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

COUNTER-MEMORIAL ON MERITS & DAMAGES

February 26, 2018

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GLOSSARY OF KEY TERMS

Name of Instrument	Abbreviation	Exhibit	Description
STATUTES, LEGISLATION AND REGULATIONS			
Telecommunications Act, S.C. 1993, c. 38	"Telecommunications Act"	**C-046**	The *Telecommunications Act* (and associated regulations) governs telecommunications in Canada. It addresses a number of matters including rates, facilities and services, telecommunications apparatus, and investigation and enforcement, and sets out the objectives of Canadian telecommunications policy.
Radiocommunication Act, R.S.C. 1985, c. R-2	"Radiocommunication Act"	**C-057**	The *Radiocommunication Act* (and associated regulations) governs the licensing and regulation of radio apparatus and the use of radio frequency spectrum, including the issuance of spectrum licences, in Canada. Radiocommunication is a subset of telecommunications.
Radiocommunication Regulations, SOR/96-484	"Radiocommunication Regulations"	**C-001**	The *Radiocommunication Regulations* are adopted pursuant to the *Radiocommunication Act* and expand on the application and enforcement of the *Radiocommunication Act*.
Investment Canada Act, R.S.C. 1985, c. 28, 1st Supp.	"ICA"	**R-169**	The *Investment Canada Act* (and associated regulations) provides for the review of significant investments in Canada by non-Canadians in a manner that encourages investment, economic growth, and employment opportunities in Canada, and provides for the review of investments in Canada by non-Canadians that could be injurious to national security.

Name of Instrument	Abbreviation	Exhibit	Description
National Security Review of Investments Regulations, SOR/2009-271	"National Security Regulations"	**C-102**	The *National Security Review of Investments Regulations* are adopted pursuant to the *Investment Canada Act* and expand on the application and enforcement of the national security review component of the *Investment Canada Act.*
Competition Act, R.S.C. 1985, c. C-34	"Competition Act"	**R-106**	The *Competition Act* governs competition law in Canada and is aimed at preventing anti-competitive practices in the Canadian marketplace. The Competition Bureau enforces the *Competition Act.*
GOVERNMENT AND OTHER ENTITIES			
Industry Canada (currently known as Innovation Science and Economic Development Canada)	"Industry Canada" or "the Department"	N/A	Industry Canada is a Government of Canada department. It is responsible, amongst other things, for spectrum management in Canada pursuant to the *Radiocommunication Act* and the *Radiocommunication Regulations* with due regard to the objectives of the *Telecommunications Act.* It is also responsible for supporting the Minister of Industry Canada with reviews under the *Investment Canada Act.*
Canadian Radio-television and Telecommunications Commission	"CRTC"	N/A	The CRTC is a specialized government agency that develops, implements, and enforces regulatory policies on telecommunications and broadcasting in the public interest. It is vested with powers to regulate rates, terms and conditions of telecommunications services.
Competition Bureau	"Competition Bureau"	N/A	The Competition Bureau is an independent law enforcement agency that investigates anti-competitive activities and reviews mergers. It enforces the *Competition Act*.

Name of Instrument	Abbreviation	Exhibit	Description
Strategic Policy Sector (currently known as the Strategy and Innovation Policy Sector)	N/A	N/A	SPS is the division of Industry Canada that advises on wireless telecommunications policy considerations and develops policy options and recommendations for the Deputy Minister and Minister of Industry based on research and analysis of the market and the regulatory environment.
Spectrum Management Operations Branch	N/A	N/A	The Spectrum Management Operations Branch is the division of Industry Canada that manages the Canadian Spectrum Management Program in accordance with applicable legislation, regulation, policies and procedures. During the relevant time it was housed in the Spectrum, Information Technologies and Telecommunications Sector (currently known as the Spectrum and Telecommunications Sector).
Investment Review Division	"IRD"	N/A	The IRD is the division of Industry Canada that supports the Minister of Industry in his responsibilities for conducting reviews pursuant to the ICA.
Governor-in-Council	"GiC"	N/A	The GiC consists of the Governor General acting on the advice of the Queen's Privy Council for Canada (the only active part of which is Cabinet), and is the authority that exercises executive powers in Canada.
TELECOMMUNICATIONS POLICY AND OTHER DOCUMENTS			
Framework for Spectrum Auctions in Canada	"Spectrum Auction Framework"	**C-041**	The Spectrum Auction Framework is the broad policy document that outlines the general framework and the rules normally applicable to spectrum auctions.

Name of Instrument	Abbreviation	Exhibit	Description
Telecommunications Policy Review Panel Final Report	"TPRP Report"	**R-080**	The TPRP Report is the final report issued by the Telecommunications Policy Review Panel. The Panel was created to recommend a modern telecommunications policy and regulatory framework for Canada.
Consultation on a Framework to Auction Spectrum in the 2 GHz Range including Advanced Wireless Services	"AWS-1 Consultation Paper"	**C-050**	The AWS-1 Consultation Paper initiated public consultations for the development of a policy framework for the 2008 AWS-1 Auction.
Spectrum Policy Framework for Canada	"Spectrum Policy Framework"	**C-052**	The Spectrum Policy Framework outlines the principles on spectrum management which Industry Canada and the Minister of Industry will rely on in exercising authority under the *Radiocommunications Act*.
Licensing Procedure for Spectrum Licences for Terrestrial Services	"Licensing Circular"	**C-003**	The Licensing Circular provides the general policies and procedures applicable to the issuance and transfer of spectrum licences.
Policy Framework for the Auction for Spectrum Licences for Advanced Wireless Services and other Spectrum in the 2 GHz Range	"AWS-1 Policy Framework"	**C-004**	The Policy Framework outlines the final policy decisions on key elements of the policy framework for the 2008 AWS-1 Auction.
Licensing Framework for the Auction for Spectrum Licences for Advanced Wireless Services and other Spectrum in the 2 GHz Range	"AWS-1 Licensing Framework"	**C-005**	The Licensing Framework outlines the rules and requirements for the competitive bidding process for the 2008 AWS-1 Auction.

Name of Instrument	Abbreviation	Exhibit	Description
Conditions of Licence for Mandatory Roaming and Antenna Tower and Site Sharing and to Prohibit Exclusive Site Arrangements	"COLs on Roaming and Tower/Site Sharing"	**C-007**	The COLs on Roaming and Tower/Site Sharing were developed in the context of the 2008 AWS-1 Auction. They mandate roaming and tower/site sharing and prohibit exclusive site arrangements. They outline the process to be followed for negotiation of roaming and tower/site sharing agreements and provide for commercial arbitration to resolve any disputes. These COLs were included in the AWS-1 licences, and modified the COLs of licences that were issued prior to the 2008 AWS-1 Auction.
Industry Canada's Arbitration Rules and Procedures	"Arbitration Rules and Procedures"	**C-090**	The Arbitration Rules and Procedures contain the rules and procedures that apply to disputes (other than disputes regarding technical feasibility) between licensees that are preventing them from agreeing upon the terms and conditions of a roaming or tower/site sharing agreement.
Competition Policy Review Panel Compete to Win: Final Report	"CPRP Report"	**C-076**	The CPRP Report is the final report issued by the Competition Policy Review Panel. The Panel was created to review Canada's competition and foreign investment policies, and recommend laws and policies to improve Canada's productivity and competitiveness.
Guidelines for Compliance with the Conditions of Licence Relating to Antenna Tower and Site Sharing and to Prohibit Exclusive Site Arrangements	"Tower/Site Sharing Guidelines"	**C-093**	The Tower/Site Sharing Guidelines provided further clarity on the COLs on Roaming and Tower/Site Sharing by outlining Industry Canada's expectations on various aspects of mandated tower/site sharing.

Name of Instrument	Abbreviation	Exhibit	Description
Proposed Revisions to the Frameworks for Mandatory Roaming and Antenna Tower and Site Sharing	"Consultation Paper on Revised COLs"	**C-121**	The Consultation Paper on Revised COLs initiated consultations on the modification of the COLs of Roaming and Tower/Site Sharing that were released in 2008.
Revised Frameworks for Mandatory Roaming and Antenna Tower and Site Sharing	"Revised COLs on Roaming and Tower/Site Sharing"	**C-153**	The Revised COLs modified the COLs on Roaming and Tower/Site Sharing that were released in 2008. The COLs were modified to further facilitate roaming and tower sharing agreements.
Consultation on Considerations Relating to Transfers, Divisions and Subordinate Licensing of Spectrum Licences	"Transfer Framework Consultation Paper"	**C-152**	The Transfer Framework Consultation Paper initiated consultations on the approach to be used by Industry Canada when considering requests by licensees to transfer a spectrum licence.
Framework Relating to Transfers, Divisions and Subordinate Licensing of Spectrum Licences for Commercial Mobile Spectrum	"Transfer Framework"	**C-031**	The Transfer Framework provides guidance to licensees on how transfers of spectrum licences will be reviewed by Industry Canada and what criteria will be applied.
WIND MOBILE AND ASSOCIATED ENTITIES			
Global Telecom Holding S.A.E.	"GTH" (previously known as "OTH")	N/A	GTH is the juridical person that is the Claimant in this arbitration. GTH was formerly known as Orascom Telecom Holding S.A.E. or "OTH".
Globalive Communications Corporation	"Globalive"	N/A	Globalive is the Canadian company that sought GTH's investment in Canada's mobile wireless telecommunications market. The CEO of Globalive was Anthony Lacavera.

Name of Instrument	Abbreviation	Exhibit	Description
GTH Global Telecom Holding (Canada) Limited	"GTHCL" (previously known as "OTHCL")	N/A	GTHCL is the Canadian holding company that was wholly owned indirectly by GTH. It held a 33.02% voting interest in GIHC, which was the sole shareholder of Wind Mobile. GTHCL was formerly known as Orascom Telecom Holding (Canada) Limited or "OTHCL".
AAL Holdings Corp.	"AAL"	N/A	AAL is the Canadian holding company that held the majority voting interest (66.68%) in GIHC, which was the sole shareholder of Globalive Wireless Management Corp. (the company which operated as Wind Mobile). Mr. Anthony Lacavera indirectly owned 95% of AAL.
Mojo Investment Corp.	"Mojo"	N/A	Mojo is the Canadian company that held a 1.3% voting interest in GIHC, which was the sole shareholder of Globalive Wireless Management Corp. (the company which operated as Wind Mobile).
Globalive Investment Holding Corporation	"GIHC"	N/A	GIHC is the Canadian company, in which GTHCL held a 33.02% voting interest, AAL held a 66.68% voting interest and Mojo held a 1.3% voting interest. GIHC was the sole shareholder of Globalive Wireless LP (the company which bid in the 2008 AWS-1 Auction) and Globalive Wireless Management Corp. (the company which operated as Wind Mobile).
Globalive Wireless LP	"Globalive Wireless LP"	N/A	Globalive Wireless LP is the Canadian company that bid in the 2008 AWS-1 Auction. It was wholly owned by GIHC, in which GTH held an indirect minority voting interest.

Name of Instrument	Abbreviation	Exhibit	Description
Globalive Wireless Management Corp.	"GWMC" or "Wind Mobile"	N/A	GWMC is the Canadian company that operated under the brand name "Wind Mobile" after acquiring the spectrum licences that Globalive Wireless LP bid on in the 2008 AWS-1 Auction. It was wholly owned by GIHC, in which GTH held an indirect minority voting interest.
VimpelCom Ltd.	"VimpelCom"	N/A	VimpelCom was the majority shareholder of GTH as of April 15, 2011.
[redacted]	[redacted]	N/A	[redacted]

CHRONOLOGY OF EVENTS

Date	Event
February 16, 2007	Industry Canada launches consultation for the 2008 AWS-1 Auction with the release of the AWS-1 Consultation Paper.
June 2007	Industry Canada publishes a new Spectrum Policy Framework.
September 2007	Industry Canada publishes an updated Licensing Circular.
November 28, 2007	Industry Canada publishes the AWS-1 Policy Framework and launches consultation on the COLs on Roaming and Tower/Site Sharing with the release of draft COLs.
December 21, 2007	Industry Canada publishes the AWS-1 Licensing Framework.
February 29, 2008	Industry Canada publishes the COLs on Roaming and Tower/Site Sharing.
March 7, 2008	Industry Canada publishes responses to questions it received from interested parties on the 2008 AWS-1 Auction and accompanying frameworks and COLs.
May 23, 2008	Industry Canada launches consultation on the Arbitration Rules and Procedures that would apply to roaming and tower/site sharing disputes with the release of draft rules.
May 27, 2008 – July 21, 2008	Bidding on the 2008 AWS-1 Auction takes place.
July 21, 2008	Globalive Wireless LP is the provisional winner of 30 set-aside AWS-1 spectrum licences at a cost of C$ 442.1 million.
August 5, 2008	Globalive Wireless LP submits its documents for Industry Canada's ownership and control review under the *Radiocommunication Regulations*.
November 29, 2008	Industry Canada publishes the final Arbitration Rules and Procedures.
December 22, 2008	The CRTC contacts Globalive Wireless LP about the CRTC's ownership and control review under the *Telecommunications Act*.
February 12, 2009	The Government of Canada re-introduces legislation in Parliament to amend the ICA to include a mechanism to allow for reviews of investments that could be injurious to Canada's national security.

Date	Event
February 16, 2009	Industry Canada determines that Wind Mobile satisfied the ownership and control requirements in the *Radiocommunication Regulations*.
February 17, 2009	Industry Canada launches consultation on the Guidelines for Tower/Site Sharing with the release of draft guidelines.
March 12, 2009	The ICA is amended to include a mechanism that allows for reviews of investments that could be injurious to Canada's national security.
March 13, 2009	Industry Canada issues the 30 set-aside AWS-1 spectrum licences to Wind Mobile.
April 2009	Industry Canada publishes the Tower/Site Sharing Guidelines.
April 3, 2009	Wind Mobile submits its documents for the CRTC's ownership and control review under the *Telecommunications Act*.
October 29, 2009	The CRTC determines that Wind Mobile did not satisfy the ownership and control requirements in the *Telecommunications Act*.
December 10, 2009	The GiC varies the CRTC's ownership and control decision, finding that Wind Mobile satisfied the ownership and control requirements in the *Telecommunications Act*.
December 2009	Wind Mobile begins operations as a telecommunications carrier.
February 4, 2010	After an application by Public Mobile, the Federal Court quashes the GiC's variance of the CRTC's ownership and control decision, re-establishing the CRTC's determination that Wind Mobile did not satisfy the ownership and control requirements in the *Telecommunications Act*.
November 22, 2010	The Minister of Industry announces a review of the COLs on Roaming and Tower/Site Sharing.
Late 2010 / Early 2011	Industry Canada retains the services of a private firm, Nordicity, to evaluate the existing framework on roaming and tower/site sharing, and, if necessary, recommend changes.
April 15, 2011	VimpelCom becomes the majority shareholder of GTH. GTH remains a non-controlling shareholder in Wind Mobile. [redacted]

Date	Event
May 2011	Industry Canada receives Nordicity's report on roaming and tower/site sharing.
June 8, 2011	The Federal Court of Appeal reverses the Federal Court's ownership and control decision, re-establishing the GiC's variance of the CRTC decision such that Wind Mobile satisfied the ownership and control requirements in the *Telecommunications Act*.
March 24, 2012	Industry Canada launches consultation on the Revised COLs on Roaming and Tower/Site Sharing with the release of draft revised COLs.
April 26, 2012	The Government of Canada introduces legislation in Parliament to change the Canadian ownership and control requirements in the *Telecommunications Act*.
April 26, 2012	The Supreme Court of Canada denies leave to appeal the Federal Court of Appeal's decision on the ownership and control of Wind Mobile.
June 29, 2012	The *Telecommunications Act* amendments to remove the Canadian ownership and control requirements for telecommunication carriers with less than 10% market share, thus allowing up to 100% foreign ownership and control of such carriers, come into force.
October 24, 2012	GTH applies to the IRD and to the Competition Bureau for approval to acquire voting control of Wind Mobile.
Late 2012	The CRTC is made aware of concerns with respect to the rates, terms and conditions associated with wireless roaming and begins to study the matter.
[redacted]	[redacted]
March 7, 2013	The Revised COLs on Roaming and Tower/Site Sharing are published.
March 7, 2013	Industry Canada launches consultation on the Transfer Framework with the release of the Transfer Framework Consultation Paper.

Date	Event
[redacted]	
June 18, 2013	GTH withdraws its ICA application for approval to acquire voting control of Wind Mobile.
June 28, 2013	Industry Canada publishes the Transfer Framework.
December 12, 2013	The CRTC announces that it will examine whether wireless service providers are placing their competitors at an unfair competitive disadvantage.
December 18, 2013	The Government of Canada introduces legislation in Parliament to amend the *Telecommunications Act* to cap wholesale roaming rates.
January 13, 2014	Wind Mobile withdraws from the 700 MHz Auction.
January 14, 2014 – February 13, 2014	Bidding on the 700 MHz Auction takes place.
March 13, 2014	The five-year moratorium on transfers of Wind Mobile's set-aside spectrum licences to Incumbents expires.
June 2014	The *Telecommunications Act* amendments to prevent one carrier from charging another carrier more than the average amount it charges its own subscribers for roaming come into force.
July 31, 2014	The CRTC releases its decision prohibiting exclusivity provisions in wholesale roaming agreements between Canadian mobile wireless carriers.
September 15, 2014	GTH sells its interest in Wind Mobile to a consortium led by AAL Acquisitions Corporation for C$ 295 million. The consortium acquired C$ 135 million of debt and C$ 160 million in vendor loans, and GTH received C$ 11.
May 5, 2015	The CRTC releases its decision to set wholesale roaming rates.

INTRODUCTION

I. Overview

1. Advanced wireless telecommunications devices and services have become an essential part of our lives. These services depend on the availability of a finite public resource called radio frequency spectrum (or "spectrum") to transmit electromagnetic waves.

2. In Canada, spectrum is managed by the Minister of Industry (the "Minister"). The Minister has the authority to decide how spectrum licences are issued, to whom and on what condition. Industry Canada supports the Minister in the exercise of this authority. Spectrum is managed with a view to maximizing the economic and social benefits to Canadians. Early on, the Government of Canada ("Canada" or "the Government") determined that the objective of maximizing economic and social benefits of spectrum utilization is best achieved by promoting a competitive wireless telecommunications market. This objective is reflected in the policies and procedures governing spectrum management as well as the conditions of licences issued to wireless service providers.

3. The Canadian wireless telecommunications market is characterized by relatively high barriers to entry. Building a wireless network is a capital intensive and long-term project that involves acquiring spectrum licences and installing telecommunications antennas and associated infrastructure. These barriers have historically resulted in a market controlled by few dominant telecommunications carriers. Rogers Communications Inc. ("Rogers"), Bell Mobilility Inc. ("Bell"), and TELUS Communications Company ("TELUS") (together, the "Incumbents") emerged as the three dominant national players in the 2000s.

4. By 2007, Canada had made several attempts at introducing competition which proved not to be sustainable. Dissatisfied with the level of competition in the sector, Canada decided it would take steps in the upcoming auction of Advanced Wireless Services ("AWS" or "AWS-1") spectrum ("2008 AWS-1 Auction") to facilitate the entry of new wireless competitors ("New Entrants"), and in turn lead to more choice for consumers and better telecommunication services for Canadians at lower prices. As part of the 2008 AWS-1 Auction, the Government therefore set-aside spectrum licences for New Entrants and introduced mandatory roaming and tower/site sharing conditions of licence.

5. The set-aside allowed New Entrants to enter the market by obtaining spectrum licences at a much lower price than they otherwise would have paid had they been required to bid against the Incumbents. New Entrants, including Wind Mobile, took advantage of this opportunity. Consistent with the policy intent of the set-aside, the Government imposed a five-year moratorium on any transfer of a set-aside AWS-1 spectrum licence to an Incumbent. Afterwards, any such licence transfers would be subject to the approval of the Minister as would be the case for any other spectrum licence transfer. This requirement was explicitly indicated in the conditions of licence.

6. The conditions of licence on roaming and tower sharing were also introduced as a means of encouraging entry of New Entrants. Roaming allows customers of one telecommunication service provider to access the network of another service provider when they use their mobile devices outside the range of their home network. Mandating roaming services would allow New Entrants to offer a competitive service. Tower sharing reduces build-out costs for New Entrants by giving them access to another service provider's infrastructure for their antennas. The policy framework and the conditions of licences on roaming and tower sharing were established prior to the auction to mandate roaming services and tower sharing. The Government did not regulate rates for roaming and tower sharing but called on spectrum licence holders to negotiate agreements based on "commercial rates", which would give Incumbent service providers a fair return while incentivizing New Entrants to build out their networks. An arbitration mechanism was made available to resolve disputes between licensees.

7. Industry Canada assisted to the extent possible with the resolution of issues that arose with respect to the implementation of these conditions of licences, when brought to its attention. It also issued clarifications and, a few years later, in 2013, introduced amendments to expand and extend the roaming requirement and to strengthen tower sharing rules. Eventually, in 2015, the Canadian Radio-television Commission ("CRTC") concluded that regulation of wholesale roaming rates was required. Canada's approach was that of a prudent regulator: it initially selected less interventionist measures, and as the market evolved and the circumstances warranted, it gradually introduced more interventionist measures to achieve Canada's telecommunications policy objectives.

8. The Government's continued efforts to facilitate competition in wireless services were not limited to roaming and tower sharing. In 2012, Canada liberalized the Canadian ownership and control restrictions for telecommunication service providers to facilitate access to foreign capital for small carriers including the New Entrants.

9. Spectrum management and the regulation of the telecommunications sector are not static exercises. They necessarily have to adapt to market changes, which can occur rapidly, as a result of changes to consumer demands, technological advances and the behaviour of the market. When market changes occur, and changes to policies and conditions of spectrum licences are required as a result, the implementation of changes follows a well-established administrative process through which Industry Canada, the regulator, notifies and consults licence holders prior to implementing any change.

10. Between 2008 and 2013, the changes in the wireless telecommunications market in Canada were both unforeseen and significant. New Entrants had improved competition in the market, which had benefited consumers by lowering prices and stimulating innovation. At the same time, the progress achieved remained fragile as New Entrants were struggling. The introduction of the iPhone (and other similar advanced devices that were running applications that required large amounts of bandwith to transmit) was a game changer: access to additional spectrum was critical for New Entrants to remain competitive. Yet it was unclear whether New Entrants would continue to have access to sufficient spectrum, as Incumbents were keen on acquiring AWS-1 spectrum licences from New Entrants at the end of the five-year moratorium. The Government was concerned that such transfers would lead to further spectrum concentration, which in turn would negate the benefits that competition had brought.

11. In response to these concerns, in March 2013, the Minister announced a series of measures building on the Government's previous actions to promote competition in the market. The Government imposed spectrum caps in the upcoming 700 and 2500 MHz Auctions to provide access to additional spectrum which was critical to sustain competition beyond the Incumbents. Industry Canada also reviewed its policy on spectrum license transfer requests and consulted with the public, including spectrum licence holders, on proposed changes. In June 2013, it issued the Transfer Framework, which clarified the various factors, including spectrum concentration

(i.e. the share of total spectrum held or controlled by one or several service providers) that the Minister would take into account when exercising his authority to approve or deny licence transfer requests.

12. The Claimant in this arbitration, Global Telecom Holding S.A.E. ("GTH") seeks to use the *Agreement Between the Government of Canada and the Government of the Arab Republic of Egypt for the Promotion and Protection of Investments* (the "FIPA") as an insurance policy against its unsuccessful investment in the Canadian wireless telecommunication market and its mistimed exit from the market.

13. In 2008, the Claimant invested through equity and debt in Globalive Wireless Management Corp. ("GWMC") which operated as Wind Mobile. When it invested, the Claimant knew that it could not control Wind Mobile because of existing Canadian ownership and control requirements that applied to telecommunications service providers. Nevertheless, GTH was prepared to invest on that basis as a non-controlling shareholder and debt holder. It financed Wind Mobile's participation in the 2008 AWS-1 Auction and funded its operations. It knew that its investment required a long-term financial commitment. It was also well aware that Wind Mobile's entry in the wireless market would face significant competition by Incumbents and other New Entrants and that, even if Wind Mobile was successful, the Claimant would not see a return on its investment for many years. It invested at a time when the market in Canada was changing rapidly and Wind Mobile was not as successful as it hoped it would be.

14. In 2011, a little more than a year after Wind Mobile started operating, VimpelCom Ltd. ("VimpelCom") acquired the Claimant and its interests in Wind Mobile. VimpelCom is a telecommunications company headquartered in the Netherlands in which Russian nationals hold a significant proportion of economic interests and voting rights. The Claimant's new owners, for a number of reasons that had nothing to do with the measures at issue in this arbitration, were not prepared to maintain the investment they had acquired in Wind Mobile. Wind Mobile's operations would require significant additional investments because of the changing technological landscape and need for additional spectrum in order to be a viable competitor, and VimpelCom was not interested in providing the financing. In late 2011 or early 2012, having

failed to secure third party funding from other sources, VimpelCom started to look at options to exit the Canadian market.

15. In that context, the Claimant was not merely looking to sell its debt and non-controlling equity investment. In order to maximize the value that it would get from selling its investment, the Claimant sought to acquire voting control of Wind Mobile and sell the entire business to one of the Incumbents. This proposed acquisition of voting control was subject to various regulatory approvals, including under the *Investment Canada Act* ("ICA") and the *Competition Act*. The Claimant was aware of the required authorizations and in October 2012 it filed an application to acquire voting control of Wind Mobile under the ICA. [redacted], a review of the investment pursuant to the national security provisions of the ICA was ordered. [redacted] the Claimant decided to withdraw its ICA application for voting control of Wind Mobile.

16. The Claimant chose to exit the Canadian market in September 2014 on its own accord. Canada did not force it to do so. [redacted] which it alleges breached the National Treatment, Fair and Equitable Treatment ("FET") and Full Protection and Security ("FPS") obligations under the FIPA. The Claimant also argues, implausibly, that it had no alternative but to exit the market because of Canada's failure to create the favourable market conditions it expected. Canada's actions, it says, compounded the FET and FPS breaches because of a delay in launching Wind Mobile, allegedly caused by the CRTC ownership and control review in 2009, and because Wind Mobile was not able to negotiate better roaming and tower sharing agreements. The Claimant asserts that it should have been able to transfer Wind Mobile's spectrum licences to Incumbents after five years and that by preventing the Claimant from doing so, the Transfer Framework breached the FET, FPS and transfer of funds provisions of the FIPA.

17. None of these allegations have any merit. The Claimant never had the rights upon which its claims are founded, and its unreasonable expectations do not take into account the regulatory framework that applied at the time it invested, and continued to apply throughout the life of that investment. Canada adopted the challenged measures in pursuit of the legitimate policy objective of promoting competition in its wireless telecommunications sector and protecting its critical infrastructure from national security threats, and followed due process in doing so. The measures at issue do not constitute the type of manifestly arbitrary (or grossly unfair) measure that could amount to a breach of the FIPA.

18. At the outset, Canada re-iterates and maintains its objections to the Tribunal's jurisdiction to decide this claim. In light of the Tribunal's decision that it will consider Canada's objections together with the merits and damages, Canada relies on the arguments presented in its Memorial on Jurisdiction and Admissibility and Request for Bifurcation ("Memorial on Jurisdiction"), supplemented by the additional factual context provided in this submission.

19. Not only is the claim, or significant parts of it, outside of the Tribunal's jurisdiction, but it is based on an erroneous interpretation of the applicable legal standards and on a narrative that is unsupported by evidence.

20. *First*, the FET obligation in the FIPA does not allow the Tribunal to second-guess or assess the reasonableness of the policy choices made by the Government with respect to promoting competition in its telecommunication sector. Nor does the FIPA allow the Tribunal to review the legitimacy of the [redacted] raised by the acquisition of voting control of Wind Mobile by GTH and its parent company, VimpelCom. Governments are better placed than international tribunals to make those determinations and the FIPA specifically excludes from treaty dispute settlement the consideration of decisions by state parties over acquisitions of control. Moreover, the FET obligation in the FIPA does not guarantee the protection of investors' expectations.

21. Further, the FPS obligation does not extend beyond physical protection of the investment. In any event, there is nothing in the facts that suggests that Canada's measures interfered with the legal security of GTH's debt and equity interests in Wind Mobile.

22. Additionally, the transfer of funds provision in the FIPA does not have any application to this case. None of the measures at issue interfered with the Claimant's ability to transfer returns from its investment to its home country.

23. *Second*, the Claimant cannot simply cobble together complaints with respect to Canada's actions, which are unrelated, factually incorrect and otherwise time-barred as a basis for its argument that Canada's measures "cumulatively" breached the FET and FPS obligations. The Claimant's theory that Canada forced it to sell its investment through a series of actions is unfounded.

24. The Claimant's alleged expectations with respect to market conditions are unsupported and contradicted by the Claimant's own contemporaneous documents that show it was well aware of the risks that it was facing. The Claimant was well aware of the limits of Canada's proposed measures to improve market conditions and enable competition. It knew that mandatory roaming and tower sharing would not guarantee its success, which Industry Canada had made clear.

25. Canada went well beyond what it initially indicated it would do to assist New Entrants with respect to roaming and tower sharing. Whether it should have gone further (or taken additional measures sooner) is not the question before the Tribunal. The Claimant was well aware that negotiations with Incumbents would be difficult and that relying on roaming and tower sharing would carry significant risks for Wind Mobile. It expected fierce competition from Incumbents. It knew it would have to rely on an arbitration mechanism to resolve commercial disputes on roaming and tower sharing. Yet, it never availed itself of this dispute settlement mechanism. The Claimant cannot now blame Canada for its dissatisfaction with the roaming and tower sharing agreements freely negotiated and signed by Wind Mobile or for Wind Mobile's disappointing results, whether or not it resulted in its decision to sell its investment in Wind Mobile.

26. The Claimant's allegations regarding the CRTC's ownership and control review of GTH's investment in Wind Mobile (which it alleges are part of the cumulative breach) have no relevance to its claims. The Government acted promptly to reverse the CRTC's decision. The Claimant inappropriately blames Canada for any delay and uncertainty caused by court challenges to the Government's decision brought by other wireless operators. But even if the court process delayed the launch of Wind Mobile's operations, Canada cannot be faulted for

allowing due process of law through judicial review of Government decisions. In any event, Canadian Courts acted in a timely manner and ultimately upheld the Government's reversal of the CRTC's decision. As for the allegation that Canada caused the Claimant's exit from the market [redacted], it is plainly contradicted by the facts. By their own account, the Claimant and VimpelCom were seeking to acquire control of Wind Mobile for the purpose of selling it.

27. The Claimant's efforts at portraying the measures as part of a concerted effort to force the Claimant to sell its investment have no support in evidence. Canada wanted to see Wind Mobile and other New Entrants succeed because it wanted more competition in the wireless telecommunication market regardless of whether foreign investors were funding them. There is therefore no basis to consider the alleged measures "cumulatively" as amounting to a breach of the FET and FPS standards, and this argument must be rejected.

28. *Third,* the Claimant's argument that the introduction of the Transfer Framework was a complete change of the framework applicable to the 2008 AWS-1 Auction in breach of its legitimate expectations is without factual basis (to the extent such expectations are even relevant to the alleged breach of the FET standard). The fact that the licences were subject to a five-year moratorium on transfers to Incumbents does not mean that Wind Mobile could automatically transfer its spectrum to an Incumbent after that period, without seeking approval from the Minister. As Canada's Federal Court has already determined: "[t]he Minister simply did not make a representation that would lead a reasonable person to believe that, after five years, the acquisition or license of set-aside spectrum, by whatever means, would be unregulated by the Minister."[1] Wind Mobile's own spectrum licence conditions confirm that the Minister retained the discretion to approve or deny a transfer request, and to change the conditions of Wind Mobile's spectrum licences in order to reflect changing policies and procedures. Knowing this was the case, the Claimant decided to invest.

29. The Claimant also knew of the Government's long-standing policy objective and efforts to improve and sustain competition in the wireless sector. This policy objective was clear from the

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

start as was the fact that spectrum policies were subject to change if necessary to achieve that objective. The clarification that the Minister would consider the effect of licence transfers on spectrum concentration in exercising his existing authority to approve licence transfers was consistent with that objective.

30. *Fourth*, the Claimant's allegations with respect to Canada's national security review lack any factual grounding. The Claimant suggests that it expected from the time of its investment that it would be able to acquire voting control of Wind Mobile further to a liberalization of Canadian ownership and control rules in the telecommunication sector. While the possibility of liberalization may have been considered at various times, a decision to introduce changes to the *Telecommunications Act* was only made in 2012 (four years after the Claimant invested). While GTH's acquisition of voting control of Wind Mobile became *possible* after these changes, this acquisition of voting control was always subject to the ICA and to other regulatory approvals. GTH itself acknowledged this, including at the time of its ICA application.

31. The Claimant now seeks to challenge the basis for the ICA review, suggesting that the national security review was a "pretext". The Claimant's allegations are baseless. The review of GTH and VimpelCom's acquisition of voting control of Wind Mobile was not arbitrary. After the Claimant filed its application for voting control of Wind Mobile, and pursuant to the process established under the ICA, a national security review was ordered because the Minister had reasons to believe the proposed acquisition could be injurious to national security. Nor was the review "opaque" and lacking in due process as the Claimant alleges. In the context of the national security review, Government officials (including representatives of Public Safety) described the Government's concerns to the extent possible given the sensitivity of the information. GTH's counsel and VimpelCom had an opportunity to make representations and to provide information. [redacted] It is not for this Tribunal to review the merit of Canada's concerns with respect to the protection of its national security.

32. For the reasons set out in this Counter-Memorial, the Tribunal should dismiss these claims. None of Canada's measures either individually or cumulatively constitute a breach of its

obligations under the FIPA. However, if the Tribunal finds Canada in breach of its obligations, it must nevertheless reject the claim for damages.

33. The Claimant seeks compensation on the basis of the amount it invested in Wind Mobile, in the amount of C$ 1,330 million (excluding pre-judgment interest). There is, however, no valid reason in this case to base compensation on the investment value, which would erase any negative consequences of the Claimant's own investment and management decisions. The Claimant's attempt to inflate its damages and receive a windfall award should be rejected.

34. Instead, if the Tribunal finds a breach of the FIPA, the proper way to calculate damages is by considering the loss in fair market value of the investment "but for" the breach based on the best available evidence on the date of the breach itself. The Claimant's damages experts, Compass Lexecon, have provided a valuation of damages on this basis as an alternative, however, their calculations are based on fundamentally flawed legal and factual premises and an incorrect methodology. They do not account for the Claimant's own failure to mitigate its damages, and they inappropriately use the incorrect valuation date and *ex-post* information to substantially increase the amount of damages.

35. The Claimant is not entitled to any damages in the scenario where the Tribunal concludes that the national security review was a breach of the FIPA. There is simply no evidence that the failure to acquire control of Wind Mobile resulted in any damages to the Claimant. The decision by the Claimant and VimpelCom not to make further investments in Wind Mobile and to sell the investment pre-date the national security review and were not caused by it. Moreover there is no indication that the controlling shareholder, AAL Holdings Corporation ("AAL"), was trying to block any sale of Wind Mobile. Canada's damages experts, Mr. Benjamin Sacks and Dr. Coleman Bazelon from The Brattle Group, calculate the loss arising from the national security review as zero.

36. If the Tribunal concludes that the Transfer Framework was a breach of the FIPA (whether on its own or in combination with other measures), The Brattle Group calculates damages at no more than C$ 300 million (excluding pre-judgment interest). This reflects the difference between the price that Incumbents and New Entrants were prepared to offer for Wind Mobile at the time of the alleged breach in June 2013. This amount represents a maximum value that does not

account for any regulatory risk, including the risk that a sale to Incumbents may not have been approved by the Competition Bureau, a factor the Claimant fails to both appreciate and calculate.

II. Materials Submitted by Canada

37. Along with this Counter-Memorial and the attached exhibits and legal authorities, Canada has submitted the following documents:

- **Witness Statement of Peter Hill**: Mr. Hill was the Director General of the Spectrum Management Operations Branch at Industry Canada from 2012 to 2017. For the previous six years, he was the Senior Director in the Branch. Mr. Hill was jointly responsible for the development of Industry Canada's policy framework respecting the 2008 AWS-1 Auction and was responsible for the associated conditions of licence and their implementation. He was also responsible for the development of the Transfer Framework adopted in 2013.

- **Witness Statement of Jenifer Aitken**: Ms. Aitken was the Director General of the Investment Review Division ("IRD") at Industry Canada during the net benefit and national security reviews of GTH's proposed acquisition of voting control of Wind Mobile. Her witness statement provides an overview of the net benefit and national security review processes under the ICA and describes the application of both review processes to GTH's proposed acquisition.

- **Witness Statement of Iain Stewart**: Mr. Stewart was the Assistant Deputy Minister of the Strategic Policy Sector at Industry Canada, from May 2012 to June 2014. Mr. Stewart was responsible for the policy advice that Industry Canada provided to the Minister in respect of measures to sustain competition in the wireless telecommunications sector, which included providing policy advice and briefings in the months leading up to the adoption of the Transfer Framework in June, 2013.

- **Expert Report of The Brattle Group**: Mr. Benjamin Sacks and Dr. Coleman Bazelon of The Brattle Group have provided an expert report assessing the Claimant's damages claim. They are economics and valuation experts with experience assessing the value of wireless telecommunications projects and in assessing damages in international arbitration.

FACTS

I. Regulation of Wireless Telecommunications in Canada

A. The Relevant Regulatory Bodies and Their Roles

38. The regulation of the wireless telecommunications sector in Canada is the responsibility of Industry Canada and the CRTC. Each has a different and complementary mandate.

39. Industry Canada is responsible for spectrum management in Canada, pursuant to the *Radiocommunication Act*[2] and the *Radiocommunication Regulations*,[3] with due regard to the objectives of the *Telecommunications Act*.[4] The Minister determines what frequencies may be used by whom and for what purposes.[5] Section 5 of the *Radiocommunication Act* sets out the Minister's broad powers to "plan the allocation and use of spectrum".[6] Under the *Radiocommunication Act*, spectrum can only be used in accordance with an authorization issued by the Minister.[7] Spectrum management is an ongoing process that involves decision-making prior to, during, and after the issuance of licences and it evolves in order to respond to changes in the marketplace.

40. Telecommunications carriers that use wireless spectrum are also regulated by the CRTC pursuant to the *Telecommunications Act*.[8] The CRTC is a specialized government agency established under federal legislation to develop, implement, and enforce regulatory policies on the Canadian communications system.[9] The CRTC performs a wide range of functions, including rule making and policy development, but also has the quasi-judicial powers of a superior court with respect to the production and examination of evidence and the enforcement of its decisions. The CRTC is vested with powers to regulate rates and conditions of telecommunications services.[10] In the context of wireless telecommunications, the CRTC has recently started exercising some of these regulatory powers. Previously, it had considered that it was not necessary to exercise some of the powers to achieve the Canadian telecommunications policy

[2] **C-057**, *Radiocommunication Act*, R.S.C., 1985, c. R-2 ("*Radiocommunication Act*").

[3] **C-001**, *Radiocommunication Regulations*, SOR/96-484 ("*Radiocommunication Regulations*").

[4] **C-046**, *Telecommunications Act*, S.C. 1993, c. 38 ("*Telecommunications Act*").

[5] **RWS-Hill**, Annex A: Affidavit of Peter Hill (Sworn October 25, 2013), ¶¶ 18, 24.

[6] **C-057**, *Radiocommunication Act*, s. 5(1)(e).

[7] **C-057**, *Radiocommunication Act*, s. 5(1)(a)(i.1); **RWS-Hill**, Annex A: Affidavit of Peter Hill (Sworn October 25, 2013), ¶¶ 20-29.

[8] **C-046**, *Telecommunications Act*.

[9] **R-196**, CRTC, Three-Year Plan, 2017-2020 (last modified Apr. 25, 2017), p. 1.

[10] **C-046**, *Telecommunications Act*, ss. 24, 25(1), 27(1), 32.

objectives and had exercised "forebearance" with respect to the regulation of wireless telecommunications.[11]

41. In order to ensure the coherent development and implementation of telecommunications policy, the *Telecommunications Act* provides that the Government (through the Governor-in-Council[12] ("GiC")) may, by order, issue to the CRTC directions of general application on broad policy matters with respect to the Canadian telecommunications policy objectives.[13] It may also vary decisions of the CRTC in response to a petition or on its own motion.[14]

42. Telecommunications carriers are also subject to other generally applicable legislation. For example, mergers and acquisitions among telecommunications service providers fall within the regulatory purview of the Competition Bureau pursuant to the *Competition Act*.[15] The Competition Bureau is an independent law enforcement agency charged with enforcement of the *Competition Act*. The Competition Bureau reviews mergers to determine whether they prevent or lessen competition substantially or are likely to do so and investigates anti-competitive practices.[16]

43. In the context of the telecommunications sector, Industry Canada is responsible for promoting competition in the marketplace to meet the objectives of the *Telecommunications Act.* If there is insufficient competition, the CRTC may also intervene and exercise its regulatory

[11] Forebearance is specifically contemplated in s. 34 of the *Telecommunications Act.* The CRTC had made the decision to forebear in a series of decisions in the 1990s that continued to apply and remained unchanged as of 2008. The CRTC continued to forebear until 2015 when it determined that it was necessary to regulate wholesale roaming (*see* ¶ 182 below). *See* **R-197**, CRTC, website excerpt, Telecom Decision CRTC 94-15 (Aug. 12, 1994); **R-198**, CRTC, website excerpt, Telecom Decision CRTC 96-14 (Dec. 23, 1996); **R-199**, CRTC, website excerpt, Telecom Decision CRTC 98-18 (Oct. 2, 1998). Specifically, in Decision 94-15, the CRTC had found that wireless telecommunication services were "subject to competition sufficient to protect the interests of users, so that it was appropriate to so refrain" and that "to so refrain [wa]s not likely to impair unduly the establishment or continuance of a competitive market for those services". *See* **R-197**, CRTC, website excerpt, Telecom Decision CRTC 94-15 (Aug. 12, 1994), p. 8.

[12] The GiC refers to the Governor General acting on the advice of the Queen's Privy Council for Canada (Cabinet) and exercises executive authority in Canada.

[13] **C-046**, *Telecommunications Act*, s. 8.

[14] **C-046**, *Telecommunications Act*, s. 12. The GiC may also rescind or refer back a decision for reconsideration.

[15] **R-106**, *Competition Act*, R.S.C., 1985, c. C-34 ("*Competition Act*").

[16] **C-252**, Competition Bureau, website excerpt, "Our organization" (last visited on Sep. 24, 2017).

powers. In that sense, the mandates of Industry Canada, the CRTC and the Competition Bureau are independent, but complementary.

B. Objectives of Canada's Telecommunications Policy and Canada's Approach to Wireless Telecommunications Regulation

44. The objectives of Canada's telecommunications policy are enshrined in section 7 of the *Telecommunications Act*:

> (a) to facilitate the orderly development throughout Canada of a telecommunications system that serves to safeguard, enrich and strengthen the social and economic fabric of Canada and its regions;
>
> (b) to render reliable and affordable telecommunications services of high quality accessible to Canadians in both urban and rural areas in all regions of Canada;
>
> (c) to enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications;
>
> (d) to promote the ownership and control of Canadian carriers by Canadians;
>
> (e) to promote the use of Canadian transmission facilities for telecommunications within Canada and between Canada and points outside Canada;
>
> (f) to foster increased reliance on market forces for the provision of telecommunications services and to ensure that regulation, where required, is efficient and effective;
>
> (g) to stimulate research and development in Canada in the field of telecommunications and to encourage innovation in the provision of telecommunications services;
>
> (h) to respond to the economic and social requirements of users of telecommunications services; and
>
> (i) to contribute to the protection of the privacy of persons.[17]

45. In developing Canada's telecommunications policy and regulatory framework, the Minister must balance these different objectives. In 2005, the Minister established a Telecommunications Policy Review Panel ("TPRP") to advise on a framework that would ensure Canada continued to have a strong, internationally competitive telecommunications industry that delivers world-class products and services at affordable prices for the economic and social benefit of all Canadians.[18]

[17] **C-046**, *Telecommunications Act*, s. 7.

[18] **R-080**, Telecommunications Policy Review Panel: Final Report (Mar. 2006), p. 1-3 ("TPRP Report, 2006").

46. One of the TPRP's recommendations was reliance on market forces to the maximum extent feasible to achieve Canada's telecommunications policy objectives, and adoption of regulatory and other government measures only where market forces were unlikely to achieve a telecommunications policy objective within a reasonable time frame and only where the costs of regulation did not outweigh the benefits, and in such a manner that they were minimally interfering, efficient and proportionate to their purpose.[19] This general approach had some influence on the development of the telecommunications policy framework, including the spectrum policy, over the following years.

47. In December 2006, the Minister directed the CRTC to "(i) rely on market forces to the maximum extent feasible as the means of achieving the telecommunications policy objectives, and (ii) when relying on regulation, use measures that are efficient and proportionate to their purpose and that interfere with the operation of competitive market forces to the minimum extent necessary to meet the policy objectives".[20]

48. The new Spectrum Policy Framework for Canada released by Industry Canada in June 2007 reflects this general approach. However, it makes clear that in the context of spectrum management, achieving the overriding objective of "maximiz[ing] the economic and social benefits that Canadians derive from the use of the radio frequency spectrum resource"[21] may require some government intervention to ensure the market is sufficiently competitive. This framework and its enabling guidelines, which provide direction to the Canadian Spectrum Management Program,[22] further the policy objectives in the *Telecommunications Act* as they apply to spectrum.

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[19] **R-080**, TPRP Report, 2006, p. 4.

[20] **C-049**, Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives, SOR/2006-355, Registration 2006-12-14, s. 1(a) (Dec. 14, 2006).

[21] **C-052**, Industry Canada, Spectrum Policy Framework for Canada (DGTP-001-07) (Jun. 2007), p. 8 ("Spectrum Policy Framework").

[22] The Spectrum Policy Framework "provides the policy and spectrum management direction for wireless applications, services and uses. It comprises a Preamble, a Policy Objective and a set of Enabling Guidelines. The Objective of the Framework provides the fundamental policy basis for the spectrum program, whereas the Guidelines provide direction towards achieving the objective through management of Canada's spectrum resource. Together they provide policy and spectrum management direction for wireless applications, services and uses."

49. The Spectrum Policy Framework notes that while Industry Canada "recognizes, as do many other administrations, the importance of relying on market forces in spectrum management to the maximum extent feasible", the "decision to rely to a greater extent on market forces *must be tempered by the continued need for management of the resource*."[23] The Enabling Guidelines note that "[n]otwithstanding [reliance on market forces], spectrum should be made available for a range of services in the public interest", that "[r]egulatory measures, where required, should be minimally intrusive, efficient and effective" and that "[r]egulation should be open, transparent and reasoned, and developed through public consultation, where appropriate".[24]

50. Such an approach to spectrum management requires regular monitoring of the market, re-assessment of the applicable policy framework and of the effectiveness of existing government measures, and consideration of whether additional measures are required.[25] Indeed, the Spectrum Policy Framework indicated that Industry Canada "continue[d] to explore and implement new approaches and techniques in spectrum management to ensure the greatest access to spectrum in a competitive marketplace and the availability of spectrum for public interest needs such as security and public safety."[26]

II. Canada's Wireless Telecommunications Market: Spectrum Concentration in the Hands of Three Incumbents

51. The Government's concerns about spectrum concentration and its efforts to promote competition in the wireless telecommunications market in Canada date back to the 1990s.[27]

52. The first licences for mobile wireless telecommunications services in Canada were awarded in 1983. By 1995, there was sufficient concern about spectrum concentration to warrant the usage of a spectrum aggregation limit (also known as a "spectrum cap") during Industry Canada's licensing process for licences in the Personal Communications Services ("PCS") band

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RWS-Hill, Annex A: Affidavit of Peter Hill (Sworn October 25, 2013), ¶ 25. *See also* **C-052**, Industry Canada, Spectrum Policy Framework.

[23] **C-052**, Spectrum Policy Framework, p. 8 (emphasis added).

[24] **C-052**, Spectrum Policy Framework, p. 9.

[25] **RWS-Hill**, ¶ 22.

[26] **C-052**, Spectrum Policy Framework, p. 4.

[27] **RWS-Stewart**, ¶¶ 21-25.

of spectrum.[28] This spectrum cap "was intended to create a competitive environment and level the playing field, by ensuring that any one Incumbent could not acquire access to an excessive amount of spectrum."[29] In the context of this licensing process, Industry Canada issued two national spectrum licences to the New Entrants Clearnet PCS Inc. ("Clearnet") and Microcell Networks Inc. ("Microcell"), enabling them to enter the market.[30] Four years later, Industry Canada raised the spectrum cap hoping that increasing the spectrum cap would give reasonable opportunities to all (interested) parties in acquiring new spectrum while continuing to foster competition and safeguard against spectrum concentration.[31]

53. Beginning in the late 1990s, there was a series of mergers of the telecommunications players. In 2000, TELUS acquired Clearnet.[32] In the early 2000s, Bell, Microcell and TELUS emerged as national players, alongside Rogers which had been a national player for some time.[33]

54. In August 2004, the Minister rescinded Canada's spectrum cap policy for PCS spectrum.[34] The trigger for review of the spectrum cap policy was interest from carriers (that were at or near the spectrum cap limit in a number of markets) in accessing new spectrum for expansion and evolution of their services.[35] Notwithstanding the possibility of further consolidation in the industry, Industry Canada concluded that in light of the competition that had been spurred on in the preceding years and the further spectrum that was to be released in the coming years, the spectrum cap was not necessary at that time.[36] However, it would continue to "monitor the

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[28] **C-250**, Industry Canada website, A Brief History of Cellular and PCS Licensing (May 18, 2010), p. 1.

[29] **RWS-Stewart**, ¶ 23. *See also* **C-250**, Industry Canada, website excerpt, "A Brief History of Cellular and PCS Licensing" (May 18, 2010), p. 2; **R-082**, Industry Canada, website excerpt, "Consultation on the Spectrum for Advanced Wireless Services and Review of the Mobile Spectrum Cap Policy" (undated), p. 24, available at: http://www.ic.gc.ca/eic/site/smt-gst nsf/eng/sf08085 html.

[30] **C-250**, Industry Canada website, A Brief History of Cellular and PCS Licensing (May 18, 2010), p. 2.

[31] **RWS-Stewart**, ¶ 24; **R-082**, Industry Canada, website excerpt, "Consultation on the Spectrum for Advanced Wireless Services and Review of the Mobile Spectrum Cap Policy" (undated), p. 25.

[32] **R-200**, CBC News, "Telus bids $6.6 billion for Clearnet in wireless mega-deal", (Aug. 21, 2000), available at: http://www.cbc.ca/news/business/telus-bids-6-6-billion-for-clearnet-in-wireless-mega-deal-1.209685.

[33] **C-250**, Industry Canada website, A Brief History of Cellular and PCS Licensing (May 18, 2010), p. 2.

[34] **R-107**, Industry Canada, Notice No. DGTP-010-04 – Decision to Rescind the Mobile Spectrum Cap Policy (Aug. 27, 2004), ¶ 1 ("Notice No. DGTP-010-04").

[35] **R-107**, Notice No. DGTP-010-04, ¶ 4.

[36] **R-107**, Notice No. DGTP-010-04, ¶ 10.

industry for excessive spectrum concentration".[37] There was a desire to ensure that telecommunications operators had access to sufficient spectrum to provide services, but also that spectrum was not concentrated in the hands of a few service providers in a manner that limited competition.

55. Subsequently, there was further consolidation in the industry. In 2004, Microcell was bought by Rogers.[38] This consolidation contributed to the market structure that was in place in 2008 with three national players.[39] By that time, the Incumbents accounted for over 94% of the wireless market share in Canada. Rogers held 37% of the market share, Bell held 28%, TELUS held 27%, and the remaining 8% was shared amongst regional wireless service providers, small incumbent telecommunications service providers, and mobile virtual operators.[40]

56. As demonstrated by the graphic below, by 2007 mobile wireless spectrum was concentrated in the hands of three national licensees, the Incumbents.

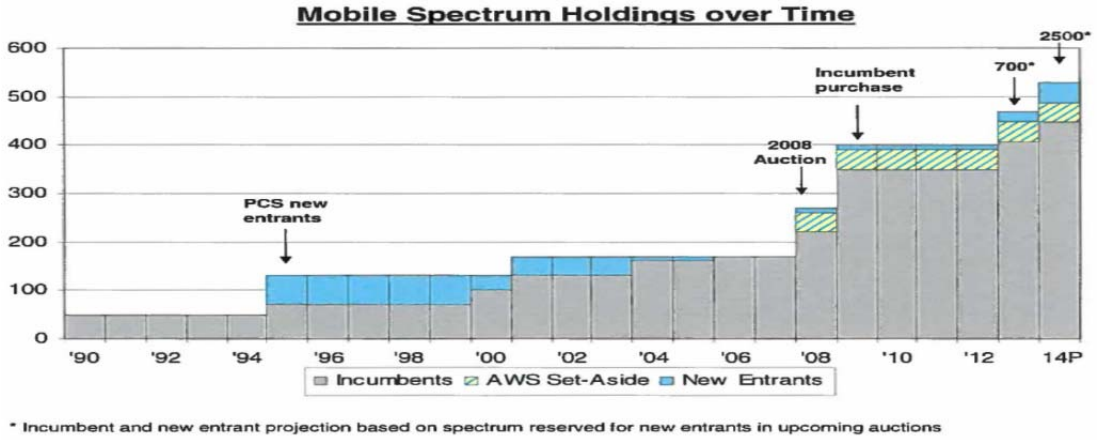

Figure 1: Mobile Spectrum Holdings over Time, 1990-2008. **R-084**, Memorandum from Iain Stewart, Industry Canada to Deputy Minister, Industry Canada, Annex B, slide 11.

[37] **R-107**, Notice No. DGTP-010-04, ¶ 15.

[38] **R-083**, CBC News, "Rogers Wireless fetches Fido" (Nov. 8, 2004), available at: http://www.cbc.ca/news/business/rogers-wireless-fetches-fido-1.501059.

[39] **RWS-Stewart**, ¶ 25.

[40] **C-079**, CRTC Communications Monitoring Report, 2008 (Jul. 2008), p. 227 ("CRTC Communications Monitoring Report, 2008").

57. That level of concentration of spectrum in the hands of three Incumbents was of concern to the Government because Canadian consumers were paying increasingly high prices for wireless services and service penetration was relatively low.[41]

58. In light of this spectrum concentration, and given that earlier efforts had not produced sustained competition in the market, the Government had to re-assess its policies and determine how to proceed in the upcoming auction.

III. The 2008 AWS-1 Auction

59. In 2007, in response to technological advances and the increasing need for AWS spectrum for applications such as cellular telephony, data, multimedia and Internet Protocol (IP)-based applications, broadband access, using third-generation (3G) cellular and other advanced technologies, Industry Canada identified new mobile spectrum for release. In anticipation of auctioning the AWS spectrum licences, Industry Canada developed the legal and policy framework for the auction. This framework, announced by the Minister, Jim Prentice, in November 2007 would set aside spectrum for New Entrants into the mobile wireless market in Canada and introduce mandatory roaming and tower/site sharing provisions "to encourage sustained competition in the market" with the goal of achieving "lower prices, better service and more choice for consumers and business".[42] The 2008 AWS-1 Auction which took place from May 27, 2008 to July 21, 2008 resulted in entry of a number of New Entrants in the market, including Wind Mobile.

A. Legal and Policy Framework for Spectrum Licence Auctions

60. Under the *Radiocommunication Act*, the Minister has the authority to issue spectrum licences for utilization of specified radio frequencies within defined geographic areas.[43]

61. The Minister may use auctions as the mechanism to assign licences for the use of radio frequency spectrum.[44] The basic policy document explaining the general framework and the

[41] **C-079**, CRTC Communications Monitoring Report, 2008, p. 228; *See also* **C-061**, Industry Canada, website excerpt, "Government Opts for More Competition in the Wireless Sector (Nov. 28, 2007).

[42] **C-061**, Industry Canada, "Government Opts for More Competition in the Wireless Sector" (Nov. 28, 2007), p. 2.

[43] **C-057**, *Radiocommunication Act*, s. 5(1)(a)(i.1).

rules normally applicable for spectrum auctions is the Framework for Spectrum Auctions in Canada ("Spectrum Auction Framework").[45]

62. The Spectrum Auction Framework contemplates the use of an auction by the Minister to issue spectrum licences where demand for access to radio frequency spectrum exceeds its supply.[46] In such circumstances, auctioning could award spectrum licences in a transparent and economically efficient manner. But to ensure maximization of economic benefits, licensees also had to be operating in a competitive marketplace.[47] In order to "promote a competitive post-auction marketplace", the framework refers to the possibility of measures "restricting or disallowing the participation of certain entities in an auction and placing limits on the amount of spectrum any one entity may hold".[48]

63. In addition to this policy framework for spectrum auctions, a client procedure circular (CPC-2-1-23) entitled *Licensing Procedure for Spectrum Licences for Terrestrial Services* (the "Licensing Circular") provides the general policies and procedures applicable to the issuance and transfer of licences.[49] Further, more specific instruments that are released in anticipation of an auction will detail the terms of that specific auction (with respect to the 2008 AWS-1 Auction these instruments included for example the AWS-1 Policy Framework and the AWS-1 Licensing Framework discussed below).

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[44] **C-041**, Industry Canada, Framework for Spectrum Auctions in Canada (Issue 2) (Oct. 2001), p. 1 ("Spectrum Auction Framework").

[45] **C-041**, Spectrum Auction Framework. There have been several Issues of this document, and Issue 2 was current from October 2001 through March 2011.

[46] **C-041**, Spectrum Auction Framework, p. 1.

[47] **C-041**, Spectrum Auction Framework, p. 2.

[48] **C-041**, Spectrum Auction Framework, p. 2.

[49] **C-003**, Licensing Circular, Issue 2, p. 4. This document has been updated on several occasions to reflect changes in Industry Canada's spectrum licensing policies. Issue 2 of the Licensing Circular which was issued in September 2007 was in effect at the time of the AWS auction in 2008.

64. The Minister also has the authority to fix the terms or conditions of spectrum licences ("COLs"), as well as the authority to amend them.[50] The COLs outline the terms and conditions of the privilege given to a licensee to use spectrum.

65. In exercising spectrum management authority under the *Radiocommunication Act*, the Minister must respect certain Canadian administrative law requirements that ensure accountability in decision-making. The requirements include exercising power within the Minister's legal authority and allowing for procedural fairness. Procedural fairness includes the right to be given notice of intended decisions that may have effect on a licence holder, the right to be heard and the right to an impartial decision-maker. Therefore, when initiating a spectrum auction and developing the applicable policy instruments, Industry Canada invariably follows a well-established consultations process with stakeholders. This process is also followed when Industry Canada introduces amendments to applicable instruments or other measures that affect licensees.

66. A spectrum auction will begin with the release of a consultation document.[51] This is followed by a comment period and reply comment period to allow for stakeholder input.[52] Industry Canada then develops and publishes the final policy framework governing the specific auction, describing the licences to be auctioned, the terms and conditions that will be attached to the licences, the opening bid for each licence as well as the rules of the auction, the eligibility criteria, and the application procedures to participate in the auction.[53] Public information sessions are held to provide a general overview of the licensing process, and there may be an opportunity for clarification of auction rules.[54] Applications are then accepted.[55] Subsequently, the auction begins with bidders submitting bids on the licences that are being offered at a specified start date.[56] The auction will close when no new bids or withdrawals are submitted in a round.[57] Then,

[50] **C-057**, *Radiocommunication Act*, s. 5(1)(b).

[51] **C-041**, Spectrum Auction Framework, p. 9.

[52] **C-041**, Spectrum Auction Framework, p. 9.

[53] **C-041**, Spectrum Auction Framework, pp. 9-10.

[54] **C-041**, Spectrum Auction Framework, p. 10.

[55] **C-041**, Spectrum Auction Framework, p. 10.

[56] **C-041**, Spectrum Auction Framework, p. 11.

each provisional licensee is required to submit eligibility documentation and payment for the full amount of its standing high bids, after which licences are issued to the licensee.[58]

B. The AWS-1 Policy Framework was Developed to Sustain and Enhance Competition in the Wireless Market

67. When Industry Canada released its consultation document on the 2008 AWS-1 Auction on February 16, 2007 ("AWS-1 Consultation Paper"), it clearly signalled its concern with the state of the Canadian wireless market and consolidations that had occurred.[59] The paper reviewed the existing regulatory framework[60] and explained the need to consider long-term competition issues in the release of additional spectrum through the 2008 AWS-1 Auction.[61] The document noted concerns about "inefficient use of spectrum which could arise from an excess concentration of wireless access spectrum beyond the needs of current operators… restricted availability of new spectrum to meet the needs of potential new users, including competitive entry; and the pressure to open up new frequency bands… when existing mobile bands [we]re not being used efficiently."[62] As a result, Industry Canada considered possible measures to enable entry. The paper identified two particular barriers to entry that wireless telecommunications operators faced in the Canadian market: (1) spectrum was a finite resource and there were limited opportunities to access it, and (2) there was a high fixed cost to build a wireless network and replicate the networks that Incumbents controlled.[63] The document went on to note that where the number of competitors is limited and there are significant barriers to entry, market forces may not be enough to discipline market behaviour and protect consumer interests.[64]

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[57] **C-041**, Spectrum Auction Framework, p. 11.

[58] **C-041**, Spectrum Auction Framework, p. 12.

[59] **C-050**, Industry Canada, Consultation on a Framework to Auction Spectrum in the 2 GHz Range including Advanced Wireless Services (DGTP-002-07) (Feb. 2007), p. 20 ("AWS-1 Consultation Paper").

[60] **C-050**, AWS-1 Consultation Paper, p. 16.

[61] **C-050**, AWS-1 Consultation Paper, p. 20.

[62] **C-050**, AWS-1 Consultation Paper, p. 20.

[63] **C-050**, AWS-1 Consultation Paper, p. 19.

[64] **C-050**, AWS-1 Consultation Paper, p. 19.

68. Industry Canada considered that the risk of government intervention to enable market entry (i.e. reducing barriers to entry) would have to be assessed against the risk of Incumbents acquiring all or a majority of the spectrum licences being auctioned which would have the effect of lessening competition by preventing market entry.[65] As such, Industry Canada sought input on whether setting aside spectrum for New Entrants in the 2008 AWS-1 Auction or introducing spectrum aggregation limits (caps) would be more effective in enhancing competition.[66]

69. In addition, the consultation document invited comments on (i) the possibility of "mandating incumbent wireless operators to offer roaming services… to foster the development of competitive wireless communication services", (ii) the "extent to which the lack of mandated roaming could be a barrier to entry", and (iii) the "services [to] be included in any mandated roaming".[67]

70. Over fifty parties provided comments in the consultations. Neither Wind Mobile nor the Claimant provided any comments.[68]

71. After the completion of consultations, the AWS-1 Policy Framework was publicly released on November 28, 2007 ("AWS-1 Policy Framework").[69] Building on the considerations discussed in the AWS-1 Consultation Paper, Industry Canada concluded that the introduction of spectrum set-aside for New Entrants in the 2008 AWS-1 Auction as well as mandatory roaming and tower/site sharing provisions were warranted.

72. The AWS-1 Policy Framework noted that while "[t]he department [wa]s committed to government policies which seek to rely on market forces to the maximum extent feasible for the provision of telecommunications service", this "policy approach c[ould] only be pursued in an environment where market forces can be expected to deliver, now and in the future, a level of

[65] **C-050**, AWS-1 Consultation Paper, pp. 20-21.

[66] **C-050**, AWS-1 Consultation Paper, pp. 22-23.

[67] **C-050**, AWS-1 Consultation Paper, pp. 24-25.

[68] **R-201**, Industry Canada, website excerpt, "Comments Received on Gazette Notice DGTP-002-07" (last modified May 17, 2010), available at: http://www.ic.gc.ca/eic/site/smt-gst.nsf/eng/sf08769.html.

[69] **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) ("AWS-1 Policy Framework").

competition sufficient to protect the interests of users."[70] A critical consideration was to "help ensure that market forces support[ed] a telecommunications infrastructure that delivers innovation and consumer choice at competitive prices."[71] Because further competition "would strengthen Canada's ability to rely on market forces to the maximum extent feasible",[72] measures to sustain and enhance competition would be introduced in the 2008 AWS-1 Auction.[73] In selecting these measures, Industry Canada considered the "needs and concerns expressed by both potential New Entrants and incumbent operators, and the interests of consumers."[74]

73. Set-aside spectrum was the first measure. Approximately 40% of the spectrum available for bidding was reserved for exclusive bidding by New Entrants to facilitate their entry into the market.[75] New Entrants were defined as "entities[] hold[ing] less than 10% of the national wireless market based on revenue."[76]

74. Mandated roaming was the second measure. Roaming allows a subscriber from one network to access another wireless operator's network in areas where the subscriber's carrier lacks infrastructure.[77] Industry Canada decided to mandate roaming outside of the licensees' territories ("out-of-territory roaming") for at least ten years and mandate roaming within the licensees' territories ("in-territory roaming") for at least five years with an extension for an additional five years for New Entrants that held licences in all areas of the country if specific roll-out targets were satisfied.[78] Five years was intended to cover the period during which the licensee was building out its network. Roaming was to be offered wherever technically feasible,

[70] **C-004**, AWS-1 Policy Framework, p. 2.

[71] **C-004**, AWS-1 Policy Framework, p. 2.

[72] **C-004**, AWS-1 Policy Framework, p. 3.

[73] **C-004**, AWS-1 Policy Framework, p. 4.

[74] **C-004**, AWS-1 Policy Framework, p. 4.

[75] **C-004**, AWS-1 Policy Framework, p. 5; **RWS-Hill**, ¶ 31.

[76] **C-004**, AWS-1 Policy Framework, p. 5; **RWS-Hill**, ¶ 31.

[77] **C-004**, AWS-1 Policy Framework, pp. 7-8; **RWS-Hill**, ¶ 32.

[78] **C-004**, AWS-1 Policy Framework, pp. 8-9; **RWS-Hill**, ¶ 33. Although there were no roll-out obligations (that is, requirements on minimum population coverage across various geographic areas), the AWS-1 Policy Framework included certain roll-out targets that would be considered by Industry Canada in considering renewal of the AWS licences after the ten-year licence term and in considering applications from New Entrants for an extension of mandated in-territory roaming beyond the initial five year period.

and Industry Canada required wireless operators to negotiate in good faith within prescribed timelines.[79] If an agreement could not be reached on roaming, "[b]inding arbitration… consistent with the settlement of commercial disputes" could be used.[80] Industry Canada "expect[ed] that roaming would be offered at commercial rates".[81]

75. Mandated tower/site sharing, was the third measure. Industry Canada decided to mandate tower/site sharing and to prohibit exclusive site arrangements.[82] Space was to be offered wherever technically feasible, negotiated within prescribed timelines, and negotiated in good faith. Licensees would "be directed to binding arbitration to resolve disputes where they cannot finalize an agreement to share within certain time frames."[83] In addition to addressing a barrier to entry, this measure was also motivated by the policy goal of reducing the proliferation of telecommunications towers across Canada.[84]

76. Given that the above changes on roaming and tower/site sharing would require changes to the COLs of pre-existing spectrum licences in other bands in addition to being reflected in the COLs for the AWS-1 licences, the AWS-1 Policy Framework indicated that Industry Canada would conduct consultations on the specific COLs around roaming and tower/site sharing and issue final decisions prior to the 2008 AWS-1 Auction. The details of the arbitration process that would apply between the wireless operators would be the object of a separate consultation.[85]

77. The AWS-1 Policy Framework also clarified that the considerations underlying Industry Canada's decision to pursue an auction with spectrum set aside for New Entrants and revised COLs on roaming and tower/site sharing were "distinct from those previously considered by the CRTC and the Competition Bureau".[86] In other words, Industry Canada's assessment of the need

[79] **C-004**, AWS-1 Policy Framework, pp. 8-9; **RWS-Hill**, ¶ 34.

[80] **C-004**, AWS-1 Policy Framework, p. 8; **RWS-Hill**, ¶ 34.

[81] **C-004**, AWS-1 Policy Framework, p. 9; **RWS-Hill**, ¶¶ 35-37.

[82] **C-004**, AWS-1 Policy Framework, p. 9; **RWS-Hill**, ¶¶ 38-39.

[83] **C-004**, AWS-1 Policy Framework, p. 9; **RWS-Hill**, ¶¶ 38-39.

[84] **C-004**, AWS-1 Policy Framework, p. 9; **RWS-Hill**, ¶¶ 38-39.

[85] **C-004**, AWS-1 Policy Framework, p. 9.

[86] **C-004**, AWS-1 Policy Framework, p. 3.

for measures to enhance competition did not have any bearing on the CRTC or the Competition Bureau's exercise of their own mandates.

78. With respect to transfers, the AWS-1 Policy Framework noted that "[w]hile all licence transfers must be approved by the Minister, licences obtained through the set-aside may not be transferred to companies that do not meet the criteria of a New Entrant for a period of 5 years from the date of issuance."[87] Thus, for a five year period the Minister would not consider set-aside licence transfer requests to Incumbents (this is referred to as the "moratorium" on transfers to Incumbents) but would consider transfer requests to New Entrants. After that period, the Minister would exercise its statutory discretion regarding the approval of transfers to any eligible party.

79. Shortly after the AWS-1 Policy Framework was released, on December 21, 2007, Industry Canada released the Licensing Framework for the 2008 AWS-1 Auction ("AWS-1 Licensing Framework"), that outlined the rules and requirements for the competitive bidding process.

80. Industry Canada indicated that it expected the auction to be held on May 27, 2008, that obtaining a licence would not guarantee success and that potential bidders should undertake their due diligence before participating in the auction.[88]

C. Industry Canada's Consultation and Release of the AWS-1 Conditions of Licence

81. In addition to being informed of the policy and licensing frameworks for the 2008 AWS-1 Auction, potential participants in the auction were also informed of the COLs that would apply to licences issued in the 2008 AWS-1 Auction as well as the changes that would be made to the COLs of pre-existing licences with respect to roaming and tower/site sharing. This information allowed interested parties to become aware of the relevant terms and conditions governing the use of spectrum before participating in the auction.

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[87] **C-004**, AWS-1 Policy Framework, p. 6.

[88] **C-005**, Industry Canada, Licensing Framework for the Auction for Spectrum Licences for Advanced Wireless Services and other Spectrum in the 2 GHz Range (DGRB-011-07) (Dec. 2007), p. 2 ("AWS-1 Licensing Framework").

82. Prior to the commencement of the 2008 AWS-1 Auction, Industry Canada issued a draft of the proposed additions to the COLs for existing and new licences to address mandated roaming and tower/site sharing and sought comments from interested parties.[89] In the context of these consultations, Industry Canada received comments from Globalive Communications Corp. ("Globalive"), while after the 2008 AWS-1 Auction, Industry Canada's interactions on telecommunications regulations issues were with the management team of Wind Mobile as the licence holder.[90]

83. The comments received by Industry Canada with respect to the proposed COLs revealed polarized views. While Incumbents found the proposed COLs unnecessary and too stringent, potential New Entrants were of the view that the government should go further.[91]

84. After the consultations, the final Conditions of Licence for Mandatory Roaming and Antenna Tower and Site Sharing and to Prohibit Exclusive Site Arrangements were released on February 2008 ("COLs on Roaming and Tower/Site Sharing"), prior to commencement of bidding in the 2008 AWS-1 Auction.[92] It clarified what was required vis-à-vis roaming and tower/site sharing and the role of Industry Canada on such matters.[93] The COLs sought to have regard to the concerns of both New Entrants and Incumbents, facilitate competition in the market while relying on market forces to the extent feasible, and be mindful of the limits to the Minister's authority.[94]

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[89] **C-060**, Industry Canada, Notice No. DGRB-010-07 – Consultation on Proposed Conditions of Licence to Mandate Roaming and Antenna Tower and Site Sharing and to Prohibit Exclusive Site Arrangements (Nov. 2007) ("Notice No. DGRB-010-07").

[90] **RWS-Hill**, ¶ 43.

[91] **RWS-Hill**, ¶ 42, 60-64.

[92] **C-007**, Industry Canada, Conditions of Licence for Mandatory Roaming and Antenna Tower and Site Sharing and to Prohibit Exclusive Site Arrangements (CPC-2-0-17, Issue 1) (Nov. 2008) ("COLs on Roaming and Tower/Site Sharing").

[93] **C-007**, COLs on Roaming and Tower/Site Sharing.

[94] **RWS-Hill**, ¶¶ 24-25, 29, 44.

85. The COLs included a number of terms and conditions beyond roaming and tower/site sharing.[95] The COLs noted that the 2008 AWS-1 licences would be issued for ten-year terms, and that the process for renewal of the licences would be determined by the Minister at a later date.

86. On transferability, the COLs noted that "[t]he licensee may apply in writing to transfer its licence in whole or in part (divisibility), in both the bandwidth and geographic dimensions. *Departmental approval is required for each proposed transfer of a licence*, whether the transfer is in whole or in part."[96] Further, the COLs noted that licences for set-aside spectrum may not be transferred to "companies that do not meet the criteria of a New Entrant, for a period of 5 years from the date of issuance."[97] The COLs do not provide any guarantee on transferability of licences at any time, including after the expiry of the five-year moratorium. Neither does any other instrument.

87. The COLs reiterated that ongoing compliance with Canadian ownership and control requirements was required.[98] On mandated roaming and tower/site sharing, the COLs made reference to the COLs on Roaming and Tower/Site Sharing.[99]

88. Importantly, the COLs reiterated the Minister's statutory power to amend the COLs stating that "[t]he Minister of Industry retains the discretion to amend these terms and conditions of

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[95] It outlined the following terms and conditions: (1) licence term, (2) terms of licence transferability and divisibility, (3) eligibility criteria to hold the license, (4) requirement to comply with Industry Canada's policies on displacement of incumbents, (5) requirement to comply with Industry Canada's procedures on radio station installations, (6) requirement for provision of technical information to Industry Canada as requested, (7) requirement to comply with various legislation, regulations and other obligations, including the applicable provisions of other statutes and the rulings of other statutory bodies, such as the CRTC and the Competition Bureau, (8) requirement to comply with any relevant technical plans, (9) requirement to comply with any requirements in international treaties, (10) requirement to maintain lawful interception capabilities, (11) requirement to invest certain percentages of the revenue generated in research and development related to telecommunications, (12) requirements for mandatory antenna tower and site sharing, (13) requirements for mandatory roaming, and (14) requirement to submit an annual report to Industry Canada with certain information. *See* **R-202**, Industry Canada, website excerpt, Licence Conditions (revised as of Nov. 2008), available at: https://www.ic.gc.ca/eic/site/smt-gst.nsf/eng/sf09234.html.

[96] **R-202**, Industry Canada, website excerpt, Licence Conditions (revised as of Nov. 2008), p. 1 (emphasis added).

[97] **R-202**, Industry Canada, website excerpt, Licence Conditions (revised as of Nov. 2008), pp. 1-2.

[98] **R-202**, Industry Canada, website excerpt, Licence Conditions (revised as of Nov. 2008), p. 2.

[99] **R-202**, Industry Canada, website excerpt, Licence Conditions (revised as of Nov. 2008), p. 2.

licence at any time."[100] Therefore, auction participants knew from the beginning that all COLs were subject to modification by the Minister at any time in pursuit of Canada's telecommunications policy objectives. As Peter Hill explains in his witness statement, "[a]mendments to COLs may be required to reflect updates, clarifications or changes in government policy". [101]

D. The 2008 AWS-1 Auction Results

89. The 2008 AWS-1 Auction was successful in providing New Entrants an opportunity to enter Canada's mobile wireless sector. Six New Entrants were awarded licences: Wind Mobile was issued 30 licences, Quebecor Inc. (that operates Videotron) was issued 17 licences, Bragg Communications Inc. (that operates Eastlink) was issued 19 licences, Shaw Communications Inc. was issued 18 licences, Data & Audio-Visual Enterprises (that operated Mobilicity) was issued 10 licences, and 6934579 Canada Inc. (that operated Public Mobile) was issued 4 licences. Further, Rogers and TELUS were issued 59 licences each, and Bell was issued 54 licences.[102]

90. By not having to bid against Incumbents for set-aside spectrum, New Entrants were able to access AWS-1 spectrum at significantly lower prices.[103]

E. GTH's Investment in Wind Mobile

91. The Government's announcement in 2007 of the auction for AWS spectrum generated significant interest by potential Canadian investors. Because of existing restrictions on foreign investment in telecommunications services, participation by foreign investors in the Canadian market was limited.

92. One of those interested investors was a Canadian businessman, Anthony Lacavera, who was at the time CEO of Globalive, a provider of operational services, audio and web conferencing, voice over internet protocol, wireless services and other products for hotels and

[100] **R-202**, Industry Canada, website excerpt, Licence Conditions (revised as of Nov. 2008), p. 6.

[101] **RWS-Hill**, ¶ 15.

[102] **CLEX-034**, Industry Canada, Auction of Spectrum Licences for Advanced Wireless Services and Other Spectrum in the 2 GHz Range – Summary by Licence Winner (Jul. 21, 2008).

[103] **RWS-Stewart**, ¶¶ 26-27.

home users.[104] Mr. Lacavera saw the Government's set-aside of spectrum for New Entrants in the 2008 AWS-1 Auction as a "game changer"[105] as it removed one of the most significant barriers to entry in the wireless market. He saw this as a "once-in-a-lifetime opportunity to create a new national carrier",[106] a "fourth player"[107] in the Canadian wireless market and was seeking financing in order to participate in the auction. Mr. Lacavera was looking for a long term investor prepared to make a substantial investment and "[park] their money for at least ten years",[108] notwithstanding the risks related to the project. In late 2007 and early 2008, Mr. Lacavera reached out to potential investors including the Claimant, GTH.[109] While GTH had no experience in Canada, after reviewing the Canadian regulatory framework[110] and Globalive's proposal, GTH agreed to finance its participation in the auction.[111]

93. Over the course of the following months, GTH undertook a more detailed due diligence of their Canadian partner, the regulatory framework, and the Canadian telecommunications market. GTH also sought advice from Canadian counsel.[112] GTH was therefore well aware, or should have been well aware, of the nature of the Canadian wireless telecommunications industry, the Minister's broad authority over spectrum management, risks that New Entrants would face in competing with Incumbents in the Canadian market, existing Canadian ownership and control

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[104] **R-203**, CBC News, "Yak Communications agrees to $67.7M US friendly takeover" (Sep. 21, 2006), available at: http://www.cbc.ca/news/business/yak-communications-agrees-to-67-7m-us-friendly-takeover-1.596807.

[105] **R-204**, Anthony Lacavera and Kate Fillion, *How We Can Win: And what happens to us and our country if we don't*, (Random House Canada, 2017), p. 13 ("Lacavera and Fillion, How We Can Win").

[106] **R-204**, Lacavera and Fillion, How We Can Win, p. 14.

[107] **R-204**, Lacavera and Fillion, How We Can Win, p. 14.

[108] **R-204**, Lacavera and Fillion, How We Can Win, p. 14.

[109] **R-204**, Lacavera and Fillion, How We Can Win, pp. 14-16; **C-066**, Email from Mike O'Connor to Assad Kairouz, et al. *attaching* Globalive materials (Feb. 29, 2008), p. 99 [redacted]

[110] **CWS-Dobbie**, ¶¶ 7-11.

[111] **CWS-Dobbie**, ¶ 13; [redacted]

[112] Claimant's Memorial, ¶ 82.

requirements, and the details of the 2008 AWS-1 Auction and AWS-1 Policy Framework. After completing its due diligence, it decided to proceed with the investment.

94. During the summer of 2008, GTH and Mr. Lacavera negotiated and entered into an investment agreement with respect to participation in the 2008 AWS-1 Auction to acquire set-aside spectrum licences, and if successful, finance the acquisition of such licences and operate the business.[113] After successfully participating in the auction, Globalive Wireless LP was provisionally awarded 30 set-aside spectrum licences on July 21, 2008 for an amount of C$ 442.1 million.[114] GWMC was set up to be the entity that would operate as a Canadian wireless company under the name Wind Mobile.

95. Industry Canada issued the spectrum licences to Wind Mobile on March 13, 2009 for a ten-year term and subject to several restrictions on transfers.[115] GTH financed the acquisition of the spectrum through a loan to Wind Mobile ("Spectrum Loan") in the amount of C$ 442.4 million.[116] As of December 31, 2013, the Spectrum Loan totaled C$ 657,319,000 including interest.[117]

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[113] The investment agreement was between Globalive Communications Holdings Ontario (a Canadian company owned by Mr. Lacavera), Orascom Telecom Holding S.A.E. (GTH) and Mojo Investments Corp. (a company owned by Mr. O'Connor). In the Agreement, the investors agree to "establish and collectively fund an investment vehicle, with the intention of acquiring Spectrum Licences… so as to establish a wireless network and service offering in Canada or parts thereof". *See* **C-084**, Amended and Restated Investment Agreement among Globalive Communications Holdings Ontario Inc. and Orascom Telecom Holding S.A.E. and Mojo Investments Corp. (Jul. 30, 2008), p. 17.

[114] **C-082**, Letter from Michael D. Connolly, Industry Canada to Michael John O'Connor, Globalive (Jul. 22, 2008). Globalive Wireless LP was the applicant that participated in the AWS auction. Globalive Wireless LP was a wholly owned subsidiary of GWMC, which was a wholly owned subsidiary of Globalive Communications Holdings Ontario. **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).

[115] **C-010**, Letter from Michael D. Connolly, Industry Canada to Kenneth Campbell, Globalive *attaching* Wind Mobile Licences (Mar. 13, 2009) (emphasis added).

[116] **C-082**, Letter from Michael D. Connolly to Michael J. O'Connor (Jul. 22, 2008). Wind Mobile paid $442.1 million for the spectrum and $304,000 in penalties. The total spectrum loan was therefore for $442.4 million.

[117] This amount represents the total with accrued interest for the loan as represented in Wind Mobile's 2013 financial statements, **CLEX-031**, Globalive Wireless Management Corp., 2013 Financial Statements (Feb. 12, 2014), p. 24. GTH waived further interest charges after December 20, 2012.

96. All of GWMC's shares were held by Globalive Investment Holdings Corp. ("GIHC").[118] The equity structure of GWMC and GIHC had to meet the existing Canadian ownership and control requirements that applied to any entity that held spectrum licences or operated as a telecommunications carrier.[119] As a result, the shareholders adjusted the structure of the investment and their shareholders' agreements several times during the course of the ownership and control reviews.[120]

97. GIHC's approved shareholder agreement of December 2009 provided that GTH (then known as Orascom Telecom Holding S.A.E., or "OTH") held 33.02% of voting interests and 65.08% of the total shares. Mr. Lacavera through AAL Corp. ("AAL") held the majority of voting shares (66.68%) but owned a minority of the total equity (34.25%). Mojo Investment Corp. ("Mojo") held 1.3% of the voting shares and 0.67% of the total equity.[121]

98. In April 2009, GTH made an equity contribution in GIHC of C$ 82,690,158.[122]

99. GTH also advanced financing for the operations of Wind Mobile. An operating loan reaching C$ 805,101,782 in December 2012 was provided to GWMC. As of December 31, 2013, the Operating Loan totaled C$ 874,982,000 including interest.[123] The total debt held by GTH in Wind Mobile as of December 2013 was therefore C$ 1,532.3 million.

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[118] **CLEX-020**, Orascom Telecom Holding (Canada) Limited, Voting Control Application Letter to Industry Canada (Oct. 24, 2012). *See also* Claimant's Memorial, fn. 213 ("Following the CRTC ownership and control review… Globalive Investment and Globalive Holdco were amalgamated").

[119] **C-001**, *Radiocommunication Regulations*, s. 10(2)(d)(i); **C-046**, *Telecommunications Act*, s. 16(1); See also Section IV below.

[120] Claimant's Memorial, ¶ 122.

[121] **CLEX-020**, Orascom Telecom Holding (Canada) Limited, Voting Control Application Letter to Industry Canada (Oct. 24, 2012); **CLEX-021**, GTH Global Telecom Holding Capital Limited, Response Letter to Voting Control Application to Industry Canada (Jan. 22, 2013); **CLEX-001**, Amended and Restated Shareholders' Agreement between AAL Holdings Corporation, Mojo Investments Corp., Orascom Telecom Holding (Canada) Limited and Globalive Investment Holdings Corp. (Dec. 15, 2009).

[122] **CLEX-027**, Orascom Telecom Holding (Canada) Ltd., Statements of Financial Position 2009, "Capital Stock" (Dec. 31, 2009).

[123] This amount represents the total with accrued interest for the loan as represented in Wind Mobile's 2013 financial statements. *See* **CLEX-031**, Globalive Wireless Management Corp., 2013 Financial Statements (Feb. 12, 2014), p. 26. GTH waived further interest charges after December 20, 2012.

100. The Claimant alleges that the debt it holds with respect to GWMC and its equity in GIHC (and therefore indirectly in GWMC) constitutes its investment in Canada. It has not alleged that its investment in Canada is Wind Mobile.

101. The Government never approached GTH with respect to investing in Canada, never sought to induce GTH to invest in the Canadian wireless sector, nor did it provide GTH (or New Entrants more generally) any promises or guarantee of success. Indeed, the Government had clearly and explicitly indicated prior to the 2008 AWS-1 Auction that it was not guaranteeing the success in the marketplace of any successful bidder.[124]

102. GTH did not approach the Government to seek any assurances in deciding whether to make an investment in Canada. In fact, GTH's discussions with the Government were limited to ensuring compliance with Canadian ownership and control requirements in structuring the investment. Once the spectrum licences were issued to Wind Mobile, the management of that company was the Government's interlocutor with respect to all other issues related to telecommunications regulation. Later on, when GTH sought to acquire control of Wind Mobile and exit the Canadian market, representatives of VimpelCom (who by then owned GTH[125]) and external legal counsel for GTH and VimpelCom were involved in the discussions with the Government.

IV. Wind Mobile Had to Satisfy the Existing Canadian Ownership and Control Requirements

103. The Claimant was aware prior to making its investment in Canada that existing regulatory requirements mandated Canadian ownership and control of any entity that held spectrum licences and/or operated as a telecommunications carrier.

104. While GTH and other investors were hoping that ownership and control regulations would be liberalized in the future, at the time of the 2008 AWS-1 Auction, the Government had not

[124] **C-050**, AWS-1 Consultation Paper, p. 22.

[125] In April 2011, VimpelCom acquired the majority shareholder of GTH and, indirectly, acquired GTH's investment in Wind Mobile. **C-021**, Email from Vanessa Brazil (on behalf of Ken Campbell) to Helen McDonald *attaching* Letter from Ken Campbell to Helen McDonald (Apr. 15, 2011); **CLEX-019**, VimpelCom Press Release, "VimpelCom completes combination with Wind Telecom" (Apr. 15, 2011).

indicated, let alone guaranteed, that they would in fact be liberalized. When Industry Canada provided clarification on the AWS-1 Policy Framework and the AWS-1 Licensing Framework during a public questions and answers process in February 2008, in response to questions about prospective liberalization, Industry Canada expressly stated that the "Department cannot anticipate what ownership and control regulations will exist in the future."[126]

105. Successful bidders in the 2008 AWS-1 Auction therefore had to demonstrate compliance with the existing ownership and control requirements. As the Claimant acknowledges, this obligation meant that "while GTH was providing almost all of Wind Mobile's funding, GTH at this time could only hold a minority of the voting shares."[127]

A. The Existing Legal Framework Required that Both Industry Canada and the CRTC Conduct their Own Independent Reviews to Ensure that Wind Mobile was Canadian Owned and Controlled

106. As noted above, while the *Radiocommunication Act* and associated regulations[128] govern the licensing and regulation of radio apparatus and the use of radio frequency spectrum in Canada, the *Telecommunications Act* and associated regulations[129] govern telecommunications in Canada, addressing a number of matters including rates, facilities and services offered by common carriers, telecommunications apparatus, and investigation and enforcement. At the time of the 2008 AWS-1 Auction, both contained Canadian ownership and control requirements.

107. The *Radiocommunication Regulations* provided that only "a corporation that is Canadian-owned and controlled" was eligible to be issued radio and spectrum licences in Canada.[130] As the Minister has the authority to issue licenses,[131] Industry Canada was responsible for undertaking this eligibility review prior to awarding any licenses.

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[126] **C-062**, Industry Canada, Responses to Questions for Clarifications on the AWS Policy and Licensing Frameworks (Feb. 27, 2008), Answer 5.3.

[127] Claimant's Memorial, ¶ 92.

[128] **C-057**, *Radiocommunication Act*; **C-001**, *Radiocommunication Regulations*.

[129] **C-046**, *Telecommunications Act*.

[130] **C-001**, *Radiocommunication Regulations*, s. 10(2)(d)(i). This section of the *Regulations* was repealed February 28, 2014. *See* **R-205**, *Regulations Amending the Radiocommunication Regulations*, SOR/2014-34 (Feb. 28, 2014).

[131] **C-057**, *Radiocommunication Act*, s. 5.

108. Simultaneously, the *Telecommunications Act* provided that "[a] Canadian carrier is eligible to operate as a telecommunications common carrier if it is a Canadian-owned and controlled corporation".[132] The CRTC was responsible for ensuring compliance with this requirement.

109. In light of this legislative framework, which was in place well before the 2008 AWS-1 Auction, the Claimant knew or should have known that Wind Mobile would have to satisfy Industry Canada that it was Canadian owned and controlled to hold spectrum licences, and would have to satisfy the CRTC that it was Canadian owned and controlled to operate as a telecommunications carrier. However, in the context of this arbitration, the Claimant takes issue with what it qualifies as a "duplicative" review. It also complains of the process by which the CRTC arrived at its decision, and the fact that the CRTC arrived at a different conclusion than Industry Canada. While Canada briefly addresses these issues below, ultimately it is of little importance given that the GiC acted promptly to reverse the CRTC's decision and Wind Mobile was able to operate shortly thereafter.

B. The CRTC's Ownership and Control Determination and Its Reversal by the Governor-in-Council

1. The CRTC is Arms-Length from the Government of Canada and Exercises Independent Quasi-Judicial Power

110. As discussed above, in addition to its rule making and policy development role, the CRTC is "an administrative tribunal that regulates and supervises broadcasting and telecommunications in the public interest."[133] As an administrative tribunal, the CRTC "operate[s] at arm's length from the federal [that is, the Canadian] government".[134] The CRTC is vested with a number of specific responsibilities and powers. Pursuant to section 48(1) of the *Telecommunications Act*, the CRTC may "on application by any interested person or on its own motion, inquire into and make a determination in respect of anything prohibited, required or permitted to be done under Part II [which includes the ownership and control requirement]".[135] In making these

[132] **C-046**, *Telecommunications Act*, s. 16(1).

[133] **R-068**, CRTC, website excerpt, "About Us" (accessed on Nov. 11, 2017).

[134] **R-196**, CRTC, Three-Year Plan, 2017-2020, p. 1.

[135] **C-046**, *Telecommunications Act*, s. 48(1).

determinations, the CRTC has broad powers like those of a superior court, that is, a Canadian judicial court with inherent jurisdiction.[136]

2. To Conduct Its Review of Wind Mobile, the CRTC Determined that an Open Process Would be More Appropriate

111. While the *Telecommunications Act* details eligibility rules, it does not set out the procedure to be followed by the CRTC in conducting an eligibility review.[137] The CRTC determines its procedure for ownership and control reviews with a view to implementing Canadian telecommunications policy objectives.[138]

112. After the 2008 AWS-1 Auction, and as a result of requests from market participants for more transparency and openness,[139] the CRTC began to consider its process for reviewing ownership and control compliance. On July 20, 2009, the CRTC established a new framework for conducting ownership and control reviews. It also made a determination on the specific process it would apply to Wind Mobile's review within that framework.

113. In establishing the new procedure for ownership and control reviews, the CRTC was mindful of the increased complexity of corporate transactions and ownership structures that it may have to examine in the context of eligibility reviews under the *Telecommunications Act*.[140] The CRTC was thus of the view that "[o]wnership and control reviews will need to vary in order

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[136] **C-046**, *Telecommunications Act*, s. 55.

[137] *See* **CLEX-017**, *Canadian Telecommunications Common Carrier Ownership and Control Regulations*, SOR/94-667 (Jun. 21, 2016).

[138] **C-046**, *Telecommunications Act*, s. 47.

[139] **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), ¶¶ 1-2.

[140] The previous instance in which the CRTC examined the procedure to be followed in conducting ownership and control reviews was in the context of the Unitel decision in 1996. The CRTC observed that "there ha[d] been a significant passage of time since the release of the [1996] Unitel decision, during which the telecommunications landscape ha[d] evolved considerably[, and] against that backdrop, the corporate finance industry ha[d] created ever more complex corporate structures, financing instruments, and arrangements which figure prominently in the establishment of new carriers and in the changes to the ownership and governance structures of existing carriers." In the context of the Unitel decision, the CRTC had then determined that "on the facts of that case, a public review process involving third-party participation was unnecessary." **C-012**, CRTC, Telecom Regulatory Policy CRTC 2009-428: Canadian ownership and control review policy (Jul. 20, 2009), ¶¶ 9-10; *See* **R-206**, CRTC, website excerpt, Telecom – Commission Letter – Call-Net, Letter from Allan J. Darling to Robert P. Boron, Call-Net Enterprises Inc. (Oct. 16, 1996), available at: http://www.crtc.gc.ca/eng/archive/1996/lt961016.htm.

to address the relative complexity or novelty of the ownership or governance structure of the carrier under review."[141]

114. The CRTC therefore established a four-tier process. At the lowest or Type 1 tier was a document-based, confidential, bilateral process for "reviews of routine ownership or governance structures that offer little in precedential value".[142] At the highest or Type 4 tier was an oral, multi-party, public process. This process would be used "where an ownership or governance structure is of a complex or novel nature, such that in the Commission's view its determination will hold precedential value to industry players and the general public, where the Commission considers that the evidentiary record would be improved by third-party submissions, and the Commission further considers that the appearance of parties would more easily allow the Commission to complete and test the evidentiary record".[143] This type of process was generally in keeping with the ownership and control reviews that the CRTC conducted pursuant to the *Broadcasting Act*.[144] It was anticipated that the Type 1 review would "continue to be the process most often employed", while the Type 4 review would be used "in exceptional circumstances".[145]

115. In the case of Wind Mobile, the CRTC found that Wind Mobile's "corporate structure" and "financing arrangements" were of a complexity that necessitated a Type 4 review.[146]

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[141] **C-012**, CRTC, Telecom Regulatory Policy CRTC 2009-428: Canadian ownership and control review policy (Jul. 20, 2009), ¶ 12.

[142] **C-012**, CRTC, Telecom Regulatory Policy CRTC 2009-428: Canadian ownership and control review policy (Jul. 20, 2009), ¶ 14.

[143] **C-012**, CRTC, Telecom Regulatory Policy CRTC 2009-428: Canadian ownership and control review policy (Jul. 20, 2009), ¶¶ 13-19. The CRTC observed that a flexible system would allow it to employ the most efficient process possible that still allowed it to satisfy its mandate in each situation. To decrease the possibility of Tier 4 reviews causing delays and being used by parties to benefit competitively, the CRTC determined that reviews were "to be conducted as expeditiously as possible". To this end, any third party participating orally in a Tier 4 process would first have to demonstrate why written participation would not be sufficient and why such participation would serve the public interest.

[144] **R-207**, Goodmans LLP, Update, "CRTC Adopts a New Framework for Telecommunications Ownership and Control Reviews" (Jul. 20, 2009), p. 1.

[145] **C-012**, CRTC, Telecom Regulatory Policy CRTC 2009-428: Canadian ownership and control review policy (Jul. 20, 2009), ¶¶ 14, 17.

[146] **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), ¶ 3.

Specifically, it was deemed that the review would have precedential value and that both the record and its examination would be improved by the involvement of third parties.[147] On October 29, 2009, after collecting the documentary evidence, accepting written comments from the parties, and conducting two separate days of oral hearings, the CRTC concluded that Wind Mobile did not meet the Canadian ownership and control requirements.[148]

3. The CRTC Concluded that GTH had Control in Fact of Wind Mobile Because of Its Assessment of the Various Complex Relations Between OTHCL and Wind Mobile

116. An inquiry on ownership and control involves an inquiry on "legal control" and an inquiry on "control in fact".[149] The test for "legal control" is focused on two objective factors, namely membership of Canadians on the board of directors of the corporation and ownership of voting shares.[150] During the CRTC's ownership and control review of Wind Mobile that resulted in Telecom Decision CRTC 2009-678 ("CRTC Decision"), the CRTC determined that Wind Mobile met the "legal control" requirement.

117. The test for "control in fact", for its part, involves a consideration of all avenues of influence of a non-Canadian shareholder on the corporation.[151] It requires the decision maker to appreciate and weigh factual elements.[152] The "control in fact" review of Wind Mobile involved consideration of a number of ways in which Global Telecom Holding Canada Limited ("GTHCL") (at the time referred to as "OTHCL") could influence Wind Mobile.

118. The CRTC Decision found that a non-Canadian, OTHCL, had the ability to determine Wind Mobile's strategic decision-making activities because it held two-thirds of Wind Mobile's

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[147] **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), ¶ 3.

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

[149] **C-046**, *Telecommunications Act*, s. 16.

[150] **C-046**, *Telecommunications Act*, s. 16(3)(a-b).

[151] **C-046**, *Telecommunications Act*, s. 16(3)(c); **C-015**, CRTC, Telecom Decision CRTC 2009-678: Review of Globalive Wireless Management Corp. under the Canadian ownership and control regime (Oct. 29, 2009), ¶¶ 34-35.

[152] **C-015**, CRTC, Telecom Decision CRTC 2009-678: Review of Globalive Wireless Management Corp. under the Canadian ownership and control regime (Oct. 29, 2009), ¶ 36.

equity, was the principal source of technical expertise for Wind Mobile, provided Wind Mobile access to an established wireless trademark, and most significantly provided the vast majority of Wind Mobile's debt financing.[153] On this basis, the CRTC found that Wind Mobile did not satisfy the test for "control in fact".[154]

119. Thus, the CRTC's assessment of the facts led it to a different conclusion than that of Industry Canada.[155] However, as further discussed below,[156] the GiC reversed the CRTC Decision and notwithstanding challenges by wireless operators, Canadian Courts upheld the GiC's authority to do so.

4. The CRTC Decision was Promptly Reversed by the Governor-in-Council

120. Subsequent to the issuance of the CRTC Decision on ownership and control on October 29, 2009, the GiC acted expeditiously. Rather than waiting for a petition for review, it initiated an examination of the CRTC Decision.[157]

121. The GiC reviewed the oral and written submissions that were made during the CRTC review, and further written submissions made to it. It concurred with the finding of the CRTC on legal control, but reached a different conclusion on control in fact, finding instead that Wind

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[153] **C-015**, CRTC, Telecom Decision CRTC 2009-678: Review of Globalive Wireless Management Corp. under the Canadian ownership and control regime (Oct. 29, 2009), ¶¶ 116, 118.

[154] **C-015**, CRTC, Telecom Decision CRTC 2009-678: Review of Globalive Wireless Management Corp. under the Canadian ownership and control regime (Oct. 29, 2009), ¶ 119.

[155] The factors the CRTC considered and that led to its conclusion included (i) specific corporate governance arrangements, particularly the authority to appoint individuals to the board of directors, (ii) shareholder rights, including limitations on AAL's rights to liquefy its interests in Wind Mobile and the extent of OTHCL's veto rights over certain corporate decisions, (iii) commercial arrangements between Wind Mobile and OTHCL concerning matters that could be key determinants of the success of Wind Mobile, particularly a Technical Services Agreement pursuant to which OTHCL was to provide technical services in relation to the network, vendor selection, equipment purchase, regulatory compliance and introduction of new products and services, and a Trademark agreement providing Wind Mobile the authority to use a trademark used by OTHCL affiliates, (iv) the greater than 65.1% equity participation of OTHCL in Wind Mobile, and (v) the financing arrangements between OTHCL and Wind Mobile through which OTHCL provided approximately 99% of Wind Mobile's debt, alongside the possibility of Wind Mobile having to continue to rely on OTHCL for further financing. **C-015**, CRTC, Telecom Decision CRTC 2009-678: Review of Globalive Wireless Management Corp. under the Canadian ownership and control regime (Oct. 29, 2009), ¶¶ 34-112.

[156] *Infra*, ¶¶ 120-124.

[157] **R-208**, Industry Canada, website excerpt, "Petitions to the Governor in Council" (last modified Nov. 20, 2015), available at: http://www.ic.gc.ca/eic/site/smt-gst.nsf/eng/h_sf05506.html. No petition was made with respect to Telecom Decision CRTC 2009-678.

Mobile was "not in fact controlled by persons that are not Canadian".[158] It found that although certain elements gave it influence, the elements taken together did not grant OTHCL a dominant or determining influence over Wind Mobile. As a result, on December 10, 2009, pursuant to its authority under section 12(1) of the *Telecommunications Act*, it varied the CRTC Decision.[159]

122. The variance decision of the GiC was challenged in domestic court by Public Mobile, another New Entrant that entered the market after acquiring licences in the 2008 AWS-1 Auction. Public Mobile commenced an application for judicial review of the decision of the GiC before the Federal Court of Canada and argued that the GiC did not act within its statutory mandate in varying the CRTC decision.[160] Both Wind Mobile and the Attorney General of Canada (that is, Canada's Minister of Justice) were Respondents in the judicial proceeding. On February 4, 2011, the Federal Court agreed with Public Mobile and quashed the GiC decision.[161]

123. Both Wind Mobile and the Attorney General of Canada appealed the decision of the Federal Court to the Federal Court of Appeal.[162] The Federal Court of Appeal delivered its judgment on June 8, 2011. The Federal Court of Appeal disagreed with the findings of the Federal Court and reversed its decision.[163] As leave to the Supreme Court of Canada was denied on April 26, 2012, the Federal Court of Appeal's judgment was the final decision on the matter under Canadian domestic law.[164]

124. Notwithstanding the legal challenges in Canadian courts by wireless operators, the GiC's decision, which came less than two months after the CRTC Decision,[165] allowed Wind Mobile to

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[158] **C-017**, Order of the Privy Council and Schedule, P.C. 2009-2008 (Dec. 10, 2009), p. 3.

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

[160] **C-115**, *Public Mobile v. Attorney General of Canada et al.*, Federal Court Docket: T-26-10, Reasons for Judgment and Judgment, 2011 FC 130 (Feb. 4, 2011), ¶ 60 ("*Public Mobile v. Attorney General of Canada*").

[161] **C-115**, *Public Mobile v. Attorney General of Canada*, ¶ 119.

[162] **C-117**, *Globalive Wireless Management Corp. and Attorney General of Canada v. Public Mobile Inc. and Telus Communications Company*, Dockets: A-78-11 & A-79-11, Reasons for Judgment, 2011 FCA 194, ¶ 1 ("*Globalive and Attorney General v. Public Mobile and Telus*").

[163] **C-117**, *Globalive and Attorney General v. Public Mobile and Telus*, ¶¶ 43, 47-48.

[164] **C-124**, *Public Mobile v. Globalive Wireless Management Corp. and Attorney General of Canada*, Judgment, 2012 SCC 34418 (Apr. 26, 2012).

[165] Pursuant to section 12(1) of the *Telecommunications Act*, the GiC has up to a year to vary a CRTC decision.

commence its operations as of December 10, 2009. This start was several months prior to the launch of any other New Entrant, including Mobilicity,[166] Public Mobile,[167] Videotron,[168] and Eastlink.[169]

V. GTH Was Aware of the Conditions of Licence for Roaming and Tower/Site Sharing Prior to Its Investment in Wind Mobile

125. As discussed above, when the Claimant made its investment in Canada, it was well aware of the extent to which the Government had committed to mandating roaming and tower/site sharing and how it would be reflected in the COLs. The internal documents of the Claimant, and the comments made by Globalive and other prospective New Entrants throughout the consultation processes leading to the 2008 AWS-1 Auction, indicate that it understood the role of Industry Canada and the scope of what it was mandating.

A. From the Outset it was Clear that Industry Canada Would Not Set Rates for Roaming and Tower/Site Sharing and that Disputes With Respect to Commercial Terms Would be Resolved through Arbitration

126. From at least November 2007, when Industry Canada issued a consultation document containing a draft of the proposed additions to the COLs, it was clear that regulation of rates for mandated roaming and tower/site sharing was not being contemplated.[170] Only the CRTC could regulate rates. Instead, the draft COLs noted that "Industry Canada expect[ed] that roaming would be offered at commercial rates that [we]re reasonably comparable to rates that [we]re currently charged to others for similar services" and that "[t]he department expect[ed] that site-

[166] **R-209**, CBC News, "Mobilicity wireless launch approved by CRTC" (May 7, 2010), available at: http://www.cbc.ca/news/technology/mobilicity-wireless-launch-approved-by-crtc-1.957119.

[167] **R-210**, CBC News, "Public Mobile to launch in May" (Mar. 19, 2010), available at: http://www.cbc.ca/news/technology/public-mobile-to-launch-in-may-1.928221.

[168] **R-211**, CBC News, "Videotron launches wireless business" (Sep. 9, 2010), available at: http://www.cbc.ca/news/business/videotron-launches-wireless-business-1.868199.

[169] **R-212**, Globe and Mail, "EastLink: The biggest cable company you've probably never heard of" (May 28, 2010), available at: https://www.theglobeandmail.com/report-on-business/eastlink-the-biggest-cable-company-youve-probably-never-heard-of/article4321110/.

[170] **C-060**, Notice No. DGRB-010-07.

sharing arrangements would be offered at commercial rates that [we]re reasonably comparable to rates currently charged to others for similar access".[171]

127. The draft clearly identified binding commercial arbitration as the mechanism to resolve disputes between licensees on all matters other than technical feasibility.[172]

128. The final COLs on Roaming and Tower/Site Sharing, which were released on February 29, 2008 did not differ significantly from the draft COLs.[173]

129. The COLs on Roaming and Tower/Site Sharing provided details on the procedure that was to be followed during negotiations between licensees on roaming and tower/site sharing. A two-step process was contemplated with a first step in which the responding licensee was to provide preliminary technical information and a second step during which the requesting operator (after reviewing the preliminary technical information that was received) would offer a proposal to share that included technical requirements and anticipated necessary modifications.[174] Timelines were delineated and details were provided on who as between the requesting operator and the responding licensee was to bear the costs for various steps in the process.[175]

130. As had been signaled earlier, the COLs re-iterated that Industry Canada expected that roaming and tower/site sharing agreements would be based on commercial rates that were reasonably comparable to rates that were charged to others for similar services.[176] As Mr. Hill explains in his witness statement, "[t]his statement was meant to provide guidance to the market" and "'commercial rates' was purposefully used, as opposed to 'cost-based rates' or other

[171] **C-060**, Notice No. DGRB-010-07.

[172] **C-060**, Notice No. DGRB-010-07 ("Aside from questions of technical feasibility, it is recognized that coming to a negotiated business agreement can delay roaming and sharing. Therefore, the proposed conditions which follow state that where it is technically feasible, but where licensees cannot finalize negotiations, parties will submit their business disputes to independent binding arbitration in order to finalize the matter").

[173] **C-067**, Industry Canada, Notice No. DGRB-002-08 – Conditions of Licence for Mandatory Roaming and Antenna Tower and Site Sharing and to Prohibit Exclusive Site Arrangements (Feb. 29, 2008), p. 1 ("Notice No. DGRB-002-08").

[174] **C-067**, Notice No. DGRB-002-08, pp. 2-3.

[175] **C-067**, Notice No. DGRB-002-08, pp. 6-9.

[176] **C-067**, Notice No. DGRB-002-08, pp. 6, 8.

qualifications."[177] Roaming rates had to be high enough to incentivize New Entrants to deploy their networks and not rely only on roaming for coverage.[178]

131. The COLs also clarified the scope of mandated roaming and tower/site sharing. In particular, it confirmed that tower/site sharing extended beyond mechanical access to an antenna supporting structure to access to ancillary equipment,[179] and that roaming did "not require communications hand-off between home and host networks such that there [was] no interruption of communications in progress."[180]

132. The COLs confirmed that commercial arbitration would be used to resolve any disputes between licensees related to roaming and tower/site sharing if negotiations were not successful:

> [S]hould the timelines outlined in the conditions below expire, then, in the absence of any final or interim agreement, either party may initiate the arbitration process and both parties will be compelled to follow that process and the arbitration rules that will be established by Industry Canada as set out below.[181]

133. The COLs provided for the commercial arbitrators presiding over a roaming or tower/site sharing dispute to have broad powers both to decide all procedural issues and "to determine all of the questions in dispute (including those relating to determining the appropriate terms [of agreements])".[182] Decisions would be "final and binding".[183]

134. The role or involvement that Industry Canada would have in disputes was explicitly limited to technical issues which were within Industry Canada's mandate. If a requesting operator disagreed with a licensee on the technical feasibility of roaming or tower/site sharing, then the

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[177] **RWS-Hill**, ¶ 36.

[178] **RWS-Hill**, ¶ 36.

[179] **C-067**, Notice No. DGRB-002-08, p. 2.

[180] **C-067**, Notice No. DGRB-002-08, pp. 7-9. Mr. Hill explains in his witness statement that: "Without communications hand-off, or seamless roaming, phone calls in progress would drop as a subscriber moved out of the coverage area of the New Entrant and onto the roaming network of an Incumbent". **RWS-Hill**, ¶ 48.

[181] **C-067**, Notice No. DGRB-002-08, p. 4.

[182] **C-067**, Notice No. DGRB-002-08, pp. 5, 7. Arbitrators would have the "discretion to deal with procedural issues as they arise, such as setting timelines, disclosure of information, evidence at the hearing, etc."

[183] **C-067**, Notice No. DGRB-002-08, p. 7.

requesting operator could ask Industry Canada to render a decision on that issue of technical feasibility. However, "[w]here disagreement exist[ed] over other issues, it c[ould] be dealt with through either commercial negotiations or the binding arbitration process, if necessary."[184] The COLs stated unequivocally that "[d]isputes with respect to any of the above issues, other than technical feasibility, which are not resolved by negotiation, shall be submitted to binding arbitration".[185]

135. This message was emphasized again in early 2008 in the public answers that Industry Canada provided to market participants with respect to the 2008 AWS-1 Auction and the new COLs:

> Industry Canada does not anticipate that technical feasibility will be an impediment to roaming. […] Industry Canada expects good faith negotiations in arriving at commercial arrangements between carriers. Should binding arbitration be required, this process should take into account the policy intent. […]
>
> Industry Canada is of the view that in the vast majority of cases, sharing will be technically feasible and that the primary consideration will be one of cost. Where disagreement exists over cost, it can be dealt with either through commercial negotiations or through the binding arbitration process if necessary. However, if a dispute arises over whether sharing is, or is not, technically feasible, Industry Canada will make a timely determination on the matter. […] [I]f it is not technically feasible to allow multiple users to access the same placement through, for example, multicoupling, the presumption would be that a greater value will be placed on the preferential location, which is a commercial dispute that can be dealt with through negotiation and binding arbitration if necessary.[186]

136. Industry Canada issued the draft Arbitration Rules and Procedures that were to apply to roaming and tower/site sharing disputes that proceeded to arbitration on May 23, 2008 in order to facilitate consultations on the rules. Industry Canada's goal was to develop a set of rules and

[184] **C-067**, Notice No. DGRB-002-08, p. 4.

[185] **C-067**, Notice No. DGRB-002-08, pp. 4-5.

[186] **C-062**, Industry Canada, Responses to Questions for Clarifications on the AWS Policy and Licensing Frameworks (Feb. 27, 2008), Answers 2.1, 3.2, 3.4.

procedures that struck the right "balance between procedural fairness and efficient dispute resolution".[187]

137. During the consultations on the terms and conditions for arbitrations, while Globalive advocated for some modifications to the rules, it was generally supportive of the proposed reliance on commercial arbitration to resolve disputes.[188]

138. The COLs and all of the elements of mandatory roaming and tower/site sharing, including how they would be enforced, were therefore in place by the time bidding in the 2008 AWS-1 Auction commenced. Following the 2008 AWS-1 Auction, in November 2008, COLs on Roaming and Tower/Site sharing entered into effect and the final Arbitration Rules and Procedures were released. The final Arbitration Rules and Procedures were substantially similar to what was proposed in the draft.[189]

B. The Internal Documents Produced by the Claimant Confirm that Prior to Making Its Investment, the Claimant was Aware that the Mandatory Roaming and Tower/Site Sharing Provisions had Certain Limitations

139. The few internal documents that the Claimant produced with its Memorial support Canada's position that GTH was well aware of the scope and limits of the roaming and tower/site sharing mandated by Industry Canada.

140. The investment package that was provided by Globalive to Michael O'Connor, the Claimant's head of Business Development and Investments, in February 2008 noted that "threats" to the proposed business included "[a]ccess to distribution channels, antenna sites hampered by incumbents" and "[h]igh roaming rates".[190]

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[187] **RWS-Hill**, ¶ 58.

[188] **RWS-Hill**, ¶ 59.

[189] **RWS-Hill**, ¶ 56.

[190] **C-066**, Email from Mike O'Connor to Assaad Kairouz, et al. *attaching* Globalive materials (Feb. 29, 2008), p. 38.

141. In the same investment package, Globalive recognized that although there was benefit to mandated roaming, the fact that rates were not mandated by Industry Canada and that they were not predictable might be problematic:

> Mandated roaming provides a benefit to new entrants as it allows them to access built out networks quickly and launch services prior to building out cell sites. The in-market roaming rate is a critical input to the model and is difficult to forecast because Industry Canada has not mandated the actual roaming prices. […]
>
> Globalive is aware of Rogers recently establishing high voice roaming rates to certain data focused MVNOs after the AWS auction rules were released. Globalive believes this was done to set market comparable rates at a higher level in advance of mandated roaming. […]
>
> There are other considerations beyond price for voice minutes when sorting out roaming, including: [h]andset compatibility and selection; and [d]ata rates. Globalive's assumptions for roaming in the financial model are $0.10 per minute. This number is very difficult to predict given the varying interpretations of "commercially reasonable" that could be made by an arbitrator.[191]

142. More generally, Globalive acknowledged the risks with respect to relying on mandated roaming and tower/site sharing:

> An attempt to model tower sharing and roaming as contemplated under the Industry Canada rules is fraught with uncertainty. The Partnership risks underestimating the cost to roll out equipment on existing towers or to enter into roaming arrangements and expect the incumbents will use all available tactics to make it difficult to implement. A mitigating factor is the defined arbitration process that Industry Canada has proposed.[192]

143. It concluded that Globalive should not plan to rely on the mandated in-market roaming:

> If roaming rates are reasonable, it may make sense to slow the capital build. Conversely, if roaming rates are not reasonable, the Partnership may have to build out network very quickly. The model has assumed that in-market roaming will not be economic for the business model the Partnership is

[191] **C-066**, Email from Mike O'Connor to Assaad Kairouz, et al. *attaching* Globalive materials (Feb. 29, 2008), pp. 91-92.

[192] **C-066**, Email from Mike O'Connor to Assaad Kairouz, et al. *attaching* Globalive materials (Feb. 29, 2008), p. 102.

> launching and the Partnership will need to build network through tower sharing as quickly as possible.[193]

144. A PowerPoint presentation by the Royal Bank of Canada[194] that was shared by Mr. O'Connor also highlighted that "[t]ower sharing [wa]s not a critical condition for new entrants [because]… [m]ost new entrants [we]re likely to focus on network building in the urban centers where there [we]re few free standing towers[;] [n]ew entrants [we]re likely to rely on roaming for rural and out-of-region areas [, and] [o]perators that rel[ied] heavily on tower sharing [we]re likely to be stuck in arbitration for months discussing engineering specs, weight-loading and wind shear".[195]

145. The Claimant was well aware of the limitations of the mandatory roaming and tower/site sharing provisions, in particular with respect to rates and resistance it could expect from Incumbents. The Claimant was aware that Wind Mobile may need to have recourse to the proposed arbitration mechanism to resolve disputes. It was also aware of the risks of relying on roaming and tower sharing for its business plan. As Mr. Hill explains in his witness statement, "[t]he New Entrants knew that they were likely to face competition both from other New Entrants and from Incumbents, and that the Incumbents would not passively accept threats to their market share."[196] Rather, prospective New Entrants understood that, as expressed by one New Entrant, "the incumbent players [would do] everything in their power to delay and cause the new companies entering the market to spend more to get established".[197]

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[193] **C-066**, Email from Mike O'Connor to Assaad Kairouz, et al. *attaching* Globalive materials (Feb. 29, 2008), p. 65.

[194] The Royal Bank of Canada is a Canadian multinational financial services company and one of the largest banks in Canada.

[195] **C-064**, Email from Mike O'Connor to Investment Committee, et al. *attaching* RBC Capital Markets, Canadian Wireless Spectrum Auction: Discussion Materials dated January 11, 2008 (Feb. 28, 2008), p. 11.

[196] **RWS-Hill**, ¶ 61.

[197] **R-127**, Jaguar Wireless, Questions and Comments Regarding Roaming and Tower Sharing, Industry Canada – Notice No. DGRB-010-07 – Consultation on Proposed Conditions of Licence to Mandate Roaming and Antenna Tower and Site Sharing and to Prohibit Exclusive Site Arrangements (Jan. 22, 2008).

C. Comments Made by Globalive during the Consultations that Took Place Prior to the 2008 Auction Further Confirm that New Entrants Were Aware of the Limitations of the Mandated Roaming and Tower/Site Sharing Provisions

146. During the consultations that took place prior to the 2008 AWS-1 Auction, a number of New Entrants commented on and questioned the details of the COLs on Roaming and Tower/Site Sharing. In particular, as Mr. Hill explains, a number of the New Entrants, including Globalive, expressed concerns about the lack of pre-set rates and the reference to "commercial rates" which they saw as carrying risks for prospective operators.[198]

147. In the written comments Globalive provided Industry Canada on January 22, 2008, it specifically questioned the methodology for determining commercial rates and how an arbitrator would make this determination:

> Please confirm and set forth in detail how the government will direct the incumbents and, if necessary, an arbitrator, on the crucial question of what will constitute reasonable commercial terms, as we expect any ambiguity in this regard to be fully exploited by the incumbents. We note in this regard that the Framework states that it is expected that roaming and tower sharing arrangements would be offered at "commercial rates that are reasonably comparable to rates currently charged to others for similar access" but does not say who these others might be or what will be considered similar access. What benchmarks or comparable are anticipated to be used in this regard? While the Framework states that "the arbitrator shall have all necessary powers to determine all of the questions in dispute (including those relating to determining the appropriate terms of the Site-sharing arrangement)", it does not state whether the arbitrator should look outside Canada.[199]

148. Globalive also sought clarifications as to what constituted "good faith" negotiations and requested that additional information be required from tower/site owners to facilitate tower/site sharing.[200]

149. Ultimately, GTH and Globalive made the business decision to participate in the 2008 AWS-1 Auction even if they were not satisfied that the COLs on Roaming and Tower/Site

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[198] **RWS-Hill**, ¶¶ 60-64.

[199] **R-126**, Letter from Simon Lockie, Globalive to Director, Spectrum Management Operations, Industry Canada (Jan. 22, 2008), p. 2.

[200] **R-126**, Letter from Simon Lockie, Globalive to Director, Spectrum Management Operations, Industry Canada (Jan. 22, 2008), pp. 2-3.

sharing would necessarily result in reasonable agreements with the other licensees. As Industry Canada had warned throughout the consultations, applicants were responsible for assessing whether the "proposed conditions of licence [we]re suitable for their… business plans"[201] and Wind Mobile and its investors apparently concluded at the time that they were.

D. Industry Canada Made Ongoing Efforts to Enhance Market Conditions Including With Respect to Roaming and Tower/Site Sharing

150. While the Government had only gone so far in setting a scheme for mandated roaming and tower/site sharing, consistent with its approach to regulating the telecommunications industry, it monitored the effects of the measures it had introduced over the following months and years to determine if further governmental action was necessary to achieve the Canadian telecommunications policy objectives.[202]

1. Industry Canada Provided Guidelines on the Existing Conditions of Licence on Tower/Site Sharing in April 2009 to Assist with Disputes Concerning their Interpretation

151. After the 2008 AWS-1 Auction, Industry Canada started receiving complaints from both New Entrants and Incumbents alleging that licensees were not respecting the COLs.[203]

152. By early 2009, a number of the New Entrants and Incumbents had signed five-year or ten-year roaming agreements, but Industry Canada continued to receive complaints on tower/site sharing negotiations.[204] Complaints related in particular to the preliminary step, which anticipated that operators that wished to engage in roaming or tower/site sharing would begin negotiations by first requesting and then receiving technical information from the other licensee on particular sites, which the requesting operator could then rely upon in formulating an offer to roam or share.[205] There were divergent views from licensees on what was mandated by the COLs

[201] **C-062**, Industry Canada, Responses to Questions for Clarifications on the AWS Policy and Licensing Frameworks (Feb. 27, 2008), Answer 6.20.

[202] **RWS-Hill**, ¶ 22.

[203] **RWS-Hill**, ¶ 67.

[204] **RWS-Hill**, ¶ 68.

[205] **RWS-Hill**, ¶ 68.

in this preliminary technical step.[206] Therefore, before determining whether a breach of a COL had occurred and whether it was appropriate to resort to its authority to suspend or revoke licences for breach of a COL,[207] Industry Canada decided to first provide further clarity on what was required pursuant to the COLs during this preliminary step of the negotiations.[208]

153. Owing to the time-sensitive nature of the deployment of networks by New Entrant operators,[209] Industry Canada released a consultation document on February 17, 2009,[210] accepted comments from interested parties until March 6, 2009,[211] and released Guidelines for Compliance with the Conditions of Licence Relating to Antenna Tower and Site Sharing and to Prohibit Exclusive Site Arrangements in April 2009 ("Tower/Site Sharing Guidelines").[212]

154. The Tower/Site Sharing Guidelines provided further clarity on required timelines and what was required in the preliminary technical information step. The clarifications were meant to address complaints of delays and bad faith in responding to requests for preliminary technical information.[213] The Guidelines clarified what would be considered a complete request for preliminary technical information and what would be considered a complete and timely response to such a request.[214] In addition, the Guidelines elaborated on the scope of the COL that provided that "[a] licensee's own future needs for tower or antenna space may be considered if they are well documented, reasonable and near term".[215] Industry Canada clarified that in assessing non-

[206] **RWS-Hill**, ¶ 68; **C-093**, Industry Canada, Guidelines for Compliance with the Conditions of Licence Relating to Antenna Tower and Site Sharing and to Prohibit Exclusive Site Arrangements (GL-06, Issue 1) (Apr. 2009), p. 1 ("Tower/Site Sharing Guidelines").

[207] **C-057**, *Radiocommunication Act*, s. 5(2). Section 5(2) of the *Radicommunications Act* grants the Minister of Industry the authority to suspend or revoke a radio authorization where the licensee has contravened the terms or conditions. The Minister cannot, however, impose other penalties.

[208] **RWS-Hill**, ¶¶ 68-72; **C-093**, Tower/Site Sharing Guidelines, p. 1.

[209] **RWS-Hill**, ¶ 69.

[210] **R-134**, Industry Canada, Consultation Letter – Issues Related to the Preliminary Phase of the Antenna Tower and Site-Sharing Process (Feb. 17, 2009).

[211] **R-134**, Industry Canada, Consultation Letter – Issues Related to the Preliminary Phase of the Antenna Tower and Site-Sharing Process (Feb. 17, 2009).

[212] **C-093**, Tower/Site Sharing Guidelines.

[213] **C-093**, Tower/Site Sharing Guidelines, p. 1.

[214] **C-093**, Tower/Site Sharing Guidelines, pp. 2-3, 5-6.

[215] **C-093**, Tower/Site Sharing Guidelines, p. 4.

compliance on this matter, a licensee would have to provide evidence demonstrating that the space would be put into service within 18 months.[216]

155. Overall, the Tower/Site Sharing Guidelines assisted both New Entrants and Incumbents by providing further guidance on what the COLs on Roaming and Tower/Site Sharing required of licensees, and contributed to a general improvement in the roaming and tower/site sharing negotiation process and a corresponding decrease in complaints.[217]

2. Industry Canada Regularly Provided Clarifications on What the Conditions of Licence Required in Order to Assist New Entrants and Incumbents with Their Negotiations

156. In addition to issuing the Tower/Site Sharing Guidelines, Industry Canada regularly provided clarifications to certain licensees on the COLs on Roaming and Tower/Site Sharing to assist them in their negotiations.

157. For example, Wind Mobile regularly brought complaints about roaming and tower/site sharing to the attention of the Spectrum Management Operations Branch of Industry Canada. Mr. Hill, who at the time was Senior Director and then Director General of the Branch, remarks that Wind Mobile submitted complaints more frequently than all of the other New Entrants combined.[218] Complaints were often vague or focused on issues outside of the scope of the COLs.[219] However, in those instances where complaints related to a matter addressed by the COLs, if the complaints were detailed and supported by evidence, Mr. Hill and his team took steps to assist Wind Mobile and the licensee it was negotiating with.[220] He was often able to resolve the source of conflict and move matters forward within 24 hours.[221]

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[216] **C-093**, Tower/Site Sharing Guidelines, pp. 4-5.

[217] **RWS-Hill**, ¶ 72.

[218] **RWS-Hill**, ¶ 97.

[219] **RWS-Hill**, ¶ 97.

[220] **RWS-Hill**, ¶ 97.

[221] **RWS-Hill**, ¶ 98.

158. Mr. Hill outlines in his witness statement four specific instances, by way of examples, in which Industry Canada was able to assist Wind Mobile in this manner.[222] He explains that Industry Canada did as much as it could in responding to complaints from Wind Mobile, to the extent that the complaints raised questions of technical feasibility or requested a clarification of the existing COLs.[223] On the other hand, when issues were unrelated to these matters, he encouraged the parties to continue commercial negotiations, with the option of proceeding to commercial arbitration.[224] Mr. Hill adds:

> When my interventions required an Incumbent licensee to proceed in a particular manner to remain compliant with the COLs, as far as I can recall, the Incumbent licensee always proceeded in that way. [225]

3. After a Review of Its Roaming and Tower/Site Sharing Conditions of Licence, Industry Canada Updated the Conditions of Licence in 2013

159. In 2010, Industry Canada began a review of the COLs on Roaming and Tower/Site Sharing. The review was prompted by three main considerations: (i) Industry Canada considered that two years of practical experience provided a good baseline of information with which to evaluate whether the original policy goals of facilitating competitive entry and limiting proliferation of towers were being achieved, (ii) Industry Canada was continuing to receive complaints from both Incumbents and New Entrants, but complaints were frequently vague, contradictory or divergent, and unsupported by evidence, and Industry Canada considered that a thorough factual analysis would assist with assessing the situation,[226] and (iii) auctions were planned in the 700 and 2500 MHz bands in the coming years and Industry Canada considered it

[222] **RWS-Hill**, ¶ 98; Annex B.

[223] **RWS-Hill**, ¶ 100.

[224] **RWS-Hill**, ¶ 100.

[225] **RWS-Hill**, ¶ 98.

[226] As Peter Hill notes in his witness statement, there was conflict in the experiences of different players: "For example, while those initiating tower/site sharing requests reported that the tower-sharing process took on average 296 days, the request receivers reported 88 days. Similarly, the Incumbent players reported having reached nearly twice as many agreements with New Entrants as the New Entrants themselves reported. There was also discrepancy in the requests initiated and requests received numbers." **RWS-Hill**, ¶¶ 75, 84; **R-135**, Nordicity, Assessment of Mandatory Tower Sharing and Roaming Provisions, Final Report Prepared for Industry Canada (May 2011), pp. 24-25, 30-31 ("Nordicity Report").

desirable to make any necessary modifications to the COLs prior to the issuance of licences for that valuable spectrum.[227]

160. The Minister announced the review on November 22, 2010, and Industry Canada began the review immediately with a view to implementing any changes to the COLs prior to the 700 and 2500 MHz Auctions.[228]

161. Industry Canada began by gathering data from licensees in order to obtain a fact base for analysis and consideration.[229] Subsequently, Industry Canada retained Nordicity,[230] an independent contractor to undertake an assessment of Industry Canada's mandated roaming and tower/site sharing requirements in light of the data it had collected and to provide a report evaluating the existing framework and, if necessary, recommending changes.[231]

162. In May 2011, Nordicity provided Industry Canada with its final report.[232] Nordicity found that "[t]hrough just two years of implementation, the mandatory tower-sharing and roaming framework [wa]s successfully furthering Industry Canada's stated policy objectives."[233]

163. On roaming, Nordicity stated that "[t]hree of the four new entrant licensees that launched service by the end of 2010 offer[ed] national roaming to their subscribers"[234] and that "[t]he presence of four new wireless carriers [wa]s also proof that the framework has been successful in facilitating new entry."[235] In terms of rates, Nordicity concluded that it was difficult to comment

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[227] **RWS-Hill**, ¶¶ 74-76.

[228] **C-113**, Industry Canada, News Release, "Minister Clement Updates Canadians on Canada's Digital Economy Strategy" (Nov. 22, 2010); **RWS-Hill**, ¶ 77.

[229] **R-136**, Letter from Fiona Gilfillan, Industry Canada to Kenneth Campbell, Globalive *attaching* Annex 1: Information to be provided – Tower and site sharing Information and Annex 2: Data Collection Templates (Nov. 23, 2010).

[230] Nordicity is a private consulting firm specializing in policy, strategy, and economic analysis in the media, creative and information and communications technology sectors. *See* **R-138**, Nordicity website, "About Us", available at: http://www nordicity.com/home/about.

[231] **R-137**, Request for Proposal # IC400998 (Nov. 25, 2010), p. 4; **RWS-Hill**, ¶ 78.

[232] **R-135**, Nordicity Report.

[233] **R-135**, Nordicity Report, p. 4.

[234] **R-135**, Nordicity Report, p. 5.

[235] **R-135**, Nordicity Report, p. 5.

on the "veracity and substantiality of this issue due to the lack of evidence provided by the regional incumbents and new entrants… [because] by their very nature, roaming negotiations are confidential and carriers are unlikely to be willing to provide the results."[236]

164. On tower/site sharing, Nordicity concluded that "[i]n approximately two years of operation, the new entrant wireless licensees ha[d] been able to collocate on 109 towers owned by other licensees."[237] Nordicity acknowledged that New Entrants were not as successful as Incumbents in converting tower sharing requests into tower sharing agreements and identified certain factors that explained that divergence.[238]

165. Overall, Nordicity found "[s]teady [i]mprovement" on tower/site sharing and time to agreement.[239] Ultimately, Nordicity concluded:

> To date, the mandatory tower-sharing and roaming framework has successfully furthered Industry Canada's stated policy objectives. While there have been clear challenges – particularly for new entrants – time-series data shows a steady improvement of overall processes. Therefore potential options to be pursued to improve the effectiveness of the framework are minimal.[240]

166. After receiving the report, Industry Canada had to evaluate its options and how to proceed.[241] It decided that certain changes to the existing COLs may be warranted, and in March 2012, Industry Canada released a consultation document with a draft of revised COLs ("Consultation Paper on Revised COLs").[242] In May and June 2012, interested parties were provided two opportunities to provide comments on the draft. Wind Mobile provided written comments both times.

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[236] **R-135**, Nordicity Report, p. 65.

[237] **R-135**, Nordicity Report, p. 19.

[238] **R-135**, Nordicity Report, p. 26; **RWS-Hill**, ¶ 81.

[239] **R-135**, Nordicity Report, pp. 5, 50.

[240] **R-135**, Nordicity Report, p. 6.

[241] **RWS-Hill**, ¶¶ 84-86.

[242] **C-121**, Proposed Revisions to the Frameworks for Mandatory Roaming and Antenna Tower and Site Sharing (Mar. 2012).

167. On March 7, 2013, Industry Canada released the Revised Frameworks for Mandatory Roaming and Antenna Tower and Site Sharing and the revised COLs, which set out changes to the COLs for Mandatory Roaming and Antenna Tower and Site Sharing and to the Arbitration Rules and Procedures ("Revised COLs on Roaming and Tower/Site Sharing").[243]

168. On roaming, the distinction between in-territory and out-of-territory roaming was removed.[244] Industry Canada observed that extending roaming obligations would recognize the importance of national coverage while "market forces and the higher costs associated with reliance on roaming [would] ensure that it [was] more profitable for carriers to continue to build out where economically feasible".[245] It would also result in more certainty for licensees.

169. On tower/site sharing, standardized reporting to Industry Canada on key data points was mandated to allow the Department to monitor negotiations and to assess whether tower/site sharing continued to improve.[246]

170. The Revised COLs on Roaming and Tower/Site Sharing also shortened timelines to respond to preliminary information requests with respect to roaming, consistent with the clarification that had already been provided for tower sharing requests in the Tower/Site Sharing Guidelines.

171. While Wind Mobile pressed for further changes with respect to the obligation to negotiate agreements in good faith, Industry Canada took the position that further changes were not necessary as arbitration was available to assist the parties if commercial arrangements could not be reached.[247] However, changes were made to allow for resort to arbitration more rapidly if the negotiations failed.[248] Timelines for the arbitration process itself were also reduced.[249]

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[243] **C-153**, Revised Frameworks for Mandatory Roaming and Antenna Tower and Site Sharing (Mar. 2013) ("Revised COLs on Roaming and Tower/Site Sharing").

[244] **C-153**, Revised COLs on Roaming and Tower/Site Sharing, p. 7.

[245] **C-153**, Revised COLs on Roaming and Tower/Site Sharing, p. 5.

[246] **C-153**, Revised COLs on Roaming and Tower/Site Sharing, p. 18.

[247] **RWS-Hill**, ¶ 95.

[248] **C-153**, Revised COLs on Roaming and Tower/Site Sharing, pp. 9, 11, 22.

172. Wind Mobile supported a number of the above changes, including the extension of in-territory roaming, greater monitoring of tower/site sharing negotiations and reduction of tower/site sharing timeframes.[250]

173. Wind Mobile also sought a number of more fundamental changes to the COLs that were not implemented.[251] For example, Wind Mobile wanted mandated roaming to include incentives for seamless roaming, caps on rates, review of rates by the CRTC, and the re-opening of existing roaming agreements.[252] Additionally, Wind Mobile took the position that "commercial arbitration [wa]s not a useful or adequate mechanism for resolving terms for domestic roaming."[253] Wind Mobile also wanted the Government to regulate tower/site sharing rates such that they would be cost-based.[254] A number of the changes Wind Mobile sought, particularly with respect to rates, were within the purview of the CRTC and not Industry Canada. Wind Mobile's comments were inconsistent with the fact that they appear not to have used the available arbitration mechanism[255] nor pursued an application before the CRTC seeking rate regulation.

174. Wind Mobile recognized that some of the changes it was advocating would constitute an "overhaul" of the framework that had been put in place for the 2008 AWS-1 Auction[256] but it

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[249] **C-153**, Revised COLs on Roaming and Tower/Site Sharing, p. 26.

[250] **RWS-Hill**, ¶ 91.

[251] **RWS-Hill**, ¶ 92.

[252] **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), p. 25 ("Wind Comments of May 14, 2012").

[253] **R-076**, Wind Comments of May 14, 2012, p. 15.

[254] **R-076**, Wind Comments of May 14, 2012, p. 10.

[255] **RWS-Hill**, ¶ 104.

[256] Wind Mobile commented: "WIND would simply reiterate its suggestions for what has to happen to achieve Industry Canada's goals, and would acknowledge that these suggestions amount to an overhaul and not tweaking." **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), p. 5 ("Wind Comments of June 13, 2012").

urged Industry Canada to "take dramatic action in the interest of Canadian consumers".[257] Mr. Hill summarizes his view of the changes sought by Wind Mobile:

> In my view, Wind Mobile's comments were not aimed at improving the mandated roaming and tower/site sharing COLs, but rather Wind Mobile was looking for fundamental changes to the AWS-1 Policy Framework and the COLs that the government had put in place in 2008.[258]

175. Following the release of the Revised COLs on Roaming and Tower/Site Sharing, Industry Canada continued to assess market conditions to determine if further efforts to sustain competition in Canada's mobile wireless telecommunications sector would be necessary.[259]

4. Canada's Efforts to Address Competition Issues in Canada's Mobile Wireless Market Evolved Over Time

176. Efforts to ensure sustained competition in the wireless telecommunications market were not static. They continued to evolve as the Government analyzed the state of the market and the effectiveness of measures that it had introduced. In addition to Industry Canada's on-going efforts to improve roaming and tower/site sharing, over the 2008 to 2014 period and beyond, the CRTC, the Competition Bureau, and Industry Canada, all took further steps that enhanced competition and contributed to a level playing field in Canada's mobile wireless market.

177. By the end of 2013, the Government felt that it was necessary to take steps to reduce roaming costs on networks within Canada.[260] The Minister therefore announced that the

[257] **R-075**, Wind Comments of June 13, 2012, p. 4.

[258] **RWS-Hill**, ¶ 94.

[259] **RWS-Hill**, ¶ 96.

[260] **R-213**, National Post, "Throne speech 2013: The full text for Governor General David Johnston's statement" (Oct. 16, 2013), p. 2, available at: http://nationalpost.com/news/politics/full-text-of-the-speech-from-the-throne-oct-16-2013.

Government would introduce legislative changes on roaming rates.[261] Wind Mobile responded positively to this news.[262]

178. The legislative changes, which came into effect in June 2014, had the effect of prohibiting one carrier from charging another carrier more than the average amount they charged their own subscribers for roaming.[263]

179. The Claimant argues that these changes came too late for them. However, throughout the period of the Claimant's investment in Canada, Wind Mobile always had the option of pursuing binding arbitration as was prescribed in the COLs on Roaming and Tower/Site Sharing or applications before the CRTC on matters within its mandate, including issues related to rates, terms and conditions of wholesale roaming and tower/site sharing. Wind Mobile did pursue a few applications before the CRTC during the 2008-2014 time period, but only one related to roaming (Roger's provision of seamless roaming to one of Rogers' brands (Chatr))[264] and no application was brought on the matter of roaming rates.[265]

180. Still, the CRTC did take various other steps within the purview of its authority to enhance the provision of mobile wireless services in Canada. The steps included the implementation of a national Wireless Code to act as a mandatory code of conduct for providers of retail mobile wireless voice and data services in 2013.[266] Additionally, in late-2012, the CRTC became aware

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[261] **R-214**, CTV News Winnipeg, "Industry Minister says status quo on roaming rates by big telcos not good enough" (Dec. 18, 2013), available at: https://winnipeg.ctvnews.ca/industry-minister-says-status-quo-on-roaming-rates-by-big-telcos-not-good-enough-1.1599651.

[262] **R-214**, CTV News Winnipeg, "Industry Minister says status quo on roaming rates by big telcos not good enough" (Dec. 18, 2013).

[263] **R-102**, *Economic Action Plan 2014 Act, No. 1*, S.C. 2014, c. 20, s. 240(1). The Bill introduced a new section 27.1 in the *Telecommunications Act* that would prohibit a carrier from charging other carriers amounts for roaming services that exceeded the average amount charged by the carrier to its own subscribers for those services. Separate caps were created for wholesale roaming charges levied for each of wireless voice calls, wireless data, and text messages.

[264] **R-215**, CRTC, Telecom Decision CRTC 2011-360, Globalive Wireless Management Corp., operating as WIND Mobile – Part VII application regarding roaming on Rogers Communications Partnership's wireless network (Jun. 3, 2011), ¶¶ 22-27 ("CRTC, Telecom Decision 2011-360"). The CRTC found that the terms and conditions of the roaming agreements negotiated between Wind Mobile and Rogers did not require seamless roaming and rejected the application because of the lack of evidence of discrimination.

[265] **R-215**, CRTC, Telecom Decision CRTC 2011-360, ¶¶ 22-27.

[266] **R-216**, CRTC, Telecom Regulatory Policy CRTC 2013-271, The Wireless Code (Jun. 3, 2013).

of concerns with respect to the rates, terms and conditions of wholesale roaming, and subsequently began research on the matter.[267]

181. After studying publicly available information and obtaining information that was not publicly available from wireless operators offering roaming in Canada regarding rates, terms, and conditions,[268] the CRTC found that "some of the large providers [we]re charging, or proposing to charge, their smaller Canadian competitors significantly higher wholesale roaming rates than those charged to U.S.-based wireless companies" and became "concerned that some wireless companies may be making it unfairly difficult for Canadian providers that d[id] not operate a national network to compete in the marketplace".[269] The CRTC therefore commenced two proceedings to examine these issues.

182. In its decision in the first proceeding, the CRTC prohibited exclusivity provisions in all wholesale roaming agreements between Canadian mobile wireless carriers.[270] By the time the CRTC released its decision in the second proceeding, the Government had already introduced legislated caps on wholesale roaming. Nevertheless, the CRTC came to the conclusion that regulating wholesale roaming rates was appropriate given an insufficient level of competition.[271] It therefore set wholesale roaming rates and, as a result, the legislated cap was revoked.[272]

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[267] **R-217**, CRTC, website excerpt, Letter from Chris Seidl to Distribution List (Aug. 30, 2013), p. 1, available at: http://www.crtc.gc.ca/eng/archive/2013/lt130830 htm. As noted by Industry Canada in the revised COLs of March 2013, "the CRTC [could] consider applications relating to rates and terms for matters such as roaming and tower sharing." **C-153**, Revised COLs on Roaming and Tower/Site Sharing, ¶ 167.

[268] **R-217**, CRTC, website excerpt, Letter from Chris Seidl to Distribution List (Aug. 30, 2013).

[269] **R-218**, CRTC, news release, "CRTC to take closer look at wholesale roaming rates, terms and conditions in Canada" (Dec. 12, 2013), available at: https://crtc.gc.ca/eng/com100/2013/r131212.htm.

[270] **C-225**, CRTC, Telecom Decision CRTC 2014-398: Wholesale mobile wireless roaming in Canada – Unjust discrimination/undue preference (Jul. 31, 2014), ¶ 38.

[271] **C-232**, CRTC, Telecom Regulatory Policy CRTC 2015-177: Regulatory framework for wholesale mobile wireless services (May 5, 2015), p. 1.

[272] **C-232**, CRTC, Telecom Regulatory Policy CRTC 2015-177: Regulatory framework for wholesale mobile wireless services (May 5, 2015), p. 1; **R-103**, *Order Fixing the Day on which this Order is published as the Day on which Certain Provisions of the Act Come into Force*, P.C. 2015-815 (Jul. 1, 2015), C. Gaz. II, Vol. 149, No. 13 [Excerpt].

183. The Claimant insinuates in its Memorial that Incumbents were allowed to engage in "anti-competitive" behavior in Canada, without consequence.[273] But Wind Mobile had the option of pursuing complaints of anti-competitive behavior before the Competition Bureau throughout the course of its operations. When Wind Mobile filed a complaint with the Competition Bureau in 2010 alleging that Rogers was using misleading advertising to promote its brand Chatr,[274] the Competition Bureau engaged in an investigation and took steps to impose penalties on Rogers.[275]

184. Further, throughout the time period of the Claimant's investment in Canada, the Competition Bureau took other actions against Incumbents, for example, with respect to misleading advertising practices.[276]

185. The evolution of legislation and regulation on wholesale roaming and the response of Government agencies like the CRTC and the Competition Bureau to complaints brought by market participants, including Wind Mobile, are evidence of Canada's commitment to competition in the Canadian wireless market. Wind Mobile, like other New Entrants, benefitted from these measures. The Claimant therefore also indirectly benefited from these efforts until it decided to exit the Canadian market in September 2014.

VI. The Transfer of Wind Mobile's Spectrum Licences to an Incumbent Was Always Subject to Ministerial Approval

186. The Claimant asserts that Wind Mobile's AWS-1 spectrum licences were "freely transferable"[277] after the expiration of the five-year moratorium on transfers to Incumbents. It

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[273] *See for example*, Claimant's Memorial, ¶ 114.

[274] **R-219**, Toronto Star, "Rogers faces $10 million penalty on ads" (Nov. 19, 2010), available at: https://www.thestar.com/business/2010/11/19/rogers_faces_10_million_penalty_on_ads.html.

[275] **R-219**, Toronto Star, "Rogers faces $10 million penalty on ads" (Nov. 19, 2010); **R-220**, Competition Bureau, announcement, "Court orders $500,000 administrative monetary penalty in Rogers-Chatr matter" (Feb. 24, 2014), available at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03675.html.

[276] For example, in 2011, the Competition Bureau reached an agreement with Bell requiring Bell to pay $10 Million for misleading advertising in relation to various services, including wireless services. **R-221**, Competition Bureau, announcement, "Competition Bureau reaches agreement with Bell Canada requiring Bell to pay $10 million for misleading advertising" (Jun. 28, 2011), available at: http://www.competitionbureau.gc.ca/eic/site/cb-bc nsf/eng/03388.html. Likewise, in 2012, after five months of investigation, the Competition Bureau began legal proceedings against Bell, Rogers, and TELUS requiring them to stop misleading advertising that promoted premium text services and compensate consumers for the same. **R-222**, Competition Bureau, announcement, "Competition Bureau sues Bell, Rogers and Telus for misleading consumers: Bureau seeks customer refunds and $31 million in penalties" (Sep. 14, 2012), available at: http://www.competitionbureau.gc.ca/eic/site/cb-bc nsf/eng/03498.html.

also asserts that Wind Mobile had a "right to sell" its spectrum licences to an Incumbent".[278] These assertions are inaccurate and misleading. Wind Mobile's ability to transfer its AWS-1 spectrum licences after the five-year moratorium was always subject to review and approval by the Minister.[279] There was never any guarantee that the Minister would approve the transfer of Wind Mobile's spectrum licences to an Incumbent.

A. Any Transfer of a Spectrum Licence, Including the Licences Issued to Wind Mobile, is at the Discretion of the Minister of Industry

187. In arguing that Wind Mobile had a right to freely transfer its AWS-1 spectrum licences after the expiry of the five-year moratorium, the Claimant places great reliance on the "enhanced transferability and divisibility rights"[280] provided to some spectrum licences, including the AWS-1 spectrum licences issued to Wind Mobile.[281] However, the concept of enhanced transferability and divisibility of licences does not entail an unrestricted right to transfer a spectrum licence as the Claimant suggests. No such right exists.

188. Mr. Hill confirms that "even for spectrum licences that have 'enhanced' transferability rights, these rights are conditional on obtaining approval from the Department and the Minister for any licence transfer."[282] As such, Wind Mobile had no unilateral right to transfer its AWS-1 spectrum licences without the Minister's approval, and no guarantee that the Minister would give such approval.

1. No Spectrum Licence Holder, including Wind Mobile, Has the Unilateral Right to Transfer its Spectrum Licences

189. The transfer of any spectrum licence depends on the Minister's exercise of his authority to issue licences. As Mr. Hill indicates, "[n]either the *Radiocommunication Act* nor the *Radiocommunication Regulations* provide for a specific method of transferring spectrum

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[277] Claimant's Memorial, ¶ 104(a). *See also*, Claimant's Memorial, ¶¶ 400, 418.

[278] Claimant's Memorial, ¶ 24(d).

[279] **RWS-Hill**, ¶¶ 11, 106, 128; **RWS-Stewart**, ¶ 28.

[280] **C-003**, Licensing Circular, Issue 2, p. 4.

[281] *See for example*, Claimant's Memorial, ¶ 325(a).

[282] **RWS-Hill**, ¶ 106.

licences."[283] In order to effect a "transfer", the Minister revokes the spectrum licence of the transferor and issues a new spectrum licence to the transferee. As Mr. Hill explains:

> Under the Act, spectrum can only be used in accordance with an authorization issued by the Minister and only the Minister can issue spectrum licences. Therefore, an existing licensee cannot allow a different party to use spectrum. The proposed transferee must obtain its own spectrum licence from the Minister, who revokes the existing spectrum licence held by the transferor.[284]

190. The ability of a licensee to *transfer* a spectrum licence is therefore not a right. It depends on the Minister exercising his authority to *issue* a spectrum licence, which is found in sub-paragraph 5(1)(a)(i.1) of the *Radiocommunication Act*. The *chapeau* to this provision directs the Minister to exercise this authority "taking into account all matters that the Minister considers relevant for… the orderly development and efficient operation of radiocommunication in Canada".[285] Pursuant to subsection 5(1.1) of the Act, in exercising the authority to issue a spectrum licence, the Minister may also "have regard to the objectives of the Canadian telecommunications policy set out in section 7 of the *Telecommunications Act*."[286]

191. Canadian courts have confirmed that through subsection 5(1) of the *Radiocommunication Act*, Canada's Parliament conferred a broad and discretionary authority over spectrum licence transfers.[287] In a judicial review application brought against Canada with respect to the Transfer Framework by the Incumbent TELUS in 2013, the Federal Court[288] held that the Minister's broad "discretion to manage the spectrum" includes discretion over whether to permit requests to

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[283] **RWS-Hill**, ¶ 105. *See also* **RWS-Hill**, Annex A: Affidavit of Peter Hill (Sworn October 25, 2013), ¶ 33.

[284] **RWS-Hill**, ¶ 105. *See also* **RWS-Hill**, Annex A: Affidavit of Peter Hill (Sworn October 25, 2013), ¶ 33.

[285] **C-057**, *Radiocommunication Act*, s. 5(1)(a)(i.1).

[286] **C-057**, *Radiocommunication Act*, s. 5(1.1); **C-046**, *Telecommunications Act*, s. 7.

[287] The Federal Court has confirmed that the scope of the Minister's authority over spectrum licences is broad. *See* **R-224**, *Telus Communications Company v. Canada (Attorney General)*, 2014 FC 1, ¶¶ 94-96 (holding that the powers granted to the Minister by section 5(1) of the *Radiocommunication Act* and section 4(1) of the *Department of Industry Act* are "broad" and that "it was well within the Minister's authority to impose spectrum caps as a condition of licence."); **R-195**, *Telus v. AGC*, ¶¶ 48-49 (holding that the Minister's powers over telecommunications under section 4(1) of the *Department of Industry Act* and over spectrum licences under section 5(1) of the *Radiocommunication Act* are "broad" and "provided [the Minister] with ample statutory authority… to establish the Deemed Transfer Requirement.").

[288] Canada's Federal Court has exclusive jurisdiction to review most government action at the federal level.

transfer spectrum licences.[289] In a private dispute arising out of competing bids to acquire Wind Mobile from the Claimant in 2014, the Ontario Superior Court of Justice[290] also observed that aside from the five-year moratorium, "WIND's AWS-1 spectrum was at all times subject to numerous restrictions on transfer" including "the Minister of Industry's unilateral discretion whether to permit transfer pursuant to the terms of license."[291]

192. Read together, the *Radiocommunication Act* provisions which grant the Minister authority to issue licences[292] and those which prohibit the use of spectrum except in accordance with a spectrum licence issued by the Minister[293] clearly indicate that a licence transfer requires the Minister's approval.[294] As Mr. Hill states, "[n]o licensee has the unilateral right to transfer its spectrum licence to a party of its choosing."[295]

2. There was No Guarantee that Wind Mobile Could Transfer its Spectrum Licences to an Incumbent after the Five-Year Moratorium

193. The Claimant's assertion that Wind Mobile's AWS-1 spectrum licences had a "stable and clear liquidity right"[296] not only ignores the provisions of the *Radiocommunication Act*, but it also ignores the COLs, which are explicit on the need for obtaining the Minister's approval for any transfer of licences.

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[289] **R-195**, *Telus v. AGC*, ¶ 57.

[290] The Ontario Superior Court of Justice has inherent jurisdiction in civil, criminal and family matters in the Province of Ontario.

[291] **R-104**, *Catalyst Capital Group Inc. v. Moyse*, 2016 ONSC 5271, ¶ 19 ("*Catalyst v. Moyse*"). As the Ontario Superior Court judge noted in the Catalyst decision: "WIND's AWS-1 wireless spectrum was acquired in a 'set aside' auction from which incumbent wireless carriers were excluded, and was subject to a restriction on transfer to incumbents for at least five years. In addition to this restriction, WIND's AWS-1 spectrum was at all times subject to numerous restrictions on transfer: (i) the Minister of Industry's unilateral discretion whether to permit transfer pursuant to the terms of license; (ii) Competition Act approval; (iii) Investment Canada Act approval; and (iv) CRTC approval."

[292] **C-057**, *Radiocommunication Act*, s. 5(1)(a)(i.1).

[293] **C-057**, *Radiocommunication Act*, s. 4(1) ("No person shall, except under and in accordance with a radio authorization, install, operate or possess radio apparatus, other than (a) radio apparatus exempted by or under regulations made under paragraph 6(1)(m); or (b) radio apparatus that is capable only of the reception of broadcasting and that is not a distribution undertaking.").

[294] *See* **RWS-Hill**, ¶ 105.

[295] **RWS-Hill**, ¶ 106.

[296] Claimant's Memorial, ¶ 319.

194. The Claimant misconstrues the scope of the "enhanced divisibility and transferability rights" referred to in the Licensing Circular, which contains Industry Canada's general policies and procedures applicable to the issuance and transfer of spectrum licences.[297] As stated in issue 2 of the Licensing Circular, which was in effect at the time of the 2008 AWS-1 Auction, while spectrum licences with "enhanced transferability and divisibility rights" could "be transferred in whole or in part (either in geographic area or in bandwidth) to a third party", any such transfer was "subject to the conditions stated on the licence and other applicable regulatory requirements."[298] This included the requirement to obtain the Minister's approval.[299]

195. The Licensing Circular's reference to licence conditions and applicable regulatory requirements reinforces that it cannot be read on its own. It must be read together with the *Radiocommunication Act* which indicates that licence transfers require the Minister's approval. The Licensing Circular must also be read together with the COLs of AWS-1 spectrum licences and the AWS-1 Licensing Framework and AWS-1 Policy Framework. Reading the Licensing Circular in its proper context confirms that any transfer of an AWS-1 set-aside spectrum licence is subject to the approval of the Minister.

196. The COLs of Wind Mobile's licences provided:

> *The licensee may apply in writing to transfer its licence* in whole or in part (divisibility), in both the bandwidth and geographic dimensions. *Departmental approval is required for each proposed transfer of a licence*, whether the transfer is in whole or in part. The transferee(s) must also provide an attestation and other supporting documentation demonstrating that it meets the eligibility criteria and all other conditions, technical or otherwise, of the licence.
>
> The Department may define a minimum bandwidth and/or geographic dimension (such as the grid cell) for the proposed transfer. Systems involved in such a transfer shall conform to the technical requirements set forth in the applicable standard.
>
> Licences acquired through the set-aside of spectrum (as defined in Policy Framework for the Auction for Spectrum Licences for Advanced Wireless

[297] *See* **RWS-Hill**, ¶ 107.

[298] **C-003**, Licensing Circular, Issue 2, p. 4.

[299] **RWS-Hill**, ¶ 109.

> Services and other Spectrum in the 2 GHz Range) may not be transferred or leased to, acquired by means of a change in ownership or control of the licensee, divided among, or exchanged with companies that do not meet the criteria of a new entrant, for a period of 5 years from the date of issuance. Industry Canada will consider requests from licensees, whether new entrants or incumbents, to exchange spectrum blocks in the same geographic territory, provided that the amount of non-set-aside spectrum is equal to or greater than the set-aside spectrum and the Department may grant such requests based on the merits of the proposal and conformity with the policy objectives.
>
> The licensee may also apply to use a subordinate licensing process.
>
> For more information, refer to Industry Canada's Client Procedures Circular CPC-2-1-23, Licensing Procedure for Spectrum Licences for Terrestrial Services, as amended from time to time.[300]

197. This COL on licence transferability and divisibility was standard to all set-aside AWS-1 spectrum licences.[301] It reflected what was provided in the AWS-1 Licensing Framework[302] and AWS-1 Policy Framework:[303] licensees could apply for the Minister's approval to transfer their licence to any party, except that no such approval would be granted for a transfer to an Incumbent for the first five years of the licence term.[304] The Claimant's attempt to read out the requirement to obtain approval of any spectrum licence transfer therefore has no basis. The COLs, the AWS-1 Licensing Framework and the AWS-1 Policy Framework explicitly refer to this approval, and contain no suggestion that it would be given automatically.

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[300] **C-010**, Letter from Michael D. Connolly, Industry Canada to Kenneth Campbell, Globalive *attaching* Wind Mobile Licences (Mar. 13, 2009) (emphasis added).

[301] **RWS-Hill**, ¶ 110; **RWS-Hill**, Annex A, ¶ 33.

[302] **C-005**, AWS-1 Licensing Framework, pp. 6-7 ("*The licensee may apply to transfer its licence(s)* in whole or in part (divisibility), in both the bandwidth and geographic dimensions. The Department may define a minimum bandwidth and/or geographic dimension (such as the grid cell) for the proposed transfer. Systems involved in such a transfer shall conform to the technical requirements set forth in the applicable standards mentioned in Section 2, Technical Considerations. Licences acquired through the set-aside may not be transferred or leased to, divided among, or exchanged with companies that do not meet the criteria of a new entrant, for a period of 5 years from the date of issuance. *Departmental approval is required for each proposed transfer of a licence, whether the transfer is in whole or in part. The licensee must apply to the Department in writing*. The transferee(s) must also provide an attestation and other supporting documentation demonstrating that it meets the eligibility criteria and all other conditions, technical or otherwise, of the licence." (emphasis added)).

[303] **C-004**, AWS-1 Policy Framework, p. 6 ("*While all licence transfers must be approved by the Minister*, licences obtained through the set-aside may not be transferred to companies that do not meet the criteria of a new entrant for a period of 5 years from the date of issuance." (emphasis added)).

[304] **RWS-Hill**, ¶ 112; **RWS-Stewart**, ¶ 28.

198. Wind Mobile and its investors knew before the 2008 AWS-1 Auction that any transfer of AWS-1 spectrum licences would be subject to approval by the Minister. When it applied to participate in the 2008 AWS-1 Auction in March 2008, Globalive Wireless LP executed a Deed of Acknowledgement in which it agreed "to accept and to be bound by all of the terms and conditions of the spectrum auction as set out in the Canada Gazette notice DGRB-011-07 and the [AWS-1 Licensing Framework]".[305] Thus it expressly acknowledged that "Departmental approval is required for each proposed transfer of a licence, whether the transfer is in whole or in part."[306]

199. Industry Canada had already brought this point to the attention of potential bidders in February 2008, through its public questions and answers process. In response to questions seeking clarification concerning licence transfers, Industry Canada stated:

> As outlined in the AWS Licensing Framework, *departmental approval is required for each proposed transfer of a licence*, whether the transfer is in whole or in part. The licensee must apply to Industry Canada in writing**.** The transferee(s) must also provide an attestation and other supporting documentation demonstrating that it meets the eligibility criteria and all other conditions, technical or otherwise, of the licence. *This provision applies for the entire term of the licence*.[307]

200. In response to questions seeking clarification of licence transferability and exchanges, Industry Canada further stated:

> Licences acquired through the set-aside may not be transferred or leased to, or divided among companies that do not meet the criteria of a new entrant, for a period of five years from the date of issuance. *Departmental approval is required for each proposed transfer of a licence, whether the transfer is in whole or in part*. The licensee must apply to Industry Canada in writing**.** The transferee(s) must also provide an attestation and other supporting

[305] **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), Attachment A: Attachment A – Deed of Acknowledgment.

[306] **C-005**, AWS-1 Licensing Framework, p. 7.

[307] **C-062**, Industry Canada, Responses to Questions for Clarifications on the AWS Policy and Licensing Frameworks (Feb. 27, 2008), Answer 5.9 (emphasis added).

> documentation demonstrating that it meets the eligibility criteria and all other conditions, technical or otherwise, of the licence.[308]

201. In light of these clarifications, bidders including Globalive Wireless LP could have no reasonable expectation that AWS-1 spectrum licences were freely transferable to an Incumbent after the first five years of the licence term without the Minister's approval, or that approval would be automatic. Nor could they have reasonably interpreted the auction framework documents as a representation to that effect.

202. Canada's position on this issue is supported by the conclusions of Canadian courts. TELUS sought judicial review of the Transfer Framework on July 29, 2013.[309] Like the Claimant in this case,[310] TELUS argued that the COLs of AWS-1 spectrum licences contained a representation by the Minister that the Incumbents "would only be prohibited from acquiring the spectrum issued to new entrants for a period of five years."[311] In a judgment issued December 2, 2014, the Federal Court held that the interpretation of the AWS-1 COLs advanced by TELUS in that case (and by the Claimant in this case) is wrong:

> I agree with the Attorney General that nothing in these statements [including the AWS-1 COLs, the AWS Licensing Framework and the Written Responses to Questions for Clarification] constitutes a statement, or even an implication that, at the end of five years a party may freely, without review or constraint by the Minister, licence or acquire any or all of the set-aside spectrum, *nor do any of these statements constitute an undertaking or assurance by the Minister that, after five years, the Minister may decline to exercise discretion to manage the spectrum*.[312]

203. The Federal Court agreed with Canada that TELUS' "interpretation of the Minister's alleged 'representations' ignore[d] the clear statements in each of those documents that all

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[308] **C-062**, Industry Canada, Responses to Questions for Clarifications on the AWS Policy and Licensing Frameworks (Feb. 27, 2008), Answer 6.18 (emphasis added).

[309] **R-225**, Federal Court, website excerpt, "Proceedings Queries: Recorded entry(ies) for T-1295-13" (last updated Jan. 16, 2018), available at: http://cas-cdc-www02.cas-satj.gc.ca/IndexingQueries/infp_RE_info_e.php?court_no=T-1295-13&select_court=T.

[310] *See* Claimant's Memorial, ¶¶ 315-316.

[311] **R-195**, *Telus v. AGC*, ¶ 56.

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

licence transfers must be approved by the Minister".[313] More importantly, the Court agreed with Canada that TELUS' "interpretation [was] also inconsistent with the explicit text of the conditions attaching to every spectrum licence issued following the AWS auction".[314] The Court's decision concluded that "[t]he Minister simply did not make a representation that would lead a reasonable person to believe that, after five years, the acquisition or license of set-aside spectrum, by whatever means, would be unregulated by the Minister."[315]

B. The Minister Has the Authority to Adopt Policies and Procedures Related to Spectrum Licence Transfers and to Impose and Change Related Conditions of Licence

204. "Spectrum management is not a static exercise that occurs at a fixed point in time."[316] As Mr. Hill explains, spectrum management "is an ongoing process that involves decisions made before, during and after issuing licences. Policies and procedures on spectrum management are therefore continuously evolving."[317] Therefore, spectrum management policies, including those related to spectrum licence transfers, are not frozen in time.

205. The constant evolution of spectrum management policies is noted in the Licensing Circular, which states that "[l]icensing policies are constantly adapting to changes in radiocommunication in order to respond effectively to the evolving competitive environment and user needs."[318] It is also reflected in the COLs of AWS-1 spectrum licences, including the COL on licence transferability and divisibility which incorporates a reference to the Licensing Circular, "as amended from time to time."[319]

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[313] **R-195**, *Telus v. AGC*, ¶ 57.

[314] **R-195**, *Telus v. AGC*, ¶ 57.

[315] **R-195**, *Telus v. AGC*, ¶ 58. TELUS did not seek to overturn this decision. *See* **R-225**, Federal Court, website excerpt, "Proceedings Queries: Recorded entry(ies) for T-1295-13" (last updated Jan. 16, 2018).

[316] **RWS-Hill**, ¶ 11.

[317] **RWS-Hill**, ¶ 11.

[318] **C-003**, Licensing Circular, Issue 2, p. 1; **C-206**, Industry Canada, Licensing Procedure for Spectrum Licences for Terrestrial Services (CPC-2-1-23, Issue 3) (Aug. 2013), p. 1 ("Licensing Circular, Issue 3").

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

206. The Minister also has the authority to amend the COLs of spectrum licences to reflect changes in spectrum management policies. This authority is found in paragraph 5(1)(b) of the *Radiocommunication Act*, which allows the Minister to "amend the terms and conditions of any licence, certificate or authorization issued under paragraph (a)",[320] including a spectrum licence issued under sub-paragraph (5)(1)(a)(1.1). The Minister's authority to amend the terms and conditions of spectrum licences is reflected in the Licensing Circular.[321]

207. In addition, both the AWS-1 Licensing Framework and the COLs of AWS-1 spectrum licences explicitly refer to the Minister's authority to amend terms and conditions of spectrum licences. The AWS-1 Licensing Framework states:

> It should be noted that spectrum licences are subject to relevant provisions in the *Radiocommunication Act* and the *Radiocommunication Regulations*. As a result, *the Minister has the power to amend the terms and conditions of the licence* and to suspend or revoke a radio authorization (paragraphs 5(1) and 5(2) of the *Radiocommunication Act*).[322]

208. Likewise, the COLs of AWS-1 spectrum licences, including those issued to Wind Mobile, state that "*[t]he Minister of Industry retains the discretion to amend these terms and conditions of licence at any time*."[323]

209. Wind Mobile and its investors were therefore aware that Industry Canada's policies on spectrum management and the COLs of AWS-1 spectrum licences were subject to change.

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[320] **C-057**, Radiocommunication Act, s. 5(1)(b).

[321] **C-003**, Licensing Circular, Issue 2, p. 3 ("It should be noted that the spectrum licence is subject to relevant provisions in the Radiocommunication Act and the Radiocommunication Regulations. For example, the Minister continues to have the power to amend the terms and conditions of spectrum licences (paragraph 5(1)(b) of the Radiocommunication Act). Such powers would be exercised on an exceptional basis and only after consultation."). See also **C-206**, Licensing Circular, Issue 3, p. 3.

[322] **C-005**, AWS-1 Licensing Framework, p. 5 (emphasis added).

[323] **C-010**, Letter from Michael D. Connolly, Industry Canada to Kenneth Campbell, Globalive *attaching* Wind Mobile Licences (Mar. 13, 2009) (see paragraph 16 of the licence conditions) (emphasis added). *See also* **RWS-Hill**, Annex A: Affidavit of Peter Hill (Sworn October 25, 2013), ¶ 31.

VII. Canada Adopted the Transfer Framework to Prevent Against Undue Spectrum Concentration in Pursuit of its Long-Standing Policy Objective of Promoting Competition

210. As noted by Iain Stewart, former Assistant Deputy Minister of Industry Canada's Strategic Policy Sector, "Industry Canada has a long-standing policy objective of promoting competition in the wireless telecommunications sector."[324] Competition in this sector contributes to the policy objective of the Canadian Spectrum Management Program adopted in 2007,[325] which is "[t]o maximize the economic and social benefits that Canadians derive from the use of the radio frequency spectrum resource."[326]

211. One of the important determinants of competition in the wireless telecommunications market is spectrum concentration, or "the share of total spectrum held or controlled by one or several service providers."[327] Industry Canada adopted the Transfer Framework to prevent against undue spectrum concentration and the detrimental effects it could have on competition in the Canadian wireless telecommunications market.

A. The Effect of Spectrum Concentration on Competition in the Wireless Market

212. In his witness statement, Mr. Stewart explains the link between spectrum concentration and competition. Mr. Stewart is well-placed to speak to Canada's concerns about the effects of spectrum concentration on competition since he led Industry Canada's Strategic Policy Sector, which develops advice to the Minister on telecommunications policy considerations, options and recommendations, based on research and analysis of the market and the regulatory environment.

213. Spectrum can become concentrated because it is a finite resource.[328] Wireless service providers need access to spectrum in order to provide commercial mobile services.[329] In other

[324] **RWS-Stewart**, ¶ 10.

[325] **RWS-Stewart**, ¶ 11.

[326] **C-052**, Spectrum Policy Framework, p. 8.

[327] **RWS-Stewart**, ¶ 16.

[328] **RWS-Stewart**, ¶ 18. *See also* **RWS-Hill**, ¶ 10, Annex A, ¶ 21.

[329] **RWS-Stewart**, ¶ 17.

words, "[a]ccess to sufficient spectrum is a precondition to the provision of wireless services."[330] The more spectrum a wireless service provider has access to, the more services they can provide and the more customers they can serve, and the more market share they can obtain at the expense of their competitors.[331]

214. However, even if a wireless service provider does not use all of the spectrum that it acquires licences for, it prevents its competitors from acquiring more market share by denying them access to an essential factor of production.[332] As such, there is an incentive for wireless service providers to acquire access to as much spectrum as possible, if only to keep competitors out of the market.

215. Mr. Stewart explains that "[a]s spectrum becomes more concentrated in the hands of fewer companies, competition in the wireless market diminishes, all other things being equal."[333] The negative effects of increased spectrum concentration on competition can include higher prices, less consumer choice and reduced innovation.[334] Higher levels of spectrum concentration also increase the potential for anti-competitive behaviour by dominant wireless service providers, which can threaten the viability of non-dominant wireless service providers who risk not having access to sufficient spectrum in order to remain viable in the long-run, and cannot take advantage of the cost benefits associated with economies of scale.[335]

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[330] **C-152**, Industry Canada, Consultation on Considerations Relating to Transfers, Divisions and Subordinate Licensing of Spectrum Licences (Mar. 2013), ¶ 9 ("Transfer Framework Consultation Paper").

[331] **RWS-Stewart**, ¶ 17.

[332] **RWS-Stewart**, ¶ 18.

[333] **RWS-Stewart**, ¶ 19. *See also* **C-152**, Transfer Framework Consultation Paper, ¶ 9 ("High concentration of spectrum licences among a small number of wireless service providers can be detrimental to competition.").

[334] **RWS-Stewart**, ¶ 19.

[335] **RWS-Stewart**, ¶ 18. The more wireless service providers have access to sufficient spectrum to remain viable over the long-run, the more competitive the market. Thus, an OECD study on Wireless Market Structures and Network Sharing found that "where there are a larger number of [mobile network operators] there is a higher likelihood of more competitive and innovative services being introduced and maintained." This study concluded that "a larger number of MNOs is often the source for innovative offers that challenge existing market wisdom and practices and a driver for the entire market to become more competitive. As a result all operators… are encouraged to improve their offers in terms of price, services offered and quality of the offer." **R-081**, OECD, "Wireless Market Structures and Network Sharing", *OECD Digital Economy Papers*, No. 243 (Paris: OECD, 2014), p. 5.

216. Over the years, Canada has taken different measures to promote competition in the wireless telecommunications market by seeking to prevent spectrum concentration. These measures have focused primarily on facilitating new entry into the market and developing conditions in which New Entrants can compete sustainably with Incumbents.

217. Canada's efforts in this regard date back to at least 1995, with the PCS licensing process through which Industry Canada introduced a spectrum cap and issued spectrum licences to the early New Entrants Microcell and Clearnet.[336] Canada renewed its efforts to promote competition through measures to prevent spectrum concentration in the context of the 2008 AWS-1 Auction, with the set-aside of spectrum for New Entrants and mandatory roaming and tower-sharing, as discussed above.[337] After the 2008 AWS-1 Auction, Canada continued its efforts to prevent spectrum concentration through additional measures to develop conditions that would promote the ability of New Entrants to compete sustainably in the market. These measures included relaxing the Canadian ownership and control requirements and establishing spectrum caps for the 700 MHz and 2500 MHz spectrum auctions.[338]

218. All of these measures were aimed at promoting competition by reducing spectrum concentration and encouraging additional competitors beyond the three national Incumbents. The Transfer Framework was thus not the first time that Canada adopted measures to prevent against undue spectrum concentration.

B. Industry Canada's Concerns About Spectrum Concentration After the Five-Year Moratorium

219. Industry Canada's concerns about the potential for undue spectrum concentration after the five-year moratorium are set out in contemporaneous documents such as the consultation paper on the Transfer Framework and briefing notes prepared for the Deputy Minister and Assistant Deputy Minister of Industry, and in the witness statement of Mr. Stewart. Mr. Stewart was Assistant Deputy Minister from May 2012 to June 2014, and in that capacity was responsible for

[336] **RWS-Stewart**, ¶ 23. *See also supra*, ¶¶ 51-52.

[337] **RWS-Stewart**, ¶ 26-29. *See also supra*, ¶¶ 58-59.

[338] **RWS-Stewart**, ¶ 30; **C-123**, Industry Canada, "Speech: Speaking Points – The Honourable Christian Paradis, PC, MP Minister of Industry, Telecommunications Decisions" (Mar. 14, 2012), pp. 1-2. *See also supra*, ¶¶ 67-80.

Industry Canada's policy advice to the Minister, leading up to the adoption of the Transfer Framework, about how to sustain competition in the wireless telecommunications sector.[339]

220. Mr. Stewart explains that Industry Canada's "[c]oncerns about losing the benefits of the competition that had been introduced in the market became more prominent towards the end of 2012."[340] While the moratorium had prevented undue spectrum concentration for the first five years of the AWS-1 set-aside spectrum licence terms, these restrictions would begin to expire in late 2013.[341] Industry Canada's measures to promote sustained competition in the wireless telecommunications sector "had yielded some positive results" since 2008 but "the progress achieved was fragile."[342]

221. New Entrants had "spurred competition" by increasing consumer choice, lowering prices, and giving a boost to investment.[343] New Entrants "offered new service options, including no contract, unlimited data, unlimited calling, lower international roaming rates and tab-based device subsidies, which had prompted the Incumbents to do the same."[344] Although they only operated in certain regions, New Entrants influenced prices nationally and had "lowered prices, by introducing lower-priced plans which the Incumbents had responded to with new offerings."[345] As Mr. Stewart notes, studies from expert consultants Wall Communications Inc.

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[339] **RWS-Stewart**, ¶ 6.

[340] **RWS-Stewart**, ¶ 31.

[341] **RWS-Stewart**, ¶ 32; **R-086**, Memorandum from John Knubley, Industry Canada to Minister of Industry, *attaching* Annex A: Main Holders of AWS Set-Aside Spectrum (Dec. 27, 2012), p. 1 and Annex A ("Memorandum of December 27, 2012").

[342] **RWS-Stewart**, ¶ 31.

[343] **RWS-Stewart**, ¶¶ 31, 36-38.

[344] **RWS-Stewart**, ¶ 36. *See also* **R-091**, Memorandum from Marta Morgan, Industry Canada to Minister of Industry, *attaching* Annex A: Options for Sustaining Wireless Competition; Annex B: Is It Worth Having a Fourth Wireless Player?, Annex C: Viability of a 4th Player in the Canadian Wireless Market, Annex D: Impact of ICA on a Fourth Player, and Annex E: Proposed Timeline – Telecommunications Decisions relating to Competition (May 9, 2013), Annex B, p. 2 ("Memorandum of May 9, 2013").

[345] **RWS-Stewart**, ¶ 37. *See also* **R-084**, Memorandum from Iain Stewart, Industry Canada to Deputy Minister, Industry Canada, attaching Annex A: Wireless Telecommunications Sector Update and Implications, Annex B: Wireless Telecommunications Sector: Status Update and Implications, and Annex C: Wireless Market Metrics, Annex A, p. 2 and Annex B, pp. 3, 6 ("Memorandum of December 7, 2012"); **R-088**, Memorandum of Marta Morgan, Industry Canada to Minister of Industry, attaching Annex A: Wireless Telecommunications Sector: Update and Implications English and French versions), and Annex B: Approach to Mobile Spectrum Licence Transfers (English and French versions), Annex A, p. 1. ("Memorandum of January 4, 2013").

and Convergence Research Group[346] found that wireless prices had fallen between 2008 and 2012 and New Entrants were offering consumers lower-priced plans.[347] New Entrants had also made significant investments between 2008 and 2012,[348] giving a boost to overall investment in the wireless telecommunications market.[349]

222. These benefits to Canadian consumers were at risk, however, as "the sustainability of this new competition was in question", with mixed prospects across the country.[350] On the one hand, the prospects for continued competition in Quebec, Eastern Canada, Saskatchewan and Manitoba were promising.[351] Vidéotron and Eastlink appeared committed to the wireless markets in Québec and Eastern Canada respectively, and benefited from internal financing, existing

[346] "Wall Communications Inc. is an economics consulting firm specializing in telecommunications (wireline, wireless, and satellite), broadcasting, copyright and intellectual property, film and television production, and new media. The firm also conducts research in other fields involving competition issues." **R-226**, Wall Communications Inc., website excerpt. "Home" (undated), available at: http://www.wallcom.ca/. "Convergence… provide[s] strategy consulting in the Internet, Content, Telecom and Technology space. [It works] at a senior level for cable, satellite and telcos, online and traditional content companies, equipment, consumer electronics and software companies, utilities, advertising agencies, institutional investors, start-ups, industry organizations and government. **R-227**, The Convergence Research Group Ltd., website excerpt, "About Us" (undated), available at: http://www.convergenceonline.com/index.php.

[347] "According to a report by Wall Communications Inc., Canadian average monthly prices in 2012 were 16 per cent lower for mid-volume plans and 12 per cent lower for high-volume plans than in 2008 (although the low-volume plans had increased by five per cent). The wireless service rates charged by the new entrants in major urban markets were on average between 23 and 37 per cent lower than those charged by the incumbents. […] Another study by Convergence Consulting Group found that new entrant prices were as much as 50 to 80 per cent lower than those of incumbents." **RWS-Stewart**, fn. 38, *citing* **R-093**, Wall Communications Inc., *Price Comparisons of Wireline, Wireless and Internet Services in Canada and with Foreign Jurisdictions: 2012 Update* (Apr. 6, 2012), pp. 17-18; **R-094**, The Convergence Consulting Group Ltd., *Canadian Wireless: Assessing the Impact of New Entrants* (Toronto: The Convergence Consulting Group Limited, 2012), p. 8.

[348] "Between 2008 and 2012, the New Entrants had collectively invested over C$ 4 billion in capital, spectrum and operating costs." **RWS-Stewart**, ¶ 38. *See also* **R-084**, Memorandum of December 7, 2012, Annex A, p. 2 and Annex B, p. 5; **R-091**, Memorandum of May 9, 2013, Annex B, p. 2.

[349] "[I]nvestment in the wireless telecommunications market […] was expected to be over C$ 2.7 billion in 2012 (up 40 per cent from 2008)." **RWS-Stewart**, ¶ 38. *See also* **R-084**, Memorandum of December 7, 2012, Annex A, p. 2 and Annex B, p. 5; **R-088**, Memorandum of January 4, 2013, Annex A, p. 1; **R-091**, Memorandum of May 9, 2013, Annex B, p. 2.

[350] **RWS-Stewart**, ¶ 39.

[351] **RWS-Stewart**, ¶ 40; **R-084**, Memorandum of December 7, 2012, Annex A, pp. 2-3 and Annex B, p. 7; **R-088**, Memorandum of January 4, 2013, Annex A, p. 2; **R-089**, Industry Canada, Presentation, "Wireless Telecommunications Market and Approach to Spectrum Licence Transfers" (Jan. 14, 2013), p. 6; **R-091**, Memorandum of May 9, 2013, Annex A, p. 1 and Annex C, p. 1.

infrastructure and an established subscriber base.[352] The regional incumbents MTS Inc. ("MTS") and Saskatchewan Telecommunications Holding Corporation ("SaskTel") were already dominant in Manitoba and Saskatchewan respectively, and were well-positioned to compete with the Incumbents in those areas.[353] As Mr. Stewart notes, "[a]ll of these providers were regional operators which had a presence in Canada's telecommunications market before entering the wireless sector."[354]

223. On the other hand, the prospects for continued competition against the Incumbents were much weaker in Ontario, Alberta and British Columbia.[355] Most of the New Entrants in these markets (Public Mobile, Mobilicity and Wind Mobile) were wireless-only operations, meaning that they had no other business lines to rely on for financing and had to rely on external investors for the extensive capital investment required to build out their networks.[356] These providers were not yet profitable and were struggling as their growth and average revenue per customer had fallen short of their business plans.[357]

224. The only other New Entrant in Ontario, Alberta and British Columbia was Shaw, which had informed Industry Canada in October 2012 that it had entered into an option agreement to transfer its set-aside AWS-1 spectrum licences to Rogers after the expiry of the moratorium in

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[352] **RWS-Stewart**, ¶ 40; **R-084**, Memorandum of December 7, 2012, Annex A, pp. 2-3 and Annex B, p. 7; **R-088**, Memorandum of January 4, 2013, Annex A, p. 2; **R-089**, Industry Canada, Presentation, "Wireless Telecommunications Market and Approach to Spectrum Licence Transfers" (Jan. 14, 2013), p. 6; **R-091**, Memorandum of May 9, 2013, Annex A, p. 1 and Annex C, p. 1.

[353] **RWS-Stewart**, ¶ 40; **R-084**, Memorandum of December 7, 2012, Annex A, p. 3 and Annex B, p. 7; **R-088**, Memorandum of January 4, 2013, Annex A, p. 2; **R-089**, Industry Canada, Presentation, "Wireless Telecommunications Market and Approach to Spectrum Licence Transfers" (Jan. 14, 2013), p. 6; **R-091**, Memorandum of May 9, 2013, Annex A, p. 1 and Annex C, p. 1.

[354] **RWS-Stewart**, ¶ 40.

[355] **RWS-Stewart**, ¶ 41; **R-084**, Memorandum of December 7, 2012, Annex A p. 3 and Annex B, p. 8; **R-088**, Memorandum of January 4, 2013, Annex A, p. 2; **R-089**, Industry Canada, Presentation, "Wireless Telecommunications Market and Approach to Spectrum Licence Transfers" (Jan. 14, 2013), p. 6; **R-091**, Memorandum of May 9, 2013, Annex A, pp. 1-2 and Annex C, pp. 1-2.

[356] **RWS-Stewart**, ¶ 42; **R-084**, Memorandum of December 7, 2012, Annex A, p. 3 and Annex B, p. 8; **R-088**, Memorandum of January 4, 2013, Annex A, p. 2; **R-089**, Industry Canada, Presentation, "Wireless Telecommunications Market and Approach to Spectrum Licence Transfers", p. 6 (Jan. 14, 2013); **R-091**, Memorandum of May 9, 2013, Annex A, pp. 1-2 and Annex C, pp. 1-2.

[357] **RWS-Stewart**, ¶ 42; **R-084**, Memorandum of December 7, 2012, Annex A, p. 3; **R-088**, Memorandum of January 4, 2013, Annex A, p. 2; **R-091**, Memorandum of May 9, 2013, Annex A, pp. 1-2 and Annex C, pp. 1-2.

2014, subject to regulatory approval.[358] A transfer of Shaw's spectrum licences to Rogers would reduce the pool of spectrum available to New Entrants in these markets by over half.[359] As Mr. Stewart notes, "the Incumbents already controlled about 90 per cent of all spectrum in British Columbia and Alberta, and this would rise to 95 per cent if Shaw's licences were transferred to Rogers."[360]

225. Unless investors consolidated the wireless-only New Entrants, it seemed unlikely that they would be able to reach profitability.[361] However, the New Entrants had made little progress in their attempts to consolidate.[362] In this context, absent a consolidation, it was unclear how much longer investors would continue to fund the operations of the wireless-only New Entrants or participate in the upcoming 700 and 2500 MHz auctions.[363]

226. The continued viability of the New Entrants depended on access to sufficient spectrum.[364] As Mr. Stewart states, "the ability of a company to provide wireless telecommunications services to customers depends first and foremost on the amount of spectrum that it holds in any given service area."[365] Technology and consumer demands had changed rapidly since the 2008 AWS-1 Auction, with widespread adoption of iPhone and Android and data-consuming applications,

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[358] **RWS-Stewart**, ¶ 41; **R-087**, E-mail from Anne Rimmer to Brian Chow (Sep. 17, 2014), *attaching* Letter from Brad Shaw, Shaw Communications Inc. to Nadir H. Mohamed, Rogers Communications Inc. (Oct. 25, 2012); [redacted] *See also* **R-084**, Memorandum of December 7, 2012, Annex A, p. 3 and Annex B, p. 8; **R-086**, Memorandum of December 27, 2012, p. 1.

[359] **RWS-Stewart**, ¶ 41; **R-084**, Memorandum of December 7, 2012, Annex A, p. 5 and Annex B, p. 10; **R-089**, Industry Canada, Presentation, "Wireless Telecommunications Market and Approach to Spectrum Licence Transfers" (Jan. 14, 2013), p. 11.

[360] **RWS-Stewart**, ¶ 41; **R-084**, Memorandum of December 7, 2012, Annex A, p. 5 and Annex B, p. 10; **R-089**, Industry Canada, Presentation, "Wireless Telecommunications Market and Approach to Spectrum Licence Transfers" (Jan. 14, 2013), p.11.

[361] **RWS-Stewart**, ¶¶ 31, 43. *See also* **R-084**, Memorandum of December 7, 2012, Annex A, p. 3; **R-088**, Memorandum of January 4, 2013, Annex A, p. 2; **R-089**, Industry Canada, Presentation, "Wireless Telecommunications Market and Approach to Spectrum Licence Transfers", p. 6 (Jan. 14, 2013); **R-091**, Memorandum of May 9, 2013, Annex A, pp. 1-2 and Annex C, pp. 1-2.

[362] "Wind Mobile, which had the most spectrum licence holdings of the wireless-only New Entrants, specifically reported to Industry Canada that it had been 'unsuccessful in striking a deal with other new entrants.'" **RWS-Stewart**, ¶ 43. *See also* **R-084**, Memorandum of December 7, 2012, Annex A, p. 3.

[363] **RWS-Stewart**, ¶ 44.

[364] **RWS-Stewart**, ¶¶ 45-46.

[365] **RWS-Stewart**, ¶ 17.

resulting in an increased demand for spectrum.[366] If the New Entrants were to succeed, they needed enough spectrum to fulfil consumers' ever-increasing demands for data.[367]

227. However, the wireless-only New Entrants had very shallow spectrum holdings: in most markets they only had one block of AWS-1 spectrum, the minimum required to provide services.[368]

228. Industry Canada had indicated that it would be making more spectrum available in the upcoming 700 MHz auction, and that there would be spectrum caps to give New Entrants the opportunity to access prime spectrum in both the 700 MHz and 2500 MHz auctions.[369] However, it was not clear whether the New Entrants would bid for this spectrum.[370] After Shaw and Rogers announced their option agreement in January 2013,[371] Industry Canada became concerned that Incumbents would attempt to acquire the remaining AWS-1 set-aside spectrum licences, which would undermine the ability of the remaining New Entrants to raise capital.[372] As Industry Canada advised the Minister:

> [I]ncumbent purchases of the set-aside AWS spectrum […] would risk that a wireless-only new entrant would have insufficient spectrum to present a sound business plan to attract further investment to continue operations and consider participating in upcoming auctions. While spectrum in itself is not a guarantee for new entrant success, it is a critical prerequisite.[373]

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[366] **RWS-Stewart**, ¶¶ 46-47.

[367] **RWS-Stewart**, ¶ 45.

[368] **RWS-Stewart**, ¶ 48; **R-084**, Memorandum of December 7, 2012, Annex A, p. 4 and Annex B, p. 9; **R-088**, Memorandum of January 4, 2013, Annex A, p. 2.

[369] *See* **RWS-Stewart**, ¶ 50; **C-122**, Industry Canada, Policy and Technical Framework, Mobile Broadband Services (MBS) – 700 MHz Band, Broadband Radio Services (BRS) – 2500 MHZ Band (SMSE-002-12) (Mar. 2012), ¶ 35.

[370] **RWS-Stewart**, ¶ 50; C-**122**, Industry Canada, Policy and Technical Framework, Mobile Broadband Services (MBS) – 700 MHz Band, Broadband Radio Services (BRS) – 2500 MHZ Band (SMSE-002-12) (Mar. 2012), ¶ 35.

[371] **C-136**, Shaw Communications Inc., press release, "Shaw Announces Agreement With Rogers for Purchase and Sale of Assets" (Jan. 14, 2013).

[372] **RWS-Stewart**, ¶ 52.

[373] **R-088**, Memorandum of January 4, 2013, Annex A, p. 2.

229. This concern increased in May 2013 when it was announced that TELUS had offered to acquire Mobilicity, subject to regulatory approvals.[374]

230. In this context, Mr. Stewart explains that "[t]here was therefore a genuine and widespread concern that within a year or so, many of the existing New Entrants would no longer be present in the market and spectrum would once again be concentrated amongst the three Incumbents."[375] The Government wanted to ensure that the competitive gains brought by the New Entrants were not lost again as had been the case in the early 2000s.[376]

C. The Transfer Framework Was Adopted to Prevent Undue Spectrum Concentration

231. To address the concerns over the potential for undue spectrum concentration after the expiry of the five-year moratorium, the Minister decided on an approach that would consider the effect of spectrum licence transfers on spectrum concentration, on a case-by-case basis.[377] After a consultation process on the proposed approach, the Transfer Framework was issued in June 2013. It clarified that when reviewing a spectrum licence transfer request, Industry Canada would consider how that transfer would affect spectrum concentration levels, with reference to specific factors.

1. The Transfer Framework Clarified How the Minister's Discretion over Spectrum Licence Transfers would be Exercised in order to Prevent Undue Spectrum Concentration

232. The purpose of the Transfer Framework was "to provide guidance to licensees as to how transfers of spectrum licences will be reviewed, as well as to introduce additional conditions of licence regarding the transfer of control of spectrum licences, all with an eye to managing the spectrum resource for the benefit of Canadians as per the [government's] policy objectives," which were "to maximize the economic and social benefits that Canadians derive from the use of the radio frequency spectrum resource, including the efficiency and competitiveness of the

[374] **RWS-Stewart**, ¶ 68. *See also* **C-180**, TELUS Communications Company, press release, "TELUS agrees to acquire Mobilicity" (May 16, 2013).

[375] **RWS-Stewart**, ¶ 51.

[376] **RWS-Stewart**, ¶ 51.

[377] **RWS-Stewart**, ¶ 63.

Canadian telecommunications industry, and the availability and quality of services to consumers."[378]

233. Mr. Hill led the Branch of Industry Canada that was responsible for developing the Transfer Framework and managed the public consultation process undertaken before it was adopted.[379] He explains that the guidance provided by the Transfer Framework was welcomed by some wireless operators.[380] For example, Public Mobile was of the view that "[c]larifying the rules around spectrum licence transfers [was] not just an academic exercise"[381] and that there was "a lack of transparency and certainty as to how transfers of spectrum licence [would] be treated."[382] As Mr. Hill indicates, Industry Canada was aiming "to provide greater transparency and certainty to licensees and to the public with respect to the transfer process and the substantive criteria and considerations that would be applied."[383]

234. The Transfer Framework informed licensees that, in reviewing all requests for commercial mobile spectrum licence transfers, "Industry Canada will analyze, among other factors, the change in spectrum concentration levels (i.e. the amount of spectrum controlled by the Applicants in comparison to that held by all licensees) that would result from the Licence Transfer."[384] It further informed licensees that "Industry Canada will examine the ability of the Applicants and other existing and future competitors to provide services, given the post-transfer concentration of commercial mobile spectrum in the affected Licence area(s)."[385]

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[378] **C-031**, Transfer Framework, ¶¶ 7-8.

[379] **RWS-Hill**, ¶¶ 5, 118, 121.

[380] **RWS-Hill**, ¶ 120.

[381] **R-145**, Public Mobile, Consultation on Considerations Relating to Transfers, Divisions and Subordinate Licensing of Spectrum Licences (May 3, 2013), ¶ 7 ("Public Mobile Comments of May 3, 2013").

[382] **R-145**, Public Mobile Comments of May 3, 2013, ¶ 7.

[383] **RWS-Hill**, ¶ 120.

[384] **C-031**, Transfer Framework, ¶ 39.

[385] **C-031**, Transfer Framework, ¶ 39.

235. Industry Canada included a detailed list of factors that it would take into account as part of this determination. These factors included:

(a) the current licence holdings of the Applicants and their Affiliates in the licensed area;

(b) the overall distribution of licence holdings in the licensed spectrum band and commercial mobile spectrum bands in the licensed area;

(c) the current and/or prospective services to be provided and the technologies available using the licensed spectrum band;

(d) the availability of alternative spectrum that has similar properties to the licensed spectrum band;

(e) the relative utility (e.g. above and below 1GHz) and substitutability of the licensed spectrum and other commercial mobile spectrum bands in the licensed area;

(f) the degree to which the Applicants and their Affiliates have deployed networks and the capacity of those networks;

(g) the characteristics of the region, including urban/rural status, population levels and density, or other factors that impact spectrum capacity or congestion; and

(h) any other factors relevant to the policy objectives outlined in this Framework that may arise from the Licence Transfer.[386]

236. As Mr. Hill explains, "[t]he Transfer Framework clarifies and makes explicit that the rationale for the Minister's review was spectrum concentration."[387] In this regard, the Transfer Framework stated:

> Spectrum concentration should be considered on a number of different levels. Overall spectrum concentration across commercial mobile spectrum bands is key to assessing the availability of spectrum for competitors. In-band concentration should also be considered, as each band can possess unique characteristics that are not or cannot be replicated in other bands. Thus, spectrum concentration within the band may influence competitors' ability to offer comparable services.
>
> Assessment of spectrum concentration should take into account the access to spectrum through subordinate licensing and spectrum sharing agreements, as the secondary licensee is benefiting from additional spectrum to deploy.

[386] *See* **C-031**, Transfer Framework, ¶¶ 39-40.

[387] **RWS-Hill**, Annex A: Affidavit of Peter Hill (Sworn October 25, 2013), ¶ 65.

> The impact of a given level of spectrum concentration may differ from region to region, due to factors that impact spectrum scarcity (e.g. population density). Additionally, spectrum holdings among operators vary widely between regions. As such, an assessment of the impact of a Licence Transfer and the resulting spectrum concentration may vary across different regions.[388]

2. The Transfer Framework Was Adopted Following a Public Consultation in Which Wind Mobile Participated

237. Before adopting the Transfer Framework, the Minister instructed Industry Canada to undertake a public consultation on its proposal to set out the criteria and process that Industry Canada would use to review spectrum licence transfer applications.[389] This consultation began on March 7, 2013, with the publication of a document entitled *Consultation on Considerations Relating to Transfers, Divisions and Subordinate Licensing of Spectrum Licences* (DGSO-002-13) (the "Transfer Framework Consultation Paper").[390]

> In the Consultation Paper, Industry Canada provided notice of its intention to amend the COLs of commercial mobile spectrum licences and the Licensing Circular "in order to indicate the specific criteria considered and process used when spectrum licence transfer applications are reviewed."[391]

238. The purpose of the consultation was "to elaborate and seek views on the approach used by Industry Canada, which will be applied with respect to all spectrum licences, when considering licensees' requests to transfer or divide a spectrum licence, or enter into a subordinate licensing arrangement."[392]

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[388] **C-031**, Transfer Framework, p. 7.

[389] *See* **RWS-Hill**, ¶ 116; **RWS-Stewart**, ¶¶ 63-64; **R-143**, Memorandum from Marta Morgan, Industry Canada to Minister of Industry (Mar. 5, 2013), pp. 3, 7.

[390] **C-152**, Transfer Framework Consultation Paper. *See also* **R-144**, Industry Canada, Notice No. DGSO-002-13 – Consultation on considerations relating to transfers, divisions, and subordinate licensing of spectrum licences, C. Gaz. I, vol. 147, no. 11, p. 511 ("Notice No. DGSO-002-13").

[391] **C-152**, Transfer Framework Consultation Paper, ¶¶ 12-13.

[392] **C-152**, Transfer Framework Consultation Paper, ¶ 1. *See also* **R-144**, Notice No. DGSO-002-13 — Consultation on considerations relating to transfers, divisions, and subordinate licensing of spectrum licences (Mar. 7, 2013), C. Gaz. I, vol. 147, no. 11, p. 511 ("Notice No. DGSO-002-13").

239. The Transfer Framework Consultation Paper set out Industry Canada's proposed approach in this regard.[393] Industry Canada invited comments from the public and stakeholders on the proposed criteria and considerations for review of spectrum licence transfer applications,[394] and on a number of related issues.[395]

240. All comments received by Industry Canada were published online[396] and interested parties had the opportunity to reply to comments submitted by other parties.[397]

241. Submissions were addressed to Mr. Hill, as the Director General of the Spectrum Management Operations Branch.[398] Sixteen submissions and reply submissions were received, primarily from wireless telecommunications providers including the three national Incumbents and New Entrants including Wind Mobile (GTH did not provide any comments separate from those of Wind Mobile).[399] Among the submissions from wireless telecommunications providers, "[s]upport for the proposed Transfer Framework was […] roughly evenly distributed across Incumbents and New Entrants."[400] Representatives of Wind Mobile had informally indicated to Industry Canada officials during the consultation that "they would support extension of AWS

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[393] **C-152**, Transfer Framework Consultation Paper, ¶¶ 16-17. As Mr. Hill States, "[t]he thrust of it was that Industry Canada would conduct a preliminary review of a spectrum licence transfer request," taking into account the amount of spectrum involved in the transfer and how it would affect levels of spectrum concentration and distribution among licensees in the region to determine whether a detailed review was required, "and then conduct a detailed review in certain cases." **RWS-Hill**, ¶ 119, Annex A: Affidavit of Peter Hill (Sworn October 25, 2013), ¶¶ 45-51; **C-152**, Transfer Framework Consultation Paper, ¶¶ 15-16.

[394] **C-152**, Transfer Framework Consultation Paper, p. 5.

[395] For example, Industry Canada sought comments on "[w]hether there is a threshold in the form of concentration or a measure of MHz-pop that Industry Canada should apply in deciding whether to conduct a detailed review, or some other type of threshold, screen, or cap that should be used to decide if a detailed review is required." Industry Canada also sought comments on its proposed timelines for reviewing spectrum licences transfer requests. *See* **C-152**, Transfer Framework Consultation Paper, pp. 5-6.

[396] **C-031**, Transfer Framework, ¶ 2 ("All comments and reply comments received in response to the consultation document are available on Industry Canada's website at: http://www.ic.gc.ca/eic/site/smt-gst nsf/eng/h_sf10568 html."). *See also* **R-228**, Industry Canada, website excerpt, "Comments Received on Gazette Notice DGSO-002-13" (last modified Apr. 8, 2013), available at: http://www.ic.gc.ca/eic/site/smt-gst nsf/eng/sf10615 html; **R-229**, Industry Canada, website excerpt, "Reply Comments on Gazette Notice DGSO-002-13" (last modified May 8, 2013), available at: http://www.ic.gc.ca/eic/site/smt-gst nsf/eng/sf10646 html.

[397] **C-152**, Transfer Framework Consultation Paper, ¶ 32; **R-144**, Notice No. DGSO-002-13, p. 511.

[398] **RWS-Hill**, ¶ 121.

[399] **RWS-Hill**, ¶ 121.

[400] **RWS-Hill**, ¶ 121.

sale restrictions or other measures that limit the ability to transfer set-aside spectrum to incumbents for an additional five years."[401]

242. Wind Mobile also formally submitted comments and reply comments in the consultation process.[402] In response to Industry Canada's proposed criteria for reviewing spectrum licence transfers, Wind Mobile advocated a completely different approach to licence transfers, suggesting that Industry Canada give a right of first refusal to the existing 'fourth player', if any, in the relevant market.[403] In other words, Wind Mobile had no issue with changes to the COLs for transfers as long as they were to its advantage.

243. In its final decision adopting the Transfer Framework, Industry Canada provided a summary of the comments received and included a discussion of the rationale for its decision on each of the issues.[404] Industry Canada acknowledged Wind Mobile's suggestion but did not retain it. Having considered all the comments, Industry Canada proceeded to finalize and publicly release the Transfer Framework with the Minister's approval on June 28, 2013.[405]

244. As contemplated in the Transfer Framework Consultation Paper, the Licensing Circular (CPC-2-1-23) and COLs of commercial mobile spectrum licences were amended to incorporate the elements of the Transfer Framework discussed above.[406]

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[401] **RWS**-Stewart, ¶ 62; **R-084**, Memorandum of December 7, 2012, Annex A, p. 7.

[402] **R-146**, Globalive Wireless Management Corp., "Canada Gazette Notice Reference No. DGSO-002-13 Consultation on Considerations Relating to Transfers, Divisions, and Subordinate Licensing of Spectrum Licences, Published in the Canada Gazette Part 1, Dated 16 March 2013: Comments of Globalive Wireless Management Corp. ("WIND")" (Apr. 3, 2013) ("Wind Comments of April 3, 2013"); **R-152**, Globalive Wireless Management Corp., "Consultation on Considerations Relating to Transfers, Divisions, and Subordinate Licensing of Spectrum Licences: Comments of Globalive Wireless Management Corp. ("WIND")" (May 3, 2013), p. 3.

[403] **RWS-Hill**, fn. 139. *See also* **R-146**, Wind Comments of April 3, 2013, ¶ 6 ("Today, transfers of existing spectrum owned by operators should not be restricted except for: a) first, checking the presence of a 'fourth' competing operator (including MVNOs) in any relevant area; and b) second, presuming satisfaction of the first criteria, requiring that the transferor of the spectrum must first give non-Incumbents a right to purchase such spectrum, provided such right of offer be limited in time and subject to evidence of credentials of the bidding transferee;").

[404] **C-031**, Transfer Framework, ¶¶ 20-22, 27-31, 48-53, 64-68, 81-82, 90.

[405] **RWS-Hill**, ¶ 127; **R-153**, Memorandum from John Knubley, Industry Canada to Minister of Industry *attaching* Annex A: Transfer Framework (English and French versions) and Annex B: Summary of Processes for Different Scenarios (Jun. 28, 2013).

[406] **RWS-Hill**, ¶¶ 131-132, Annex A: Affidavit of Peter Hill (Sworn October 25, 2013), ¶¶ 67-69.

3. Wind Mobile Publicly Supported Industry Canada's Decision to Adopt the Transfer Framework

245. After the Transfer Framework was adopted, Wind Mobile supported Industry Canada's decision to do so.

246. For example, the *Financial Post* reported that Wind Mobile's Chief Regulatory Officer, Simon Lockie "praised the government for providing proactive guidance on the considerations and time lines it would follow in making transfer decisions."[407] Mr. Lockie also gave a quote to the *Globe and Mail* stating that he was "confident that the review [of transfer requests] would be conducted expeditiously and then everyone can move forward knowing the landscape".[408]

247. Wind Mobile's CEO and Chairman, Anthony Lacavera, was also quoted in an article by the Canadian Press that was published in several media outlets indicating that Wind Mobile would benefit from continued access to spectrum as a result of the Transfer Framework:

> Wind Mobile chairman and CEO Anthony Lacavera said Wind has emerged as the fourth carrier in British Columbia, Alberta and Ontario. He owns a 35 per cent stake in the company he founded and would like to buy back the rest of it from Russia's VimpelCom.
>
> 'I think the policy framework makes it clear that there will be four carriers in every market, and that each carrier in a given market will have access to sufficient spectrum for LTE services,' Lacavera said.[409]

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[407] **R-230**, Christine Dobby, "Ottawa publishes rules on cellular spectrum transfers as industry prepares for shakeup", Financial Post (Jun. 28, 2013), p. 2, available at: http://business.financialpost.com/technology/ottawa-publishes-rules-on-cellular-spectrum-transfers-as-industry-prepares-for-shakeup.

[408] **R-231**, Rita Trichur, "Ottawa stresses competition, consumer prices in new wireless rules", Globe and Mail (Jun. 28, 2013), p. 4, available at: https://www.theglobeandmail.com/report-on-business/ottawa-stresses-competition-consumer-prices-in-new-wireless-rules/article12882059/.

[409] **R-232**, Canadian Press, "Bell Canada says new spectrum rules would favour foreign carriers" CTV News (Jun. 28, 2013), p. 2, available at: https://www.ctvnews.ca/business/bell-canada-says-new-spectrum-rules-would-favour-foreign-carriers-1.1345606; **R-233**, Canadian Press, "Bell Canada says new spectrum rules would favour foreign carriers" Huffington Post (Jun. 28, 2013), p. 2, available at: http://www huffingtonpost.ca/2013/06/28/bell-canada-says-new-spec_n_3516318.html; **R-234**, News Staff, "New spectrum rules would favour foreign carriers: Bell Canada" CityNews (Jun. 28, 2013), p. 3, available at: http://toronto.citynews.ca/2013/06/28/new-spectrum-rules-would-favour-foreign-carriers-bell-canada/.

D. The Transfer Framework Does Not Prohibit New Entrants from Transferring Spectrum Licences to Incumbents

248. The Claimant erroneously states that the Transfer Framework prohibited New Entrants from transferring their spectrum licences to an Incumbent[410] and that it specifically blocked Wind Mobile's attempt to do so.[411] However, Wind Mobile never applied to transfer its spectrum licences during the time of the Claimant's investment, so the Minister never refused any such request. Nor was the Transfer Framework a blanket prohibition or an extension of the five-year moratorium (an option that was considered and rejected by the Minister).[412]

249. As discussed above,[413] every licence transfer was, and remains, subject to approval by the Minister under the broad authority conferred pursuant to the *Radiocommunication Act*, through Industry Canada. The Transfer Framework explains how Industry Canada will decide whether or not it approves a particular application for a licence transfer. The Minister's discretion is to be exercised on a case-by-case basis applying the considerations outlined in the Transfer Framework.

250. As Mr. Hill explains, in his experience, the Transfer Framework was applied on a case-by-case basis "to each request to transfer a spectrum licence that Industry Canada received. Similarly, when the Department was asked for an informal preliminary assessment of a potential transfer, [the Branch] assessed each individual enquiry on its own merits."[414]

251. In the years following the adoption of the Transfer Framework, Industry Canada approved a number of licence transfers from New Entrants to Incumbents.[415] For example, on October 23,

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[410] *See for example*, Claimant's Memorial, ¶ 240 (arguing that "the purpose of this policy was to allow Canada to block transfers of spectrum to an Incumbent for any reason") and ¶ 304 (arguing that the "2013 Transfer Framework… made it clear that New Entrants would not be permitted to transfer their set-aside spectrum licenses (directly or indirectly) to the Incumbents.").

[411] Claimant's Memorial, ¶ 24(d).

[412] *See* **RWS-Stewart**, ¶¶ 58-63.

[413] *Supra*, ¶¶ 187-203.

[414] **RWS-Hill**, ¶ 132.

[415] Industry Canada publishes all of its decisions on spectrum licence transfer requests online. *See* **R-235**, Industry Canada, website excerpt, "Decisions on Licence Transfers of Commercial Mobile Spectrum" (last modified Dec. 15, 2017), available at: http://www.ic.gc.ca/eic/site/smt-gst.nsf/eng/sf10717.html.

2013, Industry Canada approved a request by Public Mobile (a New Entrant) and TELUS (an Incumbent) for the deemed transfer of four PCS licences in Ontario and Quebec from Public Mobile to TELUS.[416] Additionally, on June 24, 2015, Industry Canada approved a request by Rogers and Shaw to transfer the AWS-1 spectrum licences of Shaw (a New Entrant) to Rogers (an Incumbent).[417]

252. Had Wind Mobile made an application for a transfer of its licences to an Incumbent prior to its sale in 2014, that application would have been considered like all the other licence transfer applications, by applying the considerations set out in the Transfer Framework in light of the particular licence transfer proposed and the market circumstances at that time. However, since Wind Mobile never applied to transfer its spectrum licences when the Claimant had interests in Wind Mobile, it simply cannot be said that Canada "blocked" the Claimant or Wind Mobile from transferring the licences, as the Claimant asserts.[418]

VIII. When It Made Its Investment, GTH Knew That Even if Foreign Investment Restrictions in Telecommunications Were Liberalized, There Was No Guarantee It Could Acquire Control of Wind Mobile

253. GTH made its investment in Wind Mobile in 2008, as a non-controlling shareholder. The Canadian ownership and control requirements that applied at the time to telecommunications service providers did not allow GTH to control Wind Mobile. The Government never provided

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[416] **R-236**, Industry Canada, website excerpt, "Deemed Transfer of Spectrum Licences Held by Public Mobile Inc. to TELUS Communications Inc." (Oct. 23, 2013), available at: http://www.ic.gc.ca/eic/site/smt-gst nsf/eng/sf10716 html; **R-237**, Industry Canada, website excerpt, "Statement by Minister Moore on Canada's Spectrum Transfer Framework" (Oct. 23, 2013), available at: https://www.canada.ca/en/news/archive/2013/10/statement-minister-moore-canada-spectrum-transfer-framework html.

[417] **C-233**, Industry Canada, Transfer of Spectrum Licences Held by Shaw Communications Inc. to Rogers Communications Partnership (Jun. 24, 2015), Annex A; **C-234**, Industry Canada, Transfer of Spectrum Licences Held by Rogers Communications Partnership to WIND Mobile Corp.; Transfer of Spectrum Licences Held by Data and Audio-Visual Enterprises Wireless Inc. to Rogers Communications Partnership and to WIND Mobile Corp.; Transfer of a Subdivision of a Licence Held by WIND Mobile Corp. to Rogers Communications Partnership; Subordinate Licence Application for Spectrum Licences Held by WIND Mobile Corp. to Rogers Communications Partnership (Jun. 24, 2015), Annex A. *See also* **R-238**, Industry Canada, website excerpt, "AWS Spectrum Licences Transfer" (last modified Jun. 24, 2015), available at: https://www.canada.ca/en/news/archive/2015/06/aws-spectrum-licences-transfer.html.

[418] *See for example*, Claimant's Memorial, ¶ 19 (asserting that "Canada blocked GTH from exiting through a sale to an Incumbent notwithstanding that the Five-Year Rollout Period had expired") and ¶ 115 (asserting that the Transfer Framework "effectively prohibited GTH as a New Entrant from selling its set-aside spectrum licenses to an Incumbent even after the expiration of the Five-Year Rollout Period").

any guarantees that these requirements would change nor did it ever represent to GTH that it would be allowed to acquire control of Wind Mobile. The Government's decision several years later to liberalize the Canadian ownership and control requirements imposed on telecommunications service providers only meant that there were no longer any restrictions under the *Telecommunications Act* and the *Radiocommunication Regulations* that prohibited GTH from controlling Wind Mobile. The decision did not mean that GTH would necessarily be able to obtain voting control of Wind Mobile. GTH's acquisition of voting control of Wind Mobile remained subject to all applicable regulatory requirements, including approval under the ICA and the *Competition Act*.

A. Canada Liberalizes the Foreign Investment Restrictions in the Telecommunications Sector in June 2012

254. On March 14, 2012, then Minister, Mr. Christian Paradis, announced proposed changes to the Canadian ownership and control requirements imposed on Canadian telecommunications service providers.[419] Since 1993, the *Telecommunications Act* limits foreign investors from owning, directly or indirectly, more than 20% of the voting shares of a Canadian telecommunications service provider and 33.33% of the voting shares of the service provider's holding company. Moreover, at least 80% of the members of the board of directors of a Canadian telecommunications service provider must be Canadian and the service provider may not otherwise be controlled by non-Canadians. The proposed changes would exempt from the Canadian ownership and control requirements telecommunications service providers that hold less than a 10% share of the total Canadian telecommunications market based on revenue. These service providers would continue to be exempt from the Canadian ownership and control requirements even if their market share grows beyond this threshold provided the market share increase results from autonomous growth and not from mergers with or acquisitions of other service providers.

255. In 2008, the Competition Policy Review Panel ("CPRP") which had been set up by the Government to review Canada's competition and foreign investment policies had recommended

[419] **C-123**, Industry Canada, Speech: Speaking Points – The Honourable Christian Paradis, PC, MP Minister of Industry, Telecommunications Decisions (Mar. 14, 2012); **C-023**, Industry Canada, Harper Government Takes Action to Support Canadian Families (Mar. 14, 2012).

the liberalization of Canadian ownership and control requirements in the telecommunications sector in order to increase the competitiveness of the telecommunications industry and improve the productivity of Canadian telecommunications markets.[420] The TPRP, which the Minister established to provide advice on telecommunications policy, had earlier reached the same conclusion in its final report in 2006.[421] However, the Government was not prepared (either in 2006 or in 2008) to liberalize Canadian ownership and control requirements in the telecommunications sector. In fact, when Industry Canada provided clarification on the AWS Policy and Licensing Frameworks during the public questions and answers process in February 2008, in response to questions about prospective liberalization, Industry Canada expressly stated that the "Department cannot anticipate what ownership and control regulations will exist in the future."[422]

256. It was only in 2012, after thorough consideration of the issue, that the Government concluded that a limited form of liberalization was warranted and decided to enact changes to the Canadian ownership and control requirements.

257. The changes to the Canadian ownership and control requirements in the telecommunications sector were implemented through amendments to the *Telecommunications Act* that entered into force on June 29, 2012. As a result, the Canadian ownership requirements imposed on telecommunications service providers ceased to apply to service providers which, like Wind Mobile, had revenues accounting for less than 10% of the total Canadian telecommunications market.

B. The Liberalization Did Not Guarantee that GTH Could Take Control of Wind Mobile

258. The liberalization of Canada's Canadian ownership and control requirements did not otherwise exempt foreign investors seeking to acquire control of a Canadian telecommunications service provider from generally applicable legislative requirements such as those contained in the

[420] **C-076**, Competition Policy Review Panel, Compete to Win: Final Report (Jun. 2008), p. 49 ("CPRP Report").

[421] **R-080**, TPRP Report, 2006, pp. 11-24 – 11-26.

[422] **C-062**, Industry Canada, Responses to Questions for Clarifications on the AWS Policy and Licensing Frameworks (Feb. 27, 2008), p. 23.

ICA or the *Competition Act*. In fact, the press release that accompanied Minister Paradis' announcement on March 14, 2012 specifically states that "[a]s is the case with any direct foreign investment, the provisions of the Investment Canada Act will continue to apply".[423]

259. In its Memorial, the Claimant alleges that it expected such liberalization and that it had "secured a right" to "acqui[re]… control of Wind Mobile through the conversion of its non-voting shares to voting shares" "at the outset of its investment".[424] However, any such right it may have had vis-à-vis other shareholders under the Shareholders' Agreement was always subject to applicable regulatory requirements, including review and approval under the ICA. This condition was acknowledged in the Shareholders' Agreement itself which contains provisions requiring that any transfer or conversion of shares comply with applicable Canadian laws, rules or regulations,[425] as well as in public statements GTH made at the time of its application to acquire control of Wind Mobile and thereafter.[426]

260. GTH fully understood that its proposed acquisition of control of Wind Mobile would be subject to the net benefit and national security review mechanisms provided in the ICA. [redacted]

[redacted]

[redacted]

[423] **C-023**, Industry Canada, Harper Government Takes Action to Support Canadian Families (Mar. 14, 2012), p. 4.

[424] Claimant's Memorial, ¶ 182.

[425] **C-006**, Shareholders' Agreement between AAL Holdings Corporation and Mojo Investments Corp. and Orascom Telecom Holding (Canada) Limited and Globalive Investment Holdings Corp. (Jul. 31, 2008), Articles 6.1(a), 7.1(c), and Schedule C, s. E(4).

[426] **R-067**, 4-traders, article, "Orascom Telecom Holding to convene its Ordinary General Assembly and Extraordinary General Assembly, Cairo" (Oct. 21, 2012), p. 1 ("The conversion will result in OTH taking control of GIHC; therefore an approval from the Canadian investment authorities is required."); **C-140**, Press Release, "Orascom Telecom to acquire AAL Corporation interest in WIND Mobile Canada; Anthony Lacavera to step down as CEO of WIND Mobile Canada, Plans to Launch Globalive Capital in 2013", Cairo and Toronto (Jan. 18, 2013), p. 1 ("Under the terms of the signed agreement, upon obtaining certain necessary regulatory approvals, Orascom will indirectly acquire all of AAL Corp.'s interest in Globalive Wireless Management Corp., which operates under the WIND Mobile brand in Canada").

[redacted]

261. GTH therefore understood that its proposed acquisition of voting control of Wind Mobile was subject to both net benefit and national security review under the ICA and therefore that it could not be implemented without the prior authorization of the Minister.

C. The Investment Canada Act Provides for the Review of Certain Foreign Investments in Canada

262. The ICA is the only law of general application in Canada relating to the review of foreign investment. It recognizes that increased capital and technology benefit Canada and provides for the review of significant investments in Canada by non-Canadians in a manner that encourages investment, economic growth and employment opportunities in Canada.[428] Since 2009, the ICA also provides for a review mechanism that allows the government to assess whether an investment by a non-Canadian could be injurious to Canada's national security.[429]

263. The review mechanisms set out in the ICA are legally, functionally and administratively distinct from the reviews performed to ensure compliance with the Canadian ownership and control requirements imposed on telecommunications service providers by the *Radiocommunication Regulations* and the *Telecommunications Act*. The ICA reviews are managed by dedicated staff within IRD and involve broad policy considerations related to the Canadian economy and national security. In contrast, compliance with the *Radiocommunication Regulation* and the *Telecommunications Act* involves a much more narrow factual analysis and are performed by staff within the Spectrum, Information Technologies and Telecommunications Sector and the CRTC respectively.[430] In assessing whether a proposed investment complies with Canadian ownership and control requirements, SITT and the CRTC do not have the statutory mandates to also assess whether an acquisition of the Canadian business by a foreign investor is

[427] [redacted]

[428] **R-169**, *Investment Canada Act*, R.S.C. 1985, c. 28, 1st Supp., s. 3 (version in force from 29 June 2012 to 25 June 2013) ("ICA").

[429] **R-169**, ICA, s. 2.

[430] **RWS-Aitken**, ¶ 44.

likely to be of "net benefit" to Canada or whether the investment could be injurious to national security.

264. The distinct legal framework and the different roles and responsibilities of IRD, SITT and the CRTC account for why SITT's revision in 2008 of Wind Mobile's Declaration of Ownership and Control[431] and the CRTC's review of Wind Mobile's compliance with the ownership and control requirements of the *Telecommunications Act* did not pre-determine whether an eventual acquisition of voting control of Wind Mobile by GTH would be approved under the ICA.

1. An Acquisition of Control of a Canadian Business is Subject to a Net Benefit Test

265. The ICA requires that non-Canadians who propose to acquire direct control of a Canadian business either give notice to the Government of their investment or, in the alternative, file an application for net benefit review by the Minister. Which one of the two requirements applies depends on the financial value of the Canadian business. In 2012, at the time GTH submitted its application to acquire voting control of Wind Mobile, an acquisition of voting control of a Canadian business by an investor from a WTO Member State was subject to net benefit review if the value of the assets used in carrying on the Canadian business was equal to or exceeded C$ 330 million.[432] Proposed acquisitions below that statutory threshold were only required to give notice containing prescribed information about the acquisition at any time up to 30 days after implementation of the investment.[433]

266. Generally, the ICA only applies in cases where a non-Canadian: 1) acquires voting shares of a corporation incorporated in Canada carrying on a Canadian business or that controls another corporation carrying on a Canadian business; 2) acquires voting interests of a non-corporate entity that either carries on a Canadian business or that controls another entity carrying on a Canadian business; or 3) acquires all or substantially all of the assets used in carrying on a

[431] **C-084**, Globalive, Declaration of Ownership and Control of Globalive Wireless LP as a Provisional Winner of Spectrum Licences in the 2 GHz Range Including AWS, PCS and the Band 1670-1675 (Aug. 5, 2008).

[432] **R-169**, ICA, s. 14.1. The monetary threshold has gradually been increased and proposed investments by private sector investors from WTO Member States are now reviewable if the enterprise value of the Canadian business exceeds $1 billion.

[433] **R-169**, ICA, s. 12.

Canadian business.[434] A non-Canadian investor who acquires a majority of the voting interests of a corporation is deemed to acquire control of that corporation.[435] If a non-Canadian acquires less than a majority but one-third or more of the voting shares of a corporation, it will be presumed to be acquiring control of that corporation unless it can be established that, on the acquisition, the corporation is not controlled in fact by the non-Canadian through ownership of voting shares.[436] A non-Canadian who acquires less than one-third of the voting shares of a corporation is deemed not to have acquired control of that corporation.[437]

267. If a proposed investment is subject to a net benefit review, the investor must file an Application for Net Benefit Review with the Minister containing the prescribed information including a description of the investor's plans for the Canadian business.[438] The filing of the application initiates the net benefit review process. Once the Application for Net Benefit Review is certified as complete, the investor is prohibited from implementing the investment until the Minister is satisfied, or is deemed to be satisfied, that the investment is likely to be of net benefit to Canada.[439] The Minister has 45 days from the date of receipt of a complete application to review its content and determine whether the proposed investment is "likely to be of net benefit to Canada".[440] The Minister may unilaterally extend this time period by 30 days and for a longer period with the investor's approval. If a proposed investment is also subject to a national security review, the time periods to make a net benefit determination are further extended. If a proposed investment is subject to both a net benefit review and a national security review and the GiC authorizes the investment under the national security review, the Minister then has five days from the date of the GiC's order to issue a net benefit determination.[441]

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[434] **R-169**, ICA, s. 28(1).

[435] **R-169**, ICA, s. 28(3)(a).

[436] **R-169**, ICA, s. 28(3)(c).

[437] **R-169**, ICA, s. 28(3)(d).

[438] **R-169**, ICA, s. 17; **R-170**, *Investment Canada Regulations*, SOR/85-611 (as amended and in force on October 25, 2012), s. 6.

[439] **R-169**, ICA, s. 16(1).

[440] **R-169**, ICA, s. 21(1).

[441] **R-169**, ICA, s. 21(8).

268. Ms. Jenifer Aitken, who was the Director General of IRD, explains in her witness statement that in reviewing an investor's application and assessing whether a proposed investment is "likely to be of net benefit to Canada", the Minister takes into account the information in the investor's application, other information submitted by the investor, as well as any written undertakings offered by the investor. In addition, the Minister considers any information submitted by the Canadian business to be acquired; any representations submitted by a province that is likely to be affected by the proposed investment; and any other information received as part of the investment review.[442]

269. The Minister assesses this information in light of the six broad economic and policy criteria that are set out in section 20 of the ICA: 1) economic impact of the investment (employment, exports, etc.); 2) participation by Canadians in the Canadian business; 3) productivity, technological development, and product variety in Canada; 4) competition in Canada; 5) compatibility of the investment with national industrial, economic and cultural policies; and 6) contribution to Canada's ability to compete in world markets.[443]

270. The decision-making process by which the Minister determines whether or not a proposed investment is likely to be of net benefit to Canada is described in an annual report published by the Minister on the administration of the ICA and in Ms. Aitken's witness statement.[444]

2. A Foreign Investment, Including one Made through an Acquisition of Voting Control of a Canadian Business, May be Subject to a National Security Review

271. Ensuring the security of its citizens is a core responsibility of any government. The fundamental importance of this essential interest has been recognized in numerous judgements of Canadian courts.[445] Since the events of September 11, 2001, the Government has taken measures

[442] **RWS-Aitken**, ¶ 13.

[443] **R-169**, ICA, s. 21.

[444] **R-171**, Investment Canada Act, Annual Report 2009-2010, pp. 6-7; **RWS-Aitken**, ¶¶ 16-17.

[445] **R-239**, *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350, ¶ 68 ("the protection of Canada's national security and related intelligence sources undoubtedly constitutes a pressing and substantial objective"); **R-240**, *R. v. Ahmad*, (2009) CanLII 84788 (ONSC), ¶ 134 ("National security is a centrally important feature of the role of governments in the protection of the populace and in the protection of our democracy and way

to face the new and complex security threats of the 21st century. In 2004, the government issued its first national security policy in which it identified three core national security interests: 1) protecting Canada and Canadians at home and abroad; 2) ensuring Canada is not a base for threats to our allies; and 3) contributing to international security.[446]

272. In keeping with its efforts to strengthen Canada's national security, on June 20, 2005, the Government introduced in Parliament *Bill C-59, an Act to amend the Investment Canada Act*. Bill C-59 never came into force as a federal election was called before its adoption and it died on the Order Paper upon the dissolution of Parliament. It was the Government's first attempt to incorporate national security as a ground for review of foreign investments in Canada. The Minister at the time explained that the introduction of such a new review mechanism was "similar in purpose to legislation already adopted by Canada's major trading partners, such as the United States, Germany, and Japan, as well as other industrialized nations, which permits screening of foreign investments for reasons of national security."[447]

273. In 2008, the CPRP issued its report "Compete to Win" ("CPRP Report"). The CPRP Report recommended the inclusion in the ICA of a process to review foreign investments in Canada for national security. The panel noted that several countries had investment review processes that allowed consideration of national security interests and recommended a process with a scope similar to the one used by the United States government:

> [T]he Panel believes that it is in Canada's interests in a post-9/11 world to have in place an explicit national security test to support its trade and investment policies. As such, we support the Minister of Industry's statement that the government intends to carefully consider the creation of a new review requirement for transactions that raise "national security" concerns. We respectfully suggest that the scope of this review requirement should be aligned with that of the investment review process used by the Committee on Foreign Investment in the United States. This would bring Canada into line with other

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of life."); **R-241**, *Canada (Minister of Citizenship and Immigration) v. Singh*, (1998) 151 F.T.R. 101 (F.C.T.D.), ¶ 52 ("public safety and national security, [are] the most serious concerns of government.").

[446] **R-242**, Government of Canada, Securing an Open Society: Canada's National Security Policy (Apr. 2004), pp. 4-5.

[447] **R-243**, Government of Canada, news release, "Minister of Industry Introduces Amendments to the Investment Canada Act" (Jun. 20, 2005), p. 1, available at: https://www.canada.ca/en/news/archive/2005/06/minister-industry-introduces-amendments-investment-canada-act html.

> countries that have introduced a national security screening procedure, including the United Kingdom, China, Japan and Germany.[448]

274. On February 6, 2009, the Government re-introduced legislation to amend the ICA. The Bill received royal assent on March 12, 2009, and instituted national security review provisions in Part IV.1 of the ICA.[449] The provisions permit the review of proposed foreign investments in Canada that could be injurious to Canada's national security. The provisions are broad by design, covering all foreign investments, regardless of value, industrial sector or home country of the investor, including the establishment of new Canadian businesses.

275. The national security review process is set out in Part IV.1 of the ICA and the National Security Review of Investments Regulations ("National Security Regulations").[450] It consists of three stages.

276. The first stage begins when the Minister becomes aware of the investment and ends, in the case of investments subject to notification or review, 45 days after certification of the non-Canadian's application or notification as complete.[451] Usually, the Minister becomes aware of a proposed investment when a foreign investor gives a notification of an investment or files an Application for Net Benefit Review. At this stage, the security agencies and the other relevant prescribed investigative bodies assess information and intelligence related to the Canadian asset being acquired or business being established, and the foreign investor, and may consult with Canada's allies.[452] At any time during this time period, the Minister may send the non-Canadian a notice that the Minister has reasonable grounds to believe that the investment could be

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[448] **C-076**, CPRP Report, pp. 30-31 (references omitted). The statement to which the CPRP refers in this paragraph was made during a speech by the Honourable Jim Prentice, then Minister of Industry, to the Vancouver Board of Trade on October 9, 2007. *See* **R-174**, Industry Canada, The Honourable Jim Prentice, Minister of Industry, Vancouver Board of Trade 2007,Vancouver, British Columbia (Oct. 9, 2007).

[449] **R-173**, *Budget Implementation Act*, *2009*, S.C. 2009, c. 2, s. 465 (consolidation current to January 30, 2018). The national security review provisions in Part IV.1 of the ICA were deemed to have come into force on February 6, 2009. The legislation also implemented a recommendation of the CPRP to substantially liberalize the ICA by incrementally increasing to $1 billion in enterprise value the threshold beyond which proposed acquisitions by investors from WTO Members States would be subject to a net benefit review.

[450] **R-169**, ICA, Part IV.1; **C-102**, *National Security Review of Investments Regulations*, SOR/2009-271 ("National Security Regulations").

[451] **R-169**, ICA, s. 25.2(1); **C-102**, National Security Regulations, s. 2.

[452] **R-065**, Innovation, Science and Economic Development Canada, Annual Report, Investment Canada Act, 2016-2017 (Mar. 31, 2017), p. 12 ("ICA Annual Report, 2016-2017").

injurious to national security and that an order for review of the investment may be made by the GiC.[453] The effect of the notice is to prohibit implementation of the investment if it has not yet been implemented.[454] The notice triggers an additional 25 day period for consideration, by the end of which either a notice of no further action is issued or a notice of an order for a formal national security review is made by the GiC.[455]

277. The second stage of the national security review process starts if and when the GiC decides to make an order for a formal national security review of the investment, on the recommendation of the Minister, who, after consultation with the Minister of Public Safety considers that the investment could be injurious to national security. The effect of the order is to prohibit implementation of the investment if it has not yet been implemented.[456] This second stage of the national security review process may last for up to 45 days, or longer with the investor's consent.[457]

278. Once a national security review has been ordered, if the non-Canadian or other person or entity advises the Minister that they wish to make representations, the ICA provides that the Minister shall afford them a reasonable opportunity to make representations in person or through a representative.[458] The Minister may also require the non-Canadian or other person or entity to provide any information that the Minister considers necessary for the purpose of reviewing the investment.[459]

279. In determining whether an investment could cause injury to national security, Canada's security agencies and the other relevant prescribed investigative bodies "assess information and intelligence related to the Canadian asset being acquired or business being established, and the foreign investor, and may consult with Canada's allies in order to determine whether the

[453] **R-169**, ICA, s. 25.2(1).

[454] **R-169**, ICA, s. 25.2(2).

[455] **R-169**, ICA, ss. 25.3(1) and 25.2(4); **C-102**, National Security Regulations, s. 4(a).

[456] **R-169**, ICA, s. 25.3(3).

[457] **R-169**, ICA, s. 25.3(6) and 25.3(7); **C-102**, National Security Regulations, s. 5. The timelines described in this section are the ones in force at the time of GTH's Application for Net Benefit Review of October 24, 2012.

[458] **R-169**, ICA, s. 25.3(4).

[459] **R-169**, ICA, s. 25.3(5).

investment could cause injury to national security."[460] The prescribed investigative bodies are listed in the National Security Regulations and include:

(i) **Public Safety Canada:** Headed by the Minister of Public Safety, this governmental department coordinates the activities of federal departments and agencies tasked with protecting Canadians. It functions as a centralized hub for coordinating work in counter-terrorism, critical infrastructure, cyber security and transportation security.[461]

(ii) **Canadian Security Intelligence Service ("CSIS")**: Its duties include the collection, analysis and retention of information and intelligence respecting activities that may constitute threats to the security of Canada. It may also assist the Minister of National Defence or the Minister of Foreign Affairs in the collection of information or intelligence relating to the capabilities, intentions or activities of foreign states.[462]

(iii) **Royal Canadian Mounted Police ("RCMP")**: As Canada's national law enforcement service, the RCMP has a wide range of national security-related mandates. These include national security criminal investigations and critical infrastructure protection. Offences that would trigger RCMP investigations are espionage or sabotage that is against Canada or is detrimental to the interests of Canada; foreign influenced activities within or relating to Canada that are detrimental to the interests of Canada and are clandestine or deceptive or involve a threat to any person; and the unlawful release of sensitive or classified information dealing with National Security.[463]

(iv) **Communications Security Establishment ("CSE"):** The CSE is Canada's national cryptologic agency and it reports to the Minister of National Defence. It acquires and uses information from the global information infrastructure for the purpose of providing foreign intelligence, in accordance with the Government's intelligence priorities. It also provides advice, guidance and services to help ensure the protection of electronic information and information infrastructures of importance to the Government.[464]

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[460] **R-169**, ICA, s. 25.2(3) and s. 25.3; **C-102**, National Security Regulations, s. 7; **R-065**, ICA Annual Report, 2016-2017, p. 12.

[461] **R-223**, *Department of Public Safety and Emergency Preparedness Act*, S.C. 2005, c.10, ss. 4, 5, 6 (consolidation current to January 30, 2018).

[462] **R-175**, *Canadian Security Intelligence Service Act*, R.S.C. 1985, c. C-23, ss. 12(1) and 16(1)(a).

[463] **R-176**, RCMP, website excerpt, National Security Criminal Investigations Program (last modified Nov. 2, 2016), available at: http://www rcmp-grc.gc.ca/nsci-ecsn/index-eng htm.

[464] **R-177**, *National Defence Act*, R.S.C. 1985, c. N-5, s. 273.64.

280. By the end of the national security review, if the Minister is satisfied that the investment would not be injurious to national security, then a notice of no further action is issued to the non-Canadian.[465] However, if by the end of the national security review: (i) the Minister is satisfied that the investment would be injurious to national security; or (ii) the Minister is not able to determine whether the investment would be injurious to national security on the basis of available information, the Minister shall, after consultation with the Minister of Public Safety, refer the investment under review to the GiC, together with a report of the Minister's findings.[466]

281. Once the Minister refers the investment to the GiC at the end of the national security review, the GiC may, within 15 days of the date of referral, make an order taking any measures that the GiC considers advisable to protect national security, including: (i) directing the non-Canadian not to implement the investment, (ii) requiring the non-Canadian to divest themselves of control of the Canadian business or of their investment in the entity, or (iii) authorizing the investment on condition that the non-Canadian give written undertakings to Her Majesty in right of Canada or implement the investment on terms and conditions contained in the order.[467]

282. Once an order is made by the GiC, the Minister must send a copy of the order to the non-Canadian or other person or entity to which the order is directed. The non-Canadian or other person or entity to which the order is directed shall comply with the order.[468] The ICA also obligates the non-Canadian or other person or entities that are subject to an order to submit information to the Director of Investments from time to time to permit the Director to determine whether they are complying with the order.[469]

[465] **R-169**, ICA, s. 25.3(6)(b).

[466] **R-169**, ICA, s. 25.3(6)(a).

[467] **R-169**, ICA, s. 25.4(1); **C-102**, National Security Regulations, s. 6.

[468] **R-169**, ICA, s. 25.4(2) and (3).

[469] **R-169**, ICA, s. 25.5.

283. If each stage of the ICA national security review process is engaged, a national security review of an investment can last over 130 days or longer in case the non-Canadian agrees to extensions.[470]

284. Decisions and orders of the GiC under Part IV.1 of the ICA are final and binding and, except for judicial review under the *Federal Courts Act*, are not subject to appeal or to review by any court.[471] The national security review process is summarized in the chart reproduced in Annex B of Ms. Aitken's witness statement.

D. GTH's Proposed Investment is Subject to Review Under the Investment Canada Act and GTH Decides to Withdraw its Application to Acquire Voting Control of Wind Mobile

285. GTH was aware that a net benefit review would be required because its proposed investment to acquire voting control of Wind Mobile exceeded the net benefit review thresholds set out in the ICA. Therefore it filed an application with IRD for a net benefit review of its investment on October 24, 2012.[472] The government's net benefit and national security reviews under the ICA of GTH's proposed acquisition of voting control strictly conformed to all applicable statutory and regulatory requirements.

286. [redacted]

[470] **RWS-Aitken**, Annex B.

[471] **R-169**, ICA, s. 25.6. The grounds for seeking judicial review are set out in the *Act Respecting the Federal Court of Appeal and the Federal Court*. They include cases in which a decision maker acted without jurisdiction; failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe or acted, or failed to act, by reason of fraud or perjured evidence. **R-178**, *Act Respecting the Federal Court of Appeal and the Federal Court*, R.S.C. 1985, c. F-7, s. 18.1(4).

[472] [redacted]

[473] [redacted]

[474] [redacted]

287. [redacted]

288. [redacted]

[redacted]

289. [redacted]

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291. [redacted]

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297. [redacted]

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[redacted]

[redacted]

298. [redacted]

299. [redacted]

300. [redacted]

[redacted]

301.

302. On June 18, 2013, GTH withdrew its application to gain voting control of Wind Mobile thereby terminating both the net benefit and national security review processes. GTH remained at all times free to re-submit an application to obtain voting control of Wind Mobile

303. VimpelCom officials approached the Government again in November 2013 to discuss VimpelCom's options to exit the Canadian market. Government officials informed VimpelCom that they remained open to discuss the company's options but that any approval would need to address both the acquisition of voting control of Wind Mobile and its subsequent divestiture.[500]

[500] **R-263**, Memorandum from Iain Stewart, Industry Canada to the Deputy Minister, Industry Canada (Nov. 4, 2013).

IX. GTH Decides to Sell Its Investment in Wind Mobile

304. In April 2011, three years after GTH invested in Canada and a little more than a year after Wind Mobile started operating, VimpelCom acquired GTH and GTH's investment in Wind Mobile.[501] Shortly after, VimpelCom began considering options with respect to Wind Mobile and its investment in Canada. In early October 2011, because of Wind Mobile's disappointing financial results, the "large looming funding requirements of Wind Canada from 2012-2015" and the VimpelCom group's "funding constraints",[502] VimpelCom set up a team to review its options with respect to Wind Mobile. [redacted]

305. Speculation regarding VimpelCom's plans for GTH and Wind Mobile started shortly after the acquisition. In the fall of 2012, when VimpelCom sold some of its other assets that were in non-priority markets like Canada,[505] analysts surmised that VimpelCom would also be looking at selling its Canadian assets inherited from the OTH acquisition which included Wind Mobile. At the same time, media reports also indicated that VimpelCom was looking to sell.[506]

306. [redacted]

[501] *Supra*, fn. 125.

[502] **C-119**, Email from Andy Dry, VimpelCom to Pietro Cordova, Wind (Oct. 11, 2011).

[503] **C-119**, Email from Andy Dry, VimpelCom to Pietro Cordova, Wind (Oct. 11, 2011).

[504] **C-119**, Email from Andy Dry, VimpelCom to Pietro Cordova, Wind (Oct. 11, 2011). See also **C-164**, Rita Trichur et al., "Wind Mobile on block in new wireless shakeup", The Globe & Mail (Mar. 21, 2013) noting that a sale by VimpelCom of its interest in Wind Mobile was "no surprise, given Wind's challenges in Canada and VimpelCom's focus on free cash flow, debt-deleveraging and emerging markets".

[505] **R-245**, Scotiabank, Equity Research Biweekly Report: Week of October 29, 2012 (Oct. 29, 2012).

[506] **R-246**, Toronto Star, "Wireless carrier Wind Mobile up for sale" (Mar. 21, 2013), available at: https://www.thestar.com/business/tech_news/2013/03/21/wireless_carrier_wind_mobile_up_for_sale.html; **R-247**, IT World Canada News, "Orascom to take over Wind Mobile" (Jan. 18, 2013), available at: https://www.itworldcanada.com/article/orascom-to-take-over-wind-mobile/47300; **R-248**, CBC News, "Verizon takes aim at telecom Big 3 with possible Wind Mobile bid" (Jun. 26, 2013), available at: http://www.cbc.ca/news/business/verizon-takes-aim-at-telecom-big-3-with-possible-wind-mobile-bid-1.1319353.

[redacted]

307. [redacted]

308. [redacted]

[507] **RWS-Aitken**, ¶ 66; Claimant's Memorial, ¶ 209; **C-119**, Email from Andy Dry to Pietro Cordova (Oct. 11, 2011); **C-164**, Rita Trichur et al., "Wind Mobile on block in new wireless shakeup" (Mar. 21, 2013). *See also* **RER-Brattle**, ¶¶ 74-84.

[508] **C-140**, Press release, "Orascom Telecom to aquire AAL Corporation interest in WIND Mobile Canada; Anthony Lacavera to step down as CEO of WIND Mobile Canada, Plans to Launch Globalive Capital in 2013", (Jan. 18, 2013). Canada understands that at the time GTH filed its Voting Control Application, GTH and AAL were still negotiating "various elements" concerning the sale of the AAL shares. Canada has no information on the terms of such agreement, if any, since the Claimant has not produced the terms (either preliminary or final) of the sale price of the AAL shares.

[509] **C-164**, Rita Trichur et al., "Wind Mobile on block in new wireless shakeup", The Globe & Mail (Mar. 21, 2013); *See also* **C-162**, Meeting with Industry Canada: Briefing Paper on Wind Canada's Business Situation (Mar. 14, 2013) ("decision to evaluate exit options has been made."); **C-177**, Email from Adam Kalbfleisch to Richard Lajeunesse and Jenifer Aitken (Apr. 23, 2013); **C-187**, Wind Mobile Presentation, Proposed Regulatory Changes to Support Fair and Effective Competition in Canada (May 27, 2013); **CWS-Dobbie**, ¶¶ 37-38.

[redacted]

309.

[514]

[515] In June 2013, Verizon reportedly offered $700 million for Wind Mobile as part of an entry into the Canadian wireless market. By September 2013, however, Verizon was no longer interested in entering the Canadian market seemingly because of its acquisition of Vodafone. **R-249**, The Globe & Mail, "Verizon-Vodafone deal casts doubt on Verizon's Canadian entry" (Aug. 29, 2013), available at: https://www.theglobeandmail.com/report-on-business/international-business/us-business/was-canada-a-bargaining-chip-for-a-verizon-vodafone-deal/article14019168/; **R-250**, MacLean's news article, "Verizon CEO: 'We're not interested in entering the Canadian wireless market" (Sep. 3, 2013), available at: http://www macleans.ca/news/canada/verizon-ceo-were-not-interested-in-entering-the-canadian-wireless-market/.

[516]

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[518] *See* **R-251**, *See* Claimant's Memorial, ¶ 248; **CWS-Dry**, ¶ 25;

[519] **R-252**

[redacted]

[redacted]

[redacted]

[redacted]

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[520] **R-253**, [redacted]

[521] **R-254** [redacted]

[522] **R-254**, [redacted] *See also* **R-255**, [redacted]

[523] **R-254** [redacted]

[524] *See* **R-256** [redacted]

[525] **R-257**, [redacted]

[526] **R-258**, [redacted]

[redacted]

315. At the same time, the 700 MHz auction, described above, was approaching. In the end, Wind Mobile decided not to participate in the auction: it had long since decided to sell Wind Mobile and not to continue making further investments in it.

316. By the summer of 2014, following over two years of under-investment in Wind Mobile,[531] VimpelCom and the Claimant made known through UBS Securities that their selling price for Wind Mobile was C$ 300 million.[532] On September 16, 2014, Wind Mobile's controlling shareholder, AAL, and a group of private equity firms ("AAL Consortium") purchased GTH's interest in Wind Mobile (the "AAL Sale") for the equivalent of C$ 295 million (through the assumption of approximatively C$ 135 million worth of debt owed to VimpelCom and C$ 160

[527] **R-258** [redacted]

[528] **R-258** [redacted]

[529] **R-259**, [redacted]

[530] **R-259**, [redacted]

[531] As Brattle notes, in 2013 for example, Wind invested only 8% of its revenue back into its network, which was far below what other new entrants like MTS were investing, and even below the ratio that mature network operators – who were already at scale – were investing. *See* **RER-Brattle**, ¶ 81 and Figure 10.

[532] **R-104**, *Catalyst v. Moyse*, ¶ 27; **C-164**, Rita Trichur et al., "Wind Mobile on block in new wireless shakeup" (Mar. 21, 2013).

million in third party vendor loans) from which GTH claims it obtained C$ 11.[533] This sale was entirely a result of the Claimant's own business decisions.

317. Following the AAL Sale, and under new leadership, Wind Mobile acquired spectrum licences in a March 2015 auction (the "AWS-3 Spectrum") and obtained additional AWS-1 spectrum licences as result of a series of transactions including the acquisition by Rogers of the AWS-1 spectrum held by non-Incumbent, Shaw Communications ("Shaw"), and Rogers' purchase of non-Incumbent, Mobilicity.[534] The Minister approved the spectrum licence transfer requests related to these transactions. In turn, Wind Mobile's new owners sold their spectrum licences and business holdings to Shaw on December 16, 2015, for C$ 1.6 billion.[535] The Claimant suggests, wrongly, that this transaction is of some relevance to the value it could have obtained when it sold Wind Mobile.

CANADA DID NOT BREACH ITS FIPA OBLIGATIONS

I. Canada Maintains Its Objections to Jurisdiction and Admissibility

318. In its Memorial on Jurisdiction, Canada raised serious objections to the Tribunal's jurisdiction to decide this claim. In Procedural Order 2, the Tribunal decided that it would consider these objections together with the merits and damages. Canada maintains its objections

[533] **C-033**, Purchase Agreement between AAL Acquisitions Corp., GTH Global Telecom Finance (B.C.) Limited, VimpelCom Amsterdam B.V., GTH Global Telecom Holding (Canada) Limited, and Globalive Investment Holdings Corp. (Sep. 16, 2014). AAL Corp. only had a small share in the consortium acquiring Wind Mobile. **CER-Dellepiane/Spiller**, ¶ 40; **CLEX-024**, Financial Post, "Globalive Consortium reaches deal to buy Wind Mobile stake from VimpelCom (Sep. 16, 2014); **CLEX-022**, Purchase Agreement between AAL Acquisitions Corp. (Purchaser), GTH Global Telecom Finance (B.C.) Limited, VimpelCom Amsterdam BV (Sellers), GTH Global Telecom Holding (Canada) Limited and Globalive Investment Holdings Corp. (Sep. 16, 2014).

[534] In March 2015, Industry Canada conducted the AWS-3 auction. Wind Mobile successfully bid on three licences for an amount of $56.4 million. The 2500 MHz spectrum licensing auction concluded in June 2015. Wind Mobile was a qualified bidder but did not obtain any new licences. In June 2015, a four way deal was reached for Rogers to buy Mobilicity for $465 million (including $175 million in tax losses for the net of $290 million + spectrum swap with Wind). Mobilicity had paid approximately $243 million for its licences in the 2008 AWS-1 spectrum auction. For a table demonstrating how the Rogers-Mobilicity deal affected the AWS-1 spectrum licence holdings, *see* **R-264**, Christine Dobby, "Rogers-Mobilicity deal shakes up spectrum landscape, rewards Wind", Globe and Mail (Jun. 24, 2015), available at: http://www.theglobeandmail.com/report-on-business/wind-mobile-will-also-benefit-from-rogers-mobilicity-deal/article25094485/.

[535] **CLEX-061**, Shaw Communications Inc. Press Release, "Shaw Communications Inc. to acquire WIND Mobile Corp., (Dec. 16, 2015); **CLEX-062**, Shaw Communications Press Release, "Shaw Closes WIND Acquisition" (Mar. 1, 2016).

and relies on the arguments presented in its Memorial on Jurisdiction but offers the following comments.

319. First, with respect to the dispute settlement exclusion in Article II(4)(b) of the FIPA, the Tribunal noted that whether the exclusion applied "would appear to require consideration of the facts surrounding the measures in question."[536] Canada has provided in paragraphs 253-303, the relevant facts surrounding the review of the Claimant's proposed acquisition of voting control under the ICA's national security provisions. These facts establish that the measure at issue is excluded from dispute settlement pursuant to Article II(4)(b) of the FIPA. The Tribunal therefore has no jurisdiction to consider whether Canada breached the FET, FPS and National Treatment obligations under the FIPA through its national security review of GTH's proposed acquisition of voting control of Wind Mobile. This absence of jurisdiction applies regardless of whether the allegations are considered by themselves or as part of a cumulative breach. In addition, the National Treatment obligations of the FIPA do not apply to the telecommunications sector pursuant to Article IV(2)(d) of the FIPA.

320. Second, Canada objected to the timeliness of the Claimant's allegations with respect to the ownership and control review conducted by the CTRC and Canada's alleged failure to maintain a favourable regulatory framework for New Entrants in the telecommunications sector. As explained below in paragraphs 453-457, these measures should be considered separately from the national security review of the acquisition of control and the Transfer Framework. Canada also explains in paragraphs 453-457 that the Claimant's allegations with respect to these measures are based on a distorted presentation of the facts. Even if the Tribunal were to consider these measures as relevant context, they cannot contribute to a finding of a breach of the FET and FPS obligations as claims related to these measures are untimely and outside the Tribunal's jurisdiction.

321. Third, Canada re-iterates that 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

[536] Procedural Order No. 2, ¶ 108(a).

treatment of the Claimant, notwithstanding the fact that GTH only held a non-controlling interest in Wind Mobile. As Canada highlights in this submission (see in particular paragraphs 512-515 below), by conflating the two, GTH claims for damages with respect to rights that it does not have and this Tribunal should refrain from awarding the Claimant the damages it seeks.

322. Finally, with respect to Canada's objection *ratione personae*, Canada reiterates that the Claimant bears the burden of proving that it meets this jurisdictional requirement. In the absence of further relevant documents from the Claimant establishing that GTH was a permanent resident of Egypt at the time of the Request for Arbitration, Canada makes no further submissions regarding this objection at this time.

II. Canada Has Not Breached the Fair and Equitable Treatment Obligation Under Article II(2)(a) of the FIPA

323. The Claimant alleges that Canada breached the FET obligation,[537] when it "blocked" GTH from transferring Wind Mobile's licenses to an incumbent after the five-year moratorium.[538] It also alleges that Canada breached the FET obligation[539] when it [redacted] on the pretext of an arbitrary national security review".[540] Third, and finally, it alleges that both of these measures, when combined with certain alleged actions or inactions by Canada with respect to the CRTC ownership and control review[541] and mandated tower sharing and roaming[542] amount to a cumulative breach of the FET obligation[543] in the FIPA.

324. More specifically, the Claimant alleges that Canada has breached the FET obligation guaranteed by the FIPA through this conduct because it failed to protect the legitimate

[537] Claimant's Memorial, Part VII.A.2.

[538] Claimant's Memorial, p. 172.

[539] Claimant's Memorial, Part VII.A.3.

[540] Claimant's Memorial, p. 196.

[541] Claimant's Memorial, p. 206.

[542] Claimant's Memorial, p. 207.

[543] Claimant's Memorial, p. 211.

expectations of the Claimant,[544] and subjected it to conduct that was unreasonable and arbitrary,[545] non-transparent[546] and lacking in due process.[547] The Claimant's allegations of rely on a broad reading of the FET obligation that is unsupported by the text of the treaty and relevant investment treaty awards. Moreover, the facts of this case do not establish that any of the measures the Claimant complains of rise to the level required to constitute a breach of the high standard set by Article II(2)(a) of the FIPA and, as a result, all of the Claimant's allegations must be rejected.

A. The Fair and Equitable Treatment Obligation in the FIPA Refers to the Minimum Standard of Treatment Under Customary International Law

325. To support its claim of breach of the FET obligation in the FIPA, the Claimant seeks to expand the content of the obligation beyond the standard of treatment guaranteed by customary international law. It attempts to do so by referring to arbitral awards that have interpreted treaties containing differently worded FET obligations. The Claimant's arguments should be rejected.

326. A finding that the FET obligation in the FIPA extends beyond that what is required by customary international law would run counter to Canada's consistent treaty practice of tying the FET obligation to the customary international law minimum standard of treatment. Article II(2)(a) of the FIPA provides that "[e]ach Contracting Party shall accord investments or returns of investors of the other Contracting Party fair and equitable treatment *in accordance with principles of international law*".[548] This language is reflected in Canada's other FIPAs,[549] in

[544] Claimant's Memorial, ¶¶ 305, 362.

[545] Claimant's Memorial, ¶¶ 305, 345, 362.

[546] Claimant's Memorial, ¶¶ 345, 362.

[547] Claimant's Memorial, ¶ 345.

[548] **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 II(2)(a) ("Canada-Egypt FIPA").

[549] *See for example*, **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, Article II(2)(1); **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 II(2)(1); **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 II(2)(1); **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 II(2)(1); **RL-028**,

some instances with some minor variations such as a reference to FET "in accordance with international law", or with a specific reference to customary international law.[550]

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(2)(a); **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(2)(1); **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(2); **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(2); **RL-132**, *Canada-Chile Free Trade Agreement*, 5 December 1996 (entered into force 5 July 1997), Can. T.S. 1997 No. 50, Article G-05(1) ("Canada-Chile FTA"); **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(2)(1); **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(2)(1); **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(2)(1); **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(2)(a); **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(2)(a); **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(2)(a); **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(2)(a) ("Canada-Romania FIPA"); **RL-101**, *North American Free Trade Agreement*, U.S.-Can.-Mex., 1 January 1994, Article 1105(1) ("NAFTA"); **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(4); 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 III(1); **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 III(1).

[550] *See for example*, **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 6(2); **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 6(2); **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 6(2); **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 6(2); **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 46(2); **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 6(2); **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 6(2); **RL-122**, *Agreement Between the Government of Canada*

327. Investment treaty tribunals have confirmed that a FET standard at international law cannot be equated with the autonomous FET standard contained in some other treaties. They have held that, in light of the principle of effectiveness, or *effet utile*,[551] the phrase "in accordance with principles of international law", alongside the words "fair and equitable treatment," must carry some meaning.[552] The inclusion of such language is significant.

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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 6(2); **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 6(2); **RL-136**, *Canada-Korea Free Trade Agreement*, 22 September 2014 (entered into force 1 January 2015), Can. T.S. 2015 No. 3, Article 8.5(2) ("Canada-Korea FTA"); **RL-135**, *Canada-Honduras Free Trade Agreement*, 5 November 2013 (entered into force 1 October 2014), Can. T.S. 2014 No. 23, Article 10.6(2); **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 7(2); **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 6(2); **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 6(2); **RL-134**, *Canada-Panama Free Trade Agreement*, 14 May 2010 (entered into force 1 April 2013), Can. T.S. 2013 No. 9, Article 9.06(2); **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(1)(2); **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(1)(2); **RL-133**, *Canada-Colombia Free Trade Agreement*, 21 November 2008 (entered into force 15 August 2011), Can. T.S. 2011 No. 11, Article 805(1) ("Canada-Colombia FTA"); **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 5(2); **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 5(2); **RL-119**, *Canada-Peru Free Trade Agreement*, 29 May 2008 (entered into force 1 August 2009), Can. T.S. 2009 No. 15, Article 805(2).

[551] As held by the tribunal in *Renco*, "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 ("*Renco – Decision on Preliminary Objections*"). *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.") ("*Noble Ventures – Award*"); **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) ("*Fisheries Jurisdiction Case*").

[552] *See for example*, **CL-049**, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania* (ICSID Case No. ARB/05/22) Award, 24 July 2008, ¶ 590 ("*Biwater Gauff – Award*"); **RL-164**, *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan* (ICSID Case No. ARB/07/14) Excerpts of Award, 22 June 2010, ¶ 263 ("*Liman Caspian Oil – Excerpts of Award*"); **CL-066**, *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka* (ICSID Case No. ARB/09/02) Award, 31 October 2012, ¶¶ 417-418 ("*Deutsche Bank – Award*").

328. For example, the *Biwater* tribunal explained that:

> Caution must be exercised in any generalized statement about the nature of the 'fair and equitable treatment' standard, since this standard finds different expression in different treaties. For example, some treaties (such as the BIT here) simply refer to 'fair and equitable treatment'. Others include express language treating this standard as an element of the general rules of international law (e.g. the French model treaty), or list this standard alongside the rules of international law.[553]

329. Where there is a stand-alone reference to the FET standard, tribunals have held that the treaty obligation is one that is independent of any customary international law standard.[554] However, reference to "principles of international law" within the text of the FET obligation cannot be read out by the Tribunal. The *Koch Minerals* tribunal,[555] which adopted the reasoning of the *Flughafen* tribunal explains:

> The FET and FPS standards accorded to covered investments in Article 4(1) of the Treaty are prefaced by the words: '[i]n accordance with the rules and principles of international law". In the Tribunal's view, as explained below, these words import the customary international law minimum standards, rather than any autonomous higher standards, applying the rule of interpretation codified in Article 31(1) of the VCLT as to "the ordinary meaning to be given to the terms in their context.'[556]

330. Likewise, the *Rusoro* tribunal noted with respect to such language:

> [As] the BIT qualifies Venezuela's commitment to accord FET (and FPS) treatment 'in accordance with the principles of international law', the rule is referring to the CIM [or customary international minimum] Standard.[557]

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[553] **CL-049**, *Biwater Gauff – Award*, ¶ 590.

[554] **RL-164**, *Liman Caspian Oil – Excerpts of Award*, ¶ 263; **CL-066**, *Deutsche Bank – Award*, ¶¶ 417-418; **CL-049**, *Biwater Gauff – Award*, ¶ 590.

[555] **RL-165**, *Koch Minerals Sàrl and Koch Nitrogen International Sàrl v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/11/19) Award, 30 October 2017, ¶ 8.45, *citing* a non-official translation of *Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/10/19) Award, 18 November 2014, ¶ 573 ("*Koch Minerals – Award*").

[556] **RL-165**, *Koch Minerals – Award*, ¶ 8.42.

[557] **CL-016**, *Rusoro Mining Limited v. The Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/12/5) Award, 22 August 2016, ¶ 520 ("*Rusoro – Award*").

331. Similarly, the *OI European Group* tribunal noted the significance of reference to "international law" in the FET clause of a treaty:

> It is not true that the Treaty with the United Kingdom offers superior treatment to the minimum customary standard, since in reality it only offers protected investors FET 'in accordance with international law.' The Treaty therefore does not guarantee FET in abstract, but rather only as recognized by international law. And the level of protection that international law offers and ensures to foreign nationals is precisely what is known as the minimum customary standard.[558]

332. The wording of Article II(2)(a) of the FIPA must be given meaning. The provision guarantees the Claimant FET in accordance with the minimum standard of treatment under customary international law, nothing more and nothing less.

333. This interpretation of the content of Article II(2)(a) of the FIPA, is confirmed by Notes of Interpretation issued under some of Canada's treaties that clarify and reaffirm the meaning of the standard. For example, Canada, Mexico and the United States confirmed in a binding Note of Interpretation that the standard articulated in Article 1105(1) of the 1994 *North American Free Trade Agreement* ("NAFTA"), which provides for treatment "in accordance with international law, including fair and equitable treatment and full protection and security"[559] prescribes the "customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party" and that "[t]he concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens."[560]

334. Likewise, the reference to "treatment in accordance with international law, including fair and equitable treatment and full protection and security"[561] in Article G-05(1) of the 1997

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[558] **RL-166**, *OI European Group B.V. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/11/25) Award, 10 March 2015, ¶ 482.

[559] **RL-101**, NAFTA, Article 1105(1).

[560] **RL-167**, NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter Eleven Provisions (31 July 2001), s. 2(2).

[561] **RL-132**, Canada-Chile FTA, Article G-05(1).

Canada-Chile Free Trade Agreement ("*Canada-Chile FTA*") was interpreted by the Parties to the treaty in the same manner. A 2002 Note of Interpretation ties the "fair and equitable treatment" standard to the customary international law minimum standard of treatment.[562] While Canada has not issued clarifications with respect to all of its treaties,[563] these examples reflect the proper interpretation of the FET obligation in all of Canada's treaties which contain language similar to Article II(2)(a) of the FIPA.

B. The Claimant Has Not Proven that the Minimum Standard of Treatment Under Customary International Law Includes the Protections It Alleges

335. The International Court of Justice ("ICJ"),[564] prominent scholars,[565] and investment tribunals[566] have all confirmed that the party alleging the existence of a rule of customary international law has the burden of proving it. Where the existence of custom has not been demonstrated, "it is not the place of the Tribunal to assume this task. Rather, the Tribunal, in such an instance, should hold that Claimant fails to establish the particular standard asserted".[567]

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[562] **RL-168**, CCFTA Free Trade Commission, Notes of Interpretation of Certain Chapter G Provisions, 31 October 2002, s, B.

[563] Not all of Canada's treaties contain provisions contemplating notes of interpretation, and amending or clarifying treaties can be a time consuming exercise subject to many other considerations. While no clarification was made to the FET standard in the Canada-Egypt FIPA, it should be read consistently with Canada's expressed and consistent intent to refer to the standard at customary international law in its similarly worded treaties.

[564] **RL-169**, *Case Concerning Rights of Nationals of the United States of America in Morocco (France v. United States)*, [1952] I.C.J. Rep. 176, p. 200 citing *The Asylum Case (Colombia v. Peru)*, [1950] I.C.J. Rep. 266, pp. 276-277 ("The Party which relies on custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party.").

[565] **RL-170**, Ian Brownlie, *Principles of Public International Law*, 7th ed. (Oxford: Oxford University Press, 2008), p. 12 ("In practice the proponent of a custom has a burden of proof the nature of which will vary according to the subject-matter and the form of the pleadings.").

[566] **RL-171**, *ADF Group Inc. v. United States of America* (ICSID Case No. ARB(AF)/00/1) Award, 9 January 2003, ¶ 185 ("The investor, of course, in the end has the burden of sustaining its charge of inconsistency with Article 1105(1). That burden has not been discharged here and hence, as a strict technical matter, the Respondent does not have to prove that the current customary international law concerning standards of treatment consists only of discrete, specific rules applicable to limited contexts.") ("*ADF – Award*"); *See also*, **RL-172**, *United Parcel Service of America, Inc. v. Government of Canada* (UNCITRAL) Award on Jurisdiction, 22 November 2002, ¶ 84 ("the obligations imposed by customary international law may and do evolve. The law of state responsibility of the 1920s may well have been superseded by subsequent developments. It would be remarkable were that not so. *But relevant practice and the related understandings must still be assembled in support of a claimed rule of customary international law*.") (emphasis added) ("*UPS – Award on Jurisdiction*").

[567] **RL-173**, *Cargill, Incorporated v. United Mexican States* (ICSID Case No. ARB(AF)/05/2) Award, 18 September 2009, ¶ 273 ("*Cargill – Award*").

336. In discharging its burden, the Claimant must demonstrate evidence of State practice and *opinio juris* in support of the elements that it alleges form part of the fair and equitable standard in the FIPA.[568] In other words, the Claimant must provide evidence of consistent and general practice amongst States that is supported by a conviction by States that such practice is legally required by them under international law. The Claimant has not met this burden.

337. Specifically, the Claimant argues that the FET standard in Article II(2)(a) of the FIPA provides certain broad and unqualified protections to investors with respect to legitimate expectations, unreasonable and arbitrary conduct, transparency and due process.[569] However, the Claimant has not even attempted to demonstrate through State practice and *opinio juris* that these protections form part of the customary international law standard and, if so, what they require.

338. Instead, the Claimant relies solely on the awards of arbitral tribunals applying differently worded treaties containing autonomous FET obligations. However, aside from the fact that these tribunals are applying an irrelevant autonomous FET standard, tribunal decisions are not evidence of customary international law and State practice cannot be demonstrated exclusively through the decisions of past arbitral tribunals.[570] To prove State practice, the Claimant must

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[568] **RL-172**, *UPS – Award on Jurisdiction*, ¶ 84; *See also* **RL-174**, *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)*, [1969] I.C.J. Rep. 4, ¶ 74 (it is "an indispensable requirement" to show that "State practice, including that of States whose interests are specifically affected, should have been both extensive and virtually uniform in the sense of the provision invoked; – and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.") ("*North Sea Continental Shelf Cases*"); **RL-175**, *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya v. Malta)*, [1985] I.C.J. Rep. 13, ¶ 27 ("it is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States […]"); **RL-176**, *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, [1986] I.C.J. Rep. 14, ¶ 207 ("For a new customary rule to be formed, not only must the acts concerned 'amount to settled practice', but they must be accompanied by the *opinio juris sive necessitates*. Either the States taking such action or the other States in a position to react to it must have behaved so that their conduct is 'evidence of a belief that this is practice is rendered obligatory by the existence of a rule of law requiring it.'").

[569] Claimant's Memorial, ¶¶ 305, 345, 362.

[570] **RL-177**, *Glamis Gold, Ltd. v. United States of America* (UNCITRAL) Award, 8 June 2009, ¶¶ 605-607 ("*Glamis – Award*"). As the Glamis tribunal held, discussions of custom in arbitral awards can provide helpful "illustrations of customary international law if they involve an examination of customary international law." However, "[a]rbitral awards… do not constitute State practice and thus cannot create or prove customary international law." See also **RL-173**, *Cargill – Award*, ¶¶ 277; **RL-178**, *Railroad Development Corporation v. Republic of Guatemala* (ICSID Case No. ARB/07/23) Award, 29 June 2012, ¶ 217.

point to actions of *States*, not tribunals.[571] Past awards are only relevant to the extent that they include an examination of State practice and *opinio juris*.[572] None of the cases relied upon by the Claimant provide such an examination or analysis.[573]

C. The Fair and Equitable Treatment Obligation in the FIPA Does Not Include the Broad Protections that the Claimant Alleges

339. The Claimant argues that the FET standard provides certain broad and unqualified guarantees to investors in respect of unfair and arbitrary measures, legitimate expectations, transparency and due process.[574] Regardless of whether this Tribunal finds that the FET obligation in the FIPA guarantees a standard of treatment beyond the customary international law minimum standard of treatment (which it should not), the Claimant's assertions regarding these protections must be rejected.

1. The Fair and Equitable Treatment Obligation Does Not Allow a Tribunal to Second-Guess the Government's Policy Justification and Choice of Measure

340. Whether the FET obligation in the FIPA guarantees the customary international law minimum standard of treatment, or some other standard of treatment recognized by international law, the Claimant's allegations must in any event be rejected: they are nothing more than an invitation for the Tribunal to second-guess Canada's policy choices to achieve a competitive wireless telecommunication market and protect its national security interests. The Claimant's

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[571] Only States can engage in relevant actions which, if followed out of *opinio juris* and in concert with enough other States, coalesce into binding custom. See **RL-174**, *North Sea Continental Shelf Cases*, ¶ 77.

[572] **RL-179**, Sir Hersch Lauterpacht, *The Development of International Law by the International Court* (London: Stevens, 1958), pp. 20-21. *See also* **RL-180**, Mohamed Shahabuddeen, *Precedent in the World Court* (Cambridge: Cambridge University Press, 1996), pp. 71-72 ("The development of customary international law depends on state practice. It is difficult to regard a decision of the Court as being in itself an expression of State practice… A decision made by it is an expression not of the practice of the litigating States, but of the judicial view taken of the relations between them on the basis of legal principles which must necessarily exclude any customary law which has not yet crystallised. The decision may recognise the existence of a new customary law and in that limited sense it may no doubt be regarded as the final stage of development, but, by itself, it cannot create one. It lacks the element of repetitiveness so prominent a feature of the evolution of customary international law.").

[573] The ICJ has identified relevant national court decisions, domestic legislation relating to the matter at issue and official declarations by relevant State actors as the type of evidence that can demonstrate that a rule of customary international law exists. **RL-181**, *Jurisdictional Immunities of the State (Germany v. Italy)*, [2012] I.C.J. Rep. 99, ¶¶ 62-107.

[574] Claimant's Memorial, ¶¶ 161-172.

allegations ignore the fact that international law generally grants a high level of deference to States with respect to domestic policy choices and balancing of public interest and individual rights.

341. Investment tribunals have rightly rejected claimants' efforts to invoke the FET obligation as a basis for reviewing the sufficiency of the policy rationales underlying States' decisions regarding how to regulate and manage their affairs.[575] Investment treaty tribunals do not have competence to decide *ex aequo et bono*, applying their own subjective interpretation of what is "fair" vis-à-vis a particular investor. As a corollary, and in light of the deference accorded to States' policy choices, the FET standard cannot be read as a broad protection against any measure that an investor views as unfair. This is true whether or not the relevant FET standard is the standard at customary international law.

342. For example, in applying the customary international law FET standard found in the NAFTA, the *Chemtura* tribunal held that that its role was "not to second-guess the correctness of the science-based decision-making of highly specialized national regulatory agencies" (in that case, Canada's Pest Management Regulatory Agency).[576] A similar approach was taken by the tribunal in *Windstream* when applying the same standard. That tribunal declined to comment on

[575] *See for example*, **CL-038**, *Saluka Investments B.V. (The Netherlands) v. The Czech Republic* (UNCITRAL) Partial Award, 17 March 2006, ¶ 305 ("*Saluka – Partial Award*"); **CL-059**, *Gemplus, S.A., SLP, S.A., and Gemplus Industrial, S.A. de C.V. v. The United Mexican States* (ICSID Case No. ARB(AF)/04/3 & ARB(AF)/04/4) Award, 16 June 2010, ¶¶ 6-26 ("*Gemplus – Award*"); **CL-027**, *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL) Partial Award, 13 November 2000, ¶¶ 261-263 ("*S.D. Myers – Partial Award*"); **CL-061**, *El Paso Energy International Company v. The Argentine Republic* (ICSID Case No. ARB/03/15) Award, 31 October 2011, ¶ 342 ("Sometimes, the description of what FET implies looks like a programme of good governance that no State in the world is capable of guaranteeing at all times. The exigencies of FET have been detailed in *Tecmed*…") ("*El Paso – Award*"). *See also* **RL-182**, United Nations Conference on Trade and Development, *Fair and Equitable Treatment*, UNCTAD Series on Issues in International Investment Agreements II, UN Doc. UNCTAD/DIAE/IA/2011/5 (New York and Geneva: United Nations, 2012), pp. 65-67.

[576] **RL-183**, *Chemtura Corporation v. Government of Canada* (UNCITRAL) Award, 2 August 2010, ¶ 134. *Chemtura* involved a decision by the PMRA to cancel registrations that the Claimant needed to export seed treatments containing the pesticide lindane. The PMRA had "determined that termination of lindane products was warranted" due to "significant concerns regarding the adequacy of the margin of exposure for workers [to health risks] during seed treatment and handling of treated seed both on-farm and in commercial seed treatment facilities" (¶ 30).

the sufficiency of the scientific policy rationale cited by the sub-national government for a moratorium on the development of offshore wind projects in the Great Lakes.[577]

343. The same deference to regulatory agencies and government departments on scientific matters applies in the domain of economic policy and, with even greater reason, to matters of national security. For example, in *Merrill & Ring*, the claimant challenged the application of Canada's log export regime to its timber operations.[578] In considering the claim that the application of this regime breached the FET standard in the NAFTA, the tribunal held that it was "non-controversial that the Tribunal's task is not to pass judgment on the policy legitimacy of Canada's [regulatory] regime, but only to determine in this case whether its application breaches the minimum standard of treatment for aliens."[579]

344. Further, in *Crystallex*, a case under the Canada-Venezuela FIPA, the tribunal also acknowledged this deference to governments with respect to their policy choices:

> The Tribunal believes that in matters where a government regulator and/or administration is called to make decisions of a technical nature, those government authorities are the primary decision-makers called to examine the reports presented by the applying investor and the available scientific data. As such, those governmental authorities should enjoy a high level of deference for reasons of their expertise and competence (which is assumed to be present in those institutions called to make the relevant decisions) and proximity with the situation under examination. It is not for an investor-state tribunal to second-guess the substantive correctness of the reasons which an administration were to put forward in its decisions, or to question the

[577] In adopting the moratorium, Ontario cited scientific uncertainty around the effects of such projects on the environment and human health. The *Windstream* tribunal rejected the claim that the decision to adopt the moratorium breached Article 1105, noting that Ontario adopted the measure based on "a genuine policy concern that there was not sufficient scientific support for establishing an appropriate setback [distance], or [shoreline] exclusion zone, for offshore wind projects." **CL-086**, *Windstream Energy LLC v. Canada* (UNCITRAL) Award, 27 September 2016, ¶¶ 147-148, 206, 376 ("*Windstream – Award*").

[578] This regime was comprised of federal and provincial aspects which had different policy goals: "the provincial regime [sought] to ensure the availability of logs for use and manufacture in the province, while the federal regime [sought] an adequate supply and distribution of logs in Canada." **RL-184**, *Merrill & Ring Forestry L.P. v. Government of Canada* (UNCITRAL) Award, 31 March 2010, ¶ 29 ("*Merrill & Ring – Award*").

[579] **RL-184**, *Merrill & Ring – Award*, ¶ 236.

> importance assigned by the administration to certain policy objectives over others.[580]

345. Even tribunals applying autonomous FET standards have agreed with the *S.D. Myers* tribunal's caution that a determination of a breach of the FET standard does not involve "an open-ended mandate to second-guess government decision-making" and "must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders".[581]

346. For example, the *Perenco* tribunal noted that even if the applicable standard is not the FET standard at customary international law, something more than "unfairness" vis-à-vis a particular investor is required before a breach of the standard can be found:

> [A]s has been found by many other investment treaty tribunals presented with the task of ascertaining the standard's meaning – even where the applicable treaty contains no references to customary international law – there is much to be said for the general approach stated by the tribunal in *Waste Management, Inc. v. United Mexican States*, which characterized conduct attributable to the State and injurious to the investor as violating the standard when it is: '… arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the Claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process.'
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> The inclusion of such words as 'arbitrary,' the use of the adjectival modifiers 'grossly' in relation to 'unfair, just or idiosyncratic,' and 'manifest' in relation to a failure of natural justice and 'complete' in relation to a lack of transparency and candour implies a search for 'something more' that distinguishes an act in violation of international law from the perceived unfairness occasioned by many governmental actions that do not rise to a breach of international law. The challenge is to discern between the two.[582]

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[580] **CL-082**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/11/2) Award, 4 April 2016, ¶ 583 ("*Crystallex – Award*").

[581] **CL-027**, *S.D. Myers – Partial Award*, ¶¶ 261, 263 *See also* **CL-038**, *Saluka – Partial Award*, ¶ 305; **CL-059**, *Gemplus – Award*, ¶¶ 6-26.

[582] **RL-185**, *Perenco Ecuador Limited v. Republic of Ecuador* (ICSID Case No. ARB/08/6) Decision on the Remaining Issues of Jurisdiction and on Liability, 12 September 2014, ¶¶ 558-559, citing to *Waste Management, Inc. v. United Mexican States (*ICSID Case No. ARB (AF)/00/3) Award, 30 April 2004, ¶ 98.

347. An overly broad reading of the FET obligation of treatment as the Claimant suggests would be antithetical to the object and purpose of the FIPA, which serves not only to protect investors, but also promote investment in the host State. As the *Saluka* tribunal noted:

> [t]he protection of foreign investments is not the sole aim of the Treaty, but rather a necessary element alongside the overall aim of encouraging foreign investment and extending and intensifying the parties' economic relations [which] in turn calls for a balanced approach to the interpretation of the Treaty's substantive provisions for the protection of investments, since an interpretation which exaggerates the protection to be accorded to foreign investments may serve to dissuade host States from admitting foreign investments and so undermine the overall aim of extending and intensifying the parties' mutual economic relations.[583]

2. The Fair and Equitable Treatment Standard Does Not Protect Against Unreasonable or Arbitrary Measures Unless they are Devoid of any Legitimate Policy Purpose and Contrary to the Rule of Law

348. The Claimant's allegations that Canada breached the FET obligation through unreasonable and arbitrary measures are based on an erroneous interpretation of the standard the obligation guarantees. An "unreasonable" or "arbitrary" measure cannot constitute a breach of the FET obligation unless the measure is devoid of any legitimate purpose and contrary to the rule of law.[584] The ICJ defined the term 'arbitrariness' in the *ELSI* case:

> Arbitrariness is not so much something opposed to a rule of a law, as something opposed to the rule of law. … It is a willful disregard of due process of law, an act which shocks, or at least surprises a sense of judicial propriety.[585]

349. This definition has been adopted by numerous investment treaty tribunals holding that the ordinary meaning of 'arbitrary' is "'derived from mere opinion', 'capricious', 'unrestrained', 'despotic'"[586] Black's Law Dictionary defines the term as "'done capriciously or at pleasure',

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[583] **CL-038**, *Saluka – Partial Award*, ¶ 300.

[584] As noted by the *National Grid* tribunal, "the plain meaning of the terms 'unreasonable' and 'arbitrary' is substantially the same in the sense of something done capriciously, without reason." **CL-053**, *National Grid P.L.C. v. Argentine Republic* (UNCITRAL) Award, 3 November 2008, ¶ 197.

[585] **RL-186**, *Case Concerning Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, [1989] I.C.J. Rep. 15, ¶ 128.

[586] *See for example*, **RL-056**, *Noble Ventures – Award*, ¶ 176; **CL-039**, *Azurix Corp. v. The Argentine Republic* (ICSID Case No. ARB/01/12) Award, 14 July 2006, ¶ 392 ("*Azurix – Award*"); **CL-041**, *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic* (ICSID Case No. ARB/02/1) Decision on

'not done or acting according to reason or judgment', 'depending on the will alone'".[587] Arbitrariness therefore requires "that some important measure of impropriety is manifest".[588]

350. The *Lemire* tribunal further elaborated on the meaning of arbitrariness in the context of the FET standard:

> Arbitrariness has been described as 'founded on prejudice or preference rather than on reason or fact', 'contrary to the law because… [i]t shocks, or at least surprises, a sense of judicial propriety', or 'wilful disregard of due process of law, an act which shocks, or at least surprises a judicial propriety'; or conduct which 'manifestly violate[s] the requirements of consistency, transparency, even-handedness and non-discrimination'. Professor Schreuer has defined (and the tribunal in *EDF v. Romania* has accepted) as 'arbitrary': 'a. a measure that inflicts damage on the investor without serving any apparent legitimate purpose; b. a measure that is not based on legal standards but on discretion, prejudice or personal preference; c. a measure taken for reasons that are different from those put forward by the decision maker; d. a measure taken in willful disregard of due process and proper procedure.' *Summing up, the underlying notion of arbitrariness is that prejudice, preference or bias is substituted for the rule of law*.[589]

351. Conduct that may be unreasonable from the perspective of one person but does not meet these requirements does not constitute a breach of the FET obligation.

3. The Fair and Equitable Treatment Obligation Does Not Protect an Investor's Legitimate Expectations

352. The Claimant's interpretation of the FET obligation as including an obligation to protect its legitimate expectations must also be rejected. First, the FET obligation does not include a

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Liability, 3 October 2006, ¶ 157; **CL-043**, *Siemens A.G. v. The Argentine Republic* (ICSID Case No. ARB/02/8) Award, 6 February 2007, ¶ 318 ("*Siemens – Award*"); **CL-050**, *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador* (ICSID Case No. ARB/04/19) Award, 18 August 2008, ¶ 381 ("*Duke Energy – Award*"); **RL-187**, *ECE Projektmanagement International GmbH and Kommanditgesellschaft PANTA Achtundsechzigste Grundstücksgesellschaft mbH & Co v. Czech Republic* (UNCITRAL) Award, 19 September 2013, ¶¶ 4.822-4.823 ("*ECE Projektmanagement – Award*").

[587] **CL-039**, *Azurix – Award*, ¶ 392; **CL-043**, *Siemens - Award*, ¶ 318.

[588] **RL-188**, *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic* (ICSID Case No. ARB/01/3) Award, 22 May 2007, ¶ 281 ("*Enron – Award*"); **RL-189**, *Sempra Energy International v. Argentine Republic* (ICSID Case No. ARB/02/16) Award, 28 September 2007, ¶ 318 ("*Sempra – Award*"); **RL-190**, *Ulysseas, Inc. v. Ecuador* (UNCITRAL) Final Award, 12 June 2012, ¶ 319.

[589] **CL-057**, *Joseph Charles Lemire v. Ukraine* (ICSID Case No. ARB/06/18) Decision on Jurisdiction and Liability, 14 January 2010, ¶¶ 262-263 (emphasis added).

freestanding obligation to protect an investor's legitimate expectations. States and a number of tribunals have confirmed that the fulfilment of an investor's legitimate expectations is not a rule of customary international law.[590] This is because "[t]he obligations of the host State towards foreign investors derive from the terms of the applicable investment treaty and not from any set of expectations investors may have or claim to have".[591]

353. At most, legitimate expectations "may be taken into account in assessing whether there has been a breach of the State's obligation to refrain from unfair and inequitable treatment".[592] The *Mobil* tribunal maintained that the FET standard is breached by conduct that is "arbitrary, grossly unfair, unjust or idiosyncratic, or is discriminatory and exposes a claimant to section or racial prejudice" or offends judicial propriety", and that in a determination of whether there is such violation, certain representations are "a relevant factor".[593] Likewise, the *Waste Management II* tribunal observed that certain types of representations may be "relevant" as to whether the State acted in a way that was "grossly unfair, unjust or idiosyncratic" or exhibited "a complete lack of transparency and candour in an administrative process."[594] Similarly, the *Thunderbird* tribunal considered expectations to be a part of the "context" but found that measures would still have to

[590] **RL-192**, *Bear Creek Mining Corporation v. Republic of Peru* (ICSID Case No. ARB/14/21) Submission of Canada Pursuant to Article 832 of the Canada-Peru Free Trade Agreement, 9 June 2016, ¶ 10; **RL-193**, *Spence International Investments and others v. Republic of Costa Rica* (ICSID Case No. UNCT/13/2) Submission of the United States of America, 17 April 2015, ¶¶ 16, 17, 18; **RL-194**, *Spence International Investments and others v. Republic of Costa Rica* (ICSID Case No. UNCT/13/2) Non-disputing Party Submission of the Republic of El Salvador, 17 April 2015, ¶ 8; **RL-195**, *Lone Pine Resources Inc. v. Government of Canada* (ICSID Case No. UNCT/15/2) Submission of the United States of America, 16 August 2017, ¶¶ 26, 27; **RL-196**, *Eli Lilly and Company v. Government of Canada* (ICSID Case No. UNCT/14/2) Submission of the United States of America, 18 March 2016, ¶ 13.

[591] **RL-197**, *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile* (ICSID Case. No. ARB/01/7) Decision on Annulment, 21 March 2007, ¶ 67.

[592] **RL-198**, *Peter A. Allard v. Government of Barbados* (UNCITRAL) Award, 27 June 2016, ¶ 181 ("*Allard – Award*"); **RL-199**, *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada* (ICSID Case No. ARB(AF)/07/4) Decision on Liability and on Principles of Quantum, 22 May 2012, ¶ 152 ("*Mobil and Murphy – Decision on Liability*"); **RL-200**, *Waste Management, Inc. v. United Mexican States [II]* (ICSID Case No. ARB(AF)/00/3) Final Award, 30 April 2004, ¶ 98 ("*Waste Management II – Final Award*"); **CL-077**, *William Ralph Clayton, Bilcon of Delaware, Inc., et al. v. Government of Canada* (UNCITRAL) Award on Jurisdiction and Liability, 17 March 2015, ¶ 455; **RL-177**, *Glamis – Award*, ¶¶ 620-621.

[593] **RL-199**, *Mobil and Murphy – Decision on Liability*, ¶ 152.

[594] **RL-200**, *Waste Management II – Final Award*, ¶ 98.

amount to a "gross denial of justice or manifest arbitrariness" to amount to a breach of the FET obligation.[595]

354. Second, to the extent that they are considered relevant, legitimate expectations should only be considered where the State has made specific and express representations to an investor to induce the investment. As explained recently by the *Crystallex* tribunal in discussing a FET standard that was not tied to customary international law:

> A legitimate expectation may arise in cases where the Administration has made a promise or representation to an investor as to a substantive benefit, on which the investor has relied in making its investment, and which later was frustrated by the conduct of the Administration. To be able to give rise to such legitimate expectations, such promise or representation – addressed to the individual investor – must be sufficiently specific, i.e. it must be precise as to its content and clear as to its form. Furthermore, as recalled by the *Arif v. Moldova* tribunal, "a claim based on legitimate expectations must proceed from the exact identification of the origin of the expectation alleged, so that its scope can be formulated with precision.[596]

355. The requirement that any legitimate expectation relied upon be grounded in a specific commitment to a specific investor has been re-iterated in numerous cases.[597] Thus, "[e]ncouraging remarks from government officials do not themselves give rise to legitimate expectations" and rather there must be "an 'unambiguous affirmation' or a 'definitive, unambiguous and repeated assurances" that are "targeted at a specific person or identifiable

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[595] **RL-191**, *International Thunderbird Gaming Corporation v. United Mexican States* (UNCITRAL) Award, 26 January 2006, ¶¶ 147, 194.

[596] **CL-082**, *Crystallex – Award*, ¶ 547.

[597] *See for example*, **RL-201**, *Saint-Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/12/13) Decision on Liability and the Principles of Quantum, 30 December 2016, ¶ 531; **RL-202**, *Venezuela Holdings B.V. and others (formerly Mobil Corporation and others) v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/27) Award, 9 October 2014, ¶ 256; **CL-042**, *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey* (ICSID Case No. ARB/02/5) Award, 19 January 2007, ¶¶ 241-243 ("*PSEG – Award*"); **RL-203**, *Parkerings-Companiet AS v. Republic of Lithuania* (ICSID Case No. ARB/05/8) Award, 11 September 2007, ¶ 332; **CL-068**, *AES Corporation and Tau Power B.V. v. Republic of Kazakhstan* (ICSID Case No. ARB/10/16) Award, 1 November 2013, ¶ 289 ("*AES – Award*"); **RL-204**, *Walter Bau AG v. The Kingdom of Thailand* (UNCITRAL) Award, 1 July 2009, ¶ 11.11; **RL-205**, *EDF (Services) Limited v. Romania* (ICSID Case No. ARB/05/13) Award, 8 October 2009, ¶ 217; **CL-061**, *El Paso – Award*, ¶¶ 375-379; **RL-187**, *ECE Projektmanagement – Award*, ¶ 4.762; **RL-206**, *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic* (ICSID Case No. ARB/14/3) Award, 27 December 2016, ¶¶ 365-371; **RL-198**, *Allard – Award*, ¶ 194; **CL-051**, *Continental Casualty Company v. Argentine Republic* (ICSID Case No. ARB/03/9) Award, 5 September 2008, ¶¶ 260-261 ("*Continental Casualty – Award*"); **RL-177**, *Glamis – Award*, ¶¶ 766, 813; **RL-199**, *Mobil and Murphy – Decision on Liability*, ¶¶ 169-170.

group".[598] Representations that suffer from "vagueness or generality… are not capable of giving rise to reasonable legitimate expectations".[599]

356. Third, unless a specific stability agreement was concluded, (or unless the government otherwise provided a specific and explicit representation to an investor that the legal or business environment will not change) an investor cannot expect that the applicable legal or business environment will remain the same. The sovereign authority of a State to legislate and to adapt its legal system to changing circumstances was emphasized by the *Philip Morris* tribunal:

> It is common ground in the decisions of more recent investment tribunals that the requirements of legitimate expectations and legal stability as manifestations of the FET standard do not affect the State's rights to exercise its sovereign authority to legislate and to adapt its legal system to changing circumstances… The tribunal in *EFT v. Romania* has stated in this regard: 'The idea that legitimate expectations, and therefore FET, imply the stability of the legal and business framework, may not be correct if stated in an overly-broad and unqualified formulation. The FET might then mean the virtual freezing of the legal regulation of economic activities, in contrast with the State's normal regulatory power and the evolutionary character of economic life. Except where specific promises or representations are made by the State to the investor, the latter may not rely on a bilateral investment treaty as a kind of insurance policy against the risk of any changes in the host State's legal and economic framework. Such expectation would be neither legitimate nor reasonable.'… It clearly emerges from the analysis of the FET standard by investment tribunals that legitimate expectations depend on *specific* undertakings and representations made by the host State to induce investors to make an investment. Provisions of *general* legislation applicable to a plurality of persons or of category of persons, do not create legitimate expectations that there will be no change in the law. Given the State's regulatory powers, in order to rely on legitimate expectations the investor should inquire in advance regarding the prospects of a change in the regulatory framework in light of the then prevailing or reasonably to be expected changes in the economic and social conditions of the host State.[600]

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[598] **RL-207**, *White Industries Australia Limited v. Republic of India* (UNCITRAL) Final Award, 30 November 2011, ¶ 10.3.7, citing to Andrew Newcombe and Luis Paradell, *Law and Practice of Investment Treaties, Standards of Treatment* (2009), pp. 281-282 ("*White Industries – Final Award*").

[599] **RL-207**, *White Industries – Final Award*, ¶ 10.3.17.

[600] **RL-208**, *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay* (ICSID Case No. ARB/10/7) Award, 8 July 2016, ¶¶ 422-427 ("*Philip Morris – Award*"); *See also* **CL-061**, *El Paso – Award*, ¶¶ 341-379 ("In the Tribunal's view, if the often repeated formula to the effect that "the stability of the legal and business framework is an essential element of fair

357. Therefore, while an investor may develop its own expectations about the legal regime governing its investment, those expectations are irrelevant and impose no obligations on the State. States may modify or amend their regulations to achieve legitimate public policy objectives and will not incur liability merely because such changes interfere with an investor's "expectations" about the state of regulation in a particular sector. As the *Mobil* tribunal explains:

> [The fair and equitable treatment] standard does not require a State to maintain a stable legal and business environment for investments… [T]here is nothing in Article 1105 to prevent a public authority from changing the regulatory environment to take account of new policies and needs, even if some of those changes may have far-reaching consequences and effects, and even if they impose significant additional burdens on an investor. Article 1105 is not, and was never intended to amount to, a guarantee against regulatory change, or to reflect a requirement that an investor is entitled to expect no material changes to the regulatory framework within which an investment is made… What the foreign investor is entitled to under Article 1105 is that any changes are consistent with the requirements of customary international law on fair and equitable treatment.[601]

4. The Fair and Equitable Treatment Standard Does Not Provide a General Obligation of Transparency

358. The FET obligation does not include a general obligation of transparency.[602] While some tribunals have noted that a "complete lack of transparency and candour" could be a factor in a determination of violation of the FET standard,[603] the Claimant has not cited a single decision in

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and equitable treatment" were true, legislation could never be changed: the mere enunciation of that proposition shows its irrelevance. Such a standard of behaviour, if strictly applied, is not realistic, nor is it the BITs' purpose that States guarantee that the economic and legal conditions in which investments take place will remain unaltered ad infinitum. Such an outcome based on the holdings of some tribunals has been criticised by Professor Vaughan Lowe, when he analysed some of the cases based on this kind of conception, in the following terms: 'The tenor of the cases suggests that it is now regarded as 'unfair' or 'inequitable' for a state to make material changes in the business environment that prevailed when the investor committed itself to its investment.'… In other words, the Tribunal cannot follow the line of cases in which fair and equitable treatment was viewed as implying the stability of the *legal* and *business framework*. Economic and legal life is by nature evolutionary… The State has to be able to make the reasonable changes called for by the circumstances and cannot be considered to have accepted a freeze on the evolution of its legal system.").

[601] **RL-199**, *Mobil and Murphy – Decision on Liability*, ¶ 153.

[602] **RL-184**, *Merrill & Ring – Award*, ¶ 231.

[603] **RL-200**, *Waste Management II – Final Award*, ¶ 98 (emphasis added). *See also* **RL-173**, *Cargill – Award*, ¶ 285.

support of its position that a government action that is "lacking in transparency"[604] amounts to a breach of the FET obligation.

359. Further, to the extent that lack of transparency has some relevance to a FET analysis, it must be considered in light of all of the factual circumstances surrounding the conduct and the type of measure at issue.[605] As the *Micula* tribunal noted in the context of diplomatic relations:

> Whether a state has been unfair and inequitable by failing to be transparent with respect to its laws and regulations, or being ambiguous and inconsistent in their application, must be assessed in light of all of the factual circumstances surrounding such conduct. *For example, it would be unrealistic to require Romania to be totally transparent with the general public in the context of diplomatic negotiations*. The question before the Tribunal is thus not whether Romania has failed to make full disclosure of or grant full access to sensitive information; it is whether, in the event that Romania failed to do so, Romania acted unfairly and inequitably with respect to the Claimants.[606]

360. Therefore, in the context of a measure adopted to address national security concerns, given the inherent sensitivity of the subject matter, it is unreasonable to expect that a government could act in a fully transparent manner. The FET standard cannot be interpreted to impose such an obligation.

5. The Fair and Equitable Treatment Obligation Does Not Establish a Specific Process that Applies to States' National Security Reviews

361. In the context of judicial proceedings, disregard of the fundamental principles of due process may constitute a denial of justice and therefore a breach of the FET obligation. However, that is not what is at issue here. The Claimant alleges that even outside of the context of judicial proceedings, the FET standard guarantees a broad due process obligation in dealings with governments. However the Claimant does not support this assertion or define the scope of this protection. It does not establish the standard that international law requires with respect to Canada's national security review of its proposed investment. Nor does it establish how there can

[604] Claimant's Memorial, ¶ 295(b).

[605] **CL-070**, *Ioan Micula and others v. Romania* (ICSID Case No. ARB/05/20) Award, 11 December 2013, ¶ 533 ("*Micula – Award*").

[606] **CL-070**, *Micula – Award*, ¶ 533.

be a breach of due process where the Claimant has failed to avail itself of available domestic remedies to rectify the situation.

D. The Transfer Framework Did Not Breach Canada's Fair and Equitable Treatment Obligation

362. The Claimant argues that the Transfer Framework breached Article II(2)(a) because it "blocked" the transfer of Wind Mobile's spectrum licences to an Incumbent.[607] However, the Transfer Framework itself did not block any transfers. It simply clarified how the Minister would exercise the authority he already had to approve licence transfers. Moreover, as noted above, Wind Mobile never requested a transfer, and therefore Canada never blocked any transfer request by Wind Mobile or the Claimant.[608] The Claimant's FET claim based on the Transfer Framework should be dismissed on this basis alone.

363. Further, even if the Transfer Framework somehow prevented the transfer of Wind Mobile's spectrum licences to Incumbents, it does not constitute a breach of the FET obligation under Article II(2)(a). Canada adopted the Transfer Framework in pursuit of its long-standing policy objective of promoting competition in the wireless telecommunications market, by limiting spectrum concentration. The consideration of how a licence transfer will affect concentration is a legitimate and rational tool that is used by other regulators in the telecommunications sector. In adopting the Transfer Framework, Canada accorded due process and procedural fairness to all licensees, including Wind Mobile. Further, at no time did Canada ever make a specific representation that the Minister would automatically approve a set-aside licence transfer to an Incumbent. It was also clear from the start that spectrum management policies were subject to change. The Claimant's arguments[609] that the Transfer Framework breached Article II(2)(a) because it was unreasonable and arbitrary and because it frustrated the Claimant's expectations have no merit.

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[607] *See* Claimant's Memorial, ¶¶ 303-344.

[608] *Supra*, ¶¶ 248-252.

[609] *See* Claimant's Memorial, ¶ 305.

1. The Transfer Framework was Not Unreasonable or Arbitrary

364. As discussed above, a measure that is arbitrary or unreasonable only amounts to a breach of Article II(2)(a) if it is devoid of *any* legitimate purpose and contrary to the rule of law.[610] The Transfer Framework is not such a measure.

(a) The Transfer Framework Was Adopted in Good Faith and in Pursuit of Canada's Legitimate and Long-standing Policy Objective of Promoting Competition

365. The Transfer Framework was adopted in good faith and in pursuit of Canada's long-standing policy objective of promoting competition in the wireless telecommunications sector. As described above,[611] the Government had genuine concerns around the potential for undue spectrum concentration after the five-year moratorium on transfers of set-aside AWS-1 spectrum licences to Incumbents expired and the negative effects that this could have on competition, particularly in light of recent technological changes and the increased importance of access to more spectrum. The Government did not want to lose the benefits of competition that had been introduced in the market following the 2008 AWS-1 Auction, including increased consumer choice and innovation, and lower prices.[612] In this context, Industry Canada developed the Transfer Framework to clarify for all licensees that spectrum concentration would be considered in reviewing licence transfer requests going forward.[613]

366. During the public consultation on the Transfer Framework, Wind Mobile stated that it was "clear that the Government's primary policy objective" was "to create, enhance, and sustain competition in the Canadian wireless telecommunications market."[614] Wind Mobile "recogni[zed] the good faith intentions of this Government" in seeking to promote

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[610] *Supra*, ¶¶ 348-357.

[611] *Supra*, ¶¶ 212-254.

[612] **RWS-Stewart**, ¶ 31.

[613] **RWS-Stewart**, ¶¶ 60, 63.

[614] *See* **RWS-Hill**, ¶ 124; **R-146**, Wind Mobile, Comments of April 3, 2013, ¶ 2. *See also* **R-152**, Globalive Wireless Management Corp., "Consultation on Considerations Relating to Transfers, Divisions, and Subordinate Licensing of Spectrum Licences: Comments of Globalive Wireless Management Corp. ("WIND")" (May 3, 2013), ¶ 2 ("WIND recognizes that the Government's primary policy objective is to create, enhance, and sustain competition in the wireless telecommunications market in Canada.").

competition.[615] Indeed, Wind Mobile argued that the proposed Transfer Framework did not go far enough to meet this objective, urging the government to do more to promote competition and the viability of New Entrants.[616]

367. Given this acknowledgment that the purpose of the Transfer Framework was to promote competition and that this was a laudable objective, the Claimant cannot now argue that the Transfer Framework has no "credible policy objective".[617] Nor is there any support for its assertion that the sole purpose of the Transfer Framework was to "deflect public criticism".[618] This assertion is pure speculation. It is unsupported by any evidence, and is contradicted by the witness statements of Mr. Hill and Mr. Stewart,[619] as well as by the internal briefing materials prepared by Industry Canada, which demonstrate that the Department was motivated by a concern about the sustainability of competition from New Entrants and the potential for spectrum concentration to undermine competition in the wireless telecommunications market.[620]

(b) The Transfer Framework was Adopted After Careful Consideration of Different Options to Prevent Undue Spectrum Concentration

368. The Claimant's argument that the Transfer Framework was unreasonable and arbitrary fails to consider that it was adopted after months of careful analysis and deliberation by Industry Canada and the Minister, and after assessment of the merits of other available options.

369. Industry Canada's Strategic Policy Sector, led by Mr. Stewart, was responsible for this analysis and for identifying options for the Minister to consider.[621] As explained by Mr. Stewart, Industry Canada identified three options to address the risk of undue spectrum concentration.[622]

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[615] **RWS-Hill**, ¶ 125; **R-146**, Wind Mobile, Comments of April 3, 2013, ¶ 4.

[616] **RWS-Hill**, ¶¶ 125, 126. *See also* **R-146**, Wind Mobile, Comments of April 3, 2013, ¶¶ 4-6, 14-18, 20.

[617] Claimant's Memorial, ¶ 335.

[618] Claimant's Memorial, ¶ 335.

[619] *See* **RWS-Hill**, ¶ 115; **RWS-Stewart**, ¶ 66.

[620] *See supra*, ¶¶ 231-247 (and Industry Canada briefing materials cited therein).

[621] **RWS-Stewart**, ¶¶ 6, 35.

[622] **RWS-Stewart**, ¶ 58; **R-084**, Memorandum of December 7, 2012, Annex A, p. 6 and Annex B, p. 16; **R-088**, Memorandum of January 4, 2013, Annex A, p. 3 and Annex B, p. 8; **R-089**, Industry Canada, Presentation, "Wireless Telecommunications Market and Approach to Spectrum Licence Transfers" (Jan. 14, 2013), p. 13.

In choosing the appropriate approach, the Government wanted to send a consistent and clear message to the market about the Incumbents' ability to acquire set-aside spectrum licences at the end of the moratorium and the Government's commitment to sustained competition beyond the Incumbents.[623]

370. One option that was identified was to extend the AWS-1 set-aside moratorium until the end of the ten-year licence term.[624] This option would prevent all transfers that caused undue spectrum concentration in the short term, but would not resolve the issue beyond 2018-2019 when the AWS-1 spectrum licences expired.[625] It would also only apply to AWS-1 spectrum licences, and would leave the potential for undue spectrum concentration in other spectrum bands.[626]

371. Another approach was to establish a spectrum cap, as was done for PCS licences in 1995.[627] This approach was more flexible than a strict extension of the moratorium, and would allow Incumbents to acquire spectrum licences (including set-aside AWS-1 spectrum licences) within certain defined limits.[628] However, "setting limits at the right level would be important and difficult."[629] While more flexible than extending the moratorium, this approach was still

[623] **RWS-Stewart**, ¶ 66; **R-090**, Memorandum from John Knubley or Marta Morgan, Industry Canada to Minister of Industry (English and French versions), attaching Annexe A: Messages clés de l'énonce de politique sur la concurrence du sans-fil, Annexe B: La concurrence dans le secteur du sans-fil, Annexe C: Politique sur le transfert de licence de spectre: Calendrier possible des consultations, and Annex D: Letters from the Public Interest Advocacy Centre and Wind Mobile (French versions) (Jan. 29, 2013), pp. 2-3.

[624] **RWS-Stewart**, ¶¶ 58, 59.

[625] **RWS-Stewart**, ¶ 59; **R-084**, Memorandum of December 7, 2012, Annex A, p. 6; **R-095**, Industry Canada, Presentation, "Transfer Policy Consultation Options" (Jan. 9, 2013).

[626] **RWS-Stewart**, ¶ 59; **R-084**, Memorandum of December 7, 2012, Annex B, p. 16; **R-089**, Memorandum of January 4, 2013, Annex A, p. 3; **R-095**, Industry Canada, Presentation, "Transfer Policy Consultation Options" (Jan. 9, 2013).

[627] **RWS-Stewart**, ¶¶ 58, 61.

[628] **RWS-Stewart**, ¶ 61; **R-084**, Memorandum of December 7, 2012, Annex A, p. 6; **R-088**, Memorandum of January 4, 2013, Annex A, p. 3 and Annex B, p. 8.

[629] **RWS-Stewart**, ¶ 61. *See also* **R-084**, Memorandum of December 7, 2012, Annex A, p. 6 and Annex B, p. 16; **R-088**, Memorandum of January 4, 2013, Annex A, p. 3 and Annex B, p. 8.

rigid and would not provide flexibility to consider the specific situation and information available at the time of a transfer request.[630]

372. The Minister ultimately chose the more flexible approach of clarifying that his discretion over spectrum licence transfers would be exercised on a case-by-case basis taking spectrum concentration into account.[631] This approach would apply not only to set-aside AWS-1 spectrum licences, but also more broadly across all bands,[632] treating all licensees equally.

373. The approach selected by the Minister was also consistent with what some other jurisdictions were doing on spectrum regulation and competition oversight.[633] As stated in the Transfer Framework Consultation Paper:

> [i]ssues concerning spectrum aggregation and competition are not unique to Canada. Regulators worldwide have employed a wide range of measures to ensure that access to spectrum is not limited to only a small number of operators. Spectrum licence transfer requests are typically reviewed with respect to their impact on concentration and the potential impacts on competition in the provision of wireless services to the public.[634]

(c) The Tribunal's Role is Not to Second-Guess Canada's Decision to Adopt the Transfer Framework

374. Although Wind Mobile had informally indicated that it would support an extension of the AWS-1 moratorium or other measures to limit transfers of set-aside spectrum to Incumbents for an additional five years,[635] and although Wind Mobile publicly supported the Government's announcement of the Transfer Framework,[636] the Claimant now asks the Tribunal to second-

[630] **RWS-Stewart**, ¶ 61; **R-084**, Memorandum of December 7, 2012, Annex A, p. 6 and Annex B, p. 16; **R-088**, Memorandum of January 4, 2013, Annex A, p. 3 and Annex B, p. 8.

[631] **RWS-Stewart**, ¶¶ 58, 60, 63.

[632] **RWS-Stewart**, ¶ 60; **R-084**, Memorandum of December 7, 2012, Annex B, p. 16; **R-095**, Industry Canada, Presentation, "Transfer Policy Consultation Options" (Jan. 9, 2013).

[633] **RWS-Stewart**, ¶ 60; **R-084**, Memorandum of December 7, 2012, Annex A, p. 6 and Annex B, p. 16; **R-088**, Memorandum of January 4, 2013, Annex A, p. 3 and Annex B, p. 8; **R-096**, Industry Canada, "International Benchmarking – Spectrum regulation and competition oversight" (Apr. 11, 2013).

[634] **C-152**, Transfer Framework Consultation Paper, ¶ 11.

[635] **RWS-Stewart**, ¶ 62; **R-084**, Memorandum of December 7, 2012, Annex A, p. 7; **R-088**, Industry Canada, Memorandum of January 4, 2013, Annex A, p. 4.

[636] *Supra*, ¶¶ 245-247.

guess Canada's decision to adopt the Transfer Framework. It argues that the Transfer Framework was unreasonable and arbitrary because it was "incorrect",[637] "irrational"[638] or not evidence-based.[639]

375. These arguments fundamentally misunderstand the role of international investment tribunals. As discussed above,[640] and as the tribunal in *Mesa* aptly stated, "international law requires tribunals to give a good level of deference to the manner in which a state regulates its internal affairs."[641] Following the approach adopted by the tribunals in *S.D. Myers*, *Mesa*, *Chemtura*, *Windstream*, *Merrill & Ring* and *Crystallex*,[642] the Tribunal should decline the Claimant's invitation to substitute its own judgement for that of Canada's regulators.

376. Moreover, nothing in the legal authorities and factual exhibits cited by the Claimant supports a conclusion that the measure was irrational. To the contrary, the evidence establishes that it was a considered and balanced approach, informed by stakeholder consultations and analysis, and designed to further Canada's policy objective to stimulate competition in the wireless market for the benefit of Canadians.[643]

377. In support of its argument that Canada's measure was irrational, the Claimant relies on *Occidental*.[644] However, this case is not analogous. *Occidental* involved the termination of a contract between the State and an individual investor and not a regulatory measure of general application of the sort at issue here.[645] Moreover, the basis for the contract termination in

[637] Claimant's Memorial, ¶ 337.

[638] Claimant's Memorial, ¶ 339.

[639] Claimant's Memorial, ¶ 340.

[640] *See supra*, ¶¶ 339-361.

[641] **RL-105**, *Mesa Power Group LLC v. Canada* (UNCITRAL) Award, 24 March 2016, ¶ 505.

[642] *See supra*, ¶¶ 339-361.

[643] *See supra*, ¶¶ 231-247, ¶¶ 365-373.

[644] Claimant's Memorial, ¶ 340, citing **CL-065**, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador* (ICSID Case No. ARB/06/11) Award, 5 October 2012, ¶¶ 450-452 ("*Occidental – Award*").

[645] *See* **CL-065**, *Occidental – Award*, ¶¶ 2, 105.

Occidental was one of specific punishment and general deterrence,[646] neither of which applies in this case.

378. The Claimant also relies on Professor Born's dissent in *Philip Morris*.[647] Professor Born considered that Uruguay's "single presentation requirement", which permitted only a single presentation of any trademark used in marketing tobacco products, was manifestly arbitrary and disproportionate and, as a consequence, constituted a denial of FET under Article 3(2) of the Swiss-Uruguayan BIT.[648]

379. In particular, Professor Born considered it relevant that Uruguay's measure "was (and remain[ed]), in a field with an extensive body of regulation, unprecedented."[649] The evidentiary record in that case showed that "no other country in the world has adopted such a requirement."[650] The same thing cannot be said in this case. As explained above,[651] other countries in the world have adopted similar measures to regulate spectrum and oversee competition in the wireless telecommunications sector, which Canada carefully considered before adopting the Transfer Framework.

380. As factual evidence to support its argument that the Transfer Framework was irrational, the Claimant relies on a 2010 report by the House of Commons Standing Committee on Industry,

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[646] *See* **CL-065**, *Occidental – Award*, ¶¶ 414(ii), 450.

[647] Claimant's Memorial, ¶ 340, citing **CL-084**, *Philip Morris Brands Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay* (ICSID Case No. ARB/10/7) Born Concurring and Dissenting Opinion, 28 June 2016, ¶¶ 146-179 ("*Philip Morris – Concurring and Dissenting Opinion*"). The Claimant ignores the holding of the majority, which is instructive: "In the end the Tribunal does not believe that it is necessary to decide whether the SPR actually had the effects that were intended by the State, what matters being rather whether it was a 'reasonable' measure when it was adopted. Whether or not the SPR was effective in addressing public perceptions about tobacco safety and whether or not the companies were seeking, or had in the past sought, to mislead the public on the point, it is sufficient in light of the applicable standard to hold that the SPR was an attempt to address a real public health concern, that the measure taken was not disproportionate to that concern and that it was adopted in good faith. The effect of the SPR was to preclude the concurrent use of certain trademarks, without depriving the Claimants of the negative rights of exclusive use attached to those trademarks. In short, the SPR was a reasonable measure, not an arbitrary, grossly unfair, unjust, discriminatory or a disproportionate measure, and this is especially so considering its relatively minor impact on Abal's business." **RL-208**, *Philip Morris – Award*, ¶ 409.

[648] **CL-084**, *Philip Morris – Concurring and Dissenting Opinion*, ¶ 5.

[649] **CL-084**, *Philip Morris – Concurring and Dissenting Opinion*, ¶ 101.

[650] **CL-084**, *Philip Morris – Concurring and Dissenting Opinion*, ¶¶ 5, 101.

[651] *See supra*, ¶ 374.

Science and Technology.[652] However, contrary to the Claimant's assertion,[653] this document contains no "acknowledgment" by Canada that spectrum concentration is unrelated to competition.[654]

381. The Claimant next asserts that the New Entrants and Incumbents agreed that the Transfer Framework would not facilitate competition.[655] However, the Claimant only refers to the position taken by Bell, one of the Incumbents.[656] Bell's position on the Transfer Framework was not representative of all New Entrants and Incumbents.[657] As Mr. Hill states, "[s]upport for the proposed Transfer Framework was roughly evenly distributed across Incumbents and New Entrants."[658] While some opposed the Transfer Framework, many "shared Industry Canada's concern about the risk that undue spectrum concentration posed to competition",[659] including TELUS, an Incumbent.[660]

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[652] Claimant's Memorial, ¶ 338, *citing* **C-112**, Standing Committee on Industry, Science and Technology, *Canada's Foreign Ownership Rules and Regulations in the Telecommunications Sector: Report of the Standing Committee on Industry, Science and Technology* (June 2010), p. 19 ("Report of the Standing Committee").

[653] *See* Claimant's Memorial, ¶ 338.

[654] This all-party committee of legislators studies and reports to Canada's Parliament on telecommunications policy, among other issues. Its reports do not reflect the policy position of the government. **R-260**, House of Commons of Canada, website excerpt, "Committees: INDU" (undated), available at: http://www.ourcommons.ca/Committees/en/INDU.

[655] Claimant's Memorial, ¶ 339.

[656] Claimant Memorial, ¶ 339, *citing* **C-204**, Email from Victor Hwei to Carsten Revsbech, et al., *attaching* Bell, *Wireless policy loopholes hurt Canada and Canadians*, July 2013, and Bell, *An open letter to all Canadians* (Jul. 25, 2013). The Claimant also cites to Exhibit C-173. However this document does not contain any indication of whether New Entrants or Incumbents supported or opposed the Transfer Framework.

[657] Bell's opposition to the Transfer Framework was hardly surprising, considering that it had previously opposed measures to promote competition from New Entrants. As one New Entrant observed during the consultation on the Transfer Framework: "Bell Canada argued that the new policy was not needed, once again arguing – as it has on every consultation that discusses encouraging competition – that the Canadian market is fine and there is no need for government action of any kind. Given the decisions on the set-aside during the 2008 auction, the regulations (and revisions) to the rules on mandatory roaming and tower sharing, the decisions regarding the 700 Mhz and 2500 MHz auctions, and the recent public comments of the Minister, we believe Bell is alone in holding this position and there is no need to debate the facts again." **R-145**, Public Mobile Comments of May 3, 2013, ¶ 9.

[658] **RWS-Hill**, ¶ 122.

[659] **RWS-Hill**, ¶ 123. *See also* **R-147**, Eastlink, "Industry Canada Consultation on Considerations Relating to Transfers, Divisions and Subordinate Licensing of Spectrum Licences (DGSO-002-13): Comments of Bragg Communications Inc., operating as Eastlink" (Apr. 3, 2013), ¶¶ 3-4; **R-148**, MTS Allstream, "Gazette Notice DGSO 002-13, Consultation on Considerations Relating to Transfers, Divisions and Subordinate Licensing of Spectrum Licenses, 16 March 2013 – MTS Allstream comments" (Apr. 3, 2013), ¶ 5; **R-149**, Public Mobile, "Consultation on Considerations Relating to Transfers, Divisions and Subordinate Licensing of Spectrum Licences" (Apr. 3, 2013), ¶

382. The Claimant also relies on the personal opinion of Michael Connolly,[661] who was Director General of Industry Canada's Spectrum Management Operations Branch from 2007 to 2010.[662] However, Mr. Connolly's opinion with respect to the rationale for the Transfer Framework is of limited relevance, since he retired from public service three years before the Transfer Framework was adopted. He was not privy to the Government's deliberations leading up to the Transfer Framework. Moreover, the Strategic Policy Sector of Industry Canada and its Telecommunications Policy Branch, not the Spectrum Management Operations Branch would have been primarily responsible for conducting research and analysis and for developing Industry Canada's advice on wireless telecommunications policy issues including measures to sustain competition.[663] Mr. Connolly does not have any first-hand knowledge of the development of the Transfer Framework and his opinion on it should be given no weight. It only represents an after the fact commentary by a former Industry Canada official that was neither responsible for, nor well placed, to comment on the measure.

383. In sum, the Tribunal has no mandate to assess the substantive correctness or the evidentiary basis of the Transfer Framework but even if it did, the record shows that the Transfer Framework was not irrational. The Claimant may disagree with the option Canada ultimately retained to promote continued competition in the wireless telecommunications sector. However, such disagreement does not mean that Canada's choice was irrational or arbitrary, especially in light of evidence that Government officials carefully weighed and assessed all available options before adopting the Transfer Framework.

15; **R-150**, Xplornet Communications Inc. and Xplornet Broadband Inc., "Industry Canada Consultation on Considerations Relating to Transfer, Divisions and Subordinate Licensing of Spectrum Licences, Canada Gazette DGS-002-13: Comments of Xplornet Communications Inc. and Xplornet Broadband Inc." (Apr. 3, 2013), ¶ 2.

[660] **RWS-Hill**, ¶ 123. *See also* **R-151**, TELUS Communications Company, "Comments for Consultation on Considerations Relating to Transfers, Divisions and Subordinate Licensing of Spectrum Licences" (Apr. 3, 2013), ¶ 4.

[661] *See* Claimant's Memorial, ¶ 339, *citing* **CWS-Connolly**, ¶ 15.

[662] **CWS-Connolly**, ¶ 4.

[663] *See* **RWS-Stewart**, ¶ 9.

(d) The Fact that the Competition Bureau Reviews Mergers involving Telecommunications Providers Does Not Render the Transfer Framework Arbitrary or Unreasonable

384. The Claimant has also argued that the Transfer Framework was arbitrary and unreasonable because "it was redundant [with the Competition Bureau's review] for Industry Canada to exercise authority to monitor *ex post* transactions related to the consolidation of market players."[664] However, this argument obscures the distinction between the Competition Bureau's jurisdiction over merger review and the Minister's jurisdiction over spectrum licence transfers. As Mr. Hill observes, "the Competition Bureau's merger review process and Industry Canada's spectrum licence transfer review process are distinct and address different issues."[665] Their jurisdictions in these areas are complementary, not redundant, and were part of the legal and regulatory framework that existed at the time the Claimant invested.

385. The Transfer Framework clearly sets out the distinction between the two processes:

> Reviews conducted by Industry Canada, pursuant to the *Radiocommunication Act*, are separate from those conducted by the Competition Bureau pursuant to the *Competition Act*. *Under the Radiocommunication Act, the Minister of Industry reviews spectrum licence transfers as part of the mandate to plan the allocation and use of spectrum. Under the Competition Act, mergers (which can include acquisitions of assets, including spectrum licences) may be reviewed by the Competition Bureau to determine whether they prevent or lessen, or are likely to prevent or lessen, competition substantially*.[666]

386. The Transfer Framework goes on to state that "Industry Canada's direct concerns are with respect to the impact of the proposed Licence Transfer or Prospective Transfer on the concentration of spectrum in a region, whereas the Competition Bureau's concerns relate to its statutory mandate" of reviewing transactions to determine whether they prevent or lessen competition substantially, or are likely to do so.[667]

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[664] Claimant's Memorial, ¶ 341.

[665] **RWS-Hill**, ¶ 130.

[666] **C-031**, Transfer Framework, ¶ 10 (emphasis added).

[667] **C-031**, Transfer Framework, ¶ 32. *See also* **RWS-Hill**, ¶ 130.

387. This explanation was consistent with what Industry Canada had previously explained in the context of the consultation on the AWS-1 Policy Framework. Specifically, in the context of the consultation on the 2008 AWS-1 Auction, Industry Canada had explained that "there is a fundamental difference between the two [processes] that needs to be recognized".[668] The Competition Bureau reviews mergers and proposed mergers to determine whether they prevent or lessen, or are likely to prevent or lessen, competition substantially.[669] In contrast, the Minister manages the spectrum, "taking into account all matters that [he] considers relevant for ensuring the orderly establishment or modification of radio stations and the orderly development and efficient operation of radiocommunication in Canada" and the objectives of the Canadian telecommunications policy set out in the *Telecommunications Act*,[670] including "to enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications.[671] More specifically, the Minister manages the spectrum "[t]o maximize the economic and social benefits that Canadians derive from the use of the radio frequency spectrum resource."[672]

388. In pursuit of this objective, the Minister sought to promote sustained competition in the market. One of the ways of achieving this objective was by using the Minister's authority to approve transfer requests: the Minister would review each transfer request by considering specific criteria, including whether a licence transfer would result in undue spectrum concentration.

389. Canadian courts have acknowledged that the Minister's authority to review decisions on spectrum licence transfer requests and the Competition Bureau's authority to review mergers

[668] **C-050**, AWS-1 Consultation Paper, p. 18.

[669] *See* **R-106**, *Competition Act*, s. 92(1).

[670] **C-057**, *Radiocommunication Act*, ss. 5(1), 5(1.1).

[671] **C-046**, *Telecommunications Act*, s. 7.

[672] **C-052**, Spectrum Policy Framework, p. 8.

under competition law co-exist.[673] The fact that the same transaction may be reviewed by different authorities for different purposes does not render either authority's review arbitrary.

390. As Mr. Stewart explains, Industry Canada considered the role of the Competition Bureau when considering how to address the risk of spectrum becoming unduly concentrated after the five-year moratorium expired.[674] However, the Competition Bureau has no authority to regulate spectrum concentration or to issue spectrum licences, which is within the Minister's authority over spectrum management.[675] The Competition Bureau could only object to a merger involving a spectrum licence transfer if it was likely to result in a substantial lessening or prevention of competition,[676] regardless of the impact on spectrum concentration. The Competition Bureau's process would also involve long time frames during which spectrum being transferred would be unused.[677]

391. In short, it was neither arbitrary nor unreasonable for the Minister to exercise his power to regulate spectrum licence transfers simply because the Competition Bureau reviews merger transactions involving spectrum licences.

(e) The Transfer Framework Was Issued Following Consultation and Representations from Licence Holders

392. Not only was the adoption of the Transfer Framework a rational response to a legitimate policy concern, but in adopting the Transfer Framework, Canada accorded due process to all spectrum licence holders, including Wind Mobile. As described above,[678] Industry Canada held a

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

[674] **RWS-Stewart**, ¶ 55.

[675] **RWS-Stewart**, ¶ 55.

[676] **RWS-Stewart**, ¶ 56.

[677] **RWS-Stewart**, ¶ 56; **R-084**, Memorandum of December 7, 2012, Annex A, pp. 5-6 and Annex B, p. 14; **R-088**, Memorandum of January 4, 2013, Annex A, p. 3; **R-091**, Memorandum of May 9, 2013, Annex A, p. 9.

[678] *Supra*, ¶¶ 237-244.

public consultation before adopting the Transfer Framework. This consultation was consistent with Industry Canada's practice in consulting the public and licensees before implementing policies and related changes to COLs, for example as it had done in the context of mandatory roaming and tower/site sharing.[679]

393. This consultation began with the publication of the Transfer Framework Consultation Paper on March 7, 2013, more than three months before the Transfer Framework was adopted.[680] This paper described Industry Canada's policy concerns around spectrum concentration and invited comments on the approach that it proposed to address those concerns.[681]

394. Industry Canada allowed ample time for any interested party to make submissions on and to comment on the submissions made by other parties, which were made public.[682] Wind Mobile took advantage of this opportunity, as did many other service providers. GTH did not submit any comments independently from those of Wind Mobile.[683]

395. Differing views were expressed, some in favour of Industry Canada's proposed approach and others against.[684] Some parties, including Wind Mobile, proposed alternative approaches that could be considered by Industry Canada when assessing spectrum licence transfers.[685] Industry Canada considered these comments in finalizing the Transfer Framework.[686] The process was consistent with Industry Canada's well-established administrative process that is followed in the

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[679] *See supra*, ¶¶ 67-70 (regarding the consultation on the AWS-1 Policy Framework); *supra*, ¶¶ 81-83 (regarding the consultation on the AWS-1 COLS and the COLs related to mandatory roaming and tower/site sharing); *supra*, ¶ 166 (regarding the consultation on the revision to COLs related to mandatory roaming and tower/site sharing).

[680] *See supra*, ¶¶ 237-239; **C-152**, Transfer Framework Consultation Paper. *See also* **R-144**, Notice No. DGSO-002-13, p. 511.

[681] *See supra*, ¶¶ 237-239; **C-152**, Transfer Framework Consultation Paper. *See also* **R-144**, Notice No. DGSO-002-13, p. 511.

[682] *See supra*, ¶¶ 237-242.

[683] **RWS-Hill**, fn. 136.

[684] *See* **RWS-Hill**, ¶ 122.

[685] **RWS-Hill**, ¶ 122 and fn. 139 ("Wind Mobile argued that 'only upon the government implementing new and effective regulatory approaches that promote a sustainable and competitive market for non-Incumbent operators, would a revision of spectrum license transfer limits be appropriate.' In the interim, they suggested that Industry Canada adopt an alternative framework that would give a right of first refusal to the existing 'fourth player', if any, in the relevant market.").

[686] *See* **RWS-Hill**, ¶ 127 and fn. 148.

context of the exercise of the Minister's powers over spectrum management.[687] The fact that the Government did not retain the approach proposed by Wind Mobile does not mean that the Transfer Framework was unreasonable or arbitrary.

2. The Transfer Framework Did Not Frustrate any Legitimate Expectations Held by the Claimant

396. As discussed above,[688] the FET obligation in Article II(2)(a) does not include a freestanding protection for investors' expectations. Moreover, an investor's expectations can only be relevant to the FET analysis (if at all) if the investor received a specific representation, commitment or assurance from the State, which the investor relied on when making its investment. No such expectations could have been present in this case.

397. The Claimant's alleged expectations in relation to Wind Mobile's spectrum licences have no relevance, since the Claimant's investment was in debt and equity and not in Wind Mobile's licences (in the Claimant's own words[689]) and the Claimant has not submitted any claims on behalf of Wind Mobile. Moreover, Canada did not make any representations to the Claimant to induce it to invest in Wind Mobile. Finally, the Claimant could not have had a legitimate expectation that Wind Mobile had a right to transfer set-aside AWS-1 spectrum licences to Incumbents. Industry Canada never made any specific representations, or provided any commitments or assurances that the transfer of set-aside licences to Incumbents would automatically be allowed after the five-year moratorium or that the COLs would not be changed. The transfer of licences was always subject to the Minister's approval as explicitly indicated in the legislation and COLs as was the Minister's ability to amend COLs.

(a) Article II(2)(a) Does Not Protect Any Expectations that the Claimant May Have Had With Respect to Wind Mobile's Spectrum Licences

398. The Claimant has submitted claims on its own behalf under Article XIII(3), in respect of its debt and equity investment in Wind Mobile.[690] However, the Transfer Framework does not apply

[687] *See* **RWS-Hill**, ¶ 17.

[688] *See supra*, ¶¶ 352-353.

[689] *See* Request for Arbitration, ¶¶ 69, 82-88.

[690] *See* Request for Arbitration, ¶¶ 69, 82-88.

to GTH's sale of its non-controlling interest in Wind Mobile nor does it relate to GTH's debt investment. The Claimant has not submitted any claims on behalf of Wind Mobile under Article XIII(12) of the FIPA. As discussed in Canada's Memorial on Jurisdiction,[691] the Claimant therefore lacks standing to submit claims in relation to treatment accorded to Wind Mobile, including the claims related to the transfer of Wind Mobile's spectrum licences.[692]

399. As a corollary to Canada's standing objection, the Claimant's expectations about the transferability of spectrum licences have no relevance to its claims. They would only be relevant if the Claimant had submitted a claim on behalf of Wind Mobile or if the Claimant itself was the spectrum licence holder.

400. The only expectations that can be relevant to the Claimant's FET claims are those it held in relation to the investments that are the subject of its claim – its equity in GIHC and its debt interests with respect to Wind Mobile. The Claimant has not identified any such expectations. Instead the Claimant focuses on expectations it allegedly held in relation to Wind Mobile's spectrum licences, which the Claimant never controlled. Not only are these expectations irrelevant but, as discussed below, they cannot form the basis of a FET breach.

401. Similarly, when considering whether Canada made any representations to the Claimant to induce it to invest in Wind Mobile, the only representations that are relevant are those related to its investment.

402. The Claimant has provided no evidence that it relied on Canada's alleged "representations" in making its investment in Canada. Its only support for its assertion is the witness statement of its General Counsel, Mr. David L.C. Dobbie.[693] However, Mr. Dobbie does not say that a specific representation made by Canada to the Claimant induced the Claimant to invest in Wind Mobile. Mr. Dobbie only states that, "[i]n [his] view, GTH would not have been likely to invest

[691] Canada's Memorial on Jurisdiction, Part IV.

[692] The Claimant also lacks standing to submit claims in relation to the regulatory environment created by Canada for New Entrants. The standing objection applies to the Claimant's FET claims based on the Transfer Framework alone and also to the claims based on the alleged composite breach discussed below.

[693] Claimant's Memorial, ¶ 317, *citing* **CWS-Dobbie**, ¶ 41.

in Canada… had [it] been informed at the outset that we would not be allowed to sell our investment to an Incumbent."[694]

403. This statement improperly blurs the line between the Claimant, Wind Mobile and Wind Mobile's licences and what is alleged to be the investment in this case (i.e. its equity in GIHC and its debt interests with respect to Wind Mobile). Canada never prevented the Claimant from selling its equity or debt investments.

(b) The Claimant Did Not Have a Legitimate Expectation that Wind Mobile Had the Right to Transfer its Set-Aside Spectrum Licences to Incumbents

404. Even if the Tribunal were to hold that the Claimant's expectations with respect to the transfer of Wind Mobile's licences are relevant, the Claimant did not have any legitimate expectation that Wind Mobile would have a right to transfer them to Incumbents at the end of the five-year moratorium or that the Minister would refrain from taking certain measures to promote competition. The legal and policy frameworks that applied to Wind Mobile's spectrum licences and the COLs made clear that:

- any potential transfer of Wind Mobile's spectrum licences after the first five years of the licence term was subject to approval by the Minister;
- the Minister's review of any spectrum licence transfer requested by Wind Mobile would be based on policies and procedures as applicable at the time of the request;
- the Minister retained the discretion to establish and change policies and procedures in relation to spectrum licence transfers at any time; and
- the Minister retained the discretion to amend the COLs of Wind Mobile's spectrum licences, including with respect to transferability, at any time for the duration of the licence.[695]

405. The Claimant alleges it conducted due diligence with respect to Canada's legal and regulatory framework, yet it omits these key elements that should have informed any expectation it could have had with respect to any potential transfer of spectrum licences.

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[694] **CWS-Dobbie**, ¶ 41.

[695] *See supra*, ¶¶ 187-203.

406. The Claimant could not reasonably have expected that New Entrants such as Wind Mobile would automatically be allowed to transfer their spectrum licences to Incumbents after the five-year moratorium, as it alleges.[696] The Claimant describes this alleged expectation as a "condition" of its investment,[697] yet fails to identify any law, regulation, policy or statement that supports this position. The Claimant does not point to a single document that provides the type of specific and explicit assurance or representation that arbitral tribunals have found necessary to form legitimate expectations.

407. Having received no specific assurances at the time of its investment regarding Wind Mobile's ability to transfer the licences to Incumbents at the end of the five-year moratorium, the Claimant has attempted to fabricate a representation *ex post facto* based on miscellaneous excerpts of policies and procedures, ignoring clear statements in the same documents that do not support its position. This was the same strategy taken by TELUS in its failed application for judicial review of the Transfer Framework.

408. The Federal Court rejected TELUS' submission that the Minister had made a representation that Canada would refrain from regulating transfers of spectrum licences, finding that TELUS' interpretation was contradicted by the AWS-1 COLs and by the following clear statements in the documents that TELUS relied on (which the Claimant also relies on in this case):[698]

- Licensing Circular: "These spectrum licences may be transferred… to a third party subject to the conditions stated on the licence [including the condition allowing the Minister to amend the conditions of licence] and other applicable regulatory requirements"[699]
- AWS-1 Consultation: "The licensee may apply to transfer its licence(s)... Departmental approval is required for each proposed transfer of a licence, whether

[696] *See* Claimant's Memorial, ¶ 313.

[697] Claimant's Memorial, ¶ 314.

[698] **R-195**, *Telus v. AGC*, ¶ 57.

[699] **C-003**, Licensing Circular, Issue 2, p. 4.

the transfer is in whole or in part. The licensee must apply to the Department in writing"[700]

- AWS-1 Policy Framework: "all licence transfers must be approved by the Minister"[701]

- AWS-1 Licensing Framework: "The licensee may apply to transfer its licence(s)… Departmental approval is required for each proposed transfer of a licence, whether the transfer is in whole or in part. The licensee must apply to the Department in writing"[702]

409. Most importantly, Wind Mobile's AWS-1 spectrum licences stated explicitly that "[t]he licensee may apply in writing to transfer its licence […] Departmental approval is required for each proposed transfer of a licence […] The Minister of Industry retains the discretion to amend these terms and conditions of licence at any time."[703]

410. As held by the Federal Court, "[t]he Minister simply did not make a representation that would lead a reasonable person to believe that, after five years, the acquisition or license of set-aside spectrum… would be unregulated by the Minister."[704]

411. The Claimant has also characterized the Transfer Framework as "fundamentally revis[ing] the conditions existing at the time of the 2008 AWS Auction"[705] and that by doing so it frustrated its legitimate expectations. It also argues that Industry Canada had no power to take *ex post* measures to encourage competition in the wireless telecommunications sector (i.e. in respect of spectrum licences that had already been issued) and therefore it could not have expected such measures.[706] These arguments have no basis.

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[700] **C-050**, AWS-1 Consultation Paper, p. 36.

[701] **C-004**, AWS-1 Policy Framework, p. 6.

[702] **C-005**, AWS-1 Licensing Framework, pp. 6-7.

[703] **C-010**, Letter from Michael D. Connolly, Industry Canada to Kenneth Campbell, Globalive *attaching* Wind Mobile Licences (Mar. 13, 2009).

[704] **R-195**, *Telus v. AGC*, ¶ 58.

[705] Claimant's Memorial, ¶ 325.

[706] Claimant's Memorial, ¶¶ 307-313.

412. As explained above, the Minister retained the discretion to change policies and procedures related to spectrum management and to amend the COLs as necessary to reflect such changes.[707] Not only was there no specific representation that the Minister would not amend existing policies or COLs, but in fact there was a specific representation to the contrary. The fact that they were subject to change could not have been a surprise—this ability was built into the legal and regulatory framework that applied to the Claimant's investment at the time that it invested.

413. Spectrum is regularly managed in a way that affects spectrum licences that have already been issued. As Mr. Hill notes, "the Minister has exercised the power to amend the COLs of spectrum licences several times,"[708] both before and after adopting the Transfer Framework. For example:

- in 2004, the Minister rescinded a mobile spectrum cap that had been established in 1995;[709]
- in 2007, the Minister updated the requirements that all pre-existing spectrum users must follow in order to comply with the COL respecting antenna siting;[710]
- in 2008, the Minister established new COLs respecting roaming and tower/site sharing that were applied to all pre-existing commercial mobile licences;[711]
- in 2013, the Minister updated the scope and requirements relating to roaming and tower/site sharing that apply to all pre-existing commercial mobile licences; and[712]
- in 2014, the Minister updated the requirements that all spectrum users must follow in order to comply with the COL respecting antenna siting.[713]

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[707] *See supra*, ¶¶ 204-209.

[708] **RWS-Hill**, ¶ 16.

[709] *See* **R-107**, Industry Canada, Notice No. DGTP-010-04 – Decision to Rescind the Mobile Spectrum Cap Policy (Aug. 27, 2004).

[710] *See* **R-108**, Industry Canada, Notice No. DGRB-001-07 – Release of Issue 4 of CPC-2-0-03, Radiocommunication and Broadcasting Antenna Systems (Jun. 22, 2007); **R-109**, Industry Canada, Radiocommunication and Broadcasting Antenna Systems (CPC-2-0-03, Issue 4) (Jun. 2007).

[711] *See* **C-007**, Industry Canada, Conditions of Licence for Mandatory Roaming and Antenna Tower and Site Sharing and to Prohibit Exclusive Site Arrangements (CPC-2-0-17, Issue 1) (Nov. 2008).

[712] **RWS-Hill**, ¶ 40.

[713] *See* **R-110**, Industry Canada, Radiocommunication and Broadcasting Antenna Systems (CPC-2-0-03, Issue 5) (Jun. 26, 2014); **R-111**, Industry Canada, Decision on Amendments to Industry Canada's Antenna Tower Siting Procedures (DGSO-002-14) (Jun. 2014).

414. Wind Mobile was well aware that the Minister retained its discretion with respect to spectrum management. As explained by Mr. Hill, during the Transfer Framework consultation, "Wind Mobile did not ask Industry Canada to take a 'hands off' or market-based approach to regulating spectrum licences. To the contrary, they took the position that the government should do more to promote the viability of competitors to the Incumbents."[714]

415. Wind Mobile specifically lamented the "highly-concentrated"[715] nature of Canada's wireless telecommunications market. Wind Mobile did not oppose Government intervention to promote competition; it lobbied for such intervention by advocating "bold, committed and realistic governmental action to create and sustain the conditions in which a fourth carrier in each region (the oft-stated Government objective) becomes a viable proposition."[716] According to Wind Mobile, "it [was] absolutely paramount that the regulatory conditions underlying this market be developed to permit sustained competition. Clearly more regulatory changes must happen."[717]

416. As Wind Mobile, the holder of the spectrum licences at issue, was actively lobbying for the Government to "overhaul"[718] the AWS-1 Policy Framework and to make "fundamental"[719] regulatory changes and to do more to support competition from New Entrants, the Claimant cannot now argue that it had a legitimate expectation that Canada would refrain from doing so.

417. Furthermore, contrary to the Claimant's assertion, there is no support for the proposition that Industry Canada's role is limited to *ex-ante* measures and that the Competition Bureau is exclusively responsible for *ex-post* reviews to ensure that the market remains competitive.[720] To the contrary, in TELUS' application for judicial review of the Transfer Framework, the Federal

[714] **RWS-Hill**, ¶ 126.

[715] **R-146**, Wind Comments of April 3, 2013, ¶ 7.

[716] **R-146**, Wind Comments of April 3, 2013, ¶ 3.

[717] **R-146**, Wind Comments of April 3, 2013, ¶ 5 (emphasis added).

[718] **R-075**, Wind Comments of June 13, 2012, p. 5. *See also supra*, ¶ 181.

[719] **RWS-Hill**, ¶ 94. *See also supra*, ¶ 181.

[720] Claimant's Memorial, ¶ 309.

Court recognized that the Minister's regulation of spectrum and the Competition Bureau's regulation of mergers co-exist.[721]

418. Mr. Hill, who spent over a decade in senior leadership roles with Industry Canada's Spectrum Management Operations Branch, confirms that:

> [N]either the Minister nor Industry Canada has ever made a commitment to refrain from regulating spectrum and to simply rely on market forces. To the contrary, the intent has always been to allow for intervention when necessary to achieve the intended policy objective of maximizing the economic and social benefits that Canadians derive from the use of the radio frequency spectrum resource.[722]

419. Industry Canada never made any representation that its measures to promote competition would be limited to *ex-ante* measures or "that it would not engage in any *ex post* review of a spectrum transfer."[723]

E. The National Security Review of the Claimant's Application to Acquire Voting Control of Wind Mobile Did Not Breach Canada's Fair and Equitable Treatment Obligation

420. The Claimant challenges the Government's national security review of its application to acquire voting control of Wind Mobile [redacted].[724] It claims that Industry Canada's national security review of its proposed investment was "unreasonable, arbitrary, non-transparent, and lacking in due process"[725] in breach of Canada's obligations set out in Article II(2)(a) of the FIPA. The Claimant also suggests that the Government's national security review was a pretext to achieve objectives unrelated to Canada's national security. The Claimant makes conflicting statements on this issue, at times alleging that "upon disclosure from Canada, Canada's decision *may prove* to

[721] **R-195**, *Telus v. AGC*, ¶ 42. Justice Hughes noted in this respect "while the Minister's intention is to regulate spectrum licences and not mergers, the effect of his decision can have the consequence of regulating mergers within the meaning of the *Competition Act* depending on the circumstances of the case."

[722] **RWS-Hill**, ¶ 22. *See also* **C-052**, Spectrum Policy Framework, p. 8.

[723] Claimant's Memorial, ¶ 309.

[724] Claimant's Memorial, ¶ 355.

[725] Claimant's Memorial, ¶ 345.

be pretextual",[726] while at other times squarely alleging that "Canada used the pretext of the national security review process as a fishing expedition to gather information regarding GTH's future plans for Wind Mobile".[727]

421. As set out in Canada's Memorial on Jurisdiction, the Tribunal does not have jurisdiction to consider the merits of these claims because they fall within the exclusion from dispute settlement in Article II(4)(b) of the FIPA. Article II(4)(b) 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.

422. In any event, GTH's claim has no merit. Canada's national security review of GTH's proposed investment complied at all times with Canada's obligation under the FIPA to accord FET to investments of Egyptian investors.

423. The Claimant's challenge is predicated on a dystopian portrayal of Canada's national security review that is not supported by the evidence. The national security review of GTH's proposed investment was not conducted in complete secrecy by an oppressive bureaucracy for unavowed purposes. Rather, it was conducted in good faith and in strict conformity with the rules and procedures set out in the ICA and applicable regulations.[728] These rules and procedures set out a process that complies with the rules of natural justice, including due process. GTH's allegation that the Government's [redacted] are meritless relies on nothing more than mere conjecture and speculation. Moreover, [redacted] The Tribunal should reject the Claimant's invitation to second guess the Government's [redacted]

[726] Claimant's Memorial, ¶ 345 (emphasis added). *See also* Claimant's Memorial, fn. 784.

[727] Claimant's Memorial, ¶ 357.

[728] **RWS-Aitken**, ¶ 80.

1. GTH Could Not Reasonably Expect that the Investment Canada Act Review of Its Proposed Acquisition of Voting Control of Wind Mobile Would be Predetermined or Perfunctory

424. In its Memorial, the Claimant suggests it had "secured a right" to acquire "control of Wind Mobile through the conversion of its non-voting shares to voting shares… at the outset of its investment".[729] For that reason, it argues that the ICA review of the proposed acquisition of voting control was surprising and unreasonable. As discussed above, this position is contradicted by the applicable legislative framework and the Claimant's own acknowledgement of this framework.

425. Because GTH proposed to acquire control of Wind Mobile, a Canadian business, and because the asset value of Wind Mobile exceeded the statutory thresholds, GTH was required to file an Application for a Net Benefit Review under the ICA. It did so on October 24, 2012. This requirement applied regardless of the fact that Wind Mobile had been the object of an assessment by Industry Canada and the CRTC a few years earlier to assess its compliance with Canadian ownership and control requirements of the *Radiocommunication Regulations* and the *Telecommunications Act* as they existed at the time. As Ms. Aitken, who at the time of GTH's application was the Director General of IRD, explains in her witness statement:

> Although the Spectrum Management Operations Branch of Industry Canada and the Canadian Radio-television and Telecomunications Commission did review Wind Mobile's ownership structure in 2008 and 2009, this review was strictly limited to assessing whether Wind Mobile met the Canadian ownership and control requirements for telecommunication common carriers that existed at the time under the *Telecommunications Act* and the *Radiocommunication Regulations*. IRD staff was not involved in the ownership and control review of GTH's initial investment under the *Telecommunications Act* or the *Radiocommunication Regulations* because IRD's mandate is limited to the ICA.[730]

426. IRD is responsible for administering and enforcing the ICA. The IRD staff were not involved in the 2008 review of GTH's non-controlling participation in Wind Mobile, which, at that time, was strictly limited to assessing whether Wind Mobile met the Canadian ownership

[729] Claimant's Memorial, ¶ 182.

[730] **RWS-Aitken**, ¶ 44.

and control requirement for telecommunications common carriers. As such, it is incorrect to suggest that Industry Canada "approved" Wind Mobile's Shareholder Agreement. Further, there was nothing in the *Telecommunications Act* nor the *Radiocommunication Act* and *Radiocommunication Regulations* that provided for any sort of future exemption from further scrutiny under other legislation.

427. As a result, the fact that in 2008, Industry Canada had reviewed GTH's participation in Wind Mobile for compliance with the Canadian ownership and control rules could not have been understood by GTH as an indication that a future exercise of its contractual right to obtain voting control of Wind Mobile would not be scrutinized under the ICA (either for net benefit or national security concerns) or that such an assessment would be perfunctory and necessarily end in approval.

428. Moreover, as a sophisticated investor that retained the services of experienced counsel, GTH knew that Canada's decision in 2012 to liberalize the Canadian ownership and control requirements in the telecommunications sector did not exempt future investments from the otherwise applicable regulatory approvals that applied to an acquisition of voting control of a Canadian business. The Minister made this fact clear when he publicly announced the amendments to the Canadian ownership and control requirements on March 14, 2012:

> The government will amend the *Telecommunciations Act* to exempt telecommunications companies with less than 10 percent of total telecommunications Canadian market revenue from foreign investment restrictions in that Act. […] *As is the case with any direct foreign investment, the provisions of the Investment Canada Act will continue to apply*.[731]

429. Contemporaneous evidence also shows that GTH understood very well the continued applicability of the ICA review mechanisms to proposed acquisitions in the telecommunications sector. [redacted]

[731] **C-023**, Industry Canada, Harper Government Takes Action to Support Canadian Families (Mar. 14, 2012), p. 4 (emphasis added).

[redacted] GTH cannot now claim to have been surprised by the application of the ICA to its proposed investment or that the liberalization of the Canadian ownership and control requirements for the radiocommunication or telecommunications regime should have resulted in a predetermined or perfunctory ICA review process.

2. The Government's National Security Review of GTH's Proposed Investment was based on [redacted] and was Not a Pretext to Advance Ulterior Motives

430. GTH claims that Canada's [redacted] were meritless[733] and [redacted] was arbitrary, irrational,[735] and a pretext for a fishing expedition to gather information concerning GTH's future plans for Wind Mobile.[736] The facts do not establish this claim. [redacted]

431. [redacted]

[732] [redacted]

[733] Claimant's Memorial, ¶ 203.

[734] Claimant's Memorial, ¶ 358.

[735] Claimant's Memorial, ¶ 358.

[736] Claimant's Memorial, ¶ 357.

[737] [redacted]

[redacted]

432. [redacted]

433. [redacted]

434. [redacted] GTH cannot therefore credibly argue that the Government's [redacted] were trumped up in order to engage in a fishing expedition to gather information concerning GTH's future plans for Wind Mobile or to otherwise hinder GTH's divestiture plans to further the Government's plans to adopt the Transfer Framework.

435. Secondly, in Canada, a national security review is a highly structured and regulated process. It involves many Government departments and agencies as well as the Executive of the Government, the Governor General acting on the advice of the Queen's Privy Council for Canada (Cabinet). The entire process is bookended by formal instruments known as Orders in

[738] **RWS-Aitken**, ¶ 45.

[739] [redacted].

Council issued by the GiC. The first order initiating the national security review requires: 1) consultations between the Minister and the Minister of Public Safety; 2) a recommendation from the Minister to the GiC; 3) consideration by the GiC; and 4) the issuance of the formal instrument, an Order in Council, by the GiC.[740] The final order made at the end of the national security review to take any measure in respect of the investment that the GiC considers advisable to protect national security (including not authorizing a proposed investment) requires: 1) consultations between the Minister and the Minister of Public Safety; 2) a report prepared by the Minister detailing his findings and recommendations on the review, which report is provided to the GiC; 3) after receipt of the report from the Minister, a period of time during which the GiC considers the Minister's submission; and 4) the issuance of an Order in Council by the GiC. Throughout the course of the process, professional civil servants working in IRD consult with colleagues in other divisions of Industry Canada as well as colleagues in other government departments and agencies, including the prescribed investigative bodies to consider the proposed investment and to support the Minister and the GiC in performing their statutory functions. Prescribed investigative bodies will assess information and intelligence that is relevant to the proposed investment.[741] Contrary to what the Claimant suggests, this highly structured and regulated process is designed to ensure that the outcome is not manifestly arbitrary and irrational.

436. Thirdly, nothing in the evidence suggests that the Minister, the Minister of Public Safety, or the GiC acted capriciously or arbitrarily in conducting the national security review of GTH's proposed investment. On the contrary, [redacted]

[740] **R-169**, ICA, s. 25.3(1)

[741] **RWS-Aitken**, ¶ 31.

[742] [redacted]

[redacted]

437. As mentioned above, the FET standard does not grant arbitral tribunals wide latitude to second-guess Government decision-making and international law will generally defer to States with respect to domestic policy choices and their balancing of the public interest and individual rights.[744] This principle of deference towards Government decision-making should apply even more forcefully to highly sensitive policy areas where national security is at stake.

438. [redacted]

439. [redacted]

[743] [redacted]

[744] *See supra*, ¶¶ 339-361.

[745] **RWS-Aitken**, ¶ 63.

[redacted]

440. [redacted]

GTH is therefore ill-placed to now challenge the length of the review process. In any case, the review process was not unreasonably long [redacted]

3. GTH Was Informed of the Government's [redacted] and was Kept Apprised of the Status of the National Security Review

441. The Claimant has alleged that the secretive nature of the national security review was unfair and constituted a breach of the FET obligation. By its very nature, a national security review process cannot be completely transparent. The process involves the analysis of sensitive information and materials that may have been gathered or prepared by prescribed investigative bodies. It may also involve the analysis of sensitive information and materials that may have been shared in confidence by intelligence officials of like-minded countries. Also, the [redacted] may relate to domestic security initiatives that rely on secrecy to remain

[746] [redacted]

[747] VimpelCom's intentions with respect to Wind Mobile were a matter of market speculation prior to that date with market analysts surmising that VimpelCom might be interested in exiting the Canadian telecommunications market. Government officials were aware of these speculations but only obtained confirmation of VimpelCom's intentions [redacted].

[748] **RWS-Aitken**, ¶¶ 60, 73, 75.

effective. The complete disclosure of all facts underlying [redacted] could therefore itself be injurious to national security.[749]

442. Despite these inherent limitations on the transparency of the national security review process, the review of GTH's proposed investment did not take place in "complete secrecy" as the Claimant alleges. It was sufficiently transparent to provide procedural fairness to GTH. As described above,[750] the national security review process is strictly regulated. All of the steps in the process and associated timelines are set out in legislation and applicable regulations which are publicly available. Moreover, the ICA imposes on the Minister an obligation to consult the Minister of Public Safety, an obligation to notify the non-Canadian and the Canadian business, as well as an obligation, if the non-Canadian advises the Minister that it wishes to make representations, to afford it a reasonable opportunity to make representations in person or through a representative.[751] [redacted]

443. [redacted]

444. [redacted]

[749] **RWS-Aitken**, ¶ 74.

[750] *Supra*, ¶ 435.

[751] **R-169**, ICA, s. 25.3(4).

[752] [redacted]

[redacted]

445. [redacted].

446. To the extent that the Tribunal finds that the FET standard contained in Article II(2)(a) of the FIPA includes a transparency obligation, which it does not, the information provided during the course of the net benefit and national security reviews of GTH's investment more than complied with that obligation.

447. The Claimant tries to find support for its argument that the national security review process was opaque by pointing to the fact that the Government later introduced changes to make it more transparent.[754] The fact that the Government decided in December 2016 to provide even more transparency in the administration of the national security review process by publishing *Guidelines on the National Security Review of Investments* does not constitute "tacit recognition",[755] as the Claimant alleges, that the Government's administration of the process up until then amounted to a "complete lack of transparency and candour" in breach of the fair and equitable treatment standard.[756] Governments should be encouraged rather than condemned for being willing to constantly improve transparency.

[753] [redacted]

[754] **RWS-Aitken**, ¶ 38.

[755] Claimant's Memorial, ¶ 359.

[756] *See supra*, ¶¶ 352-357.

4. GTH Was Provided a Full and Fair Opportunity to Respond to the Government's [redacted]

448. GTH made full use of its right contained in the ICA to make representations to the Minister and it was given every opportunity to show Government officials that its proposed acquisition of voting control of Wind Mobile would not be injurious to national security. [redacted][757]

449. [redacted]

450. The rules of natural justice require that Government officials provide GTH with a meaningful opportunity to be heard, which they did. Neither the rules of natural justice, nor the obligation to accord FET, require governments to put national security at risk by disclosing all information and sources of information underpinning its [redacted] or to blindly accept the representations made by foreign investors.

451. Ms. Aitken summarizes well what is apparent from the evidence:

> [T]he national security and net benefit reviews of GTH's proposed acquisition of voting control of Wind Mobile were conducted in good faith and for no

[757] **RWS-Aitken**, ¶¶ 55, 64, 72, 74.

[758] [redacted]

> improper purpose or ulterior motive. In administering the national security and net benefit reviews, the government's professional civil servants complied with the requirements set out in the ICA and related regulations.[759]

452. There is no basis for this Tribunal to conclude any differently.

F. The Measures at Issue Did Not Cumulatively Breach Canada's Fair and Equitable Treatment Obligation

1. The Claimant Has Not Explained Why the Measures at Issue Amount to a Composite Act

453. The Claimant alleges a separate breach of the FET standard by considering the above measures, along with the CRTC's ownership and control review of Wind Mobile and Industry Canada's enforcement of mandated roaming and tower/site sharing, as a composite act. The Claimant argues that "Canada's acts must be viewed as a pattern of conduct that cumulatively breached GTH's rights under the BIT".[760] However, as Canada already explained in its Memorial on Jurisdiction, it is not sufficient for the Claimant to simply assert that a series of measures form composite acts and must be assessed cumulatively.[761] Rather, the Claimant must first prove that the series of acts it complains of were closely interwoven and pursued the same objective.[762]

454. All six of the authorities cited by the Claimant in support of the concept of cumulative breaches confirm this. The *Société Générale* decision cited by the Claimant noted that "a series of acts leading in the same direction" could result in a breach in the aggregate.[763] Specifically, the *OAO Tatneft* tribunal found that there was "a clear link between [a] series of events and that they all culminated in the taking over of Ukrtatnafta by Ukrainian-related interests to the exclusion of the Tatarstan interests",[764] the *Gold Reserve* arbitration concerned measures that

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[759] **RWS-Aitken**, ¶ 80.

[760] Claimant's Memorial, ¶ 361.

[761] Canada's Memorial on Jurisdiction, ¶ 171.

[762] Canada's Memorial on Jurisdiction, ¶ 171.

[763] **CL-052**, *Société Générale v. The Dominican Republic*, LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction, 19 September 2008, ¶ 91.

[764] **CL-074**, *OAO Tatneft v. Ukraine* (UNCITRAL) Award on the Merits, 29 July 2014, ¶ 330.

were all "part of a State policy aimed at gaining control of the object of the investment",[765] and the *Crystallex* arbitration dealt with a series of measures that all resulted from "the change of policy with respect to mining at the highest level".[766] Likewise, in the *Flemingo* decision, the measures were "all consequences of PPL's abusive termination of the Lease Arrangements",[767] and in the *Swisslion* case, all of the allegations entered around a "Share Sale Agreement".[768]

455. Thus, before this Tribunal can consider the measures raised by the Claimant cumulatively, the Claimant must first prove that the measures are closely interwoven and in pursuit of a particular end.

2. The Measures at Issue Cannot be Considered Cumulatively

456. As Canada described in its Memorial on Jurisdiction, there is no justification for the measures to be considered as a unity.[769] The four measures raised by the Claimant are all separate and distinct. They were taken by separate entities, each operating in the pursuit of its mandate within the confines of its authority under Canadian law.[770]

457. The Claimant has not provided any evidence indicating that the four measures were implemented systematically or in a contrived manner in order to pursue a particular end vis-à-vis Wind Mobile or the Claimant. In fact, some of the Claimant's allegations are diametrically opposed. The Claimant implies that Canada did not do enough to support competition with respect to roaming and tower/site sharing,[771] but simultaneously argues in relation to the Transfer Framework that Canada should not have introduced this measure to support competition from

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[765] **CL-075**, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/09/1) Award, 22 September 2014, ¶ 566 ("*Gold Reserve – Award*") .

[766] **CL-082**, *Crystallex – Award*, ¶ 609.

[767] **CL-085**, *Flemingo DutyFree Shop Private Limited v. The Republic of Poland* (UNCITRAL) Award, 12 August 2016, ¶¶ 559-560.

[768] **CL-064**, *Swisslio DOO Skopje v. The Former Yugoslav Republic of Macedonia* (ICSID Case No. ARB/09/16) Award, 6 July 2012, ¶ 276.

[769] Canada's Memorial on Jurisdiction, ¶¶ 173-178.

[770] Canada's Memorial on Jurisdiction, ¶¶ 173-178.

[771] Claimant's Memorial, ¶ 15.

New Entrants.[772] In conclusion, the Claimant's allegations that Canada's measures, either separately or in combination, breached the FET standard must be rejected.

III. Canada Has Not Breached the Full Protection and Security Obligation Under Article II(2)(b) of the FIPA

458. In addition to alleging that the national security review and Transfer Framework constitute breaches of the FET standard under the FIPA, the Claimant has alleged that these same measures, separately and together with Industry Canada's regulation of roaming and tower/site sharing constitute breaches of the FPS obligation.[773] However the Claimant's allegations much be rejected. The FPS obligation only concerns physical protection and no such violation has been alleged by the Claimant. Further, even if the Tribunal concludes that the FPS obligation extends beyond the protection of physical security, the Tribunal must reject the allegations for many of the same reasons set out in the section on the FET obligation above.

A. The Full Protection and Security Obligation Concerns Physical Protection

459. The Claimant argues that the "full protection and security" obligation "represents the host State's guarantee to provide a stable and secure investment environment."[774] The Claimant adds that such guarantee "extends beyond the obligation to ensure the *physical* security of an investment, and includes the guarantee of commercial and legal security."[775] However the Claimant's position is not supported by the language of the FIPA itself or by international investment treaty awards.

460. Article II(2)(b) of the FIPA provides that "[e]ach Contracting Party shall accord investments or returns of investors of the other Contracting Party full protection and security."[776] Both a *Vienna Convention on the Law of Treaties* ("VCLT") analysis and relevant investment treaty decisions support the conclusion that such obligations do not extend beyond the physical protection and security of investments or returns of investors.

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[772] Claimant's Memorial, ¶ 21.

[773] Claimant's Memorial, ¶¶ 379-381.

[774] Claimant's Memorial, ¶ 376.

[775] Claimant's Memorial, ¶ 378.

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

461. Interpreting the phrase "protection and security" in accordance with Article 31(1) of the VCLT requires the Tribunal to consider the ordinary meaning of the terms in their context and in light of their object and purpose.[777] The word 'protection', is defined in the Oxford dictionary as "[t]he action of protecting, or the state of being protected",[778] with 'protect' defined as "[k]eep safe from harm or injury"[779] and 'harm' and 'injure' defined in turn as "[p]hysical injury, especially that which is deliberately inflicted"[780] and "[d]o physical harm or damage to (someone)" or "[h]arm or impair (something)"[781] respectively. 'Impair' is defined as "[w]eaken or damage (something, especially a faculty or function)",[782] and 'damage' is defined as "[p]hysical harm that impairs the value, usefulness, or normal function of something".[783] The Oxford dictionary defines 'security' as "[t]he state of being free from danger or threat",[784] with 'danger' defined as "[t]he possibility of suffering harm or injury"[785] and 'threat' defined as "[a] person or thing likely to cause damage or danger".[786]

462. Thus, the phrase "protection and security" refers to safety from physical harm, injury, or impairment.

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[777] **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).

[778] **RL-209**, *English Oxford Living Dictionaries*, online, *s.v.* "protection", available at: https://en.oxforddictionaries.com/definition/protection.

[779] **RL-210**, *English Oxford Living Dictionaries*, online, *s.v.* "protect", available at: https://en.oxforddictionaries.com/definition/protect.

[780] **RL-211**, *English Oxford Living Dictionaries*, online, *s.v.* "harm", available at: https://en.oxforddictionaries.com/definition/harm.

[781] **RL-212**, *English Oxford Living Dictionaries*, online, *s.v.* "injure", available at: https://en.oxforddictionaries.com/definition/injure.

[782] **RL-213**, *English Oxford Living Dictionaries*, online, *s.v.* "impair", available at: https://en.oxforddictionaries.com/definition/impair.

[783] **RL-214**, *English Oxford Living Dictionaries*, online, *s.v.* "damage", available at: https://en.oxforddictionaries.com/definition/damage.

[784] **RL-215**, *English Oxford Living Dictionaries*, online, *s.v.* "security", available at: https://en.oxforddictionaries.com/definition/security.

[785] **RL-216**, *English Oxford Living Dictionaries*, online, *s.v.* "danger", available at: https://en.oxforddictionaries.com/definition/danger.

[786] **RL-217**, *English Oxford Living Dictionaries*, online, *s.v.* "threat", available at: https://en.oxforddictionaries.com/definition/threat.

463. The object and purpose of the FPS standard likewise point towards physical safety. The standard was historically "developed in the context of physical protection and security of the company's officials, employees or facilities"[787] and "notions of 'protection and constant security' or 'full protection and security' in international law have traditionally been associated with situations where the physical security of the investor or its investment is compromised".[788]

464. The above interpretation has been confirmed by the majority of investment treaty tribunals. For example, the *Crystallex* tribunal found that the FPS obligation is limited to physical protection and security:

> [T]he Tribunal considers that such treaty standard only extends to the duty of the host state to grant physical protection and security. Such interpretation best accords with the ordinary meaning of the terms "protection" and "security". Furthermore, this interpretation is supported by a line of cases involving the same or a similar phrase.[789]

465. Likewise, the *Saluka* tribunal determined that the FPS obligation is not meant to address any type of impairment, and is rather limited to the physical integrity of investments:

> The "'full protection and security'" standard applies essentially when the foreign investment has been affected by civil strife and physical violence. …
>
> [T]he standard obliges the host State to adopt all reasonable measures to protect assets and property from threats or attacks which may target particularly foreigners or certain groups of foreigners. The practice of arbitral tribunals seems to indicate, however, that the "full security and protection" clause is not meant to cover just any kind of impairment of an investor's investment, but to protect more specifically the physical integrity of an investment against interference by use of force.[790]

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[787] **RL-188**, *Enron – Award*, ¶¶ 284-287. *See also*, **CL-042**, *PSEG – Award*, ¶ 258; **RL-189**, *Sempra – Award*, ¶¶ 321-324.

[788] **CL-047**, *BG Group Plc. v. The Republic of Argentina* (UNCITRAL) Final Award, 24 December 2007, ¶ 324 ("*BG Group – Final Award*").

[789] **CL-082**, *Crystallex – Award*, ¶¶ 632-635.

[790] **CL-038**, *Saluka – Partial Award*, ¶¶ 483-484.

466. Similar findings were made by a number of other tribunals, including in the *Gold Reserve*,[791] *BG Group*,[792] and *Rumeli*[793] arbitrations.

467. Furthermore, Canada has confirmed its understanding that the FPS obligation in its treaties concerns physical protection and security in its recent treaty practice. For example, the *Comprehensive Economic and Trade Agreement* ("CETA"),[794] *Canada-Korea FTA*,[795] and *Canada-Romania FIPA*,[796] by way of examples, provide that the FPS obligation refers to physical security or police protection.

468. Additionally, in two instances, Canada took steps to clarify with respect to older agreements that do not expressly refer to physical safety that the FPS obligation has always been intended to refer to physical protection and security. In 2017, a new paragraph was added to the 1997 *Canada-Chile FTA* clarifying that the obligation "to provide 'full protection and security' means that each Party is required to provide the level of police protection required under customary international law."[797] Likewise, in 2017, the Canada-Colombia Joint Commission,

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[791] **RL-218**, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/09/1) Award, 22 September 2014, ¶¶ 622-623 ("While some investment treaty tribunals have extended the concept of full protection and security to an obligation to provide regulatory and legal protections, the more traditional, and commonly accepted view, as confirmed in the numerous cases cited by Respondent is that this standard of treatment refers to protection against physical harm to persons and property. … Accordingly, the Tribunal finds that the obligation to accord full protection and security under the BIT refers to the protection from physical harm.").

[792] **CL-047**, *BG Group – Final Award*, ¶¶ 323-328 ("The Tribunal can be relatively brief in relation to the allegations of BG. BG's claim with respect to the standard of protection and constant security must fail. The Tribunal observes that notions of "protection and constant security" or "full protection and security" in international law have traditionally been associated with situations where the physical security of the investor or its investment is compromised.").

[793] **RL-219**, *Rumeli Telekom A.S. and Telsim Mobil Telekomunikayson Hizmetleri A.S. v. Republic of Kazakhstan* (ICSID Case No. ARB/05/16) Award, 29 July 2008, ¶ 668 ("It obliges the State to provide a certain level of protection to foreign investment from physical damage.") ("*Rumeli – Award*").

[794] **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*, 20 October 2016 (provisional application on 21 September 2017; investment chapter not in force), Article 8.10(5) ("For greater certainty, "full protection and security" refers to the Party's obligations relating to the physical security of investors and covered investments.").

[795] **RL-136**, Canada-Korea FTA, Article 8.5(3)(b) ("The obligation in paragraph 1 to provide 'full protection and security' requires each Party to provide the level of police protection required under customary international law.").

[796] **RL-241**, *Agreement Between the Government of Canada and the Government of Romania for the Promotion and Reciprocal Protection of Investments*, entered into force 23 November 2011, Annex D ("For greater certainty… 'full protection and security' requires the level of police protection required under the customary international law minimum standard of treatment of aliens.").

[797] **RL-132**, Canada-Chile FTA, Article G-05(1) and **RL-242**, Canada-Chile FTA, Appendix I, Article G-05(3).

issued an interpretation reaffirming that "[t]he concept of 'full protection and security' in Article 805 of the 2011 *Canada-Colombia Free Trade Agreement* refers to a Party's obligations relating to the physical security of investors and covered investments."[798]

469. Further, the cases relied upon by the Claimant in support of its interpretation[799] do not assist it. Three of these cases concerned physical interference. *American Manufacturing & Trading* concerned losses resulting "from riot or act of violence",[800] *Biwater* concerned allegations of "occupation of City Water's facilities, usurpation of management and seizure of City Water's operations, and the deportation of City Water's management" and allegations that "[a] private entity would have found itself in breach of local civil, and potentially, criminal laws, including trespass",[801] and *Asian Agricultural Products* concerned "killings and property destruction".[802]

470. Further, the Claimant's attempt to equate the FPS and FET standards as was done in the *Vivendi* and *Azurix* arbitrations should be rejected.[803] Not only is this interpretation contrary to the principle of *effet utile*,[804] it is also unclear how such an interpretation assists the Claimant. The *Vivendi* tribunal found that the FPS standard "reach[ed] any act or measure which deprive[d] an investor's investment of protection and full security, provid[ed], in accordance with the

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[798] **RL-133**, Canada-Colombia FTA, Article 805(1); **RL-220**, *Decision of the Colombia-Canada Joint Commission Interpretation of Certain Chapter Eight Provisions*, Decision No. 6, 24 October 2017, ¶ 3(a).

[799] Claimant's Memorial, ¶¶ 376-378.

[800] **CL-026**, *American Manufacturing & Trading, Inc. v. Republic of Zaire* (ICSID Case No. ARB/93/1) Award, 21 February 1997, ¶ 6.13.

[801] **CL-049**, *Biwater Gauff – Award*, ¶¶ 408, 410.

[802] **CL-025**, *Asian Agricultural Products Ltd. v. Republic of Sri Lanka* (ICSID Case No. ARB/87/3) Final Award, 27 June 1990, ¶ 85(b).

[803] The Claimant argues that the FPS standard "extends beyond the obligation to ensure the *physical* security of an investment, and includes the guarantee of commercial and legal security." See Claimant's Memorial, ¶ 378. The Claimant simultaneously argues that the FET standard contains the "obligation of a State to provide a stable and predictable legal and business environment." *See* Claimant's Memorial, ¶ 299.

[804] 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 – Decision on Preliminary Objections*, ¶ 177. *See also*, **RL-056**, *Noble Ventures – Award*, ¶ 50 (holding that "the principle of effectiveness (*effet utile*)… plays an important role in interpreting treaties."); **RL-057**, *Fisheries Jurisdiction Case*, ¶ 52 (holding that "the principle [of effectiveness] has an important role in the law of treaties and in the jurisprudence" of the ICJ).

Treaty's specific wording, the act or measure also constitute[d] unfair and inequitable treatment".[805] The *Azurix* tribunal concluded that "[t]he tribunal, having held that the Respondent failed to provide fair and equitable treatment to the investment, finds that the Respondent also breached the standard of full protection and security under the BIT."[806]

471. Finally, the Claimant's reliance on the *Siemens* decision does not advance its case. That decision is inapposite given the different FPS provision in the treaty at issue. In its decision, the tribunal noted that the word "security" in the FPS provision it was interpreting is qualified by the word "legal",[807] and found on that basis, that non-physical security was covered by the treaty.[808] Similarly, the treaty at issue in the *National Grid* arbitration included broad language that is not found in the FIPA.[809] Specifically, the reference to "full protection and security" was followed by the phrase "Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of investors of the other Contracting Party."[810] Decisions pursuant to these treaties cannot be transposed onto the FIPA.

B. The Transfer Framework Did Not Breach Canada's Full Protection and Security Obligation

472. As discussed in Canada's Memorial on Jurisdiction,[811] the Claimant lacks standing to submit claims in relation to treatment accorded to Wind Mobile, including the claims related to the Transfer Framework constituting a breach of the FPS obligation in the FIPA. Therefore,

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[805] **CL-045**, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No. ARB/97/3), Award, 20 August 2007, ¶ 7.4.15 ("*Vivendi – Award*").

[806] **CL-039**, *Azurix – Award*, ¶ 408.

[807] **CL-043**, *Siemens – Award*, ¶¶ 302-303. Canada notes that the text of the Argentina-Germany BIT uses the word "juridical" instead of "legal" in the FPS obligation. Regardless of which word this Tribunal takes notice of, Canada's point remains.

[808] **CL-043**, *Siemens – Award*, ¶ 303 noting that "[i]n the instant case, "security" is qualified by "legal".

[809] **CL-053**, *National Grid P.L.C. v. Argentine Republic* (UNCITRAL) Award, 3 November 2008, ¶ 187.

[810] **RL-221**, *Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the Promotion and Protection of Investments*, 11 December 1998, Article 2(2).

[811] Canada's Memorial on Jurisdiction, Part IV.

because the Claimant does not allege that the Transfer Framework changed the framework applicable to the Claimant's debt and equity investments, the Article II(2)(b) claim must fail.

473. In any event, the claim that the Transfer Framework breached Article II(2)(b) must fail, since the clarification provided by the Transfer Framework did not amount to a failure to provide physical security or police protection to the Claimant's investment.

474. If the Tribunal disagrees with Canada's position that the FPS obligation is limited to physical security and concludes that it includes some protection against fundamental changes in the legal framework, the Tribunal must still reject the claim that there was a breach of Article II(2)(b), since the Transfer Framework did not fundamentally change the legal framework governing Wind Mobile's spectrum licences as the Claimant asserts.

475. The Claimant's reliance on *CME* and *National Grid* is misplaced, since the measures at issue in those cases are not analogous to the Transfer Framework. *CME* involved measures by the Czech Republic's broadcasting regulator that caused the "complete collapse"[812] of the claimant's investment in a Czech television services company. The broadcasting regulator in that case forced the investor to amend the legal structure of its investment (which the regulator had previously approved) and give up its exclusive right to use a broadcasting licence.[813] The regulator then "actively support[ed] the licence-holder… when it breached [an] exclusive Service Agreement"[814] it had with the investor, which was "the (already fragile) basis for the protection of CME's investment in the Czech Republic."[815] In contrast, the Claimant in this case has not argued that the Transfer Framework interfered with contractual relationships that formed the fundamental basis of its investment in Canada.

476. Nor can it be said that the Transfer Framework "effectively dismantled"[816] the regulatory framework that applied to the Claimant's investment, as was found to be the case in *National*

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[812] **CL-030**, *CME Czech Republic B.V. (The Netherlands) v. Czech Republic* (UNCITRAL) Partial Award, 13 September 2001, ¶ 427 ("*CME – Partial Award*").

[813] *See* **CL-030**, *CME – Partial Award*, ¶¶ 537-538, 599.

[814] **CL-030**, *CME – Partial Award*, ¶ 599.

[815] **CL-030**, *CME – Partial Award*, ¶ 572.

[816] **CL-053**, *National Grid – Award*, ¶ 189.

Grid. That case involved measures adopted by Argentina to address its currency crisis in 2002, which involved converting public service tariffs into Argentine pesos at the rate of one peso to one U.S. dollar.[817] The claimant had invested in electricity companies and related concession contracts that provided for a fixed remuneration on the basis of a tariff calculated in U.S. dollars.

477. Unlike the situation in *National Grid*, the Transfer Framework in this case did not dismantle a regulatory framework that applied to either the Claimant's investment in Wind Mobile or Wind Mobile's spectrum licences. To the contrary, the Transfer Framework clarified how a ministerial authority to approve spectrum licence transfer requests that existed in the legal regime in place at the time of the investment would be exercised at the end of the five-year moratorium. There is therefore no basis for the Tribunal to conclude that the Transfer Framework was a complete repudiation of the applicable legal framework.

C. The National Security Review Did Not Breach Canada's Full Protection and Security Obligation

478. The national security provisions of the ICA were in force at the time GTH filed its application to acquire voting control of Wind Mobile. As more fully explained in the preceding sections, GTH knew that its proposed acquisition of voting control of Wind Mobile was subject to the ICA and other approvals. It cannot therefore argue that the application of those provisions amounts to a failure to grant GTH's investment the legal protection and security to which it was entitled.

479. Also, as demonstrated above,[818] the national security review of GTH's proposed investment was not an opaque, arbitrary and meritless process. The process [redacted] by Government officials of the prescribed investigative bodies, by the Minister of Public Safety and by the GiC. The concerns were communicated in a timely manner to GTH during the review process and GTH had an adequate opportunity to respond to those concerns.

[817] **CL-053**, *National Grid – Award*, ¶ 59.

[818] *Supra*, ¶¶ 420-452.

D. The Measures at Issue Cannot Cumulatively Amount to a Breach of the Full Protection and Security Obligation

480. The Claimant argues that the above measures, together with Industry Canada's actions and inaction on roaming and tower/site sharing, resulted in a separate cumulative breach of the FPS obligation.[819] Given that none of the measures relate to the physical or even legal security of the investment it is hard to see how they could cumulatively amount to a breach of the FPS obligation. Moreover, as noted above, a series of measures can be considered cumulatively as a composite act only if the measures were closely interwoven and pursued the same objective,[820] and in this instance there is no justification for any measure to be considered together with any other measure.[821] Thus, the Claimant's allegations that Canada's measures, either separately or in combination, breached the FPS obligation must be rejected.

IV. Canada Has Not Breached the National Treatment Obligations Under Articles II(3) and IV of the FIPA

481. In its Memorial on Jurisdiction, Canada demonstrated why the Tribunal lacks jurisdiction over the Claimant's national treatment claim. Canada's jurisdictional objection is based on both Article II(4)(b)[822] and Article IV(2)(d) of the FIPA.[823] More specifically, ICA reviews as to whether to approve an acquisition of an investment are specifically excluded from the scope of the investor-State dispute settlement mechanism set out in Article XIII of the FIPA. In this case, the only measure that GTH challenges as a breach of the national treatment obligation of the FIPA is the national security review of GTH's proposed acquisition of voting control of Wind Mobile under the ICA and therefore the Tribunal has no jurisdiction over this claim. Moreover, measures in the telecommunications sector are expressly excluded from the application of the national treatment obligation contained in the FIPA.

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[819] Claimant's Memorial, ¶ 379.

[820] *Supra*, ¶¶ 456-457.

[821] *Supra*, ¶¶ 453-457.

[822] Canada's Memorial on Jurisdiction, Part III.C.

[823] Canada's Memorial on Jurisdiction, Part III.E.

482. As a result of the Tribunal's lack of jurisdiction over GTH's national treatment claim, Canada does not respond to the Claimant's allegations and arguments pertaining to this claim set out in its Memorial.[824]

483. To make out a claim of national treatment under Article II(3) of the FIPA, the Claimant bears the burden of establishing that 1) the challenged measure relates to the establishment of a new business enterprise or acquisition of an existing business enterprise or share of such enterprise by Egyptian investors; 2) the measure grants "less favourable treatment" to Egyptian investors than to Canadian investors; and 3) the government accorded the allegedly discriminatory treatment "in like circumstances".[825]

484. To make out a claim of national treatment under Article IV of the FIPA, the Claimant bears the burden of establishing the same elements except that the treatment must be with respect to the expansion, management, conduct, operation and sale or disposition of its investment.

485. Should the Tribunal reject Canada's objection to its jurisdiction to consider the Claimant's national treatment claim, Canada puts the Claimant to strict proof of its allegations.

V. Canada Has Not Breached the Obligation Related To Transfer of Funds Under Article IX(1) of the FIPA

486. The Claimant alleges that "Canada has breached its obligation to guarantee the unrestricted transfer of investments by blocking GTH's ability to transfer Wind Mobile's licences to an Incumbent."[826] The Claimant argues that Article IX(1) of the FIPA extends to domestic restrictions on the sale of assets within Canada. However, the Claimant's allegation rests on a fundamental misunderstanding of the scope of Article IX(1), which is limited to guaranteeing investors from Egypt that they will be able to transfer funds between Canada and Egypt.

[824] Claimant's Memorial, ¶¶ 387-394.

[825] **CL-044**, *United Parcel Service of America Inc. v. Government of Canada* (UNCITRAL) Award, 24 May 2007, ¶ 83; **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, ¶ 139; **CL-046**, *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States* (ICSID Case No. ARB(AF)/04/05) Award, ¶ 205; **CL-027**, *S.D. Myers – Partial Award*, ¶ 252.

[826] Claimant's Memorial, ¶ 382.

Canada's measures never limited the Claimant's ability to transfer funds generated from its investment or the sale of its investment between Canada and Egypt.

A. Article IX(1) of the FIPA Concerns the Transfer of Funds Out of the Host State

487. Article IX(1) of the FIPA provides as follows:

> Each Contracting Party shall guarantee to an investor of the other Contracting Party the unrestricted transfer of investments and returns. Without limiting the generality of the foregoing, each Contracting Party shall also guarantee to the investor the unrestricted transfer of:
>
> (a) funds in repayment of loans related to an investment;
>
> (b) the proceeds of the total or partial liquidation of any investment;
>
> (c) wages and other remuneration accruing to a citizen of the other Contracting Party who was permitted to work in connection with an investment in the territory of the other Contracting Party;
>
> (d) any compensation owed to an investor by virtue of Articles VII or VIII of the Agreement.[827]

488. This provision mandates "the unrestricted transfer of investments and returns". Pursuant to the VCLT, this phrase must be interpreted in accordance with its ordinary meaning in their context and in light of its object and purpose.[828]

489. Both "investment" and "returns" are defined terms in the FIPA. "[I]nvestment" is defined as "any kind of asset owned or controlled" by an investor,[829] while "returns" is defined as "all amounts yielded by an investment and in particular, though not exclusively, include[ing] profits interest, capital gains, dividends, royalties, fees or other current income".[830] The context of the

[827] **CL-001**, Canada-Egypt FIPA, Article IX(1).

[828] **CL-018**, *Vienna Convention on the Law of Treaties* (23 May 1969; in force on 27 January 1980), 1155 U.N.T.S. 331, Article 31(1).

[829] **CL-001**, Canada-Egypt FIPA, Article 1(f).

[830] **CL-001**, Canada-Egypt FIPA, Article 1(i).

phrase includes the title of the Article, the remainder of the paragraph, and the other paragraphs of Article IX. The title of Article IX is "Transfer of Funds".[831]

490. Article IX(1) refers to "funds in repayment of loans related to an investment", "proceeds of the total or partial liquidation of any investment", "wages and other remuneration accruing to a citizen of the other Contracting Party", and "any compensation owed to an investor by virtue of Articles VII or VIII [that is, the provisions relating to compensation for losses from an armed conflict, a national emergency or a natural disaster, or expropriation]".[832] All four scenarios relate to the movement or transfer of funds.

491. Notably, the scenarios contemplated are phrased such that there is a focus on the transfer of funds that *result from* an investment or asset, rather than the transfer of the assets themselves. For example, the focus is not on the transfer of a loan, but rather on the transfer of funds for the repayment of a loan. Likewise, the focus is not the transfer of an asset in order to liquidate an investment, but rather the transfer of funds *after* liquidation of an investment. Thus, Article IX(1) guarantees the transfer of funds that result from a number of scenarios including loans, liquidation or returns.

492. Article IX(2), which immediately follows Article IX(1), provides further guidance on what transfers are contemplated by Article IX(1):

> Transfers shall be effected without delay in the convertible currency in which the capital was originally invested or in any other convertible currency agreed by the investor and the Contracting Party concerned. Unless otherwise agreed by the investor, transfers shall be made at the rate of exchange applicable on the date of transfer.[833]

493. The use of the words "convertible currency in which the capital was originally invested" and "rate of exchange applicable on the date of transfer" point towards cross-border movement of funds from one Contracting Party to the other Contracting Party. The reference to "convertible currency agreed by the investor and the Contracting Party concerned" confirms that Article IX is

[831] **CL-001**, Canada-Egypt FIPA, Article IX.

[832] **CL-001**, Canada-Egypt FIPA, Articles VII, VIII, IX(1).

[833] **CL-001**, Canada-Egypt FIPA, Article IX(2).

not concerned with domestic transfer of assets between an investor and another private person within the host State.

494. The object and purpose underlying transfer provisions also support the above interpretation. In discussing the purpose of provisions related to "Transfer of Funds" in international investment agreements, the United Nations Conference on Trade and Development ("UNCTAD")[834] noted that "[b]y establishing a host country's obligation to permit the payment, conversion and repatriation of amounts relating to an investment, a transfer provision ensures that, at the end of the day, a foreign investor will be able to enjoy the financial benefits of a successful investment."[835] The issue paper further explains that "the primary purpose of a transfer provision is to set forth a host country's obligation to permit the payment, conversion and repatriation of the funds that relate to an investment".[836]

495. There are three broad categories of transfer provisions contemplated in investment treaties, "outward transfer of amounts derived from or associated with protected investments", "outward transfer of amounts arising from the host country's performance of other investor protection obligations under an agreement" and "inward transfer of amounts to be invested by a foreign investor".[837]

496. Thus, the object and purpose of transfer provisions in investment treaties is to address the transfer of funds between the host State and the home State.

497. Provisions in other treaties similar to Article IX(1) of the FIPA have been interpreted in this manner, supporting a conclusion that Article IX(1) of the FIPA guarantees investors from Egypt that they will be able to transfer *funds* between Canada and Egypt. For example, Article 1109 of the NAFTA states, that "[e]ach Party shall permit all transfers relating to an investment of an investor of another Party in the territory of the Party to be made freely and without

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[834] **RL-222**, United Nations Conference on Trade and Development, *Transfer of Funds*, UN Doc. UNCTAD/ITE/IIT/20, (New York and Geneva: United Nations, 2000) ("UNCTAD – Transfer of Funds").

[835] **RL-222**, UNCTAD – Transfer of Funds, p. 1.

[836] **RL-222**, UNCTAD – Transfer of Funds, p. 5.

[837] **RL-222**, UNCTAD – Transfer of Funds, pp. 30-32.

delay."[838] In the context of this provision, academics have observed that the "[t]ransfer of funds provisions 'set forth a country's obligation to permit the payment, conversion and repatriation of the funds that relate to an investment'" and that "they obligate the Party to allow funds to be transferred into and out of the host country".[839]

498. The authorities cited by the Claimant in support of its proposition only serve to reinforce Canada's position. All of the decisions relied on by the Claimant[840] confirm that the transfer provisions of treaties relate to the transfer of funds out of the host country, and not the transfer of assets within the host country.

499. For example, in *Biwater*, the claimant argued that it was unable to transfer its investment by selling its shareholding in a company because the value of the shareholding had become zero as a result of certain measures.[841] Ultimately, the tribunal did not find a breach of the transfer provision because the provision was "not a guarantee that investor will have funds to transfer" and "[i]t rather guarantee[d] that if investors ha[d] funds, they [would] be able to transfer them".[842]

500. Further, in *Achmea*, the measure at issue was an amendment that required that "all profits from health insurance be used for healthcare purposes."[843] In other words, profits or funds *generated* from the claimant's investment in the health insurance company could not be transferred out of the country to the foreign claimant shareholder, leading to a breach of the transfer provision.

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[838] **RL-101**, NAFTA, Article 1109(1).

[839] **RL-223**, Meg N. Kinnear, Andrea K. Bjorklund & John F.G. Hannaford, *Investment Disputes Under NAFTA, An Annotated Guide to NAFTA Chapter 11* (Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2006), p. 1109-5.

[840] Claimant's Memorial, ¶ 384.

[841] **CL-049**, *Biwater Gauff – Award*, ¶ 732(a).

[842] **CL-049**, *Biwater Gauff – Award*, ¶ 735.

[843] **CL-067**, *Achmea B.V. v. The Slovak Republic*, PCA Case No. 2008-13, Final Award, 7 December 2012, ¶ 96.

501. Likewise, the *AES* award does not help the Claimant. Importantly, the decision did not actually rule on the transfer provision that was at issue in that arbitration.[844] Regardless, the claimant's argument in that arbitration was that the requirement that all returns be reinvested was a breach of the transfer provision relates to the transfer of funds generated from an investment.

502. Finally, in *Continental Casualty*, the claimant argued that it "was prevented from transferring to the U.S. at par free funds amounting to U.S. $19,000,000 by Decree 1570 of 2001 (Corralito) which forbade withdrawals from banks and transfers of funds […] out of Argentina."[845] Again, the allegation related to the cross-border movement of funds and therefore does not support the Claimant's interpretation of Article IX(1).

503. The Claimant has also referred to the treatise by Professor Andrew Newcombe and Lluís Paradell in support of its assertion that broad transfer provisions protect against restrictions on sale of an investment.[846] However, the treatise only noted that some transfer provisions appear to capture restrictions that prevent liquidation – their discussion did not extend to restrictions on the domestic transfer of assets.[847] As that treatise also notes:

> The ability to transfer funds into and out of home and host states is a fundamental concern of foreign investors. Foreign investors want the ability to transfer funds into host states in order to establish, maintain and expand their investments. Foreign investors want to be able to transfer funds out of host states to repatriate profits, pay for business expenses and engage in other investment activities. The freedom to transfer funds ensures that investors can reap the financial rewards of a successful investment or exit the host state if an investment is unsuccessful. […] Although discussion of transfer rights tends to focus on host state restrictions on outward transfers, restrictions on transferring funds from home states to host states can also impede the investment promotion purpose of IIAs and the ability of foreign investors to establish or maintain the investment in the host state.[848]

[844] **CL-068**, *AES – Award*, ¶ 427.

[845] **CL-051**, *Continental Casualty – Award*, ¶ 237.

[846] Claimant's Memorial, ¶ 385.

[847] **CL-054**, *Chapter 8 – Transfer of Rights, Performance Requirements and Transparency in* Andrew Newcombe & Lluis Paradell, Law and Practice of Investment Treaties: Standards of Treatment, 2009, s. 8.8.

[848] **CL-054**, *Chapter 8 – Transfer of Rights, Performance Requirements and Transparency in* Andrew Newcombe & Lluis Paradell, Law and Practice of Investment Treaties: Standards of Treatment, 2009, s. 8.2.

B. The 2013 Transfer Framework Does Not Concern the Claimant's Ability to Transfer Funds or Returns from Its Investments

504. The Claimant states in its Memorial that its investment is "as an indirect shareholder of Wind Mobile" and "in several loans to Wind Mobile".[849] Thus, Canada's obligation under the transfer of funds provision of the FIPA is to allow the transfer of any funds (i) yielded from disposition or liquidation of its equity or debt interests, or (ii) generated from operation of its equity or debt interests.

505. The Transfer Framework did not limit the Claimant's ability to do either. In fact, despite the ongoing operation of the Transfer Framework, the Claimant was able to liquidate its equity and debt interests in Wind Mobile and transfer the funds from the sale of these interests when it exited from the Canadian market in 2014. Further, the Claimant was not prevented at any time from transferring any funds generated from its interests out of Canada.

506. The Claimant equates its investment to the AWS-1 spectrum licences that were awarded to Wind Mobile, and then argues that Canada breached Article IX(1) of the FIPA by "block[ing] GTH's ability to transfer its investment to an Incumbent".[850]

507. The *Rusoro Mining* decision squarely addressed this line of argument. In that arbitration, the claimant was arguing that an export ban on gold breached Venezuela's transfer obligation.[851] In that case, the claimant's investment was in shares and stocks of certain Venezuelan companies that had mining licenses, and mined and sold gold.[852] The relevant treaty provision provided that "[e]ach Contracting Party shall guarantee to an investor of the other Contracting Party the unrestricted transfer of investment and returns."[853]

508. The tribunal determined that gold was neither an "investment" nor a "return", and that the treaty obligation at issue did not extend to free transfer of gold:

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[849] Claimant's Memorial, ¶ 273.

[850] Claimant's Memorial, ¶ 386.

[851] **CL-016**, *Rusoro – Award*, ¶ 565.

[852] **CL-016**, *Rusoro – Award*, ¶¶ 572, 574.

[853] **CL-016**, *Rusoro – Award*, ¶ 566.

> It is undisputed that Rusoro's "investment" in Venezuela consisted in "shares and stocks" of certain Venezuelan companies holding Mining Rights. Having made the investment, Art. VIII.1 (in connection with the definitions of Art I.) guarantees Rusoro the right to an "unrestricted transfer" of funds outside Venezuela in relation with three categories of monetary flows:
>
> - All "returns" which Rusoro may generate as a consequence of its status as investor, including dividends and profits,
>
> - The price which Rusoro may collect in an eventual disposition of its investment, including capital gains, or alternatively,
>
> - Any compensation payable by the Bolivarian Republic in an eventual expropriation of Rusoro's investment.
>
> The BIT's guarantee that "returns" arising from the investment may be freely transferred does not cover, however, the entrepreneurial activities of Rusoro's subsidiaries in Venezuela. If these subsidiaries perform an export activity, the price received from the third party who imports the product, is simply a price received by a Venezuelan corporation in exchange for a commodity, not a "return" earned by Rusoro as a consequence of the holding of an investment in Venezuela.[854]

509. The same analysis applies here. The spectrum licences held by Wind Mobile are neither an investment nor a return of the Claimant's investment, and any alleged restriction on the transfer of these assets within Canada is completely outside the scope Article IX of the FIPA.

THE CLAIMANT IS NOT ENTITLED TO THE DAMAGES IT SEEKS FOR THE ALLEGED VIOLATIONS OF THE FIPA

510. As a result of the alleged breaches, the Claimant seeks compensation on the basis of all the amounts invested by GTH in Wind Mobile in the amount of C$ 1,330 million (without pre-judgment interest). There is no legal or economic basis in this case for awarding the Claimant its investment costs. The Tribunal should reject the Claimant's attempt to inflate damages and obtain a windfall award. Instead, should the Tribunal find a breach of the FIPA, damages should be calculated by considering the loss in fair market value ("FMV") of the investment but for the breach based on the best available evidence on the date of the breach itself.

[854] **CL-016**, *Rusoro – Award*, ¶¶ 572-573.

511. When this standard is applied to assess damages arising from a breach of the FIPA as a result of the national security review, the Claimant is not entitled to any damages. There is simply no evidence that the failure to acquire control of Wind Mobile resulted in any damage to the Claimant. Further, if the Tribunal concludes that the Transfer Framework was a breach of the FIPA (whether alone or in combination with other measures) that caused the Claimant damage, and the Claimant is entitled to pre-judgement interest, damages should be limited to no more than C**$ 309.5 million**. This amount reflects the difference between the price Incumbents and New Entrants were prepared to offer for Wind Mobile at the time of the alleged breach in June 2013. This figure represents a maximum value that does not account for any regulatory risk, including risk related to approval of any sale by the Competition Bureau, a factor the Claimant fails to both appreciate and quantify.

I. The Claimant Lacks Standing to Bring a Claim for Damages with Respect to the Treatment of Wind Mobile and Wind Mobile's Licences

512. As Canada has more fully set out in its Memorial on Jurisdiction, the Claimant does not have standing to bring a claim for damages arising out of the Government's alleged treatment of Wind Mobile.[855] The Claimant, and its equity and debt investments, are distinct from Wind Mobile. Still, two of the claims for damages brought by the Claimant relate to alleged treatment of Wind Mobile, specifically (i) treatment relating to Canada's failure to create favourable market conditions for Wind Mobile as a New Entrant in Canada, and (ii) treatment relating to Wind Mobile's ability to transfer its spectrum licences to Incumbents.

513. As Canada has explained, under the FIPA, a foreign shareholder may only 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, Article XIII(12) requires that the foreign shareholder must own or control the

[855] See Canada's Memorial on Jurisdiction, Part IV.

enterprise, the enterprise must consent to the arbitration, and the enterprise must waive any right to domestic proceedings in relation to every alleged breach.[856]

514. 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 in relation to the claims pursued. The Claimant has brought its claim in this arbitration pursuant to Article XIII(3).[857] Article XIII(3) allows a shareholder to bring a claim with respect to measures that relate to the treatment of, and damages to its shares. It does not however allow a claimant shareholder to pursue claims for loss or damage to the enterprise for reflective losses resulting from damage to the enterprise.[858] This distinction is of critical importance and forms part of the overall structure on the basis of which each Contracting Party agreed to arbitration.[859]

515. 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. Canada therefore reiterates its request that the claims related to the conditions that Wind Mobile enjoyed in the market and to the transfer of Wind Mobile's spectrum licenses be dismissed for lack of standing.

II. The Standard of Compensation Under the FIPA

516. Article XIII(7) of the FIPA dictates that a tribunal established under the FIPA is to "decide the issues in dispute in accordance with this Agreement and applicable rules of international law."[860] The FIPA further indicates, at Article XIII(9), that a tribunal may only award monetary

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

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

[858] Canada's Memorial on Jurisdiction, ¶ 252.

[859] As Canada noted in its Memorial on Jurisdiction (¶¶ 261-262) the FIPA structure with respect to claims by shareholders reflects the structure in the NAFTA which has been the subject of detailed consideration and submissions by NAFTA Parties. *See for example* **RL-224**, *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton, and Bilcon of Delaware Inc. v. Government of Canada* (UNCITRAL) Submission of the United States of America, 29 December 2017, ¶¶ 2-22.

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

damages and any applicable interest if the alleged breach is one other than expropriation.[861] The FIPA provides little guidance, however, on how that monetary damage is to be quantified. With the exception of Article VIII dealing with expropriation, the FIPA does not have an express provision that deals with the standard of compensation for breaches of the FIPA. As a result, and in accordance with Article XIII(7), this Tribunal must turn to "applicable rules of international law" when deciding issues of damages in the present arbitration. Both Canada and the Claimant agree in this regard.[862]

517. Both Canada and the Claimant also agree that, at international law, an award of monetary damages should repair the wrongful conduct by returning the Claimant to the position it would have been in absent that wrongful conduct.[863] As the Permanent Court of International Justice ("PCIJ") explained in *Chorzow*, damages should "as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed."[864] The Tribunal's task therefore is to consider the value of that investment in a "but-for" world, "wip[ing] out all the consequences of the illegal act."[865]

518. As discussed in the following section, any alleged damages to be awarded to the Claimant in the event Canada is found to be in breach of the FIPA should be assessed based on the difference between the FMV of the Claimant's investment as of the date of the alleged breach and what the FMV would have been "but for" the breach. The amounts invested by the Claimant do not represent an appropriate basis to calculate damages but for the breach.

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[861] **CL-001**, Canada-Egypt FIPA, Article XIII(9).

[862] Claimant's Memorial, ¶ 395.

[863] Claimant's Memorial, ¶¶ 395-396.

[864] **CL-020**, *Case Concerning the Factory at Chorzow (Germany v. Poland Republic)* Judgment, 1928, 17 P.C.I.J., Ser. A, 13 September 1928, p. 47 ("*Chorzow*").

[865] **CL-020**, *Chorzow*, p. 47.

A. The Appropriate Valuation Methodology is One that Assesses the Effect of the Breach on the Fair Market Value of the Claimant's Investment, Not One Based on the Claimant's Investment Costs

519. In its Memorial, based on its primary method of calculating damages, the Claimant seeks to recover C$ 1,330 million (before pre-judgment interest) in damages for its investment costs.[866] The Claimant asserts that it "cannot at present accurately assess the damage resulting from Canada's duplicative and inconsistent O&C review process (which, among other things, delayed Wind Mobile's launch) and Canada's failure to enforce mandatory roaming and tower/site sharing (which, among other things delayed Wind Mobile and increased operational costs substantially)."[867] Therefore, "based on currently available information, [it] is not able to assess the additional damage suffered by GTH as a result of the cumulative effect of all four of Canada's measures."[868] As a result of this, the Claimant argues that, given "damages cannot be accurately ascertained for all the measures taken by the host state, it is well-accepted that the amount invested by Claimant, updated at an appropriate rate of return, is an appropriate measure of the "*compensation sufficient to eliminate the consequences of the* [host state's] *actions*."[869] The Claimant's logic, however, is flawed and should be rejected by this Tribunal.

520. In support of its position, the Claimant relies on a number of cases that are inapposite to the facts in this case. Investment treaty tribunals have turned to investment costs as a methodology to calculate damages where an investment is still in the pre-operational stage and has no history of profits since awarding any amount for future profits related to such an investment would require an impermissible degree of speculation. The cases cited by the Claimant arise out of these situations. However, this is not the factual situation before this Tribunal.[870]

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[866] Claimant's Memorial, ¶ 402.

[867] Claimant's Memorial, ¶ 402.

[868] Claimant's Memorial, ¶ 402.

[869] Claimant's Memorial, ¶ 402.

[870] *See for example*, **RL-225**, *Metalclad Corporation v. United Mexican States* (ICSID Case No. ARB(AF)/97/1) Award, 30 August 2000, ¶ 122; **CL-043**, *Siemens – Award*, ¶¶ 355, 368-370; **RL-226**, *Wena Hotels Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/98/4) Award, 8 December 2000, ¶¶ 123-125.

521. For example, in the *Vivendi* decision, the Tribunal turned to investment costs as a valuation methodology since the investment in question was not a going concern,[871] and the claimant had failed to establish with a significant degree of certainty that the investment would have been profitable.[872] As a result, a damages valuation that assessed lost profits (in that case a discounted cash flow, or "DCF", methodology), was deemed inappropriate – future profits were too speculative. The tribunal therefore turned to investment costs to award compensation.[873] The same is true for both the *Hassan Awdi* and *Copper Mesa* arbitrations. In each of those cases the tribunal relied on investment costs to assess damages as the investment was either not a going concern[874] or was in an early exploratory stage,[875] making the calculation of future lost profits too speculative.[876]

522. In circumstances such as those, where future profits are less than certain, or speculative, making it difficult to rely on a DCF methodology and where market transactions are not available, it may be appropriate for a tribunal to award investment costs in lieu of taking a fair market value approach to damages. However, the facts before this Tribunal do not justify compensation based on investment costs.

523. First, contrary to many of these cases cited by the Claimant, at the time of the alleged breaches, Wind Mobile was a functioning telecommunications provider in Canada.

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[871] **CL-045**, *Vivendi – Award*, ¶¶ 8.3.6.

[872] **CL-045**, *Vivendi – Award*, ¶¶ 8.3.5

[873] **CL-045**, *Vivendi – Award*, ¶¶ 8.3.13

[874] **CL-076**, *Hassan Awdi, Eterprise Business Consultants, Inc. and Alfa El Corporation v. Romania* (ICSID Case No. ARB/10/13) Award, 2 March 2015, ¶ 514 ("The application of the DCF method relied upon by Claimants as 'the most appropriate way to determine the fair market value' is not justified in the circumstances. This is because Rodipet is not a going concern, it has a history of losses.") ("*Hassan Awdi – Award*").

[875] **CL-081**, *Copper Mesa Mining Corporation v. The Republic of Ecuador* (UNCITRAL) PCA Case No. 2012-2, Award, 15 March 2016, Part 7.24 ("This is hardly surprising, given that the Claimant's concessions remained in an early exploratory stage with no actual mining activities, still less any track record as an actual mining business.") ("*Copper Mesa Mining – Award*").

[876] **CL-076**, *Hassan Awdi – Award*, ¶ 514; **CL-081**, *Copper Mesa Mining – Award*, Part 7.26.

524. Second, as Canada's expert, The Brattle Group notes, investment value is an inappropriate methodology in this case from an economic perspective.[877] In their view:

> [such an approach] undercompensates Claimants if their investments would have returned a profit but-for the breaches, and overcompensates Claimants if their investments would have made a loss absent the breaches.[878]

525. As The Brattle Group indicates, "many factors could have affected Wind's economic value and caused the true economic value of Wind Mobile to diverge from Claimant's sunk costs",[879] including management choices, underinvestment, and even changing technologies:

> business decisions, under or over investment, competition from Incumbents and New Entrants, and technological evolutions. In fact, Wind appears to have suffered from bad management and underinvestment as VimpelCom did not invest (or arrange third party funding) at a sufficient level to maximize the value of its assets. For example, Wind Mobile's network did not have low band (sub 1 GHz) spectrum necessary for the new 5G wireless broadband networks. By 2014 5G were known as the next evolution of wireless networks. Wind could have acquired such frequencies in the 2014 700 MHz auction.[880]

526. As The Brattle Group notes, there are real market transactions that can be used to ascertain the FMV of the Claimant's investment, making reliance on an investment value approach in this arbitration inappropriate:

> [t]he market value of GTH's economic losses is best assessed under the But-For FMV standard. This is especially true given there were arms-length negotiations on or around the date of breach by which the market value of Wind Mobile can be assessed.[881]

527. This Tribunal should refrain from adopting a valuation approach that would award the Claimants an investment value that is more than what the market was willing to pay for its investment. As Canada notes below,[882] [redacted]

[877] **RER-Brattle**, ¶¶ 41-47.

[878] **RER-Brattle**, ¶ 41.

[879] **RER-Brattle**, ¶ 42.

[880] **RER-Brattle**, ¶ 42.

[881] **RER-Brattle**, ¶ 43.

[882] *See infra*, ¶¶ 552, 570.

[redacted] The Claimant's approach must be rejected – otherwise the Government will simply become an insurance policy for investors' bad business decisions. Moreover, the Claimant's failure to quantify damages arising out of the CRTC Review and Canada's actions with respect to roaming and tower sharing should not be used to justify recourse to investment costs as a basis for compensation. At least some damages arising out of the CRTC Review and Canada's actions with respect to roaming and tower sharing have already been quantified by the Claimant in its Memorial, it just fails to account for them in its damages analysis.[886]

528. Further, as The Brattle Group indicates, "Compass Lexecon should be able to determine damages from these breaches based on information that they or the Claimant possesses."[887] As they note, any "delay" in getting to the market as a result of the CRTC review alleged by the Claimant, and any damages suffered as a result of market conditions related to roaming and tower sharing can be quantified; the Claimant has simply failed to do so.[888]

529. Finally, the Claimant's explanation regarding its reliance on investment costs in the cumulative breach scenario has no application outside of that scenario given that its experts were able to calculate damages resulting from the other alleged breaches. The Claimant has alleged three separate breaches for this Tribunal to consider.[889] It is only with respect to the cumulative breach scenario (the third alleged breach) that the measures pertaining to the CRTC ownership

[redacted]

[886] *See for example*, Claimant's Memorial, ¶ 150 ("Wind Mobile was paying Rogers approximately C$ 1000 per gigabyte of data for domestic wholesale roaming—whereas the retail rate to subscribers was about C$ 5 per gigabyte"); *See also* **C-221**, *Proceedings of the Standing Senate Committee on Transport and Communications*, 41st Parliament, 2nd Session, Issue No. 7, 27 May 2014, 7:31.

[887] **RER-Brattle**, ¶ 44.

[888] **RER-Brattle**, ¶¶ 45-47.

[889] Claimant's Memorial, ¶¶ 305, 345, 363-366, 372, 379-382, 387.

and control review and the mandated roaming and tower sharing are even at play. The Claimant fails to address why, based on its own logic, the use of an investment valuation methodology is appropriate with respect of the two other alleged breaches.

530. The Claimant's request that this Tribunal use an investment costs methodology to assess damages should be rejected. As discussed further below, the appropriate methodology to measure the damages resulting from Canada's alleged breaches is one that assesses the effect on the FMV of the Claimant's investment but for the alleged breach.[890] This is the alternative damages methodology that the Claimant's damages experts purport to follow and the methodology adopted by Canada's experts.

B. The Claimant's Use of *Ex-Post* Facto Evidence is Inappropriate

531. The effect on the value of the investment should be established as of the date of the breach, because damages were suffered when the State adopted the measures in question. That is the specific loss for which the State is responsible. Despite this, the Claimant relies on certain tribunal decisions to argue that damages should be assessed as of the date of any award from this Tribunal, "taking into account the information available as to the evolution of the investment up until that date".[891] This approach is incorrect and is inconsistent with established international treaty awards and economic principles. Indeed, even the cases cited by the Claimant fail to help its case given the facts before this Tribunal.

532. Fundamentally, the use of *ex post* data in evaluating damages is not appropriate because it involves speculation and is arbitrary. As Arbitrator Stern notes:

> An ex post valuation meaning a valuation taking into account events and evolutions that took place after the illegal act is arbitrary. The facts existing

[890] On this point, Canada notes the substantial amount of investment treaty awards that supports the application of a fair market value (FMV) methodology in a non-expropriation scenario, such as the case at hand. *See for example*, **CL-036**, *CMS Gas Transmission Company v. The Argentine Republic* (ICSID Case No. ARB/01/8) Award, 12 May 2005, ¶ 410 ("*CMS Gas – Award*"); **CL-039**, *Azurix – Award*, ¶ 424; **RL-188**, *Enron – Award*, ¶¶ 361-362; **RL-030**, *Marvin Roy Feldman Karpa v. United Mexican States* (ICSID Case No. ARB(AF)/99/1) Award, 16 December 2002, ¶ 195 ("*Feldman – Award*"); **RL-189**, *Sempra – Award*, ¶¶ 403-405; **CL-075**, *Gold Reserve – Award*, ¶¶ 681, 682, 685.

[891] Claimant's Memorial, ¶ 401.

> after the date of the award have nothing to do with the facts of the case. The date of [the breach] is the only one that is objectively related to the dispute.[892]

533. Countless investment treaty tribunals have confirmed that it is the date of the breach that is relevant for valuation.[893] For example, the *CME* tribunal held that the "decisive date" for establishing the fair market value of the claimant's investment was the date of the alleged breach.[894] Similarly, the *CMS Gas* tribunal held that the "date to be relied on for the computation of values" was the "day before the Argentine court action", the alleged breaching measure in that arbitration, "was taken".[895] The same conclusion was reached by the tribunal in the *Murphy Exploration* arbitration, where the tribunal noted that:

> Under customary international law, if an investor loses ownership or control of its primary investment due to the breach by a host state of its international law obligations, the commonly accepted standard for calculating damages is to appraise the fair market value of the lost investment at the time it was lost, without taking into account subsequent events.
>
> […]
>
> Investor-state arbitral tribunals have frequently sought to establish the fair market value at the time of the investor's loss of its primary investment as a basis for the calculation of damages. It is also the prevailing approach in financial accounting to consider the ex-ante appraisal of an asset as of a certain valuation date without taking into account subsequent developments. [896]

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[892] **RL-227**, *Quiborax S.A. and Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia* (ICSID Case No. ARB/06/2) Partially Dissenting Opinion of Professor Brigitte Stern, 16 September 2015, ¶ 83 ("*Quiborax – Dissent*").

[893] *See for example*, **RL-228**, *CME Czech Republic B.V. v. The Czech Republic* (UNCITRAL), Final Award, 14 March 2003, ¶ 509 ("*CME – Final Award*"); **CL-036**, *CMS Gas – Award*, ¶ 441; **CL-039**, *Azurix – Award*, ¶ 418; **CL-059**, *Gemplus – Award*, 16 June 2010, ¶ 12-43.

[894] **RL-228**, *CME – Final Award*, ¶ 509.

[895] **CL-036**, *CMS Gas – Award*, ¶ 441.

[896] **CL-083**, *Murphy Exploration v. The Republic of Ecuador* (UNCITRAL), Partial Final Award, 6 May 2016, ¶ 482 (*citing to* **RL-229**, Mark Kantor, *Valuation for Arbitration: Compensation Standards, Valuation Methods and Expert Evidence* (2008), pp. 60-70); *See also* **RL-230**, *Compañia del Desarrollo de Santa Elena, S.A. v. The Republic of Costa Rica* (ICSID Case No. ARB/96/1) Final Award, 17 February 2000, ¶ 83; **CL-039**, *Azurix – Award*, ¶¶ 424-433, **RL-219**, *Rumeli – Award*, ¶ 793, **CL-047**, *BG Group – Final Award*, ¶¶ 422-429); *See also* **CL-036**, *CMS Gas – Award*, ¶ 441.

534. The tribunal in that arbitration went on to note that an *ex-post* approach was not appropriate as "the ex-post data generated after the sale of Murphy Ecuador [did] not reflect what the situation would have been in a but-for scenario."[897]

535. Only a few tribunals have accepted the use of *ex-post* evidence and only in very limited circumstances. In *Quiborax*, although the majority of the tribunal found it appropriate to use *ex post* evidence, the Tribunal nevertheless recognized that it must "value the loss with reasonable certainty. If the available ex post data is not reasonably certain, then it will have no choice but to resort to appropriately adjusted ex-ante data."[898] Arbitrator Stern dissented in that case and noted:

> In my view, a careful analysis of *Chorzów* does not support the approach of the majority and it cannot be contested that there are extremely few awards having adopted an ex post analysis as has been used here.[899]

536. Canada agrees with Arbitrator Stern's dissent in that case. While the Claimant argues strenuously for the application of the *Chorzow* standard, it fails to explain how its approach follows the standard articulated in that case or demonstrate how such an approach is consistent with investment treaty awards. As Arbitrator Stern further noted:

> The purpose of the reparation is to compensate the consequences of the illegal act of the State, as appreciated at the time of such expropriation, not the consequences of some posterior evolution of prices or evolution of demand or other circumstances.[900]

[897] **CL-083**, *Murphy Exploration v. The Republic of Ecuador* (UNCITRAL), Partial Final Award, 6 May 2016, ¶ 484.

[898] **CL-080**, *Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia* (ICSID Case No. ARB/06/2) Award, 16 September 2015, ¶ 384.

[899] **RL-227**, *Quiborax – Dissent*, ¶ 29.

[900] **RL-227**, *Quiborax – Dissent*, ¶ 40 (emphasis removed).

537. A damages valuation that uses *ex post* data, as the Claimant argues for here, represents "an ultraminority position."[901] In fact, Arbitrator Stern noted the lack of awards in support of the position the Claimant argues for this in this arbitration:

> It cannot be contested that the decisions adopting an ex post valuation – in the extensive interpretation used by the majority – are extremely few: as a matter of fact, the majority itself, in the footnote relating to the "several investment arbitration tribunals", mentions only four treaty cases: ADC v. Hungary, Siemens v. Argentina, ConocoPhilips v. Venezuela and Yukos v. Russia. These are – to the best of my knowledge – the ONLY cases in almost thirty years of investment arbitration adopting the date of the award and ex post data, compared to the hundreds of cases relying on the date of expropriation and what was foreseeable on that date, in other words, *the hundreds of awards which have granted, in case of expropriation, both lawful and unlawful, the fair market value of the expropriated property, evaluated at the date of the expropriation, with the knowledge at that time*.[902]

538. Further, the cases relied upon by the Claimant do not support its position.

539. First, not only did the *Siemens* case involve an alleged expropriation, a breach that the Claimant does not allege here, but a correct reading of that case demonstrates that the tribunal used the valuation at the date of the expropriation, not the date of the award.[903]

540. Second, the decision of the tribunal in the *Windstream* arbitration rested on the fact that "the Claimant ha[d] not lost the full value of its investment."[904] Indeed, the investor in that arbitration still held on to the investment at the time of the award. That is not the case the Tribunal has before it here. Indeed, the Claimant sold its investment in 2014. It retains no interest in Wind Mobile. Further, in *Windstream*, the tribunal relied on a comparable transactions methodology for damages that compared transactions relating to the stage of development of the project and not a particular date in time. Therefore, the valuation date was largely irrelevant to

[901] **RL-227**, *Quiborax – Dissent*, ¶ 44. *See also* ¶ 56 ("I consider that the solution suggested by ADC and Yukos is biased in favor of the investors and that the solution which systematically applies the harshest damages on the Respondent State resembles punitive damages, which are excluded in international law. A legal solution cannot just be based on what is more favorable to one of the parties.") and ¶ 63 ("It just confuses the "but for" world and the real world, without rendering the "but for" world more real.").

[902] **RL-227**, *Quiborax – Dissent*, ¶ 43 (emphasis in original).

[903] **CL-043**, *Siemens – Award*, ¶¶ 377, 379-385.

[904] **CL-086**, *Windstream – Award*, ¶ 484.

the tribunal's damages conclusion. The valuation date in that arbitration was only relevant to the extent it was used to determine the appropriate exchange rate to be applied to the award.[905]

541. Third, the Claimant relies on the *El Paso* decision to argue that the value of its investment "should be determined with reference to a date subsequent to that of the internationally wrongful act"[906] but as the Claimant itself notes when quoting from that case, such an approach was only to be used if the "damage is 'financially assessable', therefore not speculative".[907]

542. The Claimant hasn't presented any evidence to confirm that the 2015 transaction involving Wind Mobile, Shaw and Rogers would have occurred, or even that it was probable, at the time of the alleged breach or that it would have taken place absent such breach. What would have happened had the Transfer Framework not existed or had the Claimant's request to acquire voting control of Wind Mobile not raised [redacted] requires speculation about VimpelCom, Wind Mobile and other market participants' business decisions. It is highly uncertain. Further, the Claimant's own documents contradict its position. The evidence put forward by the Claimant demonstrates that its intention was to sell its interest in Wind Mobile, not continue to operate and invest in Wind Mobile going forward.[908]

543. Relying on the *Chorzow* standard, this Tribunal must consider the situation which "in all probability [would] have existed" absent the breach.[909] Reliance on the *ex-post* Rogers-Shaw-Wind Mobile deal does not meet that standard. On the date of the alleged breach, the Shaw-Rogers-Wind Mobile transaction that would take place two years later was not foreseeable and therefore could not have affected the FMV of Wind Mobile or the Claimant's decisions with respect to its investment. This transaction was not on the radar at all.

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[905] **CL-086**, *Windstream – Award*, ¶ 484.

[906] Claimant's Memorial, fn. 863.

[907] Claimant's Memorial, fn. 863.

[908] As further discussed in paragraphs ¶¶ 552, 584 below, as early as 2011 the Claimant indicated its intention to sell Wind Mobile rather than continuing to invest in it. *See also* **RER-Brattle**, ¶¶ 77-79, 82, 86.

[909] **CL-020**, *Chorzow*, p. 47.

544. As the tribunal in *RosInvestco* noted, "any award of damages that rewards the speculation by Claimant with an amount based on an ex-post analysis would be unjust."[910] The same is true in the case at hand. As the claimant did in *RosInvestco*, the Claimant is asking this Tribunal to go beyond the facts at the time of the breach and reward it with damages based on an unrealistic forecast of what it would have done. Information available at the time of the breach is far more relevant to any damages analysis than the *ex-post* evidence put forward by the Claimant. The Claimant's argument that the FMV of Wind Mobile should be assessed based on the 2015 sale of Wind Mobile to Shaw, adjusted to "take into account specific features of GTH's *but-for* scenario"[911] should therefore be rejected.

III. The Claimant Has Failed to Prove that Any of the Challenged Measures Caused It Actual Loss

545. The Claimant has alleged that "[a]s a result of the Government's failures, GTH was left without a commercially reasonable basis to continue funding Wind Mobile, and GTH had no viable option but to exit the Canadian market and recover whatever value it could by selling Wind Mobile to a non-Incumbent."[912] However, the Claimant has failed to provide any evidence to link the alleged breaches to the sale of its investment and resulting losses it allegedly suffered. In fact, [redacted], the Claimant had already begun exploring options for exiting the Canadian market. As the Claimant has not met its burden to prove the alleged breaches caused the actual losses it claims, the Tribunal must reject the Claimant's claim for damages.

A. The Claimant Bears the Burden of Proving that the Alleged Breaches of the FIPA Caused the Actual Losses it Claims

546. For any alleged breach of the FIPA, the burden is on the Claimant to show that the alleged breach caused it an actual and specific loss. Specifically, Article XIII(2) indicates that a dispute only arises between an investor and a Contracting Party when that investor "has incurred loss or

[910] **RL-231**, *RosInvestco UK Ltd. v. The Russian Federation* (SCC Arbitration V (079/2005)) Final Award, 12 September 2010, ¶ 670 ("*RosInvestco – Final Award*").

[911] Claimant's Memorial, ¶ 411.

[912] Claimant's Memorial, ¶¶ 25, 117.

damage by reason of or, arising out of" the alleged breach.[913] As explained by numerous international treaty tribunals, this language requires a "sufficient causal link"[914] or an "adequate[] connect[ion]"[915] between the alleged breach of the FIPA or agreement in question and the loss sustained by the investor. This is also the standard applied in investment treaty awards more generally,[916] following the decision of the PCIJ in the *Chorzow* case.[917]

547. As the tribunal in *Biwater* explains, causation in international investment law "comprises a number of different elements, including, *inter alia*; (a) a sufficient link between the wrongful act and the damage in question; and (b) a threshold beyond which damage, albeit linked to the wrongful act, is considered too indirect or remote".[918] Similarly, the Commentary to Article 31 of the International Law Commission's ("ILC") Articles describes the requirement of causation as follows:

> [R]eference may be made to losses 'attributable to [the wrongful] act as a proximate cause', or to damage which is 'too indirect, remote, and uncertain to be appraised', or to 'any direct loss, damage including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations as a result of' the wrongful act. Thus causality in fact is a necessary but not a sufficient condition of reparation. […] The notion of a sufficient causal link which is not too remote is embodied in the general requirement in article 31 that the injury should be in consequence of the wrongful act, but without the addition of any particular qualifying phrase.[919]

548. As recognized by the *LG&E* tribunal, the appropriate question to ask in a damages analysis is: "what did the investor lose by reason of the unlawful act?"[920] Put differently, the issue the

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[913] **CL-001**, Canada-Egypt FIPA, Article XIII(2).

[914] **RL-232**, *S.D. Myers, Inc. v. Canada* (UNCITRAL) Second Partial Award, 21 October 2002, ¶ 140 ("*S.D. Myers – Second Partial Award*"); *See also* **CL-049**, *Biwater Gauff – Award*, ¶ 779 ("Compensation for any violation of the BIT, whether in the context of unlawful expropriation or the breach of any other treaty standard, will only be due if there is a sufficient causal link between the actual breach of the BIT and the loss sustained by [the Enterprise].").

[915] **RL-030**, *Feldman – Award*, ¶ 194.

[916] *See for example*, **CL-049**, *Biwater Gauff – Award*, ¶ 778; See also **CL-050**, *Duke Energy – Award*, ¶ 468.

[917] **CL-034**, *Chorzow*, p. 47.

[918] **CL-049**, *Biwater Gauff – Award*, ¶ 785; *See also* **CL-050**, *Duke Energy – Award*, ¶ 468.

[919] **RL-233**, *International Law Commission*, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), Article 31, pp. 92-93 (citations omitted).

[920] **RL-234**, *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic* (ICSID Case No. ARB/02/1) Award, 25 July 2007, ¶ 45.

Tribunal must resolve is, assuming a breach has occurred, what is "the situation which would, in all probability, have existed" if "all consequences of" the breach are "wipe[d] out".[921] As noted above, the burden is on the Claimant to show both that the alleged breach caused it a loss, and the actual and specific quantum of that loss. At the heart of this analysis is the requirement for the Claimant to demonstrate a "sufficient causal link" between the alleged breach of the FIPA and the loss sustained by the investor.[922]

549. In order for the Claimant to be entitled to the damages it seeks, it must prove specifically how each of its alleged losses was caused by one or more of the alleged breaches of the FIPA. However, the Claimant has failed to meet its burden as it has failed to link any of its alleged harm to any specific breach of the FIPA. Investment treaties such as the FIPA are not tools to be used by claimants to recover money related to the failure of their businesses due to factors unrelated to the alleged breach of the FIPA.[923] It is not enough for the Claimant to simply identify alleged breaches, and then identify alleged losses. The FIPA, and international law, requires more than this.

B. The Claimant Has Failed to Prove that It Suffered Any Damages as a Result of the Alleged Breaches

550. The Claimant has argued that the Government's failure to allow it to acquire voting control of Wind Mobile left it no choice but to exit the market.[924] More specifically, it alleges that VimpelCom's decision to continue funding GTH's investment in Wind Mobile depended on "whether GTH could take full legal control over its investment."[925] [redacted] "[926] and that Canada "put Wind Mobile in a corner

[921] **CL-050**, *Duke Energy – Award*, ¶ 468; **RL-184**, *Merrill & Ring – Award*, ¶ 260.

[922] **RL-232**, *S.D. Myers – Second Partial Award*, ¶ 140; **CL-049**, *Biwater Gauff – Award*, ¶ 779.

[923] **RL-200**, *Waste Management II – Final Award*, ¶ 114; *See also* **RL-235**, *Emilio Maffezini v. Spain* (ICSID Case No. ARB/97/7) Award on the Merits, 13 November 2000, ¶ 64; *See also* **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, ¶ 29.

[924] Claimant's Memorial, ¶¶ 252, 257.

[925] Claimant's Memorial, ¶ 255.

[926] **CWS-Dry**, ¶ 30.

such that GTH was forced to contemplate exercising a key exit strategy (the sale of Wind Mobile to an Incumbent)."[927]

551. However, the Claimant has not provided any support for its proposition that Canada's measures, whether the national security review of the Claimant's request to acquire voting control of Wind Mobile or the Transfer Framework, forced it to sell its interest in Wind Mobile. The Claimant's decision to sell its investment to a New Entrant, the AAL Group, in September 2014 in lieu of maintaining its investment in Wind Mobile as a debt holder and a non-controlling shareholder was the Claimant's choice based on its own business decisions, and not the result of any actions or inaction by the Government. The Claimant's motivation to sell "was not related to voting control (or lack of it) and was evident *before* the [breach] is alleged to have occurred or to have been anticipated."[928]

552. The evidence demonstrates that GTH planned on selling its investment in Wind Mobile well before [redacted], and therefore well before the date of any of the breaches alleged by the Claimant. As far back as October 2011, VimpelCom set up a team to review Wind Mobile's options for the future.[929] At the time, due to VimpelCom's group funding constraints and the requirement for substantial funding in Wind Mobile if it was to be successful going forward, VimpelCom was urgently considering its exit options, including a plan to sell or to discontinue operations as early as the first quarter of 2012.[930] From that point on, VimpelCom's investment in Wind Mobile was minimal.[931] [redacted]

[927] Claimant's Memorial, ¶ 362.

[928] **RER-Brattle**, ¶ 143.

[929] [redacted]

[930] [redacted]

[931] [redacted]

[redacted]

553. VimpelCom's intent to sell Wind Mobile was also reflected in media reports prior to the date of any alleged breach. For example, on March 21, 2013, three months before any decision was made with respect to the acquisition of voting control of Wind Mobile by the Claimant, media reports confirmed that Wind Mobile was up for sale.[940] The Toronto Star noted on that date that "VimpelCom has started a process to sell Wind Mobile" and that "bids will be accepted starting Friday."[941] There are many other examples: on January 18, 2013, [redacted]

[redacted] Randall Palmer & Euan Rocha, "Canada blocks Telus deal for more wireless spectrum", REUTERS (Jun. 4, 2013).

[938] **R-249**, The Globe and Mail, "Verizon-Vodafone deal casts doubt on Verizon's Canadian entry" (Aug. 29, 2013).

[redacted]

[940] **R-246**, Toronto Star, "Wireless carrier Wind Mobile up for sale" (Mar. 21, 2013).

[941] **R-246**, Toronto Star, "Wireless carrier Wind Mobile up for sale" (Mar. 21, 2013).

[redacted], a news article indicates that "VimpelCom has said Wind isn't a strategic asset and is assessing what to do with the Canadian investment,"[942] in reference to a quote from Anthony Lacavera. The article goes on to indicate that "VimpelCom put Wind Mobile in a basket of assets to be sold. Wind is the only one left."[943] Canada was simply not a priority market for VimpelCom. [redacted][944] A newspaper report from the end of June 2013 reported that "U.S. wireless giant Verizon ha[d] offered to buy Canadian cellular upstart Wind Mobile with an initial bid of $700 million, *after weeks of advanced talks*."[945]

554. Mr. Lacavera has publicly suggested that the motives behind VimpelCom's interest in selling Wind Mobile had nothing to do with the national security review (and even the 2013 Transfer Framework). As he notes:

> [A] few months later all hell broke loose, eight thousand kilometers away, when the Ukrainian government backed out of a treaty to form an association with the European Union, triggering a major crisis that culminated in Russia's invasion and annexation of Crimea in early 2014. While all of this was unfolding, VimpelCom began broadly retrenching and selling off its holdings in the West. They wanted out of countries that, like Canada, were vehemently denouncing the Russian government's actions. The Russians at the helm of the company were already deeply distrustful of the Harper government and WIND was a small, non-strategic asset in their portfolio […] [W]hen Putin invaded Crimea in March 2014, VimpelCom felt it needed to get out of WIND immediately and decide not to invest another dollar in the business.[946]

555. Further, the Claimant alleges that the Transfer Framework caused it damages "[w]hen it became clear that GTH had no choice but to exit Canada, Canada prohibited GTH from selling its investment for its genuine value and in accordance with the terms of the original framework it had put in place."[947] Therefore, to the extent that the Claimant's argument that Canada caused it

[942] **R-247**, IT World Canada News, "Orascom to take over Wind Mobile" (Jan. 18, 2013).

[943] **R-247**, IT World Canada News, "Orascom to take over Wind Mobile" (Jan. 18, 2013).

[944] **R-262**, Globe and Mail, "Telecom shares slump after Verizon's $700 million bid for Wind" (Jun. 26, 2013).

[945] **R-248**, CBC News, "Verizon takes aim at telecom Big 3 with possible Wind Mobile bid" (Jun. 26, 2013) (emphasis added).

[946] **R-204**, Anthony Lacavera and Kate Fillion, "How We Can Win", pp. 41-42.

[947] Claimant's Memorial, ¶ 372. *See also* Claimant's Memorial, ¶¶ 19, 244.

to sell has no basis, the Claimant should not be entitled to damages resulting from the Claimant's own decision to sell at that time. Moreover, as noted above,[948] during the time of the Claimant's investment in Wind Mobile, no request to transfer Wind Mobile's spectrum was submitted to Industry Canada. Neither the Claimant, nor VimpelCom, nor Wind Mobile sought Industry Canada's approval to transfer Wind Mobile's spectrum licences to an Incumbent.

556. The Claimant has not met its burden of proof for damages – it has not provided credible evidence that establishes that any of the challenged measures resulted in the Claimant's decision to sell to the AAL Group in September 2014. The Claimant is therefore not entitled to any damages arising out of a breach of the FIPA should the Tribunal find Canada to be unsuccessful on the merits of its legal arguments.

IV. Even if Causation is Proven, the Claimant Has Failed to Put Forward the Appropriate "But For" Scenario and as a Result Its Claim for Damages is Grossly Overstated

A. The Claimant Has Failed to Put Forward the Appropriate "But For" Scenarios for the Breaches it Alleges

557. The Claimant has failed to put forward a valid "but for" scenario and valuation date that allows the Tribunal to properly calculate any damages to which the Claimant would be entitled in the event a breach is found for each specific breach it alleges and causation is proven. Instead, the Claimant relies on inappropriate valuation dates and hindsight to justify an overly inflated damages claim.

558. In its Memorial, the Claimant has put forward three "but for" scenarios for the Tribunal to consider for each of the alleged breaches, none of which provide an adequate valuation model to measure the damages resulting from the alleged breaches. As Canada demonstrates below, a proper "but for" analysis reveals that the Claimant is not entitled to the full quantum of damages it seeks. In what follows, Canada provides the proper "but for" analysis to be applied in this arbitration.

[948] *Supra*, ¶¶ 248-252.

1. The Appropriate "But For" Scenario for a Breach Arising out of Canada's Review of the Claimant's Application for Voting Control of Wind Mobile

559. The Claimant alleges that Canada breached the FET obligation,[949] and failed to accord its investment national treatment protection[950] when it "prevent[ed] GTH from exercising voting control on the pretext of an arbitrary national security review".[951] To calculate damages arising out of this breach the Claimant has constructed a "but for" world that assumes the Claimant "would have held on its investment at least until December 16, 2015 (the date of the announcement of the Shaw transaction)" and that "Wind Mobile's evolution had Claimant been the controlling shareholder would have been the same as Wind Mobile's actual evolution between September 2014 and December 2015."[952] It further assumes that "the restrictions to transfer spectrum to Incumbents are still in place and, therefore, the fair market value of Claimant's stakes in Wind Mobile would reflect the willingness to pay of a non-Incumbent as of that time."[953] In doing so, it applies a valuation date of December 16, 2015.[954]

560. However, a correct damages valuation for an alleged breach arising out of the Government's failure [redacted] has a valuation date of **June 18, 2013**. This is the date on which the Claimant asserts that [redacted]"[955] over Wind Mobile and as such, the date of the alleged breach. Using that date, the "but for" world must also only take into account the situation as it existed at the time of the breach – *ex-post* evidence is not permitted in such an analysis, as discussed above.[956] At the time of the alleged breach (June 18, 2013), the five-year moratorium restricting the transfer of spectrum licences to an Incumbent remained in place[957] and a "but for" analysis reflecting the value of Wind Mobile on the date of

[949] Claimant's Memorial, ¶ 345.

[950] Claimant's Memorial, ¶ 387.

[951] Claimant's Memorial, ¶ 345.

[952] **CER-Dellepiane/Spiller**, ¶ 123.

[953] **CER-Dellepiane/Spiller**, ¶ 123.

[954] **CER-Dellepiane/Spiller**, ¶ 125.

[955] Claimant's Memorial, ¶¶ 206, 360.

[956] *See supra*, ¶¶ 531-544.

[957] The five-year moratorium expired in March 2014 and the Transfer Framework came into effect on June 28, 2013.

the alleged breach must take that fact into account. By that time, the Minister had also indicated that he was concerned about spectrum concentration and had initiated consultations on the proposed Transfer Framework.[958] Indeed, by June 4, 2013, the Minister had announced the imminent release of the Transfer Framework[959] which was then adopted on June 28, 2013.[960]

561. As such, a proper "but for" analysis assumes that the Claimant was not prevented on national security grounds from obtaining voting control of Wind Mobile and the FMV of the Claimant's investment on that date must be assessed by looking at offers from New Entrants to purchase Wind Mobile on that date.

562. Further, the evidence contradicts the Claimant's statement that it "would have held on to its investment at least until December 16, 2015 (the date of the announcement of the Shaw transaction)"[961] and that it would have sold Wind Mobile at that time. The Claimant sought to acquire control of Wind Mobile for the purpose of selling it and, as noted above,[962] was already actively seeking offers at the time of the alleged breach. The Claimant cannot now argue for a "but for" world that runs contrary to evidence contemporaneous with the time of the alleged breach. The Claimant's attempt at revisionist history must be rejected.

2. The Appropriate "But For" Scenario for a Breach Arising out of the Transfer Framework

563. The Claimant alleges that Canada breached the FET obligation[963] and the guarantee of unrestricted transfer of investments[964] when it "blocked" GTH from transferring Wind Mobile's licences to an Incumbent after the five-year moratorium.[965] The Claimant's "but for" scenario then assumes that "*but for* Canada's breach, Claimant would have sold its stake in Wind Mobile

[958] **RWS-Stewart**, ¶ 70.

[959] **RWS-Stewart**, ¶ 71.

[960] **C-031**, Transfer Framework.

[961] **CER-Dellepiane/Spiller**, ¶ 123.

[962] *Supra*, ¶¶ 550-553.

[963] Claimant's Memorial, ¶ 301(a).

[964] Claimant's Memorial, ¶ 382.

[965] Claimant's Memorial, ¶ 374.

in March 2014 to one of the three Incumbents."[966] The Claimant then applies a valuation date of March 13, 2014, the date when Wind Mobile's five-year moratorium on the transfer of spectrum licences to an Incumbent would have ended.[967] However, the Claimant and any potential purchasers of Wind Mobile knew prior to March 13, 2014 that at the end of the five-year moratorium, the Minister would exercise his discretion to assess requests pursuant to the considerations set out in the Transfer Framework.

564. Any diminution in the value of Wind Mobile resulting from the Transfer Framework would have occurred as of **June 28, 2013** when the Transfer Framework was issued. The Claimant's use of March 13, 2014 as the valuation date is therefore incorrect.

565. Further, the Claimant's own submissions support a valuation date of June 28, 2013 as opposed to the March 2014 valuation date[968] used by their experts, as this is the date, when the Claimant says they were prevented from "selling Wind Mobile to an incumbent".[969] The Claimant argues that in June 2013, "Canada released its new, restrictive transfer framework *effectively barring GTH from ever selling Wind Mobile to an Incumbent*."[970]

566. The Claimant further argues in its Memorial that:

> Wind Mobile kept Industry Canada apprised of its options and negotiations given Industry Canada's new requirement that any transaction should be approved by Industry Canada before an agreement was made. In its internal notes, Canada recorded among its "*Important Dates*" that on 12 March 2014, "*WIND's AWS license prohibition on transferring spectrum to incumbents expired*." *Of course, the "expiration" of the transfer prohibition no longer mattered as a practical matter in view of the Government's new 2013 Transfer Framework*.[971]

[966] **CER-Dellepiane/Spiller**, ¶ 138.

[967] **CER-Dellepiane/Spiller**, ¶ 138.

[968] **CER-Dellepiane/Spiller**, 15.

[969] Claimant's Memorial, ¶ 21.

[970] Claimant's Memorial, ¶ 21 (emphasis added).

[971] Claimant's Memorial, ¶ 258 (emphasis added). *See also* Claimant's Memorial, ¶ 243 ("In retrospect, the release of the 2013 Transfer Framework was the death-knell to GTH's attempts to sell Wind Mobile to an Incumbent. As described below, while GTH and the Incumbents would continue to attempt to negotiate a transaction which would

567. Thus according to the Claimant while the five-year moratorium on the transfer of spectrum ended in March 2014, the "expiration" of that restriction was irrelevant from a damages perspective in light of the announcement of the Transfer Framework in June 2013. As such, June 28, 2013 is the correct valuation date to use for a breach arising out of the Transfer Framework.

3. The Appropriate "But For" Scenario for a Breach Arising out of the Alleged Cumulative Breach

568. The Claimant alleges that both of these measures (i.e. the national security review of the proposed acquisition of voting control of Wind Mobile and the Transfer Framework), when combined with certain alleged actions (or alleged inactions) taken by Canada with respect to the CRTC ownership and control review[972] and mandated roaming and tower sharing[973] amount to a cumulative breach of both the FET[974] and FPS[975] obligations in the FIPA. In order to assess damages arising out of this alleged cumulative breach, the Claimant has assumed that "but for" the alleged breaches, the Claimant "would have been allowed to exert control over Wind Mobile and, as a consequence, would have continued operating and investing in Wind Mobile rather than divesting its stake in the company in 2014"[976] and would have been able to sell its stake in Wind Mobile to an Incumbent after the expiry of the five-year moratorium on March 13, 2014.[977] The Claimant then applies a valuation date of December 16, 2015, the date of the Shaw-Rogers-Wind Mobile transaction.[978]

569. However, the Claimant's so-called "cumulative breach" crystalized on the date of the last measure because that is when the effects of the alleged breach materialized, that is, when the Transfer Framework was issued. Therefore, a correct damages valuation for an alleged breach

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withstand Canada's new framework, Canada ultimately prohibited all further attempts by GTH to sell Wind Mobile to an Incumbent.").

[972] Claimant's Memorial, ¶¶ 363-364.

[973] Claimant's Memorial, ¶¶ 365-366.

[974] Claimant's Memorial, ¶ 372.

[975] Claimant's Memorial, ¶¶ 379-381.

[976] **CER-Dellepiane/Spiller**, ¶ 11.

[977] **CER-Dellepiane/Spiller**, ¶ 11.

[978] **CER-Dellepiane/Spiller**, ¶ 12.

must have a valuation date of **June 28, 2013**. As noted above,[979] the Claimant's own submissions confirm this valuation date. It is on this date, and not a date almost two years later as proposed by the Claimant, that the alleged breach crystalized and damages were allegedly suffered.

570. Further, as noted above, the evidence filed by the Claimant indicates that the Claimant [redacted][980] The Claimant has not demonstrated why the Shaw-Rogers-Wind Mobile transaction in December 2015, a transaction which involved the transfer of spectrum licences to another New Entrant and in which the Claimant was not involved, is more relevant than actual offers made to the Claimant at the time of the alleged breach.[981] As further discussed above,[982] relying on the December 2015 Shaw-Rogers-Wind Mobile deal incorporates into the damages analysis a number of speculative assumptions. It incorrectly assumes a number of business decisions occurred in the interim without any evidence to support the conclusion that VimpelCom would have made such decisions if it had control of Wind Mobile. Such assumptions do not belong in a proper damages valuation.[983] Using June 28, 2013 as the valuation date, the "but for" world only takes into account the situation as it existed at the time of the breach and prevents damages being awarded based on speculation as the Claimant has asked the Tribunal to do.[984]

B. The Claimant Is Not Entitled to the Quantum of Damages It Seeks

571. In the event the Tribunal finds that the alleged measures caused the Claimant the specific damages it seeks, the Claimant is still not entitled to the quantum of damages it has requested. The Claimant's valuation is replete with errors and flawed speculative assumptions that together

[979] *Supra*, ¶¶ 565-566.

[980] *Supra*, ¶¶ 527, 552.

[981] Further, the Claimant's choice of December 16, 2015 as the valuation date for this scenario is inconsistent with its choice of March 14, 2013 as the valuation date in the previous scenario where the only breach is the 2013 Transfer Framework. In each of those scenarios, the Transfer Framework is either the breach, or the event where the breach crystalized (in the case of the cumulative breach). Therefore, the valuation date must be the same in both scenarios. The Claimant has arbitrarily chosen a later valuation date in the cumulative breach scenario. This is illogical. The correct valuation date for both alleged breaches is the same – **June 28, 2013**.

[982] *Supra*, ¶¶ 531-544.

[983] **RER-Brattle**, ¶¶ 54-59, 85-97.

[984] As noted above, it is inappropriate to use *ex-post* evidence in a damage evaluation. See Section IV.B.1.a above.

result in a gross overvaluation of the Claimant's investment. Once these errors are corrected, and the speculative assumptions removed, then as The Brattle Group concludes, on the valuation date the quantum of damages suffered by the Claimant is substantially less, and is zero in the scenario in which the Tribunal concludes that the national security review alone is a breach.

1. The Correct Valuation Approach Shows that the Claimant is Not Entitled to all the Damages it Seeks in Its Alleged Cumulative Breach Scenario

(a) The Claimant's Use of an Incorrect Valuation Date and *Ex-Post* Standard Does Not Provide an Accurate Measure of the Damages to the Claimant's Investment

572. The Claimant's incorrect valuation date and use of *ex-post* information results in a substantial overstatement of the reduction of the FMV of the Claimant's investment caused by the breach. Applying a valuation date of June 28, 2013, and taking into account only information available as of that date, reduces the Claimant's damages claim by over C$ 1 billion.

573. Both Canada's damages expert, The Brattle Group, and the Claimant agree that FMV is determined based on the price a willing buyer would pay a willing seller on the valuation date.[985] To measure damages then, one must determine the difference, on the valuation date, between the price that an Incumbent would have paid for GTH's interest in Wind Mobile and the price that a New Entrant would have paid for GTH's interest in Wind Mobile.[986] When this methodology is applied to determine the effect of the breach on the FMV of the Claimant's investment, using the *ex-ante* standard (as opposed to the Claimant's *ex-post* standard), it is clear that the Claimant's claim for damages is grossly inflated. As The Brattle Group notes, relying on the "best available market-based information regarding the value of Wind Mobile to Incumbents and New Entrants at or around the date of the breach"[987] (June 28, 2013) means that the Claimant is entitled to no

[985] **RER-Brattle**, ¶ 32; Claimant's Memorial, ¶ 419; **CER-Dellepiane/Spiller**, ¶ 81.

[986] As discussed further below, there is no evidence that the Claimant`s lack of control of Wind Mobile had any effect on the FMV of the Claimant's investment. As such, any alleged decrease in FMV would only be due to the adoption of the Transfer Framework.

[987] **RER-Brattle**, ¶ 36.

more than C$ 300 million.[988] Using the proper "but-for" scenario described above, The Brattle Group notes:

> Under an *ex-ante* standard, the Valuation Date is in June 2013, [redacted]

574. [redacted]) reflects an equivalent amount of damages for this arbitration due to the total amount of debt GTH possessed at the time of the breach.[990] In other words, any damages result from the difference in funds available to pay GTH's debt in the "actual" and "but-for" worlds (as the value of GTH's equity is zero in both scenarios).[991] The Brattle Group demonstrates this in Figures 8 and 9 of its Report and explains its methodology and results as follows:

> In the absence of regulatory risk, damages are C$300 million (before pre-judgement interest), [redacted]
>
> Figure 8 shows that damages result exclusively from the difference in value available to pay GTH's debt between the But-For and the Actual worlds, and that the value of GTH's equity is nil in both the But-for and Actual worlds.
>
> [redacted] […].

575. The Brattle Group's total damages calculation of C$ 300 million is substantially less than the Claimant's proposed damages of C$ 1,612 million that Compass Lexecon arrives at using an

[988] **RER-Brattle**, ¶ 71, Figures 1 and 9.

[989] **RER-Brattle**, ¶ 17.

[990] **RER-Brattle**, ¶¶ 65-66.

[991] **RER-Brattle**, ¶¶ 65-66.

[992] **RER-Brattle**, ¶¶ 65-66.

incorrect valuation date and *ex-post* information.[993] As The Brattle Group indicates, "Compass Lexecon's use of hindsight increases damages significantly as compared to an *ex-ante* approach."[994]

(b) The Claimant Fails to Take into Account any Regulatory Risk

576. The Claimant has completely ignored the fact that further regulatory approvals would have been required for the sale of Wind Mobile to an Incumbent, or for GTH to acquire voting control of Wind Mobile. Specifically, by assuming that absent the national security review it would have been able to acquire control of Wind Mobile, the Claimant ignores the fact that any acquisition of control was also subject to a net benefit review.

577. Moreover, the Claimant also ignores the fact that any acquisition of control and any subsequent sale of Wind Mobile to an Incumbent would have been subject to review by the Competition Bureau. The Claimant has failed to account for any risk that the Competition Bureau review could have examined the transaction and either blocked, imposed conditions or required divestitures in order to be approved. Any such conditions or divestitures would reduce the FMV of Wind Mobile to a potential buyer.

578. The Competition Bureau would likely have carefully scrutinized any potential sale of Wind Mobile to an Incumbent. Under its policy framework for merger review set out in its (Merger Enforcement Guidelines), the Competition Bureau may challenge or seek to amend a merger under the *Competition Act* if the merger would likely result in a substantial lessening or prevention of competition, which the Competition Bureau describes as a merger that enables the merged firm "to sustain materially higher prices than would exist in the absence of the merger by diminishing existing competition."[995] In conducting this analysis, the Competition Bureau will

[993] **CER-Dellepiane/Spiller**, ¶ 119 and Figure 16. The Claimant has converted this number into US$ figures as of its valuation date, for a total of US$ 1,170 million. As Canada notes however, in the event the Tribunal finds Canada to be in breach of the FIPA and an award of damages is appropriate, any damages would be paid in Canadian currency. As such, it is more accurate and appropriate to discuss damages quantum in Canadian dollars.

[994] **RER-Brattle**, ¶ 106.

[995] **R-105**, Competition Bureau, Merger Enforcement Guidelines (Oct. 6, 2011), ¶ 2.9.

analyze many factors, including high industry concentration;[996] the existence of significant barriers to entry; when the acquired firm has been or has the potential to become a disruptive player in the market; and the extent to which there is effective remaining competition in the market.[997] In the Competition Bureau's view, the wireless industry at this time, as it continues to today, exhibited all of these factors[998] and therefore the sale of Wind Mobile to an Incumbent would have resulted in significant scrutiny by the Competition Bureau. Any risks from adverse actions resulting from competitive concerns would reduce the FMV of Wind Mobile below the amount offered by the Incumbents to buy Wind Mobile, and most certainly the amount claimed by the Claimant in this arbitration, given that they were contingent on regulatory approval without any conditions or adjustments.

579. The Claimant has not even attempted to quantify any of these regulatory risks. As a result, its damages quantification is inappropriately inflated.[999] Any award of damages must account for this risk, and the burden is squarely on the Claimant to prove its damages case in this regard. It has failed to do so.

580. As The Brattle Group notes, their damages calculation of **C$ 300 million** under this scenario is overstated as it fails to account for any regulatory risk.[1000] As such, this amount represents an outer bound on the amount of damages the Claimant should be awarded in the event the Tribunal find that the Transfer Framework, together with the national security review of the Claimant's request to acquire voting control of Wind Mobile, the CRTC review and

[996] The MEGs set out particular thresholds for market shares below which the Competition Bureau generally will not have concerns. These thresholds are (1) for a unilateral exercise of market power – 35% post-merger market share for the parties; and (2) for a coordinated exercise of market power – 65% market share of the top four firms post-merger, with the merged firm representing at least 10%. *See* **R-105**, Competition Bureau, Merger Enforcement Guidelines (Oct. 6, 2011), pp. 5.9.

[997] **R-106**, *Competition Act*, s. 93.

[998] The significant barriers in this industry previously noted by the Competition Bureau include access to spectrum, sunk costs and challenges to deploy extensive technological networks, development of regional distributional networks, access to smartphones and building customers service systems. (See, for example, the Competition Bureau's statement with regards to Bell's acquisition of MTS: http://www.competitionbureau.gc.ca/eic/site/cb-bc nsf/eng/04200.html.)

[999] **RER-Brattle**, ¶¶ 60-63, 149-159.

[1000] **RER-Brattle**, ¶ 63.

Canada's action/inaction with respect to mandatory roaming and tower sharing amount to a breach of the FIPA.

(c) Even if the Tribunal were to Adopt the Claimant's Approach to Determining the Reduction in Fair Market Value of the Claimant's Investment, its Damages Claim is Grossly Overstated

581. As The Brattle Group notes, even if the use of *ex-post* information is permitted, the Claimant's damages valuation is flawed, internally inconsistent and overstates damages.[1001] This is due in large part to the Claimant's own failure to mitigate its losses.[1002] Further, even if the Claimant's valuation date of December 2015 is used, the Claimant's damages claim is incorrect as a result of Compass Lexecon's misuse of and incorrect adjustments made to the prices observed in the transaction between Rogers, Shaw and Wind Mobile.[1003]

(i) The Claimant Failed to Mitigate Its Damages

582. The duty to mitigate damages is a general principle of international law applicable to investment disputes, generally,[1004] and this dispute in particular.[1005] The ILC Articles provide that "[e]ven the wholly innocent victim of wrongful conduct is expected to act reasonably when confronted by the injury" and that "failure to mitigate by the injured party may preclude recovery to that extent."[1006] This rule is frequently applied by arbitral tribunals when dealing with issues of international law.[1007] In the *Gabčíkovo-Nagymaros* case, the ICJ held that the injured party

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[1001] **RER-Brattle**, ¶¶ 73-89.

[1002] **RER-Brattle**, ¶ 74-84. Brattle also notes that Compass Lexecon overstates damages by selecting the wrong but for valuation date (*see* **RER-Brattle**, ¶¶ 85-87) and by incorrectly assuming Wind would have bought AWS-3 spectrum if GTH had controlled Wind (*see* **RER-Brattle**, ¶¶ 88-89).

[1003] **RER-Brattle**, ¶¶ 90-97.

[1004] **RL-236**, *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic* (ICSID Case No. ARB/03/23) Award, 11 June 2012, ¶¶ 1302-1303 ("*EDF v. Argentina – Award*"); **RL-237**, *Middle East Cement Shipping and Handling Co. S.A. v. Egypt* (ICSID Case No. ARB/99/6) Award, 12 April 2002, ¶ 167 ("*Middle East Cement – Award*").

[1005] **CL-001**, Canada-Egypt FIPA, Article XIII(7).

[1006] **RL-233**, *ILC Articles – Commentary*, Article 31(11); **RL-238**, *Case Concerning the Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, [1997] I.C.J. Rep. 7, ¶ 80; **RL-237**, *Middle East Cement – Award*, ¶ 167; **RL-239**, *Hrvatska Elektroprivreda D.D. v. Republic of Slovenia* (ICSID Case No. ARB/05/24) Award, 17 December 2015, ¶ 215.

[1007] **RL-050**, *AIG Capital Partners, Inc. and CJSC Tema Real Estate Company v. Republic of Kazakhstan* (ICSID Case No. ARB/01/06) Award, 7 October 2003, ¶ 10.6.4(1) ("Mitigation of damages, as a principle, is applicable in a

"which has failed to take the necessary measures to limit the damage sustained would not be entitled to claim compensation for that damage which could have been avoided."[1008] This principle is two-fold: the aggrieved party has a duty to take reasonable steps to mitigate the damages it has suffered, and the failure to do so will preclude recovery to that extent.

583. The rationale behind this principle is "to avoid the aggrieved party passively sitting back and waiting to be compensated for harm which it could have avoided or reduced."[1009] As stated by the tribunal in *EDF International* "[i]t would be patently unfair to allow Claimants to recover damages for loss that could have been avoided by taking reasonable steps. In other words, the injured party must be held responsible for its own contribution to the loss."[1010]

584. By the date of the breach, June 28, 2013, and as early as 2011, VimpelCom had already decided that it would not make any further investment in Wind Mobile and that exiting the market was its preferred option.[1011] Between then and the time the Claimant sold Wind Mobile to the AAL Group in September 2014 for C$ 295 million, Wind Mobile had not received the necessary funding (either through further investment by VimpelCom or through a third party). As The Brattle Group notes, this can be detrimental to an investment's value.[1012] Between April 2011 and June 2013, VimpelCom provided only C$ 88 million in funding to Wind Mobile despite VimpelCom noting that over C$ 500 million would be required to keep Wind Mobile viable.[1013] VimpelCom continued this pattern after the breach as well, contributing only C$ 81

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wide range of situations. It has been adopted in common law and in civil law countries, as well as in International Conventions and other international instruments – as for instance in Article 77 of the Vienna Convention and Article 7.4.8 of the UNIDROIT Principles for International Commercial Contracts. It is frequently applied by international arbitral tribunals when dealing with issues of international law.")

[1008] **RL-238**, *Case Concerning the Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, [1997] I.C.J. Rep. 7, ¶ 80.

[1009] **RL-240**, International Institute for the Unification of Private Law, *UNIDROIT Principles for International Commercial Contracts 2010*, Article 7.4.8, Comment 1 [Excerpt].

[1010] **RL-236**, *EDF v. Argentina – Award*, ¶ 1301.

[1011] **C-119**, Email from Andy Dry to Pietro Cordova (Oct. 11, 2011); **RER-Brattle**, ¶¶ 74-84.

[1012] **RER-Brattle**, ¶¶ 82, 84.

[1013] **RER-Brattle**, ¶ 79.

million in loans in the fifteen months following the alleged breach.[1014] As The Brattle Group notes:

> VimpelCom did not take any of these actions – either before or until fifteen months after the alleged breach, when they sold to AAL. VimpelCom mismanaged Wind before the breach and for the fifteen months after the breach before the sale to AAL, under-funding it so severely that Wind defaulted on loans to third parties.[1015]

585. [redacted].[1016] Any decrease in value then from what the Claimant would have received had they sold their interest in Wind Mobile on the valuation date ([redacted] and what they eventually sold Wind Mobile for many months later (C$ 295M in the AAL sale) must be borne by the Claimant as a result of its failure to mitigate its losses.[1017] [redacted] to the C$ 295 it actually sold for in the AAL sale is due, at least in part, and, as The Brattle Group notes, potentialy entirely,[1018] to VimpelCom's own failure to mitigate its losses by not investing further into Wind Mobile, or securing third party funding following the alleged breach.[1019]

(ii) The Claimant's Valuation of Wind Mobile's Spectrum Licences is Incorrect

586. Even if the Tribunal were to accept the Claimant's valuation date, the Claimant's damages assessment is overstated due to incorrect and inconsistent assumptions it makes when valuing spectrum.[1020] The Claimant relies on three separate components to calculate the value of Wind Mobile – the spectrum that Wind Mobile acquired in the 2008 AWS-1 Auction, spectrum Wind Mobile acquired in the 2015 AWS-3 Auction, and the value of Wind Mobile's Operations.[1021]

[1014] **RER-Brattle**, ¶ 81.

[1015] **RER-Brattle**, ¶ 23.

[1016] **RER-Brattle**, ¶¶ 55, 57, 74-84.

[1017] **RER-Brattle**, ¶¶ 74-84.

[1018] **RER-Brattle**, ¶ 84.

[1019] **RER-Brattle**, ¶¶ 74-84.

[1020] **RER-Brattle**, ¶¶ 90-97.

[1021] **CER-Dellepiane/Spiller**, ¶¶ 107-108; **RER-Brattle**, ¶ 91, Figure 11.

However, the spectrum pricing used by the Claimant in arriving at a FMV for Wind Mobile is incorrect and is based on inaccurate assumptions. The Brattle Group has provided a detailed analysis of the errors in Compass Lexecon's spectrum pricing approach in its Report.[1022]

2. The Correct Valuation Approach Shows that the Claimant is Not Entitled to all of the Damages It Seeks for a Breach Arising out of the Transfer Framework

587. For many of the same reasons stated above, the Claimant has also overstated the reduction in the FMV of its investment in Wind Mobile in a scenario which the Transfer Framework is the only breach. While Compass Lexecon calculates the Claimant's damages in this scenario to be C$ 1.101 million as of their valuation date,[1023] as The Brattle Group demonstrates, the FMV on the correct valuation date – the date of the breach – is C$ 300 million.[1024]

(a) The Claimant's Use of an Incorrect Valuation Date and *Ex-Post* Standard, and its Failure to Account for Regulatory Risk, Do Not Provide an Accurate Fair Market Value of Wind Mobile at the Time of the Breach

588. As discussed above,[1025] the Claimant's use of an *ex-post* approach, along with an incorrect valuation date, grossly overstates its damages claim. As discussed above in the cumulative breach scenario, on the date of the alleged breach (June 28, 2013), [redacted].[1026] Applying this information then, as is done above in the cumulative breach scenario, means that in the "but for" world the maximum amount of damages the Claimant can recover in this arbitration, [redacted], or **C$ 300 million**.[1027]

[1022] **RER-Brattle**, ¶¶ 90-97.

[1023] **CER-Dellepiane/Spiller**, ¶ 136.

[1024] **RER-Brattle**, ¶ 13, Figure 1.

[1025] *Supra*, ¶¶ 531-544.

[1026] **RER-Brattle**, ¶¶ 55, 57, 74-84.

[1027] **RER-Brattle**, ¶¶ 108, 110.

589. However, this represents an upper bound on the damages the Claimant can recover. This value fails to account for any regulatory risk.[1028] Any transaction involving a sale to an Incumbent would have been subject to further review by the Competition Bureau, for example. Any risk that such a transaction would be rejected, or would require divestitures would most certainly reduce the overall FMV of Wind Mobile to a potential buyer. As such, The Brattle Group notes that its calculation of damages resulting from the Transfer Framework of C$ 300 million is potentially overstated.

(b) Even if the Tribunal Were to Adopt the Claimant's Approach, its Damages Claim is Grossly Overstated

590. As The Brattle Group notes, even if the Claimant's valuation date is chosen and *ex-post* information is permitted, the Claimant's damages valuation is flawed, internally inconsistent and overstates damages under this scenario:[1029]

> Compass Lexecon's estimate is unreliable and inflated because their spectrum license valuation ignores important features of both the spectrum licenses themselves and the market environment.[1030]

591. The Brattle Group has provided a detailed analysis of the errors in Compass Lexecon's spectrum pricing approach in its report.[1031]

592. Further, the Claimant failed to mitigate its losses. As discussed above, the Claimant's failure to invest further money into Wind Mobile, or secure third party funding, directly resulted in a decrease in the FMV of Wind Mobile between the date of the breach and the date Wind Mobile was sold to the AAL Group, fifteen months later.[1032] The Claimant should not now be able to recover higher damages simply because it failed to mitigate its losses.

[1028] **RER-Brattle**, ¶ 109.

[1029] **RER-Brattle**, ¶¶ 111-122.

[1030] **RER-Brattle**, ¶ 113.

[1031] **RER-Brattle**, ¶¶ 113-122.

[1032] **RER-Brattle**, ¶ 112.

3. The Correct Valuation Approach Shows that the Claimant is Not Entitled to Any of the Damages It Seeks for Breaches Related to the National Security Review

593. As noted above, the Claimant has failed to demonstrate that Canada's [redacted][1033] The Claimant has failed to put forward a single document that demonstrates any loss suffered as a result of this alleged breach, and instead, merely assumes causation. Its damages experts then provide a FMV valuation that is completely disconnected from any facts relevant to the breach itself.

594. As Canada's damages expert, The Brattle Group has noted, there is no evidence that the value of GTH's interest in Wind Mobile decreased [redacted].[1034] As they note:

> The only difference in value to GTH should come from having control in the But-For and lacking control in the Actual world. Compass Lexecon do not *claim* that control made a difference to the value of GTH's Interests on the Valuation Date, nor were they instructed to make that assumption.
>
> There are two ways that control could be valuable to GTH:
>
> a. if AAL would block a sale to an New Entrant willing to pay more for Wind than it was worth to GTH; or
>
> b. if GTH could have provided better management than AAL.
>
> Compass Lexecon do not claim either condition held, nor is there any evidence for either.[1035]

595. As such, the change in FMV of the Claimant's interest in Wind Mobile before the breach and the day immediately following the breach is zero[1036] and the Claimant is not entitled to any damages.

[1033] *Supra*, ¶¶ 550-556.

[1034] **RER-Brattle**, ¶¶ 123-125.

[1035] **RER-Brattle**, ¶¶ 135-136.

[1036] **RER-Brattle**, ¶ 139.

V. The Claimant Is Not Entitled to Pre-Judgment Interest

596. Under Article XIII(9) of the FIPA, a tribunal has discretion to award "any applicable interest." However, both the FIPA and ICSID Rules are silent on the terms of such awards. The guiding principle under international law is that interest is only necessary to ensure full reparation, but that there is no automatic right to it.[1037] As a result, the Claimant bears the burden of proving that the circumstances of this case justify an award of interest to ensure full reparation. The Claimant has provided no reasons as to why it is entitled to such interest and as a result, it has failed to meet its burden. The Tribunal should therefore reject the Claimant's request for pre-judgment interest.

597. Moreover, even if the Tribunal determines that the Claimant is entitled to pre-judgment interest, as The Brattle Group explains, its calculation is erroneous and uses an inappropriate methodology.[1038] The Claimant has relied on pre-judgement interest based on an estimate of Wind Mobile's cost of debt from its "but for" valuation date to the date of the award.[1039] However, this methodology over-compensates the Claimant for the actual risks it bore with respect to payment of any award in the event the Tribunal decides one is warranted. As The Brattle Group notes, the appropriate interest rate to compensate the Claimant in the event the Tribunal finds an award for pre-judgment interest appropriate is "the one-month Canadian Treasury Bill rate, compounded monthly."[1040]

ORDER REQUESTED

598. For the foregoing reasons, Canada respectfully requests that the Tribunal dismiss the Claimant's claims in their entirety and with prejudice, order that the Claimant bear the costs of this arbitration, including Canada's costs for legal representation and assistance, and grant any further relief it deems just and proper.

[1037] **RL-233**, *ILC Articles – Commentary*, Article 38, Commentary (1), p. 107.

[1038] **RER-Brattle**, ¶¶ 160-166.

[1039] **CER-Dellepiane/Spiller**, ¶¶ 16, 97, 99, 120, 137, 148. *See also* **CER-Dellepiane/Spiller**, Appendix B, s. B.3.

[1040] **RER-Brattle**, ¶ 166.

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Respectfully submitted on behalf of the Government of Canada,

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