

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

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

*Claimant*

and

**THE UNITED MEXICAN STATES**

*Respondent*

ICSID Case No. UNCT/17/1

**CLAIMANT'S POST-HEARING BRIEF**

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## I. INTRODUCTION

1. The core issue in this case is whether Respondent formally recognized and expressly validated Claimant's legitimate investment rights via a unanimous resolution, and then later illegally repudiated its own orders, thereby destroying Claimant's investments in violation of the NAFTA.

2. The record is now complete, and it shows exactly this: an orderly and reasoned process that led to Resolution 381, which established Claimant's interconnection rights, that was later followed by the IFT's dramatic change in position which targeted Claimant's investment for elimination. Importantly, the record further shows that the IFT had never before acted in such a manner, and that it has never since acted in such a manner.

3. Moreover, the record reveals that Claimant has steadfastly given a consistent account of its treatment, supported by the ordinary meaning of the terms used by the IFT in its resolutions and decrees, consistent with Mexican telecommunications law and policy, and consistent with the IFT's processes and procedures over the years. As Claimant will elaborate in this submission, Respondent's own witnesses attest to these facts.

4. Respondent's defense is the opposite, and it is nothing less than remarkable. Respondent takes a process that was intended – pre-reform and post-reform – to liberalize Mexico's monopolistic telecom market by ensuring prompt interconnection, and, for purposes of this case, advocates in favor of a process that delays indefinitely interconnection. Rather than support the reforms that were intended to weaken the monopolist, in this case Respondent, **on every single issue**, supports interpretations that favor and strengthen Telmex. Rather than providing the new entrant with a consistent application of the law, Respondent employed never before used ploys – such as post-facto requiring the new entrant to physically interconnect without having in place an executed interconnection agreement – which served to condemn Claimant's investment.

5. Respondent's "alternative world" was on full display during the hearing in this matter. For example, while telecom carriers negotiate an interconnection agreement to reach consensus on agreed terms, according to now-Commissioner Sostenes Díaz, "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. . . .”<sup>1</sup>

6. In addition, Respondent brought before the Tribunal a so-called expert, who has never negotiated a single interconnection agreement, to declare that Telmex’s offer to Tele Fácil expired after three days. Somehow, this theory became “very key or crucial” to Respondent’s defense, even though it was never asserted by Telmex, is not in any of the IFT’s Resolutions or Decrees, and is not even practical in real life.<sup>2</sup> Further, it is only in the “alternative world,” reserved for Tele Fácil alone, that a Mexican telecommunications regulator would try to testify that when the Mexican Congress amended the Constitution and imposed asymmetric regulations on Telmex to curb its market abuses, it was really only concerned about Telmex’s monopolization of “mobile services.”<sup>3</sup>

7. Respondent’s disconnect with the real world extends to its approach to and flouting of the Tribunal’s document production orders. We heard at the hearing that the Government of Mexico is “at peace” with and concluded that there is not “anything to be concerned about” the fact that they failed to produce an important draft of Decree 77, even though it was in their files all along, blithely asserting that their production in this case was limited to “only official” documents “presented to the Plenary.”<sup>4</sup> Respondent insisted before the Tribunal that it is ok to assume that the IFT’s Commissioners “do not issue e-mails” and suggested that one should feel “badly for the Commissioners” when asking them to produce relevant and responsive information in an international arbitration that alleges a violation of Mexico’s obligations under an international treaty.<sup>5</sup> In Respondent’s alternative world, the IFT can refuse to provide data to the Claimant, but then have its expert, Mr. Obradors, rely on his unique access to the IFT’s data as a basis to criticize Dr. Mariscal’s analysis for having arrived at a conclusion that was off by 3%.<sup>6</sup>

8. These positions, the bulwarks of its defense, show Respondent to be prepared to do its best to hide the truth, and to cast aside its policies and laws, including its constitutional reforms, to win this case. It consoles itself that this approach is justified because there will not be

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<sup>1</sup> Díaz Test., Tr. 463:17-464:4.

<sup>2</sup> Buj Test., Tr. 801:6-803:9; 846:2-849:15.

<sup>3</sup> Díaz Test., Tr. 424:16-425:12.

<sup>4</sup> Peláez Test., Tr. 518:11-17.

<sup>5</sup> *Id.*, Tr. 526:12-527:16.

<sup>6</sup> *See* Obradors Test., Tr. 1165:19-1167:22.

another Tele Fácil. But this consolation is false for two main reason. It is false because there is a Tele Fácil, and there is a NAFTA to ensure that this kind of conduct does not go unpunished. And it is false because, if this case demonstrates anything, it demonstrates that the IFT continues to be under the sway of the dominant carrier that has successfully frustrated all efforts to liberalize the Mexican telecommunications sector.

9. In the pages that follow, Claimants will elucidate, with the benefit of hearing testimony, the critical elements of this case. Section II will set forth the reasons why Claimant is entitled to recovery of its losses resulting from Respondent's conduct. Claimant will show that he has proven: (1) he made an investment in Mexico; (2) he is entitled to make a claim under the NAFTA; (3) his fair and equitable treatment claim under Chapter 1105 of the NAFTA is valid; (4) his claim of expropriation under Chapter 1110 of the NAFTA has merit; and (5) he is entitled to the full reparations he has claimed for the damages suffered.

10. Section III addresses Respondent's approach to this entire proceeding, which has focused on minimizing the amount of information that is made available to Claimant and the Tribunal. This includes flouting of the Tribunal's orders on the production of documents, which, as Claimant will explain, was confirmed at the hearing. In this section, Claimant will formally make his specific requests for adverse inferences under § 18.23 of Procedural Order No. 1. Section III is followed by a short conclusion.

## **II. CLAIMANT IS ENTITLED TO RECOVERY**

### **A. Claimant Has Proven That He Made an Investment in Mexico**

11. From the beginning, Claimant has asserted his qualifying investments under the NAFTA by identifying all of them including, most importantly, his interconnection rights under Resolution 381.<sup>7</sup> Respondent, in contrast, has put forward a variety of confused arguments that seek to undermine Resolution 381 while simultaneously arguing its validity. These issues are addressed in the sections that follow. As demonstrated below, the only reasonable conclusion from the evidence before this Tribunal is that Claimant made an investment in Mexico as defined by NAFTA.

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<sup>7</sup> See, e.g., Statement of Claim, § III.A.1.

**1. Resolution 381 Was a Complete Resolution That Established Valuable Investment Rights for Claimant**

12. It has been Claimant's position from the beginning of this case that the IFT, in Resolution 381, determined that "Telmex was barred from creating a dispute about the rates, because 'the interconnection rates were completely determined by Telmex and Telnor in the draft interconnection agreement sent to Tele Fácil on August 26, 2013, and which Tele Fácil had full knowledge of and consented to the same;'"<sup>8</sup> and furthermore, that "[t]he IFT directed the parties to formalize an interconnection agreement that included, inter alia, the 'rates that are ordered through this Resolution'"<sup>9</sup> – namely, the rates agreed between Telmex and Tele Fácil.

13. For its part, Respondent repeatedly asserts that "Resolution 381 did not grant any rate rights to Tele Facil."<sup>10</sup> However, Respondent's position fails to confront a key part of Resolution 381: the part in which the IFT determined that the rate was not in dispute between the parties, and consequently, that the agreed-upon rate became part of the interconnection resolution. This consequence is clear from the First Resolution clause of Resolution 381:

FIRST. Within 10 (ten) business days following the date in which the notification of this Resolution is effective, Tele Fácil México, S.A. de C.V., and the companies Teléfonos de México, S.A.B. de C.V. and Teléfonos del Noroeste, S.A. de C.V. must interconnect their telecommunications networks and initiate the provision of the corresponding interconnection services. In that same term, such companies must execute the interconnection agreement of their telecommunications networks pursuant to the terms and conditions determined in the FIFTH Consideration section of this Resolution. Once the corresponding agreement has been executed, they must submit jointly or individually an original or certified copy of the agreement to the Federal Telecommunications Institute, within the 30 (thirty) business days following its execution, in order to register it in the Public Telecommunications Registry.<sup>11</sup>

14. As Claimant further explained in response to the seventh question posed by the Tribunal to the parties during the hearing:<sup>12</sup>

First, we know that the IFT specifically references the Interconnection Agreement offered by Telmex on August 26, 2013 which was sent by a

<sup>8</sup> Reply, ¶ 47 (citing Resolution 381, at 13-14, **C-029**).

<sup>9</sup> Reply, ¶ 48 (citing Resolution 381, at 16, **C-029**).

<sup>10</sup> Rejoinder, II.C.

<sup>11</sup> Resolution 381, at 16-17, First Resolution, **C-029**.

<sup>12</sup> Email dated April 25, 2019 from Sarah Marzal Yetano to Counsel to the Parties ("7. Considering Section C of Resolution 381, what is the interconnection agreement that is referred to in its First Dispositif ('*Resolutivo Primero*')).

notary public to Tele Fácil and which included the relevant Annexes. Further, in the “Considerations of the Institute” on Page 13 of the English version of Resolution 381, it again references the rates sent to Tele Fácil on August 26, 2013. From this, it can be concluded that the Interconnection Agreement that is referred to in the *Resolutivo Primero* is the August 26, 2013, interconnection agreement, which was sent by Telmex by Notary Public and which started the negotiation process. That document is in the record as Exhibit C 21 or Tab 13 of the Hearing Bundle. You can see from the cover letter that it is dated August 26, 2013.

You can see that the rate is contained as is evidenced on Slides 49 and 50 and, of course, it provided for a term until December 31st, 2017.<sup>13</sup>

15. The *Resolutivo Primero* of Resolution 381 referred to above includes the language “such companies must execute the interconnection agreement of their telecommunications networks **pursuant to the terms and conditions determined in the FIFTH Consideration section of this Resolution.**”<sup>14</sup> The Fifth consideration section includes the IFT’s analysis of whether there was a disagreement between the parties on rates, and importantly, its determination that there “were completely determined” between the parties.<sup>15</sup>

16. Respondent’s answer to the Tribunal completely avoided the language of the Resolution, and vaguely asserted, with no reference to the actual text of the Resolution, that “the First *Resolutivo* of Resolution 381 refers to any agreement which Telmex and Tele Fácil could negotiate provided that it include, one, the possibility of indirect interconnection, and two, the non-inclusion of a clause establishing portability charges.”<sup>16</sup>

17. In the hearing, Respondent’s witnesses tried, but ultimately could not avoid, the implications of the IFT’s determination that there was no dispute between the parties on the interconnection rate. Thus, we heard from Sostenes Díaz Gonzáles, now an IFT Commissioner, who asserted at the hearing that he was “completely responsible” for drafting Resolution 381.<sup>17</sup>

18. First, when asked about freedom of contract on the part of concessionaires seeking to interconnect, Commissioner Díaz confirmed that the parties were always able to negotiate the rates between them, and only in the case of an inability to reach agreement will the IFT resolve the rate issue:

<sup>13</sup> Claimant’s Closing Statement, Tr. 1274:17-1275:14.

<sup>14</sup> Resolution 381, at 17, **C-029** (First Resolution) (emphasis added).

<sup>15</sup> *See id.*, at 13.

<sup>16</sup> Respondent’s Closing Statement, Tr. 1318:10-15.

<sup>17</sup> Díaz Test., Tr. 418:19-22.



Q. But the law adopted by Congress, the LFTR or FTBL, specifically and expressly permits carriers to continue to negotiate their rates, does it not?

A. Yes, Article 131(b) is similar to what was Article 42 of the law. That is to say, concessionaires can freely negotiate the rates, but in the event that there is not an agreement, they can turn to the Institute for the Institute to resolve the matter, which has been the practice from more or less 2015, 2016, 2017, some 430 resolutions on interconnection were issued, most of them related to rates.<sup>18</sup>

19. Next, Commissioner Díaz confirmed that the agreed terms and the disputed terms, when resolved by the IFT, come together to form the interconnection agreement ordered:

Q. Commissioner Díaz, you would agree that, when a concessionaire of public telecommunications networks has submitted a request before the Institute to resolve the conditions that could not be agreed upon with another concessionaire, the resulting Interconnection Agreement incorporates both the conditions that were agreed upon by the Parties as well as those resolved by the Institute; correct?

A. That is what the law says. The hypothesis in Article 129 of the law and which was covered by Article 42 of the previous law, there was a part of the Agreement which was to be worked out by the Parties and another part that was to be worked out by the Institute. Just those conditions on which it was not possible to reach an agreement.<sup>19</sup>

20. Third, Commissioner Díaz made it absolutely clear that both the disputed terms resolved by the IFT, and the terms agreed between the parties, must be incorporated into the final interconnection agreement:

Q. In the expectation of participants in the telecommunications market is that, upon issuance of a resolution that resolves an interconnection disagreement, no more items pending resolution shall be present which prevent the provision of services; correct?

A. I don't know what the expectation of the participants in the market is. What I understand is that Article 42 of the previous law on Article 129 of the current law sets out two types of conditions: Those agreed upon by the free will of the Parties and those that are resolved by the Institute. **Both should be incorporated in the Interconnection Agreement.**<sup>20</sup>

21. Fourth, Commissioner Díaz confirmed that the IFT made an affirmative decision that the tariffs (i.e., rates) had been agreed upon by Telmex and Tele Fácil:

Q. Indeed, one of the first steps of analysis that your department undertook in drafting Resolution 381 consisted of a review of the evidence

<sup>18</sup> *Id.*, Tr. 428:11-22.

<sup>19</sup> *Id.*, Tr. 430:4-18.

<sup>20</sup> *Id.*, Tr. 430:19-431:9 (emphasis added).

submitted by the Parties to verify if a disagreement on the subject of rates actually existed; correct?

A. We reviewed the record; and, in the record, we did not find that, during the negotiation phase, Telmex had expressed to Tele Fácil its disagreement in respect of rates.

Q. And the IFT determined that an agreement existed between the Parties on the subject of interconnection rates; correct?

A. For purposes of resolving the disagreement, we noted that Telmex sent a proposed agreement to Tele Fácil. Tele Fácil did not object to it, and so we understood for purposes of the Resolution, that tariffs had been agreed upon.<sup>21</sup>

22. Finally, Commissioner Díaz confirmed that the determination that there was an agreement on rates appears in the Fifth Consideration section of Resolution 381.<sup>22</sup>

23. Respondent has tried to escape the IFT's clear command when it ordered execution of the interconnection agreement "pursuant to the terms and conditions determined in the FIFTH Consideration section of this Resolution," by arguing that the rate term agreed between the parties did not form part of the interconnection, but instead was a term that the parties could negotiate anew after the conclusion of the IFT's disagreement resolution process. This was, of course, the shocking conclusion of Decree 77.<sup>23</sup>

24. In his testimony during the hearing, Commissioner Díaz explained, through the words of Commissioner Labardini,<sup>24</sup> the absurdity of this conclusion in a regime that purports to prioritize the importance of prompt interconnection:<sup>25</sup>

Q. Could you give us your opinion about what Commissioner Labardini stated, essentially focusing on yesterday's audio?

A. . . . That procedure of negotiation could continue *ad infinitum*, and therefore there would not be any signing of an Interconnection Agreement. That is what Commissioner Labardini was saying in yesterday's video.<sup>26</sup>

25. Negotiation *ad infinitum* is the "never ending story" that Claimant clearly explained, but which Respondent never addressed in this arbitration. The conclusion that previously agreed terms are nevertheless open for negotiation (and subsequent dispute proceedings) *after* the conclusion of the single disagreement procedure authorized by law, places

<sup>21</sup> *Id.*, Tr. 434:3-19.

<sup>22</sup> *Id.*, Tr. 435:16-20.

<sup>23</sup> See Decree 77, Fourth Decree, at 15, **C-051** ("The rights of the parties are held harmless regarding the conditions that were not a matter of the Interconnection Agreement.")

<sup>24</sup> Transcript of March 5 Plenary Meeting, at 12-13, **C-043**.

<sup>25</sup> See, e.g., FTBL, at Article 129, **CL-004**.

<sup>26</sup> Díaz Test., Tr. 412:7-22.

in the hands of an incumbent a tool to ward off any interconnection with any concessionaire indefinitely; it is a tool that protects **only Telmex** – it harms the new entrant and it harms the Mexican telecom market. Thus, this interpretation is diametrically opposed to the telecom reforms undertaken by Mexico, which authorized a single disagreement procedure and commanded that it be completed “transparently, promptly, [and] quickly.”<sup>27</sup>

26. In the hearing, Commissioner Díaz exposed the absurdity of Decree 77:

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.<sup>28</sup>

...

Q. And, Commissioner Díaz, all the other Terms and Conditions were now held harmless; correct?

A. That's correct.

Q. So, there was no rate at this point?

A. That's what that Agreement was saying.

Q. But also [170] pages of the Interconnection Agreement that had already been discussed between Tele Fácil and Telmex, those, too, were now held harmless; correct?

A. Yes, that's correct.<sup>29</sup>

27. Respondent's ex post-facto efforts to change its conclusions are unavailing. The evidence shows that once the resolution was issued, as it was on November 26, 2014, Tele Fácil's rights were set and those rights included the rates agreed with Telmex.

## 2. The IFT Properly Exercised its Powers in Rendering Resolution 381

28. Respondent,<sup>30</sup> Respondent's witnesses<sup>31</sup> and Respondent's experts<sup>32</sup> would, if given the chance, go back to rewrite Resolution 381. But the words used by the IFT in resolution

<sup>27</sup> FTBL, at Article 129, **CL-004**.

<sup>28</sup> Díaz Test., Tr. 461:5-15.

<sup>29</sup> *Id.*, Tr. 462:11-20.

<sup>30</sup> Respondent's Closing Statement, Tr. 1317:8-9 (“Resolution 381, did not use the best language possible”).

<sup>31</sup> Díaz Test., Tr. 477:6-17 (“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.”)

381 are not “unfortunate choices of words” to paraphrase Respondent’s legal expert, Mr. Buj;<sup>32</sup> rather they are the conclusions of a unanimous body resolving an interconnection dispute, pursuant to its well-established process.

29. It is noteworthy that the authorities relied upon by the IFT in Resolution 381 include the pre-reform telecommunications law (the “Federal Law of Telecommunications”) and the post-reform telecommunications law (the “Federal Telecommunications and Broadcasting Law”).<sup>34</sup> The IFT was clearly cognizant that the interconnection resolution straddled both laws, as is also clear from its discussion in the First Consideration of the Resolution. The important point, however, is that neither the IFT’s application of the law, nor the language that it used in this Resolution, were ever challenged contemporaneously by members of the IFT itself, or Telmex. Indeed, as Commissioner Díaz acknowledged, no one doubted the IFT’s authority to order that the rates be included in the executed interconnection agreement:

Q. Earlier, you testified that you cannot recall the specific number of people that would have reviewed Resolution 381, but we talked about that it had been shared among all of the Commissioners, people within your offices, the Head of the Regulatory Policy Unit.

Did any of those people tell you that Resolution 381 needed to be changed because the IFT did not have the authority to declare that the rates were completely agreed?

A. No. As the best I can recall, no one mentioned that to me.<sup>35</sup>

30. There was no dissent because Resolution 381 worked as it was supposed to work: two parties came to it seeking an interconnection order based on their agreement. The IFT determined the agreed terms and resolved the disputed terms, and ordered the interconnection agreement to be executed within ten business days. Respondents ex post-facto arguments cannot change these facts.

### **3. The IFT Properly Determined That the Parties Had an Agreement**

#### **a. Telmex’s Offer Never Expired**

31. In Respondent’s alternative world, the terms of Telmex’s 170-page, highly technical standard Interconnection Framework Agreement, which determines a new

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<sup>32</sup> Buj Test., Tr. 828:4-6 (“[T]he whole case that Tele Fácil raises is based on the literal interpretation of an unfortunate choice of words used by the IFT . . .”).

<sup>33</sup> *Id.*

<sup>34</sup> See, e.g., Resolution 381, at 16, **C-029**.

<sup>35</sup> Díaz Test., Tr. 436:16-437:4.

concessionaire's viability in the Mexican market, is valid for only three days.<sup>36</sup> Thus, Respondent argues that because the concessionaires never consented to the proposed interconnection terms within three days, Tele Fácil never possessed rights to the highly lucrative interconnection rate of USD \$0.00975 per minute. In reality, Respondent's alleged three-day theory has absolutely no grounding in law or fact in interconnection disputes, and is based exclusively on the opinion of Respondent's expert, Mr. Rodrigo Buj, who admits he has no experience negotiating interconnection agreements.<sup>37</sup>

32. The "three-day" rule is utterly impractical and finds no support in industry practice. When confronted at the hearing with basic facts about the length, content and complexity of Telmex's Framework Agreement, Mr. Buj revealed his lack of knowledge. He conceded that an interconnection agreement contains "hundreds" of provisions,<sup>38</sup> but that he had never negotiated one<sup>39</sup> and was not familiar with the "technical aspects" of such an agreement.<sup>40</sup> Under cross-examination, Mr. Buj was immediately forced to recognize that his three day theory did not pass muster:

Q. So, your view is that Tele Fácil would have to have reviewed all the many terms and conditions in the Agreement, consult with Legal Counsel, consult with its IT Department, its billing department, consult with its engineers to confirm all technical requirements for interconnection, including Telmex's capacity to carry Tele Fácil's calls and then be in a position to sign 170-page complex document within three days; correct?

A. Well, I see this in two ways. *Of course, in three days that might be difficult*, but if in two weeks or in three or in one month, . . .<sup>41</sup>

33. He added shortly thereafter: "I would not say that [acceptance of Telmex's Framework Agreement] has to be in three days, but I think it is less reasonable for it to take one year to review this."<sup>42</sup> The speed with which Mr. Buj backed off Respondent's central position, when faced with basic facts about the complexity and technicality of the Telmex's Framework Agreement, is telling; it demonstrates that his argument lacks any merit.

34. The criticism of Mr. Buj's "three-day" argument by Mr. Gerardo Soria, Claimant's Mexican law expert, is worth recalling. Mr. Soria rightly notes that "Mr. Buj limited

<sup>36</sup> Buj First Report, ¶ 27.

<sup>37</sup> Buj Test., Tr. 783:14-19.

<sup>38</sup> *Id.*, Tr. 843:10-12.

<sup>39</sup> *Id.*, Tr. 849:5:6.

<sup>40</sup> *Id.*, Tr. 845:3-4.

<sup>41</sup> *Id.*, 846:7-18 (emphasis added).

<sup>42</sup> *Id.*, 847:7-9.

his analysis to a contract theory without considering the nature of the act, or the specific rules applicable to interconnection.”<sup>43</sup> Mr. Soria explains that, according to Article 1859 of the Civil Code, the Code provisions only apply “as long as said provisions do not oppose the nature of the agreement or the special laws applicable to the specific agreement.”<sup>44</sup> Mr. Soria takes the proper view that the three-day rule in Article 1806 *does* oppose the nature of the FTL, and that the concept of consent must take into consideration the FTL’s provisions on the negotiation and resolution of dispute concerning interconnection agreements.<sup>45</sup> Thus, according to Mr. Soria, consent between concessionaires to interconnection terms is governed primarily by Mexican telecommunications law, not the Civil Code. Professor Álvarez concurs in this view in her second expert report, with an emphasis on the administrative nature of the IFT’s acts.<sup>46</sup>

35. Finally, it became evident at the hearing that Mr. Buj was the mastermind of Respondent’s “three-day rule” argument. In his testimony, he did not hesitate to explain that, despite any recognition of a three-day rule by the IFT or the Mexican courts, he urged the defense for litigation purposes:

Q. ... with respect to the three-day rule, how did it come to be that this became a centerpiece of Respondents' legal defense when it wasn't in any of the Resolutions or decrees prior to that point?

A. Well, surely, and for this they probably did have an expert. It probably derived from the opinion presented [by me] or when I told them the matters on which it's going to refer these, and was--whether there was or not or how it became a central point.<sup>47</sup>

Thus, Mr. Buj, a commercial litigator developed *ex post facto* a litigation argument that finds no external support in Mexican law or jurisprudence or in industry practice in Mexico. It should be rejected by the Tribunal.

#### **b. Industry Practice Supports Claimant’s Position**

36. The evidence shows how interconnection negotiations and disagreement procedures actually work. **First**, carriers freely negotiate and try to reach agreements in as many terms as they can. **Second**, after negotiating for not less than 60 days, one of the parties may

<sup>43</sup> Soria Second Report, ¶ 7, C-111.

<sup>44</sup> *Id.*, ¶ 11.

<sup>45</sup> Mr. Soria’s critical analysis appears in his second expert report at Soria Second Report, paragraphs 14-16. Mr. Soria also points out that pursuant to Article 1856 of the Civil Code “the use of traditions and customs shall be taken in to consideration when it comes to the ambiguities of the agreements” and that a three-day rule “goes against the use and customs of the industry.” *Id.*, ¶¶ 19-20.

<sup>46</sup> Álvarez Second Report, ¶¶ 14-15, C-110.

<sup>47</sup> Buj Test., Tr. 802:22-803:8.

conclude that negotiations have reached an impasse, and then resort to the regulator to resolve the terms over which the parties have manifested disagreement, with all other agreed terms being concluded.<sup>48</sup> **Third**, and finally, the regulator's order resolving the dispute process results in a full and complete interconnection agreement that is the combination of the agreed terms and the terms that were resolved by the IFT.

37. This is consistently seen in prior interconnection disagreements resolved by COFETEL and the IFT. By way of example, the following interconnection resolutions are in the record:

No.	Interconnection Disagreement	Start of Negotiations	Request before the COFETEL/IFT	Negotiation Days
1	Maxcom v. Telmex <sup>49</sup>	January 31, 2002	May 24, 2004	844
2	Bestcable v. Telmex <sup>50</sup>	December 1, 2003	April 22, 2005	508
3	Megacable v. Unefon <sup>51</sup>	April 5, 2002	June 27, 2003	448
4	IP Matrix v. Telmex <sup>52</sup>	January 31, 2005	September 9, 2005	221
5	Mega Cable v. AT&T Digital <sup>53</sup>	May 25, 2015	September 7, 2015	105
6	Telmex v. IP Matrix <sup>54</sup>	January 20, 2015	May 15, 2015	115
7	Resolution 381 <sup>55</sup>	August 26, 2013	July 11, 2014	319

38. In all of these cases, negotiations extended for a period much longer than three days and, indeed, even longer than the minimum 60-day negotiation period. In none of these cases did COFETEL/IFT refer to offer/counter-offer time periods in the Civil Code as being applicable to the negotiation of interconnection agreements, nor does the regulator conclude or even suggest that an offer is rescinded after a certain period of time. In all of these cases,

<sup>48</sup> Soria Test., Tr. 721:15-722:1 (“In dispute resolution, the IFT determines the conditions that were agreed, the Terms and Conditions that were agreed, and resolves only on the Terms and Conditions that have not been agreed. Once that is done, it orders two things: The interconnection and the signature of the Interconnection Agreement within the same period of time. That has been the practice since the beginning of Interconnection Agreements in 1996.”)

<sup>49</sup> Álvarez Report, ¶¶ 53-56, **C-008**.

<sup>50</sup> *Id.*, ¶¶ 57-58.

<sup>51</sup> *Id.*, ¶¶ 61-63.

<sup>52</sup> *Id.*, ¶¶ 59-60.

<sup>53</sup> Resolution P/IFT/251115/543 through which the Plenary of the Federal Telecommunications Institute determines the conditions of interconnection not agreed between Mega Cable, S.A. de C.V. and AT/T Digital, S. de R.L. de C.V. (November 25, 2015), **C-100**.

<sup>54</sup> Resolution P/IFT/250815/356 through which the Plenary of the Federal Telecommunications Institute determines the conditions of interconnection not agreed between Teléfonos de México, S.A.B de C.V. and IP Matrix, S.A. de C.V. (August 12, 2015), **C-101**.

<sup>55</sup> Resolution 381, at 2, **C-029**.

however, the Regulator clearly recognized the principle that what is not disputed by the Parties during the negotiation is final as an agreed term.<sup>56</sup>

39. Likewise, Dr. Álvarez explained that:

In this interconnection procedure, special interconnection procedure, there is part of a procedure where we find the possibility for the Parties to negotiate those Terms and Conditions of interconnection. If a disagreement arises, they may resort to the IFT, the Regulator, which resolves everything that is necessary, and the key here is decide as a final decision. In the 23 years in which the market has been open to competition in Mexico as far as I know--and I studied this every day 24 hours a day telecommunications--this is the only case in which this finality has been questioned.

The Resolution of a disagreement by the Institute is final, valid, and enforceable, and its compliance has to be demanded, this together with the agreed term[s] are the Interconnection Agreement.<sup>57</sup>

40. Respondent itself recognizes this. Commissioner Díaz's testimony on this subject highlights why Decree 77 was so contrary to established practice:

<sup>56</sup> *Maxcom v. Telmex*, **C-008.410-414** ("It is duly verified that Maxcom formally requested Telmex and Telnor the start of negotiations pursuant to Article 42 of the FTL...Telmex and Telnor state that there is one sole point of disagreement with Maxcom in connection with the interconnection conditions regarding their public telecommunications networks, and it is regarding the payment by Maxcom for Special Projects...Due to the above, the agreement on recovery of costs attributable to Special Projects does not constitute a requirement for interconnection... Consequently, since there is no disagreement in interconnection matters between the parties in this procedure, Telmex and Telnor are obligated to grant the interconnection requested by Maxcom... Therefore, Telmex and Telnor must... execute the interconnection agreement of their public telecommunications networks with Maxcom's Long Distance Network, in the terms and conditions that were agreed by them. . . ."); *Bestcable v. Telmex*, **C-008.429** ("[the parties] must execute the agreement for interconnection of their corresponding local networks, in the terms and conditions that were agreed by them and in non-discriminatory conditions"); *Megacable v. Unefon*, **C-008.465** ("From the above arguments, it is concluded that the parties agreed the rate that Megacable shall pay UNEFON for termination in its fixed network and that there is no agreement between the concessionaires regarding the interconnection rate for the termination service in Megacable's public telecommunications network. By this virtue, this Commission must resolve the disagreement presented regarding the latter rate. "); *IP Matrix v. Telmex*, **C-008.445** ("By such virtue, this Commission will analyze and resolve the interconnection conditions not agreed by the parties, so that once resolved, they are incorporated to the Proposed Master Agreement offered by Telmex and accepted by IP Matrix."); *Mega Cable v. AT&T Digital*, at 18, **C-100-S.018** ("From the above, and since Mega Cable and AT&T Digital expressly indicated to this Institute which are the conditions in disagreement during the procedure, this Institute determines that in order to efficiently provide interconnection services between their networks it shall resolve each and every condition requested by the concessionaires"); *Telmex v. IP Matrix*, at 22, **C-101-S.022**, ("From the above, and since Telmex and IP Matrix expressly indicated to this Institute which are the conditions in disagreement during the procedure, this Institute determines that in order to efficiently provide interconnection services between their networks it shall resolve each and every condition requested by the concessionaires"); and Resolution 381, at 13, **C-029** ("Therefore, the only interconnection conditions not agreed upon by the parties in the process of negotiating to execute the corresponding interconnection agreement are those which are expressly cited in the Fifth Consideration section of this resolution.").

<sup>57</sup> Álvarez Test., Tr. 668:15-669:8.



Q. And, again, the expectation of participants in the telecommunications market is that, upon issuance of a resolution that resolves an Interconnection Agreement, no more pending resolution items shall be present; correct?

A. That is what has happened historically. The conditions agreed upon are not resolved, and the concessionaires then sign the Agreement.<sup>58</sup>

...

Q. Would you read Paragraph 4?

A. The assertion in Paragraph 43 of my First Statement was stated only to point out that historically when a concessionaire public telecommunications networks has submitted a request before the Institute to resolve the conditions that could not be agreed with another concessionaire, the resulting Interconnection Agreement incorporates both the conditions that were agreed upon by the Parties as well as those that were resolved by the Institute.<sup>59</sup>

41. Finally, it is important to note that this procedure derives from the fact that, unlike other types of agreements, interconnection between concessionaires is a mandatory and not an optional process.<sup>60</sup> Any telecommunications carrier in Mexico must interconnect with every other concessionaire in the Mexican market that requests it in order to ensure the ubiquity and reliability of the public telecommunications network.<sup>61</sup> Because participation in the process is compulsory, it follows that Telmex had to keep an offer on the table and could not refuse to continue negotiations.<sup>62</sup> (After the expiration of the 60-day minimum negotiation period, however, Telmex could have commenced the IFT's dispute process to force the interconnection agreement with Tele Fácil to be finalized.)

42. Considering the above, Resolution 381 fully comported with the law, as understood by the industry and consistently implemented by the regulator. The Respondent's

<sup>58</sup> Díaz Test., Tr. 437:7-12.

<sup>59</sup> Díaz Test., Tr. 474:18-475:5.

<sup>60</sup> Álvarez Test., Tr. 667:19-668:6.

<sup>61</sup> Federal Telecommunications Law (enacted on June 7, 1995) (hereinafter "FTL"), at Article 42, **CL-001** ("Public telecommunications network carriers shall interconnect their networks and shall execute an agreement in a term no greater than 60 calendar days, starting from the moment one of the parties requests so."), and Federal Telecommunications and Broadcasting Law (enacted on July 14, 2014) (hereinafter "FTBL"), at Article 129, **CL-004** ("The concessionaires operating public telecommunications networks shall interconnect their networks, and in order to do so, they shall subscribe an agreement within no longer than sixty calendar days from the date any of them request it.").

<sup>62</sup> This does not mean that Telmex's offer could have remained on the table in perpetuity. In Tele Fácil's Concession, as is the case for all other concessions in Mexico, Tele Fácil was required to enter into and begin providing telecommunication services within a specified time period, and it had to return to the Regulator to ask for an extension if it could not meet the deadline for provision of services. These requirements to commence service within a specified time period impose limitations on the period of times in which parties can continue their negotiations.

efforts to reengineer the law to benefit Telmex and the detriment of a single company, Tele Fácil, must be rejected.

**c. Changes in Law Did Not Invalidate Telmex's Offer**

43. Respondent asserts that Resolution 381 was defective because of changes in law made Telmex incapable of maintaining its offer by the time Tele Fácil started the interconnection disagreement with the IFT.<sup>63</sup> As explained below, Telmex knowingly extended its offer to Tele Fácil despite these legal changes, and was fully entitled to do so.

44. Uncontroverted testimony by Carlos Bello, who was present at the meetings with Telmex, shows that Telmex decided to maintain its offer for interconnection under the same terms and conditions as originally offered, despite the legal changes, including its declaration as a Preponderant Economic Agent:

[W]e 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.<sup>64</sup>

45. These negotiations and Telmex's position are also confirmed in the record by Mr. Sacasa's uncontroverted witness statement,<sup>65</sup> contemporaneous billing by Carlos Bello's firm,<sup>66</sup> as well as a contemporaneous memo detailing one of such meetings.<sup>67</sup>

46. Respondent did not submit a witness statement from any Telmex official, nor did Respondent cross-examine Miguel Sacasa during the hearing on this point, despite having full opportunity to do so. Respondent simply ignored existing evidence in the record showing that Telmex expressed no interest in modifying its offer, and ignored the fact that Telmex expressly stated its desire to leave the offer unchanged so that it could maintain its legal challenges to the entire premise of asymmetric regulation at the Mexican courts.

47. It is also clear that nothing prevented Telmex from maintaining its offer to Tele Fácil after the reforms were implemented. As an initial matter, the freedom of negotiation

<sup>63</sup> Rejoinder, ¶¶ 31-35. This issue was also raised by the Tribunal as a question to the Parties during the Hearing.

<sup>64</sup> Bello Test., Tr. 314:21-315:8.

<sup>65</sup> See Sacasa First Statement, ¶¶ 48-52, **C-003**.

<sup>66</sup> See BGBG invoice for May 2014, **C-130**; BGBG invoice for June 2014, **C-131**.

<sup>67</sup> **R-001**.

principle – a key right under Mexican law – applied under both the FTL and, when it came into effect, the FTBL, as acknowledged by Commissioner Díaz on cross-examination.<sup>68</sup> Therefore, at no time did Telmex lose the ability to offer Tele Fácil of the rate of USD \$0.00975.

48. It is important to recognize that Telmex could also still have made an offer that included the payment of reciprocal rates. During the time between the Preponderant Economic Agent determination on March 6, 2014, and the issuance of the FTBL, on July 14, 2014, the rate that Telmex was allowed to collect under the 36<sup>th</sup> Rule of the Preponderant Asymmetric Rules was higher than zero.<sup>69</sup> After the FTBL became effective, the Preponderant Economic Agent could not “collect” from other concessionaires insofar as there was a preponderant economic agent (the “Rate Zero”).<sup>70</sup> Importantly, the law merely provided a limitation or suspension on what the Preponderant Economic Agent could collect from competitive carriers during the time period that it was a Predominant Economic Agent.<sup>71</sup> Consequently, agreements containing reciprocal rates remained untouched because, if at any point in time during the lifespan of the specific interconnection agreement Telmex ceased to be a Predominant Economic Agent, those negotiated rates could resume once again being effective.<sup>72</sup> And, indeed, if regulated by a stronger IFT, it was entirely possible that Telmex could have been brought below a fifty percent market share during the three years of the contract term originally offered to Tele Fácil. Therefore, Telmex could have legally made the same offer it made on August 26, 2013 at any point in time during the negotiations with Tele Fácil, and Tele Fácil could have legally accepted the offer.

49. The legal reforms were considered by the parties and by the IFT in the analysis of Resolution 381; all agreed that they provided no basis for modifying or revoking Telmex’s offer.

<sup>68</sup> Díaz Test., Tr. 428:14-19 (“Article 131(b) is similar to what was Article 42 of the law. That is to say, concessionaires can freely negotiate the rates, but in the event that there is not an agreement, they can turn to the Institute for the Institute to resolve the matter . . .”).

<sup>69</sup> Preponderant Economic Agent Rules, at Thirty Sixth Rule, **CL-010** (“The rates for Interconnection Services of Transit, Origination and Termination that the Preponderant Economic Agent **will charge** shall be determined based on a cost model created pursuant . . .” (emphasis added)).

<sup>70</sup> FTBL, at Article 131(a), **CL-004** (“The agents referred to in the preceding paragraph, shall not charge other concessionaires for the traffic terminating in their network . . .”).

<sup>71</sup> See Soria Second Report, Section B.2.2, **C-111**.

<sup>72</sup> FTBL, at Article 131, **CL-004** (“**While there is a preponderant economic agent** in the telecommunications sector... the fixed and mobile traffic termination rates, including calls and short messages shall be asymmetrical in accordance with the following: a) **[t]he agents referred to in the previous paragraph, shall not charge** other concessionaires for the traffic terminating in their network . . .” (emphasis added)).

Today, those very same reforms, therefore, can provide no basis for Respondent's *post facto* efforts to invalidate Resolution 381.

#### 4. Respondent's Argument That Interconnection Rights Are Not an Investment Is Meritless

50. As described below, Respondent's position on the interpretation and application of the NAFTA distorts the agreement's key provisions and makes an investor's access to international arbitration virtually unattainable.

51. Respondent concedes that each asset identified by Claimants, including the relevant enterprise (Tele Fácil), the partners' shares in Tele Fácil, and their rights to profits under the MOU, constitute an "investment" within the meaning of the NAFTA—save for one. Respondent challenges the proposition that the NAFTA protects Tele Fácil's interconnection rights under its agreement with Telmex.<sup>73</sup> With absolutely no support in either Mexican law or international practice, Mexico simply declares that interconnection rights are not "intangible property," nor did Claimant's capital and technological contributions amount to "interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory."<sup>74</sup>

52. Not much, if anything, remains of Respondent's argument. At the hearing, Respondent's counsel made only a tangential reference to Article 1139(g) in the context of Respondent's argument regarding derivative claims:

[A]s a shareholder of a company, Mr. Nelson owns other investments in keeping with the definition of Article 1139. In other words, the Shareholders of a company are not owners of the assets of that company. *This is relevant because the Claimant posits that the Interconnection Agreement with Telmex falls under the definition of Article 1139(g). This interpretation is incorrect, when you analyze it in the context of Article 1139 and Chapter 11 together.*<sup>75</sup>

Thus, Respondent no longer appears to maintain that qualitatively an interconnection agreement cannot meet the definition of an "investment."

53. If, in fact, Respondent has abandoned its position, it is a wise move. As reiterated at the hearing, the IFT itself has recognized that interconnection rights, rights to revenue based on call flow, are intangible property that can be assigned to third parties. As Telmex's own

<sup>73</sup> Rejoinder, ¶¶ 193-199.

<sup>74</sup> *Id.*, ¶ 196.

<sup>75</sup> Respondent's Opening Statement, Tr. 224:11-22 (emphasis added).

model interconnection agreement (offered to Tele Fácil in August 2013) states: a concessionaire's right to revenue under an interconnection agreement is an asset that can serve as collateral in support of commercial transactions in Mexico, *i.e.*, a concessionaire can assign its collection rights to financial institutions.<sup>76</sup>

54. Both of Claimant's Mexican law experts have been unequivocal that interconnection rights constitute intangible property under Mexican law. Professor Álvarez opines that "[s]uch right[s] under the Federal Civil Code would be the equivalent of [an asset without physical existence] pursuant to article 754."<sup>77</sup> Mr. Soria concurs with this conclusion, finding that Telmex's interconnection rights were "intangible assets [that] were comprised of personal rights, which precisely arose from the interconnection agreement with Telmex/Telnor."<sup>78</sup>

55. Notably, Respondent chose not to cross-examine either expert on this point at the hearing. Indeed, it would be prudent if Respondent has dropped this argument. To deny that interconnection rights are "investments" would effectively carve out a large portion of the telecommunications sector from the protections of the NAFTA, a position that Mexico could not possibly intend to take.

**B. Claimant May Claim with Respect to the IFT's Misconduct and Is Not Required to Exhaust Local Remedies**

56. Respondent has argued that Claimant may not claim with respect to the IFT's misconduct; only the acts of the Mexican Telecommunications Courts may serve as the basis of a claim after Claimant has exhausted all available legal remedies.

57. However, Respondent distorts the nature of the dispute resolution process established under Chapter Eleven. For Respondent, arbitration under the NAFTA only becomes available after years and years of domestic litigation. Specifically, Respondent asserts that Tele Fácil was required to litigate all *amparo* challenges to the highest judicial level as Claimant may only bring a denial of justice claim on the basis of alleged judicial misconduct, not of the IFT's misconduct.<sup>79</sup> Such a requirement does not exist under Chapter Eleven and would unjustifiably delay Claimant's right to initiate arbitration by several years.

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<sup>76</sup> Original Draft Interconnection Agreement, Clause Ninth, at 32-33, **C-021**.

<sup>77</sup> Álvarez First Report, ¶ 204, **C-008**.

<sup>78</sup> Soria Second Report, ¶ 163, **C-111**.

<sup>79</sup> Respondent's Closing Statement, Tr. 1322:11-1323:1.

58. The cross-examination of Mr. Buj further highlighted the absurdity of Respondent's position. Mr. Buj was asked whether when the IFT rendered Resolution 127, which formally replaced Tele Fácil's high rate with the much lower default rate, it destroyed the company's right to sue Telmex to execute the correct interconnection agreement. The point of the question was to challenge the effectiveness of the litigation path when the term in dispute had already been re-established by the IFT. Mr. Buj's response was astounding:

A. No, not at all. What should be done and what ought to have been looked at from the constitutional and administrative angle, what should have been done is challenge as Telmex did with Resolution 381 as also Tele Fácil did it, challenge Agreement--Decree 77 either through an expansion of the original case or with an amparo. It should have been to challenge Resolution 127, if the Decree 77 was decreed non-constitutional. Hypothetically, *if Decree 77 was decreed unconstitutional because hypothetically would have changed [R]esolution 77. And, therefore, Resolution 127 would be pointless because it was based on the legality of Decree 77.* What would have happened in that assumption--and it's not hypothetical. This is how litigations are done in telecommunications and other matters. The Resolution would, depending one resolution on another, based on Mexican jurisprudence being the fruit of another act that was determined in Constitution would have been meritless. *It's a complicated path because litigations in telecommunications are complicated*, but I don't think it would have been groundless.<sup>80</sup>

59. Thus, according to Mr. Buj, to prevail ultimately and completely against Telmex—even after years of litigation in the Telecommunications Courts to challenge Decree 77—Tele Fácil would then have been required to challenge the legality of Resolution 127. However, by then, the term of the interconnection between Tele Fácil and Telmex would have long expired. Thus, according to Respondent's position that Claimant can only challenge the final acts of the Telecommunications Courts, Claimant's claim would not ripen until all challenges to Decree 77 and Resolution 127 were exhausted—many years after the offensive conduct by the IFT had occurred. This is not at all how the NAFTA works.

60. First, the NAFTA contains no exhaustion requirement. To bring a claim in arbitration, the investor, in addition to satisfying applicable timing requirements, must demonstrate that (1) he is an “investor of a Party” who has made an investment in another NAFTA Party; (2) he has suffered injury from a “measure” of another NAFTA Party; and (3) the “measure” is in breach of an investment protection contained in Section A of Chapter Eleven.

<sup>80</sup> Buj Test., Tr. 859:10-860:12 (emphasis added).

61. Unlike other investment treaties, the NAFTA contains no provisions requiring the exhaustion of local remedies as a precondition for arbitration. So long as the “measure” in question is final in relation to its originating governmental body, it is actionable under Chapter Eleven.<sup>81</sup> Thus, the measures of the IFT, the ultimate authority on telecommunications regulatory matters in Mexico, which caused the destruction of Tele Fácil’s interconnection rights and, in turn, Claimant’s entire investment, are directly actionable under Chapter Eleven. They do not need to be challenged in Mexican courts before being the subject of an arbitration claim.

62. Moreover, the NAFTA expressly permits post-arbitration *amparo* actions. Article 1121 requires an investor to waive many, but not all local actions arising out of the same measure that forms the basis of the NAFTA claim. However, certain proceedings are excepted, including: “*injunctive, declaratory or other extraordinary relief, not involving the payment of damages*, before an administrative tribunal or court under the law of the disputing Party.” Tele Fácil’s *amparo* actions clearly fall within this exception, as they sought only a declaration of unconstitutionality and an injunction against future government misconduct; there is no possibility of obtaining damages. Thus, *amparos* need not be exhausted.<sup>82</sup>

63. Second, Respondent further misreads *Azinian v. Mexico*. Respondent argues that, under *Azinian*, any U.S. investor that challenges a government measure in Mexican court in connection with an investment waives its right to challenge those measures under the NAFTA. According to Mexico, the U.S. investor may only then bring a claim for denial of justice for to the Mexican court’s conduct.

64. *Azinian* does not stand for this proposition, however. Rather, in that case, the tribunal determined that there was no *prima facie* violation of the NAFTA by Mexico because it was determined that the U.S. investor had defrauded the government into signing a contract. Thus, the tribunal concluded that the only remaining possible recourse for the investor under the NAFTA was a claim of denial of justice if, when the investor sought a review of the government’s conduct, the courts had mistreated the investor (which it was ruled they did not). The approach in *Azinian* is thus uncontroversial and subsequent investor-State tribunals have followed a similar line of reasoning.<sup>83</sup>

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<sup>81</sup> Reply, ¶¶ 226-233.

<sup>82</sup> *Id.*, ¶¶ 246-250.

<sup>83</sup> *Id.*, ¶¶ 234-244.

65. Respondent's flawed interpretation of the case, however, subverts the plain language and purpose of the NAFTA. Under Chapter Eleven, investors may challenge a government measure in local courts for up to three years before deciding to initiate a NAFTA arbitration, at which time they must waive their rights to continue most forms of local litigation.<sup>84</sup> Thus, contrary to Respondent's understanding of *Azinian*, Claimant's use of local litigation could not have waived all potential claims against the IFT, leaving only claims of denial of justice by the courts intact. In fact, Claimant was expressly allowed to do so for at least three years and, in this case, where *amparos* were pursued for an unlimited period of time.

66. Respondent's arguments regarding *Azinian* have not evolved or strengthened during this case. Respondent has not responded to the cases cited in Claimant's Reply that directly refute Respondent's interpretation of *Azinian*,<sup>85</sup> either in its Rejoinder or at the hearing. In fact, Respondent's opening hearing presentation appears to undermine their position. Respondent argued:

The Respondent maintains that the law, as described in the *Azinian* Case, is applicable to this case because the Institute and the Specialized Courts resolved a dispute between private parties instead of a dispute between an investor and an organ of the Mexican State, which was the case in the *Azinian* Case.<sup>86</sup>

67. Respectfully, Claimant does not follow this logic. If Respondent is highlighting a factual distinction between *Azinian* and the present case based on the nature of parties to the underlying dispute, then *Azinian* is even less relevant.

68. In sum, Claimant is entitled to claim with respect to the IFT's measures.

**C. Claimant Has Proven His Fair and Equitable Treatment Claim**

69. Claimant has set forth its arguments underlying its fair and equitable treatment claims at length in its pleadings and hearing presentations. The IFT's failure to enforce Resolution 381 and its repudiation of the terms of 381 were so arbitrary, secretive and discriminatory as to fall well below the minimum standard of treaty incorporated into the NAFTA in Article 1105. Claimant has also demonstrated separately that the Telecommunications Courts' conduct was so incompetent and unfair as to also breach Article 1105. In response to new testimony at the hearing, Claimant adds the following final arguments:

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<sup>84</sup> *Id.*, ¶¶ 246-250.

<sup>85</sup> *Id.*, ¶¶ 234-244.

<sup>86</sup> Respondent's Opening Statement, Tr. 232:18-233:1.



**1. Claimant Has Demonstrated That Respondent Arbitrarily and Discriminatorily Failed to Enforce Resolution 381 to Protect Telmex**

70. Interconnection resolutions are final and binding, and must be enforced.<sup>87</sup> The IFT did not enforce Resolution 381 even after the interconnection agreement it ordered had not been executed by the parties within the 10 business days it mandated,<sup>88</sup> and even after several requests submitted by Tele Fácil after the term had expired.<sup>89</sup> As the evidence has shown, the IFT, the then recently created agency with broad authorities to regulate and sanction the preponderant economic agent, unlawfully refused to enforce its own Resolution 381 against Telmex to protect Telmex to Tele Fácil's great detriment.

71. As Respondent's expert Rodrigo Buj conceded at the hearing, Resolution 381, as an interconnection resolution, should have been enforced by IFT, despite any doubts or challenges the concessionaires may have had:

Q. I will agree with you it's a very complicated process, and it's one that plays into Telmex's favor because it can litigate these issues, as you say, for years and years and years and there is never interconnection, and doesn't that violate the principles of prompt and effective interconnection under the new constitutional reforms?

A. Yes, it's precisely for that reason that the amparo cannot result in suspension. **So, the IFT resolutions need to be enforced, whatever they may be, in favor of one or the other, but that doesn't suspend the amparo, nor is there a suspension, for instance, when Telmex challenged the interconnection rates. There is no suspension in its favor, either.** So, I don't think it's in favor of any particular player.<sup>90</sup>

72. Rather than enforcing Resolution 381, as required by law, the IFT inexplicably stood still, shockingly reneged on its constitutional duty to reign in the newly designated preponderant economic agent, Telmex. Based on the evidence presented at the hearing, the cause for the IFT's gross dereliction of duty is even clearer.

73. It is now a matter of record that Mr. Gerardo Sanchez Henkel, the then Head of the Compliance Unit, was instructed by superiors not to act pursuant to his authorities in order to

<sup>87</sup> See Álvarez Test., Tr. 671:21-672:4, (Dr. Álvarez explained that "[a]nother fundamental element in an interconnection-dispute resolution is that it must be valid, it must be enforced immediately. There is no possibility for a future act by anyone, simply it has to be complied with, and this has also been recognized by the Supreme Court.")

<sup>88</sup> Resolution 381, **C-029**.

<sup>89</sup> Complaint filed on December 19, 2014, **C-035**; Complaint filed on January 28, 2015, **C-038**; Complaint filed on February 13, 2015, **R-074**; Letter on February 26, 2015, **C-107**; meeting with Plenary on March 5, 2015, **C-043**; and follow-up letter to meeting with Plenary on March 23, 2015, **C-049**.

<sup>90</sup> Buj Test., Tr. 860:13-861:7 (emphasis added).

protect Telmex, even though he assured Tele Fácil in January 2015 that Resolution 381 was clear and should be enforced.<sup>91</sup>

74. Mr. Carlos Bello's testimony that described the IFT's conspiracy with Telmex and is reproduced below:

MR. CARTER: Mr. Bello, during your cross-examination, you were asked a question about whether you have refutable evidence about Telmex's participation in ex parte meetings with the IFT. In your response, you referred to meetings here in Washington.

Can you describe those meetings for the Tribunal?

MS. ITURRIAGA: I do apologize, but that's not the question I asked.

PRESIDENT ZULETA: Yes, but he referred specifically to a meeting in Washington; therefore, this question is allowable.

THE WITNESS: Yes, of course.

Mr. Sánchez Henkel came to Washington for a meeting. I told him about the case, asked him to talk--speak about it, and he came to Washington to talk to us about the history of how he viewed all the issues pertaining to Resolution 381 and Decree 77.

And, at the meeting, he told us that for him, it was very direct. *He told us that there were going to be problems for compliance with Resolution 381. He told us that the IFT President met with him to talk about this Resolution because it was a serious problem for Telmex*, and he came here practically to prepare a witness statement about that; and, ultimately, he decided not to sign it.

But with what he told us here, it was quite clear and obvious that there had been meetings at the IFT relating to the issues having to do with Telmex meetings or the internal operations within IFT to be able to end it.<sup>92</sup>

75. Mr. Bello thus testified, under oath, that, according to Mr. Sanchez-Henkel, the IFT's President Gabriel Oswaldo Contreras ordered him (Mr. Sanchez-Henkel) not to enforce Resolution 381 to save Telmex. Respondent did not re-cross-examine Mr. Bello on this testimony, and it never sought leave to present a rebuttal witness and/or rebuttal evidence. Respondent argued against Claimant's offer to provide additional evidence on this issue, and, then ultimately "withdr[ew]" its "accusations" that Claimant's assertion that President Contreras was directly involved in blocking enforcement of Resolution 381 were unfounded and made without due diligence.<sup>93</sup> Thus, Mr. Bello's testimony stands unchallenged.

<sup>91</sup> Bello Statement, ¶ 86-87, C-004; Sacasa Statement, ¶ 93-95, C-003.

<sup>92</sup> Bello Test., Tr. 309:19-311:6 (emphasis added).

<sup>93</sup> Claimant's Hearing Remarks, Tr. 1100:15-1105:13.

76. Seen in isolation, the IFT's conspiracy to destroy Tele Fácil may seem astounding, but, in context, it represents just one of various initiatives undertaken by the IFT to shield Telmex from the economic ramifications of Mexico's constitutional reforms.

77. In the summer of 2014, pursuant to the Constitutional Reform,<sup>94</sup> Congress had adopted the FTBL prohibiting the preponderant economic agent from collecting termination rates from competitive carriers.<sup>95</sup> This asymmetry is commonly known as "zero rate," and became effective on August 13, 2014.<sup>96</sup> The "zero rate" would cause Telmex to become a net payer of termination rates, while its competitors – the competitive carriers exchanging traffic with Telmex – became net collectors.

78. Despite this congressionally mandated sanction against Telmex, the IFT developed means to shield it. On December 19, 2014, the IFT adopted a new default interconnection rate for 2015.<sup>97</sup> Instead of maintaining default interconnection rates at the same level the IFT had imposed previously (when Telmex was the net beneficiary of those rates), the IFT adopted a new cost model that resulted in what Commissioner Díaz described as "a substantial reduction in interconnection rate as of 2015," meaning the default rate applied if concessionaires cannot agree on a rate term.<sup>98</sup> The dramatic reduction for 2015 can be seen in the following chart:<sup>99</sup>

Year	Rate in Dollars	Rate in Pesos	Variation %
2012	USD\$0.001847	\$0.02432	---
2013	USD\$0.00189	\$0.02392	-1.63%
2014	USD\$0.001934	\$0.02445	+2.21%
2015	USD\$0.000253	\$0.004179	<b>-82.91%</b>

79. This "substantial reduction" in default termination rates was implemented almost immediately after Congress had acted to take further action to balance the playing field against Telmex's monopolistic practices. Thus, the reduction in the default rate resulted in a clear benefit for Telmex and prejudice for its competitors. That is, after Congress imposed the "zero rate" to convert Telmex into a net payer and competitors into net collectors of termination rates, the IFT

<sup>94</sup> Constitutional Reform, **CL-002**.

<sup>95</sup> FTBL, at Article 131(b), **CL-004**.

<sup>96</sup> FTBL, **CL-004**.

<sup>97</sup> Decree by which the Plenary of the Federal Telecommunications Institute determines the fixed rate in accordance with the interconnection costs calculation methodology to be used in the interconnection dispute proceedings in 2015, **R-024**.

<sup>98</sup> Díaz Test., Tr. 439:17-18.

<sup>99</sup> See Díaz First Statement, ¶¶ 28 and 34.

mented Congress's action by giving Telmex an 83% discount on what it would have otherwise paid to competitive entrants under the asymmetric regulations adopted by Congress.

80. Tele Fácil's high rate of USD \$0.00975 per minute, confirmed by Resolution 381, stood as the sole barrier to achieving this 83% rate reduction -- a reduction that Commissioner Díaz had helped craft with direct input from Telmex.<sup>100</sup> Thus, the IFT similarly neutralized this threat for Telmex's benefit. As Dr. Mariscal explained at the hearing, Tele Fácil's business plan was a natural, market-based asymmetry;<sup>101</sup> Telmex would be sending far more call traffic to Tele Fácil than Telmex would be receiving from the new company. Tele Fácil would also be able to use Telmex's high rates to the benefit other competitors of Telmex in the market.<sup>102</sup> Under the high rate and the "zero tariff" condition, Telmex stood to suffer a massive financial loss. Mr. Sacasa and Mr. Bello explained in uncontested testimony that Telmex's lead attorney, Mr. Javier Mondragon, told them that this is why Telmex would never sign the interconnection agreement with Tele Fácil.<sup>103</sup> Thus, as indicated by Mr. Sanchez-Henkel, the IFT took measures to protect the preponderant economic agent.

81. As a result, the IFT repudiated Resolution 381, under the guise of an "interpretation," clearing the way for Telmex to bring a dispute against Tele Fácil that resulted in Resolution 127.<sup>104</sup> That resolution unjustifiably replaced the Tele Fácil's high rate, USD \$0.00975 per minute, with the 2015 default rate, MX \$0.004179 (USD \$0.000253 per minute)—forty times lower.

82. The IFT's failure to enforce Resolution 381 was motivated by discrimination, marked by arbitrariness and pursued in secrecy. It was not an inadvertent deviation from law and practice, but a total repudiation of Mexico's new regulatory regime—and one that was ironically

<sup>100</sup> Díaz Test., Tr. 439:19-445:19.

<sup>101</sup> Mariscal Test., Tr. 999:5-11

<sup>102</sup> *Id.*

<sup>103</sup> Mr. Mondragon stated during these meetings that "he had deduced that [Tele Fácil] were planning to obtain high volumes of inbound traffic" and that "if IFT or any judge ever force[] Telmex to execute the agreement, he would personally make sure that it was not signed until December 31, 2017.", Bello Statement, ¶ 96, C-004. See Bello Statement, ¶ 96, C-004; Sacasa Statement, ¶ 89, C-003.

<sup>104</sup> As Commissioner Díaz admitted during his cross-examination, the new low default rate incentivized Telmex not to agree to a rate with any competitor, but instead to initiate new disagreements with every carrier for 2015 in order to reduce obtain the lowest default rate to pay them. Díaz Test., Tr. 447:6-9 ("When the law was issued, as it is of compulsory application, Telmex had incentives to turn to the Institute to ask that the Institute resolve the matter of the rates.") Competitors, on the other hand, had no incentive to start a disagreement with Telmex because that would reduce the rate Telmex had to pay them. Díaz Test., Tr. 450:6-10. ("Q. So just so the record is clear, competitive carriers did not come to the IFT and ask the IFT to order Telmex to pay them less money; correct? A. That's correct. There are no incentives for that.").

intended not to sanction Telmex, but rather to promote its monopolistic practices. As all of the evidence in this case prove, the IFT's conduct breached Article 1105.

## **2. Claimant Has Demonstrated That Decree 77 Was Arbitrary and Discriminatory**

83. In Respondent's upside-down world, Decree 77 was just another ordinary act of the IFT resulting from the typical application of the confirmation of criteria process. In actuality, it was a one-of-kind measure issued, contrary to well-established principles and practice of Mexican telecommunication law and policy. It is the consummation of the IFT's arbitrariness, secrecy and discrimination against Tele Fácil, conduct that breaches Article 1105.

84. In describing the IFT's process for "interpreting" Resolution 381, Respondent stated in its Statement of Defense: "a criteria confirmation is a procedure by which a private individual, company or even a governmental agency requests an interpretation of a legal or administrative provision or regulation."<sup>105</sup> In Mr. Gorra's first witness statement, he described twenty confirmations of criteria decreed by the IFT, indicating that some have been decided by the Plenary regarding interconnection matters,<sup>106</sup> some have been requested by private concessionaires and federal government entities and decided by the Plenary,<sup>107</sup> and some have been requested by the IFT's administrative unit.<sup>108</sup> His description was designed to give the Tribunal the impression that Decree 77 was just like any of these other twenty interpretations.

85. Nothing could be farther from the truth—and Respondent finally appears to acknowledge this. In response to Mr. Gorra's first witness statement, Claimant explained, in detail, how each of the twenty interpretations described was unlike Decree 77. Of the twenty decrees eleven were issued by the Legal Unit, not the Plenary, and thus do not interpret a prior decision of the Plenary.<sup>109</sup> Of the remaining nine decrees, five do no relate to a prior interconnection dispute.<sup>110</sup> Of the last four remaining decrees, none show that the IFT has ever analyzed the scope of a previously established interconnection agreement. As explained,<sup>111</sup> two of these involve the IFT simply granting the parties' joint request to recognize a settlement agreement. Notably, neither of these involved a request for confirmation of criteria. In the other

<sup>105</sup> Statement of Defense, ¶ 104.

<sup>106</sup> First Gorra Statement, ¶ 14.

<sup>107</sup> *Id.* at ¶ 15.

<sup>108</sup> *Id.* at ¶ 16.

<sup>109</sup> Reply, ¶ 312.

<sup>110</sup> *Id.* at ¶ 313.

<sup>111</sup> *Id.* at ¶¶ 314-323.

two cases, as explained, respectively, the IFT did not provide its interpretation of a prior resolution in the context of a dispute with another carrier and, in the context of an interconnection agreement that contained a Continuity Clause, the IFT found that the concessionaire's previously agreed rates continued to apply. In sum, none of the decrees described by Mr. Gorra are analogous.

86. Notably, Respondent has never meaningfully contested Claimant's analysis or conclusion. Mr. Gorra made no attempt to defend his position in his second witness statement or during his direct testimony at the hearing. Nor did Respondent choose to address Claimant's response in its opening arguments at the hearing.

87. Mr. Peláez, former IFT Executive Coordinator, who spent almost the entirety of his direct testimony at the hearing trying to explain away a statement he made at the March 5, 2015 Plenary meeting, served only to highlight the arbitrary nature of Decree 77. During the March 5, 2015 Plenary meeting, Commissioner Cuevas asked whether the regulator had ever ordered interconnection without an agreement in place. Mr. Peláez stated: "in previous cases we have never had a case of ordering the interconnection prior to an agreement, there has always been an agreement together with interconnection, from what I remember."<sup>112</sup>

88. At the hearing, Mr. Peláez tried in vain to walk back his comment. He maintained that Commissioner Cuevas asked a question "related to whether the record of the Institute or in COFETEL there had been any order of interconnection before having worked out a rate issues or whether the interconnection was only ordered once the rate was resolved."<sup>113</sup> Mr. Peláez insisted that his March 5 comment—that interconnection had never been ordered without an agreement in place—was taken out of context. He maintains: "I was explaining, and I referred specifically to the issue of interconnected networks as Commissioner Diaz had already indicated."<sup>114</sup>

89. This claim falls flat considering the basic fact that the purpose of this meeting was to address a situation involving a new entrant, with no interconnection agreement and no physical interconnection. Moreover, Commissioner Cuevas's question was clearly broader. He asked: "Has the regulator sustained, from the times of COFETEL and currently [at the IFT] that the duty to interconnect is per se, admissible regardless of whether there are rate matters later or

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<sup>112</sup> Transcript of March 5 Plenary Meeting, at 11, **C-043**.

<sup>113</sup> Peláez Test., Tr. 487:12-16.

<sup>114</sup> *Id.*, Tr. 488: 19-21.

[has the regulator] always required interconnection if, and only if, the rate issue has been resolved?”<sup>115</sup>

90. Mr. Diaz had not answered the question posed, discussing, instead, instances in which a rate term was disputed *while* the concessionaires remained interconnected.<sup>116</sup> Mr. Peláez’s subsequent response to the same question, however, clearly addressed whether the regulator had ever “order[ed] the interconnection prior to an agreement” – he confirmed that there has “always been an agreement together with interconnection.”<sup>117</sup> For Mr. Peláez to now try to spin his comment at the March 5 Plenary to support Mr. Diaz’s answer is to ignore entirely the context of the discussion occurring on March 5, 2015.

91. The two situations are clearly distinct. Previously interconnected concessionaires benefit from an executed agreement and can continue doing business in accordance with those terms; they already have facilities in place and can continue billing and paying one another on previously agreed commercial terms, subject to a possible future reconciliation. In stark contrast, if Tele Fácil were ordered to interconnect without critical commercial terms in place, it would have been required to embark on a major telecommunications venture without any contractual terms, including no guarantee as to when it would be paid or how much it would be paid for its services.

92. Regardless of whether or not he meant to support Mr. Diaz’s response to Commissioner Cuevas, Mr. Peláez’s answer to Commissioner Cuevas on March 5, 2015 was accurate: “in previous cases we have never had a case of *ordering* the interconnection prior to an agreement, there has always been an agreement together with interconnection, from what I remember.”<sup>118</sup> Indeed, even during his cross-examination, Mr. Peláez could still offer no previous case:

Q. Did IFT ever historically resolve an interconnection disagreement between two non-interconnected networks to be interconnected without there being a contract?

A. I don’t recall, it’s been some time since I’ve left.<sup>119</sup>

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<sup>115</sup> Transcript of March 5 Plenary Meeting, at 11, **C-043**.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* (emphasis added).

<sup>119</sup> Peláez Test., Tr. 507:7-12.

Given the centrality of this issue in the present arbitration, if Mr. Peláez and Respondent were unable to identify a single case in which the regulator ordered interconnection without an interconnection agreement, then Decree 77 was undoubtedly unprecedented.

93. Claimant's Mexican telecom law experts, both leading figures in the field, agree that Decree 77 was one of kind—and in an entirely illegal respect.<sup>120</sup>

94. In sum, the Tribunal should not accept Respondent's alternative reality in which Decree 77 was in any way normal, let alone legal. By contrast, it represented a gross departure from well-established Mexican telecom law and practice in violation of Article 1105.

### **3. Respondent's Defense of Claimant's FET Claim Is Wrong**

95. In its attempt to defend against Claimant's fair and equitable treatment claim, Respondent unpersuasively tries to downplay the IFT's misconduct and divert the Tribunal's attention to the *amparo* proceedings.

96. With respect to the IFT's conduct, Respondent repeated two hollow defenses at the hearing: "Tele Fácil had complete access to the system of interconnection disagreements" and "Tele Fácil had the opportunity to present its arguments to the Institute [of Federal Telecommunications (IFT)], and even met with the persons in the Compliance Unit and the Plenary."<sup>121</sup> The first defense misses the point. Claimant has not complained about its access to the proceedings leading up to Resolution 381 and Resolution 127. Rather, its claim concerns its lack of access to the unlawful and secretive confirmation criteria process—a process that resulted

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<sup>120</sup> Professor Álvarez testified: "Decree 77 was never a Confirmation of Criteria. It was only an amendment of rights and obligations. The IFT mutilated the scope of its authority simply to say--and said only what is disputed, and that is against our public policy, our long standing public policy. This destroyed Tele Fácil's rights for Resolution 381, but not only that, it destroyed the entire interconnection policy of the Mexican State, opening a door for never-ending interconnection disputes, as I say in my opinion. And, as a consequence of this, it released Telmex from its obligation to interconnect and to honor the agreed rate to 2017. Alvarez Test., Tr. 674:17-- 675:7. Mr. Soria opined: "The fact that the IFT internally requested a confirmation of criteria on February 10, 2015, without any of the parties at that point having presented a formal concern regarding the scope of the terms and conditions they were obligated to execute in the interconnection agreement ordered by Resolution 381. Even so, the fact that Telmex/Telnor was requesting the IFT to consider that the agreed fees were contrary to the new legal framework clearly constitutes clear evidence that Telmex/Telnor knew that it had to comply with all terms and conditions established in Resolution 381, even the disputed ones, such as the fees. Decree 77 pretends to be a pronouncement ordering the execution of Resolution 381 in response to Tele Fácil's requests when in reality Decree 77 revoked that agreement. As a former Commissioner, I can strongly state that this is not a common practice; in fact, it seems to me to be an abuse of power." Soria First Report, ¶ 114.

<sup>121</sup> Respondent's Opening Presentation, Tr. 233: 8-14.



in Decree 77 which improperly forged the path for Telmex to obtain Resolution 127, which formally replaced Tele Fácil's lucrative rate term.<sup>122</sup>

97. As explained in detail in Claimant's submissions, Tele Fácil was not provided a meaningful opportunity to provide input into the confirmation of criteria process, which proceeded in secret behind closed doors.<sup>123</sup> Tele Fácil representatives complained to the Compliance Unit and other parts of the IFT about the lack of enforcement of Resolution 381, but no one at the IFT informed Tele Fácil about its consideration of requests for confirmation of criteria request from the Legal Unit and Telmex.<sup>124</sup> Claimant only received partial information about these procedures at the March 5 Plenary meeting, which would not have occurred if Tele Fácil had not demanded it.<sup>125</sup> A few weeks later, Decree 77 was issued and blocked Tele Fácil from operating in the Mexican market, thus destroying Claimant's investment.<sup>126</sup>

98. Respondent rests most of its defense on Tele Fácil's alleged access to the Specialized Telecommunications Courts.<sup>127</sup> But this strategy is misguided. The Courts' conduct is secondary to the Tribunal's analysis. The IFT's conduct, independently, already had given rise to a NAFTA claim and had caused irreparable damage to Claimant's investments in early 2015, well before Tele Fácil filed its *amparo* actions. In fact, as explained above, Claimant was not required to exhaust the procedures of the Courts before bringing a NAFTA a claim based on the IFT's conduct. In any event, as outlined in Claimant's pleadings, the Courts' record was abysmal, failing to offer any meaningful review of the IFT's conduct, in breach of their judicial duties, and unjustifiably blocking Tele Fácil's appeal, which was first accepted and then denied under circumstances which Respondent has been unable to explain convincingly.<sup>128</sup>

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<sup>122</sup> Statement of Claim, ¶¶ 486-597; Reply, ¶¶ 274-339.

<sup>123</sup> Statement of Claim, ¶ 589.

<sup>124</sup> Statement of Claim, ¶ 575.

<sup>125</sup> Statement of Claim, ¶ 27.

<sup>126</sup> Decree 77, C-051.

<sup>127</sup> Statement of Defense, ¶ 305; Rejoinder, ¶ 205; Respondent's Opening Statement, Tr. 233:15-22; Tr. 234: 1-6.

<sup>128</sup> Statement of Claimant, ¶¶ 245-287; Rejoinder, ¶¶ 340-386. Respondent instead tries to divert the Tribunal's attention to an alleged attempt by Tele Fácil's external counsel to bribe courthouse officials to admit Tele Fácil's appeal of the *amparo* ruling on the constitutionality of Decree 77. The attorneys involved have denied any wrongdoing in sworn testimony and Respondent chose not to call them to the hearing to challenge their statements. Moreover, the only evidence that Respondent relies on is a Minute of Facts that is unsigned by the responsible court official. Appeal Statement of Facts, at 9, C-066. Thus, Respondent has clearly failed to carry its burden of proving such serious allegations.

#### D. Claimant Has Proven His Expropriation Claim Under The NAFTA

99. As reflected in Claimant’s briefing and testimony, in this arbitration, Claimant has proven the following critical facts: (1) in Resolution 381, the IFT established all applicable terms of interconnection between Tele Fácil and Telmex, including application of a rate of USD \$0.00975 through 2017; (2) the IFT arbitrarily and unjustifiably refused to enforce the interconnection agreement resolved in Resolution 381 in Tele Fácil’s favor; (3) Decree 77 unlawfully formalized the destruction of Tele Fácil’s interconnection rights, including the high rate to which it was entitled; and (4) without an interconnection agreement with Telmex—and particularly without a rate term—Tele Fácil could not earn a commercial return on its investment or otherwise meaningfully operate in the Mexican market.<sup>129</sup> In short, by repudiating Tele Fácil’s valuable interconnection rights, the IFT rendered Tele Fácil completely valueless. These facts amply establish an unlawful expropriation in violation of Article 1110.

100. Respondent’s novel defense is unavailing, if not antithetical to the terms of Chapter Eleven. According to Respondent, Article 1110 on expropriation contains an implicit carve-out for all IFT conduct that is related in any way, however tangentially, to a dispute between private concessionaires.<sup>130</sup> At the hearing, Respondent’s counsel argued:

... Resolution 381, as well as Decree 77 and Resolution 127, are related to an interconnection disagreement between two private operators: Telmex and Tele Fácil.

The amparo proceedings and their challenges before Specialized Courts following the Resolutions of the Institute were a continuation of that original dispute between Tele Fácil and Telmex. It is important to note that the administrative resolutions in question did not derive from a dispute between Tele Fácil and the Mexican State.<sup>131</sup>

It adds unpersuasively that “a judicial measure issued in the context of a dispute between private entities cannot lead to a claim of expropriation under Article 1110.”<sup>132</sup>

101. Respondent’s argument reflects a deep misunderstanding of the scope of Chapter Eleven. Putting aside certain timing requirements, the only limits on an investor’s right to claim are, as explained above, that he demonstrate that: (1) he is “an investor of a Party” that has made

<sup>129</sup> Statement of Claim, ¶¶ 366-416; Reply, ¶¶ 258-269 (citing *Burlington Resources v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability (Dec. 14, 2002), **CL-024**).

<sup>130</sup> Statement of Defense, ¶¶ 259-262; Rejoinder, ¶¶ 177-183; Respondent’s Opening Statement, Tr. 228:8-229:7.

<sup>131</sup> Respondent’s Opening Statement, Tr. 228: 4-14.

<sup>132</sup> *Id.*, Tr. 228:14-17.

an investment in another NAFTA Party; (2) there exist “measures” adopted by a Party relating to the investment; and (3) such measures have breached an investment protection and caused damage. Contrary to Respondent’s assertion, there is nothing in the language of the NAFTA that limits an investor’s ability to claim simply because it has previously been involved in a private dispute with another person or entity. In the case of claims brought pursuant to Article 1117, an investor must also demonstrate that he “owns or controls” the local enterprise on whose behalf he seeks to claim.

102. As to the existence of “measures,” it is important to recall that the Mexican government conduct at issue in this case is not disputed, only the consequences that flow from such conduct. Namely, Respondent has never contested that Claimant’s claim arises out of the following key measures: the IFT’s failure to enforce Resolution 381, the IFT’s use of the confirmation of criteria process, Decree 77, and the IFT’s initiation of the dispute resolution process that led to Resolution 127. These measures are decidedly sovereign in nature. Claimant accepts that Tele Fácil was involved in a *private* dispute with Telmex about rates—at times directly and knowingly, as in the case of Resolutions 381 and 127 and, at times unknowingly, as in the case of the confirmation of criteria process that led to Decree 77. However, these facts are irrelevant because to make out a claim Claimant must only demonstrate that Respondent’s *government* measures breached Chapter Eleven.

103. Respondent’s restrictive interpretation of Article 1110 not only finds no support in the terms of the NAFTA, but also distorts the single piece of evidence offered to support this proposition: the United States 1128 submission in *Eli Lilly v. Canada*. In that document, the U.S. Government states: “decisions of *domestic courts* acting *in the role of neutral and independent arbiters* of the *legal rights of litigants* do not give rise to a claim for expropriation under Article 1110(1).”<sup>133</sup> However, it is undisputed that the IFT is not a “domestic court” under Mexican law or that the majority of its Commissioners are not even lawyers. Further, the IFT never acted “in the role of neutral and independent arbiter” with respect to the relevant events, such as when it failed to enforce Resolution 381, abused the confirmation of criteria process that led to Decree 77, and unlawfully proceeded to replace Tele Fácil’s lucrative rate term with the default rate in Resolution 127.

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<sup>133</sup> *Eli Lilly & Co. v. Government of Canada*, ICSID Case No. UNCT/14/2, Submission of the United States of America (Mar. 18, 2016), ¶ 29, **RL-002**.

104. Further, Respondent's reliance on the United States 1128 submission is inconsistent with its own factual argument. Respondent has argued throughout this arbitration that, in Resolution 381, the IFT never determined the rate term under Tele Fácil's interconnection agreement, nor did Decree 77 reverse the IFT's prior ruling on rates. It is difficult to understand, then, how the U.S. position, which expressly applies to situations where "the legal rights of litigants" have been adjudicated, advances Respondent's case in any way.

105. Respondent also strangely tries to imbed additional standing provisions into Article 1110. It claims that this provision prohibits derivative claims by a shareholder of an enterprise in relation to loss to the enterprise's investments. At the hearing, Respondent argued:

Permit me also to consider the interpretation of Article 1110 with you. Members of the Tribunal will surely know that some provisions of Chapter 11 apply to investments of another party as well as to investments of the Investors of another party. Article 1110 prohibits the direct or indirect expropriation or equivalent measures to direct or indirect expropriation of an investment or an investment of an investor of another party. Article 1110 does not protect the investments of an investment of an investor of another party.<sup>134</sup>

106. As is clear from the plain language of Article 1110, that provision protects "investments" without qualification. It says nothing about an investor's standing to claim. That subject is governed by Articles 1116 and 1117 of the NAFTA. Under those provisions, respectively, an investor may claim in his own right, such as in his capacity as shareholder, and an investor that owns or controls an enterprise may claim on behalf of the enterprise. Thus, the operative "investment" under Article 1110 is relative to the investor's standing to claim under Article 1116 and/or Article 1117.<sup>135</sup> In the latter case, Claimant may claim for the loss of all of Tele Fácil's investments, including its rights under the interconnection agreement, as determined in Resolution 381. In the former case, Mr. Nelson can claim in relation to his shares and to his right to 60% of Tele Fácil's profits under the MOU. Article 1110 itself imposes no limitations with respect to an investor's standing to claim.

107. In the end, the protections of Article 1110 are not restricted, as Respondent argues, and Claimant has made out a strong case that Respondent has failed to uphold them. As Professor Álvarez testified at the hearing, "interconnection is as important as the air we

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<sup>134</sup> Respondent's Opening Statement, Tr. 224:21-225:9.

<sup>135</sup> Reply, ¶¶ 209-222; Claimant's Opening Statement, Tr. 120:3-123:22.

breathe”—especially for new entrants.<sup>136</sup> The IFT’s conduct snuffed out Tele Fácil’s rights, depriving the company and its investors of the ability to earn a commercial return in Mexico.

**E. Claimant Has Provided Ample Basis to Calculate Damages with Reasonable Certainty**

**1. Only the Estimates of Lost Revenue Are Still in Dispute - Respondent’s Experts Either Adopted the Other Inputs or Failed to Rebut Them**

108. There is surprisingly little disagreement on most of the inputs to Claimant’s calculation of damages; in fact, all of the inputs except the estimations of lost revenue are not in dispute because they were either un rebutted by Respondent or adopted by Respondent’s expert Mr. Obradors in presenting his alternative damages model. Even Mr. Obradors agreed that the dispute over the calculation of damages goes to the revenue estimates for the most part.<sup>137</sup>

109. Dr. Dippon used a DCF methodology to calculate lost profits for Tele Fácil’s DID, International Termination, and retail services. This is a standard lost profits model that calculates the difference between the net revenue in the “but-for” world and the actual world.<sup>138</sup> Because Tele Fácil’s entire business case was destroyed, profits in the actual world are zero.<sup>139</sup>

110. The basic steps in a DCF methodology are to determine the damages period, calculate lost revenue, subtract incremental costs that would have been avoided, calculate the appropriate discount rate, discount the annual lost profits to the time of wrongdoing (*i.e.*, Jan. 15, 2015) and then apply a prejudgment interest rate to account for the opportunity cost of the lost money. Consequently, the critical inputs to Dr. Dippon’s model include estimations of lost revenues and incremental costs, a discount rate, damages period and prejudgment interest rate.

111. For her model to calculate lost profits for the Competitive Tandem service, Dr. Mariscal adopted the same inputs used by Dr. Dippon, except that for this line of business she needed to use an econometric model to calculate lost revenue.

112. Mr. Obradors testified that he prepared an “alternative estimate” of Tele Fácil’s damages using a DCF methodology and that this estimate was “true and accurate” and could be relied upon by the Tribunal in their decision in this matter.<sup>140</sup> He followed the same steps as Dr.

<sup>136</sup> Álvarez Test., Tr. 667:15-19.

<sup>137</sup> Obradors Test., Tr. 1142:7-11.

<sup>138</sup> Dippon Test., Tr. 881:1-3.

<sup>139</sup> *Id.*, Tr. 881:3-5.

<sup>140</sup> Obradors Test., Tr. 1131:2-15.

Dippon, using the same inputs, except that he did not use Dr. Dippon's data for lost revenue. Because of this testimony and endorsement of the Dr. Dippon's calculation as reliable, any of the inputs used by both Mr. Obradors and Dr. Dippon should not be in dispute.

113. As an initial matter, Mr. Obradors also used a DCF methodology in calculating his alternative damages.<sup>141</sup> He offered no opinion that contradicted Dr. Dippon's use of a DCF methodology. There is, therefore, no dispute between the experts as to whether a DCF methodology is appropriate.

114. Mr. Obradors used the same six-year damages period as Dr. Dippon did in his damages model.<sup>142</sup> He also used the Weighted Average Cost of Capital ("WACC") of 12.36% for the first year and 13.02% for the later years as the discount rate in his alternative model – the same as Dr. Dippon calculated.<sup>143</sup> There is, therefore, no dispute between the experts as to the damages period or the WACC to be used.

115. Mr. Obradors did not use a prejudgment interest rate in his calculation because he did not calculate a positive number for damages.<sup>144</sup> But he did not present testimony refuting Dr. Dippon's prejudgment interest rate.<sup>145</sup> Respondent, likewise, did not present any testimony rebutting the prejudgment interest rate used by Dr. Dippon.<sup>146</sup>

116. Dr. Dippon subtracted incremental costs that Tele Fácil would have avoided paying such as direct costs attributable to a certain service, indirect costs and operating costs. Mr. Obradors also used the same incremental cost model as Dr. Dippon although he did adjust for varying levels of revenue were appropriate. For example, for DID, 50% of revenue would be paid to DID providers so this cost varies with revenue volume.

117. For practical purposes, therefore, all the inputs to Claimant's damages model, except for estimates of lost revenue, are unrebutted or adopted by Respondent's expert witness. Claimant, therefore, will only address the issues relating to the estimation of lost revenue for each line of business in this Brief.

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<sup>141</sup> *Id.*, Tr. 1135:8-11, 1141:14-17.

<sup>142</sup> *Id.*, Tr. 1135:12-18.

<sup>143</sup> *Id.*, Tr. 1135:19-1136:3.

<sup>144</sup> *Id.*, Tr. 1138:20-1139:7.

<sup>145</sup> *Id.*, Tr. 1217:17-1218:14.

<sup>146</sup> Of course, the Tribunal will have to adjust the prejudgment interest calculation based on the actual date and amount of the Award (or have the parties calculate the prejudgment interest).

## 2. Damages for the International Termination Line of Business Are Calculated with Reasonable Certainty

118. Respondent presents two arguments in an attempt to refute Claimant's damages for the International Termination line of business. First, Respondent and its expert contend that the damages for this line of business are zero because Tele Fácil should have gone forward with this line of business regardless of the actions taken by the IFT and to the exclusion of its other lines of business. Second, Respondent's expert disagrees with Dr. Dippon's calculation of lost revenue and instead, calculates lost revenue from sources he is unwilling to vouch for or from sources that are less accurate than the historical data produced by Future Telecom.

### a. Claimant's Calculation of Lost Revenue for International Termination Relies on Actual Historical Data from Future Telecom

119. For the estimation of lost revenue for the International Termination line of business, Dr. Dippon testified that he used Future Telecom's *actual* traffic minutes, the [REDACTED], and Future Telecom's *actual* termination rates.<sup>147</sup> This is actual historical data based on the call detail records of [REDACTED] by Future Telecom.<sup>148</sup> Dr. Dippon testified that: "We have a lot of the information, factual information . . . and that's quite unique and that results in very little forecasting . . . and, therefore, highly accurate damages estimates."<sup>149</sup> He also testified: "It's a very straightforward calculation; purely factual, no speculation, no assumptions."<sup>150</sup> When asked if it is a nice thing to have such actual data, even Mr. Obradors admitted that: "Yes, that's fantastic . . . ."<sup>151</sup>

120. In contrast, Mr. Obradors only supplied speculation and guesswork to rebut Dr. Dippon's lost revenue calculation. His official position, as set forth in his summary of his model, is that the lost revenues were "zero" because of what he labeled a "business decision" not to go forward with this business line.<sup>152</sup> Even though he estimated lost revenues at "zero," he did include calculations of lost revenue in his report, but these calculations were marred by gross computational errors and were based on made-up or unsupported data.

<sup>147</sup> Dippon Test., Tr. 883:11-884:2.

<sup>148</sup> Obradors Test., Tr. 1201:5-12.

<sup>149</sup> Dippon Test., Tr. 880:14-19.

<sup>150</sup> *Id.*, Tr. 884:10-12.

<sup>151</sup> Obradors Test., Tr. 1195:17-20.

<sup>152</sup> *Id.*, Tr. 1147:4-1148:14.

121. Mr. Obradors admitted that he did not use the actual volume and rates provided by Future Telecom in his calculation of lost revenue for the International Telecom line of business. He testified that he did not interview [REDACTED] of Future Telecom nor did he even request such an interview.<sup>153</sup> Instead of actual, historical data provided by Future Telecom, Mr. Obradors used unreliable sources he was unwilling to vouch for, including a rate proposal submitted by Marcatel. Mr. Obradors testified that: “I cannot express an opinion about how skilled Marcatel might be for estimating such data . . . .”<sup>154</sup> Based on this admission, the Marcatel data should be disregarded because there is no evidence that the Marcatel data is reliable.

122. Another source of data relied upon by Mr. Obradors to calculate lost revenues was FCC data from 2014.<sup>155</sup> Mr. Obradors, however, admitted that the FCC data was what is referred to as “self-reported” data which means only carriers who want to participate provided data and there is no check on the accuracy of their reports.<sup>156</sup> He also admitted that the FCC data included traffic that did not terminate on Telmex’s network which was not part of Dr. Dippon’s model.<sup>157</sup> The FCC data, therefore, cannot substitute for the actual traffic volume and rates experienced by Future Telecom and used by Dr. Dippon in his calculations.

123. More critically, Mr. Obradors admitted that he made a mistake in interpreting the call detail records from Future Telecom. Future Telecom is an aggregator that sends traffic to a switch in [REDACTED]. Mr. Obradors used the switching charge paid by Future Telecom in [REDACTED] as though it was the terminating rate it paid in Mexico, which was a grave error that resulted in a fundamentally erroneous reduction in Mr. Obradors’ damages calculation. The switch operator would not know what the ultimate terminating rate would be, and the switch charge is much lower than the ultimate termination rate. Mr. Obradors admitted as much: “They could be something that is not quite correct—I’m saying that’s possible, so I’m not sure.”<sup>158</sup>

**b. Respondent’s Actions Precluded Tele Fácil’s Ability to Go Forward with the International Termination Line of Business**

124. Respondent and its damages expert Mr. Obradors contend that Claimant suffered no damages relating to the International Termination line of business because Tele Fácil could

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<sup>153</sup> *Id.*, Tr. 1176:9-16.

<sup>154</sup> *Id.*, Tr. 1180:14-15.

<sup>155</sup> *Id.*, Tr. 1180:16.

<sup>156</sup> *Id.*, Tr. 1192:2-13.

<sup>157</sup> *Id.*, Tr. 1193:1-17.

<sup>158</sup> *Id.*, Tr. 1199:7-9.



have hypothetically negotiated a new interconnection agreement with Telmex that included a lower interconnection rate and then proceeded with its International Termination (and Retail Services) lines of business to the exclusion of its DID and Competitive Tandem lines of business. This contention is legally and factually incorrect and it in no way limits Claimant's ability to recover lost profits relating to the International Termination line of business.

125. As an initial matter, in its briefing, Respondent frames this argument as coming under the doctrine of mitigation; presumably characterized as a failure of Tele Fácil to mitigate its damages. This mitigation argument fails for several reasons. First, Mr. Obradors testified that he did not make any adjustment to his alternative damages calculation for an alleged failure on the part of Tele Fácil to mitigate damages.<sup>159</sup> Second, "The onus of proof on the issue of mitigation is always on the person pleading it . . . ."<sup>160</sup> Respondent did not present evidence that the loss would have been "avoidable by reasonable action that could have been taken by" Tele Fácil to pursue the International Termination Service line of business.<sup>161</sup> Instead of identifying concrete steps that Tele Fácil could have taken, Respondent speculates about actions that would have been impossible for Tele Fácil to take or too risky for it to take. Indeed, Claimant need only show that it had a "plausible explanation" for its conduct to rebut the doctrine of mitigation -- which it has shown.<sup>162</sup> Third, the doctrine of mitigation does not require a party to give up something of value, which Tele Fácil would be doing by going forward with one of its lines of business to the exclusion of its others.<sup>163</sup>

126. To be fair, and to be helpful to the Tribunal, Respondent's argument is better characterized as one of causation of damages, *i.e.*, the lost profits attributed to the International Termination Service were not caused by the actions of Respondent because Tele Fácil could have gone forward with the International Termination Service without the high interconnection rate it had negotiated with Telmex. Even when framed correctly, however, this argument is legally and factually incorrect, as discussed below.<sup>164</sup>

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<sup>159</sup> *Id.*, Tr. 1138:1-10.

<sup>160</sup> *AIG Capital Partners, Inc. and CJSC Tema Real Estate Co. v. Republic of Kazakhstan*, ICSID Case No. ARB/01/6, Award (Oct. 7, 2003), ¶ 10.6.4(4), **CL-150**.

<sup>161</sup> *Id.*, ¶ 10.6.4.

<sup>162</sup> *See, e.g., Middle East Cement Shipping and Handling Co. S.A. v. Egypt*, ICSID Case No. ARB/99/6, Award (Apr. 12, 2002), ¶¶ 168, 170, **CL-056**.

<sup>163</sup> *Hrvatska Elektroprivreda d.d. v. Republic of Slovenia*, ICSID Case No. ARB/05/24, Award (Dec. 17, 2015), ¶¶ 214-217, **CL-133**.

<sup>164</sup> Claimant's arguments also rebut the doctrine of mitigation argument made by Respondent in its briefing.

**i. It Is Uncontroverted that an Interconnection Agreement Would Have Been Necessary for Tele Fácil to Provide Service**

127. It is uncontroverted that Tele Fácil would have needed an interconnection agreement to provide service. This expectation was not only reasonable but has been the rule with every other carrier in Mexico historically.<sup>165</sup> As Respondent's witness Mr. Peláez conceded during the hearing, carriers always had a signed written interconnection agreement before interconnecting.<sup>166</sup>

128. During her testimony, Dr. Álvarez cited to the Supreme Court in saying that:

Since interconnection agreements are the legal instruments that govern the Terms and Conditions in which interconnection services are provided between the carriers thereto, consequently it is essential the effective signature of them by virtue of the law, because the Federal Telecommunications Law has not considered it sufficient for networks to be interconnected without having an interconnection agreement.<sup>167</sup>

129. She added that: "And this is important. Yesterday, Mr. Peláez stated that there is no case in Mexico where the physical interconnection has been ordered without there being an interconnection agreement, and that is absolutely correct. The only case I know of is Decree 77."<sup>168</sup>

130. Commissioner Díaz, on Respondent's side, also recognized the primacy of an interconnection agreement:

Q. And, again, the expectation of participants in the telecommunications market is that, upon issuance of a resolution that resolves an interconnection agreement, no more pending resolution items shall be present; correct?

A. That is what has happened historically. The conditions agreed upon are not resolved, and the concessionaires then sign the Agreement.<sup>169</sup>

<sup>165</sup> Díaz Test., Tr. 437:5-12.

<sup>166</sup> Peláez Test., Tr. 533:20-534:6.

<sup>167</sup> Álvarez Test., Tr. 669:14-22.

<sup>168</sup> *Id.*, Tr. 670:1-6.

<sup>169</sup> Díaz Test., Tr. 437:5-12.

**ii. Respondent's Actions Prevented Tele Fácil from Obtaining an Interconnection Agreement**

131. The IFT did not enforce Resolution 381 in a timely manner. Instead, it waited until April 8, 2015, when it issued Decree 77, and granted the parties an additional 10 business-day term to interconnect.<sup>170</sup>

132. Thus, from January 1, 2015, through April 8, 2015, there was no Interconnection Agreement to govern the interconnection relationship with Telmex. In this situation, Future Telecom would not have directed international traffic to Tele Fácil nor could Tele Fácil have provided service.

133. On April 8, 2015, the IFT moved from not enforcing 381 to reversing it via Decree 77. The Second, Third, and Fourth Ordering Decrees of Decree 77 provide the following:

**Second.** A period of 10 (ten) business days is granted as from the day following the date on which the notification of this Decree takes effect for Tele Fácil and Telmex/Telnor to interconnect their public telecommunications networks.

**Third.** Without prejudice to the provisions in the previous numeral, the parties must execute the corresponding agreement, observing the provisions of the Fifth Consideration section of the Interconnection Resolution [381]; that is, the provisions related to indirect interconnection and the omission of any reference to portability costs.

**Fourth.** The rights of the parties are held harmless regarding the conditions that were not a matter of the Interconnection Resolution [381].<sup>171</sup>

134. The Second Ordering Decree orders the usual 10 business day term to physically interconnect. However, there is no mention of an obligation to execute an interconnection agreement. This appears in the Third Ordering Decree. So, unlike Resolution 381, the IFT separated the obligation to physically interconnect from the obligation to execute an interconnection agreement to govern the interconnection.

135. Critically, the Third Ordering Decree contains no term limit for executing an interconnection agreement.<sup>172</sup> This is unprecedented. Moreover, looking further at the Third Ordering Decree, the only compulsory terms the IFT ordered to include in the required Interconnection Agreement are: (i) a provision for indirect interconnection and (ii) the omission

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<sup>170</sup> Decree 77, Second Decree, at 14, **C-051**.

<sup>171</sup> *Id.*, at 14-15.

<sup>172</sup> *Id.*, at 14.

of portability charge. No other terms were ordered, and all other clauses agreed by the parties were thrown away, handing Telmex the upper hand to renegotiate all terms.

136. This is reinforced by the Fourth Ordering term which provides: “The rights of the Parties are held harmless regarding the conditions that were not a matter of the Interconnection Resolution.”<sup>173</sup>

137. The import of this language was also made clear by Commissioner Díaz in his cross examination with respect to the Third and Fourth Ordering Decrees of Decree 77. It went as follows:

Q. And, Commissioner Díaz, all the other Terms and Conditions were now held harmless; correct?

A. That's correct.

Q. So there was no rate at this point?

A. That's what that Agreement was saying.

Q. But also [170] pages of the Interconnection Agreement that had already been discussed between Tele Fácil and Telmex, those too, were now held harmless; correct?

A. Yes, that's correct.<sup>174</sup>

138. This order to execute an interconnection agreement with only two terms<sup>175</sup> was unprecedented. This specific ordering clause is the reason Decree 77 was narrowly approved via a four-three vote<sup>176</sup> instead of unanimous, as was Resolution 381.<sup>177</sup> No business line, including International Termination, could go forward in this situation. Tele Fácil now did not have an interconnection agreement at all. By not enforcing Resolution 381 and issuing Decree 77, which destroyed the interconnection agreement the parties had negotiated, Tele Fácil could not have proceed with any of its business lines, including the international termination business line.

139. Another fiction that Respondent doggedly pursues is its claim that Decree 77 was only a “clarification” of Resolution 381.<sup>178</sup> Respondent can only maintain this fiction by wholly ignoring the text of each. A quick comparison of the operative sections of both will suffice to expose the fiction. The First Resolution of Resolution 381 states in relevant part that:

Within 10 (ten) business days . . . [the Parties] must interconnect their telecommunications networks and initiate the provision of the

<sup>173</sup> *Id.* at Fourth Decree, at 15.

<sup>174</sup> Díaz Test, Tr. 462:11-20.

<sup>175</sup> Decree 77, at 14, **C-051**.

<sup>176</sup> *Id.*, at 15-16.

<sup>177</sup> Resolution 381, at 18, **C-029**.

<sup>178</sup> *See, e.g.*, Statement of Defense, ¶ 106.

corresponding interconnection services. In that same term, such companies must execute the interconnection agreement of their telecommunications networks pursuant to the terms and conditions determined in the FIFTH Consideration of this Resolution.<sup>179</sup>

140. The corresponding decrees of Decree 77 are found in its Second and Third decrees, which provide in relevant part as follows:

**Second.** A period of 10 (ten) business days is granted [for the Parties] to interconnect their public telecommunications networks.

**Third.** Without prejudice to the provisions in the previous numeral, the parties must execute the corresponding agreement, observing the provisions of the Fifth Consideration section of the Interconnection Resolution, that is, the provisions related to indirect interconnection and the omission of any reference to portability costs.<sup>180</sup>

141. The difference is stark: Resolution 381 orders the parties to execute their interconnection agreement in the same time period as the parties' obligation to physically interconnect their networks. Decree 77 orders physical interconnection within ten business days, but fails to place a time limit on the execution of the interconnection agreement itself. Decree 77 also effectively excises the rate term from the Fifth Consideration of Resolution 381. These are dramatic changes, and in now rationale world could such changes legitimately be called a clarification or an interpretation.

142. The implications to Tele Fácil of Decree 77 were dramatic. The IFT handed Telmex the ability to delay indefinitely the interconnection agreement; by this action, the very rules pursuant to which the parties were to agree to interconnect would not be in place, and Tele Fácil would have no redress in the event of misconduct by Telmex.

143. The underlying reality for Tele Fácil in the wake of Decree 77 is that it did not have an interconnection agreement which was necessary to provide Future Telecom with International Termination services.

**iii. It Would Have Been Too Risky for Tele Fácil to Proceed with Its Rights in Doubt**

144. Mr. Obradors testified that a solution to this: "I think that what one would have done is you could deliver traffic, well, let's try. If it works well, well, then I'm going to give you

<sup>179</sup> Resolution 381 at 16-17, **C-029**.

<sup>180</sup> Decree 77, at 14, **C-051**.

more traffic.”<sup>181</sup> Mr. Obradors’ approach not only ignores the fact that Tele Fácil would have to abandon all of the rights Resolution 381 had already granted to it for other business lines, but it also ignores the inevitable risks that such a decision would bring to the international termination business line itself.

145. It is also worth remembering that shortly after that critical decision that Respondent is arguing of only pursuing international arbitration had to be made, the international termination line ceased to be profitable. As Dr. Dippon explained:

A. Yes, it had a very short time span. Now, I don't think Tele Fácil knew that going in, but it turned out that Future Telecom ceased to aggregate traffic, the very traffic that it would have sent to Tele Fácil, I believe, by mid-April 2016, so it's very fast-moving. It was an opportunity, it's a window of opportunity and that closed after a bit over a year.<sup>182</sup>

146. Tele Fácil did not know all of those matters back then, or exactly how profitable each business line would be. What Tele Fácil did know at that time was that the IFT was prepared not to enforce its own resolutions and ignore all judicial precedent, the Constitutional reforms, historical telecommunications practice and the intended benefits to the Mexican people for the sake of protecting the preponderant economic agent. Under such a scenario Tele Fácil had no chance whatsoever to create even a single viable line of business, especially if that line of business posed a threat, perceived or real, to Telmex.

147. To put it charitably, for Respondent to contend that Tele Fácil in these circumstances could have pursued the International Call Termination line of business, without an agreement, and without the enforcement actions of the regulator, and having to abandon its rights, is naive in the extreme. Dr. Dippon explained it perfectly.<sup>183</sup>

### **3. Using the United States as a Benchmark Provides a Basis for Estimating Lost Revenue for the DID Business with Reasonable Certainty**

148. For estimations of the lost revenue relating to the DID business, Dr. Dippon used the United States market as a benchmark for demand.<sup>184</sup> He also testified that using the United States as a benchmark was appropriate because it is the only country in the world where “core”

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<sup>181</sup> Obradors Test., Tr. 1231:12-14.

<sup>182</sup> *Id.*, Tr. 911:3-10.

<sup>183</sup> *Id.*, Tr. 912:9-915:18.

<sup>184</sup> *Id.*, Tr. 881:16-883:10.

DID services exist.<sup>185</sup> Mr. Obradors essentially agreed with this conclusion: “[W]hen we provide data from other markets, they could not be used to estimate demand. Why? Because the services were different. There [sic] were Adjunct Services, perhaps we would call them ‘acesorios.’”<sup>186</sup>

149. Even though agreeing that the U.S. market was the only market with core DID services, Mr. Obradors did not agree with using the U.S. as a benchmark. He did not, however, interview any of the principal operators of DID services in the United States such as Josh Lowenthal of FreeCC and George Cernat of AudioNow to explore whether the United States was an adequate benchmark.<sup>187</sup> His excuse for not performing any such interviews was that he was on a “fixed price” engagement.<sup>188</sup>

150. Instead of using the United States as a benchmark, Mr. Obradors divided various countries up into tiers, but he admitted at the hearing that he ended up using only Israel as a benchmark.<sup>189</sup> Respondent presented no compelling data to prove that the DID market in Israel would be more comparable than the U.S. market to estimate the demand of the DID market Tele Fácil planned to develop in Mexico.

#### **4. Dr. Mariscal’s Damages Model Provides a Basis to Calculate Damages with Reasonable Certainty for the Competitive Tandem Line of Business**

151. Dr. Mariscal presented a damages model that provides a sound basis to calculate damages with reasonable certainty for the Competitive Tandem line of business.

152. Respondent’s critique of the lost revenue calculations in Dr. Mariscal’s model boils down to an argument that: a) two of the parameters in her model are incorrect; and, b) there would have been zero revenue because the Competitive Tandem Service is illegal and could not have been provided by Tele Fácil.<sup>190</sup> Both critiques are incorrect.

##### **a. Dr. Mariscal’s Estimations of the Disputed Parameters Are Justified**

153. Dr. Mariscal made reasonable estimations of the disputed parameters that are more than robust enough to meet the requirement that she use the best evidence available to

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<sup>185</sup> *Id.*, 882:12-18.

<sup>186</sup> Obradors Test., Tr. 1205:4-8.

<sup>187</sup> *Id.*, Tr. 1202:9-16.

<sup>188</sup> *Id.*, Tr. 1202:19-1203:6.

<sup>189</sup> *Id.*, Tr. 1208:20-1209:3.

<sup>190</sup> Buccirosi Test., Tr. 1061:18-1063:6; Obradors Test., Tr. 1218:15-1219:6.

calculate damages. The first disputed parameter is a percentage showing “the portion of subscribers of Telmex rivals that are net-call receivers” and the second parameter is a percentage “which represents the share of profits stemming from, say, of CPS that would go to Tele Fácil.”<sup>191</sup>

154. In her submitted testimony and during her cross examination at the hearing, Dr. Mariscal explained the basis for her calculation of these parameters in her scenarios. For the net-call receivers’ data, it should be noted that the IFT has this data but has refused to produce it. Dr. Mariscal testified that, “If IFT had provided this information, I would have a way of doing it. I’m sure they have this information.”<sup>192</sup>

155. Dr. Mariscal, in the absence of cooperation from the IFT, was able to make reasonable, conservative estimations of the percentage of net-call recipients to use in her model thus fulfilling her duty to use the best evidence available. She corroborated the 30% estimate in her conservative scenario by multiplying the percentage of calls in fixed lines that go to fixed lines (80%) by Telmex’s market share (65%) which equates to a 28% estimation, very close to the 30% she used.<sup>193</sup> For her moderate scenario she used a 50% estimate which is essentially an assumption that it is equally likely for a customer to have net-calls as not.

156. For the share of profits parameter, she used the proposal that Tele Fácil made to [REDACTED] and intended to make to other carriers.<sup>194</sup> She based this assumption on interviews with Tele Fácil’s founders.<sup>195</sup> She explained also that none of the carriers wanted to negotiate with Telmex because Telmex has not been honorable in dealing with small operators.<sup>196</sup> Also, she testified that none of these operators would have access initially to an asymmetric tariff which gives them an incentive to enter the Competitive Tandem Services project with Tele Fácil.<sup>197</sup> As a former high-level regulator with the Mexican competition authority,<sup>198</sup> Dr. Mariscal has much more experience with these Mexican market dynamics and her testimony is

<sup>191</sup> Buccirossi Test., Tr. 1062:1-5.

<sup>192</sup> Mariscal Test., Tr. 1035:2-4.

<sup>193</sup> *Id.*, Tr. 1037:3-1038:8.

<sup>194</sup> *Id.*, Tr. 1041:5-1043:3.

<sup>195</sup> *Id.*, Tr. 1042:9-1043:3.

<sup>196</sup> *Id.*, Tr. 1044:1-5.

<sup>197</sup> *Id.*, Tr. 1044:8-20.

<sup>198</sup> *Id.*, Tr. 993:14-15.



more informed than that of a Spanish engineer (Obradors) or an Italian economist (Buccirossi).<sup>199</sup>

**b. Competitive Tandem Was a Permissible Service at the Time It Would Have Been Provided by Tele Fácil**

157. Mr. Obradors testified that he did not include any damages for the Competitive Tandem Services in his alternative calculation because he concluded it was illegal.<sup>200</sup>

158. The essence of Respondent's argument that Competitive Tandem was an illegal service is that, "The result of the application of this [non-discrimination] principle is that Tele Fácil cannot charge two operators different fees for the service of terminating call in its network"<sup>201</sup> and that "Telmex would certainly have invoked this principle to demand of Tele Fácil the same interconnection rate that"<sup>202</sup> it could have offered another concessionaire and, thus, it would be "impossible to uphold the hypothesis that Tele Fácil would have been able to charge Telmex the rate of \$0.00975 per minute which it purportedly agreed upon with it in 2014."<sup>203</sup>

159. The record shows that much of the support for Respondent's defenses to reduce the amount of damages, namely the applicability of the non-discrimination principle to the preponderant economic agent and the prohibition of double-transit, was created after the interconnection dispute between Tele Fácil and Telmex and the IFT's Resolutions on the matter. Respondent bases its *post facto* arguments on actions adopted by the IFT after Claimant had submitted its Notice of Arbitration.<sup>204</sup>

160. The central support for Respondent's argument is based on Commissioner Díaz's witness statements.<sup>205</sup> However, during his cross-examination, Commissioner Díaz acknowledged that his analysis of the non-discrimination principle was copied from the IFT's interpretation adopted in the Mega Cable confirmation of criteria on October 27, 2016 (issued after the Notice of Arbitration was filed in this proceeding).<sup>206</sup>

<sup>199</sup> *Id.*, Tr. 992:15-993:17.

<sup>200</sup> Obradors Test., Tr. 1142:18-1144:4.

<sup>201</sup> *See* Respondent's Opening Statement, Tr. 250:17-251:7.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> Claimant's Notice of Arbitration was filed on September 26, 2016.

<sup>205</sup> *See* Statement of Defense, ¶ 381 & n.378; Rejoinder, ¶ 268 n.324.

<sup>206</sup> Mega Cable Confirmation of Criteria, **C-126**.

161. In summary, even when Mega Cable specifically and expressly stated in its request that it was not asking about the application of the non-discrimination principle to the Predominant Economic Agent, the IFT Plenary, nevertheless, went out of its way to talk about how the principle applied to Telmex. The IFT interpreted in this confirmation of criteria procedure, which does not impose any rights and obligations to third parties but only serves as guidance to the requesting party,<sup>207</sup> that Telmex could benefit from interconnection rates offered and agreed between competitive carriers.

162. In the Mega Cable confirmation of criteria, issued a little over a month after the Notice of Arbitration was filed by Claimant, the IFT answered a question that was never asked. Respondent has provided no evidence that the IFT has ever applied it in practice industry wide.

163. Dr. Álvarez explained during the hearing that the non-discrimination principle can only be used by those carriers and networks in similar circumstances and for similar services, and that Telmex, as preponderant economic agent, cannot be considered in similar circumstances as other competitive carriers.<sup>208</sup> On the same topic, Mr. Soria further explained that the FTBL expressly exempts interconnection rates from the non-discrimination principle, preventing Telmex from benefiting from lower rates with Tele Fácil while their interconnection agreement, and the applicable rate of USD \$0.00975, remained effective.<sup>209</sup>

164. Likewise, Dr. Márquez confirmed that this is not a particularity of Mexico's legal system, but rather consistent with international telecommunications systems that consider asymmetric regulation:

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<sup>207</sup> Gorra First Statement, ¶ 11 (“[T]he ‘confirmation of criterion’ implies the interpretation of a law or stipulation to determine its subject and scope, without implying the execution of an act that by itself affects the rights and obligations of the parties. Therefore, the delivered response has the sole purpose of guiding the actions of the regulated party, but does not create any right or prejudice whatsoever.”)

<sup>208</sup> Álvarez Test., Tr. 675:12-676:5 (“Briefly on the principle of non-discrimination, here we would have to resort under Article 133 of the Constitution to see how this principle should be interpreted. This principle cannot be applied in isolation. It is a principle like that of equality which is always related to something or someone. International treaties such as that of the WTO, the ITU, and NAFTA itself established that, in order to apply the non-discrimination principle, it has to be for similar services and in similar circumstances. So, when there is an operator like Telmex with 65.1 percent of market share, as of 2014, it would be nearly impossible to be in similar circumstances than any of the other fixed line operators . . .”).

<sup>209</sup> Soria Test., Tr. 728:9-22 (“The Respondent has referred to Article 125 of the new law, the LFTR, which mentions the principle of non-discrimination. I must mention that there is an exception in the first paragraph of the exception applies specifically to rates.

And the last paragraph says that the Terms and Conditions for interconnection offered to some must be offered to any other. And that is correct, but the agreement in its entirety has to be offered, including rights and obligations, benefits and burdens. It is not possible to cherry-pick the Clauses, ‘those I like, I will accept, and those I don't like, I will not.’ You have to take the Agreement as a whole.”)

So, the principle of non-discrimination is normally applied between equivalent operations, and that is why a system such as the Mexican one from a point of view of what legislation provides, what it seeks to do is to avoid that economic agents that are there called "preponderant" and are called "dominant" in other legislations, so they have the same conditions because basically what is being sought is to ensure there is a mechanism in place to have asymmetrical destination systems.<sup>210</sup>

165. In addition to the non-discrimination principle, Respondent has also argued that the damages claimed by Tele Fácil would be limited due to a double transit prohibition. This argument, again, is based on Commissioner Díaz's witness statement.<sup>211</sup> Commission Díaz bases its conclusion on provisions of the Signaling Technical Plan<sup>212</sup> and the Minimum Technical Conditions for Interconnection.<sup>213</sup>

166. Regarding the Signaling Plan, Commissioner Díaz and Respondent conveniently refer to the first paragraph of section 8.7, which mandates that the IDO, this is the identification of the originating carrier, to be maintained,<sup>214</sup> but ignore the second paragraph which expressly allows "other accommodations" that allow ways of maintaining the IDO in indirect interconnection, including double transit.<sup>215</sup>

167. Additionally, pursuant to the Signaling Plan, the IDO is intended to regulate billing among concessionaires, not to impose prohibition on how interconnection must be performed. As Commissioner Díaz conceded:

Q. My question is: As a technical matter, the IDO is not relevant to the delivery of the actual call. That is for billing purposes; correct?

<sup>210</sup> Márquez Test., Tr. 631:9-18.

<sup>211</sup> See Statement of Defense, ¶ 387; Rejoinder, ¶ 291.

<sup>212</sup> Díaz First Statement, ¶ 98.

<sup>213</sup> Díaz Second Statement, ¶ 36.

<sup>214</sup> See Rejoinder ¶¶ 290 and 291.

<sup>215</sup> See Reply, ¶ 434, citing to Numbering Plan, at 39, section 8.7, **CL-147**:

8. Exchange of information in network interconnection. In addition to the information necessary to establish and send the call, the minimum information that must be exchanged in real time for the network interconnection will be the following:

...

8.7. The carriers that offer local transit service, will only route calls in which the IDO [identification number of originating network] or the BCD [identification number of destination network] that they receive, corresponds to the concessionaire from whom they are receiving the call via the interconnection trunk, and shall transfer those same codes to the destination network.

The above, notwithstanding that it will be allowed to share interconnection trunks, and that in consequence one same trunk may correspond to more than one IDO, as well as other accommodations that allow a more efficient use of infrastructure, pursuant to the legal, regulatory and administrative provisions applicable to interconnection.

A. That is correct.<sup>216</sup>

168. The Signaling Plan does not regulate interconnection and does not contain a prohibition of double transit. However, double transit was in fact eventually prohibited through the modification of the Minimum Technical Standards of Interconnection adopted by the IFT, which came into effect on January 1, 2018.<sup>217</sup> It is worth noting that Tele Fácil's agreement with Telmex had an expiration date of December 31, 2017, so it would have not been impacted by these modifications in regulations.

169. Commissioner Díaz conceded during the hearings that there were no prohibitions of double transit in the Minimum Technical Conditions for Interconnection at the relevant time:

Q. Commissioner Díaz, you offer as support for the proposition that double tandem and transit was unlawful--excuse me, Double Transit was unlawful. You offer the Minimum Technical Conditions Agreement for Interconnection in Paragraph 36 of your Second Witness Statement.

A. I have that paragraph before me.

Q. The specific part of the Minimum Technical Conditions Agreement that you quote here in your statement was published on November 9, 2017; correct?

A. That is correct.

Q. And it became applicable in 2018; correct?

A. That's correct.<sup>218</sup>

170. Also, as shown by the evidence, double-transit was not only legal, but also desirable for competition and a valuable tool to achieve the goals intended by Congress when they adopted the Constitutional reforms in telecommunications matters.<sup>219</sup>

171. When Dr. Márquez referred to the post-facto argument of the double transit prohibition that started on 2018, he stated that:

Although the regulatory framework is clear, apparently the decisions taken by the IFT, unfortunately, go against the timeliness and opportunity which have been determined as essential for interconnection. There are contrary positions at the IFT, and Commissioner Estavillo said this very clearly. There is no reason whatsoever for the Double Transit not be allowed by the regulation.<sup>220</sup>

<sup>216</sup> Díaz Test., Tr. 471:5-8.

<sup>217</sup> Minimum Interconnection Conditions 2018, at 1, **C-122**.

<sup>218</sup> Díaz Test., Tr. 468:7-19.

<sup>219</sup> For a detailed description of double transit and the impact of prohibiting it in the Mexican telecommunications market, please refer to Claimant's Reply Brief, ¶¶ 449-457.

<sup>220</sup> Márquez Test., Tr. 636:18-637:3.

172. Finally, as Dr. Márquez explained, Respondent's argument that the distinction of double tandem and double transit makes this discussion moot is irrelevant, since they are two species of the same genre: indirect interconnection.<sup>221</sup> Tele Fácil was not legally prohibited from deploying its business plans for Competitive Tandem as planned.

### **III. THE TRIBUNAL SHOULD APPLY AN ADVERSE INFERENCE IF NECESSARY**

#### **A. The IFT Has the Obligation to Retain Documentation**

173. Respondent's unsupported position in this case regarding evidence not produced is that every employee of the IFT, no matter his or her position, can make the legal determination of what documents created or received during their duties as public officers must be retained, and which ones can be immediately destroyed. This position, however, ignores fundamental components of Mexican law.

174. Mr. David Gorra explained during his examination what he believes Mexican law requires of public servants in the IFT regarding their duties to preserve documents:

The law is very clear, that since that there were documents which, by their very nature and content, must be included in a file. First classification, those are files with the documentary value. The second and third classification[s] are those documents which offer support for information or immediate administrative corroboration.

It is very clear that these two documents [support for information or immediate administrative corroboration] share a nature which is not the same one as documents in file, so they should not be in a file. However, their production, first of all, is not compulsory. And, Number 2, a public servant, if he needs it for his further use on a specific matter, may preserve them. That is guideline Number 11. They may be preserved, in which case they will have to be assigned a documentary number under the filing chart--codes. If not, those documents are either not generated or not preserved in those terms since they do not need to be in a file.<sup>222</sup>

175. Thus, for Respondent, the only compulsory obligation is to retain the official version of documents in the Document File (*Documento de Archivo*). If a document is not the official file in the Document File, then such document can be destroyed unless a public servant "needs it for his further use on a specific matter," meaning that they can be destroyed at will by the public officer who created or received it.

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<sup>221</sup> *Id.*, Tr. 660:20-661:2.

<sup>222</sup> Gorra Test., Tr. 620:18-621:16.

176. This view, however, is simply not supported by the plain text of Guideline Number 11 referenced by Mr. Gorra. Article 11 of the Guidelines referenced by Mr. Gorra states as follows:

**Article 11.** Immediate administrative evidentiary documents and information support documents can be grouped in binders, dossiers or in any other form, but not as Files. Such documents may not be transferred to the concentration Archive and deletion thereof shall be made at the Archive in process subject to compliance with the safekeeping requirements set forth in the relevant section of the document disposal catalogue.<sup>223</sup>

177. Thus, under Article 11 of the IFT Guidelines, all Immediate Administrative Verification Documents and Information Support Documents are not part of the Archive File, but rather must be preserved in “binders, dossiers or in any other form.”<sup>224</sup> Article 11 is also very clear when it provides that that these documents can only be legally deleted in “compliance with the safekeeping requirements set forth in the relevant section of the document disposal catalogue.”<sup>225</sup> Respondent and its witness Mr. Gorra has consistently and repeatedly ignored these critical parts of its own Guidelines.

178. These Guidelines also mandate that electronic documents must be treated as physical documents, and that they be retained and stored for public access.<sup>226</sup> The IFT Guidelines provide that IFT officials “shall classify” electronic documents based on their characteristics.<sup>227</sup> This is not an option, it is a mandate.

179. Thus, it is clear that the IFT had a duty to preserve far more than the official files they have produced in this case, including a duty to preserve their relevant emails. The IFT has never come forward with any catalog of documentary dispositions relevant to the records requested in this case. The only conclusion that can be drawn is that such catalogs do not exist. Thus, while Respondent may be “at peace” with the fact that public servants within the IFT have violated Mexican transparency law,<sup>228</sup> neither Claimant nor Tribunal should accept such a casual disregard for the law – or for the Tribunal’s orders.

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<sup>223</sup> IFT Guidelines on Document Retention, at Article 11, **CL-102**.

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> *Id.* at Article 14 (“Electronic and digital documents shall have the same effects as hard copy documents; therefore, Administrative Units shall classify such documents based on their characteristics . . .”).

<sup>227</sup> *Id.*

<sup>228</sup> *See* Peláez Test., Tr. 518:11-20.

180. It is beyond concerning that Mr. Gorra, a high official of a federal agency like the IFT, would testify that an undesirable effect of following the clear text of the Guidelines would be that IFT officers “would be filing every single e-mail, everyone single note, and we would have to classify every single document, whatever its content.”<sup>229</sup> The way of complying with the “maximum transparency principle” under Mexican law is to follow the law by retaining information created during the actions of a public agency,<sup>230</sup> and in the case of documents that are no longer necessary to be kept, then the law provides a procedure to permit the legal destruction of such documents.<sup>231</sup>

181. Respondent’s legal argument not only fails after scrutiny against the applicable legal provisions, but its position is impossible to believe as a factual matter as well. Respondent’s position is, after all, not that *some* emails were destroyed, but rather that there is not a single email left discussing the several drafts, resolutions, meetings and communications regarding Tele Fácil. Thus, if the Tribunal were to believe Respondent, it would have to conclude that every single person of the dozens that were involved in the Tele Fácil decisions within the IFT<sup>232</sup> acted in the same exact manner. This is, every IFT officer individually deleted each and every email they created, sent and/or received in connection with the Tele Fácil matter. They had to do that in their desktop computers, their laptops, their smartphones, and even in the IFT’s servers and cloud storage. The Tribunal would have to believe that not one single person within the IFT ever created an archive of their email or a backup folder on their computer saving a copy of any relevant electronic communication or document about this important agency

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<sup>229</sup> Gorra Test., Tr. 622:3-5.

<sup>230</sup> To alleviate concerns of a scenario such as the one Mr. Gorra expressed, Mexican law provides exceptions for retaining documents regarding emails “of strict personal character.” *See* Reply, ¶ 116, citing to **CL-105**, at 1-2.

<sup>231</sup> *See* Reply, ¶¶ 114-115.

<sup>232</sup> *See* Díaz Test., Tr. 419:8-12 (Commissioner Díaz confirming that “two to three people” from his staff reviewed Resolution 381); *id.*, Tr. 419:19-21 (Commissioner Díaz confirming the Head of the Regulatory Unit reviewed the draft of Resolution 381); *id.*, Tr. 420:19-421:2 (Commissioner Díaz confirming that the draft of Resolution 381 was shared for review to the Technical Secretariat of the Plenary and the offices of the Commissioners); *id.*, Tr. 421:7-12 (Commissioner Díaz approximation of “seven to 10 people” staff on each Commissioner’s office); Peláez Test., Tr. 500:6-501:5 (Mr. Peláez remembering the names of 10 attendees plus “some of their advisors” of the Commissioners to the March 5 meeting between Tele Fácil and IFT Plenary to discuss enforcement of Resolution 381); Canchola Test., Tr. 551:9-16 (Mr. Canchola confirming he discussed his draft of confirmation of criteria that resulted in decree 77 “with the Director of the Area for termination who is under me”); *id.*, Tr. 552:14-17 (Mr. Canchola confirming he sent a copy of his confirmation of criteria to Mr. Sanchez Henkel since he “would generally send a copy of what we do to the Head of the Unit”); Gorra Test., Tr. 588:13-589:9 (Mr. Gorra confirming he received comments on Decree 77 “at working meetings with the Commissioners”).

matter. Not one individual kept any written notes from the several meetings held among IFT officers themselves, and with Tele Fácil and/or Telmex.

182. Common sense dictates that this scenario could only occur for one of two reasons. The first possibility is that there was an orchestrated plan on the part of the IFT to destroy evidence. The second possibility is that Respondent continuously defied the Tribunal's order to do a diligent search of its records and produce the information that it actually has. Neither option is acceptable and either warrants sanction.

**B. Respondent Disregarded the Tribunal's Orders**

183. The evidence has clearly established that Respondent refused to fully and timely comply with the Tribunal's orders. In Procedural Order No. 3, the Tribunal granted several parts of Claimant's request for production of documents and ordered Respondent to confirm that it had conducted a good faith search for responsive documents.<sup>233</sup> The requests that were granted included, but were not limited to, any internal memoranda, communications, emails or notes at the IFT regarding Resolution 381, Decree 77, or Resolution 127.

184. In response to the Tribunal's Order, on October 26, 2017, Respondent informed the Tribunal that it did a new search diligently and in good faith without finding other documents.<sup>234</sup> Unfortunately, the record demonstrates that the opposite is true. The IFT failed to conduct a timely search for responsive documents from even the most central actors and only begrudgingly produced specific documents after the Claimant was able to establish the existence of such documents beyond doubt.

185. Mr. Luis Fernando Peláez, the Executive Coordinator of the IFT, was in charge of coordinating the production process within the IFT and acted as liaison with the Ministry of Economy.<sup>235</sup> Mr. Peláez confirmed that in his opinion, he had no need to communicate to IFT employees that relevant documents to the arbitration must be maintained, so he never asked anyone to preserve information even after he was informed of the Tribunal's order in connection with Tele Fácil's document requests.<sup>236</sup> No efforts to preserve information were undertaken.<sup>237</sup>

<sup>233</sup> Procedural Order No. 3, Tribunal's Decision on Request Nos. 3, 6, 7, 7bis, 9, 10, and 11.

<sup>234</sup> See Procedural Order No. 4. ¶ 2.

<sup>235</sup> Peláez Test., Tr. 515:22-516:9.

<sup>236</sup> *Id.*, Tr. 517:9-13 ("Q. You indicated to IFT the need to preserve documents? A. No, I don't- I'm not involved with the preservation of documents. Each area is responsible for keeping its information on all the matters they follow.").

<sup>237</sup> *Id.*, Tr. 517:20-518:6 ("Q. Even though the Secretariat of the Economy requested information going beyond the file, knowing that there was an international arbitration, you didn't say to anyone that they had to preserve



He testified specifically that he did not advise the IFT Plenary, which would include Chairman Contreras, to preserve his emails, suggesting that the IFT's Commissioners do not have a duty to "preserve information."<sup>238</sup>

186. The evidence shows that Mr. Peláez never undertook his duty to assemble and produce relevant evidence with any degree of care, much less one that reflected the significance of this Tribunal's orders. For example, after Claimant brought the transcript of the March 13, 2015 Plenary meeting to light during the document production process, where the Phantom Decree 77 was discussed, the Tribunal ordered Respondent to produce additional information, namely additional drafts of Decree 77 and any other information found.<sup>239</sup> In response to this new order, Mr. Peláez authored a letter of November 13, 2017, attesting that after a new diligent and good faith search<sup>240</sup> he could confirm that the draft of Decree 77 was "submitted again in the terms originally proposed" at the April 2015 Plenary meeting and there were no different versions. Relying on Mr. Peláez's letter, Respondent, in turn, assured the Tribunal that there was no alternative version of Decree 77 and offered as "proof" of this fact the final version of Decree 77 available on the IFT's website.<sup>241</sup>

187. Mr. Peláez made this representation in his November 13, 2017 letter knowing full well, however, that an earlier draft of Decree 77 had been considered and not adopted by the Plenary.<sup>242</sup> The only logical conclusion, therefore, is that Mr. Peláez's November 13, 2017 letter was an intentional effort to mislead the Tribunal.

188. After Claimant informed the Tribunal that Mexican law required the original draft of Decree 77 to be transmitted to the Commissioners at least twenty-four hours in advance of a scheduled Plenary meeting, the Tribunal again ordered Respondent to produce these materials.<sup>243</sup> On January 16, 2018, Respondent finally acknowledged that it had, and always had, a draft of Decree 77<sup>244</sup> that it had failed to produce.<sup>245</sup> As we now know, that draft was materially different

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documents of Tele Fácil? A. I asked them to give me information. They didn't have any. I didn't tell them that they had to preserve information because I said if there is information, submit it.").

<sup>238</sup> See Peláez Test., Tr. 529:14-530:2.

<sup>239</sup> Procedural Order No. 4, ¶ 22-23.

<sup>240</sup> Attachment to Respondent's letter to the Tribunal dated November 15, 2017.

<sup>241</sup> *Id.* at 2.

<sup>242</sup> Peláez Test., Tr. 496:3-6 ("Q. But normally you were present in the sessions? A. In the sessions of the Plenary, yes, I was always there").

<sup>243</sup> Procedural Order No. 4, ¶ 22.

<sup>244</sup> Phantom Decree 77, **C-116**.

<sup>245</sup> Respondent's letter to the Tribunal (Jan. 16, 2018).

from the final version approved by the IFT Plenary on April 2015 and those changes further helped Telmex.<sup>246</sup>

189. Further, the Tribunal and the Claimant learned for the first time on January 16, 2018, that despite Respondent's representations of having undertaken multiple "diligent and good faith" searches, the IFT had never asked the IFT Commissioners to preserve or produce relevant documents.<sup>247</sup> Mr. Peláez's numerous "diligent and good faith" searches had only consisted in asking the same individuals for the same information, and avoiding some of the most important Units and individuals within the IFT.<sup>248</sup> This failure reflects anything but a good faith effort to ensure that the Tribunal had available to it the whole truth about why the IFT failed to enforce Resolution 381 and ultimately deprived Tele Fácil of the negotiated rate with Telmex through Decree 77.

190. And even more worrisome, it is also not clear how many documents Respondent actually has in its possession but has refused to produce because Mr. Peláez or someone else at the IFT decided that "it was not necessary," just as they initially did with Phantom Decree 77. Mr. Peláez confirmed that the IFT could make the determination of which versions of a document to produce, because if different versions of a document are the same "in substance" under his or a Unit's subjective opinion, and regardless if such different versions contain modifications, then they are considered the same document.<sup>249</sup>

191. On this point it is worth noting that the Tribunal's Procedural Order No. 4 specified that "all responsive documents must be produced, *even if identical*."<sup>250</sup> When asked about Claimant's claims that there were additional drafts of Decree 77 that have not been produced, Mr. Peláez testified the following:

Perhaps, yes. There may be different drafts of the Resolution, not just of Decree 77. But the only one that's valid is the one that is submitted and voted on by the Commissioners.<sup>251</sup>

192. In a similar fashion, Mr. Gorra testified during his examination that he was in charge of including changes to the initial draft of Decree 77,<sup>252</sup> and that he did so through several

<sup>246</sup> See Reply, ¶¶ 145-152 for a detailed description of the changes between Phantom Decree 77, C-116, and Decree 77, C-051.

<sup>247</sup> Respondent's letter to the Tribunal (Jan. 16, 2018), at § 1(b).

<sup>248</sup> Peláez Test., Tr. 520:12-15 ("Q. So your diligence and good faith was limited to requests of the same thing of the same areas? A. I did that in good faith and very diligently, yes.").

<sup>249</sup> See generally *id.*, Tr. 524:11-526:1.

<sup>250</sup> Procedural Order No. 4, ¶ 22 (emphasis added).

<sup>251</sup> Peláez Test., Tr. 521:2-5.

meetings with Commissioners and their staff between March 6 and March 13, 2015.<sup>253</sup> During this testimony, Mr. Gorra made multiple critical admissions about the existence of a relevant copy of the draft of Decree 77 that was maintained in electronic format on his computer. Mr. Gorra said that “this is how the comments were provided orally, and I just recorded them on my computer, and it was my responsibility to consider whether or not they should be added”<sup>254</sup> and “on my computer equipment, I made the modifications that I considered appropriate” **every day that he received comments.**<sup>255</sup>

193. When asked in cross examination, Mr. Gorra testified that “I changed my own document, and that is the document that was then presented to the Plenary” and that “[a]ll I did was amend the document taking into account what I heard. I did not add comments other than—nor did I make any recording. That document has already been provided to the Tribunal.”<sup>256</sup> The reality is that the document that Mr. Gorra refers to as being provided “to the Tribunal” on January 16, 2018,<sup>257</sup> months after it was originally ordered to be produced, is a photocopy of the final printed and stamped version of Phantom Decree 77.<sup>258</sup> No version of the *electronic* document that Mr. Gorra maintained on his computer has been produced – the document that he testified that he worked on every day that week between March 6 and March 13 2015—despite despite the Tribunal’s clear order that “all responsive documents must be produced, even if identical.”<sup>259</sup> Pursuant to the IBA Rules on the Taking of Evidence in International Arbitration, a “document” means “a writing, communication, picture, drawing, program or data of any kind, whether recorded or maintained on paper or by electronic, audio, visual or any other means.” Mr. Gorra’s electronic version of Phantom Decree 77 should have been produced.

194. Having Mr. Gorra’s electronic version of the document, even if identical to the final printed version of Phantom Decree 77 on its surface, may well have revealed new and relevant facts. Using forensic tools, the document’s metadata could have enabled Claimant to

<sup>252</sup> Gorra Test., Tr. 603:4-20 (“Q. Now, Mr. Gorra, who was responsible for managing the process of finalizing what became Decree 77? A. When you say “finalize,” what are you referring to? Q. Well, we know that on April 8<sup>th</sup>, 2015, Decree 77 was issued. A. That’s right. Q. What I would like to know is: who managed the process of getting it from March 6<sup>th</sup> to April 8<sup>th</sup>? A. The Legal Affairs Unit. Q. You were in that unit at that time; isn’t that right? A. That’s right. Q. Were you responsible for managing the process? A. Yes.”).

<sup>253</sup> Gorra Test., Tr. 576:9-20.

<sup>254</sup> *Id.*, Tr. 576:17-20.

<sup>255</sup> *Id.*, Tr. 608:13-18.

<sup>256</sup> *Id.*, Tr. 590:12-591:11.

<sup>257</sup> Email dated January 16, 2018 from Respondent to the Tribunal; Phantom Decree 77, **C-116**.

<sup>258</sup> *See* Phantom Decree 77, **C-116**.

<sup>259</sup> Procedural Order No. 4, ¶ 22.

gain a clearer understanding of when the document was modified and whether the key changes between the initial and final drafts of Decree 77 likely occurred as a result of a single meeting or were made in stages suggesting multiple meetings. Given Mr. Gorra's inability to provide specific details about who requested which changes and why,<sup>260</sup> this additional information may well have shed additional light on the question of whether all of the material changes were made at the direction of the IFT Chairman, as Gerardo Sanchez Henkel has suggested during his meeting with Carlos Bello.<sup>261</sup> In all such cases, the electronic version may have aided Claimant and the Tribunal in understanding the evolution of the IFT's decision to ensure that Decree 77 stripped away all of the mutually-agreed interconnection terms between Tele Fácil and Telmex during this critical time in which (1) Tele Fácil was requesting enforcement of Resolution 381; but (2) Sostenes Díaz Gonzalez was altering the IFT's cost-study methodology in a manner that produced savings of over 80% for the Preponderant Economic Agent,<sup>262</sup> thereby undermining the intended impact of the zero rate adopted by Congress.<sup>263</sup> Once again, Respondent made its own determination that it was not "necessary" to produce this document even though the Tribunal had ordered its production.

195. From the examination of Respondent's witnesses and the available evidence in the record, it is clear that Respondent disregarded Tribunal's orders to perform a diligent and thorough search and to produce all internal memoranda, communications, emails or notes at the IFT regarding Resolution 381, Decree 77, or Resolution 127. Respondent should be sanctioned for its defiance of the Tribunal's orders.

### **C. Missing Witnesses**

196. Aside from Respondent's flouting of the orders of the Tribunal, Respondent did not make available to the Tribunal certain key persons in the IFT who could readily have provided testimony concerning the key issues in the case.<sup>264</sup> Most importantly, Respondent did not provide witness testimony of Mr. Oswaldo Contreras, the Chairman of the IFT at all relevant times, Gerardo Sánchez Henkel, the Head of the IFT Compliance Unit at all relevant times, and Carlos Silva, who was the Head of the IFT's Legal Unit at all relevant times. These three men

<sup>260</sup> Gorra Test., Tr. 606:5-6 ("I don't remember the exact dates when those meetings happened"); Tr. 607:17-607:18 ("Yes, as I recall, some of the advisors [of the Commissioners] were present. I don't remember who").

<sup>261</sup> Bello Test., Tr. 310:16-21.

<sup>262</sup> See Díaz Test., Tr. 439:19-444:19.

<sup>263</sup> See *id.*

<sup>264</sup> See Claimant's Opening Statement, Tr. 15:6-16:4.

played pivotal roles in the IFT's abrupt about face in this case, via a path never before taken, and could easily have answered the key questions in this case. Equally as important was the potential live testimony of former Commissioner Adriana Labardini, former Commissioner Maria Elena Estavillo, or former Commissioner Ernesto Estrada, the members of the IFT at the time who dissented every step of the way when the IFT veered off the course of Resolution 381.

197. Claimant fully understands that Respondent is under no obligation to produce any particular witnesses; nonetheless, consistent with the path Respondent has taken with respect to the production of documents, Respondent has sought to avoid the possibility of exposing itself – and the Tribunal – to facts that are adverse to Respondent. Instead, the Tribunal has largely heard from individuals who lacked personal knowledge of these key events.

#### **D. Adverse Inference**

198. In light of the foregoing, and pursuant to § 18.23 of Procedural Order No. 1,<sup>265</sup> Claimant requests the Tribunal to issue an adverse inference against the Respondent for its repeated failures with regard to the production of evidence. Claimant asks that the Tribunal make the following specific adverse inferences:

- a. The IFT's Chairman, Gabriel Oswaldo Contreras Saldívar, acted to prevent the head of the Compliance Unit, Gerardo Sanchez Henkel, from enforcing Resolution 381's requirement for the parties to execute an interconnection agreement that included the rate of \$0.00975 USD/mou for term ending in December 2017;
- b. That the IFT failed to enforce Resolution 381 at the request of, and in coordination with, Telmex.

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<sup>265</sup> Procedural Order No. 1., § 18.23 ("If a disputing party. . . fails to produce any document or category of documents ordered by the Tribunal, the Tribunal may infer that such document or category of documents is adverse to the interests of the non-complying Party.").

#### IV. CONCLUSION

199. The facts presented to this Tribunal in the form of documents, witness statements, and live testimony clearly establish that Claimant is entitled to recover for Respondent's breaches of the NAFTA. Respondent made an investment in Mexico and successfully negotiated a favorable interconnection agreement with Telmex. The IFT, acting pursuant to law and practice, duly determined the two disputed terms, while confirming that the interconnection rate had already been established by agreement of the parties. That conclusion and the resulting order carried the force of law, and should have solidified Claimant and Tele Fácil's successful entry into the telecommunications market. Indeed, it is precisely what the telecommunications reform in Mexico were intended to guarantee – the certainty that foreign investors had long demanded.


200. Instead, the uncontroverted evidence clearly establishes that a decision was made at the highest levels of the IFT to undermine and circumvent those reforms and continue the IFT's long practice of propping up Telmex, despite its decades of monopolistic practices. Decree 77 and Resolution 127, the products of that decision, were arbitrary and discriminatory, contradicting the expectations of industry participants and the legitimate expectations of Tele Fácil, defying Mexican law and policy, and, ultimately, annihilating Tele Fácil's business prospects. Thus, even if this evidence had not come forward in this arbitration process, Respondent's utilization of Decree 77 and Resolution 127 to revoke Resolution 381 has been shown to violate the investment protections guaranteed by the NAFTA.

201. Indeed, even in the face of Respondent's blatant disregard for its duties to preserve evidence and defiance of the Tribunal's discovery orders, there can be little doubt that the IFT acted unlawfully to benefit Telmex and then compounded this unlawful conduct by destroying or refusing to produce relevant documents that would have revealed the true details about how Decree 77 came into existence.

202. This Tribunal speaks through its orders. The order in this case should condemn the IFT's post-Resolution 381's conduct, both before and during the course of this proceeding. The order in this case should conclude that Claimant, Joshua Dean Nelson, has fully proven his claims and is entitled to recover the entirety of his lost profits. The order in case should conclude that those damages have been proven with reasonable certainty to be in excess of USD \$477 million.

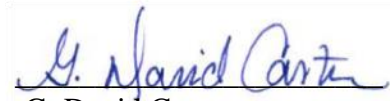
Respectfully submitted,

August 15, 2019

  
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