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Global Telecom Holding v. Canada: Interpreting and Applying Reservations and Carve-Outs in Investment Treaties

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Within investment treaties, reservations and carve-outs perform a crucial role in balancing investment protection and liberalization with competing regulatory interests of States. While carve-outs for taxation matters have been interpreted and applied by a significant number of investment treaty tribunals, carve-outs concerning other issues and reservations have been adjudicated much less frequently. The recent Award in Global Telecom Holding v. Canada raises several key questions of treaty interpretation concerning a reservation by Canada in the Canada–Egypt Bilateral Investment Treaty (BIT), and a carve-out, which removed from investor-State arbitration decisions by either Party not to permit the establishment or acquisition of a business enterprise. This case comment critically analyses the approach to interpreting reservations and carve-outs adopted in the Award and the associated Dissenting Opinion. I suggest that it is through the application of the ordinary rules of treaty interpretation that adjudicators will locate the appropriate limits of reservations and carve-outs, and there is little justification for adopting a restrictive interpretation of such provisions. The case also demonstrates that interpretative inferences based on one treaty party’s other investment treaties must be approached with care.

Keywords: reservations, carve-outs, exceptions, treaty interpretation, national treatment, national security

1 INTRODUCTION

Reservations and carve-outs are a heterogeneous set of provisions in investment treaties that play a crucial role in balancing investment protection and liberalization with competing regulatory interests of States. The two categories of provisions can be distinguished. Carve-outs are provisions whereby the treaty parties agree to ‘exempt an entire policy area or sector from the scope of a treaty’, or from its dispute settlement mechanisms, for all treaty parties.¹ In contrast, reservations, while also being contained in the treaty text (including annexes) agreed by the treaty parties, ‘permit parties to unilaterally nominate ... sectors in relation to

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¹ Caroline Henckels, *Should Investment Treaties Contain Public Policy Exceptions?*, 59 B.C.L. Rev. 2825, 2828 (2018).

which they reserve the right to adopt or maintain otherwise non-conforming measures'.² While carve-outs for taxation matters have been interpreted and applied by a significant number of investment treaty tribunals, carve-outs concerning other issues and reservations have been adjudicated much less frequently.³

The Award in *Global Telecom v. Canada*⁴ raises several key questions of interpretation of a reservation by Canada, concerning national treatment, in the Canada–Egypt Bilateral Investment Treaty (BIT), and of a carve-out, which removed from investor-State arbitration decisions by either Party not to permit the establishment or acquisition of a business enterprise.⁵ While the BIT at issue is from an older generation of Canadian treaties concluded in the 1990s, the issues addressed in the Award and associated Dissenting Opinion are likely to be of wider significance. This is particularly likely given that investment treaties have increasingly been extended to provide non-discrimination obligations in the pre-establishment phase,⁶ which is typically associated with substantial use of

² *Ibid.* This use of the term reservation must be distinguished from reservations as defined in the law of treaties, which are unilateral statements made by a State when signing or ratifying a treaty that are external to the text of the treaty: Andrew Newcombe & Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* 481 (Kluwer Law International 2009). Aikaterini Titi, *The Right to Regulate in International Investment Law* 50–52 (Nomos 2014). Vienna Convention on the Law of Treaties, Art. 2(d) (23 May 1969).

³ See e.g., Henckels, *supra* n. 1, at 2833–2834 (identifying some sixteen investor-State tribunals that have interpreted carve-outs or reservations, which mostly concern carve-outs for taxation issues). A reservation for existing non-conforming measures was considered in *Mobil Investments Canada Inc. & Murphy Oil Corp. v. Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum (22 May 2012), paras 247–413, and Partial Dissenting Opinion of Philippe Sands. Carve-outs for procurement and cultural industries were considered in *United Parcels Service of America Inc. v. Canada*, ICSID Case No. UNCT/02/1, Award (11 June 2007), paras 127–136, 156–172, and Separate Statement of Ronald A Cass, paras 64–80, 134–154. See also Meg Kinnear, Andrea Kay Bjorklund & John FG Hannaford, *Investment Disputes Under NAFTA: An Annotated Guide to NAFTA Chapter 11* 1108–23–1108–31 (Kluwer Law International 2006) (discussing relevant jurisprudence under the North American Free Trade Agreement (NAFTA)).

⁴ *Global Telecom Holding S.A.E. v. Canada*, ICSID Case No. ARB/16/16, Award (27 Mar. 2020) (hereinafter ‘*Global Telecom*, Award’).

⁵ Agreement Between the Government of Canada and the Government of the Arab Republic of Egypt for the Promotion and Protection of Investments, Arts. II(4)(b), IV(2)(d) and Annex (13 Nov. 1996) (hereinafter ‘Canada–Egypt BIT’).

⁶ Only a minority of investment treaties contain pre-establishment non-discrimination obligations, however the relative proportion of treaties containing such obligations has grown significantly: Jonathan Bonnitcha, Lauge N. Skovgaard Poulsen & Michael Waibel, *The Political Economy of the Investment Treaty Regime* 18, 103 (OUP 2017). United States, Canadian and Japanese investment treaties routinely include pre-establishment non-discrimination obligations, as do preferential trade agreements with investment chapters. See e.g., Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Arts 9.4–9.5 (8 Mar. 2018) (hereinafter CPTPP); ASEAN Comprehensive Investment Agreement, Arts 5–6 (26 Feb. 2009); Comprehensive Economic and Trade Agreement Between Canada and the European Union, Arts 8.6–8.7 (30 Oct. 2016) (hereinafter CETA). For discussion see e.g., M. Sornarajah, *The International Law on Foreign Investment* 394–396 (4th ed., CUP 2017); Anna Joubin-Bret, *Admission and Establishment in the Context of Investment Protection*, in *Standards of Investment Protection* 9, 10–15 (August Reinisch ed., OUP 2008). Note that recent treaties limit significantly the availability of investor-State arbitration for pre-establishment guarantees: see Murilo

reservations.⁷ The use of carve-outs, whereby certain sensitive matters are removed from investor-State dispute settlement, has also been a common practice in recent investment treaties.⁸ Accordingly, investor-State tribunals are likely to be faced with interpreting and applying an increasingly complex range of reservations and carve-outs. The facts of this case, which partly concerned a decision not to permit the acquisition of control over a business on national security grounds, are also potentially a sign of things to come as national security concerns increasingly influence the regulation of foreign investment.⁹

2 KEY FACTS

The case concerns an investment by the claimant, Global Telecom Holding (GTH), an Egyptian company, in the Canadian telecommunications sector. GTH decided in 2008 to pursue a joint venture with a Canadian partner to participate in an auction for spectrum licenses for Advanced Wireless Services.¹⁰ The auction had been designed by Canada as a means for opening its telecommunications sector to new carriers and reducing market concentration.¹¹ GTH, through its wholly owned Canadian subsidiary, advanced the funds to cover the spectrum licenses.¹²

Lubambo, *Entry Rights and Investments in Services: Adjudicatory Convergence Between Regimes?*, in *Adjudicating Trade and Investment Disputes: Convergence or Divergence?* 92, 97–105 (Szilárd Gáspár-Szilágyi, Daniel Behn & Malcolm Langford eds, CUP 2020).

⁷ Newcombe & Paradell, *supra* n. 2, at 138, 507. Sornarajah, *supra* n. 6, at 395–397. The Canada–Egypt BIT would fall into the ‘second generation’ of Canadian investment treaties within the typology offered by Lévesque and Newcombe. They suggest this ‘second generation’ includes some sixteen investment treaties signed by Canada after the conclusion of NAFTA and prior to the Canadian Model Treaty of 2004. Significantly for present purposes, it was in this generation that Canadian investment treaties began to include substantial pre-establishment protections and thus to feature a long list of reservations: Céline Lévesque & Andrew Newcombe, *Canada*, in *Commentaries on Selected Model Investment Treaties* 53, 57–59, 85–86 (Chester Brown ed., OUP 2013).

⁸ For example, in several of Australia’s recent trade and investment treaties, claims in respect of public health measures or tobacco control measures are excluded from investor-State dispute settlement: Indonesia–Australia Comprehensive Economic Partnership Agreement, Art. 14.21(1)(b) (4 Mar. 2019); Peru–Australia Free Trade Agreement, Ch. 8, s. B, n. 17 (12 Feb. 2018); Singapore–Australia Free Trade Agreement, Ch. 8, Art. 22 (as amended, 13 Oct. 2016); Investment Agreement Between the Government of Australia and the Government of the Hong Kong Special Administrative Region of the People’s Republic of China, s. C, n. 14 (26 Mar. 2019). *See also* CPTPP, Art. 29.5. Recent investment treaties frequently exclude claims regarding negotiated restructurings of public debt from investor-State dispute settlement, except if the claim is based on national treatment or most-favoured-nation treatment: e.g., CPTPP, Annex 9-G, para. 2.

⁹ *See e.g.*, Lizzie Knight & Tania Voon, *The Evolution of National Security at the Interface Between Domestic and International Investment Law and Policy: The Role of China* 21 JWIT 104 (2020). UNCTAD, *National Security-Related Screening Mechanisms for Foreign Investment: An Analysis of Recent Policy Developments* (2019). OECD Secretariat, *Acquisition- and Ownership-Related Policies to Safeguard Essential Security Interests: Current and Emerging Trends, Observed Designs, and Policy Practice in 62 Economies* (2020).

¹⁰ *Global Telecom*, Award, *supra* n. 4, para. 34.

¹¹ *Ibid.*, paras 11–12.

¹² *Ibid.*, para. 36.

Canadian law placed various restrictions on foreign ownership and control of telecommunications carriers, meaning GTH was not permitted to hold more than 20% of the voting shares of Wind Mobile, the new communications carrier which resulted from the joint venture, or 33 1/3% of the voting shares of the carrier's holding company.¹³ The agreements creating the investment structure nevertheless gave GTH the right to take voting control over Wind Mobile if Canada's ownership and control rules were relaxed in future.¹⁴ Wind Mobile's investment structure had, despite some contestation, been found to comply with Canada's ownership and control rules for the telecommunications sector by two different regulatory reviews.¹⁵

In 2012, Canada's ownership and control rules for the telecommunications sector were amended to exempt 'carriers with less than 10% market share from the requirement of being Canadian owned and controlled'.¹⁶ At this point, GTH made an application for regulatory approval to acquire voting control of Wind Mobile.¹⁷ This decision required review and approval under the Investment Canada Act, Canada's investment screening legislation, which had been amended in 2009 to provide for review and potential refusal of foreign investments on national security grounds.¹⁸ The facts concerning what occurred in the national security review are almost entirely redacted from the published Award, however GTH's case on the merits was partly based on the treatment received in the national security review.¹⁹ In 2013, in the context of the expiry of a five-year restriction placed on transfers of spectrum licenses acquired in the 2008 auction by new carriers, Canada developed a framework for reviewing proposed spectrum transfers, again with the aim of reducing market concentration.²⁰ Exactly how this framework affected GTH, including its ability to sell Wind Mobile to an incumbent carrier after the end of the five-year transfer restriction, is not entirely clear due to heavy redaction in the Award.²¹ Ultimately, in 2014 GTH sold its shareholding in Wind Mobile to a non-incumbent carrier, namely its original Canadian joint venture partner and a group of private equity firms.²² Subsequently, following a further spectrum license auction and approvals of license transfers among certain carriers, Wind Mobile was sold by its new owners at a substantial profit.²³

¹³ *Ibid.*, paras 24–25, 38.

¹⁴ *Ibid.*, para. 38.

¹⁵ *Ibid.*, paras 44–55.

¹⁶ *Ibid.*, para. 69.

¹⁷ *Ibid.*, para. 72.

¹⁸ *Ibid.*, para. 71. Investment Canada Act, RSC 1985, c. 28 (1st Supp.). See also Knight & Voon, *supra* n. 9, at 112–113.

¹⁹ *Global Telecom*, Award, *supra* n. 4, para. 203(e) and Annex at 53.

²⁰ *Ibid.*, paras 85–99.

²¹ *Ibid.*, paras 100–105.

²² *Ibid.*, para. 106.

²³ *Ibid.*, paras 107–110.

3 INTERPRETING AND APPLYING RESERVATIONS

3.1 THE AWARD

The tribunal was faced with interpreting and applying a reservation permitted by Article IV(2)(d) of the BIT, which provided, in relation to national treatment and certain other obligations, that these obligations would ‘not apply to ... the right of each Contracting Party to make or maintain exceptions within the sectors or matters listed in the Annex to this Agreement’.²⁴ The Annex provided in the relevant parts that:

Canada reserves the right to make and maintain exceptions in the sectors or matters listed below:

- social services (i.e. public law enforcement; correctional services; income security or insurance; social security or insurance; social welfare; public education; public training; health and child care);
- services in any other sector ...²⁵

The majority interpreted the right to adopt future exceptions to national treatment, as provided for by Article IV(2)(d), as ‘subject to only one condition: the sector or matter must be listed in the Annex’.²⁶ Importantly, the majority rejected the claimant’s argument that the right to adopt future exceptions, provided for in Article IV(2)(d), had to be activated by Canada prior to applying a measure inconsistent with the national treatment obligation, for example, by notifying investors subject to the BIT’s protections.²⁷ There was ‘simply no basis in the text of the BIT to impose an additional procedural requirement that triggers the effectiveness of the exception’.²⁸ In justifying this conclusion, the majority considered the transparency provision in the BIT, which provided that existing non-conforming measures had to be notified to the other Contracting Party, an approach that is common in investment treaties.²⁹ For the majority, this indicated that ‘if the Contracting Parties had intended for that right [to adopt future non-conforming measures] 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’.³⁰ The majority also considered the more general obligation imposed by the other limb of the BIT’s transparency provision, requiring each Party:

²⁴ Canada–Egypt BIT, *supra* n. 5, Art. IV(2)(d).

²⁵ *Ibid.*, Annex.

²⁶ *Global Telecom*, Award, *supra* n. 4, para. 367.

²⁷ *Ibid.*, paras 368–369, 374.

²⁸ *Ibid.*, para. 369.

²⁹ *Ibid.*, para. 370, citing Canada–Egypt BIT, *supra* n. 5, Art. XVI(1). See e.g., the provisions in United States investment treaties cited *infra* n. 55. ASEAN Comprehensive Investment Agreement, *supra* n. 6, Art. 9(1)–(2).

³⁰ *Global Telecom*, Award, *supra* n. 4, para. 371.

to the extent practicable, to ensure that its laws, regulations, procedures, and administrative rulings of general application respecting any matter covered by this Agreement are promptly published or otherwise made available ... to enable interested persons and the other Contracting Party to become acquainted with them.³¹

The majority held that that '[e]ven if there were any want of diligence on the part of Canada' in publicising its exercise of the right to establish future exceptions to national treatment, a breach of the general transparency obligation, which had not been alleged, would not 'imply any violation of any other' provision.³²

On the question of the scope of Canada's reservation in the Annex, given the reference to 'services in any other sector', the majority rejected the claimant's suggestion that this should be read narrowly in light of the reference in the preceding item to 'social services', so as to avoid rendering the term 'social services' superfluous.³³ Instead, in light of the clear language of the Annex, the 'only plausible interpretation is that all services, including social services, fall within the scope of the Annex'.³⁴

The tribunal also noted that the use of such 'language is consistent with many of Canada's investment treaties from the mid- to late-1990s, which contain similar exceptions for services', citing some eight Canadian treaties that contain identical language in the reservations by Canada in the equivalent Annex.³⁵ The question of whether it is permissible to refer to other investment treaties concluded by only one of the parties to the treaty under interpretation has been debated by investor-

³¹ Canada–Egypt BIT, *supra* n. 5, Art. XVI(2).

³² *Global Telecom*, Award, *supra* n. 4, para. 371.

³³ *Ibid.*, paras 377, 360(b).

³⁴ *Ibid.*, para. 377.

³⁵ *Ibid.*, para. 378, n. 539. The treaties cited by the tribunal, drawing on Canada's submissions, which contain identical language in the relevant reservation by Canada are: Agreement Between the Government of Canada and the Government of Ukraine for the Promotion and Protection of Investments, Art. IV(2)(d) and Annex, para. 1 (24 Oct. 1994); Agreement Between the Government of Canada and the Government of Republic of Philippines for the Promotion and Reciprocal Protection of Investments, Art. IV(2)(d) and Annex, s. 1(a) (9 Nov. 1995) (hereinafter 'Canada–Philippines BIT'); Agreement Between the Government of Canada and the Government of the Republic of Trinidad and Tobago for the Reciprocal Promotion and Protection of Investments, Art. IV(2)(d) and Annex, para. 1 (11 Sept. 1995); Agreement Between the Government of Canada and the Government of Barbados for the Reciprocal Promotion and Protection of Investments, Art. IV(2)(d) and Annex (29 May 1996); Agreement Between the Government of Canada and the Government of the Republic of Ecuador for the Promotion and Reciprocal Protection of Investments, Art. IV(2)(d) and Annex (29 Apr. 1996); Agreement Between the Government of Canada and the Government of the Republic of Venezuela for the Promotion and Protection of Investments, Annex, para. 11(d)(i) (1 July 1996); Agreement Between the Government of Canada and the Government of the Republic of Panama for the Promotion and Protection of Investments, Art. IV(2)(d) and Annex (12 Sept. 1996); Agreement Between the Government of Canada and the Government of the Republic of Armenia for the Promotion and Protection of Investments, Art. IV(2)(d) and Annex (8 May 1997). Beyond the agreements cited, there are other Canadian investment treaties that include the same language: e.g., Agreement Between the Government of Canada and the Government of the Republic of Croatia for the Promotion and Protection of Investments, Annex, para. II(1)(c) (3 Feb. 1997).

State tribunals and commentators.³⁶ As Andrew Mitchell and James Munro have suggested, if there is something to link those other investment treaties to the common intention of the parties to the treaty under interpretation, the other treaties could either serve as evidence of the ordinary meaning of a term, or as a supplementary means of interpretation.³⁷ In the Award under discussion, where what was at issue was a reservation formulated by Canada, and accepted by Egypt prior to the conclusion of the BIT,³⁸ it is perhaps arguable that the Parties intended to adopt the meaning of ‘services in any other sector’ evidenced by Canada’s reservations in its contemporaneous treaties. However, such an inference is questionable, as there is no direct evidence to link Canada’s other treaties to the common intention of both Parties to the Canada–Egypt BIT, and the relevant term does not appear to have had a well-established ordinary meaning.³⁹ Ultimately, the majority found that GTH’s claim, which concerned the telecommunications sector, was excluded by Canada’s reservation from the scope of the BIT’s national treatment obligation.⁴⁰

3.2 DISSENTING OPINION

3.2[a] *Distinction Between Right to Adopt Exceptions and Non-conforming Measures*

The Dissenting Opinion of Arbitrator Born fundamentally departed from the majority regarding how to interpret Canada’s reservation contained in Article IV (2)(d) and the Annex of the BIT. First, Arbitrator Born distinguished between reserving a right and exercising a right. In his view Article IV(2)(d) and Canada’s reservation in the Annex did not constitute the exercise by Canada of the right to make or maintain exceptions in relation to national treatment. Instead, the provisions simply granted Canada a right to make future exceptions in relation to the sectors listed in the Annex.⁴¹ Second, Arbitrator Born held that the majority had conflated the right to adopt ‘an exception’, as provided for in Article IV(2)(d), and the right to adopt a ‘measure’, a term which appeared in other parts of the same

³⁶ See generally Andrew D. Mitchell & James Munro, *Someone Else’s Deal: Interpreting International Investment Agreements in the Light of Third-Party Agreements*, 28 EJIL 669, esp. 681–695 (2017); Martins Paporinskas, *The International Minimum Standard and Fair and Equitable Treatment* 120–131 (OUP 2013).

³⁷ Mitchell & Munro, *supra* n. 36, at 682–684, 691–694.

³⁸ See Canada’s explanation that each Party formulated its own list of reservations, which was reviewed by the other Party prior to concluding the treaty: *Global Telecom Holding S.A.E. v. Canada*, ICSID Case No. ARB/16/16, Government of Canada Rejoinder on Merits and Damages and Reply on Jurisdiction and Admissibility (3 Feb. 2019), paras 129–130.

³⁹ See Mitchell & Munro, *supra* n. 36, at 691–692; Paporinskas, *supra* n. 36, at 121–122.

⁴⁰ *Global Telecom*, Award, *supra* n. 4, paras 379–380.

⁴¹ *Global Telecom Holding S.A.E. v. Canada*, ICSID Case No. ARB/16/16, Dissenting Opinion of Gary Born (27 Mar. 2020), paras 18–23 (hereinafter ‘*Global Telecom*, Dissenting Opinion of Gary Born’).

provision that concerned existing non-conforming measures.⁴² The term ‘measure’ was defined in the BIT, as it is in many investment treaties, to include ‘any law, regulation, procedure, requirement, or practice’.⁴³ In contrast, Arbitrator Born held that a review of other exceptions provisions in the BIT suggested that exceptions were ‘treated as defined categories of governmental actions and measures, which are excluded from ... the Treaty’s substantive protections’.⁴⁴ Thus, Article IV(2)(d) permitted the Parties ‘to formulate ... “exceptions” that would encompass defined categories of future “measures” that a Contracting State might wish to adopt or impose’, in connection with the sectors or matters in the Annex, which would be excluded from the national treatment obligation.⁴⁵ It did not permit ‘the Contracting Parties to simply impose non-conforming measures’.⁴⁶

Arbitrator Born suggested his interpretation, emphasizing the difference between a right to adopt ‘exceptions’ and ‘measures’, was confirmed by Canada’s other investment treaties, noting that the 2004 Canadian Model BIT refers to the term ‘measure’ in the equivalent provision covering future measures removed from the scope of the national treatment obligation.⁴⁷ However, a difficulty with this argument is that the evidence relied on significantly post-dates the conclusion of the Canada–Egypt BIT, and thus is not necessarily probative of the common intention of the Parties to the treaty under interpretation. Most of the investment treaties concluded by Canada at around the same time as the Canada–Egypt BIT also refer in the equivalent provision to the right to adopt ‘exceptions’ not ‘measures’, with one exception.⁴⁸ Again, the point is that inferences based on one treaty party’s other investment treaties must be approached cautiously.

3.2[b] *Requirement to Notify Future Exceptions from National Treatment*

Arbitrator Born also confirmed his interpretation by having regard to the treaty’s transparency provision, which, in his view, indicated the Parties’ intention ‘to clearly identify and communicate measures that would hinder the protection of

⁴² *Ibid.*, paras 24–28, citing Canada–Egypt BIT, *supra* n. 5, Art. IV(2)(a)–(c).

⁴³ Canada–Egypt BIT, *supra* n. 5, Art. 1(h). For identical or similar definitions see e.g., North American Free Trade Agreement, Art. 201 (17 Dec. 1992) (hereinafter NAFTA); CPTPP, Art. 3; ASEAN Comprehensive Investment Agreement, *supra* n. 6, Art. 4(f).

⁴⁴ *Global Telecom*, Dissenting Opinion of Gary Born, *supra* n. 41, paras 29–31, citing Canada–Egypt BIT, *supra* n. 5, Arts VI and XVII.

⁴⁵ *Ibid.*, paras 32, 34.

⁴⁶ *Ibid.*, paras 35–36.

⁴⁷ *Ibid.*, para. 33, citing Canada Model BIT, Art. 9(2) (2004).

⁴⁸ See *supra* n. 35. The Agreement Between the Government of Canada and the Government of the Kingdom of Thailand for the Promotion and Protection of Investments, Art. IV(3) (17 Jan. 1997) (hereinafter ‘Canada–Thailand BIT’) refers to the right to adopt ‘measures’ inconsistent with the national treatment obligation, perhaps lending some support to the suggested distinction.

foreign investment’, so that ‘both Contracting Parties, and their respective investors, are at all times aware of developments that would affect the rights and obligations established by the BIT’.⁴⁹ Specifically, he found that the treaty’s general transparency obligation, extracted above,⁵⁰ required that ‘the exercise of a reserved right under Article IV(2)(d) [concerning future exceptions from national treatment] necessarily required notifying the other Party’.⁵¹ Arbitrator Born emphasized that his interpretation did not affect Canada’s right to adopt future exceptions to national treatment, in relation to the sectors listed in the Annex, but merely required it ‘to formulate and publicize those exceptions in advance ... so that other Contracting Parties and foreign investors could determine when Article IV(1) applied and when it did not’. In contrast, the majority’s interpretation left Canada ‘free, at any time and in any manner, to impose blatantly discriminatory measures favoring Canadian nationals, in broad sectors of its economy, without any prior notice to Egypt or Egyptian investors and without any other requirement or limitation’.⁵² This was contrary to the BIT’s ‘fundamental objective of providing a secure, predictable and transparent environment, characterized by the rule of law’ and a remarkable result.⁵³

It is worth considering this aspect of the case, concerning whether future exceptions to national treatment had to be notified prior to being applied, in light of similar but not identical provisions contained in some other investment treaties.⁵⁴ For example, older United States investment treaties typically include a qualification to the national treatment obligation such as: ‘subject to the right of each Party to make or to maintain exceptions falling within one of the sectors or matters listed in the Annex to this Treaty’.⁵⁵ These provisions also require that the relevant Party

⁴⁹ *Global Telecom*, Dissenting Opinion of Gary Born, *supra* n. 41, paras 40–44.

⁵⁰ See *supra* text at n. 31.

⁵¹ *Global Telecom*, Dissenting Opinion of Gary Born, *supra* n. 41, para. 44.

⁵² *Ibid.*, paras 16, 37–39.

⁵³ *Ibid.* Arbitrator Born highlighted that the services sector encompasses roughly 70% of Canada’s economy: para. 38.

⁵⁴ In addition to the provisions discussed in this paragraph, concerning each Party’s right to adopt future exceptions to national treatment, an analogy might be drawn with denial of benefits clauses. Some denial of benefits provisions do not specify conditions for exercising the right to deny benefits. Nevertheless, jurisprudence has developed certain procedural requirements, including a requirement of prior notification, and considered whether any denial of benefits only operates prospectively: see e.g., Lindsay Gastrell & Paul-Jean Le Cannu, *Procedural Requirements of ‘Denial-of-Benefits’ Clauses in Investment Treaties: A Review of Arbitral Decisions*, 30 ICSID Rev—FILJ 78, 82–96 (2015). Loukas Mistelis & Crina Baltag, *Denial of Benefits Clause*, in *Max Planck Encyclopedia of International Procedural Law* (Hélène Ruiz Fabri ed., OUP 2019), paras 43–45.

⁵⁵ Treaty Between the United States of America and the Republic of Panama concerning the Treatment and Protection of Investment, Art. II(1) (27 Oct. 1982). For identical or almost identical provisions see e.g., Treaty Between the Government of the United States of America and the Republic of Senegal Concerning the Reciprocal Encouragement and Protection of Investment, Art. II(3) (6 Dec. 1983); Treaty Between the Government of the United States of America and the Government of the People’s Republic of the Congo Concerning the Reciprocal Encouragement and Protection of Investment,

‘notify the other [Party] of any future exception with respect to the sectors or matters listed in the Annex’, and that ‘any future exception by either Party shall not apply to investment ... existing in that sector at the time the exception becomes effective’.⁵⁶

The purpose of such an express obligation to notify future exceptions to the other treaty party, and to only apply such exceptions to future investments, is to ensure legal certainty around which investments are excluded from non-discrimination obligations.⁵⁷ Article IV(2)(d) of the Canada–Egypt BIT, extracted above, did not contain any such conditions, but simply referred to ‘the right of each Contracting Party to make or maintain exceptions within the sectors or matters listed in the Annex’. The question is obviously what, if anything, should be inferred from this difference. In this regard, the majority in a footnote accepted Canada’s argument that this difference with treaties requiring express notification of future exceptions from national treatment confirmed that there was no basis for imposing such a requirement when interpreting this BIT.⁵⁸ Arbitrator Born, in contrast, saw this point as not pertinent, on the basis that on his interpretation, under Article IV(2)(d) and the Annex, Canada had merely reserved and not exercised the right to adopt future exceptions from national treatment, meaning Canada’s measures were not removed from the scope of the national treatment obligation.⁵⁹

3.2[c] Scope of ‘Services in Any Other Sector’

Arbitrator Born also dissented regarding whether the measures at issue fell within the reference to ‘services in any other sector’ in the matters reserved by Canada in the Annex. Contrary to the majority approach, Arbitrator Born held that the

Art. II(3) (3 Aug. 1984); Treaty Between the United States of America and the Republic of Poland Concerning Business and Economic Relations, Art. II(1) (21 Mar. 1990); Treaty Between the United States of America and the Czech and Slovak Federal Republic Concerning the Reciprocal Encouragement and Protection of Investments, Art. II(1) (22 Oct. 1991); Treaty Between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, Art. II(1) (14 Nov. 1991); Treaty Between the United States of America and Ukraine Concerning the Encouragement and Reciprocal Protection of Investment, Art. II(1) (4 Mar. 1994).

⁵⁶ *Ibid.*

⁵⁷ *Joseph C Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award (28 Mar. 2011), paras 49–51 (holding such provisions requiring notification are ‘a fundamental requirement in order to guarantee that investors enjoy legal certainty, and that States cannot invoke the exception *ex post facto*, surprising the investor’s good faith’). Kenneth J Vandeveld, *U.S. International Investment Agreements* 243 (OUP 2009).

⁵⁸ *Global Telecom*, Award, *supra* n. 4, para. 369, n. 536. For Canada’s submissions see *Global Telecom*, Canada Rejoinder, *supra* n. 38, paras 126–127.

⁵⁹ *Global Telecom*, Dissenting Opinion of Gary Born, *supra* n. 41, paras 18–23. Given Arbitrator Born’s conclusion that Canada’s measures were not removed from the scope of the national treatment obligation, and Canada had not provided any defence on the merits on this part of the claim, Arbitrator Born held that GTH was entitled to a finding that Canada had breached its obligation under Art. IV(1) of the BIT and a consequent award of damages: para. 11.

reference to services in ‘any other sector’ in the Annex had to be interpreted in light of the preceding term, ‘social services’, which included a list of specific examples. Accordingly, ‘any other sector’ would cover social services in sectors other than those listed in brackets within the initial reference to social services.⁶⁰ Arbitrator Born also suggested that the fact that many other Canadian BITs from the same period contain identical language to that contained in the Annex to the Canada–Egypt BIT ‘merely means that those treaties also raise comparable issues of interpretation (which are not before this Tribunal and which other tribunals have not addressed) ... [and] says nothing whatsoever about how those issues of interpretation should ultimately be resolved’.⁶¹

In his view, more important were other Canadian investment treaties concluded at almost the same time as the Canada–Egypt BIT ‘with texts that shed light on what the BIT’s Annex was understood to mean’.⁶² Specifically, Arbitrator Born highlighted that one of the contemporaneous BITs did not include a reservation by Canada in relation to ‘services in any other sector’, and in certain treaties Canada’s counterparties had listed the specific industries that would be covered by their reservation concerning services.⁶³ Arbitrator Born also noted that some other Canadian investment treaties refer explicitly to ‘telecommunications services’ in the equivalent Annex for reservations concerning future non-conforming measures, and accepted the claimant’s argument that this suggested that if Canada had meant to make a reservation in this regard, it would have done so expressly.⁶⁴

Overall, as with the reference to other treaties elsewhere in the Award and Dissenting Opinion, it is questionable whether there was sufficient evidence to

⁶⁰ *Ibid.*, paras 52–55, 57–59. The text of the Annex is extracted *supra*, text at n. 25.

⁶¹ *Ibid.*, para. 61.

⁶² *Ibid.*, paras 62–63.

⁶³ *Ibid.*, citing Canada–Thailand BIT, *supra* n. 48, Art. IV(3) and Annex 1; Canada–Philippines BIT, Annex, s. 1(b). Beyond these agreements, certain other Canadian investment treaties from the same period lack the reference in Canada’s equivalent reservation to ‘services in any other sector’: e.g., Agreement Between the Government of Canada and the Government of the Lebanese Republic for the Promotion and Protection of Investments, Annex I, para. II(1)(d) (11 Apr. 1997).

⁶⁴ *Global Telecom*, Dissenting Opinion of Gary Born, *supra* n. 41, para. 64. An explicit reservation regarding telecommunications appears to have first been used by Canada in the Agreement Between the Government of Canada and the Government of the Republic of Peru for the Promotion and Protection of Investment, Annex II, Schedule of Canada (14 Nov. 2006). Canada submitted that its investment treaty practice had evolved, and its older agreements also excluded telecommunications through the broad exceptions for services: *Global Telecom*, Award, *supra* n. 4, para. 349. Arbitrator Born further held that the Annex permitted ‘exceptions for the regulation of “services” in a given sector, not the regulation of anything in a sector that involves services’, and what was at issue was not the regulation of services, but the regulation of financial holdings and corporate control: paras 51–56. A difficulty with this interpretation is that the distinction drawn seems to lack a basis in the text of Art. IV(2)(d) and the Annex, which simply refer to the right of a Party ‘to make or maintain exceptions within the sectors or matters listed’.

link the above considerations to the common intention of the Parties to the Canada–Egypt BIT, and thus what, if any, inferences, should be drawn.⁶⁵ In particular, the reference to sectors Canada’s other treaty partners may have nominated in their list of reservations, although part of a treaty text agreed to by Canada, has a weak link to the common intention of the Parties to the Canada–Egypt BIT, absent further evidence. Also, the other Canadian treaties referred to, which contain an explicit reservation for future non-conforming measures concerning ‘telecommunications services’, significantly post-date the Canada–Egypt BIT, and thus do not necessarily shed light on the common intention of the Parties to that Agreement.⁶⁶

4 INTERPRETING AND APPLYING CARVE-OUTS

The Award is also notable for interpreting and applying a carve-out that removed ‘[d]ecisions by either Contracting Party not to permit establishment of a new business enterprise or acquisition of an existing business enterprise or a share of such enterprise by investors or prospective investors’ from the BIT’s investor-State dispute settlement mechanism.⁶⁷ The question was whether this carve-out applied, and thus excluded jurisdiction, in relation to the part of GTH’s case concerning its 2012 application to obtain voting control over Wind Mobile and the national security review conducted under the Investment Canada Act. By majority, the tribunal held that the carve-out did not apply. First, the majority rejected Canada’s argument that it has always excluded decisions taken pursuant to the Investment Canada Act from its trade and investment treaties, noting that the carve-out could have, and did not, referred explicitly to the legislation, and the tribunal had to interpret the terms of the BIT.⁶⁸ As the claimant highlighted, in some of its other investment treaties Canada has explicitly excluded decisions following a review under the Investment Canada Act from dispute settlement.⁶⁹

Second, the majority was not convinced that the proposed transaction pursuant to the shareholders’ agreement governing the joint venture, whereby GTH

⁶⁵ See *supra* nn. 36–37 and associated text.

⁶⁶ See *supra* n. 64.

⁶⁷ Canada–Egypt BIT, *supra* n. 5, Art. II(4)(b).

⁶⁸ *Global Telecom*, Award, *supra* n. 4, para. 326.

⁶⁹ *Ibid.*, para. 319, citing Canada–Thailand BIT, *supra* n. 48, Art. II(4); NAFTA, Annex 1138.2. For similar explicit exclusions in more recent Canadian investment treaties, see e.g., Agreement Between Canada and the Hashemite Kingdom of Jordan for the Promotion and Protection of Investments, Annex IV(1) (28 June 2009); Agreement Between the Government of Canada and the Government of the People’s Republic of China for the Promotion and Reciprocal Protection of Investments, Annex D.34(1) (9 Sept. 2012); Agreement Between Canada and the State of Kuwait for the Promotion and Protection of Investments, Annex 3 (26 Sept. 2011); Agreement Between the Government of the Hong Kong Special Administrative Region of the People’s Republic of China and the Government of Canada for the Promotion and Protection of Investments, Annex IV (10 Feb. 2016).

would obtain voting control of Wind Mobile, was an ‘acquisition of an existing business enterprise or a share of such enterprise’ within the terms of the carve-out.⁷⁰ Instead, the rights attaching to GTH’s shares were merely ‘enhanced with the ability to vote’, meaning what was at issue was an acquisition of voting control but not an acquisition of a business or shares in the sense of ownership.⁷¹ The majority also suggested that this interpretation was supported by the object and purpose of the BIT, on the basis that a broad view of the carve-out, beyond its explicit terms, ‘would hardly be conducive to the encouragement of the creation of favourable conditions for investors to make investments’.⁷²

An anonymous member of the tribunal dissented on this point, holding that the proposed acquisition of control constituted an ‘acquisition of an existing business enterprise’ within the meaning of the carve-out.⁷³ This member reasoned that the provision focused:

on the acquisition of a “business enterprise,” i.e., an economic entity rather than a legal entity; and 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.⁷⁴

The dissenting member also held that the object and purpose of the BIT ‘is not confined to the promotion and protection of investments, but must be understood to include both the fair treatment of investments and the preservation of certain regulatory competences for the State hosting the investment’.⁷⁵

The points raised by the anonymous dissenter are, in my view, well taken. The purpose of the carve-out is clearly to preserve a substantial degree of host state control over the admission of foreign investment, by removing decisions not to permit the establishment of a new business enterprise or the acquisition of an existing business enterprise from investor-State arbitration.⁷⁶ Accordingly, there

⁷⁰ *Global Telecom*, Award, *supra* n. 4, paras 328–329.

⁷¹ *Ibid.*, paras 329–332. The tribunal noted that while the relevant parts of the Investment Canada Act apply to the acquisition of control over an enterprise, this concept was not referred to in the treaty provision under interpretation: para. 332.

⁷² *Ibid.*, para. 333. The Preamble to the BIT states ‘that the promotion and the protection of investments of investors of one Contracting Party in the territory of the other Contracting Party will be conducive to the stimulation of business initiative and to the development of economic cooperation between them’: Canada–Egypt BIT, *supra* n. 5, Preamble.

⁷³ *Global Telecom*, Award, *supra* n. 4, para. 336.

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

⁷⁶ Ordinarily, such decisions would be subject to a national treatment obligation and could be subject to the treaty’s interstate arbitration mechanism: Canada–Egypt BIT, *supra* n. 5, Arts. II(3)(a), XV. However, in this case, the pre-establishment national treatment obligation did not apply, due to the application of Canada’s reservation pursuant to Art. IV(2)(d) and the Annex.

was a good case for the carve-out covering an acquisition of control, even if it did not involve an acquisition of ownership in a strict legal sense. Also, contrary to the majority view, the object and purpose of investment treaties should not be understood as exclusively focused on investment protection and promotion, and thus as necessarily supporting a restrictive (pro-investor) construction of the carve-out.⁷⁷ Rather, as the anonymous dissent suggested, when characterizing the object and purpose of an investment treaty, it must be remembered that States retain legitimate competences to regulate foreign investment, and investment protection serves as a means to other ultimate ends (e.g., sustainable development).⁷⁸

5 CONCLUSION

Overall, *Global Telecom v. Canada* highlights that reservations and carve-outs must be carefully drafted, with a focus on exactly what the treaty parties wish to exclude from the scope of a particular treaty obligation or from dispute settlement. While reservations and carve-outs take a wide variety of forms, it is through the application of the ordinary rules of treaty interpretation, with attention to the principles of contextual and effective treaty interpretation, that adjudicators will locate the appropriate limits of the particular provision at issue.⁷⁹ As suggested above, there is little justification for adopting a restrictive interpretation of reservations or carve-outs, based on a lopsided characterization of the object and purpose of investment treaties that only emphasizes investment protection and promotion. In my view, the Award and the Dissenting Opinion also highlight that interpretative inferences based on one treaty party's other investment treaties should be approached with care, and there must be some basis to link such other treaties to the common intention of the parties to the treaty under interpretation. As national security concerns increasingly influence the regulation of both existing foreign investments and

⁷⁷ See similarly Newcombe & Paradell, *supra* n. 2, at 484–487 (criticizing presumptions favouring a narrow interpretation of exceptions based on the investment protection and promotion purpose of investment treaties); *Mobil Investments Canada Inc. v. Canada*, *supra* n. 3, paras 251–255 (rejecting the argument that reservations for non-conforming measures should be interpreted restrictively).

⁷⁸ See e.g., Federico Ortino, *Investment Treaties, Sustainable Development and Reasonableness Review: A Case Against Strict Proportionality Balancing*, 30 LJIL 71, 75–83 (2017) (suggesting investment protection guarantees are an instrument to achieve the ultimate purpose of investment treaties, which was traditionally to promote the economic development of the treaty parties, and has evolved into a more complex purpose of sustainable development).

⁷⁹ For an interesting discussion of the significance of the principles of contextual and effective interpretation across several areas of international adjudication see Caroline E. Foster, *Global Regulatory Standards in Environmental and Health Disputes: Regulatory Coherence, Due Regard and Due Diligence* 150–152, 173, 290–292 (OUP 2021).

admission decisions, *Global Telecom v. Canada* also demonstrates the practical salience of reservations and carve-outs. Provisions excluding particular sectors from non-discrimination obligations, or removing certain sensitive decisions (e.g., investment screening decisions) from dispute settlement, are likely to grow in importance.⁸⁰

⁸⁰ Consider, e.g., Regional Comprehensive Economic Partnership, Art. 17.11 (15 Nov. 2020) (excluding '[a] decision by a competent authority ... of a Party on whether or not to approve or admit a foreign investment proposal, and the enforcement of any conditions or requirements that an approval or admission is subject to' from the State-State dispute settlement mechanisms in the treaty; the treaty does not include investor-State dispute settlement).

