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**BEFORE THE HONORABLE ARBITRATION TRIBUNAL ESTABLISHED PURSUANT TO
THE CHAPTER ELEVEN OF THE NORTH AMERICAN FREE TRADE AGREEMENT
(NAFTA)**

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

v.

**THE UNITED MEXICAN STATES
(RESPONDENT)**

ICSID CASE No. UNCT/17/1

Post Hearing Submissions of the Respondent

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I. INTRODUCTION

1. As directed by the Tribunal, the Respondent shall focus these discrete post-hearing brief submissions on summarizing its defence (with reference to the appropriate sources for the Tribunal's ease) and explain how that defence was further substantiated by the oral evidence provided by the factual witnesses, legal experts, and damages experts at the hearing of this matter on the 22 April to 26 April 2019.

2. With the close of evidence, it is clear that the Respondent's telecommunications regulator and Courts acted promptly, fairly and within the proper scope of their legal mandate in resolving the dispute between two private parties: Tele Fácil and Telmex. In the same manner, and based on the evidence in the casefile and the oral testimony provided by witnesses and experts during the hearing in this arbitration, it is discredited the Claimant's position that the Mexican government acted collusively to affect its alleged investment. On the contrary, the Claimant, like any economic agent or private party, has had access to the relevant authorities and specialized courts.

3. The submissions that follow regarding the oral evidence proffered at the hearing further cement the establishment of the following key facts for the Tribunal's consideration in reaching a determination in this proceeding:

- Resolution 381 was based entirely and appropriately on whether a disagreement existed as between Tele Fácil and Telmex and its appropriate resolution in terms prescribed by article 42 of the LFT. It did not focus on whether a binding agreement on interconnection fees existed. Confirming agreements is not within the mandate of the IFT, and there is no reason to justify a position in that regard. The IFT, in this context, is a dispute resolution body of interconnection disagreements. In any event, there was never an agreement between Tele Fácil and Telmex on interconnection rates;
- Resolution 381 issued by the IFT did not decide interconnection rates between Tele Fácil and Telmex;
- Decree 77, which was subsequently issued by the IFT, served solely to clarify the scope of Resolution 381 and did not decide interconnection rates between Tele Fácil and Telmex;
- In three separate amparo claims, the Courts specialized in telecommunications matters affirmed that: i) the reference to interconnection rates in Resolution 381 was only made to explain the reason why the IFT did not rule on interconnection rates in Resolution

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381, ii) that the IFT had not imposed an obligation on Telmex and Tele Fácil to execute an interconnection agreement that contained rates from the First Telmex Proposal, iii) that Decree 77 only determined the scope of Resolution 381, and iv) that Resolution 127 was not a matter determined previously in Resolution 381 because the only points in dispute analyzed and resolved in Resolution 381 were those related to indirect interconnection and the costs associated with numeric portability; and v) Tele Fácil had access to and availed itself of its rights to justice under the Mexican legal system however failed to exhaust these remedies, thus disabling itself from advancing any denial of justice under international law.

4. As the Respondent has also consistently put forward, the Tribunal here is being asked to determine the appropriate application of the NAFTA to the following issues:

- Whether the interconnection agreement with Telmex that Tele Fácil alleges to have perfected constitutes an “investment” in the territory of the United Mexican States;
- If the Claimant have any investment, whether that investment was directly or indirectly expropriated in violation of NAFTA Article 1110; and
- Whether any alleged act or omission of the IFT, the Mexican Courts or any other organ of the Mexican State amounted to a denial of justice at customary international law or any other violation of NAFTA Article 1105.

5. The submissions that follow are intended to draw from the oral testimony that evidence during the hearing, which the Respondent submits should colour the Tribunal’s considerations of these defining questions.

6. This post-hearing brief will also address in further detail the questions the Tribunal asked the parties in this arbitration during the hearing.

II. MATERIAL FACTS ESTABLISHED AT THE HEARING

A. Tele Fácil’s original Concession

7. As evidenced during the hearing before the Tribunal, in 2011, when Tele Fácil applied for an application for a Concession was aware of the risks of its investment. The partners of Tele Fácil were told by their lawyer, Mr. Bello, about such risks that Telmex’s monopolistic power represented:

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“Well, I told them there was a monopoly and that that would be a complicated matter [...]”.¹ Tele Fácil's partners were aware of the risks it faced when entering the Mexican market and knew that Telmex controlled 65% of the telecommunications market in Mexico at that time.²

8. The lack of direct involvement of the Claimant, Mr. Nelson, with Tele Fácil's business is demonstrated by the fact that he was not involved in the preparation or delivery of the Concession Application. When asked whether he reviewed the Concession application at the hearing, he responded that “I don't believe I actually saw this one before it was submitted”.³

9. The evidence provided at the hearing supports a finding that it was Mr. Sacasa who provided the data included in the planning documents⁴ attached to the Concession application.⁵

10. It is also telling that the application for Concession included financial projections for the first five years of Tele Fácil's operations that projected net losses in the amount of \$1,407,862, followed by projected net gains of \$2,327,628 in the following three years.⁶ Tele Fácil was unable to advise whether these projections were in US dollars or Mexican Pesos, although Mr. Sacasa testified that “it seems to be in Mexican pesos”.⁷

11. Tele Fácil was granted the requested Concession on 17 May 2013 with a duration of 30 years.

B. The Negotiations between Tele Fácil and Telmex

12. As the Tribunal will recall, on 7 August 2013, Tele Fácil requested to negotiate an interconnection agreement with Telmex.⁸

13. Later, on 26 August 2013, Telmex sent Tele Fácil a draft interconnection agreement (the “First Telmex Proposal”).⁹ At the hearing, Tele Fácil confirmed that the First Telmex Proposal was the “standard proposal” in “the format that was used by everybody”.¹⁰

14. The First Telmex Proposal offered a reciprocal interconnection rate of USD \$0.00975 until 31

¹ Transcript of Hearing (“Transcript”), Evidence of Carlos Bello (“Bello”), Vol.2, p.287 (EN).

² Transcript, Mr. Bello, Vol 2, p. 287 (EN).

³ Transcript, Evidence of Joshua Nelson (“Nelson”), Vol. 2, p. 330 (EN).

⁴ The planning documents consisted of six annexes, including: a description of the services that Tele Fácil intended to provide; and a business plan that described the technical specifications of the project and the investment and financial programs. Exhibit C-016.

⁵ Transcript, Evidence of Miguel Sacasa (“Sacasa”), Vol. 2, p. 401-403 (EN).

⁶ Transcript, Mr. Nelson, Vol 2, pp.330-332 (EN).

⁷ *Id.*, Vol. 2, p. 331 (EN); Transcript, Sacasa, Vo.2 p. 401 (EN).

⁸ Exhibit C-058.

⁹ Exhibit C-02, Witness Statement of Jorge Blanco, ¶ 53.

¹⁰ Transcript, Mr. Bello, Vol. 2, p. 313 (EN).

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December 2017.¹¹ As a related point, Mr. Bello confirmed that at the time that the First Telmex Proposal was offered to Tele Fácil, Telmex had not been declared a Preponderant Economic Agent (“PEA”) and Telmex was not subject to asymmetrical regulation.¹²

15. At the hearing, President Zuleta asked Mr. Bello whether during the period between receiving the First Telmex Proposal and Telmex being declared a PEA, Tele Fácil provided any comments to Telmex on that document. Mr Bello’s responded as follows:

THE WITNESS: In that timeframe, between August, I don't recall if we had meetings with Telmex. I don't actually recall if we sent anything to Telmex in that timeframe.

And I apologize, prior to the Resolution on Preponderance.¹³

16. President Zuleta sought further confirmation on this answer with the following exchange:

PRESIDENT ZULETA: So, prior to the Preponderance Resolution, did you comment, did you pose any objections about the indirect interconnection and portability?

THE WITNESS: I don't believe so. When we--I think we went back to Telmex after the Preponderance Decision, but I cannot truly say if there's nothing--I don't know if there was any e-mail exchange, but, quite honestly, I don't recall.¹⁴

17. With respect to the Exhibits that form the written evidentiary record, the Respondent notes that Tele Fácil’s only written response to the First Telmex Proposal, which included proposed amendments to the First Telmex Proposal, was delivered to Telmex until 8 July 2014.

18. Tele Facil has claimed that various negotiations took place between it and Telmex between the First Telmex Proposal being delivered on 26 August 2013 and the delivery of Tele Facil’s written response on 8 July 2014. Those alleged negotiations were carried out by Mr. Sacaca and Mr. Bello on behalf of Tele Fácil.¹⁵

19. Mr. Bello, in particular, claims to have had a meeting with Mr. Gallaga (from Telmex) sometime after Telmex became a PEA, and that Mr. Gallaga renewed or confirmed the First Telmex Proposal. In response to a question from President Zuleta, Mr. Bello described that meeting as follows:

THE WITNESS: Yes, that is correct. I do recall clearly that there was a lot of movement in the sector. The Regulator had created the Preponderance Rules. There

¹¹ *Id.*, Vol. 2, p. 289 (EN).

¹² *Id.*, Vol. 2, p. 289 (EN).

¹³ *Id.*, Vol. 2, p. 313 (EN).

¹⁴ *Id.*, Vol. 2, pp. 313-314 (EN).

¹⁵ Transcript, Evidence of Jorge Blanco (“Blanco”), Vol. 2, p. 378 (EN).

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was a new bill underway--it was very large--and we went back enough to the Preponderance Measures.

I do recall I thought it was also going to--interconnection would be very much easier, and Tele Fácil's entry into the sector; and, for that reason, we went back to Telmex to--we were ready with our network, so we went back to Telmex to tell them or ask them if something was going to change.

We knew that there would be new regulations coming out, we knew that things could change, and we were also curious to know if they were going to change the offer, particularly the rate, and Telmex confirmed that nothing would change; it was "take it or leave it." They were very blunt. We are going to combat this Resolution, and it doesn't apply to us. If you want anything, it's the original offer.¹⁶

20. In respect of that meeting, Mr. Bello confirmed that Tele Fácil never asked for written confirmation of that alleged renewal.¹⁷ Moreover, the following exchange demonstrates how Tele Fácil accepted Mr. Gallaga's "take it or leave it" offer:

PRESIDENT ZULETA: How did you accept that offer? You know that there is a discussion here as to whether that offer was accepted or not accepted under which terms.

So the question is: How do you understand? It's not a legal question. You're a factual witness, but how was this offer accepted, the offer that was issued on the date that we saw earlier?

THE WITNESS: Tele Fácil formally sent Telmex a letter with the terms we did not want and accepting the remainder. For us, that was acceptance, but this is something that the IFT had to resolve--that was Resolution 381--and that, for us, was confirmed.

PRESIDENT ZULETA: Yes, but the letter you sent indicating what you didn't agree to, do you recall if it had any other variant other than your not agreement with the interconnection and portability?

THE WITNESS: I would have to read it, but yes, we did convey the idea that the only thing we didn't agree with was--well, we didn't formally write--formally write "Yes, I accept each and every term except for these two." The only area that there is a disagreement on was the interconnection--direct interconnection and portability charges.

PRESIDENT ZULETA: Very well. Thank you very much.¹⁸

21. One of the key issues that remained unanswered until the hearing was the rationale for Tele Fácil not responding in writing to the First Telmex Proposal of 26 August 2013 until 8 July 2014. However, this question was answered during the testimony of Mr. Blanco at the hearing.

¹⁶ Transcript, Mr. Bello, Vol. 2, p. 314-315 (EN).

¹⁷ *Id.*, Vol. 2, p. 315 (EN).

¹⁸ Transcript, Mr. Bello, Vol. 2, pp. 316-317 (EN).

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22. On 9 May 2014, Mr. Sacasa sent a written report¹⁹ to Mr. Nelson and Mr. Blanco.²⁰ Mr. Blanco confirmed that Mr. Sacasa's written report was describing a meeting between Tele Fácil and Telmex.²¹

23. The following passage from Mr. Sacasa's report was read to Mr. Blanco during his cross examination:

Our Strategy: I consider that after Telmex's refusal to comply with the provisions of the law and the low possibility that [REDACTED] agrees to mount an IP interconnection, we proceed to sign the contracts with these operators under the conditions that we already know. In this way, we comply with the regulation mandate that there must be an agreement signed between two operators to allow traffic between their interconnected networks. At the moment of signing the contracts (which I estimate will be the same scheme with [REDACTED]) we will not mention that we will use the indirect interconnection scheme (this option appears automatically activated in the contracts) so that, once the instruments have been agreed upon, we will notify to the operators via a Notary Public that we have opted for the indirect interconnection scheme and that we will use another operator to receive and deliver local-local traffic (in the transit mode) on the TDM infrastructure that they already have in operation with said operator, and that we all know will be NexTel.²²

24. In response to questions relating to Tele Fácil's strategy to not negotiate the issue of indirect interconnection openly with Telmex, Mr. Blanco then made the following clarification:

[...] So, when you read this, do you recall if you raised any concerns with Mr. Sacasa about the fact that indirect interconnection wasn't being negotiated openly with Telmex but the plan was to sign the Agreements and then notify them of indirect interconnection? Would that have caused you concern when that was reported to you?

A. No.

Q. And can you explain why not openly telling Telmex about indirect interconnection would not have caused you concern?

A. Because everyone knew that Telmex was not willing to comply with the new regulations to allow other types of connections, that they were using that 1870 technology in a time when AT&T, for instance, was mandating that all new interconnections be in IP, VOIP, Voice-Over Internet Protocol, and requiring within a limited time frame that all their existing customers switch over. Telmex was making it clear that they weren't willing to do Voice-Over Internet Protocol; hence, we were having to come up with ways that we could effect this strategy.²³

¹⁹ Reporte titulado "Resumen del estado que guardan las negociaciones para llevar a cabo la interconexión con otros concesionarios".

²⁰ Exhibit R-001.

²¹ Transcript, Mr. Blanco, Vol. 2, pp. 383-384 (EN).

²² *Id.*, Vol. 2, pp. 383-384 (EN) and Exhibit R-001. .

²³ Transcript, Mr. Blanco, Vol. 2, pp. 386-387 (EN).

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25. Mr. Blanco then went on to provide the rationale for Tele Fácil's negotiation strategy to remain silent with Telmex on the issue indirect interconnection until after the signing the Interconnection Agreement:

Q. And I take it one of the way would be to notify them of indirect interconnection after the signing of the Agreement?

A. You have to realize that we were dealing in an environment with a monopolistic carrier who may not have been monopolistic but their behavior, just like AT&T's was prior to 1984, was completely monopolistic. This is a carrier who would go to any lengths to get its way, and there was no real supervision by the regulatory agencies to that effect. They were telling us that they weren't going to do indirect when we knew that one of the ways that Telmex has historically put bottlenecks to keep growth from its competitors was utilizing TDM networks and not expanding the networks.

So, did we use strategies? Did David use a strategy against Goliath? Yes. We came up with strategies.²⁴

26. It is clear that the strategy employed by Tele Fácil was to remain silent on the issue of indirect interconnection and portability until it was ready to partially accept the First Telmex Proposal.

27. Notably, there is no evidence that Telmex ever offered to Tele Fácil the possibility to partially accept their First Proposal. To the contrary, Mr. Bello's argument is that Mr. Gallaga's renewal of the First Telmex Proposal after Telmex was declared as PEA was on a "take it or leave it" basis. Tele Fácil's correspondence of 8 July 2014 to Telmex cannot be described as a "take it" acceptance of the entire First Telmex Proposal.

28. What has become apparent is that this strategy by Tele Fácil then became coupled with its tactic to almost immediately commence an interconnection dispute. As set out in the next section, this tactic is a significant driver in what then occurred before the IFT.

C. The interconnection dispute between Tele Fácil and Telmex and Resolution 381

29. Just three days after delivering its 8 July 2014 written response to Telmex, on 11 July 2014 Tele Fácil requested the IFT's intervention to resolve the interconnection dispute with Telmex.²⁵ Commencing the interconnection dispute within approximately 72 hours of responding to Telmex is consistent with the strategy described by Mr. Blanco.²⁶

²⁴ *Id.*, Vol. 2, p. 387 (EN).

²⁵ Exhibit C-025.

²⁶ Transcript, Mr. Blanco, Vol. 2, p. 387 (ENG).

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30. That interconnection dispute was undertaken by the IFT in accordance with Article 42 of the abrogated Federal Telecommunications Law (“FLT”). Article 42 established that if within 60 days after the commencement of negotiations the concessionaires didn't reach an agreement, it was then up to the Regulator to resolve those interconnection terms that had not been agreed upon.²⁷

31. According to Mr. Sóstenes Díaz, this meant that there was an obligation for concessionaires to interconnect their networks, and only if there was a disagreement would the authority intervene. Further, when the authority intervenes, it has to demonstrate that the pre-requisites of the regulations in Article 42 are complied with. That is, that both are concessionaires of the public telecommunications network, negotiations took place for at least 60 days, and one of the parties has informed the other which conditions it did not agree to during the negotiation process.²⁸

32. The Tribunal is aware that Tele Fácil's request for the authority's intervention identified only two items of disagreement: “Indirect Interconnection” and “Portability Charges”.²⁹

33. In response, Telmex submitted that there was no disagreement on indirect interconnection and portability, but that there was disagreement on interconnection rates.³⁰ Telmex also confirmed it was interested in executing an agreement with Tele Fácil and attached a new proposal (“Telmex's Second Proposal”) to the reply. Telmex's Second Proposal contained modifications on indirect interconnection and portability rates.³¹

34. Tele Fácil responded further arguing that there was no disagreement on interconnection rates, and that the only items to be resolved by the Regulator were indirect interconnection and portability.³²

35. To summarize, the authority was then faced with the following situation:

- Tele Fácil taking the position that the disagreement concerned only indirect interconnection and portability; and
- Telmex taking the position that the dispute concerned only interconnection rates.

²⁷ Transcript, Evidence of Sóstenes Díaz (“Díaz”), Vol. 2, pp. 407-408 (EN).

²⁸ *Id.*, Vol. 2, p.408 (EN).

²⁹ Exhibit C-025, pp. 2 - 5.

³⁰ Exhibit C-029, pp. 12-13.

³¹ Exhibit R-007, This second proposal included a bill & keep (Clause 4) clause and a reciprocity clause (Clause 14), however, it omitted Annex C with the interconnection rates. Another significant change was that it incorporated new language to Clause 21 (Litigation) indicating that Telmex was litigating the asymmetrical regulations imposed by IFT in Mexican courts and added a new clause that obligated both Telmex and Tele Fácil to “observe, respect and apply the terms” of any rulings issued by the courts in such proceedings.

³² Exhibit R-066.

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36. Mr. Sóstenes Díaz, who was responsible for the drafting Resolution 381,³³ explained that before Resolution 381 was issued, Telmex granted Tele Fácil's requests on numerical portability and indirect interconnection, but also raised a disagreement with respect to interconnection rates.³⁴

37. In this context, Mr. Díaz explained the process as follows:

Q. And the Institute was forced to determine in the first place the extent of the disagreement between the operators, and in particular, whether it included a dispute regarding interconnection rates; correct?

A. When we do the analysis about what are the conditions not agreed upon, we need to see whether they are supported by the normative hypothesis; that is to say, whether during the negotiation process one of the Parties has asked another--and there is a record of it in the record--in the file, that it is stated as a formal communication as between the Parties; and second, that at least one of the Parties seeks its Resolution from the Institute.

So, when we analyze the question of rates from Telmex, while it met the second requirement, which is that one of Parties was requesting it, it did not meet the first requirement, which is that in the course of negotiations, Telmex had formally communicated to Tele Fácil its disagreement in respect of rates.³⁵

38. The Respondent submits that it is important for the Tribunal to understand and recognize that in conducting such an analysis, the IFT's assessment is focused on whether there is documentary evidence of a disagreement and not on whether an actual agreement exists. This was confirmed by Mr. Díaz in response to a question posed by Arbitrator Gómez Peralta:

ARBITRATOR GOMEZPERALTA: My question is whether the IFT conducts a legal evaluation on the terms--or legal terms of whether consent was given, if there was an agreement, but looking at it from the legal standpoint.

Does the Institute conduct such a legal assessment?

THE WITNESS: No. What we evaluate is whether there is a disagreement. We don't look at whether there is agreement. We focus on disagreements. [...] ³⁶

39. The process for assessing whether a disagreement exists was further explained by Mr. Díaz in response to a question posed by President Zuleta:

PRESIDENT ZULETA: I have two questions.

You have referred to the fact that there is no document. So, what evidence do you look at to see if there is a disagreement or not? Does it suffice for one of the Parties to say

³³ Transcript, Mr. Díaz, Vol. 2, p.418 (EN).

³⁴ *Id.*, pp. 432-433 (EN).

³⁵ *Id.*, Vol. 2, pp. 433 (EN).

³⁶ Transcript, Mr. Díaz, pp. 479-480 (EN).

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there is a disagreement, or is some other analysis conducted and, if so, what?

THE WITNESS: Normally, what we look at is to see if the file first has a document which we call the "Start of Negotiations." This is important to verify the negotiations were actually conducted and that you can then start counting the 60 days.

Furthermore, in the file, there may be different exchanges of formal letters or communications between the Parties where one expresses to the other one that it does not agree with certain elements under certain condition, and it's very specific.

For instance, I would like to negotiate with you the rate that is applicable for the period 1 January-31 December of such-and-such a year.

So it's things like that we look into.³⁷

40. The repeated suggestions by the Claimant that the IFT determined that an agreement on interconnection rates existed between Telmex and Tele Fácil are factually incorrect. The analysis underpinning Resolution 381 is based on whether there was evidence of a disagreement – not evidence of an agreement.

41. In Resolution 381, the IFT resolved only two conditions. These were numerical portability and indirect interconnection.³⁸ In this regard, there are two types of conditions: those conditions agreed upon by the Parties and those that are resolved by the IFT. Resolution 381 required that Telmex and Tele Fácil sign an interconnection agreement that includes the two conditions addressed by Resolution 381, but did not impose any other mandatory terms or conditions on that interconnection agreement.³⁹ Mr. Díaz confirmed that this was further reinforced by the inclusion of the sentence in Resolution 381 that reads as follows: “This is without prejudice that Tele Fácil, Telmex and Telnor formalized terms, conditions, and tariffs for interconnection ordered through this Resolution”.⁴⁰

42. One of the criticisms raised by the Claimant is that the IFT’s focus on the existence of a disagreement rather than confirming the existence of an agreement creates a situation where the parties could start the interconnection dispute process with agreed terms and then end that dispute process with disagreement on those agreed terms. Mr. Díaz fully addressed this issue as follows:

A. In keeping with the law, what is presupposed is that the concessionaires will agree on part of the Agreement, perhaps all of the Agreement, some questions which are difficult by nature, they will not be able to agree on, and they will go to the Institute,

³⁷ *Id.*, pp. 480-481 (EN).

³⁸ *Id.*, pp. 409-410 (EN).

³⁹ *Id.*, pp. 409-410 and 430-431 (EN).

⁴⁰ Transcript, Mr. Díaz, Vol. 2, pp. 409-410 (EN).

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and the IFT will resolve them.

But it is not something which is part of the interconnection procedure. The interconnection procedure is to determine disagreed terms. If a concessionaire wants to be certain that he will come out of the interconnection process with the entire Interconnection Agreement, what he can do is put before the Institute as disagreed terms each and every one of the clauses of the Agreement to be certain that, at the end the day, he will have the Agreement together with the interconnection rates, provided that they are all under the hypothesis of Article 42, then, and Article 129 now.

Q. Commissioner Díaz, it is your position that if a carrier wants to maintain agreed terms, they must now submit all of the agreed terms to the IFT as if they are disagreed?

A. No. I'm just saying what is the scope of the interconnection procedure. The interconnection procedure, as established by the Supreme Court of Justice, is intended to resolve disagreed terms. We cannot say anything about the agreed terms. I cannot resolve something that has been agreed under the interconnection procedure.

What we understand and what has historically happened is that a large portion of the Agreement is agreed by the Parties. They go to the Authorities to resolve the disagreed terms, and finally they sign what was freely agreed and what was decided by the authority.⁴¹

43. A final note with respect to Resolution 381: the Respondent notes the exchange between Arbitrator Veeder and Mr. Díaz which took place at the hearing, in which Mr. Díaz was asked about what Arbitrator Veeder characterized as the “unfortunate” wording at page 13 of Resolution 381:

ARBITRATOR VEEDER: Would you wish to change any wording in these two paragraphs in the light of what you know today?

THE WITNESS: Yes, perhaps if I were to redraft this Resolution, I would be more specific when referring to the scope of what's included in the disagreement, and I would be more careful--to be more careful with any statements made.

ARBITRATOR VEEDER: Well, let's look at the first paragraph where it finishes, and I read the English: "on which Tele Fácil had full knowledge of and consented to the same." I see in the Spanish at the top of Page 14.

THE WITNESS: Yes, I see it.

ARBITRATOR VEEDER: Would you wish to change that wording now?

THE WITNESS: Today, I would try to be more precise in drafting it. Perhaps pointing out that the Resolution was limited only to the number portability and to the indirect interconnection.⁴²

⁴¹ *Id.*, Vol. 2 pp. 463-464 (EN).

⁴² Transcript, Mr. Díaz, Vol. 2 pp. 476 (EN).

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44. The Claimant seeks improperly to support her position in that “unfortunate wording” (included in the Recitals “Considerandos” not the Dispositifs “Resolutivos”) to conclude that Resolution 381 expressly ordered the execution of the First Telmex Proposal by Telmex and Tele Fácil with modifications only to numerical portability and indirect interconnection. The Claimant relies upon two experts, Mr. Soria and Dr. Alvarez, to support this position. However, these two experts did not participate in the IFT’s decision-making process that underpins Resolution 381, nor the drafting of Resolution 381, nor any of the related *Amparo* proceedings.

45. By contrast, the person who was responsible for the drafting of Resolution 381, Mr. Díaz, has testified that Resolution 381 did not order Telmex and Tele Fácil to execute the First Telmex Proposal with modifications only to numerical portability and indirect interconnection. The IFT further confirmed this fact through the issuance of Resolution 77. Moreover, both Resolution 381 and Decree 77 were also subject to *Amparo* proceedings, in which it was reviewed and confirmed that the actions taken by the IFT were consistent with the applicable law

46. The importance of reading Resolution 381 as a whole and in context, rather than taking two paragraphs out of context, was explained by Mr. Buj as follows:

Q. But we just walked through these paragraphs, and there was a disagreement between Tele Fácil and Telmex, and it was resolved by the Regulator; correct?

A. Well, that's why one must put context to the paragraphs that we've read. In effect, at no part of my opinion do I mention that this is the clearest Resolution in the world, but nor that it should be read in isolation.

There are two ways of looking at this resolution. Looking at just two paragraphs from Pages 13 and 14 to which I refer in my opinion, or analyzing the context in which it was issued, and your question, Attorney, is very important because Telmex, what it says--Telmex says there is no agreement. The IFT, acting formally speaking in the terms of Article 42 says, "I don't find any evidence that there's been a negotiation that was rejected with respect to rates; therefore, I'm not going to issue any ruling on them."

Reading only these two paragraphs, it seems to me a mistake.

Now, answering your question, what can the IFT resolve? The IFT can resolve only the terms not agreed upon as between the Parties, any term agreed upon between the Parties cannot be resolved by the IFT. It might be controverted by the IFT if it's against a public policy provision but not within Article 42.⁴³

47. Following this response by Mr. Buj, the Claimant attempted to equate the finding by the IFT that there was no dispute on rates for the purpose of Article 42, with a finding of fact that there

⁴³ Transcript, Mr. Buj, Vol. 3, pp.811-12 (EN).

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was no dispute on rates:

Q. In exercising that authority, the IFT found that there was not a valid dispute because the Interconnection Agreement had been agreed to; correct?

A. In the paragraph we just read, what it says is that it doesn't meet the requirements of 42; right?

Q. Right.

But, in its exercise of authority, it's deciding whether or not something is a dispute and, therefore, you know, in relation to Article 42 whether they can resolve it as a dispute.

A. Well, you asked my opinion, and I'm giving you my opinion.

It seems to me that what the IFT is resolving here is a strictly formal matter. I don't think anyone could say that there's not a debate as to whether the rate had or had not been agreed upon when there is an expressed statement by Telmex saying that there is no rate, and when you have this whole context that we've been discussing in this response that I have been giving you.

So, if you carefully read the paragraph, what it says is that the requirements of Article 42 are not met, and it is based very much on regulatory resolutions that the authority can act formalistically in the exercise of its powers. In my opinion, sir, that is what is happening.⁴⁴

48. The importance of context was further explained by Mr. Buj when the Claimant, once again, attempted to have Mr. Buj agree to the incorrect proposition that Resolution 381 recognized the existence of an agreement on rates:

Q. Okay. Now, we have spent some time walking through the text of Resolution 381 in the operative part of the Fifth Consideration section.

Do you still take the position that the Resolution 381 did not recognize the existence of any rate?

You used the word "recognized." I'm not talking about "resolving," but just "recognized."

A. I believe, sir, as I hold in Footnote 79, and I'm glad that we've referred to it, that the IFT should have simply said the requirements of Article 42 were not met, and this leaves the Parties' rights intact.

The problem, once again, of how these words are used is because one assumes, under the arrangement that has been discussed so much here, that there is an agreement, but there is only lack of agreement in respect of two terms when Telmex said subsequently that there was no agreement with respect to the rates as well.

So, in effect, I believe that Resolution 381 should have been clear, but that, in my

⁴⁴ *Id.*, Vol. 3, pp.813-814 (EN).

Courtesy Translation

opinion--I'm not an attorney for any party here, but in my opinion, this does not generate a right in favor of your client. This determination and this choice of words is what led to the amparo promoted by Telmex, which was not resolved.

The Second Collegiate Tribunal where it was going to be resolved, I have no doubts that the matter would have been resolved at least in a different way. It would have analyzed the substance of the matter, but that was not possible.

And what formally exists today under Mexican law, having exhausted all the possibilities and having given all possibilities to Tele Fácil, is that what Resolution 381 says is only that the requirements in 42 were not met. That is why it's important for me not to place a paragraph of Resolution 381 out of context.⁴⁵

49. In the face of the evidence of Mr. Díaz, coupled with the IFT's clarification of Resolution 381 through Decree 77 and the decisions of the *Amparo* courts, the so-called "unfortunate wording" contained in the Recitals of Resolution 381 cannot form the basis for a claim made pursuant to Chapter 11 of the NAFTA.

D. Attempts to execute the interconnection agreement after the issuance of Decree 77

50. As noted in the Respondent's previous submissions, the deadline to comply with Resolution 381 was 19 December 2014.⁴⁶

51. On 10 December 2014, Telmex sent a letter to Tele Fácil confirming it was ready to establish interconnection. Telmex also delivered a draft interconnection agreement for Tele Fácil's signature.⁴⁷ This document was not provided by the Claimant to Dr. Alvarez⁴⁸ or Mr. Soria.⁴⁹

52. On 10 December 2014, Telmex also sent a letter to the IFT.⁵⁰ That letter confirms that on 9 December 2014 Telmex met with Tele Fácil to execute an interconnection agreement, however, Tele Fácil refused to sign the agreement. Telmex also requested that the IFT compel Tele Fácil to sign the interconnection agreement. This document was also not provided by the Claimant to Dr. Alvarez⁵¹ or to Mr. Soria.⁵²

53. The fact that both Telmex and Tele Fácil had requested the IFT's intervention to enforce

⁴⁵ Transcript, Mr. Buj, Vol. 3, pp. 828-829 (EN).

⁴⁶ Exhibit C-029, p. 16.

⁴⁷ Exhibits R-009 and C-031.

⁴⁸ Transcript, Evidence of Clara Luz Alvarez ("Alvarez"), Vol. 3, p.683-684 (EN).

⁴⁹ Transcript, Evidence of Gerardo Soria ("Soria"), Vol. 3, pp. 745-746 (EN).

⁵⁰ Exhibit R-008.

⁵¹ Transcript, Dr. Alvarez, Vol. 3, pp. 687-690 (EN). The Respondent notes that Dr. Alvarez initially testified that she did not recall if she saw that document, and then stated that if the document was not in the list attached to her report she did not review it. That document is not attached to her report.

⁵² Transcript, Dr. Soria, Vol. 3, pp. 747-748 (EN).

Courtesy Translation

Resolution 381 is a key material fact. The Claimant withheld this information from its expert witnesses. Dr. Alvarez's and Mr. Soria's analyses of the actions leading up to the issuance of Resolution 381 and Decree 77 are premised on the inaccurate belief that only Tele Fácil had requested enforcement by the ITF. This directly undermines the weight, if any, to be afforded to those expert opinions.

54. On 19 December, Tele Fácil filed a document before the IFT entitled "Notice of Compliance of Interconnection Resolution", requesting the enforcement of Resolution 381.⁵³ The Claimant did not provide this document to Mr. Soria.⁵⁴

55. On 9 January 2015, Telmex sent another letter to Tele Fácil, asking to continue negotiations to determine interconnection rates. Telmex also advised that:

- It would use the direct interconnection mode (not indirect through Nextel) in the case of call traffic that Telmex would send to Tele Fácil, and requested the technical information needed to make the necessary arrangements;⁵⁵
- Explained that Telmex could not offer Tele Fácil the same terms and conditions offered in 2013, because such terms were contrary to the 2013 Constitutional Reform and the FLTB, and
- In respect of determining the rate that Telmex would have to pay to Tele Fácil in 2015, Telmex proposed using the regulated rate that the IFT had just published (MXP \$0.004179).⁵⁶

56. On 28 January 2015, Tele Fácil filed a complaint against Telmex at the IFT's Compliance Unit for an alleged breach of Resolution 381.⁵⁷

57. In summary, by early 2015 it was clear that Tele Fácil had no agreement and Telmex were at an impasse, and this is the situation that had to face the IFT:

- Tele Fácil' position was that - except for indirect interconnection and portability fees - all other interconnection terms and conditions had already been agreed to by the parties.
- Telmex's position was that the rate offered in the First Telmex Proposal was no longer applicable on account of the various regulatory changes, including the PEA Declaration

⁵³ Exhibit C-035, p. 3.

⁵⁴ Transcript, Dr. Soria, Vol. 3, pp. 746-747 (EN).

⁵⁵ Exhibit C-037, p. 2.

⁵⁶ *Id.*

⁵⁷ Exhibit C-038.

Courtesy Translation

and the special asymmetrical PEA rates.

58. By having the documents sent by Telmex to Tele Fácil and to IFT in December 2014 withheld from them, the Claimant's experts did not have an accurate understanding of the issues before the IFT. As Mr. Soria confirmed in his testimony:

Q. And both Telmex and Tele Fácil sought the IFT's intervention to enforce Resolution 381; is that correct?

A. I don't know. Until these proceedings, I had no knowledge that Telmex had sought enforcement of Resolution 381. I do know Tele Fácil had done so, but that's all I know.⁵⁸

E. The Criteria Confirmation Request

59. On 10 February 2015, IFT's Supervision Division requested a criteria confirmation to the Legal Unit.⁵⁹

60. The events leading up to that request were described at the hearing by the General Director of Supervision, Mr. Canchola, as follows:

[...] Now, in the specific case, Tele Fácil filed a complaint in 2015 where they noted the noncompliance by Teléfonos de Mexico on the operative parts of Resolution 381 issued by the Plenary of the Institute. At that moment, we analyze all of the documentation.

I should clarify that the supervision process, supervision of telecommunications that we do, is not a procedure that has time periods that are regulated in the telecommunications law. Since it's an administrative act to implement the Federal Telecommunications Law, we go to the generic procedure.

In the generic procedure, what the authority does as the General Director of Supervision is to institute the procedure. It does the process, and it carries out all the acts that are necessary to be able to determine whether or not there is compliance or noncompliance in relation to what has been denounced.

In relation to Resolution 381, based on the information that existed in the record that we analyzed in my office, we found that there was no reason whatsoever to request a verification visit because, based on the information submitted by Tele Fácil and by Telmex, it was crystal-clear that there was no interconnection, that there was no agreement, such that there was no reason whatsoever for me to seek a visit to verify anything.⁶⁰

61. Mr. Canchola then went on to explain why he requested the Confirmation of Criteria from the

⁵⁸ Transcript, Dr. Soria, Vol. 3, pp. 747-748 (EN).

⁵⁹ Exhibit C-040.

⁶⁰ Transcript, Evidence of Mr. Luis Gerardo Canchola ("Canchola"), Vol.2, pp.536-537 (EN).

Courtesy Translation

Legal Office of the IFT:

Now, the reason why I did so was precisely because, based on a reading of the record, both the documentary information that was in the complaint that was lodged by Tele Fácil and the elements that had been put forward by Telmex, it was clear in the record that there was not common ground, there was not a meeting of minds, just what the--it wasn't clear that there was an agreement of which enforcement was sought. The operative part of the resolution said that the Parties should interconnect, and that they should sign the Agreement.

And I should clarify here that, in an incredible act that I never had seen in my time at IFT or at COFETEL, I'd never seen a petition such as this situation in which there was apparently a meeting of the minds that did not exist as such. I had never seen that in all my time at the Institute, neither when I was in litigation or in supervision, where on the one hand one says there is an agreement, and the other says not all the conditions are there, so that for me was a problem because in order to be able to enforce the Agreement in the interconnection, I needed to know what the Agreement was. And given that distinct position of each of the two parties, in the use of my authority, I asked the legal office to render an interpretation for us, which could then be submitted to the Plenary.⁶¹

62. This further exemplifies the fact that, unlike the Claimant's experts who only focused on Tele Fácil's submissions, the Director General for Supervision of the IFT fully considered information received from both parties that held contradictory positions. The Respondent submits that it was not only appropriate to do so, but it was incumbent upon the Director General for Supervision to consider the submissions of both Tele Fácil and Telmex.

63. Moreover, this provides a full explanation for the Criteria Confirmation Request: the General Director of Supervision was being asked to enforce interconnection without an agreement between the parties. The dilemma this created is described by Mr. Canchola as follows:

Q. And you, instead of enforcing or proposing a verification or a penalty, you asked the Legal Affairs Unit whether it has the power to demand the signature on interconnection or to sign the Agreement; is that correct?

A. Yes.

Clarifying that the problem lies in that, for example, for me to be able to determine the interconnection, you do a visit, and you determine whether there is an interconnection. The problem here, that was the interpretation I requested, that in the terms as requested to Tele Fácil in its claim, my problem was, what agreement am I going to demand to determine whether there is compliance or not when both Parties had not agreed and had different positions on the application of 381.

So that was--that was the reason for the question.

⁶¹ *Id.*, Vol.2, pp.538-539 (EN).

Courtesy Translation

Q. But then why did you doubt the power to enforce 381?

A. Well, perhaps that's not the best way to word it, but what we were after was to know what was the Agreement I should demand.

Q. So, it's an unfortunate use of words in this Confirmation of Criteria?

A. Well, it's--I don't think it's unfortunate wording. Decree 77 resulted.⁶²

F. Decree 77

64. Decree 77 was discussed and approved by the IFT at the 8 April 2015 *Pleno* session.⁶³

65. The *Pleno* Commissioners confirmed, by a majority vote of 4 to 3, that Resolution 381 did not establish the interconnection rates that had to be included in the interconnection agreement between Tele Fácil and Telmex, and that all of the terms and conditions except indirect interconnection rates and portability charges were not the subject matter of Resolution 381.⁶⁴ This meant that Telmex and Tele Fácil had to negotiate the other rates and, if not able to reach an agreement, then submit the dispute before the IFT for its resolution.⁶⁵

66. Throughout this arbitration it has been suggested by the Claimant that the fact that Decree 77 was not a unanimous decision somehow affects the legal validity of that Decree. The Claimant's expert, Dr. Alvarez, confirmed that "from a legal standpoint" there is no difference whether Decree 77 was decided on a unanimous or majority basis:

Q. Thank you.

To determine legal validity of a resolution or a Decree by the Institute, is there a difference between a resolution or agreement adopted by the Plenary either unanimously or by majority?

A. From a legal standpoint, no, but what does it tell me as a researcher and when it comes to telecommunications? A divided vote means that there is a dispute. It's not something that is carved in stone, to say symbolically, but legally. Indeed, when there is a majority, then it has the same validity.⁶⁶

67. Moreover, the Claimant's experts repeatedly claim that Decree 77 "changed the terms of Resolution 381,"⁶⁷ or otherwise "destroyed the rates".⁶⁸ Such conclusions are entirely based upon

⁶² *Id.*, Vol. 2, pp.560 -561 (EN).

⁶³ Exhibit C-051.

⁶⁴ Declaration of Mr. David Gorra, ¶ 54.

⁶⁵ *Id.*, ¶ 44.

⁶⁶ Transcript, Dr. Alvarez, Vol. 2, p.679 (EN).

⁶⁷ *Id.*, Vol. 3, p.692 (EN).

⁶⁸ Transcript, Dr. Soria, Vol. 3, p.748 (EN).

Courtesy Translation

the factually incorrect belief that Resolution 381 approved the rates contained in the First Telmex Proposal. This incorrect belief is premised on the “unfortunate wording” in the Recitals of Resolution 381 which has been clarified by Mr. Díaz (who wrote Resolution 381), through Decree 77 and through the *Amparo* proceedings.

68. Through cross-examination, the Claimant unsuccessfully attempted to have Mr. Díaz agree that Decree 77 permitted the rates offered by Telmex to be subject to further negotiation. Mr. Díaz confirmed that Decree 77 simply decreed that the conditions that were not resolved by Resolution 381 – such as rates - were held harmless:

Q. Is it your testimony that the Fourth Ordering Clause is the provision of Decree 77 that allows the rates offered by Telmex are now held harmless and can be subject to further negotiation?

A. My understanding of Decree 77 was that it decreed that the conditions--for those conditions that were not resolved by the Institute, which were not part of the lites of the Resolution, that the rights of the Parties would be held harmless so that they could negotiate them, and if needed, submit them to an Interconnection Agreement.⁶⁹

69. Decree 77 did not modify, in any way, the two issues of disagreement that were decided by Resolution 381 being numerical portability and indirect interconnection. Decree 77 also reaffirmed that the parties must execute an interconnection agreement. This was described by Mr. Díaz during the hearing as follows:

Q. Could you look at the Third Ordering Clause? There, it says that the Parties must execute the Agreement and that the Agreement must reflect Indirect Interconnection in the omission of portability costs; correct?

A. That's correct.

Q. So, Decree 77 required the Parties to sign an Interconnection Agreement but did not include rates; correct?

A. The Third Clause, in my opinion, refers to the signing of an agreement, and the agreement is whatever the Parties really agreed, but it should include both terms which were resolved in Resolution 381, which were the non-inclusion of portability charges and for Telmex to allow the receipt of Tele Fácil traffic through the transit service.⁷⁰

70. Decree 77 did not destroy an agreement that existed between Telmex and Tele Fácil. The parties were free to execute any agreement so long as it excluded numerical portability and permitted indirect interconnection:

⁶⁹ Transcript, Mr. Díaz, Vol. 2, p.462 (EN).

⁷⁰ Transcript, Mr. Díaz, Vol. 2, pp. 461-462 (EN).

Courtesy Translation

Q. Commissioner Díaz, how is it that the Fourth Ordering Clause of Resolution 77 completely eliminates all of the Agreement that had been reached between Tele Fácil and Telmex? All of the Agreement is gone now.

A. No, it doesn't disappear because, if the Parties agree, they can sign it.⁷¹

71. Decree 77 clarified that Resolution 381 did not establish rates. As such, Decree 77 did not take away any rights from Tele Fácil. The only thing that Decree 77 took from Tele Fácil was the mistaken belief that it could force Telmex to execute a portion of the First Telmex Proposal without Telmex's agreement.

G. Resolution 127

72. On 16 June 2015, Telmex filed a request with the IFT to resolve an interconnection dispute with Tele Fácil.⁷² Telmex advised the IFT that it had not been able to reach an agreement with Tele Fácil for the interconnection rate that Telmex had to pay for call traffic that terminated on Tele Fácil's network, and for the direct interconnection for the delivery of traffic on Tele Fácil's network.⁷³ Telmex requested that the IFT:

- determine the interconnection rate that Telmex had to pay Tele Fácil. Telmex proposed \$0.0044179 M.N. pesos for the period between 1 January and 31 December 2015. This rate was the 2015 Regulated Rate;
- determine that the measure of traffic would be based on the actual duration of calls without rounding to the next minute; and
- order Tele Fácil to facilitate the direct interconnection for the call traffic that would terminate on Tele Fácil's network.⁷⁴

73. On 17 July 2015, Tele Fácil filed its response to this interconnection dispute.⁷⁵ Tele Fácil elected a legal strategy whereby it argued that Telmex's request was improper because a valid interconnection agreement was established by Resolution 381. Tele Fácil also requested that the IFT Compliance Unit verify whether Telmex had complied with Resolution 381.⁷⁶ These

⁷¹ *Id.*, Vol. 2, pp. 464-465 (EN).

⁷² Exhibit C-055, pp. 1-2. Exhibit R-025.

⁷³ Exhibit C-055, p. 4. Exhibit CL-04, art. 118, LFT.

⁷⁴ *Id.*, pp. 13.

⁷⁵ Exhibit C-056, pp. 8-9.

⁷⁶ *Id.*, p. 16.

Courtesy Translation

submissions were made by Tele Fácil in the face of Decree 77. This is consistent with Tele Fácil's decision, as confirmed by Mr. Bello, to reject compliance with Decree 77 by refusing to execute an interconnection agreement with Telmex and to also refuse to participate in indirect interconnection testing.⁷⁷

74. On 26 August 2015, Telmex presented further written argument to the IFT.⁷⁸ Telmex confirmed that:

- It had already implemented the indirect interconnection with Tele Fácil by way of the transfer service provided by Nextel;
- The Compliance Unit had undertaken an inspection in order to confirm that the indirect interconnection through Nextel had been established; and
- During the verification, IFT officials had corroborated that Tele Fácil did not have its telephone numbers activated to receive Telmex traffic.

75. On 4 September 2015, Tele Fácil presented further written argument to the IFT.⁷⁹ Tele Fácil again ignored Decree 77 and argued that the applicable rate and existence of a valid contract had been established in Resolution 381 and asked the IFT to dismiss the interconnection dispute.

76. The interconnection dispute between Telmex and Tele Fácil, which was debated and voted on in the *Pleno* session of 7 October 2015, resulted in Resolution 127.⁸⁰

77. Resolution 127 confirmed that the IFT was obligated to use the 2015 Regulated Rate.⁸¹ As such, the regulated rate Telmex had to pay to Tele Fácil was \$0.004179 MX pesos per minute (*i.e.*, the regulated rate in force at the time of the Resolution). This regulated rate would be in effect from 7 October 2015 to 31 October 2015.

78. Resolution 127 also directed Tele Fácil to facilitate Telmex connecting to its network directly, in accordance with FTL article 118.⁸²

79. The Claimant has made a range of allegations to the effect that the imposition of the Regulated Rate in Resolution 127 was somehow contrary to the asymmetrical regulations, or otherwise unfairly benefitted Telmex as a PEA. Despite numerous attempts during cross-examination of the Respondent's witnesses from IFT, the Claimant failed to establish any evidentiary foundation for

⁷⁷ Transcript, Mr. Bello, Vol. 2, pp.304-308 (EN).

⁷⁸ Exhibit R-026.

⁷⁹ Exhibit R-027, p. 1.

⁸⁰ Exhibit C-061, p. 37.

⁸¹ Exhibit C-061, pp. 29-31. See also Exhibits R-028 and R-024.

⁸² *Id.*, pp. 31-37.

Courtesy Translation

these accusations.

80. One of the ways in which the Constitutional reform sought to promote competition was to empower the IFT to establish asymmetrical measures applicable to a PEA such as Telmex. One of the specific asymmetric regulations was the imposition of what has been referred to as the “Zero Rate”.⁸³

81. The purpose of such asymmetric regulation was not, as suggested by the Claimant, to ensure that Telmex become a net payer of interconnection fees to the competitive market. Rather, the asymmetric regulation was to establish a fair playing field for operators because of traffic imbalances by establishing zero tariff for the PEA and cost-based tariff for other concessionaires. Regarding the purpose of the asymmetric regulation, the Claimant asked Commissioner Diaz the following question:

Q. And the purpose of the asymmetric regulation was that Telmex would become a net payor of interconnection fees to the competitive carriers in the market; is that correct?

A. It's not like that in my reading. The purpose of the regulation was to establish a fair playing field for the operators because of traffic imbalances. I believe that when Telmex had a zero tariff, or--I'm sorry, Telmex and Telnor had a zero tariff, and with that what they were trying to do was to eliminate the disadvantage faced by operators due to the traffic imbalances. My understanding is that the concern basically was from the mobile services. Telcel maintained most of its traffic as on net, and it was difficult for other concessionaires to compete because of the scale. This impact of the zero tariff was basically made of this immobile service, and I think that the purpose was to level that off because of the imbalances in the mobile services.

However, Article 131(b) also provided the--empowered the Institute to issue a costing methodology; in other words, the tariffs of all the alternative operators had to be calculated based on cost.

And, 131(b) also indicated that natural asymmetries of networks to be interconnected needed to be considered, and the Institute had the authority to issue that methodology.

When the Institute issued the methodology because there were already a number of measures to determine interconnection tariffs, the Institute came up with a pure incremental cost method. What does this mean? It means that you can only charge for the strictly necessary costs for a concessionaire to finish the call. What was the purpose of this? It was to give better tariffs to the end-user; in other words, at the time the Institute was adopting an approach such as that in Europe or where interconnection is not a business; in other words, the interconnection rate must make it possible to recover strictly those costs that are necessary for delivery of the service without turning it into a business.

⁸³ Transcript, Mr. Díaz, Vol. 2, p.424 (EN).

Courtesy Translation

So, the regulation implied zero tariff for preponderant but cost-based tariff for the other concessionaires.⁸⁴

82. In addition to imposing the zero rate, the Constitutional reform also imposed an obligation on IFT to establish a cost methodology, which is used to annually establish the regulated rate. That cost methodology underwent a process of public consultation and was imposed near the end of 2014.⁸⁵

83. The Claimant incorrectly alleges that by adopting the cost methodology, the IFT helped reduce the interconnection rate that Telmex would pay many of the competitive carriers in the market. This unfounded allegation by the Claimant ignores the reality that the cost methodology, and the resulting regulated rate, was designed and is intended to provide better rates for end-users. Mr. Díaz explained this as follows:

Q. So, by adopting this methodology, you helped to reduce the rate that Telmex would pay many of the competitive carriers in the market, creating savings for Telmex of 83 percent; correct?

A. It is not correct.

I would like to note that that rate is paid by all of the concessionaires. It is paid by the mobile concessionaires, the fixed concessionaires, and the intention in issuing a new cost methodology, as appears in the public consultation, was to try to offer better rates to the end-users.

When the Institute issues its Resolution, it does not take note of the benefit that any particular company is going to obtain at that moment; and as appears in the methodology, the purpose is to come up with better rates for end-users.⁸⁶

84. There is no evidence to support the Claimant's allegation that the IFT's cost methodology was developed with the intention or purpose of benefitting Telmex. To the exact contrary, the purpose of the cost methodology was to give better prices to the end-users in Mexico. The application of the regulated rate in Resolution 127 was not only entirely appropriate, it was done in accordance with the telecommunication laws that resulted from the Constitutional reform.

H. Domestic Court proceedings

85. The issue of whether Resolution 381 imposed an obligation on Telmex to execute the First

⁸⁴ Transcript, Mr. Díaz, Vol. 2, pp.424-426 (EN).

⁸⁵ *Id.*, p.441 (EN).

⁸⁶ Transcript, Mr. Díaz, Vol. 2, pp.441-442 (EN).

Courtesy Translation

Telmex Proposal subject to numerical portability and indirect interconnection has been fully litigated before the Mexican courts through three *amparos*. The Respondent submits that that the Claimant is asking this Tribunal to act as a Court of Appeal to decide on a *de novo* basis issues that have already been determined with finality by the Mexican Courts.

86. At the request of the Tribunal, the parties have jointly prepared and submitted a chronology of the three *Amparos*. In light of the fact that the pleadings have already provided significant detail on these proceedings, the Respondent limits its comments on the three *amparo* proceedings to highlighting those aspects that arose during the oral hearing.

1. The First *Amparo*

87. For the benefit of the Tribunal, the chronology for the first *amparo* is as follows:

| Date | Event | Exhibit or Reference |
|-----------|--|----------------------|
| 26-Dec-14 | Telmex files an <i>amparo</i> challenging Resolution 381. The following authorities are named as responsible authorities (defendants): Congress, Chamber of Senators, Chamber of Representatives, President of Mexico, Minister of Communications and Transportation, Plenary of the IFT, Chairman of the IFT, and Head of the Regulatory Policy Unit of IFT. Telmex names Tele Fácil as "interested third party". | C-036 |
| 15-Jan-15 | The Second District Court for Administrative Matters, specialized in Economic Competition, Broadcasting and Telecommunications admits the <i>amparo</i> filing of December 26, 2014, and assigns it Registration File No. 351/2014. | Referred to in C-069 |
| 11-May-15 | Telmex extends the scope of its <i>amparo</i> to include challenges against Decree 77. | C-054 |
| 25-May-15 | The Second District Court admits the extension submitted by Telmex. | Referred to in C-069 |
| 11-Mar-16 | The Second District Court denies Telmex's <i>amparo</i> 351/2014. | C-069 |
| 05-Apr-16 | Tele Fácil submits an <i>amparo</i> appeal (<i>recurso de revisión</i>) to <i>amparo</i> 351/2014. | R-030 |
| 08-Apr-16 | Telmex submits an <i>amparo</i> appeal (<i>recurso de revisión</i>) to <i>amparo</i> 351/2014. | Referred to in R-031 |
| 25-Apr-16 | Second Circuit Collegiate Court in Administrative Matters Specialized in Economic Competition, Broadcasting and Telecommunications admits Telmex and Tele Facil's appeals (<i>recursos de revisión</i>) under the same docket No. 62/2016. | Referred to in R-031 |

Courtesy Translation

| Date | Event | Exhibit or Reference |
|-----------|--|----------------------|
| 13-Jul-16 | Tele Facil withdraws its appeal. | R-032 |
| 24-Nov-16 | Telmex's Review Appeal 62/2016 is dismissed. | R-031 |

88. The first *amparo*, which was filed by Telmex, initially challenged only Resolution 381.⁸⁷ However, after the issuance of Decree 77, the first *amparo* was expanded to challenge both Resolution 381 and Decree 77.⁸⁸

89. On 11 March 2016, the Specialized Second District Court issued its judgment, which confirmed that the reference to interconnection rates in Resolution 381 was only made to explain the reason for which the IFT would not rule on interconnection rates in Resolution 381, that the IFT had not obliged Telmex and Tele Fácil to consider the rates established in the First Telmex Proposal, and that Decree 77 only determined the scope of Resolution 381.⁸⁹ As described by Mr. Buj:

So we have three amparo motions. The amparo brought by Telmex, what the judge says is, "Your rights are not being affected. I deny the amparo because they did not rule on that you have a rate." The interpretation by the judge, reading the entirety of Resolution 381, is the same that I have put forward in my opinion, which is seeing the full context of the Resolution, it had not determined a rate; rather, it was subject to Article 42. And the requirements not being met to analyze it, there was no pronouncement on it.⁹⁰

90. Tele Fácil and Telmex both appealed against the judgment of the Specialized Second District Court on 5 and 8 April 2016, respectively.⁹¹

91. On 13 July 2016, Tele Fácil voluntarily filed a written submission with the Second Collegiate Court desisting from its appeal.⁹² In this regard, the Claimant's expert, Dr. Alvarez, explained the consequences of withdrawing from an *amparo*:

Q. Could you explain, based on your legal experience, what are the consequences, legal consequences, of withdrawing an amparo?

⁸⁷ Exhibit C-036, p.3; Exhibit C-069; Statement of Defense ¶ 174.

⁸⁸ Exhibit C-069-S.001, p. 4; Exhibit C-054; and Transcript, Mr. Buj, Vol. 3, p. 863 (EN).

⁸⁹ Exhibit C-69.

⁹⁰ Transcript, Mr. Buj, Vol. 3, pp.863-864 (EN).

⁹¹ Exhibit R-031, p. 1. See also Exhibit R-030. On 25 April 2016, the appeals were assigned to the Second Collegiate Court, and admitted and registered under the file number 62/2016.

⁹² Exhibit R-032.

Courtesy Translation

A. If one of the Parties withdraws, the one requesting that amparo in this case, it is it no longer looks into the merits of the matter.

Q. In other words, if a party puts forward an amparo as claimant and they withdraw from a review, then the Collegiate Tribunal hearing the case can no longer focus and hear about the merits?

A. Yes, they can no longer hear the merits. That's correct.⁹³

92. On 24 November 2016, the Second Collegiate Court dismissed Telmex's appeal on the basis that the because issue had been resolved in the other two *amparo* proceedings.⁹⁴ In a question posed by President Zuleta, Mr. Buj confirmed that there existed *res judicata* with respect to the content of the appeal:

THE WITNESS: Well, you're right. There is not identity of the Parties because there is an amparo in which the Respondent is the authority. All participate as interested third parties in the different proceedings. But what you have is *res judicata* with respect to the merits, with respect to the declaration of legality in one of the procedures--in other words, there is *res judicata* in relation to the content, the subject matter of the dispute.⁹⁵

2. The Second *Amparo*

93. The Chronology of the second *amparo* is as follows:

| Date | Event | Exhibit or Reference |
|-----------|---|----------------------|
| 07-May-15 | Tele Fácil files an <i>amparo</i> challenging the IFT's failure to enforce Resolution 381 and the issuance of Decree 77. The following authorities are named as responsible authorities (defendants): Plenary of the IFT, IFT's Compliance Unit and IFT's Legal Unit. Tele Fácil names Telmex and Telnor as "interested third party". | R-033 and C-053 |
| 19-May-15 | The First District Court for Administrative Matters specialized in Economic and Competition, Broadcasting and Telecommunications admits Tele Fácil's <i>amparo</i> and assigns it Registration File No. 1381/2015. | Referred to in C-063 |
| 22-Jan-16 | The First District Court for Administrative Matters specialized in Economic and Competition, Broadcasting and Telecommunications denies Tele Fácil's <i>amparo</i> 1381/2015. | C-063 |
| 11-Feb-16 | Deadline for filing an appeal (<i>recurso de revisión</i>) against <i>amparo</i> | Referred to |

⁹³ Transcript, Dr. Alvarez, Vol. 3, p.698 (EN).

⁹⁴ Exhibit R-031.

⁹⁵ Transcript, Mr. Buj, Vol. 3, p. 868 (EN).

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| Date | Event | Exhibit or Reference |
|-----------|---|----------------------|
| | 1381/2015 . | in C-068 |
| 12-Feb-16 | Tele Fácil submits an appeal (<i>recurso de revisión</i>) to <i>amparo</i> 1381/2015. Eventually, the appeal (<i>recurso de revisión</i>) is registered under the docket No. 35/2016. | C-065 |
| 12-Feb-16 | The First District Court declares the ruling in <i>amparo</i> No. 1381/2015 final. | R-034 |
| 24-Feb-16 | The First District Court for Administrative Matters specialized in Economic and Competition, Broadcasting and Telecommunications issueds document confirming submission of document by Tele Facil with Minutes of Fact and evidence. | C-067 |
| 25-Feb-16 | Tele Fácil files an <i>amparo</i> challenge (<i>recurso de queja</i>) against the First District Court's decision to declare the ruling in <i>Amparo</i> No. 1381/2015 as final. Eventually, the First Circuit Collegiate Court admits the <i>amparo</i> challenge (<i>recurso de queja</i>), which is registered under docket No. 11/2016. | Referred to in R-035 |
| 09-Mar-16 | The First Circuit Collegiate Court admits Tele Fácil's <i>amparo</i> Appeal (<i>recurso de revisión</i>) and registers it under the docket No. 35/2016. | C-068 |
| 21-Apr-16 | Tele Facil's <i>amparo</i> Appeal (<i>recurso de revisión</i>) No. 35/2016 is dismissed. | C-075 |
| 21-Apr-16 | Tele Fácil's <i>amparo</i> challenge (<i>recurso de queja</i>) No. 11/2016 against the order dated February 12, 2016 is dismissed. | R-035 |

94. The second *amparo* was brought by Tele Fácil, who argued *inter alia*, that Decree 77 was illegal because it modified Resolution 381 by removing the interconnection rate allegedly imposed upon Telmex by Resolution 381.⁹⁶

95. On 22 January 2016, the First District Court rejected Tele Fácil's *amparo*,⁹⁷ finding that Decree 77 only determined the scope of Resolution 381, and that the rates to be contained in the interconnection agreement between Telmex and Tele Fácil were not part of the interconnection disagreement before the IFT.⁹⁸ As described by Mr. Buj:

Then comes the Tele Fácil resolution in which Tele Fácil insisting in both *amparo* claims it's the same argument; that Tele Fácil said Decree 77 is illegal because there was already an agreement and the arguments that we already are familiar with, which were

⁹⁶ Exhibit R-033.

⁹⁷ Exhibit C-063, p.18.

⁹⁸ *Id.*, p. 16.

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the exact same ones that are being put forth here.

That is why Paragraph 3 or 4, among the first in my statement, what I say is that I'm very much surprised that, since this is an international investment arbitration, they're dealing with the same issues that the Mexican courts have already dealt with because it would appear that what is being done is a review of what was done by the Mexican courts because the arguments are identical, practically no distinction.

So, at the moment that they are--those amparos are being considered, the judge says the follows, once again: In the resolution against Decree 77, what the judge says is, the Resolution does not address the determination of a rate; rather, it only did not establish a rate, it did not issue a ruling in the terms of Article 42. It's consistent with what the other judges said in the Telmex broadband amparo.⁹⁹

96. Tele Fácil then tried to appeal *amparo* 1381/2015 but failed to file that appeal in the time limits imposed by Mexican domestic law. The Respondent notes that the Claimant has utterly failed to provide evidentiary support for the preposterous allegation that Mexican authorities unduly impeded it from filing the appeal.¹⁰⁰ To the contrary, the evidentiary record demonstrates that Tele Fácil's appeal was not sustained solely because of the actions and/or omissions of Tele Fácil and its legal advisors.

97. The First Collegiate Court determined that the presentation of Tele Fácil's appeal had been untimely. In making that finding, the Court not only considered the fact that the appeal was not filed on time, but also the fact that the appeal was not entered in the first hour of the following business day.¹⁰¹

98. The consequence of Tele Fácil failing to file the appeal in a timely manner is that the 22 January 2016 decision in the second *amparo* (*sentencia* 1381/2015) becomes a final decision. The ramifications of this was described by Mr. Buj as follows:

So, in the second amparo, in which there was presented late against the Resolution, well, it was firm, and it is a direct *res judicata*. And it was firmed that in the relationship between Telmex and Tele Fácil, stemming from Resolution 381 and Decree 77, no rate had been set that was then modified. So what does it firm is the judge's interpretation where she says that no rate was determined in the terms of 42, and that was then confirmed by 77.

As there was *res judicata*, the judges--and this is what they said in their judgment--could not take cognizance of the matter because there was a formal *res judicata*. And I don't think anyone's rights were violated, but I do think there was a procedural error. That determination became final with respect to this determination--or this situation, rather.

⁹⁹ Transcript, Mr. Buj, Vol. 3, pp. 864-865 (EN).

¹⁰⁰ Statement of Claim, ¶ 268.

¹⁰¹ Exhibit R-035, p. 2.

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It is res judicata, therefore, I cannot rule.¹⁰²

3. The Third Amparo

99. The Chronology of the third *amparo* is as follows:

| Date | Event | Exhibit or Reference |
|-----------|---|----------------------|
| 11-Nov-15 | Tele Fácil files an <i>amparo</i> challenging Resolution 127. The following authorities are named as responsible authorities (defendants): Plenary of the IFT, and IFT's Regulatory Policy Unit Tele Fácil names Telmex and Telnor as "interested third party". | C-062 |
| 27-Nov-15 | The Second District Court for Administrative Matters, specialized in Economic Competition, Broadcasting and Telecommunications admits the <i>amparo</i> filing of November 11, 2015, and assigns it Registration File No. 1694/2015. | Referred to in C-070 |
| 15-Mar-16 | The Second District Court for Administrative Matters, specialized in Economic Competition, Broadcasting and Telecommunications denies Tele Fácil's <i>amparo</i> 1694/2015. | C-070 |
| 07-Apr-16 | Tele Fácil submits an <i>amparo</i> appeal (" <i>recurso de revisión</i> ") to <i>amparo</i> 1694/2015 to the Circuit Collegiate Court for Administrative Matters, specialized in Economics Competition, Broadcasting and Telecommunications. | C-074 |
| 15-Apr-16 | Tele Fácil's appeal is admitted by the Second Circuit Collegiate Court for Administrative Matters, specialized in Economic Competition, Broadcasting and Telecommunications and is filed as Amparo in Revision No. 48/2016. | Referred to in R-036 |
| 13-Jul-16 | Tele Fácil withdraws its appeal. | C-076 |
| 12-Aug-16 | The Second Circuit Collegiate Court for Administrative Matters, specialized in Economic Competition, Broadcasting and Telecommunications issues judgment on Review Appeal (<i>recurso de revisión</i>) 48/2016 . | R-036 |

100. The third *amparo*, which was initiated by Tele Fácil on 11 November 2015,¹⁰³ challenged the legality of Resolution 127.

101. On 15 March 2016, the Second District Court denied Tele Fácil's *amparo*,¹⁰⁴ concluding

¹⁰² Transcript, Mr. Buj, Vol. 3, pp. 867-868 (EN).

¹⁰³ Exhibit C-062.

¹⁰⁴ Exhibit C-070

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that the rates determination contained in Resolution 127 was not a matter determined previously in Resolution 381 because the only points in dispute analyzed and resolved in Resolution 381 were those related to indirect interconnection and the costs associated with numeric portability.¹⁰⁵

102. Tele Fácil appealed that decision on 7 April 2016,¹⁰⁶ but then withdrew that appeal on 13 July 2016.¹⁰⁷ As with the first appeal, upon the withdrawal of the appeal, the Court's decision of 15 March 2016 became final (*i.e.*, *cosa juzgada*).

I. The alleged agreement between Tele Fácil and Telmex

103. The Respondent submits that it has been well established by the evidence in this proceeding that Resolution 381 was entirely based upon an analysis of whether a disagreement existed, not whether an agreement existed. This is been reaffirmed at the hearing by Díaz, it was clarified by the IFT in Decree 77 and it was confirmed by the three *amparos*.

104. A Tribunal established under Chapter 11 of the NAFTA must not act as an appellate or revision court of decisions of regulatory authorities or domestic courts. In the particular case, the Respondent considers that the Tribunal would be prevented to act as a Court of Appeal with respect to the determinations of the IFT and the decisions of the *amparo* Courts, then undertaking an analysis of whether an agreement actually existed between Telmex and Tele Fácil is both unnecessary and inappropriate. In fact, to do so would put this Tribunal in a situation whereby it is undertaking an analysis – whether a binding agreement existed between Telmex and Tele Fácil - that the IFT did not conduct in deciding Resolution 381. The Respondent submits that the proper way for the Tribunal to decide this case is on the basis of the analysis that was actually undertaken by the IFT and approved by the *amparo* Courts.

105. If the Tribunal nevertheless elects to undertake an analysis of whether an agreement actually existed between Telmex and Tele Fácil, the Respondent highlights the following facts.

106. First, no agreement, partial or otherwise, was ever executed. The Claimants' suggestion that the parties agreed to all of the terms and conditions governing their interconnection relationship without executing a signed agreement is commercially unrealistic.

107. Second, as a matter of Mexican Law, there was no binding agreement between Tele Fácil

¹⁰⁵ *Id.*, pp. 24-30.

¹⁰⁶ Exhibit R-036.

¹⁰⁷ Exhibit C-076.

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and Telmex on rates or any other interconnection term. This has been explained in the expert reports of Mr. Buj, as well as his oral testimony at the hearing.¹⁰⁸

108. The Respondent and its expert have referred throughout this proceeding that both the abrogated LFT and the new LFTyR provide the supplementary application of the Federal Civil Code. During the hearing, Mr. Soria referred to the fact that, for the formation of consent, the Commercial Code prevailed with respect to the application of the Federal Civil Code, and that the formalities provided in the Federal Civil Code are not applicable to commercial acts such as the interconnection.¹⁰⁹ The above is incorrect for the following reasons:

- An interconnection agreement is a commercial act between private persons and is governed by civil legislation;
- Under Mexican Law, the Civil Code determines the basic elements of contracts and agreements;¹¹⁰
- There are no provisions in the Commercial Code that incorporate the Fourth Title of the Federal Civil code. In particular, there is no provision regulating the offer or the consent;
- The Commercial Code itself refers to the Civil Code as applicable regulations; and¹¹¹
- Mr. Soria acknowledged during the hearing that, in the Federal Civil Code there is no provision that allows one of the parties to accept only one of the terms and conditions included in the initial offer.¹¹²

109. The alleged renewal of Telmex's offer, apparently made almost eleven months after the initial proposal, lacks all formalities under Mexican Law. According to Mr. Bello's oral testimony, Tele Facil's lawyer during the negotiations period, the meeting where they were informed that the terms of Telmex's initial proposal were valid, was in person (*entre presents*) and there was no written renewal of the offer.¹¹³ In this case, according to the Federal Civil Code, the acceptance of the offer should have been during the meeting because is an offer *entre presentes*.¹¹⁴

¹⁰⁸ Transcript, Mr. Buj, Vol. 3, p. 854-856.

¹⁰⁹ Transcript, Dr. Soria, Vol. 3, p. 735-737.

¹¹⁰ Exhibit CL-04, Federal Civil Code, Fourth Title.

¹¹¹ Transcript, Mr. Buj, Vol. 3, p. 854-856.

¹¹² Transcript, Dr. Soria, Vol. 3, p. 736-737.

¹¹³ Transcript, Mr. Bello, Vol 2, p. 314-315.

¹¹⁴ Código Civil Federal, "Artículo 1805.- Cuando la oferta se haga a una persona presente, sin fijación de plazo para aceptarla, el autor de la oferta queda desligado si la aceptación no se hace inmediatamente. La misma regla se aplicará a la oferta hecha por teléfono o a través de cualquier otro medio electrónico, óptico o de cualquier otra tecnología que permita la expresión de la oferta y la aceptación de ésta en forma inmediata."

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110. The confirmation, or rather, Tele Facil's comments to Telmex's proposal, cannot be considered an acceptance of the offer under the applicable law.¹¹⁵ As stated by Mr. Bello, Tele Facil's response was formally sent in a letter with the terms they accepted and those not accepted, specifically referring to the portability charges and the indirect interconnection.¹¹⁶ This letter had a deadline of 5 days for Telmex to accept or express its comments on the matter, which was not respected by Tele Facil.

111. On the contrary, Tele FÁCIL claimed that it had reached an agreement with Telmex regarding all the interconnection terms, except two: portability charges and indirect interconnection, implying that there was no outright acceptance of the offer. The evidence on the record shows that Telmex did not agree with this position.

III. THE LAW

112. The Respondent has fully addressed the applicable law in its Statement of Defence and Rejoinder. That law has not been reproduced in this post-hearing submission.

113. The Respondent repeats and relies upon those submissions in full.

IV. THE TEN QUESTIONS POSED BY THE TRIBUNAL

114. At the hearing, the Tribunal posed ten questions to the parties. Initial answers were provided the following day. What follows are the Respondent's supplemental answers to those ten questions.

A. Question One: What is the "investment" that according to Claimant was expropriated or subjected to unfair and inequitable treatment, both for Mr. Nelson and for Tele FÁCIL?

115. Chapter 11 employs clear and precise definitions that are used purposefully and consistently. It is important to review these definitions in order to understand to whom each substantive obligation created by Chapter 11 is owed, and who is entitled to employ the arbitration proceedings in Section B of Chapter 11. . Put another way: who is the investor and what does the investor own?

¹¹⁵ Código Civil Federal, "Artículo 1810.- El proponente quedará libre de su oferta cuando la respuesta que reciba no sea una aceptación lisa y llana, sino que importe, modificación de la primera. En este caso la respuesta se considerará como nueva proposición que se regirá por lo dispuesto en los artículos anteriores."

¹¹⁶ Transcript, Mr. Bello, Vol. 2, p. 316-317.

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116. After the issuance of Procedural Order No. 13, there remained only one investor: Mr. Nelson.

117. In this case, Mr. Nelson owns shares in Tele Fácil. The Respondent accepts that Tele Fácil is an “enterprise” as defined by Article 201 of the NAFTA.

118. The definition of “investment” in Article 1139 includes:

(b) an equity security of an enterprise;

[...]

(g) real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes;

[...]

119. The Respondent accepts that Mr. Nelson’s ownership of shares qualifies as an “investment” in accordance with Article 1139 as “an equity security of an enterprise”.

120. As a shareholder, Mr. Nelson did not own any other asset within Article 1139’s definition of investment. Mr. Nelson does not have an ownership interest in the company’s assets.

121. The Claimant’s allegation that the interconnection agreement with Telmex constitutes “real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes” should be dismissed. Such an interpretation is incorrect when viewed in the context of Article 1139 and Chapter Eleven as a whole. It is also completely unsupported by the evidentiary record which demonstrates that Resolution 381 only determined whether there existed a disagreement. As explained above, the evidence at the hearing establishes that Resolution 381 did not create a binding agreement between Telmex and Tele Fácil with respect interconnection rates.

122. Pursuant to Procedural Order Nos. 14-16, the issue of Mr. Nelson’s ownership interest in Tele Fácil, and whether he exercised *de facto* control of Tele Fácil will be the subject of further written submissions by the parties. In that context, there will also be further submissions on whether Mr. Nelson can advance a claim under Article 1117 of the NAFTA on behalf of Tele Fácil. For this reason, the Respondent will not further address Article 1117 in these post-hearing submissions.

123. In any case, Article 1110 prohibits measures equivalent to direct or indirect nationalization or expropriation of “an investment of an investor of another Party”. Article 1110 does not protect “the investments of an investment of an investor of another Party”. Even if this Tribunal were to

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conclude that Resolution 381 and the alleged interconnection agreement that flowed therefrom is an intangible asset – it's not an investment of Mr. Nelson. At best, this would be an investment of an investment of an investor of another Party. As such, it cannot be subject to expropriation.

B. Question Two: What part of the alleged “investment” of Mr. Nelson and Tele Fácil does the Respondent dispute?

124. This question has been partially answered by the Respondent’s response to Question One above. As well, this issue is also being partially litigated as part of the Respondent’s objection to jurisdiction arising out of the Mr. Blanco’s bankruptcy.

125. To provide further clarification, however, the Respondent reiterates its position that:

- Mr. Nelson has no direct claim for alleged expropriation of Tele Fácil’s concession or any of its other assets; and
- There is no evidentiary support for a claim by Mr. Nelson that unlawful interference by the Respondent was so invasive and devastating that Tele Fácil was rendered incapable of carrying on business and became effectively worthless;

C. Question Three: Is there any issue under international law with respect to the acts and omissions of the IFT being attributable to the Respondent?

126. At the hearing, both the Claimant¹¹⁷ and the Respondent¹¹⁸ confirmed that the answer to this question is “no”.

127. The Respondent reiterates that as an autonomous constitutional regulatory body specialized in telecommunications, IFT must be afforded a high level of deference toward its decision making.

128. This issue is further addressed in the Respondent’s response to question eight herein.

D. Question Four: What are the most relevant legal and evidential materials on the record to help the Tribunal decide whether under Mexican law the July 7, 2014 letter (Exhibit C-0024) constitutes an acceptance of an offer by Telmex or a counter-offer from Tele Fácil to Telmex or a third category?

129. This is an issue of fact and domestic law to which the parties are in complete dispute.

130. As a preliminary matter, and as set out above, the Respondent submits that the only conclusion supported by the evidence is that Resolution 381 was entirely based upon an analysis

¹¹⁷ Claimant Closing Statement, Transcript, Vol. 5, p.1255.

¹¹⁸ *Id.*, p. 1305.

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of whether an interconnection disagreement existed, not whether an agreement existed. This was reaffirmed at the hearing by Mr. Díaz, it was clarified by the IFT in Decree 77 and it was confirmed by the specialized courts in the three *amparos*.

131. If the Tribunal accepts this evidence, then an analysis of whether the 7 July 2014 letter constitutes acceptance of an offer from Telmex or a counter-offer from Tele Fácil is not necessary.

132. In any event, Tele Fácil's communication dated 7 July 2014 does not constitute an acceptance to Telmex's offer. To the contrary, it is a new offer made by Tele Fácil.

133. The Respondent submits that this question has been fully addressed in its Counter Memorial and Rejoinder, as highlighted at the hearing.¹¹⁹

E. Question 5: Given the changes in the law, could Telmex under Mexican law make an offer to Tele Fácil on July 7, 2014 under the same interconnection rates as the ones in the Telmex documentation of August 26, 2013?

134. As set out at the hearing, the Respondent's position is that, under Mexican law, Telmex could not make an offer to Tele Fácil on July 7, 2014 which contained the same interconnection rates as those included in the First Telmex Offer of August 26, 2013.¹²⁰

135. This is because the First Telmex Proposal contained reciprocal that were no longer permitted under the applicable law.

F. Question 6: What are the most relevant legal and evidential materials on the record to help the Tribunal decide whether or not there was a renewal of Telmex's offer during the meeting in June 2014 between Messrs. Bello and Sacasa and Telmex's representative (Mr. Gallaga)?

136. The Respondent reiterates that all draft interconnection agreements and important communications from Telmex to Tele Fácil were issued through public notary.¹²¹ By contrast, the alleged meeting in June 2014 was not documented in any way.

137. It is also important for the Tribunal to recognize that while Mr. Bello claims that this meeting occurred sometime in June, Mr. Sacasa's evidence is that the "final meeting" with Mr. Gallaga occurred "shortly after" Telmex had been declared a PEA on 6 March 2014:

I attended approximately three different meetings with Telmex during this time to seek

¹¹⁹ *Id.*, pp. 1306-1310.

¹²⁰ *Id.*, Vol. 5, pp. 1311-1312.

¹²¹ *Id.*, Vol. 5, pp. 1312-1313; for instance see Exhibit R-002, Exhibit C-024.

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to finalize the interconnection agreement, but without success. Then, Tele Facil had a final meeting with Mr. Gallaga. This meeting occurred shortly after Telmex had been declared a preponderant economic agent on March 6, 2014.¹²²

138. The only contemporaneous document relating to this meeting is a written report prepared by Mr. Sacasa dated 9 May 2014.¹²³ This is the report, described above, in which Mr. Sacasa detailed the meeting with Telmex and set out Tele Fácil's strategy to remain silent on the issue of indirect interconnection. It is submitted that this document, coupled with Mr. Sacasa's evidence that the final meeting with Mr. Gallaga occurred shortly after 6 Mach 2014, supports a conclusion that there was no meeting in June 2014.

139. On a final note, there is no contemporaneous documentary evidence that Telmex ever offered to Tele Fácil the ability to partially accept the First Telmex Proposal. In fact, Mr. Bello's evidence that Mr. Gallaga's renewal of the First Telmex Proposal was on a "take it or leave it" basis contradicts this assertion. There is no interpretation of the phrase "take it or leave it" that supports offering partial acceptance. That phrase only has one meaning – accept the entire agreement or reject the entire agreement.

G. Question Seven: Considering Section C of Resolution 381, what is the interconnection agreement that is referred to in its First Dispositif (“Resolutivo Primero”)?

140. The Respondent reaffirms the answer it provided to this question at the hearing.¹²⁴

141. Furthermore, for the reasons set out above, the Respondent submits that testimony at the oral hearing has established that Resolution 381 was entirely based upon an analysis of whether a disagreement existed, and not upon an analysis of whether an agreement on rates existed. This has been reaffirmed at the hearing by Mr. Díaz, it was clarified by the IFT in Decree 77 and it was confirmed by the three *amparos*.

142. In this context, it is clear that Resolution 381 did not establish interconnection rates to be included in an interconnection agreement between Telmex and Tele Fácil, and this has been confirmed by Mexican courts. The Respondent respectfully submits that these are fully established juridical facts that this Tribunal cannot substitute with its own determinations, as if it were an international appeal entity for determinations made by the competent authorities and specialized

¹²² Exhibit C-003, para. 49.

¹²³ Exhibit R-001.

¹²⁴ Respondent Closing Statement, Transcript, Vo. 5. Pp. 1314-1318.

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domestic courts.

H. Question Eight: Is there a margin of appreciation for a regulator, such as the IFT, under international law?

143. There is a broad margin of appreciation for a regulator and expert in telecommunications, such as the IFT. Under international law, the need for a broad margin of appreciation is heightened when the regulator is addressing a highly technical regulatory matter as is the case of an interconnection disagreement procedure carried out in accordance with the applicable law.¹²⁵ The case law which supports this position was fully addressed in the response provided to this question at the hearing.¹²⁶

I. Question Nine: From a purely valuation standpoint, whether or not the DCF methodology should apply to this case?

144. The Respondent repeats and relies upon the answer provided at the hearing.¹²⁷

145. The DCF approach is not appropriate in this case. Tele Fácil has no history of profitable operations. This results in the Claimant's experts having to speculate on a range of crucial variables such as price, the demand for services, costs and capital expenditures.

146. In the context of international arbitration, the availability of a proven track record of profitability is considered a requirement for use of DCF. For example, according to the World Bank's Guidelines on the Treatment of Foreign Direct Investment,¹²⁸ for an enterprise that is not a going concern – such as Tele Fácil – liquidation value should be used instead of the DCF methodology.

147. Moreover, numerous international tribunals have rejected the use of a DCF in the absence

¹²⁵ At the time this question was answered during the hearing, Respondent placed special emphasis on the award of *Crystallex v Bolivia*, mainly in paragraph 583 of the award: “The Tribunal believes that in matters where a government regulator and/or administration is called to make decisions of a technical nature, those government authorities are the primary decision-makers called to examine the reports presented by the applying investor and the available scientific data. **As such, those governmental authorities should enjoy a high level of deference for reasons of their expertise and competence (which is assumed to be present in those institutions called to make the relevant decisions) and proximity with the situation under examination. It is not for an investor-state tribunal to second-guess the substantive correctness of the reasons which an administrative were to put forward in its decisions.** or to question the importance assigned by the administration to certain policy objective over others.” *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, April 4, 2016, ¶583. CL-093.

¹²⁶ Respondent Closing Statement, Transcript, Vo. 5, pp. 1319-1323.

¹²⁷ *Id.*, pp. 1323-1326.

¹²⁸ Exhibit RL-011, Guidelines on the Treatment of Foreign Direct Investment, World Bank (1992).

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of a sufficient track record of profitable operations:

- *Metalclad v United Mexican States*: the Tribunal confirmed that where the enterprise has not operated for a sufficiently long time to establish a performance record or where it has failed to make a profit, future profits cannot be used to determine going concern or fair market value.¹²⁹
- *Tecmed v United Mexican States*: the fact the Claimant had operated for only two years, combined with difficulties in obtaining objective data, led the Tribunal to disregard the DCF methodology.¹³⁰
- *Merril & Ring*: the Tribunal recognized that assumptions incorporated into valuation methods such DCF must be drawn from specific information provided by a historical record of profitability, or other elements that allow for an educated estimate. In that case there was no measure of profitability relating to the period before the measures were adopted. As such, the Tribunal rejected DCF valuation.¹³¹
- *Gemplus v. Mexico*: the claimant's business operated for less than 1 year. The Tribunal held that such a business history was far too uncertain and incomplete to provide a sufficient factual basis for the DCF method.¹³²
- In *Tza Ya Shum v. Peru*: the Claimant had three years in operations and in two of those three years the company had losses. On that basis, it concluded that lack of a history of profitability results in a lack of uncertainty. As such, the Tribunal rejected the use of the DCF methodology.¹³³
- In *Caratube v. Kazakhstan*: the Claimants had operated for over 5 years but had not realized profits. The Tribunal rejected the DCF method because the Claimants were not a going concern with a proven record of profitability.¹³⁴

¹²⁹ Exhibit RL-012, *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, ¶¶ 119-120.

¹³⁰ Exhibit RL-013, *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, ¶ 186.

¹³¹ Exhibit RL-015, *Merrill & Ring Forestry L. P. v. Government of Canada*, UNCITRAL, administered by ICSID, Award, 31 March 2010, ¶ 264.

¹³² Exhibit RL-016, *Gemplus, S.A., SLP, S.A. and Gemplus Industrial, S.A. de C.V. v. los Estados Unidos Mexicanos*, ICSID Case No. ARB(AF)/04/3 & ARB(AF)/04/4, Award, 16 June 2010, ¶¶ 13-72.

¹³³ Exhibit RL-017, *Tza Yap Shum v. Peru*, ICSID Case No. ARB / 07/6, Award, July 7, 2011, ¶ 263.

¹³⁴ Exhibit RL-018, *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB / 13/13, Award, September 27, 2017, ¶¶ 1098 and 1099.

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148. Just like in these cases, Tele Fácil cannot demonstrate a history of profitable operations to justify its claim for damages. Without a historical record of profitability, the Tribunal must reject the DCF method.

149. The unreliability of the DCF method employed by the Claimants is highlighted when you compare the claim for damages of USD \$472,148,929 with the value of Tele Fácil's assets and a contemporary valued made by Aldwych Capital Partners. The Tele Fácil's asset inventory shows that it has invested only USD \$178,946.97 in telecom equipment, that is, a tiny fraction of the damage claim.¹³⁵ Moreover, in 2013, Aldwych Capital Partners valued Tel Fácil's concession between 1 and 2 million dollars and rejected the use of the DCF method until Tele Fácil became operational and its business plan was validated. According to Aldwych, other methodology valuation (as the DCF) could be used later, once Tele Fácil become operational with a track record of 1-2 years.¹³⁶ As the Tribunal is aware, Tele Fácil never became operational.

150. The modest value of Tel Fácil's assets and concession, compared to its damages claim, reinforces the inappropriateness of using the DCF methodology in this case.

J. Question Ten: Could or could not Tele Fácil pursue the international termination line of business independently of its other lines of business in 2015 and 2016?

151. International termination services is the largest component of the claim for damages, accounting for approximately 66% of the alleged lost revenues.¹³⁷ The position is reiterated that it would not have been logical to give up the profits that this line of business would supposedly have left to protect the Retail Services (which were marginally profitable at best scenario), the Competitive Tandem Services (business line invented to cover the claim of damages) and the DID Services (whose profitability has not been demonstrated).

152. The step-by-step process by which Tele Fácil would provide international termination services was described by Mr. Blanco at the hearing.¹³⁸ Importantly, Mr. Blanco confirmed that the interconnection rate that Telmex would pay to Tele Fácil doesn't come into play in Tele Fácil's international termination services.¹³⁹ The Claimant's expert, Dr. Dippon, also confirmed that

¹³⁵ Exhibit R-058.

¹³⁶ Exhibit R-042, pp. 13-14.

¹³⁷ First Expert Report Mr. Obradors, ¶ 49.

¹³⁸ Transcript Mr. Blanco, Vol. 2, pp.363-371.

¹³⁹ *Id.*, Vol. 2, p. 371.

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international termination services did not involve receiving traffic from Mexican operators for termination abroad.¹⁴⁰ This is because Tele Fácil's international termination services would not have involved receiving traffic from Telmex.

153. The Respondent submits that Tele Fácil's international termination services were not impeded by any of the measures at issue in this case. Tele Fácil elected not to commence its operations rather than connect its network with Telmex and offer international termination services. It would be entirely contrary to the most basic principles of damages to compensate Tele Fácil for its voluntary election not to offer international termination services.

154. In responding to this question at the hearing, the Claimant provided the following explanation for not pursuing international termination services:

But the real question is: What if it doesn't work? The fact is that if it didn't work, Tele Fácil would never get another minute of traffic from Future Telecom. This was a risk that Tele Fácil could not accept, especially as a new entrant.¹⁴¹

155. This answer creates an impossible contradiction for the Claimant. On one hand, the Claimant states pursuing international termination services "was a risk that Tele Fácil could not accept". On the other hand, Mr. Blanco claims that international termination services represented profits "in the hundred million dollars a year."¹⁴² The irony that the alleged profits from the "risk that Tele Fácil could not accept" play a central role in Tele Fácil's damages claim should not be lost on the Tribunal.

156. Moreover, in answering this question at the hearing, the Claimant focused (again) on its incorrect allegation that Resolution 381 approved and imposed the interconnection rate included in the First Telmex Proposal. This does not answer the question.

157. Could Tele Fácil have signed an interconnection agreement with Telmex, connect its networks in a timely manner, and then implement international termination services? The answer is yes. By way of example:

- On 26 August 2013, Telmex delivered the First Telmex Proposal.¹⁴³ Tele Fácil could have immediately accepted that interconnection agreement;

¹⁴⁰ Transcript, Dr. Dippon, Vol. 4, p.898.

¹⁴¹ Respondent Closing Statement, Transcript, Vol 5, p. 1285.

¹⁴² Transcript Mr. Blanco, Vol. 2, p. 373.

¹⁴³ Exhibit C-021.

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- On 10 December 2014, after the issuance of Resolution 381, Telmex delivered another interconnection agreement, confirming that it was ready to execute the interconnection agreement and establish interconnection.¹⁴⁴ Tele Fácil could have immediately accepted that interconnection agreement;
- On 16 April 2015, after the issuance of Decree 77, Telmex wrote to Tele Fácil advising that it would establish indirect interconnection through Nextel and that it remained at Tele Fácil's disposal to carry out meetings to execute the interconnection agreement.¹⁴⁵ Tele Fácil elected to not respond to that invitation;
- On 9 January 2015, Telmex formally sought from Tele Fácil negotiations to defined the interconnection rate for 2015 and to facilitate direct interconnection between Telmex's network and Tele Fácil's network.¹⁴⁶ Tele Fácil's refusal led to Resolution 127;
- In addition to these concrete examples, Mr. Díaz also confirmed that "If a concessionaire wants to be certain that he will come out of the interconnection process with the entire Interconnection Agreement, what he can do is put before the Institute as disagreed terms each and every one of the clauses of the Agreement to be certain that, at the end the day, he will have the Agreement together with the interconnection rates, provided that they are all under the hypothesis of Article 42, then, and Article 129 now."¹⁴⁷ Tele Fácil could have commenced such an interconnection dispute at any time.

158. There can be no doubt that Tele Fácil had ample opportunity to execute an interconnection agreement and connect its network with Telmex's network. Had it done so, it could have pursued international termination services, and, assuming that Mr. Blanco and Tele Fácil's expert Mr. Dippon are correct about the alleged profitability, enjoyed profits in excess of \$100 million USD. Instead, Tele Fácil voluntarily elected to abandon its operations in Mexico.

V. Damages

159. The Claimant's theory of damages has been fully addressed by the Respondent in the Statement of Defence and the Rejoinder. With this in mind, the Respondent shall focus its submissions upon highlighting the following evidence from the hearing which in its view will be

¹⁴⁴ Exhibit R-009.

¹⁴⁵ Exhibit R-015 and Transcript, Bello, pp.303-304.

¹⁴⁶ Exhibit C-037.

¹⁴⁷ Transcript, Vol. 2, p. 463.

Courtesy Translation

of further assistance to the Tribunal as it considers the damages issues at play.

A. International Termination Services

160. As set out in response to the Tribunal's Tenth Question, international termination services are the largest component of the claim for damages, accounting for approximately 66% of the alleged lost revenues.¹⁴⁸

161. Importantly, international termination services do not involve receiving traffic from Telmex which, under the Claimant's hypothesis, would have been subject to the interconnection rate included in the First Telmex Proposal. This was agreed to by the Claimant's expert, Dr. Dippon:

Q. Would you agree that neither Tele Fácil's costs nor its revenues under this line of business had anything to do with interconnection rate that Telmex would have had to pay Tele Fácil?

A. That is correct, I would agree with that.¹⁴⁹

162. The consequence of this? The IFT's alleged failure to enforce Resolution 381 and the alleged improper issuance of Decree 77 and Resolution 127 had no impact whatsoever over this line of business.

163. International termination services were not impeded by any of the measures at issue in this matter. Tele Fácil elected to close its operations rather than offer international termination services. As set out above herein, Tele Fácil had multiple opportunities to execute an interconnection agreement with Telmex. It elected no to do so every time.

164. The following answer provided by the Respondent's expert, Mr. Obradors, to a question posed by Arbitrator Veeder is also telling:

ARBITRATOR VEEDER: I think the first question you probably just answered, which is, would it have been viable as a business for Tele Fácil to pursue an international termination business line as a stand-alone service; that is, abandoning everything else he was seeking to do and just to pursue that particular line of business?

From what you're saying, I would assume the answer is "no."

THE WITNESS: Now, in my opinion--had I been the Investor in this company and I had thought--and I had thought that I was going to have 15 million in revenues monthly,

¹⁴⁸ First Expert Report Mr. Obradors, ¶ 49.

¹⁴⁹ Transcript, Dr. Dippon, Vol. 4, p.901.

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I would have pursued that line of business.¹⁵⁰

165. Arbitrator Veeder then went on to ask Mr. Obradors about Dr. Dippon's opinion that Future Telecom would not have proceeded under the MOU if legal challenges between Telmex and Tele Fácil remained. Dr. Dippon's evidence was as follows:

Q. Okay. So, if I understand correctly, if Tele Fácil went to Future Telecom and told them, "look, I have an interconnection agreement with Telmex and I have interconnected with Nextel," Future Telecom would not have been in a position to deliver the traffic or would be reluctant to deliver the traffic?

A. If there were still legal challenges between Tele Fácil and Telmex, of course. I would have--you would have to ask Future Telecom. I would say the risk is way too high.

You have to understand that Future Telecom depends on the reliability of its terminating provider in Mexico because if the call does not go through, if there is a problem, if the calls stall, Future Telecom's ability to aggregate traffic will be impacted, so they will pay for this dearly.

So, no, I think Future Telecom would not have given that traffic to Tele Fácil.¹⁵¹

166. This conclusion by Dr. Dippon, however, is premised on the assumption that legal challenges continued to exist as between Telmex and Tele Fácil. There is no reason to assume that those legal challenges would continue. As set out in the response to the Tribunal's Question Ten, above, Tele Fácil had ample opportunity to enter into an interconnection agreement with Telmex and avoid all of the legal challenges.

167. On a final note, the Claimant's expert, Dr. Dippon's damages calculation for international termination services relies upon traffic that would flow from Future Telecom to Tele Fácil. The relationship between Future Telecom to Tele Fácil was codified in a Memorandum of Understanding ("MOU") dated 14 June 2013. The work that would flow from this MOU is what Tele Fácil's counsel described as "a risk that Tele Fácil could not accept, especially as a new entrant."¹⁵²

168. There is absolutely no causal link between the measures at issue and the damages claimed. The Claimant is asking this Tribunal to order compensation for Tele Fácil's voluntary election not to offer international termination services. Any damages awarded for this line of business would be an inappropriate windfall.

¹⁵⁰ Transcript, Mr. Obradors, Vol. 5, p. 1226.

¹⁵¹ Transcript, Dr. Dippon, Vol. 4, pp. 914-915.

¹⁵² Transcript, Vol. 5, p. 1287.

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B. Non-discrimination principle

169. In assessing the applicability of the non-discrimination principle, the Respondent urges the Tribunal to begin by reviewing Article 125 of the FLTB:

Article 125. Concessionaires operating public telecommunications networks are bound to interconnect their networks with those of other concessionaires in non-discriminatory and transparent conditions and based on objective criteria and in strict compliance with the plans referred to the previous Article, except as provided by this law on the subject of rates.

The interconnection of public telecommunications networks and their rates, terms and conditions, are of public order and social interest.

The terms and conditions for interconnection offered by a concessionaire to another by virtue of an agreement or a resolution issued by the Institute, shall be granted to any other party requesting it, as from the date of the request.¹⁵³

170. The Tribunal will observe that a plain reading of Article 125 establishes that all operators are obliged to interconnect their networks under non-discriminatory conditions and to offer, to any other operator who so requests, the same terms and conditions that they offer to third parties.

171. In this regard, the non-discrimination principle operates in a similar way to the MFN provision included in most investment treaties. That is to say, if two operators have an interconnection agreement, any of them can demand from the other the same interconnection terms offered to a third operator, if they deem those terms more advantageous.¹⁵⁴

172. The second witness statement of Mr. Díaz addresses this principle.¹⁵⁵ In his cross-examination, Mr. Díaz confirmed that his systemic interpretation of the FLTB, including the FTBL's non-discrimination principles, is based upon the interpretation by the Plenary:

Q. Commissioner Díaz, should the Tribunal understand this systematic interpretation of the LFTR to be a systematic interpretation of someone not trained in providing systematic interpretations of legal texts?

A. No. That is the interpretation reviewed by the Plenary which has legal powers in the LFTR. It has the power to interpret the law, so does the administrative provisions within its competence. All I'm doing is to include here what the Plenary had said in that Confirmation of Criteria.¹⁵⁶

173. In contrast to Mr. Díaz, who relied upon the interpretation of the domestic regulator, the

¹⁵³ Exhibit CL-004 at p. CL-004.035.

¹⁵⁴ Witness Statement of Mr. Díaz, ¶ 62.

¹⁵⁵ Second Statement of Mr. Díaz, Section D, ¶¶ 49-68. Second Expert Report of Mr. Buj, ¶¶ 204-214.

¹⁵⁶ Transcript, Mr. Díaz, Vol. 2, pp. 466-467.

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Claimant's expert did not refer to Article 125 in his expert report because he inexplicably did not consider it to be relevant:

Q. In this discussion, about the principle of non-discrimination, you don't make reference to Article 125; correct?

A. No, I do not make reference to that Article.

Q. You don't consider it relevant in this context?

A. I did not think it's relevant. No, I didn't think it's relevant for the context.¹⁵⁷

174. The Respondent submits that Article 125 of the LFTR is obviously relevant to the principle of non-discrimination. The interpretation of Article 125 by Mr. Díaz, which is based upon the interpretation by the Plenary, should be preferred over that of the Claimant's expert's treatment of it who ignored that Article entirely.

175. The result of this non-discrimination principle is that Telmex would receive the lowest interconnection rate agreed to by Tele Fácil with other operators. Telmex obviously would have exercised this entitlement. The Claimant's expert, Dr. Dippon, agreed with this proposition:

Q. So, the Respondent has also argued that, pursuant to Article 125 of the Federal Law of Telecommunications and Broadcasting, Tele Fácil would have been obliged to offer Telmex the same rate it offers any other operator upon request.

Would you agree that the correct interpretation of Article 125 is also an issue of domestic law?

A. I would believe so, yes, sir.

Q. So, assuming again that the Respondents' interpretation is correct, would you agree that it would have been in Telmex's best interest to invoke this provision, to demand from Tele Fácil, the same rate offered to, say, other landline operators?

A. Yes, of course, it would have. I mean, it raises the question why Telmex ever negotiated a rate or how this rate ever came about.

But yes, under that hypothetical, I think it would make sense for Telmex to ask for the lower rate as a profit-maximizing company.¹⁵⁸

176. In this context, the Respondent respectfully reminds the Tribunal that Article 128 of the FLTB obligates all operators to register interconnection agreements, and that information is then made publicly available.¹⁵⁹ The purpose of this public registry is to ensure that operators are

¹⁵⁷ Transcript, Dr. Marquez, Vol. Vol. 3, p. 650.

¹⁵⁸ Transcript, Dr. Dippon, Vol. 4, pp. 942-945.

¹⁵⁹ Exhibit CL-004 at p. CL-004.045.

Courtesy Translation

informed of the terms and conditions that their competitors offer to one other.

177. In this context, recall that Tele Fácil and Nextel had negotiated an interconnection agreement in December 2014. The interconnection rate was MXP \$0.02445. Telmex would have been entitled to demand from Tele Fácil that rate.

178. It is not realistic for the Tribunal to accept suggestions by the Claimants that either Tele Fácil would not connect with other operators or that it would successfully negotiate the rate included in the First Telmex proposal with all other operators.

C. Double transit is not permitted in Mexico

179. The current regulatory framework permits indirect interconnection between two operators but does not allow indirect interconnection through more than one intermediary. Indirect interconnection through more than one intermediary is referred to as “double transit”.¹⁶⁰

180. At the hearing, it became apparent that the Claimant’s expert, Mr. Marquez, did not appreciate the difference between “double transit” and “double tandem”:

Q. I’m going to ask you to please turn to Paragraph 72 of your Expert Report now.

I’m going to quote from that Paragraph 72:

"However, Mexico argues that the" interconnect--"Double Transit interconnection is not viable vis-à-vis the existing regulation on number portability, as well as the technical numbering and signaling plan, thus implying that the Double Tandem interconnection is a service to be provided solely by the Preponderant Economic Agent."

And I see that it uses the terms "Double Transit" and "Double Tandem" as different.

Do you think they are synonymous?

A. They are the species of a same genus. There is a direct interconnection.¹⁶¹

181. The difference between “double transit” and “double tandem” was explained by the Respondent’s expert, Mr. Obradors:

So, the concepts are clear, what is Double Transit? Double Transit refers to transiting through two intermediate networks of different operators. In other words, the example would be from a third operator to Telmex--to Telmex and finally to Tele Fácil, so we go through going through the Telmex and Nextel works to get from the third operator to Tele Fácil.

Double Tandem as well is referred to a double jump within the network with the same

¹⁶⁰ Witness Statement of Mr. Díaz, ¶ 98.

¹⁶¹ Transcript, Dr. Marquez, Vol. 3, pp.660-661.

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operator. This corresponds to telephone network architecture that would be somewhat of legacy today because you could connect locally, and then you would access only a few users a bit further up, that would be a single tandem, and further up would be Double Tandem. And normally connecting to two or three interconnection points, you would access the full national territory.¹⁶²

182. The fact that double transit is not permitted by the Mexican regulatory telecommunications framework is detailed in Mr. Díaz's second witness statement.

183. In that second witness statement, Mr. Díaz stated that "the business proposed by Tele Fácil assumes that the outgoing interconnections will continue to be carried out by the operator with whom the user has contracted the service, without any further intervention of Tele Fácil".¹⁶³ He then went on to conclude that "If that were so, then the Fundamental Numbering Plan ("FNP") would be breached because number 8.5.3 establishes that the IDO and IDD codes are the same."¹⁶⁴

184. Mr. Díaz confirmed this very point during his cross-examination:

Q. The IDO does not impact the delivery or routing of calls; correct?

A. If I recall correctly, that's in 8.5.3 of the Numbering Plan, and it points out that the IDO and IDD must be the same--in other words, they are to be the same number.¹⁶⁵

185. The Claimant's theory of damages is premised upon it connecting with other operators through the prohibited at law process of double transit.

186. This Tribunal cannot award damages premised upon impermissible double transit.

D. DID/Conferencing Services

187. DID/Conferencing includes various services such as free conferencing calling, audio or telephone and chat rooms. Such services would not have been provided directly by Tele Fácil, but instead, by a third-party DID/Conferencing Service provider.¹⁶⁶

188. In order to access the DID/Conferencing Services, an end user in Mexico would be required to call a number on Tele Fácil's network. Tele Fácil and the DID/Conferencing service provide would then split the interconnection revenue on a 50/50 basis. The interconnection rate is the only source of revenue for Tele Fácil under DID/Conferencing Services and this is important in the

¹⁶² Transcript, Mr. Obradors, Vol. 5, p.1129.

¹⁶³ Second Witness Statement Mr. Díaz, ¶ 75(ix).

¹⁶⁴ Second Witness Statement Mr. Díaz, ¶ 75(ix).

¹⁶⁵ Transcript, Mr. Díaz, Vol. 2, pp.470-471.

¹⁶⁶ Transcript, Dr. Dippon, Vo. 4, p. 934.

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context of non-discriminatory principle that will be discussed later.¹⁶⁷

189. The Claimant's expert, Dr. Dippon, based his quantification of damages on two fundamental assumptions: (i) that double transit was permissible in Mexico, and (ii) that the non-discrimination principle would not operate to reduce the rate that Telmex would pay to Tele Fácil for interconnection. Both assumptions are unfounded, as explained in the Rejoinder and the witness statement of Mr. Díaz.¹⁶⁸

190. During the hearing, Dr. Dippon acknowledged that whether or not double transit is permissible under the current Mexican regulatory regime is a question of domestic law:

So, if the operator happened to interconnect indirectly with Nextel through Telmex, then Nextel would have to provide second transit to the call to reach Tele Fácil; do you agree?

A. Yes.

Q. So, Mexico has argued that Double Transit is not allowed under current regulations in Mexico.

A. I'm aware of that, yes.

Q. So, would you agree that whether or not this is allowed is a question of domestic law?

A. It is. Yes, I would agree with that.

I think the only value I would try to add to this conversation is that there are double indirect interconnections examples in the world. So somewhere else it seems to be possible and legal, but you're right, ultimately, it's a question of domestic law.¹⁶⁹

191. Dr. Dippon also confirmed that if double transit was not permitted, then the DID/Conferencing traffic assumed in his assessment of damages would "fall away". This is because that service would only be available to Telmex users and Nextel users:

Q. Okay. Assuming that the Respondents' interpretation of its own regulations is correct, would you agree that the damages would be limited to calls made by Telmex and Nextel users?

A. I mean, that's certainly a possible outcome. It is--well, I think, if this was the case, I would--I mean, so first of all, I agree that's a possible outcome. The only hesitation I have is we're changing the assumption in the but-for world and we're suddenly saying, plus you're not allowed to do double interconnect.

¹⁶⁷ *Id.*, Vol. 4, p. 935.

¹⁶⁸ Statement of Defense, ¶¶ 399-407, Rejoinder, ¶¶ 267-287 y 291-298, and Second Witness Statement Mr. Díaz ¶¶ 36-42 and 49-68.

¹⁶⁹ Transcript, Dr. Dippon, Vo. 4, p. 937.

Courtesy Translation

If that was the outcome, and obviously that's the center of dispute, would the counterfactual world would look the same? The answer to that is, I don't know. But it's a possibility that if Tele Fácil found no other way than doing double--Indirect Interconnection to Telmex, then that traffic would fall away, as you say.

Q. In that case, that would limit the availability of the service; correct?

A. Yes.

Q. So, it would only be available to Telmex users and Nextel users.

A. Under that hypothetical, yes.¹⁷⁰

192. It is submitted that the Claimant's theory of damages with respect to DID/Conferencing services is significantly flawed because it is based on the erroneous assumption that Tele Fácil could double transit through Nextel.¹⁷¹ As set out above, this is not the case. Double transit is not permitted by the Mexican telecommunication regulatory framework.

193. Moreover, the Claimant's theory of damages with respect to DID/Conferencing services also assumes that Tele Fácil would have maintained the rate from the First Telmex Proposal until the end of 2017 despite the principle of non-discrimination. As set out above, on the basis of the non-discrimination principle as established by Article 125 of the FLTB, Telmex would have received the lowest interconnection rate agreed to by Tele Fácil with other operators.

194. Dr. Dippon confirmed that a much lower termination rate would have drastically reduced Tele Fácil's revenue from its proposed DID/Conferencing services:

Q. And what would be the impact of your damages assessment of equating Telmex termination rate to that of other landline operators?

A. So, I did not run that sensitivity on the model, but we can just think it through.

If a much lower termination rate would have applied, that, obviously, would drastically reduce the revenue to Tele Fácil from its DID Services, and the part that we don't know is whether that would have caused any of the providers not to enter the market.¹⁷²

195. In closing on the issue of DID/Conferencing, the Respondent reminds the Tribunal that its expert made an alternative estimate by adjusting the assumptions he deemed erroneous and the

¹⁷⁰ *Id.*, Vol. 4, pp. 937-938.

¹⁷¹ Remember that the rest of the operators in Mexico interconnect directly with Telmex and indirectly with each other. Therefore, to send traffic to the Tele Fácil network, an operator would have to send the traffic to Telmex (first transit), Telmex would then have to deliver it to Nextel (who would offer the double transit) and Nextel would later deliver it to Tele Fácil. See Statement of Defense, ¶¶ 387-389 and Rejoinder, ¶¶ 399-407.

¹⁷² Transcript, Dr. Dippon, p.943.

Courtesy Translation

damages claimed by the Claimants reduce by 99.4% in the “main scenario” and by 98.3% in the “conservative scenario”.¹⁷³

E. Competitive Tandem Services

196. As an initial comment, the Respondent reminds the Tribunal that competitive tandem services was conceived after-the-fact for the sole purpose of increasing the amount of damages. This is recorded in a document dated 18 March 2017, which read as follows:

It is important to point out that the final dimension of the proposed project must be tied to a study of financial modeling that reveals, in the light of the real fixed telephony traffic that flows between Telmex and the rest of the Public Telecommunications Networks (RPTs), which would be the final magnitude of this project and the shielding of what is proposed within the legal and regulatory framework (the latter must be included in the modeling to be carried out). So that it can be finally incorporated into the financial model of damages in the NAFTA claim with the confidence that it is duly supported and grounded, which would contribute to increase the credibility of what it presented in the International Arbitration Panel, and obviously increase the amount to claim.¹⁷⁴

[Emphasis added]

197. The Claimant is asking this Tribunal to award damages for a line of business that was first documented 2 years after Tele Fácil failed to pursue it. To this end, the only other documents that allegedly address competitive tandem services have not been disclosed on the basis of solicitor privilege.¹⁷⁵ Those undisclosed documents were allegedly created in July and November of 2015 to undertake a preliminary case assessment in anticipation of litigation. The artificial nature of the Claimant’s claim is supported by the Claimant’s failure to provide business planning documents that address tandem competitive services to its expert, Dr. Mariscal. At the hearing, Dr. Mariscal confirmed that she was not provided with a written business plan, any market analysis, documents explaining the technical implementation of the competitive tandem services, financial projections, an estimate of the expected volume of traffic or any marketing materials.¹⁷⁶

198. When asked about the absence of a market analysis, Dr. Mariscal confirmed that “Other than interviews and discussions with Tele Fácil people, no, I did not have written stuff.”¹⁷⁷ When

¹⁷³ First Expert Report, Mr. Obradors, ¶¶ 171-182 and 185.

¹⁷⁴ Exhibit R-059 at p. 5 of 5.

¹⁷⁵ See the “*Privilege Log*” provided by Claimants in response to the Respondent’s Second Request for Documents, Exhibit R-085.

¹⁷⁶ Transcript, Dr. Mariscal, pp. 1003-1004.

¹⁷⁷ *Id.*, p. 1003.

Courtesy Translation

then asked about documents explaining the technical implementation of the competitive tandem services she stated as follows:

A. No, although I do remember that during--and again, this might be two years ago, so my memory is not that fresh. I do remember that they did have documents, but I did not use those documents or rely on those documents. I mean, these documents existed, but no.¹⁷⁸

199. Dr. Mariscal was also not provided with any documents relating to the competitive tandem services business model of the state of international experience in running a similar venture:

Q. So, were you provided with any document related to this known business model or the state of international experience in running a similar venture?

A. So, I undertook various interviews with Mr. Sacasa and also with Mr. Bello on this, and the business model was explained to me as well as its uses in other countries, yes, but not documents, no. Otherwise, they would be in my Report.¹⁷⁹

200. Finally, Dr. Mariscal also confirmed that no contracts for tandem competitive services were signed.¹⁸⁰ The respondent submits that this further reinforces the fact that competitive tandem services was conceived of after-the-fact, and also undermines the Claimant's unsubstantiated claim that this service was marketable.

201. All of these facts support a conclusion that the Claimant is not asking this Tribunal to compensate based upon damages actually suffered, but instead, to compensate for retroactive creativity.

202. Moreover, in preparing her report, Dr. Mariscal relied entirely on counsel's instructions to assume that competitive tandem services were legal in Mexico and that it was technically feasible.¹⁸¹ The Claimant has not provided any further expert evidence to establish the technical feasibility of legality of competitive tandem services. By contrast, the second witness statement of Mr. Díaz fully explains why competitive tandem services are not technical feasible or legally permissible in Mexico.¹⁸²

203. In this regard, the Respondent reminds the Tribunal that once a phone number is migrated to Tel Fácil, the user ceases to be a client of the original third party operator and becomes a client

¹⁷⁸ *Id.*, p. 1004.

¹⁷⁹ *Id.*, p. 1006.

¹⁸⁰ *Id.*, p. 1009.

¹⁸¹ *Id.*, p. 1013.

¹⁸² Second Witness Statement, Mr. Díaz, ¶¶ 69-75.

Courtesy Translation

of Tele Fácil.¹⁸³ In such a competitive industry, it is preposterous to suggest that third party providers would give up their client base and the retail revenues associated with that client to share in a high interconnection rate that expires less than three years later, in 2017.

204. Moreover, to award damages the Tribunal would also need to accept that all of the end users in Mexico would consent to their services being migrated to Tele Fácil.¹⁸⁴ Again, this is just not a plausible. There would be no motivation for them to do so.

205. The opinion of the Respondent's expert, Analysys Mason, is that other operators would not be willing to give up 30% of their clients and lose the retail revenues associated with those clients only to receive a fraction of the interconnection fees paid by Telmex for in-bound calls to those numbers.¹⁸⁵

206. In sum, there exists absolutely no basis for an award of damages in relation to Tandem Competitive Services.

F. Conclusion

207. Plainly put, the Respondent did not restrict the operations of Tele Fácil.

208. The oral hearing made clear that Resolution 381:

- assessed whether there existed disagreement between Tele Fácil and Telmex; and then
- decided only the disagreed issues that were the subject of the disagreement raised: numerical portability and indirect interconnection.

209. Resolution 381 did not, as the Claimant suggests, assess whether Tele Fácil and Telmex had consensually agreed to all other terms and conditions of interconnection. The IFT was only empowered to resolve the disagreement raised.

210. To this end, Resolution 381 did not impose any obligation upon Telmex and Tele Fácil to execute the First Telmex Proposal subject to modifying numerical portability and indirect interconnection. This fact was reaffirmed at the hearing by Mr. Díaz, was confirmed by the IFT in Decree 77 and further confirmed by the three *amparo* decisions.

211. Tele Fácil also exercised the legal remedies available to challenge decisions of the IFT and the fact that the Specialized Courts have ruled against them in no way implies that they have been denied justice.

¹⁸³ First Expert Report, Mr. Obradors, ¶ 82.

¹⁸⁴ Exhibit CL-004, Article 191 of the FLTB. First Expert Report, Mr. Obradors, ¶ 82.

¹⁸⁵ First Expert Report, Mr. Obradors, ¶ 82.

Courtesy Translation

212. Even in the event of any liability existing which it does not, the Claimant failed to discharge their burden of proving damages. It is plain and obvious that the Claimant's estimate of damages is too speculative and cannot serve as a basis for awarding damages, in an extreme case that the Tribunal determine that the Respondent is internationally responsible of a violation to the NAFTA.

213. For all of the foregoing, the Respondent requests that this Tribunal dismiss the Claimant's claims in their entirety and order the Claimant to joint and severally indemnify the Respondent for the arbitration costs and its legal costs, including travel expenses of its legal team, witnesses and experts.

All of which is respectfully submitted this 15th day of August 2019.

Respectfully,

El Director General

Orlando Pérez Gárate