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INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
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CERTIFICATE

GLOBAL TELECOM HOLDING S.A.E.

v.

CANADA

(ICSID CASE NO. ARB/16/16)

I hereby certify that the attached document is a true copy of the Tribunal's Award dated 27 March 2020, together with the Dissenting Opinion of Mr. Gary Born.

[signed]

/ Meg Kinnear /
Secretary-General

Washington, D.C., 27 March 2020

Public Version

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

GLOBAL TELECOM HOLDING S.A.E.

(Claimant)

v.

CANADA

(Respondent)

ICSID Case No. ARB/16/16

AWARD

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

Secretary of the Tribunal
Ms. Lindsay Gastrell

Date of dispatch to the Parties: 27 March 2020

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TABLE OF DEFINED TERMS AND SELECTED ABBREVIATIONS

2001 Spectrum Auction Framework	*Framework for Spectrum Auctions in Canada (Issue 2)* released by Industry Canada in October 2001 **C-041**
2008 AWS Auction	Canada's auction of Advanced Wireless Services spectrum licenses in 2008
2008 AWS Consultation	*Consultation on a Framework to Auction Spectrum in the 2 GHz Range including Advanced Wireless Services* released by Industry Canada on 16 February 2007 **C-050**
2008 AWS Auction Policy Framework	*Policy Framework for the Auction for Spectrum Licences for Advanced Wireless Services and other Spectrum in the 2 GHz Range* released by Industry Canada in November 2007 **C-004**
2013 Spectrum Licensing Procedure	*Licensing Procedure for Spectrum Licences for Terrestrial Services (CPC-2-1-23, Issue 3)* released by Industry Canada in August 2013 **C-206**
AAL	AAL Holdings Corporation
[redacted]	[redacted]
Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings 2006
AWS	Advanced Wireless Services
Birch Hill	Birch Hill Equity Partners
BIT	Agreement between the Government of Canada and the Government of the Arab Republic of Egypt for the promotion and Protection of Investments, which entered into force on 11 March 1997 **CL-001** (English), **CL-002** (French) and **CL-003** (Arabic)
C-[#]	GTH's Exhibit
CER-[Name]	Expert Report of [Name] submitted by GTH
CL-[#]	GTH's Legal Authority
Claimant	Global Telecom Holding S.A.E. (also "GTH")
Claimant's Closing	Claimant's Closing Statement at the Hearing, 12 April 2019

Claimant's Opening	Claimant's Opening Statement at the Hearing, 12 April 2019
COLs	Conditions of licenses
Contracting Parties	The Government of Canada and the Government of the Arab Republic of Egypt, Parties to the BIT
CPHS	Claimant's Post-Hearing Submission
CRTC	Canadian Radio-Television and Telecommunications Commission
CRTC Decision	CRTC decision of 29 October 2009 finding that Wind Mobile did not satisfy the O&C Rules
CWS-[Name]	Witness Statement of [Name] submitted by GTH
Egypt	Arab Republic of Egypt
FET	Fair and Equitable Treatment
GiC	Governor in Council
GiC Decision	GiC decision of 10 December 2009, which varied the CRTC Decision of 29 October 2009
GTH	Global Telecom Holding S.A.E. (also "Claimant")
GTHCL	Global Telecom Holding (Canada) Limited
Globalive	Globalive Communications Corp.
Globalive Holdco	Globalive Canada Holdings Corp.
Globalive Investment	Globalive Investment Holdings Corp.
Hearing	Hearing on Jurisdiction, the Merits and Liability, and Quantum held in Paris, France from 1 to 12 April 2019
ICA	Investment Canada Act
ICJ	International Court of Justice
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on 14 October 1966
ICSID	International Centre for Settlement of Investment Disputes
ILC Articles	INTERNATIONAL LAW COMMISSION, *Responsibility of States for Internationally Wrongful Acts* (2001) **CL-028**

Incumbent	Rogers, Bell Communications and Telus, the three dominant wireless service providers in the Canadian market
IRD	Investment Review Division of Industry Canada
Jur. Memorial	Canada's Memorial on Jurisdiction and Admissibility and Request for Bifurcation, dated 15 November 2017
Jur. Rejoinder	GTH's Rejoinder on Jurisdiction and Admissibility, dated 5 March 2019
Merits Counter-Memorial	Canada's Counter-Memorial on Merits and Damages, dated 26 February 2018
Merits Memorial	GTH's Memorial on the Merits and Damages, dated 29 September 2017
Merits Rejoinder and Jur. Reply	Canada's Rejoinder on Merits and Damages and Reply on Jurisdiction and Admissibility, dated 3 February 2019
Merits Reply and Jur. Counter-Memorial	GTH's Reply on Merits and Damages & Counter-Memorial on Jurisdiction and Admissibility, dated 5 November 2018
Minister	Minister of Industry and Industry Canada
NAFTA	North American Free Trade Agreement
New Entrant	New wireless operators who purchased spectrum licenses at the 2008 AWS Auction
O&C Rules	Canada's ownership and control rules
PCO	Privy Council Office, the department of the Government that supports the Prime Minister of Canada
PCS	Personal Communications Services
PO1	Procedural Order No. 1, dated 13 June 2017
PO2	Procedural Order No. 2 – Decision on Respondent's Request for Bifurcation, dated 14 December 2017
PO3	Procedural Order No. 3 – Decision on the Parties' Requests for Document Production, dated 1 June 2018
PO4	Procedural Order No. 4 – Decision on the Claimant's Objections to the Respondent's Claims of Privilege, dated 3 November 2018
PO5	Procedural Order No. 5 – Decision on Outstanding Issues of Legal Privilege, dated 13 December 2018

PO6	Procedural Order No. 6 - Decision on Common Interest Privilege, Limited Waiver of Privilege and Subject Matter Waiver of Privilege, dated 18 January 2019
PO7	Procedural Order No. 7 – Hearing Organization, dated 14 March 2019
PO8	Procedural Order No. 8 – Independent Expert Assessment on Privilege, dated 14 March 2019
PO9	Procedural Order No. 9 – Decision on GTH's Request of 18 March 2019, dated 25 March 2019
PO10	Procedural Order No. 10 – Decision on GTH's Request of 21 November 2019, dated 8 December 2019
Public Safety	Public Safety Canada
R-[#]	Respondent's Exhibit
RER-[Name]	Expert report of [Name] submitted by Canada
Respondent	Canada
Respondent's Closing	Closing Statement of Canada at the Hearing, 12 April 2019
Respondent's Opening	Opening Statement of Canada at the Hearing, 12 April 2019
RL-[#]	Respondent's Legal Authority
Rogers	Rogers Communications Inc.
RPHS	Respondent's Post-Hearing Submission
RWS-[Name]	Witness statement of [Name] submitted by Canada
Shaw	Shaw Communications Inc.
Spectrum Licensing Procedure	*Licensing Procedure for Spectrum Licences for Terrestrial Services (CPC-2-1-23, Issue 2)* released by Industry Canada in September 2007
Telus	TELUS Communications Company
Transfer Framework	*Framework Relating to Transfers, Divisions and Subordinate Licensing of Spectrum Licences for Commercial Mobile Spectrum (DGSO-003-13)* released by Industry Canada in June 2013 **C-031**
VCLT	Vienna Convention on the Law of Treaties, which entered into force on 27 January 1980

Voting Control Application	Application submitted by GTHCL on 24 October 2012, seeking to acquire voting control of Wind Mobile and to purchase AAL's shares of Wind Mobile **C-027**

DRAMATIS PERSONAE

AAL Holdings Corporation	An Ontario corporation, wholly owned subsidiary of AAL Telecom Holdings Incorporated ("AAL Telecom"), an Ontario corporation. Ninety-five percent (95%) of AAL Telecom's shares are owned by Anthony Lacavera, a Canadian citizen ordinarily resident in Ontario. Brice Scheschuk and Simon Lockie, two other Canadian citizens ordinarily resident in Ontario, each own 2.5% of AAL Telecom's shares
[redacted]	[redacted]
Andrew, John	External counsel for GTH
Bailey, Jim	Canadian financial consultant
Campbell, Ken	CEO of Wind Mobile
Conolly, Michael	Director General, SMO, Industry Canada
Cordoba, Pietro	VimpelCom officer and project leader for the divestment of Wind Mobile. Appointed as COO of Wind Mobile
Dobbie, David	GTH General Counsel
Dry, Andy	VimpelCom Director of Corporate Finance
Global Telecom Holding S.A.E. or GTH	The Claimant, formerly known as Orascom Telecom Holding, an Egyptian joint stock company listed in the Egyptian stock exchange.
Globalive Communications Corp. (Globalive)	A Canadian telecommunications provider led by Anthony Lacavera (see below in this table), and GTH's partner in the incorporation of Wind Mobile (initially called Globalive Wireless LP) to participate in the 2008 AWS Auction
Globalive Wireless LP	See Wind Mobile
GTHCL	Global Telecom Holding (Canada) Limited, an indirectly controlled and wholly-owned subsidiary of GTH, formerly Orascom Telecom Holding (Canada) Limited
Lacavera, Anthony	Principal of Globalive and CEO and Chairman of Wind Mobile
Lockie, Simon	Chief Legal Officer of Globalive, and Chef Regulatory Officer of Wind Mobile
Lunder, Jo	CEO of VimpelCom
Mobilicity	One of the New Entrants
Mojo Investments Corp	An Ontario corporation, wholly owned by Michael J. O'Connor, a Canadian citizen ordinarily resident in Ontario

O'Connor, Michael	GTH Head of Business Development and Investments
Orascom Canada	A wholly-owned subsidiary of Orascom Telecom Canada (Malta) Limited, a Maltese corporation, which is, in turn, a wholly owned subsidiary of Orascom Telecom Holding S.A.E., a public company incorporated under the laws of Egypt with Ordinary Shares traded on the Cairo and Alexandria Stock Exchange and Global Depository Receipts traded on the London Stock Exchange
Shaw	One of the New Entrants
Telenor	A Norwegian company and shareholder of GTH
VimpelCom	A Bermudan company based in the Netherlands and minority shareholder of GTH. Has provided shareholder loans to GTH for on-lending to Wind Mobile.
Weather Investments	Shareholder of Wind Mobile
Wind Mobile	Brand name for Globalive Wireless Management Corp., a joint venture between GTH and Globalive, incorporated as a Canadian company

I. INTRODUCTION

1. The present dispute has been submitted to the International Centre for Settlement of Investment Disputes ("**ICSID**") on the basis of the Agreement between the Government of Canada and the Government of the Arab Republic of Egypt for the promotion and Protection of Investments, which entered into force on 11 March 1997 (the "**BIT**")[1] and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on 14 October 1966 (the "**ICSID Convention**").

2. In this Award, the Tribunal first introduces the Parties (Section II) and provides an overview of the factual background to the dispute (Section III). Section IV sets out the procedural history leading up to this Award, and Section V recalls the Parties' requests for relief. The Tribunal then addresses the objections to jurisdiction and admissibility (Section VI), before turning to the claims on the merits (Section VII). The Parties' requests for costs are considered in Section VIII.

3. Ultimately, the Tribunal holds that it has jurisdiction over all claims except the national treatment claim. On the merits, the Tribunal dismisses the remaining claims. The Tribunal's Award is set forth in Section X.

4. In reaching the decisions contained in this Award, the Tribunal has carefully reviewed and considered all the arguments presented by the Parties in both their written and oral submissions. The fact that a specific argument is not expressly referenced in this Award does not mean that it has not been considered, as the Tribunal includes only those points which it considers most relevant for its decisions.

[1] **CL-001**, BIT (English Version); **CL-002**, BIT (French Version); **CL-003**, BIT (Arabic Version). GTH refers to this agreement as the "BIT," whereas Canada refers to it as the "FIPA." Although the Tribunal has no preference for one of these terms over the other, it has chosen to use a single term, "BIT," for consistency.

II. THE PARTIES

5. The claimant is Global Telecom Holding S.A.E. ("**GTH**" or "**Claimant**"), a joint stock company incorporated under the laws of the Arab Republic of Egypt ("**Egypt**") and listed on the Egyptian Stock Exchange.[2] GTH, which was formerly known as Orascom Telecom Holding S.A.E., operates mobile telecommunications networks in several markets around the world. Its registered office is 2005 Nile City Towers, North Tower, Cornish El Nile, Ramlet Beaulac, 11221 Cairo, Egypt.[3]

6. The respondent is Canada (also referred to as the "**Respondent**"), a sovereign State. Canada has been an ICSID Contracting State since 1 December 2013.

III. FACTUAL BACKGROUND

7. The following summary is intended to provide a general overview of the factual background to the dispute between the Parties. It is not intended to be an exhaustive description of all facts considered relevant by the Tribunal. Further factual material will be addressed in the context of the Tribunal's analysis of the issues in dispute below.

A. OVERVIEW OF CANADA'S WIRELESS TELECOMMUNICATIONS MARKET

8. Oversight of the Canadian wireless telecommunications industry is exercised primarily by two Canadian government authorities. Industry Canada, headed by the Minister of Industry (the "**Minister**"), manages the radio frequency spectrum in Canada pursuant to the Radiocommunication Act.[4] The Canadian Radio-Television and Telecommunications Commission (the "**CRTC**") regulates telecommunications carriers pursuant to the Telecommunications Act.[5]

[2] Request for Arbitration, Annex E; Merits Memorial, ¶ 1.

[3] Request for Arbitration, ¶ 15.

[4] **C-057**, *Radiocommunication Act*, R.S.C., 1985, c. R-2; **C-036**, Industry Canada, Policy and Call for Applications — Wireless Personal Communications Services in the 2 GHz Range — Implementing PCS in Canada, 15 June 1995.

[5] **C-046**, *Telecommunications Act*, S.C. 1993, c. 38; **R-197**, CRTC, website excerpt, Telecom Decision CRTC 94-15, 12 August 1994.

9. In addition, telecommunications providers are subject to generally applicable legislation such as the Canadian Competition Act, pursuant to which the Competition Bureau reviews mergers and acquisitions and investigates anti-competitive practices.[6]

10. The Canadian telecommunications market has expanded significantly since the late 1990s. However, by 2007, the market was highly concentrated, with 94% of market share held by three dominant carriers: Rogers Communications Inc. ("**Rogers**"), Bell Canada ("**Bell**"), and TELUS Communications Company ("**Telus**") (together, the "**Incumbents**").[7] Mobile wireless spectrum was also concentrated in the hands of the Incumbents.[8] Canadian consumers were paying high prices and service penetration was low, relative to other markets.[9]

B. THE 2008 AWS AUCTION

11. In 2007, Industry Canada identified new Advanced Wireless Services ("**AWS**") spectrum for release by auction.[10] In light of the market and spectrum concentration prevailing at the time, Industry Canada viewed the auction as an opportunity to open the market to new wireless operators ("**New Entrants**").[11]

12. On 16 February 2007, Industry Canada initiated the consultation phase for the auction of AWS spectrum licenses to be held in 2008 (the "**2008 AWS Auction**") with the publication of the *Consultation on a Framework to Auction Spectrum in the 2 GHz Range including Advanced Wireless Services* (the "**2008 AWS Auction Consultation**").[12] In this document, Industry Canada noted its overall objective of fostering a competitive wireless telecommunications market and

[6] **R-106**, *Competition Act*, R.S.C., 1985.

[7] **C-079**, 2008 CRTC Report, p. 227; **C-056**, 2007 CRTC Report, p. 92.

[8] **R-084**, Memorandum from Iain Stewart, Industry Canada to Deputy Minister, Industry Canada, Annex B, slide 11.

[9] **C-079**, 2008 CRTC Report, p. 228.

[10] **C-050**, AWS Auction Consultation.

[11] **C-050**, AWS Auction Consultation, Part II, § 2.7; **C-004**, AWS Auction Policy Framework, p. 4 ("The measures being taken are intended to ensure an opportunity for entry by addressing the potential to exploit spectrum as an entry barrier. The department is satisfied that the potential benefits of new entry warrant these measures."); **C-048**, Industry Canada, Spectrum Policy Provisions and Consultation on a Framework to Auction Spectrum in the 2 GHz Range for Advanced Wireless Services: Briefing to ADM SITT, 21 November 2006, slide 6 ("the auction is a unique opportunity for creating opportunity for new market entry"). The Term "New Entrants" is defined in the AWS Auction Policy Framework as "Any entity, including affiliates and associated entities, which holds less than 10 percent of the national wireless market based on revenue." **C-004**, AWS Auction Policy Framework, p. 5.

[12] **C-050**, 2008 AWS Auction Consultation.

identified certain barriers to market entry, including the "unavailability of spectrum" and the "high fixed cost of building a wireless network" to replicate the networks controlled by Incumbents.[13] The document also stated that "[f]oreign investment restrictions have the effect of limiting potential entry in the telecommunications market thereby reducing the competitive discipline that the threat of entry can provide."[14]

13. Industry Canada sought input on, *inter alia*: (a) whether it was necessary to adopt measures in the 2008 AWS Auction to enable market entry; (b) if so, whether setting aside spectrum for New Entrants or introducing spectrum caps would be most effective in fostering competition; (c) the possibility of mandating that Incumbents offer roaming services to New Entrants; and (d) the proposed conditions of license.[15]

(1) The Spectrum Policy Framework and Licensing Procedure

14. On 13 June 2007, Industry Canada published a revised *Spectrum Policy Framework for Canada*, which provides the general "policy foundation" for the spectrum management in Canada.[16] It stated that Canada's objective was to "maximize the economic and social benefits that Canadians derive from the use of the radio frequency spectrum resource."[17] It stressed the importance of relying on market forces "to the maximum extent feasible" and stated that "[r]egulatory measures, where required, should be minimally intrusive, efficient and effective."[18]

15. Then, in September 2007, Industry Canada released the *Licensing Procedure for Spectrum Licences for Terrestrial Services*, providing the general policies and procedures applicable to the issuance and transfer of spectrum licenses.[19] With regard to the transfer of licenses, this document states that spectrum licenses obtained through an auction process enjoy "enhanced transferability and divisibility rights" and that such "licences may be transferred in whole or in part (either in

[13] **C-050**, 2008 AWS Auction Consultation, Part II, §§ 2.5 and 2.7.
[14] **C-050**, 2008 AWS Auction Consultation, Part II, § 2.5.
[15] **C-050**, 2008 AWS Auction Consultation, pp. 20-25.
[16] **C-052**, Industry Canada, Spectrum Policy Framework for Canada (DGTP-001-07), June 2007.
[17] **C-052**, Industry Canada, Spectrum Policy Framework for Canada (DGTP-001-07), June 2007, § 4.3.
[18] **C-052**, Industry Canada, Spectrum Policy Framework for Canada (DGTP-001-07), June 2007, § 4.4.
[19] **C-003**, Industry Canada, Licensing Procedure for Spectrum Licences for Terrestrial Services (CPC-2-1-23, Issue 2), September 2007.

geographic area or in bandwidth) to a third party subject to the conditions stated on the licence and other applicable regulatory requirements."[20] It also specified the "conditions and guidelines" applicable to the transfer of spectrum.[21]

(2) The 2008 AWS Auction Policy Framework and Licensing Framework

16. On 28 November 2007, Canada published its *Policy Framework for the Auction for Spectrum Licences for Advanced Wireless Services and other Spectrum in the 2 GHz Range* (the "**2008 AWS Auction Policy Framework**").[22] Further to the 2008 AWS Auction Consultation, Industry Canada had decided to set aside spectrum for New Entrants in the 2008 AWS Auction and to provide for mandatory roaming and tower/site sharing.

17. Both Parties have highlighted the following general statement set out in the 2008 AWS Auction Policy Framework:

> The department is committed to government policies which seek to rely on market forces to the maximum extent feasible for the provision of telecommunications services to Canadians. This policy approach can only be pursued in an environment where market forces can be expected to deliver, now and in the future, a level of competition sufficient to protect the interests of users. Accordingly, in making this resource available, a critical consideration has been to implement an auction framework that will help ensure that market forces support a telecommunications infrastructure that delivers innovation and consumer choice at competitive prices.[23]

18. Various measures and terms set forth in the Policy Framework are relevant to the current dispute, including the following:

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

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

[22] **C-004**, Industry Canada, Policy Framework for the Auction for Spectrum Licences for Advanced Wireless Services and other Spectrum in the 2 GHz Range, November 2007 ("2008 AWS Auction Policy Framework").

[23] **C-004**, 2008 AWS Auction Policy Framework, p. 2. *See* Merits Memorial, ¶¶ 58-59; Merits Counter-Memorial, ¶ 72.

a. *Set-Aside Spectrum*: Canada reserved 40 MHz (approximately 40%) of the spectrum that was to be auctioned for bidding exclusively by New Entrants.[24] This is referred to as the 'set-aside' spectrum.

b. *Mandatory Roaming*: Canada mandated that Incumbents provide roaming to AWS licensees outside of the licensees' territory for ten years (the term of the AWS license) and roaming within the licensees' territory for five years while the licensees built out their network, with a possible five-year extension for New Entrants that met specified rollout targets.[25] Incumbents were required to make roaming "available at commercial rates," described as rates "that are reasonably comparable to rates that are currently charged to others for similar services."[26] Further, arrangements were to be offered "wherever technically feasible" and negotiated in good faith within certain time frames.[27] In the event that "the parties [were] unable to come to an agreement within the established time frame, the parties [would] be required to undertake binding arbitration."[28]

c. *Mandatory Tower/site Sharing*: Canada mandated tower/site sharing wherever technically feasible in order to prohibit exclusive site arrangements. Sharing agreements were to be negotiated in good faith within prescribed time frames. Licensees would "be directed to binding arbitration to resolve disputes where they cannot finalize an agreement to share within certain time frames."[29]

d. *Rollout Targets*: The 2008 AWS Auction Policy Framework set forth roll-out targets to be achieved within five years, which would be taken into account by Industry Canada in deciding whether to renew the AWS licences after the ten-year licence term and in

[24] **C-004**, 2008 AWS Auction Policy Framework, p. 5

[25] **C-004**, 2008 AWS Auction Policy Framework, pp. 8-9. Roaming is the process by which one operator's subscribers can access another operator's network in areas where the subscriber's operator lacks infrastructure. Merits Counter-Memorial, ¶ 74.

[26] **C-004**, 2008 AWS Auction Policy Framework, pp. 8-9.

[27] **C-004**, 2008 AWS Auction Policy Framework, p. 8.

[28] **C-004**, 2008 AWS Auction Policy Framework, p. 8.

[29] **C-004**, 2008 AWS Auction Policy Framework, p. 9.

considering applications from New Entrants for an extension of mandated in-territory roaming beyond the initial five-year period.[30]

e. *Five-Year Transfer Restriction*: The 2008 AWS Auction Policy Framework stated 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."[31]

19. One month after releasing the 2008 AWS Auction Policy Framework, on 22 December 2007, Industry Canada released the *Licensing Framework for the Auction for Spectrum Licences for Advanced Wireless Services and other Spectrum in the 2 GHz Range* (the "**2008 AWS Auction Licensing Framework**"), which described the rules and requirements for bidding in the 2008 AWS Auction and called for applications.[32] Potential investors that wished to participate in the 2008 AWS Auction were required to submit an application by 10 March 2008, together with a letter of credit to serve as a deposit in the auction.[33]

20. In the lead up to the application deadline, Industry Canada took questions regarding the 2008 AWS Policy and Licensing Frameworks and released its answers on 27 February 2008.[34]

(3) Mandatory Roaming & Tower/Site Sharing Policies

21. The 2008 AWS Policy and Licensing Frameworks left the specific procedures, policies and time frames related to mandatory roaming and tower/site sharing to be set forth in the final conditions of license ("**COLs**"), which would be released later. In November 2007, in parallel with

[30] **C-004**, 2008 AWS Auction Policy Framework, p. 10.

[31] **C-004**, 2008 AWS Auction Policy Framework, p. 6.

[32] **C-005**, Industry Canada, Licensing Framework for the Auction for Spectrum Licences for Advanced Wireless Services and other Spectrum in the 2 GHz Range (DGRB-011-07), December 2007 ("2008 AWS Auction Licensing Framework").

[33] **C-005**, 2008 AWS Auction Licensing Framework, § 5.4.1.

[34] **C-062**, Industry Canada, Responses to Questions for Clarifications on the AWS Policy and Licensing Frameworks, 27 February 2008. In considering **C-062**, the Tribunal also considered **C-467** admitted pursuant to PO 10.

its release of the 2008 AWS Auction Policy Framework, Canada had initiated a consultation on the proposed COLs relating to conditions of license to mandatory roaming and tower/site sharing.[35]

22. On 29 February 2008, Industry Canada released the results of this consultation in a notice of the final Conditions of Licence for Mandatory Roaming and Antenna Tower and Site Sharing and to Prohibit Exclusive Site Arrangements.[36]

23. In May 2008, Industry Canada initiated consultations on the arbitration rules and procedures that would apply to roaming and tower/site sharing disputes, the results of which were released on 29 November 2008 in a circular titled *Industry Canada's Arbitration Rules and Procedures*.[37]

(4) The Ownership & Control Rules

24. The 2008 AWS Auction was also subject to Canada's ownership and control rules ("**O&C Rules**"). At the time, under the Telecommunications Act and the Radiocommunications Regulations, any radiocommunications common carrier was required to be "Canadian-owned and controlled." With respect to a corporation, this meant that Canadians had to own "not less than 80 per cent of the corporation's voting shares issued and outstanding."[38]

25. Further, under the Canadian Telecommunications Common Carrier Ownership and Control Regulations, a non-Canadian could not own more than 33 1/3% of the voting shares of a holding company of a Canadian carrier.[39] The CRTC had authority to review compliance of the O&C Rules

[35] **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, November 2007.

[36] **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, 29 February 2008. *See also* **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), November 2008.

[37] **C-090**, Industry Canada, Industry Canada's Arbitration Rules and Procedures (CPC-2-0-18, Issue 1), November 2008.

[38] **C-001**, Radiocommunication Regulations, SOR/96-484, § 10(1) ("**Canadian-owned and controlled** means, in respect of a corporation, that (a) not less than 80 per cent of the members of the board of directors of the corporation are individual Canadians, (b) Canadians beneficially own, directly or indirectly, in the aggregate and otherwise than by way of security only, not less than 80 per cent of the corporation's voting shares issued and outstanding, and (c) the corporation is not otherwise controlled by persons who are not Canadians"); **C-046**, Telecommunications Act, § 16(3).

[39] **C-035**, Canadian Telecommunications Common Carrier Ownership and Control Regulations, SOR/94-667, § 2.

under the Telecommunications Act, while Industry Canada was responsible for ensuring compliance with the identical O&C Rules under the Radiocommunication Regulations.

26. In August 2007, Industry Canada released an updated circular advising on the procedures relating to "Canadian Ownership and Control."[40]

(5) Results of the 2008 AWS Auction

27. The 2008 AWS Auction began on 27 May 2008 and closed on 21 July 2008. Canada raised CAD 4.3 billion in revenue through the auction, and six New Entrants won licenses.[41] One of those New Entrants was Wind Mobile, a joint venture between GTH and a Canadian operator, as discussed below.[42] Wind Mobile won 30 AWS spectrum licenses (covering a population of 23.3 million) at a price of CAD 442.1 million.[43]

(6) The Conditions of License

28. In November 2008, Canada released the updated COLs, which applied to the licenses obtained through the 2008 AWS Auction.[44] With regard to the mandatory roaming and tower/site sharing, the COLs adopted the conditions set out in Industry Canada's notice of 29 February 2008.[45] Other portions of the COLs relevant to the present dispute include the following:

> **1. Licence Term**
>
> This licence is issued for a 10-year term. The process for issuing licences after this term and any issues relating to renewal will be determined by the Minister of Industry following a public consultation.
>
> **2. Licence Transferability and Divisibility**
>
> 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

[40] **C-058**, Industry Canada, Canadian Ownership and Control (CPC-2-0-15, Issue 2), August 2007.

[41] **C-080**, Industry Canada, Auction of Spectrum Licences for Advanced Wireless Services and Other Spectrum in the 2 GHz Range – Licence Winners, 21 July 2008.

[42] *See* § III.C below.

[43] **C-082**, Letter from Michael D. Connolly to Michael John O'Connor, 22 July 2008.

[44] **R-202**, Industry Canada, website excerpt, *Licence Conditions* (revised as of November 2008), p. 1.

[45] *See* **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, 29 February 2008. *See also* **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), November 2008.

> 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.
>
> […]
>
> Licences acquired through the set-aside of spectrum … may not be transferred or leased to, acquired by means of a change in ownership or control of the licensee, 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.
>
> […]
>
> **16. Amendments**
>
> The Minister of Industry retains the discretion to amend these terms and conditions of licence at any time.[46]

(7) Wind Mobile's Licenses

29. Following Industry Canada's review and confirmation of Wind Mobile's compliance with the O&C Rules (discussed below),[47] Industry Canada formally issued to Wind Mobile its spectrum licenses on 13 March 2009.

30. The COLs released by Industry Canada in November 2008 are contained in Wind Mobile's licenses.[48]

C. GTH'S INVESTMENT IN WIND MOBILE

(1) GTH's Entry into the Canadian Market

31. The 2008 AWS Auction generated significant interest by potential investors, including Globalive Communications Corp. ("**Globalive**"), a Canadian telecommunications operator.[49] Globalive began seeking investors with which it could partner to participate in the auction. At the same time, GTH had learned that Canada was planning to set aside spectrum in the 2008 AWS

[46] **R-202**, Industry Canada, website excerpt, *Licence Conditions* (revised as of November 2008), p. 1; *see* **C-010**, Wind Mobile Licenses.

[47] *See* § III.D below.

[48] **C-010**, Wind Mobile Licenses.

[49] Merits Counter-Memorial, ¶¶ 91-92.

Action for New Entrants and saw a potentially promising investment opportunity in the Canadian market.[50]

32. Globalive and GTH entered into talks in February 2008 to explore the possibility of a joint venture. On 6 March 2008, they executed a memorandum of understanding, by which GTH agreed to (a) enter into an exclusive negotiation period with Globalive and [redacted] GTH's investment committee had received information concerning Globalive's background and experience and its proposed joint venture structure, as well as the Canadian legal and regulatory framework and important terms of the 2008 AWS Auction.[52] GTH also sought advice from the Canadian law firm [redacted] regarding compliance with the O&C Rules.[53]

33. On 10 March 2008, Globalive Wireless LP (later known as Globalive Wireless Management Corp. and operating under the brand name Wind Mobile) ("**Wind Mobile**") filed an application to participate in the 2008 AWS Auction and provided the required deposit [redacted] totalling CAD 235 million.[54] Industry Canada accepted Wind Mobile's application.

34. The Parties agree that during the period after GTH entered into exclusive negotiations with Globalive, GTH conducted detailed due diligence of the Canadian telecommunications market and

[50] **C-065**, Email from Mike O'Connor to Aldo Mareuse, et al., 28 February 2008 [redacted]

[51] [redacted]

[52] **C-066**, Email from Mike O'Connor to Assaad Kairouz, et al., 29 February 2008, attaching Globalive materials.

[53] **CWS-Dobbie**, ¶ 11.

[54] **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, 10 March 2008; [redacted]

the regulatory framework.[55] In May 2008, GTH's investment committee decided to go forward with the joint venture with Globalive and participate in the 2008 AWS Auction through Wind Mobile.[56]

35. As noted above, through its participation in the auction, Wind Mobile was issued 30 AWS spectrum licenses for a total of CAD 442.1 million.[57]

(2) The Structure of GTH's Investment

36. On 30 July 2008, GTH entered into an investment agreement with Globalive Communications Holdings Ontario Inc. ("**GCHO**") and Mojo Investments Corp. ("**Mojo**"), another Canadian company.[58] In this agreement, GTH agreed that it would advance funds for the total amount of the spectrum licenses through its wholly-owned subsidiary, Global Telecom Holding Canada Limited ("**GTHCL**") (known at the time as OTHCL), and that those licenses and all related rights would be held by Wind Mobile.[59]

37. The following day, 31 July 2008, GTH entered into two shareholder agreements (together, the "**SHAs**"):

a. an agreement under which GTHCL and Globalive Investment Holdings Corp. ("**Globalive Investment**") owned all the shares in Globalive Canada Holdings Corp. ("**Globalive Holdco**"), which was in turn the sole owner of Wind Mobile;[60] and

[55] Merits Memorial, ¶ 84; Merits Counter-Memorial, ¶ 93.

[56] **CWS-Dobbie**, ¶ 16.

[57] **C-082**, Letter from Michael D. Connolly to Michael John O'Connor, 22 July 2008.

[58] **C-084**, Globalive, Declaration of Ownership and Control of Globalive Wireless LP as a Provisional Winner of Spectrum Licences in the 2GHz Range Including AWS, PCS and the Band 1670-1675 MHz, 5 August 2008, pp. 16-56 (hereinafter, "**Declaration of Ownership and Control**") (Amended and Restated Investment Agreement Globalive Communications Holdings Ontario Inc. and Orascom Telecom Holding S.A.E. and Mojo Investments Corp., 30 July 2008).

[59] **C-084**, Globalive, Declaration of Ownership and Control of Globalive Wireless LP as a Provisional Winner of Spectrum Licences in the 2GHz Range Including AWS, PCS and the Band 1670-1675 MHz, 5 August 2008, pp. 16-56 (Amended and Restated Investment Agreement Globalive Communications Holdings Ontario Inc. and Orascom Telecom Holding S.A.E. and Mojo Investments Corp., 30 July 2008, § 3).

[60] **C-084**, Declaration of Ownership and Control, 5 August 2008, pp. 57-95 (Shareholders' Agreement between Orascom Telecom Holding (Canada) Limited and Globalive Investment Holdings Corp. and Globalive Canada Holdings Corp., 31 July 2008).

b. an agreement under which GTHCL, Mojo and AAL Holdings Corporation ("**AAL Holdings**") owned all the share capital of Globalive Investment.[61]

38. In light of the existing O&C Rules, GTH could not hold more than 20% of Wind Mobile's voting shares. However, according to GTH's General Counsel, Mr. David Dobbie, GTH understood "that there was a policy movement in Canada towards a relaxation of the O&C Rules."[62] Thus, the SHAs and the Articles of Incorporation for Globalive Investment gave GTH the right to take voting control over Wind Mobile if the O&C Rules were relaxed in the future.[63]

39. In making its investment, GTH provided the following loans and equity contribution to Wind Mobile:

[redacted]

[61] **C-084**, Declaration of Ownership and Control, 5 August 2008, pp. 96-136 (Shareholders' Agreement between AAL Holdings Corporation and Mojo Investments Corp. and Orascom Telecom Holding (Canada) Limited and Globalive Investment Holdings Corp., 31 July 2008).

[62] **CWS-Dobbie**, ¶ 11.

[63] **C-084**, Declaration of Ownership and Control, 5 August 2008, pp. 80, 92 (Globalive Holdco SHA, Clause 6.6 and Schedule C), pp. 119, 134-35 (Globalive Investment SHA, Clause 6.8 and Schedule C), pp. 137-49 (Globalive Canada Holdings Corp. Articles of Incorporation), and pp. 150-65 (Globalive Investment Holdings Corp. Articles of Incorporation).

[64] **C-092**, Letter from Martin Masse to Michael D. Connolly, *attaching* revised Declaration of Ownership and Control of Globalive Wireless Management Corp., 2 March 2009 (hereinafter "**Revised Declaration of Ownership and Control**"), pp. 163-88 ($66,000,000 Term Loan Agreement (Revised Version) between Orascom Telecom Holding S.A.E. and Globalive Wireless Management Corp., 23 March 2008,

[65] **C-033**, Purchase Agreement between AAL Acquisitions Corp., GTH Global Telecom Finance (B.C.) Limited, VimpelCom Amsterdam B.V., GTH Global Telecom Holding (Canada) Limited, and Globalive Investment Holdings Corp., 16 September 2014, Schedule A-3.

[66] **C-092**, Revised Declaration of Ownership and Control, pp. 137-62 ($442,403,000 Term Loan Agreement (Revised Version) between Orascom Telecom Holding (Canada) Limited and Globalive Wireless Management Corp., 31 July 2008.

c. On 1 April 2009, GTH provided an equity contribution of CAD 82,690,158 through the purchase of Globalive Investment shares.

(3) VimpelCom's Acquisition of GTH

40. At the time of GTH's investment in the Canadian market, Weather Investments S.p.A. ("**Weather Investments**") was the largest shareholder in GTH. In April 2011, control of GTH passed from Weather Investments to a wider group comprised of Weather Investments and VimpelCom Ltd. ("**VimpelCom**"), a telecommunications company based in The Netherlands. VimpelCom became the largest shareholder in GTH.

41. Canada had first become aware of this potential transaction through public sources in August 2010, [redacted].[67]

42. On 15 April 2011, Wind Mobile notified Industry Canada and the CRTC that the deal had closed, noting that "this transaction does not change anything at WIND Mobile or Globalive, or in any way affect the shareholdings."[68] [redacted]

[67] [redacted]

[68] **C-021**, Email from Vanessa Brazil (on behalf of Ken Campbell) to Helen McDonald, 15 April 2011, *attaching* Letter from Ken Campbell to Helen McDonald, 15 April 2011; **C-022**, Email from Vanessa Brazil (on behalf of Ken Campbell) to Konrad von Finckenstein, 15 April 2011, *attaching* Letter from Ken Campbell to Konrad von Finckenstein, 15 April 2011. Wind Mobile had notified Industry Canada and the CRTC of the deal in October 2010. **C-019**, Email from Vanessa Brazil (on behalf of Ken Campbell) to Helen McDonald, 4 October 2010, *attaching* Letter from Ken Campbell to Helen McDonald, 4 October 2010; **C-020**, Email from Vanessa Brazil (on behalf of Ken Campbell) to Konrad von Finckenstein, 4 October 2010, *attaching* Letter from Ken Campbell to Konrad von Finckenstein, 4 October 2010.

[69] [redacted]

43. After VimpelCom acquired GTH in April 2011, it set up a team to review strategic options for the future of Wind Mobile, [redacted]

D. THE OWNERSHIP & CONTROL REVIEWS

(1) Review by Industry Canada

44. As required under the 2008 AWS Auction Licensing Framework, on 5 August 2008, Wind Mobile submitted its Declaration of Ownership and Control to Industry Canada, in order to commence the review of Wind Mobile's compliance with the O&C Rules.[72] Over several months, Wind Mobile and its legal representatives met with Industry Canada to discuss areas of concerns and possible changes to the investment structure to address those concerns.[73] It is undisputed that at the time, Industry Canada knew of the provisions allowing GTH to take voting control of Wind Mobile if the O&C Rules were relaxed in the future.[74]

45. After certain changes were made to the corporate structure, Industry Canada found Wind Mobile to be in compliance with the Radiocommunication Regulations O&C Rules on 16 February 2009.[75] Wind Mobile then provided Industry Canada with a revised Declaration of Ownership and Control.[76] Industry Canada issued Wind Mobile's 30 spectrum licenses on 13 March 2009.[77]

[70] **C-119**, Email from Andy Dry to Pietro Cordova, 11 October 2011.

[71] **R-371**, E-mail from Andy Dry, VimpelCom to Pietro Cordova, Wind Mobile et al., 18 April 2012, *attaching* Summary OF GEB April 16th Decision, Action Paths, and Next Steps,

[72] **C-084**, Globalive, Declaration of Ownership and Control, 5 August 2008.

[73] **CWS-Campbell**, ¶ 17; **CWS-Dobbie**, ¶ 20.

[74] *See* Merits Memorial, ¶ 123; **C-064**, Email from Mike O'Connor to Investment Committee, et al., 28 February 2008, *attaching* RBC Capital Markets, *Canadian Wireless Spectrum Auction: Discussion Materials*, 11 January 2008, p. 22 ("Equity ownership may be structured to allow foreign investors to take advantages of future changes in foreign ownership".)

[75] **C-091**, Letter from Michael D. Connolly to Kenneth Campbell, 16 February 2009.

[76] **C-092**, Letter from Martin Masse to Michael D. Connolly, *attaching* revised Declaration of Ownership and Control of Globalive Wireless Management Corp., 2 March 2009.

[77] **C-010**, Wind Mobile Licenses.

(2) Review by the CRTC

46. On 22 December 2008, the CRTC wrote to Wind Mobile and the other New Entrants offering to conduct a review of their compliance with the O&C Rules under the Telecommunications Act prior to the commencement of their operations.[78] In response, on 3 April 2009, Wind Mobile submitted its ownership documents, which had been approved by Industry Canada, to the CRTC for review.[79]

47. Shortly thereafter, Telus wrote to the CRTC advocating for a "more fulsome and transparent review" of Wind Mobile's ownership, citing public documents that "give rise to legitimate concerns that appropriate governance controls be put in place to ensure that Globalive is controlled in fact by Canadians."[80] Shaw then wrote to the CRTC supporting Telus' request.[81] Wind Mobile responded to the Incumbents' request in a letter of 5 May 2009, arguing that the public review sought by Telus and Shaw "would be highly discriminatory and contrary to the principles of administrative fairness."[82]

48. After receiving this correspondence, on 22 May 2009, the CRTC initiated consultations concerning its O&C Rules review process.[83] At the conclusion of the consultations, on 20 July 2009, the CRTC established a new four-tier framework for the O&C review process.[84] In most cases, the CRTC would conduct a bilateral, confidential Type 1 review.[85] However, the CRTC explained that:

> in exceptional circumstances, the Commission will hold an oral, public, multi-party proceeding (Type 4 review) where an ownership or governance structure is of a

[78] **C-008**, Letter from John Keogh to Simon David Lockie, 22 December 2008.

[79] **C-011**, Letter from McCarthy Tétrault LLP to Stephen Millington, 3 April 2009.

[80] **C-094**, Letter from Michael Hennessy to Konrad W. von Finckenstein, 20 April 2009, p. 1.

[81] **C-095**, Letter from Jean Brazeau to Konrad W. von Finckenstein, 22 April 2009.

[82] **C-096**, Letter from Simon Lockie to Konrad W. von Finckenstein, 5 May 2009, p. 1.

[83] **C-098**, CRTC, Notice of Consultation CRTC 2009-303 – Call for comments – Canadian ownership and control review procedure under section 16 of the Telecommunications Act, 22 May 2009.

[83] **C-098**, CRTC, Notice of Consultation CRTC 2009-303 – Call for comments – Canadian ownership and control review procedure under section 16 of the Telecommunications Act, 22 May 2009, ¶¶ 1-2.

[84] **C-012**, CRTC, Telecom Regulatory Policy CRTC 2009-428: Canadian ownership and control review policy, 20 July 2009.

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

> 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. Under this type of review, documentary evidence filed by the carrier under review will be available for public inspection. Third parties will have an opportunity to file written submissions and request to provide oral submissions on that evidence. At the conclusion of the review process, a public decision will be issued.[86]

49. On the same day, the CRTC notified Wind Mobile that it would conduct a Type 4 review of Wind Mobile's ownership.[87]

50. In the following months, the CRTC issued written interrogatories to Wind Mobile, accepted written comments from the public and held two days of oral hearings. During this process, further changes were made to Wind Mobile's structure in response to concerns expressed by the CRTC.[88] Yet ultimately, the CRTC determined that Wind Mobile did not satisfy the O&C Rules. In its decision of 29 October 2009 (the "**CRTC Decision**"), the CRTC found that Wind Mobile had "met the test for legal control" but was "controlled in fact by Orascom, a non-Canadian" and therefore did "not meet the requirements set out in section 16 of the [Telecommunications] Act and [was not] eligible to operate as a telecommunications common carrier."[89]

51. The CEO of Wind Mobile at the time, Mr. Ken Campbell, wrote to the Minister of Industry, opposing the CRTC Decision. He stated that:

> the CRTC made this determination, which is not required by law, knowing that it could kill our business and totally undermine the Government's pro-competitive and pro-consumer spectrum policy.

[86] **C-012**, CRTC, Telecom Regulatory Policy CRTC 2009-428: Canadian ownership and control review policy, 20 July 2009, ¶ 17.

[87] **C-013**, CRTC, Telecom Notice of Consultation CRTC 2009-429: Notice of hearing – 23 September 2009, Gatineau, Quebec – Proceeding to consider the compliance of Globalive with the ownership and control regime, 20 July 2009; **C-014**, CRTC, Telecom Notice of Consultation CRTC 2009-429-1: Notice of hearing – 23 September 2009, Gatineau, Quebec – Proceeding to consider the compliance of Globalive with the ownership and control regime, Erratum, 21 July 2009.

[88] **C-015**, CRTC, Telecom Decision CRTC 2009-678: Review of Globalive Wireless Management Corp. under the Canadian ownership and control regime, 29 October 2009, ¶ 31.

[89] **C-015**, CRTC, Telecom Decision CRTC 2009-678: Review of Globalive Wireless Management Corp. under the Canadian ownership and control regime, 29 October 2009, ¶¶ 33, 119.

[…]

> If the regulatory delays caused by the decision are serious, we will have no choice but to abort the launch, lay off staff and mothball our operations.[90]

52. After the CRTC Decision was issued, the Governor in Council (the "**GiC**") commenced a review pursuant to its authority under the Telecommunications Act to vary decisions of the CRTC. The GiC disagreed with the CRTC's finding that Orascom controlled Wind Mobile in fact. Thus, on 10 December 2009, the GiC varied the CRTC Decision (the "**GiC Decision**").[91] It held that Wind Mobile satisfied the O&C Rules under the Telecommunications Act and was eligible to operate as a Canadian telecommunications common carrier.[92]

53. In December 2009, Wind Mobile commenced operations as a telecommunications carrier.[93]

54. The GiC Decision was challenged in Federal Court by Public Mobile Inc., another New Entrant. The respondents in the proceeding were Wind Mobile and the Attorney General of Canada. On 4 February 2011, the Federal Court agreed with Public Mobile and quashed the GiC Decision.[94]

55. Both Wind Mobile and the Attorney General of Canada appealed the Federal Court decision, and by its judgment of 8 June 2011, the Federal Court of Appeal reversed the Federal Court and reinstated the GiC Decision.[95] Leave to appeal to the Supreme Court of Canada was denied in April 2012, closing the matter under Canadian law.[96]

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

[91] **C-017**, Order of the Privy Council and Schedule, P.C. 2009-2008, 10 December 2009.

[92] **C-017**, Order of the Privy Council and Schedule, P.C. 2009-2008, 10 December 2009.

[93] **R-069**, Globe and Mail, Lacavera in race against clock for holiday sales; Ottawa's decision to overturn CRTC ruling clears Canada's newest wireless company to launch immediately, 12 December 2009

[94] **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.

[95] **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.

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

E. IMPLEMENTATION OF THE MANDATORY ROAMING AND TOWER/SITE SHARING

56. As noted above, in parallel with the 2008 AWS Auction, Industry Canada adopted a policy of mandatory roaming and tower/site sharing, pursuant to which licensees were required to negotiate in good faith and provide other operators roaming and tower/site sharing at reasonable commercial terms.

57. After the 2008 AWS Auction, Industry Canada received complaints from both Incumbents and New Entrants (including Wind Mobile) that licensees were not following the COLs on roaming and site/tower sharing.[97] By letter of 15 May 2009, Wind Mobile sought clarification from Industry Canada regarding the conditions on roaming, noting that a response "is much needed and will be greatly appreciated and is, in fact, required for Rogers and [Wind Mobile] to usefully advance our negotiations and, if necessary, to proceed to arbitration."[98]

58. On 1 June 2009, Industry Canada responded as follows:

> While Industry Canada may provide clarifications on the existing conditions of licence, I would like to remind you that Industry Canada will only formally rule on technical feasibility or potential breaches of the conditions of licence. Disputes regarding the commercial aspects, terms or costs related to the roaming agreement should be dealt with through negotiations between the parties, and if necessary, the arbitration process as set out by Industry Canada.[99]

59. GTH alleges that the arbitration process was not a viable option and that Wind Mobile therefore "had no commercial choice but to agree to the terms imposed by Rogers in order to provide service to subscribers in areas where it did not have any towers or coverage."[100]

60. With regard to tower/site sharing, Industry Canada released a consultation document in February 2009. Based on the responses, in April 2009, it released its *Guidelines for Compliance with the Conditions of Licence Relating to Antenna Tower and Site Sharing and to Prohibit*

[97] **RWS-Hill**, ¶¶ 67-68.

[98] **C-097**, Letter from Simon Lockie to Peter Hill, 15 May 2009.

[99] **C-100**, Letter from Peter Hill to Simon Lockie, 1 June 2009. Mr. Peter Hill testifies that in several instances, Industry Canada provided Wind Mobile specific assistance in its negotiations with other licensees. **RWS-Hill**, ¶ 98; Annex B.

[100] Merits Memorial, ¶ 151.

Exclusive Site Arrangements.[101] Yet as of July 2010, New Entrants requesting to share on towers were only 4.5% successful in reaching agreements, according to Industry Canada statistics.[102]

61. In November 2010, the Minister announced that Industry Canada was commencing a review of its roaming and tower/site sharing policy.[103] Industry Canada retained the consulting firm Nordicity to assess the effectiveness of the policy, and Nordicity provided its final report in May 2011.[104]

62. In March 2012, Industry Canada launched a public consultation on proposed changes to the COLs on roaming and tower/site sharing.[105] Wind Mobile commented on the proposal in May and June 2012 and also met with the Minister of Industry in January 2013 to push for regulatory change. Wind Mobile suggested, *inter alia*, that (a) domestic wholesale roaming rates be capped, (b) the rates be subject to CRTC review, (c) existing roaming agreements be reopened, and (d) exclusivity provisions in roaming agreements be prohibited.[106]

63. On 7 March 2013, Industry Canada released revised COLs and the *Revised Frameworks for Mandatory Roaming and Antenna Tower and Site Sharing*, setting out the changes to the COLs for mandatory roaming and tower/site sharing and to the arbitration rules and procedures.[107] Wind Mobile met with Industry Canada officials again in May and October 2013, continuing to press for additional changes and clarifications to the policy.[108]

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

[102] **C-118**, Industry Canada, *Roaming and Tower Sharing Review*, Slide 25.

[103] **C-113**, Industry Canada, News Release: Minister Clement Updates Canadians on Canada's Digital Economy Strategy, 22 November 2010.

[104] **R-137**, Request for Proposal # IC400998, 25 November 2010, p. 4.

[105] **C-121**, Industry Canada, Proposed Revisions to the Frameworks for Mandatory Roaming and Antenna Tower and Site Sharing, March 2012.

[106] **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, p. 25

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

[108] **C-187**, Wind Mobile, Proposed Regulatory Changes to Support Fair and Effective Competition in Canada – Pietro Cordova, Chief Operating Officer, Simon Lockie, Chief Regulatory Officer, 27 May 2013; **C-213**, Wind Mobile, Domestic Roaming: Presentation by Simon Lockie, Chief Regulatory Officer, October 2013.

64. In 2013 and 2014, the CRTC also assessed the competitiveness of the mobile wireless services market to determine whether regulatory changes were required. In July 2014, the CRTC banned the use of exclusivity clauses in roaming agreements, based on its finding that Rogers had improperly used such clauses to prevent New Entrants from negotiating better deals with other operators.[109]

65. In addition, on 19 June 2014, the Canadian Parliament amended the Telecommunications Act to prohibit carriers from charging other carriers more than the average amount they charged their own subscribers for roaming.[110] Finally, in May 2015, the CRTC adopted caps on certain roaming rates.[111]

66. On the basis of these facts, GTH alleges that Canada only began to meaningfully address the regulatory environment nearly five years after the 2008 AWS Auction, by which time GTH was negotiating the sale of its investment.[112]

F. GTH'S APPLICATION FOR VOTING CONTROL OF WIND MOBILE AND THE NATIONAL SECURITY REVIEW

67. At the time of the 2008 AWS Auction, Canada's O&C Rules prevented GTH as a non-Canadian company from acquiring voting control over Wind Mobile. The 2008 AWS Auction Policy Framework noted that the CRTC was reviewing the O&C Rules, which "act as restrictions on foreign investment which constitutes a barrier to market entry," but that [r]emoval or liberalization of these requirements would require legislative changes."[113]

68. In June 2010, the Standing Committee on Industry, Science and Technology of the Canadian Parliament issued a report, *Canada's Foreign Ownership Rules and Regulations in the*

[109] **C-225**, CRTC, Telecom Decision CRTC 2014-398: Wholesale mobile wireless roaming in Canada – Unjust discrimination/undue preference, 31 July 2014.

[110] **R-102**, *Economic Action Plan 2014 Act, No. 1*, S.C. 2014, c. 20, s. 240(1).

[111] **C-232**, CRTC, Telecom Regulatory Policy CRTC 2015-177: Regulatory framework for wholesale mobile wireless services, 5 May 2015.

[112] Merits Memorial, ¶¶ 163-165.

[113] **C-004**, 2008 AWS Auction Policy Framework, p. 3. *See also* **C-050**, 2008 AWS Auction Consultation, § 2.5.1 ("Foreign investment restrictions have the effect of limiting potential entry in the telecommunications market thereby reducing the competitive discipline that the threat of entry can provide. It is important to consider the effect this may have on the free operation of the market and the ability to rely solely on market forces in the forthcoming auction").

Telecommunications Sector, in which it advised that "the economic case in favour of the removal of foreign ownership restrictions is clear."[114] Also in June 2010, Industry Canada initiated consultations on the matter with the release of the paper, *Opening Canada's Doors to Foreign Investment in Telecommunications: Options for Reform*.[115]

69. On 14 March 2012, the Minister of Industry announced proposed changes to the O&C Rules, which would exempt telecommunication carriers with less than 10% market share from the requirement of being Canadian owned and controlled.[116] On 29 June 2012, the Telecommunications Act was amended to adopt the proposed changes.[117]

70. GTH asserts that, based on this amendment, it expected to be able to obtain voting control over Wind Mobile pursuant to the company's founding documents, which had been reviewed by Canada during the O&C compliance reviews of Wind Mobile.[118]

71. However, GTH's attempt to take voting control of Wind Mobile remained subject to review and approval under the Investment Canada Act (the "**ICA**").[119] Under the ICA, certain investments are subject to a net benefit review, in which the Investment Review Division of Industry Canada (the "**IRD**") assesses whether the proposed transaction is "likely to be of net benefit to Canada."[120] In addition, the ICA had been amended in March 2009 to provide for a "review of investments in

[114] **C-112**, INDU 2010 Report, Chapter 5, p. 41.

[115] **C-111**, Industry Canada, Opening Canada's Doors to Foreign Investment in Telecommunications – Options for Reform Consultation Paper, June 2010.

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

[117] **C-026**, An Act to implement certain provisions of the budget tabled in Parliament on March 29, 2012 and other measures, Bill C-38, S.C. 2012, 29 June 2012 ("16(2) A Canadian carrier is eligible to operate as a telecommunications common carrier if … (c) it has annual revenues from the provision of telecommunications services in Canada that represent less than 10% of the total annual revenues, as determined by the Commission, from the provision of telecommunications services in Canada.").

[118] Merits Memorial, ¶¶ 180-181.

[119] *See* **C-144**, Letter from William G. VanderBurgh, Aird & Berlis LLP to Marie-Josée Thivierge, Industry Canada *attaching* Responses by GTH Global Telecom Holding (Canada) Limited to summary of concerns and questions, 22 January 2013, p. 3 ("lifting the '*per se*' foreign ownership restrictions in the *Telecommunications Act* was not intended to obviate the applicability of the IC Act. GTHCL thus understands the continuing applicability and relevance of the IC Act to transactions in the telecommunications industry, both with respect to ensuring that proposed transactions are of 'net benefit' to Canada and to ensuring that concerns relating to Canada's national security are satisfactorily addressed").

[120] **R-169**, Investment Canada Act (29 June 2012 – 25 June 2013), § 21(1).

Canada by non-Canadians that could be injurious to national security."[121] Under the national security review provisions of the ICA, the GiC is empowered to "take any measures in respect of the investment that [it] considers advisable to protect national security, including … directing the non-Canadian not to implement the investment."[122]

72. Pursuant to the ICA, on 24 October 2012, GTH's wholly owned subsidiary GTHCL submitted an application seeking approval of its plans to acquire voting control of Wind Mobile and to purchase AAL's shares of Wind Mobile (the "**Voting Control Application**").[123]

73. An internal Industry Canada memorandum expressed the view that the proposed transaction was not problematic "[f]rom a telecommunications policy perspective," noting that GTH was "not increasing its ownership stake in Globalive, but rather executing an option that Orascom has held since its original investment in 2009."[124]

[redacted]

[redacted]

[121] **R-169**, Investment Canada Act (29 June 2012 – 25 June 2013), § 2. The national security review provisions were adopted through a 2009 amendment to the ICA. **R-173**, *Budget Implementation Act, 2009*, S.C. 2009, c. 2, s. 465.

[122] **R-169**, Investment Canada Act (29 June 2012 – 25 June 2013), § 25.4(1). The GiC's decision is final and binding and not subject to appeal except for judicial review under the Canadian Federal Courts Act. *Id.*, § 25.5.

[redacted]

[redacted]

[redacted]

[redacted]

G. THE 2013 TRANSFER FRAMEWORK

85. In the years following the 2008 AWS Auction, Canada became concerned about the prospect of spectrum concentration once the five-year restriction on the transfer of set-aside licenses expired. Industry Canada had announced that that it would be holding 700 MHz and 2500 MHz spectrum auctions and that there would be spectrum caps so that New Entrants could access prime spectrum.[148] Yet the viability of the New Entrants was in question, and it was unclear whether they would participate.[149]

86. Against this background, on 14 January 2013, Shaw (a New Entrant) announced that it had reached an agreement with Rogers (an Incumbent) to sell Rogers a purchase option on its set-aside licenses.[150] Industry analysts saw that the market was consolidating,[151] and Wind Mobile strongly opposed the deal, urging Industry Canada to "immediately revoke Shaw's AWS licenses."[152]

87. On 7 March 2013, Industry Canada released a *Consultation on Considerations Relating to Transfers, Divisions and Subordinate Licensing of Spectrum Licences* (the "**2013 Transfer Consultation**"). It proposed that in certain cases, Industry Canada would conduct a "detailed review" of proposed license transfers in which it would consider whether the transfer would

[147] [redacted] *See* **C-102**, National Security Review Regulations.

[148] **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), March 2012, ¶ 35.

[149] **RWS-Stewart**, ¶ 50.

[150] **C-136**, *Shaw Announces Agreement With Rogers for Purchase and Sale of Assets*, 14 January 2013. Rogers and Shaw had sought a preliminary review of this option agreement from Industry Canada in October 2012. Industry Canada responded as follows: "Based on the documentation that you have provided, we conclude that the proposed option agreement is not prohibited under the A WS condition of licence concerning licence transferability. However, we do consider that the agreement would be inconsistent with intent of the conditions and the Framework. You cannot apply for the transfer of Shaw's set-aside licences until September 2, 2014." **R-099**, Letter from Peter Hill, Industry Canada to Ken Engelhart, Rogers Communications and Jean Brazeau, Shaw Communications, 19 November 2012.

[151] **C-142**, Scotiabank, Biweekly Report: Converging Networks: The Writing's on the Wall – The Canadian Wireless Market is Consolidating, 21 January 2013.

[152] **R-360**, Letter from Simon Lockie, Wind Mobile to John Knubley, Industry Canada, 22 January 2013.

impact, among other things, "the efficiency and competitiveness" of the Canadian telecommunications market.[153]

88. The *Globe & Mail* reported that the Minister of Industry had initiated the consultation after learning that New Entrants were contemplating selling their spectrum licenses to Incumbents, and that his plan was to have the new rules in place before the five-year transfer restriction expired.[154]

89. Together with the 2013 Transfer Consultation, Industry Canada issued a press release titled "Harper Government Puts Consumers First in Telecommunications Plan,"[155] and the Minister of Industry gave a speech in which he stated:

> [O]ur government is delivering on our promise to use the upcoming wireless spectrum auctions to promote four competitors in each region of the country. … [B]efore the auction, we will review the policy on spectrum licence transfers with the objective of promoting competition in the wireless sector. To be clear, our government wants to see at least four players in each market.[156]

90. [redacted]

[153] **C-152**, 2013 Transfer Consultation, ¶ 15.

[154] **C-171**, Rita Trichur & Boyd Erman, *Ottawa moving quickly to finalize wireless rules*, THE GLOBE & MAIL, 15 April 2013. *See* **C-166**, Rita Trichur, *Wireless carriers sound alarm over Ottawa's spectrum transfer plan*, THE GLOBE & MAIL, 4 April 2013

[155] **C-157**, Industry Canada, News Release: Harper Government Puts Consumers First in Telecommunications Plan, 7 March 2013.

[156] **C-156**, Industry Canada, Speech: Speaking Points – The Honourable Christian Paradis, PC, MP, Minister of Industry, New measures to increase competition in the wireless sector, 7 March 2013. The auction to which he referred was an auction of 700 MHz spectrum scheduled for early 2014.

[157] [redacted]

[158] [redacted]

[redacted]

93. In the meantime, on 16 May 2013, Telus had announced that it had reached an agreement to purchase Mobilicity (another New Entrant) and its AWS spectrum licenses for CAD 380 million.[162]

94. However, on 4 June 2013, the Minister of Industry announced that Industry Canada had denied Telus' application to obtain Mobilicity's spectrum licenses. He stated:

> These licences were specifically set aside for new entrants in the AWS auction. I have been clear. The Government has been clear. Spectrum set aside for new entrants was not intended to be transferred to incumbents. That is why we had to put in place restrictions on the transfers of the set-aside spectrum. That is why I will

[redacted]

[162] **C-180**, Telus, TELUS agrees to acquire Mobilicity, 16 May 2013.

> not be approving this—or any other—transfer of set-aside spectrum to incumbents ahead of the five-year limit.[163]

95. The Minister also announced that, under the new transfer policy (which had yet to be published), "proposed spectrum transfers—including AWS spectrum transfers—that will result in undue concentration and therefore reduce competition will not be permitted."[164] He further stated:

> [L]et me be clear—our government will not hesitate to use any and every tool at our disposal to:
>
> • protect consumers;
>
> • promote competition; and
>
> • promote at least four wireless providers in every region of the country.[165]

96. On the same day, the Minister made similar statements before the House of Commons.[166]

97. On 28 June 2013, Industry Canada released the *Framework Relating to Transfers, Divisions and Subordinate Licensing of Spectrum Licences for Commercial Mobile Spectrum* (the "**Transfer Framework**").[167] The stated purpose of the 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."[168]

98. The Transfer Framework stated that:

[163] **C-193**, Industry Canada, Speech: Speaking Points – The Honourable Christian Paradis, PC, MP, Minister of Industry, Telecommunications Announcement, 4 June 2013.

[164] **C-193**, Industry Canada, Speech: Speaking Points – The Honourable Christian Paradis, PC, MP, Minister of Industry, Telecommunications Announcement, 4 June 2013.

[165] **C-193**, Industry Canada, Speech: Speaking Points – The Honourable Christian Paradis, PC, MP, Minister of Industry, Telecommunications Announcement, 4 June 2013.

[166] **C-195**, House of Commons Debates, Hansard 146(262), 41st Parliament, 1st Session, 4 June 2013, p. 17647 ("Mr. Speaker, today I announced that any proposed wireless transfer resulting in undue spectrum concentration and therefore less competition will not be approved. Spectrum set aside for new entrants was never intended to be transferred to incumbents and as such will not be approved now, nor will it likely be in the future. Our Conservative government will not hesitate to use any and every tool at its disposal to support greater competition in the market and protect Canadian consumers").

[167] **C-031**, Industry Canada, Framework Relating to Transfers, Divisions and Subordinate Licensing of Spectrum Licences for Commercial Mobile Spectrum (DGSO-003-13), June 2013.

[168] **C-031**, Industry Canada, Framework Relating to Transfers, Divisions and Subordinate Licensing of Spectrum Licences for Commercial Mobile Spectrum (DGSO-003-13), June 2013, ¶ 8.

> In making its determination as to the impact of a Licence Transfer on the policy objectives of this Framework, 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.[169]

99. Industry Canada then released an updated *Licensing Procedure for Spectrum Licences for Terrestrial Services* (the "**2013 Spectrum Licencing Procedure**") to reflect the new Transfer Framework. As set out in GTH's Merits Memorial, Industry Canada revised its statement on the transferability of licenses as follows:[170]

> *~~To~~ In order to meet the policy goals of the ~~Department~~ Government, the spectrum licences assigned under the different licensing processes may not have the same privileges. One such privilege is that of the enhanced transferability and the divisibility rights accorded to spectrum licences ~~assigned through an auction~~. These spectrum licences may be transferred in whole or in part (either in geographic area or in bandwidth) to a third party, subject to the conditions stated on the licence and review and approval by Industry Canada, as set out in this document and in other ~~applicable~~ regulatory requirements. The Minister has the authority to consider any and all matters deemed relevant to the request for a transfer, and to grant the transfer as requested, to fix additional terms and conditions, or to refuse the transfer.*

H. GTH'S EXIT FROM THE CANADIAN MARKET

[redacted]

[169] **C-031**, Industry Canada, Framework Relating to Transfers, Divisions and Subordinate Licensing of Spectrum Licences for Commercial Mobile Spectrum (DGSO-003-13), June 2013, ¶ 39.

[170] Merits Memorial, ¶ 242 (Comparison of § 5.6 of the 2013 Spectrum Licensing Procedure (**C-206**) and the 2007 Spectrum Licensing Procedure (**C-003**)).

[171] **CWS-Dry**, ¶ 24.

[172] [redacted]

[173] **CWS-Dry**, ¶ 24.

101. Around this time, potential purchasers also sought Industry Canada's informal input regarding whether proposed transactions would be acceptable under the Transfer Framework.[174]

103. At this point, the application deadline for the upcoming 700 MHz spectrum auction was approaching on 17 September 2013. Pursuant to the applicable anti-collusion rules, if Wind Mobile submitted an application, it would be prohibited from speaking to other applicants during the auction period.[179]

104.

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[179] **C-154**, Industry Canada, Licensing Framework for Mobile Broadband Services (MBS) – 700 MHz Band (DGSA-001-13), March 2013, § 5.4.

[180]

[redacted][183]

105. Wind Mobile applied to participate in the 700 MHz auction in advance of the deadline. Then, in November 2013, GTH and VimpelCom representatives met with the Prime Minister's Office and Industry Canada.[184] GTH understood from the discussion that [redacted] or for GTH to sell Wind Mobile to an Incumbent after the five-year transfer restriction.[185] Thus, VimpelCom and GTH were unwilling to fund the purchase of additional spectrum, and in January 2014, Wind Mobile withdrew from the 700 MHz auction.[186]

106. VimpelCom and GTH continued to explore the possibility of selling Wind Mobile to a non-Incumbent. Finally, on 15 September 2014, GTH approved the sale of its shareholding in Wind Mobile to AAL (Wind Mobile's controlling shareholder) and a group of private equity firms ("**AAL Consortium**"). In the transaction, AAL Consortium paid GTH CAD 11 million and assumed approximatively CAD 135 million worth of debt owed to VimpelCom and CAD 160 million in vendor loans.[187] Industry Canada approved the sale in November 2014.[188]

[181] [redacted]

[182] [redacted]

[183] [redacted]

[184] **R-263**, Memorandum from Iain Stewart, Industry Canada to the Deputy Minister, Industry Canada, 4 November 2013.

[185] **CWS-Dry**, ¶ 28.

[186] **CWS-Dry**, ¶ 30. *See* **C-218**, Industry Canada, *Advice to the Minister*, 17 March 2014, *Wireless Telecom – Status Update (As of March 14, 2014)* ([redacted] .

[187] **C-033**, Purchase Agreement between AAL Acquisitions Corp., GTH Global Telecom Finance (B.C.) Limited, VimpelCom Amsterdam B.V., GTH Global Telecom Holding (Canada) Limited, and Globalive Investment Holdings Corp., 16 September 2014.

[188] **C-229**, Industry Canada, Deemed Transfer of Spectrum Licences held by Globalive Wireless Management Corp. (GWMC), operating as WIND Mobile, to AAL Acquisitions Corp., 4 November 2014.

I. DEVELOPMENTS AFTER GTH'S EXIT

107. In March 2015, Industry Canada held an auction of AWS-3 spectrum licenses, in which certain spectrum was set aside for New Entrants.[189] Wind Mobile acquired a block of set-aside spectrum licenses through this auction for CAD 56.4 million.[190]

108. On 24 June 2015, Industry Canada approved two transfers of set-aside spectrum licenses to Rogers: (a) Rogers' purchase of the set-aside spectrum licenses of Shaw (a New Entrant) for CAD 350 million; and (b) Rogers' acquisition of Mobilicity (a New Entrant) for CAD 440 million.[191] As part of these transactions, Rogers transferred all of Mobilicity's AWS spectrum to Wind Mobile, and Shaw's AWS spectrum was split between Wind Mobile and Rogers. In return, Wind Mobile transferred a some of its existing AWS spectrum to Rogers.[192]

109. In an announcement on the same day, the Minister of Industry stated:

> Today our government approved a series of spectrum licence transfers between Rogers, Shaw, Mobilicity and WIND. These transfers will result in at least four wireless firms in every region of the country being able to offer the latest technology, world-class service and more choice to all Canadians and their families.[193]

110. On 16 December 2015, Wind Mobile's new owners sold the company's spectrum licences and business holdings to Shaw for CAD 1.6 billion.[194]

[189] See **C-230**, Industry Canada, Technical, Policy and Licensing Framework for Advanced Wireless Services in the Bands 1755-1780 MHz and 2155-2180 MHz (AWS-3) (SLPB-007-14), December 2014;

[190] **C-231**, Peter Evans, Rogers buys no new spectrum as AWS-3 wireless auction raises $2.1B, 6 March 2015.

[191] **C-237**, Rogers buys Mobilicity plus Shaw's 4G spectrum; Wind gets windfall, TeleGeography, 25 June 2015; **C-233**, Industry Canada, Transfer of Spectrum Licences Held by Shaw Communications Inc. to Rogers Communications Partnership, 24 June 2015; **C-234**, Industry Canada, Transfer of Spectrum Licences Held by Rogers Communications Partnership to WIND Mobile Corp.; Transfer of Spectrum Licences Held by Data and Audio-Visual Enterprises Wireless Inc. to Rogers Communications Partnership and to WIND Mobile Corp.; Transfer of a Subdivision of a Licence Held by WIND Mobile Corp. to Rogers Communications Partnership; Subordinate Licence Application for Spectrum Licences Held by WIND Mobile Corp. to Rogers Communications Partnership, 24 June 2015.

[192] *Id.*

[193] **C-235**, Industry Canada, News Release: Statement by Industry Minister James Moore, 24 June 2015.

[194] **C-241**, Shaw, Press Release: Shaw Communications Inc. to acquire WIND Mobile Corp., 16 December 2015.

IV. PROCEDURAL HISTORY

111. On 28 May 2016, GTH submitted to ICSID a Request for Arbitration, including exhibits 1 to 36 and Annexes A to I.

112. On 6 June 2016, in accordance with Article 36 of the ICSID Convention, the Secretary-General of ICSID registered the Request for Arbitration and so notified the Parties. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an arbitral tribunal as soon as possible pursuant to Articles 37 to 40 of the ICSID Convention.

113. By correspondence of 12 and 13 August 2016, the Parties informed ICSID of their agreed method of constituting the Tribunal. The Parties agreed that the Tribunal would be composed of three members, with each Party appointing one arbitrator, and third, presiding arbitrator to be appointed pursuant to a list procedure. In this regard, the Parties specified that they would exchange lists of candidates for the President of the Tribunal without copying ICSID.

114. In accordance with the Parties' agreed method of appointment, GTH appointed Mr. Gary Born, a national of the United States of America, as arbitrator. Canada then appointed Professor Vaughan Lowe, a national of the United Kingdom, as arbitrator. Professor Lowe accepted his appointment on 19 August 2016, and Mr. Born accepted his appointment on 25 August 2016.

115. On 30 August 2016, the Parties informed ICSID that they had agreed to an amended schedule for the list procedure by which the presiding arbitrator was to be appointed.

116. On 19 January 2017, the Parties jointly requested ICSID's assistance in appointing the President of the Tribunal. Specifically, the Parties asked ICSID to provide them with a list of seven candidates, which had been pre-screened for conflicts and availability. Upon receipt of the list, each Party had the option to agree to appoint a candidate from the other Party's previously exchanged lists of candidates. Otherwise, each Party would be permitted to strike two names from the list and rank the remaining candidates from one to five, with one being the most preferred. The candidate with the lowest total score would be appointed.

117. At ICSID's request, the Parties specified on 25 January 2017 that in the event of a tie among candidates, the candidate with the lowest difference between the points assigned by each

Party would be appointed. If the tie were still not resolved, the Parties would attempt to agree on one of the candidates with the lowest total score. In the absence of agreement, the Secretary-General would select and appoint the President from among those candidates.

118. On 6 February 2017, ICSID provided the Parties with the requested strike-and-rank list.

119. Pursuant to the Parties' agreed procedure, considering the results of the Parties' rankings, the Secretary-General appointed Professor Dr. Georges Affaki, a national of France and Syria, as President of the Tribunal. Professor Affaki accepted his appointment on 21 February 2017.

120. On the same date, in accordance with ICSID Arbitration Rule 6(1), the Secretary-General notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. The Parties were provided copies of the declarations required under ICSID Arbitration Rule 6(2) signed by Professor Affaki, Mr. Born and Professor Lowe, as well as the accompanying statements of Mr. Born and Professor Lowe.

121. Following its constitution, the Tribunal consulted with the Parties regarding the format and date of the first session. The Tribunal determined that the first session would be held by teleconference on 21 April 2017.

122. On 10 March 2017, in preparation for the first session, the Secretary of the Tribunal transmitted to the Parties a draft agenda and a draft procedural order, which had been approved by the Tribunal. The Parties were invited to confer on procedural matters and to inform the Tribunal of any agreements they reached or, in the absence of agreement, of their respective positions.

123. On 7 April 2017, the Parties submitted a joint draft procedural order reflecting the Parties' agreement on most procedural issues. A limited number of matters remained in dispute, including the place of the proceeding, confidentiality and the "number and sequence of pleadings, including whether the proceedings should be bifurcated to deal with Canada's preliminary objections on jurisdiction and admissibility."[195]

[195] Email from the Claimant (on behalf of the Parties) to the Tribunal of 7 April 2017.

124. Later on 7 April 2017, GTH submitted a letter addressing the disputed procedural issues. Canada submitted (a) a request for bifurcation, including legal authorities RL-001 to RL-036, and (b) a letter addressing the other disputed procedural matters.

125. On 14 April 2017, Canada submitted a letter containing its response to GTH's letter of 7 April 2017. On the same day, GTH filed a Submission on Bifurcation, Publication and Place of Proceeding, together with legal authorities CL-001 to CL-0018.

126. Also on 14 April 2017, the Tribunal confirmed that the Parties would be given an opportunity to make oral presentations on the issue of bifurcation during the first session. The Tribunal noted that, after hearing the Parties' presentations, it would consult the Parties regarding the need for any further procedure.

127. The first session was held by teleconference as scheduled on 21 April 2017.

128. Following the first session, the Tribunal determined that it would be premature to decide whether to bifurcate the proceeding at that stage, and that the Tribunal would be better-placed to decide after receiving the Respondent's jurisdictional objections. The Tribunal informed the Parties of this determination on 2 May 2017.

129. The Tribunal continued to consult the Parties regarding the outstanding disputed procedural issues, encouraging them to agree as far as possible. The Parties were able to reach agreement on certain matters, including that the place of arbitration would be Paris, France. On 13 June 2017, the Tribunal issued Procedural Order No. 1 ("**PO1**"), embodying the agreements of the Parties and the decisions of the Tribunal regarding the procedure to govern the arbitration. The Procedural Timetable was attached as Annex A of PO1.

130. With regard to issues of confidentiality and transparency, the Parties were directed to consult and agree on a draft confidentiality order. PO1 provided that The Tribunal's awards, decisions and orders would be published on the ICSID website, subject to the redaction of confidential information under a Confidentiality Order to be agreed by the parties.

131. On 31 August 2017, Mr. Born provided the Parties with a supplemental statement pursuant to Arbitration Rule 6.

132. In accordance with the Procedural Timetable, on 29 September 2017, GTH filed its Memorial on the Merits and Damages, together with exhibits C-001 to C-254, legal authorities CL-001 to CL-089,[196] the Expert Report of Santiago Dellepiane A. and Pablo T. Spiller, and the Witness Statements of Kenneth D. Campbell, Michael C. Connolly, David L. C. Dobbie and Andrew M. Dry ("**Merits Memorial**").

133. On 5 October 2017, Mr. Born provided the Parties with a supplemental statement pursuant to Arbitration Rule 6.

134. On 26 October 2017, the Parties submitted a draft Confidentiality Order. They sought the Tribunal's resolution of one disputed issue. On 30 October 2017, the Tribunal issued the Confidentiality Order applicable to the proceeding.

135. On 15 November 2017, Canada filed its Memorial on Jurisdiction and Admissibility and Request for Bifurcation, together with exhibits R-001 to R-078, legal authorities RL-038 to RL-163 and the Expert Report of Prof. Dr. Mohamed S. Abdel Wahab ("**Jur. Memorial**").

136. On 29 November 2017, GTH filed its Response to Canada's Request for Bifurcation.

137. On 14 December 2017, the Tribunal issued Procedural Order No. 2 ("**PO2**"), in which it decided to deny the Respondent's request for bifurcation. Accordingly, the arbitration proceeded in accordance with the Procedural Timetable applicable to a joined proceeding,

138. On 26 February 2018, Canada filed its Counter-Memorial on Merits and Damages, including exhibits R-079 to R-264 and legal authorities RL-164 to RL-242, the Expert Report of The Brattle Group, and the Witness Statements of Jennifer Aitken, Peter Hill and Iain Stewart ("**Merits Counter-Memorial**").

139. In accordance with Section 15.1 of PO1 and the Procedural Timetable, on 28 March 2018, each Party served on the other Party a request for the production of documents. Subsequently, each

[196] The legal authorities previously submitted with the Claimant's submission of 14 April 2017 were refiled with the Merits Memorial.

Party set forth its objections to the other Party's requests for documents and then its responses to the other Party's objections.

140. On 2 May 2018, the Parties informed the Tribunal that they were in the process of discussing their document requests with a view to reaching agreement on additional points. The Parties jointly requested that the deadline to submit the document request schedules to the Tribunal be extended. On 3 May 2018, the Tribunal confirmed the Parties' agreed extension.

141. On 14 May 2018, each Party submitted its document production schedule to the Tribunal. The Respondent also submitted a cover letter and supporting documentation.

142. By correspondence of 15 and 16 May 2018, the Parties made further, unsolicited submissions relating to the document requests.

143. On 1 June 2018, the Tribunal issued Procedural Order No. 3, including Annexes A and B ("**PO3**") containing its decisions on the Parties' document requests. In PO3, the Tribunal stated that it was "not ordering the production of any document subject to legal privilege."[197]

144. On 18 July 2018, GTH informed the Tribunal that the Parties had agreed to extend a number of deadlines on the Procedural Timetable. The following day, the Tribunal approved the Parties' agreement.

145. By letter of 21 August 2018, Canada requested a further extension of time to complete its document production pursuant to PO3 and proposed a revised Procedural Timetable to accommodate this extension. At the Tribunal's invitation, GTH submitted a response to the Respondent's letter on 24 August 2018. GTH opposed the requested extension. On 27 August 2018, the Tribunal informed the Parties of its decision on the matter and issued a revised Procedural Timetable.

146. On 9 October 2018, GTH submitted a letter to the Tribunal, together with Appendices A to G, in which it objected to certain categories of privilege claimed by Canada. On 10 October 2018, the Respondent informed the Tribunal by email that it intended to submit a response to

[197] PO3, ¶ 14.

GTH's letter. By email of 11 October 2018, the Tribunal took note of both GTH's letter and Canada's email.

147. On 17 October 2018, Canada submitted an electronic copy of its response to GTH's letter of 9 October 2018. Canada subsequently filed a hard copy of the response, together with exhibits R-265 to R-292 and legal authorities RL-243 to RL-255. In its response, Canada informed the Tribunal that there were also outstanding issues related to GTH's production of documents and privilege claims, but did not make any application to the Tribunal in this respect.

148. On 2 November 2018, Canada submitted a letter, together with exhibits R-293 to R-295 and Appendices A to F. It requested that the Tribunal (a) order GTH to conduct a document-by-document review and to produce several categories of documents over which it had asserted privilege; and (b) stay the proceedings until the Tribunal had an opportunity to address these issues.

149. On 3 November 2018, the Tribunal issued Procedural Order No. 4 ("**PO4**"), addressing GTH's objections to the Canada's privilege claims. Pursuant to PO4, Canada was required to conduct a review of withheld and redacted documents, and to produce any documents not subject to privilege in light of the Tribunal's guidance.

150. In the cover email to PO4, the Tribunal invited GTH to comment on Canada's letter of 2 November 2018. The Tribunal also asked for an update regarding the Parties' redaction of the procedural orders which had been issued but not yet published.

151. On 5 November 2018, GTH submitted its Reply on Merits & Damages and Counter-Memorial on Jurisdiction and Admissibility, including exhibits C-255 to C-401, legal authorities CL-090 to CL-183, the Expert Report of Dr. Hani Sarie-Eldin and the Second Expert Report of Santiago Dellepiane A. and Pablo T. Spiller ("**Merits Reply and Jur. Counter-Memorial**").

152. By letter of 8 November 2018, Canada (a) sought an extension to the deadline for its compliance with PO4; (b) informed the Tribunal that the Parties had reached agreement on the redaction and publication of PO3; and (c) identified a number of disagreements between the Parties regarding the designation of information as Confidential or Restricted Access Information in PO2 and the Parties' submissions.

153. On 10 November 2018, the Tribunal wrote to the Parties in response to Canada's letter of 8 November 2018. The Tribunal (a) granted the requested extension; (b) confirmed that PO3 would be published without its Annexes as agreed by the Parties; and (c) set a pleading schedule for the issue of the designation of information as Confidential or Restricted Access Information.

154. One 12 November 2018, GTH submitted two letters, together with exhibits C-402 to C-428 and legal authorities CL-184 to CL-188. The first letter responded to Canada's letter of 2 November 2018 concerning GTH's production of documents and privilege claims. The second letter was in response to Canada's letter of 8 November 2018 concerning the designation of information as Confidential or Restricted Access Information.

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

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

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

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

159. By letter of 22 November 2018, the Tribunal reminded the Parties of the various steps agreed during the case management teleconference. In accordance with the Tribunal's directions, both Parties submitted letters on 25 November 2018 providing certain information requested by

the Tribunal. GTH submitted exhibits C-429 to C-431 with its letter, and Canada submitted exhibits R-295 to R-298 with its letter concerning privilege under the ICA.

160. On 29 November 2018, the Parties submitted a Stern Schedule containing their respective positions on the disputed issues relating to GTH's assertion of legal privilege. It was accompanied by Canada's exhibits R-299 to R-320 and legal authorities RL-256 to RL-261, and GTH's legal authorities CL-189 to CL-192.

161. On 2 December 2018, GTH confirmed that its positions in the Stern Schedule did not take account of new arguments advanced by Canada and that it would be available if the Tribunal wished to hear GTH's position on these matters.

162. On 7 December 2018, GTH confirmed that the Parties had agreed to the redactions of PO2, and provided the non-confidential version of the Order, which was published on the ICSID website.

163. On 13 December 2018, the Tribunal issued Procedural Order No. 5, including Annex A ("**PO5**"), containing its decision on each outstanding issue of legal privilege that had been identified by the Parties in their Stern Schedule dated 29 November 2018.

164. In PO5, the Tribunal addressed the Parties' submissions on whether there is an exception to the waiver of privilege where parties have a common interest. The Tribunal held that, "the onus is on GTH to demonstrate that the law applicable to privilege for each communication recognises common interest privilege *and* that the communication qualifies for common interest privilege."[198] GTH was granted leave to present evidence concerning the attachment of common interest privilege for each relevant communication, provided that it did so without delay.

165. The Tribunal also noted in PO5 that if the Parties sought further guidance or a determination from the Tribunal in relation to limited waivers of legal privilege, the Tribunal would require better particularised pleadings in this respect.

[198] PO5, Annex A, p. 20.

166. By email of 20 December 2018, GTH informed the Tribunal that it planned to make submissions with respect to common interest privilege and limited waiver of privilege, pursuant to PO5. In response, the Tribunal encouraged the Parties to attempt to reach an agreement on these matters. The Tribunal instructed the Parties that, if they were unable to reach such an agreement, they should make precise submissions in the form of a Stern Schedule.

167. On 7 January 2019, the Parties informed the Tribunal that they had been unable to reach agreement on the remaining issues of legal privilege. On behalf of the Parties, Canada submitted the Stern Schedule containing the Parties' respective positions on these matters.[199] It was accompanied by Canada's exhibits R-321 to R-358 and GTH's exhibits C-432 to C-447.

168. On 11 January 2019, the Parties informed the Tribunal of certain agreements they had reached relating to the Procedural Timetable. They provided further clarification about their agreement on 23 January 2019, and in response, the Tribunal issued a revised Procedural Timetable on 28 January 2019.

169. On 18 January 2019, the Tribunal issued Procedural Order No. 6, including Annex A ("**PO6**") containing its decision on common interest privilege, limited waiver of privilege and subject matter waiver of privilege.

170. By letter of 22 January 2019, Canada requested information regarding the relationship between Mr. Born and GTH's counsel, Gibson Dunn & Crutcher, LLP. GTH responded on 27 January 2019, and Mr. Born provided a statement on 28 January 2019. On 30 January 2019, Canada stated that it appreciated the clarifications and had taken note of Mr. Born's statement that no present or past relation with Gibson Dunn & Crutcher, LLP affects his independence or impartiality in this arbitration.

171. By letter of 27 January 2019, GTH sought leave to (a) include in the evidentiary record documents produced pursuant to PO6, and (b) adduce new evidence of un-waived privilege for certain categories of documents. The Tribunal responded on 30 January 2019. It granted GTH's first request, noting that Canada would be permitted to submit any responsive evidence within

[199] The Claimant subsequently informed the Tribunal that its supporting documentation had not been properly numbered in the Stern Schedule and filed a corrected version.

seven days after GTH filed the new documents. Regarding GTH's second request, the Tribunal invited Canada to comment.

172. On 3 February 2019, Canada submitted its Rejoinder on Merits and Damages and Reply on Jurisdiction and Admissibility, including exhibits R-359 to R-598, legal authorities RL-262 to RL-329, the Second Expert Report of The Brattle Group, the Second Legal Expert Report of Prof. Dr. Mohamed S. Abdel Wahab, and the Rejoinder Witness Statements of Jenifer Aitken, Peter Hill and Iain Stewart ("**Merits Rejoinder and Jur. Reply**").

173. By letter of 12 February 2019, Canada informed the Tribunal that the Parties had been unable to reach agreement on the remaining issues of legal privilege. Canada requested "that the Tribunal apply Article 3.8 of the IBA Rules and organise the tendering by GTH of certain non-disclosed and redacted documents to a Tribunal-appointed neutral expert."

174. Upon the invitation of the Tribunal, GTH responded to Canada's letter on 15 February 2019. GTH opposed Canada's request for an expert review of the disputed documents and suggested that the Tribunal itself conduct a review to resolve the Parties' outstanding dispute over the two categories of documents addressed in GTH's letter of 27 January 2019 and certain other redacted documents.

175. Canada responded to GTH's proposal by letter of 18 February 2019. Canada stated that it was "willing to proceed with the Tribunal reviewing certain documents rather than appointing an independent expert to do so."

176. By letter of 19 February 2019, the Tribunal informed the Parties that, in light of the Parties' agreement, the Tribunal would conduct the review of documents. The Tribunal instructed the Parties to consult regarding the precise scope of the Tribunal's review and offered guidance in this regard. The Tribunal also instructed GTH to submit a hyperlinked schedule of the disputed documents to the Tribunal no later than 25 February 2019.

177. On 25 February 2019, GTH informed the Tribunal that, despite the Parties' continued discussions regarding GTH's privilege claims, there remained more than 160 documents in dispute. GTH shared its view that "it would be neither procedurally fair nor proper for the Tribunal to review all of these documents." Therefore, GTH stated that "the only timely and procedurally

fair way forward is to accept Respondent's suggestion that an independent third party be appointed to review all of the disputed privileged documents."

178. The Tribunal responded to the Parties on the same day. It noted that, considering Canada's letter of 12 February 2019 and GTH's letter of 25 February 2019, the Tribunal understood there to be a joint application by the Parties to appoint an independent expert to review the disputed documents. The Tribunal granted the application and confirmed that it had identified a list of potential candidates and instructed ICSID to contact them to inquire about their availability and independence. The Parties were instructed to consult and attempt to agree on detailed Terms of Reference and a list of documents to be provided to the expert.

179. The Parties submitted their joint proposed Terms of Reference on 28 February 2019. After reviewing the Parties' proposal and making certain additions, the Tribunal provided the revised Terms of Reference to the Parties for their consideration. Both Parties subsequently confirmed their agreement with the revised Terms of Reference.

180. On 1 March 2019, the President of the Tribunal held a pre-hearing teleconference with the Parties to discuss the organization of the upcoming hearing. Following the teleconference, the President deliberated with his co-arbitrators regarding the outstanding issues.

181. On 2 March 2019, the Tribunal informed the Parties that it intended to appoint Dr. Patricia Shaughnessy to serve as the independent expert, and that Dr. Shaughnessy had confirmed her availability and independence. The Parties were given until the following day to raise any objection to the appointment.

182. As neither Party raised any objection, on 3 March 2019, the Tribunal confirmed the appointment of Dr. Shaughnessy as the independent expert, and she signed the Terms of Reference.

183. On 4 March 2019, GTH provided Dr. Shaughnessy with a hyperlinked schedule of the disputed documents. Dr. Shaughnessy conducted her review and, on 12 March 2019, submitted her assessment to the Tribunal.

184. On 14 March 2019, the Tribunal issued two orders: Procedural Order No. 7 ("**PO7**") containing the Parties agreements and the Tribunal's decisions relating to the organization of the

hearing; and Procedural Order No. 8, including Annex A ("**PO8**"), by which it adopted Dr. Shaughnessy's assessment of the privilege issues.

185. On 5 March 2019, GTH filed its Rejoinder on Jurisdiction and Admissibility, including exhibits C-448 to C-455, legal authorities CL-193 to CL-213, the Second Expert Report of Dr. Hani Sarie-Eldin and the Second Witness Statement of Mr. David L. C. Dobbie ("**Jur. Rejoinder**").

186. On 18 March 2019, GTH wrote to the Tribunal, challenging the completeness of Canada's document production pursuant to PO3 and requesting certain relief from the Tribunal.

187. In response, the President of the Tribunal wrote to the Parties to encourage them to confer together with an aim to reaching a consensus on the matters outlined in GTH's letter. In the event the Parties were unable to agree, the President invited Canada to provide a response. By letter of 23 March 2019, Canada informed the Tribunal that the Parties had been unable to resolve their disagreement and set out its response to GTH's letter of 18 March 2019.

188. On 25 March 2019, the Tribunal issued Procedural Order No. 9, including Annex A ("**PO9**") containing its decision on GTH's request of 18 March 2019.

189. A hearing on jurisdiction, merits and quantum took place at the Word Bank Office in Paris from 1 to 12 April 2019 (the "**Hearing**"). The following persons were present at the Hearing:

Tribunal
Professor Georges Affaki, President
Mr. Gary Born
Professor Vaughan Lowe
Acting Secretary of the Tribunal
Ms. Jara Minguez

For GTH
Counsel:
Ms. Penny Madden QC, Gibson, Dunn & Crutcher LLP
Mr. Rahim Moloo, Gibson, Dunn & Crutcher LLP
Ms. Charline YimGibson, Dunn & Crutcher LLP
Mr. Piers Plumptre, Gibson, Dunn & Crutcher LLP
Ms. Laura Corbin Gibson, Dunn & Crutcher LLP
Ms. Nadia WahbaGibson, Dunn & Crutcher LLP
Ms. Marryum Kahloon, Gibson, Dunn & Crutcher LLP

Mr. Paul Evans, Gibson, Dunn & Crutcher LLP

Parties:
Mr. Alex Shalaby, Global Telecom Holding S.A.E.
Mr. David Dobbie (also a witness), VEON Ltd., formerly Global Telecom Holding S.A.E.
Mr. Matthew Matule, VEON Ltd.
Mr. Tim Burke, VEON Ltd.

Witnesses / Experts:
Mr. John Andrew, Aird & Berlis LLP
Mr. Kenneth Campbell, Formerly Wind Mobile
Mr. Michael Connolly, Formerly Industry Canada
Mr. Andrew Dry, VEON Ltd.
Dr. Hani Sarie-Eldin, Sarie-Eldin & Partners
Dr. Pablo Spiller, Compass Lexecon
Mr. Santiago Dellepiane, Berkeley Research Group
Ms. Daniela Bambaci, Berkeley Research Group
Mr. Miguel Nakhle, Compass Lexecon
Mr. Charles Rice, Compass Lexecon

For Canada
Counsel:
Ms. Sylvie Tabet, General Counsel, Trade Law Bureau, Government of Canada
Mr. Jean-Francois Hebert, Senior Counsel, Trade Law Bureau, Government of Canada
Mr. Scott Little, Senior Counsel, Trade Law Bureau, Government of Canada
Mr. Mark Klaver, Counsel, Trade Law Bureau, Government of Canada
Ms. Johannie Dallaire, Counsel, Trade Law Bureau, Government of Canada
Mr. Stefan Kuuskne, Counsel, Trade Law Bureau, Government of Canada
Ms. Darian Bakelaar, Paralegal, Trade Law Bureau, Government of Canada
Mr. Benjamin Tait, Paralegal, Trade Law Bureau, Government of Canada

Parties:
Ms. Natacha Guilbault, Senior Counsel, Innovation, Science and Economic Development, Government of Canada
Ms. Jennifer Mulligan, Paralegal, Innovation, Science and Economic Development, Government of Canada
Mr. Aldo Ongaro, Manager and Party Representative, Innovation, Science and Economic Development, Government of Canada
Ms. Shamali Gupta, Officer and Party Representative, Investment Trade Policy, Government of Canada
Mr. Vincent Boulanger, Officer, Investment Trade Policy, Government of Canada

Witnesses / Experts:
Mr. Chris Reynolds, Trial Graphics Expert, Core Legal
Ms. Jenifer Aitken, Witness, Government of Canada

Mr. Peter Hill, Witness, Government of Canada
Mr. Iain Stewart, Witness, Government of Canada
Prof. Dr. Mohamed Abdel-Wahab, Expert Witness, Zulficar & Partners
Dr. Coleman Bazelon, Expert Witness, The Brattle Group
Mr. Benjamin Sacks, Expert Witness, The Brattle Group
Mr. Fabricio Nunez, Expert Consultant, The Brattle Group

Court Reporter
Mr. Trevor McGowan

190. On 23 April 2019, GTH submitted an application requesting that the Tribunal make certain inferences in relation to five exhibits on the record: C-258, C-261, C-262, C-264, and C-333. Canada requested leave to respond, which the Tribunal granted. On 29 April 2019, Canada submitted its response. The Tribunal then invited GTH to indicate whether it wished to reply, and in response, GTH stated that it did not consider it necessary to comment further at that time.

191. On 24 May 2019, each Party submitted its Post-Hearing Submission.

192. On 11 June 2019, each Party submitted its Submission on Costs.

193. On 21 November 2019, GTH submitted a letter to the Tribunal seeking leave to submit nine new documents into the record. GTH attached these nine documents as Appendices A to I to the Application.

194. On 24 November 2019, the Tribunal acknowledged receipt of the Application and provided instructions to the Parties. The Tribunal noted that GTH had referenced being prejudiced by not being able to make arguments or to cross examine witnesses on the nine documents. In this regard, the Tribunal stated:

> The Tribunal is concerned about allegations of impairment of a Party's right to fully state its case. Claimant is invited to specify by no later than 27 November 2019 whether the Application is limited to seeking leave to submitting the nine appendices A to I on the record or is also meant to include any further requests.

195. In its message, the Tribunal also invited Canada to respond to GTH's request.

196. By email of 26 November 2019, GTH replied to the Tribunal's query and confirmed that "the Application is limited to seeking leave to submit Appendices A to I into the record as new Factual Exhibits and does not seek other relief."

197. On 4 December 2019, Canada submitted its response to the Application, together with Annex A and Appendices A to F.

198. On 8 December 2019, the Tribunal issued Procedural No. 10, including Annex A ("**PO10**"), addressing GTH's request of 21 November 2019. The Tribunal decided to grant GTH's request with respect to each of the nine documents.

199. In the meantime, on 27 November 2019, the Parties jointly requested that the Tribunal provide guidance on certain confidentiality issues relating to the publication of the Tribunal's procedural orders. The Tribunal provided the requested advice on 16 January 2020.

200. On 10 March 2020, the Parties informed the Tribunal that they had agreed on the redaction of Confidential and Restricted Access Information in PO5, PO6, PO8 and PO10. The Secretary confirmed that the non-confidential versions of these orders would be published on the ICSID website.

201. Also on 10 March 2020, the Tribunal declared the proceeding closed in accordance with ICSID Arbitration Rule 38(1).

V. THE PARTIES' REQUESTS FOR RELIEF

A. GTH'S REQUEST FOR RELIEF

202. GTH asserts that the Tribunal has jurisdiction over this dispute and that Canada has breached the BIT by failing to (a) afford GTH fair and equitable treatment, (b) ensure full protection and security of GTH's investment, (c) guarantee the unrestricted transfer of GTH's investment, and (d) grant GTH's investment treatment no less favourable than that which it provides to investments of its own investors.[200]

[200] Merits Memorial, § VII.

203. GTH requests that the Tribunal:

(a) **DECLARE** that it has jurisdiction over GTH's claims in this Arbitration;

(b) **DECLARE** that each of GTH's claims in this Arbitration are admissible;

(c) **DISMISS** all of Canada's objections on jurisdiction and admissibility;

(d) **DECLARE** that Canada has breached its obligations to GTH under the BIT arising from Canada's blocking of the sale of Wind Mobile to an Incumbent, specifically:

(i) The fair and equitable treatment standard pursuant to Article II(2)(a) of the BIT,

(ii) The full protection and security standard pursuant to Article II(2)(b) of the BIT, and

(iii) The unrestricted transfer guarantee pursuant to Article IX(1) of the BIT;

(e) **DECLARE** that Canada has breached its obligations to GTH under the BIT arising from Canada's treatment of GTH due to alleged national security concerns, specifically:

(i) The fair and equitable treatment standard pursuant to Article II(2)(a) of the BIT,

(ii) The full protection and security standard pursuant to Article II(2)(b) of the BIT, and

(iii) National treatment protection pursuant to Article IV(1) of the BIT;

(f) **DECLARE** that Canada has breached the fair and equitable treatment standard pursuant to Article II(2)(a) and the full protection and security standard pursuant to Article II(2)(b) of the BIT due to its cumulative treatment of GTH's investment, including but not limited to the breaches at paragraphs 78(d) and 78(e);

(g) **ORDER** Canada to pay GTH the following amounts valued as of 30 September 2018, to be updated to the Date of Award (or other such amount the Tribunal determines to be appropriate):

(i) For any breach found under paragraph 78(d), US$ 1.807 billion or, in the alternative, US$ 768.2 million;

(ii) For any breach found under paragraph 78(e), US$ 1.807 billion or, in the alternative, US$ 993.5 million or, in the further alternative, US$ 884.9 million;

(iii) For any breach found under paragraph 78(f), US$ 1.807 billion or, in the alternative, US$ 1.311 billion.

(h) **ORDER** Canada to pay all of the costs and expenses of the Arbitration, including GTH's legal fees, the fees and expenses of any experts, the fees and expenses of the Tribunal, and ICSID's other costs; and

(i) **AWARD** such other relief as the Tribunal considers appropriate.[201]

B. CANADA'S REQUEST FOR RELIEF

204. Canada submits that the Tribunal lacks jurisdiction over this dispute, and it denies each of GTH's claims under the BIT.

205. Canada requests that the Tribunal render an award:

a) Declaring that GTH is not an "investor" of the Arab Republic of Egypt within the meaning of Article I of the Canada-Egypt FIPA and that the Tribunal lacks jurisdiction over GTH's claims.[202]

In the alternative,

b) Declaring that the adoption of the Transfer Framework did not breach Canada's obligations under Articles II(2)(a), II(2)(b), and IX(1) of the Canada-Egypt FIPA; and

c) Declaring that the national security review of GTH's application to acquire voting control of GTH falls within the dispute settlement exception in Article II(4)(b) of the Canada-Egypt FIPA and that the Tribunal lacks jurisdiction over GTH's claims related to the national security review.

In the further alternative,

d) Declaring not admissible pursuant to the reservation in Article IV(2)(d) and its annex, the claim that the national security review of GTH's application to acquire voting control of GTH breaches Article IV(1) of the Canada-Egypt FIPA; and

e) Declaring that the national security review of GTH's application to acquire voting control of Wind Mobile did not breach Canada's obligations under Articles II(2)(a) and II(2)(b) of the Canada-Egypt FIPA; and

f) Declaring that Canada's cumulative treatment of GTH's investment did not breach Canada's obligations under Articles II(2)(a) and II(2)(b) of the Canada-Egypt FIPA.

And in all cases,

g) Dismiss GTH's claim for damages and ordering that GTH bear the costs of the arbitration, including Canada's costs for legal representation and assistance.

[201] Claimant's Post-Hearing Submission, ¶ 78; *see* Reply, ¶ 453; Merits Memorial, ¶ 427; Claimant's Letter of 14 April 2019.

[202] Respondent's Letter of 16 April 2019; *see* Merits Counter-Memorial, ¶ 598; Merits Rejoinder and Jur. Reply, ¶ 414; Respondent's Post-Hearing Submission, ¶ 91.

VI. JURISDICTION AND ADMISSIBILITY

206. Canada's position is that the Tribunal lacks jurisdiction over GTH's claims because: (a) GTH does not qualify as an "investor" under Article I(g) of the BIT; (b) Article II(4)(b) of the BIT deprives the Tribunal of jurisdiction over GTH's claims concerning the Transfer Framework; (c) the claims are time-barred under Article XIII(3)(d) of the BIT; and (d) Article IV(2)(d) excludes GTH's national treatment claims from dispute resolution under the BIT. Canada objects to the admissibility of GTH's claims relating to the treatment of Wind Mobile on the basis that GTH lacks standing to bring these claims.

207. The following table reflects Canada's view of how its objections affect GTH's claims.[203]

[203] Jur. Memorial, Annex, p. A-1.

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

In the table below "X" indicates the Tribunal's lack of jurisdiction over a claim of breach of the FIPA or the Claimant's lack of standing as a result of Canada's jurisdictional and admissibility objections.

Challenged Measures (¶¶ 24 and 301 of the Claimant's Memorial)	**Obligations Allegedly Breached***	**Jurisdiction *Ratione Personae* under Article XIII and Article 25 of the ICISD Convention**	**Article II(4)(b) Dispute Settlement Exclusion of Decisions Not to Permit Establishment or Acquisition of Enterprises**	**Jurisdiction *Ratione Temporis* under Article XIII(3)**	**Article IV and its Annex Exclusion of the Application of National Treatment Obligations to Services**	**Standing to Claim for Damages Arising from Treatment of Wind Mobile**
Blocking GTH's right to transfer Wind Mobile's set-aside spectrum licenses to an incumbent at the expiration of the Five-Year Rollout Period	Self-standing breach of: FET, FPS, UTI	X				X
Subjecting GTH to an unreasonable, arbitrary, non-transparent national security review of the Voting Control Application, without due process	Self-standing breach of: FET, FPS, NT	X	X		X (NT obligation only)	
Subjecting GTH's investment to a redundant CRTC Review	Composite breach of FET	X		X		
Failing to uphold basic conditions to alleviate barriers to market entry (particularly with respect to roaming and tower sharing)	Composite breach of FET, FPS	X		X		X

* **FET**: Obligation to accord Fair and Equitable Treatment under Article II(2)(a); **FPS**: Obligation to accord Full Protection and Security under Article II(2)(b); **UTI**: Obligation to Guarantee Unrestricted Transfer of Investments under Article IX(1); **NT**: Obligation to accord National Treatment under Articles II(3) and IV.

208. In response, GTH asserts that Canada's objections must be dismissed because the Tribunal has jurisdiction over all of GTH's claims, and the claims relating to the treatment of Wind Mobile are admissible.

209. Below, the Tribunal addresses the applicable legal standard and each of Canada's five objections. The Tribunal's decision on jurisdiction and admissibility is contained in Section VI.G.

A. APPLICABLE LEGAL STANDARD

(1) Canada's Position

210. Canada submits that the burden of establishing the Tribunal's jurisdiction over GTH's claims lies with GTH.[204] As stated by the tribunal in *Tulip v. Turkey*, "it is for Claimant to satisfy the burden of proof required at the jurisdictional phase," and this burden remains with the claimant even when a jurisdictional objection is raised by a respondent.[205] In this regard, Canada cites *National Gas v. Egypt*, in which the tribunal reasoned as follows:

> Although it is the Respondent which has here raised specific jurisdictional objections, it is not for the Respondent to disprove the Tribunal's jurisdiction. Under international law, as a matter of legal logic and the application of the principle traditionally expressed by the Latin maxim "*actori incumbit probatio*", it is for the Claimant to discharge the burden of proving all essential facts required to establish jurisdiction for its claims.[206]

211. Thus, according to Canada, only when a claimant has proven the facts necessary to establish jurisdiction does "the burden shift[] to the respondent to show why, despite the facts proved by the claimant, the tribunal does not have jurisdiction."[207]

[204] Jur. Memorial, ¶ III.A.

[205] Jur. Memorial, ¶ 20, *citing* **RL-038**, *Tulip Real Estate Investment and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Bifurcated Jurisdictional Issue, 5 March 2013, ¶ 48. *See also* **RL-039**, *Aaron C. Berkowitz, Brett E. Berkowitz and Trevor B. Berkowitz (formerly Spence International Investments and others) v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Corrected), 30 May 2017, ¶ 239 ("The burden is … on the Claimants to prove the facts necessary to establish the Tribunal's jurisdiction"); **RL-040**, *ICS Inspection and Control Services Limited (U.K.) v. The Argentine Republic* (UNCITRAL) Award on Jurisdiction, 10 February 2012, ¶ 280 ("The burden of proof for the issue of consent falls squarely on a given claimant who invokes it against a given respondent. Where a claimant fails to prove consent with sufficient certainty, jurisdiction will be declined").

[206] Jur. Memorial, ¶ 23, *citing* **RL-042**, *National Gas S.A.E. v. Arab Republic of Egypt*, ICSID Case No. ARB/11/7, Award, 3 April 2014, ¶ 118.

[207] Jur. Memorial, ¶ 24.

212. Further, in Canada's view, a State's consent to jurisdiction must be "clearly and unambiguously ascertained"; if there is any ambiguity, a tribunal should decline jurisdiction.[208]

213. Canada contends that, in this case, its consent to arbitration contained in Article XIII of the BIT is conditioned on a potential claimant satisfying certain requirements and procedures.[209] According to Canada, these conditions are fundamental bases of its consent. Canada highlights Article XIII(5) of the BIT, which states that "[e]ach Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration in accordance with the provisions of this Article."[210]

214. For Canada, it follows that GTH must prove that it has fulfilled all the requirements of Article XIII of the BIT in order to establish the Tribunal's jurisdiction.[211]

(2) GTH's Position

215. In its submissions on the legal standard applicable to Canada's preliminary objections, GTH does not challenge Canada's position regarding the burden of proof.[212] GTH focuses instead on the applicable rules of treaty interpretation, arguing that Canada's objections rest on a flawed interpretation of the BIT.[213]

216. GTH submits that the Tribunal must interpret the BIT's jurisdictional requirements in accordance with the Vienna Convention on the Law of Treaties (the "**VCLT**"), which provides the principles of customary law applicable to treaty interpretation.[214]

[208] Jur. Memorial, ¶¶ 25-26, citing **RL-040**, I*CS Inspection and Control Services Limited (U.K.) v. The Argentine Republic* (UNCITRAL) Award on Jurisdiction, 10 February 2012, ¶ 280; **RL-043**, *Fireman's Fund Insurance Company v. The United Mexican States*, ICSID Case No. ARB(AF)/02/01, Decision on the Preliminary Question, 17 July 2003, ¶ 64; **RL-044**, *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, I.C.J. Reports, 4 June 2008, ¶ 62.

[209] Jur. Memorial, ¶ 27.

[210] Jur. Memorial, ¶ 27, *quoting* **CL-001**, BIT (English Version), Article XIII(5) (Respondent's emphasis).

[211] Jur. Memorial, ¶ 28.

[212] GTH does not accept Canada's assertion that a State's consent to arbitration must be "unambiguously ascertained."

[213] Reply on Merits and Jur. Counter-Memorial, § III.A.

[214] Reply on Merits and Jur. Counter-Memorial, ¶ 96.

217. According to GTH, Canada's interpretation of the BIT is inconsistent with these rules in the following ways:

a. Canada fails to interpret the ordinary meaning of certain terms in accordance with Article 31 of the VCLT. In particular, Canada's interpretation "undermines the BIT's purpose to promote the free flow of investments between the Parties."[215]

b. Canada ignores the express terms of the BIT and instead improperly relies on supplementary means of interpretation, such as Canada's other treaties. This approach is contrary to Article 32 of the VCLT. [216]

c. Canada does not attempt to find the meaning of terms that best reconciles the multiple authentic texts of the BIT (the English, French and Arabic versions) and instead relies on interpretations that cannot be supported by all three versions.[217]

d. There are no special rules of interpretation for treaty provisions dealing with a State's consent to arbitration. Yet, in an attempt to heighten the standard of proof, Canada mischaracterizes the law and asserts that State's consent to a tribunal's jurisdiction must be "unambiguously ascertained."[218]

(3) The Tribunal's Analysis

218. The Tribunal notes that there is no disputed issue that it needs to decide on this matter at this stage. The Tribunal need not decide on issues such as the burden of proof and treaty interpretation in the abstract and will instead consider such matters when relevant in relation to each jurisdictional objection in the sections below.

B. WHETHER GTH IS A QUALIFYING INVESTOR UNDER ARTICLE I(G) OF THE BIT

219. Canada's first objection is that the Tribunal lacks jurisdiction *ratione personae* over all GTH's claims because GTH does not qualify as an "investor" under Article I(g) of the BIT.

[215] Reply on Merits and Jur. Counter-Memorial, ¶ 97.
[216] Reply on Merits and Jur. Counter-Memorial, ¶ 98.
[217] Reply on Merits and Jur. Counter-Memorial, ¶ 99.
[218] Reply on Merits and Jur. Counter-Memorial, ¶100, *quoting* Jur. Memorial, ¶ 26.

220. GTH argues that Canada's objection is based on a misreading of the BIT and must be dismissed.

(1) Relevant Provision of the BIT

221. Article I(g) of the BIT defines "investor" as follows:

> (g) "investor" means […] in the case of the Arab Republic of Egypt:
>
> any natural or juridical person, including the Government of the Arab Republic of Egypt who invests in the territory of Canada.
>
> […]
>
> the term "juridical person" means any entity established in accordance with, and recognized as a juridical person by the laws of the Arab Republic of Egypt: such as public institutions, corporations, foundations, private companies, firms, establishments and organizations, and having permanent residence in the territory of the Arab Republic of Egypt.[219]

222. The Parties have also referred to the Arabic and French versions of this provision, which together with the English are all equally authentic texts.

223. The definition of "*investisseur*" found in Article I(f) of the French BIT reads as follows:

> « investisseur désigne » […] Dans le cas de la République arabe d'Égypte : toute personne physique ou morale, y compris le gouvernement de la République arabe d'Égypte, qui fait un investissement sur le territoire canadien :
>
> […]
>
> par le terme « personne morale », il faut entendre toute entité constituée en conformité avec les lois de la République arabe d'Égypte et reconnue comme personne morale par ces lois: dont les institutions publiques, les personnes morales proprement dites (ou corporations) les fondations, les compagnies privées, les firmes, les établissements et les associations, ayant le droit de résidence permanente sur le territoire de la République arabe d'Égypte.[220]

224. The Arabic version of Article I(g) reads as follows:

> (ز) "المستثمر" يعني :
>
> [...]
>
> **في حالة جمهورية مصر العربية :**

[219] **CL-001**, BIT (English Version), Article I(g).

[220] **CL-002**, BIT (French Version), Article I(f).

أي شخص طبيعي أو إعتباري بما في ذلك حكومة جمهورية مصر العربية يستثمر في إقليم كندا :

[...]

٢- و يعني "شخص إعتباري" أي منشأة تكونت أو أنشئت وفقاً لقوانين جمهورية مصر العربية مثل االمنشآت العامة و الشركات العامة و الخاصة و المؤسسات و المنظمات و التي لها إقامة دائمة في إقليم جمهورية مصر العربية.[221]

(2) Canada's Position

225. Canada submits that GTH has failed to prove that it (a) was established in accordance with, and recognized as juridical person by the laws of Egypt and (b) had its "permanent residence" in Egypt at the time it filed the Request for Arbitration.[222] Thus, GTH is neither an "investor" under the BIT nor a "National of another Contracting State" within the meaning of Article 25(2)(b) of the ICSID Convention, and the Tribunal therefore lacks jurisdiction *ratione personae* over GTH's claims.[223]

a. Establishing the Tribunal's Jurisdiction *Ratione Personae* Under the ICSID Convention and the BIT

226. According to Canada, GTH must prove that it was an "investor" under Article I(g) of the BIT at the time it filed the Request for Arbitration on 28 May 2016 in order to establish the Tribunal's jurisdiction *ratione personae* under the ICSID Convention and the BIT.[224]

227. Canada highlights that its consent to arbitrate under Article 25 of the ICSID Convention extends only to "a national of another Contracting State," within the meaning of Article 25(2).[225] Canada asserts that Article 25(2)(b), which applies to juridical persons, "does not impose any particular test" for determining the nationality of a juridical person and instead "leaves broad

[221] **CL-003**, BIT (Arabic Version), Article I(g).

[222] Jur. Memorial, ¶¶ 31, 84 *et seq*.; Rejoinder ¶¶ 73 *et seq.*

[223] Jur. Memorial, ¶ 32; Merits Rejoinder and Jur. Reply, ¶ 27.

[224] Jur. Memorial, ¶¶ 33-38, *citing* **RL-045**, Zachary Douglas, *The International Law of Investment Claims* (Cambridge: Cambridge University Press, 2009) [Excerpt], p. 284 ("The tribunal's jurisdiction *ratione personae* extends… to an individual or legal entity… which has the nationality of another of the contracting state parties in accordance with the relevant provision in the investment treaty and the municipal law of that contracting state party and, where applicable, Article 25 of the ICSID Convention.").

[225] Jur. Memorial, ¶ 34.

discretion to the Contracting States to define … corporate nationality, under the relevant BIT."[226] Thus, in Canada's view, the definition of "national of another Contracting State" is determined by the nationality requirements contained in the applicable treaty. In the present case, those nationality requirements are set forth in Article I(g) of the BIT.

228. Similarly, Canada asserts that its consent to arbitrate under Article XIII(1) of the BIT extends only to a dispute with "an investor of the other Contracting Party."[227]

229. Therefore, Canada concludes, if GTH cannot prove that it qualified as an "investor" under Article I(g) of the BIT "at the time of the alleged breaches, and that it continued to qualify as such until the time that it commenced arbitral proceedings," the Tribunal lacks jurisdiction *ratione personae*.[228]

b. Interpretation of Article I(g) of the BIT

230. Canada's position is that under Article I(g) of the BIT, GTH must show that it had permanent residence in Egypt on the date it submitted the Request for Arbitration.[229] Canada advances a number of arguments to support this interpretation.

231. *First*, in Canada's view, the ordinary meaning of Article I(g) is that an entity must fulfil two requirements to qualify as a "juridical person" in Egypt: the first requirement is to be "established in accordance with, and recognized as a juridical person by the laws of the Arab

[226] Jur. Memorial, ¶ 35, *quoting* **RL-046**, Christoph Schreuer, *The ICSID Convention: A Commentary*, 2d ed. (Cambridge: Cambridge University Press, 2009) [Excerpt], p. 263.

[227] Jur. Memorial, ¶ 37, *quoting* **CL-001**, BIT (English Version), Article XIII(1) ("Any dispute between one Contracting Party and *an investor of the other Contracting Party*, relating to a claim by the investor that a measure taken or not taken by the former Contracting Party is in breach of this Agreement, and that the investor has incurred loss or damage by reason of, or arising out of, that breach, shall, to the extent possible, be settled amicably between them." (*Canada's emphasis*)). *See also* Article XIII(2) ("If a dispute has not been settled amicably through consultations within a period of six months from the date on which it was initiated, it may be submitted by *the investor* to arbitration in accordance with paragraph (4)." (*Canada's emphasis*)).

[228] Jur. Memorial, ¶ 38, *citing* **RL-024**, Zachary Douglas, *The International Law of Investment Claims* (Cambridge University Press, 2009), p. 290 ("The claimant must have had the relevant nationality at the time of the alleged breach of the obligation forming the basis of its claim and continuously thereafter until the time the arbitral proceedings are commenced."); **RL-025**, *Société Générale In Respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. v. Dominican Republic* (UNCITRAL), Award on Preliminary Objections to Jurisdiction, 19 September 2008, ¶ 109 (affirming that nationality must be established "at the time of the breach.").

[229] Jur. Memorial, ¶¶ 40-62; Merits Rejoinder and Jur. Reply, ¶¶ 41 *et seq.*

Republic of Egypt," and the second is "having permanent residence in the territory of the Arab Republic of Egypt."[230] Canada notes that these requirements are linked by the word "and," which indicates that the second requirement is separate from, and additional to, the first requirement.[231]

232. *Second*, Canada relies on the principle of *effet utile*, arguing that a contrary interpretation would render the words "and having permanent residence in the territory of the Arab Republic of Egypt" meaningless.[232] Canada cites *Tenaris v. Venezuela*, in which the tribunal applied the *effet utile* principle to give meaning to the terms "*sede*" (seat in Portuguese) and "*siège social*" in the applicable treaties. The tribunal stated that "if '*siège social*' and '*sede*' are to have any meaning, and not be entirely superfluous, each must connote something different to, or over and above, the purely formal matter of the address of a registered office or statutory seat."[233] Canada also cites *CEAC v. Montenegro* and *Mera v. Serbia*, in which the tribunals found that the phrase "having its seat …" introduced an additional requirement into the definition of investor.[234]

[230] Jur. Memorial, ¶ 43, *quoting* **CL-001**, BIT ("English Version"). In the Merits Rejoinder and Jur. Reply, Canada refers to "the *triple* requirements of being established in accordance with, and recognized as a juridical person by the laws of Egypt and having permanent residence in Egypt" (emphasis added), but this does not appear to change the basis of Canada's argument. Merits Rejoinder and Jur. Reply, ¶ 49,

[231] Jur. Memorial, ¶¶ 43-44, *citing* **RL-054**, *Oxford English Dictionary*, 3d ed., online (2008), *s.v.* "and".

[232] Jur. Memorial, ¶¶ 46-49, *citing* **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 ("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-056**, *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, ¶ 50 ("the principle of effectiveness (*effet utile*)… plays an important role in interpreting treaties."); **RL-057**, *Fisheries Jurisdiction Case (Spain v. Canada)*, Judgment of 4 December 1998, I.C.J. Reports 1998, p. 432, ¶ 52 ("the principle [of effectiveness] has an important role in the law of treaties and in the jurisprudence [of the ICJ]").

[233] Jur. Memorial, ¶¶ 47-48, *citing* **RL-058**, *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/26, Award, 29 January 2016, ¶¶ 150-151. The definition of investor under the Venezuela-Luxembourg BIT included "any legal person constituted in accordance with the laws of the Kingdom of Belgium, the Grand Duchy of Luxembourg or the Republic of Venezuela, and having its 'siège social' in the territory of the Kingdom of Belgium, the Grand Duchy of Luxembourg or the Republic of Venezuela respectively…". The definition of "investor" under the Venezuela-Portugal BIT covered "[l]egal persons, including commercial companies and other companies or associations, that have their seat [sede] in one of the Contracting Parties and are constituted pursuant to and function in accordance with the Laws of that Contracting Party." *Id.*, ¶ 115.

[234] Merits Rejoinder and Jur. Reply, ¶ 48, *citing* **RL-262**, *CEAC Holdings Limited v. Montenegro*, ICSID Case No. ARB/14/8, Award, 26 July 2016, ¶ 201 (dismissing a claim because the claimant had failed to establish that it had its seat in that country, where the relevant treaty defined "investor" as including "a legal entity incorporated, constituted or otherwise duly organized in accordance with the laws and regulations of one Contracting Party, <u>having its seat</u> in the territory of that Contracting Party and making investments in the territory of the other Contracting Party" (*Canada's emphasis*)); **RL-266**, *Mera Investment Fund Limited v. Republic of Serbia*, ICSID Case No. ARB/17/2,

233. *Third*, Canada asserts that its interpretation is supported by the context of the definition of "investor" in the BIT, which includes a differently worded definitions for Canadian and Egyptian investors.[235] The definition of a Canadian investor (which covers "any enterprise incorporated or duly constituted in accordance with applicable laws of Canada, who makes the investment in the territory of the Arab Republic of Egypt") requires only incorporation and not permanent residency. In Canada's view, if the Contracting Parties had wanted both Canadian and Egyptian investors to be covered by an incorporation test only, they would not have drafted asymmetrical definitions of "investor" and included the permanent residency requirement in the definition of an Egyptian investor.[236]

234. Canada rejects GTH's argument that Canada's approach would undermine the reciprocal nature of investment protection under the BIT.[237] For Canada, "an expectation that a BIT applies in exactly the same way, to the same types of entities in both jurisdictions would be unrealistic," especially because the relevant rules of corporate law differ among States.[238] Canada adds that asymmetrical definitions of "investor" in investment treaties are not uncommon.[239] Indeed, the scope of *natural* persons who qualify as investors under the BIT also differs between Canada and Egypt.[240]

Decision on Jurisdiction, 30 November 2018, ¶ 62 (interpreting the same treaty as in *CEAC* and finding that "for the Claimant to qualify as an investor, it must be a legal entity (i) incorporated, constituted or otherwise duly organized according to the laws of the Republic of Cyprus, (ii) having its seat in the territory of the Republic of Cyprus, and (iii) making investments in the territory of Serbia.").

[235] Jur. Memorial, ¶¶ 50-53.

[236] Jur. Memorial, ¶ 52; Merits Rejoinder and Jur. Reply, ¶ 59.

[237] Merits Rejoinder and Jur. Reply, ¶¶ 60-63, *citing* Merits Reply and Jur. Counter-Memorial, ¶ 117.

[238] Merits Rejoinder and Jur. Reply, ¶ 61.

[239] Merits Rejoinder and Jur. Reply, ¶ 63, *citing* **RL-270**, Agreement Between the Swiss Confederation and the Republic of Paraguay on the Promotion and Reciprocal Protection of Investments (1992), Article 1(1)(ii)(b)(c) (definition of "investor"). *See also* **RL-271**, Agreement Between the Government of Jamaica and the Government of the Swiss Confederation for the Reciprocal Promotion and Protection of Investments (1991), Article 1(b) (definition of "companies"); **RL-272**, Agreement Between the Government of the Kingdom of Saudi Arabia And The Government of Malaysia Concerning the Promotion and Reciprocal Protection of Investments (2001), Article 1(3) (definition of "investor"); **RL-273**, Agreement between The Government of the People's Republic of Bulgaria and The Government of the Republic of Cyprus on Mutual Encouragement and Protection of Investments (1988), Article 1(3) (definition of "investor").

[240] Merits Rejoinder and Jur. Reply, ¶ 62.

235. *Fourth*, Canada argues that the equally authentic Arabic version of the BIT supports its interpretation of Article I(g).[241] The Arabic version is similar to the English version, except that it includes the terms "which have" (in Arabic) instead of the present participle "having." Thus, according to Canada, the clause referring to permanent residency is introduced with the words "and which have," indicating a separate and additional requirement.[242]

236. *Fifth*, Canada denies that the equally authentic French text of the BIT undermines its interpretation.[243] Canada acknowledges that the French text is "slightly different" from the English and Arabic texts, in that the final clause of the definition of "*personne morale*" ("juridical person") is "*ayant le droit de résidence permanente sur le territoire de la République arabe d'Égypte*" ("having the right to permanent residence in the Arab Republic of Egypt"). Thus, the word "and" does not appear as in the English and Arabic texts, and the French text refers to "the right to permanent residence" instead of "permanent residence."[244]

237. In Canada's view, any difference in the meaning among the three authentic texts is removed by the application of Article 31 of the VCLT.[245] In particular, Canada argues that the inclusion of the phrase "*ayant le droit de résidence permanente*" in the French text, when read in context, indicates that the Contracting Parties intended for only a subset of entities that meet the first requirement to fall within the definition of "*investisseur*."[246]

238. *Sixth*, Canada argues that the principle of *effet utile* requires that the words "*ayant le droit de résidence permanente*" be interpreted as adding something to the first part of the definition. According to Canada:

> Egyptian law does not recognize a concept of permanent residence for either natural or juridical persons, meaning there is no *right* of permanent residence for legal entities under Egyptian Law. In order for these terms to be given meaning, and be read consistently with the English and Arabic texts, the reference to having a *right* of permanent residence in the

[241] Jur. Memorial, ¶¶ 54-56; Merits Rejoinder and Jur. Reply, ¶¶ 50-52.
[242] Jur. Memorial, ¶ 56; Merits Rejoinder and Jur. Reply, ¶ 52.
[243] Jur. Memorial, ¶¶ 57-62; Merits Rejoinder and Jur. Reply, ¶¶ 53-58.
[244] Jur. Memorial, ¶ 58.
[245] Jur. Memorial, ¶ 60.
[246] Jur. Memorial, ¶ 61.

> French text must be understood as requiring that the entity actually *have* permanent residence in Egypt.[247]

239. *Seventh*, Canada argues that its interpretation is the only way to reconcile the three authentic texts of the BIT.[248] In this regard, Canada points out that if the Tribunal does not find that an interpretation of Article I(g) of the BIT under Articles 31 and 32 of the VCLT removes the difference in meaning between the French version and the English and Arabic versions, the Tribunal must adopt the meaning that best reconciles the three versions, in light of the object and purpose of the Treaty.[249] According to Canada, because two of the three authentic versions of the BIT require permanent residence in Egypt, the phrase "*ayant le droit de résidence permanente*" should be interpreted as requiring the effective exercise of that right.[250]

240. *Eighth*, Canada denies that this interpretation would "stifle the object and purpose of the BIT" by restricting its scope, as GTH alleges.[251] Canada urges the Tribunal to avoid overly broad interpretations of the BIT on the basis of GTH's "myopic view of a treaty's object and purpose that would systematically favour investors to the detriment of host States every time interpretive issues need to be resolved."[252]

[247] Jur. Memorial, ¶ 62. Canada submits that "both experts on Egyptian law agree that the concept of 'permanent residence' is not recognized in Egyptian law. It is therefore not possible to argue that Egyptian law provides a right to something that it does not recognize and does not define." Merits Rejoinder and Jur. Reply, ¶ 68.

[248] Merits Rejoinder and Jur. Reply, ¶¶ 67-72.

[249] Merits Rejoinder and Jur. Reply, ¶ 70, *citing* **CL-018**, VCLT, Article 33(4).

[250] Merits Rejoinder and Jur. Reply, ¶¶ 69-70.

[251] Merits Rejoinder and Jur. Reply, ¶ 71, *quoting* Merits Reply and Jur. Counter-Memorial, ¶ 128.

[252] Merits Rejoinder and Jur. Reply, ¶ 71, *citing* **CL-038**, *Saluka Investments BV (The Netherlands) v. The Czech Republic* (UNCITRAL) Partial Award, 17 March 2006, ¶ 300 ("The protection of foreign investments is not the sole aim of the Treaty, but rather a necessary element alongside the overall aim of encouraging foreign investment and extending and intensifying the parties' economic relations. That in turn calls for a balanced approach to the interpretation of the Treaty's substantive provisions for the protection of investments, since an interpretation which exaggerates the protection to be accorded to foreign investments may serve to dissuade host States from admitting foreign investments and so undermine the overall aim of extending and intensifying the parties' mutual economic relations.")

241. *Finally*, Canada contends GTH has not clearly explained the meaning it ascribes to the words "and having permanent residence in the territory of the Arab Republic of Egypt," and that, in any event, none of the interpretations GTH advances is viable.[253]

242. In particular, Canada does not accept that the phrase refers to "another example of a type of entity that qualifies as an Egyptian juridical person."[254] Canada agrees with GTH that the words "such as" followed by a colon introduce a non-exhaustive list of entities that satisfy the requirement of being established in accordance with, and recognized as juridical persons by Egyptian law.[255] However, Canada argues that the list stops at the word "organizations" and is followed by a participle clause (beginning with "…, and having") which introduces an additional condition.[256]

243. Similarly, Canada does not agree with GTH's assertion, in relation to the French text, that the phrase "*ayant le droit de résidence permanent*" is intended to "describe[] a common characteristic amongst the preceding list of example entities."[257] Canada highlights that this phrase is set off with a comma and that "*ayant*" is not preceded by the word "or."[258] In Canada's view, this means that the verb "*ayant*" is attached to the subject "*toute entité*" rather than to any of the example entities listed, and that the final clause must contain a separate requirement.[259] Furthermore, Canada argues that GTH's interpretation is not supported by its own expert on Egyptian law, Dr. Sarie-Eldin, [redacted]

[253] Merits Rejoinder and Jur. Reply, ¶ 43, *citing* Merits Reply and Jur. Counter-Memorial, ¶¶ 108, 112 (referring to the phrase as "yet another example of a type of entity that qualifies as an Egyptian juridical person") and ¶ 111 (stating that the phrase in the French version of the BIT "describes a common characteristic amongst the preceding list of example entities.").

[254] Merits Rejoinder and Jur. Reply, ¶¶ 43-49.

[255] Jur. Memorial, ¶ 44.

[256] Merits Rejoinder and Jur. Reply, ¶¶ 45-48. 1. Canada notes that, according to the *Chicago Manual of Style*, "[i]tems in a list should consist of parallel elements." **CL-134**, *The Chicago Manual of Style* (16th ed.) (The University of Chicago Press, 2010). According to Canada, the illustrative list in Article I(g) includes seven parallel nouns, with the last two items in the list separated by "and," indicating the end of the list. On the other hand, the final clause is a participle clause, which is not an equivalent grammatical unit. Merits Rejoinder and Jur. Reply, ¶ 47.

[257] Merits Rejoinder and Jur. Reply, ¶¶ 54-58.

[258] Merits Rejoinder and Jur. Reply, ¶¶ 55-56, *citing* **RL-267**, Maurice Grevisse and André Goosse, *Le Bon Usage* (16th ed.) (Louvain-la-Neuve: DeBoeck Supérieur, 2016) (with certified translation), ¶ 126 (b).

[259] Merits Rejoinder and Jur. Reply, ¶¶ 55-57

[redacted][60] Thus, he evidently does not consider permanent residence to be an inherent characteristic of the entities listed in Article I(g).

c. The Meaning of Permanent Residence

244. Canada submits that the concept of "permanent residence" in Article I(g) of the BIT refers to the jurisdiction with which the entity has the strongest attachment and where it currently resides and intends to continue residing.[261]

245. In advancing its interpretation, Canada urges the Tribunal to interpret "permanent residence" as an autonomous treaty concept in accordance with the VCLT.[262] In Canada's view, this is necessary because Egyptian law does not recognize the concept of "permanent residence," especially in the context of juridical persons.[263] According to Canada, approaching "permanent residence" as an autonomous treaty standard would be consistent with a number of arbitral decisions addressing criteria such as "permanent residence" or "*siège social*."[264] For example, in *Binder v. Czech Republic*, the tribunal decided that "permanent residence should be considered to be a treaty concept and should as such be given an autonomous meaning and be interpreted according to the principles of [the VCLT]."[265]

246. Therefore, Canada considers the ordinary meaning of the terms "permanent" and "residence," with reference to the *Oxford Dictionary*,[266] and concludes that:

> the ordinary meaning of "permanent residence" in a jurisdiction indicates that a juridical person must have strong and enduring ties to that jurisdiction in terms of its business activities, management and operations, and an intention to maintain these ties. Moreover,

[260] Merits Rejoinder and Jur. Reply, ¶ 54, *citing* **CER-Sarie-Eldin**, ¶¶ 23-28.

[261] Jur. Memorial, ¶¶ 63 *et seq.*; Merits Rejoinder and Jur. Reply, ¶¶ 74-80.

[262] Jur. Memorial, ¶¶ 65-74.

[263] Jur. Memorial, ¶ 66; **RER-Zulficar**, ¶¶ 13, 27.

[264] Jur. Memorial, ¶¶ 69-73, *citing* **RL-074**, *Binder v. Czech Republic* (UNCITRAL) Award on Jurisdiction, 6 June 2007; **RL-058**, *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, ¶ 165; **RL-075**, *Orascom TMT Investments S.à.r.l. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Award, 31 May 2017, ¶ 278.

[265] **RL-074**, *Binder v. Czech Republic* (UNCITRAL) Award on Jurisdiction, 6 June 2007, ¶ 74.

[266] Jur. Memorial, ¶¶ 76-77, *quoting* **RL-076**, *Oxford English Dictionary*, 8th ed., *s.v.* "permanent" ("Continuing or designed to continue or last indefinitely without change; abiding, enduring, lasting; persistent. Opposed to temporary.") and "residence" ("The fact of living or staying regularly at or in a specified place for the performance of official duties, for work, or to comply with regulations."). *See* Merits Rejoinder and Jur. Reply, ¶ 75.

> these ties must be stronger than the entity's ties to any other jurisdiction at the time when the permanence of residence is assessed.[267]

247. According to Canada, this interpretation is supported by arbitral decisions interpreting "permanent residence" requirements of investment treaties in the context of natural persons.[268] In *Binder v. Czech Republic*, the tribunal found that an investor's permanent residence is in the State to which "the investor has the strongest attachment."[269] In *Uzan v. Turkey*, the tribunal found that for a natural person to be "permanently residing" in a State, they must be legally permitted to reside in that jurisdiction *and* must permanently reside there as a matter of fact.[270]

248. Canada also relies on Professor Abdel Wahab's opinion that maintaining a principal place of management in Egypt is "an indispensable prerequisite and a condition *sine qua non* of a permanent residence."[271] Canada disagrees with the opinion of Dr. Sarie-Eldin, who attempts to equate "permanent residence" with "registered office."[272] In Canada's view, if that had been Egypt's intention, it would have included "registered office" as a requirement in the BIT, as it did in its investment treaty with Finland.[273]

249. Finally, Canada offers an alternative argument in case the Tribunal disagrees that "permanent residence" is an autonomous treaty standard or seeks guidance from Egyptian law. In that event, Canada "agrees with GTH that the concept of domicile as understood in Egyptian law

[267] Jur. Memorial, ¶ 79; *see* Merits Rejoinder and Jur. Reply, ¶ 75.

[268] Jur. Memorial, ¶¶ 80-83; Merits Rejoinder and Jur. Reply, ¶¶ 76-79. While Canada acknowledges that "tribunals should be careful about applying nationality requirements to juridical persons that apply to natural persons," it considers these decisions instructive, and argues that the tribunals' analyses "should be applied *mutatis mutandis* to the requirement set out in Article I(g)(ii) of the [BIT]." Merits Rejoinder and Jur. Reply, ¶ 76. Canada notes that this Tribunal will be the first to interpret and apply the concept of "permanent residence" in relation to a juridical person. Jur. Memorial, ¶ 63.

[269] Jur. Memorial, ¶ 80, *quoting* **RL-074**, *Binder v. Czech Republic* (UNCITRAL) Award on Jurisdiction, 6 June 2007, ¶¶ 73-75.

[270] Jur. Memorial, ¶¶ 81-82, *citing* **RL-078**, *Cem Cenzig Uzan v. Republic of Turkey* (SCC Case No. V 2014/023) Award on Respondent's Bifurcated Preliminary Objection, 20 April 2016, ¶ 156.

[271] **RER-Zulficar-2**, ¶ 11.

[272] Merits Rejoinder and Jur. Reply, ¶ 84, *citing* **CER-Sarie-Eldin**, ¶ 29.

[273] **RL-285**, Egypt-Finland BIT, Article 1(3)(b) (defining "investor" to include "any legal entity such as a company, corporation, firm, partnership, business association, institution or organisation, incorporated or constituted in accordance with the laws and regulations of the Contracting Party and having its registered office within the jurisdiction of that Contracting Party…").

is the connecting factor in Egyptian law that more closely resembles 'permanent residence' both from a definitional and functional perspective."[274]

[redacted]

[274] Merits Rejoinder and Jur. Reply, ¶ 94; **RER-Zulficar**, ¶ 40; **RER-Zulficar-2**, ¶ 41.
[275] Jur. Memorial, ¶¶ 84-99; Merits Rejoinder and Jur. Reply, ¶¶ 81-93.
[276] Jur. Memorial, ¶¶ 3, 15, 85-99.
[277] Jur. Memorial, ¶¶ 100-105.
[278] Jur. Memorial, ¶ 84; Merits Rejoinder and Jur. Reply, ¶¶ 81-84; **RER-Zulficar-2**, ¶ V.
[279] Jur. Memorial, ¶ 105; Merits Rejoinder and Jur. Reply, ¶¶ 81-82; **RER-Zulficar**, ¶¶ 57, 73-79.
[280] Merits Rejoinder and Jur. Reply, ¶ 81.

[redacted]

[redacted]

[redacted]

e. Whether GTH was "established in accordance with, and recognized as a juridical person by the laws of the Arab Republic of Egypt"

255. Canada asserts that the Parties agree that, to qualify as an "investor" under Article I(g) of the BIT, GTH must show that it was "established in accordance with, and recognized as a juridical

[redacted]

person by the laws of the Arab Republic of Egypt."[299] In its Merits Rejoinder and Jur. Reply, Canada set out a new allegation that GTH has not satisfied this requirement.[300] Canada states that it "advances this argument for the first time in its Rejoinder because [it] is based on documents produced in response to Canada's document requests."[301]

256. Canada's position is that GTH cannot rely on its registration in the Egyptian Commercial Register to establish that it is an "investor" under the BIT because GTH does not, as a matter of fact, meet the requirements applicable to a joint stock company under Egyptian law.[302]

257. In this regard, Professor Abdel Wahab cites Article 1 of the Companies Law of Egypt, which provides that "[e]very company incorporated in the Arab Republic of Egypt shall locate its principal place in Egypt."[303] Thus, according to Professor Abdel Wahab, "having the *actual* principal place of management in Egypt is a prerequisite to validly incorporate a JSC" and is also "necessary to maintain the JSC's good standing."[304]

258. In Professor Abdel Wahab's opinion, the principal place of management of a juridical person in Egypt "is the physical place where its actual board meetings are held."[305] As noted above, Canada alleges that GTH held no board meetings in Egypt after February 2015.[306] While GTH alleges that it still holds general assembly meetings in Egypt, Professor Abdel Wahab considers this irrelevant to determining the principal place of management because "the general assembly is simply a meeting of shareholders and not the directors, who are entrusted with managing and operating the company."[307]

[299] Merits Rejoinder and Jur. Reply, ¶ 32, *citing* Merits Reply and Jur. Counter-Memorial, ¶ 103.

[300] Merits Rejoinder and Jur. Reply, ¶¶ 32-39.

[301] Merits Rejoinder and Jur. Reply, n. 16.

[302] Merits Rejoinder and Jur. Reply, ¶¶ 33-38.

[303] **RER-Zulficar**, ¶¶ 20, 58-61, 74-80; **RER-Zulficar-2**, ¶¶ 9-11, 21, 30-31; **R-406**, Government of Canada, Translation Bureau, Certified Translation (Arabic-English) of **MSW-005**, Law No. 159 of 1981, issuing the Egyptian Companies Law (1981).

[304] **RER-Zulficar**, ¶ 58.

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

[306] *See* ¶ 252 above. **RER-Zulficar-2**, n. 7.

[307] **RER-Zulficar-2**, ¶ 56.

259. [redacted].[308] According to Canada, in numerous cases, tribunals have looked beyond official government documents to satisfy themselves of the underlying facts pertaining to jurisdiction.[309] Canada urges the Tribunal to do the same in this case and "not give any legal effect to the information contained on the relevant extracts of the Commercial Register."[310]

(3) GTH's Position

260. GTH's position is that the Tribunal has jurisdiction *ratione personae* over this dispute pursuant to Article 25 of the ICSID Convention and Article XIII of the BIT because on the date of the Request for Arbitration, GTH was a "juridical person" that had made an investment in Canada, within the meaning of Article I(g) of the BIT.[311]

261. GTH submits that (a) Article I(g) of the BIT does *not* require an entity to have a permanent residence in Egypt to qualify as a "juridical person"; (b) Canada's interpretation of "permanent residence" has no basis; [redacted]; and (d) Canada's argument that GTH is not recognized as a juridical person by Egyptian law is untimely and unfounded.

[308] [redacted]

[309] Merits Rejoinder and Jur. Reply, ¶ 32, *citing* **RL-262**, *CEAC Holdings Limited v. Montenegro*, ICSID Case No. ARB/14/8, Award, 26 July 2016, ¶ 155; **RL-263**, *Waguih Elie George Siag & Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Decision on Jurisdiction, 11 April 2007, ¶¶ 151-153, 193; **CL-121**, *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Award, 7 July 2004, ¶ 63.

[310] Merits Rejoinder and Jur. Reply, ¶ 39.

[311] Merits Reply and Jur. Counter-Memorial, ¶ 101; Jur. Rejoinder, ¶ 5.

a. Interpretation of Article I(g) of the BIT

262. GTH argues that there is no "permanent residence" requirement in the BIT, as asserted by Canada.[312] GTH considers that this is clear from the ordinary meaning of Article I(g) of the BIT in all three authentic language versions.[313]

263. In GTH's view, Article I(g) of the BIT contains a broad definition of an Egyptian investor this is a "juridical person" ("**any entity** established in accordance with, and recognized as a juridical person by the laws of the Arab Republic of Egypt"), followed by the words "such as" and a colon, which introduces a non-exhaustive list of entities that could qualify as a "juridical person" separated by commas.[314] GTH notes that the phrase "and having permanent residence in the territory of the Arab Republic of Egypt" follows the colon and is separated from the preceding examples by a comma.[315] Therefore, GTH argues that this phrase "is yet another example of a type of entity that qualifies as an Egyptian juridical person."[316]

264. In this regard, GTH rejects Canada's argument that the sentence resumes after the non-exhaustive list of examples to introduce an additional condition applicable to "any entity."[317] According to GTH, the "dispositive grammatical rule on this issue is that a sentence does not resume following a colon."[318]

[312] Merits Reply and Jur. Counter-Memorial, ¶¶ 105-128; Jur. Rejoinder, ¶¶ 14-24.

[313] GTH considers that resort to supplementary means of interpretation is unnecessary because the ordinary meaning of the BIT is clear. However, GTH argues that Egypt's model BIT confirms its interpretation. Egypt's model BIT provides a definition for an Egyptian "juridical person" that replaces the commas separating each element of the list in Article I(g) of the BIT with semi-colons. In GTH's view, this makes it even clearer that Egypt intended "having permanent residence" to serve as another example of a qualifying entity, rather than a separate requirement. Merits Reply and Jur. Counter-Memorial, ¶¶ 121-125, *citing* **CL-090**, Egypt Model BIT *in* UNCTAD, *International Investment Instruments: A Compendium* (Vol. V. 2000), Doc No. UNCTAD/DITE/2(Vol.V) ("'Juridical person' means, with respect to either Contracting Party, any entity established in accordance with, and recognized as a juridical person by its laws: such as public institutions; corporations; foundations; private companies; firms; establishments and other organisations; and having permanent residence in the territory of one of the Contracting Party").

[314] Merits Reply and Jur. Counter-Memorial, ¶ 107; **CL-001**, BIT (English Version), Article I(g) (*GTH's emphasis*); **CL-134**, *The Chicago Manual of Style* (16th ed. 2010), ¶ 6.59 ("A colon introduces an element or a series of elements illustrating or amplifying what has preceded the colon.").

[315] Merits Reply and Jur. Counter-Memorial, ¶ 107.

[316] Merits Reply and Jur. Counter-Memorial, ¶ 108.

[317] Jur. Rejoinder, ¶ 17, *citing* Merits Rejoinder and Jur. Reply, ¶ 44.

[318] Jur. Rejoinder, ¶ 18; **CL-208**, *The Chicago Manual of Style* (17th ed. 2017), ¶ 6.61 ("use a colon sparingly, however, and only to emphasize that the second clause illustrates or amplifies the first"). GTH disagrees with Canada

265. Turning to the French version of the BIT, GTH submits that there are two important features of the text which confirm that "permanent residence" is not an independent requirement: (a) after the list of examples, the text refers to entities "having the right to permanent residence" in Egypt; and (b) that phrase is not preceded by the word "and."[319] Thus, in GTH's view, that "phrase describes a common characteristic amongst the preceding list of example entities," and any entity with the right to permanent residence in Egypt may qualify as a "juridical person."[320] GTH asserts that this interpretation is consistent with Article 53 of the Egyptian Civil code, which states that a juridical person is "entitled to … [a]n independent domicile."[321]

266. With respect to the Arabic version of the BIT, GTH notes that text is similar to the English version and considers that the punctuation should be inferred from the English version.[322] According to GTH, in the Arabic version, the phrase "and which have permanent residence" refers back to the other example entities on the list.[323] For GTH, this is confirmed by the use of the plural term "have," because if the phrase referred to "any entity," as Canada submits, it would have used the singular "has."[324]

267. GTH recognizes that there are differences in the language of the three authentic versions of the BIT and asserts that the Tribunal must adopt the interpretation that best reconciles the three texts.[325] In this regard, GTH states:

that the items in a list must be "equivalent grammatical units," arguing that the authority cited by Canada does not state such a requirement. Jur. Rejoinder, ¶ 19; **RL-265**, *The Chicago Manual of Style* (17th ed. 2017), ¶¶ 6.127-6.129.

[319] Merits Reply and Jur. Counter-Memorial, ¶ 111.

[320] Merits Reply and Jur. Counter-Memorial, ¶ 111; Jur. Rejoinder, ¶ 20(c). *Cf.* Merits Reply and Jur. Counter-Memorial, ¶ 112 ("The French version of the BIT therefore shows that having 'permanent residence' is not an additional requirement to qualify as an Egyptian 'juridical person' but is merely another example of a qualifying entity.") and ¶ 114 ("the words that follow the colon and 'including' / 'such as' are unequivocally meant in all three versions to provide a non-exhaustive, non-cumulative list of example entities that can qualify as Egyptian 'juridical persons.'").

[321] Merits Reply and Jur. Counter-Memorial, ¶ 111; **HSE-002**, Egyptian Civil Code, Law No. 131 of 1948, Articles 52 and 53; **CER-Sarie-Eldin**, ¶¶ 17, 19; **RER-Zulficar**, ¶ 48.

[322] Merits Reply and Jur. Counter-Memorial, ¶ 113; Jur. Rejoinder, ¶ 17 and n. 38.

[323] Jur. Rejoinder, ¶ 20(b).

[324] Jur. Rejoinder, ¶ 20(b). GTH cites Canada's translation of the Arabic BIT for this point. **R-001**, BIT (Canada's Arabic-English translation), Article I(g).

[325] Jur. Rejoinder, ¶ 21, *citing* **CL-018**, VCLT, Article 33(4); *see* Merits Reply and Jur. Counter-Memorial, ¶ 126.

> The consistent element across the three equally authentic versions of the BIT is that while entities having permanent residence form part of or describes the list of entities that qualify as Egyptian juridical persons under the BIT, permanent residence is not an independent requirement to qualify as an Egyptian juridical person investor.[326]

268. GTH contends that Canada's alternative interpretation of Article I(g) of the BIT, which adds a separate requirement that an entity must have a permanent residence in Egypt, is contrary to the ordinary meaning of the three authentic texts of the BIT.[327]

269. GTH denies that the asymmetrical definitions of Egyptian and Canadian investors somehow support Canada's interpretation.[328] According to GTH, Canada's argument undermines the reciprocal promotion of investment and the equal and non-discriminatory treatment of investors.[329] Further, GTH asserts that the definition of a Canadian "enterprise" investor is "consistent in both structure and substance" with the definition of an Egyptian "juridical person."[330] It includes "any enterprise incorporated or duly constituted in accordance with [Canadian law]" and then lists examples.[331]

270. Moreover, GTH argues that Canada fails to give meaning to the terms "the right to" in the French version of the BIT, contrary to the principle of *effet utile*.[332] GTH cites Canada's acknowledgement that its interpretation "accords with **two out of the three versions of the Canada-Egypt FIPA**."[333] For GTH, this is insufficient to meet the mandate of Article 33(4) of the VCLT.[334] GTH considers Canada's interpretation would also "stifle the object and purpose of the BIT."[335]

[326] Jur. Rejoinder, ¶ 22.

[327] Merits Reply and Jur. Counter-Memorial, ¶ 120; Jur. Rejoinder, ¶¶ 17-20.

[328] Merits Reply and Jur. Counter-Memorial, ¶¶ 117-119.

[329] Merits Reply and Jur. Counter-Memorial, ¶ 117, *citing* **CL-001**, BIT (English Version), Preamble.

[330] Merits Reply and Jur. Counter-Memorial, ¶¶ 118-119.

[331] Merits Reply and Jur. Counter-Memorial, ¶¶ 118-119.

[332] Merits Reply and Jur. Counter-Memorial, ¶¶ 116, 127.

[333] Jur. Rejoinder, ¶ 23, *quoting* Merits Rejoinder and Jur. Reply, ¶ 70 (*GTH's emphasis*).

[334] Jur. Rejoinder, ¶ 24.

[335] Jur. Rejoinder, ¶ 128, *citing* **CL-047**, *BG Group Plc. v. The Republic of Argentina* (UNCITRAL) Final Award, 24 December 2007, ¶ 134 ("Adoption of the Spanish term of the BIT as advocated by Argentina would considerably restrict the coverage of the treaty, discourage 'greater investment' and defeat the shared aspiration expressed by Argentina and the U.K. in executing this instrument in 1993.").

b. Meaning of Permanent Residence

271. GTH reviews the dictionary definitions of the terms "permanent" and "residence" and concludes that the ordinary meaning of "permanent residence" is a place where an entity resides for a continuing period.[336]

272. GTH sees no basis for Canada's argument that "permanent residence" indicates a single place where an entity has the "strongest attachment."[337] GTH's submissions on this point include the following arguments:

a. Canada's interpretation is inconsistent with the ordinary meaning of "permanent residence."[338]

b. Canada's interpretation would require multinational companies to have a single permanent residence, which is illogical in light of the reality of corporate personality.[339]

c. Tribunals have recognized that even natural persons may have more than one permanent residence.[340]

d. Canada attempts to impose something like a dominant nationality test, which is not recognized as a general principle of international law.[341] Canada's own authorities

[336] Merits Reply and Jur. Counter-Memorial, ¶ 131; **RL-076**, *Oxford English Dictionary Online*, Definition of "*permanent*, adj. and n." ("Continuing or designed to continue or last indefinitely without change; abiding, enduring, lasting; persistent"); **RL-077**, *Oxford English Dictionary Online*, Definition of "*residence*, n.1" ("The fact of living or staying regularly at or in a specified place for the performance of official duties, for work, or to comply with regulations.")

[337] Merits Reply and Jur. Counter-Memorial, ¶¶ 132-140.

[338] Merits Reply and Jur. Counter-Memorial, ¶ 134; Jur. Rejoinder, ¶ 27.

[339] Merits Reply and Jur. Counter-Memorial, ¶ 135.

[340] Merits Reply and Jur. Counter-Memorial, n. 262, *citing* **RL-074**, *Binder v. The Czech Republic* (UNCITRAL) Award on Jurisdiction, 6 June 2007, ¶ 73 ("the possibility of two permanent residences may not be entirely excluded according to the wording of the BIT").

[341] Merits Reply and Jur. Counter-Memorial, ¶ 136, *citing* **CL-135**, Vaughan Lowe, "Injuries to Corporations," *in The Law of International Responsibility* (2010), p. 1009 ("There is … still little sign of any 'genuine connection' test establishing itself in international practice concerning the protection of corporations."); **CL-128**, Christoph H. Schreuer, Loretta Malintoppi, August Reinisch & Anthony Sinclair, *The ICSID Convention: A Commentary* (2d ed. 2009), p. 292 ("ICSID practice repeatedly confirms that in the absence of a definition of nationality in a treaty or law imposing further, more substantial connections than mere incorporation or seat, it is both permissible and to be expected that investors will structure their investments in order to avail themselves of treaty protection and, thus, the right to submit disputes to ICSID.").

confirm that tribunals will not apply such a restrictive test without express treaty language.[342]

e. Canada draws its interpretation from two cases that address the question of whether a *natural* person could advance a claim against the State of their nationality, which is irrelevant in the present case.[343] In any event, these decisions do not help Canada. In *Binder v. Czech Republic*, the tribunal's decision was based on the parties' agreement that the claimant could be an investor of only one of the State parties to the relevant treaty, and the tribunal refused to exclude "the possibility of two permanent residences."[344] In *Uzan v. Turkey*, the tribunal's decision was based on specific treaty language, which is not found in the BIT.[345]

273. GTH considers that although Egyptian law is of limited relevance in interpreting the BIT, Egyptian law could provide the Tribunal with insight into Egypt's intent in drafting Article I(g).[346] In this regard, the Parties' experts on Egyptian law agree that Egyptian law does not recognize the concept of "permanent residence" for juridical persons.[347] However, according to GTH, the concept of "domicile" under Egyptian law is analogous to the concept of "permanent residence"

[342] Merits Reply and Jur. Counter-Memorial, ¶ 136, *citing* **CL-075**, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, ¶ 252 ("where the test for nationality is 'incorporation' as opposed to control or a 'genuine connection', there is no need for the tribunal to enquire further unless some form of abuse has occurred."); **RL-005**, *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility, 18 April 2008, ¶ 93 ("there is simply no room for an argument that a supposed rule of 'real and effective nationality' should override either the permissive terms of Article 25 of the ICSID Convention or the prescriptive definitions incorporated in the BIT"); **RL-004**, *Alpha Projecktholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award, 8 November 2010, ¶¶ 333-145; **RL-047**, *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013, ¶¶ 110-139 (rejecting the Kazakhstan's request to impose a "real and effective nationality" requirement).

[343] Merits Reply and Jur. Counter-Memorial, ¶¶ 137-139; Jur. Rejoinder, ¶¶ 28-29.

[344] Jur. Rejoinder, ¶ 29; **RL-074**, *Binder v. The Czech Republic* (UNCITRAL) Award on Jurisdiction, 6 June 2007, ¶¶ 73-75.

[345] Merits Reply and Jur. Counter-Memorial, ¶ 139, *citing* **RL-078**, *Cem Cenzig Uzan v. Republic of Turkey* (SCC Case No. V 2014/023) Award on Respondent's Bifurcated Preliminary Objection, 20 April 2016, ¶ 156 ("the structure of the wording 'permanently residing' implies that there must also be a determination that an Investor was actually living permanently in the territory of the Contracting Party… If the intention … had been to refer solely to the legal status of the natural person as defined by domestic law, the text might have used the words 'permanent resident").

[346] Merits Reply and Jur. Counter-Memorial, ¶ 141.

[347] **CER-Sarie-Eldin**, ¶ 15 ("Under Egyptian law, there is no express definition of what constitutes 'permanent residence.'"); **RER-Zulficar**, ¶ 10; **RER-Zulficar-2**, ¶ 11.

in the BIT.[348] Professor Sarie-Eldin opines that, under Egyptian law, (a) all juridical persons are entitled to an "independent domicile" under Egyptian law; (b) "domicile" is deemed to be the place where management is located; and (c) for a juridical person with its principal place of management abroad, "its place of management [in Egypt] is deemed to be the place where its local management is located."[349]

274. GTH also discusses the concepts of "resident" and "registered office" under Egyptian law. GTH agrees with Professor Abdel Wahab that a juridical person is considered "resident" in Egypt if it is incorporated under Egyptian law.[350] GTH highlights that as an Egyptian joint stock company, it is required to have "registered office" in Egypt.[351]

[redacted]

[348] Merits Reply and Jur. Counter-Memorial, ¶ 145.
[349] **HSE-002**, Egyptian Civil Code, Law No. 131 of 1948, Article 53(2)(d); *see* **CER-Sarie-Eldin**, ¶¶ 19-20.
[350] Merits Reply and Jur. Counter-Memorial, ¶ 143; **RER-Zulficar**, ¶ 69.
[351] Merits Reply and Jur. Counter-Memorial, ¶ 144; **CER-Sarie-Eldin**, ¶ 21.
[352] Merits Reply and Jur. Counter-Memorial, ¶¶ 147-150; Jur. Rejoinder, ¶¶ 25-33.

[redacted]

[redacted]

d. Whether GTH was "established in accordance with, and recognized as a juridical person by the laws of the Arab Republic of Egypt"

277. In response to Canada's position that GTH is not "established in accordance with, and recognized as a juridical person by the laws of the Arab Republic of Egypt," GTH contends that this objection is untimely and, in any event, wrong.[365]

278. GTH refers to the requirement in the ICSID Arbitration Rules that jurisdictional objections must be raised "as early as possible" and "no later than the expiration of the time limit fixed for the filing of the counter-memorial."[366] GTH asserts that, by raising this objection in its Merits Rejoinder and Jur. Reply, Canada has failed to comply with this Rule. GTH does not accept Canada's explanation that the objection is based on documents GTH produced in the document production phase.[367] According to GTH, "every document except one Canada has cited to form the factual basis of this objection is a publicly available document that Canada has had access to for the duration of this Arbitration."[368] The one document originating from GTH's document production could not have given rise to the new objection, as Canada itself states that this document "expressly recognized" the points contained in the public documents.[369] Thus, GTH argues that Canada's objection must be dismissed as untimely.

279. In any event, GTH further argues that Canada's objection has no merit, as GTH has been established in accordance with and recognized as a juridical person by the laws of Egypt at all times.[370]

280. According to GTH, Canada's position is based on Professor Abdel Wahab's incorrect view that an Egyptian joint stock company must have its "principal place of *management*" in Egypt.[371] Dr. Sarie-Eldin explains that the relevant requirement is that a joint stock company must maintain

[365] Jur. Rejoinder, ¶¶ 6-13.

[366] Jur. Rejoinder, ¶ 7, *quoting* ICSID Arbitration Rule 41(1).

[367] Jur. Rejoinder, ¶¶ 7-9, *citing* Merits Rejoinder and Jur. Reply, n. 7.

[368] Jur. Rejoinder, ¶ 9. *See* Merits Rejoinder and Jur. Reply, ¶ 37 (citing **R-407**, GTH, *Minutes of Board of Directors Meeting*, 21 September 2015; **R-064**, GTH, *Global Telecom to move its place of operations to Amsterdam*, 21 September 2015; [redacted]

[369] Jur. Rejoinder, ¶ 9, *quoting* Merits Rejoinder and Jur. Reply, ¶ 37.

[370] Jur. Rejoinder, ¶¶ 10-13.

[371] Jur. Rejoinder, ¶ 12, *citing* Merits Rejoinder and Jur. Reply, ¶¶ 33, 35, 38.

a "principal place" in Egypt that is registered on the commercial register.[372] GTH asserts that it has met this requirement because at all times, the address on its commercial register was the Nile City Towers complex in Cairo.[373] Thus, GTH is a valid Egyptian joint stock company, and no Egyptian regulatory authority has alleged otherwise, despite knowing that some of GTH's functions have moved to The Netherlands.[374]

(4) The Tribunal's Analysis

281. The Parties dispute whether GTH was a qualifying "investor" of Egypt at the time of the submission of the Request for Arbitration on 28 May 2016, as the term is defined in BIT Article I(g).[375]

282. The BIT provides two separate, and different, definitions for "investor" according to whether the investor is Canadian or Egyptian. In this arbitration, only the latter is relevant. Within the definition provided in Article I(g) for an Egyptian investor, separate meanings are ascribed to an investor who is a natural person and to an investor which is a juridical person. Given the undisputed status of GTH as a corporation,[376] only the definition of juridical person in Article I(g) of the BIT is relevant to determine whether GTH is a protected investor.

283. As indicated in the BIT, the treaty has been authenticated in three languages: Arabic, English and French, "all versions being equally authentic."[377] In relevant parts, Article I(g) provides:

> "investor" means : […]
> In the case of the Arab Republic of Egypt: […]
> any natural or juridical person any natural or juridical person, including the Government of the Arab Republic of Egypt who invests in the territory of Canada. […]

[372] **CER-Sarie-Eldin-2**, ¶¶ 9, 12-19.

[373] **CER-Sarie-Eldin-2**, ¶ 9; **HSE-005** - GTH's Commercial Register (2018); **HSE-006** - GTH's Commercial Register (2016).

[374] Jur. Rejoinder, ¶ 12; **CER-Sarie-Eldin-2**, ¶¶ 18-19; **R-064**, GTH, *Global Telecom to move its place of operations to Amsterdam*, 21 September 2015; **R-407**, GTH, *Minutes of Board of Directors Meeting*, 21 September 2015; **MSW-030**, GTH, *Minutes of Board of Directors Meeting*, 21 September 2015.

[375] Day 2, Tr. 101:8-19.

[376] *See* **HSE-005**, GTH's Commercial Register (2018); **HSE-006**, GTH's Commercial Register (2016).

[377] **CL-001**, BIT (English Version), *in fine*.

> (ii) the term "juridical person" means any entity established in accordance with, and recognized as a juridical person by the laws of the Arab Republic of Egypt: such as public institutions, corporations, foundations, private companies, firms, establishments and organizations, and having permanent residence in the territory of the Arab Republic of Egypt.[378]

284. The corresponding terms in the equally authentic French and Arabic versions are as follows:

f) « investisseur » désigne : […]
Dans le cas de la République arabe d'Égypte: toute personne physique ou morale, y compris le gouvernement de la République arabe d'Égypte, qui fait un investissement sur le territoire canadien : […]
ii) Par le terme « personne morale », il faut entendre toute entité constituée en conformité avec les lois de la République arabe d'Égypte et reconnue comme personne morale par ces lois : dont les institutions publiques, les personnes morales proprement dites (ou *corporations)* les fondations, les compagnies privées, les firmes, les établissements et les associations, ayant le droit de résidence permanente sur le territoire de la République arabe d'Égypte.[379]

(ز) "المستثمر" يعني : [...]
في حالة جمهورية مصر العربية :
أي شخص طبيعي أو إعتباري بما في ذلك حكومة جمهورية مصر العربية يستثمر في إقليم كندا :
[...]
٢- و يعني "شخص إعتباري" أي منشأة تكونت أو أنشئت وفقاً لقوانين جمهورية مصر العربية مثل االمنشآت العامة و الشركات العامة و الخاصة و المؤسسات و المنظمات و التي لها إقامة دائمة في إقليم جمهورية مصر العربية.[380]

285. As is obvious on their face, the three linguistic versions of the BIT are not identical. For example, the Arabic version omits the reference to "and recognised as a juridical person by," which is found both in the English and in the French versions.[381] Punctuation marks are also inconsistently inserted in the relevant subparagraphs across the three linguistic versions. That said, none of those differences casts doubt on the requirement in the BIT that an Egyptian investor that is a juridical person must be established in accordance with the laws of Egypt *and* must have permanent residence in the territory of Egypt.

[378] **CL-001**, BIT (English Version), Article I(g).

[379] **CL-002**, BIT (French Version), Article I(f).

[380] **CL-003**, BIT (Arabic Version), Article I(g).

[381] At the Hearing, in reply to the President of the Tribunal's question, Canada conceded that the omission is not relevant to its jurisdictional case. Day 2, Tr. 123:8-10.

286. The foregoing two conditions of establishment *and* of permanent residence are cumulative. GTH's attempt to question the application of a requirement of permanent residence to a juridical person based on its reading of the punctuation marks in Article I(g)(ii) of the BIT goes counter to the explicit terms of that provision. Indeed, GTH's submission that, because of the positioning of the colon and of the comma in subparagraph (ii), the requirement of permanent residence only applies to the specific categories listed after the colon but not generically to "any entity established" goes counter to the ordinary meaning of the conjunction "and" appearing in the English and in the Arabic version, and to the acceptable usage of the comma in the French version. Taken together, those conjunction and punctuation mark, when read in light of Article 33(4) of the VCLT, denote the intention of the drafters of the BIT to close the illustrative list of non-exhaustive categories of juridical persons investors of Egypt (such as public institutions … and organisations) and return to a general requirement of "permanent residence" that is applicable to all juridical persons regardless of the category.

287. The Tribunal notes that both Parties have made submissions on the point that the French version of the BIT refers to "*ayant le droit de résidence permanente*," which translates in English as "having the right to permanent residence" in Egypt. On its face, that reference appears to set a different standard from the equally authentic English and Arabic versions which require the investor to "have permanent residence."[382] Neither Party nor their experts has suggested that the French version sets a different standard that must prevail over the other versions of the BIT. In any event, the Tribunal considers that it has been plainly evidenced in fact that GTH had been established – not only had the right to become established – in accordance with the laws of Egypt and remained so on the date of the Request for Arbitration,[383] *and* that it is recognised as a juridical person by the laws of Egypt and remained so on the date of the Request for Arbitration.[384] The

[382] Merits Rejoider and Jur. Reply, ¶ 54; Jur. Rejoinder, ¶ 23.

[383] *See* **HSE-005**, GTH's Commercial Register (2018); **HSE-006**, GTH's Commercial Register (2016)..

[384] GTH Opening, slide 183; Day 6, Tr. 287:24-85-2 and Day 6, Tr. 83:5-10 (Professor Abdel Wahab evidence at the hearing). *See also* the following exchange at the hearing on Day 6, Tr. 81:10-22: "A. (Professor Abdel Wahab) Yes, because if it is fictitious in a way, not reflective of reality, the company risks nullity. That is the issue. MR BORN: But when you say "risks nullity", do you mean that non-compliance with that requirement is an automatic nullity, or that something has to be done by legal process? A. (Professor Abdel Wahab) No, it has to be done by way of legal process. MR BORN: And until that legal process is completed, the company is still a company? A. (Professor Abdel Wahab) Yes, indeed."

following brief exchange at the hearing between the Tribunal and Canada's Egyptian law expert helpfully confirms those facts:

> MR BORN: Can I interject, just so that I'm sure I understand your testimony. I think you agreed with Ms Madden that GTH is incorporated in Egypt and remains recognised under Egyptian law as a joint stock company?
>
> A. Indeed, Professor.[385]

288. This is further corroborated by GTH's Egyptian law expert's unqualified evidence at the hearing:

> The second issue: is GTH established and recognised under Egyptian law? And again, my conclusion is: yes, it is. Definitely and without any doubt, it has been incorporated in compliance with Egyptian law and continued to be in compliance with Egyptian law, and continues to be an Egyptian company. Because the only requirement to be an Egyptian national as a company is to be incorporated under Egyptian law, and this is where you get your nationality as an Egyptian company.[386]

289. Canada's submission that GTH "is not an entity established in accordance with the laws of Egypt"[387] because GTH allegedly does not have a principal place of management in Egypt is rebutted by the production by GTH of a contemporaneous extract from the Commercial Register, approved by the Egyptian government, certifying that GTH has its headquarters in Egypt.[388]

290. That first requirement for a qualifying investor under Article I(g)(ii) being established, the Tribunal is therefore left with the task of determining whether GTH had permanent residence in the territory of Egypt on the relevant date. The term "permanent residence" is not defined in the BIT. Likewise, both Egyptian law experts instructed by the Parties agree that the term is not defined either in Egyptian law.[389] The Parties agreed in their pleadings,[390] and reiterated at the hearing, that it is an autonomous treaty concept:

[385] Day 6, Tr. 83 :7-10.

[386] Day 6, Tr. 154 :12-20.

[387] Day 9, Tr. 146:8-10.

[388] **HSE-005**, GTH's Commercial Register (2018); **HSE-006**, GTH's Commercial Register (2016).

[389] Merits Rejoinder and Jur. Reply, ¶ 68; **CER-Sarie-Eldin**,, ¶ 10. *See also* Canada's Opening stating that "the definition of 'investor' comes from Egypt … they were the ones putting it forward, notwithstanding the fact that there does not appear to be a permanent residence of corporation requirement in Egyptian law." Day 2, Tr. 12:14-22.

[390] Merits Rejoinder and Jur. Reply, ¶ 94.

> [MS TABET:] Now, how to interpret the concept of "permanent residence": the best way, by interpreting the treaty, if we accept that it's an autonomous standard, not one that refers to Egyptian law, is to adopt an ordinary meaning definition of "permanent residence".
>
> THE PRESIDENT: So you accept that "permanent residence", in the definition of Egyptian investor, is an autonomous concept of the treaty, and that the Tribunal does not have to look at Egyptian law for interpreting it?
>
> MS TABET: I think that is our position, and we have made alternative submissions as well.
>
> THE PRESIDENT: Right. Could Claimant remind me if on that point that concords with your submission? Do you accept that the Tribunal has to look only at the treaty to interpret "permanent residence" in the definition of Egyptian investor?
>
> MS MADDEN: Yes, this is a public international law question.
>
> THE PRESIDENT: Thank you. So the Tribunal does not have to look at the course of conduct, or precedent in Egyptian diplomacy in concluding similar treaties; we'll just concentrate on that particular treaty?
>
> MS MADDEN: I think that's right, yes, sir.
>
> THE PRESIDENT: Canada confirms?
>
> MS TABET: Yes.
>
> THE PRESIDENT: Thank you, that's helpful.[391]

291. The Tribunal will therefore be guided in its interpretation of the term "permanent residence" by the rules of interpretation of treaties set out in VCLT, including in particular Articles 31 to 33.

> *Article 31*. General rule of interpretation
>
> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
>
> (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> 3. There shall be taken into account, together with the context:
>
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

[391] Day 2, Tr. 128:23-25, 129:1-24; Day 9, Tr. 149:3-7.

> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>
> (c) any relevant rules of international law applicable in the relations between the parties.
>
> 4. A special meaning shall be given to a term if it is established that the parties so intended.
>
> *Article 32*. Supplementary means of interpretation
>
> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (a) leaves the meaning ambiguous or obscure; or
>
> (b) leads to a result which is manifestly absurd or unreasonable.
>
> *Article 33*. Interpretation of treaties authenticated in two or more languages
>
> 1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.
>
> 2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.
>
> 3. The terms of the treaty are presumed to have the same meaning in each authentic text.
>
> 4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.[392]

292. The Tribunal finds no support in the BIT for Canada's contention that "permanent residence," as used in the BIT, requires strong and enduring ties "that must be stronger than the entity's ties to any other jurisdiction at the time when the permanence of residence is assessed."[393] For an international corporation engaged in business in numerous markets to be required to have a single permanent residence would be an extraordinary limitation and a departure from customary and legitimate means of doing business that ought only be considered where the BIT itself or, absent that and in accordance with the VCLT, its preparatory work or the circumstances of its

[392] **CL-018**, VCLT, Articles 31-33.

[393] Jur. Memorial, ¶ 79; *see* Merits Rejoinder and Jur. Reply, ¶ 75.

conclusion warrant such a construction. No such evidence is adduced by Canada. The Tribunal considers that a juridical person can have more than one permanent residence absent an overriding mandatory limitation in the applicable laws.

293. The Tribunal agrees with Canada that the Contracting Parties agreed to promote foreign investments only according to the terms of the BIT and its scope provisions.[394] However, where those terms are provided without limitation as is the case in Article I(g)(ii) for "permanent residence," the Tribunal cannot imply arbitrary limitations for that would unbalance the BIT's substantive provisions.[395] As GTH rightly points out,[396] Canada's reliance on *Binder v. Czech Republic* overlooks the essential linchpin on which that award rests *expressis verbis*: "the Parties agree that the BIT envisages a permanent residence in one State only."[397] There is no evidence of any such agreement between the Parties in these proceedings as concerns the Egypt-Canada BIT.

294. The Tribunal also considered Canada's Egyptian law expert's opinion that, under Egyptian law referred to in Article I(g)(ii), "permanent residence" means the principal place of management. To that end, the expert testified as follows:

> So if a company that is presumably an Egyptian joint stock company just maintains an office, this is not demonstrative of domicile or permanent residence, as indicative also of the company being a foreign company, because an Egyptian company would have its principal place of management in Egypt.[398]

[394] Merits Rejoinder and Jur. Reply, ¶ 71.

[395] Merits Rejoinder and Jur. Reply, ¶ 71, *citing* **CL-038**, *Saluka Investments BV (The Netherlands) v. The Czech Republic* (UNCITRAL) Partial Award, 17 March 2006, ¶ 300 ("The protection of foreign investments is not the sole aim of the Treaty, but rather a necessary element alongside the overall aim of encouraging foreign investment and extending and intensifying the parties' economic relations. That in turn calls for a balanced approach to the interpretation of the Treaty's substantive provisions for the protection of investments, since an interpretation which exaggerates the protection to be accorded to foreign investments may serve to dissuade host States from admitting foreign investments and so undermine the overall aim of extending and intensifying the parties' mutual economic relations.").

[396] Merits Rejoinder and Jur. Reply, ¶ 77.

[397] **RL-074**, *Binder v. Czech Republic* (UNCITRAL) Award on Jurisdiction, 6 June 2007, ¶ 73. *See* Merits Reply and Jur. Counter-Memorial ¶ 138, and Merits Rejoinder and Jur. Reply, ¶ 78.

[398] Day 6, Tr. 14:7-12.

295. Domestic procedural matters such as the address where a company may be validly served with legal documents and other corporate issues governed by the Egyptian Companies Act[399] are of little assistance to this Tribunal for the purpose of determining its jurisdiction over an investor pursuant to the identification of its permanent residence, an autonomous treaty concept.[400] The Tribunal considers that any contention implying a notion of exclusiveness in the identification of the permanent residence of a company faces the difficulty that, in all three linguistic versions of Article I(g)(ii), "permanent residence" is ascribed no qualifications, and requires no minimum bar or specific material manifestations. A registered office, as evidenced in the contemporaneous Commercial Register extract adduced in evidence, suffices to show "permanent residence".[401] While Canada questioned at the hearing the accuracy of the information contained on the Commercial Register,[402] it has not provided any satisfactory evidence of that contention. Canada also accepts that the determination of the relevant place is a factual determination.[403] The officially-certified, signed and stamped extract of the Commercial Register,[404] an Egyptian government-issued document, referring to the headquarters of GTH at the relevant time as being located in Egypt, is accepted by the Tribunal as sufficient evidence of the company's establishment in accordance with, and of its recognition as a juridical person by, the laws of Egypt.

296. Absent a requirement in the BIT, the Tribunal need not decide whether the address shown on the official registry extract as being GTH's headquarters corresponds to the company's principal place of management.[405] Exclusive location concepts of that sort are better left to statutes or model laws that explicitly require them, as in the case of cross-border insolvency.[406] Resorting

[399] Day 6, Tr. 15:1-5; **R-628**, The Egyptian Companies Law No. 159 of 1981 [Supplementary unofficial translation of Articles 54, 60, 63, 68, 77, 82] 1981; **R-629**, The Egyptian Civil and Commercial Procedures Code issued by Law No. 13, of 1968 [Unofficial Translation of Articles 13(3) and 19], 968; **MSW-034**, Companies' Law as Amended by Law No. 4 of 2018, 16 January 2018 (showing an amendment to article 1 of Act No. 159/198, which appears to relate primarily to the matter of proper service of judicial acts upon the company).

[400] *See* ¶ 290 above.

[401] To that end, see the evidence of GTH's Egyptian law expert, **HSE-005**, GTH's Commercial Register (2018); **HSE-006**, GTH's Commercial Register (2016); Day 6, Tr. 153:21-154:1.

[402] Merits Rejoinder and Jur. Reply, ¶ 39.

[403] Day 2, Tr. 103:15-16.

[404] **HSE-005**, GTH's Commercial Register (2018); **HSE-006**, GTH's Commercial Register (2016).

[405] Canada's Closing Presentation, slide 6.

[406] By way of example, see the concept of Center of Main Interest (COMI) in the UNCITRAL Model Law Insolvency (1997), the EU Insolvency Regulation 848 recital 30, and U.S. Bankruptcy Code ¶1502.

to a Procrustean forcing of such concepts into the text of the BIT absent compelling evidence of the Contracting Parties' intention to restrict "permanent residence" is not an approach that this Tribunal considers appropriate for the interpretation of the BIT.

297. [redacted] The Tribunal considers that GTH need not meet other thresholds asserted by Canada absent a specific requirement in the BIT. Canada in effect takes the position that GTH is required to maintain a one and only "principal place of management" in Egypt at the relevant time. As already noted, there is no requirement of exclusiveness in the BIT. [redacted]

[redacted] Day 2, Tr. 103:20-25. [redacted]

[redacted]

299. As to submissions attempting to infer support from the concept of natural persons' domicile under any of the Contracting Parties' domestic laws, they are simply irrelevant in the case of corporate investors, because the BIT explicitly differentiates in Article I(g) between their definition in subparagraph (ii) and that of individual investors in subparagraph (i).

[redacted]

As such, GTH meets the requirements for an "investor" as defined in the BIT.

C. WHETHER ARTICLE II(4)(B) OF THE BIT DEPRIVES THE TRIBUNAL OF JURISDICTION OVER GTH'S CLAIMS RELATING TO THE VOTING CONTROL APPLICATION

301. Canada's second objection is aimed at GTH's claim concerning the national security review conducted in the context of GTH's attempt to acquire voting control of Wind Mobile. According to Canada, this claim is excluded from the dispute resolution provision of the BIT pursuant to Article II(4)(b) of the BIT, and the Tribunal therefore lacks jurisdiction over the claim.

302. GTH argues that Canada's objection must be dismissed because GTH's claim does not relate to an "acquisition" within the meaning of Article II(4) of the BIT.[412] Rather, it relates to the exercise of rights already acquired at the time it made its investment, before the national security review. Alternatively, GTH asserts that its claim concerns the process leading up to [redacted] not the decision itself and is therefore permitted under Article II(4)(a) of the BIT.[413]

[411] Canada's Closing Presentation, slide 9; *see* Merits Rejoinder and Jur. Reply, ¶ 89; **RER-Zulficar-2**, ¶¶ 14, 42-45; **MSW-028**, GTH BoD Minutes as published on GTH's website.

[412] Merits Reply and Jur. Counter-Memorial, ¶ 20.

[413] Merits Reply and Jur. Counter-Memorial, ¶ 22.

(1) Relevant Provision of the BIT

303. Article II(4) of the BIT provides that:

> (a) Decisions by either Contracting Party, pursuant to measures not inconsistent with this Agreement, as to whether or not to permit an acquisition shall not be subject to the provisions of Articles XIII or XV of this Agreement.
>
> (b) Decisions by either Contracting Party not to permit establishment of a new business enterprise or acquisition of an existing business enterprise or a share of such enterprise by investors or prospective investors shall not be subject to the provisions of Article XIII of this Agreement.[414]

(2) Canada's Position

304. Canada submits that the ordinary meaning of Article II(4)(b) of the BIT is unambiguous: any decision falling within the scope of the provision is excluded from investor-State dispute settlement.[415] In other words, Canada has not consented to arbitrate any dispute arising out of a decision covered by Article II(4)(b) of the BIT, regardless of whether such a decision is subject to obligations contained in the BIT.[416]

305. In Canada's view, the object and purpose of Article II(4)(b) is to allow the Contracting Parties to retain their sovereignty over decisions concerning the establishment or acquisition of businesses, which can be sensitive.[417] Canada asserts that most investment treaties contain some form of limitation or exclusion in this respect.[418]

306. According to Canada, decisions made pursuant to the ICA fall within the scope of Article II(4)(b) of the BIT. Canada argues that this is by design; it "has always sought in all of its trade and investment agreements a broad exclusion for its ICA review process and the result of such

[414] **CL-001**, BIT (English version), Article II(4).

[415] Jur. Memorial, ¶¶ 111-116.

[416] Jur. Memorial, ¶ 124.

[417] Jur. Memorial, ¶ 127.

[418] Jur. Memorial, ¶ 128; *see e.g.*, **RL-084**, United Nations Conference on Trade and Development, Admission and Establishment, UNCTAD/ITE/IIT/10 (vol. II), (United Nations, 1999), p. 20 ("Today, the investment control model is the most widely used. The number of BITs that have followed this approach and the wide geographical distribution of regional agreements applying the investment control approach show a broad acceptance of its underlying rationale by many States, namely, that FDI is welcome but remains subject to host State regulation at the point of entry.").

review."[419] Canada highlights that the language of Part IV.1 of the ICA, which governs the scope of the national security review, mirrors the language in Article II(4)(b) of the BIT. It applies to an investment, implemented or proposed, by a non-Canadian:

> (a) to **establish** a new Canadian business;
>
> (b) to **acquire** control of a Canadian business in any manner described in subsection 28(1); or
>
> (c) to **acquire**, in whole or in part, or to establish an entity carrying on all or any part of its operations in Canada …[420]

307. The ICA was triggered when GTH submitted the Voting Control Application.[421] [redacted] was a "decision" within the scope of Article II(4)(b) of the BIT, which is excluded from the Tribunal's jurisdiction.[422]

308. [redacted] Accepting this allegation as true for the purpose of the jurisdictional objection, Canada concludes that there was a "decision" within the meaning of Article II(4)(b) of

[419] Jur. Memorial, ¶ 133; *see* ¶¶ 133-140. Canada cites numerous Canadian investment treaties and trade agreements containing language identical or similar to Article II(4)(b) of the BIT (**RL-85 to RL-99**). Canada notes that "other treaties signed by Canada have specifically referred to the ICA when the exclusion was specific to Canada. … However, the use in some treaties of provisions drafted in more generic terms to extend application to both Contracting Parties, does not change the fact that the language in all of Canada's FIPAs was intended to cover decisions pursuant to reviews under the ICA." Jur. Memorial, ¶ 140, *citing* **RL-100**, *Agreement Between the Government of Canada and the Government of the Kingdom of Thailand for the Promotion and Protection of Investments*, 17 January 1997 (entered into force 24 September 1998), Can. T.S. 1998 No. 29, Article II(4); **RL-101**, *North American Free Trade Agreement*, U.S.-Can.-Mex., 1 January 1994, Article 1138 (as supplemented by its Annex 1138.2).

[420] Jur. Memorial, ¶¶ 146-147, *quoting* **C-009**, Investment Canada Act (12 March 2009 – 28 June 2012), § 25.1 (*Canada's emphasis*).

[421] Jur. Memorial, ¶ 141.

[422] Jur. Memorial, ¶¶ 141-147.

[redacted]

the BIT. [redacted]

309. Contrary to GTH's submission, Canada contends that GTH's attempt to gain voting control of Wind Mobile was clearly an "acquisition" within the meaning of Article II(4)(b).[426] According to Canada, it is undisputed that through the proposed transaction, GTH sought to convert Class D non-voting shares of Wind Mobile into Class B voting shares.[427] Under the Shareholders' Agreement, that conversion process would involve GTH returning the original shares and *acquiring* new shares it did not already own.[428] This would also have constituted an acquisition of legal control of Wind Mobile.[429] [redacted] Ultimately, GTH would have held over 99% of the voting and equity shares of Wind Mobile.[431]

310. Canada cites contemporaneous documents in which GTH refers to the proposed transaction as an acquisition.[432] In addition, Canada points to [redacted]

[425] Jur. Memorial, ¶ 145.

[426] Merits Rejoinder and Jur. Reply, ¶¶ 99-107.

[427] Merits Rejoinder and Jur. Reply, ¶ 99; **C-027**, Letter from William G. VanderBurgh to Industry Canada, Director of Investments, *attaching* Voting Control Application, 24 October 2012, p. 3.

[428] Merits Rejoinder and Jur. Reply, ¶¶ 99-100; **C-018**, Amended and Restated Shareholders' Agreement between AAL Holdings Corporation and Mojo Investments Corp. and Orascom Telecom Holding (Canada) Limited and Globalive Investment Holdings Corp., 15 December 2009, p. 5 of Schedule C.

[429] Merits Rejoinder and Jur. Reply, ¶ 102.

[430] Merits Rejoinder and Jur. Reply, ¶ 101; **C-027**, Letter from William G. VanderBurgh to Industry Canada, Director of Investments, *attaching* Voting Control Application, 24 October 2012, p. 3.

[431] Merits Rejoinder and Jur. Reply, ¶ 101.

[432] Jur. Memorial, ¶ 147; Merits Rejoinder and Jur. Reply, ¶¶ 103-105; **C-027**, Letter from William G. VanderBurgh to Industry Canada, Director of Investments, *attaching* Voting Control Application, 24 October 2012, ¶ 10 ("The name of the entities operating the Canadian business to be acquired by OTHCL are Globalive Investment Holdings Corp." (*Canada's emphasis*)); [redacted]

[redacted] the national treatment obligation contained in Article II(3) of the BIT.[433] As that provision concerns the "acquisition of an existing business enterprise or a share of such enterprise," Canada argues that GTH cannot turn around and claim that the Voting Control Application did not relate to such an acquisition.[434]

311. Canada rejects GTH's attempt to distinguish between the national security review process, on the one hand, [redacted].[435] In Canada's view, this approach would render the exclusion in Article II(4)(b) meaningless.[436] It is also contrary to the ordinary meaning of "decision," which includes the "process of arriving at a conclusion regarding a matter under consideration."[437] According to Canada, GTH's interpretation is based on a strained reading of Article II(4)(a), which is not even the basis of Canada's jurisdictional objection.[438]

312. In any event, Canada argues that GTH's description of the alleged breach is not in fact limited to the review process, but [redacted] For example, GTH challenges [redacted] through a national security review."[439] Moreover, Canada submits that "GTH has not identified any damages that flow from the national security review process that are independent from the alleged decision."[440]

[redacted]

[433] Merits Rejoinder and Jur. Reply, ¶¶ 106-107, *citing* Request for Arbitration, ¶¶ 101, 105; Merits Memorial, ¶ 388.

[434] Merits Rejoinder and Jur. Reply, ¶¶ 106-107.

[435] [redacted]

[436] Merits Rejoinder and Jur. Reply, ¶ 110.

[437] Merits Rejoinder and Jur. Reply, ¶ 110, *quoting* **RL-079**, *Oxford English Dictionary Online*, Definition of "*decision*, n.", as cited in Canada's Memorial on Jurisdiction, ¶ 117.

[438] Merits Rejoinder and Jur. Reply, ¶ 111, *citing* Merits Reply and Jur. Counter-Memorial, ¶ 172

[439] Merits Rejoinder and Jur. Reply, ¶ 112, *quoting* Merits Reply and Jur. Counter-Memorial, ¶ 175 ("Canada's [redacted] through a national security review – because GTH was a non-Canadian investor – meant that GTH was treated differently from Canadian investors in like circumstances").

[440] Merits Rejoinder and Jur. Reply, ¶ 113, *citing* **CER-Dellepiane-Spiller**, ¶ 122 (referring to damages arising "exclusively from Claimant [redacted] after the foreign control restrictions were lifted").

313. In light of the above, Canada asserts that the challenged measures fall within Article II(4)(b) as a decision not to permit the acquisition of an existing business enterprise or a share of such enterprise.

(3) GTH's Position

314. GTH's primary position is that Article II(4) of the BIT is irrelevant because the Voting Control Application was not an attempted "acquisition" within the meaning of that provision.[441] Therefore, Canada's objection must be dismissed.

315. In this regard, GTH argues that the subject of its Voting Control Application was neither the acquisition of Wind Mobile nor the acquisition of shares in Wind Mobile, but rather a conversion of GTH's non-voting shares into voting shares in order to take control of Wind Mobile.[442] GTH asserts that it could not acquire something it already owned.

316. GTH does not accept Canada's "highly formalistic argument about the mechanics of a share conversion," which in GTH's view, ignores the fact that GTH was seeking to exercise its pre-existing right to obtain control over Wind Mobile once the O&C Rules were relaxed."[443]

317. GTH alleges that at the time it submitted the Voting Control Application, Canada recognized that the transaction was not an acquisition but a share conversion. [redacted]

[441] Merits Reply and Jur. Counter-Memorial, ¶¶ 156, 159-166.

[442] Merits Reply and Jur. Counter-Memorial, ¶ 161; **C-027**, Letter from William G. VanderBurgh to Industry Canada, Director of Investments, *attaching* Voting Control Application, 24 October 2012; **C-084**, *Declaration of Ownership and Control of* Globalive Wireless LP *as a Provisional Winner of Spectrum Licences in the 2 GHz Range Including AWS, PCS and the Band 1670-1675 MHz*, 5 August 2008, pp. 163 (*Articles of Amendment*, 30 July 2008, p. 1f) ("any holder of Class D Non-Voting Common Shares **shall be entitled** at the holder's option to **convert** any or all of the Class D Non-Voting Common Shares held by the holder into . . . fully paid and non-assessable Class B Voting Common Shares" (*GTH's emphases*)), p. 80 (*Shareholders' Agreements*, 31 July 2008, p. 20) ("**6.6 Right of Orascom to Increase Voting Interest.** Orascom shall have the right to increase its voting interest in Globalive Holdco" (*GTH's emphasis*)), p. 92 (*Shareholders' Agreements*, 31 July 2008, Schedule C, p. 4).

[443] Jur. Rejoinder, ¶ 35(a), *citing* Merits Rejoinder and Jur. Reply, ¶¶ 99-100. In response to Canada's reliance on GTH's national treatment claim, GTH argues that it relies on Article II(3)(a) of the BIT only in the alternative. Jur. Rejoinder, ¶ 35(c), *citing* Merits Reply and Jur. Counter-Memorial, ¶ 349 and n. 725.

[redacted]

318. According to GTH, Canada supports its objection by expanding the scope of the term "acquisition" in Article II(4) to cover "all forms of transactions **that lead to gaining control** or ownership of the enterprise."[445] In GTH's view, there is no basis for this addition to the text; if the Contracting Parties had intended Article II(4) to cover an acquisition of control, they would have done so.[446]

319. Similarly, GTH sees Canada's submissions relating to the ICA as an attempt to improperly expand the scope of Article II(4).[447] According to GTH, the language of the ICA is clearly broader than Article II(4) in that it allows Canada to review a proposed investment when a non-Canadian seeks "to acquire control of a Canadian business."[448] Yet Canada seeks to import this domestic law into the BIT to avoid its international obligations.[449] GTH notes that the BIT does not contain a reference to the ICA, whereas Canada has explicitly and clearly named that legislation "where it meant to do so in other treaties."[450]

[redacted]

[445] Merits Reply and Jur. Counter-Memorial, ¶ 163, *quoting* Jur. Memorial, ¶ 121 (*GTH's emphasis*).

[446] Merits Reply and Jur. Counter-Memorial, ¶ 163.

[447] Merits Reply and Jur. Counter-Memorial, ¶ 164; Jur. Rejoinder, ¶ 40.

[448] Merits Reply and Jur. Counter-Memorial, ¶ 164, *quoting* **C-009**, Investment Canada Act (12 March 2009 – 28 June 2012), §§ 25.1, 25.4.

[449] Jur. Rejoinder, ¶ 42.

[450] Merits Reply and Jur. Counter-Memorial, ¶ 165; **RL-100**, Agreement between the Government of Canada and the Government of the Kingdom of Thailand for the Promotion and Protection of Investments (signed 17 January 1997; entry into force 24 September 1998), Article II.4 ("A decision by Canada, following a review under the Investment Canada Act, with respect to whether or not to permit an acquisition that is subject to review, shall not be subject to the dispute settlement provisions of Articles XIII or XV of this Agreement"); **RL-101**, North American Free Trade Agreement, Annex 1138.2.

320. GTH submits that in considering Canada's objection, the Tribunal should not simply "accept Canada's bald assertion that its actions fall under any particular carve-out," but should examine the factual record and consider whether Canada's conduct was *bona fide*.[451]

321. GTH's alternative argument is that, even if the Tribunal were to find that the Voting Control Application was an "acquisition," GTH's claim does not fall within the exclusion of Article II(4).[452] According to GTH, when Article II(4) is considered as a whole, it becomes clear that the provision covers only decisions relating to acquisitions and not to the process of reaching such decisions.[453]

322. Based on a comparison of the language of subparagraphs (a) and (b) of Article II(4), GTH makes the following observations:

a. Article II(4)(a) covers *all* acquisitions, whereas Article II(4)(b) covers only "acquisition[s] of an existing business enterprise or a share of such enterprise." Therefore, only Article II(4)(a) could apply to the Voting Control Application, given that the alleged "acquisition" related to voting control of Wind Mobile.[454]

b. Article II(4)(a) refers to the decision-making process ("whether or not to permit"), whereas Article II(4)(b) refers to the decision itself. Therefore, the exception to dispute resolution does not apply to a decision-making process relating to acquisitions.[455]

c. Under Article II(4)(a), [redacted] is *not* exempt from dispute resolution if it was reached in a manner that is inconsistent with the BIT.[456]

[451] Merits Reply and Jur. Counter-Memorial, ¶¶ 167-168, *citing*, *inter alia*, **CL-157**, *Yukos Universal Limited (Isle of Man) v. The Russian Federation* (UNCITRAL) PCA Case No. AA 227, Final Award, 18 July 2014, ¶¶ 1430-1435 (declining to apply a tax carve-out provision in the ECT because Russia did not engage in a *bona fide* exercise of its tax powers); **RL-231**, *RosInvestco*, Final Award, ¶ 628; **CL-148**, *Quasar de Valores SICAV S.A., Orgor de Valores SICAV S.A., GBI 9000 SICAV S.A., ALOS 34 S.L. v. The Russian Federation*, SCC Case No. 24/2007, Award, 20 July 2012, ¶ 179.

[452] Merits Reply and Jur. Counter-Memorial, ¶¶ 157, 169-174; Jur. Rejoinder, ¶¶ 36-39.

[453] Jur. Rejoinder, ¶ 39.

[454] Jur. Rejoinder, ¶ 37(c).

[455] Jur. Rejoinder, ¶¶ 37(a), 39.

[456] Merits Reply and Jur. Counter-Memorial, ¶ 173; Jur. Rejoinder, ¶ 37(b).

323. GTH concludes that, even if Article II(4) were applicable, it could not exclude GTH's claims because the subject of those claims "[redacted]."[457] According to GTH, that decision-making process falls within the Tribunal's jurisdiction under Article II(4)(a). In addition, GTH asserts that under Article II(4)(a), "[redacted] remains subject to dispute resolution because the dispute arises from measures inconsistent with its obligations under the BIT."[458]

(4) The Tribunal's Analysis

324. The decisions in this section of the Award are taken by a majority of the Tribunal.

325. In support of its second jurisdictional challenge based on Article II(4)(b) of the BIT, Canada advances both its construction of the relevant BIT provision and policy reasons to show that its [redacted] is excluded from the arbitration mechanism set out in Article XIII of the BIT.[459] The Tribunal, by a majority, finds neither of those two grounds to be convincing.

326. First, Canada's reference to its treaty practice allegedly systematically excluding from international treaty dispute settlement mechanisms ICA-related decisions in respect of the establishment or acquisition of a business enterprise is insufficient to deny the Tribunal's jurisdiction under the BIT. The Tribunal must determine the scope of its jurisdiction with reference to the terms of the BIT, as interpreted in accordance with Article 31 of the VCLT. Consistent with its alleged practice, Canada could have specifically referred to its foreign ownership and control legislation in Article II(4)(b) of the BIT; it has not done so, although the ICA had been enacted in 1985 and, as such, predated the BIT.

327. The additional argument that Canada refrained from specifically naming the ICA in the BIT to afford symmetrical protection to both Contracting States is not persuasive either. The BIT features other protections afforded nominally to one or the other of the Contracting States and their

[457] [redacted]

[458] Merits Reply and Jur. Counter-Memorial, ¶ 174.

[459] Merits Rejoinder and Jur. Reply, ¶¶ 96 *et seq*.

respective nationals without any consistent symmetrical approach (e.g., Article I(g) and the Annex).

328. Second, the Tribunal is not persuaded by Canada's argument that, for the purpose of acquiring voting control of Wind Mobile, GTH's intended conversion of Class D non-voting shares of Wind Mobile into Class B voting shares involves an "acquisition of shares" within the meaning of Article II(4)(b) or, as Canada put it more synthetically at the hearing:

> The share conversion is an acquisition of shares, and in this case it also amounts to an acquisition of Wind Mobile.[460]

329. The Amended and Restated Shareholders' Agreement[461] to which Canada refers mentions in section 4 of Schedule C a conversion of Class D non-voting shares into Class B voting shares on the basis of one Class D share for each Class B share. The fact that the mechanism involves a return of Class D share certificates and the issue of Class B share certificates does not mean, absent evidence of an *animus novandi*, that new Class B shares are acquired. It is simply that the shareholder's rights over the shares are enhanced with the ability to vote. Had the conversion of Class D shares into Class B shares involved an obligation to "acquire" ownership of the Class B shares to achieve the conversion, GTH would in all logic have had to "sell" its Class D shares which, being nominative, would have had to be annulled. This would have triggered a reduction in Wind Mobile's corporate capital, even for a *scintilla temporis*, until capital is increased with the issue of the new Class B shares. A complex annulment/issue/acquisition of share process of that sort would be expected to be mentioned in a sophisticated document like the Amended and Restated Shareholders' Agreement. No such mention can be found therein. The fact is that the Agreement only refers to a conversion of shares, and does so consistently throughout. As GTH

[460] Day 2, Tr. 113:16-18. *See also* Merits Rejoinder and Jur. Reply, ¶ 100 ("The share conversion process thus constitutes an acquisition of shares of an existing business enterprise because GTH would have obtained new voting shares of Wind Mobile that it did not previously own. The exclusion in Article II(4)(b) is not limited to certain types of share acquisitions. Conversion of shares is one of the ways of realizing an acquisition of shares, because the shareholder has to return the original certificates (i.e. ceases to own them), and in exchange receives new shares from the company. The fact that the term *conversion* is used does not negate the legal nature of the transaction taking place whereby one set of shares is cancelled in exchange for another set of shares with different attributes").

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

puts it: "GTH sought to convert non-voting shares that it already owned by exercising a preexisting right, that GTH had already acquired, to assume voting control of its investment."[462]

330. As to Canada's argument that GTH has referred in some of its correspondence to "acquisition," it is difficult to draw any firm inferences out of inconsistent references, the reason being that those references often are made to issues other than the conversion of the non-voting shares. Importantly, those references – if they were to be considered – ought to be read against the following statement [redacted]

331. Canada ran a further case to the effect that:

> the acquisition of voting shares would also have amounted to an acquisition of the enterprise resulting from an acquisition of legal control. Article II(4) applies to decisions not to permit the acquisition of an existing business enterprise or a share of such enterprise.[134] There is no basis on which to limit the exclusion to certain forms of acquisitions of an existing business enterprise. Acquisitions of existing business enterprises are often realized through acquisitions of control.[464]

332. Canada supports its contention by referring to subsection 28(1) of the ICA, which includes a reference to the acquisition of voting control.[465] The difficulty for Canada is that the BIT refers to the "acquisition of an existing business enterprise, or a share of an enterprise," but not to the acquisition of voting control. One cannot be held to be necessarily subsumed in the other. Absent a reference in the BIT to the acquisition of legal control, and in conformity with the general rule of interpretation in Article 31(1) of the VCLT, the majority of the Tribunal considers that the BIT

[462] Merits Reply and Jur. Counter-Memorial, ¶¶ 156, 161.

[redacted]

[464] Merits Rejoinder and Jur. Reply, ¶ 100.

[465] Merits Rejoinder and Jur. Reply, n. 135, *citing* **C-009**, Investment Canada Act (12 March 2009 – 28 June 2012).

refers in Article II(4)(b) to the acquisition of an enterprise or a share thereof in the sense of ownership as opposed to control.

333. It should be added that the object and purpose of the treaty – a general interpretation standard under Article 31(1) of the VCLT – commands that potentially choosing a broad interpretation of the terms of the treaty so as to read a reference to an "acquisition of an existing business enterprise or a share of such enterprise" as including an acquisition of legal control should only be considered with caution. Broadening exclusions from the protections accorded in the BIT by a Contracting Party to nationals of the other Contracting Party, beyond their explicit terms, would hardly be conducive to the encouragement of the creation of favourable conditions for investors to make investments.

334. Therefore, the Tribunal, by a majority, decides that it cannot accept Canada's assertion that the challenged measures fall within the scope of Article II(4)(b) of the BIT as a decision not to permit the acquisition of an existing business enterprise or a share of such enterprise. The objection on jurisdiction is therefore rejected.

335. With the above determination made, the Tribunal need not go into the additional argument that GTH adduces seeking to differentiate between "a decision" and "the process of reaching that decision."[466]

336. One Member of the Tribunal considers that the exception under Article II(4) of the BIT to the right of the investor to submit disputes to arbitration is applicable to the present dispute. This Member considers that the measure complained of here concerned the acquisition of voting control over Wind Mobile and thus constitutes an "acquisition … of an existing business enterprise" within the meaning of Article II(4), interpreted in good faith in accordance with the ordinary meaning to be given to those terms in their context and in the light of the object and purpose of the BIT. The focus in that Article in its English and French texts[467] is on the acquisition of a "business enterprise," i.e., an economic entity rather than a legal entity; and from the point of view of the

[466] *Ibid.*, ¶¶ 169 *et seq*. Day 1, Tr. 167:10.

[467] While the Arabic text may have a narrower meaning or connotation, confining the reference to a 'company' rather than an 'enterprise', this Member considers that the best reconciliation of the treaty texts, in accordance with the principle set out in Article 33(4) of the VCLT, points to a wider concept of a 'business enterprise'.

Contracting Parties, for whose benefit the Article II(4) exception is established, the acquisition of control is at least as significant in the context of the control of foreign investment (with which the BIT is by its nature essentially concerned) as is the acquisition of rights of financial participation in a business without any correlative rights to control that business. Furthermore, this Member considers that the object and purpose of the treaty is not confined to the promotion and protection of investments, but must be understood to include both the fair treatment of investments and the preservation of certain regulatory competences for the State hosting the investment. The majority of the Tribunal has considered the minority's opinion, but decided that it does not change its interpretation of the provision.

D. WHETHER ARTICLE IV(2)(D) OF THE BIT DEPRIVES THE TRIBUNAL OF JURISDICTION OVER THE CLAIMANT'S NATIONAL TREATMENT CLAIMS

337. Canada's next objection targets GTH's claim that Canada breached its national treatment obligations contained in the BIT. Canada submits that this claim is precluded by the reservation it made pursuant to Article IV(2)(d) of the BIT, and the Tribunal therefore lacks jurisdiction *ratione materiae* over the claim.[468]

338. In response, GTH argues that this objection must be dismissed because (a) Canada never exercised its right to make or maintain an exception under Article IV(2)(d), and (b) in any event, Canada did not reserve the right to maintain exceptions with respect to investments made in the telecommunications sector.

(1) Relevant Provisions of the BIT

339. Article IV(II)(d) of the BIT specifies that the Contracting Parties' national treatment obligations "do not apply to: […] the right of each Contracting Party to make or maintain exceptions within the sectors or matters listed in the Annex to this Agreement."[469]

340. The Annex states:

> 1. In accordance with Article IV, subparagraph 2(d), Canada reserves the right to make and maintain exceptions in the sectors or matters listed below:

[468] Jur. Memorial, § III.E.

[469] **CL-001**, BIT (English version), Article V(I)(d).

- social services (i.e. public law enforcement; correctional services; income security or insurance; social security or insurance; social welfare; public education; public training; health and child care);

- services in any other sector;

- government securities - as described in SIC 8152;

- residency requirements for ownership of oceanfront land;

- measures implementing the Northwest Territories and the Yukon Oil and Gas Accords.

2. For the purpose of this Annex, "SIC" means, with respect to Canada, Standard Industrial Classification numbers as set out in Statistics Canada, Standard Industrial Classification, fourth edition, 1980.[470]

(2) Canada's Position

341. Canada submits that the BIT imposes no national treatment obligations on Canada within the sectors listed in its Annex, because Canada has reserved the right to act inconsistently with those obligations under Article V(I)(d).[471] Canada has listed all service sectors in its Annex, which includes the telecommunication sector.[472] Therefore, GTH's national treatment claim, which relates exclusively to the telecommunications sector, is excluded from the scope of the BIT's national treatment provisions.[473]

a. Whether Canada has Made an Exception Under Article IV(2)(d) of the BIT

342. According to Canada, it may make or maintain an exception pursuant to Article IV(2)(d) at any time by adopting or maintaining measures or by according treatment that would otherwise be inconsistent with the national treatment obligations; it is not required to take any additional steps to exercise this right.[474]

343. Canada argues that its interpretation of Article IV(2)(d) is based on the ordinary meaning of the text, which is "that Canada has maintained policy flexibility to not accord national treatment to investors of Egypt and their investments within the matters or sectors listed in the Annex."[475]

[470] **CL-001**, BIT (English version), Annex.
[471] Jur. Memorial, ¶ 199.
[472] Jur. Memorial, ¶¶ 226-231; Merits Rejoinder and Jur. Reply, ¶¶ 131-136.
[473] Jur. Memorial, ¶¶ 225-235; Merits Rejoinder and Jur. Reply, ¶ 114.
[474] Jur. Memorial, ¶¶ 193, 205-214.
[475] Jur. Memorial, ¶ 206.

Canada considers that the dictionary definitions of the terms "make," "maintain" and "exception" support its interpretation.[476] Further, according to Canada, the text simply does not specify any procedural requirements that must be fulfilled to trigger the exception. In particular, Canada points out that the BIT does not contain a notification requirement, unlike some other investment treaties.[477] Thus, there is no basis for GTH's assertion that Canada must notify Egypt and its investors before exercising its right to make an exception.[478]

344. Canada contends that its interpretation is reinforced by the context of Article IV(2)(d), and in particular by Egypt's list of excepted sectors or matters, which uses language that is not compatible with GTH's argument that a State must enact a reservation before it becomes effective.[479] Canada also refers to the object and purpose of Article IV(2)(d), which in its view, is "to ensure that Canada's national treatment obligations in its FIPAs do not unduly limit Canada's policy space."[480] Canada notes that when then BIT was negotiated in the 1990s, "it was common for BITs to include only very weak or no national treatment obligations."[481]

[476] Jur. Memorial, ¶¶ 200, 205-209; **RL-107**, *Black's Law Dictionary*, *s.v.* "make" ("To cause (something) to exist" or "To enact (something)"); **RL-108**, *Oxford English Dictionary*, *s.v.* "make" ("To bring into existence by construction or elaboration"); **RL-109**, *Black's Law Dictionary*, *s.v.* "maintain" ("To continue (something)"); **RL-110**, *Oxford English Dictionary*, *s.v.* "maintain" ("To (cause to) continue, keep up, preserve"); **RL-111**, *Black's Law Dictionary*, *s.v.* "exception" ("Something that is excluded from a rule's operation"); **RL-112**, *Oxford English Dictionary*, *s.v.* "exception" (The action of excepting (a person or thing, a particular case) from the scope of a proposition, rule, etc.; the state or fact of being so excepted" or "Something that is excepted; a particular case which comes within the terms of a rule, but to which the rule is not applicable").

[477] Jur. Memorial, ¶¶ 212-213; Merits Rejoinder and Jur. Reply, ¶¶ 126-127, *citing* **RL-115**, Treaty Between the United States of America and Ukraine Concerning the Encouragement and Reciprocal Protection of Investments (1994), Article II(1) ("Each Party agrees to notify the other Party before or on the date of entry into force of this Treaty of all such laws and regulations of which it is aware concerning the sectors or matters listed in the Annex. Moreover, each Party agrees to notify the other of any future exception with respect to the sectors or matters listed in the Annex, and to limit such exceptions to a minimum.").

[478] Merits Rejoinder and Jur. Reply, ¶ 126, *citing* Merits Reply and Jur. Counter-Memorial, ¶ 183.

[479] Jur. Memorial, ¶ 200, citing **R-001**, Government of Canada, Translation Bureau, Certified Translation (Arabic-English) of the BIT, Annex, ¶ 2 ("In accordance with Article IV, subparagraph 2(d), Egypt reserves the right to make and maintain exceptions in the sectors or matters listed below: a) Prohibited fields to create any enterprise and they are: 1) arms and ammunition 2) tobacco b) Regions prohibited from creating any projects on them: - projects to be established in Sinai, on condition that Egyptians own 51% of the capital related to the project established in Sinai…"). This paragraph of the Annex is contained only in the Arabic version of the BIT.

[480] Jur. Memorial, ¶ 201.

[481] Merits Rejoinder and Jur. Reply, ¶ 129, citing **RL-087**, Agreement Between the Government of Canada and the Government of the Republic of Argentina for the Promotion and Protection of Investments, 5 November 1991 (entered into force 29 April 1993), Can. T.S. 1993, No. 11, Article IV ("Each Contracting Party shall, **to the extent possible and in accordance with its laws and regulations**, grant to investments or returns of investors of the other Contracting Party treatment no less favourable than that which it grants to investments or returns of its own investors." (*Canada's*

345. Turning to past arbitral decisions, Canada cites *Lauder v. Czech Republic* and *Lemire v. Ukraine*, in which the tribunals considered reservations similar to Article IV(2)(d) of the BIT.[482] The *Lauder* tribunal found that the reservation allowed the State to "treat foreign investment less favorably than domestic investment … in the sectors or matters for which it has reserved the right to make or maintain an exception in the Annex to the Treaty."[483] The *Lemire* tribunal characterized the national treatment obligation in the relevant treaty as "a general principle, subject to an exception (for investment in listed sectors and matters)."[484] According to Canada, the tribunals in these cases ultimately decided that the exceptions did not apply, but for reasons not present in this case.[485]

346. Canada rejects GTH's attempt to read procedural requirements into Article IV(2)(d).[486] In Canada's view, GTH's argument is based on a misunderstanding of the difference between *existing* non-conforming measures and *future* non-conforming measures.[487] Article IV(2)(a)-(c) lists existing non-conforming measures, whereas Article IV(2)(d) excludes future non-conforming by referring to the right to make or maintain exceptions.[488] In this way, the Contracting Parties sought "to preserve maximum flexibility"[489] to introduce "new non-conforming measures in the

emphasis)); **RL-088**, Canada-Hungary FIPA, Article III(4) ("Each Contracting Party shall, **to the extent possible and in accordance with its laws and regulations**, grant to investments or returns of investors of the other Contracting Party a treatment no less favourable than that it grants to investments or returns of its own investors." (*Canada's emphasis*)).

[482] Jur. Memorial, ¶¶ 210-212.

[483] **RL-114**, *Ronald S. Lauder v. The Czech Republic* (UNCITRAL) Final Award, 3 September 2001, ¶ 220. The relevant treaty provision referred to "the right of each Party to make or maintain exceptions falling within one of the sectors or matters listed in the Annex to this Treaty."

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

[485] Jur. Memorial, ¶ 212 and n. 325, *citing* **RL-114**, *Ronald S. Lauder v. The Czech Republic* (UNCITRAL) Final Award, 3 September 2001, ¶¶ 218, 220; **RL-116**, *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 18 March 2011, ¶ 47.

[486] Merits Rejoinder and Jur. Reply, ¶¶ 117-125.

[487] Merits Rejoinder and Jur. Reply, ¶¶ 118-124.

[488] Merits Rejoinder and Jur. Reply, ¶ 118.

[489] Merits Rejoinder and Jur. Reply, ¶ 120, *quoting* **RL-288**, Céline Lévesque and Andrew Newcombe, *Commentary on the Canadian Model FIPA* in Chester Brown, *Commentaries on Selected Model Investment Treaties* (Oxford University Press, 2013), p. 86. According to Canada, this authority addresses Canada's 2004 Model BIT but concludes that Canada's second generation BITs (like the BIT), although organized differently, have the same effect. Merits Rejoinder and Jur. Reply, ¶ 121.

future."[490] Canada considers that Article XVI of the BIT, which GTH cites to support its interpretation, reinforces Canada's position. It requires the Contracting Parties, within two years after the entry into force of the BIT, to notify one another of any *existing* non-conforming measures; it does not apply to future measures, which by their very nature cannot be identified.[491]

347. Canada further contends that the BIT does not distinguish between the reservation of a right and the exercise of a right, as GTH suggests.[492] In this regard, Canada refers to "denial of benefits" clauses, which are found in certain investment treaties and often use the language of a reservation of rights. According to Canada, tribunals have found that such language allows the State to deny the treaty rights at the time they are being claimed.[493]

b. Whether the Annex Includes Telecommunications

348. Regarding the scope of the exception, Canada's position is that the Annex of the BIT excludes all services, including telecommunications.[494] Canada highlights that the first exclusion listed in the Annex is "social services," which is followed by "services in *any* other sector."[495] Canada reads these together to mean that all service sectors, including social services, fall within the scope of the exception.[496] Thus, Canada sees no basis for GTH's position that telecommunications are not covered by the Annex.

349. In Canada's view, its interpretation of the Annex is confirmed by Canada's treaty practice. It argues that nearly all its investment treaties from 1994 to the late 1990s contain provisions identical or similar to Article IV(2)(d) the Annex of the BIT, which contains a broad exception for

[490] Merits Rejoinder and Jur. Reply, ¶ 122, *quoting* **RL-289**, Marie-France Houde, *Novel Features in Recent OECD Bilateral Investment Treaties*, in OECD, *International Investment Perspective* (2006), p. 169. This authority discusses the United States and Canadian 2004 model BITs.

[491] Merits Rejoinder and Jur. Reply, ¶ 124; **CL-001**, BIT (English version), Article XVI.

[492] Merits Rejoinder and Jur. Reply, ¶ 125.

[493] Merits Rejoinder and Jur. Reply, ¶ 126, *citing* **RL-290**, *Guaracachi America Inc. and Rurelec PLC v. The Plurinational State of Bolivia* (UNCITRAL) Award, 31 January 2014, ¶ 376 ("The very purpose of the denial of benefits is to give the Respondent the possibility of withdrawing the benefits granted under the BIT to investors who invoke those benefits. As such, it is proper that the denial is 'activated' when the benefits are being claimed.").

[494] Jur. Memorial, ¶¶ 215-224; Merits Rejoinder and Jur. Reply, ¶¶ 131-136.

[495] Merits Rejoinder and Jur. Reply, ¶ 132, *quoting* **CL-001**, BIT (English version), Annex.

[496] Merits Rejoinder and Jur. Reply, ¶ 132.

all services from Canada's national treatment obligations.[497] Canada opposes GTH's argument that Canada specifically identified telecommunications in other treaties when it sought to exclude that sector.[498] Canada points out that GTH cites treaties from 2013 and 2014, which reflect an "evolution in the architecture of Canada's FIPAs over the past three decades."[499] These treaties and the BIT all exclude telecommunications, albeit in different ways.[500]

350. In addition, Canada considers GTH's position that telecommunications is not a service "plainly wrong and contradicted by the fact that the measures at issue clearly relate to the provision of telecommunications services by Wind Mobile."[501]

351. In this regard, Canada considers GTH's reliance on the Standard Industrial Classification misplaced because (a) it is referenced in the BIT only with respect to "government securities" and not "any other services"; (b) it does not contain a single category for all services in which telecommunications would fall; and (c) it refers to "telecommunications broadcasting and transmission services" and therefore does not suggest that telecommunications are not services. [502]

(3) GTH's Position

352. GTH's position is that Canada's objection must be dismissed because Canada did not exclude telecommunications from its national treatment obligations.[503] GTH argues that Canada has not exercised its right to make an exception under Article IV(2) of the BIT and that, in any event, the Annex does not cover telecommunications.[504]

[497] Jur. Memorial, ¶ 218, *citing* **RL-026**, Canada-Ukraine FIPA, Article IV(2)(d), Annex; **RL-027**, Canada-Trinidad and Tobago FIPA, Article IV(2)(3), Annex; **RL-089**, Canada-Philippines FIPA, Article IV(2)(4), Annex; **RL-094**, Canada-Barbados FIPA, Article IV(2)(4), Annex; **RL-093**, Canada-Ecuador FIPA, Article IV(2)(4), Annex; **RL-095**, Canada-Venezuela FIPA, Annex II.11.4; **RL-092**, Canada-Panama FIPA, Article IV(2)(4), Annex; **RL-100**, Canada-Thailand FIPA, Article IV(3), Annex I; **RL-028**, Canada-Armenia FIPA, Article IV(2)(d), Annex.

[498] Jur. Memorial, ¶ 223, *citing* Merits Memorial, n. 833.

[499] Jur. Memorial, ¶ 223.

[500] Jur. Memorial, ¶¶ 223-224.

[501] Merits Rejoinder and Jur. Reply, ¶ 114.

[502] Merits Rejoinder and Jur. Reply, ¶¶ 134-136; **RL-291,** Statistics Canada, *Standard Industrial Classification* (1980).

[503] Merits Reply and Jur. Counter-Memorial, ¶¶ 175 *et seq.*; Jur. Rejoinder, ¶¶ 43 *et seq.*

[504] Merits Reply and Jur. Counter-Memorial, ¶ 176.

a. Whether Canada has Made an Exception Under Article IV(2)(d) of the BIT

353. GTH acknowledges that Canada has a right under Article IV(2)(d) to make and maintain exceptions to national treatment protection.[505] However, GTH contends that this is "simply a right reserved to make an exclusion in the future," and the exercise of this right requires more than the mere adoption of a measure.[506]

354. For GTH, this is clear from the ordinary meaning of Article IV(2) and the Annex.[507] GTH points out a distinction between Article IV(a)-(c) and Article IV(d): while the former refer to "measures" that the Contracting Parties can make or maintain without violating the national treatment obligation, the latter only permits the Contracting Parties to "make or maintain exceptions" within certain sectors specified in the Annex.[508] Thus, the provision identifies certain existing exceptions to national treatment and leaves it to the States whether to exercise their right to make further exceptions in the future.[509]

355. Turning to the Annex, GTH highlights that Canada "reserve[d] the right to make and maintain exceptions" in the listed sectors.[510] In GTH's view, if Canada had wished to *make* the exception rather than reserve the right to do so, it would have used different language. GTH points to Article IV(2)(a)(ii) of the BIT, which expressly excludes certain future non-conforming measures.[511]

[505] Merits Reply and Jur. Counter-Memorial, ¶ 177; Jur. Rejoinder, ¶ 43.

[506] Jur. Rejoinder, ¶ 43.

[507] Merits Reply and Jur. Counter-Memorial, ¶¶ 177-183; Jur. Rejoinder, ¶ 43.

[508] Merits Reply and Jur. Counter-Memorial, ¶¶ 177-178; Jur. Rejoinder, ¶ 44. GTH recalls that "measure" is defined in the BIT to include "any law, regulation, procedure, requirement, or practice." **CL-001**, BIT (English version), Article I(h).

[509] Merits Reply and Jur. Counter-Memorial, ¶¶ 177-178; Jur. Rejoinder, ¶¶ 44.

[510] Merits Reply and Jur. Counter-Memorial, ¶ 181, *quoting* **CL-001**, BIT (English version), Annex.

[511] Merits Reply and Jur. Counter-Memorial, ¶ 181; Jur. Rejoinder, ¶ 44, *quoting* **CL-001**, BIT (English version), Article IV(2)(a)(ii) ("Subparagraph (3)(a) of Article II, paragraph (1) of this Article, and paragraphs (1) and (2) of Article V do not apply to: […] any measure maintained or adopted after the date of entry into force of this Agreement that, at the time of sale or other disposition of a government's equity interests in, or the assets of, an existing state enterprise or an existing governmental entity, prohibits or imposes limitations on the ownership of equity interests or assets or imposes nationality requirements relating to senior management or members of the board of directors").

356. GTH asserts that such a reservation of rights cannot be equated with the exercise of a right, as recognized by numerous arbitral tribunals.[512] According to GTH, Canada attempts to equate the two concepts by relying almost exclusively on its 2004 Model BIT, which is irrelevant to the present case.[513] In any event, unlike the BIT, the 2004 Model BIT clearly states that the national treatment provisions "**shall not apply to any measure that a Party adopts or maintains** with respect to sectors, subsectors or activities, as set out in its schedule to Annex II."[514] GTH finds this difference in language from that of the BIT "telling."[515]

357. Therefore, GTH argues that Canada must affirmatively exercise its right to make exceptions to national treatment "by providing notice to investors that are subject to the BIT's protections," and that such notice cannot have retroactive effect.[516] As support for this point, GTH cites arbitral decisions addressing "denial of benefits" clauses.[517] GTH considers that Article XVI

[512] Merits Reply and Jur. Counter-Memorial, ¶ 181; Jur. Rejoinder, ¶ 45, *citing* **CL-123**, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, ¶ 155 ("the existence of a 'right' is distinct from the exercise of that right. For example, a party may have a contractual right to refer a claim to arbitration; but there can be no arbitration unless and until that right is exercised."); **RL-164**, *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Excerpts, 22 June 2010, ¶ 224 ("To reserve a right, it has to be exercised in an explicit way."); **CL-132**, *Yukos Universal Limited (Isle of Man) v. The Russian Federation* (UNCITRAL) PCA Case No. AA 227, Interim Award on Jurisdiction and Admissibility, 30 November 2009, ¶ 456 (stating that the ECT "'reserves the right' of each Contracting Party to deny the advantages of that Part to such an entity. This imports that, to effect denial, the Contracting Party must exercise the right."); **CL-155**, *Anatolie Stati, Gabriel Stati, Ascom Group SA, and Terra Raf Trans Traiding Ltd v. Kazakhstan*, SCC Case No. V 116/2010, Award, 19 December 2013, ¶ 745 (finding that a reserved right "would only apply if a state invoked that provision to deny benefits to an investor before a dispute arose"); **CL-172**, *Bear Creek Mining Corporation v. Republic of Perú*, ICSID Case No. ARB/14/21, Award, 30 November 2012, ¶ 319.

[513] Jur. Rejoinder, ¶ 45.

[514] Jur. Rejoinder, ¶ 45, *quoting* **RL-117**, Canada's Model BIT (2004), Article 9(2) (*GTH's emphasis*).

[515] Jur. Rejoinder, ¶ 45.

[516] Jur. Rejoinder, ¶¶ 46, 48.

[517] Jur. Rejoinder, n. 132 and 138, *citing* **CL-123**, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, ¶ 157 ("The exercise would necessarily be associated with publicity or other notice so as to become reasonably available to investors and their advisers.") and ¶ 162 ("the right's exercise should not have retrospective effect"); **CL-132**, *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, (UNCITRAL) PCA Case No. AA 227, Interim Award on Jurisdiction and Admissibility, ¶ 458 (finding that the respondent could not use notice given in its memorial in the proceedings as a basis for retrospective "exercise of the reserved right of denial"); **CL-200**, *Khan Resources Inc., Khan Resources B.V., and Cauc Holding Company Ltd. v. The Government of Mongolia* (UNCITRAL) Decision on Jurisdiction, ¶ 427 (finding that respondents must "exercise their …right in time to give adequate notice to investors"); **RL-164**, *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Excerpts, ¶ 225 ("notification has prospective but no retroactive effect."). At the same time, GTH cautions that "[d]enial of benefits provisions, the requirements of which are clear on the face of a treaty, **cannot** be equated with the right to make future reservations, the scope of which remains undetermined until the right has been exercised." Jur. Rejoinder, ¶ 47; *see* ¶ 49, *citing* **RL-290**, *Guaracachi*

of the BIT provides guidance regarding how such notice should be provided.[518] That provision requires the Contracting Parties to "exchange letters listing, to the extent possible, any existing measures that do not conform to the obligations."[519]

358. According to GTH, Canada's reliance on *Lemire v. Ukraine* and *Lauder v. Czech Republic* does not help its case, because these decisions merely confirm the proposition that a State can reserve the right to make exceptions, which is not disputed.[520]

359. In sum, GTH's view is that Canada must exercise its right to make or maintain an exception *before* such an exception can take effect.[521] As Canada has failed to provide any evidence that it sought to exercise its right, the objection must fail.[522]

b. Whether the Annex Includes Telecommunications

360. In any event, GTH argues that the telecommunication sector does not fall within the scope of the reservation of rights contained in the Annex to the BIT.[523] GTH rejects Canada's position that telecommunications is covered by the item "services in any other sector."[524] GTH advances the following arguments to support its view:

a. The category "services in any other sector" is not equivalent to "services sectors," as Canada suggests.[525]

America Inc. and Rurelec PLC v. The Plurinational State of Bolivia (UNCITRAL) Award, 31 January 2014, ¶¶ 375-379.

[518] Jur. Rejoinder, ¶ 46.

[519] **CL-001**, BIT (English version), Article XVI(1).

[520] Merits Reply and Jur. Counter-Memorial, ¶ 183, *citing* Jur. Memorial, ¶¶ 210-212.

[521] Merits Reply and Jur. Counter-Memorial, ¶ 183.

[522] *See* Jur. Rejoinder, ¶ 46.

[523] Merits Reply and Jur. Counter-Memorial, ¶¶ 186-189; Jur. Rejoinder, ¶¶ 50-52.

[524] Jur. Rejoinder, ¶ 50, *quoting* **CL-001**, BIT (English version), Annex.

[525] Merits Reply and Jur. Counter-Memorial, ¶ 187, *quoting* Jur. Memorial, ¶ 204. GTH submits that to the extent the phrase "services in any other sector" is ambiguous, "that ambiguity only supports GTH's position that Canada needed to take some clear action to implement an exception within the services sector under the Annex." Merits Reply and Jur. Counter-Memorial, ¶ 189.

b. Canada's interpretation would render the first item in the list ("social services") superfluous.[526]

c. In any event, the telecommunications sector is not a service sector; it also covers infrastructure, construction and product sales.[527]

d. Canada's own Standard Industrial Classification, which is referenced in the Annex to the BIT, classifies telecommunications as a utility, not a service.[528]

e. In other investment treaties, Canada has expressly exempted measures with respect to "telecommunications services" but did not do so in the BIT. Indeed, in other treaties, Canada exempted "telecommunications services" *in addition to* "the establishment or acquisition in Canada of an investment in the services sectors."[529]

361. Therefore, GTH submits that even if Canada were able to exercise its right to make an exception merely by adopting a non-conforming measure (which GTH denies), this jurisdictional objection must still be dismissed because telecommunications does not fall within Canada's purported exception.

362. Finally, GTH adds that Canada's national security review would not fall within the purported exception in any case because it is not a measure targeting "services"; rather, it targets all foreign investments regardless of the sector.[530]

(4) The Tribunal's Analysis

363. As a preliminary point, the Tribunal notes that Article IV(2)(d) of the BIT concerns exceptions to national treatment, which is a substantive protection granted under the BIT. Canada

[526] Merits Reply and Jur. Counter-Memorial, ¶ 188.

[527] Merits Reply and Jur. Counter-Memorial, ¶ 187; Jur. Rejoinder, ¶ 50.

[528] Merits Reply and Jur. Counter-Memorial, ¶ 187; Jur. Rejoinder, ¶ 50, *citing* **CL-097**, Statistics Canada, *Standard Industrial Classification* (1980), p. 174 (classifying "Telecommunication Carriers Industry" is classified under "Communications and Other Utilities").

[529] Jur. Rejoinder, ¶ 51, *quoting* **CL-069**, Agreement between the Government of Canada and the Government of the United Republic of Tanzania for the Promotion and Reciprocal Protection of Investments (signed 17 May 2013; entry into force 9 December 2013), Article 16(3), Annex II. GTH cites a number of other treaties entered into by Canada, including **CL-073**, **CL-078**, **RL-118** to **RL-129** and **RL-133** to **RL-135**.

[530] Jur. Rejoinder, ¶ 52.

invokes this provision as an objection to the Tribunal's jurisdiction, and GTH has responded on that basis. In the Tribunal's view, the issue might be better characterised as a question of admissibility or even merits, given its relevance to substantive protection rather than to the dispute resolution provisions of the BIT. However, this distinction carries no practical consequence in the present circumstances. Regardless of how one chooses to characterise Canada's objection, its operation is the same: if the Tribunal upholds the objection, it will not consider GTH's national treatment claim any further. Therefore, the Tribunal will address Canada's objection as pleaded by the Parties.

364. The decisions in this section of the Award are taken by the Tribunal acting by a majority.

365. The Tribunal must determine whether, pursuant to Article IV(2)(d) and the Annex of the BIT, measures taken in the telecommunications sector are excluded from the scope of Canada's national treatment obligations. To reach that determination, the Tribunal will address in turn two main questions: (a) has Canada validly made an exception under Article IV(2)(d)? and (b) if so, is telecommunications captured by that exception? With respect to each of these questions, the Tribunal's fundamental task is to interpret the relevant provisions of the BIT in accordance with Article 31(1) of the VCLT.

366. Article IV of the BIT is structured as a statement of general principle in paragraph (1), subject to a number of exceptions set forth in paragraph (2). Specifically, paragraph (2) states that paragraph (1) and certain other provisions of the BIT "do not apply to" subparagraphs (a) to (d). Subparagraph (a) refers to "existing non-conforming measures" and a very specific category of measures adopted after the date of the entry into force of the BIT (relating to ownership and participation in State entities). In turn, subparagraphs (b) and (c) refer to the continuation, renewal and amendment of such measures.

367. Of primary interest to the Tribunal is Article IV(2)(d), which provides that the national treatment obligation in paragraph (1) "does not apply to … the right of each Contracting Party to make or maintain exceptions within the sectors or matters listed in the Annex." [531] The text makes clear that the right to make an exception in a sector or a matter is subject to only one condition:

[531] The Arabic version of the Annex (but not in the English and the French versions) also includes Egypt's reservation of right to make and maintain exceptions in specifically listed matters. This is not disputed between the Parties.

the sector or matter must be listed in the Annex. In the Annex, Canada "reserves the right to make and maintain exceptions" in five categories, including "social services" and "services in any other sector."[532] This language, similar in all three authentic linguistic versions of the BIT, leaves no room for doubt that Canada has the right to make exceptions to its national treatment obligation with respect to "services." Unattractive as the result may seem to the dissenting minority,[533] such is the Parties' agreement as recorded in the explicit terms of the BIT. The Tribunal is neither expected nor empowered to rewrite the Treaty to make its substantive protections more efficient for the interests of a party. The Tribunal is not expected either to adapt the application of the terms of the Treaty to suit the variable size of the concerned sectors in the Canadian economy.[534]

368. A remaining question is whether Canada may exercise that right by simply adopting or applying an inconsistent measure, or whether Canada must take an intermediary step to "activate" that right. Canada's position is that the "right to make exceptions is the right to take inconsistent measures," whereas GTH contends that Canada must affirmatively exercise its right to make exceptions, such as "by providing notice to investors that are subject to the BIT's protections." [535]

369. The Tribunal finds that the correct, and most reasonable, interpretation of Article IV(2)(d) and the Annex supports Canada's position. In particular, there is simply no basis in the text of the BIT to impose an additional procedural requirement that triggers the effectiveness of the exception.[536]

370. In this regard, it is useful to consider Article XVI of the BIT, which provides:

> 1. The Contracting Parties shall, within a two year period after the entry into force of this Agreement, exchange letters listing, to the extent possible, any existing measures that do not conform to the obligations in subparagraph (3)(a) of Article II, Article IV or paragraphs (1) and (2) of Article V.

[532] The scope of this category is discussed below, beginning at ¶ 375.

[533] Dissenting Opinion of Mr. Born, ¶¶ 16, 38.

[534] *Ibid.*, ¶ 50.

[535] Day 2, Tr. 140:9-16; Jur. Rejoinder, ¶¶ 46, 48. *See* the summary of the Parties' positions in Section VI.D(2) and (3) above.

[536] As Canada highlights, many BITs include express notice requirements for exceptions such as those permitted by Article IV(2)(d).

> 2. Each Contracting Party shall, to the extent practicable, ensure that its laws, regulations, procedures, and administrative rulings of general application respecting any matter covered by this Agreement are promptly published or otherwise made available in such a manner as to enable interested persons and the other Contracting Party to become acquainted with them.

371. Article XVI(1) sets out a process by which the Contracting Parties are to notify one another of any existing non-conforming measures, but there is no such process prescribed for exercising the right granted by Article IV(2)(d). The obvious indication is that if the Contracting Parties had intended for that right to be subject to any notification requirement beyond listing the relevant sector or matter in the Annex, they would have included it in the text of the BIT.[537] Even if there were any want of diligence on the part of Canada in publicising this fact under Article XVI(2) (Transparency) of the BIT, that could amount to a breach of Article XVI(2) but would not, of itself, imply any violation of any other Article of the BIT.

372. With regard to the Annex, the reference to "services in any other sector" must be read in the context of the four other listed items. These refer to matters as specific as "government securities – as described in SIC 8152" and "residency requirements for ownership of oceanfront land" and "measures implementing the Northwest Territories and the Yukon Oil and Gas Accords." The specificity of these categories also suggests that no further action by Canada is required or contemplated prior to its entitlement to rely upon these asserted "exceptions." Although "services in any other sector" is broader than the other items listed, there is no indication in the text that it should be treated differently.

373. The Tribunal can but note that the text of the Annex could have been drafted in clearer terms. For instance, Canada could have stated that its national treatment obligation does not apply to non-conforming measures in the listed sectors or matters. At the same time, the Tribunal understands that the terms used ("reserves the right to make exceptions") reflect the fact that Article IV(2)(d) is largely forward looking. While Article IV(2)(a) to (c) are primarily concerned

[537] It is worth noting that GTH does not allege any violation of Article XVI. From the record, it is clear that the text of ICA was available to investors at all times and that, as a matter of fact, GTH knew of the national security review provisions that were adopted in 2009.

with *existing* measures (and thus refer clearly to excluded "non-conforming measures"), the main purpose of Article IV(2)(d) is to exclude measures that might be adopted *in the future*.

374. In any event, the Tribunal must interpret the text of the BIT as it is, not as it should have been drafted in an ideal situation. As already mentioned, the text leaves no doubt that Canada has the right to make exceptions to its national treatment obligation in "services," and the Tribunal declines to subject that right to a notice requirement or other procedural hurdle which is not included in the BIT. Thus, the Tribunal concludes that under Article IV(2)(d) and the Annex, Canada may adopt or apply measures with respect to "services" that are not in conformity with its national treatment obligation.

375. It is important to emphasize that this exception is limited to the national treatment provisions of the BIT. Canada remains obligated to provide Egyptian investors fair and equitable treatment when adopting or applying any measures in relation to "services" under Article II(2)(a) of the BIT, and Canada must be reasonably transparent in the adoption of laws, regulations and procedures that might affect "services" under Article XVI(2).

376. The Tribunal now turns to the question of whether "services in any other sector" includes telecommunications, which is the sector at issue in the present case. The Tribunal has no difficulty finding that it does.

377. As noted above, the first item listed in the Annex is "social services," followed by "services in *any* other sector." The only plausible interpretation is that all services, including social services, fall within the scope of the Annex.[538] The Tribunal cannot accept GTH's argument that "services in any other sector" should be read more narrowly to give meaning to the reference to "social services" in the preceding item. That Canada chose to divide services into two categories, and provide further elaboration in respect of the first category, does not alter the clear language of the Annex.

378. While the breadth of the category "services in any other sector" might seem surprising, the language is consistent with many of Canada's investment treaties from the mid- to late- 1990s,

[538] Merits Rejoinder and Jur. Reply, ¶ 132.

which contain similar exceptions for services.[539] In any event, it is not for the Tribunal to judge the extent to which a State chooses to guarantee investors national treatment (or not).

379. The Tribunal is also unpersuaded by GTH's assertion that telecommunications is not a service sector. That assertion fails to reflect reality and runs contrary to GTH's own description of Wind Mobile's activities, which were aimed at providing mobile telecommunications services to Canadian customers.[540]

380. In light of the findings above, the Tribunal concludes that GTH's national treatment claim, which relates exclusively to the telecommunications sector, is excluded from the scope of the BIT's national treatment provisions. Accordingly, the national treatment claim is dismissed and will not be considered on the merits.

E. WHETHER THE CLAIMS ARE TIME-BARRED UNDER ARTICLE XIII(3)(D) OF THE BIT

381. Canada's submits that the Tribunal lacks jurisdiction *ratione temporis* over certain of GTH's claims because they are time-barred pursuant to the limitations period contained in Article XIII(3)(d) of the BIT.

382. GTH argues that its claims relating to Canada's cumulative, or composite, breaches of the BIT are not impacted by the notification period in Article XIII(3)(d) of the BIT, and the Tribunal should therefore dismiss Canada's objection.

(1) Relevant Provision of the BIT

383. Article XIII(3)(d) of the BIT provides:

> An investor may submit a dispute as referred to in paragraph (1) to arbitration in accordance with paragraph (4) only if: […] not more than three years have elapsed from the date on

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

[540] In this regard, the Tribunal agrees with Canada that GTH's reliance on the Standard Industrial Classification is misplaced because it is referenced in the BIT only with respect to "government securities" and not "any other services."

which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.[541]

(2) Canada's Position

384. Canada submits that the Tribunal lacks jurisdiction *ratione temporis* over GTH's claims challenging (a) the CRTC's O&C review of Wind Mobile and (b) Canada's alleged failure to maintain a regulatory framework for roaming and tower site/sharing favourable to New Entrants.[542] In Canada's view, these claims fall outside the strict limitations period in Article XIII(3)(b) of the BIT, and GTH cannot evade that limitations period by alleging that the measures are part of a composite breach.[543]

385. According to Canada, Article XIII(3)(d) places a strict limitation on when an investor may submit a dispute to arbitration: an investor may not submit a claim if more than three years have elapsed since it first acquired knowledge, or should have first acquired knowledge, of the alleged breach and alleged loss arising out of that breach.[544] If this condition is not met, Canada has not consented to arbitrate the dispute, and the Tribunal therefore lacks jurisdiction.[545] Several tribunals considering the limitations period in Articles 1116(2) and 1117(2) of NAFTA (which contain the same language as Article XIII(3)(d)) have confirmed that the limitations period is a fundamental basis of a State's consent to arbitrate, and an investor's failure to comply deprives the tribunal of jurisdiction.[546]

386. Canada contends that GTH cannot evade the limitations period by alleging that the measures form part of a cumulative or composite breach.[547] In Canada's view, GTH has repeatedly

[541] **CL-001**, BIT (English version), Article XIII(3)(d).

[542] Jur. Memorial, ¶¶ 149 *et seq.*; Merits Rejoinder and Jur. Reply, ¶¶ 137 *et seq.*

[543] Jur. Memorial, ¶ 150; Merits Rejoinder and Jur. Reply, ¶ 137.

[544] Jur. Memorial, ¶ 165.

[545] Jur. Memorial, ¶ 152, *citing* **CL-001**, BIT (English version), Article XIII(5) ("Each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration in accordance with the provisions of this Article.").

[546] Jur. Memorial, ¶¶ 155-162, *citing*, *inter alia*, **RL-031**, *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America* (UNCITRAL) Decision on Objections to Jurisdiction, 20 July 2006, ¶ 24; **RL-032**, *Apotex Inc. v. United States of America* (UNCITRAL) Award on Jurisdiction and Admissibility, 14 June 2013, ¶¶ 314-335; **RL-033**, *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Canada* (UNCITRAL) Award on Jurisdiction and Liability, 17 March 2015, ¶¶ 258-282.

[547] Merits Rejoinder and Jur. Reply, ¶ 141.

changed its characterization of the measures relating to the CRTC review and the roaming and tower/site sharing framework throughout this proceeding in an attempt to circumvent Article XIII(3)(d).[548] However, Canada sees no merit in any of GTH's theories.

387. Canada asserts that Article XIII(3)(d) is a "clear and rigid limitation defense … not subject to any suspension, prolongation or other qualification."[549] In particular, as stated by the tribunal in *Grand River v. United States*, a claimant cannot "base its claim on the most recent transgression, [when] it had knowledge of earlier breaches and injuries."[550] Canada contends that GTH must not be permitted to toll the limitations period by tying untimely measures to more recent ones.[551] In Canada's view, that would strip Article XIII(3)(d) of any purpose.[552]

388. In any event, Canada considers that GTH has failed to prove a cumulative or composite breach.[553] Canada states that establishing a composite breach "requires demonstrating that the measures were all unified by a common purpose or intent."[554] This is a fact-specific inquiry.[555] In

[548] Merits Rejoinder and Jur. Reply, ¶¶ 142-143. Canada points out that in the Request for Arbitration (¶¶ 97(a), 97(b) and 98), GTH stated that "each of the measures individually, and/or taken together" constituted a breach. In the Merits Memorial (¶ 284), GTH stated that measures were "separate and independent breaches of the BIT." In the Merits Reply and Jur. Counter-Memorial (¶¶ 200, 201), GTH stated that the two relevant measures do not independently amount to independent beaches of the BIT" but rather are part of a composite breach.

[549] Jur. Memorial, ¶ 156, *quoting* **RL-030**, *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)99/1, Award, 16 December 2002, ¶ 63.

[550] Merits Rejoinder and Jur. Reply, ¶ 146, *quoting* **RL-031**, *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America* (UNCITRAL) Decision on Objections to Jurisdiction, 20 July 2006, ¶ 81.

[551] Merits Rejoinder and Jur. Reply, ¶¶ 146-147, *citing* Merits Reply and Jur. Counter-Memorial, ¶ 200 ("a composite breach of FET occurs on the date of the final act causing the composite acts to unequivocally amount to a breach").

[552] Merits Rejoinder and Jur. Reply, ¶ 197, *citing* **RL-035**, *Spence International Investments, LLC et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award, 25 October 2016, ¶ 208.

[553] Jur. Memorial, ¶¶ 170-178; Merits Rejoinder and Jur. Reply, ¶¶ 145-150.

[554] Merits Rejoinder and Jur. Reply, ¶ 148, *citing* **RL-325**, Robert Kolb, *The International Law of State Responsibility: An Introduction* (Edward Elgar Publishing, 2017), p. 51; **RL-292**, Scott Vesel, "A 'creeping' violation of the Fair and Equitable Treatment Standard?", *Arbitration International*, Vol. 30, No. 3, pp. 556-557 ("In further elucidating the concept of 'composite act', Professor Salmon has emphasized the distinction between 'simple repeated acts' and 'a series of conducts which constitute a unit because of the pursued intention'. Citing Special Rapporteur James Crawford's insistence 'on the fact that the composite act must be limited to breaches characterized by an aspect of systematic policy,' Salmon concludes that 'what characterizes the composed delict is, apart from a quantitative aspect, the existence of a motive which unites the whole of the criticized conducts in one determined wrongful act.'…"). *See* Jur. Memorial, ¶ 171, *citing* **CL-031**, *Técnicas Medioambientales TECMED S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, ¶ 62; **RL-106**, *Sergei Paushok et al. v. The Government of Mongolia* (UNCITRAL) Award on Jurisdiction and Liability, 28 April 2011, ¶ 499.

[555] Jur. Memorial, ¶ 172, *citing* **CL-016**, *Rusoro Mining Limited v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016, ¶¶ 229-231.

this regard, Canada cites *Rusoro v. Venezuela*, in which the tribunal examined whether a series of measures shared a sufficient "connection" to consider them "a unity" for purposes of the relevant limitations period and found no such linkage.[556]

389. In addition, Canada argues that a composite act as defined in Article 15 of the International Law Commission's *Articles on Responsibility of States for Internationally Wrongful Acts* (the "**ILC Articles**") "refers to obligations which can only be breached through a series of measures rather than through an individual act," such as those relating to genocide and crimes against humanity.[557]

390. Canada recalls that the composite act as alleged by GTH includes (a) the CRTC review, (b) the roaming and tower/site sharing regulatory framework, (c) the treatment of GTH's Voting Control Application, and (d) the Transfer Framework. In Canada's view, these are separate, distinct measures, and GTH has failed to show any link among them other than the alleged impact on Wind Mobile.[558] For example, the CRTC is "an arm's-length regulator" separate from the arms of the Government involved with the other measures, and it carried out its review pursuant to the Telecommunications Act, a distinct legal basis.[559] Similarly, the roaming and tower/site sharing regulatory framework shares no link with the other measures and applied to all New Entrants, not only Wind Mobile.[560] The ICA review was conducted on the distinct basis of national security concerns by an arm of Industry Canada that is not involved with telecommunications policy.[561]

391. Thus, Canada asserts that these four measures must be considered separately, and the result is that the claims relating to the CRTC review and the regulatory framework for New Entrants are

[556] Merits Rejoinder and Jur. Reply, ¶ 152, *citing* **CL-016**, *Rusoro Mining Limited v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016, ¶ 229.

[557] Merits Rejoinder and Jur. Reply, ¶ 150, *quoting* **RL-292**, Scott Vesel, "A 'creeping' violation of the Fair and Equitable Treatment Standard?", *Arbitration International*, Vol. 30, No. 3, p. 556; *see* **RL-233**, International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001) ("Commentary on the ILC Articles"), Article 15, Commentary 2 (stating that a "composite act" covers "breaches of obligations which concern some aggregate of conduct and not individual acts as such.").

[558] Jur. Memorial, ¶¶ 171-178; Merits Rejoinder and Jur. Reply, ¶¶ 151-154.

[559] Jur. Memorial, ¶¶ 174-175.

[560] Jur. Memorial, ¶ 176; Merits Rejoinder and Jur. Reply, ¶ 153.

[561] Jur. Memorial, ¶ 177; Merits Rejoinder and Jur. Reply, ¶ 153.

untimely.[562] According to Canada, GTH does not contest that these measures, if considered on their own, fall outside the limitations period.[563]

392. Moreover, in Canada's view, the evidence clearly shows that GTH had knowledge of these alleged breaches and the damages arising out of them before the cut-off date of 28 May 2013.[564] In particular, Canada considers that GTH had the requisite knowledge in relation to the CRTC review by late 2009, and in any event by April 2012, when leave to appeal the GiC Decision to the Supreme Court of Canada was denied, closing the final opportunity for it to be reversed.[565]

393. Regarding the regulatory framework for New Entrants, Canada points to GTH's submissions that Canada took action to enforce the regulatory framework only in March 2013, with the release of the revised COLs on mandatory roaming and tower/site sharing.[566] Thus, on GTH's own case, it had the requisite knowledge relating to Canada's alleged failure to enforce the regulatory framework no later than March 2013.

394. Canada concludes that GTH's claims relating to these two measures fall outside the limitations period in Article XIII(3)(d) of the BIT, and they must be dismissed for lack of jurisdiction *ratione temporis*.

(3) GTH's Position

395. GTH submits that it has complied with the notification period in Article XIII(3)(d) in respect of all its claims, including those relating to Canada's cumulative breach of the BIT.[567] According to GTH, nothing in Article XIII(3)(d) prevents the Tribunal from considering the CRTC

[562] Jur. Memorial, ¶¶ 180-190; Merits Rejoinder and Jur. Reply, ¶¶ 157-158.

[563] Merits Rejoinder and Jur. Reply, ¶ 156.

[564] Jur. Memorial, ¶¶ 180-190; Merits Rejoinder and Jur. Reply, ¶¶ 157-158.

[565] Jur. Memorial, ¶¶ 180-181, *citing* Merits Memorial, ¶¶ 126-143; **C-124**, *Public Mobile v. Globalive Wireless Management Corp. and Attorney General of Canada*, leave to appeal to SCC refused, 34418, 26 April 2012; **C-024**, *The Globe & Mail*, "Globalive wins court battle over foreign control," 26 April 2012.

[566] Merits Rejoinder and Jur. Reply, ¶ 159, *citing* Merits Reply and Jur. Counter-Memorial, ¶¶ 45, 321(a).

[567] Merits Reply and Jur. Counter-Memorial, ¶¶ 192 *et seq.*; Jur. Rejoinder, ¶¶ 53 *et seq*.

review and the regulatory framework for New Entrants as part of GTH's claims of cumulative breaches.[568]

396. GTH acknowledges that the CRTC review and Canada's alleged failure to ensure a level playing field to New Entrants occurred more than three years prior to the date of filing of the Request for Arbitration. As a result, GTH asserts that it is not claiming those as stand-alone or separate breaches.[569] However, GTH submits that those breaches are part of a cumulative breach, which was not known until June 2013.[570]

397. GTH points to the description of "composite act" found in Article 15 of the ILC Articles and its Commentary.[571] Article 15 states that a composite breach is "a series of actions or omissions defined in aggregate as wrongful," which "occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act."[572]

398. Thus, GTH considers that a composite breach occurs on the date of the *final* act causing the series of acts to amount to a breach, and a wronged party cannot have knowledge of the breach until that date.[573] In this regard, GTH also cites *Société Générale v. Dominican Republic*, in which the tribunal recognized that:

> there might be situations in which each act considered in isolation will not result in a breach of a treaty obligation, but if considered as a part of a series of acts leading in the same direction they could result in a breach at the end of the process of aggregation.[574]

[568] Jur. Rejoinder, ¶ 53.

[569] Day 1, Tr. 173:24-174:15.

[570] Claimant's Post-Hearing Submission, § IV.

[571] Merits Reply and Jur. Counter-Memorial, ¶ 198; Jur. Rejoinder, ¶ 57, *citing* **CL-028**, ILC Articles (2001), Article 15; **RL-233**, International Law Commission, ILC Articles with commentaries (2001), p. 63.

[572] Merits Reply and Jur. Counter-Memorial, ¶ 198, *quoting* **CL-028**, ILC Articles (2001), Article 15; *see* **RL-233**, International Law Commission, ILC Articles with commentaries (2001), p. 63 ("A consequence of the character of a composite act is that the time when the act is accomplished cannot be the time when the first action or omission of the series takes place. It is only subsequently that the first action or omission will appear as having, as it were, inaugurated the series. Only after a series of actions or omissions takes place will the composite act be revealed, not merely as a succession of isolated acts, but as a composite act, i.e. an act defined in aggregate as wrongful.")

[573] Merits Reply and Jur. Counter-Memorial, ¶ 200; Jur. Rejoinder, ¶¶ 55-56.

[574] Merits Reply and Jur. Counter-Memorial, ¶ 200, quoting **RL-025**, *Société Générale In Respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. v. The Dominican Republic* (UNCITRAL) LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction, 19 September 2008, ¶ 91.

399. GTH rejects Canada's characterization of a composite act under international law.[575] *First*, GTH does not agree that acts must be "unified by a common purpose or intent"[576] to form a composite breach, and contends that Canada's position is based on a misreading of its authorities.[577] In GTH's view, "the only linkage required is that the acts together must lead in the direction of the breach."[578] GTH argues that this is consistent with Canada's own statement that a composite breach may occur when a series of acts is "converging action towards the same result" and with the decisions in the cases cited by Canada, namely *Techmed v. Mexico*, *Paushok v. Mongolia*, and *Société Générale v. Dominican Republic*.[579]

400. *Second*, GTH denies that the concept of a composite breach applies only to obligations breached by a series of measures rather than single acts. In GTH's view, Canada's position is not supported by the text of the ILC Articles and runs counter to arbitral decisions recognizing that FET obligations may be breached by a composite act.[580]

401. According to GTH, the theory of composite breach addresses the present case exactly. Canada subjected GTH to "a pattern of conduct that gradually eroded the framework upon which GTH's investment was premised."[581] Some of Canada's acts do not amount on their own to a

[575] Jur. Rejoinder, ¶¶ 56-60.

[576] Jur. Rejoinder, ¶ 58, *quoting* Merits Rejoinder and Jur. Reply, ¶¶ 148-149, 151-152.

[577] Merits Reply and Jur. Counter-Memorial, ¶¶ 201-202; Jur. Rejoinder, ¶ 58, *citing, inter alia*, **RL-325**, Robert Kolb, *The International Law of State Responsibility: An Introduction* (Edward Elgar Publishing, 2017), p. 51; **RL-292**, Scott Vesel, "A 'creeping' violation of the Fair and Equitable Treatment Standard?" *Arbitration International*, Vol. 30, No. 3, pp. 556, 559-64. GTH states that "Mr. Vesel's reading of Article 15 to include a requirement of common purpose is … unsupported by the language of Article 15 and the commentary to which he cites."

[578] Merits Reply and Jur. Counter-Memorial, ¶ 202; *see* Section VII.A(5)(a) below.

[579] Merits Reply and Jur. Counter-Memorial, ¶ 202, *citing* **CL-031**, *Técnicas Medioambientales TECMED S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, ¶ 62; **RL-106**, *Sergei Paushok CJSC Golden East Company, and CJSC Vostokneftegaz Company v. The Government of Mongolia* (UNCITRAL) Award on Jurisdiction and Liability, 28 April 2011, ¶ 499; **RL-025**, *Société Générale In Respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. v. The Dominican Republic* (UNCITRAL) LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction, 19 September 2008, ¶ 94. GTH notes that "each of these cases, the tribunals (i) were asked to consider acts pre-dating the entry into force of the applicable treaty; and (ii) having concluded that such acts could not form the basis of their own breaches, considered whether they could in any event form part of a composite breach crystalizing after the relevant treaty had entered into force." Jur. Rejoinder, n. 161.

[580] Jur. Rejoinder, ¶ 59, *citing* **CL-061**, *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, ¶¶ 515-519.

[581] Merits Reply and Jur. Counter-Memorial, ¶ 193.

breach of the BIT.[582] In particular, GTH does not allege that the CRTC review and Canada's failure to enforce the roaming and tower/site sharing regulatory framework are discrete breaches.[583] However, with the benefit of hindsight, this pattern of conduct amounts to a composite breach, "which crystallized by the time of Canada's unlawful treatment of GTH's efforts to take voting control of its investment."[584]

402. GTH highlights that under Article XIII(3)(d) of the BIT, the notification period does not start to run until the investor has knowledge of the breach and the damage arising from that breach.[585] GTH finds the use of the word "breach" significant because "the BIT recognizes that the date of a breach may be distinct from any one fact establishing the breach."[586] According to GTH, Canada ignores the text and conflates the date of "breach" with the date of the underlying factual events.[587]

403. In the present case, GTH submits that it could not have known of Canada's cumulative breach of the FET standard or the resulting damage until June 2013 at the earliest.[588] It was at that time, with Canada's treatment of GTH Voting Control Application, that the totality of circumstances first amounted to a breach of FET.[589]

404. Therefore, GTH submits, Article XIII(3)(d) does not apply, and the Tribunal has jurisdiction over GTH's claim.

[582] Jur. Rejoinder, ¶¶ 55-56.

[583] Merits Reply and Jur. Counter-Memorial, ¶ 201 (distinguishing *Rusoro v. Venezuela* on the basis the facts "differentiated from the case here, where the earlier acts do not independently amount to independent breaches of the BIT (even if the later ones do)."); Jur. Rejoinder, ¶ 56.

[584] Merits Reply and Jur. Counter-Memorial, ¶ 194; *see* Section VII.A(5) below.

[585] Jur. Memorial, ¶¶ 205-208.

[586] Jur. Memorial, ¶ 206.

[587] Jur. Memorial, ¶ 206.

[588] Merits Reply and Jur. Counter-Memorial, ¶¶ 197, 209; Jur. Rejoinder, ¶ 55. *Cf.* Merits Reply and Jur. Counter-Memorial, ¶ 211, where GTH states "GTH could not have known of the damage suffered as a result of Canada's conduct until these acts could be understood in their full context. Indeed, Canada's acts caused GTH to leave the Canadian market, crystallizing the damage Canada had caused to GTH. Thus, it was only upon GTH's sale of Wind Mobile in September 2014 that any limitation period began to run."

[589] Jur. Memorial, ¶ 210; **C-032**, Letter from William G. VanderBurgh to Jenifer Aitken, 18 June 2013, p. 2 (referring for the first time to rights under investment treaties).

(4) The Tribunal's Analysis

405. GTH does not argue that either (a) the CRTC ownership and control review or (b) the alleged failure of the Government's measures related to roaming and tower/site sharing amounts to an independent breach of the BIT.[590] GTH also acknowledges that the "duplicative O&C Reviews and Canada's failure to maintain a favourable regulatory environment are acts that took place prior to June 2013."[591] However, GTH submits that, pursuant to the test set out in Article XIII(3)(d) of the BIT, it could only have known after June 2013 that those acts formed part of a cumulative breach.[592] Specifically, GTH claims that it was only [redacted] in June 2013 that GTH "acquired knowledge of the alleged breach" in the terms of Article XIII(3)(d).[593] As stated by GTH's counsel at the hearing:

> The cumulative breach took place no earlier than June 2013, so GTH could not have known of the breach, it could not have known of the loss before then.[594]

406. After considering the opposing arguments by the Parties on the issue of the time bar, the Tribunal decides that whether GTH's allegation of a composite breach[595] is sustained is a question for the merits, not a question of jurisdiction. For jurisdictional purposes, the Tribunal only needs to decide whether the two-pronged test set out in Article XIII(3)(d) of the BIT is satisfied: i.e., that GTH had only acquired actual or constructive knowledge (a) of the alleged breach as pleaded in its claim *and* (b) of the resulting loss or damage having occurred, within the three-year limitation period prior to the submission of the Request for Arbitration on 28 May 2016.[596] If it were to be established that one or more breaches became known, or should have become known, to the investor more than three years before it submitted its dispute to arbitration, the claim in relation to that specific breach will be time barred under Article XIII(3)(d), without prejudice to the other

[590] Jur. Rejoinder, ¶ 60; Day 1, Tr:173:21-174:9.

[591] Jur. Rejoinder, ¶ 60.

[592] Jur. Rejoinder, ¶ 60.

[593] Merits Reply and Jur. Counter-Memorial, ¶¶ 61, 209.

[594] Day 1, Tr. 174:17-19.

[595] *See* Merits Reply and Jur. Counter-Memorial, ¶ 200; **CL-028**, ILC Articles (2001), Article 15; **RL-025**, *Société Générale In Respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. v. The Dominican Republic* (UNCITRAL) LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction, 19 September 2008, ¶ 94.

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

unrelated breaches giving rise to admissible claims under the same provision or under other provisions of the BIT.

407. However, the investor's actual or constructive knowledge of the breach is only one part of the test set in Article XIII(3)(d). Time limitation will only bar a claim if, in addition to the breach having become known to the investor more than three years before it submitted its claim to arbitration, the loss or damage resulting from that breach *also* became known to that investor more than three years before it submitted its claim. All three equally authentic linguistic versions of the BIT confirm the cumulative nature of the 'time of knowledge' test of the limitation period in Article XIII(3)(d).

408. The Tribunal notes that GTH does not argue that either the CRTC ownership and control review or the alleged failure of the Government's measures related to roaming and tower/site sharing is "an independent breach of the BIT."[597] Whether the series of actions or omissions in relation thereto are part of a wider, cumulative breach of the BIT, as alleged by GTH,[598] or distinct and separate measures as alleged by Canada,[599] is a matter for the merits. The same applies to the question of identifying the links in the chain,[600] if any, between those two time-barred actions of Canada and the other alleged breaches, namely, the national security review and the Transfer Framework.

409. Accordingly, the Tribunal need not decide whether it has jurisdiction on inexistent claims. Determining whether a composite breach has occurred depends on the characterisation of the specific facts underlying those claims and the rights and obligations set in the BIT. The Tribunal addresses these questions below in the Merits section of the Award.

410. In understanding the time bar in Article XIII(3)(d) of the BIT, the precedents arising under a different treaty, NAFTA, adduced by Canada in support of its defense *ratione temporis*, are of

[597] *See* ¶ 405 above.

[598] Jur. Rejoinder, ¶ 60.

[599] Merits Rejoinder and Jur. Reply, at ¶ 151.

[600] The tribunal in *Rusoro v. Venezuela* uses the term "linkage." **CL-016**, *Rusoro Mining Limited v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016, ¶ 230. Canada refers in its submissions to "a pattern of conduct unified by a common intent converging towards the same result," (Merits Rejoinder and Jur. Reply, a¶ 149), which GTH rejects (Jur. Rejoinder, ¶ 59).

little assistance. This is because of the differences in the relevant terms of each treaty. While, as submitted by Canada,[601] the English version of Article 1116(2) of NAFTA is identical on its face to Article XIII(3)(d) of the BIT, the equally authentic French versions of each of those two treaties differ. Indeed, the French version of NAFTA Article 1116(2)[602] provides: "*Un investisseur ne pourra soumettre une plainte à l'arbitrage si plus de trois ans se sont écoulés depuis la date à laquelle l'investisseur a eu ou aurait dû avoir connaissance du manquement allégué et de la perte ou du dommage subi.*" This may be translated in English as requiring that the investor "knowledge of the alleged breach and of the incurred loss or damage." In contrast, the French version of the BIT requires of the investor to "*avoir connaissance de la violation prétendue et du préjudice ou du dommage* **qu'elle lui a causés**."[603] This may be translated in English as requiring that the investor has "knowledge of the alleged breach and of the loss or damage caused by that breach."[604]

411. The Tribunal considers that, under Article XIII(3)(d) of the BIT, for the investor to acquire knowledge, whether actually or constructively, that it has incurred loss or damage *caused by the alleged breach,* all the actions or omissions necessary to constitute the alleged breach must have occurred. This is particularly true in the case of a composite act, as alleged by GTH on the basis of Article 15 of the ILC Articles.[605] It is only when the last of the actions or omissions necessary to constitute the wrongful act occurs (which, as the ILC noted, is not necessarily the last act in the series),[606] that the investor can acquire knowledge of the loss caused by that wrongful act as required in Article XIII(3)(d) of the BIT.

412. The Tribunal therefore dismisses Canada's time bar objection to jurisdiction based on Article XIII(3)(d) as unfounded, given that GTH is not asserting any claim for separate breaches

[601] Merits Rejoinder and Jur. Reply, ¶ 146.

[602] NAFTA Article 2206: "Authentic Texts" provides: "The English, French and Spanish texts of this Agreement are equally authentic."

[603] *Emphasis added.*

[604] The Parties have not pointed in their submissions to this difference between the terms of NAFTA and those of the BIT. However, the Tribunal is only relying on the BIT, the three authentic versions of which have been pleaded, not on NAFTA which is not relevant to the Tribunal's jurisdiction.

[605] *See* ¶ 406 above.

[606] The Commentary to ILC Article 15 states that the Article "defines the time at which a composite act 'occurs' as the time at which the last action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act, without it necessarily having to be the last of the series." **RL-233**, International Law Commission, ILC Articles with commentaries (2001), ¶ 7.

in relation to the alleged facts pertaining to the CRTC review and to the roaming and tower/site sharing measures. The Tribunal does so without prejudice to the possibility that, as a matter of the merits of the case, particular elements of the claim as presented by GTH are liable to be dismissed because they are not shown to be elements of a composite act that comes to completion only within the three-year period.

F. WHETHER THE CLAIMANT HAS STANDING TO BRING CLAIMS RELATING TO THE TREATMENT OF WIND MOBILE

413. Canada objects to the admissibility of GTH's claims which, in Canada's view, relate to the treatment of Wind Mobile. Specifically, Canada submits that GTH lacks standing to bring its claims concerning measures that allegedly affected (a) Wind Mobile's competitiveness as a New Entrant in the Canadian telecommunications market, and (b) the transferability of Wind Mobile's licenses.

414. GTH's position is that it has standing under Article XIII(3) of the BIT to bring claims relating to both direct and indirect loss or damages it suffered as a result of Canada's alleged breaches of the BIT. In GTH's view, Canada's objection must be dismissed because it is based on an irrelevant provision of the BIT and a non-existent principle of international law.

(1) Relevant Provision of the BIT

415. Article XIII of the BIT concerns the "Settlement of Disputes between an Investor and the Host Contracting Party." It provides in relevant part:

> 1. Any dispute between one Contracting Party and an investor of the other Contracting Party, relating to a claim by the investor that a measure taken or not taken by the former Contracting Party is in breach of this Agreement[] and that the investor has incurred loss or damage by reason of, or arising out of, that breach, shall, to the extent possible, be settled amicably between them.
>
> […]
>
> 3. An investor may submit a dispute as referred to in paragraph (1) to arbitration in accordance with paragraph (4) only if:
>
> (a) the investor has consented in writing thereto;
>
> (b) the investor has waived its right to initiate or continue any other proceedings in relation to the measure that is alleged to be in breach of this Agreement before the courts or tribunals of the Contracting Party concerned or in a dispute settlement procedure of any kind;

[…]

4. The dispute may, at the election of the investor concerned, be submitted to arbitration under:

(a) The International Centre for the Settlement of Investment Disputes (ICSID)

[…]

5. Each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration in accordance with the provisions of this Article.

[…]

7. A tribunal established under this Article shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.

[…]

12. (a) A claim that a Contracting Party is in breach of this Agreement, and that an enterprise that is a juridical person incorporated or duly constituted in accordance with applicable laws of that Contracting Party has incurred loss or damage by reason of, or arising out of, that breach, may be brought by an investor of the other Contracting Party acting on behalf of an enterprise which the investor owns or controls directly or indirectly. In such a case

(i) any award shall be made to the affected enterprise;

(ii) the consent to arbitration of both the investor and the enterprise shall be required;

(iii) both the investor and enterprise must waive any right to initiate or continue any other proceedings in relation to the measure that is alleged to be in breach of this Agreement before the courts or tribunals of the Contracting Party concerned or in a dispute settlement procedure of any kind.[607]

(2) Canada's Position

416. Canada argues that GTH and Wind Mobile cannot be equated with one another, following the principle of international law that an enterprise and its shareholders have separate legal personality.[608] This principle was set forth by the ICJ in the *Barcelona Traction* case, and the Court recognized that harm to a shareholder does not create a right for the shareholder to seek compensation for measures taken against the enterprise.[609]

[607] **CL-001**, BIT (English version), Article XIII.

[608] Jur. Memorial, ¶¶ 241-244, *citing*, *inter alia*, **RL-138**, *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Judgment, I.C.J. Reports 1970, pp. 41-44.

[609] Jur. Memorial, ¶ 242, *quoting* **RL-138**, *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Judgment, I.C.J. Reports 1970, p. 44 ("Notwithstanding the separate corporate personality, a wrong done to the company frequently causes prejudice to its shareholders. But the mere fact that damage is sustained

417. Canada distinguishes between direct and derivative/reflective shareholder claims. According to Canada, a claim is derivative if the alleged harm to the shareholder resulted from the treatment of the corporation.[610] In that case, the shareholder has no independent right of action under international law.[611]

418. Canada asserts that the BIT contains two separate standing provisions to cover these two types of claims: Articles XIII(3) for direct claims and XIII(12) for derivative claims.[612] In Canada's view, to "have standing under Article XIII(3) for a claim concerning an investment in shares or loans, an investor must allege direct harm to its shareholder or creditor rights or entitlements."[613] On the other hand, Article XIII(12) provides a narrow exception to the general principle of separate legal personality by allowing a shareholder to bring a claim on behalf of an enterprise incorporated in the host State. When a shareholder brings a claim under Article XIII(12), both the shareholder and the enterprise must consent to arbitration and waive any right to initiate other proceedings relating to the challenged measure, and any damages are to be paid to the enterprise.[614]

419. According to Canada, a claim for "indirect loss following the enterprise's loss … may only be made under Article XIII(12)," and the conditions of that provision must be fulfilled.[615] The investor cannot bypass these conditions by bringing a claim based on the treatment of an enterprise under Article XIII(3), as GTH attempts to do in this case.[616] Canada asserts that such a tactic is not permitted under the plain wording of Article XIII(3), which provides that an investor's right

by both company and shareholder does not imply that both are entitled to claim compensation. … Thus whenever a shareholder's interests are harmed by an act done to the company, it is to the latter that he must look to institute appropriate action; for although two separate entities may have suffered from the same wrong, it is only one entity whose rights have been infringed").

[610] Jur. Memorial, ¶ 243, *citing* **RL-138**, *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Judgment, I.C.J. Reports 1970, ¶ 47.

[611] Jur. Memorial, ¶ 244. Canada notes that international law applies to this case under Article XIII(7) of the BIT, which states that the Tribunal "shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law." **CL-001**, BIT (English version), Article XIII(7).

[612] Jur. Memorial, ¶ 251; Merits Rejoinder and Jur. Reply, ¶¶ 162-163.

[613] Merits Rejoinder and Jur. Reply, ¶ 160.

[614] Jur. Memorial, ¶ 254, *citing* **CL-001**, BIT (English version), Article XIII(12)(a).

[615] Merits Rejoinder and Jur. Reply, ¶ 163.

[616] Merits Rejoinder and Jur. Reply, ¶ 160.

to claim on its own behalf is limited to "a claim… that the investor has incurred loss or damage."[617] That tactic would also render Article XIII(12) useless or redundant.[618]

420. Canada denies that the difference between Articles XIII(3) and XIII(12) is limited to the treatment of damages and should be addressed with the merits, as GTH asserts.[619] Canada maintains that these are provisions that govern standing to bring a claim, and that the Contracting Parties did not consent to arbitrate claims that fail to comply with them.[620]

421. Canada argues that the distinction between Articles XIII(3) and XIII(12) must be respected to avoid "serious negative consequences," such as: (a) the possibility that multiple shareholders would bring claims arising out of the same treatment to a corporation, compromising judicial economy and potentially resulting in inconsistent decisions; (b) overriding creditors' rights; (c) the possibility of double recovery where both a shareholder and corporation seek damages in relation to the same measures; and (e) overriding managements' control of business decisions.[621]

422. Canada does not consider *EnCana v. Ecuador*, cited by GTH, to offer useful guidance on the application of Articles XIII(3) and XIII(12), as Ecuador had raised a different standing objection under a different treaty.[622] At the same time, Canada cites certain cases under NAFTA, which according to Canada, contains standing provisions (Articles 1116 and 1117) that are similar to those in the BIT.[623] For example, in *GAMI v. Mexico*, although the tribunal accepted jurisdiction, it rejected the claimant's argument that Mexico's treatment of the claimant's subsidiary rendered

[617] Jur. Memorial, ¶ 252, *quoting* **CL-001**, BIT (English version), Article XIII(3).

[618] Jur. Memorial, ¶ 255; Merits Rejoinder and Jur. Reply, ¶ 175.

[619] Merits Rejoinder and Jur. Reply, ¶ 176, *citing* Merits Reply and Jur. Counter-Memorial, ¶ 227.

[620] Merits Rejoinder and Jur. Reply, ¶¶176-177, *citing* **CL-001**, BIT (English version), Article XIII(5) ("Each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration in accordance with the provisions of this Article.").

[621] Jur. Memorial, ¶¶ 256-260; Merits Rejoinder and Jur. Reply, ¶ 187

[622] Merits Rejoinder and Jur. Reply, ¶ 175, *citing* **CL-125**, *EnCana Corporation v. Republic of Ecuador* (UNCITRAL) Award, 3 February 2006, ¶ 142.

[623] Jur. Memorial, ¶¶ 261-262; Merits Rejoinder and Jur. Reply, ¶¶ 164-167, *citing* **RL-151**, *GAMI Investments Inc. v. The Government of the United Mexican States* (UNCITRAL) Final Award, 15 November 2004; **RL-104**, *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2) Award, 11 October 2002, ¶ 86 ("a NAFTA tribunal should be careful not to allow any recovery, in a claim that should have been brought under Article 1117, to be paid directly to the investor."); **CL-115**, *Pope & Talbot, Inc. v. Government of Canada* (UNCITRAL) Award in Respect of Damages, 31 May 2002; **RL-232**, *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL) Second Partial Award, 21 October 2002.

the claimant's shares worthless. The tribunal reasoned that an investor must show that a breach of the treaty "leads with sufficient directness to loss or damage in respect of a given investment."[624]

423. Canada also cites *BG v. Argentina*, in which BG alleged that Argentina's measures negatively impacted BG's domestic subsidiary and brought claims relating to that subsidiary's licence, to which BG was not a party.[625] The tribunal found that "BG does not have standing to seize this Tribunal with 'claims to money' and 'claims to performance,' or to assert other rights, which it is not entitled to exercise directly."[626]

424. According to Canada, "certain tribunals have wrongly overridden the corporate form to permit shareholder reflective loss claims on the basis that BITs are *lex specialis*."[627] Canada sees nothing in the text of Article XIII(3) of the BIT that would allow such a departure from the customary international law principle of separate corporate personality.[628]

425. Canada does not accept that the definition of "investment" in Article I(f) of the BIT specifies standing rights and allows an investor to bring a derivative claim under Article XIII.[629] Canada acknowledges that shares in an enterprise may be an investment, but argues that to have standing under Article XIII, an investor must claim that breach relates to the rights or entitlements associated with those shares.[630] For Canada, this is clear from the fact that Article XIII does not state that an investor may bring claims for a loss *to its investment*.[631] While GTH cites cases in which tribunals have inferred from the definition of "investment" that shareholders have standing to claim damages arising from loss incurred by an enterprise, Canada argues that these cases

[624] Merits Rejoinder and Jur. Reply, ¶ 164, *quoting* **RL-151**, *GAMI Investments Inc. v. The Government of the United Mexican States* (UNCITRAL) Final Award, 15 November 2004, ¶ 33 (*Canada's emphasis*).

[625] Merits Rejoinder and Jur. Reply, ¶ 168, *citing* **CL-047**, *BG Group Plc. v. The Republic of Argentina* (UNCITRAL) Final Award, 24 December 2007, ¶ 189.

[626] **CL-047**, *BG Group Plc. v. The Republic of Argentina* (UNCITRAL) Final Award, 24 December 2007, ¶ 214 (*Canada's emphasis*).

[627] Merits Rejoinder and Jur. Reply, ¶ 179, *citing* **CL-005**, *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction, 17 July 2003, ¶ 48; **CL-118**, *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, 14 January 2004, ¶¶ 49, 56.

[628] Merits Rejoinder and Jur. Reply, ¶ 179.

[629] Merits Rejoinder and Jur. Reply, ¶¶ 169-171.

[630] Merits Rejoinder and Jur. Reply, ¶¶ 169-171.

[631] Merits Rejoinder and Jur. Reply, ¶ 170.

provide no useful guidance to the Tribunal because they are based on the interpretation of treaties without the same provisions on standing as those in the BIT.[632]

426. Canada further argues that GTH's use of the term "bundle of rights" cannot expand its rights in relation to its shares in Wind Mobile.[633] In any event, this term has most often been used to refer to property or contractual rights, which Canada considers broader than rights attached to shares or debt.[634]

427. On the basis of the above, Canada contends that GTH cannot bring a claim for alleged breaches and damages suffered by Wind Mobile.[635] Canada notes that, at the relevant time, GTH held debt and an indirect non-controlling minority interest in Wind Mobile.[636] However, GTH's allegations regarding the regulatory framework for New Entrants and the transferability of Wind Mobile's spectrum licences do not concern any impairment of the rights associated with GTH's shareholding or loans. Rather, GTH alleges that Canada's failure to ensure a favourable regulatory framework hurt Wind Mobile and its operations (not its shareholders).[637] Similarly, GTH alleges that the Transfer Framework impaired spectrum licenses which are held by Wind Mobile (not by GTH).[638] In particular, Canada argues that neither the Transfer Framework nor any other measure

[632] Merits Rejoinder and Jur. Reply, ¶ 171, *citing* Merits Reply and Jur. Counter-Memorial, n. 391.

[633] Merits Rejoinder and Jur. Reply, ¶¶ 172-173.

[634] Merits Rejoinder and Jur. Reply, ¶ 173, *citing* **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, ¶¶ 2.6, 5.1, 6.67; **CL-040**, *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award of the Tribunal, 2 October 2006, ¶¶ 303-304, 325; **CL-058**, *ATA Construction, Industrial and Trading Company v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award, 18 May 2010, ¶¶ 81-82; **CL-137**, *Ioannis Kardassopoulos and Ron Fuchs v. The Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award, 3 March 2010, ¶¶ 236, 339; **CL-117**, *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003, ¶ 3.7, 6.1, 17.1; **CL-088**, *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award, 7 February 2017, ¶¶ 339, 358; **RL-303**, Julian Arato, *The Private Law Critique of International Investment Law*, Institute for International Law and Justice Working Paper 2018/4, 6 September 2018.

[635] Jur. Memorial, ¶¶ 240, 273-279; Merits Rejoinder and Jur. Reply, ¶¶ 183-188.

[636] Jur. Memorial, ¶ 273, *citing* **CER-Dellepiane/Spiller**, Figure 1.

[637] Jur. Memorial, ¶¶ 273-279; Merits Rejoinder and Jur. Reply, ¶ 183.

[638] Jur. Memorial, ¶¶ 280-281; Merits Rejoinder and Jur. Reply, ¶ 183.

ever prevented GTH from selling its shares in Wind Mobile.[639] For Canada, it follows that these measures "did not interfere with GTH's investment."[640]

428. Thus, Canada concludes that GTH's derivative claims could only have been brought under Article XIII(12) of the BIT. Because GTH failed to do so, it lacks standing to assert claims relating to the regulatory framework for New Entrants and the Transfer Framework.[641]

(3) GTH's Position

429. GTH submits that pursuant to Article XIII, it has standing to bring all its claims.[642] According to GTH, "Canada's measures affected **both** Wind Mobile **and** GTH's investment, and GTH claims only for the loss it has suffered as a result of the impact to its investment."[643] GTH asserts that this is permitted by the ordinary meaning of the BIT.[644]

430. GTH first considers the definition of "investment" contained in Article I(f) of the BIT, which covers "any kind of asset," including "shares stock, bonds and debentures or any other form of participation in a company," "money" and "rights."[645] GTH states that its "investment includes, among other things, its indirect shareholding in Wind Mobile, its loans, and all of the associated rights that relate to its equity and debt investments."[646]

431. According to GTH, it is a well-recognized principle of international investment law that this "bundle of rights and legitimate expectations" that comes with owning shares of a company like Wind Mobile are protected under the BIT.[647] Therefore, a State can breach its obligations

[639] Merits Rejoinder and Jur. Reply, ¶ 185.

[640] Merits Rejoinder and Jur. Reply, ¶ 184. Canada states that GTH's "damages calculations highlight the fact that its alleged loss from these measures is only reflective of Wind Mobile's loss … The implications for GTH's debt and equity investment are derived from the effect on Wind Mobile's value." *Id.*, ¶ 188.

[641] Jur. Memorial, ¶¶ 280-281; Merits Rejoinder and Jur. Reply, ¶ 183.

[642] Merits Reply and Jur. Counter-Memorial, ¶¶ 212 *et seq.*; Jur. Rejoinder, ¶¶ 62 *et seq.*

[643] Jur. Rejoinder, ¶ 76 (*GTH's emphasis*).

[644] Merits Reply and Jur. Counter-Memorial, ¶¶ 215-224; Jur. Rejoinder, ¶¶ 62-69.

[645] Merits Reply and Jur. Counter-Memorial, ¶ 217, *quoting* **CL-001**, BIT (English version), Article I(f).

[646] Merits Reply and Jur. Counter-Memorial, ¶ 218.

[647] Merits Reply and Jur. Counter-Memorial, ¶ 219 *quoting* **CL-040**, A*DC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, 2 October 2006, ¶¶ 303-304.

under an investment treaty by damaging the rights and legitimate expectations of an enterprise in which the investor has shares, even if the State has not interfered directly with the shares.[648]

432. GTH asserts that it is permitted to submit a claim for any breach of the BIT if it has incurred damage.[649] GTH points to Article XIII(1), (3), and (4) of the BIT, by which GTH, as a qualifying investor under Article I(g) of the BIT, may submit a dispute to arbitration if the dispute "relat[es] to a claim by the investor that a measure taken or not taken by the … Contracting Party is in breach of this Agreement[] and that the investor has incurred loss or damage by reason of, or arising out of, that breach."[650] GTH has claimed (a) that several measures taken or not taken by Canada are in breach of the BIT, and (b) that GTH incurred loss or damage due to those breaches. Thus, in GTH's view, it has properly submitted its claims under the relevant provisions of the BIT.[651] Contrary to Canada's position, nothing in Article XIII requires GTH to "claim that the breach relates to the rights or entitlements associated with its shares."[652]

433. GTH recognizes that Article XIII(12) of the BIT permits an investor "acting on behalf of an enterprise" to bring a claim for damage incurred by that enterprise.[653] However, GTH argues that it is not bringing a claim for damages incurred by Wind Mobile. Indeed, GTH states that it "cannot invoke Article XIII(12) as it no longer owns Wind Mobile and would therefore not have standing under that article."[654] Therefore, Article XIII(12) is irrelevant in this case.

434. In addition, GTH considers Canada's interpretation of Article XIII to be inconsistent with Article VII, which protects both "investments" and "returns" from unlawful expropriation and thus foresees claims by shareholders who no longer control assets that have been expropriated.[655]

[648] Merits Reply and Jur. Counter-Memorial, ¶ 219.
[649] Merits Reply and Jur. Counter-Memorial, ¶ 220.
[650] Jur. Rejoinder, ¶¶ 63-64, *quoting* **CL-001**, BIT (English version), Article XIII.
[651] Jur. Rejoinder, ¶ 64.
[652] Jur. Rejoinder, ¶ 66, *quoting* Merits Reply and Jur. Counter-Memorial, ¶ 170.
[653] Jur. Rejoinder, ¶ 65, *quoting* **CL-001**, BIT (English version), Article XIII(12).
[654] Jur. Rejoinder, ¶ 67; *see* Merits Reply and Jur. Counter-Memorial, ¶ 224.
[655] Jur. Rejoinder, ¶ 68, *quoting* **CL-001**, BIT (English version), Article VII.

435. According to GTH, its interpretation of Article XIII is supported by the only other decision to address a nearly identical provision in another BIT.[656] In *EnCana v. Ecuador*, EnCana brought claims under the Canada-Ecuador BIT with respect to Barbadian subsidiaries involved oil and gas exploration in Ecuador.[657] One of Ecuador's jurisdictional objections was that EnCana was "not claiming in relation to its own loss but rather in relation to loss suffered by" its subsidiaries.[658] The tribunal stated that:

> The Tribunal does not interpret Article XIII(12) as limiting the clear words of Articles I and XIII(1) which allow an investor to maintain a claim for loss suffered to itself arising from a breach of the BIT. … True, it does distinguish between loss or damage suffered by a locally incorporated enterprise and loss or damage suffered directly or indirectly by the investor itself. Circumstances can be envisaged where a breach of the BIT affecting a locally incorporated subsidiary would have caused no loss or damage to the parent – e.g., where no consequence flowed from the breach either to the returns to the parent or to the share value of the subsidiary. … But an investor which alleges that it has suffered loss or damage, directly or indirectly, through a breach of the BIT is entitled to bring proceedings under Articles XIII(l) and (2). If it cannot prove compensable loss or damage, it will fail on the merits; that does not affect the jurisdiction of a tribunal constituted in accordance with Article XIII(4) to entertain its claim.[659]

436. GTH asserts that this reasoning is directly applicable to the present case.[660]

437. On the other hand, GTH contends that Canada relies on a purported general principle of international law that is irrelevant to investment treaty arbitration: the separation of legal personality between an enterprise and a shareholder.[661] According to GTH, Canada's argument

[656] Merits Reply and Jur. Counter-Memorial, ¶¶ 225-227, *citing* **CL-125**, *EnCana Corporation v. Republic of Ecuador* (UNCITRAL) Award, 3 February 2006.

[657] Merits Reply and Jur. Counter-Memorial, *citing* **CL-125**, *EnCana Corporation v. Republic of Ecuador* (UNCITRAL) Award, 3 February 2006, ¶¶ 1, 23.

[658] Jur. Rejoinder, n. 185, *quoting* **CL-125**, *EnCana Corporation v. Republic of Ecuador* (UNCITRAL) Award, 3 February 2006, ¶ 115.

[659] **CL-125**, *EnCana*, Award, ¶ 118.

[660] Merits Reply and Jur. Counter-Memorial, ¶ 227.

[661] Merits Reply and Jur. Counter-Memorial, ¶¶ 229-231, *citing* Jur. Memorial, ¶¶ 241-248.

has been dismissed by commentators[662] and arbitral tribunals,[663] and the ICJ has recognized that in contemporary international law, the protection of company and shareholder rights is generally governed by investment treaties rather than the law on diplomatic protection.[664]

438. In GTH's view, none of the cases cited by Canada supports its position.[665] To the contrary, these cases, including *GAMI v. Mexico*[666] and *BG v. Argentina*,[667] demonstrate that Canada's objection to GTH's "standing" is in fact an issue to be addressed on the merits.[668]

439. GTH also addresses Canada's assertion that "serious negative consequences" could arise if the distinction between Articles XIII(3) and XIII(12) is not respected.[669] GTH argues that none

[662] **CL-165**, Campbell McLachlan, Laurence Shore, and Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (2d ed. 2017), ¶ 6.123 ("Given the wide definition of investment contained in most bilateral investment treaties, if an 'investment' can include shares in a company there is no conceptual reason to prevent an investor recovering for damage caused to those shares which has resulted in a diminution in their value.").

[663] **CL-005**, *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction, 17 July 2003, ¶ 48 ("The Tribunal therefore finds no bar in current international law to the concept of allowing claims by shareholders independently from those of the corporation concerned, not even if those shareholders are minority or non-controlling shareholders. Although it is true, as argued by the Republic of Argentina, that this is mostly the result of *lex specialis* and specific treaty arrangements that have so allowed, the fact is that *lex specialis* in this respect is so prevalent that it can now be considered the general rule, certainly in respect of foreign investments and increasingly in respect of other matters. To the extent that customary international law or generally the traditional law of international claims might have followed a different approach – a proposition that is open to debate – then that approach can be considered the exception.") and ¶¶ 57-65; **CL-006**, *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Jurisdiction and the Merits, 3 September 2013, ¶¶ 282-86.

[664] Merits Reply and Jur. Counter-Memorial, ¶ 230, *citing* **RL-139**, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Preliminary Objections, Judgment of 24 May 2007, (2007) I.C.J. Reports 582, ¶ 88 ("in contemporary international law, the protection of the rights of companies and the rights of their shareholders, and the settlement of the associated disputes, are essentially governed by bilateral or multilateral agreements for the protection of foreign investments . . . the role of diplomatic protection [has] somewhat faded, as in practice recourse is only made to it in rare cases where treaty régimes do not exist or have proved inoperative").

[665] Jur. Rejoinder, ¶¶ 70-75 and n. 211.

[666] **RL-151**, *GAMI Investments Inc. v. The Government of the United Mexican States* (UNCITRAL) Final Award, 15 November 2004, ¶ 33 ("The Tribunal does not accept that directness for the purposes of NAFTA Article 1116 is a matter of form. The fact that a host state does not explicitly interfere with share ownership is not decisive. The issue is rather whether a breach of NAFTA leads with sufficient directness to loss or damage in respect of a given investment. Whether GAM can establish such a prejudice is a matter to be examined on the merits. Uncertainty in this regard is not an obstacle to jurisdiction.").

[667] **CL-047**, *BG Group Plc. v. The Republic of Argentina* (UNCITRAL) Final Award, 24 December 2007, ¶ 215. GTH notes that "unlike BG in relation to MetroGAS's license, GTH does not claim that its investment is in the form of (*i*) claims to money, or (*ii*) the Wind Mobile Licenses." Jur. Rejoinder, ¶ 74.

[668] Merits Reply and Jur. Counter-Memorial, ¶ 228; Jur. Rejoinder, ¶ 70.

[669] Merits Reply and Jur. Counter-Memorial, ¶ 228, *quoting* Jur. Memorial, ¶ 256.

of the consequences identified by Canada could arise in this case because GTH is not claiming in respect of damage incurred by Wind Mobile. On the other hand, GTH sees significant practical problems with Canada's approach. In this regard, GTH states:

> GTH sought to invest in the Canadian telecommunications market as an Egyptian investor, it had no choice but to agree to a shareholding structure by which it would invest in the Canadian enterprise through the ownership of shares. Now, Canada seeks to preclude GTH from claiming damage to its investment due to Canada's measures by referring to the very shareholding structure Canada had required GTH to create.[670]

440. Finally, GTH addresses Canada's factual assertion that GTH always had the ability to sell its shares in Wind Mobile despite the Transfer Framework.[671] GTH argues that this assertion is wrong as a matter of fact and is, in any event, a question for the merits.[672]

441. In sum, GTH's position is that Canada's objection to GTH's standing must be dismissed because it has no basis in the BIT.

(4) The Tribunal's Analysis

442. The Tribunal notes that the definition of "investment" under Article I(f) is broad. It includes any kind of asset owned or controlled directly or indirectly by an investor of one Contracting Party in the territory of the other Contracting Party. Shares are specifically listed amongst the non-exhaustive examples in that provision of the BIT, as are bonds and debentures and claims to money.[673] GTH's indirect shareholding in Wind Mobile and the debt owed to it by Wind Mobile are therefore qualifying investments that are protected by the BIT. Moreover, earlier in this Award, the Tribunal ruled that GTH is a qualifying investor that benefits from the BIT's protections.[674]

[670] Jur. Rejoinder, ¶ 79.

[671] Jur. Rejoinder, ¶ 78.

[672] Jur. Rejoinder, ¶ 78; Merits Memorial, Part VII.A.2; Merits Counter-Memorial, Part IV.A.2.

[673] **CL-001**, BIT (English version), Article I(f) ("'investment' means any kind of asset owned or controlled either directly, or indirectly through an investor of a third State, by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the latter's laws and, in particular, though not exclusively, includes: … (ii) shares, stock, bonds and debentures or any other form of participation in a company, business enterprise or joint venture; (iii) money, claims to money, and claims to performance under contract having a financial value").

[674] *See* above Section VI.B.

443. The Tribunal notes that GTH asserts that it is not bringing a claim under the BIT on behalf of Wind Mobile or for damages incurred by Wind Mobile, but claims pursuant to Article XIII(1) in respect of its own loss as an investor in Wind Mobile, i.e., as a shareholder and a creditor of Wind Mobile. The Tribunal considers therefore that GTH need not comply with the terms of Article XIII(12) of the BIT. As GTH's counsel stated during the Hearing:

> So that's exactly what GTH did: they brought the claim under Article [XIII](1); they waived their right to bring these claims under any other forum, even whether or not they could have aside. So we think Article XIII(12) is just simply irrelevant here.[675]

444. The Tribunal notes approvingly the pragmatic approach that the *EnCana v. Ecuador* tribunal has taken: an investor that qualifies for the protection of the treaty, and which alleges that it has suffered loss or damage that is separate from that suffered by its locally-incorporated subsidiary, is entitled to bring proceedings to recover those alleged separate damages under the equivalent of Article XIII(1).[676] Whether that investor prevails on the merits is a matter that does not relate to the debate on the jurisdiction of the Tribunal.

445. The decisions in the large number of investment cases to which GTH refers, holding that an investor has standing to claim damages because of the loss in the value of its shares or debt, does not mean that *Barcelona Traction* was wrongly decided; nor is this Tribunal suggesting that *Barcelona Traction* has become irrelevant in light of more recent investment arbitral jurisprudence such as *CMS v. Argentina*.[677] *Barcelona Traction* was essentially about diplomatic protection.[678] This arbitration is predicated primarily on the terms of the BIT. Those terms broadly define qualifying investments to include the indirect holding of shares and claims to money, and permit

[675] Day 1, Tr. 172:12-15.

[676] **CL-125**, *EnCana Corporation v. Republic of Ecuador* (UNCITRAL) Award, 3 February 2006, ¶ 118.

[677] **CL-005**, *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction, 17 July 2003, ¶ 48 ("The Tribunal therefore finds no bar in current international law to the concept of allowing claims by shareholders independently from those of the corporation concerned, not even if those shareholders are minority or non-controlling shareholders. Although it is true, as argued by the Republic of Argentina, that this is mostly the result of *lex specialis* and specific treaty arrangements that have so allowed, the fact is that *lex specialis* in this respect is so prevalent that it can now be considered the general rule, certainly in respect of foreign investments and increasingly in respect of other matters. To the extent that customary international law or generally the traditional law of international claims might have followed a different approach – a proposition that is open to debate – then that approach can be considered the exception.").

[678] **CL-165**, Campbell McLachlan, Laurence Shore, and Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (2d ed. 2017), ¶ 6.123.

an investor to bring to arbitration claims for loss or damages caused to its investment by a measure taken by the host State in breach of the BIT.

446. Accordingly, the Tribunal decides that GTH has standing under Article XIII(1) of the BIT to submit a dispute to arbitration in accordance with the conditions set out in Article XIII(3).

G. THE TRIBUNAL'S DECISION ON JURISDICTION

447. The Tribunal upholds Canada's objection to the Tribunal's jurisdiction over GTH's claim that Canada violated its national treatment obligations set forth in the BIT. The Tribunal denies Canada's remaining objections to jurisdiction and admissibility.

448. Consequently, the Tribunal dismisses GTH's national treatment claim and finds that it has jurisdiction over each of GTH's remaining claims, the merits of which will be considered in the following Section.

VII. MERITS

A. FAIR AND EQUITABLE TREATMENT

449. GTH submits that Canada has breached its obligation to provide fair and equitable treatment ("**FET**") under Article II(2)(a) of the BIT by (a) blocking GTH from selling Wind Mobile to an Incumbent;[679] (b) subjecting GTH to an arbitrary national security review process that lacked transparency and due process;[680] and (c) Canada's cumulative conduct over the lifetime of GTH's investment.[681]

450. Canada argues that GTH has based these claims on an overly-broad reading of Article II(2)(a) and denies that there has been any breach of its FET obligation.[682]

[679] Merits Memorial, § VII.A.2; Merits Reply and Jur. Counter-Memorial, § IV.A.2; Claimant's Post-Hearing Submission, § II.A.

[680] Merits Memorial, §VII.A.3; Merits Reply and Jur. Counter-Memorial, § IV.A.3; Claimant's Post-Hearing Submission, § III.C.

[681] Merits Memorial, § VII.A.4; Merits Reply and Jur. Counter-Memorial, § IV.A.4; Claimant's Post-Hearing Submission, § IV.B.

[682] Counter-Memorial, § II; Merits Rejoinder and Jur. Reply, § III.A; Respondent's Post-Hearing Submission, § II.

451. In the following Sections, after recalling the relevant provision of the BIT, the Tribunal considers the applicable legal standard and each of GTH's FET claims by first setting out the Parties' respective positions and then its own analysis.

(1) Relevant Provision of the BIT

452. Canada's FET obligation is set forth in Article II(2)(a) of the BIT as follows:

> Each Contracting Party shall accord investments or returns of investors of the other Contracting Party
>
> (a) fair and equitable treatment in accordance with principles of international law […].[683]

(2) Applicable Legal Standard

a. GTH's Position

453. GTH asserts that FET is a flexible standard, which allows a tribunal to "fill in any potential gaps not explicitly covered by other treaty protections in order to safeguard the object and purpose of the BIT."[684]

454. According to GTH, the ordinary meaning of the terms "fair" and "equitable"[685] must be interpreted in the context of the BIT's object and purpose to promote and protect foreign investment between Canada and Egypt, as stated in the preamble:

> RECOGNIZING that **the promotion and the protection of investments** of investors of one Contracting Party in the territory of the other Contracting Party will be conducive to

[683] **CL-001**, BIT (English Version), Article II(2)(a).

[684] Merits Memorial, ¶ 290, *citing* **CL-042**, *PSEG Global Inc. and Konya Ilgın Elektrik Üretim ve Ticaret Limited Şirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007, ¶ 239 ("[FET] allow[s] for justice to be done in the absence of the more traditional breaches of international law standards . . . thus ensuring that the protection granted to the investment is fully safeguarded"); **CL-072**, Rudolf Dolzer, "Fair and Equitable Treatment: Today's Contours," 12 *South Carolina Journal of International Law and Business* 7 (2013), p. 12; **CL-087**, *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Award, 19 December 2016, ¶ 380; **CL-083**, *Murphy Exploration & Production Company International v. The Republic of Ecuador* (UNCITRAL) PCA Case No. 2012-16, Partial Final Award, 6 May 2016, ¶ 206.

[685] GTH submits that the ordinary meaning of these terms requires Canada to "treat GTH's investment with 'just,' 'even-handed,' 'unbiased,' 'legitimate,' and 'reasonable' behavior." Merits Memorial, ¶ 291, *quoting, inter alia*, **CL-071**, *Black's Law Dictionary*, Definitions of "Fair" and "Equitable."

> **the stimulation of business initiative** and to **the development of economic cooperation between them**.[686]

455. In addition, GTH highlights the placement of Article II(2)(a) within a provision titled "Establishment, Acquisition and Protection of Investments," which also provides that the Contracting Parties "shall encourage the creation of favourable conditions for investors."[687]

456. Thus, considering the ordinary language of Article II(2)(a) in context, GTH argues that the FET standard protects investors against conduct that (a) is unreasonable, arbitrary, discriminatory or inconsistent;[688] (b) lacks transparency;[689] (c) denies the investor due process;[690] or (d) frustrates an investor's legitimate expectations.[691] GTH elaborates on these protections as follows.

[686] Merits Memorial, ¶ 291; **CL-001**, BIT (English Version), Preamble (*GTH's emphasis*).

[687] **CL-001**, BIT (English Version), Article II(1).

[688] Merits Memorial, ¶ 295(a), *citing, inter alia*, **CL-082**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶¶ 543, 577-579; **CL-038**, *Saluka Investments BV v. The Czech Republic* (UNCITRAL) Partial Award, 17 March 2006, ¶ 307; **CL-031**, *Técnicas Medioambientales TECMED S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, ¶ 154; **CL-057**, *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, ¶ 284; **CL-031**, *Técnicas Medioambientales TECMED S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, ¶ 154; Merits Reply and Jur. Counter-Memorial, ¶ 239.

[689] Merits Memorial, ¶ 295(b), *citing*, **CL-082**, *Crystallex International Corporation v Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶¶ 543, 579; **CL-031**, *Técnicas Medioambientales TECMED S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, ¶¶ 154, 167, 172; **CL-075**, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, ¶ 570; **CL-038**, *Saluka Investments BV v. The Czech Republic* (UNCITRAL) Partial Award, 17 March 2006, ¶¶ 307, 309; **CL-057**, *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, ¶ 284; **CL-041**, *LG&E Energy Corp. and others v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, ¶ 128; Merits Reply and Jur. Counter-Memorial, ¶ 239.

[690] Merits Memorial, ¶ 295(c), *citing*, **CL-038**, *Saluka Investments BV v. The Czech Republic* (UNCITRAL) Partial Award, 17 March 2006, ¶ 308; **CL-057**, *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, ¶ 284; Merits Reply and Jur. Counter-Memorial, ¶ 239.

[691] Merits Reply and Jur. Counter-Memorial, ¶ 296, *citing*, *inter alia*, **CL-070**, *Ioan Micula and others v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, ¶ 667 ("an overwhelming majority of cases supports the contention that, where the investor has acquired rights, or where the state has acted in such a way so as to generate a legitimate expectation in the investor and that investor has relied on that expectation to make its investment, action by the state that reverses or destroys those legitimate expectations will be in breach of the fair and equitable treatment standard and thus give rise to compensation"); **CL-083**, *Murphy Exploration & Production Company International v. The Republic of Ecuador* (UNCITRAL) PCA Case No. 2012-16, Partial Final Award, 6 May 2016, ¶¶ 247-48; **CL-031**, *Técnicas Medioambientales TECMED S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, ¶¶ 154-156.

457. According to GTH, unreasonable or arbitrary treatment which violates a host State's FET obligation includes any of the following, even if adopted in good faith:

> 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.[692]

458. In addition, GTH asserts that a measure may be arbitrary if it is disproportionate to the alleged objective.[693] GTH does not accept Canada's articulation of the standard for arbitrary and discriminatory treatment, which relies on cases interpreting a separate treaty provision dealing with arbitrary and discriminatory measures.[694] However, as confirmed by the Tribunal in *Lemire v. Ukraine*, a State action that does not amount to a breach of that separate provision may still violate the FET standard.[695]

459. GTH submits that the protection of an investor's legitimate expectations is a core part of the FET obligation.[696] Thus, "when the State enacts a framework and adopts conditions with the express purpose of encouraging investment, a State should be held accountable for fundamental or important changes to that framework."[697] Canada's assertion that the principle of legitimate

[692] Merits Reply and Jur. Counter-Memorial, ¶ 264, *quoting* **RL-205**, *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, ¶ 303.

[693] Merits Reply and Jur. Counter-Memorial, ¶ 266, *citing*, *inter alia*, **CL-065**, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, 5 October 2012, ¶¶ 404-409.

[694] Merits Reply and Jur. Counter-Memorial, ¶ 265, *citing* Counter-Memorial on Merits and Damages, ¶¶ 348-349.

[695] Merits Reply and Jur. Counter-Memorial, ¶ 265, *citing* **CL-057**, *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, ¶ 259.

[696] Merits Reply and Jur. Counter-Memorial, ¶ 262.

[697] Merits Reply and Jur. Counter-Memorial, ¶ 262, *citing* **CL-083**, *Murphy Exploration & Production Company – International v. The Republic of Ecuador* (UNCITRAL) PCA Case No. 2012-16, Partial Final Award, 6 May 2016, ¶¶ 247-48; **CL-031**, *Técnicas Medioambientales TECMED S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, ¶¶ 154-56 (finding that the FET obligation requires States to "provide to international investments treatment which does not affect the basic expectations that were taken into account by the foreign investor to make the investment"); **CL-075**, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, ¶ 570; **CL-082**, *Crystallex International Corporation v Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶¶ 543, 546-47; **CL-050**,

expectations is not a "freestanding obligation" is contradicted by the cases it cites, which all hold that an investor's legitimate expectations are a relevant consideration in identifying a breach of FET.[698] Further, contrary to Canada's position, there is no requirement that an investor's expectations be based on "specific and express representations."[699] Rather, legitimate expectations may be created by implicit representations or the legal and business framework in place at the time of the investment.[700]

460. GTH submits that Article II(2)(a) is an autonomous FET standard—not the "minimum standard of treatment" under customary international law, as asserted by Canada.[701] GTH agrees with Professor Schreuer's statement that "in the absence of a clear indication to the contrary, the fair and equitable treatment standard contained in BITs is an autonomous concept."[702]

461. According to GTH, Canada's interpretation of Article II(2)(a) is unsupported by the text and renders the words "fair" and "equitable" meaningless.[703] GTH specifically rejects Canada's reliance on the phrase "in accordance with principles of international law" as a reference to the

Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador, ICSID Case No. ARB/04/19, Award, 18 August 2008, ¶¶ 339-40; **CL-041**, *LG&E Energy Corp., LG&E Capital Corp., and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, ¶¶ 127-28; **CL-053**, *National Grid P.L.C. v. Argentine Republic* (UNCITRAL) Award, 3 November 2008, ¶¶ 173-75; **CL-057**, *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, ¶ 264; **CL-070**, *Ioan Micula and others v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, ¶ 667 ("an overwhelming majority of cases supports the contention that, where the investor has acquired rights, or where the state has acted in such a way so as to generate a legitimate expectation in the investor and that investor has relied on that expectation to make its investment, action by the state that reverses or destroys those legitimate expectations will be in breach of the fair and equitable treatment standard and thus give rise to compensation"); **CL-060**, *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal, S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010, ¶¶ 222-26; **CL-039**, *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, ¶ 372; **CL-085**, *Flemingo DutyFree Shop Private Limited v. The Republic of Poland* (UNCITRAL) Award, 12 August 2016, ¶ 534.

[698] Merits Reply and Jur. Counter-Memorial, ¶ 263, *citing* Merits Counter-Memorial, ¶ 353.

[699] Merits Reply and Jur. Counter-Memorial, ¶ 263, *citing* Merits Counter-Memorial, ¶¶ 352-357.

[700] Merits Reply and Jur. Counter-Memorial, ¶ 263, *citing*, *inter alia*, **CL-070**, *Ioan Micula and others v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, ¶ 669 ("There must be a promise, assurance or representation attributable to a competent organ or representative of the state, which may be explicit or implicit"); **CL-075**, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, ¶ 571 ("The investor's legitimate expectations are based on undertakings and representations made explicitly or implicitly by the host State").

[701] Merits Reply and Jur. Counter-Memorial, ¶¶ 242 *et seq.*

[702] Merits Reply and Jur. Counter-Memorial, ¶ 246, *quoting* **CL-122**, Christoph Schreuer, "Fair and Equitable Treatment in Arbitral Practice," 6 J.W.I.T. 357 (2005), p. 364.

[703] Merits Reply and Jur. Counter-Memorial, ¶¶ 244-246.

customary international law minimum standard of treatment. GTH highlights that the term "customary" does not appear in Article II(2)(a).[704] In its view, the proper interpretation of the phrase, which gives meaning to all the terms of Article II(2)(a), is that "FET cannot be contrary to the principles of international law and, to the extent there is any difference between the two, principles of international law act as a floor but not as a ceiling."[705]

462. GTH contends that if the Contracting Parties had intended to provide treatment in accordance to the minimum standard of treatment, they would have used that formulation.[706] Yet the phrase "minimum standard of treatment," is not found anywhere in the BIT.[707] GTH points out that Canada *has* included those words in other treaties. For example, NAFTA expressly refers to the "Minimum Standard of Treatment," as does Canada's 2004 BIT.[708] On the other hand, Canada's 1994 Model BIT, on which the BIT is based, uses the language of Article II(2)(a).[709]

463. GTH further argues that tribunals have repeatedly rejected interpretations such as the one advanced by Canada in this case. In particular, GTH cites *Vivendi v. Argentina*, *Suez v. Argentina*, *Crystallex v. Venezuela*, *Gold Reserve v. Venezuela*, and *Arif v. Moldova*.[710] In each of these cases, the FET clause in the applicable treaty provided for FET in accordance with principles of international law, and in each case, the tribunal rejected the respondent's argument that the clause should be interpreted to guarantee only the minimum standard of treatment. The *Vivendi* tribunal

[704] Merits Reply and Jur. Counter-Memorial, ¶ 247.

[705] Merits Reply and Jur. Counter-Memorial, ¶¶ 244 and 246.

[706] Merits Reply and Jur. Counter-Memorial, 248-249, *citing* **CL-060**, *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal, S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010, ¶ 184 (reasoning that the minimum standard of treatment is "so well known and so well established in international law that one can assume that if [the treaty parties] had intended to limit the content of fair and equitable treatment to the minimum international standard they would have used that formulation specifically").

[707] Merits Reply and Jur. Counter-Memorial, ¶ 248.

[708] Merits Reply and Jur. Counter-Memorial, ¶ 249, *citing* **RL-101**, North American Free Trade Agreement, Article 1105; **RL-117**, Canada Model BIT (2004), Article 5.

[709] Merits Reply and Jur. Counter-Memorial, ¶ 249, *citing* **CL-107**, Canada Model BIT (1994), Article II(2)(a).

[710] Merits Reply and Jur. Counter-Memorial, ¶¶ 250 *et seq.*, *citing* **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, ¶¶ 7.4.1-7.4.9; **CL-060**, *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal, S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010, ¶¶ 180-186; **CL-082**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶ 530; **CL-075**, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, ¶¶ 567-68; **CL-151**, *Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013, ¶ 526.

specifically stated that there was "no basis for equating principles of international law with the minimum standard of treatment."[711] The *Crystallex* tribunal found that the FET clause in the Canada-Venezuela BIT was an autonomous standard, having observed that "[u]nlike treaties such as NAFTA, which expressly incorporate the minimum standard of treatment, the Canada-Venezuela BIT nowhere refers to such minimum standard."[712]

464. GTH argues that Canada has found no support for its position in past arbitral decisions; instead, Canada cites cases that stand for an entirely different proposition: that the minimum standard of treatment has evolved over time and now affords the same level of treatment as an autonomous FET clause.[713] For example, the tribunal in *Rusoro v. Venezuela* stated that the "discussion of whether Art. II.2 of the BIT incorporates or fails to incorporate the CIS Standard when defining FET has become dogmatic: there is no substantive difference in the level of protection afforded by both standards."[714]

465. In any event, even if the minimum standard of treatment were relevant, GTH contends that it provides far greater protection than Canada suggests.[715] Tribunals applying this standard have found that it covers measures that are unreasonable, arbitrary, lacking in transparency, without due

[711] **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, ¶¶ 7.4.5-7.4.7.

[712] **CL-082**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶ 530.

[713] Merits Reply and Jur. Counter-Memorial, ¶ 258.

[714] Merits Reply and Jur. Counter-Memorial, ¶ 259, *quoting* **CL-016**, *Rusoro Mining Limited v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016, ¶ 520. *See also* **RL-166**, *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award, 10 March 2015, ¶ 489 ("it is quite possible that currently the minimum customary standard and the FET envisaged in the treaties have converged, according the investor with substantially equivalent levels of protection."). GTH considers *Koch Minerals v. Venezuela*, cited by Canada, irrelevant because of the tribunal's conclusion that the distinction between the customary international minimum standard and the autonomous standard made no difference when applied to the facts of that case." **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, ¶ 8.47.

[715] Merits Reply and Jur. Counter-Memorial, ¶¶ 268-272.

process, or discriminatory.[716] Furthermore, in GTH's view, legitimate expectations are an important element of the minimum standard of treatment.[717]

466. In response to Canada's assertion that GTH must establish the content of the minimum standard of treatment with evidence of State practice, GTH contends that "the wealth of analysis done by other tribunals to define the contemporary scope of the minimum standard of treatment is more than sufficient to establish the parameters of that standard."[718]

b. Canada's Position

467. Canada submits that Article II(2)(a) of the BIT refers to the customary international law principle of the minimum standard of treatment.[719] In Canada's view, this is clearly indicated by the words "in accordance with principles of international law," which distinguish Article II(2)(a) from an autonomous FET standard.

468. According to Canada, it follows a consistent treaty practice of tying the FET clause to the minimum standard.[720] The language in Article II(2)(a) is found in Canada's other treaties,[721]

[716] Merits Reply and Jur. Counter-Memorial, ¶ 270, *citing*, *inter alia*, **CL-016**, *Rusoro Mining Limited v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016, ¶ 524; **RL-200**, *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, ¶ 98; **CL-077**, *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Canada* (UNCITRAL) Award on Jurisdiction and Liability, 17 March 2015, ¶¶ 442-44; **CL-080**, *Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015, ¶ 292.

[717] Merits Reply and Jur. Counter-Memorial, ¶ 270, *citing* **RL-200**, *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, ¶ 98 ("applying this [minimum] standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant."); **CL-031**, *Técnicas Medioambientales TECMED S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, ¶ 154 (finding that the standard requires conduct that "does not affect the basic expectations that were taken into account by the foreign investor to make the investment."); **CL-043**, *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007, ¶ 299; **RL-166**, *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award, 10 March 2015, ¶ 491; **CL-016**, *Rusoro Mining Limited v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016, ¶ 524; **RL-191**, *International Thunderbird Gaming Corporation v. The United Mexican States* (UNCITRAL) Award, 26 January 2006, ¶ 147; **CL-036**, *CMS Gas Transportation Company v. Argentine Republic*, ICISD Case No. ARB/01/8, Award, 12 May 2005, ¶ 274.

[718] Merits Reply and Jur. Counter-Memorial, ¶ 272.

[719] Merits Counter-Memorial, ¶¶ 325 *et seq.*; Merits Rejoinder and Jur. Reply, ¶¶ 193 *et seq.*

[720] Merits Counter-Memorial, ¶ 326.

[721] Merits Counter-Memorial, n. 549, *citing*, *inter alia*, **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

sometimes with "minor variations," such as a specific reference to customary international law.[722] The result, as contended by Canada, is that GTH is entitled to "FET in accordance with the minimum standard of treatment under customary international law, nothing more and nothing less."[723]

469. Canada rejects GTH's position that Article II(2)(a) is an autonomous treaty standard.[724] It argues that, in accordance with the principle of *effet utile*, the Tribunal must give meaning to the words "in accordance with principles of international law."[725] According to Canada, the "reason for including these words in the FET provision is to ensure that the FET treatment has to meet the specific requirements of, and be in accord with, principles of international law, meaning the minimum standard of treatment."[726]

470. According to Canada, investment treaty tribunals have found these words to be significant, including in the cases *Biwater Gauff v. Tanzania*, *Koch Minerals v. Venezuela*, *Rusoro v.*

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**, 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).

[722] Merits Counter-Memorial, n. 550, *citing*, *inter alia*, **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); ("Each Party shall accord to a covered investment treatment in accordance with the customary international law minimum standard of treatment of aliens, including fair and equitable treatment and full protection and security"); **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).

[723] Merits Counter-Memorial, ¶ 332.

[724] Merits Rejoinder and Jur. Reply, ¶¶ 193 *et seq.*

[725] Merits Counter-Memorial, ¶ 327.

[726] Merits Rejoinder and Jur. Reply, ¶ 196.

Venezuela and *OI Group v. Venezuela*.[727] For example, the *Koch Minerals* tribunal specifically found that a treaty provision similar to Article II(2)(a) of the BIT "necessarily incorporates a reference to the level of protection that International Law provides to foreigners, that is, to what is known as the customary minimum standard."[728]

471. In this regard, Canada rejects GTH's reliance on the omission of the word "customary" in Article II(2)(a); Canada notes that this word is also absent from other treaties, including NAFTA, which incorporate the minimum standard of treatment.[729]

472. For Canada, because Article II(2)(a) is a customary international law standard, it follows that the burden is on GTH to provide evidence of State practice and *opinio juris* to support its position regarding the elements of the fair and equitable standard in the BIT.[730] In Canada's view, GTH has failed to meet this burden. GTH relies solely on past arbitral decisions, which are not evidence of State practice.[731]

473. In any event, Canada contends that, even if the Tribunal were to find that Article II(2)(a) provides protection beyond the minimum standard of treatment, it should reject GTH's argument that investors are entitled to broad protections in relation to unfair and arbitrary measures, legitimate expectations, transparency and due process.[732]

474. According to Canada, GTH's "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."[733] Whether the FET standard is autonomous or based in

[727] Merits Counter-Memorial, *citing* **CL-049**, *Biwater Gauff (Tanzania) Ltd., v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, ¶ 590; **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; **CL-016**, *Rusoro Mining Limited v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016, ¶ 520; **RL-166**, *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award, 10 March 2015, ¶ 482.

[728] Merits Rejoinder and Jur. Reply, ¶ 197, *citing* **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.

[729] Merits Rejoinder and Jur. Reply, ¶ 198.

[730] Merits Counter-Memorial, ¶¶ 335-337.

[731] Merits Counter-Memorial, ¶ 338.

[732] Merits Counter-Memorial, ¶ 339.

[733] Merits Counter-Memorial, ¶ 340.

customary international law, Canada's position is that FET does not permit tribunals to second guess a State's policy choice or the justification of that choice.[734] This has been confirmed in several arbitral decisions; for example, the tribunal in *Crystallex v. Venezuela* stated that:

> 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 importance assigned by the administration to certain policy objectives over others.[735]

475. Canada further contends that an overly-broad reading of Article II(2)(a) would be inconsistent with the object and purpose of the BIT because, as stated by the tribunal in *Saluka v. Czech Republic*, "an interpretation which exaggerates the protection to be accorded to foreign investments may serve to dissuade host States from admitting foreign investments."[736]

476. As to the specific contents of the FET standard, Canada rejects each of the elements advanced by GTH.

477. *First*, Canada argues that the FET standard does not protect against unreasonable or arbitrary measures unless they are devoid of any legitimate purpose and contrary to the rule of law.[737] In the *ELSI* case, the ICJ stated that "[a]rbitrariness is not so much something opposed to a rule of a law, as something opposed to the rule of law… It is a wilful disregard of due process of law, an act which shocks, or at least surprises a sense of judicial propriety."[738] Similarly, the

[734] Merits Counter-Memorial, ¶¶ 340 *et seq.*; Merits Rejoinder and Jur. Reply, ¶¶ 201-214.

[735] Merits Counter-Memorial, ¶ 344, *quoting* **CL-082**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶ 583. *See also* **CL-086**, *Windstream Energy LLC v. Canada* (UNCITRAL) Award, 27 September 2016, ¶¶ 147-148, 206, 376; **RL-184**, *Merrill & Ring Forestry L.P. v. Government of Canada* (UNCITRAL) Award, 31 March 2010, ¶ 29.

[736] Merits Counter-Memorial, ¶ 347, *quoting* **CL-038**, *Saluka Investments BV v. The Czech Republic* (UNCITRAL) Partial Award, 17 March 2006, ¶ 300.

[737] Merits Counter-Memorial, ¶¶ 348 *et seq.*; Merits Rejoinder and Jur. Reply, ¶ 213.

[738] Merits Counter-Memorial, ¶ 348, *quoting* **RL-186**, *Case Concerning Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, [1989] I.C.J. Rep. 15, ¶ 128.

tribunal in *Lemire v. Ukraine* stated that "the underlying notion of arbitrariness is that prejudice, preference or bias is substituted for the rule of law."[739]

478. *Second*, Canada denies that the FET standard includes a freestanding obligation to protect an investor's legitimate expectations.[740] Canada accepts that legitimate expectations may be a relevant factor in assessing whether a measure constitutes a breach of the FET standard, but to establish a breach, that measure would still have to be grossly unfair or unjust.[741] Moreover, legitimate expectations can only be considered at all if the State has made specific and express representations to an investor to induce the investment.[742]

479. Canada further contends that, in light of the State's sovereign authority to legislate and to adapt its legal system to changing circumstances, an investor cannot have a legitimate expectation that the legal or business environment will remain the same, unless the State has provided an explicit and specific representation to that effect.[743] As stated by the tribunal in *Mobil v. Canada*, FET "does not require a State to maintain a stable legal and business environment for investments."[744] Thus, in Canada's view, an investor's own expectations about the legal regime applicable to its investment "are irrelevant and impose no obligations on the State."[745]

480. *Third*, Canada submits that the FET standard does not impose a general obligation of transparency.[746] According to Canada, while a complete absence of transparency could be a relevant factor in the FET analysis, there is no support for GTH's position that a measure "lacking

[739] Merits Counter-Memorial, ¶ 350, *quoting* **CL-057**, *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, ¶¶ 262-263.

[740] Merits Counter-Memorial, ¶¶ 352 *et seq.*; Merits Rejoinder and Jur. Reply, ¶¶ 210 *et seq.*

[741] Merits Counter-Memorial, ¶ 353.

[742] Merits Counter-Memorial, ¶ 354, *citing* **CL-082**, *Crystallex International Corporation v Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶ 547 ("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"); Merits Rejoinder and Jur. Reply, ¶¶ 204-206, *citing* **RL-177**, *Glamis Gold, Ltd. v. United States of America* (UNCITRAL) Award, 8 June 2009, ¶ 620.

[743] Merits Counter-Memorial, ¶ 354, *citing* **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; Merits Rejoinder and Jur. Reply, ¶¶ 207-208.

[744] Merits Counter-Memorial, ¶ 357, *quoting* **RL-199**, *Mobil Investments Canada Inc. & Murphy Oil Corporation v. Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum, 22 May 2012, ¶ 153.

[745] Merits Counter-Memorial, ¶ 357.

[746] Merits Counter-Memorial, ¶¶ 358-360; Merits Rejoinder and Jur. Reply, ¶ 215.

in transparency" constitutes a breach of FET.[747] In addition, a lack of transparency, to the extent relevant to the FET analysis, would be considered in light of all the surrounding circumstances. Thus, in the context of national security concerns, it would be unreasonable to expect a government to act with full transparency.[748]

481. *Finally*, Canada rejects GTH's assertion that the FET standard guarantees broad due process protections for investors outside the context of judicial proceedings. According to Canada, GTH has failed to define the scope of this protection and to provide any support for its position.[749]

c. The Tribunal's Analysis

482. As can be noted from the summaries above, the Parties differ as to the content and scope of the FET obligation expressed in Article II(2)(a) of the BIT. In construing the scope of that obligation as agreed between the Contracting Parties in the BIT, the Tribunal will have regard to the general rule of interpretation in Article 31 of the VCLT. Contrary to other disputed terms in the BIT, the three authentic texts of the BIT are identical in setting out an FET obligation for each Contracting Party "in accordance with principles of international law."

483. In reviewing the object and purpose of the BIT, the Tribunal notes that both the Preamble[750] and Article II(1)[751] state the wish of the Contracting Parties to create favourable conditions for Canadian investors in Egypt, and for Egyptian investors in Canada, and their recognition that the protection of investments made by their respective nationals in the territory of the other Contracting State will be conducive to the stimulation of business initiative and to the development of economic cooperation between those States. The Tribunal considers those objectives to be important in construing the terms of the BIT in accordance with Article 31 of the VCLT.

[747] Merits Counter-Memorial, ¶ 358, *citing* **RL-200**, *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, ¶ 98.

[748] Merits Counter-Memorial, ¶¶ 359-360.

[749] Merits Counter-Memorial, ¶ 361.

[750] **CL-001**, BIT (English Version), Preamble ("RECOGNIZING that the promotion and the protection of investments of investors of one Contracting Party in the territory of the other Contracting Party will be conducive to the stimulation of business initiative and to the development of economic cooperation between them").

[751] **CL-001**, BIT (English Version), Art. II(1) ("Each Contracting Party shall grant to investments, or returns of investors of the other Contracting Party, treatment no less favourable than that which, in like circumstances, it grants to investments or returns of investors of any third State.").

484. Dealing first with Canada's argument that the fair and equitable treatment standard set out in the BIT is limited to the minimum standard of treatment under customary international law, the Tribunal concludes that there is no basis for such an interpretation. Any such limitation runs counter to the explicit terms used in Article II(2)(a) and to the ordinary meaning to be given to those terms in their context and in the light of the BIT's object and purpose.

485. Article II(2)(b) refers to fair and equitable treatment in conformity with principles of international law; it does not refer to the minimum standard of treatment. The authentic French and Arabic texts of the BIT are identical to the English text.[752] This Tribunal finds no support for Canada's endeavour to override the terms of the BIT and to draft into Article II(2)(b) a reference to the minimum standard that would limit the potential application of a wider range of international law principles than the minimum standard alone.

486. It is worth recalling the words of Dr. F.A. Mann, recalled by the *Vivendi* tribunal as follows:

> As Dr. F.A. Mann, one of the twentieth century's leading authorities on the interaction between municipal law and public international law wrote in 1981:
>
> > *"the terms 'fair and equitable treatment' envisage conduct which goes far beyond the minimum standard and afford protection to a greater extent and according to a much more objective standard than any previously employed form of words. A Tribunal would not be concerned with a minimum, maximum or average standard. It will have to decide whether in all circumstances the conduct in issue is fair and equitable or unfair and inequitable. No standard defined by any other words is likely to be material. The terms are to be understood and implied independently and autonomously"*.
>
> Dr. Mann's conclusions have been echoed by others. Like Dr. Mann, an UNCTAD Report on Fair and Equitable Treatment concluded that "where the fair and equitable standard is invoked, the central issue remains simply whether the actions in question are in all the

[752] To be precise, the authentic French and Arabic texts of the BIT refer in Article II(2)(a) to "*the* principles of international law" [emphasis added], while the English text omits "the". However, no submissions were made that the omission is a relevant factor in construing the FET obligation in the BIT and the Tribunal does not consider that it is critical to that effect.

> circumstances fair and equitable or unfair and inequitable". Stephen Vascianne reached the same conclusion in his extensive study of the concept of fair and equitable treatment.[753]

487. In other international treaties to which Canada is a party, explicit reference is made to the "minimum standard of treatment." This includes Article 1105 of NAFTA[754] and Article 5 of Canada's 2004 Model BIT.[755] In particular, NAFTA, signed in 1992, predates the BIT. The concept of the minimum standard was well known to Canada when negotiating and signing the BIT. Yet, the BIT does not make reference thereto. Canada's agreement with Egypt expressed in the BIT is to be enforced, and this Tribunal shall therefore construe the FET obligation in accordance with principles of international law.

488. In assessing whether the FET obligation has been breached, a tribunal must determine whether, in all of the circumstances of the particular case, the conduct properly attributable to the State has met the treaty requirement that it be "fair and equitable."[756] The stricter standard of "grossly unfair or unjust" conduct averred by Canada is not supported by the text of the BIT.[757] Further, as recognised by the *CMS v. Argentina* tribunal, FET is an objective standard which is "unrelated to whether the Respondent has had any deliberate intention or bad faith in adopting the measures in question. Of course, such intention and bad faith can aggravate the situation, but are not an essential element of the standard."[758]

[753] **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, ¶¶ 7.4.8-7.4.9 (footnotes omitted) (quoting F.A. Mann, "British Treaties for the Promotion and Protection of Investments," 52 BRIT. YB Int'l L. 241, 244 (1981) and citing Stephen Vascianne**, "**The Fair and Equitable Treatment Standard in International Investment Law and Practice," 70 BRIT. Y.B. Int'l L 99, 144 (1999)).

[754] **RL-101**, North American Free Trade Agreement, Article 1105 (titled "Minimum Standard of Treatment").

[755] **RL-117**, Canada Model BIT (2004), Article 5 (titled "Minimum Standard of Treatment" and stating in subparagraph (2): "The concepts of 'fair and equitable treatment' and 'full protection and security' in paragraph 1 do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens").

[756] **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, ¶ 7.4.12.

[757] *See* Merits Counter-Memorial, ¶ 353.

[758] **CL-036**, *CMS Gas Transportation Company v. Argentine Republic*, ICISD Case No. ARB/01/8, Award, 12 May 2005, ¶ 280; *see* **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, ¶ 7.4.12.

489. The Tribunal notes the *Tecmed v. Mexico* tribunal's holding in construing Article 4(1) of the Mexico-Spain BIT (1996), which is similar in its terms to Article II(2)(b) of the BIT:

> The Arbitral Tribunal considers that this provision of the Agreement, in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations. Any and all State actions conforming to such criteria should relate not only to the guidelines, directives or requirements issued, or the resolutions approved thereunder, but also to the goals underlying such regulations. The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any preexisting decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities. The investor also expects the State to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investment without the required compensation. In fact, failure by the host State to comply with such pattern of conduct with respect to the foreign investor or its investments affects the investor's ability to measure the treatment and protection awarded by the host State and to determine whether the actions of the host State conform to the fair and equitable treatment principle. Therefore, compliance by the host State with such pattern of conduct is closely related to the above-mentioned principle, to the actual chances of enforcing such principle, and to excluding the possibility that state action be characterized as arbitrary; i.e. as presenting insufficiencies that would be recognized "…by any reasonable and impartial man," or, although not in violation of specific regulations, as being contrary to the law because: ...(it) shocks, or at least surprises, a sense of juridical propriety.[759]

490. In answer to Canada's concerns about potential limits on the State's ability to regulate, this Tribunal does not consider that the FET obligation, as interpreted in accordance with the terms of the BIT, improperly or unreasonably restricts the State from legislating and adapting its legal system to changing circumstances. In doing so, however, the State may not ignore the interests of an investor that relied on the State's earlier course of action.[760]

[759] **CL-031**, *Técnicas Medioambientales TECMED S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, ¶ 154 (footnotes omitted).

[760] See **CL-040**, A*DC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, ¶ 483; **CL-072**, Rudolf Dolzer, "Fair and Equitable Treatment: Today's Contours," 12 S.C. J. of Int'l L. 7, 23 (2013).

491. The above being determined, the Tribunal need not determine in the abstract theoretical issues such as the breadth of protection that an investor is entitled to claim in relation to unfair and arbitrary measures, legitimate expectations, transparency and due process. The Tribunal will consider whether there has been a breach of the FET obligation in relation to each specific claim advanced by GTH in Sections (3) to (5) below based on the relevant facts and the evidence adduced in the case.

(3) Whether the Transfer Framework Breached the Respondent's Fair and Equitable Treatment Obligation

a. GTH's Position

492. GTH claims that Canada violated Article II(2)(a) of the BIT by denying GTH the ability to transfer the set-aside spectrum licenses to an Incumbent after the five-year transfer restriction had expired.[761] According to GTH, Canada's action constitutes two distinct breaches of the FET standard: (a) Canada frustrated GTH's legitimate expectations; and (b) Canada subjected GTH to unreasonable and arbitrary treatment.[762]

(i) *GTH's Expectations*

493. GTH asserts that a fundamental component of the 2008 AWS Auction Framework was a finite five-year restriction on the transfer of set-aside spectrum licenses, after which New Entrants would be permitted to sell their licenses to an Incumbent.[763] The purpose of this restriction was to prevent New Entrants from engaging in arbitrage with their spectrum license and to encourage licensees to put the spectrum to meaningful use.[764]

494. However, according to GTH, "Canada knew that it could not introduce an indefinite ban on the sale of set-aside spectrum licenses to Incumbents because it knew that investors would not

[761] Merits Memorial, ¶ VII.A.2; Merits Reply and Jur. Counter-Memorial, ¶ IV.A.2.

[762] Merits Memorial, ¶ 305.

[763] Merits Reply and Jur. Counter-Memorial, ¶ 273.

[764] Merits Memorial, ¶ 312, *citing* **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) (stating that the five-year restriction was "intended to encourage licensees **to put the spectrum to use and to deter acquisition of spectrum licenses by speculators** and those whose intent is to preclude access to the spectrum by their competitors.") (*GTH's emphasis*); Merits Reply and Jur. Counter-Memorial, ¶ 277(b).

purchase spectrum licenses with such a restriction."[765] Thus, GTH alleges that Canada deliberately introduced the finite five-year period to induce New Entrants to invest in the Canadian telecommunications sector.[766]

495. GTH argues that Industry Canada and all the New Entrants understood and expected that after expiration of the five-year restriction, the New Entrants would be permitted to transfer their spectrum licenses to Incumbents.[767] Mr. Michael Connolly testifies that Industry Canada intended to allow market forces to return after five years and had accepted the possibility that there might be no New Entrants left in the market after that period.[768]

496. According to GTH, its expectation that Canada would uphold this condition was supported by the following facts:

a. In the *Licensing Procedure for Spectrum Licences for Terrestrial Services* (the "**Spectrum Licensing Procedure**"), Industry Canada confirmed that relevant spectrum licenses enjoyed the "privilege" of "enhanced transferability and divisibility rights."[769]

b. Canada had recognized "the importance of relying on market forces in spectrum management" and confirmed that regulatory measures, if and when adopted, would be minimally intrusive.[770]

c. Industry Canada's past practice was to allow the sale of a New Entrant to an Incumbent after a transfer restriction period had expired.[771]

[765] Merits Reply and Jur. Counter-Memorial, ¶ 273.

[766] Merits Reply and Jur. Counter-Memorial, ¶ 273.

[767] Merits Memorial, ¶ 313; **CWS-Connolly**, ¶ 13.

[768] **CWS-Connolly**, ¶ 13.

[769] Merits Memorial, ¶ 314; **C-003**, Industry Canada, Licensing Procedure for Spectrum Licences for Terrestrial Services (CPC-2-1-23, Issue 2), September 2007, § 5.6.

[770] Merits Memorial, ¶ 314; Merits Reply and Jur. Counter-Memorial, ¶ 277(f); **C-052**, Industry Canada, *Spectrum Policy Framework for Canada (DGTP-001-07)*, ¶ 4.4.

[771] Merits Memorial, ¶¶ 38 (describing the sales of Clearnet and Microcell), 314.

d. Canada had assured investors that the "spectrum licenses may be transferred in whole or in part (either in geographic area or in bandwidth) to a third party subject to the conditions stated on the licence and other applicable regulatory requirements."[772]

e. The five-year transfer restriction was memorialized in Wind Mobile's set-aside spectrum licenses in unambiguous terms:

> Licenses acquired through the set-aside of spectrum . . . may not be transferred or leased to, acquired by means of a change in ownership or control of the licensee, 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.[773]

497. GTH submits that it relied on the 2008 AWS Auction Framework in making its investment, including Canada's assurances that GTH would be permitted to transfer Wind Mobile's spectrum licenses to an Incumbent after the five-year restriction period.[774] This was, in GTH's view, a critical exit option. Mr. David Dobbie testifies that "GTH would not have been likely to invest in Canada, and certainly not at the price we bid in the Auction, had we been informed at the outset that we would not be allowed to sell our investment to an Incumbent."[775] Similarly, Mr. Andy Dry testifies that it would be difficult to justify investing as a New Entrant without a clear, stable liquidity right attached to the spectrum licenses.[776]

498. GTH asserts that Canada itself recognized how important it was for investors to have "the fullest possible knowledge of the spectrum at issue and the auction procedures and rules prior to the auction."[777] The 2001 Spectrum Auction Framework stated that "[u]nderstanding exactly what is being auctioned is very important for bidders to develop business plans, secure adequate financing and develop a bidding strategy."[778] More specifically, according to Mr. Connolly's

[772] Merits Memorial, ¶ 311; **C-003**, Industry Canada, Licensing Procedure for Spectrum Licences for Terrestrial Services (CPC-2-1-23, Issue 2), September 2007, § 5.6.

[773] Merits Memorial, ¶ 315; **C-010**, Wind Mobile Licenses, Condition 2 (*GTH's emphasis*).

[774] Merits Memorial, ¶¶ 317 *et seq.*; Merits Reply and Jur. Counter-Memorial, ¶ 274.

[775] **CWS-Dobbie**, ¶ 41.

[776] **CWS-Dry**, ¶ 14.

[777] Merits Memorial, ¶ 320, *quoting* **C-041**, 2001 Spectrum Auction Framework, Framework Summary, ¶ 1.

[778] **C-041**, 2001 Spectrum Auction Framework, ¶ 4.

testimony, Industry Canada was "fully aware that an indefinite ban on any sale of set aside spectrum would deter New Entrants from bidding in the AWS Auction."[779]

499. GTH observes that the auction was a success for Canada, "generat[ing] almost $4.3 billion in revenues for the Government of Canada."[780] In GTH's view, this success was the direct result of Canada's representations to investors, including with respect to the five-year transfer restriction.[781]

500. However, GTH alleges that when the time approached for it to exercise this critical exit option, Canada changed the rules and prevented GTH from selling Wind Mobile to an Incumbent, thereby frustrating GTH's legitimate expectations.[782] In this way, "Canada decided to penalize GTH for its substantial investment and resulting success and hold it hostage."[783] GTH's position is summarized as follows:

> by enacting the 2013 Transfer Framework and denying GTH its right to sell Wind Mobile's licenses to an Incumbent after the Five-Year Rollout Period, Canada frustrated GTH's legitimate expectations by subverting a critical condition GTH relied on when it made the decision to invest in Canada. This is an unambiguous breach of Canada's obligation to accord GTH's investment FET under the BIT.[784]

501. GTH identifies four ways in which the Transfer Framework and 2013 Spectrum Licensing Procedure fundamentally changed the terms of the 2008 AWS Auction and Wind Mobile's licenses.[785] Canada (a) removed the "enhanced transferability rights" of the licenses;[786] (b) gave Minister Paradis unfettered discretion to approve and reject transfer applications for any reason;[787]

[779] **CWS-Connolly**, ¶ 13.

[780] Merits Memorial, ¶ 323, *quoting* **C-081**, Industry Canada, "News Release: 15 Companies Bid Almost $4.3 Billion for Licences for New Wireless Services," 21 July 2008.

[781] Merits Memorial, ¶ 323.

[782] Merits Memorial, ¶¶ 324 *et seq.*; Merits Reply and Jur. Counter-Memorial, ¶ 274.

[783] Merits Reply and Jur. Counter-Memorial, ¶ 274.

[784] Merits Memorial, ¶ 332.

[785] Merits Memorial, ¶ 325;

[786] **C-003**, Industry Canada, Licensing Procedure for Spectrum Licences for Terrestrial Services (CPC-2-1-23, Issue 2), September 2007, § 5.6; **C-206**, 2013 Spectrum Licensing Procedure, § 5.6.

[787] **C-206**, 2013 Spectrum Licensing Procedure, ¶ 5.6 ("The Minister has the authority to consider any and all matters deemed relevant to the request for a transfer, and to grant the transfer as requested, to fix additional terms and conditions, or to refuse the transfer").

(c) adopted a new policy objective to have "four wireless providers in every region of the country," which it would "use any and every tool at its disposal" to achieve;[788] and (d) added new criteria for transfer requests.[789]

502. According to GTH, Industry Canada made it clear that under the new Transfer Framework, it would deny any transfer request that jeopardised its fourth provider policy. For example, Minister Paradis told the House of Commons that "[s]pectrum set aside for new entrants was never intended to be transferred to incumbents and as such will not be approved now, nor will it likely be in the future."[790]

503. GTH denies that having a guaranteed fourth player had always been the objective of the 2008 AWS Auction. It points to a December 2012 internal Industry Canada presentation, which stated that "aside from the 5-year restriction on AWS spectrum, there are no other specific conditions" for spectrum transfer, and that "[c]hanging the current IC approach to license transfer requests would require consultation."[791]

504. GTH rejects Canada's reliance on the fact that transfers of the spectrum licenses were always subject to the Minister's approval and that the Minister had the right to amend the conditions of the licenses.[792] In GTH's view, it was reasonable in the circumstances for New Entrants to expect that the Minister would approve transfers after expiration of the five-year restriction.[793] Further, Canada informed prospective investors that the Minister's discretion to

[788] **C-119**, Industry Canada, News Release: "Harper Government Releases Spectrum Licence Transfer Framework," 28 June 2013; **C-194**, Industry Canada, News Release: "Harper Government Protecting Consumers and Increasing Competition in Canadian Wireless Sector," 4 June 2013.

[789] **C-031**, Transfer Framework.

[790] **C-195**, House of Commons Debates, Hansard 146(262), 41st Parliament, 1st Session, 4 June 2013, p. 17647.

[791] Merits Memorial, ¶ 329; **C-131**, Email from Rebecca Guillemette to Cindy-Lee Cook, et al., 10 December 2012, *attaching* Industry Canada, *Wireless Telecommunications Sector: Status Update and Implications*, 10 December 2012 [ATI Document], Slide 14.

[792] Merits Reply and Jur. Counter-Memorial, ¶¶ 280 *et seq.*

[793] Merits Reply and Jur. Counter-Memorial, ¶ 281.

amend conditions to licenses under the Radiocommunications Act 5(1)(b) "would be exercised on an exceptional basis."[794]

505. According to GTH, Canada's internal documents show that the Minister's authority in this regard was narrow. In a 2012 memorandum, Industry Canada described the "*Status quo*" as follows:

> IC would not be in a position to object to spectrum license transfers that would reduce the limited pool of spectrum available to new entrants and increase incumbents' spectrum dominance. The Competition Bureau would be the sole body that could review spectrum license transfer requests with competitive impacts in mind, with any objections involving a lengthy legal process.[795]

506. That memorandum also suggests that including spectrum concentration as a factor in the review of transfer requests would be "additional Ministerial discretion," and that extending the five-year restriction would be "changing the rules of the set-aside near the end of the 5 year period."[796]

507. GTH also opposes Canada's arguments that the Transfer Framework did not prohibit the transfer of Wind Mobile License's to an Incumbent, and that GTH never submitted a transfer application to Industry Canada. According to GTH, Canada made clear that any transfer from a New Entrant would not be approved; under such circumstances, "no reasonable New Entrant would have thought to submit a futile application that the Government had already made clear would be rejected."[797]

[794] Merits Reply and Jur. Counter-Memorial, ¶ 280; **C-003**, Industry Canada, Licensing Procedure for Spectrum Licences for Terrestrial Services (CPC-2-1-23, Issue 2), September 2007, § 5.3.

[795] Merits Reply and Jur. Counter-Memorial, ¶ 287; **C-258**, Memorandum from Iain Stewart to Deputy Minister, Industry Canada, *Update on Wireless Telecom Sector*, 7 December 2012, p. 7, Annex A: Wireless Telecommunications Sector Update and Implications, p. 6.

[796] **C-258**, Memorandum from Iain Stewart to Deputy Minister, Industry Canada, *Update on Wireless Telecom Sector*, 7 December 2012, p. 7, Annex A: Wireless Telecommunications Sector Update and Implications, p. 6.

[797] Merits Reply and Jur. Counter-Memorial, ¶ 289. [redacted]

(ii) *Unreasonable and Arbitrary Treatment*

508. GTH submits that Canada's adoption of the Transfer Framework was also unreasonable and arbitrary, constituting a second, independent breach of Article II(2)(a).[798] GTH considers it "a politically motivated pivot towards the new goal of engineering a fourth player, spurred by public criticism regarding anticipated market consolidation after the expiration of the Five-Year Rollout Period."[799]

509. According to GTH, Canada had no credible policy objective behind its actions. Rather, the policy shift was undertaken in response to criticism from analysts and the media that the Government's efforts to increase competition in the telecom market had failed yet again.[800] Indeed, Canada spent CAD 8.5 million on an advertising campaign to convince the public that the Government was putting Canadian consumers first.[801]

510. GTH alleges that Canada made its fourth player objective the cornerstone of its media campaign,[802] although no such policy had existed at the time of the 2008 AWS Auction.[803] In fact, in the lead up to the 2008 AWS Auction, Industry Canada recognized that it could not ensure the success of New Entrants and that the process could result in a market with no New Entrants.[804]

[redacted]

[798] Merits Memorial, ¶¶ 335 *et seq.*; Merits Reply and Jur. Counter-Memorial, ¶¶ 290 *et seq.*

[799] Merits Reply and Jur. Counter-Memorial, ¶ 275.

[800] Merits Memorial, ¶ 336; Merits Reply and Jur. Counter-Memorial, ¶ 291.

[801] Merits Reply and Jur. Counter-Memorial, ¶ 291; **C-383**, Christine Dobby, "Ottawa feared wireless 'failures'; Wanted upstarts to merge: memos," *National Post*, 3 December 2013, p. 3; **C-393**, Publish Works and Government Services Canada, *2013-2014 Annual Report on Government of Canada Advertising Activities*, p. 4 ("In response to public discussion about competition in the wireless market, Industry Canada launched the More Choices campaign to ensure Canadians had the facts about Government of Canada telecommunications policy and the measures introduced to deliver cutting edge technologies to Canadian families at affordable prices."), p. 11 (showing that Industry Canada spent C$ 8,467,653 on television, print, radio, and internet advertising in the 2013/2014 financial year. *See* Merits Memorial, ¶ 337.

[802] Merits Memorial, ¶ 337 (citing a number of public announcements by the Government referring to the fourth player objective).

[803] Merits Memorial, ¶ 338.

[804] Merits Reply and Jur. Counter-Memorial, ¶ 38(d), 292-293; **CWS-Connolly**, ¶¶ 13, 15; **C-294**, Scenario and speaking points for CWTA Mini-conference on the AWS auction, 19 April 2007, p. 14 ("The Minister is on record saying that we have no preconceived notions on the outcome of this process").

511. According to GTH, Canada's focus on guaranteeing a fourth provider had no rational relationship to the stated goal of increasing competition; there was no evidence that it would have such an effect.[805] Rather, "contemporaneous studies and analysis suggested that Canada's fourth player policy was not good for consumers, distorting the market, and stifling innovation."[806] Mr. Connolly testifies that the policy was "irrational given that ultimately the market dictates how many service providers are viable in a given market and not government fiat."[807] GTH opines that in other telecom markets, three providers is the ideal number for a competitive environment.[808]

512. In GTH's view, any legitimate concerns about the effect of license transfers on competition would have been addressed by the Competition Bureau.[809] Indeed, at the time Canada was considering the Transfer Framework, it knew that the Competition Bureau was "the sole body that could review spectrum licence transfer requests with competitive impacts in mind."[810] Thus, according to GTH, it was redundant for Industry Canada to monitor the effect of transfers on market consolidation. In the lead up to the 2008 AWS Auction, Industry Canada made clear that the scope of its mandate was limited to the use of *ex-ante* measures to encourage competition, which did not extend to *ex post* merger reviews.[811]

513. GTH argues that the cost of this arbitrary and unreasonable policy was borne by GTH when Canada blocked its sale of Wind Mobile. In GTH's view, Industry Canada unfairly targeted Wind Mobile precisely because GTH had invested more than other investors to make Wind Mobile the

[805] Merits Memorial, ¶¶ 338-340; Merits Reply and Jur. Counter-Memorial, ¶ 293.

[806] Merits Reply and Jur. Counter-Memorial, ¶ 293, **C-391**, Martin Masse and Paul Beaudry, *The State of Competition in Canada's Telecommunications Industry – 2014*, Montreal Economic Institute, May 2014, pp. 27-41.

[807] **CWS-Connolly**, ¶ 15.

[808] Merits Reply and Jur. Counter-Memorial, ¶ 293; **C-391**, Martin Masse and Paul Beaudry, *The State of Competition in Canada's Telecommunications Industry – 2014*, Montreal Economic Institute, May 2014, p. 38; **C-394**, Martin Masse and Paul Beaudry, *The State of Competition in Canada's Telecommunications Industry – 2015*, Montreal Economic Institute, May 2015, pp. 24-25.

[809] Merits Memorial, ¶¶ 342-243; Merits Reply and Jur. Counter-Memorial, ¶ 295.

[810] Merits Reply and Jur. Counter-Memorial, ¶ 295; **C-258**, Memorandum from Iain Stewart to Deputy Minister, Industry Canada, *Update on Wireless Telecom Sector*, 7 December 2012, p. 7 (Annex A: Wireless Telecommunications Sector Update and Implications, p. 6).

[811] Merits Memorial, ¶¶ 307-309, 340-341; **C-050**, AWS Auction Consultation Paper, Part II, ¶ 2.4.3.

New Entrant most likely to succeed.[812] GTH states that "Canada breached the BIT by singling out Wind Mobile in this way."[813]

514. Finally, GTH contends that even if Canada's action had any legitimate basis, it would still constitute a violation of the FET standard because it was disproportionate.[814] GTH alleges that "Canada knew the approach it took would have the most detrimental impact on the value of GTH's investment" but it proceeded despite the fact that it had identified several alternative options to address its competition concerns.[815]

b. Canada's Position

515. Canada denies that the Transfer Framework breached Article II(2)(a) of the BIT by blocking the sale of Wind Mobile to an Incumbent.[816]

516. Canada's primary position is that it did not "block" the sale of Wind Mobile to an Incumbent, as alleged by GTH.[817] Rather, under the Transfer Framework, each request for a license transfer was to be considered on a case-by-case basis. While Canada accepts that "the Department was approached informally on a few occasions about potential deals involving Wind Mobile's licences," it argues that GTH never in fact requested a transfer of Wind Mobile's licences.[818] Given that the Minister never denied such a request, Canada concludes that there is no factual basis for GTH's claim.

517. In any event, Canada further argues that the Transfer Framework was not contrary to any legitimate expectations GTH could have held; nor was it an unreasonable or arbitrary measure targeting Wind Mobile.

[812] Merits Memorial, ¶ 344; **C-350**, *VimpelCom/Wind Scenarios,* 19 April 2013.

[813] Merits Reply and Jur. Counter-Memorial, ¶ 299.

[814] Merits Reply and Jur. Counter-Memorial, ¶¶ 297-298.

[815] Merits Reply and Jur. Counter-Memorial, ¶ 297; **C-350**, *VimpelCom/Wind Scenarios*, 19 April 2013, p. 4; **C-377**, Advice to the Minister, *Wireless Telecommunications Policy Options*, c. September 2013, p. 5.

[816] Merits Counter-Memorial, ¶ II.D; Merits Merits Rejoinder and Jur. Reply, ¶ III.A.3.

[817] Merits Counter-Memorial, ¶ 362; Merits Rejoinder and Jur. Reply, ¶ 305.

[818] Merits Rejoinder and Jur. Reply, ¶ 305.

(i) *GTH's Expectations*

518. According to Canada, GTH's arguments regarding the alleged frustration of its legitimate expectations must be rejected for several reasons.

519. *First*, as a corollary to its objection to GTH's standing,[819] Canada argues that GTH's expectations about the transferability of the AWS spectrum licenses are irrelevant to its claim because Wind Mobile—not GTH—was the license holder, and GTH has not brought a claim on behalf of Wind Mobile.[820] Canada's position is summarized as follows:

> 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. … 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.[821]

520. *Second*, even if the Tribunal were to find GTH's expectations as to Wind Mobile's licenses relevant, Canada contends that it never guaranteed GTH a "right" to sell Wind Mobile or transfer Wind Mobile's licences to an Incumbent at the end of the five-year restriction on license transfers.[822] In Canada's view, GTH's alleged expectations are based on a mischaracterization of the relevant regulatory framework, rather than actual assurances made by Canada.[823]

521. In this regard, Canada raises the following points:

a. Under the Radio Communications Act, any transfer of a spectrum license requires the Minister's approval, and Canadian courts have confirmed that the Minister's broad "discretion to manage the spectrum" includes discretion over whether to approve

[819] See Section VI.F above.

[820] Merits Counter-Memorial, ¶¶ 398-403.

[821] Merits Counter-Memorial, ¶¶ 400-401.

[822] Merits Counter-Memorial, ¶ 404; Merits Rejoinder and Jur. Reply, ¶¶ 256, 263.

[823] Merits Rejoinder and Jur. Reply, ¶¶ 259 *et seq.*

requests to transfer spectrum licenses.[824] In deciding whether to approve a transfer, the Minister can take into account a wide variety of considerations.[825]

b. As stated in the Licensing Circular in effect at the time of the 2008 AWS Auction, although 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," such a transfer was "subject to the conditions stated on the licence and other applicable regulatory requirements."[826]

c. The COL's of Wind Mobile's licenses stated:

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 Minister of Industry retains the discretion to amend these terms and conditions of licence at any time.[827]

d. The 2008 AWS Auction Policy Framework, the AWS Licensing Framework and the AWS Consultation Paper also expressly state the requirement to obtain approval of any

[824] Merits Counter-Memorial, ¶¶ 187-192; **RWS-Hill**, ¶¶ 105-106; **C-057**, *Radiocommunication Act*, ¶¶ 5(1)(a)(i.1), 5(1.1); **C-046**, *Telecommunications Act*, s. 7; **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 Communications Company v. Attorney General of Canada, Bell Mobility Inc., Bragg Communications Inc. Carrying on Business as Eastlink, Data & Audio-Visual Enterprises Wireless Inc. Carrying on Business as Mobilicity, Globalive Wireless Management Corp. Carrying on Business as Wind, MTD Inc., Allstream Inc., Public Mobile Inc., Rogers Communications Inc., Saskatchewan Telecommunications and Shaw Communications Inc.*, Federal Court, Docket: T-1295-13, Judgment and Reasons, 2014 FC 1157 ("***Telus v. AGC***"), ¶¶ 48-49, 57 (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.").

[825] Merits Rejoinder and Jur. Reply, ¶ 267; **C-057**, *Radiocommunication Act*, ss. 5(1)(a)(i.1), 5(1.1); **RWS-Hill**, ¶ 113.

[826] Merits Counter-Memorial, ¶ 194; **C-003**, Industry Canada, Licensing Procedure for Spectrum Licences for Terrestrial Services (CPC-2-1-23, Issue 2), September 2007, § 5.6.

[827] **C-010**, Wind Mobile Licenses.

spectrum licence transfer.[828] Canada made this requirement clear to potential bidders in the 2008 AWS Auction, through the public questions and answers process.[829]

e. GTH and other potential bidders knew that Canada's objective in conducting the 2008 AWS Auction was not to allow New Entrants to acquire spectrum at a discount only to have them sell it to Incumbents.[830]

f. The sale of Wind Mobile to an Incumbent would also have been subject to approval by the Competition Bureau under the Competition Act.[831]

522. Canada concludes that no reasonable investor could have had a legitimate expectation that a New Entrant would be allowed to automatically transfer its spectrum licences to Incumbents at the end of the five-year restriction on transfers, as GTH alleges.[832] Indeed, according to Canada, GTH has failed to show any law, regulation, policy or statement which contains a specific assurance or representation regarding Wind Mobile's alleged ability to transfer the licences to Incumbents at the end of the five-year restriction.[833] Rather, GTH "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."[834]

523. Canada argues that the Federal Court rejected that same approach when, in 2013, Telus challenged the Transfer Framework, arguing that the spectrum licences contained a representation by the Minister that the Incumbents "would only be prohibited from acquiring the spectrum issued

[828] Merits Counter-Memorial, ¶ 197; **C-005**, AWS Licensing Framework, pp. 6-7 ("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.") **C-004**, 2008 AWS Auction 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." (*Canada's emphasis*)); **C-050**, AWS Auction Consultation Paper, p. 36.

[829] Merits Counter-Memorial, ¶¶ 199-201; **C-062**, Industry Canada, Responses to Questions for Clarifications on the AWS Policy and Licensing Frameworks, 27 February 2008, Answer 5.9 ("As outlined in the AWS Licensing Framework, departmental approval is required for each proposed transfer of a licence… This provision applies for the entire term of the licence.") and Answer 6.18.

[830] Merits Rejoinder and Jur. Reply, ¶ 275.

[831] Merits Rejoinder and Jur. Reply, ¶ 271.

[832] Merits Counter-Memorial, ¶ 406.

[833] Merits Counter-Memorial, ¶ 406.

[834] Merits Counter-Memorial, ¶ 407; *see* Merits Rejoinder and Jur. Reply, ¶ 262.

to new entrants for a period of five years."[835] The Court concluded that the "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."[836]

524. Moreover, Canada submits that it never represented to GTH or Wind Mobile that the Minister would certainly approve a transfer request after the expiration of the five-year restriction.[837] This position is supported by the testimony of Mr. Iain Stewart and Mr. Peter Hill.[838] In Canada's view, none of GTH's arguments is sufficient to establish the existence of a legitimate expectation regarding the approval of a potential transfer. Specifically, Canada rejects GTH's reliance on the speculations of industry analysts and market participants regarding what might happen after the five-year period.[839] Canada also contends that an approval of a license transfer more than a decade earlier under different circumstances does not create a "past practice" on which to base future expectations.[840]

525. *Third*, Canada argues that GTH was on notice that the telecommunications regulatory framework existing at the time of the 2008 AWS Auction was subject to change.[841] In this regard, Canada notes the following:

a. The Spectrum Licensing Procedure in effect at the time of the 2008 AWS Auction states that "licensing policies are constantly adapting to changes in radiocommunication in order to respond effectively to the evolving competitive environment and user needs."[842]

[835] **R-195**, *Telus v. AGC*, ¶ 56. *See* Merits Counter-Memorial, ¶¶ 202-203, 407-410; Merits Rejoinder and Jur. Reply, ¶ 269.

[836] **R-195**, *Telus v. AGC*, ¶ 58.

[837] Merits Rejoinder and Jur. Reply, ¶ 272 *et seq.*

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

[839] Merits Rejoinder and Jur. Reply, ¶ 274.

[840] Merits Rejoinder and Jur. Reply, ¶ 276, *citing* Merits Reply and Jur. Counter-Memorial, ¶ 35, 277(i).

[841] Merits Counter-Memorial, ¶¶ 204-209; 412-416; Merits Rejoinder and Jur. Reply, ¶¶ 290-293.

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

b. The Minister's authority to amend the COLs is stated in section 5(1)(b) of the Radiocommunication Act.[843]

c. The COLs provide that the Minister "retains the discretion to amend these terms and conditions of licence at any time."[844]

d. The Minister had exercised this discretion and amended the COLs several times before the Transfer Framework was adopted.[845]

526. Canada highlights that Wind Mobile itself actively lobbied for "more regulatory changes"[846] and an "overhaul" of the AWS Auction Framework to support competition from New Entrants.[847] Thus, GTH could not have had a legitimate expectation that Canada would refrain from making regulatory changes to promote competition.[848]

527. *Fourth*, Canada submits that the Transfer Framework was not in fact a fundamental change of the telecommunications regulatory framework that existed at the time GTH made its investment.[849] To the contrary, the Transfer Framework furthered Canada's longstanding policy objective of addressing spectrum concentration and fostering competition in the telecommunications sector, which was the driving force behind the design of the 2008 AWS Auction itself.[850] Thus, while Canada acknowledges that it had not previously identified spectrum concentration as a factor the Minister would consider when approving license transfers, it argues that all market participants were well aware of the Government's concerns about spectrum

[843] **C-057**, Radiocommunication Act, R.S.C., 1985, c. R-2, s. 5(1)(b).

[844] **C-010**, Wind Mobile Licenses, ¶ 16 of the COLs.

[845] Merits Counter-Memorial, ¶ 413; Merits Rejoinder and Jur. Reply, ¶ 292; **RWS-Hill**, ¶ 16.

[846] **R-146**, Consultation on Considerations Relating to Transfers, Divisions, and Subordinate Licensing of Spectrum Licences: Comments of Globalive Wireless Management Corp. ("WIND"), 3 April 2013, ¶¶ 3-7; *see* Merits Counter-Memorial, ¶¶ 414-416; Merits Rejoinder and Jur. Reply, ¶ 293;

[847] **R-075**, Wind Comments of June 13, 2012, p. 5.

[848] Merits Counter-Memorial, ¶ 416.

[849] Merits Rejoinder and Jur. Reply, ¶¶ 277 *et seq.*

[850] Merits Rejoinder and Jur. Reply, ¶¶ 278, 282.

concentration and competition.[851] Similarly, Canada rejects GTH's allegation that the Minister newly adopted the "fourth player policy" after the 2008 AWS Auction.[852]

528. According to Canada, the Transfer Framework clarified how the Minister would exercise his existing statutory discretion in considering license transfer requests, thereby providing predictability and transparency to licensees.[853] Thus, Canada opposes GTH's position that the Transfer Framework broadened the Minister's discretion. According to Canada, GTH relies on a single internal note to support its view, whereas several other internal notes refer to the consideration of spectrum concentration as a clarification of the Minister's existing discretion—not an addition to it.[854] In any event, Canada points out that only Parliament has the authority to expand the Minister's discretion.[855]

529. Canada also opposes GTH's submission that Industry Canada's mandate with respect to fostering competition was limited to *ex ante* measures, and that it was the role of the Competition Bureau to conduct *ex post* reviews of transfers.[856] Canada contends that GTH was well aware of the Minister's *ex post* authority and, in fact, encouraged the use of that authority in the context of Shaw's AWS licenses.[857] Further, as confirmed by the Federal Court, the Competition Bureau's

[851] Merits Rejoinder and Jur. Reply, ¶ 282.

[852] Merits Rejoinder and Jur. Reply, ¶ 279, *citing*, *inter alia*, **R-488**, Industry Canada, Measures intended to enable new entry through the AWS spectrum auction, 11 September 2007, p. 9 ("The following factors are pertinent to this consideration: the nature of the potential new entrants and sustainability of a fourth competitor..."); **RWS-Stewart-2**, ¶ 16; **RWS-Stewart**, ¶ 34.

[853] Merits Rejoinder and Jur. Reply, ¶¶ 283-285.

[854] Merits Rejoinder and Jur. Reply, ¶ 285; **C-265**, Memorandum from John Knubley and Marta Morgan, Industry Canada to Minister of Industry, Measures to Sustain Competition in Wireless Sector, 29 January 2013 [updated version of R-090], p. 2; **C-275**, Memorandum from John Knubley and Marta Morgan to Minister of Industry, Overview of Options for Sustaining Competition in the Wireless Market, 9 May 2013 [updated version of R-091], Exhibit Page 6.

[855] Merits Rejoinder and Jur. Reply, ¶ 285.

[856] Merits Counter-Memorial, ¶¶ 417-419; Merits Rejoinder and Jur. Reply, ¶¶ 286-289.

[857] Merits Rejoinder and Jur. Reply, ¶ 287; **R-360**, Letter from Simon Lockie, Wind Mobile to John Knubley, Industry Canada, 22 January 2013, p. 2 ("WIND Mobile hereby requests that Industry Canada take steps to immediate revoke Shaw's AWS licenses as a result of it becoming ineligible to hold its AWS licences, and re-auction the revoked spectrum to New Entrants so that the AWS set-aside spectrum can be used in accordance with the intended public policy."); **R-493**, E-mail from Simon Lockie, Globalive to Andy Dry, VimpelCom, et al., 7 May 2013, *attaching* Draft Memorandum "Keys to Viability, Industry Canada", p. 2.

mandate does not override the Minister's authority to consider spectrum concentration in reviewing spectrum licence transfer requests.[858]

(ii) *Unreasonable and Arbitrary Treatment*

530. Canada denies GTH's allegation that the Transfer Framework was unreasonable and arbitrary, in violation of Article II(2)(a) of the BIT.[859] Canada asserts that GTH's position is unfounded and invites the Tribunal to improperly second-guess State policy.[860]

531. According to Canada, the "Transfer Framework was adopted in good faith and in pursuit of Canada's longstanding policy objective of promoting competition in the wireless telecommunications sector."[861] Mr. Hill and Mr. Stewart testify that the motivation behind the Transfer Framework was Industry Canada's concern that spectrum concentration could undermine competition in the telecommunications sector.[862] Mr. Hill states that many New Entrants shared Canada's concern about the effect of spectrum concentration on competition.[863] Indeed, Wind Mobile itself recognized that "the Government's primary policy objective" was "to create, enhance, and sustain competition in the Canadian wireless telecommunications market."[864] Therefore, Canada sees no basis for GTH's current position that the Transfer Framework was adopted to "deflect public criticism" rather than to advance a legitimate policy objective.[865]

532. Canada similarly rejects GTH's argument that the Transfer Framework was "irrational" or not evidence-based.[866] In Canada's view, the "Tribunal has no mandate to assess the substantive

[858] Merits Counter-Memorial, ¶ 417; Merits Rejoinder and Jur. Reply, ¶¶ 288-289; **RWS-Hill-2**, ¶ 22; **R-195**, *Telus v. AGC*, ¶¶ 37-38, 43.

[859] Merits Counter-Memorial, ¶¶ 364 *et seq.*; Merits Rejoinder and Jur. Reply, ¶¶ 294 *et seq.*

[860] Merits Rejoinder and Jur. Reply, ¶ 294.

[861] Merits Counter-Memorial, ¶ 365.

[862] **RWS-Hill**, ¶ 115; **RWS-Stewart**, ¶ 66.

[863] **RWS-Hill**, ¶ 123.

[864] **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")", 3 May 2013, ¶ 2; *see*; Merits Counter-Memorial, ¶ 366; **RWS-Hill**, ¶ 124; **R-146**, Consultation on Considerations Relating to Transfers, Divisions, and Subordinate Licensing of Spectrum Licences: Comments of Globalive Wireless Management Corp. ("WIND"), 3 April 2013, ¶ 2.

[865] Merits Counter-Memorial, ¶ 367, *quoting* Merits Memorial, ¶ 335.

[866] Merits Counter-Memorial, ¶¶ 374-383; Merits Rejoinder and Jur. Reply, ¶¶ 295-298.

correctness or the evidentiary basis of the Transfer Framework but even if it did, the record shows that the Transfer Framework was not irrational."[867] Canada submits that GTH has provided no convincing evidence for its allegations in this regard. In particular, Canada considers Mr. Connolly's testimony to be of "limited relevance," given that he (a) lacks first-hand knowledge of the adoption of the Transfer Framework, and (b) did not work in the branch of Industry Canada responsible for researching and advising on telecommunications policy.[868]

533. Moreover, Canada contends that it adopted the Transfer Framework only after months of deliberations and consideration of alternative options.[869]

534. Canada also highlights that it held a public consultation, beginning with the Transfer Framework Consultation Paper, which set out the concerns about spectrum concentration and invited comments on the proposed approach.[870] The public and licensees were given ample time to comment, and Wind Mobile took advantage of the opportunity.[871] Canada concludes that the licensees were accorded due process, and 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."[872]

535. Canada opposes GTH's argument that Industry Canada's consideration of spectrum concentration in reviewing license transfer requests was "redundant" with the Competition Bureau's mandate to review merger transactions involving spectrum licences.[873] Canada's position is that the Minister's review authority co-exists with that of the Competition Bureau, as confirmed by the Federal Court.[874] According to Canada, the two review processes are distinct, and only the

[867] Merits Counter-Memorial, ¶ 383; *see* ¶ 375, *citing*, *inter alia*, **RL-105**, *Mesa Power Group LLC v. Canada* (UNCITRAL) Award, 24 March 2016, ¶ 505 ("international law requires tribunals to give a good level of deference to the manner in which a state regulates its internal affairs.").

[868] Merits Counter-Memorial, ¶ 382.

[869] Merits Counter-Memorial, ¶¶ 368-373; **RWS-Stewart**, ¶¶ 6, 35, 58-62; **R-084**, Memorandum of 7 December 2012, Annex A, p. 6; **R-088**, Memorandum of 4 January 2013, Annex A, p. 3 and Annex B, p. 8.

[870] **C-152**, Transfer Framework Consultation Paper.

[871] Merits Counter-Memorial, ¶ 394; **RWS-Hill**, ¶ 122.

[872] Merits Counter-Memorial, ¶ 395; *see* Merits Rejoinder and Jur. Reply, ¶ 298.

[873] Merits Counter-Memorial, ¶¶ 384-391.

[874] Merits Counter-Memorial, ¶ 389; **R-195**, *Telus v. AGC*, ¶¶ 37-38, 43.

Minister has the authority to manage spectrum concentration.[875] Thus, the Competition Bureau could object to a merger only "if it was likely to result in a substantial lessening or prevention of competition, regardless of the impact on spectrum concentration."[876] Canada asserts that this distinction was explained in the Transfer Framework[877] and previously in the 2008 AWS Auction Consultation Paper.[878]

536. Finally, Canada submits that there is no basis for GTH's argument that Canada targeted Wind Mobile. According to Canada, the Transfer Framework was not aimed at Wind Mobile's licenses, but instead applied to all commercial mobile spectrum licences.[879] Canada contends that GTH's position in this arbitration is inconsistent with earlier comments by Wind Mobile and GTH:

a. Wind Mobile did not oppose the Transfer Framework during the 2013 consultation.[880]

b. Wind Mobile had informally expressed that it would support an extension of the five-year transfer restriction.[881]

c. During the 2013 consultations, Wind Mobile acknowledged that Canada was pursuing its long-standing objective to promote competition.[882]

[875] Merits Counter-Memorial, ¶¶ 389-390; **C-057**, *Radiocommunication Act*, ss. 5(1), 5(1.1).

[876] Merits Counter-Memorial, ¶ 390.

[877] **C-031**, Transfer Framework, ¶ 10 ("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.").

[878] **C-050**, AWS Auction Consultation Paper, p. 18.

[879] Merits Rejoinder and Jur. Reply, ¶ 300

[880] Merits Counter-Memorial, ¶ 374; Merits Rejoinder and Jur. Reply, ¶ 301; **C-348**, Memorandum from Pamela Miller to the Assistant Deputy Minister, Stakeholder Submissions to the Transfers Consultation, attaching Annex A: Summaries of Key Submissions, 3 April 2013, Exhibit Page 7; **R-497**, E-mail from Felix Saratovsky, VimpelCom to Simon Lockie, Globalive, et al., 8 April 2013.

[881] Merits Counter-Memorial, ¶ 374; **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.

[882] **R-146**, Consultation on Considerations Relating to Transfers, Divisions, and Subordinate Licensing of Spectrum Licences: Comments of Globalive Wireless Management Corp. ("WIND"), 3 April 2013, ¶ 2; **R-152**, Consultation on Considerations Relating to Transfers, Divisions, and Subordinate Licensing of Spectrum Licences: Reply Comments of Globalive Wireless Management Corp. ("WIND"), 3 May 2013, ¶ 2.

d. GTH encouraged regulatory action to address its concern that spectrum speculation had been allowed, and that New Entrants might be "allowed to re-sell AWS to highest bidder after 2014."[883]

537. For Canada, this shows that Wind Mobile was in a position to benefit from regulatory measures promoting competition, and GTH cannot now argue that Canada's efforts in this regard targeted Wind Mobile.[884]

c. The Tribunal's Analysis

538. This section of the Award contains the Tribunal's analysis of GTH's FET claims relating to Canada's adoption and implementation of the Transfer Framework. The Tribunal will consider GTH's claims that Canada's actions (i) frustrated GTH's legitimate expectations and (ii) were arbitrary, unreasonable, and lacked transparency.

(i) *Legitimate Expectations*

539. To determine whether Canada's conduct frustrated GTH's legitimate expectations and, as a result, breached the FET standard as set out in Article II(2)(a) of the BIT, the Tribunal will examine whether, based on the evidence adduced by the Parties, it is possible to identify representations by Canada that could give rise to legitimate expectations by GTH, the extent to which GTH relied on those representations in its investment decision, and whether Canada fundamentally departed from those representations after GTH made its investment in reliance thereon.

540. The Tribunal has reviewed, *inter alia*, the 2001 Spectrum Auction Framework,[885] the Spectrum Licensing Procedure,[886] the 2008 AWS Auction Policy Framework,[887] and the AWS Auction Consultation Paper,[888] all of which were available to GTH in 2008 when considering

[883] **R-420**, VimpelCom Presentation, "Meeting with Industry Canada – Briefing Paper on Wind Canada's Business Situation," 14 March 2013, slide 5.

[884] Merits Rejoinder and Jur. Reply, ¶¶ 300-302.

[885] **C-041**, 2001 Spectrum Auction Framework.

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

[887] **C-004**, 2008 AWS Auction Policy Framework.

[888] **C-050**, AWS Auction Consultation Paper.

whether to invest in Canada. The Tribunal finds no compelling evidence that Canada represented at the time of the AWS Auction that it would unconditionally permit New Entrants to transfer their set-aside licences to Incumbents, or that the Minister would approve all applications to transfer set-aside spectrum to Incumbents automatically after the expiry of the five-year transfer restriction. The evidence reviewed below supports this finding.

541. Under the heading "Licence Transferability and Divisibility," the COLs state:

> 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.[889]

542. As highlighted by both Parties, the 2008 AWS Auction Policy Framework and the AWS Licensing Framework each contains the following statement: "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."[890] Canada correctly argues that this statement put potential bidders on notice that all license transfers were subject to ministerial approval. The Tribunal finds the language to be unambiguous in this respect. GTH focuses instead on the second limb of the statement, which sets out the five-year restriction on transfers. In effect, GTH attempts to turn this *restriction* on transfers into a positive *obligation* of Canada to permit transfers after the five-year period. The Tribunal does not accept this argument. Reading selectively the part of the statement that GTH cites as a guarantee of unconditional transfer would override the express requirement of ministerial approval contained in the other part of the same statement.

543. The *Responses to Questions for Clarification on the AWS Policy and Licensing Frameworks*, a document that Canada issued on 27 February 2008 as a companion document to the other documents for the AWS Auction, which was adduced by GTH as evidence in this arbitration, further corroborates the Tribunal's determination in the preceding paragraph. In that

[889] **C-010**, Wind Mobile Licenses (*emphasis added*). In the cover letter to the Licenses, the Director General of Industry Canada indicated to Mr. Campbell, the CEO of Globalive: "I would strongly suggest that you carefully read the conditions appended to the licences,"

[890] **C-004**, 2008 AWS Auction Policy Framework, p. 6; **C-005**, AWS Licensing Framework, p. 7.

document, Canada indicated: "Once licences have been issued, licensees may transfer licences, subject to departmental approval, to other companies provided that they meet the conditions of licence."[891] Canada further specified in that document:

> 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.*[892]

544. At the Hearing, the former director of Industry Canada, Mr. Connolly, explained that a license transfer requires Ministerial approval because the transfer involves the issuance of a new licence, which only the Minister has authority to do:

> Q. Now, under item (a)(i.1), the act grants the minister authority for the issuance of spectrum licences; correct? You can also see it on the screen.
> A. Yes.
> Q. And through the authority to issue licences, the minister has authority over transfer reviews; correct?
> A. Yes, he does.
> Q. And just so we all understand how transfers work, transfers involve the surrendering of a licence and the issuance of a new licence; correct?
> A. Yes, the scheme of the Radiocommunication Act is such that the licence must be issued to the entity that's going to own or operate radio apparatus. To transfer a licence, a licence is revoked with consent from party A and a new licence issued to party B.
> Q. So a transfer in spectrum is not like selling typical goods, where two individuals in the private market can just exchange the good freely, without the government being involved; correct?
> A. The government must be involved, at a minimum, because, as I've mentioned, party B is to receive a new radio authorisation. Party B must, at minimum, meet the eligibility requirements that are in the regulations, and it's the minister's responsibility to verify that those eligibility requirements have been met.[893]

545. While the policy documents repeatedly refer to the required approval of the Minister, they do not contain any assurance that such approval shall be granted where the eligibility criteria of

[891] **C-062**, Industry Canada, Responses to Questions for Clarifications on the AWS Policy and Licensing Frameworks, 27 February 2008, p. 20 (*emphasis added*). In considering that evidence, the Tribunal also reviewed **C-467** later adduced by GTH and admitted on the evidential record pursuant to PO10.

[892] *Ibid.* at ¶ 5.9 (*emphasis added*); repeated at ¶ 6.18.

[893] Day 3, Tr. 132:7-133:11 (Connolly).

the transferee are fulfilled and the restriction period has expired. Meeting the eligibility criteria is necessary to apply for a license transfer; however, ministerial approval is still required for the transfer to be effective. In this sense, the eligibility requirements stand as an admissibility prerequisite: the Minister need not consider a transfer application that does not meet the prerequisite. GTH ignores the distinction between *admissibility* and *approval* when it argues that such a reading of the Minister's power renders the five-year restriction redundant and of no meaning.[894] The COLs leave no doubt that the transfer is predicated on the Minister's approval:

> 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.[895]

546. This is also reflected in the testimony of Mr. Connolly who explained that even if the eligibility criteria were met, the Minister retained discretion to approve or disapprove transfers after five years:

> Q. So even if the eligibility criteria were met, the minister retained discretion to approve or disapprove transfers after five years; correct?
> A. He did.
> Q. Canada also did not make an express or explicit promise or representation that transfers to incumbents would be automatically approved after five years; correct?
> A. That is correct. And as I've explained before, it cannot be automatic, because the minister has 25 obligations.[896]

547. The Tribunal notes the assertion by GTH that "the evidence shows that the only express restriction on transfer contained in set-aside spectrum licenses was the 5-year restriction on transfer to an Incumbent."[897] That assertion, in the terms by GTH, casts light on a fundamental flaw in GTH's case: the five-year restriction on transfer is not *the only* restriction; meeting eligibility criteria and obtaining the Minister's approval of the application for transfer are prerequisites. And

[894] Claimant's Post-Hearing Submission, ¶ 24(b).

[895] **C-010**, Wind Mobile Licenses, pp. 2, 5 (*emphasis added*).

[896] Day 3, Tr. 168:16-25.

[897] Claimant's Post-Hearing Submission, ¶ 23(d).

neither of those two prerequisites excludes the Minister's ability to take into account spectrum concentration when deciding whether to approve an application for transfer.

548. GTH has highlighted the statement in the Spectrum Licensing Procedure that spectrum licenses obtained through an auction process enjoy the "privilege" of "enhanced transferability and divisibility rights."[898] However, the Tribunal has been shown no evidence that enhanced transferability alone guarantees a favourable outcome of the ministerial approval process. As Canada explained, the term "enhanced transferability" for auctioned licences meant that a licensee could apply to transfer an unutilised spectrum licence or unutilised parts thereof.[899] This is in contrast to non-auctioned licences or radio licences, which could usually only be indivisibly transferred as part of a going concern.[900]

549. More generally, all of the policy documents must be read in the context of the underlying legislative and regulatory regime. In particular, the Radiocommunication Act expressly gives the Minister the power to amend the COLs:

> taking into account all matters that the Minister considers relevant for ensuring the orderly establishment or modification of radio stations and the orderly development and efficient operation of radiocommunication in Canada … (b) amend the terms and conditions of any licence, certificate or authorization issued under paragraph (a).[901]

550. The Tribunal notes that its reading of the relevant policy documents is consistent with that of Canada's Federal Court in *Telus v. AGC*, which held:

> [N]othing in these statements constitutes a statement, or even an implication that, at the end of five years a party may freely, without review or constraint by the Minister, licence or acquire any or all of the set-aside spectrum, nor do any of these statements constitute an undertaking or assurance by the Minister that, after five years, the Minister may decline to exercise discretion to manage the spectrum.[902]

[898] Merits Memorial, ¶ 314; **C-003**, Industry Canada, Licensing Procedure for Spectrum Licences for Terrestrial Services (CPC-2-1-23, Issue 2), September 2007, § 5.6.

[899] Respondent's Post-Hearing Brief, ¶ 39, citing **C-003**, Industry Canada, Licensing Procedure for Spectrum Licences for Terrestrial Services (CPC-2-1-23, Issue 2), September 2007, § 5.6.

[900] Day 4, Tr. 52:1-55:25 (Hill); Day 4, Tr. 243:13-18 (Stewart).

[901] **C-057**, Radiocommunication Act, R.S.C., 1985, § 5(1).

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

551. GTH seeks to sidestep this outcome by pointing to internal memoranda circulated within Government agencies purportedly expressing Canada's view that New Entrants were entitled to transfer their set-aside spectrum upon the expiry of the five-year restriction. For example, in one memorandum, a staffer of Industry Canada indicates: "Incumbents would have to wait five years before being able to acquire a new entrant, either to reduce competition or to acquire spectrum capacity."[903] The Tribunal notes that this internal memorandum was not available to GTH at the time of the investment so as to permit even the possibility of building a legitimate expectation thereon.[904] In any event, the Tribunal finds no persuasive argument prompting it to give priority to an internal memorandum over the explicit terms of the policy documents discussed above. Moreover, the arbitral record contains other contemporaneous internal Government documents that emphasise the cumulative conditions of transferability as stated in the COLs, such as the following:

> Q15 – Could new entrants use a set-aside to flip the spectrum for profit at the expense of taxpayers?
>
> No. A condition of licence will stipulate that the spectrum acquired under a set-aside cannot be sold to companies that are not eligible for the set-aside, for 5 years following the auction.
>
> There is nothing automatic about a licence transfer. The transfer of a licence is subject to Ministerial approval.[905]

552. The Tribunal will next consider GTH's argument that the Minister's previous approvals of transfers of mobile spectrum licences created a precedent as to how he would review transfer applications, resulting in a legitimate expectation that transfers to Incumbents would receive approval if the eligibility criteria and the moratorium expiry prerequisites were met.[906] In this regard, Mr. Connolly testified at the Hearing as follows:

> Q. Past transfer approvals do not and cannot bind the minister in his or her exercise of discretion over subsequent transfer applications, can they?

[903] **C-308**, **[[**Email from Suzanne Lambert to Pamela Miller, *attaching* Table of AWS Implications**]]**, p. 6.

[904] Day 8, Tr. 230:6-17. The Tribunal need not decide on Canada's submission that, for a representation to give rise to legitimate reliance, it has to have been critical to the investor's decision to invest.

[905] **R-478**, AWS Announcement Questions and Answers, 27 November 2007, p. 17. *See also* the testimony of Mr. Connolly at Day 3, Tr. 168:13-22.

[906] Two Incumbents, Telus and Rogers, were each granted approval to purchase New Entrants Clearnet and Microcell who had been issued PCS spectrum licenses. *See* **C-040** and **C-043**, Claimant's Opening Presentation, slide 35.

A. I don't believe so.[907]

553. In his Second Witness Statement, Mr. Hill stated:

> Furthermore, Telus' acquisition of Clearnet and Rogers' purchase of Microcell are not examples of automatic transferability without Ministerial approval. The Department analyzed each application and provided recommendations to the Minister based on the context and circumstances prevailing at the time. In each case, the Minister exercised his discretion and issued a decision. These administrative decisions, made on a case-by-case basis, do not create precedents regarding future decisions by the Minister. Each decision to approve or deny a licence transfer is based on the particular circumstances of the request. By 2013 and 2014, the conditions prevailing in the wireless telecommunications market were significantly different than the circumstances prevailing a decade earlier when the Clearnet and Microcell licence transfers occurred.[908]

554. The Tribunal accepts this testimony and does not agree with GTH's argument that the Minister's past approvals could create an expectation as to future approvals upon which GTH was entitled to rely.

555. In sum, the record makes clear that Canada did not make any representation which could give rise to a legitimate expectation of GTH that it is assured of being permitted to transfer its spectrum licenses to an Incumbent after the expiry of the five-year restriction on transfers. In light of this determination of the Tribunal, it is unnecessary for the Tribunal to examine whether GTH's relied, exclusively or not,[909] on representations by Canada in reaching its decision in 2008 to invest in Canada. Any assumptions GTH made based on what the market might have expected Canada to do in relation to applications for transfer at the end of the five-year period were made at GTH's own risk; their consequences cannot be imputed to Canada.

556. For completeness, however, the Tribunal notes that GTH's own internal documents reveal a gap between what the policy documents provided and what GTH took from those documents. An example is the Private Placement Memorandum,[910] an internal, confidential document of

[907] Day 2, Tr. p. 169:1-4 (Connolly).

[908] **RWS-Hill 2**, ¶ 11.

[909] Claimant's Post-Hearing Submission, ¶ 15(b).

[910] **C-066**, Email from Mike O'Connor to Assaad Kairouz, et al., 29 February 2008, *attaching* Globalive materials, pp. 62-63. That document was the subject of abundant discussion at the Hearing. *See* Day 8, Tr.163 *et seq.*

Globalive that had not been shared with the Canadian Government before the investment was made.[911] That Memorandum only referred to the five-year restriction on the sale of spectrum to an Incumbent; it did not mention the other eligibility conditions required of the transferee or the requirement of ministerial approval set out in the COLs. Another example is the presentation by JP Morgan to Orascom Telecom on 10 April 2008, which indicated that a "License may not be transferred to incumbent companies for 5 years from issuance," but did not mention the other conditions on transfer set out in the auction documents and the underlying statutes.[912] GTH's reliance on those reports, which were prepared by its professional advisors on the basis of publicly available auction documents and their underlying rules, was GTH's own business decision for which Canada cannot be faulted.

557. GTH's misreading of the policy documents is also reflected in the testimony of Mr. Dobbie and Mr. Andrew. Mr. Dobbie stated that "after the five-year period was up, a New Entrant would be able to sell set-aside spectrum licences to an Incumbent."[913] Mr. Andrew similarly stated that "after the 5-year period had expired, a New Entrant would be free to transfer the set-aside spectrum licences to any entity meeting the O&C Rules, including an Incumbent."[914] Those views are plainly unsupported by the policy documents to which they refer. What those documents permit a New Entrant to do upon the expiry of the five-year transfer restriction is *to apply* for transfer to an entity meeting the eligibility criteria, including an Incumbent, whereupon the Minister will review the application and decide whether to approve that application. Conflating the ability to *apply for a transfer* and the *actual transfer* is an interpretation of the applicable rules that GTH chose to make; Canada cannot be held liable for the consequences of GTH's own choice.

[911] Day 8, Tr. 165:6-12 (Madden) ("You also posed the question, Mr Chairman: did government officials see this contemporaneously? We have checked -- or Globalive counsel have checked as far as they can, and we've also checked with Mr Andrew. There's no evidence that that was provided – it's a private placement memorandum – that it was provided to the government.") Counsel for GTH sought to adduce evidence at the hearing that the Private Placement Memorandum had been submitted to the Government, although only in August 2009. Day 8, Tr.168:18-21 (Madden). In reply to a question from the Tribunal, counsel for GTH submitted: "No, sir, we do not submit that this amounts to knowledge. This document isn't evidence of knowledge of the Canadian Government, save that it was knowledge by August 2009, in our submission, because it was actually provided to the Government of Canada expressly in response to a request, 'Please provide us with all the documents that you sent to investors to encourage investment'. So as at that date, yes, they had knowledge of this document. But this document, in terms of the period February 2008 leading up to the AWS auction, that was, as it were, a private document." Day 8, Tr. 183:25-184:10 (Madden).

[912] **C-072**, JPMorgan, Orascom Telecom – Canadian Wireless Opportunity, 10 April 2008, p.19.

[913] **CWS-Dobbie**, ¶ 10.

[914] **CWS-Andrew**, ¶ 8.

558. For these reasons, the Tribunal finds that GTH has not established the existence of any legitimate expectation that was violated, in breach of the BIT, by Canada's adoption and implementation of the Transfer Framework.

559. Had GTH succeeded in evidencing that, after it made its investment based on the terms and undertakings set out in the auction policy documents, Canada had fundamentally altered those policy documents, for example by prolonging the five-year finite restriction on transfer, or by deciding that no set-aside licence may be transferred at all at any time, there could have been an argument that Canada may have breached its obligation pursuant to Article II(2)(a) of the BIT. However, no such evidence was presented to the Tribunal.

560. In the next section, the Tribunal will consider GTH's claims of arbitrariness, unreasonableness and lack of transparency.

(ii) *Arbitrariness, Unreasonableness and Lack of Transparency*

561. In considering GTH's claim that Canada acted arbitrarily and unreasonably in adopting and implementing the Transfer framework, the Tribunal will have reference to the standard stated by the tribunal in *Crystallex v. Venezuela* that "a measure is for instance arbitrary if it is not based on legal standards but on excess of discretion, prejudice or personal preference, and taken for reasons that are different from those put forward by the decision maker."[915] The Tribunal also accepts GTH's reference to the tests of arbitrariness expressed by Professor Schreuer in his expert opinion in *EDF v. Romania*, including his view that a measure is arbitrary if it "inflicts damage on the investor without serving any apparent legitimate purpose."[916]

562. In applying the standard, the Tribunal's task is not to second guess the substantive correctness of Canada's regulatory decisions or the policy motivations behind those decisions. The Tribunal considers that deference is due to the competent governmental authorities in the exercise of their mandate. At the same time, this Tribunal agrees with the statement of the Crystallex

[915] **CL-082**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶ 578.

[916] **RL-205**, *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, ¶ 303; Claimant's Post-Hearing Submission, ¶ 30.

tribunal that "deference to the primary decisionmakers cannot be unlimited, as otherwise a host state would be entirely shielded from state responsibility and the standards of protection contained in BITs would be rendered nugatory."[917]

563. The Tribunal further notes, with agreement, that investment tribunals have consistently ruled that, absent an undertaking of the host State to stabilise the regulatory framework in the sector where the investment is made, a change in that framework to reflect the market evolution that is not arbitrary or aimed to harm the investor is not a breach of the FET standard.[918]

564. The difficulty for GTH is that, in attempting to establish a breach of the FET standard under the BIT, it has not met its burden of proving that the Transfer Framework was not based on legal standards, reflected an excess of discretion, prejudice or personal preference, or was politically motivated and without any legitimate policy objective.

565. In particular, GTH evidenced no fundamental inconsistency with Canada's spectrum management policy objectives or with the objectives of the 2008 AWS Auction. The evidence adduced showed that references to spectrum concentration in the 2013 Transfer Framework that brought Industry Canada to block the transfer of set-aside spectrum licences to Incumbents were essentially adopted to enhance competition. This reflected the change in the market between 2008 and 2012 due to the rising use of smartphones which made it critical for the government to control spectrum concentration.[919] While before June 2013, spectrum concentration might not have been

[917] **CL-082**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶ 584.

[918] **RL-205**, *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, ¶ 217 ("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"); **RL-318**, *Charanne B.V. and Construction Investments S.A.R.L. v. The Kingdom of Spain*, SCC Case No. V 062/2012, Final Award (Unofficial English Translation), 21 January 2016, ¶ 510 ("However, as stated in previous sections of this award, in the absence of a specific commitment toward stability, an investor cannot have a legitimate expectation that a regulatory framework such as that at issue in this arbitration is to not be modified at any time to adapt to the needs of the market and to the public interest."); **CL-038**, *Saluka Investments BV v. The Czech Republic* (UNCITRAL) Partial Award, 17 March 2006, ¶ 305 ("No investor may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged. In order to determine whether frustration of the foreign investor's expectations was justified and reasonable, the host State's legitimate right subsequently to regulate domestic matters in the public interest must be taken into consideration as well."); Respondent's Closing Presentation, slide 127.

[919] Day 4, Tr. 118:1-18 (Hill); Day 3, Tr. 153:25-154:18 (Connolly).

conspicuously underscored as a condition for approval of transfer, the rationale for the 2008 AWS Auction was built on the need to avoid concentration by the Incumbents. The Telecommunications Act, a source of Ministerial authority over spectrum management,[920] provides "that the Canadian telecommunications policy has as its objectives […] (c) to enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications."[921] In reply to an argument of inconsistency put by GTH,[922] the Tribunal does not find any illegitimacy or irrationality in the Canadian Government's considering in 1994 that the market was competitive and introducing ten years later, in 2013, a Transfer Framework to regulate spectrum concentration, given the important evolution in the market that was amply discussed at the Hearing. Wind Mobile's acknowledgment that "the Government's primary policy objective" was "to create, enhance, and sustain competition in the Canadian wireless telecommunications market" contradicts GTH's argument that the Transfer Framework was politically-motivated, and adopted to "deflect public criticism" rather than to advance a legitimate policy objective.[923]

566. Accordingly, and contrary to GTH's contention, the Tribunal does not see in the adduced evidence a fundamental change in the 2013 Transfer Framework, but rather different wording of the same policy that had been the consistent rationale for the AWS Auction since its inception. Moreover, the discretionary authority of the Minister to approve transfer applications, omnipresent in the AWS Auction policy documents, never excluded spectrum concentration as one of the criteria for approval.

[920] **C-052**, Industry Canada, *Spectrum Policy Framework for Canada (DGTP-001-07)*, ¶ 3.1 ("The Minister of Industry, through the Department of Industry Act, the Radiocommunication Act and the Radiocommunication Regulations, with due regard to the objectives of the Telecommunications Act, is responsible for spectrum management in Canada. As such, the Minister is responsible for developing national policies and goals for spectrum resource use and ensuring effective management of the radio frequency spectrum resource"); **C-004**, 2008 AWS Auction Policy Framework, p. 8 ("The department agrees that mandated roaming is important to promote competition and supports the orderly development of radiocommunication in light of the policy objectives of the Telecommunications Act."). *See* Respondent's Opening Presentation, slide 6.

[921] **C-046**, Telecommunications Act, §7.

[922] *See* Merits Memorial, ¶ 338.

[923] **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")", 3 May 2013, ¶ 2. *See* Merits Counter-Memorial, ¶ 366; **RWS-Hill**, ¶ 124; **R-146**, Consultation on Considerations Relating to Transfers, Divisions, and Subordinate Licensing of Spectrum Licences: Comments of Globalive Wireless Management Corp. ("WIND"), 3 April 2013, ¶ 2.

567. At the Hearing, the Parties debated the evidentiary impact of certain internal advice to the Minister not referring to spectrum concentration as a specific criterion in the outcome of the transfer review process.[924] The Tribunal finds in that debate no grounds permitting it to infer a limitation of the Minister's discretion to consider other factors as would be consistent with the objectives of the Radiocommunication Act and Telecommunications Act in reviewing licence transfers, as that discretion had been indicated in the COLs.

568. Moreover, the Tribunal considers that neither the terms of the licences nor the statutes that underlie those licences can be read as committing Canada to freeze its telecom regulatory framework. Specifically, the Radiocommunication Act provides the Minister with authority, albeit on an exceptional basis and only after consultation,[925] to "amend the terms and conditions of any licence, certificate or authorization issued paragraph (a)."[926] The COLs, one of the main documents on which GTH rests its claim of legitimate expectations,[927] refer to the Radiocommunication Act and make it binding on the spectrum licensee.[928]

569. GTH has also asserted that Canada's actions breached the FET standard because they lacked transparency. In its Closing Presentation, GTH advanced two arguments in this regard:

> First, assuming Canada's assertion regarding Canada's intended meaning of the transferability of licenses is correct, Canada failed to ensure that GTH understood that "*undue spectrum concentration*" would be used to prevent GTH's ability to sell its investment. […]

[924] **C-261**, Memorandum from John Knubley and Marta Morgan to Minister of Industry, *Approach to Mobile Spectrum Licence Transfer Requests*, *attaching* Annex A: Main Holders of AWS Set-Aside Spectrum, 27 December 2012; **C-262**, Memorandum from John Knubley and Marta Morgan to Minister of Industry, *Approach to Mobile Spectrum Licence Transfers – Briefing Material*, *attaching* Annex A: Wireless Telecommunications Sector: Update and Implications and Annex B: Industry Canada, *Approach to Mobile Spectrum Licence Transfers*, January 2013; Day 3, Tr. 154:5-25 (Connolly); Day 4, Tr. 134:14-135:12 (Hill); Day 5, Tr. 17:24-19:18 (Stewart) (testifying that "The minister's discretion is unbounded. The minister had the discretion to make decisions on spectrum transfers pursuant to the two acts that are involved here."), Tr. 20:18-21:1, 80:15-21. In considering **C-262**, the Tribunal also reviewed **C-468** later adduced by GTH and admitted into the evidential record pursuant to PO10.

[925] **C-003**, Industry Canada, Licensing Procedure for Spectrum Licences for Terrestrial Services (CPC-2-1-23, Issue 2), September 2007, § 5.3.

[926] **C-057**, Radiocommunication Act, R.S.C., 1985, § 5(1)(b).

[927] **C-465**, **[[**Claimant's Closing Presentation**]]**, p. 8.

[928] **C-010**, Wind Mobile Licenses, headings and ¶ 7.

> Second, assuming Canada's assertion regarding Canada's intended meaning of the transferability of licenses is correct, Canada failed to clarify to GTH the meaning of this provision when it became aware of GTH's understanding in August 2009.[929]

570. The Tribunal finds that Canada's explicitly stated prerequisites for spectrum transferability, including competition policy considerations that may be considered by the Minister in the approval process, satisfy any transparency requirement that might arise under the FET obligation. The Tribunal finds no ground in the BIT, including in the principles of international law against which the FET standard is to be assessed pursuant to Article II(2)(a), to warrant additionally to ascribe Canada to a duty to correct potential misunderstandings of the applicable rules that the investor, GTH, competently counselled throughout the investment process, has chosen to infer.

(iii) *Conclusion*

571. For the reasons stated above, the Tribunal dismisses GTH's claim that Canada violated Article II(2)(a) of the BIT by denying GTH the ability to transfer the set-aside spectrum licenses to an Incumbent after expiry of the five-year transfer restriction period. GTH has not established that Canada frustrated GTH's legitimate expectations, or that Canada subjected GTH treatment that was arbitrary, unreasonable, non-transparent, politically motivated or without any legitimate policy objective.

572. In light of that conclusion, the Tribunal decides that it is unnecessary also to review Canada's defense on the standing of GTH to bring this claim, allegedly because only Wind Mobile (the license holder) could assert its entitlement to legitimate expectations.

[929] **C-465**, Claimant's Closing Presentation, slides 69-70.

(4) Whether Canada Breached its Fair and Equitable Treatment Obligation by Conducting the National Security Review and Preventing [redacted]

a. GTH's Position

573. GTH submits that Canada also violated Article II(2)(a) of the BIT by subjecting GTH to an arbitrary national security review and [redacted] GTH alleges that Canada's actions were unreasonable, arbitrary, non-transparent, and that they failed to accord GTH due process.[931]

574. Regarding the specific legal standards applicable to measures concerning national security issues, GTH asserts that such measures are not entitled to special deference.[932] GTH notes that the BIT contains no carve-out for national security issues. According to GTH, tribunals have found that State conduct in the name of national security concerns may violate the FET standard, particularly where other motives were involved or there were alternative means of addressing the State's concerns that would not have conflicted with the FET obligation.[933] GTH submits that "[i]n these circumstances, once an investor has made a *prima facie* case that there has been a breach, the burden shifts to the respondent to rebut this case," which is especially important where the relevant documents are held by the State.[934]

575. Regarding the relevant factual background, GTH submits that the key facts are not in dispute.[935] GTH alleges that in the lead-up to the 2008 Auction, Canada sent a "clear message" to GTH and other prospective foreign investors that Canada's O&C Rules, which limited foreign

[930] Merits Memorial, § VII.A.3; Merits Reply and Jur. Counter-Memorial, ¶ 10 and § IV.A.3.

[931] Merits Reply and Jur. Counter-Memorial, § IV.A.3.

[932] Merits Reply and Jur. Counter-Memorial, ¶ 300.

[933] Merits Reply and Jur. Counter-Memorial, ¶ 300, *citing* **CL-173**, *Deutsche Telekom AG v. The Republic of India*, (UNCITRAL) PCA Case No. 2014-10, Interim Award, 13 December 2017, ¶ 239 ("To assess the necessity of the measures to safeguard the state's essential security interests, the Tribunal will thus determine whether the measure was principally targeted to protect the essential security interests at stake and was objectively required in order to achieve that protection, taking into account whether the state had reasonable alternatives, less in conflict or more compliant with its international obligations.").

[934] Merits Reply and Jur. Counter-Memorial, ¶ 301, *citing* **CL-158**, *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award, 25 August 2014, ¶ 8.68.

[935] Merits Reply and Jur. Counter-Memorial, ¶ 302.

ownership and control, could be relaxed in the future.[936] In particular, GTH cites the AWS Auction Policy Framework, in which Canada recognized that its O&C Rules "constitute a barrier to market entry" and noted that the "question of foreign ownership restrictions is being studied by the Competition Policy Review Panel."[937]

576. According to GTH, it "relied on this representation" in making its investment "and, at the outset, incorporated into the structure of its investment the right to take advantage of any future relaxation of the O&C Rules."[938] Specifically, GTH negotiated with Globalive to include a provision in Wind Mobile's Shareholding Agreements and Articles of Incorporation that permitted GTH to take voting control over Wind Mobile if and when the O&C Rules changed.[939] GTH states that these documents were reviewed by both Industry Canada and the CRTC, and that GTH specifically raised the provision with regulators.[940] Canada was therefore aware of GTH's right and did not object to it.[941]

577. GTH submits that the expected regulatory change finally came in March 2012, when the Minister announced that foreign investment restrictions would be lifted for telecommunications common carriers with less than a ten percent market share. [942] In June 2012, the Telecommunications Act was revised accordingly.[943]

[936] Merits Reply and Jur. Counter-Memorial, ¶ 28; *see* Merits Memorial, ¶¶ 173, 346.

[937] **C-004**, 2008 AWS Auction Policy Framework, p. 3 ("These [O&C Rules] ensure that Canada's telecommunications infrastructure is owned and controlled by Canadians. However they also act as restrictions on foreign investment which constitutes a barrier to market entry. The question of foreign ownership restrictions is being studied by the Competition Policy Review Panel. Removal or liberalization of these requirements would require legislative changes.").

[938] Merits Reply and Jur. Counter-Memorial, ¶ 4(c); *see* ¶ 302; Merits Memorial, ¶ 93; **CWS-Dobbie**, ¶ 11.

[939] Merits Memorial, ¶ 93; Merits Reply and Jur. Counter-Memorial, ¶ 29; **C-084**, Declaration of Ownership and Control, 5 August 2008, pp. 80, 92 (Globalive Holdco SHA, Clause 6.6 and Schedule C); **C-084**, Declaration of Ownership and Control, 5 August 2008, pp. 119, 134-35 (Globalive Investment SHA, Clause 6.8 and Schedule C); **C-084**, Declaration of Ownership and Control, 5 August 2008, pp. 137-49 (Globalive Canada Holdings Corp. Articles of Incorporation); **C-084**, Declaration of Ownership and Control, 5 August 2008, pp. 150-65 (Globalive Investment Holdings Corp. Articles of Incorporation).

[940] Merits Reply and Jur. Counter-Memorial, ¶¶ 42, 302.

[941] Merits Reply and Jur. Counter-Memorial, ¶¶ 29, 60, 302.

[942] Merits Memorial, ¶ 347; **C-123**, Industry Canada, Speech: Speaking Points – The Honourable Christian Paradis, PC, MP Minister of Industry, Telecommunications Decisions, 14 March 2012.

[943] Merits Memorial, ¶ 347.

578. According to GTH, once this change was in place, it sought to exercise its right to take voting control of Wind Mobile and submitted the Voting Control Application, expecting it to be approved quickly.[944]

[redacted]

[944] Merits Memorial, ¶ 184; Merits Reply and Jur. Counter-Memorial, ¶¶ 60, 303; [redacted]

[946] Merits Memorial, ¶ 184; [redacted]

[947] Merits Memorial, ¶ 183; [redacted]

[948] [redacted]

[949] Merits Memorial, ¶ 350; *see* Merits Reply and Jur. Counter-Memorial, ¶ 306.

[950] Merits Memorial, ¶ 205; Merits Reply and Jur. Counter-Memorial, ¶¶ 63, 304; **C-009**, Investment Canada Act (12 March 2009 – 28 June 2012), §§ 25.2-25.4; **C-102**, National Security Review Regulations.

[951] Merits Reply and Jur. Counter-Memorial, ¶¶ 63-68, 304.

[redacted]

[952] Merits Memorial, ¶ 351; Merits Reply and Jur. Counter-Memorial, ¶ 65; [redacted]

[953] Merits Reply and Jur. Counter-Memorial, ¶ 67; [redacted]

[954] Merits Memorial, ¶ 352; Merits Reply and Jur. Counter-Memorial, ¶ 307; [redacted]

[955] Merits Reply and Jur. Counter-Memorial, ¶ 66; [redacted]

[956] Merits Memorial, ¶¶ 182-208, 353; Merits Reply and Jur. Counter-Memorial, ¶ 63.

[957] Merits Reply and Jur. Counter-Memorial, ¶¶ 69-75, 310-311; [redacted]

[redacted]

[960] **C-009**, Investment Canada Act (12 March 2009 – 28 June 2012), § 25.4(1)(b).

[redacted]

[962] Merits Reply and Jur. Counter-Memorial, ¶ 68; [redacted]

[963] Merits Memorial, ¶ 205 [redacted]

[redacted]

580. For GTH, it is clear from the above that GTH was deprived of due process in the national security review, in breach of Canada's FET obligation.[965] In [redacted]

[redacted]

582. GTH concludes that Canada used the national security review as a pretence to gather information about GTH's business plans for Wind Mobile and, ultimately, force the sale of Wind Mobile to a non-Incumbent to further Canada's fourth player policy.[972] GTH states that, "[i]n such circumstances, the evidence shows, on the balance of probabilities, that Canada's national security

[964] Merits Memorial, ¶ 206; Merits Reply and Jur. Counter-Memorial, ¶ 65; [redacted]

[965] Merits Memorial, ¶ 357; Merits Reply and Jur. Counter-Memorial, ¶ 312.

[966] Merits Reply and Jur. Counter-Memorial, ¶ 312.

[967] Merits Reply and Jur. Counter-Memorial, ¶ 312.

[968] Merits Reply and Jur. Counter-Memorial, ¶ 313; **C-247**, Investment Canada Act, *Guidelines on the National Security Review of Investments*, 19 December 2016.

[969] Merits Reply and Jur. Counter-Memorial, ¶ 307.

[970] Merits Memorial, ¶ 352; Merits Reply and Jur. Counter-Memorial, ¶ 307; [redacted]

[971] Merits Reply and Jur. Counter-Memorial, ¶ 307; [redacted]

[972] Merits Reply and Jur. Counter-Memorial, ¶¶ 310, 314.

review was without any legitimate basis and was, therefore, arbitrary and unreasonable, in breach of Canada's FET obligation."[973]

b. Canada's Position

583. Canada submits that GTH's claim relating to the national security review must be dismissed because GTH misstates the applicable legal standard and fails to prove its allegations.[974] According to Canada, the record shows that the national security review complied at all times with Article II(2)(a) of the BIT.[975]

584. Canada rejects GTH's assertion that no special deference is due to State actions taken in the context of national security concerns.[976] Canada argues that the authorities cited by GTH contradict its own position. For example, Canada refers to the award in *Devas v. India*, which states:

> An arbitral tribunal may not sit in judgment on national security matters as on any other factual dispute arising between an investor and a State. National security issues relate to the existential core of a State. An investor who wishes to challenge a State decision in that respect faces a heavy burden of proof, such as bad faith, absence of authority or application to measures that do not relate to essential security interests.[977]

585. Thus, in Canada's view, the "principle of deference towards Government decision-making should apply even more forcefully to highly sensitive policy areas where national security is at stake."[978] Although GTH asserts that it is not challenging [redacted] the national security review, Canada contends that this is precisely what GTH does when it asks the Tribunal to second-guess the existence of the national security concerns underlying the review.[979] Canada asserts that the Tribunal is not permitted to review [redacted] in this way.[980]

[973] Merits Reply and Jur. Counter-Memorial, ¶ 314.

[974] Counter-Memorial, § II.E; Merits Rejoinder and Jur. Reply, § II.A.2.

[975] Counter-Memorial, ¶ 422.

[976] Merits Rejoinder and Jur. Reply, ¶ 244, *citing* Merits Reply and Jur. Counter-Memorial, ¶ 300.

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

[978] Merits Counter-Memorial, ¶ 437.

[979] Merits Rejoinder and Jur. Reply, ¶ 243, *citing* Merits Reply and Jur. Counter-Memorial, ¶ 157.

[980] Merits Rejoinder and Jur. Reply, ¶ 243.

586. In any event, Canada contends that GTH has failed to prove its various factual allegations regarding its Voting Control Application the national security review.

587. *First*, Canada rejects GTH's assertion that it had "secured a right" to acquire voting control of Wind Mobile once Canada's O&C Rules were liberalized, and that it was therefore surprised by the national security review.[981] According to Canada, GTH ignores the "fundamentally different contexts in which ownership and control reviews and ICA reviews operate."[982] In 2008, Industry Canada reviewed Wind Mobile's Shareholders' Agreement in Wind Mobile for compliance with the then-applicable O&C Rules under the Telecommunications Act and the Radiocommunication Act.[983] In contrast, the IRD conducted the review under the ICA to determine whether GTH's Voting Control Application was likely to be of net benefit to Canada and whether it would threaten national security.[984] Canada points out that when the O&C Rules were liberalized in 2012, the Minister made clear that "the provisions of the Investment Canada Act will continue to apply,"[985] a fact which GTH's counsel acknowledged in a January 2013 letter.[986]

588. Therefore, Canada does not see how the 2008 review of Wind Mobile's Shareholders' Agreement, or the liberalization of the O&C Rules is 2012, could have resulted in any expectation regarding the review of GTH's Voting Control Application by IRD.[987]

589. *Second*, Canada denies that its national security review was a pretext to advance its telecommunications policy, as alleged by GTH.[988] In Canada's view, GTH's claim is "predicated

[981] Merits Counter-Memorial, ¶¶ 424-429; Merits Rejoinder and Jur. Reply, ¶¶ 223-226.

[982] Merits Rejoinder and Jur. Reply, ¶ 223.

[983] Merits Counter-Memorial, ¶¶ 259, 425; Merits Rejoinder and Jur. Reply, ¶¶ 224; **RWS-Aitken**, ¶ 44.

[984] Merits Rejoinder and Jur. Reply, ¶ 224.

[985] **C-023**, Industry Canada, Harper Government Takes Action to Support Canadian Families, 14 March 2012, p. 4; *see* Counter-Memorial, ¶ 428; Merits Rejoinder and Jur. Reply, ¶ 225; **C-042**, House of Commons – Canada, *Opening Canadian Communications to the World – Report of the Standing Committee on Industry, Science and Technology*, April 2003, p. 55.

[986] **C-144**, Letter from William G. VanderBurgh, Aird & Berlis LLP to Marie-Josée Thivierge, Industry Canada, 22 January 2013, p. 3.

[987] Counter-Memorial, ¶¶ 424-429; Merits Rejoinder and Jur. Reply, ¶¶ 223-226.

[988] Counter-Memorial, ¶¶ 430-440; Rejoinder ¶¶ 227-234.

on a dystopian portrayal of Canada's national security review that is not supported by the evidence."[989] In this regard, Canada's arguments include the following:

[redacted]

[989] Counter-Memorial, ¶ 423.

[990] Counter-Memorial, ¶ 431; [redacted]

[991] Counter-Memorial, ¶ 431; [redacted]

[993] Merits Rejoinder and Jur. Reply, ¶ 227; [redacted]

[994] Counter-Memorial, ¶ 436.

[995] Counter-Memorial, ¶ 434; Merits Rejoinder and Jur. Reply, ¶ 228.

[redacted]

d. GTH's allegations are illogical because "GTH's acquisition of voting control of Wind Mobile was seen as potentially leading to more investment in Wind Mobile which would advance Canada's telecommunications policy objectives and further competition in the wireless telecommunications sector."[998] Thus, from the perspective of telecommunications policy, "the initiation of the national security review could even be seen as counterproductive."[999]

[redacted]

[redacted]

[997] Merits Rejoinder and Jur. Reply, ¶ 229; [redacted]

[998] Merits Rejoinder and Jur. Reply, ¶ 230; *see* **C-336**, Letter from Iain Stewart to Marie-Josée Thivierge, *attaching* Case Summary, 14 December 2012, p. 1 ("From a telecommunications policy perspective, the proposed transaction [GTH's acquisition of voting control] is consistent with the goals of the recent reform to telecommunications foreign investment restrictions and the government's stated policy objectives for the industry."). In considering that evidence, the Tribunal also reviewed C-469 later adduced by GTH and admitted on the evidential record pursuant to PO10.

[999] Merits Rejoinder and Jur. Reply, ¶ 230.

[1000] Merits Counter-Memorial, ¶ 438.

[1001] Merits Rejoinder and Jur. Reply, ¶¶ 250-254; [redacted]

[1002] Merits Rejoinder and Jur. Reply, ¶ 253; [redacted]

[1003] Merits Rejoinder and Jur. Reply, ¶ 251; [redacted]

590. Canada submits that, in light of the above, GTH cannot credibly argue that Canada's national security concerns were trumped up to allow the Government to investigate or impede GTH's business plans to further telecommunications policy.[1004] For Canada, it is clear that the national security review was motivated by legitimate national security interests.

591. *Third*, contrary to GTH's allegations, Canada submits that it accorded GTH due process at all times during the national security review.

592. In this regard, Canada states that a national security review involves "a highly structured and regulated process," which "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."[1005] Canada outlines the various steps in the process, which are, in its view, "designed to ensure that the outcome is not manifestly arbitrary."[1006]

593. Canada opposes GTH's allegations regarding the secrecy of the process. According to Canada, national security reviews involve sensitive information and materials and, by their very nature, cannot be completely transparent.[1007] However, Canada asserts that it provided GTH with sufficient information to ensure procedural fairness.[1008]

[redacted]

[redacted]

[redacted]

[1004] *See* Merits Counter-Memorial, ¶ 434.

[1005] Merits Counter-Memorial, ¶ 435.

[1006] Merits Counter-Memorial, ¶ 435.

[1007] Merits Counter-Memorial, ¶ 441; Merits Rejoinder and Jur. Reply, ¶¶ 235-236.

[1008] Merits Counter-Memorial, ¶ 442.

[redacted]

[redacted]

594. [redacted] Thus, even if the FET standard includes a transparency obligation (which Canada denies), the information provided to GTH during national security review more than complied with that obligation.[1016]

595. In response to GTH's allegations that the lack of transparency is demonstrated by Canada's subsequent adoption of the Guidelines on the National Security Review of Investments, Canada contends that these Guidelines did not change the way in which national security reviews are conducted under the ICA and, in any event, would not amount to a "tacit recognition" of any "prior deficiency."[1017]

596. In addition, Canada submits that GTH was provided with a fair opportunity to respond to Canada's national security concerns.[1018] [redacted]

[1011] Merits Counter-Memorial, ¶ 445; Merits Rejoinder and Jur. Reply, ¶ 237; [redacted]

[1014] Merits Rejoinder and Jur. Reply, ¶¶ 237, 239, *quoting* Merits Reply and Jur. Counter-Memorial, ¶¶ 65, 300.

[1015] Merits Rejoinder and Jur. Reply, ¶ 240.

[1016] Merits Counter-Memorial, ¶ 446.

[1017] Merits Counter-Memorial, ¶ 447, *quoting* Merits Memorial, ¶ 359; Merits Rejoinder and Jur. Reply, ¶ 242, *quoting* Merits Reply and Jur. Counter-Memorial, ¶ 313; *see* **C-247**, Investment Canada Act, *Guidelines on the National Security Review of Investments*, 19 December 2016.

[1018] Merits Counter-Memorial, ¶¶ 448-452.

[redacted]

598. In sum, Canada's position is it conducted the national security review in good faith and accorded GTH due process, and there is no basis for GTH's allegation that the process was arbitrary and non-transparent.

c. The Tribunal's Analysis

599. GTH claims that Canada violated its FET obligation by subjecting GTH to an arbitrary national security review and [redacted] Specifically, GTH alleges that Canada failed to provide (a)

[1019] Merits Counter-Memorial, ¶ 448.

[1020] Merits Rejoinder and Jur. Reply, ¶ 248; [redacted]

[1021] Merits Counter-Memorial, ¶ 449; [redacted]

[1022] Merits Counter-Memorial, ¶ 440.

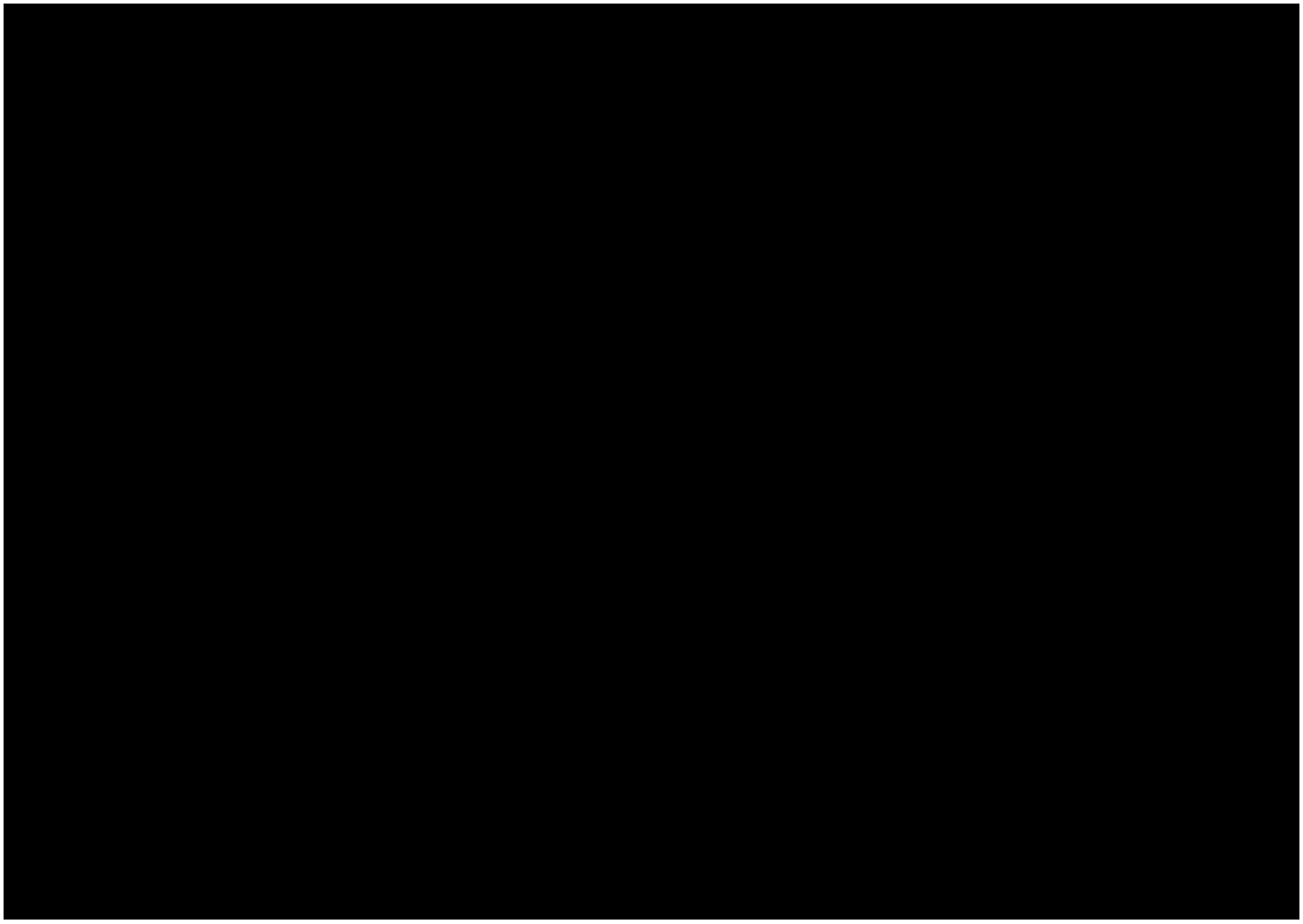
[1023] Merits Counter-Memorial, ¶ 440; Merits Rejoinder and Jur. Reply, ¶ 241; [redacted]

[1024] Claimant's Closing Presentation, slide 115; Claimant's Post-Hearing Submission, § III.

transparency and due process, and (b) non-arbitrary and consistent treatment. The Tribunal has discussed the relevant legal standards above.[1025]

600. GTH offered in its Opening Presentation at the Hearing a helpful outline of the events surrounding the national security review of GTH's Voting Control Application. It is copied below.

[1025] *See* Sections VII.A(2) and VII.A(3)(c)(ii) above.



601. At the outset, the Tribunal notes a marked difference between the national security review-related claim advanced by GTH and its other claim in relation to the transferability of set-aside AWS licences. In relation to the national security review, it is undisputed that GTH had been put on notice in the 2008 AWS Auction documents of the requirement that an acquisition of control by a non-Canadian of an investment of the type GTH made in Wind Mobile in the Canadian wireless market is subject to the restrictions set out in the O&C Rules and to a confidential review for determination by the Minister of whether that acquisition of control would be of net benefit to Canada.[1026] To that end, the AWS Auction Consultation Paper provided:

[1026] **R-169**, Investment Canada Act (29 June 2012 – 25 June 2013), § 16; **C-144**, Letter from W. VanderBurgh to M.J. Thivierge, 22 January 2013, p. 3.

2.5.1 Foreign Investment Restrictions

> Canadian ownership and control requirements impose certain restrictions on foreign investment in facilities-based telecommunications carriers in Canada including wireless carriers. The spectrum considered in this consultation process will eventually be licensed under the Radiocommunication Act subject to Canadian ownership and control requirements and therefore subject to foreign investment restrictions. Foreign investment restrictions have the effect of limiting potential entry in the telecommunications market thereby reducing the competitive discipline that the threat of entry can provide. It is important to consider the effect this may have on the free operation of the market and the ability to rely solely on market forces in the forthcoming auction.[1027]

602. Similarly, the restrictions on foreign investment in the Canadian wireless market was underscored in the 2008 AWS Auction Policy Framework:

> In addition to access to spectrum, a consideration particular to the Canadian wireless market is the presence of Canadian ownership requirements under the *Telecommunications Act* which apply to all facilities-based carriers. These requirements ensure that Canada's telecommunications infrastructure is owned and controlled by Canadians. However they also act as restrictions on foreign investment which constitutes a barrier to market entry. The question of foreign ownership restrictions is being studied by the Competition Policy Review Panel. Removal or liberalization of these requirements would require legislative changes.[1028]

603. The conclusion is therefore unescapable that GTH had all the means to know, at the time of making its investment, that the ownership of a Canadian wireless business was subject to foreign investment restrictions. Importantly, GTH had also been given contemporaneous knowledge that any change in those restrictions would require an amendment to the laws, not merely administrative tolerance or the exercise of the Minister's discretion.

604. To the extent that GTH acted upon the assumption that "there was a policy movement in Canada towards a relaxation of the O&C Rules which would allow a foreign company like GTH to take control of its investment in Wind Mobile," as Mr. Dobbie testified, that assumption reflects the degree of risk that GTH was willing to take on when deciding to invest in Canada.[1029] Indeed, that assumption proved correct: Canada did eventually relax the O&C Rules as expected.

[1027] **C-050**, AWS Auction Consultation Paper, ¶ 2.5.1.

[1028] **C-004**, 2008 AWS Auction Policy Framework, p. 3

[1029] **CWS-Dobbie**, ¶¶ 11, 21.

605. However, the change in the O&C Rules did not guarantee that GTH would be permitted to take control of Wind Mobile, or that its attempt to do so would be exempt from review under the ICA. [redacted]

606. Similarly, the applicability of the ICA was unaffected by the fact that GTH structured its "investment in a way that would give GTH the right to take control if the O&C Rules changed."[1031] GTH may have had such a right in the relevant corporate documents, but that contractual right does not supersede applicable Canadian law.

607. In these circumstances, it is not the Tribunal's role to assess [redacted] To properly consider GTH's claims, the Tribunal need only consider how that process was conducted.

608. First, the Tribunal will address GTH's allegation that the process was not transparent. Assessing the proper standard of transparency in relation to acts of government requires taking into account the sensitivity of the information at issue. In a national security review, it is understandable that intelligence agencies might conduct investigations before informing the targeted persons, or that information requests might not state the reasons therefor in full detail. The Tribunal considers that due process standard should be deemed satisfied where the subject of the investigation is afforded a fair opportunity to make its case in relation to readily identifiable issues, and that opportunity is afforded reasonably ahead of an administrative decision being made based

1030 [redacted]

1031 *Ibid.*; Claimant's Opening Presentation, slide 72, citing **C-084**, Declaration of Ownership and Control of Globalive Wireless LP as a Provisional Winner of Spectrum Licences in the 2 GHz Range Including AWS, PCS and the Band 1670-1675 MHz, 5 August 2008, pp. 80 (Shareholders' Agreements, 31 July 2008, p. 20), 134 (Shareholders' Agreements, 31 July 2008, Schedule C, p. 4), 163 (Articles of Amendment, 30 July 2008, p. 1f).

on objectively verifiable factors and after an appropriate time period which is not unnecessarily rushed. The Tribunal will apply this standard to the relevant facts surrounding the national security review, which are largely uncontested.

609. The background to the purpose of the ICA review of foreign investments can be found in the witness statement of Ms. Aitken, the Director of IRD at the relevant time:

> The ICA is the primary mechanism for reviewing foreign investments in Canada. It contemplates the review of significant investments by non-Canadians to determine whether they are likely to be of net benefit to Canada and it provides a mechanism for the review of investments by non-Canadians that could be injurious to national security. […]
>
> Under the ICA, the Minister is responsible for determining whether direct investments by non-Canadians in non-cultural Canadian businesses are likely to be of net benefit to Canada. A non-Canadian seeking to acquire control of an established Canadian business valued at or above a certain threshold must apply for review of that acquisition, which entails an assessment by the Minister of whether or not the investment is likely to be of net benefit to Canada.[1032]

[redacted]

[1032] **RWS-Aitken**, ¶¶ 6, 8. In her evidence, Ms. Aitken indicated that in 2012, a foreign investment was subject to review if the book value of the assets used in carrying on the Canadian business being acquired was equal to or exceeded CAD 330 million.

[redacted]

[1035] **RWS-Aitken**, ¶¶ 45 *et seq.*

[redacted]

612. On the basis of the evidence in the arbitral record, the Tribunal considers that Canada provided GTH with an adequate opportunity to make its case in relation to the regulatory and the national security reviews under the ICA, and that GTH engaged fully in that exchange. [redacted] contradicts GTH's allegations that it was "completely left in the dark,"[1039] and "not given any information that would enable it to defend itself or address the

[redacted]

[1038] *See, e.g.,* [redacted]

[1039] Merits Reply and Jur. Counter-Memorial, ¶ 300.

Government's concerns,"[1040] which form the basis of GTH's claim of denial of due process and un-transparent conduct in violation of Canada's FET obligation.

613. The remaining claim advanced by GTH is that "Canada's national security review was without any legitimate basis and was, therefore, arbitrary and unreasonable, in breach of Canada's FET obligation."[1041]

[1040] *Ibid.*, ¶ 303.

[1041] Merits Reply and Jur. Counter-Memorial, ¶ 314.

[1043] Claimant's Closing Presentation, slides 117-119.

[redacted]

615. More generally, as Canada rightly submits:

> National security concerns are not static, they evolve over time as the nature of security threats change, new intelligence is gathered and the assessment of these risks reviewed. An assessment of the same facts may lead to a different conclusion with respect to the concerns they raise depending on other available information and the surrounding circumstances.[1045]

616. [redacted] The Tribunal

[1045] Respondent's Post-Hearing Submission, ¶ 58, *citing* Day 5, Tr. 309:11-310:1 (Aitken); **RWS-Aitken**, ¶ 38.

[redacted]

considers that evidence as satisfactorily demonstrating genuine national security concerns assessed by the competent authorities. As a result, GTH's claims that Canada's actions were unreasonable and arbitrary are dismissed.

617. To be complete, the Tribunal has reviewed GTH's claim that Canada misused the national security review of its Voting Control Application in order to further Canada's telecommunication policy objectives.[1050] The evidence on the record does not support GTH's arguments. The evidentiary record shows that national security concerns assessed by the competent Canadian security and intelligence authorities prompted the ICA review.[1051] Alleging, as GTH does,[1052] that the purpose of conducting a national security review in this case was to advance telecommunication policy objectives of Canada or to allow time to implement the Transfer Framework is a serious matter, akin to alleging a conspiracy. Yet, GTH fails to meet the evidentiary burden of establishing its allegation. The claim must be dismissed.

618. Without it affecting the findings of the Tribunal set out above,

[1050] Claimant's Opening Presentation, slide 82.

[1052] Day 1, Tr. 75: 3-10 ("So if we could turn to slide 82, which is a memo to the minister on 9th May (C-275), it couldn't be clearer that Canada was using the national security review to probe for information on whether GTH was intending to sell to an incumbent. It stated in terms that the national security review was being used to influence the outcome of GTH's investment in Wind Canada, in furtherance of its 'fourth player' strategy").

[1053] Respondent's Post-Hearing Submission, ¶ 64.

[redacted] it is understandable that a prudent investor may well decide that it is time to put an end to the significant sums that it was compelled to pour into the investment given the cash-intensive requirements of this economic field.[1056] Harsh as it might be, such is the reality of business with its potential for windfall profit or for abysmal loss. In any event, it cannot turn into a ground to rule that Canada has breached the BIT by its conduct of the national security review of GTH's application to take control of Wind Mobile.

(5) Whether the Measures Cumulatively Breached the Respondent's Fair and Equitable Treatment Obligation

a. GTH's Position

619. GTH submits that Canada's pattern of treatment of GTH's investment following the 2008 AWS Auction until the sale of Wind Mobile in September 2014, taken together, cumulatively breached Article II(2)(a).[1057]

620. According to GTH, it is well accepted (including by Canada)[1058] that certain Government measures, which would not appear to amount to a breach of the FET standard in isolation, may amount to a breach when viewed cumulatively with other acts.[1059] GTH cites the award in *El Paso*

[redacted]

[1056] **CWS-Dry**, ¶¶ 26, 29 (referring to GTH having "already invested well over CAD 1 billion") and having to decide whether to "commit to a potential further investment of as much as CAD 230 million to participate in the auction.").

[1057] Merits Memorial, ¶¶ 361 *et seq.*; Merits Reply and Jur. Counter-Memorial, ¶¶ 315 *et seq.*

[1058] Merits Reply and Jur. Counter-Memorial, ¶ 316, *citing* Merits Counter-Memorial, ¶¶ 453-454.

[1059] Merits Memorial, ¶ 362, *citing* **CL-075**, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, ¶ 566; Merits Reply and Jur. Counter-Memorial, ¶ 316, *citing* **CL-028**, ILC Articles, Article 15(1) ("Article 15. Breach consisting of a composite act 1. The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act."); **CL-031**, *Técnicas Medioambientales TECMED S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, ¶ 62, n. 26 ("Whether it be conduct that continues in time, or a complex act whose constituting

v. Argentina, in which the tribunal held that Argentina had breached the FET standard through a series of measures that contributed to claimants selling their investment at a loss.[1060] The *El Paso* tribunal viewed Argentina's measures "as cumulative steps which individually do not qualify as violations of FET, … but which amount to a violation if their cumulative effect is considered," and noted that the "combination of all these measures completely altered the overall framework."[1061]

621. In GTH's view, the theory of cumulative or composite breach does not require that the relevant acts were driven by a common intent.[1062] Rather, as stated by the tribunal in *Tecmed v. Mexico*, the "common thread" is "a converging action towards the same result, *i.e.* depriving the investor of its investment, thereby violating the Agreement."[1063]

622. Applying the theory of cumulative breach to the present case, GTH argues that Canada's cumulative acts over the life of GTH's investment breached Article II(2)(a) of the BIT by:

> (*i*) amounting to a complete frustration of GTH's legitimate expectation that it would be subject to a framework designed to alleviate barriers to entry and to facilitate competition in the wireless telecommunications market; and (*ii*) by subjecting GTH to a "*series of circumstances*," which, *in toto*, can only be described as unreasonable, arbitrary, non-transparent, and inconsistent.[1064]

623. While GTH accepts "that Canada could not guarantee its success," it asserts that it legitimately expected Canada to maintain the framework it had designed to induce GTH's investment, which was aimed at reducing barriers to entry and facilitating competition in the wireless telecommunications market.[1065] Instead, GTH alleges, Canada undertook a series of

elements are in a time period with different durations, it is only by observation as a whole or as a unit that it is possible to see to what extent a violation of a treaty or of international law rises or to what extent damage is caused.").

[1060] Merits Reply and Jur. Counter-Memorial, ¶¶ 317-319, *citing* **CL-061**, *El Paso*, Award, ICSID Case No. ARB/03/15, Award, 31 October 2011, ¶ 519.

[1061] Merits Reply and Jur. Counter-Memorial, ¶¶ 317-319, *citing* **CL-061**, *El Paso*, Award, ICSID Case No. ARB/03/15, Award, 31 October 2011, ¶¶ 515-519.

[1062] Merits Reply and Jur. Counter-Memorial, ¶ 320.

[1063] Merits Reply and Jur. Counter-Memorial, ¶ 320, *quoting* **CL-031**, *Técnicas Medioambientales TECMED S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, ¶ 62.

[1064] Merits Memorial, ¶ 362.

[1065] Merits Memorial, ¶ 361.

measures that "stripped the 2008 AWS Auction Framework … of any meaning" and devastated the value of GTH's investment.[1066]

624. *First*, GTH alleges that from 2009 through 2012, it was subjected to "an unreasonable, redundant, and inconsistent O&C review process by the CRTC."[1067] According to GTH, the CRTC created a new, onerous four-tier review procedure to target Wind Mobile even though Industry Canada had already reviewed and confirmed Wind Mobile's compliance with the O&C Rules when it issued Wind Mobile's spectrum licenses.[1068] GTH alleges that CRTC created the procedure in direct response to requests from Wind Mobile's competitors.[1069]

625. In GTH's view, Canada knew that this duplicative review was likely to harm Wind Mobile, but the CRTC conducted it anyway and, applying the same O&C Rules as Industry Canada had applied, reached the opposite conclusion.[1070] This stalled GTH's investment, "putting Wind, its investor and customers into an impossible situation,"[1071] and also entangled Wind Mobile in years

[1066] Merits Reply and Jur. Counter-Memorial, ¶ 321; *see* ¶¶ 322-325.

[1067] Merits Memorial, ¶ 363.

[1068] Merits Memorial, ¶¶ 140-143, 363; Merits Reply and Jur. Counter-Memorial, ¶ 321(b).

[1069] Merits Memorial, ¶¶ 129-134; Merits Reply and Jur. Counter-Memorial, ¶ 43; **C-094**, Letter from Michael Hennessy to Konrad W. von Finckenstein, 20 April 2009; **C-095**, Letter from Jean Brazeau to Konrad W. von Finckenstein, 22 April 2009; **C-096**, Letter from Simon Lockie to Konrad W. von Finckenstein, 5 May 2009; **C-098**, CRTC, *Telecom Notice of Consultation CRTC 2009-303 – Call for comments – Canadian ownership and control review procedure under section 16 of the* Telecommunications Act, 22 May 2009; **C-012**, CRTC, *Telecom Regulatory Policy CRTC 2009-428: Canadian ownership and control review policy*, 20 July 2009; **C-013**, CRTC, *Telecom Notice of Consultation CRTC 2009-429: Notice of hearing – 23 September 2009, Gatineau, Quebec – Proceeding to consider the compliance of Globalive with the ownership and control regime*, 20 July 2009; **C-014**, CRTC, *Telecom Notice of Consultation CRTC 2009-429-1: Notice of hearing – 23 September 2009, Gatineau, Quebec – Proceeding to consider the compliance of Globalive with the ownership and control regime, Erratum*, 21 July 2009; **R-207**, Goodmans LLP, *Update: CRTC Adopts a New Framework for Telecommunications Ownership and Control Reviews*, 20 July 2009, p. 1.

[1070] **C-015**, CRTC, Telecom Decision CRTC 2009-678: Review of Globalive Wireless Management Corp. under the Canadian ownership and control regime, 29 October 2009, ¶¶ 33, 119.

[1071] **C-105**, RBC Capital Markets, *Industry Comment: Telecommunication Services – Trick or Treat: CRTC Strikes Possible Deathblow to Globalive*, 30 October 2009 ("The CRTC dropped an absolute bombshell on the wireless market Thursday night by denying Globalive's wireless application and effectively neutering the biggest and most disruptive of the potential new wireless entrants . . . for now.").

of litigation to reverse the CRTC's decision,[1072] which Canada acknowledges was wrong in substance.[1073]

626. *Second*, GTH submits that in the 2008 AWS Auction Framework, Canada informed prospective investors that it would introduce mandatory roaming and tower/site sharing conditions, to address and important barrier to market entry.[1074] Yet, according to GTH, "despite its assurances, Canada failed to ensure a fair and reasonable regulatory environment for the New Entrants."[1075] With respect to roaming, Canada failed to act or provide clarity regarding the applicable conditions when GTH had difficulty obtaining reasonable terms in its negotiations with Incumbents, despite repeated requests from GTH.[1076] Similarly, Mr. Campbell testifies that Canada did not step in when the Incumbents failed to engage in good faith discussions on tower and site sharing.[1077] As of December 2010, Wind Mobile was not able to negotiate sharing for any of its 146 towers, and other New entrants faced similar problems.[1078] According to GTH, Canada recognized in 2010 and 2011 that the regulatory scheme was not working as planned, but it was very slow to act.[1079] Canada did not launch a public consultation until March 2012[1080] and only released its Revised Frameworks for Mandatory Roaming and Antenna Tower and Site Sharing in March 2013, nearly five years after the 2008 AWS Auction.[1081]

[1072] **C-017**, Order of the Privy Council and Schedule, P.C. 2009-2008, 10 December 2009; **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; **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.

[1073] Merits Reply and Jur. Counter-Memorial, ¶ 42, *citing*, *inter alia*, Merits Counter-Memorial, ¶ 109 ("the GiC acted promptly to reverse the CRTC's decision").

[1074] Merits Memorial, ¶¶ 145-146; Merits Reply and Jur. Counter-Memorial, ¶45; **C-004**, 2008 AWS Auction Policy Framework; **CWS-Connolly**, ¶¶ 11-13.

[1075] Merits Memorial, ¶ 147.

[1076] Merits Memorial, ¶¶ 149-151, 157; **C-067**, Mandatory Roaming & Tower/Site Sharing Notice, ¶ 9(4)(a); **CWS-Campbell**, ¶ 15; **C-097**, Letter from Simon Lockie to Peter Hill, 15 May 2009; **C-100**, Letter from Peter Hill to Simon Lockie, 1 June 2009, p. 3.

[1077] **CWS-Campbell**, ¶ 13.

[1078] **C-118**, Industry Canada, *Roaming and Tower Sharing Review* [ATI Document], slide 25; **CWS-Campbell**, ¶ 13.

[1079] **R-137**, Contracting Authority, Request for Proposal, # IC400998, 25 November 2010; **C-118**, Industry Canada, *Roaming and Tower Sharing Review*, July 2011 [ATI Document], Slides 16-17.

[1080] **C-121**, Industry Canada, Proposed Revisions to the Frameworks for Mandatory Roaming and Antenna Tower and Site Sharing, March 2012.

[1081] Merits Memorial, ¶¶ 156-60; Merits Reply and Jur. Counter-Memorial, ¶ 45; **C-121**, Industry Canada, *Proposed Revisions to the Frameworks for Mandatory Roaming and Antenna Tower and Site Sharing*, March 2012; **C-153**,

627. *Third*, as discussed in Section (4) above, GTH alleges that Canada treated GTH's investment unfairly by conducting the national security review [redacted].[1082]

628. *Finally*, as discussed in Section (3) above, GTH argues that Canada adopted the Transfer Framework to prevent the sale of Wind Mobile to an Incumbent, despite its earlier assurances that the spectrum licenses sold in the 2008 Auction had enhanced transferability rights, subject to a finite five-year restriction on transfer.[1083]

629. In GTH's view, these actions together "cornered GTH's investment, leaving GTH with no rational option but to sell its investment to a non-incumbent for a fraction of its value."[1084]

630. GTH further argues that these actions constitute "a consistent pattern of contradictory acts by different arms of the Canadian Government," in breach of the FET standard.[1085] In particular, GTH alleges that the Minister of Industry, the CRTC and the Competition Bureau each applied their mandate to GTH's investment in contradictory ways that caused damage to GTH.[1086] For example: (a) both CRTC and Industry Canada reviewed Wind Mobile for compliance with the O&C Rules and reached opposite results; (b) until 2015, CRTC followed a "forbearance policy" on the basis that there was sufficient competition in the wireless telecommunications sector, whereas Industry Canada adopted the Transfer Framework in 2013 in the name of promoting competition in the market; and (c) Industry Canada's review under the Transfer Framework duplicates the role of the Competition Bureau.[1087]

Industry Canada, *Revised Frameworks for Mandatory Roaming and Antenna Tower and Site Sharing (DGSO-001-13)*, March 2013.

[1082] *See* Merits Memorial, ¶ 368; Merits Reply and Jur. Counter-Memorial, ¶ 321(c).

[1083] *See* Merits Memorial, ¶ 369; Merits Reply and Jur. Counter-Memorial, ¶ 321(d).

[1084] Merits Memorial, ¶ 305.

[1085] Merits Reply and Jur. Counter-Memorial, ¶ 326, *citing* **CL-082**, *Crystallex International Corporation v Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶ 585; **CL-087**, *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Award, 19 December 2016, ¶¶ 382-383.

[1086] Merits Reply and Jur. Counter-Memorial, ¶¶ 328-331.

[1087] Merits Reply and Jur. Counter-Memorial, ¶¶ 331-333.

b. Canada's Position

631. Canada submits that the measures considered together do not constitute a breach of Article II(2)(a) of the BIT.

632. Canada's position is that, to establish a composite or cumulative breach, GTH must show that the relevant acts "were closely interwoven and pursued the same objective."[1088] Canada argues that this requirement is confirmed by each of the authorities cited by GTH.[1089] However, in Canada's view, the measures to which GTH refers are distinct, taken over a period of seven years by separate State entities pursuing different mandates, and GTH has failed to provide any evidence that the measures were implemented in a systematic way or aimed at a particular result.[1090]

633. According to Canada, GTH improperly focuses solely on the *effect* of Canada's actions on GTH's investment. However, Canada asserts that the question of GTH's losses does not arise until after GTH has first established a breach of Article II(2)(a); GTH cannot rely on the fact that it was unable to recover the value of its investment to prove that Canada's conduct amounted to a breach of FET.[1091]

[1088] Merits Counter-Memorial, ¶ 453; *see* Memorial on Jurisdiction, ¶ 171; Merits Rejoinder and Jur. Reply, ¶ 306.

[1089] **CL-052**, *Société Générale v. The Dominican Republic*, LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction, 19 September 2008, ¶ 91 (referring to a "a series of acts leading in the same direction"); **CL-074**, *OAO Tatneft v. Ukraine* (UNCITRAL) Award on the Merits, 29 July 2014, ¶ 330 (finding "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"); **CL-075**, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, ¶ 566 (finding that the measures were "part of a State policy aimed at gaining control of the object of the investment"); **CL-082**, *Crystallex International Corporation v Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶ 609; **CL-085**, *Flemingo DutyFree Shop Private Limited v. The Republic of Poland* (UNCITRAL) Award, 12 August 2016, ¶¶ 559-560; **CL-064**, *Swisslio DOO Skopje v. The Former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/09/16, Award, 6 July 2012, ¶ 276.

[1090] Merits Counter-Memorial, ¶ 457.

[1091] Merits Rejoinder and Jur. Reply, ¶¶ 323-324, *citing* **RL-292**, Scott Vesel, "A 'creeping' violation of the Fair and Equitable Treatment Standard?", *Arbitration International*, Vol. 30, No. 3, p. 561 ("In contrast to expropriation, none of the FET principles enumerated by the *Rumeli* tribunal – save perhaps that of legitimate expectations – readily lends itself to analysis based solely on the *effects* of the government's conduct. Indeed, the question of whether such principles as transparency, good faith, or due process have been breached would appear to be an entirely separation question from whether their breach caused compensable harm.").

634. In any event, Canada contends that GTH's narrative of the events is based on a mischaracterization of the facts.[1092]

635. *First*, Canada argues that the CRTC review of Wind Mobile under the O&C Rules cannot contribute to an alleged breach of Article II(2)(a).[1093] According to Canada, the requirement that Wind Mobile comply with an O&C review by both Industry Canada and the CRTC was part of the regulatory framework in place when GTH made its investment.[1094] GTH's internal documents show that it understood that these were distinct processes.[1095] Canada sees nothing in the record to show that GTH believed the CRTC review would necessarily have the same result as the Industry Canada review.[1096]

636. Moreover, Canada argues that the Government took rapid action to minimize any detrimental impact on Wind Mobile; within two months, the GiC had varied the CRTC decision in accordance with its authority under the Telecommunications Act, allowing Wind Mobile to launch immediately.[1097] Thus, Canada asserts that GTH "cannot pick and choose the elements that

[1092] Merits Rejoinder and Jur. Reply, ¶ 307.

[1093] Merits Rejoinder and Jur. Reply, ¶¶ 308-314.

[1094] Merits Rejoinder and Jur. Reply, ¶ 309; **C-046**, Telecommunications Act, s. 16; **C-001**, Radiocommunication Regulations, SOR/96-484, s. 10(2)(d)(i); **R-205**, Regulations Amending the Radiocommunication Regulations, SOR/2014-34, 28 February 2014. **C-058**, Industry Canada, *Canadian Ownership and Control* (CPC-2-0-15, Issue 2), August 2007.

[1095] Merits Rejoinder and Jur. Reply, ¶ 310; **R-501**, Globalive Wireless LP – Private Placement Memorandum (v2), 15 February 2008, p. 18, s. 4.3 ("There are two organizations that oversee the wireless telecommunications market in Canada. Industry Canada is responsible for managing spectrum, including spectrum auctions, and administers the *Radiocommunications Act* (Canada). The CRTC administers the *Telecommunications Act* (Canada). It has specific responsibility under the *Telecommunications Act* (Canada) for ensuring compliance with foreign ownership and control rules and has broad regulatory authority over the Canadian telecommunications system."); **R-502**, Orascom Telecom Holding – Board of Directors Briefing, Globalive Canada, 6 March 2009 ("Following the grant of the licenses and prior to the commencement of operations, the approval of the CRTC, the Canadian government department responsible for regulating telecommunications carriers, will be sought"); **R-503**, E-mail from Stefano Songini, Wind to Ken Campbell, Globalive, 14 March 2009, p. 2: (Globalive "ha[s] been successful in securing the license from Industry Canada" but a review and discussions with the CRTC is a "necessary next step."); **R-361**, Analysys Mason Presentation, "Final report for investors - Due diligence and Banking Case for Globalive Wireless," 2 July 2009, slides 17, 37.

[1096] Merits Rejoinder and Jur. Reply, ¶ 312; **R-504**, E-mail from Michael P. Cole to Michel Hubert, OTelecom et al., 24 April 2009, p. 1 ("not sure how much the CRTC will listen to a competitor like Telus on this, but if they kick up enough public pressure on this to hold public hearings (which I testified in on Bell), this could add months to the process and make the approval without tough pro-Canadian governance conditions much more challenging.") .

[1097] Merits Rejoinder and Jur. Reply, ¶¶ 313-314.

fit its narrative that it was unfairly treated and ignore the Government's actions that benefitted it."[1098]

637. *Second*, Canada argues that GTH's allegations relating to the Government's implementation of the roaming and tower/site sharing conditions are untimely, unsupported and cannot, in any event, contribute to a breach of its FET obligation.[1099] According to Canada, GTH understood the regulatory framework and proposals relating to roaming and tower/site sharing before it decided to participate in the 2008 AWS Auction. Canada implemented the exact conditions of licences it had announced, and GTH cannot now challenge the effectiveness of those conditions.[1100]

638. Canada asserts that Industry Canada took numerous actions in response to Wind Mobile's complaints regarding roaming and tower/site sharing, but that under the established legal framework it was ultimately for Wind Mobile to resolve the commercial terms of its roaming and tower/site sharing agreements through arbitration. Canada contends that it cannot be blamed for GTH's choice not to use that mechanism, even though some New Entrants did so successfully.

639. Further, Canada argues that it made diligent efforts to help improve the conditions on roaming and tower/site sharing.[1101] For example, it: (a) launched a public consultation in 2009, leading to the Guidelines for Tower/Site Sharing;[1102] (b) engaged an independent firm in 2010 to study the roaming and tower/site sharing arrangements;[1103] (c) released the Proposed Revisions on the Frameworks for Mandatory Roaming and Antenna Tower and Site Sharing in 2012 for

[1098] Merits Rejoinder and Jur. Reply, ¶ 314.

[1099] Merits Rejoinder and Jur. Reply, ¶¶ 315-322.

[1100] Merits Rejoinder and Jur. Reply, ¶ 317; **RWS-Hill-2**, ¶¶ 17, 32; **R-500**, JP Morgan, Conference Call on Canada, 4 September 2008, p. 12; **R-362**, Wind Mobile Presentation, "2009/2010 Business Review Management Package – 2009 (8+4) Forecast & 2010 Budget," 11 November 2009, slide 24 ("We will pursue our rights to mandated tower sharing and roaming, but realise process is slow and therefore, not predicate our launch on such initiatives"); **R-507**, E-mail from Alaa Abdel Ghafar, OTelecom to Stewart Thompson, Globalive, et al., 18 November 2008, pp. 1-2.

[1101] Merits Rejoinder and Jur. Reply, ¶ 321.

[1102] **RWS-Hill**, ¶¶ 70-72; **C-093**, Guidelines for Compliance with the Conditions of Licence Relating to Antenna Tower and Site Sharing and to Prohibit Exclusive Site Arrangements, April 2009, Issue 1.

[1103] **R-135**, Nordicity, Assessment of Mandatory Tower Sharing and Roaming Provisions, Final Report Prepared for Industry Canada, May 2011, p. 4.

consultation;[1104] and (d) published the Revised COLs on Roaming and Tower/Site Sharing in March 2013.[1105] For Canada, the fact that GTH found the process too slow or insufficient cannot establish a breach of the FET standard.[1106]

640. Canada also denies GTH's allegation that there was a pattern of inconsistent decision making by different State entities which constitutes a breach of the FET standard.[1107] In Canada's view, GTH's position is based on a misunderstanding of the functioning of governments. For Canada, there is nothing surprising or wrong with different State entities (like Industry Canada, the CRTC and the Competition Bureau) acting within their respective mandates and legal authority to arrive at different conclusions.[1108] In any event, Canada argues that its policy objective to increase competition in the telecommunications sector "remained consistent" during the life of GTH's investment, even if "the measures that were considered necessary to achieve it evolved in response to changing circumstances."[1109]

c. The Tribunal's Analysis

641. In determining the legal standard for a composite/cumulative breach, this Tribunal does not apply to its review of the evidence a threshold requirement that all of the alleged acts must be unified by a common purpose of malicious intent by the State as pleaded by Canada.[1110] In line with the standard set by the *Tecmed* tribunal, the Tribunal considers that while the acts or omissions must be something more than a routine exercise of legitimate governmental powers, it is sufficient that:

> The common thread weaving together each act or omission into a single conduct attributable to the Respondent is not a subjective element or intent, but a converging action

[1104] **C-121**, Proposed Revisions to the Frameworks for Mandatory Roaming and Antenna Tower and Site Sharing, March 2012.

[1105] **C-153**, Revised Frameworks for Mandatory Roaming and Antenna Tower and Site Sharing, March 2013.

[1106] Merits Rejoinder and Jur. Reply, ¶¶ 320, 322.

[1107] Merits Rejoinder and Jur. Reply, ¶¶ 325-326.

[1108] Merits Rejoinder and Jur. Reply, ¶ 326.

[1109] Merits Rejoinder and Jur. Reply, ¶ 326.

[1110] Merits Reply and Jur. Counter-Memorial, ¶ 320.

> towards the same result, i.e. depriving the investor of its investment, thereby violating the Agreement.[1111]

642. The success of GTH's claim depends therefore on its ability to establish, as a matter of fact, whether the various acts it cites converge toward the same result and, if so, whether those acts taken together amount to a breach of FET.

643. After reviewing the acts by Canada that, according to GTH, together amount to a breach of FET, the Tribunal does not find sufficient evidence to establish cumulative or composite breach by Canada of its obligations under Article II(2)(a) of the BIT.

644. Taking in turn each of Canada's acts listed by GTH in this head of claim,[1112] the Tribunal finds that the evidence shows different mandates for Industry Canada and the CRTC, so that their acts cannot be deemed to be duplicative or repetitive.[1113] Each of those agencies of the Government acted within its respective authority in conducting separate reviews of Wind Mobile's corporate structure and reached a decision concerning the particular agency's own field of competence.[1114] Each review was a legitimate exercise of a regulatory power. No inference or breach of the FET standard may be drawn from the sole fact that the outcome of those reviews was not identical.

645. The Tribunal holds the same view as concerns the allegation of inconsistency between the CRTC's decision in 1994 to forbear from regulating wireless telecommunications services following its determination that "competition was sufficient to protect the interests of users"[1115] and Industry Canada's decision to take into account spectrum concentration in the Minister's approval of applications for transfer, as set forth in the Transfer Framework in 2013. The different

[1111] **CL-031**, *Técnicas Medioambientales TECMED S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, ¶ 62.

[1112] The Tribunal notes that GTH does not claim that the roaming/tower sharing or the CRTC/ICA O&C reviews *on their own* constitute a breach of FET, because they fall outside the three-year time bar. *See, e.g.*, Jur. Memorial ¶ 56 ("GTH does not contend that the alleged facts outside the three-year period led to a discrete breach (or multiple breaches)"); Claimant's Post-Hearing Submission, ¶ 74.

[1113] Merits Rejoinder and Jur. Reply, ¶ 325.

[1114] Day 3, Tr. 169:11-15 (Connolly) ("Q. And Industry Canada's review of the ownership and control rules was not determinative of the CRTC's ownership and control analysis; correct? A. That is correct. The CRTC makes an independent decision on the same matter.").

[1115] In accordance with section 34(2) of the Telecommunications Act. **C-046**, Telecommunications Act, § 34 (2). *See* Merits Rejoinder and Jur. Reply, ¶ 326.

scope and purpose underlying each of those decisions excludes that inferences of inconsistency be drawn merely from the fact that they did not yield identical outcomes. Moreover, the Tribunal has previously found in this Award that there is no evidence that Canada has fundamentally changed its transferability of spectrum rules so as to frustrate GTH's legitimate expectations.[1116]

646. As to whether the Canadian Government should have intervened in the wireless market to require Incumbents to offer more reasonable terms to Wind Mobile in relation to tower and site sharing, GTH fails to establish the statutory grounds on which the Government could have interfered in the Incumbents' rights to negotiate advantageous business deals with New Entrants. Importantly, the evidence adduced by Canada shows that the CEO of Wind Mobile, Mr. Campbell, considered the terms of the national roaming agreement agreed with Rogers, an Incumbent, as being "reasonable."[1117] While he described the prices agreed with Rogers as being "slightly higher than some benchmarks," he expressed his belief that "we can pass through to consumers with a small mark up if necessary."[1118] As one would expect of a prudent business decision-maker, he considered the roaming agreement globally and identified advantages that outweighed the price, namely that "it allows us to ensure that our proposition does not suffer from an 'inferior coverage' perspective."[1119] It is difficult to see how this contemporaneous evidence from the person who was at the helm of GTH's investment in Canada is consistent with GTH's subsequent claim that Wind Mobile failed to obtain the reasonable commercial rates it was expecting, as a result of Canada's failed policy.[1120] Nothing on the evidential record warrants an expectation that the Canadian telecom regulator would interfere in the wireless market to tip in favour of the New Entrant the balance of business dealings negotiated at arm's length amongst professionals, specialists of the relevant sector. This was well summarised at the Hearing by Industry Canada's then Director General of the Spectrum Management Operations Branch, Mr. Peter Hill, who testified that:

[1116] *See* Section VII.A(3) above.

[1117] **R-601**, **[[**Email from Ken Campbell to Wafaa Lotaief and David Dobbie, *attaching* Wind, *WIND Mobile, Management Presentation*, December 9, 2010**]]**, p. 5.

[1118] *Ibid*.

[1119] *Ibid*.

[1120] Merits Memorial, ¶ 149.

> where a specific issue was brought to our attention, we acted immediately. Where a general issue was brought to our attention, such as "They're really being not nice", it would be very -- it's impossible for me to act on that. But we got a lot of those.[1121]

647. As to the rest of Canada's acts listed by GTH under this head of claim, the Tribunal need not repeat its findings already made in this Award motivating its dismissal of GTH's claims of [redacted] or refusal by Canada to permit automatic transfer of the set aside licences upon the expiry of the restriction period.[1122] The important point is that all these acts, when viewed cumulatively, do not establish the "common thread" that GTH allege to amount to a composite breach of Canada's obligations to accord FET to GTH's investment.[1123] GTH's claim in relation to the totality of the measures taken by Canada breaching the FET treatment obligation is therefore dismissed.

(6) Conclusion on Fair and Equitable Treatment

648. For the reasons stated above, the Tribunal holds that GTH has failed to establish that Canada breached Article II(2)(a) of the BIT. Each of GTH's FET claims is therefore dismissed.

B. FULL PROTECTION AND SECURITY

649. GTH submits that Canada has breached its obligation to provide full protection and security ("**FPS**") under Article II(2)(b) of the BIT because the Government's "cumulative action (and inaction) towards GTH's investment threatened the commercial and legal security of GTH's investment."[1124]

650. Canada submits that this claim must be rejected because the FPS obligation concerns only physical protection and, in any event, GTH has failed to prove its factual allegations.

651. In the following Sections, the Tribunal first recalls the relevant provision of the BIT, then addresses the applicable legal standard, and then considers whether GTH has established a breach of the FPS standard under Article II(2)(b) of the BIT.

[1121] Day 4, Tr. 179:11-180:1.
[1122] *See* Section VII.A(3) and (4) above.
[1123] Merits Reply and Jur. Counter-Memorial, ¶ 325.
[1124] Merits Memorial, ¶ 379.

(1) Relevant Provision of the BIT

652. Canada's obligation to provide FPS is set forth in Article II(2)(b) of the BIT, which states:

> Each Contracting Party shall accord investments or returns of investors of the other Contracting Party […] full protection and security.[1125]

(2) Applicable Legal Standard

a. GTH's Position

653. GTH's position is that Article II(2)(b) constitutes a "positive obligation on the State to create and maintain a commercial and legal framework that ensures the security of investments and protects investments from the adverse actions of third parties or State organs."[1126] While GTH acknowledges that this provision does not reflect a strict liability standard, it argues that the host State must exercise vigilance and due diligence and "take all reasonable measures to protect the investor against harm."[1127] GTH cites Professor Schreuer's description of the FPS obligation:

> [B]y assuming the obligation of full protection and security the host State promises to provide a factual and legal framework that grants security and to take the measures necessary to protect the investment against adverse action by private persons as well as State organs. In particular, this requires the creation of legal remedies against adverse action affecting the investment and the creation of mechanisms for the effective vindication of investors' rights.[1128]

654. Contrary to Canada's position, GTH argues that FPS extends beyond the physical security of an investment and includes the obligation to ensure an investment's commercial and legal security.[1129] To support this interpretation, GTH points to the definition of "investment" in the

[1125] **CL-001**, BIT (English Version), Article II(2)(b).

[1126] Merits Memorial, ¶ 376; *see* Merits Reply and Jur. Counter-Memorial, ¶ 334.

[1127] Merits Memorial, ¶ 376, *citing* **CL-026**, *American Manufacturing & Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award, 21 February 1997, ¶ 6.05; **CL-049**, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, ¶¶ 725, 730; **CL-025**, *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 27 June 1990, ¶ 85(b) (finding a breach of FPS and violation of the due diligence obligation through "failure to resort to . . . precautionary measures" and "inaction and omission").

[1128] **CL-056**, Christoph Schreuer, "Full Protection and Security," *Journal of International Dispute Settlement* (2010), p. 14.

[1129] Merits Memorial, ¶ 378, *citing* **CL-049**, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, ¶¶ 728-30 ("It would in the Arbitral Tribunal's view be unduly artificial to confine the notion of 'full security' only to one aspect of security, particularly in light of the use of this term in a

BIT, which includes intangible assets that are also protected by the FPS provision.[1130] As stated by the tribunal in *Siemens v. Argentina*, "[i]t is difficult to understand how the physical security of an intangible asset would be achieved."[1131]

655. In GTH's view, Canada's interpretation of Article II(2)(b), which would limit FPS to physical security, ignores "the obvious fact that protection and security can relate to any harm or injury."[1132] GTH considers that Canada has failed to show that the ordinary meaning of the terms "protection" and "security" address only physical harm.[1133] GTH further argues that those terms must be read in the context of Article II(2)(b), which appears in an Article that is designed to "encourage the creation of favourable conditions for investors" and provides protections to achieve this objective.[1134] For GTH, the artificial addition of a physical component to FPS would be contrary to that objective.

656. Finally, GTH contends that Canada's arguments relating to its recent treaty practice support GTH's interpretation. According to GTH, the fact that some of Canada's recent treaties expressly state that the FPS standard refers only to physical security demonstrates that when States intend to limit FPS in that way, they do so expressly.[1135]

BIT, directed at the protection of commercial and financial investments."); **CL-039**, *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, ¶ 408 (finding that FPS "is not only a matter of physical security; the stability afforded by a secure investment environment is as important from an investor's point of view"). **CL-053**, *National Grid P.L.C. v. Argentine Republic* (UNCITRAL) Award, 3 November 2008, ¶ 187 (stating that there is "no rationale for limiting the application of a substantive protection of the Treaty to a category of assets—physical assets—when it was not restricted in that fashion by the Contracting Parties."); **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, ¶¶ 7.4.15-7.4.17.

[1130] Merits Memorial, ¶ 378.

[1131] **CL-043**, *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007, ¶ 303.

[1132] Merits Reply and Jur. Counter-Memorial, ¶ 335.

[1133] Merits Reply and Jur. Counter-Memorial, ¶ 335. GTH offers the example of Canada referring to the definition of "harm" as "[p]hyiscal injury," when the same authority also defines harm as "[a]ctual or potential ill effects or danger" and the verb harm as "[h]ave an adverse effect on." Merits Reply and Jur. Counter-Memorial, n. 687, *citing* **RL-211**, *English Oxford Living Dictionaries Online*, Definition of "*harm*".

[1134] **CL-001**, BIT (English), Article II(1); *see* Merits Reply and Jur. Counter-Memorial, ¶ 335.

[1135] Merits Reply and Jur. Counter-Memorial, ¶ 336, *citing* Merits Counter-Memorial, ¶ 467.

b. Canada's Position

657. Canada argues that GTH's interpretation of Article II(2)(b) of the BIT improperly "equates the standard with an open-ended guarantee of commercial and legal security," which is not supported by the text of the BIT or by previous arbitral decisions.[1136]

658. Canada's position is that the protection guaranteed by Article II(2)(b) of the BIT does not extend beyond the physical security of investments. According to Canada, this interpretation is consistent with Article 31 of the VCLT.[1137] Canada looks to the Oxford Dictionary to find the ordinary meaning of the terms "protection" and "security" and concludes that "the phrase 'protection and security' refers to safety from physical harm, injury, or impairment."[1138] Further, Canada argues that the "object and purpose of the FPS standard likewise point to physical safety." As observed by several tribunals, the standard was "developed in the context of physical protection and security of the company's officials, employees or facilities."[1139]

659. According to Canada, its interpretation of the standard has been confirmed by most investment treaty tribunals that have considered the issue, including the tribunals in *Crystallex v.*

[1136] Merits Rejoinder and Jur. Reply, ¶ 329; *see* Merits Counter-Memorial, ¶ 459.

[1137] Merits Counter-Memorial, ¶¶ 461-462.

[1138] Merits Counter-Memorial, ¶ 462; **RL-209**, *English Oxford Living Dictionaries* online.

[1139] Merits Counter-Memorial, ¶ 463, *quoting* **RL-188**, *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007, ¶¶ 284-287; *see* **CL-042**, *PSEG Global Inc. and Konya Ilgın Elektrik Üretim ve Ticaret Limited Şirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007, ¶ 258; **RL-189**, *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 200, ¶¶ 321-324.

Venezuela,[1140] *Saluka v. Czech Republic*,[1141] *Gold Reserve v. Venezuela*,[1142] *BG Group v. Argentina*,[1143] and *Rumeli v. Kazakhstan*.[1144]

660. In Canada's view, GTH cites arbitral decisions that do not support its position. Canada points out that three of those cases concern physical interference with the relevant investment.[1145] With respect to *Azurix v. Argentina* and *Vivendi v. Argentina*, Canada asserts that the tribunals in those cases equated the FET and FPS standard, contrary to the principle of *effet utile*.[1146] Finally, Canada considers that the decisions in *Siemens v. Argentina* and *National Grid v. Argentina* must be distinguished on the basis of the language of the relevant FPS clauses. The *Siemens* tribunal noted that the word "security" in the FPS clause it was considering was modified by the word

[1140] **CL-082**, *Crystallex International Corporation v Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶¶ 632-635 ("the 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").

[1141] **CL-038**, *Saluka Investments BV v. The Czech Republic* (UNCITRAL) Partial Award, 17 March 2006, ¶¶ 483-484 ("The 'full protection and security' standard applies essentially when the foreign investment has been affected by civil strife and physical violence … and 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.").

[1142] **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.").

[1143] **CL-047**, *BG Group Plc. v. The Republic of Argentina*, UNCITRAL, Final Award, 24 December 2007, ¶¶ 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.").

[1144] **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.

[1145] Merits Counter-Memorial, ¶ 469; **CL-026**, *American Manufacturing & Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award, 21 February 1997, ¶ 6.13; **CL-049**, *Biwater Gauff (Tanzania) Ltd., v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, ¶¶ 408, 410; **CL-025**, *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 27 June 1990, ¶ 85(b).

[1146] Merits Counter-Memorial, ¶ 470; **CL-039**, *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, ¶ 408 ("The 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"); **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.

"legal," and in the treaty at issue in *National Grid*, the reference to "full protection and security" was followed by broad language not found in the BIT.[1147]

661. Canada further argues that it has confirmed its understanding of the FPS obligation in its recent treaty practice by including an express reference to physical security or police protection.[1148] With respect to two of its older treaties that do not include such an express reference, Canada has clarified the FPS obligation, either by adding a new paragraph or through an interpretive note.[1149]

c. The Tribunal's Analysis

662. The Parties do not dispute that the FPS standard is independent of the FET standard. The separate head of treaty-based claim submitted by GTH in relation to the FPS standard reflects the drafting of each standard in a separate provision in the BIT, with the FET standard provided in Article II(2)(a) and the FPS standard in Article II(2)(b).

663. The Parties do not dispute either that the FPS standard covers the obligation of the host State to accord physical protection to the investor, its investments and the investors' returns. However, they disagree on whether the FPS duty arising under the BIT reaches beyond physical protection also to include commercial and legal protection of the investment and the investor's returns.[1150]

664. The Tribunal has reviewed the terms of the BIT in accordance with Article 31 of the VCLT and in light of the authorities adduced by the Parties, and has noted that the terms "protection" and

[1147] Merits Counter-Memorial, ¶ 471; **CL-043**, *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007, ¶¶ 302-303; **CL-053**, *National Grid P.L.C. v. Argentine Republic* (UNCITRAL) Award, 3 November 2008, ¶ 187.

[1148] Merits Counter-Memorial, ¶ 467; **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."); **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."); **RL-241**, Canada-Romania FIPA, 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.").

[1149] Merits Counter-Memorial, ¶ 468; **RL-132**, Canada-Chile FTA, Article G-05(1) and **RL-242**, Canada-Chile FTA, Appendix I, Article G-05(3).

[1150] Merits Memorial, ¶ 378.

"security" in Article II(2)(b) are qualified by "full" without any exclusion or limitation. The Tribunal therefore agrees with GTH that the standard of "full protection and security" as set in the BIT is not limited to safeguards against physical interference by State organs and private persons, but extends to accord legal safeguard for the investment and the returns of the investor. In this respect, the Tribunal agrees with the decisions of several previous investment tribunals. For example, in *CME v. Czech Republic*, the tribunal ruled that "[t]he host State is obligated to ensure that neither by amendment of its laws nor by actions of its administrative bodies is the agreed and approved security and protection of the foreign investor's investment withdrawn or devalued."[1151] In *CSOB v. Slovakia*, the tribunal held:

> The Slovak Republic's denial of CSOB's title to request from the Slovak Republic that SI's losses are covered would deprive CSOB from any meaningful protection for its loan and thus breach the Slovak Republic's commitment to let CSOB 'enjoy full protection and security' as stated in Article 2(2) BIT.[1152]

665. The tribunal in *Azurix v. Argentina* was particularly explicit in holding that "full protection and security was understood to go beyond protection and security ensured by the police. It is not only a matter of physical security; the stability afforded by a secure investment environment is as important from an investor's point of view."[1153] In upholding the same rule, the tribunal in *Siemens v. Argentina* drew additional authority from the fact that the relevant treaty, like the BIT in this arbitration, defined "investment" as applying also to intangible assets in relation to which "physical" security is difficult to apprehend, ruling:

> As a general matter and based on the definition of investment, which includes tangible and intangible assets, the Tribunal considers that the obligation to provide full protection and security is wider than 'physical' protection and security. It is difficult to understand how the physical security of an intangible asset would be achieved.[1154]

[1151] **CL-030**, *CME Czech Republic B.V. (The Netherlands) v. The Czech Republic* (UNCITRAL) Partial Award, 13 September 2001, ¶ 613.

[1152] **CL-113**, *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Award, 29 December 2004, ¶ 170.

[1153] **CL-039**, *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, ¶ 408.

[1154] **CL-043**, *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007, ¶ 303. *See also* **CL-045**, *Compania de Aguas del Aconquija S.A. and Vivendi Universal v. Argentina*, Award, 20 August 2007, ¶ 7.4.14; **CL-049** *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, ¶ 729; **CL-053** *National Grid P.L.C. v. Argentine Republic* (UNCITRAL) Award, 3 November

666. Canada's reference to recent treaty practice limiting FPS to ensuring the physical safety of the foreign investment[1155] shows that, had the Contracting States wished to limit FPS in such a way, they could have spelled the limitation out in the treaty itself. No such attempt was made in the BIT. The investors are therefore entitled to the full extent of the unqualified assurance of full protection and security that each of the two Contracting States has committed in Article II(2)(b) to accord investments or returns of investors of the other Contracting State.

667. That said, the Tribunal notes that both Parties agree that the obligation of the host State to accord FPS does not create a strict liability that would dispense with the need for a claimant to prove that the alleged injury was attributable to the State or its agents.[1156] As stated by the ICJ in the *ELSI* case:

> The reference. . . to the provision of 'constant protection and security' cannot be construed as the giving of a warranty that property shall never in any circumstances be occupied or disturbed.[1157]

668. Thus, the standard is that the State must act with "due diligence" to meet its full protection and security obligation.[1158] The Tribunal will determine in the following section whether, on the basis of the facts of the case as pleaded by the Parties, Canada has satisfied the required degree of vigilance to accord GTH's investment in Wind Mobile full protection and security in accordance with Article II(2)(b) of the BIT.

2008, ¶ 189. *See* **CL-056**, Christoph Schreuer, "Full Protection and Security," *Journal of International Dispute Settlement* (2010), pp. 7-10.

[1155] Merits Counter-Memorial, ¶ 467 and the treaties therein cited by Canada as examples.

[1156] *See* Merits Memorial, ¶ 376.

[1157] **RL-186**, *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, Judgment of 20 July 1989, (1989) I.C.J. Reports 15, 20 July 1989, ¶ 108. *See also* **CL-025**, *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 27 June 1990, ¶¶ 45-53 ("the Tribunal declares unfounded the Claimant's main plea aiming to consider the Government of Sri Lanka assuming strict liability under Article 2.(2) of the Bilateral Investment Treaty, without any need to prove that the damages suffered were attributable to the State or its agents, and to establish the State's responsibility for not acting with 'due diligence'."); **CL-031**, *Técnicas Medioambientales TECMED S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, ¶ 177 ("The Arbitral Tribunal agrees with the Respondent, and with the case law quoted by it, in that the guarantee of full protection and security is not absolute and does not impose strict liability upon the State that grants it").

[1158] **RL-056**, *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, ¶ 164 ("The latter is not a strict standard, but one requiring due diligence to be exercised by the State.").

(3) Whether the Respondent Breached its Full Protection and Security Obligation

a. GTH's Position

669. GTH submits that Canada has breached its FPS obligation in several ways.[1159] According to GTH, Canada not only failed to protect GTH's investment from harm, but was in fact the "main culprit" that knowingly caused the damage.[1160]

670. Specifically, GTH alleges that Canada breached its FPS obligation in the following ways:

a. Canada subjected GTH to an opaque, arbitrary national security review, during which Canada failed to inform GTH of any serious charges and did not provide GTH a meaningful opportunity to respond.[1161]

b. Canada "introduced significant uncertainty to the security of GTH's investment and the future of Wind Mobile" by conducting the national security review in a prolonged, non-transparent way.[1162]

c. Canada introduced further legal insecurity for GTH and Wind Mobile when it introduced the Transfer Framework, thereby changing a key component of the conditions of the spectrum licenses.[1163]

d. Canada's acts, when viewed cumulatively, dismantled the regulatory framework that Canada had designed to induce GTH to invest in the Canadian market, and thereby "destroyed the legal security of GTH's investment."[1164]

[1159] Merits Memorial, ¶¶ 379-381; Merits Reply and Jur. Counter-Memorial, ¶¶ 337-341.
[1160] Merits Reply and Jur. Counter-Memorial, ¶ 337.
[1161] Merits Memorial, ¶ 186; Merits Reply and Jur. Counter-Memorial, ¶ 338.
[1162] Merits Reply and Jur. Counter-Memorial, ¶¶ 77, 338.
[1163] Merits Reply and Jur. Counter-Memorial, ¶ 340.
[1164] Merits Reply and Jur. Counter-Memorial, ¶ 341.

b. Canada's Position

671. Canada argues that GTH's FPS claim must fail because GTH has not alleged that its investment suffered any physical harm.[1165]

672. Further, even if the Tribunal disagrees with Canada's interpretation of Article II(2)(b), Canada's position is that GTH has failed to establish a breach of the FPS standard. In this regard, Canada asserts that GTH's allegations relating to FPS "are essentially based on the same mischaracterizations as the allegations of breach of the FET standard."[1166] Therefore, Canada refers to its submissions in connection with GTH's FET claim.[1167]

673. Canada also raises the following arguments:

a. Contrary to GTH's position, the Transfer Framework did not fundamentally change or "effectively dismantle" the legal framework applicable to Wind Mobile's spectrum licences. Rather, the Transfer Framework clarified how the Minister would exercise his existing discretion in relation to spectrum license transfers.[1168]

b. GTH was well aware of the national security provisions of the ICA when it submitted the Voting Control Application, and therefore cannot argue that the national security review deprived its investment of the legal protection and security to which it was entitled. [redacted] and ensured that GTH was accorded due process throughout the process. [1169]

c. There is no justification for GTH's arguments that various distinct measures should be considered cumulatively to amount to a composite breach of FPS. In addition, GTH's

[1165] Merits Counter-Memorial, ¶¶ 458, 473, 480.

[1166] Merits Rejoinder and Jur. Reply, ¶ 332.

[1167] Merits Counter-Memorial, ¶¶ 478, 479; Merits Rejoinder and Jur. Reply, ¶ 332.

[1168] Merits Counter-Memorial, ¶ 475. Canada argues that, unlike the situation in *CME v. Czech Republic*, there is no allegation in this case that Canada, through the Transfer Framework, interfered with contractual relationships that formed the basis of GTH's investment. **CL-030**, *CME Czech Republic B.V. (The Netherlands) v. Czech Republic* (UNCITRAL) Partial Award, 13 September 2001, ¶ 427.

[1169] Merits Counter-Memorial, ¶ 478; Merits Rejoinder and Jur. Reply, ¶ 332(ii).

complaints about the mandatory roaming and tower/site sharing conditions are based on a mischaracterization of events.[1170]

674. Thus, Canada concludes that GTH's claim under Article II(2)(b) of the BIT must be rejected.

c. The Tribunal's Analysis

675. The Tribunal has already noted that the standards of FET and of FPS are distinct, as indicated by the fact that they are set out in two different provisions of the BIT.[1171] It follows that the host State is subject to different obligations under each of those standards, even if in certain situations those obligations might overlap. However, the Tribunal can only decide on whether the State has satisfied its FPS-based obligation of exercising due diligence by examining the specific facts averred by the Parties. To that end, the Tribunal notes that the facts averred by GTH in support of its claim of breach of FPS are the same facts that GTH had previously invoked in support of its claim of breach of FET. As Canada notes, GTH does not advance new allegations.[1172] This is particularly the case as concerns the allegation that Canada undertook an opaque and arbitrary national security review of GTH's Voting Control Application, and the allegation that the introduction of the Transfer Framework fundamentally changed the terms of Wind Mobile's spectrum licences.

676. Considering the above, the main factual findings set out by the Tribunal earlier in this Award are relevant to GTH's FPS claim. In particular:

a. The introduction of the Transfer Framework in 2013 was not inconsistent with the policy documents shared with GTH in advance of the 2008 AWS Auction, and did not amount to fundamentally change the terms of GTH's spectrum licenses.

[1170] Merits Counter-Memorial, ¶ 440; Merits Rejoinder and Jur. Reply, ¶ 332(iii).
[1171] *See* ¶ 663 above.
[1172] Merits Counter-Memorial, ¶ 332.

b. There is no evidence that the national security review of GTH's Voting Control Application was pretextual, or that Canada failed to provide GTH with sufficient information to respond to Canada's concerns.

c. Thus, neither the national security review of GTH's Voting Control Application nor the Transfer Framework constitutes arbitrary, inconsistent or opaque treatment of GTH's investment.

d. GTH has not established its claim that Canada committed a series of acts, including the national security review and the Transfer Framework, that can be viewed together as a composite act depriving GTH of its investment.

677. Applying these findings to GTH's FPS claim, it becomes clear that there is no basis in the evidential record before this Tribunal to determine that Canada has failed to exercise "due diligence" with respect to the protection of GTH's investment. The Tribunal must therefore dismiss GTH's FPS claim.

678. For the avoidance of doubt, the Tribunal notes that it has considered each of GTH's allegations in the specific context of the FPS standard set forth above, and is not simply repeating its determination on GTH's FET claims.

679. The Tribunal's determination earlier in this Award that neither the national security review nor the introduction of the Transfer Framework and its alleged impact on the transferability of the set-aside licenses to incumbents, whether viewed separately or cumulatively, constitutes arbitrary, inconsistent or opaque acts of Canada applies *mutatis mutandis* in relation to GTH's claim of breach of the FPS standards and leads to its dismissal.

680. In so deciding, the Tribunal is neither applying the FET standard in reviewing the facts alleged by GTH in support of its FPS claim nor conflating the two separate BIT standards. The Tribunal reviewed each claim separately in accordance with its own ascribed standard. The Tribunal has found the following:

a. The State had no duty to interfere in the negotiation between the New Entrants and the Incumbents in relation to roaming and tower sharing.[1173]

b. The reviews by the competent Canadian authorities of Wind Mobile's shareholder structure leading to different outcomes were conducted by separate government entities, each acting properly within its mandate.[1174]

c. The national security review of GTH Voting Control Application was conducted, in its duration, scope and modalities, in the respect of the investor's fundamental right to due process, [redacted].[1175]

d. GTH failed to establish that Canada has fundamentally changed the transferability terms of the set-aside spectrum licences, where Canada had essentially clarified the relevance of weighing spectrum concentration in the exercise by the Minister of his discretion in reviewing an application for transfer to an Incumbent.[1176]

681. It follows that the State's conduct was consistent with the statutes and regulations made available to the investor at the time of the investment, and cannot amount to a breach of the FPS standard under the BIT, just as it did not amount to a breach of the FET standard under that BIT.

(4) Conclusion on Full Protection and Security

682. For the reasons stated above, the Tribunal dismisses GTH's claim that Canada has breached Article II(2)(b) of the BIT by failing to provide GTH's investment full protection and security.

[1173] *See* Section VII.A(5) above.
[1174] *See* Section VII.A(5) above.
[1175] *See* Section VII.A(4) above.
[1176] *See* Section VII.A(3) above.

C. NATIONAL TREATMENT

683. The Tribunal has ruled earlier in this Award that it has no jurisdiction to determine GTH's claim that Canada breached its obligation to provide national treatment protection to GTH under Article IV(1) of the BIT.[1177]

D. GUARANTEE OF UNRESTRICTED TRANSFER OF INVESTMENTS

684. GTH's final claim is that Canada breached its obligation to guarantee the unrestricted transfer of investments under Article IX(1) of the BIT by blocking GTH from transferring Wind Mobile's licenses to an Incumbent, which Canada denies.

685. In the following Sections, the Tribunal reproduces the relevant BIT provision, summarizes the Parties submissions, and then sets out its analysis and conclusion in relation to this claim.

(1) Relevant Provision of the BIT

686. Article IX(1) of the BIT, under the heading "Transfer of Funds," provides:

> 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;

[1177] *See* Section VI.D(4) above.

> (d) any compensation owed to an investor by virtue of Articles VII or VIII of the Agreement.[1178]

687. Canada also refers to paragraphs (2) and (3) of Article IX, which state:

> 2. 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.[1179]
>
> 3. Notwithstanding paragraphs 1 and 2, a Contracting Party may prevent a transfer through the equitable, non-discriminatory and good faith application of its laws relating to:
>
> (a) bankruptcy, insolvency or the protection of the rights of creditors;
>
> (b) issuing, trading or dealing in securities;
>
> (c) criminal or penal offenses;
>
> (d) reports of transfers of currency or other monetary instruments; or
>
> (e) ensuring the satisfaction of judgments in adjudicatory proceedings.

(2) GTH's Position

688. In addition to challenging Canada's Transfer Framework under the FET and the FPS provisions of the BIT, GTH also challenges the same under Article IX(1) of the BIT. To that end, GTH avers that the reference in Article IX(1) to "transfer of investments and returns" should be read to include the "transfer," in the meaning of sale, to an Incumbent of GTH's investment consisting of "the bundle of rights associated with its indirect shareholding and loans to Wind Mobile."[1180]

689. GTH submits that Article IX(1) is broad and covers the transfer of any "investment" or "return."[1181] GTH highlights that the second sentence of the provision expressly states that it

[1178] **CL-001**, BIT (English Version), Article IX(1).
[1179] **CL-001**, BIT (English Version), Article IX(2).
[1180] Merits Reply and Jur. Counter-Memorial, ¶ 345.
[1181] Merits Memorial, ¶ 383.

should not be read to limit the general principle of free transfer and lists additional types of transfers that are "also" guaranteed.[1182]

690. GTH asserts that, "[w]hile broad transfer guarantee provisions are uncommon, the ordinary meaning of this provision is clear" and includes the sale or disposition of investments generally.[1183] According to GTH, the tribunal in *Karkey v. Pakistan* confirmed that a similarly broad transfer provision can apply to the free transfer of investments as opposed to funds.[1184] GTH also cites the observation of Newcombe and Paradell that:

> some IIA provisions appear to apply more generally to restrictions on the investment itself. For example, Article VII, Canada-Venezuela [BIT] (1996), guarantees to investors 'the unrestricted transfer of investments.' Domestic restrictions on the sale or other disposition of the investment that prevent the investor from liquidating its investment would appear to be covered by this type of provision, and not simply the transfer of funds after liquidation.[1185]

691. GTH considers that this free transfer protection is important to prevent measures that would result in the "effective[] imprisonment" of an investment.[1186]

[1182] Merits Reply and Jur. Counter-Memorial, ¶ 343.

[1183] Merits Reply and Jur. Counter-Memorial, ¶ 344; *see* Merits Memorial, ¶ 385.

[1184] Merits Reply and Jur. Counter-Memorial, ¶ 344, *citing* **CL-169**, *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award, 22 August 2017, ¶¶ 653-56.

[1185] Merits Memorial, ¶ 385, *quoting* **CL-054**, Andrew Newcombe & Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (2009), Chapter 8 – Transfer Rights, Performance Requirements and Transparency, pp. 399-436, ¶ 8.8.

[1186] Merits Memorial, ¶ 384, *quoting* **CL-049**, *Biwater Gauff (Tanzania) Ltd., v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, ¶ 735; *see* **CL-067**, *Achmea B.V. v. The Slovak Republic*, PCA Case No. 2008-13, Final Award, 7 December 2012, ¶ 286 (finding that Slovakia's prohibition on the distribution of profits to investors was a breach of Slovakia's obligations under the relevant BIT's free transfer provision); **CL-068**, *AES Corporation and Tau Power B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/10/16, Award, 1 November 2013, ¶¶ 423-27 (observing that a "tariff in exchange for investment" scheme which required investors to reinvest all operating cash flow could be a breach of the ECT's free transfer provision, although such breach was already absorbed in its finding that FET had been breached by the same scheme); **CL-051**, *Continental Casualty Company v. Argentine Republic*, ICSID Case No ARB/03/9, Award, ¶ 240 ("Protected transfers are those essential for, or typical to the making, controlling, maintenance, disposition of investments, especially in the form of companies; or in the form of debt, service and investment contracts, including the making, performance and enforcement of contracts; the acquisition, use, protection and disposition of property of all kinds, including intellectual and industrial property rights; and the borrowing of funds, to name the kind of investments and associated activities mentioned in Art. I of the BIT more relevant to this issue.").

692. Therefore, GTH rejects Canada's position that the application of Article IX(1) is limited to the transfer of *funds* from the host State to the investor's State.[1187] In GTH's view, Canada's interpretation ignores the ordinary meaning of the of Article IX(1) and relies on the "object and purpose underlying transfer provisions" in general, contrary to the mandate in Article 31 of the VCLT to consider the text of the BIT.[1188] Further, GTH contends that Canada has neither cited any authority to support its narrow interpretation, nor distinguished those authorities put forward by GTH.[1189] More fundamentally, GTH does not accept that there is a basis for Canada's distinction between the funds generated by an investment and the core assets making up the investment, which are both valuable to the investor.[1190]

693. According to GTH, its "investment" is "comprised of the bundle of rights associated with its indirect shareholding and loans to Wind Mobile," which GTH must be permitted to transfer without restriction pursuant to Article XI(1).[1191] For GTH, it follows that when Canada blocked GTH's ability to transfer its investment to an Incumbent after the expiration of the five-year transfer restriction, Canada violated Article IX(1) so clearly that "the case law simply does not contain a precedent for such a flagrant breach of the free transfer provision."[1192]

(3) Canada's Position

694. Canada submits that GTH's claim under Article IX(1) must be dismissed because it is based on a fundamental misunderstanding of the scope of the provision. According to Canada, Article IX(1) does not apply to restrictions on the sale of assets within Canada; rather, it is limited to guaranteeing the free transfer of funds between Canada and Egypt.[1193]

695. In Canada's view, GTH's expansive reading of Article IX(1) is unsupported by the ordinary meaning of the terms read in the context of the whole provision.[1194] Canada recalls that

[1187] Merits Reply and Jur. Counter-Memorial, ¶ 346, *citing* Merits Counter-Memorial, ¶¶ 491-503.
[1188] Merits Reply and Jur. Counter-Memorial, ¶ 346.
[1189] Merits Reply and Jur. Counter-Memorial, n. 720.
[1190] Merits Reply and Jur. Counter-Memorial, n. 720.
[1191] Merits Reply and Jur. Counter-Memorial, ¶ 345.
[1192] Merits Memorial, ¶ 386.
[1193] Merits Counter-Memorial, ¶¶ 486-503; Merits Rejoinder and Jur. Reply, ¶¶ 334-344.
[1194] Merits Rejoinder and Jur. Reply, ¶ 335.

the terms "investment" and "returns" are both defined in the BIT.[1195] Turning to the context, Canada first notes that the title of Article IX is "Transfer of Funds" and argues that if Canada and Egypt had intended a broader scope of the provision, they would have reflected it in the title.[1196] Second, Canada asserts that each of the examples listed in paragraph (1) of Article IX relates to the movement of funds that *result from* an investment or asset.[1197] Third, Canada points out that paragraph (2) addresses how transfers are to be guaranteed in terms that clearly related to the movement of funds.[1198] Finally, Canada refers to the exceptions in paragraph (3), each of which could only apply to the movement of funds.[1199]

696. Canada considers that its interpretation is also supported by the purpose of free transfer provisions, which is to "ensure[] that the foreign investor reaps the benefits or enjoys the fruits of his or her investment through dividend payments, paying for goods and services, servicing of debts, or fulfilling other financial obligations."[1200] For Canada, it follows that the purpose of Article IX is to protect "cross-border movements of funds related to the investment."[1201]

697. According to Canada, all the arbitral decisions cited by GTH confirm that free transfer provisions relate to the transfer of funds out of a host State.[1202] In addition, Canada argues that the

[1195] Merits Counter-Memorial, ¶ 489. In Article 1(f) of the BIT, "investment" is defined as "any kind of asset owned or controlled" by an investor. In Article 1(i), "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." **CL-001**, BIT (English Version).

[1196] Merits Counter-Memorial, ¶ 489; Merits Rejoinder and Jur. Reply, ¶ 336.

[1197] Merits Counter-Memorial, ¶¶ 490-491; Merits Rejoinder and Jur. Reply, ¶ 337.

[1198] Merits Counter-Memorial, ¶¶ 492-493; Merits Rejoinder and Jur. Reply, ¶ 337.

[1199] Merits Rejoinder and Jur. Reply, ¶ 337.

[1200] Merits Rejoinder and Jur. Reply, ¶ 339, *quoting* **RL-320**, Abba Kolo, "Transfer of Funds: The Interaction Between the IMF Articles of Agreement and Modern Investment Treaties: A Comparative Law Perspective," in Stephan W. Schill, *International Investment Law and Comparative Public Law* (Oxford University Press, 2010), p. 346. *See* Merits Counter-Memorial, ¶ 494, *citing* **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), pp. 1, 5, 30-32.

[1201] Merits Rejoinder and Jur. Reply, ¶ 339.

[1202] Merits Counter-Memorial, ¶¶ 498-501, *citing* **CL-049**, *Biwater Gauff (Tanzania) Ltd., v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, ¶ 735 (referring to the guarantee that an investor with funds would be able to transfer those funds); **CL-067**, *Achmea B.V. v. The Slovak Republic*, PCA Case No. 2008-13, Final Award, 7 December 2012, ¶ 96 (concerning a measure that required "all profits from health insurance be used for healthcare purposes."); **CL-068**, *AES Corporation and Tau Power B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/10/16, Award, 1 November 2013, ¶ 427; **CL-051**, *Continental Casualty Company v. Argentine Republic*, ICSID Case No ARB/03/9, Award, ¶ 237.

Newcombe and Paradell treatise cited by GTH does not discuss the application of transfer provision to restrictions on the domestic transfer of assets; it merely notes that some transfer provisions appear to apply to restrictions on liquidation.[1203]

698. Moreover, Canada contends that GTH's interpretation of Article IX(1) "would expand the provision to an untenable and unworkable standard"[1204] that would impede the functions of State entities carrying out the lawful regulation of domestic commerce and competition.[1205]

699. Applying its interpretation to the present case, Canada submits that GTH's claim must be dismissed because the Transfer Framework did not concern GTH's ability to transfer funds or returns from its investment.[1206] In this regard, Canada recalls that GTH's stated investment is its indirect shareholding in, and loans to, Wind Mobile.[1207] Canada considers that its obligation under Article IX(1) of the BIT in relation to that investment is to guarantee "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."[1208] Canada argues that it complied with that obligation, as evidenced by the fact that GTH was able to liquidate its equity and debt interests in Wind Mobile and transfer the proceeds of that sale, even after the Transfer Framework was in place.[1209]

700. In Canada's view, Wind Mobile's spectrum licences are neither an "investment" nor a "return" of GTH, and therefore, any alleged restriction of the transfer of those licenses does not fall within the scope of Article IX(1).[1210] Canada cites *Rusoro v. Venezuela*, in which the claimant held equity in Venezuelan gold mining companies and argued that an export ban on gold breached Venezuela's transfer obligation under the relevant treaty.[1211] The *Rusoro* tribunal held that the ban

[1203] Merits Counter-Memorial, ¶ 503, *citing* **CL-054**, Andrew Newcombe & Lluis Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*, 2009, Chapter 8 – Transfer of Rights, Performance Requirements and Transparency, § 8.8.

[1204] Merits Rejoinder and Jur. Reply, ¶ 342.

[1205] Merits Rejoinder and Jur. Reply, ¶¶ 342-344.

[1206] Merits Counter-Memorial, ¶¶ 504-509.

[1207] Merits Counter-Memorial, ¶ 504, *citing* Merits Memorial, ¶ 273.

[1208] Merits Counter-Memorial, ¶ 504.

[1209] Merits Counter-Memorial, ¶ 505; Merits Rejoinder and Jur. Reply, ¶¶ 346-347.

[1210] Merits Counter-Memorial, ¶ 509.

[1211] Merits Counter-Memorial, ¶¶ 507-509, *citing* **CL-016**, *Rusoro Mining Limited v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016, ¶ 565. The transfer provision provided that

did not breach that obligation because the gold did not constitute an "investment" or "return" within the meaning of the relevant transfer provision.[1212]

701. Finally, Canada submits that GTH's claim is based on a mischaracterization of the facts.[1213] Canada denies that it "blocked" the sale of Wind Mobile to an Incumbent, as GTH never requested a transfer of Wind Mobile's licences.[1214]

(4) The Tribunal's Analysis and Conclusion

702. The Tribunal finds that GTH's claim in relation to unrestricted transfers is based on a misconception of the scope of the term "transfer" in Article IX of the BIT. While it could be argued that the sale of personal property involves a "transfer" of ownership, this is not the meaning of "transfer of investments and returns" used in Article IX(1) of the BIT. When interpreting the terms of Article IX "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose," as required by Article 31(1) of the VCLT, the Tribunal notes the reference in Article IX to:

- "transfer of investments and returns," where the term "returns" is defined in Article 1(i) as "amounts yielded by an investment";
- "funds in repayment of loans related to an investment";
- "the proceeds of the (…) liquidation of any investment";
- "transfers shall be effected in the convertible currency in which the capital was originally invested";
- "transfers shall be made at the rate of exchange applicable on the date of transfer";

"[e]ach Contracting Party shall guarantee to an investor of the other Contracting Party the unrestricted transfer of investment and returns." *Id.*, ¶ 566.

[1212] **CL-016**, *Rusoro Mining Limited v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016, ¶¶ 572-573.

[1213] Merits Rejoinder and Jur. Reply, ¶¶ 345-348.

[1214] Merits Rejoinder and Jur. Reply, ¶ 348.

- "transfer, the returns attributable to investments in the territory of the other Contracting Party"; and

- the title of Article IX: "*Transfer of funds.*"

703. All of the terms of Article IX referred to above point towards the construction of the term "transfer" as denoting the free movement of the funds invested in the host State,[1215] or of the proceeds of the liquidation of an investment that takes the form of another category of qualifying asset, and the returns on investment that the investor yielded over the duration of the investment. Thus, "transfer" includes expatriation outside the host State, whether or not that movement consists of a repatriation to the investor's country. In all of those situations, Article IX precludes the host State from restricting the right of the investor to transfer the amount, proceeds and returns of its investment out of the host State, for instance by enacting capital or currency controls, subject to the exceptions listed in Article IX(3).

704. In so deciding, the Tribunal agrees with Canada's submission that the purpose of Article IX is to protect cross-border movements of funds related to the investment. The Tribunal also notes approvingly Canada's citation of Dr. Abba Kolo's summary of the purpose of transfer of funds provisions in investment treaties, in the following terms:

> [T]he ability to transfer funds in and out of the host state ensures that the foreign investor reaps the benefits or enjoys the fruits of his or her investment through dividend payments, paying for goods and services, servicing of debts, or fulfilling other financial obligations that would enhance the value of the investment.[1216]

705. Any remaining doubt on the proper interpretation of "transfer" in Article IX is dispelled by reading the corresponding term in the authentic French text "*transfert*" (while French "*transmission*" would have been used had the Contracting States meant to refer to the outright sale of the investment) and the authentic Arabic text "التحويل" (while "البيع" or "نقل الملكية" would have been used had the Contracting States meant to refer to outright sale or to conveyance of property). Applying the interpretation rule set out in Article 33 of the VCLT, the Tribunal adopts the meaning

[1215] If the qualifying investment takes the form of money or securities pursuant to Article I(f)(i) and (iii) of the BIT.

[1216] **RL-320**, Abba Kolo, "Transfer of Funds: The Interaction Between the IMF Articles of Agreement and Modern Investment Treaties: A Comparative Law Perspective," *in* Stephan W. Schill, *International Investment Law and Comparative Public Law* (Oxford University Press, 2010), p. 346.

of "transfer" which best reconciles the three authentic texts, having regard to the object and purpose of the treaty. That meaning is the permission of the free circulation of the funds that consist in or result from the investment, as opposed to a guarantee of an unrestricted conveyance of ownership of that investment to an Incumbent at the end of the five-year period.

706. Considering the above, the Tribunal cannot accept GTH's broad interpretation of Article IX(1) of the BIT. In the Tribunal's view, that provision applies exclusively to the transfer of funds.

707. GTH does not provide any evidence that Canada hampered its ability to freely dispose of the return of the sale of its investment in Wind Mobile in 2014, whether its indirect shareholding or loans, including by transferring the proceeds outside Canada or investing them in other assets in Canada after the Transfer Framework was introduced. Article IX in its true construction offers no ground to GTH to claim relief. GTH's claim under Article IX is dismissed.

E. THE TRIBUNAL'S DECISION ON THE MERITS

708. In conclusion, the Tribunal has determined that GTH has failed to establish that Canada breached any of its obligations set forth in the BIT. The Tribunal therefore dismisses all GTH's claims on the merits. As a consequence, there is no need for the Tribunal to consider GTH's claim for damages or the Parties' submissions on quantum.

709. The final matter for determination is the Parties' respective claims for the costs of the proceeding, which the Tribunal addresses in the next section.

VIII. COSTS

A. THE PARTIES' SUBMISSIONS ON COSTS

710. Each of the Parties asks the Tribunal to order the other Party to pay all the costs of the arbitration, including the cost of legal representation and assistance, the fees and expenses of the Tribunal, and ICSID's costs.

(1) GTH's Submission on Costs

711. GTH submits that the Tribunal has discretion to allocate the costs of the proceeding, and that the Tribunal should exercise that discretion by awarding GTH its costs.

712. In particular, GTH's position is that if it were to prevail on the merits, it should be reimbursed for the costs it incurred over the entire course of this arbitration.[1217] In GTH's view, such an award of costs is required to achieve the *Chorzów* principle of full reparation.[1218]

713. GTH further argues that, in any event, it should be reimbursed for all the costs incurred as a result of the following:

a. Canada's unsuccessful application to bifurcate the proceeding, which necessitated several rounds of oral and written submission.[1219]

b. Canada's "ill-supported" objections to jurisdiction and admissibility, including its "frivolous objection to Claimant's status as an Egyptian juridical person investor."[1220]

714. The following table contains a summary of the fees and expenses GTH incurred in the entire proceeding, up to 31 May 2019:

Description of Costs	**Amount**
Legal fees (Gibson Dunn)	USD 14,624,241.90
Disbursements for Fees and Expenses of Consultants and Local Counsel	USD 576,680.96
Disbursements for Fees and Expenses of Testifying Experts	USD 1,561,397.09
Other Disbursements	USD 1,302,347.56

[1217] Claimant's Cost Submission, ¶ 7.

[1218] Claimant's Cost Submission, ¶ 6, *citing* **CL-075**, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, ¶ 860 ("Compensating Claimant for the cost of bringing this proceeding is required to wipe out the consequences of Respondent's breach of the BIT and is particularly appropriate in the current case given the serious and egregious nature of the breach").

[1219] Claimant's Cost Submission, ¶ 7(a).

[1220] Claimant's Cost Submission, ¶ 7(b).

Advance Payments to ICSID	USD 600,000.00
TOTAL	USD 18,664,667.51

715. GTH also provides a breakdown of these costs by time periods and an estimate of the costs attributable to defending against Canada's objections to jurisdiction and admissibility.

(2) Canada's Submission on Costs

716. Like GTH, Canada submits that the Tribunal has broad discretion to allocate the costs of the proceeding.[1221] According to Canada, in deciding the allocation of costs, the Tribunal should take into account the following factors: (a) the outcome of the proceeding; (b) the relative success of the parties; (c) the parties' conduct of the proceeding; (d) the reasonableness of the parties' costs; and (e) whether the dispute involved complex or novel issues.[1222]

717. Applying this standard to the present case, Canada argues that if the Tribunal upholds Canada's jurisdictional objections, GTH should bear all Canada's costs, especially considering that GTH opposed bifurcation of the preliminary objections.[1223]

718. In any event, even if the Tribunal were to find jurisdiction over some of the claims, Canada urges the Tribunal to consider "the serious and legitimate arguments put forward by Canada in its defence," and the fact that GTH's broad claims and ambiguous position regarding which measures were being challenged increased the costs of Canada's defense.[1224]

719. Canada further submits that GTH took an unreasonable approach to document production and privilege claims, resulting in unnecessary costs. Therefore, GTH "must bear the parties' costs

[1221] Canada's Costs Submission, ¶¶ 2-3.

[1222] Canada's Costs Submission, ¶ 3, citing, inter alia, **RL-200**, *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, ¶ 183; **CL-158**, *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award, 25 August 2014, ¶¶ 10.30, 10.32; **CL-082**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶¶ 959-960; **RL-171**, *ADF Group Inc., v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003, ¶ 200.

[1223] Canada's Costs Submission, ¶¶ 5-6.

[1224] Canada's Costs Submission, ¶ 7.

for its unjustifiable privilege assertions and repeated failures to comply with the Tribunal's production orders."[1225] Similarly, Canada considers GTH's approach to damages an unreasonable departure from accepted damages principles, resulting in a costly exchange that could have been avoided.[1226]

720. According to Canada, its costs are reasonable in light of GTH's approach to the case, which required Canada to expend significant resources to defend the claims.

721. The following table contains a summary of the fees and expenses Canada incurred from the filing of GTH's Notice of Intent in on 27 November 2015 to 31 May 2019:

Description of Costs	**Amount**
Legal Representation (Trade Law Bureau)	CAD 4,986,699.38
Legal Representation (Innovation, Science and Economic Development Canada)	CAD 1,223,990.96
Disbursements for Fees and Expenses of Consultants and Testifying Experts	CAD 2,701,874.80
Other Disbursements	CAD 227,650.68
Advance Payments to ICSID	CAD 792,805.00
TOTAL	CAD 9,933,020.82

B. THE ARBITRATION COSTS

722. The costs of this arbitration, including the fees and expenses of the Members of the Tribunal and ICSID's administrative fees and direct expenses, amount to:

[1225] Canada's Costs Submission, ¶¶ 8-10.

[1226] Canada's Costs Submission, ¶ 11.

Description of Costs	Amount
Arbitrators' fees and expenses	
Professor Georges Affaki	USD 483,341.95
Mr. Gary Born	USD 99,490.81
Professor Vaughan Lowe	USD 89,595.50
Independent Expert's fees	USD 33,562.50
ICSID's administrative fees	USD 158,000.00
Direct expenses (estimated)	USD 131,639.97
TOTAL	USD 995,630.73

723. In accordance with ICSID Administrative and Financial Regulation 14(3)(d) and paragraph 9.1 of PO1, these arbitration costs have been paid out of advance payments made by the Parties in equal parts (50% by GTH and 50% by Canada). The remaining balance in the case escrow account will be reimbursed to the Parties in equal parts. As a result, GTH's share of the arbitration costs amounts to USD 497,815.37, and Canada's share also amounts to USD 497,815.37.

C. THE TRIBUNAL'S ANALYSIS AND DECISION ON COSTS

724. Both Parties accept that the Tribunal has broad discretion to allocate costs under the BIT and the ICSID Convention. Specifically, Article XIII(9) of the BIT provides that the "tribunal may also award costs in accordance with the applicable arbitration rules." In turn, Article 61(2) of the ICSID Convention states:

> In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.

725. In the exercise of its discretion in matters of allocation of costs, the Tribunal finds it fair that the Parties bear the costs of the arbitration in equal shares and that each Party bears its own legal and other costs expended in connection with this arbitration. In reaching this decision, the Tribunal has considered all the circumstances of the case, including in particular the outcome on jurisdiction in favour of GTH (but for Canada's jurisdictional challenge in relation to the national treatment claim) and on the merits in favour of Canada, the results achieved by each Party during their protracted dispute in relation to privileged documents, and the fact that GTH's claims, even if they did not succeed on the merits, presented genuine issues which could legitimately be brought before an investment tribunal.

726. In a final note, the Tribunal notes its high appreciation to counsel for both Parties for their highly professional, proactive and courteous attitude throughout the proceedings, which was of great assistance to this Tribunal in fulfilling its duties.

IX. AWARD

727. For the reasons set forth above, the Tribunal:

728. DECIDES that it has no jurisdiction to entertain GTH's claim that Canada breached its national treatment obligations under Article IV(1) of the BIT in respect of GTH's investment;

729. DECIDES that it has jurisdiction under the BIT and the ICSID Convention to entertain GTH's claims that Canada breached the following obligations under the BIT:

(i) The fair and equitable treatment standard in Article II(2)(a) of the BIT,

(ii) The full protection and security standard in Article II(2)(b) of the BIT, and

(iii) The unrestricted transfer guarantee in Article IX(1) of the BIT;

730. DECIDES that the claims mentioned in paragraph 729 are admissible;

731. DISMISSES GTH's claims that Canada breached its obligations under the BIT, specifically:

(i) The fair and equitable treatment standard in Article II(2)(a) of the BIT,

(ii) The full protection and security standard in Article II(2)(b) of the BIT, and

(iii) The unrestricted transfer guarantee in Article IX(1) of the BIT;

732. DISMISSES GTH's request for damages;

733. ORDERS the Parties to bear the arbitration costs in equal parts;

734. HOLDS that each Party shall bear its legal costs and expenses without contribution by the other Party; and

735. DISMISSES all other claims or defences by either Party.

[signed]

Gary Born
Arbitrator

Date: 16/3/20

[signed]

Vaughan Lowe
Arbitrator

Date: 12/03/2020

[signed]

Georges Affaki
President of the Tribunal

Date: 11 March 2020

Dissenting Opinion of Gary Born

1. I agree in a number of respects with the Tribunal's factual and legal analysis, and with many of the conclusions in its Award. I write separately, however, on one issue as to which I disagree fundamentally with both the Tribunal's decision and reasoning.

2. Preliminarily, I emphasize my high regard for my colleagues on the Tribunal, and for the care and diligence with which they have approached this matter, both in the Award and otherwise. Nonetheless, I am unable to join the Tribunal's conclusion that GTH's national treatment claim is outside the Tribunal's jurisdiction because it is assertedly excluded from the scope of the BIT's national treatment protections by an exception under Article IV(2)(d) and the Annex to the BIT. In my view, the Tribunal's interpretation of Article IV(2)(d) on this issue is impossible to reconcile with either the language of the BIT or the evident object and purpose of the Treaty.[1]

I. INTRODUCTION

3. It is important to place interpretation of Article IV(2)(d) and the Treaty's Annex in their proper context under the BIT. Article IV(2)(d) is a piece of a broader set of treaty provisions addressing the Contracting Parties' national treatment guarantees and the exceptions to those protections.

4. Article IV(1) of the BIT guarantees protected foreign investors national treatment: "Each Contracting Party shall grant to investments or returns of investors of the other Contracting Party treatment no less favorable than that which, in like circumstances, it grants to investments or returns of its own investors with respect to the expansion, management, conduct, operation and sale or disposition of investments."[2] It is familiar law that protections of foreigners against local discrimination, in the form of national treatment guarantees like Article IV(1), are a bedrock principle of virtually all contemporary investment protection treaties.[3]

5. Article IV(1) is subject to several exceptions. In particular, Articles IV(2)(a), (b) and (c) of the BIT exclude specified non-conforming measures of the Contracting Parties from the national treatment protections of Article IV(1), while Article IV(2)(d) permits the Contracting Parties to except future non-conforming measures from Article IV(1). Thus, Article IV(2) of the BIT provides:

> "paragraph (1) of this Article [IV], … do[es] not apply to:
>
> a. any existing non-conforming measures maintained within the territory of a Contracting Party; …

[1] Terms defined in the Award have the same meaning in this Dissenting Opinion as in the Award.
[2] **CL-001**, BIT (English version), Article IV(1).
[3] *See, e.g.*, August Reinisch, *National Treatment* in BUILDING INTERNATIONAL INVESTMENT LAW: THE FIRST 50 YEARS OF ICSID 389 (Kinnear, Fischer, Mínguez Almeida, et al. (eds); Dec 2015) ("National treatment is one of the basic non-discrimination disciplines in international investment law. Almost all bilateral investment treaties ("BITs") and multilateral investment agreements contain national treatment provisions requiring contracting states to provide investors and investments from other contracting parties treatment no less favorable than that accorded to their own investors and investments."). *See also Consortium R.F.C.C. v.Kingdom of Morocco*, ICSID Case No. ARB/00/6, Award (22 Dec. 2003) (Briner, Cremades, Fadlallah), ¶ 53 (describing national treatment as a "disposition qui se rencontre systématiquement dans les traités de protection des investissements").

b. the continuation or prompt renewal of any non-conforming measure referred to in subparagraph (a);
c. an amendment to any non-conforming measure referred to in subparagraph (a), to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with those obligations;
d. the right of each Contracting Party to make or maintain exceptions within the sectors or matters listed in the Annex to this Agreement."

6. As its text indicates, Article IV(2) was directed principally towards "existing non-conforming measures," which were already in force at the time the BIT was ratified, and the subsequent continuation, renewal or amendment of such existing measures. Article XVI(1) of the BIT required the Contracting Parties to the BIT to notify one another, within two years of the BIT's entry into force, of all such existing non-conforming measures.[4] It is common ground that nothing in Articles IV(2)(a), (b) or (c) exempted new non-conforming measures, adopted after the date that the Treaty entered into force, from Article IV's national treatment guarantees; these provisions were directed exclusively towards *existing* measures.[5]

7. In addition, and of direct relevance here, Article IV(2)(d) provides that the Treaty's national treatment protections do not apply to "the right of each Contracting Party to make or maintain exceptions within the sectors or matters listed in the Annex to this Agreement."[6] In contrast to Articles IV(2)(a), (b) and (c), Article IV(2)(d) is forward-looking, permitting the Contracting Parties to "make or maintain exceptions," within specific sectors identified in the Annex to the Treaty, in the future (after the signature and ratification of the BIT). In contrast to Articles IV(2)(a)-(c), Article IV(2)(d) established a mechanism by which the Contracting Parties could adopt exceptions for new non-conforming measures from the BIT's national treatment protections – provided, of course, that the requirements of Article IV(2) and the Treaty's Annex were complied with.

8. As contemplated by Article IV(2)(d), Canada listed in the Annex of the Treaty a number of sectors or matters as to which it reserved the right to make and maintain exceptions in the future. These sectors were divided by Canada into five general categories, which included "social services" and "services in any other sector."[7] Specifically, the relevant part of the Annex provides:

> 1. In accordance with Article IV, subparagraph 2(d), Canada reserves the right to make and maintain exceptions in the sectors or matters listed below:
>
> – social services (i.e. public law enforcement; correctional services; income security or insurance; social security or insurance; social welfare; public education; public training; health and child care);

[4] **CL-001**, BIT (English version), Article XVI(1) ("The Contracting Parties shall, within a two year period after the entry into force of this Agreement, exchange letters listing, to the extent possible, any existing measures that do not conform to the obligations in subparagraph (3)(a) of Article II, Article IV or paragraphs (1) and (2) of Article V.").
[5] That is underscored by Article IV(2)(c) which permitted amendments to existing non-conforming measures, but only "to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with those obligations." **CL-001**, BIT (English version), Article IV(2)(c).
[6] **CL-001**, BIT (English version), Article IV(2)(d).
[7] **CL-001**, BIT (English version), Annex.

– services in any other sector;

– government securities - as described in SIC 8152;

– residency requirements for ownership of oceanfront land;

– measures implementing the Northwest Territories and the Yukon Oil and Gas Accords.

2. For the purpose of this Annex, "SIC" means, with respect to Canada, Standard Industrial Classification numbers as set out in Statistics Canada, Standard Industrial Classification, fourth edition, 1980.[8]

9. The Tribunal concludes that these provisions of Article IV(2)(d), and the Annex, exclude all of Canada's challenged measures from Article IV(1)'s national treatment guarantees. In the Tribunal's words, "GTH's national treatment claim, which relates exclusively to the telecommunications sector, is excluded from the scope of the BIT's national treatment provisions. Accordingly, the national treatment claim is dismissed and will not be considered on the merits."[9]

10. In my view, neither Article IV(2)(d) nor the Annex of the BIT provides a basis for excluding Canada's challenged measures from the Treaty's national treatment protections. That is true for two separate and independent reasons: (a) Article IV(2)(d) and the Annex only reserved Canada's right to make exceptions from Article IV(1)'s protections in specified sectors, and Canada never exercised that right to make an exception with respect to its challenged measures; and (b) the sectors listed in the Annex do not, in any event, include the telecommunications sector, to which Canada's challenged measures relate.

11. As a consequence, Canada's challenged measures are subject to the BIT's national treatment protections, and the Tribunal has jurisdiction to consider GTH's claims. Canada has not asserted any defense on the merits to those claims and, as a consequence, GTH is entitled to an award declaring that Canada has breached its obligations under Article IV(1) and awarding it damages for the losses resulting from that breach.

II. CANADA HAS NOT MADE AN EXCEPTION UNDER ARTICLE IV(2)(D) FOR THE CHALLENGED MEASURES

12. Preliminarily, GTH has challenged three of Canada's measures under Article IV(1)'s national treatment protections: (a) Canada's implementation of a new process to review Wind Mobile's foreign ownership and control; (b) Canada's prohibition of the sale of GTH's interest in Wind Mobile to incumbent operators; and (c) [redacted].[10] As noted above, it is common ground that Canada has (unusually) offered no affirmative defense to any of these three claims under Article IV(1).

13. Also preliminarily, it is equally common ground that Canada has done nothing pursuant to Article IV(2)(d) of the BIT other than to enact and apply the foregoing three challenged measures. Canada has concededly not provided Egypt any notice or other statement excepting any of the challenged measures from Article IV(1)'s provisions, whether pursuant to Article IV(2)(d), the Annex, or otherwise. Canada also has concededly made no

[8] **CL-001**, BIT (English version), Annex.
[9] Award, ¶ 379.
[10] Request for Arbitration, ¶ 105.

statement, whether publicly, to Egypt, directly to GTH, or otherwise, excepting any of the challenged measures from Article IV(1)'s national treatment obligation or, for that matter, referring in any manner to either its challenged measures or to excepted measures under Article IV(2)(d) or the Annex.

14. Rather, Canada's position is that it is free to adopt and apply discriminatory measures, and to take discriminatory actions, at any time, provided only that those measure fall within the scope of the five categories listed in the Treaty's Annex. As the Tribunal correctly observes:

> According to Canada, it may make or maintain an exception pursuant to Article IV(2)(d) at any time by adopting or maintaining measures or by according treatment that would otherwise be inconsistent with the national treatment obligations; it is not required to take any additional steps to exercise this right.[11]

15. The Tribunal accepts Canada's claim without qualification. It concludes that Article IV(2)(d) of the BIT permits Canada to adopt and apply measures, or take other actions, that violate Article IV's national treatment guarantee without any prior action or notice. In the Tribunal's view, "there is simply no basis in the text of the BIT to impose an additional procedural requirement that triggers the effectiveness of the exception."[12] In particular, the Tribunal reasons that "if the Contracting Parties had intended for that right to be subject to any notification requirement beyond listing the relevant sector or matter in the Annex, they would have included it in the text of the BIT."[13]

16. The Tribunal's analysis produces what, in my view, is a very remarkable result – namely, that the vast bulk of Canada's obligation to provide non-discriminatory national treatment under the BIT is almost entirely without any substance or effect. Under the Tribunal's analysis, Canada is free, at any time and in any manner, to impose blatantly discriminatory measures favoring Canadian nationals, in broad sectors of its economy, without any prior notice to Egypt or Egyptian investors and without any other requirement or limitation. That result makes the Treaty's basic promise of non-discriminatory, transparent treatment of foreign businesses, pursuant to the rule of law, largely illusory. That is a deeply unattractive result, which contradicts the basic objectives of both the Treaty and international law more generally.

17. In my view, nothing in the BIT's text or purposes permits, much less requires, this remarkable result. Rather, the plain language of the Treaty leaves both Contracting Parties free, in their sovereign capacities, to except substantial numbers of new measures from the BIT's national treatment protections, while mandating that they do so in accordance with an orderly and transparent process.

18. First, the Tribunal misunderstands the character and meaning of Article IV of the BIT when it reasons that nothing in the BIT "impose[s] an additional procedural requirement that triggers the effectiveness" of Article IV(2)(d).[14] That reasoning ignores the essential point that, unless Article IV(2)(d) affirmatively excepts Canada's challenged measures from

[11] Award, ¶ 341.
[12] Award, ¶ 368.
[13] Award, ¶ 370. The Tribunal also suggests that the "specificity" of other categories in the Annex "suggests that no further action by Canada is required or contemplated prior to its entitlement to rely upon these exceptions." Award, ¶ 371.
[14] Award, ¶ 368.

Article IV(1)'s national treatment protection, then that protection remains fully applicable. Inquiry into notification or "additional procedural requirement[s]" is unnecessary if Article IV(2)(d) and the Annex do not themselves affirmatively exclude Canada's challenged measures from the scope of Article IV(1).

19. Regrettably, the Award largely ignores the text of both Article IV(2)(d) and the Annex. In my view, it is clear from the text of these provisions that they do not except Canada's challenged measures from Article IV(1) or otherwise authorize Canada to adopt or impose the challenged measures. Both of those provisions of the BIT are limited solely to a reservation of rights by the Contracting Parties to make future exceptions to Article IV(1)'s obligations, without either exercising those reserved rights or authorizing a Contracting Party to adopt or apply measures that violate Article IV(1). Thus:

a) Article IV(2)(d) provides a "right of each Contracting Party to make or maintain exceptions within the sectors or matters listed in the Annex";

b) In turn, in the Annex, Canada "reserves the right to make and maintain exceptions" in five specified areas.

20. There can be no serious doubt that the reservation of a right, as permitted by Article IV(2)(d) and the Annex, is not the actual exercise of that right. As a matter of language, "reserving a right" is asserting the freedom to exercise (or not to exercise) the reserved right in the future; it is not the present exercise of the right that has been reserved. To take an obvious example, if a party reserves the right to initiate an arbitration or litigation, or to challenge election results, it does not in so doing commence an arbitration or litigation or file an election challenge; it only preserves, for possible future exercise, an asserted right. On a more mundane level, if I reserve a seat on a flight, or a table in a restaurant, I do not in so doing fly to my destination or enjoy a meal; I simply ensure that, if I so choose in the future, I will not be precluded from doing so.

21. This conclusion requires no legal authority, beyond the plain meaning of Article IV(2)(d)'s text. In any event, authority uniformly adopts precisely the foregoing interpretation of a reservation of rights:

a) "[T]he existence of a 'right' is distinct from the exercise of that right. For example, a party may have a contractual right to refer a claim to arbitration; but there can be no arbitration unless and until that right is exercised."[15]

b) "[The Energy Charter Treaty] 'reserves the right' of each Contracting Party to deny the advantages of that Part to such an entity. This imports that, to effect denial, the Contracting Party must exercise the right."[16]

[15] **CL-123**, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, ¶ 155.
[16] **CL-132**, *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA Case No. AA 227, Interim Award on Jurisdiction and Admissibility, 30 November 2009, ¶ 456.

c) "[A reserved right] would only apply if a state invoked that provision to deny benefits to an investor before a dispute arose."[17]

22. Thus, the text of Article IV(2)(d) and the Annex leave no serious question that neither provision constituted the actual exercise of any right on the part of Canada to make or maintain an exception to the BIT's national treatment protection under Article IV(2)(d). Rather, Article IV(2)(d) granted Canada (exceptionally) the right to "make or maintain exceptions" in sectors identified in the Annex, while the Annex identified five specified areas within which Canada could exercise the right to make exceptions.

23. Critically, nothing in either Article IV(2)(d) nor the Annex then exercised the rights that Canada had reserved. As noted above, Canada concededly has done nothing pursuant to Article IV(2)(d) to exercise those rights. That should be an end to the analysis. Nothing in Article IV(2)(d) nor the Annex does anything beyond making the reservation of a right, which is not itself sufficient to except Canada's challenged measures from the BIT's national treatment protections.

24. Second, the Tribunal also ignores the nature of the right that Canada is permitted to reserve, and has reserved, under Article IV(2)(d). Article IV(2)(d) permits a Contracting Party to "*make or maintain exceptions*" within the sectors specified in the Annex. Importantly, making or maintaining an "exception" is not adopting or imposing a measure; instead, it is formulating a category of measures to which Article IV(1)'s national treatment standard will not apply. This conclusion is clear from Article IV(2)(d)'s use of the term "exception" – that is, a category that is carved out of or excluded from the basic rule[18] prescribed in Article IV(1).

25. The right to make or maintain an exception under Article IV(2)(d) is fundamentally different from the right to impose measures under Article IV(2)(a), (b) and (c). Each of Article IV(2)(a), (b) and (c) excludes from Article IV(1)'s national treatment protection existing "measures" of the Contracting Parties. Thus, Article IV(2)(a) excludes "any existing non-conforming *measures* maintained within the territory of a Contracting Party," while Article IV(2)(b) excludes the "continuation or prompt renewal of any non-conforming *measure*," and Article IV(2)(c) excludes certain "amendment[s] to any non-conforming *measure*." Those provisions specifically addressed "measures" that were already in existence when the BIT came into force.

26. In contrast, as noted above, Article IV(2)(d) prescribed a mechanism by which each of the Contracting Parties could, after the BIT came into force, formulate additional exceptions to Article IV(1)'s requirements. Indeed, in the Tribunal's own words, "the terms used ('reserves the right to make exceptions') reflect the fact that Article IV(2)(d) is largely forward looking."[19]

27. Critically, however, the future actions permitted by Article IV(2)(d) are not the imposition or application of "*measures*," as under Articles IV(2)(a)-(c), but are instead the

[17] **CL-155**, *Anatolie Stati, Gabriel Stati, Ascom Group SA, and Terra Raf Trans Traiding Ltd v. Kazakhstan*, SCC Case No. V 116/2010, Award, 19 December 2013, ¶ 745.
[18] Oxford Learner's Dictionary defines "exception" as a "a thing that does not follow a rule." *Exception*, Oxford Advanced Learner's Dictionary (2014); Cambridge Dictionary defines "exception" as "someone or something that is not included in a rule, group, or list or that does not behave in the expected way." *Exception*, Cambridge Business English Dictionary (2011).
[19] Award, ¶ 372.

making of "*exceptions*." Needless to say, although the two terms are related, "exceptions" are not "measures" – which is why Articles IV(2)(a)-(c) and Article IV(2)(d) used different terms in the same provision of the Treaty.

28. It is elementary that the Tribunal is obliged to give effect to the text that the Parties have chosen to use in the Treaty.[20] That includes in particular giving effect to the different language that the Parties chose to use in Articles IV(2)(a)-(c), on the one hand, and Article IV(2)(d), on the other hand. Treating the different language of these provisions, and the different terms "measures" and "exceptions," as if they were the same thing not only disregards the Treaty's language but also violates the basic rule of treaty interpretation (that requires giving effect to all provisions of a treaty,[21] including giving meaning to different terms).

29. Unsurprisingly, the Treaty's other provisions also confirm in the clearest of terms this basic distinction between "measures" and "exceptions." The Treaty itself defines "measures" as regulatory and legislative instruments and other governmental or administrative orders or actions;[22] that definition is consistent with the ordinary usage and understanding of the term. In contrast, the Treaty consistently categorizes and treats "exceptions" in an entirely different manner, as made clear in the text of Article VI (setting forth specified "Miscellaneous Exceptions") and Article XVII (setting forth specified "General Exceptions"). In each of these provisions of the Treaty, "exceptions" are treated as defined categories of governmental actions and measures, which are excluded from the rules otherwise prescribed by the Treaty's substantive protections, such as those in Article IV(1).[23]

30. For example, Article VI set forth exceptions for "Cultural industries," which are defined exhaustively as including, *inter alia*, "the publication, distribution, or sale of books,

[20] *See, e.g.*, Vienna Convention on the Law of Treaties, art. 31 ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."). *See also Competence of the General Assembly for the Admission of a State to the United Nations* (Advisory Opinion), [1950] ICJ REP. 4, 8 ("The Court considers it necessary to say that the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur. … When the Court can give effect to a provision of a treaty by giving to the words used in it their natural and ordinary meaning, it may not interpret the words seeking to give them some other meaning."); *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization* (Advisory Opinion), [1960] ICJ REP. 150, 159-160 ("The [text of the treaty] must be read in [its] natural and ordinary meaning"); *Temple of Preah Vihear*, [1961] ICJ REP. 17, 32 ("[W]ords are to be interpreted according to their natural and ordinary meaning in the context in which they occur."). *See also* Gerald G. Fitzmaurice, *The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points*, 28 BRIT. Y.B. INT'L L. 1, 10 (1951) ("The thought of the majority [of the ICJ] could be summed up by saying that in their view the intentions of the framers of a treaty, as they emerged from the discussions or negotiations preceding its conclusion, must be presumed to have been expressed in the treaty itself, and are therefore to be sought primarily in the actual text, and not in any extraneous source.").

[21] *See, e.g.*, Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice 1951–4: Treaty Interpretation and Other Treaty Points*, 33 BRIT. Y.B. INT'L L. 203, 211 (1957) ("Treaties are to be interpreted … in such a way that a reason and a meaning can be attributed to every part of the text."). *See also Fisheries Jurisdiction (Spain v. Canada)*, Jurisdiction of the Court, Judgment, [1998] ICJ REP. 432 ("[the] principle [of effectiveness] has an important role in the law of treaties"); *Argentina–Safeguard Measures on Imports of Footwear*, AB-1999-7, WT/DS121/AB/R, 27, ¶ 81 (1999) ("[A] treaty interpreter must read all applicable provisions of a treaty in a way that gives meaning to all of them, harmoniously. And, an appropriate reading of [the text] must, accordingly, be one that gives meaning to all the relevant provisions….").

[22] *See* **CL-001**, BIT (English version), Article I(h) ("'[M]easure' includes any law, regulation, procedure, requirement, or practice.").

[23] **CL-001**, BIT (English version), Articles VI and XVII.

magazines, periodicals or newspapers in print or machine readable form but not including the sole activity of printing or typesetting any of the foregoing; or the production, distribution, sale or exhibition of film or video recordings …."[24] Similarly, Article XVII set forth "General Exceptions," including "environmental measures," again carefully defined as measures "necessary to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement; necessary to protect human, animal or plant life or health; …."

31. Thus, the Treaty's text and structure make it clear that a "measure" refers to a Contracting State's governmental action (whether legislative, executive, administrative) which is applied to or imposed on a foreign investor, while an "exception" refers to a category of measures which is excluded from the Treaty's protections or to a Contracting State's exercise of a right under the BIT to exclude categories of measures from the Treaty's protections. Importantly, the Treaty's "exceptions" are defined in advance, as specified categories of measures, which can be ascertained by reference to the text of the Treaty. Contrary to the Tribunal's analysis, the concepts of "measures" and "exceptions" are not interchangeable, but instead are fundamentally different, both in ordinary usage, in Article IV and in the other provisions of the treaty.

32. Applying the Treaty's definition of "measures" and "exceptions" under Article IV, it is in my view very clear what Article IV(2)(d) allowed Contracting States to do. Article IV(2)(d) authorized Contracting States, within limits prescribed by the Annex, to formulate specified "exceptions" that would encompass defined categories of future "measures" that a Contracting State might wish to adopt or impose. Critically, however, the making of exceptions under Article IV(2)(d) and the Annex required the formulation of a defined category of measures, like the exceptions in Articles VI and XVII of the Treaty, and not merely an ad hoc, after-the-fact exclusion of any measures within the scope of the Annex from the Treaty's protections.

33. The foregoing conclusion is not only evident from the deliberate (and repeated) use of different language in Article IV(2)(d) ("right to make or maintain exceptions") and Article IV(2)(a)-(c) (existing "measures"), and from the definitions and treatment of "measures" and "exceptions" in the Treaty. This conclusion is also evident from Canada's other bilateral investment treaties. In particular, Canada's 2004 Model BIT provides that the BIT's national treatment obligations "shall not apply to *any measure* that a Party adopts or maintains" with respect to defined sectors.[25] That text, unlike the text of Article IV(2)(d) in the Canada-Egypt BIT, does not provide for Contracting Parties to make "exceptions" for future "measures," but instead simply excludes from the BIT's coverage all future "measures" in particular fields. The terms of Canada's 2004 Model BIT confirm both the plain language of Article IV(2)(d) and the difference in the text of Article IV(2)(d) and Articles IV(2)(a)-(c).

34. The same conclusion is also apparent from the structure of the BIT. Articles IV(2)(a)-(c) refer to existing measures, which could be (and, under Article XVI(1), must be) identified at the time the Treaty was ratified, and which are then excluded from Article IV(1). Article IV(2)(d) refers to future measures, which were not yet (and could not be) identified at the time the Treaty was ratified, but which could nonetheless be excluded from Article IV(1). Because these measures could not be identified, the Contracting Parties provided a mechanism in Article IV(2)(d) to allow for exceptions to be made, within limits prescribed in

[24] **CL-001**, BIT (English version), Article VI(3).
[25] **RL-117**, Canada's Model BIT (2004), Art. 9(2) (emphasis added).

the Annex, from Article IV(1)'s national treatment protection for as-yet-unidentified measures.

35. In doing so, however, the Contracting Parties did not simply exclude economic sectors or types of measures from the scope or application of Article IV(1). Instead, the Contracting Parties limited the fields within which future non-conforming measures might be excepted from Article IV(1), by requiring that these fields be identified in an Annex; and they provided for the Contracting Parties to then "make exceptions" within those fields, not for the Contracting Parties to simply impose non-conforming measures. That structure confirms both the different language of Article IV(2)(d) (referring to "exceptions," not to "measures") and the text of the Annex (referring to the "reservation of a right" to make exceptions, not a right to impose measures).

36. One could imagine treaty language that had the meaning adopted by the Tribunal with respect to Article IV(2)(d); that text would not, however, be what Article IV(2)(d) or the Annex actually says. Instead, adopting the Tribunal's interpretation of the BIT, Article IV(2)(d) would say "notwithstanding Article IV(1), each Contracting State has the right to adopt, maintain, amend and impose measures in the sectors listed in the Annex" which do not conform to Article IV(1), and the Annex would say "Article IV(1) does not apply to any measures of Canada in the following sectors." Needless to say, nothing in Article IV remotely resembles such a provision.

37. Third, given the clarity of Article IV(2)(d)'s language and structure, there is little need to consider the BIT's object and purpose. For the avoidance of doubt, however, those purposes decisively confirm what the Treaty's text says. In particular, the BIT's fundamental objective of providing a secure, predictable and transparent environment, characterized by the rule of law, both argues for the conclusions outlined above and excludes the interpretation urged by Canada and adopted by the Tribunal.

38. Under the Tribunal's interpretation of Article IV, the BIT's fundamental guarantee of national treatment is subject to an open-ended, entirely discretionary power on the part of Canada to disregard the Treaty's protection. In what appears to encompass some 70 percent of Canada's economy,[26] Canada is free under the Tribunal's interpretation of the Treaty – without notice or restriction – to impose discriminatory measures. As noted above, this is a remarkable, and remarkably unattractive, result. That unbounded discretion is little different from a self-judging exception to the Treaty's national treatment obligation, which is contrary to both the rule of law and the BIT's fundamental objectives, and entirely different from the manner in which "exceptions" were treated elsewhere in the Treaty (in Articles VI and XVII). Indeed, that sort of sweeping discretionary power to discriminate on an ad hoc basis against foreigners is almost the exact opposite of what the BIT promised and sought to achieve.

39. In contrast, reading the BIT to mean what Article IV says does nothing to limit the Contracting States' sovereign regulatory authority. Canada would remain free to adopt exceptions, pursuant to Article IV(2)(d), from Article IV(1)'s national treatment protection (within the limits of the Annex); Canada would merely be required to formulate and publicize those exceptions in advance, as it did in Articles VI and XVII, so that other Contracting Parties and foreign investors could determine when Article IV(1) applied and when it did not.

[26] The services sector accounted for an estimated 70.2% of Canada's GDP in 2017. *See GDP – composition, by sector of origin*, Central Intelligence Agency World Factbook – Canada.

That is precisely the type of transparency, regularity and legal security that both the BIT and the rule of law promise – but that the Tribunal, regrettably, declines to affirm.

40. Fourth, Canada and the Tribunal also rely on Article XVI(1) of the BIT, which sets out a process by which the Contracting Parties are to notify one another of any existing non-conforming measures,[27] while observing that there is no such process prescribed by Article XVI for exercising the right granted by Article IV(2)(d).

41. That analysis is in my view entirely unpersuasive. Article XVI(1) specifically addresses only "existing" non-conforming measures. The point of Article XVI(1) is not to provide a general notice mechanism for issues that arise under the BIT in the future, after the Treaty is in force – rather, it has a limited purpose pertaining to "existing" measures.

42. For the reasons discussed above, the reason that Article IV(1) was drafted to apply specifically to Articles IV(2)(a)-(c), and not Article IV(2)(d), is that Article IV(2)(d) itself requires the Contracting States to formulate and make "exceptions" to Article IV(1) – namely, publicly available instruments defining what categories of future measures would, and would not, be excepted from Article IV(1)'s national treatment requirement. It would have made no sense to extend Article XVI(1)'s requirement for notice of "measures" to the very different "exceptions" under Article IV(2)(d).

43. Article XVI of the BIT is also instructive of something else: the intention of the Contracting Parties to clearly identify and communicate measures that would hinder the protection of foreign investment. In addition to the requirement in Article XVI(1) of exchanging letters about existing measures that do not conform to the BIT obligations, Article XVI(2) provides that each party must "ensure that its laws, regulations, procedures, and administrative rulings of general application respecting any matter covered by this Agreement are promptly published or otherwise made available in such a manner as to enable interested persons and the other Contracting Party to become acquainted with them."[28]

44. Article XVI thus seeks to ensure that both Contracting Parties, and their respective investors, are at all times aware of developments that would affect the rights and obligations established by the BIT. Unlike Article XVI(1), Article XVI(2) lacks the word "existing," making clear that such notice is necessary for all present and future measures. This is consistent with the overarching purpose of the BIT to facilitate "economic cooperation" by "the promotion and the protection of investments of … the other Contracting Party."[29] Read in this context, the exercise of a reserved right under Article IV(2)(d) necessarily required notifying the other Party. As the Tribunal acknowledges, the language of the Annex which is at issue – "services in any other sector" – is exceptionally broad.[30]

45. Finally, the Tribunal laments that the Annex "could have been drafted in clearer terms."[31] With respect, Article IV(2)(d), Article XV1(1) and the Annex were drafted in

[27] **CL-001**, BIT (English version), Article XVI(1). As noted above, the article provides that "The Contracting Parties shall, within a two year period after the entry into force of this Agreement, exchange letters listing, to the extent possible, any existing measures that do not conform to the obligations in subparagraph (3)(a) of Article II, Article IV or paragraphs (1) and (2) of Article V."
[28] **CL-001**, BIT (English version), Article XVI(2).
[29] **CL-001**, BIT (English Version), Preamble.
[30] The Tribunal calls "services in any other sector" category "broader than the other items listed." Award, ¶ 371.
[31] Award, ¶ 372.

perfectly clear terms. Particularly when read together, in light of the BIT's object and purpose, these provisions impose clear and sensible rights and obligations. Again regrettably, the Tribunal chooses not to give effect to those provisions. Notably, however, if one accepted the Tribunal's view that the Annex and the BIT are unclear, then it underscores all the more the need to interpret Article IV(2)(d) and the Annex consistently with the Treaty's object and purpose and the desirability of avoiding the remarkably unattractive and implausible result produced by the Tribunal's analysis.

III. THE TELECOMMUNICATIONS INDUSTRY IS NOT AN EXCEPTION UNDER THE ANNEX

46. Even if Article IV(2)(d) had the meaning urged by the Tribunal, its conclusion would still be wrong. Even accepting the Tribunal's interpretation of Article IV(2)(d), Canada did not reserve the right to impose non-conforming measures with respect to investments made in telecommunications. In my view, the Tribunal is wrong to conclude that the exceptions to national treatment protection contained in Article IV(2)(d) and the related Annex encompass the telecommunications sector.

47. As discussed above, an exception can only be made pursuant to Article IV(2)(d) "within the sectors or matters listed in the Annex to this Agreement."[32] In turn, the relevant provisions of the Annex read as follows:

> 1. In accordance with Article IV, subparagraph 2(d), Canada reserves the right to make and maintain exceptions in the sectors or matters listed below:
>
> – social services (i.e. public law enforcement; correctional services; income security or insurance; social security or insurance; social welfare; public education; public training; health and child care);
>
> – services in any other sector;
>
> – government securities - as described in SIC 8152;
>
> – residency requirements for ownership of oceanfront land;
>
> – measures implementing the Northwest Territories and the Yukon Oil and Gas Accords. [33]

48. It is common ground that Canada can only make an exception under Article IV(2)(d) if that exception falls within one of the "sectors or matters" listed in the Annex to the BIT. Article IV(2)(d) was not an unbounded right to make exceptions for future measures in any and all areas – but only within those sectors specified in advance in the BIT's Annex.

49. The Tribunal concludes that the Annex's "language leaves no room for doubt that Canada has the right to make exceptions to its national treatment obligation with respect to services"[34] as it is the only "plausible" explanation.[35] In the Tribunal's view, telecommunications is a "service," and as a consequence Canada's challenged measures, applied to a telecommunications company, fall within the Annex. The Award also finds instructive the fact that Canada has contained similar exceptions for services in other

[32] **CL-001**, BIT (English version), Article IV(2)(d).
[33] **CL-001**, BIT (English version), Annex.
[34] Award, ¶ 366.
[35] Award, ¶ 376.

investment treaties, and that GTH's own description of Wind Mobile's activities includes "providing mobile telecommunications services to Canadian customers."[36]

50. Preliminary, the Tribunal's (and Canada's) interpretation of the Annex is again remarkable. In the Tribunal's view, the term "services in any other sector" means any services sector or any sector in which services are provided. As a consequence, telecommunications are a services sector (as presumably would be the case for information technology, health care, finance, advertising, insurance, transport, energy and other fields comprising some 70% of Canada's economy).[37] In my view, that interpretation again ignores the plain language of the BIT and produces a result that is antithetical to the BIT's object and purpose.

51. First, the Annex does not permit exceptions in any services sector; instead, the Annex permits exceptions to be made for measures regulating "services in any other sector." The Annex allows exceptions for the regulation of "services" in a given sector, not the regulation of anything in a sector that involves services. Here, there is no suggestion that Canada's review of the shareholding of telecommunications (and other) investments was a regulation of "services": it obviously was not, and was, equally obviously, a regulation of financial holdings and corporate control. Nothing in the Annex purports to except future measures of that nature.

52. Second, the Annex also does not permit exceptions for measures regulating all services. It only encompasses a defined category of services – namely, "services in any other sector." Critically, the Tribunal (and Canada) ignore the phrase "any *other sector*," which has a readily-ascertainable and important meaning.

53. The Annex's reference to "any *other sector*" immediately follows the Annex's reference to:

> "social services (i.e. public law enforcement; correctional services; income security or insurance; social security or insurance; social welfare; public education; public training; health and child care)."[38]

54. In this context, the most natural reading of the Annex is that services in "any *other sector*" is a reference to other "social services" in sectors not already specified in the parenthetical in the above quoted text of the Annex. That is what the reference to "other sectors" is most plainly construed to mean, and in the context of the Annex, that is the better reading of the reference to "services."

55. Notably, the Annex does not say "any services," or "any sector in which services are provided," or "financial, legal, accounting, consulting, telecommunications and any other services." Rather, the Annex includes, after a reference to social services in several specified sectors (notably, preceded by an "i.e.," not an "e.g.,"), a reference to "services in any other sector." In context, that reference must be to "services" in other sectors in addition to those already specified, but without any change from a focus on "services" and, specifically, on "social services."

[36] Award, ¶ 378.
[37] *See supra* note 26.
[38] **CL-001**, BIT (English version), Annex.

56. And, as already discussed, Canada's challenged measures are regulations of neither "services," much less "social services," in any sector. Critically, Canada's challenged measures are a regulation of investment and ownership/control in the telecommunications sector. Those measures are not a regulation of "services," and are most decidedly not a regulation of "social services." They are a regulation of financial ownership and corporate control, which has nothing to do with the items listed in the Annex.

57. Third, the Tribunal's reading of the language of the Annex would also make the first of Canada's listed sectors ("social services") superfluous: if the second sub-paragraph really did refer generically to all services in any sector, then the first sub-paragraph would be entirely subsumed within it, and therefore would have no independent meaning. The rule of non-redundancy is a fundamental tenet of treaty interpretation in international law[39] – it requires a treaty to be interpreted "in such a way that a reason and a meaning can be attributed to every part of the text."[40] In other words, the reading should not reduce a clause to redundancy or inutility. Applied to our case, understanding the second element of the Annex ("services in any other sector") to refer to "*social* services in any other sector" is the only way to prevent the first element, "social services," from becoming meaningless.

58. Moreover, the first sub-paragraph of the Annex provides in parentheses more detail about sectors that were considered to involve the provision of "social services": public law enforcement; correctional services; income security or insurance; social security or insurance; social welfare; public education; public training; and health and child care.[41] A natural understanding of the language that immediately follows this provision, in the second sub-paragraph, then, is that "social services" are not limited to the sectors indicated in parentheses, but rather capture other sectors as well.

59. Fourth, the Tribunal acknowledges, with some understatement, that "the breadth of the category 'services in any other sector' might seem surprising"[42] given the Tribunal's interpretation. That is true. The breadth of this category – apparently encompassing some 70% of Canada's economy – is particularly striking when contrasted with the narrow character of the sectors identified in the Annex's first sub-paragraph (i.e. "public law enforcement" (but not private law enforcement), "correctional services, and "public education" (again, not private education)). It is very odd to think that the drafters of these limited and narrow categories, also intended to make all these limitations redundant and meaningless by way of a passing reference to "services" generally. Despite that, the

[39] Edward Gordon, *The World Court and the Interpretation of Constitutive Treaties*, 59 AM. J. OF INT'L L. (1965), p. 814 ("A twin-forked rule of interpretation constantly mentioned by the Court is (a) that a treaty must be read as a whole to give effect to all of its terms and avoid inconsistency, and (b) that no word or provision may be treated as or rendered superfluous."). *See also* Beagle Channel Arbitration (Argentina v. Chile), Court of Arbitration established by the British Government pursuant to the Argentina-Chile General Treaty of Arbitration, 1902, Award of 18 February 1977, 52 INT'L L.R. 140, ¶ 35 ("if Chile's view of Article II is correct, the attributions made to her under Article III would appear to be redundant and unnecessary."); *Korea—Definitive Safeguard Measure on Imports of Certain Dairy Products*, AB-1999–8, WT/DS98/AB/R, p 24, ¶¶ 80–81(1999) ("it is the duty of any treaty interpreter to read all applicable provisions of a treaty in a way that gives meaning to all of them, harmoniously.").
[40] Gerald G. Fitzmaurice, *supra* note 21, at 211.
[41] **CL-001**, BIT (English Version), Annex ("social services (i.e. public law enforcement; correctional services; income security or insurance; social security or insurance; social welfare; public education; public training; health and child care i.e. public law enforcement; correctional services; income security or insurance; social security or insurance; social welfare; public education; public training; health and child care)").
[42] Award, ¶ 377.

Tribunal's position is that the Annex (silently and secondarily) includes finance, telecommunications, insurance, information technology, energy and the like.

60. The Tribunal dismisses this implausible reading of the Annex with a reference to "many of Canada's investment treaties from the mid to late 1990s, which contain similar exceptions for services."[43] The Tribunal cites bilateral investment treaties between Canada and nine other states that Canada has identified.[44] The comparable Annex in all but one of these agreements is identical to that in the Canada-Egypt BIT, leading the Tribunal to conclude that these treaties support both its interpretation of the Annex and the breadth of the "services in any other sector" formulation.

61. The Tribunal's analysis is unconvincing. The fact that other bilateral investment treaties have language like that in the BIT's Annex merely means that those treaties also raise comparable issues of interpretation (which are not before this Tribunal and which other tribunals have not addressed); that fact says nothing whatsoever about how those issues of interpretation should ultimately be resolved.

62. More important, in my view, are treaties concluded at almost the same time as the Canada-Egypt BIT with texts that shed light on what the BIT's Annex was understood to mean. Specifically, the Canada-Thailand BIT, signed in 1997, does not have the language "services in any other sector" in its Annex, while the Kingdom of Thailand reserves the right to make and maintain exceptions in "business in services, i.e., accountancy, attorneyship, architecture, advertisement, brokerage or agency, auction, haircutting, hair dressing, and beauty treatment."[45] Similarly, the Canada-Philippines BIT contains an exception from the Philippines for "services involving the practice of licensed profession."[46]

63. In other words, at the same time the Canada-Egypt BIT was concluded, texts that Canada negotiated described with some detail, and in a very limited manner, the industries that would fall under the "services" exception. That does not support, and instead contradicts, the Tribunal's view that the Annex contained very broad services exceptions (and was part of a consistent Canadian practice of including such exceptions); instead, at the most relevant times, Canada's bilateral investment treaties had the reverse.

64. Moreover, the Tribunal ignores the fact that Canada has specifically identified "telecommunications services" as an exception in other bilateral investment treaties.[47] Canada argues that these treaties reveal an "evolution in the architecture of" foreign investment protection agreements,[48] but the more persuasive inference would be that if Canada had meant to reserve the right to make exceptions in the telecommunications sector, it would have done so expressly, as in other treaties.

[43] Ibid.
[44] **RL-026**, Canada-Ukraine FIPA (1994), Article IV(2)(d), Annex; **RL-027**, Canada-Trinidad and Tobago FIPA (1995), Article IV(2)(3), Annex; **RL-089**, Canada-Philippines FIPA (1996), Article IV(2)(4), Annex; **RL-094**, Canada-Barbados FIPA (1996), Article IV(2)(4), Annex; **RL-093**, Canada-Ecuador FIPA (1996), Article IV(2)(4), Annex; **RL-095**, Canada-Venezuela FIPA (1996), Annex II.11.4; **RL-092**, Canada-Panama FIPA (1996), Article IV(2)(4), Annex; **RL-100**, Canada-Thailand FIPA (1997), Article IV(3), Annex I; **RL-028**, Canada-Armenia FIPA (1997), Article IV(2)(d), Annex.
[45] **RL-100**, Canada-Thailand FIPA (1997), Article IV(3), Annex I(2).
[46] **RL-089**, Canada-Philippines FIPA (1996), Article IV(2)(4), Annex I(b).
[47] Jur. Rejoinder, ¶ 51.
[48] Jur. Memorial, ¶ 223.

65. The Tribunal also acknowledges that "the reference to 'services in any other sector' must be read in the context of the four other listed items."[49] As the Tribunal notes, the language of the last three exceptions in the Annex is detailed and precise.[50] Likewise, the first exception, for "social services," is elaboratively defined in parentheses.[51] Like Canada's other bilateral investments treaties, these provisions all suggest a focused and limited, rather than open-ended, approach towards exceptions. In turn, that indicates that the category "services in any other sector" should be interpreted in light of the other listed items in the Annex, giving it a more definite meaning in association with "social services."

66. Finally, even if one accepts Canada's position that "services in any other sector" means "any services sector," the Annex expressly categorizes telecommunications as a non-services sector in ¶ 2. The sole – and sufficient – guidance in the Annex for identifying a services industry is Statistics Canada's Standard Industrial Classification ("SIC").[52] According to SIC, telecommunications is not a "services" industry; rather, it falls under "communications and other utilities."[53] While the telecommunications business may indeed be concerned with the provision of services, the definition in the Annex must control.

67. The Tribunal contends that reliance on the SIC is "misplaced because it is referenced in the BIT only with respect to government securities and not any other services."[54] This analysis ignores the plain language of the BIT: ¶ 2 of the Annex states that "[f]or the purpose of this Annex, SIC means…."[55] The Annex does not provide that use of the SIC is limited to the government securities reference – for instance, "for the purpose of government securities," or "for the purpose of the third item under Annex (1)." Paragraph 2's reference to the SIC is clear and unambiguous, and, in turn, the SIC plainly excludes telecommunications.

IV. CONCLUSION

68. For these reasons, I respectfully dissent.

[49] Award, ¶ 371.
[50] The last three items are "government securities – as described in SIC 8152"; "residency requirements for ownership of oceanfront land"; and "measures implementing the Northwest Territories and the Yukon Oil and Gas Accords"). Exhibit **CL-001**, BIT (English), Annex ¶ 1.
[51] Ibid.
[52] Exhibit **CL-001**, BIT (English), Annex ¶ 2. *See also* Exhibit **CL-097**, Statistics Canada, Standard Industrial Classification (1980).
[53] Exhibit **CL-097**, Statistics Canada, Standard Industrial Classification (1980), p. 174.
[54] Award, ¶ 378, fn. 538 (internal quotations omitted).
[55] Exhibit **CL-001**, BIT (English), Annex ¶ 2.

[signed]

Gary Born