Public Version

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

ICSID Case No. ARB/16/16

BETWEEN

GLOBAL TELECOM HOLDING S.A.E.

Claimant

and

GOVERNMENT OF CANADA

Respondent

CLAIMANT'S REJOINDER ON JURISDICTION AND ADMISSIBILITY

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5 March 2019

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1. Global Telecom Holding S.A.E. hereby submits its Rejoinder on Jurisdiction and Admissibility in accordance with Procedural Order No. 1, dated 13 June 2017, the Revised Timetable, dated 28 January 2019, and Rule 31 of the International Centre for Settlement of Investment Disputes Rules of Procedure for Arbitration Proceedings.[1]

2. With this submission, GTH further introduces one new document on the record relevant to the merits of GTH's claims and the quantum of damages[2] in accordance with Ms. Gastrell's Letter to the Parties, dated 30 January 2019.[3]

[1] Short forms and abbreviations have the meaning set-out in GTH's Memorial on Merits and Damages and GTH's Counter-Memorial. *See* Claimant's Memorial on the Merits and Damages, 29 September 2017 (hereinafter "**GTH's Memorial on Merits and Damages**"); Claimant's Reply on Merits and Damages & Counter-Memorial on Jurisdiction and Admissibility, 5 November 2018 (hereinafter "**GTH's Counter-Memorial**").

[2] [redacted]

[3] Letter from Ms. Gastrell to the Parties, 30 January 2019, p. 1 ("*Considering all the circumstances, the Tribunal has decided to grant the Claimant's request for leave to include in the evidentiary record documents that are being produced pursuant to Procedural Order No. 6.*").

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

3. As set out in GTH's Memorial on the Merits and Damages and GTH's Reply on Merits and Damages & Counter-Memorial on Jurisdiction and Admissibility (referred herein as "**GTH's Counter-Memorial**"), the Tribunal has jurisdiction over this dispute.[4] The majority of Canada's Rejoinder on Merits and Damages and Reply on Jurisdiction and Admissibility ("**Canada's Reply**")[5] repeats the points set out in its first Memorial on Jurisdiction and Admissibility and Request for Bifurcation ("**Canada's Memorial**").[6] As GTH has addressed these points extensively in its Counter-Memorial, GTH focuses herein on areas where Canada has mischaracterized the facts or law, or has introduced new arguments. By doing so, it does not accept arguments it has already addressed previously but on which Canada continues to insist.

4. Accompanying this submission are:

   (a) The Second Expert Report of Dr. Hani Sarie-Eldin, dated 5 March 2019;[7] and

   (b) The Second Witness Statement of Mr. David Dobbie, dated 5 March 2019.[8]

[4] *See* GTH's Counter-Memorial, Part III; GTH's Memorial on Merits and Damages, Part VI.

[5] Canada's Rejoinder on Merits and Damages and Reply on Jurisdiction and Admissibility, 3 February 2019 (hereinafter "**Canada's Reply**").

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

[7] **CER-Sarie-Eldin-2**.

[8] **CWS-Dobbie-2**.

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

5. GTH is a qualifying "*investor*" pursuant to the BIT because it is an Egyptian "*juridical person*"[9] that has invested in the territory of Canada. Canada urges the Tribunal to read the definition as additionally requiring GTH to have "*permanent residence*" in Egypt. As GTH has explained in its Counter-Memorial, Canada's argument contravenes the rules of treaty interpretation and should be rejected.[10] [redacted]

6. Presumably in recognition of the weakness of its original argument, Canada now raises a new complaint, not based on law or fact, that GTH was not "*established in accordance with, and recognized as a juridical person by the laws of the Arab Republic of Egypt*"[11] at the time the Request for Arbitration was filed. This is an extraordinary claim on any view and one that is obviously wrong.

I.A.1. GTH Was, And Remains, An Egyptian Juridical Person

I.A.1.a. Canada's New Objection Is Untimely

7. Canada's new objection that GTH is not established in accordance with and recognized as a juridical person by the laws of Egypt is in any event out of time. Pursuant to the ICSID Arbitration Rules, Canada was required to raise this objection "*as early as*

[9] **Exhibit CL-001**, Agreement between the Government of Canada and the Government of the Arab Republic of Egypt for the Promotion and Protection of Investments (English version) (signed 13 November 1996; entry into force 3 November 1997) (hereinafter "**BIT (English)**"), Article I(g) (an Egyptian "*juridical person*" is defined as "*any entity established in accordance with, and recognized as a juridical person by the laws of the Arab Republic of Egypt*").

[10] *See* GTH's Counter-Memorial, ¶¶ 101-50.

[11] Canada's Reply, Part II.A.2.

possible" and "*no later than the expiration of the time limit fixed for the filing of the counter-memorial*."[12] Canada alleges that this objection has been raised at this eleventh hour because it is "*based on documents produced in response to Canada's document requests*."[13] The Tribunal need only turn to the factual premise of Canada's objections to see that this is a disingenuous pretext to raise an untimely and meritless objection.

8. Canada possessed the factual information upon which it bases this objection no later than the filing of its Memorial. Canada states that the factual basis for this objection is that "*GTH is effectively managed from the Netherlands and not Egypt*."[14] While claiming that it learned this due to GTH's document productions, Canada has, in fact, been arguing since its November 2017 Memorial that GTH was effectively managed from Amsterdam.[15]

9. Moreover, **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.[16] With respect to the single non-public document received

[12] ICSID Arbitration Rule 41(1) ("*Any objection that the dispute or any ancillary claim is not within the jurisdiction of the Centre or, for other reasons, is not within the competence of the Tribunal* ***shall be made as early as possible.*** *A party shall file the objection with the Secretary-General* ***no later than the expiration of the time limit fixed for the filing of the counter-memorial****, or, if the objection relates to an ancillary claim, for the filing of the rejoinder—unless the facts on which the objection is based are unknown to the party at that time*." (emphases added)). *See also* **Exhibit CL-206**, *Pac Rim Cayman LLC v. The Republic of El Salvador*, ICSID Case No. ARB/09/12, Award, 14 October 2016, ¶¶ 5.40-5.50 (observing "*the ordinary meaning of* [Rule 41(1)] *establishes as the primary rule that jurisdictional objections must be made as early as possible*" and that "[t]*his rule is subject to the further condition that any such objection may not exceed the time limit for the counter-memorial*").

[13] Canada's Reply, n. 16. Prior to this point, Canada focused solely on the alleged separate "*permanent residence*" requirement, and on multiple occasions accepts that GTH otherwise satisfies the test of Article I(g) of the BIT and is a "*legal entity in good standing*." *See, e.g.*, Canada's Memorial, ¶¶ 31, 46, 84, 105, 107.

[14] Canada's Reply, n. 16.

[15] Canada's Memorial, ¶ 104 (alleging that GTH's "*strategic management and day-to-day operations* [] *were moved to Amsterdam*").

[16] *See* Canada's Reply, ¶ 37, *citing* **Exhibits R-407**, GTH, *Minutes of Board of Directors Meeting*, 21 September 2015; **Exhibit R-064**, GTH, *Global Telecom to move its place of operations to Amsterdam*, 21 September 2015, http://www.gtelecom.com/documents/10157/104020/Egypt-Amsterdam+GTH+PR.pdf;

from GTH due to document productions, Canada's own characterization of that document is that it "*expressly recognized*" the points it alleges are already reflected in the public documents.[17] Canada cannot credibly claim that GTH's document productions gave rise to its new objection and it must be dismissed as out of time.

I.A.1.b. Even if the Tribunal Reaches Canada's New Argument, It Must Be Rejected

10. GTH has—at all times, including at the time of the filing of the Request for Arbitration—been established in accordance with and recognized as a juridical person by the laws of Egypt. Therefore, even if the Tribunal allows Canada's new objection, it is baseless.

11. As Dr. Hani Sarie-Eldin explains in his Second Report, there is no legal or factual basis to question GTH's standing as an Egyptian juridical person in the form of an Egyptian joint stock company.[18] To be recognized as an Egyptian joint stock company under Egyptian law, GTH need only satisfy a limited set of formal and substantive requirements.[19] Of these requirements, the only one Canada disputes is whether GTH has its "*principal place*" in Egypt.[20] An Egyptian joint stock company's "*principal place*" in Egypt is the address listed in its commercial register.[21] GTH's address listed

[redacted] The same is true of the documents referred to in Dr. Abdel Wahab's second expert report.

[17] Canada's Reply, ¶ 37.

[18] **CER-Sarie-Eldin-2**, ¶¶ 7-11.

[19] **CER-Sarie-Eldin-2**, ¶¶ 8-9.

[20] **CER-Sarie-Eldin-2**, ¶¶ 8-9, 12.

[21] **CER-Sarie-Eldin-2**, ¶ 9. *See also* Canada's Reply, n. 24.

on its commercial register at the time of the filing of the Request for Arbitration was (and remains) at Nile City Towers in Cairo, Egypt.[22]

12. In addition to GTH's principal place in Cairo, GTH remains a publicly listed company with thousands of Egyptian shareholders,[23] and is subject to significant scrutiny by the Egyptian regulatory authorities.[24] Canada, however, asserts that notwithstanding these facts, GTH is not "*established in accordance with, and recognized as a juridical person by the laws of the Arab Republic of Egypt.*"[25] The sole basis for this claim is its expert's position that Egyptian law requires that an Egyptian joint stock company have its "*principal place of management*" in Egypt,[26] as opposed to its "*principal place*." As Dr. Hani Sarie-Eldin confirms, there is no requirement that an Egyptian joint stock company have its "*principal place of management*" in Egypt.[27] The law only requires that a joint stock company maintain a "*principal place*" in Egypt registered on the commercial register.[28] [redacted]

[22] **Exhibit C-397**, Global Telecom Holding S.A.E., *Current Corporate Status of Global Telecom Holding S.A.E.*, 25 May 2016, *attaching* Global Telecom Holding S.A.E. commercial register extract, 4 May 2016 (Arabic and English translation). *See also* **Exhibit HSE-005**, GTH's Commercial Register, 9 August 2018.

[23] **CWS-Dobbie-2**, ¶¶ 1, 5(a).

[24] **CER-Sarie-Eldin-2**, ¶¶ 11, 18-19.

[25] Canada's Reply, Part II.A.2.

[26] Canada's Reply, ¶¶ 33, 35, 38.

[27] **CER-Sarie-Eldin-2**, ¶¶ 12-19.

[28] **CER-Sarie-Eldin-2**, ¶ 9.

[29] *See* **CER-Sarie-Eldin-2**, ¶¶ 18-19; **Exhibit R-064**, GTH, *Global Telecom to move its place of operations to Amsterdam*, 21 September 2015, http://www.gtelecom.com/documents/10157/104020/Egypt-Amsterdam+GTH+PR.pdf; **Exhibits R-407**, GTH, *Minutes of Board of Directors Meeting*, 21 September 2015; **Exhibit MSW-030**, GTH, *Minutes of Board of Directors Meeting*, 21 September 2015.

13. GTH's address on its commercial register at the time of the filing of the Request for Arbitration (and now) was in Cairo, Egypt, and GTH is a valid Egyptian joint stock company.[30] That is an end to the matter and Canada's objection fails accordingly.[31]

I.A.2. GTH Satisfies The Definition Of An Egyptian Investor In The BIT

I.A.2.a. There Is No "*Permanent Residence*" Requirement In The BIT

14. As to Canada's prior objection to GTH's qualification as an Egyptian investor, GTH recalls that the definition in Article I(g) contains only two requirements: (*i*) the investor must be an Egyptian juridical person as a matter of Egyptian law; and (*ii*) the investor must have made an investment in Canada.[32] GTH is entitled to protection under the BIT because it is an Egyptian juridical person that invested in Canada.

15. The conclusion that GTH is an Egyptian juridical person investor is derived from the ordinary meaning of the words used in each equally authentic version of this BIT.[33] The excerpts from the three versions of the BIT are provided in the table below.

[30] **CER-Sarie-Eldin-2**, ¶ 9.

[31] **CER-Sarie-Eldin-2**, ¶ 10. Canada alleges that GTH's Egyptian commercial register extract is "*not necessarily conclusive evidence of the facts they purport to prove*." *See* Canada's Reply, ¶ 32. However, each of the authorities relied on by Canada make clear that "*certificates of nationality and other official documents*" are "prima facie *evidence of nationality*" and once the presumption of nationality is established, the burden of proof to rebut this presumption shifts to the respondent. *See* **Exhibit 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; **Exhibit RL-262**, *CEAC Holdings Limited v. Montenegro*, ICSID Case No. ARB/14/8, Award, 26 July 2016, ¶¶ 155, 157; **Exhibit RL-264**, *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the Ad Hoc Committee on the Application for Annulment of Mr. Soufraki, 5 June 2007, ¶ 63.

[32] GTH's Counter-Memorial, ¶¶ 102, 105-29.

[33] GTH's Counter-Memorial, ¶¶ 105-20.

English Text	French Text	Arabic Text
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.[34]	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.[35]	ويعني "شخص اعتباري" أي منشأة تكونت أو أنشئت وفقاً لقوانين جمهورية مصر العربية، مثل المنشآت العامة والشركات العامة والخاصة والمؤسسات والمنظمات والتي لها إقامة دائمة في إقليم جمهورية مصر العربية.[36]

16. In its latest submission, Canada persists in its effort to artificially construct an additional requirement in the BIT that GTH must have permanent residence in Egypt as a matter of fact, applying an invented test of what having permanent residence requires.[37] Without repeating GTH's prior submissions, GTH highlights the following key points.

17. **First**, the presence of the colon in both the English and French texts (and, by inference, the Arabic text[38]) introduces a non-exhaustive list of different entities that qualify as an Egyptian juridical person, and makes clear that permanent residence is not a separate requirement to qualify as an Egyptian juridical person investor. Canada agrees that the

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

[35] **Exhibit CL-002**, Agreement between the Government of Canada and the Government of the Arab Republic of Egypt for the Promotion and Protection of Investments (French version) (signed 13 November 1996; entry into force 3 November 1997) (hereinafter "**BIT (French)**"), Article I(f) (emphasis added).

[36] **Exhibit CL-003**, Agreement between the Government of Canada and the Government of the Arab Republic of Egypt for the Promotion and Protection of Investments (Arabic version) (signed 13 November 1996; entry into force 3 November 1997) (hereinafter "**BIT (Arabic)**"), Article I(g).

[37] Canada's Reply, Part II.A.3.

[38] The Arabic version of the BIT does not use the same punctuation as used in the English and French versions. It is notable, however, that one comma does appears in the Arabic text, between "*the Arab Republic of Egypt*" and "*such as*": جمهورية مصر العربية، مثل **Exhibit CL-003**, BIT (Arabic), Article I(g) (red emphasis added). In addition, punctuation may be inferred from the equally authentic English and French texts so as to reconcile the interpretation of the three versions. *See* GTH's Counter-Memorial, ¶ 113. Yet, Canada's translation of the Arabic version of the BIT omits the use of a colon (despite its appearance in both the English and French texts), replacing the colon with a comma. *See* **Exhibit R-001**, BIT (Canada's Arabic-English translation), Article I(g).

colon in Article I(g) introduces a non-exhaustive list of entities that meet the definition of "*any entity established in accordance with, and recognized as a juridical person by the laws of the Arab Republic of Egypt*."[39] Yet, Canada chooses to ignore it—attempting instead to claim that the information that **follows** that colon introduces a separate, additional condition for "*any entity*" to qualify as an Egyptian juridical person investor.

18. The dispositive grammatical rule on this issue is that a sentence **does not resume** following a colon—colons are used "*only to emphasize that the second clause* [following the colon] *illustrates or amplifies the first.*"[40] If the treaty drafters had wanted to resume the sentence after the list, there are tools that would have allowed this, such as "*em dashes*" or parentheses.[41] Instead, the drafters used a colon followed

[39] Canada's Reply, ¶ 44. *See also* GTH's Counter-Memorial, ¶ 107.

[40] *See* **Exhibit CL-208**, CHICAGO MANUAL OF STYLE *Online* (17th ed. 2017), *6.61: Use of the colon*, ¶ 6.61 ("*use a colon sparingly, however, and* **only** *to emphasize that the second clause illustrates or amplifies the first. (The colon usually conveys or reinforces the sense of 'as follows'. . .)*"); **Exhibit CL-203**, André Goosse and Maurice Grevisse, LE BON USAGE *Online* (16th ed. 2016), *§130 - Les deux points*, § 130 (« *Les deux points . . . b) Ils annoncent l'analyse, l'explication, la cause, la consequence, la synthèse de ce qui precede (c'est un moyen précieux pour suggérer certains rapports logiques)* » translated in English as "*Colons . . . b) They announce the analysis, the explanation, the cause, the consequence, the synthesis of what precedes (it is a precious means to suggest certain logical links)*"). *See also* **Exhibit CL-134**, THE CHICAGO MANUAL OF STYLE (16th ed. 2010), ¶ 6.59. As Canada's source also recognizes, where a colon is used to introduce a list, the preceding part is a "*grammatically complete sentence*." **Exhibit RL-265**, THE CHICAGO MANUAL OF STYLE (17th ed. 2017), ¶ 6.129 (describing that if the colon is used to introduce a "*run-in list*," that "[i]*f the introductory material forms a grammatically complete sentence, a colon should precede the first parenthesis*" (the parenthesis referring to the parenthesis used to mark divisions in run-in lists like "*(i)*" or "*(a)*")). *See also* GTH's Counter-Memorial, ¶¶ 107-20.

[41] **Exhibit CL-211**, CHICAGO MANUAL OF STYLE *Online* (17th ed. 2017), *6.95: Use of parentheses*, ¶ 6.95 ("*Parentheses—stronger than a comma and similar to the dash—are used to set off material from the surrounding text*" for example: "*He suspected that the nobel gases (helium, neon, etc.) could produce a similar effect*."); **Exhibit CL-209**, CHICAGO MANUAL OF STYLE *Online* (17th ed. 2017), *6.85: Em dashes instead of commas, parentheses, or colons*, ¶¶ 6.85 ("*Em dashes are used to set off an amplifying or explanatory element . . . especially when an abrupt break in thought is called for*"); **Exhibit CL-210**, CHICAGO MANUAL OF STYLE *Online* (17th ed. 2017), *6.87: Em dashes for sudden breaks or interruptions*, 6.87 ("*An em dash or a pair of em dashes may indicate a sudden break in thought or sentence structure or an interruption in dialogue*."); **Exhibit CL-204**, André Goosse and Maurice Grevisse, LE BON USAGE *Online* (16th ed. 2016), *§132 - Les parenthèses*, § 132 (« *Les parentheses . . . b) Rôles des parenthèses 1° Les parenthèses s'emploient surtout pour intercaler dans un texte une indication accessoire* » translated in English as "*Parentheses . . . b) Role of parentheses 1° Parentheses are used mainly to insert in a text an accessory indication*"); **Exhibit CL-205**, André Goosse and Maurice Grevisse, LE BON USAGE *Online* (16th ed. 2016), *§135 - Le tiret*, § 135 (« *Le tiret . . . b) Comme les parentheses . . . deux tirets servent à isoler de*

by a list divided by Oxford commas.[42] Therefore, the meaning is clear: following the colon, there can be no additional stand-alone requirement to qualify as "*any entity*" for the purposes of Article I(g).

19. In its effort to resume the sentence after the colon (and create a second requirement to qualify as "*any entity*"), Canada misinterprets its own authorities. Canada argues that each element of a list should be "*equivalent grammatical units*."[43] However, its cited source states no such requirement.[44] Attempting to overcome the grammatical difficulties of the French text, Canada provides a source for the proposition that a comma is used to show that "*the word following the comma* ***is not attached*** *to the nearest subject preceding the comma*."[45] The source in fact states that a comma "*indicates that a term* ***does not need*** *to be attached to what immediately precedes it*."[46] That is a very different proposition and unavailing in the context of the current debate because—as will be discussed further below—there can be no doubt that the phrase following the comma in the French text **is attached** to what immediately precedes it. Canada also makes much of the fact that the second to last element of the list is comprised of "'*establishment* [sic] *and organizations*.'"[47] However, this grouping is

la phrase certains éléments . . . Devant le signe qui termine la phrase (point, etc.) ou la sous-phrase (double point), le second tiret disparaît » translated in English as "*Em dash . . . b) Like parentheses . . . two em dashes are used to isolate certain elements in a sentence . . . Before the sign that ends the sentence (period, etc.) or the sub-sentence (colon), the second em dash disappears*").

[42] *See* **Exhibit CL-183**, English Oxford Living Dictionaries Online, Definition of "*Oxford comma*," https://en.oxforddictionaries.com/definition/oxford_comma (accessed 2 November 2018).

[43] Canada's Reply, ¶ 45, *citing* **Exhibit RL-265**, THE CHICAGO MANUAL OF STYLE (17th ed. 2017), ¶¶ 6.127-6.129.

[44] **Exhibit RL-265**, THE CHICAGO MANUAL OF STYLE (17th ed. 2017), ¶¶ 6.127-6.129.

[45] Canada's Reply, ¶ 55 (emphasis added), *citing* **Exhibit RL-267**, Maurice Grevisse and André Goosse, LE BON USAGE (16th ed. 2016), ¶ 126(b).

[46] **Exhibit RL-267**, Maurice Grevisse and André Goosse, LE BON USAGE (16th ed. 2016), ¶ 126(b) (emphasis added).

[47] *See* Canada's Reply, ¶ 46 (emphasis in the original).

merely reflective of the way entities are grouped in Egyptian law[48] and consistent with the structure of other lists contained in this BIT.[49]

20. On the basis of the clear grammatical rule that a sentence cannot resume following a colon, the ordinary meaning of the "*permanent residence*" phrase in the three versions of the BIT is clear:

(a) In the English version, "*, and having permanent residence*" refers to yet another example of an entity that qualifies as an Egyptian juridical person.[50]

(b) In the Arabic version, "*and which have permanent residence*" refers to the other example entities on the list. Canada's translation further confirms this by the use of the plural term "*have*."[51] If this phase referred to the noun "*any entity*," as Canada submits, it would have used the singular "*has*."

(c) In the French version, "*, having the right to permanent residence*" again must refer to the example entities on the list.[52]

[48] *See* **Exhibit HSE-002**, Egyptian Civil Code, Law No. 131 of 1948, Articles 52 (for example, referring to "[c]*ivil and commercial companies*" and "[a]*ssociations and institutions*" as units).

[49] For example, the definition of "*investment*" includes as one element of the list "*shares, stock, bonds and debentures . . .*" and the subjects listed at Article III include "*telecommunications transport networks and telecommunications transport services*." *See* **Exhibit CL-001**, BIT (English), Articles I(f), III(3)(c).

[50] **Exhibit CL-001**, BIT (English), Article I(g). *See* **Exhibit CL-207**, CHICAGO MANUAL OF STYLE *Online* (17th ed. 2017), *5.112: Gerunds*, ¶ 5.112 (describing "*Gerunds*" and the use of present participles as nouns). Canada cites awards which interpret the word "*having*" as giving rise to a separate requirement for juridical persons. *See* Canada's Reply, ¶ 48, n. 51. Even a cursory review of the language quoted by Canada from the underlying treaty illustrates that the language is different (in significant ways) from the BIT in this case. The definition neither included a colon nor was there the list of the kind included in Article I(g). *See* Canada's Reply, ¶ 48, n. 51 (quoting the underlying treaty's "*investor*" definition as "'*a legal entity incorporated, constituted or otherwise duly organized in accordance with the laws and regulations of one Contracting Party, having its seat in the territory of that Contracting Party and making investments in the territory of the other Contracting Party*'" (emphasis as provided by Canada)).

[51] *See* **Exhibit R-001**, BIT (Canada's Arabic-English translation), Article I(g).

[52] Canada refers to the presence of "*having*" in other treaties entered into by Egypt, however none of these other treaties refer to "*having the right*." In particular, Canada cites Article 1(4)(a) of the Egypt-Armenia BIT ("*corporations, firms and associations incorporated or constituted under the law in force in any part of the Arab Republic of Egypt and having their headquarters in it's* [sic] *territory*") and Article I(3)(ii) of the Egypt-Serbia BIT ("*a legal entity incorporated, constituted or otherwise duly organized in accordance with the laws and regulations of one Contracting Party, having its headquarters in the territory of that Contracting Party and making investments in the territory of the other Contracting Party*"). *See* Canada's Reply, ¶ 64, *citing* **Exhibit RL-282**, Agreement between the Government of the Arab Republic of Egypt and the Government of the Republic of Armenia for the Promotion and Protection of Investments (signed 9 January 1996; entry into force 1 March 2006); Article 1(4)(a); **Exhibit RL-283**, Agreement between the Arab Republic of Egypt

21. As noted, there are differences in the language used across the three authentic versions. Faced with these differences, the Tribunal's task is to arrive at the interpretation that best reconciles the three texts.[53] Article 33(4) of the VCLT provides:

> *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.*[54]

22. For the central question at issue—whether the "*permanent residence*" phrase can be construed as a separate, additional requirement to qualify as an Egyptian juridical person investor[55]—the only interpretation which accords with Article 33(4)'s mandate is the interpretation offered by GTH. 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.

23. **Second**, Canada rightly concedes that its reading of the BIT to add a "*permanent residence*" requirement cannot be reconciled with the French text.[56] In the French text, it refers (after the colon) to « *, ayant le droit de résidence permanente* » or "*, having*

and Serbia and Montenegro on the Reciprocal Promotion and Protection of Investments (signed 24 May 2005; entry into force 20 March 2006), Article I(3)(ii). As the Tribunal will notice, among other differences, these provisions do not contain lists, do not contain colons, and do not contain the phrase "*such as*."

53 *See* GTH's Counter-Memorial, ¶¶ 96, 99.

54 **Exhibit CL-018**, Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331 (hereinafter "**VCLT**"), Article 33(4).

55 *See* Canada's Reply, ¶¶ 42-43.

56 See Canada's Reply, ¶¶ 67-72.

the right to permanent residence."[57] This cannot be read as a separate requirement that any entity in fact has permanent residence in Egypt.[58] Yet, Canada alleges that its interpretation should be adopted because "*it is the interpretation that accords* ***with two out of the three versions of the Canada-Egypt FIPA***."[59]

24. GTH's interpretation accords with all equally authentic versions, and this is the interpretation that "*best reconciles the texts*" in accordance with Article 33(4) of the VCLT.[60] An interpretation that accords with "*two out of the three versions*" of the BIT is not sufficient, and on this basis, Canada's interpretation must fail and its *ratione personae* objection must be dismissed.

I.A.2.b. [redacted]

25. [redacted]

[57] **Exhibit CL-002**, BIT (French), Article I(f).

[58] *See* GTH's Counter-Memorial, ¶¶ 111-12, 116, 127. Canada's arguments in respect of French grammar have been addressed above. *See also supra* ¶ 19. Canada's attempt to rely on Dr. Sarie-Eldin's analysis of Egyptian law to defeat an ordinary meaning interpretation of the French text is unpersuasive given Egyptian law has no relevance in this part of the analysis and, in any event, does not disprove GTH's interpretation. *See* Canada's Reply, ¶ 54. Moreover, Canada asserts, without any support or basis in the language of the BIT, that the phrase « *ayant le droit de résidence permanente* » and the use of the word "*right*" in the French version "*can be interpreted as requiring the effective exercise of the right in question*." Canada's Reply, ¶ 69.

[59] Canada's Reply, ¶ 70 (emphasis added).

[60] **Exhibit CL-018**, VCLT, Article 33(4). *See also* **Exhibit CL-147**, *Hesham Talaat M. Al Warraq v. Republic of Indonesia*, UNCITRAL, Final Award, 21 June 2012, ¶ 72.5; **Exhibit CL-047**, *BG Group Plc. v. The Republic of Argentina*, UNCITRAL, Final Award, 24 December 2007, ¶¶ 128-34; GTH's Counter-Memorial, ¶¶ 126-28.

[61] GTH's Counter-Memorial, ¶¶ 130-50.

26. At the time of the filing of the Request for Arbitration, GTH was—and is—an Egyptian joint stock company that maintains a registered "*principal place*" in Egypt.[62] [redacted]

[redacted]

[62] *See* **CER-Sarie-Eldin**, ¶ 25; **CER-Sarie-Eldin-2**, ¶ 9.

[63] *See* **CER-Sarie-Eldin**, ¶ 24; **CER-Sarie-Eldin-2**, ¶¶ 11, 18-19, 22; **CWS-Dobbie-2**, ¶¶ 4, 5(a), 5(g), 5(i), 6; GTH's Counter-Memorial, ¶ 148.

[64] *See* **CWS-Dobbie-2**, ¶ 5(a).

[65] *See* **CER-Sarie-Eldin**, ¶ 26; **CWS-Dobbie-2**, ¶ 5(c); GTH's Counter-Memorial, ¶ 103.

[66] *See* **CER-Sarie-Eldin-2**, ¶¶ 25-32, Annex A.

[67] *See* **Exhibit HSE-015**, Minutes of GTH's Ordinary and Extraordinary General Meetings, 2016, Minutes of the Extraordinary General Assembly Meeting No. (1) of 2016, 31 March 2016, (1) "Considering amending article (38) of the statutes of the Company", p. 16.

[68] *See e.g.,* **Exhibit HSE-014**, Minutes of GTH's Extraordinary General Meetings and Minutes of GTH's Ordinary General Meetings, 2017 and 2018, Minutes of the Ordinary General Assembly Meeting No. (2) of 2018, 30 May 2018, § 1, pp. 39-40.

[69] *See* **Exhibit HSE-014**, Minutes of GTH's Extraordinary General Meetings and Minutes of GTH's Ordinary General Meetings, 2017 and 2018, Minutes of the Ordinary General Assembly Meeting No. (1) of 2017, 29 March 2017, §§ 5, 7, p. 22-23; Minutes of the Ordinary General Assembly Meeting No. (1) of 2018, 17 April 2018, §§ 4, 6, pp. 32-33.

[70] *See* **CER-Sarie-Eldin**, ¶ 25; **CER-Sarie-Eldin-2**, ¶ 11; GTH's Counter-Memorial, ¶ 147.

[redacted]

27. Canada does not contest that GTH has an office and conducts activities in Egypt. It instead maintains that the determination of whether GTH can be described as "*having permanent residence*" requires the application of a "*strongest attachment*" test.[74] This is a work of fiction. Such a test cannot be derived from the ordinary meaning of the terms "*permanent*" and "*residence*."[75] Canada appears to accept this: it defines the ordinary meaning of entities "*having permanent residence*" to mean "*entities that stay in Egypt indefinitely without change, (that is to say on a continuous basis)*."[76] Nowhere in Canada's own reading of the ordinary meaning of "*permanent residence*" does it suggest an **exclusive** permanent residence.[77]

28. The source of Canada's strongest attachment test is therefore not found in the words of the BIT, but rather an ill-placed analogy to two awards in which tribunals considered a

[71] *See* **CER-Sarie-Eldin**, ¶ 25; **CER-Sarie-Eldin-2**, ¶ 22, n. 27; GTH's Counter-Memorial, ¶ 147.

[72] *See* **CWS-Dobbie-2**, ¶ 5(d). [redacted]. *See* **CWS-Dobbie-2**, ¶ 5(e).

[73] *See* **CWS-Dobbie-2**, ¶¶ 5(b), 5(i).

[74] Canada's Reply, ¶ 74.

[75] *See* GTH's Counter-Memorial, ¶ 131.

[76] Canada's Reply, ¶ 75. Even under its own domestic law in relation to natural persons, Canada recognizes that permanent residence does not imply exclusivity. In order to maintain status as a Canadian permanent resident, there is no requirement that a natural person **only** reside in Canada. Permanent residents must live in Canada for a minimum of two years within a five year period, and therefore can spend more than 50% of her or his time living in another country. *See* **Exhibit C-452**, Immigration and Refugee Protection Act, S.C. 2001, c. 27, § 28(2)(a).

[77] At times, Canada has also referred to an alleged element of "*intent*" on the part of the entity to stay in the location indefinitely. *See, e.g.*, Canada's Reply, ¶ 80. This argument appears calculated to neuter the requirement that the test for an "*investor*" under the BIT looks to the moment the RFA was filed. The reading into "*permanent residence*" of an additional intent requirement would be well beyond the bounds of the ordinary meaning of the BIT.

requirement for "*permanent residence*" in the context of natural persons.[78] As GTH has previously explained, the circumstances addressed in those awards must be distinguished from the present case.[79] In these two cases, the critical question was whether the natural person investor could advance a claim against the State of their nationality.[80]

29. As an example, Canada misrepresents a critical element of *Binder*.[81] The parties to that dispute agreed that the natural person investor could **only be an investor of one of the relevant Contracting Parties to the underlying bilateral investment treaty** (the Czech Republic or Germany), *i.e.*, that the treaty required one exclusive nationality as between the two Contracting Parties. This has no bearing on the consideration of whether a company has "*permanent residence*" in any particular country, or indeed more than one country.[82] In this regard, Canada tellingly ignores the tribunal's finding in the very paragraph it relies upon which states that, even for natural persons and pursuant to the language used in the underlying treaty, "*the possibility of two permanent residences may not be entirely excluded according to the wording of the BIT*."[83]

[78] *See* Canada's Reply, ¶¶ 76-80, *citing* **Exhibit RL-074**, *Binder v. The Czech Republic*, UNCITRAL, Award on Jurisdiction, 6 June 2007; **Exhibit RL-078**, *Cem Cenzig Uzan v. Republic of Turkey*, SCC Case No. V 2014/023, Award on Respondent's Bifurcated Preliminary Objection, 20 April 2016.

[79] *See* GTH's Counter-Memorial, ¶¶ 137-39.

[80] *See* **Exhibit RL-074**, *Binder*, Award on Jurisdiction, ¶¶ 68-69 (describing the requirements of the Czech-German BIT and observing that the claimant is a dual Czech-German citizen bringing a claim against the Czech Republic); **Exhibit RL-078**, *Uzan*, Award on Respondent's Bifurcated Preliminary Objection, ¶¶ 139, 152 (describing that the claimant was a national of Turkey seeking to bring claims for breach of the ECT against Turkey, and considering whether the claimant could be said to be permanently residing in another State).

[81] *See* Canada's Reply, ¶ 78.

[82] *See* **Exhibit RL-074**, *Binder*, Award on Jurisdiction, ¶¶ 73-75.

[83] **Exhibit RL-074**, *Binder*, Award on Jurisdiction, ¶ 73.

30. [redacted]

31. Canada cannot credibly allege that the "[r]*equirements that an entity must meet to be validly established and recognized as a juridical person in Egypt cannot also serve as evidence of permanent residence*."[87] This does not make sense. [redacted]

32. And in the event the Tribunal looks to Egyptian law to inform its interpretation of "*having permanent residence*,"[89] the Tribunal should look to the concept of "*principal place*," which GTH satisfies.[90] Should the Tribunal refer to the principle of "*domicile*,"

[84] *See* **CWS-Dobbie-2**, ¶ 5. *See also* GTH's Counter-Memorial, ¶¶ 147-50.

[85] *See* Canada's Reply, ¶ 87.

[86] *See* **CWS-Dobbie-2**, ¶¶ 5(b), 5(f), 5(i).

[87] Canada's Reply, ¶ 81.

[88] *See supra* ¶¶ 26, 30. The requirements to be an Egyptian joint stock company are addressed above. *See supra* ¶ 11.

[89] As confirmed between the Parties, both experts agree that there is no concept of "*permanent residence*" of juridical persons under Egyptian law. *See* **CER-Sarie-Eldin**, ¶ 15 ("*Under Egyptian law, there is no express definition of what constitutes 'permanent residence.'*"); **RER-Zulficar**, ¶ 10; **RER-Zulficar-2**, ¶ 11.

[90] *See* **CER-Sarie-Eldin-2**, ¶ 34.

as Canada urges it to do,[91] [redacted]

33. As a final point on this matter, [redacted]

[91] *See* Canada's Reply, ¶ 94. As Canada agrees that the question is one of Egyptian law, it is curious that Canada cites to the definition of domicile in the *Black's Law Dictionary*. *See* Canada's Reply, ¶ 94, n. 123, *citing* **Exhibit RL-286**, BLACK'S LAW DICTIONARY (10th ed. 2014), Definition of "*domicile*."

[92] *See* **CER-Sarie-Eldin-2**, ¶ 35.

[93] *See* Canada's Reply, ¶ 88.

[94] *See* Letter from Mr. Moloo to the Tribunal, 12 November 2018, ¶¶ 6-7.

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

34. The Tribunal has jurisdiction over claims arising from Canada's breaches of the BIT arising from its treatment of GTH's Voting Control Application.[95] In its latest submission, Canada has once again failed to offer any valid reason to deviate from the BIT's clear language and its objections must be dismissed.

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

35. Article II(4) of the BIT excludes certain "*decisions*" by Canada from being the subject of dispute resolution pursuant to Article XIII.[96] It is simply not applicable to GTH's claims relating to its Voting Control Application. As set forth in GTH's Counter-Memorial, the Voting Control Application was not an "*acquisition*" as contemplated by Article II(4).[97] Canada's arguments hinge on the following flaws:

(a) Canada's highly formalistic argument about the mechanics of a share conversion ignores the reality that GTH merely sought to exercise a pre-existing right, acquired at the outset of its investment, to obtain control over Wind Mobile once the foreign ownership rules were relaxed.[98]

(b) [redacted]

[95] *See* GTH's Counter-Memorial, Part III.C.

[96] *See* GTH's Counter-Memorial, Part III.C.1.

[97] GTH's Counter-Memorial, Part III.C.1.a.

[98] *See* Canada's Reply, ¶¶ 99-100.

[99] *See* GTH's Counter-Memorial, ¶ 161, n. 302 [redacted]

(c) Canada's Reply depends on a false portrayal of GTH's position regarding national treatment.[100] GTH has made clear in its submissions that it relies foremost on Article IV(1) of the BIT for its national treatment claim, and relies on Article II(3)(a) only in the alternative.[101]

36. Moreover, a fatal defect persists in Canada's analysis of Article II(4)(b). A complete and correct analysis of Canada's favored provision, Article II(4)(b), cannot be done without considering Article II(4) as a whole.[102] Yet, Canada refuses to read Article II(4)(b) in the context of Article II(4)(a).[103] Article II(4) states, in complete part:

> *(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.*[104]

37. While there are similarities between these two clauses, it is important to appreciate the differences to give each their proper and effective interpretation. Such an interpretation requires that neither provision is rendered superfluous. Taking this approach, it becomes clear that the two clauses of Article II(4) identify two different exclusions to

[redacted].

100 *See* Canada's Reply, ¶ 106.

101 *See* GTH's Counter-Memorial, ¶ 349, n. 725.

102 GTH's Counter-Memorial, Part III.C.1.b and Table 2.

103 *See* Canada's Reply, ¶ 111.

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

dispute resolution.[105] A comparison between the these two provisions reveals the following critical differences:

(a) Article II(4)(a) refers to "*Decisions . . .* ***as to whether or not to permit***" while Article II(4)(b) refers to "*Decisions . . .* ***not to permit***." Article II(4)(a) therefore refers to **the decision-making process**, while Article II(4)(b) refers to the decisions not to permit.[106]

(b) Article II(4)(a) refers to "*Decisions . . .,* ***pursuant to measures not inconsistent with this Agreement***," thereby explicitly applying its exclusion from dispute resolution only to those decisions which **comply with the provisions of the BIT**.[107]

(c) Article II(4)(a) covers all acquisitions, whereas Article II(4)(b) only covers "*establishment of a new business enterprise or* ***acquisition of an existing business enterprise or a share of such enterprise***." In other words, under no reading could Article II(4)(b) cover an application to take of control of a business enterprise that had already been acquired.[108]

38. Thus, Article II(4)(a) establishes that the exceptions to dispute resolution **do not apply** to Canada's decision-making relating to acquisitions. Even if the Tribunal determines that GTH's Voting Control Application amounts to an "*acquisition,*" then it could only come within Article II(4)(a). The only thing that GTH was "*acquiring*" is voting control,[109] and not "*an existing business enterprise or a share of such enterprise.*"

[105] *See* GTH's Counter-Memorial, ¶¶ 171-74.

[106] *See* GTH's Counter-Memorial, ¶ 172.

[107] *See* GTH's Counter-Memorial, ¶ 173.

[108] *See* GTH's Counter-Memorial, ¶ 174.

[109] *See* **Exhibit C-009**, Investment Canada Act, R.S.C. 1985, c. 28, 1st Supp., § 25.1(b), (c) (contained in Part IV.1, entitled "*Investments Injurious to National Security*," listing separately investments "*to acquire control of a Canadian business*" and investment "*to acquire, in whole or in part, or to establish an entity carrying on all or any part of its operations in Canada*"); Canada's Reply, ¶¶ 224 (noting that "[g]*iven the fundamental differences in focus and purpose of both types of reviews, the ownership and control reviews of Wind Mobile had no relevance to the review of GTH's application to acquire voting control of Wind Mobile under the ICA.*"), 233 [redacted]

39. And even if the Tribunal were to find that the Voting Control Application comes within the ambit of Article II(4), Article II(4)(b) only covers decisions in relation to acquisitions of an existing business enterprise (or a share thereof) and not the process of arriving at such decisions.

40. Canada alleges that the purpose of Article II(4) is so broad as to allow it "*to screen foreign investments without being challenged by investors*" in Arbitration.[110] This expansive reading of the exclusions to dispute resolution has no basis in the words of Article II(4), and would deprive the BIT of meaning. Likewise, Canada is wrong to argue that Article II(4)'s exclusions must apply to all decisions reached under the *ICA*.[111] In this regard, contrary to Canada's mischaracterization, GTH has never alleged that Article II(4) does not apply to certain decisions reached pursuant to the *ICA*.[112] Rather, GTH objects to Canada's argument that **every** *ICA* process or decision must be excluded from Arbitration. GTH accepts that Article II(4)(b) exempts "[d]*ecisions 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*," including qualifying decisions made pursuant to the *ICA*.[113] [redacted] and the process by which it reached this decision falls outside of this scope.[114]

110 Canada's Reply, ¶ 96.

111 *See* Canada's Reply, ¶ 108.

112 *See* Canada's Reply, ¶ 108 (Canada claims that "[i]*t would be truly extraordinary if, as GTH claims, the dispute settlement exclusion contained in Article II(4) did not apply to 'the primary mechanism for reviewing foreign investments in Canada', as it would essentially gut the provision of any meaningful effect for Canada*").

113 *See* **Exhibit CL-001**, BIT (English), Article II(4)(b).

114 GTH's claim for national treatment is extends to the opque decision making process employed by Industry Canada. [redacted]

41. Finally, the repercussions of Canada's arguments when applied to GTH are troubling. [redacted] Yet, Canada alleges that pursuant to its reading of Article II(4)(b), and despite GTH's existing investment in the same Canadian enterprise, [redacted] even if such measures are in breach of obligations otherwise owed to GTH.

42. Canada's interpretation of the provision fails to consider its context and, at bottom, is a futile attempt to import all of the *ICA* requirements into the BIT and to rely on domestic law to avoid its international obligations.[118] Accordingly, the Tribunal should dismiss

[redacted]

[115] *See* GTH's Memorial on Merits and Damages, ¶ 10; GTH's Counter-Memorial, ¶ 6.

[116] *See* GTH's Memorial on Merits and Damages, ¶¶ 80, 93, 123, 174; GTH's Counter-Memorial, ¶ 60; **CWS-Dobbie**, ¶ 21.

[117] *See* GTH's Memorial on Merits and Damages, ¶¶ 181-82; GTH's Counter-Memorial, ¶ 60.

[118] *See* **Exhibit CL-028**, INTERNATIONAL LAW COMMISSION, *Responsibility of States for Internationally Wrongful Acts* (2001), Article 3 ("*The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.*"). *See also* GTH's Counter-Memorial, ¶ 166, n. 310, *citing* **Exhibit RL-208**, *Philip Morris Brand Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016, ¶ 476; **Exhibit RL-189**, *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007, ¶ 385; **Exhibit RL-188**, *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007, ¶ 337; **Exhibit CL-136**, *SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, 12 February 2010, ¶ 72; **Exhibit CL-091**, *Certain German Interests in Polish Upper Silesia (Germany v. Poland*), Judgment of 25 May 1926, P.C.I.J. Reports Series A, No. 7, p. 19; **Exhibit CL-142**, *CEMEX Caracas Investments B.V. and CEMEX Caracas II*

Canada's objection and conclude it has jurisdiction over GTH's claims arising from Canada's treatment of its Voting Control Application.

I.B.2. Canada Did Not Exclude The Telecommunications Sector From Its National Treatment Obligations

43. The plain language of the BIT makes clear that Canada's ability to exclude investments in services sectors from national treatment protection is simply a **right reserved to make an exclusion in the future**.[119] Canada's proposed interpretation of Article IV(2)(d) and the Annex would delete or replace words in this BIT, and transform a reserved right to make an **exclusion** into the right to adopt a new non-conforming **measure**.

44. To make its argument, Canada conflates "*measure*"—which is a defined term in the BIT—and "*exception*."[120] A cursory review of Article IV(2) evidences a distinction between sub-paragraphs (a), (b), and (c) on the one hand, and sub-paragraph (d) on the other hand. Sub-paragraphs (a), (b), and (c) all refer to "*measures*" that the Contracting Parties can make or maintain without violating the national treatment obligation in the BIT.[121] If, as Canada alleges, *"Article IV(2)(d) excludes certain future non-conforming*

Investments B.V. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/08/15, Decision on Jurisdiction, 30 December 2010, ¶ 70.

[119] *See* **Exhibit CL-001**, BIT (English), Article IV(2)(d) (national treatment protections "*do not apply to . . . (d)* ***the right*** *of each Contracting Party to make or maintain exceptions within the sectors or matters listed in the Annex to this Agreement*" (emphasis added)), Annex, ¶ 1 ("*Canada* ***reserves the right*** *to make and maintain exceptions in the sectors or matters listed below*" (emphasis added)). *See also* GTH's Counter-Memorial, Part III.C.2.

[120] *See, e.g.*, Canada's Reply, ¶ 118 ("*Article IV(2)(d) excludes certain* ***future non-conforming measures*** *by referring to the Parties' right* ***to make or maintain exceptions*** *with respect to matters or sectors listed in the Annex of the FIPA*" (emphases added)).

[121] According to Article I(h) of the BIT, "'*measure' includes any law, regulation, procedure, requirement, or practice.*" **Exhibit CL-001**, BIT (English), Article I(h).

measures,"[122] it would have said so. Instead it only permits a Contracting Party to "*make or maintain* [future] ***exceptions***" in the BIT—in the sectors or matters identified—along the lines it did in sub-paragraphs (a) to (c). The only future non-conforming measure excluded from national treatment protection is contemplated by Article IV(2)(a)(ii), which addresses "*any measure maintained or adopted after the date of entry into force of this* [BIT]" with respect to certain ownership or management restrictions a Contracting Party might impose following the disposition of the assets of a state-owned enterprise or entity.[123]

45. Further, GTH has explained in its November submission that the reservation of a right does not equate to an exercise of that right.[124] While failing to address any of the cases affirming this principle[125] (including the case on which Canada relies, *Rurelec v.*

[122] *See* Canada's Reply, ¶ 118.

[123] *See* **Exhibit CL-001**, BIT (English), Article IV(2)(a)(ii).

[124] GTH's Counter-Memorial, ¶¶ 181-85.

[125] *See* GTH's Counter-Memorial, ¶¶ 181-85, *citing* **Exhibit 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.*"); **Exhibit RL-164**, *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Excerpts of Award dated June 22, 2010 made pursuant to Rule 48(4) of the ICSID Arbitration Rules of 2006, 22 June 2010, ¶ 224 ("*To reserve a right, it has to be exercised in an explicit way.*"); **Exhibit CL-132**, *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA Case No. AA 227, Interim Award on Jurisdiction and Admissibility, 30 November 2009, ¶ 456 ("[the ECT] *rather 'reserves the right' of each Contracting Party to deny the advantages of that Part to such an entity. This imports that, to effect denial, the Contracting Party must exercise the right.*"); **Exhibit CL-155**, *Anatolie Stati, Gabriel Stati, Ascom Group SA, and Terra Raf Trans Traiding Ltd v. Kazakhstan*, SCC Case No. V 116/2010, Award, 19 December 2013, ¶ 745 (finding that a reserved right "*would only apply if a state invoked that provision to deny benefits to an investor before a dispute arose*"); **Exhibit CL-172**, *Bear Creek Mining Corporation v. Republic of Perú*, ICSID Case No. ARB/14/21, Award, 30 November 2012, ¶ 319 (refusing to import a requirement that would limit its jurisdiction where the treaty allowed Peru "*to adopt*[] *or maintain*[] *a measure that prescribes special formalities in connection with the establishment of covered investments*" but there was no evidence in the FTA or on the record that Peru had exercised this option). *See also* **Exhibit CL-200**, *Khan Resources, Inc., Khan Resources B.V., and CAUC Holding Company Ltd. v. The Government of Mongolia and MonAtom LLC*, UNCITRAL, PCA Case No. 2011-09, Decision on Jurisdiction, 25 July 2012, ¶ 429 ("*A good faith interpretation does not permit the Tribunal to choose a construction . . . that would allow host states to lure investors by ostensibly extending to them the protections of the ECT, to then deny these protections when the investor attempts to invoke them in international arbitration.*").

Bolivia[126]), Canada persists in attempting to argue that its exceptions were affirmatively "*establishe*[d]" by the language of the BIT.[127] Canada's analysis relies almost entirely on its interpretation of Canada's 2004 Model BIT.[128] This 2004 Model BIT was neither the model upon which this BIT was based (*i.e.*, the 1994 Model BIT[129]), nor does it assist Canada's case. Rather, the differences between the language of the 2004 Model BIT's national treatment exception and this BIT's provisions are telling. The 2004 Model BIT states at Article 9(2) that "*Articles 3* [the national treatment provision], *4, 6 and 7* ***shall not apply to any measure that a Party adopts or maintains*** *with respect to sectors, subsectors or activities, as set out in its schedule to Annex II.*"[130] Article IV(2)(d) of this BIT, however, states that the national treatment provision "***does 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.*"[131]

46. In order for Canada to exercise its rights affirmatively to exempt national treatment protection within certain services sectors or matters, it must do so by providing notice to investors that are subject to the BIT's protections.[132] And Article XVI of the BIT

[126] Canada has mischaracterized the decision in *Rurelec*. *See* Canada's Reply, ¶ 125. When the tribunal in *Rurelec* referred to "*activat*[ion]," this was limited to the application of a "*express prior reservation*" that "*any US investor who invests in Bolivia already knows in advance of the possibility of a denial of benefits by Bolivia – as long as the Article XII* ***requirements*** *are met*." *See* **Exhibit RL-290**, *Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia*, UNCITRAL, PCA Case No. 2011-17, Award, 31 January 2014, ¶ 373 (emphasis added). Parallels cannot be drawn to undefined future measures and to do so would eviscerate the legal certainty to which investors are entitled.

[127] *See* Canada's Reply, ¶¶ 118-23 (in particular, heading to Part II.C.2.a).

[128] *See* Canada's Reply, ¶¶ 119-22.

[129] *See* **Exhibit CL-107**, Canada Model BIT (1994).

[130] **Exhibit RL-117**, Canada's Model BIT (2004), Article 9(2) (emphasis added).

[131] **Exhibit CL-001**, BIT (English), Article IV(2)(d) (emphases added).

[132] This has been discussed in the context of "*denial of benefits*" provisions. *See* **Exhibit CL-123**, *Plama*, 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*."); **Exhibit CL-132**, *Yukos*, 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*"); **Exhibit CL-200**, *Khan Resources*, Decision on Jurisdiction, ¶ 427 (finding an obligation on respondent

provides some indication of how such notice ought to be provided. With respect to "*existing measures that do not conform to the* [national treatment] *obligations*" the Contracting Parties agreed "*within a two year period after the entry into force of this* [BIT], *exchange letters listing, to the extent possible, any existing measures that do not conform to the obligations . . .*"[133] In this case, Canada has not provided any evidence that it sought to exercise the right it had reserved under the BIT. In fact, the first time Canada has suggested that it wishes to exercise the right it reserved with respect to the "*services sector*" in the BIT's Annex is in this proceeding.[134]

47. To be sure, Canada may not exercise its right to make an exception and designate a particular measure as exempt retroactively. Tribunals have considered a State's attempt to deny treaty protection to investors in the very different context of "*denial of benefits*" provisions, which allow State Parties to deny specific investment treaty protections to investors that do not meet known, pre-defined criteria (like the existence of an "*economic connection*" or "*substantial business activities*" in the host State).[135] Denial 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. Critically, an investor can self-assess as to whether a denial of benefits clause could be applied to it and can "*act*[] *in such a way as to preclude the Respondent from being able to invoke that clause*."[136]

States to "*exercise their . . . right in time to give adequate notice to investors*"). Such provisions are, of course, distinct from the reservation of rights provisions in this case. *See infra* ¶ 47.

133 **Exhibit CL-001**, BIT (English), Article XVI(1).

134 Canada has not referenced any event, prior to the date it filed its Memorial, that could be considered a notification to investors of its intent to exclude the telecommunications sector from the national treatment protection guaranteed by the BIT.

135 *See* **Exhibit CL-202**, Lindsay Gastrell and Paul-Jean Le Cannu, *Procedural Requirements of 'Denial-of-Benefits' Clauses in Investment Treaties: A Review of Arbitral Decisions*, 30(1) ICSID REVIEW 78 (2015), p. 79.

136 **Exhibit RL-290**, *Rurelec*, Award, ¶ 375.

It is impossible to conduct a similar analysis with respect to an oracular, unarticulated reservation.

48. However, even in this significantly different context, tribunals considering denial of benefits provisions have concurred that a reservation of right must be exercised affirmatively.[137] They also confirm that the provision of such notice **cannot have retroactive effect**.[138]

49. Canada relies on *Rurelec v. Bolivia* in support of the proposition that the phrase "*reserves the right to*" allows "*a Party to deny the treaty rights when they are being claimed*."[139] Canada's reliance on *Rurelec* is misplaced. **First**, the tribunal in *Rurelec* in fact confirms that in order to retroactively exercise a reservation of rights, the right must first be sufficiently defined so that it is capable of being invoked.[140] **Second**, the *Rurelec* tribunal interpreted the denial of benefits provision, in its context, as allowing for BIT protection to be challenged retroactively because "*it is only when a dispute arises that the respondent State will be able to assess whether such requirements* [to deny benefits] *are met and decide whether it will deny the benefits of the treaty in respect of that particular dispute.*"[141] Here, it is not the investor that "*activates*" the application of the State's right to introduce a new measure. Rather, it is Canada's

[137] *See, e.g.*, **Exhibit CL-202**, Lindsay Gastrell and Paul-Jean Le Cannu, *Procedural Requirements of 'Denial-of-Benefits' Clauses in Investment Treaties: A Review of Arbitral Decisions*, 30(1) ICSID REVIEW 78, Part III.A.

[138] *See* **Exhibit RL-164**, *Liman Caspian Oil*, Excerpts of Award dated June 22, 2010 made pursuant to Rule 48(4) of the ICSID Arbitration Rules of 2006, ¶ 225 ("*notification has prospective but no retroactive effect.*"); **Exhibit CL-123**, *Plama*, Decision on Jurisdiction, ¶ 162 ("*the right's exercise should not have retrospective effect*"); **Exhibit CL-132**, *Yukos*, Interim Award on Jurisdiction and Admissibility, ¶ 458 (finding that "[r]*etrospective application of a denial of rights would be inconsistent with such promotion and protection* [of investment] *and constitute treatment at odds with those terms.*").

[139] Canada's Reply, ¶ 125.

[140] **Exhibit RL-290**, *Rurelec*, Award, ¶ 375.

[141] **Exhibit RL-290**, *Rurelec*, Award, ¶ 379.

anticipated introduction of a non-conforming measure that should trigger Canada's ability to exercise its rights. And **third**, despite the *Rurelec* tribunal's conclusion, and as noted above, numerous tribunals have concluded that the denial of benefits **cannot** apply retroactively.[142]

50. In any event, the telecommunications sector is not a "*services sector*,"[143] and thus does not come within the scope of the reservation of rights contained in the Annex to the BIT.[144] The telecommunications sector covers infrastructure, construction, and product sales, in addition to services.[145] There is simply no reason to conclude, as Canada does, that telecommunications must be categorized as a "*services sector*"[146] within the meaning of the Annex. The fact that telecommunications is classified **not** as a services sector by the Canada's own SIC classification system, but as a utility, supports this common-sense understanding.[147]

142 *See supra* n. 138.

143 *See* Canada's Reply, ¶ 123.

144 *See* GTH's Counter-Memorial, ¶¶ 186-89.

145 [redacted]

146 Or, as stated in the BIT, "*services in any other sector*." **Exhibit CL-001**, BIT (English), Annex.

147 *See* **Exhibit CL-097**, Statistics Canada, *Standard Industrial Classification* (1980), p. 174 (where the "*Telecommunication Carriers Industry*" is classified under "*Communications and Other Utilities*"). Canada criticizes GTH for relying on the SIC in its analysis, despite this being the only Canadian industry classification referenced in the Annex and Canada's prior attempt to rely instead on a separate classification procedure not referenced in the BIT. Such critique rings hollow. *See* GTH's Counter-Memorial, ¶ 187; Canada's Reply, ¶¶ 134-35.

51. Canada's reliance on the wording of its other BITs has no relevance to interpreting the language negotiated between Egypt and Canada in this BIT. However, even a review of Canada's treaty practice makes it clear that while in other BITs, Canada has chosen to explicitly exempt measures with respect to "*telecommunications services*" **in addition to** "*the establishment or acquisition in Canada of an investment in the services sectors*," it did not do so here.[148]

52. Finally, even if Canada had the unfettered ability to make or maintain future non-conforming **measures** in the telecommunications sector, which it does not, the measure in question—Canada's national security review targeting only foreign nationals—is not

[148] *See* **Exhibit CL-069**, Agreement between the Government of Canada and the Government of the United Republic of Tanzania for the Promotion and Reciprocal Protection of Investments (signed 17 May 2013; entry into force 9 December 2013), Article 16(3), Annex II. *See also* **Exhibit CL-073**, Agreement between the Government of Canada and the Government of the Republic of Benin for the Promotion and Reciprocal Protection of Investments (signed 9 January 2013; entry into force 12 May 2014), Article 18(2), Annex II(8); **Exhibit CL-078**, Agreement Between Canada and the Republic of Serbia for the Promotion and Protection of Investments (signed 1 September 2014; entry into force 27 April 2015), Article 17(3), Annex II; **Exhibit RL-118**, Agreement between Canada and the Republic of Peru for the Promotion and Protection of Investments (signed 14 November 2006; entry into force 20 June 2007; suspended 1 August 2009), Article 9(2), Annex II; **Exhibit RL-119**, Canada-Peru Free Trade Agreement (signed 29 May 2008; entry into force 1 August 2009), Articles 808(2), Annex II; **Exhibit RL-120**, Agreement between Canada and the Hashemite Kingdom of Jordan for the Promotion and Protection of Investments (signed 28 June 2009; entry into force 14 December 2009), Article 9(2), Annex II; **Exhibit RL-121**, Agreement between Canada and the State of Kuwait For The Promotion and Protection of Investments (signed 26 September 2011; entry into force 19 February 2014), Article 16(2), Annex I; **Exhibit RL-122**, Agreement between the Government of Canada and the Government of the Republic of Côte D'Ivoire for the Promotion and Protection of Investments (signed 30 November 2014; entry into force 14 December 2015), Article 16(3), Annex II; **Exhibit RL-123**, Agreement between Canada and Mali for the Promotion and Protection of Investments (signed 28 November 2014; entry into force 8 June 2016), Article 16(3), Annex II; **Exhibit RL-124**, Agreement between Canada and the Federal Republic of Senegal for the Promotion and Protection of Investments (signed 27 November 2014; entry into force 5 August 2016), Article 17(2), Annex I; **Exhibit RL-125**, Agreement between the Government of Canada and the Government of the Hong Kong Special Administrative Region of the People's Republic of China for the Promotion and Protection of Investments (signed 10 February 2016; entry into force 6 September 2016), Article 16(2), Annex II; **Exhibit RL-126**, Agreement between Canada and the Republic of Cameroon for the Promotion and Protection of Investments (signed 3 March 2014; entry into force 16 December 2016), Article 16(3), Annex II; **Exhibit RL-127**, Agreement between Canada and Mongolia for the Promotion and Protection of Investments (signed 8 September 2016; entry into force 24 February 2017), Article 16(2), Annex I; **Exhibit RL-128**, Agreement for the Promotion and Protection of Investments between Canada and the Republic of Guinea (signed 27 May 2015; entry into force 27 March 2017), Article 17(2), Annex I; **Exhibit RL-129**, Agreement between the Government of Canada and the Government of Burkina Faso for the Promotion and Protection of Investments (signed 20 April 2015; entry into force 11 October 2017), Article 17(2), Annex II; **Exhibit RL-133**, Canada-Colombia Free Trade Agreement (signed 21 November 2008; entry into force 15 August 2011), Article 809(2), Annex II; **Exhibit RL-134**, Canada-Panama Free Trade Agreement (signed 14 May 2010; entry into force 1 April 2013), Article 9.09(2), Annex II; **Exhibit RL-135**, Canada-Honduras Free Trade Agreement (signed 5 November 2013; entry into force 1 October 2014), Article 10.9(2), Annex II.

a measure targeting "*services*." Rather, it targets any foreign investment made in any sector. Accordingly, the measure in question would not come within any theoretical exception in any case.

I.C. The Tribunal Has Jurisdiction Over GTH's Claims For Cumulative Breaches Arising From Canada's Overall Pattern Of Conduct

53. GTH's claims for cumulative (or composite) breaches, including the acts forming part of those breaches, are not impacted by the three-year notification period provided in the BIT.[149] The crux of Canada's objection in relation to these claims is that certain acts underlying these breaches amount to "*separate and distinct measures*"[150] which occurred more than three years before the filing of the Request for Arbitration and, therefore, such acts should be disregarded. However, nothing in the BIT prevents this Tribunal from considering these acts as part of GTH's claims of cumulative breaches.[151] Moreover, as discussed further below, Canada confounds a simple matter by relying on case law relating to the consideration of breaches or facts that pre-date the entry into force of an underlying treaty, a fundamentally distinct circumstance to this case—there is no question that the BIT was in force during the entire duration of GTH's investment in Canada.

54. The notification period on which Canada relies states:

> *An investor may submit a dispute as referred to in paragraph (1) to arbitration in accordance with paragraph (4) only if: . . .*

[149] GTH's Counter-Memorial, Part III.D.

[150] *See* Canada's Memorial, ¶¶ 150 ("*separate and distinct measures*"), 173 ("*separate and distinct measures*"), 175 ("*distinct and separate nature*"), 176 ("*separate and distinct*"), 177 ("*must be considered separate and distinct*"), 178 ("*separate and distinct acts*"), 191 ("*separate and distinct*"); Canada's Reply, ¶¶ 138 ("*separate and distinct measures*"), 141 ("*distinct and separate measures*"), 149 ("*distinct and separate measures*"), 150 ("*distinct and separate measures*"), Part II(D)(2)(c) (heading referring to "*Distinct and Separate Measures*"), 151 ("*distinct and separate measures*").

[151] *See* **Exhibit RL-049**, *Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L., and S.C. Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, 24 September 2008, ¶¶ 156-57 ("*the critical date is the date when the dispute arose rather than the date when events and actions that may have given rise to the dispute took place. . . The Tribunal will examine alleged breaches of the BIT based on acts that preceded the entry into force of the BIT if . . . the violations are of continuing or composite character . . .* ***these issues are properly considered at the merits phase***." (emphasis added)).

> *(d) not more than three years has elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.*[152]

55. Canada does not understand this provision. Canada has committed cumulative or composite breaches of FET and FPS by a series of acts that together amount to a breach of the BIT's provisions.[153] Some of these acts or measures, when independently considered, do not amount to breaches by themselves.[154] Until the final act following the series of acts amounts to a breach, "*a wronged party cannot have knowledge of the composite breach*."[155] This concept is analogous to a jigsaw puzzle: each piece makes up an act (some larger and containing more of the image than others) but only when a sufficient number of pieces are placed together is the picture clear enough for the investor to know its rights under the BIT have been breached. As GTH has made clear, the cumulative breaches here took place no earlier than June 2013.[156] Therefore the three-year notification clause does not apply. In any event, Canada was obliged to afford GTH the protections of the BIT at those times.

[152] **Exhibit CL-001**, BIT (English), Article XIII(3)(d).

[153] *See* GTH's Memorial on Merits & Damages, Part VII.A.4; GTH's Counter-Memorial, Parts IV.A.4, IV.B.

[154] *See* GTH's Memorial on Merits & Damages, ¶¶ 361-62; GTH's Counter-Memorial, ¶¶ 193-94.

[155] GTH's Counter-Memorial, ¶ 200. GTH repeats that, in this case, the Tribunal is considering a **composite** breach by Canada, and not a **continuing** breach, concepts that Canada intentionally conflates in its latest submission (often by reference to NAFTA jurisprudence). *See, e.g.*, Canada's Memorial, ¶¶ 156-69; Canada's Reply, ¶ 146. Similarly, Canada's assertion that GTH had knowledge of the facts that underpin elements of the composite breach, when the BIT requires "***knowledge of the alleged breach***" remains specious. *See, e.g.*, Canada's Reply, ¶¶ 157-59; GTH's Counter-Memorial, ¶¶ 210-11; **Exhibit CL-001**, BIT (English), Article XIII(3)(d) (emphasis added).

[156] *See* GTH's Memorial on Merits & Damages, ¶¶ 370-71; GTH's Counter-Memorial, ¶¶ 197, 209. *See also* **Exhibit CL-196**, Christoph H. Schreuer, Loretta Malintoppi, August Reinisch & Anthony Sinclair, THE ICSID CONVENTION: A COMMENTARY (2d ed. 2009), p. 225 ("*The time of the dispute is not identical with the time of the events leading to the dispute. By definition, the incriminated acts must have occurred some time before the dispute. Therefore, the exclusion of disputes occurring before a certain date cannot be read as excluding jurisdiction over events occurring before that date. A dispute requires not only the development of the events to a degree where a difference of legal positions can become apparent but also the existence of communication between the parties that demonstrates that difference*.").

56. Given the fact that GTH does not contend that the alleged facts outside the three-year period led to a discrete breach (or multiple breaches), Canada's objection must be that claims relating to facts and events that post-date the three-year notification period fall outside the Tribunal's jurisdiction or are inadmissible.[157] Article XIII(3)(d) says nothing of this kind.

57. As explained in GTH's Counter-Memorial, Article 15 of the Articles on State Responsibility and its Commentary describe a "*composite act*" which amounts to a breach, namely "[t]*he breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful*" that "*occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act*."[158] Article 15 addresses precisely the circumstance which occurred in this case. Canada's last resort is to argue that Article 15 "*is not applicable*" to this dispute,[159] and this argument must fail.

58. **First**, contrary to Canada's allegation, Article 15 does not require that the acts forming a composite act be "*unified by a common purpose or intent*"[160] and none of Canada's

[157] *See* **Exhibit CL-201**, *ECE Projektmanagement International GmbH and Kommanditgesellschaft PANTA Achtundsechzigste Grundstücksgesellschaft mbH & Co v. The Czech Republic*, UNCITRAL, PCA Case No. 2010-5, Award, 19 September 2013, ¶ 4.743 ("*The Tribunal is of the view that in principle it is for the investor to allege and formulate its claims of breach of relevant treaty standards as it sees fit. It is not the place of the respondent State to recast those claims in a different manner of its own choosing and the Claimants' claims accordingly fall to be assessed on the basis on which they are pleaded*.").

[158] **Exhibit CL-028**, INTERNATIONAL LAW COMMISSION, *Responsibility of States for Internationally Wrongful Acts* (2001), Article 15. *See also* **Exhibit RL-233**, INTERNATIONAL LAW COMMISSION, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001), p. 63.

[159] *See* Canada's Reply, ¶ 148. *See also* **Exhibit RL-025**, *Société Générale In Respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. v. The Dominican Republic*, UNCITRAL, LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction, 19 September 2008, ¶ 91.

[160] *See* Canada's Reply, ¶¶ 148-49, 151-52. Canada formulates this alleged requirement in numerous ways alleging, for example, that GTH must show that "*the measures are interconnected and are part of a pattern of conduct unified by a common intent converging towards the same result*."

cited authorities support this proposition.[161] In fact, Canada's test has narrowed since its last submission. While in its Memorial, Canada alleged that a composite breach required **either** a showing of "*common purpose **or** represent, 'converging action towards the same result,'*"[162] Canada has revised its position to require showing "*common intent converging towards the same result*."[163] Yet, this precise context—namely the arbitrary, irrational, disproportionate nature of Canada's actions for the duration of GTH's investment which created an unstable and fundamentally unsound environment—demonstrates why "*common intent*" cannot be a necessary component of cumulative breach.[164] For the avoidance of doubt, the paragraph of *Tecmed* cited by

[161] While Professor Robert Kolb refers to discriminatory practice (which requires a showing of intent), he at no point suggests that a unifying intent is a requirement for acts to form a composite breach. *See* **Exhibit RL-325**, Robert Kolb, THE INTERNATIONAL LAW OF STATE RESPONSIBILITY: AN INTRODUCTION (2017), p. 51. While Scott Vesel posits that Article 15 refers to obligations which can only be breached through a series of measures and the 1976 version of the definition envisaged a common purpose, he recognizes the concept of a creeping violation of FET and describes its relevance, in particular in the context of alleged breaches of an investor's legitimate expectations. *See* **Exhibit RL-292**, Scott Vesel, *A 'Creeping' Violation of the Fair and Equitable Treatment Standard?*, 30(3) ARB. INT'L 553 (2014), pp. 556, 559-64. Mr. Vesel's reading of Article 15 to include a requirement of common purpose is, in any event, unsupported by the language of Article 15 and the commentary to which he cites. Moreover, each of the prior decisions upon which Canada seeks to rely in this regard reinforce that there is no common purpose or intent requirement for composite breach. *See* **Exhibit CL-031**, *Técnicas Medioambientales TECMED S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, ¶¶ 62, 68; **Exhibit RL-106**, *Sergei Paushok CJSC Golden East Company, and CJSC Vostokneftegaz Company v. The Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability, 28 April 2011, ¶¶ 491-99 (with respect to alleged acts occurring during a 2001 negotiation of an agreement, finding only that "[t]*he evidence presented by the Parties on the subject of the Negotiations cannot support a conclusion that the failure to arrive at the signing of a stability agreement in 2001 was part of a series of actions by Respondent which, taken together, would lead the Tribunal to the conclusion that there has been a breach of the Treaty on the basis of composite acts*."); **Exhibit RL-025**, *Société Générale*, Award on Preliminary Objections to Jurisdiction, ¶¶ 91-94 ("*The Tribunal accordingly concludes that to the extent that on the consideration of the merits an act is proved to have originated before the critical date but continues as such to be in existence after that date, amounting to a breach of a Treaty obligation in force at the time it occurs, it will come within the Tribunal's jurisdiction. This will also be the case if a series of acts results in the aggregate in such breach of an obligation in force at the time the accumulation culminates after the critical date*."). In 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.

[162] Canada's Memorial, ¶ 171 (emphasis added).

[163] Canada's Reply, ¶ 149, *citing* Canada's Memorial, ¶ 171. Elsewhere, Canada goes even further to allege that GTH must demonstrate such acts "*were part of a pattern of conduct targeting the Claimant*" or that the measures share "*a common intent to disadvantage the Claimant*." *See* Canada's Reply, ¶¶ 149, 153.

[164] *See* **Exhibit CL-148**, *Quasar de Valores SICAV S.A., Orgor de Valores SICAV S.A., GBI 9000 SICAV S.A., ALOS 34 S.L. v. The Russian Federation*, SCC Case No. 24/2007, Award, 20 July 2012, ¶ 45 (in the context of indirect expropriation, observing that "[i]*ndirect expropriation, of course, does not speak its name. It must*

Canada makes clear that the "*common thread*" to connect a series of acts when faced with an alleged *ratione temporis* issue is not premised on a respondent's intent.[165] Moreover, Canada continues to mischaracterize the *Rusoro* tribunal's description of the "*linkage*" element between wrongful acts leading to a cumulative breach, suggesting without basis that the tribunal's reference to "*unity*" between the acts in fact translates to "*common purpose*."[166]

be deduced from a pattern of conduct, observing its conception, implementation, and effects as such, ***even if the intention to expropriate is disavowed at every step***" (emphasis added)).

[165] *See* Canada's Reply, ¶ 149, citing Canada's Memorial, ¶ 171; **Exhibit CL-031**, *Tecmed*, Award, ¶ 62 ("*The Claimant's considerations, particularly detailed in its memorial and transcribed in paragraph 58 above, show that the Claimant, in order to determine whether there has been a violation of the Agreement, holds that the investment and the Respondent's conduct are to be considered as a process and not as an unrelated sequence of isolated events. This position of the Claimant would have two consequences. The first one is that the Respondent, prior to December 18, 1996, and through the conduct of different agencies or entities in the state structure, gradually but increasingly appears to have weakened the rights and legal position of the Claimant as an investor. Such conduct would appear to have continued after the entry into force of the Agreement, and would have resulted in the refusal to extend the authorization on November 25, 1998, which would have caused the concrete damage suffered by the Claimant as a result of such conduct. The common thread weaving together each act or omission into a single conduct attributable to the Respondent is not a subjective element or intent, but a converging action towards the same result, i.e. depriving the investor of its investment, thereby violating the Agreement. The second consequence is that, before getting to know the final result of such conduct, this conduct could not be fully recognized as a violation or detriment for the purpose of a claim under the Agreement, all the more so if, at the time a substantial part of such conduct occurred, the provisions of the Agreement could not be relied upon before an international arbitration tribunal because the Agreement was not yet in force*."). It is important to note that the *ratione temporis* issue in *Tecmed* was whether events pre-dating the entry into force of the applicable treaty could be considered a part of a composite act. The Tribunal concluded:

> *On the other hand, conduct, acts or omissions of the Respondent which, though they happened before the entry into force, may be considered a constituting part, concurrent factor or aggravating or mitigating element of conduct or acts or omissions of the Respondent which took place after such date do fall within the scope of this Arbitral Tribunal's jurisdiction. This is so, provided such conduct or acts, upon consummation or completion of their consummation after the entry into force of the Agreement constitute a breach of the Agreement, and particularly if the conduct, acts or omissions prior to December 18, 1996, could not reasonably have been fully assessed by the Claimant in their significance and effects when they took place, either because as the Agreement was not in force they could not be considered within the framework of a possible claim under its provisions or because it was not possible to assess them within the general context of conduct attributable to the Respondent in connection with the investment, the key point of which led to violations of the Agreement following its entry into force*.

Exhibit CL-031, *Tecmed*, Award, ¶ 68.

[166] Canada's Reply, ¶ 152, *citing* **Exhibit CL-016**, *Rusoro Mining Limited v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016, ¶ 229.

59. **Second**, Canada's position that a breach consisting of a composite act as defined by Article 15 applies **only** to obligations breached by a series of measures rather than single acts ("*such as obligations relating to genocide, apartheid, or crimes against humanity*") is misleading and unsupported by the ordinary meaning of that Article.[167] As one of Canada's authorities observes, "*creeping expropriation*" is an example of a "*composite breach*" as contemplated by Article 15.[168] Arbitral tribunals have similarly recognized that FET obligations may be breached by a composite act.[169]

60. The theory of composite breach addresses exactly the circumstances contemplated here. Canada is correct that GTH has not provided "*convincing reason as to why the CRTC ownership and control review or the alleged failure of the Government's measures related to roaming and tower/site sharing* ***could independently*** *be considered a breach of the* [BIT]*,*"[170] precisely because GTH does not advance either of these measures as an independent breach of the BIT. While the duplicative O&C Reviews and Canada's failure to maintain a favorable regulatory environment are acts that took place prior to

[167] Canada's Reply, ¶ 150. *See also* Canada's Reply, n. 199.

[168] **Exhibit RL-325**, Robert Kolb, THE INTERNATIONAL LAW OF STATE RESPONSIBILITY: AN INTRODUCTION (2017), p. 51. Mr. Vesel (another authority cited by Canada) states that intent on the part of the State is not a requirement to establish a "*creeping expropriation*." **Exhibit RL-292**, Scott Vesel, *A 'Creeping' Violation of the Fair and Equitable Treatment Standard?*, 30(3) ARB. INT'L 553 (2014), pp. 555, 557. Mr. Vesel's position on an alleged common purpose requirement contained in Article 15 is addressed in n. 161 above.

[169] *See* GTH's Counter-Memorial, Part IV.A.4.a, *citing* **Exhibit CL-061**, *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, ¶¶ 515-19. *See also* **Exhibit 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, ¶¶ 250-51 (finding that a FET obligation was "*seriously breached*" by the "'*roller-coaster' effect of the continuing legislative changes*" even where "*some of these changes were introduced to facilitate investments*."); **Exhibit CL-199**, *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award, Concurring and Dissenting Opinion of Judge Charles N. Brower, 21 June 2011, ¶ 3 (finding a breach FET where "*several acts that frustrated Claimant's expectations, arbitrarily disrupted the Contract's balance of benefits and obligations, and fit comfortably into a 'pattern directed at damaging AGBA.'*"); **Exhibit RL-004**, *Alpha Projecktholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award, 8 November 2010, ¶ 420 ("*The principle of fair and equitable treatment . . . means, in part, that governments must avoid arbitrarily changing the rules of the game in a manner that undermines the legitimate expectations of, or the representations made to, an investor*.").

[170] Canada's Reply, ¶ 155 (emphasis added).

June 2013, only after that date [redacted] could GTH have known that these formed part of a wider, cumulative breach of the BIT. GTH alleges that these actions form part of Canada's actions over the lifetime of GTH's investment amounting to the complete destruction of the framework upon which GTH made its investment in 2008.[171]

61. In sum, whether GTH's allegation of a composite breach is sustained is a question for the merits (and is addressed elsewhere in its pleadings[172]) not a question of jurisdiction. For jurisdictional purposes, the Tribunal only need decide that the alleged composite breach was not cognizable prior to the three-year notification period.

[171] GTH's Counter-Memorial, Part IV.A.4.b. *See also* **Exhibit C-451**, Email from Iain Stewart to Iain Stewart, 23 June 2013, pp. 2-3 (recognizing that the significant problems faced by the New Entrants by June 2013 were a consequence of the failures in the 2008 AWS Auction Framework).

[172] *See* GTH's Memorial on Merits & Damages, ¶¶ 111-265; GTH's Counter-Memorial, ¶¶ 315-33.

I.D. GTH Has Standing To Bring Claims Relating To The Treatment Of Its Investment

62. GTH has standing to bring its claims pursuant to the ordinary meaning of Article XIII of the BIT (which addresses the settlement of disputes between an investor and the host contracting state).[173] GTH, as a shareholder of Wind Mobile, has brought claims for breaches of Canada's obligations contained in the BIT, and for damage or loss incurred **by GTH** as a result of these breaches.[174] In other words, the threshold requirements of Article XIII(1), (3), and (4), have been satisfied and GTH has standing to pursue each of its claims. Nothing in the BIT—including Article XIII(12), which relates to claims for damage or loss incurred **by the enterprise incorporated in the host state**—demands a different result.

63. The relevant provisions of Article XIII provide:

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

[173] *See* GTH's Counter-Memorial, Part III.E.

[174] *See* GTH's Counter-Memorial, ¶¶ 215-21.

the Settlement of Investment Disputes between States and Nationals of other States. . .

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; and

(iv) the investor may not make a claim if more than three years have elapsed from the date on which the enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that it has incurred loss or damage.

(b) Notwithstanding subparagraph 12(a), where a disputing Contracting Party has deprived a disputing investor of control of an enterprise, the following shall not be required:

(i) a consent to arbitration by the enterprise under 12(a)(ii); and

(ii) a waiver from the enterprise under 12(a)(iii).[175]

64. Article XIII(1), (3), and (4) provide that GTH "*may*" at its election submit a dispute to arbitration if the dispute is "*relat*[ed] *to a claim by* [GTH] *that*" (*i*) "*a measure taken or not taken by* [Canada] *is in breach of this Agreement*"; **and** (*ii*) "[GTH] *has incurred loss or damage by reason of, or arising out of, that breach.*" GTH has claimed that

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

several measures taken or not taken by Canada are in breach of the BIT.[176] And GTH has claimed that it has incurred loss or damage due to these breaches.[177] Therefore, GTH has properly brought this dispute to arbitration in accordance to Article XIII(1), (3), and (4).

65. Separately, an investor "*acting on behalf of an enterprise*" "***may***" submit a dispute to arbitration pursuant to Article XIII(12) if it claims (*i*) "*that a Contracting Party is in breach of this Agreement*" **and** (*ii*) "***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***."[178] Either avenue can only be taken to the exclusion of the other.[179]

66. And either avenue requires the investor to claim that a Contracting Party's measure has breached the BIT. However, Canada is incorrect to assert that Article XIII requires

[176] *See* GTH's Memorial on Merits & Damages, Part VII; GTH's Counter-Memorial, Part IV.

[177] *See* GTH's Memorial on Merits & Damages, Part VIII; GTH's Counter-Memorial, Part V.

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

[179] *See* **Exhibit CL-001**, BIT (English), Articles XIII(3)(b) (stating that the investor must "*ha*[ve] *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*"), XIII(12)(a)(iii) (stating that "*both the investor and enterprise must waive any right to initiate or continue any other proceedings in relation to the measure that is alleged to be in breach of this Agreement before the courts or tribunals of the Contracting Party concerned or in a dispute settlement procedure of any kind*"). Tribunals have declined to find that a shareholder investor is barred from bringing a claim even in cases where the underlying enterprise retained the right to bring an independent claim. *See* **Exhibit CL-197**, *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Decision on the Application for Annulment of the Argentine Republic, 1 September 2009, ¶¶ 114-16 ("*while there may be unresolved problems in relation to the possibility of multiple proceedings, double recovery and the extent to which minority shareholders should be compensated if the local company remains a going concern, this in itself does not make the interpretation of the BIT referred to above 'ambiguous or obscure' or 'manifestly absurd or unreasonable' . . . Azurix is in the not unusual position of a foreign investor incorporating a subsidiary in the host State through which the investment is made. That investment was found by the Tribunal to have been rendered worthless by action for which the host State was found to be responsible. . . . the problems identified by Argentina appear to be hypothetical in the present case, the Committee finds that it does not need to address them.*"). *See also* **Exhibit CL-198**, *Enron Creditors Recovery Corp. and Ponderosa Assets, L.P. v. The Argentine Republic*, ICSID Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic, 30 July 2010, ¶¶ 123-24 (noting that even where there exist "*potential problems of double recovery . . . there exist*[] *pragmatic ways of dealing with them.*").

GTH to "*claim that the breach **relates to the rights or entitlements associated with its shares***."[180] In fact, as explained below, this is exactly the kind of faulty assertion that the tribunals in *GAMI*, *BG*, and others considered and rejected.[181]

67. Rather, the key distinction between the two is that one allows an investor to claim for loss or damage it has incurred itself, while the other allows an investor to claim for loss or damage to the locally-incorporated enterprise in which it has invested. Here, GTH is claiming for loss or damage it has suffered, not for damage suffered by Wind Mobile.[182] **In fact, GTH cannot invoke Article XIII(12) as it no longer owns Wind Mobile and would therefore not have standing under that article.** Article XIII(12) is therefore irrelevant, and GTH has properly invoked Article XIII(1), (3), and (4) to pursue its claims.

68. Canada's proposed interpretation of Article XIII is also in direct conflict with Article VIII of the BIT which protects "[i]*nvestments or **returns***" from unlawful

[180] Canada's Reply, ¶ 170 (emphasis added).

[181] *See* **Exhibit CL-047**, *BG Group*, Final Award, ¶¶ 190, 203 (the tribunal found BG was "*clearly*" a covered investor even though BG did not "*claim that Argentina's measures were specifically directed against its shareholding in GASA and MetroGAS. BG claim*[ed] *instead that damage to the value of its shares was caused by (or derives from) measures adopted by Argentina which had a negative impact on the activities of MetroGAS and, hence, on the value of its shareholding*"); **Exhibit RL-151**, *GAMI Investments Inc. v. The Government of The United Mexican States*, UNCITRAL, Final Award, 15 November 2004, ¶ 33 ("*The fact that a host state does not explicitly interfere with share ownership is not decisive.*"). *See also* **Exhibit CL-197**, *Azurix Corp. v. the Argentine Republic*, ICSID Case No. ARB/01/12, Decision on the Application for Annulment of the Argentine Republic, 1 September 2009, ¶¶ 94 ("*the Committee considers that there is nothing in the wording of Article I(1)(a) that would suggest that it is only Azurix's legal rights as a shareholder in ABA that are protected*"), 105 ("*the Committee considers that if ABA itself is an investment of Azurix for the purposes of the BIT, it follows that conduct towards ABA also will be characterised as conduct towards an investment of Azurix.*"); **Exhibit CL-212**, *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/14/32, Decision on Jurisdiction, 29 June 2018, ¶ 228 ("*In the jurisprudence of investment treaty tribunals, it has been held that such indirect expropriations can occur, inter alia, when host State measures, which directly affect assets of the company, substantially and permanently deprive the shareholder-investor of her investment in the shareholding in the company and effectively destroy the value of those shares. In such cases, shareholders can bring claims based on (indirect) expropriation of their shareholding in the host State.*").

[182] *See* GTH's Counter-Memorial, ¶¶ 215-28.

expropriation.[183] This provision necessarily contemplates claims made by shareholders who are no longer in control of the assets that have been expropriated. Patently, "*it would not make sense if the assets of the company in which the investor has a shareholding interest were not protected by the Treaty as well as the shares themselves*."[184]

69. GTH's interpretation of the BIT is supported by the only tribunal to consider an identical provision in another BIT,[185] and, as discussed below, each of the NAFTA authorities relied upon by Canada.[186] Yet, Canada persists in its objection, and presents

[183] **Exhibit CL-001**, BIT (English), Article VIII(1) (emphasis added). "*Returns*" are defined in the BIT to mean "*all amounts yielded by an investment and in particular, though not exclusively, includes profits, interest, capital gains, dividends, royalties, fees or other current income*." **Exhibit CL-001**, BIT (English), Article I(i).

[184] **Exhibit CL-213**, *Anglo American PLC v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/14/1, Final Award, 18 January 2019, ¶ 210.

[185] *See* GTH's Counter-Memorial, ¶¶ 225-27, *citing* **Exhibit CL-125**, *EnCana Corporation v. Republic of Ecuador*, UNCITRAL, LCIA Case UN3481, Award, 3 February 2006, ¶¶ 115-22. Canada has referred to no other authority directly addressing the treaty language in this case. Canada's contention that the tribunal in *EnCana* was "*interpret*[ing] *a different treaty*" is fanciful given that the terms of Article XIII in the BIT and in the Canada-Ecuador BIT at issue in *Encana* are near identical, and Canada is a Contracting Party to both treaties. *See* Canada's Reply, ¶ 175. Meanwhile, Canada's attempts to distinguish *EnCana* are unavailing: Canada simply repeats the nature of its standing objection and asserts that it is different from Ecuador's objection in *EnCana*. *See* Canada's Reply, ¶ 175. Yet, there is no relevant analytical difference between the argument Canada asserts and Ecuador's position in *Encana.* As stated in the decision:

> [Ecuador] *argues that the* [Canada-Ecuador] *BIT envisages a distinction between, on the one hand, claims brought by the investor in respect of damage and loss which it itself has suffered under Article XIII(1), and on the other, claims brought on behalf on an enterprise which the investor 'owns or controls directly or indirectly' under Article XIII(12) . . . According to* [Ecuador], *EnCana is not claiming in relation to its own loss but rather in relation to loss suffered by* [the subsidiary companies] . . . ***In particular, having regard to Article XIII(12)* [of the Canada-Ecuador BIT], *the parties to the* [Canada-Ecuador] *BIT could not have intended claims to be brought in respect of damage done to a subsidiary incorporated in a third State, otherwise Article XIII(12) would have been unnecessary***.

Exhibit CL-125, *EnCana*, Award, ¶ 115 (emphasis added). Similar to GTH's position in this case, Encana argued "*that there is nothing in the language of Article XIII(1) which limits it to claims for direct or independent injury. In EnCana's view Article XIII(12) does not limit the application of Article XIII(1). Rather Article XIII(12) is a special provision allowing an investor to bring proceedings on behalf of a subsidiary incorporated in the host State which has suffered loss or damage there*." *See* **Exhibit CL-125**, *Encana*, Award, ¶ 116. Any difference in the formulation of the two objections is merely semantic and Canada does not address GTH's contention, supported by the tribunal in *EnCana*, that Article XIII(12) contemplates granting jurisdiction as a supplement to the broad jurisdiction granted under Article XIII(1). *See* GTH's Counter-Memorial, ¶ 228.

[186] *See infra* ¶¶ 70-71.

in its latest submission a revised position that Article XIII(3) only allows GTH to claim for its "*direct loss*."[187] Canada alleges that the only avenue for GTH to claim for its "*indirect loss*" is Article XIII(12),[188] even though, as noted above, GTH no longer owns any part of Wind Mobile.

70. Even if GTH could still bring a claim on behalf of Wind Mobile, the legal authorities on which Canada relies do not support its case.[189] Far from it: each of these cases recognize that the questions raised by Canada in its "*standing*" objection are in reality factual issues that must be assessed on the merits.[190] Canada mischaracterizes the cases and its invocations are replete with errors. For example, Canada refers extensively to *GAMI v. Mexico* yet incorrectly summarizes the findings of the tribunal.[191] In *GAMI*, the tribunal found that it **did have jurisdiction** over a claim brought by a minority shareholder of a GAM, a Mexican company, for the diminution in value of its shares in GAM pursuant to Article 1116 of NAFTA.[192] In so finding, the tribunal rejected the observations of the United States, who sought to invoke *Barcelona Traction* as support for its proposition that Article 1116 of NAFTA covers only direct injury to an investor,

187 *See* Canada's Reply, ¶ 162.

188 *See* Canada's Reply, ¶ 163. Canada's primary citation for this proposition, the tribunal's correction and interpretation of an award in *Feldman v. Mexico*, in fact only states that pursuant to Article 1117 of NAFTA (the provision addressing damages to an enterprise), damages should be paid to that enterprise. *See* Canada's Reply, ¶ 164, n. 220, *citing* **Exhibit RL-293**, *Marvin Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Correction and Interpretation of the Award, 13 June 2003, ¶¶ 12-13.

189 *See* GTH's Counter-Memorial, ¶ 228, n. 421.

190 *See* GTH's Counter-Memorial, ¶ 228, n. 421 (and discussion therein). Canada appears to go some way to accepting that this is the case in its Reply. *See* Canada's Reply, ¶ 183.

191 *See* Canada's Reply, ¶ 164.

192 *See* **Exhibit RL-151**, *GAMI*, Final Award, ¶ 33. Article 1116 of NAFTA gives "[a]*n investor of a Party*" a right to commence an arbitration where "*the investor has incurred loss or damage by reason of, or arising out of,* [a relevant] *breach*." In contrast, Article 1117 of NAFTA gives "[a]*n investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly*" the right to commence an arbitration where "*the enterprise has incurred loss or damage by reason of, or arising out of, that breach*." *See* **Exhibit RL-101**, North American Free Trade Agreement (signed 1992; entry into force 1 January 1994), Articles 1116, 1117.

and concluded that no such "*direct*" targeting of the shareholders is required.[193] The tribunal instead relied on to *ELSI*, *Goetz*, and *Vivendi*[194] to conclude that it had "*jurisdiction with respect to **all** of GAMI's claims*."[195] The tribunal's conclusion on this issue (which Canada excerpts misleadingly[196]) was as follows:

> *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.*[197]

71. And in its Reply, Canada misstates the tribunal's conclusions on the merits. The tribunal ultimately dismissed GAMI's claims **for discrimination** on the basis that GAMI had failed to demonstrate that the measures directed at GAM, which GAMI alleged were discriminatory, arose from GAMI's involvement (*i.e.*, from GAMI's foreign status).[198] Canada somehow interprets this conclusion to stand for the expansive

193 *See* **Exhibit RL-151**, *GAMI*, Final Award, ¶¶ 29-30.

194 **Exhibit RL-151**, *GAMI*, Final Award, ¶¶ 30-32. *See also* **Exhibit 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; **Exhibit CL-193**, *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, ¶ 50 ("*it cannot be argued that CGE did not have an 'investment' in CAA from the date of the conclusion of the Concession Contract, or that it was not an 'investor' in respect of its own shareholding, whether or not it had overall control of CAA. Whatever the extent of its investment may have been, it was entitled to invoke the BIT in respect of conduct alleged to constitute a breach*"). In particular, the *GAMI* tribunal observed, "[t]*he ICJ itself accepted in* ELSI *that US shareholders of an Italian corporate entity could seise the international jurisdiction when seeking to hold Italy liable for alleged violation of a treaty by way of measures* imposed on that entity." **Exhibit RL-151**, *GAMI*, Final Award, ¶ 30.

195 **Exhibit RL-151**, *GAMI*, Final Award, ¶ 43 (emphasis added). *See also* **Exhibit CL-047**, *BG Group*, Final Award, ¶¶ 197-201 (concurring with the *GAMI* tribunal's analysis).

196 Canada's summary of the tribunal's finding states: "*The tribunal held that to have standing, the investor must show that a breach of the treaty '<u>leads with sufficient directness</u> to loss or damage in respect of a given investment.'*" Canada's Reply, ¶ 164, n. 225 (emphasis in original), *citing* **Exhibit RL-151**, *GAMI*, Final Award, ¶ 33.

197 **Exhibit RL-151**, *GAMI*, Final Award, ¶ 33.

198 *See* **Exhibit RL-151**, *GAMI*, Final Award, ¶ 115.

proposition that "[t]*he tribunal refused to consider acts taken towards GAM because, by definition, they were acts taken against the enterprise – not the claimant shareholder*."[199] That is not what the Tribunal concluded. Rather, the Tribunal found that the acts against the enterprise were not taken because of the investor's foreign status, and as such no discrimination on the basis of nationality could be established. This finding is therefore irrelevant.

72. Canada also misrepresents the conclusions in *BG Group v. Argentina*.[200] The claimant, BG, owned an indirect shareholding in an Argentinian company (MetroGAS), which owned a license for the distribution of natural gas.[201] The claims were brought under the Argentina-UK BIT.[202] Article 1(a) of the Argentina-UK BIT explains that, under that treaty, "*investment*" means:

> *. . . every kind of asset defined in accordance with the laws and regulations of the Contracting Party in whose territory the investment is made and admitted in accordance with this Agreement and in particular, though not exclusively, includes: . . .*
>
> *(ii) shares in and stock and debentures of a company and any other form of participation in a company, established in the territory of either of the Contracting Parties;*
>
> *(iii) claims to money which are directly related to a specific investment or to any performance under contract having a financial value; . . .*

[199] Canada's Reply, ¶ 164, n. 224, *citing* **Exhibit RL-151**, *GAMI*, Final Award, ¶ 115. The *GAMI* tribunal's analysis in fact considers that GAMI could have brought a successful claim breach of the minimum standard of treatment under NAFTA against Mexico for a failure to implement and enforce Mexican regulations. None of the regulations in question interfered with GAMI's right to hold shares in GAM. *See* **Exhibit RL-151**, *GAMI*, Final Award, ¶¶ 103-10. Canada additionally misconstrues the *GAMI* tribunal's analysis of the **merits** of GAMI's claim for expropriation and its analysis, which "*relates to the* substantive *determination of a breach*," without any adverse finding on whether GAMI could in fact bring a so-called derivative claim. *See* **Exhibit RL-151**, *GAMI*, Final Award, ¶ 123.

[200] Canada's Reply, ¶ 168, *citing* **Exhibit CL-047**, *BG Group*, Final Award, ¶¶ 189-90, 210, 214.

[201] **Exhibit CL-047**, *BG Group*, Final Award, ¶ 1.

[202] *See* **Exhibit RL-221**, Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the Promotion and Protection of Investments (signed on 11 December 1990; entry into force 19 February 1993).

> *(v) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources.*[203]

73. The tribunal was asked to consider two separate categories of investments: (*i*) BG's indirect shareholding in MetroGAS, relying on Article 1(a)(ii) of the Argentina-UK BIT; and (*ii*) BG's claims to performance, money, and benefits from the MetroGAS license as contemplated by Articles 1(a)(iii) and (v).[204] With respect to the first category, the tribunal found that it had jurisdiction,[205] citing the *GAMI* tribunal's analysis with approval, noting that *Barcelona Traction* was "*inapposite*,"[206] and confirming the legitimacy of what it called "*derivative shareholder claims.*"[207] In this regard, *BG Group* also affirms GTH's claims for damage caused to its investment (*i.e.*, its shareholding in Wind Mobile).[208]

74. Separately, the Tribunal found that BG did not have standing to bring claims in relation to its alleged investments pursuant to Articles 1(a)(iii) and (v) of the Argentina-UK BIT (the part of the decision upon which Canada relies).[209] That finding is irrelevant for

[203] **Exhibit RL-221**, Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the Promotion and Protection of Investments (signed on 11 December 1990; entry into force 19 February 1993), Article 1.

[204] **Exhibit CL-047**, *BG Group*, Final Award, ¶ 186.

[205] **Exhibit CL-047**, *BG Group*, Final Award, ¶¶ 205, 216.

[206] **Exhibit CL-047**, *BG Group*, Final Award, ¶ 202.

[207] **Exhibit CL-047**, *BG Group*, Final Award, ¶¶ 196, 199.

[208] *See also* **Exhibit CL-194**, *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004, ¶ 137 (finding that there is no requirement "*that there be no interposed companies between the investment and the ultimate owner of the company*."); **Exhibit CL-142**, *CEMEX*, Decision on Jurisdiction, ¶¶ 149-58; **Exhibit CL-150**, *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Jurisdiction, 19 December 2012, ¶¶ 246-50; **Exhibit CL-005**, *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction, 17 July 2003, 42 I.L.M. 788 (2003), ¶ 65 ("*Whether the protected investor is in addition a party to a concession agreement or a license agreement with the host State is immaterial for the purpose of finding jurisdiction under those treaty provisions, since there is a direct right of action of shareholders.*").

[209] Canada's Reply, ¶ 168, *citing* **Exhibit CL-047**, *BG Group*, Final Award, ¶¶ 189-90, 210, 214.

purposes of this case. Here, 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. In other words, GTH is merely claiming for the losses suffered as a result of actions taken by the government that led to a diminution of value to its shareholding. Similarly, in dismissing any claims related to BG's claims to money or contractual rights, the *BG Group* tribunal observed:

> *This finding is consistent with BG's analysis of its own alleged damages. BG's expert did not provide a valuation of damage to BG's rights in the MetroGAS License independent of the loss of value of its shareholding interest in GASA and MetroGAS. The theory, of course, is that any damage to MetroGAS will reflect on the value of BG's equity ownership in GASA and MetroGAS. This finding does not disturb the end result.*[210]

75. Yet Canada relies on the cases referenced above to support the unsustainable assertion that "*Article XIII(3) contains no language that allows an investor to bring claims for loss 'to its investment.'*"[211] This is **exactly** what Article XIII(1), (3), and (4) allow an

[210] **Exhibit CL-047**, *BG Group*, Final Award, ¶ 215.

[211] Canada's Reply, ¶ 170. Canada's discussion of *Mondev* is similarly unavailing. Whilst it is true (and completely unremarkable) that the *Mondev* tribunal distinguished between Articles 1116 and 1117 of NAFTA, the most important findings in that case for present purposes were (*i*) that the claiming investor in *Mondev* (holding an indirect interest in the project company) did have standing under Article 1116 of NAFTA and (*ii*) that the "*principal difference* [between Articles 1116 and 1117 of NAFTA] *relates to the treatment of any damages recovered*." **Exhibit RL-104**, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, ¶¶ 83-84. The same could be said of Articles XIII(1) and XIII(12) of the BIT. Canada's reliance on *Pope & Talbot* also gets it nowhere: that tribunal expressly rejected Canada's argument that claims under Articles 1116 and 1117 of NAFTA are mutually exclusive, an argument that relied on the same faulty logic as that deployed by Canada in this Arbitration. *See* **Exhibit CL-115**, *Pope & Talbot Inc v. The Government of Canada*, UNCITRAL, Award in Respect of Damages, 31 May 2002, ¶¶ 77-80, *citing* **Exhibit RL-153**, *Pope & Talbot, Inc. v. The Government of Canada*, UNCITRAL, Statement of Defence (Phase 3 – Damages), 18 August 2001, ¶ 51. Furthermore, as Canada accepts, the *Pope & Talbot* tribunal awarded damages "*for losses suffered directly by the investor*"*—i.e.*, in the same way that GTH now claims for losses it has suffered directly. *See* Canada's Reply, ¶ 167, *citing* **Exhibit CL-115**, *Pope & Talbot*, Award in Respect of Damages, ¶ 85. The same is true of the decision in *S.D. Meyers*, upon which Canada also relies. *See* Canada's Reply, ¶ 167, *citing* **Exhibit RL-232**, *S.D. Meyers, Inc. v. Government of Canada*, UNCITRAL, Second Partial Award, 21 October 2002, ¶¶ 222-28.

investor to do.[212] Furthermore, Canada has itself explained that damage should be assessed by reference to the change in value to the investment.[213]

76. Perhaps understanding the difficulty of its position, Canada attempts to discount GTH's description of its investment as a "*bundle of rights*"[214] by, once again, misinterpreting the pertinent authorities.[215] Canada's attempt to distinguish its measures into those that affected Wind Mobile's business and those that "*interfere*[d] *with GTH's investment*"

[212] As quoted above:

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

Exhibit CL-001, BIT (English), Article XIII (emphasis added).

[213] *See* Canada's Reply, ¶ 366; Canada's Memorial, ¶ 573.

[214] *See* Canada's Reply, ¶¶ 172-73; GTH's Memorial on the Merits and Damages, ¶ 386; GTH's Counter-Memorial, ¶ 219, *citing* **Exhibit RL-165**, *Koch Minerals Sàrl and Koch Nitrogen International Sàrl v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/19, Award, 30 October 2017, ¶¶ 6.56-59 ("*It is thus not permissible to slice up an overall investment into its constituent parts, like a sausage, so as to contend that one part, isolated by itself alone, is not an 'investment' whereas as an integrated part of the whole investment, it is*"); **Exhibit CL-058**, *ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award, 18 May 2010, ¶ 96; **Exhibit CL-137**, *Ioannis Kardassopoulos and Ron Fuchs v. The Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award, 3 March 2010, ¶¶ 236, 339; **Exhibit CL-117**, *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003, ¶ 17.1; **Exhibit CL-088**, *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award, 7 February 2017, ¶¶ 339, 358; **Exhibit CL-113**, *Ceskoslovenska Obchodni Banka*, Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999, ¶ 72.

[215] None of the authorities cited by Canada relate to investments that claimants claimed to constitute a "*bundle of rights*" and Canada's attempt to distinguish "*property or contractual rights*" from the rights of a shareholder are artificial. *See* Canada's Reply, ¶ 173. The tribunal in *ADC* specifically notes that the contested measures, "*effect of causing the rights of the Project Company to disappear and/or become worthless. The Claimants lost whatever rights they had in the Project and their legitimate expectations were thereby thwarted.* ***This is not a contractual claim against other parties to the Project Agreements****. An act of state brought about the end of this investment and, particularly absent compensation, the BIT has been breached*." **Exhibit CL-040**, *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award of the Tribunal, 2 October 2006, ¶ 304 (emphasis added). *See also* **Exhibit CL-195**, *Telenor Mobile Communications A.S. v. Republic of Hungary*, ICSID Case No. ARB/04/15, Award, 13 September 2006, ¶ 67 ("*The Tribunal considers that . . . the investment must be viewed as a whole and that the test the Tribunal has to apply is whether, viewed as a whole, the investment has suffered substantial erosion of value.*").

in Wind Mobile[216] is simply a continuation of its misunderstanding of how investment treaties like this BIT protect an investor's bundle of rights. Each of 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.

77. Similarly, the tribunal in *Eiser v. Spain* found that Spain had breached its FET obligations pursuant to the ECT by implementing regulatory changes which impacted the operation and revenue of solar plants owned in part by the claimants through their indirect shareholding.[217] Rejecting Spain's objection, the tribunal saw no impediment to awarding the claimants the damage caused by these breaches by reference to the diminution of value of their shareholding (a question of quantum of damage as opposed to standing).[218]

78. Canada's standing arguments are based in complete part on its misinterpretation of the BIT's provisions and not on the facts at issue. However, one factual matter bears addressing: Canada has raised a new assertion that GTH "*has no standing to make its claim regarding the Transfer Framework*" because, as a non-controlling shareholder, GTH had the ability to sell its shares in Wind Mobile, including to an Incumbent, despite the Transfer Framework.[219] **First**, this allegation is factually incorrect. As explained in detail in its prior submissions, GTH did not have the ability to sell its investment in Wind Mobile,[220] which, among other things, gave it (or any investor that

[216] Canada's Reply, ¶¶ 183-88. Specifically, Canada now argues that the 2013 Transfer Framework and the roaming and tower/site sharing measures only affected Wind Mobile's business and not GTH's investment.

[217] **Exhibit CL-089**, *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Final Award, 4 May 2017, ¶¶ 388-418.

[218] **Exhibit CL-089**, *Eiser*, Award, ¶¶ 245-49, 441.

[219] Canada's Reply, ¶ 185.

[220] GTH's Memorial on Merits & Damages, Part VII.A.2; GTH's Counter-Memorial, Part IV.A.2.

would purchase its shareholding) the right to take control of the company.[221] **Second**, in any event, this factual issue is a question for the merits, not jurisdiction.[222] And **third**, it is irrelevant because it is premised on Canada's erroneous position that the alleged measure must specifically target GTH's shares.

79. Finally, Canada's arguments once again have significant practical consequences that make them highly unattractive. In this case, Canada had invited foreign investment in its telecommunications market but at the same time imposed strict Canadian ownership and control requirements.[223] Thus, when 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. Adopting Canada's interpretation would neuter the protections granted to investors under the BIT, especially in circumstances where domestic laws make shares the only available path to making an investment.

[221] *See, e.g.*, GTH's Memorial on Merits & Damages, ¶ 174; GTH's Counter-Memorial, ¶ 22(f).

[222] *See* **Exhibit CL-213**, *Anglo American*, Final Award, ¶ 206 ("*The question of the link between the damage supposedly suffered by the investor and the protected or unprotected nature of the investment that it claims has been violated must be resolved in the merits phase.*").

[223] GTH's Memorial on Merits & Damages, Part V.C.1.a; GTH's Counter-Memorial, Part II.G.

II. REQUEST FOR RELIEF

80. On the basis of the foregoing, without limitation and reserving GTH's right to supplement these prayers for relief, GTH respectfully requests that in response to Canada's objections on jurisdiction and admissibility,[224] the Tribunal:

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

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

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

(d) **ORDER** Canada to pay all of the costs and expenses associated with Canada's objections on jurisdiction and admissibility, 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

(e) **AWARD** such other relief as the Tribunal considers appropriate.

Dated: 5 March 2019

For and on behalf of Global Telecom Holding S.A.E.

Gibson Dunn & Crutcher LLP

GIBSON, DUNN & CRUTCHER LLP

[224] GTH's Request for Relief with respect to the merits and damages are set out in GTH's Counter-Memorial. *See* GTH's Counter-Memorial, Part VI.