

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

**Global Telecom Holding S.A.E.**

**v.**

**Canada**

**(ICSID Case No. ARB/16/16)**

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**PROCEDURAL ORDER NO. 4**  
**DECISION ON THE CLAIMANT'S OBJECTIONS TO**  
**THE RESPONDENT'S CLAIMS OF PRIVILEGE**

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***Members of the Tribunal***

Prof. Georges Affaki, President of the Tribunal

Prof. Gary Born, Arbitrator

Prof. Vaughan Lowe, Arbitrator

***Secretary of the Tribunal***

Ms. Frauke Nitschke

3 November 2018

## **I. PROCEDURAL BACKGROUND**

1. On 1 June 2018, the Tribunal issued Procedural Order No. 3, which set forth the Tribunal's decision on each of the Parties' respective requests for document production. In Procedural Order No. 3, the Tribunal stated that it was "not ordering the production of any document subject to legal privilege."<sup>1</sup>
2. On 9 October 2018, the Claimant submitted a letter to the Tribunal in which it objected to certain categories of privilege claimed by the Respondent, together with Appendices A to G (the "Objections").
3. On 10 October 2018, the Respondent informed the Tribunal by email that it intended to submit a response to the Objections, pursuant to the procedure set forth in paragraph 5.3 of Procedural Order No. 1. By email of 11 October 2018, the Tribunal took note of both the Objections and the Respondent's email.
4. On 17 October 2018, the Respondent submitted an electronic copy of its response to the Objections (the "Response"). The Respondent subsequently dispatched a hard copy of the Response, together with Legal Authorities RL-243 to 255 and Exhibits R-265 to 292, to ICSID and the Members of the Tribunal. In doing so, the Respondent relied on paragraph 13 of Procedural Order No. 1, which allows seven days between the electronic and hardcopy filing of a submission. Consequently, the Members of the Tribunal received the submission only after 24 October 2018.
5. In the cover letter submitted with the Response, the Respondent informed the Tribunal that there are outstanding issues related to the Claimant's production of documents and privilege claims. The Respondent stated:

Until such time as GTH provides the requested additional details and completes its document production, Canada is not in a position to determine whether and to what extent the Claimant's privilege claims comply with the Tribunal's Procedural Order No.1 and the

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<sup>1</sup> Procedural Order No. 3, ¶ 14.

IBA Rules on the Taking of Evidence in International Arbitration [(the “IBA Rules”)] and therefore reserves its right to bring a challenge in this respect.

6. As the Respondent has not made any application to the Tribunal in respect of the Claimant’s document production, this Order does not address the matter.
7. Following receipt of the Response, the Claimant did not seek leave to submit a rejoinder in response to the Respondent’s defense of its privilege claims. Therefore, the Tribunal has proceeded with its consideration of the Parties’ submissions on this issue (briefly summarised in Section II) in light of the applicable standards (Section III). For the reasons stated in Section IV, the Tribunal issues the Decision contained in Section V.

## **II. THE PARTIES’ SUBMISSIONS**

### **A. The Objections**

8. The Claimant’s position is that the Respondent is in breach of its disclosure obligations set forth in Procedural Order No. 3 because the Respondent has withheld or redacted documents on the basis of impermissible categories of legal privilege. Specifically, the Claimant disputes four categories of privilege claimed by the Respondent: “Cabinet Confidence,” “Deliberative Process,” “Third Parties in Confidence,” and “National Security.”<sup>2</sup> The Claimant requests that the Tribunal order the production of the documents withheld by the Respondent on these bases.<sup>3</sup>
9. According to the Claimant, Article 9.2(f) of the IBA Rules,<sup>4</sup> which can essentially be relied upon only by a respondent State, must be construed and applied narrowly.<sup>5</sup> In the Claimant’s view, a respondent is not entitled to withhold documents merely because they

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<sup>2</sup> Objections, p. 2. The Claimant explains that it first communicated its concerns with the Respondent’s privilege claims to the Respondent by letter of 21 September 2018 (Objections, Appendix B). The Respondent replied on 26 September 2018, stating that it would not produce any further documents (Objections, Appendix C).

<sup>3</sup> Objections, p. 5.

<sup>4</sup> See the text at ¶ 35 below.

<sup>5</sup> Objections, p. 2, citing *Philip Morris Asia Limited v. The Commonwealth of Australia*, PCA Case No. 2012-12, Procedural Order No. 12, 14 November 2014, ¶ 4.6.

are “sensitive” under domestic law. Rather, the respondent must show that the documents have a “special” sensitivity, which is found compelling by the Tribunal.

10. The Claimant asserts that, based on the information it has, there is no indication of a compelling reason for the Respondent to withhold or redact the documents at issue, because:
  - a. Although most of the documents are more than five years old, the Respondent has not shown why they remain sensitive;
  - b. In light of the Confidentiality Order governing this proceeding, the Respondent has “fail[ed] to explain why the protection of a Confidential or even a Restricted Access designation could not resolve its concerns related to institutional confidence or national security”;
  - c. There is no basis for the Respondent’s argument that the Claimant bears the burden of showing that the documents are important to its case, especially considering that a determination on the documents’ relevance and materiality has already been made; and
  - d. The Respondent has provided examples of redacted portions of documents without explaining how such information falls within Article 9.2(f) of the IBA Rules.<sup>6</sup>
11. The Claimant also advances specific arguments relating to each of the four challenged categories of privilege, as summarised in the following paragraphs.
12. *Cabinet Confidence*: According to the Claimant, this is a principle of domestic law, which is inapplicable in this case, and the Respondent has failed to show how the documents it withheld or redacted fall within Article 9.2(f) of the IBA Rules. Indeed, the relevant documents appear to be less sensitive than documents reflecting the actual deliberations of cabinet members. The Claimant asserts that the content of these documents relates directly to aspects of its claim.<sup>7</sup>

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<sup>6</sup> Objections, p. 3.

<sup>7</sup> Objections, p. 4.

13. *Canadian Radio-television and Telecommunications Commission (“CRTC”) Deliberative Process Privilege*: The Claimant states that the documents withheld or redacted on this basis “appear to be memoranda, notes, and presentations relating to legislative amendments to the Telecommunications Act dating from approximately 3-5 years ago.”<sup>8</sup> In the Claimant’s view, the Respondent has failed to show that this information is compellingly sensitive and cannot be protected under the Confidentiality Order.<sup>9</sup>
14. *Third Parties in Confidence*: The Claimant states that “[t]here is no basis under the IBA Rules to redact for third parties’ confidential information, and particularly in this case where there is a confidentiality order in place.”<sup>10</sup>
15. *National Security*: The Claimant argues that the Respondent has failed to support its position that it may withhold documents by merely invoking national security. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

**B. The Response**

16. The Respondent requests that the Tribunal reject the Claimant’s challenge to the Respondent’s privilege claims.<sup>12</sup> According to the Respondent, the Objections “are based on a mischaracterization of both the applicable legal standard and Canada’s approach to asserting privilege.”<sup>13</sup>
17. The Respondent’s position is that its privilege claims fall well within Article 9.2(f) of the IBA Rules. For the Respondent, this provision “reflects the commonly accepted principle

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<sup>8</sup> Objections, p. 4.

<sup>9</sup> Objections, pp. 4-5.

<sup>10</sup> Objections, p. 5.

<sup>11</sup> Objections, p. 5.

<sup>12</sup> Response, ¶ 66.

<sup>13</sup> Response, ¶ 3.

in international arbitration that the confidentiality of certain particularly sensitive documents related to decisions made by governments must be maintained and that their production may be resisted.”<sup>14</sup> The Respondent rejects the Claimant’s assertion that Article 9.2(f) must be read narrowly. Rather, as noted by the Tribunal in *Bilcon v. Canada*, the correct approach when deciding whether certain information can be withheld is to balance the public interest in protecting the information against the importance of the information for the claimant’s case.<sup>15</sup>

18. The Respondent explains that its counsel has therefore “aimed to disclose the maximum amount of information possible while protecting the institutional sensitivity at issue.”<sup>16</sup> For each document, counsel considered whether to withhold information in light of the following five factors:

1) the Claimant’s interest in the disclosure of the information to advance its case as set out in its pleadings including the Claimant’s Memorial on Merits and Damages; 2) the importance of the particular institutional sensitivity at issue as reflected in the statutory protection accorded under Canadian law; 3) the disclosure or availability of non-privileged evidence with related content; 4) the provisions of the Tribunal’s Confidentiality Order, particularly those concerning confidential and restricted access designations; and 5) the length of time since the creation of the document or transmittal of the communication.<sup>17</sup>

19. The Respondent contends that it has not improperly relied on its domestic law in asserting privilege, as alleged by the Claimant. In the Respondent’s view, its domestic laws are helpful in providing evidence of the sensitivity of certain documents and to explain the Respondent’s claims of privilege under Article 9.2(f) of the IBA Rules.<sup>18</sup>

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<sup>14</sup> Response, ¶ 4, citing **RL-243**, Nathan D. O’Malley, *Rules of Evidence in International Arbitration, an annotated guide* (Informa, London, 2012), ¶ 9.92.

<sup>15</sup> Response, ¶ 6, citing **RL-244**, *Bilcon of Delaware et. al. v. The Government of Canada* (UNCITRAL) Procedural Order No. 13, 11 July 2012, ¶¶ 22-26.

<sup>16</sup> Response, ¶ 7.

<sup>17</sup> Response, ¶ 6.

<sup>18</sup> Response, ¶¶ 8-10.

20. The Respondent then proceeds to explain each of the six categories of privilege it has asserted under Article 9.2(f) of the IBA Rules, as summarised in the following paragraphs.
21. *Confidences of the Queen’s Privy Council for Canada*: The Respondent seeks to withhold “Cabinet confidences” on the basis of their political and institutional sensitivity.<sup>19</sup> In the Respondent’s view, “the importance of safeguarding the confidentiality of deliberative and decision-making documents of governments is well settled in international investment law.”<sup>20</sup> Cabinet deliberations, in particular, must be kept secret in support of free and frank discussions among Ministers and their “collective responsibility.” Thus, Respondent argues that tribunals have consistently held that such information falls within Article 9.2(f) of the IBA Rules.<sup>21</sup>
22. In response to the Claimant’s arguments, the Respondent contends that the Claimant has mischaracterized the type of documents withheld under this category.<sup>22</sup> Further, the Respondent rejects the Claimant’s view that only documents recording actual deliberations of the Cabinet may be withheld; rather, in its view, “certain types of information that surround and feed into the Cabinet decision-making process or prepare a Minister in relation to that process must also be protected.”<sup>23</sup> Finally, the Respondent does not accept that the age of the document is a reason for disclosure.

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<sup>19</sup> Response, ¶ 12.

<sup>20</sup> Response, ¶ 11, citing **RL-248**, *Glamis Gold, Ltd. v. United States of America* (UNCITRAL) Decision on Parties’ Requests for Production of Documents Withheld on the Grounds of Privilege, 17 November 2005, ¶ 36.

<sup>21</sup> Response, ¶ 14, citing **RL-249**, *Merrill & Ring Forestry L.P. v. The Government of Canada* (UNCITRAL) Decision of the Tribunal on Production of Documents, 18 July 2008, ¶¶ 16-18; **RL-250**, *United Parcel Service of America Inc. v. Government of Canada* (UNCITRAL) Decision of the Tribunal Relating to Canada’s Claim of Cabinet Privilege, 8 October 2004, ¶ 11; **RL-251**, *Vito G. Gallo v. The Government of Canada* (UNCITRAL) Procedural Order No. 3, 8 April 2009, ¶ 54; **RL-244**, *Bilcon of Delaware et. al. v. The Government of Canada* (UNCITRAL) Procedural Order No. 13, 11 July 2012, ¶¶ 22-26.

<sup>22</sup> The Respondent states that it has withheld the following types of information: “memoranda and briefing material the purpose of which is to present proposals or recommendations to Cabinet; agenda of Cabinet, minutes and records of decisions of Cabinet; documents that consist of or reflect communications or discussions between ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy; departmental briefing notes and communications between civil servants concerning material or matters to be discussed or proposed to be discussed at Cabinet; and draft legislation” (Response, ¶ 16).

<sup>23</sup> Response, ¶ 17.

23. The Respondent's final point regarding Cabinet confidences is that many documents withheld under this category are also privileged as attorney-client communications under Article 9.2(b) of the IBA Rules or national security information under Article 9.2(f).<sup>24</sup>
24. *National Security*: The Respondent has withheld or redacted a number of documents on the basis that disclosure of the information would be injurious to Canada's national security. The Respondent asserts that there are many different reasons that disclosure of certain information might threaten national security and provides several examples. According to the Respondent, such information is particularly sensitive and deserving of protection. This ground for secrecy is recognized in the domestic legislation of Canada and many other States, and it has been upheld repeatedly by international tribunals.<sup>25</sup>
25. The Respondent describes the process by which it identified information subject to privilege on the ground of national security, and asserts that it has "acted in good faith and undertaken due diligence," seeking to disclose as much information as possible.<sup>26</sup> In the Respondent's view, its agencies are best placed to determine what information touches on national security; the Tribunal must not second guess the Government's opinion on the matter.<sup>27</sup>
26. In response to the Objections, the Respondent also makes the following arguments:
- a. In weighing the Claimant's interest in disclosure against the risk to national security, it should be noted that "information in this arbitration relates to purely economic interests that are by their very nature less fundamental" than interests such as human rights.<sup>28</sup>

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<sup>24</sup> Response, ¶ 21.

<sup>25</sup> Response, ¶ 24.

<sup>26</sup> Response, ¶ 30.

<sup>27</sup> Response, ¶ 32.

<sup>28</sup> Response, ¶ 33.

- b. Disclosure of the information that the Respondent has withheld is unlikely to advance the Claimant’s case. Thus, the Claimant’s request for an adverse inference is “premature, unjustified in the circumstances and must be rejected.”<sup>29</sup>
  - c. Considering the limited scope of the information withheld, there is no interference with the Claimant’s right to a fair trial.
  - d. The Claimant’s arguments concerning the lack of details provided by the Respondent for its national security privilege claims are misplaced. The Respondent is unable to provide further details, as that would allow inferences to be made about the privileged material, thereby threatening national security.<sup>30</sup>
27. *Confidential Deliberations of the CRTC Commissioners*: The Respondent has claimed privilege over document that “directly relate to the decision making process by the [CRTC] Commissioners.”<sup>31</sup> According to the Respondent, the CRTC is an administrative tribunal, which performs an adjudicative function. Therefore, information reflecting the confidential deliberations of the CRTC Commissioners is subject to deliberative secrecy and must be withheld.<sup>32</sup> The Respondent’s position is summarised as follows:
- There is a compelling institutional sensitivity related to the independence of the CRTC and its ability to discharge its mandate that warrants non-production of the documents over which Canada has claimed privilege. Producing these documents would have the same chilling effects that courts have consistently warned against. The disclosure of the confidential deliberations of the CRTC Commissioners would compromise their decision-making process on matters falling with the CRTC’s mandate.<sup>33</sup>
28. *Communication Submitted by Third Parties to the CRTC in confidence pursuant to s. 39 of the Telecommunications Act*: The Respondent has claimed privilege with respect to commercially sensitive information submitted by third parties in confidence to the CRTC.

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<sup>29</sup> Response, ¶ 34.

<sup>30</sup> Response, ¶ 36.

<sup>31</sup> Response, ¶ 44.

<sup>32</sup> Response, ¶¶ 37-44.

<sup>33</sup> Response, ¶ 45.

In the Respondent's view, "disclosure of this information risks harming the financial position of these enterprises, and may inhibit or discourage third parties from providing information to the CRTC that it requires to discharge its mandate."<sup>34</sup> For this reason, the Canadian Telecommunications Act prohibits disclosure of this confidential information, except in very limited circumstances.<sup>35</sup> Further, the Respondent contends that the Claimant has failed to show how the confidential information in the CTRC's possession is material to its claim.

29. The Respondent notes that it considered the Confidentiality Order when considering whether to disclose this information. However, in light of the considerations above, it determined that the interest in non-disclosure outweighs the Claimant's interest in disclosure.<sup>36</sup>
30. *Confidential Information in the Possession of the Competition Bureau*: The Respondent has also claimed privilege with respect to "highly sensitive third party confidential information collected by the Competition Bureau in the context of its work reviewing mergers and acquisitions."<sup>37</sup> The Respondent points out that such information is protected from disclosure under the Canadian Competition Act.<sup>38</sup> It argues that this information also falls within Article 9.29(f) of the IBA Rules because of the "institutional sensitivity related to the Bureau's ability to carry out its core mandate,"<sup>39</sup> as disclosure would discourage third parties from providing this important information to the Bureau in the future. In addition, the Respondent asserts that the Claimant has failed to show how the information withheld is material to its claim.
31. Again, the Respondent notes that it has considered the Confidentiality Order, but that the interest in non-disclosure still outweighs any competing interest.

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<sup>34</sup> Response, ¶ 50.

<sup>35</sup> Response, ¶ 49, citing **C-046**, *Telecommunications Act*, s. 39.

<sup>36</sup> Response, ¶ 53.

<sup>37</sup> Response, ¶ 55.

<sup>38</sup> Response, ¶¶ 57-58, citing **R-106**, *Competition Act*, R.S.C. 1985, c. C-34, s. 29.

<sup>39</sup> Response, ¶ 61.

32. *Information Obtained by Government Officials with Respect to a Third Party in the Course of the Administration or Enforcement of the Investment Canada Act*: The Respondent has withheld three documents and redacted two others which “contained information obtained by government officials with respect to a third party in the course of the administration or enforcement of the Investment Canada Act.”<sup>40</sup> The Respondent argues that the release of such information is prohibited under Canadian law and raises a “significant systemic sensitivity.”<sup>41</sup> Because the Respondent considers this information immaterial to the Claimant’s case, it has determined that the interest in non-disclosure outweighs any potential benefit to the Claimant.

### **III. APPLICABLE STANDARDS**

33. This arbitration is governed by (a) the ICSID Convention, (b) the ICSID Arbitration Rules, and (c) the Tribunal’s procedural orders.
34. The Parties agreed to a procedure for the production of documents in Section 15 of Procedural Order No. 1. In addition, Section 1.4 of Procedural Order No. 1 states as follows:

The Tribunal may seek guidance from, but shall not be bound by, the 2010 IBA Rules on the Taking of Evidence in International Arbitration, in particular with respect to:

[...]

(d) The admissibility and assessment of evidence (Article 9 of the IBA Rules).

35. Thus, in considering the Objections, the Tribunal has referred, where appropriate, to Article 9.2 of the IBA Rules. In particular, the Tribunal has assessed the Respondent’s privilege claims in light of Article 9.2(f), which provides:

The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any Document,

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<sup>40</sup> Response, ¶ 64.

<sup>41</sup> Response, ¶¶ 64-65.

statement, oral testimony or inspection for any of the following reasons:

[...]

(f) grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution) that the Arbitral Tribunal determines to be compelling...

#### **IV. ANALYSIS**

36. The Tribunal notes at the outset that, as stated in footnote 4 of the Objections, the Claimant does not dispute the Respondent's claim for solicitor-client privilege at this time.<sup>42</sup> The Tribunal also notes that, as mentioned above, the Respondent's reference to the Claimant's failure to fully comply with its document production obligations<sup>43</sup> has been made merely by way of reservation, without asking the Tribunal to decide anything at this stage. The Tribunal therefore does not take any decision on those matters.
37. The Tribunal has reviewed and reached a decision on the six categories of privilege claimed by the Respondent pursuant to Article 9.2(f) of the IBA Rules, namely: 1. Cabinet confidences, 2. National security, 3. Deliberative process (CRTC), 4. Third parties in confidence (CRTC), 5. Confidential information in the possession of the Competition Bureau (Competition Act), and 6. Information obtained by the Government in relation to the enforcement of the Investment Canada Act (ICA).
38. In reviewing the Response, the Tribunal found no evidence of bad faith in terms of a selective assertion of privilege or otherwise. The Tribunal notes that the Respondent has exhibited a number of government memoranda in support of its Counter-Memorial, and has stated in the Response that it produced more than 200 additional memoranda, many without redaction.<sup>44</sup> Moreover, the Tribunal is given no reason to believe that the Respondent has acted contrary to its assertion that it balanced its public interest in

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<sup>42</sup> Objections, n. 4.

<sup>43</sup> Cover Letter to the Response, pp. 1-2.

<sup>44</sup> Response, ¶ 16.

protecting the information with the Claimant's need of the information to advance its case.<sup>45</sup>

39. The Tribunal also agrees with the Respondent that Article 9.2(f) of the IBA Rules is predicated to a certain extent on domestic law directing the classification of evidence as a secret by a government. In the Tribunal's opinion, the degree of political or institutional sensitivity must be measured to a certain extent by reference to domestic law.
40. Reviewing in turn the Claimant's objections and the Respondent's defenses, the Tribunal decides as follows:
41. *Cabinet Confidences*: The Tribunal does not consider that any deliberative and decision-making documents of governments fall automatically within the scope of Article 9.2(f) of the IBA Rules. That said, the Tribunal has been given no evidence of a blanket refusal by the Respondent on this ground. In particular, the Tribunal notes the following relevant points:
  - a. The five-year limitation period alleged by the Claimant is not persuasive. A government document may remain politically sensitive several years after it is issued depending on its nature and the public interest that it seeks to protect.
  - b. The Respondent asserts that many documents falling within the scope of Cabinet Confidence privilege are also solicitor-client-privileged.<sup>46</sup> This privilege ground is not contested by the Claimant and the Tribunal accepts it.
  - c. The Claimant's assertion that Ministers' briefing reports or government staff emails are unmeritorious of Cabinet Confidence privilege is not persuasive.<sup>47</sup> The Tribunal accepts that, depending on their terms and the public interest that they seek to protect, those documents may directly or indirectly relate to Article 9.2(f) of the IBA Rules situations and merit protection as such.

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<sup>45</sup> Response, ¶¶ 6, 15.

<sup>46</sup> Response, ¶ 21.

<sup>47</sup> Objections, p. 4.

42. In view of the above, the Tribunal orders the Respondent to review all responsive documents that it has withheld or redacted on this ground of privilege and to ensure that its privilege log (a) includes all redacted documents as well as those withheld in full, and (b) for those documents withheld in full, states that the asserted privilege cannot be adequately safeguarded through redaction(s).
43. *National Security*: In deciding on this matter, the Tribunal notes that the Respondent's assertion of national security privilege is not a case of a blanket refusal, as evidenced by its production of 235 documents responsive to [REDACTED] [REDACTED] which excludes bad faith. The Tribunal also notes that, of those documents, the Respondent redacted 128 and withheld a further 27 on national security grounds, asserting Article 9.2(f) of the IBA Rules for each instance of withheld information. The Respondent explains in great detail how it determined that the release of each withheld information "would" (not "could") be injurious to its national security.<sup>49</sup>
44. The Tribunal considers that the age of a document alone does not cure national security concerns; nor has the Claimant provided any persuasive reasoning or compelling authority to show why the passing of time sets aside any national security interest.
45. In view of the above, the Tribunal orders the Respondent to review all responsive documents that it has withheld or redacted on this ground of privilege and to ensure that its privilege log (a) includes all redacted documents as well as those withheld in full, and (b) for those documents withheld in full, states that the asserted privilege cannot be adequately safeguarded through redaction(s).
46. *Deliberative Process (CRTC)*: The Respondent has asserted this category of privilege under Article 9.2(f) of the IBA Rules as a basis for redacting the document contained in Appendix E to the Objections and for withholding additional documents listed in its privilege log. The Claimant argues that CRTC deliberative process privilege is one of

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<sup>48</sup> Response, n. 18.

<sup>49</sup> Response, ¶ 32.

national law and that the Respondent has not provided evidence that the information is sensitive or reasons to justify withholding it.

47. The Respondent submits, without being challenged, that CRTC is a tribunal and performs an adjudicative function.<sup>50</sup> Moreover, the Respondent underscores that it is claiming the deliberative process privilege only in relation to the CRTC Commissioners' deliberation to render an adjudicatory decision, not in relation to the secretariat and staff who are not involved in the decision-making process.
48. In view of the above, the Tribunal orders the Respondent to review all responsive documents that it has withheld or redacted on this ground of privilege and to ensure that its privilege log (a) includes all redacted documents as well as those withheld in full, and (b) for those documents withheld in full, states that the asserted privilege cannot be adequately safeguarded through redaction(s).
49. *Third Parties in Confidence (CRTC)*: The Claimant summarily dismisses the Respondent's assertion of privilege on the ground of Article 9.2(f) of the IBA Rules as concerns information submitted in confidence by third party to the CRTC. In doing so, the Claimant only refers to that privilege as being one of domestic law. After considering the Claimant's argument, the Tribunal concludes that it cannot exclude a privilege claim merely because it rests on grounds of domestic law. Depending on the facts and the circumstances of the case, some of those privileges merit recognition by international tribunals. Legal privilege is one; so is the case of privileged communication between regulators and the regulated entities in regulated sectors.
50. The Tribunal is not convinced by the Respondent's argument that the Claimant fails to evidence that the confidential information in the possession of CRTC is material to its claim.<sup>51</sup> The Claimant is not required to do so, given that the Tribunal has previously ordered the production of responsive documents. Rather, the Tribunal upholds the Respondent's defense on the ground that s.39 of the Telecommunications Act allows a

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<sup>50</sup> Response, ¶¶ 40-41.

<sup>51</sup> Response, ¶ 52.

person to submit to CRTC information that it can designate as being confidential, and assures that person that such information shall not be disclosed.<sup>52</sup> Legitimate expectations of third parties merit protection outside extraordinary circumstances that might compel to ignorance. No such circumstances have been evidenced to the Tribunal.

51. In view of the above, the Tribunal orders the Respondent to review all responsive documents that it has withheld or redacted on this ground of privilege and to ensure that its privilege log (a) includes all redacted documents as well as those withheld in full; (b) asserts expressly that each of those documents, or portions thereof, are privileged because they specifically fall under s.39(1)(a), (b) or (c) of the Telecommunications Act, as may be the case for each instance of withheld information, and thus fall under Article 9.2(f) and/or Article 9.2(b) of the IBA Rules; and (c) for those documents withheld in full, states that the asserted privilege cannot be adequately safeguarded through redaction(s).
52. *Confidential information in the possession of the Competition Bureau (Competition Act):* The same argument advanced by the Respondent to protect information collected in confidence by CRTC is likewise advanced to protect information held by the Competition Bureau in similar circumstances. The Claimant did not include in its Objections a specific challenge to the Competition Act protection of confidential information.
53. Therefore, the Tribunal notes the Respondent's production of a significant number of responsive documents pursuant to the Tribunal's Procedural Order No. 3 in relation to document request 15, and upholds the defense that the Respondent advances under the Competition Act for the same reasons that it upheld the Respondent's defense in relation to the Telecommunications Act.
54. *Information obtained by the Government in relation to the enforcement of the Investment Canada Act:* The Claimant also did not include in its Objections a specific challenge to this ground of privilege.

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<sup>52</sup> C-046, *Telecommunications Act*, s. 39(2).

55. However, the Tribunal notes that, contrary to the situation under the Telecommunications Act, s.36 ICA does not relate to protecting the legitimate expectation of persons which have labeled the information that they transmitted to the Ministry of Innovation as “confidential” in reliance on the statute. The Tribunal also notes that s.36 does not fall under Part IV.1 of ICA, which deals with National Security. Rather, it falls under Part VI, General Regulation. Moreover, s.36 ICA provides for a long list of exceptions allowing the Minister to disclose the information, including, in 3.1, to an “investigative body” for “that body’s lawful investigation.” Furthermore, contrary to its arguments in relation to its other claims for privilege listed above, the Respondent only refers to unparticularized potential hinderance to cooperative disclosure by foreign investors.<sup>53</sup>
56. In view of the above, the Tribunal recalls Procedural Order No. 3 and affirms its order for the Respondent to produce responsive documents.

## **V. DECISION**

57. For the foregoing reasons, the Tribunal holds as follows:
- a. In relation to all responsive documents falling within the six categories listed above, the Tribunal confirms that if the Respondent, in conducting its review of withheld and redacted documents, finds any documents that do not fall within Article 9.2(b) or 9.2(f) of the IBA Rules in light of the Tribunal’s guidance above, those documents must be produced by Monday, 12 November 2018.
  - b. Step M of the Procedural Timetable remains unchanged, except that the Claimant is granted leave to apply for an amendment to its Reply on the Merits should the Respondent’s production of responsive documents after the filing of the Reply on the Merits occasion the need for changes.

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<sup>53</sup> Response, ¶ 64.

For and on behalf of the Tribunal,

[signed]

Prof. Georges Affaki  
President of the Tribunal  
Date: 3 November 2018