INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Global Telecom Holding S.A.E.

v.

Canada

(ICSID Case No. ARB/16/16)

PROCEDURAL ORDER NO. 2
DECISION ON RESPONDENT'S REQUEST FOR BIFURCATION

Members of the Tribunal
Prof. Dr. Georges Affaki, President of the Tribunal
Prof. Gary Born, Arbitrator
Prof. Vaughan Lowe, Arbitrator

Secretary of the Tribunal
Ms. Frauke Nitschke

14 December 2017

CONTENTS

I. INTRODUCTION ... 2
A. The Parties ... 2
B. The Subject of this Order ... 2
II. PROCEDURAL HISTORY ... 3
III. THE PARTIES' REQUESTS FOR RELIEF ... 5
IV. OVERVIEW OF THE UNDERLYING DISPUTE ... 5
V. THE PARTIES' POSITIONS ... 10
A. Respondent's Position ... 10
(1) Applicable Legal Standard ... 10
(2) [redacted]
(3) Second Objection: Article II(4)(b) of the BIT ... 13
(4) Third Objection: Jurisdiction Ratione Temporis ... 15
(5) Fourth Objection: Article IV(2)(d) of the BIT ... 17
(6) Fifth Objection: Admissibility ... 18
B. Claimant's Position ... 20
(1) Applicable Legal Standard ... 20
(1) [redacted]
(2) Second Objection: Article II(4)(b) of the BIT ... 23
(3) Third Objection: Jurisdiction Ratione Temporis ... 24
(4) Fourth Objection: Article IV(2)(d) of the BIT ... 25
(5) Fifth Objection: Admissibility ... 25
VI. THE TRIBUNAL'S ANALYSIS ... 26
A. Legal Framework ... 27
B. Analysis ... 28
VII. DECISION ... 31
ANNEX A: PROCEDURAL TIMETABLE ... 1

I. INTRODUCTION

A. The Parties

1. The claimant is Global Telecom Holding S.A.E. ("**GTH**" or "**Claimant**"), a company established under the laws of the Republic of Egypt ("**Egypt**"). GTH is represented in this proceeding by Ms. Penny Madden QC and Ms. Besma Grifat-Spackman of Gibson, Dunn & Crutcher LLP in London, and Mr. Rahim Moloo and Ms. Charline Yim of Gibson, Dunn & Crutcher LLP in New York.

2. The respondent is Canada (also referred to as "**Respondent**"). Canada is represented in this proceeding by Ms. Sylvie Tabet, Mr. Jean-Francois Hébert, Ms. Heather Squires, Ms. Jenna Wates and Ms. Valantina Amalraj of the Trade Law Bureau (JLT), Global Affairs Canada.

B. The Subject of this Order

3. This Order addresses Canada's request for bifurcation of the proceeding. Canada asks the Tribunal to address Canada's jurisdictional objections in a preliminary phase, while GTH prefers that those objections be joined to the merits.

4. The Tribunal first sets out the relevant procedural history (Section II), the Parties' requests for relief (Section III) and a brief overview of the underlying dispute as alleged by GTH to the extent it is relevant to this Order (Section IV). In Section V, the Tribunal summarizes the Parties' positions. It then provides its analysis of Canada's request for bifurcation (Section VI) and states its order in Section (VII).

5. The Tribunal has carefully reviewed and considered all the arguments presented by the Parties. The fact that a specific argument is not expressly referenced in this Order does not mean that it has not been considered, as the Tribunal includes only those points which it considers most relevant for its decision.

II. PROCEDURAL HISTORY

6. Following the constitution of the Tribunal on 21 February 2017, the Tribunal consulted with the Parties and scheduled the first session to be held by teleconference on 21 April 2017.

7. On 10 March 2017, the Tribunal provided the Parties with a draft agenda for the first session and a draft procedural order to facilitate the Parties' discussions on procedural matters in advance of the first session.

8. On 7 April 2017, the Parties submitted their comments on the draft agenda and procedural order. They also informed the Tribunal that they had been able to reach agreement on the majority of procedural issues. One issue on which the Parties could not agree was the "number and sequence of pleadings, including whether the proceedings should be bifurcated to deal with Canada's preliminary objections on jurisdiction and admissibility."[1] The Parties informed the Tribunal that they would submit their respective comments on the disputed issues (including bifurcation) later that day. They also proposed to each submit a response to the other Party's comments one week later.

9. Later that day, Canada submitted its Request for Bifurcation, date 7 April 2017, together with legal authorities RL-001 to RL-0036 (the "**April Request for Bifurcation**"). GTH submitted a letter of the same date, addressing the disputed procedural issues, including bifurcation.

10. On 10 April 2017, the Tribunal approved the Parties' proposal that each Party would submit a response to the other Party's comments of 7 April 2017.

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

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

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

13. On 19 April 2017, the Parties informed the Tribunal that they had agreed to allocate 45 minutes for each Party's presentation on bifurcation. The Tribunal subsequently confirmed this agreement.

14. The first session was held by teleconference on 21 April 2017, and each Party made oral submissions on the issue of bifurcation as agreed.

15. Following the first session, the Tribunal considered the Parties' written and oral submissions on the issue of bifurcation. It determined that it would be premature to decide whether to bifurcate the proceeding at that stage, and that the Tribunal would be better-placed to decide after receiving Canada's jurisdictional objections. By letter of 2 May 2017, the Tribunal informed the Parties of this determination. It noted that Canada would be welcome to submit another request for bifurcation together with its jurisdictional objections.

16. On 13 June 2017, the Tribunal issued Procedural Order No. 1, embodying the agreements of the Parties and the decisions of the Tribunal regarding the procedure to govern the arbitration. The Procedural Timetable was attached as Annex A of Procedural Order No. 1. The Procedural Timetable sets out the dates for each procedural step leading to the Tribunal's decision on bifurcation (if any). It then provides alternative timetables for the remaining procedural steps, one of which will apply following the Tribunal's decision on bifurcation, depending on the outcome.

17. In accordance with the Procedural Timetable, on 29 September 2017, GTH filed its Memorial on the Merits and Damages, together with exhibits C-001 to C-254, legal

authorities CL-001 to CL-089,[2] the Expert Report of Santiago Dellepiane A. and Pablo T. Spiller, and the Witness Statements of Kenneth D. Campbell, Michael C. Connolly, David L. C. Dobbie and Andrew M. Dry (the "**Memorial**").

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

19. On 29 November 2017, GTH filed its Response to Canada's Request for Bifurcation (the "**Response**").

III. THE PARTIES' REQUESTS FOR RELIEF

20. As part of the request for relief contained in the Jur. Memorial and Request for Bifurcation, Canada states that it "respectfully requests that the Tribunal hear Canada's jurisdictional and admissibility objections in a preliminary phase."[3]

21. In the Response, GTH includes the following request for relief:

> On the basis of the foregoing, and in light of the fact that bifurcation would decrease efficiency and increase cost and the risk of unfair proceedings, GTH respectfully requests that the Tribunal reject Canada's Request for Bifurcation.[4]

IV. OVERVIEW OF THE UNDERLYING DISPUTE

22. The purpose of the following overview of the dispute is to provide context for the Parties' arguments on this issue of bifurcation. It is based on GTH's submissions filed to date, as Canada has not yet responded to GTH's substantive claims. Nothing in this overview should be considered a finding of the Tribunal with respect to any disputed fact.

---

[2] The legal authorities previously submitted with the April Response were refiled with the Memorial.

[3] Jur. Memorial and Request for Bifurcation, ¶ 297.

[4] Response, ¶ 33.

23. GTH submitted this dispute to arbitration on the basis of (a) the Agreement Between the Government of Canada and the Government of the Arab Republic of Egypt for the Promotion and Protection of Investments (the "**BIT**"),[5] and (b) the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "**ICSID Convention**").

24. GTH alleges that it invested in the Canadian telecommunications market following a series of actions by Industry Canada in 2007 and 2008 to encourage investors to participate in an auction for Advanced Wireless Services spectrum licences (the "**2008 AWS Action**").[6] According to GTH, Canada's ultimate goal was to diversify its telecommunications market, which had historically been dominated by just three players.[7]

25. To this end, Industry Canada released a policy framework applicable to the 2008 AWS Auction.[8] GTH highlights certain conditions set forth in the policy framework, including that Canada would:

a. set aside a specific spectrum for new wireless operators ("**New Entrants**");[9]

b. prohibit the transfer of set-aside spectrum licences to companies that did not meet the criteria of a New Entrant for a period of five years from the date of issuance;[10]

c. establish certain minimum rollout requirements to be met in the first five years; and

[5] **CL-001**, BIT (English version), **CL-002**, BIT (French version), **CL-003**, BIT (Arabic version).

[6] Memorial, ¶¶ 3-5, 40.

[7] Memorial, ¶ 3.

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

[9] **C-004**, Industry Canada, Policy Framework for the Auction for Spectrum Licences for Advanced Wireless Services and other Spectrum in the 2 GHz Range, November 2007, p. 5. A new entrant was defined as: "An entity, including affiliates and associated entities, which holds less than 10 percent of the national wireless market based on revenue." *Id.*

[10] **C-004**, Industry Canada, Policy Framework for the Auction for Spectrum Licences for Advanced Wireless Services and other Spectrum in the 2 GHz Range, November 2007, p. 6.

d. require incumbent carriers to enter into roaming and tower and site-sharing agreements with New Entrants at "commercial rates."[11]

26. In addition, the 2008 AWS Auction was subject to Canada's ownership and control rules ("**O&C Rules**"), which limited the proportion of a common carrier's voting shares that could be held by a foreign investor.[12] Yet, according to GTH, the industry expected that the O&C Rules would be relaxed in the future.[13]

27. GTH learned of the 2008 AWS Auction in November 2007 and subsequently entered into discussions with Globalive Communications Corp. ("**Globalive**"), a Canadian telecommunications provider, to explore the possibility of creating a joint venture to participate in the auction.[14] Eventually, GTH and Globalive (through several intermediate companies) established a new Canadian wireless operator, Globalive Wireless Management Corp., which would later operate as Wind Mobile, to participate in the 2008 AWS Auction as a New Entrant.[15] According to GTH, the investment was structured to ensure compliance with the O&C Rules. At the same time, however, the relevant corporate documents included a provision that would allow GTH to convert its non-voting shares in Wind Mobile into voting shares when the O&C Rules changed as anticipated.[16]

28. Wind Mobile participated in the 2008 AWS Auction and successfully bid for 30 set-aside spectrum licenses for CAD 442 million, which GTH paid in 2008.[17]

---

[11] **Exhibit C-004**, Industry Canada, Policy Framework for the Auction for Spectrum Licences for Advanced Wireless Services and other Spectrum in the 2 GHz Range, November 2007, pp. 8-9.

[12] Memorial, ¶¶ 8, 92.

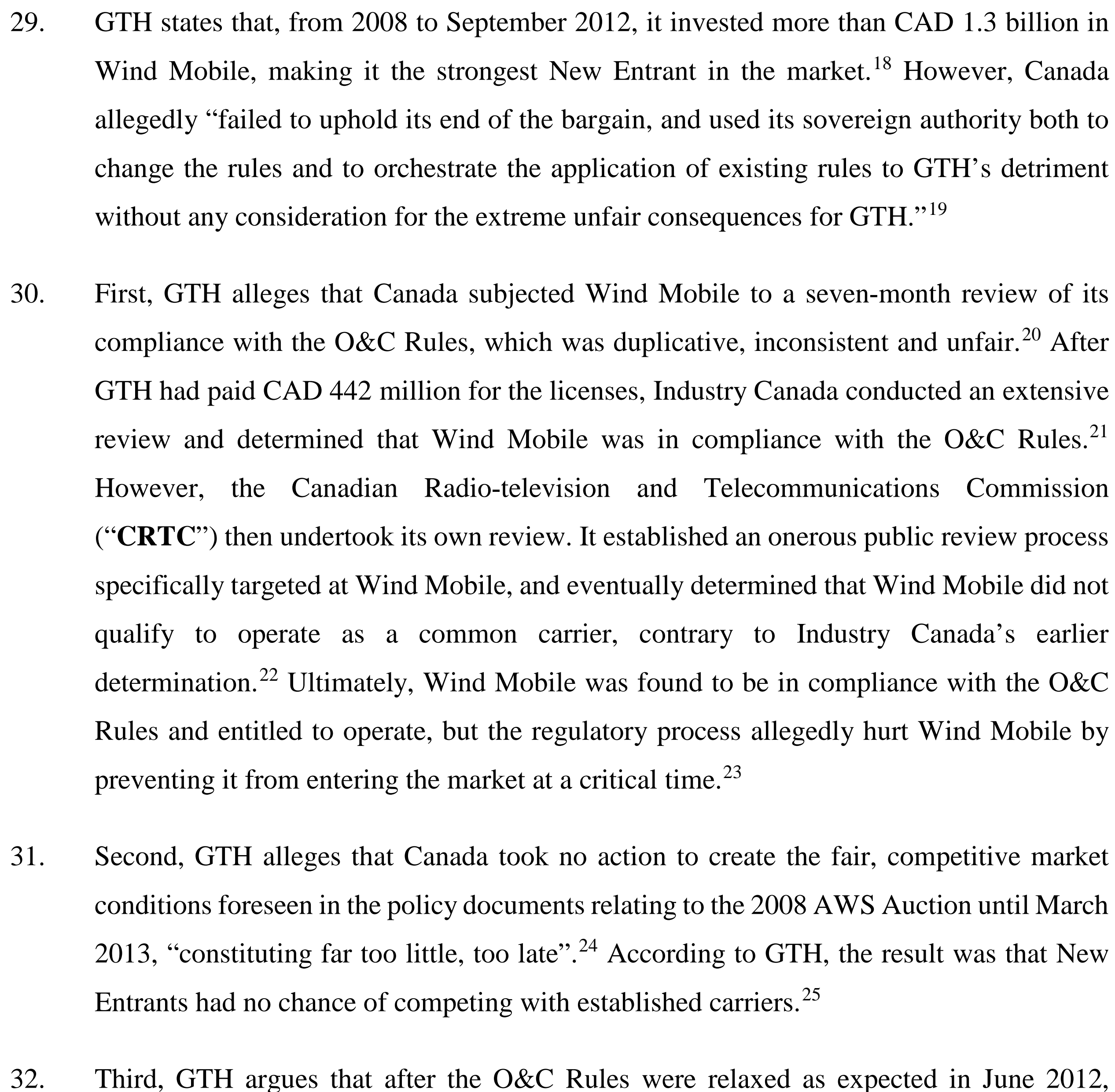
[13] Memorial, ¶ 8.

[14] Memorial, ¶ 79.

[15] Memorial, ¶¶ 9, 90-91. The corporate name of Wind Mobile is Globalive Wireless LP.

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

[17] Memorial, ¶ 87; **C-082**, Letter from Michael D. Connolly to Michael John O'Connor, 22 July 2008.



29. GTH states that, from 2008 to September 2012, it invested more than CAD 1.3 billion in Wind Mobile, making it the strongest New Entrant in the market.[18] However, Canada allegedly "failed to uphold its end of the bargain, and used its sovereign authority both to change the rules and to orchestrate the application of existing rules to GTH's detriment without any consideration for the extreme unfair consequences for GTH."[19]

30. First, GTH alleges that Canada subjected Wind Mobile to a seven-month review of its compliance with the O&C Rules, which was duplicative, inconsistent and unfair.[20] After GTH had paid CAD 442 million for the licenses, Industry Canada conducted an extensive review and determined that Wind Mobile was in compliance with the O&C Rules.[21] However, the Canadian Radio-television and Telecommunications Commission ("**CRTC**") then undertook its own review. It established an onerous public review process specifically targeted at Wind Mobile, and eventually determined that Wind Mobile did not qualify to operate as a common carrier, contrary to Industry Canada's earlier determination.[22] Ultimately, Wind Mobile was found to be in compliance with the O&C Rules and entitled to operate, but the regulatory process allegedly hurt Wind Mobile by preventing it from entering the market at a critical time.[23]

31. Second, GTH alleges that Canada took no action to create the fair, competitive market conditions foreseen in the policy documents relating to the 2008 AWS Auction until March 2013, "constituting far too little, too late".[24] According to GTH, the result was that New Entrants had no chance of competing with established carriers.[25]

32. Third, GTH argues that after the O&C Rules were relaxed as expected in June 2012,

[18] Memorial, ¶¶ 19, 99, 111.
[19] Memorial, ¶ 11.
[20] Memorial, § V.A.
[21] Memorial, ¶¶ 120-125.
[22] Memorial ¶¶ 126-144.
[23] Memorial, ¶ 14.
[24] Memorial, ¶¶ 15, 114, 366.
[25] Memorial, § V.B.

33. Fourth, GTH alleges that in March 2013, Canada reversed its previously stated policy and announced that New Entrants would no longer be permitted to transfer their set-aside spectrum licenses to an incumbent carrier after the expiration of the five-year period set forth in the 2008 AWS Auction policy framework.[30] GTH states that this action made it impossible for GTH to recover any value from its investment. Left with no other options, in September 2014, GTH agreed to sell Wind Mobile to a consortium of non-incumbent investors for CAD 295 million, an amount "far below the price Wind Mobile would have been worth *but-for* Canada's breaches."[31]

34. GTH asserts that, through these actions, Canada has breached the BIT by failing to (a) afford GTH fair and equitable treatment, (b) ensure full protection and security of GTH's investment, (c) guarantee the unrestricted transfer of GTH's investment, and (d) grant GTH's investment treatment no less favourable than that which it provides to investments

[26] Memorial, § V.C.1.

[27] Memorial, ¶ 182;

[28] Memorial, ¶ 183;

[29] Memorial, ¶ 205; **CWS-Dobbie**, ¶ 39.

[30] Memorial, § V.C.2.

[31] Memorial, ¶ 25.

of its own investors.[32] GTH seeks compensation "in excess of US$ 1.75 billion to be updated as of the date of the Award".[33]

V. THE PARTIES' POSITIONS

A. Respondent's Position

35. Canada requests that the Tribunal bifurcate this proceeding to address its five objections to jurisdiction and admissibility in a separate phase prior to considering the merits of GTH's claims. According to Canada, bifurcation "will enhance the fairness, efficiency, and economy of the proceedings."[34]

(1) Applicable Legal Standard

36. Canada submits that, pursuant to Article 41(2) of the ICSID Convention and the ICSID Arbitration Rules, ICSID tribunals have discretion to hear objections to jurisdiction and admissibility in a preliminary phase.[35] Indeed, many tribunals in investor-State cases under the ICSID Convention, the ICSID Additional Facility Rules and the UNCITRAL Rules have opted for such a bifurcated proceeding.[36]

37. In Canada's view, there are several benefits to this approach. It allows "the parties to know where they stand at an early stage,"[37] and enhances the fairness, efficiency, and economy of the proceeding.[38] In addition, Canada states that bifurcation "helps to ensure that the Tribunal only hears and decides a dispute where the conditions on consent to arbitrate have

---

[32] Memorial, § VII.

[33] Memorial, ¶ 427.

[34] April Request for Bifurcation, ¶ 2.

[35] Jur. Memorial and Request for Bifurcation, ¶ 283; April Request, ¶ 23, *citing inter alia* **RL-003**, *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. The Republic of Paraguay*, ICSID Case No. ARB/07/9) Decision of the Tribunal on Objections to Jurisdiction, 29 May 2009, ¶ 52 ("It is clear from [Article 41(2) of the ICSID Convention] that the Tribunal may decide to deal with any issue of jurisdiction or admissibility as "a preliminary question" or by joinder to the merits of the dispute").

[36] Jur. Memorial and Request for Bifurcation, ¶ 284; April Request, ¶ 26.

[37] April Request for Bifurcation, ¶ 25, *quoting* **RL-008**, Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration*, 4th ed. (London: Thomson, Sweet & Maxwell, 2004), p. 258.

[38] Jur. Memorial and Request for Bifurcation, ¶ 284.

been met."[39] For Canada, this point is especially important when a sovereign State is a party, in light of the "basic rule of international law … that a State is not obliged [to] give an account of itself on issues of merits before an international tribunal which lacks jurisdiction or whose jurisdiction has not been established."[40]

38. Regarding the applicable legal framework, Canada points to three main factors identified by the tribunals in *Philip Morris v. Australia* and *Emmis v. Hungary* to be considered in determining whether to bifurcate a proceeding.[41] Under this framework, bifurcation of a preliminary objection is appropriate when:

a. the objection is *prima facie* serious and substantial,

b. the objection can be examined without prejudging or entering the merits, and

c. the objection, if successful, could dispose of all or an essential part of the claims.[42]

39. With respect to the first element, Canada argues that "the Tribunal must only make a *prima facie* determination that the objections are not frivolous since it is only after having heard the parties' submissions on these objections that it can decide on the objections."[43]

---

[39] April Request for Bifurcation, ¶ 25.

[40] April Request for Bifurcation, ¶ 25, *quoting* **RL-010**, Shabtai Rosenne, *The World Court: What It Is and How It Works*, 5th ed. (Dordrecht: Martinus Nijhoff, 1995), p. 99. *See also* Jur. Memorial and Request for Bifurcation, ¶ 285, *citing* **RL-012**, *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt* (106 I.L.R. 531) Decision on Jurisdiction, 14 April 1988, ¶ 63 ("there is no presumption of jurisdiction – particularly where a sovereign State is involved – and the Tribunal must examine objections to the jurisdiction of the Centre with meticulous care, bearing in mind that jurisdiction in the present case exists only insofar as consent thereto has been given by the Parties").

[41] **RL-022**, *Philip Morris Asia Limited v. The Commonwealth of Australia* (UNCITRAL) Procedural Order No. 8 Regarding Bifurcation of the Procedure, 14 April 2014, ¶ 109; **RL-014**, *Emmis International Holding and others. v. Hungary,* ICSID Case No. ARB/12/2, Decision on Respondent's Application for Bifurcation, 13 June 2013, ¶ 37(2).

[42] April Request for Bifurcation, ¶ 27 and Jur. Memorial and Request for Bifurcation, ¶286, *citing* **RL-022**, *Philip Morris Asia Limited v. The Commonwealth of Australia* (UNCITRAL) Procedural Order No. 8 Regarding Bifurcation of the Procedure, 14 April 2014, ¶ 109; **RL-014**, *Emmis International Holding and others. v. Hungary,* ICSID Case No. ARB/12/2, Decision on Respondent's Application for Bifurcation, 13 June 2013, ¶ 37(2).

[43] Jur. Memorial and Request for Bifurcation, ¶ 287, *quoting* **RL-022**, *Philip Morris Asia Limited v. The Commonwealth of Australia* (UNCITRAL) Procedural Order No. 8 Regarding Bifurcation of the Procedure, 14 April 2014, ¶ 109.

40. Canada notes GTH's agreement that these three factors are relevant to the Tribunal's determination on the issue of bifurcation.[44]

41. According to Canada, each of its five objections satisfies the test for bifurcation because it is serious, can be decided without entering into the merits of the dispute, and will dispose of all or an essential part of GTH's claims.[45] By significantly reducing the scope of issues before the Tribunal in the merits phase, bifurcation would reduce the burden of document production, and lead to cost savings.[46] Canada's arguments relating to each objection are summarised in the following subsections.

(2)

[44] Jur. Memorial and Request for Bifurcation, ¶ 286, *citing* April Response, ¶ 7.

[45] April Request for Bifurcation, ¶ 28. The Tribunal notes that, in its April Request for Bifurcation, the Respondent raised also an objection with respect to the Admissibility of the Claimant's Most-Favored Nation claim. As noted in its more recent pleading, the Respondent no longer raises this objection as the Claimant has since abandoned that claim. Jur. Memorial and Request for Bifurcation, ¶ 288.

[46] Jur. Memorial and Request for Bifurcation, ¶ 295.

(3) Second Objection: Article II(4)(b) of the BIT

47. .

[49] Jur. Memorial and Request for Bifurcation, ¶ 31.

[50] Jur. Memorial and Request for Bifurcation, ¶¶ 3, 15, 85-99.

[51] Jur. Memorial and Request for Bifurcation, ¶¶ 100-105.

[52] April Request for Bifurcation, ¶ 32.

[53] April Request for Bifurcation, ¶ 33.

[54] April Request for Bifurcation, ¶ 33.

[55] April Request for Bifurcation, ¶ 34.

According to Canada, even if one were to accept GTH's allegations [redacted] unfair, arbitrary and discriminatory, this claim would be excluded from dispute resolution provisions of the BIT pursuant to Article II(4)(b).[56]

48. Article II(4)(b) states that

> Decisions by either Contracting Party not to permit establishment of a new business enterprise or acquisition of an existing business enterprise or a share of such enterprise by investors or prospective investors shall not be subject to the provisions of Article XIII of this Agreement.[57]

49. [redacted]

50. In Canada's view, the Tribunal should hear this objection in a preliminary phase for several reasons. First, Canada argues that the objection is serious and substantial, as GTH's "allegation falls squarely within the scope of the Article II(4)(b) exclusion."[60]

51. Second, the objection is a discrete question entirely independent from the merits of the dispute.[61] According to Canada, the relevant facts [redacted] are "relatively straight forward"; the Tribunal can carry out its jurisdictional analysis by relying on GTH's pleadings and assuming that all the facts pled are true.[62] [redacted]

---

[56] Jur. Memorial and Request for Bifurcation, ¶ 109.
[57] **CL-001**, BIT, Article II(4)(b).
[58] Jur. Memorial and Request for Bifurcation, ¶¶ 141-143.
[59] Jur. Memorial and Request for Bifurcation, ¶ 148.
[60] April Request for Bifurcation, ¶ 38.
[61] April Request for Bifurcation, ¶ 39.
[62] April Request for Bifurcation, ¶ 39.

52. Third, Canada submits that this objection, if accepted, would dispose of an essential part of GTH's claims. Canada accepts that it could not dispose of the case entirely, but argues that it would significantly reduce the scope of issues and evidence to be addressed in the second phase of the proceeding, leading to time and cost savings.[64]

53.

(4) Third Objection: Jurisdiction Ratione Temporis

54. Canada's objection to the Tribunal's jurisdiction *ratione temporis* relates to two categories of GTH's claims: (a) CRTC's O&C review of Wind Mobile in 2009, and (b) the alleged failure of Industry Canada to maintain a regulatory framework that would permit New Entrants to successfully compete in the telecommunications market after the AWS Auction.[67]

55. According to Canada, these claims are time-barred pursuant to the strict limitations period contained in Article XIII(3)(d) of the BIT.[68] That provision states that an investor may submit a dispute to arbitration only if

> not more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of

[63] Jur. Memorial and Request for Bifurcation, ¶ 290.
[64] April Request for Bifurcation, ¶ 40; Jur. Memorial and Request for Bifurcation, ¶ 290.
[65] April Request for Bifurcation, ¶ 40.
[66] April Request for Bifurcation, ¶ 40.
[67] Jur. Memorial and Request for Bifurcation, ¶ 149.
[68] Jur. Memorial and Request for Bifurcation, ¶¶ 180-190.

> the alleged breach and knowledge that the investor has incurred loss or damage.[69]

56. Canada asserts that the two challenged measures noted above were adopted long before the critical date of 28 May 2013 (three years before the filing of the Request for Arbitration), and that GTH either knew or should have known that it would incur the alleged damage as a result of these measures before that date.[70]

57. In particular, Canada points out that is undisputed between the Parties that all events relating to the CRTC review occurred from 2009 to April 2012, when the matter was finally closed by the Supreme Court of Canada.[71] Thus, GTH was aware of alleged damage arising from the measure no later than April 2012. With respect to the regulatory framework for New Entrants, Canada argues that the untimeliness of the claim is clear from the allegations set forth in the Memorial.[72] Indeed, the documents filed by GTH show that it had knowledge of both the alleged breach and loss long before the critical date of 28 May 2013.[73]

58. Canada denies GTH's allegation that these two measures form part of a cumulative breach. In Canada's view, they are obviously distinct measures, and the Tribunal must reject GTH's "blatant attempt to by-pass the strict three-year limitation period."[74]

59. Canada asks the Tribunal to bifurcate its objection to jurisdiction *ratione temporis*, as all three factors set forth by the tribunal in *Philip Morris v. Australia* weight in favour of bifurcation.[75] In this regard, Canada asserts that the seriousness of its objection is clear on

---

[69] **CL-001**, BIT, XIII(3)(d).

[70] Jur. Memorial and Request for Bifurcation, ¶¶ 180-190.

[71] Jur. Memorial and Request for Bifurcation, ¶ 181.

[72] Jur. Memorial and Request for Bifurcation, ¶¶ 189-190.

[73] Jur. Memorial and Request for Bifurcation, ¶ 189, *citing, inter alia,* Memorial, ¶¶ 150-161; **C-118**, Industry Canada, *Roaming and Tower Sharing Review* (Jul. 2011); **C-134**, *Issue Brief – Wind Mobile* (Jan. 11, 2013); **C-213**, Wind Mobile, *Domestic Roaming: Presentation by Simon Lockie, Chief Regulatory Officer* (Oct. 2013).

[74] Jur. Memorial and Request for Bifurcation, ¶ 150.

[75] Jur. Memorial and Request for Bifurcation, ¶ 291.

the face of GTH's allegations, which demonstrate GTH's knowledge of the alleged breaches and damage long before the critical date under Article XIII(3)(d) of the BIT.[76]

60. In addition, Canada considers that the Tribunal can decide this objection without delving into the merits. In particular, the Tribunal can identify the measure and the allegation of loss by relying on GTH's pleadings alone. There is no need to enter into the substance of the CRTC's review process or to consider Canada's obligations with regard to the regulatory framework following the AWS Auction.[77]

61. Further, Canada asserts that if this objection were upheld in a preliminary phase, the scope of issues to be addressed in the next phase would be greatly reduced. For example, the following matters could be avoided, reducing costs:

a. Evidence, including expert evidence, relating to the CRTC review, the conduct of the CRTC hearings, the substance of the CRTC decision, appeals of the CRTC decision, and the final decision to overturn the CRTC decision.

b. Factual and evidentiary issues related to Canada's regulation of the telecommunications market.

c. The issue of whether GTH's allegation related to this regulatory framework could amount to a breach of the BIT.[78]

(5) Fourth Objection: Article IV(2)(d) of the BIT

62. Canada's next objection targets GTH's claims that Canada breached its national treatment obligations contained in Article II(3)(a) and Article IV(1) of the BIT. Canada submits that these claims are precluded by the reservation it made pursuant to Article IV(2)(d) of the BIT, and the Tribunal therefore lacks jurisdiction *ratione materiae* over them.[79]

---

[76] April Request for Bifurcation, ¶¶ 53, 59.
[77] April Request for Bifurcation, ¶¶ 55, 60.
[78] Jur. Memorial and Request for Bifurcation, ¶ 291.
[79] Jur. Memorial and Request for Bifurcation, § III.E.

63. Article IV(2)(d) permits the Contracting Parties to "make or maintain exceptions within the sectors or matters listed in the Annex to this Agreement" to which the national treatment obligations will not apply.[80] The Annex, in turn, states that "Canada reserves the right to make and maintain exceptions in the sectors or matters listed below: social services …; services in any other sector …"[81] According to Canada, GTH's national treatment claim relates exclusively to the telecommunications sector, which is a service sector and therefore excluded from the scope of the BIT's national treatment provisions.[82]

64. Canada considers it appropriate to bifurcate this objection because it is *prima facie* serious and relates to "a purely legal question of interpretation based on the text of the treaty."[83] It is unrelated to the substance of GTH's claims and can be resolved without consideration of factual evidence or witness testimony.[84]

65. In addition, Canada asserts that if it were to prevail on this objection, GTH's national treatment claims would be disposed of completely. As a result, the merits phase would be more efficient, with a narrower scope for document production, shorter submissions and fewer fact and expert witnesses.[85]

(6) Fifth Objection: Admissibility

66. Canada objects to the admissibility of GTH's claims that, in Canada's view, relate to the treatment of Wind Mobile.[86] Specifically, Canada submits that GTH lacks standing to bring its claims concerning measures that allegedly affected (a) Wind Mobile's competitiveness as a New Entrant in the Canadian telecommunications market, and (b) the transferability of Wind Mobile's licenses.[87]

[80] **CL-001**, BIT, Article IV(2)(d).
[81] **CL-001**, BIT, Annex.
[82] Jur. Memorial and Request for Bifurcation, ¶¶ 225-235.
[83] Jur. Memorial and Request for Bifurcation, ¶ 292.
[84] Jur. Memorial and Request for Bifurcation, ¶ 292; April Request for Bifurcation, ¶ 46.
[85] April Request for Bifurcation, ¶ 47.
[86] Jur. Memorial and Request for Bifurcation, § IV.
[87] Jur. Memorial and Request for Bifurcation, ¶ 238.

67. Canada argues that GTH and Wind Mobile cannot be equated with one another, following the principle of international law that an enterprise and its shareholders have separate legal personality.[88] Article XIII(12) of BIT provides a narrow exception to this general principle by allowing a foreign shareholder to bring a claim on behalf of an enterprise incorporated in the host State. However, Article XIII(12) applies only in specific circumstances which are not present in the current case, and GTH does not purport to pursue its claims on behalf of Wind Mobile. Therefore, GTH cannot bring a claim for alleged breaches and damages suffered by Wind Mobile.[89]

68. For Canada, GTH's allegations regarding the regulatory framework for New Entrants and the transferability of spectrum licences "do not concern any impairment of the rights associated with the Claimant's shareholding or loans."[90] Rather, GTH alleges that Canada's failure to ensure a favourable regulatory framework hurt Wind Mobile and its operations (not its shareholders).[91] Similarly, GTH alleges that the transfer framework impaired spectrum licenses which are held by Wind Mobile (not by GTH).[92]

69. In Canada's view, this objection to admissibility should be heard in a preliminary phase to enhance efficiency. In particular, Canada states that the objection can be decided on the basis of GTH's Request for Arbitration and Memorial, without entering into the merits of the case.[93] In addition, Canada considers that a merits phase would be streamlined if this objection were upheld in a preliminary phase. For example, the Parties and the Tribunal would not need to address whether Canada failed to provide a favourable regulatory framework, whether it repudiated the framework set out in advance of the 2008 AWS Auction, or whether the alleged measures constitute a breach of the BIT.[94]

---

[88] Jur. Memorial and Request for Bifurcation, ¶¶ 241-244, *citing, inter alia*, **RL-138**, *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain),* Judgment, I.C.J. Reports 1970, pp. 41-44.

[89] Jur. Memorial and Request for Bifurcation, ¶ 240.

[90] April Request for Bifurcation, ¶ 64.

[91] Jur. Memorial and Request for Bifurcation, ¶¶ 273-279

[92] Jur. Memorial and Request for Bifurcation, ¶¶ 280-281.

[93] April Request for Bifurcation, ¶ 65.

[94] April Request for Bifurcation, ¶ 66.

B. Claimant's Position

70. GTH asks the Tribunal to deny Canada's request for bifurcation because, in GTH's view, the result of bifurcation would be delay, duplicative proceedings and "a risk of inconsistent determinations by the Tribunal," rather than an increase in efficiency and fairness.[95]

(1) Applicable Legal Standard

71. According to GTH, the Parties "agree that the Tribunal has the discretion to bifurcate proceedings and that considerations of fairness and efficiency are paramount in determining whether bifurcation is warranted."[96] In addition, the Parties are in agreement regarding the three factors that tribunals should consider in assessing a request for bifurcation.[97]

72. GTH states that it is appropriate for a tribunal to decline to bifurcate preliminary objections when

> (*i*) the objection is unlikely to succeed; or (*ii*) the stated objection will not dispose entirely of a case (or an essential part thereof) making the merits stage in the proceedings inevitable (and more protracted as a result of bifurcation); or (*iii*) there is extensive overlap between the issues relevant to the determination of the objection and the merits of the proceeding.[98]

73. Applying that test to the present case, GTH submits that it is not appropriate to hear any of Canada's objections to jurisdiction and admissibility in a preliminary phase. According to GTH, Canada's attempt to portray these objections as serious and complex must be

---

[95] Response, ¶ 9.

[96] Response, ¶ 3.

[97] Response, ¶ 3, *citing* Jur. Memorial and Request for Bifurcation, ¶¶ 283-284. These factors are set out at ¶ 38 above.

[98] Response, ¶4, *citing, inter alia,* **RL-011**, Christoph H. Schreuer, Loretta Malintoppi, August Reinisch & Anthony Sinclair, The ICSID Convention: A Commentary (2nd edition 2009), pp. 538-39 ("In a considerable number of cases tribunals have joined the consideration of jurisdictional questions to the merits of the case . . . The need for a joinder to the merits is apparent where the answer to the jurisdictional questions depends on testimony and other evidence that can only be obtained through a full hearing of the case. This would be the case, in particular, if the jurisdictional questions are closely related to the merits and depend on the same factual questions. In such a case, the decision on jurisdiction can only be made after a full consideration of the evidence.").

rejected. In fact, they are based on incorrect interpretations of the BIT and therefore lack merit.[99]

74. [redacted] As a result, bifurcation of the objections would add a year or more to the procedural timetable without eliminating the need for a merits phase.[101] In GTH's view, Canada's request for bifurcation should be rejected on that basis alone.[102]

75. Furthermore, according to GTH, many of the objections would require the Tribunal to enter into the merits of the claims, as Canada acknowledges. Because such issues would then need to be re-examined in the merits phase, bifurcation would result in delay, extra costs, and the risk of inconsistent findings of fact once the Tribunal considers the full documentary record.[103]

76. Finally, GTH states that it "would also be highly prejudicial to decide these objections prematurely, before a full hearing of the evidence on the merits, and bifurcation should be rejected on this basis in any event."[104]

77. GTH addresses each of Canada's five objections, as summarised in the following subsections.

(2) [redacted]

[redacted]

[99] Response, ¶ 6.
[100] Response, ¶ 7.
[101] Response, ¶ 18.
[102] Response, ¶ 18.
[103] Response, ¶¶ 8, 18.
[104] Response, ¶ 19.
[105] Response, ¶¶ 10, 16.

[106] Response, ¶¶ 11-14.
[107] Response, ¶ 15.
[108] Response, ¶ 13.
[110] Response, ¶ 13.
[111] Response, ¶ 14.
[112] Response, ¶ 15.
[113] Response, ¶ 15.

83. However, in the event that the Tribunal does consider bifurcating this objection, GTH asks that this be done "on an expedited basis according to a timetable that does not disrupt the April 2019 hearing dates already set aside by the Tribunal for the hearing on the merits."[115]

(3) Second Objection: Article II(4)(b) of the BIT

84. As a legal matter, GTH asserts that Canada ignores Article II(4)(a) of the BIT, which is essential to understanding the alleged exclusion in Article II(4)(b).[116] As a factual matter, GTH denies that its claim relates to the "acquisition of an existing business enterprise or a share of such enterprise."[117] According to GTH, its claims relate to the exercise of rights already acquired at the time it made its investment, [118]

85. GTH highlights Canada's statement that GTH's factual allegations can be accepted as true for the purpose of considering this objection.[119] For GTH, it follows that the Tribunal must accept the fact that GTH was seeking to exercise existing rights. Thus, Canada defeats its own objection.[120]

86. In any event, GTH argues that if the facts relating to Canada's objection were to be determined in a preliminary phase, those same facts would need to be analysed in relation to the merits.[121] GTH sees a risk that the Tribunal would need to make factual findings

[114] Response, ¶¶ 10, 16.

[115] Response, ¶ 17.

[116] Response, ¶ 22, *citing* **CL-001**, BIT (English version), Article II(4)(a) ("Decisions by either Contracting Party, pursuant to measures not inconsistent with this Agreement, as to whether or not to permit an acquisition shall not be subject to the provisions of Articles XIII or XV of this Agreement").

[117] Response, ¶ 20, *quoting* **CL-001**, BIT Article II(4)(b).

[118] Response, ¶ 22; Memorial, ¶¶ 93, 345, 348.

[119] Response, ¶ 22, *citing* Jur. Memorial and Request for Bifurcation, ¶ 141.

[120] Response, § II.B.1 ("Canada Vitiates Its Own Objection Under Article II(4)(b) Of The BIT …").

[121] Response, ¶ 23.

relevant to GTH's claims "in isolation based on an incomplete factual picture that has been grossly mischaracterized by Canada, causing substantial prejudice to GTH at the merits stage."[122] Therefore, in GTH's view, the Tribunal must not bifurcate this objection.

(4) Third Objection: Jurisdiction Ratione Temporis

87. GTH submits that the Tribunal has jurisdiction *ratione temporis* over GTH's claims for Canada's failure to provide fair and equitable treatment and full protection and security.[123] According to GTH, Canada's breaches involve "a series of measures which crystalized, at the earliest, in or around June 2013, [redacted] [redacted][124] Thus, even if certain events relating to those breaches occurred earlier, the only date relevant to the limitations period is June 2013, when "Canada's conduct culminated in a breach."[125]

88. GTH argues that this objection is inappropriate for bifurcation because, as Canada concedes, it will require a detailed inquiry into facts which are relevant to the substance of GTH's claims.[126] For example, the Tribunal will need to assess when the alleged breach occurred, the duration of the breach, and when GTH first knew of (or should have known of) the alleged breach and the existence of loss or damage.[127] Furthermore, GTH asserts that even if certain of Canada's breaches occurred outside the limitations period, the underlying measures would still need to be considered in the merits phase, as they are relevant to GTH's exit from the Canadian market.[128]

---

[122] Response, ¶ 23.

[123] Response, ¶ 24.

[124] Response, ¶ 24.

[125] Response, ¶ 24.

[126] Response, *citing* Jur. Memorial, ¶ 172 ("As the tribunal in *Rusoro* noted, a determination of whether a series of acts forms part of a larger composite act 'is very fact specific and depends on the circumstances of the case.'"). Canada cites **CL-016**, *Rusoro Mining Limited v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016, ¶¶ 229-31.

[127] Response, ¶ 25.

[128] Response, ¶ 26, *citing* **CL-016**, *Rusoro Mining Limited v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016, ¶ 233 ("this does not imply that the measures underlying [the time-barred] breaches become irrelevant. They provide the necessary background and context for adjudicating the case, and the legitimate expectations of an investor may depend crucially on matters that occurred before such Cut-Off Date.").

89. Therefore, in GTH's view, this objection should be heard together with the merits, "when a detailed review of the facts can be undertaken in their appropriate context."[129]

(5) Fourth Objection: Article IV(2)(d) of the BIT

90. GTH submits that Canada's jurisdictional objection based on Article IV(2)(d) of the BIT is founded on a flawed interpretation of that provision.[130] According to GTH, Article IV(2)(d) creates a prospective right for Canada "to make or maintain exceptions" to its national treatment obligations for any services.[131] Yet, Canada has not made such an exception; nor can it exercise its right to do so merely "by adopting or maintaining measures or by according treatment that would otherwise be inconsistent with the national treatment obligations," as Canada suggests.[132]

91. In GTH's view, bifurcation of this objection will not serve the interests of fairness or efficiency. First, bifurcation would lead to a duplicative review of the facts relating to the [redacted], which are relevant to GTH's fair and equitable treatment claim and to its exit from the Canadian market.[133] Second, in a preliminary phase, the Tribunal might be forced to make premature factual findings on such matters "in the vacuum of Canada's jurisdictional objections, prejudicing GTH claims."[134]

(6) Fifth Objection: Admissibility

92. Finally, GTH argues that Canada's objection to the admissibility of certain of GTH's claims ignores the fact that, under the BIT, shareholders may claim for both direct and direct loss.[135] According to GTH, Canada has neither addressed GTH's description of its

[129] Response, ¶ 25.
[130] Response, ¶ 28.
[131] Response, ¶ 29, *quoting* **C-001**, BIT, Article IV(2)(d) and Annex.
[132] Response, ¶ 28, *quoting* Jur. Memorial and Request for Bifurcation, ¶ 209.
[133] Response, ¶ 30.
[134] Response, ¶ 30.
[135] Response, ¶ 31.

investment as a "bundle of rights" nor dealt with the case law supporting GTH's position.[136]

93. Regarding bifurcation, GTH submits that, as with Canada's other objections, considerations of fairness and efficiency weigh in favour of hearing this objection together with the merits.[137] In this regard, GTH notes that deciding Canada's objection will require a fact-intensive inquiry that touches upon the merits, especially relating to Canada's transfer policies and how they affected GTH's ability to sell its shares.[138]

VI. THE TRIBUNAL'S ANALYSIS

94. The Tribunal notes at the outset that the purpose of this Order is to decide whether to bifurcate the present proceedings. The Tribunal takes no decision on the substance of the jurisdictional and admissibility objections at this stage but will do so at the appropriate time as provided in the Procedural Timetable.

95. Having considered the Parties' submissions and having deliberated, the Tribunal has determined that, while each of the Respondent's objections is *prima facie* serious and substantial, there is an insufficient basis for bifurcation in this case, and therefore denies the Respondent's request for bifurcation. The Tribunal notes, for the avoidance of doubt, that its decision, and its comments regarding the Respondent's specific jurisdictional and admissibility objections below, are without prejudice to the Tribunal's eventual determination of those objections or any issue on the merits. The Tribunal has in no way prejudged the outcome of any of the preliminary objections raised (which will be joined to the merits of the dispute in the manner envisaged by Article 41 of the ICSID Convention), and the Respondent is fully entitled to maintain such objections as it considers appropriate.

[136] Response, ¶ 31, *citing* Memorial, ¶ 386.
[137] Response, ¶ 32.
[138] Response, ¶ 32.

A. Legal Framework

96. The Tribunal's power to rule on the Bifurcation Request is embodied in the ICSID Convention and the ICSID Arbitration Rules.

97. With regard to the procedural stage at which the Tribunal may address any objection to its jurisdiction, Article 41(2) of the ICSID Convention states that

> [a]ny objection by a party to the dispute that the dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.

98. Furthermore, Rule 41(4) of the Arbitration Rules provides in relevant part that the Tribunal

> may deal with the objection as a preliminary question or join it to the merits of the dispute. If the Tribunal overrules the objection or joins it to the merits, it shall once more fix time limits for the further procedures.

99. Neither the ICSID Convention nor the Arbitration Rules sets forth a legal standard applicable to the decision of whether to join preliminary objections to the merits or instead to hear them in a preliminary phase. The ICSID Convention and the Arbitration Rules leave this decision entirely to the discretion of tribunals.

100. Here, the Parties are in agreement that, in exercising their discretion regarding whether to order bifurcation, tribunals should be guided by the paramount considerations of fairness and efficiency and should consider the following three factors, as identified by the tribunals in *Philip Morris v. Australia* and *Emmis v. Hungary*:[139]

a. whether the objection is *prima facie* serious and substantial;

[139] **RL-022**, *Philip Morris Asia Limited v. The Commonwealth of Australia* (UNCITRAL) Procedural Order No. 8 Regarding Bifurcation of the Procedure, 14 April 2014, ¶ 109; **RL-014**, *Emmis International Holding and others. v. Hungary,* ICSID Case No. ARB/12/2, Decision on Respondent's Application for Bifurcation, 13 June 2013, ¶ 37(2). *See also* April Request for Bifurcation, ¶ 27, Jur. Memorial and Request for Bifurcation, ¶¶ 285, 286, and Response, ¶ 3.

b. whether the objection can be examined without prejudging or entering the merits; and

c. whether the objection, if successful, could dispose of all or an essential part of the claims before the Tribunal.

101. The Tribunal accepts the Parties' submissions in this respect. It has been guided in its analysis by these criteria, as explained below.

B. Analysis

102. Preliminarily, the Tribunal considers that each of the five objections advanced by the Respondent is arguable, has been advanced in good faith, and merits the Tribunal's consideration. Accordingly, it is the Tribunal's view that the objections meet the standard of being *prima facie* serious and substantial, and not frivolous.

103. However, the Tribunal does not believe that considerations of procedural economy support bifurcation in this case. Two principal considerations lead it to this view.

the factual issue appears to be somewhat balanced (and not clearly likely to

[140] Jur. Memorial and Request for Bifurcation, ¶ 55.

be resolved in one way rather than another) on the parties' submissions currently before the Tribunal (on which the parties will doubtless seek to elaborate at an appropriate stage in the future in this arbitration, perhaps by adducing relevant *travaux préparatoires* of the BIT if they consider it appropriate). In light of this, the possibility that the consideration of this jurisdictional objection as a preliminary matter through a bifurcated proceeding might result in the avoidance of years of unnecessary and costly litigation must be weighed against the possibility that bifurcation to address this jurisdictional objection might simply result in additional costs and delays if the objection is rejected.

107. As to the remaining four objections, the Tribunal is not convinced by the Respondent's arguments that the resolution of any of those objections in the Respondent's favour in a preliminary phase would result in a reduction of the scope of the merits phase significant enough to warrant bifurcation and the attendant risk of delay and additional expense. Removing one or more of the specific claims identified in the Respondent's objections would not, it appears to the Tribunal, significantly reduce the pleadings which the parties would still be required to prepare, or the overall scope of the factual matrix and expert issues that fact witnesses and experts would be asked to address.

108. ***Second***, the Tribunal considers that preliminary consideration of these objections to jurisdiction and admissibility appears to require consideration of factual issues that will inevitably need to be revisited in the merits phase. In particular:

a. The second objection (that claims concerning [redacted] are excluded from the dispute resolution provisions of the BIT by virtue of Article II(4)(b)) would appear to require consideration of the facts surrounding the measures in question (i.e., decisions not to permit an acquisition). The Tribunal is not persuaded by the Respondent's suggestion that a limited aspect of those facts could be considered in a preliminary phase, with the broader context surrounding those events falling to the merits phase.

b. The third objection (to jurisdiction *ratione temporis*) appears to the Tribunal to inevitably require a consideration of the facts and context underlying the specific measures in question to decide whether the four measures should be considered

cumulatively as argued by the Claimant or each separately as contended by the Respondent, which will then be revisited in a merits phase. Added to this is the Claimant's position that even if certain breaches were not cumulative and fall outside the relevant time period, they are still background facts relevant to the analysis of alleged breaches that are clearly timely.

c. The fourth objection (that GTH's national treatment claims are precluded by Article IV(2)(d) and its Annex of the BIT such that the Tribunal lacks jurisdiction *ratione materiae* over them) and the fifth objection (to the admissibility of GTH's claims stemming from the treatment of Wind Mobile) both appear to require the consideration of factual issues that may well be relevant to the merits of the case as well.

109. While the factual questions raised by these jurisdictional and admissibility objections may to a certain extent be narrower than the facts relevant to the merits of the case, there is nevertheless a considerable potential for overlap, and the issues appear to the Tribunal to be intertwined with the merits. This gives rise to the risk that the Tribunal may be required to decide on issues of fact prematurely. Moreover, the costs associated with further briefing, tendering of evidence, and undertaking an evidentiary hearing on these issues on a preliminary basis would not be insignificant. In the Tribunal's view, the inevitable cost of multiple hearings therefore needs to actually produce real opportunities for gains in efficiency in order for bifurcation to be warranted, especially where the objections to be considered in the preliminary phase end up not to be dispositive of the case. The extent to which the Respondent's objections may require the Tribunal to consider facts that are also relevant to the merits significantly undermines any such real opportunities.

110. In sum, while the Tribunal accepts that, were the Respondent to succeed on one or more of its non-dispositive objections in a preliminary jurisdictional phase, the subsequent merits phase would be somewhat reduced in scope, it is not convinced that this would warrant the additional costs and time delays associated with a complete two-phase proceeding.

VII. DECISION

111. For the reasons above, the Tribunal holds as follows:

a. The Respondent's request to bifurcate the proceedings is denied.

b. This arbitration shall proceed in accordance with the Procedural Timetable applicable to a joined proceeding, which is contained in Annex A of Procedural Order No. 1 and reproduced as Annex A of this Order.

c. The question of costs is reserved.

On behalf of the Tribunal,

[signed]

____

Prof. Dr. Georges Affaki
President of the Tribunal
Date: 14 December 2017

ANNEX A: PROCEDURAL TIMETABLE

	Procedural Step	Time Period	Date
A.	Claimant's Memorial on the Merits and Damages	--	September 29, 2017
B.	Canada's Memorial on Jurisdiction and Admissibility & Request for Bifurcation (if any)	47 days	November 15, 2017
C.	Claimant's Response to (any) Request for Bifurcation	2 weeks	November 29, 2017
D.	Tribunal's Decision on Bifurcation (if necessary)	2 weeks (approx.)	December 13, 2017 (approx.)

The following timetable applies in light of the Tribunal's decision not to bifurcate the proceeding:

	Procedural Step	Time Period	Date
E.	Canada's Counter-Memorial on the Merits and Damages	103 days after B	February 26, 2018
F.	Parties' Requests for Document Production	30 days	March 28, 2018
G.	Parties' Objections to Requests for Document Production (if any)	14 days	April 11, 2018
H.	Parties' Responses to Objections to Produce Documents (if any)	14 days	April 25, 2018
I.	Application to the Tribunal for Order on Production of Documents (if necessary)	9 days	May 4, 2018
J.	Tribunal's Decision on Document Requests (if necessary)	14 days (approx.)	May 18, 2018 (approx.)
K.	Production of Documents to Requests for Document Production not objected to by the Parties	63 days after F	May 30, 2018

	Procedural Step	**Time Period**	**Date**
L.	Production of Documents as ordered by the Tribunal	60 days after J	July 17, 2018
M.	Claimant's Reply on Merits and Damages & Counter-Memorial on Jurisdiction and Admissibility	59 days after L	September 14, 2018
N.	Canada's Rejoinder on Merits and Damages & Reply on Jurisdiction and Admissibility	90 days after M	December 13, 2018
O.	Claimant's application for leave to file a Rejoinder on Jurisdiction and Admissibility, on the grounds that new jurisdictional objections or new arguments were raised in Canada's Reply on Jurisdiction and Admissibility (if necessary)	1 week	December 20, 2018
P.	Tribunal's decision on Claimant's application for leave to file a Rejoinder on Jurisdiction and Admissibility, if necessary	3 weeks (approx.)	January 10, 2019 (approx.)
Q.	Claimant's Rejoinder on Jurisdiction and Admissibility, if leave is requested and granted	29 days	February 8, 2019
R.	Pre-Hearing Conference Call	At least 6 weeks before S	TBD
S.	Oral Hearing on Jurisdiction, Admissibility, Merits and Damages	--	April 1-14, 2019 (2 weeks)
T.	Tribunal's Award	--	TBD