Public Version

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

BETWEEN:

GLOBAL TELECOM HOLDING S.A.E.

Claimant

AND

GOVERNMENT OF CANADA

Respondent

GOVERNMENT OF CANADA

MEMORIAL ON JURISDICTION AND ADMISSIBILITY AND REQUEST FOR BIFURCATION

November 15, 2017

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TABLE OF CONTENTS

I. EXECUTIVE SUMMARY 1

II. INTRODUCTION 4

III. THE TRIBUNAL DOES NOT HAVE JURISDICTION TO HEAR THIS DISPUTE 8

A. The Claimant Bears the Burden of Proving the Tribunal has Jurisdiction to hear this Dispute 8

B. The Tribunal Lacks Jurisdiction *Ratione Personae,* as the Claimant is Not an Investor of Egypt as Required by Article XIII of the FIPA and Article 25 of the ICSID Convention 11

1. Summary of Canada's Position 11

2. To Establish the Tribunal's Jurisdiction *Ratione Personae* under Article 25 of the ICSID Convention and Article XIII of the FIPA, the Claimant Must Establish that it was an "Investor" of Egypt under Article I of the FIPA at the Time it Submitted its RFA 12

3. The Tribunal Lacks Jurisdiction *Ratione Personae* under Article XIII of the FIPA and Article 25 of the ICSID Convention Because the Claimant was not an "Investor" of Egypt when it submitted the RFA 14

(a) The Definition of "Investor" in Article I of the FIPA Excludes Entities That Do Not Have Permanent Residence in Egypt 14

(i) The Ordinary Meaning of Egypt's Definition of "Investor" Requires Permanent Residence in Egypt 15

(ii) The Context of Egypt's Definition of "Investor" Indicates that "Permanent Residence" is Required in Addition to Incorporation in Egypt 18

(iii) The Equally Authentic Arabic Text of the FIPA Supports Canada's Interpretation 19

(b) "Permanent Residence" is an Autonomous Treaty Concept under the FIPA, Referring to the Jurisdiction with which an Entity has the Strongest Attachment and in which it Currently Resides and Intends to Continue Residing 22

(i) The Tribunal Should Interpret "Permanent Residence" as an Autonomous Treaty Concept in Accordance with the Rules of Treaty Interpretation 23

(ii) As an Autonomous Treaty Concept, the Jurisdiction of a Juridical Person's "Permanent Residence" means the Jurisdiction with which it has the Strongest Attachment and in which it Currently Resides and Intends to Continue Residing 27

[redacted]

4. Conclusion 41

C. Article II(4)(b) of the FIPA Deprives this Tribunal of Jurisdiction Over Certain Aspects of the Claimant's Claim 41

1. Summary of Canada's Position 41

2. Decisions by a Party Not to Permit the Acquisition of an Existing Business Enterprise or a Share of Such Enterprise by Investors of the other Party are Excluded from Dispute Settlement Pursuant to Article II(4)(b) of the FIPA 42

(a) The Ordinary Meaning of Article II(4)(b) 42

(i) "Decisions by either Contracting Party not to permit" 44

(ii) "the establishment of a new business enterprise or acquisition of an existing business enterprise or a share of such enterprise" 45

(iii) "by investors or prospective investors" 46

(b) The Context of Article II(4)(b) 46

(c) The Object and Purpose of Article II(4)(b) 48

3. Decisions made pursuant to the ICA Fall Within the Scope of Article II(4)(b) 49

[redacted] Falls within the Ambit of Article II(4)(b) and is thus Excluded from Investor-State Dispute Settlement 54

(a) The Claimant Effectively Alleges that there was a "Decision" within the Scope of Article II(4)(b) 55

[redacted]s a Decision "not to permit…acquisition of an existing business enterprise of share of such enterprise" within the Meaning of Article II(4)(b) 56

5. Conclusion 58

D. The Tribunal Lacks Jurisdiction *Rationae Temporis* Pursuant to Article XIII(3)(d) of the FIPA 58

1. Summary of Canada's Position 58
2. The FIPA Imposes a Strict Three-Year Limitation Period 59
3. Decisions Interpreting Identically Worded Provisions in Other Agreements Provide Guidance to this Tribunal 60
4. Either Actual or Constructive Knowledge is Sufficient to Start the Time Limitation in Article XIII(3)(d) 64
5. The Quantum of Damages Need Not be Known in Order to Establish Requisite Knowledge for Article XIII(3)(d) 65
6. The Claimant's Allegation that the 2009 CRTC Review and the Regulatory Environment for New Entrants are Part of a Pattern of Conduct that Cumulatively Amounts to a Breach does Not Toll the Limitation Period 66
7. The Claimant's Challenge of the 2009 CRTC Review is outside the Limitation Period 70
8. The Claimant's Challenge of Canada's Alleged Failure to Maintain a Favorable Regulatory Framework for New Entrants is Outside the Limitation Period 74
9. Conclusion 78

E. The Tribunal Lacks Jurisdiction to Consider the Claimant's National Treatment Claim, as Canada Excluded the Application of National Treatment Obligations to Investment in Services Pursuant to Article IV(2)(d) of the FIPA and its Annex 78

1. Summary of Canada's Position 78
2. Pursuant to Article IV(2)(d) and its Annex, National Treatment Obligations Do Not Apply to Canada's Treatment of Investors and Investments in Services Sectors 79
   (a) Under Article IV(2)(d), Canada has Reserved the Right, within the Sectors or Matters Listed in the Annex, to Adopt or Maintain Measures or Accord Treatment that would Otherwise be Inconsistent with its National Treatment Obligations 80
   (b) Canada's List in the Annex Associated with Article IV(2)(d) Covers all Services Sectors 82
   (c) Canada's Broad Services Reservation is not Subject to Any Procedural Requirements or Limitations 83
   (d) Canada's Treaty Practice Confirms that Canada Intended to Exclude the Application of the National Treatment Obligation for all Services Sectors under the FIPA 86
3. The Claimant's National Treatment Claims Relate to Investment in the Telecommunications Sector and Therefore Fall within the Scope of the Services Reservation under Article IV(2)(d) and its Annex 91

(a) The Services Exception Applies to the Telecommunications Sector 91

(b) The Claimant's National Treatment Claims Relate to Investment in Telecommunications 93

4. Conclusion 94

IV. THE CLAIMANT LACKS STANDING TO BRING A CLAIM WITH RESPECT TO THE TREATMENT OF WIND MOBILE AND WIND MOBILE'S LICENSES 94

A. Summary of Canada's Position 94

B. A Shareholder Cannot Bring a Claim for Treatment of an Enterprise because Separation of Legal Personality is a General Principle of International Law 95

C. The FIPA Allows a Shareholder to Bring a Claim for Treatment of an Enterprise Only As Set Out in Article XIII(12) of the FIPA 98

D. The Claimant's Claims Concerning Canada's Regulatory Environment To Enhance Competitiveness of New Entrants and Canada's Restrictions on Transfer of Spectrum do Not Involve Treatment of the Claimant 109

E. The Claimant Lacks Standing to Bring Claims Concerning Competitiveness of New Entrants and Claims Concerning Transferability of Wind Mobile's Spectrum Licenses 112

F. Conclusion 112

V. BIFURCATION IS THE MOST FAIR, EFFICIENT, AND ECONOMICAL METHOD OF PROCEEDING WITH THIS ARBITRATION 113

A. Jurisdictional and Admissibility Objections Should Be Considered as a Preliminary Matter if Doing So Will Increase the Fairness, Efficiency, and Economy of the Proceedings 113

B. Bifurcation of Canada's Jurisdictional and Admissibility Objections is the Most Fair, Efficient, and Economic Method of Proceeding 115

VI. ORDER REQUESTED 119

ANNEX - IMPLICATIONS OF JURISDICTION AND ADMISSIBILITY OBJECTIONS WITH RESPECT TO THE CLAIMS IN CLAIMANT'S MEMORIAL A-1

I. EXECUTIVE SUMMARY

1. The foundation of an arbitral tribunal's jurisdiction rests on the consent of the parties before it to arbitrate a particular dispute. The element of consent is essential. Without it, a tribunal has no jurisdiction to rule on the matter before it. In the *Agreement Between the Government of Canada and the Government of the Arab Republic of Egypt for the Promotion and Protection of Investments* (the "Canada-Egypt FIPA" or "FIPA"), each Contracting Party consented to arbitrate investment disputes. However, that consent is not all-encompassing, nor is it unconditional. An investor, as defined in Article I of the FIPA, can only submit certain types of claims to arbitration under the FIPA's dispute settlement procedures, and only if the specific conditions listed in Article XIII of the FIPA are met. These conditions are a fundamental part of the agreement reached by the Contracting Parties.

2. Global Telecom Holding S.A.E. ("GTH" or the "Claimant") has failed to respect the conditions that Canada placed on its consent to arbitration under Article XIII of the FIPA, in several respects.

3. First, the Claimant does not qualify as an investor of Egypt, as defined in Article I(g) of the FIPA. With respect to an investor that is a juridical person, Article I(g) requires not only establishment in accordance with Egyptian law, but also that the entity have permanent residence in Egypt. The Claimant bears the burden of establishing that it qualifies as an investor under the FIPA. It has not done so. Instead, the Claimant has simply asserted that GTH is a joint stock company incorporated in Egypt. [redacted] As Canada noted in its Request for Bifurcation ("RFA") of April 7, 2017, a press release issued by the Claimant on September 21, 2015, makes clear that on that date, several months before the filing of the RFA, the Claimant moved the bulk of its operations from Egypt to the Netherlands. The Claimant has not demonstrated that despite this transfer it was a permanent resident of Egypt at the time of the RFA nor has it addressed the lack of evidence regarding its operations, employees, or assets in Egypt, or its intention to maintain a long-term presence there. This failure to qualify as an investor of Egypt is fatal to the Claimant's claim. The Claimant is not entitled to the protections of the FIPA, or its dispute settlement provisions. Its entire case should be dismissed on this basis alone.

4. Second, the Claimant alleges that Canada breached the FIPA [redacted] At the time it invested in Canada, GTH's investment in Wind Mobile was limited to a non-controlling interest because of Canadian ownership and control requirements. There was no promise that this framework would change, nor was there a guarantee that GTH could ever acquire control of Wind Mobile. More importantly for this Tribunal, decisions by a Contracting Party not to permit the acquisition of an existing business enterprise or a share thereof are excluded from investor-State dispute settlement pursuant to Article II(4)(b) of the FIPA. Canada has not consented to submit to arbitrate disputes with respect to such decisions and thus this Tribunal has no jurisdiction to consider the merits and evidence related to Canada's national security review. A substantial portion of the Claimant's claim relies on this allegation and should be dismissed on this basis.

5. Third, on the face of the Claimant's own pleadings, the Claimant's allegations with respect to the ownership and control review conducted by the Canadian Radio-television and Telecommunications Commission ("CTRC") and Canada's alleged failure to maintain a favourable regulatory framework for new wireless operators ("New Entrants") in the telecommunications sector are untimely. Any claims with respect to these measures, which are legally distinct and separate from the other challenged measures in this arbitration, do not fall within the three-year limitation period for submitting a claim to arbitration, found in Article XIII(3)(d) of the FIPA. The Tribunal is therefore without jurisdiction to consider allegations with respect to these measures, whether they are challenged as stand-alone breaches or as elements of a cumulative breach. A finding in Canada's favour in this regard would also substantially narrow the scope of the Claimant's claim.

6. Fourth, the Claimant's allegation that Canada breached the national treatment obligations in the FIPA falls outside this Tribunal's jurisdiction pursuant to Article IV(2)(d) of the FIPA. That provision excludes the application of Canada's national treatment obligations with respect to any investment in the services sector, including the telecommunications sector. The

[1] Claimant's Memorial, ¶ 195. As the Claimant alleges, [redacted]

allegations that Canada's review of the Claimant's acquisition of control of Wind Mobil was discriminatory are not capable on their face of constituting a breach of the national treatment obligation. A decision in Canada's favour in this regard would result in the entirety of the Claimant's national treatment claim being dismissed with no further need to brief on the merits of this issue.

7. Finally, the Claimant lacks standing to bring claims that relate to treatment of Wind Mobile as a New Entrant in Canada, and to treatment of the spectrum licenses issued to Wind Mobile. The Claimant has attempted to equate treatment of Wind Mobile with treatment of the Claimant, notwithstanding the fact that GTH only held a non-controlling interest in Wind Mobile. It claims damages arising out of the treatment of Wind Mobile. However, under international law, shareholders may not bring a claim for treatment of or damages suffered by an enterprise. The FIPA derogates from this principle but only in certain limited circumstances set out in Article XIII. Article XIII(3) of the FIPA permits an investor to commence arbitration on its own behalf, or, alternatively, Article XIII(12) permits an investor to commence arbitration on behalf of an enterprise if it "owns or controls directly or indirectly" the enterprise. The Claimant has brought its claim pursuant to Article XIII(3). As such, it cannot pursue a claim with respect to treatment of Wind Mobile, or claim for damages suffered by Wind Mobile. A finding that these claims are inadmissible would drastically narrow the factual issues in dispute, the scale of document production, and the number of witnesses and experts that will need to be called, and result in a more efficient arbitration proceeding.

8. The Claimant had ample notice of Canada's jurisdictional and admissibility objections. Yet, despite Canada having filed its Request for Bifurcation on April 7, 2017, the Claimant's Memorial on the Merits and Damages ("Memorial") fails to address any of the serious defects that Canada identified. Despite the fact that the Claimant bears the burden of establishing jurisdiction, the Claimant did not provide any further evidence in its Memorial to establish the Tribunal's jurisdiction *ratione personae*. The Claimant also made no attempt to demonstrate how this Tribunal has jurisdiction *ratione materiae* and *ratione temporis* over certain aspects of its claim. The Claimant also blurs the distinction between treatment accorded to it and measures related to Wind Mobile, and it has not established that its claims for treatment of Wind Mobile are admissible. In sum, the Claimant invites the Tribunal to simply ignore the jurisdictional and

admissibility flaws in its claim and proceed with an examination of the merits and damages. The Tribunal must decline this invitation.

9. Canada's jurisdictional and admissibility objections should be dealt with at a preliminary stage. Doing so would result in a more efficient arbitration that would save the parties the significant time and expense of proceeding to a hearing on the merits. Canada should not be required to spend further time and public funds on merits and damages issues defending a claim for which it has not given its consent to arbitrate. Further, even if only some of Canada's objections are upheld, bifurcation would substantially narrow the scope of the dispute, clarify the points at issue, limit the scope of document production requests and reduce the potentially significant volume of documentary and testimonial evidence that will be adduced by the parties. In doing so, bifurcation will streamline and enhance the efficiency of the proceeding, should the arbitration proceed to a merits and damages phase.

10. Canada asks the Tribunal to consider Canada's jurisdictional and admissibility objections as a preliminary matter, and dismiss the Claimant's claim in its entirety. In the alternative, the Tribunal should dismiss all aspects of the Claimant's claim that are untimely, excluded from dispute settlement, and over which the Claimant has no standing.

II. INTRODUCTION

11. In this submission, Canada does not address the merits of the Claimant's factual assertions and allegations of breach. Thus, despite the Claimant's mischaracterization and misleading portrayal of the facts in its Memorial, in this submission Canada does not set out, or correct, the facts related to the claims, except to the extent that they are relevant to understanding the context of the jurisdictional and admissibility objections. To the extent that certain facts and evidence are relevant to specific preliminary objections, Canada highlights those facts alongside its arguments. However, Canada offers a few introductory remarks on the Claimant's claim in order to assist the Tribunal in its assessment of Canada's jurisdictional and admissibility objections.

12. In 2008, when GTH, then an Egyptian investor, made its investment in Canada, it did so with the clear understanding that it could not own or control Wind Mobile because of the limitations on foreign investment in the telecommunications sector that existed at the time. The requirements for Canadian ownership and control under the *Telecommunications Act* and the

Radiocommunication Regulations were unambiguous and GTH was aware of the applicable telecommunications policy and regulatory framework. It was also aware that Canada's highly-regulated telecommunications sector was dominated by three major players (the "Incumbents"), and that any New Entrants in that sector would face challenges. Success was not guaranteed. Nevertheless, and with full knowledge of these risks, GTH proceeded with its investment in Canada and invested in Wind Mobile.

13. One of the key objectives of Canada's telecommunications policy is to ensure that Canadians have access to "reliable and affordable telecommunications services of high quality".[2] To achieve this objective, Canada has sought to incentivize competition in the telecommunications sector and enable the success of New Entrants in the Canadian market through various mechanisms over the years. However, the Government of Canada has never provided any assurances with respect to the success of New Entrants. To succeed in the Canadian telecommunications sector, a service carrier must continually invest in both spectrum and infrastructure, and adapt to new evolutions in technology. It should expect fierce competition from other carriers, especially from the already established Incumbents. It should also expect that the regulatory framework may evolve. Moreover, a New Entrant should expect that setbacks may arise in the course of trying to establish its presence in the market.

14. After making its investment with full knowledge of these risks, GTH now complains that certain measures taken by Canada caused it to suffer over USD $1.75 billion in damages. To support its claim, the Claimant has weaved a tale regarding its expectations about the Canadian regulatory framework and the reasons for its decision to exit the Canadian market in 2014 and sell its interests in Wind Mobile.

15. The Claimant has chosen, not surprisingly, to gloss over the fact that VimpelCom, a company incorporated in the Netherlands, acquired control of GTH after GTH invested in Canada, and the significance of this fact. The Claimant fails to acknowledge that GTH was no longer the same entity after VimpelCom became its controlling shareholder. Vimpelcom had

[2] **C-046**, *Telecommunications Act*, S.C. 1993, c. 38, s. 7(b).

different corporate priorities, which undoubtedly played into GTH's decision to sell its interests in Wind Mobile.

16. When VimpelCom acquired control of GTH in 2011, the nature of GTH's investment in Wind Mobile did not change: GTH remained a non-controlling shareholder. GTH knew from the start that its ability to acquire control of Wind Mobile depended, amongst other things, on a relaxation of the limitations on foreign investment in the telecommunications sector in Canada, which was not certain. It also knew that any such acquisition of control would be subject to other Canadian laws and regulations. For example, it was always clear that any acquisition of control would not be automatic and would be subject to applicable authorizations and approvals, including the review mechanisms under the *Investment Canada Act* (the "ICA") and the *Competition Act*. The Claimant feigns surprise that its application for control of Wind Mobile was subject to a national security review under the ICA. But the ICA national security review mechanism, which was introduced in 2009 after several years of discussions, applies to all foreign investments in Canada, including investments in the telecommunications sector. It predates the liberalization of foreign ownership rules in the telecommunications sector, as well as VimpelCom's acquisition of GTH.

17. Leaving aside its allegations regarding Canada's national security review, the Claimant's case is, in essence, a challenge to measures taken by Canada to ensure its policy goal of promoting competition in its telecommunications sector. The Claimant's characterization of Canada's efforts and failures in promoting competition are contradictory. On one hand, the Claimant claims that Canada should have done more to regulate roaming and tower and site sharing to ensure that the Incumbents would not stifle competition from New Entrants. On the other hand, the Claimant complains of the 2013 Framework Relating to Transfers, Divisions and Subordinate Licensing of Spectrum Licenses for Commercial Mobile Spectrum and Spectrum Management and Telecommunications (the "Transfer Framework"), which included clarifications with respect to the Minister of Industry's exercise of discretion in reviewing licence transfer applications to avoid a level of spectrum concentration that could be detrimental to the competitive market. The Claimant cherry picks facts and events to suit its narrative. The Claimant's description is inaccurate and presents an incomplete, simplistic and biased picture of

the delicate balance that Canada sought to achieve while promoting competition in the telecommunications sector.

18. Contrary to what the Claimant asserts, the Government of Canada did what it said it would do with respect to mandatory roaming and tower sharing. Further, when spectrum licences were issued to Wind Mobile and other New Entrants at discounted prices, those licences came with specific conditions including, in particular, conditions that restricted transferability for a period of five years and more generally subjected *all* transfers to the Minister of Industry's authorization. The Claimant was aware of these conditions. It was not reasonable for Wind Mobile to expect that it would have an unfettered right to sell spectrum to an Incumbent at the end of the five year moratorium. The very idea is inconsistent with Canada's long-standing policy objective of incentivizing competition in the telecommunications sector – a goal the Claimant was well aware of when it invested.

19. The Tribunal need not, however, delve into witness testimony or documentary evidence related to the merits of the Claimant's claims in order to dismiss all of them on the basis of Canada's jurisdictional and admissibility objections. While Canada denies the allegations put forth by the Claimant, the claim should not proceed in light of the serious jurisdictional and admissibility objections Canada has put forward.

III. THE TRIBUNAL DOES NOT HAVE JURISDICTION TO HEAR THIS DISPUTE

A. The Claimant Bears the Burden of Proving the Tribunal has Jurisdiction to hear this Dispute

20. It is well established in international investment arbitration that a claimant bears the burden of proving all facts necessary to establish a tribunal's jurisdiction. In this regard, "[a]s a party bears the burden of proving the facts it asserts, it is for Claimant to satisfy the burden of proof required at the jurisdictional phase."[3] As the tribunal in *Spence International Investments v. Costa Rica* stated:

> [I]t is for a party advancing a proposition to adduce evidence in support of its case. This applies to questions of jurisdiction as it applies to the merits of a claim, notably insofar as it applies to the factual basis of an assertion of jurisdiction that must be proved as part-and-parcel of a claimant's case. The burden is therefore on the Claimants to prove the facts necessary to establish the Tribunal's jurisdiction.[4]

21. Similarly, as stated by the *ICS Inspection v. Argentina* tribunal:

> The burden of proof for the issue of consent falls squarely on a given claimant who invokes it against a given respondent. Where a claimant fails to prove consent with sufficient certainty, jurisdiction will be declined.[5]

22. This burden extends to all questions of jurisdiction. The same is true for issues of admissibility like standing. As the *Perenco v. Ecuador* tribunal explicitly noted, "[t]he burden of proof to establish the facts supporting its claim to standing lies with the Claimant."[6]

23. The tribunal in *Tulip Real Estate v. Turkey* confirmed that even if a jurisdictional objection is raised by the respondent, the onus is on the claimant to show that jurisdictional requirements

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[3] **RL-038**, *Tulip Real Estate Investment and Development Netherlands B.V. v. Republic of Turkey* (ICSID Case No. ARB/11/28) Decision on Bifurcated Jurisdictional Issue, 5 March 2013, ¶ 48 ("*Tulip Real Estate – Decision on Bifurcated Jurisdictional Issue*").

[4] **RL-039**, *Aaron C. Berkowitz, Brett E. Berkowitz and Trevor B. Berkowitz (formerly Spence International Investments and others) v. Republic of Costa Rica* (ICSID Case No. UNCT/13/2) Interim Award (Corrected), 30 May 2017, ¶ 239 ("*Spence – Interim Award (Corrected)*").

[5] **RL-040**, *ICS Inspection and Control Services Limited (U.K.) v. The Argentine Republic* (UNCITRAL) Award on Jurisdiction, 10 February 2012, ¶ 280 ("*ICS Inspection – Award on Jurisdiction*").

[6] **RL-041**, *Perenco Ecuador Limited v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador* (ICSID Case No. ARB/08/6) Decision on Jurisdiction, 30 June 2011, ¶ 98.

have been satisfied.[7] This was further supported by the *National Gas v. Egypt* tribunal which recently explained that:

> For present purposes, this approach means that the burden of establishing jurisdiction, including consent, lies primarily upon the Claimant. Although it is the Respondent which has here raised specific jurisdictional objections, it is not for the Respondent to disprove the Tribunal's jurisdiction. Under international law, as a matter of legal logic and the application of the principle traditionally expressed by the Latin maxim "*actori incumbit probatio*", it is for the Claimant to discharge the burden of proving all essential facts required to establish jurisdiction for its claims.[8]

24. It is only when a claimant fully discharges its burden of proving the facts necessary to establish jurisdiction that the burden shifts to the respondent to show why, despite the facts proved by the claimant, the tribunal does not have jurisdiction.[9]

25. If 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. The *Fireman's Fund v. Mexico* tribunal noted that it did "not believe that under contemporary international law a foreign investor is entitled to the benefit of the doubt with respect to the existence and scope of an arbitration agreement."[10] As further clarified by the tribunal in *ICS Inspection*:

> [A] State's consent to arbitration shall not be presumed in the face of ambiguity. Consent to the jurisdiction of a judicial or quasi-judicial body under international law is either proven or not according to the general rules of international law governing the interpretation of treaties.[11]

26. The requirement that a State's consent to jurisdiction be clearly and unambiguously ascertained has been long recognized by the International Court of Justice ("ICJ") as well. In the *Mutual Assistance in Criminal Matters* case, the ICJ noted that "consent allowing for the Court to assume jurisdiction must be certain… whatever the basis of consent, the attitude of the

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[7] **RL-038**, *Tulip Real Estate – Decision on Bifurcated Jurisdictional Issue*, ¶ 48.

[8] **RL-042**, *National Gas S.A.E. v. Arab Republic of Egypt* (ICSID Case No. ARB/11/7) Award, 3 April 2014, ¶ 118.

[9] **RL-039**, *Spence – Interim Award (Corrected)*, ¶ 239.

[10] **RL-043**, *Fireman's Fund Insurance Company v. The United Mexican States* (ICSID Case No. ARB(AF)/02/01) Decision on the Preliminary Question, 17 July 2003, ¶ 64.

[11] **RL-040**, *ICS Inspection – Award on Jurisdiction*, ¶ 280.

respondent State must 'be capable of being regarded as 'an unequivocal indication' of the desire of that State to accept the Court's jurisdiction in a 'voluntary and indisputable manner'".[12]

27. Canada and Egypt have offered their advance consent to arbitrate certain investment disputes. However, that consent is not without limits. The Parties have only offered to arbitrate particular types of claims, brought by investors that meet the definition of "investor" under the FIPA, and provided certain conditions are met. Specifically, in Article XIII, Canada and Egypt conditioned their consent on a potential claimant following certain procedures and meeting certain requirements when submitting a claim to arbitration. Article XIII(5) of the FIPA notes that "[e]ach Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration *in accordance with the provisions of this Article*".[13]

28. In order to establish consent to arbitration, the Claimant must show that it has fulfilled all of the requirements in Article XIII, including that the Claimant is an investor of Egypt, that the dispute concerns a breach by a Contracting Party of an obligation under the FIPA as required under Article XIII(2) and that the claim abides by the three-year limitation period defined in Article XIII(3)(d).[14] These conditions on Canada's consent are a fundamental part of the agreement between the Contracting Parties. The Tribunal must be satisfied that the Claimant has proven that it satisfies all of the conditions found in Article XIII.

29. Canada provided the Claimant with full notice of its jurisdictional objections in its Request for Bifurcation and again during the procedural teleconference with the Tribunal on April 21, 2017. Yet, in its Memorial, the Claimant has not even attempted to address Canada's objections. It has completely failed to meet its burden. In the sections below, Canada addresses the

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[12] **RL-044**, *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)* Judgment, I.C.J. Reports, 4 June 2008, ¶ 62.

[13] **CL-001**, *Agreement between the Government of Canada and the Government of the Arab Republic of Egypt for the Promotion and Protection of Investments*, 13 November 1996, Article XIII(5) ("Canada-Egypt FIPA") (emphasis added).

[14] **CL-001**, Canada-Egypt FIPA, Article XIII(2) states "If a dispute has not been settled amicably through consultations within a period of six months from the date on which it was initiated, it may be submitted by the investor to arbitration in accordance with paragraph (4). For the purposes of this paragraph, a dispute is considered to be initiated when the investor of one Contracting Party has delivered notice in writing to the other Contracting Party alleging that a measure taken or not taken by the latter Contracting Party is in breach of this Agreement, and that the investor has incurred loss or damage by reason of, or arising out of, that breach.".

Tribunal's lack of jurisdiction over the Claimant's claim and why it must be dismissed in its entirety.

B. The Tribunal Lacks Jurisdiction *Ratione Personae*, as the Claimant is Not an Investor of Egypt as Required by Article XIII of the FIPA and Article 25 of the ICSID Convention

1. Summary of Canada's Position

30. Canada and the Claimant agree[15] that this Tribunal's jurisdiction must be established under both Article 25 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention") and Article XIII of the FIPA. These provisions delineate Canada's standing consent to arbitrate under each of these treaties. Amongst other things, they require the Claimant to establish that it was an "investor" of Egypt, as defined under Article I of the FIPA, when it submitted the RFA.

31. The definition of an "investor" in Article I of the FIPA requires the Claimant to prove not only that it was "established in accordance with, and recognized as a juridical person by" Egyptian law, but also that it had "permanent residence" in Egypt.[16] [redacted] As such, the Claimant was not an "investor" of Egypt under Article I of the FIPA when it submitted its RFA.

32. Under these circumstances, all of the claims must be dismissed for lack of jurisdiction *ratione personae* under both Article 25 of the ICSID Convention and Article XIII of the FIPA.

[15] *See* Claimant's Memorial, ¶¶ 266-269.

[16] **CL-001**, Canada-Egypt FIPA, Article I.

2. To Establish the Tribunal's Jurisdiction *Ratione Personae* under Article 25 of the ICSID Convention and Article XIII of the FIPA, the Claimant Must Establish that it was an "Investor" of Egypt under Article I of the FIPA at the Time it Submitted its RFA

33. As noted by Professor Douglas, "[t]he tribunal's jurisdiction *ratione personae* extends… to an individual or legal entity… which has the nationality of another of the contracting state parties in accordance with the relevant provision in the investment treaty and the municipal law of that contracting state party and, where applicable, Article 25 of the ICSID Convention."[17]

34. Article 25(1) of the ICSID Convention provides, with respect to jurisdiction *ratione personae*, that "[t]he jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State… and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre." Canada's consent to arbitrate under Article 25 of the ICSID Convention therefore only extends to a Claimant that is a "national" of Egypt for the purposes of that provision.

35. GTH claims that it qualifies as a "national of another Contracting State" under Article 25.[18] The meaning of this phrase is explained in Article 25(2),[19] and the nationality of juridical persons is specifically addressed in Article 25(2)(b). This provision "does not impose any particular test" for determining corporate nationality, and "leaves broad discretion to the Contracting States to define… corporate nationality, under the relevant BIT".[20] However, as Professor Schreuer observes, "any reasonable determination of the nationality of juridical persons contained in national legislation or in a treaty should be accepted by an ICSID commission or tribunal."[21]

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[17] **RL-045**, Zachary Douglas, *The International Law of Investment Claims* (Cambridge: Cambridge University Press, 2009) [Excerpt], p. 284 ("*Douglas*").

[18] *See* Claimant's Memorial, ¶ 279.

[19] **RL-046**, Christoph Schreuer, *The ICSID Convention: A Commentary*, 2d ed. (Cambridge: Cambridge University Press, 2009) [Excerpt], p. 263. Professor Schreuer explains that while "Art. 25(2) undertakes to give a definition of the words 'national of another Contracting State' contained in Art. 25(1)[,] [w]hat follows is not a definition of the concept of nationality. Art. 25(2) merely offers some clarifications on eligible and non-eligible nationalities at certain dates." ("*Schreuer*").

[20] **RL-047**, *KT Asia Investment Group B.V. v. Republic of Kazakhstan* (ICSID Case No. ARB/09/8) Award, 17 October 2013, ¶ 113.

[21] **RL-046**, *Schreuer*, p. 287.

Thus, the definition of "national of another Contracting State" under Article 25(2)(b) must defer to the nationality requirements established by Contracting States in investment treaties.

36. Canada and Egypt have defined the nationality of juridical persons that qualify as "investors" of either Canada or Egypt in Article I of the FIPA. A juridical person must qualify as an "investor" under this definition in order to be considered as a "national of another Contracting Party" under Article 25 of the ICSID Convention. Conversely, a juridical person that does not qualify as an "investor" within the meaning of Article I of the FIPA is not a "national of another Contracting State" within the meaning of Article 25 of the ICSID Convention, over which the Tribunal has jurisdiction *ratione personae* under that treaty.

37. A claimant must also prove that it is an "investor" of Egypt in order to establish Canada's consent to arbitration and a tribunal's jurisdiction *ratione personae* under the FIPA. Pursuant to Article XIII(1), the Contracting Parties only consent to the submission of a "dispute between one Contracting Party and an investor of the other Contracting Party".[22] Only an "investor" of a Contracting Party has standing to submit a dispute to arbitration under Article XIII(2).[23]

38. The Claimant must therefore establish that it was a national of Egypt, as set out in the definition of "investor" of Egypt, at the time of the alleged breaches, and that it continued to qualify as such until the time that it commenced arbitral proceedings,[24] in this case by submitting

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

[23] **CL-001**, Canada-Egypt FIPA, Article XIII(2) ("If a dispute has not been settled amicably through consultations within a period of six months from the date on which it was initiated, it may be submitted by *the investor* to arbitration in accordance with paragraph (4).").

[24] *See* **RL-024**, Zachary Douglas, *The International Law of Investment Claims* (Cambridge: Cambridge University Press, 2009), p. 290 ("The claimant must have had the relevant nationality at the time of the alleged breach of the obligation forming the basis of its claim and continuously thereafter until the time the arbitral proceedings are commenced."). *See also*, **RL-025**, *Société Générale In Respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. v. Dominican Republic* (UNCITRAL) Award on Preliminary Objections to Jurisdiction, 19 September 2008, ¶ 109 (affirming that nationality must be established "at the time of the breach.").

an RFA.[25] If the Claimant did not satisfy this requirement on May 28, 2016, this Tribunal does not have jurisdiction *ratione personae* and the Claimant's entire claim must be dismissed.[26]

3. The Tribunal Lacks Jurisdiction *Ratione Personae* under Article XIII of the FIPA and Article 25 of the ICSID Convention Because the Claimant was not an "Investor" of Egypt when it submitted the RFA

39. As explained below, the Claimant did not meet the nationality requirements of either Article 25 of the ICSID Convention or Article XIII of the FIPA when it filed its RFA because it was not an "investor" as defined in Article I of the FIPA. As such, the Claimant has failed to meet its burden to establish the Tribunal's jurisdiction *ratione personae*.

(a) The Definition of "Investor" in Article I of the FIPA Excludes Entities That Do Not Have Permanent Residence in Egypt

40. The Claimant asserts that it meets the definition of "investor" because it is "a joint stock company established in accordance with Egyptian law."[27] However, this is not sufficient to

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[25] *See* **RL-048**, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No. ARB/97/3) Decision on Jurisdiction, 14 November 2005, ¶ 60 ("[I]t is generally recognized that the determination of whether a party has standing in an international judicial forum, for purposes of jurisdiction to institute proceedings, is made by reference to the date on which such proceedings are deemed to have been instituted. ICSID Tribunals have consistently applied this Rule. More specifically, in ICSID arbitration, the critical date for purposes of determining the nationality of the foreign investor under Article 25(2) of the ICSID Convention is the date of consent, *ie* generally the date when the arbitration is instituted in case of a dispute arising out of a BIT."); **RL-049**, *Ioan Micula and others v. Romania* (ICSID Case No. ARB/05/20) Decision on Jurisdiction and Admissibility, 24 September 2008, ¶ 111 ("Pursuant to Article 25(2)(b) of the ICSID Convention, the relevant date for determining the nationality of the Corporate Claimants is the date of the consent to submit the dispute to ICSID arbitration, i.e., the date of the Request".); **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, ¶ 9.3.4 ("As to the Jurisdiction of the Arbitral Tribunal to adjudicate upon the Request for Arbitration the same must be determined as of the date of the filing of the Request and its registration by the Centre in the present case"); **RL-051**, *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic* (ICSID Case No. ARB/09/1) Decision on Jurisdiction, 21 December 2012, ¶ 255 ("[I]nternational case law has consistently determined that jurisdiction is generally to be assessed as of the date the case is filed".). Canada expressly does not take any position in this Memorial as to the existence of a continuous nationality requirement that extends beyond the date of commencement of arbitral proceedings.

[26] *See* **RL-052**, *Aguas del Tunari, S.A., v. Republic of Bolivia* (ICSID Case No. ARB/02/3) Decision on Respondent's Objections to Jurisdiction, 21 October 2005, ¶ 278 ("[T]he scope of disputes which may be submitted [under the ICSID Convention] is necessarily limited to those disputes that pass through the jurisdictional keyhole defined by Article 25."); **RL-053**, *TSA Spectrum de Argentina S.A. v. Argentine Republic* (ICSID Case No. ARB/05/5) Award, 19 December 2008, ¶ 134 ("Article 25 of the ICSID Convention defines the ambit of ICSID's jurisdiction. In other words, it defines the extent, hence also the objective limits, of this jurisdiction (including the jurisdiction of tribunals established therein) which cannot be extended or derogated from even by agreement of the Parties.").

[27] *See* Claimant's Memorial, ¶ 271.

qualify as an "investor" under the FIPA. The definition of "investor" for juridical persons of Egypt under Article I of the Agreement also requires the Claimant to establish that it has permanent residence in Egypt.

41. Canada's interpretation of the definition of "investor" respects the ordinary meaning of the terms of Article I of the FIPA, in their context, in accordance with Article 31(1) of the *Vienna Convention on the Law of Treaties* ("VCLT").[28] The words "and having permanent residence in the territory of the Arab Republic of Egypt" necessarily require something more than mere incorporation under Egyptian law, or they would not appear in the definition. An interpretation that renders these words inoperable would also be inconsistent with the Contracting Parties' agreement to establish different definitions of "investor" for Egypt and Canada.

(i) The Ordinary Meaning of Egypt's Definition of "Investor" Requires Permanent Residence in Egypt

42. Article I(g) of the FIPA sets out two separate definitions of "investor", one for Canada and one for Egypt. The definition that applies to Egypt provides that "'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."[29] The Egypt-specific definition of "investor" then goes on to define both "natural person" and "juridical person". With respect to the latter, the text states:

> ii. the term "juridical person" means any entity established in accordance with, and recognized as a juridical person by the laws of the Arab Republic of Egypt: such as public institutions, corporations, foundations, private companies, firms, establishments and organizations, *and having permanent residence in the territory of the Arab Republic of Egypt*.[30]

43. The ordinary meaning of this definition is that in order to constitute a "juridical person", covered by Egypt's definition of "investor", an entity must fulfill two requirements. The first requirement is for the entity to be "established in accordance with, and recognized as a juridical

[28] **CL-018**, Vienna Convention on the Law of Treaties, 23 May 1969 (entered into force 27 January 1980) 1155 U.N.T.S. 331, Article 31(1) ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.") ("VCLT").

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

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

person by the laws of the Arab Republic of Egypt". The second requirement is that of "having permanent residence in the territory of the Arab Republic of Egypt." These two requirements are linked by the word "and".

44. The *Oxford English Dictionary* defines "and" as a conjunction that means "[c]oordinating" and "[i]ntroducing a word, phrase, clause, or sentence, which is to be taken side by side with, along with, or in addition to, that which precedes it."[31] The ordinary meaning of "and" therefore indicates that the items in a list are independent and cumulative. The use of "and" before "having permanent residence in the territory of the Arab Republic of Egypt" means that this is a separate and additional requirement to being "established in accordance with, and recognized as a juridical person by the laws of the Arab Republic of Egypt".

45. These two requirements are separated by the phrase "such as public institutions, corporations, foundations, private companies, firms, establishments and organizations". This phrase serves to illustrate types of entities that may be "established in accordance with, and recognized as a juridical person by the laws of the Arab Republic of Egypt". The phrase that follows ("and having permanent residence in the territory of the Arab Republic of Egypt") indicates that not all entities which meet the first requirement will satisfy the definition of "investor". These words indicate that only a sub-category of those entities will qualify as an "investor", even if they are included in the illustrative list.

46. The definition of "investor" of Egypt thus recognizes that not every entity established in accordance with, and recognized under Egyptian law has its permanent residence in Egypt for the purposes of the FIPA. Otherwise, there would be no need to include a permanent residence requirement in the definition of "juridical person". A contrary interpretation, as advocated by the Claimant,[32] would render the words "and having permanent residence in the territory of the Arab

[31] **RL-054**, *Oxford English Dictionary*, 3d ed., online (2008), *s.v.* "and".

[32] The Claimant asserts that "the entities listed" are "examples of entities meeting the definition", which "are understood to have permanent residence in Egypt". Claimant's Submission on Bifurcation, Publication, and Place of Proceeding, ¶ 17. However, this would only be accurate if the list appeared after the words "and having permanent residence in the territory of the Arab Republic of Egypt." The Claimant's assertion that the illustrative list renders those words inoperative has no merit.

Republic of Egypt" purposeless. The principle of effectiveness, or *effet utile*,[33] militates against such an interpretation.

47. The tribunal in *Tenaris and Talta v. Venezuela* applied this principle in determining whether the claimants in that case were "investors" under Venezuela's bilateral investment treaties ("BITs") with Luxembourg and Portugal. Those BITs required juridical persons to demonstrate something more than mere incorporation in the territory of a party in order to qualify as an "investor". The Venezuela-Luxembourg BIT required that the juridical person also have a *siège social* in the territory of the party,[34] while the Venezuela-Portugal BIT required that the juridical person also have its *sede* (Portuguese for seat) in the territory of the party.[35]

48. Interpreting these words as they appeared in the applicable BITs, the *Tenaris and Talta* tribunal held that "if '*siège social*' and '*sede*' are to have any meaning, and not be entirely superfluous, each must connote something different to, or over and above, the purely formal matter of the address of a registered office or statutory seat."[36] This led the tribunal "to apply the other well-accepted meaning of both terms, namely 'effective management', or some sort of

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[33] As held by the tribunal in *Renco Group Inv. v. Republic of Peru*, "the principle of effectiveness (*effet utile*) is broadly accepted as a fundamental principle of treaty interpretation. This principle requires that provisions of a treaty be read together and that 'every provision in a treaty be interpreted in a way that renders it meaningful rather than meaningless (or *inutile*).'" **RL-055**, *Renco Group Inc. v. Republic of Peru* (UNCITRAL) Decision as to the Scope of the Respondent Preliminary Objections Under Article 10.20.4, 18 December 2014, ¶ 177. *See also*, **RL-056**, *Noble Ventures, Inc. v. Romania* (ICSID Case No. ARB/01/11) Award, 12 October 2005, ¶ 50 (holding that "the principle of effectiveness (*effet utile*)… plays an important role in interpreting treaties."); **RL-057**, *Fisheries Jurisdiction Case (Spain v. Canada)* Judgment of 4 December 1998, I.C.J. Reports 1998, p. 432, ¶ 52 (holding that "the principle [of effectiveness] has an important role in the law of treaties and in the jurisprudence" of the ICJ).

[34] The definition of "investors" under the Venezuela-Luxembourg BIT covered "'Companies', that is to say, any legal person constituted in accordance with the laws of the Kingdom of Belgium, the Grand Duchy of Luxembourg or the Republic of Venezuela, **and having its 'siège social' in the territory of the Kingdom of Belgium, the Grand Duchy of Luxembourg or the Republic of Venezuela respectively** and any legal person effectively controlled by an investor covered by paragraphs 1 (a) or (b) that has made an investment in the territory of the other Contracting Party." **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 ("*Tenaris – Award*") (emphasis in original).

[35] The definition of "investor" under the Venezuela-Portugal BIT covered "Legal persons, including commercial companies and other companies or associations, **that have their seat [*sede*] in one of the Contracting Parties** and are constituted pursuant to and function in accordance with the Laws of that Contracting Party." **RL-058**, *Tenaris – Award*, ¶ 115 (emphasis in original).

[36] **RL-058**, *Tenaris – Award*, ¶ 150.

actual or genuine corporate activity."[37] The tribunal noted that its interpretation was grounded in the ordinary meaning of the treaty and supported by the *effet utile* principle:

> This conclusion follows from the simple wording of each Treaty. But as articulated by Venezuela, it is also mandated by the well-established doctrine of "*effet utile*". According to this, the terms of a treaty must if possible be interpreted so that they do not become devoid of effect, or as put by Venezuela:
>
> > "... tribunals and courts [must] interpret the provisions of treaties in a manner to give full weight and effect consistent with the normal sense of the words and with the other parts of the text, and in a manner such that reason and sense will be accorded as much as possible to each part of the text."[38]

49. Applying the principle of *effet utile* recognized in *Tenaris and Talta*, this Tribunal should reject the Claimant's invitation to interpret the words "and having permanent residence in the territory of the Arab Republic of Egypt" in the definition of "investor" as inoperative.[39] The principle of *effet utile* requires these words to be interpreted in accordance with their normal meaning and operation.

(ii) The Context of Egypt's Definition of "Investor" Indicates that "Permanent Residence" is Required in Addition to Incorporation in Egypt

50. The definition of an "investor" of Egypt must be read in the context of the entire definition of "investor", which includes the definition of an "investor" of Canada. Reading these definitions together demonstrates that the permanent residence requirement in the definition of "investor" of Egypt, which is not found in the definition of "investor" of Canada, is meant to capture something more than mere establishment and recognition of a juridical person under domestic laws. Ignoring the permanent residence requirement in the definition of "investor" of Egypt under Article I of the FIPA would be inconsistent with the drafting of an asymmetrical definition of "investor" with different requirements for each Contracting Party.

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[37] *Ibid*.

[38] **RL-058**, *Tenaris – Award*, ¶ 151.

[39] *See* Claimant's Submission on Bifurcation, ¶ 17 (stating that the only "operative part of the definition precedes the colon.").

51. As described above, Article I contains separate and differently worded definitions of "investor" for Canada and Egypt. This indicates that the Contracting Parties did not intend for the same definition of "investor" to apply for each Contracting Party.

52. The Claimant's interpretation ignores the different definitions agreed upon by the Contracting Parties, reading paragraph (b) of the definition of "investor" for Egypt as equivalent to paragraph (b) of the definition of "investor" for Canada. Canada's definition covers "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".[40] It does not include a permanent residence requirement. The Contracting Parties would not have included this requirement in the definition of investor applicable to juridical persons of Egypt if they intended coverage of juridical persons to be the same as for Canada.

53. The use of separate and differently worded definitions (and particularly the reference to "permanent residence" in Egypt's definition) confirms that, for a juridical person of Egypt, mere establishment, such as incorporation, and recognition under Egyptian law is not sufficient to qualify as an "investor" under the FIPA.

(iii) The Equally Authentic Arabic Text of the FIPA Supports Canada's Interpretation

54. The ordinary meaning and context of the Arabic text of the FIPA,[41] which is equally authentic,[42] supports Canada's interpretation of the definition of "investor" in the English text.

55. According to a certified translation, the Arabic text of Article I provides that "in the case of the Arab Republic of Egypt", the definition of "investor" includes "any… juridical person,

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

[41] **RL-059**, *Agreement between the Government of Canada and the Government of the Arab Republic of Egypt for the Promotion and Protection of Investments*, 13 November 1996 (Arabic version – signed), 2025 U.N.T.S. 289, at 290 ("Canada-Egypt FIPA (Arabic version – signed)"), available at: https://treaties.un.org/doc/Publication/UNTS/Volume%202025/v2025.pdf.

[42] **CL-001**, Canada-Egypt FIPA, at p. 15.

including the Government of the Arab Republic of Egypt who invests in the territory of Canada."[43] For the purposes of this definition, "juridical person" translates as follows:

> ii. 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*.[44]

56. The words "and which have permanent residence" in the translated Arabic text are equivalent to "having permanent residence" in the English text, reinforcing that the ordinary meaning of the definition of "investor" for Egypt requires permanent residence in Egypt, in addition to establishment and recognition as a juridical person under Egyptian law.

57. The French text of the definition of *investisseur* is worded slightly different, but it can and should be read consistently with the Arabic and English texts. For Egypt, the definition covers "*toute personne physique ou morale, y compris le gouvernement de la République arabe d'Égypte, qui fait un investissement sur le territoire canadien*".[45] The term "*personne morale*" ("juridical person") is defined as follows:

> ii. 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.*[46]

58. The italicized words translate to "having the right to permanent residence" in Egypt.[47] The French text thus formulates the permanent residence requirement slightly differently than the English text and the Arabic text, referring to "the right to permanent residence" instead of

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[43] **R-001**, Government of Canada, Translation Bureau, Certified Translation (Arabic-English) of **RL-059**, *Agreement Between the Government of Canada and the Government of the Arab Republic of Egypt for the Promotion and Protection of Investments*, 13 November 1996 (Arabic version – signed), 2025 U.N.T.S. 289 at 290 (Nov. 10, 2017).

[44] *Ibid* (emphasis added).

[45] **CL-002**, Canada-Egypt FIPA (French version), Article I.

[46] *Ibid* (emphasis added).

[47] *See* Claimant's Submission on Bifurcation, Publication, and Place of Proceeding, ¶ 15.

"permanent residence". Like the English text, the French text uses the present participle construction "having" ("*ayant*"). The word "and" does not appear in the French text, as it does in the English and Arabic texts. However, these drafting differences do not alter the conclusion that Article I of the FIPA requires an entity to demonstrate permanent residence in Egypt in order to qualify as an "investor" under that Agreement. In order to give the phrase *ayant le droit de résidence permanente* meaning consistent with the English and Arabic texts, it must be interpreted as referring to a right of permanent residence that is being exercised.

59. Pursuant to Article 33(3) of the VCLT, "[t]he terms of the treaty are presumed to have the same meaning in each authentic text."[48] Article 33(4) provides that "[e]xcept where a particular text prevails…, 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."[49]

60. In this case, the application of Article 31 of the VCLT[50] removes any difference between the meaning of the words used in the English, French, and Arabic texts.

61. As with the phrase "and having permanent residence" in English, the phrase "*ayant le droit de residence permanente*" must be placed in its larger context. This context includes the requirement to be "*constituée en conformité avec les lois de la République arabe d'Égypte et reconnue comme personne morale par ces lois*" (that is, "constituted in accordance with the laws of the Arabic Republic of Egypt and recognized as a juridical person by these laws"). The inclusion of the phrase "*ayant le droit de résidence permanente*" in the French text indicates that the Contracting Parties intended for only a subset of entities that meet the first requirement, including a subset of the listed entities ("*les institutions publiques, les personnes morales proprement dites (ou corporations) les fondations, les compagnies privées, les firmes, les établissements et les associations*") to be covered by the definition of "*investisseur*".

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[48] **CL-018**, VCLT, Article 31(3).

[49] **CL-018**, VCLT, Article 31(4).

[50] **CL-018**, VCLT, Article 31(1) ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.").

62. The principle of effectiveness requires the words "*ayant le droit de résidence permanente*" to be interpreted as referring to something additional to "*constituée en conformité avec les lois de la République arabe d'Égypte et reconnue comme personne morale par ces lois*". A right of permanent residence is something that can only be granted by domestic law. Yet, as discussed below, Egyptian law does not recognize a concept of permanent residence for either natural or juridical persons, meaning there is no *right* of permanent residence for legal entities under Egyptian Law.[51] In order for these terms to be given meaning, and be read consistently with the English and Arabic texts, the reference to having a *right* of permanent residence in the French text must be understood as requiring that the entity actually *have* permanent residence in Egypt. The Tribunal should not adopt an interpretation that would render a whole phrase of the definition *inutile* in all three languages or lead to a different outcome under the French text than under the English and Arabic texts, where it is possible to read the texts harmoniously.

(b) "Permanent Residence" is an Autonomous Treaty Concept under the FIPA, Referring to the Jurisdiction with which an Entity has the Strongest Attachment and in which it Currently Resides and Intends to Continue Residing

63. References to the "permanent residence" of juridical persons are relatively rare in international investment agreements. Canada has identified permanent residence requirements for juridical persons in only seven other BITs to which Egypt is a party,[52] and in six BITs to

[51] As attested by Egyptian legal expert, Professor Dr. Mohamed S. Abdel Wahab, the concept of "permanent residence" does not exist under Egyptian law. *See* III.B.3(b)(i) below.

[52] **RL-060**, *Agreement Between the Czech Republic and the Arab Republic of Egypt for the Promotion and Protection of Investments*, 29 May 1993 (entered into force 4 June 1994), Article 1(2)(b); **RL-061**, *Agreement for the Promotion and Protection of Investments Between the Republic of Ghana and the Arab Republic of Egypt*, 11 March 1998 (not in force), Article 1(2); **RL-062**, *Agreement Between the Government of the Arab Republic of Egypt and the Government of the Republic of Latvia for the Promotion and Protection of Investments*, 24 April 1997 (entered into force 3 June 1998), Article 1(2)(b); **RL-063**, *Agreement for the Promotion and Protection of Investments Between the Government of the Arab Republic of Egypt and the Government of the Republic of Malawi*, 21 October 1997 (entered into force 7 September 1999), Article I(1)(b); **RL-064**, *Agreement on the Promotion and Protection of Reciprocal Investments Between the Government of the Democratic Socialist Republic of Sri Lanka and the Government of the Arab Republic of Egypt*, 11 March 1996 (entered into force 10 March 1998), Article 1(2)(b); **RL-065**, *Agreement for the Promotion and Protection of Investments Between the Arab Republic of Egypt and the Republic of Uganda*, 4 November 1995 (not in force), Article 1(2)(b); **RL-066**, *Agreement for the Promotion and Protection of Investments Between the Arab Republic of Egypt and the Republic of Zambia*, 28 April 2000 (not in force), Article 1(3)(B).

which neither Canada nor Egypt is a party.[53] However, no tribunal appears to have opined on these provisions. To Canada's knowledge, this Tribunal will be the first to interpret and apply the concept of "permanent residence" of a juridical person under an international investment treaty.

64. As discussed below, the concept of "permanent residence" in the definition of "investor" under Article I of the FIPA does not refer to Egyptian law, and Egyptian law does not recognize a concept of "permanent residence" in the context of juridical persons. As such, the Tribunal should interpret "permanent residence" as an autonomous treaty concept. Interpreting the concept in accordance with the VCLT suggests that a juridical person's permanent residence is the jurisdiction with which it has the strongest attachment and in which it currently resides and intends to continue residing.

(i) The Tribunal Should Interpret "Permanent Residence" as an Autonomous Treaty Concept in Accordance with the Rules of Treaty Interpretation

65. In determining whether a legal person is a national of a given State, international law has usually looked to the place of incorporation or the place of the seat of the company. States sometimes provide in treaties for different criteria to ascertain the nationality of corporate investors. Here, the FIPA refers to a requirement that the legal entity have its permanent residence in Egypt. However, as Egyptian law does not appear to recognize any concept of "permanent residence" for juridical persons, domestic law is of limited relevance in this case. As

[53] **RL-067**, *Agreement Between the Republic of Albania and the Republic of Slovenia on Reciprocal Promotion and Protection of Investments*, 23 October 1997 (entered into force 22 March 2000), Article 1(3)(b); **RL-068**, *Agreement Between the Government of the Slovak Republic and the Government of the Republic of Croatia on the Promotion and Reciprocal Protection of Investments*, 12 February 1996 (entered into force 6 February 1997), Article 1(2)(b); **RL-069**, *Agreement Between the Czech Republic and the Republic of Albania for the Promotion and Reciprocal Protection of Investments*, 27 June 1994 (entered into force 7 July 1995), Article 1(2)(b); **RL-070**, *Agreement Between the Republic of Croatia and the Czech Republic for the Promotion and Reciprocal Protection of Investments*, 5 March 1996 (entered into force February 1997), Article 1(1)(b); **RL-071**, *Agreement Between the Czech Republic and the Republic of Belarus for the Promotion and Reciprocal Protection of Investments*, 14 October 1996 (entered into force 9 April 1998), Article 1(2)(b); **RL-072**, *Agreement Between the Hashemite Kingdom of Jordan and the Czech Republic for the Promotion and Reciprocal Protection of Investments*, 20 September 1997 (entered into force 25 April 2001), Article 1(2)(b).

such, the Tribunal should interpret the requirement that an entity have permanent residence in Egypt in accordance with the rules of treaty interpretation.[54]

66. As attested by Professor Dr. Mohamed S. Abdel Wahab, a prominent Egyptian lawyer and expert in Egyptian law, "the notion of '*permanent residence*' is not recognized and is non-existent under Egyptian law especially for juridical persons."[55] Professor Dr. Wahab explains that "[u]nder Egyptian law, the two principal connecting factors available to establish a link between a person and Egypt are: '*domicile*' and '*nationality*'."[56] As explained in Dr. Wahab's report, while Egyptian law recognizes both "domicile" and "habitual residence" of natural persons, neither of these concepts is relevant to the concept of "permanent residence" for a juridical person.[57] With respect to the "domicile" of a juridical person, under Egyptian doctrine this notion is interchangeable with that of "siège social".[58] Both of these terms "designate the principal place of management, which generally is the place where all corporate decisions are made."[59]

67. However, the Contracting Parties to the FIPA did not require that an entity be "domiciled" in Egypt, as determined by Egyptian law, in order to qualify as an "investor". Nor did the Contracting Parties simply refer to the corporation's "nationality". Moreover, the Contracting Parties did not choose any other terms such as "principal place of management" and "principal

[54] As stated in a recent resolution of the Institut de Droit International, "[t]he interpretation and application of bilateral and multilateral international instruments for the protection of international investments shall be in accordance with the general rules of international law as reflected in the Vienna Convention on the Law of Treaties." The resolution goes on to state that "[a]rbitral tribunals, when referring to notions defined in municipal law, such as that of nationality or legal personality, shall at the same time respect the relevant rules of international law." **RL-073**, Institut de Droit International, Resolution on the Legal Aspects of Recourse to Arbitration by an Investor Against the Authorities of the Host State under Inter-State Treaties, 18th Commission, 13 September 2013, available at: http://www.idi-iil.org/app/uploads/2017/06/2013_tokyo_en.pdf.

[55] **RER-Zulficar**, ¶ 13.

[56] **RER-Zulficar**, ¶ 16.

[57] **RER-Zulficar**, ¶¶ 39-46.

[58] **RER-Zulficar**, ¶ 49.

[59] **RER-Zulficar**, ¶ 49.

place of business or operation" used in Egyptian law in considering the link between a juridical person and a particular territory within Egypt.[60]

68. Instead, the Contracting Parties referred to a different concept, that of "having permanent residence". Given that "the notion of 'permanent residence' of juridical persons does not exist under Egyptian law and is not regulated thereunder",[61] the words "permanent residence" in the definition of "investor" of Egypt must be understood as an autonomous treaty concept which the Tribunal should interpret in accordance with the rules of treaty interpretation.

69. This approach would also be consistent with other awards interpreting other connecting criteria between an investor and its home State under other BITs, including *Binder v. Czech Republic*,[62] *Tenaris and Talta v. Venezuela*,[63] and *Orascom TMT Investments S.à.r.l. v. Algeria*.[64]

70. The *Binder* tribunal was interpreting the definition of "investor" for natural persons under the Czech-German BIT, which included a requirement to have "permanent residence… within the respective areas to which this Treaty applies".[65] The tribunal held that the concept of permanent residence under that treaty should be interpreted in accordance with international law, rather than domestic law:

> The Czech-German BIT being an international treaty, the Arbitral Tribunal does not find it appropriate to determine the question of permanent residence

[60] *See* **RER-Zulficar**, ¶ 31.

[61] **RER-Zulficar**, ¶ 27.

[62] **RL-074**, *Binder v. Czech Republic* (UNCITRAL) Award on Jurisdiction, 6 June 2007 ("*Binder – Award on Jurisdiction*"). Note that the *Binder* tribunal's award on jurisdiction was set aside by a reviewing Czech court in June 2009. However, a higher court reversed the set-aside decision in July 2010. Although the Czech Republic appealed from the higher court's decision, it appeared to have discontinued those proceedings after prevailing in the arbitration on the merits. The Czech Court decisions are not publicly available. *See* **R-002**, Luke Eric Peterson, Investment Arbitration Reporter, "Czech Court Overturns Jurisdictional Decision in BIT Arbitration" (Sep. 2, 2009), available at: http://www.iareporter.com/articles/czech-court-overturns-jurisdictional-decision-in-bit-arbitration/; **R-003**, Luke Eric Peterson, Investment Arbitration Reporter, "Efforts to Set-Aside Intra-EU BIT Award Likely to be Abandoned, as Czech Government Claims Victory in Arbitration" (Sep. 7, 2011), available at: http://www.iareporter.com/articles/efforts-to-set-aside-intra-eu-bit-award-likely-to-be-abandoned-as-czech-government-claims-victory-in-arbitration/.

[63] **RL-058**, *Tenaris – Award*.

[64] **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 ("*Orascom – Award*").

[65] **RL-074**, *Binder – Award on Jurisdiction*, ¶ 1.

> on the basis of the national law of one of the Contracting Parties. Instead, permanent residence should be considered to be a treaty concept and should as such be given an autonomous meaning and be interpreted according to the principles of the Vienna Convention on the Law of Treaties which provides in Article 31(1) that a treaty shall be interpreted in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose.[66]

71. In *Orascom*, the tribunal held that domestic nationality requirements were not determinative of whether the claimant, a juridical person, was an "investor" of Luxembourg under the BIT between the Belgo-Luxembourg Economic Union and Algeria. That treaty included a requirement that the investor have its "*siège social*" in the territory of Luxembourg, in addition to being constituted in accordance with the law of Luxembourg.[67] The *Orascom* tribunal held:

> … in application of Article 31 of the VCLT, the Tribunal cannot agree that the requirement of *siège social* in Article 1(1)(b) of the BIT refers to domestic nationality requirements. The grammatical and syntactic structure of the provision and the context in which the term *siège social* is employed make it clear that for corporations the BIT provides its autonomous or treaty-specific requirement *ratione personae*.[68]

72. The *Tenaris and Talta* tribunal arrived at a similar conclusion when interpreting the definition of "investors" under the Venezuela-Luxembourg and Venezuela-Portugal BITs. As noted above, the applicable definitions required that an entity have its "*siège social*" or "*sede*" in the relevant State.[69] The tribunal "accept[ed] that the interpretation of the terms '*siège social*' or '*sede*' is a matter of international, not domestic, law."[70] The tribunal noted in this regard that "[w]hereas the concepts of '*citizen*' and corporate '*constitution*' in the Luxembourg Treaty, and '*national*' and '*constitution and functioning*' in the Portuguese Treaty, contain a specific and express *renvoi* to the domestic laws of the parties to the Treaties, the terms '*siège social*' and

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[66] **RL-074**, *Binder – Award on Jurisdiction*, ¶ 74.

[67] **RL-075**, *Orascom – Award*, ¶ 180 ("Pour l'application du présent Accord, 1. le terme « investisseurs » désigne : … b) Les « sociétés », c'est-à-dire, toute personne morale constituée conformément à la législation belge, luxembourgeoise ou algérienne, et ayant son siège social sur le territoire de la Belgique, du Luxembourg ou de l'Algérie.").

[68] **RL-075**, *Orascom – Award*, ¶ 278.

[69] *See* ¶ 47 and fns. 34-35, *supra*.

[70] **RL-058**, *Tenaris – Award*, ¶ 165.

'*sede*' in the respective Treaties do not."[71] The tribunal therefore stated that it would only "consider the municipal law of (in particular) Luxembourg and Portugal, by way of background to its interpretation."[72]

73. As with the concepts of *siège social* in the Venezuela-Luxembourg BIT and seat or *sede* in the Venezuela-Portugal BIT, the concept of "permanent residence" in the FIPA does not contain an express *renvoi* to domestic law. In contrast, the FIPA refers to domestic law with respect to the requirement that the entity be "established in accordance with, and recognized as a juridical person by *the laws of the Arab Republic of Egypt*".[73]

74. Given the absence of an express *renvoi* to Egyptian law in connection with the permanent residence requirement, and the absence of a concept of "permanent residence" of juridical persons under Egyptian law,[74] this Tribunal should interpret "permanent residence" as an autonomous treaty concept, in accordance with the normal rules of treaty interpretation.

(ii) As an Autonomous Treaty Concept, the Jurisdiction of a Juridical Person's "Permanent Residence" means the Jurisdiction with which it has the Strongest Attachment and in which it Currently Resides and Intends to Continue Residing

75. Applying the interpretative approach set out in the VCLT demonstrates that the concept of "permanent residence" refers to the jurisdiction with which an entity has the strongest attachment, and in which it currently resides and intends to continue residing in the future.

76. The *Oxford English Dictionary* defines "permanent" as "[c]ontinuing or designed to continue or last indefinitely without change; abiding, enduring, lasting; persistent. Opposed to *temporary*."[75] As such, in the context of the definition of "investor" of Egypt, the ordinary meaning of the word "permanent" conveys the temporal aspect of an entity's current residence

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[71] *Ibid.*

[72] **RL-058**, *Tenaris – Award*, ¶ 169.

[73] **CL-001**, Canada-Egypt FIPA, Article I (emphasis added).

[74] **RER-Zulficar**, ¶ 38 ("the notion of a juridical person's "permanent residence" does not exist under Egyptian law").

[75] **RL-076**, *Oxford English Dictionary*, 8th ed., *s.v.* "permanent" (emphasis in original).

and its intention to continue residing in Egypt. It conveys an intention to maintain a long-term residence in Egypt. It also conveys a sense of exclusivity: an entity may have residence in multiple States at any given point in time, but only one of those residences can be considered "permanent". That is not to say that the jurisdiction of an entity's permanent residence cannot change, only that an entity may not have permanent residence in more than one State at a time.

77. The word "residence" is typically used in relation to natural persons. In that context, it may refer to "[t]he fact of living or staying regularly at or in a specified place for the performance of official duties, for work".[76] However, in conjunction with the concept of permanence, "residence" is also defined as "[t]he circumstance or fact of having one's permanent or usual dwelling place or home in or at a certain place; the fact of residing or being resident. Also in extended use."[77]

78. The ordinary meaning of the words "permanent" and "residence" thus suggests that "permanent residence" should be assessed with a view to determining where, as a matter of fact, an entity's strongest ties are, and where there is evidence of an intention to continue residing. In the case of a natural person, those ties are related to domestic matters and familial, social and professional relationships. In the case of a juridical person, those ties involve business activities, management and operations.

79. Based on the above, the ordinary meaning of "permanent residence" in a jurisdiction indicates that a juridical person must have strong and enduring ties to that jurisdiction in terms of its business activities, management and operations, and an intention to maintain these ties. Moreover, these ties must be stronger than the entity's ties to any other jurisdiction at the time when the permanence of residence is assessed. To determine whether an entity has permanent residence in one State or another, a tribunal should undertake a holistic factual assessment of the entity's ties with each jurisdiction, and decide which jurisdiction the entity has the strongest ties to. Assessing the strength of those ties will require evidence, for example, of where the entity has its business activities, management, strategic decision making and operations.

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

[77] *Ibid*.

80. This approach is supported by the decisions of international investment tribunals determining the "permanent residence" of natural persons under other BITs. These assessments of whether a natural person is a permanent resident of a given State have tended to focus on the strength of that individual's attachment to the State. For example, interpreting the term "permanent residence" in the context of the Czech-German BIT, the *Binder* tribunal held that "[t]he general purpose of the term… must be considered to be that protection in one State should only be given to investors with a strong attachment to the other State."[78] The tribunal accepted that a person could not be a permanent resident of two States.[79] In assessing whether an investor who was a natural person was a permanent resident of Germany or the Czech Republic, the tribunal stated that "it would have to be determined to which of these States the investor has the strongest attachment."[80]

81. The tribunal in *Uzan v. Turkey* held that the phrase "permanently residing" under the Energy Charter Treaty must be interpreted so as to prevent an investor that was a natural person from establishing residence in multiple jurisdictions in order to avail himself of each State's protections without actually having to reside in that State. The tribunal held:

> The use of "permanently residing" appears to require that a natural person should be both permanently residing in the Contracting Party (a factual requirement), and for such status to be recognised by local domestic law (a legal requirement). Such interpretation avoids a situation whereby a natural person could obtain resident permits from multiple jurisdictions (e.g. by becoming an investor in that state) in order to avail of such state's protections, without actually having to reside within any of those states. The factual and legal connection of the Investor to the Contracting Party is thus of high importance under the ECT.[81]

82. The *Uzan* tribunal thus considered it insufficient that the natural person was legally permitted to reside in a jurisdiction; they needed to permanently reside there as a matter of fact in

[78] **RL-074**, *Binder – Award on Jurisdiction*, ¶ 75.

[79] **RL-074**, *Binder – Award on Jurisdiction*, ¶ 73.

[80] **RL-074**, *Binder – Award on Jurisdiction*, ¶ 75.

[81] **RL-078**, *Cem Cenzig Uzan v. Republic of Turkey* (SCC Case No. V 2014/023) Award on Respondent's Bifurcated Preliminary Objection, 20 April 2016, ¶ 156.

order to qualify for the investment protections available as an investor of that State under the applicable investment treaty.[82]

[redacted]

[82] *Ibid*, ¶ 156 ("The Tribunal decides that there are thus two requirements that a natural person must meet in order to be considered an Investor based on the permanently residing criterion. The ordinary meaning of this Article necessitates a factual and a legal component. Starting with the latter, there is no dispute that this operates a *renvoi* to the domestic law of the Contracting Party. The Tribunal must look to the domestic law of the Contracting Party in question to determine whether the Claimant qualifies as permanently residing in that country in accordance with that law. However, determinations by domestic authorities, while highly persuasive, are not absolutely determinative, and the Tribunal is authorized to examine the underlying facts in order to determine whether the Claimant has permanently resided there in accordance with the applicable domestic law. Regarding the factual component, the Tribunal decides that the structure of the wording 'permanently residing' implies that there must also be a determination that an Investor was actually living permanently in the territory of the Contracting Party.").

[83] Claimant's Memorial, fn. 614.

[84] Claimant's Submission on Bifurcation, Publication, and Place of Proceeding, ¶ 13.

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[145] Request for Arbitration.

[146] Claimant's Submission on Bifurcation, Publication, and Place of Proceeding, ¶ 13.

[147] Claimant's Submission on Bifurcation, Publication, and Place of Proceeding, ¶ 13.

[148] **RER-Zulficar**, ¶¶ 57, 73-79.

[redacted]

C. Article II(4)(b) of the FIPA Deprives this Tribunal of Jurisdiction Over Certain Aspects of the Claimant's Claim

1. Summary of Canada's Position

109. The Claimant alleges that the review of the Claimant's application to acquire control of Wind Mobile under the national security provisions of the ICA is a breach of the FIPA's national treatment, full protection and security and fair and equitable treatment obligations. The Claimant alleges that this review, [redacted], was

arbitrary, without any rational basis and carried out on a discriminatory basis.[149] However, even assuming these allegations are true (which they are not), the Claimant's claim is excluded from dispute settlement pursuant to Article II(4)(b) of the FIPA, which excludes decisions by Canada not to permit the acquisition of an existing business enterprise or a share of such enterprise by investors of Egypt from investor-State dispute settlement. Consequently this Tribunal is without jurisdiction to hear such claims.

2. Decisions by a Party Not to Permit the Acquisition of an Existing Business Enterprise or a Share of Such Enterprise by Investors of the other Party are Excluded from Dispute Settlement Pursuant to Article II(4)(b) of the FIPA

110. Article II of the FIPA contains certain obligations with respect to the establishment, acquisition and protection of investments. However, the express provisions of Article II(4) read in context and in light of their object and purpose make clear that the Contracting Parties protected their discretion not to permit the "establishment of a new business enterprise or acquisition of an existing business enterprise or a share of such enterprise" by investors from the other Contracting Party. They did so by excluding such decisions from dispute settlement. Neither Canada nor Egypt has consented to arbitrate any dispute arising out of such decisions.

(a) The Ordinary Meaning of Article II(4)(b)

111. Under Article II of the FIPA, Canada and Egypt have assumed certain obligations with respect to the establishment, acquisition and protection of investments. Specifically, Article II(2) guarantees that:

> Contracting Parties 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.

[149] In addition, with respect to the allegation that the national security review and ownership and control provisions were discriminatory, as set out in Part III.E below, Canada also maintains that the national treatment obligations are not applicable.

112. Article II(3) further notes that:

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

113. Article II(2) and (3) then provide for fair and equitable treatment and full protection and security of investments, and national treatment and most-favoured nation treatment for investors or prospective investors of each of the Contracting Parties as it relates to the "establishment, acquisition and protection of investors." The Claimant has relied on these provisions to argue that Canada's treatment of [redacted] its application to acquire voting control of Wind Mobile was (i) "unreasonable, arbitrary, non-transparent, and lacking in due process, amounting to an independent breach of Article II(2)(a) of the [FIPA]",[150] (ii) a failure "to grant GTH's investment the legal protection and security to which to which it was entitled" in accordance with Article II(2)(b) of the FIPA,[151] and (ii) a breach of the FIPA's national treatment provision.[152]

114. However, Article II(4)(b) provides that:

> 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.

[150] Claimant's Memorial, ¶ 345.

[151] Claimant's Memorial, ¶¶ 376, 380.

[152] Claimant's Memorial, ¶¶ 387-394. The Claimant has alleged a breach of the national treatment obligations under both Article II and IV of the FIPA. As Canada will demonstrate in this section, and also below in Part III.E, regardless of which national treatment provision the Claimant is relying on, such a claim is outside the jurisdiction of this tribunal.

115. Applying the rules of treaty interpretation found in Article 31(1) of the VCLT,[153] Article II(4)(b) imposes a clear limitation on the jurisdiction of a tribunal to decide alleged violations of Article II(2) and (3).

116. As explained below, the ordinary meaning of this provision leads to the unambiguous conclusion that any decision falling within the ambit of Article II(4)(b) is **not subject to** investor-State dispute settlement under Article XIII of the FIPA. A "decision" 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" is not subject to challenge under the FIPA. Put in terms of the dispute at hand, Canada has not consented to arbitrate any dispute arising out of Canada's decision not to permit the establishment of a new business or acquisition of an existing business enterprise or a share of such enterprises by Egyptian investors or prospective Egyptian investors.

(i) "Decisions by either Contracting Party not to permit"

117. The ordinary meaning of the phrase "decisions by either Contracting Party not to permit" in Article II(4)(b) is straight forward. The *Oxford English Dictionary* defines "decision" as "[t]he action, fact, or process of arriving at a conclusion regarding a matter under consideration; the action or fact of making up one's mind as to an opinion, course of action, etc.; an instance of this."[154] The phrase "to permit" means "[p]ermission or liberty, esp. formally granted, to do a particular thing."[155]

118. A Party makes a decision not to permit the establishment of a new enterprise or acquisition of an existing enterprise or share of such an enterprise, where it does not allow, does not authorize, or does not grant approval of such transactions. As described further below, in

[153] **CL-018**, VCLT, Article 31(1) ("A treaty shall be interpreted in good faith with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.").

[154] **RL-079**, *Oxford English Dictionary*, *s.v.* "decision".

[155] **RL-080**, *Oxford English Dictionary*, *s.v.* "permit".

Canada, decisions not to permit the establishment of a new business or acquisition of an existing business enterprise or a share of such enterprise are made pursuant to the ICA.[156]

(ii) "the establishment of a new business enterprise or acquisition of an existing business enterprise or a share of such enterprise"

119. The second operative element of Article II(4)(b) refers to three types of transactions for which permission can be denied by the Contracting Party: (1) "establishment of a new business enterprise" (2) "acquisition of an existing business enterprise" (3) "acquisition of a share of" an existing business enterprise.

120. The ordinary meaning of the terms "establishment" and "acquisition" can be discerned by turning to their dictionary definition. The term "establishment" is defined in the *Oxford English Dictionary* as "action or means of establishing."[157] The term "establish" is further defined as "[t]o set up on a secure or permanent basis, to found."[158] The term "acquisition" is defined as "[t]he action or an act of acquiring something" or "to buy or obtain (an asset or object) for oneself."[159]

121. Based on these definitions, the "establishment of a new business enterprise" then refers to a scenario when an investor is setting up a new business, for example, by way of incorporation of a new company, investment of funds and physical assets and presence or by other means. The reference to acquisition of an "existing business enterprise or share of such enterprise" presupposes that a business enterprise already exists and that a foreign investor seeks to acquire or obtain the business or a share of such enterprise. Similarly, the acquisition of a share of an existing business enterprise refers to a transaction whereby a part or portion of an existing enterprise is either purchased by an investor or obtained through other means. The terms "acquisition of an existing business enterprise or share of such enterprise" generally refers then

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[156] By specifying that the dispute settlement exclusion applies to Decisions by either Contracting Party, Article II(4)(b) makes the exclusion applicable to both decisions of the Government of Canada as well as decisions of the Government of Egypt. As a result, the language is descriptive and does not refer specifically to the domestic legislation regarding investment review and authorizations in either country.

[157] **RL-081**, *Oxford English Dictionary*, *s.v.* "establishment".

[158] **RL-082**, *Oxford English Dictionary*, *s.v.* "establish".

[159] **RL-083**, *Oxford English Dictionary*, *s.v.* "acquisition".

to all forms of transactions that lead to gaining control or ownership of the enterprise, whether through share transactions, asset transactions or otherwise. For example, obtaining the majority of voting shares of an existing enterprise would therefore qualify either as the "acquisition of shares" of an existing enterprise or the "acquisition of an existing enterprise".

(iii) "by investors or prospective investors"

122. The language in Article II(4)(b) refers to attempts to establish or acquire a business enterprise or share thereof "by investors or prospective investors". The use of the terms "investors" and "prospective investors" reflects the fact that decisions contemplated by Article II(4)(b) can affect investors that currently have no investment but wish to invest in the country as well as existing investors. Such terms are intended then to capture a number of scenarios, for example, where a potential investor is looking to invest in the territory of a Contracting Party for the first time, where an investor has already invested in the territory of a Contracting Party but wishes to make another investment in that country, or 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.

(b) The Context of Article II(4)(b)

123. In accordance with Article 31(1) of the VCLT, terms of Article II(4)(b) must be interpreted in accordance with their contextual ordinary meaning.[160] This necessarily requires that the Tribunal look to the other sub-paragraphs contained in Article II and the overall context of Article II itself. The structure of Article II and the placement of the dispute settlement exclusions in Article II reveal that the Parties wished to comprehensively address in that Article obligations governing decisions that pertain to the establishment and acquisition of investments and any remedies available in respect of those decisions.

124. Article II sets out the obligations and the remedies related to establishment and acquisition decisions. First, the title of Article II is "Establishment, Acquisition and Protection of Investments". This is reflected in the content of the obligations and exclusions set out in paragraphs (1) to (4) of Article II. Article II(1) provides that the Contracting Parties shall

[160] **CL-018**, VCLT, Article 31(1).

encourage favourable conditions for investors of the other Contracting Party to make investments in its territory. Article II(2) requires the Contracting Parties to extend certain protections to these investments when they are made. Article II(3) imposes obligations with respect to the Parties' approval of establishment of a new business enterprise or the acquisition of an existing business enterprise or share of such enterprise. It requires that the Contracting Parties "permit" such transactions by investors or prospective investors on a non-discriminatory basis. Such non-discrimination obligation is subject to certain exceptions set out in the FIPA.[161] Article II(4)(b) then must be interpreted in this context to exclude from investor-State dispute settlement all decisions to permit the establishment of a new business enterprise or the acquisition of an existing business enterprise or share of such enterprise, regardless of whether or not the decisions are subject to obligations under the FIPA.

125. Further, the text of Article II(4)(b) is not limited to excluding the application of certain provisions to these decisions, as is the case elsewhere in the treaty text. For example, Article IV(2) provides that "subparagraph (3)(a) of Article II, paragraph (1) of this Article and paragraphs (1) and (2) do not apply to" certain measures and exceptions. Article VI also contains exceptions from certain provisions. For example Article VI (2) provides that "the provisions of Articles II, III, IV and V of this Agreement do not apply to (a) procurement…". While these exceptions provide for the non-application of certain provisions of the Agreement, Article II(4)(b) does not contain any such limitations. The dispute settlement exclusion therefore applies with respect to any allegation of breach of the Agreement so long as it relates to a decision falling within the scope of Article II(4)(b).

126. Finally, the Claimant argues in its Response to Canada's Request for Bifurcation that a measure must be "not inconsistent with" the FIPA for dispute settlement to be excluded. It does so by reading the requirement in Article II(4)(a) into Article II(4)(b). There is simply no basis for doing so. In fact, the absence of a requirement for consistency with the Agreement in Article II(4)(b), in contrast to Article II(4)(a), highlights that the Parties intended a different scope of application. Reading in the text from one provision into the other should not be permitted.

[161] See for example non-discrimination exceptions in Article IV of the FIPA.

Further, Canada does not seek to rely on Article II(4)(a), making its test irrelevant here. The Tribunal therefore need not turn its mind to that provision.

(c) The Object and Purpose of Article II(4)(b)

127. In accordance with Article 31(1) of the VCLT, the ordinary meaning of Article II(4)(b) must also be read in light of its object and purpose.[162] The 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 without having such decisions challenged by investors (in the case of Article II(4)(b)), or by the other Contracting Party or investors (in the case of Article II(4)(a)) on any grounds. Through Article II(4), the Contracting Parties wanted to reserve their right to make such decisions and avoid second-guessing or review by tribunals of the merit of such decisions. Indeed, States have generally wanted to retain sovereignty over such decisions, which are often sensitive.

128. Most investment treaties therefore contain some form of limitation or exclusion with respect to such decisions. For example, some treaties limit the scope of the treaty so that it does not apply to investors seeking to make investments.[163] Others exclude decisions to authorize the establishment or acquisition of business enterprises, or decisions pursuant to investment review legislation from the scope of the treaty or from dispute settlement. In the FIPA, the Contracting Parties have protected their discretion over decisions to permit the establishment or acquisition of business enterprises by including a dispute settlement exclusion in Article II(4). As discussed further below, this is consistent across all of Canada's investment treaties.[164]

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[162] **CL-018**, VCLT, Article 31(1).

[163] **RL-084**, United Nations Conference on Trade and Development, Admission and Establishment, UNCTAD/ITE/IIT/10 (vol. II), (United Nations, 1999), p. 20 ("Today, the investment control model is the most widely used. The number of BITs that have followed this approach and the wide geographical distribution of regional agreements applying the investment control approach show a broad acceptance of its underlying rationale by many States, namely, that FDI is welcome but remains subject to host State regulation at the point of entry.").

[164] *See* ¶¶ 133-140.

3. Decisions made pursuant to the ICA Fall Within the Scope of Article II(4)(b)

129. The ICA governs foreign investments in Canada through establishment and acquisition, and is the primary mechanism by which foreign investments are reviewed.[165] It contemplates two types of situations where Cabinet Ministers and/or the Governor-in-Council determine whether an investment may proceed: (1) in the case of reviewable transactions, whether or not an investment is likely of net benefit to Canada is determined by the Minister of Industry,[166] and (2) whether or not a foreign investment could be injurious to Canada's national security is jointly examined by the Minister of Industry and the Minister of Public Safety and Emergency Preparedness and determined by the Governor-in-Council.[167]

130. Of importance to this arbitration is the review of investments that may be injurious to national security outlined in Part IV.1 of the ICA which applies in respect of an investment, implemented or proposed, by a non-Canadian:

> (a) to establish a new Canadian business;
>
> (b) to acquire control of a Canadian business in any manner described in subsection 28(1); or
>
> (c) to acquire, in whole or in part, or to establish an entity carrying on all or any part of its operations in Canada if the entity has
>
> (i) a place of operations in Canada,
>
> (ii) an individual or individuals in Canada who are employed or self-employed in connection with the entity's operations, or
>
> (iii) assets in Canada used in carrying on the entity's operations.[168]

131. A "non-Canadian" is defined under the ICA as "an individual, a government or an agency thereof or an entity that is not a Canadian",[169] with an "entity" being further defined as "a

[165] **R-065**, Innovation Science and Economic Development Canada, Annual Report, Investment Canada Act, 2016-17 (Mar. 31, 2017), pp. 2-3.

[166] **C-009**, *Investment Canada Act*, R.S.C. 1985, c. 28, 1st Supp., ss. 14, 16 ("ICA"). The Minister of Heritage is responsible for determinations related to cultural industries.

[167] **C-009**, ICA, s. 25.6.

[168] **C-009**, ICA, s. 25.1.

corporation, partnership, trust or joint venture."[170] As such, when an individual or corporation that is a non-Canadian attempts to establish or acquire control of an existing business within Canada, it may be subject to review,[171] following which the Minister may refer the investment to the Governor-in-Council for a final determination as to whether the investment will be authorized and if so, under what conditions.[172] When the Governor-in-Council determines that directing the non-Canadian "not to implement the investment" is considered advisable in order to protect national security, the investment is not authorized.[173]

132. This is the very type of decision contemplated in Article II(4)(b) of the FIPA. Under Part IV.1 of the ICA, the Ministers and Governor-in-Council make a "decision… not to permit establishment of a new business enterprise or acquisition of an existing business enterprise or a share of such enterprise" if such an investment could be injurious to Canada's national security. These decisions fit squarely within the text of Article II(4)(b) and are not subject to investor-State dispute settlement under the FIPA. Indeed, the above analysis with respect to the ordinary meaning, context and object and purpose of Article II(4)(b) support the conclusion that decisions made pursuant to the ICA with respect to the establishment or acquisition of investments in Canada by non-Canadians are excluded from investor-State dispute settlement.

133. The approach Canada has taken when signing investment treaties or free trade agreements corroborates Canada's consistent intent to exclude from dispute settlement any decision made with respect to the establishment or acquisition of a business enterprise under the ICA. Canada has always sought in all of its trade and investment agreements a broad exclusion for its ICA review process and the result of such review either by explicitly mentioning the ICA or by including language similar to that found in Article II(4)(b). This FIPA is no different.

134. Canada does not want decisions under the ICA, and especially those pertaining to national security which by their very nature are extremely sensitive decisions, to be subject to review by

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[169] **C-009**, ICA, s. 3.

[170] *Ibid.*

[171] **C-009**, ICA, Parts IV and IV.1.

[172] **C-009**, ICA, ss. 25.3(6), 25.4.

[173] **C-009**, ICA, s. 25.4.

an arbitral tribunal. States, not arbitral tribunals, are in a better position to make such decisions. The same holds true in the domestic law scenario. Canada's domestic courts cannot second guess the government's decisions made on the grounds of protecting national security and their underlying considerations. Decisions and orders of the Governor-in-Council and decisions of the Minister under the ICA are final and binding and not reviewable[174] by domestic courts, except in very limited circumstances.[175] By seeking such exceptions and exclusions, Canada sought to ensure that it could continue to review certain foreign investments in Canada without being subject to challenges.

135. This discretion to admit foreign investment in accordance with its domestic law and not have it subject to dispute settlement is reflected in very broad language in all of Canada's FIPAs from the 1990s. For example, Article II of the Canada-Poland FIPA (1990) provides:

> […]
>
> 2. Subject to its laws, regulations and published policies, each Contracting Party shall admit investments of investors of the other Contracting Party.
>
> 3. This Agreement shall not preclude either Contracting Party from prescribing laws and regulations in connection with the establishment of a new business enterprise or the acquisition or sale of a business enterprise in its territory, provided that such laws and regulations are applied equally to all foreign investors. Decisions taken in conformity with such laws and regulations shall not be subject to the provisions of Articles IX or XI of this Agreement.[176]

136. The same provision can be found in the Canada-Russia FIPA (1991),[177] the Canada-Argentina FIPA (1993),[178] and the Canada-Hungary FIPA (1993).[179]

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[174] **C-009**, ICA, s. 25.6.

[175] The only very limited ground for challenge is judicial review under the *Federal Courts Act* – decisions under the ICA are not subject to appeal or to review by any other court. **C-009**, ICA, s. 25.6. Further, remedies are extremely limited. See **R-066**, *Federal Courts Act*, R.S.C., 1985, c. F-7, s. 18.1(3).

[176] **RL-085**, *Agreement Between the Government of Canada and the Government of the Republic of Poland for the Promotion and Reciprocal Protection of Investments*, 6 April 1990 (entered into force 22 November 1990), Can. T.S. 1990 No. 43, Article II ("Canada-Poland FIPA").

[177] **RL-086**, *Agreement Between the Government of Canada and the Government of the Union of Soviet Socialist Republics for the Promotion and Reciprocal Protection of Investments*, 20 November 1989 (entered into force 27 June 1991), Can. T.S. 1991 No. 31, Article II ("Canada-Soviet Union FIPA").

137. In the mid-1990s, the provision was slightly modified to include the language found in this FIPA. For example, the Canada-Ukraine FIPA (1995) notes in Article II(4)(b) that:

> 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.[180]

138. Canada's other FIPAs from that period, namely the Canada-Trinidad and Tobago FIPA (1996),[181] the Canada-Philippines FIPA (1996),[182] the Canada-Latvia FIPA (1995),[183] the Canada-Romania FIPA (1996),[184] the Canada-Armenia FIPA (1999 but signed in 1997),[185] the Canada-Panama FIPA (1998),[186] the Canada-Ecuador FIPA (1997),[187] the Canada-Barbados

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[178] **RL-087**, *Agreement Between the Government of Canada and the Government of the Republic of Argentina for the Promotion and Protection of Investments*, 5 November 1991 (entered into force 29 April 1993), Can. T.S. 1993, No. 11, Article II ("Canada-Argentina FIPA").

[179] **RL-088**, *Agreement Between the Government of Canada and the Government of the Republic of Hungary for the Promotion and Reciprocal Protection of Investments*, 3 October 1991 (entered into force 21 November 1993), Can. T.S. 1993, No. 14, Article II ("Canada-Hungary FIPA").

[180] **RL-026**, *Agreement Between the Government of Canada and the Government of Ukraine for the Promotion and Protection of Investments*, 24 October 1994 (entered into force 24 July 1995), Can. T.S. 1995 No. 23, Article II(4)(b) ("Canada-Ukraine FIPA").

[181] **RL-027**, *Agreement Between the Government of Canada and the Government of Trinidad and Tobago for the Reciprocal Promotion and Protection of Investments*, 11 September 1995 (entered into force 8 July 1996), Can. T.S. 1996 No. 22, Article II(4)(1) and (2) ("Canada-Trinidad and Tobago FIPA").

[182] **RL-089**, *Agreement Between the Government of Canada and the Government of the Republic of the Philippines for the Promotion and Reciprocal Protection of Investments*, 9 November 1995 (entered into force 13 November 1996), Can. T.S. 1996 No. 46, Article II(4) and (5) ("Canada-Philippines FIPA").

[183] **RL-090**, *Agreement Between the Government of Canada and the Government of the Republic of Latvia for the Promotion and Protection of Investments*, 26 April 1995, entered into force 27 July 1995, Can. T.S. 1995 No. 19, Article II(4)(a) and (b) (later amended) ("Canada-Latvia FIPA").

[184] **RL-091**, *Agreement Between the Government of Canada and the Government of the Republic of Romania for the Promotion and Reciprocal Protection of Investments*, 17 April 1996, entered into force 11 February 1997, Can. T.S. 1997 No. 47, Article II(4)(a) and (b) (later amended) ("Canada-Romania FIPA").

[185] **RL-028**, *Agreement Between the Government of Canada and the Government of the Republic of Armenia for the Promotion and Protection of Investments*, 8 May 1997 (entered into force 29 March 1999), Can. T.S. 1999 No. 22, Article II(4)(1) and (2) ("Canada-Armenia FIPA").

[186] **RL-092**, *Treaty Between the Government of Canada and the Government of the Republic of Panama for the Promotion and Protection of Investments*, 12 September 1996 (entered into force 13 February 1998), Can. T.S. 1998 No. 35, Article II(4)(1) and (2) ("Canada-Panama FIPA").

[187] **RL-093**, *Agreement Between the Government of Canada and the Government of the Republic of Ecuador for the Promotion and Reciprocal Protection of Investments*, 29 April 1996 (entered into force 6 June 1997, terminated 19 May 2017), Can. T.S. 1997 No. 25, Article II(4)(1) and (2) ("Canada-Ecuador FIPA").

FIPA (1997),[188] and the Canada-Venezuela FIPA (1998) ,[189] all contain the same exclusion from dispute settlement.

139. Further, the Canada-Uruguay FIPA (1999),[190] the Canada-Costa Rica FIPA (1999),[191] the Canada-Lebanon FIPA (1999),[192] and the Canada-Croatia FIPA (2001)[193] all contain an exclusion from dispute settlement which reproduces virtually the same broad language as Article II(4) of the FIPA. For example, Annex I, Article VI(1) and (2) of the Canada-Costa Rica FIPA (1999) (entitled "Exclusions from Dispute Settlement (Establishment)") provides:

> 1. Decisions of a Contracting Party as to whether or 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 of the other Contracting Party shall not be subject to dispute settlement under Article XII [Settlement of Disputes between an Investor and the Host Contracting Party] of this Agreement.
>
> 2. Further to paragraph (1), decisions by a Contracting Party pursuant to a pre-existing non-conforming measure described in Article II (1) (b) of this Annex as to whether or not to permit an acquisition shall, in addition, not be subject to dispute settlement under Article XIII [Disputes between the Contracting Parties].[194]

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[188] **RL-094**, *Agreement Between the Government of Canada and the Government of Barbados for the Reciprocal Promotion and Protection of Investments*, 29 May 1996 (entered into force 17 January 1997), Can. T.S. 1997 No. 4, Article II(4)(a) and (b) ("Canada-Barbados FIPA").

[189] **RL-095**, *Agreement Between the Government of Canada and the Government of the Republic of Venezuela for the Promotion and Protection of Investments*, 1 July 1996 (entered into force 28 January 1998), Can. T.S. 1998 No. 20, Article II(3) ("Canada-Venezuela FIPA").

[190] **RL-096**, *Agreement Between the Government of Canada and the Government of the Eastern Republic of Uruguay for the Promotion and Protection of Investments*, 29 October 1997 (entered into force 2 June 1999), Can. T.S. 1999 No. 31, Article VI(1) and (2) ("Canada-Uruguay FIPA").

[191] **RL-097**, *Agreement Between the Government of Canada and the Government of the Republic of Costa Rica for the Promotion and Protection of Investments*, 18 March 1998 (entered into force 29 September 1999), Can. T.S. 1999 No. 43, Article VI(1) and (2) ("Canada-Costa Rica FIPA").

[192] **RL-098**, *Agreement Between the Government of Canada and the Government of the Lebanese Republic for the Promotion and Protection of Investments*, 11 April 1997 (entered into force 19 June 1999), Can. T.S. 1999 No. 15, Article VI(1) and (2) ("Canada-Lebanon FIPA").

[193] **RL-099**, *Agreement Between the Government of Canada and the Government of the Republic of Croatia for the Promotion and Protection of Investments*, 3 February 1997 (entered into force 30 January 2001), Can. T.S. 2001 No. 4, Annex I, Article VI(1) and (2) ("Canada-Croatia FIPA").

[194] **RL-097**, Canada-Costa Rica FIPA, Annex I, Article VI(1) and (2).

140. Other treaties signed by Canada have specifically referred to the ICA when the exclusion was specific to Canada. This includes the Canada-Thailand FIPA (1998)[195] and the North American Free Trade Agreement ("NAFTA").[196] However, the use in some treaties of provisions drafted in more generic terms to extend application to both Contracting Parties, does not change the fact that the language in all of Canada's FIPAs was intended to cover decisions pursuant to reviews under the ICA. The approach Canada has taken when signing other investment treaties or free trade agreements confirms that it has always been the intention of Canada to exclude from investor-State dispute settlement any decision made with respect to the establishment or acquisition of a business enterprise under the ICA.

4. [redacted] Falls within the Ambit of Article II(4)(b) and is thus Excluded from Investor-State Dispute Settlement

141. For the purposes of ascertaining jurisdiction, the relevant facts surrounding the Claimant's arguments with respect to Canada's National Security Review are relatively straight forward and the Tribunal can assume that all the facts pled by the Claimant with respect to this issue are true. As the Claimant notes, on October 24, 2012, GTH Global Telecom Holding Canada Limited ("GTHCL"), a company it indirectly controlled and wholly owned, submitted an application under the ICA to the Investment Review Division ("IRD") of Industry Canada for the proposed acquisition of Wind Mobile.[197] The application proposed the acquisition of control of Wind Mobile through the conversion of non-voting shares to voting shares.[198] This application triggered Part IV.1 of the ICA, which, as described above, allows for the review of proposed

[195] **RL-100**, *Agreement Between the Government of Canada and the Government of the Kingdom of Thailand for the Promotion and Protection of Investments*, 17 January 1997 (entered into force 24 September 1998), Can. T.S. 1998 No. 29, Article II(4) ("Canada-Thailand FIPA").

[196] **RL-101**, *North American Free Trade Agreement*, U.S.-Can.-Mex., 1 January 1994, Article 1138 (as supplemented by its Annex 1138.2) ("NAFTA").

[197] Claimant's Memorial, ¶ 182 [redacted]

[198] [redacted]

investments and permits their refusal on the basis of national security concerns.[199] By submitting its application under the ICA, as it was required to do by law, the Claimant was prohibited from implementing its investment until it obtained approval from the Minister.[200]

142. [redacted]

143. The Claimant now alleges in its Memorial that Canada breached the FIPA's national treatment, fair and equitable treatment and full protection and security provisions [redacted] on the pretext of an arbitrary national security review."[203] It notes on numerous occasions that the [redacted] breached the FIPA. However, such an allegation is outside the scope of dispute settlement as contemplated in Article XIII of the FIPA pursuant to Article II(4)(b).

(a) The Claimant Effectively Alleges that there was a "Decision" within the Scope of Article II(4)(b)

144. As the Claimant explains in its Memorial, [redacted]

[199] Claimant's Memorial, ¶ 183 [redacted]

[200] **C-009**, ICA, ss. 16(1) and 25.2(2).

[201] [redacted] Claimant's Memorial, ¶ 205.

[202] [redacted] Claimant's Memorial, ¶ 206.

[203] Claimant's Memorial, Heading VII.A.3.

[204] Claimant's Memorial, ¶ 359.

[205] Claimant's Memorial, ¶ 360.

[redacted] Assuming that this allegation is true for the purpose of the jurisdictional objection, it would be a "decision" within the meaning of Article II(4)(b).

145. Further, [redacted], the Claimant's allegations must certainly be rejected: only measures of the Government of Canada that are in breach of the Agreement and cause loss or damage to the investor can be challenged. [redacted]

(b) [redacted] is a Decision "not to permit…acquisition of an existing business enterprise of share of such enterprise" within the Meaning of Article II(4)(b)

146. As noted above, Part IV.1 of the ICA applies in respect of an investment, implemented or proposed, by a non-Canadian to:

> (a) to **establish** a new Canadian business;

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[206] [redacted] Claimant's Memorial, ¶ 205.

[207] [redacted]

[208] Claimant's Memorial, ¶ 206.

[209] Claimant's Memorial, ¶¶ 169, 182-208.

[210] The dispute settlement exclusion under Article II(4)(b) cannot be circumvented because an investor [redacted]. Allowing an investor to challenge Canada's decision to review in that circumstance would be contrary to the object and purpose of the provision.

> (b) to **acquire** control of a Canadian business in any manner described in subsection 28(1); or
>
> (c) to **acquire**, in whole or in part, or to establish an entity carrying on all or any part of its operations in Canada if the entity has
>
> (i) a place of operations in Canada,
>
> (ii) an individual or individuals in Canada who are employed or self-employed in connection with the entity's operations, or
>
> (iii) assets in Canada used in carrying on the entity's operations.[211]

147. This provision, which sets out the scope of the national security review under the ICA, refers to the establishment of a new Canadian business and the acquisition of an existing Canadian business, and mirrors the language in Article II(4)(b) of the FIPA. Section 28(1) of the ICA further provides that a non-Canadian can acquire control of a Canadian business by "the acquisition of voting shares of a corporation incorporated in Canada carrying on the Canadian business."[212] This acquisition of voting shares leading to control of an existing Canadian business enterprise can take place through the conversion of non-voting shares to voting shares.

[redacted]

[211] **C-009**, ICA, s. 25.1 (emphasis added).

[212] **C-009**, ICA, s. 28(1)(a).

[213] [redacted] **R-067**, 4-traders, article, *Orascom Telecom Holdings (S.A.E.): Orascom Telecom Holding to convene its Ordinary General Assembly and Extraordinary General Assembly*, (Oct. 21, 2012). Available at: http://www.4-traders.com/ORASCOM-TELECOM-HOLDINGS-6491753/news/Orascom-Telecom-Holdings-S-A-E-Orascom-Telecom-Holding-to-convene-its-Ordinary-General-Asse--15411095/.

[214] Claimant's Memorial, ¶ 213 ([redacted]; Claimant's Memorial, ¶ 182 [redacted] Claimant's Memorial, ¶ 394 [redacted]

[redacted] Given this, any challenge of that decision cannot be subject to investor-State dispute settlement under the FIPA and this Tribunal is without jurisdiction over such a claim.

5. Conclusion

148. Decisions by Canada not to permit the acquisition of an existing business enterprise by investors of Egypt were specifically excluded from the scope of Canada's consent pursuant to Article II(4)(b). As such, the Claimant's allegations with respect to the national security review triggered by its application to assume voting control of Wind Mobile are not subject to investor-State dispute settlement and any claims in this regard are outside this Tribunal's jurisdiction.

D. The Tribunal Lacks Jurisdiction *Rationae Temporis* Pursuant to Article XIII(3)(d) of the FIPA

1. Summary of Canada's Position

149. The FIPA limits the Tribunal's temporal jurisdiction to claims brought within three years of the alleged breach and damages. Two of the four measures GTH challenges in this arbitration fall outside of this limitation period and thus are beyond the scope of the Tribunal's temporal jurisdiction: the CRTC's ownership and control review of Wind Mobile and the Government of Canada's alleged failure to ensure a level playing field for New Entrants.

150. In a blatant attempt to by-pass the strict three-year limitation period, the Claimant alleges that these two measures amount to a breach when "considered cumulatively" with the Transfer Framework that prevented the sale of its set-aside spectrum licenses to incumbents as well as with the Government of Canada's national security review of its application to gain voting control over Wind Mobile.[215] When considered cumulatively, according to GTH, the two measures "in total amount to a separate and cumulative breach"[216] of Canada's treaty obligations. In essence, the Claimant is attempting to cure the jurisdictional defect highlighted by Canada in its Request for Bifurcation[217] by bootstrapping time-barred measures to separate and distinct

[215] Claimant's Memorial, ¶¶ 24(a) and (b), 301(c).

[216] Claimant's Memorial, ¶ 301(c).

[217] Request for Bifurcation, ¶¶ 48-61.

measures that are within the Tribunal's temporal jurisdiction. As more fully explained below, the four measures GTH complains of in this arbitration are distinct measures that this Tribunal must consider separately for the purposes of ascertaining its jurisdiction *rationae temporis*.

151. Both the CRTC Review and measures with respect to New Entrants were adopted well before the critical date of May 28, 2013, three years before the filing of the RFA on May 28, 2016. It is equally clear that GTH knew, or should have known, that it would incur the alleged loss or damage as a result of these measures before the cut-off date of May 28, 2013. The Claimant's allegations with respect to these measures should accordingly be dismissed at the outset and the Claimant's attempt to circumvent the strict three-year limitation period should be rejected.

2. The FIPA Imposes a Strict Three-Year Limitation Period

152. Article XIII(5) of the FIPA provides Canada's consent to arbitrate disputes arising out of the FIPA "in accordance with the provisions of [that] Article".[218] One of those provisions, Article XIII(3)(d), places a strict limitation on *when* an investor may submit a dispute to arbitration. A Claimant may only submit a dispute to arbitration, and a Tribunal can only assume jurisdiction over the dispute, if no more than three years have elapsed since the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and of loss or damage arising out of that breach. If this condition has not been met, Canada has not consented to arbitrate and, as a consequence, a Tribunal cannot exercise its jurisdiction over a dispute.[219]

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

[219] Article XIII(3) refers to other conditions which must also be met: "An investor may submit a dispute as referred to in paragraph (1) to arbitration in accordance with paragraph (4) only if: a. the investor has consented in writing thereto; b. the investor has waived its 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; c. if the matter involves taxation, the conditions specified in paragraph 5 of Article XII have been fulfilled; and d. not more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.".

153. Article XIII(3)(d) of the FIPA indicates:

> 3. An investor may submit a dispute as referred to in paragraph (1) to arbitration in accordance with paragraph (4) only if:
>
> […]
>
> (d) not more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.

154. Accordingly, 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.

3. Decisions Interpreting Identically Worded Provisions in Other Agreements Provide Guidance to this Tribunal

155. While no arbitral tribunal has interpreted the language in Article XIII(3)(d) of the FIPA, decisions of tribunals interpreting identical language under other trade agreements and BITs can provide guidance to this Tribunal. For example, Articles 1116(2) and 1117(2) of the NAFTA contain identical wording to that found in Article XIII(3)(d) of the FIPA. Therefore, decisions of tribunals established under that agreement are of particular relevance to this dispute.

156. Numerous NAFTA tribunals have reiterated that the standard articulated in Articles 1116 and 1117 is a strict limitations period that forms one of the fundamental bases of Canada's consent to arbitrate disputes under NAFTA Chapter Eleven, which covers investment. The same is true for Article XIII(3)(d) of the FIPA. As the *Feldman v. Mexico* tribunal stated:

> [T]he Arbitral Tribunal stresses that, like many other legal systems, NAFTA Articles 1117(2) and 1116(2) introduce a clear and rigid limitation defense, which, as such, is not subject to any suspension, prolongation or other qualification. Thus the NAFTA legal system limits the availability of arbitration within the clear-cut period of three years…[220]

[220] **RL-030**, *Marvin Roy Feldman Karpa v. United Mexican States* (ICSID Case No. ARB(AF)99/1) Award, 16 December 2002, ¶ 63 (emphasis added) ("*Feldman – Award*"). *See also*, **RL-034**, *Corona Materials, LLC v. Dominican Republic* (ICSID Case No. ARB(AF)/14/3) Award on the Respondent's Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR CAFTA, 31 May 2016, ¶¶ 192, 199 (citing the *Feldman*

157. The ordinary meaning of NAFTA Chapter Eleven's time limitation for filing a claim has been succinctly described by Professor Michael Reisman:

> It takes great effort to misunderstand Article 1116(2). It establishes that the challenge of the compatibility of the measure must be made within three years of *first* acquiring (i) knowledge of the measure and (ii) that the measure carries economic cost for those subject to it. If the challenge is not made within those three years, it is time-barred.[221]

158. In short, as with Canada and Egypt under the FIPA, the NAFTA Parties do not consent to arbitrate claims submitted to arbitration after the expiry of the three-year limitations period, and a NAFTA Chapter Eleven tribunal has no jurisdiction *rationae temporis* over such untimely claims. Consent to arbitrate then only exists if the limitation period has been respected.

159. Several NAFTA Chapter Eleven tribunals have dismissed claims on this basis. For example, in *Grand River Enterprises Six Nations Ltd. v. United States*, the claimant commenced a NAFTA Chapter Eleven arbitration on March 12, 2004, alleging breaches arising from a 1998 tobacco litigation Master Settlement Agreement ("MSA") and subsequent State actions taken pursuant to the MSA.[222] The United States challenged the tribunal's jurisdiction over the claim on the ground that it was time-barred by Article 1116(2). The *Grand River* tribunal agreed with the United States, finding that claims based on the MSA were untimely.[223] In its award, the tribunal confirmed that Articles 1116(2) and 1117(2) impose a strict three-year limitations period on claims under Chapter Eleven.[224]

Award with approval in interpreting the equivalent three-year limitations period in the DR-CAFTA as "strict" and not susceptible to suspension or tolling ("*Corona – Award on Preliminary Objections*").

[221] **RL-102**, *Merrill & Ring Forestry L.P. v. Canada* (UNCITRAL) Opinion of W. Michael Reisman with Respect to the Effect of NAFTA Article 1116(2) on Merrill & Ring's Claim, 22 April 2008, ¶ 28 (emphasis in original) ("*Merrill & Ring – Reisman Opinion*").

[222] **RL-031**, *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America* (UNCITRAL) Decision on Objections to Jurisdiction, 20 July 2006, ¶ 24 ("*Grand River – Decision on Objections to Jurisdiction*").

[223] **RL-031**, *Grand River – Decision on Objections to Jurisdiction*, ¶¶ 103-104. The only claim it reserved for consideration on the merits was one based on separate and distinct legislation adopted by individual states after March 12, 2001 (i.e., within the applicable three-year limitation period).

[224] **RL-031**, *Grand River – Decision on Objections to Jurisdiction*, ¶ 29.

160. More recently, in *Apotex Inc. v. United States* the tribunal agreed with the United States that the claimant's allegation that a decision by the United States Food and Drug Administration ("FDA") that prevented Apotex from bringing its drug to market was time-barred under Article 1116(2) of the NAFTA.[225] The claimant in that case commenced the arbitration on June 4, 2009.[226] However, the administrative decision challenged by the claimant had been issued by the FDA more than three years earlier, on April 11, 2006. As such, the tribunal concluded that "all claims based exclusively upon the FDA decision of 11 April 2006 are time-barred, and therefore must be dismissed."[227]

161. Similarly, the tribunal in *Bilcon v. Canada* found that certain decisions and actions by government officials relating to the claimants' investments in a proposed quarry could not form the basis of a NAFTA claim because they fell outside of the three-year limitations period set out in Article 1116, despite the claimants arguing that such actions were part of a continuing course of conduct.[228] The claimants in *Bilcon* commenced that arbitration on June 17, 2008.[229] However, the tribunal found that some of the breaches they alleged arose prior to the beginning of the three-year time period starting on June 17, 2005.[230] These included decisions with respect to an application to the Nova Scotia Department of Environment and Labour for a blasting permit, which expired on May 1, 2004, and a decision to refer the project to a joint review panel for an environmental assessment process, which was made on August 7, 2003.[231] The *Bilcon* tribunal took the view, therefore, that "as regards the breaches identified by the Investors that

[225] **RL-032**, *Apotex Inc. v. United States of America* (UNCITRAL) Award on Jurisdiction and Admissibility, 14 June 2013, ¶¶ 314-335 ("*Apotex – Award on Jurisdiction and Admissibility*").

[226] **RL-032**, *Apotex – Award on Jurisdiction and Admissibility*, ¶ 3.

[227] **RL-032**, *Apotex – Award on Jurisdiction and Admissibility*, ¶ 324.

[228] **RL-033**, *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Canada* (UNCITRAL) Award on Jurisdiction and Liability, 17 March 2015, ¶¶ 258-282 ("*Bilcon – Award*").

[229] **RL-033**, *Bilcon – Award*, ¶ 41.

[230] **RL-033**, *Bilcon – Award*, ¶ 281.

[231] **RL-033**, *Bilcon – Award*, ¶ 267.

arose prior to the beginning of the three-year period starting on 17 June 2005, the corresponding claims must be considered time-barred."[232]

162. Simply put, Canada does not consent to arbitrate claims that fall outside the applicable limitations period. The three-year time limitation period under NAFTA Articles 1116(2) and 1117(2) commences on the date when the investor (or enterprise) first acquired, or should have first acquired, knowledge of the alleged breach. NAFTA tribunals have found that failure to comply with the time limitation period deprives a tribunal of jurisdiction.[233] The same is true for the FIPA. The Contracting Parties have only agreed to arbitrate claims that fall within the limitation period stipulated in the FIPA. The 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.[234] As explained below, in this case, the three-year limitation period under Article XIII(3)(a) has long since

[232] **RL-033**, *Bilcon – Award*, ¶ 281.

[233] *See for example*, **RL-103**, *Methanex Corporation v. United States of America* (UNCITRAL) Partial Award, 7 August 2002, ¶ 120 ("In order to establish the necessary consent to arbitration, it is sufficient to show (i) that Chapter 11 applies in the first place, i.e. that the requirements of Article 1101 are met, and (ii) that a claim has been brought by a claimant investor in accordance with Articles 1116 and 1117 (and that all pre-conditions and formalities required under Articles 1118-1121 are satisfied). Where these requirements are met by a claimant, Article 1122 is satisfied; and the NAFTA Party's consent to arbitration is established."); **RL-033**, *Bilcon – Award*, ¶ 229 ("The heightened protection given to investors from other NAFTA Parties under Chapter Eleven of the Agreement must be interpreted and applied in a manner that respects the limits that the NAFTA Parties put in place as integral aspects of their consent…"); **RL-030**, *Feldman – Award*, ¶ 63; **RL-031**, *Grand River – Decision on Objections to Jurisdiction*, ¶ 38; **RL-032**, *Apotex – Award on Jurisdiction and Admissibility*, ¶¶ 314-315, 324, 335. *See also*, **RL-102**, *Merrill & Ring – Reisman Opinion*, ¶ 16 ("In this opinion, I consider the three year time limitation under NAFTA Article 1116(2), that is, jurisdiction ratione temporis.").

[234] The Claimant must prove that it "first acquired" knowledge of the alleged breach and incurred loss on a specific date that falls within the limitation period. The Claimant cannot merely assert when it "first acquires" knowledge because the acquisition of knowledge is a question of fact. **RL-031**, *Grand River – Decision on Objections to Jurisdiction*, ¶ 54 ("This is foremost a question of fact."); **RL-035**, *Spence International Investments, LLC, Berkowitz et al. v. Republic of Costa Rica* (ICSID Case No. UNCT/13/2) Interim Award, 25 October 2016, ¶ 163 ("If the Claimants cannot establish, to an objective standard, that they first acquired knowledge of the breaches and losses that they allege in the period after 10 June 2010, they fall at the first hurdle. To surmount this obstacle, each claimant must show, in respect of each property claim, that they have a cause of action, a distinct and legally significant event that is capable of founding a claim in its own right, of which they first became aware in the period after 10 June 2010.") ("*Spence – Interim Award*"). *See also*, ¶ 166 ("The jurisdictional aspects of this case are heavily fact-specific. Although interpretations of law, notably of CAFTA Article 10.1.3 and 10.18.1, are necessary, the Tribunal's assessment ultimately turns on appreciations of fact."); ¶ 239 ("[T]he Tribunal observes that it is for a party advancing a proposition to adduce evidence in support of its case. This applies to questions of jurisdiction as it applies to the merits of a claim, notably insofar as it applies to the factual basis of an assertion of jurisdiction that must be proved as part-and-parcel of a claimant's case. The burden is therefore on the Claimants to prove the facts necessary to establish the Tribunal's jurisdiction. If that can be done, the burden will shift to the Respondent to show why, despite the facts as proved by the Claimants, the Tribunal lacks jurisdiction.").

expired for the Claimant's challenge of the CRTC's ownership and control review of Wind Mobile as well as the Claimant's challenge to the Government of Canada's alleged failure to ensure a level playing field for New Entrants. This Tribunal is now without jurisdiction with respect to these claims as the RFA was filed on May 28, 2016,[235] more than three years after the Claimant would or should have had knowledge of the alleged breach and any alleged loss or damage arising from these measures. All of the relevant dates with respect to the 2009 CRTC Review and the regulatory environment for New Entrants occurred more than three years prior to the filing of the RFA and as such, this Tribunal has no jurisdiction to hear the Claimant's claims in this regard.

4. Either Actual or Constructive Knowledge is Sufficient to Start the Time Limitation in Article XIII(3)(d)

163. Article XIII(3)(d) of the FIPA provides that the time limitation may commence from two possible points in time: (1) the moment when an investor or enterprise "first acquired" knowledge of the alleged breach and loss, or (2) the moment when an investor or enterprise "should have first acquired" knowledge of the alleged breach and loss. The limitation period thus begins to run once a claimant has acquired either actual knowledge or constructive knowledge of the alleged breach and loss.

164. The notion of actual knowledge accounts for what an investor subjectively knew. In contrast, the notion of constructive knowledge accounts for what a reasonable investor objectively ought to have known. NAFTA jurisprudence is helpful with respect to the interpretation of the phrase "first acquired" as well.[236] As explained by the tribunal in *Grand River*, "'[c]onstructive knowledge' of a fact is imputed to [a] person if by exercise of reasonable care or diligence, the person would have known of that fact."[237] The *Grand River* tribunal also noted the close relationship between constructive knowledge and constructive notice, which "entails notice that is imputed to a person, either from knowing something that ought to have put

[235] Request for Arbitration.

[236] See **RL-031**, *Grand River – Decision on Objections to Jurisdiction*, ¶¶ 53, 58; **RL-033**, *Bilcon – Award*, ¶ 273. *See also*, **RL-034**, *Corona – Award on Preliminary Objections*, ¶¶ 193, 217; **RL-035**, *Spence – Interim Award*, ¶ 170.

[237] **RL-031**, *Grand River – Decision on Objections to Jurisdiction*, ¶ 59.

the person to further inquiry, or from wilfully abstaining from inquiry in order to avoid actual knowledge."[238] In other words, a claimant cannot feign ignorance of facts it should reasonably have been aware of had it conducted appropriate due diligence.[239]

5. The Quantum of Damages Need Not be Known in Order to Establish Requisite Knowledge for Article XIII(3)(d)

165. As explained above, a claimant may not bring a claim if more than three years have elapsed since it first acquired knowledge, or should have first acquired knowledge, of the alleged breach and alleged loss arising out of that breach. However, the specific quantum of loss need not be known in order to establish the requisite knowledge. This has been confirmed in various NAFTA arbitrations where tribunals were interpreting the same language that appears in Article XIII(3)(a) of the FIPA.[240] For example, the *Grand River* tribunal stated:

> A party is said to incur losses, expenses, debts or obligations, all of which may significantly damage the party's interests, even if there is no immediate outlay of funds or if the obligations are to be met through future conduct. Moreover, damage or injury may be incurred even though the amount or extent may not become known until some future time.[241]

166. This confirms the holding of the tribunal in *Mondev v. United States*: "[a] claimant may know that it has suffered loss or damage even if the extent of quantification of the loss or damage is still unclear."[242]

167. More recently, the *Bilcon* tribunal "agree[d] with the reasoning of its predecessors on this point" and stated that "[t]he plain language of Article 1116(2) does not require full or precise knowledge of loss or damage."[243] The *Bilcon* tribunal further held that a requirement of "reasonably specific knowledge of the amount of the loss" could not be read in to the plain

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[238] *Ibid.*

[239] **RL-031**, *Grand River – Decision on Objections to Jurisdiction*, ¶ 73.

[240] **RL-031**, *Grand River – Decision on Objections to Jurisdiction*, ¶¶ 77-78; **RL-104**, *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2) Award, 11 October 2002, ¶ 87 ("*Mondev – Award*"); **RL-032**, *Apotex – Award on Jurisdiction and Admissibility*, ¶¶ 318-320, 324-325; **RL-033**, *Bilcon – Award*, ¶¶ 271-275; **RL-105**, *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL) Award, 24 March 2016, ¶ 313.

[241] **RL-031**, *Grand River – Decision on Objections to Jurisdiction*, ¶ 77.

[242] **RL-104**, *Mondev – Award*, ¶ 87.

[243] **RL-033**, *Bilcon – Award*, ¶ 275.

language of Article 1116(2), because this "might prolong greatly the inception of the three-year period and add a whole new dimension of uncertainty to the time-limit issue; it would have to be determined in each case not only whether there is actual or constructive knowledge of loss of damage, but whether the investor has knowledge that is sufficiently 'actual' or 'concrete.'"[244]

168. In this respect, the *Bilcon* tribunal also noted the practical reasons that caution a tribunal against "interpreting Article 1116(2) in a manner that expands the timing options open to an investor."[245] In particular, the tribunal considered that a "host state can be prejudiced by a loss of institutional memory or documents on its part concerning the alleged breaches" and that "[d]elay in bringing a claim might result in a situation where a host state is unknowingly carrying on acts or omissions for which it might be ordered to pay compensation."[246]

169. The above-noted NAFTA decisions on this point were recently endorsed by the tribunal in *Rusoro Mining Limited v. Venezuela*. That tribunal was interpreting Article XII(3)(d) of the Canada-Venezuela FIPA, which contains a three-year limitations period similar to that of Article XIII(3)(d) of the FIPA and NAFTA Article 1116(2).[247] "In accordance with established NAFTA case law," the tribunal held, "what is required [to start the limitations period] is simple knowledge that loss or damage has been caused, even if the extent and quantification are still unclear."[248]

6. The Claimant's Allegation that the 2009 CRTC Review and the Regulatory Environment for New Entrants are Part of a Pattern of Conduct that Cumulatively Amounts to a Breach does Not Toll the Limitation Period

170. In its Memorial, the Claimant argues that the CRTC's 2009 review of Wind Mobile's shareholding structure and Canada's alleged failure to maintain a favorable regulatory environment are part of a "pattern of conduct that cumulatively breached GTH's rights under the

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[244] *Ibid.*

[245] **RL-033**, *Bilcon – Award*, ¶ 277.

[246] *Ibid.*

[247] **CL-016**, *Rusoro Mining Limited v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/12/5) Award, 22 August 2016, ¶¶ 204-205 ("*Rusoro – Award*").

[248] **CL-016**, *Rusoro – Award*, ¶ 217.

BIT."[249] This is a transparent attempt to bring its allegations with respect to the two measures within the Tribunal's temporal jurisdiction. However, the fact that the Claimant alleges a cumulative breach does not prevent this Tribunal from "separate[ing] a series of events into distinct components, some time-barred, some still eligible for consideration on the merits."[250]

171. It is not sufficient for a claimant to simply allege that a series of measures form composite acts that must be assessed cumulatively. Allowing this would greatly compromise the efficacy of the limitation period provisions found in investment agreements. Rather, to make out a claim of composite breach, a claimant must show that the series of acts it complains of have a common purpose or represent, "converging action towards the same result"[251] and amount to a breach after the critical date.[252] On the face of the Claimant's factual allegations, this is not what is at issue here.

172. As the tribunal in *Rusoro* noted, a determination of whether a series of acts forms part of a larger composite act "is very fact specific and depends on the circumstances of the case."[253] In this case, like in *Rusoro*, there is no justification for "the totality of acts [being] considered as a unity not affected by the time bar."[254]

173. Both the 2009 CRTC ownership and control review of Wind Mobile and allegations with respect to the regulatory framework following the 2008 AWS Spectrum auction are separate and distinct measures with respect to each other, and with respect to the review of the Claimant's investment under the ICA and Canada's implementation of the Transfer Framework.

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[249] Claimant's Memorial, ¶¶ 28, 284, 361, 372. The Claimant's Memorial is ambiguous as to whether these measures are also being challenged as separate breaches, or only as elements of a breach when considered together with other measures.

[250] **RL-033**, *Bilcon – Award*, ¶ 266; **RL-104**, *Mondev – Award*, ¶ 87; **RL-030**, *Feldman – Award*, ¶ 203; **RL-031**, *Grand River – Decision on Objections to Jurisdiction*, ¶ 86.

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

[252] **RL-025**, *Société Générale – Award on Preliminary Objections to Jurisdiction*, ¶ 94.

[253] **CL-016**, *Rusoro – Award*, ¶¶ 229-231.

[254] **CL-016**, *Rusoro – Award*, ¶ 229.

174. With respect to the 2009 CRTC ownership and control review of Wind Mobile, the nature of the CRTC, the legal basis for its actions, and the fact that the Claimant is challenging the CRTC review process, not its outcome, make clear that it is not part of any of the other measures alleged to constitute a breach. The CRTC, "an administrative tribunal that regulates and supervises broadcasting and telecommunications in the public interest",[255] is responsible for the enforcement of sections 16(1) and (3) of the *Telecommunications Act*, under which the ownership and control review of the Claimant's investment was conducted.[256] The CRTC is an arm's-length regulator that carries out its own review, analysis and decision-making separate from any other entity in the Government of Canada. Reviews of ownership and control under the *Telecommunications Act* are carried out independently of any other reviews taking place, or any other laws, regulations, or policies being applied to an investor by any other government entity, including reviews by Industry Canada under the *Radiocommunications Regulations* and any review under the ICA.[257]

175. The decision to require the Claimant to undergo a Tier 4 review rested solely with the CRTC pursuant to the *Telecommunications Act.* This distinct legal basis for the CRTC's actions highlights the distinct and separate nature of this measure. The CRTC review process and the resulting conclusion were completed long before the critical date of May 28, 2016, as discussed below. Moreover, as the Claimant itself explains, the conclusion from the CRTC's ownership and control review of Wind Mobile was ultimately overturned by a decision of the Canadian government. The government's decision was ultimately upheld by Canadian courts and all appeals of the government's decision were exhausted by April 2012.[258] The government's decision and the Canadian courts' rulings are not being challenged by the Claimant. The Claimant cannot therefore challenge the CRTC review process or its outcome, which was overturned prior to the three-year time limitation.

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[255] **R-068**, CRTC, website excerpt, "About Us", available at: https://crtc.gc.ca/eng/acrtc/org.htm.

[256] **C-046**, *Telecommunications Act*, S.C. 1993, c. 38, ss. 8-9.

[257] Further, the Claimant was well aware of this requirement, and the fact that it was required to undergo a separate and distinct review from any ownership and control review at Industry Canada, prior to it investing in Canada. Both the ownership and control review outlined in section 16 of the *Telecommunications Act* and the ownership and control review outlined in section 10(1) of the *Radiocommunications Regulations* were enacted prior to the Claimant investing in Canada (**C-001**, *Radiocommunication Regulations*, SOR/96-484, s. 10(1)).

[258] Claimant's Memorial, ¶¶ 140-143.

176. Similarly, the Claimant's allegations with respect to the regulatory framework put in place by Industry Canada to enhance competitiveness for New Entrants in the telecommunications sector are also separate and distinct from the allegations related to the Transfer Framework and the national security review of the Claimant's voting control application. The Transfer Framework relates to a spectrum license holder's ability to transfer or sell spectrum. The allegations that Canada failed to maintain a favorable regulatory framework for New Entrants are centered on the tower sharing and roaming conditions of licenses that were imposed on telecommunications operators following the AWS Spectrum auction. Canada's alleged failure to enforce those license conditions in order to aid the competitiveness of New Entrants do not relate to the transferability of spectrum licenses in any manner.

177. Likewise, the Claimant's allegations with respect to the regulatory framework on tower sharing and roaming are entirely separate from the allegations with respect to the Claimant's application to acquire voting control of Wind Mobile. The national security review under the ICA of the Claimant's attempt to acquire voting control is entirely unrelated to promotion of competition in the telecommunications sector or alleviation of barriers to entry in the telecommunication sector by mandating roaming and tower sharing. Indeed, the trigger for the Claimant's national security review was not related to the competitiveness of Wind Mobile in the telecommunications sector at all. As explained above,[259] national security reviews may occur under the ICA when a foreign investor wishes to establish or to acquire control of a Canadian business.[260] Reviews under the ICA are undertaken by a division of Industry Canada (the Investment Review Division) which is separate and distinct from the division that deals with telecommunications policy.[261] A national security review occurs if the Minister of Industry, after consultation with the Minister of Public Safety and Emergency Preparedness, considers that the investment could be injurious to national security, and the Governor-in-Council, on the recommendation of the Minister of Industry, makes an order within the prescribed period for the

[259] See Part III.C.3, *supra*.

[260] **C-009**, ICA, ss. 25.1, 25.2(1).

[261] Claimant's Memorial, ¶ 182 referring to the fact that the National Security Review was conducted by the Investment Review Division at Industry Canada.

review of the investment.[262] Such a review in no way relates to how telecommunications licenses are managed, or any laws, regulations or policies Canada puts in place to manage telecommunications licenses or competitiveness in the sector. As such, any allegations relating to Canada's failure to maintain a favourable regulatory framework must be considered separate and distinct from such a review.

178. The fact that the CRTC's 2009 review of Wind Mobile's shareholding structure and Canada's alleged failure to maintain a favorable regulatory environment are separate and distinct acts from the other measures put forth by the Claimant is clear from the Claimant's own description of the measures. In its Memorial, the Claimant describes the different measures under separate standalone sections that are unrelated to one another.[263] The only common link between the four measures is that they were applied to Wind Mobile. As a result, the Claimant's allegations with respect to the CRTC's ownership and control review of Wind Mobile and the Government of Canada's failure to ensure a level playing field for New Entrants should not be assessed together with the Transfer Framework and the national security review for the purpose of the Tribunal's determination of its jurisdiction *ratione temporis*.

179. The Tribunal must now consider whether the Claimant had knowledge of the alleged breach and loss or damage arising out of these measures before the critical date of May 28, 2013.

7. The Claimant's Challenge of the 2009 CRTC Review is outside the Limitation Period

180. The Claimant's claims based on the 2009 CRTC review of its participation in Wind Mobile are untimely. Based on the information put forward in the Claimant's Memorial alone, the Claimant knew both of the alleged breach and of alleged loss arising from that breach no later than April 2012. The Claimant had until April 2015 to bring a claim based on the 2009 CRTC review. Its RFA of May 28, 2016 is therefore over a year too late.

181. The Claimant alleges that Canada "subjected Wind Mobile to a duplicative, inconsistent and unprecedented review of its compliance with its foreign ownership and control regulations

[262] **C-009**, ICA, s. 25.3(1).

[263] Claimant's Memorial, ss. V(A), (B) and (C).

under a public review process created especially by the CRTC for Wind Mobile at the behest of its competitors."[264] However, it is undisputed between the disputing parties that **all events** relating to the 2009 CRTC review process occurred before the limitation period critical date of May 28, 2013. The Claimant highlights each of these events in its Memorial, culminating with the Supreme Court of Canada's refusal to grant leave to appeal the Federal Court of Appeal's decision in April 2012.[265] Indeed, the Tribunal need not look beyond the Claimant's Memorial to make a determination that the Claimant's claim is untimely. As the following timeline demonstrates, the Claimant was aware of alleged loss or damage arising out of the CRTC's review no later than April 2012:

Date	Event
December 22, 2008	CRTC issues a letter to all New Entrants, including Wind Mobile, indicating that it was prepared to conduct a review for compliance with the Canadian ownership and control requirements in section 16 of the *Telecommunications Act*.[266]
April 3, 2009	Wind Mobile submits materials to CRTC for review.[267]
May 22, 2009	CRTC initiates a consultation process inviting comment on whether Canadian ownership and control reviews should in some circumstances be open to the public, rather than confidential.[268]
July 20, 2009	CRTC establishes a new four-tier framework for Canadian ownership and control reviews, under which a public, multi-party oral hearing phase would be available in cases involving complex or novel governance structures or financing arrangements.[269]
July 20, 2009	Wind Mobile notified that it would have to undergo Type 4 review by CRTC.[270]

[264] Request for Arbitration, ¶ 10(a); Claimant's Memorial, ¶¶ 119-144.

[265] Claimant's Memorial, ¶¶ 126-143 (and exhibits cited to therein).

[266] **C-008**, Letter from John Keogh to Simon David Lockie (Dec. 22, 2008).

[267] **C-011**, Letter from McCarthy Tétrault LLP to Stephen Millington (Apr. 3, 2009).

[268] **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 (May 22, 2009).

[269] **C-012**, CRTC, *Telecom Regulatory Policy CRTC 2009-428: Canadian ownership and control review policy* (Jul. 20, 2009).

[270] **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* (Jul. 20, 2009); **C-014**, CRTC, *Telecom Notice of Consultation CRTC 2009-429-1: Notice of hearing – 23*

September 23-24, 2009	Public hearing with respect to Wind Mobile's ownership and control review.[271]
October 29, 2009	CRTC rules that Wind Mobile was controlled in fact by the Claimant. It therefore did not meet the Canadian ownership and control requirement under section 16 of the *Telecommunications Act*, and was not eligible to operate as a telecommunications common carrier.[272]
October 31, 2009	Wind Mobile writes to Minister of Industry, Tony Clement, expressing displeasure with review.[273]
December 10, 2009	Governor-in-Council exercised its power to vary decisions of the CRTC, effectively reversing the decision of the CRTC. The Governor-in-Council determined that Wind Mobile was not controlled in fact by a non-Canadian.[274]
January, 2010	Public Mobile Inc., a New Entrant, seeks judicial review of the Order in Council.[275]
February 4, 2011	Federal Court quashes the decision of the Governor-in-Council. However, this ruling did not prevent Wind Mobile from continuing to operate as a telecommunications common carrier.[276]
June, 2011	Federal Court of Appeal quashes decision of the Federal Court.[277]
April 26, 2012	Leave to appeal the Supreme Court of Canada denied, closing the final opportunity for the Governor-in-Council's decision to be reversed.[278]

September 2009, Gatineau, Quebec – Proceeding to consider the compliance of Globalive with the ownership and control regime, Erratum (Jul. 21, 2009).

[271] **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* (Jul. 20, 2009).

[272] **C-015**, CRTC, *Telecom Decision CRTC 2009-678: Review of Globalive Wireless Management Corp. under the Canadian ownership and control regime* (Oct. 29, 2009).

[273] **C-106**, Email from Ken Campbell to Khaled Bichara, et al. *attaching* Letter from Ken Campbell to the Honourable Tony Clement (Oct. 31, 2009).

[274] **C-017**, Order of the Privy Council and Schedule, P.C. 2009-2008 (Dec. 10, 2009).

[275] **C-108**, *Public Mobile v. Attorney General of Canada, et al.*, Federal Court, Court File No. T-26-10, Notice of Application (Jan. 8, 2010).

[276] **C-115**, *Public Mobile v. Attorney General of Canada, et al.*, 2011 FC 130.

[277] **C-117**, *Globalive Wireless Management Corp. and Attorney General of Canada v. Public Mobile Inc. and Telus Communications Company*, 2011 FCA 194.

[278] **C-124**, *Public Mobile v. Globalive Wireless Management Corp. and Attorney General of Canada*, leave to appeal to SCC refused, 34418 (Apr. 26, 2012); **C-024**, THE GLOBE & MAIL, *Globalive wins court battle over foreign control* (Apr. 26, 2012).

182. Not a single event related to the CRTC's review occurred after the critical date for this Tribunal's temporal jurisdiction. To the extent the CRTC review breached the FIPA, the Claimant knew or should have known this at the time of the review process itself. Nothing that occurred after the critical date could change the nature of the CRTC review of Wind Mobile's ownership and control or the conclusion of the review.

183. Further, the Claimant knew that it had suffered a loss from the alleged breach no later than by late **2009**. This knowledge manifests itself in the Claimant's own statements including those expressed in several media articles at the time[279] and in the Claimant's submissions in this arbitration.[280] According to media articles from 2009, Wind Mobile's launch was planned for early November, but the CRTC decision prevented this from happening until December 10, 2009, when the CRTC decision was varied by the Governor-in-Council.[281] Wind Mobile CEO Anthony Lacavera stated in December 2009 that "[i]n terms of our costs it's been extremely expensive, obviously, for us to continue to run this operation without any customers".[282] Apart from the alleged direct loss of sales and sunk operational costs, Wind Mobile also alleged other losses arising from the CRTC review long before the critical date. For example, in 2011, Wind Mobile stated that uncertainty following the CRTC decision "has made it even more difficult for

[279] Canada makes no admission in respect of any of the alleged facts, positions and opinions expressed in the media articles referenced here. The latter merely constitute evidence of the Claimant's knowledge before the critical date.

[280] Request for Arbitration, ¶ 30; Claimant's Memorial, ¶ 14; **CWS-Campbell**, ¶¶ 20-21.

[281] **R-069**, Globe and Mail, *Lacavera in race against clock for holiday sales; Ottawa's decision to overturn CRTC ruling clears Canada's newest wireless company to launch immediately*, (Dec. 12, 2009), B3 ("Globalive planned to start selling wireless plans in early November, but was stalled when the Canadian Radio-television and Telecommunications Commission ruled in October that the company violated federal foreign ownership rules."); **R-070**, Globe and Mail, *Keep Globalive out of wireless game, rival says*, (Nov. 24, 2009), B9 ("Globalive was gearing up for a November launch of its Wind Wireless service, hiring and training hundreds of workers. They are being kept on the payroll pending Ottawa's decision, and are currently being deployed to help out in community volunteer programs.").

[282] **R-069**, Globe and Mail, *Lacavera in race against clock for holiday sales*, (Dec. 12, 2009), B3. *See also*, **R-071**, Toronto Star, *WIND Mobile keeping call-centre staff busy*, (Nov. 19, 2009), B4 ("The volunteering gives around 400 employees something to do while the company awaits a review of the CRTC's decision by Industry Canada. 'They're on our payroll. We're incurring huge costs,' he [Lacavera] said. 'And obviously we were very concerned about where morale would go when they're all reading these decisions.'").

WIND to attract financing on reasonable terms and has been challenging to overcome in the marketplace".[283]

184. It is beyond doubt that the Claimant knew both of the alleged breach due to the CRTC review and of loss arising from that alleged breach prior to the critical date of May 28, 2013.

8. The Claimant's Challenge of Canada's Alleged Failure to Maintain a Favorable Regulatory Framework for New Entrants is Outside the Limitation Period

185. The Claimant alleges that Canada "failed to create and maintain a fair, competitive and favorable regulatory environment"[284] and that Canada "failed to enforce regulations against the Incumbents and failed to implement and amend legislation to enable the New Entrants to be competitive."[285] The Claimant alleges that Canada committed to providing mandatory roaming in the 2007 Policy Framework,[286] requiring roaming arrangements to be "negotiated expeditiously and in good faith"[287] and made available to New Entrants at "commercial rates"[288] and that Canada failed to implement and adequately enforce this framework of measures for New

[283] **R-072**, Globalive Wireless Management Corp., Comments on Canada Gazette Notice SMSE-018-10: Consultation on a Policy and Technical Framework for the 700 MHz Band and Aspects Related to Commercial Mobile Spectrum (Feb. 28, 2011), ¶ 18. *See also*, **R-073**, Toronto Star, *Ruling puts Globalive at risk*, (Nov. 5, 2009), B3 ("Start-up wireless carrier Globalive Communications says talks with new financial backers have stalled and its entire business is in danger following a ruling by Canadian regulators that found the company was controlled by foreigners. 'The whole business has been put at risk by this decision,' Globalive chairman and founder Anthony Lacavera said in an interview. 'We're not near resolving the financing issue and I don't see how we resolve it with this kind of pressure.'"); **R-074**, Globe and Mail, *Globalive on hunt for cash to expand Wind Mobile*, (Jan. 16, 2010), B7 ("In November, Mr. Lacavera was famished for capital. He was knocking on doors for emergency financing after an abrupt rejection of Globalive's bid to enter the Canadian wireless market by the Canadian Radio-television and Telecommunications Commission.").

[284] Request for Arbitration, ¶ 10(b), p. 22. *See also*, Claimant's Memorial, ¶¶ 15, 145-165.

[285] Request for Arbitration, ¶ 10(b). *See also*, Claimant's Memorial, ¶¶ 15, 145-165.

[286] Request for Arbitration, ¶ 58; Claimant's Memorial, ¶ 60(d).

[287] Request for Arbitration, ¶ 59. *See also*, Claimant's Memorial, ¶ 60(d); **C-004**, Industry Canada, Policy Framework for the Auction for Spectrum Licences for Advanced Wireless Services and other Spectrum in the 2 GHz Range (Nov. 2007), p. 8.

[288] Request for Arbitration, ¶ 59. *See also*, Claimant's Memorial, ¶ 60(d); **C-004**, Industry Canada, Policy Framework for the Auction for Spectrum Licences for Advanced Wireless Services and other Spectrum in the 2 GHz Range (Nov. 2007), pp. 8-9.

Entrants.[289] It further alleges that the arbitration mechanism implemented to enforce this framework was inadequate to the task.[290]

186. However, the Claimant's allegation that Canada's failure to create and maintain a favourable regulatory environment for Wind Mobile breached the FIPA is untimely. The Claimant knew of both the facts underpinning this alleged breach and loss allegedly arising from it prior to the critical date of May 28, 2013.

187. The Claimant's allegation that the regulatory environment for New Entrants breached the FIPA is based on its characterization of facts that were well known to it prior to the critical date. The Claimant's own pleadings expressly allege a failure to deliver on the promised regulatory regime prior to the critical date. The Claimant alleged in its RFA that from "2009 and until 2014, Wind Mobile encountered considerable difficulties regarding its negotiations with the Incumbents and the possibility of obtaining reasonable commercial rates."[291] The Claimant also alleges that Canada "failed to create and maintain a fair, competitive and favorable regulatory environment for at least five years, as promised to New Entrants in 2008."[292] The alleged failure to deliver on this promise therefore ran from 2008 through to 2013. The entire period is prior to the critical date.

188. Moreover, the thrust of the Claimant's arguments as to why Canada's tower sharing and roaming regulatory efforts were insufficient is that the avenue selected by Canada for enforcement of those provisions, namely arbitration, was time-consuming and hence ineffective.[293] The Claimant's view is that Canada should have provided greater oversight along with sanctions and caps on costs for tower sharing and roaming provisions to be effectively enforced.[294] However, Canada selected arbitration as its avenue for enforcement of tower sharing

[289] Claimant's Memorial, ¶¶ 15, 145-165.

[290] Claimant's Memorial, ¶¶ 151-154.

[291] Request for Arbitration, ¶ 60.

[292] Request for Arbitration, ¶ 10(b) (emphasis added). *See also*, Claimant's Memorial, ¶¶ 15, 145-165.

[293] Claimant's Memorial, ¶¶ 151-154.

[294] Claimant's Memorial, ¶¶ 157-158, 161.

and roaming in 2007[295] and, on the Claimant's own admission, the Claimant found that means of enforcement to be ineffective as soon as it attempted to avail itself of the benefits of those provisions.[296] Although the Claimant may have sought changes to Canada's method of enforcement, the facts relevant to this alleged breach crystallized well before the critical date.

189. The Claimant's allegations with respect to the regulatory framework clearly demonstrate that its claim in this regard is outside the limitations period. Indeed, the Tribunal need not look any further than the Claimant's Memorial to make this determination.[297] The Claimant has cited to numerous documents which demonstrate that it had knowledge of both alleged breach and loss prior to the critical date of May 28, 2013. For example, the Claimant has alleged that:

- "Wind Mobile complained on numerous occasions to Canada regarding the hurdles it faced during negotiations with the Incumbents. [298] For example, on **15 May 2009**, Mr. Lockie, on behalf of Wind Mobile, wrote to Industry Canada to request clarification and direction concerning roaming. Mr. Lockie explained the difficulties faced by the parties regarding the interpretation of the conditions and Wind Mobile's difficulties in ultimately obtaining reasonable terms."[299]

[295] **C-004**, Industry Canada, Policy Framework for the Auction for Spectrum Licences for Advanced Wireless Services and other Spectrum in the 2 GHz Range (Nov. 2007), pp. 8-9.

[296] Claimant's Memorial, ¶¶ 151, 154; **C-221**, *Proceedings of the Standing Senate Committee on Transport and Communications*, 41st Parliament, 2nd Session, Issue No. 7 (May 27, 2014), 7:31 (Testimony of Mr. Lockie); **CWS-Campbell**, ¶ 14.

[297] While the Tribunal need not look to other documents to make this determination on jurisdiction there are numerous examples available in the public record that demonstrate the Claimant knew of an alleged breach and alleged loss or damage arising out of that breach long before the critical date. *See for example*, **R-075**, Globalive Wireless Management Corp. (Wind Mobile), Reply Comments on Canada Gazette Notice DGSO-001-12: Proposed Revisions to the Framework for Mandatory Roaming and Antenna Tower and Site Sharing Published in the Canada Gazette Part I, 24 March 2012 (Jun. 13 2012), ¶¶ 4-5, 8; **R-072**, Globalive Wireless Management Corp., Comments on Canada Gazette Notice SMSE-018-10: Consultation on a Policy and Technical Framework for the 700 MHz Band and Aspects Related to Commercial Mobile Spectrum (Feb. 28, 2011), ¶ 18; **R-076**, Globalive Wireless Management Corp. (Wind Mobile) Comments on Canada Gazette Notice DGSO-001-12: Proposed Revisions to the Frameworks for Mandatory Roaming and Antenna Tower and Site Sharing Published in the Canada Gazette Part I, 24 March 2012 (May 14, 2012), fn. 4; **R-077**, Globe and Mail, *ON THE LINE; How Ottawa's plan to foster wireless competition sank*, (May 18, 2013), B6. Here again, it is understood that Canada makes no admission in respect of any of the alleged facts, positions and opinions expressed in the above noted exhibits.

[298] **CWS-Campbell**, ¶ 15.

[299] Claimant's Memorial, ¶ 150 (emphasis added).

- "According to Industry Canada's own statistics, as of **December 2010**, Wind Mobile was not able to negotiate sharing for a single one of its 146 towers.[300]"

- "On **11 January 2013**, Wind Mobile's Chief Operating officer, Peitro Cordova, and Mr. Lockie, met with the Minister of Industry, and other Government representatives to once again ask Canada to improve roaming and tower sharing conditions.[…] Wind Mobile explained to Industry Canada that: (i) voice air time charges paid to Rogers were two to three times the rate paid by Wind Mobile to T-Mobile, NewCore and Cincinnati Bell in the U.S.; (ii) SMS outbound messages charges paid to Rogers were three times more expensive than the rates charged by Wind Mobile's U.S. roaming providers; and (iii) data roaming rates paid to Rogers were three to five times the rate paid by Wind Mobile to AT&T per megabyte."[301] And that "[w]ith respect to tower sharing, Wind Mobile explained that "WIND Mobile initially encountered significant resistance by the incumbents to tower sharing [which] result[ed] in delays for WIND's initial roll-out and complaints to Industry Canada" and that "problems still persist with respect to future use reservations by the incumbents of prime tower elevations and high rates for co-location based on a commercial reasonableness standard as opposed to [a] cost based [approach]."[302]

- "In **March 2013,** Industry Canada announced its decisions to revise to its roaming and tower sharing policy.[303] This was four years after the AWS spectrum licenses were issued to Wind Mobile, almost as many years since Canada became aware that the roaming and tower sharing conditions were not working, and one year since the consultation process to address these conditions were announced."[304]

- "On **27 May 2013**, Wind Mobile met again with Industry Canada officials to reiterate its concerns regarding the regulatory environment and to highlight the need to improve the competitive environment.[305] Wind Mobile also explained during the meeting that the Incumbents enjoyed a highly "protected" and favorable competitive position in Canada, allowing the creation of a nearly impenetrable oligopoly."[306]

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[300] Claimant's Memorial, ¶ 155 (emphasis added); **C-118**, Industry Canada, *Roaming and Tower Sharing Review* (Jul. 2011).

[301] Claimant's Memorial, ¶ 157 (emphasis added); **C-134**, *Issue Brief – Wind Mobile* (Jan. 11, 2013); **C-213**, Wind Mobile, *Domestic Roaming: Presentation by Simon Lockie, Chief Regulatory Officer* (Oct. 2013).

[302] Claimant's Memorial, ¶ 158; **C-134**, *Issue Brief – Wind Mobile* (Jan. 11, 2013); **C-133**, Wind Mobile, *WIND Mobile – Presentation to: Minister of Industry – By: Pietro Cordova, Chief Operating Officer and Simon Lockie, Chief Regulatory Officer* (Jan. 11, 2013).

[303] **C-153**, Industry Canada, *Revised Frameworks for Mandatory Roaming and Antenna Tower and Site Sharing (DGSO-001-13)* (Mar. 2013).

[304] Claimant's Memorial, ¶ 160 (emphasis added).

[305] **C-187**, Wind Mobile, *Proposed Regulatory Changes to Support Fair and Effective Competition in Canada – Pietro Cordova, Chief Operating Officer, Simon Lockie, Chief Regulatory Officer* (May 27, 2013).

[306] *Ibid*; Claimant's Memorial, ¶ 161 (emphasis added).

190. Each of these examples demonstrate that the Claimant had knowledge of the facts that underpin the alleged breach, and knowledge of loss or damage arising from that alleged failure of the Government of Canada to maintain a favourable regulatory framework prior to the critical date of **May 28, 2013**. As a result, this Tribunal is without jurisdiction to hear such claims and the Claimant's arguments must be dismissed.

9. Conclusion

191. Article XIII(3)(d) of the FIPA places a strict three-year limitations period on the ability of a Claimant to bring a claim. The Claimant had, or should have had, knowledge of the alleged breach and loss or damages arising out of that breach more than three years before the date on which it submitted its claim to arbitration. As such, this Tribunal is without jurisdiction to hear the Claimant's claim. The Claimant's claims with respect to the CRTC's ownership and control review of Wind Mobile, as well as its claims with respect to Canada's alleged failure to maintain a stable regulatory environment for New Entrants are separate and distinct from other claims made by the Claimant with respect to Canada's national security review and the Transfer Framework. They must be considered separately for the purpose of ascertaining jurisdiction *ratione temporis*. In doing so, it is apparent that such claims are untimely. The Claimant cannot avoid such a result simply by alleging a cumulative breach. As a result, this Tribunal is without jurisdiction to consider these aspects of the Claimant's claim.

E. The Tribunal Lacks Jurisdiction to Consider the Claimant's National Treatment Claim, as Canada Excluded the Application of National Treatment Obligations to Investment in Services Pursuant to Article IV(2)(d) of the FIPA and its Annex

1. Summary of Canada's Position

192. The Claimant alleges that Canada's treatment of its investment breached the national treatment obligations set out in Article II(3)(a) and Article IV(1) of the FIPA. However, this Tribunal lacks jurisdiction *ratione materiae* to consider these claims under Article XIII of the FIPA. Pursuant to that Article, the Tribunal only has subject matter jurisdiction to consider allegations that, if proven, are capable of constituting a breach of a Contracting Party's obligations under the Agreement. The Tribunal has no jurisdiction to hear claims that allege breaches of obligations that *prima facie* do not apply to certain sectors or matters. This is the

case with the Claimant's national treatment claims under Article II(3)(a) and IV(1), which are precluded by Canada's broad services reservation under Article IV(2)(d) and its associated Annex.

193. Article IV(2)(d) of the FIPA and its Annex exclude certain sectors from the application of Canada's national treatment obligations, including all services sectors. In all services sectors, including telecommunications services, Canada has reserved the right to make or maintain exceptions (that is, to adopt or maintain measures or to accord treatment) that would otherwise be inconsistent with its national treatment obligations. Canada may make or maintain such an exception at any time, and need not fulfil any procedural prerequisites or notification requirements in order to exercise this right.

194. The Claimant's allegations that Canada breached its national treatment obligations under Article II(3)(a) and Article IV(1) with respect to its investment in the telecommunications sector are outside this Tribunal's jurisdiction *ratione materiae*. Therefore, all of the Claimant's national treatment claims must be dismissed.

2. Pursuant to Article IV(2)(d) and its Annex, National Treatment Obligations Do Not Apply to Canada's Treatment of Investors and Investments in Services Sectors

195. Article II(3)(a) and Article IV(1) of the FIPA set out certain national treatment obligations that each Contracting Party must observe with respect to the investors and investments of the other Contracting Party. Article II(3)(a) covers the pre-establishment phase of investment. It requires each Contracting Party to accord national treatment to investors or prospective investors of the other Contracting Party with respect to the establishment of a new business enterprise or acquisition of an existing business enterprise or share of such enterprise.[307] Article IV(1) covers the post-establishment phase of investment. It requires each Contracting Party to accord national

[307] Article II(3)(a) provides:

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

treatment to investments or returns of investors of the other Contracting Party with respect to the expansion, management, conduct, operation and sale or disposition of investments.[308]

196. However, as indicated in the heading to Article IV ("National Treatment after Establishment and *Exceptions to National Treatment*"),[309] the Contracting Parties' national treatment obligations are subject to certain exceptions. These exceptions are set out in Article IV(2). Interpreting sub-paragraph (d) of Article IV(2) and its associated Annex in accordance with the general rule of interpretation set out in Article 31 of the VCLT confirms that Canada reserved the right to adopt or maintain measures or accord treatment in the services sector that would otherwise be inconsistent with its national treatment obligations. As such, the national treatment obligations, including under Article II(3)(a) and Article IV(1), do not apply to Canada's treatment of Egyptian investments and investors in any services sectors.

(a) Under Article IV(2)(d), Canada has Reserved the Right, within the Sectors or Matters Listed in the Annex, to Adopt or Maintain Measures or Accord Treatment that would Otherwise be Inconsistent with its National Treatment Obligations

197. Article IV(2) sets out the exceptions that apply to the Contracting Parties' national treatment obligations, including under Article II(3)(a) and Article IV(1). Specifically of relevance to this arbitration, Article IV(2)(d) provides:

> 2. Subparagraph (3)(a) of Article II, paragraph (1) of this Article, and paragraphs (1) and (2) of Article V do not apply to:
>
> …
>
> d. the right of each Contracting Party to make or maintain exceptions within the sectors or matters listed in the Annex to this Agreement.

198. The sectors or matters within which a Contracting Party maintains the right to make or maintain exceptions to its national treatment obligations are those "listed in the Annex to this

[308] Article IV(1) provides:

> 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.

[309] Emphasis added.

Agreement". If a Contracting Party has listed a sector or matter in the Annex, it maintains the right to make or maintain exceptions to the national treatment obligations within the listed sector or matter, and the national treatment obligations simply "do not apply".

199. By allowing a Contracting Party to "make or maintain exceptions" to its national treatment obligations within a sector or matter that it has listed in the Annex, Article IV(2)(d) has the effect of broadly excluding all listed sectors or matters from the scope of a Contracting Party's national treatment obligations. In other words, the FIPA imposes no national treatment obligations on a Contracting Party within a sector or matter that the Contracting Party has listed in its Annex, because the Contracting Party has reserved the right to act inconsistently with those obligations at any time. In this way, the Contracting Party can be said to have reserved "policy space" in certain sectors listed in its Annex, within which it is free to not accord national treatment.

200. This textual interpretation of Article IV(2) is supported by the context of the provision, which includes the relevant Annex. The second paragraph of the Annex in the translated Arabic text contains Egypt's list of sectors or matters to which the national treatment obligations of the FIPA do not apply. The list indicates that Egypt reserved its right to adopt discriminatory measures that, for example, prohibit the creation of any enterprises in the fields of "arms and ammunition" and "tobacco", or to impose a foreign equity cap of 49% on "projects to be established on Sinai".[310] The wording of Egypt's reservations is not compatible with the Claimant's contention that an exception needs to be "enacted or effected"[311] before the reservation is rendered operative. It confirms that Article IV(2)(d) and the Annex pre-empt the application of national treatment obligations in listed sectors or matters.

201. As discussed in Part III.E(2)(d) below, Canada's textual interpretation of Article IV(2) is also supported by the object and purpose of such an exception which is to ensure that Canada's national treatment obligations in its FIPAs do not unduly limit Canada's policy space.

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[310] **R-001**, Government of Canada, Translation Bureau, Certified Translation (Arabic-English) of **RL-059**, *Agreement Between the Government of Canada and the Government of the Arab Republic of Egypt for the Promotion and Protection of Investments*, 13 November 1996 (Arabic version – signed), 2025 U.N.T.S. 289 at 290, Annex, ¶ 2.

[311] Claimant's Submission on Bifurcation, Publication, and Place of Proceeding, ¶ 24.

(b) Canada's List in the Annex Associated with Article IV(2)(d) Covers all Services Sectors

202. The first paragraph of the Annex contains the list of sectors or matters within which Canada reserves the right to make or maintain exceptions to its national treatment obligations, including Articles II(3)(a) and IV(1).[312] Specifically, Paragraph 1 of the Annex provides:

> 1. In accordance with Article IV, subparagraph 2(d), Canada reserves the right to make and maintain exceptions in the sectors or matters listed below:
>
> - social services (i.e. public law enforcement; correctional services; income security or insurance; social security or insurance; social welfare; public education; public training; health and child care);
> - services in any other sector;
> - government securities - as described in SIC 8152;
> - residency requirements for ownership of oceanfront land;
> - measures implementing the Northwest Territories and the Yukon Oil and Gas Accords.

203. The first item in Canada's list is "social services". The next item is "services in any other sector". In this context, "services in any other sector" necessarily refers to services in any sector other than "social services", that is, all services that are not "social services". Canada's list therefore includes any service, whether it is a social service or another type of service.

204. In short, Article IV(2)(d) and its Annex establish a broad reservation to Canada's national treatment obligations, including Article II(3)(a) and Article IV(1), for all services sectors. In any services sector, the operation of Article IV(2)(d) and its Annex permit Canada to make or maintain exceptions (in other words, adopt or maintain measures and accord treatment) that would otherwise be inconsistent with those obligations. The FIPA imposes no obligation on Canada to accord national treatment to investors or investments in any services sector, either pre-establishment or post-establishment.

[312] The second paragraph of the Annex contains a definition that is not directly relevant to the present case. It provides that "[f]or 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."

(c) Canada's Broad Services Reservation is not Subject to Any Procedural Requirements or Limitations

205. Contrary to the Claimant's suggestion,[313] where a claim *prima facie* falls within the scope of the services reservation, Canada has no obligation to furnish any evidence that it has made or maintained an exception under the services reservation. Nor is Canada ever required to give advanced notice that it is making or maintaining an exception under the services reservation. The Claimant's arguments to the contrary should be rejected, as they are not based on the ordinary meaning of Article IV(2)(d) and the Annex in their context, and because they are contrary to arbitral awards interpreting similar BIT provisions, which hold that such provisions constitute sectoral-based exceptions.

206. As noted above, Article IV(2)(d) provides that Article II(3)(a) and Article IV(1) "do not apply to… the right of each Party to make or maintain exceptions within the sectors or matters listed in the Annex to this Agreement." The ordinary meaning of this phrase is that Canada has maintained policy flexibility to not accord national treatment to investors of Egypt and their investments within the matters or sectors listed in the Annex. This allows Canada to "make", introduce or enact new measures that would otherwise be inconsistent with its national treatment obligations, and to "maintain" any such measures that existed at the time the treaty came into force.

207. This ordinary meaning is derived from the constituent elements of the text of paragraph 1 of the Annex. As defined in *Black's Law Dictionary*, the word "make" means "[t]o cause (something) to exist" or "[t]o enact (something)".[314] Similarly, the *Oxford English Dictionary* defines "make" as "[t]o bring into existence by construction or elaboration".[315] These same dictionaries define "maintain" as "[t]o continue (something)"[316] and "[t]o (cause to) continue, keep up, preserve."[317] The words "make" and "maintain" in Article IV(2)(d) therefore indicate that a Contracting Party may both enact or establish new exceptions within the sectors or matters

[313] *See* Claimant's Submission on Bifurcation, Publication, and Place of Proceeding, ¶ 24.

[314] **RL-107**, *Black's Law Dictionary*, *s.v.* "make".

[315] **RL-108**, *Oxford English Dictionary*, *s.v.* "make".

[316] **RL-109**, *Black's Law Dictionary*, *s.v.* "maintain".

[317] **RL-110**, *Oxford English Dictionary*, *s.v.* "maintain".

listed in the Annex, and continue to keep in place any such exceptions that existed at the time the treaty came into force.

208. Turning to "exception", *Black's Law Dictionary* defines this word as "[s]omething that is excluded from a rule's operation".[318] Likewise, the *Oxford English Dictionary* defines "exception" as "[t]he action of excepting (a person or thing, a particular case) from the scope of a proposition, rule, etc.; the state or fact of being so excepted" or "[s]omething that is excepted; a particular case which comes within the terms of a rule, but to which the rule is not applicable".[319] The word "exceptions" in Article IV(2)(d) therefore refers to excluding the application of the national treatment obligations. Pursuant to the first two items in the list in the Annex, for Canada this includes any measures it adopts or maintains in relation to "social services" or "services in any other sector".

209. The plain language of Article IV(2)(d) and its Annex are clear: 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.

210. Canada's interpretation is supported by two cases in which tribunals considered similar reservations—*Lauder v. Czech Republic* and *Lemire v. Ukraine*. The *Lauder* tribunal interpreted a national treatment exception under the United States-Czech Republic BIT that was similar to Article IV(2)(d) of the FIPA.[320] The tribunal held that the language providing for "the right of each Party to make or maintain exceptions falling within one of the sectors or matters listed in the Annex to this Treaty" allowed a Party to "treat foreign investment less favorably than

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[318] **RL-111**, *Black's Law Dictionary*, *s.v.* "exception".

[319] **RL-112**, *Oxford English Dictionary*, *s.v.* "exception".

[320] *See* **RL-113**, *Treaty between the United States of America and the Czech and Slovak Federal Republic Concerning the Reciprocal Encouragement and Protection of Investments*, 22 October 1991 (entered into force 19 December 1992), Article II(1) ("Each Party shall permit and treat investment, and activities associated therewith, on a basis no less favorable than that accorded in like situations to investment or associated activities of its own nationals or companies, or of nationals or companies of any third country, whichever is the most favorable, subject to the right of each Party to make or maintain exceptions falling within one of the sectors or matters listed in the Annex to this Treaty.") (emphasis added) ("U.S.-Czech BIT").

domestic investment", albeit "only in the sectors or matters for which it has reserved the right to make or maintain an exception in the Annex to the Treaty".[321]

211. Interpreting another similar national treatment exception under the United States-Ukraine BIT,[322] the *Lemire* tribunal similarly held that "[t]he literality of the Treaty does not leave room for doubt: the parties can make or maintain exceptions, but the scope of these limitations must be restricted to the principle of national treatment."[323] The tribunal further described the national treatment obligation as being "structured as a general principle, subject to an exception (for investment in listed sectors and matters)."[324]

212. While the *Lauder* and *Lemire* tribunals both determined that the national treatment exceptions invoked by the respondents did not apply in those cases, they did so for reasons that do not exist here.[325] It must also be noted that that the national treatment exceptions invoked under the BITs that applied in those cases were subject to notification requirements that are not present in the FIPA. In this regard, the United States-Czech BIT and United States-Ukraine BIT specifically provide:

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[321] **RL-114**, *Ronald S. Lauder v. The Czech Republic* (UNCITRAL) Final Award, 3 September 2001, ¶ 220 ("*Lauder – Award*").

[322] **RL-115**, *Treaty Between the United States of America and Ukraine Concerning the Encouragement and Reciprocal Protection of Investments*, 4 March 1994 (entered into force 16 November 1996), Article II(1) ("Each Party shall permit and treat investment, and activities associated therewith, on a basis no less favorable than that accorded in like situations to investment or associated activities of its own nationals or companies, or of nationals or companies of any third country, whichever is the most favorable, subject to the right of each Party to make or maintain exceptions falling within one of the sectors or matters listed in the Annex to this Treaty.") (emphasis added) ("U.S.-Ukraine BIT").

[323] **RL-116**, *Joseph Charles Lemire v. Ukraine* (ICSID Case No. ARB/06/18) Award, 18 March 2011, ¶ 46 ("*Lemire – Award*").

[324] *Ibid.*

[325] In *Lauder*, the tribunal held that the national treatment exception under the U.S.-Czech BIT did not apply because the Czech Republic had not listed television broadcasting, the sector in which the claimant had invested, in the Annex of the BIT. Indeed, the Czech Republic had only listed "ownership of real property; and insurance" in the Annex. *See* **RL-114**, *Lauder – Award*, ¶¶ 218, 220. In contrast, Canada's list in the Annex to the Canada-Egypt FIPA covers all services including, as discussed in Part III.D.2 below, the telecommunications services sector in which the Claimant invested. In *Lemire*, the tribunal held that the national treatment exception under the U.S.-Ukraine BIT did not apply because the obligation at issue was that of fair and equitable treatment, not national treatment. *See* **RL-116**, *Lemire – Award*, ¶ 47. In contrast, Canada is only seeking to apply the national treatment exception under the Canada-Egypt FIPA to the claims based on alleged breaches of the national treatment obligation. Canada is not seeking to expand the exception to cover its fair and equitable treatment obligations.

> Each Party agrees to notify the other Party before or on the date of entry into force of this Treaty of all such laws and regulations of which it is aware concerning the sectors or matters listed in the Annex. Moreover, each Party agrees to notify the other of any future exception with respect to the sectors or matters listed in the Annex…[326]

213. In addition to agreeing to notification of future exceptions, the parties to these BITs also agreed "to limit such exceptions to a minimum."[327] No such language appears in the FIPA, confirming the broad scope of Canada's services reservation under Article IV(2) and the Annex, and Canada's right to exercise it at any time.

214. In sum, Canada's services reservation for national treatment is not subject to limitation and may be exercised at any time, simply by adopting or maintaining a measure or by according treatment that would otherwise be inconsistent with the national treatment obligations. This right is not subject to any procedural prerequisites. The Claimant's suggestion[328] that Canada must provide evidence that it notified the Claimant that it was exercising the right to make or maintain an exception under the services reservation, either before the alleged breaches or before this arbitration, is without merit. This would impose a second step of notification, which the treaty does not contemplate.

(d) Canada's Treaty Practice Confirms that Canada Intended to Exclude the Application of the National Treatment Obligation for all Services Sectors under the FIPA

215. The broad national treatment reservation for all services under the FIPA is consistent with Canada's treaty practice in the mid-1990s, and with the evolution of Canada's investment policy with respect to the scope of national treatment protections under its FIPAs since the beginning of its FIPA program in 1989.

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[326] **RL-113**, U.S.-Czech BIT, Article 2(1); **RL-115**, U.S.-Ukraine BIT, Article 2(1).

[327] The relevant provisions state: "Moreover, each Party agrees to notify the other of any future exception with respect to the sectors or matters listed in the Annex, and to limit such exceptions to a minimum. Any future exception by either Party shall not apply to investment existing in that sector or matter at the time the exception becomes effective. The treatment accorded pursuant to any exceptions shall, unless specified otherwise in the Annex, be not less favorable than that accorded in like situations to investments and associated activities of nationals or companies of any third country." **RL-113**, U.S.-Czech BIT, Article 2(1); **RL-115**, U.S.-Ukraine BIT, Article 2(1).

[328] Claimant's Submission on Bifurcation, ¶ 24.

216. In Canada's first generation of FIPAs signed from 1989 to 1991, a Contracting Party was only required to admit investments of investors of the other Contracting Party "[s]ubject to its laws, regulations and published policies"[329] or "[s]ubject to its laws and regulations"[330] (that is, the laws, regulations and policies of the host State). Post-establishment, a Contracting Party agreed to accord national treatment only to a limited extent and "in accordance with its laws and regulations".[331]

217. Starting with its second generation of FIPAs in the mid-1990s, Canada began to conclude more ambitious FIPAs which expanded the scope of national treatment protections available to foreign investors. Instead of undertaking national treatment commitments in accordance with its laws and regulations, Canada agreed to make its national treatment obligations subject to specific categories of exclusions, including the right to maintain existing non-conforming measures and to make or maintain exceptions within certain sectors or matters listed in an annex to its FIPAs.

218. Nearly all of Canada's FIPAs signed from 1994 to the late 1990s contain a provision similar or identical to Article IV(2)(d) and the Annex of the Canada-Egypt FIPA.[332] The broad national treatment exception for all services in this FIPA is typical of Canada's second generation FIPAs from this time. In some later examples of Canada's second generation FIPAs,

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[329] **RL-085**, Canada-Poland FIPA, Article II(2); **RL-086**, Canada-Soviet Union FIPA, Article II(2); **RL-088**, Canada-Hungary FIPA, Article II(2).

[330] **RL-087**, Canada-Argentina FIPA, Article II(2).

[331] **RL-085**, Canada-Poland FIPA, Article III(4) ("[E]ach Contracting Party shall, to the maximum extent possible and in accordance with its laws and regulations, grant to investors, investments or returns of investors of the other Contracting Party a treatment no less favourable than that its grants to investors, investments or returns of its own investors.") (emphasis added); **RL-086**, Canada-Soviet Union FIPA, Article III(4) ("[E]ach Contracting Party shall, to the extent possible and in accordance with its laws and regulations, grant to investments or returns of investors of the other Contracting Party a treatment no less favourable than that it grants to investments or returns of its own investors.") (emphasis added); **RL-088**, Canada-Hungary FIPA, Article III(4) ("[E]ach Contracting Party shall, to the extent possible and in accordance with its laws and regulations, grant to investments or returns of investors of the other Contracting Party a treatment no less favourable than that it grants to investments or returns of its own investors.") (emphasis added); **RL-087**, Canada-Argentina FIPA, Article IV ("Each Contracting Party shall, to the extent possible and in accordance with its laws and regulations, grant to investments or returns of investors of the other Contracting Party treatment no less favourable than that which it grants to investments or returns of its own investors.") (emphasis added).

[332] *See* **RL-026**, Canada-Ukraine FIPA, Article IV(2)(d), Annex; **RL-027**, Canada-Trinidad and Tobago FIPA, Article IV(2)(3), Annex; **RL-089**, Canada-Philippines FIPA, Article IV(2)(4), Annex; **RL-094**, Canada-Barbados FIPA, Article IV(2)(4), Annex; **RL-093**, Canada-Ecuador FIPA, Article IV(2)(4), Annex; **RL-095**, Canada-Venezuela FIPA, Annex II.11.4; **RL-092**, Canada-Panama FIPA, Article IV(2)(4), Annex; **RL-100**, Canada-Thailand FIPA, Article IV(3), Annex I; **RL-028**, Canada-Armenia FIPA, Article IV(2)(d), Annex.

the exception was maintained but moved to an Article entitled "National Treatment Exceptions", contained in an Annex entitled "General and Specific Exceptions".[333] Substantively, however, they contained the same broad exception for all services sectors.

219. In 2004, Canada introduced a new model FIPA[334] inspired by Chapter Eleven of NAFTA,[335] which came into force on January 1, 1994. Unlike Canada's second generation FIPA's, NAFTA Chapter Eleven and Canada's 2004 model FIPA do not contain language establishing a broad reservation from national treatment obligations for all services. Instead, they included a national treatment obligation that was subject to a "Reservations and Exceptions" provision. Pursuant to that provision, the national treatment obligation does not apply to existing non-conforming measures or to future measures adopted in certain sensitive sectors, subsectors or activities within which the State Parties wished to reserve policy flexibility to adopt or maintain measures that would not conform with the national treatment obligation.[336] Existing non-conforming measures at the national level were listed in one Annex (Annex I), and sensitive sectors, subsectors or activities in which the State reserves policy flexibility, to adopt future non-conforming measures, were listed in another (Annex II).

220. Canada's Annex II reservations in NAFTA include a reservation to Article 1102 (the national treatment obligation in NAFTA's investment chapter) which states, amongst other details, that:

> Canada reserves the right to adopt or maintain *any measure relating to investment in telecommunications transport networks and telecommunications transport services*, radiocommunications and submarine cables, including

[333] **RL-096**, Canada-Uruguay FIPA, Annex I, Article II(1)(3); **RL-098**, Canada-Lebanon FIPA, Annex I, Article II(1)(4); **RL-097**, Canada-Costa Rica FIPA, Annex I, Article II(1)(3); **RL-099**, Canada-Croatia FIPA, Annex I, Article II(1)(3).

[334] **RL-117**, Canada's Model FIPA, 2004.

[335] *See* **RL-101**, NAFTA, Chapter Eleven.

[336] **RL-117**, Canada's Model FIPA, Article 9(1) ("Articles 3, 4, 6 and 7 shall not apply to: (a) any existing non-conforming measure that is maintained by (i) a Party at the national level, as set out in its Schedule to Annex I, or (ii) a sub-national government; (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 Articles 3, 4, 6 and 7"); Article 9(2) ("Articles 3, 4, 6, and 7 shall not apply to any measure that a Party adopts or maintains with respect to sectors, subsectors or activities, as set out in its schedule to Annex II.").

> ownership restrictions and measures concerning corporate officers and directors and place of incorporation.[337]

221. Canada sought to apply this approach based on a negative list of reservations for existing non-conforming measures and future measures in investment chapters of trade agreements that it concluded going forward, and in its "third generation" of FIPAs beginning with the Canada-Peru FIPA signed in 2006.[338] Throughout Canada's third generation FIPAs,[339] and investment

[337] **RL-101**, NAFTA, Annex II, Schedule of Canada, p. 4 (emphasis added).

[338] **RL-118**, *Agreement Between Canada and the Republic of Peru for the Promotion and Protection of Investments*, 14 November 2006 (entered into force 20 June 2007, suspended 1 August 2009), Can. T.S. 2007 No. 10, Article 9, Annex II. Note that the Canada-Peru FIPA is suspended from operation while the subsequently-concluded Canada-Peru Free Trade Agreement is in force. **RL-119**, *Canada-Peru Free Trade Agreement*, 29 May 2008 (entered into force 1 August 2009), Can. T.S. 2009 No. 15, Articles 808, 845, Annex II ("Canada-Peru FTA").

[339] *See* **RL-120**, *Agreement Between Canada and the Hashemite Kingdom of Jordan for the Promotion and Protection of Investments*, 28 June 2009 (entered into force 14 December 2009), Article 9, Annex II; **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*, 16 May 2013 (entered into force 9 December 2013), Article 16, Annex II; **RL-121**, *Agreement Between Canada and The State of Kuwait For The Promotion and Protection of Investments*, 26 September 2011 (entered into force 19 February 2014), Can. T.S. 2014 No. 5, Article 16, Annex I; **CL-073**, *Agreement Between the Government of Canada and the Government of the Republic of Benin for the Promotion and Reciprocal Protection of Investments*, 9 January 2013 (entered into force 1 October 2014), Article 18, Annex II; **CL-078**, *Agreement Between Canada and the Republic of Serbia for the Promotion and Protection of Investments*, 1 September 2014 (entered into force 27 April 2015), Article 17, Annex II; **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*, 26 September 2013 (entered into force 14 December 2015), Can. T.S. 2015 No. 19, Article 16, Annex II; **RL-123**, *Agreement Between Canada and Mali for the Promotion and Protection of Investments*, 28 November 2014 (entered into force 8 June 2016), Can. T.S. 2016 No. 5, Article 16, Annex II; **RL-124**, *Agreement Between Canada and the Federal Republic of Senegal for the Promotion and Protection of Investments*, 27 November 2014 (entered into force 5 August 2016), Article 17, Annex I; **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*, 10 February 2016 (entered into force 6 September 2016), Can. T.S. 2016 No. 8, Article 16, Annex II; **RL-126**, *Agreement Between Canada and the Republic of Cameroon for the Promotion and Protection of Investments*, 3 March 2014 (entered into force 16 December 2016), Can. T.S. 2016 No. 15, Article 16, Annex II; **RL-127**, *Agreement Between Canada and Mongolia for the Promotion and Protection of Investments*, 8 September 2016 (entered into force 24 February 2017), Can. T.S. 2017 No. 7, Article 16, Annex I; **RL-128**, *Agreement for the Promotion and Reciprocal Protection of Investments between Canada and the Republic of Guinea*, 27 May 2015 (entered into force 27 March 2017), Can. T.S. 2017 No. 12, Article 17, Annex I; **RL-129**, *Agreement Between the Government of Canada and the Government of Burkina Faso for the Promotion and Protection of Investments*, 20 April 2015 (entered into force 11 October 2017), Article 17, Annex II. Note, however, that certain agreements concluded after the Canada-Peru FIPA included the exception for all services from Canada's second generation FIPAs. *See* **RL-091**, Canada-Romania FIPA, Article IV(2)(d), Annex; **RL-090**, Canada-Latvia FIPA, Article IV(2)(d), Annex. Moreover, some agreements adopted the first generation approach to national treatment, making it unnecessary to take any reservations. *See* **RL-130**, *Agreement Between Canada and the Czech Republic for the Promotion and Protection of Investments*, 6 May 2009 (entered into force 22 January 2012), Article III(4); **RL-131**, *Agreement Between Canada and the Slovak Republic for the Promotion and Protection of Investments*, 20 July 2010 (entered into force 14 March 2012), Article III(4).

chapters of free trade agreements concluded since NAFTA,[340] Canada consistently included an Annex containing reservations for future measures in various sensitive services sectors, including telecommunications. It is only in its latest trade agreements that Canada moved away from a complete exception to the application of national treatment obligations to investments in the telecommunications sector.[341]

222. The listing approach used in Canada's modern FIPAs and free trade agreements requires reservations to be set out with greater specificity, with reference to particular services sectors instead of a blanket reservation for all services sectors. This reflects Canada's increasing ambition in terms of ensuring that obligations have as broad a coverage as possible. However, at the time of the Canada-Egypt FIPA, Canada maintained the ability to discriminate with respect to investors and investments in the telecommunications sector through the broad services reservation in Article IV(2)(d) and its Annex.

223. The Claimant notes that Canada "separately identified telecommunications as an exception in other bilateral investment treaties where it has sought such an exception."[342] The Claimant cites specifically to Canada's FIPAs with Benin, Tanzania and Serbia, which were signed in 2013 and 2014.[343] However, this merely reflects the evolution in the architecture of Canada's FIPAs over the past three decades. The Canada-Egypt FIPA for its part establishes a broad national treatment reservation for all services, including telecommunications, which is consistent

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[340] *See* **RL-132**, *Canada-Chile Free Trade Agreement*, 5 December 1996 (entered into force 5 July 1997), Can. T.S. 1997 No. 50, Article G-08, Annex II; **RL-119**, Canada-Peru FTA, Article 808, Annex II; **RL-133**, *Canada-Colombia Free Trade Agreement*, 21 November 2008 (entered into force 15 August 2011), Can. T.S. 2011 No. 11, Article 809, Annex II; **RL-134**, *Canada-Panama Free Trade Agreement*, 14 May 2010 (entered into force 1 April 2013), Can. T.S. 2013 No. 9, Article 9.09, Annex II; **RL-135**, *Canada-Honduras Free Trade Agreement*, 5 November 2013 (entered into force 1 October 2014), Can. T.S. 2014 No. 23, Article 10.9, Annex II.

[341] *See* **RL-136**, *Canada-Korea Free Trade Agreement*, 22 September 2014 (entered into force 1 January 2015), Can. T.S. 2015 No. 3, Article 8.9, Annex I; **RL-137**, *Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part*, 30 October 2016 (provisional application on 21 September 2017; investment chapter not in force), Article 8.15 and Annex I, Schedule of Canada, Reservation I-C-9. In those agreements Canada moved its national treatment reservation with respect to investment in the telecommunications sector to Annex I (the annex for existing non-conforming measures) instead of Annex II (the annex for future measures). This means that these more recent treaties "grandfather" the existing level of liberalization with respect to foreign investment in Canada's telecommunications services sector, but do not allow for more restrictive measures to be adopted in the future.

[342] Claimant's Memorial, fn. 833.

[343] *Ibid.*

with Canada's treaty practice from that time. Canada's subsequent decision to include lists of specific services sectors that are excluded from the scope of its national treatment obligation does not change the scope of Article IV(2)(d) of the FIPA and its Annex.

224. Canada's second generation FIPAs, like the Canada-Egypt FIPA, and third generation FIPAs, like those cited by the Claimant, adopt a different approach to arrive at a similar result, *vis-à-vis* telecommunications. The former exclude telecommunications from the scope of Canada's national treatment obligations by allowing Canada to make or maintain broad exceptions for "services in any other sector". The latter exclude certain aspects of telecommunications by "grandfathering" existing measures and/or including a broad exception to adopt and maintain measures that were inconsistent with its national treatment obligations for certain specific services sectors going forward, including telecommunications.

3. The Claimant's National Treatment Claims Relate to Investment in the Telecommunications Sector and Therefore Fall within the Scope of the Services Reservation under Article IV(2)(d) and its Annex

225. The broad national treatment reservation for services described above applies in the telecommunications sector. Since the Claimant's national treatment claims relate to measures that were allegedly adopted in that sector and to treatment that it was allegedly accorded as an investor in that sector, its claims under Article II(3)(a) and Article IV(1) must be dismissed.

(a) The Services Exception Applies to the Telecommunications Sector

226. As the telecommunications sector is a services sector, the broad services exception for national treatment described in Part III.E.2 above applies. The Claimant's assertion that Article IV(2)(d) and the Annex to the FIPA do not exclude the application of Canada's national treatment obligations in the telecommunications sector defies the ordinary meaning of the phrase "services in any other sector" as used in the context of the Annex to the FIPA.

227. The Claimant first argues that "[t]he wireless telecommunications sector does not fall under any of the 'sectors or matters' contained in Annex A" for the purpose of Article IV(2)(d)

because it is not "an enumerated 'social services' sector".[344] However, Canada has never argued that the wireless telecommunications sector is a social service.

228. Next, despite acknowledging that it is in the business of offering "telecommunications services",[345] the Claimant inexplicably asserts that wireless telecommunications do not qualify as "services in any other sector".[346] This baffling interpretation fails to give effect to the ordinary meaning of the terms of the Annex to the FIPA in their context.

229. As noted above, paragraph 1 of the Annex lists the sectors or matters in which Canada has maintained the right to make or maintain exceptions to its national treatment obligations under Article II(3)(a) and Article IV(1), in accordance with Article IV(2)(d). The first two items are "social services" and "services in any other sector". The Claimant has not advanced any argument or evidence to support its assertion that "services in any other sector" does not cover the telecommunications sector in this context.

230. The standard classification systems that apply to international trade in services confirm that the ordinary meaning of "services in any other sector" in the Annex to the FIPA covers wireless telecommunications. For example, as noted in Canada's Request for Bifurcation,[347] the World Trade Organization's Services Sectoral Classification List classifies "telecommunication services" as a services sub-sector within the "communication services" sector.[348] Similarly, the United Nations Statistical Commission's Central Product Classification classifies "telecommunications services" as a services group within the division of "post and telecommunications services".[349]

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[344] *Ibid.*

[345] Claimant's Memorial, ¶ 1 (emphasis added).

[346] Claimant's Memorial, fn. 833.

[347] Canada's Request for Bifurcation, fn. 43.

[348] **RL-029**, WTO, Services Sectoral Classification List: Note by the Secretariat, WTO Doc. No. MTN.GNS/W/120, 10 July 1991, p. 3.

[349] **R-078**, United Nations Statistics Division, website excerpt, "Detailed structure and explanatory notes: CPCprov code 752", available at: https://unstats.un.org/unsd/cr/registry/regcs.asp?Cl=9&Lg=1&Co=752.

231. Nor is there any indication in the text of the FIPA or its Annex that the Contracting Parties intended to exclude any particular service sector, such as telecommunications, from Canada's broad services reservation for national treatment. To the contrary, the words "any other" indicate that the Contracting Parties intended that the exception to apply to all services not already covered by the category of "social services".

(b) The Claimant's National Treatment Claims Relate to Investment in Telecommunications

232. The Claimant's national treatment claims relate entirely to treatment allegedly accorded to the Claimant and its investment in the telecommunications sector, which is a services sector. Such claims cannot survive jurisdictional scrutiny, as they fall within the broad national treatment exception for services taken by Canada in Article IV(2)(d) of the FIPA and its Annex.

233. The Claimant appears to allege two separate breaches of Canada's national treatment obligations, both relating to the national security review procedure of GTHCL's application to acquire voting control over its investment in Wind Mobile, a New Entrant in the telecommunications sector. As such, the Claimant's national treatment claims relate to investment in the telecommunications sector.

234. More specifically the Claimant first alleges that "Canada breached its obligation to accord national treatment protection when it applied [the] national security review procedure [redacted][350] The Claimant goes on to say that "Canada breached its obligation to provide national treatment protection to GTH when, in response to GTHCL's Voting Control Application, it initiated and conducted [the] review on the basis of alleged national security concerns, pursuant to a review procedure applicable only to foreign investors."[351] This allegation is restricted to the Claimant's investment in the telecommunications sector.

235. The Claimant's second national treatment claim appears to be that [redacted]

[350] Claimant's Memorial, ¶ 387.

[351] Claimant's Memorial, ¶ 392.

[redacted] This allegation is also restricted to the Claimant's investment in the telecommunications sector.

4. Conclusion

236. Canada exercised its right to exclude certain matters and sectors from its national treatment obligations under the FIPA, including Articles II(3)(a) and IV(1). Pursuant to Article IV(2)(d), Canada listed in the Annex to the Agreement certain matters and sectors to which those national treatment obligations do not apply, including all services sectors.

237. The Claimant's national treatment claims relate to its investment in the telecommunications sector. This sector falls within the scope of the sectors or matters listed in the Annex to the FIPA. Therefore, Canada has the right to make exceptions to its national treatment obligations under Articles II(3)(a) and IV(1) in the telecommunications sector at any time. The Claimant cannot submit a claim for alleged breaches of obligations that do not apply. The Claimant's allegations are not capable of constituting breaches of the Agreement and must therefore be dismissed for lack of jurisdiction *ratione materiae*.

IV. THE CLAIMANT LACKS STANDING TO BRING A CLAIM WITH RESPECT TO THE TREATMENT OF WIND MOBILE AND WIND MOBILE'S LICENSES

A. Summary of Canada's Position

238. The Claimant, Global Telecom Holding S.A.E., and its equity and debt investments, are distinct from Wind Mobile. Still, two of the claims brought by the Claimant relate to alleged treatment of Wind Mobile, specifically (i) treatment relating to the competitiveness of Wind Mobile as a New Entrant in Canada, and (ii) treatment relating to the transferability of Wind Mobile's licenses. As further explained below, the Claimant lacks standing in relation to these two claims.

239. Separation of legal personality between an enterprise and its shareholders is a general principle of international law applicable to this arbitration. Derogation from this general

[352] *Ibid.*

principle only extends to what is provided in a specific treaty. The FIPA provides for limited derogation from the general principle that shareholders have no standing to submit a claim for losses incurred by an enterprise. Specifically, a foreign shareholder may bring a claim with respect to treatment of an enterprise that is a juridical person incorporated in the host State if the foreign shareholder brings the claim on behalf of the enterprise. In such a case, any damages awarded will be paid to the affected enterprise. To bring a claim on behalf of an enterprise, the foreign shareholder must own or control the enterprise, the enterprise must consent to the arbitration, and the enterprise must waive any right to domestic proceedings in relation to every alleged breach.[353]

240. None of these criteria are satisfied in this case. The Claimant is not pursuing its claims in this arbitration on behalf of Wind Mobile, and Wind Mobile has neither consented to this arbitration nor filed a waiver is relation to the claims pursued. As it has not brought the claim on behalf of Wind Mobile, the Claimant cannot bring a claim for alleged breaches and damages that relate to the treatment of Wind Mobile. The FIPA does not allow a claimant to bring a claim for reflective loss, or loss suffered by a claimant that is inseparable from the loss suffered by the enterprise.

B. A Shareholder Cannot Bring a Claim for Treatment of an Enterprise because Separation of Legal Personality is a General Principle of International Law

241. International law dictates that corporate entities are separate legal entities distinct from their shareholders. In other words, incorporation of an enterprise creates a legal person that is separate from its owners and which acquires its own separate assets, rights and liabilities. This notion of separate legal personality was recognized as a principle of international law in the *Barcelona Traction* case,[354] where the ICJ stated:

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[353] **CL-001**, Canada-Egypt FIPA, Article XIII(12).

[354] **RL-138**, *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)* Judgment, I.C.J. Reports 1970, p. 3 ("*Barcelona Traction Case*"). In the more recent *Diallo* case, the ICJ affirmed that separate legal personality of corporations is a general principle of international law (**RL-139**, *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Preliminary Objections, Judgment of 24 May 2007, I.C.J. Reports 2007, p. 582, ¶ 61 ("*Diallo*")).

> The concept and structure of the company are founded on and determined by a firm distinction between the separate entity of the company and that of the shareholder, each with a distinct set of rights. …
>
> [T]he shareholders' rights in relation to the company and its assets remain limited, this being, moreover, a corollary of the limited nature of their liability. At this point the Court would recall that in forming a company, its promoters are guided by all the various factors involved, the advantages and disadvantages of which they take into account.[355]

242. The Court observed that while harm to an enterprise frequently harms the shareholder as well, this is not enough to grant a shareholder a right to seek compensation for measures taken against a corporation:

> Notwithstanding the separate corporate personality, a wrong done to the company frequently causes prejudice to its shareholders. But the mere fact that damage is sustained by both company and shareholder does not imply that both are entitled to claim compensation. Thus no legal conclusion can be drawn from the fact that the same event caused damage simultaneously affecting several natural or juristic persons. Creditors do not have any right to claim compensation from a person who, by wronging their debtor, causes them loss. In such cases, no doubt, the interests of the aggrieved are affected, but not their rights. Thus whenever a shareholder's interests are harmed by an act done to the company, it is to the latter that he must look to institute appropriate action; for although two separate entities may have suffered from the same wrong, it is only one entity whose rights have been infringed.[356]

243. The Court went on to clarify the distinction between direct claims (claims that the shareholder has a right to make) on the one hand, and derivative claims (claims that only indirectly concern the shareholder) on the other:

> The situation is different if the act complained of is aimed at the direct rights of the shareholder as such. It is well known that there are rights which municipal law confers upon the latter distinct from those of the company, including the right to any declared dividend, the right to attend and vote at general meetings, the right to share in the residual assets of the company on liquidation. Whenever one of his direct rights is infringed, the shareholder has an independent right of action. On this there is no disagreement between the Parties. But a distinction must be drawn between a direct infringement of the

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

[356] **RL-138**, *Barcelona Traction Case*, ¶ 44 (emphasis added).

> shareholder's rights, and difficulties or financial losses to which he may be exposed as the result of the situation of the company.[357]

244. Thus, a shareholder's claim is direct if it concerns treatment of the shareholder that is separate and distinct from the treatment of the corporation itself. A claim is derivative if the shareholder was affected simply as a consequence of the treatment of the corporation. In the latter case, a shareholder does not have any independent right of action under international law with respect to reflective losses it may have suffered as a result of the treatment of the corporation.

245. This general principle of international law applies to this arbitration except to the extent the FIPA specifically derogates from the principle. Article XIII(7) of the FIPA states that a tribunal "shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law",[358] which includes general principles of law.

246. Arbitral tribunals have recognized that the principle of separate legal personality of an incorporated enterprise and its shareholders applies in investment arbitration except to the extent the relevant investment treaty has derogated from it. The *HICEE v. Slovak Republic* tribunal stated:

> When the Claimant says that "investment treaty jurisprudence" gives a shareholder standing to pursue claims for damage to the assets of a company in which it holds shares, that is not a proposition that can be upheld by the Tribunal in so sweeping a form, given the default position in international law that the corporate form is recognized as legally distinct from the shareholders, and confers on the corporate entity the capacity to assert claims for damage suffered to it or its property. The true position, as the Tribunal understands it, is 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 implication. The position, in other words, is controlled by the treaty.[359]

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[357] **RL-138**, *Barcelona Traction Case*, ¶ 47.

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

[359] **RL-140**, *HICEE B.V. v. The Slovak Republic* (UNCITRAL) PCA Case No. 2009-11, Partial Award, 23 May 2011, ¶ 147 ("*HICEE – Partial Award*").

247. Likewise, the *Poštová banka v. Greece* tribunal observed that "the "default position" in international law is that a company is legally distinct from its shareholders."[360]

248. Thus, unless the Claimant proves positively that Canada and Egypt derogated in the FIPA from the general principle of law of separate legal personality of shareholders and enterprises, this Tribunal is bound to apply that rule to this claim.[361] It is well recognized that "[a]n important principle of international law should not be held to have been tacitly dispensed with by international agreement, in the absence of words making clear an intention to so".[362]

C. The FIPA Allows a Shareholder to Bring a Claim for Treatment of an Enterprise Only As Set Out in Article XIII(12) of the FIPA

249. The FIPA's definition of "investment" covers "shares".[363] Pursuant to Article XIII(3) of the FIPA a shareholder may bring a claim with respect to measures that relate to the treatment of, and damages to its shares. A shareholder can also bring a claim with respect to measures that relate to the treatment of, and damages to the enterprise in which it holds shares, but only in the manner prescribed in Article XIII(12).

250. The inclusion of shares as a type of investment in Article I(f)(b) does not in itself create new rights in respect of shares. A treaty "does not create a new type of shareholding by listing it among the categories of assets that may constitute investments any more than it creates a new type of land by the same device" and thus "where a shareholding is the object of an investment treaty claim, the basic contours of the rights attaching to that form of investment must be derived from the municipal legal order."[364] In other words, it cannot be assumed that the inclusion of

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

[361] States can mutually derogate from general principles of law by providing for such derogation in their investment treaties. This was explicitly acknowledged by the ICJ in the Diallo case (**RL-139**, *Diallo*, ¶ 88). The *lex specialis derogat generali* rule gives priority to the *lex specialis* in a treaty notwithstanding the general rule that applies outside of the treaty regime. However, it is understood that the parties to a treaty have mutually agreed to modify their legal relationships "only to the extent provided for in the treaty" (**RL-142**, John H. Currie, *Public International Law* (2nd ed., Irwin Law Inc., 2008), p. 206).

[362] **RL-143**, *Loewen Group, Inc. and Raymond L. Loewen v. United States of America* (ICSID Case No. ARB(AF)/98/3) Award, 26 June 2003, ¶ 160.

[363] **CL-001**, Canada-Egypt FIPA, Article I(f).

[364] **RL-045**, *Douglas*, p. 400 (¶ 751).

shares in the definition of "investment" automatically extends treaty protection beyond a covered investor's shareholding interest to the underlying enterprise and its interests. To the contrary, because of the principle of separate legal personality, an interest in the shares of an enterprise is distinct from any interests of the enterprise, and the remainder of the treaty has to be considered to determine if and under what conditions a shareholder investor can bring claims in relation to an enterprise.

251. The FIPA contemplates derivative claims. Specifically, the FIPA outlines two distinct avenues for claims, one for direct claims (Article XIII(3)) and another for derivative claims (Article XIII(12)). Article XIII(3) of the FIPA permits a foreign investor to commence arbitration on its own behalf for its treatment and loss,[365] or, alternatively, Article XIII(12) permits an investor to commence arbitration on behalf of an enterprise that is a juridical person incorporated in the host State for loss the enterprise has incurred if the investor "owns or controls directly or indirectly" the enterprise.[366] The Claimant has brought its claim in this arbitration pursuant to Article XIII(3).[367]

252. As Article XIII(3) clearly states, the right of the investor to claim on its own behalf is limited to "a claim… that the investor has incurred loss or damage".[368] Nothing in the text of Article XIII(3) supports an argument that Canada and Egypt intended to derogate from the general rule of separate legal personality. On this basis alone, Article XIII(3) does not allow a claimant shareholder to pursue claims for loss or damage to the enterprise for reflective losses resulting from damage to the enterprise.

253. Importantly, Article XIII(3) must be interpreted in the context of Article XIII(12). Article XIII(12) provides that in certain specified circumstances "a claim… that **an enterprise**… has incurred loss or damage…may be brought by an investor".[369] Specifically, an investor has

[365] **CL-001**, Canada-Egypt FIPA, Article XIII(3).

[366] **CL-001**, Canada-Egypt FIPA, Article XIII(12).

[367] Request for Arbitration, ¶¶ 68-69.

[368] **CL-001**, Canada-Egypt FIPA, Articles XIII(1), XIII(3).

[369] **CL-001**, Canada-Egypt FIPA, Article XIII(12).

standing to bring a claim for loss to an enterprise under Article XIII(12) only "on behalf of an enterprise which the investor owns or controls directly or indirectly."[370]

254. Further, unlike with a claim pursued under Article XIII(3), when a claim is pursued under Article XIII(12) any damages awarded are paid to the enterprise and not the investor.[371] Article XIII(3) states that when an investor has suffered a loss it can submit a claim to arbitration "only if: … the investor has consented in writing thereto; [and] the investor has waived its 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".[372] On the other hand, Article XIII(12) states that when an enterprise has suffered a loss "the consent to arbitration of both the investor and the enterprise shall be required"[373] and that "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".[374]

255. Thus, the FIPA creates a separation between Articles XIII(3) and XIII(12) based on whether the claim concerns loss or damage incurred by the foreign shareholder investor or a local enterprise. The distinct conditions for standing under Articles XIII(3) and XIII(12) indicate that there are two types of claims that are strictly separate and not to be conflated. Ignoring this distinction would render Article XIII(12) redundant. An interpreter is not free to adopt a reading that reduces whole treaty clauses to inutility.[375]

256. An interpretation that reads out the distinction between Articles XIII(3) and XIII(12) would have serious negative consequences. First, Article XIII(12) ensures that only a shareholder

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[370] *Ibid.*

[371] **CL-001**, Canada-Egypt FIPA, Article XIII(12)(a)(i).

[372] **CL-001**, Canada-Egypt FIPA, Articles XIII(3)(a), XIII(3)(b).

[373] **CL-001**, Canada-Egypt FIPA, Article XIII(12)(a)(ii).

[374] **CL-001**, Canada-Egypt FIPA, Article XIII(12)(a)(iii).

[375] **RL-144**, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, Report of the Appellate Body, 29 April 1996, p. 23.

investor that owns or controls an enterprise can pursue a claim for loss or damage to the enterprise. This ensures that multiple minority shareholders cannot pursue claims over the same events and the same damages. The possibility of multiple shareholders bringing claims for the same treatment and damage to the same enterprise raises the risk of inconsistent decisions and compromises judicial economy.[376]

257. Second, the distinction between Articles XIII(3) and XIII(12) is critical to ensuring that creditors' rights are respected. Articles XIII(3) and XIII(12) ensure that damages suffered by an enterprise due to a breach are paid to the enterprise, and not to its shareholders.[377] In corporate law, creditors have a priority claim over shareholders for corporate assets.[378] Allowing claims by shareholder investors on their own behalf for treatment of an enterprise under Article XIII(3) would by-pass the enterprise to the detriment of creditors and non-claimant shareholders.[379] The *Mondev* tribunal recognized that awarding damages to the enterprise for its losses, rather than to shareholders, could be important to creditors with security interests in the damages paid.[380] That tribunal also noted that paying an award to a shareholder for losses of the enterprise "could also make a difference in terms of the tax treatment of those damages."[381] Introducing different priority rankings over corporate assets unsettles the predictability of the corporate form.[382]

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[376] **RL-145**, David Gaukrodger, *Investment Treaties as Corporate Law: Shareholder Claims and Issues of Consistency*, OECD Working Papers on International Investment, No. 2013/3, OECD Investment Division, p. 9 ("national courts have frequently underlined that the no reflective loss principle serves the societal interest in "judicial economy" by reducing the number of cases needed to address the harm.") ("*Gaukrodger, 2013*").

[377] See, for example, **RL-146**, *GAMI Investments Inc. v. United Mexican States* (UNCITRAL) Submission of the United States, 30 June 2003, ¶ 17; **RL-147**, *GAMI Investments Inc. v. United Mexican States* (UNCITRAL) Mexico's Statement of Defense, 24 November 2003, ¶¶ 166-167 (agreeing with and quoting US submission) ("*GAMI – Statement of Defense*"); **RL-148**, *Alford v. Frontier Enterprises, Inc*., 599 F. 2d 483 (1st. Cir. 1979), p. 2 ("[the shareholder] is attempting to use the corporate form both as shield and sword at his will […T]he corporate form … effectively shielded [him] from liability", but the shareholder contended that he "can disregard the corporate entity and recover damages for himself. Of course, this is impermissible.").

[378] **RL-149**, David Gaukrodger, Chapter 8, *The impact of investment treaties on companies, shareholders and creditors*, OECD Business and Finance Outlook 2016, p. 235 ("*Gaukrodger, 2016*").

[379] **RL-149**, *Gaukrodger, 2016*, p. 239.

[380] **RL-104**, *Mondev – Award*, ¶¶ 84, 86.

[381] **RL-104**, *Mondev – Award*, ¶ 84.

[382] **RL-150**, David Gaukrodger, *Investment Treaties and Shareholder Claims for Reflective Loss: Insights from Advanced Systems of Corporate Law*, OECD Working Papers on International Investment, No. 2014/2, OECD Publishing, p. 18 ("*Gaukrodger, 2014*").

258. Third, the waiver requirement in Article XIII(3), unlike the one in Article XIII(12), only extends to the claimant and not to its enterprise, meaning that the enterprise has not waived its right to pursue claims domestically or otherwise. The *GAMI v. Mexico* tribunal cautioned that allowing claims by a shareholder on a shareholder's own behalf for treatment of an enterprise would create insurmountable difficulties with respect to quantification of any loss to a particular shareholder investor.[383] Risk of double recovery arises.[384] Again, there is a possibility of inconsistent decisions and harm to judicial economy. A State may also see little value in settling with an enterprise when its shareholders can bring claims with respect to the same measures.[385]

259. Fourth, requiring the consent of both the enterprise and the shareholder to pursue arbitration under Article XIII(12) respects the concept of delegated management, which like separate legal personality, is a core characteristic of the corporate form.[386] It is a corporation's directors and officers that make most business decisions, including whether to commence or settle litigation. They have a fiduciary duty to act in the enterprise's best interests, by considering diverse corporate constituents, including minority shareholders. The directors and officers may not consider commencing or continuing arbitration against the host State to be in the enterprise's long-term interest.[387] If shareholders could pursue claims autonomously under Article XIII(3) for treatment of an enterprise, such interests would be compromised.

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[383] **RL-151**, *GAMI Investments Inc. v. United Mexican States* (UNCITRAL) Final Award, 15 November 2004, ¶¶ 116-121 ("This scenario [of a court or investor-State tribunal accounting for damages that were awarded by the other body in its award] is of course a fantasy. It is factually implausible. It lacks legal foundation. The Tribunal is aware of no procedural basis on which such coordination could take place… The overwhelming implausibility of a simultaneous resolution of the problem by national and international jurisdictions impels consideration of the practically certain scenario of unsynchronised resolution. It is sufficient to consider the hypothesis that a NAFTA tribunal were to order payment to GAMI [that is, the foreign investor] before the Mexican courts render their final decision. … What effect should the Mexican courts now give to the NAFTA award? How could GAM's [that is, the domestic enterprise's] recovery be reduced because of the payment to GAMI? GAM is the owner of the expropriated assets. It has never paid dividends. It would have been most unlikely to distribute revenues in the amount recovered by GAMI. At any rate such a decision would have required due deliberation of GAM's corporate organs. Creditors would come first. And other shareholders would have an equal right to the distribution. GAM would obviously say that it is the expropriated owner and that its compensable loss under Mexican law could not be diminished by the amount paid to one of its shareholders.").

[384] **RL-151**, *GAMI – Final Award*, ¶¶ 120-121.

[385] **RL-145**, *Gaukrodger*, 2013, p. 9 ("where shareholders can claim autonomously for reflective loss, a settlement with the company may be of little value to the government (and thus to the company and its creditors).")

[386] **RL-150**, *Gaukrodger*, 2014, p. 16.

[387] **RL-145**, *Gaukrodger*, 2013, p. 10.

260. It is for reasons such as this that the distinction between Articles XIII(3) and XIII(12) must be respected. A basic tenet of corporate law recognized across legal systems is that a corporation has separate legal status from its shareholders. As a consequence, the shareholders are shielded from liability for the actions of the corporate enterprise. It would be inappropriate for a shareholder to take advantage of the separate legal status of corporate enterprise to shield itself from potential liability in the domestic sphere, but then disregard that legal status for the purpose of making claims in the international sphere.

261. The NAFTA draws a similar distinction in the types of claims that can be pursued. Article 1116 of the NAFTA states that "[a]n investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation… and that the investor has incurred loss or damage by reason of, or arising out of, that breach."[388] Article 1117 of the NAFTA, on the other hand, states that "[a]n investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that another Party has breached an obligation… and that the enterprise has incurred loss or damage by reason of, or arising out of, that breach." All three NAFTA Parties have consistently interpreted Articles 1116 and 1117 as distinct provisions and agreed that a shareholder cannot bring a claim on its own behalf for damages to its shares resulting from loss to the enterprise.[389] Although a few NAFTA tribunals

[388] **RL-101**, NAFTA, Article 1116.

[389] The United States explained as follows in its third party submissions in Pope: "Articles 1116 and 1117 of the NAFTA serve distinct purposes... Where the investment is a separate legal entity, such as an enterprise, any damage to the investment will be a derivative loss to the investor, and the investor will have standing to bring a claim under Article 1117. Where the investment is not a separate legal entity, any damage to the investment will be a direct loss to the investor, and the investor will have standing to bring a claim under Article 1116… Examples of direct losses sustained by an investor in its capacity as an investor that would give rise to a claim under Article 1116 are, for example, losses suffered as a result of an investor's stockholder shares having been expropriated or losses sustained as a result of the investor having been denied its right to vote its shares in a company incorporated in the territory of another NAFTA Party." The United States further confirmed that: "while harm to an investment may very well result in harm to the investor, this does not support the contention that – despite the plain language of the NAFTA – an investor can bring a claim under Article 1116 for loss or damage incurred by an enterprise because an enterprise is an investment". (**RL-152**, *Pope & Talbot v. Government of Canada* (UNCITRAL) Seventh Submission of the United States of America, 6 November 2001, ¶¶ 3-4, 6, 9).

Similarly, Canada stated in its pleadings in Pope that "[t]he drafters of NAFTA included Article 1117 to provide a remedy for injuries to enterprises that would otherwise be barred from bringing a claim by the customary international law rule prohibiting claimants from filing international claims against their own governments" and that Article 1117 "supplement[ed] customary international law by creating a derivative right of action for the benefit of an investor." Thus, "[w]here a claim concerns loss or damage incurred by an investment, the investor can only

have blurred the distinction between Articles 1116 and 1117, they have done so in situations very different from the factual scenario before this Tribunal. In particular, some NAFTA tribunals have 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.[390]

262. In contrast, when addressing minority non-controlling shareholder claimants, other NAFTA tribunals have been more cognizant of the legal distinction between an enterprise and its shareholders. For example, in *GAMI*, which concerned a minority shareholder claimant, the tribunal dismissed the claims before it largely on the basis of the legal distinction between an enterprise and its shareholders. Specifically, on the discrimination claims, the *GAMI* tribunal stated: "It is not conceivable that a Mexican corporation becomes entitled to the anti-discrimination protections of international law by virtue of the sole fact that a foreigner buys shares in it."[391] In other words, a discrimination claim could not be made out by relying upon treatment of an enterprise and equating it to treatment of the foreign claimant. Similarly, on expropriation, the tribunal stated that "GAMI's shares in GAM [the enterprise] have not been expropriated" and hence "GAMI must therefore say that its *investment* in GAM has suffered something tantamount to expropriation."[392] In other words, the claimant had to prove that its shares (as opposed to the enterprise GAM itself) had suffered something tantamount to expropriation. Thus, the claim had to concern treatment of the shares as opposed to the enterprise. With the claim of unfair and inequitable treatment, the tribunal noted there would be a jurisdictional impediment if the claim only concerned treatment of the enterprise's asset.[393] It

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recover for claims that are derived from or depend on the injury to its investment if it submits the claim pursuant to Article 1117." (**RL-153**, *Pope & Talbot v. Government of Canada* (UNCITRAL) Statement of Defence (Phase 3 – Damages), 18 August 2001, ¶¶ 49-54).

Mexico has taken exactly the same position. In *GAMI*, Mexico agreed that the interests of shareholders must not be confused with those of the enterprise, and argued in its Statement of Defence that "[a] shareholder cannot bring a claim in accordance with Article 1116 for damages or losses suffered directly by an enterprise". (**RL-147**, *GAMI – Statement of Defense*, ¶ 167(h)).

[390] **RL-104**, *Mondev – Award*, ¶ 86.

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

[392] **RL-151**, *GAMI – Final Award*, ¶ 123 (emphasis in original).

[393] **RL-151**, *GAMI – Final Award*, ¶42.

went on to consider the claim related to treatment of the shareholder and found that it did not pass muster with respect to damages.[394]

263. The Claimant has cited to three cases in its Memorial, namely *CMS Gas v. Argentina*,[395] *ConocoPhillips v. Venezuela*,[396] and *Mobil Corporation v. Venezuela*,[397] in support of its ability to pursue claims on its own behalf for treatment of Wind Mobile in this arbitration.[398] The *CMS Gas* arbitration was pursued under the Argentina-United States BIT,[399] and the *ConocoPhillips* and *Mobil Corporation* arbitrations were pursued under the Netherlands-Venezuela BIT.[400] Neither of these treaties contains a stand-alone provision that contemplates the circumstances in which a foreign shareholder can pursue a claim in relation to treatment of a domestic enterprise in which it holds shares. Thus, the tribunals' analysis with respect to the admissibility of claims by a shareholder in relation to treatment of an enterprise in those arbitrations is inapposite to claims under Article XIII of the FIPA.

264. Further, even where treaties have not provided an express delineation between direct and derivative claims in the manner that the FIPA has, tribunals have by and large only allowed shareholder claims for treatment of an enterprise in certain factual scenarios. In determining whether treaty protection extended to a shareholder investor not only with respect to rights inherent to a shareholder, but also with respect to the operations of the enterprise in which an investor holds shares in, the *Telefónica v. Argentina* tribunal observed that "the separate legal personalities of the foreign investor, on the one hand, and of the local company in which such

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[394] **RL-151**, *GAMI – Final Award*, ¶¶ 83-85.

[395] **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 ("*CMS Gas – Decision on Jurisdiction*").

[396] **CL-006**, *ConocoPhillips Petrozuata B.V. et al. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/30) Decision on Jurisdiction and the Merits, 3 September 2013.

[397] **CL-014**, *Mobil Corporation, Venezuela Holdings, B.V. et al. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/27) Decision on Jurisdiction, 10 June 2010.

[398] Claimant's Memorial, fn. 616.

[399] **RL-154**, *Treaty Between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment*, 14 November 1991 (entered into force 20 October 1994).

[400] **RL-155**, *Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Republic of Venezuela*, 22 October 1991 (entered into force 1 November 1993, terminated 1 November 2008).

investor has invested, on the other hand, should not be ignored without an adequate consideration of the facts of each case."[401]

265. In the vast majority of cases where tribunals have allowed claims by a shareholder on its own behalf for treatment of an enterprise upon reliance on broad definitions of "investment" in the governing treaty that included shares, one or more of the following factors were present: (1) the claimant was the controlling shareholder of the enterprise in relation to which it was bringing its claims, (2) the claimant was part of a consortium and had participated in a contractual relationship with the State in its own capacity (and not just as the shareholder of an enterprise) in relation to the investment, and (3) there was an intention by the State that the applicable investment treaty would apply to the claimant as a participant of the State's privatization efforts.

266. First, many of the cases where shareholder claims for reflective loss resulting from the treatment of the enterprise were admitted involved a controlling shareholder claimant. This was the case in the *Telefónica* and *Continental Casualty v. Argentina* arbitrations, amongst others. The *Telefónica* tribunal observed that "considering the general definition of investment in Art. II.1 of the BIT and the fact that Telefónica fully controls TASA due to its shareholding, one can consider TASA, as a company, as a protected investment… in case of an acquisition by an investor of one Contracting Party of the entire capital of the other Party, treaty protection is not limited to the free enjoyment of the shares, that is the exercise of the rights inherent in the positon of a shareholder".[402] The *Continental Casualty* tribunal similarly determined that with "specifically a controlling or sole shareholder", treaty protection extends not just to rights related to the shareholding, but also to the enterprise.[403]

267. Second, in a number of the cases where shareholder claims for treatment related to the enterprise were deemed admissible, the shareholder investor was either a part of a consortium or party to a concession agreement, and separately from the enterprise, took on contractual rights or

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[401] **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, ¶ 74 ("*Telefónica – Decision on Objections to Jurisdiction*").

[402] **RL-156**, *Telefónica – Decision on Objections to Jurisdiction*, ¶¶ 75-76.

[403] **RL-157**, *Continental Casualty Company v. The Argentine Republic* (ICSID Case No. ARB/03/9) Decision on Jurisdiction, 22 February 2006, ¶ 79.

obligations *vis-à-vis* the State. In the *Hochtief v. Argentina* case, the tribunal observed the following in deciding on the admissibility of claims by a shareholder claimant:

> In this context, the Tribunal attaches particular importance to two material facts. First, the initial investment was made by members of a consortium, which bid for the Project as a consortium. The Concession was awarded by Respondent to that consortium: not to PdL [that is, the enterprise] or to some other single company, but to the members of the Consortium. The incorporation of PdL was required by the terms of the bid offer in order to implement the terms of the Concession. … Claimant's rights as an investor were at that time *its own rights in relation to the Project as a member of the Consortium*, and not its rights *qua* shareholder in PdL; and Respondent's obligations to Claimant under the BIT date from that time. …
>
> Secondly, the Concession Contract itself (in Article 5.2) stipulated that PdL would assume all obligations and rights of the Consortium members under the Concession Contract.[404]

268. The tribunal concluded that the:

> Claimant retain[ed] its standing to bring claims in respect of the treatment of its shareholding in PdL in a situation such as the present, where (i) the investment was clearly made at a date before the establishment of PdL and the [c]laimant acquired rights under the BIT at that date, and (ii) the bidding terms required the transfer of consortium rights to a company to be established and maintained for the purpose of holding the concession rights so transferred, and (iii) the actual commercial obligations (of financing, of commitment of materials, technology, labor and skills, and of organization of work, etc.) remained unchanged by the transfer of rights to PdL, and (iv) there is no evidence that the [c]laimant had waived or renounced its rights of action against Respondent under the BIT.[405]

269. Similarly, in the *LANCO v. Argentina* arbitration, the parties to the concession agreement that was at issue included not just the enterprise, which was the grantee, and the relevant government ministry, "but also four more companies, including the [c]laimant who, in terms, sign[ed] the Concession Agreement '*in their capacity as awardees and guarantors of the*

[404] **RL-158**, *Hochtief AG v. The Argentine Republic* (ICSID Case No. ARB/07/31) Decision on Liability, 29 December 2014, ¶¶ 153-157 ("*Hochtief – Decision on Liability*") (emphasis in original).

[405] **RL-158**, *Hochtief – Decision on Liability*, ¶ 168.

grantee's obligations'".[406] The tribunal determined that "the Argentine Republic having included the awardees in their own name and right (in [this] case, LANCO) to ensure the sound completion of the project, the Argentine Republic should bear in mind that the Argentina-U.S. Treaty applies to its relationship with LANCO".[407]

270. The *Telefónica* tribunal also identified the explicit mention and recognition of the claimant "as 'Operador Principal', independently from its being also a member of the Consortium" as a decisive circumstance.[408] This was also the case in *Impregilo v. Argentina* where the tribunal noted that "Impregilo was one of the parties in the consortium that was granted the concession for water and sewage services" and that "in accordance with the applicable requirements the consortium formed an Argentine company with which the Concession Contract was concluded".[409] In all of these cases, a more direct relationship between the claimant and the activities and assets of the enterprise existed, including through contractual agreements.

271. Third, the issue of admissibility of shareholder claims for treatment of the enterprise has most often arisen in the context of privatization efforts by States. In such contexts, tribunals have observed that there was a specific intention on the part of the State to extend investment protections to investors participating in the privatization. In *Camuzzi v. Argentina*, the tribunal concluded that the claims were admissible because the treaty at issue "was signed with the precise intention of guaranteeing the investments that would be made in the privatization process, by means of the specific modality with which they were made."[410] In a similar fashion, the *LG&E v. Argentina* tribunal found "sufficient evidence of the Argentine Republic's attitude towards treaty law, in recognizing the special application of bilateral treaties on encouragement

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[406] **RL-159**, *Lanco International Inc. v. The Argentine Republic* (ICSID Case No. ARB/97/6) Preliminary Decision: Jurisdiction of the Arbitral Tribunal, 8 December 1998, ¶ 12 (emphasis in original) ("*Lanco – Preliminary Decision on Jurisdiction*").

[407] **RL-159**, *Lanco – Preliminary Decision on Jurisdiction*, ¶ 19.

[408] **RL-156**, *Telefónica – Decision on Objections to Jurisdiction*, ¶¶ 78-80.

[409] **RL-160**, *Impregilo S.p.A. v. Argentine Republic* (ICSID Case No. ARB/07/17) Award, 21 June 2011, ¶137.

[410] **RL-161**, *Camuzzi International S.A. v. The Argentine Republic* (ICSID Case No. ARB/03/2) Decision on Objections to Jurisdiction, 11 May 2005, ¶ 56.

and protection of investments to gas privatization."[411] Likewise, the *Enron v. Argentina* tribunal found to be relevant that the specific foreign investors "were invited by the Argentine government to participate in the privatization process".[412] The *CMS* decision that the Claimant relies on in support of its claims also concerned Argentina's privatization program pursuant to which the claimant purchased a portion of the shares of the relevant enterprise directly from Argentina.[413]

272. The above factors have been found to be relevant to or even determinative of the question of standing. Here, no such factors are present and the Claimant does not have standing over claims related to treatment of an enterprise.

D. The Claimant's Claims Concerning Canada's Regulatory Environment To Enhance Competitiveness of New Entrants and Canada's Restrictions on Transfer of Spectrum do Not Involve Treatment of the Claimant

273. Prior to September 16, 2014, the date the Claimant alleges it exited the Canadian market, the Claimant's investment appears to have been in shares of Telecom Holding Canada (Malta) Limited, which the Claimant wholly owned.[414] Telecom Holding Canada (Malta) Limited was the sole owner of Global Telecom Holdings Canada BV (Netherlands), which in turn wholly owned GTH Global Telecom Finance (BC) Limited (Canada) ("GTH BC").[415] This enterprise, in turn, was the sole owner of GTHCL.[416] GTHCL had a minority voting interest in Globalive

[411] **RL-162**, *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic* (ICSID Case No. ARB/02/1) Decision of the Arbitral Tribunal on Objections to Jurisdiction, 30 April 2004, ¶ 59.

[412] **RL-163**, *Enron Corporation and Ponderosa Assets, L.P. v. The Argentine Republic* (ICSID Case No. ARB/01/3) Decision on Jurisdiction (Ancillary Claim), 2 August 2004, ¶ 44.

[413] Claimant's Memorial, fn. 616; **CL-005**, *CMS Gas – Decision on Jurisdiction*, ¶¶ 18-19.

[414] **CER-Dellepiane/Spiller**, Figure 1.

[415] **CER-Dellepiane/Spiller**, Figure 1.

[416] **CER-Dellepiane/Spiller**, Figure 1.

Investment Holdings Corp. ("GIHC").[417] GIHC wholly owned Wind Mobile.[418] Thus, the Claimant only held an indirect minority voting interest in Wind Mobile.[419]

274. The allegations raised by the Claimant with respect to competitiveness of New Entrants and the Transfer Framework relate to treatment of New Entrants including Wind Mobile. The Claimant has defined "New Entrants" as "successful bidders"[420] of the AWS Auction in its RFA and as "new wireless operators".[421] The Claimant neither bid in the auction nor acted as a wireless operator in Canada at any time. Globalive Wireless LP, in which the Claimant indirectly held a minority voting interest, is the legal entity that bid in the AWS Auction,[422] and Globalive, which owned Globalive Wireless LP and operated under the name "Wind Mobile", acquired and held the spectrum licenses[423] issued subsequent to the bidding process.

275. Specifically, the Claimant has made the following assertions in its Memorial concerning Canada's regulatory environment:

- "[D]espite the rhetoric in the licenses and policy documents, Canada failed to take any steps to establish (or even foster) the market conditions necessary to provide New Entrants with a reasonable opportunity to compete successfully against the Incumbents."[424]

[417] **CER-Dellepiane/Spiller**, Figure 1.

[418] **CER-Dellepiane/Spiller**, Figure 1.

[419] Further to the Claimant's shareholder interests, the Claimant has alleged that it holds debt interests vis-à-vis Wind Mobile. The relationship between a creditor and a debtor is an arm's length relationship. Thus, any debt interest of the Claimant vis-à-vis Wind Mobile cannot create proximity between the Claimant and Wind Mobile such that the Claimant can pursue an independent cause of action in relation to treatment of Wind Mobile.

[420] Claimant's Request for Arbitration, ¶ 5.

[421] Claimant's Memorial, ¶ 3.

[422] **C-069**, Globalive Wireless LP, *Application to Participate in the Auction for Spectrum Licences for Advanced Wireless Services and other Spectrum in the 2 GHz Range* (Mar. 10, 2008). The application identifies the "Applicant Name" as "Globalive Wireless LP".

[423] **C-080**, Industry Canada, *Auction for Spectrum Licences for Advanced Wireless Services and Other Spectrum in the 2 GHz Range – Licence Winners* (Jul. 21, 2008); **C-082**, Letter from Michael D. Connolly to Michael John O'Connor (Jul. 22, 2008); **C-010**, Letter from Michael D. Connolly to Kenneth Campbell, *attaching* Wind Mobile Licences (Mar. 13, 2009).

[424] Claimant's Memorial, ¶ 15.

- "Wind Mobile complained on numerous occasions to Canada regarding the hurdles it faced during its negotiations with the Incumbents."[425]

- "[W]hen it became clear that the Incumbents would not negotiate roaming and tower sharing agreements in good faith (as required by the framework) and despite repeated requests from New Entrants like Wind Mobile to remedy what it considered to be a clear breach of license, Canada turned a blind eye."[426]

- "As time went on, despite continued complaints to the Government by Wind Mobile and others, circumstances remained the same."[427]

276. None of these claims relate to the treatment of the Claimant's equity or debt interests. Instead, the allegations center on treatment of New Entrants, such as Wind Mobile, including allegations of (i) difficulties faced by New Entrants with Incumbents, (ii) the regulatory environment faced by New Entrants, and (iii) enforcement measures related to roaming and tower sharing arrangements between Incumbents and New Entrants.

277. The Claimant has also made a number of assertions in its Memorial with respect to Wind Mobile's ability to transfer its spectrum licenses:

- "GTH expected that once the Five-Year Rollout Period expired, the prohibition on a New Entrant's ability to transfer Wind Mobile's set-aside spectrum licenses to an Incumbent would expire".[428]

- "Through its new 2013 Transfer Framework, Canada made it clear that New Entrants would not be permitted to transfer their set-aside spectrum licenses (directly or indirectly) to the Incumbents."[429]

278. Again, these claims do not relate to Canada's treatment of the Claimant as a shareholder or a creditor. Rather, the Claimant's allegations centre on regulations surrounding transfer of spectrum licenses of New Entrants and particularly, Wind Mobile. The spectrum licenses at issue are an asset[430] of Wind Mobile's, not the Claimant. The Claimant was never granted any

[425] Claimant's Memorial, ¶ 150.

[426] Claimant's Memorial, ¶ 366.

[427] Claimant's Memorial, ¶ 155.

[428] Claimant's Memorial, ¶ 104.

[429] Claimant's Memorial, ¶ 304.

[430] Spectrum licenses grant licensees the privilege of utilizing specific radio frequencies within defined geographic areas. Spectrum licenses do not generate any property rights.

spectrum licenses by Canada. The Transfer Framework did not impact or hinder the Claimant's ability to transfer its equity investments including its indirect shares in GIHC because a sale of a minority non-controlling ownership interest would not have triggered a review under the Transfer Framework.

279. Any alleged impact from these measures on the Claimant's indirect equity investments can only be derivative of injury that was suffered by Wind Mobile.

E. The Claimant Lacks Standing to Bring Claims Concerning Competitiveness of New Entrants and Claims Concerning Transferability of Wind Mobile's Spectrum Licenses

280. The Claimant lacks standing to bring claims relating to the regulatory treatment of New Entrants and claims relating to the Transfer Framework as they are claims with respect to treatment of Wind Mobile. The Claimant brought its claim on its own behalf under Article XIII(3) of the FIPA and Wind Mobile has neither consented to this arbitration nor filed a waiver in relation to the claims being pursued by the Claimant. In these circumstances, the Claimant can only pursue claims with respect to treatment of its own equity and debt investments in the enterprise, Wind Mobile.

281. As described, the Claimant's allegations about the regulation of competitiveness and the restrictions on transfer of spectrum licenses, on their face, are allegations of breach and loss resulting from treatment of Wind Mobile. The Claimant does not have standing under Article XIII(3) to pursue these claims.

F. Conclusion

282. The Claimant does not have standing in this arbitration under the FIPA in relation to treatment of Wind Mobile or Wind Mobile's spectrum licenses. The Claimant can only pursue allegations that Canada breached directly its rights *qua* shareholder and creditor and that it suffered damages as a result of this alleged breach. It cannot pursue claims that are only derivative of the treatment of, and damages suffered by Wind Mobile. Two of the Claimant's claims, the claims relating to the regulatory treatment of Wind Mobile and transferability of Wind Mobile's spectrum licenses, on the basis of the Claimant's own presentation of the facts

and arguments, concern treatment of Wind Mobile, and not the Claimant. These claims ought to be dismissed for lack of standing.

V. BIFURCATION IS THE MOST FAIR, EFFICIENT, AND ECONOMICAL METHOD OF PROCEEDING WITH THIS ARBITRATION

A. Jurisdictional and Admissibility Objections Should Be Considered as a Preliminary Matter if Doing So Will Increase the Fairness, Efficiency, and Economy of the Proceedings

283. As Canada indicated in its Request for Bifurcation,[431] and as agreed to by the Claimant,[432] this Tribunal has the discretion to hear objections to its competence in a preliminary phase in accordance with Article 41(2) of the ICSID Convention,[433] and the ICSID Arbitration Rules.[434]

284. The Tribunal's discretion to bifurcate proceedings extends to both jurisdictional and admissibility objections.[435] Many tribunals in ICSID proceedings and investor-State proceedings under the UNCITRAL or ICSID Additional Facility Rules have dealt with jurisdictional and admissibility issues as preliminary questions for reasons of fairness, efficiency, and economy of

[431] Canada's Request for Bifurcation, 7 April 2017, ¶¶ 22-27.

[432] Claimant's Submission, 14 April 2017, ¶ 7.

[433] Article 41(2) of the ICSID Convention provides "Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute."

[434] Rule 41(1) of the ICSID Arbitration Rules provides "Any objection that the dispute or any ancillary claim is not within the jurisdiction of the Centre or, for other reasons, is not within the competence of the Tribunal shall be made as early as possible. A party shall file the objection with the Secretary-General no later than the expiration of the time limit fixed for the filing of the counter-memorial…". Rule 41(3) of the ICSID Arbitration Rules provides: "Upon the formal raising of an objection relating to the dispute, the Tribunal may decide to suspend the proceeding on the merits…". Additionally, Rule 31(4) of the ICSID Arbitration Rules states that the Tribunal may deal with an objection raised under Rule 41(1) "as a preliminary question or join it to the merits of the dispute."

[435] See Canada's Request for Bifurcation, 7 April 2017, ¶ 24 citing to **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, ¶ 52; **RL-004**, *Alpha Projecktholding GmbH v. Ukraine* (ICSID Case No. ARB/07/16) Award, 8 November 2010, ¶ 240; **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, ¶ 112; **RL-006**, *Abaclat and Others v. The Argentine Republic* (ICSID Case No. ARB/07/5) Decision on Jurisdiction and Admissibility, 4 August 2011, ¶ 245.

the arbitration.[436] Indeed, the Claimant has acknowledged fairness and efficiency as being considerations for determining whether bifurcation is warranted.[437]

285. Nevertheless, the Claimant has objected to bifurcation on the basis that it would be more costly.[438] This is simply not true. As Canada indicated in its Request for Bifurcation,[439] the Tribunal and the disputing parties should seek to avoid finding themselves in the circumstances that "[w]ith the wisdom of hindsight, the majority of the costs and expenses of each party and of the dispute, both in duration and expense, would have been avoided"[440] had the proceedings been bifurcated and the respondent's jurisdictional objections been heard in a preliminary phase. As the tribunal in *Southern Pacific Properties v. Egypt* noted, "there is no presumption of jurisdiction – particularly where a sovereign State is involved – and the Tribunal must examine [a sovereign's] objections to the jurisdiction of the Centre with meticulous care, bearing in mind that jurisdiction in the present case exists only insofar as consent thereto has been given by the Parties".[441]

286. The three main factors identified by the *Philip Morris v. Australia* and *Emmis v. Hungary* tribunals for determining whether bifurcation is appropriate provide a useful framework for analysis in this case and have been adopted by tribunals under ICSID and other procedural

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[436] See Canada's Request for Bifurcation, ¶ 25; **RL-012**, *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt* (106 I.L.R. 531) Decision on Jurisdiction, 14 April 1988, ¶ 63; **RL-013**, *Tulip Real Estate – Decision on Request for Bifurcation*, ¶¶ 55-56; **RL-014**, *Emmis – Decision on Application for Bifurcation*, ¶ 57; **RL-001**, *Accession Mezzanine – Decision on Jurisdictional Objections and Request for Bifurcation*, ¶ 39(2) and (5); **RL-015**, *Bayview Irrigation District and others v. United Mexican States* (ICSID Case No. ARB(AF)/05/1) Award on Jurisdiction, 19 June 2007, ¶ 10; **RL-016**, *Canfor Corp. v. United States of America* (UNCITRAL) Decision on the Place of Arbitration, Filing of a Statement of Defence and Bifurcation of the Proceedings, 23 January 2004, ¶ 55; **RL-017**, *Canfor Corp. and Terminal Forest Products Ltd. v. United States of America* (UNCITRAL) Decision on Preliminary Question, 6 June 2006, ¶ 2; **RL-018**, *GAMI Investments, Inc. v. United Mexican States* (UNCITRAL) Procedural Order No. 2, 22 May 2003, ¶ 1; **RL-019**, *United Parcel Service of America v. Government of Canada* (UNCITRAL) Decision of the Tribunal on the Filing of a Statement of Defence, 17 October 2001, ¶ 16.

[437] Claimant's Submission, 14 April 2017, ¶ 5.

[438] Claimant's Submission, 14 April 2017, ¶ 7.

[439] Canada's Request for Bifurcation, ¶ 72.

[440] **RL-036**, *Caratube International Oil Company v. Republic of Kazakhstan* (ICSID Case No. ARB/08/12) Award, 5 June 2012, ¶ 487.

[441] **RL-012**, *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt* (106 I.L.R. 531) Decision on Jurisdiction, 14 April 1988, ¶ 63.

rules.[442] Those factors are: (i) whether the objection is *prima facie* serious and substantial; (ii) whether the objection can be examined without prejudging or entering the merits; and (iii) whether the objection, if successful, could dispose of all or an essential part of the claims that have been raised.[443] The Claimant agrees that these three considerations are relevant to the Tribunal's determination of whether to bifurcate.[444]

287. In determining whether to bifurcate the proceedings, the Tribunal must only make a *prima facie* determination that the objections are not frivolous since it is only after having heard the parties' submissions on these objections that it can decide on the objections.[445] As Canada demonstrated in its Request for Bifurcation, and in this Memorial on Jurisdiction, all of its objections meet the test for bifurcation: they are serious and substantial, they can be examined without prejudging or entering the merits of the dispute, and they will dispose of all or essential parts of the claim.

B. Bifurcation of Canada's Jurisdictional and Admissibility Objections is the Most Fair, Efficient, and Economic Method of Proceeding

288. In its Request for Bifurcation, Canada requested that the Tribunal hear as a preliminary matter six objections to the Tribunal's competence.[446] As the Claimant has since abandoned its most-favoured-nation claim pursuant to Article III of the FIPA, Canada requests that the Tribunal bifurcate the remaining five objections to the Tribunal's jurisdiction: (1) Canada's objection *ratione personae*; (2) Canada's objection pursuant to the dispute settlement exclusion in Article II(4)(b); (3) Canada's objection *ratione temporis* under Article XIII(3)(d); (4) Canada's objection pursuant to the services reservation in Article IV(2)(d) and its Annex; and (5) Canada's admissibility objection based on the Claimant's lack of standing. Rather than repeating

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[442] Canada's Request for Bifurcation, ¶ 27; *See for example*, **RL-014**, *Emmis – Decision on Application for Bifurcation*, ¶ 37(2); **RL-013**, *Tulip Real Estate – Decision on Request for Bifurcation*, ¶ 30; **RL-023**, *Glamis Gold, Ltd. v. The United States of America* (UNCITRAL) Procedural Order No. 2 (Revised), 31 May 2005, ¶¶ 12, 13(c).

[443] **RL-022**, *Philip Morris Asia Limited v. The Commonwealth of Australia* (UNCITRAL) Procedural Order No. 8 Regarding Bifurcation of the Procedure, 14 April 2014, ¶ 109; **RL-014**, *Emmis – Decision on Application for Bifurcation*, ¶ 37(2).

[444] Claimant's Submission, 14 April 2017, ¶ 7.

[445] **RL-022**, *Philip Morris Asia Limited v. The Commonwealth of Australia* (UNCITRAL) Procedural Order No. 8 Regarding Bifurcation of the Procedure, 14 April 2014, ¶ 109.

[446] Canada's Request for Bifurcation.

all of its arguments here, Canada relies on the arguments set out in its Request for Bifurcation with respect to the appropriateness of bifurcating these five objections, but provides a brief summary below.

289. First, with respect to Canada's objection *ratione personae*, as set out in Part III.B above, Canada is asking the Tribunal to make a preliminary determination as to whether the Claimant qualifies as an investor of Egypt under Article I(g) of the FIPA. Although the Tribunal will be required to undertake an assessment of evidence in order to make this determination, that assessment is completely unrelated to the merits of the case. Canada's objection *ratione personae* should be held in a preliminary phase because it is *prima facie* serious and substantial, it is distinct from the merits, and if it is upheld, it will result in the dismissal of the entire claim and avoid unnecessary and costly litigation.

290. Second, with respect to Canada's objection pursuant to the dispute settlement exclusion in Article II(4)(b), as set out in Part III.C above, Canada is asking the Tribunal to make a preliminary determination as to whether Article II(4)(b) of the FIPA excludes from dispute settlement any claim arising from a decision not to permit the acquisition of a business enterprise or share thereof. This objection can be examined without prejudging or entering the merits. It is a discrete question which requires the Tribunal to determine whether the exclusion from dispute settlement applies based on the terms of Article II(4)(b). It is completely independent from an assessment of whether the national treatment, fair and equitable treatment or full protection and security obligations under the FIPA have been breached and can be carried out by simply relying on the Claimant's own pleadings. The Tribunal's determination of this objection would involve a limited analysis on the fact that a decision barring an acquisition was made, not on the content, rationale, or motivation of that decision, and it can be completed based on the allegations pled by the Claimant. If accepted, Canada's objection would dispose of an essential part of the claims raised and will considerably reduce the scope of issues and evidence in this arbitration, resulting in a significant reduction of costs. It would also substantially reduce the scope of the document production stage of the proceeding, saving both time and money.

291. Third, with respect to Canada's objection *ratione temporis*, as set out in Part III.D above, Canada is asking the Tribunal to make a preliminary determination as to whether two of the

measures alleged by the Claimant dating back to 2007 and 2009 are barred by the strict three-year limitation period set out in Article XIII(3)(d) of the FIPA. In determining these objections, the Tribunal will be required to undertake an analysis of the treaty standard and jurisprudence relating to first acquired knowledge of loss. It is a question of identifying the measure and the allegation of loss, without entering into any substantive issues or analysis as to whether the measure was in conformity with treaty standards and it can be done by simply relying on the Claimant's own pleadings.[447] If accepted, Canada's objections would considerably reduce the scope of issues and evidence in this arbitration resulting in a significant reduction of costs. It would avert the need for expert evidence and document production relating to the CRTC review process, the creation of the Tier Four review, the conduct of the CRTC hearings, the substance of the CRTC decision, the conduct of subsequent appeals of the CRTC decision, and the ultimate decision of the government to overturn the CRTC decision. It would also avert the need to address many factual and evidentiary issues related to the government's regulation of the wireless telecommunications sector and whether an alleged failure to put in place a level playing field for New Entrants could ever amount to a breach of the FIPA. Canada's objections should be addressed in a preliminary phase because they are *prima facie* serious and substantial, they can be determined without pre-judging or entering into the merits and, if accepted, they would dispose of a significant portion of the Claimant's claims, resulting in more efficient proceedings and reduction of costs.

292. Fourth, with respect to Canada's objection pursuant to the services reservation in Article IV(2)(d) and its Annex, as set out in Part III.E above, Canada is asking the Tribunal to make a preliminary determination as to whether Article IV(2)(d) and its associated Annex excludes all national treatment claims in the services sectors. This issue is a discrete and purely legal question of interpretation based on the text of the treaty and is completely distinct from the substance of the alleged breaches. The Tribunal's determination of this objection would require no evidence, witness testimony, or document production. Canada's objection should be considered in a

[447] First, with respect to Canada's objection relating to the allegations surrounding the CRTC review, the Claimant's pleadings acknowledge that loss was suffered from the CRTC national security review as of December 2009 (see Part III.D.6 above). Second, with respect to Canada's objection relating to the allegations surrounding a failure to maintain a favourable regulatory environment, the Claimant's pleadings acknowledge that loss was suffered long before the limitation period cut-off date (see Part III.D.7 above). These acknowledgements alone provide an adequate basis for the Tribunal to determine that the alleged measures are time-barred.

preliminary phase because it is *prima facie* serious and substantial, and it can be examined without prejudging or entering into the merits. If accepted, it would completely eliminate the national treatment claims raised and will considerably reduce the scope of issues and evidence in this arbitration, resulting in significant efficiencies and reduction of costs.

293. Finally, with respect to Canada's admissibility objection based on the Claimant's lack of standing, as set out in Part IV above, Canada is asking the Tribunal to make a preliminary determination as to whether the Claimant has standing in relation to any alleged impairment of Wind Mobile or its assets. The Tribunal's determination of this question does not require it to delve into the merits of the case – it can be considered based on the allegations set out in the Claimant's RFA and Memorial. If accepted, Canada's objection would significantly streamline the proceedings on the merits as it would not require a determination as to whether Canada failed to implement and enforce a level playing field for New Entrants, whether the implementation of the Transfer Framework was a repudiation of the 2008 AWS transfer framework, or whether either of these alleged failures could amount to a breach of the FIPA. Canada's objection with respect to the Claimant's standing should be determined in a preliminary phase because it is *prima facie* serious and substantial, it can be determined without delving into the merits, and it will allow the arbitration to proceed with greater efficiency as it will drastically narrow the factual issues in dispute and the scale of document production and evidence required, resulting in a significant reduction of costs.

294. Further, to the extent that the Claimant does not argue that the CRTC's review process and Canada's failure to ensure a level playing field for New Entrants constitute self-standing breaches of the FIPA,[448] a finding that the Tribunal does not have jurisdiction to consider Canada's national security review of GTHCL's application to gain voting control of Wind Mobile and that GTH does not have standing to challenge the Transfer Framework would render Canada's objection *ratione temporis* moot. Such a finding would necessarily also be dispositive of the Claimant's allegations concerning the CRTC review process and Canada's failure to ensure a level playing field for New Entrants.

[448] Claimant's Memorial, ¶ 301.

295. In the event that any of Canada's objections are upheld, but the case proceeds to the merits, the result will be a more efficient proceeding because of a substantial reduction in the number of legal issues to be addressed. Bifurcation will also eliminate or significantly reduce the scope of what could potentially be a time consuming and voluminous document production phase which will no doubt require the Tribunal to decide on objections to the production of highly sensitive material. Further, significant savings will be achieved with respect to costs associated with the tribunal, fact and expert witnesses, and briefing and argument of the case.

296. In light of Canada's jurisdictional and admissibility objections, bifurcation is the most fair, efficient, and economic way forward. Given the serious and substantial nature of its objections, Canada should not be obliged to fully address the merits of the dispute before a Tribunal whose jurisdiction has not been established.[449] Canada respectfully requests therefore that the Tribunal bifurcate these proceedings and hear Canada's jurisdictional and admissibility objections in a preliminary phase.

VI. ORDER REQUESTED

297. For the foregoing reasons, Canada respectfully requests that the Tribunal hear Canada's jurisdictional and admissibility objections in a preliminary phase and issue an award:

(i) dismissing the Claimant's claims in their entirety and with prejudice on grounds of lack of jurisdiction and inadmissibility, or in the alternative, dismissing all aspects of the Claimant's claims that are untimely, excluded from dispute settlement, and over which the Claimant has no standing;

(ii) ordering the Claimant to bear the costs of the arbitration in full and to indemnify Canada for its legal fees and costs; and

(iii) granting any further relief it deems just and appropriate.

[449] Canada's Request for Bifurcation, 7 April 2017, ¶ 25 citing to **RL-007**, Gary Born, *International Commercial Arbitration* (Alphen aan den Rijn: Kluwer Law International, 2009), Volume I, p. 994 ("Although no absolute rules can be prescribed, the more appropriate course for the arbitral tribunal is generally to conduct a preliminary proceeding on credible good faith jurisdictional challenges. That permits the parties to fully address the issue and, if jurisdiction is lacking, avoids the expense of presenting the case on merits. It also avoids forcing a party, who may not be subject to a tribunal's jurisdiction, to litigate the merits of its claims in what may be an illegitimate forum."); **RL-008**, Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration*, 4th ed. (London: Thomson, Sweet & Maxwell, 2004), p. 258; **RL-010**, Shabtai Rosenne, *The World Court: What It Is And How It Works*, 5th ed. (Dordrecht: Martinus Nijhoff, 1995), p. 99.

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ANNEX - IMPLICATIONS OF JURISDICTION AND ADMISSIBILITY OBJECTIONS WITH RESPECT TO THE CLAIMS IN CLAIMANT'S MEMORIAL

In the table below "X" indicates the Tribunal's lack of jurisdiction over a claim of breach of the FIPA or the Claimant's lack of standing as a result of Canada's jurisdictional and admissibility objections.

Challenged Measures (¶¶ 24 and 301 of the Claimant's Memorial)	**Obligations Allegedly Breached***	**Jurisdiction *Ratione Personae* under Article XIII and Article 25 of the ICISD Convention**	**Article II(4)(b) Dispute Settlement Exclusion of Decisions Not to Permit Establishment or Acquisition of Enterprises**	**Jurisdiction *Ratione Temporis* under Article XIII(3)**	**Article IV and its Annex Exclusion of the Application of National Treatment Obligations to Services**	**Standing to Claim for Damages Arising from Treatment of Wind Mobile**
Blocking GTH's right to transfer Wind Mobile's set-aside spectrum licenses to an incumbent at the expiration of the Five-Year Rollout Period	Self-standing breach of: FET, FPS, UTI	X				X
Subjecting GTH to an unreasonable, arbitrary, non-transparent national security review of the Voting Control Application, without due process	Self-standing breach of: FET, FPS, NT	X	X		X (NT obligation only)	
Subjecting GTH's investment to a redundant CRTC Review	Composite breach of FET	X		X		
Failing to uphold basic conditions to alleviate barriers to market entry (particularly with respect to roaming and tower sharing)	Composite breach of FET, FPS	X		X		X

* **FET**: Obligation to accord Fair and Equitable Treatment under Article II(2)(a); **FPS**: Obligation to accord Full Protection and Security under Article II(2)(b); **UTI**: Obligation to Guarantee Unrestricted Transfer of Investments under Article IX(1); **NT**: Obligation to accord National Treatment under Articles II(3) and IV.