CONTAINS CONFIDENTIAL INFORMATION

IN AN ARBITRATION UNDER THE NORTH AMERICAN FREE TRADE AGREEMENT AND THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (1976)

JOSHUA DEAN NELSON, IN HIS OWN RIGHT AND ON BEHALF OF TELE FÁCIL MÉXICO, S.A. DE C.V., AND JORGE LUIS BLANCO

Claimants

and

THE UNITED MEXICAN STATES

Respondent

ICSID Case No. UNCT/17/1

REPLY OF CLAIMANTS JOSHUA DEAN NELSON, IN HIS OWN RIGHT AND ON BEHALF OF TELE FÁCIL MÉXICO, S.A. DE C.V., AND JORGE LUIS BLANCO

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C-110	Expert Reply Opinion of Professor Clara Luz Álvarez	English
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C-115	*Comunicado de Prensa No. 35/2018 emitido por el Instituto Federal de Telecomunicaciones, "El Senado de la República Ratifica como Comisionado del IFT a Sóstenes Díaz González* (Press Release 35/2018 issued by the Federal Telecommunications Institute, "Senate Ratifies Sóstenes Díaz González as IFT Commissioner") (April 25, 2018)	Spanish and English
C-116	*Oficio IFT/100/PLENO/STP/745/2015 emitido por la Secretaría Técnica del Pleno con el anteproyecto del Acuerdo Mediante el cual el Pleno del Instituto Federal de Telecomunicaciones establece el alcance de la "Resolución mediante la cual el Pleno del Instituto Federal de Telecomunicaciones determina las condiciones de interconexión no convenidas entre Tele Fácil México, S.A. de C.V. y las empresas Teléfonos de México, S.A.B. de C.V. y Teléfonos del Noroeste, S.A. de C.V.* (Document IFT/100/PLENO/STP/745/2015 issued by the Technical Secretary of the Plenary with the draft of Decree by which the Plenary of the Federal Telecommunications Institute establishes the scope of the "Resolution by which the Plenary of the Federal Telecommunications Institute determines the interconnection conditions not agreed between Tele Fácil México, S.A. de C.V. and the companies Teléfonos de México, S.A.B. de C.V. and Teléfonos del Noroeste, S.A. de C.V.) (March 13, 2015)	Spanish and English
C-117	*Catálogo de Disposición Documental emitido por el Organo Interno de Control del Instituto Federal de Telecomunicaciones* (Catalogue of Documentay Disposition issued by the Internal Control Unit of the Federal Telecommunications Institute) (May 17, 2017)	Spanish and English

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C-118	*Dictamen de las Comisiones Unidas de Comunicaciones y Transportes, Radio, Televisión y Cinematografía, y de Estudios Legislativos, con Proyecto de Decreto por el que se Expiden la Ley Federal de Telecomunicaciones y Radiodifusión, y la Ley del Sistema Público de Radiodifusión del Estado Mexicano; y se Reforman, Adicionan y Derogan Diversas Disposiciones en Materia de Telecomunicaciones y Radiodifusión* (Resolution by the Commissions of Communications and Transport, Broadcasting, Television and Cinematography, and of Legislative Studies, with Initiative of Decree to Issue the Federal Telecommunications and Broadcasting Law, and the Law of the Mexican State Public Broadcasting; and which Amends, Adds and Supersedes several provisions in Telecommunications and Broadcasting Matters) (July 1, 2014)	Spanish and English
C-119	*Nota Informativa emitida por el Instituto Federal de Telecomunicaciones respecto al acceso presencial a las sesiones del Pleno* (Informational Note issued by the Federal Telecommunications Institute regarding physical access to Plenary meetings) (September 24, 2014)	Spanish and English
C-120	*Acuerdo mediante el cual el Pleno del Instituto Federal de Telecomunicaciones aprueba su calendario annual de sesiones ordinarias y el calendario annual de labores para el año 2014* (Decree by which the Plenary of the Federal Telecommunications Institute approves the annual calendar of ordinary sessions and the annual calendar of business days for 2014) (February 5, 2014)	Spanish and English
C-121	*Acta de Verificación Ordinaria No. IFT/DF/DGV/562/2015 emitida por el Instituto Federal de Telecomunicaciones* (Ordinary Verification Minute No. IFT/DF/DGV/562/2015) (June 10, 2015)	Spanish and English
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Factual Exhibit	Document Description	Original Language
C-123	*Resolución P/IFT/EXT/241116/40 mediante la cual el Pleno del Instituto Federal de Telecomunicaciones modifica y autoriza al Agente Económico Preponderante los Términos y Condiciones del Convenio Marco de Interconexión presentado por Teléfonos de México, S.A.B. de C.V. aplicable del 1 de enero al 31 de diciembre de 2017* (Resolution P/IFT/EXT/241116/40 by which the Plenary of the Federal Telecommunications Institute modifies and authorizes the Preponderant Economic Agent the Terms and Conditions of the Framework Interconnection Agreement submitted by Teléfonos de México, S.A.B. de C.V. applicable from January 1 to December 31, 2017)	Spanish and English
C-124	*Versión Estenográfica de la XLIV Sesión Ordinaria del Pleno 2 de noviembre de 2017,* (Transcript of Plenary's XLIV Ordinary Session) (November 2, 2017)	Spanish and English
C-125	*Versión Estenográfica de la XLIII Sesión Ordinaria del Pleno del Instituto Federal de Telecomunicaciones* (Transcript of Federal Telecommunications Institute Plenary's XLIII Ordinary Session) (November 1, 2017)	Spanish and English
C-126	*Acuerdo mediante el cual el Pleno del Instituto Federal de Telecomunicaciones emite Respuesta a la Solicitud de Confirmación de Criterio presentada por Mega Cable, S.A. de C.V., con relación a las tarifas de interconexión* (Decree by which the Plenary of the Federal Telecommunications Institute issues a Confirmation of Criteria as Requested by Mega Cable, S.A. de C.V., in connection with interconnection rates) (October 27, 2016)	Spanish and English
C-127	*Acuerdo mediante el cual el Pleno del Instituto Federal de Telecomunicaciones emite Respuesta a la Solicitud de Confirmación de Criterio presentada por Megacable Comunicaciones de México, S.A. de C.V., en relación con las tarifas de interconexión* (Decree by which the Plenary of the Federal Telecommunications Institute issues a Confirmation of Criteria as Requested by Megacable Comunicaciones de México, S.A. de C.V., in connection with interconnection rates) (July 5, 2017)	Spanish and English

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C-128	*Contratos del IFT con Analysys Mason conforme al Portal de Transparencia del Instituto Nacional de Acceso a la Información (*IFT Contracts with Analysys Mason pursuant to the Transparency Website of the National Institute of Access to Information) (las accessed on May 31, 2018)	Spanish and English
C-129	M. Angeles Villarreal, U.S. - Mexico Economic Relations: Trends, Issues, Implications (Congressional Research Services March 27, 2018), https://fas.org/sgp/crs/row/RL32934.pdf	English
C-130	Claimant0004465-66 BGBG invoice for May 2014	English
C-131	Claimant0004467-68 BGBG invoice for June 2014	English
C-132	Witness Statement by Juan Bonequi	English
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CL-102	*Acuerdo mediante el cual el Pleno del Instituto Federal de Telecomunicaciones expide los Lineamientos en Materia de Organización y Conservación de Archivos del Instituto Federal de Telecomunicaciones* (Decree by which the Plenary of the Federal Telecommunications Institute issues the Guidelines for Organization and Conservation of Files for the Federal Telecommunications Institute), enacted on August 3, 2015	Spanish and English
CL-103	C*ircular emitida por la Unidad de Administración del Instituto Federal de Telecomunicaciones por la que se dan a conocer las "Políticas pare el Uso de los Recursos de Tecnologías de la Información y Comunicaciones del Instituto Federal de Telecomunicaciones*" (Circular issued by the Administration Unit of the Federal Telecommunications Institute that publishes the "Policies for the use of Information and Communication Technologies of the Federal Telecommunications Institute), enacted on October 1, 2015	Spanish and English
CL-104	*Ley Federal de Archivos* (General Archive Law), enacted on January 23, 2012	Spanish and English
CL-105	*Recomendaciones para la organización y conservación de correos electrónicos institucionales de las dependencias y entidades de la Adminnistración Pública Federal emitidas por el Instituto Federal de Acceso a la Información Pública* (Recommendations for the organization and conservation of institutional emails of the agencies and departments of the Federal Public Administration), enacted on February 10, 2009	Spanish and English
CL-106	UNCTAD, SCOPE AND DEFINITION 33 (2011)	English
CL-107	*Apotex Inc. v. United States*, NAFTA/UNCITRAL, Award on Jurisdiction and Admissibility (June 14, 2013	English
CL-108	*Merrill & Ring LP v. Government of Canada*, NAFTA/UNCITRAL, Award (Mar. 31, 2010)	English
CL-109	KENNETH J. VANDEVELDE, U.S. INTERNATIONAL INVESTMENT AGREEMENTS 134 (Oxford, 2009)	English
CL-110	Andrea K. Bjorkland, "Commentary on NAFTA Chapter 11", in COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES 530 (Chester Brown, ed. Oxford, 2013)	English
CL-111	*European Media Ventures SA v. Czech Republic*, UNCITRAL, Partial Award on Liability (July 8, 2009)	English
CL-112	*German Interests in Polish Upper Silesia* (Germ. v. Pol.), Judgment , 1925 PCIJ (ser. A), No.6 (Aug. 25)	English

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CL-113	*Norwegian Shipowners' Claims* (Norway v. United States), 1 R. Int'l Arb. Awards 307, 343 (Oct. 13, 1922)	English
CL-114	*Amoco Int'l Finance Corp. v. Government of the Islamic Republic of Iran*, 15 Iran-U.S. Cl. Tr. Rep. 189, 220 (July 14, 1987)	English
CL-115	*Phillips Petroleum Co. Iran v. Islamic Republic of Iran*, 21 Iran-U.S. Cl. Trib. Rep. 79, 106 (June 29, 1989)	English
CL-116	*Starrett Housing Corp. v. Government of the Islamic Republic of Iran*, 16 Iran-U.S. Cl. Trib. Rep. 112, 114-115 (Aug. 14, 1987)	English
CL-117	*Saipem S.p.A. v. People's Republic of Bangladesh*, ICSID Case No. ARB/05/7, Award (June 30, 2009)	English
CL-118	International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Supplement No. 10 (A/56/10), Chapter IV.E.1, art. 1 (Nov. 2001), http://www.refworld.org/docid/3ddb8f804.html	English
CL-119	*Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision of the ad hoc Committee (June 14, 2010)	English
CL-120	*Generation Ukraine, Inc. v. Government of Ukraine*, ICSID Case No. ARB/00/9, Award (Sept. 16, 2003)	English
CL-121	Christoph Schreuer, *Calvo's Grandchildren: The Return of the Local Remedies in Investment Arbitration*, 1 The Law and Practice of International Courts and Tribunals 1, 15 (2005)	English
CL-122	*AMCO Asia Corp. v. Republic of Indonesia, Award*, 1 ICSID Rep. 413, 460 (Nov. 20, 1984), sustained in relevant part, Ad hoc Committee Decision on Application for Annulment, 1 ICSID Rep. 509, 526-527 (May 16, 1986)	English
CL-123	3 JOHN BASSETT MOORE, INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY 3229, 3229-30 (1898)	English
CL-124	ALWYN V. FREEMAN, INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICES 34-35 (1970)	English
CL-125	North American Free Trade Agreement, Implementation Act, Statement of Administrative Action, H.R. Doc. No. 103-159, Vol. 1, 103d Cong., 1st Session, 147 (1993)	English
CL-126	*Renco Group v. Republic of Peru*, ICSID Case No. UNCT/13/1, Second Submission of the United States of America (Sept. 1, 2015)	English
CL-127	*Detroit International Bridge Co. v. Government of Canada*, PCA Case No. 2012-25, Award on Jurisdiction (Apr. 2, 2015)	English
CL-128	Sergio Puig, *Investor-State Tribunals and Constitutional Courts: The Mexican Sweetners Saga*, V(2) MEXICAN LAW REVIEW 199, 215, 220 (2012)	English

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CL-129	*Merrill & Ring Forestry L.P. v. Government of Canada*, NAFTA/UNCITRAL, Award (Mar. 31, 2010)	English
CL-130	*Eli Lilly v. Government of Canada*, ICSID Case No. UNCT/14/2, Final Award, ¶ 221 (Mar. 16, 2017)	English
CL-131	*ATA Construction, Indus. & Trading Co. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award (May 18, 2010)	English
CL-132	Bin Cheng, *General Principles Of Law as Applied by International Courts and Tribunals* 141 (Cambridge, 1987)	English
CL-133	*Hrvatska Elektroprivreda d.d. v. Republic of Slovenia*, ICSID Case No. ARB/05/24, Award (Dec. 17, 2015)	English
CL-134	*Inmaris Perestroika Sailing Maritime Services GmbH v. Government of Ukraine, ICSID Case No. ARB/08/8, Excerpts of Award (Mar. 1, 2012)*	English
CL-135	*Resolución P/IFT/290515/130 mediante la cual el Pleno del Instituto Federal de Telecomunicaciones pone fin al procedimiento iniciado el 17 de diciembre de 2008 para resolver las condiciones de interconexión no convenidas entre Avantel, S.A. de C.V. y Pegaso PCS, S.A. de C.V.* (Resolution P/IFT/290515/130 by which the Plenary of the Federal Telecommunications Institute ends the procedure initiated on December 17, 2008 to resolve the interconnection conditions not agreed between Avantel, S.A. de C.V. and Pegaso PCS, S.A. de C.V.) (May 29, 2015)	Spanish and English
CL-136	*Resolución P/IFT/290515/129 mediante la cual el Pleno del Instituto Federal de Telecomunicaciones tiene por presentados los convenios modificatorios al Convenio Marco de Interconexión entre Axtel, S.A.B. de C.V. y Pegaso PCS, S.A. de C.V. (Resolution P/IFT/290515/129 by which the Plenary of the Federal Telecommunications Institute considers as delivered the adenda to the Interconnection Framework Agreement between Axtel, S.A.B. de C.V., and Pegaso PCS, S.A. de C.V.) (May 29, 2015)*	Spanish and English
CL-137	Jan Paulsson, *Denial of Justice in International Law* 134 (Cambridge University Press, 2005)	English
CL-138	*Ambatielos Claim* (*Greece v. United Kingdom of Great Britain and Northern Ireland*), Award (March 6, 1956)	English
CL-139	*Antoine Fabiani Case*, Decision of the 1902 French-Venezuela Commission (July 31, 1905)	English

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CL-140	Jurisprudencia 2a./J. 108/2009 agosto de 2009, con rubro DEMANDA DE AMPARO DIRECTO. ES OPORTUNA SU PRESENTACIÓN EN LA PRIMERA HORA HÁBIL DEL DÍA SIGUIENTE AL DEL VENCIOMIENTO DEL PLAZO, CUANDO CON MOTIVO DE UN HORARIO DE LABORES FIJADO EN ACUERDOS ADMINISTRATIVOS O LEYES SECUNDARIAS SE RESTRINGIERON LAS VEINTICUATRO HORAS (Jurisprudence 2a./J. 108/2009 August 2009, titled DIRECT AMPARO. IT IS TIMELY IF SUBMITTED IN THE FIRST BUSINESS HOUR OF THE NEXT DAY THE TERM ELAPSED, WHEN THE TWENTY-FOUR HOURS OF THE BUSINESS DAY WERE LIMITED BY A SCHEDULE ESTABLISHED IN AN ADMINISTRATIVE DECREE OR IN A SECONDARY STATUTE) (August 2009)	Spanish and English
CL-141	Tesis II.1o.4 L (10a.) con rubro DEMANDA DE AMPARO. ES EXTEMPORÁNEA LA PRESENTADA A PRIMERA HORA HÁBIL DEL DÍA SIGUIENTE A AQUEL EN QUE FENECE EL TÉRMINO PARA PROMOVERLA, CUANDO EXISTE UN FUNCIONARIO AUTORIZADO PARA RECIBIR PROMOCIONES FUERA DEL HORARIO DE LABORES DE LA JUNTA (Judicial Precedent II.1o.4 L (10a.) titled AMPARO PLEADING. IT IS EXTEMPORANEOUS IF SUBMITTED ON THE FIRST BUSINESS HOUR OF THE DAY FOLLOWING THE ONE IN WHICH THE TERM ELAPSED, WHEN THERE IS AN AUTHORIZED OFFICER TO RECEIVE DOCUMENTS OUTSIDE THE REGULAR BUSINESS HOURS.) (March 2017)	Spanish and English
CL-142	*Ley Orgánica del Poder Judicial Federal* (Organic Statute of the Federal Judicial Power) (May 26, 1995)	Spanish and English
CL-143	*Oil Field of Texas, Inc. v. Government of the Islamic Republic of Iran*, Award No. 258-43-1 (Oct. 8 1986), reprinted in 12 Iran-U.S. C.T.R. 308, 315 ()	English
CL-144	*Himpurna California Energy Ltd. (Bermuda) v. PT. (Persero) Perrusahaan Listruik Negara (Indonesia)*, Award (May 4, 1999)	English
CL-145	*Código Nacional de Procedimientos Penales* (National Code of Criminal Procedures), enacted on March 5, 2014	Spanish and English
CL-146	*Código Penal Federal* (National Criminal Code), enacted on August 14, 1931	Spanish and English
CL-147	*Plan Técnico Fundamental de Numeración* (Technical Fundamental Plan of Numbering) (December 11, 2014)	Spanish and English
CL-148	Plan Técnico Fundamental de Interconexión (Fundamental Interconnection Plan), enacted on February 10, 2009	Spanish and English

Legal Exhibit	Document Description	Original Language
CL-149	S. Ripinsky & K. Williams, *Damages in International Investment Law* 284 (2008)	English
CL-150	*AIG Capital Partners, Inc. and CJSC Tema Real Estate Co. v. Republic of Kazakhstan*, ICSID Case No. ARB/01/6, Award (Oct. 7, 2003)	English
CL-151	*MTD Equity Sdn. Bhd. v. Republic of Chile*, ICSID Case No. ARB/0/7, Award (May 25, 2004)	English
CL-152	*Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award (May 20, 1992)	English
CL-153	*AMCO Asia Corp. v. Republic of Indonesia*, Award, ICSID Case No. ARB/81/1, Award (May 31, 1990)	English
CL-154	International Bar Association, Rules on the Taking of Evidence in International Arbitration (adopted May 29, 2010), Art. 5, Rule 2(c)	English
CL-155	*Ley de Amparo* (*Amparo* Statute), enacted on April 2, 2013	Spanish and English

ACRONYMS

CDR	Call Detail Record
CFC	Federal Competition Commission
COFETEL	Federal Commission of Telecommunications
DCF	Discounted Cash Flow
DID	Direct Inward Dial
FLAP	Federal Law of Administrative Procedure
FMV	Fair Market Value
FTBL	Federal Telecommunications and Broadcasting Law
FTL	Federal Telecommunications Law
GLCC	Great Lakes Communication Corporation
IDO	Originating Carrier Network (*Identificator de Origin*)
MXN	Mexican Pesos
NAFTA	North American Free Trade Agreement
IFT	Federal Telecommunications Institute
IP	Internet Protocol
ITU	International Telecommunication Union
OECD	Organisation for Economic Co-operation and Development
TDM	Time-Division Multiplexing
USD	United States Dollars
VOIP	Voice-over-IP
WACC	Weighted Average Cost of Capital
UNCTAD	United Nations Conference on Trade and Development

I. OVERVIEW

1. The clear message from Mexico's Statement of Defense is that it will sacrifice fundamental principles of law and governance to win this case. It is prepared in this proceeding to completely ignore the plain language of Resolution 381, the regulatory decision that is at the heart of this case. It is prepared to assert limits to its regulatory authority that cripple its own ability to effectively oversee interconnection and foster competition in the telecommunications market. It is prepared to embrace a one-of-a-kind, illegitimate process to erase the legitimate determinations made in Resolution 381. It is prepared to interpret established market reform principles, such as the principle of non-discrimination, in ways that entrench and enrich the market monopolist at the expense of competition. It is prepared to ignore its obligation to produce relevant documents that have been requested in this proceeding – documents that, by its own law, it was obligated to maintain and provide to Claimants.

2. If extended beyond this case, Respondent's unprecedented positions would have a dramatic and paralyzing impact on the competitive telecommunications landscape in Mexico and undo the very essence of the Constitutional reforms through which Mexico sought to promote foreign investment to modernize that sector. Its Statement of Defense thus invites the serious question of why Respondent is apparently so willing, even eager, to take positions that will further damage and weaken its telecommunications regulatory system. Specifically, one must wonder whether Respondent's positions in this case are intentionally designed to cover the IFT's tracks after it unlawfully protected Telmex's dominant position in the Mexican telecommunications market at the expense of the weak upstart, Tele Fácil.

3. Resolving the "why," however, is not imperative for establishing Respondent's breaches of the NAFTA Chapter Eleven in this proceeding. What is critical are the facts. The facts are evident from the plain language of Resolution 381 and they cannot be obscured by

Respondent's ex post facto rationalizations or the selective (and often second-hand) recollections of Respondent's witnesses. Furthermore, these facts should not be obfuscated by Respondent's refusal to produce documents that should exist and that should have been produced – and that, if produced, would likely have exposed the IFT's bad faith.

4. Indeed, the principal facts surrounding Resolution 381 are undisputed. It is not disputed that, after several rounds of negotiations with Telmex, Tele Fácil filed a petition before the IFT on July 11, 2014, requesting that it decide the terms and conditions that the parties could not agree to so that the two parties could interconnect, as required by law. It is not disputed that Tele Fácil's request clarified that there were only two open issues: indirect interconnection and portability charges.

5. It is not disputed that, in the proceeding culminating with Resolution 381, Telmex asserted that the interconnection rate was not agreed to by the two parties. It is not disputed that, in Resolution 381, the IFT determined the indirect interconnection and portability charges issues in Tele Fácil's favor. It is not disputed that the IFT rejected Telmex's claim that the interconnection rates were not agreed to by the two parties. It is not disputed that the IFT ruled as follows: "[T]he Institute considers Telmex and Telnor's arguments to be inadmissible, given the fact that the interconnection rates were completely determined by Telmex and Telnor in the draft interconnection agreement sent to Tele Fácil on August 26, 2013, and which Tele Fácil had full knowledge of and consented to the same."[1]

6. It is not disputed that the IFT found that the parties must (1) interconnect their networks to satisfy the public interest and execute the interconnection terms, conditions and

[1] *Resolución mediante la cual el Pleno del Instituto Federal de Telecomunicaciones determina las condiciones de interconexión no convenidas entre Tele Fácil México, S.A. de C.V. y las empresas Teléfonos de México, S.A.B. de C.V., y Teléfonos del Noroeste, S.A. de C.V., P/IFT/261114/381* (Nov. 26, 2014) (hereinafter "Resolution 381"), at 13, **C-029.**

rates, as determined, within ten business days, (2) ensure that the terms and conditions ordered may be offered to other concessionaires who request them, and (3) record the Resolution in the Public Telecommunications Registry within ten business days. It is not disputed that the relevant language of the IFT's decision reads as follows:

> [T]he parties must interconnect their public telecommunications networks to provide local service, to allow the interoperability of the networks and telecommunications services in the same term; in order for the end users of one network to be able to connect and route public traffic to the users of the other and vice versa, or to use services provided by the other network, complying with the public interest as previously referred and in its case, to formalize the interconnection agreement pursuant to this Resolution, in order to satisfy the public interest as soon as possible.
>
> Additionally, and in order for the interconnection terms and conditions determined by the IFT in this Resolution to be offered in a non-discriminatory manner to other concessionaires who request them and that require similar interconnection services, capacities or functions, the Institute's Plenary deems convenient to make this Resolution available to them. For these purposes, this Resolution shall be recorded in the Public Telecommunications Registry kept by the Institute within the next 10 (ten) business days following its notification.
>
> The above, without prejudice to Tele Fácil, Telmex and Telnor formalizing the interconnection **terms, conditions and rates that are ordered in this Resolution** and for such effect to execute the corresponding agreement. In this regard, the concessionaires, jointly or individually, must submit the interconnection agreement for inscription in the Public Telecommunications Registry within the 30 (thirty) business days following its execution.[2]

7. Finally, it is not disputed that, in Resolution 381, the IFT ordered the parties to physically interconnect their networks and execute the resolved interconnection agreement within ten business days:

> **FIRST.** Within 10 (ten) business days following the date in which the notification of this Resolution is effective, Tele Fácil México, S.A. de C.V., and the companies Teléfonos de México, S.A.B. de C.V. and Teléfonos del Noroeste, S.A. de C.V. must interconnect their telecommunications networks and initiate the provision of the corresponding interconnection services. In that same term, such companies must execute the

[2] *Id.* at 15-16 (emphasis added).

> interconnection agreement of their telecommunications networks pursuant to the terms and conditions determined in the FIFTH Consideration section of this Resolution. Once the corresponding agreement has been executed, they must submit jointly or individually an original or certified copy of the agreement to the Federal Telecommunications Institute, within the 30 (thirty) business days following its execution, in order to register it in the Public Telecommunications Registry.[3]

8. These are the fundamental, undisputed facts of this case. This orderly and well-established process resulted in a complete interconnection agreement between the two parties. Even Mr. Sostenes Diaz Gonzalez, Respondent's key witness on the IFT's practice and procedure, agrees with Claimants' position about the intended result of the IFT's resolution of an interconnection dispute. In his statement, Mr. Diaz states:

> The conditions that have been agreed by the concessionaires and, where appropriate, those that have been determined by the IFT when resolving a disagreement, **will form the entire interconnection agreement.** That is, by issuing a resolution that resolves interconnection, it is expected that there are no outstanding elements to be resolved that impede the provision of services.[4]

9. Notwithstanding Mr. Diaz's understanding, the core of Respondent's defense to this straightforward, non-controversial, and imminently sensible regulatory process is to assert that, in Resolution 381, the IFT "did not decide the rates that should apply"[5] because "the IFT cannot make a determination with regards to terms that have been agreed by the operators."[6]

10. In other words, Respondent is taking the remarkable position that, in an interconnection proceeding, an IFT order has no prescriptive power except with respect to disagreed terms that are being disputed before the IFT. With respect to the agreed terms—that is, the terms and conditions freely negotiated and agreed to by the carriers—the parties are free to

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3 *Id.* at 16-17.
4 Declaration of Sostenes Diaz Gonzalez (hereinafter "Diaz Statement"), ¶ 43 (emphasis added).
5 Statement of Defense, ¶ 6.
6 *Id.* ¶ 67.

initiate repetitive and endless disagreement procedures before the IFT. In the words of Decree 77, those terms that were already agreed upon during negotiations are now "held harmless regarding the conditions that were not a matter of the Interconnection Resolution."[7]

11. Thus, according to Respondent's interpretation, after the IFT renders an order regarding an interconnection dispute, the parties are free to renege on the terms they had already agreed to and start a new interconnection disagreement, thereby repeating this cycle indefinitely. This is contrary to Mr. Diaz's own statement on the subject.[8] Indeed, common sense alone exposes Respondent's position as one that makes a mockery of the interconnection dispute resolution process and literally guarantees the perpetual dominance of a preponderant economic agent at the expense of a competitive sector and new entrants.

12. Claimants have made this point emphatically and repeatedly in their Statement of Claim and via the expert reports appended to it, but Respondent has completely failed to address this issue. In its Statement of Defense, Respondent has wholly ignored the implications of its position, just as it has ignored the ordinary meaning of the terms of Resolution 381. Instead, Respondent pushes forward with a post-hoc expedient, seeking to exonerate the IFT for its illegal reversal of Resolution 381.

13. That Respondent's rationalization is post-hoc—not contemplated by any of the participants at the time—is clear from the reactions of those participants to Resolution 381. At the time of Resolution 381, the IFT apparently had no idea that what Respondent now urges was

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[7] *Acuerdo mediante el cual el Pleno del Instituto Federal de Telecomunicaciones establece el alcance de la "Resolución mediante la cual el Pleno del Instituto Federal de Telecomunicaciones determina las condiciones de interconexión no convenidas entre Tele Fácil México, S.A. de C.V. y las empresas Teléfonos de México, S.A.B. de C.V., y Teléfonos del Noroeste, S.A. de C.V.,"* P/IFT/EXT/080415/77 (April 8, 2015) (hereinafter "Decree 77"), Fourth Decree, at 12 (emphasis added), **C-051**.

[8] *See supra* note 4 and accompanying text.

supposed to be the law. In Resolution 381, after emphasizing the need for the parties to interconnect in the public interest and make the Resolution public, the IFT required the parties to "formaliz[e] the interconnection terms, conditions and rates that are ordered through this Resolution and for such effect to execute the corresponding agreement."[9] How could the IFT possibly make such a determination if it had no authority to require interconnection on the basis of resolved terms and agreed terms?[10]

14. Similarly, Tele Fácil had no idea that this was supposedly the law. Immediately following Resolution 381, Tele Fácil executed an interconnection agreement with Nextel to ready itself for indirect interconnection with Telmex.[11] Additionally, as the IFT ordered, within ten business days of the IFT's decision, Tele Fácil presented to Telmex the complete interconnection agreement. There is no evidence whatsoever from Tele Fácil's post-Resolution conduct that reasonably could lead one to conclude that Tele Fácil considered the parties "held harmless" from the rate to which they had agreed.

15. Even Telmex clearly believed that the IFT had authority to order interconnection on the basis of disputed and undisputed terms, even though it was clearly unhappy with the outcome of Resolution 381. At least two interconnection agreements presented by Telmex for Tele Fácil's signature after Resolution 381 was issued included the rate of USD 0.00975, even though Telmex made a variety of other changes. Further, the very fact that it made multiple

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9 Resolution 381, at 16, **C-029**.

10 As expressed by Prof. Clara-Luz Álvarez in her Second Expert Opinion "[t]his decision in Decree 77 directly contravenes the order to execute an agreement within the term specified in Resolution 381. Had the IFT thought that Resolution 381 could only be enforced with respect to indirect interconnection and portability, then why did the IFT order the execution of the interconnection agreement? It makes no sense." Second Expert Opinion of Professor Clara-Luz Álvarez (hereinafter "Álvarez Second Report"), ¶ 41, **C-110**.

11 Statement of Claim, ¶¶ 104-107.

challenges before the IFT and the amparo courts to try to eliminate the rate originally agreed to is proof that it never considered itself "held harmless" for that rate after Resolution 381.

16. Respondent's position, however, cynically sets the stage for its argument that this dispute is not between U.S. investors and Mexico under the NAFTA, but rather between two commercial actors, Tele Fácil and Telmex.[12] But this view entirely discounts the IFT's role as the regulator of a heavily regulated sector. Respondent cannot simply ignore the IFT's constitutional responsibilities as a regulator in order to pretend that its conduct had no impact on Tele Fácil and its U.S. investors.

17. The IFT is not a "domestic court[] acting in the role of neutral and independent arbiter[] of the legal rights of litigants" as Respondent would now have this Tribunal believe.[13] Rather, the IFT is a regulator with exclusive power over the telecommunications sector, which includes the power to resolve interconnection disputes between operators, to act as the authority on competition and antitrust matters, and to sanction non-compliant operators.[14]

18. In Resolution 381, the IFT rejected Telmex's belated effort to argue that there was a disagreement on rates, expressly finding that the interconnection rate between the parties was mutually agreed to:

> [T]he interconnection rates were completely determined by Telmex and Telnor in the draft interconnection agreement sent to Tele Fácil on August 26, 2013, and which Tele Fácil had full knowledge of and consented the same.
>
> Consequently, Telmex and Telnor's argument in connection with an alleged disagreement on interconnection rates is dismissed, since the aforementioned rates were defined in the draft agreement for the provision

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12 *See, e.g.*, Statement of Defense, ¶ 267.

13 Statement of Defense, ¶ 268 (quoting from *Eli Lilly & Co. v. Government of Canada*, ICSID Case No. UNCT/14/2, Submission of the United States of America (Mar. 18, 2016), ¶ 29, **RL-002**).

14 *See* Statement of Defense, ¶¶ 32-42.

> of fixed local interconnection services and its exhibits, sent by Telmex and Telnor to Tele Fácil, and which are part of the evidence in this record . . . .[15]

19. Having exercised its power to make this determination and having ordered physical interconnection and execution of the agreement, the IFT had the sole responsibility to enforce that order. It did not. When it later clawed back the rights granted to Tele Fácil via Decree 77, the IFT compounded by magnitudes its failure to enforce Resolution 381 and inflicted fatal harm on Tele Fácil. The damage wrought by these actions is Respondent's responsibility, and Respondent's responsibility alone.

20. Respondent argues that "[t]he issuance of Decree 77 was a proper exercise of IFT's regulatory powers which it exercised in good faith to clarify the legal effect of Resolution 381, namely, that the IFT had not decided the interconnection rates between Telmex and Tele Fácil in the context of the dispute that had been submitted to it for resolution."[16] Again, the evidence shows otherwise, as it clearly demonstrates that the IFT acted duplicitously and mendaciously between December 2014 and April 8, 2015 (the date of Decree 77) with respect to Tele Fácil and its representatives.

21. On December 19, 2014, after expiration of the IFT's ten-day deadline, Tele Fácil formally requested the IFT to take action to enforce Resolution 381. The IFT never acted on that request. Tele Fácil, however, persevered, requesting a meeting with the Compliance Unit of the IFT, which eventually took place on January 12, 2015. As recounted in Claimants' Statement of Claim and their accompanying witness statements, during this meeting Mr. Sanchez Henkel, the Head of the Compliance Unit, expressed his view that Resolution 381 was perfectly clear and that the parties should have executed the interconnection agreement and physically

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15 Resolution 381, at 13, **C-029**.

16 Statement of Defense, ¶ 7.

interconnected.[17] Mr. Sanchez Henkel asked Tele Fácil to submit an enforcement request directly to his Unit, and warned that he would likely receive resistance from other areas of the IFT that were cautious about acting against Telmex—particularly the Legal Unit.

22. Tele Fácil submitted a second compliance complaint and enforcement request on January 28, 2015.[18] In the "Request" section of the petition, the third item requested by Tele Fácil's counsel was as follows:

> The Compliance Department is asked to undertake the actions necessary for Telmex/Telnor to comply with the Resolution, i.e., immediately sign the agreements that my client hereby provides once again, duly signed and the terms of which are in accordance with the Interconnection Resolution (Annex 15) and to implement the indirect interconnection under the terms requested by Tele Fácil (Annex 11).[19]

Like its first request for compliance, this request was met with silence.

23. Unbeknownst to Tele Fácil, on February 10, 2018,[20] the Compliance Unit submitted to the Legal Unit a request for a "confirmation of criteria," essentially seeking an opinion of the Legal Unit concerning Resolution 381. Putting aside for the moment the unique and inappropriate invocation of this procedure, the request itself is remarkable, and states as follows:

> I submit this to see if the Compliance Unit, based on the complaint of Tele Fácil, can require Telmex/Telnor compliance with the Resolution, in the terms requested by the complainant, that is, to require said concessionaires both to comply with the interconnection of their networks and to execute the respective interconnection agreement, within the terms contained in the resolution.

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17 Statement of Claim, ¶¶ 194-195.

18 *Denuncia por incumplimiento a la Resolución de Desacuerdo de Interconexión por Telmex/Telnor presentada por Tele Fácil México ante la Unidad de Cumplimiento del Instituto Federal de Telecomunicaciones* (Notice of Breach by Telmex/Telnor to Interconnection Resolution submitted by Tele Fácil México before the Compliance Unit of the Federal Telecommunications Institute) (January 28, 2015) (hereinafter "Second Enforcement Request"), **C-038.**

19 *Id.* at 8.

20 Respondent erroneously puts this date at January 10, 2015. Statement of Defense, ¶104.

> Therefore, this Legal Unit is requested to confirm the legal criterion, consisting in the authority of the Institute's Plenary to require concessionaires that submitted a disagreement of interconnection to the Institute, includes not only the interconnection but also the execution of the corresponding agreement, in the form and terms determined in the resolution of disputes submitted for the Institute's consideration.[21]

24. In other words, Tele Fácil's request was somehow transformed by the IFT into a request to determine whether the IFT itself has the authority to require physical interconnection and execute the interconnection agreement according to the terms of the order. The very raising of this question undermined the unambiguous core order of Resolution 381:

> **FIRST.** Within 10 (ten) business days following the date in which the notification of this Resolution is effective, Tele Fácil México, S.A. de C.V., and the companies Teléfonos de México, S.A.B. de C.V. and Teléfonos del Noroeste, S.A. de C.V. must interconnect their telecommunications networks and initiate the provision of the corresponding interconnection services. In that same term, such companies must execute the interconnection agreement of their telecommunications networks pursuant to the terms and conditions determined in the FIFTH Consideration section of this Resolution. Once the corresponding agreement has been executed, they must submit jointly or individually an original or certified copy of the agreement to the Federal Telecommunications Institute, within the 30 (thirty) business days following its execution, in order to register it in the Public Telecommunications Registry.[22]

25. If the answer to this "confirmation of criteria" was "no, the IFT did not have the authority to execute the interconnection agreement on the terms established in Resolution 381" – as it was in the event – it meant that Tele Fácil walked away from Resolution 381 with an interconnection agreement consisting of only two terms: indirect interconnection and no portability charges. Consequently, this was no "confirmation of criteria"; it was an improper

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[21] *Confirmación de Criterio presentada por la Unidad de Cumplimiento a la Unidad de Asuntos Jurídicos del Instituto Federal de Telecomunicaciones* (Confirmation of Criteria submitted by the Compliance Unit to the Legal Unit of the Federal Telecommunications Institute) (February 10, 2015) (hereinafter "Compliance Unit Confirmation of Criteria"), at 2-3, **C-040** (emphasis added).

[22] Resolution 381, at 16-17, **C-029**.

appellate process[23] that transformed the core of the Resolution. As Mr. Sanchez Hankel admitted to Tele Fácil's representatives just a month earlier, Resolution 381 was perfectly clear and the parties should have executed the interconnection agreement and physically interconnected. The Compliance Unit should have used its authority to ensure that was done. Instead, it abdicated this responsibility, which is why Dr. Álvarez characterized this step as "highly unusual" and amounting to "willful negligence" on the part of the Compliance Unit.[24]

26. With respect to the propriety of using this process in this context, Respondent asserts that "it is not irregular or illegal for the IFT to issue criteria confirmations in relation to resolutions issued by the *Pleno*."[25] In support of this position, it cites the witness statement of Mr. David Gorra, claiming Mr. Gorra identified various instances where the IFT has clarified resolutions through criteria confirmations.

27. Mr. Gorra may have identified instances where the IFT has "clarified" resolutions, however, as explained in Section III.B.2.c. below, he did not point to any confirmation of criteria that supports his position that Decree 77 was a lawful exercise of the confirmation of criteria process.

28. The Compliance Unit's request for "confirmation of criteria" was never disclosed to Tele Fácil and Tele Fácil only became aware of it after Decree 77 was issued. This is significant because on March 5, 2015, the IFT Plenary met with representatives of Tele Fácil, at Tele Fácil's request, to discuss compliance with the IFT's order in Resolution 381. Claimants have exhaustively described this meeting based on the stenographic record in paragraphs 201-209 of its Statement of Claim. For present purposes, it suffices to point out that, while Tele Fácil

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[23] As Claimants' Expert Witness, Gerardo Soria, notes, "administrative authorities are not allowed to revert their own resolutions." Expert Opinion of Gerardo Soria (hereinafter "Soria First Report"), ¶ 104, n. 86, **C-009**.

[24] Expert Opinion of Professor Clara Luz Álvarez (hereinafter "Álvarez First Report"), ¶ 119, **C-008**.

[25] Statement of Defense, ¶ 106.

saw its meeting with the Plenary as an opportunity to force Telmex's compliance with Resolution 381, it had no idea that the IFT had already put into play a "confirmation of criteria" ―ostensibly on the basis of Tele Fácil's request for compliance―that had the potential to wholly undermine Resolution 381. It is remarkable that the IFT never informed Tele Fácil of this vitally important development, and because the IFT hid this critical fact, Tele Fácil had no meaningful opportunity to address it at the March 5 meeting or otherwise.

29. Mr. Carlos Bello, counsel for Tele Fácil, recalled that the notion that the IFT "needed guidance on the meaning of Resolution 381 was highly unusual and made no sense to me."[26] The IFT's failure to disclose its already-hatched plan denied Tele Fácil its due process rights and exposes as disingenuous Respondent's claim that "[t]he transcript of the meeting with the *Pleno* makes it clear that the IFT sought to clarify the scope of Resolution 381 and that Tele Fácil was fully aware this process that culminated with the issuance of Decree 77."[27]

30. In fact, the critical "process" was hidden from Tele Fácil. Tele Fácil's lack of understanding of what was really happening in this meeting is apparent from Mr. Bello's Witness Statement:

> At the end, we left the meeting thinking we had the support of all of the Commissioners, and that they would act to enforce Resolution 381. There was no indication they would modify in any way Resolution 381. There was no indication that Tele Fácil needed to pursue any further action to try to enforce Resolution 381. Even at the end of the meeting, the Chairman walked us to the elevator where he said that they would act in the most expeditious and serious manner, understanding the problem, and that prompt interconnection was the most important issue for competitive markets to flourish in Mexico so Resolution 381 would be enforced.[28]

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26 Witness Statement of Carlos Bello (hereinafter "Bello Statement"), ¶ 111, **C-004**.
27 Statement of Defense, ¶ 119.
28 Bello Statement, ¶ 115, **C-004**.

31. All that the IFT disclosed to Tele Fácil in the March 5 meeting was an ambiguous statement that "there is another document from Telmex where they ask us to confirm the criteria pertaining to the provisions of this agreement."[29] In fact, while Tele Fácil was never provided a copy of Telmex's filing until long after Decree 77 was adopted, we now know that Telmex was asking whether the new telecommunications reform laws that came into effect on July 14, 2014, should displace the rate term established in Resolution 381.[30] Telmex did not challenge the scope of Resolution 381 – that was left to the IFT, again without Tele Fácil's knowledge. Thus, Telmex's request for a confirmation of criteria, submitted on February 18, 2015, followed on the heels of the Compliance Unit's February 10, 2015 request and set the stage for Decree 77.

32. Respondent asserts that Decree 77 "did not modify Resolution 381 in any way: it simply confirmed that the resolution did not establish the rates that had to be included in the interconnection agreement, given that these were not a part of the interconnection dispute that Tele Fácil presented on 11 July 2014."[31] Respondent's assertion that Decree 77 "did not modify

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[29] *Versión Estenográfica de audio de Entrevista del Pleno No. 2015-03-05-1239-SP-18 con Tele Fácil México, S.A. de C.V.*, Transcript of Audio Recording of Plenary Meeting No. 2015-03-05-1239-SP-18 with Tele Fácil, (March 5, 2015), (hereinafter "Transcript of March 5 Plenary Meeting"), at 6, **C-043**.

[30] Similarly, Mr. Sánchez Henkel's statement during the March 5 Plenary meeting that he had asked the Legal Unit a question about whether interconnection could be ordered without a signed interconnection agreement also did not provide Tele Fácil with notice that the Compliance Unit had initiated a confirmation of criteria to the Legal Unit. *See* Transcript of March 5 Plenary Meeting, at 11, **C-043** ("This is exactly what we asked the Legal Unit to advise on, because the order to interconnect and execute the agreement is provided only in one resolution point and for the same period. So, for the purpose of adjusting to what is expressly ordered by the Plenary, we would need to have absolute accuracy regarding the scope for us to be able to require the interconnection and execution of the agreement or both issues separately. Then the subject and the need to determine the scope have been addressed in an adequate manner and once defined then we will act immediately."). Mr. Sánchez Henkel's statement was made immediately after the Mr. Pelaez answered the question, noting that "we have never had a case of ordering the interconnection prior to an agreement, there has always been an agreement together with the interconnection." *Id.* Thus, having never been informed that a confirmation of criteria had been requested by the Compliance Unit, having heard Mr. Pelaez's discussion of the clear history of requiring signed interconnection agreements, Tele Fácil had no reason to understand that the Compliance Unit expected further guidance from the Legal Unit before acting to enforce Resolution 381 or that the Legal Unit would resolve the Compliance Unit's confirmation of criteria in a manner that directly contradicted its long-standing requirement that physical interconnection occurs after the signing of a fully-completed interconnection agreement.

[31] Statement of Defense, ¶ 127 (emphasis in original).

Resolution 381 in any way" is astounding. If that was the case, why did Decree 77 "confirm that the resolution did not establish the rates that had to be included in the interconnection agreement," when in fact Resolution 381 determined that "the Institute considers Telmex and Telnor's arguments to be inadmissible, given the fact that the interconnection rates were completely determined by Telmex and Telnor in the draft interconnection agreement sent to Tele Fácil on August 26, 2013, and which Tele Fácil had full knowledge of and consented the same"?[32] Certainly, Decree 77 effectively reversed this finding.

33. If Decree 77 did not modify Resolution 381 in any way, why did it determine that the interconnection rates "remain[ed] untouched" and were deemed to be "held harmless," when Resolution 381 ruled unequivocally that "the interconnection rates were completely determined" and that "the only interconnection conditions not agreed upon by the parties in the process of negotiating to execute the corresponding interconnection agreement" were with respect to indirect interconnection and portability charges?

34. If Decree 77 did not modify Resolution 381 in any way, why did it impose no time limit for the critical step of executing their interconnection agreement, when Resolution 381 ordered the disputing parties to interconnect their networks and execute an interconnection agreement within ten business days?

35. Respondent offers no answers to these fundamental questions. Its position is to ignore the language of Resolution 381 and push forward with the party line that nothing was changed by the post-resolution steps taken by the IFT. In fact, everything changed, at least for Tele Fácil and other potential new entrants into the Mexican telecommunications sector. By the issuing Decree 77, the IFT transformed its interconnection dispute process from the one-stop

[32] Resolution 381, at 13-14, **C-029**.

shop it was intended to be to a process that favored Telmex by dragging on endlessly without resulting in actual interconnection. This is what happened here, and these are the core issues presented by this case and that give rise to Claimants' claims for damages.

36. Respondent's argue, based solely on the fact that Claimants' brought amparo actions against Decree 77 and Resolution 127 before Mexico's Specialized Telecommunications Courts, that Claimants' have no right to claim a breach of Chapter Eleven on the basis of the IFT's misconduct.[33] As demonstrated below, Respondent's position is unfounded; it is contrary to international law principles of State responsibility, and would seek to impose, contrary to the object and purpose of Chapter Eleven, an exhaustion requirement on Claimants.[34]

37. As set forth in its Statement of Claim and herein, Tele Fácil has, however, made a distinct claim for denial of justice under Article 1105 arising from the acts and omissions of those Specialized Courts. Despite the seriousness of Tele Fácil's claim, Respondent's defense of its judiciary is woefully deficient. Respondent resorts to general descriptions of the Court's rulings and distracts with irrelevant explanations rather than addressing the harsh facts at each procedural step that support Tele Fácil's claim.

38. Respondent is in a bind, because, as will be demonstrated in detail, these courts failed to provide any substantive treatment under Mexican law of the facts and legal issues presented by Claimants' petitions. They did as Respondent has done in its Statement of Defense: wholly ignore the significant legal and policy ramifications of Decree 77 and Resolution 127. Unfortunately, these decisions are illustrative of continued systemic deficiencies in the

[33] Statement of Defense, ¶¶ 302-303, 305.
[34] *See infra* Section III.A.3.

Specialized Telecommunication Courts that are addressed and identified by Claimants' expert, Pablo Márquez.[35]

39. Tele Fácil's right to meaningful judicial review was further thwarted in its attempted appeal of the District Court's decision. As discussed below, the Appellate Court squashed Tele Fácil's timely filed appeal on the basis of an unfounded procedural irregularity – indeed, the Court ignored the timely filed appeal, memorialized in a ruling that admitted the amparo appeal, to ultimately reject the appeal as untimely filed. Respondent's defense of this arbitrary Appellate Court act is wholly divorced from the facts, particularly in its representation to the Tribunal that Tele Fácil had two windows of time in which to present its appeal. As described in this Reply, that defense is nothing but a red herring that is irrelevant to the facts before the Tribunal.

40. Finally, Respondent has failed to provide any serious rebuttal to Claimants' damages claims. It asserts, in a noticeable inconsistency with its own damages expert, that the DCF methodology is not appropriate here because the absence of a "track record" forces an expert to "speculate about important variables such as price, the demand for services, costs, capital expenditures, etc."[36] However, it fails to address Claimant's supported position that no speculation is necessary because robust data exists either from the track record of Claimants' other businesses in the United States or actual marketplace data.

41. More generally, where Claimants have presented a comprehensive damages case supported by detailed analysis and bolstered by the opinions of two well-respected economists, Claimants have presented a scattershot defense that includes the opinion of an engineer –not a professional economist—in a firm that is hardly independent given its substantial work over the

[35] Expert Report of Dr. Pablo Márquez (hereinafer "Márquez Reply Report"), ¶¶ 81-86, **C-114**.
[36] Statement of Defense, ¶ 346.

years for the IFT. Its expert report includes inaccurate statements of law, unsupported assertions, unfounded assumptions and speculative alternative calculations of damages that are riddled with obvious errors.

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42. The remainder of the Reply is structured as follows:

a) Section II corrects the Government's mischaracterization of the key facts;

b) Section III addresses Respondent's purported legal objections;

c) Section IV confirms Claimants' right to damages and compensation, and the amount that is due;

d) Section V sets out Claimants' request for relief

43. This Reply is accompanied by: one binder of factual exhibits, one binder of legal authorities; four statements of fact witnesses; the Expert Reply Opinion of Clara-Luz Álvarez; the Expert Reply Report of Christian M. Dippon, Ph.D.; the Expert Reply Report of Elisa Vera Mariscal Medina, Ph.D.; the Expert Report of Dr Pablo Márquez; and the Expert Reply Opinion of Gerardo Soria.

II. IN ADDRESSING RESOLUTION 381, DECREE 77, AND RESOLUTION 127 RESPONDENT DISTORTS AND IGNORES KEY FACTS

A. Respondent Fails to Adduce Facts Sufficient to Rebut Claimants' Showing That Resolution 381 Definitively Established Tele Fácil's Rights

44. As Claimants detailed in their Statement of Claim, on November 26, 2014, the IFT Plenary resolved a dispute regarding interconnection between Telmex and Tele Fácil in a unanimous ruling, resolving each of the disagreements in Tele Fácil's favor.[37] Resolution 381 reached four key conclusions: (1) it rejected Telmex's arguments that negotiations between Telmex and Tele Fácil were not in compliance with time lines required for such negotiations and that, as a result, the IFT was required to dismiss Tele Fácil's request to resolve the disputes;[38] (2) it rejected Telmex's terms on portability charges;[39] (3) it determined that Tele Fácil was entitled to indirectly interconnect with Telmex;[40] and (4) it held that the rates for interconnection were already agreed to by the parties.[41]

45. Despite its efforts to muddy the water and create confusion, an examination of Respondent's Statement of Defense and its limited supporting witness statements reveals that Respondent has actually offered no evidence refuting Claimant's interpretation of Resolution 381. And, indeed, the witness for the Respondent most familiar with, and in charge of, the interconnection regulations at the IFT actually agrees with Claimants on two of the most central conclusions, namely that, at the conclusion of the interconnection disagreement process, the expectation is that no issues remain unresolved, and that the IFT reviewed the evidence and

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37 Resolution 381, at 10-17, **C-029.**
38 *Id.* at 10-12.
39 *Id.* at 14-16.
40 *Id.*
41 *Id.* at 12-14.

concluded in Resolution 381 that "an agreement existed between the parties on the subject of interconnection rates."[42]

46. Unable to successfully attack Claimants' interpretation of Resolution 381, but unwilling to concede its obvious implications, Respondent instead relies on a variety of defensive tactics. For example, Respondent repeatedly ignores the most important evidence in the record. With regard to other evidence, it distorts the evidence to try to create the false perception that there are inconsistencies in the statements offered by Claimants' witnesses. Respondent also creates ex post facto arguments that were either never made by Telmex or expressly rejected by the IFT in Resolution 381. In sum, and as explained more fully below, Respondent fails to muster any evidence that refutes the plain language and clear meaning of Resolution 381.

1. Claimants' Interpretation of Resolution 381 Remains Unrebutted and Respondent's Key Factual Witness Agrees with Claimants

47. When it issued Resolution 381, the IFT rejected Telmex's claim that the parties had a disagreement regarding interconnection rates that the IFT should resolve. The IFT found unequivocally that the interconnection rates were fully established because Telmex offered the rates and "Tele Fácil had full knowledge of and consented [to the rates]."[43] According to the IFT, Telmex was barred from creating a dispute about the rates, because "the interconnection rates were completely determined by Telmex and Telnor in the draft interconnection agreement sent to Tele Fácil on August 26, 2013, and which Tele Fácil had full knowledge of and consented to the same."[44] The IFT made clear that the rates "were defined in the draft agreement for the

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42 *See* Diaz Declaration, ¶¶ 41-43, and 69.

43 Resolution 381, at 13-14, **C-029** (emphasis added); Witness Statement of Migual Sacasa (hereinafter "Sacasa First Statement"), ¶ 63, **C-003**; Bello Statement, ¶ 69, **C-004**.

44 Resolution 381, at 13-14, **C-029**.

provision of fixed local interconnection services and its exhibits, sent by Telmex and Telnor to Tele Fácil, and which are part of the evidence in this record. . . ."[45] Accordingly, there was nothing for the IFT to evaluate on the issue of rates, because "there is no evidence that Telmex and Telnor expressed their disagreement with the interconnection rates."[46]

48. The IFT directed the parties to formalize an interconnection agreement that included, inter alia, the "rates that are ordered through this Resolution . . . ."[47]

49. The IFT concluded Resolution 381 with the following operative clauses, ordering the parties to physically interconnect their networks, and to execute the interconnection agreement as resolved:

> FIRST. Within 10 (ten) business days following the date in which the notification of this Resolution is effective, Tele Fácil México, S.A. de C.V., and the companies Teléfonos de México, S.A.B. de C.V. and Teléfonos del Noroeste, S.A. de C.V. must interconnect their telecommunications networks and initiate the provision of the corresponding interconnection services. In that same term, such companies must execute the interconnection agreement of their telecommunications networks pursuant to the terms and conditions determined in the FIFTH Consideration section of this Resolution. Once the corresponding agreement has been executed, they must submit jointly or individually an original or certified copy of the agreement to the Federal Telecommunications Institute, within the 30 (thirty) business days following its execution, in order to register it in the Public Telecommunications Registry.[48]

50. Thus, once Resolution 381 was issued, all of the necessary terms for interconnection were fully established and the parties were obligated within ten business days to memorialize those terms, including the applicable rate, and execute an interconnection agreement. As the IFT itself has stated several times in resolving interconnection disputes, "[t]he interconnection agreement to be executed by the parties must allow the provision of

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45 *Id*. at 14.
46 *Id.* at. 13-14 (emphasis added).
47 *Id.* at 16.
48 *Id.* at 17 (First Resolution).

interconnection services between the telecommunications networks without having any pending elements to be agreed for the duration of the agreement's effective term" and "once the IFT has issued its resolution there are no pending elements to be determined that would prevent the provision of the services."[49] The IFT has adhered to this view of the interconnection disagreement procedure on every occasion except one: Tele Fácil's.[50]

51. As explained in more detail below, Respondent has not refuted and, indeed, its own witness agrees (as demonstrated below), that once the IFT issued Resolution 381, all parties understood that there was nothing left for the IFT to do except to ensure that Tele Fácil and Telmex executed the interconnection agreement containing the agreed-upon rates, eliminating portability charges, and permitting indirect interconnection. The IFT had nothing left to evaluate on the issue of rates, because it had reviewed the evidence and made a ruling that the rates were never in dispute.

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[49] *See, e.g.*, *Resolución P/IFT/251115/543 mediante la cual el Pleno del Instituto Federal de Telecomunicaciones determina las condiciones de interconexión no convenidas entre Mega Cable, S.A. de C.V. y AT&T Digital, S. de R.L. de C.V.* (Resolution P/IFT/251115/543 through which the Plenary of the Federal Telecommunications Institute determines the conditions of interconnection not agreed between Mega Cable, S.A. de C.V. and AT&T Digital, S. de R.L. de C.V.) (November 25, 2015), **C-100;** *Resolución P/IFT/120815/356 mediante la cual el Pleno del Instituto Federal de Telecomunicaciones determina las condiciones de interconexión no convenidas entre Teléfonos de México, S.A.B. de C.V. e IP Matrix, S.A. de C.V.* (Resolution P/IFT/120815/356 through which the Plenary of the Federal Telecommunications Institute determines the conditions of interconnection not agreed between Teléfonos de México, S.A.B. de C.V. and IP Matrix, S.A. de C.V.) (August 12, 2015), **C-101 (**emphasis added).

[50] Indeed, as noted in the Statement of Claim, after issuing Decree 77, the IFT began including in future orders a statement providing that:

> "[t]he interconnection agreement to be executed by the parties must allow the provision of interconnection services between the telecommunications networks without having any pending elements to be agreed for the duration of the agreement's effective term; likewise, **the resolution that the IFT issues to resolve conditions that have not been agreed by the parties shall operate in the same manner, this, in order that once the IFT has issued its resolution there are no pending elements to be determined that would prevent the provision of the services.**"[50]

Statement of Claim, ¶¶ 103, 581.

52. Strikingly, Respondent's primary factual witnesses on interconnection issues, Sostenes Diaz Gonzalez, agrees with Claimants' interpretation of the key principles of Resolution 381. Mr. Diaz served as the General Director of Regulation of Interconnection and Resale of Telecommunications Services until, on the heels of submitting his witness statement in this case, he was appointed to the position of Commissioner of the IFT, replacing Commissioner Adriana Labardini (a strong critic of Decree 77).[51]

53. As noted, Mr. Diaz and Tele Fácil agree on the core issues regarding the proper understanding and scope of Resolution 381. First, both agree that the interconnection process in Mexico, both before and after the reforms, has as a central tenant the principle of freedom of contract. As Claimants expressed in the very first paragraph of their Statement of Claim:

> There are certain core principles of Mexican telecommunications law that predominate over others, and that are critical to an open, fair and competitive telecommunications sector. These include the principle of freedom of contract, whereby telecommunications carriers can agree between themselves on the terms by which they will interconnect their networks.[52]

54. Mr. Diaz agrees:

> The LFTR, same as the LFT, favours the parties' will…. This is the reason why the actions of the IFT under article 129 of the LFTR – and in the past, under article 42 of the LFT – are limited to the resolution of those conditions that the concessionaires were unable to agree upon. The **IFT may not pronounce on those conditions that the concessionaires have agreed upon, under the principle of the will of the parties or "freedom of contract."**[53]

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51 *Comunicado de Prensa No. 35/2018 emitido por el Instituto Federal de Telecomunicaciones, El Senado de la República Ratifica como Comisionado del IFT a Sóstenes Díaz González* (Press Release 35/2018 issued by the Federal Telecommunications Institute, "Senate Ratifies Sóstenes Díaz González as IFT Commissioner") (April 25, 2018), **C-115.**

52 Statement of Claim, ¶ 1.

53 Diaz Declaration, ¶¶ 41-42 (emphasis added).

55. Second, both agree that, once the parties have agreed to rates, terms, and conditions during the interconnection negotiations, the IFT must defer to the will of the parties, unless the agreement is unlawful. As Mr. Diaz states, "[c]oncessionaires may sign the corresponding agreement in the terms they may agree, provided that they comply with the applicable legal and regulatory framework."[54]

56. Third, both agree that once the IFT resolves any disputed terms, the IFT's resolution, together with the terms already agreed to by the parties during negotiations, form the entire interconnection agreement. As Claimants described, "Under Mexican telecommunications law, the regulator is empowered to resolve any outstanding terms and to order the carriers, among other things, to execute a complete and final interconnection agreement based on the terms previously agreed by the parties and disputed terms resolved by the regulator."[55]

57. Claimant's expert, Gerardo Soria, put it this way:

> This posture [in Decree 77] clearly contravenes the purpose of the interconnection disagreement procedure stated in Article 42, which is meant to settle whatever differences the carriers could not settle themselves, the rest of the conditions and clauses being considered final. Had they not been final, logic dictates that the parties would have submitted them along with the other disagreed conditions so the IFT would settle them as well…. Moreover, if the IFT had not found evidence of a final agreement of the rest of the conditions, it was its duty to resolve all the disputed terms and conditions in Resolution 381.[56]

58. While Dr. Clara Luz Álvarez states that:

> [T]he long-standing public policy in Mexico [] recognizes that when the telecommunications regulator decides an interconnection dispute, it is mandating the final terms and conditions. Such final terms and conditions are comprised of those which have been freely agreed by the parties and those determined by the specific decisions made by the IFT.[57]

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54 *Id.* ¶ 42.
55 Statement of Claim, ¶ 353.
56 Soria First Report, ¶ 119, **C-009**.
57 Álvarez Second Report, ¶ 19, **C-110.**

59. Mr. Diaz agrees with the conclusion reached by Claimants and Claimants' experts:

> The conditions that the concessionaires have agreed upon and, when applicable, those conditions determined by the IFT upon resolution of a disagreement, will **amount to the full interconnection agreement**. This is, it is expected that upon issuance of a resolution that resolves an interconnection disagreement, **no more items pending resolution shall be present** which prevent the provision of the services.[58]

60. Fourth, both agree that in the specific case of the Tele Fácil-Telmex dispute, the IFT examined the evidence and made a specific finding that the rates had been agreed upon during the course of negotiations. As Claimants have explained, the IFT concluded that "the interconnection rates were completely determined by Telmex and Telnor" and that Tele Fácil had "full knowledge and consented" to those rates.[59] Accordingly, the IFT dismissed Telmex's argument that the rates had not been established.[60]

61. Mr. Diaz explains the situation well and acknowledges that the IFT made an explicit finding that "an agreement existed between the parties on the subject of interconnection rates":

> In respect of this dispute, Telmex states that no disagreement existed in terms of indirect interconnection and numeric portability charges. However, a disagreement was present in terms of interconnection rates. Therefore, one of the first steps of analysis consisted of a review of the evidence submitted by the parties to verify if a disagreement on the subject of rates actually existed. It is within this context that the IFT determined that Telmex, having offered certain rates, and not having stated its disagreement to Tele Fácil, **an agreement existed between the parties on the subject of interconnection rates** and, therefore, those rates should not be determined by the Institute. In other words, the Institute at all times acted under the hypothesis that the remaining conditions of the agreement were

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58 Diaz Declaration, ¶ 43 (emphasis added).
59 Resolution 381, at 13-14, **C-029**.
60 *Id.* at 14 (emphasis in original).

> freely negotiated between Telmex and Tele Fácil, so it deemed that no other item was matter in dispute in the proceeding initiated by Tele Fácil.[61]

62. Thus, based on the sworn testimony of Respondent's witness – the very individual charged with overseeing the regulation of the interconnection process for the IFT – once the IFT determined that "an agreement existed between the parties on the subject of interconnection rates,"[62] the "IFT may not pronounce on those conditions that the concessionaires have agreed upon, under the principle of the will of the parties or 'freedom of contract.'"[63]

63. Despite this critical and conclusive concession, the Respondent's Statement of Claim simply ignores it. Rather than acknowledging that Decree 77 is fundamentally at odds with this inescapable conclusion, Respondent instead attempts to excuse the IFT's conduct by ignoring inconvenient facts and offering a host of post-facto arguments and patently unreasonable legal interpretations.

64. Finally, Claimants indicated in their Statement of Claim that "the IFT's discriminatory treatment of Tele Fácil is also apparent when comparing the IFT's complete non-action to enforce Resolution 381 with the IFT's swift actions to enforce and follow-up on Decree 77." Respondent's discussion in its Statement of Defense of the enforcement actions taken by the IFT, which includes a description of several verification visits, and the sanction imposed by the IFT on Tele Fácil – all took place after Decree 77 was issued. Thus, Respondent itself acknowledges that the IFT did nothing to enforce Resolution 381.

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61 Diaz Declaration, ¶ 69 (emphasis added).
62 *Id.*
63 *Id.* ¶ 42.

2. Respondent's Ex Post Facto Attacks on Resolution 381 Ignore Inconvenient Facts or Make Assertions Already Rejected by the IFT

65. One of the more surprising and, frankly, confusing aspects of Respondent's Statement of Defense and the expert report of Mr. Buj is its attempt to resurrect previously rejected arguments, and create new arguments, regarding the timeline of the negotiations. Respondent and its expert assert that Tele Fácil waited too long to accept the rate offered by Telmex and that, as a result, that offer expired.[64] This line of attack is meritless for three distinct reasons. First, Mr. Buj's analysis entirely ignores the fact that Telmex renewed its offer on the eve of Tele Fácil initiating the interconnection dispute procedure and that Telmex did so with full knowledge of the reforms. Second, the same line of argument that Mr. Buj makes, and that Respondent attempts to leverage as a defense now, were encompassed in, and rejected by, the IFT in Resolution 381. Third, Mr. Buj misunderstands the legal nature of an interconnection dispute resolution and the role of civil and administrative law in that process.

a. Mr. Buj's Effort to Assert that Telmex's Offer Had Expired Before Tele Fácil Accepted It Ignores Substantial Evidence

66. In his expert report, Mr. Buj asserts that "when Tele Fácil tried to accept the First Agreement Proposal of Telmex" 11 months had elapsed.[65] According to Mr. Buj, this period of time was "clearly excessive under any point of view" and that "Telmex was no longer bound by this offer."[66] According to Mr. Buj, the period of time to accept Telmex's original offer was either 3 days or, alternatively, 60 days pursuant to Article 42 of the LFT.[67]

67. To make this argument, Mr. Buj simply ignores the fact that Telmex renewed its offer in June 2014. As evidenced by the witness statements of Mr. Bello and Mr. Sacasa

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64 Statement of Defense, ¶ 85; Expert Report by Rodrigo Buj Garcia (hereinafter "Buj Report"), ¶ 30.
65 *Id.* ¶ 29.
66 *Id.*
67 *Id.* ¶¶ 30-31.

submitted on behalf of the Claimants, because an extended period of time had lapsed since Tele Fácil received Telmex's original offer and various reforms had occurred, Tele Fácil inquired of Telmex whether its original offer remained available.[68] Telmex confirmed that it remained available and unchanged.[69]

68. Respondent relies on a document summarizing the status of interconnection negotiations prepared by Miguel Sacasa.[70] Respondent represents to this Tribunal that this document "paints a different picture" of the events provided by Mr. Bello in his witness statement.[71] But, Respondent is either confused or seeking to mislead this Tribunal.

69. In his witness statement, Miguel Sacasa described a series of meetings with Telmex to try to negotiate on the issues of number portability and indirect interconnection.[72] He recalled three different meetings, followed by a final meeting with Mr. Gallaga, after Telmex had been declared a preponderant economic agent.[73] The invoices from Mr. Bello's law firm, which were produced to Respondent, reveal that Tele Fácil attended meetings with Telmex on both May 6, 2014, and then again on June 27, 2014.[74] Thus, it is readily apparent that Mr. Sacasa's memorandum of May 9, 2014, which Respondent relies upon, necessarily summarizes the meeting that occurred on May 6, 2014.

70. On the other hand, in his witness statement, Carlos Bello described a meeting with Mr. Gallaga in June 2014 in which he and Mr. Sacasa "went back again to Telmex to meet with Mr. Gallaga and confirm whether Telmex's offer was still standing or if there had been any

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68 Sacasa First Statement, ¶¶ 48-51, **C-003**; Bello Statement, ¶¶ 59-60, **C-004**.
69 *Id.*
70 Statement of Defense, ¶ 51 (citing R-001).
71 *Id.*
72 Sacasa First Statement, ¶¶ 48-51, **C-003**.
73 *Id*. ¶ 49.
74 *See* **C-130** (Claimant0004465-66) (BGBG invoice for May 2014); **C-131** (Claimant0004467-68) (BGBG invoice for June 2014).

changes. Mr. Gallaga stated that the new rules were not at all relevant to Telmex's offer and that Tele Fácil had to execute the contract with Telmex as it had been originally offered."[75]

71. Thus, Mr. Bello's witness statement describing Telmex's renewal of its offer focuses on the "final meeting" in June 2014 with Mr. Gallaga, which his billing confirms occurred on June 27, 2014.[76] Thus, contrary to Respondent's representation, Mr. Sacasa's memorandum does not "paint a different picture" of the events that occurred in the June 2014 meeting, but rather describes an entirely different meeting (i.e., the one that occurred in May 2014).

72. Indeed, what is striking about both Mr. Bello's and Mr. Sacasa's witness statements is the clarity and consistency of their recollection that, in the June 2014 meeting, Mr. Gallaga stated that the changes in law made no difference to Telmex because Telmex planned to challenge all of the IFT's determinations regarding its status as a preponderant economic agent.[77] Respondent has offered no rebuttal to this evidence. Further, it is undisputed that the amendment to the Mexican Constitution occurred in June 2013[78] and that Telmex's declaration as a Preponderant Economic Agent occurred in March 2014.[79] Finally, Respondent acknowledges, as it must, that the "fact that the President of Mexico sent a draft bill to Congress (24 March 2014) [and] that the legislators debated its contents (from March to June 2014) … was well-known

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75 Bello Statement, ¶ 58, **C-004**.

76 *Id.*

77 Sacasa First Statement, ¶ 50, **C-003**; Bello Statement, ¶ 58-60, **C-004**.

78 *Decreto por el que se reforman y adicionan diversas disposiciones de la Constitución Política de los Estados Unidos Mexicanos, en materia de telecomunicaciones* (Decree by which several provisions are amended and added to the Political Constitution of the United Mexican States, in telecommunications matters), (enacted on June 11, 2013) (hereinafter "Constitutional Reform"), **CL-002.**

79 *Resolución P/IFT/EXT/060314/76 mediante la cual el Pleno del Instituto Federal de Telecomunicaciones determina al grupo de interés económico de América Móvil, S.A.B. de C.V. como agente económico preponderante en el sector de telecomunicaciones* (Resolution P/IFT/EXT/060314/76 by which the Plenary of the Federal Telecommunications Institute determined the América Móvil, S.A.B. de C.V. economic group as the preponderant economic agent in telecommunications) (March 6, 2014) (hereinafter "Determination of Preponderant Economic Agent"), **CL-010.**

within industry circles in Mexico."[80] Thus, Claimants and Respondent both agree that Telmex was aware of the reforms at the time Mr. Bello and Mr. Sacasa met with Mr. Gallaga in June 2014 to confirm that Telmex's offer remained available and unchanged.

73. Mr. Buj also ignores the fact that, after the IFT issued Resolution 381, Telmex twice proposed a revised interconnection agreement to Tele Fácil.[81] While the first proposed revised interconnection agreement included nearly 100 changes (including shortening its effective period to just 21 days, rather than the three-year period that had been offered and accepted), it did include the rate of $0.00975 that had been ordered by Resolution 381.[82] The second version of the agreement offered by Telmex also offered the rate of $0.00975, while shortening the time period.[83] Thus, Telmex's actions after Resolution 381 clearly reflect an awareness that the rate had been ordered by the IFT and remained a lawful rate.

74. In sum, Mr. Buj's opinion that Telmex's offer had expired is entirely unreliable because he wholly ignores the unrebutted evidence that Telmex renewed its offer in June 2014 after the Constitutional reforms, after Telmex's declaration as a Preponderant Economic Agent, and after the intended statutory changes were already known to Telmex. As the IFT concluded in Resolution 381, there is simply no evidence that Telmex ever sought to modify the rate it had previously offered or to negotiate a new rate with Tele Fácil.[84] Rather, all available evidence

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80 Statement of Defense, ¶ 31.

81 *See* Statement of Claim, ¶ 182 (citing Bello Statement ¶ 77, **C-004**; *see also* Sacasa First Statement ¶¶ 72-73, **C-003**.); *id.* ¶ 189 (citing *Nuevo Proyecto de Convenio Marco de Interconexión Local presentado por Teléfonos de México, S.A.B. de C.V. a Tele Fácil México, S.A. de C.V*. (New Draft of Local Interconnection Agreement notified by Teléfonos de México, S.A.B. de C.V. to Tele Fácil México, S.A. de C.V.) (December 9, 2014), at Exhibit C § 1, **C-031**; *Notificación de Nuevo Proyecto de Convenio Marco de Interconexión Local presentado por Teléfonos de México, S.A.B. de C.V. a Tele Fácil México, S.A. de C.V.* (Notification of New Draft of Local Interconnection Agreement notified by Teléfonos de México, S.A.B. de C.V. to Tele Fácil México, S.A. de C.V.) (December 10, 2014), **C-094**; Sacasa First Statement ¶ 78, **C-003**; Bello Statement ¶ 79, **C-004**.)

82 *Id.* ¶ 182.

83 *Id.* ¶ 189.

84 Resolution 381, at 13, **C-029**.

establishes that Telmex intended to challenge the government's decision to denominate it as a preponderant economic agent and impose asymmetric regulations on it.[85] Because Telmex's plan was to attack and seek to overturn the regulations, and thus return to its abusive market practices, Telmex had no reason to deviate from the high rate it had offered Tele Fácil. From Telmex's perspective, the high rate remained the most attractive option because it intended to continue to leverage that rate to its advantage.

75. In addition to ignoring Telmex's decision to renew its offer to Tele Fácil, Mr. Buj also ignores the IFT's conclusion that the offer had been accepted by Tele Fácil. Specifically, in Resolution 381, after an examination of the evidence, the IFT held that "Tele Fácil had full knowledge of and consented to the [rates]."[86] Having concluded as a matter of fact and law that Telmex offered, and Tele Fácil accepted, the rate, there is no justification for Respondent to now assert its baseless argument that Telmex's offer expired.

76. Finally, Mr. Buj's conclusion ignores Telmex's post-Resolution 381 conduct, which reflected its understanding that the rate had been fixed by Resolution 381, even while Telmex sought to make a series of other improper changes.

b. The IFT Already Rejected Arguments Regarding the Length of the Negotiation Period

77. Respondent's argument regarding the time lapse between the commencement of interconnection negotiations and the initiation of the dispute resolution process in July 2014 must also fail because the IFT itself expressly rejected Telmex's arguments that the 11-month time lapse precluded Tele Fácil from initiating the interconnection dispute resolution process to resolve the disputed issues of indirect interconnection and portability charges.[87] By making

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85 Sacasa First Statement ¶ 50, **C-003**; Bello Statement ¶ 60, **C-004.**

86 Resolution 381, at 13, **C-029** (emphasis added).

87 *Id*. at 10-12.

these arguments now, it is as though the Government of Mexico is asserting the IFT's incompetence as its primary defense.

78. The record is clear that the IFT considered and rejected several arguments about the 11-month period between the commencement and conclusion of negotiations. Telmex made the following arguments regarding the time between the initiation of negotiations and the initiation of the dispute resolution procedure, which were addressed in Resolution 381:

a. Tele Fácil "never presented a formal request before my clients to initiate negotiations, for which the assumptions established by Article 42 of the" LFT "for an interconnection disagreement to exist are not met. . . for which this Institute must dismiss the requirement of said concessionary, due to its inadmissibility."[88]

b. "Concessionaires must jointly inform the SCT on the initiation of negotiations." The IFT should have "confirmed the existence of the joint notification" and "when it verified that said notification had not been presented, it should have dismissed the resolution."[89]

c. "[I]n view of the fact that TELE FACIL did not formally initiate negotiation, the term of 60 days contained in Article 42 of the LFT cannot be expired as TELE FACIL claims. . . ."[90]

79. The IFT rejected each of Telmex's arguments regarding timing, and, in so doing, expressly addressed the 11-month time period. It found that:

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88 *Respuesta a inicio de desacuerdo de interconexión presentada por Teléfonos de México, S.A.B. de C.V. ante el Instituto Federal de Telecomunicaciones* (Reply by Teléfonos de México, S.A.B. de C.V. to interconnection disagreement procedure submitted before the Federal Telecommunications Institute) (August 26, 2014), at 7, **C-027.**

89 *Id.* at 8-9.

90 *Id.* at 9.

a. "[T]he fact that Telmex, Telnor, and Tele Fácil did not jointly request nor notify the beginning of negotiations regarding interconnection for the Institute to proceed . . . is irrelevant, when the existence of the disagreement between the aforementioned concessionaires is evident. . . ."[91]

b. "[T]he term of 60 (sixty) calendar days established in article 42 of the FTL for Tele Fácil, Telmex and Telnor to agree upon the terms, conditions and interconnection rates has elapsed from August 7, 2013, date on which it was requested that Telmex and Telnor execute the interconnection agreement and until July 11, 2014, date of the Request for Resolution."[92]

80. Thus, from the plain language of Resolution 381 it is clear that the IFT (1) was fully aware of the eleven-month period that elapsed between the commencement of negotiations and the initiation of the dispute resolution process; (2) concluded that this delay did not invalidate Tele Fácil's right to initiate and maintain the dispute resolution process; and (3) did not invalidate Telmex's rate offer and Tele Fácil's acceptance of that rate. Respondent's efforts to resurrect arguments already rejected by the IFT must fail.

c. Mr. Buj Misunderstands the Legal Nature of an Interconnection Dispute Resolution

81. Mr. Buj ignores entirely the fact that interconnection agreements are governed by Mexican telecommunications law (the FTL prior to the reforms and the FTBL after the reforms). Instead, he erroneously relies exclusively on the Mexican Federal Civil Code in providing his opinion.[93]

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91 Resolution 381, at 10, **C-029**.
92 *Id*. at 12.
93 Buj Report, ¶ 22.

82. As Gerardo Soria explains in his Second Expert Report, Article 1859 of the Federal Civil Code provides that the terms of the Civil Code apply to all agreements except agreements subject to specific or special laws.[94] He further states that the FTL, which applies to interconnection agreements, is such a special law.[95] Mr. Buj's analysis is thus fundamentally flawed because it fails to take into account the FTL as it applied to the Tele Fácil-Telmex interconnection agreement.

83. Mr. Soria states that:

> [T]he FTL only states a minimum period of negotiation in case the parties require the intervention of the IFT, considering that the negotiations take time due to the nature of the subject. This means that even if administrative law allows concessionaires a negotiation period during which the freedom of contract principle prevails, it clearly limits the application of contractual/civil law, and mandates the administrative intervention in order to ensure interconnection is not entirely left to the will of one or both concessionaires.[96]

Thus, the FTL provides its own rules concerning the term of an offer and acceptance for interconnection agreements, taking into account the underlying regulatory framework and the policy rationales underpinning that framework. This *lex specialis* must, according to the Mexican Civil Code, prevail over the standard provisions of that Code.[97] By failing to take into consideration the role of the FTL in the Tele Fácil-Telmex interconnection agreement, Mr. Buj's opinion is inapplicable and should be accorded no weight.

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94 Expert Reply Report of Gerardo Soria (hereinafter "Soria Second Report"), ¶ 11, **C-111.**
95 *Id.* ¶ 13.
96 *Id.* ¶ 16.
97 *Id.* ¶ 11.

B. Respondent Fails to Rebut Claimants' Case That Decree 77 Unlawfully Modified Resolution 381 and Tainted All IFT Action Taken Thereafter

84. As Claimants and its legal experts explained and demonstrated in the Statement of Claim, Decree 77 was an unlawful reversal of Resolution 381 and functionally an expropriation decree.[98] Decree 77 unlawfully rescinded Tele Fácil's right to enforce the rate that had been offered by Telmex and accepted by Tele Fácil.[99] Decree 77 is built on the demonstrably false narrative that the IFT was not competent to recognize or acknowledge the binding nature of the rate when it issued Resolution 381 and that, instead, the issue of the rate was "held harmless" for a future disagreement procedure.[100]

85. Decree 77 repudiated key aspects of Resolution 381, leaving Tele Fácil no interconnection agreement to enforce. Resolution 381 made the following critical conclusions regarding an agreement between Tele Fácil and Telmex regarding the rate:

a. "[T]he interconnection rates were completely determined by Telmex and Telnor in the draft interconnection agreement sent to Tele Fácil on August 26, 2013, and which Tele Fácil had full knowledge of and consented to."[101]

b. "[T]he only interconnection conditions not agreed upon by the parties in the process of negotiating to execute the corresponding interconection agreement are those which are expressly cited in the Fifth Consideration section of this resolution" (i.e., indirect interconnection and number portabilty charges).[102]

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98 Statement of Claim, ¶¶ 383-397.
99 *Id.* ¶¶ 391-394.
100 *Id.*
101 Resolution 381, at 13, **C-029**.
102 *Id.*

c. "[H]aving dismissed Telmex's arguments, and there existing an agreement between Tele Fácil, Telmex, and Telnor to formalize the Agreement for the Provision of Local Interconnection Services offered by Telmex and Telnor as evidence in Telmex and Telnor's Reply, such concessionaires are obliged to grant the interconnection requested by Tele Fácil."[103]

d. "The above, without prejudice to Tele Fácil, Telmex and Telnor formalizing the interconnection terms, conditions **and rates** that are **ordered** in this Resolution and for such effect to execute the correspondening agremeent."[104]

86. Thus, it is clear that the IFT expressly found that an agreement existed with regard to the rates that would be paid by Telmex and Telnor and ordered that those rates be included in the final interconnection agreement.

87. In Decree 77, the IFT reached exactly the opposite conclusion, finding that the previously agreed terms were not established:

> **Regarding the other terms and conditions of the interconnection agreement that the parties must execute**, taking into consideration that this collegiate body did not address the provisions contained in the draft agreement included in the file as it was not a matter of disagreement and therefore it was not a matter of its competence, **it is clarified that the rights of the parties regarding the aspects that were not a subject matter of the Interconnection Resolution remain untouched**.[105]

Decree 77 continued:

> [W]hen ordering the execution of the corresponding Interconnection agreement in [Resolution 381, the IFT] did not make any determination

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103 *Id.* at 15.

104 *Id.* at 16.

105 Decree 77, at 10 (emphasis added), **C-051**; *id.* at 10-11 (The IFT added: "The above, since the will of the parties is what governs the execution of an interconnection agreement and therefore the IFT cannot impose terms and conditions that were not submitted to its consideration as a disagreement.").

> regarding any other stipulation contained in the draft agreement included in the record, as they were not considered as part of the disagreement.[106]

88. The fiction that Resolution 381 was not modified by Decree 77 is repeated by Respondent in its Statement of Defense: "the Pleno did not modify Resolution 381 in any way: it simply confirmed that the resolution did not establish the rates that had to be included in the interconnection agreement, given that these were not part of the interconnection dispute that Tele Fácil presented on 11 July 2014."[107]

89. Importantly, however, Respondent does not deny the crippling effect of Decree 77. Indeed, it makes an important admission:

> As to the rest of the conditions that were not the subject matter of Resolution 381, the *Pleno* decided "[p]reserving the rights of the parties". This meant that **Telmex and Tele Fácil had to negotiate the rates** and, in case of not reaching an agreement, to submit the dispute before the IFT for its resolution.[108]

90. As Dr. Pablo Márquez, the former Chairman of Colombia's Commission for Communications Regulation and a principle drafter of the OECD's 2017 report regarding the IFT's implementation of the reforms, states in his expert report, the IFT is acting both against the Mexican legal framework and best international practices:

> Even though the existing framework is compliant with international best practices, the **IFT is compromising its effective practical implementation by opening the door, once again, to the incumbent's delaying tactics**.[109]

91. Thus, despite expressly finding in Resolution 381 that "the only interconnection conditions not agreed upon by the parties in the process of negotiating to execute the corresponding interconnection agreement are those which are expressly cited in the Fifth

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106 Decree 77, at 11, **C-051**.
107 Statement of Defense, ¶ 127.
108 *Id.* ¶ 128 (emphasis added).
109 Márquez Reply Report, ¶ 70, **C-114** (emphasis in original).

Consideration section of this resolution,"[110] the IFT stripped away those rates and granted Telmex a second bite of the apple to renegotiate the rates. The IFT also assured Telmex that, if Telmex could not bend Tele Fácil to its will, the IFT would do the job for it by permitting Telmex to bring the issue back to the IFT, where the IFT could impose lower rates on Tele Fácil for Telmex's benefit.[111] Thus, as the Respondent implicitly acknowledges through its admission that Decree 77 reopened negotiations on rates, Decree 77 deprived Tele Fácil of the benefit of its bargain with Telmex. Stripped of its enforceable interconnection agreement with Telmex, Tele Fácil could not enter the telecommunications market.

C. Resolution 127 Exists Solely Because of the IFT's Illegal Decree 77

92. To distract from this inescapable conclusion, Respondent argues that, in 2015, when given the free pass to renegotiate the rates, Telmex could not offer the same rates it had previously agreed to with Tele Fácil because of the "regulatory changes made in 2014."[112] This argument is a red herring.

93. Had the IFT not eviscerated Resolution 381 by permitting Telmex to reopen negotiations on rates, Telmex would have had no reason to make a new offer to Tele Fácil in 2015. The interconnection agreement that should have been executed and enforced between Tele Fácil and Telmex was to last for a period of three years.[113] Nothing about the reforms would have disrupted or caused that agreement to terminate prematurely.[114]

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110 Resolution 381, ¶ 13.
111 Statement of Defense, ¶ 128.
112 Statement of Defense, ¶ 148.
113 *Escritura Pública No. 9,581 que contiene la notificación por virtud de la cual Teléfonos de México notifica a Tele Fácil el Proyecto de Convenio de Interconexión Local* (Public Deed No. 9,581 that contains the notification by which Teléfonos de México, S.A.B. de C.V. proposes the Local Interconnection Agreement Draft to Tele Fácil México, S.A. de C.V.) (August 26, 2013) (hereinafter "Original Draft Interconnection Agreement"), at Exhibit C § § 1.1 and 1.2, **C-021.**
114 Soria Second Report ¶¶ 80-82, **C-111.**

94. Decree 77 illegally opened the door for Resolution 127. As Gerardo Soria concludes:

> [B]ased on my experience in the sector since 1991…Cofetel and the IFT always understood Article 42 of the FTL in this sense, and every interconnection disagreement was understood as a final solution to all terms necessary for material interconnection (either pre-agreed or disagreed). In no way had the regulator intervened twice or even three times to resolve terms between two carriers in relation to the same interconnection "disagreement".[115]

95. Dr. Álvarez agrees:

> In all my experience in telecommunications, I have never seen an interconnection decision like Decree 77 which presents the perfect path to rendering interconnection dispute resolutions meaningless; Decree 77 creates a "never-ending story," with successive and endless disputes over already freely agreed terms and conditions."[116]

96. From an international best practices point of view, this is extremely worrisome. As Dr. Pablo Márquez states:

> [T]he IFT's conduct regarding the interconnection dispute between Tele Fácil and Telmex negates one of the key best practice principles concerning interconnection, that is, timeliness/opportunity, and thus evidently undermines one of the fundamental purposes of the telecommunications reform. Indeed, **the regulator's interpretation according to which, its powers are confined to determining the terms and conditions subject to disagreement between the parties, ultimately allows for the emergence of subsequent interconnection disputes, hence creating a vicious cycle in which the discussions are never fully closed** (which used to be the prevailing situation under the previous regime, due to operators' abuse of *amparo* trials suspending critical regulatory decisions).[117]

97. In sum, Decree 77 illegally modified Resolution 381 in a manner that permitted Telmex to initiate a further dispute regarding rates which had already been agreed to and which the IFT had already ordered to be included in an executed interconnection agreement. Without

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115 Soria Second Report, ¶ 34, **C-111.**
116 Álvarez Second Report, ¶ 41, **C-110.**
117 Márquez Reply Report, ¶¶ 68-69, **C-114.**

the unlawful Decree 77 there would have been no reason for the IFT to impose significantly lower rates on Tele Fácil through Resolution 127. Respondent has failed to refute these conclusions.

D. Respondent Must Not Benefit from Flouting the Tribunal's Orders, Destroying Evidence, and Engaging in Witness Tampering to Hide the Truth About the Origins and Purpose of Decree 77, And Must Be Sanctioned

98. Respondent's defense of this claim has been fundamentally compromised by its egregious conduct in relation to the production of documents ordered by the Tribunal.

99. Specifically, the IFT has either destroyed or has refused to produce any emails or notes that would shed light on what influenced the development and adoption of Decree 77. Indeed, as the Claimants have previously explained and detailed, and reiterate below, because of the IFT's failure to publish the required catalogs of documentary disposition, the IFT could not legally delete a single email related to the dispute between Tele Fácil and Telmex.[118] Despite this legal prohibition, Respondent has informed the Tribunal that each and every email relevant to this dispute has been deleted.[119] In addition to deleting emails, the IFT failed to comply with its transparency obligations by engaging in a substantive discussion at the March 2015 Plenary meeting that is neither part of the IFT's recording of the meeting nor the official minutes of the proceeding.

100. Furthermore, as Claimants have shown, and as reiterated below, Respondent has repeatedly failed to produce information regarding an initial draft of Decree 77 that was proposed to the IFT Plenary for adoption on March 13, 2015 but rejected at that time. Despite repeated representations of having conducted a good faith search,[120] Respondent first failed to

118 Claimant's letter to Tribunal on document production (December 6, 2017).
119 Respondent's letter to the Tribunal (November 15, 2017).
120 Respondent's letter to the Tribunal (November 15, 2017).

come forward with any indication that such a document even existed, and then subsequently misrepresented to the Tribunal and Claimants that this draft of Decree 77 was identical to the one subsequently adopted on April 8, 2015.[121]

101. When it was finally produced, Claimants discovered that the reality is starkly different than what Respondent led the Claimants and the Tribunal to believe. The final version of Decree 77 was changed in profound ways from the earlier draft that was proposed in March 2015. Rather than asserting that Tele Fácil should seek to enforce the rate that Telmex had offered in another forum (such as the courts), the final version of Decree 77 paved the way for Telmex to initiate a new dispute resolution process before the IFT and, ultimately, to have the IFT issue Resolution 127 wherein it imposed a rate forty times lower than the one Telmex had agreed to pay to Tele Fácil.[122]

102. Unfortunately, Respondent's repeated efforts to hide documents and destroy documentary and auditory has marred this process, and it is necessary for Claimants to address these issues – the destruction of emails, the missing "phantom" Decree 77, and witness tampering – in turn below.

1. The Destruction of Emails

103. The IFT's destruction of emails has been detailed at length in a series of correspondence provided to the Tribunal and, as such, will only be summarized briefly below.

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121 Respondent's letter to the Tribunal (January 16, 2018).

122 *Oficio IFT/100/PLENO/STP/745/2015 emitido por la Secretaría Técnica del Pleno con el anteproyecto del Acuerdo Mediante el cual el Pleno del Instituto Federal de Telecomunicaciones establece el alcance de la Resolución mediante la cual el Pleno del Instituto Federal de Telecomunicaciones determina las condiciones de interconexión no convenidas entre Tele Fácil México, S.A. de C.V. y las empresas Teléfonos de México, S.A.B. de C.V. y Teléfonos del Noroeste, S.A. de C.V.* (Document IFT/100/PLENO/STP/745/2015 issued by the Technical Secretary of the Plenary with the draft of Decree by which the Plenary of the Federal Telecommunications Institute establishes the scope of the "Resolution by which the Plenary of the Federal Telecommunications Institute determines the interconnection conditions not agreed between Tele Fácil México, S.A. de C.V. and the companies Teléfonos de México, S.A.B. de C.V. and Teléfonos del Noroeste, S.A. de C.V.) (March 13, 2015) (hereinafter "Phantom Decree 77"), **C-116.**

Before doing so, however, the necessary starting point is to note the complete dearth of evidence in the record about how Decree 77 came into existence in the first place.

104. In its Statement of Claim and supporting witness statements, Claimants offered detailed accounts of how Tele Fácil sought enforcement of Resolution 381, was offered assurances from both Gerardo Sanchez Henkel, then the head of the IFT Compliance Unit, and later Chairman Gabriel Contreras, that they understood and were prepared to enforce Resolution 381.[123] Other than those accounts, there is virtually no evidence about what happened at the IFT between the adoption of Resolution 381 on November 26, 2014, and the adoption of Decree 77 on April 8, 2015, notwithstanding the fact that Claimants repeatedly requested such documents pursuant to the procedures agreed to in this arbitration.

105. With regard to these procedures, on September 28, 2015, the Tribunal issued Procedural Order No. 3 to decide issues arising out of Claimants' First Request for Production of Documents.[124] The Tribunal overruled various objections asserted by Respondent and granted Claimants' request for the production of documents in response to several categories of requests (Claimants' requests Nos. 1, 3, 5, 6, 7, 7 Bis, 8, 9, 10, 11, 12, and 17) in whole or in part.[125] The Tribunal ordered responsive documents to be produced by October 25, 2017.[126]

106. On October 25, 2017, Respondent filed its response. In that response, it represented to the Tribunal that it had "diligently and in good faith [searched] within their records," but discovered no additional responsive documents.[127]

123 *See* Statement of Claim, ¶¶ 194-195, 209.
124 Procedural Order No. 3 (September 28, 2015).
125 *Id.* ¶ 22.
126 *Id.* ¶ 23.
127 Respondent's letter to the Tribunal (October 25, 2017).

107. On November 1, 2017, at the Tribunal's invitation, Claimants responded to the comments provided by Respondent.[128] Claimants pointed out that "it is simply not plausible that a government agency involved with an important regulatory matter for two years does not have any emails, memoranda, notes, agendas or similar communications about its consideration of that matter in the context of regulatory proceedings."[129] In a detailed Appendix, Claimants then explained why the available evidence, and logic, pointed to the inescapable conclusion that the Respondent should have had and produced, inter alia, email and internal communications regarding the request for enforcement of Resolution 381 and drafts of Decree 77.[130]

108. In addition, Claimants noted that, during the course of their own investigation, they had discovered that transcripts of proceedings before the IFT revealed that various IFT officials made specific reference to documents received by the Commissioners and other parties in connection with the Tele Fácil Matter.[131] Claimants stated that "[t]hese transcripts are proof that additional documents exist – or did exist – that have not been produced."[132]

109. In their letter, Claimants also reiterated that Mexican transparency law imposed obligations on the IFT to preserve relevant emails. The letter explained that Mexican Transparency Law includes a general principle of maximum transparency and public entities must make every effort to guarantee the greatest transparency possible so that private parties have access to the public information they request.[133] Citing to specific legal provisions, Claimants explained that the IFT's transparency obligations and document retention legal

128 Letter from T. Feighery to E. Zuleta, et al. (Nov. 1, 2017).
129 *Id.* at 1.
130 *Id.* at Appendix A, 6-10.
131 *Id.* at Appendix A, 7, 10.
132 *Id.* at 2.
133 *Id.* at 3.

framework start with certain Constitutional principles and includes the Federal Transparency and Information Access Law.[134] Claimants also explained that the IFT's Guidelines on document retention provide that electronic data, including emails, "shall have the same effects as hard copy documents," and their time of retention must be classified accordingly.[135] Finally, Claimants noted that "[d]ocuments must be classified pursuant to the Catalogue of Documental Disposition, which indicates when a specific document can be deleted permanently" and that "[o]nly when the time specified by the Catalogue of Documental Disposition has elapsed can a document be permanently destroyed."[136]

110. Respondent replied to Claimants' letter on November 30, 2017.[137] In its letter, Respondent did not deny Claimants' assertion that relevant documents exist or did exist at some time. It did not refer to or discuss the IFT Guidelines as the applicable rules for storing and retaining documents. Instead, Respondent suggested that all of the obligations to retain documents, including emails, were governed solely by a Circular that had been prepared by the IFT Administration Unit.[138]

111. Respondent's effort to ignore the Guidelines and instead focus the Tribunal's attention solely on the Circular was, Claimants assert, a smokescreen. The Guidelines are the specific legal provisions issued by the IFT Plenary that establish document-retention related obligations of the IFT, including its Units and staff, in compliance with the Federal Archive

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134 Letter from T. Feighery to E. Zuleta, et al. (Nov. 1, 2017), at 2.

135 *Acuerdo mediante el cual el Pleno del Instituto Federal de Telecomunicaciones expide los Lineamientos en Materia de Organización y Conservación de Archivos del Instituto Federal de Telecomunicaciones* (Decree by which the Plenary of the Federal Telecommunications Institute issues the Guidelines for Organization and Conservation of Files for the Federal Telecommunications Institute), enacted on August 3, 2015 (hereinafter "IFT Guidelines on Document Retention"), at Article 14, **CL-102**.

136 Letter from T. Feighery to E. Zuleta, et al. (Nov. 1, 2017), at 3.

137 *See generally* Letter from Respondent to E. Zuleta, et al. (Nov. 30, 2017).

138 *See id.* at 1-2, ¶¶ 3-4.

Law.[139] The Circular, on the other hand, is merely an internal policy adopted by the IFT Administration Unit.[140] It does not – and cannot – supersede the Guidelines formally adopted by the Plenary to ensure that the IFT complies with the Archive Law.

112. As Claimants explained by letter dated December 6, 2017,[141] and again at the Tribunal's invitation, an examination of the IFT Guidelines implementing the Archive Law clearly reveals that emails or other electronic work papers of the IFT staff that participated in issuing Resolution 381, Decree 77, and Resolution 127, as well as all emails regarding or relating to Tele Fácil's request for enforcement of Resolution 381, were required to be classified, at a minimum, as Immediate Administrative Verification Documents and preserved by each Unit of the IFT for the duration established by that Unit's Catalog of Documentary Disposition.[142] As discussed below, this means that these documents could not have been deleted unless the IFT undertook specific steps laid out in the law. There is no evidence that Respondent undertook any of these prescribed steps.

113. The Claimants' conclusions regarding the IFT's transparency obligations are derived from the following analysis of the Guidelines:

a. Under the IFT Guidelines, each IFT Unit must "Classify the information pursuant to the applicable legal provisions."[143]

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139 IFT Guidelines on Document Retention, at Article 1, **CL-102**.

140 *Circular emitida por la Unidad de Administración del Instituto Federal de Telecomunicaciones por la que se dan a conocer las "Políticas pare el Uso de los Recursos de Tecnologías de la Información y Comunicaciones del Instituto Federal de Telecomunicaciones"* (Circular issued by the Administration Unit of the Federal Telecommunications Institute that publishes the "Policies for the use of Information and Communication Technologies of the Federal Telecommunications Institute), enacted on October 1, 2015 (hereinafter "IFT's Circular on IT Policies"), at Article 1, **CL-103.**

141 Letter from T. Feighery to E. Zuleta, et al. (December 6, 2017).

142 *Id.* at 3.

143 IFT Guidelines on Document Retention, at Article 23, Section X ("Corresponds to each Administrative Unit to . . . X. Classify the information in accordance with the applicable legal provisions."), **CL-102**.

b. Article 14 of the Guidelines provides that "Electronic Documents and Digital Documents will have the same nature as printed documents, and therefore the Units **must classify them pursuant to their characteristics**, either as Archive Documents, Immediate Administrative Verification or Information Support Documents."[144]

c. Each of the three categories that electronic documents must be classified into are defined in the Guidelines. The three categories are:

i. **Archive Documents (*documentos de archivo*)**:[145] Archive Documents have the highest level of classification and make up the official file of the IFT on a matter. They include evidence of official acts of the IFT and the originals of official documents. Work papers and copies of documents already in the Archives would not be characterized as "Archive Documents."[146] There is no procedure for deleting or destroying any Archive Documents

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144 *Id.* at Article 14.

145 *Id.* at Article 7:

> Archive documents are those that meet one or several of the following characteristics:
> I. They constitute evidence and evidence of the registration of an administrative, legal or accounting fact or act, for the integration of the Records of each Administrative Unit;
> II. They are obtained, generated, transformed or modified in the exercise of functions and attributions conferred on the Institute, in accordance with the applicable legal-administrative framework;
> III. They are unique documents that certify the fulfillment of the functions of the public servants of the Institute, independently of the support in which they are found;
> IV. Each Administrative Unit generates them as evidence and testimony of the fulfillment of the obligations of the administrative management, independent of its support, or
> V. They are original documents.
> The Archive Documents form a set of organized records that are interrelated and must be integrated into Files.

146 *Id.* at Article 12, Section III ("Documents that do not correspond to the subject, as well as copies, duplicate documents and work papers, should not be included in the Archive (*expedientes*).").

unless the specific document is later downgraded and an official log is created prior to its destruction.[147]

ii. **Immediate Administrative Verification Documents (*documentos de comprobación administrativa inmediata*):**[148] This is the middle category of documents. It includes all documents "created or received by the Administrative Unit in the course of administrative procedures."[149] This definition is, of course, broad enough to encompass any emails created or received by any staff member of the IFT relating to the Tele Fácil and Telmex interconnection dispute. The conclusion that emails related to Tele Fácil and Telmex are properly characterized as "Immediate Administrative Verification Documents" is made clear by the definition of "work papers," which are defined as "**immediate administrative verification documents** and information support documents that are generated, received, handled or used and temporarily kept in the Procedural Files, comprised by documents of different origins and characteristics whose value lies in the data

147 *Id.* at Article 4, Section XX; *id.* at Article 21.

148 *Id.* at Article 9:

> Immediate administrative verification documents are those that meet all or any of the following requirements:
>
> I. They are created or received by the Administrative Unit in the course of administrative procedures;
>
> II. They are evidence of the execution of an immediate administrative act, such as vouchers for photocopies, minutes, visitor records, various shipping lists, attendance cards, etc.
>
> III. They are unique documents that are not part of a procedure or issue defined in the General Archival Classification Chart.

149 *Id.* at Article 9, Section 1.

they contain to support administrative tasks and do not form part of the Archives, which can be physical or digital."[150] In other words, even digital work papers, such as draft, notes, or emails between staff members relating to an IFT matter, must be preserved in the IFT's Procedural Files.

iii. **Information Support Documents (*apoyo informativo*):**[151] Information Support Documents are the lowest category of documents. These include those documents that are not the original or do not relate to the exercise of the IFT's duties by a public servant.[152]

114. Under the IFT Guidelines, all Immediate Administrative Verification Documents and Information Support Documents are not part of the Archive File, but rather preserved as part of the Unit's Procedural File.[153] As noted above, emails that relate to any official item pending before the IFT fit within the definition of "Immediate Administrative Verification

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150 *Id.* at Article 4, Section 26.

151 *Id.* at Article 10:

> Information support documents are those that comply with all or any of the following requirements:
>
> I. They do not verify an administrative act or fact;
> II. They are documents constituted by copies of origin and diverse characteristics whose usefulness resides in the information they contain to support the assigned tasks;
> III. They are usually multiple copies that provide information, they are not original documents, they are editions, reprographics, photocopies or impressions that serve as information for the activity of their user, or
> IV. For their content, they do not document the exercise of the functions of public servants.

152 *Id.*

153 *Id.* at Article 11 ("The Immediate Administrative Verification and Informative Support Documents may be integrated in folders, binders or other type of storage mean, but not as Archives (*Expedientes*). These documents will also not be transferred to the Concentration File; their elimination will be made from the Procedural File subject to complying with the retention obligations established in the applicable section of the Catalog of Documentary Disposition.").

Documents."[154] Therefore, all emails relating in any way to the Tele Fácil-Telmex dispute were required to be classified as Immediate Administrative Verification Documents and placed into each Unit's Procedural File.

115. Thus, if any Unit of the IFT intended to delete any document in a Procedural File, the Unit could only do so lawfully in accordance with a published "Catalog of Documentary Disposition,"[155] which is the "[g]eneral and systematic record instrument that establishes the documentary values, the conservation periods, the documentary validity, the reservation or confidentiality classification and the final destination" for all documents created or received by that Unit.[156] If no "Catalog of Documentary Disposition" has been published by an IFT Unit, then the Unit lacks the legal authority to delete any Immediate Administrative Verification Documents, including emails and work papers reflecting the Unit's work regarding the Tele Fácil-Telmex dispute.

116. The conclusion that emails relating to the performance of any official duty must be categorized and deleted only in accordance with the schedule established by a Catalog of Documentary Disposition is reinforced by the Federal Institute of Access to Public Information (FIAPI), which has issued specific recommendations regarding the preservation of emails to help federal agencies ensure compliance with the Archive Law.[157] FIAPI's Fourth Recommendation

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154 *Id.* at Article 9.

155 *See id.* at Article 11 (providing that elimination of Immediate Administrative Verification Documents will be performed only after complying with the "retention obligations established in the applicable section of the Catalog of Documentary Disposition."); *see also id.* at Article 14 **(**providing, *inter alia*, "electronic documents must be classified according to the thematic items or documentary series of the Catalog of Documentary Disposition and the structure of the general table of archival classification").

156 *Ley Federal de Archivos* (General Archive Law), enacted on January 23, 2012 (hereinafter "Archive Law"), at Article 4 (defining the Catalog of Documentary Disposition), **CL-104**.

157 *See generally Recomendaciones para la organización y conservación de correos electrónicos institucionales de las dependencias y entidades de la Adminnistración Pública Federal emitidas por el Instituto Federal de Acceso a la Información Pública* (Recommendations for the organization and conservation of institutional emails of the agencies and departments of the Federal Public Administration), enacted on February 10, 2009, **CL-105.**

makes clear that all emails that are "created, received or kept under any circumstance, in the organization of work, in the exercise of authorities of the officers or entities and the activities or actions of public servants," are public information.[158] The only emails that are not subject to the retention obligations of the Archive Law are those "emails of strict personal character that have no relation with the exercise of authorities of the officers or entities, nor with the activities or actions of the public servants in such quality."[159] Finally, FIAPI's Recommendations confirm that emails relating to any official business shall be maintained "under the conditions and for the terms established in the catalog of documentary disposition" that each agency is required to publish.[160]

117. Claimants were able to locate only a single Catalog of Documentary Disposition on the IFT's website, which related only to the Internal Audit Unit (Organo Interno de Control) of the IFT, which had no apparent involvement in this matter.[161] No Catalog of Documentary Disposition has been located for the Legal Unit, the Compliance Unit, or the Executive Coordinator of the IFT. When Claimants raised this issue, Respondent never came forward with any other catalogs. Accordingly, Respondent failed to establish any basis upon which any of the relevant Units could have lawfully deleted any email or other work papers related to the Tele Fácil-Telmex dispute. In short, the IFT has operated in violation of the Archive Law and its

158 *Id.* at 1-2.
159 *Id.*
160 *Id.* at 2.
161 *See generally Catálogo de Disposición Documental emitido por el Organo Interno de Control del Instituto Federal de Telecomunicaciones* (Catalogue of Documentay Disposition issued by the Internal Control Unit of the Federal Telecommunications Institute) (May 17, 2017), **C-117.** A review of the Catalog of Documentary Disposition from the Internal Audit Unit shows that the shortest period of time in which items were required to be preserved in that Unit's Procedural File was one year, with most categories requiring preservation of two years or more.

Guidelines because many of its Units have failed to create the Catalog of Documentary Disposition that are legally required by the Archive Law.

118. When pressed on these issues, Respondent relied on a letter from the Executive Coordinator of the IFT to try to explain away the IFT's failure to produce any emails.[162] This letter asserted that Articles 14 and 15 of the Guidelines are intended to impose upon the IFT a duty only to classify electronic documents that have a "documentary value" and that, in any event, staff at the IFT have an "obligation" to "purge his e-mail inbox, in order not to exceed the assigned storage capacity."[163] The Executive Coordinator's explanations erroneously circumscribed the duties of the IFT and its own Guidelines.

119. As noted above, the plain language of Article 14 provides that "Electronic Documents and Digital Documents will have the same nature as printed documents, and therefore the Units must classify them pursuant to their characteristics, either as archive documents, immediate administrative verification or informative support."[164] Thus, whether the documents are created electronically in the first instance or later digitized, they "must" be classified into one of the three categories of documents.

120. In addition, the Executive Coordinator ignored the definition of Immediate Administrative Verification Documents, which includes all documents "created or received by the Administrative Unit in the course of administrative procedures" and provides that "work papers," are "Immediate Administrative Verification Documents and information support documents that are generated, received, handled or used and temporarily kept in the Procedural Files, comprised by documents of different origins and characteristics whose value lies in the

162 Respondent's letter to the Tribunal (November 15, 2017).
163 Respondent's letter to the Tribunal (November 15, 2017), at 12 (page 4 of exhibit).
164 IFT Guidelines on Document Retention, at Article 14, **CL-102**.

data they contain to support administrative tasks and do not form part of the Archives, which can be physical or digital."[165]

121. Finally, the Executive Coordinator's suggestion that IFT staff members have an obligation to "purge" emails from their inbox was simply false. The Circular establishing the Policies for Use of Information Technology Resources[166] expressly acknowledges that the IFT staff's first and highest obligation is to "comply with current regulations regarding applicable responsibilities to the Public Servants of the Institute."[167] Further, the Circular does not establish any obligation to delete even a single email. Rather, it gives the IFT staff two options for maintaining the size of their inbox: "Periodically delete or archive the E-mail messages so that it does not exceed the storage capacity assigned to your mailbox, which is described in article 7 of this document."[168] Thus, rather than mandating the deletion of emails, as Respondent contends, the Circular merely imposes an obligation upon users to take whichever measure is appropriate and consistent with their document retention obligations.

122. In sum, because the emails and other work papers are directly related to the performance of the IFT's official duties, the Guidelines require that they be deleted only in accordance with the schedule established in each Unit's published Catalog of Documentary Disposition. Therefore, if any staff member of the IFT needed to reduce the size of their email inbox, the staff member was required by law to create an archive of those emails on their personal computer.

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165 *Id.* at Article 9.

166 As discussed below in response to the Tribunal's Question No. 5, The relevant version of the Circular is dated October 1, 2015, and has now been provided to the Tribunal as part of Annex 1 to the Respondent's November 30, 2017 letter.

167 IFT's Circular on IT Policies, at Article 4, Section I, **CL-103**.

168 *Id.* at Article 4, Section X.

123. In addition to its misrepresentations, Respondent also failed to acknowledge that the October 1, 2015 IFT Circular regarding the use of IT resources unequivocally required that each of the IFT's users maintain a backup of their personal computers.[169] Rather than acknowledging or addressing this requirement of the Circular, the Respondent attempted to rely upon a Circular that the IFT issued on October 31, 2017, after the Tribunal had already issued Procedural Order No. 3.[170]

124. In addition to the fundamental mischaracterization of the legal requirements to preserve emails related to the Tele Fácil-Telmex dispute, Respondent represented that each and every email had already been deleted.[171] This is simply unfathomable as a factual matter in light of the number of IFT staff members involved. Eighteen people from the IFT staff attended the March 5, 2015 meeting between Tele Fácil and the IFT.[172] Attendees included the heads of the Legal Affairs Unit and the Performance/Compliance Unit, multiple Commissioners, and members of the respective Commissioners' staff.[173] Two Commissioners were absent from the meeting because they were out of town on travel,[174] but participated in the votes on Resolution

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169 *Id.* at Article 7 ("It is the responsibility of every User to consider the following guidelines with respect to all that Information that is generated, stored and safeguarded in the exercise of their functions: The User is responsible for the backup of the Information contained in the Personal Computing Equipment that has been assigned to him."), **CL-103**.

170 *See* Comparison of October 1, 2015 Circular and October 31, 2017 Circular, attached as Annex 1 to Claimants' December 6, 2017 letter to the Tribunal. Notably, the October 31, 2017 Circular omits the requirement to backup the personal computer that was previously contained in Article 7. The October 31, 2017 Circular also modifies the requirement to preserve emails. Specifically, in Article 19, the new Circular states that individuals are responsible for "maintaining only and exclusively that information that needs to be consulted later" and affirmatively represents that "The DGTIC, as part of its operation, does not make backups of the mailbox of Institutional Electronic Mail of the Users, regardless of whether these are found locally (PST file) or on the Mail Server." In short, the October 31, 2017 Circular has been revised after-the-fact to corroborate the Respondent's arguments to the Tribunal.

171 *See* Respondent's letter to the Tribunal (November 15, 2017), at 4.

172 *See* Transcript of March 5 Plenary Meeting, **C-043**.

173 *See id.*

174 *See id.*

381, Decree 77, and Resolution 127.[175] Accordingly, at a bare minimum, twenty people from the IFT were involved in the Tele Fácil-Telmex matter, and, in practice, it is likely that many more played some role at some point in the process.

125. Moreover, even when a user reaches the storage limit established by the IFT for his or her email account on the IFT server, it does not mean that every old email is simply deleted. Rather, the IFT's Circular regarding the use of IT resources makes it clear that users can reduce the size of their inbox on the email server in one of two ways: (1) archive emails to their computer; or (2) delete emails, if appropriate.[176] As Claimants noted in their December 6, 2017 letter, it would strain belief to conclude that twenty or more people all acted in an identical manner by deleting each and every email regarding Tele Fácil, instead of saving a single email in their inbox or in a personal archive on their computer.[177]

126. Thus, it was extremely troubling, but hardly surprising, to learn that Respondent had not even requested the members of the Commission to conduct a good faith search for documents until February 1, 2018, when Mr. Pelaez, Executive Coordinator of the IFT, finally sent a request to the Commissioners to search for responsive documents.[178] Thus, for several months, Respondent continuously and falsely represented to this Tribunal that all relevant documents had been collected and produced.

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175 *See* Resolution 381, at 18, **C-029**; Decree 77, at 14, **C-051**; *Resolución mediante la cual el Pleno del Instituto Federal de Telecomunicaciones determina las condiciones de interconexión no convenidas entre Teléfonos de México, S.A.B. de C.V., Teléfonos del Noroeste, S.A. de C.V. y Tele Fácil México, S.A. de C.V., aplicables del 1 de enero al 31 de diciembre de 2015*, P/IFT/EXT/071015/127 (Oct. 7, 2015) (hereinafter "Resolution 127"), at 37, **C-061**.

176 *See* IFT's Circular on IT Policies, at Article 4, Section X, **CL-103.**

177 Letter from T. Feighery to E. Zuleta, et al. (December 6, 2017), at 12.

178 *See* Letters from L. Pelaez Espinosa to IFT Commissioners (Feb. 1, 2018), Annex 1 to Respondent's Letter to the Tribunal (Feb. 15, 2018).

127. The search conducted in February 2018 yielded only three documents – internal analyses prepared by Commissioner Labardini's staff on the staffs' views of the drafts of Resolution 381, Decree 77, and Resolution 127.[179] It is impossible to know how many emails and other documents were destroyed between April 21, 2016, when Claimants' Notice of Intent was filed,[180] and February 1, 2018, when the IFT Executive Coordinator finally asked the Commissioners and their staff to provide responsive evidence,[181] as a result of Respondent's failure to implement reasonable preservation measures.

2. The Phantom First Draft of Decree 77

128. In addition to Respondent's destruction of emails, critical information is missing regarding the first draft of Decree 77, which was scheduled for a vote on March 13, 2015.[182] As described in more detail below: (1) the Respondent first failed to fulfill its document production obligations by failing to disclose that a draft of Decree 77 had been provided to the Commissioners, but rejected by the Plenary at its March 13, 2015 meeting; (2) Respondent then refused to disclose the draft and mislead Claimants and the Tribunal by emphatically stating that the draft had not changed between March 13, 2015, and April 8, 2015; (3) the original draft of Decree 77 is materially different than the version ultimately adopted and the changes that were made helped Telmex avoid paying the rate it had offered Tele Fácil; and (4) Respondent has not complied with its transparency obligations because it has withheld or destroyed evidence of the Plenary's discussion on March 13, 2015, regarding the initial draft of Decree 77. In sum,

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179 *See* Letter from Respondent to E. Zuleta, et al. (Feb. 15, 2018), at 1.

180 *See* Notice of Intent (Apr. 21, 2016).

181 *See* Letter from Respondent to E. Zuleta, et al. (Feb. 15, 2018), at 1.

182 *Versión Estenográfica de la IV Sesión Ordinaria del Pleno 13 de marzo de 2015*, (Transcript of Plenary's IV Ordinary Session dated March 13, 2015), (hereinafter "Transcript of March 13, 2015 Plenary Session admitting Comments from Commissioners"), **C-046.**

Respondent has repeatedly and consistently refused to be candid regarding the events that led to its stunning reversal of Resolution 381 and its adoption of Decree 77.

129. In its document requests, Claimant sought all information regarding the drafting and preparation of Decree 77.[183] Respondent produced nothing besides the final version of Decree 77, which was already publicly available. However, during the course of preparing its Statement of Claim, Claimants' counsel inadvertently discovered that at least two different drafts of Decree 77 had been considered by the IFT, including a draft that was not approved by the Plenary during a meeting held on March 13, 2015.[184]

130. Claimants' counsel realized that an initial draft of Decree 77 had been created in March 2015 as Claimants were preparing their Statement of Claim. Claimants' counsel learned from Tele Fácil's telecommunications counsel, Carlos Bello, that he recalled hearing in the days after his meeting with Chairman Contreras and other Commissioners and staff on March 5, 2015, that the IFT was preparing to enforce Resolution 381.[185] He also recalled being surprised, thereafter, that no action was taken by the IFT.[186] This caused Claimants' counsel to wonder what might have derailed the IFT's plans and caused this delay. Therefore, Claimants' counsel began reviewing all available documentation, including the information publicly available through the IFT's website and information obtained from the IFT through the transparency process about the critical time period between March 5, 2015 (the date Mr. Bello and Mr. Sacasa met with the IFT), and April 8, 2015, when the Plenary voted on Decree 77. During the course of this systemic review, Claimants' counsel uncovered the brief discussion at the beginning of the

183 *See* Procedural Order No. 3 (Sept. 28, 2015).

184 As explained more fully below, the witness statement of Mr. Gorra suggests that there may be a third draft that still has not been produced. *See infra* ¶ 138.

185 Bello Statement, ¶ 116, **C-004**.

186 *Id.*

IFT's Plenary meeting of March 13, 2015, which reflects the Legal Unit's desire to withdraw an agenda item related to Tele Fácil,[187] which we now know to be the draft of Decree 77. In light of the fact that the IFT had repeatedly failed to produce the stenographic record of this Plenary meeting or the initial draft of Decree 77, this discovery was shocking, to say the least.

131. Indeed, Respondent has never denied that it repeatedly failed to produce the stenographic report of that March 13, 2015 meeting of the Plenary or the early draft(s) of Decree 77, despite the clear relevance of those materials to the transparency and discovery requests made by Claimants. Respondent's failure to produce the transcript of this meeting or the original draft(s) of Decree 77 provides clear evidence that Respondent's search efforts were deficient, to say the least.

132. Upon discovering that a different version of Decree 77 had been rejected by the Commission on March 13, 2015, Claimants, through their counsel, sought to obtain that draft and evidence of the reasons why it had not been adopted.[188] Claiming to have done a thorough search, Respondent represented to Claimants and this Tribunal that the draft of Decree 77 that was scheduled to be voted upon on March 13, 2015 was identical to the version actually voted upon nearly a month later on April 8, 2015, and that any comments on the earlier draft were received by the Legal Unit orally.[189] The Respondent represented that "it was considered that the merits of the matter should not be modified, so the project was submitted again in the terms originally proposed."[190] As "proof" of the fact that the document was not modified between March 13, 2015, and April 8, 2015, Respondent pointed to "the resolution approved by the

187 Transcript of March 13, 2015 Plenary Session admitting Comments from Commissioners, **C-046**.
188 *See* Letter from T. Feighery to E. Zuleta, et al. (Nov. 1, 2017), at 7-8.
189 *See* Letter from Respondent to E. Zuleta, et al. (Nov. 15, 2017), at 5.
190 *Id.*

Plenary, which is published on the Internet portal of the IFT," and claimed that it was the "same that was submitted for consideration by the Technical Secretariat of the Plenary."[191] As such, Respondent represented to the Tribunal that it had nothing more to produce.

133. Claimants challenged Respondent's representation that proof of the identical nature of the draft and adopted versions of Decree 77 was accessible on the "Internet portal of the IFT". Claimants pointed out that the IFT's Internet portal did not include the draft of Decree 77 that was circulated to the Commissioners in advance of the March 13, 2015 Plenary meeting.[192] Claimants further pointed out that, by the Commission's own practice, drafts must be made available to Commissioners at least 24 hours before a scheduled vote, and that, as a result, there should have been evidence of this draft being transmitted to the Commissioners in advance of the March 13, 2015 meeting.[193]

134. By this point in time, two Procedural Orders had already been issued by this Tribunal regarding Respondent's document production obligations. As the Tribunal noted in its Procedural Order No. 4 dated January 2018, "through Procedural Order No. 3, the Tribunal asked Respondent to confirm that it had undertaken and will undertake a good faith effort to search for the documents responsive to Claimants' Document requests No. 3, 6, 7, 7 bis, 9, 10 and 11."[194]

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191 *Id.*

192 Letter from T. Feighery to E. Zuleta, et al. (December 6, 2017).

193 *See id.*; *see also Ley Federal de Telecomunicaciones y Radiodifusión* (Federal Telecommunications and Broadcasting Law) (enacted on July 14, 2014) (hereinafter "FTBL"), at Article 45, **CL-004**:

> Commissioners must attend the Plenary sessions unless they have a justified cause. The commissioners who foresee to be absent with justified reason, must issue their vote and reasoning with at least 24 hours of anticipation.
>
> In case of absentees as discussed in the previous paragraph, the commissioners may choose to assist, participate and issue their vote and reasoning using a remote electronic communication mean.

194 Procedural Order No. 4, ¶ 9.

The Tribunal further noted that "Respondent informed the Tribunal that it had made a new search diligently and in good faith but that no other documents had been found."[195]

135. In response to Respondent's representations, the Tribunal ordered Respondent to "inform, by 16 January 2018 with respect to Claimants' documents No. 3, 6, 7, 7 Bis, 9, 10 and 11 (a) which were the steps undertaken to conduct the search; (b) which were the specific offices where searches were conducted; and (c) in which offices the response was that documents were not found because they would have been eliminated."[196]

136. In its January 16, 2018 response to the Tribunal, Respondent suddenly notified the Tribunal and Claimants that it had found a copy of that original draft of Decree 77,[197] establishing conclusively that its prior representations of having conducted a good faith search were hollow.

137. A comparison of the original draft Decree 77 that was scheduled to be adopted on March 13, 2015, and the version adopted on April 8, 2015 reveals that Respondent's prior representations that the drafts remained unchanged were false. Respondent's witness, Mr. Gorra, who until a few months before the preparation of Decree 77 served as the personal legal advisor to Chairman Contreras,[198] now admits that changes were made to the draft Decree 77, testifying:

> On April 7, 2015 the UAJ submitted to the Technical Secretariat of the *Pleno* a second draft of Decree 77 ("Second Draft of Decree 77") **which included the amendments** arising from the considerations of the UAJ to make the project clearer, as well as those that were stated by the commissioners and the UAJ deemed as appropriate to be included in the Second Draft of Decree 77, which would end up as Decree 77. This second draft was delivered to the Technical Secretariat of the *Pleno* and approved by the *Pleno* of the IFT during the meeting dated April 8, 2015, without any amendments.[199]

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195 Procedural Order No. 4, ¶ 9.
196 Procedural Order No. 4, ¶ 11.
197 Respondent's Letter of January 16, 2018 to the Tribunal responding to the Tribunal's request for information contained in Procedural Order No. 4.
198 Soria Second Report, ¶ 105 n.40, **C-111.**
199 Declaration of David Gorra Flota (hereinafter "Gorra Statement"), ¶ 53 (emphasis added).

138. Even though Mr. Gorra has now made this admission, his testimony about the modifications that were made to the draft of Decree 77 is vague and confusing. First it is important to point out that his testimony raises a substantial question about whether there is a third draft of Decree 77 that has still never been produced by Respondent. Mr. Gorra testifies about the potential for three drafts as follows:

a. In paragraph 40, Mr. Gorra testifies that a draft of Decree 77 was sent to the Technical Secretariat on March 6, 2015.[200]

b. In paragraph 43, Mr. Gorra testifies that he and Mr. Carlos Silva, the head of the Legal Unit, "received some oral comments from the Commissioners" and that they "deemed [it] necessary to analyze those comments and prepare a new version to deliver to the *Pleno*."[201] While Mr. Gorra provides no details regarding the substance of those oral comments, he does make clear that the comments were received "prior to the meeting."[202]

c. Beginning in paragraph 44, Mr. Gorra then testifies regarding comments received "[i]n the meeting of the *Pleno* of the IFT held on March 13, 2015."[203]

139. Thus, it appears as though Mr. Gorra received oral comments on multiple occasions, including in the days leading up to the March 13, 2015 Plenary session, and then at the March 13, 2015 Plenary session. It also appears that both rounds of comments caused him to

200 *Id.* ¶ 40.
201 *Id.* ¶ 42.
202 *Id.*
203 *Id.* ¶ 44.

make revisions to the original draft of Decree 77. If this is the case, then at least one draft of Decree 77 remains missing and has never been provided to Claimants.

140. Mr. Gorra's testimony is also vague because he provides no details regarding the comments he received "prior to" the March 13, 2015 Plenary meeting. He does not state which of the Commissioners provided advance comments on the draft, when those comments were received, or the substance of the comments. Nor does he disclose what revisions were made as a result of those initial comments received prior to the March 13, 2015 Plenary meeting.

141. Mr. Gorra's discussion of the events prior to the withdrawal of the draft Decree 77 is also confusing and illogical. In discussing the March 13, 2015 meeting, Mr. Gorra states that, because of the discussion at the Plenary meeting "in which the Commissioners argued the reasons why [Telmex] may return to submit a disagreement and why [Telmex] could not," "some Commissioners (Estrada, Labardini and Estavillo) did not agree with the draft's text."[204] This explanation does not make sense, however, because Mr. Gorra also testifies that the Legal Unit prepared the First Draft of Decree 77 and sent it to the Executive Coordinator on March 6, 2015.[205] How could a conversation that occurred on March 13, 2015, have been a basis for freezing Commissioners Estrada, Labardini, and Estavillo out of the drafting process, when that drafting was already completed by that time?

142. Mr. Gorra also does not address any of the specific changes that were made to the draft of Decree 77. Rather, while acknowledging that modifications were made,[206] he offers no explanation for what motivated the specific changes or why he believed his earlier drafts were insufficient. Nor does Mr. Gorra explain how the Legal Unit distinguished between comments

204 *Id.* ¶ 48.
205 *Id.* ¶ 40.
206 *Id.* ¶ 53.

that it "deemed as appropriate to be included in the Second Draft of Decree 77"[207] and those that it would reject.

143. In particular, Mr. Gorra does not explain why he rejected Commissioner Estrada's assertion that it was "inadmissible [for him] to think that the parties could return on several occasions" to seek resolution on the same agreement.[208] Mr. Gorra does not explain why he rejected Commissioner Labardini's position that "the parties had to sign the agreement that was known to them in the negotiation stage."[209] Mr. Gorra does not explain why he rejected Commissioner Estavillo's view that the agreement that should be signed was "the agreement known during the negotiation stage, adding the conditions resolved by the Institute by Resolution 381,"[210] nor does he explain why he did not heed Commissioner Estavillo's concerns about "the possibility that the parties could return to the Institute to request a new disagreement regarding the same agreement."[211]

144. Mr. Gorra seeks to downplay and dismiss the materiality of the changes the Legal Unit made to the draft of Decree 77 between March and April 2015. He never addresses the substance or significance of those changes. But, to quote Mr. Gorra, his view that nothing material changed to the draft of Decree 77 is "totally divorced from reality."[212]

145. As described in detail below, several significant changes were made during these critical weeks in which Tele Fácil was desperately seeking enforcement of Resolution 381 so that it could commence its business operations. Notably, all of those changes benefitted Telmex by

207 *Id.*
208 *Id.* ¶ 44.
209 *Id.* ¶ 46.
210 *Id.* ¶ 47.
211 *Id.*
212 *Id.* ¶ 33.

foreclosing any possibility that Tele Fácil could have sought to enforce the rate that had been recognized in Resolution 381.

146. First, the final version of Decree 77 removed language that would have left untouched the rate term that Telmex had offered and that Tele Fácil had accepted, and directed Tele Fácil to enforce that part of the agreement "using the means deemed desirable" (i.e., through a court proceeding).[213] Instead of suggesting enforcement of the agreed upon terms, the revised version of Decree 77 disclaimed the IFT's ability to "obligate the parties involved" to anything other than the terms that had been disputed.[214] As Gerardo Soria puts it:

> Even though the changes [made to Phantom Decree 77] are subtle, their implications are not… the First Draft of Decree 77 states that the agreement contained in the records is not a subject to dispute and they may be enforced using the means deemed desirable. This was later modified to suggest that there is no enforceability in regards to the agreement contained in the records as the Final Draft of Decree 77, however, included wording that suggested the pre-agreed terms were not valid or recognized.[215]

213 Phantom Decree 77, at 10, **C-116.**
214 Decree 77, at 10, **C-051**
215 Soria Second Report, ¶¶ 109-11, **C-111.**

MARCH DRAFT	FINAL APRIL DECREE 77
In this sense, the provisions of the First Resolution item of the Interconnection Resolution regarding the requirement to interconnect the public telecommunications networks of the parties involved in the disagreement, is an order issued by the authority that must be complied with by Tele Fácil and Telmex/Telnor; regarding the portability clause, this must be removed from the corresponding interconnection agreement entered into, as applicable, between the parties. Concerning the terms of the interconnection agreement the parties must sign, considering that the IFT Plenary has not issued a resolution on the draft agreement contained in the record as this is not subject to dispute, the rights of the parties are untouched with regard to the elements that were not part of the disagreement, and may be enforced using the means deemed desirable.	In this sense, the provisions of the First Resolution item of the Interconnection Resolution regarding the signing of the corresponding agreement, is an order issued by the authority that must be complied with by Tele Fácil and Telmex/Telnor, in the understanding that said document must invariably consider the indirect interconnection and omit any reference to portability costs, the only points over which the Plenary of the IFT referred to and regarding which it has the power to obligate the parties involved.

147. Second, the final version of Decree 77 added additional language concluding that the rights of the parties "remain untouched" with regard to anything "in the draft agreement included in the file that was not a matter of its competence," and relied upon Telmex's purported "different interpretations" of Resolution 381 as the legal basis for the IFT's issuance of Decree 77.[216] The earlier version contains no such language:

[216] Decree 77, at 10-11, **C-051**.

MARCH DRAFT	FINAL APRIL DECREE 77
	Regarding the other terms and conditions of the interconnection agreement that the parties must execute, taking into consideration that this collegiate body did not address the provisions contained in the draft agreement included in the file as it was not a matter of disagreement and therefore it was not a matter of its competence, it is clarified that the rights of the parties regarding the aspects that were not a subject matter of the Interconnection Resolution remain untouched. The above, since the will of the parties is what governs the execution of an interconnection agreement Additionally, it must be considered that the parties carried out actions tending to comply with the Interconnection Resolution within the term of compliance indicated in the First Resolution item, as can be inferred from the documents referred to in backgrounds III and IV of this Decree. Nonetheless, derived from the different interpretations that the parties have made regarding the scope of the resolution, it is necessary to issue this Decree.

148. Third, the final version of Decree 77 imposed upon Tele Fácil the obligation to sign an interconnection agreement,[217] even though this version of the Decree had, at the same time, stripped away the certainty of the rates that Resolution 381 had provided. In other words, rather than merely demanding physical interconnection, the revised Decree 77 put Tele Fácil in the untenable position of being directed to sign an interconnection agreement that omitted the most material of terms: the rate. Requiring the execution of an agreement devoid of rates

[217] *Id.* at 11.

appears to have been an effort to ensure that Tele Fácil had no path to enforce the rates that had been agreed upon.[218]

MARCH DRAFT	FINAL APRIL DECREE 77
Under such circumstances, once the meaning of the Interconnection Resolution is clarified and after the period set forth in the First Resolution item of the Interconnection Resolution has elapsed, a term of 10 business days shall be granted to Telmex/Telnor as of the date of the notification of this Decree to interconnect their public telecommunications network with the Tele Fácil network, irrespective of whether the interconnection agreement has been signed with the counterparty, with the rights of the parties remaining intact so that such execution is enforced using the means deemed desirable as it is not part of the disagreements arising from the Interconnection Resolution.	Once the meaning of the Interconnection Resolution is clarified, a term of 10 business days is granted as from the day following the date on which the notification of this Agreement takes effect, in accordance with the provisions of article 32 of the Federal Administrative Procedure Law, for them to interconnect their public telecommunications networks and execute the corresponding agreement.

149. Fourth, and finally, several changes were made between March and April to Decree 77's ordering clauses. Three changes warrant careful consideration. First, in the First Ordering Clause, the revised Decree 77 created the fiction that the IFT has relied on ever since, and which the so-called specialized courts have unsearchingly accepted, namely, that Decree 77 did not create "any modification to" Resolution 381.[219] Second, by modifying the Second Ordering Clause and adding new language to the Third Ordering Clause,[220] the IFT sought to compel Tele Fácil to sign an interconnection agreement that contained no rate. Third, the revised Decree 77 eliminated reference to Tele Fácil's ability to enforce its rights "through the

[218] It cannot be ignored that Tele Fácil's refusal to sign an interconnection agreement that omitted the rates was later used by the IFT as a basis to sanction Tele Fácil. It now appears that this sanction was a set up from the very beginning, concocted by the IFT between March and April 2015.

[219] Decree 77, at 13, **C-051**.

[220] *See id.*

appropriate channels,"[221] which appears to have been a reference to, and recognition that, Tele Fácil had a binding, enforceable contract with Telmex under Mexican contract law, even though the IFT was inappropriately disclaiming the authority to enforce the undisputed terms.[222] Collectively, these changes appear to have been an effort to ensure that Tele Fácil had no path to try to enforce the agreed-upon rate through the courts. Finally, the revised Decree adds a new Fifth Ordering Clause, which expressly directs the Compliance Unit, led by Gerardo Sanchez Henkel, to use this order to shut down Tele Fácil's request for enforcement.[223] As described earlier, the addition of this ordering clause is significant given Mr. Sanchez Henkel's understanding that Resolution 381 clearly established the rates and his desire to enforce Resolution 381 without modification.[224]

MARCH DRAFT	FINAL APRIL DECREE 77
DECREE ORDER	**DECREE ORDER**
FIRST.- The scope of the Interconnection Resolution is determined in the terms established in the Second Consideration section of this Decree.	**FIRST.-** The scope of the Interconnection Resolution is determined in the terms established in the Second Consideration section of this Decree, without this implying any modification to said resolution.
SECOND.- A period of 10 (ten) business days is granted from the day following the date on which the notification of this Decree takes effect, for Tele Fácil, S.A. de C.V., and Teléfonos de México S.A.B. de C.V. and Teléfonos del Noroeste S.A. de C.V. to interconnect their public telecommunications networks, without prejudice to the execution of the respective agreement.	**SECOND.-** A period of 10 (ten) business days is granted as from the day following the date on which the notification of this Decree takes effect, for Tele Fácil and Telmex/Telnor to interconnect their public telecommunications networks.

221 *Id.*
222 *Id.*
223 *Id.*
224 *See, e.g.*, *supra* ¶ 104.

	THIRD.- Without prejudice to the provisions in the previous numeral, the parties must execute the corresponding agreement, observing the provisions of the Fifth Consideration section of the Interconnection Resolution, that is, the provisions related to indirect interconnection and the omission of any reference to portability costs.
THIRD.- The rights of the parties are held harmless and may be enforced through the appropriate channels, regarding the conditions that were not subject to disagreement.	**FOURTH.-** The rights of the parties are held harmless regarding the conditions that were not a matter of the Interconnection Resolution.
FOURTH.- The Compliance Unit is instructed to notify Tele Fácil México, S.A. de C.V., and Teléfonos de México S.A.B. de C.V. and Teléfonos del Noroeste S.A. de C.V. of this agreement.	**FIFTH.-** The Compliance Unit is instructed so that, in accordance with its authorities and considering the provisions of the Interconnection Resolution and this Decree, it carries out the pertinent actions to resolve the claim filed by Tele Fácil on January 28, 2015, indicated in background V of this Decree. **SIXTH.-** Notify this Decree to Tele Fácil and Telmex/Telnor in response to the documents indicated in backgrounds III, IV, VI, VII and VIII of the same.

150. Thus, not only was the March draft of Decree 77 not identical to the final version ultimately adopted by a 4-3 vote in April, it was fundamentally different. The original version of Decree 77 improperly disclaimed the IFT's authority to enforce the undisputed rate term and sought to extricate the IFT from the dispute by concluding that the rates should be enforced "through the appropriate channels."[225] Thus, the original draft of Decree 77 was erroneous because it renounced the IFT's obligation to ensure that its interconnection dispute resolution process yielded an "entire interconnection agreement," a necessary feature of an interconnection

[225] *See* Phantom Decree 77, at 12, **C-116**.

process that was required to ensure the prompt interconnection of networks. As Mr. Diaz acknowledges:

> The conditions that the concessionaires have agreed upon and, when applicable, those conditions determined by the IFT upon resolution of a disagreement, will **amount to the full interconnection agreement**. This is, i**t is expected that upon issuance of a resolution that resolves an interconnection disagreement, no more items pending resolution shall be present** which prevent the provision of the services.[226]

151. Even though the original draft of Decree 77 was itself fatally flawed, the final version of Decree 77 went even further. It not only unlawfully modified Resolution 381, it also sought to bind Tele Fácil to an interconnection agreement that included no rate. Rather than directing the parties to obtain enforcement elsewhere, it created the pathway for the "never ending story" that allowed Telmex to return to the IFT to initiate a new proceeding and obtain rates forty times lower than those that it had voluntarily agreed to with Tele Fácil. In short, the revisions sought to protect Telmex at the expense of Tele Fácil.

152. Thus, there can be no serious doubt about the reason for the Respondent's repeated attempts to hide the original version of the draft decree or why Respondent was willing to repeatedly and falsely represent to the Claimants and the Tribunal that no changes had been made between March and April 2015. The modifications that were made by the IFT during those crucial weeks of delay are damning. This also explains why the IFT has deleted and destroyed every single email communication from this critical time period. The IFT never wanted anyone to know the truth about these pro-Telmex changes.

153. In addition to its failure to be forthcoming regarding the substance of the initial draft of Decree 77, it appears that Respondent has also hidden or destroyed information regarding the discussion that occurred at the meeting of the IFT Plenary on March 13, 2015.

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[226] Diaz Statement, ¶ 43 (emphasis added).

154. In the witness statement of David Gorra Flota, Mr. Gorra makes the following statement regarding the March 13, 2015 meeting:

> **In the meeting of the *Pleno* of the IFT held on March 13, 2015, when the First Draft of Decree 77 was delivered, I recall that the Commissioners verbally commented** to the representatives of the UAJ (*i.e.* Mr. Carlos Silva and myself), that we had to analyze the scope of capacity of the Institute to resolve disagreements; this is, that if it was possible that even after the issuance of Decree 77 the parties could submit a new disagreement. In this respect, the UAJ commented that, from the legal point of view (given it involves capacity to resolve on conditions not already agreed upon), nothing prevented the parties to return to the Institute to submit a disagreement on questions that had not been the subject of Resolution 381.[227]

155. As support for his assertion about what was "verbally commented" at the IFT Plenary meeting (which he attempts to summarize in paragraphs 45-51), Mr. Gorra confusingly cites to the Stenographic version of the session of March 13, 2015, attached to Claimants' Statement of Claim as Exhibit C-046.[228] What is most troubling about that stenographic record and the audio recording of the Plenary's March 13, 2015 meeting from which it is derived, however, is that it contains none of the discussion about which Mr. Gorra attempts to testify. Again, none of the discussion about why the IFT declined to adopt the draft of Decree 77 appears in the official IFT record. Rather, that recording and the stenographic records begins as follows:

> **Commissioner Gabriel Oswaldo Contreras Saldivar:** Good afternoon, welcome to the fifth Ordinary Session of the Plenary Session of the Institute. I would like to ask the Secretary to verify if there is quorum for the meeting to be held.
>
> **Yaratzet Furies Lopez:** Mr. Chairman, I inform you that with the presence of the seven Commissioners, we have legal quorum.
>
> **Commissioner Gabriel Oswaldo Contreras Saldivar:** Thank you. Before submitting the agenda for your approval, I would like to give the floor to

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227 Gorra Statement, ¶ 44 (emphasis added).

228 Transcript of March 13, 2015 Plenary Session admitting Comments from Commissioners, **C-046**.

David Gorra, General Director of Legal Instrumentation in the Legal Affairs Unit.

David Gorra Flota: Thank you, Mr. Chairman. This is in relation with the matter listed under number III.8, named Agreement through which the Plenary Session of the Federal Telecommunications Institute establishes the scope of the resolution through which the Plenary Session of the Federal Telecommunications Institute determines the interconnection conditions not agreed to between Tele Facil Mexico, S.A. de C.V. and the companies Telefonos de Mexico S.A.B. de C.V. and Telefonos del Noroeste, S.A. de C.V.

The Legal Affairs Unit has received various comments from the offices of the Commissioners, therefore it is requested that it be withdrawn from the Agenda, in order to analyze them and be able to present a version that can be submitted to the consideration of the Plenary Session.

Commissioner Gabriel Oswaldo Contreras Saldivar: Thank you David, it would thus be submitted to the consideration of the Commissioners. I am also going to give the floor to Luis Lucatero, Head of the Regulatory Policy Unit.

Luis Felipe Lucatero Govea: Thank you, Mr. Chairman. I would like to very respectfully request that be matter III.8 be removed from the Agenda, which in our opinion requires a deeper analysis on the various legal aspects involved. We would like more time to evaluate it and we would like to remove it from the Agenda. Thank you.

Commissioner Gabriel Oswaldo Contreras Saldivar: Thank you Luis, I will submit it for consideration.

Based on the reasons given, I submit the Agenda for your approval, removing the matters indicated under numbers 111.7 and 111.8, due to the reasons that have been expressed. Those who are in favor, please state as such.

Yaratzet Funes Lopez: It is unanimously approved.

Commissioner Gabriel Oswaldo Contreras Saldivar: Thank you. In order to keep the meeting organized, I will maintain the numbering with the understanding that the corresponding adjustments will be made to the respective Minutes.[229]

[229] *Id.* at 1-2.

156. From the sworn testimony of Mr. Gorra we now know that various comments from the offices of the Commissioners were received "[i]n the meeting of the Pleno of the IFT held on March 13, 2015," and not at some time prior to the Plenary meeting.[230] Because the comments were received "[i]n the meeting of the Pleno," the IFT's transparency obligations required those comments to be recorded and made available for public inspection.

157. The Constitutional Reform imposed upon the newly-created IFT a duty to "comply with principles of transparency and access to information. [The IFT Plenary] shall collegially deliberate and decide on issues by majority of vote; their meetings, agreements and resolutions shall be public…"[231]

158. To comply with the transparency obligation of having the IFT Plenary's sessions publicly available, Congress established in the FTBL the process for Plenary sessions to be recorded and kept available for consultation.[232] The FTBL contains three relevant and related Articles addressing the IFT's duty to maintain a transparent decision-making process.

159. In Article 47 of the FTBL, Congress declared that all meetings of the Plenary shall be public except where confidential or reserved information is being discussed. It also imposed upon the IFT an obligation to hold any non-public confidential meetings only in accordance with the Federal Law of Transparency and Access to Governmental Public Information:

> **Article 47**. The agreements and resolutions of the Plenary of the Institute shall be public and only the parts containing confidential or reserved information shall be reserved.
>
> **The Plenary meetings shall also be public except for those where confidential or reserved information is discussed.**

230 *See* Gorra Statement, ¶ 44.
231 *See* Constitutional Reform, article 28 section VI, **CL-002**.
232 FTBL, at Article 47-49, **CL-004**.

> Regarding the two foregoing paragraphs, **only the information declared as such in accordance with the provisions of Federal Law of Transparency and Access to Governmental Public Information and other applicable provisions shall be considered confidential and reserved.**[233]

160. In Article 48 of the FTBL, Congress imposed upon the IFT the duty to record, and make available for public inspection, all meetings of the IFT Plenary, except as provided in Article 47 for confidential or reserved information:

> **Article 48. The recordings of the meetings of the Plenary of the Institute shall be made available in public versions** generated in accordance with the Federal Law of Transparency and access to the Governmental Public Information and additionally there shall be a stenographic version which shall be made available to the public through a tool of easy use and access in the Internet portal of the Institute. **The meetings of the Plenary shall be kept for further consultation.**[234]

161. In Article 49 of the FTBL, Congress mandated that any non-public discussions of the Plenary occur only after publicly justifying the need for such a meeting. Article 49 also requires that, even on matters that are discussed in private, the vote of the Plenary be made public:

> **Article 49. When information corresponding to one or several matters has been declared confidential or reserved, the Plenary shall agree to discuss them in private meetings, justifying publicly the reasons for such determination.**
>
> **The vote of each commissioner in the Plenary shall be public, including in the case of private meetings.** Voting shall be nominal by show of hand, according to provisions governing the meetings. The Institute's Internet portal shall include a section to consult public versions of the votes of the commissioners in each of the matters submitted to the consideration of the Plenary including, when applicable, the corresponding particular votes.[235]

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233 FTBL, at Article 47, **CL-004**.
234 *Id.* at Article 48.
235 *See id.* at Article 49.

162. Congress' intention when adopting the above articles was to maintain the public's trust in the transparency and accountably of the IFT generally, but specifically to protect foreign investors:

> "**One of the pillars of the constitutional reform was to grant certainty to national and foreign investments** for the telecommunications and broadcasting sectors, reason for which, in addition to a precise and unambiguous regulation for regulatory matters, [**the FTBL] must also include provisions that allow to clearly know the decision processes**, and that is why the Constitution established that the IFT Plenary must comply with principles of transparency and access to information and that their sessions, decrees and resolutions must be public, with the exceptions provided by statute. To comply with this requirement, the Draft Decree that these Commissions submit for vote provides the way in which the Institute's Plenary sessions may be publicly consulted."[236]

163. There is no record that the IFT publicly justified having a private, non-public meeting regarding the original draft of Decree 77 that was proposed for the IFT's adoption on March 13, 2015. As such, the IFT was obligated to record the meeting and make it publicly available. However, the record that the IFT has made publicly available includes none of the discussion about which Mr. Gorra testifies in his witness statement. Thus, it is clear from the available evidence that the IFT Commissioners discussed the draft of Decree 77 at a Plenary meeting without complying with its transparency obligations. By doing so, the IFT has denied Tele Fácil access to information that the FTBL required to be made publicly available.

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[236] *Dictamen de las Comisiones Unidas de Comunicaciones y Transportes, Radio, Televisión y Cinematografía, y de Estudios Legislativos, con Proyecto de Decreto por el que se Expiden la Ley Federal de Telecomunicaciones y Radiodifusión, y la Ley del Sistema Público de Radiodifusión del Estado Mexicano; y se Reforman, Adicionan y Derogan Diversas Disposiciones en Materia de Telecomunicaciones y Radiodifusión (*Resolution by the Commissions of Communications and Transport, Broadcasting, Television and Cinematography, and of Legislative Studies, with Initiative of Decree to Issue the Federal Telecommunications and Broadcasting Law, and the Law of the Mexican State Public Broadcasting; and which Amends, Adds and Supersedes several provisions in Telecommunications and Broadcasting Matters) (July 1, 2014) (hereinafter "Senate's Discussion of FTBL Initiative"), at 203, **C-118.**

164. Because the IFT had a duty to record the debate about whether to adopt the draft of Decree 77 that was on its March 13, 2015 meeting agenda and it failed to do so, Claimants and this Tribunal have no way of knowing what was actually discussed and whether Mr. Gorra's recollection of those discussions in paragraphs 45-51 of his witness statement are accurate. As he himself notes, "the meeting where the First Draft was discussed was held about three years ago. I do not recall the specific comments of each Commissioner. I only recall the positions of each Commission in general."[237]

165. In sum, then, rather than having a recording and verbatim transcript of this most critical of decisions, we are left with a single person's non-specific recollection of that off-the-record meeting.[238] And, as a reminder, Tele Fácil was never given notice of the IFT's plan to vote on any resolution at the March 13, 2015 meeting,[239] and the IFT's practice is not to have the public or affected parties attend their meetings.[240]

166. Further, it bears repeating that the Claimants and the Tribunal have received:

a. no notes or emails summarizing the meeting and the specific issues raised by the Commissioners when they met on March 13, 2015;

b. no analysis explaining the reasons for the significant and substantial changes made to the draft between March 13, 2015, and April 8, 2015; and

c. no evidence of those revisions being shared between the Legal Affairs Unit and the Regulatory Policy Unit, even though the record is clear that

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237 Gorra Statement, ¶ 45.

238 *Id.*

239 In IFT's website containing the calendar of Plenary sessions (http://www.ift.org.mx/conocenos/pleno/calendario-de-sesiones/2018-05), they only publish the agenda after the session has occurred. There is no information about the matters to be discussed in upcoming sessions.

240 *Nota Informativa emitida por el Instituto Federal de Telecomunicaciones respecto al acceso presencial a las sesiones del Pleno* (Informational Note issued by the Federal Telecommunications Institute regarding physical access to Plenary meetings) (September 24, 2014) (hereinafter "IFT's Note on Attendance to Plenary Meetings"), **C-119.**

both units asked for the time and authority to be involved in making revisions.

167. Because the IFT has allowed or caused every piece of evidence during this time period to be destroyed, it is impossible to know with certainty what forces influenced the Legal Affairs Unit and the Regulatory Policy Unit during this critical time period to move from a draft that left the rate Tele Fácil and Telmex had agreed to intact for potential judicial enforcement to the version that was ultimately adopted, which clearly seeks to foreclose any possibility of enforcement of the rate, instead providing Telmex with a second bite at the apple to undo the negotiated rates.

3. Witness Tampering

168. In its letter to the Tribunal of November 1, 2017, Claimants informed the Tribunal of its profound concerns regarding apparent witness tampering that occurred as Claimants were working to finalize the Statement of Claim.[241] The Claimants indicated their intention to keep the Tribunal informed of developments on this issue. Claimants' investigation of this matter is continuing and Claimants will provide the Tribunal with additional information as it becomes available.

* * *

169. In sum, the Respondent has failed to muster any credible evidence that calls into question Claimants' conclusion that the IFT failed to enforce Resolution 381 and then issued Decree 77 to unlawfully reverse Resolution 381's clear order for the parties to interconnection their network and execute an interconnection agreement within 10 days containing "the interconnection **terms, conditions and rates that are ordered in this Resolution [381]**." In

[241] Letter from T. Feighery to E. Zuleta, et al. (November 1, 2017), at 5.

addition, the record establishes that the IFT has repeatedly failed to conduct a good faith search for evidence, allowed or caused relevant evidence to be destroyed, and has repeatedly failed, and continues to fail, the full story about how the various drafts of Decree 77 came into existence and were modified. What is clear, however, is that the modifications made to Decree 77 were entirely one sided, benefitting Telmex while attempting to foreclose any avenue for Tele Fácil to enforce the rates that had been agreed to and ordered by Resolution 381.

III. RESPONDENT'S LEGAL ARGUMENTS REGARDING ITS VIOLATIONS OF NAFTA ARE ENTIRELY UNFOUNDED

170. Respondent's Statement of Defense contains five short pages of legal argument relating to the merits of the case, none of which is persuasive. With hopes of diverting the Tribunal's attention from the misconduct of the IFT and the Mexican courts, Respondent raises a series of baseless threshold objections. These range from the unfounded to the surprisingly misplaced. The little that Respondent says about the merits of Claimants' claims parallels its generally self-serving approach to the facts: Respondent simply pretends that Resolution 381 never established Tele Fácil's interconnection rights so that it can argue that Decree 77 never destroyed those critical rights. This is simply contrary to reality. Further, Respondent ignores the severe failings of the Specialized Telecommunications Courts.

171. Claimants' response to all of Respondent's legal arguments relating to the IFT's breaches of Articles 1110 and 1105 and the Mexican Telecommunications Courts' subsequent breach of Article 1105 appears below.

A. Respondent Has Failed to Substantiate Its Threshold Objections

1. Claimants have established the existence of their investments in Mexico

172. In their Statement of Claim, Claimants have enumerated the many assets owned by Tele Fácil, in its capacity as investment company, and by Claimants, in their role as

shareholders of Tele Fácil, that constitute protected "investments" under Chapter Eleven.[242] Tele Fácil, the investment "enterprise,"[243] functioned as concessionaire with rights to provide "quadruple play" services in Mexico,[244] rights to earn significant revenues through the exchange of call traffic under the interconnection agreement with Telmex,[245] various telecommunications equipment, rights to business income and a right to access the Mexican telecommunications market.[246] In addition, Claimants owned shares in Tele Fácil and, collectively, a right to 80% of Tele Fácil's profits under the Memorandum of Understanding dated July 20, 2009, the investment partners' shareholders' agreement.[247]

173. In large part, Respondent does not refute Claimants' assertions that the enumerated assets are "investments" within the meaning of Article 1139. It expressly concedes that Claimants' shares in Tele Fácil constitute "investments."[248] Further, it raises no objection to Claimants' assertion that the remainder of assets enumerated in the Statement of Claim are also "investments," except with respect to Tele Fácil's interconnection agreement.

174. In that regard, Respondent argues, in the context of responding to Claimant's expropriation claim, that the interconnection agreement would not "fall[] within Article 1139 (g) – 'real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose economic benefit or other business purposes.'"[249] Respondent fails to develop this argument with any vigor. It simply adds that "[t]hese are at most legal rights of Tele Fácil and Telmex, obliging each to pay the other for termination of calls on its network."[250]

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242 Statement of Claim, ¶¶ 294-311.
243 *Id.* ¶¶ 294-296.
244 *Id.* ¶¶ 297-298.
245 *Id.* ¶¶ 299-300.
246 *Id.* ¶¶ 301-306.
247 *Id.* ¶¶ 311.
248 Statement of Defense, ¶ 262.
249 *Id.* ¶ 263.
250 *Id.*

175. Without further elaboration, Claimants are left to wonder what Respondent means. Having sketched out its argument in the context of responding to Claimants' expropriation claim, Respondent appears to assert that the interconnection agreement was not an "investment" that was capable of being expropriated because it would have only established rights to payment between the investor and a third party, i.e., between private parties, as opposed to between the investor and the host State.

176. Respondent's argument is readily discredited on numerous grounds: (a) Tele Fácil's rights under the interconnection agreement clearly constitute "intangible property" under Mexican law and, in any event, are "interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory"[251]; (b) the definition of "investment" in Article 1139 does not exclude assets creating rights running between an investor and a third party; and (c) Tele Fácil's rights under the interconnection agreement are capable of being expropriated.

a. Tele Fácil's interconnection rights constitute "intangible property."

177. Respondent makes no attempt whatsoever to rebut the detailed opinions of Claimants' leading telecommunications experts regarding the legal nature of Claimants' interconnection rights as established under Resolution 381.

178. Professor Clara Álvarez provided an extensive analysis of Tele Fácil's property rights in her first expert report. She explained that, under Mexican law, all persons, including legal entities, possess an estate that may include both tangible and intangible property. She defines the latter as follows:

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[251] North America Free Trade Agreement, ch. 11 (1989), http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/fta-ale/11.aspx?lang=eng (hereinafter "NAFTA Article []"), at Article 1139 (definition of "investment"), **CL-086**.

> Assets without physical existence (*incorpóreos*) are rights considered "*bienes muebles"* and may consist of copyrights, rights upon a credit, rights derived from a legal relationship, shares in a company. "(…) in connection with the assets, [the Federal Civil Code] first refers to the things [movables] and then assets without physical existence or rights in articles 753 and 754". Any asset not considered by law as real-estate property will be deemed as "*bienes muebles*".[252]

179. In Tele Fácil's case, Professor Álvarez explained that Resolution 381 "is the source of the rights and obligations between Telmex and Tele Fácil, imposing also an obligation to enforce upon the IFT." She continued:

> Tele Fácil could rely that such right would be enforced by the IFT (1) as Resolution 381 was valid and enforceable, (2) because interconnection is a public interest matter, and (3) because Resolution 381 had a term for interconnection to be performed and for the interconnection agreement to be executed. Such right under the Federal Civil Code would be the equivalent of a *bien mueble* ... pursuant to article 754. Hence, Tele Fácil´s right was in fact an asset, such asset would be deemed part of its estate.[253]

180. Professor Álvarez confirms this conclusion in her second expert report.[254]

181. Mr. Gerardo Soria concurs that Tele Fácil possessed intangible rights. In his second expert report, he provides:

> Aside from Tele Facil´s property rights over its telecommunications infrastructure, and specifically its property rights over the fruits or rents generated from it, as well as the rights over the inherent value of its concession title, Tele Facil also held intangible rights derived directly from its agreement with Telmex/Telnor. These intangible assets were comprised of personal rights, which precisely arose from the interconnection agreement with Telmex/Telnor. Therefore, such rights already formed part of Tele Facil´s patrimony -as this concept will be analyzed in the following paragraphs- at the moment in which the agreement became enforceable, specifically, as pertaining to interconnection fees.[255]

182. This important testimony about the nature of rights established pursuant to Resolution 381, or any interconnection resolution for that matter, remains uncontested by

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252 Álvarez First Report, ¶ 201, **C-008** (citations to Mexican law and commentary omitted).
253 *Id.* ¶ 204 (citations to Mexican law and commentary omitted).
254 Álvarez Second Report, ¶¶ 25-28, **C-110.**
255 Soria Second Report, ¶ 163, **C-111**.

Respondent. It simply argues that Tele Fácil's rights were never established, but it fails to disprove that, if such rights did exist (which they did), that they would not constitute "intangible property," within the meaning of Article 1139 of the NAFTA. Moreover, if Respondent's position were correct, it would mean that providers in Mexico's telecommunications industry are provided no legal certainty regarding their financial relationships with other providers. As Professor Álvarez and Mr. Soria demonstrate, this is clearly not the case.

183. Further, Tele Fácil's rights under its interconnection agreement with Telmex, in any event, would also easily fall under the heading "interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory" set forth in NAFTA Article 1139(h).[256] That provision has been described as a "catch-all" category of investment designed to capture commitments of capital by investors of one NAFTA Party in the territory of another that are of a more permanent nature than those arising through simple cross-border sales.[257] The conditions of Article 1139(h) are satisfied if the investor can demonstrate the existence of "an actual and demonstrable entitlement . . . to a certain benefit under an existing contract or other legal instrument."[258]

184. For example, when charged with interpreting the scope of NAFTA Article 1139(h), the tribunal in Mondev v. United States held that a contractual option to purchase a parcel of municipal land for future redevelopment constituted an interest arising from the commitment of capital.[259] The tribunal reasoned that the investment existed for purposes of

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256 UNCTAD, SCOPE AND DEFINITION 33 (2011), **CL-106**.

257 *Id*; *see also Apotex Inc. v. United States*, NAFTA/UNCITRAL, Award on Jurisdiction and Admissibility (June 14, 2013), ¶ 234, **CL-107**.

258 *Merrill & Ring LP v. Government of Canada*, NAFTA/UNCITRAL, Award (Mar. 31, 2010), ¶ 142, **CL-108**.

259 *Mondev International Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, Award (Oct. 11, 2002), ¶ 80 ("In the present case, in the Tribunal's view, Mondev's claims involved 'interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory' . . . and they were not

NAFTA Article 1139(h), even though the option to acquire the real estate parcel was never fully exercised. The tribunal emphasized that "once an investment exists, it remains protected by NAFTA even after the enterprise in question may have failed" and observed that "a person remains an investor for the purposes of Articles 1116 and 1117 even if the whole investment has been definitively expropriated, so that all that remains is a claim for compensation."[260]

185. Similarly, the rights held by Tele Fácil under its interconnection agreement vested under Mexican law clearly constitute "interests arising from the commitment of capital," even if the IFT subsequently destroyed them. Thus, these rights satisfy the definition of investment either within the meaning of Article 1139(g) or Article 1139(h).

b. The definition of "investment" does not exclude rights running between an investor and a third party.

186. Article 1139 provides a broad, asset-based definition of "investment." Assets falling within the definition range widely from "an enterprise" to "an interest in an enterprise" to "real estate or other property, tangible or intangible." It encompasses assets falling into three broad categories: (1) assets relating in some way to an enterprise; (2) interests relating to economic activity; and (3) "any other claims to money that do not involve the kinds of interests mentioned elsewhere in the definition."[261] Despite being a closed list, according to one NAFTA tribunal, the definition of "investment" in the NAFTA is still framed in "exceedingly broad terms."[262]

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caught by the exclusionary language in paragraph (j) of the definition of 'investment', since they involved 'the kinds of interests set out in subparagraphs (a) through (h).'"), **CL-057**.

260 *Id*.

261 KENNETH J. VANDEVELDE, U.S. INTERNATIONAL INVESTMENT AGREEMENTS 134 (Oxford, 2009), **CL-109**.

262 In *Feldman v. United Mexican States*, "[t]he term 'investment' is defined in Article 1139 in exceedingly broad terms. It covers almost every type of financial interest, direct or indirect, except certain claims to money." *Marvin Feldman v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award (Dec. 16, 2002), ¶ 96, **CL-051;** *see also* Andrea K. Bjorkland, "Commentary on NAFTA Chapter 11", in COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES 530 (Chester Brown, ed. Oxford, 2013) ("The definition of investment in NAFTA is a broadly encompassing but exhaustive list."), **CL-110**.

187. In fact, the scope of Article 1139 is cabined only by the words defining each enumerated category of assets and a general carve-out for purely commercial transactions. Neither limitation excludes Tele Fácil's rights under the interconnection agreement from the definition of "investment." Nor does either render interconnection agreement rights incapable of being expropriated in any way.

188. Article 1139(g)—on which Respondent solely focuses—covers "real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes."[263] Thus, by its own terms, Article 1139(g) defines "investment," in relevant part, as including "other property." This broad category is qualified only by the phrase "tangible and intangible" and subject only to the condition that such property be "acquired in the expectation or used for the purpose of economic benefit or other business purposes." Nothing in the text of Article 1139(g) therefore can be reasonably interpreted as excluding agreements that create rights or interests between private parties.

189. As explained in the Statement of Claim, Tele Fácil's rights under the interconnection agreement easily satisfy these qualifications.[264] Tele Fácil's interconnection rights are vested property rights under Mexican law. This point is made emphatically by two of Mexico's leading telecommunications experts, Professor Álvarez and Mr. Soria, in two rounds of expert opinions.[265] Notably, Respondent's purported expert, Mr. Buj, does not object to this conclusion as a matter of law. Rather, he simply—and erroneously—argues that such rights never arose as a matter of contract law.[266]

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263 NAFTA Article 1139 (definition of "investment"), **CL-086**.

264 Statement of Claim, ¶¶ 299-300.

265 Álvarez First Report, ¶¶ 87-97, **C-008**; Álvarez Second Report, ¶¶ 25-27, 101, **C-110**; Soria First Report, ¶¶ 27-37, **C-009**; Soria Second Report, ¶¶ 135-173, **C-111**.

266 Buj Report, ¶¶ 18-19.

190. Acquiring the interconnection agreement was also clearly a critical step in order for Tele Fácil to gain access to Mexico's telecommunications market. Undoubtedly, the whole purpose of securing such rights was to allow Tele Fácil to interconnect with Telmex indirectly in order to gain unfettered access to Mexico's telecommunications market and to earn a substantial profit by offering unique telecommunications services to the Mexican people.[267]

191. Further, the carve-out in the definition of "investment" in Article 1139 for certain purely commercial arrangements does not include Tele Fácil's interconnection agreement. Article 1139 only excludes:

> (i) claims to money that arise solely from (i) commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of another Party, or (ii) the extension of credit in connection with a commercial transaction, such as trade financing, other than a loan covered by subparagraph (d); or (j) any other claims to money, that do not involve the kinds of interests set out in subparagraphs (a) through (h).[268]

192. As explained, the interconnection agreement constituted intangible property within the meaning of Article 1139(g) that was qualitatively distinct from a transboundary contract for services or trade financing.

193. Finally, the basic premise of Respondent's argument—that contracts between private parties are not investments—has already been rejected out of hand by another esteemed investor-State tribunal. In European Media Ventures SA v. Czech Republic, the Czech Republic argued, also in the context of defending against an expropriation claim, that "a contractual right will not qualify as an investment unless the other party to the contract is the host State."[269] That

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267 Statement of Claim, ¶¶ 76-82.

268 NAFTA Article 1139 (definition of "investment"), **CL-086**.

269 *European Media Ventures SA v. Czech Republic*, UNCITRAL, Partial Award on Liability (July 8, 2009), ¶ 40, **CL-111**.

argument was based on the respondent's unconventional reading of the ICSID Convention according to which, it argued, only the rights of host foreign investors vis-à-vis the host State were protected. The tribunal quickly dispensed with the argument, finding definitively that "the jurisprudence of international investment law tribunals quite clearly leaves no room for it."[270]

194. The tribunal went on to explain that investment treaties provide a much broader scope of protection than alleged by the Czech Republic:

> [W]e believe that the prime object of the Treaty … was not so much to protect the foreign party from breaches by the host State of its own contractual obligations, a protection which would already be afforded to some degree by the domestic courts or by chosen private dispute-resolution methods, but to make sure that the State did not cut across rights established by the kind of dealings between the foreigner and a party within the State . . . .[271]

195. In other words, the tribunal found that the investment treaty at issue, as well as the investment treaty system as a whole, protected, among other things, agreements between private parties.

196. The tribunal's conclusion was confirmed by the fact that the applicable investment treaty contained no mention of any limitation on the scope of investment protection alleged by the Czech Republic. According to the tribunal, "[w]e are sustained in this view by the fact that all of the grounds argued by the Respondent could, if the drafters of the Treaty had thought fit, have been made plain by express provision, of which there is no trace."[272]

197. While the text of the treaty at issue in European Media Ventures may have differed in certain respects from Chapter Eleven the NAFTA, it bears the same basic structure and purpose, and thus the tribunal's reasoning is highly persuasive in the present circumstances.

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270 *Id*.
271 *Id.*
272 *Id.* ¶ 42.

c. Rights running between an investor and a third party are capable of being expropriated.

198. The NAFTA's legal standard set forth in Article 1110 does not in any way preclude an unlawful taking of agreements establishing rights between private parties. Article 1110 provides that, unless certain conditions are met, a NAFTA party may not legally "directly or indirectly … expropriate an investment of an investor of another Party in its territory …."[273] Article 1110 contains no language restricting its scope of protection. In fact, under Chapter Eleven, all "investments" are protected against unlawful expropriation.

199. Further, NAFTA tribunals interpreting the meaning of the term "expropriation" in Article 1110 by reference to international law standards have also never found that the protection does not apply with respect to rights running between private parties.[274] In Glamis Gold v. United States, the tribunal stated: "[A] State is responsible, and therefore must provide compensation, for an expropriation of property when it subjects the property of another State Party's investor to an action that is confiscatory or that 'unreasonably interferes with, or unduly delays, effective enjoyment' of the property."[275] According to the tribunal in Grand River Enterprises v. United States, "expropriation involves the deprivation or impairment of all, or a very significant proportion of, an investor's interests."[276] In Fireman's Fund v. Mexico, the

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[273] NAFTA Article 1110(1), **CL-086**.

[274] According to Article 1131(1), "[a] Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law." *See also Glamis Gold, Ltd. v. United States*, UNCITRAL (NAFTA), Award (June 8, 2009), ¶ 354 ("The inclusion in Article 1110 of the term 'expropriation' incorporates by reference the customary international law regarding that subject."), **CL-044.**

[275] *Glamis Gold, Ltd. v. United States*, UNCITRAL (NAFTA), Award (June 8, 2009), ¶ 354 (citing Rudolf Dolzer, "Expropriation and Nationalization," in 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 319 (Rudolf Bernhardt, ed. 1995), **CL-044**. In one non-NAFTA case, the tribunal similarly provided that "[a] necessary condition for expropriation is the neutralisation of the use of the investment." *El Paso Energy International Co. v. Argentine Republic*, ICSID Case No. ARB/03/15, Award (Oct. 31, 2011), ¶ 233(2), **CL-033**.

[276] *Grand River Enterprises Six Nations, Ltd. v. United States*, UNCITRAL (NAFTA), Award (Jan. 12, 2011), ¶ 147, **CL-045**.

tribunal found that "[e]xpropriation requires a taking (which may include destruction) by a government-type authority of an investment."[277]

200. Notably, NAFTA tribunals have referred broadly to the protection afforded under Article 1110 to an investor's "property," "interests," or "investment." None has ever found that the standard of protection under Article 1110 varies in its application depending on the nature of the parties to the rights or interests affected. Nor has any tribunal ever concluded that the standard fails to apply in situations where the "property," "interests," or "investment" arises out of an agreement between private parties.

201. Moreover, it is long established in the decisions of international courts and tribunals that agreements between private parties can be expropriated. For example, in Case Concerning Certain German Interests In Polish Upper Silesia, the Permanent Court of International Justice found Poland responsible for expropriating contracts between private companies for the establishment and operation of a nitrate plant at Chorzów.[278] The Court observed that "in the present case it can hardly be doubted that, in addition to the real property which had belonged to the Reich, there were property, rights and interests, such as patents and licenses, probably of a very considerable value, the private character of which cannot be disputed and which were essential to the constitution of the undertaking."[279]

202. In the Norwegian Shipowners' Claims, an ad hoc arbitral tribunal found the United States had expropriated private contracts between certain Norwegian shipowners and U.S. shipyards.[280] After the U.S. Government dispossessed these shipowners of their contracts,

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277 *Fireman's Fund Insurance Co. v. United Mexican States*, ICSID Case No. ARB(AF)/02/01, Award (July 17, 2006), ¶ 176 (a), (c), **CL-040**.

278 *German Interests in Polish Upper Silesia* (Germ. v. Pol.), Judgment , 1925 PCIJ (ser. A), No.6 (Aug. 25), **CL-112**.

279 *Id.* ¶ 47(a).

280 *Norwegian Shipowners' Claims* (Norway v. United States), 1 R. Int'l Arb. Awards 307, 343 (Oct. 13, 1922), **CL-113**.

they were no longer able to fulfill their obligations vis-à-vis the shipyards. Without concern about the private nature of the rights at stake, the tribunal held that material, plans, specifications "and other such physical or intangible property of the claimants" had been unlawfully taken and ordered the United States to pay compensation.[281]

203. The Iran-United States Claims Tribunal has similarly interpreted the scope of the expropriation obligation broadly to encompass contracts between private parties. In Amoco International Finance Corp. v. Iran, the Tribunal opined that "[e]xpropriation, which can be defined as a compulsory transfer of property rights, may extend to any right which can be the object of a commercial transaction."[282] Similarly, in Phillips Petroleum Co. Iran v. Iran, the Tribunal held that expropriation gives rise to state responsibility "whether the expropriation is formal or de facto and whether the property is tangible, such as real estate or a factory, or intangible, such as the contract rights involved in the present Case."[283]

204. In practice, in applying that standard, the Iran-United States Tribunal has adjudicated claims of expropriation of contracts between an investor and a private third party without pause. In Starrett Housing Co. v. Iran, for example, the claimants entered into a series of contracts with a private Iranian bank for the purchase of land and construction of condominium apartments.[284] In finding a unlawful taking of property by the respondent, the Tribunal explained that Starrett's property interest was comprised of the "physical property as well as the right to manage the Project and to complete the construction" in accordance with the contractual

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281 *Id.* at 323.

282 *Amoco Int'l Finance Corp. v. Government of the Islamic Republic of Iran*, 15 Iran-U.S. Cl. Tr. Rep. 189, 220 (July 14, 1987), **CL-114**.

283 *Phillips Petroleum Co. Iran v. Islamic Republic of Iran*, 21 Iran-U.S. Cl. Trib. Rep. 79, 106 (June 29, 1989), **CL-115**.

284 *Starrett Housing Corp. v. Government of the Islamic Republic of Iran*, 16 Iran-U.S. Cl. Trib. Rep. 112, 114-115 (Aug. 14, 1987), **CL-116**.

agreements, "and to deliver the apartments and collect the proceeds of the sales" of the apartments.[285]

205. Investor-State arbitration tribunals have followed suit. In CME v. Czech Republic, the claimant, a Dutch company, entered into a joint venture agreement with a private Czech company,[286] pursuant to which the two companies formed a private television station.[287] Subsequently, the parties entered into a service agreement, which the claimant's partner eventually terminated under the undue influence of the State's Media Council.[288] In finding that the respondent had expropriated the claimant's contract rights, the tribunal had no problem with the fact that the media license was owned by the claimant's former partner, a private entity.[289]

206. Further, in Saipem v. Bangladesh, the claimant and another private party had entered into a gas pipeline construction contract that included an ICC arbitration provision.[290] The claimant alleged that its rights to arbitration under the contract, later reflected in an ICC award rendered pursuant to the contract, had been expropriated through actions of the Bangladeshi courts.[291] The tribunal concluded that the right to arbitrate under the contract was a protectable property interest, and that the nullification of those rights by the Bangladeshi courts was "tantamount to a taking of the residual contractual rights arising from the investments as crystallised in the ICC Award."[292]

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285 *Id.* ¶ 3.

286 *CME Czech Republic B.V. (Netherlands) v. Czech Republic,* UNCITRAL, Partial Award (Sept. 13, 2001), ¶¶ 9-10, **CL-28**.

287 *Id.* ¶ 12.

288 *Id.* ¶ 612.

289 *See id.* ¶ 591.

290 *Saipem S.p.A. v. People's Republic of Bangladesh*, ICSID Case No. ARB/05/7, Award (June 30, 2009), ¶ 10, **CL-117**.

291 *Id.* ¶ 128.

292 *Id.* ¶ 129.

207. Based on the long and consistent practice of international courts and tribunals, therefore, it is clear that an investor's rights under a contractual agreement with a party other than the host State are capable of being expropriated.

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208. For the aforementioned reasons, Respondent's argument that Tele Fácil's rights under the interconnection agreement cannot be expropriated because it created rights with a third party, Telmex, and not Respondent, is therefore entirely unfounded.

2. Claimants are entitled to claim for the total loss of their business venture

209. Respondent argues that Claimants, as shareholders, "could have no direct claim for alleged expropriation of Tele Fácil's concession or any of its other assets and there is no basis to assert a claim of expropriation on behalf of Tele Fácil for an alleged taking of any of its assets."[293] Respondent adds that "[i]t is trite law in Mexico, as it is everywhere, that shareholders in a company do not have ownership interest in the company's assets."[294] At the same time, Respondent concedes that "the Claimants owned shares in an enterprise (Tele Fácil) which would qualify as an 'investment.'"[295]

210. Thus, while not disputing that Claimants may claim in relation to any loss suffered in their capacity as shareholders, Respondent does dispute Claimants' standing to claim for losses incurred by Tele Fácil. Respondent's arguments are unavailing, however. As explained below, Claimants are entitled both to claim on behalf of Tele Fácil and on their own behalf as shareholders in Tele Fácil to recoup the total loss to their business venture resulting from the IFT's destruction of Claimants' business in Mexico.

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293 Statement of Defense, ¶ 262.
294 *Id.*
295 *Id.*

a. Claimants are entitled to claim on behalf of Tele Fácil.

211. In their Statement of Claim, Claimants submitted a claim on behalf of Tele Fácil pursuant to Article 1117 of the NAFTA.[296] That provision entitles an investor to claim, "on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly."[297] To establish Mr. Nelson's right to claim under Article 1117, Claimants previously asserted:

> Mr. Nelson also currently owns 60% of Tele Fácil and has controlled the company since changes in Mexico's law on June 11, 2013 allowed him to do so. Since the inception of the business venture in Mexico, Mr. Nelson has been the sole source of capital used to fund Tele Fácil's operations, including the payment of salaries, concession and permitting fees, real estate fees, advertising cost, and legal and other professional fees. He has also been the sole source of technical equipment and engineering support that allowed for the transmission of call traffic to and from Mexico and within Mexico. At all times following Mexico's reforms, Mr. Nelson therefore possessed an ultimate right to make key company decisions.[298]

212. These assertions were supported by sworn statements made by Tele Fácil's three shareholders, Mr. Nelson, Mr. Blanco, and Mr. Sacasa, and by Tele Fácil's outside counsel, Mr. Bello.[299] Respondent has not contested any of the facts asserted by Claimants.

213. In support of their right to claim on behalf of Tele Fácil, Claimants also relied expressly on International Thunderbird v. Mexico.[300] In that case, another NAFTA tribunal determined that de facto control by a claimant over a local enterprise is a sufficient basis for establishing the right to claim under Article 1117. Specifically, the tribunal found:

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296 Statement of Claim, ¶ 330.

297 NAFTA Article 1117, **CL-086**.

298 *Id.* ¶ 332 (citing *International Thunderbird Gaming Corp. v. United Mexican States*, UNCITRAL (NAFTA), Award (Jan. 26, 2006), ¶¶ 106-108, **CL-049**) (footnotes omitted).

299 Witness Statement of Joshua Dean Nelson (hereinafter "Nelson Statement") ¶ 32, **C-001**; Sacasa First Statement, ¶ 17, **C-003**; Bello Statement, ¶ 18, **C-004;** *see also* Witness Statement of Jorge Blanco (hereinafter "Blanco Statement"), ¶ 20, **C-002**.

300 Statement of Claim, ¶ 332 n.544.

> The term "control" is not defined in the NAFTA. Interpreted in accordance with its ordinary meaning, control can be exercised in various manners. Therefore, a showing of effective or "*de facto*" control is, in the Tribunal's view, sufficient for the purposes of Article 1117 of the NAFTA. In the absence of legal control however, the Tribunal is of the opinion that *de facto* control must be established beyond any reasonable doubt.[301]

The tribunal continued:

> It is quite common in the international corporate world to control a business activity without owning the majority voting rights in shareholders meetings. Control can also be achieved by the power to effectively decide and implement the key decisions of the business activity of an enterprise and, under certain circumstances, control can be achieved by the existence of one or more factors such as technology, access to supplies, access to markets, access to capital, know how, and authoritative reputation. Ownership and legal control may assure that the owner or legally controlling party has the ultimate right to determine key decisions. However, if in practice a person exercises that position with an expectation to receive an economic return for its efforts and eventually be held responsible for improper decisions, one can conceive the existence of a genuine link yielding the control of the enterprise to that person.[302]

214. Like the claimant in Thunderbird, at all relevant times, Mr. Nelson possessed ultimate decision-making authority over Tele Fácil by virtue of his role as the sole financer of the project and sole provider of essential technical equipment and know how. Accordingly, Mr. Nelson has standing to claim on behalf of Tele Fácil under Article 1117.

215. Claimants' assertions of fact and law are completely uncontested by Respondent. In its Statement of Defense, Respondent merely suggests, "[e]ven if the Claimants could assert an expropriation claim on behalf of Tele Fácil."[303] However, it provides no factual or legal analysis relating to the application of Article 1117 either before or after this statement.

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301 *International Thunderbird Gaming Corp. v. United Mexican States*, UNICTRAL (NAFTA), Award (Jan. 26, 2006), ¶ 106 (footnote omitted), **CL-049**.

302 *Id.* ¶ 108.

303 Statement of Defense, ¶ 263.

Respondent thus has therefore failed to meet its burden of disproving Mr. Nelson's right to claim on behalf of Tele Fácil under Article 1117.

b. Claimants are entitled to claim on their own behalf

216. As Claimants have demonstrated, they also possess the right to claim on their own behalf under Article 1116(1)(a). In their Statement of Claim, Claimants have demonstrated that they owned two types of "investments" in their capacity as shareholders in Tele Fácil.[304] These include their shareholdings in company, which Respondent concedes are "investments,"[305] and their rights to profit under the MOU, which Respondent does not dispute constitutes an "investment."

217. Messrs. Nelson and Blanco owned 49% of Tele Fácil (40% by Mr. Nelson and 9% by Mr. Blanco) until March 29, 2016 at which time they become majority shareholders (60% by Mr. Nelson and 20% by Mr. Blanco). Respondent concedes that the shares owned by Messrs. Nelson and Blanco constitute "investments."[306] In addition, under the MOU, throughout the life of the investment, Messrs. Nelson and Blanco were entitled, respectively, to 60% and 20% of Tele Fácil's profits.[307] Respondent does not refute the fact that Claimants' rights under the MOU were also protected "investments" under Chapter Eleven.

218. It is well established that investors, in their capacity as shareholders (even minority shareholders), may claim in relation to losses of the investment company. In GAMI v. Mexico, a U.S. shareholder claimed for alleged injury caused by Mexico's expropriation of certain sugar mills owned by the Mexican investment company in which the shareholder owned

304 Statement of Claim, ¶¶ 310-311.
305 Statement of Defense, ¶ 262.
306 *Id.*
307 Statement of Claim, ¶ 363.

a minority stake.[308] The shareholder's claim was not based on Mexico's seizure of its shares, but rather that the expropriation of the mills destroyed its investment as the mills made up the bulk of the investment companies' assets.[309] While recognizing that "[a] fundamental feature of [the shareholder]'s claims is that they are derivative," the tribunal found that the shareholder had standing to claim for harm done to its stake in the investment company.[310]

219. The tribunal refused to accept the argument that under Article 1116 a shareholder can only claim for direct injury to their rights and interests as shareholders:

> The Tribunal does not accept that directness for the purposes of NAFTA Article 1116 is a matter of form. The fact that a host state does not explicitly interfere with share ownership is not decisive. The issue is rather whether a breach of NAFTA leads with sufficient directness to loss or damage in respect of a given investment.[311]

Thus, a measure need not expressly target an investment company's shareholders in order for there to be "sufficient directness" between the breach and the loss or damage.

220. Another tribunal applying an analogous provision under the CAFTA-DR reached the same conclusion. In TECO v. Guatemala, the claimant, which held only a 30% stake in a Guatemalan electricity distributor, claimed for losses suffered in proportion to its shareholding when Guatemala's regulator arbitrarily established the governing electricity rate at a level that caused the local distributor to suffer financial harm.[312] Specifically, the claimant sought damages "for its portion of the cash flow lost by EEGSA [the local distributor]" during the time period in which the arbitrary tariff was imposed.[313] The TECO Tribunal granted the request:

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308 *GAMI Investments, Inc. v. United Mexican States*, UNCITRAL (NAFTA), Final Award (Nov. 15, 2004), ¶ 28, **CL-043.**

309 *Id.*.

310 *Id.* ¶ 23.

311 *Id.* ¶ 33.

312 *TECO Guatemala Holdings LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/17, Award (Dec. 19, 2013), ¶ 264, **CL-066**.

313 *Id.* ¶ 716.

> The Arbitral Tribunal finds that Respondent's breach caused losses to the Claimant. Such damages amount to the (i) Claimant's share of the higher revenues that EEGSA would have received had the CNEE observed due process in the tariff review, (ii) to run from the moment the high revenues would have been first received until the moment when the Claimant sold its share in EEGSA. The amount of such losses must be quantified in the "but for" scenario discussed by the Parties, on the basis of what the tariffs should have been had the CNEE complied with the regulatory framework.[314]

Implicit in the tribunal's ruling was that there was "sufficient directness" between Guatemala's breach and the injury to the minority shareholder given that the shareholder's profit stream was directly pegged to the local distributor's daily revenues.

221. As explained in the Statement of Claim, there is similarly more than "sufficient directness" between the IFT's mistreatment of Tele Fácil and the profits lost by Messrs. Nelson and Blanco. Through Resolution 381, the IFT granted Tele Fácil interconnection rights in relation to Telmex, including the highly lucrative right to charge Telmex USD 0.00975 for each incoming minute of call traffic. Messrs. Nelson and Blanco, by way of the MOU, collectively had a right to 80% of all profits earned by Tele Fácil. Thus, there was absolutely no separation between Tele Fácil's profitability and the success of Claimants' investment; under the MOU, company and shareholders would rise and fall in unison. Thus, when the IFT denied enforcement of Resolution 381 and, ultimately, destroyed Tele Fácil's interconnection rights by issuing Decree 77, Claimants suffered directly.

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222. Based on the reasons provided above and contrary to Respondent's assertions, Claimants clearly have standing to claim, on behalf of Tele Fácil, for 100% of the company's lost profits and, in an event, on their own behalf, for 80% of the company's lost profits.

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314 *Id.* ¶ 742.

3. Claimants are entitled to claim separately for breaches committed by the IFT and by the Telecommunications Courts

223. In its Statement of Defense, Respondent argues that Claimants have no right to claim a breach of Chapter Eleven on the basis of the IFT's misconduct alone.[315] This argument is based solely on the fact that Claimants have brought amparo actions against Decree 77 and Resolution 127 in Mexico's Specialized Telecommunications Courts. As a consequence, Respondent maintains that Claimants have forfeited their right to claim under Chapter Eleven in relation to the IFT's actions, which directly destroyed Tele Fácil's business, and may only claim denial of justice by the Specialized Courts. In other words, Respondent asserts that the two internationally wrongful acts at issue in the case—the IFT's repudiation of Resolution 381 and the Courts' abdication of their judicial duty—are only cognizable under one claim that requires Claimants to exhaust local remedies.

224. In an attempt to support this position, Respondent cites Azinian v. United States of Mexico. In that case, the tribunal held that Mexico had not expropriated the concession agreement at issue because the investors had fraudulently induced it to enter into the contract, a fact that was confirmed by both the tribunal and Mexico's local courts. The Azinian Tribunal observed: "[a] government authority surely cannot be faulted for acting in a manner validated by its courts unless the courts themselves are disavowed at the international level."[316]

225. As explained below, Respondent's position is unfounded because it seeks: (a) contrary to international law principles of State responsibility, to disentitle Claimants from claiming for losses arising directly out of the IFT's administrative misconduct; and (b) contrary

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315 Statement of Defense, ¶¶ 302-303, 305.

316 Statement of Defense, ¶ 303 (citing *Robert Azinian, Kenneth Davitian, & Ellen Baca v. United Mexican States*, ICSID ARB(AF)/97/2, Award (Nov. 1, 1999), ¶ 97, **CL-60)**.

to the object and purpose of the Chapter Eleven, to impose an exhaustion requirement on Claimants' claims arising out of the IFT's conduct.

a. Claimants may claim based on distinct internationally wrongful acts

226. The Draft Articles on State Responsibility provide plainly that "[e]very internationally wrongful act of a State entails the international responsibility of that State."[317] NAFTA Chapter Eleven entitles a claimant to claim on its own behalf or on behalf of an enterprise that a NAFTA Party "has breached an obligation under: (a) Section A [of the Chapter]." Consequently, the Tribunal's duty is to evaluate each of Claimants' claims of breach arising out of distinct sets of measures, namely (1) the IFT's dramatic reversal of Resolution 381 that destroyed Tele Fácil's interconnection rights, and (2) the Telecommunications Courts' abdication of its judicial responsibility that denied Tele Fácil justice. As explained in the Statement of Claim, while both sets of measures engage the international responsibility of Respondent, Claimants' principle claim centers on the IFT's misconduct; the Courts' mistreatment only compounded the injury previously suffered by Claimants.

227. The IFT is undoubtedly an independent administrative body capable of engaging Respondent's international responsibility.[318] According to Mexico's Constitution:

> The Federal Telecommunications Institute is an autonomous agency with its own legal personality and equity focused on the efficient development of broadcasting and telecommunications, as established in this Constitution and in the terms determined by law. It shall thus be responsible for regulating, promoting and supervising the use, development and operation of the radio spectrum, networks and the provision of broadcasting and telecommunications services and access to active, passive and other

317 International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Supplement No. 10 (A/56/10), Chapter IV.E.1, art. 1 (Nov. 2001), http://www.refworld.org/docid/3ddb8f804.html (emphasis added), **CL-118**.

318 *Id.* art. 4 ("The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions . . . .").

> essential infrastructure guaranteeing the provisions set forth in Articles 6 and 7 of this Constitution.[319]

Accordingly, the IFT is the sole authority in Mexico with regulatory power over all telecommunications activity.

228. In addition, Mr. Gorra states in his witness statement, "the Pleno is the top governing and decision-making body in the Institute, and to exercise its capacities it has an organic structure supporting the dispatch of its affairs."[320] Thus, the Plenary's acts and omissions constitute final acts of the Mexican Government. They are thus undoubtedly capable—on their own without any involvement of Mexico's courts—of giving rise to internationally wrongful acts under the international law of State responsibility.

229. Claimants' principal claim in this arbitration is that the IFT's arbitrary, secretive, and discriminatory refusal to enforce Resolution 381, and its subsequent repudiation of Tele Fácil's interconnection rights in Decree 77, are in and of themselves breaches of Articles 1110 and Article 1105(1). Further, in accordance with Articles 1116 and 1117, Claimants have proven that they "incurred loss or damage by reason of, or arising out of, th[ose] breach[es]."[321]

230. As explained, Claimants' losses began in mid-January 2015 when senior IFT officials conspired to deny Tele Fácil its right to begin earning revenue under its interconnection agreement with Telmex, a scheme that was later memorialized in April 2015 when, under Decree 77, these rights were formally "held harmless."[322] Thus, by Chapter Eleven's own terms, Claimants' right to bring a claim against Respondent arose in mid-July 2015, after "six months have elapsed since the events giving rise to a claim."[323]

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319 Constitutional Reform, art. 28, **CL-002.**
320 Gorra Statement, ¶ 8.
321 NAFTA Articles 1116(1)(b) and 1117(1)(b), **CL-086**.
322 Decree 77, at 12, **C-051**.
323 NAFTA Article 1120, **CL-086**.

231. In contrast, the Specialized Telecommunications Courts' abdication of their judicial function and unjustified denial of Tele Fácil's appeal separately engaged Mexico's international responsibility. These subsequent acts demonstrated that Mexico's judicial system failed to comport with international minimum standards in violation of Article 1105(1) alone. Because the IFT's prior violations of Article 1110 and Article 1105(1) had already destroyed Claimants' investment by April 2015, Respondent's judicial misconduct conduct arising on March 15, 2016 merely compounded Claimants' losses.[324]

232. Further proof that Claimants raise two distinct sets of claims is the attenuated relationship between the IFT's conduct, on the one hand, and the scope of review of the Telecommunications Courts' in an amparo action, on the other hand. When properly adjudicated, an amparo action evaluates the constitutionality of government conduct under Mexican law.[325] However, the only remedy available to an aggrieved party is a declaration of unconstitutionality and, if necessary, an order against the offending government actor to reform its conduct going forward.[326] Importantly, a claimant is not entitled to compensatory relief, including for lost profits that would have been acquired from private third parties.[327]

233. Thus, even if Tele Fácil had prevailed in its amparo action—which would have taken many months to accomplish—the company would never have been compensated for the sizable loss of profits that it permanently surrender its time-limited interconnection agreement with Telmex.[328] In this scenario, Claimants would still have been entitled to bring a claim under Chapter Eleven for their losses suffered as a result of the IFT's misconduct.

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324 Claimants have pleaded accordingly. *See* Statement of Claim, ¶ 610.

325 *Ley de Amparo* (*Amparo* Statute), enacted on April 2, 2013 (hereinafter "*Amparo* Statute"), at Article 1, **CL-155**.

326 *Amparo* Statute at Article 77, **CL-003**.

327 *Id.*

328 Statement of Claim, ¶ 412.

234. A claimant's right to claim solely in relation to a government's administrative acts or omissions, with or without resort to local courts, has been confirmed by other tribunals. As the ad hoc Annulment Committee in Helnan International Hotels v. Egypt explained, "[i]n numerous ICSID cases, tribunals have rendered awards in favour of the claimants as a result of administrative decisions, in which no such application to the local courts has been made."[329]

235. The Helnan ad hoc Committee recognized that "[a] single aberrant decision of a low-level official is unlikely to breach the [fair and equitable treatment] standard unless the investor can demonstrate that it was part of a pattern of state conduct applicable to the case."[330] But it maintained that "[a] requirement to pursue local court remedies would have the effect of disentitling a claimant from pursuing its direct treaty claim for failure by the Executive to afford fair and equitable treatment, even where the decision was taken at the highest level of government within the host State."[331] According to the Helnan ad hoc Committee, such a result "would leave the investor only with a complaint of unfair treatment based upon denial of justice in the event that the process of judicial review of the Ministerial decision was itself unfair"—an outcome which would, in effect, "empty the development of investment arbitration of much of its force and effect."[332]

236. On this basis, the Helnan ad hoc Committee annulled the panel's conclusion that Helnan was barred from challenging actions of the Egyptian Tourism Ministry under the treaty because it had not first sought to reverse them in Egypt's administrative courts.

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329 *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision of the *ad hoc* Committee (June 14, 2010), ¶ 48, **CL-119**.
330 *Id*. ¶ 50.
331 *Id.* ¶ 53.
332 *Id.* ¶¶ 47, 53.

237. If this Tribunal were to conclude that it cannot evaluate the IFT's measures against Respondent's NAFTA obligations without the Mexican courts first having addressed domestic law challenges to the same measures, it would disentitle Tele Fácil of its principal treaty claim against the government actor that destroyed Claimants' investment. Numerous recent investor-State tribunals have rejected such an approach. For example, in TECO Guatemala Holdings v. Guatemala, the Tribunal held that Guatemala's National Commission of Electric Energy breached the minimum standard of treatment obligation in the CAFTA-DR by disregarding the fundamental principles of the regulatory process that it should have applied to Teco's tariff review in a manner that was both arbitrary and discriminatory.[333]

238. In so holding, the TECO Tribunal flatly rejected that such a finding was foreclosed by the Guatemalan Constitutional Court's ruling that the Commission's conduct was consistent with Guatemalan law.[334] Instead, it noted that "the loss allegedly suffered by the Claimant derives primarily from actions taken by the [regulator] CNEE, rather than from the decisions made by the Guatemalan judiciary" and, therefore, "there is no need for the Claimant to establish a denial of justice in order to find the State in breach of its international obligations as a consequence of the actions taken by the [regulator] CNEE."[335]

239. This decision is consistent with the reasoning of the Generation Ukraine Tribunal, which distinguished between domestic administrative measures that are internationally wrongful "per se" and those that are not internationally wrongful until investors are denied justice when challenging them.[336] Generation Ukraine challenged a series of acts and omissions on the part of

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333 *See TECO Guatemala Holdings LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/17, Award (Dec. 19, 2013), ¶¶ 710-711, **CL-066.**

334 *See id.* ¶¶ 471-484.

335 *Id.* ¶ 484.

336 *Generation Ukraine, Inc. v. Government of Ukraine*, ICSID Case No. ARB/00/9, Award (Sept. 16, 2003), ¶ 20.33, **CL-120**.

the Kyiv City State Administration relating to the construction of an office tower in downtown Kyiv. The Generation Ukraine Tribunal concluded that none of the municipal administrator's acts or omissions "transcends the threshold for an indirect expropriation" and remarked that "in the absence of any per se violation of the BIT discernable from the relevant conduct of the Kyiv City State Administration, the only possibility in this case for the series of complaints relating to highly technical matters of Ukrainian planning law to be transformed into a BIT violation would have been for the Claimant to be denied justice before the Ukrainian courts in a bona fide attempt to resolve these technical matters."[337]

240. Therefore, because Generation Ukraine failed to demonstrate how the regulator's measures rose to the level of an internationally wrongful act, it could not demonstrate that Ukraine had breached the treaty without pointing to a distinct and separate international delict by the Ukrainian courts. According to a leading commentator, any argument that an investor is obligated to challenge executive or administrative actions first in local courts is foreclosed by the Generation Ukraine "Tribunal's finding that the administrative authorities had not per se violated the BIT."[338]

241. Based on aforementioned analysis, Respondent's reliance on Azinian v. Mexico to argue that Tele Fácil, having engaged Mexico's courts, may only raise a claim of denial of justice by those courts is misplaced. Respondent does not demonstrate how Azinian is at all analogous to the present situation. There, the investor had failed to establish a per se violation of the NAFTA based on the regulator's misconduct. To the contrary, the tribunal had reached its own determination, consistent with that of the Mexican courts, that the claimants had fraudulently

337 *Id.*

338 Christoph Schreuer, *Calvo's Grandchildren: The Return of the Local Remedies in Investment Arbitration*, 1 The Law and Practice of International Courts and Tribunals 1, 15 (2005), **CL-121**.

induced the concession agreement at issue.[339] Thus, the Azinian Tribunal concluded, that, unless the claimants could demonstrate mistreatment by Mexico's courts, which had been engaged to assess the validity of the concession agreement, no violation of the NAFTA would be cognizable.[340] Respondent's extreme interpretation of Azinian—that is, that it bars all claims against the regulator anytime local courts have been engaged—is thus completely at odds with the case itself and the reasoning of the more recent approach of investor-State tribunals discussed above.

242. Respondent's reading of Azinian also runs directly counter to first principles of State responsibility under customary international law. Article 3 of the Draft Articles of State Responsibility makes clear that "[t]he characterization of an act of a State as internationally wrongful is governed by international law" and "not affected by the characterization of the same act as lawful by internal law."[341] Further, it is axiomatic that "an international tribunal is not bound to follow the result of national court."[342] Therefore, the fact that the Specialized Telecommunications Courts upheld the IFT's measures under Mexican law is not determinative of this Tribunal's examination of those measures in light of Respondent's international obligations under the NAFTA.

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339 *Robert Azinian, Kenneth Davitian, & Ellen Baca v. United Mexican States*, ICSID Case No. ARB (AF)/97/2, Award (Nov. 1, 1999), ¶ 121, **CL-60**.

340 *Id.* ¶ 124.

341 International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, art. 3 (emphasis added), **CL-118**.

342 *AMCO Asia Corp. v. Republic of Indonesia*, Award, 1 ICSID Rep. 413, 460 (Nov. 20, 1984), *sustained in relevant part,* Ad hoc Committee Decision on Application for Annulment, 1 ICSID Rep. 509, 526-527 (May 16, 1986), **CL-122**; 3 JOHN BASSETT MOORE, INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY 3229, 3229-30 (1898) (Decision of U.S. Commissioners Under Mar. 3, 1889 Act of Congress) ("It is well settled that the decisions of a court, condemning the property of citizens of another country, are not conclusive evidence of the justice or legality of such condemnation."), **CL-123**; ALWYN V. FREEMAN, INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE 34-35 (1970) ("The conclusive force of a domestic judgment is expended in the process of creating a definitive legal relationship between a private plaintiff and defendant. It is congenially impotent to modify the relationship which springs up between *States* when a rule of international law has been violated."), **CL-124**.

243. Here, Claimants have demonstrated how the IFT's arbitrary, discriminatory, and non-transparent refusal to enforce the terms of Resolution 381, formalized as Decree 77, directly breached Articles 1110 and 1105(1). They have separately proven how the Specialized Telecommunications Courts subsequently breached Article 1105(1) when it denied Tele Fácil justice in the context of the company's amparo challenge. While the legality of the IFT's actions under Mexican law may have some bearing on Tele Fácil's Chapter Eleven claims, it is not dispositive of either of them. Rather, the Tribunal is mandated to resolve these claims by application of international law standards.

244. For these reasons, this Tribunal should treat the IFT and the Specialized Telecommunications Courts as distinct organs, each capable of engaging Mexican State responsibility in distinct ways and at different times.

b. No exhaustion requirement under Chapter Eleven

245. Respondent's interpretation of Azinian is also undermined by the object and purpose of Chapter Eleven's dispute settlement provisions.

246. Article 1121, entitled "Conditions Precedent to Submission of a Claim to Arbitration," sets forth the procedural requirements for an investor to bring a claim under Chapter Eleven.[343] Article 1121(1)(b) of the NAFTA requires an investor to waive the right to initiate or continue any actions in local courts or other fora relating to the disputed measure[344] except for "proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing

[343] NAFTA Article 1121, **CL-086**.

[344] *See* North American Free Trade Agreement, Implementation Act, Statement of Administrative Action, H.R. Doc. No. 103-159, Vol. 1, 103d Cong., 1st Session, 147 (1993), **CL-125**.

Party."[345] In addition, pursuant to Articles 1116(2) and 1117(2), a claimant may bring a claim within three years of the date on which it knew or should have known that it suffered damage or loss.[346]

247. Article 1121(1)(b) thus contains a "no U-turn" waiver provision.[347] Article 1121(1)(b) is designed to promote legal certainty for respondents by minimizing the risk of double recovery and conflicting outcomes in multiple fora, while permitting claimants to seek relief from domestic courts in the first instance for up to three years without thereby foreclosing their treaty claims.[348] Importantly, Article 1121(1)(b) does not require a claimant to exhaust local remedies prior to submitting a claim to arbitration under the chapter; nor does it require a claimant to make a choice between domestic and international law remedies, as do treaties with "fork-in-the-road" clauses, unless a claimant ultimately decides to pursue NAFTA arbitration[349]—and even then a claimant can continue to pursue an action "for injunctive, declaratory or other extraordinary relief, not involving the payment of damages."[350]

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345 NAFTA Article 1121(1)(b), **CL-086**.

346 NAFTA Articles 1116(2) and 1117(2) ("An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage."), **CL-086**.

347 *See Renco Group v. Republic of Peru*, ICSID Case No. UNCT/13/1, Second Submission of the United States of America (Sept. 1, 2015) (discussing the analogous waiver provision in Article 10.18 of the U.S.-Peru Trade Promotion Agreement) ("U.S.-Peru TPA"), ¶¶ 3-5, **CL-126**.

348 *See International Thunderbird Gaming Corp. v. United Mexican States*, UNICTRAL (NAFTA), Award (Jan. 26, 2006), ¶ 118 ("The consent and waiver requirements set forth in Article 1121 serve a specific purpose, namely to prevent a party from pursuing concurrent domestic and international remedies, which could either give rise to conflicting outcomes (and thus legal uncertainty) or lead to double redress for the same conduct or measure."), **CL-049**; *Detroit International Bridge Co. v. Government of Canada*, PCA Case No. 2012-25, Award on Jurisdiction (Apr. 2, 2015), ¶ 318 ("The logic behind Article 1121 is evident. It is to allow the investor quickly to start an action in the court of the host State to resolve its dispute, without prejudice to the possibility of subsequent resort to an investment arbitration tribunal should the investor still consider that the treaty standards have not been met and decide to abandon the action in the host State's courts. The only exceptions allowed are actions for injunctive, declaratory, or other extraordinary relief: these need not be abandoned."), **CL-127**.

349 *See Renco Group v. Republic of Peru*, ICSID Case No. UNCT/13/1, Second Submission of the United States of America (Sept. 1, 2015), ¶ 3, **CL-126**.

350 NAFTA Article 1121(1)(b), **CL-086**.

248. With NAFTA Article 1121, the NAFTA Parties designed a system that provides investors with a broad range of strategic options for challenging measures alleged to violate the chapter and expressly "permits simultaneous or subsequent use of domestic and international fora."[351] In fact, the exception to the waiver requirement in Article 1121 for concurrent, simultaneous, or subsequent domestic court proceedings to obtain extraordinary relief "probably reflects Mexico's preference for domestic judicial enforcement of the rights of investors to stimulate the use of the constitutional proceeding know [sic] as amparo by foreign investors."[352] Therefore, by its terms, Article 1121 dispensed with the customary international law exhaustion of local remedies requirement by expressly stipulating that investors may initiate Chapter Eleven claims while continuing "proceedings for injunctive, declaratory or other extraordinary relief," such as amparo actions before the Specialized Telecommunications Courts.

249. Other tribunals interpreting similar dispute resolution provisions have confirmed this interpretation. In Cystallex International Corp. v. Bolivarian Republic of Venezuela, the Tribunal rejected Venezuela's contention that "neglect of local remedies" barred a Canadian mine operator's expropriation claim.[353] It noted that the operative treaty—the Canada-Venezuela BIT—contained a provision requiring investors to waive their domestic remedies prior to

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[351] Sergio Puig, *Investor-State Tribunals and Constitutional Courts: The Mexican Sweetners Saga*, V(2) MEXICAN LAW REVIEW 199, 215, 220 (2012) (setting forth those strategic options: "(i) it may seek damages (or declaratory or injunctive relief) in domestic courts on domestic law grounds and subsequently bring a claim for damages before a Chapter Eleven tribunal; (ii) in Mexico only, it may seek damages in a domestic court on NAFTA grounds, but will then be barred from bringing a claim before a Chapter Eleven tribunal; (iii) it may bring a claim for damages before a NAFTA tribunal directly, but must waive its right to initiate or continue claims for damages in domestic courts on domestic law grounds other than NAFTA and its right to initiate or continue claims for damages before other dispute settlement procedures; (iv) it may bring a claim for damages before a NAFTA tribunal and simultaneously or subsequently seek declaratory or injunctive relief in domestic courts on domestic law grounds; or (v) it may bring a claim for damages before a NAFTA tribunal, while the enterprise—which is not owned or controlled directly or indirectly—seeks relief in domestic courts."), **CL-128**.

[352] *Id.* at 219. In fact, because Mexico provides investors with the ability to enforce the obligations in Chapter Eleven through a private right of action in Mexican courts, Mexico negotiated Annex 1120.1.

[353] *Crystallex International Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award (Apr. 4, 2016), ¶ 710, **CL-093**.

invoking their international remedies under the BIT. The Crystallex Tribunal properly concluded that "[t]o read a pursuit of local remedies requirement as part of the substantive cause of action would entail bringing in by the back door a requirement that is excluded at the front door."[354]

250. Respondent's argument that Claimants may only raise a NAFTA claim with respect to the IFT's misconduct after challenging the regulator's conduct in local court, thus, improperly imposes an exhaustion requirement on Chapter Eleven. Respondent has failed to demonstrate that the NAFTA Parties intended to limit a claimant's ability to bring a claim in this manner. In actuality, NAFTA Party investors can—and have—submitted claims under Chapter Eleven against administrative agencies without first exhausting local remedies.[355]

* * *

251. As Claimants are entitled under Chapter Eleven to bring distinct claims in relation to the IFT's misconduct and are not required to exhaust judicial remedies in doing so, Respondent's reliance on Azinian is entirely misplaced.[356]

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354 *Id.*

355 *See Marvin Feldman v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award (Dec. 16, 2002), ¶ 78 ("questions as to whether Mexican law as determined by administrative authorities or Mexican courts is (sic) consistent with the requirements of NAFTA and international law are to be determined in this arbitral proceeding, and we are not barred from making that determination by the fact that not all of the issues have yet been resolved by Mexican courts.") (holding that Mexican Ministry of Finance and Public Credit's discriminatory application of excise tax regime for exported cigarettes violated NAFTA Chapter Eleven), **CL-051**; *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award (Sept. 18, 2009), ¶¶ 302-303 (holding that the Mexican Ministry of Economy's application of an HFCS import permit regime violated various provisions in NAFTA Chapter Eleven even though Cargill's judicial nullity proceedings in Mexican court were still pending), **CL-026**; *Merrill & Ring Forestry L.P. v. Government of Canada*, NAFTA/UNCITRAL, Award (Mar. 31, 2010), ¶¶ 26-32 (examining the implementation of Canada's timber export regime by officials in the British Columbia Ministry of Forestry and the Canadian Department of Foreign Affairs for consistency with the obligations in NAFTA Chapter Eleven even though those actions had not first been challenged in Canadian court), **CL-129**; *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Government of Canada*, UNCITRAL (NAFTA), Award on Jurisdiction and Liability (Mar. 17, 2015), ¶¶ 36, 742 (upholding U.S. investors' challenge to actions and omissions by the Canadian Minister of Environment and provincial regulators without requiring exhaustion of domestic remedies), **CL-72**.

356 Following on its *Azinian* argument, Respondent states: "This admonition in *Azinian* is all the more applicable in cases where the administrative body and the domestic courts are charged with deciding a dispute between private parties, as is the case here, rather than a dispute between an investor and an organ of the State."

4. Claimants do not allege that Mexico's courts expropriated their investment

252. Respondent saves its most peculiar objection for last. It argues that because, in this case, the claims of mistreatment by both the IFT and the courts relate to an underlying dispute between two private parties, Tele Fácil and Telmex, Claimants are barred from bringing an expropriation claim under Chapter Eleven. In an attempt to support its position, Respondent invokes the United States' non-disputing Party brief submitted in Eli Lilly v. Canada. In that submission, the United States observed "the particular 'dearth' of international precedents on whether judicial acts may be expropriatory."[357] Respondent nevertheless fails to persuade.

253. Respondent's argument is no more than an extension of its flawed position that Claimants cannot claim in relation to the IFT's misconduct. However, as explained, Respondent has offered no convincing interpretation of the NAFTA or general international law that would explain how the IFT's internationally wrongful acts have been entirely subsumed into the Court's conduct for purposes of claiming under Chapter Eleven. Respondent therefore cannot simply decide to reframe Claimants' claim, as it pleases, to become an alleged expropriation by the

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Statement of Defense, ¶ 304. No elaboration follows. In any event, NAFTA Chapter Eleven tribunals have long recognized that:

> [a]n adequate mechanism for the settlement of disputes as contemplated by Chapter Eleven must extend to disputes, whether public or private, so long as the State Party is responsible for the judicial act which constitutes the 'measure' complained of, and that act constitutes a breach of a NAFTA obligation, as for example a discretionary precedential judicial decision.

The Loewen Group, Inc. and Raymond L. Loewen v. United States, ICSID Case No. ARB(AF)/98/3), Decision on Jurisdiction (Jan. 5, 2001), ¶ 54, **CL-67**.

In fact, when resolving challenges to its competence and jurisdiction, the *Loewen* Tribunal clearly rejected the United States' contention that it could not be responsible under international law for domestic judicial acts resolving disputes between private parties, maintaining that "[n]either in the text or context of NAFTA nor in international law" was there any support for such a position. *Id.* In the end, the *Loewen* Tribunal reasoned that while the obligations in Chapter Eleven can only be engaged by the acts and omission of a NAFTA Party's organs, the chapter's investment protections "must extend to the protection of foreign investors from private parties when they act through the judicial organs of the State." *Id.* ¶ 58.

[357] *Eli Lilly & Co. v. Government of Canada*, ICSID Case No. UNCT/14/2, Submission of the United States of America (Mar. 18, 2016), ¶ 268, **RL-002**.

Specialized Telecommunications Courts. The only expropriation claim that Claimants bring in these proceeding is with respect to the IFT's refusal to enforce Resolution 381.

254. For this reason, the United States' non-disputing Party submission in Eli Lilly is irrelevant to this case. Eli Lilly involved the actions of Canada's judiciary, not of any administrative regulatory authority. Whether or not there is a "'dearth' of international precedents on whether judicial acts may be expropriatory" is inconsequential here. Claimants do not allege a judicial expropriation of its investment. Even if it did, tribunals have found that judicial conduct can amount to an unlawful expropriation in violation of international law.[358]

* * *

255. For the aforementioned reasons, all of Respondent's threshold objections should be dismissed.

B. Respondent Has Failed to Rebut Claimants' Claims on the Merits

256. In its Statement of Defense, Respondent does not refute any of the legal standards of investment protection under Articles 1110 and 1105 of the NAFTA as set forth by Claimants.[359] Nor does Respondent seek to supplement those standards in any way. Rather, Respondent disputes the results of Claimants' application of those standards to the facts of this

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[358] *See Eli Lilly v. Government of Canada*, ICSID Case No. UNCT/14/2, Final Award, ¶ 221 (Mar. 16, 2017) ("As a matter of broad proposition, therefore, it is possible to contemplate circumstances in which a judicial act (or omission) may engage questions of expropriation under NAFTA Article 1110, such as, perhaps, in circumstances in which a judicial decision crystallizes a taking alleged to be contrary to NAFTA Article 1110."), **CL-130**; *Saipem S.p.A. v. People's Republic of Bangladesh*, ICSID Case No. ARB/05/7, Award (June 30, 2009), ¶ 181 (holding that Bangladeshi courts had expropriated Saipem's contractual rights, as well as the residual value of its investment, when they annulled an ICC award and rejecting the notion that "expropriation by a court necessarily presupposes a denial of justice"), **CL-117**; *ATA Construction, Indus. & Trading Co. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award (May 18, 2010), ¶ 121 (holding that by extinguishing ATA's contractual right to arbitration the Jordanian Court of Cassation expropriated a valuable asset in violation of the Turkey-Jordan BIT), **CL-131**.

[359] Respondent states: "For the most part, the legal standards that Claimants have identified in their legal submissions on expropriation and the minimum standard of treatment are not controversial, except by omission." Statement of Defense, ¶ 257. Respondent does not explain what it means by "except by omission."

case. However, as explained below, Respondent offers no credible rebuttal in the face of overwhelming evidence of the IFT's misconduct in breach of Articles 1110 and 1105.

1. Respondent has failed to disprove the existence of an unlawful expropriation

257. Respondent makes very brief arguments in its Statement of Defense that seek to show that Claimants never suffered from an unlawful expropriation, either because the economic impact on Tele Fácil's operations was not sufficiently severe or because Respondent's actions constituted legitimate regulation in the public interest.[360] Both assertions are entirely unfounded.

a. There was a substantial deprivation in the value of Claimants' investment

258. As mentioned, Respondent does not refute any of the legal standards set forth in Claimants' Statement of Claim for determining the existence of an expropriation under Article 1110. These standards include those set forth in Burlington Resources v. Ecuador:

> When assessing the evidence of an expropriation, international tribunals have generally applied the sole effects test and focused on substantial deprivation. . . .
>
> When a measure affects the environment or conditions under which the investor carries on its business, what appears to be decisive, in assessing whether there is a substantial deprivation, is the loss of the economic value or economic viability of the investment.[361]

259. The tribunal continued:

> In this sense, some tribunals have focused on the use and enjoyment of property. The loss of viability does not necessarily imply a loss of management or control. What matters is the capacity to earn a commercial return. After all, investors make investments to earn a return. If they lose this possibility as a result of a State measure, then they have lost the economic use of their investment.[362]

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360 Statement of Defense, ¶¶ 264-266.

361 *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision of Liability (Dec. 14, 2002), ¶¶ 396-397, **CL-024**.

362 *Id*.

260. Based on Claimants' application of this and other similar formulations of the relevant legal standard, Claimants have demonstrated that Claimants were unjustifiably denied their capacity to earn a commercial return on their investment in Mexico.

261. Specifically, Claimants have proven the following critical facts: that, in Resolution 381, the IFT established all applicable terms of interconnection between Tele Fácil and Telmex, including application of a rate of USD 0.00975 through 2017; that the IFT arbitrarily and unjustifiably refused to enforce the interconnection agreement resolved in Resolution 381 in Tele Fácil's favor; that Decree 77 unlawfully formalized the destruction of Tele Fácil's interconnection rights, including the rate of USD 0.00975 to which it was entitled; and that, without an interconnection agreement with Telmex—and particularly without a rate term—Tele Fácil could not earn any revenue or otherwise meaningfully operate in the Mexican market. In short, by repudiating Tele Fácil's interconnection rights, including the agreed rate term, the IFT rendered Tele Fácil completely inert and valueless.

262. Respondent's response in the face of this overwhelming evidence is confused and unpersuasive. First, Respondent argues that Tele Fácil, in any event, would never have been able to benefit from the high rate because it was invalid under the new telecommunications law that included lower default rates based on a public cost model.[363] However, this argument is nothing more than an ex post facto—and legally flawed—justification for the IFT's misconduct.

263. As explained, neither the IFT nor the Specialized Telecommunications Courts ever found that the USD 0.00975 rate term in the interconnection agreement to be inconsistent with the new telecommunications law—even when Telmex raised the issue expressly in the Resolution 381 proceedings and in its amparo action challenging Resolution 381. Instead, the

[363] Statement of Defense, ¶ 265.

IFT chose to repudiate Tele Fácil's high rate on the basis of an egregiously flawed interpretation of Article 42 that ran directly contrary to a core tenet of Mexican telecommunications policy, namely, to ensure prompt and effective interconnection. Given that Respondent's telecommunications regulator and courts have had every opportunity to assess the legality of the high rate, and never found a problem, Respondent cannot now in good faith conjure up this new basis as a reason why Tele Fácil would not have been profitable.[364]

264. Second, Respondent contends that, in any event, Tele Fácil's profit-making potential would have been time barred by the interconnection agreement's period of application, which ran through 2017.[365] As explained, Tele Fácil stood to earn tremendous profits during the first years of its business based on lucrative agreements and understandings with other carriers that committed to send millions of minutes to Tele Fácil, resulting in high revenues at a rate of USD 0.00975.[366] According to Claimants' valuation expert, but for the IFT's mistreatment, Tele Fácil would have earned USD 472,148,929 for the duration of the interconnection agreement. Claimants could have then reinvested a large portion of these significant profits back into Tele Fácil in order to sustain the company's growth through the development of additional lines of business.[367]

265. Third, Respondent wrongly—and, frankly, simplistically—argues that Tele Fácil could have, and should have, continued to offer its telecommunications services in Mexico, even at the lower default interconnection. Such a counterfactual is entirely implausible, however, in light of the dire situation that Tele Fácil actually faced in the months following Resolution 381.

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364 *See, e.g.*, Bin Cheng, *General Principles Of Law as Applied by International Courts and Tribunals* 141 (Cambridge, 1987) (observing that "[i]t is a principle of good faith that "a man shall not be allowed to blow hot and cold -to affirm at one time and deny at another . . . . Such a principle has its basis in common sense and common justice"), **CL-132**.

365 Statement of Defense, ¶ 265.

366 *See* Statement of Claim, ¶¶ 12, 169-170, 175-176, 350, 357-358, 404-406, 702-714.

367 *See id.*¶¶ 674, 739-742.

In fact, to accept the lower rate at the time would have amounted to a highly irrational business decision.

266. During the winter of 2014-2015, the IFT had repeatedly refused to enforce Resolution 381, even though that measure stated on its face that the USD 0.00975 rate applied. At the time, the IFT gave Tele Fácil no reason to believe that its rate was in jeopardy. Even Telmex believed the rate had been established and, thus, sought to challenge Resolution 381 in a subsequent amparo action. To accept Telmex's offer of the lower rate at the beginning of 2015, therefore, would have been nonsensical. In early April 2015, the IFT issued Decree 77, leaving no doubts as to its plan never to enforce Resolution 381, and leaving Tele Fácil fully at the mercy of Telmex. In the face of so much covert and overt hostility on the part of the IFT toward Tele Fácil's interests, it is unreasonable to suggest that Tele Fácil should have submitted to the IFT's scheme and accepted a much lower interconnection rate than it was entitled to have.

267. Further, there was no legal obligation for Tele Fácil to condone the unlawful actions of Telmex and the IFT by agreeing to accept a fraction of what it was legally entitled to. Indeed, signing an interconnection agreement with the lower rate offered by Telmex and ordered by the IFT would likely have been interpreted as a knowing waiver of a right, preventing Tele Fácil from having any avenue for subsequent enforcement and recovery of those losses. No legal precedent requires a party to act in an unreasonable manner by waiving valuable contractual rights as part of an effort to mitigate damages.[368]

268. Rather, international tribunals have found that a claimant only has a duty to mitigate its damages if mitigation is reasonable under the circumstances. For example, in Hrvatska Elektroprivreda v Republic of Slovenia, the tribunal found it was reasonable for the

[368] *See infra* Section IV.B.2.b.

claimant to reject contractual terms by the State when those terms "differed materially" from the State's original obligations.[369] According to the tribunal, under such circumstances, "the general principles of international law applicable in this case require an innocent party to act reasonably in attempting to mitigate its losses."[370]

269. Similarly, Tele Fácil could not reasonably be expected to accept an interconnection rate that was one fortieth of the value of the rate it was entitled to received, a rate that would have made it impossible for Tele Fácil to enter successfully and compete in Mexico's telecommunications market. In Inmaris Perestroika Sailing Maritime Services v. Ukraine, for example, the tribunal held that the investor "could not reasonably have been expected to resume operations" after Ukraine imposed a measure temporarily banning the use of its primary asset, because that measure destroyed the value of the investor's contractual rights and caused permanent, lasting damage to its business in the country.[371]

b. Respondent did not act for a public purpose

270. Respondent's argument that the IFT acted in the public interest is as meritless as it is misplaced.[372] Having failed to disprove that the IFT expropriated Claimants' investment, Respondent may only exculpate itself by demonstrating that its taking was lawful within the meaning of Chapter Eleven. Namely, pursuant to Article 1110, Respondent must prove that the expropriation was: "(a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with due process of law and Article 1105(1); and (d) on payment of compensation in accordance with paragraphs 2 through 6." Even if Respondent could demonstrate that the IFT acted for a

369 *Hrvatska Elektroprivreda d.d. v. Republic of Slovenia*, ICSID Case No. ARB/05/24, Award (Dec. 17, 2015), ¶¶ 213-214, **CL-133**.
370 *Id.* ¶ 215.
371 *Inmaris Perestroika Sailing Maritime Services GmbH v. Government of Ukraine*, ICSID Case No. ARB/08/8, Excerpts of Award (Mar. 1, 2012), ¶ 300, **CL-134**.
372 Statement of Defense, ¶¶ 270-272.

public purpose, it makes no attempt whatsoever to show that the remaining conditions have been satisfied. Therefore, Respondent's defense fails in any event.

271. Fundamentally, Respondent fails to show that the IFT took Claimants' investment for a public purpose. In its Statement of Defense, Respondent merely cites the efforts by various branches of the Mexican government to "reduce interconnection fees in the interest of promoting competition, encouraging new entrants and improving affordability of telecom services for consumers."[373] Respondent also cites government measures that have designated Telmex as a PEA and have imposed a zero rate on the monopoly. These references are of no utility in the abstract, however. In the context of this case, all that matters is whether the IFT's treatment of Tele Fácil was pursued in accordance with legitimate public policy objectives. It clearly was not.

272. As explained in detail in the Statement of Claim, the IFT never proffered a public interest rationale for holding Tele Fácil's previously established interconnection rate "harmless" in Decree 77 or for replacing the previously high rate with the low default rate in Resolution 127.[374] At all times, the IFT acted to destroy Tele Fácil's rights on the basis of an improbable legal interpretation of Article 42 of the FTL under which the IFT never has authority to resolve an interconnection disagreement in a single proceeding.[375] Such interpretation runs directly counter to long-established tenets of Mexico's telecommunications regime requiring prompt and effective interconnection because telecommunication is a service that should not be denied to the public.[376] It also hands Telmex, the monopoly, a powerful tool to delay interconnection

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373 Statement of Defense, ¶ 271.
374 Statement of Claim, ¶¶ 421-425, 430-432.
375 Statement of Claim, ¶¶ 391-394, 538-539; Álvarez First Report, ¶¶ 98-134, **C-008**; Soria First Report, ¶¶ 93-115, **C-009**.
376 Statement of Claim, ¶¶ 137-139, 540-544; Álvarez First Report, ¶¶ 14-26, 42-45, **C-008**; Soria First Report ¶¶ 9-16, 116-125, **C-009**.

indefinitely, thus preventing competitors from entering the telecommunications market.[377] Thus, rather than acting in the public interest in reversing Resolution 381, the IFT has acted firmly against the public interest.

273. Respondent's attempts to raise ex post facto policy arguments are therefore unconvincing. All of Respondent's new justifications for Decree 77 and Resolution 127 undermine the policy objectives of "promoting competition, encouraging the entry of new competitors and improving access to consumer telecommunications."

2. Respondent has failed to disprove a fair and equitable treatment violation

274. Claimants have explained, in detail, in the Statement of Claim how the IFT refused to enforce Resolution 381, contrary to its legal duty, and, instead, engaged in an abuse of process—a misuse of the confirmation of criteria process and illegal Decree 77—that led to the destruction of Claimants' investment.[378] As demonstrated, this scheme was pursued arbitrarily, secretly and discriminatorily in violation of Respondent's obligation to provide Claimants' investment fair and equitable treatment.

275. Respondent's response to Claimants' serious allegations of wrongdoing is astonishingly muted. It proceeds from the false assumption that Resolution 381 never established the parties' interconnection rights, including a rate of USD 0.00975 through 2017. Though completely wrong, Respondent simply maintains that the IFT's failure to enforce Resolution 381 and the confirmation of criteria processes were necessary to clarify a confusing

[377] Statement of Claim, ¶¶ 32, 545-548; Álvarez First Report, ¶¶ 169-171, **C-008**; Soria First Report, ¶¶ 153, 209-210, **C-009**.

[378] Statement of Claim, ¶¶ 185-230, 378-397, 493-500; Álvarez First Report, ¶¶ 98-134, **C-008**; Soria First Report, ¶¶ 93-115, **C-009**.

situation regarding the scope of Resolution 381, and that Decree 77 was nothing more than a clarification of that confusing situation in Telmex's favor.[379]

276. Respondent's "business as usual" defense, however, cannot survive careful scrutiny. As explained below, Respondent has failed: (1) to provide a reasonable explanation for the Compliance Unit's request for confirmation of criteria sent mysteriously on February 10, 2015; (2) to justify the repudiation of Mexico's telecommunications regulatory regime in favor of Telmex; (3) to show that Decree 77 was not an extraordinary, one-of-a-kind measure that illegally ordered only partial enforcement of Resolution 381; and (4) to prove that Tele Facilá was provided a meaningful opportunity to be heard before its valuable interconnection rights were revoked by the IFT.

277. In short, Respondent has failed to clear itself from its responsibility for breaching Article 1105 through a complete repudiation of Mexico's telecommunications regime by using ultra vires means to eliminate Tele Fácil from the Mexican market.

a. There is no legitimate explanation for the Compliance Unit's use of confirmation of criteria leading to Decree 77

278. Respondent has yet to provide a reasonable explanation for a critical event in this case: the IFT's Compliance Unit request for confirmation of criteria sent on February 10, 2015. On that day, the Unit led by Mr. Sanchez-Henkel, requested an interpretation from the Legal Unit regarding whether Resolution 381 had to be enforced in its entirety.[380] Specifically, the Compliance Unit asked whether, despite the clear orders included in Resolution 381, the parties were required both to physically interconnect their telecommunications systems and execute the

379 Statement of Defense, ¶¶ 90-136.
380 Statement of Claim, ¶¶ 24, 196-197, 313.

interconnection agreement containing the commercial terms of the parties' relationship.[381] Mr. Sanchez-Henkel's request set in motion a secret process, culminating in the adoption of Decree 77, that destroyed Tele Fácil's previously granted interconnection rights.[382]

279. Claimants allege, and Respondent denies, that the IFT Chairman ordered Mr. Sanchez-Henkel to make the request. As explained by Claimants, upon information and belief, the Chairman instructed Mr. Sanchez-Henkel not to enforce the portion of Resolution 381 ordering the parties to execute the interconnection terms determined by Resolution 381 in order to protect Telmex from alleged harm.[383] The Legal Unit's answer was ultimately adopted as Decree 77. Although Respondent denies this happened, the facts are stacked against it.

280. Respondent fails to provide a first-hand denial that Chairman Contreras instructed Mr. Sanchez-Henkel not to enforce Resolution 381; conspicuously absent from the Statement of Defense is any statement by Chairman Contreras denying that he instructed Mr. Sanchez-Henkel not to enforce Resolution 381 in its entirety.

281. Instead, Respondent marches out Mr. Gorra, a mid-level IFT official, to address the secretive confirmation of criteria process that led to Decree 77.[384] However, based on information and belief, he did not attend the critical meeting in which the Chairman's instructions were delivered. Mr. Gorra thus can only state, without any demonstrable first-hand knowledge of events, that Claimants' assertion is "totally divorced from reality."[385] However, it

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381 Statement of Claim, ¶¶ 379-382.
382 Statement of Claim, ¶¶ 383-397.
383 Statement of Claim, ¶¶ 378-380.
384 According to Mr. Soria, Mr. Gorra previously served as Legal Adviser to Mr. Contreras. Soria Second Report, ¶ 106 n.39, **C-111**. Indeed, just as Mr. Diaz was recently promoted (*see supra* ¶ 52), Mr. Gorra was likewise rewarded via a promotion on May 23, 2018 to Technical Secretary of the Plenary Head, not long after submitting his witness statement in this Arbitration. *See* IFT's Directory at http://www.ift.org.mx/conocenos/directorio (last accessed on June 5, 2018).
385 Gorra Statement, ¶ 33.

is Mr. Gorra who is completely distanced from this critical event in this case and thus very unlikely to have first-hand knowledge about the "reality" of the Chairman's actions.

282. Rather than responding directly to the allegations regarding Mr. Sanchez-Henkel, Respondent states that it "cannot confirm or deny" that representatives of Tele Fácil, Mr. Bello and Mr. Sacasa, met with Mr. Sanchez-Henkel on January 12, 2015 to request enforcement of Resolution 381.[386] Mr. Bello and Mr. Sacasa have both attested to the fact that, in that meeting, Mr. Sanchez-Henkel expressed his view that Resolution 381 was clear on its face and should be enforced in its entirety.[387] There is thus no contrary evidence in the record disputing the opinions expressed in that meeting.

283. Third, Respondent's denial of Telmex's influence is flimsy, but even if accepted, only compounds Mr. Sanchez-Henkel's highly peculiar conduct. According to Respondent, Telmex never contacted the IFT to express concerns regarding Resolution 381 before the company filed its own request for confirmation of criteria on February 18, 2015.[388] Respondent staunchly took this position in the context of Claimants' first request for documents: "The Respondent has been unable to identify any records pertaining to meetings [between IFT and Telmex] held from November 2014 to 7 October 2015 relating to the topics of interconnection [with Tele Fácil]."[389]

284. By Respondent's own account, the Compliance Unit made his request for confirmation of criteria on February 10, 2015—eight days earlier than when Telmex made its own request for confirmation of criteria and twenty-nine days after Mr. Sanchez-Henkel met with

386 Statement of Defense, ¶ 109. Claimants note that this is odd position for a government to take as the IFT is required by law to maintain records of who has attended meetings with IFT officials. Respondent's document production in this regard therefore has fallen woefully short.

387 Sacasa First Statement, ¶¶ 92-98, **C-003**; Bello Statement, ¶¶ 86-90, **C-004**.

388 Statement of Defense, ¶ 111.

389 Respondent's objections to Claimants' request for documents (Request Nos. 5 and 6), reproduced on page 24 of Procedural Order No. 3.

representatives of Tele Fácil, during which he assured Tele Fácil's representatives that Resolution 381 was clear and should be enforced. Respondent takes the view, therefore, that the Compliance Unit acted sua sponte to question the enforceability of Resolution 381 even before Telmex ever formally objected to Resolution 381 and, according to Claimants' uncontested assertion, after having assured Tele Fácil representatives that Resolution 381 was clear on its face and should be enforced. Respondent offers no explanation for what changed Mr. Sanchez-Henkel's resolve to enforce Resolution 381 during this time period.

285. Fourth, Respondent makes no attempt to dispute the fact that Decree 77 addressed the interpretive question raised by Mr. Sanchez Henkel, that is, whether Resolution 381 could be only partially enforced with respect to physical interconnection but did not adopt the position set forth in Telmex's confirmation of criteria.

286. In its request for confirmation of criteria, Telmex stated that it had "offered to execute the corresponding interconnection agreement to Tele Facil in 2013" including a "[r]ate of 0.00975 US dollars," that the legal changes had "voided" its offer, and that the IFT had erred in Resolution 381 by resolving "in a partial manner regarding only the rates that were contained in the 2013 interconnection agreement."[390] According to Telmex, it "cannot continue to offer Tel Facil the terms, conditions, and rates that were offered in 2013" and therefore, the IFT must confirm that the interconnection agreement that Telmex and Tele Fácil were required to execute "must reflect the terms and conditions contained in the currently effective legal framework."[391]

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[390] *Confirmación de Criterio presentada por Teléfonos de México ante el Instituto Federal de Telecomunicaciones* (Confirmation of Criteria submitted by Teléfonos de México to the Federal Telecommunications Institute) (February 18, 2015), (hereinafter "Telmex's Confirmation of Criteria"), at 3-5, **C-041.**

[391] *Id*. at 6, 8.

(These arguments probably sound familiar because, while they were rejected in 2015, they are the arguments that the Respondent tries to resurrect now.)

287. The fact is that the Compliance Unit's question and the IFT Plenary's response fits hand in glove. The Legal Unit proposed, and the Plenary adopted, the position that Resolution 381, in fact, did not need to be enforced completely; rather, only physical interconnection was required, while undisputed terms were "held harmless" and left to the parties to resolve without any time limitation.[392]

288. Notably, neither Tele Fácil nor Telmex had submitted requests to the IFT that would logically produce such a result. For its part, Tele Fácil had only requested enforcement of Resolution 381 in its entirety. For its part, Telmex had requested invalidation of the previously established interconnection rate, USD 0.00975, on the basis that it was inconsistent with the new regulatory regime.[393] Importantly, both Tele Fácil and Telmex accepted that the rate term had been established, despite wanting different consequences to flow from changes under the new law.[394] Thus, in the end, while Decree 77 resolved the situation in Telmex's favor, it did so on the basis of Mr. Sanchez-Henkel's Unit request alone, thus suggesting that the path chosen for the destruction of Tele Fácil's business, and protection of Telmex, was carefully orchestrated from the inside.

289. Respondent has not been able to provide any credible explanation for Mr. Sanchez-Henkel Unit's sua sponte request for confirmation of criteria in light of these facts—both unrefuted or undisputed. Its Statement Defense provides:

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392 Statement of Claim, ¶ 196.
393 Statement of Claim, ¶¶ 199, 221.
394 Statement of Claim, ¶ 21; Resolution 127, at 35, **C-061**; *see also* Telmex's Confirmation of Criteria, at 6-7, **C-041**.

> By early February 2015, it was clear that Tele Fácil and Telmex were at an impasse. Both operators had complained that the other party refused to execute the agreement and had written several communications to the *Pleno* and the ITF's Compliance Unit, as evidenced in the previous section.[395]

290. A description of the Compliance Unit's request for confirmation of criteria immediately follows this sentence, as if to indicate that the head of the Compliance Unit was required to intervene at this point in order to help resolve the dispute between Tele Fácil and Telmex.[396]

291. Respondent's version of the facts is highly misleading, however. As explained, at the beginning of February 2015, according to Respondent, the IFT had received no request for enforcement, comments or complaints contact whatsoever from Telmex regarding Resolution 381. It is thus entirely false to state that "[b]oth operators" had submitted complaints to the Plenary and Compliance Unit. Only Tele Fácil had.[397] Thus, there would have been no justification for Mr. Sanchez-Henkel to step in and resolve a dispute before Telmex had brought it to the Compliance Unit.

292. Mr. Gorra's attempted explanation of the Compliance Unit's conduct is equally misleading. In his witness statement, he asserts:

> I have had access to Tele Fácil's Statement of Claim and understand that it argues that Decree 77 was issued by a direct order of the President of the IFT. This assertion is totally divorced from reality. The issuance of Decree 77 arises from the necessity to determine the scope of Resolution 381 in order to enforce it. It is the UAJ itself that suggests the issuance of the Decree 77 from the writings received by Telmex and Tele Fácil and the request for confirmation of criterion from the Compliance Unit.[398]

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395 Statement of Defense, ¶ 102.
396 *Id.* ¶ 104.
397 Statement of Claim, ¶ 192-195.
398 Gorra Statement, ¶ 33 (emphasis added).

293. Mr. Gorra therefore seeks to divert the Tribunal's attention to Decree 77. Undoubtedly, the preamble of Decree 77 references Tele Fácil's requests for enforcement and requests for confirmation of criteria by the Compliance Unit and Telmex. However, as explained, Mr. Sanchez-Henkel's Unit request preceded Telmex's request and, thus, according to Respondent, was made sua sponte. Mr. Gorra offers no explanation for this unusual conduct.

294. A statement by Mr. Buj, Respondent's legal expert, compounds Respondent's problem. In his statement, Mr. Buj describes the dispute between Tele Fácil and Telmex in December 2014 as to execution of the interconnection agreement and Tele Fácil's subsequent complaint filed with the Compliance Unit on January 28, 2015. He then concludes:

> This caused that on February 10, 2015, based on articles 52 and 53, section VI of the Organic By-laws of the IFT, the Compliance Unit (hereinafter the "UC") submitted to the Legal Affairs Unit (hereinafter the "UAJ") of the IFT a confirmation criterion request."[399]

295. Putting aside that it is unclear how Mr. Buj, an outside legal expert, would have known what "motivated" Mr. Sanchez Henkel, Mr. Buj's conclusion is not sensible. He fails to explain why Mr. Sanchez-Henkel, as head of the Compliance Unit, would have been "motivated" to thwart enforcement of Resolution 381 before (according to Respondent) ever having received any complaint from Telmex.

296. At the end of the day, Respondent simply cannot provide a reasonable explanation for the Compliance Unit's conduct, which the IFT itself concedes was unprecedented. It is important to recall that, in the March 5, 2015 meeting, Mr. Pelaez, the IFT's Executor Coordinator, stated "we have never had a case of ordering the interconnection prior to an agreement, there has always been an agreement together with the interconnection."[400] Mr.

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399 Buj Report, ¶ 74.

400 Transcript of March 5 Plenary Meeting, at 11 (Peláez Statement), **C-043**.

Sanchez-Henkel's request—to see if the IFT could do what Mr. Pelaez said had never been done—thus launched the IFT into uncharted regulatory territory. Yet the IFT provides no cogent explanation for why such action was pursued, action which ultimately deprived Tele Fácil of its ability to operate in Mexico.

297. Under the circumstances, the only reasonable interpretation of events is the one asserted by Claimants, that is: Mr. Sanchez-Henkel was ordered by Chairman Contreras not to enforce Resolution 381; Mr. Sanchez was ordered by Chairman Contreras to ask the Legal Unit whether Resolution 381 could be partially enforced, i.e., only with respect to physical interconnection, without requiring execution of the corresponding interconnection agreement; Mr. Sanchez-Henkel's request posed the question that was solely answered in Decree 77, which resulted in the destruction of Tele Fácil's interconnection rights; and that the process of neutralizing the effect of Resolution 381 was undertaken to protect Telmex's interests.

298. These conclusions can be reached readily based on the evidence before the Tribunal. However, in light of Respondent's unjustified withholding (and possible destruction) of key evidence in the course of these proceedings, if necessary, the Tribunal should draw the necessary adverse inferences against Respondent, pursuant to §18.23 of Procedure Order No. 1 and Article 27 of the UNCITRAL Arbitration Rules.

b. No legitimate explanation for repudiation of Telecommunications regime

299. Respondent's Statement of Defense is remarkably unresponsive in the face of Claimants' serious allegations regarding the IFT's arbitrary decision-making that destroyed Tele Fácil's ability to operate in the Mexican market.[401]

[401] Statement of Claim, ¶¶ 185-230, 378-416, 488-52; Álvarez First Report, ¶¶ 98-146, **C-008**; Soria First Report, ¶¶ 93-127, **C-009**.

300. First, Respondent makes little attempt to explain the IFT's complete reversal of its position regarding rates between Resolution 381 and Decree 77. Resolution 381 ruled unequivocally that "the interconnection rates were completely determined"; "the only interconnection conditions not agreed upon by the parties in the process of negotiating to execute the corresponding interconnection agreement" were with respect to portability charges and indirect interconnection; and that the parties must "formaliz[e] the interconnection terms, conditions and rates that are ordered in this Resolution."[402] In stark contrast, Decree 77 found the opposite, namely, that the interconnection rates "remain[ed] untouched" and were deemed to be "held harmless."[403] Respondent merely refuses to accept that such rates were ever determined.

301. Second, Respondent fails to justify the IFT's absurd interpretation of its limited authority to resolve interconnection disputes in a single proceeding. Nowhere in the Statement of Defense is there a defense of the IFT's untenable interpretation of Article 42 of the FTL.[404] Nor is there any explanation as to how such an interpretation could possibly be compatible with the long-established tenets of Mexican telecommunications law requiring prompt and effective interconnection in the public interest.

302. Third, Respondent ignores the extreme consequences of the IFT's approach in Decree 77 were it, in fact, applied broadly to Mexico's entire telecommunications industry. As explained, if taken to its logical conclusion, the IFT's position in Decree 77 would allow any concessionaire, including Telmex, to reopen a settled interconnection dispute repeatedly in order

402 Resolution 381, at 13, 16, **C-029**.
403 Decree 77, at 9, 12, **C-051.**
404 This interpretation has been completely refuted by Claimants' legal experts. Álvarez First Report, ¶¶ 118-134, **C-008**; Soria First Report, ¶¶ 104-125, **C-009**.

to delay interconnection or to renege on a previously agreed term.[405] Surprisingly, there is no mention in the Statement of Defense of how such an approach would not severely undermine Mexico's telecommunications reforms that are ostensibly designed to thwart, not encourage, Telmex's anti-competitive conduct.

303. Further, the text of draft Decree 77—obtained by Claimants during the document production process—reveals even deeper arbitrariness in the IFT's decision-making. For example, in the third paragraph of the draft decree's order, the IFT would have concluded: "The rights of the parties are held harmless and may be enforced through the appropriate channels, regarding the conditions that were not subject to disagreement."[406] However, in the corresponding fourth paragraph of the final order, the IFT issued the more truncated determination: "The rights of the parties are held harmless regarding the conditions that were not a matter of the Interconnection Resolution."[407]

304. The difference between the two versions is significant, with one worse than the earlier. According to the draft, the IFT would have determined that it had no authority to establish the parties' undisputed interconnection terms, but that the disputing parties could themselves seek to enforce their rights in Mexico's commercial courts. Mr. Gorra's statement confirms this reading of the draft decree. He recalls at the meeting on March 13, 2015 to discuss the draft, "[t]he President then commented that to his understanding the matters agreed upon

405 Professor Álvarez has aptly described this absurdity as the "never-ending story" of interconnection. Álvarez First Report, ¶¶ 157-161, **C-008**; Álvarez Second Report, ¶¶ 23, 41, 56, **C-110**; *see also* Statement of Claim, ¶¶ 545-553.

406 Phantom Decree 77, at 12 (emphasis added), **C-116**.

407 Decree 77, at 12 (the Fourth Decree), **C-051**.

between the parties were enforceable before the Judicial Power of the Federation since the IFT only resolved on non-agreed matters."[408]

305. Notably, requiring parties to enforce undisputed interconnection terms before the courts could take several months, even years, to resolve and would squarely run afoul of the principle of prompt and effective interconnection.[409] In fact, as previously explained, this is precisely why the new telecommunications reforms barred the possibility of enjoining the enforcement of an interconnection resolution pending the resolution of a related amparo challenge.[410] Still, while draft Decree 77 represented a complete abdication of the IFT's role as the ultimate enforcer of interconnection agreements, it at least on some level recognized that the rights established in Resolution 381 might be enforced one day, albeit after much delay, in the courts.

306. In comparison, Decree 77, as adopted, placed Tele Fácil in an even more vulnerable situation. The final version notably omits the phrase "and may be enforced through the appropriate channels." While resort to the courts in this situation would have still been detrimental to Tele Fácil's interest, it would have at least provided a remedy. In contrast, Decree 77 merely declares both parties' rights to be "held harmless" in the abstract. Thus, under Decree 77, Tele Fácil's only options were to seek to renegotiate or refuse to renegotiate the previously agreed rates. Either choice would have inevitably led to a disagreement, intervention by the regulator, and the imposition of the lower default rate. In fact, the IFT allowed Telmex to bring a

408 Gorra Statement, ¶ 49.
409 Statement of Claim, ¶¶ 137-139, 540-544; Álvarez First Report, ¶¶ 14-26, 42-45, **C-008**; Soria First Report, ¶¶ 9-16, 116-125, **C-009**.
410 Statement of Claim, ¶¶ 119-120, 131-132; Álvarez First Report, ¶¶ 42-45, 180, **C-008**; Soria First Report, ¶¶ 14-15 & n.15, **C-009**.

new disagreement over 2015 interconnection rates in June 16, 2015, and the IFT subsequently imposed the default rate on the parties in Resolution 127.

307. Equally disturbing is the erratic swing of the IFT's decision-making during the short period of time between November 2014 and April 2015. In November, the IFT rendered Resolution 381 in which it expressly established Tele Fácil's right to the high rate term and ordered the parties both to interconnect and execute the interconnection agreement within ten business days. In March, the IFT produced draft Decree 77, concluding that the parties must interconnect within ten business days, but could enforce their rights in the courts.[411] In April, the IFT issued Decree 77, requiring interconnection within ten business days, but leaving Tele Fácil no remedy to enforce previously agreed terms, including the interconnection rate.[412]

308. Respondent provides no rational basis for such an extreme shift in the IFT's treatment of Tele Fácil. With respect to the move from draft Decree 77 to final Decree 77, in particular, Respondent only provides Mr. Gorra's vague description of an allegedly unrecorded portion of the March 13 Plenary meeting in which three Commissioners heavily criticized the draft.[413] However, there is no explanation at all for why the final version resulted in an even worse outcome in terms of its incompatibility with Mexican telecommunications law and its injury to Tele Fácil's interconnection rights.

c. The IFT's abuse of the confirmation of criteria process was unprecedented

309. In their Statement of Claim, Claimants demonstrated that the IFT's use of the confirmation of criteria process to reverse Resolution 381 was unprecedented and highly

411 Phantom Decree 77, at 12, **C-116**.
412 Decree 77, at 12, **C-051**.
413 Gorra Statement, ¶¶ 44-51.

discriminatory against Tele Fácil.[414] Specifically, Claimants presented a thorough review of all publicly available interpretive decrees to show that neither the IFT nor COFETEL, its predecessor, ever re-opened or revised the binding terms of a dispute resolution order. Decree 77 was the first and last to do so.

310. Respondent itself did not dispute this fact in advance of this arbitration. As mentioned, Mr. Peláez, the IFT's Executive Coordinator, stated at the Plenary meeting held on March 5, 2015, that "in previous cases we have never had a case of ordering the interconnection prior to an agreement, there has always been an agreement together with the interconnection, from what I remember."[415] Also, in response to transparency requests submitted by Claimants' counsel to the IFT's Transparency Unit in advance of these proceedings, the IFT conceded that it has never issued a confirmation of criteria to interpret the scope of a resolution that settled an interconnection disagreement.[416]

311. Yet Respondent now takes a different view. Relying principally on Mr. Gorra's statement, Respondent attempts to show that the Plenary regularly issues decrees like Decree 77 that interpret the scope of a prior interconnection disagreement resolutions. To that purported end, Mr. Gorra references three types of decrees: (1) decisions by the Plenary to concessionaires' confirmations of criteria requests on interconnection matters; (2) decisions by the Plenary on requests by concessionaires and federal government entities on other matters; and (3) decisions on requests by other IFT Units to the Legal Unit.[417] However, none of the decrees is even remotely similar to Decree 77.

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414 Statement of Claim, ¶¶ 196-198, 378,383, 493-519; Álvarez First Report, ¶ 135 & n. 95, **C-008**.

415 Transcript of March 5 Plenary Meeting, at 11 (Peláez Statement), **C-043**.

416 *Oficio IFT/212/CGVI/UT/800/2017 emitido por la Unidad de Transparencia del Instituto Federal de Telecomunicaciones* (Document IFT/212/CGVI/UT/800/2017 issued by the Transparency Unit of the Federal Telecommunications Institute) (July 4, 2017), at 5, **C-083**.

417 Gorra Statement, ¶¶ 14-17.

312. Many of the decrees that Mr. Gorra references are immediately distinguishable. Of the twenty decrees referenced, eleven were issued by the Legal Unit, not the Plenary, and thus do not interpret a prior decision of the Plenary. As Mr. Gorra himself explains: "In the case of Decree 77, the involvement of the Pleno of the IFT was necessary because it was related to the interpretation of an act of the Pleno itself, whose execution was pending due to discrepancies of interpretation."[418] Thus, as shown below, the eleven decrees issued by the Legal Unit could never interpret a resolution issued by the Plenary:

Decree Number	**Paragraph Reference in Gorra's Statement**	**Issuing Authority**
IFT/227/UAJ/132/2016	14.d	Legal Unit
IFT/227/UAJ/188/2016	14.e	Legal Unit
IFT/227/UAJ/192/2016	14.f	Legal Unit
IFT/227/UAJ/193/2016	14.g	Legal Unit
IFT/227/UAJ/189/2016	14.h	Legal Unit
IFT/227/UAJ-DG-CJ/0020/2015	16.a	Legal Unit
IFT/227/UAJ/0068/2015	16.b	Legal Unit
IFT/227/UAJ/090/2015	16.c	Legal Unit
IFT/227/UAJ/002/2016	16.d	Legal Unit
IFT/227/UAJ/068/2016	16.e	Legal Unit
IFT/227/UAJ/151/2016	16.f	Legal Unit
IFT/227/UAJ/133/2017	16.g	Legal Unit

[418] Gorra Statement, ¶ 18.

313. Of the remaining nine decrees, five of them do not even relate to a prior interconnection dispute, as demonstrated by the chart below:

Decree Number	**Paragraph Reference in Gorra's Statement**	**Subject Matter**
P/IFT/010716/344	15.a	Question whether the provision of Internet Access requires a concession
P/IFT/140916/486	15.b	Question whether the provision of Internet Access requires a concession
P/IFT/010716/345	15.c	Question whether the provision of certain services requires a concession
P/IFT/240517/264	15.d	Question whether an authorization of a company may be used by its subsidiary
P/IFT/271016/592	15.e	Mega Cable asks about the application of rates between non-preponderant carriers

314. Thus, in the end, only four decrees cited by Mr. Gorra even remotely resemble Decree 77, but even these fail to show that the IFT has ever analyzed the scope of a previously established interconnection agreement, let alone changed its terms.

315. For example, Plenary decrees P/IFT/290515/130[419] and P/IFT/290515/129[420] are factually similar to one another, but decidedly different from Decree 77. In the first case,

[419] *Resolución P/IFT/290515/130 mediante la cual el Pleno del Instituto Federal de Telecomunicaciones pone fin al procedimiento iniciado el 17 de diciembre de 2008 para resolver las condiciones de interconexión no convenidas entre Avantel, S.A. de C.V. y Pegaso PCS, S.A. de C.V.* (Resolution P/IFT/290515/130 by which the Plenary of the Federal Telecommunications Institute ends the procedure initiated on December 17, 2008 to resolve the interconnection conditions not agreed between Avantel, S.A. de C.V. and Pegaso PCS, S.A. de C.V.) (May 29, 2015), **CL-135**.

[420] *Resolución P/IFT/290515/129 mediante la cual el Pleno del Instituto Federal de Telecomunicaciones tiene por presentados los convenios modificatorios al Convenio Marco de Interconexión entre Axtel, S.A.B. de C.V. y Pegaso PCS, S.A. de C.V.* (Resolution P/IFT/290515/129 by which the Plenary of the Federal Telecommunications Institute considers as delivered the adenda to the Interconnection Framework Agreement between Axtel, S.A.B. de C.V., and Pegaso PCS, S.A. de C.V.) (May 29, 2015), **CL-136**.

P/IFT/290515/130, COFETEL had resolved an interconnection disagreement between Avantel and Pegaso, by establishing the interconnection rates from January 2008 to December 2010. Both parties initiated an administrative revision appeal (an action available under the previous telecommunications law) to challenge the resolution. While the appeal was pending, the parties reached a settlement to their dispute. They subsequently submitted the settlement agreement to the regulator, now the IFT, and requested the termination of the administrative revision appeal. In this decree, the IFT's only action was to grant the parties' request to recognize the settlement agreement and terminate the open procedure.

316. The second case, P/IFT/290515/129, also relates to the former COFETEL's resolution of an interconnection agreement, this time between Axtel and Pegaso covering the period between 2008 to 2011. Unhappy with the result, Pegaso brought an amparo action to challenge COFETEL's ruling. In May 2015, Axtel and Pegaso agreed to settle their dispute and, accordingly, submitted an addendum to the previously ordered interconnection agreement with updated terms. The parties then jointly requested that the IFT (COFETEL's successor regulator) declare that the settlement agreement superseded COFETEL's prior resolution. Recognizing that in interconnection agreements the will of the parties must prevail pursuant to the principle of freedom of contract under both the old and new telecommunications law, the IFT granted the parties' joint request.

317. Notably, neither of these cases involved a request for confirmation of criteria, let alone an interpretation of a prior interconnection disagreement resolution. Rather, in both cases, the IFT simply exercised its basic administrative authority to terminate certain post-resolution procedures (holdovers from the previous law) pursuant to the will of the parties. Neither case

therefore involves the interpretation and revision of previously established interconnection terms against the interests of one of the disputing parties, as was the case with Decree 77.

318. The third case, P/IFT/271016/592,[421] concerned a request for confirmation of criteria by Mega Cable regarding whether competitive carriers can freely negotiate interconnection rates under Article 131 of the FTBL, whether carriers that are not the preponderant economic agent are subject to the non-discrimination principle regarding interconnection rates pursuant to Articles 125 and 126 of the FTBL, and whether the IFT's annual default rates, when applied to resolve a dispute, apply to other carriers by way of the non-discrimination principle.

319. The IFT's decision in P/IFT/271016/592 was unlike that in Decree 77. In Mega Cable's case, the IFT offered an interpretation of Mexican telecommunications law (with mixed results, as explained above)[422] relating only to that carrier's interest. That interpretation was not offered in the context of a dispute with another carrier. Nor was the IFT interpreting a prior resolution resolving an interconnection disagreement, as Decree 77 purported to do.

320. The fourth case, Resolution P/IFT/050717/369,[423] is also distinguishable and, in fact, supports Claimants' position. By way of background, MCM and Telmex had entered into an interconnection agreement in 1999 containing a "continuous application clause." Under such a clause, the agreement would automatically extend at the end of each applicable period until a

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421 *Acuerdo mediante el cual el Pleno del Instituto Federal de Telecomunicaciones emite Respuesta a la Solicitud de Confirmación de Criterio presentada por Mega Cable, S.A. de C.V., con relación a las tarifas de interconexión* (Decree by which the Plenary of the Federal Telecommunications Institute issues a Confirmation of Criteria as Requested by Mega Cable, S.A. de C.V., in connection with interconnection rates) (October 27, 2016) (hereinafter "Mega Cable Confirmation of Criteria"), **C-124**.

422 *Id.* at 11.

423 *Acuerdo mediante el cual el Pleno del Instituto Federal de Telecomunicaciones emite Respuesta a la Solicitud de Confirmación de Criterio presentada por Megacable Comunicaciones de México, S.A. de C.V., en relación con las tarifas de interconexión (*Decree by which the Plenary of the Federal Telecommunications Institute issues a Confirmation of Criteria as Requested by Megacable Comunicaciones de México, S.A. de C.V., in connection with interconnection rates) (July 5, 2017) (hereinafter "MCM Confirmation of Criteria"), **C-127**.

new agreement was executed. Following Telmex's designation as a preponderant agent, two disputes arose as to the applicable rates on July 10, 2015 (regarding applicable rates for 2015) and on October 7, 2015 (regarding applicable rates for 2016), respectively. The IFT ruled that the default rate under the FTBL applied with respect to both relevant periods, *i.e.*, for the remainder of 2015 (July through December) and throughout 2016.

321. Subsequently, MCM requested a confirmation of criteria to clarify that prior to the IFT's first ruling on July 10, 2015 the parties' previously agreed rates still applied, even after Telmex's preponderant determination on March 6, 2014 and the IFT's resolution. In Resolution P/IFT/050717/369, the IFT confirmed, among other things, that the previously agreed rate would apply by virtue of the "continuous application clause." Notably, Resolution P/IFT/050717/369 is distinguishable from Decree 77. In Resolution P/IFT/050717/369, the IFT interpreted the parties' interconnection agreement, in light of the relevant telecommunications law, to find that the rates agreed between MCM and Telmex remained applicable up until the IFT's July 10, 2015 ruling. In no way did the IFT interpret the scope of the IFT's prior interconnection disagreement resolutions.

322. Moreover, Resolution P/IFT/050717/369 upheld the principle of freedom of contract. Namely, the IFT ruled that Telmex remained bound by the rate agreed with Mega Cable, even after Telmex was designated a preponderant economic agent. The IFT's ruling thus stands in direct conflict with Respondent's *ex post facto* position that the rate agreed between Telmex and Tele Fácil was illegal following the adopted of the FTBL and other telecommunications reforms.

323. In sum, Respondent has failed to show that Decree 77 was an ordinary confirmation of criteria decision. In fact, as Respondent itself admitted before this arbitration

was initiated, Decree 77 was a one-of-a-kind measure used only to release Telmex from an interconnection agreement that it no longer wished to abide by.[424]

d. Tele Fácil had no reasonable opportunity to be heard

324. By Respondent's own admissions, Claimants were never provided a meaningful opportunity to be heard before the IFT revoked its valuable interconnection rights. In its Statement of Defense, Respondent concedes that "criteria confirmation is not a procedure that is followed as a legal proceeding and, therefore, the parties are not asked to state their positions."[425] Mr. Gorra elaborates:

> The response to a request for confirmation of criterion by the *Pleno* of the IFT is not an administrative in the form of a trial. Accordingly, there are not "statements" or arguments phases, even for the party requesting the criterion.[426]

325. Importantly, Respondent does not dispute that Tele Fácil was ever formally informed of or invited to express its views in relation to either the Compliance Unit's request for confirmation of criteria submitted on February 10, 2015 or Telmex's request for confirmation of criteria submitted on February 26, 2015. Rather, it takes the position that Tele Fácil had no right to do so, even though the IFT's action in response would destroy the company's valuable interconnection rights and bar its entry into the Mexican market.[427]

326. Putting aside Respondent's mistaken view that Tele Fácil had no right to know about the confirmation of criteria processes,[428] Respondent argues unpersuasively that, in any event, Claimants' interests were considered. Respondent relies solely on events taking place on March 5, 2015 at a meeting between Tele Fácil representatives and the Plenary.[429] However, as

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424 *See* Transcript of March 5 Plenary Meeting, at 11 (Peláez Statement), **C-043.**
425 Statement of Defense, ¶ 283.
426 Gorra Statement, ¶ 19.
427 Statement of Defense, ¶ 122; Gorra Statement, ¶ 19.
428 Statement of Defense, ¶ 122; Gorra Statement, ¶ 19.
429 Gorra Statement, ¶¶ 19-32.

explained, that meeting afforded Claimants none of the due process protections required under Article 1105 for numerous reasons.

327. First, the IFT misleadingly obscured the fact that the Compliance Unit had submitted a request for confirmation of criteria, the request that would become the basis for Decree 77. Aware at the time only of Telmex's refusal to sign the interconnection agreement, Tele Fácil's representatives began the meeting by recounting the course of events involving Telmex and its present difficulties in terms of executing the interconnection agreement. These opening remarks emphasized the urgent need to enforce Resolution 381.

328. In response, Mr. Silva, the head of the Legal Unit, spoke first, raising, for the very first time, the fact that Telmex had filed a confirmation of criteria and citing that request as the cause for delay. In particular, he stated:

> [T]here is another document from Telmex where they ask us to confirm the criteria pertaining to the provisions of the agreement, then that is the part of why the enforcement of this November resolution [381] of the Plenary is detained, that is, we have to analyze the scope of the resolution to resolve in consequence, that is, what is the scope of this resolution regarding the execution of the agreement or not.[430]

329. Chairman Contreras immediately followed Mr. Silva's statement by declaring that consequently there were "different interpretations" regarding Resolution 381 that "we have to resolve it."[431]

330. This revelation was a shock not only to Tele Fácil, but also to some of the Commissioners. For example, Commissioner Labardini interjected: "Excuse me, the details here are important. What part of interconnection is not clear? What is the scope you wish to confirm? What criteria do you want to present? What is the part that is not clear?"[432]

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430 Transcript of March 5 Plenary Meeting, at 6 (Silva Statement), **C-043** (emphasis added).
431 *Id.* (Contreras Statement).
432 *Id.* (Labardini Statement).

331. Mr. Silva response, notably, focused only on Telmex's request for confirmation of criteria, with no mention of the Compliance Unit's request:

> The part that Telmex indicates is that its legal situation has changed and therefore this agreement must be subject to certain changes of the current law, which is the confirmation it asks for. So we consider that there must be a determination of what is the scope of this Plenary resolution [381], not about the interconnection, which is clear and already consented by Telmex, the issue to be clarified is the signing of the agreement.[433]

332. These comments by the IFT's most senior officials were entirely misleading. They framed the issue for discussion solely in relation to Telmex's request for confirmation of criteria, without expressly acknowledging the Compliance Unit's request. As explained, Telmex never disputed that Resolution 381 established the high rate (at least for 2014), but rather took the view that that rate was inconsistent with the regulatory reforms and, thus, must be replaced with the lower default rate going forward as of 2015.[434] Nor did Telmex ever request an interpretation of Resolution 381 as to whether physical interconnection could be ordered without execution of the interconnection agreement.[435] Importantly, that question was raised solely by the Compliance Unit 8 days before Telmex ever submitted its own request for confirmation of criteria.[436]

333. Mr. Silva's comments, reinforced by those of the Chairman, therefore deceivingly blended the substance of the two requests by the Compliance Unit and Telmex in order to suggest an overriding need to determine "what is the scope of this resolution [381] regarding the execution of the agreement or not."[437] Moreover, there was no discussion whatsoever at the March 5 meeting about the IFT's novel, though completely flawed, interpretation of Article 42 of

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433 *Id.* (Silva Statement) (emphasis added).
434 Statement of Claim, ¶¶ 199, 431-432, 489-500; Telmex's Confirmation of Criteria, at 6-7, **C-041**.
435 Statement of Claim, ¶¶ 199, 431-432, 489-500.
436 Compliance Unit Confirmation of Criteria, **C-040**.
437 Transcript of March 5 Plenary Meeting, at 6 (Silva Statement), **C-043**.

the FTL that would serve as the basis for Decree 77, i.e., that the regulator lacked authority to determine undisputed interconnection terms.

334. Under these circumstances, Tele Fácil's representatives thus remained in the dark through the meeting about the IFT's ulterior motives. They therefore responded, as best they could, to defend their company's interests based on their understanding of what they had just heard allegedly regarding Telmex's (not the Compliance Unit's) confirmation of criteria. Consequently, Mr. Bello intervened to emphasize generally that Resolution 381 had already established all the terms of interconnection, including the rate term, and that Telmex should not be permitted to reopen those terms because it is unhappy with the deal.[438] He then expressed general concern that the IFT was considering a proposal to modify Resolution 381.

335. To suggest, as Respondent does, that Tele Fácil had a full and fair opportunity to defend its interests at the March 5 meeting is patently false.

336. Second, by the time of the March 5 meeting the decision to reverse Resolution 381 was a fait accompli and, thus, Tele Fácil had no genuine opportunity to state its case. Indeed, in hindsight, Chairman Contreras's comments at the meeting revealed that approach in Decree 77 had already been determined. At one point, he stated:

> [A]s far as I understand, the body of that same resolution expressed that the rates were not part of the disagreement, that is, and why I say it, we have legal precedents in which what was not expressly submitted to the authority's consideration, specifically the disagreement, amparos have been granted, I say it for terms and for other matters, because the authority is limited in resolving the proposed disagreement.[439]

337. The Chairman's comments were followed up with similar remarks by Mr. Sostenes, General Director of Interconnection and Resale of Telecommunications Services, who,

438 *Id.* at 7-8 (Bello Statement).
439 *Id.* at 7 (Contreras Statement).

as the coordinator of the IFT's review, stated that with respect to Resolution 381, "the IFT does not resolve regarding rates."[440]

338. These comments, although vague in nature and unsupported by legal support or analysis, foreshadow the exact position that would later be taken in Decree 77. In fact, the very next day after the meeting, the Legal Unit transmitted its first draft of the decree that laid out the IFT's unprecedented position that Resolution 381 should be interpreted as having determined only the disputed terms.[441] Thus, the March 5 meeting was, at best, a superficial exercise, perhaps in an attempt to provide some semblance of democratic governance, before Decree 77 unjustifiably erased Tele Fácil's lucrative interconnection rights.

339. In light of these considerations, Mr. Gorra's assessment of the March 5 meeting is astonishing. He states that:

> [I]t is evident that: i) Tele Fácil was aware that a draft would be prepared in which the writings submitted by Telmex and Tele Fácil would be addressed, as well as the requests of confirmation of criterion submitted by Telmex and the Compliance Unit of the Institute; ii) Tele Fácil was aware that the confirmation of criterion to be prepared by the Legal Affairs Unit would analyze the scope of Resolution 381; and iii) Tele Fácil was aware of the interpretative position of the involved units on the scope of Resolution 381.[442]

However, as the evidence demonstrates, at no time had any IFT official ever revealed to Tele Fácil the existence of a separate request for confirmation of criteria by the Compliance Unit, which, in the end, became the sole basis for the repudiation of Resolution 381. In addition, at no time had any IFT official ever disclosed to Tele Fácil, with sufficient specificity, the legal basis on which the IFT would conclude in Decree 77 that Resolution 381 was only partially enforceable, despite its clear language to the contrary.

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440 *Id.* at 8 (Diaz Statement).
441 Gorra Statement, ¶ 40.
442 Gorra Statement, ¶ 29.

C. Respondent Has Failed To Disprove That The Acts And Omissions Of Its Courts Have Breached Article 1105

340. As explained in detail in the Statement of Claim, Mexico's Specialized Telecommunications Courts denied Claimants justice in breach of NAFTA Article 1105(1) when they, through acts and omissions, failed to provide Tele Fácil a meaningful forum for resolution of Tele Fácil's constitutional challenges to Decree 77, the principle measure that destroyed Claimants' investment in Mexico. In short, the Courts completely abdicated their judicial function when they rubberstamped the IFT's unlawful action and denied Tele Fácil the right to file its appeal of the lower court's erroneous judgment.

341. As further explained, the misconduct of the Mexican judiciary caused a distinct breach of the NAFTA. The Statement of Claim provides:

> This breach occurred well after the IFT had destroyed Claimants' investment in violation of Articles 1110 and 1105 of the NAFTA.[443] It therefore arises out of a separate factual predicate. Nevertheless, Claimants expended resources seeking redress for their losses, on a prospective basis, in Mexican courts.[444]

These losses stand alone and, for the sake of emphasis, have now been parsed out from Claimants' overall damages claim. In total, they amount to approximately USD 91,800.00, the total costs incurred by Mr. Nelson in seeking justice in vain in connection with three *amparo* proceedings before the Specialized Telecommunications Courts.[445]

342. Respondent's defense to Claimants' claim of denial of justice is decidedly unavailing. Unable to justify any of the Courts' decision-making based on established legal principles, Respondent confines itself to describing the Court's rulings, as if that alone is

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443 As explained, the IFT destroyed Claimants' investments in mid-January 2015.

444 Statement of Claim, ¶ 610 & n.875 (stating that "Mr. Nelson funded the litigation in connection with several *amparo* actions concerning Resolution 381, Decree 77, and Resolution 127").

445 Reply Witness Statement of Migual Sacasa (hereinafter "Sacasa Second Statement"), ¶ 4, **C-108.**

sufficient validation. Notably, Respondent cannot—and therefore does not—support the Court's reasoning with its own assessment of Mexican constitutional and telecommunications law. Were it to attempt to do so, Respondent would immediately reveal the fatal flaws in the Courts' approach.

343. As explained below, Respondent cannot disprove that the Specialized Telecommunications Courts—through serious incompetence at the lower level and a denial of access at the appellate level—have denied Tele Fácil justice.

1. Respondent Cannot Defend the District Court's Severely Inadequate Treatment of Tele Fácil's Amparo against Decree 77

344. It is well established that severe deficiencies in the judicial process give rise to a denial of justice. As the Azinian Tribunal recognized, a denial of justice will arise, for example, where a NAFTA Party's courts "administer justice in a seriously inadequate way."[446] Similarly, in Mondev v. United States, the tribunal emphasized that while NAFTA Chapter Eleven tribunals should not second-guess the decisions of domestic courts, they may determine that a domestic judicial decision "was clearly improper and discreditable, with the result that the investment has been subjected to unfair and inequitable treatment" in breach of NAFTA Article 1105(1).[447]

345. Respondent has failed to present a full-throated defense of its courts—indeed, it cannot do so in the face of such gross incompetence. Both Respondent and its expert, Mr. Buj, provide only a superficial description of the ruling of the Specialized Telecommunications Courts in connection with Tele Fácil's amparo against Decree 77.[448] As Mr. Soria aptly observes

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446 *Robert Azinian, Kenneth Davitian, & Ellen Baca v. United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award (Nov. 1, 1999), ¶ 102, **CL-060**.

447 *Mondev Int'l Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, Award (Oct. 11, 2002), ¶ 127, **CL-057**.

448 Soria Second Report, ¶ 124, **C-111** ("Mr. Buj limits his opinion in regard to the Amparo Rulings to a summary of the facts, without any analysis of the actions taken by the Courts. Paragraphs 87 through 121 contain no analysis whatsoever. The section is merely a list of actions taken by the Courts and a repetition of their statements, all of which are being questioned in this procedure, in regard to their rightfulness.").

in his second expert report, Mr. Buj provides "no analysis of the legality or thoroughness of the Courts' rulings and/or interpretation of the actions taken by the IFT."[449] In fact, a closer look at the critical decision on Tele Fácil's amparo against Decree 77 reveals a judicial opinion devoid of any application of legal principles or substantive reasoning.

346. On May 7, 2015, Tele Fácil filed an amparo to challenge the IFT's failure to enforce Resolution 381, and its subsequent issuance of Decree 77.[450] Tele Fácil raised five challenges: (1) that the IFT lacked authority to modify and/or revoke Resolution 381 by issuing Decree 77, since the principles of freedom of contract and finality of an administrative resolution of interconnection disagreement must prevail; (2) that Decree 77 violated the principle of unity of physical interconnection and execution of the agreement on commercial terms; (3) that the IFT's Legal Unit lacked authority to interpret and modify a Plenary resolution; (4) that Decree 77 was based on a flawed interpretation of the law that violated the principles of legal certainty, fair hearing and due process and; (5) that the IFT erred in failing to enforce Resolution 381 by instead issuing Decree 77.[451] The Court failed to provide any meaningful analysis of any of Tele Fácil's challenges.

347. On January 22, 2016, the First District Court for Administrative Matters, specialized in Economic Competition, Broadcasting and Telecommunications denied Tele Fácil's amparo on all grounds.[452]

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449 *Id.* ¶ 126**.**

450 *Demanda de Amparo número 1381/2015 promovido por Tele Fácil México, S.A. de C.V. ante la Juez Primero de Distrito en Materia Administrativa, especializada en Competencia Económica, Radiodifusión y Telecomunicaciones,* (Amparo trial 1381/2015 initiated by Tele Fácil México, S.A. de C.V. before the First District Judge in Administrative Matters Specialized in Economic Competition, Broadcasting and Telecommunications). (May 7, 2015) (hereinafter "Tele Fácil's *Amparo* Claim against Decree 77"), **C-053**.

451 *Id.* at 7-13, First Violation Concept.

452 *Sentencia de Juicio de Amparo número 1381/2015 promovido por Tele Fácil México, S.A. de C.V. emitida por la Juez Primero de Distrito en Materia Administrativa, especializada en Competencia Económica, Radiodifusión y Telecomunicaciones,* (Resolution by the First District Judge in Administrative Matters Specialized

348. With regard to Tele Fácil's first challenge, which raised critical questions regarding the scope of the IFT's authority to resolve disputes and the legality of Decree 77 itself, the District Court merely rubberstamped the IFT's conduct, with no legal analysis. In fact, the District Court's only discussion involved a bizarre two-column chart (containing a side-by-side presentation of the full text of Resolution 381 and Decree 77) followed by a few non-analytical conclusory statements.[453] After the chart, which spanned a total of eight pages, the Court reached its decision in a few short paragraphs:

> As noted, it is inaccurate that the interconnection resolution was modified or revoked, since **from the comparative** it is found that the challenged act was only adopted to address the requests for confirmations of criteria formulated by the claimant and the interested third party and to enforce the execution of the interconnection resolution.
>
> In this regard, it can be noted that the only determination made was that the resolution only resolved the conditions not agreed between the claimant and the interested third parties regarding indirect interconnection and portability.
>
> Therefore, the order to interconnect the public telecommunications networks and to execute the corresponding agreement, in terms of article 42 of the Federal Telecommunications Law, it must invariably consider these points of disagreement, for which the responsible agency does have authority to enforce them.
>
> Which makes it clear that there is no modification and/or revocation to the resolution that determined the conditions of interconnection, because it addressed the same issues, without amending them, but only specifying with precision its scope, so it must be said that such determination is an integral part of the resolution, to the extent that they pursue the same purposes.
>
> Therefore the claimants lacks reason, when it argues that the resolution was modified and/or revoked, since as it has already been found, this did not happen since no essential part of the resolution changed.[454]

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in Economic Competition, Broadcasting and Telecommunications to Amparo trial 1381/2015 initiated by Tele Fácil México, S.A. de C.V) (Jan. 22, 2016) (hereinafter "Resolution of Tele Fácil's *Amparo* against Decree 77"), **C-063**.

453 *Id.* at 7-16.

454 *Id.* at 15 (emphasis in original).

349. The District Court's conclusion based on these short paragraphs is severely inadequate. The Court decided that Decree 77 did not modify or revoke Resolution 381 solely on the basis that Decree 77 itself said so, as allegedly evidenced by the comparison chart.[455] There is, however, no legal analysis of the text or purpose of Article 42 of the FTL, no consideration of the underlying constitutional imperative to ensure prompt and effective interconnection to serve the public interest, no assessment of the differing legal requirements and deadlines imposed on the parties, respectively, under Resolution 381 and Decree 77, and no assessment of the impact of Decree 77 on the reforms designed to foster competition in the telecommunications sector. There is, in sum, simply no legal analysis behind the Court's decision that Decree 77 was not unconstitutional, only blind deference to the IFT's interpretation of its own authority, which is itself terribly thin.

350. Regarding Tele Fácil's argument that Decree 77 violated the principle of freedom of contract and finality of administrative resolutions, the District Court found that:

> all the remaining challenged acts arguing a violation to the principle of the parties' freedom of contract contained in article 42 of the Federal Telecommunications Law and those aimed to argue that the only way to modify a resolution is through the indirect amparo, are **inadmissible**. This, because such challenges derive from the arguments that have been dismissed in previous paragraphs.[456]

In other words, the Court fell back on its prior non-analysis, *i.e.,* the comparative chart, and failed to engage in any proper analysis of the important question posed by Tele Fácil.

351. The District Court's treatment of Tele Fácil's argument that Decree 77 unlawfully ordered physical interconnection without simultaneously requiring execution of the interconnection agreement was equally poor. On this point, the Court simply reiterates the

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455 *Id.* at 14.

456 Tele Fácil's *Amparo* against Decree 77, at 15, **C-063** (emphasis in original).

approach of Decree 77: "the claimant is incorrect since there is no detachment as it alleges, on the contrary, the obligation to execute the agreement and the physical interconnection of the network have always existed, clarifying that the agreement must invariabl[y] integrate the indirect interconnection and omit any reference to portability costs."[457] In other words, the Court found that simply because Decree 77 says so, it is acceptable that the parties must physically interconnect their systems within ten business days and, with the exception of provisions on indirect interconnection and portability, renegotiate all previously agreed terms in that same time period.

352. The District Court's sparse reasoning is even more surprising in light of the IFT's own admission that there has never been a case in which physical interconnection was ordered without a resolution of all business terms. As Mr. Peláez stated at the March 5, 2015 meeting of the Plenary: "in previous cases we have never had a case of ordering interconnection prior to an agreement, there has always been an agreement together with the interconnection …."[458] It is thus shocking that the Court failed to undertake any review of the implications of ordering this unprecedented act by the IFT in Decree 77.

353. Finally, the District Court mishandled Tele Fácil's challenge that Decree 77 violated the guarantees of legal certainty, the right to a hearing and due process because it required the company to execute terms of an agreement that were unspecified and inexact. The Court's decision is unhelpfully circular: "As has been shown through this opinion, the Plenary of the Federal Telecommunications Institute, when resolving the interconnection conditions that were not agreed upon, only referred to the matters not agreed between the parties, this is, indirect

457 *Id.* at 17.
458 Transcript of March 5 Plenary Meeting, at 11, **C-043.**

interconnection and clause of portability."[459] Thus, according to the Court's illogic, Decree 77 was not vague because it only confirmed that Resolution 381 did not determine the terms that were previously agreed between the parties, including the rate of USD 0.00975.

354. Notably, Respondent makes a lukewarm effort to defend the Court's conduct against Claimants' condemnation. Specifically, neither Respondent nor its expert, Mr. Buj, takes on the chorus of criticism by Mexico's leading telecommunications experts, Professor Álvarez and Mr. Soria. Both have detailed the extreme failings of the Court in their first and second reports, including with respect to the amparo decision supporting Decree 77.[460] Yet Respondent is blasé in its response, hoping to convince the Tribunal that there was nothing peculiar about the District Court's conduct.

355. This is, of course, an impossible task. The District Court was presented with unprecedented, yet foundational, legal questions regarding the scope of the IFT's authority to resolve interconnection disagreements and the principle of unity between interconnection and execution of interconnection agreements. However, it sat on its hands and failed to execute its judicial duty of review. Whether by virtue of inexperience, incompetence or protectionism, the Court's treatment of Tele Fácil's claims in its challenge to Decree 77 was seriously inadequate and formed the initial basis for a denial of justice against Tele Fácil.

2. Respondent Cannot Defend the Appellate Court's Denial of Tele Fácil's Right of Appeal

356. A denial of access to judicial relief constitutes a denial of justice in violation of Article 1105(1). According to Paulsson:

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459 Tele Fácil's *Amparo* against Decree 77, at 17, **C-063**

460 Soria First Report, ¶¶ 232-260, **C-009**; Álvarez First Report, ¶¶ 172-197, **C-008**; Soria Second Report, ¶¶ 124-134, **C-111**; Álvarez Second Report, ¶¶ 90-100, **C-110**.

> The right of access to courts is fundamental and uncontroversial; its refusal the most obvious form of denial of justice. Legal rights would be illusory if there were no entitlement to a procedural mechanism to give them effect.[461]

357. The decisions of international tribunals confirm his description of the international law rule. In Azinian v. Mexico, the tribunal observed that "[a] denial of justice could be pleaded if the relevant courts refuse to entertain a suit."[462] The decision in the Ambatielos arbitration between Greece and the United Kingdom also sheds light on the broad concept of access to courts, including the ability to file appeals:

> the foreigner shall enjoy full freedom to appear before the courts for the protection or defence of his rights, whether as plaintiff or defendant; to bring any action provided or authorised by law; to deliver any pleading by way of defence, set off or counterclaim; to engage Counsel; to adduce evidence, whether documentary or oral or of any other kind; to apply for bail; to lodge appeals and, in short, to use the Courts fully and to avail himself of any procedural remedies or guarantees provided by the law of the land in order that justice may be administered on a footing of equality with nationals of the country.[463]

In the *Fabiani Case*, the neutral umpire on the French-Venezuela Mixed Claims Commission held that denial of justice claims encompass "all the direct or disguised refusals to judge … in spite of the compliance with all the legal formalities by the prejudiced party."[464]

358. In this case, Tele Fácil was denied access to Respondent's judiciary when its appeal of the District Court's amparo ruling concerning Decree 77 was unjustifiably rejected after having previously been accepted.

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461 Jan Paulsson, *Denial of Justice in International Law* 134 (Cambridge University Press, 2005), **CL-137**.

462 *Robert Azinian, Kenneth Davitian, & Ellen Baca v. United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award (Nov. 1, 1999), ¶ 102, **CL-060**.

463 *Ambatielos Claim* (*Greece v. United Kingdom of Great Britain and Northern Ireland*), Award (March 6, 1956), XII R.I.A.A. 83, 111 (emphasis added), **CL-138**.

464 *Antoine Fabiani Case*, Decision of the 1902 French-Venezuela Commission (July 31, 1905), X R.I.A.A. 83, 118, **CL-139**.

359. On February 11, 2016, Tele Fácil sought to appeal the decision of the District Court to the Circuit Collegiate Court in Administrative Matters, specialized in Economic Competition, Broadcasting and Telecommunications. Importantly, Respondent does not refute that Tele Fácil's representative arrived at the courthouse to file the appeal at 11:58 pm on the day it was due, that the clerk was not available to receive the appeal until midnight, and that the clerk proceeded to reject the appeal as untimely.[465]

360. Nevertheless, Respondent argues that Tele Fácil was at fault. Specifically, it claims that, having been wrongfully denied access to the courthouse on February 11, Tele Fácil was required to file its appeal by 10:00 am the next day, but instead Tele Fácil's appeal was received by the clerk of the court at 10:56 am. Specifically, Respondent states:

> What the Claimants fail to mention is that there exists a process well established in the jurisprudence of the Mexican Supreme Court to deal with situations as those described in the Statement of Claim. Tele Fácil could have done one of two things the next day (12 February 2015): (i) present the appeal before the office of common correspondence of the district courts between 8:30 – 9:00 am (before the courts opened their doors); or (ii) present directly to the First District Court after 9:01 am.[466]

While Respondent never states it clearly in the Statement of Defense, it is clear that it believes that, with respect to the second alleged opportunity to file, Tele Fácil was limited to the first business hour of the day following the deadline.

361. Respondent's assessment of the situation, however, is entirely detached from reality, as explained below. First, there is no process (and Respondent cites no authority) that permits an appellant who was denied access to the courthouse on the day of the deadline to file its appeal the next day before 9:00 am. Second, the authority relied on by Respondent that

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[465] Statement of Defense, ¶ 198; Buj Report, ¶ 113; *see also* Witness Statement of Juan Bonequi (hereinafter "Bonequi Statement"), ¶¶ 2-6, **C-132**.

[466] Statement of Defense, ¶ 199 (footnotes omitted).

purportedly would have allowed Tele Fácil to file its appeal during the first business hour of the day after it was improperly denied, i.e., after 9:00 am – 10:00 am, was inapplicable to Tele Fácil's situation, thus requiring Tele Fácil to pursue alternative remedies.

a. No opportunity to file before 9:00 am on February 12

362. Respondent states that, after being denied access to file its appeal on February 11, it could have returned the next morning to file its appeal between 8:30 am and 9:00 am. Respondent fails to provide any analysis of law or practice to support its view either in its Statement of Defense or in Mr. Buj's expert report. There is, in fact, no such practice under Mexican law granting a putative appellant the right to file in this manner.

363. Further, the uncontested facts of this case belie Respondent's argument. As previously demonstrated:

> [On] February 12, 2016, being approximately 8:40 a.m., Lic. Ms. Diana Margarita Mayorga Rea [legal counsel for Tele Fácil], appeared at the Office of Common Correspondence of the Tribunals Specialized in Economic Competition, Broadcasting and Telecommunications, in order to try to submit on behalf of [Tele Fácil] the brief containing the appeal for review, which was denied the previous day. However, the person in charge of the Office of Common Correspondence at the time told her that he was unable to receive the appeal for review, on the grounds that it was outside of the schedule of reception.[467]

364. Further, as explained by Mr. Bonequi, Tele Fácil's counsel, given the highly unusual circumstances surrounding Tele Fácil's denial of access to the courthouse the night before, under his direction, his associate, Ms. Mayorga, made inquiries at 8:40 am at the Office

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467 *Exposición de Hechos respecto a la presentación del amparo en revisión 1381/2015 presentado por Tele Fácil México, S.A. de C.V. ante el Juez Primero de Distrito en Materia Administrativa Especializada en Competencia Económica, Radiodifusión y telecomunicaciones* (Statement of Fact regarding presentation of Amparo Appeal 1381/2015 submitted by Tele Fácil México, S.A. de C.V. before the First District Judge in Administrative Matters Specialized in Economic Competition, Broadcasting and Telecommunications) (February 24, 2016) (hereinafter "Appeal Statement of Facts"), at 2 ¶ 3, **C-066**.

of Common Correspondence to understand what options Tele Fácil had to make its filing.[468] The response she received made it very clear that there was never an opportunity to submit the appeal before 9:00 am. As explained by Mr. Bonequi, "the person in charge at the Office of Common Correspondence refused to admit the appeal on the basis that it was beyond the deadline and therefore outside of the permissible period for admissions."[469]

365. In fact, even Respondent's own expert, Mr. Buj, concurs that no filing could be made before 9:00 am. In his report, he states, in describing the events in the morning of February 12: "On the next day, at 8:40 am, Tele Fácil's representative went back to the Court's Front Desk to ask to have Tele Fácil's writ, accepted, request that, supposedly was rejected by being not being within the hours, since the writs can be filed upon 9:00 am."[470] Although Mr. Buj is wrong about the existence of any automatic option of filing after 9:00 am, as explained below, he admits nevertheless and contrary to Respondent's assertions, that there was no ability to do so before that time.

366. Consequently, Respondent's position is entirely unfounded when it asserts that "Tele Fácil could have done one of two things the next day (12 February 2015): [including] (i) present the appeal before the office of common correspondence of the district courts between 8:30 – 9:00 am (before the courts opened their doors) …."[471] This option never existed.

b. No opportunity to file the appeal from 9-10 am on February 12

367. Respondent's alleged second option to file the appeal the day after it was unduly rejected—"(ii) present directly to the First District Court after 9:01 am."[472]—also never existed

468 Bonequi Statement, ¶ 7, **C-132**.
469 *Id*.
470 Buj Report, ¶ 113.
471 Statement of Defense, ¶ 199.
472 Statement of Defense, ¶ 119.

as a matter of law. Mr. Buj cites an exception to the general filing rule that allows the delayed filing of a pleading when the courts are operating under restricted working hours on the day of a filing deadline, for example, because the deadline falls on a weekend or national holiday. He states:

> even taking into consideration the "events" occurred at 23:58 hours of the day for the filing of the appeal for review, by not filing the appeal for reivew within the first working hour of the next day before the First District Court (i.e., within the first hour of February [12,] 2016), it did not complied with the process requirement set forth in mandatory legal precedent for said Collegiate Court.[473]

However, this exception had no application in Tele Fácil's situation where the court had not been operating on the basis of restricted working hours on the day of the filing deadline.

368. As a general rule, litigants before the Specialized Telecommunications Courts have until midnight on the date of a filing deadline to submit hard copies of their pleadings with the court clerk. According to this general rule, "the physical filing of the complaint or pleadings within term can be done on the day the term concludes, even outside of the business hours of the courts at the office of parties' correspondence that shall remain open until the twenty-four hours of the day of the term."[474] Thus, by default, Tele Fácil had until midnight on the night of February 11, 2016 to file its appeal to the District court's decision regarding Tele Fácil's amparo challenge to Decree 77.

369. The exception to this general rule that Respondent's appears to rely on applies only in limited circumstances, none of which existed on February 12, 2016 when Tele Fácil sought again to file its appeal. The exception, established by the Mexican Supreme Court, provides as follows:

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473 Buj Report, ¶ 119.

474 *Amparo* Statute at Article 21, **CL-003**.

> **DIRECT AMPARO. IT IS TIMELY IF SUBMITTED IN THE FIRST BUSINESS HOUR OF THE NEXT DAY THE TERM ELAPSED, WHEN THE TWENTY-FOUR HOURS OF THE BUSINESS DAY WERE LIMITED BY A SCHEDULE ESTABLISHED IN AN ADMINISTRATIVE DECREE OR IN A SECONDARY STATUTE**. The term to submit a complaint of amparo must be strictly complied with, since it constitutes an element that limits the time in which the complainant of an opinion, award or resolution that terminates a trial may validly exercise that action. However, that also imposes an obligation to the responsible authority to respect the term and not to limit or restrict it, since any action intended to do that means an illegal restriction to the fundamental right of access to justice. In other words, the exercise of an amparo action through the submission of the corresponding complaint cannot be limited by reducing the term, even by a few hours, affecting the complainant that knows it has a determined term and that the last day consists of twenty four hours. In this conditions, when due to a business schedule contained in administrative decrees or secondary statutes, the opportunity to submit an amparo complaint is restricted, creating an impossibility to submit until the twenty four hours of the day the term elapses, it is hereby concluded that if submitted during the first business hour of the following day it will be considered as timely, since for causes not attributable to claimant it was in no possibility of doing it on the last day of the term. [475]

In other words, the exception to the general timing rule applies, thus granting a litigant an additional hour to file a submission on the morning after a deadline (*i.e.,* from 9:00 am to 10:00 am), only where the Court's schedule is restricted on the day of the deadline "by administrative decrees or secondary statutes."

370. This same conclusion has been confirmed by judicial precedent that states that when a Court has resources and personnel available to receive pleadings until midnight, as was the case with Tele Fácil, the exception in the jurisprudence described above regarding the

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475 *Jurisprudencia 2a./J. 108/2009 agosto de 2009, con rubro DEMANDA DE AMPARO DIRECTO. ES OPORTUNA SU PRESENTACIÓN EN LA PRIMERA HORA HÁBIL DEL DÍA SIGUIENTE AL DEL VENCIOMIENTO DEL PLAZO, CUANDO CON MOTIVO DE UN HORARIO DE LABORES FIJADO EN ACUERDOS ADMINISTRATIVOS O LEYES SECUNDARIAS SE RESTRINGIERON LAS VEINTICUATRO HORAS* (Jurisprudence 2a./J. 108/2009 August 2009, titled DIRECT AMPARO. IT IS TIMELY IF SUBMITTED IN THE FIRST BUSINESS HOUR OF THE NEXT DAY THE TERM ELAPSED, WHEN THE TWENTY-FOUR HOURS OF THE BUSINESS DAY WERE LIMITED BY A SCHEDULE ESTABLISHED IN AN ADMINISTRATIVE DECREE OR IN A SECONDARY STATUTE) (August 2009) (hereinafter "Jurisprudence 2a./J. 108/2009") (emphasis added), **CL-140**.

requirement to make a submission in the first business hour of the next day is not applicable. This judicial precedent provides:

> **AMPARO PLEADING. IT IS UNTIMELY IF SUBMITTED ON THE FIRST BUSINESS HOUR OF THE DAY FOLLOWING THE ONE IN WHICH THE TERM ELAPSED, WHEN THERE IS AN AUTHORIZED OFFICER TO RECEIVE DOCUMENTS OUTSIDE THE REGULAR BUSINESS HOURS**. When computing the deadline for submitting an amparo in cases where there is an officer authorized to receive filings outside the regular business hours, as is the case with legal secretaries and labor secretaries of the Local Conciliation and Arbitration Boards of the State of Mexico, the hypothesis established in jurisprudence 2a./J 108/2009, of the Second Chamber of the Supreme Court of Justice of the Nation, published in the Judicial Weekly of the Federation and its Gazette, Ninth Period, Volume XXX, August 2009, page 154, with title: "DIRECT AMPARO. IT IS TIMELY IF SUBMITTED IN THE FIRST BUSINESS HOUR OF THE NEXT DAY THE TERM ELAPSED, WHEN THE TWENTY-FOUR HOURS OF THE BUSINESS DAY WERE LIMITED BY A SCHEDULE ESTABLISHED IN AN ADMINISTRATIVE DECREE OR IN A SECONDARY STATUTE" is not applicable. This, because if said court has mechanisms and personnel to allow the filing of pleadings with a specific term within the 24 hours of the last day of the term, the amparo pleading filed at the first business hour of the day following that in which the term ends, when there is an official authorized to receive the document outside regular business hours, is extemporaneous.[476]

Therefore, after being improperly rejected on the night of the filing deadline, under this judicial precedent, Tele Fácil would not have been limited to making its filing within the first business hour of the following day.

371. On February 11, 2016, the day on which Tele Fácil's appeal was due, the only "administrative decree" or "secondary statute" that might apply and restrict the courthouse's

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476 *Tesis II.1o.4 L (10a.) con rubro DEMANDA DE AMPARO. ES EXTEMPORÁNEA LA PRESENTADA A PRIMERA HORA HÁBIL DEL DÍA SIGUIENTE A AQUEL EN QUE FENECE EL TÉRMINO PARA PROMOVERLA, CUANDO EXISTE UN FUNCIONARIO AUTORIZADO PARA RECIBIR PROMOCIONES FUERA DEL HORARIO DE LABORES DE LA JUNTA* (Judicial Precedent II.1o.4 L (10a.) titled AMPARO PLEADING. IT IS EXTEMPORANEOUS IF SUBMITTED ON THE FIRST BUSINESS HOUR OF THE DAY FOLLOWING THE ONE IN WHICH THE TERM ELAPSED, WHEN THERE IS AN AUTHORIZED OFFICER TO RECEIVE DOCUMENTS OUTSIDE THE REGULAR BUSINESS HOURS.) (March 2017) (hereinafter "Judicial Precedent II.1o.4 L (10a.)"), **CL-141**.

schedule was the Organic Law of the Federal Judicial Branch. According to that law, which applied with respect to weekends and holidays throughout 2016, "the following will not be considered as business days: Saturdays and Sundays, January 1, February 5, March 21, May 1, September 16, and November 20, during which no judicial actions will be performed, except for other cases expressly provided in Law."[477]

372. Accordingly, February 11, 2016, the day on which Tele Fácil attempted to file its appeal at 11:58 pm was an unrestricted business day, and the court clerk was obliged to receive Tele Fácil's appeal up until midnight. Moreover, contrary to Respondent's assertions, the exception to the general filing rule established by the Supreme Court's jurisprudence was never applicable.

373. The actions of Respondent's own government officials support this interpretation of the law. As explained, Tele Fácil's representatives appeared on the morning of February 12 at 8:40 am to make inquiries with the court clerk as to how Tele Fácil could proceed to file its appeal in light of the unusual events of the prior evening. It is undisputed that Mr. Julio Cesar Lopez de los Santos, the responsible court clerk informed Tele Fácil's representatives that the filing was late and would not be accepted.[478] In other words, as the previous day, the day of the deadline, was not a day on which restricted operating hours were in effect due to any administrative decree or secondary statute, the exception to the normal timing rule did not apply.

374. Further, as Mr. Bonequi indicated in his witness statement, the head of the Office of Common Correspondence never indicated that that Tele Fácil would have an opportunity to file its appeal between 9:00 am and 10:00 am on February 12.[479]

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477 *Ley Orgánica del Poder Judicial Federal* (Organic Statute of the Federal Judicial Power), enacted on May 26, 1995 (hereinafter "Organic Statute of the Federal Judicial Power"), Article 163, **CL-142**.

478 Appeal Statement of Facts, at 9, **C-066.**

479 *See* Bonequi Statement, ¶ 7, **C-132**.

375. As a result of being denied access to file the appeal at 8:40 am, Tele Fácil's representatives had no choice but to seek permission to file the company's appeal through alternative means.[480] Even though he has no first-hand knowledge of events, Mr. Buj callously remarks that Tele Fácil's counsel "randomly waited" for the Chief Judge of the Circuit Court, "and only once they held a meeting with [him], Tele Fácil filed its appeal."[481] The reality of the situation was quite different. As Tele Fácil's counsel had been denied access to the courthouse the prior evening under unusual circumstances, it now had to work diligently to gather the evidence to demonstrate its timeliness and to pursue alternative means of admitting its appeal.[482]

376. According to Mr. Bonequi, Ms. Mayorga went directly to the office of the Chief Judge of the Telecom Courts, Judge F. Javier Mijangos Navarro ("Judge Mijangos") "to request his immediate attention due to the seriousness of the matter" and "waited there for an hour until Judge Mijangos invited her into his office."[483] According to Mr. Bonequi:

> At 10:00 hours, Ms. Mayorga, with Ms. Sosa [one of the firm's paralegals] present, explained the situation to Judge Mijangos. In response, he confirmed that Ms. Margarita Mayorga's statements were truthful and ordered the staff of the court to draft an administrative minute that was eventually finalized on February 15, 2016. As part of Judge Mijangos' investigation, he telephoned the security office and asked for a report of the calls made by the security officers to the Office of Common Correspondence between 23:50 and 24:00 the night before. He was supplied with the call report log which indicated that two calls were made at 23:58 and 23:59. Additionally, one of the security officers recognized Ms. Mayorga, and informed the Judge that she had arrived at Court the night before.[484]

480 *Id.* ¶¶ 8-9; *see also* Witness Statement by Elia Sosa (hereinafter "Sosa Statement"), ¶ 3, **C-133**.
481 Buj Report, ¶ 113.
482 Bonequi Statement, ¶¶ 8-12, **C-132**; *see also* Sosa Statement, ¶¶ 3-4, **C-133**.
483 Bonequi Statement, ¶¶ 8-12, **C-132**; *see also* Sosa Statement, ¶ 4, **C-133**.
484 Bonequi Statement, ¶ 9, **C-132**; *see also* Sosa Statement, ¶¶ 5-6, **C-133**.

377. Based on the evidence available at the time, Ms. Mayorga, along with Ms. Sosa, was permitted to file Tele Fácil's appeal directly with the First District Court, as opposed to with the Office of Common Correspondence.[485] Judge Mijangos also permitted Tele Fácil's to continue to gather relevant evidence to prove that Ms. Mayorga's attempt to file the appeal had been timely.[486]

378. Tele Fácil's appeal was then filed with the Court at 11:56 am on February 12. Three days later, all involved parties convened again at the courthouse to make statements and present evidence that would form the Minutes of Fact,[487] a document that the Court would later review in determining whether Tele Fácil's appeal would be admitted on a permanent basis. The Minutes of Fact included statements by individuals involved in the matter, both as representatives of Tele Fácil and court officers, documenting that a timely attempt to file Tele Fácil's appeal had been made.[488]

379. Importantly, on March 9, 2016, the Court of Appeals in Administrative Matters Specialized in Economic Competition, Broadcasting and Telecommunications admitted Tele Fácil's appeal on the basis that Tele Fácil's representative arrived at the courthouse in a timely manner at 11:58 pm on February 11, and that, by no fault of Tele Fácil, the responsible clerk was not available to receive the submission. Writing for the Court, Chief Justice Patricio González-Loyola Perez found:

> . . .the statements and the evidence provided by the appellant are taken into consideration, from which it is proven that appellant's representative, Diana Margarita Mayorga Rea appeared in the Office of Parties' Correspondence at the twenty three hours with fifty eight minutes of the eleventh day of

485 Bonequi Statement, ¶ 10, **C-132**; Sosa Statement, ¶ 7, **C-133**.
486 Bonequi Statement, ¶ 10, **C-132.**
487 Appeal Statement of Facts, at 8, **C-066.**
488 Appeal Statement of Facts, at 7-9, **C-066**. Mr. Bonequi was also involved in this process. *See* Bonequi Statement, ¶ 12, **C-132**.

> February 2016, and the person in charge of the Office of Common Correspondence of the District Courts and Collegiate Courts in Administrative Matters Specialized in Economic Competition, Broadcasting and Telecommunications and of the Auxiliary Center of the First Region was absent, reason for which receipt certification of the revision appeal could not be stamped.[489]

The Court continued:

> In accordance with the foregoing and taking into consideration that there are elements to consider the appellant's statement as true in the sense that it appeared to file the document within the term provided in the applicable law, in addition that the right to access to justice must prevail in terms of the principles contained in article 17 of the Constitution, I hereby consider the appeal submission as timely.[490]

380. Notably, there was no discussion in the Court of Appeals' opinion about the exception to the general timing rule for submission. Rather, the Court accepted that Tele Fácil's attempt to file its appeal was made by midnight of February 11, 2016, a day when the Court's operating hours were not restricted. Thus, the Court admitted Tele Fácil's appeal "as timely" not by reference to the "day after" filing exception, as described above, but on the basis of Tele Fácil's constitutional "right to access to justice."[491]

381. In light of the Court of Appeals' clear ruling, its complete reversal on April 21, 2016 is inexplicable. In that decision, a three-judge panel, including Chief Justice Patricio González-Loyola Perez, unanimously ignored the Court's prior ruling of March 9, 2016. The Court of Appeal now dismissed the appeal, finding:

> 5. By letter dated February 11, 2016, the claimant, through its attorney Carlos Arturo Bello Hernandez tried to file an appeal for review against the judgment of January 22, 2016.
>
> 6. In that letter appears a seal for the First District Court in Administrative Matters, specialized in economic competency, broadcasting and

[489] Decisión de admisión de recurso de revisión de amparo 1381/2015 (Admission of Appeal to amparo 1381/2015) (March 9, 2016) (hereinafter "Admission of Amparo Appeal"), at 2, **C-068** (emphasis added).
[490] *Id*. (emphasis added).
[491] *Id*.

> telecommunications, as time and date of receipt, **11:56 AM of February 12, 2016**.
>
> 7. By order of February 12, 2016, the district judge in the matter: a) declared the judgment of January 22 of that year to be firm and final; b) received the notice of filing an appeal for review; and, c) prior to providing the referral of the means of appeal to the court of appeals, in turn, cautioned the appellant to exhibiting the number of copies required for the procedure, under the warning that, if they failed to do so within a period of three days the same would not be filed.
>
> From the previous narrative of factual background, it can be noticed that the appeal for review against the judgment by the Constitutional hearing of the trial of amparo indirecto 1381/2015, was filed and received in the First District Court in Administrative Matters, specialized in economic competition, Broadcasting and Telecommunications, the day following the conclusion of the 10-day period established in Article 86 of the Amparo Law.[492]

382. Outrageously, there is no mention whatsoever of Chief Judge González-Loyola's prior resolution of the matter in favor of Tele Fácil. Instead, the Court simply pretended that ruling never happened in shocking defiance of the very constitutional principles on which it based its earlier ruling.

383. In light of these events, Respondent's argument that the dismissal of Tele Fácil's appeal was justified because the company had failed to file its appeal by 10:00 am on February 12 is doubly outrageous. First, the Court of Appeal itself makes no mention whatsoever of the "day after" filing exception in its decision of April 21, 2016. Its analysis, however flawed, was simply based on the conclusion that the appeal was filed late at 11:56 am on February 12. Respondent's invocation of the "day after" filing exception is thus a purely ex post facto

[492] *Sentencia de Juicio de Amparo en Revisión número 35/2016 promovido por Tele Fácil México, S.A. de C.V. emitida por el Primer Tribunal Colegiado de Circuito en Materia Administrativa, especializada en Competencia Económica, Radiodifusión y Telecomunicaciones*, (Resolution by the First Court of Appeals in Administrative Matters Specialized in Economic Competition, Broadcasting and Telecommunications to Amparo in Revision 35/2016 initiated by Tele Fácil México, S.A. de C.V.), (Apr. 21, 2016) , at 11-12, **C-075** (emphasis added).

argument aimed at covering the Court's tracks when it blatantly buried a key decision granting Tele Fácil the right to file its appeal.

384. Second, Respondent's attempt to know what the Court of Appeals panel was thinking when it made its decision is as strange as it is unfounded. Respondent admits that the appeal was formally admitted on March 9, 2016:

> The appeal arrived at the hands of the First Collegiate Court which admitted it on 9 March 2016 and registered it with file number 35/2016.228. The First Collegiate Court determined that there could be grounds to consider that the presentation of the appeal had been untimely for reasons not those of Tele Fácil.[493]

At the same time, Respondent adds: "Nevertheless, it [the Court of Appeals] always had in mind that the document had been presented outside of the 10-day period set out by law."[494] Not surprisingly, Respondent fails to explain how it could have known what the Court of Appeals panel "had in mind" at the time.

385. Accordingly, Respondent has failed to demonstrate how, after being improperly denied access to the courthouse on February 11, 2016 (a fact unrefuted by Respondent), and after Tele Fácil was formerly granted the right to file its appeal on March 9, 2016 (another fact unrefuted by Respondent), the Court of Appeals' baseless reversal of a prior decision and denial of Tele Fácil's appeal could be remotely justified.

* * *

386. In sum, Respondent has failed to refute Claimants' evidence and argument that, through a combination of the District Court's seriously inadequate decision-making and the District Court's unjustified denial of Tele Fácil's appeal, Respondent violated Article 1105 of the NAFTA.

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493 Statement of Defense, ¶ 204 (footnotes omitted).

494 *Id*.

3. Respondent's Additional Attempts to Blame Tele Fácil for Being Denied Justice Are Unfounded

387. Respondent makes two arguments asserting that Tele Fácil was responsible for its own inability to pursue justice before the Specialized Telecommunications Courts: (1) that its untimely appeal triggered the application of res judicata; and (2) that it bribed courthouse officials. Neither argument is valid as explained below.

a. The Circuit Court misapplied the principle of res judicata

388. Even though Claimants have demonstrated that Tele Fácil was denied justice in relation to Tele Fácil's amparo against Decree 77, Respondent argues that Tele Fácil barred the Court of Appeal from further consideration of relevant legal claims in Telmex's amparo against Resolution 381 and Decree 77. Specifically, Mr. Buj asserts that the lower court decision became res judicata "due to errors only attributable to Tele Fácil -extemporary filing of the recourse of revision" and that this "prevented the analysis in other processes with respect to the substantial matters."[495] Respondent is incorrect.

389. By way of background, the Court of Appeals applied the principle of res judicata in the context of Telmex's appeal of the District Court's decision on the constitutionality of Resolution 381 and Decree 77.[496] Telmex had sought to reargue that the IFT should have replaced the high rate of USD 0.00975 established in Resolution 381 with the lower "regulated rate" for interconnection between Telmex and Tele Fácil. On November 24, 2016, Telmex's appeal was denied, with all issues being dismissed on the basis of res judicata.

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495 Buj Report, ¶ 99.

496 *See Sentencia de Juicio de Amparo en Revisión número 62/2016 promovido por Teléfonos de México, S.A.B. de C.V. emitida por el Segundo Tribunal Colegiado de Circuito en Materia Administrativa, especializado en Competencia Económica, Radiodifusión y Telecomunicaciones,* (Resolution by the Second Court of Appeals in Administrative Matters Specialized in Economic Competition, Broadcasting and Telecommunications to Amparo in Revision 62/2016 initiated by Teléfonos de México, S.A.B. de C.V.), (Nov. 24, 2016) (hereinafter "Resolution of Telmex's Appeal of *Amparo* against Resolution 381 and Decree 77"), at 4, Basis and admission of the appeal for review, **C-078**.

390. The Court of Appeals' decision was severely deficient in its selective application of res judicata principles. Telmex had raised an array of claims challenging provisions of the Federal Telecommunications Law, the Fundamental Technical Plan of Interconnection, Resolution 381 and Decree 77. Tele Fácil had also intervened in the proceedings as an interested third party and raised concerns about Decree 77, the same concerns it had raised in its own amparo against Decree 77.

391. With respect to Telmex's challenges to the Federal Telecommunications Law and the Fundamental Technical Plan, the Court of Appeals invoked and applied the doctrine of res judicata. Citing the Amparo Law, the Court observed:

> Article 61, section XI, of the Amparo Law establishes that the trial is inadmissible "*against general norms or acts that have been the subject matter of a firm resolution in another amparo trial, in terms of the previous section"*; this is, pursuant to section X of the same article, when an amparo trial is *"promoted by the same complainant (quejoso), against the same authorities and by the same challenged act, even when the constitutional violations are diverse, unless the amparo is against general norms challenged due to different acts of application.*[497]

392. For clarity, the Court of Appeals reiterated the applicable provisions of the Amparo Law as follows:

> for res judicata to be effective in a judicial procedure it is indispensable that in the resolved process and the one where the res judicata is being invoked, there is a "triple identity", comprised by the following elements: i) identity of the parties in litigation; ii) identity of the subject matter that is being demanded; and iii) identity of the causes (remote and proximate) for which the demand was initiated. Only existing that triple identity may it be affirmed that the subject matter of the second judicial procedure was already subject matter of the first one.
>
> By such virtue, for "res judicata" to apply in an amparo trial, it is necessary that:

497 *Id.* ¶ 50.

> The complainant (*quejoso*) in the analyzed trials are the same individuals or entities.
>
> The responsible authorities are the same in both trials.
>
> The general acts or norms subject matter of the firm resolution in the previous amparo coincide with the acts challenged in the new trial.[498]

It concluded that "[o]nly existing that triple identity may it be affirmed that the subject matter of the second judicial procedure was already subject matter of the first one."[499]

393. On this basis, the Court of Appeals proceeded to dismiss Telmex's claims challenging the Federal Telecommunications Law and the Fundamental Technical Plan because the requisite "triple identity" had been established in relation to other proceedings: Previously, (1) Telmex had sued (2) the IFT to challenge the constitutionality of (3) the same government acts.[500]

394. The Court of Appeals' treatment of Telmex's challenges to Resolution 381 and Decree 77 was highly improper and ran counter to the principles of res judicata that the Court itself had recognized. The Court found that these challenges were inadmissible because the District Court decisions resolving Tele Fácil's amparos against Decree 77 and Resolution 127 were "firm" in the sense that they were no longer appealable. Specifically, the Court of Appeals found:

> As can be seen, the legality of Resolution [381] including the rates has already been analyzed in the transcribed opinions, since both firm judgments determined that the procedure that originated such resolution only had as subject matter the indirect interconnection and the portability.
>
> Then, these judgments cannot be ignored, since doing so would be contrary to legal certainty and effective judicial protection; and, therefore, the challenges herein analyzed are now ineffective to try to modify the

498 *Id.* at 91.
499 *Id.*
500 *Id.* at 115.

> challenged resolution-in the reviewed part-since it is clear that "res judicata" is applicable.[501]

395. The Court of Appeals' ruling was not only wrong because Tele Fácil, in fact, did file its appeal in the amparo against Decree 77 on time, but also because the Court of Appeals grossly misapplied the doctrine of res judicata.

396. Unjustifiably, after recognizing the "triple identity" test that underpins the res judicata doctrine, the Court of Appeals failed to apply it with respect to Telmex's challenges to Resolution 381 and Decree 77. At a minimum, the first prong of the test, which requires in an amparo action that "the same complainant (quejoso)" bring both actions was not met: Tele Fácil was the complainant in its amparos against Decree 77 and Resolution 127, whereas Telmex was the complainant in its amparo against numerous governmental acts. Thus, the doctrine of res judicata could never apply, and the Appellate Court's decision is shockingly erroneous.

397. Mr. Buj, Respondent's expert, gladly rubberstamps the Court of Appeals' incompetence on behalf of Respondent. He loudly declares throughout his opinion that Tele Fácil's own actions caused the Appellate Court to apply the doctrine of res judicata. He states:

> The judgment issued for the amparo proceeding registered under file number 1381/2015, filed by Tele Fácil against the Agreement 77 (hereinafter "Judgment 1381/2015"), acquired the status of res judicata under Mexican law due to the following: (i) the timeframe on which the amparos and appeals related to this case were resolved; (ii) Tele Fácil's withdrawal of two amparo appeals for review that prevented reviewing the merits of certain amparo judgments; and (iii) the extemporaneity with which Tele Fácil filed the appeal for review 35/2016.[502]

However, Mr. Buj is simply asserting facts (some of which are disputed), not the proper "triple identity" test for application of the *res judicata* doctrine, a test which he never identifies or analyzes anywhere in his opinion.

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501 *Id*. at 296.

502 Buj Report, ¶ 88.

398. It is therefore stunning that, once again, Respondent points the finger at Tele Fácil when, in fact, it is Mexico's courts, in this instance the Court of Appeals, that have failed to perform their basic judicial function properly, thus, barring the opportunity to adjudicate Telmex's challenge to Decree 77 and, in the process, critical issues about the scope of the IFT's authority to determine previously agreed interconnection terms also raised by Tele Fácil.

b. Respondent's unfounded bribery claims are irrelevant

399. In another attempt to obscure the courts' gross misconduct, Respondent accuses Tele Fácil's counsel of seeking to file their appeal through bribery on the morning of February 12 after being improperly denied access to the courthouse the night before.[503] Respondent relies solely on the Minutes of Fact drawn up by one of the court officers on February 15, 2017 as part of Tele Fácil's efforts to prove the timeliness of its appeal. These Minutes were based on input from the parties involved in the events of February 11 and 12.[504] Respondent's claims of bribery on the basis of these Minutes are unsubstantiated—and in any event immaterial—to the resolution of the claims presented in this arbitration.

400. First, Respondent's claims that "the lady's driver [presumably the chauffeur of Tele Fácil's counsel] … offered some money so I could give him access to the building and receive the documentation [presumably relating to the appeal]" and that this offer was rejected.[505] Respondent neither provides the name of "the lady's driver" nor any evidence the he or she acted under the instructions of "the lady." Respondent's claim is thus entirely unreliable.[506]

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503 Statement of Defense, ¶ 206.
504 Appeal Statement of Facts, **C-066**.
505 Statement of Defense, ¶ 202.
506 Tribunals have consistently ruled claims of corruption are subject to a heightened evidentiary standard, which Respondent's claims fall well short of meeting. *See, e.g.*, *Oil Field of Texas, Inc. v. Government of the Islamic Republic of Iran*, Award No. 258-43-1 (Oct. 8 1986), reprinted in 12 Iran-U.S. C.T.R. 308, 315 (holding that

401. Second, Respondent claims that Tele Fácil's counsel hinted to the court clerk at 8:40 am on the February 12 that "they could come to some sort arrangement" whereby he might backdate Tele Fácil's submission. Respondent then jumps to the extreme conclusion that Tele Fácil's counsel sought to bribe the clerk. Under the circumstances, it is far more reasonable to assume that Tele Fácil's counsel was searching for solutions to a highly unconventional problem created by the Court's own error in not admitting the appeal when timely presented the night before. Further, the court clerk notably failed to sign the Minutes of Facts and therefore did not attest to the accuracy of his statement in the end. His statement in the Minutes, thus, has minimal evidentiary value at best.

402. As weak as Respondent's accusations are, they are in any event immaterial to the outcome of this arbitration. The question of whether Tele Fácil's appeal was timely filed turns entirely on Mexican law, as discussed above. By Chief Justice González-Loyola's own legal reasoning, Tele Fácil was entitled to file its appeal at 11:56 am on February 12 because it had been denied its constitutionally protected right to justice on the prior evening. Notably, when Judge González-Loyola made his ruling on March 9, the Minutes of Fact were before him and presented no concerns at the time.

403. In sum, Respondent's claims of bribery are nothing more than a meaningless distraction and ex post facto argument, designed to divert attention away from the misconduct by the District Court and the Court of Appeals, including a complete failure to resolve Tele Fácil's

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alleged bribery would not be established if, on the evidence presented, "reasonable doubts remain"), **CL-143**; *see also Himpurna California Energy Ltd. (Bermuda) v. PT. (Persero) Perrusahaan Listruik Negara (Indonesia)*, Award (May 4, 1999), ¶ 116, **CL-144**. In addition, under Mexican law, bribery is a crime that must be proven "beyond a reasonable doubt." *See Código Nacional de Procedimientos Penales* (National Code of Criminal Procedures), enacted on March 5, 2014, (hereinafter "National Code of Criminal Procedures"), at Article 402, **CL-145**; and *Código Penal Federal* (National Criminal Code), enacted on August 14, 1931, (hereinafter "Federal Criminal Code"), at Article 222, **CL-146**.

amparo against Decree 77 on the basis legal principles, the manifestly arbitrary denial of Tele Fácil's appeal, and the gross misapplication of the doctrine of res judicata.

4. Respondent Fails to Address the Systemic Deficiencies in the Specialized Telecommunications Courts

404. Beyond Respondent's denial of justice in connection with Tele Fácil's amparo against Decree 77, Claimants have demonstrated the systemic failures and, consequently, the unreliability of the decisions of the Specialized Telecommunications Courts.[507] In their first expert reports, Professor Álvarez and Mr. Soria, both former COFETEL commissioners and leading voices on telecommunications issues in Mexico, condemned the decisions of the Telecommunications Courts, in connection with all three amparo actions (two by Tele Fácil and one by Telmex), as inappropriately facile.[508] Mr. Soria emphasized, in particular, that in all its decisions the Specialized Courts breached their duty of "exhaustiveness," that is, to rigorously apply legal principles to resolve all legal claims before it.[509]

405. Respondent's tepid response to their criticism has not changed their views. Both reprise their positions in their second expert reports. Professor Álvarez repeats:

> Although there are several separate judicial proceedings (*amparos*) relating to the case at stake, they are all intertwined and all base their final decision on Decree 77, causing erroneous decisions.
>
> The Specialized Telecommunications Court based its decisions, not on legal analysis, but on a complete and blind deference toward the IFT, by simply repeating the IFT's arguments in finding that Decree 77 was merely an interpretation of Resolution 381 -- even if Resolution 381 was clear and required no interpretation.
>
> Beside affording the IFT undue deference and agreeing with the IFT's conclusion in Decree 77, without a thorough scrutiny, the Telecommunications Courts essentially assumed that Decree 77 did not

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507 Statement of Claim, ¶¶ 610-640; Soria First Report, ¶¶ 232-260, **C-009**; Álvarez First Report, ¶¶ 172-197, **C-008**.

508 Soria First Report, ¶¶ 232-260, **C-009**; Álvarez First Report, ¶¶ 172-197, **C-008**.

509 Soria First Report, ¶¶ 250-251, **C-009**.

> change Resolution 381, and that Resolution 381 pronounced nothing in connection with interconnection rates. I disagree with both assumptions.[510]

406. Mr. Soria also reiterates his serious concerns about the Specialized Telecommunications Courts' conduct. He states:

> … a qualitatively deficient judgment, dictated by a superficial or negligent analysis of the controversy, is not only reprehensible, but also violates the Constitutional principles that underlie judicial proceedings. The simulation of completeness -- that is, the mere textual reference to the controversial points, to the evidence and to the manifestations of the parties, without any study -- is, in fact, a denial of justice, expressly proscribed by the Mexican legal system.
>
> In the specific case, the judgments of the Specialized Courts in Economic Competition, Broadcasting and Telecommunications suffer precisely from an illusory or simulated compliance with the principle of completeness. Indeed, it is easy to see that the Courts merely reproduced each of the considerations in which the IFT supported its resolutions and, immediately, without a thorough analysis, declared that these considerations were correct, and that the challenged resolutions were legal.
>
> As stated in my Previous Report, the rulings in this case may seem "thorough" or "exhaustive" because they reference the controversial points. However, the rulings are qualitatively deficient, and therefore, they violate the principle of exhaustiveness and the right to access justice, because they do not contain a study in which the Courts should have analyzed and confronted effectively the arguments aimed to evidence the irregularity of the resolutions of the IFT.[511]

407. In their Statement of Claim, Claimants also cited a 2017 follow-up report to the OECD's 2012 Telecommunications Review of Mexico. In that follow-up report, the OECD has also noted the failings of the Specialized Telecommunications Courts to date: the "practical establishment [of the specialized courts] has encountered some obstacles with respect to human resources and their expertise and experience of such specialized topics. . . . The current situation

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510 Álvarez Second Report, ¶ 90-92, **C-110**.
511 Soria Second Report, ¶¶ 130-132 **C-111**.

is therefore less effective than it might otherwise be and could ultimately lead to counterproductive outcomes."[512]

408. Claimants now add another authoritative voice to the chorus of criticism of the Specialized Telecommunications Courts. Mr. Pablo Márquez, a law firm partner and contributor to the OECD review of Mexico's practices, explains the inadequacies of the Courts in general:

> … in practice, the establishment of the [Specialized Telecommunications] courts has encountered some obstacles regarding human resources and their expertise in and experience of such specialized topics. In this regard, there are important budgetary constraints that impede that judges ability to receive specific training in their areas of competence, a drawback that is further emphasized due to the lack of in-house economic and technical experts within the courts (in fact, having such in-house experts is optional under the current framework).
>
> Another relevant issue pertains to the short terms of appointment of judges serving at the specialized courts (ranging from 2 to 3 years, depending on the Superior Council of the Judiciary's appointment order); such a timeframe is not only insufficient for judges to build up an adequate base of knowledge, but also compromises the stability and independence of these public servants in carrying out their mandate. Considering the important learning curves present in addressing these complex issues, having judges in office for only 2 to 3 years is inefficient in terms of instruction costs (it may be costly for the State to invest important resources in training these judicial officers only to have them leave shortly thereafter), the judges' minimum adaptation period and the possible political influence they could be subject to. In sum, we believe that, presently, the "specialized" courts are not, in fact, specialized. This is particularly concerning in light of the complex technical, operational and financial issues involved in interconnection disagreements, and of the *"important policy considerations that are vital to the general health of the telecommunications sector as a whole"* it entails.
>
> Although the existence of specialized courts on matters pertaining to telecommunications, broadcasting and economic competition is not common in other jurisdictions –rather, it is a specific solution for the prevailing abuse of litigation that existed in Mexico prior to the reform–, it is common that the judicial bodies in charge of reviewing the regulators' decisions are assisted by technical and economic experts in these highly complex issues. If generalist judges without compulsory expert assistance

[512] OECD (2017), *OECD Telecommunication and Broadcasting Review of Mexico 2017*, OECD Publishing, Paris (hereinafter "OECD 2017 Telecommunication Review of Mexico"), at 60, **C-084**.

> were to make a final determination on a questioned administrative resolution, there could be a significant risk of undermining the purposes of the reform. However, such risks also arise if the judges –whether "specialized" or generalist–, perhaps due to their lack of expertise and fear of erring in their judgement, limit themselves to carry out superficial analyses of the contested regulatory decisions, and to simply act as a "notary" confirming the regulator's determinations. Among the most relevant attributes of the judicial branch are its independence and its mission to interpret and apply the law to factual situations; accordingly, if the judicial organisms charged with interpreting and applying the telecommunications regime lack the necessary specialized insight, and are not in office for a sufficient term enabling them to autonomously execute their mandate, the materialization of the rules contained in such a framework is jeopardized.[513]

409. With respect to the specific decisions rendered in connection with Tele Fácil's and Telmex's amparos against Decree 77, Resolution 127 and Resolution 381, Mr. Márquez offers a very unfavorable review:

> A review of the courts' decisions in the Tele Fácil-Telmex/Telnor dispute reveals the abovementioned issues. In effect, none of the judicial decisions question IFT's atypical interpretation of the FTL and LFTR provisions on interconnection dispute resolution, and most importantly, none of them seem to ponder that one of the purposes underpinning the telecommunications and broadcasting reform was to prevent operators' abuse of litigation delaying the implementation of fundamental regulatory decisions. Therefore, by embracing the inadequate interpretation pursuant to which, there is an absolute respect for private autonomy in the conclusion of interconnection agreements that would hence limit the regulator's functions to resolving the terms and conditions under dispute, the courts are in fact facilitating subsequent challenges and allegations of "disputes" (when, in bringing a dispute resolution request before IFT to resolve on specific contentious topics, one assumes that all other terms and conditions have been agreed upon).
>
> As stated in the preceding section, such an analysis is at odds with the best practice principles for ensuring expeditious interconnection to the dominant incumbent's network under reasonable and non-discriminatory conditions.[514]

513 Márquez Reply Report, ¶¶ 82-84, **C-114** (footnote omitted).

514 *Id.* ¶¶ 85-86.

410. The criticism of the Specialized Telecommunications Courts, both from inside and outside of Mexico, thus highlights the gross deficiencies in all of the decisions rendered by Respondent's judiciary in connection with the Tele Fácil-Telmex dispute. Not only did certain of these decisions give rise to a denial of justice, as explained above, but also the Specialized Court's decisions *en toto* cannot be trusted as an accurate, let alone, authoritative pronouncement of Mexican telecommunications law. Accordingly, the Tribunal should afford no deference to decisions of Respondent's judiciary in the context of this arbitration.

* * *

411. For all of the aforementioned reasons, the Tribunal should uphold Claimants' claim of denial of justice and afford no deference to the decisions of Respondent's courts.

IV. DAMAGES

412. Much of Respondent's Statement of Defense is focused on reducing or eliminating the substantial damages that Claimants have suffered and are entitled to recover. Claimants' reply to those arguments proceeds in two parts. First, Claimants address a series of assertions regarding Mexican telecommunications law that Respondent posits as its basis for claimaing that certain lines of business that Tele Fácil intended to pursue would have been either unlawful or not viable. Second, Claimants address the expert report provided by Joan Obradors, revealing neumerous flawed assumptions and calculation errors, and explains why the conclusions reached by Claimants' experts, Dr. Christian Dippon and Dr. Elisa Mariscal, provide the only valid calculation of damages in this matter.

A. IN ITS EFFORTS TO DIMINISH CLAIMANTS' SUBSTANTIAL DAMAGES, RESPONDENT DISTORTS THE FACTS AND LAW, UNDERMINING THE VERY ESSENCE OF THE REFORMS AND BENEFITTING TELMEX

413. Resondent has made several flawed assertions regarding Mexican telecommunications that, according to Respondents, would have prevented Tele Fácil from entering into business in a timely fashion, prevented it from maintaining the negotiated interconnection rates with Telmex for the three year period of the interconnection agreement, or prevented it entirely from pursuing certain lines of business. Claimaints respond to, and demonstrate the fallacy of, each of these arguments below. First, Claimants respond to the assertion that it was not interconnected with NEXTEL and that, as a result, it was not prepared to commence service in the time frames set forth by Claimants' damages experts. Second, it addresses the argument that the business lines and associated damages claimed in this case must comport with the business plan submitted by Tele Fácil in its 2011 application for its concession to operate as a telecommunications carriers. Third, Claimants address Respondent's flawed assertion that "double transit" is unlawful in Mexico and that, as a result, Tele Fácil could not have offered its competitive tandem services. Fourth, and finally, Claimants respond to the erroneous argument that Telmex was an intended beneficiary of the non-discrimination principle contained in the FTBL.

1. Tele Fácil's Agreement with NEXTEL Was Not an Obstacle to Tele Fácil's Timely Launch

414. Respondent observes that Tele Fácil and Nextel began negotiating an interconnection agreement at the same time Tele Fácil and Telmex began negotiations, and that those negotiations were concluded on December 12, 2014, when Tele Fácil and Nextel entered

into an interconnection agreement and two commitment letters.[515] The execution of the agreement was delayed until after the IFT issued Resolution 381 because, as Claimants have repeatedly explained, it is impossible to operate in the Mexican telecommunications market without a functioning interconnection with Telmex.[516] Thus, once Resolution 381 was issued and clearly held in Tele Fácil's favor, Tele Fácil sought to bring the negotiations with Nextel to a conclusion. Ultimately, the agreement between Tele Fácil and Nextel was finalized and executed on December 12, 2014, within the ten-day period established in Resolution 381 for Telmex and Tele Fácil to finalize their interconnection agreement and interconnect their networks.[517]

415. Respondent attempts to gain ground by asserting that the commitment letters, which included the negotiated rates for the exchange of traffic between Tele Fácil and Nextel, were not registered with the IFT at that time.[518] Respondent then invites the Tribunal to "speculate as to the reasons for Tele Fácil's failure to register the side letters with the rates" and suggests that the reason for not registering the letter was that it would have alerted other carriers to the right to receive the same terms and conditions under the principle of non-discrimination.[519] Both carriers to an interconnection agreement have an identical filing obligation,[520] yet in this circumstance neither Nextel nor Tele Fácil found it necessary to submit the commitment letters to the IFT. In other words, Respondent seems to be implying it was a nefarious conspiracy by Nextel and Tele Fácil to deprive Telmex of the benefit of the rate. There is no reason for Respondent's baseless speculation; the explanation is a simple matter of the calendar.

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515 Statement of Defense, ¶¶ 58-61.
516 Statement of Claim, ¶¶ 76-78.
517 *Id.* ¶ 104.
518 Statement of Defense ¶¶ 58-61.
519 *Id.* ¶ 62.
520 FTBL, Article 128, **CL-004**.

416. Specifically, Article 128 of the FTBL provides that "[t]he interconnection agreements shall be registered with the Institute in the Telecommunications Public Registry, within thirty business days following their signature."[521] According to the IFT's official calendar of business days and holidays,[522] December 22, 2014, to January 2, 2015, as well as February 2, 2015, are considered holidays. Thus, for letters signed on December 12, 2014, and counting thirty business days, registration was not required until February 9, 2015. By that time, however, two significant facts interceded to make the filing moot.

417. First, Telmex refused to execute the interconnection agreement offered by Resolution 381 and the IFT had taken no action to enforce Resolution 381. Thus, there was no expectation that traffic would begin to be exchanged pursuant to the interconnection agreement with Nextel, making the rates moot.

418. Second, the rates in the two commitment letters expired before the 30-day registration period lapsed. As Respondent recognizes, the commitment letters between Tele Fácil and Nextel provided for rates that would last only from December 12, 2014, through December 31, 2014 (i.e., 21 days after the execution of the letters).[523] Thereafter, the parties would have been required to renew the rates if they were going to be applicable for 2015.[524] Of course, that never happened because of the IFT's failure to enforce Resolution 381 and its subsequent

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521 *Id.*

522 *See Acuerdo mediante el cual el Pleno del Instituto Federal de Telecomunicaciones aprueba su calendario annual de sesiones ordinarias y el calendario annual de labores para el año 2014* (Decree by which the Plenary of the Federal Telecommunications Institute approves the annual calendar of ordinary sessions and the annual calendar of business days for 2014) (February 5, 2014), **C-120**.

523 *Id.* ¶ 61 ("[O]n 12 December 2014, Nextel and Tele Fácil executed two side letters (*i.e.,* "*carta compromiso*") setting the rate that Nextel would pay Tele Fácil **from 12 to 31 December 2014** at MXP $0.02445, as well as a rate of 0.3094 that Tele Fácil would pay Nextel during the same period of time. **The rates were short lived** perhaps in anticipation of IFT's imminent publication of the 'Regulated Rates' for 2015.") (emphasis added) (footnotes omitted); **R-006**.

524 Reply Witness Statement of Carlos Bello (hereinafter "Bello Second Statement"), ¶ 15, **C-109**.

repudiation of it through Decree 77. Accordingly, given the timing of events, the commitment letters never became operative.

419. The suggestion that Tele Fácil was attempting to hide the rate it had negotiated with Nextel is flatly false. As described above, under the FTBL, Telmex, as the declared preponderant economic agent, had no ability to use the non-discrimination principle to demand access to a rate negotiated between two competitive carriers. Moreover, filing negotiated rates that were already expired does nothing to further the rights of competitive carriers to obtain terms and conditions on a non-discriminatory basis.

420. As Mr. Bello confirms, "by the time the filing deadline arrived, it was clear that the IFT was not enforcing Resolution 381 and that the rates had expired without ever becoming effective."[525] Under the circumstances, Mr. Bello's "time and attention was focused on trying to understand why the IFT was not acting to enforce Resolution 381 and filing an agreement on rates that were never going to be valid anyway seemed to be a waste of time."[526]

421. In addition to erroneously suggesting some nefarious intent by not filing the commitment letters that never became operative, the Respondent asserts that "[a]lthough Nextel and Tele Fácil executed an interconnection agreement in late 2014 they do not appear to have physically interconnected their networks."[527]

422. Respondent's assertion in this regard seems to be based on the results of certain inspection visits in which traffic did not flow all the way from Telmex to Tele Fácil.[528] However, as Mr. Bello explains, the evidence does not support the Respondent's assertion:

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525 Bello Second Statement, ¶ 15, **C-109.**

526 *Id.*

527 Statement of Defense, ¶ 63.

528 *Oficio IFT/225/UC/DG-VER/3661/2015 emitido por la Unidad de Cumplimiento del Instituto Federal de Telecomunicaciones* (Document IFT/225/UC/DG-VER/3661/2015 issued by the Compliance Unit of the Federal Telecommunications Institute) (September 15, 2015) (hereinafter "First Verification Findings"), **C-059.**

> The IFT itself has recognized and verified that Nextel and Tele Fácil's networks were physically interconnected. This is evidenced in the Verification Minutes drafted during the first verification visit and audit performed by the IFT to Tele Fácil, where the IFT found no irregularities by Tele Fácil and recognized that such interconnection was properly in place. During the verification visit, the IFT's inspectors performed 11 test calls from Tele Fácil's numbers to both Nextel and Telmex's numbers. As can be seen in the chart of the Verification Minutes containing the results of those calls, the call performed between Tele Fácil and Nextel (call No 6) was properly completed. The only way for a call to be completed between numbers of different networks is if the networks are interconnected. To recognize this, the IFT's Verification Minutes has a column of the chart titled "Was communication established", and the answer is "Yes". However, when the other test calls were performed from Tele Fácil to Telmex's numbers, the call was not completed. For Telmex's numbers, the answer in the column "Was communication established" is in every case: "No". Thus, this IFT record establishes that the physical interconnection between Tele Fácil and Nextel was in place, even though the connection between Nextel and Telmex was not functioning.[529]

423. Thus, contrary to Respondent's argument, the IFT's records reveal that the physical interconnection between Tele Fácil and Telmex was in place. The breakdown in the communication path occurred after the traffic reached Nextel's network because the circuits between Telmex and Nextel were not open for the exchange of traffic.

424. Moreover, it is worth reiterating that Tele Fácil had no obligation to maintain a physical interconnection for the exchange of traffic with Telmex traffic until and unless the interconnection agreement was executed. As Luis Fernando Pelaez, the IFT's executive coordinator, acknowledged at the March 5, 2015 meeting between Tele Fácil and the IFT, the IFT had never ordered physical interconnection in the absence of a signed interconnection agreement:

> **LUIS FERNANDO PELAEZ:** Commissioner, in previous cases we have never had a case of ordering the interconnection prior to an agreement, there

[529] Bello Second Statement, ¶ 16, **C-109** (citing First Verification Findings, **C-059**; *Acta de Verificación Ordinaria No. IFT/DF/DGV/562/2015 emitida por el Instituto Federal de Telecomunicaciones* (Ordinary Verification Minute No. IFT/DF/DGV/562/2015) (June 10, 2015), at 14-15, **C-121**) (footnotes omitted).

> has always been an agreement together with the interconnection, from what I remember.[530]

425. In sum, nothing about the Nextel interconnection agreement was an effort to hide the negotiated rates and the physical interconnection between Nextel and Tele Fácil was established promptly. Had the IFT simply acted to enforce Resolution 381 by requiring Telmex to sign the interconnection agreement with the negotiated rate and indirect interconnection, nothing about this process would have delayed or prevented Tele Fácil from entering into its business lines in the time frame established by Claimants' damages experts.

2. The Business Plan Submitted with Tele Fácil's Concession Application Did Not Limit Tele Fácil's Opportunities

426. In furtherance of its effort to diminish Claimants' damages, Respondent argues that three of the four lines of business that comprise Claimants' damages claim were not expressly discussed in Tele Fácil's 2011 concession application,[531] and that, as a result, these business lines should not be considered in Claimants' damages calculation. Respondent implies that Tele Fácil was required to strictly follow the business plan presented in its concession application.[532]

427. This argument is meritless. Nothing about Tele Fácil's application for a concession or the concession itself limits or restricts Tele Fácil's ability right to adapt and expand its service offering. Indeed, Tele Fácil sought and obtained a broad concession that permitted it to provide any telecommunications service, except broadcast services.[533] In its application for

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530 Transcript of March 5 Plenary Meeting, at 11, **C-043**.
531 Statement of Defense, ¶¶ 18-19.
532 Statement of Defense, ¶ 21.
533 *Concesión para Instalar, Operar y Explotar una Red Pública de Telecomunicaciones* (Concession to Install, Operate and Exploit a Public Telecommunications Network) (May 17, 2013) (hereinafter "Concession"), at § A.1, **C-019.**

the concession, Tele Fácil stated that it intended to provide any telecommunications service that its infrastructure would support.[534]

428. Indeed, any effort to twist the application into a constraint on Tele Fácil's ability to provide services entirely distorts the purpose for the concession application process as it existed at the time. As Mr. Bello explains, the requirement to include a business plan and financial projections dated back to 1995 and existed to "ensure that any carrier who wanted to enter the market had a sustainable business and would not fail and leave consumers without any telecommunications service."[535] However, one aspect of opening the markets to competition was that it was no longer necessary to obtain absolute certainty that a new carrier would be able to survive and provide telecommunication services indefinitely, because there would always be at least one other carrier that could provide service if a carrier had to end its operations.[536] Thus, the submission of the business plan and financial projections "represented only an analysis of the *minimum* requirements for entry."[537]

429. As Mr. Bello testifies, he is unaware of any precedent for the suggestion that concession application services as a limitation on the ability of a concessionaire to adapt its business plan to market opportunities.[538] Mr. Bello also explains that imposing such a requirement would "actually serve as a disservice to competition and innovation"[539] and "makes no sense" "because it takes a long period of time for the concession application to be reviewed

534 *Solicitud para la obtención de una concesión de red pública de telecomunicaciones* (Request to obtain a public telecommunications concession) (May 27, 2011) (hereinafter "Application for Concession"), at 2, **C-016**.
535 Bello Second Statement, ¶¶ 29–31, **C-109**.
536 *Id.*
537 *Id.*
538 *Id.* ¶ 30 ("I have never seen the regulators require the concessionaires to obligate by the investment and financial projections contained within the concession application business plan.").
539 *Id.* ¶ 31.

and approved."[540] As Mr. Bello points out, it took Mexico two years to approve Tele Fácil's application.[541] As evidenced by the pace at which the Constitutional reforms were adopted, a lot can change in the telecommunications marketplace in a span of two years.

430. Indeed, the materiality of the concession application business plan is best demonstrated by the IFT's conclusion to abandon the requirement all together in 2015. As Mr. Bello explains:

> In 2015 the IFT published a decree describing the process by which the IFT approves and issues the general guidelines for granting the concessions mentioned in Title 4 of the FTBL. The draft of the decree was put out for public comment and one of the comments received suggested reducing the period of investment and coverage projections from three years to one year. In its final decree, the IFT mentioned this comment, however, instead of choosing to reduce the projection period from three years to one year, it chose to eliminate the investment projection requirement entirely. Clearly, by eliminating the investment projection requirement in 2015 the IFT was signaling that such projections have no meaning, bearing, or enforceability upon a concessionaire after the concessionaire's application is approved. [542]

431. As with its other arguments, Respondent's assertion that Tele Fácil's 2011 concession application business plan provides grounds for limiting Tele Fácil's substantial damages in this proceeding is a red herring. The projections made in that business plan reflected minimum standards for obtaining a concession and in no way restricted Tele Fácil's right to adapt and change to the changing circumstances or limited its ability to provide innovative new services.

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540 *Id.* ¶ 32.
541 *Id.*
542 *Id.* ¶ 34 (citations omitted).

3. Respondent's Assertion that "Double Transit" is Unlawful Serves Only to Insulate Telmex from Competition in the Transmit Market, a Position Directly Counter to the Reforms

432. Respondent attempts to devalue Claimants' significant damages by arguing that anticipated profits from portions of Claimants' business streams that required two or more transiting carriers to handle a single call from origination to termination (so-called "double transit") would not have been available because double transit is prohibited in Mexico.[543] This argument primarily relates to Claimants' competitive tandem line of business, in which Tele Fácil would have competed with Telmex's near monopoly over tandem switching and transit services. However, Respondent also tries to extend this argument in order to reduce Claimants' damages for international termination.[544] As explained fully below, Respondents arguments are both legally and factually wrong.

a. There is No Legal Prohibition Against Double Transit in Mexico

433. Contrary to Respondent's assertions, there is no legal prohibition against double transit in Mexico. The sole support for this assertion is a plan regarding the use of telephone numbers in Mexico,[545] which in no way prohibits two carriers from being engaged in the process of transiting a call from its origination point to its termination point. Mr. Diaz states in paragraph 98 that double transit is prohibited in Mexico on the basis of the *Decree by means of which the Plenary of the Federal Institute of Telecommunications issues the Numerical Portability Rules and modifies the Fundamental Technical Numbering Plan, the Fundamental*

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543 For clarity, in total, four carriers would handle a call in the double transiting scenario. First, the originating carrier, then transit carrier #1, then transit carrier #2, and finally, the terminating carrier.

544 Statement of Defense, ¶ 413.

545 *Plan Técnico Fundamental de Numeración* (Technical Fundamental Plan of Numbering) (December 11, 2014) (hereinafter "Numbering Plan"), **CL-147**.

Technical Plan of Signaling and the operational specifications for the implantation of portability of geographic and non-geographic numbers ("**Signaling Plan**").[546]

434. Mr. Diaz supports this argument by citing to Section 8.7 of the Signaling Plan without any further argumentation or even providing a copy of the relevant excerpts of the Signaling Plan. Section 8.7 of the Signaling Plan reads as follows:

> 8. Exchange of information in network interconnection
>
> In addition to the information necessary to establish and send the call, the minimum information that must be exchanged in real time for the network interconnection will be the following:
>
> …
>
> 8.7. The carriers that offer local transit service, will only route calls in which the IDO [identification number of originating network] or the BCD [identification number of destination network] that they receive, corresponds to the concessionaire from whom they are receiving the call via the interconnection trunk, and shall transfer those same codes to the destination network.
>
> The above, notwithstanding that it will be allowed to share interconnection trunks, and that in consequence one same trunk may correspond to more than one IDO, as well as other accommodations that allow a more efficient use of infrastructure, pursuant to the legal, regulatory and administrative provisions applicable to interconnection.[547]

435. It is significant to note that Mr. Diaz seems to rely solely on the first paragraph of Section 8.7 for his argument, which mandates transit service providers to only route calls in which the IDO matches the carrier that is connected through the trunk the interconnection is performed.[548] Mr. Diaz does not appear to consider or even acknowledge the second paragraph of this section, which makes it clear that the provision does not contain an absolute prohibition, but clearly permits concessionaires to "share trunks" and make use of "other accommodations

546 *Id*.
547 *Id*. § 8.7.
548 *Id.*

that would allow a more efficient use of infrastructure."[549] Thus, as discussed further in the paragraphs that follow, the Signaling Plan does not institute any absolute prohibitions, but rather provides general guidance on how to avoid situations in which signaling information is manipulated or eliminated, thus preventing the ability of carriers to collect interconnection fees.

436. As an initial matter, the Signaling Plan is a technical document that provides carriers in the telecommunications market with specific protocols about what information is to be included in the electronic signaling that accompanies a telephonic call. The signaling information performs several functions, including helping to route the call to its intended destination and ensuring that the various carriers that help to deliver the call have the necessary information to bill the applicable interconnection fees for the call. Section 8 of the Signaling Plan speaks directly to information that is to be exchanged between carriers as part of the signaling information.[550] The definition of IDO in number 3.1 of the Signaling Plan expressly provides that "the identifying code of the origination network has as its main purpose the correct invoicing of calls."[551] In other words, the purpose of this provision of the Signaling Plan is to ensure that the traffic is properly identified to enable, among other things, the proper invoicing of interconnection. Respondent seeks to distort this provision by asserting that it acts as a complete bar to all transit services by more than one carrier.[552]

437. Nothing in Section 8.7 of the Signaling Plan imposes a prohibition on double transit. Rather, it simply indicates that the IDO must match the concessionaire that which it is receiving the call.[553] So long as there is a real-time IDO match at every segment of a call that is

549 *Id.*
550 *Id.* § 8.
551 *Id.* § 3.1.
552 Statement of Defense, ¶ 387.
553 Numbering Plan, § 8.7, **CL-006**.

carried by a different concessionaire, Section 8.7 stands for the proposition that there is theoretically no limit to the number of carriers that help deliver a call from initiation to termination.

438. Therefore, it is necessarily the case that, contrary to Respondent's arguments, Section 8.7 of the Signaling Plan does not require a carrier to receive traffic directly from the originating carrier in order to verify the IDO. Since Section 8.7 does not impose an obligation to be directly interconnected with the originating carrier, but rather expressly acknowledges that the signaling information, including the IDO, can be transferred to the destination network,[554] it acknowledges the potential for indirect interconnection, or double transit. The IFT fails to explain how or why it is material to the telecommunications network whether or not the call passes through a single transit provider or two providers en route to its destination, as long as appropriate measures are taken to ensure that the IDO is not removed or manipulated.

439. Given the above (namely, the origin and purpose of Section 8.7 of the Signaling Plan and the IFT's order on indirect interconnection in Resolution 381) the implications of the IFT's arguments in this case warrant scrutiny. This provision of the Signaling Plan was added by the IFT in December 2014,[555] after Telmex had already been named the preponderant economic agent.[556] Thus, if Respondent's argument is to be believed, the result would be to insulate Telmex from competition as a provider of transit services to competitive carriers.

440. The position Respondent asserts on the issue of double transit in this proceeding also differs from prior statements on this issue by the IFT, except Resolution 381. Based on what Claimants have been able to determine, the concept that double transit was somehow unique or

554 *Id.*
555 Numbering Plan, § 8.7, **CL-006**.
556 Determination of Preponderant Economic Agent, **CL-010**.

different than a single transit indirect interconnection was originally asserted by Telmex when it challenged certain provisions of the Framework Interconnection Agreement that the IFT imposed on it as the PEA for 2017.[557] There, Telmex argued against providing a double transit, for calls being delivered to its sister company, Telnor. Under the Framework Interconnection Agreement, Telmex would be obligated to accept and deliver calls terminating on its network and also to transit calls terminating to Telnor.[558] Telmex asserted that its duty to transit calls bound for Telnor was erroneous because it would violate a double transit restriction.[559]

441. Importantly, and contrary to its assertions here, the IFT dismissed Telmex's complaint in an opinion of November 24, 2016, under the Sixth Preponderant Rule, which provides the following obligation:

> SIXTH. The Preponderant Economic Agent is obliged to provide Transit services to Requesting Concessionaires that request such services and are directly or indirectly interconnected with the Preponderant Economic Agent's network, in order to route traffic between one or more local areas.[560]

442. Thus, the IFT instructed Telmex that, as the PEA, it had the obligation to provide indirect interconnection and transit services in order to deliver calls to Telnor, even if that meant there were two transit providers involved in the call. As the IFT explained:

> This is not contrary to the administrative provisions in the signaling plan, since numeral 8.7 of the Fundamental Technical Plan of Signaling establishes the following:

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557 *Resolución P/IFT/EXT/241116/40 mediante la cual el Pleno del Instituto Federal de Telecomunicaciones modifica y autoriza al Agente Económico Preponderante los Términos y Condiciones del Convenio Marco de Interconexión presentado por Teléfonos de México, S.A.B. de C.V. aplicable del 1 de enero al 31 de diciembre de 2017* (Resolution P/IFT/EXT/241116/40 by which the Plenary of the Federal Telecommunications Institute modifies and authorizes the Preponderant Economic Agent the Terms and Conditions of the Framework Interconnection Agreement submitted by Teléfonos de México, S.A.B. de C.V. applicable from January 1 to December 31, 2017) (November 24, 2016) (hereinafter "Resolution of Interconnection Framework Agreement"), at 40-45, **C-123.**

558 *Id.*

559 *Id.*

560 *Id.* at 43.

> *8.7 The carriers that offer local transit service, will only route calls in which the IDO [identification number of originating network] or the BCD [identification number of destination network] that they receive, corresponds to the concessionaire from whom they are receiving the call via the interconnection trunk, and shall transfer those same codes to the destination network.*
>
> Therefore, a call routed through the transit service provided by Telmex and has as its destination Telnor's network, complies with numeral 8.7 since Telmex can receive traffic in the interconnection trunk coming from the competitive carrier with his IDO and Telmex can deliver the traffic to Telnor without performing any modification to the signaling information.[561]

443. The IFT also cited Article 4 of the Fundamental Interconnection Plan, establishing the following analysis:

> Article 4. **Concessionaires must deliver the Traffic to its final destination or to a Concessionaire or combination of Concessionaires that can do it** and therefore, must provide and have access to Interconnection Services under the Law and this Plan, as well as other applicable provisions.
>
> In this sense, it can be observed that when a competitive carrier generates a call to a user of any other concessionaire, the competitive carrier has the obligation to deliver that traffic to its final destination or to a Concessionaire or combination of concessionaires that can do it.[562]

444. Article 4 of the Fundamental Interconnection Plan therefore expressly recognizes that a "combination of Concessionaries" can be used to deliver telecommunications traffic to its "final destination."[563] Likewise, mirroring Article 4, Article 30 of the same Fundamental Interconnection Plan also recognizes this situation by establishing that "Transit service may be provided between two or more public telecommunications networks."[564] In other words, the Fundamental Interconnection Plan clearly embraces double transit. Respondent's argument and its expert conclusion simply ignore this fact.

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561 *Id*. at 44

562 *Id*. at 43.

563 Plan Técnico Fundamental de Interconexión (Fundamental Interconnection Plan), enacted on February 10, 2009 (hereinafter "Fundamental Interconnection Plan"), at Article 4, **CL-148**.

564 *Id*., Article 30.

445. What is still more troubling, however, is that on November 2, 2017, just days before the Respondent received Claimants' Statement of Claim, the IFT published a resolution establishing the minimum interconnection conditions for 2018,[565] which contained a brand new minimum technical condition that had never before appeared. This new condition provides:

> **EIGHTH.** Transit service will be provided between networks that are interconnected in a direct and bidirectional manner with the network that provides the transit service, this is, that sends and receives traffic directly with the concessionaire providing the transit service.
>
> In terms of the preponderance regulation, the Preponderant Economic Agent shall be obliged to provide the Transit service to the Requesting Concessionaires that request it, for which the preponderant must guarantee the provision of such service through one of its networks.[566]

446. The first paragraph mandates any carrier providing transit service to be directly interconnected with the network it receives the traffic from and the network it terminates the traffic at. Therefore, by requiring a direct interconnection, it limits the number of tandem or transit providers that can participate in routing the call. The second paragraph reinforces the obligation of the preponderant economic agent in providing transit services to any concessionaire that requests it, but still complying with what is said in the first paragraph.

447. During the Plenary session voting on this new condition, Commissioner Estavillo dissented in particular against this new provision, which was not included in previous years. Commissioner Estavillo raised her concern in the following manner:

> Regarding the eighth condition, my particular vote is against it, because this would limit the obligation to provide transit services by the Preponderant

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565 *Acuerdo Mediante el cual el Pleno del Instituto Federal de Telecomunicaciones establece las condiciones técnicas mínimas para la interconexión entre concesionarios que operen redes públicas de telecomunicaciones y determina las tarifas de interconexión resultado de la metodología para el cálculo de costos de interconexión que estarán vigentes del 1 de enero al 31 de diciembre de 2018 (*Decree by which the Plenary of the Federal Telecommunications Institute establishes the minimum technical conditions for the interconnection between concessionaires that operate public telecommunications networks and determined the interconnection rates resulting from the interconnection cost methodology that shall be effective from January 1 to December 31 2018) (November 9, 2017) (hereinafter "Minimum Interconnection Conditions 2018"), **C-122.**

566 *Id.*

> Economic Agent and eliminates the possibility of resolving conditions for double transit; this pursuant to the first paragraph of this condition.
>
> And in the second paragraph, because it contravenes the preponderance resolution that contains the obligation for the preponderant to offer transit services both in the measures for mobile and fixed. It is not one or the other, it is both. In practice, this will eliminate the obligation established in the preponderance resolution for Telcel to offer transit services and, in fact, this paragraph was not contained in last year's decree [of minimum interconnection conditions] and it should be consistent with our biannual resolution [of preponderance].[567]

448. As Commissioner Estavillo noted, this addition to the 2018 minimum interconnection conditions would prevent double transit in practice. Thus, imposing this new condition would have been unnecessary if the Signaling Plan already prohibited double transit as a matter of law, as Respondent has asserted.[568] *A contrario sensu*, double transit was allowed before this new condition.

b. Creating a Legal Prohibition Against Double Transit in Mexico Would Serve Only to Insulate Telmex from Competition

449. The Respondent's arguments regarding the interpretation of the Signaling Plan and its modification to the 2018 interconnection conditions serves only one purpose: insulating Telmex from competition in the transit market.

450. As Gerardo Soria explains, there is no technical justification that compels a prohibition against double transit:

> [N]umeral 8.7 of the Decree of the Fundamental Technical Plan does not prohibit double transit. As a matter of fact, although the first paragraph of said numeral seems to prohibit double transit, the second paragraph leaves open the possibility for other measures that allow a more efficient use of

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567 *Versión Estenográfica de la XLIV Sesión Ordinaria del Pleno 2 de noviembre de 2017*, (Transcript of Plenary's XLIV Ordinary Session) (November 2, 2017) (hereinafter "Transcript of Plenary Session adopting the 2018 Minimum Interconnection Conditions"), at 31, **C-124**.

568 Statement of Defense, ¶ 387.

> infrastructure that should lead the IFT to approve double transit. This means that double transit is in fact not prohibited in Mexico.[569]

451. As Clara Luz Álvarez states:

> [N]ot only is it the case that double transit is not prohibited, but double transit may even be a way to have a more efficient interconnection.[570]

452. As Christian Dippon observes, double transit is a recognized practice in other countries:

> Mr. Obradors' claim is inconsistent with the international experience that allows double-transit. This suggests that double-transit does not necessarily require the modification of the IDO. Other countries have dealt with this issue and have allowed double transit. . . .For instance, double transit interconnections are legal in the United Kingdom, where they are referred to as double-tandem transit or inter-tandem transit, depending on the circumstances. . . . Similarly, double transit is permitted in the United States.[571]

453. Moreover, implementing a prohibition on double transit is particularly worrisome because it would hinder the ability of competitive carriers to compete with Telmex in an area where further investment is desperately needed. The IFT's failure to create adequate competition in the transit services market has been documented.[572] This failure has significant consequences for the efforts to fully open the landline telecommunications market to competition because, without competitive transit providers, Telmex will remain a bottleneck monopoly through which all carriers must send and receive traffic.

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569 Soria Second Report, ¶ 185, **C-111.**

570 Álvarez Second Report, ¶ 89, **C-110.**

571 Reply Expert Report of Christian M. Dippon, Ph.D. (hereinafter "Dippon Second Report"), ¶¶ 28-30, **C-112.**

572 *See* OECD (2012), *OECD Telecommunication and Broadcasting Review of Mexico 2012*, OECD Publishing, Paris (hereinafter "OECD 2012 Telecommunication Review of Mexico"), at 25-26, **C-017** (describing Telmex's high market share and stating that "Broadband development has also led many Internet service providers (ISPs) in OECD countries to offer voice over Internet Protocol (VoIP) services, increasing competition in voice markets" but that alternative "means of access have not been implemented in Mexico").

454. As Mr. Diaz, who recently became a Commissioner of the IFT, so eloquently and troublingly put it, Telmex will remain the transit operator "par excellence" ("por excelencia") in Mexico."[573] Claimants believe that Telmex will retain its position of dominance because the IFT is creating new rules to prevent other carriers from having the freedom to compete with Telmex, just as it has done to Tele Fácil. Indeed, for any regulator to describe the incumbent monopolist carrier as an "operator par excellence" after its well-documented decades of anti-competitive and abusive practices, and in the middle of faltering reforms intended to curb those abuses, is deplorable. Worse yet, those words of praise are being heaped upon Telmex by an individual that was just confirmed to assume the seat on the IFT previously held by Commissioner Labardini, an outspoken opponent of the IFT's unlawful Decree 77.[574] The record of the November 1, 2017 meeting reveals that Diaz was the primary proponent of implementing this new pro-Telmex rule.[575]

455. Insulating Telmex from competition in the provision of transit services must be viewed through the lens of the OECD's 2017 Report, which revealed that the reforms were not having the anticipated impact in the landline market because of ineffective implementation by the IFT and insufficient infrastructure alternatives. The OECD found that:

> In many ways this regulation appears to be adequate, but it has encountered substantial obstacles in its practical implementation, particularly in meeting objectives for fixed networks.

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573 Diaz Statement, ¶ 57 (Spanish original). Respondent's English translation alters this testimony, translating the phrase to describe Telmex only as the "main transit operator in Mexico."

574 *Versión Estenográfica de la XXI Sesión Extraordinaria del Pleno 8 de abril de 2015*, (Transcript of Plenary's XXI Extraordinary Session dated April 8, 2015), (hereinafter "Transcript of Plenary Session adopting Decree 77"), at 6-9 (emphasis added), **C-052**.

575 See *Versión Estenográfica de la XLIII Sesión Ordinaria del Pleno del Instituto Federal de Telecomunicaciones* (Transcript of Federal Telecommunications Institute Plenary's XLIII Ordinary Session) (November 1, 2017) (hereinafter "Transcript of Plenary Session adopting the 2018 Framework Interconnection Agreement"), at 19, **C-125**.

* * *

> The IFT has made very limited progress since the reform was introduced to ensure that whole services are available to access seekers. . . . The law itself is likely not the primary issue, rather it is the incentives the preponderant agent has to comply with practical implementation as opposed to reporting compliance. In an environment where there is **insufficient alternative infrastructure** to furnish wholesale services and in the absence of tools such as an EMS to enable wholesale access, assess progress and ensure compliance with obligations, it is reasonable that the IFT seeks further functional separation.[576]

456. As Dr. Pablo Márquez, the former Chairman of Colombia's Commission for Communications Regulation and a principle drafter of the OECD's 2017 report regarding the IFT's implementation of the reforms, states in his expert report:

> In conclusion, the IFT's stance, which –whether intentionally or by chance– favors the preponderant agent in telecommunications by excluding other carriers from delivering double transit interconnection services competing with its own IP-based transit interconnection services, is contrary to the purposes of *ex ante* regulation –i.e. advancing competition in markets in which it is feasible, as is the case with double tandem interconnection, by confronting market failures such as dominance–and on the best practice principle of non-discrimination, which, as discussed in detail in the preceding chapter, admits differential treatment of dominant incumbents. Moreover, Mexico's questioning of Tele Fácil's business case under double transit IP interconnection is contrary to technological neutrality and, finally, impairs the constitutional right to entrepreneurial freedom, conforming to which private companies are free to determine their entrepreneurial and commercial strategies, within the boundaries of the law.[577]

457. In sum, no prohibition against double transit even arguably existed until a few days before the Claimants filed their Statement of Claim and the prohibition only became effective on January 1, 2018.[578] Any such prohibition undermines Mexico's reforms by insulating Telmex from competition in the competitive transit market, which has far reaching consequences for the success of those reforms.

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576 OECD 2017 Telecommunication Review of Mexico, at 152-154, **C-084**.
577 Márquez Reply Report, ¶ 80, **C-114**.
578 Minimum Interconnection Conditions 2018, **C-122.**

4. The Assertion that the Non-Discrimination Principle Should be Used to Protect Telmex from the Negotiated Rate Distorts Asymmetric Regulation and Symies Competition

458. In its attempt to defend against the substantial damages caused by the IFT's unlawful reversal of Resolution 381, Respondent argues that the quantum of damages cannot be proven because the claim for damages "completely ignores the principle of non-discriminatory treatment established in Article 125 of the new LFTyR that would have made it impossible for Tele Fácil to maintain the high rate that it had supposedly agreed with Telmex."[579] According to Respondent:

> Even assuming that Tele Fácil had contractually secured a high interconnection rate with Telmex (*quod non*), this advantage would have been short-lived by virtue of the principle of non-discriminatory treatment established in article 125 of the LFTR, which states:
>
> > Article (16): The concessionaires that operate public telecommunication networks will be obliged to interconnect their networks with those of other concessionaires under non-discriminatory, transparent conditions based on objective criteria and in strict compliance with the plans referred to in the previous article, except as provided in this Law regarding rates.
> >
> > The interconnection of public telecommunications networks, their rates, terms and conditions, are of public order and social interest.
> >
> > The terms and conditions for interconnection that a concessionaire offers to another due to an agreement or resolution of the Institute, must be granted to any other that requests it, from the date of the request. [Own emphasis]
>
> The principle of non-discriminatory treatment works in a similar way to the most-favored-nation provision that is included in most bilateral investment treaties. Any operator can demand from another the same terms of interconnection that it offers to a third party operator, if you consider these terms more advantageous. These terms and conditions must be granted from the request, without it being necessary to initiate a disagreement before the IFT.[580]

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579 Statement of Defense ¶ 14.

580 *Id.* ¶¶ 380-81.

459. As explained below, Respondent's argument that the non-discrimination principle would have crippled Tele Fácil's business model, and therefore renders its damages speculative and scandalous, is factually and legally wrong, and deeply disturbing as a policy matter. Respondent's position that Telmex, the declared preponderant economic agent, could have relied on the non-discrimination principle to invalidate a negotiated contract directly conflicts with the plain language of the FTBL and the clear intent expressed by the Congress of the United Mexican States in adopting the telecommunications reforms. Its position is also logically and factually inconsistent with the asymmetric regulatory regime put in place by Congress to curb Telmex's anti-competitive practices. Indeed, its position on this issue stands in stark contrast to international best practices governing interconnection in an assymetric regulatory environment specifically implemented to curb the PEA's abuses.

460. In support of its pro-Telmex gloss on the non-discrimination principle, Respondent relies on a confirmation of criteria related to a non-party, Mega Cable. That decision, issued after Claimants' Notice of Intent was filed in this matter, noticeably goes out of its way to answer questions that were never asked by Mega Cable. The answers to those unasked questions were provided in the context of a non-public proceeding in which no other party was given notice or allowed to participate. Moreover, the IFT's confirmations of criteria are non-binding advisory opinions that have no precedential value. In short, for such an important and central issue to its defense, the sole evidence the Respondent offers is something it wrote after knowing about the magnitude of Claimants' claims and without a transparent decision-making process. Ultimately, the Mega Cable decision has no bearing on the outcome of this proceeding.

461. Claimants' will address these issues in the paragraphs that follow. After doing so, Claimants will show why it is the case that, even if Respondent was correct in its assertion that

Telmex had the ability to use the non-discrimination principle to its advantage (and it is not), Respondent has failed to demonstrate as a factual matter that Tele Fácil would have been unable to retain the rate that it agreed to with Telmex. Rather, as we will discuss, all available evidence demonstrates that Telmex and the IFT both believed that Tele Fácil would have been able to retain the rate, and moreover that other carriers may have also been able to obtain the high rate from Telmex on the basis of the same non-discrimination principle. This is why Telmex and the IFT Chairman were so desperate to undo Resolution 381 as soon as they realized the economic ramifications for Telmex.

a. The Assertion that the Non-Discrimination Principle Should Be Used to Protect Telmex from the Contractual Rate It Offered Tele Fácil Distorts Asymmetric Regulation and Stymies Competition

462. Respondent's assertion that the FTBL imposes a non-discrimination obligation on competitive carriers to extend the same rate to Telmex that it extends to carriers that are not the PEA is demonstrably false. Respondent's position conflicts with the plain language of the statute, the Congressional Record developed at the time the telecommunications reforms were adopted by the Senate, and international best practices for the implementation of asymmetric regulation to curb market abuses by the PEA.

463. As a general principle, the FTBL[581] establishes in its Title Five, Chapter I, Article 118 that telecommunications providers must provide its services *to the public* in a non-discriminatory manner:

> **Article 118.** The concessionaires operating public telecommunications networks shall:

[581] Respondent's arguments regarding non-discrimination in connection with the Nextel agreement should be analyzed under the new FTBL because the agreement was executed on December 2014, while the new FTBL became effective in August 2014.

> […]
>
> **VI.** Provide services to the public in a non-discriminatory manner, in accordance to what is established in the concession licenses.

464. Chapter III, Article 124, addresses the non-discrimination obligation with regarding to interconnection services between concessionaires:

> **Article 124.** Concessionaires that operate public telecommunications networks must adopt open designs of network architecture to guarantee the interconnection and interoperability of their networks.
>
> For such purposes, the IFT will draft, update and manage the technical fundamental plans of numbering, switching, signaling, transmission, rating, synchronization and interconnection, among others, to which the concessionaires operating public telecommunications networks will be subject to. Such plans must consider the interests of the users and the concessionaires, prevailing the interest of the users and may take into consideration the recommendations and best international practices, having the following purposes:
>
> **I.** Promote a wide development of new telecommunications concessionaires, technologies, infrastructures and services, by the deployment and investment in telecommunications networks and the promotion of innovation;
>
> **II. Give a non-discriminatory treatment to concessionaires except for the asymmetric regulations or specific measures provided by this Law;** (Emphasis added).
>
> […]

465. Thus, Article 124 above recognizes that one of the purposes of interconnection and its enforcement and interpretation by the IFT should be to "give a non-discriminatory treatment to concessionaires" under the technical fundamental plans, while recognizing that the asymmetric regulations and specific measures provided for in the FTBL (discussed below) are exceptions to the non-discrimination obligations.

466. One of the specific asymmetric measures in the FTBL is Article 125, which provides:

> **Article 125.** The concessionaires that operate public telecommunications networks must interconnect their networks with the networks of other concessionaires in non-discriminatory and transparent conditions, and must be based on objective criteria and in strict compliance with the plans referred in the previous article, **except for the provisions of this Law regarding rates**.
>
> The interconnection of the public telecommunications networks, **its rates, terms and conditions, are of public order and social interest**.
>
> The **terms and conditions** for interconnection that a concessionaire offers to another concessionaire by virtue of an agreement or by a resolution of the IFT, must be granted to any other that requests them, upon the date of request.

467. The first paragraph of Article 125, therefore, expressly provides that provisions set forth in the Law regarding rates are an exception to the non-discriminatory principle. The third paragraph of Article 125 provides only that "terms and conditions for interconnection" of an agreement with must be granted to other concessionaires, noticeably omitting the word "rates," even though the immediately preceding paragraph expressly distinguishes between "rates" and "terms and conditions." Applying the principle *expression unius est exclusion alterius* compels the conclusion that the omission of rates in the third paragraph is indicative of a conclusion that rates obtained by "agreement" are not required to be "granted to any other that requests them."

468. Finally, Article 131 regulates how interconnection rates are to be set during the time a PEA exists in the market, as follows:

> **Article 131.** When the IFT considers that there are effective competition conditions in the telecommunications sector, it will determine the criteria by which the concessionaires of public telecommunications networks, both wireline and wireless, will execute in a mandatory manner agreements of reciprocal settlement of traffic, without any charge for termination, including calls and SMS.
>
> **During the time that there is a preponderant economic agent in the telecommunications sector or an economical agent that directly or indirectly has a national market share of more than 50% in the**

> **telecommunications sector**, measured either by users, subscribers, traffic routed through its network or capacity used of the network in accordance with the information possessed by the IFT, **the termination rates for wireline and wireless traffic, including calls and SMS, shall be asymmetric pursuant to the following**:
>
> **a) The agents referred in the previous paragraph will not charge other concessionaires for the traffic terminating in their network**, and
>
> **b) For the traffic to be terminated in the network of the other concessionaires, the interconnection rate shall be freely negotiated.**
>
> The IFT will resolve any dispute regarding rates, terms and/or conditions of the interconnection agreements referred in section b) of this article, based on the cost methodology that it will determine, considering the natural asymmetries of the interconnected networks, the market share or any other factor, determining the rates, terms and/or conditions as a result.
>
> The rates to be determined by the IFT based on that methodology shall be transparent, reasonable and, if applicable, asymmetric, considering the market share, times of most use of the network, volume of traffic or others to be determined by the IFT.
>
> The rates shall be unbundled in a sufficient manner so that the concessionaire that will be interconnected does not need to pay for components or resources of the network that are not necessary for the service to be provided.

469. Thus, under article 131 of the FTBL, while there is a PEA the asymmetric regulation on rates includes all of the following:

- the PEA will not charge for termination in its network;
- termination in other carriers will be freely negotiated and agreed; and
- in case of disagreement regarding the rates that the non-PEA will charge for termination, the IFT will apply the regulated rates.

470. In sum then, Article 124 imposes a general non-discriminatory obligation on interconnection, "except for the asymmetric regulations or specific measures provided by this Law." Article 125 imposes an affirmative obligation only to extend non-discriminatory "terms and conditions," expressly omitting any non-discrimination obligation for rates. Further, Article

125 expressly disclaims any non-discrimination obligations for "the provisions of this Law regarding rates." Finally, Article 131 sets for the provisions of the Law regarding rates during the time in which a PEA exists, including making it the Law that rates for termination of traffic on the networks of non-PEAs shall be those "freely negotiated." Therefore, under the plain language of the statute, Congress clearly spoke to the issue and determined that, during the period of time in which Telmex is a PEA, the rates that are freely negotiated between Telmex and any non-PEA, such as Tele Fácil, are not subject to the non-discrimination obligations of the FTBL.

471. Based on this analysis, it is evident that Telmex is not entitled to invoke the non-discrimination principle in order to avoid the rate it negotiated with Tele Fácil, and Respondent's arguments to the contrary are simply an excuse intended to avoid the substantial damages that the IFT's unlawful modification of Resolution 381 has caused Claimants.

472. This interpretation is clearly buttressed by the Congressional record created when the Senate of Mexico adopted the reforms. While discussing interconnection and its applicable terms, conditions and rates, the Senate Commission concluded that the language of Article 131 was "correct" because "before switching to a generalized scheme of compensatory traffic agreements, efforts should focus on eliminating those conditions that distort markets and avoid the development of conditions of effective competition and that affect adversely the welfare of the users and consumers."[582]

473. Relevant to the analysis of the FTBL's non-discrimination obligations, is reliance by the Senate on the Supreme Court of Justice's opinion in amparo revision 426/2010, which determined that asymmetric interconnection rates do not violate the constitutional right to

[582] Senate's Discussion of FTBL Initiative, at 285, **C-118**.

equality.[583] In this amparo, the Supreme Court resolved a Telcel challenge to a COFETEL interconnection dispute resolution, where COFETEL determined certain interconnection rates to be included in the agreement with Axtel. Telcel argued that COFETEL's interconnection dispute resolution was unconstitutional because it resolved lower rates than those existing in the market that Telcel already had with other concessionaires. Telcel argued that COFETEL's action was in violation of the constitutional right to equality, and against the non-discrimination principle.

474. To explain why Article 131 exempted rates from the non-discrimination requirement, Congress cited Supreme Court precedent, stating that "asymmetrical fees of interconnection do not violate the right to equality" because "precedent . . . established that the right to equality would be affected if the fees did not take into account the different characteristics of each of the providers."[584] According to the Senate,

> The Supreme Court of Justice of the Nation has discussed whether establishing a differentiated fee would imply a violation of said [equality] principle and, in that context, concluded that "in no way would [the principle] imply the requirement to establish identical fees for all concessionaires." Among the considerations of the highest court are, among others:
>
> - The need to meet the reality of the market.
> - Not all dealers have the an equal volume of traffic.
> - There is no constitutional requirement for all dealers to be granted identical treatment.
> - Not all concessionaires are in equal circumstances.
> - Trying to establish an equal rate, without making a distinction about their participation (refers to the market), would violate the principle of equality by giving equal treatment to the unequal."[585]

583 *Id*.
584 *Id.* at 294.
585 *Id*. at 294-295 (emphasis added).

475. According to the Senate, "Therefore, said court Court concluded that determining lower fees (for a concessionaire) to those of other concessionaires does not imply a violation of the principles of 'non-discrimination' and 'equality.'"[586]

476. The Senate's analysis made the following additional findings derived from the Supreme Court precedent:

> "The Supreme Court of Justice of the Nation considered that the equality principle is fully respected in interconnection matters by allowing all concessionaires to have access to the essential inputs of the others, avoiding that one of them imposes disadvantageous conditions to its competitors, which:
>
> > "…in no way implies the requirement of establishing identical rates to all concessionaires, since considering the conditions of its intervention, it cannot be forgotten that, as has already been said, not all of them have the same traffic, nor they have the same number of users, which means they don't have the same negotiation power."
>
> The Supreme Court of Justice of the Nation deemed lawful to establish asymmetric conditions, or otherwise there would equal treatment to unequal entities:
>
> > "…there is no constitutional requirement for all concessionaires of telephony to have an identical treatment, since as has already been said, the participation of the operators in this regulated market is extremely variable, in fact, to pretend to give an equal treatment without any distinction considering their participation would violate the equality principle, by treating equally those who are unequal."
>
> Establishing identical rates would prevent concessionaires from adequately developing; since the highest court reiterated that:
>
> > "…there is no inequality since there is no reason to consider that all disagreements in a determined term must be resolved with the same result, since not all concessionaires are in equal circumstances which should be recognized when establishing rates."
>
> Likewise, [the court] considered what is known as "non-discriminatory treatment" and indicated that the purpose of the Telecommunications Law is to promote the efficient development of telecommunications and healthy competition among different providers of telecommunications services, in

[586] *Id.* at 295.

> order for these to be rendered with better prices, diversity and quality in benefit of the users and, besides, to promote an adequate social coverage. In that sense [the court] concluded that:
>
> > "…the circumstance that the challenged resolution determined lower rates to those agreed with other concessionaires, **does not imply**, by that fact, a violation to the non-discriminatory and equality principles…"[587]

477. In sum then, the Senatorial record reveals that the Senate had no intention of making rates a part of the non-discrimination obligations and certainly had no intention of having this non-discrimination obligation be used by the preponderant economic agent to assert that it had to be treated "equally" with smaller carriers with less market power. In accordance with the interpretation of the Supreme Court and adopted by Congress, forcing a non-preponderant carrier to grant equal treatment to the PEA (i.e., "treating equally those who are unequal"), would itself be a violation of the non-discriminatory and equality principles.

b. Respondent Ignores Article 131(b) To Arrive at Its Flawed Conclusion Regarding the Non-Discrimination Principle

478. Against this background, it should come as little surprise that Respondent mispresents the non-discrimination principle and fails to address the fact that Article 131 governs the setting of rates for traffic terminating on the PEA' network **and for traffic terminating on other carriers' networks.**[588] A review of Respondent's Statement of Defense demonstrates that its discussion of Article 131 omits this second aspect of the Article. Ignoring this aspect of Article 131 is the only way in which Respondent is able to reach its flawed conclusion that Telmex stood to be the beneficiary of the non-discrimination obligations.

479. Respondent describes Article 131 in the Statement of Defense only once, as follows:

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587 Senate's Discussion of FTBL Initiative, at 296-297, **C-118**.

588 Statement of Defense, ¶¶ 380-386.

> *b) Asymmetrical rates for the PEA* – Article 131 establishes a measure applicable to those concessionaires determined to be PEAs, to wit, an "asymmetric tariff" termination rate for fixed and mobile traffic. This rate provides that PEAs will no longer be able to charge other operators for interconnection that terminate on their network. This means that Telmex cannot charge any tariff for calls by other non-PEA concessionaires that terminate on its network (this is commonly referred to as the zero-rate).[589]

480. It can be seen from this cribbed discussion of Article 131 that Respondent has omitted the critical language of Article 131(b), which provides that "For the traffic to be terminated in the network of the other concessionaires, the interconnection rate shall be freely negotiated."[590] Thus, the Respondent attempts to portray Article 131 as if it speaks only to the issue of what rate Telmex can charge and ignores entirely the issue of what Telmex must pay. But, as seen above, Article 131 speaks to both issues, and clearly provides that the rate a non-PEA may charge is the rate "freely negotiated."[591] This intentional omission is the lynchpin of the Respondent's flawed argument and its misguided assertions regarding the non-discrimination obligation.

481. The witness statement of Sostenes Diaz similarly fails to acknowledge the full scope of Article 131, instead continuously omitting this key portion of the Article:

> 22. Later, with the publication of the LFTR, the PEA regulation on interconnection was modified. As will be shown below, article 131(a) of the LFTR establishes that the PEA may not charge interconnection to the other concessionaires for the traffic to be completed in the PEA's network. Therefore, as of August 13, 2014, Telmex is not allowed to charge for interconnection, which is colloquially known as "zero rate".
>
> * * *
>
> 30. Article 131 of the LFTR establishes the capacity and obligation of the Institute to determine the rates to consider in the resolution of interconnection agreements through a costs methodology. Besides, this article establishes a transcendental asymmetric measure applicable to those

589 Statement of Defense, ¶ 29(b) (footnote omitted).
590 FTBL, Article 131 (b), **CL-004**.
591 *Id.*

> economic agents deemed as preponderant, as it establishes that they will not be able to charge other concessionaires for the traffic being completed in their network. This is colloquially known as "zero rate".
>
> * * *
>
> 32. Since the publication of the LFTR, the IFT has complied in a timely manner with the obligations stipulated in articles 131 and 137. On December 18, 2014, the IFT published the "Decision on the 2014 Costs Methodology", by which a pure incremental costs methodology was adopted to determine the Regulated Rate, which resulted in a substantial reduction of the termination rate for fixed calls.
>
> * * *
>
> 52. This industry practice changed from the determination of mandatory rates for the PEA (i.e. asymmetric rates): first, with Decision 17 by which a MXN $0.02015 pesos rate was determined, to be in force from April 6 to December 31, 2014, and second, with the coming into force of the new LFTR that, in its article 131, stipulates that the PEA is not allowed to charge interconnection to the other operators – i.e. the "zero rate".
>
> * * *
>
> 54. Article 131 of the LFTR also establishes that in the event that the IFT determines that effective competition conditions are present in the telecommunications sector, the criteria will be established for the concessionaires to sign bill & keep agreements again. However, this situation has not existed, since PEAs are still present in the telecommunications sector to this date.
>
> * * *
>
> 101. This aside, it should be noted that such business was not affected in any way by the rate that the IFT determined in Resolution 127. This is because the traffic completion business consists of the delivery of traffic originated in other countries, mainly the United States, to a Mexican operator, including Telmex, which they intended to do through Tele Fácil and, therefore, the only relevant rate is the one that Tele Fácil would have to pay to operators in Mexico. Since Telmex is a PEA, such rate is equal to zero by virtue of article 131 a) of the LFTR.[592]

482. Thus, despite mentioning Article 131 on seven different occasions in his witness statement, Mr. Diaz never acknowledges that Article 131(b) expressly addresses the rates that a

[592] *See* Diaz Statement, ¶¶ 22, 30, 32, 52, 54 and 101.

non-PEA may charge for terminating traffic on its network while Telmex is a PEA. It is difficult to believe that such consistency is mere coincidence.

483. Respondent's expert, Mr. Buj, also never directly addresses the fact that Article 125 and Article 131(b) expressly refuse to extend the non-discrimination principle to the rates freely negotiated between Telmex and Tele Fácil, even though he recognizes that Article 131 embraces the freedom of contract principle as a central tenant of the reforms:

> Article 60 of the LFT enshrined the principle of rate freedom by establishing that the *"... concessionaires and [permit holders] will freely establish the rates of the telecommunications services in terms which allow for the rendering of said services in satisfactory conditions of quality, competitively, security and permanence.*"
>
> That same principle is provided in article 126 of the LFTR, by expressing that "*with the exception of the rates referred to in article 131 of the Law, the concessionaires of the public telecommunications networks will agree upon the conditions under which the interconnection thereof will take place.*" On the other hand, article 131, second paragraph of that same Law provides that, with the exception of the prohibition to collect a rate for the traffic which ends up in the prevailing economic agent´s network, the interconnection rate for call terminations in the network of the other concessionaires, may be freely negotiated.[593]

484. Mr. Buj also acknowledges that the non-discrimination principle "can be invoked by any concessionaire which experiences a differentiated treatment with respect to another whom is found in the same factual and legal situation."[594] Thus, on the one hand, Mr. Buj recognizes that it would be necessary to be in the same situation of fact and law to be able to invoke the non-discrimination principle, yet on the other hand he fails to acknowledge or analyze the significant differences between Telmex, the PEA, and Tele Fácil a new prospective entrant to the marketplace.

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593 Buj Report, ¶ 156.

594 *Id.* ¶ 210 (citing to Resolution of appeal for revision 407/2015 dated August 12, 2015 issued by the Second Chamber of the SCJN).

485. Respondent has every reason not to want to mention Article 131(b); it clearly contradicts Respondent's position that Telmex, who has long abused its market power, should suddenly become the beneficiary of the non-discrimination obligations at the same time Congress has ordered the IFT to impose asymmetric regulation to curb these abuses. As Mr. Bello describes in his Reply Witness Statement, "pursuant to the above interpretation of articles 124, 125 and 131 b), neither rates nor asymmetric regulation are subject to the non-discrimination principle and the free negotiation of interconnection rates is a principle established in the FTBL itself."[595]

486. While the Respondent's position in this case is directly contradicted by the plain language and clear intent of the FTBL, its position has far-reach and potentially crippling consequences for the effectiveness of the reforms. By taking this position in this arbitration, the IFT is handing Telmex another gift – the ability to subvert all of its negotiated contracts in favor of the much lower rate derived through the IFT's cost study process – a process directed by its purported "independent" expert Analysys Mason.[596]

487. As Claimants' expert witness Pablo Márquez, the former Chairman of Colombia's Commission for Communications Regulation from October 2012 to November 2014, and Commissioner from 2014 to February 2015, and a principle drafter of the 2017 OECD Telecommunication and Broadcasting Review of Mexico 2017 explains, permitting a predominant economic agent to use the non-discrimination principle to demand the same rates negotiated between two competitive carriers is contrary to the intention of the reform and is in conflict with international best practices for markets imposing asymmetric regulation:

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595 Bello Second Statement, ¶ 12, **C-109.**

596 Analysys Mason is the consultant contracted by the IFT during the last years to establish the cost model analysis that results in the default regulated rate that must be applied by the IFT in case of an interconnection disagreement between concessionaires.

> Consequently, non-discrimination is at the core of interconnection policy to ensure that smaller players and market entrants will have the incentives to invest, as well as the conditions to compete in a level playing field with dominant incumbent undertakings, which is particularly important in non-mature markets. It is thus clear that the non-discrimination principle **safeguards the rights of preponderant agents' rivals as a means of achieving greater policy goals** -i.e. the deployment of telecommunication infrastructure and bridging the digital divide-; in this sense, its teleology does not entail "protecting" the preponderant economic agent from "discriminatory" practices carried out by its competitors (which, strictly speaking, unless the latter also possess market power, they could not incur in anticompetitive discrimination vis-à-vis the antitrust laws – at least not from a unilateral conduct perspective).[597]

488. Dr. Márquez continues his analysis as follows:

> It is thus surprising that the IFT is invoking the non-discrimination principle to grant the preponderant operator more favorable interconnection fees to be paid for accessing Tele Fácil's network, when it is clear from the LFTR provisions outlined above, that **non-discrimination is not an absolute principle, and that, while it is applicable relative to non-dominant players, it cannot be implemented regarding the dominant incumbent**. This reasoning is consonant with the best practice guidelines reviewed in preceding sections, according to which *ex ante* interconnection regulation in non-mature markets aims to foster competition in telecommunication markets by incentivizing market entry and innovation on the part of alternative competitors, positively impacting consumer welfare in the long run. Therefore, **if regulators were to establish symmetric interconnection rules on an unleveled playing field, this would end up favoring dominant incumbent network operators to the detriment of alternative competitors**, who would risk not attaining a minimum operational scale owing to the strong network and customer lock-in effects associated to telecommunication markets. In this vein, the IFT's determinations in the Tele Fácil-Telmex/Telnor dispute, specifically in what concerns Resolution 127, opposes the purposes of the telecommunication reform by extending the non-discrimination principle to factual situations not governed thereby, i.e. dominant incumbent operators, or "major suppliers".[598]

489. Claimants' Mexican telecommunications law experts, both former telecommunications regulators, agree. According to Clara Álvarez Luz:

> [I]t is clear, based on generally accepted practice, that analysis of the non-discrimination principle involves two requirements, namely, comparing like

[597] Márquez Reply Report, ¶ 47, **C-114** (footnote omitted) (emphasis in original).
[598] *Id.* ¶ 68, **C-114** (emphasis in original).

> networks/services, and having like circumstances. In a given case, is those requirements are not met, then non-discrimination cannot be alleged. . . . The non-discrimination principle cannot be viewed in isolation. This principle is one that needs to be assessed and applied in relation to someone or something. Thus, if the conditions or the services are not the same, then the non-discrimination principle does not apply automatically, as Respondent, Mr. Díaz and Mr. Buj try to argue.[599]

490. Gerardo Soria put it this way:

> It is true that, according to the non-discrimination principle, a concessionaire is allowed, under certain circumstances, to request its counterparty in an interconnection agreement to replicate the terms and conditions that the IFT might have imposed to the latter when resolving a diverse interconnection disagreement proceeding, in case they represent a better offer for the requesting concessionaire. However, it is important to note that the intention of the non-discrimination principle was to benefit the entrance of new agents into the telecommunications market and therefore, was intended to protect smaller telecommunications entities and not the preponderant agent.[600]

491. In sum, Mexico's Congress never intended for the non-discrimination principle to be used as a weapon by Telmex, and it made clear in the FTBL that rates are exempted from the non-discrimination obligations. Any assertion to the contrary contradicts the will of Congress and undermines the reforms. Respondent's arguments are a serious and transparent indicator that regulatory capture has occurred once again in Mexico and that the IFT is unable or unwilling to truly open the market to competition and protect foreign investment. Its dangerous assertions in this proceeding should send shockwaves throughout the industry and should be rejected here.

c. The Mega Cable Confirmation of Criteria is Another Ex Post Facto Rationalization by the IFT

492. In order to bolster the indefensible assertion that the non-discrimination obligation would have been a tool available to Telmex to avoid its obligation to pay the negotiated rate with

599 Álvarez Second Report, ¶¶ 72, 75, **C-110.**
600 Soria Second Report, ¶ 52, **C-111.**

Tele Fácil for the 3-year period of the interconnection agreement, Respondent relies upon a confirmation of criteria regarding Mega Cable, SA de CV ("Mega Cable").[601] Mr. Diaz describes this confirmation of criteria as follows:

> Recently, the *Pleno* of the IFT issued a confirmation of criterion by which it resolved that concessionaires operating public telecommunications networks, without exception, are bound to interconnect their networks on non-discriminatory conditions.18 In this resolution, the *Pleno* concluded that, as with all concessionaires, the PEA is also a beneficiary of the principle of non-discriminatory treatment established in article 125 of the LFTR. The only exceptions for the PEA are in respect of: (i) requesting non-discriminatory treatment in terms of charging for traffic termination in its network, and (ii) negotiating rates for network termination traffic.[602]

493. As a starting point, it is important to be clear about what a confirmation of criteria is – and what it is not. The Respondent makes the following admission regarding the limited effect of a proper confirmation of criteria:

> The witness statement of Mr. David Gorra clarifies that a criteria confirmation does not affect the rights and obligations of particular individuals, as its sole purpose is to determine the object and/or scope of a law or provision and, consequently, does not generate any right or prejudice:
>
> From the legal point of view, **the "confirmation of criterion" implies the interpretation of a law or stipulation to determine its subject and scope, without implying the execution of an act that by itself affects the rights and obligations of the parties. Therefore, the delivered response has the sole purpose of guiding the actions of the regulated party but does not create any right or prejudice whatsoever.**[603]

494. Accordingly, as the Respondent acknowledges, the confirmation of criteria (1) does not affect the rights and obligations of individuals; and (2) cannot grant or impose rights or obligations. A confirmation of criteria is thus intended to provide guidance only to the party asking the questions. As a result, the decision is necessarily an "advisory" opinion that does not

601 Diaz Statement, ¶ 65.
602 *Id.* (citing Mega Cable Confirmation of Criteria, **C-126**).
603 Statement of Defense, ¶ 121 (emphasis added).

constitute precedent for the IFT. This is necessarily the case because the confirmation of criteria practice does not include the traditional notice-and-comment rulemaking process; there is no public notice of the IFT's intention to evaluate a particular issue and no opportunity for the industry to provide input to the IFT before it renders its decision.[604] Moreover, because it does not constitute an official action by the IFT, whatever opinion the IFT offers in a confirmation of criteria is not subject to judicial review.[605]

495. Beyond the procedural shortcomings of relying on a confirmation of criteria to establish Respondent's key legal defense, this particular confirmation of criteria has a separate, but critical, substantive defect: it answers a question that was not even asked. The specific confirmation of criteria referenced by Mr. Diaz was issued by the IFT Plenary in response to questions submitted by Mega Cable.[606] Mega Cable asked the following:

> a) That in accordance with the provisions of article 131, paragraph b) of the Telecommunications Law, the concessionaires that operate public telecommunications networks will freely negotiate the rates applicable to the interconnection services, **when they are not part of the Preponderant Economic Agent**.
>
> b) That according to the content of Articles 125 and 126 of the Telecommunications Law and following the principle of equality prevailing in interconnection agreements when concessionaires operating public telecommunications networks **are not part of the preponderant economic agent**, the principle of non-discriminatory treatment on rates is exempted.
>
> c) That the publication of rates made by the Institute, in terms of article 131 of the Telecommunications Law and the resolutions of disagreements on rates, will be applicable among the concessionaires when the resolution of rates by the Institute is adopted, for each specific case raised, without these being extended to other operators in accordance with the principle of non-discriminatory treatment.[607]

604 *Id*. ¶ 122.
605 Gorra Statement, ¶ 11.
606 Mega Cable Confirmation of Criteria, **C-126.**
607 *Id.* at 2.

496. Thus, it is clear from the language of Mega Cable's request for confirmation of criteria that Mega Cable inquired about how the reforms affected the right of negotiations between carriers that were "no part of the preponderant economic agent" (i.e., two competitive carriers negotiating interconnection rates).[608]

497. Seemingly out of the blue, the IFT set about answering not simply the questions that were asked by Mega Cable, but also questions that were not asked. Even though Mega Cable had not inquired about how the reforms impacted Telmex, the IFT went out of its way to make a series of pro-Telmex pronouncements. With regard to the first question posed by Mega Cable, the IFT inserted the following dicta:

> However, it is important to clarify that the PEA may also freely negotiate with other concessionaires, regarding the rate that must be paid to terminate traffic in the networks of the latter.[609]

498. In response to the second question, the IFT determined that it could not conclude that all rates were exempt from the non-discrimination obligation.[610] In the process of doing so, it needlessly granted Telmex the power to use the non-discrimination principle to invalidate existing interconnection agreements – the very argument that Respondent now asserts as it key defense in this case:

> [F]rom a systematic interpretation of the LFTR, it can be concluded that the aforementioned precepts establish two exceptions in the following terms:
>
> - Article 125 of the LFTR, stating: *"except for the provisions of this Law on rates ,"* should be understood in the sense that the provision is excluding the PEA of the possibility of requesting non-discriminatory treatment exclusively for the termination of traffic in its network, since, as has been said, in terms of article 131, paragraph a) of the LFTR, the PEA is prevented from charging for such concept, and

608 *Id.*
609 *Id*. at 4.
610 *Id*. at 8.

> Article 126 of the same rule, by stating: "*With the exception of the rates referred to in article 131 of this* Law", it should be understood that the PEA is being excluded from the possibility of freely negotiating interconnection conditions, only in relation to the collection of fees for termination of traffic in its network, since by law the PEA will not be able to charge for such service, a circumstance that, as already stated, is not subject to negotiation.
>
> In this way, it is possible to affirm that, like all concessionaires, the PEA is also a beneficiary of the non-discriminatory treatment referred to in article 125 of the LFTR, as well as the freedom of negotiation provided for in article 126 of the same statute, provided it is not about: 1) requesting non-discriminatory treatment with respect to charging for termination of traffic in its network and ii) negotiating rates for termination of traffic in its network.
>
> Outside of the two scenarios indicated, it should be understood that the PEA is free to negotiate rates, terms and conditions in terms of interconnection, as well as to request non-discriminatory treatment from any concessionaire.[611]

499. In response to Mega Cable's third question, the IFT resolved that both the PEA and the non-PEA were entitled to receive the rates either negotiated or implemented by the IFT through a dispute resolution process immediately:

> [I]t is clear that Article 125 of the LFTR is subject to the principle of non-discriminatory treatment of interconnection rates that derive from an agreement between concessionaires and also those that are imposed as a result of a resolution of the Institute, without mattering that the latter have been determined by referring to the corresponding rate resolution, In both cases, any concessionaire (except for the PEA for the rate of traffic termination in its network), may request from another the rates that has been mutually agreed with a diverse operator, as well as those resolved by the Institute derived from a disagreement of interconnection, based on its application.[612]

500. Thus, under the IFT's interpretation of the non-discrimination principle in the Mega Cable decision, if a competitive carrier negotiates a rate with Telmex, Telmex can unilaterally and immediately invalidate that negotiation as soon as a competitive carrier enters

611 *Id*. at 6-7.
612 *Id*. at 11.

into an agreement with any other carriers if that carriers obtains a lower rate. Further, if the competitive carrier that has negotiated a rate with Telmex is unable to reach an agreement with any other carrier, and thus has to seek resolution of the rate at the IFT, Telmex can invalidate its negotiated agreement and immediately demand the lower rate established by the IFT's process. In short, through this decision, the IFT has sought to ensure that Telmex will never have to pay a negotiated rate, and will always be able to obtain the rate established by the IFT.

501. To Claimants, the fact that the IFT went out of its way to answer a question that Mega Cable never asked about such a critical and far-reaching issue, and in a proceeding that was not subject to notice and comment from the industry, is in and of itself shocking. It smacks of the worst in regulatory decision-making. But the fact that this highly suspect decision was issued just one month after Claimants filed their Notice of Arbitration informing Respondent that it estimated its damages to be approximately USD $500 million[613] suggests a much more sinister motive: it appears that the IFT is still willing, notwithstanding the Constitutional reforms, to continue to defy the clear intent of Congress, undermine the telecommunications reform, and prop up Telmex at the expense of a competitive telecommunications market.

d. Even Assuming *Arguendo* that Respondent's Legal Interpretation of the Non-Discrimination Principle Was Not Legally Flawed, Its Factual Conclusions Are

502. As set forth above, Respondent's assertion that Telmex was a lawful beneficiary of the non-discrimination principle is fatally flawed. However, if we assume for the sake of argument only that this was not the case, Respondent has failed to substantiate its conclusion that Tele Fácil would have been ipso facto unable to retain the negotiated rate confirmed by

613 *Notice of Arbitration* (September 26, 2016) (hereinafter "Notice of Arbitration"), **C-103**.

Resolution 381. As described in more detail below, the facts in this case lead to the opposite conclusion.

503. Respondent's assertion that, because of the non-discrimination principle, Tele Fácil would have been unable to retain the rate negotiated with Telmex rests on an unproven and illogical assumption that other carriers would have refused to pay Tele Fácil that same rate. According to the Respondent:

> Needless to say, that Tele Fácil had to execute interconnection agreements with other operators and they would have hardly agreed to the Telmex Rate. The reason is that said rate was considerably higher than the "regulated rate" that IFT publishes in the last quarter of the previous [year] pursuant to Article 137:
>
> > Article 137: The Institute shall publish in the Federal Official Gazette, in the last trimester of the year, the minimum technical conditions and the rates resulting from the cost methodologies issued by the Institute, which shall be valid during the following calendar year.
>
> In case of a disagreement with other operators, IFT would have been called to resolve the dispute and it would have done so using the "regulated rate", as was in fact the case in Resolution 127 and the 89 other disputes resolved in 2015. Evidently, upon the publication of such agreement, Telmex would have been able to request the same rate to Tele Fácil pursuant to the non-discriminatory treatment principle.[614]

504. Respondent's speculation is flawed. The volumes of traffic that competitive carriers would have terminated to Tele Fácil's network would have been infinitesimal in comparison to the volumes that those carriers would have been terminating on behalf of Telmex on their own networks. Thus, under the IFT's flawed view of how the non-discrimination principle works in practice, each carrier would have faced a straightforward and uncomplicated choice: does it pay a higher rate to Tele Fácil for a smaller volume of traffic in order to be able to use the non-discrimination principle to require Telmex to pay it the same rate that it

614 Statement of Defense, ¶¶ 385-386 (footnotes omitted).

voluntarily agreed to pay Tele Fácil? In other words, would a rational economic actor pay out $10.00 in order to be able to collect $100.00? The proposition is no more complicated. Thus, the Respondent's contention that other operators "would have hardly agreed to the Telmex Rate" is fundamentally illogical and bad economics.

505. As Mr. Bello testifies:

> [A]fter Telmex was named the PEA, all competitive carriers would be net recipients of termination fees from Telmex. Moreover, given Telmex's huge market share as compared to Tele Fácil's market share, it is unavoidable that all carriers would receive more traffic from Telmex then they would terminate to Tele Fácil. Thus, based on pure logic and economics, concessionaires would have opted to go to Telmex to request to receive the more favorable, higher rate and would have been incentivized to avoid doing anything to cause Tele Fácil to lose the benefit of that rate . . . .[615]

506. In fact, this is clearly the outcome that Telmex – a rational economic actor if ever there was one – understood would occur if it allowed Resolution 381 to be enforced. As Mr. Sacasa described regarding his final meeting with Javier Mondragón, the personal attorney of the Slim family:

> In the last meeting with Mr. Mondragón at Telmex's offices, I told him that if Telmex wanted to force Tele Fácil out of business, which would happen if Tele Fácil signed the new interconnection agreement as proposed, then Telmex should have to compensate Tele Fácil for all of the profits it was going to lose. At that point, Mr. Mondragón became enraged and started yelling at us. After several minutes of listening to Mr. Mondragón rant, while we remained calm and quiet, I asked him to relax. I reminded him that we agreed to come to the table with an offer, but noted that as soon as Tele Fácil gave its offer, he exploded. I said that is no way of negotiating. I added that Telmex has heard Tele Fácil's offer, and that we are now ready to hear Telmex's offer.
>
> Mr. Mondragón told us that Tele Fácil's business plan was unacceptable to Telmex. Mr. Mondragón took out a notepad and started writing while saying, to the best of my recollection:
>
> > If you have a rate of 0.0975 USD… well let's make it easier, one cent per minute until 2017, with whatever plan you implement, you

615 Bello Second Statement, ¶ 14, **C-109.**

> obtain X million minutes, Telmex would have to pay this much, if I sign the agreement on behalf of Telmex, multiplied for 12 months, **multiplied for three years**.

While pointing to his paper, he added:

> You are insane if you think I am going to let this happen. You are insane! This will not happen and I will make sure it never does. I am not willing to sacrifice Telmex's investment of billions of dollars in the Mexican telecommunications market.

He also said, "I will not allow **other carriers** to build a statute of you in Switzerland, where all their money is going to be **after using Tele Fácil's rates**."

In concluding the meeting, Mr. Mondragón said he was going to do whatever it took to prevent the execution of the interconnection agreement, and he assured Mr. Bello and me that even if the IFT or anyone forced Telmex to do it, that Telmex "will sign it on December 31, 2017, so Tele Fácil gets no money from Telmex."[616]

507. Thus, Telmex not only expected the negotiated rate to last for the duration of the three-year period, but was also clearly aware of the possibility that other carriers in the market would also be able to use Tele Fácil's rate to generate significant resources as well. Telmex, therefore, had every incentive to stop the enforcement of Resolution 381 before any other carrier could opt into the agreement and preserve the rate for the future use of Telmex's competitors.

508. Accordingly, despite the Respondent's post hoc rationalizations, the evidence establishes that Telmex and Tele Fácil both believed that other carriers in the market would be anxious to opt-in to the higher rate that had been ordered through Resolution 381 because that would enable them to benefit from the rate during the time period in which Telmex was required to pay, but could not collect, for interconnection. There is no contemporaneous evidence that any party believed that the non-discrimination principle could be lawfully used by Telmex to subvert the negotiated agreement.

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616 Sacasa First Statement, ¶¶ 85-89, **C-003**.

e. Despite Initiating Numerous Disagreement Procedures, Telmex Never Claimed the Right to Terminate an Existing Interconnection Agreement Prior to Its Expiration

509. Respondent's assertion that Telmex would have been able to avoid its obligation to pay the rate offered to Tele Fácil by relying on the non-discrimination principle and terminating the interconnection agreement before the expiration of the three-year term also conflicts with the facts. Tele Fácil's Mexican telecommunications counsel, Carlos Bello, had his staff perform an analysis of all of the disagreement procedures instituted by Telmex following the implementation of the FTBL and the declaration of Telmex as a PEA. That analysis revealed that Telmex never initiated an interconnection dispute to terminate or avoid its obligations under an existing interconnection agreement. Rather, each of its disagreement procedures sought to establish the rates that would apply after its existing interconnection agreement came to an end.

510. Mr. Bello describes his analysis this way:

> Respondent's assertion that Telmex could petition the IFT to resolve the Telmex-Tele Fácil interconnection rate for a *second time* is wrong. This is because, under the FTBL, IFT resolution of a rate dispute is not permitted in cases where the rate contained in the interconnection agreement has already been previously executed. Moreover, the prior acts of both Telmex and the IFT indicate an understanding of this rule.
>
> Within the considerations ("whereas") provision of every IFT disagreement resolution is the following statement:
>
> Article 129 of the FTBL authorizes the IFT, upon request of a party, to intervene in case there is no interconnection agreement condition prior to interconnecting with the public telecommunications networks, as well as in the case where a concessionaire requests to begin negotiations to agree to new interconnection terms, conditions or rates, that have not been agreed in previously executed interconnection agreements.[617]
>
> I understand that this paragraph means that, while carriers may petition the IFT to resolve an interconnection rate dispute, the IFT cannot be asked to review an interconnection rate that has previously been agreed to by the disputing party or that has previously been ruled on by the IFT. Thus,

[617] *See*, *e.g.*, Resolution 127, at 12, **C-061**.

> Telmex would not be allowed to return to the IFT to again challenge the Telmex-Tele Fácil interconnection agreement rate, even if the IFT resolved other operators' interconnection agreements in favor of the "regulated rate."
>
> The IFT has a history of following the provision cited above and based on my analysis of Telmex's acts at the IFT in 2015, Telmex clearly understands this provision as well. Recently, I asked my staff to conduct an analysis of the various interconnection agreement disputes Telmex initiated at the IFT during the agency's 2015 sessions, which is attached as **Exhibit A**. During that period of time, Telmex sought the IFT's review of 45 *separate* interconnection agreement rates. However, each challenge was about what rate would apply *after* the existing interconnection agreement expired. Telmex never once initiated a dispute asserting that the IFT had the authority to relieve Telmex of its obligation to pay a negotiated interconnection rate in *medias res*, rather it only brought disagreement procedures to establish what rate would become applicable upon the expiration of the existing interconnection agreement.
>
> Moreover, the analysis revealed that once the IFT resolved a rate contained in an individual interconnection agreement, Telmex never again challenged that rate.[618]

511. Further, in IFT's decision in a new confirmation of criteria issued by IFT on July 2017 as requested by Megacable Comunicaciones de México, S.A. de C.V. ("MCM"), the IFT affirmed that the adoption of the new FTBL did not invalidate Telmex's obligation to pay the rates it had negotiated and agreed to in interconnection agreements. Rather, that negotiated rate survived the adoption of the FTBL.[619] The IFT also did not conclude that the negotiated rates became unenforceable because Telmex was declared the PEA. Rather, it indicated that, because there was no showing of disagreement on the rate, the parties could go to enforce it in the courts.[620] Thus, the IFT's decision in MCM provides support for the conclusion that the negotiated rate that was ordered to be included in the interconnection agreement as part of Resolution 381 would have remained a valid and enforceable rate throughout the three-year

618 Bello Second Statement, ¶¶ 19-23 and Exhibit A thereto, **C-109**.
619 MCM Confirmation of Criteria, at 22, **C-127.**
620 *Id.*

period, but for the IFT's unlawful reversal of that order through Decree 77 and Resolution 127.[621]

512. In sum, the record refutes the Respondent's suggestion that Telmex would have been able to terminate the interconnection agreement during its three-year effective period. The record shows that, once Telmex agreed to a negotiated rate, that rate remained effective for the agreement's duration and, only then, did Telmex successfully initiate dispute procedures to obtain the lower IFT-calculated rate.

f. The Interconnection Agreement's Non-Discrimination Clause Would Not Have Entitled Telmex to Terminate the Interconnection Agreement

513. In addition to its flawed conclusions about the legal and factual application of the non-discrimination principle in the FTBL, the Respondent also seems to rely on the existence of the non-discrimination principle in the draft interconnection agreement (ICA) as an additional basis for concluding that Tele Fácil would not have been able to retain the rate of $0.00975 for the full three year period in which it would have been effective.[622] This argument is equally flawed because the non-discrimination language in the draft ICA expressly acknowledges that the non-discrimination obligation only applies to carriers that are of equal nature.

514. Specifically, the draft ICA defines Non Discriminatory Treatment as follows:

> In matters of interconnection, the obligation to grant an equal treatment to licensees that are located **in equal conditions** among each other. [623]

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621 *Id.*

622 *See, e.g.,* Statement of Defense, ¶ 45; Buj Report, ¶ 41(g).

623 *See, e.g.*, Original Draft Interconnection Agreement, at 15, **C-021**; *Acta No. 255 que contiene la notificación realizada por Tele Fácil, S.A. de C.V. a Teléfonos de México, S.A.B. de C.V. con Contrato de Interconexión a ser celebrado conforme lo resuelto en la Resolución 381* (Public deed 255 which contains notification performed by Tele Fácil, S.A. de C.V. to Teléfonos de México, S.A.B. de C.V. with Interconnection Agreement to be executed pursuant to Resolution 381) (December 16, 2014) (hereinafter "Notification to Telmex with Interconnection Agreement to be Executed Pursuant to Resolution 381"), at 18, **C-033** (emphasis added).

515. The draft ICA then applies this definition of Non Discriminatory Treatment in Section Twenty, which provides:

> **NON DISCRIMINATORY TREATMENT.**
>
> The parties agree that pursuant to the provision of Law, and subject to the provisions of their respective concession titles, the same shall act based on a Non Discriminatory Treatment with respect to the Services subject matter of Interconnection that TELMEX and TELE FACIL if applicable provides to other licensees with similar capacities and functions among each other.[624]

516. Thus, bringing the definition together with the language of the Non Discriminatory Treatment provisions, it is clear that the agreement only imposes a non-discrimination obligation when carriers are "in equal conditions." By the virtue of being declared the PEA, no other carrier in the market is equal to Telmex. Telmex is the only carrier that has such substantial market power as to require the Mexican Constitution to be amended in an effort to curb its repeated and well-documented anticompetitive practices.

517. Mr. Bello confirms that "Telmex's proposal expressly defined Non Discriminatory Treatment to include only 'the obligation to grant an equal treatment to licensees that are located **in equal conditions** among each other,'" which he considered to be "a material part of the interconnection agreement that Telmex proposed."[625]

518. Mr. Soria in his reply report concludes that the ICA's nondiscrimination obligations, like the FTBL's, does not enable Telmex to obtain the rates Tele Fácil negotiated with Nextel or any other competitive carrier. According to Mr. Soria:

> [T]he non-discrimination principle can only be invoked by a concessionaire with functions and capacities that are similar to the functions and capacities of the concessionaire whose offer is to be replicated. . . . [T]he requirement for the two concessionaires to be under comparable situations, and

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624 *See, e.g.*, Original Draft Interconnection Agreement, at 38 (Clause 21), **C-021**; Notification to Telmex with Interconnection Agreement to be Executed Pursuant to Resolution 381, at 42 (Clause 20), **C-033**.

625 Bello Second Statement, ¶ 13, **C-109** (emphasis in Bello statement).

> rendering the same services is supported by Articles 43 and 45 of the FTL, and expressly agreed upon Clauses First and Twenty-First of the agreement offered by Telmex/Telnor to Tele Fácil.[626]

519. In sum, the Respondent's assertion that the interconnection agreement would have authorized Telmex to avoid its obligation to pay the negotiated rate for the duration of the ICA's three-year term fails to comport with the plain language and intent of the agreement. Telmex, as a PEA, is not on par with competitive carriers and everyone – perhaps except the IFT – understands this fundamental fact.

B. CLAIMANTS ARE ENTITLED TO SUBSTANTIAL DAMAGES FOR RESPONDENT'S BREACH OF THE NAFTA

1. A Roadmap to the Evaluation of Claimant's Damages

520. In their opening submission, Claimants presented a comprehensive damages case supported by detailed analysis and bolstered by the opinions of two well-respected economists. In its Statement of Defense and accompanying expert reports, Respondent has presented a sprawling critique supported by an engineer –who is not a professional economist—that consists of inaccurate statements of law, unsupported assertions, unfounded assumptions and speculative alternative calculations of damages riddled with errors. Whether intentional or not, Respondent's strategy appears to be an effort to obfuscate and confuse in hopes of derailing Claimants' damages claim.

521. The reply expert reports of Claimants' experts, Dr. Christian Dippon and Dr. Elisa Mariscal, directly rebut Respondent's critique and that of its expert witness in a point-by-point fashion. This portion of Claimants' reply submission, however, in an effort to be most helpful to the Tribunal, will address the step-by-step process necessary to evaluate Claimants' damages

626 Soria Second Report, ¶ 92, **C-111**.

claim and demonstrate that Claimants are entitled to substantial damages. Thus, hopefully, this section will provide a "roadmap" for the Tribunal in its evaluation of damages.

522. At the outset, there are three major areas of evaluation one needs to understand to determine the nature and extent of Claimants' damages in this proceeding. The three major areas are:

a. Evaluation of the legal doctrines related to recovery of damages;

b. Evaluation of the parties' damages experts to determine the weight that should be given to their testimony; and,

c. Evaluation of the damages models presented, including the data, assumptions and calculations made.

523. After explaining the steps necessary for each part of the evaluation, it will be shown that the Claimants' damages case is appropriate and deserving of relief. After reviewing Mr. Obradors' expert report, Dr. Dippon is still of the opinion that Tele Fácil suffered economic harm of USD 357,880,731 for three of its four lines of business.[627] Likewise, Dr. Mariscal is still of the opinion that Tele Fácil suffered economic harm of USD 114,268,198 for its Competitive Tandem Services line of business.[628]

2. Evaluation of the Legal Doctrines Involved Shows No Barriers Exist to Recovery of Damages by Claimants

524. After an initial evaluation of the credibility and competence of the experts, the next step is an evaluation of the legal doctrines that may restrict or preclude the recovery of damages. Claimants suggest the following analysis should be followed:

a. Have the Claimants used a legally cognizable theory of damages?

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627 Dippon Second Report, ¶ 152, **C-112.**

628 Expert Report of Elisa Vera Mariscal Medina, Ph.D. (hereinafter "Mariscal First Report"), ¶ 141, **C-011**; Reply Expert Report of Elisa Vera Mariscal Medina, Ph.D. (hereinafter "Mariscal Second Report"), ¶ 12, **C-113**.

b. Did the Claimants fail to mitigate their damages by not going forward with some of the lines of business and abandoning others?

c. Are the damages precluded because of Claimants' original expectations?

a. Recovery of Lost Profits is an Appropriate Theory of Damages

525. Claimants' damages experts, and Respondent's as well, use a lost profits theory to estimate damages that incorporates the Discounted Cash Flow ("DCF") methodology. Respondent admits, as it must, that "it is true that the DCF methodology is widely used in investment valuation"[629] Respondent, however, argues that the DCF methodology is not appropriate here because the absence of a "track-record" forces an expert to "speculate about important variables such as price, the demand for services, costs, capital expenditures, etc."[630]

526. As explained below, the DCF methodology is appropriate for use in these circumstances but, as a threshold matter, there is no bright-line rule prohibiting the use of the DCF methodology for business purportedly without a "track-record," as Respondent suggests. International tribunals have awarded lost profits where it is reasonably clear that a company would have earned profits – even if, as here, there was no record of earned profits for the specific entity at issue. For example, in Crystallex v. Venezuela, the tribunal found that, while there was no proven track record of profitability because mining operations had not commenced, it nonetheless was sufficiently established that: "It is undisputed that Crystallex did not have a proven track record of profitability, because it never started operating the mine. However, in the

629 Statement of Defense, ¶ 346.
630 *Id.*

Tribunal's view, it has sufficiently established that, if it had been allowed to operate, it would have engaged in a profitmaking activity and that such activity would have been profitable."[631]

527. The authoritative Reference Manual on Scientific Evidence states that the DCF methodology can be used for valuing the profitability of a start-up business.[632] The use of a DCF methodology is appropriate here because there is sufficient data to estimate variables such as price, demand, costs and capital expenditures. Ripinsky and Williams in their treatise on damages also confirm that: "The case law indicates that, in certain circumstances, a claim for lost profits can be allowed even if the relevant business was not a going concern at the time of breach and despite the absence of the past profitability record."[633] Respondent's attempt to create a bright-line rule against the use of the DCF methodology in this case should be rejected.

528. Despite Respondent's argument that DCF should not be used here, Mr. Obradors does not suggest that it should not be used here. It is telling that Mr. Obradors is not willing to endorse the view that the DCF methodology cannot be used here. Even more telling is that Mr. Obradors uses a DCF methodology in calculating his alternative damages calculations.[634] It is improper and disingenuous for Respondent to simultaneously present an alternative damages claim to the Tribunal that uses a DCF methodology while arguing that the DCF methodology cannot be used by Claimants.

529. The ultimate concern in restricting the use of the DCF methodology in certain circumstances, as Respondent admits, is based on a fear that a paucity of data would require speculation. Respondent, however, fails to identify any specific instances of speculation in

631 *Crystallex International Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award (April 4, 2016), ¶ 877, **CL-093**.
632 Dippon Second Report, ¶ 147, **C-112**.
633 S. Ripinsky & K. Williams, Damages in International Investment Law 284 (2008), **CL-149**.
634 Analysys Mason Report, ¶ 191.

Claimants' damages case. Respondent, therefore, is arguing for the application of a rule, even though the harm sought to be prevented by the rule is not present. Importantly, for each of the lines of business, no speculation is necessary because robust data exists either from the track record of Claimants' other businesses in the United States or actual marketplace data.

530. For example, in calculating the damages for International Termination Services, Dr. Dippon relied on actual call volumes and historical pricing experienced by Future Telecom, as well as an MOU signed between Future Telecom and Tele Fácil.[635] This is as far from speculation as possible because the actual Call Detail Records ("CDR") have been relied upon and produced. This data includes a record of every call that would have been carried by Tele Fácil under the MOU with Future Telecom. Relying on actual, historical data is not, in any way, speculation. International termination service of telephone calls from the United States to Mexico, moreover, is hardly a new industry, and Mr. Blanco, one of the claimants, has extensive experience in this line of business.[636]

531. Likewise, for the DID business, extensive information is available from Mr. Nelson's business, GLCC, which is the leading DID business in the United States, and that information was obtained directly from market participants like FreeCC, AudioNow, NCC and SIP.[637] For the retail business, costs were estimated on expenses set forth by Tele Fácil in its Concession Application, which was approved.[638]

532. In sum, for a hypothetical start-up in a brand-new industry without any operational data, it might be inappropriate to use the DCF methodology. But that is not the situation here. These telecommunications services are offered all over the world and have been

635 Expert Report of Christian M. Dippon, Ph.D. (hereinafter "Dippon First Report"), ¶¶ 82-83, **C-010**.
636 Blanco Statement, ¶¶ 5-8, **C-002**.
637 Dippon Second Report, ¶ 87, **C-112**.
638 *Id.* ¶ 135.

for some time, actual marketplace data is available for many of the inputs, and Claimants have extensive experience and track records in these industries. The rationale for the "rule" advanced by Mexico is simply not present here. Tribunals have recognized that expertise and a track record in similar circumstances is sufficient to support a lost profits claim. For example, the Tribunal in Vivendi v. Argentina, stated: "The Tribunal also recognizes that in an appropriate case, a claimant might be able to establish the likelihood of lost profits with sufficient certainty even in the absence of genuine going concern. For example, a claimant might be able to establish clearly that an investment, such as concession, would have been profitable by presenting *sufficient* evidence of its expertise and proven record of profitability of concessions it (or indeed others) had operated in similar circumstances."[639]

533. Without any citations to evidence or research, Respondent dismisses Claimants' impressive experience in the United States because of "significant cultural differences" between the two countries and differences in size and purchasing power.[640] This would no doubt come as a surprise to the thousands of companies that do business in both markets. Ironically, Respondent's argument cuts across the very purpose of the NAFTA, which was to expand trade between the United States and Mexico. Unfortunately, Respondent's argument reflects a "heads I win, tails you lose" attitude towards market access on its part.

534. Notably, Respondent fails to rebut the impressive experience of Tele Fácil's principals, a significant part of which occurred in Mexico. Mr. Nelson is the CEO of GLCC and a pioneer in the DID/conferencing industry who helped that industry grow exponentially in the

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639 *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Award (Aug. 20, 2007), ¶ 8.3.4, **CL-030**.

640 Statement of Defense, ¶ 357.

United States.[641] Mr. Blanco was MCI Telecommunications' top salesman, helped the United Nations create a private global network, and helped form the communications company Avantel in Mexico.[642] Likewise, Mr. Sacasa has extensive telecommunications experience in Mexico.[643]

535. It should also be noted that adoption of such a hard and fast rule, i.e., that a business must have a track record of profits in Mexico and nowhere else, would create perverse incentives for a regulator like Mexico. Under such a rule, Mexico would have an incentive to destroy any new business competing with Telmex quickly before such a business could develop a track record in Mexico and be entitled to lost profits. This is hardly the outcome the signatories to the NAFTA would have anticipated.

536. Respondent's criticism of the DCF methodology should also be rejected because it fails to present alternative valuation methods for the Tribunal to consider. Respondent argues that "[i]n a case like this, results obtained through the use of the DCF methodology should be validated against other valuation methods."[644] Nonetheless, Respondent fails to present such "other" valuation methods, even though its expert witness on damages uses the DCF methodology for his own alternative damages calculations.

b. The Doctrine of Mitigation Does Not Apply Here

537. Respondent blends the doctrines of causation and mitigation into a mélange from which it argues that, because Claimants theoretically could have negotiated a new interconnection agreement with a low interconnection rate that also allowed for indirect interconnection and because Claimants proceeded with two of their four lines of business

641 Nelson Statement, ¶¶ 12-16, **C-001**.
642 Blanco Statement, ¶¶ 7-9, **C-002**.
643 Sacasa First Statement, ¶¶ 5-6, **C-003**.
644 Statement of Defense, ¶ 358.

without a high interconnection rate with Telmex, they are therefore precluded from recovering damages from these two lines of business, i.e., International Termination Services and Retail Services.[645] This argument is legally and factually incorrect.

538. Notwithstanding Respondent's obfuscation, the chain of causation here is clear: after officially recognizing and expressly validating Claimants' legitimate investment rights in a lengthy, reasoned and unanimous resolution, the IFT later abruptly and unjustifiably repudiated its own rulings. The IFT's dramatic change in position targeted Claimants' investment for elimination. Never before had the IFT acted in such a manner, and, indeed, never since. The clawing back of the interconnection agreement between Tele Fácil and Telmex approved in Resolution 381 directly caused all of Claimants' damages because Tele Fácil could not realistically provide telecommunications services in Mexico without an interconnection agreement with Telmex.

539. By virtue of Resolution 381, Tele Fácil obtained an interconnection agreement with Telmex that contained two key features: a high interconnection rate and indirect interconnection. This interconnection agreement was critical to Tele Fácil's business because Telmex accounts for 60% - 70% of the Mexican telecommunications market in the relevant time periods.[646] Without an interconnection agreement with Telmex, it is not feasible for a telecommunications carrier to do business in Mexico. In stark terms, therefore, the actions of the IFT caused Claimants' damages: Tele Fácil needed an interconnection agreement to operate its business; by virtue of Resolution 381 it had obtained an interconnection agreement; and the IFT's subsequent actions took that interconnection agreement away. Another way to phrase the causation analysis is whether Tele Fácil would have earned the lost profits claimed "but for" the

645 Statement of Defense, ¶ 371.
646 Statement of Claim, ¶ 7.

actions of the IFT. The answer is clearly yes: with the interconnection agreement in hand, Tele Fácil had the equipment, people, plans and capital to move forward with its four lines of business.[647] Tele Fácil was in the right place, at the right time, with important customers already lined up.[648] If the IFT had enforced its resolution, Tele Fácil could have opened its interconnection switch and began to earn profits.

540. Neither Mexico nor its expert witness refute this chain of causation by arguing that Tele Fácil could have entered the Mexican telecommunications market without an interconnection agreement with Telmex. Instead of disputing this basic chain of causation, Respondent argues that, after the issuance of Decree 77, Claimants should have then abandoned their rights to the interconnection agreement approved by Resolution 381;[649] negotiated a new agreement with Telmex with a lower rate and an assumption, sub silentio, that Telmex would agree to indirect interconnection even though it had not done so in the past; and, then, move forward with half of their business lines while abandoning the other half of their business lines (as well as abandoning any right to challenge or appeal the IFT's improper actions). This argument is legally and factually defective in a number of ways.

541. As a threshold matter, Respondent has not met the standards to support the doctrine of mitigation. Mitigation must be proved affirmatively by the party pleading it. The burden of proving mitigation, therefore, is on Respondent. In AIG v. Kazakhstan, the tribunal stated that:

> The onus of proof on the issue of mitigation is always on the person pleading it – if he fails to show that the Claimant or Plaintiff ought reasonably to have taken certain mitigating steps, then the normal measure of damages will apply. The question of mitigation of damages is always a

647 Nelson Statement, ¶ 63, **C-001**.
648 *Id.* ¶ 74.
649 Statement of Defense, ¶ 376.

> question of fact: as to whether the loss was avoidable by reasonable action that could have been taken by a Claimant is also a question of fact, not of law.[650]

542. Mitigation as a defense requires the party pleading it to identify concrete steps that could have been taken to avoid or reduce the damage. In essence, mitigation is a duty to take affirmative action to "cut your losses," i.e., close up shop, lay off employees, sell equipment or the like. Another example can be found in the decision by the Tribunal in MTD v. Chile,[651] which declined to award damages for investments made after the investor had received from the government the final rejection of its request for re-zoning the land, which was a necessary requirement for the project.[652] It ruled that investments made after the adverse action by the Chilean government could have been avoided.

543. Mexico has not identified concrete actions that could have been taken, nor has it demonstrated that Tele Fácil's loss would have been "avoidable by reasonable action that could have been taken by" Tele Fácil.[653] Instead of identifying concrete steps, Respondent argues that Claimants should have revamped their business by abandoning two critical lines of business and negotiating an entirely new interconnection agreement. Arguing that claimants should have engaged in essentially a different business than the one the one they had destroyed is not a proper argument about the mitigation of damages. If it was, Respondent could avoid all damages by arguing that Tele Fácil should have abandoned its Mexican operations in their entirety and devoted its resources to bitcoin mining or other enterprises.

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650 *AIG Capital Partners, Inc. and CJSC Tema Real Estate Co. v. Republic of Kazakhstan*, ICSID Case No. ARB/01/6, Award (Oct. 7, 2003), ¶ 10.6.4(4), **CL-150**; *see also Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award (Apr. 12, 2002), ¶ 170, **CL-056** ("Respondent has the burden of proof for the facts establishing such a duty and the failure of Claimant to carry it out.").

651 *MTD Equity Sdn. Bhd. v. Republic of Chile*, ICSID Case No. ARB/0/7, Award (May 25, 2004), ¶ 240, **CL-151**.

652 *Id.*

653 *See AIG Capital Partners, Inc. and CJSC Tema Real Estate Co. v. Republic of Kazakhstan*, ICSID Case No. ARB/01/6, Award (Oct. 7, 2003), ¶ 10.6.4(4), **CL-150**.

544. Indeed, Tele Fácil acted entirely reasonably under the circumstances, and respected arbitration decisions demonstrate that Tele Fácil's conduct should not be judged in light of subsequent events. In Middle East Cement, the tribunal found no evidence that claimant had failed to comply with the duty to mitigate where claimant argued that it would not have been economically feasible to find an alternative to the sale of cement that had been barred by Mexico's decree prohibiting the import of cement.[654] The tribunal found "the explanations given by Claimant at least plausible. That is sufficient to deny a duty to mitigate, as Egypt [?] has the burden of proof for the facts establishing such a duty and the failure of Claimant to carry it out."[655]

545. Middle East Cement demonstrates that Tele Fácil need only provide a "plausible explanation" for its conduct. Here, Tele Fácil had a strong economic interest in carrying out the entire business supported by the 2014 agreement and continuously tried to secure Telmex's compliance with Resolution 381.[656] Tele Fácil therefore has more than a "plausible explanation" for not changing its entire business approach by only providing International Termination Service and Tandem Service.

546. Another important aspect of the doctrine of mitigation defeats Mexico's argument because the duty to mitigate does not require a party to give up something of value. This point is illustrated in Hrvatska Elektroprivreda d.d. v. Republic of Slovenia,[657] where the tribunal accepted claimant's position that it was reasonable to reject an offer made by Slovenia

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654 *Middle East Cement Shipping and Handling Co. S.A. v. Egypt*, ICSID Case No. ARB/99/6, Award (Apr. 12, 2002), ¶ 168, **C-056**.

655 *Id*. ¶ 170.

656 *See* Statement of Claim, ¶ 20.

657 *Hrvatska Elektroprivreda d.d. v. Republic of* Slovenia, ICSID Case No. ARB/05/24, Award (Dec. 17, 2015), **CL-133**.

subsequent to Slovenia's initial agreement to provide electricity to claimant due to the "substantial differences between the terms of the [subsequent] Offers and those of the [initial] Agreement."[658] The tribunal also found that there were non-financial matters that reasonably influenced claimant's decision, such as the concern that accepting the offers could lead to a disincentive for Slovenia to ratify the initial agreement to provide electricity.[659] Further, in Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt,[660] the tribunal held that claimants were not obligated to accept a proposed alternative site for their project because the alternative site was not a suitable option.[661]

547. The same considerations apply here—Tele Fácil had strong economic reasons to vigorously pursue enforcement of the 2014 agreement by securing Telmex's compliance with Resolution 381. Failing to do so would have undermined its position that the 2014 agreement was enforceable. Further, any acceptance of an alternative offer from Telmex would have required Tele Fácil to give up valuable rights under its 2014 agreement and abandon two of its four lines of business without rights to redress. The actions suggested by Respondent that Claimants should have undertaken would have required it to give up something of value, and therefore would neither have been reasonable nor economically feasible – nor required by the doctrine of mitigation.

548. Respondent's argument is also faulty because it contains an inherent assumption that is incorrect. Respondent ignores the fact that indirect interconnection to Telmex was also one of the terms of the interconnection agreement approved by Resolution 381. To proceed

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658 *Id.* ¶ 214.

659 *Id.* ¶ 217.

660 *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award (May 20, 1992), **CL-152**.

661 *Id.* ¶ 172 ("While the Claimants may have been under an obligation to mitigate the damages incurred as a result of the cancellation of the [project], such an obligation is not so broad and all encompassing as to require the Claimants to accept an unsuitable alternative site that was never contemplated by the Parties' agreement.").

forward with its International Termination Service or Retail Service, Tele Fácil would have had to negotiate indirect interconnection with Telmex in addition to a lower interconnection rate. Indirect interconnection was critical because Telmex was notorious for delaying interconnection to other carriers, especially new entrants.[662] If Tele Fácil had to directly connect with Telmex, Telmex likely would have only let Tele Fácil have one E1 trunk (capable of handling 30 calls at a time) instead of the 64 E1 trunks that Mr. Sacasa estimated Tele Fácil would initially need.[663] Also, Telmex charged exorbitant fees to connect directly with its network. Dr. Dippon estimated the fees for 64 E1s to be USD 818,000.[664]

549. In sum, Respondent's argument that Claimants should have dropped two of their lines of business, given up their rights to redress Respondent's expropriation and denial of justice, and negotiated a new interconnection agreement with lower rates and indirect interconnection (even though Telmex opposed indirect interconnection) should be rejected in its entirety as legally and factually incorrect and misplaced.

c. Claimants' Expectations Are Only Relevant to the Fact of Damage and Not the Overall Amount of Damages

550. Respondent argues that Claimants' damages claim is overstated because an examination of "Claimants' expectations about the project" are not in line with the actual damages now being claimed.[665] Respondent's argument, however, is legally wrong. Without using the word "foreseeable" itself, Respondent is actually arguing that Claimants' damages are not recoverable because they were not foreseeable. In effect, Respondent argues that Claimants'

662 Dippon Second Report, ¶¶ 46-48, **C-112**.
663 Sacasa First Statement, ¶ 46, **C-003**; Dippon Second Report, ¶ 49, **C-112**.
664 Dippon Second Report, ¶ 49, **C-112**.
665 Statement of Defense, ¶¶ 359-370.

allegedly modest expectations about the future of the business show that the claimed damages lack proximate causation because they were not foreseeable.[666]

551. Respondent gets the law wrong in regard to foreseeability and Claimants' expectations. Whether or not damages are foreseeable goes to the fact of damages or, more specifically, to determine what particular element of damages claimed by the investor will be compensated, but not to the quantum of damages or by how much the investor will be compensated.[667] "Causation does not seem to influence the actual quantification of each individual head of damage."[668] Here, the rule means that it must be foreseeable that the IFT's actions caused Claimants lost profits but the amount, or quantification, of the lost profits need not be foreseeable.

552. The Tribunal in Amco v. Indonesia II confronted this issue directly.[669] Indonesia argued that only damages that were foreseeable at the time of revocation of a license could be awarded.[670] The Tribunal denied this argument and ruled:

> [F]oreseeability goes to causation and damages, and normally not the quantum of profit. That the revocation of the licence would cause Amco to be unable to secure its share of profits under the Profit-Sharing Agreement was undoubtedly foreseeable. The principle of foreseeability does not require that the party causing the loss is at the moment of time able to foresee the precise quantum of the loss actually sustained.[671]

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666 If Respondent is not arguing foreseeability, then its discussion of Claimants' expectations is simply irrelevant, rather than legally incorrect, and should be disregarded.

667 S. Ripinsky & K. Williams, Damages in International Investment Law 141 (2008), **CL-149**.

668 *Id.*

669 *AMCO Asia Corp. v. Republic of Indonesia*, Award, ICSID Case No. ARB/81/1, Award (May 31, 1990), ¶ 175, **CL-153**.

670 *Id.*

671 *Id.*

553. According to the Tribunal, there was no need for the claimant to establish that the amount of lost profits was foreseeable, it was enough to show the causation link between the unlawful act and the type of damages claimed (here lost profits).[672]

554. Therefore, Respondent's extended discussion of Claimants' expectations, business plans, and investment banker analysis is beside the point. There is no legal requirement that the actual quantum of damages be foreseeable, or that Claimants' expectations line up with the quantum of damages, as long as the fact of damages is foreseeable, i.e., that the unlawful act would cause some type of lost profits to Claimants.

555. In any event, besides being legally incorrect, Respondent's discussion is analytically incorrect. Mr. Bello testifies that Tele Fácil's concession application was filed under the 1995 Federal Telecommunications Law, which provided a complicated process for obtaining a public telecommunication network concession up until 2015 when the law changed.[673] Only the coverage projection is enforceable and obligatory after the filing.[674] However, the investment and financial projections are not part of the final concession document and are only included so that the plan as a whole meets the interstate services concession.[675] With the opening of the Mexican telecommunications market, the financial projections became much less important and reflected minimum requirements for entry.[676] Indeed, in 2015 the IFT published a decree eliminating the investment projection requirement completely.[677] The financial projection requirement was only a formality under the 1995 law and not included in the 2015 decree.[678]

672 S. Ripinsky & K. Williams, Damages in International Investment Law 141 (2008), **CL-149**.
673 Bello Second Statement, ¶ 28, **C-109**.
674 *See id.* ¶ 30.
675 *See id.*
676 *See id.* ¶ 31.
677 *See id.* ¶ 34.
678 *See id.* ¶ 35.

Thus, Respondent's argument is belied by its own regulatory actions that show the financial and investment disclosures were not enforced.

C. Evaluation of the Parties' Damages Experts Reveals that Mr. Obradors' Expert Report Should be Given Little Weight

556. The damages portion of any proceeding often becomes a "battle of the experts" because the calculation of damages relies on specialized expertise in areas like economics and financial analysis. Claimants submit that at least the following three questions should be answered in evaluating how much weight should be given to the parties' damages experts:

a. Is the expert truly independent?

b. Is the expert's report within the scope of his or her expertise?

c. Does the expert's work exhibit due care?

a. Mr. Obradors is not Sufficiently Independent

557. Respondent's expert witness, Joan Obradors, is a partner of the consulting firm Analysys Mason.[679] He lacks sufficient independence as an expert witness because of Analysys Mason's relationship with the IFT. Analysys Mason does significant work outside this proceeding for the IFT in developing cost models for regulation.

558. Analysys Mason has been retained by the IFT on at least thirteen separate occasions to perform consulting work. Pursuant to the IFT's own information,[680] Analysys Mason been contracted thirteen times during the period shown, with the total amount of fees paid being close to USD 6 million dollars (MEX $104,219,133.20). This consulting work appears to be for constructing cost models to assist the IFT in its rate-setting function.

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679 Analysys Mason Report, Annex D.

680 *Contratos del IFT con Analysys Mason conforme al Portal de Transparencia del Instituto Nacional de Acceso a la Información* (IFT Contracts with Analysys Mason pursuant to the Transparency Website of the National Institute of Access to Information) (last accessed on May 31, 2018) (hereinafter "IFT-Analysys Mason Contracts"), **C-128**.

559. The IBA Rules on the Taking of Evidence in International Arbitration require each expert to include "a statement of his or her independence from the Parties, their legal advisors, and the Arbitral Tribunal."[681] Mr. Obradors includes a statement in his report that he is "impartial,"[682] but the evaluation of his independence needs to extend beyond that. Mr. Obradors' curriculum vitae reveals that he is currently a partner with Analysys Mason,[683] so he presumably shares in the profits the firm makes from its work with the IFT. Moreover, Mr. Obradors is in charge of the firm's activities in Latin America,[684] which means it is likely that revenues from Respondent may affect his profit and loss responsibility with Analysys Mason.

560. The IBA Rules further provide that an expert report should include, "a statement regarding his or her present and past relationship (if any) with any of the Parties."[685] Mr. Obradors, however, fails to mention the relationship between his firm, Analysys Mason, and the IFT in his expert report.

561. Even though Mr. Obradors will likely strive to be impartial, it is only natural to want to please a client that has given millions of dollars of work to his firm and will likely send more work in the future. A negative opinion from Mr. Obradors could be the end of that work from the IFT and negatively affect Mr. Obradors financially and professionally. As Upton Sinclair, a famous American writer, once said, "It is difficult to get a man to understand something, when his salary depends on his not understanding it." It should come as no surprise, then, that Analysys Mason submitted a report that parrots the IFT's legal arguments, creates

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681 *See* International Bar Association, Rules on the Taking of Evidence in International Arbitration (adopted May 29, 2010), Art. 5, Rule 2(c), **CL-154**.
682 Analysys Mason Report, at 58.
683 *Id*., Annex D.
684 *Id.*
685 *See* International Bar Association, Rules on the Taking of Evidence in International Arbitration (adopted May 29, 2010), Art. 5, Rule 2(a)), **CL-154**.

flawed models that show little or no damages for Claimants, and relies on nonpublic information it obtained in the course of its work with the IFT to support portions of its analysis.

562. In contrast, Dr. Dippon of NERA Economic Consulting ("NERA") stated in his report that, "I have no prior experience with or against the Claimants, the Respondents, counsel for either the Claimants or Respondents, or the Arbitral Tribunal. . . . My compensation or my firm's compensation is not dependent, in any way, on the substance of my opinions or the outcome of this arbitration."[686] Dr. Dippon, therefore, is truly independent – he has neither worked for Claimants in the past nor would he have any expectation of working for them in the future. Likewise, Dr. Elisa Mariscal has no prior experience working for Claimants nor any expectation of working for them in the future.[687]

563. To be clear, Claimants are not accusing Mr. Obradors of any wrongdoing. Given the circumstances and his firm's relationship with the IFT, however, he cannot be considered completely independent. His report should be rejected outright or, at the very least, the Tribunal should consider his lack of independence when giving weight to his opinion.

2. Mr. Obradors Opines Outside the Scope of his Expertise

564. Mr. Obradors' curriculum vitae ("CV") lists his educational training as that of an engineer with an M.B.A. degree.[688] According to Mr. Obradors, he has an M.B.A. from City University, London, as well as M.Sc. degrees in telecommunications from Telecom Paris, France, and ETS/UPC Barcelona, Spain.[689] He is not a Ph.D. economist and his background and

686 Dippon First Report, ¶ 8, **C-010**.
687 Mariscal Second Report, ¶ 2, **C-113**.
688 *See* Analysys Mason Report, Annex D.
689 *See id.*

training are not in economics. In fact, his CV states, "He is specialized in due diligence projects and regulation of fixed and mobile networks."[690]

565. In contrast, both Dr. Dippon and Dr. Mariscal are professional economists. They both have Ph.D.'s in economics and impressive experience in the field of economics.[691]

566. This distinction is crucial and likely explains many of the errors Mr. Obradors has made in his analysis. In very broad terms, a lost profit analysis, like the one used here, divides into revenue and cost estimation. An engineer like Mr. Obradors is skilled in cost estimation because of his familiarity with communications equipment and networks; indeed, cost estimation is the very work Analysys Mason performs for the IFT.[692] Revenue estimation, however, is much different from cost estimation and requires skill in revenue forecasting, which includes analysis of demand drivers and market structure and is usually performed by professional economists. This distinction shows up in Mr. Obradors' work: his analysis of cost is very professional, but his revenue estimations are defective both in theory and in calculation.

567. Similarly, Mr. Obradors' CV does not show any legal training or expertise in Mexican telecommunications regulation, but he includes a section early in his report entitled, "Comments on the Allegations," which contains extensive legal analysis.[693] In his "Comments," Mr. Obradors purports to opine on Article 125 of the LFTyR and the regulations purportedly governing double indirect interconnection.[694] Mr. Obradors is not a lawyer or legal expert and his opinions on these matters should be disregarded. In any event, and as more fully explained in Section IV(A) above, his opinions on these issues are incorrect. It should be noted that the text

690 *Id.* (emphasis in original).
691 *See* Mariscal First Report, Annex: CV at 41, **C-011.**
692 IFT-Analysys Mason Contracts, **C-128**.
693 *See* Analysys Mason Report, §1.3.
694 *Id*. ¶¶ 16, 24.

in his report on these legal issues is remarkably similar to opinions written by the IFT in other contexts.

568. In contrast, neither Dr. Dippon nor Dr. Mariscal have exceeded the scope of their expertise and both have abstained from giving legal opinions.

a. Mr. Obradors' Work Does Not Exhibit Due Care

569. One aspect of an expert's report that is critical to the evaluation of his or her opinion is whether the expert's work exhibits due care to the given assignment. The presence of calculation errors or mistakes is usually a sign that an expert did not exercise due care in completing his or her work. This may be a result of not having enough time to accomplish the work, delegation of the work to unqualified junior consultants, or a lack of expertise in the first place.

570. Mr. Obradors' report contains a number of glaring errors that suggest he either did not have sufficient time to complete his work or did not devote sufficient time to review the work of his more junior colleagues. Many of these errors are material and, even the ones that are not material, suggest a lack of due care in preparing his report.

571. One example is the calculation of market share for Future Telecom. Mr. Obradors compared Future Telecom's annual traffic to an estimate of the entire market's monthly traffic and unsurprisingly reached the high market share number of 84 percent.[695] When done correctly, Mr. Obradors' market share estimation for Future Telecom should have been 7.1 percent.[696] Mr. Obradors trumpeted this erroneous market share number to support his conclusion that

695 *Id.* ¶ 41.
696 *See* Dippon Second Report, ¶ 61, **C-112**.

Claimants' damages claim for international termination service was improbable.[697] This gross error suggests a lack of due care in preparation of the report.

572. Another more puzzling error is the "marketing cost" estimation used for Retail Services.[698] For his estimation of the setting-up costs for a new retail store, Mr. Obradors relies on a 2011 article from a general audience business magazine about "Little Green Beans," a children's supply consignment store in Austin, Texas, "specializ[ing] in children's clothing, toys, and accessories such as strollers and high chairs."[699] Among the setting up costs are store fixtures, which include racks and shelves, but also mannequins and bookcases.[700] In estimating the size of the store, Mr. Obradors relies on a 2010 presentation by a company in the United Kingdom that operates electronic retail stores like Best Buy.[701] The square feet in the presentation are for a Best Buy mobile standalone store.[702] The average commercial lease rate in Mexico City per square meter is based on a 2017 article about the average commercial lease rate for malls in Mexico City.[703] Besides being downright bizarre, use of such anecdotal evidence contradicts good practice for estimating costs. This is even more surprising because Analysys Mason is well-known worldwide for its work on cost models on behalf of regulators; perhaps it is now letting its student interns prepare the damages reports.

573. Dr. Dippon details a number of analytical errors in his report that are too numerous to recount here. Since Mr. Obradors is well-qualified in the telecommunications field, these errors suggest that he was not given sufficient time to complete his work or that junior

697 *See Id.*
698 *See* Analysys Mason Report, ¶ 189.
699 Dippon Second Report, ¶ 143, **C-112**.
700 *Id*.
701 *See id*.
702 *Id.*
703 *Id.*

employees did much of the work without adequate supervision. Either way, these errors should affect the weight given to Mr. Obradors' opinions.

3. Claimants' Damage Calculations Are Correct and Well Supported

574. The next step in the evaluation is to examine the damages calculations themselves. Claimants submit that at least the following three questions should be answered during this examination process:

a. What do the experts agree upon in their respective calculations?

b. What is not agreed upon and therefore in dispute?

c. For the disputed items, is Claimants' approach appropriate with respect to the data, assumptions, and calculations made in the various damages models?

a. Both Sides' Experts Agree Upon a Number of Issues

575. Determining what the experts agree upon is critical here because Respondent has tried to obfuscate with its heated rhetoric. However, when its own expert report is compared with Claimants' expert reports, it becomes clear that both side's experts agree on a number of things. Of course, this makes the job of the Tribunal easier because only the items in dispute need to be addressed.

576. Importantly, Mr. Obradors agrees with the overall damages framework, in that damages consist of lost profits in the "but-for" world.[704] Since all three damages experts agree on lost profits as the form of damages, there is no need for the Tribunal to examine other types of damages frameworks.

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[704] *See* Dippon Second Report ¶ 16, **C-112**.

577. Mr. Obradors uses the same Weighted Average Cost of Capital ("WACC") that Dr. Dippon calculated for Tele Fácil and uses it to discount the annual lost profit figures and apply a prejudgment interest rate to the discounted revenue stream.[705] The WACC is essentially a "commercially reasonable rate" that includes the factors relevant to a telecommunications investment in Mexico.[706] Mr. Obradors offers no criticism of the WACC used by Dr. Dippon and Dr. Mariscal. And in its Statement of Defense, Respondent does not offer an alternative calculation of the WACC, but instead suggests that the WACC is "an extraordinarily high rate" and that the United States T-Bill rate be used instead.[707] Currently, such rates range from 1.68 percent to 2.20 percent.[708] But using the U.S. T-Bill rate would mean that an investment in the Mexican telecommunications market has the same risk as a short-term government security backed by the full faith and credit of the United States. Respondent offers no support for this outlandish supposition, and its own expert witness does not support it.[709]

578. Mr. Obradors agrees with Dr. Dippon that the relevant damages period started on January 15, 2015, and ends on December 31, 2020.[710] In its Statement of Defense, Respondent argues, without expert witness support, that this damages period is not feasible.[711] Respondent provides no witness testimony to rebut Mr. Nelson's witness statement that by November 2014,

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705 *See id*. ¶ 17.

706 *See id*. ¶ 150.

707 Statement of Defense, ¶¶ 427-428.

708 *See* U.S. Department of Treasury, Daily Treasury Bill Rates Data, https://www.treasury.gov/resource-center/data-chart-center/interest-rates/Pages/TextView.aspx?data=billrates.

709 Mexico relies on the decision in *S.D. Myers v. Government of Canada*, UNCITRAL, [Second] Partial Award (Oct. 21, 2002), ¶¶ 315-16, **RL-008**, to support its argument. Mexico misconstrue *S.D. Myers* in this regard because the Tribunal in that case declined to award a return based on lost opportunity or what the claimant could have done with the money as to speculative, but it did state that, "To be compensated for the value of the lost use of money by a payment of interest that reflects what the market considered to be the value of money at the time is appropriate." *Id*. This is what the WACC represents; Claimants are not making a lost opportunity claim but simply seeking recompense for the time value of their lost profits.

710 *See* Analysys Mason Report, ¶ 185-86; Dippon Second Report, ¶ 16, **C-112**.

711 *See* Statement of Defense, ¶¶ 390-98.

"Tele Fácil had all of the equipment, employees and facilities in place that would be necessary to begin exchanging traffic indirectly with Telmex."[712] Respondent does not offer testimony to rebut the fact that Future Telecom could switch its traffic to Tele Fácil virtually instantaneously, nor does it offer testimony to rebut the witness statements of Mr. Lowenthal, of FreeCC, and Mr. Cernat, of AudioNow, which indicate their companies would have started marketing their services as soon as Tele Fácil could connect with Telmex and begin exchanging traffic.[713] Respondent's criticism of the damages period used by Claimants' experts, therefore, is contradicted by its own expert's work and is merely a lawyer's argument unsupported by evidence or testimony.

579. For the International Termination Services, DID/Conferencing Services and Retail Services, Mr. Obradors uses many aspects of the NERA damages model in calculating alternative damages. His reliance on the model, and failure to introduce an original model, shows his agreement with the NERA model. Based on an expert review of the electronic backup provided by Mr. Obradors, his analysis is consistent with NERA's method of calculating incremental cost, which includes direct costs, indirect costs and incremental operating expenses.[714]

580. Mr. Obradors does not adopt the economic model used by Dr. Mariscal in her analysis of Competitive Tandem Services. Instead, he offers a series of criticisms, addressed in a later section, that suggests he does not fully understand the use of economic modeling in this context.

712 Nelson Statement, ¶ 63, **C-001**.
713 *See* Dippon Second Report, ¶ 149, **C-112**.
714 *See id.* ¶ 19, **C-112**.

b. The Disputed Items Between the Experts is Limited

581. As described above, there is significant agreement among the parties. Thus, the points in dispute are limited and clear. For International Termination Services and DID/Conferencing, essentially all that is in dispute are the revenue estimates. For Retail Services, the dispute centers on revenue estimates, but also includes disputes over costs. For Competitive Tandem Services, Mr. Obradors, for the most part, incorrectly maintains that the entire business is illegal; he offers only general criticisms of economic modeling[715] and fails to provide a detailed critique of Dr. Mariscal's damages model.

c. Claimants' Approach to the Disputed Items is Appropriate and Supported

582. Respondent cites to the Chorzow Factory case for the proposition that the award of damages must, "re-establish the situation which would, in all probability have existed if the act had not been committed."[716] Many tribunals have "drawn a distinction between proving the fact of loss and the amount of loss, suggesting that the standard of proof for the latter is somewhat lower than for the former."[717] The damages calculations performed by Claimants' experts, of course, go to the amount of loss. The Tribunal in SPP v. Egypt noted in this regard: "it is well-settled that the fact that damages cannot be assessed with certainty is one reason not to award damages when a loss has been incurred."[718]

583. By isolating and analyzing the aspects of damages that are actually disputed by Respondent's experts, it can be seen that Claimants' damages model is appropriate and well-supported.

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715 Analysys Mason Report, § 3.3 at 28.

716 Statement of Defense, ¶ 330 (emphasis in original) (citing Exhibit **CL-097**, *The Factory at Chorzow (Germany v. Poland)* (Claim for Indemnity) (Merits), 1928 PCIJ Rep. Ser. A. No. 17 at 47 (Sept. 13, 1928)).

717 S. Ripinsky & K. Williams, *Damages in International Investment Law* 165 (2008), **CL-149**.

718 *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award (May 20, 1992), ¶ 215, **CL-152**.

d. International Termination Services

584. Dr. Dippon's estimate of the revenue that Tele Fácil would have received from the International Traffic Termination business is straightforward and based on actual transactions by Future Telecom.[719] He used Future Telecom's actual minutes of fixed line traffic and multiplied them by the competitive international termination rate that Tele Fácil would have offered, which was slightly lower than the rates Future Telecom actually paid to carriers for this traffic.[720]

585. This is the rare lost profits claim based on actual traffic and actual prices that were paid. There is no speculation to these numbers because they are historical. Because the actual traffic levels and negotiated rates are known for the entire time period these damages are claimed, Dr. Dippon's revenue calculation for International Traffic Termination is a very solid estimate – to say the least.

586. In response to this very solid estimate devoid of speculation, Mr. Obradors stitches together a number of wildly speculative critiques to attack Dr. Dippon's analysis. None is convincing. First, Mr. Obradors tries to cast doubt on the revenue estimate by claiming that Future Telecom would have obtained 84.8 percent of the entire international traffic market if the revenue estimates were correct.[721] This calculation is the result of a gross error. Mr. Obradors bases his estimate on a submission made by a company named Marcatel and uses its estimate of 4,300 million minutes to calculate the total annual volume.[722] However, the Marcatel estimate Mr. Obradors uses is a monthly figure, which Mr. Obradors forgets to multiply by twelve to calculate the annual figure. He then compares Future Telecom's annual traffic to this monthly

719 Dippon First Report, ¶¶ 81-83, **C-010**.
720 *Id.* ¶ 82.
721 *See* Analysys Mason Report, ¶ 41.
722 *Id.*

estimate and comes up with an 84.8 percent market share.[723] When done correctly by comparing Future Telecom's annual traffic to the annualized Marcatel estimate, the market share for Future Telecom would be 7.1 percent. Even this market share estimate is likely too high after making additional computational corrections and acknowledging that official data is likely to underestimate international traffic terminating in Mexico because of entities that "by-pass" the authorized international gateways.[724]

587. Second, Mr. Obradors asserts that low interconnection rates indicated by Marcatel in September 2017 would mean Tele Fácil would not be able to effectively compete with other carriers.[725] This assertion fails on many levels. The time period does not match the damages period because the letter was filed by Marcatel in September 2017 and the damages period relevant to international terminations is between 2015 and the first quarter of 2016, after which Future Telecom withdrew from the Mexican market.[726] But beyond that problem, the Marcatel letter is only a letter seeking to obtain a favorable regulatory ruling. The actual data from Future Telecom and the actual historic termination rates during the damages period show that the rates did not drop during the damages period.

588. Third, Mr. Obradors attempts to use rates between Telcel and Austria Telekom in 2014 and between Telcel and T-Mobile in 2015 to show that rates offered by Telcel were "highly competitive."[727] His analysis, however, is wrong. Mr. Obradors compares the international termination rate for Telekom Austria with transit rates offered to T-Mobile.[728] These transit rates are significantly higher than what Tele Fácil agreed to pay Nextel and, more critically, say

723 *Id.*
724 *See* Dippon Second Report, ¶ 63, **C-112**.
725 *See* Analysys Mason Report, ¶ 43.
726 *See* Dippon Second Report, ¶ 65, **C-112**.
727 *See* Analysys Mason Report, ¶ 44, Figure 2.2.
728 *See* Dippon Second Report, ¶ 67, **C-112**.

nothing about the Telcel termination rate to T-Mobile. In the end, this hodgepodge of faulty analysis sheds no light on Claimants' damages.

589. Likewise, in his Figure 2.4, Mr. Obradors purports to show data indicating a sharp drop in rates in 2014 and 2015 but, again, his data and analysis are faulty. In his Reply Report, Dr. Dippon provides an extensive analysis of these shortcomings.[729]

590. In sum, Mr. Obradors proposes the use of a third party's estimate for August 2017, which is after Future Telecom exited the Mexican market, instead of using actual traffic and rate data. Mr. Obradors' critiques of the revenue estimation for the International Termination business should be rejected as speculative and unsupported.

591. Mr. Obradors' restated international termination damages must also be rejected as speculative and unsupported. As an initial matter, Mr. Obradors offers little support for his calculations. For example, his Figure 2.7 only has footnotes for one of ten lines of data, and that footnote only cites the Nextel transit rate and the Mexican peso to U.S. dollar exchange rate.[730] Beyond being unsupported, and as Dr. Dippon explains, his calculation is also riddled with errors.[731] The bottom line is that Mr. Obradors' restatement of international termination damages should be rejected because he (1) uses made-up data when real data is available, (2) uses unsupported traffic volumes and (3) uses termination rates that do not apply to Telmex and which are not the rates paid by international traffic providers like Future Telecom.[732]

729 *See id.* ¶¶ 69-75, **C-112**.
730 *See* Analysys Mason Report, ¶ 65.
731 *See* Dippon Second Report, ¶¶ 80-86, **C-112**.
732 *See id.* ¶ 86.

e. DID/Conferencing

592. For the DID/Conferencing line of business, Dr. Dippon created an econometric model using actual U.S. traffic data from the various conference service providers to forecast the estimated traffic in Mexico.[733] In simple terms, the NERA Model disaggregates each of the DID traffic projections and then uses market shares to allocate traffic going to Telmex, other landlines, Telcel, etc. The NERA Model then multiples the traffic by termination rates for each provider.

593. The general technique underlying Dr. Dippon's revenue estimation is that of benchmarking. Benchmarking is a well-known technique in economic analysis in which one market with known data is compared to another, similar market without available data. Adjustments are made to make the two markets equivalent enough for valid comparisons.

594. Mr. Obradors, as a non-economist, seems to be confused as to how a benchmarking exercise works. Indeed, he admits that, "we are somewhat perplexed by the methodology followed by Dr. Dippon."[734] Mr. Obradors goes on to admit that, "We note that the DID services market is relatively opaque and data for other markets is not easily found, so it is difficult to estimate the total traffic volume for DID services in Mexico."[735] But this is precisely when benchmarking should be used -- when data for Mexico is not available but data for the United States is available.

595. After admitting that data is not available for Mexico, Mr. Obradors asserts that an econometric model should not have been used to forecast using the US as a benchmark but, instead, an econometric model should be built to forecast demand for DID/Conferencing services

733 *See* Dippon First Report, ¶ 75, **C-010**.
734 Analysys Mason Report, ¶ 137.
735 *Id.* ¶ 140.

in Mexico.[736] Mr. Obradors does not build this model or even suggest how this model could be built.

596. Mr. Obradors also does not present a convincing case for why the U.S. data, with adjustments, cannot be used as a benchmark for Mexico for this business. For the most part, he relies on anecdotal observations – such as that "boxing and soccer" are popular in Mexico but not in the United States[737] – but this simply means that chat rooms in Mexico would focus on boxing and soccer while U.S. chat rooms would focus on sports that are more popular in the United States.

597. The economies of the United States and Mexico are sufficiently similar to allow the use of the United States, with adjustments, as a benchmark for the Mexican economy. The U.S. Congressional Research Service recently concluded that, "Mexico's economy is closely linked to the U.S. economy due to the strong trade and investment ties between the two countries."[738] Mexico is one of the United States' most important trading partners, ranking second among U.S. export partners and third in total trade (imports plus exports).[739] Exports comprised 37 percent of Mexico's GDP in 2017, with 80 percent of those exports headed to the United States.[740] Mexico's GDP real growth rate was 2.7 percent in 2015, 2.3 percent in 2016, and 2.1 percent in 2017, while the United States' GDP real growth rate was 2.9 percent in 2015, 1.5 percent in 2016, and 2.2 percent in 2017.[741] In fact, the relationship is aptly summed up in a

736 *Id.* ¶ 146.
737 *Id.* ¶ 155.
738 M. Angeles Villarreal, U.S.-Mexico Economic Relations: Trends, Issues, Implications at 11(Congressional Research Service March 27, 2018), https://fas.org/sgp/crs/row/RL32934.pdf, **C-129.**
739 *Id.* at 2.
740 *Id.* at 2.
741 *Id.* at 12 (Figure 4).

famous quote from Porfirio Diaz, a former President of Mexico: "Poor Mexico, so far from God and so close to the United States!" Here are some key economic indicators compared:[742]

Table 1. Key Economic Indicators for Mexico and the United States

	Mexico		United States	
	2007	2017[a]	2007	2017
Population (millions)	112	129	302	327
Nominal GDP (US$ billions)[b]	1,052	1,153	14,478	19,387
Nominal GDP, PPP[c] Basis (US$ billions)	1,565	2,352	14,478	19,387
Per Capita GDP (US$)	9,410	8,928	48,006	59,381
Per Capita GDP in $PPPs	13,995	17,743	48,006	59,381
Nominal exports of goods & services (US$ billions)	290	446	1,665	2,344
Exports of goods & services as % of GDP[d]	28%	37%	12%	12%
Nominal imports of goods & services (US$ billions)	308	443	2,383	2,915
Imports of goods & services as % of GDP[d]	29%	39%	17%	15%

Source: Compiled by CRS based on data from Economist Intelligence Unit (EIU) online database.

a. Some figures for 2017 are estimates.

b. Nominal GDP is calculated by EIU based on figures from World Bank and World Development Indicators.

c. PPP refers to purchasing power parity, which reflects the purchasing power of foreign currencies in U.S. dollars.

d. Exports and Imports as % of GDP derived by EIU.

598. Ironically, after criticizing the use of the U.S. as a benchmark for Mexico, Mr. Obradors proceeds to use the U.K., Sweden, Norway, Denmark, Holland, Israel and South Africa as comparable countries for parts of his analysis.[743] Mexico's argument against benchmarking rings hollow when its expert proceeds to use benchmarking with less comparable countries in his analysis.

599. Mr. Obradors presents what he claims are "inconsistencies" in the different sources used by Dr. Dippon.[744] However, as Dr. Dippon explains in his reply report, these alleged "inconsistencies" are not inconsistencies at all, but rather a reflection of Mr. Obradors' misunderstanding of the data sources.[745]

742 *Id.* at 2.
743 *See* Analysys Mason Report, ¶ 174.
744 *See id.* ¶ 150.
745 Dippon Second Report, ¶¶ 97-100, **C-112**.

600. Mr. Obradors also provides an alternative damages calculation that, not surprisingly given Analysys Mason's relationship with the IFT, results in a reduction of 99.4 percent to 98.3 percent of the revenue calculated by Dr. Dippon in his first report.[746] In his reply report, Dr. Dippon goes into extensive detail to explain why Mr. Obradors' alternative calculation is incorrect, and that detailed analysis need not be repeated here.[747]

f. Retail Services

601. Because Tele Fácil planned to offer retail service bundles to subscribers at a monthly rate, Dr. Dippon estimates retail revenue based on total subscribers rather than total traffic.[748] Estimated subscriber count is multiplied by the monthly bundle fees and then annualized.[749]

602. Mr. Obradors insists on making four "adjustments" to the retail model proposed by Dr. Dippon. This include revising: (a) the customer acquisition pattern; (b) average monthly revenue per customer; (c) revenue from activation, equipment, and technical support; and (d) marketing costs.[750] Not only are these adjustments incorrect, they reflect a lack of due care or skill by Mr. Obradors or perhaps a lack of both.

603. First, Mr. Obradors claims that it is "nonsensical" to assume customers are acquired at the start of each year and he applies an "S-curve" to customer acquisition.[751] The NERA Model, however, does not assume customer acquisition at the beginning of each year; rather, the Model follows the Concession Application, which uses both the average subscribers

746 *See* Analysys Mason Report, ¶ 185.
747 *See* Dippon Second Report, ¶¶ 109-134, **C-112**.
748 Dippon First Report, ¶ 85, **C-010**.
749 *Id*.
750 *See* Analysys Mason Report, ¶ 189.
751 *See id.*

for the year and total subscribers for each year.[752] Again, not only is Mr. Obradors wrong, but a careful analysis on his part would have prevented his mistake.

604. Second, Mr. Obradors replaces the monthly subscription fee from the Concession with his own estimate, which he claims is "actual data" from the Mexican market.[753] But he fails to explain why the subscription fee in the Concession does not reflect actual data, nor does he explain why the subscription plan he selects constitutes "actual data," especially since he estimates the fee to be 21 percent lower from 2015 to 2016 and 37 percent lower over the entire damages period.[754]

605. Dr. Dippon pulled the plans and rates for fixed-line services from an IFT publication – in particular the voice and broadband "double-play" services, which Mr. Obradors says is the appropriate comparison – and put them in Table 15 of his Reply Report.[755] The rates proposed by Mr. Obradors are far below the lowest rates shown by the IFT, and the actual offerings of the Tele Fácil Concession fall within the range of the plans offered by several other operators.[756]

606. Third, Mr. Obradors excludes "revenue from activation, equipment and technical support" because he claims other operators do not charge for these services.[757] Mr. Obradors, however, does not supply a citation supporting his assertion, nor does he explain why Tele Fácil could not charge for such services even if other operators did not.

752 *See* Dippon Second Report, ¶ 137, **C-112**.
753 *See* Analysys Mason Report, ¶ 189.
754 *See* Dippon Second Report, ¶ 139, **C-112**.
755 *Id*. ¶ 139, Table 15.
756 *See id.*
757 *See* Analysys Mason Report, ¶ 189.

607. Dr. Dippon researched this issue and found that the IFT publishes reports on different telecommunications plans and provides a link on its website that compares plans.[758] The website states that, for a number of operators, such as Cablecom, Cablemas, Cablevision, and Telecable, that a one-time installation charge applies.[759] Even Telmex charged for wiring, and its website lists the charge as MXD $1,130 for new subscriptions to double-play packages.[760] Strangely, Mr. Obradors retains these revenue categories in his own damages model after arguing they should be excluded[761] – another example of a lack of due care.

608. Fourth, Mr. Obradors replaces the marketing costs calculation in the NERA Model with a mix of anecdotal data sources culled from general business magazines or random Internet searches.[762] He does this without explaining why the model from the Concession that was approved by COFETEL is not appropriate. For example, he assumes one retail storefront would be needed, even though the Concession states the marketing would be done through "big store brands," and includes a salary for a salesperson and marketing service line.[763]

609. For the setup of this new store, Mr. Obradors relies on a 2011 magazine article about "Little Green Beans," which is a children's supply consignment store in Austin, Texas specializing in children's clothing, toys and equipment and furnishings such as strollers and high chairs.[764] For his estimation of the size of the store, he uses a 2010 presentation by a company in the United Kingdom that operates stores like Best Buy for consumer electronics.[765] The lease rate he uses is from a 2017 article for average commercial lease rates for shopping malls in

758 *See* Dippon Second Report, ¶ 141, **C-112**.
759 *Id.*
760 *Id.*
761 *See id.*
762 *See id.* ¶ 142.
763 *See id.*
764 *See id.* ¶ 143.
765 *See id.*

Mexico City, from which he takes a rough average without explanation.[766] This approach is not scientific in the least, nor is it in line with accepted methods of calculating damages. Again, all of this is emblematic of the lack of due care exercised by Mr. Obradors in the preparation of his analysis.

610. In sum, Mr. Obradors makes a number of "adjustments" to the Retail Services portion of the NERA Model but, upon closer examination, none of these adjustments is appropriate or well-founded.

g. Competitive Tandem Services

611. Dr. Mariscal uses an econometric model to estimate revenue for the Competitive Tandem Services line of business. In her Conservative Scenario she estimates the minimum value of the residential and non-residential subscribers that would have been transferred to Tele Fácil using a 30 percent estimate of subscribers transferred.[767] She also uses a 75/25 percent revenue split between Tele Fácil and the competitive carriers transferring subscribers.[768] In her Moderate scenario, she uses a more optimistic assumption of 50 percent of subscribers transferred and an 80/20 percent split of revenue between Tele Fácil and the other competitive carriers.[769] Although her revenue estimations are more complex than those for the other revenue streams, her estimations are based on a well-accepted model for non-facilities-based entry (which is when an entrant interconnects with existing carriers rather than building a new network infrastructure) into a market, as well as based on actual data from the Mexican telecommunications market.

766 *See id.*
767 Mariscal First Report, ¶ 121, **C-011**.
768 *Id.* ¶ 130.
769 *Id.* ¶ 122.

612. Mr. Obradors' principal argument against the Competitive Tandem Services line of business is that, in his non-legal expert opinion, it is illegal. Mr. Obradors asserts that, "there are no similar services being offered in other markets."[770] Consequently, Mr. Obradors likens the Competitive Tandem Service to number portability and proceeds to attack it as if it were a number portability service.[771] This is a classic "straw man" argument.

613. This issue is addressed in Section IV(A) above. For present purposes, it is enough to note that Mr. Bello, in his witness statement, explains that the Geographic Number Transfer process and number portability are "entirely different concepts, both legally and technically."[772] In the Geographic Number Transfer process, "telephone numbers may be transferred from one operator to another operator as long as the transfer is jointly requested by the operator who has the numbers assigned and the operator to whom the number will be transferred."[773] The end user still receives a bill from the same carrier and no end user consent is required "because nothing changes from the end user's perspective."[774] Mr. Obradors' clumsy attempt to conflate the two concepts should be rejected.

614. Another fundamental problem with Mr. Obradors' argument is that he is trying to analyze the Competitive Services Tandem project as a retail business, when, in reality, it would have been a wholesale business.[775] Tele Fácil's business proposition was aimed at the wholesale market by providing calling termination services to other operators.[776] Mr. Bello describes the process: "an operator that receives calls simply transfers the numbers to Tele Fácil and, from that

770 Analysys Mason Report, ¶ 76.
771 *Id.*
772 Bello Statement, ¶ 4, **C-004**.
773 *Id.*
774 *Id.*
775 *See* Mariscal Second Report § 3.2, **C-113**.
776 *See id.*

moment, Tele Fácil will receive any calls to such numbers, will be responsible for transiting those calls, and is entitled to be paid the interconnection rate by the originating carrier."[777]

615. Contrary to Mr. Obradors' assertions, the Geographic Number Transfer process is a common practice in Mexico.[778] According to Mr. Bello, it is common for operators to use other operators' numbers.[779] He uses the example of Nextel during the 2003 period in which it used numbers that were assigned to Telmex and the end users never knew of the situation.[780]

616. Mr. Obradors' next set of critiques of Dr. Mariscal's econometric model reveal his lack of understanding of the scientific method used in providing economic evidence, rather than on any defect in Dr. Mariscal's work. In her Reply Report, Dr. Mariscal patiently wades through Mr. Obradors' unfounded criticisms and explains economic theory and practice in a clear and practical way.[781]

617. For example, Mr. Obradors criticizes Dr. Mariscal for discussing various models that she ends up not using.[782] But that is the essence of a "best fit" exercise that includes revising and discarding other methodologies so that a valid methodology can be found. Dr. Mariscal comments: "This statement clearly reflects a lack of understanding about the scientific method used in presenting economic evidence, and why reviewing different methodologies to estimate damages is a standard step employed before choosing one particular methodology."[783] She also makes the point that, "there would have been no use for an expert economist if all the models could be estimated and none could be discarded."[784]

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777 Bello Statement ¶ 6, **C-004**.
778 *See id.* ¶ 7.
779 *See id.*
780 *See id.*
781 *See* Mariscal Second Report, § 4, **C-113**.
782 Analysys Mason Report, ¶ 89.
783 Mariscal Second Report, ¶ 24, **C-113**.
784 *Id.* ¶ 34.

618. Showing again his lack of knowledge of economic modeling, Mr. Obradors complains that the model used by Dr. Mariscal is "very simple" and uses "unjustified parameters."[785] Dr. Mariscal used an Industrial Organization model referred to as the Bijl and Peitz (2003),[786] which is named for the authors of the book that describes it. Bijl and Peitz describe a general model and then develop different variants by changing different assumptions.[787] Their model has a theoretically based payoff function or profit function grounded in a market similar to the "but for" market Tele Fácil would have operated in.[788] The model is designed to arrive at a profit function to estimate Tele Fácil's potential gains and stopped at that point.[789] Mr. Obradors' criticism is, therefore, unfounded and based on his ignorance of economic modeling, rather than a valid critique of the model.

619. Finally, in several instances, Mr. Obradors criticizes Dr. Mariscal's calculations and suggests alternate data inputs from the market model that Analsys Mason constructed for the IFT for regulatory purposes. For example, Mr. Obradors suggests that the figure for off-net traffic in Dr. Mariscal's model should be 27% based on the market model.[790] The version of the market model publicly available, however, does not include a description of the variables necessary to do these calculations. Respondent, however, has refused to produce this information when requested[791] and stated that Mr. Obradors only relied on four items to produce his report – the market model not being one of the four. Claimants also requested information

785 Analysys Mason Report, ¶ 89.
786 *See* Mariscal Second Report § 10(d), **C-113**.
787 *See id.* ¶ 43.
788 *See id.* ¶¶ 44-46.
789 *See id*.
790 Analysys Mason Report, ¶ 100.
791 Letter dated 31 May 2018 from Samantha Atayde Arrellanno to Equardo Zuleta Jaramillo, President of the Tribunal.

about the net-call recipients for each carrier and similar information relevant to Mr. Obradors' criticisms. Respondent refused to produce any of this information.

620. Section 3.3 of Mr. Obradors' expert report, consisting of paragraphs 96-105, must, therefore, be ignored because of Respondent's failure to produce the information used by Mr. Obradors' to fashion his critique. Without the ability of both sides to examine the information requested, it is impossible for Mr. Obradors calculations to be replicated and also impossible for the Tribunal to determine whether his critique in Section 3.3 is well-founded.

V. REQUEST FOR RELIEF

621. On the basis of the foregoing, without limitation and fully reserving their right to supplement this request, Claimants respectfully request the following relief:

a. A final declaration that the Government has breached its obligations to Claimants under the NAFTA;

b. An order that the Government pay Claimants compensation for their losses, currently quantified at USD 472,148,929;

c. An order that the Government pay Claimants pre-award compound interest, at a commercially reasonable rate or such other rate determined by the applicable law;

d. An order that the Government pay Claimants post-award compound interest, at a commercially reasonable rate or such other rate determined by the applicable law, until the date the compensation is actually paid;

e. An order that the Government pay the costs of this arbitration proceeding, including the costs of the Tribunal and the legal and other costs incurred

by the Claimants, on a full indemnity basis, together with interest on such costs, in an amount to be determined by the Tribunal; and

f. Such other and further relief as the Tribunal may deem appropriate.

622. Claimants reserve the right to amend or supplement this Statement of Claim.

Respectfully submitted,

June 5, 2018

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