTH would have acquired over 99% of the voting and equity shares of Wind Mobile.

102. Further, in this case, the acquisition of voting shares would also have amounted to an acquisition of the enterprise resulting from an acquisition of legal control. Article II(4) applies to decisions not to permit the acquisition of an existing business enterprise or a share of such enterprise.[134] There is no basis on which to limit the exclusion to certain forms of acquisitions of an existing business enterprise. Acquisitions of existing business enterprises are often realized through acquisitions of control.[135]

103. Although the terms "acquire" or "acquisition" are conspicuously rare in the Claimant's written pleadings, GTH's contemporaneous documents use the verb profusely, thus confirming that the contemplated transaction was indeed an acquisition.[136] [redacted]

[133] **C-027**, Letter from William G. VanderBurgh to Industry Canada, Director of Investments, *attaching* Voting Control Application (Oct. 24, 2012), p. 3. *See also* **C-148**, Letter from William G. VanderBurgh to Marie-Josée Thivierge (Feb. 8, 2013), pp. 2-3.

[134] In its Memorial on Jurisdiction, Canada relies on dictionary definitions to show that "[t]he terms 'acquisition of an existing business enterprise or share of such enterprise generally refers then to all forms of transactions that lead to gaining control or ownership of the enterprise, whether through share transactions, asset transactions or otherwise". Canada's Memorial on Jurisdiction, ¶ 121.

[135] This is why subsection 28(1) of the ICA, which aims to cover different methods by which a non-Canadian can acquire control of a Canadian business, includes a reference to the acquisition of voting control. (**C-009**, *Investment Canada Act*, R.S.C. 1985, c. 28, 1st Supp., s. 28(1)).

[136] The Claimant has preferred instead to use verbs such as "take control" (at Claimant's Reply, ¶¶ 10, 12, 161) or "assume control" (at Claimant's Reply, ¶ 156).

[redacted]

106. GTH's attempt to circumvent the application of the exclusion is also undermined by its own claim that Canada's alleged denial of its application to acquire voting control of Wind Mobile breaches the national treatment obligation contained in Article II(3) of the Canada-Egypt FIPA.[140] That obligation only applies to pre-establishment measures. It is drafted as follows:

> 3. Each Contracting Party shall permit establishment of a new business enterprise or acquisition of an existing business enterprise or a share of such enterprise by investors or prospective investors of the other Contracting Party on a basis no less favourable than that which, in like circumstances, it permits such acquisition or establishment by:
>
> a. its own investors or prospective investors; or

[137] [redacted]

[138] [redacted]

[139] [redacted]

[140] Request for Arbitration, ¶¶ 101, 105; Claimant's Memorial, ¶ 388.

b. investors or prospective investors of any third state.[141]

107. GTH cannot both claim a breach of Article II(3) of the FIPA and claim that its application to acquire voting control of Wind Mobile was not an "acquisition of an existing business enterprise" as the terms are used in both Articles II(3) and II(4) of the FIPA.

108. GTH misunderstands the purpose of Canada's reference to the *ICA* in its Memorial on Jurisdiction. Canada does not seek to import the "requirements of its domestic legislation, the *ICA*, into the BIT."[142] It merely demonstrates that the decisions made pursuant to the *ICA* fall within the scope of Article II(4)(b).[143] To be clear, Canada is not "cherry-picking self-serving domestic legislation,"[144] it refers to the *ICA* in its pleadings for one reason only: because GTH has decided to challenge [redacted] following the review process conducted pursuant to that legislation. In its Memorial on Jurisdiction, Canada has set out its treaty practice of systematically excluding from international treaty dispute settlement any decision made with respect to the establishment or acquisition of a business enterprise under the *ICA*.[145] Although the format of the exclusion has varied over the years, decisions such as those taken pursuant to an *ICA* review have consistently been excluded. It would be truly extraordinary if, as GTH claims, the dispute settlement exclusion contained in Article II(4) did not apply to "the primary mechanism for reviewing foreign investments in Canada",[146] as it would essentially gut the provision of any meaningful effect for Canada.

[141] **CL-001**, Canada-Egypt FIPA, Article II(3) (emphasis added). In contrast, the obligations to provide "national treatment after establishment" is contained in Article IV of the FIPA.

[142] Claimant's Reply, ¶ 164.

[143] Canada's Memorial on Jurisdiction, ¶¶ 129-133, 147.

[144] Claimant's Reply, ¶ 163.

[145] Canada's Memorial on Jurisdiction, ¶¶ 135-140.

[146] **RWS-Aitken**, ¶ 6.

3. The Tribunal Has No Jurisdiction to Consider GTH's Claim that the *ICA* Review Process, as Distinguished From the Alleged Decision, Breached Canada's Obligations Under the FIPA

109. The Tribunal has no jurisdiction to engage in a wide-ranging review of Canada's treatment of GTH during the *ICA* review under the guise of establishing whether this review was a *bona fide* application of the *ICA*.[147]

110. As Canada has explained, the Claimant is not allowed to do indirectly what it cannot do directly.[148] Allowing investors to bring claims challenging the process that led to a decision under the *ICA* would render the exclusion found in Article II(4) effectively useless. It would also run counter to the ordinary meaning of the word "decision" which is defined as "[t]he action, fact, or process of arriving at a conclusion regarding a matter under consideration; the action or fact of making up one's mind as to an opinion, course of action, etc.; an instance of this."[149] This definition makes clear that the process of arriving at a conclusion and the decision itself are inseparable.

111. GTH attempts to convince the Tribunal of the soundness of its argument by adopting a strained interpretation of Article II(4)(a), a provision Canada has not invoked. According to GTH, the use of the words "as to whether or not" in Article II(4)(a) excludes from treaty dispute settlement "the process used to arrive at a decision."[150] However, nothing in the ordinary meaning or context of that provision allows the Treaty interpreter to arrive at that conclusion. Similarly, nothing in Article II(4)(b) (the provision on which Canada relies) suggests that the exclusion only applies to the decision and not the review process leading to the decision.

112. In any event, although the Claimant states in its jurisdictional arguments that it is only challenging the process by which the Government came to a decision as to whether or not to approve the acquisition, [redacted]

[147] Claimant's Reply, ¶ 168.

[148] Canada's Memorial on Jurisdiction, ¶ 145.

[149] **RL-079**, Oxford English Dictionary Online, Definition of "*decision*, n.", as cited in Canada's Memorial on Jurisdiction, ¶ 117 (emphasis added).

[150] Claimant's Reply, ¶ 172.

[redacted] For example, at paragraph 168 of its Reply, the Claimant argues: "[t]his Tribunal has jurisdiction to determine whether Canada, in purporting to apply its authority to conduct a national security review [redacted], acted in a manner that frustrated the letter and spirit of Canada's commitments under the BIT." It also argues that [redacted] through a national security review – because GTH was a non-Canadian investor – meant that GTH was treated differently from Canadian investors in like circumstances".[151]

113. Further, to the extent that the Tribunal finds that it has jurisdiction over the *ICA* review process [redacted], it must still be satisfied that GTH suffered damages because of the *ICA* review process [redacted][152] However, GTH has not identified any damages that flow from the national security review process [redacted] Rather, the Claimant's damages valuation experts have considered that the damages caused by the ICA review, and for which the Claimant should be compensated, [redacted] The Claimant's attempt to reframe its case to satisfy the jurisdictional requirements of the FIPA does not even accord with its own pleadings on the issues of liability and damages. It should therefore be rejected.

[151] Claimant's Reply, ¶ 175.

[152] **RL-184**, *Merrill & Ring Forestry L.P. v. The Government of Canada* (UNCITRAL) Award, 31 March 2010 ("*Merrill & Ring – Award*"), ¶ 245: ("…in the case of conduct that is said to constitute a breach of the standards applicable to investment protection, the primary obligation is quite clearly inseparable from the existence of damage. Indeed, a finding of liability without a finding of damage would be difficult to explain in the context of investment law arbitration and would indeed be contrary to some of its fundamental tenets.")

[153] **CER-Dellepiane-Spiller**, ¶ 122.

C. The Tribunal Has No Jurisdiction to Hear the Claimant's National Treatment Claim Given That Services Are Listed in the Annex to Article IV of the FIPA

1. Summary of Canada's Position

114. In its Reply, the Claimant repeats the same arguments it put forward in its Response to Canada's Request for Bifurcation.[154] The Claimant wrongfully argues that Article IV(2)(d) and its Annex do not allow Canada to adopt and maintain a measure without notifying Egypt of such measures. The Claimant's position is contrary to the ordinary meaning of Article IV(2)(d) and its Annex, which unlike other treaties, do not contain a notification requirement. In its Reply, the Claimant is also now asserting that Canada did not reserve the right to adopt or maintain exceptions in the telecommunications sector under the Annex to Article IV of the FIPA because "telecommunications" is not classified as a "service" industry according to the Standard Industrial Sector ("SIC"). This strained interpretation is plainly wrong and contradicted by the fact that the measures at issue clearly relate to the provision of telecommunications services by Wind Mobile.

2. Article IV(2)(d) Excludes from the National Treatment Obligation Sectors Listed in Canada's Annex and its Operation is not Subject to Any Other Requirements

115. Contrary to what the Claimant suggests in its Reply, Article IV(2)(d) and its Annex establish that Canada has the right to make or maintain exceptions in certain sectors or matters and this right is not subject to any limitation. The Claimant attempts to incorrectly limit the national treatment exception for services under Article IV(2)(d) and its Annex by adding requirements that are simply not present in the FIPA.

116. First, the Claimant argues that a distinction should be made between a reservation of right and an exercise of right. Accordingly, it suggests that if the Contracting Parties' intent was to establish exceptions in certain sectors, they would have used a different formulation than "reserve the right to make or maintain exceptions."[155] Second, the Claimant contends that under the FIPA, it is not enough for a State to simply adopt a measure, rather, in order to "effectuate its

[154] Claimant's Response to Canada's Request for Bifurcation, ¶ 29.

[155] Claimant's Reply, ¶ 181.

reservation of a right to maintain exceptions, it must give the other State and its investors due notice."[156]

117. The Claimant's arguments fail to recognize the distinction between reservations for existing non-conforming measures and reservations for future non-conforming measures taken by the Parties. In addition, contrary to what may be the case in other investment treaties, the FIPA does not require further procedural steps to adopt or maintain an exception or accord treatment in the services sector. There is no basis to read-in such a prerequisite not contemplated in the FIPA.

a) Article IV(2)(d) Establishes Exceptions for Future Measures in Sectors Where States Were Not Prepared to Make Commitments

118. Article IV identifies national treatment exceptions both for existing non-conforming measures and for future non-conforming measures. Article IV(2)(a) through (c) list existing non-conforming measures, which can be maintained, renewed, or amended. Article IV(2)(d) excludes certain future non-conforming measures by referring to the Parties' right to make or maintain exceptions with respect to matters or sectors listed in the Annex of the FIPA.

119. Article IV, which contains exceptions to national treatment obligations for both existing and future non-conforming measures, is typical of Canada's second generation FIPAs. Canada's 2004 Model FIPA also contains exceptions to national treatment obligations under Article 9 "Reservations and Exceptions". Article 9(1)(a) through (c) set out exceptions for existing non-conforming measures which are listed in Annex I of the 2004 Model FIPA, while Article 9(2) refers to future non-conforming measures which are listed in Annex II of the 2004 Model FIPA.

120. According to Céline Lévesque and Andrew Newcombe, in their commentary on Canada's 2004 Model FIPA, reservations for future measures include strategic or sensitive sectors, and are meant to preserve maximum flexibility for governments:

> As to *existing* non-conforming measures, the Model provides that they can be maintained or renewed but if they are amended the resulting measure cannot be

[156] Claimant's Reply, ¶ 184.

> more restrictive (ie the 'ratchet mechanism'). […] **As to *future* measures, the reservations typically include strategic or sensitive sectors where the government wishes to preserve maximum flexibility**. In Canada's case, the relevant Annex includes, for example, reservations for preferences granted to aboriginal peoples, for minority affairs, and for social services.[…][157]

121. Noting that second generation FIPAs are organized differently,[158] Lévesque and Newcombe nonetheless conclude that they have a similar effect as Canada's 2004 Model FIPA.[159] As a result, Canada has the right, under the FIPA, to adopt future non-conforming measures that would otherwise be inconsistent with its national treatment obligations.

122. A 2006 OECD report also outlines the distinction between non-conforming measures and future measures in the Canadian and US Model FIPAs. Regarding the reservations for future non-conforming measures, the report concludes that they are meant to reaffirm the right of States to introduce new non-conforming measures in the future:

> Both the Canadian (Article 9) and US Models (Article 14) provide for top down lists for existing "non-conforming measures" to the obligations on NT/MFN treatment, key personnel and performance requirements (*i.e.*, transfer, expropriation, minimum standard of treatment obligations are not included). These lists mainly "grandfather" existing non-conforming measures with respect to "sectors, sub-sectors or activities" listed. **The prerogative of introducing new non-conforming measures in the future is also provided in a separate list**.[160]

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[157] **RL-288**, Céline Lévesque and Andrew Newcombe, *Commentary on the Canadian Model FIPA* in Chester Brown, *Commentaries on Selected Model Investment Treaties* (Oxford: Oxford University Press, 2013) ("*Lévesque and Newcombe*"), p. 86 (emphasis added).

[158] One notable difference is that Canada's 2004 Model FIPA contains four Annexes. Annex I pertains to reservations for existing non-conforming measures while Annex II pertains to reservations for future non-conforming measures. Annex III provides exceptions for the Most-Favoured National Treatment and Annex IV provides exclusions from dispute settlement. As explained above, Canada's second generation FIPAs typically only contained a single Annex listing future non-conforming measures while reservations for existing non-conforming measures are listed in the text of the National Treatment Article. *See* **RL-288**, *Lévesque and Newcombe*, p. 128.

[159] **RL-288**, *Lévesque and Newcombe*, p. 86: ("Second generation FIPAs, while organized differently, appear to have similar effect. One notable exception is the absence of the MFN provision in the list of articles to which reservations (similar to those of the Model's Article 9) apply.")(references omitted).

[160] **RL-289**, Marie-France Houde, *Novel Features in Recent OECD Bilateral Investment Treaties*, in OECD, *International Investment Perspective* (OECD, 2006), p. 169 (emphasis added).

123. This is what the Parties to the FIPA did in Article IV(2)(d) and its Annex. Canada reserved the right to adopt or maintain a measure or accord treatment, in the future, for certain matters or sectors specifically listed in the Annex of the FIPA, which would be otherwise inconsistent with its national treatment obligations. In its Annex, Canada included an exception for services in any other sector. Consequently, there can be no breach of the FIPA, with respect to any measure of Canada that does not provide national treatment to investors and their investments in the services sector.

124. The Claimant argues that Article XVI of the FIPA proves that the Contracting Parties' intent was to "ensure that any exceptions […] were clearly set out, predictable and known to investors."[161] While this is true with respect to existing non-conforming measures, it clearly does not apply to areas where the Parties to the FIPA reserved the right to adopt future non-conforming measures. Indeed, Article XVI only states that the Contracting Parties have two years, following the entry into force of the FIPA, to exchange letters listing **existing non-conforming measures**.[162] By definition, future non-conforming measures cannot be listed. The interpretation suggested by the Claimant is contrary to the very purpose of the provision, which is to maintain the ability to introduce "new non-conforming measures in the future" in sectors or matters listed in the Annex of the FIPA.[163]

125. Further, and despite the Claimant's allegations, there is no distinction in the FIPA between a reservation of right and an exercise of right. For instance, certain FIPAs include a denial of benefits clause, which often contains the words "reserves the right to". Tribunals have confirmed that such language allows a Party to deny the treaty rights when they are being claimed.[164] The

[161] Claimant's Reply, ¶ 182.

[162] The later listing of existing non-conforming measures is not unusual in Canada's treaty practice. See for example NAFTA Article 1108(2) and its Annex I which also provide for the possibility of Contracting Parties to list existing non-conforming measures maintained by a state or a province. (**RL-101**, NAFTA Article 1108(1) and Annex I).

[163] In this particular instance, there was never any exchange of a list of non-conforming measures between Egypt and Canada. Non-conforming measures in the telecommunications services sector would not have been listed, because of the exception listed in the Annex of the FIPA which excludes the application of the national treatment obligation to that sector.

[164] In *Rurelec v. Bolivia*, the tribunal noted that the denial of benefits "is 'activated' when the benefits are being claimed." *See* **RL-290**, *Guaracachi America Inc. and Rurelec PLC v. The Plurinational State of Bolivia* (UNCITRAL) Award, 31 January 2014, ¶ 376: ("[…]**The very purpose of the denial of benefits is to give the**

same can be said about reservations for future non-conforming measures. The very intent behind such reservations is to allow Contracting Parties to a FIPA to adopt or maintain otherwise inconsistent measures, thus conserving policy flexibility in certain sectors or matters.[165]

b) Unlike Some Other Treaties, There is No Requirement in the Canada Egypt FIPA to Notify the Other Party

126. The Claimant argues that Canada has the obligation to "exercise its rights to make or maintain an exception **before** such exception can take effect."[166] According to the Claimant, to exercise this right, Canada "must [first] give the other State and its investors due notice." The Claimant relies on the tribunal's analysis in *Lemire* to reach this conclusion. However, in *Lemire*, the tribunal's analysis was based on the US-Ukraine BIT which contained language requiring the Contracting Parties to notify the other Party for both **existing non-conforming measures** and **futures measures**:

> Each Party agrees to notify the other Party before or on the date of entry into force of this Treaty of all such laws and regulations of which it is aware concerning the sectors or matters listed in the Annex. Moreover, each Party agrees to notify the other of any future exception with respect to the sectors or matters listed in the Annex, and to limit such exceptions to a minimum.[167]

127. As noted above, in contrast to the US-Ukraine BIT at issue in *Lemire*, the FIPA does not contain language requiring a Party to the FIPA to notify the other Party of any future exceptions or to limit such exceptions to a minimum.[168] In the absence of such language, there is no basis to

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Respondent the possibility of withdrawing the benefits granted under the BIT to investors who invoke those benefits. As such, it is proper that the denial is "activated" when the benefits are being claimed.") (emphasis added).

[165] **RL-306**, Lee M. Caplan & Jeremy K. Sharpe, *Commentary on the 2012 U.S. Model BIT*, in Chester Brown, *Commentaries on Selected Model Investment Treaties* (Oxford: Oxford University Press, 2013), p. 809 (noting that "Pursuant to Article 14(2), each Party may schedule in Annex II negotiated exceptions for specific sectors, subsectors, or activities for which it wishes either to maintain existing measures or adopt new or more restrictive measures. These exceptions are not subject to the 'ratchet rule'. **Thus, in areas covered by an Annex II exception, a Party may alter its domestic regime in almost any manner toward greater or lesser conformity with the four specified BIT obligations**." (emphasis added)).

[166] Claimant's Reply, ¶ 183.

[167] **RL-115**, *Treaty Between the United States of America and Ukraine Concerning the Encouragement and Reciprocal Protection of Investments* (1994), Article II(1).

[168] A number of other investment treaties are drafted in a way similar to the FIPA and do not contain language requiring a Contracting Party to notify the other Party when it adopts or maintains future exceptions. See for example, **RL-329**, *Treaty Between the United States of America and the Republic of Uruguay Concerning the*

conclude that Canada had to notify Egypt or its investors before making or maintaining an exception within the sectors or matters listed in the Annex of the FIPA.

c) Each Party was Responsible for its Own Annex of Future Measures

128. The Claimant contends that it is improper for Canada to claim that it has "*carte blanche* to enact non-conforming measures at any time without notice to the other Party or investor."[169] However, this is exactly what the Parties agreed to do in the listed sectors. The Tribunal cannot re-write the Parties' agreement in this respect. Like Canada, Egypt also reserved its rights to make and maintain exceptions in certain sectors or matters.

129. As was typical at that time, the negotiating Parties agreed on a general approach to reservations for future non-conforming measures, and each Party was responsible for listing sectors covered by its reservation, subject to review by the other Party. It is worth remembering that when the Canada-Egypt FIPA was negotiated in the 1990s, it was common for BITs to include only very weak or no national treatment obligations.[170] .

130. In this case, the Parties to the FIPA agreed in negotiations that each Party could reserve policy flexibility to introduce new measures in certain sectors or matters listed in the Annex of the FIPA that would otherwise be inconsistent with its national treatment obligations. Before the signature of the Agreement, the Canada and Egypt exchanged their Annexes.[171] Canada does not

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Encouragement and Reciprocal Protection of Investments (2005), Article 14(2); **RL-268**, *Treaty Between the United States of America and the Government of the Republic of Rwanda Concerning the Encouragement and Reciprocal Protection of Investments* (2008), Article 14(2).

[169] Claimant's Reply, ¶ 182.

[170] **RL-087**, *Agreement Between the Government of Canada and the Government of the Republic of Argentina for the Promotion and Protection of Investments*, 5 November 1991 (entered into force 29 April 1993), Can. T.S. 1993, No. 11, Article IV: ("Each Contracting Party shall, **to the extent possible and in accordance with its laws and regulations**, grant to investments or returns of investors of the other Contracting Party treatment no less favourable than that which it grants to investments or returns of its own investors.") (emphasis added); **RL-088**, Canada-Hungary FIPA, Article III(4): ("[E]ach Contracting Party shall, **to the extent possible and in accordance with its laws and regulations**, grant to investments or returns of investors of the other Contracting Party a treatment no less favourable than that it grants to investments or returns of its own investors.") (emphasis added). This can be further explained by the fact that in the 1990s, many countries had not made national treatment commitments with respect to services in the WTO or in free-trade agreements and did not wish to do so in investment agreements.

[171] **R-416**, E-mail from Doug Paterson, Canadian Embassy to Diane Harper, FIPA Unit, *attaching* letter from Ebtissam El-abd, Arab Republic of Egypt (Nov. 5, 1996).

have any record of a negotiation regarding its Annex. As for Egypt, its list of sectors covered by the reservation was only transmitted to Canada a few days before the end of the negotiations.[172] This list appears not to have been subject to any further negotiations between Canada and Egypt.

3. Canada's Annex Excludes All Services Including Telecommunications

131. The Claimant argues that Canada has not reserved the right to make and maintain exceptions in the telecommunications sector. The Claimant's contention is based on the fact that this would result in too broad a reservation and would render the "social services" element of the list superfluous. The Claimant is also arguing that the SIC does not categorize "telecommunications" as a "service" industry.

a) Other Contemporary Treaties also Include a Broad Services Reservation Under Article IV(2)(d)

132. The exclusion for "services in *any* other sector" in Canada's Annex follows the exclusion referring to "social services". Thus read together they confirm that Canada intended to exclude all services sector including social services.

133. The Claimant contends that "services in any other sector" is ambiguous and cannot be interpreted to mean that Canada can "make a *post-hoc* exception to national treatment protection." [173] At the time, however, as mentioned above, many BITs did not contain a national treatment obligation. Further, the broad services reservation contained in the Canada-Egypt FIPA is typical of Canada's second generation FIPAs. For example, the Canada-Ukraine FIPA contains an identical reservation for "services in any other sector" under Article IV(2)(d) and its Annex.[174] Other second generation FIPAs, such as the Canada-Philippines FIPA,[175] the Canada-

[172] **R-416**, E-mail from Doug Paterson, Canadian Embassy to Diane Harper, FIPA Unit, *attaching* letter from Ebtissam El-abd, Arab Republic of Egypt (Nov. 5, 1996).

[173] Claimant's Reply, ¶ 189.

[174] **RL-026**, *Agreement Between the Government of Canada and the Government of Ukraine for the Promotion and Protection of Investments*, (1994), Article IV(2)(d) and its Annex.

[175] **RL-089**, *Agreement Between the Government of Canada and the Government of the Republic of the Philippines for the Promotion and Reciprocal Protection of Investments*, 9 November 1995 (entered into force 13 November 1996), Can. T.S. 1996 No. 46, Article IV(2)(4) and Section 1 of its Annex.

Panama FIPA,[176] and the Canada-Trinidad and Tobago FIPA,[177] all contain a broad services reservation relating to "services in any other sector", thus confirming Canada's practice at the time to reserve in its FIPAs its policy flexibility to adopt future non-conforming measures with respect to services.

b) To the Extent Relevant, the Standard Industrial Classification Also Refers to Telecommunications Services

134. There is no need to go beyond the ordinary meaning of the words "services" in order to conclude that telecommunications services are indeed services. The Claimant's reliance on the SIC to argue the contrary should be rejected by the Tribunal. First, the SIC does not constitute a general interpretative tool for the FIPA. The FIPA only refers to the SIC in relation to "government securities" and not to "services in any other sector." Paragraph 1 of the Annex provides:

> 1. In accordance with Article IV, subparagraph 2(d), Canada reserves the right to make and maintain exceptions in the sectors or matters listed below:
>
> - social services (i.e. public law enforcement; correctional services; income security or insurance; social security or insurance; social welfare; public education; public training; health and child care);
>
> - services in any other sector;
>
> - government securities - as described in SIC 8152; […]

135. Thus, according to the text of the provision itself, the SIC does not serve to interpret the other elements. Second, the SIC is a tool created by Statistics Canada primarily for statistical purposes.[178] Contrary to the Claimant's contention, its main objective is not to classify goods or services,[179] but rather to "break[…] down the total of economic production into industries, that

[176] **RL-092**, *Treaty Between the Government of Canada and the Government of the Republic of Panama for the Promotion and Protection of Investments*, 12 September 1996 (entered into force 13 February 1998), Can. T.S. 1998 No. 35, Article IV(2)(4) and its Annex.

[177] **RL-027**, *Agreement between the Government of Canada and the Government of the Republic of Trinidad and Tobago for the Reciprocal Promotion and Protection of Investments* (1995), Article IV(2)(d) and its Annex.

[178] **RL-291**, Statistics Canada, *Standard Industrial Classification* (1980), p. xii.

[179] Claimant's Reply, ¶ 187.

is, groups of producing units engaged in similar types of activity in relation to similar goods and services."[180] There is no one category or heading that purports to exhaustively list all of the services sector; instead, services related to a particular industry are listed under the relevant heading. [181]

136. Finally, the SIC classifies "telecommunications" under the "Communications and Other Utility Industries". This category is further defined as consisting of the "[e]stablishments primarily engaged in providing telecommunications broadcasting and transmission services and those operating postal and courier services."[182] Accordingly, to the extent it is relevant, the SIC cannot be used to imply that telecommunications services are not services.

D. The Claims with Respect to the CRTC Ownership and Control Review of Wind Mobile and the Roaming and Tower/Site Sharing Measures Do Not Form Part of a "Cumulative Breach" and are Untimely

1. Summary of Canada's Position

137. In an attempt to cure the jurisdictional defect identified by Canada in its written pleadings, the Claimant, in its Reply, now appears to move away from alleging that the CRTC ownership and control review of Wind Mobile and the roaming and tower/site sharing measures are themselves a breach of the FIPA. Instead, the Claimant maintains that these measures form part of a "cumulative breach" or a "composite act" as defined in Article 15 of the International Law

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[180] As explained in the SIC, "However, the problems of harmonizing commodity classifications and the unavailability of a standard classification of services together with the simplistic version of an industry in economic theory whereby a single product or service is produced in each firm, have probably contributed to **the SIC sometimes being interpreted as a goods and services classification, though such an interpretation is incorrect in many applications**. This interpretation is, in fact, the result of emphasizing the goods and services dimension of the production matrix. **It must be realized that the SIC takes into account only the principal goods or services of the producing units in an** "**industry-of-origin" type of structure**; it tends to disregard goods and services resulting from secondary activities." **RL-291**, Statistics Canada, *Standard Industrial Classification* (1980), pp. xi and xxvi (emphasis added).

[181] According to the SIC, the unit to be classified is the establishment:

> Using the establishment as the unit of tabulation:
>
> an industry = a group of establishments whose production represents a homogeneous set of goods or services; or;
>
> = a group of all establishments primarily engaged in the same or similar kind of economic activity.

See **RL-291,** Statistics Canada, *Standard Industrial Classification* (1980), p. xvii.

[182] **RL-291**, Statistics Canada, *Standard Industrial Classification* (1980), p. 181.

Commission's Articles on Responsibility of States for Internationally Wrongful Acts ("ILC Articles") and that the limitation period set out in Article XIII(3)(d) only began to run on the date of the final act of a series of acts. Thus, according to the Claimant, not until June 2013, at the earliest, could it have acquired knowledge of a breach of Canada's obligations under the FIPA.[183]

138. First, the Claimant's newest attempt to evade the strict limitation period of Article XIII(3)(d) should be rejected, as the Claimant has not proven that the measures it challenges form part of a cumulative breach. To the contrary, the CRTC ownership and control review and the alleged failure to maintain a favourable regulatory environment are separate and distinct measures. Further, the theory of a "composite act" put forward by the Claimant cannot in this case prevail over the three-year limitation period of the FIPA.

139. Second, properly considered on their own, the CRTC ownership and control review and the allegations related to roaming and tower/site sharing are untimely. The Claimant undoubtedly first acquired knowledge (actual or constructive) of the alleged breaches and the loss arising out of the alleged breaches before the critical date of May 28, 2013.

2. The Claimant has Not Established that the Measures Form Part of a Cumulative Breach

140. In its Reply, the Claimant argues that Canada engaged in a "pattern of conduct" which had the effect of "gradually erod[ing] the regulatory framework upon which GTH's investment was premised"[184] and that only with "the benefit of hindsight", it acquired knowledge that "Canada's measures cumulatively amount to breaches of Canada's obligations to accord [fair and equitable treatment ("FET")] and [full protection and security ("FPS")]."[185] The Claimant contends that the CRTC ownership and control review and the alleged failure to maintain a favourable regulatory framework for New Entrants form part of this "pattern of conduct" which "crystallized

[183] Claimant's Reply, ¶ 197.

[184] Claimant's Reply, ¶ 193.

[185] Claimant's Reply, ¶ 194.

by the time of Canada's unlawful treatment of GTH's effort to take voting control of its investment" in June 2013.[186]

141. In a blatant attempt to circumvent the strict limitation period found in Article XIII(3)(d), the Claimant asserts that this alleged cumulative breach is the equivalent of a "composite act" under Article 15 of the ILC Articles. However, the evidence shows that the CRTC ownership and control review and the alleged failure to maintain a regulatory environment favourable for New Entrants are distinct and separate measures that clearly fall outside the three-year limitation period. The Claimant knew of the alleged breaches and the loss arising out of such breaches before the cut-off date of 28 May 2013.

a) The Claimant's Position Regarding the Nature of all Four Measures has Changed Multiple Times In An Effort To Bring In Untimely Claims

142. The Claimant has taken contradictory positions in this arbitration regarding the nature of the measures at issue and whether it challenges as distinct measures the CRTC ownership and control review and the alleged failure of the regulatory framework to alleviate barriers to market entry.

143. For example, in its RFA, the Claimant points to a list of measures[187] which includes the "fail[ures] to maintain a regulatory environment favorable to New Entrants" and the "duplicative, inconsistent, and unprecedented" CRTC's ownership and control review, and indicates that "each of the measures **individually, and/or taken together**" constitute a breach of Canada's FET and FPS obligations.[188] In its Memorial, in response to Canada's time-bar arguments, the Claimant presented Canada's measures as "separate and independent breaches of the BIT."[189] However, in its Reply, the Claimant now argues that the CRTC ownership and control review and the alleged failure of the regulatory framework "do not independently amount

[186] Claimant's Reply, ¶¶ 193-194.

[187] Request for Arbitration, ¶ 97.

[188] Request for Arbitration, ¶¶ 97(a), 97(b) and 98 (emphasis added).

[189] Claimant's Memorial, ¶ 284. See also Claimant's Memorial, ¶¶ 284, 361 and 372.

to independent breaches of the BIT."[190] Rather, the Claimant contends that "a series of separate acts or omissions can *in toto* result in a breach of an international obligation" and that "[u]ntil that final act occurs, a wronged party cannot have knowledge of the **composite breach**."[191] The Claimant relies on this new characterization of the measures as part of a composite act to assert that it is only on the date of the final act, with the benefit of hindsight, that it could have first acquired knowledge of the breaches.

144. The Claimant's theory of composite breach, like that of cumulative breach, not only contradicts its own earlier pleadings, it is also a clear attempt to evade the strict limitation period set out in Article XII(3)(d) of the FIPA and should be rejected.

b) The Claimant's Characterization of the Measures as a "Composite Act" Does Not Toll the Limitation Period in Article XIII(3)(d)

145. The Claimant's newest argument regarding the theory of "composite act" pursuant to Article 15 of the ILC Articles is inapplicable in this case. The Claimant's attempt to bypass the strict limitation period of Article XIII(3)(d) should be dismissed by the Tribunal.

146. Several NAFTA Chapter Eleven awards have recognized that Articles 1116 and 1117 of the NAFTA,[192] which contain identical wording to that found in Article XIII(3)(d) of the FIPA in regard to the three-year limitation period, provide a "clear and rigid limitation" period.[193] In its Reply, the Claimant attempts to distinguish these cases by arguing that Canada is conflating the

[190] Claimant's Reply, ¶ 201 (emphasis added).

[191] Claimant's Reply, ¶ 200 (emphasis added).

[192] Claimant's Reply, ¶ 203. The Claimant argues that Canada does not refer to any awards where a tribunal was asked to decide the application of the theory composite act in relation to a tribunal's jurisdiction *rationae temporis*.

[193] **RL-032**, *Apotex Inc. v. The Government of the United States of America* (UNCITRAL) Award on Jurisdiction and Admissibility, 14 June 2013, ¶¶ 304, 326 and 327; **RL-031**, *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America* (UNCITRAL) Decision on Objections to Jurisdiction, 20 July 2006 ("*Grand River – Decision on Jurisdiction*"), ¶ 29; **RL-030**, *Marvin Feldman v. United Mexican States* (ICSID Case No. ARB(AF)/99/1) Award, 16 December 2002 ("*Feldman – Award*"), ¶ 63. In other non-NAFTA awards, tribunals have also recognized that a provision containing identical wording to that found in Article XIII(3) imposes a 'strict' limitation period. *See for instance* **RL-034**, *Corona Materials, LLC v. Dominican Republic* (ICSID Case No. ARB(AF)/14/3) Award on the Respondent's Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR CAFTA, 31 May 2016, ¶¶ 192, 199.

notions of "continuing breach" and of "cumulative breach",[194] the latter being equivalent, according to the Claimant, to a composite act as defined in Article 15 of the ILC Articles.[195] However, whether an investor relies on the notion of "continuing breach", as was the case in *Spence v. Costa Rica*, or the notion of "composite breach", does not change the conclusion: "a claimant [is not] free to base its claim on the most recent transgression, [when] it had knowledge of earlier breaches and injuries."[196] Otherwise, it would completely denude the limitation clause of its purpose.[197]

147. Yet, this is clearly what the Claimant tries to do. It attempts to bootstrap time-barred measures to later measures that fall within the Tribunal's jurisdiction by claiming that the relevant date is the "date of the final act causing the composite acts to […] amount to a breach."[198]

148. The theory of composite act under Article 15 of the ILC Articles is not applicable to the present dispute. Indeed, this theory does not assist the Claimant, since it requires demonstrating that the measures were all unified by a common purpose or intent.[199] It is not sufficient that

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[194] Claimant's Reply, ¶ 203.

[195] Claimant's Reply, ¶ 203.

[196] **RL-031**, *Grand River – Decision on Jurisdiction*, ¶ 81.

[197] **RL-035**, *Spence International Investments, LLC et al. v. Republic of Costa Rica* (ICSID Case No. UNCT/13/2) Interim Award, 25 October 2016, ¶ 208.

[198] Claimant's Reply, ¶ 200.

[199] See **RL-325**, Robert Kolb, *The International Law of State Responsibility: An Introduction* (United Kingdom: Edward Elgar Publishing, 2017) ("*Kolb*"), p. 51: (noting that "[*c*]*omposite breaches* concern situations where a chain of actions or omissions will reveal a breach only when looked at in sequence. Thus, a 'discriminatory practice', prohibited under human rights treaties, will appear in most cases only after a certain pattern of conduct reveals a deliberate targeting of a certain group of persons. When the first acts or omissions take place, it is not yet clear whether there is intentional discrimination against a certain group of persons. Once the acts are considered in their totality, the issue becomes clear.") *See also* **RL-292**, Scott Vesel, *A 'creeping' violation of the Fair and Equitable Treatment Standard?*, Arbitration International, Vol. 30, No. 3 ("*Vesel*"), pp. 556-557 (the author, after analysing Professor Salmon's work and the 1976 version of the Draft ILC Articles also concludes that a purpose or intent "is fundamental to the definition of a 'composite act'": ("In further elucidating the concept of 'composite act', Professor Salmon has emphasized the distinction between 'simple repeated acts' and 'a series of conducts which constitute a unit because of the pursued intention'. Citing Special Rapporteur James Crawford's insistence 'on the fact that the composite act must be limited to breaches characterized by an aspect of systematic policy,' Salmon concludes that 'what characterizes the composed delict is, apart from a quantitative aspect, the existence of a motive which unites the whole of the criticized conducts in one determined wrongful act.' Similarly, the commentary accompanying the 1976 version of the Draft ILC Articles, defined a 'composite act' as follows:

measures forming part of a composite act simply "lead to the same direction" as the Claimant suggests.[200]

149. The Claimant asserts that it is only when considered in the totality of the circumstances that Canada's acts amount to a cumulative breach. However, the Claimant never demonstrates that the measures are interconnected and are part of a pattern of conduct unified by a common intent converging towards the same result.[201] It provides no explanation on how the Government's decision to overturn the CRTC decision on ownership and control, and the regulatory framework on roaming and tower/site sharing display a common intent to disadvantage the Claimant. The Claimant's presentation of the facts constitutes not only revisionist history but is also unsupported by the factual evidence.

150. Moreover, as explained in the commentary on Article 15 of the ILC Articles, the theory of "composite act" only covers "breaches of obligations which concern some aggregate of conduct and not individual acts as such."[202] Thus, the term "composite act", by its nature, "refers to obligations which can only be breached through a series of measures rather than through an individual act" such as obligations relating to genocide, apartheid, or crimes against humanity.[203]

> [A]n act made up of a series of separate actions or omissions which relate to separate situations but which, taken together, meet the conditions for a breach of a given international obligation. The distinctive characteristic of such an act of the State is thus the systematic repetition of actions having the same purpose, content and effect, but relating to a specific cases which are independent of one another.")

See also, **RL-326**, Jean Salmon, *Duration of the Breach*, in James Crawford, Alain Pellet, and Simon Olleson, *The Law of International Responsibility* (Oxford: Oxford University Press, 2010), pp. 391-392.

[200] Claimant's Reply, ¶ 320.

[201] Canada's Memorial on Jurisdiction, ¶ 171, *citing* **CL-031**, *Técnicas Medioambientales TECMED S.A. v. The United Mexican States* (ICSID Case No. ARB(AF)/00/2) Award, 29 May 2003, ¶ 62 ("*Tecmed – Award*"); **RL-106**, *Sergei Paushok et al. v. The Government of Mongolia* (UNCITRAL) Award on Jurisdiction and Liability, 28 April 2011, ¶ 499.

[202] **RL-233**, International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001) ("Commentary on the ILC Articles"), Article 15, Commentary 2; **RL-292**, *Vesel*, p. 556

[203] **RL-292**, *Vesel*, p. 556: (noting that "The bulk of Article 15 is concerned with identifying the time at which a breach occurs. The operative language defines the concept of a 'composite act' as 'a series of actions or omissions defined in the aggregate as wrongful'. As the commentary explains,

> "Composite acts covered by Article 15 are limited to breaches of obligations which concern some aggregate of conduct and not individual acts as such. In other words, their focus is 'a series of acts or omissions defined in aggregate as wrongful'. Examples include the obligations concerning genocide,

As explained below, the CRTC ownership and control review and Canada's roaming and tower/site sharing measures are distinct and separate measures that do not form part of a cumulative breach or a composite act, and a challenge to these measures is therefore time-barred.

c) The CRTC Ownership and Control Review of Wind Mobile and the Alleged Failure to Maintain a Regulatory Framework Favourable to New Entrants are Distinct and Separate Measures that Do Not Form part of a Cumulative Breach

151. In its Reply, the Claimant has not addressed the arguments raised by Canada in its Counter-Memorial regarding the fact that the CRTC ownership and control review of Wind Mobile in 2009, and the alleged failure of the regulatory framework to ensure a level playing field for New Entrants, are distinct and separate measures not only with respect to each other, but also with respect to the other two measures, namely, the *ICA* review of the Claimant's application to acquire voting control of Wind Mobile and the Transfer Framework. The Claimant has not demonstrated any link between the four measures apart from an alleged impact on the Claimant. It is not sufficient for the Claimant to repeatedly use the words "pattern of conduct" for the measures to automatically qualify as a cumulative breach.

152. The tribunal in *Rusoro* had to determine whether a series of measures, all related to the gold mining sector in Venezuela, shared a "connection" that would allow the tribunal to consider those measures as "a unity" not affected by the time bar (in other words whether the measures shared a common purpose).[204] However, after carefully analysing the measures at play, the tribunal had no other choice but to conclude that such linkage was absent.[205]

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apartheid or crimes against humanity, systematic acts of racial discrimination, systematic acts of discrimination prohibited by a trade agreement, etc."

In other words, the term 'composite act' refers to obligations which can *only* be breached through a series of measures rather than through an individual act."), citing to **RL-233**, Commentary on the ILC Articles, Article 15, Commentary 4.

[204] **CL-016**, *Rusoro Mining Limited v. The Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/12/5) Award, 22 August 2016 ("*Rusoro – Award*"), ¶ 229; Collins Dictionary defines unity as: "constancy, continuity, or fixity of purpose, action." **R-417**, Collins Dictionary, definition of "*unity*", available at: https://www.collinsdictionary.com/dictionary/english/unity.

[205] **CL-016**, *Rusoro – Award*, ¶ 230.

153. The same conclusion can be drawn regarding the four measures that the Claimant alleges form a composite act. The CRTC's ownership and control decision of Wind Mobile was promptly reversed by the Governor-in-Council ("GIC") allowing Wind Mobile to launch its operations. The Claimant does not explain how this is consistent with its theory that Canada's actions were part of a pattern of conduct targeting the Claimant. Further, the alleged failure to maintain a favourable regulatory framework for New Entrants is focused on the roaming and tower/site sharing measures, which applied to all licensees and which Canada sought to improve over time. These measures are clearly distinct from the Transfer Framework except to the extent they generally sought to foster competition in the wireless telecommunications market. The roaming and tower/site sharing measures are also distinct from the ownership and control review conducted by the CRTC, an arm's-length regulator, and from the *ICA* review, which was initiated because of national security concerns related to the proposed acquisition of voting control of Wind Mobile by the Claimant.

154. Mindful of not repeating the same arguments, Canada further refers the Tribunal to its arguments in its Memorial on Jurisdiction on the distinct nature of all four measures, arguments that have not formally been contested by the Claimant.[206] Canada also corrects the Claimant's erroneous description of the facts as they relate to these alleged measures in Section III.A.4 below.

3. To The Extent That The CRTC Ownership And Control Review Of Wind Mobile And The Alleged Failure To Maintain A Regulatory Framework Favourable To New Entrants Do Not Form Part Of A Cumulative Breach, The Claimant Does Not Contest The Claims Are Untimely

155. Given that the Claimant provides no convincing reason as to why the CRTC ownership and control review or the alleged failure of the Government's measures related to roaming and tower/site sharing could independently be considered a breach of the FIPA, when considered together with the national security review and the Transfer Framework, any challenge to the CRTC review or the roaming and tower/site sharing provisions should have been brought within three years of the measures and knowledge of damages.

[206] See Canada's Memorial on Jurisdiction, ¶¶ 170-178.

156. In its Reply, the Claimant does not dispute the fact that these measures are untimely if considered on their own. The evidence clearly establishes that they are.

157. With respect to the CRTC review, the Claimant challenges the fact that Wind Mobile was subjected to a duplicative and unprecedented public review.[207] Prior to the end of 2009, the Claimant knew that it would be subject to a separate review by the CRTC,[208] the process that would be applied to the CRTC review,[209] and the result of the CRTC review.[210] The Claimant's documents also indicate that it first acquired knowledge of the alleged breach and the damages arising out of that breach long before the cut-off date of May 28, 2013.[211]

158. Further, with respect to the roaming and tower/site sharing measures, to the extent that the Claimant is arguing that the Government has failed to put in place the regulatory framework it said it would at the outset of the 2008 AWS-1 Auction, the Claimant would have known or should have known about this failure immediately. If the Claimant is arguing that the regulatory framework was not effective, and that Canada should have gone further to improve the conditions on roaming and tower/site sharing, then, assuming this constitutes a breach of Canada's obligations under the FIPA, which it does not, it is still time barred. The Claimant made similar arguments to the Department with respect to the alleged failure of the regulatory

[207] Claimant's Reply, ¶ 321 (b).

[208] **C-008**, Letter from John Keogh, CRTC to Simon David Lockie, Globalive Wireless LP (Dec. 22, 2008). Further, the fact that licensees would also have to satisfy the ownership and control requirements of the *Telecommunications Act* was expressly stated in the AWS policy and auction frameworks which were released at the end of 2007.

[209] The Claimant learned on July 20, 2009 that it had to undergo a Tier 4 review process. *See* **C-013**, CRTC, *Telecom Notice of Consultation CRTC 2009-429* (Jul. 20, 2009). The CRTC's decision to establish a new framework to conduct ownership and control reviews **was made in July 2009. C-012**, CRTC, *Telecom Regulatory Policy CRTC 2009-428: Canadian ownership and control review policy* (Jul. 20, 2009).

[210] On October 29, 2009, the CRTC concluded that the corporate structure of Wind Mobile did not comply with the ownership and control rules under the *Telecommunications Act*. **C-015**, CRTC, *Telecom Decision CRTC 2009-678: Review of Globalive Wireless Management Corp. under the Canadian ownership and control regime* (Oct. 29, 2009).

[211] **C-101**, Letter from Michael O'Connor to Mr. Dean Del Mastro, MP (Aug. 14, 2009), p. 4. In this letter, Michael O'Connor, GTH's Head of Business Developments and Investment, alerted a Member of Parliament to the serious negative implications for GTH following the CRTC's "duplicative review" even raising the possibility of legal action against the Government of Canada. The Claimant therefore had "knowledge that loss or damage ha[d] been caused, even if the extent and quantification [were] still unclear." **CL-016**, *Rusoro – Award*, ¶ 217.

framework, including with respect to roaming and tower/site sharing before the cut-off date of May 28, 2013.[212]

159. In its Reply, the Claimant complains that Canada only took action in 2013 to enforce the regulatory framework, five years after the 2008 AWS Auction, by releasing the Revised COLs on Mandatory Roaming and Tower/Site Sharing in March 2013.[213] Thus, based on the Claimant's own acknowledgement that Canada took action in March 2013 to improve the roaming and tower sharing framework (and leaving aside the merits of the Claimant's allegations regarding Canada's failures), the claims regarding Canada's lack of effort are untimely. Since the Claimant has failed to bring a claim regarding the CRTC ownership and control review and the alleged failure of the regulatory framework for New Entrants within the three-year limitation

[212] **R-418**, E-mail from Pietro Cordova, Wind to Righetti Romano, Wind and Henk Van Dalen, VimpelCom (Jan. 12, 2013), p. 1: ("we also mentioned our unhappiness with the current regime regulating tower sharing and roaming agreement."); **R-419**, Draft Letter from Wind Mobile to Industry Canada (Dec. 23, 2012), p. 3: ("Also of immediate and further concern to WIND […] is the fact that progress has been extremely slow in concluding tower sharing agreements (both the CRTC and Industry Canada are well aware of our frustrations in this regard). In the absence of being able to conclude such agreements […], WIND anticipates significant difficulties in being able to sustain the quality and service levels offered by the incumbent mobile operators offering 3G services. […] While we applaud the initiative of the Canadian Government in introducing the changes contained in the *Telecommunications Act 2012*, especially the removal of restrictions on foreign shareholdings in Canadian telecommunications companies, the regulatory environment regarding the availability of spectrum still falls short of international 'best practice' when it comes to the amount of, and the manner in which, spectrum that should be made available to smaller mobile operators."); **R-420**, VimpelCom Presentation, "Meeting with Industry Canada – Briefing Paper on Wind Canada's Business Situation" (Mar. 14, 2013), slide 7: ("Significant regulatory remedies are needed to provide a path to success for new entrants/Wind Canada"… "Measures announced on March 7 do not effectively address these issues."), slide 11: ("VimpelCom believes the new Industry Canada proposals do not seem to sufficiently address the key regulatory issues in the market to change the status quo"); *See also* an updated version of this presentation at **R-421**, VimpelCom Presentation, "Meeting with Industry Canada – Briefing Paper on Wind Canada's Business Situation" (Mar. 14, 2013), slide 7: ("Absence of a pro competitive regime facilitating network roll out: a) No requirements that tower/site sharing to be provided by incumbents on attractive terms and cost-based prices b) No requirements that national roaming be provided on attractive terms and cost-based prices. 4. Weakness of regulations relating to incumbent roaming obligations: a) National roaming as a permanent obligation is a positive step but absence of price and non-discrimination obligations together with absence of a seamless hand-off obligation reduces the effectiveness. "); **R-422**, E-mail from Pietro Cordova to Henk Van Halen, VimpelCom et al. *attaching* WIND Canada, November 2012 – Summary of recent meetings in Ottawa (Nov, 27, 2012): ("Please find enclose a brief summary of the meetings I had in Ottawa during the month of November. These meetings were set up with both Ministry and Regulatory Officers with the "excuse" of introducing the new COO of the company and were used to start expressing our concerns about certain issues (mostly spectrum but also roaming agreements, tower sharing regulations, etc.)"); **C-190**, Letter from Jo Lunder, VimpelCom to The Hon. Christian Paradis, Industry Canada (May 29, 2013), p. 1: ("As recently as Monday, May 27, 2013, the Chief Operating Officer and Chief Regulatory Officer of Wind Mobile met with Industry Canada officials to present a list of regulatory changes that are urgently needed to improve competition in Canada.")

[213] Claimant's Reply, ¶¶ 45, 321(a).

period pursuant to Article XIII(3)(d), the Tribunal lacks jurisdiction *ratione temporis* to hear claims regarding these two measures.

E. As A Non-Controlling Shareholder and Creditor Of Wind Mobile, The Claimant Does Not Have Standing Under Article XIII(3) To Bring Its Claims On The Transferability Of Wind Mobile's Spectrum Licences And The Regulatory Environment For New Entrants

1. Summary of Canada's Position

160. GTH has no standing under Article XIII(3) to bring its claims with respect to Canada's treatment of Wind Mobile and any indirect loss that GTH incurred with respect to its investment as a result of loss incurred by Wind Mobile. Consequently, the Tribunal has no jurisdiction over GTH's claims regarding: (i) the Transfer Framework, which it alleges affected the transferability of Wind Mobile's spectrum licences and the sale of Wind Mobile; and (ii) the roaming and tower/site sharing conditions. GTH says it has standing because these measures impacted the value of GTH's equity and debt investments in Wind Mobile. Yet Article XIII(3) does not permit claims by shareholders or creditors for reflective or indirect loss – that is, loss incurred by an enterprise that results in decreased share value or debt repayments. This follows from the wording of Article XIII(3) in its context, which includes Articles XIII(12). An investor cannot bypass the conditions in Article XIII(12) to bring a claim based on loss incurred by an enterprise under Article XIII(3), even if the enterprise's loss has a repercussive effect on the share value or debt repayments. To have standing under Article XIII(3) for a claim concerning an investment in shares or loans, an investor must allege direct harm to its shareholder or creditor rights or entitlements. Here, the Transfer Framework and roaming and tower/site sharing conditions applied to the enterprise that held the licences, Wind Mobile. GTH cannot override the corporate form and the rights of other creditors to Wind Mobile by recovering for loss incurred by Wind Mobile.

161. The Claimant's argument that GTH has standing because Canada "block[ed] the sale of Wind Mobile to an Incumbent"[214] is flawed. Apart from being factually incorrect because Canada never actually blocked a sale of Wind Mobile or a transfer of its spectrum licences to an

[214] Claimant's Reply, ¶ 212.

Incumbent, this argument ignores the fact that none of the measures at issue affected GTH's right to sell its shares or dispose of its debt interests.[215] Importantly, it is uncontested that GTH could have sold its shares in Wind Mobile to anyone, including the Incumbents. As GTH did not have a controlling ownership interest in Wind Mobile, the sale of GTH's shares in Wind Mobile would not have amounted to a change of control of Wind Mobile's spectrum licences. As a result, the Transfer Framework would not have applied to such a share sale. Moreover, GTH's allegations on the roaming and tower/site sharing conditions are based only on loss incurred by Wind Mobile. Thus the Claimant is unable to show that the Transfer Framework and the roaming and tower/site sharing conditions involved treatment of GTH that directly damaged its shareholder or creditor rights or entitlements, separate from any alleged loss that Wind Mobile incurred. Accordingly, GTH has no standing to submit its claims on these measures under Article XIII(3).

2. Article XIII(3) Does Not Grant Standing for GTH to Claim It Suffered a Breach and Indirect Loss as a Result of Measures Relating to, and Damage Incurred by, an Enterprise in which It Holds Equity or Debt Interests

a) The Distinction between Direct and Derivative claims

162. The Claimant declares that "[t]he BIT allows GTH as a shareholder of Wind Mobile to bring claims relating to both direct and indirect loss or damages suffered as a result of Canada's breaches of its obligations under the BIT."[216] This is incorrect. As explained in Canada's Memorial on Jurisdiction,[217] and elaborated below, the FIPA has two separate standing provisions: one for claims of direct loss incurred by an investor (Article XIII(3)); and another that allows the investor to bring a claim for loss incurred by an enterprise (Article XIII(12)). Article XIII(3) does not permit shareholders or creditors to bring claims of indirect loss based on

[215] **RWS-Hill-2**, ¶ 28.

[216] Claimant's Reply, ¶ 212.

[217] Canada's Memorial on Jurisdiction, ¶ 255.

damage incurred by the enterprise. Rather, it grants the investor standing to claim direct loss or damage that the investor has incurred.[218]

163. Article XIII(12), on the other hand, allows an investor to seek redress for loss incurred by the enterprise in which the investor holds shares or a right to debt repayments, when the investor owns or controls the enterprise directly or indirectly.[219] If the investor incurs indirect loss following the enterprise's loss, a claim may only be made under Article XIII(12); and any damages awarded under Article XIII(12) must be paid to the enterprise. The FIPA does not permit a shareholder or creditor investor to personally recover compensation for harm to the enterprise's rights or assets.

164. Investment tribunals have recognized that an investor must claim direct loss to bring a claim on its own behalf.[220] While the Claimant does not contend with NAFTA cases on this point, these cases bear relevance to the interpretation of Article XIII(3) because of the parallels between Articles XIII(3) and XIII(12) with NAFTA Articles 1116 and 1117. Both treaties contemplate a strict separation between direct and derivative claims, and do not grant standing for shareholders or creditors to obtain compensation in their own name for indirect loss.[221] For instance, the dispute in *GAMI* concerned a claim of indirect loss. GAMI brought a claim under Article 1116 for loss of the value of its shares in GAM, a Mexican company, due to Mexico's

[218] **CL-001**, Canada-Egypt FIPA, Article XIII(3) states: "An investor may submit a dispute as referred to in paragraph (1) to arbitration in accordance with paragraph (4) only if: […] (d) not more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage." (emphasis added).

[219] **CL-001**, Canada-Egypt FIPA, Article XIII(12) states: "(a) A claim that a Contracting Party is in breach of this Agreement, and that an enterprise that is a juridical person incorporated or duly constituted in accordance with applicable laws of that Contracting Party has incurred loss or damage by reason of, or arising out of, that breach, may be brought by an investor of the other Contracting Party acting on behalf of an enterprise which the investor owns or controls directly or indirectly. In such a case (a) any award shall be made to the affected enterprise; […] (iv) the investor may not make a claim if more than three years have elapsed from the date on which the enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that it has incurred loss or damage." (Emphasis added.)

[220] See, e.g., **RL-293**, *Marvin Feldman v. United Mexican States* (ICSID Case No. ARB(AF)/99/1) Correction and Interpretation of the Award, 13 June 2003, ¶¶ 12-13 (revising the award to comply with the requirement of Article 1135(2) that damages under Article 1117 be paid to the enterprise).

[221] Canada's Memorial on Jurisdiction, ¶¶ 261-262.

expropriation of mills owned by GAM.[222] While the tribunal accepted jurisdiction, in considering the merits of the claim it took a strict stance in defining the substantive rights that a minority shareholder, who did not own or control the company, could assert.[223] The tribunal refused to consider acts taken towards GAM because, by definition, they were acts taken against the enterprise – not the claimant shareholder.[224] Importantly, the tribunal rejected GAMI's argument that treatment of GAM's mills rendered GAMI's shares worthless. The tribunal held that to have standing, the investor must show that a breach of the treaty "leads with sufficient directness to loss or damage in respect of a given investment."[225] In raising concerns over indirect claims, it noted difficulties associated with the allocation of compensation between a shareholder and subsidiary, especially when "unsynchronised resolution" of the same dispute by national and international jurisdictions was a "practically certain scenario.[226] Ultimately, the tribunal did not have to decide these issues, as GAMI failed to prove a NAFTA violation.[227]

165. The Claimant also disregards key elements of the *Mondev* decision. The dispute concerned a claim under Article 1116 by Mondev International Ltd. ("Mondev"), for losses caused by the City of Boston regarding a land development project operated by Mondev's subsidiary. Objecting to the tribunal's jurisdiction, the United States argued the claim should have been brought under Article 1117. It emphasized "the importance of the distinction between claims brought by an investor of a Party on its own behalf under Article 1116 and claims brought by an investor of a Party on behalf of an enterprise under Article 1117."[228] The tribunal stated: "a

[222] NAFTA Article 1116, like Article XIII(3) of the FIPA, grants standing for claims of direct losses to investors. In contrast, NAFTA Article 1117, like Article XIII(12) of the FIPA, permits claims on behalf of the enterprise based on loss or damage incurred by the enterprise. *See* **RL-294**, *GAMI Investments Inc. v. The United Mexican States* (UNCITRAL) Statement of Claim of the Investor, 10 February 2003, ¶ 12.

[223] **RL-151**, *GAMI Investments Inc. v. The Government of the United Mexican States* (UNCITRAL) Final Award, 15 November 2004 ("*GAMI – Award*"), ¶¶ 37-42, 115; **CL-165**, Campbell McLachlan, Laurence Shore, and Matthew Weiniger, *International Investment Arbitration: Substantive Principles*, (2d ed. 2017), ¶ 6.136.

[224] **RL-151**, *GAMI – Award*, ¶ 115.

[225] **RL-151**, *GAMI – Award*, ¶ 33 (emphasis added).

[226] **RL-151**, *GAMI – Award*, ¶¶ 116-121.

[227] **RL-151**, *GAMI – Award*, ¶ 137.

[228] **RL-104**, *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2) Award, 11 October 2002 ("*Mondev – Award*"), ¶ 84.

NAFTA tribunal should be careful not to allow any recovery, in a claim that should have been brought under Article 1117, to be paid directly to the investor."[229] It further cautioned that:

> [i]t is clearly desirable in future NAFTA cases that claimants consider carefully whether to bring proceedings under Articles 1116 and 1117, either concurrently or in the alternative, and that they fully comply with the procedural requirements under Articles 1117 and 1121 if they are suing on behalf of an enterprise.[230]

166. The *Mondev* tribunal's warning not to allow payment of compensation to an investor in the context of a claim deriving from the enterprise's losses shows the importance of distinguishing claims for derivative loss under Article XIII(12) from claims of direct loss under Article XIII(3).

167. Furthermore, the tribunals in *Pope & Talbot* and *S.D. Myers* awarded damages only for losses suffered directly by the investor bringing the claim, and not by the enterprise. In *Pope & Talbot*, the damages found by the tribunal consisted of the investor's out of pocket expenses (accountants' fees, legal fees, and lobbying fees).[231] In *S.D. Myers*, the tribunal awarded the claimant damages only for its lost or delayed income stream from the polychlorinated biphenyl inventory that it could have reasonably expected to import into the United States and process at its U.S. facilities.[232]

168. The *BG v. Argentina* case was brought under the U.K. – Argentina BIT, which does not contain two separate standing provisions comparable to the FIPA's.[233] Nevertheless, the tribunal held that a shareholder-investor had no standing for a claim of indirect loss for damage derived by a subsidiary. The claimant BG Group Plc. ("BG") brought claims for the benefits of a licence for the distribution of natural gas granted by Argentina to MetroGAS S.A ("MetroGAS"), a

[229] **RL-104**, *Mondev – Award*, ¶ 86 (emphasis added).

[230] **RL-104**, *Mondev – Award*, ¶ 86 (emphasis added).

[231] See **CL-115**, *Pope & Talbot, Inc. v. Government of Canada* (UNCITRAL) Award in Respect of Damages, 31 May 2002 ("*Pope & Talbot – Damages Award*"), ¶ 85.

[232] See **RL-232**, *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL) Second Partial Award, 21 October 2002 ("*S.D. Myers – Second Partial Award*"), ¶¶ 222-228.

[233] See **RL-221**, *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the Promotion and Protection of Investments* (1990), Article 8 (Settlement of Disputes between an Investor and a Host State).

domestic company in which BG owned an interest.[234] The tribunal considered these claims derivative: BG was not a party to the licence and did not claim that Argentina's measures were specifically directed against its shareholding in MetroGAS; instead, BG claimed that Argentina's measures had a negative impact on the activities of MetroGAS, and hence on the value of its shares in MetroGAS.[235] The tribunal drew a clear distinction between direct and indirect claims and asked: "whether BG can bring those claims before this Tribunal indirectly."[236] It held that BG had no standing to assert claims derived from MetroGAS's licence. The tribunal stated: "BG does not have standing to seize this Tribunal with "claims to money" and "claims to performance", or to assert other rights, which it is not entitled to exercise directly."[237] No cases could compel it to depart from the treaty's standing provision: "[t]here is no authority on the record, including *CMS*, identifying the source of the Tribunal's authority to depart from Article 8 of the BIT."[238] A parallel can be drawn between BG's claims over the rights and loss associated with MetroGAS's licence, and GTH's claims over the rights and loss associated with Wind Mobile's spectrum licences. As the *BG* tribunal found, such derivative claims are outside this Tribunal's jurisdiction.

b) The Definition of "Investment" Does Not Specify Standing Rights

169. The Claimant relies on Article XIII(1) and the definition of "investment" in Article I(f) to argue it has standing under Article XIII(3). According to its reading, as long as GTH has a qualifying investment under the FIPA, it has standing with respect to any dispute that affects the value of that investment. The Claimant cites commentators stating that, given the wide definition of "investment" in some BITs, "there is no conceptual reason to prevent an investor recovering

[234] **CL-047**, *BG Group Plc. v. The Republic of Argentina* (UNCITRAL) Final Award, 24 December 2007 ("*BG Group – Award*"), ¶ 189.

[235] **CL-047**, *BG Group – Award*, ¶ 190.

[236] **CL-047**, *BG Group – Award*, ¶ 210.

[237] **CL-047**, *BG Group – Award*, ¶ 214 (emphasis added). Note that the Final Award rendered by the Tribunal was subsequently denied enforcement on different grounds by the United States Court of Appeals for the District of Columbia Circuit. *See* **RL-295**, *Republic of Argentina v. BG Group Plc*, D.C. Cir., No. 11-7021, 17 January 2012.

[238] **CL-047**, *BG Group – Award*, ¶ 214 (internal footnotes omitted).

for damage caused to those shares which has resulted in a diminution in their value."[239] Canada does not contest that shares may be an investment, and that investors can claim for certain direct damages to their shares. But the definition of "investment" does not specify which rights a shareholder has for standing or what types of loss it can claim.[240] The status of shares or debt as a protected investment does not give shareholders or creditors standing to bring claims of indirect loss based on damages incurred by an enterprise in which they hold shares or debt interests.[241] Only the FIPA's standing provisions determine an investor's right to bring a claim.[242]

170. Article XIII(3) is the operative standing provision, and it does not support the Claimant's broad interpretation of standing under the FIPA. Article XIII(3) contains no language that allows an investor to bring claims for loss "to its investment." Rather, for a shareholder to have standing under Article XIII(3), it must claim that the breach relates to the rights or entitlements associated with its shares and that "the investor has incurred loss or damage."[243] Similarly, a creditor has standing to bring a claim concerning a measure that interfered with its right to repayment that caused it to incur loss directly. But nothing in the text of Article XIII(3) provides that an investor may personally recover damages based on loss incurred by an enterprise that led to diminution in share value or debt repayments.

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[239] Claimant's Reply, ¶ 221, citing **CL-165**, Campbell McLachlan, Laurence Shore, and Matthew Weiniger, *International Investment Arbitration : Substantive Principles*, (2d ed. 2017), ¶ 6.123 (emphasis added).

[240] **RL-045**, Zachary Douglas, *The International Laws of Investment Claims* (2009) ("*Douglas*"), ¶ 768: ("the misconception that meanders through the corpus of investment treaty precedents is that the recognition by investment treaties of a shareholding as a covered investment somehow disposes of the question relating to the rights of the shareholder that can form the object of an investment treaty claim. These are entirely distinct issues.") **RL-296**, Gabriel Bottini, *The Admissibility of Shareholder Claims: Standing, Causes of Action, and Damages*, September 2017 [Excerpt – Parts 4 and 5] ("*Bottini*"), p. 118.

[241] **RL-045,** *Douglas*, ¶ 747; **RL-296**, *Bottini*, p. 146; **RL-145**, David Gaukrodger, *Investment Treaties as Corporate Law: Shareholder Claims and Issues of Consistency*, OECD Working Papers on International Investment, No. 2013/03, OECD Investment Division ("*Gaukrodger*, 2013), p. 8.

[242] **RL-045**, *Douglas*, ¶ 743: ("Perhaps the single greatest misconception that has plagued investment treaty jurisprudence to date concerns the problem of claims by shareholders. The root of this misconception is the incorrect characterisation of the problem as one of jurisdiction rather than admissibility.") (Emphasis added.)

[243] A shareholder's rights may include: the right to any declared dividend, to attend and vote at general meetings, to have first refusal to purchase shares, to inspect corporate records, and to share in the residual assets of the company on liquidation. **RL-045,** *Douglas*, ¶¶ 773-774; **RL-145**, *Gaukrodger*, 2013, p. 13.

171. The Claimant cites tribunals that infer from the definition of "investment" that shareholder-investors have standing to claim damages arising from loss incurred by an enterprise.[244] Yet as noted, the determinative factor for standing is the FIPA's standing clauses. Tribunal decisions that appear to permit claims of indirect loss based on interpretations of treaties that do not contain similar standing provisions with the FIPA offer no useful guidance to this Tribunal in applying the FIPA's standing clauses.[245]

c) Describing the Investment As a "Bundle of Rights" Does Not Expand the Claimant's Standing Under the FIPA

172. The Claimant invokes the notion of a "bundle of rights" to conflate the rights attached to its shares and debt with the rights of Wind Mobile. It states that "it is the legitimate expectations and the bundle of rights that come with owning shares of a company like Wind Mobile that are protected."[246] Yet using the term "bundle of rights" cannot expand a shareholder's rights in relation to its shares, or a creditor's rights *vis-à-vis* its debt interests.[247] Shareholder rights and the value of shares are distinct concepts: owning shares does not involve a right to a specific share value.[248] Share prices may rise or fall due to the treatment of an enterprise; but the fluctuation in share value alone has no bearing on the shareholder's rights attached to its shares. Similarly, when a debtor has difficulty repaying its debts, this may change the likelihood that a creditor receives full repayment. Yet it does not diminish the creditor's entitlement as of right to be repaid by the debtor, including from its assets upon dissolution. The Claimant points to no investment decision to support its view that a creditor may bring an investment dispute to recover from a State the full value of debt owed by a debtor enterprise on the basis that the State's treatment of that enterprise may have indirectly contributed to non-repayment of the debt.

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[244] Claimant's Reply, footnote 391.

[245] In addition, the *CMS*, *ConocoPhilips*, and *Mobil* decisions involved treaties that do not contain a separate standing provision comparable to Article XIII(12) which explicitly delineates the conditions to bring a claim deriving from loss or damage incurred by an enterprise.

[246] Claimant's Reply, ¶ 219.

[247] Canada's Memorial on Jurisdiction, ¶ 250.

[248] In *Barcelona Traction*, Fitzmaurice posited shareholders do not have a "legal right" that shares "shall have or be maintained at, any particular market value." **RL-297**, *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)* Second Phase, Separate Opinion of Judge Sir Gerald Fitzmaurice, I.C.J. Reports 1970, 5 February 1970, p. 68; **RL-296**, *Bottini*, p. 155.

173. Moreover, where cases use the term "bundle of rights",[249] it is usually associated with property or contractual rights.[250] For instance, the rights at issue in *ADC* concerned property and contractual rights.[251] Such rights are broader than those attached to shares or debt.[252] If a breach damages an investor's real property investment, it may have standing to recover for the diminished property value. In contrast, the rights and assets of an enterprise are separate from its shareholders or creditors.[253] Shares and debt carry no right to personally claim damages for the enterprise's loss. Thus the Claimant's self-defined investment as a "bundle of rights" does not establish a right to claim diminished share value or debt repayments based on loss incurred by the enterprise.[254]

[249] Although the term "bundle of rights" is not entirely novel, it is not a "well-trodden concept in international investment law" as the Claimant suggests (Claimant's Reply, ¶ 219). Even the *Koch Minerals* tribunal, the first decision that the Claimant cites to support this statement, never referred to a "bundle of rights" in its Award.

[250] For instance, *Koch Minerals* concerned a sales agreement that involved contractual rights to performance, along with an equity interest in a project plant that produced and sole nitrogen fertilizers (**RL-165**, *Koch Minerals Sàrl and Koch Nitrogen International Sàrl v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/11/19) Award, 30 October 2017 ("*Koch Minerals – Award*"), ¶¶ 2.6, 5.1, 6.67). *ATA Construction* concerned an Arbitration Agreement that the Jordanian Court of Cassation extinguished (**CL-058**, *ATA Construction, Industrial and Trading Company v. Hashemite Kingdom of Jordan* (ICSID Case No. ARB/08/2) Award, 18 May 2010, ¶¶ 81-82). *Ioannis Kardassopoulos* included rights to construct and operate an oil pipeline (**CL-137**, *Ioannis Kardassopoulos and Ron Fuchs v. The Republic of Georgia* (ICSID Case Nos. ARB/05/18 and ARB/07/15) Award, 3 March 2010, ¶¶ 236, 339). *Generation Ukraine* involved rights in a construction project for an office block development and associated agreements (**CL-117**, *Generation Ukraine, Inc. v. Ukraine* (ICSID Case No. ARB/00/9) Award, 16 September 2003, ¶ 3.7, 6.1, 17.1). *Burlington Resources* involved expropriated assets with contractual rights (**CL-088**, *Burlington Resources Inc. v. Republic of Ecuador* (ICSID Case No. ARB/08/5) Decision on Reconsideration and Award, 7 February 2017 ("*Burlington – Decision on Reconsideration and Award*"), ¶¶ 339, 358).

[251] **CL-040**, *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary* (ICSID Case No. ARB/03/16) Award of the Tribunal, 2 October 2006 ("*ADC – Award*"), ¶¶ 303-304, 325. Specifically, the investment involved "certain rights of the project company to operate, use and exploit Terminal 2A and 2B" at an Airport, as well as rights under a Project Agreement and a Management Services Agreement. Professor Crawford explained that the case was "not entirely dissimilar from *Chorzów*", because "we are talking about rights of use which can constitute an investment" (¶ 303, emphasis added). The *ADC* tribunal did not use the term "bundle of rights", or state that equity or debt interests can on their own constitute a "bundle of rights".

[252] **RL-303**, Julian Arato, *The Private Law Critique of International Investment Law*, Institute for International Law and Justice Working Paper 2018/4, 6 September 2018 ("*Arato*"), p. 42.

[253] **RL-138**, *Barcelona Traction*, p. 34; **RL-139**, *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Preliminary Objections, Judgment of 24 May 2007, I.C.J. Reports 2007, p. 606.

[254] Nor does Article II(2)(a) of the FIPA establish such a right to standing. The FET obligation does not determine a shareholder's or creditor's rights in relation to its shares or debt, or settle an investor's claim to standing. The protection of "returns of investors" protects an investor's right to returns from the enterprise in which it invests, but does not establish a right to a specific amount of returns.

3. Only Article XIII(12) Permits Shareholders or Creditors to Bring Claims Based on Loss Incurred by the Enterprise In Which They Invested

174. The Claimant states that "Article XIII(12) is irrelevant", that the standing provision is "not applicable", and that Canada's reference to Article XIII(12) is "misleading."[255] Article XIII(12) is pertinent to GTH's claims because it is the only provision that grants standing for an investor to bring a claim for a breach and loss incurred by an enterprise.

175. The Claimant asserts that "[t]he purpose of this type of provision [Article XIII(12)] is to address circumstances where a breach of the BIT affects a locally incorporated subsidiary that caused no loss or damage to the investor."[256] This reasoning is flawed and blurs the distinction between the two standing provisions. The FIPA does not state that an investor has standing under Article XIII(3) to bring a claim for loss or damage incurred by an enterprise, and can rely on Article XIII(12) as a fallback standing provision when the investor has not incurred loss or damage. The Claimant relies on the *EnCana* decision; but the tribunal in that case interpreted a different treaty concerning a different objection and does not offer useful guidance in this case.[257] One of Ecuador's jurisdictional objections in *EnCana* was that under Article XIII(12) of the Canada-Ecuador FIPA, the treaty parties did not intend to allow claims for damage done to a subsidiary incorporated in a third State.[258] Canada's objection to standing is different from Ecuador's jurisdictional objection. Canada maintains that the inclusion of Article XIII(12) in the treaty reveals the FIPA Parties' intention that investors have no standing under Article XIII(3) to submit claims for treatment of and loss incurred by the enterprise. If an investor could bring a claim for a breach related to the treatment of the enterprise resulting in a diminution in its share value or debt repayments, Article XIII(12) would become redundant. The requirement in Article XIII(12)(a)(i) that any award for loss or damage incurred by the enterprise "shall be made to the affected enterprise" would be rendered meaningless. The lack of any equivalent provision in

[255] Claimant's Reply, ¶ 223 and footnote 391.

[256] Claimant's Reply, footnote 408 (emphasis added).

[257] The *EnCana* tribunal declined jurisdiction over all of EnCana's claims except for expropriation, based on the taxation exemption under Article XII(1) of the treaty. **CL-125**, *EnCana Corporation v. Republic of Ecuador* (UNCITRAL) Award, 3 February 2006 ("*EnCana – Award*"), ¶ 142.

[258] **CL-125,** *EnCana – Award*, ¶ 115, citing Respondent's Rejoinder, 8 October 2004, §§ 60, 64. The subsidiaries, AEC Ecuador Ltd ("AEC") and City Oriente Limited ("COL") were both incorporated in the Barbados.

relation to Article XIII(3) carries the implication that derivate claims were not contemplated under Article XIII(3). A shareholder or creditor is not permitted to sidestep the requirements for standing under Article XIII(12) and personally recover damages for the enterprise's loss via Article XIII(3). This Tribunal should not adopt an interpretation that reduces Article XIII(12) to ineffectiveness.[259]

176. The Claimant suggests the distinction between Articles XIII(3) and XIII(12) only relates to the treatment of damages, and that Canada's standing objection is an issue for the merits.[260] However, standing concerns whether a claimant can bring a claim under the treaty. Article XIII(5) states: "[e]ach Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration in accordance with the provisions of this Article."[261] The FIPA Parties did not consent to the submission of a claim that fails to comply with the standing provisions in Article XIII. This threshold question precedes an assessment of the merits or damages. Regardless of whether the Claimant can substantiate its allegations, if it fails to submit claims under the appropriate standing provision, then it lacks standing and this Tribunal has no jurisdiction to hear its claims.

177. While an important difference between Articles XIII(3) and XIII(12) relates to whether the investor or enterprise is entitled to recover an award, that is not the only distinguishing feature between the provisions. The two provisions contain different rules on consent to arbitration and waiver. Article XIII(3) requires consent to arbitration and a waiver from the investor, but not from the enterprise.[262] If an investor were permitted to submit a claim under Article XIII(3) for

[259] **RL-144**, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, Report of the Appellate Body, 29 April 1996, p. 23. Canada's Memorial on Jurisdiction, ¶ 255. *See* **RL-298**, *Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya v. Chad)* Judgment of 3 February 1994, I.C.J. Reports 1994, ¶ 51 (rejecting construction that was "contrary to one of the fundamental principles of interpretation of treaties, consistently upheld by international jurisprudence, namely that of effectiveness"); **RL-253**, *The Corfu Channel Case*, Judgment of 9 April 1949, I.C.J. Reports 1949, p. 24: ("It would indeed be incompatible with the generally accepted rules of interpretation to admit that a provision of this sort occurring in a special agreement should be devoid of purport or effect.")

[260] Claimant's Reply, footnote 421 and ¶ 227.

[261] **CL-001**, Canada-Egypt FIPA, Article XIII(5) (emphasis added).

[262] **CL-001**, Canada-Egypt FIPA, Article XIII(3) provides that an investor may submit a dispute only if: "(a) the investor has consented in writing thereto; (b) the investor has waived its right to initiate or continue any other

loss incurred by an enterprise, nothing would prevent the shareholder that owned and controlled the enterprise from submitting a claim on behalf of the enterprise for the same events, as the enterprise provided no waiver. This could lead to multiple recoveries of damages based on the same loss of the enterprise. The requirements in Article XIII(12) that the enterprise must consent to arbitration and submit a waiver for claims based on loss it incurred confirms that the FIPA Parties did not intend to permit investors to submit claims under Article XIII(3) based on loss incurred by the enterprise, irrespective of any repercussive effects on the investor's share values or debt repayments. [263]

4. The Claimant Has No Standing to Override Wind Mobile's Legal Personality

178. Wind Mobile has not consented to this arbitration or submitted a waiver for GTH's claims based on loss that Wind Mobile allegedly incurred from the Transfer Framework and the roaming and tower/site sharing conditions. But instead of claiming that these measures caused GTH to incur loss independent of Wind Mobile's loss, GTH declares that the separation of legal personality between an enterprise and its shareholders "has long been discredited" and "has long been dismissed by eminent scholars and in investment treaty jurisprudence."[264] Yet, the corporate form is respected across legal regimes, including the FIPA and international investment law, as well as customary international law and national laws. Article XIII(12) of the FIPA recognizes the distinction between the enterprise and the investor who owns and controls the enterprise, as it refers to "an enterprise that is a juridical person incorporated or duly constituted in accordance with applicable laws of that Contracting Party".[265] Article 25(2)(b) of the ICSID Convention defines the scope of ICSID's jurisdiction to "any juridical person", which includes an enterprise incorporated under domestic law. The *Poštová banka* tribunal stated that

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proceedings in relation to the measure that is alleged to be in breach of this Agreement before the courts or tribunals of the Contracting Party concerned or in a dispute settlement procedure of any kind; […]" (emphasis added).

[263] For an investor to submit a claim under Article XIII(12)(a): "(ii) the consent to arbitration of both the investor and the enterprise shall be required; (iii) both the investor and the enterprise must waive any right to initiate or continue any other proceedings in relation to the measure that is alleged to be in breach of this Agreement before the courts or tribunals of the Contracting Party concerned or in a dispute settlement procedure of any kind; […]" (emphasis added.)

[264] Claimant's Reply, ¶¶ 214, 230.

[265] **CL-001**, Canada-Egypt FIPA, Article XIII(12)(a) (emphasis added).

the default position in international law is that a company is legally distinct from its shareholders.[266]

179. Unfortunately, certain tribunals have wrongly overridden the corporate form to permit shareholder reflective loss claims on the basis that BITs are *lex specialis*.[267] Yet a BIT is not "a self-contained closed legal system" that is isolated from certain supplementary rules – whether of international law or domestic legal character.[268] The two can coexist so long as there is no inconsistency between them or a discernible intention that one provision is to exclude the other.[269] As Article XIII(7) of the FIPA states: "[a] tribunal established under this Article shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law."[270] Similarly, Article 1.1 of Procedural Order No. 1 provides that the applicable rules of international law govern this arbitration.[271] Nothing in the text of Article XIII(3) shows a discernible intention to derogate from customary international law limitations and allow shareholder claims of reflective loss.[272] Neither the inclusion of shares as a protected investment in the FIPA, nor granting standing to investors to bring claims for their own loss, justifies the displacement of international law on the corporate form and the prohibition on shareholders bringing claims to personally recover damages based on losses of a separate enterprise.

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[266] **RL-141**, *Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic* (ICSID Case No. ARB/13/8) Award, 9 April 2015, ¶ 230.

[267] See **CL-005**, *CMS Gas Transmission Company v. The Republic of Argentina* (ICSID Case No. ARB/01/8) Decision of the Tribunal on Objections to Jurisdiction, 17 July 2003, ¶ 48; and **CL-118**, *Enron Corporation and Ponderosa Assets, L.P. v. The Argentine Republic* (ICSID Case No. ARB/01/3) Decision on Jurisdiction, 14 January 2004, ¶¶ 49, 56.

[268] **CL-025**, *Asian Agricultural Products Ltd. v. Republic of Sri Lanka* (ICSID Case No. ARB/87/3) Final Award, 27 June 1990 ("*Asian Agricultural – Award*"), ¶ 21. *See also* **RL-299**, *Douglas*, p. 9; **RL-296**, *Bottini*, p. 127.

[269] **RL-233**, Commentary on the ILC Articles, Article 55, Commentary 4.

[270] **CL-001**, Canada-Egypt FIPA, Article XIII(7) (emphasis added).

[271] Procedural Order No. 1, 13 June 2017, Article 1.1: ("The governing law for this arbitration is the Agreement Between the Government of Canada and the Government of the Arab Republic of Egypt for the Promotion and Protection of Investments (the "FIPA") and applicable rules of international law.")

[272] Article XIII(3) derogates from customary international law only to the extent that it permits individual investors (including minority shareholders) to assert claims for loss the investor incurred that could otherwise be asserted only by States. Article XIII(12) provides a limited carve out from customary international law only to the extent that it permits shareholder investors to bring a claim on behalf of the locally-incorporated enterprise.

180. The Claimant discounts the corporate form as upheld in *Barcelona Traction*[273] because that case involved diplomatic protection. Yet the ICJ noted that the antecedent question of shareholder rights in international law was different from the conditions applicable to diplomatic protection.[274] To determine if Belgium could bring its case, the Court first had to address the scope of the Belgian nationals' rights as shareholders in relation to the corporation.

181. Canada's use of the term "reflective loss" is not designed to import concepts from the exercise of diplomatic protection into the FIPA.[275] Scholars, courts, and practitioners commonly use this term to describe the widely-recognized rule against shareholder standing for claims based on injury to the corporation resulting in incidental diminution in share value.[276] Although it chose to dismiss the corporate form outright, the Claimant is wrong to ignore the many reasons motivating courts to reject claims of reflective loss. These concerns relate to the object and purpose of the FIPA; thus they may assist in interpreting Article XIII(3).[277] The FIPA aims to promote and protect investments in order to stimulate business initiative and economic cooperation.[278] In countries with well-developed corporate law regimes, companies do business in an established commercial framework that prohibits shareholders from claiming damages for diminished share values based on the enterprise's losses.[279] A recent decision by the Supreme

[273] **RL-138**, *Barcelona Traction*, ¶¶ 41-44.

[274] **RL-300**, *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain*) I.C.J. Reports 1964, Judgment of 24 July 1964 on Preliminary Objections, p. 45; **RL-296**, *Bottini*, p. 118.

[275] Claimant's Reply, ¶ 224.

[276] **RL-150**, David Gaukrodger, *Investment Treaties and Shareholder Claims for Reflective Loss: Insights from Advanced Systems of Corporate Law*, OECD Working Papers on International Investment, No. 2014/02, p. 7. **RL-145**, *Gaukrodger*, 2013, p. 9. *See* **RL-301**, Bas J. de Jong, *Shareholders' Claims for Reflective Loss: A Comparative Legal Analysis*, European Business Organization Law Review, Vol. 14, No. 1, 2013. *See, e.g.*, **R-423**, *Johnson v. Gore Wood & Co.* [2001] 1 All ER 481, pp. 58-60: (discussing "reflective loss" claims by shareholders); **R-424**, *Gardner v. Parker* [2005] B.C.C. 46 (2004), p. 21: ("This appeal raises, not for the first time, the ambit and limits of the rule against reflective loss"); *see also* **RL-302**, Victor Joffe & James Mather, *The Vanishing Exception Part One: How Rare Are Exceptions to the No Reflective Loss Principle?*, New Law Journal, 28 November 2008.

[277] **RL-145**, *Gaukrodger*, 2013, p. 32. *See also* **RL-303**, *Arato*, p. 42; **CL-018**, *VCLT*, Article 31(1).

[278] **CL-001**, Canada-Egypt FIPA, Preamble.

[279] *See, e.g.*, **RL-145**, *Gaukrodger*, 2013, pp. 15-17. **RL-303**, *Arato*, p. 42: ("Because shareholder standing cuts to the core of separate legal personality, corporate law everywhere sharply distinguishes two kinds of shareholder claims. On the one hand, shareholders may bring "direct claims," for direct injury to their shares (if, say, the government improperly forces a particular investor to sell his shares in a company). On the other hand, shareholders are typically not permitted to bring claims for "shareholder reflective loss" (SRL), meaning claims based on injury to the corporation causing incidental diminution in share value.") (Emphasis added).

Court of Canada re-iterated that under Canada's civil law and common law jurisdictions, shareholders cannot exercise rights of action belonging to corporations in which they hold shares, unless they can demonstrate a breach of a distinct obligation and a direct injury that is distinct from that suffered by the corporation.[280] Under U.S. law, shareholders have no standing to claim damages on their own behalf for "a wrongful act that depletes corporate assets and thereby injures shareholders only indirectly, by reason of the prior injury to the corporation."[281] The English House of Lords, German Supreme Civil Court, and French Cour de cassation have also held that the shareholder can claim for any separate, direct damage, but not for reflective loss.[282] Allowing claims of reflective loss would weaken this rule and subject investors to contradictory rules depending on the applicable law.

182. Permitting reflective loss would also be detrimental to creditors and other shareholders. Separate legal personality provides two types of asset protection: it shields the assets of its equity holders from the corporation's creditors (owner shielding); and it shields the corporation's assets from creditors of the equity holders (entity shielding).[283] Creditors and shareholders rely on these protections when deciding to invest in the corporation.[284] Creditors expect that they have a claim against the assets of the company and will be paid in bankruptcy ahead of shareholders according to the priority rules.[285] Placing investment treaty-protected shareholders ahead of creditors would undermine creditor rights.[286] This would have a distortive effect on legal rights and therefore

[280] **R-425**, *Brunette v. Legault Joly Tiffault s.e.n.c.r.l.*, 2018 SCC 55, ¶¶ 8, 21, 51.

[281] **R-426**, *Hometown Financial, Inc. v. United States*, 56 Fed. Cl. 477, 486 (2003), p. 12.

[282] **R-423**, *Johnson v. Gore Wood & Co.* [2001] 1 All ER 481, pp. 58-60; **RL-145**, *Gaukrodger*, 2013, pp. 16-17.

[283] **RL-304**, Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, Yale Law Journal, Volume 110, No. 3 (2000), p. 2 ("The truly essential aspect of asset partitioning is […] shielding of the assets of the entity from claims of the creditors of the entity's owners or managers.")

[284] **RL-305**, Richard A. Posner, *The Rights of Creditors of Affiliated Corporations*, University of Chicago Law Review: Vol. 43: Iss. 3, Article 3.

[285] The court in *Gaubert v. United States* explained: "[w]ere common shareholders allowed to sue directly and individually for damages to the value of their shares, we would be allowing them to bypass the corporate structure and effectively preference themselves at the expense of the other persons with a superior financial interest in the corporation." (**R-427**, *Gaubert v. United States*, 885 F.2d 1284 (5th Cir. 1989), rev'd, 499 ("*Gaubert*"), at 1291).

[286] See, e.g., **RL-306**, *Caplan and Sharpe*, p. 826 (noting with respect Article 24(1)(b) of the U.S. Model BIT, which is substantively identical to Article XIII(12) of the FIPA, that the provision maintains the "distinction between the rights of shareholders and the corporation [and…] prevents investors 'from effectively stripping away a corporate

would not be conducive to promoting investment, business initiative, or economic cooperation. For all of the above reasons, the Tribunal should not grant standing to GTH in its bid to personally recover damages based on loss incurred by Wind Mobile.

5. GTH's Claims Regarding the Transfer Framework and the Roaming and Tower/Site Sharing Measures Are Inadmissible Because They Are Based on Measures Related To and Loss Incurred by Wind Mobile

183. The Claimant asserts that "GTH is not claiming for damage caused to the enterprise; GTH is claiming for damage caused to itself as a result of Canada's wrongful acts."[287] Yet in defining its alleged loss from the Transfer Framework and the roaming and tower/site sharing conditions, the Claimant refers to loss or damage allegedly incurred by Wind Mobile which only had incidental effects on the value of GTH's equity and debt interests.[288] For instance, the Claimant refers to "the harm Canada had already done to Wind Mobile prior to its sale."[289] The Claimant also discusses "Wind Mobile's ownership of the spectrum licenses and the rights that came with them."[290] GTH alleges that "by blocking New Entrants from selling their set-aside spectrum licenses to Incumbents, they were blocking New Entrants from realizing the greatest value from their investments."[291] Article XIII(3) does not grant standing for the Claimant's allegations based on breaches of the alleged rights of the licensee, Wind Mobile, and the losses incurred by Wind Mobile, even if they had repercussive effects on the value of GTH's shares or debt interests.

184. The Transfer Framework and the roaming and tower/site sharing provisions did not interfere with GTH's investment. Through all relevant times – once GTH invested in Canada until it sold its shares in Wind Mobile to AAL – GTH retained its shareholding and debt interests *vis-à-vis* Wind Mobile. Canada did nothing to undermine the rights that GTH could exercise in relation to its shares. GTH also retained its right to repayment of its loans to Wind Mobile

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asset […] to the detriment of others with a legitimate interest in that asset, such as the enterprise's creditors'."); **R-427**, *Gaubert*, at 1291.

[287] Claimant's Reply, ¶ 228.

[288] Claimant's Reply, ¶¶ 221, 213, 353.

[289] Claimant's Reply, ¶ 416 (emphasis added).

[290] Claimant's Reply, ¶ 287.

[291] Claimant's Reply, ¶ 22(e) (emphasis added).

regardless of whether Wind Mobile's financial situation, and its ability to repay its loans, was affected by Canada's measures or for any other reason.

185. While the Claimant alleges that Canada "blocked" GTH from selling Wind Mobile to an Incumbent, GTH never had a right to sell Wind Mobile – GTH could only sell its shares in Wind Mobile. As VimpelCom noted, without changing the basis of its existing investment by acquiring voting control of Wind Mobile, it would have no right [redacted][292] It is telling that the Claimant never alleges that it was prevented from selling its shares in Wind Mobile. In fact, at all times GTH had the ability to sell its shares in Wind Mobile, including to an Incumbent. The Transfer Framework addressed the transfer of spectrum licences. If Wind Mobile had requested a transfer of its spectrum licences, the Transfer Framework would have applied. If the sale of shares in Wind Mobile led to a change of control of Wind Mobile and thus of its spectrum licences, the Transfer Framework's "deemed control" provision would have applied. Conversely, as a non-controlling shareholder in Wind Mobile, GTH was not affected by the Transfer Framework and could have sold its shares to any buyer. Thus the Claimant has no standing to make its claim regarding the Transfer Framework, as it fails to show that the Transfer Framework caused direct loss to GTH's shareholder or creditor rights or entitlements.

186. Similarly, the roaming and tower/site sharing conditions affected a separate legal enterprise from the Claimant and did not interfere with GTH's investment in Wind Mobile. These measures applied to all licensees, including Wind Mobile. The licences containing the COLs on roaming and tower/site sharing were issued to the enterprise operating as a wireless telecommunications service provider, not the investors in such enterprise. Any claim regarding failure to enforce the roaming and tower/site sharing provisions would have to be a claim that the licensee, Wind

[292] [redacted]

Mobile, suffered harm. Thus GTH has no standing to submit a claim under Article XIII(3) based on any of Wind Mobile's alleged losses from the roaming and tower/site sharing conditions.[293]

187. In this case, GTH was not the only shareholder in Wind Mobile, it did not control Wind Mobile, and GTH did not bring the claim on Wind Mobile's behalf.[294] The tribunal in *UPS* observed that when an enterprise has multiple shareholders, it would be problematic to blur the line between NAFTA's standing provisions.[295] The *GAMI* tribunal's warnings are particularly salient here.[296] If the Tribunal permits GTH to recover damages for loss incurred by Wind Mobile, this would increase the risk of inconsistent decisions[297] and double recovery,[298] threatening the legitimacy of the investment dispute settlement system.[299] The appropriate recipient of any award for loss that Wind Mobile incurred must be Wind Mobile. If a claim were validly brought on Wind Mobile's behalf, making it whole could ensure that all of the stakeholders with an interest in Wind Mobile – including creditors and other shareholders – receive appropriate compensation. This further clarifies that GTH's claims for loss resulting from the Transfer Framework and the roaming and tower/site sharing conditions are only derivative claims for loss to Wind Mobile.

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[293] Rather than obstructing GTH's ownership interest in Wind Mobile, the Claimant's documents reveal that "we believe that the government will not obstruct our ability to develop WIND Canada." **R-430**, E-mail from Carsten Revsbech, VimpelCom to Jo Lunder, VimpelCom (Dec. 10, 2013), p. 6.

[294] Claimant's Reply, ¶ 224.

[295] **CL-044**, *United Parcel Service of America Inc. v. Government of Canada* (UNCITRAL) Award on the Merits, 24 May 2007 ("*UPS – Award on the Merits*"), ¶ 35.

[296] **RL-151**, *GAMI – Award*, ¶¶ 116-121. The *GAMI* tribunal did not reach a ruling on the award of damages.

[297] For example, contrast **RL-114**, *Ronald S. Lauder v. The Czech Republic* (UNCITRAL) Final Award, 3 September 2001 with **CL-030**, *CME Czech Republic B.V. (The Netherlands) v. The Czech Republic* (UNCITRAL) Partial Award, 13 September 2001 and **RL-228**, *CME Czech Republic B.V. (The Netherlands) v. The Czech Republic* (UNCITRAL) Final Award, 14 March 2003 ("*CME – Award*"). In addition, contrast **CL-036**, *CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8) Award, 12 May 2005 ("*CMS – Award*") with **CL-141**, *Total, S.A. v. Argentine Republic* (ICSID Case No. ARB/04/1) Decision on Liability, 27 December 2010 ("*Total – Decision on Liability*").

[298] See, e.g., **R-423** , *Johnson v. Gore Wood & Co.* [2001] 1 All ER 481, p. 54: ("If the shareholder is allowed to recover in respect of [indirect] loss, then either there will be double recovery at the expense of the defendant or the shareholder will recover at the expense of the company and its creditors and other shareholders.") (emphasis added).

[299] See for example, **RL-307**, United Nations Commission on International Trade Law, Forty-eighth session, Concurrent proceedings in investment arbitration, Note by the Secretariat, A/CN.9/848, 17 April 2015, ¶¶ 13-14.

188. Finally, the Claimant's own damages calculations highlight the fact that its alleged loss from these measures is only reflective of Wind Mobile's loss. Its calculation of compensation for the diminution in the fair market value of GTH's interests resulting from the Transfer Framework (or the Transfer Framework and the voting control application) is based on the value of Wind Mobile. The implications for GTH's debt and equity investment are derived from the effect on Wind Mobile's value. However, just as shareholders and creditors generally cannot be held liable for wrongs committed by the corporation, they have no standing to submit a claim under Article XIII(3) based on loss the enterprise incurred from wrongs committed against it.

III. CANADA DID NOT BREACH THE FIPA OBLIGATIONS

189. In its Reply, the Claimant maintains overly broad and unsustainable interpretations of the FIPA obligations. The general objectives of the FIPA cannot be used, as the Claimant suggests,[300] to circumvent the precise wording and scope of its provisions. The FIPA provisions themselves represent the Parties' agreement on how they would implement their common objectives with respect to investment protection. None of the allegations come close to amounting to a breach of the FIPA standards as properly interpreted. Moreover, the Claimant's allegations of breach rely on a mischaracterization of both the facts and the applicable Canadian laws and policies. Canada explains below that:

(i) The Claimant's allegations regarding the Transfer Framework are incapable of amounting to a breach of the properly interpreted FET, FPS, and Transfer of Funds obligations in the FIPA. Moreover, the Claimant's allegations that the Transfer Framework was an arbitrary, politically-motivated measure are completely unsupported by the facts. So are its allegations that it was a reversal of the legal and policy framework applicable to wireless telecommunications. The Transfer Framework was introduced in June 2013 to clarify the factors that the Minister would consider in approving all licence transfer requests. It was consistent with the existing framework and the Government's long-standing statutory objectives to promote competition in the sector. There was never any guarantee or representation by the Government that the transfer of set-aside licences to Incumbents would automatically be approved after the five-year moratorium. Further, the Claimant's allegations that Canada "blocked" a sale of

[300] Claimant's Reply ¶¶ 232-233, 242.

Wind Mobile to Incumbents are wrong. GTH also side-steps an important point: the Transfer Framework did not constitute a restriction on or affect the Claimant's ability to sell its debt or equity interests in Wind Mobile, including to an Incumbent. Only a change of control of Wind Mobile or a request to transfer its licences would have been subject to the Transfer Framework.

(ii) The Tribunal does not have jurisdiction to consider whether the national security review of the Claimant's proposed acquisition of voting control of Wind Mobile was in breach of the FIPA obligations. In any event, it could not amount to a breach of the FET obligation. It was neither a pretense to promote telecommunications policy objectives, as the Claimant suggests, nor was it conducted in an opaque way inconsistent with due process. Furthermore, it was not in breach of the national treatment obligation because the obligation was simply not applicable.

(iii) The Claimant's strained effort at portraying Canada's conduct as a cumulative breach also fails. As for the claims related to the CRTC ownership and control review and the failure to implement favourable roaming and tower/site sharing conditions, which the Claimant is no longer challenging in and of themselves: they are untimely and unfounded, and cannot contribute to a finding of cumulative breach. Further, there was no "dismantling of the framework" on which GTH made its decision to invest, nor a concerted effort to force GTH to sell its investment in Canada. In fact, nothing prevented GTH from remaining as an investor in Wind Mobile on the same basis upon which it made its investment, and to benefit from the Government's continued efforts to promote competition in the wireless telecommunications market.

190. As Canada explains below, none of the measures at issue in this case constitute a breach of the FIPA obligations.

A. Canada Did Not Breach The Fair And Equitable Treatment Obligation Under Article II(2)(a): The Claimant Puts Forward an Excessively Broad Interpretation of the Standard under Article II(2)(a) and Mischaracterizes The Facts

191. The Claimant's allegation that Canada breached its obligation to accord FET to the Claimant's investment is based on an overly broad interpretation of Article II(2)(a) of the FIPA that ignores the precise wording of the provision. Article II(2)(a) requires Canada to provide fair

and equitable treatment *in accordance* with principles of international law.[301] The high threshold required by international law to find a breach of the FET obligation has not been met in this case. [302]

192. The Tribunal should reject the Claimant's unwarranted invitation to second-guess the Government's national security concerns and its telecommunications policy choices. In any event, as discussed below, the Claimant's allegations of breach are based on mischaracterizations of its rights and are not supported by evidence.

1. Article II(2)(a) Does Not Provide The Broad Standard Of Treatment Advocated By The Claimant

a) The Claimant Attempts To Turn The Standard Into A Vague Standard That Has No Ascertainable Content But Should Be Assessed Simply On The Facts

193. The Claimant's continuing assertion that Article II(2)(a) is an autonomous standard[303] ignores the express wording of the provision, which refers to the FET standard "in accordance with principles of international law."[304] The Claimant attempts to avoid the import of these words by noting that "[a]bove all, what amounts to a breach of the FET standard should be assessed against the facts of the particular case."[305] While the facts of a case are always integral to the FET analysis, the Claimant's approach would essentially grant the Tribunal *ex aequo et*

[301] Claimant's Reply, ¶ 235; **CL-001**, Canada-Egypt FIPA, Article II(2)(a) (emphasis added).

[302] **RL-177**, *Glamis Gold, Ltd. v. United States of America* (UNCITRAL) Award, 8 June 2009 ("*Glamis – Award*"), ¶ 627 summarized the minimum standard of treatment as it exists under international law: "[A] violation of the customary international law minimum standard of treatment, […], requires an act that is sufficiently egregious and shocking – a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons – so as to fall below accepted international standards and constitute a breach […]." Canada does not disagree that the content of the international minimum standard may evolve over time. *See* Claimant's Reply, ¶ 269. Canada's position has always been that customary international law can evolve over time, but that the threshold for finding a violation of minimum standard of treatment is still high. **RL-310**, *ADF Group Inc. v. United States* (ICSID Case No. ARB(AF)/00/1) Second Submission of Canada Pursuant to NAFTA Article 1128, 19 July 2002, ¶ 33; **CL-161**, *Windstream Energy LLC v. Government of Canada* (UNCITRAL) Counter-Memorial of Canada, 20 January 2015 ("*Windstream – Canada's Counter-Memorial*"), ¶¶ 382-389. *See also* **RL-177**, *Glamis – Award*, ¶¶ 612-613 discussing **RL-311**, *L.F.H. Neer and Pauline Neer (U.S.A.) v. United Mexican States* (1926) 4 R.I.A.A. 60, 15 October 1926, ¶ 4.

[303] Claimant's Reply, ¶ 242.

[304] **CL-001**, Canada-Egypt FIPA, Article II(2)(a).

[305] Claimant's Reply, ¶ 241.

bono jurisdiction. In focusing only on the facts, the Claimant simply glosses over the first element of its burden, which is to establish the standard against which the facts must be assessed.[306] The words "in accordance with principles of international law" cannot be ignored by the Tribunal as they are integral to the scope of the obligation and indicate that it is the customary international law minimum standard of treatment that must be applied.

194. The Claimant maintains that Canada fails to give all the words of the provision meaning and seeks to render useless the words "fair" and "equitable."[307] To support this claim, the Claimant cites Professor Christoph Schreuer who writes, "*in the absence of a clear indication to the contrary, the fair and equitable treatment standard contained in BITs is an autonomous concept.*"[308] However, it is precisely the inclusion of the phrase "in accordance with principles of international law" that provides the necessary indication to the contrary.[309] The following sentence of Professor Schreuer's very same analysis reads: "[d]epending on the specific wording of a particular treaty, this concept may well overlap with or even be identical to the minimum standard *required by international law*. The meaning of a clause providing for FET will ultimately depend on its specific wording."[310] Here, the specific wording of the provision to accord FET *in accordance* with principles of international law clearly distinguishes this standard from an autonomous one. Instead, it refers to the standard that derives its content from the well-known minimum standard required by international law.

195. The Claimant's Reply wrongly contends that Canada's interpretation misunderstands the *effet utile* principle of treaty interpretation.[311] The fundamental purpose of *effet utile* is to ensure that the provisions of a treaty are interpreted in such a way that "a reason and a meaning" can be

[306] Canada's Counter-Memorial ¶¶ 335-338.

[307] Claimant's Reply, ¶ 246.

[308] **CL-122**, Christoph Schreuer, *Fair and Equitable Treatment in Arbitral Practice*, 6 J.W.I.T. 357 (2005), p. 364.

[309] **CL-025**, *Asian Agricultural – Award*, ¶ 52. As distinguished in **RL-165**, *Koch Minerals – Award*, ¶ 8.44: ("it was the 'non-reference to international law' which led [the AAPL] tribunal to adopt an autonomous FPS standard; and (with consideration of the dissent), it is clear the tribunal would have decided otherwise with the express additional wording in this Treaty.")

[310] **CL-122**, Christoph Schreuer, *Fair and Equitable Treatment in Arbitral Practice*, 6 J.W.I.T. 357 (2005), p. 364 (emphasis added).

[311] Claimant's Reply, ¶ 245.

attributed to every word in the text.[312] Employing *effet utile* to the words "in accordance with principles of international law" in Article II(2)(a) thus requires providing each of these words not only with their correct meaning but also their reason.

196. The reason for including these words in the FET provision is to ensure that the FET treatment has to meet the specific requirements of, and be in accord with, principles of international law, meaning the minimum standard of treatment.

197. As noted in Canada's Counter-Memorial,[313] in the *Koch Minerals* case, the tribunal found that a reference to "principles of international law" in connection with FET obligation imports the customary international law minimum standard, rather than any autonomous standards. The *Koch Minerals* tribunal (adopting the decision in *Flughafen v. Venezuela*) explained that it:

> considers that the provision included in the BITs, requiring that FET be defined in accordance with International Law necessarily incorporates a reference to the level of protection that International Law provides to foreigners, that is, to what is known as the customary minimum standard.[314]

198. The Claimant tries to minimize the relevance of the *Koch Minerals* decision and other decisions cited by Canada providing that the reference to a standard in accordance with "principles of international law" refers to the customary international law minimum standard of treatment. However, as noted by Professor Palombino's recent treatise on the subject, "should a treaty provision accord FET to investors and their investments *in accordance with principles of international law,* a reference to the IMS (international minimum standard) rule would be

[312] **RL-312**, *PNG Sustainable Development Program Ltd. v. Independent State of Papua New Guinea* (ICSID Case No. ARB/13/33) Award, 5 May 2015, ¶ 267, citing **RL-012**, *Southern Pacific Properties (Middle East) Limited. v. Arab Republic of Egypt* (ICSID Case No. ARB/84/3) Decision on Jurisdiction, 14 April 1988, ¶ 94. The Claimant itself cites to the *Renco Group* decision to the same effect: ("The principle of *effet utile* requires that a treaty be interpreted so that every operative clause is 'meaningful rather than meaningless'.") Claimant's Reply, fn 454, quoting **RL-055**, *The Renco Group, Inc. v. Republic of Peru* (UNCITRAL) Decision as to the Scope of the Respondent's Preliminary Objections Under Article 10.20.4, 18 December 2014, ¶ 199.

[313] Canada's Counter Memorial, ¶ 329.

[314] **RL-165**, *Koch Minerals – Award*, ¶ 8.45 citing to *Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/10/19) Award, 18 November 2014.

supposed".[315] Such a reading is also consistent with Canada's treaty practice and its constant and uniform interpretation of these provisions. [316]

199. The Claimant's argument that the standard cannot be the customary international law minimum standard of treatment because there is no specific reference to the term "customary" international law, must also be rejected. As noted above, other treaties, including NAFTA, that contain a FET provision tied to international law, but no explicit reference to "customary" international law, have nevertheless been interpreted to refer to the minimum standard of treatment at customary international law.

200. In sum, there is no basis for the broad autonomous FET standard invoked by the Claimant.

b) A Breach of an Investor's Expectations Does Not Amount to a Breach of FET

201. The Claimant argues that the FIPA's FET standard prohibits a State from frustrating an investor's legitimate expectations.[317] However, the FET standard at customary international law does not provide for such protection[318] and the Claimant remains unable to provide *opinio juris* or evidence of State practice to prove otherwise.[319] Having failed to do so, its claims based on a breach of legitimate expectations should be dismissed.

202. Alternatively, if the Tribunal considers that legitimate expectations may be relevant in an FET analysis, they can only be "taken into account" in assessing whether there has been a breach of FET: a breach of an investor's expectations does not itself establish a breach of FET.[320]

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[315] **RL-313**, Fulvio Maria Palombino, *Fair and Equitable Treatment and the Fabric of General Principles* (The Hague, The Netherlands: T.M.C. Asser Press, 2018), p. 30 (emphasis in original), citing to **RL-166**, *OI European Group B.V. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/11/25) Award, 10 March 2015, ¶ 482, finding that the phrase "in accordance with international law" provides the level of protection that international law offers and is precisely what is known as the minimum customary standard.

[316] Canada's Counter-Memorial, ¶ 326.

[317] Claimant's Reply, ¶¶ 262-263.

[318] See cases cited in Canada's Counter-Memorial, ¶ 352.

[319] Claimant's Reply, ¶ 262.

[320] See Canada's Counter Memorial ¶ 353.

203. The Claimant advances a broad standard linked to a general obligation to provide a stable and predictable legal and business environment that protects an investor's expectations and insulates it from changes in laws or policies.[321] It maintains that legitimate expectations do not have to arise from specific and express representations made by the State to an investor to induce the investment.[322] According to the Claimant, representations can be implicit and created by the legal and business framework existing at the time of the investment, without the need for a specific or "express" promise or assurance.[323] However, the minimum standard of treatment at customary international law provides no such protection and, in any event, even investment tribunals applying a stand-alone FET provision have refused to extend the concept of legitimate expectations to this extent. [324]

204. In *Glamis*, the Tribunal found that an investor's expectations can only be considered as a relevant factor under the FET standard at customary international lawwhen they are based on some *specific representations* made by the host State and when specific *commitments or assurances* have been given to encourage the investment.[325] *Glamis* found that legitimate expectation requires a need for "at least a quasi-contractual relationship between the State and the investor, whereby the State has purposely and specifically induced the investment."[326]

205. Tribunals have found that legitimate expectations with respect to licences may arise from express terms in the licences.[327] In the absence of such quasi-contractual commitments, however, tribunals have been reluctant to find a basis for legitimate expectations. For example, in

[321] Claimant's Reply, ¶ 263.

[322] Claimant's Reply, ¶ 263.

[323] Claimant's Reply, ¶ 263.

[324] Canada's Counter-Memorial, ¶ 352.

[325] **RL-177**, *Glamis – Award*, ¶ 620.

[326] **RL-177**, *Glamis – Award*, ¶ 766.

[327] **CL-141**, *Total – Decision on Liability*, ¶ 101; **CL-036**, *CMS – Award*, ¶ 151.

Metalpar, the tribunal found that there was no contractual relation that could form the grounds for legitimate expectations.[328]

206. Even in the few cases finding that representations leading to legitimate expectations can be based on a regulatory framework, what was commonly at issue was an investment framework or legislation that provided clear and unambiguous assurances or commitments to foreign investors to induce their investments.[329] The situation in these cases bears no resemblance to the facts at issue here. Unlike the *Antin* case relied upon by the Claimant, the regulatory framework at issue in this case was not a regime targeting foreign investors or designed to induce foreign investment, and no specific commitments were made to the Claimant.[330] The AWS-1 regulatory

[328] **RL-314**, *Metalpar S.A. and Buen Aire S.A. v. The Argentine Republic* (ICSID Case No. ARB/03/5) Award on the Merits [Unofficial English Translation], 6 June 2008, ¶¶ 185-186.

[329] **RL-315**, Kenneth J. Vandevelde, *A Unified Theory of Fair and Equitable Treatment*, (2010) 43 NYU J. Int'l L. & Pol. 72., pp. 75-78; **CL-041**, *LG&E Energy Corp., LG&E Capital Corp., and LG&E International Inc. v. Argentine Republic* (ICSID Case No. ARB/02/1) Decision on Liability, 3 October 2006 ("*LG&E – Decision on Liability*"), ¶ 175: ("As such, Argentina's abrogation of the guarantees under the statutory framework – calculation of the tariffs in dollars before conversion to pesos, semi-annual tariff adjustments by the PPI and no price controls without indemnification – violated its obligations to Claimants' investments. Argentina made these **specific obligations to foreign investors**, such as LG&E, by enacting the Gas Law and other regulations, and then advertising these guarantees in the Offering Memorandum to induce the entry of foreign capital to fund the privatization program in its public service sector. These laws and regulations became obligations within the meaning of Article II(2)(c), **by virtue of targeting foreign investors** and applying specifically to their investments, that gave rise to liability under the umbrella clause."); **CL-047**, *BG Group – Award* ¶ 344: ("[…]Argentina **unilaterally withdrew commitments** which induced BG to make its investment in Argentina and this constitutes unreasonable action and a breach of this provision of the treaty."), ¶ 346; **CL-036**, *CMS – Award*, ¶ 277: ("[i]t is not a question of whether the legal framework might need to be frozen as it can always evolve and be adapted to changing circumstances, but neither is it a question of whether the framework can be dispensed with altogether **when specific commitments to the contrary have been made**.") In addition to these cases that address whether legitimate expectations can arise out of the legal framework, a number of investment tribunals have emphasized the need for specific representations as a basis for legitimate expectations. See for example: **RL-225**, *Metalclad Corporation v. United Mexican States* (ICSID Case No. ARB(AF)/97/1) Award, 30 August 2000 ("*Metalclad – Award*"), ¶ 89: ("Metalclad was entitled to rely on the representations of federal officials and to believe that it was entitled to continue its construction of the landfill."); **RL-200**, *Waste Management, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/00/3) Award, 30 April 2004 ("*Waste Management – Award*"), ¶ 98: ("In applying this standard, it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant."); **RL-191**, *International Thunderbird Gaming Corporation v. The United Mexican States* (UNCITRAL) Award, 26 January 2006 ("*Thunderbird – Award*"), ¶¶ 146-148 (concept of legitimate expectations involves reliance on the specific assurances provided by government officials but concluding that the Mexican SEGOB did not generate such expectations through its Oficio relating to gambling machines). *See also* **RL-316**, *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America* (UNCITRAL) Award, 12 January 2011, ¶ 141: ("Ordinarily, reasonable or legitimate expectations of the kind protected by NAFTA are those that arise through **targeted representations** or assurances made explicitly or implicitly by a state party.")

[330] **CL-179**, *Antin Infrastructure Services Luxembourg S.a.r.l. and Antin Energia Termosolar B.V. v. The Kingdom of Spain* (ICSID Case No. ARB/13/31) Award, 15 June 2018. This case, cited by the Claimant, confirms that

framework was a regime applicable to licensees in wireless telecommunications who, at the time, were required to be Canadian owned and controlled.[331] Further, as discussed below, there were no assurances in the regulatory framework that the Minister would approve the sale of Wind Mobile or the transfer of its licences, or would allow the Claimant to acquire voting control of Wind Mobile.

c) A Change in the Legal Framework Is Not a Breach of FET

207. Absent a specific commitment to stabilization, changes in the regulatory framework are not a breach of FET. If it were so, governments could never change their laws to adapt to evolving circumstances and needs or to pursue legitimate policy objectives. Investors should anticipate some degree of change, and as various tribunals have noted it is not a breach of FET for a host State to not provide an entirely stable, unchanged legal and business framework for an investor.[332] This is especially true in regulated sectors such as telecommunications which are

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legitimate expectations may arise from specific representations by the government. ¶ 510 ([…]'specific assurances made by Spain's public officials that the RD 661/2007 would not be materially altered, all confirm that the Claimants' expectations were legitimate."), ¶ 538 ("Third, the expectations of the investor need to originate from some **affirmative action of the State**, either in the form of specific commitments made by the host State to the investor−as several international investment tribunals have recognized−or in the form of representations made by the host State, for example, with respect to certain features of a regulation aimed at encouraging investments in a specific sector. In other words, legitimate expectations cannot arise from subjective considerations of the investor absent an affirmative action of the State which, objectively determined, evidences that the State intended to describe a particular treatment or regime on which the investor could rely when making its investment." This paragraph cites to **RL-317**, *AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary* (ICSID Case No. ARB/07/22) Award, 23 September 2010 ("*AES – Award*"), ¶ 9.3.31 ("In this case, however, the Tribunal observes that no specific commitments were made by Hungary that could limit its sovereign right to change its law (such as a stability clause) or that could legitimately have made the investor believe that no change in the law would occur.")

[331] Canada's Counter-Memorial ¶ 109.

[332] **RL-318**, *Charanne and Construction Investments v. Spain* (SCC Case No. V 062/2012) Final Award [Unofficial English Translation], 21 January 2016, ¶ 510: ("in the absence of a specific commitment toward stability, an investor cannot have a legitimate expectation that a regulatory framework such as that at issue in this arbitration is to not be modified at any time to adapt to the needs of the market and to the public interest"); **RL-208**, *Philip Morris Brand Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay* (ICSID Case No. ARB/10/7) Award, 8 July 2016 ("*Philip Morris – Award*"), ¶ 422: ("It is common ground in the decisions of more recent investment tribunals that the requirements of legitimate expectations and legal stability as manifestations of the FET standard do not affect the State's rights to exercise its sovereign authority to legislate and to adapt its legal system to changing circumstances."); **CL-061**, *El Paso – Award*, ¶ 350: ("Such a standard of behaviour, if strictly applied, is not realistic, nor is it the BITs' purpose that States guarantee that the economic and legal conditions in which investments take place will remain unaltered *ad infinitum*.) ¶ 367: ("it is inconceivable that any State would accept that, because it has entered into BITs, it can no longer modify pieces of legislation which might have a negative impact on foreign investors, in order to deal with modified economic conditions and must

subject to rapid and constant technological changes and where, in order to achieve statutory objectives, the regulator must adjust its policies to changes in the market. As the *Saluka* tribunal stated, it is unreasonable for an investor to expect "that the circumstances prevailing at the time the investment it made [will] remain totally unchanged" and not to take into account the host State's legitimate right to regulate domestic matters.[333]

208. The Claimant argues that changes in the legal and business framework in an important or fundamental manner will breach the FET obligation.[334] However, the fact that the Claimant characterizes certain measures as "fundamental changes" to the applicable regulatory framework does not make it so, nor does it suddenly turn perfectly legitimate actions by the Government, taken in response to changing circumstances, into FET breaches. In the absence of specific representations by the Government, to the investor, that the regulatory framework would not change, no breach of FET can be found.[335] FET provisions in investment treaties are not stability clauses.

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guarantee absolute *legal stability*"), ¶ 372: ("Under a FET clause, a foreign investor can expect that the rules will not be changed without justification of an economic, social or other nature. Conversely, it is unthinkable that a State could make a general commitment to all foreign investors never to change its legislation whatever the circumstances, and it would be unreasonable for an investor to rely on such a freeze."); **RL-206**, *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic* (ICSID Case No. ARB/14/3) Award, 27 December 2016, ¶ 367: ("[…] tribunals have so far declined to sanctify laws as promises"); **RL-317**, *AES – Award*, ¶ 9.3.27-9.3.35; **CL-180**, *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt* (ICSID Case No. ARB/14/4) Award, 31 August 2018, ¶ 9.152, *referring to* **CL-125**, *EnCana – Award*, ¶ 173: ("In the absence of a specific commitment from the host State, the foreign investor has neither the right nor any legitimate expectation that the tax regime will not change, perhaps to its disadvantage, during the period of the investment."); **RL-199**, *Mobil Investments Canada Inc. & Murphy Oil Corporation v. Canada* (ICSID Case No. ARB(AF)/07/4) Decision on Liability and on Principles of Quantum, 22 May 2012, ¶ 153.

[333] **CL-038**, *Saluka – Award*, ¶ 305.

[334] Claimant's Reply, ¶¶ 241, 262.

[335] **RL-205**, *EDF (Services) Limited v. Romania* (ICSID Case No. ARB/05/13) Award, 30 September 2009, ¶ 217: ("The idea that legitimate expectations, and therefore FET, imply the stability of the legal and business framework, may not be correct if stated in an overly-broad and unqualified formulation. The FET might then mean the virtual freezing of the legal regulation of economic activities, in contrast with the State's normal regulatory power and the evolutionary character of economic life. Except where specific promises or representation are made by the State to the investor, the latter may not rely on a bilateral investment treaty as a kind of insurance policy against the risk of any changes in the host State's legal and economic framework. Such expectation would be neither legitimate nor reasonable."); **RL-208,** *Philip Morris – Award*, ¶ 426: ("It clearly emerges from the analysis of the FET standard by investment tribunals that legitimate expectations depend on *specific* undertakings and representations made by the host State to induce investors to make an investment. Provisions of *general* legislation applicable to a plurality of persons or of category of persons, do not create legitimate expectations that there will be no change in the law.")

209. As Canada explains below, in this case Canada provided no specific assurance that the regulatory framework would remain static, and in fact notified licensees that COLs were subject to change. Further, considered in its context, the Transfer Framework was in keeping with longstanding Government policy and not a fundamental change to the applicable regulatory framework.

d) The FET Standard Does Not Allow Tribunals To Second-Guess The Legitimacy Of Government Measures Or Whether They Are Proportional To The Objectives Pursued

210. States have a right to regulate and to determine their own policy objectives. The FET standard in Article II(2)(a) does not give *carte blanche* to investors or tribunals to second-guess these choices. [336] This is exactly what the Claimant invites the Tribunal to do by challenging the reasonableness of Canada's measures and the legitimacy of the policy objectives being pursued.[337] The Claimant's proposition in this regard must be rejected.

211. As past tribunals have noted, the FET standard does not allow second-guessing of government decision making.[338] In other words, the FET standard does not allow tribunals to review the sufficiency or policy rationales regarding States' decisions, or whether a State's choice of measure to attain a policy objective was appropriate.[339]

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[336] Canada's Counter-Memorial, ¶¶ 340-347.

[337] Claimant's Reply, ¶ 241.

[338] The tribunal decisions in *S.D. Myers, Chemtura, Mesa Power, Thunderbird* all found that the State should be accorded deference with respect to its policy choices and that the minimum standard does not allow for second-guessing government decisions. (**CL-027**, *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL) Partial Award, 13 November 2000, ¶¶ 261-263; **RL-183**, *Chemtura Corporation v. Government of Canada* (UNCITRAL) Award, 2 August 2010, ¶ 134; **RL-105**, *Mesa Power Group LLC v. Government of Canada* (UNCITRAL) Award, 24 March 2016, ¶ 505; **RL-191**, *Thunderbird – Award*, ¶ 160). Also finding deference with respect to decisions by governments within a field of expertise see **CL-082**, *Crystallex International Corporation v. Venezuela* (ICSID Case No. ARB(AF)/11/2), Award, 4 April 2016, ¶ 581; **RL-177**, *Glamis – Award*, ¶ 779: ("[I]t is not the role of this Tribunal, or any international tribunal, to supplant its own judgment of underlying factual material and support for that of a qualified domestic agency. Indeed, our only task is to decide whether Claimant has adequately proven that the agency's review and conclusions exhibit a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons so as to rise to the level of a breach of the customary international law standard embedded in Article 1105.")

[339] **CL-059**, *Gemplus, S.A., et al. v. Mexico* (ICSID Case Nos ARB(AF)/04/3 and ARB(AF)/04/4) Award, 16 June 2010 ("*Gemplus – Award*"), ¶ 6-26: ("Fourth, as to deference, the Tribunal accepts the Respondent's submissions to the effect that this Tribunal should not exercise 'an open ended mandate to second-guess

212. Indeed, tribunals have acknowledged the complex balancing between different interests and considerations that are inherent in governmental decisions, and have refused to intervene to second-guess governments' choices of policies and measures to achieve these policies. For example, in *Philip Morris*, the Tribunal refused to find a breach of FET, deferring to the respondent State's discretion in implementing a regulatory change and stated that, "[t]he fair and equitable treatment standard is not a justiciable standard of good government, and the tribunal is not a court of appeal."[340]

213. Considering whether a measure is arbitrary and in breach of the FET standard should not entail an examination of the merit of the measure. As stated in Canada's Counter-Memorial, the FET standard does not protect against arbitrary measures unless they are devoid of legitimate policy purpose and contrary to the rule of law.[341] The Claimant argues for a broader standard and consideration of whether the measures adopted by Canada are reasonable and proportionate to the alleged objective.[342] However, the minimum standard at customary international law does not allow for such an analysis of proportionality in determining a breach of FET, and arbitrariness is a much more exacting standard. [343]

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government decision-making', in the words of the arbitration tribunal in *S.D. Myers*."); **RL-319**, *Electrabel S.A. v. Republic of Hungary* (ICSID Case No. ARB/07/19) Award, 25 November 2015, ¶ 181: ("It is all too easy, many years later with hindsight, to second-guess a State's decision and its effect on one economic actor, when the State was required at the time to consider much wider interests in awkward circumstances, balancing different and competing factors.")

[340] **RL-208**, *Philip Morris – Award*, ¶ 418.

[341] Canada's Counter-Memorial, ¶¶ 348-351.

[342] Claimant's Reply, ¶ 266.

[343] Canada's Counter-Memorial, ¶¶ 348-351. With respect to proportionality, cases cited by the Claimant including *Tecmed* and *Azurix*, referred to proportionality in the context of expropriation but not FET (**CL-031**, *Tecmed – Award* , ¶ 122 and **CL-039**, *Azurix Corp. v. The Argentine Republic* (ICSID Case No. ARB/01/12) Award, 14 July 2006 ("*Azurix – Award*"), ¶ 311). This is further explored by Bücheler in **RL-269**, Gebhard Bücheler, *Proportionality in Investor-State Arbitration* (Oxford, United Kingdom: Oxford University Press, 2015), p. 193, who writes, "The tribunals adjudicating claims arising out of the 2001-3 Argentine crisis are not alone in their hesitance to explicitly endorse proportionality as an analytical tool in interpreting and applying FET provisions. While there are some notable exceptions, references to proportionality in arbitral jurisprudence are still rather scarce. One of these exceptions is the 2012 decision in *Occidental v. Ecuador* […]. Here, the tribunal held that 'fair and equitable treatment has on several occasions been interpreted to import an obligation of proportionality.' Three out of four decisions relied on by the tribunal in support of this proposition, however, referred to proportionality in the context of expropriation but not FET: this is true for *LG&E, Azurix,* and *Tecmed.* In *MTD v Chile*, the fourth decision cited by the *Occidental* tribunal, both parties agreed with Judge Schwebel's statement that FET

214. Based on the foregoing, it is clear that the application of the minimum standard of treatment does not allow for the Tribunal to consider the legitimacy and proportionality of Canada's measures to the objectives of policy decisions. As will be demonstrated below, none of the Claimant's assertions about Canada's conduct approach the high threshold of arbitrariness that tribunals have considered to constitute breaches of the FET standard.

e) The Claimant Does Not Substantiate the Existence Or Content Of Any Transparency Or Due Process Obligation Required By The FET Standard

215. The Claimant argues that the FET standard requires States to act transparently and with due process but does not substantiate the content of these obligations.[344] As noted in Canada's Counter-Memorial, the FET standard does not contain a general obligation of transparency or due process.[345] Cases including *Merrill & Ring v. Canada* and *Cargill v. Mexico* have held that there is no obligation of transparency under customary international law.[346] Nor does international law set out the precise extent of due process obligations in the context of national

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'encompass[es] such fundamental standards as good faith, due process, non-discrimination, and *proportionality.'* Still, the *MTD* tribunal did not engage in a proportionality analysis." (citing to **CL-041**, *LG&E – Decision on Liability*, ¶ 195; **CL-039**, *Azurix – Award*, ¶ 311; **CL-031**, *Tecmed – Award*, ¶ 122; **CL-033**, *MTD Equity Sdn. Bhd. And MTD Chile S.A. v. Republic of Chile* (ICSID Case No. ARB/01/7) Award, 25 May 2004, ¶¶ 109, 115; **CL-065**, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador* (ICSID Case No. ARB/06/11) Award, 5 October 2012 ("*Occidental – Award*")). **CL-061**, *El Paso – Award*, ¶ 243 also relied on the **CL-031**, *Tecmed – Award* in discussing proportionality with respect to expropriation.

[344] Claimant's Reply, ¶ 267.

[345] Canada's Counter-Memorial, ¶¶ 358-360.

[346] **RL-184**, *Merrill & Ring – Award*, ¶ 231; **RL-173**, *Cargill, Incorporated v. United Mexican States* (ICSID Case No. ARB(AF)/05/2) Award, 18 September 2009, ¶ 294. *See also*, **RL-308**, *United Mexican States v. Metalclad Corporation*, 2001 BCSC 664, Reasons for Judgment of the Honourable Mr. Justice Tysoe, 2 May 2001, ¶ 68: ("No authority was cited or evidence introduced to establish that transparency has become part of customary international law.") With respect to the applicable FET standard, only a complete lack of transparency has been seen as a relevant factor to the extent that it was contrary to representations made by the host state: **RL-200**, *Waste Management – Award*, ¶ 98: ("Taken together, the *S.D. Myers*, *Mondev*, *ADF* and *Loewen* cases suggest that the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.")

security reviews. As such, the Claimant's efforts to find Canada's lack of transparency and due process as a violation of FET must be dismissed.

216. In any event, as demonstrated below, Canada accorded transparency and due process in its dealings with the Claimant.

2. The National Security Review of the Claimant's Application to Acquire Voting Control of Wind Mobile Did Not Breach Canada's Fair and Equitable Treatment Obligation under Article II(2)(a)

a) Summary of Canada's Position

217. For the reasons set out above in section II.B and in Canada's Memorial on Jurisdiction,[347] the Tribunal lacks jurisdiction over GTH's claim that Canada's treatment of its application to acquire voting control of Wind Mobile breached the FET obligation guaranteed by Article II(2)(a) of the FIPA.[348] In the alternative, if the Tribunal finds that it has jurisdiction to rule on this claim, GTH's arguments must still be rejected. The facts set out in the witness statements and documents filed by the Claimant in this arbitration fall far short of the threshold required to establish a breach of the FET obligation guaranteed by the FIPA.

218. The Reply repeats many of the same arguments GTH raised in its Memorial and suffers from the same fundamental flaws. The Claimant employs its misguided and oft-repeated theory that the Government used the "pretense of a national security review"[349] to achieve telecommunications policy objectives as a procrustean bed, stretching or simply ignoring facts to fit its theory.

219. The evidence on the record, including a considerable number of documents that Canada produced to GTH in response to its document requests, most of which the Claimant chose not to refer to in its Reply, shows that the decision to initiate a national security review of GTH's proposed acquisition of voting control of Wind Mobile was based on national security concerns that were raised by prescribed investigative bodies.

[347] Canada's Memorial on Jurisdiction, section III(C).

[348] Claimant's Reply, section IV.A.3.

[349] Claimant's Reply, ¶ 314.

220. As Jenifer Aitken, who at the time occupied the position of Director General Investment Review, explains in her second Witness Statement, the national security review was initiated because of national security concerns and not for a purported objective of achieving a fourth wireless telecommunications carrier at all costs. [redacted]

221. Ultimately, the Claimant had no right to a perfunctory and predetermined *ICA* review. All it had a right to and could expect was a fair and impartial review under the *ICA* of its voting control application, which is exactly the treatment that it received.

222. The evidence also establishes that, in conducting the national security review under the *ICA*, Canada accorded GTH due process in reviewing its application to obtain voting control of Wind Mobile. GTH was provided with sufficient information to understand the nature of Canada's national security concerns and, as contemplated by the *ICA*, had numerous opportunities to assess how it could address them and to make representations in person or by a representative.[352] [redacted] Moreover, it is unseemly for GTH to complain about the length of the review process [redacted] which, in any case, was not unduly long.

[350] **C-009**, *Investment Canada Act*, R.S.C. 1985, c. 28, 1st Supp., s. 14(1).

[351] **RWS-Aitken-2**, ¶ 10.

[352] See subsection 25.3(4) of the *ICA*, which allows a non-Canadian to make representations to the Minister either in person or by a representative. (**C-009**, *Investment Canada Act*, R.S.C. 1985, c. 28, 1st Supp., s. 25.3(4).)

[353] Subsection 25.3(6) of the *ICA* contemplates that the Minister and the non-Canadian can agree to extensions of the time period for review prescribed under the National Security Review of Investment Regulations. (**C-009**, *Investment Canada Act*, R.S.C. 1985, c. 28, 1st Supp., s. 25.3(6).)

b) The Fact That Wind Mobile Was Subject To An Ownership And Control Review or That Canada Liberalized the Applicable Ownership And Control Rules Did Not Entitle GTH To A Perfunctory or Predetermined *ICA* Review

223. The Claimant argues that Canada's national security review of GTH's efforts to acquire voting control of Wind Mobile "must be viewed in its proper context,"[354] which allegedly includes Canada's earlier ownership and control reviews as well as Canada's decision to liberalize the Canadian ownership and control requirements in the telecommunications sector in June 2012. However, the Claimant fails to appreciate the fundamentally different contexts in which ownership and control reviews and *ICA* reviews operate.

224. Jenifer Aitken explains in her first Witness Statement[355] that the ownership and control reviews that Wind Mobile was subjected to at the time it won AWS-1 spectrum licences in 2009 was entirely separate from the review processes set out in the *ICA*. The reviews conducted by the Spectrum Management and Operations Branch of Industry Canada and the CRTC focused on Wind Mobile and whether it complied with the ownership and control requirements set out at the time in the *Telecommunications Act* and the *Radiocommunication Regulations.* The examination of Wind Mobile's shareholders' agreement was done in that context to determine whether Wind Mobile was Canadian owned and controlled.[356] In contrast, the reviews conducted under the *ICA* were led by the IRD. They focused on GTH and whether its application to acquire voting control of Wind Mobile was likely to be of net benefit to Canada, and whether the proposed acquisition would be injurious to Canada's national security. Given the fundamental differences in focus and purpose of both types of reviews, the ownership and control reviews of Wind Mobile had no relevance to the review of GTH's application to acquire voting control of Wind Mobile under the *ICA.* The *ICA* is a law of general application that applies to all sectors, including sectors in which there are no Canadian ownership and control requirements.

[354] Claimant's Reply, ¶ 303.

[355] **RWS-Aitken**, ¶ 44.

[356] Canada's Counter-Memorial, ¶ 259.

225. Similarly, the liberalization in June 2012 of the Canadian ownership and control requirements in the telecommunications sector could not have led GTH to believe that the *ICA* review of its proposed acquisition would be fast-tracked or that it would be exempt from the *ICA* review process. None of the policy review panels or parliamentary committees to which GTH refers in its pleadings[357] ever suggested, much less recommended, that the acquisition of Canadian telecommunications common carriers by foreign investors should be exempted from review under the *ICA* or subject to an expedited *ICA* review. Quite the opposite, the Report of the Standing Committee on Industry, Science and Technology stressed the continued application of the *ICA*:

> While this reform [the liberalization of the Canadian ownership and control requirements] could conceivably lead to foreigners gaining control of a Canadian telecommunications carrier, the Committee is confident that the Investment Canada Act provides the government with the tools it needs to ensure that substantial foreign investment will be carried out in a way that is consistent with the public interest.[358]

226. The fact that ownership restrictions were liberalized in the telecommunications sector did not limit in any way the Government's ability to conduct net benefit or national security reviews in that sector under the *ICA*. The Government of Canada's determination that the manner in which GTH structured its minority investment in Wind Mobile in 2008 complied with the then applicable Canadian ownership and control requirements did not mean that Industry Canada had "signed off"[359] on GTH's option to acquire voting control of Wind Mobile in respect of the reviews that needed to be conducted under the *ICA*. [redacted]

[357] Claimant's Memorial, ¶¶ 171, 176-177; Claimant's Reply, ¶ 303.

[358] **C-042**, House of Commons – Canada, *Opening Canadian Communications to the World – Report of the Standing Committee on Industry, Science and Technology* (Apr. 2003, p. 55.

[359] **CWS-Dobbie**, ¶ 31.

[360] Canada's Counter-Memorial, ¶ 429; [redacted].

c) Canada's National Security Concerns Relating to GTH's Proposed Acquisition of Voting Control of Wind Mobile Triggered the National Security Review

227. GTH challenges Canada's motives for initiating a national security review of its application to acquire voting control of Wind Mobile, and implies that the national security review was used to meet the purported objective of achieving a fourth wireless telecommunications carrier at all costs. [redacted]

361 [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

362 [redacted]

[redacted]

[redacted]

[redacted]

363 [redacted].

364 **RWS-Aitken**, ¶ 66; **RWS-Aitken-2**, ¶ 8.

365 [redacted]

366 See section 20 of the *ICA* which lists the factors to be taken into account by the responsible Minister in making a determination under section 21 of the ICA as to whether or not an investment is likely to be of net benefit to Canada. In particular, the responsible Minister must take into account, where relevant, the factors in subsection 20(f) of the ICA which contemplate "…the compatibility of the investment with national industrial, economic and cultural policies." (**C-009**, *Investment Canada Act*, R.S.C. 1985, c. 28, 1st Supp., s. 20.)

[redacted] The Claimant has referred to Mr. Stewart's letter in its Reply,[368] yet it has chosen to ignore the fact that the letter is clearly at odds with its theory that the national security review was a pretense to advance telecommunications policy objectives. From a telecommunications policy perspective, GTH's acquisition of voting control of Wind Mobile was seen as potentially leading to more investment in Wind Mobile which would advance Canada's telecommunications policy objectives and further competition in the wireless telecommunications sector. In contrast, the initiation of the national security review [redacted] cannot be characterized as a tool to advance those same interests. The Government would have had no need to initiate a national security review to advance telecommunications policy objectives if those objectives could have been advanced by simply allowing the investment to be assessed under the *ICA* net benefit review. On the contrary, when examined strictly from the perspective of Canada's telecommunications policy objectives, the initiation of the national security review could even be seen as counterproductive.

231. In advancing its argument that the national security review was used to achieve Canada's telecommunications policy, the Claimant has also ignored the substantial number of documents that Canada produced in response to its document requests no. 10 and 11 in respect of the Government of Canada's national security review. Although some of these documents have been redacted to protect special political or institutional sensitivities, Canada's document production in this arbitration shows that the prescribed investigative bodies and Public Safety were engaged throughout the duration of the national security process. The national security concerns raised by the prescribed investigative bodies and Public Safety initiated and drove the national security review under the *ICA*.[369] The level of engagement of the prescribed investigative bodies and Public Safety is evidence of both the seriousness of the Government's national security concerns, and the statutory role that such entities play within the *ICA* national security review process. Such involvement further supports the Government of Canada's position that the national

[367] **C-336**, Letter from Iain Stewart to Marie-Josée Thivierge, *attaching* Case Summary (Dec. 14, 2012), p. 1. *See also* **RWS-Aitken-2**, ¶ 6.

[368] Claimant's Reply, ¶ 61.

[369] **RWS-Aitken-2**, ¶¶ 4-5, 10.

security review was not used as a pretense to address other matters unrelated to national security, such as concerns with the level of competition in the wireless telecommunications sector. [redacted]

232. As the existence of these documents shows, and as confirmed by Canada's witnesses in this arbitration,[375] the national security review of VimpelCom's proposed acquisition of voting

[370] [redacted]

[375] **RWS-Stewart-2**, ¶ 26; **RWS-Aitken-2**, ¶ 4-5, 10.

control of Wind Mobile was initiated and performed based on information that originated with the prescribed investigative bodies.

234.

[376] Claimant's Reply, ¶ 307.

[377]

2.

[380] Claimant's Reply, ¶ 307.

[redacted]

d) Canada Accorded GTH Due Process in the Context of the National Security Review

235. By their very nature, national security reviews cannot be performed in a completely transparent manner. The special institutional sensitivity regarding disclosure of certain information, which the Tribunal has already found to be compelling in Procedural Order No. 4, similarly prevented Canada from disclosing the same information to GTH in the course of the national security review of its proposed acquisition of voting control of Wind Mobile. Canada described the special institutional sensitivity in its Response to the Claimant's Challenge to Canada's Privilege Claims:

> There are many reasons why the disclosure of certain documents generated for the national security review of a proposed investment could be injurious to the national security of Canada. Documents may reveal the identity of a confidential source of information, the targets of investigations, persons of interest and the existence of past, present or anticipated national security investigations. Disclosing such information would diminish the operational capacity and the ability to fulfill the security agencies' statutory mandates. It would also jeopardize the efficacy of ongoing and future operations by prompting targets to take measures to thwart these operations. Documents may reveal sensitive Canadian or allied methods, capabilities and techniques, including the means of covertly collecting, storing and communicating information and intelligence and the effectiveness of such techniques. Disclosing such information would prejudice the efficacy of any future use of these techniques and reveal Canadian and allied capabilities thereby allowing targets to change their methods of operation in the hope of thwarting these

[381] [redacted]

> techniques. Documents may also reveal confidential relationships Canada maintains with foreign governments or institutions, and information received in confidence from foreign sources. The disclosure of such information would prejudice Canada's relationship with allied agencies, undermine existing information sharing regimes and cause a possible chill on information flow. The disclosure of such documents may also reveal the names of protected employees, contact information, addresses, internal administrative procedures and methods of operation. The disclosure of such information would reveal the identity and contact information of individuals working under covert circumstances, thereby limiting their ability to conduct their work, and in some cases, placing the individual in danger. Also, gathered over time, administrative procedures and methodologies may reveal the manner in which an agency conducts its business, thereby allowing contrary interests to understand aspects of covert operations, and adjust their behaviour to frustrate these processes.[382]

236. These concerns are equally applicable regardless of whether the information is disclosed in the context of a regulatory review, or in the context of arbitration proceedings.

237. Moreover, it is not accurate to state that GTH was "completely left in the dark"[383] regarding Canada's national security concerns. [redacted]

[382] Canada's Response to the Claimant's Challenge to Canada's Privilege Claims, pp. 11-12.

[383] Claimant's Reply, ¶ 300.

[384] Claimant's Reply, ¶ 305.

[385] [redacted]

[redacted]

[redacted]

> [redacted]
>
> [redacted]
>
> [redacted]
>
> [redacted].

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386 [redacted]

[redacted]

[redacted]

[redacted]

239. As a result of the foregoing, GTH cannot sustain its claim that "[a]t no stage did GTH and VimpelCom understand the national security concerns against it."[390] [redacted]

[redacted]

[389] [redacted]

[390] Claimant's Reply, ¶ 65.

[redacted]

242. The Claimant's arguments pertaining to the adoption in December 2016, after the initiation of this arbitration, of the Guidelines on the National Security Review of Investments ("NSR

[391] [redacted]

[392] Claimant's Reply, ¶ 306.

[393] Claimant's Reply, ¶ 304.

[394] Canada's Counter-Memorial, ¶ 440.

[395] [redacted]

Guidelines") are also without merit. The NSR Guidelines cannot be considered as a recognition that the "prior process was deficient"[397] for the simple reason that they did not change in any way the process through which national security reviews are conducted. The NSR Guidelines were adopted under the authority of section 38 of the *ICA*, which authorizes the Minister to "issue and publish, in such manner as the Minister deems appropriate, guidelines and interpretation notes with respect to the application and administration of any provisions of this Act or the regulations."[398] This provision does not authorize the Minister to amend or otherwise modify the rules adopted by Parliament and the Government in the *ICA* and its regulations. As Jenifer Aitken explains in her first Witness Statement, the NSR Guidelines were adopted to clarify "some of the relevant factors that the Minister or the GiC would typically consider during the course of a national security review."[399] GTH would have been subjected to the same review process had the NSR Guidelines been issued and published before its proposed acquisition of Wind Mobile. In any event GTH fails to explain how the NSR Guidelines, had they been issued, would have changed anything in the review process that applied to its proposed investment.

e) The Tribunal Should Not Second-Guess Canada's National Security Determinations

243. Presumably to avoid the application of the exclusion in Article II(4)(b), GTH alleges that it is not challenging the outcome of the national security review of its proposed acquisition of voting control of Wind Mobile [redacted] but rather, "Canada's improper treatment of GTH that led to an unjustified conclusion".[400] This deceptive distinction does not hold. While the Claimant professes not to challenge [redacted], it is clear that this is exactly what it seeks to do. GTH invites the Tribunal to second-guess the existence of national security concerns upon which Canada conducted a national security review [redacted] and to exit the

[397] Claimant's Reply, ¶ 313.

[398] **C-009**, *Investment Canada Act*, R.S.C. 1985, c. 28 (1st Supp.), s. 38.

[399] **RWS-Aitken**, ¶¶ 38-39.

[400] Claimant's Reply, ¶ 157.

market. GTH is therefore necessarily calling into question the outcome of the *ICA* review process.

244. In its Reply, GTH makes the dubious statement that national security reviews "are owed no special deference when it comes to ensuring that the subjected investor is afforded the basic elements of FET."[401] The Claimant's statement is contradicted by the very same authorities it cites to support its statement. The majority of the arbitral tribunal in *CC/Devas & al.* cautioned that:

> An arbitral tribunal may not sit in judgment on national security matters as on any other factual dispute arising between an investor and a State. National security issues relate to the existential core of a State. An investor who wishes to challenge a State decision in that respect faces a heavy burden of proof, such as bad faith, absence of authority or application to measures that do not relate to essential security interests.[402]

245. The arbitral tribunal that heard the *Deutsche Telekom AG* dispute similarly accepted that a "degree of deference" is owed to a State's assessment as to the existence of essential security interests but at the same time stated that "such deference cannot be unlimited."[403]

246. Both the *CC/Devas* and *Deutsche Telekom* tribunals ultimately found India liable for breaches of its treaty obligations as a result of its decision to cancel an agreement between a state-owned enterprise and a foreign investor to lease spectrum capacity on two satellites. The *CC/Devas* tribunal, by a majority, accepted that the cancellation of the lease agreement was at least partially directed to the protection of its essential security interests.[404] It found that the reservation of spectrum for the needs of defence and para-military forces "can be classified as 'directed to the protection of [India's] essential security interests'" and thus covered by the essential security interest clause in the Mauritius-India BIT. The tribunal did not reach the same conclusion, however, with respect to spectrum reservation for "railways and other public utility

[401] Claimant's Reply, ¶ 300.

[402] **CL-164**, *CC/Devas (Mauritius) Ltd., et al. v. The Republic of Inidia* (UNCITRAL) Award on Jurisdiction and Merits, 25 July 2016 ("*CC/Devas – Award*"), ¶ 245.

[403] **CL-173**, *Deutsche Telekom AG v. The Republic of India* (UNCITRAL) Interim Award, 13 December 2017 ("*Deutsche Telekom – Interim Award*"), ¶ 235.

[404] **CL-164**, *CC/Devas – Award*, ¶ 358.

services as well as for societal needs, and having regard to the needs of the country's strategic requirements."[405]

247. The *Deutsche Telekom* tribunal rejected India's defense based on the essential security interest clause in the Germany-India BIT, which, contrary to the clause contained in the Mauritius-India BIT, contains a necessity test. The evidence in that case, including evidence of India's own military forces, did not establish that the cancellation of the lease was required to address India's military needs.[406] The tribunal also found that the cancellation was motivated by other societal needs that were unrelated to national security.[407] The tribunal did state, however, that it "would of course accept that the so called strategic needs expressed by the Armed Forces meet the test for essential security interests" and that it would likewise "accept the same qualification for the national security interests expressed by the so-called 'internal security agencies', such as the Border Security Force, the Central Industrial Security Force or the Central Reserve Police Force."[408]

248. Contrary to the claimants in the *CC/Devas* and *Deutsche Telekom* cases, the Claimant has not adduced any evidence to show that considerations other than the national security concerns identified by prescribed investigative bodies triggered the national security review of GTH's proposed acquisition of voting control of Wind Mobile, [redacted] There is thus no reason to second-guess the

[405] **CL-164**, *CC/Devas – Award*, ¶ 354.

[406] **CL-173**, *Deutsche Telekom – Interim Award*, ¶¶ 245, 261.

[407] **CL-173**, *Deutsche Telekom – Interim Award*, ¶¶ 281, 282.

[408] **CL-173**, *Deutsche Telekom – Interim Award*, ¶ 281.

[409] [redacted].

determinations of Canada's prescribed investigative bodies or find that Canada's national security review "was without any legitimate basis and was, therefore, arbitrary and unreasonable."[410]

249. The evidence before this Tribunal shows that the review of GTH's application to acquire voting control of Wind Mobile rigorously complied with the process set out in the *ICA* and its regulations. [redacted]

As Canada explained in its Counter-Memorial, this highly structured and regulated process is designed to ensure that the outcome is not manifestly arbitrary and irrational.[412]

[410] Claimant's Reply, ¶ 314.

[411] [redacted]

[412] Counter-Memorial, ¶ 435.

f) [redacted]

250. [redacted]

[redacted]

[413] Claimant's Reply, ¶¶ 69-75, 310-311.

[414] [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[417] **RWS-Aitken**, ¶ 71. *See also* **RWS-Aitken-2**, ¶ 10.

[418] [redacted]

[419] **RWS-Aitken-2**, ¶ 10; **RWS-Stewart-2**, ¶ 31.

3. The Transfer Framework Did Not Breach the FET Obligation Under Article II(2)(a)

a) Summary of Canada's Position

255. The Claimant argues that Canada breached the FET obligation in the FIPA by "blocking" the sale of Wind Mobile and Wind Mobile's licences as a result of the Transfer Framework. As explained in section II.E above, this claim is *prima facie* flawed because the Transfer Framework did not affect GTH's ability to sell its equity or debt interests in Wind Mobile to any buyer. Moreover, the Claimant's allegations that the Transfer Framework breached the FET obligation under Article II(2)(a) of the FIPA are not only based on erroneous interpretation of the standard, – they are also unsupported by the facts of this case. The evidence establishes that the Transfer Framework did not frustrate any promise or assurance made to GTH; it was not contrary to any legitimate expectations; it did not represent a fundamental change in the applicable legal framework; and it was not an arbitrary measure by Canada designed to target the Claimant. As such, on the facts alone, there is no basis for this claim.

256. At no time did Canada ever provide GTH with a "right" to sell Wind Mobile or transfer Wind Mobile's licences to an Incumbent. The Claimant portrays its inability to sell Wind Mobile or to transfer Wind Mobile's licences as a violation of its expectations. To the extent this is relevant to the FET standard, which Canada denies, the Claimant has not established that GTH had a right to do so, or provided evidence of clear and unambiguous representations by Canada that it would be allowed to do so. Instead, it relies on inappropriate inferences and points to speculations of market participants as to what would happen at the end of the five-year moratorium. None of this is relevant to establish a breach of Article II(2)(a). In fact, Canada made no explicit or implicit representations, commitments, promises, or otherwise provided assurances to New Entrants or Wind Mobile in particular that New Entrants would have a right to transfer their spectrum licences to Incumbents after the five-year period. Instead, Canada explicitly stated that all licence transfer requests would be subject to obtaining the Minister's approval, with no indication as to whether they would be approved.

257. With the Transfer Framework, the Minister clarified that he would exercise his existing discretion to approve or disapprove spectrum licence transfer requests by considering, amongst

other things, spectrum concentration, given the influence of this factor on competition in the telecommunications market. It was not an arbitrary measure. To the contrary, Industry Canada introduced the Transfer Framework after thorough consideration of various options; consultations with all stakeholders, including licensees; and in furtherance of the Government's long-standing objective of fostering competition in the wireless telecommunications sector. Moreover, there was no fundamental change of the regulatory framework: the Transfer Framework was consistent with the applicable regulatory framework.

258. Finally, the Transfer Framework did not "block" the transfer of New Entrants' licences to Incumbents, as the Claimant suggests. Under the Transfer Framework each request would be considered on a case-by-case basis based on the circumstances prevailing at the time of the request, and whether the transfer raised spectrum concentration concerns. Wind Mobile did not request the Minister's approval to transfer its licences to an Incumbent, and Canada did not deny it.

b) The Claimant's Allegation That The Transfer Framework Was Inconsistent With GTH's Expectations Is Not Based On Assurances Given To It By Canada, But On A Mischaracterization Of The Regulatory Framework Applicable To Wind Mobile's Licences

259. The Claimant argues that by not allowing the sale of Wind Mobile or the transfer of Wind Mobile's licences to Incumbents, Canada acted inconsistently with GTH's legitimate expectations on which its decision to invest was premised. However, the Claimant fails to make out such a claim on the facts. Neither the regulatory framework nor Canada's previous approvals of certain transfers granted the Claimant a right or a guarantee that it could sell Wind Mobile or transfer its spectrum licences to an Incumbent; and the Claimant provides no evidence that this was an essential consideration in its decision to invest in Wind Mobile. The Claimant fails to demonstrate that it had any legitimate expectations upon which it relied and which Canada frustrated.

(i) The Existing Regulatory Framework Did Not Guarantee That Wind Mobile's Licences Could Be Transferred To Incumbents At The End Of The Five-Year Moratorium

260. Nothing in Industry Canada's general policy documents related to spectrum auctions and licensing procedures, or in the specific instruments for the 2008 AWS-1 Auction, provides any right to licensees to transfer their spectrum licences without first obtaining Ministerial approval. Nor can such a right be found in the COLs for the 2008 AWS-1 set-aside licences which set out the rights and obligations of licensees.

261. As explained in Canada's Counter-Memorial and in the Witness Statements of Peter Hill and Iain Stewart, the COLs that were included in AWS-1 licences contained a restriction on the transfer of set-aside spectrum licences to Incumbents for five years, but no automatic right to do so after that period.[420] The COLs in Wind Mobile's licences provided that "[l]icences acquired through the set-aside of spectrum […] **may not** be transferred […] to an [Incumbent] for a period of 5 years."[421] Contrary to what the Claimant suggests, the COLs did not provide that, after the five-year period, licences could automatically be transferred to anyone or that the Minister would allow transfers to Incumbents.[422] Despite the Claimant's efforts to read into the COLs a "condition" that provided that they would be "permitted to sell their set-aside spectrum licenses to an Incumbent after the expiration of the five-year restriction on transfer",[423] the COLs contain no such language. Instead, the COLs provided that after five years, "the licensee may apply in writing to transfer its licence."[424] Contemplating that licensees can submit a request to transfer does not imply an automatic right to transfer. It implies the very opposite conclusion: New

[420] **RWS-Hill**, ¶¶ 111-112; **RWS-Stewart**, ¶¶ 28, 32.

[421] **C-010**, Letter from Michael D. Connolly, Industry Canada to Kenneth Campbell, Globalive Wireless Management Corp., attaching Wind Mobile Licences (Mar. 13, 2009) (see paragraph 2 of the licence conditions).

[422] **RWS-Hill-2**, ¶¶ 9-10; **R-478**, AWS Announcement Questions and Answers (Nov. 27 2007), pp. 7-8: ("Q15 - Could new entrants use a set-aside to flip the spectrum for profit at the expense of taxpayers? No. A condition of licence will stipulate that the Spectrum acquired under a set-aside cannot be sold to companies that are not eligible for the set-aside, for 5 years […] There is nothing automatic about a licence transfer. The transfer of a licence is subject to Ministerial approval.") (emphasis added).

[423] Claimant's Reply, ¶ 273.

[424] **C-010**, Letter from Michael D. Connolly, Industry Canada to Kenneth Campbell, Globalive Wireless Management Corp., attaching Wind Mobile Licences (Mar. 13, 2009) (see paragraph 2 of the licence conditions).

Entrants had no right to transfer set-aside spectrum to Incumbents without requesting it *and* obtaining Ministerial approval. [425]

262. The Claimant attempts to support its interpretation of the regulatory framework by referring to selective extracts of internal departmental briefing notes from late 2012 examining options to respond to spectrum concentration concerns.[426] The Claimant points in particular to a briefing note that refers to the absence of additional restrictions on transfers and to a return to the *status quo* at the end of the five-year moratorium.[427] The document does not however refer to a right for licensees to transfer licences. It simply confirms that at the end of the five-year moratorium, the "additional restriction" included as a condition of licence for New Entrants – that the Minister would not accept *any* requests to transfer spectrum to Incumbents for five years – would no longer apply; and after that period, transfers *may* be permitted but would still "require the approval of Industry Canada."[428] In other words, any transfer request would be subject to the otherwise applicable process which required Ministerial approval. In that sense, there was a "finite" period during which the prohibition would apply and a return to the *status quo* regarding spectrum licence transfers afterwards. The *status quo* did not however imply an automatic right to transfer licences. It only meant that the prohibition no longer applied.[429]

263. For the same reasons, contrary to what the Claimant continues to argue, the enhanced divisibility and transferability rights that attached to AWS-1 licences did not grant licensees a right to "freely" transfer their licences.[430] Nothing in the spectrum management regulatory framework provides a right to freely transfer licences without Ministerial approval. Under the *Radiocommunication Act*, spectrum can only be used in accordance with an authorization issued

[425] **RWS-Hill-2**, ¶¶ 9-10.

[426] Claimant's Reply, ¶¶ 48, 282.

[427] Claimant's Reply, ¶¶ 48, 282, citing to **C-258**, Memorandum from Iain Stewart to Deputy Minister, Industry Canada, Update on Wireless Telecom Sector (Dec. 7, 2012), pp. 5, 6, 23.

[428] **C-258**, Memorandum from Iain Stewart to Deputy Minister, Industry Canada, Update on Wireless Telecom Sector (Dec. 7, 2012), Exhibit Page 6.

[429] **RWS-Stewart-2**, ¶ 7.

[430] Claimant's Reply, ¶ 4(b); Canada's Counter-Memorial, ¶¶ 194-196.

by the Minister and only the Minister can issue spectrum licences. No licensee has the unilateral right to transfer its spectrum licence to a party of its choosing.[431]

264. Spectrum licences, contrary to radio licences, have enhanced divisibility and transferability rights to account for the need to make adjustments to spectrum holdings.[432] But these rights are made explicitly subject to the "conditions stated on the licence and other applicable regulatory requirements."[433] This always included the requirement to obtain the Minister's approval with respect to any transfer of licences, including for AWS-1 licences.[434] This discretion to approve or deny licence transfers is essential to enable the Minister to properly manage spectrum in accordance with the objectives of the *Radiocommunication Act*, having regard to the policy objectives of the *Telecommunications Act*.[435]

265. The Claimant seeks support for its argument from the fact that Canada was aware that "after five years, it was possible that […] no New Entrants would remain."[436] It concludes on this basis that Canada had accepted that New Entrants could transfer set-aside licences to Incumbents because Canada knew that New Entrants would expect "a valuable exit strategy."[437] It is true that Canada was aware that its efforts to foster competition may not succeed (or that some New Entrants in the market may not succeed in establishing themselves). Indeed, Canada had warned licensees that it could not guarantee their success, given that success of New Entrants depended on a number of factors, many of which were beyond Canada's control.[438] However, this observation in no way suggests that Canada intended or accepted that all set-aside

[431] **RWS-Hill**, ¶¶ 105-106; **RWS-Hill-2**, ¶¶ 12-14; **R-359**, *TELUS Communications Company v. Attorney General of Canada*, 2014 FC 1, Affidavit of Peter Hill (Sept. 27, 2013), ¶¶ 12-20.

[432] **RWS-Hill-2**, ¶ 8.

[433] **C-003**, Industry Canada, Licensing Procedure for Spectrum Licences for Terrestrial Services (CPC-2-1-23, Issue 2) (Sep. 2007) ("Licensing Circular, Issue 2"), p. 4.

[434] **RWS-Hill-2**, ¶ 8: "Enhanced transferability never meant that licence holders had a *carte blanche*, unilateral right to transfer spectrum licences without Ministerial approval or with only a cursory review on eligibility. The Minister always retained discretion to approve or disallow a spectrum licence transfer. *See also* **RWS-Hill**, ¶¶ 106, 109-112.

[435] **RWS-Hill-2**, ¶ 14.

[436] Claimant's Reply, ¶ 38(d).

[437] Claimant's Reply, ¶ 38(a).

[438] **RWS-Hill-2**, ¶ 18.

licences would end up in the hands of Incumbents.[439] Nor did Canada agree in advance to allow New Entrants to transfer their set-aside spectrum to Incumbents at the end of the five-year moratorium, or provide New Entrants a right to do so.[440] That would have been contrary to the very purpose of what the Government was trying to achieve.[441]

266. Canada did not design the 2008 AWS-1 Auction to guarantee New Entrants a windfall: New Entrants were given access to set-aside licences on the basis that they would introduce competition in the market, not so they could sell their business or transfer their licences to Incumbents for a profit as soon as the moratorium ended.[442] Indeed, shortly after the 2008 AWS-1 Auction, the Minister confirmed his understanding that the auction rules and licence provisions were not designed to allow New Entrants to acquire spectrum licences for the sole purpose of transferring them after five years at a profit to Incumbents, as he stated: "I intend to say publicly that we will prevent spectrum hoarding and spectrum flipping and that I will use the authority of the license [*sic*] to prevent this from happening."[443] The Government's concern at the time was not just about New Entrants obtaining set-aside spectrum licences at a discount and "immediately selling those license [*sic*] to an Incumbent at a profit."[444] The objective was to

[439] **R-479**, Industry Canada, "AWS Auction: Recommendations and Implications" (Oct. 25, 2007), p. 5: (regarding the option of imposing a condition of licence acquired in the set-aside that New Entrants cannot transfer licences to Incumbents: "[t]his condition prevents the acquisition of spectrum for purposes of reselling to incumbents. Such a restriction respects the intent of the set aside to encourage new entrants. It prevents incumbents from acquiring new entrants and conversely, also deters parties from bidding speculatively with hopes of selling to incumbents for profit.") (Emphasis added.)

[440] **RWS-Hill-2**, ¶¶ 7-10.

[441] **RWS-Hill-2**, ¶ 16.

[442] **RWS-Stewart-2**, ¶¶ 5-6: ("the policy objective was to encourage New Entrants to establish sustainable competition. It was not to provide them set-aside spectrum at a low price only to have licences end up in the hands of Incumbents after five years. This would not advance the policy objective of establishing sustainable competition. In my view, it was not reasonable for New Entrants to believe that as soon as the five-year moratorium ended, they would automatically be allowed to transfer the set-aside licences to Incumbents."); **RWS-Hill-2**, ¶18: ("The Government never intended that, after the five-year moratorium, the number of competitors would revert back to three dominant Incumbents holding virtually all of the spectrum licences."); **C-004**, Industry Canada, *Policy Framework for the Auction of Spectrum Licences for Advanced Wireless Services and other Spectrum in the 2 GHz Range* (Nov. 2007), p. 4 ("AWS-1 Policy Framework"): ("market conditions are such that establishing measures for the auction for AWS spectrum licences to sustain and enhance competition is warranted.")

[443] **R-480**, E-mail from Glenn Sheskay to Pierre Legault (Mar. 11, 2008), p. 3

[444] Claimant's Reply, ¶ 36.

increase competition in the long-run, not just for a five-year period.[445] In Wind Mobile's own words, interpreting the AWS-1 spectrum policy in a way that would result in set-aside licences being "sold" to Incumbents as soon as the five-year moratorium ended would "render the AWS set-aside a meaningless delay of the inevitable and would render future spectrum set-asides (and spectrum caps) meaningless as well."[446]

267. None of the documents which set out the applicable regulatory framework, and none of the documents cited by the Claimant, refer to automatic approval of spectrum licence transfers by the Minister or restrict the Minister's discretion to approve or deny licence transfers after the five-year moratorium.[447] Therefore, the Minister was only required to exercise this discretion consistently with the requirements of Canadian administrative law, namely: that it not be arbitrary; that it be exercised consistently with the objectives of the relevant legislation (in this case the *Radiocommunication Act* and the *Telecommunications Act*); and that it be exercised in accordance with principles of natural justice and procedural fairness.[448] The *Radiocommunication Act* provides that the Minister, when issuing a spectrum licence, may take into account all matters that he considers relevant for ensuring the orderly development and efficient operation of radiocommunication in Canada, as well as the objectives of Canadian telecommunications policy.[449] That is, the Minister can take into account a wide variety of considerations in deciding whether or not to approve a spectrum licence transfer.[450]

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[445] **RWS-Hill-2**, ¶ 17.

[446] **R-360**, Letter from Simon Lockie, Wind Mobile to John Knubley, Industry Canada (Jan. 22, 2013), p. 3. Wind Mobile and the Claimant understood that the objective of the 2008 AWS-1 Auction was to increase competition. **R-422**, E-mail from Pietro Cordova, Wind to Henk van Dalen, VimpelCom et al., *attaching* "WIND Canada – November 2012 – Summary of recent meetings in Ottawa" (Nov. 27, 2012), p. 4: ("Wind Mobile might be willing to be in Canada for the long-term and […] it is in the Government's hands to determine if it remains committed to seeing through on its policy goals established with the AWS auction.")

[447] **RWS-Hill-2**, ¶ 7: ("Neither the AWS-1 Policy Framework, the Licensing Circular, the AWS-1 Licensing Framework, nor the COLs in the AWS spectrum licences restricted the Minister's statutory discretion with respect to spectrum licence transfers after the five-year moratorium.")

[448] **RWS-Hill-2**, ¶ 5.

[449] The Canadian Telecommunications Policy objectives are set out in section 7 of the *Telecommunications Act* (**C-046**, *Telecommunications Act*, S.C. 1993, c. 38, s. 7).

[450] **C-057**, *Radiocommunication Act*, ss. 5(1)(a)(i.1), 5(1.1); **RWS-Hill**, ¶ 113.

268. The Minister retained his discretion to approve transfers of licences including to Incumbents, depending on whether doing so furthered the goals of the Government's wireless telecommunications policy, which included fostering competition in the wireless telecommunications market.[451]

269. This was also the conclusion of the Federal Court in the *Telus* judicial review – which the Claimant continues to ignore despite Canada referencing it in the Counter-Memorial.[452] Nonetheless, the clear interpretation provided by the Federal Court of the *domestic* regulatory framework addresses directly the Claimant's allegations. After considering all of the documents that were part of the applicable regulatory framework, including the AWS-1 Licensing Framework, the AWS-1 COLs, and the Written Responses to Questions for Clarification, the Federal Court in *Telus* found:

> **[N]othing in these statements constitutes a statement, or even an implication** that, at the end of five years a party may freely, without review or constraint by the Minister, licence or acquire any or all of the set-aside spectrum, **nor do any of these statements constitute an undertaking or assurance by the Minister** that after five years, the Minister may decline to exercise discretion to manage the spectrum.[453]
>
> In the Federal Court's view, "**[t]he Minister simply did not make a representation** that would lead a reasonable person to believe that, after five years, the acquisition or license of set-aside spectrum, by whatever means, would be unregulated by the Minister."[454]

270. The regulatory framework provided no right to Wind Mobile to transfer its licences to an Incumbent without Ministerial approval; and there was no guarantee that the Minister would

[451] This intention is reflected in internal department documents prepared at the time of the AWS-1 Auction. *See* **R-481**, Industry Canada, "Measures to Facilitate New Entry: Spectrum Set-aside" (Oct. 25, 2007), p. 8: ("The department would review any proposed transfer of licence and determine whether or not the applicant would be eligible in accordance with the policy objectives which warrant the use of set-asides.")

[452] Canada's Counter-Memorial, ¶¶ 202-203.

[453] **R-195**, *Telus v. AGC*, ¶ 57 (emphasis added).

[454] **R-195**, *Telus v. AGC*, ¶ 58 (emphasis added).

approve such transfers.[455] As Iain Stewart states: "any expectation that Wind Mobile would automatically be allowed to transfer its set-aside licences to an Incumbent would not have been consistent with the regulatory framework and the Government's stated policy objectives."[456] Instead, the applicable regulatory framework made clear that the Government maintained the ability to take active steps to further the telecommunications policy objective through its spectrum management policies, including through the exercise of Ministerial discretion over spectrum licence transfer requests.

271. Finally, not only did Wind Mobile not have a right to transfer its licences without first obtaining Minister's approval, but any sale of Wind Mobile and resulting transfer of its licences to an Incumbent would also have been subject to other existing regulatory approvals, including approval by the Competition Bureau under the *Competition Act*.[457]

(ii) Canada Never Represented That the Minister Would Approve Any Requests to Transfer Set-Aside Licences to Incumbents at the End of the Five-Year Moratorium

272. Beyond the fact that the regulatory framework contains no representation that the Minister would automatically approve licence transfer requests, Iain Stewart and Peter Hill both confirm that they are not aware of *any* representations made to Wind Mobile or to GTH (either at the time of the investment or afterwards) that there would be an automatic approval of transfers of set-

[455] **RWS-Hill-2**, ¶ 13: ("Neither the COLs in Wind Mobile's spectrum licences nor any of the 2008 AWS Auction policy or licensing documents included a "right" or "condition", as suggested by the Claimant, that Wind Mobile would be permitted to sell set-aside spectrum licences to an Incumbent.")

[456] **RWS-Stewart-2**, ¶ 9.

[457] A footnote in both the Consultation on Issues Related to Spectrum Auctioning, dated August 1, 1997, and the resulting Framework for Spectrum Auctions in Canada, dated August 1998, states that: "It should be noted that any licence transfer would also be subject to the provisions of the *Competition Act*." (**R-482**, Industry Canada, Consultation on Issues Related to Spectrum Auctioning (Aug. 1, 1997), footnote 30; **C-038**, Industry Canada, Framework for Spectrum Auctions in Canada (Aug. 1998), footnote 20). *See also* **R-104**, *Catalyst Capital Group Inc. v. Moyse*, 2016 ONSC 5271, ¶ 19. As the Ontario Superior Court judge noted in the *Catalyst* decision: "WIND's AWS-1 spectrum was at all times subject to numerous restrictions on transfer: (i) the Minister of Industry's unilateral discretion whether to permit transfer pursuant to the terms of license; (ii) Competition Act approval; (iii) Investment Canada Act approval; and (iv) CRTC approval."

aside licences to Incumbents at the end of the five-year moratorium.[458] Nor has the Claimant presented evidence of any express representation that it would be the case.

273. The Claimant continues to refer to "representations that GTH would be permitted to exit the market by transferring the set-aside licenses to an Incumbent"[459] and to Canada "provid[ing] GTH with the right to sell Wind Mobile to an Incumbent after the expiration of the Five-Year Rollout Period."[460] It suggests that such "representations", although not explicit, can be inferred from the 2008 AWS-1 Auction Framework and from the expiration after five years of the condition that New Entrants were not allowed to transfer their set-aside spectrum licences to an Incumbent.[461] Yet as discussed above, Canada made no representations on the transferability of set-aside licences upon the expiry of the five-year moratorium (except that Ministerial authorization would be required for any transfer, as has always been the case); and no representation of automatic transferability can be inferred from the regulatory framework.

274. On the requirement for Ministerial approval of licence transfers, the Claimant states that "it was reasonable for investors to expect that an application submitted to Canada to transfer a set-aside spectrum license to an Incumbent after the end of the Five-Year Rollout Period would have been approved,"[462] and that the market thought that it would be possible. Broad statements about the anticipations of market participants, and speculations by industry analysts as to what might happen at the end of the five-year moratorium, have no relevance to establishing that Wind Mobile had a right, or that the Claimant had a legitimate expectation, with respect to transfer of Wind Mobile's licences to Incumbents.[463] Licensees' expectations regarding approval of their

[458] **RWS-Stewart-2**, ¶ 9; **RWS-Hill-2**, ¶ 10.

[459] Claimant's Reply, ¶ 274.

[460] Claimant's Reply, ¶ 439.

[461] Claimant's Reply, ¶ 273.

[462] Claimant's Reply, ¶ 281.

[463] Claimant's Reply, ¶ 38(c): ("GTH, GTH's advisors, New Entrants, Incumbents, and market commentators all believed that the Minister would allow the transfer of set-aside licenses to an Incumbent after five years.") Not only is this irrelevant, but the documents cited by the Claimant in support of its assertions on this point are based on self-serving comments by industry participants, and in fact establish that while there was much speculation on what may happen at the end of the five-year moratorium, there was no certainty. See for example: **R-483**, E-mail from Felix Saratovsky, VimpelCom to Pietro Cordova, Wind et al. (Feb. 27, 2013), p. 1 forwarding analysis from Canacord Genuity which states: ("while we remain bullish about Canadian incumbent wireless carriers, we urge investors not

requests to transfer their licences, in particular where, such as here, they have no basis in the terms of the COLs, cannot be equated to a right. Under Canadian law, and as stated in the COLs, the Minister retained discretion to approve or deny licence transfers after the five-year moratorium. This would have been clear to Wind Mobile and GTH given the numerous Canadian law firms advising them and should have informed their expectations.

275. The Claimant presents the ability to transfer licences to Incumbents at the end of the five-year moratorium as a key consideration for making its investment in Wind Mobile.[464] However, none of the contemporaneous documents support this proposition. Rather, they indicate that when it decided to invest, GTH contemplated a long-term investment.[465] Further, if this was important to its investment decision, GTH would have certainly sought a clarification or an explicit representation from Industry Canada regarding what would happen after the five-year moratorium. As part of the 2008 AWS-1 Auction, a follow-up questions and answers process allowed parties to seek clarification on various aspects of the auction spectrum policy.[466] Wind

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to ignore regulatory risks and uncertainties – we also wonder whether Paradis will allow incumbent consolidation of new entrants in 2014 […] even though the moratorium on incumbent ownership of new entrant set aside spectrum from the 2008 AWS auction expires next year. We remind readers that Industry Canada has to approve all changes in control of spectrum, regardless of auctions rules.") (emphasis added.); **R-484**, E-mail from Pietro Cordova, Wind to Felix Saratovsky, VimpelCom et al. (Jul. 30, 2013), forwarding a research commentary. After referring to the consistent position of the Government over the last year regarding its objective for more competition, the analyst commented (pp. 1-2): ("based on our read of the 2008 auction rules, and based on our discussions with IC officials over the past year, we believe the answer is no [i.e. whether IC can be forced to allow Incumbents to acquire Wind and Mobilicity]. We believe the AWS spectrum rules stated that transfers of set aside spectrum to incumbents would definitely NOT be allowed in the first five years, but the rules didn't say that transfers would definitely be approved after such timeframe. Spectrum transfers are always subject to approval by IC based on whatever public policy criteria they feel is appropriate at the time.") (emphasis added).

[464] Claimant's Reply, ¶¶ 38(b), 277(e).

[465] [redacted] **C-066**, E-mail from Mike O'Connor to Assad Kairouz, et al. attaching Globalive materials (Feb. 29, 2008), p. 99 [redacted]

[466] **R-485**, Industry Canada Advice to the Minister, Comments from Incumbent Wireless Carriers re: Advanced Wireless Services (AWS) Spectrum Auction Policy (Dec. 7, 2007), p. 1: ("the benefits of this process from a legal risk management point of view include that the answers can be carefully reviewed for accuracy and reliability and that there is a clear record of what answers were.") The Department was also very cautious in proceeding in this way, and through formal consultations and comments so that "all submissions may be treated equally" and to avoid

Mobile submitted certain questions regarding the auction in the questions and answers process, but neither Wind Mobile nor GTH ever asked the Department, Minister, or other Canadian Government officials for a clarification regarding transfers of licences to Incumbents at the end of the five-year moratorium.[467] Beyond the questions and answers process, the Department was very careful not to have separate discussions with potential auction participants or make individual representations regarding the regulatory framework.[468] All of the explanations regarding the 2008 AWS-1 Auction and the COLs were available to all potential New Entrants. As discussed above, New Entrants knew that Ministerial approval was required with respect to licence transfers, and that any decision would be made in furtherance of the objectives of Government's wireless telecommunications policy. Based on all of the information available to them, they should have known the Government's objective was not to allow New Entrants to acquire set-aside spectrum at a lower price only to have them sell it to Incumbents. While the immediate concern about flipping of licences was addressed by the five-year moratorium and the mandated roaming and tower/site sharing provisions, the Government also retained the ability to take further measures in support of its objective of sustained competition.[469]

276. The fact that many years before, the Government allowed the transfer of licences from Microcell to Rogers and Clearnet to Telus, does not establish, as the Claimant suggests, that the Government would necessarily allow transfers of set-aside licences to Incumbents at the end of the five-year moratorium.[470] First, the Microcell and Clearnet licences were not AWS-1 licences. The Government's approval of the transfer of Microcell and Clearnet's licences took place many

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"an argument that the Minister ultimately favoured one point of view by carrying on a dialogue with a particular stakeholder." (page 2).)

[467] A question from another auction participant asked what would happen at the end of the five-year moratorium (*See* **R-486**, Questions Received Through DGRB-011-07 (AWS Licensing Framework) and DGRB-010-07 (Towers and Roaming) (Jan. 30, 2008), p. 10 (last question on page). In its responses, the Department re-iterated that approval was required for any licence transfers. **C-062**, Industry Canada, Responses to Questions for Clarifications on the AWS Policy and Licensing Frameworks (Feb. 27, 2008), Answer 6.18 on p. 30: ("Licences acquired through the set-aside may not be transferred or leased to, or divided among companies that do not meet the criteria of a new entrant, for a period of five years from the date of issuance. Departmental approval is required for each proposed transfer of a licence, whether the transfer is in whole or in part.") (emphasis added).

[468] **RWS-Hill-2**, ¶ 10.

[469] **RWS-Hill-2**, ¶ 17; **RWS-Stewart-2**, ¶ 8.

[470] Claimant's Reply, ¶¶ 35, 277(i).

years prior, in a very different market and under different circumstances.[471] The Government took additional measures in the 2008 AWS-1 Auction, including by mandating roaming and tower/site sharing, to avoid a similar outcome whereby new entry proved not to be sustainable. By 2013, the conditions prevailing in the wireless telecommunications market were significantly different than the circumstances prevailing over a decade earlier and required a different response.[472] Second, the prior approval of a licence transfer does not create a "past practice" or a binding precedent that directs future Government actions and forces it to follow the same approach. The Government never represented that it would act in the same way as it had in those two cases; instead it was explicit in maintaining its discretion over licence transfers and the ability to amend the conditions of licences to respond to changing circumstances.

c) The Transfer Framework Was Not A Fundamental Change Of The Existing Regulatory Framework

277. In its Counter-Memorial, Canada explained that the Transfer Framework was consistent with the existing regulatory framework at the time of the Claimant's investment in Wind Mobile, and that it simply clarified how the Minister would exercise his existing discretion over transfers of licences. In its Reply, the Claimant once again attempts to portray the introduction of the Transfer Framework as a repudiation of the existing regulatory framework by minimizing the importance of the Government's long-standing objective to foster competition in the wireless telecommunications sector, by mischaracterizing the scope of the existing Ministerial discretion to approve transfers, and by ignoring the terms of the licensees' COLs that warned that they were subject to amendments. The fundamental elements of the telecommunications regulatory framework did not change, and the Claimant's claims of a breach of FET in this regard must be dismissed.

[471] The Microcell and Clearnet licences were subject to different restrictions, such as a spectrum cap, and were issued pursuant to a different framework than the AWS-1 licences. For a description of the circumstances in which the transfer of Microcell and Clearnet licences occurred see **RWS-Stewart**, ¶¶ 22-25.

[472] **RWS-Hill-2**, ¶ 11; **RWS-Stewart**, ¶ 26.

(i) The Transfer Framework Furthered Canada's Long-Standing Objective of Fostering Competition in the Telecommunication Sector

278. The overarching objective of Canada's wireless telecommunications policy objectives was described in the 2007 Spectrum Policy Framework for Canada as "maximizing the economic and social benefits that Canadians derive from the use of the radio frequency spectrum resource."[473] To achieve this objective, the Government sought to promote competition beyond the existing three Incumbents. Canada's objective to foster competition in the telecommunications sector in order to benefit consumers was long-standing, oft-pronounced, and a driving consideration in the design of the 2008 AWS-1 Auction.

279. The Claimant suggests in its Reply that there was a fundamental change in policy resulting from the Government's new "fourth player policy" and that this policy did not exist at the time of the 2008 AWS-1 Auction.[474] While the Claimant refers repeatedly to the fourth player policy and to Ministerial statements with respect to the need for a fourth player, it does not effectively explain how this is inconsistent with the objective of fostering competition in the market.[475] There was no change of direction. In reality, references to, and analysis of, the effect on competition of a fourth wireless operator in the market can be found in material from Industry Canada, market analysts, and even market participants, and pre-date the Minister's statements and the 2008 AWS-1 Auction.[476]

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[473] **C-052**, Industry Canada, Spectrum Policy Framework for Canada (DGTP-001-07) (Jun. 2007), p. 8; **R-359**, *TELUS Communications Company v. Attorney General of Canada*, 2014 FC 1, Affidavit of Peter Hill (Sep. 27, 2013), ¶¶ 30-32.

[474] Claimant's Reply, ¶¶ 285, 292.

[475] To the contrary, the Claimant understood that the two were closely related. *See* [redacted]

[476] **C-264**, Industry Canada Presentation, "Wireless Telecommunications Market and Approach to Spectrum Licence Transfers" (Jan. 14, 2013) [updated version of **R-089**], p. 3, referring to March 2012 measures to support 4th player); **R-488**, Industry Canada, Measures intended to enable new entry through the AWS spectrum auction (Sep. 11, 2007), p. 9: ("The following factors are pertinent to this consideration: the nature of the potential new entrants and sustainability of a fourth competitor, the costs and barriers to entry to new entrants, the impact of foreign investment restrictions, experience in Canada and other countries, and finally, an assessment of relative risks."); **R-489**, Industry Canada, Applying Restrictions to Competitive Measures (Sep. 14, 2011), p. 1: ("the Department's intent is to support a competitive market and to establish a fourth strong regional player."); **R-490**, Industry Canada

280. As Iain Stewart explained, Ministerial statements and related communications material referred to "four competitors in each region,"[477] because it was "a simple way of referring to the policy objective of greater sustained competition"[478] beyond the three Incumbents, and to the benefits to consumers that would result from this competition. To the extent it was sustainable (for example in the urban centers), the Government never intended to limit competition to four players. Similarly, it was unlikely there would even be three players in some rural areas.[479]

281. Moreover, the Transfer Framework was introduced because of the concerns related to spectrum concentration and its effect on the Government's long-standing objective of furthering competition.[480] Spectrum concentration was a concern because it has the potential to lead to less competition and impede the orderly development of radiocommunications. The Government's concerns about spectrum concentration and its effect on competition date back to the mid-1990s.[481] Industry Canada had considered spectrum concentration for many years when developing policies concerning spectrum management in general and the commercial spectrum bands in particular.[482] For instance, it sought to address spectrum concentration through

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Presentation, "Potential Upcoming Spectrum Transfers of AWS Set-Aside" (Draft) (Oct. 5, 2012), slide 4: (slide discussing "Government Policy to Encourage a 4th Player"); **R-478**, AWS Announcement Questions and Answers (Nov. 27 2007), p. 6: ("Q3 – Is the Minister going to licence a fourth national operator? The measures being taken will ensure an opportunity for entry into the wireless market. Whether national or regional operators emerge from this process will depend on how companies bid in the auction. Government cannot guarantee new entry.") Wind Mobile often used this terminology and presented itself as the fourth competitor (see for example, **R-364**, Industry Canada, "Reaction to 700 MHz announcement March 14, 2012" (Mar. 20, 2012), p. 2; **R-366**, E-mail from Andy Dry, VimpelCom to Henk van Dalen, VimpelCom (Nov. 16, 2011), p. 1: ("We believe that there is tremendous potential for Wind Canada to become the clear 4th national operator and achieve its business plan objectives."); **R-367**, Memorandum to Jo Lunder and Henk van Dalen from Albert Hollema and Andy Dry (Sep. 16, 2011), p. 1: ("We believe that there is tremendous potential for Wind Canada to become the clear 4th national operator and achieve its business plan objectives."); [redacted].

[477] **C-156**, Government of Canada, Speech: Speaking Points – The Honourable Christian Paradis, PC, MP, Minister of Industry, New Measures to increase competition in the wireless sector (Mar. 7, 2013), p. 1.

[478] **RWS-Stewart-2**, ¶ 16; **RWS-Stewart**, ¶ 34.

[479] **RWS-Stewart-2**, ¶ 16.

[480] **RWS-Stewart**, ¶¶ 16-20.

[481] **RWS-Stewart**, ¶¶ 21-25.

[482] **RWS-Stewart-2**, ¶ 11. **R-107**, Industry Canada, Notice No. DGTP-010-04 – Decision to Rescind the Mobile Spectrum Policy (Aug. 27, 2004) (discussing spectrum concentration in 2004), p. 3.

spectrum caps in previous auctions.[483] When the spectrum cap was rescinded in 2004 as a result of the improvement of competition (and entry of new players) and because it was believed that the availability of additional spectrum would mitigate spectrum concentration concerns, Industry Canada indicated that "[i]n carrying out its role in the management of the radio frequency spectrum, the Department will continue to consult on releasing new spectrum resources and monitor the industry for excessive spectrum concentration."[484] The Government introduced new measures through the 2008 AWS-1 Auction to address spectrum concentration by supporting the establishment of new competitors.

282. Spectrum concentration was therefore an existing concern for the Department prior to the adoption of the Transfer Framework. Even though spectrum concentration had not been expressly identified previously as a factor that the Minister would consider when approving licence transfers, market participants, including Wind Mobile, were well aware of the Government's overarching objective of fostering competition in the telecommunications sector.

(ii) The Transfer Framework Clarified How The Minister Would Exercise Discretion

283. The Transfer Framework did not introduce a reversal, nullification, or fundamental change of the existing regulatory framework. It provided predictability and transparency to licensees on how the Minister would exercise discretion over approval of licence transfers to achieve Canada's telecommunications policy objectives, including greater competition in the telecommunications sector.[485] As a clarification on the exercise of an existing statutory discretion, it does not amount to a radical change of the rules.

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[483] **C-297**, Memorandum from Len St. Aubin to the Visiting Senior Assistant Deputy Minister, "Policy Overview of Previous Competitive Licensing" (May 30, 2007), p. 4: ("spectrum caps (also known as spectrum aggregation limits) have been used in all previous auctions. […] In some cases the cap was used to facilitate market entry and functioned as a set-aside, while in other cases the objective was to prevent spectrum concentration."); **R-492**, Industry Canada, Draft "Measures intended to enable new entry through the AWS spectrum auction" (Oct. 23, 2007), p. 5: ("In previous competitive mobile licencing processes in Canada, measures have been used either to facilitate market entry, or to prevent spectrum concentration.")

[484] **R-107**, Industry Canada, Notice No. DGTP-010-04 – Decision to Rescind the Mobile Spectrum Policy (Aug. 27, 2004) (discussing spectrum concentration in 2004), ¶ 15.

[485] **RWS-Hill**, ¶ 120.

284. In its Reply, the Claimant challenges the scope of the existing Ministerial discretion. It argues that the Transfer Framework provided additional discretion to the Minister, and that the Department broadened its authority to afford it "complete and total" discretion over licence transfers.[486] Yet the Minister always had the discretion to consider various factors when reviewing individual transfer requests, including compliance with the COLs and Industry Canada policies applicable to the particular spectrum band, as well as whether any resulting changes in spectrum concentration could affect the ability of the applicants and other existing and future competitors to provide services in the affected licence area.[487]

285. In support of its arguments that the Transfer Framework was outside the scope of the Minister's existing authority, the Claimant cites to a single internal note which analyzes the option of introducing spectrum concentration as a factor in the Departments' reviews of spectrum transfer requests.[488] The document incidentally refers to consideration of spectrum concentration as providing "additional discretion" because it was not previously specifically identified as a relevant consideration. The Claimant places excessive emphasis on this reference, which is contradicted by the numerous internal notes that refer to a *clarification* of, rather than an addition to, the Minister's existing discretion.[489] Moreover, only Parliament, through legislation, can confer discretion on a Minister. The *Radiocommunication Act* provides the Minister with broad discretion over spectrum management including licence transfers. If the Transfer Framework went beyond the Minister's authority it would have been invalidated by

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[486] Claimant's Reply, ¶¶ 285, 340.

[487] **C-003**, Licensing Circular, Issue 2, s. 5.6: ("Spectrum licences are a subset of radio authorizations which may be issued at the discretion of the Minister of Industry through various licensing processes. […] These spectrum licences may be transferred in whole or in part (either in geographic area or in bandwidth) to a third party subject to the conditions stated on the licence and other applicable regulatory requirements. […] All proposed licence transfers must comply with existing policies.") *See also*: **R-359**, *TELUS Communications Company v. Attorney General of Canada*, 2014 FC 1, Affidavit of Peter Hill (Sep. 27, 2013), ¶¶ 20-24; **RWS-Hill-2**, ¶¶ 23-24; **C-057**, *Radiocommunication Act*, R.S.C., 1985, c. R-2, s. 5(1)(a)(i.1).

[488] Claimant's Reply, ¶ 55: ("Canada knew that adding spectrum concentration as a factor in its transfer application review process would amount to '[p]roviding additional Ministerial discretion.'"), citing to **C-258**, Memorandum from Iain Stewart to Deputy Minister, Industry Canada, Update on Wireless Telecom Sector (Dec. 7, 2012).

[489] **RWS-Stewart-2**, ¶ 7. See for example, **C-265**, Memorandum from John Knubley and Marta Morgan, Industry Canada to Minister of Industry, Measures to Sustain Competition in Wireless Sector (Jan. 29, 2013) [updated version of R-090], p. 2; **C-275**, Memorandum from John Knubley and Marta Morgan to Minister of Industry, Overview of Options for Sustaining Competition in the Wireless Market (May 9, 2013) [updated version of R-091], Exhibit Page 6.

Canadian courts. Instead and as noted, in the judicial review brought by Telus, the Federal Court upheld the Minister's authority to amend the COLs and introduce the Transfer Framework.[490]

286. The Claimant also submits that the Minister's powers over licence transfers could not be used to support greater competition in the wireless telecommunications market because Industry Canada's mandate was limited to *ex ante* measures, and because considering "competition" was the role of the Competition Bureau. This argument is incorrect.

287. The fact that the Competition Bureau and the CRTC had certain responsibilities for *ex post* measures did not mean that Industry Canada's authority was limited to *ex ante* measures.[491] As noted above, the Minister has broad powers under the *Radiocommunication Act* and *Radiocommunication Regulations* to manage Canada's spectrum resources. In pursuing the statutory objectives under the *Radiocommunication Act* and the *Telecommunications Act*, the Minister has authority to enact *ex ante* measures for auction design. But the Minister's authority is not limited to such measures. The Department's use of *ex ante* measures in the 2008 AWS-1 Auction in no way restricted its ability to adopt *ex post* measures. For example, the Minister exercised *ex post* authority when amending existing COLs to mandate roaming and tower/site sharing. The Claimant was aware of this authority to impose *ex post* measures and in fact actively encouraged the Minister to use his *ex post* authority in the context of Shaw's licences.[492] The Minister also had *ex post* authority to disallow spectrum transfer requests.

288. Similarly, the fact that the Competition Bureau's mandate includes a consideration of whether certain transactions substantially lessen competition in no way limits Industry Canada's

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[490] **R-195**, *Telus v. AGC*, ¶¶ 45, 49.

[491] **RWS-Hill-2**, ¶ 22.

[492] **R-360**, Letter from Simon Lockie, Wind Mobile to John Knubley, Industry Canada (Jan. 22, 2013), p. 2: ("WIND Mobile hereby requests that Industry Canada take steps to immediate revoke Shaw's AWS licenses as a result of it becoming ineligible to hold its AWS licences, and re-auction the revoked spectrum to New Entrants so that the AWS set-aside spectrum can be used in accordance with the intended public policy."); [redacted]

ability to consider spectrum concentration and its effect on competition in the wireless telecommunications sector.[493] As Peter Hill explains, the roles of the CRTC, the Competition Bureau, and Industry Canada are complementary:

> Industry Canada's spectrum licence transfer review process addresses different issues from the Competition Bureau's merger review process. Industry Canada's concern over the impact of a proposed licence transfer on the concentration of spectrum differs from the Competition Bureau's statutory mandate to determine whether certain transactions lessen competition substantially. The Transfer Framework is not a competition test; and the Competition Bureau does not have a mandate with respect to spectrum management. Moreover, the CRTC's *ex post* authority over the regulation of rates, facilities, and services in the wireless telecommunications market addresses competitive issues in the market and does so from a completely different perspective.[494]

289. Further, as Canada previously explained, the Federal Court has already decided this issue and found that the Minister's authority to review spectrum licence transfer requests and consider spectrum concentration can co-exist with the Competition Bureau's authority to review mergers that may cause a substantial lessening of competition.[495] Thus, the Transfer Framework was perfectly in keeping with the Minister's existing authority and did not constitute a fundamental change of the legal framework.

[493] The Claimant was well aware of the different focus of analysis of the Competition Bureau and Industry Canada. *See for example*: [redacted] **R-492**, Industry Canada, Draft "Measures intended to enable new entry through the AWS spectrum auction" (Oct. 23, 2007), p. 14: ("The ex post measures currently in place in the Competition Act were not designed to promote competition per se, but were instead developed to ensure that a substantial lessening or prevention of competition does not take place.")

[494] **RWS-Hill-2**, ¶ 22.

[495] Canada's Federal Court considered and rejected a similar argument as made by the Claimant in this arbitration, in TELUS' application for judicial review of the Transfer Framework in 2014. In that case, TELUS argued that having the Transfer Framework apply to a "Deemed Transfer" conflicted with the Competition Tribunal's authority over mergers under the *Competition Act*. Justice Hughes rejected this argument, finding that "the jurisdiction given to the Commissioner of Competition and Competition Tribunal by the *Competition Act* does not oust the jurisdiction of the Minister of Industry to make the Deemed Transfer Requirements" that were at issue in that case. **R-195**, *Telus v. AGC*, ¶¶ 37-38, 43.

(iii) Licensees Were Expressly Warned That The Regulatory Framework Was Subject To Change

290. Because spectrum policies need to adapt to technological and market changes in order to meet the Canadian telecommunications policy objectives, Industry Canada maintains discretion to amend spectrum licensing policies and COLs.

291. Industry Canada specifically noted that its spectrum licensing policies were subject to change. The Licensing Circular, which includes Departmental policies and procedures on spectrum licences, explains: "licensing policies are constantly adapting to changes in radiocommunication in order to respond effectively to the evolving competitive environment and user needs."[496]

292. Licensees were also on notice that the Minister could amend the COLs. Not only was the Minister's authority to amend the COLs stated in section 5(1)(b) of the *Radiocommunication Act*,[497] but it was also expressly stated in the COLs of AWS-1 licences. The licences, including Wind Mobile's licences, included a specific section on "Amendments" which provided that "[t]he Minister of Industry retains the discretion to amend these terms and conditions of licence at any time."[498] It was the same authority pursuant to which the Minister amended the COLs in 2008 to mandate roaming and tower/site sharing to the benefit of New Entrants. Thus, there could not have been any legitimate expectation that the regulatory framework would remain static and that the COLs would not change.

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[496] **C-003**, Licensing Circular, Issue 2, s. 4. It is also reflected in the COLs of AWS-1 spectrum licences, including the COL on licence transferability and divisibility which incorporates a reference to the Licensing Circular, "as amended from time to time" (**C-010**, Letter from Michael D. Connolly, Industry Canada to Kenneth Campbell, Globalive attaching Wind Mobile Licences (Mar. 13, 2009) (see paragraph 2 of the licence conditions)). *See also* **RWS-Hill**, ¶¶ 107-108.

[497] Section 5(1)(b) of the *Radiocommunication Act* allows the Minister to "amend the terms and conditions of any licence, certificate or authorization issued under paragraph (a)", including a spectrum licence issued under sub-section (5)(1)(a)(i.1) (**C-057**, *Radiocommunication Act*, R.S.C., 1985, c. R-2, s. 5(1)(b)).

[498] **C-010**, Letter from Michael D. Connolly, Industry Canada to Kenneth Campbell, Globalive attaching Wind Mobile Licences (Mar. 13, 2009) (see paragraph 16 of the licence conditions). The Minister's statutory authority to amend COLs at any time is also referred to in the *Framework for Spectrum Auctions in Canada* (**C-038**, Industry Canada, *Framework for Spectrum Auctions in Canada*, (Aug. 1998), s. 6.1 Ministerial Authority).

293. The Claimant conspicuously avoids addressing how, having been made aware of the Minister's authority to adjust policies and amend the COLs, it can claim that the Transfer Framework frustrated its legitimate expectations or represented a fundamental change in the regulatory framework.[499] In fact, at the time, Wind Mobile actively encouraged the Government to take further action after the expiration of the five-year moratorium in order to uphold the objectives of the 2008 AWS-1 Auction to support new entry and enhance competition.[500] The Claimant cannot now 'have it both ways' – condemning the Government's efforts to promote competition after previously speaking out for it.

d) The Transfer Framework Was Not Arbitrary and Did Not Target Wind Mobile

294. The Claimant questions the Government's efforts to encourage a fourth player in the market and even posits that there is no evidence that it would lead to more competition or benefit consumers. Having benefitted from the spectrum set-aside to encourage New Entrants, GTH now questions the validity of the objectives pursued by the Government. Not only are these arguments unfounded, but the Tribunal should simply not engage in this second-guessing of Government policy.

(i) The Transfer Framework Was Not an Irrational, Politically-Motivated Change of Direction

295. The Transfer Framework was developed after careful analysis of various options to achieve the Government's long-standing objective of sustained competition in the wireless telecommunications market, consideration of the implications of those options, and consultation

[499] Claimant's Reply, ¶ 280.

[500] **R-422**, E-mail from Pietro Cordova to Henk Van Halen et al. *attaching* WIND Canada, November 2012 – Summary of recent meetings in Ottawa (Nov, 27, 2012), pp. 2-3, 6 [redacted]

with all stakeholders, including licensees.[501] By clarifying and making explicit the factors that the Minister would consider in assessing proposed transfers to achieve the telecommunications policy objectives, the Transfer Framework offered greater predictability to all participants in the telecommunications sector.

296. What the Claimant attempts to portray as a "politically-motivated objective to create a fourth player",[502] and a reaction to public criticism, was in fact a proper policy response to the market conditions in light of the objectives set out in the relevant statutes. It was the Department's role and the Minister's mandate to monitor the market and adjust telecommunications policies and regulatory actions with respect to spectrum management in order to further the objectives of the *Radiocommunication Act* and the *Telecommunications Act*. This is what the Government did. The design of the 2008 AWS-1 Auction and the Government's subsequent efforts to improve the regulatory framework were all aimed at achieving greater competition in the market through the competitive pressure brought by the New Entrants. This in turn would maximize the economic and social benefits that Canadians derive from the use of the radio frequency spectrum resource.[503] By 2012, it became clear that the Government needed to do more to foster sustained competition. Given the significant changes in mobile device technology, the demand for spectrum had dramatically increased. Having sufficient spectrum holdings was critical to the viability of New Entrants. The Government had already announced its plans to auction additional spectrum in the 700 MHz auction. At the same time there was a risk of consolidation of AWS-1 set-aside spectrum licences in the hands of Incumbents, which would limit spectrum available to New Entrants.[504] By specifying that spectrum concentration would be considered when assessing licence transfers, the Government was looking to further support competition.[505] This was not unheard of: regulators in other countries were also using

[501] **RWS-Stewart-2**, ¶ 22.

[502] Claimant's Reply, ¶¶ 291, 293.

[503] **RWS-Hill**, ¶ 22; **C-052**, Industry Canada, Spectrum Policy Framework for Canada (DGTP-001-07) (Jun. 2007), p. 8.

[504] **RWS-Stewart**, ¶¶ 45-54.

[505] Canada was aware that "incumbents are expected to pay the highest price for reasons including preventing a fourth provider from acquiring the spectrum they need to be sustainable." (**C-262**, Memorandum from Marta

similar tools.[506] The Transfer Framework was rationally connected to the legitimate public policy goal of greater competition pursued through previous Government actions including in the context of the 2008 AWS-1 Auction. As such, it was neither arbitrary nor unreasonable.

297. In its Counter-Memorial, Canada explained that many different options were considered to respond to spectrum concentration concerns and the risk that the Government's efforts at encouraging sustained competition would fail. In choosing the appropriate policy response, Canada balanced the interests of various stakeholders, including New Entrants, Incumbents, and consumers. The Department took into account the existing regulatory framework and analyzed to what extent the different options would contribute to the policy objective and considered the implications on market participants. The Department also considered the different submissions it received, including from stakeholders, in order to make a balanced determination on how best to accomplish its long-standing policy objectives. Therefore, while the Government was committed to pursuing its objective of more competition in the wireless market, the Claimant's statement that Canada did "not hesitate to use any and every tool at its disposal […] regardless of the unfair costs to investors"[507] and "however illegitimate"[508] is plainly inaccurate. Rather, the Government's response to the changing conditions was measured. Instead of simply extending indefinitely the restriction on transfers of set-aside licences to Incumbents, the Government chose an option that would provide more flexibility and allow transfers to be approved where they did not raise spectrum concentration concerns.

298. The fact that other alternatives were considered, or that there were preferable alternatives from the Claimant's perspective, does not signify that the Transfer Framework was unreasonable or "disproportionate"[509] – and certainly not a breach of Article II(2)(a). In his second Witness

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Morgan and John Knubley to Minister of Industry, "Approach to Mobile Spectrum Licence Transfers – Briefing Material" (Jan. 4, 2013), Exhibit Page 6.

[506] **C-264**, Industry Canada Presentation, "Wireless Telecommunications Market and Approach to Spectrum Licence Transfers" (Jan. 14, 2013), slide 8: ("Regulators in other countries (e.g., U.S., U.K.) closely examine all significant licence transfer requests […] to limit excessive concentration of the public resource.")

[507] Claimant's Reply, ¶ 59.

[508] Claimant's Reply, ¶ 86.

[509] Claimant's Reply, ¶ 297.

Statement, Iain Stewart discusses the different avenues that Industry Canada initially explored and analyzed, and explains that "the Transfer Framework was the option retained to further the Government's objective after careful consideration of various options"[510] because "it was the best option to achieve the objective of sustained competition."[511]

299. In its Reply, the Claimant reiterates its challenge to the Transfer Framework as an *ex post* measure outside the Department's mandate.[512] Not only is this incorrect, as discussed above,[513] but it is also not determinative of a breach of Article II(2)(a). The Claimant's challenge of the legitimacy of the Government's policy objectives is also clearly outside the scope of Article II(2)(a). The fact that the Claimant now disagrees with the Government's view that greater competition (i.e. competition beyond the three Incumbents including through a fourth player) would be beneficial[514] is irrelevant, in addition to being contrary to its position and statements at the time.[515] The Department's view that more competition was desirable was based on its internal analysis; considerations of empirical data demonstrating that a fourth competitor (or generally more competitors) could benefit consumers; relevant evidence available, both domestically and internationally; and discussions with various stakeholders and economists.[516] It

[510] **RWS-Stewart-2**, ¶ 2(iii).

[511] **RWS-Stewart-2**, ¶¶ 19-24.

[512] Claimant's Reply, ¶ 294.

[513] See ¶¶ 285-289, above.

[514] Claimant's Reply, ¶ 293.

[515] **R-419**, Draft Letter from Wind Mobile to Industry Canada (Dec. 23, 2012), p. 7; **R-422**, E-mail from Pietro Cordova to Henk Van Halen et al. *attaching* WIND Canada, November 2012 – Summary of recent meetings in Ottawa (Nov, 27, 2012), p. 2; [redacted]

[516] **R-492**, Industry Canada, Draft "Measures intended to enable new entry through the AWS spectrum auction" (Oct. 23, 2007), pp. 7-8: ("In addition to the public consultation, the Department assembled economic experts and telecommunications market and financial analysts in separate roundtable discussions." *See* p. 14 for a discussion on auctions in the United Kingdom and Australia; **R-479**, Industry Canada, "AWS Auction: Recommendations and Implications" (Oct. 25, 2007), p. 1: (a set-aside "is consistent with past auctions and with actions taken in other countries to foster more competitive wireless markets"); **R-481**, Industry Canada, "Measures to Facilitate New Entry: Spectrum Set-aside" (Oct. 25, 2007), p. 2: ("Expert economists consulted by the department generally supported the views of new entrants. A set-aside would be an effective measure that provides for a specific block of spectrum to be made available for new entrants.")

is not the role of investment arbitration tribunals to second-guess the legitimacy of Government policy objectives.

(ii) The Claimant and Its Investment in Wind Mobile Stood To Benefit From the Government's Efforts at Sustaining Competition

300. The Transfer Framework was designed to provide clarifications to all market participants regarding how the Minister would consider licence transfer requests. The criteria were related to the objective of fostering competition in the market and would be applied to all licence transfers. The Transfer Framework did not seek to address solely or specifically the transfer of Wind Mobile's licences. It was made applicable not only to AWS-1 licences but more broadly to all commercial mobile spectrum licence transfer requests, and has been applied to all such licence transfer requests since its adoption in 2013.[517]

301. The Claimant's assertion that Canada's actions "targeted"[518] Wind Mobile and that the Transfer Framework caused it harm is incongruent with the fact that Wind Mobile did not oppose it during the 2013 Transfer Framework Consultation.[519] The consultation process was specifically designed to obtain input and perspectives from the licensees and other interested parties. Some market participants opposed the Transfer Framework during consultations; Wind Mobile did not.[520] In its Reply, the Claimant takes issue with that characterization of Wind Mobile's position.[521] However, the submissions speak for themselves. In its submissions, Wind Mobile acknowledged that the Government was acting in pursuit of its long-standing objective to

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[517] **RWS-Hill**, ¶ 128.

[518] Claimant's Reply, ¶ 299 and footnote 587.

[519] **C-348**, Memorandum from Pamela Miller to the Assistant Deputy Minister, Stakeholder Submissions to the Transfers Consultation, attaching Annex A: Summaries of Key Submissions (Apr. 3, 2013), Exhibit Page 7: (Wind Mobile indicated that it "[b]roadly agree[d] with the criteria set out in the consultation paper". It went on: "WIND generally supports the proposed criteria used to determine if a detailed review is required."); [redacted]. **R-422**, E-mail from Pietro Cordova to Henk Van Halen et al. *attaching* WIND Canada, November 2012 – Summary of recent meetings in Ottawa (Nov. 27, 2012), pp. 2-4, 6.

[520] **RWS-Hill**, ¶¶ 122-126.

[521] Claimant's Reply, footnote 97.

promote competition in the telecommunications sector.[522] Wind Mobile's consultation submission lamented Canada's "highly-concentrated oligopolistic" wireless telecommunications market.[523] It complained of a "lack of competitiveness" and appeared to acknowledge that Industry Canada was attempting to address this issue through the proposed Transfer Framework.[524] It also appeared to endorse the idea of having a "fourth player" in every market as a vehicle to promote competition.[525] Even prior to the Transfer Framework Consultation, in their communications to the Department, Wind Mobile emphasized the importance of ensuring that New Entrants have access to sufficient spectrum,[526] which was also a consideration in introducing the Transfer Framework. Wind Mobile stood to benefit from such measures and therefore so did the Claimant. Indeed, the Claimant itself made similar representations to the Government asking for a change in spectrum policy that would give New Entrants access to

[522] **R-146**, Consultation on Considerations Relating to Transfers, Divisions, and Subordinate Licensing of Spectrum Licences: Comments of Globalive Wireless Management Corp. ("WIND") (Apr. 3, 2013), ¶ 2; **R-152**, Consultation on Considerations Relating to Transfers, Divisions, and Subordinate Licensing of Spectrum Licences: Reply Comments of Globalive Wireless Management Corp. ("WIND") (May 3, 2013), ¶ 2.

[523] **R-146**, Consultation on Considerations Relating to Transfers, Divisions, and Subordinate Licensing of Spectrum Licences: Comments of Globalive Wireless Management Corp. ("WIND") (Apr. 3, 2013), ¶ 7.

[524] **R-146**, Consultation on Considerations Relating to Transfers, Divisions, and Subordinate Licensing of Spectrum Licences: Comments of Globalive Wireless Management Corp. ("WIND") (Apr. 3, 2013), ¶ 10.

[525] **R-146**, Consultation on Considerations Relating to Transfers, Divisions, and Subordinate Licensing of Spectrum Licences: Comments of Globalive Wireless Management Corp. ("WIND") (Apr. 3, 2013), ¶ 3. *See also*, **RWS-Hill**, ¶¶ 122-126; [redacted] **RWS-Hill-2**, ¶ 30.

[526] **R-146**, Consultation on Considerations Relating to Transfers, Divisions, and Subordinate Licensing of Spectrum Licences: Comments of Globalive Wireless Management Corp. ("WIND") (Apr. 3, 2013), ¶¶ 14, 16, 18; **R-152**, Consultation on Considerations Relating to Transfers, Divisions, and Subordinate Licensing of Spectrum Licences: Reply Comments of Globalive Wireless Management Corp. ("WIND") (May 3, 2013), ¶ 8. In a summary of the meeting between Industry Canada and Wind Mobile (Simon Lockie and Pietro Cordova), Wind Mobile expressed the need for access to spectrum; that it could not out bid the Incumbents; and that the Government needed "to restrict any transfer of AWS to incumbents." (**R-422**, E-mail from Pietro Cordova to Henk Van Halen et al. *attaching* "WIND Canada, November 2012 – Summary of recent meetings in Ottawa" (Nov. 27, 2012), pp. 2-3, 7; [redacted] **R-420**, VimpelCom Presentation, "Meeting with Industry Canada – Briefing Paper on Wind Canada's Business Situation" (Mar. 14, 2013), slide 5: ("spectrum 'speculation' has been allowed, as companies that brought AWS spectrum in 2008 have not built out networks and may (depending on new policy framework being established) be allowed to re-sell AWS to highest bidder after 2014."), slide 7: (refers to a "clear need for spectrum policy shift" which should "avoid spectrum hoarding by the Big Three.")

spectrum at the "right price".[527] Thus the Claimant wanted to "have its cake and eat it too": it asked the Government to make regulatory changes to support competition and New Entrants like Wind Mobile, but GTH did not want to be prevented from selling Wind Mobile to Incumbents.

302. In its Reply, the Claimant argues that it did not support the restrictions on transfer unless Canada did more to create favorable regulatory conditions.[528] But as explained by Peter Hill in his second Witness Statement, this is precisely what Canada was doing: it was working on further improvements to regulatory conditions,[529] which Wind Mobile and VimpelCom acknowledged at the time.[530]

e) Canada Did Not Block the Sale of Wind Mobile or the Transfer of Its Licences to an Incumbent

303. Throughout its submissions, the Claimant has repeatedly sought to gloss over the fact that GTH did not own and control Wind Mobile or its licences. For example, it claims that Canada "blocked GTH's sale of Wind Mobile to an Incumbent" and that "Canada […] prevent[ed] GTH from selling its set-aside spectrum licenses to an Incumbent." Canada explains in Section II.E that such claims by GTH are flawed and inadmissible.

304. Further, as discussed above, the "sale" of Wind Mobile's licences to an Incumbent would have entailed a transfer of licences which was subject to Ministerial approval. Similarly, the sale of Wind Mobile to an Incumbent would have resulted in a deemed transfer of Wind Mobile's licences to an Incumbent, and therefore required the Minister's approval. As a result, Wind

[527] **R-420**, VimpelCom Presentation, "Meeting with Industry Canada – Briefing Paper on Wind Canada's Business Situation" (Mar. 14, 2013), slide 5: ("[s]ince 2008 little has been done, despite Wind's requests, from a regulatory perspective to provide wireless challengers with sufficient spectrum resources at the right price" and "spectrum 'speculation' has been allowed, as companies that brought AWS spectrum in 2008 have not built out networks and may (depending on new policy framework being established) be allowed to re-sell AWS to highest bidder after 2014.") **R-422**, E-mail from Pietro Cordova to Henk Van Halen et al. *attaching* WIND Canada, November 2012 – Summary of recent meetings in Ottawa (Nov. 27, 2012), p. 2; **R-498**, E-mail from Pietro Cordova, Wind to Henk van Dalen, VimpelCom (Jan. 21, 2013), *attaching* Draft Letter from Wind Mobile to John Knubley, Industry Canada, p. 2.

[528] Claimant's Reply, footnote 97.

[529] **RWS-Hill-2**, ¶ 30.

[530] **R-363**, E-mail from Augie K. Fabela, VimpelCom Ltd. to James Maunder, Industry Canada (Dec. 18, 2013), p. 1.

Mobile (or the potential purchaser) would have had to request the Minister's approval for these transactions. No such request was made.

305. The Transfer Framework did not "block" the transfer of New Entrants' licences to Incumbents. Each request for a licence transfer would be considered on a case-by-case basis, in light of the circumstances prevailing at the time of the request and the considerations set out in the Transfer Framework. While the Department was approached informally on a few occasions about potential deals involving Wind Mobile's licences, the Claimant never made a request for transfer of Wind Mobile's licences to an Incumbent and consequently, the Minister never denied such a request. Thus the facts show that the Claimant was never "blocked" by Canada from selling Wind Mobile or from transferring its spectrum licences.

4. The Measures Considered Together Do Not Amount to a Breach of Article II(2)(a)

306. As explained in Section II.D above, distinct measures cannot be considered to form part of a cumulative breach unless they form part of a pattern of conduct with a common intent. This is not the case here. Instead the Claimant uses the concept of "cumulative conduct" to bring in complaints arising from interactions with the regulator over the course of almost seven years based on a revisionist description of events, and which are unrelated to the challenged measures.[531] Specifically, the Claimant alleges that Canada's failure with respect to the implementation of the roaming and tower/site sharing conditions and the CRTC's ownership and control review in 2009, combined with the Transfer Framework and Industry Canada's review of GTH's application to acquire voting control of Wind Mobile, resulted in the "dismantling" of the regulatory framework on which it relied to invest in Canada in 2008 and "to the near complete destruction in value of GTH's investment."[532]

307. Canada demonstrates below that Canada's actions with respect to the CRTC ownership and control review and roaming and tower/site sharing measures do not support the Claimant's

[531] It is worth noting that the Claimant has now clarified that it does not challenge the CRTC ownership and control review and the roaming and tower/site sharing measures in and of themselves.

[532] Claimant's Reply, ¶ 315.

narrative that Canada's actions were part of a pattern of unfair conduct against GTH – Properly understood these actions cannot contribute to a finding of a breach of the FET standard. Further, the Claimant's cumulative breach argument is clearly an effort to draw attention away from the context in which each measure was taken and to focus solely on the losses the Claimant allegedly suffered. However, establishing that GTH did not recover the value of its investment does not establish that Canada's measures breached the FET standard in Article II(2)(a). In this case, the Claimant's allegations that Canada's actions were inconsistent are based on nothing more than mischaracterizations of the facts.

a) The CRTC Ownership and Control Review of Wind Mobile Cannot Contribute to a Finding of Breach of Canada's Fair and Equitable Treatment Obligation

308. The Claimant argues that it was subjected to a duplicate review by the CRTC in July 2009, after it received confirmation by Industry Canada that it met the ownership and control requirements under the *Radiocommunication Regulations.* This second review allegedly had the effect of delaying Wind Mobile's launch.[533] According to the Claimant, this second review also contributed, together with the other three measures, to Canada's failure "to honor the investment framework it had created".[534]

309. The need to comply with both Industry Canada's ownership and control review and the CRTC ownership and control review did not alter the regulatory framework upon which the Claimant relied to invest in Canada. On the contrary, the Canadian ownership and control requirements were always part of the regulatory framework[535] and the Claimant was well aware of them before making its investment.[536] The AWS-1 Policy Framework specifically indicates

[533] Claimant's Reply, ¶ 322.

[534] Claimant's Reply, ¶ 333.

[535] **C-046**, *Telecommunications Act*, s. 16; **C-001**, *Radiocommunication Regulations*, SOR/96-484, s. 10(2)(d)(i); Section 10 of the *Radiocommunication Regulations* was repealed on February 28, 2014. *See* **R-205**, *Regulations Amending the Radiocommunication Regulations*, SOR/2014-34 (Feb. 28, 2014). **C-058**, Industry Canada, *Canadian Ownership and Control* (CPC-2-0-15, Issue 2) (Aug. 2007).

[536] **R-499**, Globalive Presentation, "Canada AWS Opportunity Assessment – May 2008 – Investment Committee 2" (May 6, 2008), slide 45: ("Under Canadian law a wireless operating corporation must be Canadian-owned and controlled and meet the following conditions … Canadian authorities will look at all the documentation to ensure that the foreign investor does not somehow exercise control over the operations of the licensee. An extensive case by

that: "[i]n addition to access to spectrum, a consideration particular to the Canadian wireless market is the presence of Canadian ownership requirements under the *Telecommunications Act* which apply to all facilities-based carriers." These requirements ensure that Canada's telecommunications infrastructure is owned and controlled by Canadians.[537]

310. The Claimant's internal documents further demonstrate that it was aware of the necessity to comply with the Canadian ownership and control requirements under both the *Radiocommunication Regulations* and the *Telecommunications Act*, and understood that these were two distinct review processes.[538] Thus, it cannot pretend in the context of this arbitration that the second review was unforeseen.

311. Following Industry Canada's determination that Wind Mobile met the Canadian ownership and control requirements of the *Radiocommunication Regulations* and issuance of the spectrum licences on March 6, 2009, an internal presentation to GTH's Board of Directors on the same day

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case review will consider factors such as shareholders agreements, veto rights on day-to-day operations, services agreements, composition of the BoD, operating committee composition, the nature of the foreign investor and its Canadian partners etc."); **R-500**, JP Morgan, Conference Call on Canada (Sep. 4, 2008), pp. 8-9: ("As some of you might know there is a very strict regulation in Canada in terms of foreign ownership; we are restricted to have less than 50% of the voting stock of a telecom company" and "We have tried to adhere 100% to the restrictions on foreign ownership to the effect that we do not have control of the company; it has to do with the officers in charge, the board representations, the ownership structure. We're quite confident that as far as the legislation and the regulations we have adhered to them. Now should there come any comments from Industry Canada which would require us to be flexible, or change any of that, we are keen to do this opportunity. We are not really much concerned about control; we are concerned about success.")

[537] **C-004**, AWS-1 Policy Framework, p. 3. **C-046**, *Telecommunications Act*, c. 38, s. 16.

[538] [redacted] **R-502**, Orascom Telecom Holding – Board of Directors Briefing, Globalive Canada (Mar. 6, 2009): ("Following the grant of the licenses and prior to the commencement of operations, the approval of the CRTC, the Canadian government department responsible for regulating telecommunications carriers, will be sought"); **R-503**, E-mail from Stefano Songini, Wind to Ken Campbell, Globalive (Mar. 14, 2009), p. 2: (Globalive "ha[s] been successful in securing the license from Industry Canada" but a review and discussions with the CRTC is a "necessary next step."); **R-361**, Analysys Mason Presentation, "Final report for investors - Due diligence and Banking Case for Globalive Wireless" (Jul. 2, 2009), slides 17, 37: ("The award of the spectrum is subject to a review of the ownership and governance structure of the company. Canadian law requires that Canadian operators are Canadian-owned and controlled" and "Potential threat of challenge to foreign ownership of Globalive by competitors").

confirms that it was aware that it would next have to satisfy the CRTC that it complied with the ownership and control rules under the *Telecommunications Act* :

> Industry Canada […]…. have(sic) sent a formal letter indicating that the structure we propose is compliant in terms of Canadian ownership and control. […] Following the grant of the licenses and prior to the commencement of operations, the approval of the CRTC […] will be sought.
>
> Next steps: 1 - Approval of CRTC to be sought.[539]

312. The CRTC and Industry Canada each had to conduct their own review according to their mandates and pursuant to the applicable statutory requirements. Nothing in the Claimant's documents suggests that it believed the CRTC authorization would be pro-forma, automatic or necessarily lead to the same result as the Industry Canada review.[540]

313. Importantly, as Canada explained in its Counter-Memorial, following the CRTC's decision that Wind Mobile was not Canadian owned and controlled, the Government of Canada, through the GiC, promptly varied the CRTC decision in accordance with its authority set out in section 12 of the *Telecommunications Act*.[541] From beginning to end, this variance process was

[539] **R-502**, Orascom Telecom Holding – Board of Directors Briefing, Globalive Canada (Mar. 6, 2009).

[540] On the contrary, see **R-504**, E-mail from Michael P. Cole to Michel Hubert, OTelecom et al. (Apr. 24, 2009), p. 1: ("not sure how much the CRTC will listen to a competitor like Telus on this, but if they kick up enough public pressure on this to hold public hearings (which I testified in on Bell), this could add months to the process and make the approval without tough pro-Canadian governance conditions much more challenging.") *See also* comments made in light of the 2008 AWS Auction concerning the difficulty to meet the ownership and control requirements under Canadian law. **R-499**, Globalive Presentation, "Canada AWS Opportunity Assessment – May 2008 – Investment Committee 2" (May 6, 2008), slides 46, 48: ("Nevertheless, there is a risk that this structure will not be accepted but this risk can be mitigated by adopting a strictly compliant governance structure. It is likely that there will be some discussions with Industry Canada on the structure post-auction, and some minor amendments may be required to meet any concerns that they may have. It is unlikely (but possible) that we would be unable to reach agreement on a mutually acceptable structure with Industry Canada" and "CIC/MO – there is a risk that this may be viewed as influenced by WI"); **R-505**, Memorandum from Mike O'Connor, Assaad Abdousleiman, Assaad Kairouz, Ragy Soliman, to Naguib Sawiris, "CANADA Wireless Auction" (Mar. 6, 2008), p. 4: ("The case on ownership and control will be much easier if OT partners with Globalive/YAK as YAK has a local presence in Canada and has its own expertise in the telecom domain, such that it will not be wholly reliant on OTH. It will be difficult, but not impossible, to devise an ownership structure which will allow OTH sufficient operational control, without triggering the ownership and control restrictions applicable to broadband licensees.")

[541] Canada's Counter-Memorial, ¶¶ 120-124; **C-046**, *Telecommunications Act*, s. 12.

completed in less than two months. This rapid action taken by the Government in response to Wind Mobile's request minimized any detrimental impact on Wind Mobile and GTH.[542]

314. The Claimant conveniently ignores the Government's response which allowed Wind Mobile to immediately launch its operations as a telecommunications carrier, being the first of the New Entrants to do so. The Claimant cannot pick and choose the elements that fit its narrative that it was unfairly treated and ignore the Government's actions that benefitted it. Properly considered, the actions of the Government with respect to Wind Mobile's ownership and control review cannot contribute to a finding of a breach of Article II(2)(a).

b) The Government's Implementation of Roaming and Tower/Site Sharing Conditions Cannot Contribute to a Finding of A Breach of Canada's Fair and Equitable Obligation

315. In its Reply, the Claimant re-iterates its discontent with Canada's efforts to address the roaming and tower/site sharing conditions. It asserts that the Government of Canada, despite having been made aware of many issues with the COLs on roaming and tower/site sharing, "sat on its hands until 2013"[543], when it finally amended the conditions of licences. According to the Claimant, it was then "too little, too late".

316. First, as mentioned above in section II.D.3, the Claimant's recriminations regarding the roaming and tower/site sharing measures are untimely, unsupported, and cannot in any event constitute a breach of the FET standard. The Claimant argues that the 2008 AWS-1 Auction Framework was not effective and that despite the New Entrants' various complaints, Industry Canada did not do enough to correct it.[544] It also asserts that while Canada had promised to alleviate the barriers to market entry, the regulatory framework in place at the time did not allow for such a result.[545]

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[542] *See* **R-506**, The Star news article, "New cellphone operator could go live next week" (Dec. 11, 2009).

[543] Claimant's Reply, ¶ 323.

[544] Claimant's Reply, ¶ 22 (d).

[545] Claimant's Reply, ¶ 321 (a).

317. The Claimant cannot challenge the initial measures put in place by Canada, as it was well aware of the existing regulatory framework and what was proposed with respect to roaming and tower/site sharing before deciding to participate in the 2008 AWS-1 Auction.[546] The Government put in place the exact conditions of licences that had been announced and subject to consultations and on which GTH based its decision to invest.[547]

318. When Wind Mobile complained to Industry Canada on matters related to technical feasibility or clarifications of the COLs, Industry Canada took numerous actions to quickly solve the issues raised by Wind Mobile.[548] Indeed, Industry Canada often reached out to Incumbents in order to alleviate some of Wind Mobile's concerns over negotiations with them.[549] However, from the start, Industry Canada made it clear that licensees would have to resort to arbitration to resolve "the commercial terms and conditions on which roaming and tower/site sharing was provided."[550]

319. Knowing this, Wind Mobile nonetheless decided not to use the arbitration mechanism. The Government of Canada cannot be blamed for Wind Mobile's decision.

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[546] While the Claimant and other New Entrants, through the prior consultation initiated on November 28, 2007, wanted the COLs on mandatory roaming and tower/site tower sharing to go further, these propositions were not retained by Industry Canada. GTH understood from the start that the measures on roaming and tower/site sharing did not provide a guarantee regarding the result of the negotiations. **R-500**, JP Morgan, Conference Call on Canada (Sep. 4, 2008), p. 12: (Michael O'Connor in discussing GTH's plan in Canada noted that "[w]hat [Incumbents] can do is hold us back, delay us, but inevitably they will have to do it at a certain point in time." *See also* **R-362**, Wind Mobile Presentation, "2009/2010 Business Review Management Package – 2009 (8+4) Forecast & 2010 Budget" (Nov. 11, 2009), slide 24 ("We will pursue our rights to mandated tower sharing and roaming, but realise process is slow and therefore, not predicate our launch on such initiatives"); **R-507**, E-mail from Alaa Abdel Ghafar, OTelecom to Stewart Thompson, Globalive, et al. (Nov. 18, 2008), pp. 1, 2: ("However, we will still need to be more clear on the process the incumbents will mandate to enter into discussions on the different fronts and specially on interconnection and national roaming. With regards to the site sharing, we have already asked our vendors to provide us with a back-up plan per site in case of deadlocks" and "[d]omestic roaming negotiations and arbitration are getting closer to critical path to launch […]. In terms of mandated site sharing, we are looking at a long process here as you know.")

[547] **RWS-Hill-2**, ¶¶ 17, 32.

[548] **RWS-Hill-2**, ¶ 36; **RWS-Hill**, ¶¶ 97, 98 and 100.

[549] **RWS-Hill-2**, ¶ 36.

[550] **RWS-Hill**, ¶¶ 35, 55. Further, despite the Claimant's allegations, some New Entrants were successful in using this mechanism, thus demonstrating its effectiveness and efficiency.

320. As for the Claimant's allegations that mandatory roaming and tower/site sharing provisions were insufficient, and that the Government should have done more to ensure a level playing field for New Entrants, they cannot establish a breach of the FET standard. No government can be certain that its policies will achieve their objective.

321. The Claimant's allegations fail to acknowledge the diligence and efforts made by the Canadian Government to address roaming and tower/site sharing conditions. Industry Canada took numerous steps within its authority to help improve the conditions on roaming and tower/site sharing:

- On February 17, 2009, following complaints received from both New Entrants and Incumbents, Industry Canada launched a public consultation, which led to the publication of the Guidelines for Tower/Site Sharing in April 2009.[551]

- In November 2010, Industry Canada sought to review the conditions on roaming and tower/site sharing and asked telecommunications carriers to provide their data in this regard.[552] Nordicity, an independent firm, was retained to study the roaming and tower/site arrangements.[553]

- In March 2012, following the Nordicity report, Industry Canada released for consultation the Proposed Revisions on the Frameworks for Mandatory Roaming and Antenna Tower and Site Sharing.[554]

- In March 2013, Industry Canada published the Revised COLs on Roaming and Tower/Site Sharing.[555]

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[551] **RWS-Hill**, ¶¶ 70-72. The Guidelines provided greater clarity regarding the tower/site sharing process. *See* **C-093**, Guidelines for Compliance with the Conditions of Licence Relating to Antenna Tower and Site Sharing and to Prohibit Exclusive Site Arrangements (Apr. 2009) Issue 1.

[552] **RWS-Hill**, ¶ 77. **R-136**, Letter from Fiona Gilfillan, Industry Canada to Kenneth Campbell, Globalive *attaching* Annex 1: Information to be provided – Tower and site sharing Information and Annex 2: Data Collection Templates (Nov. 23, 2010).

[553] Nordicity submitted its report on May 2011 and while it proposed changes, it did recognize that the framework had been generally successful. **R-135**, Nordicity, Assessment of Mandatory Tower Sharing and Roaming Provisions, Final Report Prepared for Industry Canada (May 2011), p. 4. *See also* **RWS-Hill**, ¶¶ 79-85.

[554] After a careful gathering of data and analysing of the comments received from stakeholders, Industry Canada, keeping in mind the importance of balancing New Entrants and Incumbents' needs, decided to propose and consult on potential amendments to the COLs on roaming and tower/site sharing. **C-121**, Proposed Revisions to the Frameworks for Mandatory Roaming and Antenna Tower and Site Sharing (Mar. 2012). *See also* **RWS-Hill-2**, ¶¶ 32, 33.

322. New Entrants, including Wind Mobile, were generally supportive of these efforts, and of subsequent efforts to improve conditions that would foster sustained competition.[556] The fact that from the Claimant's perspective the Government was too slow in making the "dramatic and unprecedented changes in regulations" that it was seeking to improve the competitive environment for New Entrants,[557] or that the Government did not go far enough, does not establish that the Government "turned a blind eye" to the complaints. While the Government never provided the Claimant a specific commitment that it would go further in regulating roaming and tower sharing, it was open to and invited input from stakeholders, including licensees, on changes that would assist in promoting competition in the wireless telecommunications market.[558] Ultimately, none of the allegations regarding the mandatory

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[555] **C-153**, Revised Frameworks for Mandatory Roaming and Antenna Tower and Site Sharing (Mar. 2013). During that same year, the Government of Canada announced its intention to cap domestic roaming rates by amending the *Telecommunications Act*.

[556] **RWS-Hill-2**, ¶¶ 36, 40. For example, according to the Claimant's own documents, a report received by Wind Mobile in 2009 acknowledged Industry Canada and the CRTC's numerous interventions, **R-361**, Analysys Mason Presentation, "Final report for investors - Due diligence and Banking Case for Globalive Wireless" (Jul. 2, 2009), slide 15. Further, in 2013, following the Canadian Government's announcement that it was going to cap domestic rates, Augie K. Fabela II of Beeline, stated: "James, very positive news. We are of course fully supportive! Looking forward to our discussion on Friday. Regards, Augie." (**RWS-Hill-2**, ¶ 40, citing to **R-363**, E-mail from Augie K. Fabela, VimpelCom Ltd. to James Maunder, Industry Canada (Dec. 18, 2013), p. 1.) *See also* [redacted] *See also* [redacted]. Following the *Revised COLs on Roaming and Tower/Site Sharing*, Wind sent a letter to Rogers in order to renegotiate roaming agreements.

[557] [redacted] *See also* [redacted]

[558] Wind Mobile, the Claimant and VimpelCom met on several occasions with Industry Canada both at the officials and the political level and raised proposals for significant changes to the regulatory regime including with respect to roaming and tower sharing. See for example **R-418**, E-mail from Pietro Cordova, Wind to Righetti Romano, Wind and Henk Van Dalen, VimpelCom (Jan. 12, 2013), p. 1: ("we also mentioned our unhappiness with the current regime regulating tower sharing and roaming agreement […] the Minister at the end of our presentation said that they fully understood our position and that the Government continues to be very supportive of competition. He said that certain things have been done but that they understand that more need to be done to continue along that path."); **R-493**, E-mail from Simon Lockie, Globalive to Andy Dry, VimpelCom, et al. (May 7, 2013), *attaching* Draft Memorandum "Keys to Viability, Industry Canada", (Apr. 15, 2013), p. 1; [redacted].

roaming and tower/site sharing provisions and the regulatory framework can contribute to a finding of breach of Article II(2)(a).

c) There was no Pattern of Conduct or of Inconsistent Decisions Targeting the Claimant

323. In its Reply, the Claimant argues that the measures adopted by different arms of the Canadian Government and Canada's "pattern of conduct" amount to a breach of the FET standard that "had devastating consequences on the value of GTH's investment."[559] The Claimant wrongfully attempts to demonstrate that Canada's measures looked at *in toto* constitute a breach of its FET obligations by focusing only on the effects of the measures adopted by the Government on its investment.

324. However, the Claimant cannot rely on the fact that it has suffered losses to demonstrate that Canada breached its FET obligation under the FIPA. The question of whether the Claimant has suffered any losses is a separate question from whether measures adopted by Canada amount to a breach of the FET standard. [560] Indeed, with respect to the FET obligation, the effects of the measures adopted by a State are relevant *once* a breach of the FET standard has been established.[561] Thus, the fact that the Claimant was not able to recover the value of its investment does not establish, in and of itself, that Canada's conduct amounted to a breach of Article II(2)(a). By relying solely on the effects of the measures, the Claimant fails to demonstrate how the four measures cumulatively amount to a breach of Canada's Treaty obligations.

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[559] Claimant's Reply, ¶ 325. *See also* ¶ 332: ("The two arms of the Government again acted inconsistently, in a manner that caused significant damage to GTH.")

[560] **RL-292**, *Vesel*, p. 561 (noting that "[i]n contrast to expropriation, none of the FET principles enumerated by the *Rumeli* tribunal – save perhaps that of legitimate expectations – readily lends itself to analysis based solely on the *effects* of the government's conduct. Indeed, the question of whether such principles as transparency, good faith, or due process have been breached would appear to be an entirely separation question from whether their breach caused compensable harm.")

[561] **RL-292**, *Vesel*, pp. 561-562: (noting that "[o]rdinarily, in the FET context the effects of the host State's actions are principally relevant for the assessment of causation of damages rather than for the determination of whether a breach occurred. In *Vivendi II*, for example, the tribunal first assessed whether the measures were in breach of treaty obligations and then turned to the question of whether the claimants had met their 'obligation to show that the damages alleged were caused by the measures we have found to infringe the BIT.'") The author also notes that the award on which the Claimant relies on, *El Paso v. Argentina*, "anomalous[ly] […] incorporated the effects of the government measures into its assessment that a 'creeping' violation of the FET standard had occurred."

325. Further, in its Reply, in a last-ditched attempt to establish that Canada's measures cumulatively amount to a breach of the FET standard, the Claimant now argues that it was the victim of "contradictory acts by different arms of the Canadian Government."[562] While the Claimant recognizes the different mandates and complementary roles of Industry Canada, the CRTC, and the Competition Bureau[563], it nonetheless argues that these three entities acted in inconsistent ways throughout the course of GTH's investment in Canada, which caused the Claimant to exit the Canadian market.

326. The Claimant's allegations are clearly based on a misconception of the inner functioning of States. To suggest that Government conduct should be assessed "as a whole" ignores the different roles and mandates of the agencies, departments, and other organs of the State, which are vested with different decision making powers. It is not unusual – nor does it amount to a breach of the FET standard – for different arms of a government, acting within their respective authority and on different legal grounds, to arrive at decisions that "contradictorily" affect those authorities: the fact that an authorization is given by one agency does not mean that *all* other regulatory authorizations will be granted. The CRTC, the Competition Bureau, and Industry Canada work at arm's length and independently from each other in the fulfilment of their respective mandates. It is only logical that they can, and sometimes do, come to different conclusions. Thus, Industry Canada and the CRTC reaching a different conclusion following their separate and independent reviews of Wind Mobile's corporate structure does not amount to a breach of Canada's FET obligation. Nor can the CRTC's decision in 1994 to forbear from regulating wireless telecommunications services following its determination that "competition was sufficient to protect the interests of users"[564] be viewed as inconsistent with the Government's measures to foster competition, including by introducing the Transfer Framework

[562] Claimant's Reply, ¶ 326.

[563] Claimant's Reply, ¶ 326.

[564] In accordance with section 34(2) of the *Telecommunications Act.* **C-046**, *Telecommunications Act*, s. 34 (2). This forbearance policy ended in 2015.

in 2013.[565] Canada's policy objective remained consistent, but the measures that were considered necessary to achieve it evolved in response to changing circumstances.

B. Canada did not Breach the Full Protection and Security Standard: The Claimant's Allegations Rely on an Incorrect Interpretation of Article II(2)(b) and a Mischaracterization of the Regulatory Framework

327. In its Counter-Memorial, Canada explained that the FPS standard of Article II(2)(b) relates to ensuring the *physical* safety of foreign investment.[566] The parameters of the standard are well established, based on the plain and ordinary language of the provision in its context and the object and purpose of the Treaty; tribunal findings and academic commentary; and recent treaty practice.

328. In response, the Claimant persists with an interpretation of the FPS standard that goes much beyond physical protection. The Claimant claims that FPS requires the creation and maintenance of a commercial and legal framework ensuring the security of investment, in addition to protection against harm in business dealings with third parties or organs of the State – in short, a "guarantee of commercial and legal security."[567] As Canada explains below, this interpretation of the standard is as baseless as it is unworkable, a point illustrated by the array of mischaracterizations laid out in the Claimant's Reply as to why Canada breached the FPS obligation. In the end, FPS is limited to ensuring safety from physical harm, injury, or impairment, and nothing more. There is no basis to find that Canada acted inconsistently with the standard.

[565] In the context of the 2008 AWS-1 Auction, Industry Canada explained that its role regarding market competition differed from the role of the CRTC and the Competition Bureau, since Industry Canada was mainly concerned with spectrum management. **R-478**, AWS Announcement Questions and Answers (Nov. 27 2007), pp. 7-8: ("Q6 – [t]he CRTC and Competition Bureau say that the wireless industry is competitive. Does the government disagree? […] Spectrum is a valuable and finite public resource and we have the responsibility of managing it for the benefit of all Canadians. Managing the spectrum is quite different from the specific issues previously considered by the CRTC and the Competition Bureau.")

[566] Canada's Counter-Memorial, ¶¶ 459-471.

[567] Claimant's Reply, ¶ 334.

1. The Claimant Errs in Equating the FPS Standard with an Open-Ended Guarantee of Commercial and Legal Security

329. The Claimant has argued that a "physical" component of the FPS standard is inconsistent with the context and objective of the provision.[568] But rather than acknowledging the weight of the many past authorities that have interpreted the FPS standard as being confined to protection of the physical integrity of an investment,[569] the Claimant equates the standard with an open-ended guarantee of commercial and legal security and then cites to "multiple ways"[570] that Canada breached the standard.

330. The FPS standard protects the physical integrity of an investment only, and is not a guarantee against any regulatory measure that may negatively impact an investor. Further, while the Claimant's allegations make profuse reference to terms such as "uncertainty",[571] "significant concern",[572] or "legal insecurity"[573] none of them even come close to meeting the Claimant's own incorrect interpretation of the applicable legal standard under Article II(2)(b).

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[568] Claimant's Reply, ¶ 334.

[569] In *Saluka*, *Gold Reserve*, *BG*, and *Rumeli*, the tribunals provide jurisprudence, context and further analysis of the FPS standard as referring to "physical harm" alone. For example, in *Gold Reserve*, the Tribunal found: "While some investment treaty tribunals have extended the concept of full protection and security to an obligation to provide regulatory and legal protections, the more traditional, and commonly accepted view, as confirmed in the numerous cases cited by Respondent is that this standard of treatment refers to protection against physical harm to persons and property." (**CL-075**, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/09/1) Award, 22 September 2014 ("*Gold Reserve – Award*"), ¶ 622). As noted in *Saluka*, "[t]he practice of arbitral tribunals seems to indicate, however, that the 'full security and protection' clause is not meant to cover just any kind of impairment of an investor's investment, but to protect more specifically the physical integrity of an investment. against interference by use of force." (**CL-038**, *Saluka – Award*, ¶ 484). This position was confirmed more recently in *AWG* where, following an analysis of previous decisions on the subject, the tribunal concluded that the obligation of full protection and security required "due diligence to protect investors and investments primarily from physical injury." (**CL-060**, *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal, S.A. v. The Argentine Republic* (ICSID Case No. ARB/03/19) and *AWG Group v. The Argentine Republic* (UNCITRAL) Decision on Liability, 30 July 2010, ¶ 179).

[570] Claimant's Reply, ¶ 337.

[571] Claimant's Reply, ¶ 337.

[572] Claimant's Reply, ¶ 339.

[573] Claimant's Reply, ¶ 340.

2. The Claimant's Allegations that Canada Breached its Full Protection and Security Obligation are Based on the Same Mischaracterizations as its Allegations of Breach of the Fair and Equitable Treatment

331. The Claimant argues that Canada breached its FPS obligation because of (1) the national security review process; (2) the transfer framework and changes to the conditions of licences; and (3) the "cumulative breach", and in particular the previous measures taken together with the delayed response to complaints on the roaming and tower/site sharing conditions.

332. Given that these allegations are essentially based on the same mischaracterizations as the allegations of breach of the FET standard, and do not advance new claims, Canada will not repeat here the same points made in response to the Claimant's allegations on FET, but briefly notes:

(i) The initiation of a national security review of GTH's voting control application [redacted] are outside the Tribunal's jurisdiction; in any event the national security review was done pursuant to and in accordance with the provisions of the *ICA,* and the Claimant was accorded due process.

(ii) The Transfer Framework was adopted pursuant to and in accordance with the existing regulatory framework; it was not a fundamental change of the applicable regulatory framework given that changes to spectrum policies and to COLs were contemplated in the regulatory framework. There was no "contractual relationship that formed the basis of [GTH's] investment in Canada"[574] given that the only relationship that existed was the relation between the Department as the regulator and Wind Mobile as the licensee.

(iii) Canada did not "effectively dismantle the regulatory framework designed to induce GTH's investment in Canada". It introduced the mandatory roaming and tower/site sharing provisions that it had announced; and when New Entrants raised issues the Government acted in response to these complaints. The Government also continued its efforts to support sustained competition including by introducing amendments to improve the COLs on roaming and tower/site sharing in 2013.

[574] Claimant's Reply, ¶ 340.

333. As such, there is no basis for the allegations of violation of Article II(2)(b) and the claims should be rejected.

C. Canada did not Breach the Transfer of Funds Obligation under Article IX

1. The Claimant's Allegations Rely on an Incorrect Interpretation of the Standard

334. In its Reply, the Claimant maintains that Canada has committed a breach of the "unrestricted transfer provision," Article IX of the FIPA, by restricting the Claimant's ability to "transfer its investments in Canada."[575] However, as noted in Canada's Counter-Memorial,[576] the Claimant's allegations of breach are based on a fundamental misunderstanding of the transfer provision under Article IX. Article IX only guarantees the international transfer of *funds* between Egypt and Canada, in line with the object and purpose of the provision.[577]

a) The Claimant Reads the Terms "Unrestricted Transfer" out of Context

335. The Claimant persists in putting forward a reading of Article IX(1) of the FIPA that is inconsistent with its ordinary meaning, read in the context provided by the provision as a whole, including its title, and with the object and purpose of the Treaty.

336. The title of the provision confirms its scope. The title of Article IX is "Transfer of Funds", not "Unrestricted Transfers of Investments". If, as the Claimant suggests, the Parties had made broader commitments not to restrict the transfer of investments in any way, they would have chosen a title that reflected this broader scope. Instead they specifically limited it to transfer of funds.

337. In addition to the title, the inclusion of both the first and the second sentences of Article XI makes clear that the provision is concerned with the act of transferring *funds*.[578] Paragraph (1) clearly contemplates the movement or transfer of funds. Indeed, each of the examples listed in

[575] Claimant's Reply, ¶ 342.

[576] Canada's Counter-Memorial, ¶ 486.

[577] Canada's Counter-Memorial, ¶¶ 486-503.

[578] **CL-001**, Canada-Egypt FIPA, Article IX(2).

paragraph (1) relates to movement of funds ("funds in repayment of loans related to an investment; the proceeds of the total or partial liquidation of any investment; wages and other remuneration accruing to a citizen of the other Contracting Party who was permitted to work in connection with an investment in the territory of the other Contracting Party; any compensation owed to an investor by virtue of Articles VII or VIII of the Agreement."). Furthermore, the provision immediately following Article IX(1) addresses *how* such fund transfers are to be guaranteed: "without delay in the convertible currency in which the capital was originally invested or in any other convertible currency agreed by the investor…".[579] The focus on currency plainly demonstrates that what is at issue is the movement of funds. Paragraph (3) sets out exceptions to the obligation. These exceptions in themselves confirm that the obligation is only related to transfer of funds. They envisage where the movement of funds may be impeded, for example, as a result of bankruptcy, seizing assets for criminal purposes, or as a result of court decisions.

338. Read as a whole, these paragraphs convey the scope of the Article as clearly concerned with protecting an investor's ability to freely transfer funds into and out of the host State.

339. The purpose of transfer of funds provisions in investment treaties was well summarized in *International Investment Law and Comparative Public Law*: "the ability to transfer funds in and out of the host state ensures that the foreign investor reaps the benefits or enjoys the fruits of his or her investment through dividend payments, paying for goods and services, servicing of debts, or fulfilling other financial obligations that would enhance the value of the investment."[580] Hence, transfer of funds provisions in investment treaties protect the freedom of cross-border movements of funds related to the investment.[581] The purpose of Article IX is to protect the movement of these funds.

[579] Canada's Counter-Memorial, ¶ 492.

[580] **RL-320**, Abba Kolo, *Transfer of Funds: The Interaction Between the IMF Articles of Agreement and Modern Investment Treaties: A Comparative Law Perspective*, in Stephan W. Schill, *International Investment Law and Comparative Public Law* (Oxford: Oxford University Press, 2010) ("*Kolo*"), p. 346.

[581] **RL-320**, *Kolo*, p. 346.

340. In its Counter-Memorial, Canada referred to previous arbitral decisions and commentary establishing that provisions such as Article IX do not go beyond transfer of funds. While the Claimant has ignored these authorities, it has not provided any further support for its broad interpretation of the provision.[582]

341. The Claimant continues to argue that Canada does not support its proposition that the funds generated by an investment are in any way distinct from the core assets making up the investment and that both are subject to protection as a composite whole. However, the transfer provision is not concerned with the assets making up the investment but the transfer of funds as a distinct (although related) element of the investment. The protection of the investment itself is covered by the other FIPA obligations. Thus, the concept of the provision's protections extending to a "bundle of rights" beyond transfer of funds, as argued by the Claimant, is incorrect and misplaced.

b) The Claimant's Interpretation of the Transfer Standard Would Have Wide-Ranging Consequences Not Supported by a Proper Reading of Article IX

342. The interpretation of Article IX(1) advocated by the Claimant would not only go beyond the terms and purpose of the transfer provision but would also expand the standard to apply to situations not within the provision's ambit, which would have negative consequences for the foreign investment regime contemplated by the FIPA. It would expand the provision to an untenable and unworkable standard.

343. As noted in the Claimant's Reply, the Claimant argues that, "if the Tribunal finds that Canada's blocking of the sale of GTH's investment in Wind Mobile was a breach of the free transfer guarantee of this BIT, then this finding would apply equally to *all* Canadian State organs, including the Competition Bureau."[583] This illustrates the wide-ranging consequences of transforming Article IX into a protection against all measures that could affect an investor's ability to sell its investment.

[582] Canada's Counter-Memorial, ¶¶ 494-503.

[583] Claimant's Reply, ¶ 380 (emphasis added).

344. The unreasonableness of such an interpretation is clear. It would render inoperable domestic competition bodies and other State organs involved in the lawful regulation of commerce within the State. The transfer provision was never intended to be a wide-ranging tool to impede the functions of the State in the regulation of domestic affairs.

2. The Claimant's Allegations Rely On Mischaracterization Of The Facts: Canada Never Prevented The Transfer Of The Claimant's Investment In Wind Mobile

345. Not only does the Claimant misconstrue the scope of protection of Article IX, but it also relies on a biased presentation of the relevant facts.

346. First, applying the proper test, it is clear, and the Claimant does not contest, that Canada never prevented the transfer of funds that the Claimant realized from the sale of its interests in Wind Mobile.

347. Second, the fact that Canada never restricted the sale of GTH's investment in Wind Mobile is also uncontested. None of the measures being challenged prevented GTH's ability to sell its debt and indirect equity interests in Wind Mobile. The Transfer Framework did not affect the minority equity interests that GTH had in Wind Mobile or their sale, including to Incumbents. Further, the Claimant liquidated its debt and equity interests and transferred these funds in 2014.[584] At no time was the Claimant prevented from transferring funds generated by these interests back to Egypt or Amsterdam.

348. Finally, to the extent the Claimant's arguments rely on the incorrect factual assertion that Canada "blocked" the sale of Wind Mobile to an Incumbent, this argument should be rejected. Not only does the claim conflate GTH's investment with Wind Mobile, but as set out in section II.A.3, neither Wind Mobile nor the Claimant ever requested a transfer of Wind Mobile's licences to an Incumbent and none was ever denied.

[584] Canada's Counter-Memorial, ¶ 16.

349. Given the foregoing, it is clear that Canada did not breach Article XI of the FIPA, as it in no way restricted the Claimant's ability to transfer funds into or out of Canada. The Claimant's allegation should be rejected.

D. Canada did not Breach the National Treatment Obligation as the Obligation is Not Applicable

350. The Claimant's national treatment claim is based on the fact that it was subject to the national security review provisions of the ICA with respect to its proposed acquisition of voting control of Wind Mobile and that this mechanism would not have applied if it were a Canadian investor.

351. The *ICA* review mechanism, and the fact that it only applies with respect to foreign investors seeking to acquire a Canadian investment, is consistent with the FIPA and all of Canada's international obligations. In all of its treaty negotiations Canada ensures that it maintains the flexibility to use this mechanism to review certain proposed investments by foreign investors, whether through exceptions, reservations, or exclusions from dispute settlement, or a combination thereof. In this FIPA, Article II(4)(d) excludes from investor-state dispute settlement, claims relating to breaches of any of the Treaty's substantial obligations, including the national treatment obligation.

352. In any event, as discussed in section II.C above, under Article IV(2)(d) of the FIPA, the national treatment obligation is not applicable with respect to telecommunications services.

IV. THE CLAIMANT IS NOT ENTITLED TO THE DAMAGES IT SEEKS FOR THE ALLEGED VIOLATIONS OF THE FIPA

A. Summary of Canada's Position

353. As Canada explained in Part II.E, the Claimant does not have standing to make a claim for losses allegedly suffered as a result of damages to Wind Mobile. Therefore claims for losses arising from the Transfer Framework or from the regulatory framework with respect to roaming

and tower/site sharing are inadmissible. But putting this issue aside,[585] the Claimant's approach to damages is fundamentally unsound and must be rejected. In section IV.B below, Canada first places the Claimant's damages claim in its appropriate context by recalling a key principle which must guide any award of damages: it is the Claimant who bears the burden of proving that an alleged breach caused its alleged injury and losses. The Claimant pays lip service to this governing principle, but fails to properly apply it. In section IV.C, Canada explains that while the Claimant continues to claim that it should be awarded compensation based on its investment costs, it provides no valid reason for its position. The Claimant's investment costs are irrelevant to the value of its debt and equity interests in Wind Mobile but-for the alleged breaches, and its claim for these costs should be rejected outright given that it would not compensate the Claimant for losses *caused by the alleged breaches*. In section IV.D, Canada then explains the simple market-based approach that can be taken to determining damages in this case – specifically by assessing the damages caused by an alleged breach on the basis of actual facts known at the time of the breach. In Section IV.E, Canada contrasts the simplicity and reliability of its market-based approach with the complexity and speculation inherent in the "alternative"[586] market-based valuations proposed by the Claimant, and explains why these valuations must be rejected. Canada concludes in Section IV.F by summarizing the findings that must be made regarding damages in this case.

B. The Claimant Bears the Burden of Proving That an Alleged Breach Has Caused its Alleged Injury and Loss

354. As Canada explained in its Counter-Memorial, the Claimant bears the burden of establishing that an alleged breach caused the injury it claims. For causation to be proven, the Claimant must demonstrate a "sufficient causal link"[587] or an "adequate[] connect[ion]"[588]

[585] In the event that the Tribunal determines that the Claimant is entitled to bring claims for losses arising out of the Transfer Framework or from the regulatory framework with respect to roaming and tower sharing, which it is not, Canada addresses the merits of these damages claims below.

[586] Claimant's Reply, section V.D.

[587] **RL-232**, *S.D. Myers – Second Partial Award*, ¶ 140. *See also* **CL-049**, *Biwater Gauff (Tanzania) Ltd. v. Tanzania* (ICSID Case No. ARB/05/22) Award, 24 July 2008 ("*Biwater – Award*"), ¶ 779: ("Compensation for any violation of the BIT, whether in the context of unlawful expropriation or the breach of any other treaty standard, will only be due if there is a sufficient causal link between the actual breach of the BIT and the loss sustained by [the Enterprise].").

between an alleged breach of the FIPA and alleged injury, the latter being the consequence of the former. It is not enough for the Claimant to merely allege a breach of the FIPA on one hand, and damages on the other – the two must be sufficiently connected.

355. In this regard, Article 31 of the ILC Articles provides, that "[t]he responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act."[589] The Commentaries to Article 31 highlight the importance of the causation requirement, explaining that "[i]t is only '[i]njury … caused by the internationally wrongful act of a State for which full reparation must be made. This phrase is used to make clear that the subject matter of reparation is, the injury resulting from and ascribable to the wrongful act, rather than any and all consequences flowing from an internationally wrongful act."[590] In other words, the alleged injury cannot be too remote – "[t]he notion of a sufficient causal link which is not too remote is embodied in the general requirement in article 31 that the injury should be in consequence of the wrongful act."[591]

356. International law requires a high degree of certainty that an alleged breach has caused alleged injury. As the Permanent Court of International Justice explained in *Chorzów*, "reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed."[592] More recently, in the *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* the ICJ articulated the question as follows: "whether there is a sufficiently direct and certain causal nexus between the wrongful act … and the injury suffered." The ICJ added that this nexus could only be established "if the Court were able to conclude from the case as a whole and with a sufficient degree of certainty that the

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[588] **RL-030**, *Feldman – Award*, ¶ 194.

[589] **CL-028**, International Law Commission, *Responsibility of States for Internationally Wrongful Acts* (2001) ("ILC Articles"), Article 31(1).

[590] **RL-233**, Commentary on the ILC Articles, Article 31, Commentary (9).

[591] **RL-233**, Commentary on the ILC Articles, Article 31, Commentary (10).

[592] **CL-020**, *Case Concerning the Factory at Chorzów (Germany v. Poland)*, Merits, Judgment of 13 September 1928, 1928 P.C.I.J. (ser. A) No. 17 ("*Chorzów*"), p. 47 (emphasis added).

[injury] would in fact have been averted if the Respondent had acted in compliance with its legal obligations."[593]

357. A similar threshold has been applied by investment arbitration tribunals. The tribunal in *Biwater Gauff* explained that causation "comprises a number of different elements, including, inter alia; (1) a sufficient link between the wrongful act and the damage in question; and (2) a threshold beyond which damage, albeit linked to the wrongful act, is considered too indirect or remote."[594] It further noted that "'causing injury' must mean more than simply the wrongful act itself …, otherwise the element of causation would have to be taken as present in every case, rather than being a separate enquiry." Moreover, "[w]hether or not each wrongful act by the Republic 'caused injury' such as to ground a claim for compensation must be analysed in terms of each specific 'injury' for which [the claimant] has in fact claimed damages."[595] The *Rompetrol* tribunal similarly noted that:

> [t]o the extent, however, that a claimant chooses to put its claim (as in the present Arbitration) in terms of monetary damages, then it must, as a matter of basic principle, be for the claimant to prove, in addition to the fact of its loss or damage, its quantification in monetary terms and **the necessary causal link between the loss or damage and the treaty breach**.[596]

358. It is therefore incumbent on the Claimant to prove that each alleged breach in this case caused the specific injury being claimed. If it can meet this burden, then it must demonstrate the appropriate amount of compensation "for the damage caused thereby."[597] However, as the Commentaries to the ILC Articles note, "[t]ribunals have been reluctant to provide compensation

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[593] **RL-321**, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v. Serbia and Montenegro)* I.C.J. Reports 2007, Judgment of 26 February 2007, p. 234 (emphasis added).

[594] **CL-049**, *Biwater – Award*, ¶ 785; **CL-050**, *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador* (ICSID Case No. ARB/04/19) Award, 18 August 2008, ¶ 468. *See also* **CL-059**, *Gemplus – Award*, ¶ 11.8; **CL-046**, *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/04/5) Award, 21 November 2007, ¶ 282.

[595] **CL-049**, *Biwater – Award*, ¶¶ 803-804 (emphasis added).

[596] **RL-322**, *The Rompetrol Group N.V. v. Romania* (ICSID Case No. ARB/06/3) Award, 6 May 2013 ¶ 190 (emphasis added).

[597] **CL-028**, ILC Articles, Article 36(1).

for claims with inherently speculative elements."[598] While an assessment of compensation entails some estimation of the value of the investment and the effect of the breaches on that value, a methodology that assesses damages based on concrete evidence should be preferred. In this vein, a measure of fair market value based on *actual offers* provides a more reliable methodology than one founded on speculation regarding what *might* have been the value of the Claimant's debt and equity interests in Wind Mobile in the absence of a breach.

C. The Claimant's Investment Cost Approach is Irrelevant to a Consideration of Damages

359. In its Reply, the Claimant continues to advance an investment cost approach as its primary measure of damages.[599] It argues that the Tribunal "'enjoy[s] a wide margin of discretion' to determine the appropriate method for calculating the quantum of damages"[600] and that it has a duty to arrive at a damages quantum that is a "rational and fair estimate"[601] rather than to engage in a search for the "disputably correct determination"[602] of the Claimant's loss. On this basis, it suggests that its investment costs are a fitting "barometer"[603] for awarding compensation.[604] The Claimant's investment costs in this case do not represent a proper measure of damages caused by the alleged breaches. Even its own experts do not pretend that it does. Instead, they state axiomatically that "it is a proper representation of what Claimant has invested in Canada."[605]

360. First, the Claimant's suggestion that investment costs are a fitting barometer for its damages effectively ignores that damages are to re-establish the situation which, in all probability, would have existed had the alleged breaches not been committed. As GTH *was* invested in the Canadian wireless market up to the time of the alleged breaches, the situation that

[598] **RL-233**, Commentary on the ILC Articles, Article 36, Commentary (27).

[599] Claimant's Reply, ¶¶ 354, 360, 362-364, 387-394. *See also* **CER-Dellepiane/Spiller-2**, ¶¶ 15(a), 18-20.

[600] Claimant's Reply, ¶ 359.

[601] Claimant's Reply, ¶ 359.

[602] Claimant's Reply, ¶ 359.

[603] Claimant's Reply, ¶ 360.

[604] Claimant's Reply, ¶ 360.

[605] **CER-Dellepiane/Spiller-2**, ¶ 21.

must be re-established cannot possibly be one in which all events preceding the alleged breach are erased back to the time before it made an investment, warranting an award of investment costs. Whether GTH would have invested with perfect hindsight as to how successful its investment might be is irrelevant to calculating damages caused by the alleged breaches.

361. Second, the Claimant suggests that an investment cost approach is warranted when "quantifying the total lost profits is too difficult."[606] However, the cases it cites in support of its proposition are not relevant to the assessment that must be conducted here. Notably, in these cases an investment cost approach was adopted because the investment in question was not a going concern[607] or because an assessment of future damages would have required an impermissible degree of speculation.[608] Here, Wind Mobile *was* a going concern,[609] and an assessment of compensation based on a market-based approach *would not* impose an impermissible degree of speculation as there are actual contemporaneous documents – namely multiple purchase offers for Wind Mobile – that provide a highly reliable indicator of the fair

[606] Claimant's Reply, ¶ 390.

[607] See for example, **CL-076**, *Hassan Awdi, Eterprise Business Consultants, Inc. and Alfa El Corporation v. Romania* (ICSID Case No. ARB/10/13) Award, 2 March 2015, ¶ 514: ("The application of the DCF method relied upon by Claimants as 'the most appropriate way to determine the fair market value' is not justified in the circumstances. This is because Rodipet is not a going concern, it has a history of losses.") (emphasis added); **RL-225**, *Metalclad – Award*, ¶ 121: ("The Tribunal agrees with Mexico that a discounted cash flow analysis is inappropriate in the present case because the landfill was never operative and any award based on future profits would be wholly speculative.") (emphasis added). Further, the tribunal in *Quiborax* applied a DCF methodology as the investment in question was a going concern (*See* **CL-080**, *Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia* (ICSID Case No. ARB/06/2) Award, 16 September 2015, ¶ 347). The Claimant also cites to the submissions by Canada in the *Gallo, Bilcon* and *Windstream* NAFTA arbitrations in which Canada argued in favour of an investment cost approach. But these submissions illustrate the very point that an investment cost approach should be resorted to where the investment in issue is a non-going concern and a market based approach cannot be used (**CL-140**, *Vito G. Gallo v. Government of Canada* (UNCITRAL) Counter-Memorial of Canada, 29 June 2010, ¶¶ 467-479; **CL-171**, *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton, and Bilcon of Delaware Inc. v. Government of Canada* (UNCITRAL) Rejoinder Memorial on Damages of Canada, 6 November 2017, ¶ 147; **CL-161**, *Windstream – Canada's Counter-Memorial*, ¶¶ 561, 563-565).

[608] For example, in *Impregilo v. Argentina*, the Tribunal adopted an investment cost approach because future damages were too speculative, not because the Claimant had failed to quantify certain losses. (*See* **RL-160**, *Impregilo S.p.A. v. Argentine Republic* (ICSID Case No. ARB/07/17) Award, 21 June 2011 ("*Impregilo – Award*"), ¶¶ 375-379). Further, in *Biloune and Marine Drive Complex v. Ghana*, the tribunal failed to apply the DCF methodology offered by the Claimant because the Claimant had "not provided any realistic proof of the future profits of the company" (*See* **CL-105**, *Biloune and Marine Drive Complex Ltd v. Ghana Investment Centre and the Government of Ghana*, Award on Damages and Costs of 30 June 1990, (1992) 95 I.L.R. 211, p. 228).

[609] Canada's Counter-Memorial, ¶ 523.

market value of Wind Mobile, and therefore of the Claimant's debt and equity interests in Wind Mobile, at the time of the alleged FIPA breach.

362. The Claimant argues that a market-based approach would fail to capture the full extent of damages suffered by the Claimant because its experts were unable to quantify damages associated with the ownership and control review or Canada's alleged failure to implement favourable market conditions with respect to roaming and tower/site sharing.[610] However, the Claimant's experts should be able to determine any damages arising from these alleged measures.[611] Indeed, the Claimant's own documents demonstrate that it was quantifying, for its own business purposes, the effects of certain regulatory changes.[612] The Claimant's experts' failure to calculate any damages arising from these alleged breaches does not make the exercise impossible.[613] Nor does it justify relying on an investment cost approach.

363. Third, the Claimant's claim for over USD$ 1.8 billion in investment costs bears no relationship to the value of its debt and equity interests in Wind Mobile prior to any alleged breach, or prior to any diminution in value that could have been caused by an alleged breach. It is substantially higher than what any willing buyer was then offering to pay for Wind Mobile.[614] Moreover, the Claimant's own documents demonstrate that, through a sale process initiated prior to the alleged breach, VimpelCom would have been satisfied with recovering the money it had

[610] Claimant's Reply, ¶ 391; **CER-Dellepaine/Spiller-2,** ¶ 28; **CER-Dellepaine/Spiller**, ¶ 13.

[611] Canada's Counter-Memorial, ¶ 528; **RER-Brattle**, ¶ 44-47.

[612] [redacted].

[613] Canada notes that the Compass Lexecon Reply Report does not cite to a single internal document of the Claimant. It is not clear then whether the Claimant's expert was even provided with the information needed to make such calculations.

[614] [redacted]

invested following the merger with GTH, and that GTH's investment costs were not seen as a realistic estimate of the value of the Canadian assets.[615]

364. A claim for investment costs ignores the impact of various management decisions on the value of Wind Mobile over time. [redacted] The

[615] [redacted].

[616] [redacted].

[617] *See also* Canada's Counter-Memorial, ¶¶ 584-585; **RER-Brattle-1**, ¶¶ 74-84; **RER-Brattle-2**, ¶¶ 31, 88, 100, 135.

[618] [redacted].

[619] [redacted]

[620] [redacted]

Claimant's investment cost approach also ignores other factors, independent of the alleged breaches, which resulted in the lower value of Wind Mobile, such as consumer preferences and competition from Incumbents and other New Entrants.[621]

365. In short, a damages award based on investment costs would eliminate all business risk that the Claimant bore in making its investment and operating Wind Mobile. From a damages perspective this makes no economic sense. As Canada's expert, The Brattle Group, explains, "[i]nvestment value is not an economically valid measure of damages in this dispute. It is a sunk cost that does not represent or approximate the market value of GTH's interests in Wind, or losses to them, on any date." As such, an award based on investment value "would therefore not make the Claimant whole. Rather, it would make the Claimant better-off than it would have been

[redacted].

[621] *See*: **R-380**, Memorandum from Andy Dry & Brigitte van der Maarel to Henk van Dalen, "Re: Wind Mobile Canada – UBS Presentation" (Jan. 27, 2011), p. 1: ("The key factors affecting the development of the Canadian mobile market and Wind Mobile's position are: • the higher than expected price of spectrum […] • unexpectedly aggressive action of the incumbents […] • aggressive price cutting among the new entrants […]. The result of the above factors has been that the invested cost to develop the network and subscriber base has been far higher than was forecasted, and the subscriber acquisition costs have been much higher than expected. As a result, Wind Mobile's ARPU and subscriber levels have been lower than forecasted, business plan development has slipped backwards one year from original forecast to EBITDA breakeven in 2013, and its invested capital level has been higher than projected."); **R-403**, E-mail from Andy Dry, VimpelCom to Henk van Dalen, VimpelCom (Aug. 11, 2011), attaching VimpelCom Presentation, "Wind Mobile Canada – Performance Update & Funding Requirement – Supervisory Board Presentation" (Aug. 2011), slides 2, 24.

if the alleged breaches had never occurred: Investment Value is therefore a **windfall**."[622] It is a windfall in this case because it would not account for the various factors that affected the value of Wind Mobile prior to any alleged breach.[623] An investment cost approach would turn the FIPA into an insurance policy against the detrimental impact of the Claimant's own business decisions or of normal market dynamics.[624] The Tribunal should reject the Claimant's attempt to use the FIPA to this end.

D. The Proper Market-Based Approach to Assessing Damages in this Case

366. As an alternative to its investment cost approach, the Claimant relies on a market-based approach in attempting to quantify damages. Canada agrees that using a market-based approach is the proper way to determine potential damages in this case. However, the Claimant's valuation models are overly-complex, based on extreme speculation, and are inherently unreliable. Damages in this case can be calculated by simply assessing the difference between the actual fair market value of Wind Mobile and the fair market value of Wind Mobile in the absence of an alleged breach. This assessment can and must be carried out in this case on an *ex ante* basis, that is, on the basis of concrete information known at the time of the breach. As Brattle explains, "[t]he *ex-ante* standard … has a critical advantage in this dispute: it is simple and reliable to implement because we observe market-based indicators of the [fair market value ("FMV")] in *both* the But-For and Actual states of the world."[625] Below Canada applies this simple *ex ante* market-based approach to each of the three potential breach scenarios.

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[622] **RER-Brattle-2**, ¶ 76.

[623] [redacted]

[624] **RL-200**, *Waste Management – Award*, ¶¶ 160, 177; **RL-323**, *Fireman's Fund Insurance Company v. The United Mexican States* (ICSID Case No. ARB(AF)/02/1) Award, 17 July 2006, ¶¶ 184, 218.

[625] **RER-Brattle-2**, ¶ 18.

1. Damages Under the 2013 Transfer Framework Breach Scenario

367. Using an *ex ante* approach, potential damages caused by the alleged 2013 Transfer Framework breach must be assessed at the time of this measure, **June 28, 2013**. As the Claimant asserts that the Transfer Framework precluded it from selling Wind Mobile to an Incumbent, damages, if any, must be "the difference between the But-For FMV of Wind if it could be sold to an Incumbent and the Actual FMV of Wind given that under this scenario it could only be owned by (or sold to) a New Entrant."[626]

[redacted][9] However, as Brattle notes "regulatory risk reduces the expected value of a sale to an Incumbent by more than the value to a New Entrant thus further lowering damages."[630] This includes the risk that, even without the Transfer Framework, Wind Mobile's sale to an Incumbent would not have obtained other regulatory authorizations. It also includes the possibility that, depending on the circumstances prevailing at the time of the request, the transfer of Wind Mobile's spectrum licences to an Incumbent could have been approved under the Transfer Framework. [631] Brattle explains the impact of both of these factors on a calculation

[626] **RER-Brattle-2**, ¶ 39.

[627] [redacted].

[628] See Annex B to Canada's Rejoinder, Documents Referring to New Entrant Offers.

[629] **RER-Brattle-2**, ¶ 40.

[630] **RER-Brattle-2**, ¶¶ 39-41 and Figure 4.

[631] *See* Canada's Counter-Memorial, ¶¶ 248-252.

of damages under the 2013 Transfer Framework breach scenario in paragraphs 55-58 and Figure 6 of its Rejoinder Expert Report.[632]

369. As Canada explains below, the Claimant completely ignores the issue of regulatory risk. [redacted]

[redacted]

[632] **RER-Brattle-2**, ¶¶ 155-158, Figure 6.

[633] Claimant's Reply, ¶ 427.

[634] Claimant's Reply, ¶ 427.

[635] **RER-Brattle-2**, ¶¶ 66-68.

[636] [redacted]

[637] Claimant's Reply, ¶ 428.

[638] Claimant's Reply, ¶ 428.

[639] [redacted]

[redacted]

2. No Damages Under the National Security Review Breach Scenario

371. Applying a proper *ex ante* approach, under the National Security Review breach scenario the Tribunal must determine the fair market value of the Claimant's investment in Wind Mobile

[redacted]

640 [redacted]

on **June 18, 2013**, [redacted] In fact, the purpose of the voting control application was to facilitate the sale of Wind Mobile. The evidence does not suggest that, if the Claimant were to have obtained voting control of Wind Mobile, it would have changed course and decided to remain an investor in the company. Moreover, there is no evidence that any potential sale of Wind Mobile was impeded by lack of control.

372. As Brattle explains, there are there are two ways in which voting control might be relevant to damages in this case: (1) if AAL would have blocked a sale to a New Entrant; or, (2) if GTH would have provided better management once it controlled Wind Mobile.[642] The evidence demonstrates that neither of these is true in the case at hand. First, it was highly unlikely AAL would have blocked any of the options to sell Wind Mobile pursued by GTH.[643] Further, GTH's

[641] See Canada's Counter-Memorial, ¶¶ 560-561.

[642] **RER-Brattle-2**, ¶ 46.

[643] **RER-Brattle-2**, ¶ 48-49. [redacted].

internal documents disclose that in its view it essentially had *de facto* control of Wind Mobile,[644] making the effect of obtaining legal voting control of little relevance to the sales process or the management of Wind Mobile. As explained in an internal email, "we have had, and expect to continue to have, operational control of WIND Canada because our local partner has taken a passive operational role."[645] Second, the Claimant has not put forward any evidence to suggest that the Claimant would have provided better management of Wind Mobile if it had voting control, such that it would have increased the value of its investment. In fact, as previously mentioned, VimpelCom was heavily involved in the management of Wind Mobile.[646]

[redacted]

[645] **R-430**, E-mail from Carsten Revsbech, VimpelCom to Jo Lunder, VimpelCom (Dec. 13, 2013), p. 5. [redacted]

[646] Once VimpelCom took over GTH in 2011, it became heavily involved in the management of Wind. For example, VimpelCom became heavily involved in the review of Wind Mobile's business plan going forward (see for example: **R-562**, E-mail from Pietro Cordova, Wind Mobile to Andy Dry, VimpelCom (Oct. 11, 2011); **R-563**, E-mail from Andy Dry, VimpelCom to Albert Hollema, VimpelCom (Mar. 20, 2012), *attaching* Memorandum from Jo Lunder, VimpelCom to Wind Canada Steering Committee et al. (Mar. 19, 2012), p. 1 of e-mail: ("Governance now brought under Jo directly, all paths to be compared and new timetable set."); **R-525**, E-mail from Andy Dry, VimpelCom to Henk van Dalen, VimpelCom (Oct. 6, 2011); **R-523**, E-mail from Albert Hollema to Andy Dry, *attaching* comments on Memorandum to Jo Lunder and Henk van Dalen from Albert Hollema and Andy Dry (Sep. 16, 2011); [redacted] Further, VimpelCom made changes to the project management team of Wind Mobile, giving VimpelCom more oversight (see for example: **R-563**, E-mail from Andy Dry, VimpelCom to Albert Hollema, VimpelCom (Mar. 20, 2012), *attaching* Memorandum from Jo Lunder, VimpelCom to Wind Canada Steering Committee et al. (Mar. 19, 2012), p. 1 of e-mail: ("Governance now brought under Jo directly, all paths to be compared and new timetable set."), p. 1 of

373. In light of these facts, Brattle explains that under this scenario, "damages are the difference between the value of Wind Mobile on 18 June 2013 if GTH could have obtained voting control (*i.e.* but-for the breach), and the value it actually had on the same day given that it could not obtain voting control. These damages are **zero**."[647]

3. Damages Under the Cumulative Breach Scenario

374. Again, applying a proper *ex ante* approach, the valuation date for assessing potential damages under the Cumulative breach scenario must necessarily be **June 28, 2013** – the date on which this alleged breach crystalized through the release of the 2013 Transfer Framework. The Claimant itself acknowledges that it acquired knowledge of the Cumulative breach, and losses arising from it, in June 2013.[648] While it makes contradictory statements about the effective date on which Canada "blocked" its sale to Incumbents (likely because Canada never actually blocked such a sale), the only measure that it points to as having prevented a sale to Incumbents is the 2013 Transfer Framework.

375. Using this valuation date, Brattle encapsulates the basis for the maximum damages that could be awarded under the Cumulative breach scenario: "*ex ante* damages resulting from the 2013 Transfer Framework Breach is the difference between the But-For value [redacted] and Actual value [redacted] or **C$ 300 million.** […] Damages from the National Security Review Breach alone are **zero**. Therefore, damages for the two breaches **combined** is also **C$ 300 million**."[649]

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memorandum: (discussing "Changes to Project Management"); **R-525**, E-mail from Andy Dry, VimpelCom to Henk van Dalen, VimpelCom (Oct. 6, 2011), p. 2: (noting that "Pietro de Cordova of Wind to become Project Manager of Wind Canada project immediately, reporting to Jo Lunder, Hank van Dalen and Ossama Bessada" of VimpelCom and that "[f]rom VIP HQ, Andy Dry to assist Pietro on the project, also be the VIP HQ member assigned to all merger discussions.") *See also* [redacted].

[647] **RER-Brattle-2**, ¶¶ 129-133 and Figure 9.

[648] Claimant's Reply, ¶¶ 197, 209.

[649] **RER-Brattle-2**, ¶¶ 145-149 and Figure 11.

E. The Claimant's Market-Based Approach To Assessing Damages Is Fundamentally Flawed And Must be Rejected

376. As Canada explains below, the Claimant's market-based approach can be dismissed on multiple grounds: (1) the Claimant has not demonstrated that any of the alleged breaches caused the damages it claims; (2) its approach consists of valuations that are wholly reliant on groundless speculation based on *ex post* events in the Canadian wireless industry up to the date of the award. While the Claimant refers to these events in attempting to explain how it *might* have operated Wind Mobile absent the alleged breaches, its story is de-bunked by its own documents; (3) the Claimant disregards potential regulatory risk which could have affected the sale value of Wind Mobile in the absence of the alleged breaches, and it ignores that the low sale value it *did* ultimately obtain was a by-product of its decision not to continue funding Wind Mobile in order to allow it to acquire the spectrum required to remain competitive; and, (4) the inputs into the Claimant's valuation models are rife with faulty assumptions and methodological errors. In the end, none of the market-based valuations put forward by the Claimant provide a reliable basis on which to assess damages.

1. The Claimant Has Not Discharged Its Burden of Establishing That Any of the Alleged Breaches Caused the Injury it Claims

377. In its Reply, the Claimant does not contest that it bears the burden of proving causation.[650] Yet it fails to meet its burden. This is because its market-based approach and the calculations of its experts are premised on an *ex post* assumption that "on a balance of probabilities, absent any one of Canada's breaches, GTH would not have exited the Canadian wireless telecommunications market by selling Wind Mobile to the AAL Consortium in September 2014."[651] This first assumption leads to further speculation about the business decisions and potential timing of a sale of Wind Mobile that the Claimant says *would* have been made in the absence of the alleged breaches. The Claimant fails to demonstrate the existence of a sufficient causal link between the alleged FIPA breaches and the alleged forced sale of Wind Mobile in

[650] Claimant's Reply, ¶ 359: ("GTH must demonstrate, on a balance of probabilities, that Canada's actions caused damage to GTH as a matter of fact by comparing the actual world with the *but-for* world that would have existed if all consequences of Canada's breach(es) were wiped out.")

[651] Claimant's Reply, ¶ 366.

September 2014. In fact, it fails to even engage in a causal analysis – its arguments on causation in the Reply are just recitations of its assumption that in the absence of the alleged breaches it would have continued to invest and operate Wind Mobile.[652]

378. This version of the but-for sequence of events is unsupported by the evidence. As Canada explained in its Counter-Memorial,[653] and more fully explains below on the basis of documents that have since been produced, [redacted] While the Claimant points to the fact that Wind Mobile was sold in September 2014, *after* the measures that it complains of,[655] the decision to sell was made *before* the measures complained of. The fact that the sale occurred after the alleged breaches does not establish causation between the two.

[redacted]

[652] Claimant's Reply, ¶¶ 366-378.

[653] See Canada's Counter-Memorial, ¶¶ 550-556.

[654] See Annexes A and B to Canada's Rejoinder, Documents Referring to Incumbent and New Entrant Offers.

[655] Claimant's Reply, ¶¶ 367-375.

[656] [redacted]

[657] [redacted]

[658] [redacted]

[redacted]

380. These are but a few examples illustrating that a decision had been made, very early on and well before the alleged breaches, to sell Wind Mobile. There are many more.[663] While various other options were being considered for Wind Mobile at the same time, [redacted]

[redacted]

[redacted] both prior to and following the measures alleged to breach the FIPA, those options were only being considered as alternatives, in the event that a sale of Wind Mobile could not be achieved.[664] It is therefore much more probable and likely that *but-for* the breaches the Claimant would have proceeded with its preferred option which was to sell Wind Mobile.

381. Under its market-based approach, the Claimant bears the burden of establishing, with a sufficient degree of certainty, that but-for the alleged breaches it would not have sold Wind Mobile as soon as it did. The documents cited above show that it has failed to do this in respect of the alleged 2013 Transfer Framework breach. Moreover, as Canada has already explained, it has not even attempted to establish causation in respect of the alleged National Security Review breach.[665] These failures justify outright rejection of the Claimant's damages claims.

2. The Claimant's *Ex-Post* and Date of Award Approach is not Based on Relevant, Reasonable and Reliable Information

382. In addition to not meeting its burden of causation, the Claimant's market-based approach is fundamentally unsound because it asks the Tribunal to go beyond facts foreseeable at the time of the breach, to ignore concrete evidence, and to reward it with a windfall of damages on the basis

[664] [redacted]

[665] In fact, it appears to simply subsume its National Security Review breach analysis in its submissions regarding the alleged Cumulative breach without any explanation of how the national security review caused it the injury it claims. See Claimant's Reply, ¶¶ 367-375.

of the Claimant's version of *ex post* events up to the date of award. [666] As the Claimant wrongly notes, Canada does not argue that *ex post* information is never appropriate in damages quantification.[667] In certain circumstances, and when information is "relevant, reasonable and reliable,"[668] it might be open to a tribunal to utilize such information in assessing damages. However, the underpinnings of the Claimant's *ex post* and date of award approach are the antithesis of "relevant, reasonable and reliable."

383. In brief, the Claimant's approach relies on the extreme supposition that, absent the alleged breaches, it would have continued to manage and invest in Wind Mobile, in the same manner and making the same decisions as its subsequent owners, and then, at either of two dates far off into the future,[669] it would have sold Wind Mobile and realized sale proceeds far beyond those it earned in the real world. The Tribunal should reject the Claimant's theory. First, on the facts of this case an *ex post* approach is without legal foundation. Second, the Claimant's *ex post* damages are nothing more than a speculative and opportunistic construct, designed to provide far more in damages than it ever hoped to realize.

a) An *Ex Post* and Date of Award Approach to Assessing Market Value in this Case is Without Legal Foundation

384. The effect on the value of an investment of a measure inconsistent with the FIPA must be established as of the date of the breach.[670] This view is widely accepted by international tribunals[671] and is in keeping with economic principles of quantification.[672] In this regard, the Claimant's approach fails to account for any degree of foreseeability or certainty at the time of

[666] Claimant's Reply, ¶ 398.

[667] Claimant's Reply, ¶ 403.

[668] **CL-088**, *Burlington – Decision on Reconsideration and Award*, ¶ 335 (emphasis added).

[669] Specifically the date of the Shaw-Rogers-Wind transaction in December 2015, and a September 30, 2018 proxy date for the date of the award.

[670] Canada's Counter-Memorial, ¶¶ 531-544.

[671] See for example: **RL-228**, *CME – Award*, ¶¶ 491-493; **CL-039**, *Azurix Corp. v. The Argentine Republic* (ICSID Case No. ARB/01/12) Award, 14 July 2006, ¶¶ 417-418; **CL-059**, *Gemplus – Award*, ¶¶ 12-43 – 12-45; **RL-324**, *Bernardus Henricus Funnekotter and Others v. Republic of Zimbabwe* (ICSID Case No. ARB/05/06) Award, 22 April 2009, ¶ 119; **RL-230**, *Compañia del Desarrollo de Santa Elena, S.A. v. The Republic of Costa Rica* (ICSID Case No. ARB/96/1), Final Award, 17 February 2000, ¶¶ 78-84.

[672] **RER-Brattle-2**, ¶¶ 18, 34-35.

the breach and is not supported by the jurisprudence on which it relies.[673] As Arbitrator Stern noted in her dissent in *Quiborax*:

> It cannot be contested that the decisions adopting an ex post valuation – in the extensive interpretation used by the majority – are extremely few; as a matter of fact, the majority itself, in the footnotes relating to the "several investment arbitration tribunals", mentions only four treaty cases […] These are – to the best of my knowledge – the ONLY cases in almost thirty years of investment arbitration adopting the date of the award and ex post data compared to the hundreds of cases relying on the date of expropriation and what was foreseeable on that date, in other words, the hundreds of awards which have granted, in the case of expropriation, both lawful and unlawful, the fair market value of the expropriated property, evaluated at the date of the expropriation, with the knowledge at that time.[674]

385. The Claimant relies heavily on the four cases mentioned by Arbitrator Stern in that dissent – *ADC*, *Siemens*, *Yukos* and *ConocoPhilips*,[675] but none of them support its position. In fact, these four cases all deal with an illegal expropriation, which the Claimant has not alleged in this arbitration.[676] The overwhelming majority of cases adopt an approach whereby the valuation date is the date of the breach, and assess the fair market value of the investment based on knowledge and information foreseeable *on that date*.[677]

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[673] Claimant's Reply, ¶ 399.

[674] **RL-227**, *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia* (ICSID Case No. ARB/06/2) Partially Dissenting Opinion, 7 September 2015, ¶ 43.

[675] Claimant's Reply, ¶ 399-400, citing to **CL-043**, *Siemens A.G. v. The Argentine Republic* (ICSID Case No. ARB/02/8) Award, 6 February 2007; **CL-006**, *ConocoPhillips Petrozuata B.V., Conocophillips Petrozuata B.V. Conocophillips Hamaca B.V., Conocophillips Gulf Of Paria B.V. and Conocophillips Company v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/30) Decision on Jurisdiction and the Merits, 3 September 2013; **CL-157**, *Yukos Universal Limited (Isle of Man) v. The Russian Federation* (UNCITRAL) Final Award, 18 July 2014 and **CL-040**, *ADC - Award*.

[676] The arbitral decisions discussing whether the date of the award or date of breach is the appropriate valuation date almost invariably involve an illegal expropriation. Some tribunals have used the date of award valuation approach in those circumstances, on the basis that it prevents the unjust enrichment of states who expropriate investments knowing their value will increase in the future. The justification provided for the use of *ex post* information, and the date of award in those circumstances was that it would provide a deterrent against States engaging in this form of activity. However, these policy reasons are not applicable in this case. Canada did not take possession of the Claimant's investment following the alleged breach, nor does the Claimant allege an indirect expropriation. There is no allegation that Canada was unjustly enriched following the alleged breaches. As such, the date of breach is the appropriate valuation date for the Tribunal to consider, applying an *ex ante* analysis.

[677] Canada has already explained why the Claimant's reliance on the *Siemens* decision is incorrect. See Canada's Counter-Memorial, ¶ 539.

386. The Claimant also relies on *Chorzów*[678] in addition to the ILC Articles[679] in asserting that full reparation is to be made as of the date of award. However, neither authority supports the view that *ex post* valuation is appropriate in every circumstance. As the Court in *Chorzów* made clear, and as the ILC Articles recognize, damages are to establish the position which "would, **in all probability**, have existed if that act had not been committed."[680] Implicit in these authorities is that if events post-dating the breach are to play into damages, the Claimant must prove that "in all probability" they would have transpired in the absence of the breach. They do not afford the Claimant free reign to pick the most favourable set of circumstances up to the date of the award, regardless of whether they were probable at the time of the breach, to serve as the basis of damages.

387. The Claimant also relies on the decision in *Burlington Resources* in support of its misguided interpretation of *Chorzów*.[681] However, the *Burlington Resources* tribunal found that it was not clear, given that the case settled in the end, as to whether *Chorzów* would have adopted an approach whereby "[t]he losses on the date of the judgment could be assessed either by reference to the value of the undertaking on the date of the taking plus any lost profits accrued between the taking and the judgment, or by reference to the value of the undertaking on the date of the judgment."[682] What the *Burlington Resources* tribunal did conclude was that if information post-dating an alleged breach is to be relied upon in assessing damages, it requires a certain degree of foreseeability, otherwise the *ex ante* approach should be preferred.[683]

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[678] Claimant's Reply, ¶ 398.

[679] Claimant's Reply, ¶ 398.

[680] **CL-020**, *Chorzów*, p. 48 (emphasis added). *See also* **RL-233**, Commentary on the ILC Articles, Article 31, Commentaries (1)-(4).

[681] Claimant's Reply, ¶ 406. Canada also notes the Claimant's critique of Canada's use of the *Murphy v. Ecuador* Award (see Claimant's Reply, ¶ 406, citing **CL-083**, *Murphy Exploration & Production Company – International v. The Republic of Ecuador* (UNCITRAL) Partial Final Award, 6 May 2016). As the Claimant notes, the Tribunal there determined that "***in [that] case***" it was not appropriate to take into account *ex post* information because the *ex post* data upon which the claimant sought to rely was not more relevant and reliable than the *ex ante* data. This directly supports the position Canada has advanced in this arbitration. The *ex ante* evidence available to this tribunal **is** more relevant and reliable than the *ex-post* evidence the Claimant wishes to rely on. As such, the Tribunal should adopt the *ex ante* approach.

[682] **CL-088**, *Burlington – Decision on Reconsideration and Award*, ¶¶ 327-329.

[683] **CL-088**, *Burlington – Decision on Reconsideration and Award*, ¶¶ 334-335: ("If, in the circumstances of the particular case, the use of ex post information is relevant, reasonable and reliable, it is the majority's opinion that it

Likewise, as the tribunal in *Impreglio* found, a "sufficient reason to believe that such gains would have been obtained"[684] is required before speculative evidence can play into the quantification of losses.

388. This kind of foreseeability does not exist in this case. As Brattle notes "the *ex-post* approach requires judgments about the actions that Wind, Claimant, and VimpelCom would have taken in the absence of the breaches" such as "the level of funding that VimpelCom/GTH would have taken in the absence of the breaches."[685] These judgments can only be based on speculation. Moreover, using an *ex post* approach would allow for huge and completely arbitrary differences in potential damages awards depending on what transpired after the breaches occurred and on the timing of the award.

389. In the end, even the Claimant agrees that a tribunal must find a "reasonable basis" for its assessment of damages.[686] The fact that assumptions must be "reasonable" is key – there is no room for pure speculation[687] – a point confirmed by other cases relied upon by the Claimant,[688]

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should be preferred to *ex ante* information. As noted in Quiborax, '[t]he Tribunal must value the loss with reasonable certainty. If the available *ex post* data is not reasonably certain, then it will have no choice but to resort to appropriately adjusted *ex ante* data […]'.") (emphasis added).

[684] **RL-160**, *Impregilo – Award*, ¶ 380.

[685] **RER-Brattle-2**, ¶ 82.

[686] Claimant's Reply, ¶ 361.

[687] The Claimant has also argued that "a respondent state will not be permitted to rely on evidentiary hurdles created by its breaches to argue that the quantum of damage is speculative" and that "if a respondent State argues that damage must be ignored due to an event of uncertain impact, the consequences of this uncertainty will be both by that State" (*see* Claimant's Reply, ¶¶ 362-364). However, the Claimant hasn't alleged that Canada's actions or inactions make proving damages in this arbitration impossible. There is simply no argument or evidence put forward that Canada's actions have created evidentiary difficulties with respect to damages. Nor has Canada alleged that the Claimant's arguments with respect to ex-post evidence are speculative as a result of "an event of uncertain impact", as the Claimant notes at ¶ 364 of its Reply. Unlike the cases cited by the Claimant in footnote 758 of its Reply, the uncertainty with respect to *ex post* damages does not arise from "lack of access to documents" as was the case in **CL-111**, *Vivian Mai Tavakoli v. Iran*, Case No. 832, Award No. 580-832-3, 23 April 1997, 33 IRAN-U.S. C.T.R. 206, or the renewal of a concession contract, as was the case in **CL-100**, *Liberian Eastern Timber Corporation ("LETCO") v. Republic of Liberia* (ICSID Case No. ARB/83/2) Award, 31 March 1986, (1987) 26 I.L.M. 647, or that a certain licence would not have been renewed as in **RL-228**, *CME – Award*. Further, while the Claimant argues that such uncertainty will be borne by a respondent state, especially where "that State is in fact the Party in control of such event and the only Party in a position to provide evidence to resolve that uncertainty", there is no place for such an argument here. The Claimant has not alleged that Canada is the only party in possession of documents relevant to damages. In fact, the majority of the Claimant's production in this arbitration consists of documents relevant to damages that were in the possession of the Claimant, not Canada.

including the *Marion Unglaube*,[689] and *Von Pezold*[690] awards. In light of such authorities, and the facts of this case, the Claimant's *ex post* and date of award approach to damages is legally without foundation.

b) The Claimant's *Ex-Post* and Date of Award Approach Only Serves to Inflate its Claim

390. In this case, the Claimant's use of *ex post* information is unjustified as there exists appropriate and reliable *ex ante* information on the value of the investment. The events that the Claimant says would have unfolded in the absence of the breach are both speculative and opportunistic in the extreme and only serve to inflate the claim. For example, the Claimant argues that "but-for" the alleged Cumulative breach and National Security Review breach[691] it "would not have sold Wind Mobile to the AAL Consortium in September 2014. Instead, the evidence shows that GTH would have made the commercially reasonable decision to remain invested in Canada."[692] It then presents two possible valuations using *ex post* information. The first valuation assumes that the Claimant would have taken part in the Shaw-Rogers-Wind Mobile transaction of December 2015.[693] The second valuation assumes the Claimant would

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[688] *See* for example, **CL-024**, *Amoco – Award*, ¶ 238: ("One of the best settled rules of the law of international responsibility of States is that no reparation for speculative or uncertain damage can be awarded").

[689] **CL-145**, *Marion Unglaube v. Republic of Costa Rica* (ICSID Case No. ARB/08/1) Award, 16 May 2012, ¶¶ 317-318: (whereby the Tribunal did not accept the Claimant's expert's analysis leading to a "perfect judgement" on part of the Claimant. Instead, the Tribunal accepted only the assumptions and adjustments which it felt were reasonable in light of the circumstances.)

[690] **CL-079**, *Bernhard Friedrich Arnd Rüdiger Von Pezold et al. v. Republic of Zimbabwe* (ICSID Case No. ARB/10/15) Award, 28 July 2015, ¶¶ 763-764: (whereby the Tribunal accepted ex-post evidence as the evidence supported the position that the Claimants continually reinvested the returns of their investment and whoever had ownership of the expropriated investment has the benefit of that reinvestment in the future.)

[691] The Claimant states that it has not relied on *ex post* evidence in the scenario where the 2013 Transfer Framework is the only breach. See Claimant's Reply, ¶ 440, noting that "Mr. Dellepaine and Dr. Spiller need not rely on *ex-post* information to reach this valuation because, in this scenario, GTH would likely have sold Wind Mobile to an Incumbent after the expiration of the Five-year Rollout Period." However, the Claimant *does* rely on *ex post* information in that their experts base their calculations on the September 2014 sale of Wind Mobile to AAL. Moreover, they engage in further speculation to "assess the but-for value as of March 2014 of the spectrum licenses that Wind Mobile acquired in the 2008 AWS-1 Auction based on the closest market observation for the price of spectrum paid by Incumbents to that date: the 700 MHz Auction in February 2014." *See* **CER-Dellepiane/Spiller-2**, ¶ 98.

[692] Claimant's Reply, ¶ 367.

[693] **CER-Dellepiane/Spiller-2**, ¶¶ 75-76; *see also* Claimant's Reply, ¶ 433, Claimant's Memorial, ¶¶ 419, 421-424.

have held on to its shares in Wind Mobile and loans to Wind Mobile into the future, and that Wind Mobile would have followed the same trajectory that Wind Mobile (now Freedom Mobile) enjoyed from the date of the breach until September 30, 2018 (as a proxy for the date of award), under totally different management.[694]

391. As Canada has already explained above and in its Counter-Memorial,[695] the Claimant provides no evidence in support of its assertion that it in the absence of the breaches it would have, in all probability, continued to invest and taken part in the December 2015 transaction involving Wind Mobile, Shaw and Rogers. [redacted]

[694] **CER-Dellepiane/Spiller-2**, ¶¶ 77-78.

[695] Canada's Counter-Memorial, ¶ 542.

[696] [redacted]

[697] [redacted].

[redacted]

393. The Claimant also asks the Tribunal to accept that, in the alternative, it would have continued operating Wind Mobile until this day, using the date of award as the valuation date (with September 30, 2018 as a proxy).[698] However, in light of the evidence, a far more reasonable conclusion is that the Claimant would have sold its debt and equity interests in Wind Mobile regardless of the alleged breaches, not that it would have continued to invest in Wind Mobile.[699] The evidence offers no support for a contention that "the but-for evolution of Wind Mobile under Claimant's management after 2014 would approximately mirror the actual evolution of Wind."[700] The Claimant is simply speculating. Again, what the evidence reveals is [redacted]. As Brattle explains:

> Compass Lexecon's damages stem entirely from their *ex-post* approach based on unrealistic and opportunistic assumptions. The value Compass Lexecon

[698] **CER-Dellepiane/Spiller-2**, ¶¶ 15(b)(ii) and c(ii).

[699] [redacted]

[700] **CER-Dellepiane/Spiller-2**, ¶ 15(b)(ii).

> assign to Wind Mobile on their Actual Valuation Date, 16 September 2014 (the second right red dashed vertical line), is the C$295 million value in the sale to AAL on that date. That is C$405 million less than the [redacted] on our Valuation Date, and, increases Compass Lexecon's damages estimate by that amount. The value Compass Lexecon assign to Wind on their But-For Valuation Dates (the second and third red dashed vertical lines), C$1,600 million (on 16 December 2015) and C$2,838 million (on 30 September 2018), are significantly higher [redacted]. Compass Lexecon consider that increase in value as part of damages.[701]

394. The Claimant itself acknowledges in its Reply that "taking into account information that occurred in the real world almost always renders the damages valuation more certain."[702] In light of this statement, it makes no sense why it has chosen speculation over actual offers to purchase Wind Mobile by Incumbents and New Entrants in valuating Wind Mobile.[703]

3. The Claimant Ignores Relevant Factors, Resulting in Inflated Valuations

a) The Claimant Inappropriately Disregards the Regulatory Risk

395. As Canada explained in its Counter-Memorial, the Claimant's market-based approach to valuation ignores the fact that further regulatory approvals would have been required for the sale of Wind Mobile to an Incumbent, or for GTH to acquire voting control of Wind Mobile.[704] As a result, the damages assessment in the Memorial was overstated. The Claimant continues to disregard regulatory risk in its Reply. It does so by asserting that: (1) any attempt by the Competition Bureau to block a sale would be "in breach of the free transfer guarantee" of the FIPA;[705] (2) it is Canada's burden to prove that regulatory risk exists and should be accounted

[701] **RER-Brattle-2**, ¶ 132.

[702] Claimant's Reply, ¶ 404.

[703] Canada notes that while the Claimant advocates for the Date of Award as the appropriate valuation date, the Claimant does not in fact use such a date in its main damages analysis. It uses December 16, 2015. This is neither the date of the award or the date of the alleged breach. Instead, to reach an amount of damages owed, but-for the alleged breaches, the Claimant values its investment in Wind Mobile as of December 16, 2015 and then brings forward that value to the Date of Award using, what the Claimant believes to be, a "commercial interest rate" (see for example, **CER-Dellepiane/Spiller-2**, ¶ 15(b)(i). The Claimant's choice of valuation date then appears to be inconsistent with its legal arguments, and entirely arbitrary.

[704] Canada's Counter-Memorial, ¶¶ 576-580.

[705] Claimant's Reply, ¶ 380.

for in a damages analysis;[706] and, (3) there is "no evidence to support the proposition that there was any risk that Canada would have prevented the transaction from taking place."[707] Each assertion is without merit.

396. First, the Competition Bureau's ability to review and challenge mergers that result, or are likely to result, in a substantial lessening of competition has not otherwise been disputed, nor could it be. It should be presumed consistent with the FIPA. In any event, the Claimant's throw-away argument regarding the Competition Bureau's authority is based on an incorrect reading of the transfer provision of the FIPA, as set out in Part III.A.3 above.

397. Second, the burden of proof with respect to damages rests squarely on the Claimant.[708] It cannot avoid this burden by pawning part of its onus off to Canada, but must rather provide sufficient evidence to support its damages claim. In this regard, as Canada explains below, the Claimant has failed to establish there was *no* regulatory risk associated with its proposed divestiture.

398. Third, and most important, there is ample documentary evidence on record, [redacted], that show VimpelCom itself was conscious of the potential for regulatory risk relating to the potential approval of a sale of Wind Mobile, and that it took such risk into account in comparing various offers. [redacted]

[706] Claimant's Reply, ¶ 381.

[707] Claimant's Reply, ¶ 382.

[708] See Canada's Counter-Memorial, ¶¶ 546-549.

[709] [redacted]

[710] Claimant's Reply, ¶ 382.

[redacted] There was therefore clearly a risk that the Competition Bureau would not allow these transactions to proceed without changes,[713] that such changes could have

[711] [redacted]

[713] For example, in the course of the Bureau's recent 2017 review of Bell's acquisition of MTS, the Bureau required that Bell enter into a Consent Agreement which involved "divesting a significant number of MTS post-paid subscribers and approximately one-third of MTS dealer locations to TELUS; and to divest assets and provide transitional services to Xplornet, including the divestiture of 40 MHz of spectrum, six retail stores and 24,700 subscribers." These commitments undertaken by Bell were necessary to address the likely substantial lessening of competition that would have arisen as a result of the proposed transaction in the province of Manitoba. *See* **R-581**, Competition Bureau website excerpt, "Competition Bureau statement regarding Bell's acquisition of MTS" (Feb. 15, 2017), p. 5, available at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04200.html.

been significant, and that the changes could reduce the price that a buyer would be willing to pay for Wind Mobile.[714]

399. The Claimant's assertion that the Competition Bureau has yet to block a sale of a New Entrant to an Incumbent is irrelevant. In support of its assertion, the Claimant suggests that because the Competition Bureau approved Rogers' acquisition of Microcell in 2005, it would have similarly approved a sale of Wind Mobile to an Incumbent.[715] Yet the very documents the Claimant cites belie its point. In a Technical Backgrounder on this approval, the Competition Bureau notes the "highly fact-specific" nature of each investigation and cautions that "[r]eaders should not draw overly broad conclusions regarding how the Bureau is likely in the future to analyse other activities or transactions involving particular firms."[716] Each transaction considered by the Competition Bureau must be considered in light of the relevant market and prevailing conditions at the time of the review. The Bureau's 2014 challenge of a proposed acquisition by Bragg Communications (Eastlink) of Bruce Telecom, which "would likely have substantially lessened competition in the sale of wireline broadband internet services and bundles of home telephone, television and/or wireline broadband internet services in Port Elgin and

[714] These factors would all reduce potential damages under the 2013 Transfer Framework Breach scenario. Moreover, as Canada has explained above in ¶ 368, the fact that the Transfer Framework did not prohibit New Entrants from transferring spectrum licenses to Incumbents, which the Claimant also ignores, also operates to reduce damages under this scenario.

[715] Claimant's Reply, footnote 792.

[716] See **C-290,** Competition Bureau, *Acquisition of Microcell Telecommunications Inc. by Rogers Wireless Communications Inc., Technical Backgrounder* (Apr. 2005), p. 9: (which further provides that: "Merger review is fact specific and the Bureau's conclusion in this case are based on its findings at this time with respect to the operation of the relevant markets. Readers are cautioned from drawing conclusions relating to future matters given the dynamic evolution of markets, technology and business structures and given the unique facts of every transaction.") (emphasis added) A number of such factors make the Microcell approval irrelevant to situation of Wind Mobile. For example, at the time of the Microcell transaction wireless providers in Canada still operated on two different standards (Rogers and Microcell on GSM and Telus/Bell on CDMA) whereas no LTE networks have converged to the same technology. Further, the Competition Bureau anticipated a growing market, subscriber and penetration growth and technological change, all of which had a significant impact on its conclusions. Because of these conditions, the Bureau did not view current market shares as an adequate indicator of how much market power companies would have in the future. Moreover, as Microcell was in a precarious financial situation it did not see it as being able to continue to exert competitive pressure on the market.

Paisley, Ontario", and which resulted in this transaction not proceeding, provides an illustration of the "highly fact-specific" approach taken by the Bureau.[717]

b) The Claimant Contributed to the Loss in Value of Wind Mobile by Significantly Reducing Its Funding of Wind Mobile and Not Participating in the 700 MHz Auction

400. As Canada explained in its Counter-Memorial, the Claimant has a legal duty to mitigate its damages.[718] It cannot recover damages that could have been avoided by taking reasonable steps to preserve the value of its investment. In this regard, the *EDF International* tribunal explained that "the injured party must be held responsible for its own contribution to the loss."[719]

401. The Claimant now contends that "GTH's decision to sell Wind Mobile to the AAL Consortium in September 2014 was an action of mitigation."[720] Yet this assertion misses Canada's point on mitigation entirely. The price the Claimant received when it sold its shares in Wind Mobile to AAL in 2014 was *directly* related to its own failure to mitigate. The Claimant should not be allowed to recover any resulting diminution in the value of its investment.

402. The Claimant's decision to withdraw its participation in the 700 MHz auction had a direct impact on the value it could obtain in the eventual sale of its investment.[721] [redacted]

[717] **R-581**, Competition Bureau, *Statement Regarding the Proposed Acquisition of Bruce Telecom by Eastlink* (Aug. 19, 2014).

[718] *See* Canada's Counter-Memorial, ¶¶ 582-585.

[719] **RL-236**, *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic* (ICSID Case No. ARB/03/23) Award, 11 June 2012, ¶ 1301.

[720] Claimant's Reply, ¶ 383.

[721] [redacted]

[redacted]

403. The Claimant's failure to continue funding and to obtain new spectrum, either through the auction or otherwise, resulted in the value of Wind Mobile depreciating over the course of 2013-2014. It also ultimately accounts for the drop in value of Wind Mobile, reflected in the sale price to AAL [redacted]. As Brattle explains, "GTH/VimpelCom were aware that their decision to withdraw from the 700 MHz

[redacted]

auction as well as their continued effort to reduce operational funding would reduce Wind's value."[725]

404. The Claimant's argument that it "cannot have been expected to continue to pour hundreds of millions in additional funds into Wind Mobile given the mistreatment it had suffered for the duration of its investment," is nothing more than a convenient after-the-fact justification for VimpelCom's desire to minimize its funding of Wind Mobile, something that was clear from early 2012. An expenditure of such funds would have increased the sale value of Wind Mobile in the case of the 700 MHz auction. It would have been entirely reasonable for the Claimant to have invested such funds, and Canada should not have to pay damages for the Claimant's own inaction and failure to mitigate loss.

4. The Claimant's Valuations Under Each Breach Scenario are Rife With Faulty Assumptions and Methodological Errors

405. Finally, the valuations the Claimant proposes under each breach scenario suffer from multiple flaws. For example, under the 2013 Transfer Framework breach scenario, the Claimant arrives at a revised, but still inflated valuation of Wind Mobile, based largely on an improper assessment of the value of Wind Mobile's AWS-1 spectrum license holdings.[726] In paragraphs 117-119 and Appendix H of its Rejoinder Expert Report, Brattle explains why the Claimant's experts should have made certain price adjustments in valuing AWS-1 spectrum relating to supply, geography and frequency, and how their failure to do so has led to an exaggerated damages claim.[727]

406. With respect to the National Security Review breach scenario, Brattle explains in paragraphs 138 to 144 of its Rejoinder Expert Report that the two valuations proposed by the Claimant include spectrum licenses and assets even though there is no reason to conclude that the Claimant or its parent would have acquired them. In valuing Wind Mobile these valuations also assume, incorrectly, that "GTH would have managed the company as successfully as its two

[725] **RER-Brattle-2**, ¶ 111.

[726] Claimant's Reply, ¶¶ 439-445.

[727] **RER-Brattle-2**, ¶¶ 117-119 and Appendix H.

different new owners, ignoring that under its ownership, GTH managed it poorly and left it in need of "dramatic revenue, cost and asset turnaround initiatives.""[728]

407. The Claimant's two proposed valuations under the Cumulative breach scenario are even more fraught with errors. Like the National Security Review breach scenario, they include multiple spectrum licenses that Wind Mobile would not have otherwise held under the ownership of GTH.[729] And as with the 2013 Transfer Framework breach scenario, the values assigned to these spectrum licenses are the product of miscalculation, faulty assumptions and key omissions, all of which are summarized in paragraphs 145 to 159 of Brattle's Rejoinder Expert Report.[730] These flaws result in excessive valuations that cannot possibly serve as the basis of a damages assessment in this case.

F. The Only Damages to Which the Claimant Could be Entitled

1. The Claimant's Damages Are Less Than C$ 300 Million

408. As Canada has explained in section IV.D, if the Tribunal concludes that the 2013 Transfer Framework constitutes a breach of its Treaty obligations, or that there was a cumulative breach, and that the Claimant is entitled to bring such a claim, the damages suffered by the Claimant are less than C$ 300 million plus interest and would have to be further adjusted to account for regulatory risk. It is the Claimant's burden to quantify the potential impact of such regulatory risk on damages, yet in this case the Claimant has failed to even acknowledge regulatory risk in its valuations. As a result, the Claimant has not met its burden, warranting an award of no damages under both the 2013 Transfer Framework breach and Cumulative breach scenarios. Further, as explained above, if the Tribunal finds the national security review alone to be a breach, it should not award any damages.

[728] **RER-Brattle-2**, ¶ 140.

[729] **RER-Brattle-2**, ¶ 153.

[730] **RER-Brattle-2**, ¶¶ 145-159.

2. The Claimant is not Entitled to the Pre-Judgment Interest that it Seeks

409. As Canada explained in its Counter-Memorial, the Claimant bears the burden of proving that an award of interest is justified in the circumstances of the case.[731] This requires not just establishing that interest is justified, but also the correct interest rate to be applied.

410. The Claimant argues that it is entitled to an award of pre-judgment interest at a rate that equals the "cost of debt of a wireless telecommunications operator"[732] on the presumption that it would have re-invested any funds received from a sale of its investment in a *but-for* world in one of its ongoing businesses or in a new venture.[733] However, the Claimant provides no legal or evidentiary basis for its request. It simply asserts that "GTH would have had to borrow money from other sources to fund its other business when it could have used the money it had tied up in Canada for that purpose."[734]

411. The Claimant's request is misguided. As Brattle explains, pre-judgment interest can be applied to compensate for (1) the time value of money and (2) a return for bearing risk.[735] Therefore, in determining an appropriate rate of pre-judgment interest, the key factor is the nature of the risk the Claimant may have borne in respect of potential damages and which of those are compensable as a matter of law.[736] In the case of a damages award, the only risk that is potentially compensable is default risk, not risk relating to the funding of other businesses. Here, the risk of default of the Canadian government is negligible[737]

412. As such, if the Tribunal were to conclude that the Claimant is entitled to pre-judgment interest, Canada maintains that the appropriate rate is the one-month Canadian Treasury Bill rate,

[731] Canada's Counter-Memorial, ¶ 596.

[732] Claimant's Reply, ¶ 450.

[733] Claimant's Reply, ¶ 450.

[734] Claimant's Reply, ¶ 450.

[735] **RER-Brattle**, ¶ 161.

[736] **RER-Brattle**, ¶ 161.

[737] **RER-Brattle**, ¶ 166.

compounded monthly.[738] Other tribunals have also found that Treasury Bill rates represent an appropriate and fair rate for determining pre-judgment interest.[739]

3. Arbitration Costs

413. Canada requests the opportunity to present further submissions on costs, together with its quantification of costs, after the issuance of the Tribunal's decision on jurisdiction, liability and damages. The Claimant's conduct has caused Canada to incur unnecessary costs in this arbitration, particularly with respect to the document production phase including the Claimant's excessive and unjustified privilege claims, as well as the Claimant's unreasonable approach to damages quantification. Further submissions will allow the Tribunal to decide the appropriate apportionment and quantification of the arbitration costs in this case.

V. ORDER REQUESTED

414. For the foregoing reasons, Canada respectfully requests that the Tribunal dismiss the Claimant's claims in their entirety and with prejudice, and grant any further relief it deems just and proper.

February 3, 2019

Respectfully submitted on behalf of the Government of Canada,

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Jean-Francois Hébert
Heather Squires
Scott Little
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Stefan Kuuskne

[738] Canada's Counter-Memorial, ¶ 597.

[739] **CL-075**, *Gold Reserve – Award*, ¶¶ 853, 855; **CL-036**, *CMS – Award*, ¶ 471.

ANNEX A TO CANADA'S REJOINDER MEMORIAL

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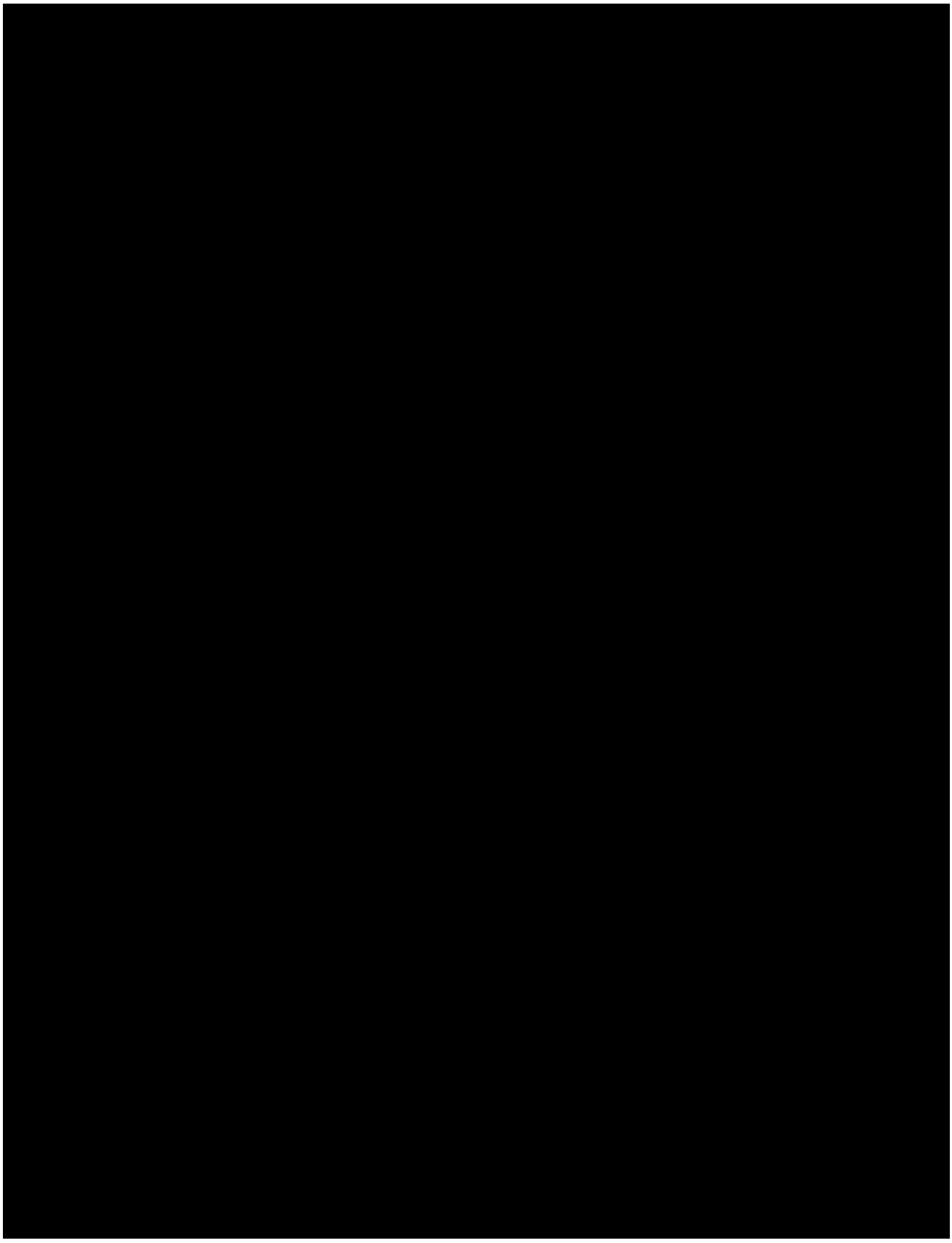

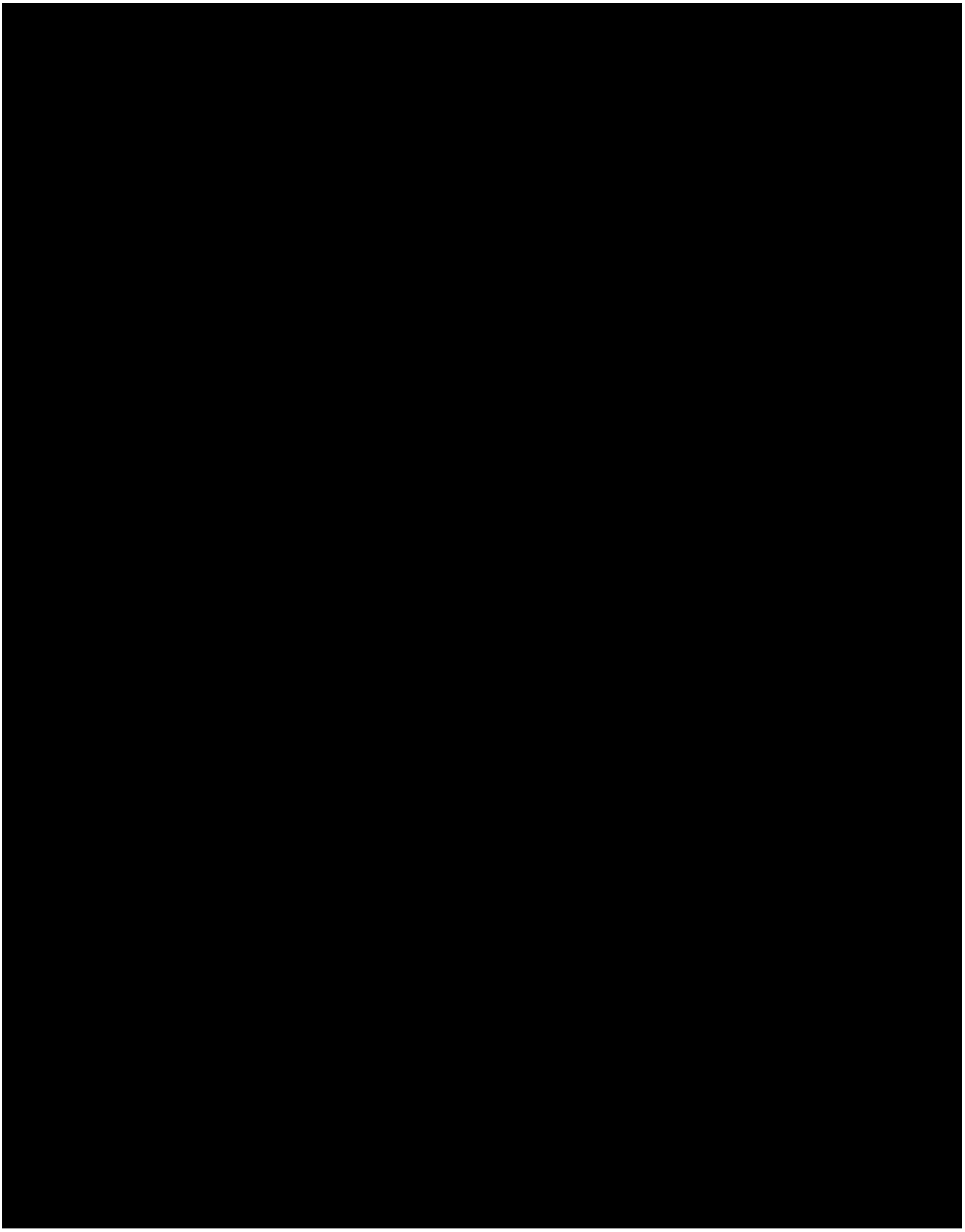

ANNEX B TO CANADA'S REJOINDER MEMORIAL

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