Public Version

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

ICSID Case No. ARB/16/16

BETWEEN

GLOBAL TELECOM HOLDING S.A.E.

Claimant

and

GOVERNMENT OF CANADA

Respondent

CLAIMANT'S REPLY ON MERITS AND DAMAGES & COUNTER-MEMORIAL ON JURISDICTION AND ADMISSIBILITY

---

5 November 2018

GIBSON, DUNN & CRUTCHER LLP
Telephone House
2-4 Temple Avenue
London EC4Y 0HB
United Kingdom

GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, NY 10166
United States of America

TABLE OF CONTENTS

1. Global Telecom Holding S.A.E. hereby submits its Reply on Merits and Damages & Counter-Memorial on Jurisdiction and Admissibility in accordance with Procedural Order No. 1, dated 13 June 2017, and Rule 31 of the International Centre for Settlement of Investment Disputes Rules of Procedure for Arbitration Proceedings.[1]

I. EXECUTIVE SUMMARY

2. In 2007 and 2008, Canada encouraged GTH, an Egyptian investor, to invest in Canada's 2008 AWS Auction and over the next several years to contribute over C$ 1.3 billion to the Canadian wireless telecommunications market. Canada used carefully worded incentives to lead investors to believe that investment in the Canadian wireless telecommunications market would be a lucrative move. Canada memorialized these inducements in a favorable regulatory framework that claimed to provide New Entrants with the opportunity to succeed against the three dominant Incumbents, with a fallback protection that New Entrants would be able to exit for value after five years.

3. Once investment in the Canadian market had been secured, Canada disregarded those assurances without a second thought. Canada unfairly and inequitably ignored key conditions, created new and unforeseen obstacles, and ultimately dismantled the favorable framework it had publicized to attract investment in order to engineer a four-player wireless telecommunications market at any cost. As a result, Canada directly

[1] Short forms and abbreviations have the meaning set-out in GTH's Memorial on Merits and Damages. *See* Claimant's Memorial on the Merits and Damages, 29 September 2017 (hereinafter "**GTH's Memorial on Merits and Damages**"). GTH has provided at **Appendix A** a list of key terms, short forms, and abbreviations used in the Parties' submissions. For an exhibit comprised of several documents (for example, an email with attachments), citations to the exhibit will refer to the page number of the complete exhibit. For an exhibit comprised of a single document, citations to the exhibit will refer to internal page numbers, where available, or, alternatively, the page number of the exhibit. Finally, in accordance with Procedural Order No. 4, dated 3 November 2018, GTH reserves the right to apply to amend this submission should Canada produce additional responsive documents after this date. *See* Procedural Order No. 4, ¶ 57(a).

profited from the fees GTH paid for set-aside spectrum licenses (C$ 442 million), while GTH was left with a virtually worthless asset and suffered losses in excess of US$ 1.8 billion.

4. Canada does not dispute that the inducements it offered were necessary and deliberately designed to attract new investors. Without these incentives it is unlikely investors would have been interested in participating in the 2008 AWS Auction due to the overwhelming competitive advantage enjoyed by the three Incumbents and historic barriers to market entry.[2] In short, Canada had to convince investors that:

(a) **The New Entrants would have a fair chance at competing with the Incumbents.** Canada set aside spectrum licenses for auction that could only be bid for by New Entrants, to prevent the Incumbents from out-bidding New Entrants. Canada also announced that it would require the Incumbents to enter into roaming and tower/site-sharing agreements with New Entrants at "*commercial rates*" for at least five years. Investors understood this to mean that Canada was committed to ensuring fair conditions to compete against the Incumbents—and, as Michael Connolly[3] confirms, this was intentional and precisely what Canada led investors to believe.

(b) **The New Entrants would be able to monetize the substantial investment required to support a New Entrant after five years by a sale to an Incumbent**. Canada structured the set-aside spectrum licenses to prohibit a sale (or "*flip*") to an Incumbent for a limited period of five years to encourage investment in the Canadian wireless telecommunications market. Subject only to this finite five-year period, the spectrum licenses were otherwise freely transferable with "*enhanced transferability and divisibility rights*,"[4] meaning that license transfer requests would be approved provided the recipient met the

---

[2] *See, e.g.*, **CWS-Dobbie**, ¶ 41; **Exhibit C-050**, Industry Canada, *Consultation on a Framework to Auction Spectrum in the 2 GHz Range including Advanced Wireless Services (DGTP-002-07)*, February 2007, p. 24 (emphasizing key barriers to market entry, including high establishment costs, competing against economies of scale, and restrictions on foreign ownership); **Exhibit C-004**, Industry Canada, *Policy Framework for the Auction for Spectrum Licences for Advanced Wireless Services and other Spectrum in the 2 GHz Range*, November 2007, pp. 3-4 (recognizing the significant barriers to entry faced by prospective new entrants in the telecommunications market); **Exhibit C-061**, Industry Canada, *Government Opts for More Competition in the Wireless Sector*, 28 November 2007, https://www.ic.gc.ca/eic/site/smt-gst.nsf/eng/sf10021.html#nr (accessed 27 September 2017), p. 5 ("*The measures being taken are intended to ensure an opportunity for entry into the marketplace.*").

[3] Michael Connolly was Director General of Spectrum Management Operations at Industry Canada at the time of the 2008 AWS Auction.

[4] *See* **Exhibit C-003**, Industry Canada, *Licensing Procedure for Spectrum Licences for Terrestrial Services (CPC-2-1-23, Issue 2)*, September 2007, § 5.6.

eligibility requirements under the Radiocommunication Regulations. Investors understood this to mean that set-aside spectrum licenses would be freely transferable to an Incumbent after five years, allowing realizable, future value after five years of investment—and, as Mr. Connolly confirms, this was intentional and precisely what Canada wanted investors to think.

(c) **Foreign ownership and control restrictions could be relaxed in the future.** Canada publicized an additional incentive designed specifically to attract foreign investors, such as GTH. Canada was aware that the O&C Rules, which limited foreign ownership and control, were a deterrent to foreign investors participating in the 2008 AWS Auction and, therefore, emphasized that Canada was contemplating the future relaxation of foreign ownership restrictions for wireless telecommunications common carriers. GTH relied on this representation and, at the outset, incorporated into the structure of its investment the right to take advantage of any future relaxation of the O&C Rules. Canada was aware of, and did not object to, GTH's procurement of this right.

5. In short, Canada led investors to believe that, if they purchased set-aside spectrum licenses during the 2008 AWS Auction, they would enjoy regulatory conditions that would enable New Entrants to compete against the Incumbents. Moreover, Canada led investors to believe that, after a Five-Year Rollout Period and the expiration of the finite restriction on transfer, the set-aside spectrum licenses purchased during the 2008 AWS Auction could command substantial realizable value through a sale to an Incumbent. Finally, Canada led investors to believe that they would be able to avail themselves of the anticipated future relaxation of foreign ownership restrictions. Together, these provisions constituted the framework for investment in Canada's 2008 AWS Auction (the 2008 AWS Auction Framework).

6. It was on the basis of the incentives Canada created for its 2008 AWS Auction Framework that GTH made its decision to invest in the New Entrant, Wind Mobile. Up-front, GTH paid Canada C$ 442 million to purchase spectrum licenses at the 2008 AWS Auction. Over the lifetime of GTH's investment in Canada, GTH spent over C$ 1.3 billion to best position Wind Mobile to succeed. GTH was exactly the type of committed investor that Canada had wanted to attract through the 2008 AWS Auction

Framework. As a result of GTH's financial and commercial commitment, Wind Mobile was able to become the most successful of all the New Entrants (despite an uneven playing field against the Incumbents).[5] It is of utmost irony and inequity that Canada repaid this unparalleled investor commitment by depriving GTH's investment of all value—an investor that had contributed the most value amongst the New Entrants to the Canadian economy was the investor who suffered the most as a result of Canada's unfair manipulation of the telecommunications market.

7. Over the next five years, Canada failed at every opportunity to respect the basic tenets of the 2008 AWS Auction Framework that it had used to attract GTH's investment. By its actions, Canada effectively dismantled this Framework to the point where GTH was left holding an asset of virtually no value. Among other breaches of its obligations under the BIT, Canada's failure to uphold the inducements it offered GTH to convince GTH to invest over a billion dollars in Canada amounts to a cumulative breach of Canada's obligation to accord GTH's investment FET.

8. Canada's unfair actions were many and cumulative. **First**, after one Government entity (Industry Canada) concluded that Wind Mobile complied with the O&C Rules, Wind Mobile's competitors urged a separate Government arm (the CRTC) to undertake a second, duplicative compliance review pursuant to **the same** O&C Rules. The CRTC did so, and succumbed to the pressure to introduce a brand new, four-type review

[5] For example, Canada describes in a February 2013 memorandum of advice to the Minister of Industry that "*of the new entrants, Globalive is seen by industry analysts as the one most likely to succeed, particularly because it has a financially strong strategic investor in Orascom/VimpelCom, which has significant global experience in the wireless industry. The company could potentially play an important role in increasing competition in Canada's wireless sector*." **Exhibit R-181**, Memorandum from John Knubley to Minister of Industry, *GTH Global Telecom Holding (Canada) Limited's Proposed Acquisition of Globalive Investment Holdings Corp. And Globalive Wireless Management Corp*, 5 February 2013, p. 5. *See also* **Exhibit R-181**, Memorandum from John Knubley to Minister of Industry, *GTH Global Telecom Holding (Canada) Limited's Proposed Acquisition of Globalive Investment Holdings Corp. And Globalive Wireless Management Corp*, 5 February 2013, pp. 4, 6.

procedure, pursuant to which it applied the most onerous and most public review process (Type 4) to Wind Mobile. After undertaking this targeted and onerous review process, the CRTC, in direct contradiction to Industry Canada, found that Wind Mobile did not comply with the O&C Rules. This contradictory finding (which was ultimately overturned by the Canadian courts) caused substantial uncertainty to Wind Mobile's future and significantly delayed Wind Mobile's launch, thereby depleting the value of Wind Mobile's first-mover advantage.

9. **Second**, despite all the assurances in 2008 that there would be a fair regulatory environment and even though Canada was well-aware that the Incumbents were refusing to act in good faith in respect of mandatory roaming and tower/site-sharing, in the five years that followed, Canada did nothing to promote a fair regulatory regime in which the New Entrants would have any chance of competing with the Incumbents. To combat Canada's failure to act, GTH was required to invest more heavily in Wind Mobile to facilitate its success.

10. Then, Canada dealt GTH two critical blows. Having announced the relaxation of foreign ownership restrictions in 2012, Canada deprived GTH of any ability to exercise its rights to take control of Wind Mobile pursuant to the explicit provisions of GTH's investment documents. In response to GTH's Voting Control Application, Canada subjected GTH to a lengthy, opaque, and arbitrary national security review, alleging that GTH's control over Wind Mobile posed an unspecified threat to Canada's national security. Canada refused to explain the cause of any concerns, and rather used this national security review as a tool to advance its telecommunications policy. [redacted]

[redacted]

[redacted] As Canada's internal memoranda show, Canada thought it could use this review process to procure information regarding GTH's future plans for Wind Mobile and to engineer a telecommunications market more to Canada's liking: namely, a four-player market which could not exist if Wind Mobile was sold to an Incumbent. Ultimately, [redacted] Accordingly, GTH withdrew its Application. Several months later, GTH again sought to clarify whether Canada would ever allow GTH to take control over Wind Mobile and, again, [redacted]

11. With the five-year limitation on transfer about to expire (and the realizable value of GTH's investment about to increase) and news that New Entrants were seeking to exit the market by sale to an Incumbent, Canada hastily adopted a new regulatory framework (the 2013 Transfer Framework) that changed the pre-existing rules on the transfer of spectrum license and empowered Canada to indefinitely prohibit New Entrants from selling set-aside spectrum licenses to Incumbents. Canada admits that it adopted this framework in direct response to news that New Entrants were seeking to exit the market by a sale to Incumbents, and sought a mechanism to prevent New Entrants from doing so. The evidence also makes it clear that Canada did so to create, at any cost, a fourth player in the market, an objective that could only be met with Wind Mobile's set-aside spectrum licenses. Thus, with one stroke of its pen, Canada did an about-face, deliberately and knowingly contradicting the 2008 AWS Auction Framework, and destroying the realizable value of the set-aside spectrum licenses.

Canada used every tool at its disposal, however illegitimate, to enforce its new policy objective of keeping a fourth player in the market at any cost.

12. Canada's measures devastated GTH's investment. As a result of the above, GTH was left with no prospect of being able to realize the value of its investment by selling to an Incumbent and had no prospect whatsoever of being able to take control of its investment. Given Canada's track record of broken promises, any faith GTH had that it would be treated fairly by Canada—especially in light of Canada's explicit indication that GTH was an unwelcome foreign investor—disappeared.

13. GTH's dilemma was compounded by the fact that Canada was about to issue new spectrum licenses through the 2014 700 MHz Auction. Participating in this auction would have required GTH to invest significant further funds into the Canadian market, funds GTH needed to convince VimpelCom (its majority shareholder) to loan. GTH and VimpelCom understandably did not want to commit further funds for the purchase of more spectrum until the issue of GTH's control over Wind Mobile had been resolved.

14. The options facing GTH were bleak. It could either:

    (a) Invest hundreds of millions of more dollars into Wind Mobile in addition to the C$ 1.3 billion already invested, notwithstanding the pattern of unfair treatment at the hands of the Canadian Government, including Canada's clear signal that GTH was no longer welcome as an investor and Canada's blanket prohibition on the transfer of GTH's investment to an Incumbent; or

    (b) Mitigate GTH's losses and exit the Canadian market by selling Wind Mobile to a non-Incumbent for the best price possible.

15. In light of the unfair treatment over the life of GTH's investment, GTH was reluctant to take the risk of pouring further funds into Canada. GTH opted to mitigate its losses and exit the Canadian market.

16. As discussed in **Part II**, these facts are largely undisputed by Canada and paint a stark picture of Canada's multiple breaches of the BIT, including its obligations to afford GTH FET, FPS, national treatment protection, and to guarantee the unrestricted free transfer of GTH's investment. Canada's conduct over the lifetime of GTH's investment (in complete disregard for the 2008 AWS Auction Framework) comprised both separate and cumulative breaches of Canada's treaty obligations. It is disingenuous for Canada now to claim that the incentives it offered in 2008 to attract investors were in fact meaningless, given that Canada had deliberately designed such representations to encourage investors to inject funds into the Canadian mobile telecommunications market. Moreover, Canada's position contravenes the plain language and spirit of its obligations under the BIT.

17. Canada does not (and cannot) contest the factual matrix, so instead it seeks in its Counter-Memorial on Merits and Damages[6] to move the goalposts as to the standards of legal protection it was required to provide to GTH under the BIT. Canada advocates interpretations of these obligations that are neither supported by the ordinary language of the BIT nor the overwhelming body of investment treaty jurisprudence, and that are so muted as to render Canada's obligations meaningless. Canada's attempt to rewrite both the BIT and the relevant legal principles is addressed in **Part IV** below.

18. Further, Canada resorts to making the extraordinary claim that its unfair actions (including the complete reversal of the Investment Framework that convinced GTH to invest) did not cause any loss to GTH. This claim is not credible, as underscored by Canada's hopeless argument that, notwithstanding the unfair treatment and loss GTH

[6] Government of Canada Counter-Memorial on Merits & Damages, 26 February 2018 (hereinafter "**Canada's Counter-Memorial on Merits and Damages**").

had suffered at the hands of the Canadian Government, GTH was nevertheless obliged to retain its investment in Canada and inject even more cash into the Canadian market. As addressed in **Part V.B.3**, Canada's position has no grounding in law or commercial reality.

19. **Dr. Pablo Spiller and Mr. Santiago Dellepiane** have prepared an updated valuation of the damage Canada's breaches of the BIT have caused GTH. In their Second Report, they assess GTH's investment cost—and, therefore, the total compensation owed to GTH—to amount to US$ 1.807 billion.[7] Alternatively, applying a market-based methodology, GTH is owed between US$ 768.2 million to US$ 1.311 billion, subject to the Tribunal's findings on liability.[8]

20. In light of the lack of Canada's defense on the merits and remedies, Canada has tellingly resorted to specious jurisdictional and admissibility objections.[9] In particular, Canada makes the meritless claim that GTH (one of Egypt's pre-eminent companies listed on the Egyptian stock exchange, and with multiple Egyptian shareholders) is not in fact an Egyptian juridical person for the purposes of the BIT, and that Canada had no obligation to treat GTH fairly and equitably when it invested C$ 1.3 billion into the Canadian wireless telecommunications market. As addressed in **Part III.B**, Canada should never have advanced such an implausible claim; GTH having to defend against it only supports its claim for costs. On any view, GTH is an investor for the purposes of the BIT. **Dr. Hani Sarie-Eldin of Sarie Eldin & Partners**, a leading authority on Egyptian corporate law, confirms that GTH is as an Egyptian joint stock company and

---

[7] *See* **CER-Dellepiane/Spiller-2**, Part II.2.

[8] *See* **CER-Dellepiane/Spiller-2**, Part II.3.

[9] Government of Canada Memorial on Jurisdiction and Admissibility and Request for Bifurcation, 15 November 2017 (hereinafter "**Canada's Memorial on Jurisdiction and Admissibility**").

is, without any doubt, an Egyptian juridical person [redacted].[10] Canada's remaining jurisdictional and admissibility objections are equally misconceived.

21. These ill-conceived arguments underline a more pervasive and troubling aspect of this case. The purpose of this BIT is the "*the promotion and the protection of investment of investors of one Contracting Party in the territory of the other Contracting Party*."[11] By concluding this BIT with Egypt, Canada has agreed to encourage the creation of favorable conditions for investors and to guarantee to those investors certain fundamental protections. Yet, Canada believes that it can eschew all responsibility for its patently unfair treatment of an Egyptian investor, notwithstanding that Canada intentionally persuaded GTH to invest significant funds building a new competitor in Canada's telecommunications market and recognized the importance to an investor of reliability in understanding the asset it was purchasing in that foreign land. It is time for Canada to acknowledge its multiple failures and be compelled to fully honor its international obligations.

---

[10] *See* **CER-Sarie-Eldin**.

[11] **Exhibit CL-001**, Agreement between the Government of Canada and the Government of the Arab Republic of Egypt for the Promotion and Protection of Investments (English version) (signed 13 November 1996; entry into force 3 November 1997) (hereinafter "**BIT (English)**"), Title and Preamble; **Exhibit 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) (signed 13 November 1996; entry into force 3 November 1997) (hereinafter "**BIT (French)**"), Title and Preamble; **Exhibit CL-003**, Agreement between the Government of Canada and the Government of the Arab Republic of Egypt for the Promotion and Protection of Investments (Arabic version) (signed 13 November 1996; entry into force 3 November 1997) (hereinafter "**BIT (Arabic)**"), Title and Preamble. *See also* **Exhibit C-037**, External Affairs and International Trade Canada, *Canadian Ambassador Signs Foreign Investment Protection Agreement with Egyptian Minister of International Cooperation*, 13 November 1996 [ATI Document], p. 1 (announcing the signature of the BIT and noting that it "*will increase the confidence of investors, provide greater investment protection and help promote bilateral investment flows*").

II. THE KEY FACTS ARE NOT IN DISPUTE

22. Canada has agreed in substantial part with GTH's submissions on the facts most relevant to this dispute. Specifically, Canada acknowledges that:

(a) The 2008 AWS Auction Framework was designed to attract new investors to Canada's wireless telecommunications market. To address historic challenges faced by New Entrants, Canada introduced certain incentives, including the set-aside of spectrum licenses for bidding only by New Entrants and mandatory roaming and tower/site sharing conditions. Canada further publicized that it was contemplating the future relaxation of its O&C Rules to allow foreign investors to control wireless telecommunications carriers.

(b) To avoid the circumvention of the set-aside of spectrum licenses and speculative bidders who sought to sell set-aside spectrum licenses at a premium to Incumbents, Canada introduced a finite five-year restriction on the transfer of set-aside spectrum licenses. During this period, New Entrants were expected to make a good faith effort to rollout their spectrum and buildout their network. After five years, the status quo of enhanced spectrum transferability rights was expected (by the Government and the market) to return.

(c) Upon participating in the 2008 AWS Auction and purchasing C$ 442 million in set-aside spectrum licenses, Wind Mobile was subjected to duplicative and contradictory reviews to consider its compliance with the O&C Rules. After one arm of the Government confirmed that Wind Mobile complied with the O&C Rules, another arm of the Government knowingly applied a second, duplicative, and targeted review to Wind Mobile, resulting in the opposite conclusion.

(d) From the early days of the New Entrants' development, the Government was aware that its mandatory roaming and tower/site sharing conditions were not having their intended effect, but did not act to remedy these issues until 2013 (almost five years after 2008 AWS Auction). And its most significant actions (such as caps on roaming rates) did not occur until after GTH exited the market.

(e) By 2012, the Government knew that the New Entrants, including Wind Mobile, were contemplating selling or transferring their AWS set-aside spectrum licenses to Incumbents after the expiration of the five-year restriction on transfer. In direct response, Canada introduced the 2013 Transfer Framework deliberately to keep at least one New Entrant (*i.e.*, a fourth player) in the market. In the 2013 Transfer Framework, Industry Canada granted itself, for the first time, the authority to consider spectrum concentration as a factor in license transfer application requests. This amendment significantly altered the enhanced transferability regime that otherwise would have applied upon the expiration of the five-year restriction on transfer. The Government was aware

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.

(f) At the same time the Government introduced the 2013 Transfer Framework, and after the long-anticipated relaxation of the O&C Rules, Canada subjected GTH to a lengthy national security review process, [redacted] Since 2009, Canada had been aware of GTH's right to convert its non-voting shares to voting shares in the event the O&C Rules were relaxed. This right was expressly included in Wind Mobile's shareholder agreements, which had been the subject of Canada's extensive and duplicative reviews.

23. There is, therefore, broad agreement between the Parties as to the key facts underlying this dispute. And the limited number of facts that Canada has contested do not assist its defense and are contradicted by the documentary record.

24. GTH summarizes the state of the relevant factual landscape below.[12] As will be explained at **Part IV**, the facts as set out below are dispositive on the merits and show that Canada has committed numerous breaches, including cumulative breaches, of its obligations under the BIT.

II.A. The Conditions Introduced In The 2008 AWS Auction Framework Were Designed To Attract Investors In The Wireless Telecommunications Market

25. Canada confirms that it sought in the 2008 AWS Auction to facilitate the entry of new competitors in the wireless telecommunications market.[13] However, prospective New Entrants faced several significant challenges. As Canada describes:

[12] For the avoidance of doubt, GTH does not accept any factual assertion or statement which it has chosen not to expressly contest here. Rather, for efficiency, GTH refers only to those facts it considers relevant to the resolution of this Arbitration.

[13] *See* Canada's Counter-Memorial on Merits and Damages, ¶¶ 3-6, 59, 67-75, 216-18; **RWS-Hill**, ¶ 29. *See also* GTH's Memorial on Merits and Damages, ¶¶ 40-75, 100-10; **Exhibit C-023**, Industry Canada,

> *The Canadian wireless telecommunications market is characterized by relatively high barriers to entry. Building a wireless network is a capital intensive and long-term project that involves acquiring spectrum licences and installing telecommunications antennas and associated infrastructure. These barriers have historically resulted in a market controlled by a few dominant telecommunications carriers.*[14]

26. Canada explains that in an effort to address these challenges, the Government introduced certain conditions in its 2008 AWS Auction Framework to facilitate market entry.[15] One such measure was the set-aside of spectrum licenses for New Entrants only to prevent the Incumbents from purchasing all of the new spectrum licenses by outbidding any potential New Entrants.[16] Another was the introduction of mandatory roaming and tower/site sharing conditions to address the "*high fixed cost to build a wireless network and replicate the networks that Incumbents controlled*."[17]

Harper Government Takes Action to Support Canadian Families, 14 March 2012, pp. 1, 3 ("*In 2008, the Harper Government set aside spectrum for new entrants and implemented other policies to support new competitors. New entrants have since made large investments to launch services and are providing greater choice to Canadian consumers*."); **Exhibit C-123**, Industry Canada, *Speech: Speaking Points – The Honourable Christian Paradis, PC, MP Minister of Industry, Telecommunications Decisions*, 14 March 2012, https://www.canada.ca/en/news/archive/2012/03/telecommunications-decisions.html, p. 2 (accessed 24 September 2017) ("*In the last spectrum auction, held in 2008, our government took action to encourage new entry in the wireless market*.").

[14] Canada's Counter-Memorial on Merits and Damages, ¶ 3. *See also* Canada's Counter-Memorial on Merits and Damages, ¶¶ 67-69, 75; GTH's Memorial on Merits and Damages, ¶¶ 33, 40.

[15] *See* Canada's Counter-Memorial on Merits and Damages, ¶¶ 4-6, 71, 73-75. *See also* GTH's Memorial on Merits and Damages, ¶¶ 60, 101, 145, 306; **Exhibit C-004**, Industry Canada, *Policy Framework for the Auction for Spectrum Licences for Advanced Wireless Services and other Spectrum in the 2 GHz Range*, November 2007.

[16] *See* Canada's Counter-Memorial on Merits and Damages, ¶¶ 68, 73. *See also* GTH's Memorial on Merits and Damages, ¶¶ 40(a), 60(b); **Exhibit C-004**, Industry Canada, *Policy Framework for the Auction for Spectrum Licences for Advanced Wireless Services and other Spectrum in the 2 GHz Range*, November 2007, pp. 5-6.

[17] Canada's Counter-Memorial on Merits and Damages, ¶¶ 67, 74-75. *See also* GTH's Memorial on Merits and Damages, ¶¶ 40(b)-(c), 60(d)-(e); **Exhibit C-004**, *Policy Framework for the Auction for Spectrum Licences for Advanced Wireless Services and other Spectrum in the 2 GHz Range*, November 2007, pp. 7-9; **Exhibit C-291**, Industry Canada, Memorandum from Richard Dicerni and Carole Swan to Memorandum to the Minister, *Antenna Tower Sharing*, 2007, p. 2 (observing that "[s]*takeholders have been anxiously awaiting the publication of updated procedures*" on tower sharing and that "*Industry Canada should address this issue prior to the Advanced Wireless Services auction, as it impacts business decisions of potential bidders*.").

27. While the above is accepted between the Parties, Canada neglects to acknowledge that it also explicitly sought to attract *foreign* investment. In the lead up to the 2008 AWS Auction, Minister of Industry Jim Prentice emphasized that facilitating foreign investment was one of his key policy objectives, touting its benefits and stating:

> *I want to send a* ***clear signal to market participants. They need to know the law of the land. That we are open to foreign investment.*** *Understand its importance. And welcome its benefits.*[18]

28. Canada explained in its 2007 AWS Auction Consultation that it understood that "*Foreign Investment Restrictions*" applicable to wireless telecommunications carriers were an important "*Barrier*[] *to Market Entry*."[19] In its final AWS Auction Policy Framework, Canada explained that restrictions on foreign ownership were being studied by the Competition Policy Review Panel,[20] affirming to potential foreign investors that such restrictions might be revised.[21] While the precise timing of the

---

[18] **Exhibit R-174**, Industry Canada, *Speaking Points - The Honourable Jim Prentice, PC, QC, MP, Minister of Industry, Vancouver Board of Trade 2007*, 9 October 2007, https://wayback.archive-it.org/3608/20080508061304/http:/www.ic.gc.ca/epic/site/ic1.nsf (accessed 22 February 2018), p. 5.

[19] **Exhibit C-050**, Industry Canada, *Consultation on a Framework to Auction Spectrum in the 2 GHz Range including Advanced Wireless Services (DGTP-002-07)*, February 2007, Part II, § 2.5.1. *See also* GTH's Memorial on Merits and Damages, ¶ 172; **Exhibit C-048**, Industry Canada, *Spectrum Policy Provisions and Consultation on a Framework to Auction Spectrum in the 2 GHz Range for Advanced Wireless Services: Briefing to ADM SITT,* 21 November 2006 [ATI Document], p. 5.

[20] **Exhibit C-004**, Industry Canada, *Policy Framework for the Auction for Spectrum Licences for Advanced Wireless Services and other Spectrum in the 2 GHz Range*, November 2007, p. 3. *See also* GTH's Memorial on Merits and Damages, ¶ 173.

[21] As Canada acknowledges in its submission, reports by both the Telecommunications Policy Review Panel in 2006 and the Competition Policy Review Panel in 2008 recommended the liberalization of these rules to improve the competitiveness of the telecommunications industry. *See* Canada's Counter-Memorial on Merits and Damages, ¶ 255. *See also* **Exhibit R-080**, Industry Canada, *Telecommunications Policy Review Panel: Final Report 2006*, March 2006, Afterword, pp. 11-25 – 11-26; **Exhibit C-076**, Competition Policy Review Panel, *Compete to Win: Final Report – June 2008*, pp. 47, 49; **Exhibit C-042**, House of Commons – Canada, *Opening Canadian Communications to the World – Report of the Standing Committee on Industry, Science and Technology*, April 2003; **Exhibit C-296**, The Commissioner of Competition, *Comments of the Commissioner of Competition on the Consultation on a Framework to Auction Spectrum in the 2 GHz Range including Advanced Wireless Services*, 25 May 2007, ¶¶ 42 ("*In the Bureau's view, the foreign investment restrictions are intimately tied to the viability of new entrants into wireless services markets*."), 47 ("*All of this suggests that there is fairly widespread consensus in the telecom sector that liberalizing the foreign ownership restrictions would, as the Panel concluded, likely result in significant improvements in the quality, pricing and availability in wireless services in Canada*.").

relaxation of these rules was not known, the clear message to prospective foreign investors like GTH was that these rules could be relaxed in the future.[22]

29. It was on this basis that GTH specifically negotiated and included in its Shareholder Agreements a provision that would allow it to take voting control over Wind Mobile if and when the O&C Rules were relaxed, a provision that was reviewed and approved by Industry Canada.[23]

30. Canada used the prospect of a future relaxation in the O&C Rules to encourage foreign investors like GTH to invest in 2008, knowing that this was an important factor in a foreign investor's decision to invest. Canada also knew that GTH's investment was deliberately structured to give GTH the right to avail itself of any relaxation in the regulations, and confirmed that such provision was acceptable. Canada's hair-splitting that its actions did not constitute a formal pre-approval is beside the point—in order to secure GTH's investment, Canada actively encouraged GTH to believe the rules would likely be relaxed in the future and, if they were, that GTH would be able to benefit from such relaxation.

II.B. Set-Aside Spectrum Licenses Purchased At The 2008 AWS Auction Benefit From Enhanced Transferability And Divisibility Rights Subject Only To A Finite Five-Year Restriction On Transfer To Incumbents

31. Canada describes that, in the period leading up to the 2008 AWS Auction, one of the overarching principles of its telecommunications policy (as memorialized in its 2008

[22] *See* GTH's Memorial on Merits and Damages, ¶¶ 171-74; **Exhibit C-064**, Email from Mike O'Connor to Investment Committee, et al., 28 February 2008, p. 24 (RBC Capital Markets, *Canadian Wireless Spectrum Auction: Discussion Materials*, 11 January 2008, Slide 22) ("*Equity ownership may be structured to allow foreign investors to take advantages of future changes in foreign ownership*"); **CWS-Dobbie**, ¶ 21.

[23] *See* GTH's Memorial on Merits and Damages, ¶¶ 80, 93, 123, 174; **CWS-Dobbie**, ¶ 21.

AWS Auction Framework) was to rely on market forces to the maximum extent feasible.[24]

32. This overarching policy applied equally to the transfer of spectrum licenses. In advance of the 2008 AWS Auction, Canada emphasized that there was a movement towards market-based exclusive spectrum rights[25] and that regulatory measures, if at all used, would be minimally intrusive.[26] This is explicit in the documents comprising the 2008

---

[24] *See, e.g.*, Canada's Counter-Memorial on Merits and Damages, ¶¶ 44(f), 46-49, 72, 84. *See also* GTH's Memorial on Merits and Damages, ¶¶ 37, 44, 46, 51-52, 58-59; **CWS-Connolly**, ¶¶ 6-10, 12; **Exhibit C-046**, Telecommunications Act, S.C. 1993, c. 38, § 7 ("*Canadian Telecommunications Policy*" and "*Objectives*"); **Exhibit C-050**, Industry Canada, *Consultation on a Framework to Auction Spectrum in the 2 GHz Range including Advanced Wireless Services (DGTP-002-07)*, February 2007, Part II, §§ 2, 2.1; **Exhibit C-052**, Industry Canada, *Spectrum Policy Framework for Canada (DGTP-001-07)*, June 2007, §§ 2, 3.4-3.6, 4.4; **Exhibit C-004**, Industry Canada, *Policy Framework for the Auction for Spectrum Licences for Advanced Wireless Services and other Spectrum in the 2 GHz Range*, November 2007, p. 2; **Exhibit C-294**, *Scenario and speaking points for CWTA Mini-conference on the AWS auction*, 19 April 2007, p. 14 (*The Auction of Spectrum in the 2 GHz Range Including Advanced Wireless Services* (Presentation Notes), 18 April 2007, Slide 5) (noting that "*the auction framework is based on reliance on market forces*").

[25] **Exhibit C-294**, *Scenario and speaking points for CWTA Mini-conference on the AWS auction*, 19 April 2007, pp. 3-4 (Questions and Answers: Study of Market-based Exclusive Spectrum Rights, 10 April 2007), 5-9 (Statement of Work: Study of Market-based Exclusive Spectrum Rights, 26 February 2007); **Exhibit C-052**, Industry Canada, *Spectrum Policy Framework for Canada (DGTP-001-07)*, June 2007, § 3.6 ("*The Framework reflects the Department's evolution toward more market-based policies and regulation where appropriate, and the government's recently stated commitment to this approach*."). *See also* **Exhibit C-059**, McLean Foster & Co., *Study of Market-based Exclusive Spectrum Rights*, August 2007, https://www.ic.gc.ca/eic/site/smt-gst.nsf/vwapj/market_based_rights-droits_axes_sur_le_marche-eng.pdf/$FILE/market_based_rights-droits_axes_sur_le_marche-eng.pdf (accessed 24 September 2017).

[26] **Exhibit C-052**, Industry Canada, *Spectrum Policy Framework for Canada (DGTP-001-07)*, June 2007, § 4.4 (including in its enabling guidelines, that: "[r]*egulatory measures, where required, should be minimally intrusive, efficient and effective*" and that "[r]*egulation should be open, transparent and reasoned*"); **Exhibit C-293**, *Telecom Invitational Forum – Montebello Panel on The Wireless Future – Speaking Points for Mike Binder*, 24 April 2007, pp. 1-2 (in Michael Binder's speaking points for a 2007 panel on "*The Wireless Future*," he described: "*We changed the Radiocommunication Act in 1996 to allow for spectrum auctions and a greater reliance on market forces to select licensees. Then in 1998 we released the Framework for Spectrum Auctions in Canada. We also changed our licensing framework to allow for long term spectrum licences for commercial spectrum. This has proven to be more efficient and less intrusive than licensing each and every mobile phone and tower as we used to do.* ***I think everyone recognizes that the wireless industry has prospered by lighter touch regulation and increased competition***." (emphasis added)); **Exhibit C-292**, Industry Canada, *Renewing Canada's Advantage: Modernizing Canada's Telecom/Spectrum Framework,* 7 March 2007, Slide 14 ("*The guidelines promote, among others . . .* [m]*inimally intrusive regulatory measures where required*"); **Exhibit C-314**, Advice from Mike Connolly to the Assistant Deputy Minister, *Meeting with the Canadian Wireless Telecommunications Association (CWTA), on February 29, 2008*, *attaching* Interview Questions – *Wireless Telecom* Magazine – Issue 1, 2008, p. 3 (describing that "[t]*he wireless industry in Canada is one of the most deregulated segements of the telecommunications industry*"). This policy remained when Canada began planning the 2014 700 MHz Auction. *See* **Exhibit C-326**, Industry Canada, *The 2012 Canadian Spectrum Auction,* 13 September 2011, Slide 9 ("*Government role should only go so far in influencing markets. . . . Level of intervention could involve set-asides as in 2008, or a less heavy-handed capping of the amount of spectrum that any single firm can purchase*.").

AWS Auction Framework, which made clear that spectrum licenses would be transferrable in the secondary market:

(a) **AWS Auction Consultation (February 2007)**: In the AWS Auction Consultation, Canada explained that one of the risks of setting-aside spectrum licenses was that it would result in "*unviable*" or "*uneconomic*" entry by New Entrants.[27] In line with its policy to rely on market forces, Canada observed that if a New Entrant proved unsuccessful, this "***can be corrected by market forces should a new entrant fail***."[28] Thus, Canada confirmed that "[l]*icences will be transferable and divisible in the secondary market*," adding that "[a]*n effective market calls for the reduction of barriers to entry and a productive secondary market*."[29]

(b) **Spectrum Policy Framework (June 2007)**: In the Spectrum Policy Framework issued shortly thereafter, Canada emphasized, among other things, the enabling guideline that its "[s]*pectrum policy and management should support the efficient functioning of markets by: . . . facilitating secondary markets for spectrum authorizations.*"[30]

(c) **Spectrum Licensing Procedure (September 2007)**: In this document, Canada described the "*enhanced transferability and divisibility*" rights afforded to

---

[27] **Exhibit C-050**, Industry Canada, *Consultation on a Framework to Auction Spectrum in the 2 GHz Range including Advanced Wireless Services (DGTP-002-07)*, February 2007, Part II, § 2.7 ("*Potential adverse impact (i.e. unviable entry) can be corrected by market forces should a new entrant fail . . . Not taking explicit action to enable entry may therefore have the consequence of preventing entry while taking explicit action runs the risk of potentially enabling uneconomic entry.*"). *See also* **Exhibit C-294**, *Scenario and speaking points for CWTA Mini-conference on the AWS auction*, 19 April 2007, p. 17 (*The Auction of Spectrum in the 2 GHz Range Including Advanced Wireless Services* (Presentation Notes), 18 April 2007, p. 8) (describing in speaking notes to a presentation to the CWTA in April 2007 that "*Consideration for the ability to correct itself through mergers, acquisitions, divestiture or secondary market trading*"); **Exhibit C-306**, Email from Len St. Aubin to Pamela Miller, Julie Fujimura, Adam Scott, and Guy Mitchell, 10 September 2007, p. 1 ("*Or else you allow entry that proves unsustainable, and entrants either fail to capture market share or are bought out –the market then will have spoken that three is enough. On balance, at worse a set aside gets us back to where we would have been anyway (same level of competition after a few transactions costs), and at best new competitors that thrive and bring innovation and better and lower priced services.*"); **Exhibit C-298**, The Commissioner of Competition, *Reply Comments of the Commissioner of Competition on the Consultation on a Framework to Auction Spectrum in the 2 GHz Range including Advanced Wireless Services*, 27 June 2007, ¶ 7.

[28] **Exhibit C-050**, Industry Canada, *Consultation on a Framework to Auction Spectrum in the 2 GHz Range including Advanced Wireless Services (DGTP-002-07)*, February 2007, Part II, § 2.7 (emphasis added). *See also* GTH's Memorial on Merits and Damages, ¶¶ 46, 104(a), 310-14.

[29] **Exhibit C-050**, Industry Canada, *Consultation on a Framework to Auction Spectrum in the 2 GHz Range including Advanced Wireless Services (DGTP-002-07)*, February 2007, Part II, §§ 5.1, 5.3. *See also* GTH's Memorial on Merits and Damages, ¶¶ 48, 104(a), 310-14.

[30] **Exhibit C-052**, Industry Canada, *Spectrum Policy Framework for Canada (DGTP-001-07)*, June 2007, § 4.4. *See also* GTH's Memorial on Merits and Damages, ¶¶ 52, 310-14.

> licenses purchased at auction, specifying that "*licences may be transferred in whole or in part . . . to a third party.*"[31]

33. These representations informed investors what was meant by "*enhanced transferability*"—a privilege Canada acknowledges exists[32]—of auctioned spectrum licenses in the ordinary course. As Canada's representations make clear, spectrum licenses "*will be transferable and divisible in the secondary market*."[33]

34. Importantly, one of Canada's key rationales for this transfer privilege was that it would allow markets to correct unviable entry by New Entrants, an acknowledged risk if Canada decided to introduce auction measures to alleviate barriers to entry like setting-aside spectrum licenses for New Entrants.[34] Canada observed in its internal issue papers discussing the rules and conditions of the 2008 AWS Auction:

> *If a set-aside or aggregation limit does not result in new entry or new entry proves to be unsustainable, then the market will have indicated that either the level of competition is sufficient or that, even with some measures, the barriers to entry are formidable and the likelihood of successful entry is low – again, suggesting that greater competition is unlikely. . . .*

---

[31] **Exhibit C-003**, Industry Canada, *Licensing Procedure for Spectrum Licences for Terrestrial Services (CPC-2-1-23, Issue 2)*, September 2007, § 5.6. *See also* GTH's Memorial on Merits and Damages, ¶¶ 55-56, 310-14; **Exhibit C-038**, Industry Canada, *Framework for Spectrum Auctions in Canada,* August 1998, Framework Summary, p. 2 ("*Licensees will be allowed to transfer and subdivide their licences to eligible third parties*."); **Exhibit C-039**, Industry Canada, *Policy and Licensing Procedure for the Auction of Additional PCS Spectrum in the 2 GHz Frequency Range*, 28 June 2000, Framework Summary ("*Licences are transferable and divisible in the secondary market.*"); **Exhibit C-041**, Industry Canada, *Framework for Spectrum Auctions in Canada (Issue 2),* October 2001, Framework Summary, p. 2 ("*Licensees will be allowed to transfer their licences in whole or in part (in both bandwidth and geographic dimensions) to eligible third parties.*"). As Canada described in its first Spectrum Auction Framework released in 1998, "[b]*y allowing licences to be bought and sold after an auction, a firm with a more valuable new use of the spectrum can negotiate a transfer with the incumbent licensee that is beneficial not only to both parties, but also to consumers*." *See* **Exhibit C-038**, Industry Canada, *Framework for Spectrum Auctions in Canada,* August 1998, § 6.3.

[32] *See* Canada's Counter-Memorial on Merits and Damages, ¶ 187.

[33] **Exhibit C-050**, Industry Canada, *Consultation on a Framework to Auction Spectrum in the 2 GHz Range including Advanced Wireless Services (DGTP-002-07)*, February 2007, Part II, § 5.1.

[34] **Exhibit C-050**, Industry Canada, *Consultation on a Framework to Auction Spectrum in the 2 GHz Range including Advanced Wireless Services (DGTP-002-07)*, February 2007, Part II, § 2.7.

> *On a balance of risks, on one hand there is a risk of further consolidation in the industry, while on the other there is a possibility of greater competition. However, should the new competitor(s) prove to be unsuccessful, this is correctable in the market post-auction, while the same cannot be said of the former.*[35]

35. The emphasis and reliance on market forces in respect of license transfers is consistent with Canada's historic treatment of license transfer requests. Canada details in its Counter-Memorial on Merits and Damages that Canada had approved two prior sales of New Entrants to Incumbents—Telus acquired Clearnet and Rogers acquired Microcell.[36] These transactions took place after a 3-year prohibition on transfer of the relevant licenses had expired.[37] In other words, the only precedents for the sale of New

---

[35] **Exhibit C-306**, Email from Len St. Aubin to Pamela Miller, Julie Fujimura, Adam Scott, and Guy Mitchell, 10 September 2007, pp. 14-15 (Measures intended to enable new entry through the AWS spectrum auction (draft), 5 September 2007, pp. 13-14); **Exhibit C-309**, Email from Len St. Aubin to Paul Boothe, Ron Parker, and Michael Binder, 23 October 2007, pp. 11-12, 15-16 (Measures intended to enable new entry through the AWS spectrum auction (draft), 23 October 2007, pp. 10-11 ("[c]*oncerning the ability of the market to sustain a fourth competitor, Microcell and Clearnet are good examples of how the market works. If the new competitor is strong enough and market opportunity exists, the company will survive, if not, the market will correct inefficient entry through acquisitions*."), 14-15 ("*While ex ante measures designed to foster competition in the wireless services market do not guarantee sustainable entry, or even new entry of any kind, they do provide an important opportunity to increase the level of competition in what can be currently described as an oligopolistic market structure. . . . Overall, looking at the question of whether to take measures to enable entry amounts to assessing for Canadian consumers the balance of risks associated with enabling new entry: on one hand there is a risk of enabling entry that later proves unsustainable, and on the other, of preventing entry by allowing incumbents to pay a premium to outbid new entrants. Looking at possible outcomes, the view of the department is that the risks of the first course of auction* [sic] *are smaller. Should the new competitors prove to be unsuccessful, the market will correct 'inefficient entry' after the auction. If a new entrant fails, its assets, including spectrum, will be acquired or the spectrum auctioned off again.*"). *See also* **Exhibit C-301**, Memorandum from Richard Dicerni and Paul Boothe to the Minister, c. August 2007, *Advanced Wireless Services (AWS) Spectrum Auction Consultations*, p. 18 (Annex A: Industry Canada, *Advanced Wireless Services (AWS) Spectrum Auction*, 3 August 2007, Slide 15).

[36] *See* Canada's Counter-Memorial on Merits and Damages, ¶¶ 53-55. *See also* GTH's Memorial on Merits and Damages, ¶ 38.

[37] *See* GTH's Memorial on Merits and Damages, ¶ 38; **Exhibit C-036**, Industry Canada, *Policy and Call for Applications — Wireless Personal Communications Services in the 2 GHz Range — Implementing PCS in Canada*, 15 June 1995, § 6.8.3 ("*Transfer of authorizations* [ ] *Consistent with general policy in this area and the specific provisions of section 18 of the General Radio Regulations II, the transfer of an authorization to another party will not be allowed without a full review of the application by Industry Canada and the approval of the Minister. In the absence of exceptional circumstances, no transfer of authorizations will be permitted in the first three years after the award of an authorization granted pursuant to this policy to provide PCS.*"); **CWS-Connolly**, ¶ 5.

Entrants to Incumbents demonstrated that transfers once those restrictions had expired would be permitted.

36. This was the context in which Canada introduced the five-year restriction on the otherwise enhanced transferability and divisibility rights in the 2008 AWS Auction.[38] Canada confirms that it introduced this provision to prevent arbitrage (*i.e.*, New Entrants buying set-aside spectrum licenses at a discount to the market price and then immediately selling those licenses to an Incumbent at a profit) and the resulting circumvention of the set-aside.[39] In other words, Canada sought to encourage the utilization of that spectrum, and honest efforts by New Entrants to utilize the spectrum licenses and to invest in the wireless telecommunications market.[40] To achieve this

---

[38] *See* **Exhibit C-004**, Industry Canada, *Policy Framework for the Auction for Spectrum Licences for Advanced Wireless Services and other Spectrum in the 2 GHz Range*, November 2007, p. 6; **Exhibit C-005**, Industry Canada, *Licensing Framework for the Auction for Spectrum Licences for Advanced Wireless Services and other Spectrum in the 2 GHz Range (DGRB-011-07)*, December 2007, § 4.2.

[39] *See* **RWS-Stewart**, ¶ 28; Government of Canada's Request for Bifurcation of Canada's Jurisdiction and Admissibility Objections, 7 April 2017, ¶ 9 ("[t]*his condition was aimed at avoiding circumvention of the set-aside and was consistent with the legislative objectives of achieving reliable and affordable telecommunications services and enhanced competitiveness.*"). *See also* GTH's Memorial on Merits and Damages, ¶ 60(b); **Exhibit C-051**, Quebecor Media Inc., *Submission by Quebecor Media Inc. To Industry Canada in Response to Canada Gazette Notice DGTP-002-07*, "*Consultation on a Framework to Auction Spectrum in the 2 GHz Range including Advanced Wireless Services*," 25 May 2007, p. 17; **Exhibit C-053**, Niagara Networks Incorporated, *Reply Comments – Canada Gazette Notice DGTP-002-07, "Consultation on a Framework to Auction Spectrum in the 2 GHz Range including Advanced Wireless Services"*, 26 June 2007, p. 51; **Exhibit C-054**, Data & Audio-Visual Enterprises Inc., *Reply to Submissions Filed with Respect to DGTP-002-07, Consultation on a Framework to Auction Spectrum in the 2 GHz Range including Advanced Wireless Services*, 27 June 2007, ¶ 21; **Exhibit C-055**, Cybersurf Corp., *Consultation on a Framework to Auction Spectrum in the 2 GHz Range including Advanced Wireless Services, Reply Comments of Cybersurf Corp.,* 27 June 2007, ¶¶ 11-12; **Exhibit C-305**, Email from Anastasia Gould to Rosamond Bain, 29 August 2007, p. 4 (Proposed Amendments to the Conditions of Licence (Mark-up of draft), 29 August 2007, p. 2); **Exhibit C-309**, Email from Len St. Aubin to Paul Boothe, Ron Parker and, Michael Binder, 23 October 2007, p. 65 (Memo to Minister or Attachment Thereto, *AWS Auction, Recommendations and Implications* (draft), p. 5). *See also* **Exhibit C-114**, Industry Canada, *Decisions on a Band Plan for Broadband Radio Service (BRS) and Consultation on a Policy and Technical Framework to License Spectrum in the Band 2500-2690 MHz*, February 2011, § 4.1.2 (describing historic restrictions on the transfer of licenses, including the five-year restriction on set-aside spectrum licenses from the 2008 AWS Auction, and observing that "[r]*estrictions on secondary market transactions and transferability on set-aside spectrum may need to be imposed* ***for a specific time frame*** *to limit opportunities for economic arbitrage of spectrum licences*." (emphasis added)); **Exhibit C-307**, Email from Peter Hill to Anastasia Gould and Howard Chatterton, 18 September 2007, p. 3 (noting that a restriction for even five years might cause issues "*for companies facing potential bankruptcy within the 5 years*").

[40] *See, e.g.*, GTH's Memorial on Merits and Damages, ¶¶ 37, 41, 60(b)-(c); **Exhibit C-122**, Industry Canada, *Policy and Technical Framework, Mobile Broadband Services (MBS) – 700 MHz Band, Broadband Radio*

objective, Canada concluded that maintaining this restriction for "**[f]*ive years following the auction would be adequate***."[41]

37. Canada accepts that it intended this period to be finite, and that after five years had passed, Canada expected that this restriction would no longer apply and the transfer regime would revert to the *status quo ante*.[42] The *status quo ante* was Canada's policy that spectrum licenses have "*enhanced transferability and divisibility rights*."[43] As discussed further below, Canada's existing policy and intentions is all the more clear when Canada contemplated changing the transfer rules in 2013. As Canada described in one memorandum, "*the current policy permit*[s] *AWS-set-aside spectrum to be acquired by incumbents starting in late 2013*."[44]

Services (BRS) – 2500 MHZ Band (SMSE-002-12), March 2012, ¶ 142 (explaining that the five-year restriction on transfer imposed during the 2008 AWS Auction was "*intended to encourage licensees to put the spectrum to use*").

[41] **Exhibit C-304**, Email from Patrick Carrey to Guy Mitchell, et al., 29 August 2007, p. 6 (Spectrum Set-aside (draft), 29 August 2007, p. 5) (emphasis added). *See also* **Exhibit C-315**, Email from Peter Hill to Mike Connolly and Howard Chatterton, 24 June 2008, p. 2 (observing that "*a weak competitor is one that is easier to buy out in 5 years. And don't forget about the study about the billions of dollars of value to the incumbents by blocking new entry. There is a real incentive for incumbents to block access to more spectrum to ensure they are weak*.").

[42] *See* Canada's Counter-Memorial on Merits and Damages, ¶¶ 5, 78. The *status quo*, in Canada's view, would mean that after five years, "*any such licence transfers would be subject to the approval of the Minister as would be the case for any other spectrum licence transfer.*" *See* Canada's Counter-Memorial on Merits and Damages, ¶ 5. The expectation regarding the Minister's approval will be discussed at **Part IV.A.2.a**.

[43] *See* GTH's Memorial on Merits and Damages, ¶¶ 55, 61, 311, 314; Canada's Counter-Memorial on Merits and Damages, ¶ 187. *See also* **Exhibit C-305**, Email from Anastasia Gould to Rosamond Bain, et al., 30 August 2007, p. 2 (Proposed Amendments to the Conditions of Licence (draft), 30 August 2007, p. 1) ("*Licensees are currently permitted to transfer licence(s) in whole or divide the licence(s) in bandwidth and/or geographic dimensions, however each* **notice** *is subject to ministerial approval. Notices are reviewed to ensure: the current licensee is in compliance with its condition of licence; the future licensee meets all licensing requirements, most notably Canadian ownership and control; there are no other issues to be considered before the transfer is activated*." (emphasis in original)).

[44] **Exhibit C-258**, Memorandum from Iain Stewart to Deputy Minister, Industry Canada, *Update on Wireless Telecom Sector*, 7 December 2012 [*Updated version of* **Exhibit R-084**], p. 6 (Annex A: Wireless Telecommunications Sector Update and Implications, p. 5).

38. Canada further accepts the following facts (explicitly or by its silence), which confirm that Canada intended investors to believe that the five-year prohibition on sale to an Incumbent would be finite:

(a) Canada intended the restriction to be finite because it knew investors would expect a valuable exit strategy after a reasonable period of time in the event that they were unsuccessful in establishing a viable business.[45]

(b) Canada recognized that features of the spectrum licenses and auction impacting value, including the ability to transfer spectrum licenses—*i.e.*, liquidate one's investment—are critical in informing an investor's decision to invest.[46] For

[45] *See* GTH's Memorial on Merits and Damages, ¶¶ 41(a), 60(b); **CWS-Connolly**, ¶ 13; **Exhibit C-050**, Industry Canada, *Consultation on a Framework to Auction Spectrum in the 2 GHz Range including Advanced Wireless Services (DGTP-002-07)*, February 2007, Part II, § 2.7 (observing that the risk of unviable entry and the failure of a new entrant could be corrected by market forces). Canada of course had the option to state in its 2008 AWS Auction Framework that transfers of set-aside spectrum licenses were subject to an indefinite restriction on license transfers as proposed by some contributors to the AWS Auction consultation process. *See, e.g.*, **Exhibit C-055**, Cybersurf Corp., *Consultation on a Framework to Auction Spectrum in the 2 GHz Range including Advanced Wireless Services, Reply Comments of Cybersurf Corp.*, 27 June 2007, ¶ 12.

[46] *See, e.g.*, GTH's Memorial on Merits and Damages, ¶ 32; **Exhibit C-038**, Industry Canada, *Framework for Spectrum Auctions in Canada,* August 1998, § 3 (in referring to Canada's spectrum release plan, observing that "[t]*his information will enable participants to more accurately assess the current and future marketplace when developing their business plans, and help them prepare a reasonable valuation for the spectrum in question. By reducing uncertainty, this information will give bidders greater confidence in determining an appropriate strategy*."); **Exhibit C-041**, Industry Canada, *Framework for Spectrum Auctions in Canada (Issue 2)*, October 2001, §§ 2.3.1 (addressing existing fees for incumbent licensees and explaining that it would not adjust those fees in light of future spectrum auctions: "*The Department recognizes that re-calibration of incumbents' fees could create significant uncertainty for licensees who acquired their licences in good faith under the fee regime in existence at that time. Uncertainty created by re-calibration would damage established businesses that had made plans and secured financing under the rules of the day. These uncertainties could have a major impact on the availability of financing, investment in new technologies, and the provision of new services.*"), 4 ("*Understanding exactly what is being auctioned is very important for bidders to develop business plans, secure adequate financing and develop a bidding strategy. While upholding the status of radio spectrum as a public natural resource, it is important to provide bidders, and subsequently licensees, with a well-defined set of licence attributes so as to enhance their abilities to secure financing; to invest in their networks; and, to provide the best possible services to Canadian consumers*."), 5 ("*One of the goals in the* [auction] *process is to clearly articulate the policy and licensing considerations and decisions so that potential bidders have the fullest possible knowledge of the spectrum at issue and the auction procedures and rules prior to the auction*."); **Exhibit C-294**, *Scenario and speaking points for CWTA Mini-conference on the AWS auction*, 19 April 2007, p. 13 (*The Auction of Spectrum in the 2 GHz Range Including Advanced Wireless Services* (Presentation Notes), 18 April 2007, p. 4) (acknowledging in a presentation regarding the upcoming 2008 AWS Auction that "[Auction] *Framework essential to the bidders*," and noting in the speaking points that "[a]*ll interested parties must know how the process will be run before the bidding starts – This ensures fairness and transparency* [ ] ***Bidders have to know what their rights and obligations will be***." (emphasis added)); **Exhibit C-052**, Industry Canada, *Spectrum Policy Framework for Canada (DGTP-001-07)*, June 2007, § 4.4 ("*The Department recognizes the benefits of implementing flexibility in a spectrum management program enabling spectrum users to adapt to changing conditions, to the extent practical. This also requires that the obligations and privileges of spectrum authorizations be clearly defined*."); **Exhibit C-297**, Memorandum from Len St. Aubin to the Visiting Senior Assistant Deputy Minister, copying Michael Binder, *Policy Overview of Previous Competitive Licensing*, 30 May 2007, p. 3 (describing that in the event an implementation of service or roll-out obligation would be imposed, "*a*

example, in response to internal concerns regarding the "*high*" expectation of license renewal reflected in the Spectrum Auction Framework, Canada observed that "*this term has been in place since the first auction process and licensees see it as an important element of business certainty, a point validated by our external experts*."[47] Canada knew that such conditions needed to be clear because "[u]*nderstanding exactly what is being auctioned is very important for bidders to develop business plans, secure adequate financing and develop a bidding strategy*."[48] Canada explained, therefore, that "[o]*ne of the goals in the* [auction] *process is to clearly articulate the policy and licensing considerations and decisions so that potential bidders have the fullest possible knowledge of*

proposed condition of licence will be made in the consultation paper and the final policy decision will be clearly stipulated prior to the start of the auction."); **Exhibit C-302**, Email from Julie Fujimura to Pamela Miller, 10 August 2007, p. 1 (Timelines for AWS Spectrum Auction, p. 1) ("*Framework document must be accurate, clear and thorough for stakeholders . . . Critical to ensure auction rules are clearly understood by bidders to facilitate a successful auction, minimize risk*"); **Exhibit C-303**, Industry Canada, *The Auction of Spectrum in the 2 GHz Range Including Advanced Wireless Services*, 20 August 2007, Slide 5 ("*Framework essential for the bidders*"). *See also* **CWS-Dry**, ¶ 14; **Exhibit C-113**, Industry Canada, *News Release: Minister Clement Updates Canadians on Canada's Digital Economy Strategy*, 22 November 2010, http://www.ic.gc.ca/eic/site/064.nsf/eng/06096.html (accessed 24 September 2017), p. 3 ("*To increase the predictability of the spectrum regime and encourage infrastructure investment, personal communications services and cellular fee rates have, for the moment, been frozen at their current levels. Given the importance of the duration of spectrum licences for investment planning purposes, the length of licences for mobile broadband spectrum will be extended to 20 years for all future auctions and upcoming licence renewals.*"); **Exhibit C-193**, Industry Canada, *Speech: Speaking Points – The Honourable Christian Paradis, PC, MP, Minister of Industry, Telecommunications Announcement*, 4 June 2013, https://www.canada.ca/en/news/archive/2013/06/telecommunications-announcement.html (accessed 24 September 2017), p. 2 ("[G]*oing forward, proposed spectrum transfers—including AWS spectrum transfers—that will result in undue concentration and therefore reduce competition will not be permitted. . .* [the new transfer policy] *will give industry the clarity and predictability they need to chart the future of their companies*."); **Exhibit C-156**, Industry Canada, *Speech: Speaking Points – The Honourable Christian Paradis, PC, MP, Minister of Industry, New measures to increase competition in the wireless sector*, 7 March 2013, https://www.canada.ca/en/news/archive/2013/03/new-measures-increase-competition-wireless-sector.html (accessed 24 September 2017), p. 2 ("*In order for wireless providers to invest in new spectrum and new services for Canadians, they need greater certainty over the next few years*."); **Exhibit C-165**, Rogers, *Comments of Rogers Communications: Consultation on considerations Relating to Transfers, Divisions, and Subordinate Licensing of Spectrum Licences (DGSO-002-13)*, 3 April 2013, ¶¶ 16, 23-24 ("*From the bidder's perspective, certainty of terms is essential to the process of valuing the spectrum and considering how much to bid in a particular market. . . . One of the most important rights associated with auctioned spectrum is the right to sell it in the aftermarket*."); **Exhibit C-059**, McLean Foster & Co., *Study of Market-based Exclusive Spectrum Rights*, 31 August 2007, https://www.ic.gc.ca/eic/site/smt-gst.nsf/vwapj/market_based_rights-droits_axes_sur_le_marche-eng.pdf/$FILE/market_based_rights-droits_axes_sur_le_marche-eng.pdf (accessed 24 September 2017); **Exhibit R-231**, Rita Trichur, *Ottawa stresses competition, consumer prices in new wireless rules,* THE GLOBE & MAIL, 28 June 2013, https://www.theglobeandmail.com/report-on-business/ottawa-stresses-competition-consumer-prices-in-new-wireless-rules/article12882059/, p. 2 ("*Carriers participated in the last auction with the understanding the standstill period would only last for five years – a key ground rule that gives investors comfort about the liquidity of spectrum assets and the timing for potential exit strategies*.").

[47] **Exhibit C-313**, Advice from Richard Dicerni and Paul Boothe to the Minister, *Auction for AWS Spectrum Licences*, 11 February 2008, p. 2.

[48] **Exhibit C-041**, Industry Canada, *Framework for Spectrum Auctions in Canada (Issue 2)*, October 2001, § 4.

the spectrum at issue and the auction procedures and rules prior to the auction."[49]

(c) In 2008, Canada, 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.[50] As explained below, this expectation

---

[49] **Exhibit C-041**, Industry Canada, *Framework for Spectrum Auctions in Canada (Issue 2)*, October 2001, § 5.

[50] *See, e.g.*, GTH's Memorial on Merits and Damages, ¶¶ 104-109; Canada's Counter-Memorial on Merits and Damages, ¶¶ 10, 224, 228-30 (acknowledging that New Entrants and Incumbents acted in 2012 as though they considered the five-year restriction to be finite); **CWS-Connolly**, ¶ 13 (confirming that Industry Canada imposed a limited five year restriction on the transfer of set-aside spectrum licenses to Incumbents because it was "*long enough to mitigate against speculation and to provide an incentive to New Entrants to build networks and offer competing services, while affording New Entrants the expectation of the ability to exit the market and divest the licences after five years should they not succeed*."); **CWS-Dobbie**, ¶ 10 (explaining that GTH "*understood* [the five-year] *provision to mean that, after the five-year period was up, a New Entrant would be able to sell set-aside spectrum licences to an Incumbent*" and stating that "*one of the exit strategies considered by GTH and Globalive was a sale to an Incumbent after five years*."); **Exhibit C-003**, Industry Canada, *Licensing Procedure for Spectrum Licences for Terrestrial Services (CPC-2-1-23, Issue 2)*, September 2007, Appendix A (providing a sample spectrum license transfer "*notification*" requiring only basic information regarding the proposed licensee and requesting a confirmation of compliance with the O&C Rules); **Exhibit C-066**, Email from Mike O'Connor to Assaad Kairouz, et al., 29 February 2008, *attaching* Globalive materials, p. 17 (Investor Presentation Globalive Wireless Partnership, 26 February 2008, Slide 4 (describing that AWS set-aside spectrum would be "[v]*alued by incumbents, potential foreign entrants in the future*")), 63-64, 72-73, 99 (Globalive Wireless LP Private Placement Memorandum (v2), 15 February 2008, §§ 3.1, 3.4 (explaining that "[t]*he key restriction that Industry Canada placed on new entrants is the inability to sell the acquired new entrant spectrum to an incumbent until five years after acquisition*" and that "[e]*xit strategies could take many forms and include an initial public offering, a sale to an incumbent after five years or sale to any other party (that meets the foreign ownership restrictions) at any time*."), 4.2 (referring to the Microcell merger as a case study), 9.1 (observing that "[t]*he return of capital and the realization of gains, if any, from investment will occur only upon the partial or complete realization of or disposition of Interests*.")), 373-74, 385, 391 (Memorandum from Brice Scheschuk, *Financial Model Assumptions and Considerations*, 15 February 2008, pp. 1-2 (noting that capitalizing on the set-aside spectrum auction could theoretically occur by "*holding* [the spectrum] *for five years with no operations and taking a chance on a positive return through a straight sale to an incumbent*"), 13 ("*We believe that the spectrum will have significant value on a stand-alone basis to either an incumbent (five years after acquisition) or another entrant within five years. . . .* [T]*he need for additional spectrum should grow with data usage and there is inherent value to an incumbent to keep spectrum from other incumbents.*"), 19 ("*Exit strategies could take many forms and include an IPO, sale to an incumbent after five years or sale to any other party (that meets the foreign ownership restrictions) within five years*."); **Exhibit C-072**, JPMorgan, *Orascom Telecom – Canadian Wireless Opportunity*, 10 April 2008, Slides 19 (observing "[l]*icense may not be transferred to incumbent companies for 5 years from issuance*"), 23-28 (describing Rogers' acquisition of Microcell as the case study for the Canadian telecommunications market and describing the factors that created value for Microcell); **Exhibit C-077**, Email from Aldo Mareuse to Mike O'Connor and Investment Committee, 5 June 2008 (noting that New Entrants "*can resell to new entrants, but if* [New Entrants] *buy set aside spectrum, they can'* [sic] *resell to incumbents for five years*"); **Exhibit C-228**, *Quadrangle Group LLC, QCP CW S.A.R.L., and Data & Audio-Visual Enterprises Investments Inc. v. Attorney General of Canada*, Ontario Superior Court of Justice, Court File No. CV-14-511539, Amended Statement of Claim, 3 October 2014, ¶ 29 (Mobilicity's investors allege that Canada told them expressly that they would be permitted to sell set-aside spectrum licenses to an Incumbent after five years); **Exhibit C-363**, BMO Capital Markets, *Wireless Policy in Canada: Searching for a Silk Purse in a Sow's Ear*, 20 June 2013, pp. 2-3 ("*Financial backers of the three new entrants made their investments with an exit strategy if commercial operations stalled: selling to the incumbents in five years. The Minster's denial of the TELUS-Mobilicity deal, and his opaque language regarding other sales of AWS spectrum to incumbents (Rogers/Shaw and Rogers/Videotron) may open up legal recourse. The government accepted investors' capital on the way in, but may have changed the rules four years later. It isn't exactly an ideal precedent to have hanging out there when you're trying to attract a billion or two of*

capital, again, to finance the fourth player."); [redacted]; **Exhibit C-223**, Howard Solomon, *Industry Canada once willing to let incumbents buy startups: Rogers*, IT WORLD CANADA, 18 June 2014, http://www.itworldcanada.com/article/industry-canada-once-willing-to-let-incumbents-buy-startups-rogers/94646 (accessed 24 September 2017) (a senior executive at Rogers states that he was also informed expressly by Canada that Incumbents would be able to purchase set-aside spectrum licenses from New Entrants after five years); **Exhibit C-311**, Email from Peter Hill to Heather Hall and Howard Chatterton, 29 November 2007, p. 7 (Genuity, *Canadian Telecom and Cable Services, AWS auction rules favour new entrants*, 29 November 2007, p. 3) (referring to the five-year restriction and observing that "*five years is not that long. Clearnet was acquired five years after it obtained its PCS license and Microcell was acquired nine years after it was awarded a PCS license*."); **Exhibit C-073**, Andrew Willis, *New wireless players expected to buy and flip*, THE GLOBE & MAIL, 30 April 2008, https://beta.theglobeandmail.com/report-on-business/streetwise/new-wireless-players-expected-to-buy-and-flip/article1341694/?ref=http://www.theglobeandmail.com& (accessed 24 September 2017) ("*Industry veterans also point to Shaw Communications as a potential buy-and-flip wireless player. The cable company has justified this view by cautioning investors not to read too much into its decision to put up a $400-million deposit ahead of the auction. Obviously, having someone park spectrum for a few years, then sell it to one of the big three is not going to mess up the strong underlying economics of the Canadian wireless market*."); **Exhibit C-071**, David George-Cosh, *Cellphone competition about to heat up*, NATIONAL POST, 19 March 2008, p. 2 ("*Still, analysts caution that the release of the applicant list does not immediately translate into a viable company. Aside from the additional capital needed to deploy a service, spectrum could be viewed as a strategic asset that could be held for five years and later resold for a premium. 'I think that there's a lot of rethinking going around,' said Iain Grant, managing director for SeaBoard Group. 'With every dollar you spend on spectrum, you're going to need to spend two or three on hardware. It would also be good to have some money left over for marketing as well. Or they could just flip it.'*"); **Exhibit C-083**, Email from Delphine Lemarchand to Mike O'Connor, et al., 22 July 2008, p. 4 (Merrill Lynch, *Industry Overview: Telecom Services-Wireless/Cellular – Canada's wireless spectrum auction ends*, 21 July 2008, p. 1) (observing after the results of the 2008 AWS Auction were announced that "[t]*he substantial incumbent/new entrant spectrum pricing gap could encourage some new entrant bidders to hold their spectrum for resale*."); **Exhibit C-103**, Email from Dvai Ghose to Aldo Mareuse, 29 October 2009, p. 1 (Genuity Capital Markets advised that one option for Wind Mobile after the CRTC's contradictory O&C decision was to "*sit on its spectrum in the hope that foreign ownership restrictions are lifted in Canada. Alternatively, it could wait for 5 years, after which time incumbents are allowed to own the AWS spectrum that was initially reserved for new entrants like Globalive*."); **Exhibit R-094**, The Convergence Consulting Group Ltd., *Canadian Wireless: Assessing the Impact of New Entrants,* September 2012, p. 89 ("*Globalive received its license on March 13th 2009 (hence can be acquired by an Incumbent after March 13th 2014*"); **Exhibit R-245**, Scotiabank, *Biweekly Report: Converging Networks: A Signal of VimpelCom's (VIP) Eventual Exit from Canada,* 29 October 2012, p. 2 ("*We believe that would pave the path for the ultimate exit in 2014 when the licences are transferable to the incumbents Rogers, BCE, and TELUS*."); **Exhibit C-164**, Rita Trichur et al., *Wind Mobile on block in new wireless shakeup*, THE GLOBE & MAIL, 21 March 2013, https://beta.theglobeandmail.com/report-on-business/wind-mobile-on-block-in-new-wireless-shakeup/article10062360/ (accessed 24 September 2017), p. 2 ("*But even before the new entrants launched service, industry observers expected the companies to sell out to larger players, given the industry's history of consolidation and the heavily discounted prices offered by the new entrants*."); **Exhibit C-165**, Rogers, *Comments of Rogers Communications: Consultation on considerations Relating to Transfers, Divisions, and Subordinate Licensing of Spectrum Licences (DGSO-002-13)*, 3 April 2013, ¶ 16 ("[i]*t would be inappropriate to apply the Department's proposals during the current term of spectrum licences that were acquired in an auction, since existing licensees* ***had no idea that the transferability of their licences would be subject to the proposed assessments when they initially acquired their spectrum licences****. For example, successful bidders that paid hundreds of millions of dollars for their licences in the 2008 AWS spectrum auction made these substantial investments in the absence of the proposed new rules which may make it more difficult to obtain approval for spectrum transfers*." (emphasis added)); **Exhibit C-178**, Rogers, *Comments of Rogers Communications: Consultation on considerations Relating to Transfers, Divisions, and Subordinate Licensing of Spectrum Licences (DGSO-002-13)*, 3 May 2013, ¶ 50 ("*The policy that was established in advance of the AWS auction clearly indicated that incumbents would be prohibited from acquiring set-aside spectrum* ***for a period of no more than 5 years from the time of licensing****. The Department could have set the restriction at 10 years or forever - but chose not to do so. This timeframe was arrived at after a full public consultation and careful deliberation by Industry Canada. Nowhere in the AWS*

is all the more clear in Canada's documents contemplating the change of the transfer rules in 2012 and 2013, which acknowledge that blocking these transfers would change the existing rules and amount to expanding the Minister's powers to give him additional discretion.[51]

(d) Canada knew that once market forces were permitted to resume after five years, it was possible that the Incumbents would simply buy the New Entrants and no New Entrants would remain.[52] Canada affirmed that it had "*no preconceived notions on the outcome of this process*"[53] and that after the 2008 AWS Auction the market could determine there would be no fourth player.[54] At this time, Canada was well aware that "*more is not always the better and merrier in industries such as telecom*."[55]

---

auction policy is it stated that this prohibition might continue for a period of more than 5 years." (emphasis added)).

[51] *See infra* **Part II.F**.

[52] *See* **CWS-Connolly**, ¶¶ 13, 15. *See also* GTH's Memorial on Merits and Damages, ¶ 41(a); **Exhibit C-306**, Email from Len St. Aubin to Pamela Miller, Julie Fujimura, Adam Scott, and Guy Mitchell, 10 September 2007, p. 22 (Reliance on Ex Post Regulatory Measures to Ensure a Competitive Wireless Services Market (draft), 5 September 2007, p. 6) (observing that "[w]*hile* [*ex-ante*] *measures do not guarantee sustainable entry, or even new entry of any kind, they do provide an important opportunity to increase the level of competition in what can be currently described as an oligopolistic market structure*."); **Exhibit C-309**, Email from Len St. Aubin to Paul Boothe, Ron Parker, and Michael Binder, 23 October 2007, p. 60 (Memo to Minister or Attachment Thereto, *AWS Auction, Recommendations and Implications* (draft), p. 1) ("*Even with the advantages provided to new entrants, market share losses are by no means certain, and remain several years away at best*."). Minister Prentice acknowledged this possibility when commenting on the progress of the 2008 AWS Auction during bidding, stating "[t]*he forces of the market will always result in some amount of movement in the industry but at this point the focus is to ensure that the distribution of the spectrum produces more competition and lower prices and more choices.*" **Exhibit C-078**, David Ljunggren, *Wireless auction going well, Ottawa says*, TORONTO STAR, 10 June 2008, p. 2. Moreover, Canada emphasizes repeatedly in its submission that it did not "*guarantee*" the success of New Entrants who chose to participate in the 2008 AWS Auction. *See, e.g.*, Canada's Counter-Memorial on Merits and Damages, ¶¶ 24, 80, 101. As discussed below, Canada changed its mind—deciding that it would require the success of at least one New Entrant fourth player at any cost. *See infra* **Part II.F**.

[53] **Exhibit C-294**, *Scenario and speaking points for CWTA Mini-conference on the AWS auction*, 19 April 2007, p. 14 (*The Auction of Spectrum in the 2 GHz Range Including Advanced Wireless Services* (Presentation Notes), 18 April 2007, p. 5) ("*The Minister is on record saying that we have no preconceived notions on the outcome of this process*.").

[54] *See* **Exhibit C-293**, *Telecom Invitational Forum – Montebello Panel on The Wireless Future – Speaking Points for Mike Binder*, 24 April 2007, p. 7 (Questions and Answers – AWS Spectrum Auction, p. 1) (in a document prepared for Mr. Binder's panel describing the upcoming AWS Auction, in response to the anticipated question "*Is the Minister going to licence a fourth national carrier?*," Mr. Binder's anticipated response was "*I have no preconceived notions on the outcome of this process*").

[55] **Exhibit C-299**, Email from Len St. Aubin to Renee St-Jacques, Guy Mitchell, Pamela Miller and Ron Parker, 16 July 2007, p. 2. Canada had consulted with economists to understand their views on, *inter alia*, the impact of additional players in the market and was well aware of the conflicting views in this regard. *See* **Exhibit C-299**, Email from Len St. Aubin to Renee St-Jacques, Guy Mitchell, Pamela Miller and Ron Parker, 16 July 2007, pp. 6-9 (Round Table with Economists on AWS Spectrum Auction, Questions for Discussion); **Exhibit C-300**, Memorandum from Ron Parker to the Deputy Minister, *Economists Roundtable on Auction of Licences to Use Spectrum to Provide Advanced Wireless Services (AWS)*, 17 July 2007, pp. 5-7 (Annex A:

39. Canada is conspicuously silent with respect to the evidence of Mr. Connolly, the Director General of Spectrum Management Operations at Industry Canada who played a key role in developing the documents comprising the 2008 AWS Auction Framework.[56] As Mr. Connolly has explained (and Canada does not deny):

> *The five-year period was considered long enough to mitigate against speculation and to provide an incentive to New Entrants to build networks and offer competing services, while affording New Entrants the expectation of the ability to exit the market and divest the licenses after five years should they not succeed. We were fully aware that an indefinite ban on any sale of set-aside spectrum would deter New Entrants from bidding in the AWS Auction.*[57]

40. As explained above, the possibility that New Entrants could sell their spectrum licenses was exactly the reason Canada concluded a set-aside of spectrum licenses could be justified. Namely, Canada found that the risk of unviable entry resulting from setting-aside spectrum licenses for New Entrants was mitigated by the fact New Entrants could sell their spectrum licenses later.

II.C. The 2008 AWS Auction Was A Resounding Success For Canada

41. Due to Canada's representations, the 2008 AWS Auction was a resounding success for Canada.[58] Several New Entrants purchased spectrum licenses, including GTH, who

---

Speaking Points), 8-9 (Annex B: Round Table with Economists on AWS Spectrum Auction Questions for Discussion).

[56] Canada refers to the evidence of Mr. Connolly in a single paragraph to observe that Mr. Connolly had retired by the time the 2013 Transfer Framework was adopted. *See* Canada's Counter-Memorial on Merits and Damages, ¶ 382.

[57] **CWS-Connolly**, ¶ 13.

[58] *See* Canada's Counter-Memorial on Merits and Damages, ¶ 89; GTH's Memorial on Merits and Damages, ¶ 88; **Exhibit C-081**, Industry Canada, *News Release: 15 Companies Bid Almost $4.3 Billion for Licences for New Wireless Services*, 21 July 2008, https://www.canada.ca/en/news/archive/2008/07/15-companies-bid-almost-4-3-billion-licences-new-wireless-services.html (accessed 24 September 2017); **Exhibit C-083**, Email from Delphine Lemarchand to Mike O'Connor et al., 22 July 2008, p. 1 (forwarding an article describing the auction as "*a blow-out sale by Ottawa of new wireless spectrum licences that will add billions*

paid Canada C$ 442 million for its set-aside spectrum licenses.[59] The total revenue was three times what the Government had initially anticipated.[60] As Minister Prentice announced immediately after the auction, the 2008 AWS Auction was considered to be hugely successful and had "*exceeded* [Canada's] *expectations*" and further "*generated almost $4.3 billion in revenues for the Government of Canada*."[61] Canada does not refer in its Counter-Memorial on Merits and Damages to the considerable revenues it earned as a result of the 2008 AWS Auction and the Framework it created to procure this revenue.

II.D. After The 2008 AWS Auction, Two Arms Of The Canadian Government Engaged In Duplicative O&C Reviews To Reach Opposite Conclusions

42. Once the 2008 AWS Auction was complete, Canada immediately began to undermine its assurances of enabling market entry, specifically in relation to GTH and Wind Mobile. As Canada confirms, in 2009, after Industry Canada had already concluded that Wind Mobile satisfied the Canadsian O&C Rules, the CRTC instigated a separate review of Wind Mobile's compliance with the same rules and reached the opposite

of dollars more to the government coffers than anticipated."); **Exhibit C-078**, David Ljunggren, *Wireless auction going well, Ottawa says*, TORONTO STAR, 10 June 2008.

[59] *See* **Exhibit C-080**, Industry Canada, *Auction of Spectrum Licences for Advanced Wireless Services and Other Spectrum in the 2 GHz Range – Licence Winners*, 21 July 2008, http://www.ic.gc.ca/eic/site/smt-gst.nsf/eng/sf09002.html (accessed 24 September 2017); **Exhibit C-082**, Letter from Michael D. Connolly to Michael John O'Connor, 22 July 2008, p. 1; **Exhibit C-087**, Letter from Mylène Germain to Michael John O'Connor, 27 August 2008.

[60] **Exhibit C-083**, Email from Delphine Lemarchand to Mike O'Connor et al., 22 July 2008, p. 2.

[61] **Exhibit C-081**, Industry Canada, *News Release: 15 Companies Bid Almost $4.3 Billion for Licences for New Wireless Services*, 21 July 2008, https://www.canada.ca/en/news/archive/2008/07/15-companies-bid-almost-4-3-billion-licences-new-wireless-services.html (accessed 24 September 2017).

conclusion,[62] resulting in years of litigation to rectify a result that Canada agreed was wrong as a matter of substance.[63]

43. Moreover, as Canada accepts, in order to reach this conclusion, the CRTC had to first establish a new four-tier review process, electing to apply the most onerous of the new review procedures (Type 4) to Wind Mobile.[64] However, Canada fails to mention that the new four-tier process was only created by the CRTC **in direct response** to requests from Wind Mobile's competitors to conduct a public review of Wind Mobile's compliance.[65] GTH is not aware of any other telecommunications investor that has ever been subject to the same Type 4 review as that used to target Wind Mobile. As a result of this unfair and duplicative review, Wind Mobile's offices and over 800 employees

---

[62] *See* Canada's Counter-Memorial on Merits and Damages, ¶¶ 106-108, 116-19; GTH's Memorial on Merits and Damages, ¶¶ 119-39.

[63] *See* Canada's Counter-Memorial on Merits and Damages, ¶¶ 109 (explaining that the CRTC review "*is of little importance given that the GiC* [Governor-in-Council] *acted promptly to reverse the CRTC's decision*"), 120-21 (describing that "*the GiC acted expeditiously*" to examine the CRTC Decision and concluded that it must be varied), 122-23 (describing that Wind Mobile and the Attorney General of Canada were respondents in Public Mobile's judicial review proceeding resulting in the Federal Court's quashing of the GiC's decision, and the subsequent successful appeal by Wind Mobile and the Attorney General of the Federal Court's decision); GTH's Memorial on Merits and Damages, ¶¶ 119-39. *See also* **Exhibit C-265**, Memorandum from John Knubley and Marta Morgan to Minister of Industry (English and French versions), *Measures to Sustain Competition in Wireless Sector*, 29 January 2013 [*Updated version of* **Exhibit R-090**], p. 18 (Annex B, Slide 8) ("*Main consideration – how far to go to favor a fourth player*").

[64] *See* Canada's Counter-Memorial on Merits and Damages, ¶¶ 111-15.

[65] *See* GTH's Memorial on Merits and Damages, ¶¶ 129-34; **Exhibit C-094**, Letter from Michael Hennessy to Konrad W. von Finckenstein, 20 April 2009; **Exhibit C-095**, Letter from Jean Brazeau to Konrad W. von Finckenstein, 22 April 2009; **Exhibit C-096**, Letter from Simon Lockie to Konrad W. von Finckenstein, 5 May 2009; **Exhibit C-098**, CRTC, *Telecom Notice of Consultation CRTC 2009-303 – Call for comments – Canadian ownership and control review procedure under section 16 of the* Telecommunications Act, 22 May 2009; **Exhibit C-012**, CRTC, *Telecom Regulatory Policy CRTC 2009-428: Canadian ownership and control review policy*, 20 July 2009; **Exhibit C-013**, CRTC, *Telecom Notice of Consultation CRTC 2009-429: Notice of hearing – 23 September 2009, Gatineau, Quebec – Proceeding to consider the compliance of Globalive with the ownership and control regime*, 20 July 2009; **Exhibit C-014**, CRTC, *Telecom Notice of Consultation CRTC 2009-429-1: Notice of hearing – 23 September 2009, Gatineau, Quebec – Proceeding to consider the compliance of Globalive with the ownership and control regime, Erratum*, 21 July 2009; **Exhibit R-207**, Goodmans LLP, *Update: CRTC Adopts a New Framework for Telecommunications Ownership and Control Reviews*, 20 July 2009, p. 1 (affirming that prior to the adoption of the new process, the CRTC completed its compliance review "*on a confidential, bilateral basis*" and "[t]*he Commission's review of its telecommunications ownership and control framework was prompted by requests by Shaw and TELUS that the Commission publicly consider Globalive Wireless Management Corporation's ('Globalive') compliance with the ownership and control requirements*.").

remained idle for months, leaving Wind Mobile in a "*no-man's land*,"[66] unable to launch its business.[67] Various market commentators referred to the CRTC decision as "*an absolute bombshell*," providing "*a golden opportunity for other upstart wireless carriers looking to enter the market*" while "*putting Wind, its investor and customers into an impossible situation.*"[68]

44. Canada was well aware that its duplicative review was likely to have an adverse impact on Wind Mobile.[69] Canada has submitted and cited to several contemporaneous documents on the record reflecting statements made by Wind Mobile regarding the

---

[66] **Exhibit C-105**, RBC Capital Markets, *Industry Comment: Telecommunication Services – Trick or Treat: CRTC Strikes Possible Deathblow to Globalive*, 30 October 2009, p. 1.

[67] *See* GTH's Memorial on Merits and Damages, ¶ 144.

[68] **Exhibit C-105**, RBC Capital Markets, *Industry Comment: Telecommunication Services – Trick or Treat: CRTC Strikes Possible Deathblow to Globalive,* 30 October 2009 (describing that "[t]*he CRTC dropped an absolute bombshell on the wireless market Thursday night by denying Globalive's wireless application and effectively neutering the biggest and most disruptive of the potential new wireless entrants . . . for now*."); **Exhibit C-104**, Grant Robertson, *Globalive phone battle headed to cabinet*, THE GLOBE & MAIL, 29 October 2009, https://beta.theglobeandmail.com/globe-investor/globalive-phone-battle-headed-to-cabinet/article4297397/?ref=http://www.theglobeandmail.com& (accessed 28 September 2017) (describing the result as "*a golden opportunity for other upstart wireless carriers looking to enter the market, since Globalive was one of the more aggressive new players and will now be delayed.*"); **Exhibit C-116**, Peter Nowak, *Conservatives must deal with telecom's festering foreign ownership problem*, CBC, 7 February 2011, http://www.cbc.ca/news/technology/conservatives-must-deal-with-telecom-s-festering-foreign-ownership-problem-1.1009489 (accessed 24 September 2017), p. 3 (describing the overturn of the GiC's variance by the federal court and explaining "[n]*ot only is Wind's future at stake, the government also stands to lose much. In the span of a day,* [Prime Minister] *Harper and* [Industry of Canada Minister] *Clement went from being heroes hailed by consumers for standing up against usage-based billing, to giant goats for putting Wind, its investor and customers into an impossible situation*."). *See also* **CWS-Campbell**, ¶ 20; **Exhibit C-107**, Terence Corcoran, *How Ottawa can fix wireless mess: Third-worldish switch will cost Ottawa*, NATIONAL POST, 5 November 2009; **Exhibit C-106**, Email from Ken Campbell to Khaled Bichara, et al., 31 October 2009, *attaching* Letter from Ken Campbell to the Honourable Tony Clement, 31 October 2009, 31 October 2009; **Exhibit C-101**, Letter from Michael J. O'Connor to Dean Del Mastro, 14 August 2009.

[69] *See* GTH's Memorial on Merits and Damages, ¶ 364; **Exhibit C-255**, Industry Canada, *Canadian Ownership and Control – Globalive and the CRTC Review*, June 2009 [*Updated version of* **Exhibit C-099**], Slides 10-11 (explaining that the duplicative reviews for compliance with the O&C Rules could result in "*two outcomes, poses additional risks and uncertainties to investors and aggravates what is already seen as a barrier to investment in telecommunications in Canada*" and observing that the reviews "*create unnecessary delay for licensees and the public*"). Ultimately, Canada eliminated the duplicative reviews under the O&C Rules in 2014, leaving the CRTC solely responsible for conducting eligibility reviews. *See* **Exhibit R-205**, Regulations Amending the Radiocommunication Regulations, SOR/2014-34, 28 February 2014, http://www.gazette.gc.ca/rp-pr/p2/2014/2014-03-12/html/sor-dors34-eng.html (accessed 15 January 2018), Regulation 3.

negative impact of the CRTC Decision, particularly in respect of Wind Mobile's plans to launch.[70]

II.E. Canada Was Aware That Its Conditions On Mandatory Roaming and Tower/Site Sharing Were Not Achieving Their Intended Effect, But Did Not Implement Changes To These Policies Until 2013

45. A further obstacle to Wind Mobile's ability to compete was its inability to secure mandatory roaming and tower/site sharing on fair commercial terms. In advance of the 2008 AWS Auction, Canada had touted that it was introducing mandatory roaming and tower/site sharing conditions to encourage competitive new market entry. However, this alleged enhancement to the New Entrants' ability to compete never materialized. Canada acknowledges that it began to receive complaints almost immediately after the 2008 AWS Auction from both New Entrants and Incumbents regarding the complications faced with respect to implementing the mandatory roaming and tower/site sharing conditions.[71] Canada failed to take action, and only started to assess

---

[70] *See* Canada's Memorial on Jurisdiction and Admissibility, ¶ 183; **Exhibit R-069**, Grant Robertson and Steve Ladurantaye, *Lacavera in race against clock for holiday sales; Ottawa's decision to overturn CRTC ruling clears Canada's newest wireless company to launch immediately*, THE GLOBE & MAIL, 12 December 2009; **Exhibit R-070**, Richard Blackwell, *Keep Globalive out of wireless game, rival says*, THE GLOBE & MAIL, 24 November 2009; **Exhibit R-071**, Iain Marlow, *WIND Mobile keeping call-centre staff busy*, TORONTO STAR, 19 November 2009, https://www.thestar.com/business/2009/11/19/wind_mobile_keeping_callcentre_staff_busy.html (accessed 10 October 2017); **Exhibit R-072**, Letter from Andrea Wood to Manager, Mobile Technology and Services, Industry Canada, 28 February 2011, *attaching* Comments on Canada Gazette, Part I, November 30, 2010, Notice No. SMSE-018-10: Consultation on a Policy and Technical Framework for the 700 MHz Band and Aspects Related to Commercial Mobile Spectrum; **Exhibit R-073**, Wojtek Dabrowski, *Ruling puts Globalive at risk*, TORONTO STAR, 5 November 2009, https://www.thestar.com/business/2009/11/05/ruling_puts_globalive_at_risk.html (accessed 10 October 2017); **Exhibit R-074**, Iain Marlow, *Globalive on hunt for cash to expand Wind Mobile*, THE GLOBE & MAIL, 16 January 2010. Canada's misguided jurisdictional objection on which it relies on these facts is discussed at **Part III.D**.

[71] *See* Canada's Counter-Memorial on Merits and Damages, ¶¶ 151, 156; **RWS-Hill**, ¶ 68. *See also* GTH's Memorial on Merits and Damages, ¶¶ 148-62. Canada asserts that GTH was aware prior to the 2008 AWS Auction that mandatory roaming and tower/site sharing provisions had certain limitations. *See* Counter-Memorial on Merits and Damages, ¶¶ 139-49. This is not relevant. Whatever GTH may have known about the mandatory roaming and tower/site sharing provisions prior to the 2008 AWS Auction, Canada made an express commitment to alleviate barriers to entry and it failed to make good on that commitment.

how these conditions could be improved two years later in November 2010.[72] The May 2011 report that Canada procured from Nordicity[73] confirmed that, when compared with Incumbents, New Entrants were suffering as a result of Canada's failure to further enhance roaming and tower/site sharing conditions.[74] And yet it took Canada until March 2012 to initiate a consultation process to review the roaming and tower/site sharing conditions of licenses, and Canada did not release its Revised Frameworks for Mandatory Roaming and Antenna Tower and Site Sharing until March 2013, almost five years after the 2008 AWS Auction.[75]

---

[72] *See* Canada's Counter-Memorial on Merits and Damages, ¶¶ 160-61; **Exhibit R-137**, Contracting Authority, Request for Proposal, # IC400998, 25 November 2010; **RWS-Hill**, ¶ 78. *See also* GTH's Memorial on Merits and Damages, ¶ 156. Nordicity released its report in May 2011. *See* **Exhibit R-135**, Nordicity, *Assessment of Mandatory Tower Sharing and Roaming Provisions, Final Report Prepared for Industry Canada*, May 2011.

[73] *See, e.g.*, Canada's Counter-Memorial on Merits and Damages, ¶¶ 166-67.

[74] **Exhibit R-135**, Nordicity, *Assessment of Mandatory Tower Sharing and Roaming Provisions, Final Report Prepared for Industry Canada* (May 2011), p. 5 ("*The tower-sharing and roaming framework is not without its issues. Overall, most challenges with the framework relate to the large gap between the successes of the national incumbents and the new entrants*"). *See also* [redacted]; **Exhibit C-257**, Industry Canada, *Roaming and Tower Sharing Review*, July 2011 [*Updated version of* **Exhibit C-118**]; **Exhibit C-324**, Memorandum from Richard Dicerni and Simon Kennedy to Minister, *Implementation Strategy for Changes to the Mandatory Tower Sharing and Roaming Policy* (mark-up), 11 July 2011, p. 1 (noting that, "[i]*n hindsight, we underestimated the imbalance between incumbents and new entrants.*"); [redacted]; **Exhibit C-323**, *Question number 15: Analysis of cost-based roaming approach administered by the CRTC*, 21 June 2011; **Exhibit C-330**, Annex A: Overview of each intervention that was submitted to the CRTC, c. 2012, p. 1 ("*The Bureau argued that as a result of high industry concentration and high entry barriers, incumbent mobile telecom service providers enjoy considerable market power in the provision of retail mobile telecom services. Thus, incumbent wireless carriers have an incentive and ability to use high roaming rates to prevent new entrants from becoming effective competitors. Therefore, new entrants are likely limited in their ability to bring attractive product offerings to market, resulting in reduced product choice, higher prices for consumers and less innovation in Canadian mobile wireless markets*.").

[75] *See* Canada's Counter-Memorial on Merits and Damages, ¶¶ 166-67; **Exhibit C-121**, Industry Canada, *Proposed Revisions to the Frameworks for Mandatory Roaming and Antenna Tower and Site Sharing,* March 2012; **Exhibit C-153**, Industry Canada, *Revised Frameworks for Mandatory Roaming and Antenna Tower and Site Sharing (DGSO-001-13),* March 2013. *See also* GTH's Memorial on Merits and Damages, ¶¶ 156-60.

46. This lethargic approach to addressing what Canada had recognized from the outset was a significant barrier to market entry, stands in stark contrast to the speed at which Canada nullified the transfer condition contained in the set-aside spectrum licenses. As set-out below, it took Canada only six months from when it began to contemplate a change in the transfer rules (and three and a half months from the issuance of the consultation paper) to release the 2013 Transfer Framework that would eventually be used to block New Entrants to sell to Incumbents.

II.F. Canada Introduced The 2013 Transfer Framework To Block New Entrants From Selling Set-Aside Spectrum Licenses To Incumbents And To Keep A New Entrant In The Canadian Telecommunications Market

47. Canada has now confirmed that it adopted the 2013 Transfer Framework because it knew New Entrants were planning on selling their set-aside spectrum licenses to Incumbents upon the expiration of the Five-Year Rollout Period, and it sought a mechanism by which it could stop this from taking place.[76] Canada explains that with the expiration of the five-year period fast approaching, and after the announcements of the Shaw-Rogers option agreement,[77] it was concerned that "*the existing New Entrants*

[76] *See, e.g.*, Canada's Counter-Memorial on Merits and Damages, ¶¶ 10 (noting that its transfer framework review was prompted because "*it was unclear whether New Entrants would continue to have access to sufficient spectrum, as Incumbents were keen on acquiring AWS-1 spectrum licences from New Entrants at the end of the five-year moratorium.*"), 228 ("*Industry Canada became concerned that Incumbents would attempt to acquire the remaining AWS-1 set-aside spectrum licences, which would undermine the ability of the remaining New Entrants to raise capital*."), 230 (describing concerns that New Entrants would no longer be present in the market, and that "[t]*he Government wanted to ensure that the competitive gains brought by the New Entrants were not lost again as had been the case in the early 2000s.*"); **RWS-Stewart**, ¶¶ 31-54, 66, 68. *See also* **Exhibit C-333**, *Potential Upcoming Spectrum Transfers of AWS Set-Aside*, 5 October 2012, Slide 2 (observing that commentators predicted a number of sales of New Entrants and that the "[m]*ost likely buyers are the incumbents*" for the following reasons: "*Higher value on spectrum to deploy services – Potential additional foreclosure value on the spectrum – Significant capital to invest in spectrum*"); Canada's Counter-Memorial on Merits and Damages, ¶¶ 220, 224, 229.

[77] *See* Canada's Counter-Memorial on Merits and Damages, ¶ 224; **RWS-Stewart**, ¶ 33. Canada explains that these concerns increased after the announcement of Telus's decision to acquire Mobilicity in May 2013. *See* Canada's Counter-Memorial on Merits and Damages, ¶¶ 229; **RWS-Stewart**, ¶ 68.

would no longer be present in the market and spectrum would once again be concentrated amongst the three Incumbents."[78]

48. Canada knew there was a significant risk that the New Entrants might exit because the New Entrants were struggling to survive,[79] not least of which because of Canada's failures to create the favorable conditions it had promised.[80] Moreover, nothing in the existing transfer rules allowed Canada to prevent such a transaction after the expiration of the five-year restriction on transfer. Rather, Canada's internal documents show the opposite: Canada affirmed that the "*current policy permit*[s] *AWS-set-aside spectrum to be acquired by incumbents starting in late 2013*."[81] In several internal memoranda and presentations, Industry Canada expressly advised that under the regime that existed at the time—the "*Status quo*"—"*IC* [Industry Canada] ***would not be in a position to object to spectrum licence transfers***" because "*there are no other specific conditions*" on the transfer of spectrum licenses other than the five-year restriction on transfer of set-aside spectrum licenses.[82] [redacted]

---

[78] Canada's Counter-Memorial on Merits and Damages, ¶ 230. *See also* **RWS-Stewart**, ¶ 51.

[79] *See* **Exhibit C-258**, Memorandum from Iain Stewart to Deputy Minister, Industry Canada, *Update on Wireless Telecom Sector*, 7 December 2012 [*Updated version of* **Exhibit R-084**], pp. 2-4 (Annex A: Wireless Telecommunications Sector Update and Implications, pp. 1-3) ("*prospects for the sustainability of new competition remain mixed. . . . wireless-only new entrants in in Ontario, B.C., and Alberta, continue to be fragile*"); **Exhibit C-262**, Memorandum from Marta Morgan and John Knubley to Minister of Industry, *Approach to Mobile Spectrum Licence Transfers – Briefing Material*, 4 January 2013 [*Updated version of* **Exhibit R-088**], pp. 1-2 (Annex A: Wireless Telecommunications Sector: Update and Implications (English and French versions), pp. 3-4); **Exhibit C-338**, Industry Canada, *Competition in the Wireless Sector*, 25 January 2013, Slide 5; **Exhibit C-275**, Memorandum from Marta Morgan and John Knubley to Minister of Industry, *Overview of Options for Sustaining Competition in the Wireless Market*, 9 May 2013 [*Updated version of* **Exhibit R-091**], pp. 1-2 (Annex A: Options for Sustaining Wireless Competition, pp. 4-5), 18 (Annex C: Viability of a 4th Player in the Canadian Wireless Market, p. 1 ("*In Ontario, Alberta and BC, multiple new entrants have been competing against each other, are struggling and are currently for sale by their owners.*")).

[80] *See supra* **Part II.E**.

[81] **Exhibit C-258**, Memorandum from Iain Stewart to Deputy Minister, Industry Canada, *Update on Wireless Telecom Sector*, 7 December 2012 [*Updated version of* **Exhibit R-084**], p. 5 (Annex A: Wireless Telecommunications Sector Update and Implications, p. 6).

[82] **Exhibit C-258**, Memorandum from Iain Stewart to Deputy Minister, Industry Canada, *Update on Wireless Telecom Sector*, 7 December 2012 [*Updated version of* **Exhibit R-084**], pp. 6, 23 (Annex A: Wireless

[redacted] Moreover, Canada recognized that "[c]*urrent policies do not state that the Minister may intervene in spectrum transfers for policy reasons*."[84] Canada confirmed this interpretation in its letter responding to Rogers's submission on the potential option agreement to transfer Shaw's set-aside spectrum licenses, concluding "*that the proposed option agreement is not prohibited under the AWS condition of licence concerning licence transferability*."[85]

Telecommunications Sector Update and Implications, p. 7; Annex B: Industry Canada, *Wireless Telecommunications Sector: Status Update and Implications*, December 2012, Slide 14). *See also* GTH's Memorial on Merits and Damages, ¶¶ 328-39; [redacted]; **Exhibit C-262**, Memorandum from Marta Morgan and John Knubley to Minister of Industry, *Approach to Mobile Spectrum Licence Transfers – Briefing Material*, 4 January 2013 [*Updated version of* **Exhibit R-088**], pp. 5 (Annex A: Wireless Telecommunications Sector: Update and Implications (English and French versions), p. 3), 20 (Annex B: Industry Canada, *Approach to Mobile Spectrum Licence Transfers*, January 2013 (English and French versions), Slide 8) (outlining three approaches that could be adopted by the Ministry of Industry to prevent spectrum license transfers); **Exhibit C-264**, Industry Canada, *Wireless Telecommunications Market and Approach to Spectrum Licence Transfers*, 14 January 2013 [*Updated version of* **Exhibit R-089**], Slides 12-13; **Exhibit C-342**, Telecommunications Decisions Annexes, c. March 2013, p. 2 (Annex B: Telecommunications Decisions: Meeting Agenda with Proposed Speaking Points, p. 1) ("*2008 AWS auction set aside spectrum* ***for five years*** *for new entrants*" (emphasis added)).

83 [redacted] *See also* **Exhibit C-262**, Memorandum from Marta Morgan and John Knubley to Minister of Industry, *Approach to Mobile Spectrum Licence Transfers – Briefing Material*, 4 January 2013 [*Updated version of* **Exhibit R-088**], pp. 4-5 (Annex A: Wireless Telecommunications Sector: Update and Implications (English and French versions), pp. 2-3); **Exhibit C-264**, Industry Canada, *Wireless Telecommunications Market and Approach to Spectrum Licence Transfers*, 14 January 2013 [*Updated version of* **Exhibit R-089**], Slide 13 (referring to this as "*new rules*"); **Exhibit C-261**, Memorandum from John Knubley to Minister of Industry, *Approach to Mobile Spectrum Licence Transfer Requests*, 27 December 2012 [*Updated version of* **Exhibit R-086**], p. 2 ("[a]*side from the 5-year restriction on set-aside AWS spectrum, the current criteria for the department's review of licence transfer requests do not include factors relating to spectrum concentration or competition*."). *See also* **Exhibit C-355**, *"Revised Frameworks" Relating to Transfers, Divisions and Subordinate Licensing of Spectrum Licences* (draft), 6 May 2013, p. 2 ("*The implementation of a generally applicable and comprehensive spectrum transfer policy, as outlined in this decision, in effect removes the key rationale for maintaining the transfer prohibition on AWS spectrum since such transfers could now be reviewed under the general spectrum transfer policy*.").

84 **Exhibit C-333**, *Potential Upcoming Spectrum Transfers of AWS Set-Aside*, 5 October 2012, Slide 3.

85 **Exhibit R-099**, Letter from Peter Hill to Ken Engelhart and Jean Brazeau, 19 November 2012, p. 1; **RWS-Stewart**, ¶ 65.

49. But Canada was not content with the *status quo*. Canada became fixated on maintaining more than three wireless telecommunications operators,[86] despite having acknowledged at the time of the 2008 AWS Auction that this was an "*experiment*" at creating market entry that would be permitted to fail.[87]

50. But by late 2012, there was rampant speculation in the media that New Entrants were consolidating and Canada's efforts in the 2008 AWS Auction were a failure.[88] To combat this criticism, Canada introduced its new goal[89] to require a "***fourth player***" New Entrant in every region.[90] These announcements were made for the express

---

[86] *See* **RWS-Stewart**, ¶ 34 (Canada "*wanted to see competitors beyond the three Incumbents.*").

[87] **Exhibit C-183**, Rita Trichur, et al., *How Ottawa's plans to foster wireless competition sank*, THE GLOBE & MAIL, 18 May 2013, https://beta.theglobeandmail.com/report-on-business/how-ottawas-plan-to-foster-wireless-competition-sank/article12005826/ (accessed 24 September 2017). Canada emphasizes repeatedly in its submission that it did not "*guarantee*" the success of New Entrants who chose to participate in the 2008 AWS Auction. *See, e.g.*, Canada's Counter-Memorial on Merits and Damages, ¶¶ 24, 80, 101.

[88] *See, e.g.*, GTH's Memorial on Merits and Damages, ¶ 215; **Exhibit C-142**, Scotiabank, *Biweekly Report: Converging Networks: The Writing's on the Wall – The Canadian Wireless Market is Consolidating*, 21 January 2013; **Exhibit C-143**, Jamie Sturgeon, *Consumer groups, rivals call on Ottawa to block $700M Rogers-Shaw Spectrum deal*, FINANCIAL POST, 22 January 2013, http://business.financialpost.com/technology/consumer-groups-rivals-call-on-ottawa-to-block-700m-rogers-shaw-spectrum-deal (accessed 28 September 2017); **Exhibit C-174**, Christine Dobby, *Why Ottawa faces lose-lose situation in bid to boost wireless competition*, NATIONAL POST, 19 April 2013, http://business.financialpost.com/technology/why-ottawa-faces-lose-lose-situation-in-bid-to-boost-wireless-competition; **Exhibit C-383**, Christine Dobby, *Ottawa feared wireless 'failures'; Wanted upstarts to merge: memos*, NATIONAL POST, 3 December 2013. *See also* **Exhibit C-359**, Email from Christiane Tomaro to Christopher Johnstone, 23 May 2013, pp. 10-14 (Quebecor Media, *The Reality of Wireless New Entrants in Canada*, Slides 9-13).

[89] *See* **Exhibit C-342**, Telecommunications Decisions Annexes, c. March 2013, p. 2 (Annex B: Telecommunications Decisions: Meeting Agenda with Proposed Speaking Points, p. 1) ("*In 2008, we took action to facilitate the entry of new wireless competitors.* ***As we announced in 2012, our goal is now to sustain wireless competition by facilitating at least 4 providers in every region***.").

[90] *See* **RWS-Stewart**, ¶ 34 ("*Canada's objective of encouraging the sustainability of New Entrants was sometimes communicated as a desire to have a 'fourth player' competing against Incumbents across every region in Canada.*"). *See also* GTH's Memorial on Merits and Damages, ¶¶ 220-21; **Exhibit R-181**, Memorandum from John Knubley to Minister of Industry, *GTH Global Telecom Holding (Canada) Limited's Proposed Acquisition of Globalive Investment Holdings Corp. And Globalive Wireless Management Corp*, 5 February 2013, p. 13 (Annex 2: Background on Global Telecom Holding (Canada) Limited and Globalive, p. 2); **Exhibit C-265**, Memorandum from John Knubley and Marta Morgan to Minister of Industry (English and French versions), *Measures to Sustain Competition in Wireless Sector*, 29 January 2013 [*Updated version of* **Exhibit R-090**], p. 2; **Exhibit C-171**, Rita Trichur & Boyd Erman, *Ottawa moves quickly to finalize wireless rules*, THE GLOBE & MAIL, 15 April 2013, https://beta.theglobeandmail.com/report-on-business/ottawa-moving-quickly-to-finalize-wireless-rules/article11197998/ (accessed 24 September 2017); **Exhibit C-166**, Rita Trichur, *Wireless carriers sound alarm over Ottawa's spectrum transfer plan*, THE GLOBE & MAIL, 4 April 2013, https://beta.theglobeandmail.com/report-on-business/wireless-carriers-sound-alarm-over-ottawas-spectrum-transfer-plan/article10766064/ (accessed 24 September 2017); **Exhibit C-200**,

purpose of influencing the market.[91] While Canada's pleadings shy away from using the words "*fourth player*" to describe its objective, Canada cannot deny the wealth of evidence and statements on the record evidencing that this became the primary objective and one that was pursued ruthlessly, at any cost, and using "*any and every tool at* [Canada's] *disposal*":

(a) When the 2013 Transfer Consultation was issued, Minister Paradis announced that "*our government is delivering on our promise to use the upcoming wireless spectrum auctions* ***to promote four competitors*** *in each region of the country*."[92]

Alastair Sharp, *Canada to review all wireless spectrum transfer deals*, REUTERS, 28 June 2013, http://www.reuters.com/article/us-telecoms-spectrum/canada-to-review-all-wireless-spectrum-transfer-deals-idUSBRE95R0JQ20130628 (accessed 24 September 2017). Canada spent C$ 8.5 million on an advertising campaigns dedicated to touting the Government's efforts in the wireless communications market to Canadian consumers; **Exhibit C-383**, Christine Dobby, *Ottawa feared wireless 'failures'; Wanted upstarts to merge: memos*, NATIONAL POST, 3 December 2013; **Exhibit C-393**, Publish Works and Government Services Canada, *2013-2014 Annual Report on Government of Canada Advertising Activities*, 2015, pp. 1 (observing that "[i]*n response to public discussion about competition in the wireless market, Industry Canada launched the* More Choices *campaign to ensure Canadians had the facts about Government of Canada telecommunications policy and the measures introduced to deliver cutting edge technologies to Canadian families at affordable prices*."), 8 (showing that Industry Canada spent C$ 8,467,653 on television, print, radio, and internet advertising in the 2013/2014 financial year "[t]*o provide the facts about Government of Canada telecommunications policy and the measures introduced to improve services and costs for consumers.*").

[91] **Exhibit C-265**, Memorandum from John Knubley and Marta Morgan to Minister of Industry (English and French versions), *Measures to Sustain Competition in Wireless Sector*, pp. 2, 16 (Advice, p. 2; Annex B: La concurrence dans le secteur du sans-fil, Slide 6) ("*The Government's directive to the market will be an essential factor in the emergence of a 4th player*").

[92] **Exhibit C-156**, Industry Canada, *Speech: Speaking Points – The Honourable Christian Paradis, PC, MP, Minister of Industry, New measures to increase competition in the wireless sector*, 7 March 2013, https://www.canada.ca/en/news/archive/2013/03/new-measures-increase-competition-wireless-sector.html (accessed 24 September 2017), p. 1 (emphasis added). *See also* **Exhibit C-156**, Industry Canada, *Speech: Speaking Points – The Honourable Christian Paradis, PC, MP, Minister of Industry, New measures to increase competition in the wireless sector*, 7 March 2013, https://www.canada.ca/en/news/archive/2013/03/new-measures-increase-competition-wireless-sector.html (accessed 24 September 2017), p. 2 ("*To be clear, our government wants to see at least four players in each market*."); **Exhibit C-157**, Industry Canada, *News Release: Harper Government Puts Consumers First in Telecommunications Plan*, 7 March 2013, https://www.canada.ca/en/news/archive/2013/03/harper-government-puts-consumers-first-telecommunications-plan.html (accessed 24 September 2017) ("*ensuring at least four providers in every region can acquire spectrum in the upcoming 700 MHz spectrum auction*"). *See also* **Exhibit C-155**, Industry Canada, *Media Advisory: Minister of Industry Christian Paradis to Make Important Announcement*, 6 March 2013, https://www.canada.ca/en/news/archive/2013/03/minister-industry-christian-paradis-make-important-announcement.html (accessed 24 September 2017).

(b) On 4 June 2013, Minister Paradis made an "*Important Announcement*,"[93] in which he explained:

> *But let me be clear—our government will not hesitate to use* ***any and every tool at our disposal*** *to:*
>
> - *protect consumers;*
> - *promote competition; and*
> - ***promote at least four wireless providers in every region*** *of the country.*[94]

(c) Minister Paradis reiterated before the House of Commons:

> *Mr. Speaker, today I announced that any proposed wireless transfer resulting in undue spectrum concentration and therefore less competition will not be approved.* ***Spectrum set aside for new entrants was never intended to be transferred to incumbents and as such will not be approved now, nor will it likely be in the future****.*
>
> *Our Conservative government will not hesitate to use* ***any and every tool at its disposal*** *to support greater competition in the market and protect Canadian consumers.*[95]

(d) When Canada released the 2013 Transfer Framework, Minister Paradis announced:

> *The Harper Government is committed to promoting at least four wireless providers in every region of the country to support greater competition in the market. . . . The Harper Government*

---

[93] **Exhibit C-191**, Industry Canada, *Media Advisory: Minister of Industry Christian Paradis to Make Important Announcement*, 3 June 2013, https://www.canada.ca/en/news/archive/2013/06/minister-industry-christian-paradis-make-important-announcement.html (accessed 24 September 2017).

[94] **Exhibit C-193**, Industry Canada, *Speech: Speaking Points – The Honourable Christian Paradis, PC, MP, Minister of Industry, Telecommunications Announcement*, 4 June 2013, https://www.canada.ca/en/news/archive/2013/06/telecommunications-announcement.html (accessed 24 September 2017), p. 3 (emphases added). *See also* **Exhibit C-194**, Industry Canada, *News Release: Harper Government Protecting Consumers and Increasing Competition in Canadian Wireless Sector*, 4 June 2013, https://www.canada.ca/en/news/archive/2013/06/harper-government-protecting-consumers-increasing-competition-canadian-wireless-sector.html (accessed 24 September 2017) ("*We are seeing Canadian consumers benefit from our policies and we will not allow the sector to move backwards. I will not hesitate to use any and every tool at my disposal to support greater competition in the market*.").

[95] **Exhibit C-195**, House of Commons Debates, Hansard 146(262), 41st Parliament, 1st Session, 4 June 2013, p. 17647 (emphases added). *See also* **Exhibit C-186**, House of Commons Debates, Hansard 146(256), 41st Parliament, 1st Session, 27 May 2013, p. 17040 (Minister Paradis states that "*We want to ensure that there is a fourth player in every region of this country*.").

> *will not hesitate to* ***use any and every tool at its disposal*** *to protect Canadian consumers and to promote competition.*[96]

51. Canada was determined to use any and every tool available to the Government to manipulate the Canadian telecommunications market to create this "*fourth player*," regardless of the cost to any New Entrant or its investors.[97] Ultimately, this cost would be entirely borne by GTH.

---

[96] **Exhibit C-199**, Industry Canada, *News Release: Harper Government Releases Spectrum Licence Transfer Framework*, 28 June 2013, https://www.canada.ca/en/news/archive/2013/06/harper-government-releases-spectrum-licence-transfer-framework.html (accessed 24 September 2017), p. 1 (emphasis added).

[97] Canada deliberately misconstrues Wind Mobile's submissions during the 2013 Transfer Consultation. *See* Canada's Counter-Memorial on Merits and Damages, ¶¶ 242 (suggesting that Wind Mobile "*had no issue with changes to the COLs for transfers as long as they were to its advantage*"), 366 (suggesting that Wind Mobile thought the Transfer Framework "*did not go far enough*," when in reality the cited passages make clear that Wind Mobile did not support the any restrictions on transfer unless Canada did more to create favorable regulatory conditions), 415-16 (same). As Wind Mobile's submissions make clear, Wind Mobile (*i*) objected to the Rogers-Shaw option agreement because Shaw had done exactly what Canada had sought to prevent with the set-aside—sat on its spectrum, doing nothing, only to seek to sell the spectrum licenses for increased value; and (*ii*) indicated that if the Minister sought to deny a category of spectrum license transfers, a precondition was further regulatory change to implement the favorable regulatory conditions that Canada had promised. **Exhibit R-146**, Globalive Wireless Management Corp. ("WIND"), *Canada Gazette Notice No. DGSO-002-13, Consultation on Considerations Relating to Transfers, Divisions, and Subordinate Licensing of Spectrum Licences, Comments of Globalive Wireless Management Corp. ("WIND")*, 3 April 2013, ¶¶ 4-5. *See also* **Exhibit R-152**, Globalive Wireless Management Corp. ("WIND"), *Canada Gazette Notice No. DGSO-002-13, Consultation on Considerations Relating to Transfers, Divisions, and Subordinate Licensing of Spectrum Licences, Reply Comments of Globalive Wireless Management Corp. ("WIND")*, 3 May 2013, ¶ 4(iii). As Wind Mobile made clear, "*Until then, transfers should be permitted subject only to existing processes and law (e.g., the Competition Act and the Investment Canada Act) where appropriate, failing which these proposed restrictions will result in a further weakening of the viability of small players by diminishing the value of their licences*." **Exhibit R-146**, Globalive Wireless Management Corp. ("WIND"), *Canada Gazette Notice No. DGSO-002-13, Consultation on Considerations Relating to Transfers, Divisions, and Subordinate Licensing of Spectrum Licences, Comments of Globalive Wireless Management Corp. ("WIND")*, 3 April 2013, ¶ 5. *See also* **Exhibit R-146**, Globalive Wireless Management Corp. ("WIND"), *Canada Gazette Notice No. DGSO-002-13, Consultation on Considerations Relating to Transfers, Divisions, and Subordinate Licensing of Spectrum Licences, Comments of Globalive Wireless Management Corp. ("WIND")*, 3 April 2013, ¶ 17 ("[n]*ot addressing the core impediments to competition in the Canadian market, but concomitantly imposing blanket limits on spectrum transfers, not only will not increase competition in this country, but will have the opposite effect, by reducing the value of the spectrum held by non-Incumbents, and thereby hampering access to, and increasing the cost of, capital that is needed to invest in these operations*"). If Industry Canada were to adopt some form of transfer restriction, Wind Mobile submitted that there should be: "*a 'grace period' during which spectrum transfers will not be limited by policy considerations until the regulatory environment evolves to ensure truly competitive conditions. This proposal is justified by several years of insufficient action by Industry Canada and other regulatory authorities. There have been numerous and reiterated requests to introduce relevant and effective measures to promote the creation of a pro-competitive market environment for smaller players. The failure to allow for a 'grace period' for spectrum transfers would further undermine the already weakened position of new entrants*." **Exhibit R-146**, Globalive Wireless Management Corp. ("WIND"), *Canada Gazette Notice No. DGSO-002-13, Consultation on Considerations Relating to Transfers, Divisions, and Subordinate Licensing of Spectrum Licences, Comments of Globalive Wireless Management Corp. ("WIND")*, 3 April 2013, ¶ 6. *See also* **Exhibit R-152**, Globalive Wireless Management Corp. ("WIND"), *Canada Gazette Notice No.*

52. Canada details in its submission how it was concerned with maintaining a fourth player in the Ontario, Alberta, and British Columbia—markets where the only active New Entrants were Wind Mobile, Public Mobile, and Mobilicity.[98] The Deputy Minister of Industry John Knubley lamented in his advice to the Minister that:

> *If incumbents are able to accumulate new entrant spectrum, the result will be the inability of a strong fourth provider to emerge, in particular in Ontario, British Columbia and Alberta, repeating past failures to establish greater competition in wireless services.*[99]

DGSO-002-13, Consultation on Considerations Relating to Transfers, Divisions, and Subordinate Licensing of Spectrum Licences, Reply Comments of Globalive Wireless Management Corp. ("WIND"), 3 May 2013, ¶ 4; **Exhibit C-348**, Memorandum from Pamela Miller to the Assistant Deputy Minister, *Stakeholder Submissions to the Transfers Consultation*, *attaching* Annex A: *Summaries of Key Submissions*, 16 April 2013, p. 7.

[98] *See* Canada's Counter-Memorial on Merits and Damages, ¶ 223; **RWS-Stewart**, ¶¶ 41-42; **Exhibit C-258**, Memorandum from Iain Stewart to Deputy Minister, Industry Canada, *Update on Wireless Telecom Sector*, 7 December 2012 [*Updated version of* **Exhibit R-084**], pp. 4 (Annex A: Wireless Telecommunications Sector Update and Implications, p. 3), 17 (Annex B: Industry Canada, *Wireless Telecommunications Sector: Status Update and Implications*, December 2012, Slide 8); **Exhibit C-262**, Memorandum from Marta Morgan and John Knubley to Minister of Industry, *Approach to Mobile Spectrum Licence Transfers – Briefing Material*, 4 January 2013 [*Updated version of* **Exhibit R-088**], p. 4 (Annex A: Wireless Telecommunications Sector: Update and Implications (English version), p. 3); **Exhibit C-275**, Memorandum from Marta Morgan and John Knubley to Minister of Industry, *Overview of Options for Sustaining Competition in the Wireless Market*, 9 May 2013 [*Updated version of* **Exhibit R-091**], pp. 4-5 (Annex A: Options for Sustaining Wireless Competition, pp. 1-2), 18 (Annex C: Viability of a 4th Player in the Canadian Wireless Market, p. 1); **Exhibit C-261**, Memorandum from John Knubley to Minister of Industry, *Approach to Mobile Spectrum Licence Transfer Requests*, 27 December 2012 [*Updated version of* **Exhibit R-086**], p. 2 ("*Incumbent purchases of spectrum from new entrants would reduce the potential for a sustainable new entrant to emerge, particularly in Ontario, Alberta and British Columbia*."); **Exhibit C-264**, Industry Canada, *Wireless Telecommunications Market and Approach to Spectrum Licence Transfers*, 14 January 2013 [*Updated version of* **Exhibit R-089**], Slide 17 ("*Sustainability of fourth player is at risk in Ontario, Alberta and B.C.*"). Shaw was a fourth, but it had chosen not to use its spectrum licenses. *See* Canada's Counter-Memorial on Merits and Damages, ¶ 224; **RWS-Stewart**, ¶ 41; **Exhibit C-258**, Memorandum from Iain Stewart to Deputy Minister, Industry Canada, *Update on Wireless Telecom Sector*, 7 December 2012 [*Updated version of* **Exhibit R-084**].

[99] **Exhibit C-265**, Memorandum from John Knubley and Marta Morgan to Minister of Industry (English and French versions), *Measures to Sustain Competition in Wireless Sector*, 29 January 2013 [*Updated version of* **Exhibit R-090**], pp. 1-2. *See also* **Exhibit C-262**, Memorandum from Marta Morgan and John Knubley to Minister of Industry, *Approach to Mobile Spectrum Licence Transfers – Briefing Material*, 4 January 2013 [*Updated version of* **Exhibit R-088**], pp. 4 (Annex A: Wireless Telecommunications Sector: Update and Implications (English version), p. 2) ("*incumbent purchase of the set-aside AWS spectrum, e.g., Rogers purchasing Shaw's spectrum, would risk that a wireless-only new entrant would have insufficient spectrum to present a sound business plan to attract further investment to continue operations and consider participating in upcoming auctions.*"), 19 (Annex B: Industry Canada, *Approach to Mobile Spectrum Licence Transfers*, January 2013 (English version), Slide 7) ("*If* [the Competition] *Bureau cannot or does not pursue a case or is unsuccessful, it would threaten the sufficient availability of spectrum for a 4th player*").

53. In the Government's view "[u]*nless investors consolidated the wireless-only New Entrants, it seemed unlikely that they would be able to reach profitability*."[100] Canada believed that "[i]*f an incumbent acquired WIND, it would effectively foreclose the potential for a 4th player in these provinces, which would return to a three-market player*."[101] In other words, Wind Mobile and its set-aside spectrum licenses were a necessary piece of the Government's plan to engineer a fourth player in those regions. By implementing its fourth player policy, the Government had concluded it could not let Wind Mobile sell its spectrum licenses to an Incumbent in the near term.

---

[100] Canada's Counter-Memorial on Merits and Damages, ¶ 225. *See also* **RWS-Stewart**, ¶¶ 31, 43; **Exhibit C-262**, Memorandum from Marta Morgan and John Knubley to Minister of Industry, *Approach to Mobile Spectrum Licence Transfers – Briefing Material*, 4 January 2013 [*Updated version of* **Exhibit R-088**], p. 4 (Annex A: Wireless Telecommunications Sector: Update and Implications (English version), p. 2) ("*financial analysts predict that a merged wireless-only provider with strong financial backing could emerge as a viable fourth provider in these provinces, if conditions are favourable*"); **Exhibit C-264**, Industry Canada, *Wireless Telecommunications Market and Approach to Spectrum Licence Transfers*, 14 January 2013 [*Updated version of* **Exhibit R-089**], Slide 6; **Exhibit C-258**, Memorandum from Iain Stewart to Deputy Minister, Industry Canada, *Update on Wireless Telecom Sector*, 7 December 2012 [*Updated version of* **Exhibit R-084**], pp. 4-5 (Annex A: Wireless Telecommunications Sector Update and Implications, pp. 3-4); **Exhibit C-275**, Memorandum from Marta Morgan and John Knubley to Minister of Industry, *Overview of Options for Sustaining Competition in the Wireless Market*, 9 May 2013 [*Updated version of* **Exhibit R-091**], p. 18 (Annex C: Viability of a 4th Player in the Canadian Wireless Market, p. 1) ("*Market analysts have long believed that only one, merged, new entrant in these provinces can be viable, and a number of new investors are reporting interest in acquiring and merging the companies. . . . However, given the market dominance of the big three national incumbents, market uncertainties and business execution risk, there are no assurances that a strong fourth player will emerge in all regions of the country*.").

[101] **Exhibit C-275**, Memorandum from Marta Morgan and John Knubley to Minister of Industry, *Overview of Options for Sustaining Competition in the Wireless Market*, 9 May 2013 [*Updated version of* **Exhibit R-091**], p. 22 (Annex D: Impact of ICA REDACTED on 4th Player, p. 1). *See also* **Exhibit R-181**, Memorandum from John Knubley to Minister of Industry, *GTH Global Telecom Holding (Canada) Limited's Proposed Acquisition of Globalive Investment Holdings Corp. And Globalive Wireless Management Corp*, 5 February 2013, p. 5 (noting that Wind Mobile "*could potentially play an important role in increasing competition in Canada's wireless sector.*"); **Exhibit C-342**, Telecommunications Decisions Annexes, c. March 2013, p. 2 (Annex B: Telecommunications Decisions: Meeting Agenda with Proposed Speaking Points, p. 1 "*Allowing these transfers would quickly deplete the spectrum available for these or any other new entrants to consolidate into a viable 4th player in regions such as Alberta, BC and Ontario*."); **Exhibit C-350**, *VimpelCom/Wind Scenarios*, 19 April 2013, p. 1 (referring to the "*Wind-Incumbent*" sale scenario and noting that any such transaction would likely or definitely end the prospect of a fourth provider). Once Public Mobile and its PCS licenses were sold to Telus, the only remaining new Entrants in that region were Wind Mobile and Mobilicity. *See also* [redacted] Public Mobile's PCS licenses were not subject to the five-year restriction on transfer. *See* **Exhibit C-382**, Christine Dobby, *Telus Corp's takeover of Public Mobile cleared by competition bureau*, FINANCIAL POST, 29 November 2013, https://business.financialpost.com/technology/telus-corp-public-mobile-deal-approved (accessed 2 November 2018), p. 2; **Exhibit R-237**, Industry Canada, *Statement by Minister Moore on Canada's Spectrum Transfer Framework*, 23 October 2013, https://www.canada.ca/en/news/archive/2013/10/statement-minister-moore-canada-spectrum-transfer-framework.html (accessed 14 January 2018), p. 1.

54. The remaining question then is what tool Canada decided to use to achieve this objective and to create its fourth player.[102] As Iain Stewart, the Assistant Deputy Minister of Industry Canada during this period, explains, Canada considered three options in pursuit of this agenda: extending the Five-Year Rollout Period to ten years (Option A); adding spectrum concentration as a new factor in considering whether a license could be transferred (Option B); and regional spectrum aggregation limits or caps (Option C).[103] Canada chose the option that gave Canada the most "*flexibility*"[104] and the most "[m]*inisterial* [d]*iscretion*:"[105] Option B in the form of the 2013 Transfer Framework.[106]

55. Thus, the 2013 Transfer Framework was a drastic response by the Government to block the transfer of set-aside spectrum licenses to an Incumbent, engineer a fourth player in

---

[102] Canada described in its internal memorandum that it was structuring the 2014 700 MHz Auction to encourage consolidation, noting that "[t]*his consolidation has not yet occurred, the 5-year restriction on the AWS set-aside is set to expire next year and the government's direction on whether incumbents can acquire it will largely determine if a 4th player will emerge in much of the country*." **Exhibit C-342**, Telecommunications Decisions Annexes, c. March 2013, p. 5 (Annex C: Telecommunications Decisions: Q & A, March 2013, p. 1). *See also* **Exhibit C-342**, Telecommunications Decisions Annexes, c. March 2013, p. 2 (Annex B: Telecommunications Decisions: Meeting Agenda with Proposed Speaking Points, March 2013, p. 1 "*Government response to transfer applications will influence whether new entrants consolidate into a sustainable 4th player in BC, Alberta and Ontario, or sell out to incumbents at end of 5 year set aside.*").

[103] **RWS-Stewart**, ¶¶ 58-61. *See also* **Exhibit C-258**, Memorandum from Iain Stewart to Deputy Minister, Industry Canada, *Update on Wireless Telecom Sector*, 7 December 2012 [*Updated version of* **Exhibit R-084**], p. 25 (Annex B: Industry Canada, *Wireless Telecommunications Sector: Status Update and Implications*, December 2012, Slide 16); **Exhibit C-262**, Memorandum from Marta Morgan and John Knubley to Minister of Industry, *Approach to Mobile Spectrum Licence Transfers – Briefing Material*, 4 January 2013 [*Updated version of* **Exhibit R-088**], pp. 5-6 (Annex A: Wireless Telecommunications Sector: Update and Implications (English version), pp. 3-4), 20 (Annex B: Industry Canada, *Approach to Mobile Spectrum Licence Transfers*, January 2013 (English version), Slide 8).

[104] **Exhibit C-262**, Memorandum from Marta Morgan and John Knubley to Minister of Industry, *Approach to Mobile Spectrum Licence Transfers – Briefing Material*, 4 January 2013 [*Updated version of* **Exhibit R-088**], p. 5 (Annex A: Wireless Telecommunications Sector: Update and Implications (English version), p. 3) ("*with the flexibility to consider the impacts of proposed licence transfers at the time of the transaction*"); **Exhibit C-263**, Industry Canada, *Transfer Policy Consultation Options,* 9 January 2013 [*Updated version of* **Exhibit R-095**], p. 1 ("*Key Benefit . . . Regulators flexible to consider all factors*.").

[105] **Exhibit C-263**, Industry Canada, *Transfer Policy Consultation Options,* 9 January 2013 [*Updated version of* **Exhibit R-095**].

[106] *See* Canada's Counter-Memorial on Merits and Damages, ¶ 231; **RWS-Stewart**, ¶ 63.

the market, and to combat speculation that its "*experiment*"[107] to increase competition through the 2008 AWS Auction had failed.[108] Canada cannot credibly argue that the 2013 Transfer Framework was not a reversal of the existing transfer regime and policy (as set out in its 2008 AWS Auction Framework), nor can it assert that the addition of undue spectrum concentration as a factor in the Minister's decision-making was a mere "*clarification*."[109] As discussed, above, the *status quo* meant Industry Canada would not object to license transfers.[110] Canada knew that adding spectrum concentration as a factor in its transfer application review process would amount to "[p]*roviding*

---

[107] **Exhibit C-183**, Rita Trichur, et al., *How Ottawa's plans to foster wireless competition sank*, THE GLOBE & MAIL, 18 May 2013, https://beta.theglobeandmail.com/report-on-business/how-ottawas-plan-to-foster-wireless-competition-sank/article12005826/ (accessed 24 September 2017).

[108] *See, e.g.*, **Exhibit C-166**, Rita Trichur, *Wireless carriers sound alarm over Ottawa's spectrum transfer plan*, THE GLOBE & MAIL, 4 April 2013, https://beta.theglobeandmail.com/report-on-business/wireless-carriers-sound-alarm-over-ottawas-spectrum-transfer-plan/article10766064/ (accessed 24 September 2017); **Exhibit C-200**, Alastair Sharp, *Canada to review all wireless spectrum transfer deals*, REUTERS, 28 June 2013, http://www.reuters.com/article/us-telecoms-spectrum/canada-to-review-all-wireless-spectrum-transfer-deals-idUSBRE95R0JQ20130628 (accessed 24 September 2017); **Exhibit C-143**, Jamie Sturgeon, *Consumer groups, rivals call on Ottawa to block $700M Rogers-Shaw Spectrum deal*, FINANCIAL POST, 22 January 2013, http://business.financialpost.com/technology/consumer-groups-rivals-call-on-ottawa-to-block-700m-rogers-shaw-spectrum-deal (accessed 28 September 2017); **Exhibit C-174**, Christine Dobby, *Why Ottawa faces lose-lose situation in bid to boost wireless competition*, NATIONAL POST, 19 April 2013, http://business.financialpost.com/technology/why-ottawa-faces-lose-lose-situation-in-bid-to-boost-wireless-competition; **Exhibit C-181**, Rita Trichur & Boy Erman, *Mobilicity deal puts Ottawa in a bind: Telus's $380-million agreement for upstart leaves government facing tough questions about its attempt to create competition*, THE GLOBE & MAIL, 17 May 2013; **Exhibit C-183**, Rita Trichur, et al., *How Ottawa's plans to foster wireless competition sank*, THE GLOBE & MAIL, 18 May 2013, https://beta.theglobeandmail.com/report-on-business/how-ottawas-plan-to-foster-wireless-competition-sank/article12005826/ (accessed 24 September 2017); **Exhibit C-341**, Email from Kelly Gillis to Peter Hill, Christopher Johnstone, Iain Stewart, Brian Spurling, Pamela Miller and Oliver Archer-Antonsen, 21 February 2013, p. 1. *See also* **Exhibit C-186**, House of Commons Debates, Hansard 146(256), 41st Parliament, 1st Session, 27 May 2013, p. 17039 (in which a representative declared that Minister Paradis' "*wireless strategy* [was] *failing*").

[109] *See, e.g.*, Canada's Counter-Memorial on Merits and Damages, ¶¶ 11 ("*clarified*"), 29 ("*clarification*"), 231 ("*clarified*"), 362 ("*clarified*"), 365 ("*clarify*"), 372 ("*clarifying*"), 473 ("*clarification*"). *See also* GTH's Memorial on Merits and Damages, ¶ 242 (showing the differences in the 2007 Spectrum Licensing Procedure and the 2013 Spectrum Licensing Procedure). Set-aside AWS licenses auctioned after the release of the 2013 Transfer Framework, like those auctioned during the 2015 AWS-3 Auction, no longer contained the five-year transfer restriction—such a condition was no longer necessary. *See* **Exhibit C-230**, Industry Canada, *Technical, Policy and Licensing Framework for Advanced Wireless Services in the Bands 1755-1780 MHz and 2155-2180 MHz (AWS-3) (SLPB-007-14)* December 2014, § 9.2.

[110] *See supra* ¶ 37.

additional *Ministerial discretion*."[111] Canada knew that any of its contemplated changes regarding the transfer rules would "*require changing conditions retrospectively*,"[112] and "*would directly impact companies that purchased AWS set-aside spectrum, changing the rules of the set-aside near the end of the 5 year period*."[113] Thus, the 2013 Transfer Framework was a "*new tool*[] *to block licence transfers*"[114] to allow Canada to manipulate the wireless telecommunications market.

56. Canada was also fully aware that the imposition of such new conditions would cause significant financial loss to the New Entrants and their investors. In a presentation in October 2012 discussing the impact of blocking spectrum license transfers, Canada observed:[115]

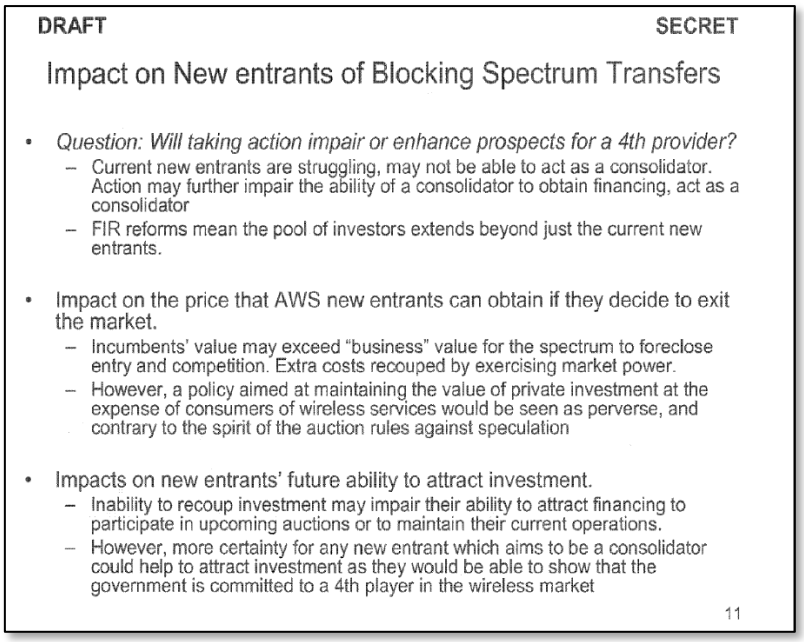
[111] **Exhibit C-258**, Memorandum from Iain Stewart to Deputy Minister, Industry Canada, *Update on Wireless Telecom Sector*, 7 December 2012 [*Updated version of* **Exhibit R-084**], p. 7 (Annex A: Wireless Telecommunications Sector Update and Implications, p. 6) (emphasis added).

[112] **Exhibit C-264**, Industry Canada, *Wireless Telecommunications Market and Approach to Spectrum Licence Transfers*, 14 January 2013 [*Updated version of* **Exhibit R-089**], Slide 13.

[113] **Exhibit C-258**, Memorandum from Iain Stewart to Deputy Minister, Industry Canada, *Update on Wireless Telecom Sector*, 7 December 2012 [*Updated version of* **Exhibit R-084**], p. 7 (Annex A: Wireless Telecommunications Sector Update and Implications, p. 6).

[114] **Exhibit C-264**, Industry Canada, *Wireless Telecommunications Market and Approach to Spectrum Licence Transfers*, 14 January 2013 [*Updated version of* **Exhibit R-089**], Slide 13.

[115] **Exhibit C-333**, *Potential Upcoming Spectrum Transfers of AWS Set-Aside*, 5 October 2012, Slide 11.



DRAFT SECRET

Impact on New entrants of Blocking Spectrum Transfers

- *Question: Will taking action impair or enhance prospects for a 4th provider?*
  - Current new entrants are struggling, may not be able to act as a consolidator. Action may further impair the ability of a consolidator to obtain financing, act as a consolidator
  - FIR reforms mean the pool of investors extends beyond just the current new entrants.
- Impact on the price that AWS new entrants can obtain if they decide to exit the market.
  - Incumbents' value may exceed "business" value for the spectrum to foreclose entry and competition. Extra costs recouped by exercising market power.
  - However, a policy aimed at maintaining the value of private investment at the expense of consumers of wireless services would be seen as perverse, and contrary to the spirit of the auction rules against speculation
- Impacts on new entrants' future ability to attract investment.
  - Inability to recoup investment may impair their ability to attract financing to participate in upcoming auctions or to maintain their current operations.
  - However, more certainty for any new entrant which aims to be a consolidator could help to attract investment as they would be able to show that the government is committed to a 4th player in the wireless market

11

57. In its internal advice to the Minister, Industry Canada affirmed:

> *Potential impacts . . .*
>
> *For new entrants, changes to the department's approach to transfers would reduce the re-sale value of their spectrum, given that incumbents are likely willing to pay the highest price for spectrum* REDACTED *. . . any changes that limit transfers of licences to incumbents . . . could reduce options for investors wishing to exit their investment.*[116]

[116] **Exhibit C-258**, Memorandum from Iain Stewart to Deputy Minister, Industry Canada, *Update on Wireless Telecom Sector*, 7 December 2012 [*Updated version of* **Exhibit R-084**], p. 8 (Annex A: Wireless Telecommunications Sector Update and Implications, p. 7). *See* [redacted]; **Exhibit C-261**, Memorandum from John Knubley to Minister of Industry, *Approach to Mobile Spectrum Licence Transfer Requests*, 27 December 2012 [*Updated version of* **Exhibit R-086**], p. 1 ("[i]*ncumbents are likely willing to pay the most for the set-aside spectrum licences, for reasons including preventing other new entrants from acquiring the spectrum*."); **Exhibit C-262**, Memorandum from Marta Morgan and John Knubley to Minister of Industry, *Approach to Mobile Spectrum Licence Transfers – Briefing Material*, 4 January 2013 [*Updated version of* **Exhibit R-088**], p. 6 (Annex A: Wireless Telecommunications Sector: Update and Implications (English version), p. 4) ("*On the other hand, it could reduce the value of new entrants' spectrum, given 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*."); **Exhibit C-264**, Industry Canada, *Wireless Telecommunications Market and Approach to Spectrum Licence Transfers*, 14 January 2013 [*Updated version of* **Exhibit R-089**], Slide 15 ("*measures would also reduce opportunity for exiting the market*"); **Exhibit C-158**, Scotiabank, *Industry Comment: Telecommunications and Cable – Canadian Wireless Myths and Facts*, 7 March 2013, p. 7 (observing that blocking transfers to Incumbents would not only fail to improve competition but also "*such denial would effectively take away the exit strategy and ability to recover some of their capital*"); **Exhibit C-165**, Rogers, *Comments of Rogers Communications:*

58. As made clear by Canada's internal documents, Canada recognized that introducing the 2013 Transfer Framework and blocking sales to Incumbents would impact the value of set-aside spectrum licenses in numerous ways, including because Incumbents would pay the highest value for that spectrum and introducing spectrum concentration as a factor in whether or not it would approve transfers "*would decrease*[] *predictability for licensees*."[117] Canada knew there was a serious risk of litigation arising from a decision by Industry Canada to block the sale of set-aside spectrum licenses to an Incumbent, and a court could approve the sale.[118]

59. Thus, while Canada deliberately encouraged new investment into the Canadian wireless telecommunications market on the understanding that the set-aside spectrum licenses

---

Consultation on considerations Relating to Transfers, Divisions, and Subordinate Licensing of Spectrum Licences (DGSO-002-13), 3 April 2013, ¶ 30 (describing that the change in transfer conditions would result in the "[d]*evaluation of AWS spectrum – particularly that held by new entrants who would now have increased risk of not being able to sell to a competitor after 5 years, as they were told they could do when they entered the auction and agreed to the terms*").

117 **Exhibit C-258**, Memorandum from Iain Stewart to Deputy Minister, Industry Canada, *Update on Wireless Telecom Sector*, 7 December 2012 [*Updated version of* **Exhibit R-084**], p. 7 (Annex A: Wireless Telecommunications Sector Update and Implications, p. 6). *See also* **Exhibit C-263**, Industry Canada, *Transfer Policy Consultation Options,* 9 January 2013 [*Updated version of* **Exhibit R-095**] (observing that while the "*Key Benefit*" for Option 1 ("*Extend AWS Set-aside*") and Option 3 ("*Overall Spectrum Cap*") was that both were "*predictable*," that by contrast the "*Key Challenges*" for Option 2 (ministerial discretion through the introduction of spectrum concentration), was that it was "*Not predictable for licensees*"). GTH informed Canada of as much when it explained in its presentation to Industry Canada on 14 March 2013 that there was "*uncertainty that* [ ] *exit values will justify existing or further investment*." **Exhibit C-162**, *Meeting with Industry Canada: Briefing Paper on Wind Canada's Business Situation,* 14 March 2013, Slide 8. *See also* **Exhibit C-333**, *Potential Upcoming Spectrum Transfers of AWS Set-Aside*, 5 October 2012, Slide 2 (observing that commentators predicted a number of sales of New Entrants and that the "[m]*ost likely buyers are the incumbents*" because "*– Higher value on spectrum to deploy services – Potential additional foreclosure value on the spectrum – Significant capital to invest in spectrum*").

118 [redacted] *See also* **Exhibit C-363**, BMO Capital Markets, *Wireless Policy in Canada: Searching for a Silk Purse in a Sow's Ear*, 20 June 2013, pp. 2-3 ("*Financial backers of the three new entrants made their investments with an exit strategy if commercial operations stalled: selling to the incumbents in five years. The Minster's denial of the TELUS-Mobilicity deal, and his opaque language regarding other sales of AWS spectrum to incumbents (Rogers/Shaw and Rogers/Videotron) may open up legal recourse. The government accepted investors' capital on the way in, but may have changed the rules four years later. It isn't exactly an ideal precedent to have hanging out there when you're trying to attract a billion or two of capital, again, to finance the fourth player*.").

would be transferrable to an Incumbent after five years,[119] Canada then changed the rules to block such transfers indefinitely knowing that this change would result in significant financial loss to the investors in the New Entrants. On its own admission, Canada did "*not hesitate to use any and every tool at* [its] *disposal*" in its pursuit to "*promote at least four wireless providers in every region of the country*"[120] regardless of the unfair cost to investors—a cost that would be paid by the investor that had contributed the most to the Canadian market.

II.G. Despite The Long-Anticipated Relaxation Of The O&C Rules, [redacted] Over Its Investment On Unexplained National Security Grounds

60. As explained above, in the lead up to the 2008 AWS Auction, Canada emphasized that the O&C Rules were a significant barrier to the entry of new market participants and that Canada was contemplating a relaxation of those rules. This was important to GTH, and GTH not only deliberately incorporated a provision in its Shareholder Agreements allowing it to take voting control of Wind Mobile in the event the O&C Rules were relaxed, but GTH specifically drew Canada's attention to this provision.[121] In fact, it was due to the unfairness of the duplicative O&C Reviews that the House Standing Committee on Industry, Science and Technology initiated a study on Canada's foreign ownership rules and regulations in the telecommunications sector and invited Wind Mobile to appear to speak on this topic.[122] When Canada finally liberalized the O&C

---

119 *See supra* **Part II.B**.

120 **Exhibit C-193**, Industry Canada, *Speech: Speaking Points – The Honourable Christian Paradis, PC, MP, Minister of Industry, Telecommunications Announcement*, 4 June 2013, https://www.canada.ca/en/news/archive/2013/06/telecommunications-announcement.html (accessed 24 September 2017), p. 1.

121 *See* GTH's Memorial on Merits and Damages, ¶¶ 80, 93, 123, 174; **CWS-Dobbie**, ¶ 21.

122 *See* GTH's Memorial on Merits and Damages, ¶¶ 141, 176; **Exhibit C-110**, Email from Simon Lockie to Khaled Bishara, et al., 24 March 2010, p. 2; **Exhibit C-112**, Standing Committee on Industry, Science and Technology, *Canada's Foreign Ownership Rules and Regulations in the Telecommunications Sector: Report*

Rules in 2012, it did so with the express intention of facilitating access to foreign capital for New Entrants.[123] It should come as no surprise to Canada that once the O&C Rules were finally relaxed, GTH immediately prepared and submitted its Voting Control Application to take advantage of this change.[124]

61. This is exactly what Canada expected would take place and was consistent with the intention behind the relaxation of foreign ownership restrictions in the first place. In a memorandum dated 14 December 2012, Mr. Stewart (the Assistant Deputy Minister of Industry Canada), considered the proposed Voting Control Application and advised the Deputy Director of Investments:

> *Thank you for seeking our input on this matter. The Telecommunications Policy Branch in my sector has been in contact with your review team to respond to specific questions and provide market information.* ***From a telecommunications policy perspective, the proposed transaction is consistent with the goals of the recent reform to telecommunications foreign investment restrictions and the government's stated policy objectives for the industry****. . . .*

---

of the Standing Committee on Industry, Science and Technology, June 2010, pp. 1-2 (Introduction), 48 (Appendix A – List of Witnesses).

[123] *See* Canada's Counter-Memorial on Merits and Damages, ¶ 8 ("*In 2012, Canada liberalized the Canadian ownership and control restrictions for telecommunication service providers to facilitate access to foreign capital for small carriers including the New Entrants*."). *See also* **Exhibit C-109**, House of Commons Debates, Hansard 145(1), 40th Parliament, 3rd Session, 3 March 2010, p. 4 ("*Our Government will open Canada's doors further to venture capital and to foreign investment in key sectors, including the satellite and telecommunications industries, giving Canadian firms access to the funds and expertise they need*."); **Exhibit C-023**, Industry Canada, *Harper Government Takes Action to Support Canadian Families*, 14 March 2012, p. 1 (describing that the lifting of foreign investment restrictions for telecommunications companies "*will help telecom companies with a small market share access the capital they need to grow and compete*."); **Exhibit C-123**, Industry Canada, *Speech: Speaking Points – The Honourable Christian Paradis, PC, MP Minister of Industry, Telecommunications Decisions*, 14 March 2012, https://www.canada.ca/en/news/archive/2012/03/telecommunications-decisions.html (accessed 24 September 2017), pp. 2-3 ("*This targeted action will remove a barrier to investment for the companies that need it most. It will allow these companies to gain further access to capital and expertise, so that they can continue to grow and compete—and better serve Canadian families and businesses.*").

[124] *See* Canada's Counter-Memorial on Merits and Damages, ¶ 285; GTH's Memorial on Merits and Damages, ¶ 182; **Exhibit C-027**, Letter from William G. VanderBurgh to Industry Canada, Director of Investments, 24 October 2012, *attaching* Voting Control Application; **Exhibit C-129**, GTH, *Minutes of Board of Directors Meeting no. (7) of 2012*, 19 October 2012, pp. 4-5. *See also* [redacted]

> *The Orascom/VimpelCom investment in Globalive has been critical to its ability to launch, fund and expand wireless services. Confidentially, Globalive has reported that it has invested a total of $1.3 billion in wireless operations in Canada since 2009, including $440 million in spectrum licences, $520 million in capital and $380 million in operating costs. . . .* ***It is important to note that Orascom/Vimplecom*** **[sic]** ***is not increasing its ownership stake in Globalive, but rather executing an option that Orascom has held since its original investment in 2009 to convert non-voting to voting shares in the event that telecom foreign investment restrictions no longer applied to the compan****y*.[125]

62. In light of the above, Canada's treatment of GTH and its Voting Control Application are all the more troubling. The facts underpinning GTH's Voting Control Application, and the national security review that ensued, are not in dispute. The relevant provisions of the Investment Canada Act that set out the procedure for conducting the national security review were adopted in March 2009.[126] In October 2010, Wind Mobile informed Canada of VimpelCom's impending acquisition of GTH,[127] notifying Canada again after the transaction had closed in April 2011.[128] [redacted]

[redacted]

[redacted]

[redacted]

---

[125] **Exhibit C-336**, Letter from Iain Stewart to Marie-Josée Thivierge, 14 December 2012, pp. 1-2 (emphases added).

[126] *See* Canada's Counter-Memorial on Merits and Damages, ¶¶ 262, 274; GTH's Memorial on Merits and Damages, ¶ 184; **RWS-Aitken**, ¶ 23. Thus, it is incorrect for Canada to say that at the time of the 2008 AWS Auction, "*GTH fully understood that its proposed acquisition of control of Wind Mobile would be subject to the net benefit and national security review mechanisms provided in the ICA*." Canada's Counter-Memorial on Merits and Damages, ¶ 259.

[127] *See* GTH's Memorial on Merits and Damages, ¶¶ 95, 178; Canada's Counter-Memorial on Merits and Damages, ¶ 431; **Exhibit C-019**, Email from Vanessa Brazil (on behalf of Ken Campbell) to Helen McDonald, 4 October 2010, pp. 1-2 (Letter from Ken Campbell to Helen McDonald, 4 October 2010); **Exhibit C-020**, Email from Vanessa Brazil (on behalf of Ken Campbell) to Konrad von Finckenstein, 4 October 2010, pp. 1-2 (Letter from Ken Campbell to Konrad von Finckenstein, 4 October 2010).

[128] *See* **Exhibit C-021**, Email from Vanessa Brazil (on behalf of Ken Campbell) to Helen McDonald, 15 April 2011, p. 2 (Letter from Ken Campbell to Helen McDonald, 15 April 2011); **Exhibit C-022**, Email from Vanessa Brazil (on behalf of Ken Campbell) to Konrad von Finckenstein, 15 April 2011, p. 2 (Letter from Ken Campbell to Konrad von Finckenstein, 15 April 2011); **CWS-Dobbie**, ¶ 31.

[129] *See* **RWS-Aitken**, ¶ 45.

63. . Concurrent with public speculation that Canada's efforts to introduce new entry into the wireless telecommunications market had not worked—as one market observer, declared "*The Writing's on the Wall – The Canadian Wireless Market Is Consolidating*"[132]—GTH submitted its Voting Control Application to Industry Canada.[133]

[130] *See* Canada's Counter-Memorial on Merits and Damages, ¶ 431; **RWS-Aitken**, ¶ 45; **Exhibit C-256**, Memorandum from Simon Kennedy to Minister of Industry, *National Security Concerns in the Canadian Telecommunication Sector and the* Investment Canada Act, 19 May 2011 [*Updated version of* **Exhibit R-194**], p. 2; **Exhibit C-335**, Memorandum from Lynda Clairmont to the Deputy Minister, *Orascom/Globalive (Wind Mobile) Transaction*, *attaching* Tab A: Scenario Note, December 2012, p. 1; **Exhibit C-337**, Memorandum from Wayne Wouters to Stephen Rigby, *Acquisition of Canadian-Owned Wind Mobile by Russian-Controlled VimpelCom*, c. 2013.

[131] *See* **Exhibit C-312**, Director General Investment Review Committee Meeting, *VimpelCom/Orascom Transaction*, 26 April 2011, pp. 2-3; **Exhibit C-318**, *Memorandum to DG National Security Operations, Public Safety* REDACTED *regarding VimpelCom/Orascom Merger* (version 1), c. April 2011, p. 2; **Exhibit C-319**, *Memorandum to DG National Security Operations, Public Safety* REDACTED *regarding VimpelCom/Orascom Merger* (version 2), c. April 2011, p. 4; **Exhibit C-322**, *VimpelCom's Investment in Globalive's Wind Mobile*, c. May 2011, p. 1; **Exhibit C-400**, Memorandum for the National Security Advisor, *Update and Next Steps on the Vimpelcom-Globalive National Security Review*, c. early 2013, p. 3.

[132] **Exhibit C-142**, Scotiabank, *Biweekly Report: Converging Networks: The Writing's on the Wall – The Canadian Wireless Market is Consolidating*, 21 January 2013. *See also* **Exhibit C-143**, Jamie Sturgeon, *Consumer groups, rivals call on Ottawa to block $700M Rogers-Shaw Spectrum deal*, FINANCIAL POST, 22 January 2013, http://business.financialpost.com/technology/consumer-groups-rivals-call-on-ottawa-to-block-700m-rogers-shaw-spectrum-deal (accessed 28 September 2017).

[133] *See* Canada's Counter-Memorial on Merits and Damages, ¶ 285; GTH's Memorial on Merits and Damages, ¶ 182; .

[134] *See* Canada's Counter-Memorial on Merits and Damages, ¶ 287; GTH's Memorial on Merits and Damages, ¶ 183.

64.

65.

[135] *See* Canada's Counter-Memorial on Merits and Damages, ¶¶ 287-303; GTH's Memorial on Merits and Damages, ¶¶ 182-208.

[136] *See* Canada's Counter-Memorial on Merits and Damages, ¶ 440; GTH's Memorial on Merits and Damages, ¶¶ 191, 197, 200;

[138] Canada's Counter-Memorial on Merits and Damages, ¶ 301; GTH's Memorial on Merits and Damages, ¶ 205;

[139] *See* GTH's Memorial on Merits and Damages, ¶ 206;

66. [redacted]

[redacted]

67.

[143] Canada's Counter-Memorial on Merits and Damages, ¶ 291.

[144] *See* Canada's Counter-Memorial on Merits and Damages, ¶ 291.

[redacted]

68. [redacted]

[redacted]

148 *See* **Exhibit C-009**, Investment Canada Act, R.S.C. 1985, c. 28, 1st Supp. (12 March 2009 – 28 June 2012), § 25.4(1)(b). *See also* Canada's Counter-Memorial on Merits and Damages, ¶ 281; GTH's Memorial on Merits and Damages, ¶ 358.

[redacted]

69.

[redacted] *See also* Canada's Counter-Memorial on Merits and Damages, ¶ 295; [redacted]

152 Canada's Counter-Memorial on Merits and Damages, ¶ 292.

153 Canada's Counter-Memorial on Merits and Damages, ¶ 292.

154 [redacted] Canada's Counter-Memorial on Merits and Damages, ¶ 292. [redacted]

[redacted]

70. [redacted]

71. [redacted]

[redacted]

72.

73.

[redacted]

74. [redacted]

[redacted]

[redacted]

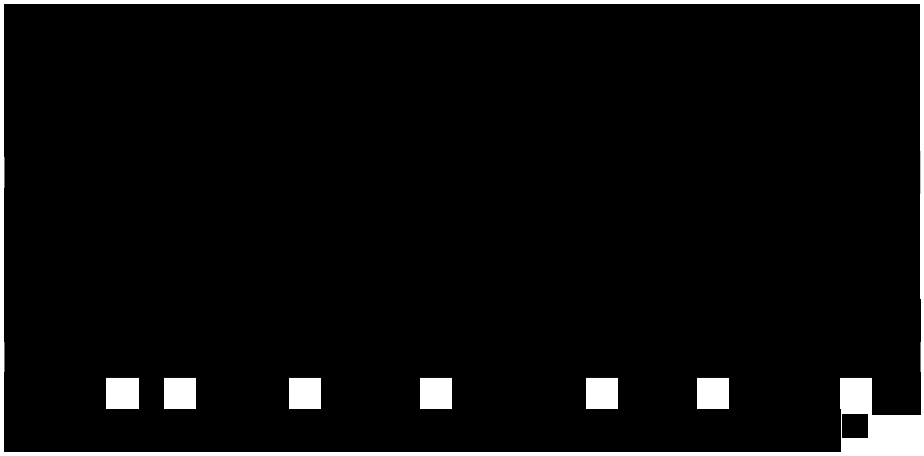
75. [redacted]

76. The documentary record further shows that Canada was well aware that the confluence of its actions was putting GTH, and its largest shareholder (VimpelCom) in a tenuous position. [redacted]

[redacted]

[167] *See also* **Exhibit C-179**, Rita Trichur, *Wind Mobile buyer keeps its 'options open,'* THE GLOBE & MAIL, 15 May 2013, https://beta.theglobeandmail.com/report-on-business/wind-mobile-buyer-keeps-its-options-open/article11939251/?ref=http://www.theglobeandmail.com& (accessed 27 September 2017), p. 2 ("*Industry Minister Christian Paradis* [was] *reluctant to give his blessing until Ottawa* [had] *assurances about Wind's future owner*."); **Exhibit C-198**, Rita Trichur, et al., *Wind Mobile's backers shelve bid: Vimpelcom unit's decision adds uncertainty to Ottawa's effort to inject competition into Canada's wireless market*, THE GLOBE & MAIL, 20 June 2013 (accessed 24 September 2017), p. 2 ("*But the government was just as concerned about whom Vimpelcom wanted to sell Wind to, as it was with Vimpelcom itself, sources say. . . . The government wanted to vet the ultimate buyer and, at some stage of the process, Vimpelcom balked at this request. Some within the government assumed during this back-and-forth that Vimpelcom hoped to transfer Wind to a major Canadian player but Mr. Paradis's early June announcement that signalled he was prepared to ban spectrum transfers to incumbents killed that option*.").

[redacted]



77. [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

78. As Canada had made clear, it intended to use "*every tool at its disposal*" to reach its desired outcome,[171] including, it seems, [redacted]

II.H. Canada Would Not Approve GTH's Sale Of Wind Mobile To An Incumbent

79. Canada acknowledges that after VimpelCom acquired GTH, VimpelCom was considering a variety of options for the Wind Mobile business, including various funding options to develop the business for the long-term as well as selling the investment to the highest bidder.[172] VimpelCom created a team to monitor the Wind Mobile business and to progress these options.[173]

80. [redacted]

---

171 **Exhibit C-195**, House of Commons Debates, Hansard 146(262), 41st Parliament, 1st Session, 4 June 2013, p. 17647. *See also* **Exhibit C-193**, Industry Canada, *Speech: Speaking Points – The Honourable Christian Paradis, PC, MP, Minister of Industry, Telecommunications Announcement*, 4 June 2013, https://www.canada.ca/en/news/archive/2013/06/telecommunications-announcement.html (accessed 24 September 2017), p. 1.

172 *See* GTH's Memorial on Merits and Damages, ¶ 209; Canada's Counter-Memorial on Merits and Damages, ¶¶ 304, 552; **Exhibit C-119**, Email from Andy Dry to Pietro Cordova, 11 October 2011.

173 *See* GTH's Memorial on Merits and Damages, ¶ 209; Canada's Counter-Memorial on Merits and Damages, ¶¶ 304, 552; **Exhibit C-119**, Email from Andy Dry to Pietro Cordova, 11 October 2011

174 *See* GTH's Memorial on Merits and Damages, ¶¶ 211-14, 226, 232, 245; Canada's Counter-Memorial on Merits and Damages, ¶¶ 308, 552; [redacted]

175 *See, e.g.*, [redacted] *See infra* n. 801.

[redacted] Canada itself understood that Incumbents would pay a premium for spectrum licenses.[176]

81. While Canada protests that it never rejected a formal application from GTH to transfer the Wind Mobile Licenses to an Incumbent,[177] Canada's internal documents, contemporaneous representations to GTH, and statements to the public demonstrate that any such formal application would have been publicly rejected.[178] The Minister

---

[176] *See supra* ¶¶ 26 (describing the rationale for the set-aside was that Incumbents would pay more for those spectrum licenses), 56-58 (describing the impact of the blocking sales to Incumbents on the value of set-aside spectrum licenses purchased at the 2008 AWS Auction). *See, e.g.*, **RWS-Stewart**, ¶ 27.

[177] *See, e.g.*, Canada's Counter-Memorial on Merits and Damages, ¶¶ 248-52, 362.

[178] *See, e.g.*, **Exhibit C-195**, House of Commons Debates, Hansard 146(262), 41st Parliament, 1st Session, 4 June 2013, p. 17647 (Minister Paradis announced to the House of Commons that "[s]*pectrum set aside for new entrants was never intended to be transferred to incumbents and as such will not be approved now, nor will it likely be in the future*."). *See also* **Exhibit C-196**, Randall Palmer & Euan Rocha, *Canada blocks Telus deal for more wireless spectrum*, REUTERS, 4 June 2013, http://www.reuters.com/article/uk-telecoms-canada/canada-blocks-telus-deal-for-more-wireless-spectrum-idUKBRE9531BG20130604 (accessed 24 September 2017) (quoting the Minister as stating that set-aside spectrum licenses are not intended to be sold to Incumbents); **RWS-Stewart**, ¶ 66 ("*Industry Canada recommended that it send a consistent and clear message to the broader market about the Incumbents' ability to acquire set-aside spectrum licences at the end of the moratorium*"); **Exhibit C-265**, Memorandum from John Knubley and Marta Morgan to Minister of Industry (English and French versions), *Measures to Sustain Competition in Wireless Sector*, 29 January 2013 [*Updated version of* **Exhibit R-090**], pp. 1-2 (in response to the option agreement between Rogers and Shaw, the Minister was advised that financial analysts "*believe that the Government's response to the Rogers-Shaw deal, and its guidance on whether incumbents can acquire AWS set-aside spectrum in general, will be a critical factor in whether a sustainable fourth player emerges . . . They believe that if the Government is seen to condone such agreements, other new entrants will seek similar option deals now, to sell out to incumbents in the future . . . Proposed key messages for a policy statement . . . emphasize the government's commitment to competition and specifically the spectrum availability for a fourth player in all regions; that the government will carefully scrutinize any transactions that threaten competition*"); **Exhibit C-270**, Memorandum from John Knubley to Minister of Industry, *GTH Global Telecom Holding (Canada) Limited's (GTH) Proposed Acquisition of Globalive Investment Holdings Corp. and Globalive Wireless Management Corp. (Globalive)*, 27 March 2013 [*Updated version of* **Exhibit R-187**], pp. 2, 4 (discussing the options available to GTH in light of the stationary review of the Voting Control Application and explaining that VimpelCom had identified, as a possible option for exit, to "*sell to an incumbent telecom company*" but advised the Minister that "*the other outcomes currently under consideration by the investor* [sale to an incumbent] *would not promote telecom policy objectives. A purchase by an incumbent would decrease competition . . . A transaction to sell the business requires your approval of the Spectrum license transfer. As described in the consultation documents, it is proposed that the factors to be considered a determining* [sic] *whether to approve a transfer include competition.*"); **Exhibit C-350**, *VimpelCom/Wind Scenarios*, 19 April 2013, p. 3 (noting that the Spectrum Transfer Policy would "*enable*[] *intervention on spectrum licence transfers to prevent incumbent acquisitions*"); **Exhibit C-353**, Annex A: *Proposed Speaking Points / Q&As*, 23 April 2013, p. 1 (describing in these speaking points that "*Acquisitions of new entrants by incumbents would not be consistent with the government's objectives*" and if asked regarding the "*status of ICA case relating to WIND*" to respond that "[a]*gain, the government has been clear in regards to its objective, and a sale of WIND to an incumbent would not be consistent with this*."); **Exhibit C-360**, *Speaking Notes for Minister Post-Announcement* (draft), 3 June 2013, p. 1 ("*Requests to transfer set-aside AWS licences to incumbents are not expected to meet the criteria of the licence transfer policy given that such transfers would*

himself made absolutely clear that the transfer of set-aside spectrum from New Entrants to Incumbents "***will not be approved now, nor will it likely be in the future***."[179] As Canada's documents make clear, the express purpose of such announcements was to signal to New Entrants that such transfers would not be approved and to therefore encourage them to consolidate.[180]

82. [redacted]

leave insufficient spectrum for a viable fourth player in most regions."); **Exhibit C-361**, Email from Christopher Johnstone to Pamela Miller and Iain Stewart, 3 June 2013, pp. 2-3, 6-7 (*Questions and Answers: Telecom Announcement*, pp. 1-2, 5-6); **Exhibit C-362**, Email from Pamela Miller to Marta Morgan and Oliver Archer-Antonsen, 6 June 2013; [redacted] *See also* **Exhibit C-343**, Scotiabank, *Has Naguib Sawiris Found His Second WIND?*, 18 March 2013 (observing that "*with Industry Canada's proposal to review licence transfers, it is essentially trying to eliminate* [the option to sell to an Incumbent] *and force* [VimpelCom and Mobilicity backers] *to either invest more or sell to a strategic investor*").

179 **Exhibit C-195**, House of Commons Debates, Hansard 146(262), 41st Parliament, 1st Session, 4 June 2013, p. 17647 (emphasis added).

180 *See* [redacted]; **Exhibit C-346**, Email from Christopher Johnstone to Iain Stewart, Jenifer Aitken and Marie-Josée Thivierge, *attaching* TD Securities Inc., *Equity Research*, 12 April 2013, p. 1 ("*FYI in advance of the call this morning: analyst consensus continues to be that IC will not permit incumbents to acquire new entrants' spectrum*."); **Exhibit C-351**, Email from Iain Stewart to Christopher Johnstone, et al., 22 April 2013, p. 1; **Exhibit C-377**, Advice to the Minister, *Wireless Telecommunications Policy Options*, c. September 2013, p. 3 ("*Your decisions in regard to any requests to transfer this spectrum to incumbents will have important consequences given that competitors will require sufficient spectrum in order to be viable. The government has previously indicated that it is committed to spectrum availability for new competitors, and that spectrum set-aside for new entrants was not intended for incumbents, and this messaging could be reiterated.*").

181 *See* Canada's Counter-Memorial on Merits and Damages, ¶¶ 313-14.

182 *See* GTH's Memorial on Merits and Damages, ¶ 247; [redacted]

83. [redacted]

84. [redacted]

[redacted]; **CWS-Dry**, ¶ 24. *See also* [redacted]

183 *See* GTH's Memorial on Merits and Damages, ¶¶ 233, 248-50; **Exhibit C-154**, Industry Canada, *Licensing Framework for Mobile Broadband Services (MBS) – 700 MHz Band* (*DGSA-001-13*), § 5.4; **CWS-Dry**, ¶¶ 18-25; [redacted]; **Exhibit C-212**, Email from Carsten Revsbech to Jo Lunder and Augie K. Fabela, 12 September 2013; [redacted]

184 [redacted]; **CWS-Dry**, ¶¶ 26-27.

185 *See* Canada's Counter-Memorial on Merits and Damages, ¶ 311; GTH's Memorial on Merits and Damages, ¶¶ 248-50. *See also* [redacted]

186 [redacted]

[redacted]

187 [redacted]

188 [redacted]

[redacted]

85. As explained above, Canada was focused on creating a fourth player in the Ontario, Alberta, and British Columbia regions. This was an objective that continued well into 2014 after the 2014 700 MHz Auction[192] and was a driving force behind its preparations for the 2015 AWS-3 Auction.[193]

* * *

86. By the end of 2013, GTH was left in an unenviable position. GTH had spent over C$ 442 million for spectrum at the outset and C$ 1.3 billion in total on the basis of a Framework expressly designed by Canada to induce new investors to participate in the 2008 AWS Auction and the Canadian wireless telecommunications market. Canada, on the other hand, failed to uphold the basic tenets of this Framework, introduced unforeseen obstacles, and then reversed key conditions. GTH was left with a New Entrant that it could not sell to an Incumbent and [redacted]

189 [redacted]

190 [redacted]

191 *See infra* n. 801.

192 *See* [redacted]

193 [redacted]

[redacted] The Government had made it clear that its objective was to force the existence of a fourth player, and that it was willing to use every tool, however illegitimate, to achieve this outcome.

87. It is unsurprising that rather than continue to invest millions of dollars a month in Wind Mobile and remain in Canada, GTH decided to salvage whatever value that it could and sold its investment in Wind Mobile in September 2014 to a consortium of non-Incumbent investors.[194]

88. And, of course, after GTH exited the market in September 2014, Canada finally achieved its objective. In December 2015, Canada's actions culminated in the sale of Wind Mobile (by this time in the hands of its Canadian investors) to Shaw, engineering Canada's fourth player entirely at GTH's expense.[195]

---

194 GTH's decision to exit the Canadian market is discussed in greater detail at **Part V.B**.

195 *See* GTH's Memorial on Merits and Damages, ¶¶ 260-65; **Exhibit C-034**, Terence Corcoran, *Terence Corcoran: Mysteries blowing in the Wind deal*, FINANCIAL POST, 15 December 2015; **Exhibit C-240**, Howard Solomon, *Shaw may finally get a cellular network if Wind deal is approved*, IT WORLD CANADA, 16 December 2015, https://www.itworldcanada.com/article/shaw-may-finally-get-a-cellular-network-if-wind-deal-is-approved/379456 (accessed 24 September 2017).

III. THE TRIBUNAL HAS JURISDICTION TO HEAR THIS DISPUTE & EACH OF GTH'S CLAIMS ARE ADMISSIBLE

89. As set out in GTH's Memorial on Merits and Damages, this Tribunal has jurisdiction over this dispute in accordance with Article 25 of the ICSID Convention and the terms of the BIT.[196] GTH is entitled to the same protection a Canadian investor receives when investment flows in the other direction.

90. Canada has raised several ill-conceived jurisdictional and admissibility objections in the hope of distracting from the condemning facts as set out above and narrowing in any way possible its responsibility for its wrongful acts. Each of its objections are premised on false and misleading interpretations of the BIT and the law, and must be dismissed.

91. **First**, GTH is an Egyptian juridical person—as an Egyptian joint stock company presently and at all relevant times, GTH has maintained a residence in Egypt throughout its existence, as it is legally required to do. Any argument suggesting otherwise is wrong as a matter of fact and law.

92. **Second**, no provision of this BIT excludes GTH's claims relating to Canada's wrongful treatment of GTH's Voting Control Application.

93. **Third**, Canada's cumulative breaches are within the three-year notice provision of this BIT because the relevant date is the date on which GTH had knowledge of the cumulative breach **and** the damage arising from that breach.

94. **Fourth**, GTH has standing to bring all claims relating to breaches of the BIT that caused damage to its investment.

---

[196] GTH's Memorial on Merits and Damages, Part VI.

95. These points, and the serious flaws underpinning Canada's objections, will be addressed in greater detail below. As will become clear, the Tribunal has jurisdiction over all of GTH's claims and all of the claims are admissible.

III.A. The Tribunal Must Interpret Jurisdictional Requirements—Like Any Treaty Provision—In Accordance With The VCLT

96. The Parties agree that, to interpret the BIT in this Arbitration, the Tribunal must apply the VCLT to understand the scope of the Contracting Parties' obligations under the BIT. The VCLT provides well-established principles that govern treaty interpretation as a matter of customary international law.[197] The VCLT makes clear that the terms of the BIT must be considered as follows:

(a) As the primary step, Article 31 of the VCLT requires that "[a] *treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and*

[197] **Exhibit CL-018**, VCLT, Part III, Section 3. *See also* **Exhibit CL-082**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶ 537; **Exhibit 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, ¶ 207; **Exhibit RL-003**, *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. The Republic of Paraguay*, ICSID Case No. ARB/07/9, Decision of the Tribunal on Objections to Jurisdiction, 29 May 2009, ¶ 59; **Exhibit RL-021**, *Ethyl Corporation v. The Government of Canada*, UNCITRAL, Award on Jurisdiction, 24 June 1998, ¶ 52; **Exhibit CL-144**, *Kiliç İnşaat İthalat, İhracat Sanayi Ve Ticaret, and Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, Decision on Article VII.2 of the Turkey-Turkmenistan Bilateral Investment Treaty, 7 May 2012, ¶ 6.4. Egypt and Canada have acceded to the VCLT. *See* **Exhibit CL-181**, *Law of Treaties: Vienna Convention on the Law of Treaties*, United Nations Treaty Series, https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XXIII/XXIII-1.en.pdf (accessed 2 November 2018).

purpose."[198] The VCLT makes clear that this exercise must be carried out in good faith.[199]

(b) Only if an interpretation of the ordinary meaning leads to an "*ambiguous or obscure*" meaning or "*to a result that is manifestly absurd or unreasonable*," recourse may be had to supplementary means of interpretation pursuant to Article 32.[200]

(c) In cases where there are multiple authentic texts, which is the case here, Article 33 provides that all authentic texts are "*equally authoritative*"[201] and are presumed to have the same meaning in each authentic text.[202]

---

198 **Exhibit CL-018**, VCLT, Article 31(1). In other words, these terms should not be interpreted in a vacuum. The "*context*" and the "*object and purpose*" of these provisions necessarily inform an understanding of the "*ordinary meaning*" of the provision. *See also* **Exhibit RL-055**, *The Renco Group, Inc. v. Republic of Peru*, UNCITRAL, Case No. UNCT/13/1, Decision as to the Scope of the Respondent's Preliminary Objections Under Article 10.20.4, 18 December 2014, ¶ 176 ("[i]*t is generally accepted that Article 31(1) of the Vienna Convention requires that a treaty should be interpreted first on the basis of its 'plain language.' . . .the interpretation of a word or phrase involves a complex task of considering the ordinary meaning of a word or phrase in the context in which that word or phrase is found and in light of the object and purpose of the document*"); **Exhibit CL-045**, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, ¶ 7.4.3 ("*interpretation in accordance with the ordinary meaning of a term . . . is not merely a semantic exercise in uncovering the literal meaning of a term . . . the term is not to be examined in isolation or* in abstracto*, but in the context of the treaty and in the light of its object and purpose.*").

199 **Exhibit CL-018**, VCLT, Article 31(1). *See also* **Exhibit CL-108**, *Maritime Delimitation and Territorial Questions (Qatar v. Bahrain)*, Judgment of 15 February 1995, (1995) I.C.J. REPORTS 6, pp. 27-39, Dissenting Opinion of Judge Schwebel, p. 39 (Justice Schwebel describes good faith as being "*the cardinal injunction of the Vienna Convention's rule of interpretation*"); **Exhibit CL-119**, *Auditing of Accounts Between the Kingdom of the Netherlands and the French Republic pursuant to the Additional Protocol of 25 September 1991 to the Convention on the Protection of the Rhine against Pollution by Chlorides of 3 December 1976 (Netherlands v. France)*, PCA Case No. 2000-02, Arbitral Award (Unofficial English Translation), 12 March 2004, ¶ 65 ("*the Tribunal emphasises that it fully recognises the fundamental role of good faith and how it dominates the interpretation and application of the entire body of international law, not only the interpretation of treaties*.").

200 **Exhibit CL-018**, VCLT, Article 32 ("*Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) Leaves the meaning ambiguous or obscure; or (b) Leads to a result which is manifestly absurd or unreasonable*.").

201 **Exhibit CL-018**, VCLT, Article 33(1) ("*When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail*.").

202 **Exhibit CL-018**, VCLT, Article 33(3) ("*The terms of the treaty are presumed to have the same meaning in each authentic text*.").

(d) Only if the application of Articles 31 and 32 reveals a lingering difference in meaning across the authentic texts, "*the meaning which best reconciles the texts, having regard to the object and purpose of the treaty*" prevails.[203]

97. Canada fails to respect these rules. **First**, Canada commits a series of errors in purporting to interpret the ordinary meaning of key terms (Article 31). These errors persist across Canada's jurisdictional objections and defenses on the merits. Canada's interpretation of key provisions of this BIT consistently undermines the BIT's purpose to promote the free flow of investments between the Parties (in both directions) by providing important protections against adverse government conduct.[204]

98. **Second**, Canada improperly relies on supplementary means of interpretation (Article 32) to supplant the ordinary meaning of the BIT's terms. While avoiding the express language of this BIT's provisions, Canada cites copiously to Canada's other treaties and, in particular, NAFTA and arbitral awards interpreting NAFTA. It is improper to import treaty practice and language from instruments separately negotiated by unrelated third parties in order to understand the provisions contained in this BIT, especially where the ordinary meaning is clear.

99. **Third**, the BIT in this case has been authenticated in three languages—English,[205] French,[206] and Arabic[207]—and each of these versions are "*equally authentic*."[208] In other

---

[203] **Exhibit CL-018**, VCLT, Article 33(4) ("*Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted*.").

[204] **Exhibit CL-001**, BIT (English), Preamble; GTH's Memorial on the Merits and Damages, ¶ 291.

[205] **Exhibit CL-001**, BIT (English).

[206] **Exhibit CL-002**, BIT (French).

[207] **Exhibit CL-003**, BIT (Arabic).

[208] **Exhibit CL-001**, BIT (English), Signature Page.

words, the BIT is "*equally authoritative in each language*."[209] Yet, instead of applying Article 33's directive to best reconcile multiple authentic texts, Canada incorrectly favors interpretations that cannot be supported by all three authentic versions of the BIT (if any).

100. **Finally**, all treaty terms are subject to the rules of interpretation set forth in the VCLT, and there are no special rules of interpretation applicable to treaty provisions dealing with a State's consent to arbitrate.[210] Just like any other treaty provision, jurisdictional provisions "*should be interpreted with due respect for the principle of good faith, should not follow an* a priori *strict or broad construction, and should be construed to achieve an objectively fair and functional solution*."[211] Thus, contrary to Canada's submission, there is no requirement that a State's consent to a tribunal's jurisdiction is

---

[209] **Exhibit CL-018**, VCLT, Article 33(1). As the procedural language of this Arbitration is English, GTH will cite in the first instance the English version of the BIT unless a discrepancy between the three authentic versions is relevant. *See* Procedural Order No. 1, § 11.1.

[210] *See* **Exhibit CL-152**, *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Decision on Objection to Jurisdiction for Lack of Consent, 3 July 2013, ¶ 22; **Exhibit RL-104**, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, ¶ 43. *See also* **Exhibit RL-040**, *ICS Inspection and Control Services Limited (United Kingdom) v. The Argentine Republic*, UNCITRAL, PCA Case No. 2010-9, Award on Jurisdiction, 10 February 2012, ¶ 280 ("Consent to *jurisdiction . . . is either proven or not according to the general rules of international law governing the interpretation of treaties.*").

[211] **Exhibit CL-124**, *Duke Energy International Peru Investments No. 1, Ltd. v. Republic of Peru*, ICSID Case No. ARB/03/28, Decision on Jurisdiction, 1 February 2006, ¶ 76. *See also* **Exhibit CL-102**, *Société Ouest Africaine des Bétons Industriels v. Senegal*, ICSID Case No. ARB/82/1, Award, 25 February 1988, (1992) 17 Y.B. COM. ARB. 42 , ¶ 4.10 ("*an arbitration agreement, like any agreement, must be interpreted with due respect for the principle of good faith . . . It is this course, rather than that of an* a priori *strict or, on the contrary, broad or liberal interpretation, which the Tribunal has followed*"); **Exhibit CL-099**, *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Award on Jurisdiction, 25 September 1983, (1984) 23 I.L.M. 351, ¶ 14.1 ("*a convention to arbitrate is not to be construed restrictively, nor, as a matter of fact, broadly or liberally. It is to be construed in a way which leads to find out and to respect the common will of the parties*" (emphases in original)). The approach of the tribunal in Amco has been adopted by a number of tribunals. *See, e.g.*, **Exhibit RL-021**, *Ethyl*, Award on Jurisdiction, ¶ 55; **Exhibit RL-020**, *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Decision on Hearing of Respondent's Objection to Competence and Jurisdiction, 5 January 2001, ¶ 51; **Exhibit CL-113**, *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999, ¶ 34; **Exhibit CL-127**, *Noble Energy, Inc. and Machalapower Cia. Ltda. v. The Republic of Ecuador and Consejo Nacional de Electricidad*, ICSID Case No. ARB/05/12, Decision on Jurisdiction, 5 March 2008, ¶¶ 195-97.

"*unambiguously ascertained*."[212] This is a mischaracterization of the law and creates a standard of proof that does not exist.

III.B. GTH Is A Qualifying Investor Of Egypt As Required By Article I(g) Of The BIT And Article 25 Of The ICSID Convention

101. This Tribunal has jurisdiction *ratione personae* over this dispute under Article 25 of the ICSID Convention and the terms of the BIT because at the time of the filing of the Request for Arbitration, dated 28 May 2016, GTH was an Egyptian "*juridical person*" that had made an investment in Canada.

102. To qualify as a protected investor under the BIT,[213] GTH must be an Egyptian "*juridical person*" that has "*invest*[ed] *in the territory of Canada*."[214] An Egyptian "*juridical person*" is defined in the BIT as "***any entity*** *established in accordance with, and recognized as a juridical person by the laws of the Arab Republic of Egypt*."[215] GTH was—and remains—an Egyptian joint stock company that has been established in accordance with, and is recognized as, a juridical person pursuant to Egyptian law.[216]

---

212 Canada's Memorial on Jurisdiction and Admissibility, ¶ 26 (referring to an alleged "*requirement that a State's consent to jurisdiction must be clearly and unambiguously ascertained*"). *See also* Canada's Memorial on Jurisdiction and Admissibility, ¶ 25 ("[i]*f there is any ambiguity as to whether or not a claimant has met its burden on a jurisdictional question, the tribunal should decline to find jurisdiction*."). Canada's attempts to set a heightened burden of proof in relation to questions of jurisdiction have been rejected in other cases. *See, e.g.*, **Exhibit RL-057**, *Fisheries Jurisdiction Case (Spain v. Canada)*, Judgment of 4 December 1998, (1998) I.C.J. REPORTS 432, ¶ 38 ("*there is no burden of proof to be discharged in the matter of jurisdiction*").

213 As Canada explains, if GTH satisfies the definition of an Egyptian investor under this BIT, GTH also satisfies the definition of "*national*" in Article 25 of the ICSID Convention. *See* Canada's Memorial on Jurisdiction and Admissibility, ¶¶ 34-36.

214 **Exhibit CL-001**, BIT (English), Article I(g).

215 **Exhibit CL-001**, BIT (English), Article I(g) (emphasis added).

216 **CER-Sarie-Eldin**, ¶¶ 16, 18, 23; **Exhibit C-397**, Global Telecom Holding S.A.E., *Current Corporate Status of Global Telecom Holding S.A.E.*, 25 May 2016, *attaching* Global Telecom Holding S.A.E. commercial register extract, 4 May 2016 (Arabic and English translation). As explained by both Parties' experts, there is no independent legal requirement under Egyptian law referring to "*permanent residence*" for a corporation to qualify as an Egyptian juridical person. *See* **CER-Sarie-Eldin**, ¶ 15, **RER-Zulficar**, Section V ("*The Non-Existence of '*Permanent Residence*' as to Juridical Persons Under Egyptian Law*").

GTH invested heavily in Canada.[217] Therefore, GTH is a protected investor under the BIT.

103. Indeed, it defies logic that GTH would not qualify as an Egyptian juridical person. At the time of the filing of the Request for Arbitration, GTH was (and is) an Egyptian joint stock company that is well-recognized to this day as one of the largest Egyptian companies in the world.[218] Among other features, GTH maintains a registered office in Egypt, is audited by Egyptian auditors applying Egyptian accounting standards, submits annually to the Egyptian Companies Department and Egyptian Tax Authorities, maintains an investor relations officer in Egypt, holds all General Assembly meetings in Egypt, and is listed on the Egyptian stock exchange.[219]

104. Rather than accept the uncontroversial fact that GTH is an Egyptian company to which it owes treaty protections, Canada manufactures two additional hurdles to advance the far-fetched notion that GTH is not Egyptian for the purposes of this BIT. Canada alleges, **first**, that an Egyptian juridical person must also have "*permanent residence*" in Egypt, and, **second**, in order to satisfy this alleged requirement, Egypt must be the place with which GTH "*has the strongest attachment and in which it currently resides and intends to continue residing*."[220] As set forth below, these additional requirements of "*permanent residence*" and "*strongest attachment*" are concocted and are not substantiated by the ordinary meaning of the BIT, Egyptian law, or international law.

---

217 *See* GTH's Memorial on Merits and Damages, ¶¶ 272-73.

218 *See, e.g.*, **Exhibit C-398**, *4 Egyptian companies in top 100 powerful companies in MENA*, 19 June 2018, EGYPT TODAY, http://www.egypttoday.com/Article/3/52364/4-Egyptian-companies-in-top-100-powerful-companies-in-MENA (accessed 2 November 2018) (noting that "[t]*he list of the most powerful 100 public companies included four Egyptian companies, which are Commercial International Bank (CIB), El Sewedy Electric Co., Orascom Construction Limited and Global Telecom.*").

219 *See infra* **Part III.B.2.c**.

220 Canada's Memorial on Jurisdiction and Admissibility, ¶ 75.

Moreover, even if the Tribunal were to find, contrary to the plain language of the BIT, that GTH must have a "*permanent residence*" in Egypt to qualify as a protected investor, [redacted].[221] Therefore, Canada's *ratione personae* objection must be dismissed.

III.B.1. The BIT's Only Requirement To Qualify As An Egyptian "*Juridical Person*" Is To Be Any Entity Established In Accordance With, And Recognized As, A Juridical Person By The Laws Of Egypt

III.B.1.a. The Ordinary Meaning Of The BIT Makes Clear That GTH Need Only Be Established In Accordance With, And Recognized As, A Juridical Person By The Laws Of Egypt

105. The BIT's only requirement to qualify as an Egyptian "*juridical person*" is to be "*any entity established in accordance with, and recognized as a juridical person by the laws of the Arab Republic of Egypt*."[222] It would be contrary to the VCLT's rules of interpretation to allow Canada to manipulate the text of this BIT to add a second requirement—namely, the alleged requirement to have "*permanent residence*" in Egypt—to satisfy the definition of an Egyptian "*juridical person*."

106. In the English version of the BIT, an Egyptian "investor" is defined as follows:

> *(g) "investor" means: . . .*
>
> *in the case of the Arab Republic of Egypt:*
>
> *any natural or juridical person, including the Government of the Arab Republic of Egypt who invests in the territory of Canada. . . .*
>
> *(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*

[221] *See infra* **Part III.B.2**.

[222] **Exhibit CL-001**, BIT (English), Article I(g).

> *organizations, and having permanent residence in the territory of the Arab Republic of Egypt.*[223]

107. The Article above provides a broad definition of an Egyptian investor that is a "*juridical person*"—"***any entity*** *established in accordance with, and recognized as a juridical person by the laws of the Arab Republic of Egypt*"—and then, following a colon, offers a non-exhaustive list of examples of entities that would qualify. This is plain from the language and grammatical structure of the Article. **First**, as explained by the Chicago Manual of Style, "[a] *colon introduces an element or a series of elements illustrating or amplifying what has preceded the colon*."[224] Words which **follow** a colon do not modify words that **precede** it; they merely describe, illustrate, or explain the words before it. **Second**, the colon followed by the phrase "*such as*," can do no more than introduce a non-exhaustive list of examples. Commas are used here, as they typically are, to separate each example in that list.[225] Thus, "*public institutions*" or "*private companies*" are examples of "*any entity*" that could qualify as an Egyptian juridical person as long as they were "*established in accordance with, and recognized as a juridical person by the laws of the Arab Republic of Egypt*."

108. Like "*public institutions*" or "*private companies*," the phrase "*and having permanent residence in the territory of the Arab Republic of Egypt*" follows the colon and is separated from the other examples by a comma. Therefore, the structure of Article I(g)

---

223 **Exhibit CL-001**, BIT (English), Article I(g) (emphasis added).

224 **Exhibit CL-134**, THE CHICAGO MANUAL OF STYLE (16th ed. 2010), ¶ 6.59.

225 **Exhibit CL-134**, THE CHICAGO MANUAL OF STYLE (16th ed. 2010), ¶ 6.123 ("[i]*f the introductory material forms a grammatically complete sentence, a colon should proceed the first parenthesis. The items are separated by commas unless any of the items requires internal commas, in which case all the items will usually need to be separated by semicolons*." (internal cross-references omitted)). This type of comma is commonly referred to as an "*Oxford comma*" or a "*serial comma*" and it is "*used after the penultimate item in a list of three or more items, before 'and'*." **Exhibit CL-183**, English Oxford Living Dictionaries Online, Definition of "*Oxford comma*," https://en.oxforddictionaries.com/definition/oxford_comma (accessed 2 November 2018).

demonstrates that an entity "*having permanent residence*" in Egypt is yet another example of a type of entity that qualifies as an Egyptian juridical person.

109. The French version of the BIT again is clear that there is no independent requirement to have a permanent residence in Egypt to qualify as a protected investor. Its English translation for the definition of an Egyptian "*juridical person*" states:

> *the term "juridical person" means **any entity** established in accordance with the laws of the Arab Republic of Egypt and recognized as a juridical person by these laws**: including** public institutions, juridical persons per se (or corporations), foundations, private companies, firms, establishments and associations**, having the right to permanent residence** in the territory of the Arab Republic of Egypt.*[226]

110. Like the other authentic versions, the French version states that an Egyptian "*juridical person*" is "***any entity** established in accordance with the laws of the Arab Republic of Egypt and recognized as a juridical person by these laws*." In the French version, the colon and the term "***including***" introduce a non-exhaustive list of examples of types of entities, again separated by a series of commas, which can qualify as juridical persons.

111. In addition, there are two important features of the French version of the BIT which confirm that the existence of a "*permanent residence*" in Egypt is not a condition precedent to qualify as an Egyptian "*juridical person*." **First**, culminating its list of examples, the French version refers to entities « ***ayant le droit de** résidence permanente* » ("***having the right to** permanent residence*").[227] **Second**, the French

---

[226] *See* **Exhibit CL-002**, BIT (French), Article I(f) (emphasis added) («*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.*»).

[227] *See* **Exhibit CL-002**, BIT (French), Article I(f) (emphasis added). Canada concurs with this translation. *See* Canada's Memorial on Jurisdiction and Admissibility, ¶ 58.

version does not preface that phrase with the word "*and*."[228] The ordinary meaning of the phrase "*having the right to permanent residence*"—without an "*and*"—demonstrates that the clause refers to the list of examples preceding it. In other words, "*public institutions*," "*private companies*," and the other listed entities, when established in accordance with the laws of Egypt, are all entities "*having the right to permanent residence in Egypt*." The final phrase describes a common characteristic amongst the preceding list of example entities, and removes any ambiguity as to the BIT's broad application. Any entity with the **right to** permanent residence (as opposed to having permanent residence) in Egypt is a qualifying entity. This reading is consistent with the Egyptian Civil Code, which not only broadly defines "*juridical persons*" to include "*public establishments*," "*endowments*," "*civil and commercial companies*," and "*associations and institutions*," but further explains in Article 53 that "[a juridical person] *is entitled to* . . . [a]*n independent domicile*."[229]

112. The French version of the BIT therefore shows that having "*permanent residence*" is not an additional requirement to qualify as an Egyptian "*juridical person*" but is merely another example of a qualifying entity. If the Parties had wished to establish permanent residence as a separate and independent requirement for Egyptian juridical persons to be protected by the BIT, the Parties would have done so, instead of adding to a non-exhaustive, non-cumulative list of example juridical persons, those "*having the right*" to permanent residence.

---

[228] As discussed below, "*and*" is the precise word relied on by Canada in its interpretation of the English version of the BIT to argue that "*permanent residence*" is a separate and independent requirement. *See infra* ¶ 115.

[229] *See* **Exhibit HSE-002**, Egyptian Civil Code, Law No. 131 of 1948, Articles 52 and 53; **CER-Sarie-Eldin**, ¶¶ 17, 19; **RER-Zulficar**, ¶ 48. The relevance of Egyptian law, if any, will be discussed further below.

113. The Arabic version of the BIT likewise affirms that having "*permanent residence*" is not an additional requirement to qualify as an Egyptian juridical person. In accord with the other authentic versions, it broadly defines an Egyptian "*juridical person*" as "***any entity*** *established or created in accordance with the laws of the Arab Republic of Egypt*."[230] The remainder of the provision in the Arabic version is substantively similar to the English version, but the Arabic language does not employ punctuation. Pursuant to Article 33(3) of the VCLT, the three authentic texts are presumed to have the same meaning; therefore, the punctuation in the English translation of the Arabic version should be inferred from the English version.[231] Thus, the Arabic version again shows that permanent residence in Egypt is not an independent requirement to qualify as an Egyptian juridical person under the BIT.

114. In sum, the words that follow the colon and "*including*" / "*such as*" are unequivocally meant in all three versions to provide a non-exhaustive, non-cumulative list of example entities that can qualify as Egyptian "*juridical persons*." The list of examples does not create any separate and additional requirements.

115. But Canada maintains that in order to qualify as an Egyptian "*juridical person*," the Egyptian entity must also meet the additional requirement of having "*permanent*

---

[230] Canada has provided the following translation of Article I(g) of the Arabic version: "*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*." **Exhibit R-001**, BIT (Arabic – English translation), Article I(g). The Arabic version states:

ويعني "شخص اعتباري" أي منشأة تكونت أو أنشئت وفقاً لقوانين جمهورية مصر العربية، مثل المنشآت العامة والشركات العامة والخاصة والمؤسسات والمنظمات والتي لها إقامة دائمة في إقليم جمهورية مصر العربية.

Exhibit CL-003, BIT (Arabic), Article I(g).

[231] **Exhibit CL-018**, VCLT, Article 33(3).

residence" in Egypt.[232] To support its interpretation, Canada relies exclusively on the word "*and*" in the English version of the BIT, while ignoring the language and structure of the entire provision.[233] In particular, Canada ignores: (*i*) the broad language of the provision (describing "*any entity*"); (*ii*) the colon; and (*iii*) the phrase "*such as*" / "*including*." Yet, together, these elements make clear that what follows the colon in Article I(g) is a non-exhaustive, non-cumulative list of examples of entities that would qualify as an Egyptian juridical person. Canada's construction of the BIT's broad definition of a juridical person to include an additional requirement is contrary to the provision's ordinary meaning.[234]

116. Importantly, Canada's reading fails to give meaning to the words used in the French version of the BIT, contrary to the VCLT and the principle of *effet utile*.[235]

---

[232] *See, e.g.*, Canada's Memorial on Jurisdiction and Admissibility, ¶¶ 31, 41.

[233] Canada's Memorial on Jurisdiction and Admissibility, ¶¶ 44-45. This is even more-so the case where its reading of "*and*" to signify exclusively a "*separate and additional requirement*" is not supported by the very definition it relies on. Canada's preferred definition only shows that "*and*" is a connecting word "*which is to be taken side by side with, along with, or in addition to, that which precedes it*." **Exhibit RL-054**, Oxford English Dictionary Online, Definition of "*and*, conj.[1], adv., and n.[1]," http://www.oed.com/viewdictionaryentry/Entry/7283 (accessed 9 November 2017), p. 1. The *Oxford English Dictionary* explains that "*and*" is "*simply connective*" can be used to connect members of a series. **Exhibit RL-054**, Oxford English Dictionary Online, Definition of "*and*, conj.[1], adv., and n.[1]," http://www.oed.com/viewdictionaryentry/Entry/7283 (accessed 9 November 2017), pp. 1, 5.

[234] *See* **Exhibit RL-231**, *RosInvestco UK Ltd. v. The Russian Federation,* SCC Case No. V 079/2005, Final Award, 12 September 2010, ¶ 388 (finding that where a BIT defined the term "*investment*" as "*every kind of asset*" followed by a non-exhaustive list there was no scope to imply additional limiting terms "*to something created under applicable national law*"); **Exhibit RL-165**, *Koch Minerals Sàrl and Koch Nitrogen International Sàrl v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/19, Award, 30 October 2017, ¶ 6.52 (finding that where the definition of "*investment*" is "*very broad*" and includes "*every kind of asset*" followed by a list of non-exhaustive examples "*this wording does not permit additional requirements not implicit in the meaning of the word 'investment.*"); **Exhibit RL-006**, *Abaclat and Others v. The Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, ¶ 354 (where a "*list covers an extremely wide range of investments*" the parties "*cannot be seen to have intended to adopt a restrictive approach with regard to what kind of activity or dealing was meant to qualify as an investment*.").

[235] Canada relies on the principle of *effet utile* to suggest that the presence of the words "*and having permanent residence in the territory of the Arab Republic of Egypt*" means that the definition of Egyptian investor requires "***something more** than mere incorporation under Egyptian law*." *See* Canada's Memorial on Jurisdiction and Admissibility, ¶ 41 (emphasis added). *See also* Canada's Memorial on Jurisdiction and Admissibility, ¶ 46. Canada's reliance on the principle of *effet utile* is misplaced. The clause "*and having permanent residence*" serves a specific purpose. As is clear from the plain language of the definition of juridical person, the purpose of the reference to permanent residence is to provide an example of a type of

Specifically, to advance its case that the clause referring to "*permanent residence*" is a separate requirement, Canada rewrites the words used in the French version—"***having the right to*** *permanent residence*"—to add "*and*" and delete "*the right to*."[236] No principle of treaty interpretation allows Canada to unilaterally rewrite the French version of the BIT to suit its objective.[237]

117. Finally, Canada relies on an alleged asymmetry in language between the definitions of Canadian and Egyptian investors to argue that the definition of an Egyptian investor was purposely crafted to be more onerous.[238] Canada's position undermines two of the fundamental purposes of this BIT: (*i*) to ensure the reciprocal promotion and protection of investments of investors of one Contracting Party in the territory of the other Contracting Party;[239] and (*ii*) to protect the equal and non-discriminatory treatment of investors from different jurisdictions.[240]

118. In any event, Canada's argument is premised on an incomplete reading of the definitions of an Egyptian juridical person investor and Canadian enterprise investor.

---

entity which may satisfy the definition of a protected investor (*i.e.*, an entity with permanent residence in Egypt). The tribunal's award in *Tenaris and Talta v. Venezuela* does not support Canada's proposition. *See* Canada's Memorial on Jurisdiction and Admissibility, ¶¶ 47-49. Both of the treaties applicable in *Tenaris* contained provisions which referred to "*siège social*" and "*sede*," respectively, in the relevant home States; these references were not, as is the case here, provided as examples of a qualifying investor, but rather appeared as separate requirements. **Exhibit RL-058**, *Tenaris S.A. and Talta-Trading E Marketing Sociedade Unipessoal LDA v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/26, Award, 29 January 2016, ¶ 115 (quoting the relevant treaty provisions). The tribunal, nevertheless, confirmed that the claimants each satisfied the definition of "*investor*" under the applicable treaties. **Exhibit RL-058**, *Tenaris*, Award, ¶¶ 226-27.

236 Canada's Memorial on Jurisdiction and Admissibility, ¶¶ 58, 62.

237 *See* **Exhibit CL-018**, VCLT, Article 33.

238 Canada's Memorial on Jurisdiction and Admissibility, ¶ 50 (noting that the definition of a Canadian "*enterprise*" investor does not refer to permanent residence, and arguing that the reference to "*permanent residence*" in Egypt's definition is therefore "*meant to capture something more than mere establishment and recognition of a juridical person under domestic laws.*").

239 **Exhibit CL-001**, BIT (English), Preamble.

240 **Exhibit CL-001**, BIT (English), Articles III and IV.

Egyptian "*Juridical Person*" Investor	Canadian "*Enterprise*" Investor
[Article I(g)]	**[Article I(g)]**
(g) "investor" means: . . .	(g) "investor" means: . . .
in the case of the Arab Republic of Egypt:	in the case of Canada: . . .
any . . . juridical person, including the Government of the Arab Republic of Egypt who invests in the territory of Canada. . . .	(ii) any enterprise incorporated or duly constituted in accordance with applicable laws of Canada, who makes the investment in the territory of the Arab Republic of Egypt . . .
	[Article I(a)]
(ii) the term "juridical person " means	(a) "enterprise" 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.[241]	(i) any entity constituted or organized under applicable law, whether or not for profit, whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association; and
	(ii) a branch of any such entity[242]

Table 1: Comparison of Egyptian "*Juridical Person*" Investor And Canadian "*Enterprise*" Investor

119. A complete comparison of these definitions results in the opposite conclusion to that advocated by Canada: these definitions are consistent in both structure and substance. Like the definition of an Egyptian "*juridical person*" investor, the BIT defines Canadian "*enterprise*" investors to include "*any enterprise incorporated or duly constituted in accordance with* [Canadian law]," and provides a list of examples of entities which qualify as an "*enterprise*."[243]

---

241 **Exhibit CL-001**, BIT (English), Article I(g).

242 **Exhibit CL-001**, BIT (English), Article I(a) and I(g).

243 **Exhibit CL-001**, BIT (English), Article I(a) and I(g). Moreover, the definition of an "*enterprise*" identifies two categories of entities which satisfy the definition: "(*i) any entity constituted or organized under applicable law . . . ; and (ii) a branch of any such entity*." Applying Canada's arguments made with respect to an Egyptian "*juridical person*," Canada's interpretation of the word "*and*" would have the Tribunal conclude that these two categories are instead two independent and additional requirements to qualify as a Canadian "*enterprise*." In other words, not only must the entity be constituted or organized under applicable

120. In sum, the ordinary meaning across each of the authentic texts of the BIT is clear and consistent: there is no independent requirement for GTH to have permanent residence in Egypt in order to be recognized as an Egyptian juridical person. Canada's objection *ratione personae* therefore fails.

III.B.1.b. Supplementary Means Of Interpretation Confirm The Ordinary Meaning Of "*Investor*"

121. The Tribunal need not turn to supplementary means of interpretation to interpret Article I(g) because the ordinary meaning of the BIT is clear.[244] However, supplementary sources confirm the ordinary meaning of Article I(g)'s definition of an Egyptian juridical person as advanced by GTH.

122. Canada has produced in the disclosure process a copy of the model bilateral investment treaty Canada provided to Egypt to inform their negotiations of this BIT ("**1994 Model BIT**").[245] This 1994 Model BIT reveals that Canada left it to its partner State to fill-in-the-blank as to who would qualify as a protected investor:

> *in the case of Canada:*
>
> > *(i) any natural person possessing the citizenship of or permanently residing in Canada in accordance with its laws; or*

law, but it must also be a branch of any such entity. This result of this reading is incoherent and demonstrates further why Canada's interpretation cannot be accepted.

[244] *See* **Exhibit CL-018**, VCLT, Article 32. *See also* **Exhibit CL-061**, *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, ¶ 582; **Exhibit RL-075**, *Orascom TMT Investments S.à.r.l. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Award, 31 May 2017, ¶ 299; **Exhibit CL-132**, *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA Case No. AA 227, Interim Award on Jurisdiction and Admissibility, 30 November 2009, ¶ 268 (the award in *Yukos* was rendered as part of three parallel arbitrations that were heard by a tribunal simultaneously).

[245] **Exhibit CL-107**, Canada Model BIT (1994); **Exhibit CL-109**, Fax from John Schofield to Ayman Aly Osman, 10 March 1996, (correspondence to Egypt forwarding Canada's 1994 Model BIT). Canada has submitted a later version of its model BIT on the record from 2004, which could not have been the model BIT that informed the Parties' negotiations. *See* **Exhibit RL-117**, Canada Model BIT (2004).

> *(ii) any enterprise incorporated or duly constituted in accordance with applicable laws of Canada,*
>
> *who makes the investment in the territory of ----------(the other Contracting Party; and*
>
> *in the case of ----------:*
>
> *(i) ----------; or*
>
> *(ii) ----------*
>
> *who makes the investment in the territory of Canada and who does not possess the citizenship of Canada.*[246]

123. Therefore, it is clear that Canada did not intend to limit the definition of an Egyptian "*juridical person*" to the narrow construction advocated in its submission.[247] On the other hand, Egypt's model BIT provides the following definition for an Egyptian "*juridical person*" investor, which replaces the commas separating each element of the list in Article I(g) of the BIT with semi-colons:

> *"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 other organisations; and having permanent residence in the territory of one of the Contracting Party.*[248]

124. As the commas separated elements of a series in the BIT, the semi-colons separate the same elements in the Egypt Model BIT. Semicolons "*can aid clarity*" when "*items in a series* [*i.e.*, list] *themselves contain internal punctuation*" and the use of commas

---

[246] **Exhibit CL-107**, Canada Model BIT (1994), Article I(e).

[247] Canada has itself explained that the reference to permanent residence is not included in any of its other bilateral investment treaties when defining which investors the agreement will cover, and it has provided no evidence to suggest it would seek such a requirement only with respect to Egypt. Canada's Memorial on Jurisdiction and Admissibility, ¶ 63.

[248] **Exhibit CL-090**, Egypt Model BIT *in* UNCTAD, *International Investment Instruments: A Compendium* (Vol. V. 2000), Doc No. UNCTAD/DITE/2(Vol.V).

might lead to ambiguity.[249] Thus, the use of semi-colons in the Model BIT makes it all the more clear that Egypt intended "*having permanent residence*" to serve as another example of a qualifying entity, and not a separate requirement.

125. Supplementary means of interpreting Article I(g) therefore confirm that permanent residence is not a requirement in order to qualify as an Egyptian "*juridical person*" investor.

III.B.1.c. GTH's Interpretation Of "*Investor*" Best Reconciles Any Discrepancies Between The Authentic Texts

126. In the rare circumstance where a difference in meaning between the authenticated texts remains after applying the basic canons of interpretation provided at Articles 31 and 32 of the VCLT, Article 33(4) directs the Tribunal to adopt "*the meaning which best reconciles the texts, having regard to the object and purpose of the treaty*."[250]

127. The meaning that best reconciles the texts is clear and set forth above, confirming that the ordinary meaning of the provision cannot require permanent residence in Egypt.[251] Canada's so-called reconciliation of the texts would have the Tribunal revise and ultimately ignore the express language of the BIT, and in particular the French version. Putting aside the ordinary meaning of the provision, its context, and punctuation, it is

---

249 **Exhibit CL-134**, THE CHICAGO MANUAL OF STYLE (16th ed. 2010), ¶ 6.58.

250 **Exhibit CL-018**, VCLT, Article 33(4).

251 *See supra* **Part III.B.1.a**. In *Hesham v Indonesia*, a tribunal engaged in a similar interpretative exercise, considering an agreement authenticated in English, French, and Arabic. The tribunal found that the English text made "*clumsy and ambiguous use*" of a word whereas the French and Arabic texts translated in English presented "*a much more natural and meaningful term in English than the term in fact used*." The tribunal observed that interpreting the provision pursuant to the VCLT, therefore, required an interpretation that "*gives the same meaning in each authentic text*" and "*best reconciles the text in regard to the object and purpose of the*" agreement. **Exhibit CL-147**, *Hesham Talaat M. Al Warraq v. Republic of Indonesia*, UNCITRAL, Final Award, 21 June 2012, ¶ 72.5.

simply not possible to equate the phrase "*having the right to permanent residence*" with a **separate** requirement to "*have permanent residence*."

128. In the event the Tribunal finds that the differences in meaning between the three authentic texts cannot be reconciled, the tribunal should reject the interpretation of the BIT that is contrary to the BIT's object and purpose. When considering two conflicting authentic texts,[252] the tribunal in *BG v. Argentina* dismissed the interpretation offered by Argentina, noting that, "[a]*doption of the Spanish term of the BIT as advocated by Argentina 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*."[253] The Tribunal should similarly dismiss Canada's attempt to the stifle the object and purpose of the BIT.

III.B.1.d. GTH Qualifies As An Egyptian "*Juridical Person*"

129. Applying the correct definition of an Egyptian juridical person investor, GTH qualifies as a protected Egyptian investor under this BIT. GTH was and continues to be an Egyptian joint stock company incorporated in accordance with the laws of Egypt.[254] GTH, therefore, satisfies the definition of an Egyptian juridical person pursuant to Article I(g) and Canada's objection *ratione personae* must be dismissed.

---

252 **Exhibit CL-047**, *BG Group Plc. v. The Republic of Argentina*, UNCITRAL, Final Award, 24 December 2007, ¶¶ 129-30 (considering that where the Spanish authentic text referred to a "*negotiable instrument*", a term with a "*narrow legal meaning*", but the English authentic text referred to a broader concept of "*claims to money*", the two terms were "*semantically irreconcilable*").

253 **Exhibit CL-047**, *BG Group*, Final Award, ¶ 134.

254 *See supra* ¶ 102.

[redacted]

130. [redacted]

III.B.2.a. [redacted]

131. The three authentic texts refer to "*permanent residence*."[256] "*Permanent*" is defined in the Oxford English Dictionary to mean "[c]*ontinuing or designed to continue or last indefinitely without change; abiding, enduring, lasting; persistent*."[257] "*Residence*" is defined, in its ordinary usage, 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*."[258] Therefore, the ordinary meaning of the words "*permanent residence*" is a place where an entity resides for a continuing period.

132. However, Canada once again misreads the plain language of the BIT in an effort to create a more stringent standard. Purporting to interpret the word "*permanent*," Canada argues, citing no authority, that it "*conveys* ***a sense of exclusivity****: an entity may have*

---

255 The Parties agrees that the terms "*permanent residence*" should be interpreted in accordance with the VCLT. *See* Canada's Memorial on Jurisdiction and Admissibility, ¶¶ 65-74.

256 *See* **Exhibit CL-001**, BIT (English), Article I(g); **Exhibit CL-002**, BIT (French), Article I(f); **Exhibit CL-003**, BIT (Arabic), Article I(g).

257 **Exhibit RL-076**, Oxford English Dictionary Online, Definition of "*permanent*, adj. and n.," http://www.oed.com/view/Entry/141184 (accessed 9 November 2017), p. 1.

258 **Exhibit RL-077**, Oxford English Dictionary Online, Definition of "*residence*, n.[1]," http://www.oed.com/view/Entry/163559 (accessed 9 November 2017), p. 1.

residence in multiple States at any point in time, but only one of those residences can be considered 'permanent.'"[259] Nothing in the word "*permanent*" suggests exclusivity, and no definition cited by Canada allows it to make this leap. And it is illogical for Canada to take this position—especially for juridical persons, which can be present in multiple places at the same time.

133. Reaching further, Canada argues, again citing no authority, that in conjunction with the word "*residence*," "*permanent*" means the singular place where an entity has its "*strongest ties*" / "*strongest attachment*" and where it intends to continue to reside.[260] To establish the Egyptian juridical person's place of strongest ties/attachment, Canada posits, once again citing no authority, that the Tribunal should undertake a comparative exercise whereby it must assess an entity's ties to each possible jurisdiction to decide where the ties are the strongest.[261] Canada's standard is contrived for the purpose of this Arbitration and finds no support in the ordinary meaning of the BIT or any authority, legal or otherwise.

134. **First**, there is nothing in the ordinary meaning of "*permanent residence*," including anything that can be derived from the context and purpose of the terms, to support this "*strongest ties*" / "*strongest attachment*" test.

135. **Second**, Canada's interpretation would have the Tribunal believe that a large multinational company with offices around the globe can only have one "*permanent*

---

259 Canada's Memorial on Jurisdiction and Admissibility, ¶ 76 (emphasis added).

260 Canada's Memorial on Jurisdiction and Admissibility, ¶¶ 75, 78.

261 Canada's Memorial on Jurisdiction and Admissibility, ¶ 79. Canada argues that this requires looking to the juridical person's "*business activities* [and] *management and operations*." *See* Canada's Memorial on Jurisdiction and Admissibility, ¶¶ 78-79.

residence."[262] Even in the context of natural persons, Canada's concocted test has been rejected by tribunals absent express treaty language.[263] Given the reality of corporate personality, the attempt to import this test into the BIT is illogical.

136. **Finally**, by arguing that the Tribunal must look to the business activities, management, and operations of a juridical person to assess where it has the "*strongest ties*," Canada attempts to interpose on the terms "*permanent residence*" a standard closer to one that looks to the entity's dominant nationality even though no such test exists as a general principle of international law.[264] If the State Parties intended for such a test to apply,

---

[262] This proposition is absurd given that tribunals have recognized even in the context of natural persons the possibility of having more than one permanent residence. *See* **Exhibit RL-074**, *Binder v. The Czech Republic*, UNCITRAL, Award on Jurisdiction, 6 June 2007, ¶ 73 ("*the possibility of two permanent residences may not be entirely excluded according to the wording of the BIT*"). *See also* **Exhibit CL-121**, *Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7, Award, 7 July 2004, ¶ 72 (noting that "[r]*esidence does not imply continuous presence and does not disallow travel*.").

[263] *See* **Exhibit 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, ¶ 140 (the tribunal rejected the respondent's attempt to establish a "*subsidiary link*" in the treaty definition of "*investor*" where an investor could be a citizen or a permanent resident of a contracting party, finding that if the contracting parties wanted to create a link "*this would have been expressed using clearer and more precise language*"); **Exhibit CL-038**, *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, ¶¶ 239, 241 (the tribunal declined to inquire whether the claimant had "*real and continuous links*" to State of nationality where the BIT did not require such a test; "*The Tribunal cannot in effect impose upon the parties a definition of 'investor' other than that which they themselves agreed. . . . it is not open to the Tribunal to add other requirements which the parties could themselves have added but which they omitted to add*."); **Exhibit RL-049**, *Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L., and S.C. Multipack S.R.L. v. Romania,* ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, 24 September 2008, ¶ 101 ("*It is also doubtful whether the genuine link test would apply pursuant to the BIT. The Contracting Parties to the BIT are free to agree whether any additional standards must be applied to the determination of nationality. . . . the clear definition and the specific regime established by the terms of the BIT should prevail and that to hold otherwise would result in an illegitimate revision of the BIT*."); **Exhibit CL-114**, *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues, 6 December 2000, ¶¶ 30-36 (rejecting Mexico's attempt to revise the definition of "*investor*" to exclude a national who was a permanent resident of Mexico but had citizenship of the United States; noting that the test for "*dominant or effective nationality*" does not apply where there is a conflict between permanent residence and citizenship conferred under normal circumstances).

[264] *See* **Exhibit CL-135**, Vaughan Lowe, *Injuries to Corporations*, *in* THE LAW OF INTERNATIONAL RESPONSIBILITY (2010), p. 1009 ("*There is, moreover, still little sign of any 'genuine connection' test establishing itself in international practice concerning the protection of corporations*."); **Exhibit CL-128**, Christoph H. Schreuer, Loretta Malintoppi, August Reinisch & Anthony Sinclair, THE ICSID CONVENTION: A COMMENTARY (2d ed. 2009), p. 292 ("*ICSID practice repeatedly confirms that in the absence of a definition of nationality in a treaty or law imposing further, more substantial connections than mere incorporation or seat, it is both permissible and to be expected that investors will structure their investments in order to avail themselves of treaty protection and, thus, the right to submit disputes to ICSID*.").

they would have used those words.[265] One need only turn to Canada's own legal authorities to conclude that tribunals routinely reject attempts by respondent States to create additional and more restrictive requirements to qualify as protected investors under a BIT.[266] This Tribunal should reject Canada's attempt to do so here.

137. Canada relies exclusively on two irrelevant cases to support its interpretation—*Binder v. The Czech Republic* and *Uzan v. The Republic of Turkey*. Both address the investor status of **natural persons, not juridical persons**, and are therefore inapposite. As Canada's own expert correctly observes, considerations with respect to the nationality of natural persons "[are] *irrelevant to the concept of 'permanent residence' for juridical persons*."[267]

---

[265] *See* **Exhibit 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, ¶ 359 ("*The Tribunal cannot find a* 'genuine link*' requirement in the Cyprus-Hungary BIT . . . The Tribunal cannot read more into the BIT than one can discern from its plain text*."); **Exhibit CL-120**, *Tokios Tokelės v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004, ¶¶ 38-39 (declining to apply a control test to determine the nationality of the claimant where the BIT did not require such a test: "*Contracting Parties are free to define their consent to jurisdiction in terms that are broad or narrow; they may employ a control-test or reserve the right to deny treaty protection to claimants who otherwise would have recourse under the BIT. Once that consent is defined, however, tribunals should give effect to it, unless doing so would allow the Convention to be used for purposes for which it clearly was not intended*.").

[266] *See, e.g.*, **Exhibit CL-075**, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, ¶ 252 (finding that the claimant met the definition of investor despite its management being headquartered in a third country because "*where the test for nationality is 'incorporation' as opposed to control or a 'genuine connection', there is no need for the tribunal to enquire further unless some form of abuse has occurred*."); **Exhibit RL-005**, *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility, 18 April 2008, ¶ 93 ("*there is simply no room for an argument that a supposed rule of 'real and effective nationality' should override either the permissive terms of Article 25 of the ICSID Convention or the prescriptive definitions incorporated in the BIT*."); **Exhibit RL-004**, *Alpha Projectholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award, 8 November 2010, ¶¶ 333-45 (rejecting Ukraine's attempt to disqualify the claimant as an "*investor*" under Article 25 of the ICSID Convention and the applicable BIT by adding additional requirements beyond "*the bright-line tests of nationality jurisdiction*" provided under both instruments); **Exhibit RL-047**, *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013, ¶¶ 110-39 (rejecting the Kazakhstan's request to impose a "*real and effective nationality*" requirement as it went beyond the definition provided in the BIT).

[267] **RER-Zulficar**, Section V.A ("*Reference to 'domicile' and 'habitual residence' for natural persons is irrelevant to the concept of 'permanent residence' for juridical persons*"). *See also* **RER-Zulficar**, ¶ 39 ("[w]*ith respect to natural persons, which I understand are of no concern or relevance in the present proceedings*"). Moreover, the BIT distinguishes between the definitions of natural persons and juridical persons. *See* **Exhibit CL-001**, BIT (English), Article I(g).

138. Moreover, these cases do not support Canada's test that the tribunal must determine permanent residence by picking the jurisdiction to which the investor has the strongest ties.[268] In *Binder v. The Czech Republic*, the parties to the arbitration agreed to interpret the provision in the Czech-German bilateral investment treaty as requiring a natural person investor to have permanent residence in only **one** of the relevant Contracting Parties to which Mr. Binder had an attachment (the Czech Republic or Germany).[269] It was only on the basis of this agreement that the tribunal explained that in the event Mr. Binder had an attachment to both the Czech Republic and Germany, it would determine his permanent residence by reference to where he had a stronger attachment.[270]

139. Similarly, the tribunal in *Uzan v. Turkey* was interpreting a provision in the Energy Charter Treaty only related to natural persons, which required the natural person claimant to show that he was "*permanently residing in that Contracting Party in accordance with its applicable law*."[271] The tribunal found that to satisfy this provision, the natural person investor must show **both** that she or he was "*permanently residing*" in the Contracting Party as a matter of fact and that she or he satisfied any legal requirement under the domestic law (given the explicit *renvoi* to domestic law).[272] The tribunal concluded 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.*"[273] In other words, the term "*residing*" was

---

268 Canada's Memorial on Jurisdiction and Admissibility, ¶¶ 79-80.

269 **Exhibit RL-074**, *Binder*, Award on Jurisdiction, ¶ 73 ("*The Parties agree that the Czech-German BIT envisages a permanent residence in one State only*.").

270 **Exhibit RL-074**, *Binder*, Award on Jurisdiction, ¶¶ 73-75.

271 **Exhibit RL-078**, *Uzan*, Award on Respondent's Bifurcated Preliminary Objection, ¶ 155.

272 **Exhibit RL-078**, *Uzan*, Award on Respondent's Bifurcated Preliminary Objection, ¶ 156.

273 **Exhibit RL-078**, *Uzan*, Award on Respondent's Bifurcated Preliminary Objection, ¶ 156.

used as a verb, rather than a noun (*i.e.*, residence). The tribunal in fact clarified that "[i]*f the intention . . . 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'*" as opposed to requiring that the investor was "*permanently residing*" in the home State.[274]

140. In short, none of the cases relied upon by Canada support its interpretation of "*permanent residence.*" Rather, "*permanent residence*"—if it is even required—only means that GTH must have a continuing presence in Egypt.

III.B.2.b. [redacted]

141. Egyptian law has a limited role in interpreting this BIT.[275] It is relevant here to the extent that the definition of an Egyptian "*juridical person*" requires nothing more than that an Egyptian investor be "*recognized as a juridical person by the laws of the Arab Republic of Egypt*."[276] As already explained, GTH is recognized as a juridical person under Egyptian law.[277] That should be the end of the matter.

142. Canada does not contest that GTH is a juridical person as a matter of Egyptian law. Rather, Canada submits that because Egyptian law does not have a concept of "*permanent residence*" for juridical persons, as supported by its expert Dr. Abdel

---

274 **Exhibit RL-078**, *Uzan*, Award on Respondent's Bifurcated Preliminary Objection, ¶ 156.

275 *See* **Exhibit RL-075**, *Orascom TMT Investments*, Award, ¶ 275 ("*it is important to recognize that the principles on the determination of nationality in one framework do not necessarily apply in another framework, which was not always apparent from the Parties' pleadings. Indeed, the meaning of a term in one framework may not be the same in other legal areas*"); **Exhibit CL-138**, *Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction, 8 March 2010, ¶ 54 ("*points of relevant domestic law may inform the Tribunal's jurisdictional analysis, but its conclusions must ultimately be reached under the BIT and the ICSID Convention themselves*.").

276 **Exhibit CL-001**, BIT (English), Article I(g).

277 *See supra* ¶ 102.

Wahab,[278] domestic law is of limited relevance in this case.[279] However, as established above, Egypt was the State that drafted the definition of an Egyptian "*juridical person*" investor.[280] Therefore, Egyptian law provides the following insights to assist this Tribunal to understand Egypt's intent.

143. **First**, Egyptian law refers to juridical persons that are "*residents*" of Egypt. As explained by Canada's expert, the law provides that a juridical person is considered "*resident*" in Egypt if it is incorporated under Egyptian law.[281] GTH clearly satisfies this test.

144. **Second**, as a matter of Egyptian law, because GTH is a joint stock company incorporated in Egypt, GTH is required to maintain a "*principal office*" / "*registered office*" in Egypt.[282] GTH has had a registered office in Egypt at all relevant points in time.[283]

145. **Third**, Egyptian law **entitles** all juridical persons to an "*independent domicile*," consistent with the French version of the BIT, which provides as an example entities that "*have the right*" to permanent residence in Egypt.[284] The concept of domicile as a matter of Egyptian law is analogous to the concept of permanent residence used in the BIT. The domicile of a juridical person is "*deemed to be the place where its place of*

---

278 **RER-Zulficar**; Canada's Memorial on Jurisdiction and Admissibility, ¶¶ 65-74.

279 Canada's Memorial on Jurisdiction and Admissibility, ¶ 65.

280 *See supra* ¶¶ 122-123.

281 **RER-Zulficar**, ¶ 69.

282 **CER-Sarie-Eldin**, ¶ 21.

283 **Exhibit C-397**, Global Telecom Holding S.A.E., *Current Corporate Status of Global Telecom Holding S.A.E.*, 25 May 2016, *attaching* Global Telecom Holding S.A.E. commercial register extract, 4 May 2016 (Arabic and English translation); **CER-Sarie-Eldin**, ¶ 23, n. 6.

284 **Exhibit HSE-002**, Egyptian Civil Code, Law No. 131 of 1948, Article 53(2); **Exhibit CL-002**, BIT (French), Article I(f). *See also* **CER-Sarie-Eldin**, ¶¶ 19-20.

management is located." [285] For a company "*that ha*[s its] *principal place of management abroad and have an activity in Egypt, its place of management is deemed to be the place where its local management is located.*"[286] Therefore, as a juridical person under Egyptian law, GTH is entitled to an independent domicile in Egypt and, in fact, has its domicile at its principal office at the Nile City Towers in Cairo, Egypt.[287]

146. Egyptian law therefore makes clear that: (*i*) GTH is an Egyptian juridical person; (*ii*) as an Egyptian joint stock company, GTH is required by law to maintain a registered office in Egypt and in fact does maintain such an office; and (*iii*) all juridical persons are entitled to an independent domicile in Egypt and that domicile is deemed to be the place of its local management. In [redacted]

III.B.2.c. [redacted]

147. [redacted]

[285] **Exhibit HSE-002**, Egyptian Civil Code, Law No. 131 of 1948, Article 53(2)(d). *See also* **CER-Sarie-Eldin**, ¶ 19.

[286] **Exhibit HSE-002**, Egyptian Civil Code, Law No. 131 of 1948, Article 53(2)(d). *See also* **CER-Sarie-Eldin**, ¶¶ 19-20.

[redacted]

148.

149.

[289] **CER-Sarie-Eldin**, ¶ 25 (citations omitted). ; **Exhibit C-396**, Global Telecom Holding S.A.E., *All Resolutions Approved at Global Telecom Holding Shareholder Meetings*, pp. 1, 3 (identifying GTH's Investor Relations Manager in Cairo, Egypt, and emphasizing that all "*General Assembly*" meetings "*shall not convene except in the Governorates of Giza or Cairo*.").

[redacted]

150. [redacted]

III.C. The Tribunal Has Jurisdiction Over Claims Arising From Canada's Treatment Of GTH's Voting Control Application

151. As described in **Part II.G**, Canada prevented GTH from exercising rights contained in Wind Mobile's governing documents—documents which multiple arms of the Canadian government had reviewed—to obtain voting control of Wind Mobile.[292] Canada did so by conducting a lengthy and opaque national security review of GTH in response to its Voting Control Application, and [redacted] Throughout this process, and in response to direct efforts by GTH to understand the serious allegations against it, Canada obfuscated and refused to provide GTH with information regarding the nature of its

[291] Canada's Memorial on Jurisdiction and Admissibility, ¶¶ 84-99 (exploring, for example, GTH's international businesses and foreign employees).

[292] *See also* GTH's Memorial on Merits and Damages, ¶¶ 182-208.

alleged concerns, while using its national security review to promote its telecommunications policy objective of engineering a fourth player in the market.

152. Canada's failure to accord basic due process to GTH and its [redacted] breached the guarantees of FET and FPS under the BIT,[293] as well as the specific guarantee of national treatment protection "*with respect to the expansion, management, conduct, operation and sale or disposition of investments*."[294]

153. The Tribunal has jurisdiction over GTH's claims and there is no applicable exception pursuant to a good faith interpretation of the BIT's provisions. However, Canada seeks to bar the Tribunal from considering whether its treatment of GTH's efforts to take voting control of Wind Mobile constitutes breaches of the BIT by advancing two baseless jurisdictional objections. **First**, Canada alleges that Article II(4)(b) excludes from dispute resolution Canada's treatment of GTH's efforts to take voting control over its investment, Wind Mobile. **Second**, Canada claims that in Article IV(2) and the Annex to the BIT, it excluded from its national treatment protection obligation investments in the telecommunications sector.

154. To advance its objections, Canada once again misconstrues the ordinary meaning of the BIT's provisions, while ignoring other critical elements of the BIT that undermine its interpretation. For the reasons set forth below, each of Canada's objections must be dismissed.

---

293 *See infra* **Parts IV.A.3** and **IV.B**; GTH's Memorial on Merits and Damages, ¶¶ 345-60, 380.

294 **Exhibit CL-001**, BIT (English), Article IV(1). *See infra* **Part IV.D**; GTH's Memorial on Merits and Damages, ¶¶ 387-94. In the alternative to Article IV(1), GTH alleges a breach of the national treatment protection described in Article II(3) of the BIT.

III.C.1. The BIT Permits The Arbitration Of Claims Arising From GTH's Attempts To Exercise Its Right To Obtain Voting Control Of Wind Mobile

155. Canada's treatment of GTH's efforts to take voting control of Wind Mobile involved a series of actions that concluded [redacted]. Canada's actions breached the BIT, and nothing in the BIT prevents this Tribunal from holding Canada accountable for these breaches.

156. Canada has alleged, however, that Article II(4) of the BIT operates to exclude from this Tribunal's jurisdiction claims arising from Canada's treatment of GTH's efforts to take voting control. Yet, Canada appears to misunderstand not only the ordinary meaning of Article II(4) as a whole, but the facts relevant to, and claims arising from, the treatment of GTH's Voting Control Application. Simply put, Article II(4) is irrelevant because GTH's efforts to take voting control over Wind Mobile were not attempted "*acquisitions*" as contemplated under Article II(4)—GTH sought to convert non-voting shares that it already owned by exercising a preexisting right, that GTH had already acquired, to assume voting control of its investment.

157. Moreover, even if GTH's bid to take voting control over Wind Mobile amounted to an acquisition of Wind Mobile and therefore Article II(4) had any relevance, the matter in dispute is not [redacted], but Canada's improper treatment of GTH that led to an unjustified conclusion. Therefore, if Article II(4) applied, GTH's claim would fall under Article II(4)(a), which expressly provides that Canada's breaches of its BIT obligations in reaching its decisions are not exempt from Arbitration.

158. Thus, nothing in Article II(4) prevents the Tribunal from exercising jurisdiction over claims arising from Canada's treatment of GTH's Voting Control Application.

III.C.1.a. The Ordinary Meaning Of Article II(4) Of The BIT Shows That It Does Not Apply

159. The Parties agree that Article II sets out the obligations of the Contracting Parties with respect to the "*Establishment, Acquisition and Protection of Investments*."[295] The overarching purpose of these obligations is to effectuate the BIT's stated goal to promote investments, stimulate business initiative, and develop economic cooperation between the Parties.[296] On this basis, Article II articulates certain fundamental rights that Egyptian investors can expect to enjoy if they make the decision to invest in Canada and vice-versa. Specifically, Article II(3) requires that the Contracting Parties:

> **[S]*hall permit*** *. . . acquisition of an existing business enterprise or a share of such enterprise by 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*
>
> *(b) investors or prospective investors of any third state.*[297]

160. In this context, Article II(4) follows this unambiguous obligation, by excluding from either investor-state dispute resolution (Article XIII of the BIT) or Contracting Party dispute resolution (Article XV of the BIT) certain types of "[d]*ecisions*" and decision-making. Article II(4) provides in complete part:

---

[295] **Exhibit CL-001**, BIT (English), Article II (heading). *See* Canada's Memorial on Jurisdiction and Admissibility, ¶ 124.

[296] **Exhibit CL-001**, BIT (English), Preamble and Article II(1) ("*Each Contracting Party shall encourage the creation of favourable conditions for investors of the other Contracting Party to make investments in its territory*.").

[297] **Exhibit CL-001**, BIT (English), Article II(3) (emphasis added).

> *(a) Decisions by either Contracting Party, pursuant to measures not inconsistent with this Agreement, as to whether or not to permit an acquisition shall not be subject to the provisions of Articles XIII or XV of this Agreement.*
>
> *(b) 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.*[298]

161. As is plain from the above, Article II(4) is only relevant in the context of Canada's decisions or decision-making relating to an "***acquisition*** *of an existing business enterprise or a share of such enterprise*" or an "***establishment*** *of a new business enterprise*."[299] An investor cannot acquire or establish something it already owns.[300] The subject of GTH's Voting Control Application was to convert its non-voting shares to voting shares to take control of its investment and Wind Mobile.[301] In this process,

---

298 **Exhibit CL-001**, BIT (English), Article II(4).

299 **Exhibit CL-001**, BIT (English), Article II(4) (emphasis added).

300 *See* Canada's Memorial on Jurisdiction and Admissibility, ¶¶ 120-22. Similarly, although the provision refers to existing investors that may engage in subsequent acquisitions (including the purchase of additional shares in an existing enterprise or the purchase of new enterprises) this provision does not regulate the rights existing investors have in shares they already own. GTH's exercise of existing rights to convert non-voting shares to voting shares cannot be equated with a subsequent acquisition. *See* **Exhibit CL-182**, English Oxford Living Dictionaries Online, Definition of "*acquisition*," https://en.oxforddictionaries.com/definition/acquisition (accessed 2 November 2018), p. 1 (emphasizing that an acquisition entails the "*a purchase of one company by another*" or the "*buying or obtaining of assets or objects*."). Analogously, it is "*well established in international law that a State may not take away accrued rights of a foreign investor by domestic legislation abrogating the law granting these rights*." **Exhibit RL-219**, *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, ¶ 335.

301 *See* **Exhibit C-027**, Letter from William G. VanderBurgh to Industry Canada, Director of Investments, *attaching* Voting Control Application, 24 October 2012; **Exhibit C-084**, *Declaration of Ownership and Control of* Globalive Wireless LP *as a Provisional Winner of Spectrum Licences in the 2 GHz Range Including AWS, PCS and the Band 1670-1675 MHz*, 5 August 2008, pp. 163 (*Articles of Amendment*, 30 July 2008, p. 1f) (*In the event that Radiocom Legislation enables non-Canadian persons to increase their voting shareholdings in GIHC beyond that permitted on the date of filing of these share provisions, then any holder of Class D Non-Voting Common Shares* ***shall be entitled*** *at the holder's option to* ***convert*** *any or all of the Class D Non-Voting Common Shares held by the holder into . . . (b) in the case of a holder that is not a Resident Canadian, fully paid and non-assessable Class B Voting Common Shares*") (emphases added), 80 (*Shareholders' Agreements*, 31 July 2008, p. 20) ("***6.6 Right of Orascom to Increase Voting Interest.*** *Orascom shall have the right to increase its voting interest in Globalive Holdco*"), 92 (*Shareholders' Agreements*, 31 July 2008, Schedule C, p. 4) ("*In the event that Radiocom Legislation enables the maximum percentage of ownership of voting shares of Globalive Holdco to be higher than that permitted on the date of filing of these share provisions, then any holder of Class C Non-Voting Common Shares shall*

GTH was neither acquiring Wind Mobile nor a share of Wind Mobile. At the time of GTH's Voting Control Application, Canada came to the same conclusion. At the time, Assistant Deputy Minister Stewart explained:

> *It is important to note that Orascom/Vimplecom* [sic] *is not increasing its ownership stake in Globalive, but rather executing an option that Orascom has held since its original investment in 2009 to convert non-voting to voting shares in the event that telecom foreign investment restrictions no longer applied to the company.*[302]

162. Thus, Article II(4) simply does not apply.

163. Rather than accept the ordinary meaning of Article II(4), Canada argues that the term "*acquisition*" covers "***all** forms of transactions **that lead to gaining control** or ownership of the enterprise*."[303] This unsupported inclusion of "*gaining control*" over an enterprise is, of course, nowhere to be found in Article II(4), and amounts to a thinly-veiled effort by Canada to qualify its treatment of GTH's Voting Control Application as a decision relating to an "*acquisition*." If "*acquisition of an existing business enterprise*" in fact included "*acquisition **of control** of an existing business enterprise*," this provision would have said so. Indeed, elsewhere in the BIT, the Contracting Parties appear to contemplate arbitration of claims in circumstances where Canada or Egypt "*has deprived a disputing investor of control of an enterprise*."[304]

---

be entitled at the holder's option to convert any and all of the Class C Non-Voting Common Shares held by the holder into . . . (b) in the case of a holder that is not Resident Canadian, fully paid and non-assessable Class B Voting Common Shares").

302 **Exhibit C-336**, Letter from Iain Stewart to Marie-Josée Thivierge, 14 December 2012, p. 2.

303 Canada's Memorial on Jurisdiction and Admissibility, ¶ 121 (emphases added). Canada continues by adding that the provision covers a scenario "*where an investor is a minority shareholder of an enterprise and wishes to purchase shares of that enterprise that would give it ownership and control of the enterprise, thereby constituting an acquisition of that enterprise*." Canada's Memorial on Jurisdiction and Admissibility, ¶ 122.

304 **Exhibit CL-001**, BIT (English), Article XIII(12)(b).

164. Canada seeks to expand the language of the BIT by cherry-picking self-serving domestic legislation that was enacted after GTH's investment was made. While domestic law is not relevant to interpret this provision referring to mutual obligations and exceptions (something Canada has itself alleged to support its *ratione personae* objection addressing Egypt's definition of a "*juridical person*" investor[305]), Canada devotes a bulk of its analysis to importing the requirements of its domestic legislation, the Investment Canada Act ("**ICA**"), into the BIT.[306] Canada's objective is obvious: it hopes to expand Article II(4) beyond the express scope of the provision to cover investment activities which may be subject to review under the ICA. Specifically, the ICA allows Canada to review a proposed investment by a non-Canadian "*to acquire control of a Canadian business*" to determine whether an investment is likely of net benefit to Canada and, as of 2009, whether an investment is injurious to national security.[307]

165. Yet, there is no reference to the ICA in this BIT. As Canada itself explains in its submission, Canada specifically referred to the ICA where it meant to do so in other treaties.[308] As eminent commentators have observed:

---

[305] *See* Canada's Memorial on Jurisdiction and Admissibility, ¶ 74 (noting that "[g]*iven the absence of an express* renvoi *to Egyptian law*" permanent residence should be interpreted as an autonomous treaty concept).

[306] *See* Canada's Memorial on Jurisdiction and Admissibility, ¶¶ 129-33, 146-47.

[307] **Exhibit C-009**, Investment Canada Act, R.S.C. 1985, c. 28, 1st Supp., ss 25.1, 25.4. *See also* Canada's Memorial on Jurisdiction and Admissibility, ¶ 129.

[308] Canada's excuse that it elected to use more "*generic terms*" and did "*not refer specifically to the domestic legislation regarding investment review and authorizations in either country*" in this treaty "*to extend application to both Contracting Parties*" does not withstand scrutiny. Canada's Memorial on Jurisdiction and Admissibility, ¶¶ 118, n. 156, 140. In other treaties to which Canada is a party, decisions under the ICA are carved out explicitly and clearly by naming that legislation, and the corresponding legislation of the counter-party. *See, e.g.,* **Exhibit RL-100**, Agreement between the Government of Canada and the Government of the Kingdom of Thailand for the Promotion and Protection of Investments (signed 17 January 1997; entry into force 24 September 1998), Article II.4 ("*A decision by Canada, following a review under the Investment Canada Act, with respect to whether or not to permit an acquisition that is subject to review, shall not be subject to the dispute settlement provisions of Articles XIII or XV of this Agreement*"); **Exhibit RL-101**, North American Free Trade Agreement, U.S.-Can.-Mex. (signed 17 December 1992; entry into force 1 January 1994), Annex 1138.2 (in which Canada excludes from dispute resolution decisions by Canada with

> *Unilateral assertions of the disputing state party, on the meaning of a treaty provision, made in the process of ongoing proceedings are of limited value. Such statements are likely to be perceived as self-serving and determined by a desire to influence the tribunal's decision in favour of the state offering the interpretation.*[309]

166. Tribunals have rejected similar attempts by respondent States to use domestic law to limit their obligations under a BIT.[310] Moreover, allowing Canada to do so would run contrary to the VCLT's instruction on the primacy of international law, establishing

---

respect to whether or not to permit an acquisition following a review under the *Investment Canada Act*); **Exhibit RL-118**, Agreement between Canada and the Republic of Peru for the Promotion and Protection of Investments (signed 14 November 2006; entry into force 20 June 2007; suspended 1 August 2009), Annex E.51; **Exhibit RL-120**, Agreement between Canada and the Hashemite Kingdom of Jordan for the Promotion and Protection of Investments (signed 28 June 2009; entry into force 14 December 2009), Annex IV. Nor did the Contracting Parties exclude from dispute resolution actions necessary to protect essential security interests. *See, e.g.*, **Exhibit CL-073**, Agreement between the Government of Canada and the Government of the Republic of Benin for the Promotion and Reciprocal Protection of Investments (signed 9 January 2013; entry into force 12 May 2014), Article 20(4)(2); **Exhibit RL-129**, Agreement Between the Government of Canada and the Government of Burkina Faso for the Promotion and Protection of Investments (signed 20 April 2015; entry into force 11 October 2017), Article 18(4)(b); **Exhibit RL-126**, Agreement between Canada and the Republic of Cameroon for the Promotion and Protection of Investments (signed 3 March 2014; entry into force 16 December 2016), Article 17(4)(b); **Exhibit RL-120**, Agreement between Canada and the Hashemite Kingdom of Jordan for the Promotion and Protection of Investments (signed 28 June 2009; entry into force 14 December 2009), Article 10(4)(b).

309 **Exhibit CL-143**, Rudolf Dolzer & Christoph Schreuer, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW (2d ed. 2012), pp. 31-32.

310 *See* **Exhibit 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, ¶ 476 ("*It would be quite novel and potentially raise due process concerns in investment arbitration cases if a subsequent unilateral statement by one State could be given substantial, let alone decisive, weight*"); **Exhibit RL-189**, *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007, ¶ 385 ("*The view of one State does not make international law, even less so when a view is ascertained only by indirect means of interpretation or in a rather remote or general way as far as the very Treaty at issue is concerned. What is relevant is the intention which both parties had in signing the Treaty*"); **Exhibit RL-188**, *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007, ¶ 337 ("*Not even if this was the interpretation given to the clause today by the United States would this necessarily mean that such interpretation governs the Treaty. What is relevant is the intention the parties had in signing the Treaty*"); **Exhibit CL-136**, *SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, 12 February 2010, ¶ 72 (rejecting Paraguay's argument that an additional act by its Head of State that was required to consent to arbitration under domestic law, should be read into the BIT, when "*no such limitation or conditionality is anywhere to be found in Article 9 of the BIT; Paraguay did not qualify Article 9(4), for example, in any way.*"). *See also* **Exhibit CL-091**, *Certain German Interests in Polish Upper Silesia (Germany v. Poland)*, Judgment of 25 May 1926, P.C.I.J. Reports Series A, No. 7, p. 19 ("*From the standpoint of International Law . . . municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures*"); **Exhibit CL-142**, *CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/15, Decision on Jurisdiction, 30 December 2010, ¶ 70 (adopting the approach of the ICJ and the PCIJ that "*a sovereign State's interpretation of its own unilateral consent to the jurisdiction of an international tribunal is not binding on the tribunal or determinative of jurisdictional issues*.").

that "[a] *party may not invoke the provisions of its internal law as justification for its failure to perform a treaty*."[311] Absent the distorting lens of its own domestic legislation, Canada offers no further justification for its interpretation of the BIT.

167. Finally, invocations of carve-outs from dispute resolution should be treated cautiously.[312] The Tribunal must adopt a good faith reading of provisions purporting to limit the scope of claims subject to its jurisdiction in view of whether the Parties' conduct is *bona fide*.[313]

---

311 **Exhibit CL-018**, VCLT, Article 27. *See also* **Exhibit CL-028**, INTERNATIONAL LAW COMMISSION, *Responsibility of States for Internationally Wrongful Acts* (2001), Article 3 ("*The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.*"); **Exhibit RL-233**, INTERNATIONAL LAW COMMISSION, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001), p. 37 (citing jurisprudence of the PCIJ and ICJ which "*leave no doubt on* [this] *subject*"); **Exhibit CL-092**, *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, Advisory Opinion of 4 February 1932, P.C.I.J. Reports Series A/B, No. 44, p. 24 ("*a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force.*").

312 In *Occidental*, the tribunal held that the challenged conduct should be carefully examined to ensure it actually falls within the scope of clause carve-out. In this case, the challenged conduct was the failure to refund the claimant for the payment of taxes. The respondent alleged that the tribunal lacked jurisdiction because of a carve-out for taxation measures. However, the tribunal found that "*the parties do not dispute the existence of the tax or its percentage. What the parties really discuss is whether its refund has been secured . . .* [or] *it should be recognized as a right under Ecuadorian Tax Law*." Therefore, although related to tax, the measure itself was not a taxation measure and therefore the carve-out did not apply. **Exhibit CL-034**, *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. UN 3467, Final Award, 1 July 2004, ¶ 74. In the recent award in *Antaris*, the tribunal rejected the respondent's arguments that excluded measures under the ECT "*had no international content*" because this "*would permit Contracting Parties unilaterally to define those measures which were, and were not, subject to the ECT.*" The tribunal found that it "*must therefore make a substantive determination of the measure in light of the relevant facts rather than simply adopting the contracting state's own, formal characterization of that measure.*" **Exhibit CL-176**, *Antaris GMBH and Dr. Michael Göde v. The Czech Republic*, UNCITRAL PCA Case No. 2014-01, Award, 2 May 2018, ¶¶ 245, 249.

313 International investment tribunals have repeatedly recognized that States cannot thwart jurisdiction relying on measures purportedly excluded by treaties that were not *bona fide*. *See, e.g.*, **Exhibit CL-157**, *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA Case No. AA 227, Final Award, 18 July 2014, ¶¶ 1430-35 (finding it had jurisdiction to adjudicate on taxation measures despite a carve-out provision in the ECT, because Russia did not engage in a *bona fide* exercise of its tax powers); **Exhibit RL-231**, *RosInvestco*, Final Award, ¶ 628 (finding it had jurisdiction to inquire whether "*an abuse of tax law*" amounted to an expropriation); **Exhibit CL-148**, *Quasar de Valores SICAV S.A., Orgor de Valores SICAV S.A., GBI 9000 SICAV S.A., ALOS 34 S.L. v. The Russian Federation*, SCC Case No. 24/2007, Award, 20 July 2012, ¶ 179 ("*there is a world of difference between incidental detriment, even of a substantial nature, and purposeful dispossession. It is no answer for a state to say that its courts have used the world* [sic] *'taxation' . . . in describing judgments by which they effect the dispossession of foreign investors*."). *See also* **Exhibit CL-174**, INTERNATIONAL LAW COMMISSION, *Report of the International Law Commission on the Work of its Seventieth Session* (2018) UN Doc No. A/73/10, p. 32 ("*an element of good faith is necessary in any 'subsequent practice in the application of the treaty'. A manifest misapplication of a treaty, as opposed*

168. In this case, GTH's claims arise out of Canada's treatment of its Voting Control Application and whether Canada's actions comply with its obligations under the BIT, including its obligation to treat GTH fairly and equitably. This 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 this BIT. That exercise does not involve simply accepting Canada's bald assertion that its actions fall under any particular carve-out. Rather, it is a matter of examining the factual record, and in particular, the conduct of the respondent State. There is no presumption in favor of Canada's sovereign prerogative or Canada's interpretation of Article II(4)(b). As explained in the following section, Article II(4)(a) establishes that Canada's conduct must in any event comply with its obligations under the BIT.

III.C.1.b. Even if Article II(4) Was Relevant, Article II(4)(a), Not Article II(4)(b), Applies Because The Subject Of GTH's Claim [redacted]

169. Even if Article II(4) was relevant to Canada's treatment of GTH's efforts to take voting control of Wind Mobile (and it is not), Article II(4)(a) exempts the application of Article II(4) in this case. In its analysis, Canada addresses each provision of Article II **except for** Article II(4)(a),[314] and considers "*context*" only insofar as it can be

to a bona fide *application (even if erroneous), is therefore not an 'application of the treaty' in the sense of articles 31 and 32* [of the VCLT].").

[314] *See* **Exhibit CL-116**, *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction, 6 August 2003, ¶ 169 ("*context* . . . *includes the structure* [as well as] *the content of the rest of the Treaty*").

reconciled with its own arguments.[315] Canada explains only that it "*does not seek to rely on Article II(4)(a)*" and then alleges that "[t]*he Tribunal therefore need not turn its mind to that provision*."[316] By ignoring Article II(4)(a), however, Canada deprives Article II(4) of its proper meaning.

170. As the table below shows, there are key differences between Article II(4)(a) and II(4)(b):

Article II(4)(a)	Article II(4)(b)
(a) Decisions by either Contracting Party,	(b) Decisions by either Contracting Party
pursuant to measures not inconsistent with this Agreement,	
as to whether or not	not
to permit	to permit
	establishment of a new business enterprise or
an acquisition	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 Articles XIII or XV of this Agreement.	shall not be subject to the provisions of Article XIII of this Agreement.

Table 2: Comparison of Article II(4)(a) and II(4)(b)

171. Article II(4)(a) applies to "[d]*ecisions . . . ,* ***pursuant to measures not inconsistent with this Agreement, as to whether or not to permit*** *an acquisition*."[317] On the other hand, Article II(4)(b) is concerned only with "[d]*ecisions . . .* ***not to permit*** *. . . acquisition*."[318]

---

[315] As explained above, the ordinary meaning of the terms of the BIT should be read in light of their context and the overarching purpose of the BIT. *See also* Canada's Memorial on Jurisdiction and Admissibility, ¶¶ 111-14, 124-25.

[316] Canada's Memorial on Jurisdiction and Admissibility, ¶ 126.

[317] **Exhibit CL-001**, BIT (English), Article II(4)(a) (emphasis added).

[318] **Exhibit CL-001**, BIT (English), Article II(4)(b) (emphasis added).

The BIT defines "*measure*" to include "*any law, regulation, procedure, requirement, or practice*."[319]

172. The differences between these two provisions are critical. **First**, Article II(4)(a) is concerned with the process used to arrive at a decision—*i.e.*, "*as to whether or not*" to allow an acquisition[320]—and not with the fact a decision has been made rejecting such an acquisition—*i.e.*, the "[d]*ecision*[] . . . *not to permit*."[321]

173. **Second**, Article II(4)(a) does not exempt from dispute resolution decisions that are reached in a manner that is inconsistent with the Contracting Parties' obligations under the BIT (as is the case here). Article II(4)(b), on the other hand, is exclusively concerned with the decision itself, and omits from investor-state dispute resolution an investor's attempt to reverse or appeal the Contracting Parties' decision to reject an acquisition in international arbitration.[322] This is the only plausible reading of these two provisions together which respects the principle of *effet utile*, and Canada has not, and cannot, offer any alternative.[323] Instead, Canada has simply ignored Article II(4)(a), just as it has other inconvenient words in the BIT.

---

319 **Exhibit CL-001**, BIT (English), Article I(h).

320 **Exhibit CL-001**, BIT (English), Article II(4)(a) (emphasis added).

321 **Exhibit CL-001**, BIT (English), Article II(4)(b) (emphasis added).

322 *See, e.g.*, Canada's Memorial on Jurisdiction and Admissibility, ¶ 127 (describing that the object and purpose of Article II(4) is to avoid second-guessing and challenges to the decision itself).

323 By dismissing the relevance of Article II(4)(a), Canada at one stage implies that the only difference between the two provisions is that Article II(4)(a) applies to disputes between Canada and Egypt rather than just disputes between Canada and Egyptian investors. As discussed herein, there are other meaningful and critical differences between the two provisions which Canada does not attempt to address or explain. *See* Canada's Memorial on Jurisdiction and Admissibility, ¶ 127 (describing that "[t]*he object and purpose of Article II(4) of the FIPA is to allow latitude to the Contracting Parties in deciding whether or not to approve the establishment or acquisition of business enterprises in their respective countries by investors or prospective investors or without having such decisions challenged by investors (in the case of Article II(4)(b)), or by the Contracting Party or investors (in the case of Article II(4)(a))on any grounds*.").

174. When Article II(4) is read in its proper and complete context, the inevitable conclusion is that if GTH's attempt to take voting control of Wind Mobile amounts to an acquisition (which it does not), the only relevant part of Article II(4) is Article II(4)(a). The subject of GTH's claims in this Arbitration is not [redacted], but the process in which it reached its indefensible outcome.[324] Article II(4)(a) of the BIT expressly states that Canada's decision with respect to GTH's Voting Control Application **remains subject to dispute resolution** because the dispute arises from measures inconsistent with its obligations under the BIT. On this basis, Canada's objection fails.

III.C.2. Canada Did Not Exclude The Telecommunications Sector From Its National Treatment Obligations

175. Canada's decision to [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. As detailed in **Part IV.D**, Canada's application of the national security review to GTH amounts to a breach of Canada's national treatment obligations as contained in Article IV(1) of the BIT.[325]

176. Canada did not address GTH's national treatment claim on the merits, choosing to rest its defense solely on its jurisdictional objection.[326] While Canada urges the Tribunal to decline jurisdiction over this breach, once again, Canada offers a fundamentally

---

[324] *See* GTH's Memorial on Merits and Damages, ¶¶ 345-60 (amounting to a breach of FET), 380 (amounting to a breach of FPS), 387–94 (amounting to a breach of Canada's national treatment protection obligation).

[325] *See also* GTH's Memorial on Merits and Damages, ¶¶ 387-94. In the alternative, this same conduct amounts to a breach of Article II(3) of the BIT.

[326] *See* Canada's Counter-Memorial on Merits and Damages, ¶¶ 481-82.

unsound reading of the BIT to support its position. In sum, its argument relies on a reading of Article IV(2) and the Annex of the BIT that would have the Tribunal believe that the Parties agreed to allow Canada to unilaterally create exceptions to national treatment protection in "*any services*" sector.[327] **First**, the ordinary meaning of the terms used in Article IV(2) and the Annex demonstrate that while Canada has a right to make and maintain exceptions to national treatment protection, the exercise of this right requires something more than the mere adoption of a measure. On this basis alone, Canada's objection fails. **Second**, even if Canada had the ability to unilaterally impose exceptions without notice to Egypt and its investors, Canada did not reserve the right to maintain exceptions with respect to investments made in the telecommunications sector.

III.C.2.a. The Ordinary Meaning Of Article IV(2) And The Annex Establishes That Canada Did Not Exclude Investments In The Telecommunications Sector From Its National Treatment Obligations

177. As Canada agrees, the operative clauses to determine the scope of exceptions made by the Parties to national treatment protection are Article IV and the Annex of the BIT. Article IV of the BIT, which sets out the Contracting Parties' obligation with respect to national treatment protection after an investor has made an investment, specifies certain narrow exceptions to this protection.[328] Article IV reads, in full:

> *1. Each Contracting Party shall grant to investments or returns of investors of the other Contracting Party treatment no less favourable than that which, in like circumstances, it grants to investments or returns of its own investors with respect to the expansion, management, conduct, operation and sale or disposition of investments.*

---

[327] *See, e.g.*, Canada's Memorial on Jurisdiction and Admissibility, ¶¶ 196, 202-204.

[328] *See* Canada's Memorial on Jurisdiction and Admissibility, ¶ 195.

> *2. Subparagraph (3)(a) of Article II, paragraph (1) of this Article, and paragraphs (1) and (2) of Article V* ***do not apply to****:*
>
> *(a) (i) any existing non-conforming measures maintained within the territory of a Contracting Party; and*
>
> *(ii) any measure maintained or adopted after the date of entry into force of this Agreement that, at the time of sale or other disposition of a government's equity interests in, or the assets of, an existing state enterprise or an existing governmental entity, prohibits or imposes limitations on the ownership of equity interests or assets or imposes nationality requirements relating to senior management or members of the board of directors;*
>
> *(b) the continuation or prompt renewal of any non-conforming measure referred to in subparagraph (a);*
>
> *(c) an amendment to any non-conforming measure referred to in subparagraph (a), to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with those obligations;*
>
> *(d)* ***the right of each Contracting Party to make or maintain exceptions within the sectors or matters listed in the Annex to this Agreement****.*[329]

178. While Article IV(2)(a), (b), and (c) refer to certain existing or future "*measures*"[330] to which national treatment protection does not apply, (d) explains instead that the BIT's national treatment protections "*do not apply to . . .* ***the right*** *of each Contracting Party to make or maintain exceptions*" within certain sectors specified in the Annex. Therefore, Article IV identifies certain existing exceptions to national treatment. In the event Canada exercises **its right in the future** to make further exceptions to its national treatment guarantee, those future exceptions cannot be the basis for a claim for a

[329] **Exhibit CL-001**, BIT (English), Article IV (emphases added).

[330] The BIT defines "*measure*" to include "*any law, regulation, procedure, requirement, or practice*." **Exhibit CL-001**, BIT (English), Article I(h).

violation of national treatment. However, such exceptions cannot be created retroactively for the purpose of avoiding liability in this Arbitration.[331]

179. The Annex states:

> *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;*
> - *residency requirements for ownership of oceanfront land;*
> - *measures implementing the Northwest Territories and the Yukon Oil and Gas Accords.*
>
> *2. For the purpose of this Annex, "SIC" means, with respect to Canada, Standard Industrial Classification numbers as set out in Statistics Canada,* Standard Industrial Classification*, fourth edition, 1980.*[332]

180. Thus, in the Annex, Canada "*reserve*[d] *the right to make and maintain exceptions*" in certain sectors. This reservation of rights to make and maintain exceptions cannot be

---

[331] *See* **Exhibit RL-164**, *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Excerpts of Award dated June 22, 2010 made pursuant to Rule 48(4) of the ICSID Arbitration Rules of 2006, 22 June 2010, ¶ 225 ("*long-term co-operation requires, and it also follows from the principle of legal certainty, that an investor must be able to rely on the advantages under the ECT, as long as the host state has not explicitly invoked the right to deny such advantages*."); **Exhibit CL-123**, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, ¶¶ 155-62; **Exhibit CL-132**, *Yukos*, Interim Award on Jurisdiction and Admissibility, ¶ 458 (finding that "[r]*etrospective application of a denial of rights would be inconsistent with such promotion and protection* [of investment] *and constitute treatment at odds with those terms.*").

[332] **Exhibit CL-001**, BIT (English), Annex (emphasis added). Canada also refers to the Arabic version of the BIT in which the Annex sets outs subjects on which **Egypt** (rather than only Canada) reserved the right to make exceptions. *See* Canada's Memorial on Jurisdiction and Admissibility, ¶ 200. That paragraph is absent from the English and French versions, but nothing turns on the additional paragraph.

expanded and changed into an unfettered right to adopt whatever measures Canada wishes. Yet, this is exactly how Canada interprets the BIT.[333]

181. There is no basis to support Canada's position. A reservation of rights cannot be equated with an exercise of rights.[334] If the Contracting Parties' intent was to establish exceptions in the sectors listed in the Annex, the Parties would not have "*reserve*[d] *the right to make and maintain exceptions*"; they would, instead, have made clear that the Parties could adopt any measure with respect to those sectors. This distinction is highlighted by the language of Article IV itself. For instance, the Parties made clear that the national treatment obligations do not apply to "***any measure*** *maintained or adopted after the date of entry into force of this Agreement*" as it relates to the disposition of either Parties' interest in a State enterprise.[335] The difference in the language used by the Parties is clear, and must be given meaning.

182. Moreover, Canada's interpretation is inconsistent with the Contracting Parties' unambiguous intention to be made aware of any measures that were exempt from the

---

[333] *See* Canada's Memorial on Jurisdiction and Admissibility, ¶ 209 ("*Canada has reserved the right to adopt or maintain measures and to accord treatment that would otherwise be inconsistent with its national treatment obligations, in all services sectors. Canada exercises that right simply by adopting or maintaining measures or by according treatment that would otherwise be inconsistent with the national treatment obligations.*").

[334] **Exhibit CL-123**, *Plama*, Decision on Jurisdiction, ¶ 155 ("*the existence of a 'right' is distinct from the exercise of that right. For example, a party may have a contractual right to refer a claim to arbitration; but there can be no arbitration unless and until that right is exercised.*"); **Exhibit RL-164**, *Liman*, Excerpts of Award dated June 22, 2010 made pursuant to Rule 48(4) of the ICSID Arbitration Rules of 2006, ¶ 224 ("*To reserve a right, it has to be exercised in an explicit way*."); **Exhibit CL-132**, *Yukos*, Interim Award on Jurisdiction and Admissibility, ¶ 456 ("[the ECT] *rather 'reserves the right' of each Contracting Party to deny the advantages of that Part to such an entity. This imports that, to effect denial, the Contracting Party must exercise the right.*"); **Exhibit CL-155**, *Anatolie Stati, Gabriel Stati, Ascom Group SA, and Terra Raf Trans Traiding Ltd v. Kazakhstan*, SCC Case No. V 116/2010, Award, 19 December 2013, ¶ 745 (finding that a reserved right "*would only apply if a state invoked that provision to deny benefits to an investor before a dispute arose*"); **Exhibit CL-172**, *Bear Creek Mining Corporation v. Republic of Perú*, ICSID Case No. ARB/14/21, Award, 30 November 2012, ¶ 319 (refusing to import a requirement that would limit its jurisdiction where the treaty allowed Peru "*to adopt*[] *or maintain*[] *a measure that prescribes special formalities in connection with the establishment of covered investments*" but there was no evidence in the FTA or on the record that Peru had exercised this option).

[335] **Exhibit CL-001**, BIT (English), Article IV(2)(a)(ii) (emphasis added).

national treatment requirement. Article XVI of the BIT provides that "[t]*he Contracting Parties shall, within a two year period after the entry into force of this Agreement, exchange letters listing, to the extent possible, any existing measures that do not conform with*,"[336] and as such are exempt from, among other things, the national treatment guarantees. The Contracting Parties sought to ensure that any exceptions to the protections offered in the BIT were clearly set out, predictable, and known to investors.[337] Canada's interpretation of Article IV(2)(d) and the Annex, which would give it *carte blanche* to enact non-conforming measures at any time without notice to the other Party or investor, is contrary to this important principle.

183. Accordingly, while Canada has reserved the right to make or maintain exceptions to national treatment protection, this clause does not allow it to take measures within the identified sectors without more. Canada has an obligation to exercise its right to make or maintain an exception **before** such an exception can take effect. While Canada seeks to rely on the tribunals' analysis in *Lemire v. Ukraine* and *Lauder v. Czech Republic* for the proposition that a State can reserve the right to make exceptions, this point is not in dispute.[338] The question is what Canada must do to exercise this right and effectuate an exception to national treatment protection.

---

336 **Exhibit CL-001**, BIT (English), Article XVI.

337 Further evidence regarding the primacy of certainty can be found in the remainder of Article IV. Article IV(2)(a), (b), and (c) spell out narrow and specific exceptions to national treatment obligations for pre-existing and future non-conforming measures. Any renewal of a pre-existing non-conforming measures is required to be made promptly in order to fall within the exception, and amendments to non-conforming measures fall within the exception only if they do not decrease the conformity with national treatment obligations. **Exhibit CL-001**, BIT (English), Article IV(2)(b)-(c). *See also* **Exhibit CL-068**, *AES Corporation and Tau Power B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/10/16, Award, 1 November 2013, ¶ 205 (emphasizing that a list of excluded fields should be presumed to be exhaustive given "*the need for legal security and predictability*").

338 *See* Canada's Memorial on Jurisdiction and Admissibility, ¶¶ 210-12.

184. The *Lemire* tribunal's analysis confirms that in order for a State to effectuate its reservation of a right to maintain exceptions, it must give the other State and its investors due notice.[339] The tribunal emphasized that putting investors on notice of exceptions to protections contained in a treaty "*is a fundamental requirement in order to guarantee that investors enjoy legal certainty, and that States cannot invoke the exception* ex post facto*, surprising the investor's good faith*."[340] Legal certainty for an investor "*is not simply a formality*."[341]

185. Canada attempts to distinguish the *Lemire* tribunal's finding by noting that the treaty in question expressly provided that the contracting parties to that treaty would notify the other regarding all such laws and regulations which it was aware concerned the sectors or matters to which it had reserved the right to maintain exceptions, and to notify the other of any future exceptions.[342] Canada's position, however, would mean that Canada need not do anything to exercise the rights it has reserved. That is inconsistent with the ordinary meaning of the BIT read in its full context.

186. The BIT's plain language defeats Canada's objection in another way. The Annex does not apply to the telecommunications sector.[343] The Annex purports to list "*the sectors or matters*" for which Canada has reserved the right to make and maintain exceptions.[344] These sectors and matters include:

---

339 **Exhibit RL-116**, *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 18 March 2011, ¶ 49.

340 **Exhibit RL-116**, *Lemire*, Award, ¶ 49.

341 **Exhibit RL-116**, *Lemire*, Award, ¶ 49.

342 Canada's Memorial on Jurisdiction and Admissibility, ¶¶ 212-13.

343 *See* Canada's Memorial on Jurisdiction and Admissibility, ¶¶ 232-35.

344 **Exhibit CL-001**, BIT (English), Annex.

- *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; . . .*[345]

187. Canada alleges that it reserved the right to make and maintain exceptions with respect to the telecommunications sector through its catch-all category of "*services in any other sector*."[346] Canada misleadingly asserts that "*services in any other sector*" refers to purported "*services sectors*."[347] While the BIT does not define "*services*" or "*sectors*," the Annex to the BIT contains a reference point for determining sector classifications: Statistics Canada's *Standard Industrial Classification* ("**SIC**").[348] Canada attempts to dismiss the Annex's reference to the SIC as "*not directly relevant to the present case*,"[349] and instead turns to other industry classification systems that take a broad and exhaustive view of "*services*."[350] Yet, the only classification system referred to in the BIT—the SIC—does not classify telecommunications as a "*service*" industry.[351] Indeed, common experience dictates that telecommunications companies do much more than provide services—they provide goods (such as phones) and build infrastructure (such as network towers).[352] Accordingly, GTH operates within the

---

345 **Exhibit CL-001**, BIT (English), Annex.

346 Canada's Memorial on Jurisdiction and Admissibility, ¶ 224.

347 Canada's Memorial on Jurisdiction and Admissibility, ¶ 204.

348 **Exhibit CL-001**, BIT (English), Annex ¶ 2. *See also* **Exhibit CL-097**, Statistics Canada, *Standard Industrial Classification* (1980).

349 Canada's Memorial on Jurisdiction and Admissibility, ¶ 202, n. 312.

350 Canada's Memorial on Jurisdiction and Admissibility, ¶ 230, nn. 348-49.

351 **Exhibit CL-097**, Statistics Canada, *Standard Industrial Classification* (1980), p. 174 (where the "*Telecommunication Carriers Industry*" is classified under "*Communications and Other Utilities*").

352 Canada itself has recognized that the telecommunications sector includes more than just provision of services in other treaties where it has explicitly carved out exceptions for "*telecommunications transport networks **and** telecommunications transport services*" (emphasis added). *See* **Exhibit RL-093**, Agreement between the Government of Canada and the Government of the Republic of Ecuador for the Promotion and Reciprocal Protection of Investments (signed 29 April 1996; entry into force 6 June 1997; terminated 19 May 2018),

telecommunications sector, which is not considered to be a "*services sector*," as Canada suggests.

188. Moreover, Canada's interpretation of "*services in any other sector*" to create a "*broad services exception*"[353] as it contends, would render the first of Canada's listed sectors or matters for which it "*reserve*[d] *the right to make and maintain exceptions*"—*i.e.*, "*social services*"—superfluous. A proper interpretation of the second element of this list must avoid subsuming the first. The only interpretation, therefore, is that Canada "*reserve*[d] *the right to make and maintain exceptions*" to, *inter alia*, accord national treatment protection in relation to "*services in any other sector*," not the entire sector itself.[354]

189. To the extent the Tribunal finds the provision "*services in any other sector*" to be vague or ambiguous, that ambiguity only supports GTH's position that Canada needed to take

---

Article III(3)(3)(2); **Exhibit RL-092**, Treaty between the Government of Canada and the Government of the Republic of Panama for the Promotion and Protection of Investments (signed 12 September 1996; entry into force 13 February 1998), Article III(3)(3)(2); **Exhibit 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 (signed 9 November 1995; entry into force 13 November 1996), Article III(3)(3)(2); **Exhibit 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 (signed 11 September 1995; entry into force 8 July 1996), Article III(3)(c)(ii); **Exhibit RL-026**, Agreement between the Government of Canada and the Government of Ukraine for the Promotion and Protection of Investments (signed 24 October 1994; entry into force 24 June 1995), Article III(3)(c)(ii); **Exhibit RL-028**, Agreement between the Government of Canada and the Government of the Republic of Armenia for the Promotion and Protection of Investments (signed 8 May 1997; entry into force 29 March 1999), Article III(3)(c)(ii); **Exhibit RL-094**, Agreement between the Government of Canada and the Government of Barbados for the Reciprocal Promotion and Protection of Investments (signed 29 May 1996; entry into force 17 January 1997), Article III(3)(3)(2).

353 Canada's Memorial on Jurisdiction and Admissibility, ¶ 226.

354 In *AES* the tribunal rejected a similar attempt by a respondent to argue that the electricity sector was excluded from the tribunal's jurisdiction where there was no express exclusion of this sector. The respondent unsuccessfully contended that the electricity sector fell under the listed exceptions of "*public health and morals*" and "*national security*". The tribunal observed that while "*certain aspect of the electricity sector . . . may under certain circumstances give rise to issues of 'national security', this is hardly the case for issues relating to the management of competition in the electricity market*." Further, "[t]*he electricity market is of a commercial nature, and while being an important component of a country's economy, it is not of a nature to constitute per se and in its entirety a matter of 'ordre public', even supposing that the phrase 'public health and morals' can be given that wide meaning*." **Exhibit CL-068**, *AES*, Award, ¶ 206.

some clear action to implement an exception within the services sector under the Annex. To accept Canada's argument that it can make a *post-hoc* exception to national treatment protection simply by categorizing a measure as relating to a broad "*services sector*" would amount to the evisceration of any national treatment guarantee and would contravene the VCLT's directive to interpret the BIT's provisions in good faith.[355]

III.C.2.b. Supplementary Means of Interpretation Confirm The Ordinary Meaning Of Article IV(2) And The Annex

190. Canada devotes multiple pages to the evolution of its treaty practice,[356] but the only conclusion that emerges is that, where Canada sought to reserve the right to make and maintain exceptions in the telecommunications sector, it did so expressly.[357] The above

---

355 *See* **Exhibit CL-018**, VCLT, Article 31(1).

356 *See* Canada's Memorial on Jurisdiction and Admissibility, ¶¶ 215-24.

357 Across numerous treaties, Canada has included express, discrete exceptions for the telecommunications sector and the services sector. This would be an unnecessary step if telecommunications was in fact subsumed within the services sector. *See* **Exhibit CL-069**, Agreement between the Government of Canada and the Government of the United Republic of Tanzania for the Promotion and Reciprocal Protection of Investments (signed 17 May 2013; entry into force 9 December 2013), Article 16(3), Annex II; **Exhibit CL-073**, Agreement between the Government of Canada and the Government of the Republic of Benin for the Promotion and Reciprocal Protection of Investments (signed 9 January 2013; entry into force 12 May 2014), Article 18(2), Annex II(8); **Exhibit CL-078**, Agreement Between Canada and the Republic of Serbia for the Promotion and Protection of Investments (signed 1 September 2014; entry into force 27 April 2015), Article 17(3), Annex II; **Exhibit RL-118**, Agreement between Canada and the Republic of Peru for the Promotion and Protection of Investments (signed 14 November 2006; entry into force 20 June 2007; suspended 1 August 2009), Article 9(2), Annex II; **Exhibit RL-119**, Canada-Peru Free Trade Agreement (signed 29 May 2008; entry into force 1 August 2009), Articles 808(2), Annex II; **Exhibit RL-120**, Agreement between Canada and the Hashemite Kingdom of Jordan for the Promotion and Protection of Investments (signed 28 June 2009; entry into force 14 December 2009), Article 9(2), Annex II; **Exhibit RL-121**, Agreement between Canada and the State of Kuwait For The Promotion and Protection of Investments (signed 26 September 2011; entry into force 19 February 2014), Article 16(2), Annex I; **Exhibit RL-122**, Agreement between the Government of Canada and the Government of the Republic of Côte D'Ivoire for the Promotion and Protection of Investments (signed 30 November 2014; entry into force 14 December 2015), Article 16(3), Annex II; **Exhibit RL-123**, Agreement between Canada and Mali for the Promotion and Protection of Investments (signed 28 November 2014; entry into force 8 June 2016), Article 16(3), Annex II; **Exhibit RL-124**, Agreement between Canada and the Federal Republic of Senegal for the Promotion and Protection of Investments (signed 27 November 2014; entry into force 5 August 2016), Article 17(2), Annex I; **Exhibit RL-125**, Agreement between the Government of Canada and the Government of the Hong Kong Special Administrative Region of the People's Republic of China for the Promotion and Protection of Investments (signed 10 February 2016; entry into force 6 September 2016), Article 16(2), Annex II; **Exhibit RL-126**, Agreement between Canada and the Republic of Cameroon for the Promotion and Protection of Investments (signed 3 March 2014; entry into force 16 December 2016), Article 16(3), Annex II; **Exhibit RL-127**, Agreement between Canada and Mongolia for the Promotion and Protection of Investments (signed 8 September 2016; entry into force 24 February 2017), Article 16(2), Annex I; **Exhibit RL-128**, Agreement

is telling and confirms that Canada treats the telecommunications sector as different than the services sector.[358] In fact, the Competition Policy Review Panel formed by the Government of Canada has emphasized the national treatment obligations owed by Canada pursuant to various investment treaties, singling out NAFTA and the WTO as the two treaties in which Canada has reserved its ability to use the ICA:

> *Canada is signatory to a number of international trade agreements, the most important of these being the World Trade Organization (WTO) Agreement and the North American Free Trade Agreement (NAFTA). Under NAFTA and WTO, Canada is generally required to provide national treatment and most favoured nation status such that foreign investors are treated equally and no less favourably than domestic investors with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments.* ***Canada has taken reservations in both agreements to preserve its ability to use the ICA to ensure that investments by non-Canadians provide net benefit to Canada. Under international trade law, Canada can amend legislation for which it has taken a reservation but it can only narrow, not broaden, its application****. . . .*
>
> *The Canada–U.S. Free Trade Agreement and NAFTA go beyond WTO undertakings to effectively prohibit any new direct investment*

for the Promotion and Protection of Investments between Canada and the Republic of Guinea (signed 27 May 2015; entry into force 27 March 2017), Article 17(2), Annex I; **Exhibit RL-129**, Agreement between the Government of Canada and the Government of Burkina Faso for the Promotion and Protection of Investments (signed 20 April 2015; entry into force 11 October 2017), Article 17(2), Annex II; **Exhibit RL-133**, Canada-Colombia Free Trade Agreement (signed 21 November 2008; entry into force 15 August 2011), Article 809(2), Annex II; **Exhibit RL-134**, Canada-Panama Free Trade Agreement (signed 14 May 2010; entry into force 1 April 2013), Article 9.09(2), Annex II; **Exhibit RL-135**, Canada-Honduras Free Trade Agreement (signed 5 November 2013; entry into force 1 October 2014), Article 10.9(2), Annex II.

[358] *See* **Exhibit CL-040**, *ADC*, Award of the Tribunal, ¶ 359 ("*When negotiating the BIT, the Government of Hungary could have inserted this requirement as it did in other BITs concluded both before and after the conclusion of the BIT in this case. However, it did not do so. Thus such a requirement is absent in this case. The Tribunal cannot read more into the BIT than one can discern from its plain text*."); **Exhibit CL-120**, *Tokios Tokelės*, Decision on Jurisdiction, ¶¶ 33-36 (considering that treaty practice demonstrates that where parties intend to deny benefits of a treaty to entities of one party that do not maintain "*substantial business activity*" in the territory of the other party this is expressly stated); **Exhibit CL-112**, *Fedax N.V. v. Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction, 11 July 1997, ¶¶ 32, 36 (finding that the respondent's treaty practice led to the conclusion that "*every time the Republic of Venezuela has wished to exclude investments that are not manifestly direct, it has done so in unequivocal terms*" and in the absence of such "*unequivocal terms*" the "*very broad meaning for the term*" cannot be circumscribed). *See also* **Exhibit CL-133**, *Mobil Investments Canada Inc. & Murphy Oil Corporation v. Canada*, ICSID Case No. ARB(AF)/07/4, Counter-Memorial of Canada, 1 December 2009, ¶¶ 172-76 (citing to the treaty practice of the United States and Japan for the proposition that "[i]*f the parties to these treaties understood R&D to be the same performance requirement as the requirement to purchase or use local goods or services, there would be no need to specifically enumerate R&D as a separate category*.").

> *restrictions (other than in a few industries) while preserving Canada's right to review large direct takeovers under the ICA. Further,* ***key features of the myriad bilateral trade and investment agreements being negotiated by Canada and other countries are aimed at protecting and promoting foreign investment through legally binding rights and obligations. However, these agreements vary greatly in both scope and content.*** *Thus, while nondiscriminatory treatment of investors is a crucial driver of globalization, the institutionalization of this effort has been challenging.*[359]

* * *

191. Canada has proffered no evidence to demonstrate that it has taken any steps to effectuate its right to make or maintain exceptions to national treatment protection as required by the BIT. Moreover, even if it had done so, telecommunications is not one of the sectors over which Canada has reserved its rights. For these two independent reasons, this objection *ratione materiae* must be dismissed.

[359] **Exhibit C-310**, Competition Policy Review Panel, *Sharpening Canada's Competitive Edge*, 30 October 2007, pp. 18, 28 (citations omitted, emphases added). In its final report, the Competition Policy Review Panel explained that "[i]*n recommending this and other changes to the ICA, the Panel is mindful that, under NAFTA and other international treaty commitments, Canada may amend the ICA only to narrow, not broaden, the scope of its application*." *See* **Exhibit C-076**, Competition Policy Review Panel, *Compete to Win: Final Report – June 2008*, p. 33.

III.D. The Tribunal Has Jurisdiction Over GTH's Claim For Cumulative Breach Of FET Arising From Canada's Overall Pattern Of Conduct

192. GTH seeks redress for multiple serious breaches of the BIT. While several of Canada's actions are sufficiently egregious to amount to breaches of the BIT on their own,[360] the whole is greater than the sum of its parts. The Tribunal must consider Canada's actions in their totality when considering a composite breach of the BIT.[361]

193. As detailed in this submission, Canada subjected GTH to a series of acts, inflicted by different arms of the Canadian government, often acting in a contradictory manner, that caused GTH substantial harm and ultimately led to its exit from the Canadian market. Canada's actions slowly backed GTH into a corner by: delaying GTH's entry into the market through a duplicative and contradictory review of its investment structure; failing to regulate Incumbent behavior in accordance with its stated policy objectives; subjecting GTH to an unfair and arbitrary review procedure [redacted] and, contrary to everyone's expectations at the time of its investment, prevented GTH from selling Wind Mobile to an Incumbent after the five-year restriction on transfer had expired. Canada engaged in a pattern of conduct that gradually eroded the framework upon which GTH's investment was premised.

194. Viewed with the benefit of hindsight, Canada's measures cumulatively amount to breaches of Canada's obligations to accord FET and FPS to GTH, which crystallized

---

[360] This includes Canada's egregious treatment of GTH through its national security review and its complete upheaval of GTH's legitimate expectation that it would be permitted to sell its investment to an Incumbent after five years.

[361] *See* **Exhibit CL-148**, *Quasar de Valores*, Award, ¶ 45 (in the context of indirect expropriation, observing that "[i]*ndirect expropriation, of course, does not speak its name. It must be deduced from a pattern of conduct, observing its conception, implementation, and effects as such, even if the intention to expropriate is disavowed at every step*").

by the time of Canada's unlawful treatment of GTH's efforts to take voting control of its investment.[362]

195. Canada seeks to draw attention away from the breadth of its wrongful conduct by arguing that GTH's claims for Canada's cumulative breaches are untimely because GTH did not notify Canada of these claims within the three-year notice period set out in Article XIII(3)(d) of the BIT.[363] But Canada misses the point: a cumulative breach claim does not materialize until one considers all of the relevant conduct together, and as such does **not arise upon the first of the acts** comprising the breach **but the last of the acts** necessary for the breach to be established. Only in hindsight is it clear that certain measures are part and parcel of a series of actions that, together, constitute an international law violation.[364]

196. Moreover, Canada confounds the temporal application of a BIT with notice requirements. This BIT was in force during all relevant times of the breaches alleged by GTH. There is simply no question of any temporal application of the BIT to this claim. The notion that every fact that is part and parcel of a composite breach of the BIT should have been notified to Canada within three years of it occurring is an absurd reading of the plain language and purpose of the notification provision.

---

362 *See infra* **Parts IV.A.4** and **IV.B**.

363 *See* Canada's Memorial on Jurisdiction and Admissibility, Part III.D. While Canada refers to this objection as a matter of jurisdiction, it is more appropriately considered a question admissibility. Namely, the question here is whether certain events that would otherwise fall within the Tribunal's jurisdiction, nevertheless cannot be considered by this Tribunal as a component of Canada's cumulative breaches because they fall outside a three-year notice period.

364 **Exhibit CL-148**, *Quasar de Valores*, Award, ¶ 44 (emphasizing the need to evaluate the respondent's actions as a continuum of conduct, the tribunal noted that "[n]*o individual feature of the narrative is necessarily decisive . . . Indeed, it may not be necessary to come to a firm view as to all discrete contentions if the totality of the circumstances point in a firm direction*."); **Exhibit RL-231**, *RosInvestco*, Final Award, ¶ 410 ("*an assessment of whether Respondent breached the IPPA can only be effectively made if and after the conduct as a whole is reviewed, rather than isolated aspects*.").

197. Canada observes that certain of the factual events underlying GTH's claim for cumulative breach of FET occurred more than three years before the filing of the Request for Arbitration on 27 May 2016 (*i.e.*, before 27 May 2013), and suggests that any claims touching these factual events do not satisfy the three-year notice period set out in Article XIII(3)(d) of the BIT.[365] But, this is not what the notice clause requires. As will be explained below, the period begins to run only after the investor has knowledge of the alleged breach (*i.e.*, here a cumulative breach of FET) and knowledge of incurred loss arising from that breach. GTH did not have knowledge of a cumulative breach of the BIT, and its losses resulting from that breach, until June 2013 at the earliest. For this simple reason, Canada's objection fails.

III.D.1. In The Context Of A Cumulative Breach, The Date Of Breach Is The Date At Which The Cumulative Conduct Amounts To A Breach Of The BIT

198. As explained in **Part IV.A.4**, international law recognizes that a series or group of acts can amount together to a breach of an international obligation.[366] Article 15 of the Articles on State Responsibility provides:

> *Breach consisting of a composite act*
>
> *1. The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful* ***occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act****.*
>
> *2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as*

[365] *See, e.g.*, Canada's Memorial on Jurisdiction and Admissibility, ¶¶ 149-51. GTH has referred to only two acts which started three or more years before the commencement of this Arbitration and neither amount to independent breaches of the BIT—these acts form part of Canada's breaches when viewed *in toto* and in conjunction with other actions. Thus, Canada is wrong when it argues that GTH's claim for cumulative breach of FET is an attempt to by-pass the three-year notice period.

[366] *See also* GTH's Memorial on Merits and Damages, ¶¶ 361-75.

> *these actions or omissions are repeated and remain not in conformity with the international obligation.*[367]

199. The Commentary to the Draft Articles on State Responsibility provides the following instructive guidance on Article 15:

> ***Paragraph 1 of article 15 defines the time at which a composite act "occurs" as the time at which the last action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act****, without it necessarily having to be the last in the series. Similar considerations apply as for completed and continuing wrongful acts in determining when a breach of international law exists; the matter is dependent upon the precise facts and the content of the primary obligation. The number of actions or omissions which must occur to constitute a breach of the obligation is also determined by the formulation and purpose of the primary rule. The actions or omissions must be part of a series but the article does not require that the whole series of wrongful acts has to be committed in order to fall into the category of a composite wrongful act, provided a sufficient number of acts has occurred to constitute a breach. At the time when the act occurs which is sufficient to constitute the breach it may not be clear that further acts are to follow and that the series is not complete. . . .*
>
> *Paragraph 2 of article 15 deals with the extension in time of a composite act. Once a sufficient number of actions or omissions has occurred, producing the result of the composite act as such, the breach is dated to the first of the acts in the series.* ***The status of the first action or omission is equivocal until enough of the series has occurred to constitute the wrongful act****; but at that point the act should be regarded as having occurred over the whole period from the commission of the first action or omission. If this were not so, the effectiveness of the prohibition would thereby be undermined.*[368]

---

[367] **Exhibit CL-028**, INTERNATIONAL LAW COMMISSION, *Responsibility of States for Internationally Wrongful Acts* (2001), Article 15 (emphasis added).

[368] **Exhibit RL-233**, INTERNATIONAL LAW COMMISSION, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001), p. 63 (emphases added) ("*A consequence of the character of a composite act is that the time when the act is accomplished cannot be the time when the first action or omission of the series takes place.* ***It is only subsequently that the first action or omission will appear as having, as it were, inaugurated the series. Only after a series of actions or omissions takes place will the composite act be revealed, not merely as a succession of isolated acts, but as a composite act, i.e. an act defined in aggregate as wrongful***." (emphasis added)).

200. In short, a series of separate acts or omissions can *in toto* result in a breach of an international obligation. The tribunal in *Société Générale v. The Dominican Republic*, in discussing breaches consisting of a composite act, recognized that "*there might be situations in which each act considered in isolation will not result in a breach of a treaty obligation, but if considered as a part of a series of acts leading in the same direction they could result in a breach at the end of the process of aggregation.*"[369] Accordingly, a composite breach of FET occurs on the date of the final act causing the composite acts to unequivocally amount to a breach. Until that final act occurs, a wronged party cannot have knowledge of the composite breach.

201. Canada seeks to rely on *Rusoro v. Venezuela* to support its allegation that GTH's claim for cumulative breach is untimely.[370] However, the circumstances in *Rusoro* are different from this case. In *Rusoro*, with respect to those acts that were alleged to fall outside the notice period, the tribunal found that the claimant had knowledge before the cut-off date that these acts might be **breaches** of the relevant treaty and had caused damage to the investment.[371] This must be differentiated from the case here, where the earlier acts do not independently amount to independent breaches of the BIT (even if the later ones do). In any event, even in that context, the tribunal found that it was "*legally sound*" to consider whether there was a "*linkage*" between these **different breaches** to justify rejecting Venezuela's notice period defense.[372] Finding that there

---

[369] **Exhibit RL-025**, *Société Générale In Respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. v. The Dominican Republic*, UNCITRAL, LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction, 19 September 2008, ¶ 91 (emphasis added).

[370] *See* Canada's Memorial on Jurisdiction and Admissibility, ¶ 172.

[371] **Exhibit CL-016**, *Rusoro Mining Limited v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016, ¶ 218.

[372] **Exhibit CL-016**, *Rusoro*, Award, ¶¶ 229-30.

was no such linkage in that case (a fact-specific exercise), the tribunal decided to consider each breach separately.[373]

202. While *Rusoro* is inapposite on the facts, insofar as the Tribunal concludes it is necessary to show a "*linkage*" among Canada's acts amounting to its cumulative breach, GTH explains on the merits that the only linkage required is that the acts together must lead in the direction of the breach.[374] And that is what Canada's acts did; they resulted in the complete erosion of the framework created by Canada to induce GTH to invest. This is consistent with the tribunals' analyses in *Tecmed*, *Paushok*, and *Société Générale* which Canada cites with approval, in which tribunals recognized that a composite breach could be found where there are a series of acts which are a "*'converging action towards the same result' and amount to a breach after the critical date*."[375]

203. While Canada cites copiously to NAFTA jurisprudence, these cases offer no support for its proposal that GTH's cumulative breach claims are barred by the three-year notification period.[376] In its analysis, Canada inaccurately conflates the distinct concepts of continuing breach and cumulative breach as defined under international law. In none of its cited cases was a tribunal asked to consider the application of a three-year notice period on a composite or cumulative breach, which, for the reasons

---

373 **Exhibit CL-016**, *Rusoro*, Award, ¶ 231.

374 *See infra* ¶ 320.

375 Canada's Memorial on Jurisdiction and Admissibility, ¶ 171, *citing* **Exhibit CL-031**, *Técnicas Medioambientales TECMED S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, ¶ 62; **Exhibit RL-106**, *Sergei Paushok CJSC Golden East Company, and CJSC Vostokneftegaz Company v. The Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability, 28 April 2011, ¶ 499; **Exhibit RL-025**, *Société Générale*, Award on Preliminary Objections to Jurisdiction, ¶ 94.

376 *See* Canada's Memorial on Jurisdiction and Admissibility, ¶¶ 155-69.

set forth below, require separate consideration distinct from those factual circumstances.[377]

III.D.2. The BIT's Three-Year Notice Period Begins On The Date The Investor Had Knowledge Of Both The Breach And The Damage Arising From That Breach

204. Article XIII(3)(d) provides, in full:

> *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,***

[377] *See* **Exhibit RL-030**, *Marvin Feldman v. United Mexican States,* ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, ¶¶ 53-63 (considering the claimants' arguments that the limitations period was tolled by party agreement and that Mexico was estopped from invoking the limitations period based on prior assurances); **Exhibit 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, ¶¶ 236-38 (considering not only that the alleged breach occurred before the cut-off date, but that the claimant had knowledge of the breach, had manifested awareness that the conduct could be a breach of the treaty, and had manifested awareness it would suffer harm as a result of the breach); **Exhibit RL-031**, *Grand River Enterprises Six Nations, Ltd., Jerry Montour, Kenneth Hill, and Arthur Montour, Jr. v. United States of America*, UNCITRAL, Decision on Objections to Jurisdiction, 20 July 2006, ¶¶ 71-72 (considering the claimant had constructive knowledge of an agreement between state attorney generals and major competitor tobacco companies, introducing a new levy on the sale of cigarettes, prior to the cut-off date but that a piece of legislation distinct from the agreement which introduced an escrow law contemplated by the agreement was not time barred); **Exhibit RL-102**, *Merrill & Ring Forestry L.P. v. The Government of Canada*, UNCITRAL, Opinion with Respect to the Effect of NAFTA Article 1116(2) on Merrill & Ring's Claim, 22 April 2008 (drawing a distinction between cases where there is a continuing violation and where, as in this case, the compatibility of a contained regulatory regime, enacted fully nine years before the arbitration was initiated, is challenged and the claimant impermissibly relies on the specific and routine applications of that regime to extend the critical date); **Exhibit RL-032**, *Apotex Inc. v. The Government of the United States of America*, UNCITRAL, Award on Jurisdiction and Admissibility, 14 June 2013, ¶¶ 325, 333 (considering the claimant could not use later court proceedings to toll the limitation period for an earlier administrative decision but that the claimant was not in and of itself time barred from bringing a claim which would require at least some consideration of the prior decision). Canada relies in particular on *Bilcon v. Canada*, in which the claimant asserted numerous continuous breaches with ongoing effect but the tribunal drew a distinction between the breach itself and the ongoing effects of the breach, finding that "*an act can be complete even if it has continuing ongoing effects*". The tribunal distinguished this from a continuing violation, as understood in international law, and further emphasized that "[i]*n order to fulfill the requirements of Article 1116(2), it is necessary . . . that the investor has actual or constructive knowledge **not only of an 'alleged breach' of Chapter Eleven**, but also that it has incurred 'loss or damage'.*" (emphasis added). **Exhibit CL-077**, *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton, and Bilcon Of Delaware, Inc. v. Government of Canada*, UNCITRAL, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015, ¶¶ 268, 273. Therefore, knowledge of the *breach* itself is necessary.

> ***knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.***[378]

205. Thus, the three-year period does not begin to run until a claimant both has knowledge that a "*breach*" has occurred and knowledge that the breach has caused loss or damage. These are cumulative conditions and each is a condition precedent for the notice period to begin.

206. Canada once again distorts or ignores the words of this BIT to reach a self-serving conclusion. **First**, while allegedly recognizing the "*straightforward*" nature of the application of this three-year notice period,[379] Canada conflates the date of a "*breach*" (as contemplated by the BIT) with the date of a factual event relevant to a breach.[380] Yet, this distinction is critical. By relying on the date of "*breach*" (rather than the "*measure*" or "*the facts underlying the breach*"), the BIT recognizes that the date of a breach may be distinct from any one fact establishing the breach (especially in the context of a composite or cumulative breach).[381]

207. **Second**, like any provision of a treaty, the ordinary meaning of a provision describing a notice period for a breach must be interpreted in light of the context of the provision

---

[378] **Exhibit CL-001**, BIT (English), Article XIII(3) (emphases added).

[379] Canada's Memorial on Jurisdiction and Admissibility, ¶ 162 (observing that "[t]*he task of this Tribunal is straightforward: it must determine the specific date on which the Claimant either first acquired, or should have first acquired, knowledge of the alleged breach and knowledge of incurred loss*.").

[380] For example, Canada states that "*a claimant may not bring a claim challenging a given measure if more than three years have elapsed since it first acquired knowledge, or should have first acquired knowledge, of the alleged breach and the alleged loss arising out of that breach*." Canada's Memorial on Jurisdiction and Admissibility, ¶ 154.

[381] Arbitral tribunals have recognized the need to be factually sensitive in establishing the temporal limits of jurisdiction. Specifically, a "*measure*" is not necessarily restricted to a singular fact or event. The tribunal in *Pac Rim* identified that a "*measure*" is not always "*a specific and identifiable governmental measure*" but can extend to a "*continuing practice*", such as a continuing practice of withholding permits. Therefore, the tribunal held it had jurisdiction over respondent's conduct that took place prior to the claimant becoming a covered investor. **Exhibit CL-146**, *Pac Rim Cayman LLC v. The Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, 1 June 2012, ¶ 3.43.

and the BIT's purpose.[382] This BIT offers several critical protections to investors with the aim of facilitating the flow of investment between the two Contracting Parties, and allows an investor to seek redress for any violation of these obligations through dispute resolution.[383] Any provision purporting to limit the ability of an investor to pursue arbitration to remedy a violation of a BIT must be read in this overarching context.[384]

208. Importantly, while tribunals have recognized that the purpose of such a notice period is to "*limit the proliferation of historic claims, with all the attendant legal and policy challenges and uncertainties that they bring*,"[385] these provisions do not allow a State to avoid liability simply because a specified period has elapsed as of the date of a breach (or the events underlying the breach). The notice period necessarily recognizes that the critical date from which the time period begins to run is the date when the investor had **knowledge of the breach and the damage arising from that breach**. As will be explored further below, this dual requirement is particularly important in the context of a cumulative breach of the BIT.

III.D.3. The Duplicative O&C Reviews And Canada's Failure To Maintain A Favorable Regulatory Environment Form Part Of Canada's Composite Breach Of The FET Standard Under The BIT

209. Canada's objection fails because GTH had no knowledge that the cumulative breach had occurred, nor that such breach had caused GTH loss or damage until, at the earliest, June 2013. With respect to Canada's cumulative breach of the BIT, its actions must be

382 *See* **Exhibit CL-018**, VCLT, Article 31(1).

383 *See supra* ¶ 97.

384 *See supra* ¶ 167.

385 **Exhibit CL-168**, *Spence International Investments, LLC, Aaron C. Berkowitz, Brett E. Berkowitz, Trevor B. Berkowitz, Brenda K. Copher, Ronald E. Copher, Glen Gremillion, Joseph M. Holsten, and Bob F. Spence v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award of the Tribunal (Corrected), 30 May 2017, ¶ 208.

viewed as a whole. As explained below in **Part IV.A.4.b**, Canada's actions for the lifetime of GTH's investment amounted to the destruction of the framework upon which GTH made its investment in 2008.

210. GTH's knowledge of the cumulative breach of FET necessarily coincides with or post-dates Canada's unlawful treatment of GTH's attempts to take voting control of its investment. GTH could not have known that Canada committed a cumulative breach of FET before this date because it was not until this time that the totality of the circumstances amounted to a breach of FET as pled by GTH.[386] Once again, Canada's defense that GTH had "*knowledge of the facts that underpin the alleged breach*"[387]—when the BIT in fact requires "*knowledge of the alleged breach*"[388]—is specious.

211. In any event, GTH could not have known of the damage suffered as a result of Canada's conduct until these acts could be understood in their full context. Indeed, Canada's acts caused GTH to leave the Canadian market, crystallizing the damage Canada had caused to GTH.[389] Thus, it was only upon GTH's sale of Wind Mobile in September 2014 that any limitation period began to run.

---

386 *See* **Exhibit C-032**, Letter from William G. VanderBurgh to Jenifer Aitken, 18 June 2013, p. 2 (referring for the first time to rights under investment treaties).

387 *See, e.g.*, Canada's Memorial on Jurisdiction and Admissibility, ¶ 190.

388 **Exhibit CL-001**, BIT (English), Article XIII(3)(d).

389 *See infra* **Part V.B.1.a**

III.E. GTH Has Standing To Bring Claims Relating To The Treatment Of Its Investment In Wind Mobile

212. The 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.[390] This is consistent with well-accepted principles of international investment law.[391] On this basis, GTH has standing to bring each of the claims raised in this Arbitration, including claims for damages it has suffered as a result of Canada's: (*i*) blocking of the sale of Wind Mobile to an Incumbent; and (*ii*) failures with respect to the regulatory environment (a component of Canada's cumulative breach).

213. Canada's breaches of the BIT had a material and direct impact on the value of GTH's equity and debt investments in Wind Mobile. What is more, they undermined GTH's

---

[390] *See* **Exhibit CL-001**, BIT (English), Articles I(f), XIII.

[391] *See, e.g.*, **Exhibit 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, 42 I.L.M. 788 (2003), ¶¶ 57-65 (finding that there was no requirement for an investor to own a controlling share or to be a named party to a concession agreement where the treaty included a direct right of action of shareholders); **Exhibit 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, ¶¶ 282-86 (finding that indirect investments were covered as the "*words of the definition* [of investment] *are clear beyond question . . . there is no need to interpret that which has no need of interpretation.*"); **Exhibit CL-014**, *Mobil Corporation, Venezuela Holdings, B.V., Mobil Cerro Negro Holding, Ltd., Mobil Venezolana De Petróleos Holdings, Inc., Mobil Cerro Negro, Ltd., and Mobil Venezolana De Petróleos, Inc. v. Bolivarian Republic of Venezuela v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010, ¶¶ 162-66 (finding that where the definition of investment is "*very broad*" and includes "*every kind of assets . . .* [t]*he BIT does not support the allegation that the definition of investment excludes indirect investments*"). Canada makes a futile attempt to distinguish these cases on the basis that none of the BITs considered included a provision that is equivalent to Article XIII(12). This is irrelevant and does not engage with the reasoning of the tribunals. The determinative factor in all three cases was whether the claimant owned a covered investment and the tribunals found unanimously that where the definition of investment covered "*every kind of investment*" or "*every kind of asset*," this patently included both direct and indirect investments. Canada's reliance on Article XIII(12) is misleading because this provision has not been relied upon by GTH, nor is it applicable. *See* Canada's Memorial on Jurisdiction and Admissibility, ¶ 263.

legitimate expectations with respect to its investment. Accordingly, Canada has breached the BIT vis-à-vis GTH's investment and the returns due to GTH.[392]

214. Yet, Canada alleges that GTH has no standing to bring claims arising from the "***treatment of***" Wind Mobile.[393] As GTH explains below, Canada's argument fails because it ignores the plain language of the BIT, cites to an irrelevant provision of the BIT, and attempts to revive a so-called "*general principle*" regarding the separation between an enterprise and its shareholder (a "*principle*" that has long been discredited).

III.E.1. The Ordinary Meaning Of Article XIII Shows That GTH Has Standing To Bring Claims Relating To The Treatment Of Its Investment In Wind Mobile And The Returns On Its Investment

215. A proper assessment of GTH's standing in this Arbitration must again begin with the words used in the BIT. As set forth below, the ordinary meaning of the BIT makes clear that GTH may seek to resolve "*any dispute*" arising from Canada's wrongful measures which are in breach of the BIT and caused GTH "***loss or damage by reason of, or arising out of, that breach***."[394]

216. GTH is a protected investor that has made a protected investment for the purposes of the BIT. GTH's status as an investor is discussed in detail at **Part III.B** in response to Canada's *ratione personae* objection. As explained in that Part, GTH is an Egyptian

---

[392] Note that the key substantive provisions of the BIT cover both investment and returns to investors. *See*, *e.g.*, **Exhibit CL-001**, BIT (English), Article II(2) ("*Each Contracting Party shall accord* ***investments or returns of investors*** *of the other Contracting Party (a) fair and equitable treatment in accordance with principles of international law, and (b) full protection and security.*" (emphasis added)).

[393] *See generally* Canada's Memorial on Jurisdiction and Admissibility, Part IV (emphasis added).

[394] *See* **Exhibit CL-001**, BIT (English), Article XIII(1) (emphasis added). *See also* **Exhibit CL-125**, *EnCana Corporation v. Republic of Ecuador*, UNCITRAL, LCIA Case UN3481, Award, 3 February 2006, ¶ 117.

"*investor*" under the BIT because it is a "*juridical person . . . who invest*[ed] *in the territory of Canada*."[395]

217. The definition of "*investment*" in the BIT covers, in relevant part:

> ***any kind of asset*** *owned or controlled either directly, or indirectly through an investor of a third State, by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the latter's laws* ***and in, particular, though not exclusively****, includes:*
> . . .
>
> *(ii)* ***shares****, stock, bonds and debentures* ***or any other form of participation in a company****, business enterprise or joint venture . . .*
>
> *(iii)* ***money****, claims to money, and claims to performance under contract having a financial value . . .*
>
> *(vi)* ***rights****, conferred by law or under contract, to undertake any economic and commercial activity, including any rights to search for, cultivate, extract or exploit natural resources.*[396]

218. In short, GTH's investment includes, among other things, its indirect shareholding in Wind Mobile, its loans, and all of the associated rights that relate to its equity and debt investments.[397]

219. Canada conspicuously fails to address GTH's description of its investment as a "*bundle of rights*"[398]—a well-trodden concept in international investment law.[399] In *ADC v.*

---

395 **Exhibit CL-001**, BIT (English), Article I(g).

396 **Exhibit CL-001**, BIT (English), Article I(f) (emphases added).

397 The BIT's definition of investment is broad and covers "*any kind of asset*." Tribunals interpreting similar language have reached the same conclusion. *See* **Exhibit RL-165**, *Koch Minerals*, Award, ¶¶ 6.52-55; **Exhibit RL-006**, *Abaclat*, Decision on Jurisdiction and Admissibility, ¶ 354; **Exhibit RL-231**, *RosInvestco*, Final Award, ¶ 388.

398 GTH's Memorial on Merits and Damages, ¶ 386.

399 **Exhibit RL-165**, *Koch Minerals*, Award, ¶¶ 6.56-59 ("*It is thus not permissible to slice up an overall investment into its constituent parts, like a sausage, so as to contend that one part, isolated by itself alone, is not an 'investment' whereas as an integrated part of the whole investment, it is*"). *See also* **Exhibit CL-058**, *ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award, 18 May 2010, ¶ 96; **Exhibit 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; **Exhibit CL-117**, *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September

Hungary, the tribunal cited affirmatively Professor James Crawford's description of an expropriated investment as a "*bundle of rights and legitimate expectations*."[400] Professor Crawford explained, and the tribunal accepted, that a State can breach its obligations to an investor under a BIT by committing actions which destroy the rights and legitimate expectations of an enterprise in which the investor is involved.[401] Therefore, Canada need not interfere directly with GTH's shares in Wind Mobile to constitute a breach (though that appears to be Canada's position). Rather, it is the legitimate expectations and the bundle of rights that come with owning shares of a company like Wind Mobile that are protected.

220. GTH is entitled to submit any breach of the BIT to arbitration if it has incurred loss or damage. The relevant sections of Article XIII state:

> 1. ***Any dispute*** *between one Contracting Party and an investor of the other Contracting Party, relating to a claim by the investor* ***that a measure taken or not taken by the former Contracting Party is in breach of this Agreement.*** [sic] ***and that the investor has incurred loss or damage by reason of, or arising out of, that breach****, shall, to the extent possible, be settled amicably between them. . . .*
>
> 3. ***An investor may submit a dispute as referred to in paragraph (1) to arbitration in accordance with paragraph (4)*** *only if: . . .*
>
> 4. *The dispute may,* ***at the election of the investor concerned****, be submitted to arbitration under:*

2003, ¶ 17.1; **Exhibit CL-088**, *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award, 7 February 2017, ¶¶ 339, 358. *See also* **Exhibit CL-113**, *Ceskoslovenska Obchodni Banka,* Decision of the Tribunal on Objections to Jurisdiction, ¶ 72.

[400] **Exhibit CL-040**, *ADC*, Award of the Tribunal, 2 October 2006, ¶¶ 303-304 ("*As will be explained later in the section dealing with liability, it is the opinion of the Tribunal that Professor Crawford articulated the matter correctly. There can be no doubt whatsoever that the legislation passed by the Hungarian Parliament and the Decree had the effect of causing the rights of the Project Company to disappear and/or become worthless. The Claimants lost whatever rights they had in the Project and their legitimate expectations were thereby thwarted. This is not a contractual claim against other parties to the Project Agreements. An act of state brought about the end of this investment and, particularly absent compensation, the BIT has been breached.*").

[401] **Exhibit CL-040**, *ADC*, Award of the Tribunal, ¶ 303.

> *(a) The International Centre for the Settlement of Investment Disputes (ICSID), established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States.*[402]

221. As a consequence of Canada's blocking of the sale of Wind Mobile and its failures with respect to roaming and tower/site sharing conditions (among other things), GTH as a shareholder of Wind Mobile has suffered damage.[403] Accordingly, GTH has standing to pursue claims arising from Canada's breaches. In the words of eminent commentators:

> *Given the wide definition of investment contained in most bilateral investment treaties, if an 'investment' can include shares in a company there is no conceptual reason to prevent an investor recovering for damage caused to those shares which has resulted in a diminution in their value.*[404]

222. Canada argues that GTH's claims do not relate to the "*treatment of* [GTH]" but rather relate to the treatment of Wind Mobile.[405] According to Canada, this means that GTH should have sought to arbitrate its claims pursuant to Article XIII(12) of the BIT.[406]

223. Article XIII(12) is irrelevant. It provides, in full:

> *(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*

---

402 **Exhibit CL-001**, BIT (English), Article XIII (emphases added).

403 *See supra* **Part V.B**.

404 **Exhibit CL-165**, Campbell McLachlan, Laurence Shore, and Matthew Weiniger, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES (2d ed. 2017), ¶ 6.123.

405 Canada's Memorial on Jurisdiction and Admissibility, Part IV(D)-(E)

406 Canada's Memorial on Jurisdiction and Admissibility, Part IV(C).

> *(i) any award shall be made to the affected enterprise;*
>
> *(ii) the consent to arbitration of both the investor and the enterprise shall be required;*
>
> *(iii) both the investor and 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; and*
>
> *(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.*
>
> *(b) Notwithstanding subparagraph 12(a), where a disputing Contracting Party has deprived a disputing investor of control of an enterprise, the following shall not be required:*
>
> *(i) a consent to arbitration by the enterprise under 12(a)(ii); and*
>
> *(ii) a waiver from the enterprise under 12(a)(iii).*[407]

224. As the language of the provision makes clear, Article XIII(12) only applies where: (*i*) an investor has claimed that "*an enterprise . . . has incurred loss or damage*" by reason of the impugned measures; and (*ii*) the investor seeks to make such claims "*on behalf of an enterprise which the investor owns or controls directly or indirectly*."[408] GTH

---

[407] **Exhibit CL-001**, BIT (English), Article XIII(12) (emphases added).

[408] Canada's allegation that permitting GTH to pursue indirect claims for loss or damage would somehow eviscerate the meaning of Article XIII(12) does not withstand scrutiny. *See* Canada's Memorial on Jurisdiction and Admissibility, ¶ 255. The purpose of this type of provision is to address circumstances where a breach of the BIT affects a locally incorporated subsidiary that caused no loss or damage to the investor. *See* **Exhibit CL-125**, *EnCana*, Award, ¶ 118. *See also* **Exhibit 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 (emphasizing the distinction between the two types of claims, "*under the provisions of the Bilateral Investment Treaty, broad as they are, claims made by investors that are not in the majority or in the control of the affected corporation when claiming for violations of their rights under such treaty are admissible. Whether the locally incorporated company may further claim for the violation of its rights under contracts, licences or other instruments, does not affect the direct right of action of foreign shareholders under the Bilateral Investment Treaty for protecting their interests in the qualifying investment.*"); **Exhibit RL-104**, *Mondev*, Award, ¶ 82 (noting that there can be a distinction drawn between the loss suffered by investor-shareholders and the loss suffered by the underlying enterprise: "*it is certainly open to Mondev to show that*

neither seeks to claim for Wind Mobile's loss or damage,[409] nor can it act on behalf of Wind Mobile which it does not presently own or control directly or indirectly. While Canada repeatedly describes GTH's claim as "*derivative*" or for "*reflective loss*,"[410] such characterizations are misleading and designed to import concepts from the exercise of a state's diplomatic protection into the BIT.

225. GTH is aware of only one other tribunal that has considered the same objection raised by Canada, and that tribunal concurred with GTH's analysis.[411] In *EnCana Corporation v. Ecuador*, the claimant, Encana, brought claims under the Canada-Ecuador BIT, which contains nearly identical language to the BIT in this Arbitration including Article XIII.[412] EnCana's claims concerned measures taken by Ecuador in respect of two wholly-owned EnCana subsidiaries incorporated in Barbados,[413] which in turn entered into certain contracts providing for rights of exploration and exploitation of oil and gas reserves in Ecuador.[414] These contracts entitled the EnCana subsidiaries to VAT refunds, which were denied by Ecuador.[415] In response to EnCana's claims, Ecuador

---

it has suffered loss or damage by reason of the decisions it complains of, even if loss or damage was also suffered by the enterprise itself, LPA").

409 Rather, it has suffered damages indirectly as a shareholder of Wind Mobile. Such claims have been referred to as "*indirect claims*." *See* **Exhibit CL-160**, Gabriel Bottini, *Indirect Shareholder Claims*, *in* BUILDING INTERNATIONAL INVESTMENT LAW: THE FIRST 50 YEARS OF ICSID (2015), p. 203, n. 2 ("*These claims are referred to as indirect claims, in the sense of claims brought by an entity that is not the direct addressee of the relevant State measure. This concept is used here regardless of whether the shareholding is direct or indirect (*i.e.*, through intermediary companies). For present purposes, 'indirect claims' is preferred over similar concepts such as 'derivative claims' or 'claims for reflective loss' mainly because these latter concepts, while perhaps more precise in certain respects, also appear more closely connected to specific domestic legal systems.*").

410 *See* Canada's Memorial on Jurisdiction and Admissibility, ¶¶ 240, 243-44, 251-52, 264, 266, 279, 282.

411 **Exhibit CL-125**, *EnCana*, Award, ¶¶ 115-22.

412 **Exhibit RL-093**, Agreement between the Government of Canada and the Government of the Republic of Ecuador for the Promotion and Reciprocal Protection of Investments (signed 29 April 1996; entry into force 6 June 1997; terminated 19 May 2018).

413 **Exhibit CL-125**, *EnCana*, Award, ¶ 1.

414 **Exhibit CL-125**, *EnCana*, Award, ¶ 23.

415 **Exhibit CL-125**, *EnCana*, Award, ¶ 23.

raised a similar objection to Canada's standing objection in this Arbitration. Specifically, Ecuador argued that there was no dispute resolution mechanism available to Encana as it did not qualify under either Article XIII(1) (because it was bringing claims, allegedly, on behalf of two enterprises) or Article XIII(12) (because the enterprises were incorporated in Barbados, a third state, whereas the enterprise must be incorporated in the host State, Ecuador).[416]

226. In addressing Ecuador's objection, the tribunal recited the relevant provisions of the Canada-Ecuador BIT, noting that, "*in accordance with general principles it is necessary to interpret the provisions of the BIT so as to give due effect to each of them having regard to the object and purpose of the treaty as a whole*."[417] The tribunal then said the following about Article XIII(12) of the Canada-Ecuador BIT:

> ***The Tribunal does not interpret Article XIII(12) as limiting the clear words of Articles I and XIII(1) which allow an investor to maintain a claim for loss suffered to itself arising from a breach of the BIT.*** *Evidently the BIT proceeds on the basis that the separate identity of corporations incorporated in different States and territories is to be respected. Nonetheless it expressly allows investments to be held through third State corporations, and claims to be made for breaches involving such investments, provided the investor has suffered loss or damage as a result.* ***True, it does distinguish between loss or damage suffered by a locally incorporated enterprise and loss or damage suffered directly or indirectly by the investor itself. Circumstances can be envisaged where a breach of the BIT affecting a locally incorporated subsidiary would have caused no loss or damage to the parent – e.g., where no consequence flowed from the breach either to the returns to the parent or to the share value of the subsidiary.*** *In such a case, the investor could only recover by bringing proceedings in accordance with Article XIII(12). Alternatively the measure of loss to the foreign investor might be different from that to the locally incorporated enterprise, e.g. in case of a majority owned enterprise or an enterprise required contractually to indemnify its parent for any loss.*

---

[416] **Exhibit CL-125**, *EnCana*, Award, ¶ 115 ("*According to* [Ecuador], *EnCana is not claiming in relation to its own loss but rather in relation to loss suffered by* [the Barbados subsidiaries] *insofar as the relief sought is the reimbursement of sums of money to these subsidiaries*.").

[417] **Exhibit CL-125**, *EnCana*, Award, ¶ 117.

> ***But an investor which alleges that it has suffered loss or damage, directly or indirectly, through a breach of the BIT is entitled to bring proceedings under Articles XIII(l) and (2). If it cannot prove compensable loss or damage, it will fail on the merits; that does not affect the jurisdiction of a tribunal constituted in accordance with Article XIII(4) to entertain its claim.***[418]

227. The same analysis is directly applicable in this case. In particular, Article XIII(12) of the BIT does not limit the clear words of Articles I and XIII(1) of the BIT, which allow GTH to maintain its claims insofar as it is able to establish that it has suffered loss as a result of breaches of the BIT with respect to its investment (*i.e.*, the bundle of rights associated with its shareholding in Wind Mobile). GTH accepts that if it is unable to prove compensable loss or damage to it by virtue of its indirect interest in Wind Mobile, its claims will fail. But that question is, as the *EnCana* tribunal found, one for the merits. It should have no bearing on the question of whether or not the Tribunal can hear GTH's claims.[419]

228. Canada attempts to defeat the ordinary meaning of the BIT and to allege that "[a]*n interpretation that reads out the distinction between Articles XIII(3)* [the article relevant to this Arbitration] *and XIII(12)* [the article Canada claims is relevant to some of GTH's claims] *would have serious negative consequences*."[420] But GTH seeks to do nothing of the kind. 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. Each of the many cases upon which Canada relies recognizes that the operative question is a factual one

---

[418] **Exhibit CL-125**, *EnCana*, Award, ¶ 118 (emphases added).

[419] As the tribunal in *Tokios Tokelės* observed, "[a]*n international tribunal of defined jurisdiction should not reach out to exercise a jurisdiction beyond the borders of the definition. But equally an international tribunal should exercise, and indeed is bound to exercise, the measure of jurisdiction with which it is endowed.*" **Exhibit CL-120**, *Tokios Tokelės*, Decision on Jurisdiction, ¶ 36.

[420] Canada's Memorial on Jurisdiction and Admissibility, ¶ 256. *See* Canada's Memorial on Jurisdiction and Admissibility, ¶¶ 255-72 and sources cited therein.

for the merits regarding what damages are claimed by the claimant; the cases do not seek to create an arbitrary bar on shareholder claims.[421]

III.E.2. Canada Relies On A Non-Existent Standard Of International Law

229. The ordinary meaning of the BIT is clear and the Tribunal need not rely on external sources to interpret the provisions relating to GTH's standing to pursue its claims. Canada, however, begins its analysis by relying on an alleged general principle of international law that recognizes the separation of legal personality between an enterprise and a shareholder.[422] **First**, Canada's argument ignores the true nature of GTH's investment as a bundle of rights as described above.

---

[421] For example, the tribunal in *Mondev*: (*i*) found that the claimant investor (holding an indirect interest in the project company) did have standing under Article 1116 of NAFTA; and (*ii*) observed that the "*principal difference* [between Articles 1116 and 1117 of NAFTA] *relates to the treatment of any damages recovered*." **Exhibit RL-104**, *Mondev*, Award, ¶¶ 83-84. The same could be said of Articles XIII(1) and XIII(12) of the BIT. Canada also asserts by reference to *Mondev* that the tribunal "*found that under the scenario of a claim being brought forward by the sole owner of an enterprise, Articles 1116 and 1117 would create a distinction only in form rather than in substance*." Canada's Memorial on Jurisdiction and Admissibility, ¶ 261, *citing* **Exhibit RL-104**, *Mondev*, Award, ¶ 86. GTH assumes that this citation is a typographical error, as the paragraph from the *Mondev* Award to which Canada cites provides no support for such a contention. Canada also relies on *GAMI Investments Inc. v. United Mexican States*. In *GAMI*, a U.S. shareholder brought a claim in respect of losses allegedly caused to its minority shareholding in a Mexican company, which itself owned a series of sugar mills that were expropriated by Mexico. As in *Mondev*, the *GAMI* tribunal found that it had jurisdiction over the shareholder claimant's claims. **Exhibit RL-151**, *GAMI Investments Inc. v. The Government of The United Mexican States*, UNCITRAL, Final Award, 15 November 2004, ¶ 33. While referring to the NAFTA Parties' submissions in *Pope & Talbot v. Canada*, including its own, Canada neglects to mention that its arguments in this regard were given short thrift by the tribunal. *See* Canada's Memorial on Jurisdiction and Admissibility, ¶ 261, n. 389; **Exhibit CL-115**, *Pope & Talbot Inc v. The Government of Canada*, UNCITRAL, Award in Respect of Damages, 31 May 2002, ¶¶ 77-80, *citing* **Exhibit RL-153**, *Pope & Talbot, Inc. v. The Government of Canada*, UNCITRAL, Statement of Defence (Phase 3 – Damages), 18 August 2001.

[422] Canada's Memorial on Jurisdiction and Admissibility, ¶¶ 241-48. Unsurprisingly, Canada engages in no effort to establish this alleged general principle of international law, while elsewhere arguing that GTH should be required to do so (notwithstanding that GTH does not purport to make a claim on the basis of customary international law). *See* Canada's Counter-Memorial on Merits and Damages, ¶¶ 335-38.

230. **Second**, this *Barcelona Traction*-based argument has no place in investment treaty arbitration and has long been dismissed by eminent scholars and in investment treaty jurisprudence.[423] The International Court of Justice has itself noted that:

> *in contemporary international law, the protection of the rights of companies and the rights of their shareholders, and the settlement of the associated disputes, are essentially governed by bilateral or multilateral agreements for the protection of foreign investments . . . the role of diplomatic protection* [has] *somewhat faded, as in practice recourse is only made to it in rare cases where treaty régimes do not exist or have proved inoperative.*[424]

231. **Third**, the conclusion of Canada's argument is that to determine whether shareholder claims are permitted under a treaty, one must look to the treaty itself.[425] Canada quotes the tribunal's award in *HICEE v. The Slovak Republic*, which makes clear that "*the admissibility of shareholder claims depends upon the provisions of the investment protection treaty in question, and that investment protection treaties very frequently make provision to allow for shareholder claims, either explicitly or by necessary*

---

[423] *See, e.g.*, **Exhibit CL-165**, Campbell McLachlan, Laurence Shore, and Matthew Weiniger, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES (2d ed. 2017), ¶ 6.123; **Exhibit CL-005**, *CMS*, Decision of the Tribunal on Objections to Jurisdiction, ¶¶ 48 ("*The Tribunal therefore finds no bar in current international law to the concept of allowing claims by shareholders independently from those of the corporation concerned, not even if those shareholders are minority or non-controlling shareholders. Although it is true, as argued by the Republic of Argentina, that this is mostly the result of* lex specialis *and specific treaty arrangements that have so allowed, the fact is that* lex specialis *in this respect is so prevalent that it can now be considered the general rule, certainly in respect of foreign investments and increasingly in respect of other matters. To the extent that customary international law or generally the traditional law of international claims might have followed a different approach – a proposition that is open to debate – then that approach can be considered the exception*."), 57-65; **Exhibit CL-006**, *ConocoPhillips*, Decision on Jurisdiction and the Merits, ¶¶ 282-86; **Exhibit CL-014**, *Mobil*, Decision on Jurisdiction, ¶¶ 162-66.

[424] **Exhibit RL-139**, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Preliminary Objections, Judgment of 24 May 2007, (2007) I.C.J. REPORTS 582, ¶ 88. *See also* **Exhibit RL-051**, *Teinver S.A., Transportes de Cercanías S.A., and Autobuses Urbanos del Sur S.A. v. The Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Jurisdiction, 21 December 2012, ¶¶ 217-20; **Exhibit RL-156**, *Telefónica S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/20, Decision of the Tribunal on Objections to Jurisdiction, 25 May 2006, ¶ 83; **Exhibit RL-157**, *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Decision on Jurisdiction, 22 February 2006, ¶ 82.

[425] *See* Canada's Memorial on Jurisdiction and Admissibility, ¶ 245 (observing that the relevance of this so-called "*general principle of international law*" depends on the terms of the BIT).

implication."[426] The BIT in this case makes clear that GTH can bring claims for loss suffered to its investments, as it has done in this Arbitration.

[426] Canada's Memorial on Jurisdiction and Admissibility, ¶ 246, *citing* **Exhibit RL-140**, *HICEE B.V. v. The Slovak Republic,* UNCITRAL, PCA Case No. 2009-11, Partial Award, 23 May 2011, ¶ 147.

IV. CANADA HAS BREACHED FUNDAMENTAL OBLIGATIONS UNDER THE BIT

232. By adopting the BIT, Canada and Egypt sought to stimulate the flow of reciprocal investment between them by promoting and protecting the investments of investors of the other State.[427] Accordingly, the BIT obliges Canada and Egypt to "*encourage the creation of favourable conditions for investors of the other Contracting Party to make investments in its territory*"[428] and provides investors of the Contracting Parties with certain critical protections, including the guarantee that a host State will treat an investor's investments and returns fairly and equitably.[429] Moreover, to enforce these protections and guarantees, the Contracting Parties adopted dispute resolution mechanisms to allow an investor to seek redress for breaches of the host State's obligations in a neutral forum.[430] In other words, this was a broad agreement intended to galvanize a wide range of investors in different sectors to make investments in a foreign territory by offering critical protections that would allow those investors to feel safe doing so.

233. Having accepted almost all of the critical facts relevant to this dispute, Canada's remaining option on the merits is to attempt to circumscribe its substantive obligations owed to GTH by advocating unsustainable interpretations of the BIT's provisions. Canada's arguments with respect to its substantive obligations ignore the ordinary meaning of the BIT's provisions and undermine the fundamental purpose of this treaty

---

427 **Exhibit CL-001**, BIT (English), Title and Preamble.

428 **Exhibit CL-001**, BIT (English), Article II(1). *See also* **Exhibit C-037**, External Affairs and International Trade Canada, *Canadian Ambassador Signs Foreign Investment Protection Agreement with Egyptian Minister of International Cooperation*, 13 November 1996 [ATI Document] (announcing the signature of the BIT and noting that it "*will increase the confidence of investors, provide greater investment protection and help promote bilateral investment flows*.").

429 **Exhibit CL-001**, BIT (English), Article II(2)(a).

430 **Exhibit CL-001**, BIT (English), Article XIII.

to encourage the flow of investment between Canada and Egypt by offering critical protections to investors.

234. Each of Canada's breaches of the BIT are addressed below.

IV.A. Canada Has Breached Its Obligation To Accord GTH's Investment Fair And Equitable Treatment

235. In GTH's Memorial on Merits and Damages, GTH has set out in detail Canada's breaches of its obligation to accord FET to GTH's investment and the returns on its investment as required by Article II(2)(a) of the BIT.[431] Specifically, Canada has breached its obligation by:

(a) Blocking GTH from selling Wind Mobile to an Incumbent after the finite five year restriction on transfer to an Incumbent had expired, despite Canada's intention and GTH's expectation that this period would last for only five years;[432]

(b) Subjecting GTH to a national security review process that was arbitrary, non-transparent, and lacking in due process, and used as a means of promoting Canada's telecommunications policy agenda to create a fourth player in the wireless telecommunications market;[433] and

(c) Canada's cumulative conduct for the duration of GTH's investment, including those breaches identified above, which resulted in the complete dismantling of the framework upon which GTH was induced to invest.[434]

236. GTH describes below the critical components of Canada's FET obligation. To lighten the weight of the evidence, Canada's primary objective is to contest the ordinary meaning of the BIT—and the findings of numerous other tribunals—to render the BIT's

---

431 *See* GTH's Memorial on Merits and Damages, Part VII.A; **Exhibit CL-001**, BIT (English), Article II(2)(a).

432 *See* GTH's Memorial on Merits and Damages, Part VII.A.2.

433 *See* GTH's Memorial on Merits and Damages, Part VII.A.3.

434 *See* GTH's Memorial on Merits and Damages, Part VII.A.4.

FET provision meaningless. Canada's effort to rewrite the BIT's "*fair and equitable*" provision (which should be treated as an autonomous treaty standard) so that it is limited to "*the minimum standard of treatment*" (a principle of customary international law) should be rejected. In any event, even if the minimum standard of treatment had any relevance here, tribunals have confirmed that due to the progressive evolution of the minimum standard of treatment under customary law, there is no distinction today between the protection afforded under the autonomous FET standard and the minimum standard of treatment.

237. Having failed to limit the scope of the FET obligation owed to GTH, Canada then mischaracterizes or ignores the relevant facts. When the facts are considered objectively, the facts establish that Canada has committed multiple breaches of its obligation to accord FET to GTH's investment.

IV.A.1. Article II(2)(a) Prohibits Treatment Which Is Unfair, Arbitrary, Inconsistent, Non-Transparent, In Breach Of An Investor's Legitimate Expectations Or Fails To Accord Due Process

238. Article II(2)(a) provides:

> *Each Contracting Party shall accord investments or returns of investors of the other Contracting Party . . . fair and equitable treatment in accordance with principles of international law. . .* [435]

239. In general terms, tribunals have found that the FET provision protects an investor from conduct by a host State that is unreasonable, arbitrary, discriminatory, inconsistent, lacking in transparency, lacking in procedural propriety or due process, or frustrates the investor's legitimate expectations.[436] The standard recognizes that a foreign investor

[435] **Exhibit CL-001**, BIT (English), Article II(2)(a).

[436] *See* GTH's Memorial on Merits and Damages, ¶¶ 290-300.

cannot be expected to bear the cost where a State decides to change the framework in an important or fundamental way, in breach of an investor's legitimate expectations or where such change otherwise is substantively or procedurally improper.

240. Akin to Canada's acts underlying this dispute—to gradually erode the 2008 AWS Auction Framework that it created to induce GTH's investment and upon which GTH relied—Canada attempts to chip-away at fundamental components of the FET standard.[437] As GTH describes in the sections below, Canada's efforts are defeated by the language of the BIT and the weight of jurisprudence.

241. Above all, what amounts to a breach of the FET standard should be assessed against the facts of the particular case.[438] A re-occurring theme in Canada's defense on the

---

[437] In sum, Canada argues that the FET standard:

(a) "*Does Not Allow a Tribunal to Second-Guess the Government's Policy Justification and Choice of Measure*" (*See* Canada's Counter-Memorial on Merits and Damages, ¶¶ 340-47);

(b) "*Does Not Protect Against Unreasonable or Arbitrary Measures Unless they are Devoid of any Legitimate Policy Purpose and Contrary to the Rule of Law*" (*See* Canada's Counter-Memorial on Merits and Damages, ¶¶ 348-51);

(c) "*Does Not Protect an Investor's Legitimate Expectations*" (*See* Canada's Counter-Memorial on Merits and Damages, ¶¶ 352-57);

(d) "*Does Not Provide a General Obligation of Transparency*" (*See* Canada's Counter-Memorial on Merits and Damages, ¶¶ 358-60);

(e) "*Does Not Establish a Specific Process that Applies to States' National Security Reviews*" (*See* Canada's Counter-Memorial on Merits and Damages, ¶ 361).

[438] *See* **Exhibit CL-070**, *Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L., and S.C. Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, ¶¶ 505-506 ("*It is undisputed that an analysis of whether a state's conduct has been fair and equitable requires an assessment of all the facts, context and circumstances of a particular case.*"); **Exhibit CL-075**, *Gold Reserve*, Award, ¶ 566 ("*The Tribunal shares the view expressed by other investment treaty tribunals that in order to establish whether an investment has been accorded fair and equitable treatment, all of the facts and circumstances of the particular case must be considered.*"); **Exhibit CL-038**, *Saluka*, Partial Award, ¶¶ 285, 291, 309 ("*To the extent that the case law reveals different formulations of the relevant thresholds, an in-depth analysis may well demonstrate that they could be explained by the contextual and factual differences of the cases to which the standards have been applied.*"); **Exhibit CL-086**, *Windstream Energy LLC v. Government of Canada*, UNCITRAL, PCA Case No. 2013-22, Award, 27 September 2016, ¶¶ 361-62 ("*In other words, just as the proof of the pudding is in the eating (and not in its description), the ultimate test of correctness of an interpretation is not in its description in other words, but in its application on the facts.*"); **Exhibit CL-082**, *Crystallex*, Award, ¶ 544 ("*The Tribunal further wishes to point out that the analysis of whether a state's conduct has been fair and equitable requires an assessment of all the facts, context and circumstances of a particular case.*"); **Exhibit 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*

merits of this claim is a blatant mischaracterization of the breadth of Canada's ability to regulate when viewed in conjunction with its obligations under this BIT. With respect to protected investors like GTH, Canada's actions must be tempered by the obligations it has voluntarily undertaken in this BIT.[439] Where a State changes the legal and business framework in an important or fundamental manner, or its actions are otherwise substantively or procedurally improper, it has breached its obligations under the BIT.[440] There is no general rule of international law, as Canada would have it, that allows States unfettered discretion in the area of public policy. Canada cannot hide behind the shield of its own decision-making by characterizing the necessary assessment of whether its actions have violated the BIT's protections as impermissible "*second-guess*[ing]"[441] or by urging the Tribunal to adopt a high level of deference to the State's conduct that neither the BIT nor international law supports.[442] The Tribunal is obliged to assess whether Canada breached the BIT and cannot defer to Canada's own determinations in this regard.

Republic, Decision on Liability, 30 July 2010, ¶ 188 ("*A fourth important characteristic of the term is that its application is crucially dependent on an evaluation of the facts of each case.*").

439 *See, e.g.*, **Exhibit CL-016**, *Rusoro*, Award, ¶ 525 ("*The right to regulate, however, does not authorize States to act in an arbitrary or discriminatory manner, or to disguise measures targeted against a protected investor under the cloak of general legislation.*").

440 *See, e.g.*, **Exhibit CL-070**, *Micula*, Award, ¶ 529 ("*In the Tribunal's view, the correct position is that the state may always change its legislation, being aware and thus taking into consideration that: (i) an investor's legitimate expectations must be protected; (ii) the state's conduct must be substantively proper (e.g., not arbitrary or discriminatory);and (iii) the state's conduct must be procedurally proper (e.g., in compliance with due process and fair administration). If a change in legislation fails to meet these requirements, while the legislation may be validly amended as a matter of domestic law, the state may incur international liability.*").

441 Canada's Counter-Memorial on Merits and Damages, ¶¶ 340-47.

442 *See* **Exhibit CL-177**, *Antaris GMBH and Dr. Michael Göde v. The Czech Republic*, UNCITRAL PCA Case No. 2014-01, Dissenting Opinion of Mr. Gary Born, 2 May 2018, ¶¶ 48, 50 ("*The application of a margin of appreciation to a state's fair and equitable treatment obligations under investment treaties is not a generally accepted principle of international law.*"); **Exhibit CL-084**, *Philip Morris Brands Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Concurring and Dissenting Opinion of Mr. Gary Born, 28 June 2016, ¶ 87 ("*The 'margin of appreciation' is a specific legal rule, developed and applied in a particular context, that cannot properly be transplanted to the BIT (or to questions of fair and equitable treatment more generally).*").

IV.A.1.a. The FET Standard In This BIT Is An Autonomous Treaty Standard

242. As will be explored in greater detail below, the FET standard in this BIT is consistent with the ordinary meaning of "*fair*" and "*equitable*" as interpreted by numerous tribunals,[443] and reinforced by the object and purpose of the BIT as a whole to promote and protect investment between Canada and Egypt.[444] Moreover, the context of this provision confirms that Canada and Egypt intended to provide broad protection to investors through an autonomous FET standard.[445] Article II, in which the FET protection appears, is entitled "*Establishment, Acquisition and Protection of Investments*."[446] Article II(1) introduces the objective of this Article, stating that the Contracting Parties are required to "***encourage the creation of favourable conditions*** *for investors of the other Contracting Party to make investments in its territory*."[447] This objective memorializes a positive obligation on Canada to promote the creation of favorable conditions; it is in this context in which the "*fair and equitable treatment*" obligation must be read.

243. As is plain from the language of the BIT, the FET standard contained in Article II(2)(a) is not the "*minimum standard of treatment*" under customary international law. Yet, Canada attempts to rewrite the BIT to refer to the "*minimum standard of treatment*," a phrase that appears nowhere in this treaty, relying specifically on the phrase "*in*

---

443 *See* **Exhibit CL-071**, BLACK'S LAW DICTIONARY (10th ed. 2014), Definitions of "*fair*" and "*equitable*" (2014); GTH's Memorial on Merits and Damages, ¶ 291.

444 *See* **Exhibit CL-001**, BIT (English), Preamble; **Exhibit C-037**, External Affairs and International Trade Canada, *Canadian Ambassador Signs Foreign Investment Protection Agreement with Egyptian Minister of International Cooperation*, 13 November 1996 [ATI Document].

445 *See* GTH's Memorial on Merits and Damages, ¶¶ 291-93.

446 **Exhibit CL-001**, BIT (English), Article II; GTH's Memorial on Merits and Damages, ¶¶ 292-93.

447 **Exhibit CL-001**, BIT (English), Article II(1) (emphasis added).

accordance with principles of international law."[448] Canada wrongly suggests that this phrase operates as a *renvoi* to customary international law, and that "*fair and equitable treatment*" is therefore the same as the "*minimum standard of treatment under customary international law*."[449]

244. This reading finds no support in the language of this BIT, nor the purpose and spirit of this BIT. The ordinary meaning of the words *"fair and equitable treatment*" do not change when discussed next to "*principles of international law*."[450] The phrase "*in accordance with principles of international law*" means exactly what it says: that the FET provision should accord or agree with principles of international law. Stated another way, FET cannot be contrary to the principles of international law and, to the extent there is any difference between the two, principles of international law act as a floor but not as a ceiling.[451]

245. The principle source of Canada's error is that it misunderstands the "*effet utile*" principle of treaty interpretation.[452] *Effet utile* is a subsidiary rule of treaty interpretation arising from Article 31 of the VCLT's mandate that a treaty must be "*interpreted in good faith*."[453] The principle of *effet utile* stands for the basic proposition that "*an*

---

448 Canada's Counter-Memorial on Merits and Damages, ¶¶ 325-34.

449 Canada's Counter-Memorial on Merits and Damages, ¶ 332.

450 **Exhibit CL-039**, *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, ¶¶ 360-61; **Exhibit CL-082**, *Crystallex*, Award, ¶¶ 491, 531, 538.

451 *See, e.g.*, **Exhibit CL-045**, *Vivendi II*, Award, ¶ 7.4.7 (referring to a similar BIT provision and observing that "*the wording of Article 3 requires that the fair and equitable treatment* conform *to the principles of international law, but the requirement for conformity can just as readily set a floor as a ceiling on the Treaty's fair and equitable treatment standard.*").

452 Canada's Counter-Memorial on Merits and Damages, ¶ 327.

453 **Exhibit CL-018**, VCLT, Article 31; **Exhibit CL-150**, *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Jurisdiction, 19 December 2012, ¶ 107 ("*This principle* [of Article 31 of the VCLT] *based on purpose and good faith gives rise to the principle of effectiveness requiring an interpretation that has an effective meaning in relation to the objective of the legal provision under examination.*").

interpretation which leads to either an impossibility or absurdity or empties the provision of any legal effects" should be avoided.[454] In short, one should not interpret a treaty in a manner that is nonsensical or renders a provision entirely meaningless.[455]

246. Here, it is Canada that fails to give all of the words meaning, seeking to render useless the words "*fair*" and "*equitable*" in favor of the minimum standard of treatment. Professor Christoph Schreuer explains that "*in the absence of a clear indication to the contrary, the fair and equitable treatment standard contained in BITs is an autonomous concept.*"[456] The Parties expressly used the phrase "*fair and equitable*"—terms of art with a known meaning in the field of investment law[457]—while noting that FET ought to accord with "*principles of international law*." GTH's interpretation that the reference to "*principles of international law*" guides, but does not limit, the protection offered by the FET standard gives meaning to all of the words.

247. Canada's interpretation, however, would further require the addition of words into the BIT's provision. Article II(2)(a) of this BIT does not qualify "*principles of international law*" with the word "*customary*." The absence of the word "*customary*" to modify "*international law*" confirms that the Contracting Parties of the BIT intended

---

454 **Exhibit CL-150**, *Urbaser*, Decision on Jurisdiction, ¶ 52. *See also* **Exhibit RL-055**, *The Renco Group*, Decision as to the Scope of the Respondent's Preliminary Objections Under Article 10.20.4, ¶ 199 ("*The principle of effet utile requires that a treaty be interpreted so that every operative clause is 'meaningful rather than meaningless.'*").

455 However, the drafters of the VCLT did not include explicit mention of *effet utile* in Article 31 to discourage potential abuse of the doctrine, and in particular "*attempts to extend the meaning of treaties illegitimately*" to capture "*an interpretation going beyond what is expressed or necessarily to be implied in the terms of the treaty*." **Exhibit CL-096**, INTERNATIONAL LAW COMMISSION, *Draft Articles on the Law of Treaties with commentaries* (1966), p. 219.

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

457 **Exhibit CL-110**, *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Judgment of 12 December 1996, (1996) I.C.J. REPORTS 803, pp. 847-61, Separate Opinion of Judge Higgins, ¶ 39 ("*the key terms 'fair and equitable treatment to nationals and companies' and 'unreasonable and discriminatory measures' are legal terms of art well known in the field of overseas investment protection*").

the Tribunal to examine *all sources* of international law.[458] While customary international law is one source of international law, other sources include treaties between states and the subsequent interpretation of those instruments by tribunals and courts.[459]

248. Furthermore, the phrase "*minimum standard of treatment*" is nowhere to be found in this BIT. If the Parties wished to provide for treatment in accordance with the minimum standard of treatment, that is what they would have said. Unless the Contracting Parties expressly refer to the "*minimum standard of treatment*," it should be presumed that they did not intend to do so. As described by one tribunal, this standard is:

> [S]*o well known and so well established in international law that one can assume that if* [the Contracting Parties] *had intended to limit the content of fair and equitable treatment to the minimum international standard they would have used that formulation specifically. In fact, they did not.*[460]

---

[458] For example, Canada has expressly negotiated treaty provisions which refer to "*customary international law*." *See, e.g.*, **Exhibit RL-118**, Agreement between Canada and the Republic of Peru for the Promotion and Protection of Investments (signed 14 November 2006; entry into force 20 June 2007; suspended 1 August 2009), Article 5.1 ("*Each Party shall accord to covered investments treatment in accordance with the customary international law minimum standard of treatment of aliens, including fair and equitable treatment and full protection and security*."); **Exhibit CL-045**, *Vivendi II*, Award, ¶ 7.4.7; **Exhibit 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, ¶ 1001 ("*Article 3 nowhere mentions 'minimum standard' as such, but rather speaks simply of principles of international law. The treaty thus invites consideration of a wider range of principles related to fairness and equity.*"); **Exhibit CL-060**, *Suez*, Decision on Liability, ¶ 185.

[459] *See generally* **Exhibit CL-093**, Statute of the International Court of Justice, 33 U.N.T.S. 993 (open for signature 26 June 1945; entry into force 24 October 1945), Article 38(1) ("*1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.*").

[460] **Exhibit CL-060**, *Suez*, Decision on Liability, ¶ 184 (finding the absence of the well-known formulation of "*minimum standard under customary international law*" telling when interpreting the Argentina-France BIT, which, like the Canada-Egypt BIT, was negotiated and entered into force during the 1990s). *See also* **Exhibit RL-185**, *Perenco*, Decision on the Remaining Issues of Jurisdiction and on Liability, ¶ 557;

249. Canada has negotiated and signed at least one treaty—NAFTA in 1992—that expressly referred to the "*Minimum Standard of Treatment.*"[461] If Canada and Egypt had agreed that the FET provision of this 1997 BIT in fact referred to the minimum standard of treatment, the BIT would state as much.[462] In fact, while Canada's 1994 Model BIT (and the one forming the basis of the BIT in this case) uses the language contained at Article II(2)(a) of this BIT,[463] the 2004 Model BIT (the version submitted by Canada) expressly refers to the "*Minimum Standard of Treatment*."[464] Furthermore, even if it helped its case, which it does not, Canada is wrong to allege that it has had a consistent practice of referring to the "*minimum standard of treatment*" in its treaties,[465] an argument which is contradicted by its own record.[466] Finally, while trite, the notes of

---

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

461 **Exhibit RL-101**, North American Free Trade Agreement, U.S.-Can.-Mex. (signed 17 December 1992; entry into force 1 January 1994), Article 1105 ("*Minimum Standard of Treatment*").

462 Long before this BIT was negotiated, the distinction between the minimum standard of treatment and the autonomous treaty standard of FET was explored by prominent scholars. *See, e.g.*, **Exhibit CL-098**, F. A. Mann, *British Treaties for the Promotion and Protection of Investments*, 52 B.Y.I.L. 241 (1981), p. 244 ("[N]*othing is gained by introducing the conception of minimum standard* [when interpreting FET] *and, more than this, it is positively misleading to introduce it. The terms 'fair and equitable treatment' envisage conduct which goes far beyond the minimum standard . . . The terms are to be understood and applied independently and autonomously*").

463 *See* **Exhibit CL-107**, Canada Model BIT (1994), Article II(2)(a).

464 *See* **Exhibit RL-117**, Canada Model BIT (2004), Article 5.

465 Canada's Counter-Memorial on Merits and Damages, ¶ 326. Moreover, Investor-State arbitration is a two-way street. Even if Canada did have a consistent practice as reflected in its other treaties (which it does not), Canada is not the only Contracting Party to the BIT. A review of Egypt's BITs makes clear why Canada conspicuously omits any mention of Egypt's treaty practice in relation to this provision. Egypt's treaty history shows it had a consistent practice of negotiating treaties with autonomous FET provisions. There is no evidence to suggest that Egypt intended any different here. In fact, only one of Egypt's BITs—the most recent with Mauritius—refers to the minimum standard of treatment. *See* **Exhibit CL-159**, Agreement between the Government of the Republic of Mauritius and the Governing of the Arab Republic of Egypt on the Reciprocal Promotion and Protection of Investments (signed 25 June 2014; entry into force 17 October 2014), Article 4.

466 While some of Canada's treaties refer to explicitly to the "*minimum standard of treatment*," others do not. Compare **Exhibit RL-101**, North American Free Trade Agreement, U.S.-Can.-Mex. (signed 17 December 1992; entry into force 1 January 1994), Article 1105 (referring to the "*Minimum Standard of Treatment*"); **Exhibit RL-125**, Agreement between the Government of Canada and the Government of the Hong Kong Special Administrative Region of the People's Republic of China for the Promotion and Protection of Investments (signed 10 February 2016; entry into force 6 September 2016), Article 6 (same), *and* **Exhibit RL-098**, Agreement between the Government of Canada and the Government of the Lebanese Republic for the Promotion and Protection of Investments (signed 11 April 1997; Entry into force 19 June

interpretation issued for separate treaties by Canada with other Contracting Parties, not including Egypt, are obviously irrelevant.[467]

250. When faced with nearly identical FET provisions, tribunals routinely have dismissed attempts by respondent States to rewrite FET provisions to refer to the minimum standard of treatment. For example, the tribunal in *Vivendi* rejected Argentina's argument that the provision in the France-Argentina BIT guaranteeing "*fair and equitable treatment according to the principles of international law*"[468] should be interpreted to guarantee only the minimum standard of treatment under international law. The *Vivendi* tribunal examined the object and purpose of the relevant treaty (the creation of favorable conditions for, and the promotion and protection of, investment),[469] and the substantial scholarship and awards of other tribunals suggesting that the inquiry to assess FET is not "*concerned with a minimum, maximum or average standard*" but rather "*whether in all circumstances the conduct in issue is fair and*

1999), Article II(2) (where Canada refers to FET "*in accordance with principles of international law*"); **Exhibit RL-095**, Agreement between the Government of Canada and the Government of the Republic of Venezuela for the Promotion and Protection of Investments (signed 1 July 1996; entry into force 28 January 1998), Article II(2) (same). While Canada may be reluctant to be finally held—for the first time—to the broad FET provision it negotiated with Egypt, Canada cannot use its retrospective subjective intentions to seek to evade the mutual protections offered by Canada and Egypt; one can be certain that any Canadian investor would hold Egypt to its autonomous FET obligations. For example, the Canadian investor, claimant Crystallex, has already held Venezuela to the autonomous standard of FET in the Canada-Venezuela BIT, which contains nearly identical language to that of the Canada-Egypt BIT. *See* **Exhibit CL-082**, *Crystallex*, Award, ¶ 530.

[467] *See* **Exhibit CL-153**, *Telefonica v. United Mexican States*, ICSID No. ARB(AF)/12/4, Procedural Order No. 1 [*Unofficial English Translation*], 8 July 2013, ¶ 17.1.3 (rejecting the application of a NAFTA note of interpretation to the dispute relating to the Spain-Mexico BIT observing that "[s]*ince the NAFTA is not applicable, neither can the Interpretive Note be applicable in this case.*"); **Exhibit RL-236**, *EDF*, Award, ¶¶ 1003, 1006 (noting that reliance on NAFTA and awards applying NAFTA were not helpful in interpreting a BIT lacking any reference to the minimum standard of treatment). Under the VCLT, "[a] *treaty does not create either obligations or rights for a third State without its consent.*" **Exhibit CL-018**, VCLT, Article 34. *See also* **Exhibit CL-153**, *Telefonica*, Procedural Order No. 1, ¶ 17.1.3 ("*an international treaty . . . cannot create rights or obligations vis-à-vis a third State without its consent.*") (citing VCLT Articles 2(g), 2(H), 26, and 34).

[468] **Exhibit CL-045**, *Vivendi II*, Award, ¶ 7.4.1 (quoting Article 3).

[469] **Exhibit CL-045**, *Vivendi II*, Award, ¶ 7.4.4.

equitable or unfair and inequitable."[470] The *Vivendi* tribunal then examined the precise language of the FET provision and concluded that there was "*no basis for equating principles of international law with the minimum standard of treatment.*"[471] Instead, the FET provision "*supports a broader reading that invites consideration of a wider range of international law principles than the minimum standard alone.*"[472]

251. The *Vivendi* tribunal aptly observed:

> *First, the reference to principles of international law supports a broader reading that invites consideration of a wider range of international law principles than the minimum standard alone. Second, the wording of Article 3 requires that the fair and equitable treatment conform to the principles of international law, but the requirement for conformity can just as readily set a floor as a ceiling on the Treaty's fair and equitable treatment standard. Third, the language of the provision suggests that one should also look to contemporary principles of international law, not only to principles from almost a century ago.*[473]

252. Other tribunals interpreting the same France-Argentina BIT have agreed with the *Vivendi* tribunal's reasoning.[474] For example, the tribunal in the case *Suez and AWG Group v. Argentina* was faced with the task of interpreting the France-Argentina BIT in addition to two other BITs with FET provisions lacking any reference to principles of international law. Although the France-Argentina BIT referenced international law

---

470 **Exhibit CL-045**, *Vivendi II*, Award, ¶¶ 7.4.8-7.4.9.

471 **Exhibit CL-045**, *Vivendi II*, Award, ¶¶ 7.4.5-7.4.7.

472 **Exhibit CL-045**, *Vivendi II*, Award, ¶ 7.4.7.

473 **Exhibit CL-045**, *Vivendi II*, Award, ¶ 7.4.7.

474 **Exhibit RL-236**, *EDF*, Award, ¶ 1001 ("*Article 3 nowhere mentions 'minimum standard' as such, but rather speaks simply of principles of international law. The treaty thus invites consideration of a wider range of principles related to fairness and equity.*"); **Exhibit CL-141**, *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, 27 December 2010, ¶¶ 125-27 (rejecting respondent's attempt to limit the FET protection to the minimum standard of treatment); **Exhibit CL-060**, *Suez*, Decision on Liability, ¶ 185.

and the others did not, the tribunal found this to be a distinction without a difference. The tribunal explained:

> *The ordinary meaning of the words 'principles of international law' is 'the legal principles derived from all sources of international law . . . 'in accordance with the principles of international law' means just what it says: that the tribunal is to interpret fair and equitable treatment under Article 3 of the Argentina-France BIT in accordance with* ***all relevant sources of international*** **[law]** *and that it is not limited in its interpretation to the minimum standard.*[475]

253. Thus, the tribunal concluded that all three treaties, whether explicitly referencing international law or not, would be interpreted in light of international law generally.[476]

254. Tribunals interpreting the Canada-Venezuela BIT, signed the same year the Canada-Egypt BIT was signed,[477] have reached the same conclusion as the *Vivendi* and *Suez and AWG Group* tribunals. The Canada-Venezuela BIT's FET provision is nearly identical to that of the Canada-Egypt BIT.[478] The tribunal in *Crystallex v. Venezuela* examined the decisions of various tribunals interpreting the FET standard, including *Vivendi*, and observed that "[u]*nlike treaties such as NAFTA, which expressly incorporate the minimum standard of treatment, the Canada-Venezuela BIT nowhere refers to such minimum standard.*"[479] The *Crystallex* tribunal concluded that the FET

---

[475] **Exhibit CL-060**, *Suez*, Decision on Liability, ¶ 185 (emphasis added).

[476] **Exhibit CL-060**, *Suez*, Decision on Liability, ¶¶ 180-186.

[477] **Exhibit RL-095**, Agreement between the Government of Canada and the Government of the Republic of Venezuela for the Promotion and Protection of Investments (signed 1 July 1996; entry into force 28 January 1998).

[478] The FET provisions in the two treaties are substantively identical, the only differences being that "*in accordance with principles of international law*" is linked only to FET in the Canada-Egypt BIT while "*in accordance with* ***the*** *principles of international law*" relates to both FET and FPS in the Canada-Venezuela BIT. *See* **Exhibit RL-095**, Agreement between the Government of Canada and the Government of the Republic of Venezuela for the Promotion and Protection of Investments (signed 1 July 1996; entry into force 28 January 1998), Article II(2 ("*Each Contracting Party shall, in accordance with the principles of international law, accord investments or returns of investors of the other Contracting Party fair and equitable treatment and full protection and security*."); **Exhibit CL-001**, BIT (English), Article II(2)(a).

[479] **Exhibit CL-082**, *Crystallex*, Award, ¶ 530.

provision thus "*cannot . . .be equated to the 'international minimum standard of treatment' under customary international law, but rather constitutes an autonomous treaty standard.*"[480]

255. In *Gold Reserve v. Venezuela*, a separate tribunal also interpreting the Canada-Venezuela BIT, examined public international law principles generally to interpret the FET provision of the BIT, rather than applying the minimum standard of treatment.[481]

256. Similarly, in *Franck Charles Arif v. Republic of Moldova*, the France-Moldova BIT at issue provided for FET "*in accordance with Public International Law principles*."[482] The tribunal found this FET standard to be an autonomous one given several factors, including the title of the article ("*Fair and Equitable Treatment*") and the object and purpose of the BIT (encouraging, protecting, and creating "*favourable conditions*" for the covered investments).[483]

257. There is a wealth of further examples where tribunals have rejected the argument that a reference in an FET provision to international law refers to the minimum standard of treatment, [484] or expressed blunt skepticism of such arguments while ultimately declining to decide the issue by observing that regardless of which standard applied, its conclusion that there was a breach of the FET provision remained the same.[485]

---

480 **Exhibit CL-082**, *Crystallex*, Award, ¶ 530.

481 **Exhibit CL-075**, *Gold Reserve*, Award, ¶¶ 567-68.

482 **Exhibit CL-151**, *Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013, ¶ 526.

483 **Exhibit CL-151**, *Arif*, Award, ¶¶ 528-29.

484 *See, e.g.*, **Exhibit RL-185**, *Perenco*, Decision on the Remaining Issues of Jurisdiction and on Liability, ¶ 557.

485 *See, e.g.*, **Exhibit RL-236**, *EDF*, Award, ¶¶ 999-1007.

258. The decisions cited by Canada[486] in fact undermine Canada's position because they stand for the simple conclusion that the minimum standard of treatment is a progressive standard that has aligned to meet the protection afforded by an autonomous FET standard, offering the same level of protection.[487]

259. For example, while Canada quotes *Rusoro* as support for this position that the minimum standard of treatment should apply, Canada ignores the *Rusoro* tribunal's operative conclusion (which appears in the same paragraph):

> [T]*he CIS* [customary international law] *Standard has developed and today is indistinguishable from the FET standard and grants investors an equivalent level of protection as the latter. The whole discussion of whether Art. II.2 of the BIT incorporates or fails to incorporate the CIS Standard when defining FET has become dogmatic:* ***there is no substantive difference in the level of protection afforded by both standards****.*[488]

260. The *OI European Group* tribunal concurred, finding that "*it is quite possible that currently the minimum customary standard and the FET envisaged in the treaties have converged, according the investor with substantially equivalent levels of protection*."[489] The decision in *Koch Minerals*, on the other hand, is practically irrelevant, as the tribunal concluded that the distinction between the customary international minimum standard and the autonomous standard made no difference when applied to the facts at issue in that case and, accordingly, only mentioned the issue in passing.[490]

---

486 *See* Canada's Counter-Memorial on Merits and Damages, ¶¶ 329-31.

487 *See infra* **Part IV.A.1.e**.

488 **Exhibit CL-016**, *Rusoro*, Award, ¶ 520 (emphasis added).

489 **Exhibit RL-166**, *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award, 10 March 2015, ¶ 489.

490 *See* **Exhibit RL-165***, Koch Minerals*, Award, ¶ 8.47 ("*the Tribunal does not consider that the result in this case would be materially different under* [ ] *FET's autonomous standard.*").

261. In sum, the ordinary meaning of the BIT's language is clear: Canada is obligated to provide GTH with "*fair*" and "*equitable*" treatment, the scope of which has been interpreted by a multitude of tribunals. It prohibits conduct by a host State that is unreasonable, arbitrary, discriminatory, inconsistent, lacking in transparency, lacking in procedural propriety or due process, or that frustrates an investor's legitimate expectations.[491] Rather than accept the FET obligation it agreed to in this BIT, Canada seeks to rewrite the BIT to add a reference to the "*minimum standard of treatment*." That is not the standard the Parties bargained for.

IV.A.1.b. The FET Standard Protects An Investor's Legitimate Expectations

262. FET prohibits a State from frustrating an investor's legitimate expectations relied upon by the investor when it decides to invest.[492] This protection is at the core of an

---

[491] GTH's Memorial on Merits and Damages, ¶¶ 290-300.

[492] *See, e.g.*, **Exhibit CL-083**, *Murphy Exploration & Production Company – International v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 2012-16, Partial Final Award, 6 May 2016, ¶¶ 247-48; **Exhibit CL-031**, *TECMED*, Award, ¶¶ 154-56 (observing that the FET provision of the treaty "*in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment which does not affect the basic expectations that were taken into account by the foreign investor to make the investment*"); **Exhibit CL-038**, *Saluka*, Partial Award, ¶¶ 301-302 ("[a]*n investor's decision to make an investment is based on an assessment of the state of the law and the totality of the business environment at the time of the investment as well as on the investor's expectation that the conduct of the host State subsequent to the investment will be fair and equitable. The standard of 'fair and equitable treatment' is therefore closely tied to the notion of legitimate expectations which is the dominant element of that standard*"); **Exhibit CL-075**, *Gold Reserve*, Award, ¶ 570; **Exhibit CL-082**, *Crystallex*, Award, ¶¶ 543, 546-47; **Exhibit CL-050**, *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, ¶¶ 339-40; **Exhibit 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, ¶¶ 127-28; **Exhibit CL-053**, *National Grid P.L.C. v. Argentine Republic*, UNCITRAL, Award, 3 November 2008, ¶¶ 173-75; **Exhibit CL-057**, *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, ¶ 264; **Exhibit CL-070**, *Micula*, Award, ¶ 667 ("*an overwhelming majority of cases supports the contention that, where the investor has acquired rights, or where the state has acted in such a way so as to generate a legitimate expectation in the investor and that investor has relied on that expectation to make its investment, action by the state that reverses or destroys those legitimate expectations will be in breach of the fair and equitable treatment standard and thus give rise to compensation*"); **Exhibit CL-060**, *Suez*, Decision on Liability, ¶¶ 222-26; **Exhibit CL-039**, *Azurix*, Award, ¶ 372 (noting that another element of FET "*is the frustration of expectations that the investor may have legitimately taken into account when it made the investment*"); **Exhibit CL-085**, *Flemingo DutyFree Shop Private Limited v. The Republic of Poland*, UNCITRAL, Award, 12 August 2016, ¶ 534.

obligation to provide treatment that is "*fair*" and "*equitable*."[493] For example, as is the case here, when the State enacts a framework and adopts conditions with the express purpose of encouraging investment, a State should be held accountable for fundamental or important changes to that framework.[494] As the tribunal in *Antin v. Spain* explained, "*a regulatory regime specifically created to induce investments in the sector cannot be radically altered—i.e., stripped of its key features—as applied to existing investments in ways that affect investors who invested in reliance of those regimes*" without the

---

493 *See* **Exhibit CL-175**, *Novenergia II – Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain*, SCC Case No. 2016/063, Final Arbitral Award, 15 February 2018, ¶ 648 (referring to legitimate expectations as the "*primary element*" of FET). *See also* GTH's Memorial on Merits and Damages, ¶¶ 296-99; **Exhibit CL-149**, *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, ¶ 7.75 ("*It is widely accepted that the most important function of the fair and equitable treatment standard is the protection of the investor's reasonable and legitimate expectations*").

494 *See* **Exhibit CL-175**, *Novenergia II*, Final Arbitral Award, ¶¶ 654 (legitimate expectations does not guarantee perfect regulatory stability, but protects against "*a radical or fundamental change to legislation or other relevant assurances by a state that do not adequately consider the interests of existing investments already made on the basis of such legislation.*"), 674 (finding breach of FET when government regulation and statements encouraging investment in renewable energy served as "*bait*" for foreign investors, and Spain subsequently made fundamental changes to its regulatory regime); **Exhibit CL-178**, *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, 16 May 2018, ¶¶ 484, ("*FET constitutes a standard the purpose of which is to ensure that an investor may be confident that (i) the legal framework in which the investment has been made will not be subject to unreasonable or unjustified modification; and (ii) the legal framework will not be subject to modification in a manner contrary to specific commitments made to the investor.*"), 516-21 (finding a breach of FET where the respondent made specific commitments through administrative documents, including letters, that guaranteed the application of a stable tariff regime); **Exhibit CL-034**, *Occidental I*, Final Award, ¶¶ 183-84 (finding that "[t]*he stability of the legal and business framework is . . . an essential element of fair and equitable treatment*" and finding a violation of the FET obligation where "*the framework under which the investment was made and operates has been changed in an important manner*"); **Exhibit CL-089**, *Eiser Infrastructure Limited and Energia Solar Luxembourg S.à r.I. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, 4 May 2017, ¶¶ 363 ("*fair and equitable treatment does protect investors from a fundamental change to the regulatory regime in a manner that does not take account of the circumstances of existing investments made in reliance on the prior regime.*"), 425 concluding that while a State has the right to regulate, "*it must do so within the international legal framework it accepted when it adhered to the* [Treaty], *including the obligation to provide compensation for any breach of its commitments under the Treaty*"); **Exhibit CL-036**, *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005, ¶ 277 ("*It 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.*"); **Exhibit CL-047**, *BG Group*, Final Award, ¶ 307 (finding the respondent "*entirely altered the legal and business environment by taking a series of radical measures*" and, in so doing, "*violated the principles of stability and predictability inherent to the standard of fair and equitable treatment.*"); **Exhibit CL-070**, *Micula*, Award, ¶¶ 677-78; **Exhibit CL-060**, *Suez*, Decision on Liability, ¶ 227. *See also* **Exhibit CL-177**, *Antaris*, Born Dissent, 2 May 2018, ¶¶ 36 ("*It is well-settled that a state may make binding commitments to foreign investors through the medium of statutes or other legislative acts.*"), 55 ("*despite maintaining its freedom to regulate the state is under the obligation to redress the damage suffered by an investor whose expectations were frustrated.*").

payment of compensation.[495] It is for this reason that the doctrine of legitimate expectations is often linked to the requirement to a State's obligation to provide a stable and predictable legal and business environment.[496]

263. Canada argues that, if a principle of legitimate expectations does exist, it is not a "*freestanding obligation*" and requires "*specific and express representations to an investor to induce the investment*."[497] Neither argument is availing. Canada itself cites a string of cases which affirm that an investor's legitimate expectations are a "*relevant*" component of considering whether the FET standard has been breached.[498] In addition, the type of representation sufficient to create legitimate expectations is best

---

[495] **Exhibit CL-179**, *Antin*, Award, ¶ 532

[496] *See* GTH's Memorial on Merits and Damages, ¶ 299 and cases cited therein. Canada argues that absent a stability agreement or a "*specific and explicit representation*," "*an investor cannot expect that the applicable legal or business environment will remain the same*." Canada's Counter-Memorial on Merits and Damages, ¶¶ 356-57. But GTH is not arguing that no changes can be made to the regulatory regime, it is arguing that the State must compensate an investor for adverse impacts associated with a fundamental alteration of the regulatory framework. As noted by the tribunal in *Murphy*, the decision to invest is grounded in the atmosphere curated by a State at the time the investment was made (for example an atmosphere that the State is "*striving to retain and attract foreign investment*"), and informs the investor's perception of the continuing stability of the legal framework in which the investment was made. **Exhibit CL-083**, *Murphy*, Partial Final Award, ¶¶ 258, 273. While not frozen, "[w]*here a State has duly considered a legislative/regulatory policy . . . governmental decisions taken thereafter must . . . maintain fidelity to that policy framework*." **Exhibit RL-185**, *Perenco*, Decision on the Remaining Issues of Jurisdiction and on Liability, ¶ 562.

[497] Canada's Counter-Memorial on Merits and Damages, ¶¶ 352-57.

[498] *See* Canada's Counter-Memorial on Merits and Damages, ¶ 353 and cases cited therein. Canada cites to sources which cannot be persuasive to support its argument that protecting an investor's legitimate expectations is not a rule of customary international law, relying first on submissions from Canada, El Salvador, and the United States. These submissions are not in any way authoritative as to the content of customary international law. Further, Canada selectively quotes a line from *MTD v. Chile*, but the *ad hoc* Committee in that case in fact accepted that "*legitimate expectations generated as a result of the investor's dealings with the competent authorities of the host State may be relevant to the application of the guarantees contained in an investment treaty*" including the guarantee of FET. **Exhibit RL-197**, *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case. No. ARB/01/7, Decision on Annulment, 21 March 2007, ¶ 69. Moreover, Canada further quotes affirmatively a sentence from a tribunal's summary of the respondent's arguments—and not the tribunal's own analysis—in *Allard v. Barbados*. *See* Canada's Counter-Memorial on Merits and Damages, ¶ 353 (quoting *Allard v. Barbados*); **Exhibit RL-198**, *Peter A. Allard v. The Government of Barbados*, UNCITRAL, PCA Case No. 2012-06, Award, 27 June 2016, ¶ 181. In fact, the tribunal in *Allard* concluded that "[w]*hether* [the BIT] *creates an autonomous FET standard or corresponds to the minimum standard of treatment, in each case it includes the protection of an investor's legitimate expectations arising from a host State's representations, under certain conditions*." **Exhibit RL-198**, *Allard*, Award, ¶¶ 193-94 (identifying "*three factual cumulative conditions*" that must be met: "*(i) was there a specific representation?; (ii) did the investor rely on it,* i.e.*, was it critical to his making of the investment?; and (iii) was the investor's reliance reasonable?*").

considered—like breaches of FET more generally—against the facts of the particular case and the objective of the legitimate expectations doctrine. The principle of legitimate expectations recognizes that it is not "*fair and equitable*" for a State to invite and encourage investment by creating certain expectations, induce investment on the basis of those expectations, and to then frustrate the very expectations it used to convince the investor to invest.[499] Considered against this fundamental premise, it is well-accepted that the types of representations leading to the creation of legitimate expectations can be "*implicit*"[500] or, importantly, created by the legal and business

[499] *See* **Exhibit CL-038**, *Saluka*, Partial Award, ¶¶ 301-302 ("*An investor's decision to make an investment is based on an assessment of the state of the law and the totality of the business environment at the time of the investment as well as on the investor's expectation that the conduct of the host State subsequent to the investment will be fair and equitable. The standard of 'fair and equitable treatment' is therefore closely tied to the notion of legitimate expectations which is the dominant element of that standard.*"). *See also* **Exhibit CL-072**, Rudolf Dolzer, *Fair and Equitable Treatment: Today's Contours*, 12 S.C. J. OF INT'L L. 7 (2014), p. 17 ("*The rationale and justification for the recognition of legitimate expectations seems obvious. The investor makes its calculations and decisions in the light of the law of the host state as it is made available to it by the host state, and the investor's assumptions about the return for its investment will depend upon the stability and predictability of those laws. Had the legal order been different, this decision to invest might have been different.*").

[500] *See, e.g.*, **Exhibit CL-070**, *Micula*, Award, ¶ 669 ("*There must be a promise, assurance or representation attributable to a competent organ or representative of the state, which may be explicit or implicit*."); **Exhibit CL-075**, *Gold Reserve*, Award, ¶ 571 ("*The investor's legitimate expectations are based on undertakings and representations made explicitly or implicitly by the host State*."); **Exhibit CL-039**, *Azurix*, Award, ¶ 318 (considering *Tecmed*, and finding that "[t]*he expectations as shown in that case are not necessarily based on a contract but on assurances explicit or implicit, or on representations, made by the State which the investor took into account in making the investment.*"); **Exhibit CL-170**, *Jürgen Wirtgen, Stefan Wirtgen, Gisela Wirtgen and JSW Solar (zwei) GmbH & Co. KG v. Czech Republic*, PCA Case No. 2014-03, Dissenting Opinion of Arbitrator Gary Born, 11 October 2017, ¶¶ 6, 12 ("*sufficiently clear commitment*" by the State to provide specified treatment); **Exhibit CL-175**, *Novenergia II*, Final Arbitral Award, ¶ 650 ("*A multitude of arbitral tribunals have established that undertakings or assurances can be explicit or implicit.*").

framework existing at the time of the investment.[501] There is no "*specific*" or "*express*" threshold.[502]

---

[501] *See, e.g.*, **Exhibit CL-083**, *Murphy*, Partial Final Award, ¶ 248 ("*An investor's legitimate expectations are based upon an objective understanding of the legal framework within which the investor has made its investment. The legal framework on which the investor is entitled to rely consists of the host State's international law obligations, its domestic legislation and regulations, as well as the contractual arrangements concluded between the investor and the State. Specific representations or undertakings made by the State to an investor also play an important role in creating legitimate expectations on the part of the investor but they are not necessary for legitimate expectations to exist. An investor may hold legitimate expectations based on an objective assessment of the legal framework absent specific representations or promises made by the State to the investor*." (citations omitted)); **Exhibit CL-062**, Rudolf Dolzer & Christoph Schreuer, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW (2d ed 2012), p. 145 ("*The investor's legitimate expectations are based on the host state's legal framework and on any undertakings and representations made explicitly or implicitly by the host state. The legal framework on which the investor is entitled to rely consists of legislation and treaties, assurances contained in decrees, licences, and similar executive statements, as well as contractual undertakings*." (citations omitted)); **Exhibit CL-038**, *Saluka*, Partial Award, ¶ 301 ("*An investor's decision to make an investment is based on an assessment of the state of the law and the totality of the business environment at the time of the investment as well as on the investor's expectation that the conduct of the host State subsequent to the investment will be fair and equitable.*"); **Exhibit CL-060**, *Suez*, Decision on Liability, ¶ 226 ("*In examining the various cases that have justifiably considered the legitimate expectations of investors and the extent to which the host government has frustrated them, this Tribunal finds that an important element of such cases has not been sufficiently emphasized: that investors, deriving their expectations from the laws and regulations adopted by the host country,* acted in reliance upon those laws and regulations and changed their economic position as a result*. Thus it was not the investor's legitimate expectations alone that led tribunals to find a denial of fair and equitable treatment. It was the existence of such expectations created by host country laws, coupled with the act of investing their capital in reliance on them, and a subsequent, sudden change in those laws that led to a determination that the host country had not treated the investors fair and equitably*." (emphasis in original)); **Exhibit CL-041**, *LG&E*, Decision on Liability, ¶ 133 (finding that Argentina had "*created specific expectations among investors*" through guarantees provided in its legislation and regulations, and was therefore bound by these guarantees); **Exhibit CL-053**, *National Grid*, Award, ¶ 179 (finding breach of FET where Argentina "*fundamentally changed the legal framework on the basis of which the Respondent itself had solicited investments and the Claimant had made them*"); **Exhibit CL-047**, *BG Group*, Final Award, ¶¶ 298, 307, 310 (observing that "[t]*he duties of the host State must be examined in the light of the legal and business framework as represented to the investor at the time that it decides to invest.*"). *See also* **Exhibit CL-034**, *Occidental I*, Final Award, ¶ 191 (observing that "*there is certainly an obligation not to alter the legal and business environment in which the investment has been made.*"); **Exhibit CL-037**, *Eureko B.V. v. Republic of Poland*, Partial Award, 19 August 2005, ¶¶ 231-32 (finding breach of FET where the organs of the Government "*breached the basic expectations of Eureko that are at the basis of its investment*" and were enshrined in the underlying contractual agreements); **Exhibit CL-070**, *Micula*, Award, ¶ 674 (finding Romania had made a promise or assurance, through its legal framework and issued certificates, which gave rise to the investors' legitimate expectation). **Exhibit CL-178**, *Masdar*, Award, ¶¶ 491-99 (finding that the claimants had a legitimate expectation that the legal framework would not be modified based on the respondent's conduct through regulations, public statements, and specific legislation); **Exhibit CL-179**, *Antin*, Award, ¶¶ 538 ("*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…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*"), 568, 573 (finding a breach of FET where a revised regulatory regime which "*depends on governmental discretion*" was "*in plain contrast with the relative precision of the Original Regime*" which gave rise to legitimate expectations).

[502] Canada waffles between requiring "*specific and express representations to an investor to induce the investment*" or "*a specific commitment*" or "*a specific and explicit representation*." Canada's Counter-Memorial on Merits and Damages, ¶¶ 354-56.

IV.A.1.c. The FET Standard Protects An Investor From Unreasonable And Arbitrary Treatment

264. Unreasonable or arbitrary treatment amounting to a violation of FET includes any of the following:

> *a. a measure that inflicts damage on the investor without serving any apparent legitimate purpose;*
>
> *b. a measure that is not based on legal standards but on discretion, prejudice or personal preference;*
>
> *c. a measure taken for reasons that are different from those put forward by the decision maker;*
>
> *d. a measure taken in wilful disregard of due process and proper procedure.*[503]

265. An act may be adopted in "*good faith*" but still be in breach of a State's FET obligations.[504] Canada's position that a measure can only be an arbitrary measure in breach of its FET obligation if it is "*devoid of* any *legitimate purpose and contrary to the rule of law*" is incorrect.[505] Canada relies entirely on cases considering treaty provisions that contain separate provisions addressing "*arbitrary*" and "*discriminatory*"

---

503 *See* **Exhibit RL-205**, *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, ¶ 303. *See also* **Exhibit CL-057**, *Lemire*, Decision on Jurisdiction and Liability, ¶¶ 262-63 (quoting Professor Schreuer's description in *EDF* and explaining "[s]*umming up, the underlying notion of arbitrariness is that prejudice, preference or bias is substituted for the rule of law*."); **Exhibit CL-130**, Christoph Schreuer, *Protection against Arbitrary or Discriminatory Measures*, *in* THE FUTURE OF INVESTMENT ARBITRATION (2009), pp. 6-7; **Exhibit CL-082**, *Crystallex*, Award, ¶ 578 ("*In the Tribunal's eyes, a measure is for instance arbitrary if it is not based on legal standards but on excess of discretion, prejudice or personal preference, and taken for reasons that are different from those put forward by the decision maker*.").

504 **Exhibit CL-039**, *Azurix*, Award, ¶ 372; **Exhibit CL-036**, *CMS*, Award, ¶ 280; **Exhibit CL-031**, *TECMED*, Award, ¶ 153; **Exhibit RL-143**, *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003, ¶ 132; **Exhibit RL-104**, *Mondev*, Award, ¶ 116; **Exhibit RL-177**, *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, 8 June 2009, ¶ 613.

505 *See* Canada's Counter-Memorial on Merits and Damages, ¶ 364 (emphasis in original). *See also* Canada's Counter-Memorial on Merits and Damages, ¶¶ 348-51.

measures.[506] This includes the single case Canada relies on purporting to consider the arbitrary component of FET, *Lemire v. Ukraine*.[507] The tribunal in *Lemire* in fact confirmed that a measure could breach the FET provision even if it did not amount to a breach of the separate arbitrary and discriminatory measure provision (although breaches of the latter would always amount to a breach of the former).[508]

266. Separate from the obligation not to act arbitrarily, the FET standard also requires that the measures adopted by Canada be proportionate to the alleged objective (of promoting competition in the market).[509] Any "*administrative goal must be balanced against the Claimants' own interest and against the true nature and effect of the conduct being censured*."[510] A measure is disproportionate where an investor "*bears an individual*

---

506 See Canada's Counter-Memorial on Merits and Damages, ¶¶ 348-49 and cases cited therein.

507 *See* Canada's Counter-Memorial on Merits and Damages, ¶ 350, *quoting* **Exhibit CL-057**, *Lemire*, Decision on Jurisdiction and Liability, ¶¶ 262-63.

508 *See* **Exhibit CL-057**, *Lemire*, Decision on Jurisdiction and Liability, ¶ 259.

509 *See, e.g.*, **Exhibit CL-065**, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, 5 October 2012, ¶¶ 404-409; **Exhibit CL-031**, *TECMED*, Award, ¶ 122; **Exhibit CL-039**, *Azurix*, Award, ¶¶ 311-12; **Exhibit 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; **Exhibit CL-061**, *El Paso*, Award, ¶ 373; **Exhibit RL-205**, *EDF*, Award, ¶ 293; **Exhibit CL-141**, *Total S.A.*, Decision on Liability, ¶ 123.

510 **Exhibit CL-065**, *Occidental II*, Award, ¶ 450. *See also* **Exhibit CL-031**, *TECMED*, Award, ¶ 122 ("*[t]here must be a reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the aim sought to be realized*"); **Exhibit CL-141**, *Total S.A.*, Decision on Liability, ¶ 123 ("*The circumstances and reasons (importance and urgency of the public need pursued) for carrying out a change impacting negatively on a foreign investor's operations on the one hand, and the seriousness of the prejudice caused on the other hand, compared in the light of a standard of reasonableness and proportionality are relevant.*").

and excessive burden"[511] that is "*out of proportion to the importance and effectiveness*"[512] of the State's policy objective.[513]

IV.A.1.d. The FET Standard Requires A State To Act Transparently And With Due Process

267. The FET standard requires States to act transparently and with due process, two components that are intertwined and address basic principles of procedural fairness. Transparency is a fundamental component of the FET standard.[514] Like transparency, due process in administrative proceedings is a near universally accepted principle of human rights and is required by the FET standard. Canada must provide due process in administrative proceedings, regardless of whether or not the proceedings are before a court.[515] Canada cites no precedent that restricts this element of FET to the

---

[511] **Exhibit CL-031**, *TECMED*, Award, ¶ 122; **Exhibit RL-205**, *EDF*, Award, ¶ 293; **Exhibit CL-039**, *Azurix*, Award, ¶ 311.

[512] **Exhibit CL-065**, *Occidental II*, Award, ¶ 450. *See also* **Exhibit CL-031**, *TECMED*, Award, ¶ 149 (finding that as Mexico was responding to political and social pressure and not a genuine environmental threat, its actions in refusing to renew a permit were unjustified and disproportionate); **Exhibit CL-141**, *Total S.A.*, Decision on Liability, ¶ 333 (finding measures adopted by Argentina did not achieve the elected policy purpose and were incompatible with "*the criteria of economic rationality, public interest (after having duly considered the need for and responsibility of governments to cope with unforeseen events and exceptional circumstances), reasonableness and proportionality*."); **Exhibit RL-205**, *EDF*, Award, ¶¶ 293-94 (finding that the impact on the claimant's investment was not an excessive burden in light of the general character of the measure and the relative impact on the investor).

[513] Ironically, Canada's own Spectrum Policy Framework provides that "'[r]*egulatory measures, where required, should be minimally intrusive, efficient and effective' and that '*[r]*egulation should be open, transparent and reasoned . . . .*'" **Exhibit C-052**, Industry Canada, *Spectrum Policy Framework for Canada (DGTP-001-07)*, June 2007, p. 9. *See also* GTH's Memorial on Merits and Damages, ¶¶ 52, 311, 314; Canada's Counter-Memorial on Merits and Damages, ¶ 49.

[514] *See* **Exhibit RL-235,** *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Award, 13 November 2000, ¶ 83 ("*the lack of transparency with which this loan transaction was conducted is incompatible with Spain's commitment to ensure the investor a fair and equitable treatment*"); **Exhibit RL-219**, *Rumeli*, Award, ¶ 618 ("*the process that led to the decision of the Working Group lacked transparency and due process and was unfair, in contradiction with the requirements of the fair and equitable treatment principle.*"); **Exhibit CL-043**, *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007, ¶¶ 308–309 (finding that the respondent showed a lack of transparency in denying access to the claimant to an administrative file and this was a breach of FET). Canada denies that there is an obligation of transparency within the FET standard, and, even if there is, that transparency obligation should be applied forgivingly to national security issues. *See* Canada's Counter-Memorial on Merits and Damages, ¶¶ 358-60.

[515] *See* **Exhibit CL-038**, *Saluka*, Partial Award, ¶ 308 ("*according to the 'fair and equitable treatment' standard, the host State must never disregard the principles of procedural propriety and due process and*

courtroom.[516] That due process rights must be afforded in all administrative proceedings is all the more apparent when applied to the facts of this case, explored further below, in which GTH was given no meaningful opportunity to defend itself in proceedings that sought to undermine its ability to control its C$ 1.3 billion investment.

---

must grant the investor freedom from coercion or harassment by its own regulatory authorities."); **Exhibit RL-225**, *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, ¶¶ 91-94 (finding a violation of FET where a municipality did not act with procedural propriety and this was one of the elements Tribunal considered in finding a violation of FET); **Exhibit CL-031**, *TECMED*, Award, ¶¶ 162, 166 (finding a violation of FET where a government agency did not act fairly and equitably when it failed to notify the claimant of its intention to refuse renewal of a permit); **Exhibit RL-237**, *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2002, ¶ 143 (finding a violation of FET where there was a procedural failure to give notice and an attachment order was executed by police without directly notifying the owner of the property and procedural failure to give notice was a violation of FET). For the avoidance of doubt, Industry Canada and the CRTC are State Organs for which Canada is responsible under international law. Article 4 of the Articles on State Responsibility provides:

> Article 4 Conduct of organs of a State
>
> 1. *The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.*
>
> 2. *An organ includes any person or entity which has that status in accordance with the internal law of the State.*

Exhibit CL-028, INTERNATIONAL LAW COMMISSION, *Responsibility of States for Internationally Wrongful Acts* (2001), Article 4. Article 5 of the Articles on State Responsibility further states:

> Article 5 Conduct of persons or entities exercising elements of governmental authority
>
> *The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity. . .*

Exhibit CL-028, INTERNATIONAL LAW COMMISSION, *Responsibility of States for Internationally Wrongful Acts* (2001), Article 5. Canada accepts the role played by Industry Canada, the CRTC, and the Competition Bureau in the management of its telecommunications sector, authority which was expressly delegated by the Government. *See, e.g.*, Canada's Counter-Memorial on Merits and Damages, ¶¶ 176, 180-85.

[516] Canada's Counter-Memorial on Merits and Damages, ¶ 361. Canadian law recognizes that even in the context of issues relating to national security, measures should be "*reasonable and proportional in the circumstances*" **Exhibit R-175**, Canadian Security Intelligence Service Act, R.S.C. 1985, c. C-23, 12.1(2) (addressing the limitations on measures that can be taken by the Canadian Security Intelligence Service). Specifically, one of the grounds to seek judicial review for national security review decisions under the *Federal Courts Act* is when the Federal Court is satisfied that the procedure "*failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe.*" **Exhibit R-178**, Federal Courts Act, R.S.C. 1985, c. F-7, 18.1(4)(b).

IV.A.1.e. The Minimum Standard Of Treatment Affords Much Greater Protection Than The Standard Of Protection Alleged By Canada

268. Even if the BIT referred to the minimum standard of treatment, Canada's efforts to dispose of the components of the FET standard described above are futile. Numerous awards, including those cited by Canada, have concluded that the minimum standard of treatment under customary international law is a progressive standard that has converged with the autonomous FET standard to provide the same level of protection.[517] In this respect, the discussion above regarding whether Article II(2)(a) refers to the minimum standard of treatment or should be treated as an autonomous standard, is academic.[518]

---

[517] *See*, *e.g.*, **Exhibit CL-036**, *CMS*, Award, ¶¶ 274-76, 284 ("*the Treaty standard of fair and equitable treatment and its connection with the required stability and predictability of the business environment, founded on solemn legal and contractual commitments, is not different from the international law minimum standard and its evolution under customary law.*"); **Exhibit RL-166**, *OI*, Award, ¶ 489 ("*The minimum customary standard has not remained frozen. It has developed significantly since its early formulations 100 years ago . . . What is relevant is not the standard as it was defined in the 20th century, but rather the standard as it exists and is accepted today . . . .*"); **Exhibit CL-016**, *Rusoro*, Award, ¶ 520 ("*there is no substantive difference in the level of protection afforded by both standards.*"); **Exhibit CL-049**, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, ¶ 592 ("*the actual content of the treaty standard of fair and equitable treatment is not materially different from the content of the minimum standard of treatment in customary international law.*"). *See also* **Exhibit CL-036**, *CMS*, Award, ¶ 284 ("*While the choice between requiring a higher treaty standard and that of equating it with the international minimum standard might have relevance in the context of some disputes, the Tribunal is not persuaded that it is relevant in this case. In fact, the Treaty standard of fair and equitable treatment and its connection with the required stability and predictability of the business environment, founded on solemn legal and contractual commitments, is not different from the international law minimum standard and its evolution under customary law.*"); **Exhibit CL-031**, *TECMED*, Award, ¶ 153 (finding that the fair and equitable treatment provision of the relevant treaty was "*an expression and part of the* bona fide *principle recognized in international law.*"); **Exhibit CL-038**, *Saluka*, Partial Award, ¶ 291 (finding that "*the difference between the* [treaty fair and equitable treatment standard] *and the customary minimum standard, when applied to the specific facts of a case, may be more apparent than real.*"); **Exhibit CL-083**, *Murphy*, Partial Final Award, ¶ 208 ("*The Tribunal finds that there is no material difference between the customary international law standard and the FET standard under the present BIT.*"); **Exhibit CL-126**, Jan Paulsson & Georgios Petrochilos, Neer-*ly Misled?*, 22 ICSID REVIEW – FILJ 242 (2007), pp. 242-57 (describing the particular circumstances in which the *Neer* standard (oft-cited in the context of the customary international law minimum standard of treatment) was formulated (in the context of a denial for justice claim) and how it is inapplicable in relation to the context of investment protection).

[518] **Exhibit CL-016**, *Rusoro*, Award, ¶ 520 ("[T]*he CIS* [customary international law] *Standard has developed and today is indistinguishable from the FET standard and grants investors an equivalent level of protection as the latter. The whole discussion of whether Art. II.2 of the BIT incorporates or fails to incorporate the CIS Standard when defining FET has become dogmatic: there is no substantive difference in the level of protection afforded by both standards.*").

269. In the event the Tribunal finds that the minimum standard of treatment has any distinct relevance to this dispute, it is generally accepted that the minimum standard of treatment has evolved and acts that may not have once been considered to breach the minimum standard, may constitute a breach of this standard today.[519]

270. Irrespective of whether the FET standard and the minimum standard of treatment have now aligned to offer the same level of protection, tribunals have uniformly concluded that the minimum standard of treatment under customary international law protects against a wide range of unfair and inequitable State conduct, not limited to conduct that is egregious or in bad faith.[520] In determining whether a State's conduct meets (or fails to meet) this minimum standard, contemporary awards have found that the minimum standard of treatment under customary international law prohibits conduct by a State that is unreasonable, arbitrary, lacking in transparency, without due process, or discriminatory.[521] Moreover, these tribunals have confirmed that the minimum

---

[519] *See, e.g.*, **Exhibit RL-184**, *Merrill & Ring Forestry L.P. v. The Government of Canada*, UNCITRAL, Award, 31 March 2010, ¶ 213 ("[T]*oday's minimum standard is broader than that defined in the* Neer *case and its progeny*."); **Exhibit CL-075**, *Gold Reserve*, Award, ¶ 567 ("*It is the Tribunal's view that public international law principles have evolved since the* Neer *case and that the standard today is broader than that defined in the* Neer *case on which Respondent relies.*"); **Exhibit RL-104**, *Mondev*, Award, ¶ 117 ("*It would be surprising if this practice and the vast number of provisions it reflects were to be interpreted as meaning no more than the* Neer *Tribunal (in a very different context) meant in 1927.*"); **Exhibit RL-177**, *Glamis*, Award, ¶ 613 ("*this Tribunal holds that the Neer standard, when applied with current sentiments and to modern situations, may find shocking and egregious events not considered to reach this level in the past.*").

[520] *See, e.g.*, **Exhibit RL-104**, *Mondev*, Award, ¶ 116 ("*To the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious. In particular, a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith.*"); **Exhibit CL-043**, *Siemens*, Award, ¶ 299 ("*none of the recent awards . . . require bad faith or malicious intention of the recipient State as a necessary element in the failure to treat investment fairly and equitably, and that, to the extent that it has been an issue, the tribunals concur in that customary international law has evolved.*"); **Exhibit CL-036**, *CMS*, Award, ¶ 280 ("[FET] *is an objective requirement unrelated to whether the Respondent has had any deliberate intention or bad faith in adopting the measures in question.*").

[521] *See, e.g.*, **Exhibit CL-016**, *Rusoro*, Award, ¶ 524; **Exhibit RL-200**, *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, ¶ 98 ("*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*

standard of treatment requires protecting an investors' legitimate expectations.[522] Even those tribunals that considered the "*minimum standard of treatment*" provision in NAFTA in the most narrow terms (deferring to the State's arguments on the scope of this standard), have concluded that an investor's legitimate expectations are an important element of the minimum standard of treatment:

> *Having considered recent investment case law and the good faith principle of international customary law, the concept of 'legitimate expectations' relates, within the context of the NAFTA framework, to a situation where a Contracting Party's conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure by the NAFTA Party to honour those expectations could cause the investor (or investment) to suffer damages.*[523]

---

reasonably relied on by the claimant."); **Exhibit CL-077**, *Bilcon*, Award on Jurisdiction and Liability, ¶¶ 442-44 (citing affirmatively the standard articulated by the *Waste Management* tribunal); **Exhibit 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, ¶ 292 (having found that Bolivia's revocation of the relevant concessions were discriminatory and unjustified as a matter of Bolivian law, finding that this amounted to a breach of the minimum standard of treatment); **Exhibit CL-086**, *Windstream*, Award, ¶ 380 (finding a breach of the minimum standard of treatment where the State left the investor in a state of "*regulatory and contractual limbo*"); **Exhibit CL-156**, *Teco Guatemala Holdings LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/17, Award, 19 December 2013, ¶ 587 ("*Under the minimum standard, international law prohibits State officials from exercising their authority in an abusive, arbitrary or discriminatory manner.*"); **Exhibit RL-178**, *Railroad Development Corporation (RDC) v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award, 29 June 2012, ¶ 219 (adopting the articulation of the minimum standard of treatment given by the tribunal in *Waste Management II*).

[522] *See, e.g.*, **Exhibit RL-200**, *Waste Management*, Award, ¶ 98 ("*applying this* [minimum] *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.*"); **Exhibit CL-031**, *TECMED*, Award, ¶ 154 (finding that the standard requires conduct that "*does not affect the basic expectations that were taken into account by the foreign investor to make the investment.*"); **Exhibit CL-043**, *Siemens*, Award, ¶ 299 (finding that there is a breach of the minimum standard of treatment where there is a "*frustration of expectations that the investor may have legitimately taken into account when it made the investment.*"); **Exhibit RL-166**, *OI*, Award, ¶ 491 ("*The obligation of FET can be violated . . . by means of general legislative actions, enacted by the State, if the new regulation contradicts the investor's legitimate expectations.*"); **Exhibit CL-016**, *Rusoro*, Award, ¶ 524 (finding that "[t]*he required threshold of propriety must be defined*" after considering factors including "*whether the State has failed to offer a stable and predictable legal framework, breaching the investor's legitimate expectations*"); **Exhibit RL-191**, *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Award, 26 January 2006, ¶ 147; **Exhibit CL-036**, *CMS*, Award, ¶ 274 ("*There can be no doubt, therefore, that a stable legal and business environment is an essential element of fair and equitable treatment.*").

[523] **Exhibit RL-191**, *Thunderbird*, Award, ¶ 147 (citations omitted); **Exhibit CL-077**, *Bilcon*, Award on Jurisdiction and Liability, ¶ 445; **Exhibit RL-200**, *Waste Management*, Award, ¶¶ 98-99; **Exhibit 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, ¶ 141; **Exhibit RL-173**, *Cargill,*

271. In fact, tribunals have found it unnecessary to resolve the debate over whether the minimum standard of treatment or the autonomous treaty standard applies because, in either case, legitimate expectations are within their scope.[524]

272. While arguing that the minimum standard of treatment under customary international law applies, Canada has chosen not to provide its own definition as to what the minimum standard of treatment requires. Canada complains instead that GTH should have evidenced a standard upon which it does not rely,[525] and that GTH must provide evidence to show that there is a consistent and general practice amongst States and evidence of those States' understanding that such practice is legally required.[526] In the unlikely event the Tribunal concludes that the FET provision of this BIT only requires the minimum standard of treatment under customary international law, the wealth of analysis done by other tribunals to define the contemporary scope of the minimum standard of treatment is more than sufficient to establish the parameters of that standard. Several other tribunals considering the minimum standard of treatment have reached the same conclusion.[527]

Incorporated v. United Mexican States, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009, ¶ 282. *See also* **Exhibit RL-177**, *Glamis*, Award, ¶¶ 620-21 (citing *International Thunderbird Gaming* with approval and observing that "[i]*n this way, a State may be tied to the objective expectations that it creates* in order to induce *investment*" (emphasis in original)).

524 *See* **Exhibit CL-164**, *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited., and Telcom Devas Mauritius Private Limited. v. The Republic of India*, UNCITRAL, PCA Case No. 2013-09, Award on Jurisdiction and Merits, 25 July 2016, ¶¶ 458, 463 ("*There is an overwhelming trend to consider the touchstone of fair and equitable treatment to be found in the legitimate and reasonable expectations of the parties, which derive from the obligation of good faith. . . .* [W]*hatever the scope of the FET standard, the legitimate expectations of the investors have generally been considered central to its definition.*").

525 GTH's primary position is that the minimum standard of treatment under customary international law has no relevance in this dispute.

526 *See* Canada's Counter-Memorial on Merits and Damages, ¶¶ 335-38.

527 *See* **Exhibit CL-086**, *Windstream*, Award, ¶ 351 (relying on the decisions of other arbitral tribunals to establish the minimum standard of treatment where "*neither Party has produced such evidence* [of State practice or *opinio juris*] *in this arbitration*."); **Exhibit RL-199**, *Mobil & Murphy Oil* , Decision on Liability and on Principles of Quantum, ¶ 152 (establishing the applicable standard "[o]*n the basis of the NAFTA case-law and the parties' arguments*" and rejecting the respondent's argument that the claimant's failure to submit evidence of State practice and *opinio juris* precluded a finding of breach of the minimum standard);

IV.A.2. Canada Breached The FET Standard By Blocking GTH From Selling Wind Mobile To An Incumbent After Five Years, Contrary To Canada's Intentions And GTH's Expectations

273. As described in GTH's Memorial on Merits and Damages and in **Part II.B** above, a fundamental component of Canada's 2008 AWS Auction Framework was the condition that New Entrants would be permitted to sell their set-aside spectrum licenses to an Incumbent after the expiration of the five-year restriction on transfer. This accorded with Canada's historic practice, the otherwise enhanced transferability rights contained in spectrum licenses sold at auction, and, significantly, Canada's intention, and everyone's expectation, that the five-year period was finite. Canada knew that it could not introduce an indefinite ban on the sale of set-aside spectrum licenses to Incumbents because it knew that investors would not purchase spectrum licenses with such a restriction. The finite five-year period was deliberate and designed to induce investors, like GTH, to pay Canada for high-cost spectrum licenses and to invest in creating a New Entrant in the Canadian telecom sector.

274. GTH relied on the 2008 AWS Auction Framework in making its investment, including Canada's representations that GTH would be permitted to exit the market by transferring the set-aside licenses purchased at the 2008 AWS Auction to an Incumbent after five years. This exit option was critical—everyone knew that Incumbents were the parties willing to pay the highest price for spectrum licenses. Yet, when it came

---

Exhibit RL-105, *Mesa Power Group, LLC v. Government of Canada*, UNCITRAL, PCA Case No. 2012-17, Award, 24 March 2016, ¶¶ 495-502 (rejecting the Respondent's argument that the Claimant had not discharged its burden to establish the scope of the minimum standard where it relied on other arbitral awards and adopting the content of the minimum standard identified by the tribunal in *Waste Management II*); **Exhibit RL-178**, *Railroad Development Corporation*, Award, ¶ 217 ("*The Tribunal notes further that, as such, arbitral awards do not constitute State practice, but it is also true that parties in international proceedings use them in their pleadings in support of their arguments of what the law is on a specific issue. There is ample evidence of such practice in these proceedings.*"). Canada acknowledges that, at the very least, past awards are "*relevant to the extent that they include an examination of State practice and* opinio juris." Canada's Counter-Memorial on Merits and Damages, ¶ 338.

time for GTH to exercise this option after years of investing substantial sums in Wind Mobile to make it a success, Canada took the extraordinary decision to change the rules and prevent GTH from selling Wind Mobile to an Incumbent on the premise that Canada wanted to keep Wind Mobile (or another New Entrant) in each regional market. In short, Canada decided to penalize GTH for its substantial investment and resulting success and hold it hostage. Canada was determined to keep Wind Mobile in the market while forcing GTH to bear the cost.

275. By stopping GTH from selling Wind Mobile to an Incumbent after the Five-Year Rollout Period, Canada frustrated GTH's legitimate expectations. Moreover, the blocking of such a sale was unreasonable and arbitrary—a politically motivated pivot towards the new goal of engineering a fourth player, spurred by public criticism regarding anticipated market consolidation after the expiration of the Five-Year Rollout Period.

276. The specific facts giving rise to Canada's breach are set out below.

IV.A.2.a. Canada Frustrated GTH's Legitimate Expectation By Blocking The Sale Of Wind Mobile To An Incumbent

277. Canada confirms, or does not contest, all of the critical facts relevant to show that GTH had the legitimate expectation that it would be allowed to sell set-aside spectrum licenses to an Incumbent after five years. These facts include:

(a) Canada designed the 2008 AWS Auction Framework to encourage investors to participate in the wireless telecommunications market, including by promoting certain conditions such as the set-aside of spectrum licenses for bidding only by New Entrants, mandatory roaming, and mandatory tower sharing conditions of license.[528]

[528] *See supra* **Part II.A**.

(b) To avoid the circumvention of the set-aside and speculative bidders who sought to sell set-aside spectrum licenses at a premium to Incumbents shortly after the Auction, Canada introduced a finite five-year restriction on the transfer of spectrum licenses avoid New Entrants purchasing spectrum licenses only to "*flip*" those licenses to Incumbents and to encourage licensees to engage in serious efforts to utilize that spectrum.[529]

(c) Canada intended the five-year period to be finite, after which the *status quo* of enhanced transferability rights would return.[530]

(d) Canada knew that it could not set an indefinite ban on the transfer of set-aside spectrum licenses to Incumbents because investors would expect a valuable exit strategy after a reasonable period of time.[531]

(e) Canada was aware that a clear understanding of what was being sold at auction was critical for investors to invest, and would have an impact on business plans and financing options.[532]

(f) Canada confirmed that regulatory measures, if and when adopted, would be minimally intrusive.[533]

(g) In line with its policy to rely on market forces to the maximum extent feasible, Canada affirmed to investors that uneconomic or unviable market entry arising from reducing barriers to market entry (like setting-aside spectrum licenses) could be corrected by the transfer of spectrum licenses in the secondary market. This was one of the factors that Canada determined mitigated the risk of setting-aside spectrum licenses.[534]

(h) Canada issued the Wind Mobile Licenses, which stated expressly that "*Licences acquired through the set-aside of spectrum . . . may not be transferred or leased to, acquired by means of a change in ownership or control of the licensee,*

[529] *See supra* ¶ 36.

[530] *See supra* ¶ 37.

[531] *See supra* ¶ 38(a).

[532] *See supra* ¶ 38(b).

[533] *See supra* ¶ 36.

[534] *See supra* ¶¶ 34, 40.

divided among, or exchanged with companies that do not meet the criteria of a new entrant, ***for a period of 5 years*** *from the date of issuance*."[535]

(i) Canada's past practice was to allow the transfer of New Entrant spectrum licenses to Incumbents after restrictions on transfer had expired (*e.g.*, Microcell and Clearnet).[536]

(j) Canada understood that once market forces returned after five-years, it was possible that no New Entrants would remain in the market and emphasized as much to investors. In other words, it accepted that its experiment to introduce market entry could fail in which case there would be no surviving fourth player in the market.[537]

278. It should, therefore, come as no surprise that GTH expected it would be able to transfer set-aside spectrum licenses purchased at the 2008 AWS Auction to an Incumbent after five years if its business was otherwise unsuccessful and GTH relied on this provision when it decided to invest in the New Entrant Wind Mobile.[538]

---

[535] **Exhibit C-010**, Letter from Michael D. Connolly to Kenneth Campbell, 13 March 2009, p. 3 (Wind Mobile Licenses, p. 2, Clause 2) (emphasis added).

[536] *See supra* ¶ 35.

[537] *See supra* ¶ 38(d).

[538] *See* **CWS-Dobbie**, ¶¶ 8-10, 40; **Exhibit C-066**, Email from Mike O'Connor to Assaad Kairouz, et al., 29 February 2008, *attaching* Globalive materials, p. 17 (Investor Presentation Globalive Wireless Partnership, 26 February 2008, Slide 4) (describing that AWS set-aside spectrum would be "[v]*alued by incumbents, potential foreign entrants in the future*"), 63-64, 72-73, 99 (Globalive Wireless LP Private Placement Memorandum (v2), 15 February 2008, §§ 3.1, 3.4 (explaining that "[t]*he key restriction that Industry Canada placed on new entrants is the inability to sell the acquired new entrant spectrum to an incumbent until five years after acquisition*" and that "[e]*xit strategies could take many forms and include an initial public offering, a sale to an incumbent after five years or sale to any other party (that meets the foreign ownership restrictions) at any time*."), 4.2 (referring to the Microcell merger as a case study), 9.1 (observing that "[t]*he return of capital and the realization of gains, if any, from investment will occur only upon the partial or complete realization of or disposition of Interests*."), 373-74, 385, 391 (Memorandum from Brice Scheschuk, *Financial Model Assumptions and Considerations*, 15 February 2008, pp. 1-2 (noting that capitalizing on the set-aside spectrum auction could theoretically occur by "*holding* [the spectrum] *for five years with no operations and taking a chance on a positive return through a straight sale to an incumbent*"), 13 ("*We believe that the spectrum will have significant value on a stand-alone basis to either an incumbent (five years after acquisition) or another entrant within five years. . . the need for additional spectrum should grow with data usage and there is inherent value to an incumbent to keep spectrum from other incumbents.*"), 19 ("*Exit strategies could take many forms and include an IPO, sale to an incumbent after five years or sale to any other party (that meets the foreign ownership restrictions) within five years*."); **Exhibit C-064**, Email from Mike O'Connor to Investment Committee, et al., 28 February 2008, p. 10 **(**RBC Capital Markets, *Canadian Wireless Spectrum Auction: Discussion Materials*, 11 January 2008, Slide 8) ("*Set-aside licenses may not be transferred to entities that do not meet the criteria of a new entrant for a period of five years from the date of issuance*"); **Exhibit C-072**, JPMorgan, *Orascom Telecom – Canadian Wireless Opportunity,* 10 April 2008, Slides 19 ("*License may not be transferred to incumbent companies for 5 years from issuance*"), 23-28

279. GTH's expectation accords with the express language of the transfer provision of the Wind Mobile Licenses issued by Canada. Those Licenses state that the restriction on transfer would last "*for a period of 5 years from the date of issuance.*"[539] The Licenses also refer the licensee to Industry Canada's Spectrum Licensing Procedure (Client Procedures Circular CPC-2-1-23) "*for more information*" with respect to transfer rights.[540] The Spectrum Licensing Procedure in turn makes clear that one privilege accorded to spectrum licenses assigned through an auction is "*enhanced transferability and divisibility.*"[541] Such licenses "*may be transferred in whole or in part . . . to a third party*" subject only to "*the conditions stated in the license*" and the "*applicable eligibility criteria outlined in the Radiocommunications Regulations.*"[542]

(describing Roger's acquisition of Microcell and the features of Microcell that created value); **Exhibit C-075**, Email from Ragy Soliman to Assaad Kairouz and David Dobbie, 25 May 2008, p. 17 (Council Tree Communications, Inc., *Discussion Materials for TA Associates Regarding a Canadian Wireless Carrier Investment,* 20 January 2008, p. 16) (referring to the "*5 Year transfer restriction for set-aside licenses*"); **Exhibit C-077**, Email from Aldo Mareuse to Mike O'Connor and Investment Committee, 5 June 2008 ("*Selling spectrum is an option, although at current high prices, there isn't necessarily an easy/profitable exit. Note that they can resell to new entrants, but if they buy set aside spectrum, they can'* [sic] *resell to incumbents for five years*."). Arbitral tribunals have repeatedly recognized that an investors decision to make an investment in a host State is necessarily influenced by the legal and business framework existing at the time of the investment. Where a host State has created legitimate expectations, reliance by the investor is presumed. *See, e.g.*, **Exhibit CL-060**, *Suez*, Decision on Liability, ¶ 222 ("*a host government through its laws, regulations, declared policies and statements creates in the investor certain expectations about the nature of the treatment that it may anticipate from the host State. The resulting reasonable and legitimate expectations are important factors that influence initial investment decisions*"); **Exhibit CL-031**, *TECMED*, Award, ¶ 154 (treatment by the State should "*not affect the basic expectations that were taken into account by the foreign investor to make the investment*."); **Exhibit CL-053**, *National Grid*, Award, ¶ 173 (quoting *Tecmed*); **Exhibit CL-070**, *Micula*, Award, ¶ 672 ("*it is not necessary for the entire investment to have been predicated solely on such expectation. Businessmen do not invest on the basis of one single consideration, no matter how important.*").

539 **Exhibit C-010**, Letter from Michael D. Connolly to Kenneth Campbell, 13 March 2009, p. 3 (Wind Mobile Licenses, p. 2, Clause 2).

540 **Exhibit C-010**, Letter from Michael D. Connolly to Kenneth Campbell, 13 March 2009, p. 3 (Wind Mobile Licenses, p. 2, Clause 2).

541 **Exhibit C-003**, Industry Canada, *Licensing Procedure for Spectrum Licences for Terrestrial Services (CPC-2-1-23, Issue 2),* September 2007, § 5.6.

542 **Exhibit C-003**, Industry Canada, *Licensing Procedure for Spectrum Licences for Terrestrial Services (CPC-2-1-23, Issue 2),* September 2007, § 5.6.

280. Given the weight of this evidence, Canada's only remaining defense is to cite to the provision of the licenses that states that license transfers are subject to the Minister's approval,[543] and to observe that the Minister can amend the conditions of license.[544] Yet, these provisions do not afford the Minister the unfettered authority to breach expectations that Canada intentionally and expressly created to induce investment in its wireless telecommunications market. Canada's FET obligation under this BIT requires that even if Canada has the power to change the terms of a license, it cannot do so by undermining the inducements it provided to convince GTH to invest or by conduct that is otherwise unfair, non-transparent, unreasonable, arbitrary, or disproportionate to its purpose. Canada in fact affirmed to prospective investors that the Minister's discretion under the Radiocommunications Act 5(1)(b) to amend conditions to licenses "*would be exercised on an exceptional basis*."[545]

281. Thus, while the Wind Mobile Licenses and certain policy documents state that transfers are subject to "*Department*" approval, like all provisions, this statement must be read in light of the contextual factors. Interpreting this provision in light of the facts set forth above shows 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 and that the Minister would not recant on the expectation created in this regard.

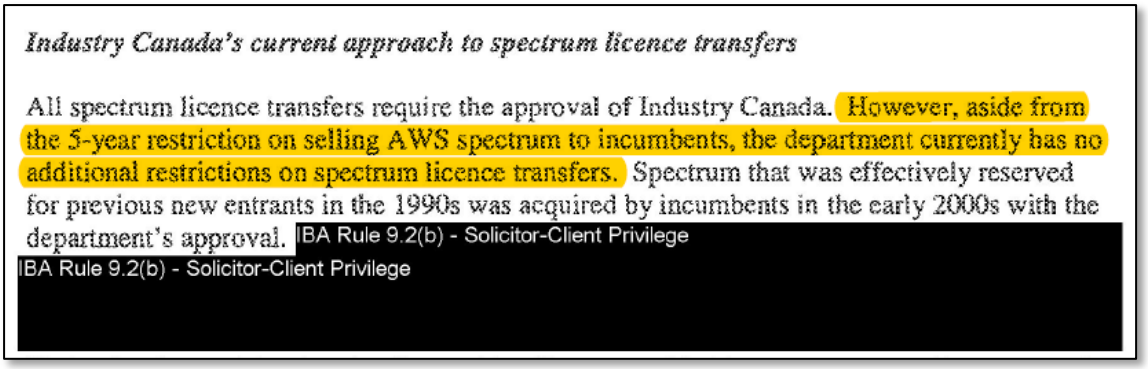
---

543 Canada's Counter-Memorial on Merits and Damages, ¶¶ 186, 188, 196, 404, 409.

544 Canada's Counter-Memorial on Merits and Damages, ¶¶ 64, 88, 204-209, 412-13.

545 **Exhibit C-003**, Industry Canada, *Licensing Procedure for Spectrum Licences for Terrestrial Services (CPC-2-1-23, Issue 2),* September 2007, § 5.3. *See also* **Exhibit C-041**, Industry Canada, *Framework for Spectrum Auctions in Canada (Issue 2)*, October 2001, § 4.2; **Exhibit C-206**, Industry Canada, *Licensing Procedure for Spectrum Licences for Terrestrial Services (CPC-2-1-23, Issue 3)*, August 2013, § 5.3. In any event, any changes to the terms and conditions of licenses must satisfy requirements of Canadian law, including Canadian administrative law requirements that ensure accountability in decision making. *See* Canada's Counter-Memorial on Merits and Damages, ¶ 65 (explained in the context of exercising spectrum management authority under the Radiocommunications Act).

282. Canada is well aware that the Minister's authority in this regard was not a broad authority that allowed the Minister to approve/reject transfer applications at her or his unfettered discretion, but that such authority was narrow and circumscribed. This is clear from Canada's internal documents contemplating the potential change in transfer rules to address fears that New Entrants would exit the market. In a December 2012 memorandum to its Deputy Minister, Industry Canada emphasized that, other than the five-year restriction, there were no other restrictions on a New Entrant's ability to transfer its set-aside spectrum licenses:[546]



Industry Canada's current approach to spectrum licence transfers

All spectrum licence transfers require the approval of Industry Canada. However, aside from the 5-year restriction on selling AWS spectrum to incumbents, the department currently has no additional restrictions on spectrum licence transfers. Spectrum that was effectively reserved for previous new entrants in the 1990s was acquired by incumbents in the early 2000s with the department's approval. IBA Rule 9.2(b) - Solicitor-Client Privilege

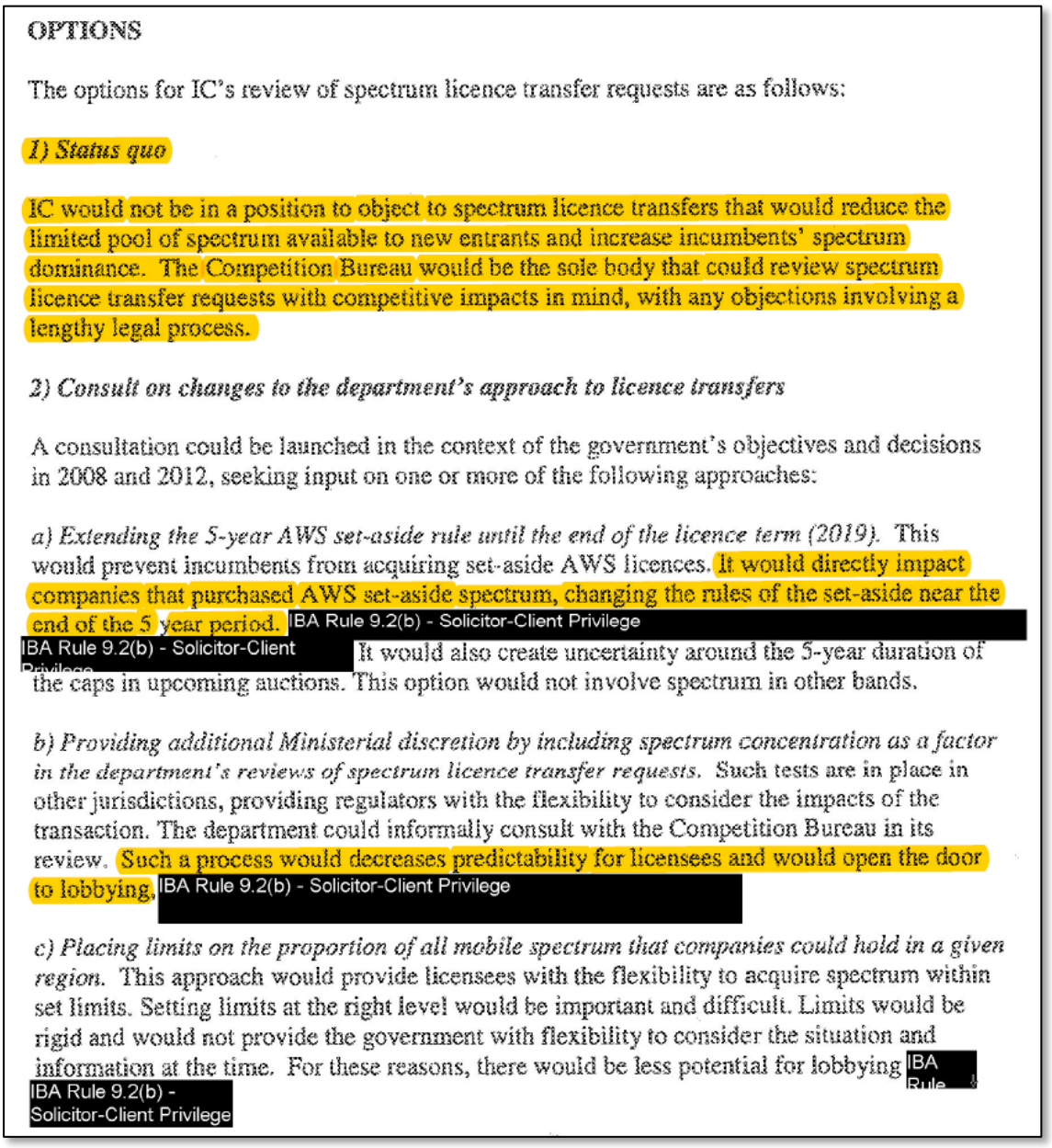
IBA Rule 9.2(b) - Solicitor-Client Privilege

283. Industry Canada realized that the existing regime would not allow Canada to prevent the New Entrants from transferring their set-aside spectrum licenses to an Incumbent. Industry Canada saw its options as follows:[547]

---

[546] **Exhibit C-258**, Memorandum from Iain Stewart to Deputy Minister, Industry Canada, *Update on Wireless Telecom Sector*, 7 December 2012 [*Updated version of* **Exhibit R-084**], p. 6 (Annex A: Wireless Telecommunications Sector Update and Implications, p. 5) (highlighting added). *See also* **Exhibit C-258**, Memorandum from Iain Stewart to Deputy Minister, Industry Canada, *Update on Wireless Telecom Sector*, 7 December 2012 [*Updated version of* **Exhibit R-084**], p. 2 (Annex A: Wireless Telecommunications Sector Update and Implications, p. 1);

[547] **Exhibit C-258**, Memorandum from Iain Stewart to Deputy Minister, Industry Canada, *Update on Wireless Telecom Sector*, 7 December 2012 [*Updated version of* **Exhibit R-084**], p. 7 (Annex A: Wireless Telecommunications Sector Update and Implications, p. 6) (highlighting added).



OPTIONS

The options for IC's review of spectrum licence transfer requests are as follows:

1) Status quo

IC would not be in a position to object to spectrum licence transfers that would reduce the limited pool of spectrum available to new entrants and increase incumbents' spectrum dominance. The Competition Bureau would be the sole body that could review spectrum licence transfer requests with competitive impacts in mind, with any objections involving a lengthy legal process.

2) Consult on changes to the department's approach to licence transfers

A consultation could be launched in the context of the government's objectives and decisions in 2008 and 2012, seeking input on one or more of the following approaches:

a) Extending the 5-year AWS set-aside rule until the end of the licence term (2019). This would prevent incumbents from acquiring set-aside AWS licences. It would directly impact companies that purchased AWS set-aside spectrum, changing the rules of the set-aside near the end of the 5 year period. IBA Rule 9.2(b) - Solicitor-Client Privilege IBA Rule 9.2(b) - Solicitor-Client Privilege It would also create uncertainty around the 5-year duration of the caps in upcoming auctions. This option would not involve spectrum in other bands.

b) Providing additional Ministerial discretion by including spectrum concentration as a factor in the department's reviews of spectrum licence transfer requests. Such tests are in place in other jurisdictions, providing regulators with the flexibility to consider the impacts of the transaction. The department could informally consult with the Competition Bureau in its review. Such a process would decreases predictability for licensees and would open the door to lobbying. IBA Rule 9.2(b) - Solicitor-Client Privilege

c) Placing limits on the proportion of all mobile spectrum that companies could hold in a given region. This approach would provide licensees with the flexibility to acquire spectrum within set limits. Setting limits at the right level would be important and difficult. Limits would be rigid and would not provide the government with flexibility to consider the situation and information at the time. For these reasons, there would be less potential for lobbying IBA Rule IBA Rule 9.2(b) - Solicitor-Client Privilege

284. Thus in Industry Canada's own words, the "***Status quo***" with respect to the review and approval of transfers would mean that it had no authority to reject license transfer requests to an Incumbent after the five-year restriction expired, and that the Competition Bureau was "*the sole body*" to review such transfers on the basis of

competition concerns.[548] Industry Canada noted, however, that the Competition Bureau had never before "*objected to a spectrum licence transfer request.*"[549] Industry Canada accepted that extending the five-year restriction would be "*changing the rules of the set-aside near the end of the 5 year period*."[550]

285. Canada also understood, unequivocally, that adding "*spectrum concentration*" as a factor in its transfer approval process would provide the Minister "*additional*" discretion that he did not previously have.[551] It was, as Canada described, a "*new tool*" and "*new rules*" that "*would require chang*[ing] *conditions* [of AWS set-aside spectrum licenses] *retrospectively.*"[552] Thus, contrary to Canada's arguments for the purposes of

---

548 **Exhibit C-258**, Memorandum from Iain Stewart to Deputy Minister, Industry Canada, *Update on Wireless Telecom Sector*, 7 December 2012 [*Updated version of* **Exhibit R-084**], p. 7 (Annex A: Wireless Telecommunications Sector Update and Implications, p. 6). *See also* **Exhibit C-262**, Memorandum from Marta Morgan and John Knubley to Minister of Industry, *Approach to Mobile Spectrum Licence Transfers – Briefing Material*, 4 January 2013 [*Updated version of* **Exhibit R-088**], pp. 5 (Annex A: Wireless Telecommunications Sector: Update and Implications (English version), p. 3), 19 (Annex B: Industry Canada, *Approach to Mobile Spectrum Licence Transfers* (English Version), January 2013, Slide 7); [redacted]

549 **Exhibit C-258**, Memorandum from Iain Stewart to Deputy Minister, Industry Canada, *Update on Wireless Telecom Sector*, 7 December 2012 [*Updated version of* **Exhibit R-084**], p. 7 (Annex A: Wireless Telecommunications Sector Update and Implications, p. 6).

550 **Exhibit C-258**, Memorandum from Iain Stewart to Deputy Minister, Industry Canada, *Update on Wireless Telecom Sector*, 7 December 2012 [*Updated version of* **Exhibit R-084**], p. 7 (Annex A: Wireless Telecommunications Sector Update and Implications, p. 6). *See also* **Exhibit C-262**, Memorandum from Marta Morgan and John Knubley to Minister of Industry, *Approach to Mobile Spectrum Licence Transfers – Briefing Material*, 4 January 2013 [*Updated version of* **Exhibit R-088**], p. 5 (Annex A: Wireless Telecommunications Sector: Update and Implications (English version), p. 3).

551 **Exhibit C-258**, Memorandum from Iain Stewart to Deputy Minister, Industry Canada, *Update on Wireless Telecom Sector*, 7 December 2012 [*Updated version of* **Exhibit R-084**], p. 7 (Annex A: Wireless Telecommunications Sector Update and Implications, p. 6). *See also* **Exhibit C-262**, Memorandum from Marta Morgan and John Knubley to Minister of Industry, *Approach to Mobile Spectrum Licence Transfers – Briefing Material*, 4 January 2013 [*Updated version of* **Exhibit R-088**], pp. 4-5 (Annex A: Wireless Telecommunications Sector: Update and Implications (English version), pp. 2-3), 19-20 (Annex B: Industry Canada, *Approach to Mobile Spectrum Licence Transfers* (English Version), January 2013, Slides 7-8). *See also* [redacted]

552 **Exhibit C-264**, Industry Canada, *Wireless Telecommunications Market and Approach to Spectrum Licence Transfers*, 14 January 2013 [*Updated version of* **Exhibit R-089**], Slide 13. Canada is aware that such

this Arbitration, the addition of spectrum concentration cannot be characterized as a mere "*clarification*" of existing policy.[553] This was a fundamental change that Canada knew would impact the value of the set-aside spectrum licenses for New Entrants.[554]

286. Canada itself confirms that it introduced the 2013 Transfer Framework to block New Entrants from selling set-aside spectrum licenses to Incumbents,[555] and that Industry Canada would therefore not allow GTH to sell Wind Mobile to an Incumbent at the end of the Five-Year Rollout Period in March 2014.[556] GTH had the legitimate expectation that a sale to an Incumbent would be approved after five years and Canada frustrated this expectation.

287. Canada has alleged that GTH's expectations regarding whether it would be permitted to transfer the Wind Mobile Licenses are not relevant here because the "[t]*he only expectations that can be relevant to the Claimant's FET claims are those it held in relation to the investments that are the subject of its claim*."[557] The line Canada attempts to draw does not exist in this BIT or as a matter of fact. The legitimate expectations component of FET is concerned with expectations that were relied upon in making an investment. The spectrum licenses are a critical part of the value associated with GTH's investment, and GTH would not have invested over C$ 1.3 billion in Canada without Wind Mobile's ownership of the spectrum licenses and the rights that came with

---

retrospective changes to license conditions could lead to legal challenges. *See* **Exhibit C-312**, Email from Pierre Legault to Michele Hurteau, 1 February 2008, pp. 2-3.

553 *See supra* ¶ 55.

554 *See supra* ¶¶ 56-58.

555 *See supra* **Part II.F**.

556 *See supra* **Part II.H**.

557 Canada's Counter-Memorial on Merits and Damages, ¶¶ 399-400. Canada objects to GTH's standing to bring claims arising from the treatment of Wind Mobile. In **Part III.E**, GTH has detailed why this objection has no basis and must be dismissed.

them.[558] Indeed, part of GTH's investment was specifically earmarked for payments associated with acquiring spectrum licenses at the outset.[559]

288. Thus, there can be no doubt that the Wind Mobile Licenses, and the rights associated with them, inform the legitimate expectations that justified GTH's investment. GTH made its investment in Canada relying on its legitimate expectation that it could sell Wind Mobile, and the spectrum licenses it came with, to an Incumbent after five years. In other words, GTH's expectations were in fact "*held in relation to the investments that are the subject of its claim*" and Canada's alleged requirement—to the extent it is even relevant—has been satisfied.

---

[558] As Wind Mobile noted in 2013, "[t]*he lifeblood of a facilities-based wireless carrier is spectrum*." **Exhibit R-146**, Globalive Wireless Management Corp. ("WIND"), *Canada Gazette Notice No. DGSO-002-13, Consultation on Considerations Relating to Transfers, Divisions, and Subordinate Licensing of Spectrum Licences, Comments of Globalive Wireless Management Corp. ("WIND"),* 3 April 2013, ¶ 3. *See also* **Exhibit C-209**, *Verizon not entering Canada's wireless market after all*, CBC, 2 September 2013, http://www.cbc.ca/news/business/verizon-not-entering-canada-s-wireless-market-after-all-1.1339361 (accessed 24 September 2017), p. 1 (Telus executive vice-president stating that "[s]*pectrum is the lifeblood of our industry*"); **Exhibit C-171**, Rita Trichur & Boyd Erman, *Ottawa moves quickly to finalize wireless rules*, THE GLOBE & MAIL, 15 April 2013, https://beta.theglobeandmail.com/report-on-business/ottawa-moving-quickly-to-finalize-wireless-rules/article11197998/ (accessed 24 September 2017), pp. 1-2 ("[spectrum] *is a public resource that is considered the very lifeblood of the wireless industry.*"); **Exhibit C-166**, Rita Trichur, *Wireless carriers sound alarm over Ottawa's spectrum transfer plan*, THE GLOBE & MAIL, 4 April 2013, https://beta.theglobeandmail.com/report-on-business/wireless-carriers-sound-alarm-over-ottawas-spectrum-transfer-plan/article10766064/ (accessed 24 September 2017), p. 2 ("*For carriers of all sizes, the stakes of this licences transfer review are high. Spectrum is the very lifeblood of the industry*."); **Exhibit R-234**, *New spectrum rules would favour foreign carriers: Bell Canada*, CITYNEWS, http://toronto.citynews.ca/2013/06/28/new-spectrum-rules-would-favour-foreign-carriers-bell-canada/ (accessed 13 February 2018), p. 3 (Telus spokesman notes that "[s]*pectrum is the lifeblood of our industry*"); **Exhibit R-149**, Public Mobile, *Public Mobile Inc. (Public Mobile) Comments on Consultation on Considerations Relating to Transfers, Divisions and Subordinate Licensing of Spectrum Licences,* 3 April 2013, ¶ 5 ("*The Minster, in his statement at the time the Consultation Document was released, acknowledged that the lifeblood of wireless carriers is access to sufficient spectrum and to sufficient affordable capital.*").

[559] *See* **Exhibit C-092**, Letter from Martin Masse to Michael D. Connolly, 2 March 2009, pp. 137-62 (Revised Declaration of Ownership and Control of Globalive Wireless Management Corp., 31 July 2008, $442,403,000 Term Loan Agreement (Revised Version) between Orascom Telecom Holding (Canada) Limited and Globalive Wireless Management Corp., 31 July 2008, *with* Schedules).

289. As a last effort, Canada argues that the 2013 Transfer Framework[560] did not operate in 2013 and 2014 as a bar to the sale or transfer of the Wind Mobile Licenses to an Incumbent.[561] Moreover, Canada posits that GTH did not take the formal steps of submitting a transfer application to Industry Canada.[562] These points are irrelevant. Indeed, the Minister himself was unequivocal in stating that the transfer of set-aside spectrum licenses from New Entrants to Incumbents "***will not be approved now, nor will it likely be in the future***."[563] The purpose of these express statements was precisely to inform the market that transfers of New Entrant spectrum to Incumbents would never be permitted.[564] In the circumstances, no reasonable New Entrant would have thought to submit a futile application that the Government had already made clear would be rejected.

---

560 Canada's focus on the 2013 Transfer Framework is misplaced. GTH's claim is that Canada breached its obligation to accord FET by blocking the sale of Wind Mobile to an Incumbent after the Five-Year Rollout Period had expired, not that the 2013 Transfer Framework by itself was the breach.

561 *See* Canada's Counter-Memorial on Merits and Damages, ¶¶ 248-52. Canada alleges that rather than act as "*a blanket prohibition or an extension of the five-year moratorium*" on transfer, the 2013 Transfer Framework made clear that applications for transfer would be assessed on a "*case-by-case basis*." *See* Canada's Counter-Memorial on Merits and Damages, ¶¶ 248, 250**.** This is not relevant.

562 *Cf.* Canada's Counter-Memorial on Merits and Damages, ¶¶ 248, 252.

563 **Exhibit C-195**, House of Commons Debates, Hansard 146(262), 41st Parliament, 1st Session, 4 June 2013, p. 17647 (emphasis added).

564 *See* [redacted]; **Exhibit C-346**, Email from Christopher Johnstone to Iain Stewart, Jenifer Aitken and Marie-Josée Thivierge, *attaching* TD Securities Inc., *Equity Research*, 12 April 2013, p. 1 ("*FYI in advance of the call this morning: analyst consensus continues to be that IC will not permit incumbents to acquire new entrants' spectrum*."); **Exhibit C-351**, Email from Iain Stewart to Christopher Johnstone, et al., 22 April, 2013, p. 1.

IV.A.2.b. Canada's Decision To Block GTH's Sale Of Wind Mobile To An Incumbent Was Unreasonable, Arbitrary & Disproportionate

290. In addition to breaching GTH's legitimate expectations, Canada's politically motivated decision to block GTH's sale of Wind Mobile to an Incumbent was unreasonable, arbitrary, and disproportionate, in violation of its obligation to accord FET to GTH's investment.

291. Canada's decision to prevent GTH from selling its set-aside spectrum licenses to an Incumbent was a new, politically motivated objective to create a fourth player in the wireless telecommunications market at any cost.[565] By late 2012, the media and industry commentators announced that the Government's attempt to introduce competition in the market had failed.[566] To combat this criticism, the Government announced its fourth-player policy, declared its intention to use "*every tool at* [its] *disposal*" to realize its policy, and released its 2013 Transfer Framework.[567] In fact, Canada spent C$ 8.5 million on an advertising campaign dedicated to touting the Government's efforts in the wireless communications market to Canadian consumers.[568] Ultimately, Canada sought to use these levers to force a fourth player to remain.

---

[565] *See supra* ¶¶ 50-55. In relevant period, from 2006 to 2015, five different people held the position of the Minister of Industry. *See* **Exhibit C-249**, Industry Canada, *Ministers of Industry*, https://www1.ic.gc.ca/eic/site/icgc.nsf/eng/00024.html#IC (accessed 24 September 2017) pp. 9-10.

[566] *See supra* ¶ 50.

[567] *See supra* ¶ 50.

[568] *See* **Exhibit C-383**, Christine Dobby, *Ottawa feared wireless 'failures'; Wanted upstarts to merge: memos*, NATIONAL POST, 3 December 2013, p. 3; **Exhibit C-393**, Publish Works and Government Services Canada, *2013-2014 Annual Report on Government of Canada Advertising Activities*, p. 4 (observing that "[i]*n response to public discussion about competition in the wireless market, Industry Canada launched the* More Choices *campaign to ensure Canadians had the facts about Government of Canada telecommunications policy and the measures introduced to deliver cutting edge technologies to Canadian families at affordable prices*."), p. 11 (showing that Industry Canada spent C$ 8,467,653 on television, print, radio, and internet

292. This fourth player policy did not exist at the time of the 2008 AWS Auction and, as Mr. Connolly describes it, to suggest otherwise is "*revisionist history*."[569] On the contrary, Canada maintained that it could not ensure the success of new entry and was well-aware that the entire exercise may result in no New Entrants in the market.[570]

293. At the time of the 2008 AWS Auction, Canada knew that the presence of New Entrants did not necessarily mean a better market.[571] And in 2013, Canada's new fourth player policy remained untethered to objective evidence that a fourth player would benefit competition. In fact, contemporaneous studies and analysis suggested that Canada's fourth player policy was not good for consumers, distorting the market, and stifling innovation.[572] According to the Montreal Economic Institute, innovation in

---

advertising in the 2013/2014 financial year "[t]*o provide the facts about Government of Canada telecommunications policy and the measures introduced to improve services and costs for consumers.*").

569 **CWS-Connolly**, ¶ 15.

570 *See supra* ¶ 38(d).

571 *See supra* ¶ 38(d), n. 55.

572 *See* **Exhibit C-391**, Martin Masse and Paul Beaudry, *The State of Competition in Canada's Telecommunications Industry – 2014*, MONTREAL ECONOMIC INSTITUTE, May 2014, pp. 27-41. *See also* **Exhibit R-080**, Industry Canada, *Telecommunications Policy Review Panel: Final Report 2006,* March 2006, pp. 3-10 – 3-11 (explaining the dangers of regulatory intervention in a competitive, dynamic, and complex market like the telecommunications markets); **Exhibit C-394**, Martin Masse and Paul Beaudry, *The State of Competition in Canada's Telecommunications Industry – 2015*, Montreal Economic Institute, May 2015, pp. 24-25 (describing the trend towards consolidation in other countries and quoting one firm's view that "*'A consensus is emerging in the mobile communications industry that three is the optimum number of mobile operators for any given market.'*"); **Exhibit C-112**, Standing Committee on Industry, Science and Technology, *Canada's Foreign Ownership Rules and Regulations in the Telecommunications Sector: Report of the Standing Committee on Industry, Science and Technology,* June 2010, p. 32 (observing that "*most OECD countries have three wireless operators that hold the vast majority of the domestic market share*"); **Exhibit C-142**, Scotiabank, *Biweekly Report: Converging Networks: The Writing's on the Wall – The Canadian Wireless Market is Consolidating*, 21 January 2013, p. 1 ("*Canada is just not large enough to have four viable wireless operators*."); **Exhibit C-173**, *Paradis' four-carrier policy may mean blocking Wind or Mobilicity sale, and new incentives*, THE WIRE REPORT, 18 April 2013, p. 1 (quoting a telecommunication analyst's reaction to Minister Paradis' new "*fourth-carrier policy*," as "*It doesn't make sense. . . . There is not enough revenue to have every part of Canada have four providers. . . . I think it's an unreasonable expectation to put on the industry*."); **Exhibit R-081**, OECD, *Wireless Market Structures and Network Sharing,* OECD Digital Economy Papers, No. 243, 2014, p. 11 ("*Most regulators agree that two MNOs are too few to ensure sufficient competition, but whether three, four or five is the optimal number is heavily debated*."); **CWS-Connolly**, ¶ 15. Canada was well aware that a fourth player might not result from the 2008 AWS Auction and that more entrants was not always better for competition. *See, e.g.*, **Exhibit C-299**, Email from Len St. Aubin to Renee St-Jacques, Guy Mitchell, Pamela Miller and Ron Parker, 16 July 2007, p. 2.

telecommunications has a greater impact on competition in the marketplace than the addition of carriers, and innovation required fewer carriers to have more spectrum licenses.[573] Other sophisticated telecommunications markets also reached the conclusion that three carriers were sufficient—and in fact ideal—for a competitive environment.[574] As is the case here, actions that are primarily driven by political agendas rather than sound policy rationale are unreasonable and arbitrary.[575]

294. Canada suggests that Industry Canada's efforts to maintain a New Entrant was an exercise of its mandate to promote competition in the wireless telecommunications market. But this rationale offers no defense for Canada's actions. Industry Canada has no obligation to make decisions on the basis of competition concerns.[576] Insofar as Industry Canada was willing to consider competition in its policy making, Industry Canada made clear in its 2008 AWS Auction Framework that it considered the scope of its mandate to extend only to the use of *ex-ante* measures at the time of Auction,

---

[573] **Exhibit C-391**, Martin Masse and Paul Beaudry, *The State of Competition in Canada's Telecommunications Industry – 2014*, MONTREAL ECONOMIC INSTITUTE, May 2014, p. 36 ("*Also, it may be preferable for financial resources in the telecommunications industry to be concentrated in the hands of a few strong players willing to invest in new technologies and services rather than scattered among several small and feeble competitors trying to survive by selling at prices barely above marginal costs*.").

[574] **Exhibit C-391**, Martin Masse and Paul Beaudry, *The State of Competition in Canada's Telecommunications Industry – 2014*, MONTREAL ECONOMIC INSTITUTE, May 2014, p. 38 (observing that many States which previously had four carriers now only have three, and "*due to the ongoing consolidation processes in many countries, the three-player model may well soon become the norm*."); **Exhibit C-394**, Martin Masse and Paul Beaudry, *The State of Competition in Canada's Telecommunications Industry – 2015*, Montreal Economic Institute, May 2015, pp. 24-25.

[575] *See, e.g.*, **Exhibit RL-114**, *Ronald S. Lauder v. The Czech Republic*, UNCITRAL, Final Award, 3 September 2001, ¶ 232 ("*The measure was arbitrary because it was not founded on reason or fact . . . but on mere fear reflecting national preference*."); **Exhibit CL-037**, *Eureko*, Partial Award, ¶ 233 ("[Poland] *acted not for cause but for purely arbitrary reasons linked to the interplay of Polish politics and nationalistic reasons of a discriminatory character*."); **Exhibit CL-038**, *Saluka*, Partial Award, ¶ 498 (finding that the Czech Republic failed to offer "*a reasonable justification for* [the Claimant's] *differential treatment*" and there had "*given a discriminatory response*"); **Exhibit CL-049**, *Biwater*, Award, ¶ 696 (finding that a Ministerial press conference "*at least in part clearly motivated by political considerations*" was an unreasonable measure). *See also* **Exhibit CL-103**, *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, Judgment of 20 July 1989, (1989) I.C.J. REPORTS 15, pp. 94-121, Dissenting Opinion of Judge Schwebel, pp. 111, 114-15.

[576] *See infra* ¶ 328.

while the Competition Bureau pursuant to the Competition Act was to monitor competition matters on an *ex-post* basis.[577] Nowhere in Canada's memorandum discussing available *ex-post* measures in the event that it decided not to introduce *ex-ante* measures to promote in the 2008 AWS Auction Framework does Canada mention Industry Canada as having any *ex-post* authority to later block license transfers or to change the conditions of license addressing such transfers.[578]

295. Moreover, Canada's documents show that at the time Canada contemplated the adoption of the 2013 Transfer Framework, Industry Canada understood that the *status*

---

[577] *See* **Exhibit C-050**, Industry Canada, *Consultation on a Framework to Auction Spectrum in the 2 GHz Range including Advanced Wireless Services (DGTP-002-07)*, February 2007, § 2.7 ("*In the current context of licensing new spectrum, consideration for setting aside spectrum for new entrants is proactive and could reduce the exclusive reliance on* ex post *regulation to address competition issues. Creating an opportunity for new entry at the time of auction is, in many respects, the only time to introduce further competition in the wireless market. That is, once market power is obtained through the aggregation of spectrum, the simple exercise of that market power in the absence of any abusive conduct (i.e. conduct that is disciplinary, predatory or exclusionary) would not raise an issue under the* Competition Act*. Reducing barriers to entry may assist new licensees in providing services in competition with existing services as described in the competition principles. Potential adverse impact (i.e. unviable entry) can be corrected by market forces should a new entrant fail. The risk of having the spectrum bought by all the incumbents is that the opportunity of having further competitive entry into the market would be prevented. Also, recent experience of regulators from other countries indicates that* ex post *solutions to wireless competition issues present a number of difficulties.*"). *See also* [redacted]; **Exhibit C-297**, Memorandum from Len St. Aubin to the Visiting Senior Assistant Deputy Minister, copying Michael Binder, *Policy Overview of Previous Competitive Licensing*, 30 May 2007, p. 2 (describing that "*Measures available to the Government to promote a competitive post-auction marketplace include restricting or disallowing the participation of certain entities in an auction and placing limits on the amount of spectrum any one entity may hold (spectrum set-aide or spectrum caps)*."); **Exhibit C-352**, Email from Mervin Grywacheski to Philip Fleming and Amy Jensen, 23 April 2013, p. 4 (Consultation on Considerations Relating to Transfers, Divisions and Subordinate Licensing of Spectrum Licences, p. 3) ("*Industry Canada's role is fundamentally one of prospective rule-making while the Competition Bureau's role is fundamentally one of enforcement which focuses on the actual impact on competition*"). It is telling that when the Telecommunications Policy Review Panel issued their Final Report in 2006, they made no mention of any responsibilities of Industry Canada when addressing the state of regulating competition in the telecommunications market, instead referring to the responsibilities of the CRTC and the Competition Bureau. Industry Canada's role was circumscribed to only providing "*regulatory approval . . . for changes of control in spectrum licensees*." *See* **Exhibit R-080**, Industry Canada, *Telecommunications Policy Review Panel: Final Report 2006,* March 2006, pp. 4-12 – 4-28; **Exhibit C-309**, Email from Len St. Aubin to Paul Boothe, Ron Parker, and Michael Binder, 23 October 2007, p. 16 (Measures intended to enable new entry through the AWS spectrum auction (draft), 23 October 2007, p. 15).

[578] *See* **Exhibit C-306**, Email from Len St. Aubin to Pamela Miller, Julie Fujimura, Adam Scott, and Guy Mitchell, 10 September 2007, pp. 17-22 (Reliance on Ex Post Regulatory Measures to Ensure a Competitive Wireless Services Market (draft), 5 September 2007).

quo was for the Competition Bureau to monitor transfer requests to consider impacts on competition. In internal documents, Industry Canada acknowledged that it "*would not be in a position to object to spectrum licence transfers that would reduce the limited pool of spectrum available to new entrants and increase incumbents' spectrum dominance*."[579] Rather, "[t]***he Competition Bureau would be the sole body that could review spectrum licence transfer requests with competitive impacts in mind, with any objections involving a lengthy legal process***."[580] Thus, any legitimate competition concerns would be addressed by the Competition Bureau. The only reason for Industry Canada to give itself the authority to intervene is if it thought that the Competition Bureau would not have otherwise prevented the New Entrants from transferring their spectrum to the Incumbents, and the public would see the Government as having failed to keep its promise.

296. What is more, Industry Canada took away an exit strategy from the New Entrants in the name of promoting competition, while another arm of the Government (the CRTC) exercised "*forbearance*" and chose not to regulate roaming rates because it felt the market was competitive without having to intervene.[581] All of the factors above

---

[579] **Exhibit C-258**, Memorandum from Iain Stewart to Deputy Minister, Industry Canada, *Update on Wireless Telecom Sector*, 7 December 2012 [*Updated version of* **Exhibit R-084**], p. 7 (Annex A: Wireless Telecommunications Sector Update and Implications, p. 6). *See also* **Exhibit C-262**, Memorandum from Marta Morgan and John Knubley to Minister of Industry, *Approach to Mobile Spectrum Licence Transfers – Briefing Material*, 4 January 2013 [*Updated version of* **Exhibit R-088**], p. 19 (Annex B: Industry Canada, *Approach to Mobile Spectrum Licence Transfers* (English Version), January 2013, Slide 7) (emphasizing the need "[f]*or new approach to be in place before potential AWS set-aside transfers starting Dec 2013*").

[580] **Exhibit C-258**, Memorandum from Iain Stewart to Deputy Minister, Industry Canada, *Update on Wireless Telecom Sector*, 7 December 2012 [*Updated version of* **Exhibit R-084**], p. 7 (Annex A: Wireless Telecommunications Sector Update and Implications, p. 6) (emphasis added). *See also* **Exhibit C-262**, Memorandum from Marta Morgan and John Knubley to Minister of Industry, *Approach to Mobile Spectrum Licence Transfers – Briefing Material*, 4 January 2013 [*Updated version of* **Exhibit R-088**], p. 19 (Annex B: Industry Canada, *Approach to Mobile Spectrum Licence Transfers* (English Version), January 2013, Slide 7).

[581] This is explored further below in the context of Canada's cumulative breaches of FET at **Part IV.A.4**.

demonstrate that Canada's blocking of GTH's sale of Wind Mobile to an Incumbent was an arbitrary and unreasonable act in breach of FET.

297. Even assuming that Canada's decision had any legitimate basis, Canada enacted a new framework that afforded it the broadest authority to block requests from New Entrants to transfer set-aside spectrum to Incumbents at its full discretion.[582] Canada took this approach despite having (and identifying) several alternative options to address its competition concerns.[583] Most obviously, it could have capped roaming rates at an earlier point in time or revised the transfer framework to apply only to future licences rather than trapping New Entrants' investment without any prospect for them to recover value.[584] Canada also considered, but evidently disposed of, options to buy back spectrum or compensate New Entrants in the amount they would otherwise be able to sell to an Incumbent.[585] Moreover, Canada knew the approach it took would have the most detrimental impact on the value of GTH's investment and decrease predictability for all set-aside spectrum licensees.[586] Thus, Canada's blocking of GTH's ability to sell Wind Mobile to an Incumbent was disproportionate. Canada could have achieved the same policy objective of increasing and fostering competition by removing barriers for the New Entrants (as opposed to putting up walls to keep them away from Incumbents);

---

582 *See supra* ¶ 54.

583 *See supra* ¶ 54.

584 Canada's internal documents in fact contemplate that the "*PLAN C*" (which was titled "*Focus On The Consumer*"), to "*PLAN A*" (titled "*Reinforce fourth player strategy*") was to implement a Transfer Policy to apply "*only to future licences*." **Exhibit C-350**, *VimpelCom/Wind Scenarios*, 19 April 2013, p. 4.

585 *See* **Exhibit C-377**, Advice to the Minister, *Wireless Telecommunications Policy Options*, c. September 2013, p. 5 ("*The government could seek to buy-back the spectrum from Mobilicity at a specific amount (would likely need to be in the range of $300M- $350 million for investors to accept) and seek to re-auction it to non-incumbents*.").

586 *See supra* ¶¶ 56-58.

by doing so, it could have avoided the significant damage it caused to GTH. Canada's disproportionate approach again amounts to a breach of FET.[587]

298. That other foreign regulators, not subject to the obligations of the BIT, have regulated spectrum concentration provides no basis on which to conclude that Canada did not act arbitrarily or disproportionately in this case in view of the contextual circumstances.[588]

299. Finally, Canada's actions unfairly targeted Wind Mobile because it was the most successful of the New Entrants. Canada knew the Wind Mobile was the most likely New Entrant to succeed, and, as such, it could not allow the sale of Wind Mobile to an Incumbent. Internally, Canada contemplated various scenarios where Wind Mobile would merge with or be sold to a third party of Canada's choosing[589]—[redacted]

---

[587] *See, e.g.*, **Exhibit CL-065**, *Occidental II*, Award, ¶¶ 450-52 (finding a breach of the FET standard where respondent's termination of a contract resulting in total loss of claimant's investment was out of proportion with the respondent's stated policy goals used to justify the termination); **Exhibit CL-084**, *Philip Morris* (Born Dissent), ¶¶ 146-79 (explaining that the majority of the tribunal should have found a breach of FET because, while the goal of the respondent's measure, which precluded tobacco manufacturers from marketing more than one variety of cigarettes per brand family, was legitimate, the measure itself was both over and under broad, not tailored to achieve its stated goal, and enacted without significant research or critical thought on the part of the respondent). Canada mischaracterizes the 2013 Transfer Framework as a "*regulatory measure of general application*" in a bid to distinguish the finding of the tribunal in *Occidental II*, where the measure affected a specific contract. At the time of implementation, the entities that would be impacted by the 2013 Transfer Framework were circumscribed to a select, identifiable group known to Canada. The 2013 Transfer Framework, similar to the Ecuadorian decree in *Occidental II*, only impacted the rights of this select group and as such was a targeted measure. *See* Canada's Counter-Memorial on Merits and Damages, ¶ 377.

[588] Canada's Counter-Memorial on Merits and Damages, ¶ 379. For both Professor Born and the majority in *Philip Morris*, a finding that a measure is not arbitrary and is proportionate is not an *en masse* conclusion but requires careful consideration of both respondent conduct and the evidentiary record *in concreto*. *See* **Exhibit RL-208**, *Philip Morris*, Award, ¶ 401 (noting that the conduct of other regulators, at most, can be considered "*a point of reference*"). In this case, Canada should have, but did not, balance the significant burden the 2013 Transfer Framework caused on licensees, who invested with the knowledge that they would be able to sell their licenses to incumbents, with its stated regulatory objective. Moreover, contrary to Canada's assertions, the absence of similar measures in other jurisdictions was not the linchpin to Professor Born's finding that Uruguay's conduct was arbitrary and disproportionate. This was only one feature of the factual matrix and the opinion places significantly greater emphasis on "*the manner in which* [the] *requirement was adopted and the surrounding legislative and regulatory regime in Uruguay*" and the patent dissonance between the stated regulatory objective and the breaching measure. **Exhibit CL-084**, *Philip Morris* (Born Dissent), ¶¶ 92, 150-73, 178-79. A similar dissonance reverberates through the evidentiary record in this case.

[589] *See, e.g.*, **Exhibit C-350**, *VimpelCom/Wind Scenarios,* 19 April 2013; [redacted]

[redacted].[590] Canada breached the BIT by singling out Wind Mobile in this way. In hindsight, it is clear that when Canada said it wanted a fourth carrier, what it really meant was it wanted Wind Mobile—and that is what it got.

IV.A.3. Canada Breached The FET Standard Through Its Unreasonable, Arbitrary, And Non-Transparent Treatment Of GTH's Efforts To Take Voting Control As Well As Its Failure To Accord Due Process

300. Reviews dealing with issues of national security are owed no special deference when it comes to ensuring that the subjected investor is afforded the basic elements of FET. Tribunals have recognized that conduct arising in the context of purported national security interests can amount to violations of FET. This is so particularly where the State's motives in invoking national security concerns are intertwined with other motives, such as commercial motives, and where there exist other avenues for addressing national security concerns other than simply nullifying an investor's acquired rights.[591] Indeed, other tribunals have not hesitated to evaluate whether national security was truly at stake, and if so to what degree,[592] or to find a breach of

---

590 *See, e.g.*, [redacted]

591 **Exhibit CL-173**, *Deutsche Telekom AG v. The Republic of India*, UNCITRAL, PCA Case No. 2014-10, Interim Award, 13 December 2017, ¶¶ 341, 367 (concluding that the respondent had only paid lip service and had not adduced any evidence "*about the results of the exploration of these 'new avenues' . . .* [t]*here* [was] *thus no proof that the military concluded that its existing and future needs could not be met*" without annulling the agreement with the claimant, and finding that "*even assuming a rational policy existed, namely the need to protect military needs . . . there was no appropriate correlation between the asserted public policy objective and the measure adopted to achieve it*").

592 **Exhibit CL-173**, *D.T.*, Interim Award, 13 December 2017, ¶¶ 246, 260 (finding that "[i]*n addition to the military needs . . . a host of other factors played a determinative role*" in the respondent's decision to take the breaching measure); **Exhibit CL-164**, *CC/Devas*, Award on Jurisdiction and Merits, ¶¶ 371-73 (finding the respondent's security interests only required the expropriation of 60%, rather than 100%, of investor's investment, and expropriation of the remaining 40% was motivated by "*several other objectives . . . which had nothing to do with national security*."); **Exhibit CL-059**, *Gemplus S.A., SLP S.A., Gemplus Industrial S.A. de C.V. and Talsud S.A. v. The United Mexican States*, ICSID Cases Nos. ARB (AF)/04/3 & ARB(AF)/04/4, Award, 16 June 2010, ¶¶ 4-180, 7-70 (finding State's alleged national security concern was a "*pretence and known to be factually false*").

FET when investors are "*completely left in the dark*" regarding a State's plans, which impact their investment, even though those plans were allegedly motivated by security concerns.[593] In short, Canada cannot invoke the pretext of "*national security*" as a means of avoiding scrutiny.[594] Had Canada wanted to exclude national security decisions from the BIT's purview, it could have. It did not. Moreover, even in the context of national security carve-outs, tribunals will consider whether there were other alternatives for dealing with the State's national security concerns; the mere invocation of concerns and contravention of rights without due regard to alternatives amounts to a breach of FET.[595]

301. In these circumstances, once an investor has made a *prima facie* case that there has been a breach, the burden shifts to the respondent to rebut this case.[596] This shift in the burden of proof is particularly important where crucial documents are withheld (whether

---

[593] **Exhibit CL-164**, *CC/Devas*, Award on Jurisdiction and Merits, ¶ 468.

[594] Accordingly, Canada's exceedingly deferential standard for national security measures—*i.e.*, that its actions would only amount to a breach if conducted "*in complete secrecy by an oppressive bureaucracy for unavowed purposes*"—is incorrect. Canada's Counter-Memorial on Merits and Damages, ¶ 423.

[595] *See* **Exhibit CL-173**, *D.T.*, Interim Award, ¶ 239 ("*To assess the necessity of the measures to safeguard the state's essential security interests, the Tribunal will thus determine whether the measure was principally targeted to protect the essential security interests at stake and was objectively required in order to achieve that protection, taking into account whether the state had reasonable alternatives, less in conflict or more compliant with its international obligations.*").

[596] *See* **Exhibit CL-094**, Bin Cheng, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS (1953), pp. 323-26 ("*Whilst it is true, as the German Commissioner observed in the* Lehigh Valley Railroad Co. Case *(1936) that: — 'Mere suspicions never can be a basic element of juridical findings,' where counter-proof can easily be produced but its non-production is not satisfactorily explained, 'it may therefore be assumed that such evidence as could have been produced on this point would not have refuted the charge in relation thereto.'*"); **Exhibit CL-025**, *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 27 June 1990, ¶ 56 (describing several "*established international law rules*" including "*in case a party 'adduces some evidence which* prima facie *supports his allegation, the burden of proof shifts to his opponent'*" and "'[i]*n cases where proof of a fact presents extreme difficulty, a tribunal may thus be satisfied with less conclusive proof, i.e.,* prima facie *evidence'*"); **Exhibit RL-237**, *Middle East Cement*, Award, ¶ 94 (adopting the international law principles on evidence as articulated by the tribunal in *Asian Agricultural Products*); **Exhibit RL-030**, *Feldman*, Award, ¶¶ 177-78; **Exhibit CL-158**, *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award, 25 August 2014, ¶¶ 8.65-68.

justified or not,) and are solely in the possession of the respondent State.[597] As one tribunal recognized, absent this shifting burden, "*the claimant would be left to prove its case from whatever incomplete documentary evidence and witness testimony the respondent State may choose to present*" and "[t]*hat burden would be, invariably, an almost impossible task*."[598]

302. Thus, GTH's efforts to take voting control over Wind Mobile—and Canada's national security review in response—must be viewed in its proper context. The key facts are, again, not in dispute. At the time of the 2008 AWS Auction, Canada expressly recognized that foreign restrictions on investments were a barrier to market entry, and informed prospective New Entrants that the relaxation of such restrictions was being considered.[599] The prospect of taking control over Wind Mobile in the event the O&C Rules were relaxed, had been an important element of GTH's decision to invest in Canada in the first place and specifically incorporated in Wind Mobile's shareholding agreements.[600] Due to duplicative reviews, these documents had been reviewed not once, but twice, by two different arms of the Canadian Government.[601] And, in fact,

---

[597] *See* **Exhibit CL-158**, *Apotex*, Award, ¶¶ 8.65-68 (observing that "*at some stage the evidential burden of proof shifts towards the respondent State and requires it to rebut the evidence adduced by the claimant*."). In *Feldman*, the tribunal observed that if the respondent possessed evidence to rebut the claim of discriminatory treatment, that it would have been irrational for the respondent not to introduce this evidence. The majority of the tribunal concluded that "*it is entirely reasonable for the majority of this Tribunal to make an inference based on the Respondent's failure to present evidence on the discrimination issue*." **Exhibit RL-030**, *Feldman*, Award, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, ¶ 178. *See also* **Exhibit CL-077**, *Bilcon*, Award on Jurisdiction and Liability, ¶ 723 (confirming that once the investor has made a *prima facie* case (in the context of alleged discriminatory treatment), the burden shifts to the respondent to show that the measure is not in breach because it is the respondent that is in the position to make this evidentiary showing).

[598] **Exhibit CL-158**, *Apotex*, Award, ¶ 8.68. Unlike in this case, in *Apotex* the respondent was able to prove that it did not treat the claimant less favorably than competitors by establishing that there was a due process integrated in its conduct; it described the "*risk-based approach*" used by its administrative agency and set out the specific factors considered in making a decision. **Exhibit CL-158**, *Apotex*, Award, ¶¶ 8.70-77.

[599] *See supra* ¶¶ 28, 60.

[600] *See supra* ¶¶ 29, 60.

[601] *See supra* ¶ 42.

GTH raised the specific provision with the Canadian regulators at that time, but Canada raised no objection.[602]

303. When Canada relaxed the O&C Rules, it was with the express purpose of inviting foreign investment in the telecommunications market.[603] At that time, Wind Mobile and GTH were the most obvious beneficiaries of this change, and Wind Mobile was in fact invited to speak before the Canadian Government on this issue.[604] On this basis, when GTH submitted its Voting Control Application, it expected that its Application would be approved in short order.[605] [redacted]

304. [redacted]

602 *See supra* ¶¶ 29, 60.

603 *See supra* ¶ 60.

604 *See supra* ¶ 60; GTH's Memorial on Merits and Damages, ¶ 176.

605 *See supra* ¶ 60; GTH's Memorial on Merits and Damages, ¶ 184; **CWS-Dobbie**, ¶ 32. *See also* **CWS-Dry**, ¶ 11.

[redacted].

607 *See supra* ¶¶ 63-68.

608 *See supra* ¶ 64.

[redacted]

305. [redacted]

[redacted]

[redacted]

306. [redacted]

[redacted]

[609] *See* [redacted]

[redacted]

307.

[redacted]

[redacted]

[redacted]

613 *See* GTH's Memorial on Merits and Damages, ¶ 189; [redacted]

614 *See* Canada's Counter-Memorial on Merits and Damages, ¶¶ 291, 436, 445.

[redacted] Canada's Counter-Memorial on Merits and Damages, ¶ 449.

[redacted]

616 Canada's Counter-Memorial on Merits and Damages, ¶ 431. [redacted]

See Canada's Counter-Memorial on Merits and Damages, ¶ 431, [redacted]

618 *See supra* ¶ 62.

619 [redacted]

308. [redacted]

309. [redacted]

310. At the same time, Industry Canada initiated its consultation to change the transfer rules.[624] [redacted]

620 *See supra* ¶ 67.

621 *See supra* ¶ 68.

622 Ironically, while subjecting GTH to a vague and untargeted national security review, Investment Canada was spending significant sums extolling the benefits of foreign-owned telecommunications companies to the wider public. For example, Canada engaged in a campaign to reassure consumers that there was no privacy risk attached to choosing a foreign cell phone provider because "*Canada has strong privacy laws to ensure our citizens' personal information is safeguarded. These laws apply equally to all organizations that collect such information in Canada. The laws prevent any provider from disclosing personal* [information]." **Exhibit C-385**, Gary Ng, *Ottawa Debuts 'More Choices' Website to 'Cut through the noise' of Big 3*, IPHONE IN CANADA, 31 December 2013, https://www.iphoneincanada.ca/carriers/ottawa-more-choices-website-vs-big-3/ (accessed 2 November 2018) (extracting screenshots from Industry Canada's *More Choices* website which has subsequently been decommissioned). *See also* **Exhibit C-379**, *Wireless War: Industry Canada Website Hits At Big Three's Claims*, HUFFINGTON POST, 25 September 2013, https://www.huffingtonpost.ca/2013/09/25/industry-canada-more-choices-wireless-campaign_n_3989778.html (accessed 2 November 2018).

623 *See supra* ¶ 68.

624 *See* **Exhibit C-152**, Industry Canada, *Consultation on Considerations Relating to Transfers, Divisions and Subordinate Licensing of Spectrum Licences*, March 2013.

311.

[625] *See supra* ¶¶ 69-75.

[626] **Exhibit C-275**, Memorandum from Marta Morgan and John Knubley to Minister of Industry, *Overview of Options for Sustaining Competition in the Wireless Market*, 9 May 2013 [*Updated version of* **Exhibit R-091**], p. 22 (Annex D: Impact of ICA REDACTED on 4th Player, p. 1) (highlighting added).

[627] *See supra* ¶¶ 69-75.

[redacted]

312. [redacted]

313. Tellingly, since the time of GTH's national security review, Canada has revised its Investment Canada Act review process to improve transparency, recognizing that the prior process was deficient.[629] This is compelling evidence of the review process's shortcomings when GTH was its target. Canada fails to adequately explain why the Tribunal should discount this evidence.[630]

314. In addition to breaching its FET obligation as a result its failures in due process, [redacted]

628 *See* Canada's Counter-Memorial on Merits and Damages, ¶¶ 262-84; **RWS-Aitken**, ¶¶ 6-42.

629 *See* Canada's Counter-Memorial on Merits and Damages, ¶ 447; **RWS-Aitken**, ¶¶ 38-39.

630 Canada's Counter-Memorial on Merits and Damages, ¶ 447 (arguing that "*Governments should be encouraged rather than condemned for being willing to constantly improve transparency*.").

[redacted] In such circumstances, the evidence shows, on the balance of probabilities, that Canada's national security review was without any legitimate basis and was, therefore, arbitrary and unreasonable, in breach of Canada's FET obligation.

IV.A.4. Canada Breached The FET Standard By Its Cumulative Conduct That Dismantled The Framework Upon Which GTH's Investment Was Based

315. As described in GTH's Memorial on Merits and Damages and in **Part II.A** above, Canada created the 2008 AWS Auction Framework with the express purpose of encouraging investment in the otherwise unwelcoming Canadian wireless telecommunications market. Rather than respect the basic terms of the Framework it created, Canada created new obstacles, ignored complaints that its conditions were not working, and then reversed fundamental promises contained in this Framework. The cumulative result is the dismantling of the 2008 AWS Auction Framework that GTH relied on when it decided to invest in Canada and, accordingly, the near complete destruction in value of GTH's investment. Canada's misconduct left GTH in the unenviable position of having fought to create a New Entrant in an unfavorable market by investing more than C$ 1.3 billion in a company that it could not control or sell for its full value. While some of the acts described above amount to separate and independent breaches of Canada's obligations under the BIT, Canada's actions must also be considered together to understand the magnitude of Canada's failures with

respect to GTH.[631] Canada's cumulative conduct amounts to a breach of its obligations to accord FET.

IV.A.4.a. FET Prohibits A Series Of Acts That Together Amount To A Breach Of FET

316. Canada accepts that a group of acts committed by a State can amount to a cumulative breach of a treaty obligation.[632] The theory of cumulative or composite breach recognizes a simple premise: certain acts which do not appear to amount to a breach of a treaty obligation in isolation, when viewed with the benefit of hindsight and **cumulatively with other acts**, can amount to a breach of a treaty obligation.[633]

317. In *El Paso v. Argentina*, the tribunal considered the overall cumulative impact of a series of measures taken by Argentina (in particular, controls over foreign exchange), and whether or not these separate actions could, collectively, constitute a breach of the FET standard under the relevant BIT in that case. Referring to Argentina's measures, the tribunal observed:

> *Although they may be seen in isolation as reasonable measures to cope with a difficult economic situation, the measures examined can be viewed as cumulative steps which individually do not qualify as violations of FET, as pointed out earlier by the Tribunal, but which amount to a violation if their cumulative effect is considered. It is quite possible to hold that Argentina could pesify, put a cap on the Spot Price,*

---

631 GTH has addressed Canada's ill-founded jurisdictional objection to GTH's claim for cumulative breach in **Part III.D**.

632 Canada's Counter-Memorial on Merits and Damages, ¶¶ 453-54.

633 GTH's Memorial on the Merits and Damages, Part VII.A.4. *See also* **Exhibit CL-028**, INTERNATIONAL LAW COMMISSION, *Responsibility of States for Internationally Wrongful Acts* (2001), Article 15(1) ("*Article 15. Breach consisting of a composite act 1. The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act*."); **Exhibit CL-031**, *TECMED*, Award, ¶ 62, n. 26 ("*Whether it be conduct that continues in time, or a complex act whose constituting elements are in a time period with different durations, it is only by observation as a whole or as a unit that it is possible to see to what extent a violation of a treaty or of international law rises or to what extent damage is caused*." (citations omitted)).

> *etc.,* ***but that a combination of all these measures completely altered the overall framework****.*[634]

318. The *El Paso* tribunal applied the same principle to describe a "*creeping*" breach of the FET standard:

> *The Tribunal considers that, in the same way as one can speak of a* creeping expropriation*, there can also be creeping violations of the FET standard. According to the case-law, a creeping expropriation is a process extending over time and composed of a succession or accumulation of measures which, taken separately, would not have the effect of dispossessing the investor but, when viewed as a whole, do lead to that result. A* **creeping violation of the FET standard** ***could thus be described as a process extending over time and comprising a succession or an accumulation of measures which, taken separately, would not breach that standard but, when taken together, do lead to such a result****.*[635]

319. Applying this standard, the tribunal in *El Paso* held that the cumulative effect of measures taken by Argentina breached FET and contributed to claimants' sale at a loss, thereby causing damage.[636] In doing so, the tribunal observed:

> *The fact that none of the measures analysed – that were not outside the Tribunal's jurisdiction or not excluded from consideration by the Tribunal because they did not result in any significant damage – were regarded,* in isolation*, as violations of the FET standard does not prevent the Tribunal from taking an overall view of the situation and to analyse the consequences of the general behaviour of Argentina.*[637]

---

634 **Exhibit CL-061**, *El Paso*, Award, ICSID Case No. ARB/03/15, Award, 31 October 2011, ¶ 515 (emphasis added).

635 **Exhibit CL-061**, *El Paso*, Award, ICSID Case No. ARB/03/15, Award, 31 October 2011, ¶ 518 (emphasis added). *See also* **Exhibit CL-075**, *Gold Reserve*, Award, ¶ 566; **Exhibit CL-085**, *Flemingo DutyFree*, Award, ¶ 536; **Exhibit RL-204**, *Walter Bau AG v. The Kingdom of Thailand*, UNCITRAL, Award, 1 July 2009, ¶ 12.43.

636 **Exhibit CL-061**, *El Paso*, Award, ¶ 519.

637 **Exhibit CL-061**, *El Paso*, Award, ¶ 459. *See also* **Exhibit CL-075**, *Gold Reserve*, Award, ¶ 566; **Exhibit RL-231**, *RosInvestco*, Final Award, ¶ 410 ("*The Tribunal considers that an assessment of whether Respondent breached the IPPA can only be effectively made if and after the conduct as a whole is reviewed, rather than isolated aspects. Therefore, hereafter, the arguments presented by the Parties regarding each major disputed issue are recalled only by short summaries and commented, but the Tribunal will only after all these summaries, taking into account these submissions by the Parties, turn to its own considerations as*

320. To amount to a composite or cumulative breach of a treaty obligation, there is no requirement that the acts be unified by a common purpose or mal-intent by the respondent State.[638] The acts need only together lead to the same direction (*i.e.*, the breach itself).[639] Canada itself cites to the *Tecmed* tribunal's description of a "*converging action towards the same result*," which reads in full:

> *The common thread weaving together each act or omission into a single conduct attributable to the Respondent is not a subjective element or intent, but* ***a converging action towards the same result, i.e. depriving the investor of its investment, thereby violating the Agreement****.*[640]

IV.A.4.b. Canada's Complete Conduct For The Duration Of GTH's Investment In Canada Amounts To A Cumulative Breach Of FET

321. All of Canada's acts together stripped the 2008 AWS Auction Framework—the framework upon which GTH made its decision to invest—of any meaning. Despite having done exactly what Canada wanted by investing over a billion dollars to create a successful New Entrant, GTH became the victim of its own efforts and success, and was forced to bear the cost of Canada's political objectives. Specifically:

(a) In the 2008 AWS Auction Framework, Canada identified mandatory roaming and tower/site sharing conditions as important barriers to market entry and

---

to whether Respondent's measures, seen together and in their cumulative effect, can be considered as a breach of the IPPA.").

638 Canada argues, unsupported by any case law, that "*the Claimant must first prove that the series of acts it complains of were closely interwoven and pursued the same objective*." Canada's Counter-Memorial on Merits and Damages, ¶ 453. Canada further contends that GTH "*has not provided any evidence indicating that the four measures were implemented systematically or in a contrived manner in order to pursue a particular end vis-à-vis Wind Mobile or the Claimant*." Canada's Counter-Memorial on Merits and Damages, ¶ 457. This is not the correct test.

639 *See* **Exhibit CL-052**, *Société Générale v. The Dominican Republic*, LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction, 19 September 2008, ¶ 91.

640 Canada's Memorial on Jurisdiction and Admissibility, ¶ 171, *citing* **Exhibit CL-031**, *TECMED*, Award, ¶ 62 (emphasis added) and **Exhibit RL-106**, *Paushok*, Award on Jurisdiction and Liability, ¶ 499 (citing *Tecmed* affirmatively).

informed prospective investors that it would alleviate these barriers to convince them to invest.[641] Despite being informed, almost immediately (and repeatedly over a period of several years), that Canada's conditions to license in this regard were not having their intended effect, Canada did not improve these conditions until 2013, nearly five years after the Auction.[642]

(b) After the 2008 AWS Auction, Canada (Industry Canada) reviewed and confirmed Wind Mobile's compliance with the O&C Rules and issued Wind Mobile its set-aside spectrum licenses purchased at Auction.[643] Despite this approval, Canada (the CRTC) elected to conduct a second review, adopting a novel, onerous review procedure targeting Wind Mobile, and reached the opposite conclusion.[644] This second, duplicative review left GTH in a "*no-man's land*"[645] where GTH was forced to allow its infrastructure and the 800 employees it had hired to sit idle while another arm of the Government attempted to rectify the situation.[646] Ultimately, Wind Mobile was forced to engage in years of litigation that arose from the CRTC's duplicative review.[647]

(c) In the 2008 AWS Auction Framework, Canada identified the restrictions on foreign ownership contained in the O&C Rules as a significant barrier to market entry and informed prospective investors that it was contemplating the potential relaxation of these rules.[648] When the relaxation of the O&C Rules finally took place in mid-2012 to facilitate foreign investment in New Entrants, GTH duly submitted its Voting Control Application.[649]

[redacted]

[641] *See supra* ¶ 26.

[642] *See supra* ¶¶ 45-46.

[643] *See supra* ¶ 42.

[644] *See supra* ¶¶ 42-43.

[645] **Exhibit C-105**, RBC Capital Markets, *Industry Comment: Telecommunication Services – Trick or Treat: CRTC Strikes Possible Deathblow to Globalive,* 30 October 2009, p. 1.

[646] *See supra* ¶ 43.

[647] *See* GTH's Memorial on Merits and Damages, ¶¶ 140-43.

[648] *See supra* ¶¶ 27-28.

[649] *See supra* ¶ 60.

[650] *See supra* ¶¶ 29, 60-78.

[redacted]

(d) In the 2008 AWS Auction Framework, Canada identified access to spectrum as a barrier to market entry and, therefore, set-aside spectrum specifically for New Entrants to purchase.[652] It recognized the enhanced transferability rights of spectrum licenses sold at auction[653] and contemplated that, in the event New Entrants turned out to be uneconomical, they would be able to transfer those licenses in the secondary market.[654] However, to avoid New Entrants who would seek to undermine the purpose of the set-aside to flip spectrum immediately to Incumbents at a profit, Canada imposed a finite, five-year restriction on transfer, during which period New Entrants would also be expected to meet certain rollout requirements.[655] After this Five-Year Rollout Period, Canada intended for the *status quo* to return in which Canada would approve the transfer of set-aside spectrum licenses to Incumbents.[656] Canada knew that this ability to sell after five years was critical to successfully encourage investment,[657] and likewise understood the importance to the investors of understanding what was being purchased at auction as this would have an impact, among other things, on business planning and available financing.[658] Despite its clear intention, with the expiration of the Five-Year Rollout Period approaching, Canada decided that it would force a fourth player to remain in the market, at any cost, and blocked GTH's ability to sell Wind Mobile to an Incumbent.[659]

322. The consequences of Canada's cumulative conduct is striking. In reliance on the 2008 AWS Auction Framework, GTH paid Canada C$ 442 million for set-aside spectrum licenses.[660] GTH was the first to launch its services (despite the delays caused by

---

651 [redacted]

652 *See supra* ¶ 26.

653 *See supra* ¶¶ 31-33.

654 *See supra* ¶¶ 32(a), 34, 40.

655 *See supra* ¶ 36.

656 *See supra* ¶ 37.

657 *See supra* ¶ 38(a).

658 *See supra* ¶ 38(b).

659 *See supra* **Parts II.F** and **II.H**.

660 *See supra* ¶ 41.

Canada's duplicative reviews for compliance with the O&C Rules).[661] GTH would go on to spend over C$ 1.3 billion in the Canadian telecommunications market to establish Wind Mobile as the most successful of the New Entrants. Canada's internal documents affirm that "*of the new entrants, Globalive is seen by industry analysts as the one most likely to succeed, particularly because it has a financially strong strategic investor in Orascom*[GTH]*/VimpelCom, which has significant global experience in the wireless industry.*"[662] In fact, given GTH's substantial investment, Canada recognized that Wind Mobile's spectrum licenses were necessary to satisfy Canada's desire for a fourth player,[663] and it acted swiftly to ensure that Wind Mobile would remain out of the hands of an Incumbent.[664]

323. Yet, when GTH—and the other New Entrants—sought Canada's assistance in reforming the mandatory roaming and tower/site sharing conditions to alleviate the barrier to entry Canada had identified in its 2008 AWS Auction Framework, Canada sat on its hands until 2013.[665] When GTH sought to launch its business in 2009, after Industry Canada affirmed its corporate structure, Canada subjected GTH to the duplicative reviews for compliance with the O&C Rules delaying GTH's launch for several months.[666] When GTH sought to take voting control over its substantial

---

661 Canada's Counter-Memorial on Merits and Damages, ¶ 124.

662 **Exhibit R-181**, Memorandum from John Knubley to Minister of Industry, *GTH Global Telecom Holding (Canada) Limited's Proposed Acquisition of Globalive Investment Holdings Corp. And Globalive Wireless Management Corp*, 5 February 2013, p. 5. *See also* **Exhibit R-181**, Memorandum from John Knubley to Minister of Industry, *GTH Global Telecom Holding (Canada) Limited's Proposed Acquisition of Globalive Investment Holdings Corp. And Globalive Wireless Management Corp*, 5 February 2013, p. 14 (Annex 2: Background on Global Telecom Holding (Canada) Limited and Globalive, p. 3).

663 *See supra* ¶ 53.

664 *See supra* **Part II.F**.

665 *See supra* **Part II.E**.

666 *See supra* **Part II.D**.

investment once the O&C Rules were finally relaxed, [redacted] When GTH sought to exercise its right to sell the set-aside spectrum licenses to an Incumbent at the expiration of the Five-Year Rollout Period, Canada informed GTH that it could no longer do so because its new policy was to force a fourth player to remain in Canada at any cost.[668] GTH was undoubtedly a victim of its own success. Somehow, GTH's contributions to the Canadian market became Canada's rationale for changing the transfer rules and refusing to allow GTH to sell its investment to an Incumbent and recover any value.

324. The result of this process ultimately put GTH in the untenable position of holding an investment [redacted], and could no longer sell to the buyer that would pay the highest price. It found itself in this situation after suffering a hostile environment in Canada for years. As explained in **Part V.B**, with respect to the compensation Canada owes GTH for its many treaty breaches, it should come as no surprise that GTH decided to exit the market to recover whatever value it could at that time.

325. There can be no question that the above is sufficient to show that Canada's acts, in aggregate, amount to a composite breach of Canada's obligations to accord FET to GTH's investment. Canada's actions together[669] demonstrate an unrelenting pattern of unfair and inequitable treatment, and had devastating consequences on the value of GTH's investment.

---

667 *See supra* **Part II.G**.

668 *See supra* **Parts II.F** and **II.H**.

669 For the avoidance of doubt, GTH's claim is that any combination of these actions can amount to a cumulative breach of FET.

326. The evidence demonstrates a consistent pattern of contradictory acts by different arms of the Canadian Government, a pattern which becomes clear when Canada's actions are viewed as a whole. Both Parties have recognized the "*complementary*" roles of Industry Canada, the CRTC, and Competition Bureau in relation to the management and regulation of the wireless telecommunications market in Canada.[670] While all three must act in tandem as organs of the same State,[671] the contradictory actions and policy decisions of each of these agencies, for the lifetime of GTH's investment in Canada, were unfair and inequitable. As explained by the tribunal in *Crystallex v. Venezuela*:

> [T]*he Tribunal will, in its review of the government conduct, assess whether there have been serious procedural flaws which have resulted in the Permit being arbitrarily denied, or in the investor being treated non-transparently or inconsistently throughout the process and thereafter.*[672]

327. In *Garanti Koza*, the tribunal affirmed this principle in relation to a situation where two State agencies acted inconsistently to force the investor to choose to: (*i*) submit accurate invoices for payment (and accepting less payment than bargained for); or (*ii*) manipulate the invoices to receive full compensation. The tribunal concluded that "*using governmental power to put an investor in such a situation is so fundamentally unfair as to amount by itself to a denial of fair and equitable treatment*."[673]

328. The responsibilities of each of the three relevant entities with respect to wireless telecommunications is defined by law and regulation. The Minister of Industry has the

---

[670] *See* GTH's Memorial on Merits and Damages, ¶¶ 34, 309; Canada's Counter-Memorial on Merits and Damages, ¶¶ 39-43, 384-87. *See also* Canada's Counter-Memorial on Merits and Damages, ¶ 384 (confirming that these three entities should not be "*redundant*").

[671] All three are State organs for which Canada is responsible. *See supra* n. 515.

[672] **Exhibit CL-082**, *Crystallex*, Award, ¶ 585.

[673] **Exhibit CL-087**, *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Award, 19 December 2016, ¶¶ 382-83.

authority to issue spectrum licenses in accordance with the Radiocommunication Act[674] and Radiocommunication Regulations,[675] in exercise of its mandate to "*ensur*[e] *the orderly establishment or modification of radio stations and the orderly development and efficient operation of radiocommunication in Canada*."[676] In exercising these powers, "*the Minister may have regard to the objectives of the Canadian telecommunications policy set out in section 7 of the Telecommunications Act*."[677] Section 7 of the Telecommunications Act details the Canadian telecommunications policy objectives, including the objective of "*enhance*[ing] *the efficiency and competitiveness . . . of Canadian telecommunications*" and "*foster*[ing] *increased reliance on market forces for the provision of telecommunications services and to ensure that regulation, where required, is efficient and effective*."[678] There is no provision mandating Industry Canada to enforce competition principles in the marketplace.

329. The CRTC has the duty to, *inter alia*, regulate rates and conditions of telecommunications services, including roaming rates charged between carriers.[679] However, the CRTC has the authority to refrain from exercising its duty in certain specified circumstances, including where doing so "*would be consistent with the*

---

674 **Exhibit C-057**, Radiocommunication Act, R.S.C., 1985, c. R-2, § 5(1)(a)(i.1). *See also* Canada's Counter-Memorial on Merits and Damages, ¶ 39.

675 **Exhibit C-001**, *Radiocommunication Regulations*, SOR/96-484. *See also* Canada's Counter-Memorial on Merits and Damages, ¶ 39.

676 **Exhibit C-057**, Radiocommunication Act, R.S.C., 1985, c. R-2, § 5(1). *See also* Canada's Counter-Memorial on Merits and Damages, ¶¶ 39, 387.

677 **Exhibit C-057**, Radiocommunication Act, R.S.C., 1985, c. R-2, § 5(1.1). *See also* Canada's Counter-Memorial on Merits and Damages, ¶ 39.

678 **Exhibit C-046**, Telecommunications Act, S.C. 1993, c. 38, § 7.

679 **Exhibit C-046**, Telecommunications Act, S.C. 1993, c. 38, Part III. *See also* Canada's Counter-Memorial on Merits and Damages, ¶ 40; GTH's Memorial on Merits and Damages, n. 56.

Canadian telecommunications policy objectives."[680] Importantly, Section 34(2) of the Telecommunications Act provides that the CRTC will refrain from the exercise of its power "[w]*here the Commission finds as a question of fact that a telecommunications service or class of services provided by a Canadian carrier* ***is or will be subject to competition sufficient to protect the interests of users.***"[681]

330. Finally, the Competition Bureau, pursuant to the Competition Act, may review mergers and acquisitions "*to determine whether they prevent or lessen competition substantially or are likely to do so*."[682]

331. For the lifetime of GTH's investment in Canada, each of these entities applied their mandates in contradictory and damaging ways. The most obvious example is the duplicative review for compliance with the O&C Rules by the CRTC, in which the CRTC reached the opposite result from Industry Canada. Another is the CRTC's exercise of "*forbearance*" in relation to the regulation of wireless telecommunications.[683] According to Canada, in making the decision to forbear, the CRTC "*found that wireless telecommunication services were 'subject to competition sufficient to protect the interests of users, so that it was appropriate to so refrain' and that 'to so refrain [wa]s not likely to impair unduly the establishment or continuance of a competitive market for those services.*"[684] This forbearance policy ended in

---

680 **Exhibit C-046**, Telecommunications Act, S.C. 1993, c. 38, § 34 (1). *See also* Canada's Counter-Memorial on Merits and Damages, ¶ 40.

681 **Exhibit C-046**, Telecommunications Act, S.C. 1993, c. 38, § 34 (2) (emphasis added). *See also* Canada's Counter-Memorial on Merits and Damages, ¶ 40.

682 Canada's Counter-Memorial on Merits and Damages, ¶ 42. *See also* **Exhibit R-106**, Competition Act, R.S.C. 1985, c. C-34; GTH's Memorial on Merits and Damages, n. 57, ¶¶ 308-309.

683 Canada's Counter-Memorial on Merits and Damages, ¶ 40, n. 11.

684 Canada's Counter-Memorial on Merits and Damages, ¶ 40, n. 11, *citing* **Exhibit R-197**, CRTC, *ARCHIVED - Telecom Decision CRTC 94-15*, 12 August 1994, https://www.crtc.gc.ca/eng/archive/1994/DT94-15.htm (accessed 27 January 2018). *See also* **Exhibit R-198**, CRTC, *ARCHIVED - Telecom Decision CRTC 96-14*,

2015.[685] It was only at that time that the CRTC concluded that regulating wholesale roaming rates was appropriate "*given an insufficient level of competition*" in the market.[686] Prior to this date, the CRTC had not intervened to assist New Entrants with respect to roaming and tower/site sharing, despite knowing that this failure was making it difficult or impossible for the New Entrants to succeed.[687]

332. Yet, while the CRTC sat on its hands on the grounds that competition was sufficient, in 2013, in the name of promoting competition, Industry Canada decided to retroactively change a critical condition of license it had put in place in 2008 (the finite five-year restriction on transfer).[688] In other words, while the CRTC decided not to assist GTH and the New Entrants because the market was sufficiently competitive without intervention, Industry Canada stepped-in to prevent the New Entrants from selling the Incumbents because it felt it needed to intervene in the name of competition (despite lacking the mandate and authority to do so). The two arms of the Government again acted inconsistently, in a manner that caused significant damage to GTH. At the same time, Industry Canada's foray into *ex-post* regulation duplicates the role that the

---

23 December 1996, https://www.crtc.gc.ca/eng/archive/1996/dt96-14.htm (accessed 27 January 2018); **Exhibit R-199**, CRTC, *ARCHIVED - Telecom Decision CRTC 98-18*, 2 October 1998, https://www.crtc.gc.ca/eng/archive/1998/dt98-18.htm (accessed 27 January 2018).

685 *See* Canada's Counter-Memorial on Merits and Damages, ¶¶ 7, 40, 182, n. 11.

686 Canada's Counter-Memorial on Merits and Damages, ¶ 182, *citing* **Exhibit C-232**, CRTC, *Telecom Regulatory Policy CRTC 2015-177: Regulatory framework for wholesale mobile wireless services,* 5 May 2015. *See also* GTH's Memorial on Merits and Damages, ¶¶ 163-65.

687 **Exhibit R-215**, CRTC, *Telecom Decision CRTC 2011-360 – Ottawa, 3 June 2011 - Globalive Wireless Management Corp., operating as WIND Mobile – Part VII application regarding roaming on Rogers Communications Partnership's wireless network*; [redacted]

688 To justify this step, Canada incorrectly argues that Industry Canada is "*responsible for promoting competition in the marketplace to meet the objectives of the Telecommunications Act*." Canada's Counter-Memorial on Merits and Damages, ¶ 43. Industry Canada is not required to consider competition in the exercise of its authority, but it "*may*" do so. **Exhibit C-057**, Radiocommunication Act, R.S.C., 1985, c. R-2, § 5(1.1). By contrast, both the CRTC and the Competition Bureau are given the express mandate to consider competition as a factor in exercising their respective authority.

Competition Bureau was expected to play. The various arms of the Canadian Government simply could not get on the same page. This is all the more troubling given that Canada was well aware of this potential for regulatory inconsistency as early as 2006.[689]

333. Canada's pattern of treating GTH and its investment in inconsistent and contradictory ways over the course of its investment is a breach of the FET standard. Canada's inconsistent conduct, [redacted] left GTH in an untenable position. Canada had failed to honor the investment framework it had created in almost every way. GTH finally decided to cut its losses and exit for the highest price it could.[690]

[689] *See generally* **Exhibit R-080**, Industry Canada, *Telecommunications Policy Review Panel: Final Report 2006,* March 2006. For example, the authors of the Telecommunications Policy Review Panel (or TPRP) referred to the duplicative mandate to consider competition principles exercised by the CRTC and the Competition Bureau (pp. 4-12 – 4-15), O&C review processes of the CRTC and Industry Canada (p. 5-25), and recommended that spectrum regulation and management responsibilities be transferred in full to the CRTC (pp. 5-16 – 5-28).

[690] *See infra* **Part V.B**.

IV.B. Canada Breached Its Obligation To Accord GTH's Investment Full Protection And Security

334. Canada's actions not only breached its FET obligation, but also its obligation to accord FPS to GTH's investment pursuant to Article II(2)(b). As explained in GTH's Memorial on Merits and Damages, FPS requires Canada to create and maintain a commercial and legal framework that ensures the security of GTH's investment and protect GTH from harm inflicted by third parties or organs of the State.[691] The FPS obligation requires more than the protection of physical security, but also includes the guarantee of commercial and legal security.[692] By subjecting GTH to the unfair and opaque national security review, blocking GTH from selling Wind Mobile to an Incumbent, and its cumulative conduct, Canada has committed separate and cumulative breaches of its FPS obligation.

335. Canada cannot contest the facts of its actions, so its primary response is to rewrite the applicable treaty standard. Purporting to apply the VCLT, it argues that "*protection*" and "*security*" can only be afforded against "*physical*" harm,[693] despite the obvious fact that protection and security can relate to any harm or injury (be it physical, commercial, or legal). GTH's interpretation is consistent with the context of the FPS provision, which appears in an Article designed to promote foreign investment and provides necessary protections to those investments to achieve this objective. The provision

---

691 GTH's Memorial on Merits and Damages, ¶¶ 376-81.

692 GTH's Memorial on Merits and Damages, ¶ 378. Canada suggests that GTH's interpretation of the ordinary meaning of FPS cannot be accepted because it seeks to equate the standard to that of FET. *See* Canada's Counter-Memorial on Merits and Damages, ¶ 470. That is not the case. As explained in GTH's Memorial on Merits and Damages, there are important components to the FPS standard that impose positive obligations on Canada to protect GTH's investment in ways that adds to the FET standard. GTH's Memorial on Merits and Damages, ¶¶ 376-81. GTH accepts, however, that if the Tribunal finds that Canada has breached FET, a finding that Canada has also breached FPS on the same facts may be of little practical consequence.

693 Canada's Counter-Memorial on Merits and Damages, ¶¶ 460-62.

proceeds both a general directive that the Contracting Parties "***encourage the creation of favourable conditions*** *for investors of the other Contracting Party to make investments in its territory*"[694] as well as an obligation that the Contracting Parties treat investments fairly and equitably.[695] Thus, a reading of the ordinary meaning of the terms of the FPS provision to artificially add a "*physical*" component would not be consistent with the context and objective of the provision.[696] Indeed, while Canada cites selectively to the definitions of various words ("*protection*," "*protect*," "*harm*," "*injure*," "*impair*," "*damage*," "*security*," "*danger*," "*threat*"), none of Canada's authorities support its proposition that "*protection*" and "*security*" only address "*physical*" harm.[697]

336. Canada once again refers to its own treaty practice to note that, in a handful of more recent treaties, it stated expressly that the standard only refers to physical security or police protection.[698] Rather than demonstrate that the FPS standard in this BIT is

---

694 **Exhibit CL-001**, BIT (English), Article II(1) (emphasis added).

695 **Exhibit CL-001**, BIT (English), Article II(2)(b).

696 While a minority of tribunals have concluded that "*full protection and security*" refers to physical protection and security, Canada cites to tribunals which have altogether failed to consider the ordinary meaning of the provision and otherwise provide sparse analysis to support their conclusion. *See* Canada's Counter-Memorial on Merits and Damages, ¶¶ 464-66. In *Saluka*, *Gold Reserve*, *BG*, and *Rumeli*, the tribunals do not so much as refer to the ordinary meaning of the provision and merely state that the standard refers to physical harm. *See* **Exhibit CL-038**, *Saluka*, Partial Award, ¶¶ 483-84; **Exhibit CL-075**, *Gold Reserve*, Award, ¶ 622; **Exhibit CL-047**, *BG Group*, Final Award, ¶¶ 324-26; **Exhibit RL-219**, *Rumeli*, Award, ¶ 668. In *Crystallex*, the tribunal states, but does not explain why, "*full protection and security*" should be read to mean "*physical protection and security*." *See* **Exhibit CL-082**, *Crystallex*, Award, ¶ 632. In reaching its conclusion, the tribunal in *Crystallex* was motivated, at least in part, by its finding that a more expansive reading of the FPS standard would result in an overlap with its interpretation of other treaty protections, including FET. *See* **Exhibit CL-082**, *Crystallex*, Award, ¶ 634. On the other hand, several tribunals having carefully considered the ordinary meaning of "*full protection and security*" have concluded that the applicable standard applies to both legal and physical protection and security. *See* GTH's Memorial on Merits and Damages, ¶¶ 376-81, for a detailed discussion of these cases.

697 For example, while Canada refers to the definition of "*harm*" as referring to "[p]*hyiscal injury*," the same exhibit also defines harm as the "[a]*ctual or potential ill effects or danger*" and the verb harm as "[h]*ave an adverse effect on*." *See* **Exhibit RL-211**, English Oxford Living Dictionaries Online, Definition of "*harm*," https://en.oxforddictionaries.com/definition/harm (accessed 28 January 2018).

698 Canada's Counter-Memorial on Merits and Damages, ¶ 467. Canada further points to two recent clarification notes that it issued with Chile and Colombia which clarify that FPS is limited to customary international law

limited to physical protection and security, these other treaties make clear that when Canada (with other third parties) intended to limit the scope of protection to only physical security, they either did so expressly or jointly issued a clarifying note stating this was the case. Canada did neither here and its defense must fail.

337. Like Canada's breaches of its FET obligation, Canada's actions have breached its FPS obligation in multiple ways. Since the 2008 AWS Auction, Canada has not only failed in its obligation to defend GTH from harm by protecting the commercial and legal security of its investment, but Canada was in fact the main culprit. By its actions, Canada knowingly introduced vast uncertainty with respect to GTH's investments and the future of Wind Mobile.

338. Canada's decision to subject GTH to an opaque and arbitrary national security review process, [redacted] amounts to a breach of Canada's FPS obligation.[699] The existence of a Canadian law allowing national security reviews of foreign investments is no defense.[700] [redacted] This is clear failure of Canada to protect or secure GTH's investment.

and physical security, respectively. Canada's Counter-Memorial on Merits and Damages, ¶ 468. As explained above, these are not relevant. *See supra* ¶ 98.

699 *See* GTH's Memorial on Merits and Damages, ¶ 186.

700 *See* Canada's Counter-Memorial on Merits and Damages, ¶ 479.

339. Canada has also breached its FPS obligation because the national security review was conducted in a prolonged and nontransparent manner, and introduced significant uncertainty to the security of GTH's investment and the future of Wind Mobile.[701] Not only did the process last several months (during which GTH was left in limbo with respect to the future of its investment), but [redacted] Any rational investor would reach the same conclusion that GTH did at the time: it could not remain an investor in Canada.[705]

340. Canada's introduction of the 2013 Transfer Framework and to block the sale of Wind Mobile to an Incumbent placed GTH's future in Canada in further turmoil. Industry

701 *See supra* **Part II.G**.

702 [redacted]

703 *See supra* ¶ 77.

704 *See supra* ¶ 77.

705 *See infra* **Part V.B.1**.

Canada's decision to broaden its authority to afford it complete and total discretion over license transfers (contrary to GTH's legitimate expectations) introduced (as Canada acknowledges in its internal documents) significant unpredictability for New Entrants like Wind Mobile and was a tool by which Canada reversed a fundamental aspect of the existing legal framework. After the introduction of the 2013 Transfer Framework, GTH continued its negotiations with Incumbents in the hope that Canada would accept such a transaction, as originally contemplated by the 2008 AWS Auction Framework.[706] It was only later that GTH understood, in no uncertain terms, that a sale to an Incumbent would not be permitted.[707] Canada's decision to change a fundamental condition of license—in fact a key component of the "*contractual relationship*[] *that formed the fundamental basis of its investment in Canada*"[708]—and block GTH's ability to liquidate its investment for its appropriate value, is exactly the type of prohibited conduct contemplated in *CME*.[709] By introducing substantial legal insecurity to GTH's investment, Canada's blocking of GTH's ability to sell to an Incumbent amounts to a separate and independent breach of Canada's FPS obligation.

---

706 *See* GTH's Memorial on Merits and Damages, ¶¶ 244-50.

707 *See, e.g.*, GTH's Memorial on Merits and Damages, ¶ 247; [redacted]; **CWS-Dry**, ¶ 24. *See also* [redacted]

708 Canada's Counter-Memorial on Merits and Damages, ¶ 475.

709 Canada's Counter-Memorial on Merits and Damages, ¶ 475, *citing* **Exhibit CL-030**, *CME Czech Republic B.V. (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, 13 September 2001. Canada attempts to distinguish *National Grid* and *CME* are not persuasive. Canada's Counter-Memorial on Merits and Damages, ¶ 475-77. Contrary to Canada's assertions, the determinative factor in those cases was the dismantling of key regulatory measures relied upon by the Claimant when assessing the opportunity to invest. **Exhibit CL-053**, *National Grid*, Award, ¶ 189; **Exhibit CL-030**, *CME*, Partial Award, ¶ 613 ("*The host State is obligated to ensure that neither by amendment of its laws nor by actions of its administrative bodies is the agreed and approved security and protection of the foreign investor's investment withdrawn or devalued*"). The 2013 Transfer Framework did not "*clarify*" existing ministerial authority. Instead it introduced a new tool that changed a critical condition of license and introduced fundamental insecurity to GTH's investment in Canada.

341. In addition to the specific breaches described above, Canada's cumulative conduct "*fundamentally change*[d]"[710] and "*effectively dismantled*"[711] the regulatory framework Canada designed to induce GTH's investment in Canada by ignoring or revising its key conditions, amounting to a composite breach of FPS. Despite inducing GTH's investment with assurances regarding favorable roaming and tower/site sharing conditions, Canada was idle in the face of complaints raised by New Entrants until 2013. Canada was aware that Incumbents were not respecting the spirit of these conditions, but its delayed response left New Entrants like GTH with no other choice but to sign uneconomic arrangements in order to launch.[712] Combined with Canada's treatment of GTH's attempts to take voting control (despite recognizing the importance of the relaxation of the O&C Rules) and its reversal of the transfer provision contained in the Wind Mobile Licenses (despite Canada's intentions in 2008 and GTH's legitimate expectations), Canada ignored or reversed all of the inducements contained in the 2008 AWS Auction Framework. In other words, despite GTH's good faith participation in the 2008 AWS Auction and earnest efforts to create a New Entrant in the market, Canada destroyed the legal security of GTH's investment in breach of its FPS obligation.

---

710 Canada's Counter-Memorial on Merits and Damages, ¶ 474.

711 **Exhibit CL-053**, *National Grid*, Award, ¶ 189.

712 *See supra* ¶¶ 45-46.

IV.C. Canada Breached Its Guarantee Of Unrestricted Transfer Of Investments

342. By restricting GTH's ability to transfer its investments in Canada, Canada has committed a clear breach of Article XI of the BIT, the unrestricted transfer provision.[713] Article XI(1) states:

> *Each Contracting Party shall guarantee to an investor of the other Contracting Party the unrestricted transfer of investments and returns. Without limiting the generality of the foregoing, each Contracting Party shall also guarantee to the investor the unrestricted transfer of: . . .*[714]

343. This provision is straightforward and requires little explanation. The first sentence sets out the general principle: "*Each Contracting Party shall guarantee to an investor of the other Contracting Party the unrestricted transfer of investments and returns*." The second sentence begins by stating, expressly, that it should not be read to limit this general principle, and identifies a list of additional types of transfers that are "*also*" guaranteed by each Contracting Party. Thus, this provision requires Canada, without exception, to guarantee to an investor like GTH "*the unrestricted transfer of investments and returns*."

344. While broad transfer guarantee provisions are uncommon, the ordinary meaning of this provision is clear. The tribunal in *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan* confirmed that transfer provisions like the one contained in this BIT can indeed be construed to relate to the free transfer of investments as opposed to funds.[715]

---

713 *See* GTH's Memorial on Merits and Damages, ¶¶ 382-86.

714 **Exhibit CL-001**, BIT (English), Article IX(1).

715 **Exhibit CL-169**, *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award, 22 August 2017, ¶¶ 653-56.

345. GTH's "*investment*" is comprised of the bundle of rights associated with its indirect shareholding and loans to Wind Mobile.[716] Pursuant to Article XI(1), GTH is permitted to transfer this "*bundle of rights*" without restriction. Simply put, when Canada did not allow GTH to transfer those rights to an Incumbent, it violated the transfer guarantee of this BIT.[717]

346. While the above should be obvious, Canada nevertheless attempts to restrict Article IX(1) to the transfer of **funds** from the host State to the home State.[718] To do so, it ignores the general principle and focuses, misleadingly, on what follows the second sentence—*i.e.*, the examples of additional types of transfers "*each Contracting Party shall **also** guarantee*."[719] Canada reaches its interpretation by ignoring the ordinary meaning of Article IX(1) as required by Article 31 of the VCLT. And, once again, Canada's reference to the "*object and purpose underlying transfer provisions*" in general are not useful for the purposes of Article 31 of the VCLT's mandate of considering the text of **this** treaty.[720]

---

716 *See supra* ¶ 219.

717 The circumstances of *Rusoro* are inapposite here and Canada's reliance on this case is misguided. *See* Canada's Counter-Memorial on Merits and Damages, ¶¶ 507-509. The claimant in *Rusoro* argued that gold mined by its subsidiary were "*returns*" protected under the BIT. The tribunal however, held that the gold was a "*commodity, not a currency*." **Exhibit CL-016**, *Rusoro*, Award, ¶¶ 567, 573-74. In contrast, spectrum licenses are assets with significant rights, which formed the core of GTH's investment in Canada. GTH does not contend that Canada restricted the transfer of "*returns*," but the transfer of its "*investments*."

718 Canada's Counter-Memorial on Merits and Damages, ¶¶ 491-503.

719 Canada's Counter-Memorial on Merits and Damages, ¶¶ 490-91.

720 *See supra* **Part III.A**. Canada cannot meaningfully distinguish any of the authorities cited by GTH in its Memorial on Merits and Damages. Canada has also not provided the tribunal with any authority to supports its proposition that a broad transfer guarantee like Article IX should be interpreted narrowly despite the clear language of the provision. Moreover, 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 when considering the investment as a composite whole, both are valuable to the investor and subject to protection given the objects and purpose of the BIT. *See* Canada's Counter-Memorial on Merits and Damages, ¶¶ 495-503.

347. On the merits, Canada's single argument is that the 2013 Transfer Framework did not limit GTH's ability to transfer any funds from its investment.[721] Canada's errors are two-fold: it applies the wrong standard and misstates the nature of the alleged breach.[722] Canada is obliged to guarantee the unrestricted transfer of GTH's investment, and it prevented GTH from being able to do just that.

348. Thus, in addition to breaches of its obligations to accord GTH's investment FET and FPS, Canada has breached Article XI of the BIT by violating its guarantee to allow the unrestricted transfer of GTH's investments.

[721] Canada's Counter-Memorial on Merits and Damages, ¶¶ 504-509.

[722] However, the breach was not the adoption of the 2013 Transfer Framework but rather Canada's blocking of GTH's sale of Wind Mobile to an Incumbent.

IV.D. Canada Breached Its Obligation To Accord National Treatment Protection

349. It is uncontroverted that Canada was able to subject GTH to its flawed national security review because of GTH's foreign ownership. As Canada explains, the national security review mechanism set out in the Investment Canada Act—and added to that Act after GTH made its original investment—only applies to non-Canadians.[723] This is *prima facie* evidence that Canada's treatment of GTH's Voting Control Application and [redacted] was discriminatory as between Egyptian and Canadian investors. Specifically, if GTH had been a Canadian investor like Globalive (its joint partner in Wind Mobile),[724] rather than an Egyptian company, no national security review procedure would have applied to GTH's efforts to convert its non-voting shares to voting shares of Wind Mobile. The Tribunal should find Canada violated its national treatment obligation as set out in Article IV(1) of the BIT by subjecting GTH to less favorable treatment as compared to Canadian investors in like circumstances.[725]

---

[723] *See, e.g.*, Canada's Counter-Memorial on Merits and Damages, ¶ 262. **Exhibit C-009**, Investment Canada Act, R.S.C. 1985, c. 28, 1st Supp. (12 March 2009 – 28 June 2012), § 25.1.

[724] Other Canadian investors in like circumstances to GTH (*i.e.*, investors who invested in New Entrants in the Canadian wireless telecommunications market) include: the various Canadian investors who together held 66.67% of the voting interest in Public Mobile, and DAVE Holdings, which held 66.67% of the voting shares of Mobilicity. *See* **Exhibit C-316**, CRTC, *Telecom Decision CRTC 2010-226: Pubic Mobile Inc. – Ownership and control review*, 22 April 2010, ¶ 20; **Exhibit C-317**, CRTC, *Telecom Decision CRTC 2010-264: Data & Audio-Visual Enterprises Wireless Inc. – Ownership and control review*, 7 May 2010, ¶ 20.

[725] **Exhibit CL-001**, BIT (English), Article IV(1) ("*Each Contracting Party shall grant to investments or returns of investors of the other Contracting Party treatment no less favourable than that which, in like circumstances, it grants to investments or returns of its own investors with respect to the expansion, management, conduct, operation, and sale or disposition of investments.*"). *See also* GTH's Memorial on Merits and Damages, ¶¶ 387-94. For the avoidance of doubt, only as a secondary case, and in the event the Tribunal interprets the Voting Control Application to amount to an "***acquisition*** *of an existing business enterprise or share of such enterprise*" does GTH allege a breach of Article II(3)(a). **Exhibit CL-001**, BIT (English), Article II(3)(a).

350. In **Part III.C** above, GTH explains that the Tribunal has jurisdiction to hear this claim on the merits and that no exception to national treatment protection applies.[726] Apart from reiterating its jurisdictional objections, Canada's only attempt at defending itself from the merits of this claim is to argue that GTH must satisfy its burden of proof, without contesting any particular element of GTH's case.[727] As noted above, GTH has satisfied its burden and Canada's objection fails.

[726] As GTH explains in that section, there is no provision of the BIT which exempts claims arising from the treatment of GTH's Voting Control Application from the jurisdiction of this Tribunal. In fact, Canada was well aware that the national security review procedures of the *Investment Canada Act* might impact its treaty obligations. *See, e.g.*, **Exhibit R-243**, Industry Canada, *Minister of Industry Introduces Amendments to the Investment Canada Act*, 20 June 2005, https://www.canada.ca/en/news/archive/2005/06/minister-industry-introduces-amendments-investment-canada-act.html (accessed 2 February 2018), p. 1 (describing Minister of Industry David Emerson's initial announcement of a proposed national security review procedure in the *Investment Canada Act* and alleging that "[t]*he proposed measure is consistent with Canada's commitments under the North American Free Trade Agreement and the World Trade Organization*." NAFTA contains an express exception regarding the dispute resolution of claims relating to the *Investment Canada Act*.).

[727] Canada's Counter-Memorial on Merits and Damages, ¶¶ 481-85.

V. CANADA MUST COMPENSATE GTH FOR DAMAGE CAUSED BY ITS BREACHES OF THE BIT

351. As detailed in the sections above, over the course of several years, Canada ignored and ultimately overturned the 2008 AWS Auction Framework that it designed to convince investors like GTH to invest in Canada. On the basis of this Framework, GTH paid Canada C$ 442 million up-front to purchase AWS spectrum licenses during the 2008 AWS Auction, and, over the course of its investment, GTH spent over C$ 1.3 billion in total to facilitate Wind Mobile's success despite the numerous obstacles created or condoned by Canada.[728] Yet, with the expiration of the Five-Year Rollout Period approaching, Canada decided it would force a fourth player to remain in every region at any cost. This cost, Canada determined, would be borne by GTH precisely because it had made the most substantial investment to establish Wind Mobile as a viable New Entrant. Internal memoranda make this clear. Canada remarked that "*of the new entrants, Globalive is seen by industry analysts as the one most likely to succeed, particularly because it has a financially strong strategic investor in Orascom/VimpelCom, which has significant global experience in the wireless industry.*"[729] Canada acknowledged that "[t]*he Orascom/VimpelCom investment in Globalive has been critical to its ability to launch, fund and expand wireless services*."[730]

352. However, Canada was concerned that "[i]*f an incumbent acquired WIND, it would effectively foreclose the potential for a 4th player in these provinces, which would return*

---

728 *See supra* **Part II.G**.

729 **Exhibit R-181**, Memorandum from John Knubley to Minister of Industry, *GTH Global Telecom Holding (Canada) Limited's Proposed Acquisition of Globalive Investment Holdings Corp. And Globalive Wireless Management Corp*, 5 February 2013, p. 5.

730 **Exhibit C-336**, Letter from Iain Stewart to Marie-Josée Thivierge, 14 December 2012, p. 2.

to a three-market player."[731] Canada was well aware that by preventing GTH from selling Wind Mobile to an Incumbent, it would have a significant impact on the value of GTH's investment.[732] Canada also knew that its treatment of GTH's efforts to take control of Wind Mobile would play a critical role in whether GTH decided to remain invested in Canada.[733]

353. While Canada did not care about the cost to GTH at the time of its breaches, Canada must now compensate GTH for the loss in the value of its investment. The Parties agree that compensation must, "*as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed*."[734] This is what is required to ensure that GTH has received "*full reparation*"[735] for the damage caused by Canada's breaches of the BIT.

354. Below, GTH establishes that Canada has caused GTH damage as a result of its breaches of the BIT. To assess the appropriate quantum of damage, GTH explains that the investment cost approach is the most appropriate methodology to fully compensate GTH for Canada's breaches of the BIT.

355. In the event the Tribunal does not accept the investment cost approach, the Parties agree in principle that damages can be assessed by applying a market-based approach, with

---

[731] **Exhibit C-275**, Memorandum from Marta Morgan and John Knubley to Minister of Industry, *Overview of Options for Sustaining Competition in the Wireless Market*, 9 May 2013 [*Updated version of* **Exhibit R-091**], p. 22 (Annex D: Impact of ICA REDACTED on 4th Player, p. 1). *See supra* ¶ 53.

[732] *See supra* ¶¶ 63-65.

[733] *See supra* ¶¶ 83-84.

[734] GTH's Memorial on Merits and Damages, ¶ 395; Canada's Counter-Memorial on Merits and Damages, ¶ 517; **Exhibit CL-020**, *The Factory at Chorzów (Germany v. Poland)*, Judgment, 13 September 1928, 1928 P.C.I.J. (Ser. A) No. 17, p. 47.

[735] **Exhibit CL-028**, INTERNATIONAL LAW COMMISSION, *Responsibility of States for Internationally Wrongful Acts* (2001), Article 31(1).

reference to the fair market value ("**FMV**") of its investment in a *but-for* world (discussed further below).[736] However, the Parties disagree as to the appropriate date on which the *but-for* damage caused to GTH should be assessed (the "**Valuation Date**") and the precise quantum of damage. Below, GTH explains: (*i*) the Valuation Date must be the date of an eventual award (the "**Date of Award**"); and (*ii*) Mr. Dellepiane and Dr. Spiller have provided reasonable and reliable assessments of the quantum of compensation owed to GTH taking into account appropriate *ex-post* information.

356. In sum, Canada owes GTH between US$ 768.2 million and US$ 1.807 billion to restore GTH to the position it would have been in but for Canada's breaches of the BIT. GTH has set-out three categories of scenarios, subject to the Tribunal's findings on liability:

(a) **Scenario 1**:[737] In this scenario, Canada's cumulative conduct (including its treatment of GTH's efforts to take voting control and its blocking of the sale of Wind Mobile to an Incumbent) amounts to a breach of the BIT.

(b) **Scenario 2**:[738] In this scenario, the Tribunal has found that Canada's treatment of GTH's efforts to take voting control (either as an individual act or cumulatively with other actions including the duplicative O&C reviews and failures in respect of favorable regulatory conditions) amounts to breaches of the BIT. However, in this scenario, the Tribunal has concluded that Canada's blocking of the sale of Wind Mobile to an Incumbent *does not*, either individually or cumulatively with other acts, amount to a breach of the BIT.

---

[736] *See* GTH's Memorial on Merits and Damages, ¶¶ 408-11; Canada's Counter-Memorial on Merits and Damages, ¶¶ 518, 526, 530.

[737] Mr. Dellepiane and Dr. Spiller refer to this scenario as the "*Cumulative Breaches*" scenario or Instruction 2.

[738] Mr. Dellepiane and Dr. Spiller refer to this scenario as the "*National Security Review Breach*" scenario or Instruction 3.i. In their Second Report, Mr. Dellepiane and Dr. Spiller have assessed damages in the event the Tribunal finds Canada's treatment of GTH's efforts to take voting control is the **only** breach of the BIT. In other words, Mr. Dellepiane and Dr. Spiller have not assessed damages in the potential scenario where the Tribunal finds a cumulative breach of FET, which **does not include** Canada's blocking of a sale to an Incumbent as part of the cumulative breach. In the event the Tribunal finds such a breach, it is clear that the damages Mr. Dellepiane and Dr. Spiller have calculated for the "*National Security Review Breach*" scenario is a **floor** as it does not value the damage caused by the duplicative reviews for compliance with the O&C Rules nor Canada's failures to provide adequate regulatory conditions. For further explanation, *see* **CER-Dellepiane/Spiller**, ¶ 13; **CER-Dellepiane/Spiller-2**, n. 28.

(c) **Scenario 3**:[739] In this scenario, the Tribunal has found that *only* Canada's blocking of GTH's sale of Wind Mobile to an Incumbent amounts to a breach of the BIT.

357. There are two approaches to calculate the compensation owed to GTH in each of these scenarios: (*i*) by reference to the cost GTH incurred in making its investment in Canada; or (*ii*) a market-based approach relying on actual transaction data from the market involving the same or similar assets. If the Tribunal elects to apply the latter market-based approach, the quantum of compensation owed will vary across each of these scenarios due to changes in the *but-for* world.

358. The table below summarizes the compensation owed to GTH subject to the approach taken by this Tribunal:

[739] Mr. Dellepiane and Dr. Spiller refer to this scenario as the "*Sale to Incumbent Breach*" scenario or Instruction 3.ii.

Liability Scenarios	*But-For* World	Method	Valuation Date	Damages Valuation
Any scenario below	-	Investment cost	N/A	US$ 1.807 billion
Scenario 1	GTH would not have sold Wind Mobile to the AAL Consortium in September 2014; GTH would have remained invested in Canada beyond that date	Market-based	Date of Award[740]	US$ 1.311 billion
Scenario 2	GTH would not have sold Wind Mobile to the AAL Consortium in September 2014; GTH would have remained invested in Canada beyond that date	Market-based	Date of Award	US$ 993.5 million
Scenario 3	GTH would not have sold Wind Mobile to the AAL Consortium in September 2014; GTH would have sold its investment to an Incumbent on or around the date of the expiration of the Five-Year Rollout Period	Market-based	Date of Award	US$ 768.2 million

Table 3: Summary Of Compensation Owed To GTH

[740] As a proxy for the Date of Award, Mr. Dellepiane and Dr. Spiller have valued damage as of 30 September 2018.

V.A. The Standard Of Proof And The Assessment Of Damages

359. Two over-arching principles guide the Tribunal's assessment of compensation owed to GTH. **First**, GTH must demonstrate, on a balance of probabilities,[741] 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.[742] **Second**, once the fact of damage has been shown, the Tribunal is required to approximate the **quantum** of that damage to the best of its ability, which necessarily requires some degree of estimation.[743] In other words, the Tribunal

---

741 *See, e.g.*, **Exhibit CL-079**, *Bernhard Friedrich Arnd Rüdiger Von Pezold, Elisabeth Regina Maria Gabriele Von Pezold, Anna Eleonore Elisabeth Webber (née Von Pezold), Heinrich Bernd Alexander Josef Von Pezold, Maria Juliane Andrea Christiane Katharina Batthyàny (Née Von Pezold), Georg Philipp Marcel Johann Lukas Von Pezold, Felix Alard Moritz Hermann Kilian Von Pezold, Johann Friedrich Georg Ludwig Von Pezold, and Adam Friedrich Carl Leopold Franz Severin Von Pezold v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015, ¶ 177 ("*In general, the standard of proof applied in international arbitration is that a claim must be proven on the 'balance of probabilities'*."); **Exhibit CL-075**, *Gold Reserve*, Award, ¶ 685 ("*The Tribunal finds no support for the conclusion that the standard of proof for damages should be higher than for proving merits, and therefore is satisfied that the appropriate standard of proof is the balance of probabilities*."); **Exhibit CL-137**, *Kardassopoulos*, Award, ¶ 229 ("*The Tribunal finds that the principle articulated by the vast majority of arbitral tribunals in respect of the burden of proof in international arbitration proceedings applies in these concurrent proceedings and does not impose on the Parties any burden of proof beyond a balance of probabilities*.").

742 GTH's Memorial on Merits and Damages, ¶ 395; Canada's Counter-Memorial on Merits and Damages, ¶ 517; **Exhibit CL-020**, *Chorzów*, Judgment, p. 47.

743 *See, e.g.*, **Exhibit CL-167**, *Marco Gavazzi and Stefano Gavazzi v. Romania*, ICSID Case No. ARB/12/25, Excerpts of Award, 18 April 2017, ¶ 124 ("*Under international law, there is thus by now a well-established and well-known* jurisprudence constante *to the effect that, however difficult, an international tribunal must do its best to quantify a loss provided that it is satisfied that some loss has been caused to the claimant by the wrongdoing of the respondent*."); **Exhibit CL-139**, *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Decision of the *ad hoc* committee, 25 March 2010, ¶¶ 144 ("*The fact that the exercise is inherently uncertain is not a reason for the tribunal to decline to award damages*."), 147 ("*once it is satisfied* [the claimant has suffered *some* damage as a result of the respondent's breach], *the determination of the precise amount of this damage is a matter for the tribunal's informed estimation in the light of all the evidence available to it*"); **Exhibit CL-083**, *Murphy*, Partial Final Award, ¶ 482 (referring to "*a large margin of appreciation*"); **Exhibit CL-106**, *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award on the Merits, 20 May 1992, (1993) 8 ICSID REVIEW – FILJ 328, pp. 388-89, ¶ 215 (finding that the determination of lost profits "*necessarily involves an element of subjectivism and, consequently, some uncertainty. However, it is well settled that the fact that damages cannot be assessed with certainty is no reason not to award damages when a loss has been incurred*."); **Exhibit CL-045**, *Vivendi II*, Award, ¶ 8.3.16 (citing *Southern Pacific Properties* affirmatively and observing that "[i]*n such cases, approximations are inevitable; the settling of damages is not an exact science*."); **Exhibit CL-075**, *Gold Reserve*, Award, ¶ 686 ("*The Tribunal further notes that, while a claimant must prove its damages to the required standard, the assessment of damages is often a difficult exercise and it is seldom that damages in an investment situation will be able to be established with scientific certainty. This is because such assessments will usually involve some degree of estimation and the weighing of competing (but equally legitimate) facts, valuation methods and opinions, which does not of itself*

"*enjoy*[s] *a wide margin of discretion*" to determine the appropriate method for calculating the quantum of damage.[744] The tribunal in *Sistem* aptly noted that "*valuations in the absence of an actual sale are estimates*" and "*the Tribunal has a legal duty to render an award under a process which the Respondent has freely agreed to establish and the Claimant has freely chosen to pursue, and to do so on the basis of the material that the parties have decided to put before it.*"[745] The Tribunal further explained that its duty was to "*arrive at a rational and fair estimate, in accordance with the BIT, of the loss sustained by the Claimant rather than to engage in a search for the chimera of a sum that is a uniquely and indisputably correct determination of the value of what the Claimant lost.*"[746]

360. In this regard, tribunals have referred to the actual amounts invested by a claimant as a barometer for assessing the appropriate quantum of damages to an investor that invested

---

mean that the burden of proof has not been satisfied. Because of this element of imprecision, it is accepted that tribunals retain a certain amount of discretion or a 'margin of appreciation' when assessing damages, which will necessarily involve some approximation."); **Exhibit CL-031**, *TECMED*, Award, ¶ 190 ("*any difficulty in determining the compensation does not prevent the assessment of such compensation where the existence of damage is certain*."); **Exhibit CL-178**, *Masdar*, Award, ¶ 577 ("*Calculation of damages inevitably involves assumptions about events that did not occur, and neither certainty nor standards of proof applicable to issues of liability are appropriate*."); **Exhibit RL-116**, *Lemire*, Award, ¶ 246 ("*Once causation has been established, and it has been proven that the* in bonis *party has indeed suffered a loss, less certainty is required in proof of the actual amount of damages; for this latter determination Claimant only needs to provide a basis upon which the Tribunal can, with reasonable confidence, estimate the extent of the loss*."); **Exhibit CL-082**, *Crystallex*, Award, ¶¶ 867-69 (finding that once the fact of damage has been established, the claimant should not be required to prove its exact quantification with the same degree of certainty); **Exhibit CL-027**, *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000, ¶ 309 ("*the Tribunal considers that the drafters of the NAFTA intended to leave it open to tribunals to determine a measure of compensation appropriate to the specific circumstances of the case*"); **Exhibit CL-162**, *Khan Resources Inc., Khan Resources B.V., and CAUC Holding Company Ltd. v. Government of Mongolia and MonAtom LLC*, UNCITRAL, Award on the Merits; **Exhibit CL-163**, *Suez, Sociedad General de Aguas de Barcelona, S.A., and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Award, 9 April 2015, ¶ 31 ("*This probable scenario is necessarily hypothetical in nature because it reflects events that did not occur, but that in all probability would have been the reasonable outcome of the fulfillment by Argentina of its international obligations under the three BITs protecting the Claimants' investments*.").

744 **Exhibit CL-178**, *Masdar*, Award, ¶ 578.

745 **Exhibit CL-131**, *Sistem Mühendislik In aat Sanayi ve Ticaret A. v. Kyrgyz Republic*, ICSID Case No. ARB(AF)/06/1, Award, 9 September 2009, ¶ 155.

746 **Exhibit CL-131**, *Sistem*, Award, ¶ 155.

on the basis of legitimate expectations that were undermined by the State.[747] This amount assesses how much would need to be returned to the investor if one were to unwind the investment.[748] A benefit to the amount invested approach is the certainty in the quantification of this value. One can know, with certainty, how much an investor sunk into an investment.

361. This is not the case using a market-based approach with reference to the FMV of Wind Mobile in a *but-for* world.[749] To determine this FMV, a tribunal will seek to identify a "*reasonable basis*" for its assessment.[750] The fact that a methodology takes into account reasonable assumptions regarding future events in a *but-for* world will not prevent a tribunal from relying on that methodology to reach an appropriate approximation of the damage caused to the investor. For example, numerous tribunals have accepted the use of a discounted cash flow to determine the value of an investment in a *but-for* world, despite having to make certain assumptions in order to project future cash flows.[751]

362. To identify reasonable assumptions to factor into a chosen methodology, tribunals have been guided by several principles. They will assume the respondent State, in the future,

---

[747] *See* **Exhibit CL-089**, *Eiser*, Award, ¶ 474 (in awarding damages for estimated lost future cash flows, observing that the tribunal's calculation of the quantum of damages was "*consistent with the amounts Claimants invested*" which "*provides a 'reality check' on the reasonableness of the Tribunal's conclusions regarding the compensation due to Claimants*").

[748] *See* **Exhibit CL-081**, *Copper Mesa Mining Corporation v. The Republic of Ecuador,* UNCITRAL, PCA Case No. 2012-2, 15 March 2016, Award, ¶ 7.29 ("*In selecting this approach, the Tribunal intends to restore the Claimant to the status quo ante, where it would have never been an investor in the Junín and Chaucha concessions*.").

[749] GTH's Memorial on Merits and Damages, ¶¶ 408-11; Canada's Counter-Memorial on Merits and Damages, ¶¶ 518, 526, 530.

[750] *See* **Exhibit CL-082**, *Crystallex*, Award, ¶ 881. *See also* **Exhibit CL-163**, *Suez*, Award, ¶ 33 (observing that the Tribunal *must apply* "*standards of reasonableness*" in assessing the *but-for* world).

[751] *See, e.g.*, **Exhibit CL-088**, *Burlington*, Decision on Reconsideration and Award, ¶¶ 299-301; **Exhibit CL-040**, *ADC*, Award of the Tribunal, ¶ 502; **Exhibit CL-080**, *Quiborax*, Award, ¶¶ 344, 347; **Exhibit CL-053**, *National Grid*, Award, ¶¶ 275-76.

would have acted lawfully and in accordance with its obligations,[752] and the investor—particularly a sophisticated investor with a track record of success—will have acted in a commercially reasonable manner.[753] Moreover, 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.[754] The tribunal in *Gemplus* explained:

> *when a respondent has committed a legal wrong causing loss to a claimant (as found by a tribunal), the respondent is not entitled to invoke the burden of proof as to the amount of compensation for such loss to*

---

[752] *See* **Exhibit CL-088**, *Burlington*, Decision on Reconsideration and Award, ¶ 358 (in building the counter-factual in relation to expropriated assets, finding: "[T]*he Tribunal must proceed on the basis that Burlington is entitled to exercise all of the contractual rights it would have had but for the expropriation, and that Ecuador would have complied with its contractual obligations going forward. In other words, when building the counterfactual scenario in which the expropriation has not occurred, the Tribunal must assume that Burlington holds the rights that made up the expropriated assets and that those rights are respected. This does not mean that the Tribunal is enforcing a contract claim. What the Tribunal does is to value an expropriated asset, which the Parties agree consists of a bundle of rights allowing Burlington to obtain future revenues.*"); **Exhibit CL-163**, *Suez*, Award, ¶ 31 (explaining that the hypothetical situation built by the tribunal would assume "*progressive, coordinated action by Argentina, AASA* [the underlying Argentinian company formed by the claimants]*, and the Claimants*" and referring to the state's FET obligation and "*the general principle of good faith*" to conclude that "*the reasonable outcome of such cooperation between the parties, adapting the Concession to the new economic and legal situation of early 2002, would have been a set of agreements ensuring the viability of the Concession*.").

[753] **Exhibit RL-116**, *Lemire*, Award, ¶¶ 203-207 (considering that the claimant was "*a reasonably well funded corporation*" with "*the necessary know how to*" operate a radio station, the tribunal rejected the respondent's contention that the claimant's own shortcomings would have contributed to the investment's lack of growth and held that there was "*no reason to believe that it would not have been able to provide excellent nationwide music and informational programs*."); **Exhibit CL-163**, *Suez*, Award, ¶ 48 (considering that even in circumstances where the investment was highly leveraged, the claimants had a "*powerful incentive not to abandon the Concession, an action that would have cost the Claimants hundreds of millions of dollars, provided that they had some realistic hope of returning the Concession to a state of profitability. Such a hope depended crucially on the Claimants' evaluation of the* [respondent] *regulator's future treatment*" because "[a]*ppropriate actions*" by the respondent would "*have been a powerful signal to the Claimants*" and would have "*encourag*[ed] *the Claimants to take the necessary steps to support the Company in a time of great adversity*."). *See also* **Exhibit 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, ¶ 70 ("*In the present case, the Tribunal is spared the need to enter further into any doctrinal discussion of the standard of compensation because it is common ground between the parties, and the Tribunal agrees, that the compensation to be paid should be based upon the fair market value of the Property calculated by reference to its 'highest and best use'*.").

[754] This is a basic application of the principle *nullus commodum capere de sua injuria propia* (no one can be allowed to take advantage of their own wrong). **Exhibit CL-094**, Bin Cheng, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS (1953), pp. 149-55.

> *the extent that it would compound the respondent's wrongs and unfairly defeat the claimant's claim for compensation.*[755]

363. Referring to the widely cited Sapphire award, the tribunal emphasized that "*confronted by evidential difficulties created by the respondent's own wrongs, . . . the claimant's burden of proof may be satisfied to the tribunal's satisfaction, subject to the respondent itself proving otherwise*."[756]

364. Thus, if a respondent State argues that damage must be ignored due to an event of uncertain impact, the consequences of this uncertainty will be borne by that State.[757] This approach is particularly appropriate 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.[758]

---

[755] **Exhibit CL-059**, *Gemplus*, Award, ¶ 13-92. *See also* **Exhibit CL-095**, *Sapphire International Petroleums Ltd. v National Iranian Oil Company*, Award of 15 March 1963, (1967) 35 I.L.R. 136, 15 March 1963, pp. 187-88 ("*It is not necessary to prove the exact damage suffered in order to award damages. On the contrary, when such proof is impossible, particularly as a result of the behaviour of the author of the damage, it is enough for the judge to be able to admit with sufficient probability the existence and extent of the damage*."); **Exhibit CL-053**, *National Grid*, Award, ¶ 283 (observing that while it always possesses a sovereign prerogative to regulate, a respondent is not "*liberated from the legal consequences*" resulting from measures which amount to a breach of its treaty obligations and the tribunal is required to establish an appropriate legal remedy).

[756] **Exhibit CL-059**, *Gemplus*, Award, ¶ 13-92.

[757] *See, e.g.*, **Exhibit CL-163**, *Suez*, Award, ¶¶ 53-55 (finding that but for the respondent's breaches of the treaty, the investment would have in all probability survived despite a liquidity crisis faced by the investment and a severe financial crisis in the respondent state); **Exhibit CL-070**, *Micula*, Award, ¶ 1173 (refusing to discount the damages awarded to the claimant where the respondent failed to establish its defense that the cause of the breaching measure, accession to the EU, had an overall positive impact on the claimant's business and increased its profits).

[758] *See* **Exhibit 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, ¶ 145 (reaffirming that in assessing damages the tribunal would "*take some account of the disadvantages suffered by the claimant, namely its lack of access to the detailed documentation, as an inevitable consequence of the circumstances in which the expropriation took place*"); **Exhibit 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, 31 March 1986, p. 44 (considering that the claimant's option to renew a concession contract would have been exercised in the absence of a breach despite the respondent's contention that "*irregularities*" in the claimant's business would have allowed state administrative organs to prevent the successful exercise of the option, and finding that this was "*only put forward as a justification for its expropriation and* [has] *not been substantiated*."); **Exhibit RL-228**, *CME Czech Republic B.V. (The Netherlands) v. The Czech Republic*, UNCITRAL, Final Award, 14 March 2003, ¶ 605 (rejecting the respondent's argument that a broadcasting license would not have been renewed by the respondent's Media Council and damages should be reduced as a result, and finding "[g]*enerally, broadcasting licenses in Europe*

365. The significance of the above principles will be discussed in greater detail below.

V.B. Canada's Breaches Have Caused GTH Substantial Loss

366. Each of Canada's breaches caused GTH damage. 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. Thus, Canada's only defense as a matter of causation fails.[759]

V.B.1. The *But-For* Scenarios Relating To Each Breach

V.B.1.a. But For Canada's Cumulative Breaches Or Canada's Breaches By Its Treatment Of GTH's Efforts To Take Voting Control, GTH Would Have Remained Invested In Canada (Scenarios 1 And 2)

367. If Canada had treated GTH's investment in accordance with its obligations under the BIT—by engaging in a fair review of Wind Mobile's compliance with the O&C Rules, upholding effective mandatory roaming and tower/site sharing conditions, allowing GTH a fair opportunity to take voting control over its substantial investment once the O&C Rules had relaxed, and maintaining the enhanced transferability and divisibility rights of the Wind Mobile Licenses after the expiration of the Five-Year Rollout

---

are renewed as a matter of ordinary administrative practice and the parties could identify to the Tribunal only one known case . . . in Europe in which a broadcasting license was not renewed, although the license requirements were fulfilled by the license owner.").

759 *See* Canada's Counter-Memorial on Merits and Damages, ¶¶ 555-56. *See also* Canada's Counter-Memorial on Merits and Damages, ¶ 555 ("*to the extent that the Claimant's argument that Canada caused it to sell has no basis, the Claimant should not be entitled to damages resulting from the Claimant's own decision to sell at that time*."). Canada complains that GTH never prepared and submitted an actual application to sell its Licenses to an Incumbent. Canada's Counter-Memorial on Merits and Damages, ¶ 555. For the same reasons that this argument was irrelevant to liability, this position is irrelevant to causation. *See supra* **Part IV.A.3.** The evidence shows that a formal application would have been fruitless given Canada's unequivocal statements that it would not allow GTH to sell Wind Mobile to an Incumbent.

Period—GTH, on the balance of probabilities, 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.

368. In 2008, GTH had invested in Canada with the hope that it could create a long-term, viable, and productive wireless telecommunications operator.[760] Due to GTH's efforts, Wind Mobile was the most successful of the New Entrants. In February 2013, Canada acknowledged this to be the case; it noted that Wind Mobile was the most likely of the New Entrants to achieve its new fourth player objective "*because it has a financially strong strategic investor in* [GTH]*/VimpelCom, which has significant global experience in the wireless industry.*"[761] Canada observed that "[t]*he Orascom/VimpelCom investment in Globalive has been critical to its ability to launch, fund and expand wireless services*."[762] In other words, because of GTH's substantial upfront investment, Wind Mobile—now in the hands of a Canadian investor—continues to operate in the Canadian market to this day.[763]

369. When VimpelCom acquired GTH, due to Wind Mobile's significant funding needs, GTH and VimpelCom began to assess a variety of options with respect to the future of

---

760 *See* GTH's Memorial on Merits and Damages, ¶¶ 77-87; **CWS-Dobbie**, ¶¶ 6-17; **Exhibit C-063**, Email from Mike O'Connor to Assaad Kairouz and Assaad Abousleiman, 27 February 2008; **Exhibit C-064**, Email from Mike O'Connor to Investment Committee, et al., 28 February 2008, *attaching* RBC Capital Markets, *Canadian Wireless Spectrum Auction: Discussion Materials*, 11 January 2008; **Exhibit C-065**, Email from Mike O'Connor to Aldo Mareuse, et al., 28 February 2008; **Exhibit C-070**, Email from Mike O'Connor to Investment Committee, et al., 12 March 2008.

761 *See* **Exhibit R-181**, Memorandum from John Knubley to Minister of Industry, *GTH Global Telecom Holding (Canada) Limited's Proposed Acquisition of Globalive Investment Holdings Corp. And Globalive Wireless Management Corp*, 5 February 2013, p. 5.

762 **Exhibit C-336**, Letter from Iain Stewart to Marie-Josée Thivierge, 14 December 2012, p. 2.

763 *See* GTH's Memorial on Merits and Damages, ¶ 265; **CER-Dellepiane/Spiller-2**, Appendix B.

Wind Mobile.[764] Numerous presentations during this period show that, like any prudent investor, [redacted]

370. Thus, contrary to Canada's reliance on media reports and speculation, GTH by no means had made its decision to sell Wind Mobile before Canada informed GTH of its national security review in December 2012.[768] Rather, the evidence shows that GTH did not make a decision to sell Wind Mobile until April 2014. Well into late 2013, GTH and VimpelCom continued to carefully consider whether to continue the business, despite the events that unfolded in the first half of 2013—namely, Canada's release of the 2013 Transfer Framework and [redacted]

---

764 *See* GTH's Memorial on Merits and Damages, ¶¶ 209-10; **CWS-Dry**, ¶ 7; **Exhibit C-119**, Email from Andy Dry to Pietro Cordova, 11 October 2011.

765 *See, e.g.*, **Exhibit C-119**, Email from Andy Dry to Pietro Cordova, 11 October 2011; **Exhibit C-120**, *VimpelCom: A fresh look at Globalive and Wind Canada*, 24 November 2011; [redacted]; **Exhibit C-331**, Memorandum from Jo Lunder to Wind Canada Steering Committee, Wind Canada Project Team, VimpelCom Business Control and M & A, *Wind Canada Project*, 19 March 2012.

766 *See* GTH's Memorial on Merits and Damages, ¶ 211; **CWS-Dry**, ¶¶ 8-9.

767 *See, e.g.*, [redacted] **CWS-Dry**, ¶¶ 8-9.

768 *See* Canada's Counter-Memorial on Merits and Damages, ¶¶ 552-54 (citing to media speculation and Anthony Lacavera's personal memoir).

[redacted]

371. However, the events of June 2013 made the state-of-play in the Canadian market uncertain while the pressure to determine the future of Wind Mobile was mounting. If GTH was to remain invested in Wind Mobile, GTH would be required to spend substantial additional funds [redacted] to purchase 700 MHz spectrum at the upcoming auction to ensure Wind Mobile could provide LTE services.[771] Yet, the rules of the 700 MHz Auction prohibited GTH from speaking with potential purchasers once it filed an application to participate in that Auction at the September 2013 deadline.[772] [redacted]

769 *See supra* ¶¶ 79-80.

770 [redacted]

771 *See* [redacted]; **CWS-Dry**, ¶ 18.

772 *See supra* ¶ 83.

773 [redacted]

372. [redacted]

373. [redacted]

374. [redacted] Canada was well aware that this was one of the reasons Wind Mobile decided to withdraw from the Auction. [780] [redacted]

774 *See supra* **Part II.H**.

775 *See supra* ¶¶ 83-84.

776 *See supra* ¶ 83.

777 *See supra* ¶ 77.

778 [redacted] *See also* **CWS-Dry**, ¶ 30. [redacted]

779 [redacted]

780 *See* GTH's Memorial on Merits and Damages, ¶ 254; **Exhibit C-282**, Industry Canada, *Advice to the Minister*, 28 February 2014, *Wireless Telecom – Status Update (As of February 28, 2014)* [*Updated version of* **Exhibit C-216**], p. 2 (Annex A, p. 1) ("*Vimpelcom has advised that it will not make any large incremental investments as long as it does not control WIND*."); [redacted]

[redacted]

While GTH continued to explore options, by April 2014—after years of mistreatment in Canada—[redacted] In September 2014, GTH sold its investment in Wind Mobile to the highest bidder it was permitted to sell to—the AAL Consortium.[784]

[redacted]

781 *See* [redacted]

782 [redacted]

783 [redacted]

784 *See* **Exhibit C-226**, GTH, *Minutes of Board of Directors Meeting*, 15 September 2014; **Exhibit C-033**, Purchase Agreement between AAL Acquisitions Corp., GTH Global Telecom Finance (B.C.) Limited, VimpelCom Amsterdam B.V., GTH Global Telecom Holding (Canada) Limited, and Globalive Investment Holdings Corp., 16 September 2014; [redacted] **CWS-Dry**, ¶ 31.

375. As demonstrated above, GTH's decision to exit the Canadian market was a carefully considered decision made in the context of an entire history of arbitrary and capricious treatment inflicted by Canada. The final stroke leading to GTH's decision to sell was [redacted]. Canada cannot rely on its own conduct to support its assertion that GTH would have exited the Canadian market. One needs to assess the likely position in the **absence** of any wrongful conduct by Canada.

376. Similarly, in *Burlington*, the tribunal confirmed that evidence that a claimant is looking to sell its investment in the face of "*an increasingly hostile environment*" created by the respondent State does not negate a finding that but for the respondent's breaches the claimant "*would in fact have kept its investment.*"[785] It was only because of Canada's treatment of GTH's investment that it ultimately decided to exit. On the other hand, if Canada had complied with its obligations under the BIT and treated GTH fairly and equitably, GTH would not have had a reason to cut its losses, and, on a balance of probabilities, would have made the logical decision to remain in the Canadian market in which it had already invested significant resources.

V.B.1.b. GTH Would Have Sold Its Investment To An Incumbent But For Canada's Blocking Of Such Sale (Scenario 3)

377. All else being equal (including the unfair treatment of GTH's efforts with respect to voting control), if Canada had permitted GTH to sell its investment to an Incumbent after five years, GTH would have done so. [redacted]

[785] **Exhibit CL-088**, *Burlington*, Decision on Reconsideration and Award, ¶ 331.

t Wind Mobile would have negotiated a sale with one of the Incumbents, and would have concluded that sale, at the earliest, in March 2014—*i.e.*, when the Five-Year Rollout Period expired.[786]

378. Instead, after a significant efforts,[788] GTH was forced to exit the market through a sale to the AAL Consortium for a nominal sum and the assumption of debt. No other option was available.

V.B.2. But For Canada's Decision To Block GTH's Sale To An Incumbent, On A Balance Of Probabilities, Canada Would Have Permitted A Sale To An Incumbent

379. But for Canada's decision to block GTH's sale to an Incumbent, Canada would have permitted a sale to an Incumbent. This is obvious. Canada's experts, Mr. Sacks and

---

[786] *See, e.g.*, **CWS-Dry**, ¶ 12.

[787] **CER-Dellepiane/Spiller-2**, Part III.1.2.

[788] *See, e.g.*,

Dr. Bazelon, however, half-heartedly suggest that an additional "*regulatory risk*" discount should apply due to decisions by other State organs that might also block such a sale.[789] This is a blatant and inappropriate effort by Canada to reduce, in whatever way it can, the quantum of damage owed to GTH.

380. **First**, 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. The appropriate *but-for* world cannot contemplate that Canada would engage in further breaches of the BIT.

381. **Second**, GTH need only show **on the balance of probabilities** that the sale to an Incumbent would have taken place but for Industry Canada's obstruction of such a sale to an Incumbent.[790] Insofar as Canada seeks to argue that it would have still prevented this transaction from taking place due to its own actions, it is plainly Canada's burden to prove that this is in fact the case.[791]

382. **Third**, and in any event, there is simply no evidence to support the proposition that there was any risk that Canada would have prevented the transaction from taking place,

---

789 *See* Canada's Counter-Memorial on Merits and Damages, ¶¶ 576-80, 589; **RER-Brattle**, ¶¶ 20-21, 60-63, 149-59. In its submission, Canada identifies two alleged regulatory risks in the *but-for* world: (*i*) even if GTH had not been subjected to the national security review, its efforts to take control would still have been subject to a net benefit review; and (*ii*) any sale of Wind Mobile to an Incumbent would be subject to review by the Competition Bureau. The net benefit review has no impact in the *but-for* world, and Mr. Sacks and Dr. Bazelon make no mention of this in the valuation analysis. Mr. Sacks and Dr. Bazelon's formula further suggests that damages should be discounted further because there was a probability that a sale to an Incumbent would have been approved in the actual world. *See* **RER-Brattle**, ¶¶ 21, 61 ("*the probability that a sale (with or without divestitures) would be approved given the 2013 Transfer Framework was greater than 0%*"), 158 (assigning a value in its formula to the "*probability the sale would be approved in the Actual world*"). Canada does not refer or rely on this alleged component of "*regulatory risk*" (the probability of an approval in an actual world) in its submission and it is, in any event, disproven by the factual record. *See supra* **Part II.H**.

790 *See supra* **Part II.H**.

791 *See supra* ¶¶ 294-296.

excluding Industry Canada's decision to change the rules on transfer. In fact, the history of the Competition Bureau's review of the acquisition of spectrum licenses from Incumbents shows that it has never, in its history, prevented a sale of a New Entrant to an Incumbent.[792] [redacted] Canada's internal documents show Industry Canada itself did not

[792] Industry Canada approved the sale of Clearnet's and Microcell's licenses to TELUS and Rogers, respectively, precisely what Industry Canada refused to do for GTH following the expiry of the Five-Year Rollout Period. *See* GTH's Memorial on Merits and Damages, ¶ 38; **Exhibit C-040**, Telus, *TELUS and Clearnet to create Canada's largest wireless company*, 21 August 2000, http://about.telus.com/community/english/news_centre/news_releases/blog/2000/08/21/telus-and-clearnet-to-create-canadas-largest-wireless-company (accessed 24 September 2017); **Exhibit C-043**, *Rogers Wireless trumps Telus with CAD $1.4B bid for Microcell*, CBC, 20 September 2004, http://www.cbc.ca/news/business/rogers-wireless-trumps-telus-with-1-4b-bid-for-microcell-1.509637 (accessed 24 September 2017). The Competition Bureau also approved these mergers. While it did not issue reasons for its approval of the TELUS-Clearnet merger, the Competition Bureau explained with respect to the Rogers-Microcell merger: "*Under section 92 of the Competition Act, the test for the Bureau to challenge a merger before the Competition Tribunal is whether a transaction is likely to prevent or lessen competition substantially. In this case, the Bureau determined that the evidence did not support such a conclusion on either a unilateral or interdependent basis. As a result, an application to the Competition Tribunal challenging this transaction was not warranted*." *See* **Exhibit C-290**, Competition Bureau, *Acquisition of Microcell Telecommunications Inc. by Rogers Wireless Communications Inc., Technical Backgrounder*, April 2005, http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/00257.html (accessed 2 November 2018). Canada has not identified any features that would make this transaction *sui generis* as compared to the sale of Clearnet and Microcell and there is therefore no reason to presume that the Competition Bureau would have deviated from its "*ordinary administrative practice*" in this case. *See* **Exhibit RL-228**, *CME*, Final Award, ¶ 605.

[793] *See, e.g.*, [redacted]

believe that the Completion Bureau would prevent a sale to Incumbent, a factor that influenced its decision to change the transfer rules in the first place.[794]

V.B.3. GTH Has Mitigated Its Loss

383. GTH's decision to sell Wind Mobile to the AAL Consortium in September 2014 was an action of mitigation—*i.e.*, "*a reasonable defensive measure, intended to minimise the risk of further losses*."[795] To qualify as an act of mitigation, the only question is whether that act "*was a reasonable response*" in the given circumstances.[796] There is no doubt that GTH's actions were a reasonable response to the circumstance in which it found itself. Canada's actions for the lifetime of GTH's investment undermined the Framework used to convince GTH to invest in Canada. After years of enduring

[redacted]; **RER-Brattle**, ¶ 21, n. 29. It is wrong to suggest that in a true *but-for* world, this is even a "*ball-park indicator*" of regulatory risk that a sale to an Incumbent would be approved.

[794] *See* **Exhibit C-306**, Email from Len St. Aubin to Pamela Miller, Julie Fujimura, Adam Scott and Guy Mitchell, 10 September 2007, p. 18 (Reliance on Ex Post Regulatory Measures to Ensure a Competitive Wireless Services Market (draft), 5 September 2007, p. 2) ("*If, for instance, a new entrant were to emerge following the AWS auction and, over the medium term and assuming that conditions of licence were complied with, one of the wireless incumbents proposed to acquire the wireless operations of the new entrant, it would be unlikely that the Competition Bureau could successfully challenge such a transaction.*").

[795] **Exhibit CL-067**, *Achmea B.V. v. The Slovak Republic*, PCA Case No. 2008-13, Final Award, 7 December 2012, ¶ 320. In this context, it is not the tribunal's role to question reasonable business decisions made by a claimant to mitigate losses. *See* **Exhibit RL-239**, *Hrvatska Elektroprivreda D.D. v. Republic of Slovenia*, ICSID Case No. ARB/05/24, Award, 17 December 2015, ¶¶ 216, 386.

[796] **Exhibit CL-067**, *Achmea*, Final Award, ¶ 320 (finding the claimant's decision to suspend operations was a "*reasonable defensive measure*" in response to regulatory reforms which subjected the investor to onerous requirements and severely limited its autonomy over its investment). *See also* **Exhibit CL-180**, *Unión Fenosa Gas, S.A v. Arab Republic of Egypt*, ICSID Case No. ARB/14/4, Award, 31 August 2018, ¶ 10.124 ("[i]*n the Tribunal's view, the legal test* [for mitigation] *is based upon a reasonable and not an absolute standard*"); **Exhibit CL-053**, *National Grid*, Award, ¶ 273 (dismissing Argentina's argument that the sale of the claimant's interests "*was not a reasonable business decision intended to mitigate damages*"); **Exhibit RL-050**, *AIG Capital Partners, Inc. and CJSC Tema Real Estate Company v. Republic of Kazakhstan*, ICSID Case No. ARB/01/6, Award, 7 October 2003, ¶ 10.6.4 (noting that "*mitigation of damages is always a question of fact: as to whether the loss was avoidable by reasonable action that could have been taken by a Claimant*" and finding that the claimant was not under an obligation to accept an alternative site after a taking even if this site was not unsuitable for its business); **Exhibit RL-239**, *Hrvatska*, Award, ¶ 400 (considering that where "*there were various options available, and the fact that* [the claimant] *took one course of action over another does not open the door for the parties, the experts or the Tribunal to second-guess, with the benefit of hindsight,* [the claimant's] *decisions at the time without evidence those decisions were unreasonable.*").

complacent and contradictory behavior by Canada, and despite investing over C$ 1.3 billion in Canada to allow Wind Mobile to succeed, [redacted] (despite Canada's knowledge that GTH would seek to benefit from any relaxation of the O&C Rules), but also made the deliberate decision to prevent GTH from selling its investment to an Incumbent (despite Canada's intentions and GTH's legitimate expectations at the time of the 2008 AWS Auction).[797] In view of this hostile and arbitrary environment, and the fact that GTH would have to spend hundreds of millions of dollars more to fund Wind Mobile,[798] it was reasonable for GTH to cut its losses and leave Canada by selling its investment at the best price it could obtain at the time.[799]

384. Despite the substantial sums GTH invested in Canada, Canada still complains that GTH failed to mitigate its damages because it should have invested more in Wind Mobile leading up to its sale in September 2014.[800] [redacted]

[797] *See supra* **Parts II.G-II.H**.

[798] *See, e.g.*, [redacted]

[799] As observed by the tribunal in *Unión Fenosa Gas*, "*the test is to be applied as at the relevant time, without the benefit of hindsight. The legal burden of proving such unreasonableness in this arbitration rests upon the Respondent*." **Exhibit CL-180**, *Unión Fenosa*, Award, ¶ 10.126.

[800] Canada's Counter-Memorial on Merits and Damages, ¶ 584; **RER-Brattle**, ¶ 84.

[801] *See* Canada's Counter-Memorial on Merits and Damages, ¶ 585. For the avoidance of doubt, neither the [redacted] offers were in fact offers GTH could have accepted by September 2014. [redacted]

385. [redacted] It was only at the later point in time that the market understood that GTH could neither sell Wind Mobile to an Incumbent, nor take voting control over its investment.

386. In any event, contrary to Canada and its experts' suggestion, there is no theory of mitigation that would require GTH to continue investing substantial sums in Wind Mobile with the hope that conditions in Canada might improve. In *Middle East Cement*

[redacted]; **Exhibit C-204**, Email from Victor Hwei to Carsten Revsbech, et al., 25 July 2013, *attaching* Bell, *Wireless policy loopholes hurt Canada and Canadians*, July 2013, and Bell, *An open letter to all Canadians*; **Exhibit C-207**, Ian Austen, *Flares in Canada at the Thought of Verizon*, NY TIMES, 1 August 2013, https://bits.blogs.nytimes.com/2013/08//01/flares-in-canada-at-the-thought-of-verizon/?mcubz=1&_r=0 (accessed 24 September 2017); **Exhibit C-209**, *Verizon not entering Canada's wireless market after all*, CBC, 2 September 2013, http://www.cbc.ca/news/business/verizon-not-entering-canada-s-wireless-market-after-all-1.1339361 (accessed 24 September 2017); **Exhibit R-249**, Steve Laduranteye and Boyd Erman, *Verizon-Vodafone deal casts doubt on Verizon's Canadian entry*, THE GLOBE & MAIL, 29 August 2013, https://www.theglobeandmail.com/report-on-business/international-business/us-business/was-canada-a-bargaining-chip-for-a-verizon-vodafone-deal/article14019168/. [redacted] *See* **Exhibit C-380**, *Allstream sale to Accelero rejected over 'national security'*, CBC NEWS, 7 October 2013, https://www.cbc.ca/news/canada/manitoba/allstream-sale-to-accelero-rejected-over-national-security-1.1929191 (accessed 2 November 2018); **Exhibit C-381**, Steve Chase and Rita Trichur, *Ottawa rejects MTS Allstream takeover deal, citing unspecified security concerns*, THE GLOBE & MAIL, 7 October 2013. In other words, these alleged offers are not appropriate indications of Wind Mobile's value in the eyes of non-Incumbents at any appropriate Valuation Date.

Shipping and Handling v. Egypt, relied upon by Canada, the tribunal dismissed Egypt's allegations that the claimant had failed to mitigate its damages, including, *inter alia*, that the claimant should have continued its investment activities despite Egypt's prior wrongful acts. The tribunal "*d*[id] *not consider this to be persuasive.*"[802] The tribunal explained that after having been subjected to the respondent's unlawful conduct, the investor "*ha*[d] *good reason to decide that, after that experience, it shall not continue with the investment activity*."[803] For this same reason, GTH 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. Doing so would have been unreasonable and irrational in the circumstances.

V.C. Canada Must Compensate GTH For US $1.807 Billion In Damages

387. Turning to the quantum of damages, applying the investment cost approach, Canada must compensate GTH US$ 1.807 billion for damage caused by its breaches of the BIT. As explained in GTH's Memorial on Merits and Damages, the amount GTH has invested in Canada is an appropriate and reasonable proxy for the amount of damage caused by Canada.[804]

388. The investment cost approach is a recognized and frequently applied methodology to assess compensation owed to a harmed investor. It is especially appropriate in the

---

802 **Exhibit RL-237**, *Middle East Cement*, Award, ¶ 169.

803 **Exhibit RL-237**, *Middle East Cement*, Award, ¶ 169. In this case, the investor had previously been subjected to a revocation of a license for its investment activity and was later permitted to recommence that activity. *See also* **Exhibit CL-061**, *El Paso*, Award, ¶ 684 ("[t]*here is no contribution by the Claimant to a loss it suffered due to its own conduct, in the absence of wilful or negligent action by the Claimant. The Tribunal does not view the sale by the Claimant of its investment in the Argentinian companies as a willful or negligent action, '*i.e. *an action which manifests a lack of due care on the part of the victim of the breach for his or her own property or right."*"); **Exhibit CL-088**, *Burlington*, Decision on Reconsideration and Award, ¶¶ 572-85.

804 GTH's Memorial on Merits and Damages, ¶¶ 405-407.

context of Canada's cumulative breaches, as GTH would not have invested any sums in Canada had it been aware that Canada would gradually destroy the Framework it created to induce GTH's investment. Moreover, as Canada itself explains, the investment cost approach is utilized by tribunals where they find certain assumptions regarding the future to be too difficult to estimate (as Canada has alleged here).[805] As will be explained below, the investment cost approach is the most appropriate measure of damages because it is difficult to assess the impact of certain components of Canada's cumulative breach on the value of GTH's investment.

389. This approach is appropriate in the context of Canada's cumulative breaches (Scenario 1) for two reasons. **First**, the investment cost approach is the most appropriate measure of damages in the event the Tribunal finds, on the balance of probabilities, that in the *but-for* world, GTH would not have invested in Canada in the first place. In the context of GTH's claims for cumulative breach, which amounted to the complete dismantling of the framework that Canada used to induced GTH's investment, one method of unwinding Canada's unlawful conduct is to assume that Canada did not offer its false inducements in the first place.[806] Thus, in the *but-for* world, GTH would not have invested in the Canadian wireless telecommunications market. In other words, appropriate compensation should return the money that GTH invested in Canada on the basis of the framework that Canada failed to honor, including the C$ 442 million it paid Canada directly for the Wind Mobile Licenses.

---

805 *See* Canada's Counter-Memorial on Merits and Damages, ¶ 522.

806 The alternative is to assume that Canada would have upheld its promises under the framework, which would require applying a market-based approach. *See* **Part V.D**.

390. **Second**, an investment cost methodology is used in cases where tribunals seek to award lost profits in principle, but quantifying the total lost profits is too difficult.[807] While tribunals have often applied the investment cost approach to projects which are not yet "*going concerns*" (where the investments consist of "*income-producing assets which has been in operation for a sufficient period of time to generate the data required for the calculation of future income*"[808]) the determinative factor in such cases is not the existence of a "*going concern*" *per se*, but whether forecasting lost profits but for the breach is possible in the circumstances.[809]

---

[807] *See* **Exhibit RL-225**, *Metalclad*, Award, ¶¶ 122-23 (stating that "[t]*he Tribunal agrees with the parties that fair market value is best arrived at in this case by reference to Metalclad's actual investment in the project*" and "*the award to Metalclad of the cost of its investment in the landfill is consistent with the principles set forth in Chorzow Factory*"); **Exhibit 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, pp. 228-29 ("*with no basis on which to calculate future profits, the Tribunal is required to consider an alternative methodology. . . . the Tribunal has concluded that the most appropriate method for valuing the damages to be paid will be to return to Mr Biloune the amounts invested in MDCL, i.e., restitution*."); **Exhibit CL-080**, *Quiborax*, Award, ¶ 345; Canada's Counter-Memorial on Merits and Damages, ¶ 520 (describing that tribunals traditionally use this methodology where "*awarding any amount for future profits related to such an investment would require an impermissible degree of speculation*."). Canada has also argued for use of the investment costs methodology in other investment treaty cases. *See, e.g.*, **Exhibit CL-171**, *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton, and Bilcon of Delaware Inc. v. Government of Canada*, UNCITRAL, PCA Case No. 2009-04, Rejoinder Memorial on Damages of Canada, 6 November 2017, ¶ 145 ("*only those investment amounts the Claimants have substantiated with evidence of payment by Bilcon of Nova Scotia or its shareholders could possibly be awarded as damages*."); **Exhibit CL-140**, *Vito G. Gallo v. Government of Canada*, UNCITRAL, PCA Case No. 55798, Counter-Memorial of Canada, 29 June 2010, ¶ 415 ("[e]*ven assuming that the Claimant could recover some damages for the alleged breach of Article 1110, he should not be permitted to recover more than the money he put at risk,* i.e.*, his* ***investment costs****. In this case, investment costs are more than reasonable compensation.*" (emphasis added)); **Exhibit CL-161**, *Windstream Energy LLC v. Government of Canada*, UNCITRAL, PCA Case No. 2013-22, Counter-Memorial of Canada, 20 January 2015, ¶ 560 ("*if the Tribunal determines that the challenged measures did actually result in losses to the Claimant . . . the only appropriate approach to quantify those losses is to determine the Claimant's investment costs*.").

[808] **Exhibit CLEX-077**, World Bank, *Guidelines on the Treatment of Foreign Direct Investment*, Foreign Investment Law Journal, Chapter IV - Expropriation and Unilateral Alterations or Termination of Contracts, ¶ 6. *See also* **Exhibit CL-024**, *Amoco International Finance Corporation v. The Government of the Islamic Republic of Iran, National Iranian Oil Company, National Petrochemical Company, and Kharg Chemical Company Limited*, Case No. 56, Award No. 310-56-3, 14 July 1987, 15 IRAN – U.S. C.T.R. 189, ¶ 203 (considering a "*going concern*" "*demonstrated a certain ability to earn revenues and was, therefore, to be considered as keeping such ability for the future*"); **Exhibit CL-111**, *Tavakoli*, Award, ¶ 95 (considering a company was a "*going concern*" if "*it had a reasonable prospect of being able to continue its operations after the Revolution.*").

[809] *See, e.g.,* **Exhibit CL-076**, *Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v. Romania*, ICSID Case No. ARB/10/13, 2 March 2015, ¶ 514 (considering compensation must be based on sunk costs given the "***history of losses***" despite the fact that the claimants acquired the investment six years before the breach date) (emphasis added); **Exhibit RL-160**, *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award, 21 June 2011, ¶¶ 375-79 (considering that it could not be established "*with a*

391. In Scenario 1, the market-based approach is not the most appropriate methodology because it does not quantify **all of the damage** that Canada has caused to GTH. Rather, it only captures the damage associated with Canada's breaches with respect to GTH's efforts to take voting control and GTH's ability to sell to an Incumbent. As Mr. Dellepiane and Dr. Spiller emphasize:

> *As explained in our First Report, our assessment of damages as a result of Canada's Cumulative Breaches does not assess damages from all of Canada's Measures. The Measures we have been unable to quantify in our assessment are: a) Canada's duplicative review of Wind Mobile's compliance with Canada's ownership and control rules, and b) Canada's failure to implement the market conditions it had promised at the outset of GTH's investment, in particular with respect to mandatory roaming and tower and site sharing. Wind Mobile's* but-for *operating value would need to be adjusted upward to account for the potential operational delays and additional costs that these Measures had on Wind Mobile. Our assessment of damages under the Cumulative Breaches Scenario, therefore, potentially underestimates the damages to Claimant arising from Canada's Cumulative Breaches.*[810]

392. Accordingly, the market-based approach fails to capture the full extent of the damage suffered by GTH under a cumulative breach scenario (Scenario 1). In such circumstances, it is appropriate to ensure that Canada returns GTH's investment.

393. **Finally**, pursuant to Canada's position, this second rationale for applying an investment cost approach applies equally to the remaining Scenarios 2 and 3. Canada argues that

---

sufficient degree of probability" that even in the absence of the respondent's breaches the investment would have been profitable, but considering that the respondent "*contributed to some extent to the negative development of the concession*", finding that the "*shared responsibility for the failure of the [investment]*" makes it inappropriate to use other valuation methods, and deciding that compensation "*should be determined on the basis of a reasonable estimate of the loss that may have been caused to* [the claimant]" through its capital contributions). Professor Marboe aptly describes being a "*going concern*" as a "*quality*" of the investment that **influences** the valuation method utilized by tribunals. Likewise, she notes that "*the existence of a 'going concern' is not a condition for the application of an income-based valuation method.*" **Exhibit CL-166**, Irmgard Marboe, CALCULATION OF COMPENSATION AND DAMAGES IN INTERNATIONAL LAW (2d ed. 2017), ¶¶ 5.93-5.95.

[810] **CER-Dellepiane/Spiller-2**, ¶ 28; **CER-Dellepiane/Spiller**, ¶ 13.

the *ex-post* data in all *but-for* scenarios are too speculative.[811] If the Tribunal agrees with Canada, the Tribunal should also rely on the investment cost approach to assess the damage suffered by GTH in Scenarios 2 and 3.[812]

394. According to the investment cost approach, Mr. Dellepiane and Dr. Spiller calculate the damages to GTH to be US$ 1.807 billion.[813] This assessment calculates the amounts invested by GTH in Canada (both equity and debt) updated at a commercial rate of interest.

V.D. In The Alternative, Canada Must Compensate GTH For At Least US $1.311 Billion In Damages Applying A Market-Based Approach

395. In the event the Tribunal finds that the investment cost approach is not appropriate, the Parties and their experts agree that a market-based approach to calculate the FMV[814] of Wind Mobile and quantum of damage owed to GTH should be used.[815]

---

811 *See, e.g.*, Canada's Counter-Memorial on Merits and Damages, ¶¶ 541-44, 570 (referring to the GTH's evidence of damage as being variously "*uncertain*," "*not foreseeable*," an "*unrealistic forecast*," based on "*speculative assumptions*," or "*based on speculation*").

812 The alleged "*speculative*" nature of *ex-post* information does not warrant a conclusion that a different date of valuation be used. An appropriate date of valuation seeks the most appropriate estimate of the actual damage caused to an investor.

813 **CER-Dellepiane/Spiller-2**, Part II.2.

814 In their First Report, Mr. Dellepiane and Dr. Spiller provided the well-accepted definition of FMV:

> *the price, expressed in terms of cash equivalents, at which property would change hands between a hypothetical willing and able buyer and a hypothetical and able seller, acting at arm's length in an open and unrestricted market, when neither is under compulsion to buy or sell and when both have reasonable knowledge of the relevant facts.*

CER-Dellepiane/Spiller, ¶ 81 (citation omitted). *See also* GTH's Memorial on Merits and Damages, ¶ 408; **RER-Brattle**, ¶ 32; Canada's Counter-Memorial on Merits and Damages, ¶ 573.

815 **RER-Brattle**, ¶¶ 15, 32, 36, 38; **CER-Dellepiane/Spiller**, ¶¶ 86-92. *See also* GTH's Memorial on Merits and Damages, ¶¶ 408-11; Canada's Counter-Memorial on Merits and Damages, ¶ 573. *See also* Canada's Counter-Memorial on Merits and Damages, ¶ 526 (emphasizing that "*there are real market transactions that can be used to ascertain the FMV of the Claimant's investment*").

396. If the Tribunal elects the market-based approach to assess the FMV of GTH's investment, this FMV must be valued on the Date of Award and take into account relevant *ex-post* information. Mr. Dellepiane and Dr. Spiller assess the FMV on the basis of three inputs assessed at the Date of Award: (*i*) the quantity of spectrum; (*ii*) the value of that spectrum; and (*iii*) the operating value of Wind Mobile. To estimate these inputs, Mr. Dellepiane and Dr. Spiller identify reasonable and verifiable *ex-post* data depending on the precise liability scenario and the *but-for* world.

397. The table below summarizes the quantum of damage arising from each scenario.[816]

Liability Scenarios	Methodology	Damages Valuation	Canada's Calculation
Any scenario below	Investment cost	US$ 1.807 billion	-
Scenario 1	Market-based	US$ 1.311 billion	C$ 309.5 million
Scenario 2	Market-based	US$ 993.5 million	C$ 0
Scenario 3	Market-based	US$ 768.2 million	C$ 309.5 million

Table 4: Quantum Assessment Summary

V.D.1. The Valuation Date Is The Date Of Award & *Ex-Post* Information Should Be Taken Into Account To Determine Appropriate Damages

398. When using a market-based approach, the appropriate Valuation Date of GTH's investment is the Date of Award. This is mandated by customary international law as reflected by the PCIJ's decision in *Chorzów*, which established that full reparations for an internationally wrongful act requires damages to be assessed "*at the time of the indemnification*."[817] This principle has also been memorialized in the reparations

[816] These figures have been updated to assess compensation owed to GTH to a more contemporaneous date (to simulate the Date of Award) as well as to account for certain minor adjustments. These adjustments are explained in Mr. Dellepiane and Dr. Spiller's Report and summarized in the sections below.

[817] **Exhibit CL-020**, *Chorzów*, Judgment, p. 48.

framework set out in the Articles on State Responsibility and numerous arbitral awards. The Articles on State Responsibility explain that the primary remedy for an internationally wrongful act is restitution—*i.e.*, to place the wronged party back into the position it was in *but-for* the internationally wrongful act.[818] Monetary compensation is awarded where any damage cannot be made good by restitution, as is the case here where, among other things, the sale of Wind Mobile to the AAL Consortium cannot be undone.[819] The objective of compensation, therefore, is to assess the monetary equivalent of restitution, which would only happen upon the issuance of an Award.[820]

399. Numerous tribunals since *Chorzów* have recognized the importance of valuing damage as of the Date of Award.[821] This is the only methodology which can truly "*wipe out all*

---

[818] **Exhibit CL-028**, INTERNATIONAL LAW COMMISSION, *Responsibility of States for Internationally Wrongful Acts* (2001), Article 35 ("[a] *State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed*").

[819] **Exhibit CL-028**, INTERNATIONAL LAW COMMISSION, *Responsibility of States for Internationally Wrongful Acts* (2001), Article 36 ("*The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby,* ***insofar as such damage is not made good by restitution***." (emphasis added)).

[820] *See, e.g.*, **Exhibit CL-079**, *Von Pezold*, Award, ¶ 763 ("*As compensation is an alternative remedy to restitution (applying if the Respondent does not perform restitution), the sum of compensation should be the financial equivalent to that which would have been returned to the Claimants*.").

[821] *See* **Exhibit CL-040**, *ADC*, Award of the Tribunal, ¶¶ 497-99 (observing that as the investment had increased in value since the wrongful act, that "*the* Chorzów Factory *standard requires that the date of valuation should be the date of the Award and not the date of expropriation, since this is what is necessary to put the Claimants in the same position as if the expropriation had not been committed*."); **Exhibit CL-088**, *Burlington*, Decision on Reconsideration and Award, ¶¶ 326 ("*In the majority's view, the full reparation standard requires that the damages resulting from the unlawful act be valued on the date of the award, using information available at that point in time*."), 329 (reviewing *Chorzów* and finding that "*three fundamental conclusions can be drawn from the Court's ruling: (i) under the full reparation principle, damages should be a substitute for restitution that has become impossible; (ii) because damages must replace restitution, they should be valued on the date on which compensation is awarded; and (iii) tribunals have full discretion to assess the valuations for purposes of determining the amount to be awarded*."); **Exhibit CL-043**, *Siemens*, Award, ¶¶ 352-53 ("*Under customary international law, Siemens is entitled not just to the value of its enterprise as of May 18, 2001, the date of expropriation, but also to any greater value that enterprise has gained up to the date of this Award, plus any consequential damages*."), 360 ("*The Tribunal has to apply customary international law. Accordingly, the value of the investment to be compensated is the value it has now, as of the date of this Award, unless such value is lower than at the date of expropriation, in which event the earlier value would be awarded*."); **Exhibit CL-080**, *Quiborax*, Award, ¶¶ 370-83 ("*The Tribunal thus concludes by majority that, dealing with an expropriation that is unlawful not merely because compensation is lacking, its task is to quantify the losses suffered by the claimant on the date of the award (or on a proxy for that date). This is*

the consequences of the illegal act" and put an investor back in the position it would have been *but-for* the wrongful act as required by *Chorzów*.[822]

400. The Tribunal may take into account information post-dating the relevant breaches—*i.e.*, "*ex-post*" information—to reach an appropriate quantum of compensation owed to a claimant as of the Date of Award. The tribunal in the *Yukos* cases observed that where there is an internationally wrongful act, international law requires that the investor receive the benefits, if any, of unanticipated events that increase the value of an asset

---

easily explained by a reference to restitution: damages stand in lieu of restitution which would take place just following the award or judgment. It is also easy to understand if one keeps in mind that what must be repaired is the actual harm done, as opposed to the value of the asset when taken."); **Exhibit CL-086**, *Windstream*, Award, ¶ 484 ("*The Tribunal considers that, since (as determined above) the Claimant has not lost the full value of its investment, the proper date of quantification of the damage to the investment, and accordingly of the Claimant's loss, is the date of this award. It is on this date that the damage to the Claimant's investment crystallized.*"); **Exhibit CL-006**, *ConocoPhillips*, Decision on Jurisdiction and the Merits, ¶¶ 343, 401 (confirming that the date of valuation is the date of the award); **Exhibit CL-145**, *Marion Unglaube v. Republic of Costa Rica*, ICSID Case No. ARB/08/1, Award, 16 May 2012, ¶ 307 (in the context of an unlawful expropriation finding that treaty-based compensation and customary international law concur that "*where property has been wrongfully expropriated, the aggrieved party may recover (1) the higher value that an investment may have acquired up to the date of the award and (2) incidental expenses.*"); **Exhibit CL-079**, *Von Pezold*, Award, ¶ 763 (adopting the date of the award as the date of valuation where the value of the expropriated asset increased from the time of the expropriation); **Exhibit CL-104**, *Amco Asia Corporation, Pan American Development Limited and P.T. Amco Indonesia v. The Republic of Indonesia*, ICSID Case No. ARB/81/1, Award, 31 May 1990, ¶¶ 182-87, 196; **Exhibit CL-023**, *Texaco Overseas Petroleum Company (TOPCO) and California Asiatic Oil Company (CALASIATIC) v. The Government of the Libyan Arab Republic*, Award on the Merits, 19 January 1977, 17 I.L.M. 1, ¶ 105 ("*Even more important,* restitutio in integrum *being in spite of everything the basic principle, it is this principle which (in conformity with the rule laid down by the Permanent Court of International Justice in the* Chorzow Factory *case according to which there should be restitution in kind or, if that is not possible, 'payment of a sum corresponding to the value which a restitution in kind would bear . . . .') will serve as .the reference for calculating the amount of a possible pecuniary indemnity, as noted by Professor Jimenez de Arechaga*."); **Exhibit CL-024**, *Amoco*, Award, ¶¶ 189-206 (noting that one method the PCIJ adopted in calculating restitution was "*an estimation of the value of the undertaking at the time of the judgment . . .* [this] *refers to the undertaking as it would have been if it had remained in the hands of the expropriated owners*."). *See also* **Exhibit RL-188**, *Enron*, Award, ¶¶ 380, 404 (finding that "[t]*o 'undo the material harm' in this case, the Tribunal considers that it needs to compare the value of Claimants' investment before the measures were adopted and its value at present*" and later affirming that to determine the value of damage caused to the investor's equity, it would compare the value of the claimants' participation before the breach with the "*current value*"); **Exhibit CL-166**, Irmgard Marboe, CALCULATION OF COMPENSATION AND DAMAGES IN INTERNATIONAL LAW (2d ed. 2017), ¶ 3.324 ("*Under the premise of 'restitution' it seems logical that, as a matter of principle, the valuation date should be the date of the award…The choice of a valuation date as late as possible ensures that all information available until that date may and can be used in order to arrive as closely as possible at full reparation*."). Canada's attempts to distinguish the findings of a few cases that have acknowledged the Date of Award are not persuasive, as each expressly recognized that the Date of Award is an appropriate Valuation Date in certain circumstances. *See* Canada's Counter-Memorial on Merits and Damages, ¶¶ 539-41.

[822] **Exhibit CL-020**, *Chorzów*, Judgment, p. 48.

up to the Date of Award as those same events would have increased the value of its investment in the event that restitution was possible.[823] The tribunal further concluded that the investor should not be required to bear the risk of unanticipated events that decrease the value of the investment because, but for the wrongful act, the investor could have sold the asset at an earlier date at the higher value.[824] On this basis, the tribunal concluded that "*an investor is entitled to choose between a valuation as of the expropriation date and as of the date of the award*."[825] In this regard, the *Yukos* tribunal followed a well-trodden line of cases since *Chorzów*, most notably, *ADC v. Hungary*.[826]

401. Dr. Manual Abdala of Compass Lexecon has explained that this *ex-post* approach:

> *forces the party that inflicted damage to bear the ex-post risks associated with the damaged or taken asset, up to the time of the award. In case the value of the asset increases in that period, the windfall would belong to the claimant by valuating the compensation at the date of the award using hindsight information, whereas if the asset would have lost value in the absence of the damaging measures, the damaging party would absorb the loss in value by valuating compensation at the date of the taking.*[827]

---

823 **Exhibit CL-157**, *Yukos*, Final Award, ¶ 1767.

824 **Exhibit CL-132**, *Yukos*, Interim Award on Jurisdiction and Admissibility, ¶ 1768. This is not to say that the claimant is entitled to the presumption that it would have exercised perfect judgment. Rather, it is the claimant that should be given the benefit of the doubt in relation to any uncertainty as to the *but-for* world. *See* **Exhibit CL-145**, *Unglaube*, Award, ¶¶ 317-19. In *Unglaube*, the tribunal was willing to assume that the claimant would have sold the asset in question six months before the market peak and update that figure by an interest rate.

825 **Exhibit CL-132**, *Yukos*, Interim Award on Jurisdiction and Admissibility, ¶ 1769.

826 *See* **Exhibit CL-040**, *ADC*, Award of the Tribunal, ¶¶ 497-99.

827 **Exhibit CL-129**, Manuel A. Abdala, *Key Damage Compensation Issues In Oil And Gas International Arbitration Cases*, 24 AM. U. INT'L L. REV. 539, pp. 557-58. There are further compelling reasons to apply the Date of Award where the investor has retained some value from the investment. In *Windstream*, the tribunal observed that its task was to quantify loss by assessing the FMV of the investment against the value that the investor retained. The tribunal observed that in such a circumstance, damage will not have "*crystallized*" until the Date of Award. *See* **Exhibit CL-086**, *Windstream*, Award, ¶ 484.

402. Thus, there is no international law principle, as Canada alleges, that equates the Valuation Date to the date of breach.[828] This is a misapplication of the *Chorzów* standard and fails to "*wipe out all the consequences of the illegal act*."[829]

403. To thwart its responsibility to pay full restitution, Canada attempts to persuade this Tribunal to find that the Valuation Date is always the date of breach and thereby ignore relevant and reliable *ex-post* information.[830] Specifically, Canada argues that *ex-post* information is *never* appropriate and *but-for* scenarios are always speculative.[831]

404. This categorical position is not reasonable, contrary to the full reparation standard, and contradicted by numerous tribunals that have held that taking into account information that occurred in the real world almost always renders the damages valuation more certain.[832] It is not speculative to take into account *ex-post* data derived from significant

---

828 *See* Canada's Counter-Memorial on Merits and Damages, ¶ 531 ("[t]*he effect on the value of the investment should be established as of the date of the breach, because damages were suffered when the State adopted the measures in question*"), ¶ 533 ("*Countless investment treaty tribunals have confirmed that it is the date of the breach that is relevant for valuation.*"). Canada's small pool of cases is not representative of wider practice in investment treaty claims. Importantly, in none of the awards selected by Canada did either of the disputing parties submit that the Valuation Date should be the Date of Award, nor consequently did any of the tribunals consider and then reject the use of the Date of Award as the Valuation Date. *See* **Exhibit RL-228**, *CME*, Final Award, ¶¶ 108, 331, 509; **Exhibit CL-036**, *CMS*, Award, ¶¶ 396, 441; **Exhibit CL-039**, *Azurix*, Award, ¶¶ 418-19; **Exhibit CL-059**, *Gemplus*, Award, ¶¶ 12-21-22, 12-38, 12-43.

829 **Exhibit CL-020**, *Chorzów*, Judgment, p. 47. *See also* **Exhibit CL-166**, Irmgard Marboe, CALCULATION OF COMPENSATION AND DAMAGES IN INTERNATIONAL LAW (2d ed. 2017), ¶ 3.342 ("*While compensation for expropriation has to reflect the objective value at the time of expropriation, the concrete valuation inherent in the principle of full reparation requires also considering developments after the unlawful act. This is necessary in order to come as closely as possible to* restituto in integrum*. The valuation date, therefore, should in principle be the date of the award in cases of state responsibility and in cases of breaches of international investment contracts.*").

830 Canada's proposed dates of breach, as explained below, are wrong.

831 *See* Canada's Counter-Memorial on Merits and Damages, ¶¶ 532, 542. Canada relies heavily on Ms. Brigitte Stern's partially dissenting opinion in *Quiborax*. *See* Canada's Counter-Memorial on Merits and Damages, ¶¶ 532, 535-37. *See also* **Exhibit 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, ¶¶ 53-60.

832 As explained by the tribunal in *Burlington*, "[s]*uch a valuation will obviously be more accurate and reliable if actual information is used in respect of relevant facts that have occurred between the expropriation and the award, rather than projections based on information available on the date of the expropriation. The valuation will be closer to reality if the Tribunal decides with 'maximum information' rather than 'maximum ignorance.*'" **Exhibit CL-088**, *Burlington*, Decision on Reconsideration and Award, ¶ 332. *See also*

events that actually took place in the market after the date of breach. This type of *ex-post* data is exactly the type of data that "*better reflect*[s] *reality*"[833] and the true value of loss suffered by an investor.

405. Canada selectively quotes from the tribunal's award in *Murphy v. Ecuador* as support for its position that a Valuation Date must be the date of breach,[834] but Canada misinterprets the tribunal's analysis. The *Murphy* tribunal expressly recognized that damages should in certain cases be valued as of the Date of Award, taking into account *ex-post* information.[835] However, the tribunal 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.[836] Specifically, the tribunal observed that immediately after the claimant sold its investment in Murphy Ecuador, there was an unprecedented change that completely transformed the nature of the investment: the purchaser Repsol disposed of the old contractual framework with the respondent State (due to expire in three years) to enter into a new contract that incentivized a ramp up in investment and increased production levels, as opposed to the old contract which incentivized winding down the

---

Exhibit CL-080, *Quiborax*, Award, ¶ 379; **Exhibit CL-104**, *Amco II*, Award, ¶ 186 ("*if Amco is to be placed as if the contract had remained in effect, then subsequent known factors bearing on that performance are to be reflected in the valuation technique.*"); **Exhibit CL-139**, *Rumeli*, Decision of the *ad hoc* committee, ¶ 151 ("*Nor is a court or tribunal required to shut its eyes to events subsequent to the date of injury, if these shed light in more concrete terms on the value applicable at the date of injury or validate the reasonableness of a valuation made at that date.*").

833 **Exhibit CL-080**, *Quiborax*, Award, ¶ 379 ("*What matters is that the victim of the harm is placed in the situation in which it would have been in real life, not more, not less. Using actual information is better suited for this purpose than projections based on information available on the date of the expropriation, as it allows to better reflect reality (including market fluctuations) when attempting to 're-establish the situation which would, in all probability, have existed if that act had not been committed*.'").

834 *See* Canada's Counter-Memorial on Merits and Damages, ¶¶ 533-34.

835 **Exhibit CL-083**, *Murphy*, Partial Final Award, ¶ 483. The tribunal recognized as well the "*large margin of appreciation*" enjoyed by tribunals in assessing the quantum of damages in pursuit of achieving full reparation for the damage suffered by the claimant. **Exhibit CL-083**, *Murphy*, Partial Final Award, ¶ 481.

836 **Exhibit CL-083**, *Murphy*, Partial Final Award, ¶ 484 (emphasis added).

investment.[837] In this context, the tribunal concluded that *ex-post* data from the actual world and this new contractual framework was an unreliable representation of the *but-for* world. In any event, the tribunal did not set the Valuation Date as the date of the breach, selecting instead the date on which the claimant sold the investment.[838]

406. Canada's interpretation of *Murphy* has been considered and dismissed by other tribunals. In *Burlington v. Ecuador*, the tribunal considered the parties' competing arguments as to whether the appropriate Valuation Date was the Date of Award or the date of breach, and the tribunal found that "*the full reparation standard requires that the damages resulting from an unlawful act* ***be valued on the date of the award, using information available at that point in time***."[839] In reaching this conclusion, the tribunal considered and dismissed Ecuador's characterization of *Murphy* as support for the proposition that valuations must be carried out solely on the basis of *ex-ante* information, the same position advanced by Canada here.[840] Rather, the *Burlington* tribunal took a more nuanced view of *Murphy*, in accord with the approach GTH describes above.

407. As will be explored in more detail below, this *ex-ante* approach is the fundamental source of the errors that pervade the damages valuations provided by Canada's valuation experts, Mr. Benjamin Sacks and Dr. Coleman Bazelon.[841]

---

837 **Exhibit CL-083**, *Murphy*, Partial Final Award, ¶ 485.

838 **Exhibit CL-083**, *Murphy*, Partial Final Award, ¶¶ 482, 486.

839 **Exhibit CL-088**, *Burlington*, Decision on Reconsideration and Award, ¶ 326 (emphasis added).

840 **Exhibit CL-088**, *Burlington*, Decision on Reconsideration and Award, ¶¶ 334-35 (noting "*the* Murphy *tribunal did not say that the use of* ex post *information is proscribed*").

841 *See also* **CER-Dellepiane/Spiller**, Part III.1.

408. Separate from its fundamental error in principle, Canada's proposed Valuation Dates suffer from further flaws because Canada has identified the wrong dates of breach. Canada identifies the following as the dates of breach for each Scenario:

(a) **Scenario 1** [*cumulative breaches*]: 28 June 2013, the date the 2013 Transfer Framework was issued;[842]

(b) **Scenario 2** [*a breach arising from Canada's treatment of GTH's efforts to control of Wind Mobile*]: 18 June 2013, [redacted][843] and

(c) **Scenario 3** [*a breach arising from Canada's blocking of the sale of Wind Mobile to an Incumbent*]: 28 June 2013, the date the 2013 Transfer Framework was issued.[844]

409. Canada's decision to rely on the date the 2013 Transfer Framework was issued as the date of breach (and, on its theory, the Valuation Date) in Scenarios 1 and 3 cannot be sustained. As explained earlier in this submission, the 2013 Transfer Framework was only the first step in Canada's ultimate blocking of the sale of Wind Mobile to an Incumbent.[845] The date of the 2013 Transfer Framework is not the date any breach crystallized.

410. Similarly, [redacted] is also inappropriate. Canada's wrongful treatment of GTH's attempts to take voting control extended beyond the national security review, and in fact continued into November 2013, [redacted][846]

---

842 Canada's Counter-Memorial on Merits and Damages, ¶ 569.

843 Canada's Counter-Memorial on Merits and Damages, ¶ 560.

844 Canada's Counter-Memorial on Merits and Damages, ¶ 564.

845 *See supra* **Part II.F**.

846 *See supra* ¶ 338.

411. If the Tribunal finds it appropriate to rely on any date other than the Date of Award, the Tribunal should consider the date on which GTH sold its stake in Wind Mobile to the AAL Consortium in September 2014. This is the date on which Canada's measures, individually or cumulatively, caused GTH to sell its C$ 1.3 billion investment in Wind Mobile for C$ 295 million (only C$ 11 million of which went to GTH) and, as such, when GTH's losses crystallized.[847] Any decision to pick a date prior to September 2014 to assess the value of Wind Mobile in the actual and *but-for* worlds would fail to satisfy the full reparation standard required by customary international law.

412. On the basis of the above, Canada's Valuation Dates are wrong, and the appropriate Valuation Date for each liability scenario is the Date of Award.

V.D.2. For Canada's Cumulative Breaches, Canada Must Compensate GTH For At Least US $ 1.311 Billion In Damages (Scenario 1)

413. In the event the Tribunal finds that the investment cost approach is not appropriate in this scenario, the Parties' experts agree that damages can be assessed—albeit undervalued in the opinion of Mr. Dellepiane and Dr. Spiller—applying a market-based methodology.[848] As was the case in their First Report, Mr. Dellepiane and Dr. Spiller's valuation takes place in two steps. **First**, they assess the FMV of Wind Mobile *but-for* the breaches. **Second**, they adjust that FMV by factors, including cash flows and third-party debt obligations, to reach the value of damage caused to GTH.

---

[847] This date is analogous to the date on which an asset is expropriated. *See* **Exhibit CL-083**, *Murphy*, Partial Final Award, ¶ 482 (observing that a sale due to a treaty breach is "*akin to an unlawful expropriation*"); **Exhibit CL-154**, *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Award, 27 November 2013, ¶ 136 (accepting that "*it is appropriate to base the actual value of the generators on the sale price of 2006 because '[t]he 2006 transaction was an arm's length transaction to an independent third party, and the sales price thus reflected what market participants believed to be the fair market value of these assets, as late* at [sic] *2006'*.").

[848] *See supra* ¶ 395.

414. As summarized below, applying this market-based methodology, Mr. Dellepiane and Dr. Spiller conclude that Canada owes GTH no less than US$ 1.311 billion for its cumulative breaches of the BIT, valued as of the Date of Award and taking into account relevant and verifiable *ex-post* information. On the other hand, Mr. Sacks and Dr. Bazelon calculate the compensation owed to GTH under this scenario to be approximately C$ 309.5 million. Is so doing, Canada's experts apply the wrong Valuation Date and rely on the wrong facts.

V.D.2.a. Mr. Dellepiane And Dr. Spiller Properly Assess The Damage Caused To GTH As Of The Date Of Award

V.D.2.a.i. The FMV Of Wind Mobile In A *But-For* World

415. To assess the *but-for* FMV of Wind Mobile in this scenario, Mr. Dellepiane and Dr. Spiller determine: (*i*) Wind Mobile's spectrum holding as of the Date of the Award;[849] (*ii*) the value of that spectrum on the basis of the most recent market information;[850] and (*iii*) Wind Mobile's operating value in reference to its current EBITDA and applying a conservative valuation multiple.[851]

416. To calculate the above, it is undoubtedly reasonable to refer to the real-world trajectory of Wind Mobile, a company that continues to operate in the current market, in respect of both its spectrum quantity and operating value. Because the very same company exists today, few assumptions need to be made about its likely trajectory.[852] This is all

---

849 **CER-Dellepiane/Spiller**, ¶¶ 105-106; **CER-Dellepiane/Spiller-2**, Part II.3.1.

850 **CER-Dellepiane/Spiller**, ¶ 107; **CER-Dellepiane/Spiller-2**, Part II.3.2.

851 **CER-Dellepiane/Spiller**, ¶ 108; **CER-Dellepiane/Spiller-2**, Part II.3.3.

852 *See, e.g.*, **Exhibit CL-040**, *ADC*, Award of the Tribunal, ¶ 309 (finding that the claimant's valuation experts were justified in using a higher internal rate of return as a baseline for calculating the value of the investment given that the expropriated investment, airport terminals, continued to exist in "*one of the fastest growing airports in the world.*"); **Exhibit RL-188**, *Enron*, Award, ¶ 429 (finding that the selling price of shares in the

the more appropriate here because GTH is a sophisticated wireless telecommunications company[853] with a proven track record of success,[854] and must be assumed to have acted in a commercially reasonable manner.[855] In fact, the trajectory of Wind Mobile represents the **minimum** value of GTH's investment in a *but-for* world given that Wind Mobile's real-world trajectory reflects the harm Canada had already done to Wind Mobile prior to its sale. Thus, relying on this data results in a conservative estimate of the FMV of GTH's investment *but-for* Canada's breaches.

417. While Canada has alleged that GTH must show that market events impacting Wind Mobile since GTH's exit from the market would have taken place in a *but-for* world,[856] this is a misapplication of the burden of proof. As explained above, once GTH has shown that Canada has caused damage by its breaches, the Tribunal is required to assess the quantum of that damage to the best of its abilities applying reasonable assumptions.[857] GTH has established, on the balance of probabilities, that but for Canada's cumulative breaches of the BIT, GTH would not have sold to the AAL

---

investment, subsequent to the breach, "*provide an accurate and realistic base for the estimate of the current and fair market value of the company*").

853 *See generally* Canada's Counter-Memorial on Merits and Damages, ¶ 428.

854 *See generally* **Exhibit R-014**, 2007 Orascom Telecom Annual Report, 31 March 2008; **Exhibit R-004**, 2014 GTH Annual Report, 2014; **Exhibit R-016**, 2004 Orascom Telecom Annual Report, 18 April 2005; **Exhibit R-017**, 2002 Orascom Telecom Annual Report, 30 April 2003; **Exhibit R-018**, 2013 GTH Annual Report, 2013.

855 *See supra* ¶ 364.

856 For example, Canada alleges that "[t]*he Claimant hasn't presented any evidence to confirm that the 2015 transaction involving Wind Mobile, Shaw and Rogers would have occurred, or even that it was probable, at the time of the alleged breach or that it would have taken place absent such breach*." *See* Canada's Counter-Memorial on Merits and Damages, ¶ 542. Canada conflates the two different market events taking place in 2015—the June 2015 Rogers-Mobilicity-Shaw Transaction through which Wind Mobile received 26 new spectrum licenses for practically no consideration **versus** the December 2015 Shaw Transaction in which Shaw purchased Wind Mobile for C$ 1.6 billion. It is unclear which event Canada complains GTH has failed to prove. In any event, GTH has met its burden. *See supra* **Part V.B.1.a**.

857 *See supra* **Part V.A**.

Consortium in September 2014 and would have remained invested in Wind Mobile.[858] The actual trajectory of Wind Mobile in the real world is an appropriate and reasonable indication of what would have happened in the *but-for* world.

418. Canada's experts also object that GTH has not proven that it would have received or purchased additional spectrum licenses through the AWS-3 Auction.[859] Yet, the evidence is clear that but for Canada's treatment of GTH, in particular GTH's efforts to take control, GTH on the balance of probabilities would have acquired additional spectrum licenses. Despite Canada's arbitrary and capricious treatment, GTH applied for the 700 MHz Auction in September 2013 to preserve its option of remaining in the Canadian market and acquiring those spectrum licenses.[860] It was only after seriously considering the option of staying in the Canadian market—which was estimated to require approximately C$ 700 million in additional funds in the coming years (including C$ 230 million for 700 MHz spectrum licenses)—that GTH ultimately decided to withdraw from the 700 MHZ Auction in January 2014, with Canada's treatment of its efforts to take control of Wind Mobile as the definitive factor.[861] While Canada's experts seek to color GTH's decision not to participate in the 700 MHz Auction as an indication that GTH would not have purchased spectrum licenses at the 2015 AWS-3 Auction but for Canada's breaches, once again, Mr. Sacks and Dr. Bazelon fail to acknowledge that this decision was taken because of (and directly

858 *See supra* **Part V.B.1.a**.

859 *See* **RER-Brattle**, ¶¶ 88-89, 146 (observing that the AWS-3 spectrum licenses were purchased after GTH exited the market), 147-48 (observing that Wind Mobile had different ownership after GTH exited the market).

860 *See supra* ¶¶ 83, 368.

861 *See supra* ¶ 370.

influenced by) Canada's breaches.[862] In fact, Wind Mobile's business plan in December 2013, prior to GTH's decision to exit, demonstrates that GTH was seriously contemplating (despite Canada's breaches) to increase Wind Mobile's AWS and 700 MHz spectrum holding.[863]

419. Having established that GTH would have procured additional spectrum licenses *but-for* Canada's breach, it is all the more reasonable to rely on the real-world trajectory of Wind Mobile's acquisition of additional spectrum licenses, much of which was engineered by Canada. This is particularly so given: (*i*) Wind Mobile was the only bidder for its blocks of set-aside spectrum licenses in the March 2013 AWS-3 Auction, and therefore able to purchase that spectrum for a minimum bid price;[864] and (*ii*) the June 2015 Rogers-Mobilicity-Shaw Transaction, approved and touted by Canada, resulted in Wind Mobile receiving a windfall of 26 new AWS-1 spectrum licenses.[865]

---

862 *See* **RER-Brattle**, ¶ 89.

863 The business plan for Wind Mobile as a standalone operation contemplated the acquisition of additional AWS and 700 MHz spectrum licenses. *See, e.g.*, [redacted]

864 *See* GTH's Memorial on Merits and Damages, ¶ 260; Canada's Counter-Memorial on Merits and Damages, n. 534; **Exhibit C-231**, Peter Evans, *Rogers buys no new spectrum as AWS-3 wireless auction raises $2.1B*, 6 March 2015, CBC, http://www.cbc.ca/news/business/rogers-buys-no-new-spectrum-as-aws-3-wireless-auction-raises-2-1b-1.2983178 (accessed 24 September 2017); **CER-Dellepiane/Spiller**, ¶¶ 58-60.

865 *See* GTH's Memorial on Merits and Damages, ¶ 261; Canada's Counter-Memorial on Merits and Damages, ¶ 317; **CER-Dellepiane/Spiller**, ¶¶ 61-64 (explaining that Wind Mobile, in exchange, was only required to transfer to Rogers 10 MHz of spectrum licenses in Southern Ontario); **Exhibit R-264**, Christine Dobby, *Rogers-Mobilicity deal shakes up spectrum landscape, rewards Wind*, THE GLOBE & MAIL, 24 June 2015, https://www.theglobeandmail.com/report-on-business/wind-mobile-will-also-benefit-from-rogers-mobilicity-deal/article25094485/; **Exhibit C-233**, Industry Canada, *Transfer of Spectrum Licences Held by Shaw Communications Inc. to Rogers Communications Partnership*, 24 June 2015, http://www.ic.gc.ca/eic/site/smt-gst.nsf/eng/sf11053.html (accessed 24 September 2017); **Exhibit C-234**, Industry Canada, *Transfer of Spectrum Licences Held by Rogers Communications Partnership to WIND Mobile Corp.; Transfer of Spectrum Licences Held by Data and Audio-Visual Enterprises Wireless Inc. to Rogers Communications Partnership and to WIND Mobile Corp.; Transfer of a Subdivision of a Licence Held by WIND Mobile Corp. to Rogers Communications Partnership; Subordinate Licence Application for Spectrum Licences Held by WIND Mobile Corp. to Rogers Communications Partnership*, 24 June 2015, http://www.ic.gc.ca/eic/site/smt-gst.nsf/eng/sf11054.html (accessed 24 September 2017); **Exhibit C-237**, *Rogers buys Mobilicity plus Shaw's 4G spectrum; Wind gets windfall*, TeleGeography, 25 June 2015, https://www.telegeography.com/products/commsupdate/articles/2015/06/25/rogers-buys-mobilicity-plus-shaws-4g-spectrum-wind-gets-windfall/ (accessed 24 September 2017). Canada declared that the approval

420. Regarding the quantum of damage in this Scenario, Canada and its experts have alleged that even if Mr. Dellepiane and Dr. Spiller's approach is accepted, GTH has failed to mitigate its damages,[866] and Mr. Dellepiane and Dr. Spiller's assessment of spectrum pricing [867] and operating value are incorrect. [868] Canada's arguments regarding mitigation have been addressed above in **Part V.B.3**. In their Second Report, Mr. Dellepiane and Dr. Spiller summarize their approach to spectrum pricing and operating value, and respond to Mr. Sacks and Dr. Bazelon's arguments.[869]

421. Applying the correct *ex-post* information, Mr. Dellepiane and Dr. Spiller have calculated the *but-for* FMV of Wind Mobile as follows:

Date of FMV Calculation	16-Dec-15	30-Sep-18
C$ Million		
Spectrum Value	1,627.3	1,819.3
Operating Value	520.0	1,488.3
***But-for* Fair Market Value**	**2,147.3**	**3,307.6**

Table 5: Wind Mobile But-For FMV In Scenario 1[870]

of these transactions as a "*win*" for Canada. *See* **Exhibit C-235**, Industry Canada, *News Release: Statement by Industry Minister James Moore*, 24 June 2015, https://www.canada.ca/en/news/archive/2015/06/statement-industry-minister-james-moore-991329.html (accessed 24 September 2017).

866 Canada's Counter-Memorial on Merits and Damages, ¶¶ 582-85; **RER-Brattle**, ¶¶ 74-84.

867 Canada's Counter-Memorial on Merits and Damages, ¶ 586; **RER-Brattle**, ¶¶ 90-97.

868 **RER-Brattle**, ¶ 95.

869 **CER-Dellepiane/Spiller-2**, Parts II.3.2-II.3.3. Mr. Dellepiane and Dr. Spiller have modified slightly their approach to valuing the two I Block licenses Wind Mobile acquired in the 2008 AWS Auction. *See* **CER-Dellepiane/Spiller-2**, ¶¶ 45-49.

870 **CER-Dellepiane/Spiller-2**, Table 6.

V.D.2.a.ii. The Damage Caused To GTH

422. To reach their final assessment of the damage caused to GTH, Mr. Dellepiane and Dr. Spiller apply the same approach from their First Report. Namely, Mr. Dellepiane and Dr. Spiller deduct from the *but-for* FMV of Wind Mobile: (*i*) Wind Mobile's cash flows;[871] (*ii*) debt owed to third parties that had seniority over GTH's debt[872] and (*iii*) AAL's liquidity right.[873]

423. Mr. Dellepiane and Dr. Spiller summarize their assessment of damages as follows:

Date of FMV Calculation	16-Dec-15		30-Sep-18	
Millions	**C$**	**US$**	**C$**	**US$**
But-for Value of Wind Mobile (Enterprise Value)	**2,147.3**		**3,307.6**	
(-) Senior Facility Debt	189.2		253.3	
(-) VimpelCom Debt	210.2		270.8	
(-) AAL Liquidity Right	57.0		66.6	
Net Enterprise Value	**1,599.3**		**1,694.1**	
GTH's Debt	1,532.3		1,532.3	
But-for Value of Equity to Wind Mobile Shareholders	**67.0**		**161.7**	
GTH's equity %	*99.3%*		*99.3%*	
But-for Value of GTH's Equity	**66.5**		**160.7**	
Value of GTH's Debt in Wind Mobile as of FMV Date	**1,532.3**		**1,532.3**	
Value of GTH's Equity in Wind Mobile as of FMV Date	**66.5**		**160.7**	
Total Value of GTH's Stake in Wind Mobile as of Dec. 16, 2015	**1,598.8**	**1,160.3**		
Compound Factor		*1.11*		
Total Damages to GTH as of Sep. 30, 2018		**1,284.3**	**1,693.0**	**1,311.4**

Table 6: Damages in Scenario 1[874]

[871] **CER-Dellepiane/Spiller-2**, Part II.3.4.a.

[872] **CER-Dellepiane/Spiller-2**, Part II.3.4.b.

[873] **CER-Dellepiane/Spiller-2**, Part II.3.4.c. Mr. Dellepiane and Dr. Spiller also account for an adjustment for GTH's waiver of interest accruals over debt holdings. **CER-Dellepiane/Spiller-2**, ¶ 71.

[874] **CER-Dellepiane/Spiller-2**, Table 9.

424. Thus, in the event the Tribunal concludes that a market-based approach is appropriate for assessing damages in this Scenario, GTH is owed at least US$ 1.311 billion as a result of Canada's cumulative breaches of the BIT.[875]

V.D.2.b. Mr. Sacks and Dr. Bazelon's Valuation Is Wrong Because It Applies The Wrong Valuation Date And Relies On Incorrect Information

425. The serious errors underlying Canada's chosen Valuation Date, and its decision to ignore reliable *ex-post* data, are addressed above.[876] These errors are the fundamental source of Mr. Sacks and Dr. Bazelon's incorrect valuation. The fallacy of this approach is all the more clear when viewed in light of its conclusions: the assumptions Mr. Sacks and Dr. Bazelon have applied result in the same assessment of damages in respect of a cumulative breach (Scenario 1) and a breach arising from Canada's blocking of a sale to an Incumbent alone (Scenario 3).[877] In other words, Canada and its experts' assumptions lead them to incorrectly assume the same *but-for* world in these scenarios and to reach the wrong damages valuation of C$ 309.5 million.[878]

426. In the event the Tribunal does not accept the Date of Award as the Valuation Date, Canada and its experts' approach to valuation remains unacceptable. Mr. Sacks and Dr. Bazelon allege that the Valuation Date for Canada's cumulative breaches should be 28 June 2013, the date of the adoption of the 2013 Transfer Framework.[879] This date is irrelevant in any scenario, and in particular Scenario 1.[880] As explained above, the only

---

875 **CER-Dellepiane/Spiller-2**, Part II.3.4.d.

876 *See supra* **Part V.D.1**.

877 *See* **RER-Brattle**, ¶ 109.

878 **RER-Brattle**, ¶ 65; Canada's Counter-Memorial on Merits and Damages, ¶¶ 527-28.

879 **RER-Brattle**, ¶ 64, Figure 9.

880 *See supra* ¶ 409. *See also* **CER-Dellepiane/Spiller-2**, Part III.1.2.

alternative date on which the damage caused to GTH's investment can be valued is the date on which Canada's breaches caused GTH to sell its investment in Wind Mobile to the AAL Consortium in September 2014.[881]

427. Moreover, Mr. Sacks and Dr. Bazelon rely in their assessment on the offers received from Incumbents and New Entrants to support their conclusion.[882] This reliance is misplaced.[883] **First**, [redacted]

428. **Second**, Mr. Sacks and Dr. Bazelon attempt to rely on [redacted] represent the FMV of GTH's investment in an actual world.[885] [redacted] and therefore do not reflect FMV.[887] In fact, Mr. Sacks and Dr. Bazelon's reliance on the [redacted] offers is a perfect illustration of the irrationality of Canada's preferred Valuation Date of 28 June 2013 (and related *ex-ante* approach). Canada's date allows its experts to close their eyes to information after that date, which made clear that [redacted]. Canada has

881 *See supra* ¶ 411.

882 **RER-Brattle**, ¶ 65; Canada's Counter-Memorial on Merits and Damages, ¶¶ 527-28.

883 *See* **CER-Dellepiane/Spiller-2**, ¶ 101, Part III.1.2.

884 *See supra* **Parts II.D-II.E.** *See also* GTH's Memorial on Merits and Damages, ¶¶ 209-215, 223-34, 245-47.

885 **RER-Brattle**, ¶ 65; Canada's Counter-Memorial on Merits and Damages, ¶¶ 573-74.

886 *See supra* n. 801.

887 *See* **CER-Dellepiane/Spiller-2**, ¶ 122.

undoubtedly chosen its Valuation Dates with the precise objective of limiting damages in this artificial and misleading way.

429. Following its inappropriate reliance on these offers, Canada and its experts then attempt to introduce an additional discount to the compensation owed to GTH by advancing an unsubstantiated argument that the FMV of GTH's investment in a *but-for* world must be reduced by some percentage for "*regulatory risk*" that a transaction would not be approved by its own State organs.[888] As explained above, this discount has no basis in law or fact.[889]

V.D.3. For Canada's Treatment Of GTH's Efforts To Take Voting Control, Canada Must Compensate GTH For At Least US $ 993.5 Million In Damages (Scenario 2)

430. Applying the market-based methodology, Mr. Dellepiane and Dr. Spiller conclude that Canada owes GTH no less than US$ 993.5 million for its breaches relating to its treatment of GTH's efforts to take voting control, valued as of the Date of Award and taking into account relevant and verifiable *ex-post* information.[890] On the other hand, Mr. Sacks and Dr. Bazelon attribute **no damage** at all to a breach of the BIT arising from Canada's treatment of GTH's efforts to take voting control alone.[891] Once again, this is a conspicuous indication that Brattle has applied the wrong Valuation Date. Mr.

---

888 *See* **RER-Brattle**, ¶ 72; Canada's Counter-Memorial on Merits and Damages, ¶¶ 576-80.

889 *See supra* **Part V.B.2**.

890 As discussed above, in their Second Report, Mr. Dellepiane and Dr. Spiller have assessed damages in the event the Tribunal finds Canada's treatment of GTH's efforts to take voting control is the only breach of the BIT. Mr. Dellepiane and Dr. Spiller have not assessed damages in the event the Tribunal finds a cumulative breach of FET, **but** also concludes that Canada's blocking of the sale of Wind Mobile to an Incumbent does not, either individually or cumulatively with other acts, amount to a breach. In the event the Tribunal finds such a cumulative breach, it is clear that the damages Mr. Dellepiane and Dr. Spiller have calculated for the "*National Security Review Breach*" scenario is a **floor** as it does not value the damage caused by the duplicative reviews for compliance with the O&C Rules nor Canada's failures to provide adequate regulatory conditions.

891 **RER-Brattle**, ¶ 139; Canada's Counter-Memorial on Merits and Damages, ¶¶ 571, 593-95.

Dellepiane and Dr. Spiller's valuation, and the errors made by Canada's experts, are discussed below.

V.D.3.a. Mr. Dellepiane And Dr. Spiller Properly Assess The Damage Caused To GTH As Of The Date Of Award

V.D.3.a.i. The FMV Of Wind Mobile In A *But-For* World

431. This scenario assumes that the Tribunal has concluded that Canada did not violate the BIT by blocking the sale of Wind Mobile to an Incumbent. Therefore, when calculating the *but-for* FMV of GTH's investment as of the Date of Award, Mr. Dellepiane and Dr. Spiller assume that Incumbents would not be available buyers for Wind Mobile in the hypothetical market.[892] Taking this assumption into account, Mr. Dellepiane and Dr. Spiller then apply the same approach utilized to determine the FMV of Wind Mobile in Scenario 1.[893]

432. Mr. Dellepiane and Dr. Spiller have calculated the *but-for* FMV of Wind Mobile as follows:

[892] **CER-Dellepiane/Spiller-2**, ¶ 77.

[893] **CER-Dellepiane/Spiller-2**, Parts II.4.1-II.4.4. As in Scenario 1, Mr. Dellepiane and Dr. Spiller have modified slightly their approach to valuing the two I Block licenses Wind Mobile acquired in the 2008 AWS Auction. *See* **CER-Dellepiane/Spiller-2**, ¶ 81.

Date of FMV Calculation	16-Dec-15	30-Sep-18
C$ Million		
Spectrum Value	1,080.0	1,349.7
Operating Value	520.0	1,488.3
***But-for* Fair Market Value**	**1,600.0**	**2,838.0**

Table 7: Wind Mobile But-For FMV In Scenario 2[894]

433. A reliable indication of the *but-for* FMV in a world where GTH retained its investment, but could not sell to an Incumbent, is the December 2015 sale of Wind Mobile to Shaw, a non-Incumbent.[895] The Shaw Transaction is exactly what the FMV approach intends to simulate: an actual sale of the asset in question in *but-for* conditions.[896] It represents, in a complete package (which includes Wind Mobile's spectrum quantity, the spectrum value, and operating value), the FMV of GTH's investment if Canada had not caused GTH to exit the market by its breaches arising from its treatment of GTH's efforts to take voting control. The Shaw Transaction, however, does not value the impact of the duplicative CRTC review and Canada's failures to maintain adequate regulatory conditions, and therefore represents the minimum value in this Scenario in the event the Tribunal finds these acts form part of a cumulative breach.[897]

---

894 **CER-Dellepiane/Spiller-2**, Table 11.

895 **CER-Dellepiane/Spiller**, ¶ 123; **CER-Dellepiane/Spiller-2**, ¶¶ 75-76. Canada appears to misunderstand this transaction, referring to it in its submission as the "*Shaw-Rogers-Wind Mobile transaction*" although Rogers was not involved. *See* Canada's Counter-Memorial on Merits and Damages, ¶ 568.

896 *See* **CER-Dellepiane/Spiller**, ¶ 126. *See also* **RER-Brattle**, ¶ 32; Canada's Counter-Memorial on Merits and Damages, ¶ 573.

897 *See supra* n. 738.

434. Mr. Sacks and Dr. Bazelon's first objection to Mr. Dellepiane and Dr. Spiller's calculation addresses matters of causation,[898] which have been addressed above.[899] Mr. Sacks and Dr. Bazelon further complain that GTH has not proven that it would have participated in the AWS-3 Auction or mitigated its damages,[900] which has also been addressed above.[901] As made clear, these objections cannot be sustained.

V.D.3.a.ii. The Damage Caused To GTH

435. To reach their final assessment of the damage caused to GTH, Mr. Dellepiane and Dr. Spiller apply the same approach from their First Report and applied in Scenario 1.[902]

436. Mr. Dellepiane and Dr. Spiller summarize their assessment of damages as follows:

[898] **RER-Brattle**, ¶¶ 142-43.

[899] *See supra* **Part V.B.1.a**.

[900] **RER-Brattle**, ¶¶ 145-48.

[901] *See supra* **Parts V.B.3 and V.D.2.a.i**.

[902] **CER-Dellepiane/Spiller-2**, Part II.4.5.

Date of FMV Calculation	16-Dec-15		30-Sep-18	
Millions	**C$**	**US$**	**C$**	**US$**
But-for Value of Wind Mobile (Enterprise Value)	**1,600.0**		**2,838.0**	
(-) Senior Facility Debt	189.2		253.3	
(-) VimpelCom Debt	210.2		270.8	
(-) AAL Liquidity Right	57.0		66.6	
Net Enterprise Value	**1,101.6**		**1,282.6**	
GTH's Debt	1,532.3		1,532.3	
But-for Value of Equity to Wind Mobile Shareholders	-		-	
GTH's equity %	*99.3%*		*99.3%*	
But-for Value of GTH's Equity	-		-	
Value of GTH's Debt in Wind Mobile as of FMV Date	**1,101.6**		**1,282.6**	
Value of GTH's Equity in Wind Mobile as of FMV Date	-		-	
Total Value of GTH's Stake in Wind Mobile as of Dec. 16, 2015	**1,101.6**	**799.5**		
Compound Factor		*1.11*		
Total Damages to GTH as of Sep. 30, 2018		**884.9**	**1,282.6**	**993.5**

Table 8: Damages in Scenario 2[903]

437. Thus, in the event the Tribunal concludes that a market-based approach is appropriate for assessing damages in this Scenario, GTH is owed at least US$ 993.5 million as a result of Canada's breaches arising from its treatment of GTH's efforts to take voting control.[904]

V.D.3.b. Mr. Sacks and Dr. Bazelon's Valuation Is Wrong Because It Applies The Wrong Valuation Date

438. As already discussed, Canada has chosen the incorrect Valuation Date (here 18 June 2013) and has accordingly ignored critical *ex-post* data.[905] Due to these errors, Mr. Sacks and Dr. Bazelon find that no damage was caused by Canada's treatment of

[903] **CER-Dellepiane/Spiller-2**, Table 13.

[904] **CER-Dellepiane/Spiller-2**, Part II.4.5.a.

[905] *See supra* ¶ 409

GTH's efforts to take voting control.[906] Instead, they argue that the only damages arising from breaches arising from Canada's treatment of GTH's efforts to take voting control would be reflected in the fall in FMV on 18 June 2013, [redacted] This position, again, demonstrates the problem with Canada's preferred Valuation Date, which asks the Tribunal to ignore the true *but-for* scenario and the actual value of damage caused by Canada's actions.[908] Using a Date of Award valuation, the Tribunal can, and should, take into account the evidence demonstrating that GTH's decision to exit the Canadian market was driven by Canada's treatment of GTH's efforts to take voting control. The only alternative date on which the damage caused to GTH's investment can be valued is the date on which Canada's breaches caused GTH to sell its investment in Wind Mobile to the AAL Consortium in September 2014.[909]

V.D.4. For Canada's Blocking Of The Sale Of Wind Mobile To An Incumbent Alone, Canada Must Compensate GTH For At Least US $ 768.2 Million In Damages (Scenario 3)

439. GTH's investment included not only the funds that GTH contributed in Wind Mobile but the bundle of rights that came with these contributions.[910] One of these rights was the right to sell Wind Mobile to an Incumbent after the expiration of the Five-Year Rollout Period. The ability to sell or transfer spectrum licenses is a critical component

---

906 **RER-Brattle**, ¶ 139.

907 **RER-Brattle**, ¶ 132.

908 *See* **CER-Dellepiane/Spiller-2**, Part III.1.1.

909 *See supra* ¶ 411.

910 *See supra* ¶ 219. Canada objects to GTH's standing to claim damages arising out of the Government's treatment of Wind Mobile. Canada's Counter-Memorial on Merits and Damages, ¶¶ 512-15. GTH has addressed this objection at **Part III.E**.

of the value of a wireless telecommunications company because it governs the liquidity of that asset.[911]

440. Applying a market-based methodology, Mr. Dellepiane and Dr. Spiller conclude that Canada owes GTH no less than US$ 768.2 million for the breaches relating to its blocking of the sale of Wind Mobile to an Incumbent, valued as of the Date of Award. Unlike the other scenarios, Mr. Dellepiane 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. On the other hand, Mr. Sacks and Dr. Bazelon calculate the compensation owed to GTH to be approximately C$ 309.5 million, applying the wrong Valuation Date and relying on the wrong facts. Mr. Dellepiane and Dr. Spiller's valuation, and the errors made by Canada's experts, are discussed below.

V.D.4.a. Mr. Dellepiane And Dr. Spiller Properly Assess The Damage Caused To GTH As Of The Date Of Award

V.D.4.a.i. The FMV Of Wind Mobile In A *But-For* World

441. Applying the same approach from their First Report, Mr. Dellepiane and Dr. Spiller assess the FMV of GTH's investment in this scenario by taking Wind Mobile's spectrum holding as of March 2014[912] and using the contemporaneous indication of the price an Incumbent would be willing to pay for that spectrum.[913] This contemporaneous

911 *See* GTH's Memorial on Merits and Damages, ¶ 32.

912 **CER-Dellepiane/Spiller-2**, ¶ 98.

913 **CER-Dellepiane/Spiller-2**, ¶ 98.

price is the price Incumbents paid for spectrum in the 700 MHz Auction in February 2014.[914]

442. Mr. Sacks and Dr. Bazelon once again argue that GTH failed to mitigate its damages[915] and Mr. Dellepiane and Dr. Spiller's calculations with respect to spectrum pricing are incorrect.[916] This mitigation objection has been address above,[917] and Mr. Dellepiane and Dr. Spiller have summarized their approach to spectrum pricing, and responded to Mr. Sacks and Dr. Bazelon's arguments, in their Second Report.[918]

443. Applying the correct spectrum pricing information, Mr. Dellepiane and Dr. Spiller have calculated the *but-for* FMV of Wind Mobile as follows:

	First Report	Second Report
AWS-1 & PCS Licenses		
MHz-POP Million	371.6	371.6
C$/MHz-POP	2.58	2.58
AWS-1 & PCS Value: C$ Million	**957.5**	**957.5**
I Block Licenses		
MHz-POP Million	4.83	4.83
C$/MHz-POP	2.58	0.16
I Block Value: C$ Million	**12.4**	**0.8**
Total Spectrum Value as of Mar. 13, 2014: C$ Million	**970.0**	**958.3**

Table 9: Wind Mobile But-For FMV In Scenario 3[919]

914 **CER-Dellepiane/Spiller-2**, ¶ 98.

915 **RER-Brattle**, ¶ 112; Canada's Counter-Memorial on Merits and Damages, ¶ 592.

916 **RER-Brattle**, ¶¶ 113-22; Canada's Counter-Memorial on Merits and Damages, ¶¶ 590-91.

917 *See supra* **Part V.B.3**.

918 **CER-Dellepiane/Spiller-2**, ¶¶ 99-100.

919 **CER-Dellepiane/Spiller-2**, Table 14.

V.D.4.a.ii. The Damage Caused To GTH

444. To reach their final assessment of the damage caused to GTH, Mr. Dellepiane and Dr. Spiller apply the same approach from their First Report.[920] Mr. Dellepiane and Dr. Spiller summarize their assessment of damages in the following table:

Sale to Incumbent Breach	13-Mar-14	
Millions	**C$**	**US$**
But-for Value of Wind Mobile (Enterprise Value)	**1,099.8**	
(-) Senior Facility Debt	157.5	
(-) VimpelCom Debt	179.1	
(-) AAL Liquidity Right	54.0	
Net Enterprise Value	**709.2**	
(-) GTH's Debt	1,532.3	
But-for Value of Equity to Wind Mobile Shareholders	-	
GTH's equity %	*99.3%*	
But-for Value of GTH's Equity	-	
Value of GTH's Debt in Wind Mobile as of Mar. 13, 2014	**709.2**	
Value of GTH's Equity in Wind Mobile as of Mar. 13, 2014	-	
Total Value of GTH's Stake in Wind Mobile as of Mar. 13, 2014	**709.2**	**640.5**
Compound factor		*1.20*
Total Damages to GTH as of Sep. 30, 2018		**768.2**

Table 10: Damages in Scenario 3[921]

445. Thus, in the event the Tribunal concludes that a market-based approach is appropriate for assessing damages in this Scenario, GTH is owed at least US$ 768.2 million as a

[920] **CER-Dellepiane/Spiller-2**, ¶¶ 101-102. *See also* **CER-Dellepiane/Spiller**, ¶¶ 142-45.

[921] **CER-Dellepiane/Spiller-2**, Table 15.

result of Canada's breaches arising from its blocking of the sale of Wind Mobile to an Incumbent.[922]

V.D.4.b. Mr. Sacks and Dr. Bazelon's Valuation Is Wrong Because It Applies The Wrong Valuation Date And Relies On Incorrect Information

446. Canada has argued that the approach to assessing compensation owed to GTH must be the same in the context of a finding of cumulative breach (Scenario 1) and a finding that Canada unlawfully blocked the sale of Wind Mobile to an Incumbent (Scenario 3).[923] Thus, Mr. Sacks and Dr. Bazelon's mistakes from Scenario 1 are repeated here.[924] Even if the Tribunal does not accept the Date of Award as the Valuation Date, Mr. Sacks and Dr. Bazelon have once again cited the wrong date of breach for their Valuation Date.[925]

447. Mr. Sacks and Dr. Bazelon rely on the wrong data to support their conclusion that compensation owed to GTH is no more than C$ 309.5 million.[926] [redacted]

---

922 **CER-Dellepiane/Spiller-2**, Part II.5.

923 *See supra* ¶ 425; **RER-Brattle**, ¶ 109.

924 *See supra* **Part V.D.2.b**.

925 *See supra* ¶ 409; **RER-Brattle**, ¶ 110.

926 **RER-Brattle**, ¶ 110.

927 **RER-Brattle**, ¶ 110; Canada's Counter-Memorial on Merits and Damages, ¶ 527 ([redacted]). *See also* Canada's Counter-Memorial on Merits and Damages, ¶¶ 588-89.

448. As was the case in Scenario 1, Canada and its experts again attempt to discount damages further by relying on non-existent non-Incumbent offers.[930] and introducing its alleged "*regulatory risk*" discount.[931]

[928] *See supra* ¶ 427; **CER-Dellepiane/Spiller-2**, ¶ 98, Part III.1.2.

[929] *See, e.g.*,

[930] *See* Canada's Counter-Memorial on Merits and Damages, ¶ 588; **RER-Brattle**, ¶ 110.

[931] *See* Canada's Counter-Memorial on Merits and Damages, ¶ 589; **RER-Brattle**, ¶ 109.

[932] *See supra* ¶ 267.

[933] *See supra* Part V.B.2.

V.E. Even In The Event The Tribunal Does Not Accept The Date Of Award As The Appropriate Date Of Valuation, Canada Must Compensate GTH For Pre-Judgment Interest At GTH's Cost Of Debt

449. If the Tribunal accepts that the Date of Award is the appropriate Valuation Date to assess the FMV of GTH's investment in a *but-for* world, the Tribunal need not consider the appropriate rate of pre-Award interest.[934] However, in the event the Tribunal finds that the Valuation Date is a date earlier than the Date of Award, like the date of the September 2014 sale to the AAL Consortium,[935] the Tribunal is empowered to assess an appropriate pre-Award interest rate to ensure full reparation for the damage Canada has caused to GTH.[936] Pre-Award interest is near universally accepted and awarded by contemporary international arbitral tribunals,[937] which recognize that such interest is necessary to place investors back in the position they would have been in *but-for* the breach(es) and to unwind the full extent of damage.[938]

450. GTH is a global wireless telecommunications company that would have re-invested any funds it received from a sale of its investment in a *but-for* world in one of its ongoing

---

934 It would also be appropriate to use a commercial rate of return to update the value of the Shaw Transaction in the event the Tribunal uses that transaction as reflecting the but-for value of Wind Mobile as of December 2015.

935 *See supra* ¶ 411.

936 *See* Canada's Counter-Memorial on Merits and Damages, ¶ 596.

937 *See, e.g.*, **Exhibit CL-070**, *Micula*, Award, ¶¶ 1265, 1270; **Exhibit RL-235**, *Maffezini*, Award, ¶ 96; **Exhibit RL-226**, *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000, ¶¶ 128-30; **Exhibit CL-065**, *Occidental II*, Award, ¶¶ 846-47; **Exhibit CL-061**, *El Paso*, Award, ¶ 747.

938 **Exhibit CL-101**, *McCollough & Company v. Ministry of Post, Telegraph and Telephone*, Case No. 89, Award No. 225-89-3, 22 April 1986, 11 IRAN – U.S. C.T.R. 3, ¶ 98 (considering the purpose of pre-award interest is "*to compensate for the delay with which the payment to the successful party is made*."); **Exhibit CL-154**, *Total S.A.*, Award, ¶ 251 ("*it is undisputable that the delay incurred by the creditor . . . in receiving the payment of the amount of money due to it must be compensated through the awarding of interest at an appropriate rate*."); **Exhibit CL-043**, *Siemens*, Award, ¶ 397 ("[f]*or the purposes of erasing the effects of the expropriation, interest should accrue from the date the Tribunal has found that expropriation occurred*"); **Exhibit CL-088**, *Burlington*, Decision on Reconsideration and Award, ¶ 531 ("*a majority of the Tribunal agrees with* [the claimant] *that past cash flows must be brought to present value through the application of an actualization or interest rate. This is a consequence of the principle of full reparation*").

businesses or in a new venture. Therefore, a conservative and reasonable pre-Award interest rate is the cost of debt of a wireless telecommunications operator, as estimated by Mr. Dellepiane and Dr. Spiller.[939] The rationale for using the cost of debt is 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.

V.F. Canada Must Compensate GTH For All Costs Incurred In This Arbitration

451. In the event the Tribunal has determined that it has jurisdiction over this dispute and Canada has breached its obligations under the BIT, GTH respectfully requests that the Tribunal order Canada to pay the entire costs and expenses of the Arbitration, including GTH's legal fees, the fees and expenses of any experts, the fees and expenses of the Tribunal, and ICSID's other costs.

452. The Tribunal's authority to award costs is established by Article 61(2) of the ICSID Convention and Rule 28 of the ICSID Arbitration Rules.[940] If the Tribunal finds that Canada breached its obligations under the BIT, the award of costs is consistent, and in fact required, by the full reparation principle set out in *Chorzów*.[941] GTH would not have brought this Arbitration, and incurred substantial costs and lost time as a result, if Canada had respected its obligations under the BIT. Moreover, GTH objects to the significant cost it has been forced to incur as a result of Canada's unsuccessful application to bifurcate these proceedings, Canada's numerous unmeritorious

939 **CER-Dellepiane/Spiller-2**, Part IV.

940 *See* ICSID Convention, Article 61(2) ("*In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award*."); ICSID Arbitration Rules, Rule 28.

941 *See* **Exhibit CL-169**, *Karkey*, Award, ¶ 1060.

objections to jurisdiction and admissibility, and Canada's burdensome approach to the document disclosure phase.[942] Accordingly, GTH should be awarded its costs and it will submit a formal quantification of its costs at the appropriate phase of these proceedings.

[942] *See* **Exhibit CL-088**, *Burlington*, Decision on Reconsideration and Award, ¶ 620 ("*In the Tribunal's view, the apportionment of costs requires an analysis of all of the circumstances of the case, including to what extent a party has contributed to the costs of the arbitration and whether that contribution was reasonable and justified. This analysis should start by considering whether a party has prevailed on its claims, and if it has prevailed only in part, whether the rejected claims were reasonable or frivolous. It should also take into account the procedural conduct of the parties, and in particular whether such conduct delayed the proceedings or increased costs unnecessarily.*").

VI. REQUEST FOR RELIEF

453. On the basis of the foregoing, without limitation and reserving GTH's right to supplement these prayers for relief, GTH respectfully requests that the Tribunal:

(a) **DECLARE** that Canada has breached its obligations to GTH under the BIT;

(b) **ORDER** Canada to pay GTH US$ 1.807 billion to be updated as of the Date of Award, or other such amount the Tribunal determines to be appropriate;

(c) **ORDER** Canada to pay all of the costs and expenses of the Arbitration, including GTH's legal fees, the fees and expenses of any experts, the fees and expenses of the Tribunal, and ICSID's other costs; and

(d) **AWARD** such other relief as the Tribunal considers appropriate.

454. GTH reserves its right to specify, supplement or amend the factual or legal claims and arguments contained herein, as well as the relief requested.

Dated: 5 November 2018

For and on behalf of Global Telecom Holding S.A.E.

Gibson Dunn & Crutcher LLP

GIBSON, DUNN & CRUTCHER LLP

Public Version

APPENDIX A

KEY TERMS

Short-Form	Additional Short-Forms[1]	Description	Exhibit(s)
GTH and Related Entities			
AAL Holdings	AAL	AAL Holdings Corporation	
Altimo		Altimo Coöperatief U.A.	
GCHO		Globalive Communications Holdings Ontario Inc.	
Globalive		Globalive Communications Corp.	
Globalive Holdco		Globalive Canada Holdings Corp.	
Globalive Investment	GIHC	Globalive Investment Holdings Corp.	
GTH	Claimant	Global Telecom Holding S.A.E. (previously known as Orascom Telecom Holding S.A.E.)	
GTHCL	OTHCL	GTH Global Telecom Holding (Canada) Limited (previously known as Orascom Telecom Holding (Canada) Limited)	
Mojo		Mojo Investments Corp.	
Orascom	OTH	Orascom Telecom Holding S.A.E. (now known as Global Telecom Holding S.A.E.)	
VimpelCom		VimpelCom Ltd. (now known as VEON Ltd.)	
Weather Investments		Weather Investments S.p.A.	
Wind Mobile	GWMC or Wind	Globalive Wireless Management Corp. Wind Mobile currently operates in Canada under the name Freedom Mobile.	

[1] Including short-forms employed in Canada's submissions.

APPENDIX A

KEY TERMS

Short-Form	Additional Short-Forms	Description	Exhibit(s)
Canada and Related Entities			
Canada	Government or Respondent	Government of Canada	
Competition Bureau		Competition Bureau	
CPRP		Competition Policy Review Panel	
CRTC		Canadian Radio-television and Telecommunications Commission	
INDU		House of Commons Standing Committee on Industry, Science and Technology	
Industry Canada	Department	Industry Canada (currently known as Innovation Science and Economic Development Canada)	
IRD		Investment Review Division of Industry Canada	
TPRP		Telecommunications Policy Review Panel	
Minister		Minister of Industry	
GiC		Governor-in-Council	

APPENDIX A

KEY TERMS

Short-Form	Additional Short-Forms	Description	Exhibit(s)
Other Entities			
AAL Consortium		Consortium of investors led by AAL Acquisitions Corp. that purchased Wind Mobile in September 2014	
Accelero		Accelero Capital Management Company Limited	
Bell		Bell Canada or Bell Mobility Inc.	
Birch Hill		Birch Hill Equity Partners Management Inc.	
Clearnet		Clearnet Communications Inc. or Clearnet PCS Inc.	
Incumbent		Rogers, Bell, or Telus	
New Entrant		A new player in Canada's wireless telecommunications industry eligible to bid on set-aside spectrum licenses auctioned during the 2008 AWS Auction and defined as: "*An entity, including affiliates and associated entities, which holds less than 10 percent of the national wireless market based on revenue*."	C-004
Microcell		Microcell Telecommunications Inc. or Microcell Networks Inc.	
Mobilicity		Data and Audio-Visual Enterprises Wireless, Inc.	
MTS Allstream	MTS	MTS Inc. or Allstream Inc.	
Public Mobile		Public Mobile Inc.	
QMI		Quebecor Media Inc	
SaskTel		Saskatchewan Telecommunications Holding Corporation	
Rogers		Rogers Communications Inc.	
Shaw		Shaw Communications Inc.	
Telus		TELUS Communications Company	
Verizon		Verizon Communications Inc.	

APPENDIX A

KEY TERMS

Short-Form	Additional Short-Forms	Description	Exhibit(s)
General			
2008 AWS Auction	2008 AWS-1 Auction	May to July 2008 auction for AWS-1 spectrum licenses	
2014 700 MHz Auction		January 2014 auction for 700 MHz spectrum licenses	
2015 AWS-3 Auction		March 2015 auction for AWS-3 spectrum licenses	
AAL Transaction	AAL Sale	Sale of Wind Mobile to AAL Consortium in September 2014	
AWS	AWS-1	Advanced Wireless Services spectrum licenses auctioned in 2008	
AWS-3		Advanced Wireless Services spectrum licenses auctioned in 2015	
COLs		Terms or conditions of spectrum licenses	
CPC		Client Procedures Circulars	C-090
CRTC Decision		CRTC, *Telecom Decision CRTC 2009-678: Review of Globalive Wireless Management Corp. under the Canadian ownership and control regime*, 29 October 2009	C-015
Five-Year Rollout Period		Five year period during which New Entrants with set-aside spectrum licenses purchased at the 2008 AWS Auction were expected to meet certain minimum roll-out requirements. During this five-year period, New Entrants were subject to a finite five-year restriction on their ability to transfer those set-aside spectrum licenses to an Incumbent.	
Order in Council		Order of the Privy Council and Schedule, P.C. 2009-2008, 10 December 2009	C-017
PCS		Personal Communications Services	
Wind Mobile Licenses		Wind Mobile's set-aside AWS spectrum licenses purchased at the 2008 AWS Auction	C-010
Voting Control Application		GTHCL's application to take voting control of Wind Mobile dated 24 October 2012	C-027

APPENDIX A

KEY TERMS

Short-Form	Additional Short-Forms	Description	Exhibit(s)
Statutes, Legislation & Regulations			
CCAA		*Companies' Creditors Agreement Act*	
Competition Act		*Competition Act*, R.S.C. 1985, c. C-34	R-106
Investment Canada Act	ICA	*Investment Canada Act*, R.S.C. 1985, c. 28, 1st Supp.	R-169 C-009
National Security Review Regulations	National Security Regulations	*National Security Review of Investments Regulations*, SOR/2009-271	C-102
O&C Reviews		Collectively, the reviews conducted by Industry Canada and the CRTC for Wind Mobile's compliance with the ownership and control rules	
O&C Rules		Canada's ownership and control rules contained in the Radiocommunication Regulations and Telecommunications Act. The relevant section of the Radiocommunication Regulations was repealed in February 2014.	C-001 C-046 R-205
Radiocommunication Act		*Radiocommunication Act*, R.S.C. 1985, c. R-2	C-057
Radiocommunication Regulations		*Radiocommunication Regulations*, SOR/96-484	C-001
Telecommunications Act		*Telecommunications Act*, S.C. 1993, c. 38	C-046

APPENDIX A

KEY TERMS

Short-Form	Additional Short-Forms	Description	Exhibit(s)
Select Policy Documents & Reports			
1998 Spectrum Auction Framework		Industry Canada, *Framework for Spectrum Auctions in Canada*, August 1998	C-038
2001 Spectrum Auction Framework	Spectrum Auction Framework	Industry Canada, *Framework for Spectrum Auctions in Canada* (Issue 2), October 2001	C-041
2006 CRTC Report		CRTC, *CRTC Telecommunications Monitoring Report,* July 2006	C-047
2007 CRTC Report		CRTC, *CRTC Telecommunications Monitoring Report*, July 2007	C-056
2008 AWS Auction Framework		Series of documents outlining the key policies and procedures applicable to the 2008 AWS Auction and its prospective participants, including: • Industry Canada, *Consultation on a Framework to Auction Spectrum in the 2 GHz Range including Advanced Wireless Services (DGTP-002-07)*, February 2007 • Industry Canada, *Spectrum Policy Framework for Canada (DGTP-001-07)*, June 2007 • Industry Canada, *Policy Framework for the Auction for Spectrum Licences for Advanced Wireless Services and other Spectrum in the 2 GHz Range*, November 2007 • Industry Canada, *Licensing Framework for the Auction for Spectrum Licences for Advanced Wireless Services and other Spectrum in the 2 GHz Range (DGRB-011-07)*, December 2007 • Industry Canada, *Responses to Questions for Clarifications on the AWS Policy and Licensing Frameworks*, 27 February 2008	C-004 C-005 C-050 C-052 C-062
2008 CRTC Report	CRTC Communications Monitoring Report, 2008	CRTC *Communications Monitoring Report*, 2008 (July 2008)	C-079
2010 Foreign Investment Consultation		Industry Canada, *Opening Canada's Doors to Foreign Investment in Telecommunications – Options for Reform Consultation Paper*, June 2010	C-111

APPENDIX A

KEY TERMS

Short-Form	Additional Short-Forms	Description	Exhibit(s)
2013 Spectrum Licensing Procedure	Licensing Circular, Issue 3	Industry Canada, *Licensing Procedure for Spectrum Licences for Terrestrial Services (CPC-2-1-23, Issue 3)*, August 2013	C-206
2013 Transfer Consultation	Transfer Framework Consultation Paper	Industry Canada, *Consultation on Considerations Relating to Transfers, Divisions and Subordinate Licensing of Spectrum Licences*, March 2013	C-152
2013 Transfer Framework	Transfer Framework	Industry Canada, *Framework Relating to Transfers, Divisions and Subordinate Licensing of Spectrum Licences for Commercial Mobile Spectrum (DGSO-003-13)*, June 2013	C-031
2014 AWS-3 Technical, Policy, and Licensing Framework		Industry Canada, *Technical, Policy and Licensing Framework for Advanced Wireless Services in the Bands 1755-1780 MHz and 2155-2180 MHz (AWS-3) (SPB-007-14)*, December 2014	C-230
700 MHz Auction Licensing Framework		Industry Canada, *Licensing Framework for Mobile Broadband Services (MBS) – 700 MHz Band (DGSA-001-13)*, March 2013	C-154
Arbitration Rules & Procedures		Industry Canada, *Industry Canada's Arbitration Rules and Procedures (CPC-2-0-18, Issue 1),* November 2008	C-090
AWS Auction Consultation	AWS-1 Consultation Paper	Industry Canada, *Consultation on a Framework to Auction Spectrum in the 2 GHz Range including Advanced Wireless Services (DGTP-002-07)*, February 2007	C-050
AWS Auction Licensing Framework	AWS-1 Licensing Framework	Industry Canada, *Licensing Framework for the Auction for Spectrum Licences for Advanced Wireless Services and other Spectrum in the 2 GHz Range (DGRB-011-07)*, December 2007	C-005
AWS Auction Policy Framework	AWS-1 Policy Framework	Industry Canada, *Policy Framework for the Auction for Spectrum Licences for Advanced Wireless Services and other Spectrum in the 2 GHz Range*, November 2007	C-004
AWS Auction Responses to Questions		Industry Canada, *Responses to Questions for Clarifications on the AWS Policy and Licensing Frameworks*, 27 February 2008	C-062

APPENDIX A

KEY TERMS

Short-Form	Additional Short-Forms	Description	Exhibit(s)
Consultation Paper on Revised COLs		Industry Canada, *Proposed Revisions to the Frameworks for Mandatory Roaming and Antenna Tower and Site Sharing*, March 2012	C-121
CPRP Report		Competition Policy Review Panel, *Compete to Win: Final Report*, June 2008	C-076
INDU 2010 Report	Report of the Standing Committee	Standing Committee on Industry, Science and Technology, *Canada's Foreign Ownership Rules and Regulations in the Telecommunications Sector: Report of the Standing Committee on Industry, Science and Technology*, June 2010	C-112
Mandatory Roaming & Tower/Site Sharing COL	COLs on Roaming and Tower/Site Sharing	Industry Canada, *Conditions of Licence for Mandatory Roaming and Antenna Tower and Site Sharing and to Prohibit Exclusive Site Arrangements (CPC-2-0-17, Issue 1)*, November 2008	C-007
Mandatory Roaming & Tower/Site Sharing Notice	Notice No. DGRB-002-08	Industry Canada, *Notice No. DGRB-002-08 – Conditions of Licence for Mandatory Roaming and Antenna Tower and Site Sharing and to Prohibit Exclusive Site Arrangements*, 29 February 2008	C-067
MBS/BRS Policy And Technical Framework		Industry Canada, *Policy and Technical Framework, Mobile Broadband Services (MBS) – 700 MHz Band, Broadband Radio Services (BRS) – 2500 MHZ Band (SMSE-002-12)*, March 2012	C-122
Ownership & Control CPC		Industry Canada, *Canadian Ownership and Control (CPC-2-0-15, Issue 2)*, August 2007	C-058
Revised COLs on Roaming and Tower/Site Sharing		Industry Canada, *Revised Frameworks for Mandatory Roaming and Antenna Tower and Site Sharing (DGSO-001-13)*, March 2013	C-153
Spectrum Licensing Procedure	Licensing Circular	Industry Canada, *Licensing Procedure for Spectrum Licences for Terrestrial Services (CPC-2-1-23, Issue 2)*, September 2007	C-003
Spectrum Policy Framework		Industry Canada, *Spectrum Policy Framework for Canada (DGTP-001-07)*, June 2007	C-052
Tower/Site Sharing Guidelines		Industry Canada, *Guidelines for Compliance with the Conditions of Licence Relating to Antenna Tower and Site Sharing and to Prohibit Exclusive Site Arrangements (GL-06, Issue 1)*, April 2009	C-093

APPENDIX A

KEY TERMS

Short-Form	Additional Short-Forms	Description	Exhibit(s)
TPRP Report		Industry Canada, *Telecommunications Policy Review Panel Final Report,* March 2006	R-080

APPENDIX A

KEY TERMS

Short-Form	Additional Short-Forms	Description	Exhibit(s)
Select Legal Authorities & Concepts			
Articles on State Responsibility		INTERNATIONAL LAW COMMISSION, *Responsibility of States for Internationally Wrongful Acts* (2001)	CL-028
ATI Document		Document received pursuant to Canada's Access to Information Act	
BIT	FIPA or Canada-Egypt FIPA	Agreement Between The Government Of Canada And The Government Of Egypt For The Promotion And Protection Of Investments (signed 13 November 1996, entry into force 3 November 1997)	CL-001 CL-002 CL-003
FET		Fair and equitable treatment obligation contained in Article II(2)(a) of the BIT	
FPS		Full protection and security obligation contained in Article II(2)(b) of the BIT	
ICSID Convention		Convention on the Settlement of Investment Disputes between States and Nationals of Other States	
ICSID Arbitration Rules		Rules of Procedure for Arbitration Proceedings (Arbitration Rules)	
VCLT	Vienna Convention	Vienna Convention on the Law of Treaties (open for signature 23 May 1969; entry into force 27 January 1980)	CL-018