

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

GLOBAL TELECOM HOLDING S.A.E.

and

CANADA

**ICSID Case No. ARB/16/16
Annulment Proceedings**

DECISION ON ANNULMENT

Members of the *ad hoc* Committee

Prof. Mónica Pinto, President

Prof. Lawrence Boo

Ms. Dyalá Jiménez

Secretary of the *ad hoc* Committee

Ms. Aurélia Antonietti

Date of dispatch to the Parties: September 30, 2022

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TABLE OF SELECTED ABBREVIATIONS

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| Applications | Applications for Annulment filed by Canada and GTH on July 27, 2020 |
| Arbitration Rules | ICSID Rules of Procedure for Arbitration Proceedings 2006 |
| Award | <i>Global Telecom Holding S.A.E. v Canada</i> , ICSID Case No. ARB/16/16, Award, March 27, 2020 |
| BIT or FIPA | Agreement between Canada and the Arab Republic of Egypt for the Promotion and Protection of Investments, which entered into force on March 11, 1998 (also called Foreign Investment Promotion and Protection Agreement) |
| C-[#] | GTH's Exhibit |
| CL-[#] | GTH's Legal Authority |
| CD-[#] | Claimant's demonstrative exhibit |
| Canada's Application | Application for Annulment filed by Canada on July 27, 2020 |
| Canada's Memorial on Partial Annulment | Canada's Memorial dated March 8, 2021 |
| Canada's Counter-Memorial on Partial Annulment | Canada's Counter-Memorial dated July 6, 2021 |
| Canada's Reply on Partial Annulment | Canada's Reply dated September 27, 2021 |
| Canada's Rejoinder on Partial Annulment | Canada's Rejoinder dated December 17, 2021 |
| CRTC | Canadian Radio-Television and Telecommunications Commission |
| Committee | Prof. Mónica Pinto, Prof. Lawrence Boo and Ms. Dyalá Jiménez |
| GCHO | Globalive Communications Holdings Ontario Inc. |
| GiC | Governor in Council |

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|---|---|
| GTH | Global Telecom Holding S.A.E. |
| GTHCL | Global Telecom Holding Canada Limited |
| GTH's Application | Application for Annulment filed by GTH on July 27, 2020 |
| GTH's Memorial on Partial Annulment | GTH's Memorial dated March 8, 2021 |
| GTH's Counter-Memorial on Partial Annulment | GTH's Counter-Memorial dated July 6, 2021 |
| GTH's Reply on Partial Annulment | GTH's Reply dated September 27, 2021 |
| GTH's Rejoinder on Partial Annulment | GTH's Rejoinder dated December 17, 2021 |
| Hearing | Hearing on Annulment held on February 7 and 8, 2022 |
| ICSID Convention | Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated March 18, 1965 |
| ICSID or the Centre | International Centre for Settlement of Investment Disputes |
| ICA | Industry Canada |
| ICA Act | Investment Canada Act |
| Mojo | Mojo Investments Corp. |
| O&C Rules | Ownership & Control Rules |
| R-[#] | Canada's Exhibit |
| RL-[#] | Canada's Legal Authority |
| RD-[#] | Respondent's demonstrative exhibit |
| Tr. Day [#] [page:line] | Transcript of the Hearing |
| Tribunal | Arbitral Tribunal in the underlying Arbitration, composed of Prof. Georges Affaki, Prof. Gary Born and Prof. Vaughan Lowe |

| | |
|---------------------|----------------------------|
| VimpelCom | VimpelCom Ltd. |
| Weather Investments | Weather Investments S.p.A. |

I. INTRODUCTION AND PARTIES

1. On July 27, 2020, Global Telecom Holdings S.A.E. (“GTH” or the “Claimant”) filed with the Secretary-General of the International Centre for Settlement of Investment Disputes (“ICSID” or the “Centre”) an application for the partial annulment of the award rendered on March 27, 2020, by Prof. Georges Affaki, Prof. Gary Born and Prof. Vaughan Lowe (the “Award”) in the case *Global Telecom Holding S.A.E. v Canada* (ICSID Case No. ARB/16/16) (“GTH’s Application”). On the same day, Canada (also, the “Respondent”) filed an application for the partial annulment of the Award (“Canada’s Application”). GTH’s Application and Canada’s Application shall together hereinafter be referred to as the “Applications.”
2. The Award decided a dispute submitted to the Centre on the basis of the Agreement between Canada and the Arab Republic of Egypt for the Promotion and Protection of Investments, which entered into force on March 11, 1998 (the “BIT” or “Treaty”)¹ and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on October 14, 1966 (the “ICSID Convention”).
3. The Claimant and Respondent are referred to as the “Parties.”
4. Both Parties applied for partial annulment of the Award on the basis of Article 52(1) of the ICSID Convention, and both identified the same three grounds for annulment, viz: (i) manifest excess of powers (Article 52(1)(b)); (ii) serious departure from a fundamental rule of procedure (Article 52(1)(d)); and (iii) failure to state reasons (Article 52(1)(e)).
5. The Committee renders one Decision that deals with both Applications. As explained below, the two Applications were dealt with together procedurally.

¹ Whilst GTH refers to the Treaty as “BIT”, Canada employs the term Foreign Investment Promotion and Protection Agreement “FIPA.” The Committee has no preference between the two terms, but for the sake of consistency will use “BIT” as did the Award (para. 1).

II. PROCEDURAL HISTORY

6. On July 27, 2020, ICSID received the Applications for annulment. On August 11, 2020, pursuant to Rule 50(2) of the ICSID Rules of Procedure for Arbitration Proceedings (the “ICSID Arbitration Rules”), the Secretary-General of ICSID registered the Applications.
7. By letter dated September 24, 2020, in accordance with Rules 6 and 53 of the ICSID Arbitration Rules, the Parties were notified that an *ad hoc* Committee composed of Prof. Mónica Pinto, a national of Argentina, appointed to the Panel by Argentina, and designated as President of the Committee, Prof. Lawrence Boo, a national of Singapore, appointed to the Panel by Singapore, and Ms. Dyalá Jiménez, a national of Costa Rica, appointed to the Panel by Costa Rica had been constituted (the “Committee”) to hear both Applications. On the same date, the Parties were notified that Ms. Aurélia Antonietti, Senior Legal Adviser, ICSID, would serve as Secretary of the *ad hoc* Committee.
8. In accordance with ICSID Arbitration Rules 53 and 13(1), the Committee held a first session with the Parties on November 6, 2020, by telephone conference.
9. Following the first session, on November 23, 2020, the Committee issued Procedural Order No. 1 recording the agreement of the Parties on procedural matters. It was agreed that the Committee would hear both Applications. Procedural Order No. 1 provided, *inter alia*, that the applicable Arbitration Rules would be those in effect from April 10, 2006, that the procedural language would be English, that the place of the proceedings would be Washington, D.C., and that the Confidentiality Order in the underlying Arbitration agreed by the Parties, dated October 30, 2017, remained in effect during these annulment proceedings.
10. In accordance with Paragraph 15.1 of Procedural Order No. 1, on January 13, 2021, Canada filed a request for the Committee to decide on the submission of new evidence.
11. On January 14, 2021, the Committee invited GTH to reply to Canada’s application on the submission of new evidence, which it did on January 28, 2021.

12. On February 4, 2021, the Committee issued Procedural Order No. 2 dismissing Canada's application for the submission of new evidence.
13. On March 8, 2021, both Parties filed a memorial on partial annulment.
14. On July 6, 2021, both Parties filed a counter-memorial on partial annulment.
15. On September 27, 2021, both Parties filed a reply on partial annulment.
16. On December 17, 2021, both Parties filed a rejoinder on partial annulment.
17. On January 19, 2022, the Committee issued Procedural Order No. 3 concerning the organization of the hearing.
18. A hearing on the Applications was held by video conference on February 7 and 8, 2022 (the "Hearing"). The following persons were present at the Hearing:

Committee:

| | |
|--------------------|-------------------------|
| Prof. Mónica Pinto | President |
| Prof. Lawrence Boo | Member of the Committee |
| Ms. Dyalá Jiménez | Member of the Committee |

ICSID Secretariat:

| | |
|------------------------|----------------------------|
| Ms. Aurélie Antonietti | Secretary of the Committee |
| Mr. Shay Lakhter | Paralegal |

For the Claimant:

| | |
|---------------------|-----------------------------|
| Ms. Penny Madden KC | Gibson, Dunn & Crutcher LLP |
| Mr. Rahim Moloo | Gibson, Dunn & Crutcher LLP |
| Ms. Charline Yim | Gibson, Dunn & Crutcher LLP |
| Ms. Marryum Kahloon | Gibson, Dunn & Crutcher LLP |
| Ms. Nadia Alhadi | Gibson, Dunn & Crutcher LLP |
| Mr. Tim Burke | VEON Ltd. |
| Ms. Maria Gritsenko | VEON Ltd. |

For the Respondent:

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| Ms. Sylvie Tabet | Global Affairs Canada |
| Mr. Jean-François Hebert | Global Affairs Canada |
| Mr. Mark Klaver | Global Affairs Canada |
| Mr. Scott Little | Global Affairs Canada |
| Mr. Benjamin Tait | Global Affairs Canada |
| Ms. Kayla McMullen | Global Affairs Canada |

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|-----------------------|-----------------------|
| Mr. Ivan Barkar | Global Affairs Canada |
| Mr. Vincent Boulanger | Global Affairs Canada |
| Ms. Natacha Guilbault | ISDEC |
| Ms. Cezary Fudali | ISDEC |
| Mr. Hasti Kousha | ISDEC |

Court Reporter:
Ms. Claire Hill

19. GTH and Canada filed their submissions on costs, respectively, on March 9 and 10, 2022.
20. On July 30, 2022, the Parties informed the Centre that they agreed that each Party would bear its own cost of the proceedings.
21. The proceedings were closed on September 16, 2022, and the Parties were notified that the Decision would be rendered within two weeks.

III. BACKGROUND ON ARBITRATION AND THE AWARD

A. FACTUAL BACKGROUND

22. The following summary is intended to provide a general overview of the factual background to the dispute between the Parties. It is not intended to be an exhaustive description of all facts considered relevant by the Tribunal and/or the Committee.
23. The present dispute regards the ability of Wind Mobile, a corporation partially owned by GTH, to operate and transfer its investment in the wireless services market in Canada.
24. At the time of the underlying arbitration, Canada's telecommunications market was highly concentrated and was dominated by three Canadian service providers – Bell, Rogers and Telus – known as the Incumbents.
25. In 2008, Canada developed an Investment Framework for Canada's Auction of Advanced Wireless Services Spectrum Licenses ("2008 AWS Auction") that would facilitate the entrance of new wireless providers, known as New Entrants. In particular, Canada set aside spectrum licenses for New Entrants that could not be transferred to Incumbents for a finite five-year period.

26. GTH, previously known as Orascom Telecom Holding S.A.E., a joint stock company incorporated in Egypt, operates mobile telecommunications networks around the world. GTH and a Canadian partner jointly participated in the 2008 AWS Auction through the enterprise Wind Mobile, which won 30 AWS spectrum licenses at a price of CAD\$ 442.1 million.
27. Under the Canadian Telecommunications Common Carrier Ownership and Control Regulations in force at the time, a non-Canadian could not own more than 33 1/3 percent of the voting shares of a holding company of a Canadian carrier. The Canadian Radio-Television and Telecommunications Commission (“CRTC”) had authority to review compliance of the Ownership & Control Rules (“O&C Rules”) under the Telecommunications Act, while Industry Canada (“ICA”) was responsible for ensuring compliance with the identical O&C Rules under the Radiocommunication Regulations.
28. GTH could not own or have voting control over Wind Mobile due to Canadian O&C Rules, but its investment was structured in a manner that would allow it to take voting control in the future if the O&C Rules were relaxed. Thus, while GTH held majority of Wind Mobile’s shares but only 32 percent of Wind Mobile’s voting shares, GTH’s non-voting shares could be converted to voting shares if and when the O&C Rules were relaxed and subject to ICA approval as provided for by the law.
29. On July 30, 2008, GTH entered into an investment agreement with Globalive Communications Holdings Ontario Inc. (“GCHO”) and Mojo Investments Corp. (“Mojo”), another Canadian company. In this agreement, GTH agreed that it would advance funds for the total amount of the spectrum licenses through its wholly owned subsidiary, Global Telecom Holding Canada Limited (“GTHCL”), known at the time as OTHCL, and that those licenses and all related rights would be held by Wind Mobile.
30. As required under the 2008 AWS Auction Licensing Framework, on August 5, 2008, Wind Mobile submitted its Declaration of Ownership and Control to Industry Canada, in order to commence the review of Wind Mobile’s compliance with the O&C Rules. Following certain changes made to the corporate structure, on February 16, 2009, Industry Canada found Wind Mobile to be in compliance with the Radiocommunication Regulations O&C

Rules. Wind Mobile then provided Industry Canada with a revised Declaration of Ownership and Control. Industry Canada issued Wind Mobile's 30 spectrum licenses on March 13, 2009.

31. On May 22, 2009, the CRTC notified Wind Mobile that it would conduct a Type 4 review of Wind Mobile's ownership.² Ultimately, the CRTC determined that Wind Mobile did not satisfy the O&C Rules. In its decision of October 29, 2009 (the "CRTC Decision"), the CRTC found that Wind Mobile had "met the test for legal control" but was "controlled in fact by Orascom, a non-Canadian" and therefore did "not meet the requirements set out in section 16 of the [Telecommunications] Act and [was not] eligible to operate as a telecommunications common carrier."³
32. After the CRTC Decision was issued, the Governor in Council (the "GiC") commenced a review pursuant to its authority under the Telecommunications Act to vary decisions of the CRTC.⁴ The GiC disagreed with the CRTC's finding that Orascom controlled Wind Mobile in fact. Thus, on December 10, 2009, the GiC varied the CRTC Decision ("the GiC Decision"). It held that Wind Mobile satisfied the O&C Rules under the Telecommunications Act and was eligible to operate as a Canadian telecommunication common carrier.
33. In December 2009, Wind Mobile commenced operations as a telecommunication carrier.
34. The GiC Decision was challenged in Federal Court by Public Mobile Inc., another New Entrant. The respondents in the proceeding were Wind Mobile and the Attorney General

² As indicated in the Award, "in exceptional circumstances, the Commission will hold an oral, public, multi-party proceeding (Type 4 review) where an ownership or governance structure is of a in exceptional circumstances, complex or novel nature, such that in the Commission's view its determination will hold precedential value to industry players and the general public, where the Commission considers that the evidentiary record would be improved by third-party submissions, and the Commission further considers that the appearance of parties would more easily allow the Commission to complete and test the evidentiary record. Under this type of review, documentary evidence filed by the carrier under review will be available for public inspection. Third parties will have an opportunity to file written submissions and request to provide oral submissions on that evidence. At the conclusion of the review process, a public decision will be issued." (Award, para. 48).

³ Award, para. 50.

⁴ Award, para. 52.

of Canada. On February 4, 2011, the Federal Court agreed with Public Mobile and quashed the GiC Decision.

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

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

37. In 2012, the O&C Rules were relaxed and GTH was no longer prohibited from having voting control over Wind Mobile. Accordingly, GTH submitted its Voting Control Application to get approval for its plan to exercise what it deemed its pre-existing right to take voting control over Wind Mobile.

38. [REDACTED]

39. [REDACTED] Finally, on September 15, 2014, GTH approved the sale of its shareholding in Wind Mobile to AAL (Wind Mobile's controlling shareholder) and a group of private equity firms ("AAL"). Industry Canada approved the sale in November 2014.

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

41. On June 24, 2015, Industry Canada approved two transfers of set-aside spectrum licenses to Rogers: (1) Rogers' purchase of the set-aside spectrum licenses of Shaw (a New Entrant) for CAD\$ 350 million; and (2) Rogers' acquisition of Mobilicity (a New Entrant) for CAD\$ 440 million. As part of these transactions, Rogers transferred all of Mobilicity's AWS spectrum to Wind Mobile, and Shaw's AWS spectrum was split between Wind Mobile and Rogers. In return, Wind Mobile transferred some of its existing AWS spectrum to Rogers.
42. On December 16, 2015, Wind Mobile's new owners sold the company's spectrum licenses and business holdings to Shaw for CAD\$ 1.6 billion.

B. THE AWARD

43. On March 27, 2020, an arbitral tribunal composed of Prof. George Affaki (President), Prof. Vaughan Lowe and Prof. Gary Born (the "Tribunal") rendered the Award in ICSID Case ARB/16/16. The Tribunal decided by majority that it lacked jurisdiction to entertain GTH's claim that Canada breached its national treatment obligations under Article IV(1) of the BIT in respect of GTH's investment and that it had jurisdiction regarding the other GTH's claims. On the merits, the Tribunal by majority dismissed GTH's claims regarding the breach of the fair and equitable standard in Article II(2)(a) of the BIT, of the full protection and security standard in Article II(2)(b) and the unrestricted transfer guarantee in Article IX of the BIT. The Tribunal also by majority dismissed GTH's claims on damages and all other claims and defences by either party. Prof. Born issued a dissenting opinion. The *dispositif* reads as follows:

"For the reasons set forth above, the Tribunal:

DECIDES that it has no jurisdiction to entertain GTH's claim that Canada breached its national treatment obligations under Article IV(1) of the BIT in respect of GTH's investment;

DECIDES that it has jurisdiction under the BIT and the ICSID Convention to entertain GTH's claims that Canada breached the following obligations under the BIT:

- (i) The fair and equitable treatment standard in Article II(2)(a) of the BIT,
- (ii) The full protection and security standard in Article II(2)(b) of the BIT, and
- (iii) The unrestricted transfer guarantee in Article IX(1) of the BIT;

DECIDES that the claims mentioned in paragraph 729 are admissible;

DISMISSES GTH's claims that Canada breached its obligations under the BIT, specifically:

- (i) The fair and equitable treatment standard in Article II(2)(a) of the BIT,
- (ii) The full protection and security standard in Article II(2)(b) of the BIT, and
- (iii) The unrestricted transfer guarantee in Article IX(1) of the BIT;

DISMISSES GTH's request for damages;

ORDERS the Parties to bear the arbitration costs in equal parts;

HOLDS that each Party shall bear its legal costs and expenses without contribution by the other Party; and

DISMISSES all other claims or defences by either Party.”

C. REQUEST FOR RELIEF – CANADA

44. In the light of its submissions, Canada asks the Committee to:

- (1) Annul the parts of the Award that contain the findings of a majority of the Tribunal with respect to Article II(4)(b) and the Tribunal's assertion of jurisdiction over GTH's National Security Review Claims; and
- (2) Grant any further relief it deems just and appropriate under the circumstances.

45. At the Hearing, Canada asked the Committee to:

- (1) Annul paragraphs 324-336 of the Award;
- (2) Annul the Tribunal's conclusions regarding its jurisdiction at paragraph 729(i) and (ii) as they pertain to Canada's national security review; and
- (3) Award such other relief as the Committee considers appropriate.

D. REQUEST FOR RELIEF - GTH

46. In the light of its written and oral submissions, GTH requests that the Committee:

- (1) Annul the Award's decision on the National Treatment Claim, as reflected in paragraph 728 of the *dispositif* and the corresponding paragraphs in the Award related to the National Treatment Claim (paragraphs 363-80, 683);
- (2) Annul the Award's decision on the Blocked Sale Claim, as reflected in paragraph 729(i) of the *dispositif* and the corresponding paragraphs in the Award related to the Blocked Sale Claim (paragraphs 539-71);
- (3) Annul the Award's decision on the Free Transfer Claim, as reflected in paragraph 729(iii) of the *dispositif* and the corresponding paragraphs in the Award related to the Free Transfer Claim (paragraphs 702-707);
- (4) Order Canada to pay all of the costs and expenses associated with the annulment proceedings, including GTH's legal fees, the fees and expenses of the Committee, and ICSID's other costs; and
- (5) Award such other relief as the Committee considers appropriate.

IV. ANNULMENT LEGAL STANDARDS

A. SCOPE OF ANNULMENT

47. Under Article 52(1) of the ICSID Convention:

“(1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:

- (a) that the Tribunal was not properly constituted;
- (b) that the Tribunal has manifestly exceeded its powers;
- (c) that there was corruption on the part of a member of the Tribunal;
- (d) that there has been a serious departure from a fundamental rule of procedure; or
- (e) that the award has failed to state the reasons on which it is based.”

48. In its Memorial on Partial Annulment, GTH states that “[a]s finality is a fundamental goal for the ICSID system, annulment proceedings are designed to have a limited scope of review. Notably, as stipulated in Article 52 of the ICSID Convention, annulment can only be granted on five bases, with each ground serving to safeguard parties from ‘*violations of the fundamental principles of law governing the Tribunal’s proceedings*’. Unlike an appeal before national courts, annulment proceedings are not intended to be a reconsideration of the merits of the case. Instead, annulment proceedings are limited to reviewing procedural errors in a tribunal’s conduct and disposition of proceedings, rather than a substantive inquiry into its reasoning and conclusions.”⁵
49. Canada, quoting the decision in *Hussein Nuaman Soufraki v The United Arab Emirates*, states that the annulment proceedings pursue three goals: the integrity of the tribunal, the integrity of the procedure, and the integrity of the award. It also stresses the differences between an appeal and annulment proceedings and that all of the grounds for annulment should be strictly construed.⁶ In its Reply, Canada insists in that while it readily agrees that annulment proceedings are not an appeal mechanism, and that arbitral tribunals are empowered to determine their own jurisdiction, it is nevertheless fully within the purview of an annulment committee to review a tribunal’s conclusions on jurisdictional issues for manifest errors. That is the very purpose of Article 52(1)(b).⁷
50. The provisions under the Convention and the Arbitration Rules are exhaustive in the enunciation of the grounds that warrant an annulment. Only those explicitly mentioned in Article 52(1) of the ICSID Convention can serve as basis for annulment. Further, neither

⁵ GTH’s Memorial on Partial Annulment, para. 29 (emphasis in the original).

⁶ RD-01, Slides 20-22.

⁷ Canada’s Reply on Partial Annulment, para. 9.

the ICSID Convention nor the Rules include appeal as a remedy against an award. This is not in dispute. The interpretation of Article 52(1) should be made in the light of Articles 31, 32 and 33 of the Vienna Convention on the Law of Treaties (“VCLT”). Therefore, an interpretation of Article 52(1) in good faith, in accordance with the ordinary meaning of the terms of the treaty in their context and in the light of its object and purpose, requires the Committee to strictly adhere to the annulment standards.⁸ Both Parties agree that there is a difference between annulment and appeal.

51. In fact, the Committee agrees with the *Total v Argentina* committee in that “annulment is an exceptional and narrowly circumscribed remedy” and that “Article 52 should be interpreted in accordance with its object and purpose, neither narrowly nor broadly.”⁹ Therefore, the Committee deems that the legal rules applicable to the annulment procedure seek to safeguard the integrity of the arbitration system and not to review the decisions in the underlying arbitrations on their merits. At the same time, the discretion awarded to the Committee by Article 52(3) of the ICSID Convention – “the Committee shall have the authority to annul the award or any part thereof on any of the grounds set forth in paragraph (1)” – should be interpreted so as not to defeat the object and purpose of the remedy or erode the finality or binding force of awards.¹⁰
52. This means that the scope of annulment is by nature quite limited, since the Committee is precluded from revisiting the facts and the evidence and even the conclusions of the Tribunal. In this case, the Committee must only be concerned with the boundaries within which the BIT signatories (and the Parties) consented to arbitrate and under which jurisdictional conditions. Also, it must be satisfied that the Tribunal issued a reasoned award and that it did not breach a fundamental rule of procedure. The Committee will set out each ground invoked by the Parties in the next section.

⁸ Tr. Day 1, Ms. Madden 20:12-21.

⁹ *Total SA v Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Annulment, February 1, 2016, para. 167 (CL-219). See also Tr. Day 1, Mr. Mooloo, 20:6-11; Tr. Day 1, Mr. Klaver, 106:4-25 and 107:1-7.

¹⁰ ICSID, *Updated Background Paper on Annulment for the Administration Council of ICSID*, May 5, 2016, para. 74 (CL-251).

53. During the Hearing it was said that “[w]hile Canada and GTH broadly agree on these principles, they diverge on how the principles apply to the award in this case.”¹¹ The Committee will consider those differences and apply the applicable standard in the given case.

B. MANIFEST EXCESS OF POWERS (ARTICLE 52(1)(B))

54. Recalling Article 52(1)(b) of the ICSID Convention, which states that an award may be annulled when “the Tribunal has manifestly exceeded its powers”, both Parties agree that this ground for annulment requires the Committee to engage in a two-stage inquiry: the assessment of the actual commission of an excess of powers and, if so, whether such excess of powers is manifest.¹² The Committee shares this view.

55. For its part, in line with *Fraport v the Philippines*, Canada submits that “[a] tribunal may manifestly exceed its powers when it goes beyond the scope of the parties’ arbitration agreement or fails to apply the proper law.”¹³

56. Quoting the committee in *Hussein Nuaman Soufraki v The United Arab Emirates*, GTH submits that a tribunal can exceed the scope of its powers when it “do[es] something beyond the reach of such powers as defined by three parameters, the jurisdictional requirements, the applicable law and the issues raised by the Parties”, including when “a tribunal acts ‘too little’” and “it does not accept and exercise the powers granted to it and fails to fulfil its mandate.”¹⁴ GTH adds that the distinction between jurisdictional errors and errors in the application of law is key in cases where tribunals decline to exercise jurisdiction they have, given that jurisdictional errors undermine the very consent that underpins arbitration. As a consequence, “if a Tribunal exceeds its jurisdiction and such excess is manifest, its decision cannot stand.”¹⁵

¹¹ Tr. Day 1, Mr. Klaver, 105:23-25.

¹² Canada’s Memorial on Partial Annulment, para. 42; GTH’s Memorial on Partial Annulment, paras. 32-33; Tr. Day 1, Mr. Maloo 21:11-15.

¹³ Canada’s Memorial on Partial Annulment, para. 43; Tr. Day 1, Mr. Maloo, 20:19-25 and 21:1-21

¹⁴ GTH’s Memorial on Partial Annulment, para. 34.

¹⁵ GTH’s Memorial on Partial Annulment, para. 36.

57. GTH refers to jurisdictional excess of powers, both to the commission by overreach and by defect. It refers to earlier decisions by ICSID *ad hoc* committees to argue that for an excess of powers to be “manifest”, committees have held that such an error must be “obvious.” An interpretation under the VCLT similarly results in the term manifest to mean “objectively evident”, “clear”, “self-evident”, “textually obvious and substantively serious” or “sufficiently clear and serious.”¹⁶
58. GTH submits that “manifest has been explained in many ways by many different committees and in different contexts, but essentially, it goes to how obvious is the excess of powers, how clear is it, how self-evident is it? Those are different ways in which committees have explained, what does it mean to be manifest? Other committees have explained the standard by a reference to the word ‘tenable’, and what does this mean? It essentially means if it’s a tenable interpretation of a treaty then it cannot be manifest that the Tribunal got it wrong, so essentially the question of whether or not it’s a tenable or an untenable interpretation is a proxy for assessing how obvious was the excess of powers.”¹⁷
59. The drafters of the ICSID Convention anticipated that an excess of powers arises when a tribunal goes beyond the scope of the parties’ arbitration agreement, decides points which have not been submitted to it, or fails to apply the law agreed by the parties.¹⁸ Accordingly, the Committee considers that a tribunal can exceed its powers if it fails to exercise jurisdiction when it is clear that it has a mandate and, conversely, when it does exercise jurisdiction lacking a mandate to do so. The “manifest” nature of the excess of powers is an excess that is obvious, clear or self-evident and which is discernable without the need for an elaborate analysis of the award.¹⁹ Some *ad hoc* committees have interpreted the meaning of “manifest” as serious or material to the outcome of the case.²⁰ Therefore, if a

¹⁶ GTH’s Memorial on Partial Annulment, para. 37.

¹⁷ Tr. Day 1, Mr. Maloo, 23:5-20.

¹⁸ ICSID, *Updated Background Paper on Annulment for the Administration Council of ICSID*, May 5, 2016, para. 81 (CL-251).

¹⁹ ICSID, *Updated Background Paper on Annulment for the Administration Council of ICSID*, May 5, 2016, para. 83 (CL-251).

²⁰ *Idem*.

tribunal proposes a tenable interpretation of a basis for its jurisdiction, it will be difficult for the excess of powers to be considered manifest.²¹

60. This Committee agrees with other *ad hoc* committees in that the ICSID Convention provides that the tribunal is the judge of its own competence, a power generally referred to as *compétence de la compétence*.²² As stated by the *Perenco v Ecuador* committee, “ICSID annulment proceedings do not avail for a *de novo* review of jurisdiction. That would be tantamount to an appeal.”²³
61. In the context of Canada’s Application, the Parties disagree on the standard regarding the application of the proper law. Canada contends that the majority of the Tribunal (the “Majority”) advanced an erroneous interpretation of the proper law.²⁴ GTH, for its part, argues that the Tribunal applied the correct law and that how it applied it is irrelevant for purposes of the annulment.²⁵
62. Canada submits that *ad hoc* committees have recognized that, where a tribunal does not apply the law applicable to the arbitration, there is grounds for annulment under Article 52(1)(b). A committee must limit itself to determining if the tribunal did, in fact, apply the law it was bound to apply, without reviewing whether it was properly applied. Nevertheless, adds Canada, in exceptional circumstances, a gross or egregious misinterpretation or misapplication of the proper law could effectively amount to a failure to apply the proper law and give rise to annulment.²⁶ Relying on *Klöckner v Cameroon*, Canada contends that “[w]here the tribunal purports to apply the applicable law but actually applies a different body of law, a manifest excess of powers may arise.”²⁷

²¹ *Caratube International Oil Company LLP v Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Decision on the Annulment Application of Caratube International Oil Company LLP, February 21, 2014, para. 144. (CL-245).

²² ICSID, *Updated Background Paper on Annulment for the Administration Council of ICSID*, May 5, 2016, para. 88.

²³ *Perenco Ecuador Limited v Republic of Ecuador*, ICSID Case No. ARB/08/06, Decision on Annulment, May 28, 2021 (“*Perenco v Ecuador*”), para. 94 (CL-274).

²⁴ RD-02, Slide 13.

²⁵ Tr. Day 2, Ms. Madden, 81:5-13.

²⁶ Canada’s Memorial on Partial Annulment, paras. 46-47.

²⁷ Canada’s Memorial on Partial Annulment, para. 49.

63. On that point, the Committee notes that the committee in *Klöckner v Cameroon* found that the tribunal issued a decision “based more on a sort of general equity than on positive law (and in particular French civil law) or precise contractual provisions, such as Article 9 of the Turnkey Contract.”²⁸ Moreover, the Klöckner committee pointed out that “in the Award’s passages on the evaluation of the respective obligations or debts, the main ones of which have just been cited, it is difficult to find any legal reasoning as required by provisions of Articles 52(1)(e) or 48(3). Instead, there is really an ‘equitable estimate’ (to use the Tribunal’s own words, p. 126; cf. also p. 127) based on ‘approximately equivalent’ estimates or approximations, which is in any case impossible to justify solely on the basis of the Award’s explanations of the *exceptio non adimpleti contractus* or the counter-claim.”²⁹ For these reasons, the committee was led to the conclusion that the tribunal had applied a different set of rules.
64. The drafting history of the ICSID Convention shows that a tribunal’s failure to apply the proper law could constitute a manifest excess of powers, but that erroneous application of the law could not amount to an annulable error, even if it is manifest.³⁰ Notwithstanding the above, as with many other *ad hoc* committees, this Committee is aware that there may be a fine line between a failure to apply the proper law and an erroneous application of the law.³¹
65. In its Application, Canada contends that the Tribunal committed a manifest excess of powers when it ascertained its jurisdiction over issues covered by Article II(4)(b) of the BIT. For its part, in its Application, GTH alleges that the Majority’s decision to decline jurisdiction over the National Treatment Claim on the basis of Article IV(2)(d) of the BIT amounted to a manifest excess of powers.

²⁸ *Klöckner Industrie-Anlagen GmbH and others v United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2, Decision on the Application for Annulment Submitted by Klöckner Against the Arbitral Award Rendered on October 21, 1983, May 3, 1985 (“*Klöckner v Cameroon*”), para. 166 (**RL-344**).

²⁹ *Klöckner v Cameroon*, para. 176.

³⁰ ICSID, *Updated Background Paper on Annulment for the Administration Council of ICSID*, May 5, 2016, para. 90 (**CL-251**).

³¹ ICSID, *Updated Background Paper on Annulment for the Administration Council of ICSID*, May 5, 2016, para. 93 (**CL-251**).

C. SERIOUS DEPARTURE FROM A FUNDAMENTAL RULE OF PROCEDURE (ARTICLE 52(1)(D))

66. GTH recalls that Article 52(1)(d) of the ICSID Convention states that an award may be annulled where “there has been a serious departure from a fundamental rule of procedure” and that it is a tribunal’s duty to act with procedural fairness in order to preserve the legitimacy of the award.³² Canada submits that the respect for the fundamental rules of procedure is an important guarantee for the integrity and the legitimacy of the arbitration procedure.³³
67. Both Parties agree, and the Committee shares their views, that this ground for annulment requires the Committee to engage in a two-stage inquiry. First, the Committee must assess whether the Tribunal has departed from a fundamental rule of procedure. If yes then, second, whether such a departure was “serious.”³⁴
68. Also, both Parties agree on the relevance of the right to be heard, and that it is considered a fundamental rule of procedure; they provide earlier decisions in support thereof.³⁵ With similar language, both Parties argue that a tribunal should not surprise the parties with an issue that neither party brought to the record and that, as part of the right to fair trial under international law, the tribunal should ensure that each party has an effective opportunity to be heard on the crucial points of the reasoning that the tribunal intends to adopt.³⁶ Canada also states that a tribunal cannot *sua sponte* raise a new thesis beyond the legal framework established by the Parties and rely on it as a basis for its decision, without providing the Parties an opportunity to comment on it.³⁷ The Committee agrees generally with these views.
69. GTH argues that “[o]nce a departure from a fundamental rule of procedure has been established, an applicant must show that the departure was ‘*serious*’ by showing either that

³² GTH’s Memorial on Partial Annulment, para. 47.

³³ Canada’s Memorial on Partial Annulment, para. 131.

³⁴ GTH’s Memorial on Partial Annulment, para. 48; Tr. Day 1, Mr. Klaver, 114:8-12.

³⁵ GTH’s Memorial on Partial Annulment, para. 49; Canada’s Memorial on Partial Annulment, paras. 137-139; Tr. Day 1, Mr. Klaver, 114:13-25.

³⁶ GTH’s Memorial on Partial Annulment, para. 50; RD-01, Slide 49.

³⁷ Canada’s Counter-Memorial on Partial Annulment, para. 17.

(i) observance of the rule may have caused the tribunal to reach a substantially different result, or (ii) non-observance deprived a party of the benefit of the rule thus impacting the proceedings. Once an *ad hoc* committee has established that a departure from a fundamental rule of procedure is serious, the committee must annul the impacted portion of the relevant award.”³⁸

70. Canada reiterates what the committee in *Perenco v Ecuador* stated “[...] that for a departure to be serious it need not be outcome determinative in the sense that the Applicant has to demonstrate that the Tribunal’s decision would have been different had the fundamental procedural rule been observed. The Applicant, however, has the burden to demonstrate that there is a distinct possibility that the departure may have made a difference on a critical issue of the Tribunal’s decision.”³⁹ The Committee agrees that this is the appropriate test.
71. In its Application, Canada alleges that there was a serious departure from the right to be heard because the Tribunal surprised the Parties with its interpretation of ownership and control, its interpretation that acquisition does not involve control, and by not having dealt with the argument regarding the purchase of AAL’s shares. For its part, in its Application, GTH alleges the same grievance regarding the Tribunal’s decision to dismiss the Free Transfer Claim because it relied on a legal argument that was not advanced by either Party.

D. FAILURE TO STATE REASONS (ARTICLE 52(1)(E))

72. GTH points out that “Article 52(1)(e) of the ICSID Convention states that an award may be annulled when ‘*the award has failed to state the reasons on which it is based*’, which reflects the requirements contained in Article 48(3) of the ICSID Convention that the award ‘*deal with every question submitted to the Tribunal*’ and ‘*state the reasons upon which it is based,*’ and ICSID Arbitration Rule 47(1)(i) which requires [sic]the award contain ‘*the decision of the Tribunal on every question submitted to it, together with the reasons upon which the decision is based*’.”⁴⁰

³⁸ GTH’s Memorial on Partial Annulment, para. 52.

³⁹ RD-01, Slide 50.

⁴⁰ GTH’s Memorial on Partial Annulment, para. 39 (emphasis in the original).

73. Both Parties state that at a minimum, an award must be sufficiently clear to “enable [...] one to follow how the tribunal proceeded from Point A. to Point B. and eventually to its conclusion, even if it made an error of fact or of law”, thus, the award must “enable the reader (and specifically the parties) to see the reasons upon which the award itself is based.”⁴¹
74. GTH contends that committees have found that a tribunal has failed to state reasons when: (1) there is an absence of reasons in the Award; (2) the tribunal presents reasons that are contradictory; (3) the tribunal fails to deal with a question submitted to it and (4) the tribunal fails to address key evidence.⁴²
75. GTH submits that the Parties agree that the absence of reasons relating to a pivotal or outcome determinative point amounts to a failure to state reasons and that contradictory reasons on outcome determinative issues amount to a failure to state reasons.⁴³
76. Canada specifies that the failure to address every question put forward by a party is not necessarily grounds for annulment. Two conditions must be satisfied to find an annullable error under Article 52(1)(e) of the Convention: (1) the reasons must be impossible to understand either because they are absent, severely lacking, and cannot reasonably be inferred from the decision read as a whole or because of contradictory findings; and (2) the failure to state reasons must relate to a decisive element, material to the outcome of the case.⁴⁴ It also contends that contradictory reasons cancel each other if they do not allow the reader to follow the tribunal’s reasoning.
77. GTH submits that according to Article 49 of the ICSID Convention, the Tribunal has to deal with every question submitted to it, which, as pointed out by Prof. Schreuer, is to be understood objectively in the sense of a crucial or decisive argument, that is one whose

⁴¹ GTH’s Memorial on Partial Annulment, para. 40; Canada’s Memorial on Partial Annulment, para. 101. See e.g. *Maritime International Nominees Establishment (MINE) v Republic of Guinea*, ICSID Case No. ARB/84/4, Decision on the Application by Guinea for Partial Annulment of the Arbitral Award dated January 6, 1988, December 22, 1989, (“*MINE v Guinea*”), para. 5.09 (RL-349).

⁴² CD-01, Slide 38.

⁴³ CD-01, Slides 39-40.

⁴⁴ Canada’s Memorial on Partial Annulment, para. 102.

acceptance would have altered the tribunal's conclusions.⁴⁵ The same line of arguments can be found in Canada's presentation, which adds that an award is nevertheless annulable when there is a lacuna significant enough to prevent a reader from following the reasoning of the tribunal. Insufficient or inadequate reasons can therefore give rise to annulment in those limited circumstances.⁴⁶

78. Canada contends that Article 52(1)(e) requires a very high threshold because the risk to get into the "impermissible" territory of an appeal is high.⁴⁷ It restates the five precepts put forward by the committee in *Cortec v Kenya*, namely (1) there is no appeal and the tribunal is the judge of the admissibility and of the probative value of any evidence adduced before it; (2) the reasoning on a particular issue/s need not be expressly stated, so long as it can reasonably be inferred from the award as a whole; (3) a tribunal is not required to address every argument raised by a party; (4) where possible, an annulment committee should interpret an award in a manner that validates its reasoning and (5) annulment may not be sought in respect of matters not put before the original tribunal.⁴⁸
79. The Committee considers that there is a clear link between the provision in the ICSID Convention requiring the tribunal to state the reasons for the award and the ground providing for annulment when there has been a failure to provide the reasons on which the award is based.⁴⁹ *Ad hoc* committees have explained that the requirement to state reasons is intended to ensure that the reader can understand the reasoning of the tribunal, meaning the reader can understand the facts and law applied by the tribunal in coming to its conclusion. The correctness of the reasoning or whether it is convincing is not relevant.⁵⁰
80. As expressed in the decision in *Perenco v Ecuador*, this Committee also "stresses that Article 52(1)(e) does not concern the failure to state correct or convincing reasons. As

⁴⁵ CD-01, Slides 41-43.

⁴⁶ RD-01, Slides 37-47; Canada's Memorial on Partial Annulment, para. 104.

⁴⁷ RD-01, Slides 30-31.

⁴⁸ RD-01, Slides 32-36.

⁴⁹ ICSID, *Updated Background Paper on Annulment for the Administration Council of ICSID*, May 5, 2016, para. 102 (CL-251).

⁵⁰ ICSID, *Updated Background Paper on Annulment for the Administration Council of ICSID*, May 5, 2016, para. 105. (CL-251).

correctly noted by the *CDC v Seychelles* committee ‘the more recent practice among *ad hoc* Committees is to apply Article 52(1)(e) in such a manner that the Committee does not intrude into the legal and factual decision-making of the Tribunal.’ It is not on an *ad hoc* committee to assess the quality, extension, or correctness of the reasons provided by a tribunal, much less to annul an award on that basis. If a tribunal provides reasons on how and why it reached its decision, there is no room for annulment under Article 52(1)(e).”⁵¹

81. While Canada and GTH broadly agree on these parameters, they diverge on how they apply to the Award in this case.⁵² In its Application, Canada contends that the Tribunal failed to state reasons regarding what it deemed the correct interpretation of Article II(4)(b) of the BIT and why the ICA Application, ██████████, would have amounted to an acquisition of ownership. In its Application, GTH contends that the Tribunal failed to state reasons in finding that Canada did not breach its fair and equitable treatment (“FET”) obligation by blocking GTH from transferring its spectrum licenses to an incumbent after a five-year restriction on transfer expired, in finding that Canada did not breach the Free Transfer obligation, and in finding it lacked jurisdiction over GTH’s claim that Canada breached the National Treatment obligation.

V. CANADA’S APPLICATION

82. Canada seeks the annulment of certain parts of the Award. Specifically, Canada seeks the annulment of the Tribunal’s conclusion that it had jurisdiction over GTH’s claims with respect to Canada’s National Security Review of the Claimant’s proposed acquisition of control of Wind Mobile (the “National Security Review”). The Majority held that the dispute settlement exclusion in Article II(4)(b) of the BIT between Canada and Egypt did not deprive the Tribunal of jurisdiction over GTH’s National Security Review Claims. The Majority reached this conclusion by finding that GTH’s voting control application under the Investment Canada Act (“ICA Act”) (generally, the “ICA Application”) did not concern the acquisition of Wind Mobile or of a share of Wind Mobile under Article II(4)(b). Canada considers that the Majority’s findings are fundamentally flawed because of a number of

⁵¹ *Perenco v Ecuador*, para. 164.

⁵² Tr. Day 1, Mr Klaver, 105:23-25.

annullable errors under the ICSID Convention. Three aspects of the relevant section of the Award (section VI.C.) arguably give rise to different grounds of annulment simultaneously.

83. Canada submits that the first aspect relates to the Majority's finding that GTH's proposed acquisition of control of Wind Mobile did not constitute an acquisition of an existing business enterprise. This conclusion, and the process by which the Majority reached it, constitute annullable errors under Articles 52(1)(b), (e), and (d) of the Convention.
84. Canada considers that the Majority's interpretation of the terms "acquisition of an existing business enterprise" in Article II(4)(b) of the BIT as limited to acquisition of ownership – but not acquisition of control – of an enterprise constitutes a manifest excess of powers under Article 52(1)(b) of the Convention. It contends that the Majority's interpretation of this jurisdictional issue is untenable, and that the Majority failed to consider Canadian law in its interpretation of what constitutes an acquisition of an enterprise. The Majority also manifestly exceeded its powers by concluding that the ICA Application did not relate to the acquisition of Wind Mobile.
85. Canada submits also that the Award fails to state reasons for the conclusion that GTH's proposed acquisition of voting control of Wind Mobile was not an acquisition of an existing business enterprise. It considers that it is therefore annullable under Article 52(1)(e) of the Convention. Although the Majority appears to have concluded that the proposed transaction would not have amounted to the acquisition of ownership of Wind Mobile, the basis for this conclusion is not explained and is impossible to understand by reading the Award.
86. In addition, Canada points out that the Majority seriously departed from a fundamental rule of procedure under Article 52(1)(d) of the Convention, as GTH never argued that Article II(4)(b) of the BIT was limited to acquisition of ownership of an enterprise, and the Tribunal never allowed Canada to address this unexpected and unreasonable interpretation. The Tribunal also failed to provide Canada with the opportunity to be heard on the issue of what constitutes acquisition of ownership of an enterprise, and why the transactions contemplated in the ICA Application met that threshold.

87. The second aspect relates to the Majority's finding that the proposed share conversion in GTH's ICA Application did not amount to the acquisition of a share of an enterprise. That conclusion, and the process by which the Majority reached its conclusion, in Canada's view, constitute annulable errors under Articles 52(1)(b), (e), and (d) of the Convention.
88. In Canada's submissions, the finding that the ICA Application did not concern the acquisition of a share of Wind Mobile is a manifest excess of powers under Article 52(1)(b) of the Convention, because: (1) it is plainly contradicted by the evidence before the Tribunal; and (2) the Tribunal failed to apply the applicable law, the Ontario Business Corporations Act (the "OBCA"), to the effects of share conversions.
89. Canada challenges the Majority's reasoning on whether the ICA Application involved an acquisition of a share because it considers it is so deficient that it amounts to a failure to state reasons under Article 52(1)(e) of the Convention. It points out that it is not possible to understand what law the Tribunal applied or on what basis it concluded that the proposed share conversion of the Class D non-voting shares do not result in the acquisition of the newly issued Class B voting shares which GTH did not previously own.
90. Canada states that, to the extent any explanation was advanced, the Majority seems to have reached its conclusion based on a theory related to the treatment of corporate capital in the Shareholder's Agreement that was not raised by the Claimant. In doing so, the Majority committed a serious departure from a fundamental rule of procedure under Article 52(1)(d) of the Convention.
91. Finally, Canada identifies a third aspect of the Tribunal's decision on Canada's jurisdictional objection under Article II(4)(b) of the BIT that allegedly gives rise to an annulable error: the Tribunal failed to consider and address the fact that GTH's ICA Application also involved an acquisition of the shares held by AAL in Wind Mobile. It submits that the Tribunal ignored Canada's argument and evidence without providing any reasons whatsoever, although the issue was material to the outcome of Canada's jurisdictional objection under Article II(4)(b). This omission constitutes a failure to state reasons and a serious departure from a fundamental rule of procedure, under Articles

52(1)(e) and (d) of the Convention, and it led the Tribunal to manifestly exceed its powers under Article 52(1)(b).⁵³

92. In order to understand the Parties' arguments better, the Committee recalls that Article II(4)(b) of the BIT reads as follows:

“Decisions by either Contracting Party not to permit the 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.”

93. Article XIII of the BIT concerns the Settlement of Disputes between an Investor and the host Contracting Party.

A. MANIFEST EXCESS OF POWERS (ARTICLE 52(1)(B))

(1) The Parties' Positions

a. Canada's Position

94. Canada submits that the Tribunal manifestly exceeded its powers under Article 52(1)(b) of the Convention by asserting jurisdiction despite the dispute settlement exclusion in Article II(4)(b) regarding GTH's claims related to Canada's National Security Review. This annulable error stems from the Majority's untenable jurisdictional finding that the review of GTH's ICA Application did not relate to the acquisition of an existing business enterprise or a share of an enterprise under Article II(4)(b), and its failure to apply the proper law in coming to its conclusions.⁵⁴
95. Canada contends that the Tribunal was bound by the limitation embodied in the BIT's Article II(4)(b) but that it failed to apply such a provision, which was the proper applicable law, and that such failure amounts to a manifest excess of its powers. Canada states that

⁵³ Canada's Memorial on Partial Annulment, paras. 1-10.

⁵⁴ Canada's Memorial on Partial Annulment, para. 51.

Article II(4)(b) is a jurisdictional provision which limits the BIT Parties' consent to arbitrate and the Tribunal's powers to decide certain disputes.⁵⁵

96. Canada contends that its treaty practice and domestic legislation, which relevance the Majority dismissed, clearly establish that the exclusion was designed to capture reviews of acquisitions under the ICA Act, including acquisitions of voting control of enterprises. The ICA, which applied to the review of GTH's proposed transaction, is Canada's primary mechanism for reviewing acquisitions of investments.⁵⁶
97. Canada alleges that in considering what constitutes the "acquisition of an existing business enterprise" within the meaning of Article II(4)(b) of the BIT, the Majority purported to interpret these terms in accordance with the VCLT, while in effect disregarding the proper rules of treaty interpretation.⁵⁷ Despite purporting to apply the VCLT, the Majority completely failed to consider the ordinary meaning of the terms in Article II(4)(b) and to take into account the context of the terms "acquisition of an existing business enterprise."⁵⁸
98. In fact, Canada alleges that Black's Law Dictionary defines the term "acquisition" as "the gaining of possession or control over something." The ordinary meaning of "acquisition of an existing business enterprise" therefore must be understood to include the action of obtaining or gaining possession or control over an existing business enterprise. Conversely, the acquisition of control of an enterprise is also an acquisition of an existing enterprise as it is generally understood in corporate merger and acquisition transactions.⁵⁹
99. Canada contends that the Tribunal did not conduct a proper interpretation in the light of Article 31(1) of the VCLT, the ordinary meaning of the terms in their context and in the light of their object and purpose, and instead relied on the absence of a specific reference to acquisition of voting control as different from acquisition of a share in the text of the BIT. According to Canada, the exclusion embodied in Article II(4)(b) of the BIT refers to

⁵⁵ Canada's Memorial on Partial Annulment, paras. 51-52.

⁵⁶ Canada's Reply on Partial Annulment, para. 14.

⁵⁷ Canada's Memorial on Partial Annulment, para. 55.

⁵⁸ Canada's Memorial on Partial Annulment, para. 57.

⁵⁹ Canada's Memorial on Partial Annulment, para. 58.

the authorizations required under domestic law with respect to the acquisition of ownership or control of an enterprise. It insists that, on the facts of the case, it is clear that GTH was seeking to acquire Wind Mobile through its ICA Application. The ICA review was triggered precisely because an acquisition of voting shares of Wind Mobile was contemplated, and the acquisition of these shares would have amounted to an acquisition of Wind Mobile through an acquisition of control.⁶⁰

100. Canada states that even assuming, for the sake of argument, that the proposed transaction submitted to the regulatory authorities involved only a conversion of GTH's Class D non-voting shares into Class B voting shares in Wind Mobile, the Majority's findings would remain contradictory. Nowhere in the Award does the Majority explain the contradiction between the fact that Wind Mobile would have become a foreign owned and controlled common carrier within the meaning of the O&C Rules after the transaction, and the fact that the same transaction allegedly did not amount to a foreign acquisition of a common carrier for the purposes of Article II(4)(b) of the BIT.⁶¹
101. Canada does not argue that the Majority's application of the VCLT, although clearly deficient and inadequate, was a failure to apply the proper law. Canada points to the Majority's perfunctory VCLT analysis to highlight the process that led to such a manifestly incorrect interpretation of Article II(4)(b) of the BIT. For example, while the Majority purported to come to its conclusion "in conformity with the general rule of interpretation in Article 31(1)" by referring to the ordinary meaning of "acquisition of an existing business enterprise or a share of such enterprise", it is impossible to understand how the VCLT allowed the Majority to read in the term "ownership" but not the term "control" in interpreting what constitutes an acquisition of an enterprise or share thereof.⁶²
102. Canada insists that the Tribunal also failed to correctly state the object and purpose of the Treaty, portraying it as being limited to the protection and promotion of investors and failing to recognize that the Contracting Parties to the Treaty also sought to maintain certain

⁶⁰ Canada's Memorial on Partial Annulment, paras. 59-62; Canada's Reply on Partial Annulment, para. 47.

⁶¹ Canada's Reply on Partial Annulment, para. 52.

⁶² Canada's Reply on Partial Annulment, paras. 22-23.

regulatory flexibilities and oversight over their investment policy.⁶³ And it concludes that, in the light of the Tribunal's finding,⁶⁴ the exercise of GTH's share conversion rights was subject to the ICA Act, the Majority's conclusion that GTH's ICA Application did not relate to the Acquisition of Wind Mobile is untenable. [REDACTED]
[REDACTED], would GTH have acquired Wind Mobile, so that in finding that the ICA Application did not relate to the acquisition of Wind Mobile, the Tribunal manifestly exceeded its powers under Article 52(1)(b) of the ICSID Convention.⁶⁵

103. Canada challenges the Majority's finding that the proposed share conversion in GTH's ICA Application would not have amounted to the acquisition of a share of an enterprise. Canada contends that having conversion rights is fundamentally different from owning the shares that would be obtained as a result of the exercise of the conversion right. A conversion right is equivalent to an option to acquire a share: before exercising the option, the option-holder does not own the share itself. It points out that the Tribunal recognized that the conversion rights were conditional on liberalization of the O&C Rules and obtaining ICA approval.⁶⁶ It further states that the Shareholder's Agreement clearly reflects the fact that the share conversion of Class D shares would result in the acquisition of newly issued additional Class B voting shares.⁶⁷
104. Canada concludes that finding that the ICA Application did not concern the acquisition of a share of Wind Mobile is a manifest excess of powers under Article 52(1)(b) of the Convention, because it is plainly contradicted by the evidence before the Tribunal.⁶⁸
105. Canada submits that GTH's ICA Application was not limited to the acquisition of new voting shares through the conversion of Class D shares. It also included the acquisition of AAL's shares in Wind Mobile, ultimately leading to GTH indirectly owning 99 percent of Wind Mobile's issued and outstanding shares. And that proves, according to Canada, that

⁶³ Canada's Reply on Partial Annulment, para. 24.

⁶⁴ Award, para. 71.

⁶⁵ Canada's Memorial on Partial Annulment, paras. 68-71.

⁶⁶ Canada's Memorial on Partial Annulment, para. 73.

⁶⁷ Canada's Memorial on Partial Annulment, para. 76.

⁶⁸ Canada's Memorial on Partial Annulment, para. 79.

it related to an acquisition of shares of an existing business enterprise within the meaning of Article II(4)(b).⁶⁹

106. Canada submits that the Tribunal departed from its duty to decide the dispute in accordance with the rules of law agreed by the Parties. It failed to consider the ICA Act in determining what constitutes an acquisition of an enterprise in the context of foreign arbitration. It also failed to apply the applicable law, the OBCA.⁷⁰
107. Canada does not suggest that domestic law was the applicable law for the purpose of determining a breach of the Treaty or that it formed the only basis for the Tribunal's jurisdiction. Rather, domestic law had to be applied in the context of interpreting and applying the jurisdictional provision in Article II(4)(b).⁷¹ Canada relies on numerous authorities which have noted that it is necessary to rely on domestic law in order to establish the existence and scope of certain facts on which jurisdiction depends. "Just like in *Fireman's Fund v Mexico* and *Gallo v Canada*, the definitions of 'investment' and 'enterprise' in Article 1 of the Treaty contain a *renvoi* to domestic law that must be taken into consideration when interpreting Article II(4)(b), which is a dispute settlement exclusion related to the acquisition of certain investments, e.g., enterprises and shares thereof."⁷²
108. Canada insists once again that the concepts of ownership and control should have been defined by domestic law, following the approach of *Nelson v Mexico*. Therefore, the Tribunal's failure to apply the relevant domestic law in making its findings on these questions constitutes a manifest excess of powers under Article 52(1)(b) of the Convention. Further, the need to refer to domestic law in interpreting "acquisition of an enterprise" and "ownership" or "control" of an enterprise is reinforced here by the direct *renvoi* to domestic law in Article 1(f) of the Treaty.⁷³

⁶⁹ Canada's Memorial on Partial Annulment, para. 81.

⁷⁰ Canada's Memorial on Partial Annulment, para. 82.

⁷¹ Canada's Reply on Partial Annulment, para. 27.

⁷² Canada's Reply on Partial Annulment, para. 29.

⁷³ Canada's Memorial on Partial Annulment, paras. 84-85, 88.

109. Canada responds to the claim that it did not provide evidence on national law regarding the share conversion process during the underlying Arbitration by stating that “the Claimant never argued that they were relevant considerations. Moreover, the Tribunal never raised the issues or allowed Canada an opportunity to present evidence of Canadian corporate law which addresses these issues.”⁷⁴

b. GTH’s Position

110. GTH submits that while Canada advances three different Article 52(1) grounds for annulment, each of them is the iteration of its disagreement with the decision and the introduction of new elements Canada never presented to the Tribunal. First, the Majority applied the proper law, and was not obliged to apply domestic law, in reaching a decision that was tenable in the light of the VCLT, and the Majority’s assessment of evidence is not subject to review in annulment. Second, the Majority articulated its reasons for finding that GTH sought neither to acquire Wind Mobile nor to obtain ownership of a share thereof, and it addressed Canada’s ancillary argument on the scope of the Voting Control Application. Third, Canada was given the right to be heard on its Article II(4)(B) objection.⁷⁵

111. GTH contends that Canada has failed to establish that the Majority committed an excess of powers under either basis, let alone a manifest excess of powers.⁷⁶

112. GTH contends that the Majority applied the proper law. It argues that Canadian law was not the applicable law but rather, as provided for in Article XIII(7) of the BIT, the BIT and applicable rules of international law. Accordingly, in its analysis of the Article II(4)(b) objection, the Majority applied the BIT provisions and international law.⁷⁷

113. GTH alleges that there is no *renvoi* to domestic law in the BIT to suggest the Majority should have considered domestic law when interpreting Article II(4)(b).⁷⁸ It also alleges

⁷⁴ Canada’s Memorial on Partial Annulment, para. 98.

⁷⁵ GTH’s Counter-Memorial on Partial Annulment, paras. 3-6.

⁷⁶ CD-02, Slide 19.

⁷⁷ GTH’s Counter-Memorial on Partial Annulment, paras. 43, 45; GTH’s Rejoinder on Partial Annulment, para. 10.

⁷⁸ GTH’s Rejoinder on Partial Annulment, para. 12.

that Canada attempts to import into Article II(4)(b) “irrelevant” references to domestic law that appear in Article I of the BIT and, even assuming *arguendo* that those references are relevant, how they would have factored into the Tribunal’s analysis of Article II(4)(b).⁷⁹ It adds that Canada’s complaint concerns the Tribunal’s consideration of domestic law as a fact, which is not a ground for annulment. Finally, it adduces that even assuming that was a ground for annulment (which is not), Canada never advanced its arguments regarding the application of Ontario Law in the Arbitration.⁸⁰

114. According to GTH, Canada’s argument, that since the terms used in Article II(4)(b) are not defined in the BIT nor in international law they had to be interpreted according to Canadian law, collides with Article 31 of the VCLT which points to the ordinary meaning of the terms in their context and in the light of the BIT’s object and purpose. GTH alleges that none of the authorities advanced by Canada is useful to its argument that the Tribunal had to apply domestic (Canadian) law.⁸¹
115. Finally, GTH considers that Canada’s argument relates to alleged errors in the Majority’s analysis, which in any case do not give rise to annulment. The Tribunal had the discretion to determine whether the ICA Act was relevant or not to its interpretation of Article II(4)(b) and it did so, and even when Canada may not agree with its conclusions, that disagreement is not a ground for annulment.⁸²
116. Regarding Canada’s argument that the OBCA should have been the leading domestic text for interpretation, GTH adduces that such was never referenced by either Party during the Arbitration. Even when Canada admits there was an absence of evidence, it argues that it was because the Tribunal never raised the issue nor invited Canada to present evidence. Canada does not explain how the Tribunal failed to give it an opportunity to produce evidence. GTH considers Canada’s arguments in this sense as new arguments it never made

⁷⁹ GTH’s Rejoinder on Partial Annulment, para. 13.

⁸⁰ GTH’s Rejoinder on Partial Annulment, paras. 14-15.

⁸¹ GTH’s Counter-Memorial on Partial Annulment, paras. 47-48.

⁸² GTH’s Counter-Memorial on Partial Annulment, para. 51.

during the Arbitration and, finding support in Procedural Order No. 2, it affirms that annulment proceedings are not the proper place to make new arguments.⁸³

117. GTH argues that Canada has not shown why the Majority's decision is untenable.⁸⁴ In fact, the Majority followed GTH's presentation on that point.⁸⁵ It applied the interpretation rule embodied in Article 31(1) of the VCLT. The Majority then applied the VCLT in coming to a reasonable and supported interpretation. Even if there were errors in the Majority's application of the VCLT, or partial non-application of some principles of interpretation contained in the VCLT, it still applied the proper law.⁸⁶ These do not amount to excess of power.
118. GTH finally alleges that, even if the Committee finds that the Majority committed any excess of powers in dismissing the Article II(4)(b) objection, such excess is not "manifest." For the reasons explained above, the Majority's purported excess is not "obvious, clear or self-evident", nor is the decision unreasonable on its face.⁸⁷
119. GTH indicates that to annul the Award for a manifest excess of powers based on untenable findings, this Committee must find that no tribunal could have reasonably reached the conclusion that the Majority did.⁸⁸
120. GTH alleges that Canada has failed to establish that the Majority's decision to dismiss Canada's Article II(4)(b) objection amounts to an excess of powers, let alone a "manifest" excess warranting annulment under Article 52(1)(b) of the ICSID Convention.⁸⁹

⁸³ GTH's Counter-Memorial on Partial Annulment, paras. 52-53.

⁸⁴ GTH's Counter-Memorial on Partial Annulment, para. 55.

⁸⁵ GTH's Counter-Memorial on Partial Annulment, para. 57 refers to GTH's Reply on Merits and Damages and Counter-Memorial on Jurisdiction, paras. 156, 161; GTH's Rejoinder on Jurisdiction and Admissibility, paras. 35-42 and GTH's Post-Hearing Submission, para. 52.

⁸⁶ GTH's Counter-Memorial on Partial Annulment, paras. 59-60.

⁸⁷ GTH's Counter-Memorial on Partial Annulment, para. 64.

⁸⁸ GTH's Counter-Memorial on Partial Annulment, paras. 41, 55; GTH's Rejoinder on Partial Annulment, para. 17.

⁸⁹ GTH's Rejoinder on Partial Annulment, para. 8.

121. For those reasons, GTH submits that Canada’s request to annul the Majority’s decision on Article II(4)(b) objection as a manifest excess of powers under Article 52(1)(b) must be dismissed.

(2) The Committee’s Analysis

122. The Committee considers that in order to determine whether the Tribunal manifestly exceeded its powers it must examine whether the Tribunal properly identified the applicable law and endeavoured to apply such law for the question of jurisdiction.

123. In paragraph 326 of the Award, the Tribunal stated that it “must determine the scope of its jurisdiction with reference to the terms of the BIT, as interpreted in accordance with Article 31 of the VCLT.” It also noted that “[c]onsistent with its alleged practice, Canada could have specifically referred to its foreign ownership and control legislation in Article II(4)(b) of the BIT; it has not done so, although the ICA Act had been enacted in 1985 and, as such, predated the BIT.”⁹⁰

124. The Tribunal further stated that it was not persuaded by Canada’s argument that the conversion of Class D non-voting shares to Class B voting shares involved a return of the exchange of share certificates with enhanced ability to vote and did not involve a sale of Class B shares to achieve the conversion. The language consistently used in the Amended and Restated Shareholder’s Agreement is for conversion which involved the exercise of a pre-existing right that GTH had already acquired.⁹¹ The Tribunal found support for this in a statement by a Canadian high ranking official who had taken the view that GTH was “executing an option that [it] has held since its original investment in 2009 to convert nonvoting to voting shares.”⁹²

125. Regarding the “proper VCLT analysis” referred to by Canada,⁹³ it is not for the Committee to examine whether the Tribunal’s interpretation of the Treaty is correct or incorrect. Such

⁹⁰ Award, para. 326.

⁹¹ Award, para. 329.

⁹² Award, para. 330.

⁹³ Canada’s Memorial on Partial Annulment, para. 60.

assessment would be equivalent to an appeal and to a *de novo* review of the Tribunal's jurisdiction, which is beyond the Committee's powers under the ICSID Convention.

126. Canada argues that when GTH made its investment in Wind Mobile in 2008, GTH did not acquire Wind Mobile. It also states that the Majority recognized that the exercise of GTH's conversion rights to acquire ownership of a majority of voting shares in Wind Mobile was subject to applicable laws as well as the ICA Act, and that the ICA review was triggered because an acquisition of voting shares was contemplated which would have amounted to an acquisition of Wind Mobile through acquisition of control. Canada alleges that those two statements are untenable at the same time.⁹⁴
127. The Committee notes that the Tribunal considered Canada's arguments and found that even when Subsection 28(1) of the ICA Act includes a reference to the acquisition of voting control, "the difficulty for Canada is that the BIT refers to the 'acquisition of an existing business enterprise, or a share of an enterprise,' but not to the acquisition of voting control. One cannot be held to be necessarily subsumed in the other."⁹⁵
128. Therefore, the Committee acknowledges that the Tribunal stated that the acquisition of control required ICA review, because the ICA Act refers to "control" explicitly, but that the BIT only refers to acquisition in the sense of ownership.
129. The Tribunal clarified its choice in the following way: "[i]t should be added that the object and purpose of the treaty – a general interpretation standard under Article 31(1) of the VCLT – commands that potentially choosing a broad interpretation of the terms of the treaty so as to read a reference to an 'acquisition of an existing business enterprise or a share of such enterprise' as including an acquisition of legal control should only be considered with caution. Broadening exclusions from the protections accorded in the BIT by a Contracting Party to nationals of the other Contracting Party, beyond their explicit

⁹⁴ Canada's Memorial on Partial Annulment, paras. 66, 68-70.

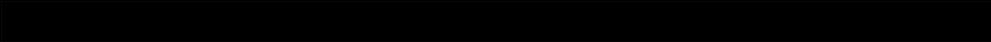
⁹⁵ Award, para. 332.

terms, would hardly be conducive to the encouragement of the creation of favourable conditions for investors to make investments.”⁹⁶

130. The Majority of the Tribunal did not share the minority’s view that “from the point of view of the Contracting Parties, for whose benefit the Article II(4) exception is established, the acquisition of control is at least as significant in the context of the control of foreign investment (with which the BIT is by its nature essentially concerned) as is the acquisition of rights of financial participation in a business without any correlative rights to control that business.”⁹⁷

131. Canada also alleges that “GTH’s ICA Application was not limited to the acquisition of new voting shares through the conversion of Class D shares. It also included the acquisition of AAL’s shares in Wind Mobile, ultimately leading to GTH indirectly owning 99 percent of Wind Mobile’s issued and outstanding shares” and “[g]iven that the transaction under review also included GTH’s proposal to acquire AAL’s shares in Wind Mobile, it is obvious that it related to an acquisition of shares of an existing business enterprise within the meaning of Article II(4)(b). The Tribunal therefore did not have jurisdiction over Canada’s decision under the ICA Act with respect to the proposed transaction and the resulting acquisition of voting shares of Wind Mobile. As a result, by asserting jurisdiction, the Tribunal manifestly exceeded its powers under Article 52(1)(b) of the ICSID Convention.”⁹⁸

132. The Committee observes that the Tribunal had taken note that “

 Ultimately, GTH would have held over 99 percent of the voting and equity shares of Wind Mobile.”⁹⁹ As indicated in the Award, in the Tribunal’s view it is the acquisition of voting control that triggers the ICA’s Application. However, the Tribunal added that the acquisition of voting

⁹⁶ Award, para. 333.

⁹⁷ Award, para. 336.

⁹⁸ Canada’s Memorial on Partial Annulment, paras. 80-81.

⁹⁹ Award, para. 309.

control could not be assimilated to acquisition of new enterprise or of a share thereof and so it was outside the exclusion set out in Article II(4)(b) of the BIT.¹⁰⁰

133. Canada submits that the Majority manifestly exceeded its powers by failing to apply the proper law in coming to its conclusions with respect to Article II(4)(b). Canada argues that “given that the concepts of acquisition, ownership, and control of investments depend on domestic law, the Tribunal could not interpret these terms without reference to Canada’s domestic law, as decided in *Nelson v Mexico*.”¹⁰¹ Canada challenges GTH’s arguments on the lack of evidence on Canadian law before the Tribunal on the grounds that Claimant never argued that they were relevant considerations and that the Tribunal had not granted Canada an opportunity to present evidence. It also argues that the Majority’s reasoning with respect to the share conversion ignores the applicable domestic law or makes implicit assumptions about domestic law that are plainly erroneous.¹⁰²
134. The Committee recalls that in *Nelson v Mexico*, the respondent alleged that the meaning of corporate control had to be determined considering the *lex situs* (i.e., in that case, Mexican law), and the “tribunal agree[d] with the respondent in that, in the case of a company such as [...] the determination of whether or not the claimant has ‘corporate control’ of the corporation is also a matter of Mexican law.”¹⁰³
135. In its Memorial on Jurisdiction, Canada submits that “[t]he terms ‘acquisition of an existing business enterprise or share of such enterprise’ generally refer then to all forms of transactions that lead to gaining control or ownership of the enterprise, whether through share transactions, asset transactions or otherwise. For example, obtaining the majority of voting shares of an existing enterprise would therefore qualify either as the ‘acquisition of shares’ of an existing enterprise or the ‘acquisition of an existing enterprise’.”¹⁰⁴ Furthermore, it stresses that “[o]f importance to this arbitration is the review of investments

¹⁰⁰ Award, para. 332.

¹⁰¹ Canada’s Memorial on Partial Annulment, para. 82.

¹⁰² Canada’s Memorial on Partial Annulment, paras. 86-89.

¹⁰³ *Joshua Dean Nelson v The United Mexican States*, ICSID Case No. UNCT/17/1, Final Award, June 5, 2020, paras. 190-191 (**RL-389**).

¹⁰⁴ Canada’s Memorial on Jurisdiction, para. 121.

that may be injurious to national security outlined in Part IV.1 of the ICA Act which applies in respect of an investment, implemented or proposed, by a non-Canadian: ... (b) to acquire control of a Canadian business in any manner described in subsection 28(1).”¹⁰⁵

136. Canada indicates that “[t]his provision, which sets out the scope of the national security review under the ICA, refers to the establishment of a new Canadian business and the acquisition of an existing Canadian business, and mirrors the language in Article II(4)(b) of the FIPA. Section 28(1) of the ICA Act further provides that a non-Canadian can acquire control of a Canadian business by ‘the acquisition of voting shares of a corporation incorporated in Canada carrying on the Canadian business.’ This acquisition of voting shares leading to control of an existing Canadian business enterprise can take place through the conversion of non-voting shares to voting shares. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Given this, any challenge of that decision cannot be subject to investor-State dispute settlement under the FIPA and this Tribunal is without jurisdiction over such a claim.”¹⁰⁶

137. In its Reply, Canada clarifies that it is not arguing that Canadian domestic law be the applicable law for the purpose of determining a breach of the Treaty or that it formed the only basis for the Tribunal’s jurisdiction; rather, domestic law has to be applied in the context of interpreting and applying the jurisdictional provision in Article II(4)(b).¹⁰⁷ However, no mention is found in its Memorial on Jurisdiction of the domestic law which should have guided the Tribunal in its interpretation of the meaning of acquisition, ownership, or control.

¹⁰⁵ Canada’s Memorial on Jurisdiction, para. 130.

¹⁰⁶ Canada’s Memorial on Jurisdiction, para. 147.

¹⁰⁷ Canada’s Reply on Partial Annulment, para. 27.

138. As pointed out by the PCIJ in the *Case of German Interests in Upper Silesia*, “[f]rom the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures.”¹⁰⁸
139. Moreover, in these annulment proceedings, Canada requested an authorization to submit new evidence on Canadian domestic law that was not included in the record of the underlying Arbitration proceedings. Canada requested the introduction of the OBCA which it deemed to be the applicable law. This Committee dismissed the request on the grounds of its non-pertinence because the annulment proceedings are not an opportunity to raise new arguments on the merits or introduce new contemporaneous evidence.¹⁰⁹
140. The Committee finds that the Tribunal had identified the applicable law and properly endeavoured to apply it. Accordingly, it finds no ground to conclude that the Tribunal manifestly exceeded its powers, in particular, that the non-application of domestic law in this respect would amount to an excess of powers. The Committee underscores in any case that Canada did not bring up domestic law during the underlying proceedings.

B. FAILURE TO STATE REASONS (ARTICLE 52(1)(E))

(1) The Parties’ Positions

a. Canada’s Position

141. Canada contends that the Tribunal’s assertion of jurisdiction over GTH’s National Security Review Claims despite the wording of Article II(4)(b) lacks any intelligible reasons that would allow the reader to understand how the Tribunal arrived at its conclusion. This is markedly different from all of its other findings in the Award. Canada states that on certain key points, the reasons expressed in the Award regarding Article II(4)(b) also contradict other findings made by the Tribunal. This further inhibits the comprehension of the Tribunal’s reasoning. Such *lacunae* in the Tribunal’s reasons for its decision to reject

¹⁰⁸ *Certain German Interests in Polish Upper Silesia (Germany v Poland)*, Judgment of May 25, 1926, P.C.I.J. Reports Series A, No. 7, p. 19 (CL-091); GTH’s Reply on Merits and Damages and Counter-Memorial on Jurisdiction and Admissibility, para. 166.

¹⁰⁹ Procedural Order No. 2, Submission of New Evidence, paras. 2, 14, 27.

Canada's jurisdictional objection based on Article II(4)(b) constitute an annulable error and an additional ground to annul this part of the Award. It constitutes a failure to state the reasons on which the Award is based.¹¹⁰

142. Canada contends that it is not possible to understand which law the Tribunal applied when it asserted jurisdiction over the National Security Review Claims. To the extent any explanation was advanced, the Majority seems to have reached its conclusion based on a theory related to the treatment of corporate capital in the Shareholder's Agreement at issue that was not raised by the Claimant.¹¹¹
143. Canada explains that the Tribunal relied on its finding that acquisition of ownership is different from acquisition of control and that "[o]ne cannot be held to be necessarily subsumed in the other." This finding led it to conclude that "[a]bsent a reference in the BIT to the acquisition of legal control, and in conformity with the general rule of interpretation in Article 31(1) of the VCLT, the majority of the Tribunal considers that the BIT refers in Article II(4)(b) to the acquisition of an enterprise or a share thereof in the sense of ownership as opposed to control." Such conclusory reasoning, according to Canada, cannot satisfy the minimum requirement to state the reasons upon which an award is based. Notably missing in the Award is any analysis of what the Majority deemed was the correct interpretation of Article II(4)(b) of the BIT. In the absence of such analysis, the reader is not in a position to understand how the elements of the well-known analytical framework set out in Article 31(1) of the VCLT led the Majority to its conclusion.¹¹²
144. Canada submits that the Award contains no assessment of whether the ICA Application, [REDACTED], would have amounted to an acquisition of ownership of Wind Mobile. Without such an assessment, Canada adds, it is impossible to understand how the Majority came to the conclusion that the dispute settlement exclusion in Article II(4)(b) of the BIT did not

¹¹⁰ Canada's Memorial on Partial Annulment, para. 108.

¹¹¹ Canada's Memorial on Partial Annulment, paras. 151, 156.

¹¹² Canada's Memorial on Partial Annulment, paras. 111-112.

apply. This failure constitutes grounds for annulment under Article 52(1)(e) of the Convention.¹¹³

145. GTH argues that, contrary to Canada's assertion, the Majority's reasoning for dismissing Canada's Article II(4)(b) objection is not contradictory. There is no contradiction between: (1) the uncontested fact that GTH's initial investment in Wind Mobile complied with the O&C Rules; and (2) the Majority's finding that GTH's conversion of its non-voting shares in Wind Mobile to voting shares did not result in GTH increasing its ownership stake. In fact, the two propositions are complementary. GTH's equity ownership in Wind Mobile would have remained at 65.08 percent at all times, and the only change arising from the exercise of its conversion right was an increase in its voting shares from 32.03 percent to 65.08 percent.¹¹⁴

146. Canada submits that the Tribunal failed to consider and address the fact that GTH's ICA Application also involved an acquisition of the shares held by AAL in Wind Mobile. The Tribunal ignored Canada's argument and evidence without providing any reasons whatsoever, although the issue was material to the outcome of Canada's jurisdictional objection under Article II(4)(b). This omission constitutes a failure to state reasons.¹¹⁵

b. GTH's Position

147. GTH alleges that the Majority did not fail to state its reasons. It considers that Canada advances the same factual complaints it has raised to support its claim that the Majority's reasoning should be annulled as a manifest excess of powers, namely, (1) the Voting Control Application did not result in an acquisition of Wind Mobile; (2) the Voting Control Application did not result in an acquisition of a share of Wind Mobile; and (3) [REDACTED]

[REDACTED]

[REDACTED]¹¹⁶

¹¹³ Canada's Memorial on Partial Annulment, para. 115.

¹¹⁴ GTH's Rejoinder on Partial Annulment, para. 31.

¹¹⁵ Canada's Memorial on Partial Annulment, paras. 126-128.

¹¹⁶ [REDACTED]

148. GTH contends that in the Award, the Majority walks through its reasons for dismissing Canada’s Article II(4)(b) objection. It explains that: (1) the text of Article II(4)(b) does not encompass all ICA-related decisions and there must be an independent assessment of the provision’s application to each case; (2) the ordinary meaning of the term of “acquisition” in Article II(4)(b), in the light of the context, object, and purpose of the BIT, did not extend to an acquisition of control and was limited to an acquisition of ownership; and (3) GTH’s Voting Control Application contemplated an acquisition of control and not an acquisition of ownership because GTH was exercising a pre-existing conversion right in respect of shares it already possessed and was not acquiring new shares. For these reasons, the Majority concluded that the Voting Control Application Claims fell outside the scope of Article II(4)(b) and dismissed Canada’s objection. Thus, a reader of this section of the Award is able to follow “how the [majority] proceeded from Point A. to Point B. and eventually to its conclusion.” As Canada acknowledges, so long as a reader can “follow how a tribunal proceeded through its reasoning”, there is no ground for annulment “regardless of whether that reasoning includes ‘a manifestly incorrect application of the law’.” The Majority articulated a clear test which required GTH to accrue a new property interest which it did not previously possess (i.e., an “annulment/issue/acquisition” as opposed to a conversion).¹¹⁷
149. GTH considers that, in particular, Canada misleadingly asserts that: (1) the Tribunal found that “GTH did not own Wind Mobile” when it made its investment in 2008; and (2) there can “be no doubt that a result of the transaction described in the [Voting Control] Application, GTH was seeking to become the owner of Wind Mobile.” In fact, argues GTH, the only change between 2008, when the investment was made, and 2012, when the Voting Control Application was filed, was the possibility of lawfully increasing GTH’s control of the enterprise. Thus, Canada’s alleged inconsistency is false.¹¹⁸
150. GTH contends that Canada next takes issue with the Majority’s alleged failure to refer to the terms of the Shareholder’s Agreement and Ontario law in finding that the Voting

¹¹⁷ GTH’s Counter-Memorial on Partial Annulment, paras. 71-72.

¹¹⁸ GTH’s Counter-Memorial on Partial Annulment, paras. 74-75.

Control Application did not relate to an acquisition of a share of Wind Mobile; but, as shown above, Canadian law was not the applicable law and, thus, the request must be dismissed.¹¹⁹

151. GTH adduces that disagreement with the Majority’s reasoning is not a basis for annulment for a failure to state reasons. It states that, as Canada itself acknowledges and describes, the Majority’s reasoning derives from its review and analysis of the terms of the Shareholder’s Agreement. GTH considers that while Canada may disagree with the Majority’s decision to reach a finding of fact based on its analysis of the Shareholder’s Agreement, as opposed to referring to Canadian law (which was never presented in the Arbitration), the Majority’s reasoning is intelligible and cannot amount to a failure to state reasons.¹²⁰

152. GTH’s Voting Control Application Claims relate to Canada’s treatment of GTH’s effort to convert its non-voting shares to voting shares, not the potential acquisition by GTH of AAL’s shares on some later date. [REDACTED]

[REDACTED]
[REDACTED]¹²¹

153. GTH contends that, in any event, as Canada accepts, the Tribunal acknowledged Canada’s argument that “GTH planned a second stage of the transaction, in which it would purchase AAL and thereby acquire AAL’s interests in Wind Mobile.”¹²² So that Canada’s request must be dismissed.

(2) The Committee’s Analysis

154. Canada submits that the Majority failed to state reasons for finding that GTH’s proposed acquisition of voting control of Wind Mobile did not constitute the acquisition of an existing business enterprise.

¹¹⁹ GTH’s Counter-Memorial on Partial Annulment, paras. 77-79.

¹²⁰ GTH’s Rejoinder on Partial Annulment, para. 34.

¹²¹ [REDACTED]

¹²² GTH’s Counter-Memorial on Partial Annulment, para. 82.

155. The Committee notes that the Tribunal was not persuaded that a conversion of shares involves an acquisition of shares as advanced by Canada. First, the Tribunal relied on the Amended and Restated Shareholder’s Agreement, which refers to conversion of shares and, as pointed out by the Tribunal, does so consistently. It also clarified that the fact that the shares had to be returned in order to get other class of shares does not involve an acquisition absent an *animus novandi*. Then, it recalled the statement of Canada’s Assistant Deputy Minister at the time of the Voting Control Application denying acquisition.¹²³
156. Second, taking into consideration both the language of the ICA Act Section IV.I, which includes a reference to the acquisition of voting control and the acquisition, in whole or in part, or the establishment of an entity carrying on all or any part of its operations in Canada, and of Article II(4)(b) of the BIT, which refers only to “acquisition of an existing business enterprise or a share of such enterprise”, the Tribunal concluded that the acquisition of an enterprise or of a share thereof is a different concept than the acquisition of control. In this sense, the Tribunal was reluctant to equate the conversion of shares that GTH already had into voting shares to an acquisition of shares.¹²⁴
157. Therefore, the Tribunal did not accept Canada’s assertion that the challenged measures fall within the scope of Article II(4)(b) of the BIT as a decision not to permit the acquisition of an existing business enterprise or a share of such enterprise and rejected the objection on jurisdiction.¹²⁵
158. Canada further argues that the Award contains contradictory findings that make it impossible to understand the reasons for which the Majority asserted jurisdiction over GTH’s National Security Review Claims. Canada alleges that the finding that GTH’s claims relating to its ICA Application fell within the jurisdiction of the Tribunal appears to contradict the Tribunal’s unanimous finding that GTH’s initial investment in Wind Mobile

¹²³ Award, paras. 328-330.

¹²⁴ Award, para. 332: “One cannot be held to be necessarily subsumed in the other. Absent a reference in the BIT to the acquisition of legal control, and in conformity with the general rule of interpretation in Article 31(1) of the VCLT, the majority of the Tribunal considers that the BIT refers in Article II(4)(b) to the acquisition of an enterprise or a share thereof in the sense of ownership as opposed to control.”

¹²⁵ Award, para. 334.

in 2008 complied with the O&C Rules. It also appears to contradict the finding that the conversion rights in the Shareholder’s Agreement were subject to ICA approval. Indeed, the Tribunal accepted that GTH did not own Wind Mobile, which should necessarily have led the Majority to conclude that the proposed acquisition would have entailed an acquisition of ownership of Wind Mobile.¹²⁶

159. The Committee underscores that it is not the Tribunal which asserted that GTH’s investment complied with the O&C Rules but rather Canada’s judiciary in a decision by the Federal Court of Appeals of 8 June 2011, as indicated in the Award.¹²⁷

160. The Committee also finds that the Tribunal decided that the proposed conversion of shares was subject to ICA Act, as indicated in its section IV.I, and was different from an acquisition of an existing business or a share thereof because the BIT was concluded after the ICA Act, so if it intended to exclude the acquisition of control, the BIT could have been more explicit.¹²⁸

161. Canada also alleges that as a result of the transaction described in the ICA Application, GTH was seeking to become the owner of Wind Mobile. Had the transaction gone ahead, GTH would have indirectly owned over 99 percent of both the voting shares and the equity of Wind Mobile.

162. [REDACTED]

[REDACTED]¹²⁹ As such when Canada asserts that “[h]ad the transaction gone ahead, GTH would have indirectly owned over 99 percent of both the voting shares and the equity of Wind Mobile”, [REDACTED]

[REDACTED]¹³⁰

¹²⁶ Canada’s Memorial on Partial Annulment, para. 116.

¹²⁷ Award, para. 55.

¹²⁸ Award, para. 332.

¹²⁹ [REDACTED]

¹³⁰ C-027, p. 1, p. 5ii.

163. Canada argues that although the Majority does not explain the test it applied to determine what constitutes ownership of an enterprise, such an extensive interest in Wind Mobile would satisfy any reasonable definition of the term. Moreover, the evidence on the record demonstrates that GTH shared this understanding. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]¹³¹

164. [REDACTED]

[REDACTED]¹³²

Thus, the Committee finds Canada's allegations on this point unpersuasive.

165. Canada alleges that the Majority failed to state reasons for finding that GTH did not acquire a share of Wind Mobile. The Committee however finds that the Tribunal made clear the difference between the acquisition of an existing business or a share thereof, as provided for in Article II(4)(b) – an operation which was beyond the Tribunal's jurisdiction – and the acquisition of control, as provided for in the ICA Act Section IV.I. As indicated above in this Decision, the Committee finds that the Tribunal explained the reasons that led it to such a distinction. It is not within the Committee's mandate to appraise the decision taken. Suffice it to state that the Tribunal's reasons are there and can be followed.

166. Canada alleges that the Tribunal avoided considering that the share conversion of GTH's non-voting shares impliedly extended to the acquisition of shares that AAL held in Wind Mobile. As explained above, the Committee has reviewed the Parties' arguments and also the documents supporting the Award. [REDACTED]

[REDACTED]

131 [REDACTED]

132 [REDACTED]

167. Given all of the above, the Committee finds that the Tribunal did state its reasons in a way that allows the reader to follow from point A to point B. Therefore, the Committee dismisses this ground for annulment.

C. SERIOUS DEPARTURE FROM A FUNDAMENTAL RULE OF PROCEDURE (ARTICLE 52(1)(D))

(1) The Parties' Positions

a. Canada's Position

168. Canada submits that there was a serious departure from a fundamental rule of procedure, as provided for in Article 52(1)(d), because GTH never argued that Article II(4)(b) of the BIT was limited to acquisition of ownership of an enterprise, and the Tribunal never allowed Canada to address this unexpected and unreasonable interpretation.

169. Canada argues that it was denied the right to be heard regarding the finding on Article II(4)(b) three times: when the Tribunal interpreted the terms ownership and control without providing Canada with the opportunity to address such interpretation; when the Tribunal decided that acquisition of the majority did not involve acquisition of control because it considered that the Shareholder's Agreement should have contained a more detailed description of the share conversion process and the treatment of corporate capital; and, finally, when the Tribunal failed to engage with Canada's argument and evidence pertaining to GTH's proposed indirect acquisition of AAL's shares in Wind Mobile (which together with the share conversion would have resulted in GTH owning over 99 percent of the voting shares and of the equity in Wind Mobile).¹³³ Canada considers it had no opportunity to respond to the reading of Article II(4)(b) that the Majority ultimately adopted.¹³⁴

170. Canada asserts that the Majority never gave it an opportunity to explain that the Shareholder's Agreement had to be read with the applicable governing law, the OBCA, which specifically addresses treatment of corporate capital in the case of share

¹³³ Canada's Memorial on Partial Annulment, para. 151.

¹³⁴ Canada's Memorial on Partial Annulment, para. 152.

conversions.¹³⁵ Canada contends that it was denied its right to be heard on GTH's proposal to acquire AAL's shares in Wind Mobile.¹³⁶

171. In its Reply, Canada contends that the implications of these errors are particularly serious because, if allowed to stand, the Majority flawed findings on Article II(4)(b) provide a roadmap for foreign investors to structure their investments in such a way as to circumvent the dispute settlement exclusion in all of Canada's treaties that contain similarly worded dispute settlement provisions.¹³⁷

b. GTH's Position

172. For its part, GTH affirms that Canada was given the right to be heard on the Article II(4)(b) objection. It states that "[i]n the Arbitration, both Parties were given the opportunity to extensively brief the Article II(4)(b) objection in written and oral submissions. Canada has not, nor could it, identified any points in the hearing where it was prevented from adducing evidence or making arguments in support of its preferred interpretation of Article II(4)(b)."¹³⁸
173. Regarding the three times on which Canada allegedly was denied the right to be heard, GTH submits the following arguments. First, Canada had the opportunity to address the proper test for determining ownership under Article II(4)(b) of the BIT. The ordinary meaning of the terms of Article II(4)(b) of the BIT was addressed extensively by the Parties, and the Majority's finding that Article II(4)(b) addresses the acquisition of ownership was squarely within that legal framework. Contrary to Canada's allegation that GTH never raised the argument, GTH affirmatively raised the argument that the Tribunal should limit the meaning of Article II(4)(b) to an acquisition of ownership. Canada then responded to this argument, albeit less than fulsomely. GTH made an argument and Canada

¹³⁵ Canada's Memorial on Partial Annulment, para. 156.

¹³⁶ Canada's Memorial on Partial Annulment, para. 157.

¹³⁷ Canada's Reply on Partial Annulment, para. 4.

¹³⁸ GTH's Counter-Memorial on Partial Annulment, para. 89.

was given the opportunity to respond. Therefore, concludes GTH, Canada's right to be heard has not been denied.¹³⁹

174. Second, GTH submits that the nature and effect of the share conversion process described in the Shareholder's Agreement was addressed by both Parties and, once again, the Majority's finding that the conversion of shares was not an acquisition of a share was squarely within the legal framework. GTH submits that the Majority adopted GTH's submission in the Award. Further, the Majority's use of the word "enhanced" does not make its finding a "new theory."¹⁴⁰
175. Third, according to GTH, the Majority sufficiently engaged with Canada's argument with respect to GTH's contemplated acquisition of AAL's shares in Wind Mobile.¹⁴¹
176. Finally, in its Rejoinder, GTH argues that these claims are wholly without merit; that Canada does not come close to establishing a departure from a fundamental rule of procedure that would warrant annulment under Article 52(1)(d) and that the new arguments advanced in Canada's Annulment Reply are incorrect and unavailing.¹⁴²

(2) The Committee's Analysis

177. Canada alleges that its right to be heard – which is a fundamental rule of procedure – was denied three times, namely, because it had no opportunity to explain what is meant by "acquisition of an existing business or a share thereof" under Canadian law; because it was not called to make its views known on the theory of the Tribunal regarding the conversion of shares and regarding GTH's acquisition of AAL's shares.¹⁴³ It further alleges that the Tribunal adopted an interpretation of Article II(4)(b) that neither party raised in their pleadings.

¹³⁹ GTH's Counter-Memorial on Partial Annulment, para. 90.

¹⁴⁰ GTH's Counter-Memorial on Partial Annulment, para. 91.

¹⁴¹ GTH's Counter-Memorial on Partial Annulment, para. 92.

¹⁴² GTH's Rejoinder on Partial Annulment, para. 43.

¹⁴³ Canada's Memorial on Partial Annulment, para. 151.

178. The Committee has reviewed the Parties' submissions in the underlying Arbitration. It notes that in Canada's Memorial on Jurisdiction, Canada proposed an interpretation of the words "decision", "acquisition" and "establishment" in accordance with definitions in the Oxford Dictionary. It also notes that Canada advanced its position that the acquisition of the voting control was included in the acquisition of an existing business or a share thereof as provided for in Article II(4)(b) of the BIT.¹⁴⁴
179. The Committee also notes that in its Reply on Merits and Damages and Counter-Memorial on Jurisdiction, GTH introduces the distinction between the acquisition of an existing business or a share thereof and the acquisition of voting control. It concludes that "[a]s is plain from the above, Article II(4) is only relevant in the context of Canada's decisions or decision-making relating to an 'acquisition of an existing business enterprise or a share of such enterprise' or an 'establishment of a new business enterprise.' An investor cannot acquire or establish something it already owns."¹⁴⁵
180. Therefore, the Committee is not persuaded by Canada's allegation that the Tribunal adopted an interpretation of Article II(4)(b) that neither party raised in the proceedings. In the Committee's view, the Tribunal applied international law, viz., the rules on treaty interpretation embodied in the VCLT. In doing so, the Tribunal decided to follow GTH's interpretation of the BIT's relevant provisions. Further, in the Committee's view what Canada qualifies as a theory is not a "theory" but rather a description of what the Tribunal deemed a (hypothetical) transaction such as the one described by Canada would have looked like. An illustration used as part of its reasoning and intended to explain or clarify the Tribunal's basis cannot be said to take any party by surprise and cannot translate into a breach of the duty to be heard.
181. Canada alleges that it was not invited to make its views known on the theory of the Tribunal regarding the conversion of shares. The Committee finds this allegation unpersuasive. First, Canada does not specify the alleged theory nor its content. In the Committee's view the Tribunal elaborated on the conversion of shares process accepting the arguments put

¹⁴⁴ Canada's Memorial on Jurisdiction and Admissibility, paras. 120-121.

¹⁴⁵ GTH's Reply on Merits and Damages and Counter-Memorial on Jurisdiction, paras. 160-161.

forward by GTH in its Counter-Memorial on Jurisdiction, mainly but not exclusively in paragraph 163. It supported its decision on the language consistently used in the Amended and Restated Shareholder’s Agreement. The Committee is reluctant to consider that this is a “theory” encompassing arguments that were not put forward by the Parties. Rather it views the Tribunal’s position as following the arguments advanced by GTH in its written piece and supported with an interpretation of the Shareholder’s Agreement in the light of the rules on treaty interpretation embodied in the VCLT. The fact that the Tribunal follows one of the Parties’ argument does not mean that it has not given the opportunity to be heard to the other.

182. Finally, Canada alleges it was not heard on GTH’s acquisition of AAL’s shares. The Committee has already considered this argument in this Decision and will once again stress that, as the Tribunal pointed out, [REDACTED]

[REDACTED]

[REDACTED]¹⁴⁶

183. In the light of the above, and in application of the standard as set out in Section IV.C., the Committee finds that Canada was not deprived of its right to be heard in the Arbitration and, in particular, that it was not deprived of its right to be heard on the specific aspects raised by Canada. Indeed, for the reasons set out above, the Committee concludes that the Tribunal did not surprise the Parties with an issue or a theory that neither party brought to the record, and it ensured that each party had an effective opportunity to be heard on the crucial points of the reasoning adopted. Given that the Committee does not find a departure from a fundamental rule of procedure, it does not need to analyse the second tier, viz, whether it is a “serious” one.

184. Thus, the Committee finds that this ground for annulment should be dismissed. In summary, the Committee dismisses Canada’s application for annulment.

¹⁴⁶ [REDACTED]

VI. GTH'S APPLICATION

185. GTH submits that it is clear on the face of the Award that the Tribunal has failed to discharge its duties. First, the Tribunal founded its decision on the absence of certain evidence yet acknowledged the existence of that very evidence elsewhere in its Award. Second, the Tribunal did not decide one of GTH's standalone dispositive claims. Third, the Tribunal failed to address critical arguments and failed to state reasons for key findings. Fourth, the Tribunal decided one claim on the basis of a legal argument that was not advanced by either Party. Fifth, the Majority manifestly exceeded its power by declining to exercise jurisdiction over a claim that the Tribunal patently had jurisdiction to decide.¹⁴⁷
186. Specifically, first adds GTH, the Tribunal's decision to dismiss the Blocked Sale Claim amounted to a failure to state reasons. First, the Tribunal's reasoning was contradictory with respect to GTH's claim that Canada breached its FET obligation by frustrating GTH's legitimate expectations. Second, the Tribunal failed to address GTH's argument that Canada breached its FET obligation because its decision to block GTH from being able to sell its investment was disproportionate; then, the Tribunal's decision to dismiss the Free Transfer Claim amounted to (1) a failure to state reasons because it failed to address GTH's argument that the BIT protected transfers of investments and not just funds, and (2) a serious departure from a fundamental rule of procedure because it justified its interpretation by relying on arguments that were not advanced by either Party. Finally, the Majority's decision to decline jurisdiction over the National Treatment Claim on the basis of Article IV(2)(d) and the Annex of the BIT amounted to (1) a manifest excess of powers because it declined to exercise jurisdiction despite finding that it had jurisdiction over the National Treatment Claim, and (2) a failure to state reasons because its interpretation of Article IV(2)(d) and the Annex lacked foundation and did not address key issues advanced by GTH.¹⁴⁸
187. GTH states that in early 2008, it identified the purchase of set-aside spectrum licenses as a promising investment opportunity in the Canadian telecommunications market. Given the

¹⁴⁷ GTH's Memorial on Partial Annulment, para. 3.

¹⁴⁸ GTH's Memorial on Partial Annulment, para. 5.

high upfront capital costs involved, GTH made the decision to invest after conducting the due diligence and carefully reviewing the Investment Framework. In particular, while GTH's objective at the outset of the investment was to create a long-term and successful New Entrant, the ability to transfer set-aside spectrum licenses to Incumbents on expiration of the five-year restriction provided a safety-net in the event the investment was unsuccessful.¹⁴⁹

188. GTH explains that in July 2008, Wind Mobile was declared the provisional winner of 30 set-aside spectrum licenses in the 2008 AWS Auction for a total of CAD\$ 442 million, and GTH paid for the set-aside spectrum licenses in August 2008. Canada raised CAD\$ 4.3 billion in revenue through the 2008 AWS Auction.¹⁵⁰

189. According to GTH, almost immediately following GTH's investment, Canada not only reneged on the fundamental conditions underpinning the Investment Framework but engaged in conduct which specifically targeted and harmed GTH and its investment. This delayed the launch of Wind Mobile and denied it a valuable first mover advantage *vis-à-vis* other New Entrants.¹⁵¹

A. MANIFEST EXCESS OF POWERS (ARTICLE 52(1)(B))

(1) The Parties' Positions

a. GTH's Position

190. GTH considers that the Majority's decision to decline jurisdiction over GTH's National Treatment Claim on the basis of Article IV(2)(d) should be annulled because it amounts to manifest excess of powers.

191. GTH states that in the Arbitration, it alleged that Canada breached its National Treatment obligation by subjecting GTH's Voting Control Application to a national security review procedure that only applies to foreign investors (the "National Treatment Claim"). In response, Canada objected to the Tribunal's jurisdiction to decide the National Treatment

¹⁴⁹ GTH's Memorial on Partial Annulment, para. 13.

¹⁵⁰ GTH's Memorial on Partial Annulment, para. 15.

¹⁵¹ GTH's Memorial on Partial Annulment, para. 16.

Claim, alleging that its measures were excepted from its National Treatment obligations by virtue of Article IV(2)(d) and the Annex of the BIT. Canada conceded that, in the event the Tribunal found that it had jurisdiction, it had no defence to the merits of GTH's National Treatment claim and accepted liability.¹⁵²

192. As GTH explains in its Memorial, the Majority's finding must be annulled for two reasons: (1) the Majority's decision to decline to exercise jurisdiction which it possessed amounted to a manifest excess of powers in violation of Article 52(1)(b) of the ICSID Convention, and (2) the Majority's analysis of Article IV(2)(d) and the Annex failed to address key arguments and reach critical findings, amounting to a failure to state reasons in violation of Article 52(1)(e) of the ICSID Convention.¹⁵³
193. For these reasons, GTH requests that the Committee annul the Majority's decision on the National Treatment Claim, as reflected in paragraph 728 of the *dispositif* and the corresponding paragraphs in the Award related to the National Treatment Claim (paragraphs 363-80, 683).¹⁵⁴
194. GTH submits that despite the Majority's admission that Canada's jurisdictional objection to GTH's National Treatment Claim should have been advanced as a question of admissibility or merits (and was not a matter of jurisdiction), the Majority found that it did not have jurisdiction over the National Treatment Claim.¹⁵⁵
195. GTH contends that the Majority declined jurisdiction to resolve the National Treatment Claim despite recognizing that Canada's "jurisdictional" objection was not a matter of jurisdiction at all. It considers that it was not open to the Tribunal to do so. If the Tribunal had in fact "address[ed] Canada's objection as pleaded by the Parties"— i.e., as a jurisdictional objection—it should have dismissed the objection and confirmed that it had jurisdiction. As committees have repeatedly explained, "it is not open to an ICSID tribunal having jurisdiction under a BIT in respect of a claim based upon a substantive provision of

¹⁵² GTH's Memorial on Partial Annulment, para. 85.

¹⁵³ GTH's Memorial on Partial Annulment, para. 87.

¹⁵⁴ GTH's Memorial on Partial Annulment, para. 88.

¹⁵⁵ GTH's Memorial on Partial Annulment, para. 89.

that BIT, to dismiss the claim”, including by erroneously characterizing something as a jurisdictional requirement—i.e., adding a new jurisdictional requirement that does not exist in the BIT. By doing so, the Majority acted “too little” and failed to fulfil its mandate. Therefore, the Majority exceeded its powers by wrongly denying jurisdiction over GTH’s National Treatment Claim.¹⁵⁶

196. GTH insists that the Majority is not permitted to accept Canada’s objection as a jurisdictional issue on the basis that “[r]egardless of how one chooses to characterise Canada’s objection, its operation is the same.” The distinction between jurisdiction and admissibility or merits is important and cannot be blurred. The former relates to the scope of a tribunal’s mandate to decide a particular dispute, whereas the latter is an assessment of substantive rights. A finding on jurisdiction is a precursor to a tribunal making an assessment of the admissibility or merits of a claim. The difference between the two concepts is not merely theoretical but can have practical consequences.¹⁵⁷
197. Based on the Tribunal’s decision to dismiss the National Treatment Claimant as a matter of jurisdiction, the Tribunal incorrectly placed the onus on GTH to show that its National Treatment Claim fell outside Article IV(2)(d) and the Annex, when in fact it should have been Canada’s burden to demonstrate that the provisions applied to exclude GTH’s investment from its National Treatment obligation.¹⁵⁸
198. Therefore, concludes GTH, the Majority’s decision to decline jurisdiction over the National Treatment Claim, while recognizing that Canada’s objection was not a matter of jurisdiction, was a clear excess of powers. The “manifest” nature of this excess of powers is underscored by the Majority’s frank acknowledgment that Canada’s objection was not a jurisdictional objection. By the Majority’s own admission, “Article IV(2)(d) of the BIT concerns exceptions to national treatment, which is a substantive protection granted under the BIT”, and does not concern exceptions to the Tribunal’s jurisdiction to adjudicate the

¹⁵⁶ GTH’s Memorial on Partial Annulment, para. 92.

¹⁵⁷ GTH’s Memorial on Partial Annulment, paras. 93-94.

¹⁵⁸ GTH’s Memorial on Partial Annulment, para. 94.

dispute. The Majority's failure is "obvious", "clear", and "self-evident" and amounts to a manifest excess of powers.¹⁵⁹

199. GTH explains that the Majority's decision had serious ramifications. GTH points out that, as Prof. Born observed in his dissenting opinion, Canada conceded in the Arbitration that, if the Tribunal found it had jurisdiction over the National Treatment claim, it should be found liable on the merits. It contends that it follows from this that, if the Majority had concluded that it had jurisdiction (which it did), the Tribunal would have been obliged to find that Canada was in breach of the BIT. No other finding was open to the Tribunal because Canada had failed to articulate its claim as an admissibility objection (and even if it had done so, the Tribunal's decision may have been different). Like its refusal to exercise jurisdiction over the National Treatment Claim, this affirms that the Tribunal has done "too little" and failed to fulfil its mandate to resolve the merits of the National Treatment Claim in GTH's favour.¹⁶⁰
200. In its Reply on Annulment, GTH seeks to establish that the Tribunal's alleged mischaracterization of Canada's objection is both "textually obvious" and "substantially serious." It argues that the text of Article IV clearly relates to the admissibility of claims and not to the jurisdiction of arbitral tribunals and that, had the Tribunal correctly characterized Canada's objection, it "could have" dismissed the objection because Canada would have had the burden of establishing the inadmissibility of GTH's claim.¹⁶¹
201. GTH concludes that by finding that it did not have jurisdiction over GTH's National Treatment Claim on the basis of provisions unrelated to its jurisdiction, the Tribunal's decision to dismiss the National Treatment Claim must be annulled pursuant to Article 52(1)(b) of the ICSID Convention.¹⁶²

¹⁵⁹ GTH's Memorial on Partial Annulment, para. 96.

¹⁶⁰ GTH's Memorial on Partial Annulment, para. 97.

¹⁶¹ GTH's Reply on Partial Annulment, paras. 60-63.

¹⁶² GTH's Memorial on Partial Annulment, para. 98.

b. Canada's Position

202. Canada submits that the Parties mostly agree on the legal tests applicable to the grounds for annulment under Articles 52(1)(b), 52(1)(e), and 52(1)(d) of the Convention. However, it submits that there are disagreements when dealing with the specific grounds. In that sense, regarding Article 52(1)(b), it points out that in practice the Parties disagree on what constitutes a manifest error, or excess of powers.¹⁶³
203. [REDACTED]
[REDACTED]
[REDACTED] GTH alleged that this measure caused it to divest itself of its investment and exit the Canadian market at a significant loss. The challenge was based on a number of provisions of the Treaty. Specifically, GTH claimed that the National Security Review breached the FET obligation in Article II(2)(a) of the Treaty; the Full Protection and Security standard in Article II(2)(b); and the National Treatment obligation in Article IV(1).¹⁶⁴
204. Canada challenges GTH's argument that the Tribunal manifestly exceeded its powers by upholding Canada's objection to the National Treatment Claim because it is based exclusively on what GTH claims is a mischaracterization of the nature of Article IV(2)(d). GTH does not call into question the Tribunal's interpretation and application of the exception contained in that provision. Canada states that GTH rightly does not argue that the Tribunal's interpretation and application of the National Treatment exception found in Article IV(2)(d) of the BIT amounts to a manifest excess of powers. Nor could it. Although it is possible to disagree with the Majority's interpretation of the provision, as Prof. Born did in his dissenting opinion, it cannot credibly be argued that the Majority's interpretation amounts to a manifest excess of powers. Any error in the interpretation of the provision would not meet the high threshold required by Article 52(1)(b).¹⁶⁵

¹⁶³ Canada's Counter-Memorial on Partial Annulment, paras. 7-8.

¹⁶⁴ Canada's Counter-Memorial on Partial Annulment, para. 71.

¹⁶⁵ Canada's Counter-Memorial on Partial Annulment, para. 74.

205. Canada submits that the only issue before this Committee is therefore whether the Tribunal's characterization of the exception contained in Article IV(2)(d) as being jurisdictional in nature, and its dismissal of GTH's National Treatment Claim on that basis, amounts to a manifest excess of powers. GTH's argument is entirely based on an erroneous reading of the Award that assumes that the Tribunal made an affirmative finding that Canada's objection was an issue of admissibility. Moreover, even if the interpretation and application of Article IV(2)(d) was an issue that pertained to the admissibility of GTH's claim, which Canada denies, the characterization of the nature of the provision is inconsequential to the fate of GTH's National Treatment Claim as the Tribunal itself explicitly noted in its Award. The Tribunal's decision therefore cannot constitute a manifest excess of power and may not be annulled on that basis.¹⁶⁶
206. According to GTH, "[t]he majority concluded that Canada's jurisdictional objection to GTH's National Treatment Claim should have been advanced as a question of admissibility or the merits and was not a matter of jurisdiction." Canada contends that "[e]ven a cursory reading of the Award reveals that the Majority arrived at no such conclusion. On the contrary, the Tribunal expressly stated that it would 'address Canada's objection as pleaded by the Parties' – in other words, within the legal framework presented by the parties, and therefore ruled on Canada's objection as a matter of jurisdiction, not admissibility."¹⁶⁷
207. Canada submits that even if this Committee concludes that the Tribunal should have dealt with Canada's objection as a matter of admissibility and not jurisdiction, GTH's annulment application must still be dismissed as GTH has not shown that the Tribunal's failure to rule on Canada's objection as a matter of admissibility made a difference to the outcome of the Arbitration. GTH has not shown that the Tribunal would have rejected Canada's objection had it ruled on it as a question of admissibility instead of jurisdiction.¹⁶⁸
208. In its Rejoinder, Canada states that while there is a conceptual difference between preliminary objections based on a tribunal's jurisdiction and those based on the

¹⁶⁶ Canada's Counter-Memorial on Partial Annulment, para. 75.

¹⁶⁷ Canada's Counter-Memorial on Partial Annulment, para. 76.

¹⁶⁸ Canada's Counter-Memorial on Partial Annulment, para. 80.

admissibility of a claim, this conceptual difference is not always reflected in arbitral awards, particularly in awards rendered under the ICSID Convention.¹⁶⁹ However, Canada relies on the decision adopted in April 2021 in *Mathias Kruck v Spain* where it is said “that the distinction between those two elements is essentially that jurisdiction is an attribute of a tribunal, which has jurisdiction in respect of a certain limited category of disputes, whereas admissibility is a characteristic of the dispute actually submitted to the tribunal which, even if the dispute falls within the jurisdiction of a tribunal, may be rejected because it is for some reason (such as a failure to exhaust local remedies, in circumstances where exhaustion is required) inadmissible.”¹⁷⁰

209. In the light of the above consideration, Canada concludes that its objection is jurisdictional in nature because it challenges an attribute of the Tribunal and not a characteristic of GTH’s Claim. Therefore, it states, the Tribunal correctly ruled on Canada’s objection as a matter of jurisdiction.¹⁷¹

(2) The Committee’s Analysis

210. The Committee finds GTH’s allegations unpersuasive. In fact, the Committee notes that the Tribunal considered and analysed the arguments put forward by the Parties in the light of the BIT and applicable international law rules. In so doing, it determined its own jurisdiction.
211. In that sense, the Tribunal noted “as a preliminary point, ... that Article IV(2)(d) of the BIT concerns exceptions to national treatment, which is a substantive protection granted under the BIT” and commented that in its view “the issue might be better characterised as a question of admissibility or even merits, given its relevance to substantive protection rather than to the dispute resolution provisions of the BIT. However, this distinction carries

¹⁶⁹ Canada’s Rejoinder on Partial Annulment, para. 54.

¹⁷⁰ *Mathias Kruck and others v Kingdom of Spain*, ICSID Case No. ARB/15/23, Decision on Jurisdiction and Admissibility, April 19, 2021, para. 192 (**RL-428**).

¹⁷¹ Canada’s Rejoinder on Partial Annulment, paras. 55-56.

no practical consequence in the present circumstances... Therefore, the Tribunal will address Canada's objection as pleaded by the Parties."¹⁷²

212. It follows from the above statement that the Tribunal dealt with the objection as pleaded by the Parties, as a question of jurisdiction. At the same time, it has to be noted that the Tribunal admitted that the outcome would have been the same whether it were classified one way or the other, so the issue is not outcome-determinative. Therefore, the Committee finds no grounds for claims in these annulment proceedings regarding the [mis]characterization of Canada's objection as shown in GTH's Memorial on Partial Annulment.¹⁷³
213. Next the Tribunal dealt with the issue of whether Canada had validly made an exception under Article IV(2)(d) and, if so, whether the telecommunications sector is captured in that exception. The Tribunal announced it was going to interpret the relevant provisions of the BIT according to the general rule of interpretation embodied in Article 31(1) of the VCLT.¹⁷⁴
214. The Tribunal found that Article IV(1) enshrines the right of the Parties to make exceptions to its national treatment obligation; paragraph 2 states that certain provisions of the BIT do not apply to subparagraphs a) to c); and in subparagraph d) "the text makes clear that the right to make an exception in a sector or a matter is subject to only one condition: the sector or matter must be listed in the Annex", where Canada lists five categories including "social services" and "services in any other sector." The Tribunal concluded that "this language, similar in all three authentic linguistic versions of the BIT, leaves no room for doubt that Canada has the right to make exceptions to its national treatment obligation with respect to 'services.' Unattractive as the result may seem to the dissenting minority, such is the Parties' agreement as recorded in the explicit terms of the BIT."¹⁷⁵

¹⁷² Award, para. 363 (emphasis added).

¹⁷³ GTH's Memorial on Partial Annulment, paras. 89, 92, 94, 96-97.

¹⁷⁴ Award, para. 365.

¹⁷⁵ Award, paras. 366-367.

215. Once the Tribunal found that the Parties had the right to make exceptions to the National Treatment Obligation, it addressed the issue of whether the making or the maintenance of an exception was subject to any specific requirement, including notification, and it concluded that “the correct, and most reasonable, interpretation of Article IV(2)(d) and the Annex supports Canada’s position. In particular, there is simply no basis in the text of the BIT to impose an additional procedural requirement that triggers the effectiveness of the exception.”¹⁷⁶
216. The Tribunal also added that “the specificity of these categories also suggests that no further action by Canada is required or contemplated prior to its entitlement to rely upon these asserted ‘exceptions.’ Although ‘services in any other sector’ is broader than the other items listed, there is no indication in the text that it should be treated differently.”¹⁷⁷
217. The Tribunal made comments on the lack of clarity of the text (which the Committee considers to be *obiter dicta*), and affirmed that “[in] any event, the Tribunal must interpret the text of the BIT as it is, not as it should have been drafted in an ideal situation. As already mentioned, the text leaves no doubt that Canada has the right to make exceptions to its national treatment obligation in ‘services,’ and the Tribunal declined to subject that right to a notice requirement or other procedural hurdle which is not included in the BIT. Thus, the Tribunal concluded that under Article IV(2)(d) and the Annex, Canada may adopt or apply measures with respect to ‘services’ that are not in conformity with its national treatment obligation.”¹⁷⁸
218. Regarding the scope of the expression “services in any other sector” and whether it includes Telecommunications, the Tribunal found that “the only plausible interpretation is that all services, including social services, fall within the scope of the Annex.”¹⁷⁹
219. Finally, “[i]n light of the findings above, the Tribunal concludes that GTH’s national treatment claim, which relates exclusively to the telecommunications sector, is excluded

¹⁷⁶ Award, para. 369.

¹⁷⁷ Award, para. 372.

¹⁷⁸ Award, para. 374.

¹⁷⁹ Award, paras. 376-377.

from the scope of the BIT's national treatment provisions. Accordingly, the national treatment claim is dismissed and will not be considered on the merits."¹⁸⁰

220. The Committee finds that GTH's claim on this point has not been adequately substantiated. Accordingly, the Committee does not find that the Tribunal committed an excess of powers in this respect, as it identified the applicable law and endeavored to apply it to the question of jurisdiction, both of which are matters governed under Section 3 of the ICSID Convention, "Powers and Functions of the Tribunal."
221. As indicated in Section IV.A., an annulment proceeding is not an appeal. The Committee finds that the role of *ad hoc* committees in safeguarding the ICSID system does not include reviewing the substance of tribunals' interpretation of the jurisdictional exceptions raised by the parties. In this case, the Tribunal exercised the powers to determine its own jurisdiction, which is how the Parties characterized the matter, per the principle of *compétence-compétence* enshrined in Article 41 of the ICSID Convention. The Committee agrees with other annulment committees that nothing in the ICSID Convention dictates a differentiation between grounds for annulment on the basis of jurisdiction or on the merits.¹⁸¹
222. The Committee has set out the logic followed by the Tribunal in its findings on jurisdiction above, noting that after hearing the Parties and reviewing all evidence, the Tribunal, by the majority of its members, selected one interpretation of the BIT over the other. The Committee finds that the Tribunal did not exceed its powers.

B. FAILURE TO STATE REASONS (ARTICLE 52(1)(E))

(1) The Parties' Positions

a. GTH's Position

- (i) *The Tribunal's decision to dismiss GTH's claim on the frustration of legitimate expectations is contradictory and absent reasoning*

¹⁸⁰ Award, para. 380.

¹⁸¹ See *SGS Société Générale de Surveillance S.A. v Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Annulment, May 19, 2014, paras. 107 and *seq.* (**RL-369**).

223. GTH contends that while the Tribunal ultimately dismissed the Blocked Sale Claim, the relevant parts of the Award should be annulled pursuant to Article 52(1)(e) of the ICSID Convention because the Tribunal failed to state reasons in respect of two of the key legal bases for GTH's claim: (1) Canada's breach of its FET obligation by frustrating GTH's legitimate expectation and (2) Canada's breach of its FET obligation by its disproportionate actions.¹⁸²
224. Therefore, GTH requests that the Committee annul the Tribunal's decision on the Blocked Sale Claim, as reflected in paragraph 729(i) of the *dispositif* and the corresponding paragraphs in the Award related to the Blocked Sale Claim (paragraphs 539-71).¹⁸³
225. GTH alleges that the Tribunal's decision to dismiss GTH's claim that Canada frustrated GTH's legitimate expectations is contradictory and without reasoning and must be annulled pursuant to Article 52(1)(e). In the Arbitration, GTH argued that Canada introduced a fundamental change to the *status quo* transfer regime and policy when it sought to block the transfer of those licenses by introducing new limitations on transfers which did not exist at the time GTH made its investment.¹⁸⁴
226. GTH adds that the Tribunal concluded "that GTH has not established the existence of any legitimate expectation that was violated, in breach of the BIT, by Canada's adoption and implementation of the Transfer Framework."¹⁸⁵
227. GTH argues that the Tribunal's conclusion that "no such evidence was presented to the Tribunal" that "Canada had fundamentally altered those policy documents, for example by prolonging the five-year finite restriction on transfer, or by deciding that no set-aside licence may be transferred at all at any time" is directly contradicted by the Tribunal's other findings in its Award and ignores key evidence presented in the Arbitration.¹⁸⁶

¹⁸² GTH's Memorial on Partial Annulment, paras. 53-54.

¹⁸³ GTH's Memorial on Partial Annulment, para. 55.

¹⁸⁴ GTH's Memorial on Partial Annulment, para. 57.

¹⁸⁵ GTH's Memorial on Partial Annulment, para. 58.

¹⁸⁶ GTH's Memorial on Partial Annulment, para. 59.

228. In its Reply, GTH insists that these two findings – one that evidence of a particular fact was not presented (the so-called “First Finding”), and another that there was such evidence (the so-called “Second Finding”) – directly contradict each other. The First Finding concludes there was no evidence that the five-year restriction on transferring set-aside spectrum licenses was prolonged by Canada. The Second Finding concludes that there was.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] The two factual findings are simply irreconcilable.¹⁸⁷

229. GTH continues stating that this contradiction relates to an outcome-determinative issue. If the Second Finding is correct (and therefore the First Finding is wrong), the Tribunal—as it expressly recognized—could have concluded that Canada breached its FET obligation. In other words, the Second Finding could have been dispositive.¹⁸⁸

230. GTH finds support for its allegations in different paragraphs of the Award. It points out that, first, the Tribunal stated that “[h]ad GTH succeeded in evidencing that, after it made its investment based on the terms and undertakings set out in the auction policy documents, Canada had fundamentally altered those policy documents, for example by prolonging the five-year finite restriction on transfer, or by deciding that no set-aside licence may be transferred at all at any time, there could have been an argument that Canada may have breached its obligation pursuant to Article II(2)(a) of the BIT. However, no such evidence was presented to the Tribunal.”¹⁸⁹ But, afterwards, it stated that “[i]n particular, GTH evidenced no fundamental inconsistency with Canada’s spectrum management policy objectives or with the objectives of the 2008 AWS Auction. The evidence adduced showed that references to spectrum concentration in the 2013 Transfer Framework that brought Industry Canada to block the transfer of set-aside spectrum licences to Incumbents were essentially adopted to enhance competition. [...] the Tribunal does not find any illegitimacy

¹⁸⁷ GTH’s Reply on Partial Annulment, para. 14.

¹⁸⁸ GTH’s Reply on Partial Annulment, para. 15.

¹⁸⁹ Award, para. 559.

or irrationality in the Canadian Government's considering in 1994 that the market was competitive and introducing ten years later, in 2013, a Transfer Framework to regulate spectrum concentration, given the important evolution in the market that was amply discussed at the Hearing. Wind Mobile's acknowledgment that 'the Government's primary policy objective' was 'to create, enhance, and sustain competition in the Canadian wireless telecommunications market' contradicts GTH's argument that the Transfer Framework was politically-motivated, and adopted to 'deflect public criticism' rather than to advance a legitimate policy objective."¹⁹⁰

231. In any event, GTH concludes, the Tribunal's decision with respect to GTH's legitimate expectations claim also failed to state reasons because it failed to address evidence that had the potential to affect the outcome of the Award.¹⁹¹

(ii) The Tribunal did not address GTH's claim of breach of FET by disproportionate action

232. GTH also alleges that the Tribunal failed to consider GTH's claim that Canada had breached its FET obligation by its disproportionate actions and decision on the Blocked Sale Claim. According to GTH, the Tribunal entirely failed to address a key basis of GTH's claim that Canada breached its FET obligation because its actions blocking GTH's ability to transfer the set-aside spectrum licenses to an Incumbent were disproportionate to Canada's purported objectives, in the light of the impact of Canada's decision on GTH and the existence of several alternative options. That is a breach on several grounds, including that such actions frustrated GTH's legitimate expectations and were unreasonable, arbitrary, non-transparent and inconsistent. GTH argued they were disproportionate as a separate and independent legal basis to advance that Canada had breached FET obligation.¹⁹²

233. GTH contends that the Tribunal did not address GTH's separate claim that Canada's actions breached FET because they were disproportionate (i.e., failing to balance the

¹⁹⁰ Award, para. 565.

¹⁹¹ GTH's Memorial on Partial Annulment, para. 62.

¹⁹² GTH's Memorial on Partial Annulment, paras. 65-66.

significant harm the 2013 Transfer Framework caused to licensees, with its stated regulatory objective, when alternatives were available). On the face of the Award, “the tribunal either failed to consider the argument or it did consider it but brought that [GTH’s] arguments should be rejected.” If the latter, “that did not free the Tribunal from its duty to give reasons for its rejection as an indispensable component of the statement of reasons on which its conclusion was based.”¹⁹³

234. GTH concludes that as a result of its failure to address and give any reasons in respect of GTH’s claim that Canada breached its FET obligation by its disproportionate actions, the Tribunal’s decision to dismiss the Blocked Sale Claim must be annulled pursuant to Article 52(1)(e) of the ICSID Convention.¹⁹⁴

235. In its Reply, GTH insists that, while it did decide on the other legal bases for breach of FET, the Tribunal simply neglected to decide whether Canada’s actions were disproportionate in breach of its FET obligation. Assessment of this claim could have changed the outcome of the dispute: the Tribunal could have found—on a proportionality analysis alone—that Canada breached its FET obligation.¹⁹⁵

(iii) *The Tribunal gave no reasons for its decision to dismiss the Free Transfer Claim*

236. GTH refers also to its Free Transfer Claim. It alleges that in the Arbitration, GTH argued that by restricting GTH from transferring its investments to an Incumbent, Canada breached the Free Transfer Guarantee contained in Article IX(1) of the BIT (the “Free Transfer Claim”).¹⁹⁶

237. GTH alleges that the Tribunal’s decision to dismiss the Free Transfer Claim should be annulled for two reasons: (1) the Tribunal failed to state reasons for its findings in violation of Article 52(1)(e) of the ICSID Convention and (2) the Tribunal committed a serious

¹⁹³ GTH’s Memorial on Partial Annulment, paras. 69-70.

¹⁹⁴ GTH’s Memorial on Partial Annulment, para. 71.

¹⁹⁵ GTH’s Reply on Partial Annulment, para. 31.

¹⁹⁶ GTH’s Memorial on Partial Annulment, para. 72.

departure from a fundamental rule of procedure by relying on a legal argument that was not advanced by either Party in violation of Article 52(1)(d) of the ICSID Convention.¹⁹⁷

238. When the Tribunal dismissed the Free Transfer Claim, it failed to state reasons in respect of two of the critical arguments advanced by GTH in the Arbitration.¹⁹⁸ Therefore, GTH requests that the Committee annul the Majority’s decision on the Free Transfer Claim, as reflected in paragraph 729(iii) of the *dispositif* and the corresponding paragraphs in the Award related to the Free Transfer Claim (paragraphs 702-707).¹⁹⁹
239. GTH states that it explained in the Arbitration, and the Tribunal accepted, that its investment was comprised of a bundle of rights associated with its indirect shareholding and loans to Wind Mobile, and that when Canada restricted GTH from transferring its investment to an Incumbent, this amounted to a clear breach of Article IX(1). In particular, GTH observed that Article IX(1) of the BIT is undoubtedly broad and refers to “the unrestricted transfer of investments and returns.” The broad scope of this provision was further reinforced by the second sentence of Article IX(1) of the BIT, which introduces a list of examples with the phrase “without limiting the generality of the foregoing.”²⁰⁰
240. GTH continues explaining that despite the arguments advanced by GTH and the language of the BIT, the Tribunal did not address the meaning of either of these critical phrases when it reached its confounding conclusion that Article IX(1) “applies exclusively to the transfer of funds.” First, the Tribunal did not address the meaning of “the unrestricted transfer of investments and returns.” Instead the Tribunal referred only to the definition of returns and the meaning of the term “transfer.” Second, the Tribunal did not address the meaning of “[w]ithout limiting the generality of the foregoing”, the foregoing being the general principle that Canada shall guarantee “the unrestricted transfer of investments and returns.”

¹⁹⁷ GTH’s Memorial on Partial Annulment, para. 73. The Committee deals with the first reason in this section.

¹⁹⁸ GTH’s Memorial on Partial Annulment, para. 75.

¹⁹⁹ GTH’s Memorial on Partial Annulment, para. 74.

²⁰⁰ GTH’s Memorial on Partial Annulment, para. 77.

Instead, the Tribunal jumped directly in its analysis to the enumerated list of examples of transfers which are also protected.²⁰¹

241. By failing to address these critical phrases of Article IX(1) and GTH's arguments in this regard, GTH alleges that the Tribunal undoubtedly "[left] the decision on a particular point essentially lacking in any expressed rationale" when that point was "necessary to the tribunal's decision." It is the Tribunal's duty to explain why no meaning should be given to these terms, which GTH argued was indispensable to interpreting the scope of the Free Transfer Guarantee contained in Article IX(1). By failing to do so, the Tribunal failed to state the reasons for its Award, and the Tribunal's decision to dismiss the Free Transfer Claim must be annulled pursuant to Article 52(1)(e) of the ICSID Convention.²⁰²

(iv) *The Majority's decision to dismiss GTH's National Treatment Claim was also contradictory and absent key reasoning*

242. As a last argument regarding this ground for annulment, GTH alleges that the Majority's decision to dismiss GTH's National Treatment Claim was also contradictory and absent key reasoning, and therefore must also be annulled pursuant to Article 52(1)(e) of the ICSID Convention.²⁰³

243. GTH argues that the Majority (and Canada) conceded that the Tribunal had jurisdiction over GTH's National Treatment Claim, but subsequently held that the Tribunal did not have jurisdiction to hear the National Treatment Claim. This is a patent example of a contradictory position whereby the Majority adopted a position that "relie[s] on hypotheses which the [majority] itself ha[s] rejected."²⁰⁴ GTH adds that Canada's objection was premised on Article IV(2)(d) of the BIT and the Annex. In particular, Canada alleged that in Article IV(2)(d) of the BIT and the Annex, Canada had exempted measures relating to the telecommunications industry from its National Treatment obligation.²⁰⁵

²⁰¹ GTH's Memorial on Partial Annulment, para. 78.

²⁰² GTH's Memorial on Partial Annulment, paras. 79-80.

²⁰³ GTH's Memorial on Partial Annulment, para. 99.

²⁰⁴ GTH's Memorial on Partial Annulment, paras. 43, 100, citing *MINE v Guinea*, para. 6.107.

²⁰⁵ GTH's Memorial on Partial Annulment, paras. 100-101.

244. GTH recalls the interpretation of this provision by the Majority: “[t]he text [of Article IV(2)(d)] makes clear that the right to make an exception in a sector or a matter is subject to only one condition: the sector or matter must be listed in the Annex. In the Annex, Canada ‘reserves the right to make and maintain exceptions’ in five categories, including ‘social services’ and ‘services in any other sector.’ This language, similar in all three authentic linguistic versions of the BIT, leaves no room for doubt that Canada has the right to make exceptions to its national treatment obligation with respect to ‘services’.”²⁰⁶
245. GTH points out that the Majority stated that it had “no difficulty” finding that “‘services in any other sector’ includes telecommunications” as “[t]he only plausible interpretation is that all services, including social services, fall within the scope of the Annex.” The Majority further adopted Canada’s position that the “right to make exceptions is the right to take inconsistent measures” and “there is simply no basis in the text of the BIT to impose an additional procedural requirement that triggers the effectiveness of the exception.” Yet, in its summation, the Majority observed that “the text of the Annex could have been drafted in clearer terms.”²⁰⁷
246. GTH states that it concurs with Prof. Born’s dissent and summarizes the failures in the Majority’s Award. GTH considers that the Majority failed to address key arguments advanced by GTH and make key findings it was obliged to reach in order to dismiss GTH’s National Treatment Claim for lack of jurisdiction.²⁰⁸
247. GTH argues that “telecommunications” does not appear in the text of Article IV(2)(d) and the Annex as a sector where Canada had reserved the right to make and maintain exceptions. To affirm the importance of this absence, GTH points to Canada’s treaty practice that showed that whenever Canada sought to include “telecommunications” among its list of sectors or matters in other treaties, it had done so expressly. GTH contends that in its Award, and while relying on other aspects of Canada’s treaty practice, the majority found that “telecommunications” could be read into the terms of the Annex under

²⁰⁶ GTH’s Memorial on Partial Annulment, para. 103.

²⁰⁷ GTH’s Memorial on Partial Annulment, para. 104.

²⁰⁸ GTH’s Memorial on Partial Annulment, para. 106.

the category “services in any other sector.” Yet, in reaching this finding, the Majority did not address, either expressly or implicitly, GTH’s argument with respect to Canada’s treaty practice.²⁰⁹

248. GTH continues that, even accepting, *arguendo*, the Majority’s decision that telecommunications falls into the category “services in any other sector”, the Majority concluded that “under Article IV(2)(d) and the Annex, Canada may adopt or apply measures with respect to ‘services’ that are not in conformity with its national treatment obligation.” Thus, under the Majority’s own reasoning, it must establish both that: (1) GTH’s investment into Canada (to which GTH claimed Canada’s National Treatment obligation was owed) was a “service” in the telecommunications sector and (2) Canada’s impugned measure were “measures with respect to [telecommunications] ‘services’.” The Majority did neither. In fact, states GTH, as Prof. Born explains in his dissent, the measure considered by the Majority relates to regulation of financial ownership and financial control by a foreign investor, not regulation of “services”, including telecommunications services.²¹⁰
249. Finally, GTH stresses that one of its fundamental arguments as to why Article IV(2)(d) and the Annex could not bar its National Treatment Claim was based on the text of the Annex, in which Canada merely “reserves the right to make and maintain exceptions.” GTH cited the reasoning of numerous tribunals that have confirmed that a reservation of a right does not equate to an exercise of a right, and therefore requires something more than the adoption of that of measure to be exempt. GTH also observed that the other prongs of Articles IV(2) ((a) through (c)), demonstrate the distinction between a reservation of rights to make an exception (prong (d)), and the imposition of a measure (prongs (a) through (c)). Prof. Born agreed, observing in his dissent that the phrase “reserves the right” is patently not synonymous with exercising that right – the reserved right still has to be exercised.²¹¹

²⁰⁹ GTH’s Memorial on Partial Annulment, para. 107.

²¹⁰ GTH’s Memorial on Partial Annulment, para. 108.

²¹¹ GTH’s Memorial on Partial Annulment, para. 109.

250. GTH points out that in its decision, the Majority failed to address the above arguments when reaching its conclusion that there was no basis in the BIT to impose an additional procedural requirement that triggers the effectiveness of the exception. However, the Majority was not free to reach its conclusion without addressing these arguments, which formed a key part of GTH's position. The Majority's failure to address GTH's arguments in this regard is all the more serious based on the majority's recognition that "the text of the Annex could have been drafted in clearer terms" including "[f]or instance, Canada could have stated that its national treatment obligation does not apply to non-conforming measures in the listed sectors or matters"—i.e., what the Majority interpreted the Annex to say. This is an extraordinary conclusion, in which the Majority tacitly recognizes that the BIT's terms do not reflect its own holding.²¹²
251. Having recognized the text's lack of clarity, the Majority then determined that the text "leaves no doubt that Canada has the right to make exceptions to its national treatment obligation in 'services,' and the Tribunal [sic] declines to subject that right to a notice requirement or other procedural hurdle which is not included in the BIT." The Majority "declined" to reach this finding despite GTH's very arguments that such a notice requirement was in fact "included in the BIT" and the Majority's own recognition that the text "could have been drafted in clearer terms." In the circumstance, it was essential for the Majority to address GTH's arguments to resolve this question.²¹³

b. Canada's Position

252. With respect to Article 52(1)(e), the Parties disagree on its application to this case and whether there was an "absence of reason."²¹⁴ Committees' practice shows that they afford tribunals discretion in how they express the reasons and the level of detail that is required and avoid intruding into the legal and factual decision making of the tribunal and stresses

²¹² GTH's Memorial on Partial Annulment, para. 110.

²¹³ GTH's Memorial on Partial Annulment, para. 110.

²¹⁴ Canada's Counter-Memorial on Partial Annulment, para. 10.

that the key touchstone is intelligibility: if one can understand the reasoning on which the award is based.²¹⁵

(i) *The Tribunal's decision to dismiss GTH's claim on the frustration of legitimate expectations is contradictory and absent reasoning*

253. Canada alleges that the Tribunal's decision that the Transfer Framework did not breach FET should not be annulled. Canada observes that on its face, the Award's analysis on the Transfer Framework is well reasoned and based on extensive consideration of GTH's allegations and the large evidentiary record.²¹⁶ Canada considers that the Tribunal stated reasons for its conclusion that the transfer framework did not frustrate GTH's legitimate expectations. Canada submits that the Tribunal has conducted an intelligible FET analysis on the transfer framework: the Tribunal enumerated the documented sources it analysed, and it concluded that there was no compelling evidence that Canada represented at the time of the AWS Auction that it would unconditionally permit New Entrants to transfer their set-aside licences to Incumbents, or that the Minister would approve all applications to transfer set-aside spectrum to Incumbents automatically after the expiry of the five-year transfer restriction.²¹⁷
254. According to Canada, specific analysis conducted by the Tribunal of the policy documents allowed it to find that there were no assurances that after the five-year period there was right to transfer but instead that those documents did mention the requisite of Minister's approval for such transfer; the Tribunal also did not agree with the argument that the Minister's past approvals could create an expectation as to future approvals upon which GTH was entitled to rely.²¹⁸ Furthermore, states Canada, the Tribunal concluded like this: "[i]n sum, the record makes clear that Canada did not make any representation which could give rise to a legitimate expectation of GTH that it is assured of being permitted to transfer

²¹⁵ Canada's Counter-Memorial on Partial Annulment, para. 12.

²¹⁶ Canada's Counter-Memorial on Partial Annulment, para. 27.

²¹⁷ Canada's Counter-Memorial on Partial Annulment, paras. 30-32.

²¹⁸ Canada's Counter-Memorial on Partial Annulment, para. 34.

its spectrum licenses to an Incumbent after the expiry of the five-year restriction on transfers.”²¹⁹ Thus, the Tribunal’s reasoning is clearly intelligible.²²⁰

255. Canada submits that GTH’s allegation of a contradiction in the Award is unfounded and provides no basis for annulment. Canada alleges that the Tribunal concluded that “no such evidence was presented to the Tribunal.” The Tribunal’s speculation on counterfactuals where there could have been an argument of a fundamental change of the policy framework – had GTH evidenced a prolongation of the five years restriction on transfers or the imposition of a complete prohibition on transfers – does not undermine the Tribunal’s conclusion that Canada did not fundamentally alter that framework nor violate any alleged legitimate expectations of GTH. The impugned statement at paragraph 559 of the Award was *obiter* and cannot serve as grounds for annulment.²²¹ According to the Tribunal, the Transfer Framework was a continuation of Canada’s earlier policy and not a fundamental change – that is, before and after the Transfer Framework was adopted, the Minister had the authority to approve or disapprove of a licence transfer request, taking spectrum concentration into account. The Tribunal never found that the identification of spectrum concentration as a relevant factor bound the Minister to block all transfers to Incumbents.²²²
256. In its Rejoinder, Canada comes back to the point: “GTH’s argument that the Tribunal contradicted its own findings is incorrect. GTH argues that a contradiction arises from the Tribunal’s statement, at paragraph 565 of the Award, that ‘[t]he evidence adduced showed that references to spectrum concentration in the 2013 Transfer Framework that brought Industry Canada to block the transfer of set-aside spectrum licences to Incumbents were essentially adopted to enhance competition.’ After citing part of this sentence, GTH characterizes the Tribunal’s statement to mean the following: ‘–i.e., prolonging the five-year finite restriction on transfer’.” According to Canada, “the Award did not use this language. The Claimant juxtaposes its own reading of paragraph 565 with the Tribunal’s

²¹⁹ Canada’s Counter-Memorial on Partial Annulment, para. 35.

²²⁰ Canada’s Counter-Memorial on Partial Annulment, para. 36.

²²¹ Canada’s Counter-Memorial on Partial Annulment, para. 38 relying on *Victor Pey Casado and Foundation President Allende v Republic of Chile*, ICSID Case No. ARB/98/2, Decision on Annulment, January 8, 2020, para. 280 in that *obiter dicta* cannot be considered for annulment since they do not affect the outcome.

²²² Canada’s Counter-Memorial on Partial Annulment, para. 39.

observation that the reference to spectrum concentration in the Transfer Framework brought Industry Canada to block the transfer of set-aside spectrum licences to Incumbents in order to enhance competition. In paragraph 565, the Tribunal was commenting on the fact that the Transfer Framework was in keeping with Canada’s telecommunications policy – that the reason why Canada blocked certain transfers of set-aside licences to Incumbents related to the objective of enhancing competition. When viewed in the context of the rest of the paragraph and of the Award, as it must be, it is clear that the Tribunal was not making a finding that through the Transfer Framework, Industry Canada blocked *all* transfers of set aside licences to Incumbents or *de facto* prolonged the five-year moratorium, as GTH suggests.”²²³

257. Canada submits that the logical flaw underlying GTH’s alleged contradiction is that it assimilates an individual exercise of ministerial discretion to reject a transfer with a prohibition on all transfers to Incumbents. In fact, the Tribunal noted that after the adoption of the Transfer Framework, Industry Canada approved the transfer of spectrum licences from New Entrants to Incumbents. This confirms that the Tribunal did not understand the Transfer Framework as a prohibition on transfers or a prolongation of the moratorium. Thus, GTH’s alleged contradiction is non-existent.²²⁴
258. GTH also argues that GTH’s argument that the Tribunal “failed to address evidence that had the potential to be relevant to the final outcome of the Award”, and points in particular to certain internal and public documents of Canada, has three key flaws. First, it is beyond the Committee’s power to review the Tribunal’s evaluation of the evidence, or to substitute its own evaluation for that of the Tribunal. The Tribunal’s choice not to discuss each piece of evidence in a voluminous record does not constitute grounds for annulment.²²⁵
259. Second, Canada states that with respect to Canada’s internal documents and their evidentiary impact, the Tribunal observed: “[a]t the Hearing, the Parties debated the evidentiary impact of certain internal advice to the Minister not referring to spectrum

²²³ Canada’s Rejoinder on Partial Annulment, para. 10.

²²⁴ Canada’s Counter-Memorial on Partial Annulment, para. 40.

²²⁵ Canada’s Counter-Memorial on Partial Annulment, para. 41.

concentration as a specific criterion in the outcome of the transfer review process.”²²⁶ The Tribunal made a reasoned determination that this material was generally not relevant to the legitimate expectations claim. [...] the Tribunal concluded that material not available to GTH when it made the investment could not form the basis for GTH’s alleged legitimate expectation.²²⁷ Further, the Tribunal noted that internal documents did not necessarily support GTH’s position – rather, certain documents supported Canada’s position and confirmed the Tribunal’s earlier findings.²²⁸

260. Finally, and more generally, Canada argues that even if certain evidence was not specifically discussed, the Award demonstrates that the Tribunal engaged in an extensive and reasoned consideration of the evidentiary record. While the Tribunal highlighted certain evidence, it assured that its analysis was not limited to those specific documents. Indeed, the Tribunal confirmed that it reviewed “the evidence adduced by the parties” on the legitimate expectations argument.²²⁹ Canada adds that the Tribunal stated that the record makes clear that Canada did not make any representation which could give rise to a legitimate expectation of GTH.²³⁰ Canada submits that when the Award is read as a whole, it is impossible to conclude that the Tribunal “ignored Canada’s own contemporaneous internal and public documents.”²³¹ So that GTH fails to establish grounds for annulment based on the Tribunal’s evaluation of the evidence.²³²

(ii) *The Tribunal did not address GTH’s claim of breach of FET by disproportionate action*

261. Canada challenges also the argument that the Tribunal did not address GTH’s claim that the Transfer Framework was disproportionate. Canada considers that the Tribunal adequately did so.

²²⁶ Canada’s Counter-Memorial on Partial Annulment, para. 42 referring to Award, para. 567.

²²⁷ Canada’s Counter-Memorial on Partial Annulment, para. 43.

²²⁸ Canada’s Counter-Memorial on Partial Annulment, para. 44.

²²⁹ Canada’s Counter-Memorial on Partial Annulment, para. 45.

²³⁰ Canada’s Counter-Memorial on Partial Annulment, para. 47.

²³¹ Canada’s Counter-Memorial on Partial Annulment, para. 48.

²³² Canada’s Rejoinder on Partial Annulment, paras. 14-21.

262. Canada submits that GTH's request for partial annulment because the Tribunal failed to consider its argument that the Transfer Framework was disproportionate has three main flaws. First, from an objective perspective, GTH's argument that the Transfer Framework was disproportionate was a sub-issue within GTH's claim that the Transfer Framework breached FET, not a stand-alone claim. GTH itself did not identify lack of proportionality as an independent breach, give it prominence in its arguments, or even argue it consistently. Instead, in the Arbitration GTH advanced two bases to claim that the Transfer Framework violated FET. The first concerned legitimate expectations. The second involved manifold accusations – that the measure was unreasonable, arbitrary, irrational, lacking in transparency, inconsistent, politically-motivated, disproportionate, lacking in due process, or otherwise improper.²³³ Canada points out that the Claimant varied these sub-issues throughout the Arbitration. GTH's Memorial on Merits and Damages advanced arguments based on reasonableness and arbitrariness. However, in this submission GTH did not argue that the Transfer Framework was disproportionate.²³⁴ GTH's proportionality argument did not feature prominently in its Reply.²³⁵ At the Hearing, which spanned two weeks, GTH never argued that Canada's measure was disproportionate.²³⁶
263. According to Canada, the second flaw with GTH's annulment request based on the Tribunal's failure to address proportionality in its conclusions on the FET claim is that it fails to consider the Award in its totality; it does not account for the fact that the Tribunal noted GTH's position on proportionality and implicitly rejected it on the law.²³⁷ Absent an undertaking of the host State to stabilise the regulatory framework in the sector where the investment is made, a change in that framework to reflect the market evolution that is not arbitrary or aimed to harm the investor is not a breach of the FET standard.²³⁸
264. Canada alleges that having enunciated the legal test in this manner, the Tribunal implicitly rejected GTH's contention that the FET standard in the FIPA includes a separate

²³³ Canada's Counter-Memorial on Partial Annulment, para. 49.

²³⁴ Canada's Counter-Memorial on Partial Annulment, para. 50.

²³⁵ Canada's Counter-Memorial on Partial Annulment, para. 51.

²³⁶ Canada's Counter-Memorial on Partial Annulment, para. 52.

²³⁷ Canada's Counter-Memorial on Partial Annulment, para. 55.

²³⁸ Canada's Counter-Memorial on Partial Annulment, para. 56.

requirement that State measures must be “proportionate.” Thus, there was no need to consider whether the Transfer Framework was disproportionate.²³⁹

265. Third, Canada argues that it can be inferred from facts set out in the Award that the Tribunal saw no basis to conclude that the Transfer Framework was disproportionate in any event. The Tribunal’s analysis of the objectives of the Transfer Framework and of the reasonableness of the measure indicates that it did not consider the measure to be disproportionate to the objective of enhancing competition. Instead, the Tribunal noted the major evolution in Canada’s telecommunications market that made it necessary for Canada to adopt the Transfer Framework to achieve its competition objectives.²⁴⁰ Ultimately, the Tribunal held that GTH had not met its burden of proving that the Transfer Framework was not based on legal standards, reflected an excess of discretion, prejudice or personal preference, or was politically motivated and without any legitimate policy objective.²⁴¹
266. In its Rejoinder, Canada summarizes that “[a]ny consideration of the arguments that GTH presented on proportionality in the only submission where it made them – its Reply on Merits and Damages – confirms that GTH did not advance sufficient legal and factual argumentation supported by evidence for the Tribunal to resolve the proportionality allegation. GTH merely argued Canada ‘knew the approach it took would have the most detrimental impact on the value of GTH’s investment’, and could have achieved its policy objective with an option that ‘could have avoided the significant damage it caused to GTH.’ Yet in the arbitration, GTH cited no evidence to support its argument that alternative approaches with lesser impact were available to Canada to achieve its policy objectives.”²⁴²

(iii) *The Tribunal gave no reasons for its decision to dismiss the Free Transfer Claim*

267. With respect to GTH’s allegation that the Tribunal gave no reasons for its interpretation leading to the dismissal of the Free Transfer Claim, Canada argues that the Tribunal

²³⁹ Canada’s Counter-Memorial on Partial Annulment, para. 57.

²⁴⁰ Canada’s Counter-Memorial on Partial Annulment, para. 58.

²⁴¹ Canada’s Counter-Memorial on Partial Annulment, para. 59.

²⁴² Canada’s Rejoinder on Partial Annulment, para. 26.

rejected the broad interpretation proposed by GTH and found that Article IX of the BIT only protects the right of an investor “to transfer the amount, proceeds and returns of its investment out of the host state.” Summarizing its finding, the Tribunal noted, “Article IX in its true construction offers no ground to GTH to claim relief.”²⁴³

268. Canada firmly contends that the Tribunal did not fail to state reasons in dismissing GTH’s claim that the restriction on the transfer of its investment amounted to a breach of Article IX(1). Canada recalls that GTH argues that the Tribunal failed to address certain textual elements of Article IX on which it had relied to support its interpretation of the provision. Notwithstanding GTH’s efforts to package its argument as a failure to state reasons, in reality it is asking the Committee to revisit the fact that, in coming to its legal conclusion, the Tribunal gave weight to certain textual elements over others, and preferred Canada’s interpretation to that put forward by the Claimant. GTH’s contention that the Tribunal failed to state reasons for its conclusion is nothing but a thinly veiled attempt to re-argue its case with respect to the interpretation of a substantive Treaty obligation. Article 52(1)(e) does not open the door to such an exercise. As GTH itself acknowledged, an annulment is not an appeal.²⁴⁴
269. In its Rejoinder, Canada insists that “[r]ather than argue an absence of reasons, GTH argues that the Award is not sufficiently reasoned because the analysis provided by the Tribunal does not specifically discuss the reasons for rejecting certain points raised by GTH in support of its position. In GTH’s view, this renders the Tribunal’s finding on the interpretation of Article IX impossible to understand.”²⁴⁵
270. Canada states that the reasons for the Tribunal’s conclusion on the interpretation of Article IX are far from being “unintelligible” or “impossible to understand.” To the contrary, they are set out plainly and in detail in the Award.²⁴⁶

²⁴³ Canada’s Counter-Memorial on Partial Annulment, para. 61.

²⁴⁴ Canada’s Counter-Memorial on Partial Annulment, para. 63.

²⁴⁵ Canada’s Rejoinder on Partial Annulment, para. 35.

²⁴⁶ Canada’s Counter-Memorial on Partial Annulment, para. 64.

271. Canada alleges that in reading this section of the Award the reader is able to understand how the Tribunal reached the conclusion that the provision “applies exclusively to the transfer of funds.” The analysis is far from “confounding” as the Claimant describes it. The Tribunal’s legal conclusions are reasoned and intelligible and there is no doubt that the Award meets the minimum requirement under ICSID Article 52(1)(e). The Claimant cannot invoke Article 52(1)(e) simply because it is unhappy with the Tribunal’s decision and wishes to re-litigate its arguments.²⁴⁷
272. Moreover, Canada insists in its Rejoinder in that “[i]n its analysis of the issue, the Tribunal retained Canada’s interpretation. It specifically emphasized certain words contained in Article IX by listing them in paragraph 702 of its Award, including ‘transfer of investments and returns’, the words that GTH takes issue with in these annulment proceedings. According to the Tribunal “[a]ll of the terms of Article IX referred to above point towards the construction of the term ‘transfer’ as denoting the free movement of the funds invested in the host State, or of the proceeds of the liquidation of an investment that takes the form of another category of qualifying asset, and the returns on investment that the investor yielded over the duration of the investment.’ Having expressed its reasons for retaining an interpretation of Article IX that did not extend beyond transfer of funds, the Tribunal did not need to parse out all of the words in Article IX and discuss why they were supportive of its finding. The Tribunal also agreed with Canada’s submission that the purpose of Article IX is to protect cross-border movements of funds related to an investment and not of the assets constituting an investment. In so holding, it referenced an authority that Canada had submitted in support of its contention.”²⁴⁸

(iv) *The Majority’s decision to dismiss GTH’s National Treatment Claim was also contradictory and absent key reasoning*

273. Finally, regarding GTH’s allegation that the Majority’s decision to decline jurisdiction over GTH’s National Treatment Claim contains contradictory findings with respect to the characterization of the nature of Canada’s objection based on Article IV(2)(d), Canada

²⁴⁷ Canada’s Counter-Memorial on Partial Annulment, para. 67.

²⁴⁸ Canada’s Rejoinder on Partial Annulment, para. 39.

contends it should be rejected for the same reasons that the characterization does not constitute a manifest excess of powers. As Canada already explained, the Tribunal never ruled that Canada's objection pertained to the admissibility of the claim and it never rejected the "hypothesis" that Canada's objection pertained to the Tribunal's jurisdiction. It simply did not decide one way or the other whether Canada's objection pertained to its jurisdiction or the admissibility of GTH's claim. GTH is therefore wrong to allege that "the majority (and Canada) conceded that the Tribunal had jurisdiction over GTH's National Treatment Claim."²⁴⁹

274. In its Rejoinder, Canada explains that "[t]he Tribunal summarized in its Award GTH's argument based on Canada's treaty practice. The Tribunal was therefore certainly aware of the argument. The fact that it did not subsequently address it in its legal analysis is an indication that it considered the argument as irrelevant in view of its conclusions based on other arguments and facts. In any event, an annulment proceeding is not a forum in which to second-guess the merits of a tribunal's findings. As Canada noted in its Counter-Memorial on Annulment, the Majority did not need to engage with GTH's argument because the Tribunal noted that it had 'no difficulty' finding that 'services in any other sector includes telecommunications' and that it was the 'only plausible interpretation' based on the text of the provision."²⁵⁰

(2) The Committee's Analysis

275. Having analysed the positions of the Parties, the Committee does not find GTH's arguments persuasive. The Committee finds that the Tribunal considered the arguments put forward by the Parties and dealt with them in a manner that can be followed logically. Its conclusion does not support GTH's arguments.

a. The Tribunal's decision to dismiss GTH's claim on the frustration of legitimate expectations is contradictory and absent reasoning

276. The Tribunal stated that to determine whether Canada's conduct frustrated GTH's legitimate expectations and, as a result, breached the FET standard as set out in Article

²⁴⁹ Canada's Counter-Memorial on Partial Annulment, para. 91.

²⁵⁰ Canada's Rejoinder on Partial Annulment, para. 75.

II(2)(a) of the BIT, it would examine whether, based on the evidence adduced by the Parties, it was possible to identify representations by Canada that could give rise to legitimate expectations by GTH, the extent to which GTH relied on those representations in its investment decision, and whether Canada fundamentally departed from those representations after GTH made its investment in reliance thereon.²⁵¹

277. Accordingly, the Tribunal analysed the policy documents regarding wireless telecommunications available to GTH when it decided to invest in Canada²⁵² and concluded that it could not find any compelling evidence that Canada represented at the time of the AWS Auction that it would unconditionally permit New Entrants to transfer their set-aside licences to Incumbents, or that the Minister would approve all applications to transfer set-aside spectrum to Incumbents automatically after the expiry of the five-year transfer restriction.²⁵³
278. The Tribunal stated very clearly that it could not accept GTH's position because it attempted to turn the restriction that effectively existed on transfers into a positive obligation of Canada to permit transfers after the five-year period. After close analysis of the relevant legal rules, the Tribunal concluded that GTH was reading them partially because the alleged transfers, which would become admissible after the five-year period, also required ministerial approval.²⁵⁴
279. Furthermore, the Tribunal engaged in a precise distinction between admissibility and eligibility when dealing with the rules and the way in which GTH read them. It pointed out that "while the policy documents repeatedly refer to the required approval of the Minister, they do not contain any assurance that such approval shall be granted where the eligibility criteria of the transferee are fulfilled, and the restriction period has expired. Meeting the eligibility criteria is necessary to apply for a license transfer; however, ministerial approval is still required for the transfer to be effective. In this sense, the eligibility requirements

²⁵¹ Award, para. 539.

²⁵² C-003, C-004, C-041 and C-050.

²⁵³ Award, para. 540.

²⁵⁴ Award, para. 542.

stand as an admissibility prerequisite: the Minister need not consider a transfer application that does not meet the prerequisite. The Tribunal concluded that GTH ignored the distinction between admissibility and approval when it argued that such a reading of the Minister’s power rendered the five-year restriction redundant and of no meaning.”²⁵⁵

280. The Tribunal was crystal clear when it affirmed that it “notes the assertion by GTH that ‘the evidence shows that the only express restriction on transfer contained in set-aside spectrum licenses was the 5-year restriction on transfer to an Incumbent.’ That assertion, in the terms by GTH, casts light on a fundamental flaw in GTH’s case: the five-year restriction on transfer is not the only restriction; meeting eligibility criteria and obtaining the Minister’s approval of the application for transfer are prerequisites.”²⁵⁶

281. The Tribunal stated that “all of the policy documents must be read in the context of the underlying legislative and regulatory regime”²⁵⁷ and pointed to the decision of Canada’s Federal Court in *Telus v AGC*, which held: “[n]othing in these statements constitutes a statement, or even an implication that, at the end of five years a party may freely, without review or constraint by the Minister, licence or acquire any or all of the set-aside spectrum, nor do any of these statements constitute an undertaking or assurance by the Minister that, after five years, the Minister may decline to exercise discretion to manage the spectrum.”²⁵⁸

282. The Tribunal dismissed as evidence an internal memorandum brought by GTH purportedly stating that there was an entitlement to transfer the set-aside spectrum after the five-year period on the grounds that it was not available to GTH when it decided to invest and also because it found no reason to give priority to an internal memorandum over clear legal rules.²⁵⁹

283. The Tribunal also analysed the past practice alleged by GTH as giving room to a precedent regarding the handling of those requests and it concluded that “the record makes clear that

²⁵⁵ Award, para. 545.

²⁵⁶ Award, para. 547.

²⁵⁷ Award, para. 549.

²⁵⁸ Award, para. 550.

²⁵⁹ Award, para. 551.

Canada did not make any representation which could give rise to a legitimate expectation of GTH that it is assured of being permitted to transfer its spectrum licenses to an Incumbent after the expiry of the five-year restriction on transfers.”²⁶⁰

284. The Tribunal found that GTH had not established the existence of any legitimate expectation that was violated, in breach of the BIT, by Canada’s adoption and implementation of the Transfer Framework.²⁶¹

285. In fact, the Tribunal dealt with allegations of unreasonability, arbitrariness, and lack of transparency in Canada’s conduct. As many other tribunals, it noted that “absent an undertaking of the host State to stabilise the regulatory framework in the sector where the investment is made, a change in that framework to reflect the market evolution that is not arbitrary or aimed to harm the investor is not a breach of the FET standard.”²⁶² Also, in reply to an argument of inconsistency put forth by GTH, the Tribunal did not find any illegitimacy or irrationality in the Canadian Government considering in 1994 that the market was competitive and introducing ten years later, in 2013, a Transfer Framework to regulate spectrum concentration, given the important evolution in the market that was amply discussed at the Hearing.²⁶³ The Tribunal continued “accordingly, and contrary to GTH’s contention, the Tribunal does not see in the adduced evidence a fundamental change in the 2013 Transfer Framework, but rather different wording of the same policy that had been the consistent rationale for the AWS Auction since its inception.”²⁶⁴ The Tribunal considered “that neither the terms of the licences nor the statutes that underlie those licences can be read as committing Canada to freeze its telecom regulatory framework.”²⁶⁵ This reasoning cannot be considered contradictory in the Committee’s view, since the Tribunal justified the stability in the objectives of Canada’s policies in the face of changed circumstances.

²⁶⁰ Award, para. 555.

²⁶¹ Award, para. 558.

²⁶² Award, para. 563.

²⁶³ Award, para. 565.

²⁶⁴ Award, para. 566.

²⁶⁵ Award, para. 568.

286. The above led the Tribunal to dismiss “GTH’s claim that Canada violated Article II(2)(a) of the BIT by denying GTH the ability to transfer the set-aside spectrum licenses to an Incumbent after expiry of the five-year transfer restriction period. GTH has not established that Canada frustrated GTH’s legitimate expectations, or that Canada subjected GTH treatment that was arbitrary, unreasonable, non-transparent, politically motivated or without any legitimate policy objective.”²⁶⁶

b. The Tribunal did not address GTH’s claim of breach of FET by disproportionate action

287. Having reviewed the Parties’ allegations and the documents on file, the Committee is persuaded that the contention that the Tribunal did not address GTH’s claim of breach of FET by disproportionate action is meritless.

288. In fact, as pointed out by Canada, GTH did not make an autonomous argument on the lack of proportionality of Canada’s measures that allegedly amounted to a breach of FET. In GTH’s Memorial on the Merits and Damages, GTH claims that the breach of FET occurred through the frustration of legitimate expectations and by unreasonably and arbitrarily blocking GTH from transferring Wind Mobile’s licenses after five years.

289. The first use of the word “disproportionate” is found in paragraph 299 when GTH elaborated on the legitimate expectations argument and, after quoting the award in *Murphy v Ecuador*, GTH concludes, *inter alia*, that “an investor cannot reasonably be expected to bear the cost associated with a State’s decision to change its regulatory environment in an ‘important’ or ‘fundamental’ way, nor can it expect to suffer a State’s regulatory conduct which is arbitrary, unreasonable, disproportionate, or otherwise improper.”²⁶⁷

290. Again, in paragraph 390 of the Memorial on the Merits and Damages, GTH mentions the word disproportionate when elaborating on investors considered “in the like circumstances” but not as a stand-alone argument.²⁶⁸

²⁶⁶ Award, para. 571.

²⁶⁷ GTH’s Memorial on the Merits and Damages, para. 299 (emphasis added).

²⁶⁸ GTH’s Memorial on the Merits and Damages, para. 390.

291. In fact, GTH's arguments on the point do not rely on the proportionality of the measures taken by Canada. Instead, GTH argues that Canada breached its obligation to afford FET by unreasonably and arbitrarily blocking GTH from transferring Wind Mobile's licenses after five years.²⁶⁹
292. As stated above, this Committee finds GTH's arguments on the grounds for annulment of the Blocked Sale Claim unpersuasive. GTH has failed to provide evidence regarding the alleged lack of reasons by the Tribunal.

c. The Tribunal gave no reasons for its decision to dismiss the Free Transfer Claim

293. The Committee will now consider GTH's arguments on the dismissal of the Free Transfer Claim. Having considered the positions of the Parties, the Committee finds that those allegations do not meet the standards for annulment.
294. The Committee notes that, as provided for in the BIT, the Tribunal envisaged the analysis of the arguments put forward by the Parties in the light of the applicable rules of international law. To that end, the Tribunal examined GTH's arguments according to the interpretation provisions in the VCLT, Articles 31 to 33.
295. In fact, the Tribunal found that GTH's claim in relation to unrestricted transfers was based on a misconception of the scope of the term "transfer" in Article IX of the BIT. Taking into account the ordinary meaning to be given to the terms in the context of the treaty and in the light of its object and purpose, the Tribunal found that *returns* as defined in Article I(i) of the BIT means all amounts yielded by an investment in and that "all of the terms of Article IX referred to above point[ed] towards the construction of the term 'transfer' as denoting the free movement of the funds invested in the host State, or of the proceeds of the liquidation of an investment that takes the form of another category of qualifying asset, and the returns on investment that the investor yielded over the duration of the investment." Thus, the Tribunal concluded that "'transfer' includes expatriation outside the host State, whether or not that movement consists of a repatriation to the investor's country. In all of

²⁶⁹ GTH Memorial on the Merits and Damages, para. 335 and *seq.*

those situations, Article IX precludes the host State from restricting the right of the investor to transfer the amount, proceeds and returns of its investment out of the host State, for instance by enacting capital or currency controls, subject to the exceptions listed in Article IX(3).”²⁷⁰ That being so, the Tribunal endorsed “Canada’s submission that the purpose of Article IX is to protect cross-border movements of funds related to the investment.”²⁷¹

296. In order to confirm its reading of Article IX of the BIT, the Tribunal found support in the different authentic texts of the BIT and confirmed that the meaning of *transfer* that best reconciles the three authentic texts is the permission of the free circulation of the funds that consists in or result from the investment, as opposed to a guarantee of an unrestricted conveyance of ownership of that investment to an Incumbent at the end of the five-year period.²⁷²
297. In the light of the above considerations, the Committee finds that the Tribunal identified the applicable law and endeavoured to apply it to the Free Transfer Claim and provided reasons for its conclusions that allow the reader to get from point A to point B in a sound manner.

d. The Majority’s decision to dismiss GTH’s National Treatment Claim was also contradictory and absent key reasoning

298. With respect to GTH’s argument that the Majority’s analysis of Article IV(2)(d) and the Annex failed to address key arguments and reach critical findings, amounting to a failure to state reasons in violation of Article 52(1)(e) of the ICSID Convention,²⁷³ and after a close analysis of the respective arguments and of the documents on file, the Committee finds the claim unpersuasive.
299. In fact, the reasoning of the Tribunal can be followed in the Award. First, the Tribunal announced its approach: “[t]he Tribunal must determine whether, pursuant to Article IV(2)(d) and the Annex of the BIT, measures taken in the telecommunications sector are

²⁷⁰ Award, para. 702.

²⁷¹ Award, para. 704.

²⁷² Award, para. 705.

²⁷³ GTH’s Memorial on Partial Annulment, para. 87.

excluded from the scope of Canada's national treatment obligations. To reach that determination, the Tribunal will address in turn two main questions: (a) has Canada validly made an exception under Article IV(2)(d)? and (b) if so, is telecommunications captured by that exception? With respect to each of these questions, the Tribunal's fundamental task is to interpret the relevant provisions of the BIT in accordance with Article 31(1) of the VCLT.²⁷⁴

300. Referring to Article IV(2)(d), the Tribunal assessed that : “[t]he text makes clear that the right to make an exception in a sector or a matter is subject to only one condition: the sector or matter must be listed in the Annex. In the Annex, Canada ‘reserves the right to make and maintain exceptions’ in five categories, including ‘social services’ and ‘services in any other sector.’ This language, similar in all three authentic linguistic versions of the BIT, leaves no room for doubt that Canada has the right to make exceptions to its national treatment obligation with respect to ‘services.’ Unattractive as the result may seem to the dissenting minority, such is the Parties’ agreement as recorded in the explicit terms of the BIT.”²⁷⁵
301. Then, the Tribunal found “that the correct, and most reasonable, interpretation of Article IV(2)(d) and the Annex supports Canada’s position. In particular, there is simply no basis in the text of the BIT to impose an additional procedural requirement that triggers the effectiveness of the exception.”²⁷⁶
302. The Tribunal continued stating that “Article XVI(1) sets out a process by which the Contracting Parties are to notify one another of any existing non-conforming measures, but there is no such process prescribed for exercising the right granted by Article IV(2)(d). The obvious indication is that if the Contracting Parties had intended for that right to be subject to any notification requirement beyond listing the relevant sector or matter in the Annex, they would have included it in the text of the BIT.”²⁷⁷

²⁷⁴ Award, para. 365.

²⁷⁵ Award, para. 367.

²⁷⁶ Award, para. 369.

²⁷⁷ Award, para. 371.

303. The Tribunal went ahead in its analysis: “[w]ith regard to the Annex, the reference to ‘services in any other sector’ must be read in the context of the four other listed items. These refer to matters as specific as ‘government securities – as described in SIC 8152’ and ‘residency requirements for ownership of oceanfront land’ and ‘measures implementing the Northwest Territories and the Yukon Oil and Gas Accords.’ The specificity of these categories also suggests that no further action by Canada is required or contemplated prior to its entitlement to rely upon these asserted ‘exceptions.’ Although ‘services in any other sector’ is broader than the other items listed, there is no indication in the text that it should be treated differently.”²⁷⁸
304. The Tribunal made some observations regarding the drafting of the Annex. They are however not essential to its decision. Indeed, the Tribunal itself stated “[i]n any event, the Tribunal must interpret the text of the BIT as it is, not as it should have been drafted in an ideal situation”, but, more importantly, it stated that “[a]s already mentioned, the text leaves no doubt that Canada has the right to make exceptions to its national treatment obligation in ‘services’, and the Tribunal declines to subject that right to a notice requirement or other procedural hurdle which is not included in the BIT. Thus, the Tribunal concludes that under Article IV(2)(d) and the Annex, Canada may adopt or apply measures with respect to ‘services’ that are not in conformity with its national treatment obligation.”²⁷⁹
305. The Tribunal stressed that “[i]t is important to emphasize that this exception is limited to the national treatment provisions of the BIT. Canada remains obligated to provide Egyptian investors fair and equitable treatment when adopting or applying any measures in relation to ‘services’ under Article II(2)(a) of the BIT, and Canada must be reasonably transparent in the adoption of laws, regulations and procedures that might affect ‘services’ under Article XVI(2).”²⁸⁰
306. As shown, the Committee finds that the Tribunal followed a path in its analysis and interpretation of the BIT and provided supporting reasons for its conclusion; such path,

²⁷⁸ Award, para. 372.

²⁷⁹ Award, para. 374.

²⁸⁰ Award, para. 375.

furthermore, is not contradictory. Therefore, the Committee determines that GTH's claim on this point should also be dismissed.

C. SERIOUS DEPARTURE FROM A FUNDAMENTAL RULE OF PROCEDURE (ARTICLE 52(1)(D))

(1) The Parties' Positions

a. GTH's Position

307. GTH considers that the Tribunal's decision to dismiss the Free Transfer Claim amounts to a serious departure of a fundamental rule of procedure by relying on arguments not advanced by the Parties. GTH argues that a serious departure of a fundamental rule of procedure, as a ground for annulment, recognizes that attached to a tribunal's power and authority to issue binding decisions, there is a concomitant duty to act with procedural fairness in order to preserve the legitimacy of the award.²⁸¹ Accordingly, it states that a tribunal cannot "surprise [...] the parties with an issue that neither party has invoked, argued or reasonably could have anticipated during the proceedings."²⁸²
308. GTH alleges that the Tribunal's decision with respect to the Free Transfer Claim must also be annulled because the Tribunal has committed a serious departure from a fundamental rule of procedure pursuant to Article 52(1)(d) of the ICSID Convention. GTH submits that not only does the Tribunal choose to ignore critical terms of the BIT and arguments made by GTH, the Tribunal relies upon an argument never advanced by the Parties in reaching its decision to dismiss the Free Transfer Claim.²⁸³
309. GTH alleges that in its Award, the Tribunal relies on the translation of the term "transfer" in the Arabic and French texts of the BIT to conclude that the Free Transfer Guarantee is limited to the movement of funds invested in the host State. Specifically, the Tribunal finds that if the Contracting Parties of the BIT had intended to protect an investor's ability to transfer ownership of an investment within the host State, the French text of the BIT would have used the French term "transmission" not "transfert" and the Arabic text of the BIT

²⁸¹ GTH's Memorial on Partial Annulment, para. 47.

²⁸² GTH's Memorial on Partial Annulment, para. 50 citing *TECO Guatemala Holdings LLC v Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment, April 5, 2016, para. 18 (CL-216).

²⁸³ GTH's Memorial on Partial Annulment, para. 81.

would have used “البيع” or “الملكية قل” instead of “التحويل.” Having reached these conclusions, the Tribunal next applies Article 33 of the VCLT, and declares that “the Tribunal adopts the meaning of ‘transfer’ which best reconciles the three authentic texts, having regard to the object and purpose of the treaty” – i.e., Article IX(1) should be limited to the transfer of funds.²⁸⁴

310. GTH argues that at no stage during the Arbitration did either Party address, refer to, or advance any arguments regarding the interpretation of the French or Arabic texts of Article IX(1) and, relatedly, the application of Article 33 of the VCLT to this Article. It was therefore wholly improper for the Tribunal to “surprise [...] the parties with an issue that neither party has invoked, argued or reasonably could have anticipated during the proceedings.” To do so amounted to a departure from a fundamental rule of procedure as it breached GTH’s right to be heard. This departure was serious: the Tribunal relied on this argument to resolve “doubts” in respect of its interpretation of Article IX(1). If GTH had been given the opportunity to fully brief this issue regarding any perceived meaning to be derived from the three authentic texts, it is possible that the Tribunal could have reached a different result.²⁸⁵
311. In its Reply, GTH argues that “[t]here appears to be no dispute that neither Party advanced arguments regarding the meaning of the Arabic and French texts, and they were considered *sua sponte* by the Tribunal.”²⁸⁶
312. It continues, “[b]y failing to allow the Parties to present arguments on the application of Article 33 of the VCLT and the meaning of the authentic treaty texts in the Arbitration, the Tribunal committed a serious departure from a fundamental rule of procedure.”²⁸⁷

²⁸⁴ GTH’s Memorial on Partial Annulment, para. 82.

²⁸⁵ GTH’s Memorial on Partial Annulment, para. 83.

²⁸⁶ GTH’s Reply on Partial Annulment, para. 51.

²⁸⁷ GTH’s Reply on Partial Annulment, para. 55.

313. Accordingly, states GTH, the Tribunal committed a serious departure from a fundamental rule of procedure, and its decision to dismiss the Free Transfer Claim must be annulled pursuant to Article 52(1)(d) of the ICSID Convention.²⁸⁸

b. Canada's Position

314. Canada argues that the Tribunal did not seriously depart from a fundamental rule of procedure by referring to the authentic Arabic and French versions of the Treaty.

315. Canada asserts that GTH's argument as regards the Tribunal's reference to the other authentic versions of the Treaty (i.e. the French and Arabic versions) mischaracterizes the basis for the Tribunal's conclusion regarding Article IX(1). In fact, the Tribunal did not rely on the French and Arabic versions of the provision for its interpretation. Rather, the Tribunal reached its conclusion as to the proper interpretation of Article IX in paragraphs 703 and 704 of the Award based on Article 31 of the VCLT. Then, in paragraph 705, the Tribunal added that the interpretation it retained was consistent with the other authentic versions of the Treaty.²⁸⁹

316. Further, while the Parties never referred to the French and Arabic versions of the text specifically in relation to the interpretation of the Transfer of Funds provision, such an approach should not come as a "surprise" to the Claimant. Both Parties recognized that the three authentic versions of the Treaty were part of a proper VCLT analysis and relevant to interpreting the provisions of the Treaty. All three authentic texts were part of the record before the Tribunal, and both Parties raised textual arguments based on the three authentic versions with respect to other provisions of the Treaty.²⁹⁰

317. In its Rejoinder, Canada argues that "[e]ven if that were not the case, the Tribunal did not commit an annulable error because the reference to the other authentic versions of the Treaty is of no consequence to the Tribunal's ruling. Therefore, it cannot constitute a serious departure of a fundamental rule of procedure. Indeed, GTH is not able to show that

²⁸⁸ GTH's Memorial on Partial Annulment, para. 84.

²⁸⁹ Canada's Counter-Memorial on Partial Annulment, para. 69.

²⁹⁰ Canada's Counter-Memorial on Partial Annulment, para. 70; Canada's Rejoinder on Partial Annulment, para. 47.

the ‘award might have been substantially different’ had the Tribunal not referenced the French and Arabic versions or had it asked the parties to comment on these authentic versions. As Canada notes in its Counter-Memorial on Annulment, it is apparent from the language used in the Award that the Tribunal merely considered the Arabic and French version of Article IX to confirm a decision it had already made. Contrary to what GTH now alleges in its Reply on Annulment, the Tribunal’s reference in its Award to ‘remaining doubt’ and the verb ‘adopt[ed]’ does not suggest that the Arabic and French versions of the Treaty informed the Tribunal’s decision such that the decision may have been substantially different had the Tribunal only considered the English version, or had it solicited briefings from the parties on the Arabic and French versions of Article IX. Instead, it merely suggests that the Tribunal was comforted by the knowledge that its interpretation of the provision was consistent with all three versions of the Treaty.”²⁹¹

(2) The Committee’s Analysis

318. Having analyzed the positions of the Parties, the Committee finds that GTH’s allegations on this ground for annulment are not supported by the record.
319. In fact, the Committee finds that the Tribunal first identified the applicable law and applied it to the interpretation of the BIT. It subsequently complemented its findings having recourse to the rule of interpretation embodied in Article 33 of the VCLT regarding treaties authenticated in two or more languages. The Committee concludes that this exercise is clearly not a case where one could suggest that the Tribunal was “relying upon an argument never advanced by the Parties” but is instead a case of a tribunal applying the law indicated by the Parties. Further, the Tribunal’s reliance on that specific interpretation is not outcome-determinative, so the ground for annulment cannot stand as it fails to pass all tests outlined by the Committee.
320. Accordingly, in view of all that has preceded, the Committee finds that GTH has no basis to sustain its assertions that the Tribunal manifestly exceeded its powers, failed to state reasons or committed a serious departure from a fundamental rule of procedure.

²⁹¹ Canada’s Rejoinder on Partial Annulment, para. 48.

VII. COSTS

A. PARTIES' SUBMISSIONS

321. GTH submits the following costs regarding its own Application:²⁹²

| | | |
|-----------------------|-----------------|-------------------|
| Legal Fees: | US\$ 956,132.25 | |
| Legal Expenses: | US\$ 4,269.40 | |
| Costs of Arbitration: | US\$ 150,000.00 | |
| Total: | | US\$ 1,110,401.65 |

322. GTH submits the following costs regarding Canada's Application:²⁹³

| | | |
|----------------------|-----------------|-----------------|
| Legal Fees: | US\$ 632,665.75 | |
| Legal Expenses: | US\$ 1,072.00 | |
| Cost of Arbitration: | US\$ 150,000.00 | |
| Total: | | US\$ 783,737.75 |

| | | |
|-----------------------------------|--|------------------|
| Total regarding both Applications | | US\$1,894,139.40 |
|-----------------------------------|--|------------------|

323. Canada presented a global costs submission according to which:²⁹⁴

| | | |
|--------------------------|------------------|---------------------|
| Professional Fees : | CAD\$ 744,086,21 | |
| Costs of the Arbitration | CAD\$ 422,056.81 | |
| Total: | | CAD\$ 1,166,143.02. |

324. On 30 July 2022, the Parties informed the Committee that they had agreed that each party would bear their own costs of the proceedings.

B. THE COMMITTEE'S DECISION ON COSTS

325. The costs of the proceedings, including the fees and expenses of the Committee, ICSID's administrative fees and direct expenses, amount to (in US\$):

²⁹² GTH's submission on costs, Annex A.

²⁹³ GTH's submission on costs, Annex B.

²⁹⁴ Canada's submission on costs, Annex I.

| | GTH's Application | Canada's Application | Total |
|-----------------------------|--------------------------|-----------------------------|------------------------|
| Prof. Mónica Pinto | US\$ 34,875 | US\$ 34,875 | US\$ 69,750 |
| Prof. Lawrence Boo | US\$ 18,062.50 | US\$ 18,062.50 | US\$ 36,125 |
| Ms. Dyalá Jiménez | US\$ 25,312.50 | US\$ 25,312.50 | US\$ 50,625 |
| ICSID's administrative fees | US\$ 126,000 | US\$ 126,000 | US\$ 252,000 |
| Direct expenses | US\$ 3,885.74 | US\$ 3,885.75 | US\$ 7,771.49 |
| Total | US\$ 208,135.74 | US\$ 208,135.75 | US\$ 416,271.49 |

326. The above costs have been paid out of the advances made by both Parties pursuant to Administrative and Financial Regulation 15(5).²⁹⁵
327. In line with the Parties' decision referred to above, the Committee confirms that each party will bear its own costs and will equally share the costs of the proceedings.

VIII. DECISION

328. For the reasons set forth above, the *ad hoc* Committee decides:
- (1) To DISMISS Canada's Application for Partial Annulment;
 - (2) To DISMISS GTH's Application for Partial Annulment; and
 - (3) To ALLOCATE each party its own fees and expenses and that they share the cost of proceedings.

²⁹⁵ The remaining balance will be reimbursed to both Applicants.

[Signed]

Prof. Lawrence Boo
Member of the *ad hoc* Committee

Date: September 30, 2022

[signed]

Ms. Dyalá Jiménez
Member of the *ad hoc* Committee

Date: September 30, 2022

[signed]

Prof. Mónica Pinto
President of the *ad hoc* Committee

Date: September 30, 2022