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