

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

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

Claimants

and

THE UNITED MEXICAN STATES

Respondent

ICSID Case No. UNCT/17/1

STATEMENT OF CLAIM

TRIBUNAL

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**LIST OF CLAIMANTS' SUBMISSIONS:
FACTUAL EXHIBITS**

Factual Exhibit	Document Description	Original Language
C-001	Witness Statement of Joshua Dean Nelson	English
C-002	Witness Statement of Jorge Blanco	English
C-003	Witness Statement of Miguel Sacasa	Spanish
C-004	Witness Statement of Carlos Bello	English
C-005	Witness Statement of Josh Lowenthal	English
C-006	Witness Statement of George Cernat	English
C-007	Witness Statement of [REDACTED]	English
C-008	Expert Opinion of Professor Clara Luz Álvarez	English
C-009	Expert Opinion of Gerardo Soria	English
C-010	Expert Report of Christian M. Dippon, Ph.D.	English
C-011	Expert Report of Elisa Vera Mariscal Medina	English
C-012	<i>Concesión para Instalar, Operar y Explorar una Red Pública de Telecomunicaciones</i> (Concession to Install, Operate and Exploit a Public Telecommunications Network) (August 3, 1990)	Spanish
C-013	Memorandum of Understanding by and between Jorge Blanco, Josh Nelson, and Miguel Sacasa (July 20, 2009)	English
C-014	<i>Escritura Pública No. 16,778 que contiene la constitución de Tele Fácil México, S.A. de C.V. (Public Deed No. 16,778 that contains Tele Fácil México, S.A. de C.V.'s incorporation)</i> (January 7, 2010)	Spanish
C-015	Sacasa, M., <i>Tele Fácil México y Great Lakes Comm de México Project</i> (Feb. 2010)	English & Spanish
C-016	<i>Solicitud para la obtención de una concesión de red pública de telecomunicaciones</i> (Request to obtain a public telecommunications concession) (May 27, 2011)	Spanish
C-017	OECD (2012), <i>OECD Telecommunication and Broadcasting Review of Mexico 2012</i> , OECD Publishing, Paris	English & Spanish
C-018	United States Department of Commerce Advocacy Questionnaire (Apr. 1, 2013)	English
C-019	<i>Concesión para Instalar, Operar y Explotar una Red Pública de Telecomunicaciones</i> (Concession to Install, Operate and Exploit a Public Telecommunications Network) (May 17, 2013)	Spanish
C-020	Memorandum of Understanding between Tele Fácil Mexico S.A. de C.V. and [REDACTED] L.L.C. (June 14, 2013)	English

C-021	<i>Escritura Pública No. 9,581 que contiene la notificación por virtud de la cual Teléfonos de México notifica a Tele Fácil el Proyecto de Convenio de Interconexión Local</i> (Public Deed No. 9,581 that contains the notification by which Teléfonos de México, S.A.B. de C.V. proposes the Local Interconnection Agreement Draft to Tele Fácil México, S.A. de C.V.) (August 26, 2013)	Spanish
C-022	<i>Oficio IFT/D03/USI/0936/13 por virtud del cual el Instituto Federal de Telecomunicaciones asignan números geográficos a Tele Fácil México, S.A. de C.V.</i> (Document IFT/D03/USI/0936/13 by which the Federal Telecommunications Institute assigns numbers to Tele Fácil, S.A. de C.V.) (December 17, 2013)	Spanish
C-023	<i>Contrato Marco de Prestación de Servicios de Telecomunicaciones que celebran Metro Net S.A.P.I. de C.V. Y Tele Fácil México, S.A. de C.V.</i> (Master Telecommunications Services Agreement executed by and between Metro Net S.A.P.I. de C.V. and Tele Fácil México, S.A. de C.V.) (January 28, 2014)	Spanish
C-024	<i>Comentarios al proyecto de convenio de interconexión local enviados por Tele Fácil México, S.A. de C.V. a Teléfonos de México, S.A.B. de C.V.</i> (Comments to the draft local interconnection agreement sent by Tele Fácil México, S.A. de C.V. to Teléfonos de México, S.A.B. de C.V.) (July 7, 2014)	Spanish
C-025	<i>Solicitud de intervención por desacuerdo de interconexión presentada por Tele Fácil México, S.A. de C.V. ante el Instituto Federal de Telecomunicaciones</i> (Request for intervention in interconnection disagreement submitted by Tele Fácil México, S.A. de C.V. before the Federal Telecommunications Institute) (July 10, 2014)	Spanish
C-026	Global Convergence Solutions, Inc. Proposal to Tele Fácil Mexico SA for The GCS Dynamic Management Solution (Aug. 19, 2014, accepted Dec. 10, 2014)	English
C-027	<i>Respuesta a inicio de desacuerdo de interconexión presentada por Teléfonos de México, S.A.B. de C.V. ante el Instituto Federal de Telecomunicaciones</i> (Reply by Teléfonos de México, S.A.B. de C.V. to interconnection disagreement procedure submitted before the Federal Telecommunications Institute) (August 26, 2014)	Spanish
C-028	<i>Alegatos presentados por Telmex en el Desacuerdo de Interconexión frente al Instituto Federal de Telecomunicaciones</i> (Telmex's Closing Arguments to the Disagreement Procedure submitted before the Federal Telecommunications Institute) (September 24, 2014)	Spanish
C-029	<i>Resolución mediante la cual el Pleno del Instituto Federal de Telecomunicaciones determina las condiciones de interconexión no convenidas entre Tele Fácil México, S.A. de C.V. y las empresas Teléfonos de México, S.A.B. de C.V., y Teléfonos del Noroeste, S.A. de C.V., P/IFT/261114/381</i> (Nov. 26, 2014)	Spanish

C-030	<i>Versión Estenográfica de la XVII Sesión Ordinaria del Pleno 26 de noviembre de 2014, (Transcript of Plenary's XVII Ordinary Session dated November 26, 2014)</i>	Spanish
C-031	<i>Nuevo Proyecto de Convenio Marco de Interconexión Local presentado por Teléfonos de México, S.A.B. de C.V. a Tele Fácil México, S.A. de C.V. (New Draft of Local Interconnection Agreement notified by Teléfonos de México, S.A.B. de C.V. to Tele Fácil México, S.A. de C.V.) (December 9, 2014)</i>	Spanish
C-032	<i>Convenio Marco de Prestación de Servicios de Interconexión Local que celebran NII Digital, S. de R.L. de C.V. y Tele Fácil México, S.A. de C.V. (Master Local Interconnection Services Agreement executed by and between NII Digital S. de R.L. de C.V. and Tele Fácil México, S.A. de C.V.) (December 12, 2014)</i>	Spanish
C-033	<i>Acta No. 255 que contiene la notificación realizada por Tele Fácil, S.A. de C.V. a Teléfonos de México, S.A.B. de C.V. con Contrato de Interconexión a ser celebrado conforme lo resuelto en la Resolución 381 (Public deed 255 which contains notification performed by Tele Fácil, S.A. de C.V. to Teléfonos de México, S.A.B. de C.V. with Interconnection Agreement to be executed pursuant to Resolution 381) (December 16, 2014)</i>	Spanish
C-034	<i>Acta No. 256 que contiene la notificación realizada por Tele Fácil, S.A. de C.V. a Teléfonos de México, S.A.B. de C.V. con información técnica para interconexión indirecta con Nextel (Public deed 256 which contains notification performed by Tele Fácil, S.A. de C.V. to Teléfonos de México, S.A.B. de C.V. with technical information for indirect interconnection with Nextel) (December 15, 2014)</i>	Spanish
C-035	<i>Aviso de Cumplimiento de Resolución de Interconexión presentada por Tele Fácil México ante el Pleno del Instituto Federal de Telecomunicaciones (Notice of Compliance of Interconnection Resolution submitted by Tele Fácil México before the Plenary of the Federal Telecommunications Institute) (December 19, 2014)</i>	Spanish
C-036	<i>Juicio de Amparo número 351/2014 promovido por Teléfonos de México, S.A.B. de C.V. ante la Juez Segundo de Distrito en Materia Administrativa, especializada en Competencia Económica, Radiodifusión y Telecomunicaciones, (Amparo trial 351/2014 initiated by Teléfonos de México, S.A.B. de C.V. before the Second District Judge in Administrative Matters Specialized in Economic Competition, Broadcasting and Telecommunications), (December 26, 2014)</i>	Spanish
C-037	<i>Solicitud de Teléfonos de México, S.A.B. de C.V. para iniciar negociaciones de tarifas de interconexión para 2015 con Tele Fácil México, S.A. de C.V. (Request sent by Teléfonos de México, S.A.B. de C.V. to Tele Fácil México, S.A. de C.V. to initiate negotiations for interconnection rates of 2015) (January 9, 2015)</i>	Spanish

C-038	<i>Denuncia por incumplimiento a la Resolución de Desacuerdo de Interconexión por Telmex/Telnor presentada por Tele Fácil México ante la Unidad de Cumplimiento del Instituto Federal de Telecomunicaciones</i> (Notice of Breach by Telmex/Telnor to Interconnection Resolution submitted by Tele Fácil México before the Compliance Unit of the Federal Telecommunications Institute) (January 28, 2015)	Spanish
C-039	<i>Lista de Asistencia Reunión en Instituto Federal de Telecomunicaciones</i> (Attendance Sheet to Meeting at Federal Telecommunications Institute) (February 6, 2015)	Spanish
C-040	<i>Confirmación de Criterio presentada por la Unidad de Cumplimiento a la Unidad de Asuntos Jurídicos del Instituto Federal de Telecomunicaciones</i> (Confirmation of Criteria submitted by the Compliance Unit to the Legal Unit of the Federal Telecommunications Institute) (February 10, 2015)	Spanish
C-041	<i>Confirmación de Criterio presentada por Teléfonos de México ante el Instituto Federal de Telecomunicaciones</i> (Confirmation of Criteria submitted by Teléfonos de México to the Federal Telecommunications Institute) (February 18, 2015)	Spanish
C-042	<i>Lista de Asistencia Reunión en Instituto Federal de Telecomunicaciones</i> (Attendance Sheet to Meeting at Federal Telecommunications Institute) (February 23, 2015)	Spanish
C-043	<i>Versión Estenográfica de audio de Entrevista del Pleno No. 2015-03-05-1239-SP-18 con Tele Fácil México, S.A. de C.V.</i> , Transcript of Audio Recording of Plenary Meeting No. 2015-03-05-1239-SP-18 with Tele Fácil, (March 5, 2015)	Spanish
C-044	<i>Correo electrónico de Miguel Sacasa a Josh Nelson y Jorge Blanco sobre reunión con Pleno</i> (E-Mail sent by Miguel Sacasa to Josh Nelson and Jorge Blanco regarding the Plenary Meeting) (March 5, 2015) (hereinafter "March 5 e-mail"), at ___, C-044 .	Spanish
C-045	<i>Correo electrónico de Miguel Sacasa a la Embajada de Estados Unidos sobre reunión con Pleno</i> (E-Mail sent by Miguel Sacasa to U.S. Embassy regarding the Plenary Meeting) (March 6, 2015)	Spanish
C-046	<i>Versión Estenográfica de la IV Sesión Ordinaria del Pleno 13 de marzo de 2015</i> , (Transcript of Plenary's IV Ordinary Session dated March 13, 2015)	Spanish
C-047	<i>Carta a Senador Javier Lozano Alarcón enviada por Tele Fácil México, S.A. de C.V.</i> (Letter to Senator Javier Lozano Alarcón by Tele Fácil) (March 20, 2015)	Spanish
C-048	<i>Carta a Senador Luis Miguel Barbosa Huerta enviada por Tele Fácil México, S.A. de C.V.</i> (Letter to Senator Luis Miguel Barbosa Huerta by Tele Fácil) (March 20, 2015)	Spanish

C-049	<i>Carta de Seguimiento a reunión con el pleno respecto al incumplimiento de Resolución de Interconexión por parte de Telmex y Telnor</i> (Follow up letter to the Plenary regarding the breach to Interconnection resolution by Telmex and Telnor) (March 23, 2015)	Spanish
C-050	<i>Propuesta por parte de la Unidad de Asuntos Jurídicos al Secretario Técnico del Pleno para establecer el Alcance de Resolución de Interconexión</i> (Proposal by the Legal Unit to the Plenary Executive Coordinator to Determine the Scope of Interconnection resolution) (April 7, 2015)	Spanish
C-051	<i>Acuerdo mediante el cual el Pleno del Instituto Federal de Telecomunicaciones establece el alcance de la “Resolución mediante la cual el Pleno del Instituto Federal de Telecomunicaciones determina las condiciones de interconexión no convenidas entre Tele Fácil México, S.A. de C.V. y las empresas Teléfonos de México, S.A.B. de C.V., y Teléfonos del Noroeste, S.A. de C.V.,” P/IFT/EXT/080415/77</i> (April 8, 2015)	Spanish
C-052	<i>Versión Estenográfica de la XXI Sesión Extraordinaria del Pleno 8 de abril de 2015</i> (Transcript of Plenary’s XXI Extraordinary Session dated April 8, 2015)	Spanish
C-053	<i>Demanda de Amparo número 1381/2015 promovido por Tele Fácil México, S.A. de C.V. ante la Juez Primero de Distrito en Materia Administrativa, especializada en Competencia Económica, Radiodifusión y Telecomunicaciones</i> , (Amparo trial 1381/2015 initiated by Tele Fácil México, S.A. de C.V. before the First District Judge in Administrative Matters Specialized in Economic Competition, Broadcasting and Telecommunications). (May 7, 2015)	Spanish
C-054	<i>Ampliación de demanda de amparo 351/2014 presentada por Teléfonos de México, S.A.B. de C.V. ante el Juez Segundo de Distrito en Materia Administrativa, especializada en Competencia Económica, Radiodifusión y Telecomunicaciones</i> (Extension of Amparo Claim 351/2014 submitted by Teléfonos de México, S.A.B. de C.V. before the Second District Judge in Administrative Matters Specialized in Economic Competition, Broadcasting and Telecommunications) (May 11, 2015)	Spanish
C-055	<i>Desacuerdo de interconexión presentado por Teléfonos de México, S.A.B. de C.V. ante el Instituto Federal de Telecomunicaciones</i> (Interconnection disagreement procedure initiated by Teléfonos de México, S.A.B. de C.V. before the Federal Telecommunications Institute) (June 16, 2015)	Spanish

C-056	<i>Respuesta a la solicitud de Resolución de desacuerdo de interconexión de Telmex/Telnor presentada por Tele Fácil México, S.A. de C.V. ante el Instituto Federal de Telecomunicaciones</i> (Reply to Telmex/Telnor interconnection dispute procedure submitted by Tele Fácil México, S.A. de C.V. before the Federal Telecommunications Institute) (July 17, 2015)	Spanish
C-057	<i>Formato para solicitar transitar a una concesión única para uso comercial presentada por Tele Fácil México, S.A. de C.V. ante el Instituto Federal de Telecomunicaciones</i> (Request to transition to a Sole Concession for commercial use submitted by Tele Fácil México, S.A. de C.V. before the Federal Telecommunications Institute) (August 4, 2015)	Spanish
C-058	<i>Solicitud de inicio de negociaciones de interconexión presentada por Tele Fácil México, S.A. de C.V. a Teléfonos de México, S.A.B. de C.V.</i> (Request to initiate negotiations of interconnection submitted by Tele Fácil México, S.A. de C.V. to Teléfonos de México, S.A.B. de C.V.) (August 7, 2013)	Spanish
C-059	<i>Oficio IFT/225/UC/DG-VER/3661/2015 emitido por la Unidad de Cumplimiento del Instituto Federal de Telecomunicaciones</i> (Document IFT/225/UC/DG-VER/3661/2015 issued by the Compliance Unit of the Federal Telecommunications Institute) (September 15, 2015)	Spanish
C-060	<i>Versión Estenográfica de la XXXVI Sesión Extraordinaria del Pleno 7 de octubre de 2015,</i> (Transcript of Plenary's XXXVI Extraordinary Session dated October 7, 2015)	Spanish
C-061	<i>Resolución mediante la cual el Pleno del Instituto Federal de Telecomunicaciones determina las condiciones de interconexión no convenidas entre Teléfonos de México, S.A.B. de C.V., Teléfonos del Noroeste, S.A. de C.V. y Tele Fácil México, S.A. de C.V., aplicables del 1 de enero al 31 de diciembre de 2015,</i> P/IFT/EXT/071015/127 (Oct. 7, 2015)	Spanish
C-062	<i>Demanda de Amparo número 1694/2015 promovido por Tele Fácil México, S.A. de C.V. ante la Juez Segundo de Distrito en Materia Administrativa, especializada en Competencia Económica, Radiodifusión y Telecomunicaciones,</i> (Amparo trial 1694/2014 initiated by Tele Fácil México, S.A. de C.V. before the Second District Judge in Administrative Matters Specialized in Economic Competition, Broadcasting and Telecommunications) (November 11, 2015)	Spanish

C-063	<i>Sentencia de Juicio de Amparo número 1381/2015 promovido por Tele Fácil México, S.A. de C.V. emitida por la Juez Primero de Distrito en Materia Administrativa, especializada en Competencia Económica, Radiodifusión y Telecomunicaciones</i> , (Resolution by the First District Judge in Administrative Matters Specialized in Economic Competition, Broadcasting and Telecommunications to Amparo trial 1381/2015 initiated by Tele Fácil México, S.A. de C.V.). (Jan. 22, 2016)	Spanish
C-064	<i>Oficio IFT/225/UC/DG-VER/222/2016 emitido por la Unidad de Cumplimiento del Instituto Federal de Telecomunicaciones</i> (Document IFT/225/UC/DG-VER/222/2016 issued by the Compliance Unit of the Federal Telecommunications Institute) (February 3, 2016)	Spanish
C-065	<i>Recurso de Revisión a Sentencia de Juicio de Amparo número 1381/2015 promovido por Tele Fácil México, S.A. de C.V. emitida por la Juez Primero de Distrito en Materia Administrativa, especializada en Competencia Económica, Radiodifusión y Telecomunicaciones</i> , (Appeal to Resolution by the First District Judge in Administrative Matters Specialized in Economic Competition, Broadcasting and Telecommunications to Amparo trial 1381/2015 initiated by Tele Fácil México, S.A. de C.V.), (February 12, 2016)	Spanish
C-066	<i>Exposición de Hechos respecto a la presentación del amparo en revisión 1381/2015 presentado por Tele Fácil México, S.A. de C.V. ante el Juez Primero de Distrito en Materia Administrativa Especializada en Competencia Económica, Radiodifusión y telecomunicaciones</i> (Statement of Fact regarding presentation of Amparo Appeal 1381/2015 submitted by Tele Fácil México, S.A. de C.V. before the First District Judge in Administrative Matters Specialized in Economic Competition, Broadcasting and Telecommunications) (February 24, 2016)	Spanish
C-067	<i>Admisión inicial de recurso de revisión de amparo 1381/2015</i> (Initial admission of Appeal to amparo 1381/2015) (February 24, 2016)	Spanish
C-068	<i>Decisión de admisión de recurso de revisión de amparo 1381/2015</i> (Admission of Appeal to amparo 1381/2015) (March 9, 2016)	Spanish
C-069	<i>Sentencia de Juicio de Amparo número 351/2014 promovido por Teléfonos de México, S.A.B. de C.V. emitida por la Juez Segundo de Distrito en Materia Administrativa, especializada en Competencia Económica, Radiodifusión y Telecomunicaciones</i> , (Resolution by the Second District Judge in Administrative Matters Specialized in Economic Competition, Broadcasting and Telecommunications to Amparo trial 351/2014 initiated by Teléfonos de México, S.A.B. de C.V.), (Mar. 11, 2016)	Spanish

C-070	<i>Sentencia de Juicio de Amparo número 1694/2015 promovido por Tele Fácil México, S.A. de C.V. emitida por la Juez Segundo de Distrito en Materia Administrativa, especializada en Competencia Económica, Radiodifusión y Telecomunicaciones, (Resolution by the Second District Judge in Administrative Matters Specialized in Economic Competition, Broadcasting and Telecommunications to Amparo trial 1694/2015 initiated by Tele Fácil México, S.A. de C.V.), (Mar. 15, 2016)</i>	Spanish
C-071	<i>Acuerdo de Inicio de Procedimiento administrativo del expediente E-IFT.UC.DG-SAN.II.0168/2016 en contra de Tele Fácil México, S.A. de C.V. por incumplimiento a Condiciones de Seguridad (Document to Initiate Administrative Procedure against Tele Fácil México, S.A. de C.V. in file No. E-IFT.UC.DG-SAN.II.0168/2016 for breaching Safety Conditions) (March 14, 2016)</i>	Spanish
C-072	<i>Escritura Pública No. 10,911 que contiene la Asamblea Extraordinaria de Accionistas de Tele Fácil México, S.A. de C.V. (Public Deed No. 10,911 that contains the Extraordinary Shareholders Meeting of Tele Fácil México, S.A. de C.V.) (March 29, 2016)</i>	Spanish
C-073	Shareholder Agreement of Tele Fácil Mexico S.A. de C.V. (April 1, 2016)	English
C-074	<i>Recurso de Revisión a Sentencia de Juicio de Amparo número 1694/2015 promovido por Tele Fácil México, S.A. de C.V. emitida por la Juez Segundo de Distrito en Materia Administrativa, especializada en Competencia Económica, Radiodifusión y Telecomunicaciones, (Appeal to Resolution by the Second District Judge in Administrative Matters Specialized in Economic Competition, Broadcasting and Telecommunications to Amparo trial 1694/2015 initiated by Tele Fácil México, S.A. de C.V.) (April 7, 2016)</i>	Spanish
C-075	<i>Sentencia de Juicio de Amparo en Revisión número 35/2016 promovido por Tele Fácil México, S.A. de C.V. emitida por el Primer Tribunal Colegiado de Circuito en Materia Administrativa, especializada en Competencia Económica, Radiodifusión y Telecomunicaciones, (Resolution by the First Court of Appeals in Administrative Matters Specialized in Economic Competition, Broadcasting and Telecommunications to Amparo in Revision 35/2016 initiated by Tele Fácil México, S.A. de C.V.), (Apr. 21, 2016)</i>	Spanish

C-076	<i>Desistimiento de Revisión de Juicio de Amparo número 1694/2015 promovido por Tele Fácil México, S.A. de C.V. emitida por la Juez Segundo de Distrito en Materia Administrativa, especializada en Competencia Económica, Radiodifusión y Telecomunicaciones, (Withdrawal by to Appeal of Amparo trial 1694/2015 initiated by Tele Fácil México, S.A. de C.V. Resolution by the Second District Judge in Administrative Matters Specialized in Economic Competition, Broadcasting and Telecommunications to), (July 13, 2016)</i>	Spanish
C-077	<i>Acuerdo de Inicio de Procedimiento administrativo del expediente E-IFT.UC.DG-SAN.II.0168/2016 en contra de Tele Fácil México, S.A. de C.V. por incumplimiento a Resolución 127 (Document to Initiate Administrative Procedure against Tele Fácil México, S.A. de C.V. in file No. E-IFT.UC.DG-SAN.II.0168/2016 for breaching Resolution 127) (August 25, 2016)</i>	Spanish
C-078	<i>Sentencia de Juicio de Amparo en Revisión número 62/2016 promovido por Teléfonos de México, S.A.B. de C.V. emitida por el Segundo Tribunal Colegiado de Circuito en Materia Administrativa, especializado en Competencia Económica, Radiodifusión y Telecomunicaciones, (Resolution by the Second Court of Appeals in Administrative Matters Specialized in Economic Competition, Broadcasting and Telecommunications to Amparo in Revision 62/2016 initiated by Teléfonos de México, S.A.B. de C.V.), (Nov. 24, 2016)</i>	Spanish
C-079	<i>Resolución mediante la cual el Pleno del Instituto Federal de Telecomunicaciones autoriza a Tele Fácil México, S.A. de C.V. la transición de un título de concesión para instalar, operar y explotar una red pública de telecomunicaciones al régimen de concesión única para uso comercial (Resolution by which the Plenary of the Federal Telecommunications Institute authorized Tele Fácil México, S.A. de C.V. to transition from a concession to install, operate and exploit a public telecommunications network, to a sole concession for commercial use) (January 30, 2017)</i>	Spanish
C-080	<i>Título de Concesión Unica para uso comercial que otorga el Instituto Federal de Telecomunicaciones para prestar servicios públicos de telecomunicaciones y radiodifusión, a favor de Tele Fácil México, S.A. de C.V. (Sole Concession for commercial use granted by the Federal Telecommunications Institute to provide public telecommunications and broadcasting services, in favor of Tele Fácil México, S.A. de C.V.) (January 30, 2017)</i>	Spanish
C-081	<i>Oficio de Expediente IFT.UC.DG-SAN.II.0168/2016 para resolver procedimiento administrativo de imposición de sanción ante Tele Fácil México, S.A. de C.V. (Document IFT.UC.DG-SAN.II.0168/2016 to resolve administrative procedure to impose sanction to Tele Fácil México, S.A. de C.V.) (April 3, 2017)</i>	Spanish

C-082	Letter from C. Bello Hernández to C. Hernández Contreras, Re: <i>Objection and statement of non-consent to the Administrative Procedure and Fine contained in file E-IFT.UC.DG-SAN.II.0168/2016</i> (April 28, 2017)	Spanish
C-083	<i>Oficio IFT/212/CGVI/UT/800/2017 emitido por la Unidad de Transparencia del Instituto Federal de Telecomunicaciones</i> (Document IFT/212/CGVI/UT/800/2017 issued by the Transparency Unit of the Federal Telecommunications Institute) (July 4, 2017)	Spanish
C-084	OECD (2017), <i>OECD Telecommunication and Broadcasting Review of Mexico 2017</i> , OECD Publishing, Paris	English & Spanish
C-085	KTIV Television, <i>Great Lakes Communication Corporation expands data center with new facility in Lake Park, IA</i> (Aug. 21, 2014)	English
C-086	Estherville News, <i>Ruter, GKN honored by IGL Corridor: Annual Business Recognition Luncheon held</i> (Nov. 21, 2014)	English
C-087	Russman, H., <i>The Daily Reporter, Nelson seeks to better the Corridor</i> (Feb. 4, 2015)	English
C-088	<i>Great Lakes Communication Corp. Honored with Iowa Venture Award</i>	English
C-089	Better Business Bureau Profile, <i>IGL TeleConnect</i>	English
C-090	Statistical Analysis of the Resolution issued by the Mexican Courts and Tribunal Specialized in Matters of Economic Competition, Telecommunications and Broadcasting (September 2015)	English & Spanish
C-091	Chart of Requests for Transition to Concesión Unica evaluated by IFT (last updated October 31, 2017)	English
C-092	<i>Resolución al procedimiento administrativo de imposición de sanción relativo al expediente E-IFT.UC.DG-SAN.II.0009/2016, emitida por el Instituto Federal de Telecomunicaciones</i> (Resolution to the administrative procedure to impose sanctions regarding the file E-IFT.UC.DG-SAN.II.0009/2016, issued by the Federal Telecommunications Institute) (October 3, 2016)	Spanish
C-093	<i>Alegatos presentados por Tele Fácil en el Desacuerdo de Interconexión frente al Instituto Federal de Telecomunicaciones</i> (Tele Fácil's Closing Arguments to the Disagreement Procedure submitted before the Federal Telecommunications Institute) (September 24, 2014)	Spanish
C-094	<i>Notificación de Nuevo Proyecto de Convenio Marco de Interconexión Local presentado por Teléfonos de México, S.A.B. de C.V. a Tele Fácil México, S.A. de C.V.</i> (Notification of New Draft of Local Interconnection Agreement notified by Teléfonos de México, S.A.B. de C.V. to Tele Fácil México, S.A. de C.V.) (December 10, 2014)	Spanish

C-095	<i>Reforma - Cuestionan Elección de Reguladores</i> (Reforma - Appointment of regulators is questioned) (August 21, 2013)	Spanish
C-096	<i>Reporte Indigo - Arrecia Guerra en Telecom - Cuestionan a Comisionado, por Armando Estrop</i> (Reporte Indigo - War on Telecom: Commissioner is Questioned, by Armando Estrop) (June 1, 2014)	Spanish
C-097	<i>Perfil de Comisionado Mario Fromow en página del IFT</i> (Commissioner Mario Fromow's Profile on IFT's Website) (November 1, 2017)	Spanish
C-098	<i>Consulta de confirmaciones de criterio en buscador de resoluciones del Pleno</i> (Search of confirmations of criteria in the Plenary Resolutions search tool) (last updated October 31, 2017)	Spanish
C-099	<i>Consulta de resoluciones de desacuerdos de interconexión en buscador de resoluciones del Pleno</i> (Search of interconnection dispute resolutions in the Plenary Resolutions search tool) (last updated October 31, 2017)	Spanish
C-100	<i>Resolución P/IFT/251115/543 mediante la cual el Pleno del Instituto Federal de Telecomunicaciones determina las condiciones de interconexión no convenidas entre Mega Cable, S.A. de C.V. y AT&T Digital, S. de R.L. de C.V.</i> (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)	Spanish
C-101	<i>Resolución P/IFT/120815/356 mediante la cual el Pleno del Instituto Federal de Telecomunicaciones determina las condiciones de interconexión no convenidas entre Teléfonos de México, S.A.B. de C.V. e IP Matrix, S.A. de C.V.</i> (Resolution P/IFT/120815/356 through which the Plenary of the Federal Telecommunications Institute determines the conditions of interconnection not agreed between Teléfonos de México, S.A.B. de C.V. and IP Matrix, S.A. de C.V.) (August 12, 2015)	Spanish
C-102	<i>Alliance Agreement by and between Tele Fácil México, S.A. de C.V. and [REDACTED]</i> (October 1, 2013)	English
C-103	<i>Notice of Arbitration</i> (September 26, 2016)	English
C-104	<i>Amended Notice of Arbitration</i> (June 9, 2017)	English
C-105	IFT, "What is the Advisory Council"	Spanish
C-106	<i>Oficio No. IFT/D05/UPR/JU/717/2014 por el cual el Instituto Federal de Telecomunicaciones requiere a Teléfonos de México, S.A.B. de C.V. y Tele Fácil S.A. de C.V. que formule alegatos</i> (Document No. IFT/D05/UPR/JU/717/2014 by which the Federal Telecommunications Institute requires Teléfonos de México, S.A.B. de C.V. and Tele Fácil, S.A. de C.V. to submit final arguments) (September 3, 2014)	Spanish

C-107	<i>Recordatorio de solicitud de interconexión indirecta presentado por Tele Fácil, S.A. de C.V. ante el Instituto Federal de Telecomunicaciones</i> (Reminder of request for indirect interconnection submitted by Tele Fácil México, S.A. de C.V. before the Federal Telecommunications Institute) (February 26, 2015)	Spanish
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**LIST OF CLAIMANTS' SUBMISSIONS:
LEGAL EXHIBITS**

Legal Exhibit	Document Description	Original Language
CL-001	<i>Ley Federal de Telecomunicaciones</i> (Federal Telecommunications Law) (enacted on June 7, 1995)	Spanish
CL-002	<i>Decreto por el que se reforman y adicionan diversas disposiciones de la Constitución Política de los Estados Unidos Mexicanos, en materia de telecomunicaciones</i> (Decree by which several provisions are amended and added to the Political Constitution of the United Mexican States, in telecommunications matters), (enacted on June 11, 2013)	Spanish
CL-003	<i>Ley de Amparo</i> (Amparo Statute), enacted on April 2, 2013 (hereinafter " <i>Amparo Statute</i> ")	Spanish
CL-004	<i>Ley Federal de Telecomunicaciones y Radiodifusión</i> (Federal Telecommunications and Broadcasting Law) (enacted on July 14, 2014)	Spanish
CL-005	<i>Constitución Política de los Estados Unidos Mexicanos</i> (Political Constitution of the United Mexican States) (enacted on February 5, 1917)	Spanish
CL-006	<i>Plan Técnico Fundamental de Numeración</i> (Technical Fundamental Plan of Numbering) (December 11, 2014)	Spanish
CL-007	<i>Estatuto Orgánico del Instituto Federal de Telecomunicaciones</i> (Organic Statute of the Federal Institute of Telecommunications), enacted on September 4, 2014	Spanish
CL-008	<i>Ley Federal de Procedimiento Administrativo</i> (Federal Law of Administrative Procedure), (enacted on August 4, 1994)	Spanish
CL-009	<i>Suprema Corte de Justicia de la Nación, Jurisprudencia P./J. 10/2011</i> (Jurisprudence P./J. 10/2011 of the Supreme Court of Justice of the Nation) (July 2011)	Spanish
CL-010	<i>Resolución P/IFT/EXT/060314/76 mediante la cual el Pleno del Instituto Federal de Telecomunicaciones determina al grupo de interés económico de América Móvil, S.A.B. de C.V. como agente económico preponderante en el sector de telecomunicaciones</i> (Resolution P/IFT/EXT/060314/76 by which the Plenary of the Federal Telecommunications Institute determined the América Móvil, S.A.B. de C.V. economic group as the preponderant economic agent in telecommunications) (March 6, 2014)	Spanish

CL-011	<i>Oficio No. SEL/300/190/13 que contiene la Iniciativa de Decreto que Reforma y Adiciona Diversas Disposiciones de la Constitución Política de los Estados Unidos Mexicanos presentada por el Presidente de la República al Congreso de la Unión</i> (Documento No. SEL/300/190/13 that contains the Initiative of Decree to Reform and Add Different Provisions to the Political Constitution of the United Mexican States submitted by the President of the Republic before the Congress of the Union) (March 11, 2013)	Spanish
CL-012	<i>Discurso Inaugural del Presidente Enrique Peña Nieto</i> (Inaugural Address by President Enrique Peña Nieto) (December 1, 2012)	Spanish
CL-013	<i>Pacto por México</i> (Pact for Mexico) (December 2, 2012) (Spanish
CL-014	<i>Código Civil Federal</i> (Federal Civil Code) (enacted on May 26, 1928)	Spanish
CL-015	Acuerdo mediante el cual el Pleno del Instituto Federal de Telecomunicaciones define los puntos de interconexión a la red pública de telecomunicaciones del Agente Económico Preponderante (Decree by which the Plenary of the Federal Telecommunications Institute determines the interconnection points to the public telecommunications network of the Preponderant Economic Agent) (February 17, 2015)	Spanish
CL-016	Mauro Arturo Rivera León, Understanding Constitutional Amendments in Mexico: Perpetuum Mobile Constitution, Vol. IX, No. 2 Mexican Law Rev. 3 (2017)	Spanish
CL-017	<i>Ley General de Sociedades Mercantiles</i> (General Law of Commercial Companies) (hereinafter "LGSM")	Spanish
CL-018	<i>In re Technology Transitions, Report and Order and Further Notice of Proposed Rulemaking</i> , 29 FCC Rcd 1433, ¶¶ 1-2 (Jan. 31, 2014)	English
CL-019	Comptel, IP Interconnection for Managed VoIP: Interconnecting Next Generation Network Service Providers (Apr. 11, 2011) (available at: http://www.incompas.org/Files/filings/2011/12-12-11_Comments_on_NG911_attachment_IP%20nterconnection_Whitepaper.pdf) (Comptel is now known as Incompas)	English
CL-020	<i>ADF Group Inc. v. United States of America</i> , ICSID Case No. ARB (AF)/00/1, Second Article 1128 Submission of Mexico (Jul. 22, 2002)	English
CL-021	<i>ADF Group Inc. v. United States of America</i> , ICSID Case No. ARB (AF)/00/1, Award (Jan. 9, 2003)	English
CL-022	<i>Asian Agricultural Products Ltd. v. Republic of Sri Lanka</i> , ICSID Case No. ARB/87/3, Final Award (June 27, 1990)	English
CL-023	<i>British Caribbean Bank Limited v. Government of Belize</i> , PCA Case No. 2010-18/BCB-BZ, Award (Dec. 19, 2014)	English
CL-024	<i>Burlington Resources Inc. v. Republic of Ecuador</i> , ICSID Case No. ARB/08/5, Decision of Liability (Dec. 14, 2002)	English

CL-025	<i>Cargill, Inc. v. United Mexican States</i> , ICSID Case No. ARB(AF)/05/2, Rejoinder of the Respondent (May 2, 2007)	English
CL-026	<i>Cargill, Inc. v. United Mexican States</i> , ICSID Case No. ARB(AF)/05/2, Award (Sep. 18, 2009)	English
CL-027	<i>Chemtura Corp. v. Government of Canada</i> , UNCITRAL (NAFTA), Award (Aug. 2, 2010)	English
CL-028	<i>CME Czech Republic B.V. v. The Czech Republic</i> , UNCITRAL (NAFTA), Partial Award (Sept. 13, 2001)	English
CL-029	<i>CMS Gas Transmission Company v. Republic of Argentina</i> , SCID Case No. ARB/01/8, Decision on Jurisdiction (July 17, 2003)	English
CL-030	<i>Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic</i> , ICSID Case No. ARB/97/3, Award (Aug. 20, 2007)	English
CL-031	<i>Compañía Del Desarrollo De Santa Elena, S.A. v. Republic of Costa Rica</i> , ICSID Case No. ARB/96/1, Final Award (Feb. 17, 2000)	English
CL-032	<i>Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka</i> , ICSID Case No. ARB/09/2, Award (Oct. 31, 2012)	English
CL-033	<i>El Paso Energy International Co. v. Argentine Republic</i> , ICSID Case No. ARB/03/15, Award (Oct. 31, 2011)	English
CL-034	<i>Elettronica Sicula S.p.A. (ELSI) (United States v. Italy)</i> , 1989 ICJ Reports 15 (Jul. 20, 1989)	English
CL-035	<i>Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. Republic of Hungary</i> , ICSID Case No. ARB/12/2, Award, (April 16, 2014)	English
CL-036	<i>EnCana Corp. v. Republic of Ecuador</i> , UNCITRAL/LCIA Case No. UN3481, Award (Feb. 3, 2006)	English
CL-037	<i>Enkev Beheer B.V. v. Republic of Poland</i> , PCA Case No. 2013-01, First Partial Award (April 29, 2014)	English
CL-038	<i>Ethyl Corp. v. The Government of Canada</i> , UNCITRAL (NAFTA), Award on Jurisdiction (Jun. 24, 1998)	English
CL-039	<i>Eureko B.V. v. Republic of Poland</i> , Partial Award (Aug. 19, 2005)	English
CL-040	<i>Fireman's Fund Insurance Co. v. United Mexican States</i> , ICSID Case No. ARB(AF)/02/1, Award (Jul. 17, 2006)	English
CL-041	<i>Frontier Petroleum Services v. Czech Republic</i> , UNCITRAL (NAFTA), Final Award (Nov. 12, 2010)	English
CL-042	<i>GAMI Investments, Inc. v. United Mexican States</i> , UNCITRAL (NAFTA), Mexico's Post-Hearing Brief (May 24, 2004)	English
CL-043	<i>GAMI Investments, Inc. v. United Mexican States</i> , UNCITRAL (NAFTA), Final Award (Nov. 15, 2004)	English
CL-044	<i>Glamis Gold, Ltd. v. United States</i> , UNCITRAL (NAFTA), Award (June 8, 2009)	English

CL-045	<i>Grand River Enterprises Six Nations, Ltd. v. United States</i> , UNCITRAL (NAFTA), Award (Jan. 12, 2011)	English
CL-046	<i>Guaracachi America, Inc. v. State of Bolivia</i> , PCA Case No. 2011-17, Award (Jan. 31, 2014)	English
CL-047	<i>Hully Enterprises Limited (Cyprus) v. Russian Federation</i> , PCA Case No. AA 226, Final Award (July 18, 2014)	English
CL-048	<i>Iberdrola Energía S.A. v. Republic of Guatemala</i> , ICSID Case No. ARB/09/5, Award (Unofficial English Translation) (Aug. 17, 2012)	English
CL-049	<i>International Thunderbird Gaming Corp. v. United Mexican States</i> , UNCITRAL (NAFTA), Award (Jan. 26, 2006)	English
CL-050	<i>LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. Argentine Republic</i> , ICSID Case No. ARB/02/1, Decision on Liability (Oct. 3, 2006)	English
CL-051	<i>Marvin Feldman v. United Mexican States</i> , ICSID Case No. ARB(AF)/99/1, Award (Dec. 16, 2002)	English
CL-052	<i>Mercer International v. Government of Canada</i> , ICSID Case No. ARB(AF)/12/3), Submission of the United Mexican States pursuant to Article 1128 Submission (May 8, 2015)	English
CL-053	<i>Metalclad Corp. v. United Mexican States</i> , ICSID Case No. ARB(AF)/97/1, Award (Aug. 30, 2000)	English
CL-054	<i>Methanex Corp. v. United States of America</i> , UNCITRAL (NAFTA), Partial Award on Jurisdiction (Aug. 7, 2002)	English
CL-055	<i>Methanex Corp. v. United States of America</i> , UNCITRAL (NAFTA), Final Award (Aug. 3, 2005)	English
CL-056	<i>Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt</i> , ICSID Case No. ARB/99/6, Award (April 12, 2002)	English
CL-057	<i>Mondev International Ltd. v. United States</i> , ICSID Case No. ARB(AF)/99/2, Award (Oct. 11, 2002)	English
CL-058	<i>Pope & Talbot Inc. v. Government of Canada</i> , UNCITRAL (NAFTA), Interim Award (June 26, 2000)	English
CL-059	<i>Railroad Development Corp. v. Republic of Guatemala</i> , ICSID Case No. ARB/07/23, Award (Jun. 29, 2012)	English
CL-060	<i>Robert Azinian, Kenneth Davitian, & Ellen Baca v. United Mexican States</i> , ICSID Case No. ARB (AF)/97/2, Award (Nov. 1, 1999)	English
CL-061	<i>S.D. Myers v. Government of Canada</i> , UNCITRAL (NAFTA), Partial Award (Nov. 13, 2000)	English
CL-062	<i>SAUR International S.A. v. Argentine Republic</i> , ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability (Jun. 6, 2012)	English
CL-063	<i>Siemens A.G. v. Argentine Republic</i> , ICSID Case No. ARB/02/8, Decision on Jurisdiction (Aug. 3, 2004)	English
CL-064	<i>Siemens A.G. v. The Argentine Republic</i> , ICSID Case No. ARB/02/8, Award (Jan. 17, 2007)	English

CL-065	<i>Tecnicas Medioambientales Tecmed S.A. v. United Mexican States</i> , ICSID Case No. ARB (AF)/00/2, Award (May 29, 2003)	English
CL-066	<i>TECO Guatemala Holdings, LLC v. Republic of Guatemala</i> , ICSID Case No. ARB/10/17, Award (Dec. 19, 2013)	English
CL-067	<i>The Loewen Group, Inc. and Raymond L. Loewen v. United States of America</i> , ICSID Case No. ARB(AF)/98/3, Decision on Jurisdiction (Jan. 5, 2001)	English
CL-068	<i>The Loewen Group, Inc. and Raymond L. Loewen v. United States</i> , ICSID Case No. ARB(AF)/98/3, Second Article 1128 Submission of Mexico (Nov. 9, 2001)	English
CL-069	<i>The Loewen Group, Inc. and Raymond L. Loewen v. United States</i> , ICSID Case No. ARB(AF)/98/3, Award (June 26, 2003)	English
CL-070	<i>Vetsy Group Limited v. Republic of Venezuela</i> , ICSID Case No. ARB/06/4, Award (Apr. 15, 2016)	English
CL-071	<i>Waste Management, Inc. v. United Mexican States</i> (“Number 2”), ICSID Case No. ARB(AF)/00/3, Award (Apr. 30, 2004)	English
CL-072	<i>William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Government of Canada</i> , UNCITRAL (NAFTA), PCA Case No. 2009-04, Award on Jurisdiction and Liability (Mar. 17, 2015)	English
CL-073	<i>Windstream Energy LLC v. Government of Canada</i> , PCA Case No. 2013-22, Submission of Mexico Pursuant to NAFTA Article 1128 (Jan. 12, 2016)	English
CL-074	<i>Windstream Energy LLC v. Government of Canada</i> , PCA Case No. 2013-22, Award (Sept. 27, 2016)	English
CL-075	Statute of the International Court of Justice, Art. 38(1)(b)	English
CL-076	4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 319 (Rudolf Bernhardt, ed. 1995)	English
CL-077	Andrea Bjorkland, Commentary on NAFTA Chapter 11, in COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES 484 (Chester Brown, ed. 2013)	English
CL-078	Patrick Dumberry, THE FORMATION AND IDENTIFICATION OF RULES OF CUSTOMARY INTERNATIONAL LAW IN INTERNATIONAL INVESTMENT LAW 1 (2016)	English
CL-079	Gerald Fitzmaurice, <i>The Meaning of the Term “Denial of Justice”</i> , 13 BYIL 113-114 (1932)	English
CL-080	Free Trade Commission Notes of Interpretation (Jul. 31, 2001), http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp)	English
CL-081	OECD, 1967 Draft Convention on the Protection of Foreign Property (1968)	English
CL-082	Martins Paparinskis, THE INTERNATIONAL MINIMUM STANDARD AND FAIR AND EQUITABLE TREATMENT 247 (2013)	English

CL-083	Jan Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL TRADE LAW 62 (2005)	English
CL-084	UNCTAD, FAIR AND EQUITABLE TREATMENT: SERIES ON ISSUES IN INTERNATIONAL TRADE AGREEMENTS II 82 (2012)	English
CL-085	UNCTAD, TAKING OF PROPERTY, SERIES ON ISSUES IN INTERNATIONAL INVESTMENT AGREEMENTS 2 (2000)	English
CL-086	NORTH AMERICA FREE TRADE AGREEMENT, ch. 11 (1989), http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/fta-ale/11.aspx?lang=eng (hereinafter NAFTA Article [])	English
CL-087	<i>Procedure</i> , Oxford Dictionary (Nov. 6, 2017) https://en.oxforddictionaries.com	English
CL-088	<i>Regulation</i> , Oxford Dictionary (Nov. 6, 2017) https://en.oxforddictionaries.com	English
	<u>DAMAGES</u>	
CL-089	<i>ADC Affiliate Ltd. v. Republic of Hungary</i> , ICSID Case No. ARB/03/16), Award (Oct. 2, 2006)	English
CL-090	<i>Azurix Corp v. Argentine Republic</i> , ICSID Case No. ARB/01/12, Award (July 14, 2006)	English
CL-091	<i>Biwater Gauff (Tanzania) Ltd. v. Republic of Tanzania</i> , ICSID Case No. ARB/05/22, Award (July 24, 2008)	English
CL-092	<i>CMS Gas Transmission Co. v. Argentine Republic</i> , ICSID Case No. ARB/01/8, Award (May 12, 2005)	English
CL-093	<i>Crystallex International Corp. v. Bolivarian Republic of Venezuela</i> , ICSID Case No. ARB(AF)/11/2, Award (April 4, 2016)	English
CL-094	<i>Quibrox S.A., Non Metallic Minerals S.A. v. Plurinational State of Bolivia</i> , ICSID Case No. ARB/06/2, Award (Sept. 16, 2015)	English
CL-095	<i>Petrobart Ltd. v. Kyrgyz Republic</i> , SCC Case No. 126/2003, Award (Mar. 29, 2005)	English
CL-096	<i>Sempra Energy Int'l v. Argentine Republic</i> , ICSID Case No. ARB/02/06 Award (Sept. 28, 2007)	English
CL-097	<i>The Factory at Chorzów (Germany v. Poland)</i> (Claim for Indemnity) (Merits), 1928 PCIJ Rep. Ser. A, No 17 (Sept. 13, 1928)	English
CL-098	<i>Tidewater, Inc., Tidewater Investments SRL, Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela</i> , ICSID Case No. ARB/10/5, Award (March 13, 2015)	English
CL-099	J. Crawford, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY (2005)	English
CL-100	S. Ripinsky & K. Williams, Damages in International Investment Law (2008)	English

CL-101	World Bank. 1992. Guidelines at Section IV(6)(i). Washington, D.C.: The World Bank. http://documents.worldbank.org/curated/en/955221468766167766/Guidelines	English
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ACRONYMS

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

I. OVERVIEW

1. There are certain core principles of Mexican telecommunications law that predominate over others, and that are critical to an open, fair and competitive telecommunications sector. These include the principle of freedom of contract, whereby telecommunications carriers can agree between themselves on the terms by which they will interconnect their networks. Under this principle, regulators need only act when the parties are unable to reach agreement. Another is the principle of prompt and effective interconnection, which recognizes that interconnection of telecommunications networks is in the public interest because it expands and enhances access to telecommunications for consumers. Finally, a third principle is that the physical interconnection of networks occurs only after the parties have finalized, and executed, their interconnection agreement governing their respective conduct. In this way, a competitive entrant is guaranteed the legal certainty it needs to start and build its business, and the knowledge that it is not left to the whims of the incumbent carrier.

2. Thus, once the government grants a concession, it is a priority that each carrier be permitted to interconnect with other carriers in the market on the basis of a comprehensive agreement, as soon as possible, so that it can exchange traffic and ensure a universal and seamless public telephone network that is equally accessible to all consumers. In the present case, the regulator responsible for protecting these fundamental principles and goals decided instead to cast them aside to improperly favor the incumbent monopolist over a new entrant.

3. This dispute arises out of action taken by Mexico's telecommunications regulator, the Federal Telecommunications Institute ("IFT"),¹ that destroyed Claimants' investments in their entirety, including their right to provide telecommunications services in Mexico's underdeveloped and highly-concentrated telecommunications sector.²

4. The basic facts of this case are straightforward: after officially recognizing and expressly validating Claimants' legitimate investment rights in a lengthy, reasoned and unanimous resolution, the IFT later abruptly and unjustifiably repudiated its own rulings. The IFT's dramatic change in position targeted Claimants' investment for elimination. Never before had the IFT acted in such a manner, and indeed, never since.

5. The IFT's unjustifiable actions clearly benefitted — and were influenced by — Mexico's national champions, Teléfonos de México, S.A.B. de C.V. and Teléfonos del Noroeste (collectively "Telmex"). Telmex is the incumbent, dominant provider of fixed telecommunications services in Mexico and is Mexico's largest, and monopolistic, telecommunications provider.

6. Telmex is part of the América Móvil Group, the fourth largest international mobile network operator in terms of subscribers and one of the largest corporations in the world. It is led by Mr. Carlos Slim Helú, who, for several years, was ranked as the richest person in the world and whose business empire, which is influential in every sector of the Mexican economy,

¹ The IFT is an independent administrative body responsible for regulating, promoting and overseeing the development and near-universal coverage of telecoms and broadcasting services in Mexico, and empowered to make its own rulings, which are final and binding. It replaces the former Comisión Federal de Telecomunicaciones ("COFETEL").

² OECD (2012), *OECD Telecommunication and Broadcasting Review of Mexico 2012*, OECD Publishing, Paris (hereinafter "OECD 2012 Telecommunication Review of Mexico"), at 11, **C-017** ("The lack of telecommunication competition in Mexico has led to inefficient telecommunications markets that impose significant costs on the Mexican economy and burden the welfare of its population.").

reportedly accounts for as much as 40% of the listings on the Mexican Stock Exchange.

7. Because of Telmex's dominance in the Mexican telecom sector,³ it was essential for Claimants' company, Tele Fácil Mexico, S.A. de C.V. ("Tele Fácil"), to interconnect with Telmex in order to access the Mexican telecom market. Consequently, once granted a concession by the IFT, on August 7, 2013, Tele Fácil requested interconnection with Telmex, which initiated the process of negotiation between the two parties on the terms of that interconnection. Two terms in particular were critical for Tele Fácil as it initiated these negotiations: price and indirect interconnection.

8. "Price" is the rate that Tele Fácil would be charged by Telmex, per minute and per call, to access consumers in Telmex's network – again, currently 64% of the Mexican market. In industry parlance, it is the *interconnection rate* that Telmex would charge Tele Fácil to *terminate* calls in Telmex's network.

9. At the time negotiations began with Telmex and Tele Fácil, the rate agreed would be a reciprocal rate under Mexican law – that is, each party to an interconnection agreement could charge the agreed rate to the other to terminate calls in their respective systems. Given their knowledge of the Mexican telecommunications market, Tele Fácil's partners anticipated that Telmex would offer an anti-competitive high rate. Experience with Telmex's conduct indicated that, because of its overwhelmingly dominant market share, Telmex would be receiving far more calls than any other telecom company, and therefore would be the net recipient of payments under the agreement. With this advantage, Telmex was and would be able to reap the benefits of a high rate.

³ *Id.* at 20 ("Market concentration is extremely high with Telmex, the incumbent fixed-line operator, having 80% share of the fixed market (in terms of subscriber lines), and Telcel, the incumbent's mobile affiliate, accounting for 70% of mobile subscribers.")

10. However, Tele Fácil's business plan permitted it to thrive at whatever price Telmex offered. As discussed in detail below, part of Tele Fácil's plan involved establishing a platform for offering innovative telecom services such as free conferencing. This required very limited termination of Tele Fácil domestic (i.e., within Mexico) minutes in Telmex's network, but would attract an overwhelming amount of Telmex domestic minutes terminating in Tele Fácil's network. For these reasons, Tele Fácil's business model – a tried and trusted model employed by Mr. Nelson in the United States – would permit it to earn substantial revenue where other competitors of Telmex could not.

11. The second critical term that Tele Fácil planned to secure was *indirect* interconnection. Indirect interconnection was necessary to combat Telmex's historical practice of using direct interconnection to harm new entrants by, for example, delaying the provision of interconnection circuits, controlling the quality of the service and imposing excessive deposit requirements on new entrants that sought to establish or increase capacity. With indirect interconnection, Tele Fácil would be able to avoid Telmex's control of Tele Fácil's network by routing its traffic through a carrier larger than Tele Fácil (e.g., Nextel), which had already established sufficient capacity to indirectly deliver traffic to Telmex.

12. In response to Tele Fácil's overture, Telmex offered Tele Fácil, as Tele Fácil anticipated, its standard framework agreement for interconnection through 2017. This agreement included the all-important pricing terms establishing the interconnection rate at a very high rate, equivalent to USD 0.00975 per minute, per call. During negotiations, the parties reached agreement on all of the terms for interconnection (including price), except for two. The first was Telmex's refusal to interconnect indirectly.

13. The second was Telmex's refusal to eliminate number portability charges. That is, Telmex insisted on imposing charges when an existing Telmex customer moved its telephone number to Tele Fácil. Tele Fácil was aware that this was another way in which Telmex historically exercised its monopoly powers to raise barriers for new entrants to gain a foothold in the telecommunications market. Because these charges had already been declared unlawful, Tele Fácil sought to have them eliminated from the interconnection agreement.

14. Thus, an agreement was reached between the two companies on all terms, including interconnection rates, except for indirect interconnection and number portability charges. Pursuant to the law, Tele Fácil then brought the contract before the IFT so that the IFT could decide the disputed terms and order the execution of the agreement and physical interconnection. The IFT did so, in a unanimous decision – Resolution 381 – issued on November 26, 2014.

15. In Resolution 381, the IFT decided the disputed terms in Tele Fácil's favor and, by recognizing the sanctity of freedom of contract between private parties on the already-agreed terms, established the existence of a complete interconnection agreement. On this basis, the IFT ordered Telmex and Tele Fácil to implement its ruling, execute the interconnection agreement, and interconnect their networks within ten business days of the ruling. This ruling established the rights Tele Fácil sought and needed to succeed in Mexico.

16. In the meantime – that is, between August 7, 2013, the date Tele Fácil first requested interconnection with Telmex, and November 26, 2014, the date the IFT issued Resolution 381 – long overdue reforms of the Mexican telecom sector became law and began to be implemented.

17. As one of the measures designed to reduce Telmex's dominance over the Mexican telecommunications market, on March 6, 2014, the IFT identified and declared Telmex a "predominant economic agent." This permitted the IFT to impose "asymmetric regulations" on Telmex. On August 13, 2014, the new Mexican telecommunication law became effective (the Federal Telecommunications and Broadcasting Law, or "FTBL"), replacing the old Federal Telecommunications Law ("FTL"). As part of the FTBL, the Mexican Congress strengthened the asymmetric regulations by requiring Telmex to charge only a "zero rate" for call termination in its network. At the same time, it allowed the competing carriers to continue charging Telmex the rate they had already agreed between themselves and the incumbent.

18. As a result of these and other developments discussed in detail below, Telmex clearly realized at some point that the interconnection agreement established by the IFT in Resolution 381 would result in Telmex losing substantial amounts of money. In particular, Telmex realized that it was potentially bound to offer the high interconnection rate with Tele Fácil to its competitors, while unable to collect anything for calls in its network because of its predominant economic agent status. Thus, on August 26, 2014, some three months before Resolution 381, Telmex argued during the IFT dispute proceedings with Tele Fácil that the parties had not agreed on a rate for interconnection. The IFT ultimately rejected this contention in Resolution 381.

19. Having presumed – wrongly – that the IFT would dismiss the rate it had offered to Tele Fácil as not agreed, and therefore not applicable, Resolution 381 presented Telmex with a nightmare scenario. It thereafter acted to erase Resolution 381 using the full weight of its influence within the IFT. As discussed below, these steps included securing the cooperation of IFT Commissioners (which included one former Telmex official) to ensure that the IFT,

including its Compliance Unit and Legal Unit, undertook a series of secret and unprecedented procedural steps to repudiate Resolution 381. As explained below, the die was cast at an IFT meeting that took place on or about January 15, 2015 when the IFT's plan to reverse Resolution 381 was established.

20. Between the date of Resolution 381 (November 26, 2014) and this date in mid-January 2015, Tele Fácil did all that it could to secure Telmex's compliance with the provisions of the IFT's resolution, but to no avail. On December 9, 2014, Tele Fácil met at Telmex's offices in Mexico City to interconnect. Instead of signing the agreement as established in Resolution 381 and interconnecting as Tele Fácil anticipated, Telmex presented Tele Fácil a drastically altered version of the interconnection agreement that had been ordered by the IFT. Shockingly, this document included a term that ended the agreement on December 31, 2014 – only *21 days* later. Tele Fácil refused to sign this agreement and asked Telmex to comply with Resolution 381. Telmex would not allow the Tele Fácil representatives to take a copy of this altered version of the interconnection agreement with them.

21. The very next day, December 10, 2014, Telmex sent to Tele Fácil's offices an interconnection agreement with Telmex's signature requesting that Tele Fácil execute it. However, this draft was also an altered version of the one that had been presented as part of the Resolution 381 procedure. While this version included the USD 0.00975 rate, removed portability charges, permitted indirect interconnection, it was still entirely unacceptable because it also limited the term of the agreement to December 31, 2014, rather than the date the parties had agreed on (December 31, 2017). Tele Fácil immediately followed up by sending Telmex for signature a signed, notarized and certified copy of the interconnection agreement as ordered by the IFT in Resolution 381. Telmex simply ignored it.

22. In the meantime, with no action on the part of the IFT to enforce Resolution 381, Tele Fácil sought and secured a meeting in early January 2015 with Gerardo Sánchez Henkel, Chief of the IFT Compliance Unit, the unit responsible for enforcing the terms of interconnection agreements. At this meeting, Mr. Sánchez Henkel confirmed that the provisions of Resolution 381 were clear, that this interconnection agreement should have been executed by the parties, and that their networks should have been interconnected by now. However, he noted that he did expect resistance from other areas of the IFT, and particularly the Legal Unit, which were known to be friendly towards Telmex.

23. Shortly thereafter, a meeting was convened in mid-January 2015 in the office of the IFT Chairman, Gabriel Oswaldo Contreras Saldivar, to discuss Telmex's concerns about enforcement of the interconnection agreement between Telmex and Tele Fácil. At this meeting, the Chairman instructed the Compliance Unit not to enforce Resolution 381 but instead to request an opinion from the Legal Unit as to whether physical interconnection could be enforced without execution of the interconnection agreement.⁴ This gave the Chairman and his allies an opportunity to unwind Resolution 381 in the form of an interpretive opinion, and this is what in fact transpired.

24. Pursuant to this instruction, on February 10, 2015, the Compliance Unit requested a "confirmation of criteria" (in Spanish, a *confirmación de criterio*) from the Legal Unit. This

⁴ The information contained in the first two sentences of this paragraph is based on Claimants' information and belief. Claimants note that Mexico has refused to disclose or produce documents relating to this, and other IFT meetings that occurred in the January to March 2015 timeframe. Claimants further note that the dispute concerning production of documents is ongoing as of the preparation of this Statement of Claim. As set forth in Claimants' November 1, 2017 submission on document production, it is simply not credible that Mexico has no relevant records during this time period. Claimants also note in its November 1, 2017 submission other, serious concerns with Mexico's conduct in this proceeding. In light of these circumstances, the Claimants reserve their right to put forward any further evidence of such meetings at a future date.

was unprecedented; there is no legal authority that permits the Compliance Unit to issue a confirmation of criteria to another unit in lieu of enforcing the Plenary's orders. As if on cue, on February 18, 2015, Telmex itself sought a confirmation of criteria from the IFT, this time, incredibly, to confirm whether the rate term should be contained in the interconnection agreement with Tele Fácil. The stage was now set for the IFT to improperly reverse course, and by that contrived, illegal process, undo Resolution 381.

25. Totally unaware of this plan, Tele Fácil continued to push for compliance with Resolution 381. Thus, on January 28, 2015, pursuant to Mr. Sánchez Henkel's request of Tele Fácil at their January 12, 2015 meeting, Tele Fácil formally presented to the IFT Compliance Unit its request for enforcement of Resolution 381. The IFT *never responded to this request*.

26. During this period, representatives of Tele Fácil met with Telmex several times. Two of these meetings included Mr. Javier Mondragón, Telmex's top litigation and regulatory counsel, who was also known to be personal counsel to the Slim family. At the end of the last such meeting, Mr. Mondragón declaring that if IFT or any judge ever forced Telmex to execute the agreement, he would personally make sure that it was not signed until December 31, 2017. There were no further conversations with Telmex after that exchange.

27. Greatly concerned with the impact of the continuing passage of time on its business, Tele Fácil sought and was granted a March 5, 2015 meeting with the IFT Plenary to request enforcement of Resolution 381. In retrospect, this meeting was an exercise in duplicity. Some of the IFT Commissioners legitimately questioned the Legal and Compliance Units as to why the interconnection agreement had not yet been signed and interconnection not effectuated, and challenged any further review of Resolution 381.

28. However, certain other Commissioners, including most particularly the Chairman himself, as well as Commissioner Mario Fromow (a former high official within the Telmex organization), had another plan in mind. The transcript of this meeting shows clearly that the Chairman simply disregarded the views of Commissioners who were gravely concerned with the legal and policy implications of reviewing a standing IFT resolution. Instead, he pushed forward with the plan hatched in January ostensibly to “interpret” the scope of Resolution 381, all the while intending to repeal it through improper means.

29. When the meeting ended, the Chairman personally walked the Tele Fácil delegation to the elevator bank, assuring them all the while that they should not worry about the outcome. Although concerned with the prospect of an “interpretation” of Resolution 381, Tele Fácil had no other choice but to trust these representations. In hindsight, it is clear that the IFT was giving itself the time and space necessary to allow its contrived process to unfold for Telmex’s benefit without further involvement and objection by Tele Fácil.

30. On March 13, 2015, another IFT Plenary was scheduled, and the agenda included the Tele Fácil - Telmex situation. The IFT Legal Unit, however, requested that the matter be taken off the agenda, and this item was indeed dropped. The substance of the proposal that was to be voted on by the Plenary at this meeting has never been disclosed. Instead, almost a month later, on April 7, 2015, the Legal Unit privately provided to the IFT Plenary its opinion (in the form of a draft decree) on the questions regarding the scope of Resolution 381.

31. On April 8, 2015, the IFT concluded, but did not publish “Decree 77.” In fact, Tele Fácil did not receive a copy of this Decree until April 13, 2015. In Decree 77, a 4-3 majority of the IFT (including both the Chairman and Commissioner Fromow) voted to take the unprecedented and illegal step of clawing back the rights that were previously guaranteed to Tele

Fácil in the regulator's initial resolution. The IFT not only refused to enforce the initial resolution, but it also illegally revoked critical aspects of it through a blatant abuse of the administrative process. The veil cast over the illegal process initiated in January 2015 was lifted: under the guise of an "interpretation" of Resolution 381, the IFT successfully repudiated it.

32. In Decree 77, the IFT purportedly "interpreted" the scope of Resolution 381 to include only to the IFT's decision on disputed terms, i.e., indirect interconnection and portability charges. Shockingly, it stated that it lacked authority to recognize and enforce terms that were previously agreed between the parties (that is, the terms that were undisputed). In other words, the IFT found that all interconnection terms, except those relating to indirect interconnection and portability charges, were no longer binding on the parties. It is worth noting that after a sweeping reform that increased the IFT's powers so that it could curb the monopoly powers of Telmex, this Decree denied powers the IFT always had, giving Telmex a new tool to frustrate new entrants.

33. By this decree, the IFT destroyed what Tele Fácil had after Resolution 381: a complete set of valuable interconnection terms with Telmex. Now, Tele Fácil had nothing but two isolated terms and a non-existent agreement. It was left completely exposed to Telmex's predatory tactics. Contrary to the fundamental precepts of Mexican telecommunications law requiring prompt and effective interconnection, Telmex could now delay business with Tele Fácil (and other future market entrants) indefinitely by manufacturing disagreements over previously agreed interconnection terms, one after the other, and initiate serial IFT dispute processes against competitors requiring each to be decided independently. This was not lost on the three dissenting Commissioners who strongly objected to the majority's decision on fundamental legal and policy grounds.

34. Indeed, Telmex acted quickly to take advantage of precisely this further opportunity presented to it by Decree 77. On June 16, 2015, Telmex submitted a new interconnection disagreement to the IFT, claiming that a disagreement with Tele Fácil existed regarding, among other things, the applicable interconnection rates for 2015. Telmex knew that it could start again from square one.

35. The IFT permitted it to do so by accepting Telmex's application to resolve the purported interconnection disagreement on June 19, 2015. In a last attempt to resurrect its rights, on July 17, 2015, Tele Fácil submitted another request to the IFT to enforce Resolution 381 against Telmex. Again, the IFT completely ignored Tele Fácil's petition, and it has never been answered.

36. Instead, on October 19, 2015, a majority of the IFT – once again against the views of dissenting Commissioners – resolved Telmex's manufactured interconnection disagreement in Telmex's favor in its Resolution 127. That decision overruled Tele Fácil's strong objections that the IFT lacked jurisdiction because it had previously decided all matters in Resolution 381.

37. In reiterating the majority rulings in Decree 77, the IFT added a new twist: it now ruled that the original interconnection agreement had *never existed*. According to the IFT, it was invalid because Telmex had refused to sign it. In other words, rather than being held accountable by the IFT for defying Resolution 381, the IFT rewarded Telmex's refusal to abide by Resolution 381 by using it as the basis for declaring the agreement unenforceable.

38. The IFT also determined the applicable interconnection rates for 2015 in Telmex's favor. Despite Resolution 381, the IFT now found that the applicable interconnection rate was Mexican pesos ("MXN") 0.004179 per minute of use (USD 0.000253 per minute of use), approximately *one fortieth* of the rate previously agreed to between the parties and

approved by the IFT (USD 0.00975 per minute of use). Thus, after destroying Tele Fácil's right to a high rate through 2017 in Decree 77, the IFT now replaced it with a low rate for 2015, a process that could be repeated with respect to 2016 and 2017 rates.

39. To the outside world, this had all the hallmarks of an orderly and appropriate process. In reality, it was an extraordinary and illegal process that was hatched behind closed doors with the goal of repudiating a valid resolution for the purpose of benefitting Mexico's dominant carrier, and to the profound detriment of a potential new entrant to the market, Tele Fácil.

40. The IFT's about-face is impossible to understand from a legal perspective: as discussed below, the IFT's later rulings violate a fundamental tenet of Mexico's telecommunications law requiring "prompt and effective" interconnection between telecommunications providers in the public interest. The IFT's about-face is also impossible to understand from a policy perspective: the IFT's repudiation had the intended effect of protecting Telmex, the declared dominant player in Mexico's telecommunications sector, from new entrants in the market like Claimants. This narrow targeting of Tele Fácil's rights gave Telmex a new tool to keep out competitors like Tele Fácil who were poised to bring dramatically lower-cost telecom services to the Mexican people. This runs squarely counter to the aims of Respondent's extensive reforms of its telecom sector in 2013.

41. The impact of the IFT's gross misconduct on Tele Fácil's business prospects in Mexico was immediate and devastating. The IFT's conduct was so unjustifiable, egregious, and blatantly confiscatory as to give rise to multiple breaches of the NAFTA. As discussed in detail below, Respondent's actions denied Claimants fair and equitable treatment under the minimum standard of treatment and unlawfully expropriated Claimants' investments in Mexico in their

entirety.

42. Respondent's actions have caused Claimants significant damages, which Claimants seek to recover through this proceeding. Under the NAFTA, Claimants are entitled to full compensation, i.e., to be put back in the position they would have been in but for the improper actions. Claimants present a Discounted Cash Flow ("DCF") analysis to determine their damages. The DCF method estimates the free cash flows that would have flowed from Tele Fácil's business and discounts them back to present value as of the date of the breach of the NAFTA. Such an approach is appropriate here because Claimants were deprived of cash flows the business was reasonably expected to generate in the absence of the improper conduct.

43. In total, the quantum of damages in this matter exceeds USD 472 million. As described more fully below, Claimants seek recovery for the quantum of lost profits that would have been earned by Tele Fácil but for the IFT's repudiation of Resolution 381. The damages calculation is the product of detailed evaluations of four lines of business that Tele Fácil was poised to pursue after Resolution 381 was issued. Christian M. Dippon, Ph.D., an economist and Managing Director at NERA Economic Consulting and chair of NERA's Global Energy, Environment, Communications, and Infrastructure Practice, concludes that Claimants suffered economic harm of USD 357,880,731 in three of the four anticipated lines of business.⁵ Additionally, economic expert Elisa V. Mariscal, Ph.D., former head of the Unilateral Conduct Investigations General Directorate at the Federal Competition Commission ("CFC") in Mexico, concludes that Claimants' damages from a fourth line of business totaled USD 114,268,198.⁶

⁵ Expert Report of Christian M. Dippon, Ph.D. (hereinafter "Dippon Report"), C-010.

⁶ Expert Report of Elisa Vera Mariscal Medina (hereinafter "Mariscal Report"), C-011.

II. STATEMENT OF FACTS

A. Parties to the Dispute

44. Mr. Joshua Nelson and Mr. Jorge Blanco are claimants in the arbitration who are bringing claims in their own right pursuant to Article 1116(1) of the NAFTA.

45. Mr. Nelson is a national of the United States who has made an investment in Mexico.⁷ He serves as a founding partner of Tele Fácil México, S.A. de C.V. ("Tele Fácil").⁸ He also serves as Chief Executive Officer of Great Lakes Communications Corp. located in Spencer, Iowa in the United States.⁹

46. Mr. Blanco is a national of the United States who has made an investment in Mexico.¹⁰ He is a founding partner of Tele Fácil México, S.A. de C.V.¹¹

47. Pursuant to Article 1117(1), Mr. Nelson brings claims in arbitration on behalf of Tele Fácil México, a corporation organized under the laws of Mexico, which is majority owned and controlled by Mr. Nelson.¹²

48. Respondent is the United Mexican States.

⁷ Witness Statement of Joshua Dean Nelson (hereinafter "Nelson Statement"), ¶¶ 4, 25-39, C-001.

⁸ *Id.* at ¶ 30-33.

⁹ *Id.* at ¶¶ 10-21.

¹⁰ Witness Statement of Jorge Blanco (hereinafter "Blanco Statement"), ¶¶ 4, 17-21, C-002.

¹¹ *Id.* at ¶¶ 1, 17-21.

¹² Nelson Statement, ¶¶ 33-36, C-001; Blanco Statement, ¶¶ 21-24, C-002; Witness Statement of Miguel Sacasa (hereinafter "Sacasa Statement"), ¶¶ 17-19, 29, C-003; Witness Statement of Carlos Bello (hereinafter "Bello Statement"), ¶¶ 16-19, C-004.

B. Claimants' Investment in Mexico

1. The Business Partners

49. Tele Fácil was created with the aim of entering and competing in the Mexican telecommunications market to provide services to consumers, including expanding access to cutting-edge teleconferencing and other collaboration services, an area in which Mexico has significantly lagged in comparison to other developed countries.¹³

50. The business venture was conceived of and developed in 2009 by three individuals with significant and successful experience in the telecommunications business: Mr. Joshua Nelson, Mr. Jorge Blanco, and Mr. Miguel Sacasa.¹⁴

51. Mr. Nelson was then and continues to serve as Chief Executive Officer of Great Lakes Communications Corp. ("GLCC"), a privately owned telecommunications company that provides wireline and Internet services to consumers in the United States.¹⁵ GLCC is an award-winning telephone company that is believed to be the country's largest family-owned local telephone company in terms of volume of traffic.¹⁶ It has terminated traffic volumes as high as

¹³ Nelson Statement, ¶¶ 22-30, C-001; Blanco Statement, ¶¶ 9-17, C-002; Sacasa Statement, ¶¶ 8-19, C-003. See also OECD 2012 Telecommunication Review of Mexico, at 11, C-017 ("While there has been growth in mobile, fixed, broadband and pay-television markets, Mexico does not compare favourably with other OECD countries that have developed more open and competitive markets and distributed ensuing benefits to consumers.")

¹⁴ Nelson Statement ¶¶ 5-21, C-001; Blanco Statement ¶¶ 5-8, C-002; Sacasa Statement ¶¶ 5-7, C-003.

¹⁵ Nelson Statement ¶¶ 10-20, C-001.

¹⁶ *Id.* ¶¶ 11, 21; see also KTIV Television, *Great Lakes Communication Corporation expands data center with new facility in Lake Park, IA* (Aug. 21, 2014), C-085 (available at: <http://www.ktiv.com/story/26340453/2014/08/Thursday/great-lakes-communication-corporation-has-expanded-its-data-center-to-a-new-facility-in-lake-park-iowa>) (last accessed Oct. 29, 2017); Estherville News, *Ruter, GKN honored by IGL Corridor: Annual Business Recognition Luncheon held* (Nov. 21, 2014), C-086 (available at: <http://www.esthervilledailynews.com/page/content.detail/id/520396/Ruter--GKN-honored-by-IGL-Corridor.html>) (last accessed Oct. 29, 2017); Russman, H., *The Daily Reporter, Nelson seeks to better the Corridor* (Feb. 4, 2015), C-087 (available at: <http://www.spencerdailyreporter.com/story/2163408.html>) (last accessed Oct. 29, 2017); *Great Lakes Communication Corp. Honored with Iowa Venture Award*, C-088 (available at: <http://www.glccom.com/news/ivaward.html>) (last accessed Oct. 29, 2017); Better Business Bureau Profile, *IGL TeleConnect*, C-089 (available at: <https://www.bbb.org/iowa/business-reviews/telephone-communications/igl-teleconnect-in-spencer-ia-32059936>) (last accessed Oct. 29, 2017).

ten billion minutes annually.¹⁷ GLCC provides local telephone and Internet services to residential customers in and around Spencer, Iowa, where it is based.¹⁸ It got its start by providing, and continues to provide, telecommunications services to free conference calling, chat services, and telephone services to telephone broadcast services.¹⁹

52. Mr. Blanco is a telecommunications expert with thirty years of experience in the telecommunications industry, specializing in new business development, first with MCI and then as a consultant/business partner in various projects, including development of a client base for various telecommunications corporations and with interests in telecommunications projects throughout Latin America and beyond.²⁰ Mr. Blanco first started his engagement in telecommunications issues in 1984 as an advisor to investors at the time of the AT&T divestiture.²¹ He then went to work at MCI Telecommunications in the major accounts department handling commercial accounts.²² In 1991, MCI created a new group, the International Markets Group, centered around Mr. Blanco.²³ He and the team he led handled the United Nations account worldwide as well as the accounts of many banks in Latin America, Spain and Portugal.²⁴

53. Specifically, he helped build global networks for Banco do Brasil, Techint Industrias as well as for the United Nations.²⁵ He helped the United Nations create a private

¹⁷ *Id.* ¶ 11; Dippon Report, ¶ 30, C-010.

¹⁸ Nelson Statement, ¶ 20, C-001.

¹⁹ *Id.* ¶ 10-19.

²⁰ Blanco Statement, ¶ 5, C-002

²¹ *Id.* ¶ 6.

²² *Id.* ¶¶ 6-7.

²³ *Id.* ¶ 7.

²⁴ *Id.*

²⁵ *Id.*

global network and handled a majority of their telecommunications projects for six years.²⁶ He was one of the key individuals in putting Grupo Financiero Banamex-Accival together with MCI to create the telecommunications company Avantel in Mexico.²⁷

54. Mr. Sacasa, a Mexican national, is a leader in the telecommunications industry with significant expertise in accessing and doing business in Latin American telecommunications markets, including in Mexico.²⁸ He has experience as an high-level officer of telecommunications companies.²⁹ He has served for many years as Vice President and CEO of The S Group USA, Inc. He is also the co-founder, President and General Manager of Grupo S, D.S.I., S.A. de C.V., and co-founder and General Manager of Enlaces Satelitales SS, S.A. de C.V.³⁰

2. The Corporate Structure

55. In considering the formation of a telecommunications company, Messrs. Blanco, Nelson, and Sacasa hired the law firm Bello, Gallardo, Bonequi y Garcia, S.C. (“BGBG”), in Mexico City, to advise the company regarding the process of obtaining a concession from the Government of Mexico to provide telecommunications services and to develop a clear understanding of the legal and regulatory requirements necessary to undertake the various lines of business that were being considered.³¹

²⁶

Id.

²⁷

Id. ¶ 9.

²⁸

Sacasa Statement ¶¶ 5-7, C-003.

²⁹

Id. ¶ 6.

³⁰

Id.

³¹

Nelson Statement, ¶ 28, C-001; Blanco Statement, ¶ 16, C-002; Sacasa Statement, ¶ 15, C-003; Bello Statement, ¶ 16, C-004.

56. In particular, law firm partner Carlos A. Bello Hernández provided extensive outside counsel services before and since the formation of Tele Fácil.³² Mr. Bello is a founding Partner of BGBG, with over twenty years' experience in the areas of telecommunications, broadcasting, space law, public tenders, governmental contracts and international negotiations.³³ He has advised numerous national and international companies in the preparation of public tenders in the area of telecommunications, in order for them to obtain concessions and permits and to comply with the obligations inherent in the concessions.³⁴ Mr. Bello has represented the Mexican Government on several occasions before international organizations. He has participated in various World Radiocommunication Conferences, Council meetings and plenipotentiary conferences of the International Telecommunication Union (ITU), and in various satellite coordination meetings and satellite treaties negotiations on behalf of Mexico with Canada and the United States of America, as well as meetings of the Inter-American Telecommunications Commission (CITEL, advisory body of the Organization of American States in telecommunication).³⁵

57. The IFT appointed Mr. Bello to its Advisory Council from 2015 to 2017.³⁶ According to the IFT, the Council's "members are specialists of recognized prestige in the subjects that are the competence of the Institute and [the Council] serve[s] as a multidisciplinary

³² Bello Statement, ¶ 16, C-004.

³³ *Id.* at ¶ 5.

³⁴ *Id.*

³⁵ *Id.* at ¶ 11.

³⁶ *Id.* at ¶ 6.

organ, made up of people with a recognized trajectory, accredited skills and extensive experience.”³⁷

58. Mr. Bello served as the Legal Vice-president of the Mexican Internet Association (AMIPCI) in 2013 and 2014, Vice-president of the Information Technologies Committee of the American Chamber of Commerce, Mexico since 2012, Deputy Board Member of the National Chamber of the Industry of Electronics, Telecommunications and Information Technology (CANIETI) and Board Member of the National Association of Telecommunications representing the firm and several clients.³⁸ He has taught Commercial Law and Constitutional Law at the Bachelor’s degree level, and Master’s degree courses in Telecommunications Law and International Business Law at the Universidad Iberoamericana, and served as Academic Coordinator of the Master’s Degree of Telecommunications Law and New Technologies at the Universidad Anahuac del Sur.³⁹

59. After careful assessment of the business prospects and regulatory framework in Mexico’s telecommunications market, and with the advice and guidance of Mr. Bello, the three partners agreed to proceed with making an investment in Mexico.⁴⁰

60. The parties entered into a Memorandum of Understanding on July 20, 2009.⁴¹ The Memorandum of Understanding set forth several key terms of the parties’ agreement, including:

³⁷ See IFT, *What Is the Advisory Council?*, C-105 (available at: <http://consejoconsultivo.ift.org.mx>) (last accessed Nov. 3, 2017).

³⁸ *Id.*

³⁹ *Id.* at ¶ 7.

⁴⁰ Nelson Statement, ¶¶ 28-29, C-001; Blanco Statement, ¶¶ 15-17, C-002; Sacasa Statement, ¶¶ 8-17, C-003; Bello Statement, ¶¶ 14-15, C-004.

⁴¹ Nelson Statement, ¶ 30, C-001; Blanco Statement, ¶ 17, C-002; Sacasa Statement, ¶ 16, C-003; Bello Statement, ¶ 18, C-004; Memorandum of Understanding by and between Jorge Blanco, Josh Nelson, and Miguel Sacasa (July 20, 2009) (hereinafter “Memorandum of Understanding”), C-013.

- a. Mr. Nelson agreed to be the primary financial investor in the company.⁴²
Mr. Nelson would also apply his know-how and seek to leverage his existing customer relationships at GLCC to obtain agreements for conference calling, chat, and broadcast services to enter the Mexican market so as to bring new and innovative services to Mexico.⁴³
- b. Mr. Sacasa agreed to be the day-to-day manager of the company.⁴⁴ In that capacity, he would attend to the company's finances, hire and retain necessary staff, and working with Mr. Bello, would ensure legal and regulatory compliance for the company.⁴⁵
- c. While not making a sizeable financial investment, Mr. Blanco agreed that he would contribute significant time and attention to the company to build and lead its sales and marketing operations.⁴⁶ In addition to leveraging his significant ties in the United States to attract international termination traffic to Tele Fácil, Mr. Blanco would lead the effort to train other employees to be part of a sales and marketing operation as the company grew and began to offer other wholesale and retail services.⁴⁷

⁴² Memorandum of Understanding, at 1, C-013; *see also* Nelson Statement ¶ 32, C-001; Blanco Statement, ¶ 18, C-002; Sacasa Statement, ¶ 17, C-003.

⁴³ Memorandum of Understanding, at 1, C-013 ("He will provide the Conference Calling Technology and System that will be the cornerstone of the Project plan initially."); *see also* Nelson Statement ¶ 32, C-001; Blanco Statement, ¶ 18, C-002.

⁴⁴ Memorandum of Understanding, at 2, C-013; *see also* Blanco Statement, ¶ 18, C-002; Sacasa Statement, ¶ 17, C-003.

⁴⁵ Memorandum of Understanding, at 2, C-013.

⁴⁶ *Id.*

⁴⁷ Blanco Statement, ¶ 19, C-002

- d. In exchange for his financial investment, the parties agreed that Mr. Nelson would be entitled to retain 60% of the company's profits.⁴⁸
- Messrs. Blanco and Sacasa were each entitled to receive 20% of the profits.⁴⁹

61. On January 7, 2010, the partners incorporated Tele Fácil under the laws of Mexico to serve as the investment and operating company.⁵⁰

62. At this time, Mexican telecommunications law restricted foreign ownership in the telecommunications sector to 49%.⁵¹ Consequently, the partners agreed that Mr. Nelson and Mr. Blanco would own 40% and 9% of Tele Fácil's shares, respectively, and Mr. Sacasa would own 51%.⁵² This capital structure is represented in the incorporation deed.⁵³ While it meant that Mr. Nelson would not have majority legal control at this time, it did not modify the condition of the MOU providing that Mr. Nelson would retain 60% of the profits.⁵⁴ Moreover, the parties agreed

⁴⁸ Memorandum of Understanding, at 1, C-013

⁴⁹ *Id.*

⁵⁰ *Escritura Pública No. 16,778 que contiene la constitución de Tele Fácil México, S.A. de C.V. (Public Deed No. 16,778 that contains Tele Fácil México, S.A. de C.V.'s incorporation)* (January 7, 2010) (hereinafter "Incorporation Deed"), C-014; see also Nelson Statement, ¶ 33, C-001; Blanco Statement, ¶ 21, C-002; Sacasa Statement, ¶ 19, C-003; Bello Statement, ¶ 19, C-004.

⁵¹ *Ley Federal de Telecomunicaciones* (Federal Telecommunications Law) (enacted on June 7, 1995) (hereinafter "FTL"), at Article 12, CL-001 ("The Concessions referred to in this Law shall only be granted to individuals or companies of Mexican nationality. The participation of foreign investment, in no case will exceed the 49 percent, except for mobile telephony. For this case, a favorable resolution from the National Commission of Foreign Investment will be required, so that the foreign investment may participate in a larger percentage."); see also Nelson Statement, ¶ 33, C-001; Blanco Statement, ¶ 21, C-002; Sacasa Statement, ¶ 18, C-003; Bello Statement, ¶ 17, C-004.

⁵² Nelson Statement, ¶ 33, C-001; Blanco Statement, ¶ 21, C-002; Sacasa Statement, ¶ 19, C-003; Bello Statement, ¶ 17, C-004.

⁵³ Incorporation Deed, Sixth Article & First Transitory Clause, C-014.

⁵⁴ Nelson Statement, ¶ 31, C-001; Blanco Statement, ¶ 20, C-002; Sacasa Statement, ¶ 19, C-003; Bello Statement, ¶ 18, C-004.

that once the foreign investment limitation was lifted through the anticipated reforms of Mexican law, Mr. Nelson would assume control of Tele Fácil.⁵⁵

63. Changes to the foreign ownership rules did, in fact, occur on June 11, 2013, when the Mexican constitution was amended to eliminate restrictions on foreign ownership and control in the telecommunications sector.⁵⁶ Upon this change in law, Mr. Nelson was not only still entitled to receive 60% of the Tele Fácil's profits, but also assumed majority legal control over the company, with the power to veto any significant decisions of the company.⁵⁷

64. On March 29, 2016, Tele Fácil's shareholders held a Shareholders' Meeting to confirm their agreement and formalized the transfer of shares among the shareholders in order to reflect the agreed allocation of ownership shares of Tele Fácil; namely, 60% by Mr. Nelson, 20% by Mr. Blanco and 20% by Mr. Sacasa.⁵⁸ At this stage, after Tele Fácil had been destroyed, the restructuring was a formality in order to seek protection against further mistreatment by the IFT, including the possible revocation of the company's concession.⁵⁹

65. The shareholders also executed a shareholders agreement to formalize their agreement concerning their respective responsibilities and assumptions of economic risk in the

⁵⁵ Nelson Statement, ¶ 31, C-001; Blanco Statement, ¶ 20, C-002; Sacasa Statement, ¶ 18, C-003; Bello Statement, ¶ 18, C-004.

⁵⁶ *Decreto por el que se reforman y adicionan diversas disposiciones de la Constitución Política de los Estados Unidos Mexicanos, en materia de telecomunicaciones* (Decree by which several provisions are amended and added to the Political Constitution of the United Mexican States, in telecommunications matters), (enacted on February 5, 1917) (hereinafter "Constitutional Reform"), at Fifth Transitory Article, CL-002 ("Once the Decree is enacted, up to 100 percent foreign direct investment shall be allowed in telecommunications and satellite communications."); see also Nelson Statement, ¶ 36, C-001; Blanco Statement, ¶ 24, C-002; Sacasa Statement, ¶ 29, C-003; Bello Statement, ¶¶ 18, 38, 40, C-004.

⁵⁷ Bello Statement, ¶ 18, C-004.

⁵⁸ *Escritura Pública No. 10,911 que contiene la Asamblea Extraordinaria de Accionistas de Tele Fácil México, S.A. de C.V.* (Public Deed No. 10,911 that contains the Extraordinary Shareholders Meeting of Tele Fácil México, S.A. de C.V.) (March 29, 2016) (hereinafter "Transfer of Shares"), C-072; see also Nelson Statement, ¶ 38, C-001; Blanco Statement, ¶ 25, C-002; Sacasa Statement, ¶ 30, C-003.

⁵⁹ Nelson Statement, ¶ 38, C-001; Blanco Statement, ¶ 27, C-002; Sacasa Statement, ¶ 30, C-003.

company.⁶⁰ The 2016 Shareholder Agreement confirmed that Mr. Nelson would own 60% of Tele Fácil, and that Mr. Blanco and Mr. Sacasa would each receive 20% each.⁶¹ It also recalled that Mr. Nelson provided all of the start-up capital and that he had committed to fund the venture fully until it was self-sustainable.⁶²

66. Mr. Blanco assumed responsibility for taking the lead in negotiating the necessary international interconnection agreements with relevant carriers wanting to route traffic into the Mexican market.⁶³ Mr. Sacasa was recognized as officer of Tele Fácil in charge of overseeing the day-to-day operations of the company, and as the leader for negotiating interconnection and commercial agreements with Mexican carriers.⁶⁴

3. The Original Business Plan

67. The original business plan prepared by Miguel Sacasa in February 2010, shortly after the investment company was incorporated, states that the purpose of Tele Fácil is “to create the network of companies in Mexico that make it possible to get legal Concessions and Licenses granted by the Mexican Government in order to have our own telephone infrastructure so as to market the ‘no cost conference’ product and other novel services in both fixed and wireless telephony such as internet access and cable, in a search to attain the widest possible coverage nationally.”⁶⁵

⁶⁰ Shareholder Agreement of Tele Fácil Mexico S.A. de C.V. (April 1, 2016) (hereinafter “2016 Shareholder Agreement”), C-073; Nelson Statement, ¶ 39, C-001; Blanco Statement, ¶ 26, C-002; Sacasa Statement, ¶ 30, C-003.

⁶¹ 2016 Shareholder Agreement, at 1, C-073.

⁶² *Id.* at 2.

⁶³ *Id.* at 3.

⁶⁴ *Id.*

⁶⁵ Sacasa, M., *Tele Fácil México y Great Lakes Comm de México Project* (Feb. 2010) (hereinafter “Original Business Plan”), at 2, C-015; *see also* Nelson Statement, ¶ 34, C-001; Blanco Statement, ¶ 22, C-002; Sacasa Statement, ¶ 24, C-003.

68. Thus, from the conception of the business, the partners recognized that Tele Fácil could provide several types of telecommunications services, including “no cost” conferencing services,⁶⁶ international termination,⁶⁷ fixed wireless services in select markets,⁶⁸ and VoIP service.⁶⁹ Tele Fácil’s initial business plan anticipated that “no cost” conferencing services and international traffic termination would generate revenues that would “justify the investments needed in order to mount and have this Project in operation.”⁷⁰ In other words, the high volume conferencing services and international termination would allow the company to self-fund its entry into the competitive market of providing services to more Mexican homes and businesses in order to effectively compete with Telmex.⁷¹

69. The original business plan declared that part of the objective was to go to market with the services that “Great Lakes Comm. Corp. has already developed in the United States,”⁷² and to implement the proven business model while also investigating and providing “new technologies and products that enable an exploitation of the telecommunications market in Mexico.”⁷³

70. The business plan provided that Mr. Nelson, through Great Lakes Communication Corporation, would fund the startup operations of the company, including the costs of the necessary office space, staffing, legal counsel, and technical equipment.⁷⁴ In light of the

⁶⁶ Original Business Plan, at 1, 2, 23-25, C-015.

⁶⁷ *Id.* at 3, 11.

⁶⁸ *Id.* at 2, 11-14, 18-21.

⁶⁹ *Id.* at 22-23

⁷⁰ *Id.* at 2.

⁷¹ *Id.* at 2; *see also* Nelson Statement, ¶ 25, 34; Sacasa Statement, ¶ 21, C-003.

⁷² Original Business Plan, at 2, C-015.

⁷³ *Id.* at 3.

⁷⁴ *Id.* at 5-6. He also paid salaries to Mr. Blanco and Mr. Sacasa as contemplated by the Memorandum of Understanding. *See* Memorandum of Understanding, at 2, C-013; Nelson Statement ¶ 62, C-001.

significant investment to be made by them, the business plan anticipated that 80% of the profits would be retained by the foreign shareholders of the company.⁷⁵

71. As discussed below, Claimants adapted their original business plan based on Mexico's substantial reform of its telecommunications market.

4. The Concession Granted to Claimants

72. With the company duly incorporated and in good standing, Tele Fácil applied to the Ministry of Communications and Transportation for a concession to install, operate and exploit a public telecommunications network.⁷⁶

73. Even though the FTL directed the Mexican government to review the Application for Concession and resolve it within 120 calendar days,⁷⁷ Mexico delayed consideration of Tele Fácil's application for nearly two years.⁷⁸ The long delay prompted Mr. Nelson and Mr. Blanco to seek the support of the United States Department of Commerce and the United States Embassy in Mexico City.⁷⁹ Tele Fácil was finally awarded the concession requested on May 17, 2013.⁸⁰

⁷⁵ Original Business Plan, at 5, C-015.

⁷⁶ *Solicitud para la obtención de una concesión de red pública de telecomunicaciones* (Request to obtain a public telecommunications concession) (May 27, 2011) (hereinafter "Application for Concession"), C-016; see also Nelson Statement, ¶ 40, C-001; Blanco Statement, ¶¶ 28-29, C-002; Sacasa Statement, ¶¶ 23-26, C-003; Bello Statement, ¶¶ 20-22, C-004.

⁷⁷ FTL, at Article 25, CL-001 ("The Ministry will analyze and review the corresponding documentation [the concession application] referred in the previous paragraph in a term not greater than 120 calendar days, within which it may request additional information to the interested parties. Once fulfilled, to its satisfaction, the requirements referred in the previous paragraph, the Ministry will grant the concession".)

⁷⁸ Nelson Statement, ¶¶ 40-42, C-001; Blanco Statement, ¶ 30, C-002; Sacasa Statement, ¶ 26, C-003; Bello Statement, ¶¶ 23-24, C-004.

⁷⁹ Tele Fácil Advocacy Questionnaire dated April 1, 2103, Exh. C-018; see also Nelson Statement, ¶¶ 43-44, C-001; Blanco Statement, ¶¶ 31-32, C-002; Sacasa Statement, ¶ 26, C-003; Bello Statement, ¶ 25, C-004.

⁸⁰ *Concesión para Instalar, Operar y Explotar una Red Pública de Telecomunicaciones* (Concession to Install, Operate and Exploit a Public Telecommunications Network) (May 17, 2013) (hereinafter "Concession"), C-019; see also Nelson Statement, ¶ 45, C-001; Blanco Statement, ¶ 33, C-002; Sacasa Statement, ¶ 28, C-003; Bello Statement, ¶ 26, C-004.

74. Exhibit A of the Concession specified that Tele Fácil was entitled to offer “any telecommunication service which can technically be provided by its infrastructure, except broadcasting services”⁸¹ and “the resale of capacity acquired from other concessionaires of public telecommunications networks.”⁸² With these authorized services, Tele Fácil was in place to offer “quadruple-play” services in Mexico, meaning the rights to provide (1) local and long distance wireline telephone, (2) local and long distance wireless telephone, (3) Internet, and (4) cable television services in key markets, including Mexico City, Guadalajara and Monterrey.⁸³ The Concession was granted for a period of 30 years.⁸⁴

5. Next Step – Interconnection Into the Mexican Telecommunications System

75. With the Concession in hand, Tele Fácil’s attention shifted to obtaining interconnection into Mexico’s telecommunications system so that it could freely exchange telecommunications traffic with other concessionaires.⁸⁵

76. For a new entrant, interconnection with the networks of other carriers is essential.⁸⁶ A new entrant must be able to exchange traffic with users of other networks within Mexico’s system, and to provide effective and efficient telecommunications services to the general public. Without interconnection, customers would only be able to communicate with other customers connected on the same network. For these reasons, Mexican law recognizes that

⁸¹ Concession, at Condition A.1.1, **C-019**.

⁸² *Id.* at Condition A.1.2.

⁸³ *Id.* at Condition A.4.

⁸⁴ *Id.* at Condition 1.5.

⁸⁵ Nelson Statement, ¶ 46, **C-001**; Blanco Statement, ¶ 52, **C-002**; Sacasa Statement, ¶ 38, **C-003**; Bello Statement, ¶ 45, **C-004**.

⁸⁶ OECD 2012 Telecommunication Review of Mexico, at §2.4, **C-017**.

“interconnection of telecom networks, interconnection rates and interconnection’s terms and conditions are of public interest (*orden público e interés social*).”⁸⁷

77. In addition to the gross inefficiencies that would come from the balkanization of networks, the lack of interconnection would make competition functionally impossible because consumers would necessarily join the incumbent’s network where the majority of other telephone subscribers could be contacted. Thus, interconnection is essential for the entry and survival of new entrants in competition against the incumbent carriers for market share, and particularly the dominant incumbent carrier. This is also why that law expressly provides that the IFT must favor “prompt and effective” interconnection between public telecommunications networks. Article 129 of the FTBL expressly provides that “the corresponding administrative procedures shall be filed transparently, promptly, quickly and all procedural acts which delay the effective interconnection between public telecommunication networks, or the conditions allowing the provision of the public telecommunication services not agreed on shall be avoided.”⁸⁸ As discussed in more detail below, the mandates to proceed in a manner that is “transparent” and “avoid any procedural practice that delays interconnection” were willfully and blatantly violated in this case.

78. In the highly concentrated Mexican telecommunications market, Tele Fácil had no choice but to seek interconnection with Mexico’s dominant carrier, Telmex, which controlled

⁸⁷ See Expert Opinion of Professor Clara Luz Álvarez (hereinafter “Álvarez Report”), ¶¶ 9-13, 20, 29 **C-008**, (citing *Ley Federal de Telecomunicaciones y Radiodifusión* (Federal Telecommunications and Broadcasting Law) (enacted on July 14, 2014) (hereinafter “FTBL”), at Article 125, **CL-004**; *Suprema Corte de Justicia de la Nación, Jurisprudencia P./J. 10/2011* (Jurisprudence P./J. 10/2011 of the Supreme Court of Justice of the Nation) (July 2011) (hereinafter “Jurisprudence 10/2011”), **CL-009**.

⁸⁸ FTBL, at Article 129, **CL-004**.

65% or more of Mexico's fixed-line market share at the time.⁸⁹ Tele Fácil did, however, have a choice as to how it could interconnect. Specifically, Tele Fácil sought to secure its market entry by requesting the right to an indirect interconnection through a third carrier to avoid Telmex's anticompetitive practices.⁹⁰ The condition was sought by Tele Fácil to combat Telmex's historical practice of using direct interconnection to harm new entrants, for example, by delaying the provision of interconnection circuits, controlling the quality of the service and imposing excessive deposit requirements on new entrants that sought to establish or increase capacity.⁹¹ With indirect interconnection, Tele Fácil would be able to avoid Telmex's control of its interconnection by routing its traffic through a carrier larger than Tele Fácil (e.g., Nextel⁹²), which had already established sufficient capacity with Telmex and was able to lease excess capacity to Tele Fácil to indirectly deliver traffic to Telmex.⁹³

79. In fact, Tele Fácil's plan was to indirectly interconnect to Telmex's network through Nextel: Tele Fácil learned that Nextel was ending a significant contract with a wireless carrier, Movistar, which had previously routed traffic through it.⁹⁴ Consequently, Nextel had significant capacity available for Tele Fácil's immediate use.⁹⁵

80. A final critical aspect of interconnection was price: how much would the new entrant have to pay for access to networks in the system (or in industry parlance, to "terminate"

⁸⁹ OECD 2012 Telecommunication Review of Mexico, at §1.4, **C-017** (In 2011, "[t]he incumbent, Telmex, ha[d] a fixed-line market share of 80%."); Sacasa Statement ¶ 38-39, **C-003**; Bello Statement, ¶ 29, **C-004**.

⁹⁰ Nelson Statement, ¶¶ 48-49, **C-001**; Blanco Statement, ¶ 56, **C-002**; Sacasa Statement, ¶ 46, **C-003**; Bello Statement, ¶¶ 46-50, **C-004**.

⁹¹ *Id.*

⁹² NII Digital, S. de R.L. de C.V. d/b/a Nextel.

⁹³ *Id.*

⁹⁴ Sacasa Statement, ¶¶ 57-60, **C-003**; Bello Statement, ¶ 61, **C-004**.

⁹⁵ *Id.*; see also *Convenio Marco de Prestación de Servicios de Interconexión Local que celebran NII Digital, S. de R.L. de C.V. y Tele Fácil México, S.A. de C.V.* (Master Local Interconnection Services Agreement executed by and between NII Digital S. de R.L. de C.V. and Tele Fácil México, S.A. de C.V.) (December 12, 2014) (hereinafter "Nextel Agreement"), **C-032**.

calls in other networks).⁹⁶ Again, as the overwhelmingly dominant carrier, the rate Telmex charged to terminate calls (via direct or indirect interconnection) was an important consideration for everyone in the market, but particularly for new entrants.

81. At this time, Mexican law required that the rates be reciprocal: in other words, the rate Telmex charged another carrier to terminate calls in Telmex's network had to be the same as the rate the other carrier charged Telmex to terminate calls in that carrier's network. As explained above, the Tele Fácil principals knew that, because of its overwhelmingly dominant market share, Telmex was accustomed to receiving far more calls than any other telecom company, and therefore being the net recipient of high termination rates. Because of this advantage, Telmex routinely offered high interconnection rates (because it was able to reap the benefits of a high rate) while at the same time placing a financial burden on the other carriers.⁹⁷

82. Tele Fácil's business plan permitted the company to thrive if Telmex took that approach.⁹⁸ As noted above and discussed in more detail below, part of Tele Fácil's plan involved establishing a platform for offering innovative telecom services such as free conference calling, a tried and trusted model employed by Mr. Nelson in the United States with great success, but unique to the Mexican market.⁹⁹ This required very limited termination of Tele Fácil domestic minutes in Telmex's network, but would attract a substantial amount of Telmex domestic minutes terminating in Tele Fácil's network.¹⁰⁰ Importantly for Mexican consumers, the Tele Fácil plan included expanding the market, rather than trying to obtain a share of the

⁹⁶ Bello Statement, ¶ 46, C-004.

⁹⁷ *Id.* ¶¶ 32-34; *see also* OECD 2012 Telecommunication Review of Mexico, at 67-68, C-017.

⁹⁸ Nelson Statement, ¶ 47, C-001; C-003; Bello Statement, ¶ 46, C-004.

⁹⁹ Nelson Statement, ¶ 68-76, C-001.

¹⁰⁰ *Id.*

existing market.¹⁰¹

83. In short, Tele Fácil was prepared for the onset of negotiations with Telmex.

6. Interconnection Negotiations with Telmex

84. Under the FTL, the law in effect at the time Tele Fácil won its Concession, the right of a carrier to interconnect its network to any other carrier's network arose at the time the concession was granted. The only requirement to exercise this right was simply to request interconnection from the other carrier.¹⁰² On August 7, 2013, Tele Fácil formally requested interconnection with Telmex.¹⁰³

85. On August 26, 2013, Telmex responded to Tele Fácil's request for interconnection by offering Tele Fácil its standard framework agreement for interconnection, with a term expiring on December 31, 2017.¹⁰⁴ The interconnection agreement proposed by Telmex included, among other terms, interconnection rates at USD 0.00975 per minute of use.¹⁰⁵ As Tele Fácil knew, this was standard practice for Telmex.¹⁰⁶ The rates offered by Telmex were beneficial to Tele Fácil due to the inbound-nature of the free conferencing projects it planned to implement as a core part of its competitive-entry strategy.¹⁰⁷ Thus, there were no negotiations

¹⁰¹ *Id.*

¹⁰² Soria Report, ¶ 39, C-009 (citing FTL, at Article 42, CL-001); Álvarez Report, ¶ 33, C-008.

¹⁰³ *Solicitud de inicio de negociaciones de interconexión presentada por Tele Fácil México, S.A. de C.V. a Teléfonos de México, S.A.B. de C.V.* (Request to initiate negotiations of interconnection submitted by Tele Fácil México, S.A. de C.V. to Teléfonos de México, S.A.B. de C.V.) (August 7, 2013) (hereinafter "Request to start negotiations"), C-058; Sacasa Statement, ¶¶ 40-41, C-003; Bello Statement, ¶¶ 51-52, C-004.

¹⁰⁴ *Escritura Pública No. 9,581 que contiene la notificación por virtud de la cual Teléfonos de México notifica a Tele Fácil el Proyecto de Convenio de Interconexión Local* (Public Deed No. 9,581 that contains the notification by which Teléfonos de México, S.A.B. de C.V. proposes the Local Interconnection Agreement Draft to Tele Fácil México, S.A. de C.V.) (August 26, 2013) (hereinafter "Original Draft Interconnection Agreement"), C-021; Sacasa Statement, ¶ 42, C-003; Bello Statement, ¶ 53, C-004.

¹⁰⁵ Original Draft Interconnection Agreement, at Local Interconnection Framework Agreement, Exhibit C, §§ 1.1 and 1.2, C-021; Sacasa Statement, ¶ 44, C-003; Bello Statement, ¶ 54, C-004.

¹⁰⁶ Sacasa Statement, ¶ 43, C-003; Bello Statement, ¶ 54, C-004.

¹⁰⁷ Nelson Statement, ¶ 47, C-001; Sacasa Statement, ¶ 43, C-003; Bello Statement, ¶ 54, C-004.

between the parties on price; Tele Fácil accepted the price Telmex offered. There were, however, negotiations on other aspects of the draft interconnection agreement. Eventually, the parties reached a point where only two terms could not be agreed: indirect interconnection and portability charges.¹⁰⁸

86. First, as noted above, Tele Fácil sought to secure its market entry by requesting the right to an indirect interconnection to avoid Telmex's anticompetitive practices. Second, Tele Fácil sought to eliminate the costs of transferring Telmex customers to Tele Fácil's competitive offerings, known as "portability charges."¹⁰⁹ Imposing charges when an existing Telmex customer "ports" their telephone number to a competitor (that is, moves its telephone number to another carrier, such as Tele Fácil) is another way in which Telmex, as the Tele Fácil principals knew, exercised its monopoly powers to raise barriers for new entrants to gain a foothold in the telecommunications market. Telmex insisted on including these charges even though they had already been declared unlawful.¹¹⁰

87. However, consistent with Telmex's proven monopolistic practices, and despite many months of meetings and discussions to try to reach an agreement, it refused to allow indirect interconnection and would not eliminate portability charges.¹¹¹

¹⁰⁸ *Comentarios al proyecto de convenio de interconexión local enviados por Tele Fácil México, S.A. de C.V. a Teléfonos de México, S.A.B. de C.V.* (Comments to the draft local interconnection agreement sent by Tele Fácil México, S.A. de C.V. to Teléfonos de México, S.A.B. de C.V.) (July 7, 2014) (hereinafter "Comments to Original Draft Interconnection Agreement"), C-024; Bello Statement, ¶¶ 54, 58, 59. C-004.

¹⁰⁹ Comments to Original Draft Interconnection Agreement, at 4, C-024; Sacasa Statement, ¶ 47, C-003; Bello Statement, ¶ 59. C-004.

¹¹⁰ *Id.*

¹¹¹ Sacasa Statement, ¶¶ 48-52, C-003; Bello Statement, ¶¶ 60-63, C-004.

7. The Dispute Resolution Process with Telmex

88. On July 11, 2014, Tele Fácil informed the regulator that all interconnection terms had been agreed between the parties except two (portability charges and indirect interconnection) and requested to initiate the procedure to resolve these remaining issues.¹¹²

89. On August 27, 2014, Telmex replied to the IFT, requesting that it deny the relief requested by Tele Fácil.¹¹³ The arguments submitted by Telmex included the following:

- a. negotiations had not started because Tele Fácil never formally requested interconnection;¹¹⁴
- b. the parties had not jointly informed the IFT of the commencement of negotiations and therefore the 60-day term necessary to begin the disagreement procedure had not elapsed;¹¹⁵
- c. the parties had not actually executed the agreement because Tele Fácil requested two modifications to the Telmex standard agreement, and Telmex is prohibited from changing its agreement due to the “non-discrimination” principle;¹¹⁶

¹¹² *Solicitud de intervención por desacuerdo de interconexión presentada por Tele Fácil México, S.A. de C.V. ante el Instituto Federal de Telecomunicaciones* (Request for intervention in interconnection disagreement submitted by Tele Fácil México, S.A. de C.V. before the Federal Telecommunications Institute) (July 10, 2014) (hereinafter “Request for Interconnection Dispute Resolution”), **C-025**; Bello Statement, ¶¶ 63-64, **C-004**.

¹¹³ *Respuesta a inicio de desacuerdo de interconexión presentada por Teléfonos de México, S.A.B. de C.V. ante el Instituto Federal de Telecomunicaciones* (Reply by Teléfonos de México, S.A.B. de C.V. to interconnection disagreement procedure submitted before the Federal Telecommunications Institute) (August 26, 2014) (hereinafter “Telmex’s Reply to Interconnection Dispute”), **C-027**.

¹¹⁴ *Id.* at Argument I.

¹¹⁵ *Id.* at Arguments II & III.

¹¹⁶ *Id.* at Argument IV.

- d. in the event that the IFT considered that negotiations had actually started, Telmex contended that there was no disagreement on indirect interconnection and portability charges; and¹¹⁷
- e. the rates had not been agreed upon by the parties.¹¹⁸

90. Remarkably, to support its argument that there was no disagreement regarding the indirect interconnection and portability charges, Telmex submitted a modified agreement along with its reply to the IFT, which now included indirect interconnection and removed the portability charges.¹¹⁹ Even more remarkably, the modified interconnection agreement omitted all of its exhibits, including the one that contained the rates and which would have confirmed the validity of those rates through December 31, 2017.¹²⁰

91. Telmex's omission of the agreed rates was not an accident. Under the post-reform legal framework, because Telmex was now designated a "preponderant economic agent," the FTBL required Telmex to charge a "zero rate" for terminating telecommunications traffic on its network.¹²¹ This made the original interconnection terms less profitable for Telmex. The new asymmetric regulation was designed to foster competition and favor new competitors.¹²² It converted the anticompetitive high interconnection rate that Telmex had historically used to abuse its market share and collect high amounts from new entrants, into a profit source for Tele Fácil and every other carrier that was potentially able to charge the high rate, while Telmex was prevented from collecting it.

¹¹⁷ *Id.* at Argument V.

¹¹⁸ *Id.* at Argument VI - X.

¹¹⁹ *Id.* at Argument IX; *see also id.* at Local Interconnection Framework Agreement, First Clause and Nineteenth Clause (previously "Portability"); Bello Statement ¶ 65, C-004.

¹²⁰ Bello Statement ¶ 65, C-004.

¹²¹ Soria Report, ¶¶ 13, 160, C-009, (citing FTBL, at Article 131, CL-004).

¹²² *Id.* at ¶ 162.

92. With this realization, Telmex now wanted to walk away from contractual terms that Tele Fácil had already accepted. On September 9, 2014, after reviewing the filings of both parties, the IFT notified them that it was ready to conclude the procedure, allowed the parties to review the file docket, and gave the parties ten days to submit their closing arguments, if any.¹²³ On September 24, 2014, both Telmex and Tele Fácil submitted their final arguments.¹²⁴

93. Telmex made basically the same arguments as it made in its August 26 submission. As a final argument, Telmex requested that the IFT determine the applicable rates.¹²⁵ It is important to note that at this time Telmex *never* contended that the negotiated rates were no longer applicable under the new law (a contention it would later make).¹²⁶

¹²³ *Oficio No. IFT/D05/UPR/JU/717/2014 por el cual el Instituto Federal de Telecomunicaciones requiere a Teléfonos de México, S.A.B. de C.V. y Tele Fácil S.A. de C.V. que formule alegatos* (Document No. IFT/D05/UPR/JU/717/2014 by which the Federal Telecommunications Institute requires Teléfonos de México, S.A.B. de C.V. and Tele Fácil, S.A. de C.V. to submit final arguments) (September 3, 2014; notified September 9, 2014) (hereinafter "Request for Final Arguments"), **C-106**.

¹²⁴ *Alegatos presentados por Telmex en el Desacuerdo de Interconexión frente al Instituto Federal de Telecomunicaciones* (Telmex's Closing Arguments to the Disagreement Procedure submitted before the Federal Telecommunications Institute) (September 24, 2014) (hereinafter "Telmex's Closing Arguments"), **C-028**; *Alegatos presentados por Tele Fácil en el Desacuerdo de Interconexión frente al Instituto Federal de Telecomunicaciones* (Tele Fácil's Closing Arguments to the Disagreement Procedure submitted before the Federal Telecommunications Institute) (September 24, 2014), **C-093**.

¹²⁵ Telmex's Closing Arguments, at Argument Sixth, **C-028**; Bello Statement ¶ 66, **C-004**;

¹²⁶ Instead, Telmex argued that it was entitled to continue charging the high rate on a reciprocal basis despite the FTBL's asymmetrical regulations. Specifically, it asserted that "the rates determined by this Institute shall be reciprocal and consistent with those that the extinct Federal Telecommunications Commission and the Institute have established for other concessionaires under equal circumstances, under the principle of Nondiscriminatory Treatment contained in the FTL, and in Telmex and Telnor's concession titles." See Telmex's Closing Arguments, at Argument Sixth, **C-028**.

C. The IFT's Recognition of Tele Fácil's Rights to Interconnection with Telmex at the Contracted Rates

1. Resolution 381

94. On November 26, 2014, the IFT Plenary ruled unanimously, resolving the disagreement in Tele Fácil's favor on all counts.¹²⁷ The IFT's decision, embodied in Resolution 381,¹²⁸ rejected Telmex's terms on portability charges and determined that Tele Fácil was entitled to indirectly interconnect with Telmex—a ruling that was critical to Tele Fácil's market viability. The IFT also ruled that all other interconnection terms, conditions and rates were already established as agreed by the parties.

95. First, it found that the only interconnection terms not agreed to by the parties during the negotiation process to execute the corresponding interconnection agreement were with respect to portability charges and indirect interconnection.¹²⁹ It recognized that Telmex had since agreed to these terms, and on that basis ordered indirect interconnection of the companies' networks, and the elimination of Telmex's portability charges:

From reviewing the parties' positions, it is concluded that Tele Fácil as well as Telmex and Telnor expressed their will to execute the local interconnection agreement including the provision of indirect interconnection service and the modifications required to the corresponding definitions. Likewise, Telmex and Telnor accepted to eliminate from the agreement the portability clause as requested by Tele Fácil. The previous modifications were reflected in the draft interconnection agreement which was presented as evidence in Telmex and Telnor's Reply....

¹²⁷ *Versión Estenográfica de la XVII Sesión Ordinaria del Pleno 26 de noviembre de 2014*, (Transcript of Plenary's XVII Ordinary Session dated November 26, 2014) (hereinafter "Transcript of Plenary Session adopting Resolution 381"), at p. 8, **C-030**.

¹²⁸ *Resolución mediante la cual el Pleno del Instituto Federal de Telecomunicaciones determina las condiciones de interconexión no convenidas entre Tele Fácil México, S.A. de C.V. y las empresas Teléfonos de México, S.A.B. de C.V., y Teléfonos del Noroeste, S.A. de C.V.*, P/IFT/261114/381 (Nov. 26, 2014) (hereinafter "Resolution 381"), **C-029**; Sacasa Statement, ¶ 62, **C-003**; Bello Statement, ¶ 68, **C-004**.

¹²⁹ Resolution 381, pp. 10-14, **C-029**.

By virtue of the parties being in agreement with the interconnection terms and conditions, the corresponding draft agreement would allow compliance with the FTL, pursuant to articles 1792, 1794, 1803 and 1807 of the Federal Civil Code that is supplemental to the FTL pursuant to article 8, section IV of the FTL.

Consequently, having dismissed Telmex's arguments, and there existing an **agreement between Tele Fácil, Telmex and Telnor to formalize the Agreement for the Provision of Local Interconnection Services offered by Telmex and Telnor, as evidence in Telmex and Telnor's Reply, such concessionaires are obligated to grant the interconnection requested by Tele Fácil.**¹³⁰

96. Second, the IFT rejected Telmex's claim that the parties had never agreed to interconnection rates. The IFT found unequivocally that the interconnection rates were fully established and that Telmex offered the rates and "Tele Fácil had full knowledge of and consented to these rates."¹³¹ This aspect of the decision was critical to Tele Fácil because it confirmed Tele Fácil's ability to provide its planned free conferencing services at a profit, and, as discussed more fully below, provided Tele Fácil with additional revenue opportunities.

97. Specifically, the IFT stated:

In this regard, the Institute considers Telmex and Telnor's arguments to be inadmissible, given the fact that the interconnection rates were completely determined by Telmex and Telnor in the draft interconnection agreement sent to Tele Fácil on August 26, 2013, and which Tele Fácil had full knowledge of and consented the same.

Consequently, **Telmex and Telnor's argument in connection with an alleged disagreement on interconnection rates is dismissed, since the aforementioned rates were defined in the draft agreement for the provision of fixed local interconnection services and its exhibits, sent by Telmex and Telnor to Tele Fácil, and which are part of the evidence in this record, particularly the ones indicated in Background IX of this Resolution.**

¹³⁰ *Id.* at pp. 15-16 (emphasis added); Sacasa Statement, ¶ 62, C-003; Bello Statement, ¶ 68, C-004.

¹³¹ Resolution 381, at pp. 13-14, C-029 (emphasis added); Sacasa Statement, ¶ 63, C-003; Bello Statement, ¶ 69, C-004.

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.

Furthermore, there is no document in the record that proves that Telmex and Telnor claimed to be in disagreement with the interconnection rates during the time the parties held negotiations to execute the corresponding interconnection agreement.

This is, Telmex and Telnor's request for the Institute to determine interconnection rates that were not agreed with Tele Fácil, does not meet the legal premise established in article 42 of the FTL, since **from reviewing the evidence in the record of this proceeding, there is no evidence that Telmex and Telnor expressed their disagreement with the interconnection rates**, nor that a formal request to begin negotiations regarding the aforementioned interconnection rates was performed and that in fact, the 60 (sixty) day period established in article 42 of the FTL has elapsed without the aforementioned concessionaires reaching an agreement on the rates, therefore Telmex and Telnor's request is dismissed.¹³²

98. Having dismissed all of Telmex's arguments categorically and having found in Tele Fácil's favor on all counts, the IFT ordered Telmex and Tele Fácil to execute the interconnection agreement, as determined by the IFT in this Resolution, and to interconnect their systems within ten business days after notification of the ruling:

[T]he parties must interconnect their public telecommunications networks to provide local service, to allow the interoperability of the networks and telecommunications services; in order for the end users of one network to be able to connect and route public traffic to the users of the other and vice versa, or to use services provided by the other networks, complying with the public interest as previously referred and in its case, to formalize the interconnection agreement pursuant to this Resolution, in order to satisfy the public interest as soon as possible.

Additionally, and in order for the interconnection terms and conditions determined by the IFT in this Resolution to be offered in a non-discriminatory manner to other concessionaires who request them and that

¹³² Resolution 381, pp. 13-14, C-029 (emphasis added).

require similar interconnection services, capacities or functions, the IFT Plenary deems convenient to make this Resolution available to them. For these purposes, this Resolution shall be recorded in the Public Telecommunications Registry kept by the IFT within the next 10 (ten) business days.

The above, **without prejudice to Tele Fácil and Telmex formalizing the interconnection terms, conditions and rates that are ordered through this Resolution and for such effect to execute the corresponding agreement.** In this regard, the concessionaires, jointly or individually, must submit the interconnection agreement for inscription in the Public Telecommunications Registry within the 30 (thirty) business days following its execution.¹³³

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

FIRST. Within 10 (ten) business days following the date in which the notification of this Resolution is effective, Tele Fácil México, S.A. de C.V., and the companies Teléfonos de México, S.A.B. de C.V. and Teléfonos del Noroeste, S.A. de C.V. must interconnect their telecommunications networks and initiate the provision of the corresponding interconnection services. In that same term, such companies must execute the interconnection agreement of their telecommunications networks pursuant to the terms and conditions determined in the FIFTH Consideration section of this Resolution. Once the corresponding agreement has been executed, they must submit jointly or individually an original or certified copy of the agreement to the Federal Telecommunications Institute, within the 30 (thirty) business days following its execution, in order to register it in the Public Telecommunications Registry.¹³⁴

2. Tele Fácil's Rights Under Mexican Law

100. In Resolution 381, the IFT resolved the only disputed interconnection terms regarding portability charges and indirect interconnection decidedly in Tele Fácil's favor, and it expressly ruled that all other interconnection terms, notably including those relating to

¹³³ *Id.* at pp. 15-16 (emphasis added).

¹³⁴ *Id.* at First Resolution, p. 17.

interconnection rates, were effective as having been agreed to between Tele Fácil and Telmex.¹³⁵

Consequently, the IFT found that the parties were obliged to execute the interconnection agreement reached by the two companies, as confirmed in Tele Fácil's favor, and physically interconnect their systems within ten business days.¹³⁶

101. Resolution 381 vested Tele Fácil with significant and valuable rights under Mexican law: among other rights, Tele Fácil had the right to indirectly interconnect with Telmex's network, the right to avoid compensating Telmex for number portability, and the right to a high rate through 2017.¹³⁷ As noted above, the IFT additionally ordered this Resolution to be published in the public registry, so that "the interconnection terms and conditions determined by the IFT in this Resolution [will be] offered in a non discriminatory manner to other concessionaires who request them."¹³⁸ The definitive nature of this Resolution could not have been clearer.

102. As a consequence of Resolution 381, Tele Fácil was now entitled under Mexican law to exchange telecommunications traffic with Telmex under its concession (indirectly through Nextel) pursuant to the rate offered by Telmex and agreed by Tele Fácil, and had already lined up strong commitments from many other providers, both in Mexico and internationally, in order to begin quickly offering substantial telecommunications services to Mexican customers and earning revenue.¹³⁹

¹³⁵ *Id.* at pp. 13-14.

¹³⁶ *Id.* at First Resolution, p. 17.

¹³⁷ Bello Statement, ¶ 70, C-004; Álvarez Report, ¶ 87, C-008; Soria Report, ¶¶ 70-77, C-009.

¹³⁸ Resolution 381, pp. 15-16, C-029.

¹³⁹ *See, e.g.*, Nelson Statement, ¶¶ 73-75, C-001; Blanco Statement, ¶¶ 39-41, C-002; Witness Statement of Josh Lowenthal (hereinafter "Lowenthal Statement"), ¶¶ 15-21, C-005; Witness Statement of George Cernat (hereinafter "Cernat Statement"), ¶¶ 12-17, C-006; Witness Statement of [REDACTED] (hereinafter [REDACTED]), ¶¶ 4-11, C-007; Sacasa Statement, ¶¶ 64-69, C-003; Bello Statement, ¶¶ 71-73, C-004.

103. Resolution 381 operated as IFT resolutions should. As the IFT itself has stated several times in resolving interconnection disputes and ordering interconnection:

“[t]he interconnection agreement to be executed by the parties must allow the provision of interconnection services between the telecommunications networks without having any pending elements to be agreed for the duration of the agreement's effective term; likewise, **the resolution that the IFT issues to resolve conditions that have not been agreed by the parties shall operate in the same manner, this, in order that once the IFT has issued its resolution there are no pending elements to be determined that would prevent the provision of the services.**”¹⁴⁰

104. In accordance with the rights vested by Resolution 381, on December 12, 2014, Tele Fácil entered into an interconnection agreement with Nextel to permit indirect interconnection with Telmex.¹⁴¹

105. Nextel México was a much larger company than Tele Fácil and thus had more leverage vis-à-vis Telmex. As noted above, Nextel had been able to secure significant capacity for the exchange of traffic with Telmex, and was about to end a significant contract with a wireless carrier, Movistar, which had previously routed traffic through it.¹⁴² Nextel therefore had the ability to offer Tele Fácil a reliable interconnection option for the indirect exchange of its traffic with Telmex.¹⁴³ Tele Fácil's interconnection agreement with Nextel thus gave it a uniquely viable avenue to quickly and efficiently access the Mexican telecommunications

¹⁴⁰ See, e.g., *Resolución P/IFT/251115/543 mediante la cual el Pleno del Instituto Federal de Telecomunicaciones determina las condiciones de interconexión no convenidas entre Mega Cable, S.A. de C.V. y AT&T Digital, S. de R.L. de C.V.* (Resolution P/IFT/251115/543 through which the Plenary of the Federal Telecommunications Institute determines the conditions of interconnection not agreed between Mega Cable, S.A. de C.V. and AT&T Digital, S. de R.L. de C.V.) (November 25, 2015), **C-100**; *Resolución P/IFT/120815/356 mediante la cual el Pleno del Instituto Federal de Telecomunicaciones determina las condiciones de interconexión no convenidas entre Teléfonos de México, S.A.B. de C.V. e IP Matrix, S.A. de C.V.* (Resolution P/IFT/120815/356 through which the Plenary of the Federal Telecommunications Institute determines the conditions of interconnection not agreed between Teléfonos de México, S.A.B. de C.V. and IP Matrix, S.A. de C.V.) (August 12, 2015), **C-101** (emphasis added).

¹⁴¹ Nextel Agreement, **C-032**.

¹⁴² Sacasa Statement, ¶¶ 57-60, **C-003**; Bello Statement, ¶ 61, **C-004**.

¹⁴³ *Id.*

network without fear that Telmex would delay the provisioning of circuits necessary for Tele Fácil to exchange traffic directly with Telmex, or otherwise impair Tele Fácil's ability to deliver quality service to its customers.

106. While pursuing an interconnection agreement with Telmex, Tele Fácil had also progressed its plans so that it would be ready to commence operations shortly after the interconnection dispute was resolved by the IFT. By way of example, these efforts included:

- a. entering into negotiations to interconnect with other relevant carriers in Mexico such as [REDACTED] and [REDACTED];¹⁴⁴
- b. Requesting and obtaining telephone numbers from the IFT that would be assigned by Tele Fácil to its customers;¹⁴⁵
- c. Complying with certain conditions imposed by the concession, including without limitation, obtaining the required bond guaranteeing compliance with its obligations, filing information on shareholders as required, submitting financial statements periodically as mandated, etc.;¹⁴⁶
- d. Investing in necessary switching and other equipment;¹⁴⁷
- e. Leasing appropriate office and colocation space;¹⁴⁸ and
- f. Hiring staff.¹⁴⁹

¹⁴⁴ Nelson Statement, ¶ 56, C-001.

¹⁴⁵ *Id.* ¶ 57, C-001; *Oficio IFT/D03/USI/0936/13 por virtud del cual el Instituto Federal de Telecomunicaciones asignan números geográficos a Tele Fácil México, S.A. de C.V.* (Document IFT/D03/USI/0936/13 by which the Federal Telecommunications Institute assigns numbers to Tele Fácil, S.A. de C.V.) (December 17, 2013), C-022.

¹⁴⁶ Nelson Statement, ¶ 58, C-001.

¹⁴⁷ *Id.* ¶ 60 - 62.

¹⁴⁸ *Id.* ¶ 60.

¹⁴⁹ *Id.* ¶ 62.

107. With all aspects in line for a successful start of operations, Tele Fácil was ready to serve Mexican consumers by following the IFT's order to execute an interconnection agreement and physically interconnect with Telmex.¹⁵⁰

108. Before discussing Telmex's reaction to Resolution 381 (which was, essentially, to do everything in its power not to comply with it and – successfully as it would turn out – to seek its reversal), it is important to understand Mexico's contemporaneous reform of its notoriously closed and monopolistic telecommunications industry. This is described in the section that follows.

109. While the fact is that the negotiations and dispute resolution process between Tele Fácil and Telmex straddled the pre- and post-telecommunications reform undertaken by Mexico, this reform was very public and long in its making; it did not come as a surprise to anyone in the sector, and indeed was much anticipated within Mexico and internationally.¹⁵¹ It is also worth bearing in mind that the interconnection dispute resolution procedure before the regulator continued seamlessly without major modifications.¹⁵² This was, in large part, because it has always been a fundamental principle of Mexican telecommunications law and policy that the freedom of contract should be the foundation of interconnection negotiations.¹⁵³ Accordingly, engagement by the regulator is necessary only as a last resort to resolve disagreements that arise

¹⁵⁰ *Id.* ¶ 63.

¹⁵¹ *See, e.g.*, OECD (2017), *OECD Telecommunication and Broadcasting Review of Mexico 2017*, OECD Publishing, Paris (hereinafter "OECD 2017 Telecommunication Review of Mexico"), at Foreword, p. 5, **C-084** ("In 2012, the OECD published an *OECD Review of Telecommunications Policy and Regulation in Mexico* as a contribution to what would become a broad constitutional, legal and regulatory reform in the telecommunications sector in Mexico.")

¹⁵² Soria Report, ¶¶ 10-16, **C-009**.

¹⁵³ *Id.*

during negotiations in order to secure prompt and effective interconnection that is so vital to the health and viability of a competitive and open telecommunications market.¹⁵⁴

D. Telmex's Monopolistic Practices Lead to Telecommunications Reforms

1. Background of Mexico's Telecommunications

110. Like many countries, Mexico had a public monopoly for wireline telephony; in Mexico, the public monopolist was Telmex.¹⁵⁵ It was partially privatized in 1990, and the history of the Mexican telecommunications sector since then is replete with the efforts of the Mexican government and regulators to slowly peel away Telmex's preferential status so as to introduce real competition into the marketplace.¹⁵⁶ In this regard, it is a history of only checkered success.¹⁵⁷ Promulgation of the 1994 FTL was one such effort by the Mexican government to liberalize the Mexican telecommunications market and to address Telmex's monopolistic powers. This reform effort, however, was widely recognized as having failed in its goal of creating a competitive telecommunications market.¹⁵⁸

111. One example is illustrative: the FTL established a process where by the Mexican competition and telecommunications regulators could declare Telmex a dominant carrier, thereby enabling the regulators to apply asymmetric regulations to Telmex that were specifically designed to reduce the market power of dominant firms. However, despite the Mexican government's numerous attempts to do so, this goal was never achieved.

¹⁵⁴ *Id.* ¶ 14; *see also* Álvarez Report, ¶¶ 21-22, C-008.

¹⁵⁵ Álvarez Report, ¶¶ 14, C-008.

¹⁵⁶ OECD 2012 Telecommunications Review of Mexico, p. 22, C-017; *see also* Bello Statement, ¶ 31, C-004.

¹⁵⁷ OECD 2012 Telecommunications Review of Mexico, p. 25, C-017 ("Competition has been slow to develop in Mexico. In the past, regulatory decisions encouraging competition have not been taken when necessary, and have been delayed and frustrated by regulatory capture and the legal system, including the use or abuse of *amparos* (legal injunctions)"; *id.* at p. 15 ("Still, competition challenges remain in the sector.")).

¹⁵⁸ *Id.*, at pp. 11-13, C-017; *see also* Bello Statement, ¶ 36, C-004.

112. The efforts failed fundamentally because Telmex fought the cumbersome regulatory process to a standstill. At that time, the “dominant carrier” determination was subject to a two-step process: the CFC first had to declare Telmex a dominant carrier; once that determination was final and binding with no further possibility of appeal, COFETEL was then authorized to impose asymmetric regulation. Despite controlling upwards of 70%¹⁵⁹ of Mexico’s telecommunications network for over 15 years, Telmex somehow managed to avoid being declared a dominant carrier over this entire period.¹⁶⁰

113. The OECD 2012 Telecommunication Review of Mexico noted that the Government of Mexico had been historically unable or unwilling to curb the abuses of Telmex and suffered from systematic regulatory failures. According to the OECD 2012 Telecommunication Review of Mexico:

Unlike most OECD countries, pro-competitive decisions have been slow to emerge in Mexico and, when taken, have been frustrated by ineffective regulatory and legal systems. . . . The sector regulator (Cofetel) lacks sufficient enforcement power and autonomy to perform its role. A lack of clear division between policy formulation and regulatory functions, in addition to inconsistent inter-agency procedures, has multiplied the opportunity for legal challenges and has created confusion within the industry, constituting barriers to market entry and effective competition. . .

One of the main barriers to competition is that decisions are either not enforced or suspended by the courts, which also diminishes effective development of regulations. Dominant operators have exploited the weak institutional framework. . . .¹⁶¹

114. With regard to the impact of Telmex’s power over the telecommunications market, the OECD reported that:

¹⁵⁹ OECD 2012 Telecommunications Review of Mexico, p. 20, **C-017**.

¹⁶⁰ For a summary of how this process unfolded and failed, see OECD 2012 Telecommunications Review of Mexico, pp. 66-67, **C-017**.

¹⁶¹ *Id.* at p. 12.

The lack of telecommunication competition in Mexico has led to inefficient telecommunications markets that impose significant costs on the Mexican economy and burden the welfare of its population. The sector is characterised by high prices, among the highest within OECD countries, and a lack of competition, resulting in poor market penetration rates and low infrastructure development. . .

[T]he resulting loss of benefit to the economy is estimated at USD 129.2 billion (2005-2009) or 1.8% GDP per annum.¹⁶²

115. When discussing the practices of Telmex, the OECD Review noted that Mexico was “ranked last in terms of investment per capita,” with the “[p]rofit margins of [Telmex] nearly double the OECD average.”¹⁶³

116. With regard to the regulator (COFETEL at the time of this report), the OECD Review indicated that it was often “criticized for lack of transparency” and “for not responding to requests, not meeting deadlines, and not reacting sufficiently fast to complaints that potentially impose a cost on market participants if resolution is delayed.”¹⁶⁴ It also noted a critical need for the regulator to “demonstrate[] its independence” and that it “is not subject to capture by the sector it regulates,” noting that “[i]n the past there have at times been close links between staff and the companies they regulate.”¹⁶⁵ It criticized COFETEL’s decision-making processes, observing:

There is a need in general to implement a more open and inclusive consultation procedure; one which is predictable and follows a well-defined process that not only allows the regulatory agency to reveal its thinking and methodologies at various stages of the regulatory process, but also permits all parties to participate constructively in the process. Such transparency should apply to all decision-making processes carried out by the regulator.¹⁶⁶

¹⁶² *Id.* at p. 11.

¹⁶³ *Id.* at p. 12.

¹⁶⁴ *Id.* at p. 49.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at p. 57.

117. After noting that the conditions imposed on Telmex included an obligation to “negotiate with other operators for the terms and conditions governing interconnection,”¹⁶⁷ the OECD Review stated that “reviews to determine whether companies are adhering to the conditions of their concession have not been undertaken,” but “are particularly necessary for [Telmex] as many industry players claim that it has not met its concession terms.”¹⁶⁸

118. The OECD Review also recognized the critical importance of interconnection, noting that “a satisfactory interconnection and access regime is indispensable to the development of a thriving, competitive telecommunications sector,” and that “[i]n practice, access delayed is often access denied.”¹⁶⁹ It concluded that “[t]he welfare loss to the Mexican economy [resulting from the failure of competitive telecommunications markets] is largely a result of the inability of COFETEL . . . to find a long-lasting solution to interconnection issues.”¹⁷⁰

119. The OECD Review stated that Telmex followed a common practice of filing *amparo* lawsuits to challenge both procedural and definitive resolutions of all or most of the regulator’s decisions in interconnection matters.¹⁷¹ *Amparo* actions are constitutional actions designed to protect person or entity’s constitutional rights. As such, they are extraordinary pleas against acts of authority outside the normal legal process of dispute resolution. Prior to the reform, an *amparo* can lead to suspension of a decision if a regulation is considered to affect and cause irreparable damage to individuals or companies.¹⁷²

¹⁶⁷ *Id.* at p. 52.

¹⁶⁸ *Id.* at p. 52.

¹⁶⁹ *Id.* at p. 65.

¹⁷⁰ *Id.* at p. 67; *see also id.* at p. 9 (“The welfare loss attributed to the dysfunctional Mexican telecommunications sector is estimated at USD 129.2 billion (2005-2009) or 1.8% GDP per annum.”).

¹⁷¹ *Id.* at p. 67.

¹⁷² *See id.* at 55.

120. For Telmex, this process was part of its normal legal strategy; it would request a temporary injunction order from an *amparo* court to stop the effects of the challenged resolution while the *amparo* was resolved, allowing it to legally avoid the obligation to interconnect its network during the *amparo* trial.¹⁷³ Once it obtained an injunction, Telmex showed no incentive to seek to resolve the actual interconnection disputes, and as a consequence, many lingered for years. According to 2012 OECD Review:

The indiscriminate use of *amparos* (by all operators) presents one of the greatest difficulties in promoting competition in the telecommunication sector in Mexico. Telmex and Telcel have managed to avoid asymmetric regulations by taking advantage of Mexico's *amparo* system and obtaining a judicial suspension for regulatory decisions that affects them or their resources.¹⁷⁴

121. Among the many conclusions and recommendations of the OECD Review, two stand out as particularly apt and relevant to the present case. The first is its conclusion that “the unsatisfactory performance of the telecommunications industry in Mexico is the result of the relentless behaviour of an incumbent fixed and mobile provider with significant market power and a dysfunctional legal system that promotes an inefficient industry which is unattractive to international partnerships and therefore is damaging to the economic potential of the country.”¹⁷⁵ All of these elements are present in this case.

122. The second addresses the failure of the “process of setting and enforcing the terms and conditions for supply of access and interconnection products,”¹⁷⁶ exactly the failure at issue here. The OECD Review states:

¹⁷³ *Id.*; see also Bello Statement, ¶ 39, C-004;

¹⁷⁴ OECD 2012 Telecommunications Review of Mexico, p. 55, C-017; see also *id.* at pp. 72-73 for a more generic description of abuse of the *amparo* process and recommendations to curb those abuses.

¹⁷⁵ *Id.* at p. 113.

¹⁷⁶ *Id.* at p. 73.

It is clear that a considerable gap exists between the actual state of regulation of interconnection and access in Mexico and the desirable properties of such a system outlined above. In short, a limited number of interconnection and access products are available, and their prices often appear to be high; there are allegations of poor service quality; there is little transparency or predictability; and delays in the process, as a result of the *amparo* system, are long and variable. In a marketplace where a single firm dominated the fixed voice, fixed broadband, and mobile marketplace, this is a recipe, as highlighted at the beginning of this report, for high costs, high prices, low quality, little choice, limited competition and low rates of penetration, with predictable adverse consequences for Mexico's economic development and the welfare of its citizens.

Improving the process of setting and enforcing the terms and conditions for supply of access and interconnection products is fundamental to improving the system.¹⁷⁷

123. The impact of the 2012 OECD Review was enormous; as seen below, it was expressly cited in the rollout of the President's reform efforts, and clearly strengthened the demand for change in the Mexican telecommunications market by openly and neutrally identifying with great specificity the shortcomings of that market.¹⁷⁸ However, as the present case shows, while the structural reforms thereafter undertaken were substantial, the human failures, primarily of the regulators to stand up to Telmex, and of the *amparo* judges to rule with the requisite expertise and independence, a truly fair and open telecommunications market still eludes Mexico.

2. Mexico's Constitutional Telecommunications Reform

124. Following the damning conclusions of the OECD Review, on December 1, 2012, Enrique Peña Nieto, during his inauguration ceremony and first speech to the nation as President of Mexico informed about the main presidential determinations, including the following:

¹⁷⁷ *Id.* at p. 72-73.

¹⁷⁸ *See, e.g., infra* at ¶¶ 129 & 131.

“Tenth: In the coming days, the President of the Republic will send an initiative to recognize in the Constitution the right to Broadband Access, as well as a number of reforms to generate greater competition in telephony, data, television and radio services.”¹⁷⁹

125. The next day, December 2, 2012, the “*Pacto por México*” was executed by President Peña Nieto, with the backing of the presidents of the three major political parties in the country.¹⁸⁰ The second of five sections of the *Pacto por México* is the “Agreements for the economic, employment and competitiveness growth.”¹⁸¹ Here, the political leaders agreed to, *inter alia*, the following reforms regarding the telecommunications sector:

Section 2. *Agreements for the economic, employment and competitive growth.*

Section 2.1. Extend the benefits of an economy made up of competitive markets.

Economic competition will be intensified in all sectors of the economy, with special emphasis in strategic sectors such as telecommunications, transport, financial services and energy. . . . To begin this State policy, the following actions are proposed:

- **Strengthening the Federal Antitrust Commission (CFC).**

[Commitment 37]

- **Creation of specialized courts for economic competition and telecommunications matters.**

[Commitment 38]

Section 2.2. Guarantee equitable access to world-class telecommunications.

¹⁷⁹ *Discurso Inaugural del Presidente Enrique Peña Nieto* (Inaugural Address by President Enrique Peña Nieto) (December 1, 2012) (hereinafter “Inaugural Speech”), **CL-012**

¹⁸⁰ *Pacto por México* (Pact for Mexico) (December 2, 2012) (hereinafter “Pacto por México”), **CL-013**.

¹⁸¹ *Id.* at Section 2.

In the telecommunications sector, it is necessary to generate much greater competition in fixed and mobile telephony, data services and open and restricted television. To do this, the following measures will be taken:

- **Right to Broadband access and effectiveness of regulator body decisions.**

Amend the Constitution to recognize the right to broadband access and to prevent companies in this sector from eluding regulatory body resolutions through amparos or other litigious mechanisms. (Commitment 39)

- **Reinforce the COFETEL's autonomy.**

The Federal Telecommunications Commission's autonomy and decision-making will be reinforced to operate under transparency rules and independence from the interests it regulates. (Commitment 40)

- **Develop a robust backbone telecommunications network.**
- **Digital Agenda and broadband access in public buildings.**
- **Competition in radio and television.**
- **Competition in telephony and data services.**

Every dominant operator in telephone and data services will be regulated to generate effective competition in telecommunications and eliminate entry barriers for other operators, including asymmetric regulation in the use of networks and determination of rates, regulation of the bundled offer of two or more services and rules of concentration, in accordance with international best practices.

...

Legislation in the telecommunications sector will be reorganized in one single law that will contemplate, among others, the aforementioned principles. (Commitment 44)

- **Adoption of measures to promote competition in television, radio, telephony and data services.**

126. On March 11, 2013, President Peña Nieto began the formal process of the long-awaited telecommunications reform. He submitted to Congress an initiative to amend several articles of the Mexican Constitution regarding telecommunications matters.¹⁸² The Initiative was met with overwhelming political support, and the then presidents of the three major political parties in Mexico all signed on to support the Constitutional amendments.¹⁸³

127. The Initiative stated that one of its objectives was to “[create] regulatory bodies with constitutional autonomy, with the necessary authorities to ensure the efficient development of the telecommunications and broadcasting sectors, and ensure conditions of competition and free enterprise in both the mentioned industries and in the economic activity generally. Finally, the [I]nitiative provides a series of specific actions for the reorganization of the markets in these industries in the short-term, such as the applicable measures to preponderant economic agents, unbundling of networks, ... among others.”¹⁸⁴

128. The Initiative further proposed that “telecommunications will be public services of general interest, for which the State will guarantee that they are provided under conditions of competition, quality, plurality, universal coverage, interconnection, convergence, free access and continuity.”¹⁸⁵

129. Regarding the creation of the IFT, the President stated in the Initiative that “[t]he relevance and transcendence of regulatory activity in the matters of economic competition,

¹⁸² *Oficio No. SEL/300/190/13 que contiene la Iniciativa de Decreto que Reforma y Adiciona Diversas Disposiciones de la Constitución Política de los Estados Unidos Mexicanos presentada por el Presidente de la República al Congreso de la Unión* (Documento No. SEL/300/190/13 that contains the Initiative of Decree to Reform and Add Different Provisions to the Political Constitution of the United Mexican States submitted by the President of the Republic before the Congress of the Union) (March 11, 2013) (hereinafter the “Initiative”), **CL-011**.

¹⁸³ *See id.* (Document Executed by Mr. Gustavo Enrique Madero Muñoz from PAN, Mr. César Camacho Quiroz from PRI, and Jesús Zambrano Grijalva from PRD).

¹⁸⁴ Initiative, p. 7, **CL-011**.

¹⁸⁵ *Id.* at p. 13.

telecommunications and broadcasting, make it desirable for the regulator to have absolute autonomy in the exercise of its authorities, subject to technical criteria and unrelated to any other interest. In this regard, the OECD has considered it important for States to have independent regulatory bodies of all the interested parties to ensure fair and transparent competition in the market.... For this purpose, additions to article 28 of the Constitution are hereby proposed in order to create the Federal Economic Competition Commission and the Federal Telecommunications Institute, as autonomous constitutional agencies, with the authorities necessary to effectively fulfill their purpose.”¹⁸⁶

130. On the IFT’s authorities, the President’s intent was to “authorize the Institute on a constitutional level to: a) regulate the participants in the broadcasting and telecommunications markets in an asymmetric manner in order to effectively eliminate barriers to competition and free enterprise...”¹⁸⁷

131. On the creation of specialized courts, the Initiative provides that:

in recent years, there has been a large number of litigation regarding resolutions in [telecommunications], which has prevented greater competition in the markets. In this regard, the OECD, in its study about telecommunications policies and regulations in Mexico, considered that “It can be said that the current legal system, in addition to the frequent use of amparo, constitutes the main factor that prevents implementation of regulation in Mexico. The consequence, as explained in the report, is a regulatory entity incapable of regulating, since the responsibility of the effective implementation is left to the courts. This structure is without a doubt inefficient and unsustainable.” The essential problem is not the existence of access to justice, which is a fundamental right of every person, but to prevent companies in vital markets, such as telecommunications and broadcasting, from abusing the justice system to slow down regulation that seeks to reduce their market power or to stop anticompetitive practices.¹⁸⁸

¹⁸⁶ *Id.* at 14 and 16.

¹⁸⁷ *Id.* at p. 18.

¹⁸⁸ *Id.* at p. 20.

132. The Initiative also provided an example of Telmex's abuse of litigation practices to avoid regulation:

Since August 1997, the Federal Competition Commission issued a declaration of dominance regarding a concessionaire in the markets of local telephony, interconnection, national long distance, international long distance and interurban data transport (Resolution AD-41-97 dated December 4, 1997). The Commission's resolution was annulled in federal court in three different occasions (First Collegiate Court in administrative matters of the first circuit, files 721/2000, 493/2003, 473/2006). The final result was the annulment of the declaration, and to start the process again in 2007 which ended with five new declarations of dominance (Resolutions DC-002-2007, DC-003-2007, DC-004-2007, DC-005-2007), which to date have not been enforced because they continue to be challenged. Another example is the challenge to interconnection resolutions for the period of 2005-2010. The Federal Telecommunications Commission (COFETEL) resolved in September 2006 (Resolution P/EXT/310806/63) the interconnection rates applicable to three concessionaires. Likewise, in January 2008, it resolved the disagreement between two of the concessionaires (Resolution P/090108/14). In both cases, the companies challenged the COFETEL resolutions through an *amparo* trial, which were resolved by the Supreme Court of Justice of the Nation only a few days ago. The regulator's resolutions were issued six and four years ago, respectively, and the period that COFETEL resolved for these rates concluded more than two years ago, which clearly demonstrates the negative effects of the lack of effectiveness of the regulator's resolutions.¹⁸⁹

133. On June 11, 2013, the Mexican Constitution was amended with overwhelming support and the aim of substantially increasing competition in the telecommunications industry by imposing asymmetric regulation on the "preponderant economic agent," fostering competition, and attracting new investment.¹⁹⁰ According to the Federal Executive's website: "Telecommunications reform is designed to eliminate monopolistic practices that have yielded

¹⁸⁹ *Id.* at p. 21, ¶¶ 3 and 4 (referring to Telmex's litigations).

¹⁹⁰ *Decreto por el que se reforman y adicionan diversas disposiciones de la Constitución Política de los Estados Unidos Mexicanos, en materia de telecomunicaciones* (Decree by which several provisions are amended and added to the Political Constitution of the United Mexican States, in telecommunications matters), (enacted on February 5, 1917) (hereinafter "Constitutional Reform"), at Article 6, 7, 27, 28, 73, 78, 94 and 105, **CL-002**.

extraordinary profits for preponderant agents to the detriment of the well-being of Mexicans and the country's development.”¹⁹¹

134. Amending the Mexican Constitution is no small task.¹⁹² It is significant that the political leaders in Mexico would feel it necessary and politically advantageous to go to the extreme of legislating at a constitutional level in order to curb the conduct of its abusive dominant carrier, Telmex. There was unquestionable recognition that Telmex has done lasting damage to the sector, to the citizenry, and to the country as a whole. As this case demonstrates, however, these steps, while noble in design, would be only as good in practice as the persons implementing them on the regulatory front lines. In the case of Tele Fácil, the people responsible for fulfilling the potential of the reforms and upholding the law have utterly failed.

3. Telmex's Designation as a “preponderant economic agent”

135. On March 6, 2014, while negotiations between Telmex and Tele Fácil were still ongoing, the IFT formally declared that Telmex was the “preponderant economic agent” in the Mexican telecommunications sector. As a consequence of this determination, the IFT imposed specific asymmetrical measures on Telmex.¹⁹³ Notably, these included the obligation to provide indirect interconnection.¹⁹⁴

¹⁹¹ See Government of Mexico, *Telecommunications Reform: What is?*

<http://reformas.gob.mx/en/telecommunications-reform/what-is> (last accessed Nov. 4, 2017).

¹⁹² Mauro Arturo Rivera León, *Understanding Constitutional Amendments in Mexico: Perpetuum Mobile Constitution*, Vol. IX, No. 2 Mexican Law Rev. 3, 6 (2017), **CL-016**.

¹⁹³ *Resolución P/IFT/EXT/060314/76 mediante la cual el Pleno del Instituto Federal de Telecomunicaciones determina al grupo de interés económico de América Móvil, S.A.B. de C.V. como agente económico preponderante en el sector de telecomunicaciones* (Resolution P/IFT/EXT/060314/76 by which the Plenary of the Federal Telecommunications Institute determined the América Móvil, S.A.B. de C.V. economic group as the preponderant economic agent in telecommunications) (March 6, 2014) (hereinafter “Determination of Preponderant Economic Agent”), **CL-010**.

¹⁹⁴ *Id.* at Exhibit 2, Fourth Resolution. These measures also included requirements that Telmex (1) share infrastructure by drafting a model public offer contract which it would be obliged to make available to concessionaires that requested it; (2) permit local loop unbundling (that is, that it permit multiple

136. Within a matter of mere months, however, it became clear that the IFT's resolution was too weak to produce the desired effects on Telmex's power in the sector. Consequently, the Mexican Congress itself acted to issue a new law, and to impose further asymmetric regulations anticipated by the Constitutional reforms in the new telecommunications statute.

4. New Telecommunication Law Enacted by Mexico

137. Following the Constitutional reform mandate, the Mexican Congress passed a new Federal Telecommunications and Broadcasting Law ("FTBL") that entered into force on July 14, 2014, and remains in force to this day.¹⁹⁵

138. The FTBL makes it expressly clear that interconnection of telecommunications networks is a matter of public interest.¹⁹⁶ It provides that concessionaires operating public telecommunications networks are obliged to promptly interconnect their networks with other carriers.¹⁹⁷ The FTBL, like the FTL, enshrines the parties' freedom to negotiate interconnection terms and conditions in their agreements, including interconnection fees.¹⁹⁸

139. The FTBL expressly provides that the IFT must favor "prompt and effective" interconnection between public telecommunications networks. Article 129 of the FTBL provides that "the corresponding administrative procedures shall be filed transparently, promptly, quickly and all procedural acts which delay the effective interconnection between public

telecommunications operators to use connections from the Telmex telephone exchange to the customer's premises); (3) provide dedicated-link leasing on a wholesale basis; (4) terminate traffic within its network regardless of where the traffic was delivered; and (5) left open additional options that the IFT might thereafter take to expedite interconnection and avoid negative effects to competition and consumers.

¹⁹⁵ *Ley Federal de Telecomunicaciones y Radiodifusión* (Federal Telecommunications and Broadcasting Law) (enacted on July 14, 2014) (hereinafter "FTBL"), **CL-004**.

¹⁹⁶ *Id.* at Article 125.

¹⁹⁷ *Id.* at Article 125, ¶ 1.

¹⁹⁸ *Id.* at Articles 126 and 131.

telecommunication networks, or the conditions allowing the provision of the public telecommunication services not agreed on shall be avoided.”¹⁹⁹ Additionally, it establishes additional minimum requirements that interconnection agreements negotiated between the parties must meet so as to avoid abusive tactics by the preponderant economic agent in delaying interconnection by slowly negotiating terms.²⁰⁰

140. Of particular importance to the present case is the FTBL provision that imposes a “zero rate” for interconnection of traffic terminating on the preponderant economic agent’s network. In other words, because Telmex was designated as a preponderant economic agent, it was required (as usual) to pay other carriers for terminating traffic in their networks. However, the reverse was not now the case: under the FTBL, Telmex could only charge “zero” – nothing – for calls terminated by other carriers in Telmex’s network. This measure was in direct response to the IFT’s failure to effectively implement the asymmetric measures included as part of its March 2014 designation of Telmex as a preponderant economic agent.²⁰¹ In other words, this was the ultimate asymmetric regulation insofar as Telmex could only pay for call termination while it could not charge for it, and this measure did not require any action on the part of the IFT (which had proven itself unable to challenge Telmex’s anticompetitive conduct) to effectuate.²⁰²

¹⁹⁹ *Id.* at Article 129.

²⁰⁰ *Id.* at Article 132.

²⁰¹ *Id.* at Article 131.

²⁰² For all other interconnection rates, the FTBL provides that the IFT shall determine default interconnection fees whenever the parties have not been able to agree on them and resort to the arbitration process before the IFT. *See id.* The rates are calculated according to a methodology issued also by the IFT itself, which should consider the asymmetries between the networks to be interconnected as well as the market share of each network, among other conditions. *Id.* If a carrier simply refuses to negotiate, then the IFT will determine all the terms and conditions of interconnection. *Id.* at Article 130.

141. Other aspects of the reform were also highly material to Tele Fácil. First, Mexico eliminated all long-distance charges in the country.²⁰³ This change made it cheaper for consumers to call any part of the country and spend longer periods of time on the phone. Second, Mexico determined that the predominant economic agent, Telmex, was required to permit competitors to terminate all traffic at a single point of interconnection.²⁰⁴ Before this change, competitors like Tele Fácil would have had to choose between (1) either building out or leasing capacity throughout Mexico in order to deliver international long distance traffic to Telmex at a point closest to its intended destination, or (2) restricting its business to handling only traffic that was intended for termination in Mexico City, Monterrey or Guadalajara where Tele Fácil would have had its physical network facilities. Now, Tele Fácil would be able to handle traffic destined for any part of the country merely by delivering all of that traffic to Telmex in Mexico City, thereby shifting the responsibility and cost to Telmex to transport that traffic to its intended destination.

142. Another important modification in the Constitutional reform reflected in the FTBL concerned the *amparo* process. As noted in the OECD 2012 Telecommunications Review of Mexico, the *amparo* process was much abused by Telmex, which used them regularly simply

²⁰³ *Id.* at Article 118 (“The concessionaires operating public telecommunications networks shall: ... V. Abstain from charging national long distance to their users for calls to any national destination.”).

²⁰⁴ *Id.* at Article 267; see also *Acuerdo mediante el cual el Pleno del Instituto Federal de Telecomunicaciones define los puntos de interconexión a la red pública de telecomunicaciones del Agente Económico Preponderante* (Decree by which the Plenary of the Federal Telecommunications Institute determines the interconnection points to the public telecommunications network of the Preponderant Economic Agent) (February 17, 2015) (hereinafter “Decree of Interconnection Points”), at Third Consideration, **CL-015** (“It is important to mention that in compliance with the Twenty-Fifth Transitional Article of the [FTBL Decree], the Institute determined in the Long Distance Elimination Decree that, as of January 1, 2015, all the national territory is one local service area, and the existence of a single interconnection rate was established for the termination of traffic within the national territory. This means that any of the Preponderant Economic Agent’s interconnection points must be capable of receiving traffic coming from the public telecommunications networks of other concessionaires that is directed to any point in its network and must terminate such traffic in its destination.”).

to obtain an injunction against measures it did not favor.²⁰⁵ Under the FTBL, *amparos* could only be brought before the newly created, specialized telecommunications courts, which prohibited temporary injunctions against IFT rulings.²⁰⁶

143. Again, however, the effectiveness of this reform was dependent on the quality and expertise of the judges that sat on these *amparo* courts. In the three years since the enactment of the FTBL, the OECD has noted in its 2017 follow-up review the failings of these courts to date: the “practical establishment [of the specialized courts] has encountered some obstacles with respect to human resources and their expertise and experience of such specialized topics. . . . The current situation is therefore less effective than it might otherwise be and could ultimately lead to counterproductive outcomes.”²⁰⁷ One of the dangers of lack of expertise is that the specialized courts would defer to the IFT’s rulings instead of reviewing IFT actions independently; as discussed below, such was the case with the *amparo* rulings effecting Tele Fácil.

144. Finally, important for competition in general, and new entrants in particular, the FTBL sought to foster competition by granting broad authorities to the IFT,²⁰⁸ and imposing asymmetric regulations on Telmex.²⁰⁹ Thus, key to the success of the reforms was the IFT’s willingness to buck its history by applying the rule of law to Telmex. Again, in the case of Tele Fácil, it failed miserably.

²⁰⁵ OECD 2012 Telecommunications Review of Mexico, p. 55, **C-017** (“Telmex and Telcel have managed to avoid asymmetric regulations by taking advantage of Mexico’s *amparo* system and obtaining a judicial suspension for regulatory decisions that affects them or their resources.”).

²⁰⁶ Constitutional Reform, at Article 28, **CL-002**.

²⁰⁷ OECD 2017 Telecommunications Review of Mexico, p. 60, **C-084**.

²⁰⁸ FTBL, at Articles 7 and 15, **CL-004**.

²⁰⁹ *Id.* at Title 12.

5. Mexico Has Achieved Some Progress, But Structural Problems Persist

145. Despite all of these structural changes in the Mexican legal framework, the effects of the reforms have still not been as good as expected in the industry or as demanded by the Mexican people. On August 31, 2017, the OECD followed up its OECD 2012 Telecommunications Review of Mexico with the *OECD Telecommunication and Broadcasting Review of Mexico 2017*, which “evaluates the implementation of the recommendations since the OECD 2012 review, assesses market developments in the telecommunication and broadcasting sectors since then, and provides recommendations for the future.”²¹⁰

146. Regarding the IFT and its enforcement authority, the 2017 report specifically finds that:

Although the changes to Mexico’s legal and regulatory framework are admirable in light of the substantial deficiencies that were identified in the 2012 OECD review, there appears to be a gap in some areas between the formal establishment of the rules and their practical implementation. A particularly concerning gap is related to the wholesale regulation applicable to the preponderant agent in the telecommunications market.²¹¹

The failure of the IFT to implement measures opposed by Telmex is at the crux of Tele Fácil’s claim in this case.

147. The OECD 2017 Telecommunications Review of Mexico also finds that:

[M]any participants in the telecommunication sector have questioned some of the IFT’s determinations leading up to the 2017 preponderance review. They claim that the measures taken have not effectively addressed the regulatory asymmetry that should exist between the preponderant agent and access seekers.²¹²

²¹⁰ OECD 2017 Telecommunications Review of Mexico, p. 15, C-084.

²¹¹ *Id.* at p. 32.

²¹² *Id.* at p. 151.

148. It makes the following recommendation:

[A]s a regulatory and economic competition authority, the IFT must continue its efforts to minimize barriers to competition and facilitate access to essential inputs, ... ensur[ing] effective compliance with the regulation imposed on the preponderant economic agent in telecommunication services regarding wholesale services necessary to compete, such as interconnection.²¹³

It also admonishes the IFT to “maintain a regulatory approach based on favouring greater competition in the telecommunication and broadcasting markets.”²¹⁴

149. The IFT’s actions in this case read like a punch list of the continued failures recognized in the OECD 2017 Telecommunications Review of Mexico. No one would deny the structural advances achieved by Mexico in its reform efforts. What continues to stymie these efforts, and what in fact obstructed Tele Fácil’s market entry, is and was the failure of the IFT to live up to the promise of these reforms through strong, unwavering regulatory enforcement, the place where a nation’s commitment to competition and transparency truly lives or dies.

150. This was all ahead of Tele Fácil, however. The reforms, as adopted by the President and Congress, promised great opportunities to new entrants and competitors of Telmex; Tele Fácil’s founders were looking closely at these opportunities with increasing optimism after the IFT’s ruling in Resolution 381.

²¹³ *Id.* at p. 241.

²¹⁴ *Id.* at p. 242.

E. Tele Fácil Adapts Its Business Plan to the Changed Regulatory Environment

151. In addition to progressing the interconnection with Telmex and readying itself to begin providing services in Mexico as soon as possible, Tele Fácil's founders, together with their legal counsel, continued to keep a close eye on the regulatory reforms, and how those reforms might impact their business.

152. When the IFT resolved the interconnection dispute and issued Resolution 381, Tele Fácil's founders understood and appreciated the opportunity presented by the reforms. Most importantly, they realized that the penalties imposed on Telmex as a predominant economic agent, coupled with the rate offered by Telmex and accepted by Tele Fácil, combined to enhance Tele Fácil's business prospects.²¹⁵ They could now enter the Mexican telecommunications market on even better terms, self-fund its retail services, and generate a larger return on their investment. To put it simply, Tele Fácil was at the right place, at the right time.

153. Tele Fácil's founders revised their business strategy to pursue four distinct lines of business. First, as previously noted, Tele Fácil anticipated providing service to high volume conference calling and broadcast services, Mr. Nelson's core telecommunications business that was such a success in the United States. Second, Tele Fácil anticipated terminating international long-distance traffic from the United States, Europe, and other parts of the world into Mexico.²¹⁶

154. Third, Tele Fácil concluded that it would pursue the opportunity to be a competitive tandem services provider.²¹⁷ As part of this service, Telmex would deliver other carrier's traffic to Tele Fácil, and Tele Fácil would ensure that the traffic was converted to the

²¹⁵ Nelson Statement, ¶¶ 64-67, C-001; Bello Statement, ¶ 71, C-004.

²¹⁶ Blanco Statement, ¶¶ 37-43, C-002; *see also* Nelson Statement, ¶ 66, C-001.

²¹⁷ Nelson Statement, ¶ 66(a), C-001; Sacasa Statement, ¶¶ 64-70, C-003; Bello Statement, ¶¶ 71-73, C-004.

more efficient and cost-effective Internet Protocol (“IP”) from the traditional Time Division Multiplexing (“TDM”) protocol on which the telecommunications network had historically relied, in order to promote a more efficient telephone network in Mexico. In other words, Tele Fácil would bring twenty-first century technology to Mexico.²¹⁸

155. Fourth, Tele Fácil would provide competitive services to local residences and businesses in select geographic areas in Mexico.²¹⁹ Each of the company’s founders would leverage their unique experience and connections to aggressively pursue these business opportunities to grow Tele Fácil’s business.

156. As originally planned, Mr. Nelson would be the leader of the DID/Conferencing Project and Mr. Blanco would be the leader of the International Traffic Termination Project. In addition, Mr. Sacasa would now be the leader of the Competitive Tandem Services Project.²²⁰ Messrs. Nelson, Blanco, Sacasa would work collaboratively to ensure that the company met the obligations in the Concession to provide competitive retail services in specific geographic markets within the time periods specified by the Concession.²²¹

²¹⁸

Id.

²¹⁹ Blanco Statement, ¶¶ 44-51, C-002; Sacasa Statement, ¶¶ 31-37, C-003

²²⁰ See Sacasa Statement, ¶ 69.

²²¹ Blanco Statement, ¶¶ 44-51, C-002; Sacasa Statement, ¶¶ 31-37, C-003

1. DID/Conferencing Project²²²

157. The DID/Conferencing Project is an extension of Mr. Nelson's highly successful enterprise in the United States, GLCC.²²³ Mr. Nelson's relationship with the largest providers of free conferencing uniquely positioned him to bring these services to the Mexican market.²²⁴ Free conference calling is not widely available in Mexico and indeed the price-per-minute for conference calling services in Mexico has remained significantly above the average rates prevailing in the United States.²²⁵ The limited free conferencing offerings in Mexico are primarily targeted to facilitating international conferences between United States and Mexican businesses, rather than intra-country conference calls.²²⁶ These services have not been available in Mexico primarily because the conference call providers have had a limited and unsatisfactory relationship with the telecommunications carriers there. However, with a proven, trusted and reliable carrier to work with in Mr. Nelson, free conference call providers have every intention and desire to begin actively marketing their services to business and individual consumers in Mexico.²²⁷

158. The business plan for this project was to contribute to dramatically increasing the overall consumption of voice conferencing in Mexico, rather than simply trying to obtain a share of the existing market.²²⁸ In the United States, the arrival of free conferencing services unleashed a huge increase in demand for conferencing services, particularly for religious groups

²²² DID or Direct Inward Dialing refers to a feature offered by local telephone companies that allows callers to directly dial to an extension on their subscribers' Private Branch Exchange ("PBX") or packet voice system without encountering an operator. DID allows local phone companies to host services that provide conferencing, chat lines, radio by phone, and other similar services. See Dippon Report, ¶¶ 27-28, C-010.

²²³ Nelson Statement, ¶¶ 22-25; ¶ 69, C-001.

²²⁴ *Id.* at ¶ 69; Dippon Report, ¶¶ 29-31, C-010

²²⁵ See Dippon Report, ¶ 32, C-010.

²²⁶ *Id.* at ¶ 42; see also Lowenthal Statement, ¶¶ 17-18, C-005.

²²⁷ Lowenthal Statement, ¶¶ 16 - 20, C-005.

²²⁸ Nelson Statement, ¶ 72, C-001.

and small/at-home businesses that could not afford the cost of the traditional host-paid toll-free conferencing services that were available in the market.²²⁹ There was every reason to believe the same dynamic would apply to Mexico, and Tele Fácil intended to provide that service.²³⁰ This was particularly true after Mexico acted to entirely eliminate long-distance charges in the country.²³¹ Because of these reforms, consumers from throughout Mexico would now be able to access these services without having to worry about per-minute long distance charges, thereby unleashing even greater demand for these services.

159. Several different free conferencing providers currently utilize GLCC's network for the termination of their calls, and intended to enter the Mexican market once Tele Fácil began operations. These include Free Conferencing Corporation ("FreeCC"), the largest provider of conferencing services in the world.²³² In addition to providing free conferencing services for meetings of all shapes and sizes, FreeCC also provides screen sharing and video conferencing services.²³³ The company offers certain "premium" services, including the ability for companies to brand their conference calling services and to provide customized hold music on their calls, which helps to generate revenues for the company and expand its attractiveness to business clients.²³⁴ FreeCC has been used by businesses of all shapes and sizes, governmental entities, universities, religious institutions, and all recent candidates for President of the United States.²³⁵

229

Id.

230

Id. at ¶ 73.

231

Id. at 66(c); *see also* FTBL, at Article 118, CL-001.

232

Nelson Statement, ¶¶ 14, C-001; Lowenthal Statement, ¶¶ 4-7, C-005; Dippon Report, ¶¶ 41-43.

233

Id.

234

Id.

235

Id.

160. Other examples include No Cost Conference²³⁶ and SIP Meeting²³⁷, which are FreeCC competitors that also provide free conference calling services to individuals, business, churches, and peer-support groups.²³⁸

161. In addition to companies that provide free or nearly-free conference calling services, GLCC also has customers that provide “chat” services and broadcast services, customers who also intended to enter the Mexican market. Each of these services, like free conferencing, require networks capable of handling high volumes of traffic, and consequently need a telecommunications carrier that is proven, trusted and reliable.

162. One such example is Alpine AudioNow.²³⁹ This company enters into content agreements with foreign and domestic radio stations to make their broadcasts available to listeners who dial a radio station to listen to content that would otherwise not be accessible to them.²⁴⁰ This service allows, for example, immigrant populations to listen to broadcasts of news or sporting events from their home countries.²⁴¹ Even within a home country, individuals can use this service to access content from a radio station in their hometown while living, working, or traveling in other parts of the country.²⁴² Unlike streaming audio services that require a consistent broadband connection, AudioNow’s services are uniquely accessible to populations that do not have unlimited broadband plans or where broadband penetration lags behind telephone access.²⁴³

²³⁶ Nelson Statement, ¶ 15, C-001; Dippon Report, ¶¶ 48-49, C-010.

²³⁷ Dippon Report, ¶¶ 46-47, C-010.

²³⁸ Nelson Statement, ¶ 15, C-001; Dippon Report, ¶¶ 48-49, C-010.

²³⁹ Dippon Report, ¶¶ 44-45, C-010; Cernat Statement, ¶¶ 4-6, C-006; Nelson Statement, ¶¶ 16, 74, C-001.

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.*

163. Zenofon, which consists of three entities, Zenofox, ZenoRadio, and MobeVoices is another example of an existing GLCC customer that was prepared to bring its innovative services to consumers in Mexico in connection with Tele Fácil's launch.²⁴⁴ Like Alpine AudioNow, Zeno Radio provides access to domestic and international radio stations to individuals using their phones to call in and listen to the broadcast, but it also provides free conference calling services, with about [REDACTED] of its business coming from religious conferencing.²⁴⁵

164. Many of GLCC's free conference, chat, and broadcast platform customers intended to become customers of Tele Fácil as the platform to offer their innovative services to the Mexican market.²⁴⁶ By the time Resolution 381 was issued, Tele Fácil had the necessary equipment in place and was ready to begin this business.²⁴⁷

165. In light of the rate offered by Telmex and accepted by Tele Fácil for call termination, combined with the elimination of long-distance charges in Mexico as part of the reforms, which made the service more attractive to residents and businesses through Mexico, these in-bound services had the ability to generate significant revenue for Tele Fácil.²⁴⁸ To further incentivize the use of Tele Fácil's network, Tele Fácil would have, as is customary practice in the sector, shared that revenue with these service providers [REDACTED].²⁴⁹ The interconnection agreement with Telmex would have generated revenues sufficient to allow these content-providing companies to make the necessary investment in marketing to

²⁴⁴ Dippon Report, ¶¶ 50, C-010; Nelson Statement, ¶ 16, 74, C-001.

²⁴⁵ *Id.*

²⁴⁶ Dippon Report, ¶¶ 40-51, C-010; Nelson Statement, ¶¶ 73-74, C-001; Cernat Statement, ¶¶ 12-17, C-006; Lowenthal Statement, ¶¶ 15-21, C-005.

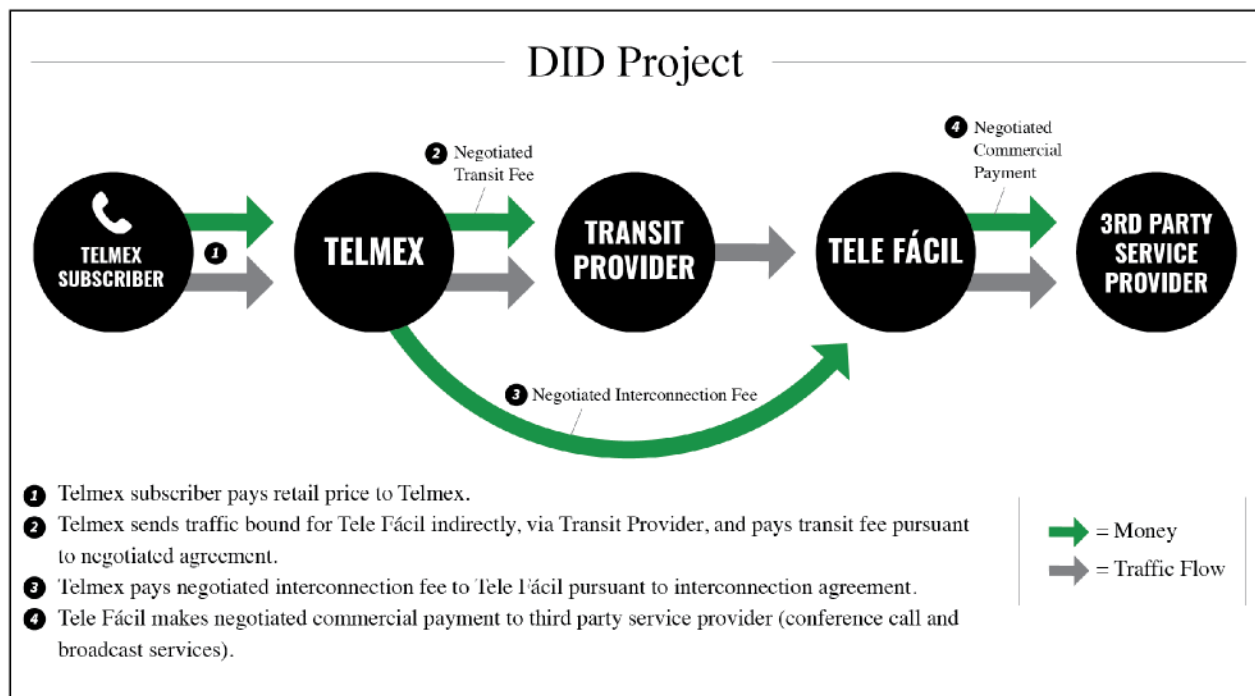
²⁴⁷ Nelson Statement, ¶¶ 55-63 & Appx. 1, C-001.

²⁴⁸ *Id.* ¶ 75.

²⁴⁹ *Id.*

attract customers and then sustain themselves on lower interconnection rates or premium product offerings going forward.²⁵⁰

166. Figure 1 is a diagram of the traffic and monetary flows for the DID/Conferencing Project.



2. International Traffic Termination

167. The International Traffic Project would allow Tele Fácil to attract international long-distance calls for termination into the Mexican market.²⁵¹ Because it held a concession and had the right of interconnection, Tele Fácil was in a position to effectively compete against other carriers to deliver traffic to Mexico on a wholesale basis.²⁵² Jorge Blanco has vast experience in developing this type of business and numerous connections in the telecommunications industry

²⁵⁰

Id.

²⁵¹

Blanco Statement, ¶ 37, C-002.

²⁵²

Id.

worldwide.²⁵³ Pursuant to the founders' plan, he was to be in charge of marketing, contacting potential customers abroad, negotiating the agreements and selling the services.²⁵⁴ The business plan involved using an aggregator of traffic in the United States, who would then transfer and terminate the traffic in Tele Fácil's network.²⁵⁵

168. The reforms implemented by Mexico created a tremendous profit generation opportunity for Tele Fácil. Specifically, among the asymmetrical regulations imposed on Telmex as a predominant economic agent was the requirement that it allow other concessionaires to deliver traffic at a single point of interconnection.²⁵⁶ This meant that Tele Fácil could deliver traffic to Telmex in Mexico City, the city where its facilities and equipment were located, without regard to the ultimate location in Mexico in which the traffic would be terminated. Before this change, Tele Fácil would have been required to incur the costs to carry the traffic much closer to its intended destination.²⁵⁷ In essence, the asymmetric regulation shifted those transport costs from Tele Fácil to Telmex, making it easier for Tele Fácil to deliver traffic nationwide, and making this line of business much more profitable than it would have otherwise been.²⁵⁸

169. Tele Fácil had finalized a significant contractual relationship with [REDACTED], an aggregator who at the time delivered traffic on behalf of several U.S. carriers for

²⁵³ *Id.* at ¶ 38.

²⁵⁴ *Id.*

²⁵⁵ *Id.* An aggregator collects traffic from several providers abroad, and then works as the connection across the border with the carrier in Mexico who will manage the traffic to terminate the international traffic within the country.

²⁵⁶ Nelson Statement, ¶ 66(b); FTBL, Article 267, **CL-004**; Decree of Interconnection Points, **CL-015**.

²⁵⁷ Nelson Statement, ¶ 66(b).

²⁵⁸ *Id.*

termination into Mexico.²⁵⁹ [REDACTED]

[REDACTED].²⁶⁰ Tele Fácil, in turn, agreed to charge [REDACTED] a rate that was favorable for the market conditions, a customary practice in international termination.²⁶¹

170. Tele Fácil had also been able to finalize a memorandum of understanding with a Spanish company that had agreed to identify Mexico-bound traffic in Europe that could be routed to Tele Fácil for termination.²⁶²

171. By the time Resolution 381 was issued, Tele Fácil had the necessary equipment in place and was ready to begin this business.²⁶³

²⁵⁹ Memorandum of Understanding between Tele Fácil Mexico S.A. de C.V. and [REDACTED] (June 14, 2013) (hereinafter "[REDACTED]"), C-020; Blanco Statement, ¶ 39-40, C-002; [REDACTED], ¶ 7, C-007; Dippon Report, ¶¶ 53-56, C-010

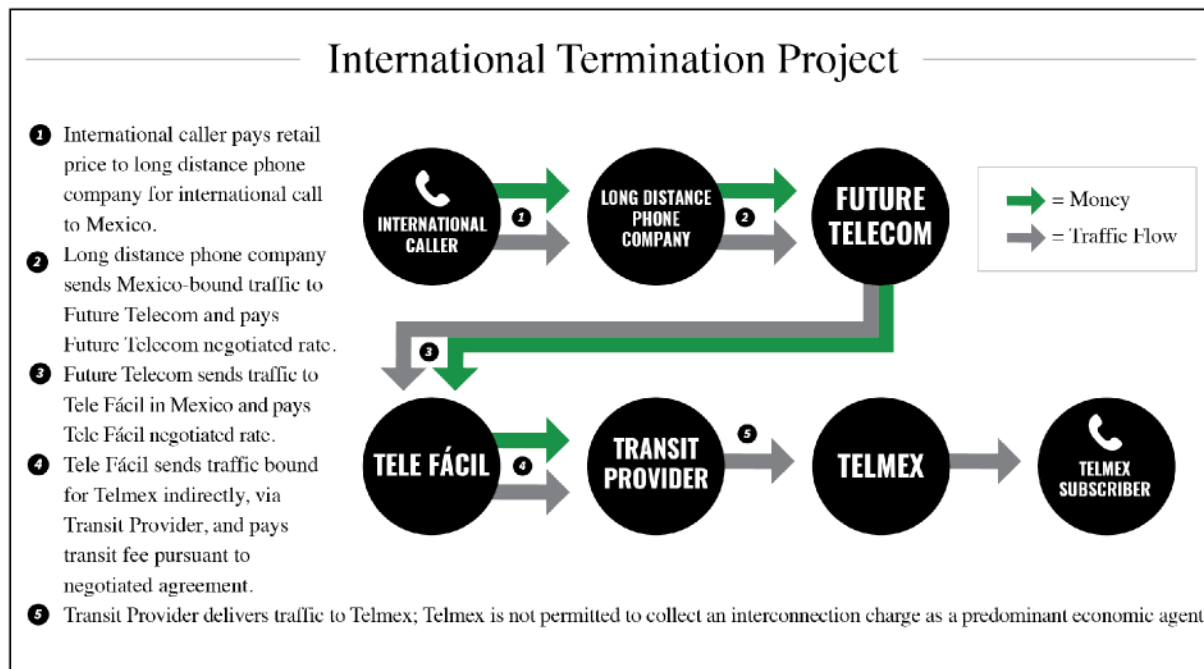
²⁶⁰ [REDACTED], at Section II, C-020; Blanco Statement, ¶ 41, C-002; [REDACTED], ¶ 8, C-007.

²⁶¹ [REDACTED], at Section II, C-020.

²⁶² Blanco Statement, ¶ 41, C-002; *Alliance Agreement by and between Tele Fácil México, S.A. de C.V. and [REDACTED]* (October 1, 2013), C-102.

²⁶³ Nelson Statement, ¶¶ 55-63 & Appx. 1, C-001.

172. Figure 2 is a diagram of the call-routing and monetary flows for the international traffic termination project.



3. Competitive Tandem Services Project

173. The Competitive Tandem Services Project was intended to position Tele Fácil to provide competitive tandem switching services to other concessionaires in Mexico in an effort to accelerate the transition to the more efficient IP technology and away from the legacy TDM technology that Telmex has historically continued to insist on utilizing.²⁶⁴ In the United States, the Federal Communications Commission has been formally working to transition the entire telephone network from IP and away from TDM since at least 2014.²⁶⁵ Even before that, the transition to IP technology had been underway for years and paved the way for several

²⁶⁴ Sacasa Statement, ¶¶ 64-69, C-003; Bello Statement, ¶¶ 72-73, C-004; Mariscal Report, ¶¶ 15-19, C-011.

²⁶⁵ See, e.g., *In the Matter of Technology Transitions*, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd 1433, ¶¶ 1-2 (Jan. 31, 2014), CL-018.

successful competitive tandem providers.²⁶⁶ In Mexico, the IFT has recognized the international telecommunications industry's transition to IP technology and its inherent benefits, also imposing as an obligation to provide IP interconnection in order to facilitate the transition.²⁶⁷

174. As part of its wholesale Competitive Tandem Services Project, Tele Fácil would ensure that the necessary protocol conversion was performed, transitioning the traffic from TDM format to IP, before the call is passed on.²⁶⁸ It is well documented that the use of IP is more efficient and produces significant cost savings.²⁶⁹ It is also well documented that Telmex has resisted the transition to IP, causing Mexico to lag behind other developed countries in this area.²⁷⁰ Therefore, by aggregating traffic from Telmex in TDM and converting those calls IP,

²⁶⁶ Mariscal Report, ¶ 17, C-011.

²⁶⁷ Decree of Interconnection Points, at pp. 2-3, CL-015 ("It is worth noticing that the transition to an IP network is a natural step for many operators that are updating their networks due to technology advantages and saving of costs associated with the operation of a network.").

²⁶⁸ Sacasa Statement, ¶¶ 64-69, C-003; Bello Statement, ¶¶ 72-73, C-004; Mariscal Report, ¶¶ 15-19, C-011.

²⁶⁹ Mariscal Report, ¶ 17, C-011; see also *In the Matter of Technology Transitions*, 29 FCC Rcd 1433, ¶ 2, CL-018; see also Comptel, *IP Interconnection for Managed VoIP: Interconnecting Next Generation Network Service Providers* (Apr. 11, 2011) (Comptel is now known as Incompas) ("IP interconnection represents an opportunity for telecommunication service providers to reduce the five-year network costs of supporting voice interconnection with Incumbent Local Exchange Carriers by 98 percent."), CL-019.

²⁷⁰ Mariscal Report, ¶ 17, C-011; see also OECD 2012 Telecommunications Review of Mexico, p. 25-26, C-017 (describing Telmex's high market share and stating that "Broadband development has also led many Internet service providers (ISPs) in OECD countries to offer voice over Internet Protocol (VoIP) services, increasing competition in voice markets" but that alternative "means of access have not been implemented in Mexico. . ."); see also Decree of Interconnection Points, at Third Consideration Section, CL-015 ("Likewise, in addition to determining the referred interconnection points, the Institute considers it necessary to establish concrete dates [for the Preponderant Economic Agent] to initiate the exchange of IP traffic."); Soria, Gerardo, *Defective Interconnection and Impending Conflict with Trump*, Telecommunications Law Institute - IDET (Dec. 16, 2016) (available at: <http://www.idet.org.mx/opinion/columnas/interconexion-defectuosa-e-inminente-conflicto-con-trump/>).

Nearly two years ago, the IFT, correctly, ordered the interconnection between all the operators through the IP protocol, as an alternative to the traditional trunks that have operated since the nineties of the last century. This change was necessary given the technological advance. Evidently, migration to new technology of traffic exchanged between networks is not something that could happen overnight and it is natural to expect a reasonable transition period.

The problem is that almost two years after the IFT ordered the migration, the interconnection between operators is in the worst of all worlds: Telmex's traditional

rather than TDM, Tele Fácil would serve a vital role in modernizing and promoting a more efficient telecommunications sector in Mexico, benefitting millions of consumers.²⁷¹

175. Because of the negotiated interconnection rate it obtained from Telmex, Tele Fácil was uniquely positioned to pursue this line of business in Mexico.²⁷² To effectuate this business relationship, those other competitive carriers would negotiate a rate that Tele Fácil would pay those carriers for traffic termination when those carriers associated their subscriber's telephone numbers with Tele Fácil, such that Telmex's network would know to route calls to those customers to Tele Fácil, and Telmex would be obligated to pay to Tele Fácil the interconnection rate negotiated between them.²⁷³

176. Tele Fácil had discussions with several carriers who were interested in pursuing this line of business as soon as Tele Fácil could complete its interconnection with Telmex.²⁷⁴ Tele Fácil would have paid these operators a share of the revenues it would receive from Telmex/Telnor, [REDACTED].²⁷⁵

177. To implement this project, Tele Fácil and another carrier would execute a negotiated agreement and update the telephone numbering records that are used to instruct Telmex's equipment to route that traffic to Tele Fácil.²⁷⁶ In order to do this, the two companies

trunks are saturated and Telmex has not invested in the new equipment and IP interconnection technology with the speed that is required not to choke traffic between networks. This traffic bottleneck is one of the most common practices of dominant agents to inhibit competition and discredit competitors.

²⁷¹ Mariscal Report, ¶ 19, C-011.

²⁷² Sacasa Statement, ¶ 66, C-003.

²⁷³ *Id.*; see also Bello Statement, ¶ 72, C-004.

²⁷⁴ *Id.* at ¶ 73; see also Sacasa Statement, ¶ 69, C-003.

²⁷⁵ Sacasa Statement, ¶ 66, C-003; Mariscal Report, ¶ 20, C-011.

²⁷⁶ *Plan Técnico Fundamental de Numeración* (Technical Fundamental Plan of Numbering) (December 11, 2014) (hereinafter "Numbering Plan"), at § 8.1.10, CL-006; Bello Statement, ¶ 72, C-004.

would notify the IFT to transfer the number to Tele Fácil.²⁷⁷ Under current regulation, a number assigned under the National Numbering Plan may be transferred to another concessionaire through a joint request by the assignor and the assignee, if the assignee (in this case, Tele Fácil) is authorized to provide the fixed or mobile service associated with the number in the area of coverage associated with it.²⁷⁸

178. Thus, having the calls delivered to Tele Fácil would allow Tele Fácil to perform the protocol conversation to IP and collect the negotiated termination rate offered by Telmex, creating a significant cost savings for the other competitive carriers in Mexico, and, because of the rate, also enabling Tele Fácil to remit a portion of the interconnection fee to those carriers.²⁷⁹

179. By the time Resolution 381 was issued, Tele Fácil had the necessary equipment in place and was ready to begin this business.²⁸⁰

²⁷⁷

Id.

²⁷⁸

Id.

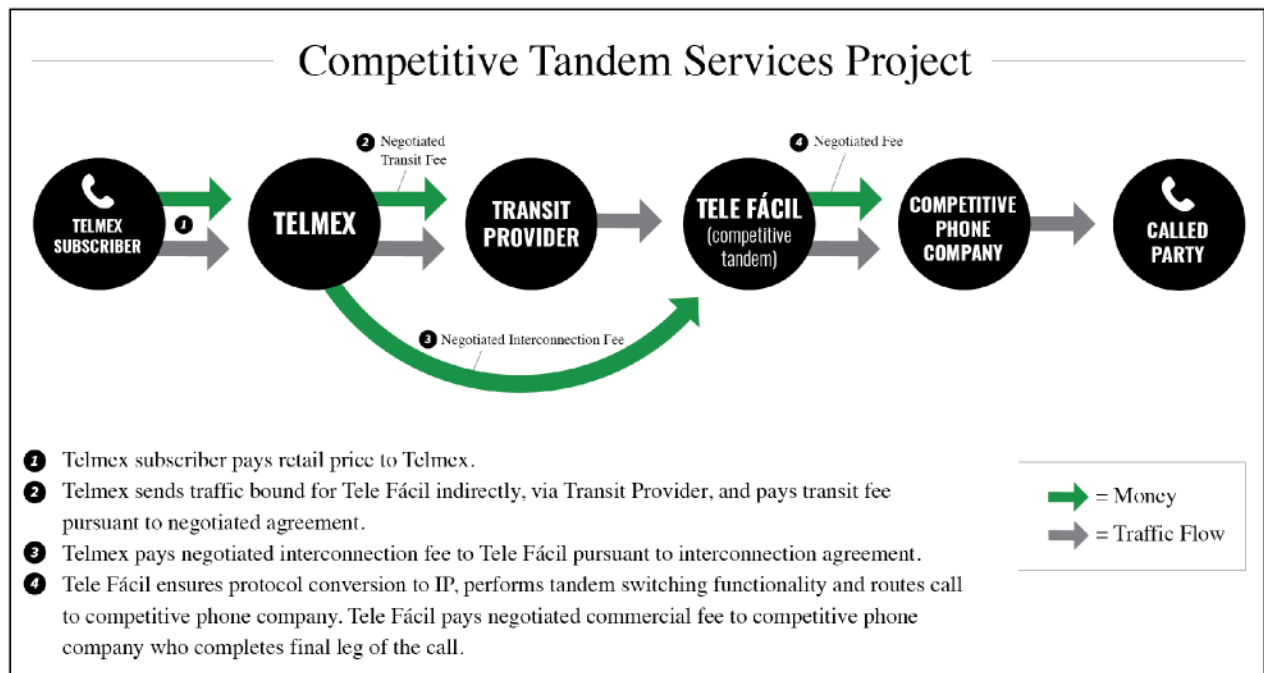
²⁷⁹

Mariscal Report, ¶¶ 15-20, C-011.

²⁸⁰

Nelson Statement, ¶¶ 55-63 & Appx. 1, C-001.

180. Figure 3 is a diagram of the traffic and monetary flows for the competitive tandem services project.



4. Retail Service Offering

181. Tele Fácil also intended to provide competitive telephone services to residences and business in select markets in Mexico, consistent with the requirements of its Concession.²⁸¹ Specifically, Exhibit A to Tele Fácil's Concession required that the company own and install specific telecommunications infrastructure equipment, and that it acquire that equipment over a five-year period.²⁸² It further required that Tele Fácil provide services in specific areas of Mexico.²⁸³

182. In order to meet its obligations to provide these services, Tele Fácil planned to utilize unlicensed radio spectrum available in those markets and to utilize WiMax

²⁸¹ Blanco Statement, ¶¶ 44-51, C-002; Sacasa Statement, ¶¶ 31-37, C-003; Dippon Report, ¶ 57, C-010.

²⁸² Concession, at Exhibit A, C-019.

²⁸³ Concession, at Exhibit A, C-019.

technologies.²⁸⁴ As the original business plan indicated, very early in its development Tele Fácil was able to identify the geographical area of San Pedro Martir, in Delgacion Tlalpan in the southern part of Mexico City, and neighboring areas, as areas in which the unlicensed spectrum was not highly saturated and would be available for Tele Fácil's use.²⁸⁵ In addition to acquiring and placing all of the necessary equipment to begin providing service in this area, Tele Fácil also entered into necessary agreement to support fiber-based backhaul for the traffic.²⁸⁶ Thus, by the time Resolution 381 was issued, Tele Fácil had the necessary equipment in place and was ready to begin this business.²⁸⁷

183. Mr. Sacasa and Mr. Blanco were also actively exploring other ways in which the company could expand its competitive retail offerings to bring greater competition to the Mexican telecommunications market at the time Resolution 381 was issued.²⁸⁸

184. These plans notwithstanding, where Tele Fácil saw further opportunity guaranteed to it, Telmex saw only threats to its business and reacted as it always had in the face of competition.

²⁸⁴ Blanco Statement, ¶¶ 44-46, C-002; Sacasa Statement, ¶¶ 31-33, C-003; Dippon Report, ¶ 57, C-010. Unlicensed spectrum is affirmatively set aside by the government for use on a first come, first served basis, and does not require the government to grant a specific exclusive license for its use.

²⁸⁵ Original Business Plan, at 14, C-015.

²⁸⁶ Nelson Statement, ¶ 61 & Appx. 1, C-001; Blanco Statement, ¶ 49, C-002; Sacasa Statement, ¶ 35; *Contrato Marco de Prestación de Servicios de Telecomunicaciones que celebran Metro Net S.A.P.I. de C.V. Y Tele Fácil México, S.A. de C.V.* (Master Telecommunications Services Agreement executed by and between Metro Net S.A.P.I. de C.V. and Tele Fácil México, S.A. de C.V.) (January 28, 2014) (hereinafter "RedIT Agreement"), C-023.

²⁸⁷ Nelson Statement, ¶¶ 55-63 & Appx. 1, C-001.

²⁸⁸ Blanco Statement, ¶¶ 47-51, C-002; Sacasa Statement, ¶¶ 34-36, C-003; Dippon Report, ¶ 58, C-010.

F. Telmex's Strategy to Erase Resolution 381 and IFT's Dramatic Reversal of its Rulings

1. The IFT's Failure to Enforce Resolution 381

185. As noted above, Tele Fácil was ready to serve Mexican consumers by immediately following the IFT's order in Resolution 381 to execute an interconnection agreement and physically interconnect with Telmex. Telmex had a very different intention. Having presumed that the IFT would dismiss the rate it had offered to Tele Fácil, the actions it took after this Resolution was issued clearly indicates that it now resolved to frustrate and ultimately unwind Resolution 381.

186. As a first step, Telmex did not comply with Resolution 381 within ten business days, as required by Resolution 381.²⁸⁹ Notification of Resolution 381 to the parties occurred on December 3, 2014, establishing December 17, 2014 as the deadline for compliance.

187. After Resolution 381 was issued, Tele Fácil requested a meeting with Telmex. At the time he scheduled the meeting, Mr. Bello asked for a copy of the contract the parties were obliged to execute pursuant to Resolution 381.²⁹⁰ Telmex refused to provide it to him.²⁹¹ On December 9, 2014, the parties met at Telmex's offices.²⁹² At this meeting, Telmex presented to Tele Fácil for signature a dramatically altered version of the agreement that had been established and ordered by the IFT; in a quick review of the document at that time, Mr. Bello and Mr. Sacasa identified "more than 100 modifications" to the contract that was offered and subject to the Resolution 381 decision.²⁹³ For example, while this version included the interconnection rate

²⁸⁹ Resolution 381, at Resolution First, p. 17, **C-029**.

²⁹⁰ Bello Statement ¶ 75, **C-004**.

²⁹¹ *Id.*

²⁹² *Id.* at ¶ 76; *see also* Sacasa Statement ¶ 71, **C-003**.

²⁹³ Bello Statement ¶ 77, **C-004**; *see also* Sacasa Statement ¶¶ 72-73, **C-003**.

agreed by the parties and established by the IFT in Resolution 381, Telmex's altered agreement had the rate terminating in 2014—even though there were only *21 days* remaining in 2014.²⁹⁴ Tele Fácil representatives refused to sign this new version, and requested Telmex to comply with Resolution 381.²⁹⁵ Notably, Telmex refused to permit the Tele Fácil team to take a copy of this document with them.²⁹⁶

188. Later that day, Mr. Sacasa received a call from Jose Covarrubias, Telmex's Director of Attention to Telecommunications Operators who asked why Tele Fácil had refused to sign the agreement and offered Tele Fácil equipment and other items in exchange for releasing Telmex for the interconnection agreement it had offered and had been ordered by the IFT in Resolution 381.²⁹⁷ Mr. Sacasa explained that the agreement had been entirely modified, did not comply with Resolution 381 and that, with the new laws in effect and the creation of the IFT to protect new entrants like Tele Fácil, Telmex was no longer free to ignore the orders of the regulator.²⁹⁸

189. On December 10, 2014, Telmex transmitted to Tele Fácil yet another version of an interconnection agreement.²⁹⁹ This version included the terms and conditions set in

²⁹⁴

Id.

²⁹⁵ Bello Statement ¶ 78, C-004; *see also* Sacasa Statement ¶ 74, C-003.

²⁹⁶

Id.

²⁹⁷ Sacasa Statement ¶ 75-77, C-003.

²⁹⁸

Nuevo Proyecto de Convenio Marco de Interconexión Local presentado por Teléfonos de México, S.A.B. de C.V. a Tele Fácil México, S.A. de C.V. (New Draft of Local Interconnection Agreement notified by Teléfonos de México, S.A.B. de C.V. to Tele Fácil México, S.A. de C.V.) (December 9, 2014) (hereinafter "New Draft Interconnection Agreement"), C-031; *Notificación de Nuevo Proyecto de Convenio Marco de Interconexión Local presentado por Teléfonos de México, S.A.B. de C.V. a Tele Fácil México, S.A. de C.V.* (Notification of New Draft of Local Interconnection Agreement notified by Teléfonos de México, S.A.B. de C.V. to Tele Fácil México, S.A. de C.V.) (December 10, 2014), C-094; Sacasa Statement ¶ 78, C-003; Bello Statement ¶ 79, C-004.

Resolution 381, but also limited the term – to December 31, 2014 instead of December 31, 2017 – as provided for in Resolution 381.³⁰⁰

190. Later that same day, Mr. Robles Miaja of Telmex called Mr. Bello to ask what it would take for Tele Fácil to accept the version of the agreement that Telmex had just sent to them.³⁰¹ Mr. Bello responded that if Tele Fácil was to accept this agreement, it would be forgoing significant income it already had the right to earn.³⁰² Consequently, Tele Fácil would require Telmex to cover these losses.³⁰³ Mr. Robles did not agree and no further offer was made.³⁰⁴ After this call, Mr. Bello immediately followed up and sent to Telmex a signed, notarized and certified copy of the interconnection agreement that reflected the terms approved by the IFT pursuant to Resolution 381.³⁰⁵ Telmex ignored it.³⁰⁶

191. Over the coming months and into 2015, Mr. Bello and Mr. Sacasa attended several meetings with Telmex, which were not of a cooperative nature.³⁰⁷ Eventually Mr. Bello and Mr. Sacasa had a meeting with Mr. Javier Mondragón, the head litigation and regulatory for

³⁰⁰ New Draft Interconnection Agreement, at Exhibit C § 1, C-031; Notification of New Draft Interconnection Agreement, C-094; Sacasa Statement ¶ 78, C-003; Bello Statement ¶ 79, C-004.

³⁰¹ Bello Statement ¶ 80, C-004.

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ *Acta No. 255 que contiene la notificación realizada por Tele Fácil, S.A. de C.V. a Teléfonos de México, S.A.B. de C.V. con Contrato de Interconexión a ser celebrado conforme lo resuelto en la Resolución 381* (Public deed 255 which contains notification performed by Tele Fácil, S.A. de C.V. to Teléfonos de México, S.A.B. de C.V. with Interconnection Agreement to be executed pursuant to Resolution 381) (December 16, 2014) (hereinafter "Notification to Telmex with Interconnection Agreement to be Executed Pursuant to Resolution 381"), C-033. Tele Fácil also informed Telmex that it was ready and able to exchange traffic indirectly through Nextel. *Acta No. 256 que contiene la notificación realizada por Tele Fácil, S.A. de C.V. a Teléfonos de México, S.A.B. de C.V. con información técnica para interconexión indirecta con Nextel* (Public deed 256 which contains notification performed by Tele Fácil, S.A. de C.V. to Teléfonos de México, S.A.B. de C.V. with technical information for indirect interconnection with Nextel) (December 15, 2014), C-034; Bello Statement ¶ 81, C-004; Sacasa Statement ¶ 79, C-003.

³⁰⁶ Bello Statement ¶ 78, C-004.

³⁰⁷ Bello Statement ¶¶ 92-96, C-004; Sacasa Statement ¶¶ 80-90, C-003.

Telmex, and personal attorney of the Slim family.³⁰⁸ Mr. Mondragón concluded the final meeting by stating to the effect that if the IFT or any judge ever forced Telmex to execute the agreement, he would personally make sure that it was not signed until December 31, 2017 – the end of the term of the interconnection agreement that the parties had agreed, and the term established in Resolution 381.³⁰⁹

192. In the meantime, with no movement by Telmex, and no action by the IFT to enforce its order, on December 19, 2014 – after expiration of the IFT’s ten-day deadline – Tele Fácil made a formal request of the IFT to take action to enforce Resolution 381.³¹⁰ The IFT failed to respond in any way to this request.³¹¹

193. Over this December 2014 – January 2015 timeframe, representatives of Telmex had numerous meetings with the IFT to voice the company’s concerns about the economic impact on Telmex if it were required to interconnect with Tele Fácil on the terms established by Resolution 381.³¹²

194. Having heard nothing from the IFT, and with valuable time wasting away, Tele Fácil sought a meeting with the IFT Compliance Unit seeking information on the status of the enforcement of Resolution 381; that meeting took place on January 12, 2015 with Mr. Gerardo Sánchez Henkel, Head of the IFT’s Compliance Unit.³¹³ At this meeting, Mr. Sánchez Henkel stated his view that Resolution 381 was perfectly clear and that the parties should have had

³⁰⁸ Bello Statement ¶¶ 92, C-004.

³⁰⁹ Bello Statement ¶ 96, C-004; Sacasa Statement ¶ 89, C-003.

³¹⁰ *Aviso de Cumplimiento de Resolución de Interconexión presentada por Tele Fácil México ante el Pleno del Instituto Federal de Telecomunicaciones* (Notice of Compliance of Interconnection Resolution submitted by Tele Fácil México before the Plenary of the Federal Telecommunications Institute) (December 19, 2014) (hereinafter "First Enforcement Request"), C-035, Bello Statement ¶ 84, C-004; Sacasa Statement ¶ 91, C-003

³¹¹ Bello Statement ¶ 84, C-004; Sacasa Statement ¶ 91, C-003.

³¹² Bello Statement ¶ 91, C-004.

³¹³ Bello Statement ¶ 86, C-004; Sacasa Statement ¶ 92, C-003.

interconnected and executed the agreement within the ten business days following Resolution 381.³¹⁴ Mr. Sánchez Henkel cautioned, however, that he expected to receive resistance from other areas of the IFT, especially the Legal Unit, since they were always cautious in acting against Telmex, and therefore would not act quickly.³¹⁵

195. Mr. Sánchez Henkel also asked Tele Fácil to submit an enforcement request directly to his Unit, including all relevant background documents and evidence, so as to enable him to move swiftly without having to rely on other IFT Units to provide him with the appropriate evidence and documentation.³¹⁶ Tele Fácil followed up with an enforcement request on January 28, 2015.³¹⁷ The IFT never responded to Tele Fácil's written requests for enforcement.

196. Unbeknownst to Tele Fácil, during the short window of time between when Tele Fácil met with Mr. Sánchez Henkel (January 12, 2015) and when it submitted its Second Enforcement Request to him (January 28, 2015), a meeting was convened in the office of the IFT Chairman, Gabriel Oswaldo Contreras Saldivar, to discuss Telmex's concerns about enforcement of the interconnection agreement between Telmex and Tele Fácil.³¹⁸ At this meeting, the

³¹⁴ Bello Statement ¶ 86-87, C-004; Sacasa Statement ¶ 93-95, C-003.

³¹⁵ Bello Statement ¶ 88, C-004; Sacasa Statement ¶ 96, C-003.

³¹⁶ Bello Statement ¶ 89, C-004.

³¹⁷ Bello Statement ¶¶ 90, C-004; *Denuncia por incumplimiento a la Resolución de Desacuerdo de Interconexión por Telmex/Telnor presentada por Tele Fácil México ante la Unidad de Cumplimiento del Instituto Federal de Telecomunicaciones* (Notice of Breach by Telmex/Telnor to Interconnection Resolution submitted by Tele Fácil México before the Compliance Unit of the Federal Telecommunications Institute) (January 28, 2015) (hereinafter "Second Enforcement Request"), C-038.

³¹⁸ As noted at footnote 4, *infra*, the information contained in the first two sentences of this paragraph is based on Claimants' information and belief. Claimants note that Mexico has refused to disclose or produce documents relating to this, and other IFT meetings that occurred in the January to March 2015 timeframe. Claimants further note that the dispute concerning production of documents is ongoing as of the preparation of this Statement of Claim. As set forth in Claimants' November 1, 2017 submission on document production, it is simply not credible that Mexico has no relevant records during this time period. Claimants also note that at least two meetings with Telmex occurred during the relevant time period, but that the official record of these meetings does not disclose whether Resolution 381 was discussed. *See Lista de Asistencia Reunión en Instituto Federal de Telecomunicaciones*

Chairman instructed the Compliance Unit to request an opinion from the Legal Unit as to whether physical interconnection could be enforced without execution of the interconnection agreement. As planned at this meeting, on February 10, 2015, the Compliance Unit duly submitted to the Legal Unit the question of whether or not the IFT Plenary had the authority to require that the concessionaires execute their interconnection agreement as established by the IFT, in addition to requiring the physical interconnection of their networks.³¹⁹

197. The Compliance Unit requested the following:

Therefore, this Legal Unit is requested to confirm the legal criterion consisting in the authority of the Institute's Plenary to require concessionaires that submitted a disagreement of interconnection to the Institute, includes not only the interconnection but also the execution of the corresponding agreement, in the form and terms determined in the resolution of disputes submitted for the Institute's consideration.³²⁰

198. The IFT's action in submitting this unnecessary and unprecedented confirmation of criteria question was illegal. There is no legal authority that permits the IFT's Compliance Unit to issue a confirmation of criteria to another unit in lieu of enforcing the Plenary's orders. Article 129 of the FTBL provides that "the corresponding administrative procedures shall be filed transparently, promptly, quickly and all procedural acts which delay the effective interconnection between public telecommunication networks, or the conditions allowing the

(Attendance Sheet to Meeting at Federal Telecommunications Institute) (February 6, 2015) (hereinafter "Attendance Sheet Feb. 6"), **C-039**; *Lista de Asistencia Reunión en Instituto Federal de Telecomunicaciones* (Attendance Sheet to Meeting at Federal Telecommunications Institute) (February 23, 2015) (hereinafter "Attendance Sheet Feb. 23"), **C-042**. Finally, Claimants note in its November 1, 2017 submission other, serious concerns with Mexico's conduct in this proceeding. In light of these circumstances, the Claimants reserve their right to put forward any further evidence of such meetings at a future date.

³¹⁹ *Confirmación de Criterio presentada por la Unidad de Cumplimiento a la Unidad de Asuntos Jurídicos del Instituto Federal de Telecomunicaciones* (Confirmation of Criteria submitted by the Compliance Unit to the Legal Unit of the Federal Telecommunications Institute) (February 10, 2015) (hereinafter "Compliance Unit Confirmation of Criteria"), **C-040**.

³²⁰ *Id.* at 3.

provision of the public telecommunication services not agreed on shall be avoided.”³²¹ This step, apparently hatched in the IFT Chairman’s office, is exactly the type of action that plagued the competitiveness and openness of the Mexican telecommunication market for years, and is precisely the kind of tactic that the reform law, the FTBL, prohibited.

199. As if in coordination with the IFT, on February 18, 2015, Telmex itself sought a “confirmation of criteria” from the Legal Unit, also unbeknownst to Tele Fácil. Such a request involves a request by a carrier to confirm its proposed legal interpretation of a particular aspect of telecommunications law.³²² Incredibly, in an attempt to renege on the freely negotiated rate terms, Telmex argued in this submission (ironically given its circumstances) that the rate terms were no longer consistent with the new telecommunications regime.³²³

200. In the meantime, the Tele Fácil founders remained very concerned about the IFT’s unresponsiveness. Consequently, on February 26, 2015, Tele Fácil sent another notice to the IFT that Telmex was continuing to refuse to comply with Resolution 381’s mandate to sign the interconnection and interconnect indirectly.³²⁴ After receiving no response from the IFT, Tele Fácil sought a meeting with the Plenary to request enforcement of Resolution 381.³²⁵ After initially being told that a meeting could not be scheduled for an extended period of time, Tele Fácil was granted a meeting, which took place on March 5, 2015.³²⁶

³²¹ FTBL, Article 129, **CL-004**.

³²² *Confirmación de Criterio presentada por Teléfonos de México ante el Instituto Federal de Telecomunicaciones* (Confirmation of Criteria submitted by Teléfonos de México to the Federal Telecommunications Institute) (February 18, 2015) (hereinafter “Telmex’s confirmation of criteria”), **C-041**.

³²³ *Id.* at pp. 3-7.

³²⁴ *Recordatorio de solicitud de interconexión indirecta presentado por Tele Fácil, S.A. de C.V. ante el Instituto Federal de Telecomunicaciones* (Reminder of request for indirect interconnection submitted by Tele Fácil México, S.A. de C.V. before the Federal Telecommunications Institute) (February 26, 2015), **C-107**.

³²⁵ Bello Statement ¶ 97, **C-004**; Sacasa Statement ¶ 99-100, **C-003**.

³²⁶ Bello Statement ¶¶ 98-99, **C-004**; Sacasa Statement ¶ 100, **C-003**.

201. At this meeting, Tele Fácil's representatives (Miguel Sacasa and Carlos Bello) explained their concerns and requested the Plenary's help to enforce Resolution 381.³²⁷ The Commissioners questioned the IFT Units about why no action had been taken.³²⁸ Carlos Silva, head of the Legal Unit, said that Resolution 381 had not been enforced because there were purportedly different interpretations.³²⁹ Given that this meeting took place almost four months after Resolution 381, and that this issue was only being addressed with the Plenary now, this excuse beggars belief.

202. Commissioner Mario Fromow stated, after declaring that in his view Resolution 381 was absolutely clear, that "I believe that the discussion is to define the scope of a resolution issued by the Plenary," again, suggesting (absurdly given his statement as to the clarity of the Resolution) that an interpretation was needed.³³⁰

203. Commissioner Adolfo Cuevas asked the Unit of Regulatory Policy if the IFT, or even COFETEL previously, had ever ordered interconnection independently from resolving rates, or if carriers must interconnect once the rates are resolved.³³¹ The Unit of Regulatory Policy confirmed that the IFT had never had a case of ordering physical interconnection without also ordering an interconnection agreement.³³² The IFT, and previously COFETEL, has always ordered both the execution of the agreement and physical interconnection jointly.

³²⁷ See generally Bello Statement ¶¶ 99-114, **C-004**; Sacasa Statement ¶ 101-111, **C-003**; *Versión Estenográfica de audio de Entrevista del Pleno No. 2015-03-05-1239-SP-18 con Tele Fácil México, S.A. de C.V.*, Transcript of Audio Recording of Plenary Meeting No. 2015-03-05-1239-SP-18 with Tele Fácil, (March 5, 2015), (hereinafter "Transcript of March 5 Plenary Meeting"), **C-043**.

³²⁸ *Id.*

³²⁹ *Id.*

³³⁰ *Id.*

³³¹ *Id.*

³³² Transcript of March 5 Plenary Meeting, at 11, **C-043**.

204. The following, highly revealing exchange also took place:

LUIS FERNANDO PELAEZ: Commissioner, in previous cases we have never had the event of ordering the interconnection prior to an agreement, there is always an agreement together with the interconnection, from what I remember.

GERARDO SANCHEZ HENKEL: This is precisely what we presented for consult to the legal unit, because the order to interconnect and sign the agreement is provided only in one resolution point and for the same case. Then for the purpose of adjusting expressly to what is ordered by the Plenary we would need to have absolute accuracy regarding the scope for us to be able to require the interconnection and signature of the agreement or both matters separately. Then the subject and the need to determine the scope have been addressed in an adequate manner and once defined then we will act immediately.³³³

205. Thus, Mr. Pelaez, the IFT Chairman's Executive Coordinator, stated what was true: that the IFT had **never** ordered physical interconnection prior to execution of an agreement.³³⁴ Despite this, Mr. Sánchez Henkel indicated that his unit requested an interpretation from the Legal Unit about this policy, even though it had been long-standing and the IFT has never deviated from it.³³⁵ The delayed and contrived nature of this exchange among IFT officials is abundantly clear.

206. As the transcript of this meeting reveals, while a cabal of Commissioners, including the Chairman, were willing to do Telmex's bidding, a minority spoke out to highlight the absurdity of the process that was under discussion, and how that approach contravened Mexican telecommunications law and policy. Again, the IFT had never before ordered physical interconnection without a signed agreement to govern the commercial conduct of the parties.

³³³ *Id* at 11-12.

³³⁴ *Id.* (emphasis added).

³³⁵ *Id.*; see also Bello Statement ¶¶ 109-110, C-004.

207. Notable was the intervention of Commissioner Labardini:

I'm worried about this point. Because I already gave my opinion about this matter on November 26, 2014 and signed that resolution. For me it is very clear and there is no place for any different interpretation, if someone wants a confirmation of criteria using their right to submit petitions to the authority, very well, separately, here, that cannot affect what has already been ordered and must be enforced without hesitation within the 10 days following the resolution. Telmex and Tele Fácil must interconnect their networks and initiate the rendering of services. In the same period, the companies must execute the interconnection agreement. These are two acts, one regarding a private agreement between the parties, and, of course, they will try to delay the interconnection arguing a series of tactics from which we have seen a large collection through 16 years, I am sorry. The mandate that I, as part of this Plenary, demand from the Units, is to enforce this resolution, that whatever needs to be done is done for the parties to interconnect. I don't see where any different interpretation fits. If we add the two years to grant the concession, which was not part of the scope of the IFT, it was before us, plus the negotiations and now each time a carrier unilaterally decides to change an offer, they will submit a confirmation of criteria? It seems to me that this will be the new generation of tactics by the predominant to evade its obligations which are many, legally and under this resolution and under the preponderance resolution, then the interconnection should occur, even indirectly, under the terms resolved by this Plenary, which should have been enforced immediately after the 10 days. Any doubt regarding the agreement and, in that sense I would not render an opinion, it would be heard by the plenary but this could not delay or distract what has already been resolved to execute the agreement. I'm concerned, concerned to see a new generation of delaying practices from this or any other company to evade the interconnection obligation, an obligation that it has by law and obligation that was already resolved. I am against recreating what I already voted for on November 26, 2014.³³⁶

208. The Chairman simply ignored Commissioner Labardini's concerns. He immediately declared that "we are speaking of the interpretation of the scope of a resolution."³³⁷ He went on to say that he understood the issues, and ended the meeting.³³⁸

³³⁶ Transcript of March 5 Plenary Meeting, at 13-14, C-043.

³³⁷ *Id.* at 14.

³³⁸ *Id.*

209. After the meeting concluded, the Chairman personally walked the Tele Fácil delegation to the elevator bank, all the while assuring them that prompt interconnection was the most important issue for competitive markets to flourish in Mexico, so Resolution 381 would be enforced.³³⁹

210. Consequently, while the representatives of Tele Fácil were concerned with the additional and unnecessary process that was being discussed, and expressed those concerns in the meeting, they nonetheless left the meeting believing that Resolution 381 would be enforced.³⁴⁰ According to Mr. Bello, he believed after the meeting that Tele Fácil “had the support of all of the Commissioners, and that they would act to enforce Resolution 381. There was no indication they would modify in any way Resolution 381. There was no indication that Tele Fácil needed to pursue further action to try to enforce Resolution 381.”³⁴¹

211. On March 13, 2015, just one week after that meeting, there was another Plenary Session with an agenda that contained an item to discuss and vote on a resolution regarding the enforcement of Resolution 381.³⁴² However, an officer of the Legal Unit requested that since “the Legal Affairs Unit has received various comments from the offices of the Commissioners, therefore it is requested that [Tele Fácil’s matter] be withdrawn from the agenda, in order to analyze them and be able to present a version that can be submitted to the consideration of the

³³⁹ Bello Statement ¶ 115, C-004; Sacasa Statement ¶ 112, C-003.

³⁴⁰ *Id.*; see also *Correo electrónico de Miguel Sacasa a Josh Nelson y Jorge Blanco sobre reunión con Pleno* (E-Mail sent by Miguel Sacasa to Josh Nelson and Jorge Blanco regarding the Plenary Meeting) (March 5, 2015) (hereinafter “March 5 e-mail”), C-044; *Correo electrónico de Miguel Sacasa a la Embajada de Estados Unidos sobre reunión con Pleno* (E-Mail sent by Miguel Sacasa to U.S. Embassy regarding the Plenary Meeting) (March 6, 2015) (hereinafter “March 6 e-mail”), C-045.

³⁴¹ Bello Statement ¶ 115, C-004.

³⁴² *Id.* at ¶ 116.

Plenary Session.”³⁴³ The agenda item was removed and whatever the IFT anticipated voting on that day along with the comments provided by the Commissioners have never been disclosed by the IFT.³⁴⁴

212. At this point, while Tele Fácil still believed that the IFT’s Chairman would honor his commitment to enforce Resolution 381, they were increasingly frustrated with the delays, as they advised two of Mexico’s Senators,³⁴⁵ and the Plenary.³⁴⁶

213. On April 7, 2015, the Legal Unit transmitted its proposed interpretation to the Plenary.³⁴⁷

2. Decree 77

214. After Resolution 381 was rendered, rather than enforcing its legal conclusions, the IFT dramatically reversed course completely. It undid its prior rulings, stripped Tele Fácil of its rights under the interconnection agreement with Telmex, and took unlawful steps that destroyed Tele Fácil’s business prospects while safeguarding Telmex’s dominant position.³⁴⁸ On April 8, 2015, the IFT rendered Decree 77.³⁴⁹

³⁴³ *Versión Estenográfica de la IV Sesión Ordinaria del Pleno 13 de marzo de 2015*, (Transcript of Plenary’s IV Ordinary Session dated March 13, 2015), (hereinafter “Transcript of Plenary Session admitting Comments from Commissioners”), **C-046**.

³⁴⁴ *Id.*; see also Bello Statement ¶ 116, **C-004**.

³⁴⁵ *Carta a Senador Javier Lozano Alarcón enviada por Tele Fácil México, S.A. de C.V.* (Letter to Senator Javier Lozano Alarcón by Tele Fácil) (March 20, 2015) (hereinafter “Letter to Lozano”), **C-047**; *Carta a Senador Luis Miguel Barbosa Huerta enviada por Tele Fácil México, S.A. de C.V.* (Letter to Senator Luis Miguel Barbosa Huerta by Tele Fácil) (March 20, 2015) (hereinafter “Letter to Barbosa”), **C-048**.

³⁴⁶ *Carta de Seguimiento a reunión con el pleno respecto al incumplimiento de Resolución de Interconexión por parte de Telmex y Telnor* (Follow up letter to the Plenary regarding the breach to Interconnection resolution by Telmex and Telnor) (March 23, 2015) (hereinafter “Follow-up with Plenary”), **C-049**.

³⁴⁷ *Propuesta por parte de la Unidad de Asuntos Jurídicos al Secretario Técnico del Pleno para establecer el Alcance de Resolución de Interconexión* (Proposal by the Legal Unit to the Plenary Executive Coordinator to Determine the Scope of Interconnection resolution) (April 7, 2015) (hereinafter “Legal Unit Proposal”), **C-050**.

³⁴⁸ Bello Statement ¶ 123, **C-004**; see also Álvarez Report, **C-008**; Soria Report, **C-009**.

³⁴⁹ *Acuerdo mediante el cual el Pleno del Instituto Federal de Telecomunicaciones establece el alcance de la “Resolución mediante la cual el Pleno del Instituto Federal de Telecomunicaciones determina las condiciones de*

215. In Decree 77, the IFT purported to “interpret” the scope of Resolution 381.³⁵⁰ This framing of Decree 77 is another indication that the IFT was aware that it could not review one of its own Resolutions, and yet this is exactly what it did; Decree 77 was anything but an interpretation. It was a fundamental revision of Resolution 381 that left Tele Fácil bereft of the key rights it had been previously granted. In addition to constituting an illegal process under the FTBL, it was contrary to the long-established policies favoring prompt and effective interconnection and sanctity of contract.

216. Principally, the “interpretation” provided in Decree 77 ran directly counter to the IFT’s obligation to “[i]ssue provisions, guidelines or resolutions in terms of public telecommunication networks interoperability and interconnection in order to ensure free competition in [the] market.”³⁵¹ By failing to enforce Resolution 381, including the rate offered by Telmex and accepted by Tele Fácil, the IFT majority frustrated the freedom of contract principle and undermined competition by denying a new entrant access to the telecommunications market, while at the same time strengthening the position of the monopolistic carrier.

217. Second, Article 129 of the FTBL provides that “the Institute shall favor the prompt and effective interconnection between public telecommunication networks, therefore, the corresponding administrative procedures shall be filed transparently, promptly, quickly, and all procedural acts which delay the effective interconnection between public telecommunication networks, or the conditions allowing the provision of the public telecommunication services not

interconexión no convenidas entre Tele Fácil México, S.A. de C.V. y las empresas Teléfonos de México, S.A.B. de C.V., y Teléfonos del Noroeste, S.A. de C.V.,” P/IFT/EXT/080415/77 (April 8, 2015) (hereinafter “Decree 77”), C-051.

³⁵⁰ *Id.* at Background IX & First Consideration.

³⁵¹ FTBL, at Article 15, § IX, **CL-004**. Article 15 section IX of the Law.

agreed on shall be avoided.”³⁵² All of the IFT’s actions after Resolution 381, including Decree 77, had the intended effect of delaying interconnection between the networks of Telmex and Tele Fácil, in violation of Article 129.

218. In Decree 77, the IFT held that Resolution 381 was only applicable to the IFT’s decision on disputed terms, i.e., indirect interconnection and portability charges, notwithstanding the fact that, as explained above, Telmex had already agreed to these terms during the course of the dispute resolution proceeding.³⁵³ Shockingly, the IFT found that it lacked authority to recognize and enforce terms that were previously agreed (that is, the terms that were undisputed between the parties).³⁵⁴

219. Despite making the exact opposite ruling in Resolution 381, the IFT now found that previously agreed terms were not established:

Regarding the other terms and conditions of the interconnection agreement that the parties must execute, taking into consideration that this collegiate body did not address the provisions contained in the draft agreement included in the file as **it was not a matter of disagreement and therefore it was not a matter of its competence**, it is clarified **that the rights of the parties** regarding the aspects that were not a subject matter of the Interconnection Resolution **remain untouched**. The above, since the will of the parties is what governs the execution of an interconnection agreement and therefore **the IFT cannot impose terms and conditions that were not submitted to its consideration as a disagreement**.³⁵⁵

Decree 77 also stated:

the IFT, when ordering the execution of the corresponding Interconnection agreement in the First Resolution item of the Interconnection Resolution, did not make any determination regarding

³⁵² *Id.* at Article 129.

³⁵³ Decree 77, at pp. 9-10, **C-051**.

³⁵⁴ *Id.* at 10

³⁵⁵ *Id.* (Emphasis added).

any other stipulation contained in the draft agreement included in the record, as they were not considered as part of the disagreement....³⁵⁶

220. In its final order, the IFT's Fourth Decree held that: "The rights of the parties are held harmless regarding the conditions that were not a matter of the Interconnection Resolution [381]."³⁵⁷ In other words, the IFT found that all interconnection terms, except those relating to indirect interconnection and portability charges, were no longer binding on the parties. Notably, this provision of Decree 77 was extremely contentious, being adopted by a slim 4/3 margin.³⁵⁸

221. Decree 77 thus gave Telmex exactly what it wanted. It permitted Telmex to renege on the rates it had agreed to with Tele Fácil (USD 0.00975 dollars per minute of use through 2017), rates that were much less profitable to it once it had been designated a Preponderant Economic Agent. Moreover, Decree 77 allowed Telmex to manufacture a new interconnection disagreement over rates, knowing that the IFT would reach a favorable result. Under the new FTBL, the IFT establishes a default rate that it applies if carriers do not negotiate their own rate; the default rate is significantly lower than the rate agreed between Telmex and Tele Fácil.³⁵⁹

222. In many ways, this particular conclusion was more damaging for the sector as a whole, as the dissenting minority recognized in Decree 77.³⁶⁰ By stating in Decree 77 that anything that "was not a matter of disagreement" is "not a matter [within the IFT's]

³⁵⁶ *Id.* at 11-12.

³⁵⁷ *Id.* at Fourth Decree.

³⁵⁸ *Id.* at p. 14 ("Likewise, reserving for vote in particular the Fourth Resolution item and its consideration section, which is approved by majority of votes of the Commissioners Gabriel Oswaldo Contreras Saldivar, Luis Fernando Borjon Figueroa, Mario German Fromow Rangel and Adolfo Cuevas Teja, with the dissenting vote to the contrary from the Commissioners Adriana Sofia Labardini Inunza, Maria Elena Estavillo Flores and of the Commissioner Ernesto Estrada Gonzalez.")

³⁵⁹ FTBL, Article 131, **CL-004** (providing that "the interconnection rate shall be negotiated freely" but if there is a "dispute regarding the rates" the IFT shall resolve the rate based on a "cost methodology that it determines").

³⁶⁰ Decree 77, at p. 10, **C-051**.

competence”³⁶¹ the IFT opened the door to potentially endless disputes over interconnection agreements.³⁶²

223. Commissioner Labardini understood perfectly the fundamental policy problem with Decree 77. In her dissent, she echoed the concerns she had expressed at the March 5, 2015 Plenary meeting by stating as follows:

The draft resolution submitted to us by the Unit of Legal Affairs in a way ratifies the scope of the Resolution [381] of November 2014, of this Institute, of which I voted in favor. On the one hand, regarding interconnection fees, this Institute, this Plenary Meeting, understood that these were fully established by the parties. There was a unilateral offer by Telmex–Telnor dated August 26, 2013, offering the rates to be applied for transit and termination, and an acceptance by Tele Fácil, in a letter notarized or notified through a Notary Public on July 8, 2014, to Telmex, accepting these rates and the rest of the Framework Agreement offered by Telmex, except on the points that were covered by the Resolution, as these were the points of disagreement between the parties, i.e. the possibility of making an indirect interconnection and eliminating any payments by Tele Fácil due to Portability.

In this Resolution of 2014, of November 2014, in which I understand that the parties, or one of them, in good faith requested clarification regarding its scope, it is clear then that the matter of disagreement were the aspects of Portability and direct interconnection and that this Institute, as well as myself as a member of the Plenary Meeting, understood that everything else, rates and everything else involved in an Interconnection Agreement, had been agreed between the parties, and this is established by the Fifth Whereas Clause of the aforementioned Resolution [381].

. . . But the first thing that, as I have said, I consider that, in this Resolution [381], this Plenary Meeting acknowledged that there was an agreement of wills. Contracts are made by agreements of wills, their formalization into written instruments is a formality but my understanding is that, and this is why I voted the way I voted in November, that there was an agreement of wills between Tele Fácil and Telmex, regarding the entire subject of interconnection, except for matters of disagreement: Portability

³⁶¹ *Id.* at p. 10, ¶¶ 3 and 4.

³⁶² *See* Álvarez Report, ¶¶ 157-161.

and indirect interconnection. This being the case, the dispute was only about that and, this being the case, the Plenary Meeting issued an order. **What does it order? It orders the execution of the Agreement involving the terms decided by this Institute and the terms already agreed between the parties** and, on the other hand, it ordered for interconnection to take place within 10 days, without the need for the formality to sign, to execute a written Agreement, which cannot be an obstacle or an excuse for this interconnection to take place.

Indeed, these are two obligations but the ultimate goal and the order, and what we should promote as regulators, is the materialization of this interconnection, for the networks to be interoperable. And if the parties brought this disagreement on just two matters, we have no reason to decide on aspects brought here to the table; this is why we only decided on what we decided. This does not imply that there is no Decision and, as it has existed since July 7 or, pardon me, July 8, 2014, I consider that an agreement of wills was valid when it was settled. . . .

Taking apart a draft interconnection agreement and dividing it into 20 disagreements, then bringing forward every clause and saying: Oh no, this no, I did not make an agreement; that would be a tactic to almost evade the law and evade the obligation to interconnect. This I why I consider, first of all, that the November Resolution, in fact, has the scope it has, ordering the parties to interconnect, to execute the Agreement in the form they agreed on July 8 and in the way in which this Institute decided on the two matters of disagreement. . . .

We resolved a dispute, acknowledging that a series of agreements between the parties already existed. And that there was only a disagreement with respect to the two aforementioned aspects; and therefore, I do not believe we have the sufficient jurisdiction to rehear the issue if any of the parties were to file another dispute over the rates issues of these two networks or over the same rates that have already been agreed upon. As the administrative authority, I believe that the November 26 Resolution and today's opinion would conclude our involvement in this matter.

I also believe that while the litigation was limited to those issues raised by the parties, adding all matters that were agreed upon by them, and the issues decided by this Institute, **the Institute actually can order the signing of the entire Agreement. I do not see how signing only the portions related to the Portability and direct interconnection charges can be ordered. They have an obligation, and have had this obligation since our opinion in November, to interconnect and sign the Agreement, as they had agreed, and as we decided. Therefore, I cannot support the Third and Fourth Rulings.** If you would please

allow me, and well, if you like, at the time Commissioner Chairman submits this to a vote, if he will do so, Ruling by Ruling. . . .³⁶³

224. Commissioner María Elena Estavillo also voted against and offered a dissenting opinion in Decree 77. In her dissenting opinion, she said:

So, the Resolution [381] that we passed, even though it did not determine rates, it did analyze if the rates were the subject of the dispute. And for that reason, it seems important to note that, in the preamble [of Decree 77], that there are several general statements which mention that the Resolution did not address or resolve the issue of rates and I do not agree with that. It was in fact decided whether it was a part of the dispute, which from my point of view, cannot be submitted again for review by the Institute.³⁶⁴

225. Finally, Commissioner Estrada also dissented against Decree 77. He stated that:

in this Resolution [381] the Plenary Session did consider that the rest of the terms and conditions that were agreed upon. In this sense, the Fourth Ruling [of Decree 77], in my opinion, opens the possibility for the parties to come before the Institute with issues presented as a disagreement, issued that were not raised as such at the time that the disagreement occurred, and that the Institute considered, considered as agreed upon, which could lead to the extreme that the Institute would have had to resolve as many disputes as the amount of clauses in the respective Interconnection Agreement. And it would have prevented this authority from resolving issues in dispute in one single act, which I think is contrary to the spirit of the regulations in effect.³⁶⁵

226. Among the four votes in favor of the Fourth Resolution of Decree 77 – the part of the Decree finding that all previously agreed terms between the parties were “held harmless” and thus could be disputed in subsequent proceedings – was the Chairman of the IFT, who had previously assured Mr. Sacasa that Resolution 381 would be enforced,³⁶⁶ and Commissioner

³⁶³ *Versión Estenográfica de la XXI Sesión Extraordinaria del Pleno 8 de abril de 2015*, (Transcript of Plenary’s XXI Extraordinary Session dated April 8, 2015), (hereinafter “Transcript of Plenary Session adopting Decree 77”), at pp. 6-9 (emphasis added), **C-052**.

³⁶⁴ *Id.* at 10-12 (emphasis added).

³⁶⁵ *Id.* at p. 1.

³⁶⁶ *See supra*. ¶ 204.

Mario Fromow.³⁶⁷ While he fails to mention it on his official IFT biography,³⁶⁸ before being appointed as a Commissioner, Mr. Fromow was, until April 2011, Manager of Regulatory Studies at Comertel, a subsidiary of Telmex. Indeed, much of Mr. Fromow's prior experience was gained in service to Telmex. From 1996 to 2004, he was employed directly by Telmex in the following positions: Chief of Strategy Planning of Telmex's Technological Institute, Coordinator of New Technology Digital Networks of Telmex's Technological Institute, and Coordinator of New Technology Transfer in Telmex's Technological Institute.³⁶⁹

227. The negative policy implications of Decree 77 were clear.³⁷⁰ So was the illegality. Mexican administrative law recognizes the principle that determinations of administrative authorities cannot be revoked by the same issuing authority.³⁷¹ This principle is based on the right to legal certainty and due process of law in accordance with Articles 14 and 16 of the Constitution.³⁷² This principle also reflects the fundamental assumption that administrative resolutions are presumed legal until a court has modified or revoked the earlier

³⁶⁷ Decree 77, at p. 14, **C-051**.

³⁶⁸ *Perfil de Comisionado Mario Fromow en página del IFT* (Commissioner Mario Fromow's Profile on IFT's Website) (November 1, 2017) (hereinafter "Fromow's Profile"), **C-097**.

³⁶⁹ Some news organizations have reported about concerns as to whether Commissioner Fromow's appointment was legal in the first place, given the fact that he was appointed to the IFT after working in the Telmex organization within three years of his appointment. *See, e.g., Reforma - Cuestionan Elección de Reguladores* (Reforma - Appointment of regulators is questioned) (August 21, 2013), **C-095**; *Reporte Indigo - Arrecia Guerra en Telecom - Cuestionan a Comisionado, por Armando Estrop* (Reporte Indigo - War on Telecom: Commissioner is Questioned, by Armando Estrop) (June 1, 2014) (hereinafter "Reporte Indigo article on Fromow"), **C-096**. Article 28 of the Mexican Constitution establishes the requirements for an individual to be an IFT Commissioner. Within Article 28, the eighth qualification for the position provides that candidates "must not have held, within the last three years, a job or served in a position or role in companies that have been subject to any of the penalty procedures substantiated by the referenced agency. Commissioners for the Federal Telecommunications Institute must not have held, within the last three years, a job or served in a position or role in the companies of private commercial concessionaires or their related entities, subject to the Institute's regulations." Constitutional Reform, at Article 28, **CL-002**. Claimants are unaware of any action taken in regard to this matter.

³⁷⁰ *See generally* Álvarez Report, ¶¶ 137-161, **C-008**; Soria Report, ¶¶ 209-231, **C-009**.

³⁷¹ Soria Report, ¶¶ 129-132, **C-009**.

³⁷² *See id.*

determination.³⁷³ Thus, even if a resolution infringes the law, in order to ensure full compliance with the legal certainty principle, authorities are prevented from revoking their own resolutions, and they are bound to recognize the rights granted therein.

228. Decree 77 also reversed the essential principle of unity of contract execution and physical interconnection. In Decree 77, the IFT ordered the parties to interconnect their systems physically within ten business days, and obligated the parties to execute “the corresponding [interconnection] agreement”—subject to no deadline.³⁷⁴ This ruling not only defied established IFT practice (as confirmed by Luis Fernando Pelaez in the March 5, 2015 Plenary meeting),³⁷⁵ but it also placed Tele Fácil in the untenable and precarious position of having to interconnect physically with Telmex, a proven monopolist, without the critical commercial terms in place to govern the parties’ relationship.

229. Finally, the procedure was performed in violation of Tele Fácil’s due process rights³⁷⁶ and its obligation to ensure that its process for resolving interconnection disputes is “transparent.”³⁷⁷ Article 14 of the Mexican Constitution provides that “No one can be deprived from their freedom or their property, possessions or rights, except by due process followed before previously established courts, in which the essential due process formalities are fulfilled and in accordance with the laws promulgated before the event occurred.”³⁷⁸ Tele Fácil was not

³⁷³ *Id.*

³⁷⁴ Decree 77, at p. 13, Third Resolution, **C-051**.

³⁷⁵ Transcript of March 5 Plenary Meeting, at p.12, **C-043**; Bello Statement, ¶ 126, **C-004**; *Oficio IFT/212/CGVI/UT/800/2017 emitido por la Unidad de Transparencia del Instituto Federal de Telecomunicaciones* (Document IFT/212/CGVI/UT/800/2017 issued by the Transparency Unit of the Federal Telecommunications Institute) (July 4, 2017) (hereinafter “Transparency Unit Confirmation”), **C-083**.

³⁷⁶ *Constitución Política de los Estados Unidos Mexicanos* (Political Constitution of the United Mexican States) (enacted on February 5, 1917) (hereinafter “Mexican Constitution”), at Article 14, **CL-005**; see also Álvarez Report, ¶¶ 5, 113, **C-008** Soria Report, ¶¶ 129-136, **C-009**.

³⁷⁷ FTBL, at Article 129, **CL-004**.

³⁷⁸ Mexican Constitution, at Article 14, **CL-005**.

properly involved in the “confirmation of criteria” proceedings which resulted in the rescission of Resolution 381, an act that immediately and directly deprived Tele Fácil of its previously granted rights.³⁷⁹

230. Outrageously, the arguments recited by the IFT in Decree 77 that are ascribed to Tele Fácil as if they were made in response to the Telmex request for confirmation of criteria³⁸⁰ are, in fact, the arguments presented by Tele Fácil in its Second Enforcement Request,³⁸¹ *not* as part of any procedure that was instituted by the IFT in advance of Decree 77. Tele Fácil was given no meaningful opportunity to address the questions and points raised – by units of the IFT or by Telmex – in the “confirmation of criteria” process that resulted in Decree 77. This process amounted to a complete violation of Tele Fácil’s constitutionally-guaranteed due process rights.

3. The IFT’s Different Approach to Enforcement of Decree 77

231. The IFT’s discriminatory treatment of Tele Fácil is also apparent when comparing the IFT’s complete non-action to enforce Resolution 381 with the IFT’s swift actions to enforce and follow-up on Decree 77. After Decree 77 was issued, Tele Fácil was subjected to an unusually high frequency of physical inspections as part of IFT’s so-called enforcement actions – two physical inspections within five months of Decree 77.³⁸² It is rare that a carrier would be

³⁷⁹ Álvarez Report, ¶¶ 5, 113, C-008 Soria Report, ¶¶ 129-136, C-009; *see also* Bello Statement, ¶¶ 119-122, C-004.

³⁸⁰ *See* Decree 77, at 5 (“Meanwhile, Tele Fácil claimed that what Telmex and Telnor indicated in connection with the failure to meet the requirements to begin the request for an interconnection disagreement procedure was false, given that, in accordance with article 42 of the FTL, it must comply with the request to execute an interconnection agreement. Tele Fácil indicated that it formally delivered to Telmex the documentation, and therefore it requests to review the execution of the interconnection agreement between Tele Fácil and Telmex.”); *id.* at 6 (“Meanwhile, Tele Fácil claimed that Telmex and Telnor’s argument regarding the determination of rates is false, insofar as in the first draft notified by Telmex via Notary Public clearly established the applicable rates for local interconnection traffic.”).

³⁸¹ Second Enforcement Request, C-038.

³⁸² *See* Bello Statement, ¶ 153, C-004; *Oficio IFT/225/UC/DG-VER/3661/2015 emitido por la Unidad de Cumplimiento del Instituto Federal de Telecomunicaciones* (Document IFT/225/UC/DG-VER/3661/2015 issued by

subject to two enforcement actions in a period of five years, let alone five months.³⁸³ By contrast, after Resolution 381 was issued, the IFT only transmitted a document request to Telmex.

232. It is even more unusual that the two inspections would yield contradictory results. Following the first inspection on June 9 and 10, 2015, the IFT concluded that no irregularities were found regarding Tele Fácil's compliance with Decree 77.³⁸⁴ Notwithstanding this favorable result, a second inspection of Tele Fácil's compliance with Decree 77 was performed over the October 20, 21 and 27, 2015 period.³⁸⁵ This time, the IFT reversed its prior conclusion and found that some irregularities existed, even though absolutely nothing had changed in the short time period between the two inspections.³⁸⁶ On March 16, 2016, the IFT notified Tele Fácil that the company would be subject to sanctions with regard to Decree 77.³⁸⁷ However, it ultimately decided to abandon the planned sanctions regarding Decree 77.³⁸⁸

the Compliance Unit of the Federal Telecommunications Institute) (September 15, 2015) (hereinafter "First Verification Findings"), **C-059**; *Oficio IFT/225/UC/DG-VER/222/2016 emitido por la Unidad de Cumplimiento del Instituto Federal de Telecomunicaciones* (Document IFT/225/UC/DG-VER/222/2016 issued by the Compliance Unit of the Federal Telecommunications Institute) (February 3, 2016) (hereinafter "Second Verification Findings"), **C-064**.

³⁸³ Bello Statement, ¶ 155, **C-004**; Soria Report, ¶¶ 175-184, **C-009**.

³⁸⁴ First Verification Findings, at 1-2, **C-059**.

³⁸⁵ Bello Statement, ¶ 154, **C-004**.

³⁸⁶ *Id.*; see also Second Verification Findings, at 1, **C-064**.

³⁸⁷ *Acuerdo de Inicio de Procedimiento administrativo del expediente E-IFT.UC.DG-SAN.II.0168/2016 en contra de Tele Fácil México, S.A. de C.V. por incumplimiento a Condiciones de Seguridad* (Document to Initiate Administrative Procedure against Tele Fácil México, S.A. de C.V. in file No. E-IFT.UC.DG-SAN.II.0168/2016 for breaching Safety Conditions) (March 14, 2016) (hereinafter "Start of Sanctioning Administrative Process"), **C-071**.

³⁸⁸ Bello Statement, ¶ 156, **C-004**; *Resolución al procedimiento administrativo de imposición de sanción relativo al expediente E-IFT.UC.DG-SAN.II.0009/2016, emitida por el Instituto Federal de Telecomunicaciones* (Resolution to the administrative procedure to impose sanctions regarding the file E-IFT.UC.DG-SAN.II.0009/2016, issued by the Federal Telecommunications Institute) (October 3, 2016), **C-092**.

233. These actions were illegal under Mexican law. The same IFT unit that granted Tele Fácil a clean bill of health in the first IFT inspection should not have subsequently revoked it.³⁸⁹

234. In addition to the unusual inspection results, Tele Fácil was also subject to discrimination by the IFT with regards to its request to transition its Concession to a new form known as the *Concession Unica* created by the FTBL. Tele Fácil was the first carrier to request the transition to *Concession Unica*.³⁹⁰ The law required this transition to be concluded within 60 days, but Tele Fácil's request was blocked for 545 days.³⁹¹ In comparison, the second longest time the IFT took to review and authorize any other transition request was 281 days, while most were resolved closer to the 60-day period established by law.³⁹²

³⁸⁹ Soria Report, ¶¶ 175-184, C-009.

³⁹⁰ Bello Statement, ¶¶ 149-150, C-004; *Formato para solicitar transitar a una concesión única para uso comercial presentada por Tele Fácil México, S.A. de C.V. ante el Instituto Federal de Telecomunicaciones* (Request to transition to a Sole Concession for commercial use submitted by Tele Fácil México, S.A. de C.V. before the Federal Telecommunications Institute) (August 4, 2015) (hereinafter "Request for Concession Unica"), C-057.

³⁹¹ Bello Statement, ¶¶ 152, C-004; *Resolución mediante la cual el Pleno del Instituto Federal de Telecomunicaciones autoriza a Tele Fácil México, S.A. de C.V. la transición de un título de concesión para instalar, operar y explotar una red pública de telecomunicaciones al régimen de concesión única para uso comercial* (Resolution by which the Plenary of the Federal Telecommunications Institute authorized Tele Fácil México, S.A. de C.V. to transition from a concession to install, operate and exploit a public telecommunications network, to a sole concession for commercial use) (January 30, 2017), C-079; *Título de Concesión Unica para uso comercial que otorga el Instituto Federal de Telecomunicaciones para prestar servicios públicos de telecomunicaciones y radiodifusión, a favor de Tele Fácil México, S.A. de C.V.* (Sole Concession for commercial use granted by the Federal Telecommunications Institute to provide public telecommunications and broadcasting services, in favor of Tele Fácil México, S.A. de C.V.) (January 30, 2017) (hereinafter "Concession Unica"), C-080.

³⁹² Bello Statement, ¶¶ 152, C-004; Chart of Requests for Transition to Concesión Unica evaluated by IFT (last updated October 31, 2017), at C-091.

4. Resolution 127 – the Denouement

235. As was predicted by the Decree 77 minority dissenters, on June 16, 2015, Telmex submitted a purportedly new interconnection disagreement to the IFT for resolution.³⁹³ Telmex claimed that a disagreement with Tele Fácil existed regarding, among other things, the applicable interconnection rates for 2015.³⁹⁴ Notably, Telmex acknowledged that Resolution 381 “establishes that such fee has already been agreed by the parties,”³⁹⁵ but then nevertheless proceeded to argue that those rates were not enforceable because in Decree 77 the IFT had decided that the interconnection fee was not resolved.³⁹⁶

236. On July 17, 2015, Tele Fácil submitted another request to the IFT to enforce Resolution 381 against Telmex, in an attempt to remind the IFT that all issues had already been resolved and Telmex’s attempt to initiate a new disagreement procedure should be dismissed.³⁹⁷ Once again, the IFT ignored a petition by Tele Fácil.

237. Instead, on October 19, 2015, the IFT issued Resolution 127, which resolved Telmex’s manufactured dispute in Telmex’s favor.³⁹⁸ Resolution 127 reiterated the rulings in

³⁹³ *Desacuerdo de interconexión presentado por Teléfonos de México, S.A.B. de C.V. ante el Instituto Federal de Telecomunicaciones* (Interconnection disagreement procedure initiated by Teléfonos de México, S.A.B. de C.V. before the Federal Telecommunications Institute) (June 16, 2015) (hereinafter “Telmex’s manufactured dispute”), **C-055**.

³⁹⁴ *Id.* In order to prepare for this argument, Telmex had requested that Tele Fácil negotiate 2015 rates, even though the rates had already been established until 2017 by Resolution 381. *See Solicitud de Teléfonos de México, S.A.B. de C.V. para iniciar negociaciones de tarifas de interconexión para 2015 con Tele Fácil México, S.A. de C.V.* (Request sent by Teléfonos de México, S.A.B. de C.V. to Tele Fácil México, S.A. de C.V. to initiate negotiations for interconnection rates of 2015) (January 9, 2015) (hereinafter “Telmex’s Request to Negotiate 2015 Rates”), **C-037**.

³⁹⁵ Telmex’s manufactured dispute, at 4, **C-055**.

³⁹⁶ *Id.* at 8.

³⁹⁷ *Respuesta a la solicitud de Resolución de desacuerdo de interconexión de Telmex/Telnor presentada por Tele Fácil México, S.A. de C.V. ante el Instituto Federal de Telecomunicaciones* (Reply to Telmex/Telnor interconnection dispute procedure submitted by Tele Fácil México, S.A. de C.V. before the Federal Telecommunications Institute) (July 17, 2015), **C-056**.

³⁹⁸ *Resolución mediante la cual el Pleno del Instituto Federal de Telecomunicaciones determina las condiciones de interconexión no convenidas entre Teléfonos de México, S.A.B. de C.V., Teléfonos del Noroeste, S.A.*

Decree 77, but with a new twist. As in Decree 77, the IFT determined in Resolution 127 that the parties were not bound by the original interconnection agreement between Telmex and Tele Fácil. However, the IFT now ruled that the original interconnection agreement had *never even existed*. According to the IFT, it was invalid because it was never signed by Telmex.³⁹⁹

238. The IFT also determined the applicable interconnection rates in Telmex's favor. Despite Resolution 381, the IFT now applied the default rate under the FTBL (MXN 0.004179 minutes per use; USD 0.000253 minutes per use), approximately *one fortieth* of the rate previously agreed to between the parties and approved by the IFT (USD 0.00975 minutes per use).⁴⁰⁰

239. Both IFT Commissioners who are also lawyers, Commissioner Labardini and Commissioner Cuevas, dissented from Resolution 127 on the basis that the decision was inconsistent with Mexican law.⁴⁰¹

240. Commissioner Labardini recalled in her dissenting vote that “this dispute has a history which was detailed in two Resolutions of this Plenary Session, one being [Resolution] 381, in 2014, and the other being [Decree] 77, in April 2015.”⁴⁰² She continued saying that “this

de C.V. y Tele Fácil México, S.A. de C.V., aplicables del 1 de enero al 31 de diciembre de 2015, P/IFT/EXT/071015/127 (Oct. 7, 2015) (hereinafter “Resolution 127”), **C-061**.

³⁹⁹ *Id.* at p. 19.

⁴⁰⁰ *Id.* at p. 35, First Resolution.

⁴⁰¹ According to the stenographic record of the IFT's plenary meeting held on October 7, 2015, Commissioner Labardini voted against the entire Resolution because she considered the rates to have already been agreed upon and resolved by the plenary. *Versión Estenográfica de la XXXVI Sesión Extraordinaria del Pleno 7 de octubre de 2015*, (Transcript of Plenary's XXXVI Extraordinary Session dated October 7, 2015), at pp. 40–41, **C-060**. In addition, Commissioner Cuevas voted against setting the rates because they were already resolved by the plenary and they were already defined in the draft agreement sent by Telmex to Tele Fácil. *Id.* at 59.

⁴⁰² *Id.* at p. 40.

dispute regarding direct interconnection fees from 2014 to 2017 had already been discussed and resolved. . . .”⁴⁰³ Therefore, she refused to vote in favor of the new resolution.

241. Commissioner Cuevas also offered a dissenting opinion that including the following:

[I]n my opinion, this Institute rightly recognized in its Resolution contained in Agreement P/IFT/261114/381 the existence of an offer by Telmex and Telnor to Tele Fácil expressed through the formal notification of a draft Framework Agreement, which included the interconnection rates that must be applied between the parties, with which, in terms of the civil legislation applicable to the concurrence of wills, and the general legal principles, Telmex and Telnor are bound by their offer, which was accepted by Tele Fácil within the established legal term at least in the part where Tele Fácil did not state disapproval, including the interconnection rates.⁴⁰⁴

242. To add insult to Tele Fácil’s injury, on August 25, 2016, the IFT’s Compliance Unit notified Tele Fácil that it was initiating a sanctions process against the company for failure to comply with Resolution 127.⁴⁰⁵ According to the IFT, the reason for initiating the sanctions process against Tele Fácil was the company’s failure to execute the new interconnection agreement that Telmex had proposed.⁴⁰⁶ Again, this action is in stark contrast to the IFT’s inaction and lack of enforcement of Resolution 381.

⁴⁰³ *Id.* at p. 41.

⁴⁰⁴ *Id.* at p. 59.

⁴⁰⁵ *Acuerdo de Inicio de Procedimiento administrativo del expediente E-IFT.UC.DG-SAN.II.0168/2016 en contra de Tele Fácil México, S.A. de C.V. por incumplimiento a Resolución 127* (Document to Initiate Administrative Procedure against Tele Fácil México, S.A. de C.V. in file No. E-IFT.UC.DG-SAN.II.0168/2016 for breaching Resolution 127) (August 25, 2016) (hereinafter "Start of Sanctioning Administrative Process for Breaching Resolution 127"), at p. 29, **C-077**.

⁴⁰⁶ *Id.*

243. On April 6, 2017, the IFT notified Tele Fácil of the resolution to the administrative procedure dated April 3, 2017, issued by IFT's Compliance Unit, for the alleged breach of Resolution 127, and by which IFT imposed a fine of MXN 2,571.94.⁴⁰⁷ The IFT's recent decision to sanction Tele Fácil by imposing the fine—after placing it in an untenable situation—is unconscionable. It is also arbitrary and discriminatory: while the IFT never took meaningful action to enforce Resolution 381 against Telmex, as it was lawfully required to do, it did not hesitate to take the extreme step of enforcing Resolution 127 against Tele Fácil.

244. Tele Fácil submitted its objection to the IFT's fine on April 28, 2017.⁴⁰⁸ It also informed the IFT that since this NAFTA arbitration had already been initiated, it was the company's intent to pursue redress against all actions of the IFT, including the imposition of the fine via its NAFTA claim to the exclusion of any local remedies.

G. The Failure of Mexico's Telecommunications Courts

245. The events described above gave rise to *amparo* actions challenging the constitutionality of the IFT's conduct: one by Telmex in connection with Resolution 381, which included Decree 77; and two by Tele Fácil in challenging Decree 77 and Resolution 127, respectively. In all cases, the newly-established specialized Mexican courts have acted as a rubber stamp to the IFT's actions, and failed to correct the misconduct that has denied Tele Fácil its previously granted interconnection rights.

⁴⁰⁷ *Oficio de Expediente IFT.UC.DG-SAN.II.0168/2016 para resolver procedimiento administrativo de imposición de sanción ante Tele Fácil México, S.A. de C.V.* (Document IFT.UC.DG-SAN.II.0168/2016 to resolve administrative procedure to impose sanction to Tele Fácil México, S.A. de C.V.) (April 3, 2017) (hereinafter "IFT Sanction to Tele Fácil"), **C-081**.

⁴⁰⁸ Letter from C. Bello Hernández to C. Hernández Contreras, Re: *Objection and statement of non-consent to the Administrative Procedure and Fine contained in file E-IFT.UC.DG-SAN.II.0168/2016* (April 28, 2017) (hereinafter "IFT Fine Objection Letter"), **C-082**.

246. As this Tribunal considers the actions of these specialized courts, it is important to recall that the creation of these courts was part of the reform process, designed to curb the abuse by Telmex in particular, of the *amparo* process as a tool to stifle competition in the telecommunications sector.⁴⁰⁹ As noted below, Telmex was particularly adept at abusing this process for that purpose.⁴¹⁰ Understandably, given the short passage of time since this reform was implemented, the value of the specialized courts is not yet readily apparent – and certainly was not apparent in the case of the dispute between Tele Fácil and Telmex.⁴¹¹

247. As the OECD reported in its 2017 assessment of the Mexican telecommunications sector:

The creation of specialised courts in highly technical and specialized matters such as telecommunication services, broadcasting and economic competition is a positive outcome of the reform. However, their practical establishment has encountered some obstacles with respect to human resources and their expertise and experience of such specialized topics. It appears that the training for judicial officials, to date, has primarily relied on academia and contacts with foreign judicial institutions, while the contributions provided by the Mexican state have been limited.

The current situation is therefore less effective than it might otherwise be and could ultimately lead to counterproductive outcomes.⁴¹²

248. Such was the case for Tele Fácil. The *amparo* courts in this case proved themselves to be only adept at blindly following the IFT's findings in Decree 77 and Resolution 127, not the independent experts envisioned by the reform.

⁴⁰⁹ OECD 2017 Telecommunications Review of Mexico, p. 60, C-084.

⁴¹⁰ See *supra* ¶¶ 119 - 120.

⁴¹¹ See generally Álvarez Report, ¶¶ 162-187, C-008; Soria Report, ¶¶ 232-263, C-009; see also Statistical Analysis of the Resolution issued by the Mexican Courts and Tribunal Specialized in Matters of Economic Competition, Telecommunications and Broadcasting (September 2015) (hereinafter "Tribunal Statistics"), C-090.

⁴¹² OECD 2017 Telecommunications Review of Mexico, p. 60, C-084.

1. Telmex's Amparo Against Resolution 381

249. On December 26, 2014, Telmex filed an *amparo indirecto* before a Mexican federal court challenging Resolution 381.⁴¹³ Telmex included numerous challenges to Resolution 381, consistent with its well-established practice of seeking to delay interconnection and implementation of regulations against it via litigation.⁴¹⁴ Telmex also challenged the adoption of the new FTBL by the Mexican Congress,⁴¹⁵ the promulgation of the FTBL by the President of Mexico,⁴¹⁶ and the IFT's determination of Telmex's status as a preponderant economic agent.⁴¹⁷

250. In its *amparo*, Telmex recognized that it was also its understanding that the IFT ordered the parties to interconnect at the rates agreed between the parties and confirmed by the IFT.⁴¹⁸ Telmex argued in one of its challenges that the Plenary mandated Telmex to submit the interconnection rates contained in the original interconnection agreement sent to Tele Fácil, on August 26, 2013, notwithstanding the fact that such rates were allegedly inapplicable due to the new legal framework.⁴¹⁹ On May 11, 2015, Telmex extended the scope of its suit by also

⁴¹³ *Juicio de Amparo número 351/2014 promovido por Teléfonos de México, S.A.B. de C.V. ante la Juez Segundo de Distrito en Materia Administrativa, especializada en Competencia Económica, Radiodifusión y Telecomunicaciones*, (Amparo trial 351/2014 initiated by Teléfonos de México, S.A.B. de C.V. before the Second District Judge in Administrative Matters Specialized in Economic Competition, Broadcasting and Telecommunications), (December 26, 2014) (hereinafter “Telmex’s *Amparo Claim* against Resolution 381 and Decree 77”), **CL-036**.

⁴¹⁴ *Id.*

⁴¹⁵ *Id.*

⁴¹⁶ *Id.*

⁴¹⁷ *Id.*

⁴¹⁸ *Id.*

⁴¹⁹ *Id.*

challenging Decree 77, which was adopted by the IFT while its *amparo* proceeding challenging Resolution 381 was still ongoing.⁴²⁰

251. On March 11, 2016, the Second District Court for Administrative Matters, specialized in Economic Competition, Broadcasting and Telecommunications issued its opinion.⁴²¹ The court dismissed Telmex's *amparo* action challenging the constitutionality of Resolution 381.⁴²²

252. However, the court proceeded to address Telmex's claims concerning the applicable rate under the new FTBL, and here is where it ran fundamentally afoul of the law.

253. First, the court decided not to analyze the content and effects of Decree 77 on the remarkable basis that the purpose of Decree 77 was only to describe the scope of Resolution 381, as which, Decree 77 would be considered as part of Resolution 381. Therefore, "the concepts of violation formulated in the [*Amparo*], are understood to be directed at the resolution [381]."⁴²³ Thus, and going along with the IFT's Orwellian use of the word "interpretation," the court proceeded to address a version of Decree 77 that simply did not exist. As is plain from the

⁴²⁰ *Ampliación de demanda de amparo 351/2014 presentada por Teléfonos de México, S.A.B. de C.V. ante el Juez Segundo de Distrito en Materia Administrativa, especializada en Competencia Económica, Radiodifusión y Telecomunicaciones* (Extension of Amparo Claim 351/2014 submitted by Teléfonos de México, S.A.B. de C.V. before the Second District Judge in Administrative Matters Specialized in Economic Competition, Broadcasting and Telecommunications) (May 11, 2015), **C-054**.

⁴²¹ *Sentencia de Juicio de Amparo número 351/2014 promovido por Teléfonos de México, S.A.B. de C.V. emitida por la Juez Segundo de Distrito en Materia Administrativa, especializada en Competencia Económica, Radiodifusión y Telecomunicaciones*, (Resolution by the Second District Judge in Administrative Matters Specialized in Economic Competition, Broadcasting and Telecommunications to Amparo trial 351/2014 initiated by Teléfonos de México, S.A.B. de C.V.), (Mar. 11, 2016) (hereinafter "Resolution of Telmex's Amparo against Resolution 381 and Decree 77"), **C-069**.

⁴²² *Id.* at p. 134, First Ruling.

⁴²³ *Id.* at 106.

decree itself, and as explained above, the real Decree 77 was not an “interpretation” of Resolution 381; it was a dramatic reversal of the rights that had been granted to Tele Fácil.⁴²⁴

254. Second, and equally damaging to Tele Fácil, the court confirmed Decree 77’s flawed reasoning that the IFT only had authority to resolve disputed interconnection terms, and lacked authority to pronounce agreed terms as final and binding on the parties.⁴²⁵ It is remarkable that shortly after a drastic Constitutional reform of Mexico’s telecommunications law, a major feature of which was to increase the IFT’s powers to favor competition, the “specialized courts” would take the opportunity to confirm a *reduction* of the IFT’s power to enforce interconnection agreements and require prompt interconnection.

255. In this regard, the court reaffirmed that during the disagreement procedure, Telmex did not confirm a disagreement on the interconnection rates and, consequently, the IFT was not required to rule on that condition. The court found that Resolution 381 only required “within the next ten business days after the notification becomes effective, [the parties] will interconnect their public telecommunications networks and start to provide the respective interconnection services and will enter into the respective agreement in which the issues related to portability and indirect interconnection are taken into consideration.”⁴²⁶ The court concluded that even though the IFT declared in Resolution 381 that the rates were agreed by the parties, it did not order the parties to include the rates in the interconnection agreement.⁴²⁷ The court further concluded – consistent with Decree 77, but wholly inconsistent with Resolution 381 – that “the imperative power of the [IFT] to force the concessionaires to comply with certain

⁴²⁴ See *supra* Part II.F.2.

⁴²⁵ Resolution of Telmex’s Amparo against Resolution 381 and Decree 77, at pp. 129-130, C-069.

⁴²⁶ *Id.* at p. 126.

⁴²⁷ *Id.* at p. 127.

conditions of interconnection in their contractual relationships is limited to those aspects that it determined in connection with the resolution of interconnection disagreements referred to in article 42 of the Federal Telecommunications Law.”⁴²⁸ Indeed, the *amparo* court relied on Decree 77, and *no other* authority, to reach this conclusion: the court simply stated that this reasoning was confirmed in Decree 77.⁴²⁹

256. Whether intentionally or incompetently, the court manifestly failed to interpret the clear language of Resolution 381 and the errors in law perpetrated by Decree 77. It compounded this error by failing to do a proper analysis of the law, and ignored the policy rationales underlying the new FTBL and the Constitutional amendments.⁴³⁰

2. Tele Fácil’s Amparo Against Decree 77

257. On May 7, 2015, Tele Fácil filed an *amparo* suit to challenge the IFT’s failure to enforce Resolution 381, and its subsequent issuance of Decree 77.⁴³¹

258. Specifically, Tele Fácil challenged the following actions of the IFT: (i) the Compliance Unit’s failure to enforce Resolution 381; (ii) the “confirmation of criteria” requested by the Compliance Unit of the Legal Unit; (iii) the Legal Unit’s opinion transmitted to the IFT Plenary; and (iv) the Plenary’s issuance of Decree 77.⁴³²

259. Among other things, Tele Fácil argued that Decree 77 was unconstitutional because the IFT had no authority to modify Resolution 381, which was a final administrative

⁴²⁸ *Id.* at p. 125.

⁴²⁹ *Id.* at p. 128.

⁴³⁰ *Id.* at pp. 125-135.

⁴³¹ *Demanda de Amparo número 1381/2015 promovido por Tele Fácil México, S.A. de C.V. ante la Juez Primero de Distrito en Materia Administrativa, especializada en Competencia Económica, Radiodifusión y Telecomunicaciones*, (Amparo trial 1381/2015 initiated by Tele Fácil México, S.A. de C.V. before the First District Judge in Administrative Matters Specialized in Economic Competition, Broadcasting and Telecommunications). (May 7, 2015) (hereinafter “Tele Fácil’s *Amparo* Claim against Decree 77”), **C-053**.

⁴³² *Id.* at pp. 2-3, Section IV.

resolution.⁴³³ Tele Fácil asserted that Decree 77 was not an interpretation of the scope of Resolution 381, but rather a reversal of a previous administrative action that changed the rights and obligations of the parties involved.⁴³⁴ Tele Fácil contended that the IFT itself did not have the legal authority to amend or reverse Resolution 381 and that the only way this could have been done was via judicial review.⁴³⁵

260. On January 22, 2016, the First District Court for Administrative Matters, specialized in Economic Competition, Broadcasting and Telecommunications, in three paragraphs, denied Tele Fácil's *amparo* action challenging the constitutionality of Decree 77, and confirmed the constitutionality and validity of Decree 77.⁴³⁶

261. Fundamentally, the Court dismissed the claim for the failure to enforce Resolution 381 simply by stating that there was no such failure, since “the Head and the General Director of Supervision of the IFT’s Compliance Unit stated in their justified report [that it was not true],”⁴³⁷ and because the IFT issued Decree 77 which it concluded had been issued to require the parties comply with Resolution 381.⁴³⁸ In other words, the court’s decision was circular and merely begged the question: it decided the challenge to Decree 77 by reference to the existence and presumed legitimacy of Decree 77.

262. On the question of the legitimacy of the “confirmation of criteria” requested by the IFT’s Compliance Unit of the Legal Unit, and the issue of the opinion drafted by the Legal

⁴³³ *Id.* at pp. 7-13, First Violation Concept.

⁴³⁴ *Id.*

⁴³⁵ *Id.* at p. 11.

⁴³⁶ *Sentencia de Juicio de Amparo número 1381/2015 promovido por Tele Fácil México, S.A. de C.V. emitida por la Juez Primero de Distrito en Materia Administrativa, especializada en Competencia Económica, Radiodifusión y Telecomunicaciones*, (Resolution by the First District Judge in Administrative Matters Specialized in Economic Competition, Broadcasting and Telecommunications to Amparo trial 1381/2015 initiated by Tele Fácil México, S.A. de C.V.). (Jan. 22, 2016) (hereinafter “Resolution of Tele Fácil’s *Amparo* against Decree 77”), **C-063**.

⁴³⁷ *Id.* at p. 4, Third Consideration.

⁴³⁸ *Id.*

Unit and provided to the IFT Plenary of Decree 77, the Court decided summarily, and again without any further analysis of the content or effects to the parties, that the *amparo* could not proceed on the grounds that “no obligation was not imposed on the claimant, nor did they modify or limit any existing right, since they are only a communication and an opinion, respectively, between the authorities of the Institute itself with effects only within that agency.”⁴³⁹ In other words, the Court concluded that the two actions by the IFT’s Compliance Unit and Legal Unit did not in any way affect Tele Fácil’s rights and obligations, so there was no action to be challenged.

263. Finally, the Court proceeded to purportedly analyze the only challenged action it deemed reviewable, namely, Decree 77 itself.⁴⁴⁰ On the issue of the IFT’s authority to issue Decree 77, the Court once more hid behind the fiction that Decree 77 was merely an interpretation of Resolution 381, and did not change any of its conclusions.⁴⁴¹ Thus, the Court blindly relied on the IFT’s argument that it was authorized to do so on the basis that the IFT has authority to:

establish the terms and conditions of interconnection that have not been agreed in connection with the public telecommunications networks, as well as to interpret the law, resolutions and administrative provisions in the telecommunications and broadcasting matters.

Therefore, the authorities it has allow the IFT to determine the scope of the resolution herein discussed, to the extent that its purpose was to give legal certainty to the parties and to identify the technical parameters to facilitate its comprehension.⁴⁴²

⁴³⁹ *Id.* at p. 5, Fifth Consideration.

⁴⁴⁰ *Id.* at p. 6, Sixth Consideration (VIII).

⁴⁴¹ *Id.* at 16.

⁴⁴² *Id.* at p. 7, Sixth Consideration.

This was anything but the independent and expert review the reform anticipated in establishing these specialized courts.

264. The Court declared that even though the FTBL only provided the IFT with the “authori[ties] to interpret such law as well as the administrative provisions in telecommunications and broadcasting matters, without including the word resolution,” “such circumstance does not imply that the authority cannot rely on that article to determine the scope of the interconnection resolution.”⁴⁴³ According to the Court, when it comes to the law, “we should not use its literal interpretation.”⁴⁴⁴ In other words, the Court concluded that it would not apply the law as written, but rather extend it to permit the IFT to issue an interpretation of its own resolutions, even though Congress had not seen fit to give the IFT that authority.

265. Again, the Court clearly seems to have accepted at face value the IFT’s fiction that Decree 77 did *not* modify the rights and obligations of the parties to Resolution 381; its ruling gives no indication of any independent assessment of both Resolution 381 and Decree 77 to assure itself of that conclusion. Bizarrely, the court pasted a two-column chart with the full text of Resolution 381 and Decree 77 side by side, with absolutely no analysis or conclusions.⁴⁴⁵ The court merely concluded that “it is inaccurate that [Resolution 381] was modified or revoked, since from the comparative it is found that [Decree 77] was only adopted in order to address the requests and confirmations of criteria formulated by [Tele Fácil] and the [Telmex] and to enforce the execution of [Resolution 381].”⁴⁴⁶ The Court further concluded, without any reasoning or

⁴⁴³

Id.

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Id.

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Id. at pp. 8-16.

⁴⁴⁶

Id. at p. 16.

support, that the comparative chart also shows that Resolution 381 only solved the conditions that had not been agreed by the parties, indirect interconnection and portability.⁴⁴⁷

266. After this alarming conclusion, the court refused to analyze any of Tele Fácil's other challenges on the grounds that "[they] derive from the arguments that have just been dismissed in previous paragraphs."⁴⁴⁸

267. In short, the Court's decision contains no real analysis of the statements and actions of the IFT. The Court's opinion was not the result of an actual, let alone thorough, legal analysis of the issues, nor any consideration of the policy implications, or any understanding of the practical consequences of Decree 77. It failed to analyze or consider whether there were any modifications to rights previously established. The Court fully ignored the main purpose of Article 42 of the FTL, which is to materialize interconnection among carriers' networks in a timely manner. Rather, the Court simply rubber-stamped what the IFT had decided and adopted these arguments to justify its own conclusions.

3. Denial of Tele Fácil's Appeal on *Amparo* Against Decree 77

268. Tele Fácil was improperly denied the opportunity to pursue its appeal of the District Court's decision. On February 12, 2016, Tele Fácil appealed the decision of the District Court to the Circuit Collegiate Court in Administrative Matters ("Circuit Court").⁴⁴⁹ However, on April 21, 2016, the Circuit Court dismissed Tele Fácil's appeal, with prejudice, but without

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Id.

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Id. at p. 17.

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Recurso de Revisión a Sentencia de Juicio de Amparo número 1381/2015 promovido por Tele Fácil México, S.A. de C.V. emitida por la Juez Primero de Distrito en Materia Administrativa, especializada en Competencia Económica, Radiodifusión y Telecomunicaciones, (Appeal to Resolution by the First District Judge in Administrative Matters Specialized in Economic Competition, Broadcasting and Telecommunications to Amparo trial 1381/2015 initiated by Tele Fácil México, S.A. de C.V.) (Feb. 12, 2016) (hereinafter "Tele Fácil's Appeal to *Amparo* against Decree 77"), C-065.

addressing the substance of Tele Fácil's claim.⁴⁵⁰ The events culminating in that dismissal are unsettling.

269. As already mentioned, on January 22, 2016, Tele Fácil's *amparo* against Decree 77 was denied. The opinion issued by the court was notified to Tele Fácil on January 25, 2016, granting the company ten days to file an appeal, if Tele Fácil wanted to do so. The term of ten days ran from January 27, 2016 to February 11, 2016.⁴⁵¹

270. On February 11, 2016, the day the appeal was due, Tele Fácil's counsel arrived at the courthouse to make the filing before it closed at midnight.⁴⁵² Court rules and practice guarantee a party's access to the courthouse until midnight on the day of a deadline.⁴⁵³ In an unprecedented event, the courthouse security guard denied counsel's access to the court's filing office; instead, he placed two calls to the office but received no answer.⁴⁵⁴ Eventually, at midnight, another call was placed successfully, but the court official refused to file Tele Fácil's appeal, claiming it was now untimely.⁴⁵⁵

271. The following day, Tele Fácil's counsel promptly raised the matter with the relevant judges and administrative officials.⁴⁵⁶ After reviewing electronic evidence of counsel's

⁴⁵⁰ *Sentencia de Juicio de Amparo en Revisión número 35/2016 promovido por Tele Fácil México, S.A. de C.V. emitida por el Primer Tribunal Colegiado de Circuito en Materia Administrativa, especializada en Competencia Económica, Radiodifusión y Telecomunicaciones*, (Resolution by the First Court of Appeals in Administrative Matters Specialized in Economic Competition, Broadcasting and Telecommunications to Amparo in Revision 35/2016 initiated by Tele Fácil México, S.A. de C.V.), (Apr. 21, 2016) (hereinafter "Rejection of Tele Fácil's Appeal of *Amparo* against Decree 77"), **C-075**.

⁴⁵¹ Bello Statement, ¶¶ 139-140, **C-004**; Rejection of Tele Fácil's Appeal of *Amparo* against Decree 77, at Background 4, **C-075**.

⁴⁵² *Id.* at ¶ 140.

⁴⁵³ *Id.*

⁴⁵⁴ *Id.*

⁴⁵⁵ *Id.* at ¶ 141.

⁴⁵⁶ *Id.* at ¶ 143.

valid attempt to file, the Chief Justice of the Circuit Court recognized the Court's fault and Tele Fácil was permitted to make its filing.⁴⁵⁷

272. The detailed description of the above facts were memorialized in the writing filed by Tele Fácil to the court on February 24, 2016, which contained the Appeal Statement of Facts and Tele Fácil's arguments on why the appeal should be admitted.⁴⁵⁸

273. On March 9, 2016, the Chief Justice, Patricio González-Loyola Perez, formally admitted the appeal as timely after considering the facts listed by Tele Fácil and the evidence presented, and resolved this by stating that:

. . .the statements and the evidence provided by the appellant are taken into consideration, from which it is proven that appellant's representative, Diana Margarita Mayorga Rea appeared in the Office of Parties' Correspondence at the twenty three hours with fifty eight minutes of the eleventh day of February two thousand sixteen, and the person in charge of the Office of Common Correspondence of the District Courts and Collegiate Courts in Administrative Matters Specialized in Economic Competition, Broadcasting and Telecommunications and of the Auxiliary Center of the First Region was absent, reason for which receipt certification of the revision appeal could not be stamped.

Pursuant to the above and taking into consideration that there are elements to consider the statement of appellant as truthful in the sense that it appeared to submit the document through which it submitted the relevant appeal within the term provided in the applicable law, in addition that the right to access to justice must prevail, in terms of the principles contained in article 17 of the Constitution I hereby consider the submission of the revision appeal as timely.⁴⁵⁹

⁴⁵⁷ *Id.* at ¶¶ 144-145; *Exposición de Hechos respecto a la presentación del amparo en revisión 1381/2015 presentado por Tele Fácil México, S.A. de C.V. ante el Juez Primero de Distrito en Materia Administrativa Especializada en Competencia Económica, Radiodifusión y telecomunicaciones* (Statement of Fact regarding presentation of Amparo Appeal 1381/2015 submitted by Tele Fácil México, S.A. de C.V. before the First District Judge in Administrative Matters Specialized in Economic Competition, Broadcasting and Telecommunications) (February 24, 2016) (hereinafter "Appeal Statement of Facts"), **C-066**; Admisión inicial de recurso de revisión de amparo 1381/2015 (Initial admission of Appeal to amparo 1381/2015) (February 24, 2016) (hereinafter "Initial Admission of Amparo Appeal"), **C-067**.

⁴⁵⁸ See Appeal Statement of Facts, **C-066**.

⁴⁵⁹ Initial Admission of Amparo Appeal, at p. 3, **C-067**.

274. Despite these decisions, on April 21, 2016, the Circuit Court dismissed Tele FÁCIL's appeal as untimely, without any reasonable justification.⁴⁶⁰ Inexplicably, according to the Circuit Court, including a vote by the Chief Justice of the Circuit Court who previously deemed the appeal as timely and admissible, because Tele FÁCIL did not file within the originally granted term, and regardless it was denied access to the filing office of the Court, its appeal was untimely.⁴⁶¹ It dismissed the appeal based on the misapplication of a generic timing rule allowing litigants to file within the first business hour following an early closure of the courts, e.g., for an official holiday.⁴⁶²

275. According to the Circuit Court, because Tele FÁCIL did not file within the Circuit Court's first business hour on the morning after it was denied access to the filing office, its appeal was untimely.⁴⁶³ This decision not only misapplied a timing rule intended for different circumstances, but it also failed to consider any of the unique circumstances surrounding Tele FÁCIL's attempted filing: it took Tele FÁCIL's counsel well over an hour to obtain evidence proving the inability to enter the courthouse; to discuss the situation with the Chief Justice of the Circuit Court; and to obtain an order issuing the Administrative Record necessary to justify the late filing.⁴⁶⁴

276. Shockingly, the Chief Justice, Patricio González-Loyola Perez, who had issued the interlocutory resolution that admitted the appeal on March 9, 2017, now voted along with the other judges to conclude that the appeal was not timely submitted.⁴⁶⁵

⁴⁶⁰ Rejection of Tele FÁCIL's Appeal of Amparo against Decree 77, **C-075**.

⁴⁶¹ *Id.* at 13.

⁴⁶² *Id.*

⁴⁶³ *Id.*

⁴⁶⁴ Appeal Statement of Facts, at Background 5, **C-066**.

⁴⁶⁵ Rejection of Tele FÁCIL's Appeal of Amparo against Decree 77, at 9, **C-075**.

277. Under Mexican law, Tele Fácil has no right or ability to appeal the decision of the Circuit Court's decision. In sum, the actions of the District Court and the Circuit Court denied Tele Fácil critical access to justice.

4. Tele Fácil's Amparo Against Resolution 127

278. On November 11, 2015, Tele Fácil filed an *amparo* against Resolution 127.⁴⁶⁶ It argued, among other things, that Resolution 127 was unlawful because it invested Telmex with the power to demand a direct interconnection when the predominant economic agent regulations had stripped Telmex of that authority.⁴⁶⁷

279. On March 15, 2016, Tele Fácil received a second ruling from the Second District Court for Administrative Matters, rejecting its constitutional challenge to Resolution 127.⁴⁶⁸ That decision, frankly, remains confusing to Tele Fácil and its counsel. It failed completely to address the issue that Telmex, as a predominant economic agent, no longer had the right to choose between connecting directly or indirectly since that right had been placed solely in the hands of the competitive carrier as part of the asymmetric regulations imposed on it by the

⁴⁶⁶ *Demanda de Amparo número 1694/2015 promovido por Tele Fácil México, S.A. de C.V. ante la Juez Segundo de Distrito en Materia Administrativa, especializada en Competencia Económica, Radiodifusión y Telecomunicaciones*, (Amparo trial 1694/2014 initiated by Tele Fácil México, S.A. de C.V. before the Second District Judge in Administrative Matters Specialized in Economic Competition, Broadcasting and Telecommunications). (November 11, 2015), **C-062**.

⁴⁶⁷ *Id.* at 24 (discussing Determination of Preponderant Economic Agent, at Fourth Resolution, **CL-010**). Requesting Concessionaire is defined to exclude Telmex, making clear that the right to decide between direct or indirect was solely in the discretion of the competitive carriers. See **CL-010** at p. 2.

⁴⁶⁸ *Sentencia de Juicio de Amparo número 1694/2015 promovido por Tele Fácil México, S.A. de C.V. emitida por la Juez Segundo de Distrito en Materia Administrativa, especializada en Competencia Económica, Radiodifusión y Telecomunicaciones*, (Resolution by the Second District Judge in Administrative Matters Specialized in Economic Competition, Broadcasting and Telecommunications to Amparo trial 1694/2015 initiated by Tele Fácil México, S.A. de C.V.) (Mar. 15, 2016) (hereinafter "Tele Fácil's Amparo against Resolution 127"), **C-070**.

IFT.⁴⁶⁹ In addition, the court reiterated the previous interpretations that the IFT only has authority to resolve disputed interconnection terms.⁴⁷⁰

280. Tele Fácil appealed that decision with the Circuit Collegiate Court in Administrative Matters, specialized in Economic Competition, Broadcasting and Telecommunications, on April 7, 2016.⁴⁷¹

281. On July 13, 2016, Tele Fácil withdrew its appeal from the court's consideration in preparation for initiating this NAFTA claim.⁴⁷²

5. Telmex's Appeal to its *Amparo* Denial Against Resolution 381 and Decree 77

282. On April 25, 2016, the Second Court of Appeals in Administrative Matters Specialized in Economic Competition, Broadcasting and Telecommunications admitted an appeal filed by Telmex to the Resolution of Telmex's *Amparo* against Resolution 381 and Decree 77.⁴⁷³

⁴⁶⁹ See *supra* n.467.

⁴⁷⁰ Tele Fácil's *Amparo* against Resolution 127, at p. 24, **C-070**.

⁴⁷¹ *Recurso de Revisión a Sentencia de Juicio de Amparo número 1694/2015 promovido por Tele Fácil México, S.A. de C.V. emitida por la Juez Segundo de Distrito en Materia Administrativa, especializada en Competencia Económica, Radiodifusión y Telecomunicaciones*, (Appeal to Resolution by the Second District Judge in Administrative Matters Specialized in Economic Competition, Broadcasting and Telecommunications to *Amparo* trial 1694/2015 initiated by Tele Fácil México, S.A. de C.V.) (April 7, 2016), **C-074**.

⁴⁷² *Desistimiento de Revisión de Juicio de Amparo número 1694/2015 promovido por Tele Fácil México, S.A. de C.V. emitida por la Juez Segundo de Distrito en Materia Administrativa, especializada en Competencia Económica, Radiodifusión y Telecomunicaciones*, (Withdrawal by to Appeal of *Amparo* trial 1694/2015 initiated by Tele Fácil México, S.A. de C.V. Resolution by the Second District Judge in Administrative Matters Specialized in Economic Competition, Broadcasting and Telecommunications to), (July 13, 2016), **C-076**.

⁴⁷³ See *Sentencia de Juicio de Amparo en Revisión número 62/2016 promovido por Teléfonos de México, S.A.B. de C.V. emitida por el Segundo Tribunal Colegiado de Circuito en Materia Administrativa, especializado en Competencia Económica, Radiodifusión y Telecomunicaciones*, (Resolution by the Second Court of Appeals in Administrative Matters Specialized in Economic Competition, Broadcasting and Telecommunications to *Amparo* in Revision 62/2016 initiated by Teléfonos de México, S.A.B. de C.V.), (Nov. 24, 2016) (hereinafter "Resolution of Telmex's Appeal of *Amparo* against Resolution 381 and Decree 77"), at p. 4, Basis and admission of the appeal for review, **C-078**.

283. On November 24, 2016, Telmex's appeal was ostensibly denied.⁴⁷⁴ However, as was the case with Telmex's first *amparo* resolution, the "denial" contained the same flawed analysis and arguments that supported the IFT's actions in favor of Telmex.

284. In the Resolution of Telmex's Appeal of *Amparo* against Resolution 381 and Decree 77, the Court recognized that the purpose of the Constitutional Telecom Reform was to avoid delays in the implementation of resolutions by the IFT and to prevent companies from abusing the right of access to justice as a mean to avoid the regulation and orders imposed by the IFT.⁴⁷⁵ However, the court agreed with the District Judge that the "disagreement" between Telmex and Tele Fácil concerned exclusively the issues of indirect interconnection and the elimination of portability charges,⁴⁷⁶ and asserted that there was no resolution by the IFT regarding rates.⁴⁷⁷

285. Regarding the interconnection disagreement between Telmex and Tele Fácil, the Court agreed with the District Court that Decree 77 merely describes the scope of Resolution 381.⁴⁷⁸ Therefore, the specialized court of appeals again treated Decree 77 and Resolution 381 as the same act, without analyzing the actual text and effects that Decree 77 had in comparison to what was in fact ordered in Resolution 381.

286. Remarkably, this appeals court also concluded that because the issue of rates had already been resolved and the *amparo* resolutions regarding Tele Fácil's challenges against

⁴⁷⁴ See *id.*

⁴⁷⁵ *Id.* at p. 124.

⁴⁷⁶ *Id.* at p. 296.

⁴⁷⁷ *Id.*

⁴⁷⁸ *Id.* at p. 268.

Decree 77 and Resolution 127 were final, the Court was bound by *res judicata*,⁴⁷⁹ and that since the issue had already been resolved by a court, it could no longer be challenged.

287. Once again, the courts failed to properly understand or analyze the IFT's prior resolutions and decree on these issues, or the implications of these rulings for Mexico's telecommunications industry as a whole, and simply parroted the IFT's language. This is not what the reform sought when establishing these courts.

H. Initiation of NAFTA Chapter Eleven Arbitration

288. Having determined that, as a small, foreign entity with no political clout in what proved to be a very closed telecommunications market, international arbitration provided the only realistic avenue for justice. On September 26, 2016, Tele Fácil filed its Notice of Arbitration under Chapter Eleven of the North American Free Trade Agreement, commencing the present action.⁴⁸⁰

III. THE TRIBUNAL HAS JURISDICTION TO DECIDE THE DISPUTE

289. Claimants have satisfied all of the jurisdictional requirements and other conditions set forth in Chapter Eleven for bringing a claim against Respondent.

A. Claimants' Claims Address Matters within the Scope of Chapter Eleven

290. Article 1101 (Scope and Coverage) provides, in relevant part, that Chapter Eleven of the NAFTA "applies to measures adopted or maintained by a Party relating to: ... (b)

⁴⁷⁹ *Id.* at p. 296.

⁴⁸⁰ Notice of Arbitration (September 26, 2016) (hereinafter "Notice of Arbitration"), C-103; Amended Notice of Arbitration (June 9, 2017) (hereinafter "Amended Notice of Arbitration"), C-104.

investments of investors of another Party in the territory of the Party.” Claimants have raised claims regarding matters within the scope of Chapter Eleven.⁴⁸¹

1. Claimants Have Made “Investments” in Mexico

291. Claimants have made significant “investments” in Mexico. Article 1139

(Definitions) defines “investment” as including, in relevant part:

- (a) an enterprise;
- (b) an equity security of an enterprise;
- ...
- (e) an interest in an enterprise that entitles the owner to share in income or profits of the enterprise;
- (f) an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution, other than a debt security or a loan excluded from subparagraph (c) or (d);
- (g) real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes; and
- (h) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under
- (i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or
- (ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise;
- ...

⁴⁸¹ Article 1101, CL-086.

292. According to the tribunal in *Marvin Feldman v. United Mexican States*, “[t]he term ‘investment’ is defined in Article 1139 in exceedingly broad terms. It covers almost every type of financial interest, direct or indirect, except certain claims to money.”⁴⁸²

293. As explained below, Claimants made “investments” in Mexico that were generally comprised of two parts: (1) the investment company, Tele Fácil, and related company assets, particularly with respect to rights of interconnection with Telmex; and (2) Claimants’ shareholdings in Tele Fácil and related rights associated with their status as shareholders.

a. Tele Fácil and Its Related Assets Constitute “Investments”

294. Tele Fácil was the investment company established by the three business partners, Messrs. Nelson, Blanco and Sacasa, to carry out their business plan.⁴⁸³ Article 1139 of the NAFTA defines the term “investment” to include “an enterprise.” According to Article 201 of the NAFTA, the term “enterprise” means “any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association.”⁴⁸⁴

295. Tele Fácil is a for-profit entity organized under Mexican law as a *Sociedad Mercantil*, specifically a *Sociedad Anónima de Capital Variable*, or commercial company, to

⁴⁸² *Marvin Feldman v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award (Dec. 16, 2002), ¶ 96, **CL-051**.

⁴⁸³ See *supra* Part II.B.3. and II.E.

⁴⁸⁴ See also NAFTA Article 1139 (definition of “enterprise of a Party”: “an enterprise constituted or organized under the law of a Party, and a branch located in the territory of a Party and carrying out business activities there.”), **CL-086**.

offer telecommunications services and products in Mexico.⁴⁸⁵ As such, it readily meets the definition of “investment.”⁴⁸⁶

296. Tele Fácil itself also held title to valuable assets that constituted “investments” within the meaning of Article 1139:

297. Concession Agreement: On May 17, 2013, Mexico’s Ministry of Communications & Telecommunications granted Tele Fácil a concession to install, operate, and exploit a public telecommunications network.⁴⁸⁷ The concession entitled Tele Fácil, as concessionaire, to provide “any telecommunications service which can technically be provided by its infrastructure, except broadcasting,”⁴⁸⁸ which included (1) local and long distance wireline telephone, (2) local and long distance wireless telephone, (3) Internet, and (4) cable television services in key markets, including Mexico City, Guadalajara and Monterrey. It also entitled Tele Fácil to interconnect its network with any other carrier’s network in Mexico, including with Telmex, the dominant carrier that controls over 60% of the telecommunications network.⁴⁸⁹

298. Tele Fácil’s concession meets the definition of “investment” as it clearly constitutes “intangible [property], acquired in the expectation or used for the purpose of economic benefit or other business purposes.”⁴⁹⁰ In fact, obtaining the concession was the first critical step for Tele Fácil to access the Mexican telecommunications market. International

⁴⁸⁵ Incorporation Deed, second clause, **C-014**.

⁴⁸⁶ Other international tribunals have found that the investment company constitutes an “investment.” See, e.g., *Chemtura Corp. v. Government of Canada*, UNCITRAL (NAFTA), Award (Aug. 2, 2010), ¶ 258, **CL-027**.
⁴⁸⁷ Concession, at 1, **C-019**.

⁴⁸⁸ *Id.* at p. 13, Chapter A, A.1.1, **C-019**.

⁴⁸⁹ FTL, at Article 42, **CL-001**.

⁴⁹⁰ Article 1139 (definition of “investment”), NAFTA, **CL-086**. The concession also clearly constitutes an “interest[] arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory” *Id.*

tribunals have regularly found that concessions, and the contractual rights that they create, constitute “investments.”⁴⁹¹

299. Interconnection Agreement: After obtaining a public telecommunications network concession, Tele Fácil negotiated the terms of interconnection with Telmex. By summer 2014, the two carriers had agreed on all but two interconnection terms relating to indirect interconnection and portability charges.⁴⁹² By law, the carriers were required to submit the dispute to the IFT for resolution in order to establish a complete interconnection agreement.⁴⁹³ On November 26, 2014, the IFT issued Resolution 381 which resolved all disputed terms in Tele Fácil’s favor.⁴⁹⁴ Accordingly, the IFT ordered both carriers to execute an interconnection agreement and physically interconnect their networks within ten business days.⁴⁹⁵

300. Tele Fácil’s interconnection agreement meets the definition of “investment” as it clearly constitutes “intangible [property], acquired in the expectation or used for the purpose of economic benefit or other business purposes.”⁴⁹⁶ Tele Fácil’s rights were binding and enforceable against Telmex as a matter of contract law and administrative law, entitling Tele Fácil to earn significant revenues selling telecommunications services.⁴⁹⁷ International tribunals have regularly found that assets of a similar nature, including contracts, licenses, and permits,

⁴⁹¹ See, e.g., *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Award (Aug. 20, 2007), ¶ 7.5.19, **CL-030**.

⁴⁹² See *supra* Part II.B.6.

⁴⁹³ FTL, at Article 42, **CL-001**.

⁴⁹⁴ Resolution 381, at pp. 14-18, **C-029**.

⁴⁹⁵ *Id.*

⁴⁹⁶ Article 1139 (definition of “investment”), NAFTA, **CL-086**. The interconnection agreement also clearly constitutes an “interest[] arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory” *Id.* **CL-086**

⁴⁹⁷ Álvarez, Report ¶¶ 87-97, **C-008**; Soria Report, ¶¶ 27-61, 69-74 **C-009**.

constitute “investments.”⁴⁹⁸

301. Telecommunications Equipment: In the course of preparing to enter the Mexican market, Tele Fácil acquired all of the technical equipment required to transfer large volumes of call traffic to and from its network. Chief among this equipment was the “switch” hardware, a device designed to manage call traffic flow that was capable of routing millions minutes of incoming and outgoing call traffic at any given point in time.⁴⁹⁹

302. Tele Fácil’s technical equipment is “tangible [property] acquired in the expectation or used for the purpose of economic benefit or other business purposes” and thus constitutes an “investment” that is protected under the NAFTA.⁵⁰⁰ Numerous international tribunals have found that tangible property is an “investment.”⁵⁰¹

303. Business Income: Another element of the value of Tele Fácil as an “enterprise” is its right to business income. By the time Resolution 381 became enforceable, Tele Fácil not only was entitled to earn revenue through its three initial lines of business (free conference calling, international termination and competitive tandem services), but it also had finalized critical relationships with its business partners to make this happen.⁵⁰² Specifically, Tele Fácil had concluded an interconnection agreement with Nextel providing for indirect interconnection with

⁴⁹⁸ With respect to contract rights, see e.g., *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award (Jan. 17, 2007), ¶¶ 267-269, **CL-064**; *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award (Oct. 31, 2012), ¶ 506, **CL-032**. With respect to administrative rights, see, e.g., *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award (April 12, 2002), ¶ 101, **CL-056**.

⁴⁹⁹ Nelson Statement, ¶¶ 60-61 and Appendix 1 (listing equipment), **C-001**.

⁵⁰⁰ Article 1139, NAFTA, **CL-086**.

⁵⁰¹ See, e.g., *ADF Group Inc. v. United States of America*, ICSID Case No. ARB (AF)/00/1, Award (Jan. 9, 2003), ¶ 154, **CL-021**; *Fireman's Fund Insurance Co. v. United Mexican States*, ICSID Case No. ARB(AF)/02/1, Award (Jul. 17, 2006), ¶ 176(b) (“The covered investment may include intangible as well as tangible property.”), **CL-040**.

⁵⁰² See *supra* Part II.E.1 and II.E.2.

Telmex,⁵⁰³ signed a Memorandum of Understanding with [REDACTED] guaranteeing approximately ten million a month minutes of international call traffic,⁵⁰⁴ and obtained firm commitments from Audio Now, Free Conference Call, No Cost Conference, and Zeno Radio to use Tele Fácil as the telecommunications platform necessary to offer their services to Mexican consumers.⁵⁰⁵

304. International tribunals have recognized that “business income, particularly when it is associated with a physical asset in the host country, is an investment within the meaning of Article 1139 both as an element of a larger investment involving the physical asset and as an investment in and of itself.”⁵⁰⁶ The business income that Tele Fácil would generate derived both from the physical infrastructure that the company had for handling high volumes of call traffic and the arrangements with Tele Fácil’s customers who would generate high volumes of call traffic to Tele Fácil based on pre-established rate terms. Tele Fácil’s guaranteed business income thus constitutes an “investment” under the NAFTA.

305. Market Access: Under Mexico’s telecommunications regime, Tele Fácil had obtained a right to access the Mexican telecommunications market. Tele Fácil’s concession guaranteed the company a right to interconnect with Telmex, and its interconnection agreement with Telmex, as established in Resolution 381, entitled it to physically interconnect with Telmex’s vast network on favorable commercial terms.⁵⁰⁷ As a new entrant in the market, Tele

⁵⁰³ Nextel Agreement, **C-032**.

⁵⁰⁴ [REDACTED] MOU, C-020; Blanco Statement, ¶¶ 39-40, C-002; [REDACTED] ¶ 7, C-007; Dippon Report, ¶¶ 53-56, C-010.

⁵⁰⁵ Dippon Report, ¶¶ 40-51, **C-010**; Nelson Statement, ¶¶ 73-74, **C-001**; Cernat Statement, ¶¶ 12-17, **C-006**; Lowenthal Statement, ¶¶ 15-21, **C-005**.

⁵⁰⁶ *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award (Sep. 18, 2009), ¶ 358, **CL-026**.

⁵⁰⁷ Soria Report, ¶ 36, 38-62, **C-009**.

Fácil's right of market access was absolutely essential to its ability to operate as a telecommunications carrier.

306. International tribunals have recognized that access to markets has a direct effect on the value of an investment, particularly with respect to the investment company's ability to generate revenues.⁵⁰⁸ In Tele Fácil's case, without an enforceable interconnection agreement with Telmex, the company could not move a single minute of call traffic or earn a single peso in the Mexican market. Tele Fácil's access to the Mexican market is, therefore, an element of the larger "investment," Tele Fácil, if not an "investment" in and of itself.

b. Claimants' Shareholdings and Shareholder Rights Constitute "Investments"

307. When developing their plans to enter the Mexican telecommunications market, the three business partners, Messrs. Nelson, Blanco and Sacasa, established a clear arrangement for the apportionment of shareholder rights between themselves. This arrangement was set forth in a Memorandum of Understanding dated July 20, 2009.⁵⁰⁹

308. First and foremost, the partners agreed that, based on Mr. Nelson's role as sole funder of the investment, he would be entitled to 60% of the profits during the life of the company. Second, the partners decided that they would eventually—when anticipated economic reforms took place—apportion company ownership as follows: 60% to Mr. Nelson; 20% to Mr. Blanco; and 20% to Mr. Sacasa.⁵¹⁰

⁵⁰⁸ See *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL (NAFTA), Interim Award (June 26, 2000), ¶ 96 (finding that the investment company's "access to the U.S. market is a property interest" protected under the NAFTA), **CL-058**; *Methanex Corp. v. United States of America*, UNCITRAL (NAFTA), Final Award (Aug. 3, 2005), Part IV, Chapter D, at ¶ 17 (noting the finding in *Pope & Talbot* and concluding that intangible property constituting "components of a process that is wealth producing" may be "investments"), **CL-055**.

⁵⁰⁹ Memorandum of Understanding, **C-013**.

⁵¹⁰ *Id.*

309. At the time that Tele Fácil was incorporated foreign equity restrictions required the following ownership structure: 51% to Mr. Sacasa; 40% to Mr. Nelson and 9% to Mr. Blanco.⁵¹¹ Subsequently, Tele Fácil was restructured with a 60/20/20 split in Mr. Nelson's favor, as originally planned.⁵¹²

310. Messrs. Nelson and Blanco held two types of assets by virtue of their shareholdings in Tele Fácil. First, they owned shares in the company which entitled them, among other things, to earn dividends based on Tele Fácil's revenues.⁵¹³ Article 1139 defines the term "investment" as including "an equity security of an enterprise," which is further defined as including "voting and non-voting shares" and "stock options."⁵¹⁴ Numerous international tribunals have found that an investor's shareholdings constitute a protected "investment."⁵¹⁵

311. Second, Messrs. Nelson and Blanco were entitled to specified percentages of Tele Fácil's profits based on the Memorandum of Understanding that, as a shareholders' agreement, legally bound the partners to honor specified profit-sharing arrangements.⁵¹⁶ This agreement constitutes an "investment" because it created "intangible [property], acquired in the expectation or used for the purpose of economic benefit or other business purposes."⁵¹⁷

⁵¹¹ Incorporation Deed, Ninth Title at p. 21, **C-014**.

⁵¹² Transfer of Shares, at p. 7, **C-072**.

⁵¹³ Incorporation Deed, at pp. 6-7, **C-014**.

⁵¹⁴ NAFTA Article 1139 (definition of "equity or debt securities"), **CL-086**.

⁵¹⁵ See, e.g., *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award (June 27, 1990), ¶ 95, **CL-022**; *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction (Aug. 3, 2004), ¶ 137, **CL-063**.

⁵¹⁶ Memorandum of Understanding, **C-013**; Bello Statement, ¶¶ 18-19, **C-004**.

⁵¹⁷ Article 1139, NAFTA.

2. Respondent's Acts at Issue are "Measures . . . Relating to" Claimants' Investments

312. Article 201 of the NAFTA defines the term "measure" as "any law, regulation, procedure, requirement or practice." As explained in *Ethyl Corporation v. Canada*, the meaning of the term is broad: "Clearly something other than a 'law,' even something in the nature of a 'practice,' which may not even amount to a legal stricture, may qualify [as a measure]."⁵¹⁸

313. The principal "measure" in this case was the IFT's decision to repudiate Resolution 381. In or about mid-January 2015, the IFT's Chairman convened a meeting in which he instructed the Compliance Unit not to enforce Resolution 381, as it should, but rather to request from the Legal Unit an interpretation as to whether the resolution must be fully enforced.⁵¹⁹ The Compliance Unit sent that request on February 10, 2015.⁵²⁰ Its request evidences a decision (likely made prior to that date) by the IFT's leadership to repudiate Resolution 381. That decision was implemented via a blatant abuse of an internal IFT procedure by which the IFT Plenary may opine, in limited circumstances, on the scope of application of a provision of telecommunications law; the process is known as the "confirmation of criteria" procedure.⁵²¹

314. Subsequent events behind the scenes at the IFT, including the preparation by the IFT's Legal Unit and Regulatory Policy Unit of a legal interpretation that revoked critical aspects of Resolution 381, indicate how the decision of the IFT's leadership was ultimately carried out.

⁵¹⁸ *Ethyl Corp. v. The Government of Canada*, UNCITRAL (NAFTA), Award on Jurisdiction (Jun. 24, 1998), ¶ 66, CL-038. See also *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Decision on Jurisdiction (Jan. 5, 2001), ¶ 40 (noting the "breadth of this inclusive definition" of "measure" in Article 201), CL-067; *SAUR International S.A. v. Argentine Republic*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability (Jun. 6, 2012), ¶ 364, CL-062.

⁵¹⁹ See *supra* Part II.F.1.

⁵²⁰ Compliance Unit Confirmation of Criteria, at 2-3, C-040.

⁵²¹ See Álvarez Report, ¶¶ 108-111, C-008.

315. The decision of the IFT's leadership to reverse Resolution 381 through the "confirmation of criteria" process constitutes a "procedure" and, thus, a "measure" within the meaning of that term under Articles 201 and 1102 of the NAFTA.⁵²²

316. Another relevant "measure" in this case is Decree 77,⁵²³ the ultimate product of the "confirmation of criteria" procedure undertaken by the IFT. In Decree 77, the IFT ruled, in a split decision, that all interconnection terms that had been previously agreed between Telmex and Tele Fácil, and that had been established in Resolution 381, were unenforceable. Specifically, the IFT determined that such terms must be "held harmless."⁵²⁴

317. Decree 77 is a formal administrative act issued by the IFT.⁵²⁵ It thus constitutes "regulation" and, in turn, a "measure" within the meaning of Articles 201 and 1102 of the NAFTA.⁵²⁶

318. Resolution 127⁵²⁷ is also a related "measure." Although the damage to Claimants' investments was inflicted far in advance of Resolution 127, that ruling of the IFT replaced critical interconnection terms that had previously been established in Tele Fácil's favor

⁵²² A "procedure" is defined as "a series of actions conducted in a certain order or manner." Procedure, Oxford Dictionary (Nov. 6, 2017) <https://en.oxforddictionaries.com>, **CL-087**. See also *SAUR International S.A. v. Argentine Republic*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability (June 6, 2012), ¶ 364, **CL-062**. Further, to the extent that the IFT's conduct involved any omission in connection with its refusal to enforce Resolution 381, it is also well established that omissions may constitute "measures" under international investment law. See, e.g., *Frontier Petroleum Services v. Czech Republic*, UNCITRAL, Final Award (Nov. 12, 2010), ¶ 223 ("There is little doubt that the term 'measure' generally encompasses both actions and omissions of a state in international law."), **CL-041**.

⁵²³ Decree 77, **C-051**.

⁵²⁴ *Id.* at p. 15, Fourth Resolution, **C-051**.

⁵²⁵ Although illegal, Decree 77 was promulgated under the guise of formal governance. See Álvarez Report, ¶ 40, **C-008**.

⁵²⁶ "Regulation" is defined as "a rule or directive made and maintained by an authority." Regulation, Oxford Dictionary (Nov. 6, 2017) <https://en.oxforddictionaries.com>, **CL-088**.

⁵²⁷ Resolution 127, **C-061**.

Resolution 381. For example, Resolution 127 set the interconnection rate between Telmex and Tele Fácil at one fortieth the level of the previously established rate.⁵²⁸

319. Resolution 127 is a formal administrative act of the IFT.⁵²⁹ It thus constitutes “regulation” and, in turn, a “measure” within the meaning of Articles 201 and 1102 of the NAFTA.⁵³⁰

320. Additionally, the acts of Respondent’s Specialized Telecommunications Courts are “measures” at issue in connection with Claimants’ efforts to challenge the constitutionality of Decree 77 through Mexico’s *amparo* process. At the level of first instance, the District Judge in Administrative Matters, Specialized in Economic Competition, Broadcasting and Telecommunications abdicated its judicial function by blindly rubberstamping the IFT’s ruling without adequate analysis.⁵³¹ At the appellate level, under highly unusual circumstances, Tele Fácil was denied the opportunity to file an appeal of the lower court’s dismissal of its suit.⁵³²

321. The decisions and actions of the Mexican courts are legally binding on Tele Fácil and thus constitute formal acts of Respondent’s judiciary.⁵³³ They are, thus, “laws” and, in turn, a “measure” within the meaning of Articles 201 and 1102 of the NAFTA.⁵³⁴

322. The acts underlying Respondent’s misconduct in this case are also clearly measures “relating to” Claimants’ investments. As determined in *Methanex v. United States*, the

⁵²⁸ *Id.* at p. 35, Resolution One, **C-061**.

⁵²⁹ Although illegal, Resolution 127 was promulgated under the guise of formal governance. See Álvarez Report, ¶ 40, **C-008**.

⁵³⁰ “Regulation” is defined as “a rule or directive made and maintained by an authority.” Regulation, Oxford Dictionary (Nov. 6, 2017) <https://en.oxforddictionaries.com>, CL-088.

⁵³¹ Tele Fácil’s Amparo against Decree 77, **C-063**.

⁵³² Initial Admission of Amparo Appeal, **C-067**; Admission of Amparo Appeal, **C-068**.

⁵³³ Mexican Constitution, at Article 103, **CL-005**.

⁵³⁴ See *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Decision on Jurisdiction (Jan. 5, 2001), ¶ 40 (“‘Law’ comprehends judge-made as well as statute-based rules.”), **CL-067**.

term “relating to,” as used in Article 1101(1), only requires that there be a “legally significant connection” between the “measures” and the “investments” at issue.⁵³⁵ Such a “legally significant connection” clearly exists in this case.

323. With respect to the IFT’s misconduct, the IFT’s decision to repudiate Resolution 381 through the “confirmation of criteria” process, Decree 77, and Resolution 127 destroyed Tele Fácil’s valuable corporate rights, including its interconnection rights, and rendered all shareholdings and related interests of the company’s shareholders worthless. There is therefore a “legally significant connection” between the IFT’s misconduct and the destruction of Claimants’ “investments.”

324. With respect to the acts of the Mexican courts, the lower court’s abdication of its judicial function and the appellate court’s unjustified rejection of Tele Fácil’s appeal denied the company its right of access to Mexico’s judiciary.⁵³⁶ There is therefore a “legally significant connection” between the Mexican courts’ misconduct and the destruction of Tele Fácil’s only available legal remedy to determine the constitutionality of the IFT’s misconduct.

B. Claimants Are Entitled To Bring Claims Against Respondent

325. Messrs. Nelson and Blanco are entitled to bring claims in arbitration against Respondent under Chapter Eleven of the NAFTA.

326. Pursuant to Article 1116(1), “[a]n investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under: (a) Section A ... and that the investor has incurred loss or damage by reason of, or arising out of, that breach.”

⁵³⁵ *Methanex Corp. v. United States of America*, UNCITRAL (NAFTA), Partial Award on Jurisdiction (Aug. 7, 2002), ¶ 147, **CL-054**.

⁵³⁶ *See supra* Part V.C.

327. Pursuant to Article 1117(1), “[a]n investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that the other Party has breached an obligation under: (a) Section A ... and that the enterprise has incurred loss or damage by reason of, or arising out of, that breach.”

328. Messrs. Nelson and Blanco each readily meet the definition of “investor of a Party.” Article 1139 defines that term as a “a national or an enterprise of such [NAFTA] Party, that seeks to make, is making or has made an investment.” Claimants, Messrs. Nelson and Blanco are nationals of the United States and hold valid U.S. passports.⁵³⁷ Neither Mr. Nelson nor Mr. Blanco is a national of any other country.⁵³⁸

329. As explained, Messrs. Nelson and Blanco have made “investments” in Mexico. Namely, as shareholders in Tele Fácil, they have committed financial and human resources to establish a telecommunications carrier in Mexico that was capable of earning significant revenues based on commercial terms of interconnection that were established by the IFT in Resolution 381.

330. Based on the facts of this case, Mr. Nelson is entitled, pursuant to Article 1117(1)(a), to bring a claim against Respondent on behalf of Tele Fácil, an “enterprise of a Party,” because Tele Fácil is “a juridical person” that Mr. Nelson “owns or controls directly or indirectly.”

331. Article 1139 of the NAFTA defines the term “enterprise of a Party” as “an enterprise constituted or organized under the law of a Party, and a branch located in the territory

⁵³⁷ See Notice of Arbitration, Annex A, C-103.

⁵³⁸ Nelson Statement, ¶ 4, C-001; Blanco Statement, ¶ 4, C-002.

of a Party and carrying out business activities there.” Tele Fácil was organized under the laws of Mexico on January 7, 2010, to operate as a company that provides public telecommunications services.⁵³⁹ Under this law, Tele Fácil is a “juridical person” known as a *Sociedad Mercantil*, or commercial company.⁵⁴⁰

332. Mr. Nelson also currently owns 60% of Tele Fácil and has controlled the company since changes in Mexico’s law on June 11, 2013 allowed him to do so.⁵⁴¹ Since the inception of the business venture in Mexico, Mr. Nelson has been the sole source of capital used to fund Tele Fácil’s operations, including the payment of salaries, concession and permitting fees, real estate fees, advertising cost, and legal and other professional fees.⁵⁴² He has also been the sole source of technical equipment and engineering support that allowed for the transmission of call traffic to and from Mexico and within Mexico.⁵⁴³ At all times following Mexico’s reforms, Mr. Nelson therefore possessed an ultimate right to make key company decisions.⁵⁴⁴

333. Accordingly, pursuant to Article 1117(1)(a), Mr. Nelson is entitled to claim on behalf of Tele Fácil for losses or damages arising out of Respondent’s breaches of Articles 1105 and 1110 in connection with the total destruction of the company’s rights to operate in the Mexican market.⁵⁴⁵

334. In any event, pursuant to Article 1116(1)(a), Messrs. Nelson and Blanco are each entitled, as shareholders in Tele Fácil, to bring claims against Mexico on their own behalf for

⁵³⁹ Incorporation Deed, Second Clause at p. 3, **C-014**.

⁵⁴⁰ *Ley General de Sociedades Mercantiles* (General Law of Commercial Companies) (hereinafter “LGSM”), at Article 2, **CL-017**.

⁵⁴¹ *See supra* Part II.B.2.

⁵⁴² Nelson Statement, ¶¶ 32, 39, 59-62, **C-001**; Blanco Statement, ¶ 18, **C-002**; Sacasa Statement ¶ 17, **C-003**.

⁵⁴³ Nelson Statement, ¶¶ 60-61, **C-001**.

⁵⁴⁴ *See International Thunderbird Gaming Corp. v. United Mexican States*, UNCITRAL (NAFTA), Award (Jan. 26, 2006), ¶¶ 106-108, **CL-049**.

⁵⁴⁵ For the same reasons, Mr. Nelson is also entitled to claim on behalf of Tele Fácil with respect to the denial of justice committed against the company by Respondent’s courts.

losses or damages arising out of Respondent's breaches of Articles 1105 and 1110 in connection with the total deprivation of their right to earn a commercial return on their investments in Mexico.⁵⁴⁶

C. Claimants Have Satisfied All Temporal Requirements

335. Claimants submitted their Notice of Arbitration on September 26, 2016, setting forth its claims with respect to the IFT's misconduct.⁵⁴⁷ Claimants submitted their Amended Notice of Arbitration on June 9, 2017, adding their claim with respect to the misconduct of Respondent's courts.⁵⁴⁸ These submissions satisfy all of the temporal requirements set forth in Chapter Eleven of the NAFTA.

336. Claimants have satisfied the six-month "waiting" period set forth in Article 1120. Claimants' Notice of Arbitration was submitted approximately seventeen months after the events giving rise to their claims with respect to the IFT's misconduct, and Claimants' Amended Notice of Arbitration was submitted approximately fourteen months after the events giving rise to their claims with respect to the conduct of Respondent's courts.

337. Pursuant to Article 1119, Claimants have also satisfied the 90-day "cooling-off" period between the filing of their Notices of Intent to File a Claim in Arbitration and their Notice of Arbitration and Amended Notice of Arbitration. Claimants' Notice of Intent with respect to their claims of IFT misconduct was submitted on April 21, 2016, approximately five months before submission of their Notice of Arbitration. Claimants' Notice of Intent with respect to

⁵⁴⁶ See *GAMI Investments, Inc. v. United Mexican States*, UNCITRAL (NAFTA), Final Award (Nov. 15, 2004), ¶ 33, **CL-043**. For the same reasons, Messrs. Nelson and Blanco are each entitled to claim with respect to the denial of justice committed against Tele Fácil by Respondent's courts.

⁵⁴⁷ Notice of Arbitration, **C-103**.

⁵⁴⁸ Amended Notice of Arbitration, **C-104**.

their claims of court misconduct was submitted on September 26, 2016 (with the Notice of Arbitration), approximately nine months before submission of the Amended Notice of Arbitration.

338. In addition, pursuant to Articles 1116(2) and 1117(2), Claimants have filed their Notice of Arbitration and Amended Notice of Arbitration within three years from the date on which they first acquired knowledge of the alleged breaches and loss or damage at issue in this case, roughly late winter/early spring 2015 with respect to the IFT's misconduct, and April 2016 with respect to the misconduct of Mexico's courts.

D. Claimants Have Satisfied All Waiver Requirements

339. Pursuant to Article 1121, Mr. Nelson, in his own right and on behalf of Tele Fácil, and Mr. Blanco, in his own right, have submitted in writing, as part of the Notice of Arbitration and the Amended Notice of Arbitration, their consent and waiver of their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measures of Respondent that are alleged to be a breach referred to in NAFTA Articles 1116 and 1117, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of Mexico.⁵⁴⁹

IV. RESPONDENT BREACHED ARTICLE 1110 OF THE NAFTA

340. Beginning in mid-January 2015, if not earlier, the IFT hatched a scheme, at the highest levels, to shield Telmex from its interconnection obligations under Resolution 381. After expressly granting Tele Fácil the right to interconnect with Telmex on favorable terms in

⁵⁴⁹ Notice of Arbitration, Annex B, C-103.

Resolution 381, including a high interconnection rate of USD 0.00975 per minute of use, the IFT illegally and unjustifiably repudiated its own rulings. Under pressure from Telmex—which stood to lose financially from Resolution 381—the IFT refused to enforce its own resolution. Instead, it chose to initiate an unprecedented internal process, culminating in Decree 77, that reversed critical aspects of its rulings to Tele Fácil’s great detriment.

341. The IFT’s misconduct destroyed Tele Fácil’s interconnection rights and its ability to operate in Mexico’s telecommunications sector. In turn, it deprived Claimants of their right to earn a commercial return on their investments in Mexico.

342. Based on the clear facts in this case, Respondent unlawfully expropriated Claimants’ investments in breach of Article 1110 of the NAFTA.

343. Article 1110 prohibits unlawful expropriation:

1. No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment (“expropriation”), except:
 - (a) for a public purpose;
 - (b) on a non-discriminatory basis;
 - (c) in accordance with due process of law and Article 1105(1); and
 - (d) on payment of compensation in accordance with paragraphs 2 through 6.

Accordingly, a NAFTA Party commits an unlawful expropriation when it takes an investment without satisfying any one of the conditions set forth in Article 1110(1)(a)-(d).

344. By its own terms, Article 1110 prohibits all acts of unlawful expropriation, regardless of form. Namely, a NAFTA Party may not unlawfully expropriate “directly or indirectly” or “take a measure tantamount to ... expropriation.” Article 1110 thus covers direct expropriation, indirect expropriation, and measures “tantamount to expropriation.”

345. Based on the plain terms of Article 1110, in determining the existence of an unlawful expropriation, “the practice of NAFTA tribunals has been to follow a three-step approach focusing on (i) whether there is an investment capable of being expropriated, (ii) whether that investment has in fact been expropriated, and (iii) whether the conditions set forth in Article 1110(1)(a)-(d) have been satisfied.”⁵⁵⁰ Further, to prove a breach of Article 1110, there is no requirement that an investor establish a host State’s bad faith or intent.⁵⁵¹

346. Applying the three-step approach below demonstrates conclusively that Respondent unlawfully expropriated Claimants’ investments in breach of Article 1110. As explained further below: (1) Claimants in their own right and through Tele Fácil acquired numerous property rights in connection with their establishment of a new telecommunications carrier in Mexico (including the right to earn a commercial return on their investments), all of which were investments capable of being expropriated; (2) the IFT expropriated Claimants’ investments when it repudiated Tele Fácil’s interconnection rights established in Resolution 381, destroying Tele Fácil’s ability to operate in Mexico and Claimants ability to earn a commercial return on their investments; and (3) the IFT’s expropriation was unlawful because it failed to pay compensation to Claimants, it discriminatorily targeted Tele Fácil for destruction, it proceeded without due process, and it directly contradicted the public interest objectives stated in Mexico’s telecommunications law.

⁵⁵⁰ *Chemtura Corp. v. Government of Canada*, UNCITRAL (NAFTA), Award (Aug. 2, 2010), ¶ 242, **CL-027**.
⁵⁵¹ *Fireman’s Fund Insurance Co. v. United Mexican States*, ICSID Case No. ARB(AF)/02/01, Award (July 17, 2006), ¶ 176(f) (“The effects of the host State’s measures are dispositive, not the underlying intent, for determining whether there is expropriation.”), **CL-040**; *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (Aug. 30, 2000), ¶ 111 (“The Tribunal need not decide or consider the motivation or intent of the adoption of the Ecological Decree.”), **CL-053**.

A. Claimants' Investments Were Capable of Being Expropriated

347. Claimants readily meet the first step of the three-step approach, which involves establishing whether they had investments capable of being expropriated.

348. “[F]or there to have been an expropriation of an investment ... (in a situation involving legal rights or claims as distinct from the seizure of physical assets) the rights affected must exist under the law which creates them....”⁵⁵² The inquiry thus begins with an examination of Mexican law. As explained above,⁵⁵³ the investments at issue in this case fall into two categories relating to: (1) the investment company, Tele Fácil, and related company assets, particularly with respect to rights of interconnection with Telmex; and (2) Claimants’ shareholdings in Tele Fácil and related rights associated with their status as shareholders. These investments gave rise to valuable property rights that had vested under Mexican law and were capable of being expropriated.

1. Corporate Rights

349. It is well established in international law that contractual rights, as well as administrative rights and commercial rights granted by governmental approval to the corporation, are capable of being expropriated.⁵⁵⁴

⁵⁵² *EnCana Corp. v. Republic of Ecuador*, UNCITRAL/LCIA Case No. UN3481, Award (Feb. 3, 2006), ¶ 184, **CL-036**.

⁵⁵³ *See supra* Part III.A.1.

⁵⁵⁴ With respect to contract rights, *see, e.g., Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. Republic of Hungary*, ICSID Case No. ARB/12/2, Award, (April 16, 2014), ¶ 164 (finding “a right conferred by contract may therefore constitute an asset for this purpose [i.e., constituting an “investment”]), **CL-035**; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Award (Aug. 20, 2007), ¶ 7.5.19 (finding “the ownership rights which are subject to deprivation are Claimants’ contractual rights themselves, ie the right to the use, enjoyment and benefit of those rights”), **CL-030**. With respect to administrative rights, *see Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award (April 12, 2002), ¶ 101 (resolution destroying pre-existing license expropriated investor’s rights), **CL-056**; *Tecnicas*

350. As the investment company, Tele Fácil possessed valuable contractual, administrative, and commercial rights under Mexican law to interconnect with Telmex and to earn revenues based on the interconnection rate (USD 0.00975 per minute of use through 2017). These rights were established through Tele Fácil's contract with Telmex, and administratively confirmed by Respondent through Resolution 381.

351. On May 17, 2013, Tele Fácil was awarded a concession which entitled it to offer "any telecommunications service that is technically possible with its infrastructure, except broadcasting" services in Mexico.⁵⁵⁵

352. As a concessionaire, Tele Fácil was entitled, pursuant to Articles 38, 41 and 42 of the FTL, to interconnect with any other carrier in Mexico, including Telmex.⁵⁵⁶ As a concessionaire, Tele Fácil also had a right to benefit from the operation of its concession. Particularly, in the case of a concession granted for the installation of a public telecommunications network, the concessionaire is the legitimate and exclusive owner of its infrastructure, assets and facilities.⁵⁵⁷ Thus, a concessionaire is entitled to benefit from the

Medioambientales Tecmed S.A. v. United Mexican States, ICSID Case No. ARB (AF)/00/2, Award (May 29, 2003), ¶ 117 (resolution denying renewal of permit expropriated investor's rights), **CL-065**.

Further, at least one tribunal has found that an investor's right to participate in a business market, a right that Tele Fácil had by virtue of its concession and interconnection agreement, is capable of being expropriated. *See Pope & Talbot Inc. v. Government of Canada*, UNCITRAL (NAFTA), Interim Award (June 26, 2000), ¶¶ 96, 98 (finding that the Investment's access to the U.S. market is a property interest subject to 'protection under Article 1110' and that "the ability to sell softwood lumber from British Columbia to the U.S. ... is, in fact a very important part of the 'business' of the Investment."), **CL-058**.

⁵⁵⁵ Concession, at p. 13, Chapter A, A.1.1, **C-019**.

⁵⁵⁶ FTBL, at Articles 38, 41-42, **CL-004**.

⁵⁵⁷ Soria Report, ¶¶ 198-199, **C-009**. This includes Tele Fácil's physical assets, such as the telecommunications equipment necessary for establishing its network. For a description of this equipment, *see* Nelson Statement, ¶¶ 60-61 and Appendix 1 (listing equipment), **C-001**.

revenues generated from its network, including interconnection fees to be paid to the concessionaire by other carriers.⁵⁵⁸

353. Importantly, under Mexican telecommunications law, a concessionaire not only is entitled to interconnect with other carriers, but is required to negotiate the commercial terms of interconnection on an expedited basis.⁵⁵⁹ Under Mexico's telecommunications law, the principle of freedom of contract prevails, and carriers are generally free to determine between themselves the commercial terms of their interconnection agreement.⁵⁶⁰ Therefore, in the event an agreement is reached, the negotiating carriers are bound by their agreed terms as a matter of contract law under Mexico's Civil Code.⁵⁶¹ If the carriers cannot agree on all interconnection terms, they are required to submit their disagreement to the regulator for resolution on an expedited basis.⁵⁶² Under Mexican telecommunications law, the regulator is empowered to resolve any outstanding terms and to order the carriers, among other things, to execute a complete and final interconnection agreement based on the terms previously agreed by the parties and disputed terms resolved by the regulator.⁵⁶³

354. In the case of Tele Fácil, its interconnection rights in relation to Telmex—including the interconnection rate—were established both as a matter of Mexican contract law and administrative law.⁵⁶⁴ As explained, in the course of the disagreement procedure resulting in Resolution 381, Telmex conceded to Tele Fácil's request for inclusion of provisions permitting

⁵⁵⁸ Soria Report, ¶ 31, 198-199, C-009.

⁵⁵⁹ FTL, at Article 42, CL-001; FTBL, at Article 129, CL-004.

⁵⁶⁰ FTL, at Article 42, CL-001; FTBL, at Article 131, CL-004.

⁵⁶¹ Civil Code, at Articles 1794 and 1795, CL-014.

⁵⁶² FTL, at Article 42, CL-001; FTBL, at Article 129, CL-004.

⁵⁶³ *Id.*

⁵⁶⁴ See Álvarez Report, ¶¶ 27-41, 203-204, C-008; Soria Report, ¶¶ 27-61, C-009.

indirect interconnection and excluding portability charges.⁵⁶⁵ Telmex's argument that the interconnection rate had never been negotiated was also rejected.⁵⁶⁶

355. As a result, the IFT expressly ruled in Resolution 381 that the interconnection agreement between Telmex and Tele Fácil was binding on the carriers as a matter of Mexican contract law. Specifically, the IFT determined:

From reviewing the parties' positions, it is concluded that Tele Fácil as well as Telmex and Telnor expressed their will to execute the interconnection agreement including the provision of indirect interconnection service and the modifications required to the corresponding definitions. Likewise, Telmex and Telnor accepted to eliminate from the agreement the portability clause as requested by Tele Fácil. The previous modifications were reflected in the draft interconnection agreement which was presented as evidence in Telmex and Telnor's Reply...

By virtue of the parties being in agreement with the interconnection terms and conditions, the corresponding draft agreement would allow to comply with the FTL, pursuant to articles 1792, 1794, 1803 and 1807 of the Federal Civil Code that is supplemental to the FTL pursuant to article 8, section IV of the FTL.⁵⁶⁷

The IFT thus unequivocally declared that Tele Fácil's contractual rights were established under Mexico's Civil Code based on the terms previously agreed with Telmex in negotiations, including the interconnection rate, plus the right to indirect interconnection and to avoid any portability charges.⁵⁶⁸

356. The IFT's ruling in Resolution 381 regarding the content of the disputing parties' interconnection agreement also established Tele Fácil's rights as a matter of Mexican administrative law. Resolution 381, like all resolutions resolving interconnection disputes, was

⁵⁶⁵ Resolution 381, at p. 15, C-029.

⁵⁶⁶ *Id.* at p. 13-14.

⁵⁶⁷ *Id.* at pp. 15-16 (emphasis added), C-029.

⁵⁶⁸ Álvarez Report, ¶¶ 92-97, 99, C-008; Soria Report, ¶¶ 51, 57, C-009.

an administrative act expressing the IFT's will to establish the disputing carriers' rights and obligations.⁵⁶⁹ Resolution 381 ordered the parties to physically interconnect their networks and to execute an interconnection agreement based on the terms established by the IFT.⁵⁷⁰

357. As explained by Professor Álvarez, once an IFT resolution is executed and notified to the disputing parties, "(1) there is no need for further acts to make them enforceable, and (2) the obligations set forth in such resolutions must be complied with immediately."⁵⁷¹ Accordingly, Resolution 381 established the terms of interconnection between Telmex and Tele Fácil, which were valid and binding on the carriers as a matter of law.⁵⁷²

358. Therefore, as a matter of both contract and administrative law, Resolution 381 established Tele Fácil's rights in relation to its anticipated interconnection with Telmex.⁵⁷³ These included, among others, the right generally to enter the Mexican market and to earn a return on its investment and, specifically, to charge Telmex a rate of USD 0.00975 per minute of use through 2017.⁵⁷⁴ It also included the right to indirectly interconnect to Telmex through a third carrier, in this case Nextel.⁵⁷⁵

⁵⁶⁹ Álvarez Report, ¶¶ 87-91, 203, C-008; Soria Report, ¶¶ 38-44, C-009.

⁵⁷⁰ Resolution 381, at p. 17, C-029.

⁵⁷¹ Álvarez Report, ¶ 27, C-008.

⁵⁷² Álvarez Report, ¶ 90, C-008; Soria Report, ¶ 73, C-009.

⁵⁷³ Álvarez Report, ¶ 35, C-008.

⁵⁷⁴ These rights derived directly from the IFT's ruling in Resolution 381. Álvarez Report, ¶ 35, C-008. International tribunals have recognized other rights directly associated with an investment. *See Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award (Sep. 18, 2009), ¶ 358 (right to business income), CL-026; *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL (NAFTA), Interim Award (June 26, 2000), ¶ 96 (right to market access), CL-058; *Methanex Corp. v. United States of America*, UNCITRAL (NAFTA), Final Award (Aug. 3, 2005), Part IV, Chapter D, at ¶ 17 (right to other wealth producing components of business), CL-055.

⁵⁷⁵ Resolution 381, at pp. 15-17, C-029.

2. Shareholder Rights

359. It is well established in international law that rights to company shares and rights to company returns are rights that are capable of being expropriated.⁵⁷⁶

360. Messrs. Nelson and Blanco held valuable rights under Mexican law as shareholders in Tele Fácil, which were capable of expropriation.

361. As explained, the Tele Fácil partners entered into a Memorandum of Understanding on July 20, 2009, as they were establishing their business venture in Mexico.⁵⁷⁷ The Memorandum of Understanding establishes the partners' agreement on, among other things, share ownership and right to corporate profits. Specifically, in exchange for certain contributions of capital and expertise, the U.S. business partners would have a right to receive a total of 80% of Tele Fácil's shares and profits (60% to Mr. Nelson and 20% to Mr. Blanco) once permitted by forthcoming changes in Mexico's investment regime.⁵⁷⁸ These changes occurred on June 11, 2013, when foreign equity caps and other restrictions were lifted by Mexico as part of its reform of its telecommunications market.⁵⁷⁹

362. Under the requirements of Mexican contract law, the Memorandum of Understanding established a binding contractual relationship between Tele Fácil's partners.⁵⁸⁰

363. As Tele Fácil was incorporated before Mexico's market reforms took effect, its ownership was originally allocated as follows: Mr. Sacasa owned 51%, Mr. Nelson owned 40%

⁵⁷⁶ See, e.g., *CMS Gas Transmission Company v. Republic of Argentina*, SCID Case No. ARB/01/8, Decision on Jurisdiction (July 17, 2003), ¶ 65, 68, CL-029; *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award (June 27, 1990), ¶ 95, CL-022.

⁵⁷⁷ Memorandum of Understanding, at p. 3, C-013.

⁵⁷⁸ *Id.* at p. 1.

⁵⁷⁹ Memorandum of Understanding, at p. 2, C-013.

⁵⁸⁰ Código Civil Federal (Federal Civil Code) (enacted on May 26, 1928) (hereinafter "Civil Code"), at Articles 1794 and 1795, CL-014.

and Mr. Blanco owned 9%.⁵⁸¹ However, on June 11, 2013, three weeks after Tele Fácil was awarded its concession, Mexico's telecommunications law was amended to permit unlimited foreign ownership and control of Tele Fácil.⁵⁸² At that point, by operation of contract law and pursuant to the terms of the Memorandum of Understanding, Mr. Nelson assumed majority control of Tele Fácil.⁵⁸³ Mr. Nelson and Mr. Blanco maintained their respective rights to earn company profits (60% and 20%) throughout the life of the company.⁵⁸⁴

364. On March 29, 2016, Tele Fácil's partners revised the company's bylaws to confirm the arrangement agreed to in the Memorandum of Understanding.⁵⁸⁵ They also formally restructured their ownership so that Messrs. Nelson and Blanco, respectively, would hold 60% and 20% of the company's shares. These changes were not necessary as the Memorandum of Understanding terms were already controlling with respect to key matters. Nevertheless, the bylaws were changed out of an abundance of caution in hopes of deterring future mistreatment by the IFT, including the unjustified revocation of Tele Fácil's concession.

365. Mr. Nelson's and Mr. Blanco's respective rights of share ownership and rights to a return on Tele Fácil's profits are established in Mexican law. Under Mexico's corporate law, a person obtains the rights of a shareholder when the person acquires company shares and is registered in the Shareholders' Registry Corporate Book.⁵⁸⁶ Further, under this law, company

⁵⁸¹ Incorporation Deed, Second Title, Sixth, at p. 6, **C-014**.

⁵⁸² Constitutional Reform, at Article Fifth Transitory Article, **CL-002**.

⁵⁸³ Bello Statement, ¶ 18, **C-004**.

⁵⁸⁴ Memorandum of Understanding, at 2, **C-013**.

⁵⁸⁵ Transfer of Shares, at p. 7, **C-072**.

⁵⁸⁶ LGSM, at Article 129, **CL-017**.

shareholders may establish rights vis-à-vis one another by executing a shareholders' agreement that binds all signatories as a matter of contract law.⁵⁸⁷

B. Claimants' Investment Has Been Expropriated

366. The facts of this case evidence an expropriation of Claimants' investment and, thus, readily satisfy the second prong of the three-prong test in determining whether Respondent breached Article 1110.⁵⁸⁸

367. According to *Burlington Resources v. Ecuador*, "[w]hen assessing the evidence of an expropriation, international Tribunals have generally applied the sole effects test and focused on substantial deprivation."⁵⁸⁹ The tribunal continued:

When a measure affects the environment or conditions under which the investor carries on its business, what appears to be decisive, in assessing whether there is a substantial deprivation, is the loss of the economic value or economic viability of the investment.⁵⁹⁰

Finally, the tribunal concluded:

In this sense, some tribunals have focused on the use and enjoyment of property. The loss of viability does not necessarily imply a loss of management or control. What matters is the capacity to earn a commercial return. After all, investors make investments to earn a return. If they lose this possibility as a result of a State measure, then they have lost the economic use of their investment.⁵⁹¹

368. Similarly, in *Glamis Gold v. United States*, the tribunal held: "[A] State is responsible, and therefore must provide compensation, for an expropriation of property when it subjects the property of another State Party's investor to an action that is confiscatory or that

⁵⁸⁷ *Id.* at Article 198.

⁵⁸⁸ *Chemtura Corp. v. Government of Canada*, UNCITRAL (NAFTA), Award (Aug. 2, 2010), ¶ 242, **CL-027**.
⁵⁸⁹ *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision of Liability (Dec. 14, 2002), ¶ 396, **CL-024**.

⁵⁹⁰ *Id.* ¶ 397 (citation omitted), **CL-024**.

⁵⁹¹ *Id.*

‘unreasonably interferes with, or unduly delays, effective enjoyment’ of the property.”⁵⁹²

According to the tribunal in *Grand River Enterprises v. United States*, “expropriation involves the deprivation or impairment of all, or a very significant proportion of, an investor’s interests.”⁵⁹³

369. In the same vein, in *Fireman’s Fund v. Mexico*, the tribunal ruled that “[e]xpropriation requires a taking (which may include destruction) by a government-type authority of an investment” and “[t]he taking must be a substantially complete deprivation of the economic use and enjoyment of the rights to the property, or of identifiable distinct parts thereof (i.e., it approaches total impairment).”⁵⁹⁴

370. The substantial deprivation test set forth by NAFTA tribunals involves consideration of two factors: the severity of the economic impact and its duration.⁵⁹⁵ An expropriation involves “the deprivation or impairment of all, or a very significant proportion of, an investor’s interests.”⁵⁹⁶ In addition, “[t]he taking must be permanent, and not ephemeral or temporary.”⁵⁹⁷ In making this determination, tribunals may consider the full panoply of State

⁵⁹² *Glamis Gold, Ltd. v. United States*, UNCITRAL (NAFTA), Award (June 8, 2009), ¶ 354 (citing Rudolf Dolzer, “Expropriation and Nationalization,” 4 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 319 (Rudolf Bernhardt, ed. 1995), **CL-044**. In one non-NAFTA case, the tribunal similarly provided that “[a] necessary condition for expropriation is the neutralisation of the use of the investment.” *El Paso Energy International Co. v. Argentine Republic*, ICSID Case No. ARB/03/15, Award (Oct. 31, 2011), ¶ 233(2), **CL-033**.

⁵⁹³ *Grand River Enterprises Six Nations, Ltd. v. United States*, UNCITRAL (NAFTA), Award (Jan. 12, 2011), ¶ 147, **CL-045**.

⁵⁹⁴ *Fireman’s Fund Insurance Co. v. United Mexican States*, ICSID Case No. ARB(AF)/02/01, Award (July 17, 2006), ¶ 176 (a), (c), **CL-040**.

⁵⁹⁵ See *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award (Sept. 18, 2009), ¶ 359, **CL-026**; *Glamis Gold, Ltd. v. United States*, UNCITRAL (NAFTA), Award (June 8, 2009), ¶ 356, **CL-044**.

⁵⁹⁶ *Grand River Enterprises Six Nations, Ltd. v. United States*, UNCITRAL (NAFTA), Award (Jan. 12, 2011), ¶ 147, **CL-045**. See also *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award (Sept. 18, 2009), ¶ 360 (“It is widely accepted that a finding of expropriation of property under customary international law requires a radical deprivation of a claimant’s economic use and enjoyment of its investment.”), **CL-026**.

⁵⁹⁷ *Fireman’s Fund Insurance Co. v. United Mexican States*, ICSID Case No. ARB(AF)/02/01, Award (July 17, 2006), ¶ 176(d), **CL-040**; see also *Cargill, Incorporated v. United Mexican States*, ICSID Case No.

action or inaction against an investor and whether multiple events taken in concert amount to expropriation.⁵⁹⁸

371. As explained, Article 1110 of the NAFTA covers direct expropriation, indirect expropriation, and measures “tantamount to expropriation.”

372. A direct expropriation entails an “open, deliberate and acknowledged taking[] of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State”⁵⁹⁹ It consists of “[t]he forcible appropriation by the State of the tangible or intangible property of individuals by means of administrative or legislative action.”⁶⁰⁰ Direct expropriation “usually involves a transfer of ownership to another person (frequently the government authority concerned), but that need not necessarily be so in certain cases (e.g., total destruction of an investment due to measures by a government authority without transfer of rights).”⁶⁰¹

373. An indirect expropriation, by contrast, constitutes conduct that, in the absence of a forced transfer or destruction of title, nevertheless has the effect of significantly devaluing the investment. In the *Glamis* case, the tribunal observed:

In an indirect expropriation, the property is still “taken” by the host government in that the economic value of the property interest is radically

ARB(AF)/05/2, Award (Sept. 18, 2009), ¶ 348, **CL-026**; *Glamis Gold, Ltd. v. United States*, UNCITRAL (NAFTA), Award (June 8, 2009), ¶ 360, **CL-044**.

⁵⁹⁸ See *Glamis Gold, Ltd. v. United States*, UNCITRAL (NAFTA), Award (June 8, 2009), ¶ 356, **CL-044**; *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL (NAFTA), Interim Award (June 26, 2000), ¶ 99, **CL-058**; see also *Frontier Petroleum Services v. Czech Republic*, UNCITRAL, Final Award (Nov. 12, 2010), ¶ 223 (“There is little doubt that the term ‘measure’ generally encompasses both actions and omissions of a state in international law.”), **CL-041**.

⁵⁹⁹ *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (Aug. 30, 2000), ¶ 103, **CL-053**; accord *Glamis Gold, Ltd. v. United States*, UNCITRAL (NAFTA), Award (June 8, 2009), ¶ 355, **CL-044**.

⁶⁰⁰ *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability (Oct. 3, 2006), ¶ 187, **CL-050**.

⁶⁰¹ *Fireman’s Fund Insurance Co. v. United Mexican States*, ICSID Case No. ARB(AF)/02/01, Award (July 17, 2006), ¶ 176, **CL-040**.

diminished, but such an expropriation does not occur through a formal action such as nationalization. Instead, in an indirect expropriation, some entitlements inherent in the property **right** are taken by the government or the public so as to render almost without value the rights remaining with the investor.⁶⁰²

374. Similarly, according to UNCTAD, an indirect expropriation occurs when measures short of an direct expropriation nevertheless “result in the effective loss of management, use or control, or a significant depreciation of the value of the assets of a foreign investor.”⁶⁰³

375. Article 1110 also contains a third category of expropriation—“measures tantamount to ... expropriation”—which generally has been regarded as consistent in content with the concept of indirect expropriation.⁶⁰⁴ As the *Glamis* Tribunal explained: “‘Tantamount’ means equivalent and thus the concept should not encompass *more* than direct expropriation; it merely differs from direct expropriation which effects a physical taking of property in that no actual transfer of ownership rights occurs.”⁶⁰⁵

376. Regardless of its form, a NAFTA Party’s conduct constitutes an expropriation when it destroys the value or commercial viability of an investment, including by depriving

⁶⁰² *Glamis Gold, Ltd. v. United States*, UNCITRAL (NAFTA), Award (June 8, 2009), ¶ 355 (emphasis added), **CL-044**.

⁶⁰³ UNCTAD, *TAKING OF PROPERTY, SERIES ON ISSUES IN INTERNATIONAL INVESTMENT AGREEMENTS 2* (2000), **CL-085**.

⁶⁰⁴ *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL (NAFTA), Interim Award (June 26, 2000), ¶ 107, **CL-058**; *Marvin Feldman v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award (Dec. 16, 2002), ¶ 101, **CL-051**; *S.D. Myers v. Government of Canada*, UNCITRAL (NAFTA), Partial Award (Nov. 13, 2000), ¶ 286, **CL-061**.

⁶⁰⁵ *Glamis Gold, Ltd. v. United States*, UNCITRAL (NAFTA), Award (June 8, 2009), ¶ 355, **CL-044**.

investors of their “capacity to earn a commercial return” on their investment or their ability to use, enjoy or otherwise benefit from his investment.⁶⁰⁶

* * *

377. In this case, as explained below, Respondent unlawfully expropriated Claimants’ investment through the implementation of a three-part scheme that, beginning in mid-January 2015, which deprived Claimants’ investments of all economic viability.

1. Part 1: The IFT’s Refusal to Enforce Resolution 381

378. In late fall/early winter 2014, Telmex began exerting tremendous pressure on the IFT to reverse Resolution 381—and the IFT relented. Despite having properly rendered Resolution 381 in Tele Fácil’s favor, beginning in mid-January 2015, the IFT devised a scheme, at the highest levels, never to enforce its rulings. The scheme was designed to allow Telmex to avoid compliance with its interconnection obligations when Telmex realized the financial impact of its deal with Tele Fácil.

379. On or about January 15, 2015, the IFT Chairman convened a meeting with the Compliance unit to discuss Resolution 381. In that meeting, he instructed the Compliance Unit not to enforce the measure, but rather to seek an interpretation from the Legal Unit as to whether the Resolution 381 could be enforced only in part.⁶⁰⁷ On February 10, 2015, as ordered, the head of the Compliance Unit, Mr. Sanchez Henkel posed the following question: whether physical

⁶⁰⁶ *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision of Liability (Dec. 14, 2002), ¶ 396, **CL-024**; *Glamis Gold, Ltd. v. United States*, UNCITRAL (NAFTA), Award (June 8, 2009), ¶ 354, **CL-044**.

⁶⁰⁷ *See supra* Part II.F.1, ¶ 23.

interconnection could be enforced without simultaneously requiring the parties to execute the interconnection agreement.⁶⁰⁸

380. The Compliance Unit's request, however wrongly concocted, provided the procedural basis for the IFT to refuse to enforce Resolution 381. According to the IFT, the Compliance Unit's question required consideration by the Plenary. As Decree 77 itself explains, the Compliance Unit's request was one of the main reasons "it is necessary for the IFT Plenary to analyze [Resolution 381] to determine its scope through the issuance of this Decree [77]."⁶⁰⁹

381. This was all a ruse of course. The Compliance Unit's request for interpretive guidance was unprecedented, unnecessary, and unfounded.⁶¹⁰ As the Compliance Unit itself would later concede at the March 5, 2015, meeting, such a question had never been posed before by the Compliance Unit.⁶¹¹ Nor did it need to be. Resolutions requiring simultaneous execution of contract terms and physical interconnection were the rule,⁶¹² and there was nothing unique about Resolution 381 to make it the exception.

382. Rather, the question raised by the Compliance Unit launched a lengthy "confirmation of criteria" process designed to avoid enforcement of Resolution 381. Namely, the IFT Chair directed the Compliance Unit to seek an interpretation that would set the stage for drafting and ultimately adopting Decree 77.⁶¹³ These secret machinations at the IFT made certain that Resolution 381 would never benefit Tele Fácil. In fact, they were merely a set up for

⁶⁰⁸ Compliance Unit Confirmation of Criteria, at 3, **C-040**.

⁶⁰⁹ Decree 77, at p. 2, **C-051**.

⁶¹⁰ Álvarez Report, ¶¶ 118-120, **C-008**; Soria Report, ¶ 114, **C-009**.

⁶¹¹ Transcript of March 5 Plenary Meeting, at pp. 11-12 (Peláez/Sánchez Henkel), **C-043**.

⁶¹² See *supra* Part V.B.2.c below regarding discussion of IFT enforcement practice.

⁶¹³ Compliance Unit Confirmation of Criteria, at p. 3, **C-040**.

the next phase of the plan that would destroy Tele Fácil's interconnection rights outright through the adoption of Decree 77.

2. Part 2: Express Repudiation of Tele Fácil's Rights in Decree 77

383. Decree 77, issued on April 8, 2015, was the end product of the IFT's internal "confirmation of criteria" process.⁶¹⁴ This process had begun with the Chairman's insistence on January 15, 2015 that the Compliance Unit's request an interpretation from the Legal Unit on the scope of Resolution 381. That request was sent on February 10, 2015, and was reinforced on February 18, 2015, when Telmex filed its own related confirmation of criteria.⁶¹⁵ In Decree 77, the IFT expressly repudiated key interconnection rights that had been previously granted to Tele Fácil in Resolution 381, including Tele Fácil's lucrative rate term.

384. While Decree 77 was the next step in the IFT's blocking tactics against Tele Fácil, it was itself also a potent expropriation decree. A basic comparison of the plain text of Resolution 381 and Decree 77 makes abundantly clear that the IFT not only refused to enforce Resolution 381, but went farther to expressly revoke Tele Fácil's valuable interconnection rights, which deprived Tele Fácil of its right to operate as a telecommunications carrier.

385. As explained, Resolution 381 properly resolved all interconnection terms in Tele Fácil's favor and, notably, rejected Telmex's argument that the interconnection rate of USD 0.00975 per minute of use through 2017 had not been established. The IFT found that "the interconnection rates were completely determined by Telmex and Telnor" and that Tele Fácil had "full knowledge and consented" to those rates.⁶¹⁶

⁶¹⁴ Decree 77, C-051.

⁶¹⁵ Telmex's confirmation of criteria, C-041.

⁶¹⁶ Resolution 381, at pp. 13-14, C-029.

386. Accordingly, the IFT dismissed Telmex's argument that the rates had not been established:

Consequently, Telmex and Telnor's argument in connection with an alleged disagreement on interconnection rates is dismissed, since the aforementioned rates were defined in the draft agreement for the provision of fixed local interconnection services and its exhibits, sent by Telmex and Telnor to Tele Fácil ...⁶¹⁷

The IFT then found that "the only interconnection conditions not agreed upon by the parties" were those relating to indirect interconnection and portability charges.⁶¹⁸ Thus, the agreed rate of USD 0.00975 per minute of use through 2017 was established by the IFT and legally binding.

387. In fact, the IFT held that all interconnection terms had been agreed between the parties because, in the course of the dispute resolution proceedings, Telmex had also conceded to indirect interconnection and no portability charges.⁶¹⁹ Thus, the IFT concluded that, under the Mexican Civil Code, that a complete contract existed "by virtue of the parties being in agreement with the interconnection terms and conditions...."⁶²⁰

388. Importantly, by its own analysis, the IFT recognized that *all* interconnection terms had been agreed to by Telmex and Tele Fácil.⁶²¹ Accordingly, all interconnection terms, rights and obligations were fixed by law with the issuance of Resolution 381. The IFT's principal ruling in Resolution 381 confirmed this conclusion, ordering the parties to execute the terms of

⁶¹⁷ *Id.* at p. 14 (emphasis in original), C-029.

⁶¹⁸ Resolution 381, at p. 13, C-029.

⁶¹⁹ Resolution 381, at p. 16 ("[T]he corresponding draft agreement would allow compliance with the FTL, pursuant to articles 1792, 1794, 1803 and 1807 of the Federal Civil Code that is supplemental to the FTL pursuant to article 8, section IV of the FTL."), C-029.

⁶²⁰ *Id.* at p. 16 (citations omitted).

⁶²¹ Álvarez Report, ¶¶ 92-96, C-008; Soria Report, ¶¶ 52, 56-57, C-009.

interconnection, as established by the IFT, and physically interconnect their networks with ten business days.⁶²²

389. The IFT's order in Resolution 381 also required the parties to prepare a copy of the interconnection agreement for publication on the IFT's public registry.⁶²³ As explained by Mr. Soria, the order to publish the interconnection agreement signified that all open issues had been resolved through the dispute resolution process, that the interconnection agreement was complete and ready to be made publicly available.⁶²⁴

390. At this stage, by its own actions, the IFT had legally and formally granted Tele Fácil, among other things, the right to interconnect indirectly with Telmex at a rate of USD 0.00975 per minute of use through 2017. Moreover, as explained, the telecommunications law compelled the IFT to ensure that the terms of interconnection would be carried out promptly and effectively.⁶²⁵

391. Decree 77 expressly repudiated key aspects of Resolution 381, leaving Tele Fácil no interconnection agreement to enforce. Based on a patently erroneous interpretation of its

⁶²² Resolution 381, at p. 17, **C-029**. ("FIRST.-Within 10 (ten) business days following the date in which the notification of this Resolution is effective, Tele Fácil México, S.A. of C.V, and the companies Teléfonos de México S.A.B. of 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 agreements of their telecommunications networks pursuant to the terms and conditions determined in the FIFTH Consideration section of this Resolution. ...").

⁶²³ *Id.* ("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.")

⁶²⁴ Soria Report, ¶ 77 ("[T]he fact that the IFT recorded Resolution 381 in the Public Registry of Telecommunications, is an unquestionable confirmation of the definitiveness and enforceability that the IFT itself, granted to the full agreement among Tele Fácil and Telmex/Telnor. In fact, the agreement reached by the parties can still be found in such Registry."), **C-009**.

⁶²⁵ FTBL, at Article 129 ("The Institute shall favor the prompt and effective interconnection between public telecommunications networks, therefore, the corresponding administrative procedures shall be filed transparently, promptly, quickly and all procedural acts which delay the effective interconnection between public telecommunications networks, or the conditions allowing the provision of the public telecommunications services not agreed on shall be avoided."), **CL-004**. *See also* Álvarez Report, ¶ 17, **C-008**.

regulatory power to resolve disputes, the IFT now determined that it had lacked authority to resolve the dispute between Tele Fácil and Telmex in its entirety in a single proceeding. Specifically, it found that “the Plenary of the IFT, in accordance with the provisions established in article 42 of the FTL, only referred to the matters not agreed by the parties, that is, regarding those matters that were a disagreement.”⁶²⁶

392. Thus, the IFT, despite the exact opposite ruling in Resolution 381, found that previously agreed terms were not established:

Regarding the other terms and conditions of the interconnection agreement that the parties must execute, taking into consideration that this collegiate body did not address the provisions contained in the draft agreement included in the file as it was not a matter of disagreement and therefore it was not a matter of its competence, it is clarified that the rights of the parties regarding the aspects that were not a subject matter of the Interconnection Resolution remain untouched.⁶²⁷

Decree 77 continued:

[W]hen ordering the execution of the corresponding Interconnection agreement in [Resolution 381, the IFT], did not make any determination regarding any other stipulation contained in the draft agreement included in the record, as they were not considered as part of the disagreement.⁶²⁸

393. The IFT reaffirmed this point in its final order when it ruled: “The rights of the parties are held harmless regarding the conditions that were not a matter of the Interconnection Resolution [381].”⁶²⁹

394. Decree 77 thus dispossessed Tele Fácil of lucrative interconnection rights, including with respect to the rate, and left the entire interconnection agreement unenforceable.⁶³⁰

⁶²⁶ Decree 77, at p. 10, C-051.

⁶²⁷ *Id.* at p. 10 (emphasis added); *id.* at p 10-11 (The IFT added: “The above, since the will of the parties is what governs the execution of an interconnection agreement and therefore the IFT cannot impose terms and conditions that were not submitted to its consideration as a disagreement.”)

⁶²⁸ Decree 77, at p. 11, C-051.

⁶²⁹ Decree 77, at p. 13, C-051.

Although purporting to “clarify” Resolution 381, in actuality, it repudiated it. All previously agreed terms, including the high interconnection rate through 2017, that Resolution 381 had established as binding and enforceable now “remain untouched” and were “held harmless.”⁶³¹ This meant they were re-opened for negotiation and, absent agreement between the parties, would serve as the basis for new interconnection disputes. At this point, therefore, Tele Fácil’s lucrative interconnection rights no longer existed. For all intents and purposes, Decree 77 was an expropriation decree.⁶³²

⁶³⁰ Álvarez Report, ¶ 126 (“Decree 77 unlawfully (i) knocks out Tele Fácil’s rights vested by Resolution 381....”) and ¶¶ 203-205, C-008; Soria Report, ¶¶ 132-133 (“As a result of the revocation that deprived Tele Fácil of the rights granted and acknowledged in Resolution 381, a substantial decrease in the value of Tele Fácil’s concession, as well as in the property of its investment unraveled as a consequence of invalidating the fees that had previously increased the value of the concession.”), C-009. The IFT’s *volte face* is similar to the facts in *Middle East Cement v. Egypt* and *CME v. Czech Republic*. In both decisions, the tribunals found that the State expropriated the claimant’s assets by destroying previously-confirmed rights. In *Middle East Cement*, an Egyptian agency issued a decree granting claimant a license for the importation and storage of cement. *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award (April 12, 2002) ¶ 98, CL-056. Egypt subsequently issued another decree that effectively overruled the first, by prohibiting all importation of cement. *Id.* ¶ 106. The tribunal concluded that Egypt expropriated the claimant’s investment by issuing the second decree, backtracking on the first. *Id.* ¶ 107.

Similarly, in the *CME* case, the state Media Council granted the claimant a license for television broadcasting in partnership with a domestic company, CET 21. *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, Partial Award (Sept. 13, 2001), CL-028. Bowing to political pressure, however, the Media Council determined to oust CME in favor of CET 21. With the Media Council’s blessing, CET 21 terminated its contract with CME, completely destroying CME’s investment. The tribunal found that the “reversal of the Media Council’s position in respect to CME’s investment” was an unjustified expropriation. *Id.* ¶¶ 591-609. The tribunal summarized the expropriation as follows: “The Media Council deprived the Claimant of its investment’s security by requiring CME in 1996 to enter into a new MOA and thereby giving up the exclusive right to use the Licence and further, in 1999, by actively supporting the licence-holder CET 21, when it breached the exclusive Service Agreement with ČNTS.” *Id.* ¶ 599.

⁶³¹ Decree 77, at pp. 10 & 13, C-051.

⁶³² It is well established that the complete destruction of an investment constitutes an expropriation. See *Fireman’s Fund Insurance Co. v. United Mexican States*, ICSID Case No. ARB(AF)/02/01, Award (July 17, 2006), ¶ 176(e) (“The taking usually involves a transfer of ownership to another person (frequently the government authority concerned), but that need not necessarily be so in certain cases (e.g., total destruction of an investment due to measures by a government authority without transfer of rights).”), CL-040; *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, Partial Award (Sept. 13, 2001), ¶ 591 (holding that the state’s actions that “caused the destruction of ČNTS’ operations, leaving ČNTS as a company with assets, but without business” was expropriation), CL-028.

395. Decree 77 left Tele Fácil's business prospects in complete disarray.⁶³³ By order of the IFT, Tele Fácil and Telmex were required to physically interconnect their networks within ten business days. They were also required to renegotiate all previously agreed terms and execute an interconnection agreement. However, the IFT imposed no deadline for the latter requirement.

396. Decree 77 sent a clear message to Telmex that it was released—"held harmless"—from all previously agreed and enforceable interconnection terms and enjoyed as much time as it wanted to renegotiate with Tele Fácil. In particular, now Telmex could seek to renegotiate the previously agreed interconnection rate of USD 0.00975 per minute of use through 2017. At this point, Decree 77 had unsettled the entire interconnection agreement, leaving its ultimate fate to Telmex's whim.

397. Moreover, Decree 77 handed Telmex a guaranteed path to force a better deal with Tele Fácil. According to recent changes in Mexico's telecommunications law, where two carriers disagreed over the rate term, the IFT was bound to impose a very low default rate that was a fraction of the value of the rate previously established between Telmex and Tele Fácil.⁶³⁴ Decree 77 thus, by design, granted Telmex an opportunity to manufacture a new dispute with Tele Fácil over rates that would reduce the previously agreed rate dramatically. As explained in the following section, this is exactly what it did.

⁶³³ Nelson Statement, ¶¶ 79-80, C-001; Blanco Statement, ¶ 68, C-002; Sacasa Statement, ¶¶ 117-121, C-003.
⁶³⁴ FTBL, at Article 131, CL-004.

3. Part 3: Covering Up the IFT's Misconduct through Resolution 127

398. Although the damage to Tele Fácil had already been done long before, Resolution 127, rendered on October 19, 2015, represented the final part of the IFT's scheme to run Tele Fácil out of the Mexican market.

399. Not surprisingly, Telmex duly responded to the IFT's cues in Decree 77 and, soon after, initiated a new dispute against Tele Fácil over 2015 rates.⁶³⁵ No longer bound by an interconnection rate of USD 0.00975 per minute of use through 2017, Telmex was able to present a new "dispute" to the IFT for resolution. That dispute was resolved in Resolution 127, in which the IFT established the new interconnection rate between the Telmex and Tele Fácil for 2015 at MXN 0.004179 per minute of use (or USD 0.000253 per minute of use), one fortieth of the rate determined in Resolution 381.⁶³⁶

400. If the IFT's decision in mid-January not to enforce Resolution 381 and Decree 77 were the crimes, Resolution 127 was the cover up. Putting aside that the IFT lacked authority to reverse a prior ruling on rates, Resolution 127, standing alone, may have appeared normal. It was rendered pursuant to the procedural rules of the new telecommunications law, referenced the importance of prompt and adequate interconnection, and resolved the purported dispute before it in a seemingly typical manner. Resolution 127 was, however, the last act in an elaborate ploy to allow Telmex to re-open and resolve a new "dispute" over rates in Telmex's favor and to Tele Fácil's profound detriment.⁶³⁷

⁶³⁵ Telmex's manufactured dispute, C-055.

⁶³⁶ Resolution 127, Resolution One, at 35, C-061.

⁶³⁷ See Álvarez Report, ¶¶ 167-171, C-008; Soria Report, ¶ 153, C-009.

4. The Complete Destruction of Claimants' Investment

401. The IFT's repudiation of Resolution 381, beginning in mid-January, completely destroyed the economic value and viability of Claimants' investment in Mexico.

402. A carrier's commercial success in Mexico depends on a number of factors. It must be able to interconnect and establish commercial terms with Telmex, the incumbent, which owns and controls the vast majority of Mexico's telecommunications infrastructure.⁶³⁸ As Professor Álvarez explains: "for the new entrant the ability to interconnect is as vital as breathing is for a human being: without interconnection a new entrant cannot survive."⁶³⁹ Additionally, it must be able to interconnect with Telmex indirectly, as the incumbent is widely known for stifling competition through its monopolistic practices.⁶⁴⁰

403. A carrier's success also depends on its ability to exchange call traffic for a fee. Generally, the more calls a carrier handles, the more money it can earn. To be successful, a carrier not only needs a source of call traffic, but also the capacity to handle as many calls as it can receive; otherwise calls will be dropped and its business will suffer.⁶⁴¹

404. Ten business days after Resolution 381 was rendered, Claimants had all the ingredients for success and were poised to earn a sizable return on their investment. They had acquired all of the necessary equipment to receive and send—immediately—high volumes of call

⁶³⁸ Bello Statement, ¶¶ 29-30, C-004; Sacasa Statement, ¶ 38, C-003. *See also* Álvarez Report, ¶¶ 14-18, CL-008.

⁶³⁹ Álvarez Report, ¶ 16, C-008. *See also* Soria Report, ¶ 205 ("[I]nterconnection with Telmex/Telnor is essential for any new entrant to subsist in the market, and the lack of it implies a severe damage to the financial balance of the concession, and seriously jeopardizes Tele Facil's return on investments as the value of the infrastructure in which a concessionaire invests is determined by the capacity of said assets to generate income and profitability to the developer."), C-009.

⁶⁴⁰ Bello Statement, ¶¶ 31-32, 33-38, C-004; OECD 2012 Telecommunication Review of Mexico, at p. 55, C-084.

⁶⁴¹ Sacasa Statement, ¶ 54, C-003.

traffic from its Mexico City location.⁶⁴² Additionally, they had executed an interconnection agreement with Nextel to facilitate indirect interconnection with Telmex,⁶⁴³ and Tele Fácil was physically connected with Nextel's network, which was, in turn, physically connected to Telmex's network.⁶⁴⁴ Thus, as a technical matter, call traffic was able to flow between Tele Fácil and Telmex with a flip of a switch.

405. Ten business days after Resolution 381 was rendered, Tele Fácil had also secured numerous arrangements with its business partners who were ready and willing to send a high volume of call traffic to Tele Fácil in very short order to take advantage of Tele Fácil's innovative business opportunity. In particular, Tele Fácil had signed a Memorandum of Understanding with [REDACTED] guaranteeing approximately ten million minutes a month of international call traffic,⁶⁴⁵ and had obtained firm commitments from Audio Now, Free Conference Call, No Cost Conference, and Zeno Radio to use Tele Fácil as the telecommunications platform necessary to offer their services to Mexican consumers.⁶⁴⁶

406. Ten days after Resolution 381 was rendered, Tele Fácil additionally had secured highly profitable interconnection terms from Telmex that were formally established in law in Resolution 381. For example, Tele Fácil was entitled to interconnect with Telmex indirectly through Nextel and enjoyed a high rate of USD 0.00975 per minute of use through 2017, all of which would allow Tele Fácil to thrive as a telecommunications provider.

⁶⁴² Nelson Statement, ¶¶ 59-60, C-001.

⁶⁴³ Nextel Agreement, C-032; Sacasa Statement, ¶ 60, C-003; Bello Statement, ¶¶ 62-63, C-004; Nelson Statement, ¶ 50, C-001.

⁶⁴⁴ Notification to Telmex with information to interconnect through Nextel, C-034; Sacasa Statement, ¶ 79, C-003.

⁶⁴⁵ [REDACTED] MOU, C-020. *See also* Blanco Statement, ¶¶ 39-41, C-002.

⁶⁴⁶ Cernat Statement, ¶¶ 12-17, C-006; Lowenthal Statement, ¶¶ 15-21, C-005; Nelson Statement, ¶¶ 74-75, C-001; Dippon Report, ¶¶ 40-51, C-010.

407. Despite these preparations, Tele Fácil was lacking one additional critical ingredient that was beyond its control: Telmex's compliance with Resolution 381. In the face of Telmex's recalcitrance, Claimants needed the IFT to enforce Resolution 381, as required under Mexican law. But rather than enforce Resolution 381, the IFT actively sought to repudiate it. In the process, it deprived Tele Fácil of the lynchpin of its business venture: an interconnection agreement with Telmex on profitable commercial terms.⁶⁴⁷

408. The economic impact of the IFT's actions was devastating. Without enforcement of Resolution 381 and, hence without an interconnection agreement with Telmex, Tele Fácil was, as a matter of fact, simply incapable of earning any revenue in Mexico.⁶⁴⁸ Under these circumstances, there was no legal or economic certainty as to what Tele Fácil and Telmex would be charging each other and being paid for calls passing through Telmex's network.

409. There was also no way to bypass Telmex, which owned and controlled the vast majority of Mexico's telecommunications infrastructure and held approximately 65% of the market share. With that kind of power, Telmex could easily have refused to pay Tele Fácil for any traffic terminating to Tele Fácil; in fact, it had made clear it would not honor the terms established in Resolution 381.⁶⁴⁹ Further, Telmex could have blocked all of Tele Fácil's call traffic.⁶⁵⁰ In Mexico, each carrier is assigned an Originating Call Number ("OCN" or "IDO" (*Identificación de Red local de Origen-in Mexico*)), which identifies the carrier as the source of a

⁶⁴⁷ See *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, Partial Award (Sept. 13, 2001), ¶ 600 (holding that when the state Media Council "remained silent or disclaimed jurisdiction" after the domestic broadcasting company breached its contract, the state "supported the vitiation of the Claimant's investment"), **CL-028**.

⁶⁴⁸ Nelson Statement, ¶ 79, **C-001**; Blanco Statement, ¶¶ 66-68, **C-002**; Sacasa Statement, ¶¶ 117-119, **C-003**. See also Álvarez Report, ¶ 126 ("Decree 77 unlawfully (i) knocks out Tele Fácil's rights vested by Resolution 381."), **C-008**.

⁶⁴⁹ New Draft Interconnection Agreement, Exhibit C, § 1 (offering the previously agreed high rate, but only through December 31, 2014), **C-031**; Notification of New Draft Interconnection Agreement, **C-094**.

⁶⁵⁰ Bello Statement, ¶ 51, **C-004**.

particular call. It is common practice for carriers to block calls, i.e., by closing its port, where the carrier has no interconnection agreement in place with the other carrier sourcing the calls.⁶⁵¹

410. In these precarious conditions, it would have been extremely reckless for Tele Fácil to proceed with its business plans.⁶⁵² In fact, the unsoundness of doing so is reflected in the IFT's own approach to resolving interconnection disputes. As a rule, and as was done in Resolution 381, the IFT orders the disputing parties, within the same time period, both to physically interconnect their networks *and* execute the interconnection agreement based on the terms established by the regulator.⁶⁵³ In this way, the regulator avoids putting any carrier in a highly vulnerable position.⁶⁵⁴ It is telling that the only instance in which the IFT broke with this practice was Decree 77 which, by design, implemented a plan to destroy Tele Fácil. The company had no opportunity but to seek, and continue to seek, enforcement of Resolution 381.

411. The economic impact of the IFT's misconduct was broad. All of Tele Fácil's lines of business were eliminated: the DID/conferencing project; competitive tandem services project, international termination; and retail services. For the first two lines of business, in particular, the high rate of interconnection (USD 0.00975 per minute of use) through 2017 was the primary income-generating basis.⁶⁵⁵ The third line of business, international termination, was not dependent on the high rate, but rather the ability to interconnect and access Telmex's network and exchange traffic in order to earn revenue.⁶⁵⁶ The fourth line of business, retail

⁶⁵¹ Bello Statement, ¶ 32, C-004; Sacasa Statement, ¶¶ 53-55, C-003.

⁶⁵² In addition to the extreme lack of commercial certainty, Tele Fácil had now been pulled into Telmex's black hole of delay, with the IFT's full support. As Professor Álvarez explains, the IFT's entire scheme was part of Telmex's dilatory tactics. Álvarez Report, ¶¶ 117, 120, 136, 154, 159, 162, 166, 169, C-008.

⁶⁵³ See *infra* Part V.B.2.c for a description of the IFT's regular practice in this regard.

⁶⁵⁴ Transcript of March 5 Plenary Meeting, at pp. 11-12 (Peláez/Sánchez Henkel), C-043.

⁶⁵⁵ See *supra* Part II.E.1 and II.E.2.

⁶⁵⁶ See *supra* Part II.E.3.

services, could not exist until capital was generated from the first three lines of business.⁶⁵⁷

Thus, no business activity was possible due to the IFT's actions.⁶⁵⁸

412. Further, the economic impact of the IFT's misconduct was permanent. Tele Fácil's window of opportunity to earn a sizable profit was time limited by the terms of interconnection and prevailing market conditions. The interconnection agreement between Tele Fácil and Telmex expired at the end of 2017, including the high rate of USD 0.00975 per minute of use through 2017. Accordingly, with respect to Tele Fácil's conference calling line of business, it was important to maximize profits during the first years of business.⁶⁵⁹ Further, in 2015, market conditions were also optimal to launch Tele Fácil's international calling line of business—especially before Telmex would act monopolistically to bottom out the market to stifle competition.

413. Accordingly, each day that the IFT refused to compel Telmex to adhere to the terms of Resolution 381 was a day of high revenues for Tele Fácil that was forever lost. For example, in the first three months of Tele Fácil's planned operations alone, the company's

⁶⁵⁷ See *supra* Part II.E.4.

⁶⁵⁸ The situation is, therefore, markedly different than in other cases in which an investor has argued the loss of one among many lines of business and the tribunal found an insufficiently severe deprivation in value to constitute an expropriation. See *Chemtura Corp. v. Government of Canada*, UNCITRAL (NAFTA), Award (Aug. 2, 2010), ¶ 263 (finding sales of a particular product in question “were a relatively small part of the overall sales of Chemtura Canada at all relevant times.”), **CL-027**; *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award (Sept. 18, 2009), ¶¶ 363-364 (finding that the investor was “not precluded from all business activity” and that the investor’s line of business at issue “was not the sole business”), **CL-026**; *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL (NAFTA), Interim Award (June 26, 2000), ¶ 101 (finding that while the investor claimed a reduction in profits from the sale of softwood lumber to the United States, “it continues to export substantial quantities of softwood lumber to the U.S. and to earn substantial profits on those sales.”), **CL-058**; *Marvin Feldman v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award (Dec. 16, 2002), ¶ 142 (finding that “[t]he Claimant is free to pursue other continuing lines of business activity”), **CL-051**.

⁶⁵⁹ Sacasa Statement, ¶ 31, **C-003**; Blanco Statement, ¶ 44, **C-002**.

international termination project would have earned—but was prevented from earning—an average of USD 519,547 per day on international termination.⁶⁶⁰

414. As recognized by numerous NAFTA tribunals, business income is a critical—often the most critical—component of the economic viability of an investment company.⁶⁶¹ In the case of Tele Fácil, a new entrant, the business income it was entitled to receive under its interconnection agreement with Telmex was absolutely essential for entering and succeeding in the Mexican market. When the IFT refused to enforce Resolution 381, it deprived Tele Fácil of its right to earn revenue which, in turn, rendered the enterprise a complete loss.

415. As a result, Claimants have suffered a catastrophic loss of its investment in Mexico. Not only did the IFT neutralize Tele Fácil, but it also rendered Claimants' shares in the company worthless, along with their rights, collectively, to earn a total of 80% of company profits. Respondent's deprivation of Claimants' investment has been total and permanent. To this day, Claimants have been unable to earn a single peso through Tele Fácil.

416. In sum, the IFT's repudiation of Resolution 381 constituted a complete expropriation of Claimants' investment, shutting down all of Tele Fácil's lines of business and removing the lynchpin of the business enterprise: the right to earn revenue.⁶⁶² The IFT's

⁶⁶⁰ See Dippon Report, **C-010**.

⁶⁶¹ See *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award (Sept. 18, 2009), ¶ 356 (finding business income to be “an integral part of the value of the underlying property”), **CL-026**; *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL (NAFTA), Interim Award (June 26, 2000), ¶ 98 (finding that the “ability to sell” is “a very important part of the ‘business’ of the investment”), **CL-058**.

⁶⁶² See *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision of Liability (Dec. 12, 2002), ¶¶ 396-397, **CL-024**. The economic impact of the IFT's actions was the same as if the IFT had denied Tele Fácil a critical permit that was essential to its operations in Mexico. See, e.g., *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (Aug. 30, 2000), ¶ 107, **CL-053**; *Técnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award (May 29, 2003), ¶ 117, **CL-065**.

misconduct thus caused a total transfer of the economic benefit to Tele Fácil under the interconnection terms established by the IFT in Resolution 381 from Tele Fácil to Telmex.⁶⁶³

C. The Conditions Set Forth In Article 1110(1)(a)-(d) Have Not Been Satisfied

417. Respondent may only lawfully expropriate Claimants' investment if the express conditions set forth in Article 1110(1)(a)-(d) have been met. These include the taking of property on payment of compensation, for a public purpose, on a non-discriminatory basis, and in accordance with due process and the fair and equitable treatment standard. Respondent has failed to satisfy any of these conditions in connection with its expropriation of Claimants' investment in Mexico. Its expropriation is therefore unlawful, as explained below.

1. Respondent Has Paid No Compensation

418. Payment of compensation for an expropriation, pursuant to the terms of Article 1110(2)-(6), is a fundamental prerequisite for a lawful expropriation. This rule is well established in international practice. As explained in *Feldman v. Mexico*, "[i]f there is a finding of expropriation, compensation is required, even if the taking is for a public purpose, non-discriminatory and in accordance with due process of law and Article 1105(1)."⁶⁶⁴

419. At no time has Respondent ever offered payment or made payment to Claimants in compensation for the destruction of their investments in Mexico. In fact, at no time has Respondent even acknowledged that its actions deprived Tele Fácil of the economic benefit of its interconnection agreement with Telmex in its entirety. In stark contrast, the IFT not only failed

⁶⁶³ It is well established in international law that, in order to prove the existence of an expropriation, it is not necessary to demonstrate that the State benefitted from the taking. *See, e.g., Windstream Energy LLC v. Government of Canada*, PCA Case No. 2013-22, Award ¶ 284 (Sept. 27, 2016) (finding an expropriation may occur "even if the host State has not obtained any economic benefit."), **CL-073**.

⁶⁶⁴ *Marvin Feldman v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award (Dec. 16, 2002), ¶ 98, **CL-051**.

to compensate Tele Fácil, but it also sanctioned Tele Fácil for allegedly failing to comply with Resolution 127 that, along with other measures, illegally forced it out of the Mexican telecommunications market.⁶⁶⁵

420. Having failed to compensate Claimants for their losses in connection with the expropriation of their investments, Respondent committed an unlawful expropriation in breach of Article 1110.

2. Respondent Acted Without Public Purpose

421. According to Article 1110(1)(a), an expropriation is only lawful if it is pursued for a public interest.⁶⁶⁶ Strikingly, in the course of expropriating Claimants' investments, the IFT has never once proffered a public interest objective as justification for its actions.⁶⁶⁷ Neither Decree 77 nor Resolution 127 even hint at a public purpose.⁶⁶⁸

422. Rather, the IFT declared that Tele Fácil's interconnection rights were unenforceable based solely on an interpretation of its own regulatory authority. Namely, the IFT determined that it could only resolve disagreements over disputed terms, but not previously agreed terms, thus stripping Tele Fácil of its previously agreed interconnection rights with Telmex, including with respect to Tele Fácil's lucrative interconnection rates.⁶⁶⁹

⁶⁶⁵ IFT Sanction to Tele Fácil, **C-081**.

⁶⁶⁶ See *Guaracachi America, Inc. v. State of Bolivia*, PCA Case No. 2011-17, Award (Jan. 31, 2014), ¶ 437 ("If the expropriation had not been made 'for a public purpose and for a social benefit related to the internal needs of that Party' it would have then been illegal *per se*."), **CL-046**.

⁶⁶⁷ Notably, neither have the courts.

⁶⁶⁸ This omission makes Respondent's expropriation unlawful. See, e.g., *Vetsy Group Limited v. Republic of Venezuela*, ICSID Case No. ARB/06/4, Award (Apr. 15, 2016), ¶ 296 ("[T]he government's failure to advance a declared purpose may serve as evidence that the measure was not taken in furtherance of such purpose."), **CL-070**; *Tecnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award (May 29, 2003), ¶ 125 (noting that "the Resolution [at issue] does not specify any reasons of public interest, public use or public emergency that may justify it."), **CL-065**.

⁶⁶⁹ Decree 77, **C-051**.

423. Indeed, the IFT's flawed interpretation runs directly counter to the public interest objectives expressly stated under Mexico's telecommunications regime. As explained, prompt and effective interconnection between providers is a fundamental tenet of telecommunications law. Article 129 of the FTBL expressly mandates the IFT to promote "prompt and effective interconnections" and demands that "all procedural acts which delay effective interconnection ... shall be avoided."⁶⁷⁰

424. Thus, it is not only practical, but also legally required as a matter of public interest, for the IFT to resolve interconnection disputes completely in a single proceeding. As Mr. Soria states, "if the parties are not able to reach an agreement and interconnect their networks in a certain term, the regulator is fully empowered to resolve over the disputed conditions, and order interconnection, in order to preserve the public interest."⁶⁷¹ Mr. Soria adds that the IFT's:

obligation [was] to promote effective interconnection and avoid suspending and paralyzing the interconnection process is clear. One of the main reasons the Constitutional Amendment in this sector was of such significance was the insufficiency of regulation which in the past allowed proceedings to be delayed.⁶⁷²

He concludes that "[t]he IFT's failure to enforce its own resolution [381] caused, first and foremost, a negative impact on the public interest."⁶⁷³

⁶⁷⁰ FTBL, at Article 129, **CL-004**.

⁶⁷¹ Soria Report, ¶ 40, **C-009**.

⁶⁷² *Id.* at ¶ 100.

⁶⁷³ *Id.* at ¶ 101. The IFT's failure to act on the basis of a public interest is also a violation of Mexican law. As Professor Alvarez states, that a lawful administrative act, among other things, "must pursue a public interest purpose." Álvarez Report, ¶ 30, **C-008**. Notably, in another case involving application of a host State's telecommunications regime, the tribunal found no evidence of public purpose because the host State's action "bears no identifiable relation to the ostensible public purposes of stabilizing and improving the telecommunications industry of Belize, or of providing reliable telecommunications services to the public." *British Caribbean Bank Limited v. Government of Belize*, PCA Case No. 2010-18/BCB-BZ, Award (Dec. 19, 2014), ¶¶ 240-241, **CL-023**.

425. Therefore, the IFT's "interpretation" of Resolution 381 was contrary to the public interest because it was designed to delay interconnection between Tele Fácil and Telmex to release Telmex from its commercial obligations.⁶⁷⁴ Moreover, it was completely antithetical to Mexico's telecommunications reforms because it empowered the incumbent carrier to bar new entrants from the market indefinitely by allowing it to continually manufacture new "disputes" to present to the regulator for resolution.⁶⁷⁵

3. Respondent Acted Discriminatorily

426. Pursuant to Article 1110(1)(b), to be lawful an expropriation must also be non-discriminatory.⁶⁷⁶ As explained in detail below,⁶⁷⁷ the IFT's treatment of Tele Fácil was highly discriminatory. The IFT deviated from well-established, longstanding law and practice, on a one-time basis, in order to exclude Tele Fácil from the Mexican market. By Respondent's own admission, Decree 77 was the only instance in which the IFT (or its predecessor, COFETEL) ever revisited a ruling resolving an interconnection dispute.⁶⁷⁸ Moreover, Decree 77 represents

⁶⁷⁴ Respondent cannot be acting in the public interest when it illegally targeted Tele Fácil for exclusion from the Mexican market. See *Enkev Beheer B.V. v. Republic of Poland*, PCA Case No. 2013-01, First Partial Award (April 29, 2014), ¶ 349 (suggesting that evidence of "improper targeting, malice or bad faith" could undermine a Respondent's claim of acting in the public interest), **CL-037**.

⁶⁷⁵ Even assuming *arguendo* that a public interest object exists, which it does not, "proportionality has to exist between the public interest fostered by the regulation and the interference with the investors' property rights" *El Paso Energy International Co. v. Argentine Republic*, ICSID Case No. ARB/03/15, Award (Oct. 31, 2011), ¶ 243, **CL-033** (citing *Técnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award (May 29, 2003), ¶ 122, **CL-065**). Even if protecting Telmex, Mexico's national champion somehow involves the public interest, completely destroying Claimants' investment in the process is a highly disproportionate response.

⁶⁷⁶ See, e.g., *Eureko B.V. v. Republic of Poland*, Partial Award (Aug. 19, 2005), ¶ 242 (finding expropriation where the state's actions were "clearly discriminatory" in order to prevent foreign investor from obtaining control of investment company), **CL-039**; see also *El Paso Energy International Co. v. Argentine Republic*, ICSID Case No. ARB/03/15, Award (Oct. 31, 2011), ¶ 241 (finding discriminatory conduct may constitute an expropriation), **CL-033**.

⁶⁷⁷ See *infra* Part V.B.1.c and V.B.2.c.

⁶⁷⁸ *Oficio IFT/212/CGVI/UT/800/2017 emitido por la Unidad de Transparencia del Instituto Federal de Telecomunicaciones* (Document IFT/212/CGVI/UT/800/2017 issued by the Transparency Unit of the Federal Telecommunications Institute) (July 4, 2017) (hereinafter "Transparency Unit Confirmation"), at pp. 1-4, **C-083**.

the *only* instance in which Mexico's telecom regulator illegally repudiated previously established interconnection rights.

427. By discriminatorily targeting Tele Fácil for destruction, Respondent failed to expropriate Claimants' investments in a non-discriminatory manner.

4. Respondent Breached Due Process and Fair and Equitable Treatment Standards

428. Finally, for Respondent's expropriation to be lawful, pursuant to Article 1110(1)(c), it must also be pursued in accordance with due process and the standards of fair and equitable treatment. As explained in detail below,⁶⁷⁹ the IFT's process was fraught with serious deficiencies that denied Tele Fácil due process completely. Not only did the IFT intentionally abuse the "confirmation of criteria" process to repudiate key aspects of Resolution 381, but it also proceeded to destroy Tele Fácil's rights without ever notifying or inviting the company to provide its views on the proposed course of administrative action.

429. By completely shutting Tele Fácil out of an administrative process in which its core property rights were taken, Respondent did not expropriate Tele Fácil's investments in accordance with due process and the standards of fair and equitable treatment.⁶⁸⁰

⁶⁷⁹ See *infra* Part V.B.1.b and V.B.2.b.

⁶⁸⁰ See *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award (April 12, 2002), ¶ 147 (holding that the state's seizure and auction of assets was not "under due process of law" and therefore was an unlawful expropriation), **CL-056**.

D. Respondent's Conduct Does Not Constitute Legitimate Regulation of General Application.

430. The measures at issue in this case—namely, the decision not to enforce Resolution 381, and the subsequent Decree 77 and Resolution 127—do not constitute regulation in the public interest. A review of all of the IFT rulings following Resolution 381 reveals the IFT's conduct could never have constituted non-discriminatory regulatory action designed and applied to protect legitimate public welfare objectives.

431. First, the IFT has never proffered any public policy basis for repudiating Resolution 381—even when Telmex presented the issue squarely to the regulator.⁶⁸¹ In Telmex's request for confirmation of criteria regarding the scope of Resolution 381, Telmex expressly argued that the high rate agreed to with Tele Fácil was incompatible with Mexico's new industry reforms, which deprived Telmex, as the predominant carrier, from charging a reciprocal rate.⁶⁸² Importantly, the IFT did not accept this argument. Rather, Decree 77 eliminated Tele Fácil's interconnection rights, including with respect to the rate, based solely on a misinterpretation of Article 42 of the FTL. Specifically, the IFT found—erroneously—that it lacked administrative authority to establish and enforce previously agreed interconnection terms.⁶⁸³

432. In short, the IFT did not repudiate Tele Fácil's interconnection rights on the basis of regulatory reform or otherwise to pursue a public welfare objective. As discussed, the IFT by its own admission did not weigh competing public welfare goals, but rather interpreted its own

⁶⁸¹ See Decree 77, at p. 11 (interpreting Article 42 narrowly), **C-051**; Resolution 127, at pp. 3, 6, 13, 25-26 (acting on basis of alleged non-agreement terms), **C-061**.

⁶⁸² Telmex's confirmation of criteria, at p. 8, **C-041**.

⁶⁸³ Decree 77, at pp. 11-12, **C-051**

regulatory authority under Article 42 of the FTL contrary to long-standing public policy underlining interconnection matters.

433. Second, the IFT's conduct did not constitute legitimate regulatory measures of general application. Rather, beginning in mid-January 2015, the IFT specifically ordered the destruction of Tele Fácil's rights in order to shield Telmex from interconnection obligations that it no longer wished to honor. Decree 77 revealed this plan, adopting an absurdly narrow interpretation of the IFT's dispute resolution authority that conveniently released Telmex from its critical interconnection obligations. Importantly, the IFT's approach had never been adopted before Tele Fácil's case, and never since.⁶⁸⁴ It was a one-time solution solely designed for Telmex's benefit, and not that of the general public.⁶⁸⁵ In fact, it *undermined* the public interest by delaying interconnection.

434. For the reasons discussed above, the IFT did not pursue non-discriminatory regulation in pursuit of a public policy objection.⁶⁸⁶ Consequently, in this case, there is no question about where the line falls between unlawful expropriation and legitimate regulation. Along the spectrum of governmental interference, the IFT's conduct stands solidly on the side of

⁶⁸⁴ See *infra* Part V.B.1.c and V.B.2.c, describing the IFT's aberrant practice in detail.

⁶⁸⁵ Protecting a national champion is not a public welfare objection. See *Hully Enterprises Limited (Cyprus) v. Russian Federation*, PCA Case No. AA 226, Final Award (July 18, 2014), ¶ 1581 ("As to condition (a), whether the destruction of Russia's leading oil company and largest taxpayer was in the public interest is profoundly questionable. It was in the interest of the largest State-owned oil company, Rosneft, which took over the principal assets of Yukos virtually cost-free, but that is not the same as saying that it was in the public interest of the economy, polity and population of the Russian Federation."), **CL-047**.

⁶⁸⁶ Even if the IFT's actions are considered to constitute general regulations, which they are not, they still constitute indirect expropriation. As explained in *El Paso v. Argentina*: "If general regulations are unreasonable, *i.e.* arbitrary, discriminatory, disproportionate or otherwise unfair, they can, however, be considered as amounting to indirect expropriation if they result in a neutralisation of the foreign investor's property rights." *El Paso Energy International Co. v. Argentine Republic*, ICSID Case No. ARB/03/15, Award (Oct. 31, 2011), ¶ 241, **CL-033**; see also *Compañía Del Desarrollo De Santa Elena, S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Final Award (Feb. 17, 2000), ¶ 72 (finding that "where property is expropriated, even for environmental purposes ... the state's obligation to pay compensation remains."), **CL-031**.

unlawful expropriation. At bottom, the IFT effectively seized and destroyed interconnections rights that the IFT itself had previously granted to Tele Fácil.

435. As a consequence, in order to determine whether Article 1110 has been breached, there is no need for the Tribunal to engage in the type of factor-weighting exercise that sometimes occurs in cases involving claims of a regulatory taking.

* * *

436. Based on the foregoing analysis, Claimants' claims satisfy each prong of the three-prong test for determining an unlawful expropriation in breach of Article 1110 of the NAFTA. Specifically, beginning in mid-January 2015, the IFT expropriated Tele Fácil's lynchpin asset—its interconnection agreement with Telmex—which, in turn, expropriated Claimants' rights as shareholders in Tele Fácil to earn a commercial return on their investments. The IFT has never provided Claimants compensation for their heavy losses when it discriminatorily targeted Tele Fácil for destruction. Nor has it ever stated a public interest objective in the course of depriving Claimants of the use and enjoyment of their investments.

437. Accordingly, Respondent has unlawfully expropriated Claimants' investments in Mexico.

V. RESPONDENT BREACHED ARTICLE 1105 OF THE NAFTA

436. The IFT's scheme to repudiate Resolution 381 also violated Article 1105 of the NAFTA. That provision requires Respondent to afford Claimants' investments in Mexico fair and equitable treatment in accordance with customary international law. Despite Article 1105, the IFT arbitrarily, discriminatorily and secretly repudiated the interconnection terms established in Resolution 381 with the effect of gutting Claimants' investments in Mexico. As explained

below, the IFT's conduct is beyond egregious to the point of lacking all good faith. Acting in concert with Telmex, Respondent disavowed fundamental tenets of Mexican law in order to save Mexico's telecom giant from the financial consequences of its deal with Tele Fácil that the incumbent no longer wished to honor.

A. The Applicable Standard Of Fair And Equitable Treatment

437. Respondent's conduct is governed by the standard set forth in Article 1105 of the NAFTA, as interpreted by the NAFTA Parties. This standard is determined by reference to customary international law, as reflected in the decisions of investor-State arbitration tribunals and as established by the practice of States, including that of Respondent.

1. The Text of the NAFTA as Interpreted by the NAFTA Parties

438. Article 1105 of the NAFTA, entitled "Minimum Standard of Treatment," establishes the applicable standard of treatment. The first paragraph of that article provides:

Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.

439. Article 1105(1) is subject to the NAFTA Free Trade Commission Notes of Interpretation of Article 1105 adopted on July 31, 2001. The Notes of Interpretation clarified the source and general scope of Article 1105(1) as follows:

1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.
2. The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.

3. A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).⁶⁸⁷

440. The Notes of Interpretation explain that Article 1105(1) does not establish an autonomous, treaty-based standard of investment protection. Rather, that provision incorporates into the NAFTA the “international minimum standard of treatment” as defined by customary international law. Accordingly, the concept of “fair and equitable treatment” is part of the customary international minimum standard of treatment and, thus, its content is defined exclusively by customary international law.⁶⁸⁸

441. The Notes of Interpretation bind the Tribunal pursuant to Article 1131(2) of the NAFTA.

2. The Fair and Equitable Treatment Standard as Reflected in the Decisions of NAFTA and Other Investor-State Arbitration Tribunals

442. It is well established that arbitral decisions, while themselves do not *create* customary international law, may *reflect* customary international law.⁶⁸⁹ With respect to the customary standard of fair and equitable treatment, the overwhelming majority of investor-State

⁶⁸⁷ Free Trade Commission Notes of Interpretation (Jul. 31, 2001), available at http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp, **CL-080**.

⁶⁸⁸ Customary international law is determined by state practice and *opinio juris*. That is, customary international law is established by the general and consistent practice of States that is followed out of a sense of legal obligation. *See, e.g.*, Statute of the International Court of Justice, Art. 38(1)(b), **CL-075**; Patrick Dumberry, THE FORMATION AND IDENTIFICATION OF RULES OF CUSTOMARY INTERNATIONAL LAW IN INTERNATIONAL INVESTMENT LAW 1 (2016), **CL-078**. The minimum standard of treatment under customary international law, including the concept of “fair and equitable treatment,” therefore derives from this source of law. *See, e.g.*, OECD, DRAFT CONVENTION ON THE PROTECTION OF FOREIGN PROPERTY (1968) (commentary on Article 1 stating that the “fair and equitable treatment” standard refers “to the ‘minimum standard’ which forms part of customary international law”), **CL-081**; *see also* Andrea Bjorkland, NAFTA CHAPTER 11: COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES 484 (Chester Brown, ed. 2013), **CL-077**.

⁶⁸⁹ *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award (Sept. 18, 2009), ¶ 277 (finding that “the writings of scholars and the decisions of tribunals may serve as evidence of custom.”), **CL-026**; *Mercer International v. Government of Canada*, ICSID Case No. ARB(AF)/12/3, Submission of the United Mexican States pursuant to Article 1128 Submission (May 8, 2015) ¶ 18, **CL-052**.

arbitration tribunals have followed the standard articulated in *Waste Management v. Mexico*.⁶⁹⁰

443. In that case, applying Article 1105 of the NAFTA, the Tribunal stated the standard as follows:

[T]he minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.⁶⁹¹

444. Under the *Waste Management* standard, different types of State misconduct may produce a result or outcome that is so fundamentally unfair, unjust or prejudicial as to fall below the minimum standard of fair and treatment. These types of misconduct roughly fall into three distinct, yet potentially overlapping, categories, namely arbitrariness, lack of due process and discrimination.

445. Notably, Respondent generally supports the statement of the fair and equitable treatment standard in *Waste Management*. For example, in its pleadings in *GAMI v. Mexico*, Respondent recalled the *Waste Management* standard and affirmed that “[i]ts analysis is in accordance with the arguments of respondent.”⁶⁹²

⁶⁹⁰ See, e.g., *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Government of Canada*, UNCITRAL (NAFTA), PCA Case No. 2009-04, Award on Jurisdiction and Liability (Mar. 17, 2015) ¶¶ 427, 442 **CL-072**; *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/17, Award (Dec. 19, 2013) ¶¶ 262, 455 (adopting *Waste Management* standard in principal part), **CL-066**; *Railroad Development Corp. v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award (Jun. 29, 2012), ¶ 219, **CL-059**.

⁶⁹¹ *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (Apr. 30, 2004), ¶ 98, **CL-071**.

⁶⁹² *GAMI Investments, Inc. v. United Mexican States*, UNCITRAL (NAFTA), Mexico’s Post-Hearing Brief (May 24, 2004), ¶¶ 48, 50, **CL-042**.

446. Other NAFTA tribunals have identified the fair and equitable treatment standard in line with *Waste Management*. Many have adopted the standard wholesale.⁶⁹³ Others have added their own gloss on the types of misconduct that trigger a fair and equitable treatment violation in light of the facts a particular case.

447. In *Cargill v. Mexico*, for example, the tribunal observed:

To determine whether an action fails to meet the requirement of fair and equitable treatment, a tribunal must carefully examine whether the complained of measures were grossly unfair, unjust or idiosyncratic; arbitrary beyond a merely inconsistent or questionable application of administrative or legal policy or procedure so as to constitute an unexpected and shocking repudiation of a policy's very purpose and goals, or to otherwise grossly subvert a domestic law or policy for an ulterior motive; or involve an utter lack of due process so as to offend judicial propriety.⁶⁹⁴

448. The *Cargill* tribunal thus fleshed out aspects of the *Waste Management* standard, observing that State conduct that unjustifiably repudiates domestic law or policy violates the fair and equitable treatment standard.

449. In *International Thunderbird v. Mexico*, the tribunal described the standard of fair and equitable treatment similarly, though more efficiently, using more concise terminology:

[T]he Tribunal views acts that would give rise to a breach of the minimum standard of treatment prescribed by the NAFTA and customary international law as those that, weighed against the given factual context, amount to a gross denial of justice or manifest arbitrariness falling below acceptable international standards.⁶⁹⁵

⁶⁹³ See *supra* n.690.

⁶⁹⁴ *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award (Sept. 18, 2009), ¶ 296, **CL-026**.

⁶⁹⁵ *International Thunderbird Gaming Corp. v. United Mexican States*, UNCITRAL (NAFTA), Award (Jan. 26, 2006), ¶ 194, **CL-049**.

450. The *International Thunderbird* tribunal’s statement of the fair and equitable treatment standard thus groups various concepts identified in *Waste Management*—such as lack of due process, unjustness, unfairness, and discrimination—under the single rubric of “denial of justice.”⁶⁹⁶ It identifies two basic elements of the fair and equitable treatment standard: manifest arbitrariness and denial of justice.

451. Notably, Respondent has expressed the standard in similar terms. For example, in *Windstream v. Canada*, Mexico intervened to take the position that Article 1105(1) covered “egregious conduct, such as serious malfeasance, manifestly arbitrary behavior or denial of justice.”⁶⁹⁷ Respondent’s position on the scope of the fair and equitable treatment standard thus generally corresponds to the approaches in *Waste Management*, *Cargill*, and *International Thunderbird*.

452. Thus, the decisions of arbitral tribunals and Mexico’s well-established positions confirm that the minimum standard of fair and equitable treatment guards against various types of State misconduct, which are roughly grouped into three distinct, yet potentially overlapping categories: (a) arbitrariness; (a) lack of due process; and (c) discrimination. As explained below, numerous tribunals have found breaches of the customary standard of fair and equitable treatment based on State conduct falling into one or more of these categories.

⁶⁹⁶ Notably, in *Iberdrola v. Guatemala*, the tribunal aptly defined “denial of justice” as follows:

[U]nder international law a denial of justice could constitute: (i) the unjustified refusal of a tribunal to hear a matter within its competence or any other State action having the effect of preventing access to justice; (ii) undue delay in the administration of justice; and (iii) the decisions or actions of State bodies that are evidently arbitrary, unfair, idiosyncratic or delayed.

Iberdrola Energía S.A. v. Republic of Guatemala, ICSID Case No. ARB/09/5, Award (Unofficial English Translation) (Aug. 17, 2012), ¶ 432, **CL-048**.

⁶⁹⁷ *Windstream Energy LLC v. Government of Canada*, PCA Case No. 2013-22, Submission of Mexico Pursuant to NAFTA Article 1128 (Jan. 12, 2016), ¶ 7, **CL-073**.

a. Arbitrariness

453. Mexico has consistently taken the position that the fair and equitable treatment standard under the NAFTA addresses arbitrariness in State decision-making.⁶⁹⁸ In *Cargill v. Mexico*, for example, Respondent cited the judgment of a chamber of the International Court of Justice in the *ELSI* case as defining the concept.⁶⁹⁹ That decision provided, in relevant part:

Arbitrariness is not so much something opposed to *a* rule of law, as something opposed to *the* rule of law. This idea was expressed by the Court in the *Asylum* case, when it spoke of ‘arbitrary action’ being ‘substituted for the rule of law.’ It is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety.⁷⁰⁰

454. In other words, a State acts arbitrarily, in violation of international law, when it conducts itself not on the basis of a system of law, but rather based on its own unrestricted will.

455. One NAFTA tribunal observed that arbitrariness breaches Article 1105 “when the State’s actions move beyond a merely inconsistent or questionable application of administrative or legal policy or procedure to the point where the action constitutes an unexpected and shocking repudiation of a policy’s very purpose and goals, or otherwise grossly subverts a domestic law or policy for an ulterior motive.”⁷⁰¹

456. Similarly, another NAFTA tribunal observed that a determination of arbitrariness often depends on context. It posited: “The imposition of a new license requirement may for

⁶⁹⁸ See, e.g., *ADF Group Inc. v. United States of America*, ICSID Case No. ARB (AF)/00/1, Second Article 1128 Submission of Mexico (Jul. 22, 2002), at 2-3, **CL-020**; *The Loewen Group, Inc. and Raymond L. Loewen v. The United States of America*, ICSID Case No. ARB(AF)/98/3, Second Article 1128 Submission of Mexico (Nov. 9, 2001), at 16, **CL-068**.

⁶⁹⁹ *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Rejoinder of the Respondent (May 2, 2007), ¶ 328, **CL-025**.

⁷⁰⁰ *Elettronica Sicula S.p.A. (ELSI) (United States v. Italy)*, 1989 ICJ Reports 15 (Jul. 20, 1989), ¶ 128 (emphasis added) (citation omitted), **CL-034**.

⁷⁰¹ *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award (Sept. 18, 2009), ¶ 293, **CL-026**.

example be viewed quite differently if it appears on a blank slate or if it is an arbitrary repudiation of a preexisting licensing regime upon which a foreign investor has demonstrably relied.”⁷⁰² Accordingly, an abrupt change in the treatment of a foreign investor contrary to law breaches Article 1105.

457. Tribunals applying the customary standard of fair and equitable treatment have often found that a breach has occurred when the host State’s conduct is unsupported by a reasonable and established policy rationale. Two cases decided under the NAFTA are illustrative.

458. In *Cargill v. Mexico*, the tribunal found a breach of Article 1105 based on Mexico’s arbitrary treatment of U.S. producers of high fructose corn syrup. Following the NAFTA’s entry into force, U.S. producers of high fructose corn syrup made significant inroads into Mexico’s sweetener market, to the detriment of Mexico’s struggling sugar cane industry. In response, Mexico demanded greater access to U.S. sugar markets. Unhappy with the U.S. response, Mexico levied a heavy tax on soft-drink bottlers that used high fructose corn syrup and subjected U.S. imports of high fructose corn syrup to a new import permit requirement. These measures had the effect of eliminating Cargill from the Mexican market and destroying its investment in Mexico.

459. The tribunal found that Mexico’s actions breached, among other obligations, the fair and equitable treatment standard because they were arbitrary. As the tribunal ruled:

the sole purpose of the import permit requirement was to change the trade policy of the United States; while the sole effect was to virtually remove

⁷⁰² *GAMI Investments, Inc. v. United Mexican States*, UNCITRAL (NAFTA), Final Award (Nov. 15, 2004), ¶ 91, CL-043.

Claimant from the Mexican HFCS market. *There is no other relationship between the means and the end of this requirement.*”⁷⁰³

460. According to the tribunal, this “complete lack of objective criteria put forth by the Mexican government by which a company could obtain a permit” made the process not only “manifestly unjust,” but also so egregious as to “surpass the standard of gross misconduct [required for a breach of Article 1105] and be more akin to an action in bad faith.”⁷⁰⁴

461. Similarly, in *Bilcon v. Canada*, the tribunal found that Canada’s arbitrary acts in connection with its consideration of a proposed quarry and marine terminal project breached Article 1105.⁷⁰⁵ That case focused on the actions of an advisory body tasked by law with advising Canadian authorities on the environmental soundness of the quarry project. Under intense pressure from the local community, the advisory body recommended against the project—a recommendation that Canadian authorities ultimately adopted. Notably, the decision was reached not on the basis of any of the environmental factors established under the law, but rather on a novel and vague concept of “core community values.”

462. The tribunal found that the advisory body acted arbitrarily in breach of Article 1105 because its denial of the project was based on an “unprecedented”⁷⁰⁶ and “fundamentally novel and adverse approach.”⁷⁰⁷ As the tribunal observed, the advisory body “effectively created, without legal authority or fair notice to Bilcon, a new standard of assessment rather than

⁷⁰³ *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award (Sept. 18, 2009), ¶ 299 (emphasis added), **CL-026**.

⁷⁰⁴ *Id.* at ¶¶ 298-299, 301.

⁷⁰⁵ *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Government of Canada*, UNCITRAL (NAFTA), PCA Case No. 2009-04, Award on Jurisdiction and Liability (Mar. 17, 2015), ¶ 604, **CL-072**.

⁷⁰⁶ *Id.* at ¶ 450.

⁷⁰⁷ *Id.* at ¶ 573.

fully carrying out the mandate defined by the applicable law.”⁷⁰⁸

463. Two cases applying the customary standard of fair and equitable treatment under the CAFTA-DR similarly found the State’s arbitrary conduct as the decisive factor for establishing a breach.

464. In *RDC v. Guatemala*, the tribunal found that Guatemala’s arbitrary application of its *lesivo* process violated the fair and equitable treatment standard. After RDC was granted a 50-year concession to run Guatemala’s national railway system, Guatemala’s President declared one of the project’s critical contracts to be “*lesivo*” or legally injurious to the state. The tribunal found not only that the *lesivo* process “may be easily abused in its application,”⁷⁰⁹ but also that it was, in fact, abused in that instance. According to the tribunal, “the *lesivo* remedy has been used under a cloak of formal correctness in defense of a rule of law, in fact for exacting concessions unrelated to the finding of *lesivo*.”⁷¹⁰ The tribunal therefore found a breach of the fair and equitable treatment standard because Guatemala had arbitrarily applied the *lesivo* remedy to seek to undo what it perceived to be unfavorable contract terms.

465. Likewise, in *TECO v. Guatemala*, Guatemala’s arbitrary conduct was again found in breach of the standard of fair and equitable treatment. That case centered on the establishment of electricity rates by the Guatemalan government, which the investor disputed. Although the law required the government to consider the views of an Expert Commission under those circumstances, the government failed to do so. The tribunal found that the government’s

⁷⁰⁸ *Id.* at ¶ 591; see also *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (Aug. 30, 2000), ¶¶ 91-92 (Mexico denied claimant a permit at a hearing “of which Metalclad received no notice, to which it received no invitation, and at which it was given no opportunity to appear” and for reasons unrelated to “the physical construction of the landfill or to any physical defects therein.”), **CL-053**.

⁷⁰⁹ *Railroad Development Corp. v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award (Jun. 29, 2012), ¶¶ 222, 233, **CL-059**.

⁷¹⁰ *Id.* at ¶ 234.

decision to “ignor[e] without reasons” the views of the Expert Commission was “manifestly inconsistent with the regulatory framework.”⁷¹¹ Namely, the government had “repudiated the . . . fundamental principles upon which the regulatory framework bases the tariff review process.”⁷¹²

b. Lack of Due Process

466. A serious failure in the administration of justice also gives rise to a breach of the customary fair and equitable treatment standard. Such misconduct is sometimes described in terms of a “complete lack of transparency and candour in an administrative process”⁷¹³ or a “denial of justice.” As explained by a leading commentator, “the delict of denial of justice occurs when the instrumentalities of a state purport to administer justice to aliens in a fundamentally unfair manner.”⁷¹⁴

467. The criteria for determining a denial of justice were aptly summarized in *Iberdrola v. Guatemala*:

[U]nder international law a denial of justice could constitute: (i) the unjustified refusal of a tribunal to hear a matter within its competence or any other State action having the effect of preventing access to justice; (ii) undue delay in the administration of justice; and (iii) the decisions or actions of State bodies that are evidently arbitrary, unfair, idiosyncratic or delayed. In this matter, the Tribunal shares the position of the Claimant in that “... denial of justice is not a mere error in interpretation of local law, but an error that no merely competent judge could have committed and that shows that a minimally adequate system of justice has not been provided.”⁷¹⁵

⁷¹¹ *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Award (Dec. 19, 2013) ¶ 708, **CL-066**.

⁷¹² *Id.* ¶ 710.

⁷¹³ *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (Apr. 30, 2004), ¶ 98, **CL-071**.

⁷¹⁴ Jan Paulsson, *DENIAL OF JUSTICE IN INTERNATIONAL LAW* 62 (2005), **CL-083**.

⁷¹⁵ *Iberdrola Energía S.A. v. Republic of Guatemala*, ICSID Case No. ARB/09/5, Award (Unofficial English Translation) (Aug. 17, 2012), ¶ 432, **CL-048**.

468. As explained in *Loewen v. United States*, a denial of justice entails “[m]anifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety.”⁷¹⁶ The test for determining a denial of justice, as stated in *Mondev v. United States*, is therefore “whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the available facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subjected to unfair and inequitable treatment.”⁷¹⁷

469. The hallmarks of a denial of justice are a State’s failure to provide foreign investors notice of, or an opportunity to be heard in, administrative and judicial proceedings such that the process is rendered fundamentally unfair.

470. Investor-State tribunals have found a breach of the customary fair and equitable treatment standard, in whole or in part, based on procedural impropriety in an administrative process.

471. In *Metalclad v. Mexico*, for example, Metalclad constructed a hazardous-waste landfill in a Mexican municipality after receiving assurances from the Mexican government that all necessary permits would be provided.⁷¹⁸ However, faced with local opposition to the landfill, the municipality’s town council denied Metalclad a municipal construction permit on a basis not set forth in the law, namely on environmental grounds. The tribunal found Mexico’s conduct to

⁷¹⁶ *The Loewen Group, Inc. and Raymond L. Loewen v. The United States of America*, ICSID Case No. ARB(AF)/98/3, Award (June 26, 2003), ¶ 132, **CL-069**; *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award (Sept. 18, 2009), ¶ 296 (“an utter lack of due process so as to offend judicial propriety”), **CL-026**.

⁷¹⁷ *Mondev International Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, Award (Oct. 11, 2002), ¶ 127, **CL-057**.

⁷¹⁸ *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (Aug. 30, 2000), ¶¶ 33-34, **CL-053**.

violation Article 1105. Critical to the tribunal's finding was the fact that "the permit was denied at a meeting of the Municipal Town Council of which Metalclad received no notice, to which it received no invitation, and at which it was given no opportunity to appear."⁷¹⁹

472. Similarly, in *Bilcon v. Canada*, described above, Bilcon argued that Canada breached Article 1105 when it provided no notice that the concept of "community core values" would be a factor considered by the advisory body in assessing Bilcon's proposed project—let alone the decisive factor.⁷²⁰ The tribunal agreed, finding that there was "no reasonable notice" that the advisory body "was going to adopt this unique approach and therefore had no opportunity to seek to clarify or contest it."⁷²¹ As a consequence, the tribunal found Canada's conduct to be "a serious breach of the law on procedural fairness"⁷²²

473. In addition, in *TECO v. Guatemala*, described above, Guatemala was found to have breached the customary fair and equitable treatment standard for failing to provide a fair process in connection with the establishment of electricity rates.⁷²³ Under Guatemalan law, the government was required to consider the views of an Expert Commission regarding recommended rates and, if the government disagreed, to provide reasons as to the basis for disregarding those rates.⁷²⁴ The government failed to do so. The tribunal observed that "a lack of due process in the context of administrative proceedings such as the tariff review process

⁷¹⁹ *Id.* ¶ 91; see also *id.* ¶ 99 ("The totality of these circumstances demonstrates a lack of orderly process and timely disposition in relation to an investor of a Party acting in the expectation that it would be treated fairly and justly in accordance with the NAFTA.").

⁷²⁰ *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Government of Canada*, UNCITRAL (NAFTA), PCA Case No. 2009-04, Award on Jurisdiction and Liability (Mar. 17, 2015) ¶ 24, CL-072.

⁷²¹ *Id.* ¶¶ 451, 543.

⁷²² *Id.* ¶ 534.

⁷²³ *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Award (Dec. 19, 2013), ¶ 780(b) CL-066.

⁷²⁴ *Id.* ¶¶ 545, 564.

constitutes a breach of the minimum standard.”⁷²⁵ Accordingly, it found: “In assessing whether there has been such a breach of due process, it is relevant that the Guatemalan administration entirely failed to provide reasons for its decisions or disregarded its own rules.”⁷²⁶

474. A maladministration of justice may also occur in the context of judicial proceedings. Fair and equitable treatment requires that a State provide an adequate system of justice that affords foreign investors fundamental procedural fairness.

475. As explained in *Azinian v. Mexico*, a denial of justice exists “if the relevant courts refuse to entertain a suit, if they subject it to undue delay, or if they administer justice in a seriously inadequate way.”⁷²⁷ The latter situation covers at least two types of misconduct where the State engages in unfair discrimination or commits gross incompetence in the administration of justice.

476. In *Loewen v. United States*, the tribunal found that “a decision which is in breach of municipal law and is discriminatory against the foreign litigant amounts to manifest injustice according to international law.”⁷²⁸ In that case, a U.S. state trial court failed to properly guard the jury against inflammatory arguments seeking to target the Canadian defendant based on its nationality, race, and economic status. As a consequence, the jury not only found against the Canadian defendant, but also imposed an excessive monetary judgment against it. Although the claim was dismissed on other grounds, the tribunal concluded that “the trial judge failed to afford

⁷²⁵ *Id.* ¶ 457.

⁷²⁶ *Id.*; see also *id.* ¶ 583 (“The obligation to provide reasons derives from both the regulatory framework and from the international obligations of the State under the minimum standard.”).

⁷²⁷ *Robert Azinian, Kenneth Davitian, & Ellen Baca v. United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award (Nov. 1, 1999) ¶ 102, **CL-060**.

⁷²⁸ *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award (June 26, 2003), ¶ 135, **CL-069**.

Loewen the process that was due.”⁷²⁹ In particular, the tribunal noted that it is the responsibility of the State under international law “to provide a fair trial” and “to ensure that litigation is free from discrimination against a foreign litigant and that the foreign litigant should not be the victim of sectional or local prejudice.”⁷³⁰

477. Another situation involving denial of justice is gross incompetence in judicial decision-making. As Gerald Fitzmaurice has observed:

In almost all such cases it is probably that the court will have committed some more or less serious error, in the sense of a wrong conclusion of law or of fact. This suggests that the right method is to concentrate on the question whether the court was competent rather than on whether it was honest. The question will then be, was the error of such a character that no competent judge could have made it? If the answer is in the affirmative, it follows that the judge was either dishonest, in which case the state is clearly responsible, or that he was incompetent, in which case the responsibility of the state is also engaged for failing in its duty of providing competent judges.⁷³¹

478. The *Azinian* tribunal described a denial of justice in judicial decision-making as a “clear and malicious misapplication of the law.”⁷³² “This type of wrong doubtless overlaps with the notion of ‘pretence of form’ to mask a violation of international law.”⁷³³

c. Discrimination

479. Discriminatory treatment by a NAFTA Party is prohibited by Article 1105 under certain circumstances. Whereas Articles 1102 (National Treatment) and 1103 (Most-Favored-Nation Treatment) address nationality-based discrimination relative to the treatment of domestic

⁷²⁹ *Id.* ¶ 119.

⁷³⁰ *Id.* ¶ 123.

⁷³¹ Gerald Fitzmaurice, THE MEANING OF THE TERM “DENIAL OF JUSTICE”, 13 *British Yearbook of International Law* 113-114 (1932), CL-079.

⁷³² *Robert Azinian, Kenneth Davitian, & Ellen Baca v. United Mexican States*, ICSID Case No. ARB (AF)/97/2, Award (Nov. 1, 1999) ¶ 103, CL-060.

⁷³³ *Id.*

and third-party nationals, Article 1105 precludes unjustified targeting of investors and their investments. According to UNCTAD, “[a] measure is likely to be found to violate the FET standard if it evidently singles out (de jure or de facto) the claimant and there is no legitimate justification for the measure.”⁷³⁴

480. NAFTA tribunals have recognized this aspect of the customary fair and equitable treatment standard. In *Waste Management v. Mexico*, the tribunal observed that “a deliberate conspiracy—that is to say, a conscious combination of various agencies of government without justification to defeat the purposes of an investment agreement—would constitute a breach of Article 1105(1).”⁷³⁵ It added: “[a] basic obligation of the State under Article 1105(1) is to act in good faith and form, and not deliberately to set out to destroy or frustrate the investment by improper means.”⁷³⁶

481. In *Cargill v. Mexico*, discussed above, the tribunal found that Mexico violated Article 1105, in large part, because it unjustifiably targeted Cargill’s investment for destruction in retaliation for the U.S. government’s refusal to grant Mexican companies increased access to U.S. sugar markets. The tribunal adamantly found Mexico’s “willful targeting, by its nature, to be manifest injustice.”⁷³⁷

⁷³⁴ UNCTAD, FAIR AND EQUITABLE TREATMENT: SERIES ON ISSUES IN INTERNATIONAL INVESTMENT AGREEMENTS II 82 (2012), **CL-084**; see also Martins Paparinskis, THE INTERNATIONAL MINIMUM STANDARD AND FAIR AND EQUITABLE TREATMENT 247 (2013) (“discrimination is still a part of the international standard, requiring reasonable justification for different treatment of similar cases.”), **CL-082**.

⁷³⁵ *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (Apr. 30, 2004), ¶ 138, **CL-071**.

⁷³⁶ *Id.*

⁷³⁷ *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award (Sept. 18, 2009), ¶ 300, **CL-026**.

482. Importantly, the tribunal underscored that Cargill’s U.S. nationality was irrelevant to the assessment of wrongdoing:

The fact that the targeted investors are corporations with U.S. nationality is of no significance in the Tribunal’s view. If the import permit requirement had been instituted to influence the trade policy of a country other than the country of the nationality of the investors, the manifest injustice is, in the Tribunal’s view, patent.”⁷³⁸

483. The Tribunal found that Mexico’s conduct in the case “surpass[ed] the standard of gross misconduct and is more akin to an action in bad faith”⁷³⁹

484. Similarly, in *Loewen v. United States*, described above, the tribunal found that a U.S. state court’s unjustified singling out of a Canadian investor and subjecting it to “discrimination” on the basis of “sectional or local prejudice” violated Article 1105. The tribunal’s finding, as a reflection of customary international law, was later incorporated into the fair and equitable treatment standard set forth in *Waste Management v. Mexico*; to recall, that standard provides, in relevant part, that “the minimum standard of treatment... of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct ... is discriminatory and exposes the claimant to sectional or racial prejudice.”

* * *

485. In sum, the fair and equitable treatment standard prohibits a broad range of State misconduct, including acts and omissions that entail arbitrariness, a lack of due process, or discrimination that falls below international standards. As explained below, Respondent’s conduct—both in connection with the IFT and the Specialized Telecommunication Courts—fell well below that standard and, accordingly, resulted in multiple breaches of Article 1105.

⁷³⁸

Id.

⁷³⁹

Id. ¶ 301.

B. The IFT's Conduct Violated the Fair and Equitable Treatment Standard

486. The IFT's conduct eviscerated Claimants' investments. The key measures at issue are: the IFT's decision, at the highest levels, not to enforce Resolution 381 and, instead, to engage in a secret process to reverse that resolution; Decree 77 in which the IFT purported to interpret Resolution 381, but actually repealed the most critical aspects of it; and Resolution 127 in which the IFT illegally permitted Telmex to replace, as a formal matter, previously established interconnection terms that were more favorable to the incumbent—including with respect to the interconnection rate terms and indirect interconnection.

487. These three measures comprised the component parts of an illicit scheme to destroy Claimants' investments in Mexico. This scheme was devised by the IFT and Telmex to allow Telmex to avoid compliance with interconnection obligations that had already been established in Resolution 381, but that Telmex had come to find financially unacceptable. As explained below, the IFT's scheme was arbitrary, unduly secretive, and highly discriminatory and, thus, patently breached Article 1105 beginning in or about mid-January 2015.

1. The IFT's High-Level Decision Not to Enforce Resolution 381 Violated the Fair and Equitable Treatment Protection.

488. As explained, a few weeks after the IFT's ruling in Resolution 381, which favored Tele Fácil on all counts, the IFT decided to reverse itself completely. This about-face occurred sometime in mid-January 2015. In a meeting on January 12, 2015, between Tele Fácil and the Head of the IFT's Compliance Unit, Mr. Sánchez Henkel assured Tele Fácil that Resolution 381 was absolutely clear and would be enforced.⁷⁴⁰ However, on February 10, 2015, Mr. Sánchez Henkel instead sent a formal request to the IFT's Legal Unit asking whether Resolution 381

⁷⁴⁰ Sacasa Statement, ¶¶ 92-97, C-003; Bello Statement, ¶¶ 87-90, C-004.

could be enforced only partially with respect to physical interconnection, but not execution of the interconnection agreement.⁷⁴¹

489. A few days later, Telmex submitted its request for confirmation of criteria to the Legal Unit.⁷⁴² That request sought the IFT's assurances that Resolution 381 was inconsistent with Mexico's recent telecommunications reforms and, thus, that the high interconnection rate through 2017 were not applicable to Telmex going forward.

490. These two requests—ostensibly for legal clarity even when Resolution 381 was unequivocal in its terms—provided the pretext for the IFT to repudiate its own prior rulings. In response to these requests, the IFT launched an internal review process that represented an unprecedented abuse of administrative process in order to absolve Telmex of its interconnection obligations and, in turn, to deprive Tele Fácil of its interconnection rights. This was accomplished as a formal matter when the IFT issued Decree 77.

491. In understanding the IFT's abuse of process, it is important to highlight that ultimately Decree 77 did not answer Telmex's question regarding the consistency of Resolution 381 with the new telecommunications law. Rather, Decree 77 answered the Compliance Unit's question in the affirmative: The IFT could enforce physical interconnection without execution of the interconnection agreement.⁷⁴³ In fact, Decree 77 ordered precisely that.

⁷⁴¹ Compliance Unit Confirmation of Criteria, **C-040**.

⁷⁴² Telmex's confirmation of criteria, **C-041**.

⁷⁴³ Soria Report, ¶¶ 113-114 ("The fact that the IFT internally requested a confirmation of criteria in order to be able to revoke the pronouncement of Resolution 381 and intentionally disguised Decree 77 as a response to Tele Fácil and Telmex/Telnor is worrisome. ...I can strongly state that this is not a common practice; in fact, it seems to me to be an abuse of power."), **C-009**; Álvarez Report, ¶ 155, **C-008** (observing that "the IFT accepted a supposed 'confirmation of criteria' by Telmex and the supposed 'confirmation of criteria' of the IFT's Compliance Unit which served as an excuse to issue Decree 77 that modified the rights vested upon Tele Fácil")

492. Thus, while in Decree 77 the IFT purported to resolve a debatable issue of enforcement between Telmex and Tele Fácil, in actuality it simply asked and answered the question in a way that would neutralize the threat posed by Tele Fácil.⁷⁴⁴ Telmex's request for confirmation of criteria simply handed the IFT a vehicle for providing its purported "interpretation" of Resolution 381.

a. The IFT's Decision Not to Enforce Resolution 381 Was Manifestly Arbitrary.

493. The IFT's decision to refuse enforcement of Resolution 381 constituted an arbitrary abuse of process in two principle respects. First, it was carried out through the blatant misuse of the process by which the IFT may interpret Mexico's telecommunications law. Second, it was carried out improperly to the complete exclusion of the proper means through which Tele Fácil's multiple requests for enforcement should have been addressed.

494. Strangely, and illegally, the IFT decided to reconsider the terms of Resolution 381 ostensibly by way of Telmex's request for confirmation of criteria. According to that process, a telecom provider may submit to the IFT a request for confirmation of criteria to obtain a formal legal opinion on the meaning of Mexico's telecom laws and regulations, not an opportunity to revisit a resolution of the IFT.⁷⁴⁵ The process is typically used when a provider plans to pursue a particular action and seeks the regulator's assurance that its interpretation of law is accurate.⁷⁴⁶

⁷⁴⁴ Soria Report, ¶ 114, C-009.

⁷⁴⁵ Álvarez Report, ¶ 111 (opining that "a confirmation of criteria cannot legally change IFT's resolutions, regulation or policy."), C-008.

⁷⁴⁶ *Id.* at ¶ 108 (explaining that "[a] confirmation of criteria is a request to an administrative authority to ascertain the authority's interpretation of the law under certain facts.").

In other words, the provider requests a confirmation of its proposed interpretation of the law *with respect to its own activities*, not its relationships with other telecom providers.⁷⁴⁷

495. According to practice, the provider may submit its proposed interpretation to the Legal Unit of the IFT which then studies the issue and formulates a recommendation either confirming or rejecting the proposed interpretation. The Legal Unit's recommendation is then presented to the IFT's Plenary for an up or down vote. Once the IFT has voted and issued its decree, the Plenary's decree is notified to the provider who requested the confirmation of criteria. A positive decree provides legal cover to the provider as it pursues its planned activity.

496. Thus, the "confirmation of criteria process" is not a valid means of revisiting a final decision of the IFT Plenary resolving an interconnection dispute.⁷⁴⁸ Importantly, under Mexican law, the IFT's authority to address a provider's request for confirmation of criteria derives from its authority to "interpret" relevant telecom law and regulations proposed by a provider.⁷⁴⁹ In particular, the Legal Unit's authority is expressly limited to "propos[ing] to the Plenary the interpretation criteria of the legal or administrative provisions"⁷⁵⁰

497. In addition, therefore, the "confirmation of criteria" process is not a means of establishing a telecom provider's interconnection rights or obligations, especially in relation to other providers.⁷⁵¹ It provides a process for interpreting the legal framework within which providers operate generally. Thus, where one provider presents an interconnection dispute with

⁷⁴⁷ *Id.* at ¶ 111 (opining that "a confirmation of criteria does not involve third parties, nor can it establish obligations for third parties.").

⁷⁴⁸ *Id.* at ¶ 111.

⁷⁴⁹ *Id.* at ¶ 108 (opinion that "the IFT (and previously Cofetel) decides requests for confirmation of criteria based on its authority to interpret the FTBL."), **C-008**.

⁷⁵⁰ IFT Organic Statute, at Article 53(V), **CL-007**.

⁷⁵¹ Álvarez Report, ¶ 111, **C-008**.

another to the IFT for resolution, the IFT must utilize the exclusive and specialized mechanism established under the law for resolving interconnection disputes.⁷⁵²

498. In this case, and despite the limited application of the “confirmation of criteria” process, the IFT blatantly misapplied it in order to allow Telmex to challenge and ultimately reverse critical aspects of Resolution 381, to Tele Fácil’s great detriment. The IFT improperly accepted Telmex’s request, which clearly and directly implicated Tele Fácil’s rights; it was framed in terms of releasing Telmex from its obligation to pay Tele Fácil an interconnection rate of US 0.00975 per minute of use through 2017.⁷⁵³

499. Further, the Legal Unit itself went well beyond the bounds of Telmex’s request for confirmation of criteria. Telmex had asked to negate the rate term of US 0.00975 per minute of use established in Resolution 381 through 2017.⁷⁵⁴ Rather than develop a proposed interpretation based on that question, the IFT developed a highly novel theory. It concluded that the former telecommunications law did, in fact, apply, but that the provision establishing the IFT’s authority to resolve disputes, Article 42 of the FTL, was very limited in scope. Namely, the Legal Unit proposed that the IFT was only empowered to resolve *disputed* interconnections terms, as opposed to establishing *undisputed* terms before the IFT and previously agreed between the providers.⁷⁵⁵

500. The IFT thus provided a response to a question that Telmex never raised, the scope of Article 42, but that still conveniently achieved the same goal of destroying Tele Fácil’s interconnection rights that threatened Telmex.

⁷⁵² In Tele Fácil’s case, this procedure was set forth in Article 42 of the FTL. See **CL-001**.

⁷⁵³ Telmex’s confirmation of criteria, at 6, 8, **C-041**.

⁷⁵⁴ Telmex’s confirmation of criteria, at 6, 8, **C-041**.

⁷⁵⁵ Legal Unit Proposal, at 4, **C-050**.

501. A second indication of the IFT's arbitrary conduct was its decision to pursue the "confirmation of criteria" process to the total exclusion of the legitimate process by which Tele Fácil's many requests for enforcement should have been addressed. Under Mexican telecommunications law, the IFT has a clear duty to ensure prompt and effective interconnection between carriers.⁷⁵⁶

502. Accordingly, the IFT should have adhered to the following normal procedures for enforcement:⁷⁵⁷

- Following Tele Fácil's request for enforcement on December 19, 2014, indicating Telmex's non-compliance with Resolution 381, the IFT should have sent an information request to Telmex and Tele Fácil requesting confirmation of interconnection, as ordered in Resolution 381;
- Assuming Telmex's response was unsatisfactory, the IFT should have followed up with a verification visit to Telmex's premises to confirm its failure to interconnect; and
- Upon confirmation, the IFT should have begun the administrative process of sanctioning Telmex for its non-compliance, ultimately ending in the imposition of a fine against the company; and
- If Telmex continued to refuse to comply, the IFT could revoke the company's concession.⁷⁵⁸

503. The IFT had followed such steps meticulously in many previous situations and would do the same subsequently to enforce Resolution 127 against Tele Fácil.⁷⁵⁹ However, it unjustifiably refused to do so, as required by law, after Telmex exerted undue pressure on the agency.⁷⁶⁰

⁷⁵⁶ FTBL, at Article 129, **CL-004**.

⁷⁵⁷ Administrative Procedure Law, Third Title, Article 13, **CL-008**; IFT Organic Statute, at Articles 43-44, **CL-007**.

⁷⁵⁸ FTBL, at Article 303, **CL-004**.

⁷⁵⁹ Resolution 127, at pp. 1-6, **C-061**.

⁷⁶⁰ As explained by Professor Álvarez, the IFT's Compliance Unit shirked its clear responsibilities:

504. Further, at the very minimum, the IFT should have provided a written response to Tele Fácil's requests for enforcement. Under the Mexican Constitution, the IFT is obligated to address any reasonable inquiry by a telecom provider within "a brief term."⁷⁶¹

505. Yet the IFT was completely unresponsive on all levels. It never responded to any of Tele Fácil's multiple requests for enforcement made on December 19, January 28, February 26, March 5, or March 23.⁷⁶² Nor did it take any action to carry out its legal mandate to enforce Resolution 381. Rather, it abdicated its responsibility and allowed the Legal Unit to use the "confirmation of criteria" process as the sole means of addressing Tele Fácil's requests, however improperly.

506. In sum, the IFT's approach to the enforcement of Resolution 381 was so completely misdirected, as a matter of law and policy, as to represent a complete abdication of the agency's core functions, without any reasonable justification whatsoever except to serve Telmex's financial interests.⁷⁶³

Issuing Decree 77 instead of enforcing Resolution 381 is unreasonable and unlawful ... because the Compliance Unit knew that it had to enforce Resolution 381 and instead of doing so, it requested an opinion of the Legal Affairs Unit. The authorities are obliged to perform their legal duties. In the case of the Compliance Unit it had the obligation to (i) verify that carriers and other regulated agents comply with the law, regulation and other provisions (e.g. Resolution 381), (ii) perform inspections (e.g. inspection to certify whether there was interconnection or not), (iii) conduct the procedure to impose a sanction when there was violation of the law, regulation and other provisions (e.g. Resolution 381); and (iv) present to the Plenary the proposed sanction; and such obligations cannot be rejected, nor can they be ignored.

Álvarez Report, ¶ 134(5) (citations omitted), **C-008**.

⁷⁶¹ Mexican Constitution, at Article 8, **CL-005**. *See also* Soria Report, ¶ 107 (concluding that Article 8 of the Constitution provides that "everyone has the right to seek an answer from an authority in regards to a specific matter"), **C-009**.

⁷⁶² First Enforcement Request, **C-035**; Second Enforcement Request, **C-038**; Reminder of Request, **C-107**; Transcript of March 5 Plenary Meeting, **C-043**; Follow-up with Plenary, **C-049**.

⁷⁶³ Álvarez Report, ¶ 119 (describing the Compliance Unit's request for interpretation as "not only highly unusual," but also "willful negligence"), **C-008**; Soria Report, ¶¶ 93-103, 112 (opining that the IFT abdicated its duties by "abusing its authority not only of interpretation, but also abusing its authority as the enforcer in

b. The IFT's Decision Not to Enforce Resolution 381 Was Improperly Secretive and Wholly Lacked Due Process.

507. In addition to being completely arbitrary, the resolution of Telmex's "confirmation of criteria process" request—and ultimately the Compliance Unit's request—was conducted for months in secrecy, without involving Tele Fácil or affording the company any due process. It was not until March 5, 2015, a few short weeks before Decree 77 was issued that the IFT even alluded to the fact that the scope of Resolution 381 was in question.⁷⁶⁴ But even then, Tele Fácil was never provided with a copy of Telmex's confirmation of criteria or the request transmitted by the Compliance Unit to the Legal Unit at the Direction of the IFT's Chairman. Consequently, it was given no reasonable chance to submit its views on the issues that would ultimately be addressed in Decree 77.

508. These egregiously unfair conditions flowed directly from the IFT's decision to use the "confirmation of criteria process" as a means to fundamentally alter Resolution 381. Because the IFT improperly extended the interconnection dispute between Telmex and Tele Fácil—despite it having been previously resolved by Resolution 381—there was no legitimate forum or procedure for doing so. The procedure it chose, the "confirmation of criteria" process, contained none of the due process protections of the IFT's specialized mechanism for resolving interconnection disputes.

telecommunications matters because in reality the IFT was denying the exercise of a previously granted right"), C-009.

⁷⁶⁴

Transcript of March 5 Plenary Meeting at p. 3, C-043.

509. Unlike the interconnection dispute resolution process, the “confirmation of criteria” process is completely one-sided.⁷⁶⁵ A provider may request a confirmation of criteria from the IFT unilaterally, and the IFT renders its decision to the provider alone, without input from other providers.⁷⁶⁶ When invoked and used properly, this process does not affect any other provider’s interests because the requesting provider is merely seeking a confirmation that its interpretation of the law, with respect to its *own* activities, is correct.

510. In stark contrast, by its nature, the interconnection dispute resolution process involves a direct conflict between two providers’ interests. It is therefore designed to afford each provider an opportunity to have its views heard before the IFT declares a winner and loser. For example, under the interconnection dispute resolution process, after one party initiates the process, the other party has an opportunity to respond, then the IFT conveys its proposed disposition to the parties, and, finally, each party is entitled to submit final arguments.⁷⁶⁷ The inclusiveness of the process is necessary to yield a fair result to the conflict.

511. Applying the unilateral “confirmation of criteria” process to resolve a bilateral interconnection dispute is fundamentally unfair and denies the absent party the procedural protections guaranteed under Mexican law. Outrageously, the IFT initiated and pursued a process, at Telmex’s request, to address an issue that directly affected Tele Fácil’s core rights, and that would ultimately lead to the formal elimination of those rights via Decree 77, without providing Tele Fácil formal notice or the opportunity to provide its views.

⁷⁶⁵ As explained by Professor Álvarez, the “confirmation of criteria” process “does not involve third parties, nor can it establish obligations for third parties.” Álvarez Report, ¶ 111, C-008.

⁷⁶⁶ *Id.* at ¶ 111.

⁷⁶⁷ See FTL, at Article 42, CL-001; FTBL, at Article 129, CL-004.

512. It is nothing short of amazing that Tele Fácil was never invited directly to participate in the IFT's consideration of the scope of Resolution 381. While the IFT entertained Telmex's views as part of the "confirmation of criteria" process, through its formal petition and possible face-to-face meetings, Tele Fácil was never approached. As Tele Fácil waited in vain for months for the IFT's response to its multiple requests for enforcement, an entirely separate secret process was taking place without its input.

513. The only indication that any such process was underway occurred when Tele Fácil was finally able to secure a meeting with the IFT Plenary on March 5, 2015—three and a half months after Resolution 381 was rendered.⁷⁶⁸ There, a vague reference by the head of the Compliance Unit to a request for a "consultation [that] was made to the Legal Unit" and a vague reference to Telmex indicating that "the legal situation has changed" was made.⁷⁶⁹ However, these comments were not sufficient to put representatives of Tele Fácil on notice that the Legal Unit was considering an "interpretation" of Resolution 381 that would completely undo all of the terms that Telmex and Tele Fácil had already agreed to, including, most importantly, the interconnection rate.

514. Notably, not one official from the IFT stopped the discussion to ensure that Tele Fácil was aware of Telmex's request for a confirmation of criteria or that the Chairman had directed the Compliance Unit to initiate an inquiry to the Legal Unit, an inquiry that would precipitate an unprecedented and broad-sweeping interpretation of the IFT's dispute resolution powers that would destroy Tele Fácil's interconnection rights.⁷⁷⁰ At no time did any official from the IFT ensure that Tele Fácil was provided with copies of those documents so that it could

⁷⁶⁸ Transcript of March 5 Plenary Meeting, C-043.

⁷⁶⁹ *Id.* at pp. 6-7.

⁷⁷⁰ Transcript of March 5 Plenary Meeting, C-043.

submit written comments to the Legal Unit or the Plenary to address the legal arguments that had been raised by Telmex.⁷⁷¹

515. Moreover, at the end of the meeting, the Chairman walked Tele Fácil's representatives out and expressly assured them that prompt interconnection was the most important issue for competitive markets to flourish in Mexico, and that Resolution 381 would be enforced.⁷⁷² Thus, Tele Fácil reasonably believed that the IFT would handle the situation properly.⁷⁷³

516. Outrageously, however, Tele Fácil only learned the full extent of the IFT's proposed interpretation of Article 42 in early April 2015 *after* the company's fate was sealed by the adoption of Decree 77.⁷⁷⁴ Such a colossal calamity of due process is completely and utterly inexcusable and falls far below the minimum standard of treatment.

c. The IFT's Decision Not to Enforce Resolution 381 Was Highly Discriminatory

517. The IFT's unprecedented use of the "confirmation of criteria" process as a means of repudiating Resolution 381 was plainly discriminatory. At Telmex's request, the IFT worked to neutralize Tele Fácil's competitive threat to Telmex by pursuing this extraordinary path of re-opening a final decision of the IFT Plenary. No other provider has ever been singled out for such treatment – for destruction – as Tele Fácil was.

⁷⁷¹ *Id.*

⁷⁷² Bello Statement, ¶¶ 116-117, C-004; Sacasa Statement, ¶¶ 111-113, C-003.

⁷⁷³ The meeting appeared to go well for Tele Fácil and Mr. Sacasa reported accordingly to the other Tele Fácil partners. See March 5 e-mail, at 1 (reporting that "[t]he commissioners openly supported our position and arguments" and that while "[t]here isn't an official Plenum's opinion [yet], [] the one showed at the meeting was to support Tele Fácil: 'Execute the Plenum's Resolution as was ordered and proceed to interconnect and sign the Interconnection Agreement with the rate of 0.00975 USD.'"), C-044.

⁷⁷⁴ Bello Statement, ¶ 120 (indicating that he was first informed about Decree 77 on April 13, 2005), C-004.

518. A thorough review of all interpretive decrees issued by the IFT and its predecessor, COFETEL, indicates, the “confirmation of criteria” process has never before nor since be used, as it was in relation to Tele Fácil, to revisit a final interconnection dispute ruling.⁷⁷⁵ Of all the interpretive decrees issued by COFETEL from 1996 to 2013, and the 23 interpretative decrees issued by the IFT from 2013 to the present, none has re-opened or revised the binding terms of a dispute resolution order.⁷⁷⁶

519. In light of these statistics, the IFT’s decision to revise Resolution 381 represented a radical departure from established regulatory practice that, significantly, occurred only on a one-time basis.⁷⁷⁷ In fact, Mr. Peláez himself, the IFT’s Executive Coordinator, stated at Tele Fácil’s March 5, 2015 meeting with the IFT Plenary that “in previous cases we have never had a case of ordering the interconnection prior to an agreement, there has always been an agreement together with the interconnection, from what I remember.”⁷⁷⁸ Additionally, the IFT itself, through its Transparency Unit, confirmed that no confirmation of criteria had ever been issued to interpret the scope of a resolution for an interconnection disagreement.⁷⁷⁹

⁷⁷⁵ Professor Álvarez has reached the same conclusion on the basis of her own study. See Álvarez Report, ¶ 135 n. 95 (“A search through the decisions of the IFT Plenary regarding confirmation of criteria was performed of January 2010 to October 24, 2017, and none of the decisions taken by the IFT Plenary in them changed in any manner previous resolutions of IFT.”), C-008. See also Soria Report, ¶ 139 (“[I]t is important to mention that, in my experience, it is not a normal practice for the IFT to issue this kind of decrees intended to interpret or determine the scope of its own resolutions to interconnection disagreements. From my experience, I can say this has never been done before.”), C-009.

⁷⁷⁶ The source material reviewed was found on the IFT’s website. See *Consulta de confirmaciones de criterio en buscador de resoluciones del Pleno* (Search of confirmations of criteria in the Plenary Resolutions search tool) (last updated October 31, 2017) (hereinafter “Confirmations of Criteria search”), C-098.

⁷⁷⁷ As Mr. Soria states, “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 Report, ¶ 114, C-009.

⁷⁷⁸ Transcript of March 5 Plenary Meeting at p. 11, C-043.

⁷⁷⁹ See *Oficio IFT/212/CGVI/UT/800/2017 emitido por la Unidad de Transparencia del Instituto Federal de Telecomunicaciones* (Document IFT/212/CGVI/UT/800/2017 issued by the Transparency Unit of the Federal Telecommunications Institute) (July 4, 2017) (hereinafter “Transparency Unit Confirmation”), C-083.

520. Under the circumstances and in light of the Chair's clear intention of not enforcing Resolution 381, it is highly implausible that the Legal Unit's divergent conduct was attributed to gross incompetence alone. Rather, the facts indicate that the Legal Unit acted, with deliberate purpose, to eliminate the competitive threat and financial obligation posed by Tele FÁCIL.

521. Such extremely biased governance is a clear breach of Article 1105 of the NAFTA.

* * *

522. In sum, the IFT's failure to enforce Resolution 381 breached the fair and equitable treatment standard in multiple respects.

523. First, it was arbitrary in accordance with principles that Respondent itself has accepted: the IFT's failure to enforce was not merely opposed to *a* rule of the law, but *the* rule of law. The IFT's decision to reopen the terms of Resolution 381 by way of Telmex's request for confirmation of criteria was not based on any legal authority or rational policy objective. Rather, the IFT's decision constituted an "unprecedented" and fundamentally novel and adverse approach.⁷⁸⁰ It amounted to an "arbitrary repudiation" of long-established procedures that unjustifiably allowed Telmex to circumvent its interconnection obligations as previously established in Resolution 381.⁷⁸¹

524. Second, the IFT's failure to enforce Resolution 381 was egregiously shrouded in secrecy and devoid of all due process. Notwithstanding Tele FÁCIL's multiple requests for

⁷⁸⁰ See *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Government of Canada*, UNCITRAL (NAFTA), PCA Case No. 2009-04, Award on Jurisdiction and Liability (Mar. 17, 2015), ¶¶ 450, 573, **CL-072**.

⁷⁸¹ See *GAMI Investments, Inc. v. The Government of the United Mexican States*, UNCITRAL (NAFTA), Final Award (Nov. 15, 2004), ¶ 91, **CL-043**; see also *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Award (Dec. 19, 2013), ¶ 780(b), **CL-066**.

enforcement of Resolution 381. The IFT never afforded Tele Fácil an opportunity to present its views and protect its interests in connection with the “confirmation of criteria” process, a process that would ultimately lead to the total destruction of its investment. The IFT’s conduct therefore constituted a “complete lack of transparency and candour in an administrative process.”⁷⁸²

525. Third, the IFT’s conduct amounted to “willful targeting” that unjustly “singled out” Tele Fácil with “no legitimate justification.”⁷⁸³ Neither before nor after Tele Fácil’s dispute with Telmex has the IFT ever abused the “confirmation of criteria” process in order to thwart a new entrant’s prospect. There is simply no other conceivable justification for the IFT’s radical departure from established law and practice other than to shield Telmex from the obligations of its deal with Tele Fácil.

526. In sum, the IFT’s abuse of the “confirmation of criteria” breached Article 1105 beginning in mid-January 2015, if not sooner, when the IFT outrageously set a plan in motion to prevent enforcement of Resolution 381. As explained, without a signed interconnection with Telmex, Tele Fácil simply could not operate in the Mexican market.⁷⁸⁴ Accordingly, Tele Fácil was denied its right to begin earning significant profits, which would accrue daily under the applicable interconnection framework.⁷⁸⁵ At this point, Tele Fácil was effectively stillborn.

⁷⁸² See *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (Apr. 30, 2004), ¶ 98, **CL-071**; see also *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (Aug. 30, 2000), ¶ 91, **CL-053**.

⁷⁸³ See *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award (Sept. 18, 2009), ¶ 300, **CL-026**; UNCTAD, FAIR AND EQUITABLE TREATMENT: SERIES ON ISSUES IN INTERNATIONAL INVESTMENT AGREEMENTS II 82 (2012), **CL-084**.

⁷⁸⁴ See *supra* Part II.B.4.

⁷⁸⁵ *Id.*

2. The IFT's Issuance of Decree 77 Violated the Fair and Equitable Treatment Protection

527. Decree 77 represented a second low point in the IFT's severe mistreatment of Tele Fácil. By adopting Decree 77, by majority vote, the IFT's Plenary unjustifiably endorsed the Legal Unit's proposed interpretation of Resolution 381. Further, it lawlessly ratified the Legal Unit's gross misuse of the "confirmation of criteria" process, which had blocked enforcement of Resolution 381 since mid-January 2015. Most tragically, the Plenary, Mexico's ultimate guardian of a fair and competitive telecommunications market, either failed to—or chose not to—check Telmex's undue influence only months after new reforms were enacted in Mexico empowering it to do so.

528. Decree 77 was a monstrosity in two critical respects. First, it unjustifiably reversed the Plenary's prior decision in Resolution 381 that Tele Fácil and Telmex were bound by all previously agreed interconnection terms, including an interconnection rate of USD 0.00975 per minute of use through 2017. The IFT now deemed these terms to be "held harmless" and requiring further negotiation.⁷⁸⁶ Second, the IFT ordered both providers to interconnect their telecommunications systems within ten business days, but set no deadline for execution of a new interconnection agreement.⁷⁸⁷ Thus, Tele Fácil was unacceptably forced into the untenable position of having to interconnect physically and begin exchanging call traffic without having critical commercial terms in place with Telmex. These new rulings confirmed the complete demise of Tele Fácil's investment in Mexico

⁷⁸⁶ Decree 77, at p. 13, C-051.

⁷⁸⁷ *Id.*

529. Decree 77 therefore was more than an erroneous application of Mexican law. It was a complete repudiation of the Mexico's regulatory framework for telecommunications as it should have been applied to Tele Fácil. As explained below, the IFT's actions were so arbitrary, procedurally unfair, and discriminatory as to fall well below the minimum standard of treatment.

a. Decree 77 Was Manifestly Arbitrary

530. Decree 77 adopted a preposterous position on the scope of Resolution 381. It concluded that the IFT lacked authority to resolve an interconnection dispute completely in a single proceeding. This position was based on an absurd reading of the IFT's dispute settlement authority under Article 42 of the FTL. That article provides:

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. Once such term has passed without the parties having executed the agreement, or before if both of them so request it, the Ministry shall settle the conditions that could not be agreed within the following 60 calendar days.⁷⁸⁸

531. Bizarrely, the majority of the Plenary concluded that the final phrase ("the Ministry shall settle the conditions that could not be agreed") vastly limited the IFT's authority to resolve only *disputed* interconnection terms presented to the IFT for decision.⁷⁸⁹ According to the majority, the IFT was powerless to finalize and compel compliance with *undisputed* terms, i.e., those previously agreed between the parties.⁷⁹⁰

532. The interpretation adopted in Decree 77 is manifestly arbitrary in multiple respects, as explained below:

⁷⁸⁸ FTL at Article 42, **CL-001**.

⁷⁸⁹ Decree 77, at pp.10-11, **C-051**.

⁷⁹⁰ *Id.*

533. First, Decree 77 completely contradicted positions taken unanimously by the Plenary in Resolution 381. Resolution 381 ruled unequivocally that “the interconnection rates were completely determined”; “the only interconnection conditions not agreed upon by the parties in the process of negotiating to execute the corresponding interconnection agreement” were with respect to portability charges and indirect interconnection.⁷⁹¹ Decree 77 found the complete opposite—that the interconnection rates “remain[ed] untouched” and were deemed to be “held harmless.”⁷⁹²

534. Resolution 381 held that “there existing an agreement between Tele Fácil, Telmex and Telnor ... such concessionaires are obligated to grant the interconnection requested by Tele Fácil.”⁷⁹³ However, Decree 77 stated the contrary: the IFT “did not address the provisions contained in the draft agreement”; “the IFT cannot impose terms and conditions that were not submitted to its consideration as a disagreement.”⁷⁹⁴

535. According to Resolution 381, “under the terms of article 42 of the FTL ... the parties must interconnect their public telecommunications networks [and] formalize the interconnection agreement pursuant to this Resolution ...”⁷⁹⁵ According to Decree 77, “the Plenary of the IFT, in accordance with the provision established in article 42 of the FTL, only referred to matters not agreed to by the parties”; establishing undisputed terms are “not a matter [within] its competence.”⁷⁹⁶

⁷⁹¹ Resolution 381, at pp. 13-14, C-029.

⁷⁹² Decree 77, at pp. 10 & 13, C-051.

⁷⁹³ Resolution 381, at p. 16, ¶¶ 2-3, C-029.

⁷⁹⁴ Decree 77, at pp. 10-11, C-051.

⁷⁹⁵ Resolution 381, at p. 16, ¶ 3, C-029.

⁷⁹⁶ Decree 77, at p. 10, C-051.

536. In Resolution 381, the IFT ordered the disputing parties to interconnect their networks and execute an interconnection agreement within ten business days.⁷⁹⁷ In Decree 77, the IFT ordered the disputing parties to interconnect their networks within ten business days, but imposed no time limit for the critical step of executing their interconnection agreement.⁷⁹⁸

537. In short, in the context of the exact same dispute, the IFT blatantly and unjustifiably reversed its own binding decisions.

538. Second, the IFT reversed itself based on the flimsiest of reasoning that was inconsistent with fundamental norms of Mexican telecom law and policy. To demonstrate, the Plenary's purported legal analysis is reproduced in its entirety:

The foregoing takes into consideration that the Interconnection Resolution was based on article 42 of the FTL, which indicates:

“Article 42. The concessionaires of public telecommunications networks must interconnect their networks, and will execute an agreement for such purpose, within a period not greater than 60 calendar days as from the request made by any of them. If said period elapses and the parties have not executed the agreement, or before if so requested by both parties, the Ministry, within the next 60 calendar days, will resolve the conditions that they have been unable to agree upon.”

It is inferred from the preceding transcript that:

- The Interconnection conditions must be included in an agreement; and
- The IFT is only authorized to resolve upon conditions not agreed to by the parties.

Therefore, it is affirmed that the Interconnection Resolution determined that the conditions not agreed to by the parties only referred to the indirect interconnection and portability. Consequently, the IFT, when ordering the execution of the corresponding Interconnection agreement in First Resolution item of the Interconnection Resolution, did not make any determination regarding any other stipulation contained in the draft

⁷⁹⁷ Resolution 381, at p. 17, ¶ 3, C-029.

⁷⁹⁸ Decree 77, at p. 13, C-051.

agreement included in the record, as they were not considered as part of the disagreement.⁷⁹⁹

539. The facileness of the IFT's reasoning is shocking. The Plenary majority justifies its seismic shift in approach to dispute settlement based on only a few words taken completely out of context. While the last sentence of Article 42 expressly empowers the IFT to resolve *disputed* matters, it does address—and, importantly, does not prohibit—the IFT from resolving interconnection disputes expeditiously and effectively.

540. Moreover, Decree 77 ignored a fundamental principle of Mexican telecommunications law, as endorsed by the Mexican Supreme Court, that interconnection must be achieved as quickly as possible as it is in the public interest.⁸⁰⁰ The first sentence of Article 42 is thus a specific application of that principle; it compels providers, as an initial matter, to interconnect physically and execute an interconnection agreement no later than 60 days. If the parties cannot reach agreement on any interconnection terms within that short time period, then Article 42 compels the parties to seek the IFT's assistance to complete the agreement so that interconnection can be accomplished as quickly as possible.

541. Mr. Soria, former COFETEL Commissioner, confirms this reasonable understanding of Article 42 in his expert opinion. He opines:

It is true that Article 42 of the FTL limits the scope of the IFT only to resolve disputes over the interconnection terms and conditions in which the parties failed to reach an agreement in a certain time period. However, it is clear that this limit stands on the presumption that the rest of the terms and conditions have already been agreed by the parties. This is why the IFT itself, when conducting the procedure which led to Resolution 381, paid special attention to the review and confirmation of the pre-agreed

⁷⁹⁹ Decree 77, at pp. 11-12 (underlining in original), **C-051**.

⁸⁰⁰ See Álvarez Report, ¶ 168 (citing *Suprema Corte de Justicia de la Nación, Jurisprudencia P./J. 10/2011* (Jurisprudencia P./J. 10/2011 of the Supreme Court of Justice of the Nation) (July 2011) (hereinafter “Jurisprudencia 10/2011”), **CL-009**), **C-008**.

conditions among Telmex/Telnor and Tele Fácil, and once the existing agreement was confirmed, the IFT only resolved the pending conditions that in this case, consisted in the indirect interconnection and portability costs.⁸⁰¹

542. He continues:

This posture [in Decree 77] clearly contravenes the purpose of the interconnection disagreement procedure stated in Article 42, which is meant to settle whatever differences the carriers could not settle themselves, the rest of the conditions and clauses being considered final. Had they not been final, logic dictates that the parties would have submitted them along with the other disagreed conditions so the IFT would settle them as well.... Moreover, if the IFT had not found evidence of a final agreement of the rest of the conditions, it was its duty to resolve all the disputed terms and conditions in Resolution 381.⁸⁰²

543. Notably, Resolution 381 itself properly emphasized the goal of prompt and effective interconnection—and the IFT’s broad authority to compel it—within the meaning of Article 42. The IFT found:

... under the terms of Article 42 of the FTL ... within the following 10 (ten) business days, **the parties must interconnect their public telecommunications networks to provide local service**, to allow the interoperability of the networks and of the telecommunications services in the same term; in order for the end users of one network to be able to connect and route public traffic with the users of the other and vice versa, or to use services provided by the other network, complying with the public interest as previously referred and in its case, **to formalize the interconnection agreement pursuant to this Resolution, in order to satisfy public interest as soon as possible.**⁸⁰³

544. The contrary approach adopted in Decree 77 is thus entirely antithetical to main aim of Mexico’s telecommunications regime, which is to ensure timely and effective interconnection between providers. Thus, as Mr. Soria aptly concludes, “The IFT’s express mandate in Resolution 381, ordering the parties to sign and execute an interconnection

⁸⁰¹ Soria Report, ¶ 117, C-009.

⁸⁰² Soria Report, ¶ 119, C-009.

⁸⁰³ Resolution 381, at p. 16 (emphasis added), C-029.

agreement, confirms that the Institute [IFT] had granted legal validity and enforceability to the *entire* agreement among the concessionaires, and not only to the conditions referring to direct interconnection and portability costs.”⁸⁰⁴

545. Third, the illogic of Decree 77 leads to truly absurd results and is wholly inconsistent with recent Mexican telecommunications reforms. If the IFT lacks power to resolve an interconnection dispute in a single proceeding, then any provider may deliberately delay interconnection contrary to the public interest. Moreover, Decree 77 encourages Mexico’s designated monopoly, Telmex, to engage in dilatory tactics to prevent competitors from entering the Mexican market, as it did in the case of Tele Fácil.

546. Professor Álvarez aptly explains the significance of the problems created by Decree 77 in her expert opinion. She observes:

Decree 77 opens the door to the never ending story, because – assuming Decree 77 was not unlawful, as it in fact is – Decree 77 renders interconnection dispute resolutions by the IFT meaningless insofar as the IFT would only have enforcement authority over the disputed terms and conditions, but not over any other terms and conditions agreed to by the carriers. Then, after a dispute procedure is finalized before the IFT, any carrier (but especially the incumbent and the dominant players) could argue there is a new dispute over a previously agreed item. For example, even if carrier A and B had agree to all terms and conditions, except item X, and the IFT resolved the dispute, either carrier could raise a dispute later over item Y, even if it previously took the position that item Y had been agreed.⁸⁰⁵

⁸⁰⁴ Soria Report, ¶ 120 (emphasis added), C-009. Mr. Soria also aptly points out that an agreement in which only two secondary terms are established, such as with respect to indirect interconnection and portability charges, is contrary to Mexican telecommunications law and policy because such an agreement would not meet the minimum requirements of a valid interconnection agreement under the law. Soria Report, ¶ 120 (citing the minimum requirements in Article 43 of the FTL), C-009.

⁸⁰⁵ Álvarez Report, ¶ 169, C-008.

547. She continues to explain the potential for abuse that Decree 77 creates:

This never-ending story for interconnection is very damaging for Mexico's telecom sector. Interconnection was, is and will be one of the major and fundamental issues for the telecom sector. Technology evolves and, with it, interconnection challenges evolve. But if the IFT can never render a final decision over interconnection, then the never-ending story will convert interconnection from a public interest matter into a tool for abuse by carriers and, particularly, by incumbents and dominant players.

⁸⁰⁶

...

548. Thus, the approach in Decree 77 is entirely backwards and, despite Mexico's recent industry reforms, hands Telmex a potent means for maintaining its market dominance.

549. Professor Álvarez concerns about the "never-ending story" are very real and, in fact, were shared by the three IFT Commissioners who dissented from adoption of Decree 77. These include Commissioners Labardini, Estrada, and Estavillo. The views of the dissenting Commissioners have been recorded in the transcripts of the Plenary discussions on Decree 77 dated April 8, 2015.⁸⁰⁷

550. Commissioner Labardini, for example, after specifically recalling that Resolution 381 had established all interconnection terms, stated:

I do not think it is convenient or suitable for any disagreement between the parties for the same reason and matter to be decided by the Institute.

Taking apart a draft interconnection agreement and dividing it into 20 disagreements, then bringing forward every clause and saying: Oh no, this no, I did not make an agreement; that would be a tactic to almost evade the law and evade the obligation to interconnect. This I why I consider, first of all, that the November Resolution [381], in fact, has the scope it has,

⁸⁰⁶ Álvarez Report, ¶ 171, C-008. *See also* Soria Report, ¶ 153 (observing that "according to the approach set forth in Decree 77 and following in Resolution 127, Telmex would be in a position to request the intervention of the IFT again, alleging a dispute on ever other term or condition not previously resolved in Resolution 381 and Resolution 127. This could further go on causing an endless delay of interconnection adversely affecting end users and new carriers") and ¶ 210 ("The IFT's failure to enforce interconnection, as originally agreed upon Tele Facil and Telmex/Telnor, appears to show that dilatory tactics used to delay the proceeding are not only effective, but also encouraged by the IFT."), C-009.

⁸⁰⁷ Transcript of Plenary Session adopting Decree 77, C-052.

ordering the parties to interconnect, to execute the Agreement in the form they agreed on July 8 and in the way in which this Institute decided on the two matters of disagreement.⁸⁰⁸

551. Commissioner Estrada echoed these concerns. In his dissenting remarks, he noted that Decree 77 improperly:

[O]pens the possibility for the parties to come before the Institute with issues presented as a disagreement, issued that were not raised as such at the time that the disagreement occurred, and that the Institute considered, considered as agreed upon, which could lead to the extreme that the Institute would have had to resolve as many disputes as the amount of clauses in the respective Interconnection Agreement.⁸⁰⁹

552. Similarly, but more generally, Commissioner Estavillo also recognized the problem of the “never-ending story.” She noted that:

It was in fact decided [in Resolution 381] whether it [the interconnection rate] was a part of the dispute, which from my point of view, cannot be submitted again for review by the Institute.⁸¹⁰

553. Thus, in the end, three of the seven IFT Commissioners expressed grave concerns about the approach taken in the Fourth Ordering Clause of Decree 77 and refused to vote in favor of it.⁸¹¹

554. The fact the Decree 77 is so fundamentally opposed to the notion of prompt and effective interconnection in the public interest makes it impossible to accept the measure as a rational application of Mexican law and policy.

555. Fourth, Decree 77 blatantly violates Mexican administrative law which prohibits the revocation of final executive acts. Although Decree 77 purportedly only interpreted Resolution 381, in fact, it revised it substantially by revoking Tele Fácil’s rights to all previously

⁸⁰⁸ Transcript of Plenary Session adopting Decree 77, at 8, **C-052**.

⁸⁰⁹ Transcript of Plenary Session adopting Decree 77, at 12, **C-052**.

⁸¹⁰ *Id.* at 11.

⁸¹¹ *Id.* at 18.

agreed interconnection terms, including a rate of USD 0.00975 per minute of use through 2017.

In doing so, the IFT acted *ultra vires*.

556. Under Mexican law, the IFT may not alter its own prior rulings.⁸¹² As Professor Álvarez explains, the IFT's authority to interpret telecommunications law "cannot be used in any manner to revise a decision, nor to modify the terms in which an IFT resolution was issued."⁸¹³ A resolution of the IFT determining a provider's interconnection rights can only be challenged and, if invalid, overturned by Mexican courts through the *amparo* procedure.⁸¹⁴ Accordingly, once Resolution 381 was rendered, the IFT had no authority to modify it on its own initiative.⁸¹⁵

557. As Mr. Soria explains, the principle of irrevocability with respect to administrative acts is rooted in Mexican constitutional protections:

This principle is based on the human rights of legal certainty and due process of law in accordance with Article 14 and 16 of the Constitution: "Article 14.- No law shall be given *ex post facto* or retroactive treatment. All persons punished under the law are entitled to due process, punishments must follow what is dictated by written law." "Article 16.- No one shall be molested in his person, family, home, papers or possessions, except by a written order or mandate of a competent authority, which shall be grounded and motivated by legal procedural cause". When an individual files a request before any authority and the authority grants the individual a right or benefit through a resolution, those advantages cannot be arbitrarily revoked."⁸¹⁶

558. Accordingly, once Tele Fácil's rights were established by the IFT under Resolution 381 and vested under Mexican law, the IFT could not legally change them.

⁸¹² The only narrow exception is to correct a notorious involuntary mistake, which is not the case here. See Soria Report, ¶ 129, C-009.

⁸¹³ Álvarez Report, ¶¶ 128, 131, C-008.

⁸¹⁴ Álvarez Report, ¶ 130, C-008. Soria Report, ¶ 129 ("[T]he only way for the issuing authorities to amend its terms, is if the relevant private entity files the available legal remedies in the courts."), C-009.

⁸¹⁵ Soria Report, ¶ 129, C-009; Álvarez Report, ¶ 134, C-008.

⁸¹⁶ Soria Report, ¶ 130, C-009.

559. But this is exactly what it did. In Resolution 381, the IFT expressly recognized that Tele Fácil and Telmex had previously agreed on all except two interconnection terms. It found specifically that “the interconnection rates were completely determined by [Telmex’s] draft interconnection agreement” and that Tele Fácil “had full knowledge of and consented to the same [rates].”⁸¹⁷ The IFT also ruled that “there existing an agreement between Tele Fácil, Telmex and Telnor ... such concessionaires are obligated to grant the interconnection requested by Tele Fácil.”⁸¹⁸

560. Yet in Decree 77, the IFT reversed that ruling completely, finding that, except for the two disputed items submitted for resolution, the disputing parties’ rights with respect to all undisputed terms, including the interconnection rate through 2017, “are held harmless.”⁸¹⁹

561. Both of Mexico’s leading telecommunications commentators—both of where served as former COFETEL Commissioners—conclude that Decree 77 illegally revised Resolution 381. Mr. Soria states:

In this case, even though the IFT pretended to disguise Decree 77 as an extension of Resolution 381, and also as a confirmation of interpretation criteria, the Institute, in fact, materially revoked its own statement in Resolution 381 concerning the recognition of the entirety and enforceability of the interconnection agreement between Telmex/Telnor and Tele Fácil. With this revocation, the IFT deprived Tele Fácil of the rights previously granted in Resolution 381, including all terms and conditions of the interconnection agreement.⁸²⁰

⁸¹⁷ Resolution 381, at pp. 13-14, **C-029**.

⁸¹⁸ *Id.* at p. 16.

⁸¹⁹ Decree 77, at p. 13, **C-051**.

⁸²⁰ Soria Report, ¶ 131, **C-009**.

562. Professor Álvarez concurs:

Interpretation authority in article 15 and 17 of the FTBL is not unlimited. In the case at stake, Resolution 381 is not unclear, and its scope was changed. In my opinion, Decree 77 did not interpret Resolution 381, nor did it clarify Resolution 381. Decree 77 changed both the reasoning of Resolution 381 and its final decisions. Consequently, Decree 77 is unlawful and contrary to the Mexican public policy in interconnection.⁸²¹

563. The decision of the Plenary majority (over the objections of three of its members) to characterize Decree 77 as no more than an “interpretation” of Resolution 381—“without this implying any modification to said resolution”⁸²²—is thus downright reprehensible.⁸²³

b. Decree 77 Completely Denied Tele Fácil Due Process.

564. Decree 77 compounded the IFT’s complete denial of due process to Tele Fácil. By adopting that measure, the Plenary endorsed the IFT’s secret scheme to impede enforcement of Resolution 381, extending its negative impact on Tele Fácil. Shockingly, the Plenary deprived Tele Fácil of its investment in Mexico without any meaningful notice or opportunity to be heard. In fact, the Plenary acted in a manner that produced an unfair and unjust outcome in three principal ways.

565. First, the Plenary knowingly condoned and perpetuated all of the process errors committed by the Legal Unit. Namely, the Plenary raised no objections to:

- The Compliance Unit’s failure to perform its duty and enforce Resolution 381, as rendered by the Plenary;

⁸²¹ Álvarez Report, ¶ 133, C-008.

⁸²² Decree 77, at p. 13, C-051.

⁸²³ Mr. Soria and Professor Álvarez concur as a matter of Mexican law. Soria Report, ¶ 136 (concluding that the IFT “had no authority to revoke its own determination in Resolution 381, as it did, or even worse, to strip Tele Fácil from previously acknowledged rights, resulting in unlawful conduct under administrative law.”), C-009; Álvarez Report, ¶ 134(1) (concluding that “[I]ssuing Decree 77 instead of enforcing Resolution 381 is unreasonable and unlawful ... because there is no legal basis to revise Resolution 381 (except by a court)”, C-008.

- the IFT’s failure to respond in any way since December 2014 to Tele Fácil’s multiple requests for enforcement of Resolution 381;
- the Legal Unit’s improper decision to subsume Tele Fácil’s request for enforcement into Telmex’s request for confirmation of criteria; and
- the Legal Unit’s failure to inform Tele Fácil at any point that the scope of Resolution 381 was being reconsidered and would be presented to the Plenary for decision.

566. Notably, the record reveals that the IFT Commissioners had specific knowledge of the substance of the Legal Unit’s draft decree—and even provided comments on it in advance of the April 8, 2017 Plenary meeting.⁸²⁴ Yet no Commissioner thought to challenge the legitimacy of the secret process, and the Plenary simply moved forward to consider the Legal Unit’s proposed “interpretation” of the scope of Resolution 381.

567. In addition, the Plenary is itself directly responsible for considering (and ultimately revising) the scope of Resolution 381 to Tele Fácil’s detriment without ever affording the company any due process protections. Putting aside the blatant illegality of amending Resolution 381, the Plenary—as the ultimate arbiter of interconnection disputes—should have recognized that its actions could (and ultimately would) negatively impact Tele Fácil’s legal rights and interests.⁸²⁵

⁸²⁴ In fact, the transcripts from the Plenary’s session that took place on March 13, 2015 indicated clearly that the Commissioners had provided comments on a draft of Decree 77. *See* Transcript of Plenary Session admitting Comments from Commissioners, at 1, **C-046**.

⁸²⁵ According to Mr. Soria, an open and fair hearing is guaranteed under Mexican law “in order to preserve specific defense rights of the affected parties, such as their right to be heard before being deprived from their rights, and to provide the necessary evidence to support their claims.” He continues: “No one shall be deprived of a legal right unless it is by means of trial filed before established courts through which the rule of law is sought.” Soria Report, ¶ 135, **C-009**.

568. In fact, the identical composition of Commissioners had recently resolved the very same dispute only a few months earlier.⁸²⁶ That process clearly allowed each party an opportunity to be heard. Namely, following Tele Fácil's petition to the IFT to resolve its interconnection dispute with Telmex, filed on July 11, 2014, the IFT adhered to the following structured procedure:⁸²⁷

- On July 11, 2014, the IFT notified Telmex of the initiation of the proceeding and, pursuant to applicable telecommunications law, provided Telmex ten days to provide a response, including its own opportunity to identify which interconnection terms it considered to be in dispute;⁸²⁸
- Telmex responded on August 26, 2014 setting forth its position in great detail;⁸²⁹
- Once the IFT had heard from each party, on September 9, 2014, it conveyed its proposed disposition of the matter to the parties and provided each party ten days to present their final arguments;
- On September 24, 2014, both Telmex and Tele Fácil submitted their final arguments;⁸³⁰ and
- On November 26, 2014, the IFT rendered a reasoned decision in the form of Resolution 381, establishing all terms of interconnection and ordering the parties to execute an interconnection agreement based on those terms and to interconnect their systems.⁸³¹

569. Accordingly, both Tele Fácil and Telmex were given the opportunity to be heard and, as evidenced by the reasoning in Resolution 381, were in fact heard.

⁸²⁶ Resolution 381, **C-029**.

⁸²⁷ FTL, at Article 42, **CL-001**; FTBL, at Article 129, **CL-004**.

⁸²⁸ Request for Interconnection Dispute Resolution, **C-025**.

⁸²⁹ Telmex's Reply to Interconnection Dispute, **C-027**.

⁸³⁰ Telmex's Closing Arguments, **C-028**.

⁸³¹ Resolution 381, **C-029**.

570. Having resolved numerous interconnection disputes like the one between Tele Fácil and Telmex, it is stunning that, under these circumstances, the Plenary did not recognize the need to provide a fair process before deciding whether to curtail Tele Fácil's critical interconnection rights.

571. Upon receiving a draft text of Decree 77 for consideration in mid-March 2015, if not earlier,⁸³² the Plenary made no effort at all to inform Tele Fácil that the scope of Resolution 381 was being considered. Tele Fácil received no notice at any time between mid-March 2015, when the Legal Unit shared a draft to the Plenary, and April 8, 2015, when the Plenary adopted Decree 77. As mentioned, Tele Fácil only learned of the loss of its rights *after* Decree 77 had already been adopted, and the same was notified to Tele Fácil's counsel on April 13, 2015.⁸³³

572. Second, the Plenary disingenuously represented that Tele Fácil's views had been taken into consideration before Decree 77 was adopted, when, in fact, they could not have been. After recalling Tele Fácil's requests for enforcement and Telmex's request for confirmation of criteria, the Plenary stated the purpose of Decree 77:

In order to address the referred requests and confirmations of criteria and with the purpose of effectively enforcing the Interconnection Resolution [381], it is necessary for the IFT Plenary to analyze said resolution in order to determine its scope through the issuance of this Decree.⁸³⁴

573. The description inaccurately suggests that Tele Fácil and Telmex had been made aware of each other's requests, when, in fact, they had not.

⁸³² The Legal Unit's draft of Decree 77 is dated April 7, 2015. Legal Unit Proposal, **C-050**. As explained, at least two weeks earlier, the IFT Commissioners were providing comments to the Legal Unit on a draft decree and, thus, there was ample opportunity to inform Tele Fácil. See Transcript of Plenary Session admitting Comments from Commissioners, at 1, **C-046**.

⁸³³ Bello Statement, ¶ 119, **C-004**.

⁸³⁴ Decree 77, at p. 2 (X), **C-051**.

574. Even more misleadingly, Decree 77 states: “... derived from the different interpretations that the parties have made regarding the scope of the resolution, it is necessary to issue this Decree.”⁸³⁵ Decree 77 thus wrongly implies that Tele Fácil and Telmex were directly engaged in an interpretive dispute and that they had had the opportunity to provide their respective “interpretations” regarding “the scope of the resolution [381].”⁸³⁶

575. However, nothing could be farther from the truth. Tele Fácil was never once invited to offer its views on “the scope of the resolution.” Rather, it had separately petitioned the IFT on multiple occasions to enforce Resolution 381 as rendered, without ever receiving a response.⁸³⁷ Nor had Tele Fácil any knowledge of the substance of Telmex’s request for confirmation of criteria,⁸³⁸ which clearly sought to claw back the scope of Resolution 381 to Tele Fácil’s detriment. Had Tele Fácil known, it would have protested vigorously. The Plenary’s mischaracterization of the situation to suggest a fair process, when none was provided, is therefore beyond the pale.

576. Third, the Plenary’s decision-making process was fundamentally deficient in that it did not account for Tele Fácil’s views, but rather only those of the IFT’s Legal Unit and possibly Telmex.⁸³⁹ Decree 77 found that “the request from Tele Fácil [for enforcement of Resolution 381] is settled in terms of the provisions of the Second Consideration section of this

⁸³⁵ *Id.* at p. 11.

⁸³⁶ *Id.*

⁸³⁷ Tele Fácil made multiple requests. *See* First Enforcement Request, **C-035**; Second Enforcement Request, **C-038**; Reminder of Request, **C-107**; Transcript of March 5 Plenary Meeting, **C-043**; Follow-up with Plenary, **C-049**.

⁸³⁸ At most, Tele Fácil representatives heard an unspecific reference “to confirm the criteria pertaining to the provisions of the agreement” at the March 5 Plenary meeting. Transcript of March 5 Plenary Meeting”) at p. 6, **C-043**.

⁸³⁹ Soria Report, ¶ 133 (“Taking into consideration the fact that Decree 77 revoked previously obtained rights, Tele Fácil should have been granted the opportunity to present its views ... The lack of allowing Tele Fácil to be heard is a clear violation of due process of law.”), **C-009**.

Decree, by establishing the scope of the Interconnection Resolution in accordance with the applicable legal precepts already analyzed.”⁸⁴⁰

577. This analysis of legal precepts, however, was based solely on the Legal Unit’s views, which were not only legally flawed, but also highly slanted in Telmex’s favor by eliminating the applicable rate of USD 0.00975 per minute of use through 2017.

578. Had Tele Fácil been invited to present its views, it would have fervently objected to the proposed interpretation of Article 42 of the FTL. Specifically, it would have argued that the interpretation ignored fundamental principles of freedom of contract and prompt and effective interconnection, violated the principle of irrevocability of administrative rulings, was contrary to Mexican Supreme Court precedents and Mexico’s efforts to reform its telecommunications market, and ultimately undermined the public interest in violation of both the letter and spirit of Mexico’s entire telecommunications regime.⁸⁴¹

c. Decree 77 Was Highly Discriminatory.

579. Decree 77 represented a radical, one-time departure from longstanding regulatory practice with the effect of neutralizing Tele Fácil as a competitive threat to Telmex. It has always been the practice of the IFT and its predecessor, COFETEL, to resolve an interconnection dispute in a single proceeding. At the conclusion of such proceeding, the regulator has always ordered the disputing parties to physically interconnect their systems and execute an interconnection agreement based on the terms established in the process.⁸⁴² Not surprisingly, therefore, Resolution 381 followed this longstanding practice precisely.

⁸⁴⁰ Decree 77, at p. 12, **C-051**.

⁸⁴¹ See Tele Fácil’s Amparo against Decree 77, **C-063**.

⁸⁴² Transcript of March 5 Plenary Meeting, at p. 11, **C-043**.

580. Decree 77 pursued a radically different—and unjustified—position. Not only did the Plenary reverse course completely and decide that it now lacked authority to establish all interconnection terms (both disputed and undisputed), but it also only ordered the disputing parties to physically interconnect their networks within ten business days; critically, a deadline for execution of the interconnection agreement was conspicuously absent.⁸⁴³

581. A thorough review of all of the IFT's resolutions clearly indicates that Decree 77 is uniquely anomalous. Once the FTBL was enacted, the IFT developed a new template which it began including, as a matter of course, in its rulings resolving interconnection disputes. That template included the following text:

The interconnection agreement to be executed by the parties must allow the provision of interconnection services between the telecommunications networks without having any pending elements to be agreed for the duration of the agreement's effective term; likewise, **the resolution that the IFT issues to resolve conditions that have not been agreed by the parties shall operate in the same manner, this, in order that once the IFT has issued its resolution there are no pending elements to be determined that would prevent the provision of the services.**⁸⁴⁴

582. The model text leaves no doubt that the IFT itself believes that it can resolve all interconnection terms (both disputed and undisputed) in a single proceeding.

583. Its clear meaning is confirmed by the standard language for issuing orders that consistently appears at the end of every similar resolution. This language provides:

⁸⁴³ Decree 77, at p. 13, **C-051**.

⁸⁴⁴ See, e.g., *Resolución P/IFT/251115/543 mediante la cual el Pleno del Instituto Federal de Telecomunicaciones determina las condiciones de interconexión no convenidas entre Mega Cable, S.A. de C.V. y AT&T Digital, S. de R.L. de C.V.* (Resolution P/IFT/251115/543 through which the Plenary of the Federal Telecommunications Institute determines the conditions of interconnection not agreed between Mega Cable, S.A. de C.V. and AT&T Digital, S. de R.L. de C.V.) (November 25, 2015) (hereinafter “Resolution 543”), at p. 17, **C-100**; *Resolución P/IFT/120815/356 mediante la cual el Pleno del Instituto Federal de Telecomunicaciones determina las condiciones de interconexión no convenidas entre Teléfonos de México, S.A.B. de C.V. e IP Matrix, S.A. de C.V.* (Resolution P/IFT/120815/356 through which the Plenary of the Federal Telecommunications Institute determines the conditions of interconnection not agreed between Teléfonos de México, S.A.B. de C.V. and IP Matrix, S.A. de C.V.) (August 12, 2015) (hereinafter “Resolution 356”), at p. 21, **C-101**.

Within the 10 (ten) business days following the date in which the notification of this Resolution is effective, [the disputing parties] must interconnect their public telecommunications networks and initiate the provision of the corresponding interconnection services. In that same term, such companies must execute the interconnection agreements of their public telecommunications networks pursuant to the terms and conditions established in the [] 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.⁸⁴⁵

584. Notably, according to established practice, the IFT imposes the same ten-day deadline on the parties for physical interconnection and execution of the interconnection agreement.

585. A complete survey of all resolutions resolving disputes under the FTBL and the FTL, excluding Decree 77 and Resolution 127, shows that the IFT's practice has remained the same when resolving disputes between concessionaires that were interconnecting for the first time, as Tele Fácil and Telmex were seeking to do.⁸⁴⁶ In every instance, the IFT resolved an interconnection dispute in a single proceeding and ordered the parties both to interconnect and execute the interconnection agreement simultaneously.

586. The Plenary's deviation from longstanding practice raises legitimate concerns about its motives. It is enormously significant that the IFT's extreme departure in practice, on a one-time basis, allowed Telmex to avoid its interconnection obligations, saving it from a deal

⁸⁴⁵ See, e.g., Resolution 381, at p. 17, **C-029**; Resolution 127, at p. 36, **C-061**; Resolution 543, at p. 32, **C-100**; Resolution 356, at p. 34, **C-101**.

⁸⁴⁶ The survey was based on a review of all publicly available resolutions in which the regulator resolved first-time interconnections when no prior interconnection agreement bound the concessionaires. See *Consulta de resoluciones de desacuerdos de interconexión en buscador de resoluciones del Pleno* (Search of interconnection dispute resolutions in the Plenary Resolutions search tool) (last updated October 31, 2017) (hereinafter "Confirmations of Criteria search"), **C-099**.

with Tele Fácil that Telmex no longer liked. Without any rational basis for unlawfully repealing critical elements of Resolution, the IFT's conduct can only be understood as naked protectionism at the expense of a new market entrant.

* * *

587. Based on the above analysis, Decree 77 clearly constitutes a further breach of Article 1105. It was so arbitrary, unduly secretive, and discriminatory as to fall well below international standards.

588. First, it was clearly arbitrary in that it “constituted an unexpected and shocking repudiation of a policy’s very purpose and goals” and “otherwise grossly subvert[ed] a domestic law or policy for an ulterior motive.”⁸⁴⁷ Astoundingly, without justification, the IFT jettisoned the most fundamental tenets of Mexican telecommunications law—including prompt and effective interconnection in the public interest—with the effect of protecting Telmex from its deal with Tele Fácil.

589. Second, the IFT Plenary destroyed Tele Fácil’s critical interconnection rights behind closed doors, without every informing Tele Fácil or soliciting input from the company. In fact, Tele Fácil remained completely locked out of a critical process that would ultimately eviscerate its investment in Mexico. Decree 77 therefore undoubtedly “involve[d] a lack of due process leading to an outcome which offends judicial propriety.”⁸⁴⁸

⁸⁴⁷ See *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award (Sept. 18, 2009), ¶ 296, **CL-026**.

⁸⁴⁸ See *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (Apr. 30, 2004), ¶ 98, **CL-071**; see also *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (Aug. 30, 2000), ¶ 91, **CL-053**.

590. Third, Decree 77 was highly discriminatory. Given Respondent's refusal to divulge requested documents, it is impossible to prove definitively the "willful targeting"⁸⁴⁹ of Tele Fácil's investment. However, the IFT's conduct is so erratic and so contrary to deeply rooted principles of Mexican law as to raise serious questions. There can be only one reasonable explanation for the IFT's actions—namely, that, at Telmex's request, the IFT eliminated the previously established terms of interconnection that were most costly to the monopolist, including a rate of USD 0.00975 per minute of use through 2017.

3. The IFT's adoption of Resolution 127 Violated the Fair and Equitable Treatment Protection

591. By the time Resolution 127 was rendered on October 19, 2015, Tele Fácil's investment was already lost.⁸⁵⁰ Still, the absurdity of that measure confirms the egregiousness of the IFT's conduct stretching back to its original decision not to enforce Resolution 381.⁸⁵¹ If the IFT's failure to enforce Resolution 381 and adoption of Decree 77 were the crimes, Resolution 127 was the bureaucratic cover-up.⁸⁵²

⁸⁴⁹ See *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award (Sept. 18, 2009), ¶ 300, **CL-026**; see also *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Award (Dec. 19, 2013), ¶ 780(b), **CL-066**.

⁸⁵⁰ See *supra* Part II.B.4.

⁸⁵¹ According to Mr. Soria, "the IFT had no authority to address Telmex's/Telnor's request to resolve this new disagreement procedure, as all the terms and conditions for their interconnection were already final and binding among the parties: some of them had been pre-agreed among the parties, as confirmed by the IFT in Resolution 381, and the rest of them (i.e. indirect interconnection and portability costs) had been resolved and determined by the IFT as Telmex had conceded to them. There was no disagreement." Soria Report, ¶ 144 (citation omitted), **C-009**.

⁸⁵² Resolution 127 was also itself fundamentally illegal. As Mr. Soria concludes: "With Resolution 127, the IFT is arbitrarily modifying an interconnection agreement which had been validated and certified by the IFT beforehand. Once again, the IFT is violating Tele Fácil's right as a concessionaire to interconnect and furthermore, the IFT is damaging the value that Tele Fácil's concession had gained by the agreed and validated fees obtained through Resolution 381" Soria Report, ¶ 154, **C-009**. Mr. Soria adds that, as with Decree 77, Resolution 127 "infringes the principle of irrevocability for administrative authorities" Soria Report, ¶ 173, **C-009**.

592. By way of background, the IFT's conduct leading up to Decree 77 invalidated all interconnection terms previously agreed between Tele Fácil and Telmex, including Tele Fácil's high interconnection rate. The IFT thus cleared the way for Telmex to manufacture a new dispute over future rates, which it could then present to the IFT for resolution. Professor Álvarez aptly described the problem as "the never-ending story."⁸⁵³

593. Further, under the FTBL, in the event of a dispute regarding the applicable rate, the IFT was obligated to impose a dramatically lower default rate.⁸⁵⁴ Telmex thus could have the rate reset to a level that was a fraction of the value of the rate it previously agreed to with Tele Fácil. This is, in fact, exactly what Telmex did.

594. On June 16, 2015, over Tele Fácil's strong objections, Telmex submitted a request to the IFT to resolve a purported dispute with Tele Fácil.⁸⁵⁵ Despite the fact that Resolution 381 had determined the applicable rate through 2017, Telmex argued, based on Decree 77, that the rate was never established.⁸⁵⁶ The IFT favored Telmex, finding that a disagreement over rates existed and for 2015 imposed the default rate of MXN 0.004179 per minute of use (USD 0.000253 per minute of use), *one fortieth* the value of the rate previously agreed between the parties and confirmed in Resolution 381.⁸⁵⁷

595. Resolution 127 thus represented a colossal pretense of form.⁸⁵⁸ After the IFT had destroyed Tele Fácil's interconnection rights, Resolution 127 papered over the affair. That

⁸⁵³ Álvarez Report, ¶¶ 25, 101, 166, C-008. See also Soria Report, ¶ 153 (describing "the approach set forth in Decree 77" as "causing endless delay of interconnection adversely affecting end users and new carriers"), C-009.

⁸⁵⁴ FTBL, at Article 131, CL-004.

⁸⁵⁵ Telmex's manufactured dispute, C-055.

⁸⁵⁶ *Id.* at p. 3.

⁸⁵⁷ Resolution 127, at p. 35, C-061.

⁸⁵⁸ Mr. Soria adds that is also "entails the IFT's evasion of its duty to enforce material interconnection over such pre-agreed conditions." Soria Report, ¶ 152, C-009.

resolution, at first glance, conformed to the general form and substance of a typical dispute resolution ruling; Resolution 127 made it appear as if the lower rate imposed by the IFT was in accordance with applicable telecommunications law. Yet the entire existence of Resolution 127 was fundamentally flawed. As explained, there was absolutely no basis in law or policy to allow Telmex a second crack at reducing the interconnection rate.⁸⁵⁹

596. More egregiously, Resolution 127 unjustifiably transformed Tele Fácil, the law-abiding market entrant, into a bad actor in the eyes of the law. According to Resolution 127, Tele Fácil was required to physically interconnect with Telmex and execute an interconnection agreement with the lower rate—in other words, accept the IFT’s travesty of justice as a formal matter. Tele Fácil had no choice but to refuse and, as a consequence, was sanctioned by the IFT’s Compliance Unit.⁸⁶⁰ The burden of interconnection has now unfairly shifted from Telmex to Tele Fácil.

597. In sum, Resolution 127 is a direct consequence of the IFT’s arbitrary, secretive and discriminatory scheme to save Telmex from its deal with Tele Fácil. Therefore, derivatively, it also breaches Article 1105.

4. The IFT’s Enforcement Practices and Delay in Converting Tele Fácil’s Concession Further Confirms the IFT’s Breach of Article 1105

598. Other aspects of the IFT’s dealings with Tele Fácil confirm a general climate of mistreatment. These include the IFT’s uneven enforcement practices against Telmex and Tele Fácil and the IFT’s discriminatory treatment in grossly delaying the granting of Tele Fácil’s application for a sole concession. Although these measures, in themselves, may not rise to the

⁸⁵⁹ See *supra* Part V.B.2.a.

⁸⁶⁰ Start of Sanctioning Administrative Process, C-071.

level of an independent breach of Article 1105, they nevertheless demonstrate the extent to which the IFT chose to single out Tele Fácil for harsher treatment solely because of its dispute with Telmex.

a. Unjustified Sanctions Against Tele Fácil following Resolution 127.

599. The IFT's blatantly disparate approach to enforcing Resolution 381 and Resolution 127 raises serious concerns about its motives. As explained, at Telmex's request, the IFT refused to enforce Resolution 381 against Telmex, choosing instead to pursue the unlawful revision of its prior ruling. Despite Tele Fácil's three petitions to enforce Resolution 381 in winter 2014, the IFT never once provided a formal response nor any explanation for its lack of responsiveness. It was not until Tele Fácil was notified of Decree 77 several months later in April 2015 that the company finally understood the outcome of its requests.

600. In stark contrast, the IFT took steps to enforce Resolution 127 against Tele Fácil almost immediately after its adoption on October 19, 2015. Already in November 2015, the IFT sent information requests to Tele Fácil and Telmex.⁸⁶¹ The purpose of such a request is to seek confirmation that the parties had complied with Resolution 127. A second information request was sent to Tele Fácil in January 2016.⁸⁶² Then, on August 25, 2016, the IFT's Compliance Unit notified Tele Fácil that it was initiating a sanction process against the company for failure to comply with Resolution 127.⁸⁶³ Finally, on April 3, 2017, the IFT imposed a fine of MXN 2,571.94 pesos on Tele Fácil.⁸⁶⁴

⁸⁶¹ IFT Sanction to Tele Fácil, at Fifth Background, at p. 4, **C-081**.

⁸⁶² *Id.* at Eighth Background, p. 7, **C-081**.

⁸⁶³ Start of Sanctioning Administrative Process for Breaching Resolution 127, at p. 29, **C-077**.

⁸⁶⁴ IFT Sanction to Tele Fácil, at p. 100, **C-081**.

601. While the fine imposed on Tele Fácil was nominal, the IFT's conduct disturbingly shows a pattern of following established law only when it favored Telmex to Tele Fácil's detriment.⁸⁶⁵ When enforcement would harm Telmex, the IFT stood idle, but when it benefitted Telmex, the IFT sprang into action. The IFT's acts and omissions further evidence its highly discriminatory and arbitrary targeting against Tele Fácil.

b. The IFT's Unjustified Delay in Converting Tele Fácil's Concession.

602. The IFT also unjustifiably delayed the processing of Tele Fácil's application to convert its original concession granted under the FTL, a "public telecommunications network" concession, into a "sole concession" pursuant to the FTBL. Obtaining the new form of concession was significant for Tele Fácil. A sole concession provides substantial business advantages as it establishes fewer obligations for the concessionaire. Namely, Tele Fácil originally held a public telecommunication network concession, a type of concession that under Mexico's new telecommunications law could no longer be extended for additional terms, unless converted.

603. The process to convert a prior concession into a sole concession is intended to be simple and expeditious. Under the FTBL, a concessionaire must file a basic application that includes only the concessionaire's general information and a statement that it is in compliance with applicable laws and regulations. Further, by law, the IFT is required to complete its

⁸⁶⁵ For a detailed discussion of the IFT's mistreatment of Tele Fácil with respect to the verification and sanctions process, *see* Bello Statement, ¶¶ 154-157, C-004; Soria Report, ¶¶ 175-184, C-009.

assessment of an application and grant a sole concession to an eligible concessionaire within 60 days of the date of the application.⁸⁶⁶

604. Tele Fácil filed its application for a sole concession on August 4, 2015.⁸⁶⁷

Notably, it was the very first application to be filed with the IFT.⁸⁶⁸ Yet the IFT unreasonably failed to take action to convert Tele Fácil's concession for well over a year. It was not until January 30, 2017 that Tele Fácil's conversion to the sole concession was finally granted.⁸⁶⁹

605. The IFT's gross delay was unfounded and discriminatory. Conversion of existing concessions was a high priority for the IFT and, for all other eligible applicants, the IFT converted concessions in a timely manner. As the chart below demonstrates,⁸⁷⁰ with the exception of Tele Fácil, on average the IFT took 119 days to convert a concession, with the shortest conversion occurring in 48 days and the longest in 281 days:

Concessionaire	IFT Resolution Number	Date Filed	Date Granted	Days under Review
Concesionaria Comseg, S.A. de C.V.	P/IFT/111215/563	Aug 11, 2015	Dec 11, 2015	122
Victoria Noemí Canto Chacón	P/IFT/231015/478	Aug 26, 2015	Oct 23, 2015	58
TV de Calpulalpan, S.A de C.V.	P/IFT/161215/601	Oct 9, 2015	Dec 16, 2015	68
TV Rey de Occidente, S.A. de C.V.	P/IFT/170216/59	Oct 9, 2015	Feb 17, 2016	131
Cable Sur, S.A. de C.V.	P/IFT/161215/602	Oct 12, 2015	Dec 16, 2015	65

⁸⁶⁶ FTBL, at Article 73, CL-004.

⁸⁶⁷ Request for *Concesion Unica*, C-57.

⁸⁶⁸ Bello Statement, ¶ 151, C-004.

⁸⁶⁹ Approval of Transition to *Concesion Unica*, C-079.

⁸⁷⁰ For the data on which this chart is based, see Comparison of Transitions to *Concesion Unica* Evaluated by IFT (2015-2016), C-091. See also Soria Report, Exhibit J, C-009.

Televisión por cable de Múzquiz, S.A de C.V.	P/IFT/161215/603	Oct 26, 2015	Dec 16, 2015	51
Apco Networks, S.A. de C.V.	P/IFT/060416/152	Oct 28, 2015	Apr 6, 2016	161
Red Five Two, S.A. de CV.	P/IFT/060416/153	Oct 28, 2015	Apr 6, 2016	161
Sistema de Cable Hkan, S.A. de C.V.	P/IFT/170316/130	Dec 18, 2015	Mar 17, 2016	90
Luis Alberto Alonzo Magaña	P/IFT/180516/225	Dec 2, 2015	May 18, 2016	168
Extravisión Comunicación, S.A.P.I. de C.V.	P/IFT/180516/224	Jan 13, 2016	May 18, 2016	126
Arely Isabel Góngora Pech	P/IFT/270416/173	Mar 10, 2016	Apr 27, 2016	48
Súper Cable del Sureste, S.A. de C.V.	P/IFT/280616/337	Mar 14, 2016	Jun 28, 2016	106
Sistema de Telecomunicaciones Vía Satélite de Quiroga, S.A. de C.V.	P/IFT/280616/336	Apr 19, 2016	Jun 28, 2016	70
Ultracable de América, S.A. de C.V.	P/IFT/280616/338	Apr 19, 2016	Jun 28, 2016	70
Level 3 México Landing, S. de R.L.	P/IFT/140916/492	May 6, 2016	Sep 14, 2016	131
Unet Telecomunicaciones, S.A. de C.V.	P/IFT/280916/515	May 17, 2016	Sep 28, 2016	134
Margarita Ciprés Cruces	P/IFT/250117/47	May 17, 2016	Jan 25, 2017	252
MVS Net, S.A. de C.V.	P/IFT/140617/338	Sep 6, 2016	Jun 14, 2017	281
Uca Comunicaciones, S.A. de C.V.	P/IFT/250117/46	Sep 22, 2016	Jan 25 2017	121
Multimedia de Tulum, S.A. de C.V.	P/IFT/250117/25	Oct 21, 2016	Jan 25, 2017	92
Desarrollos de Sistemas de Televisión, S.A. de C.V.	P/IFT/080217/68	Oct 26, 2016	Feb 8, 2017	105

606. In stark contrast with its treatment of other providers, it took the IFT **545** days to convert Tele Fácil's concession.

607. While the exact cause for delay is unknown, it can be readily inferred. According to Mr. Bello, Tele Fácil's outside counsel, "the IFT blocked the authorization to transition Tele Fácil to the Concesion Unica to put pressure on Tele Fácil to stop requesting enforcement of Resolution 381."⁸⁷¹

608. Whatever the reason, the IFT's actions make little sense. It initially decided internally to grant Tele Fácil's request, then refused to act on that decision, and then finally granted Tele Fácil's request, but taking over a year longer to act than with respect to any other application. The IFT's erratic conduct smacks of discriminatory targeting.⁸⁷²

* * *

609. In sum, the IFT's decision not to enforce Resolution 381, its issuance of Decree 77, and its adoption of Resolution 127 formed the parts of a scheme designed to absolve Telmex of its interconnection obligations that, in turn, destroyed Tele Fácil's ability to operate in Mexico. As explained above,⁸⁷³ by denying Tele Fácil an interconnection agreement with Telmex, the IFT deprived Claimants' investments of all value. The IFT's conduct thus breached Article 1105 beginning in mid-January 2015.

⁸⁷¹ Bello Statement, ¶ 152, **C-004**.

⁸⁷² For a discussion of the IFT's less preferential treatment of Tele Fácil in comparison to Telmex, *see* Soria Report, ¶¶ 188-194, **C-009**.

⁸⁷³ *See supra* Part V.B.1.c and V.B.2.c.

C. The Acts of the Specialized Telecommunications Courts Violated The Fair and Equitable Treatment Protection.

610. The misconduct of Mexico's Specialized Telecommunications Courts in connection with Tele Fácil's challenge to Decree 77 breached the fair and equitable treatment standard. This breach occurred well after the IFT had destroyed Claimants' investment in violation of Articles 1110 and 1105 of the NAFTA.⁸⁷⁴ It therefore arises out of a separate factual predicate. Nevertheless, Claimants expended resources seeking redress for their losses, on a prospective basis, in Mexican courts.⁸⁷⁵ The misconduct of the Mexican courts gave rise to damages for which Claimants may claim separately under Article 1105.

611. This aspect of Claimants' dispute arises in connection with Tele Fácil's filing of an *amparo* action before the Specialized Telecommunications Courts.⁸⁷⁶ This action gave the newly-formed Specialized Courts the opportunity to address the unconstitutionality of the IFT's conduct, on a prospective basis, by enforcing Mexican telecommunications law and policy. However, the Courts failed miserably to do so on two counts.

612. First, the lower courts exhibited gross incompetence when they failed to consider Tele Fácil's arguments meaningfully and to apply even the most basic principles of Mexican telecommunications law that would have readily demonstrated the illegality of the IFT's conduct. Second, the appellate court unjustifiably denied Tele Fácil its right to appeal the lower court's ruling. Collectively, these acts resulted in a serious denial of justice which harmed Tele Fácil.

⁸⁷⁴ As explained, the IFT destroyed Claimants' investments in mid-January 2015.

⁸⁷⁵ Mr. Nelson funded the litigation in connection with several *amparo* actions concerning Resolution 381, Decree 77, and Resolution 127.

⁸⁷⁶ Tele Fácil's *Amparo* Claim against Decree 77, C-053.

1. The Lower Courts Acted With Gross Incompetence

613. On May 7, 2015, Tele Fácil filed an amparo suit to challenge the following actions of the IFT: (i) the Compliance Unit's failure to enforce Resolution 381; (ii) the "confirmation of criteria" requested by the Compliance Unit of the Legal Unit; (iii) the Legal Unit's opinion transmitted to the IFT Plenary; and (iv) the Plenary's issuance of Decree 77.⁸⁷⁷

614. Among other things, Tele Fácil argued that Decree 77 was unconstitutional because the IFT had no authority to modify Resolution 381, which was a final administrative resolution.⁸⁷⁸ Tele Fácil also asserted that Decree 77 was not an interpretation of the scope of Resolution 381, but rather a reversal of a previous administrative action that changed the rights and obligations of the parties involved.⁸⁷⁹ Tele Fácil contended that the IFT itself did not have the legal authority to amend or reverse Resolution 381 and that the only way this could have been done was via judicial review.⁸⁸⁰

615. On January 22, 2016, the First District Court for Administrative Matters, specialized in Economic Competition, Broadcasting and Telecommunications, in three paragraphs, denied Tele Fácil's *amparo* action challenging the constitutionality of Decree 77, and confirmed the constitutionality and validity of Decree 77.⁸⁸¹

616. The Court dismissed the claim for the failure to enforce Resolution 381 simply by stating that there was no such failure, since the Compliance Unit stated that it was not true,⁸⁸² and because the IFT issued Decree 77 which it concluded had been issued to require the parties

⁸⁷⁷ "Tele Fácil's *Amparo* Claim against Decree 77, C-053.

⁸⁷⁸ *Id.* at pp. 8-13.

⁸⁷⁹ *Id.*

⁸⁸⁰ *Id.*

⁸⁸¹ Resolution of Tele Fácil's *Amparo* against Decree 77, C-063.

⁸⁸² *Id.* at p. 4, Third Consideration.

comply with Resolution 381.⁸⁸³ In other words, the court’s decision was circular and merely begged the question: it decided the challenge to Decree 77 by reference to the existence and presumed legitimacy of Decree 77.

617. On the question of the legitimacy of the “confirmation of criteria” requested by the IFT’s Compliance Unit of the Legal Unit, and the issue of the opinion drafted by the Legal Unit and provided to the IFT Plenary of Decree 77, the court decided summarily, and again without any further analysis of the content or effects to the parties, that the *amparo* could not proceed on the grounds that “through the [IFT actions], no obligation was imposed on [Tele Fácil], nor any existing obligation was modified or any right was limited, since they are only a communication and an opinion, respectively, between authorities of the IFT with effects only within the agency.”⁸⁸⁴ Thus, the Court concluded that the two actions by the IFT’s Compliance Unit and Legal Unit did not in any way affect Tele Fácil’s rights and obligations, so there was no action to be challenged.

618. Finally, the Court proceeded to purportedly analyze the only challenged action it deemed reviewable, namely, Decree 77 itself.⁸⁸⁵ On the issue of the IFT’s authority to issue Decree 77, the court once more hid behind the fiction that Decree 77 was merely an interpretation of Resolution 381, and did not change any of its conclusions.⁸⁸⁶

619. Specifically, the Court declared that even though the FTBL authorized the IFT only to “interpret such law itself as well as the administrative provision in telecommunications and broadcasting matters, without including the word resolution...[it] does not imply that the

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Id.

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Id. at p. 5, Fifth Consideration.

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Id. at p. 6, Sixth Consideration (VIII).

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Id. at 16.

[IFT] cannot rely on that article to determine the scope of the interconnection resolution.”⁸⁸⁷ The Court proceeded to blindly rely on the IFT’s argument that it was authorized to do so on the basis that the IFT has authority to “interpret” its resolutions in order to:

establish the terms and conditions of interconnection that have not been agreed in connection with the public telecommunications networks, as well as to interpret the law, resolutions and administrative provisions in the telecommunications and broadcasting matters.

Therefore, the authorities it has allow the IFT to determine the scope of the resolution herein discussed, to the extent that its purpose was to give legal certainty to the parties and to identify the technical parameters to facilitate its comprehension.⁸⁸⁸

620. The Court continued to declare that even though the FTBL only provided the IFT with the “authori[ties] to interpret such law as well as the administrative provisions in the field of telecommunications and broadcasting matters, without including the word resolution,” “such circumstance does not imply that the authority cannot rely on that article to determine the scope of the interconnection resolution.”⁸⁸⁹ According to the Court, when it comes to the law, “we should not use its literal interpretation.”⁸⁹⁰ In other words, the Court concluded that it would not apply the law as written, but rather extend it to permit the IFT to issue an interpretation of its own resolutions, even though Congress had not seen fit to give the IFT that authority.

621. Thus the Court, without any independent analysis, accepted as fact the notion that Decree 77 was simply an interpretation of Resolution 381, and that it did *not* modify the rights and obligations of the parties to Resolution 381. However, its ruling gives no indication of any independent assessment of both Resolution 381 and Decree 77 to assure itself of that conclusion.

⁸⁸⁷ *Id.* at p. 7, Sixth Consideration.

⁸⁸⁸ *Id.* at pp. 6-7, Sixth Consideration.

⁸⁸⁹ *Id.* at p. 7, Sixth Consideration

⁸⁹⁰ *Id.*

Bizarrely, the court pasted a two-column chart with the full text of Resolution 381 and Decree 77 side by side, with absolutely no analysis or conclusions.⁸⁹¹

622. The Court merely concluded that “it is inaccurate that [Resolution 381] was modified or revoked, since from the comparative it is deduced that [Decree 77] was only adopted in order to address the requests and confirmations of criteria formulated by [Tele Fácil] and the [Telmex] and to enforce the execution of [Resolution 381].”⁸⁹² The Court further concluded, without any argumentation or support, that the comparative chart also shows that Resolution 381 only solved the conditions that had not been agreed by the parties, indirect interconnection and portability.⁸⁹³

623. After this alarming conclusion, the Court refused to analyze any of Tele Fácil’s other challenges on the grounds that “they derive from the arguments that have just been dismissed in the previous paragraphs.”⁸⁹⁴

624. In short, the Court’s decision contains no real analysis of the statements and actions of the IFT. The court’s opinion was not the result of an actual, let alone thorough, legal analysis of the issues, nor any consideration of the policy implications, or any understanding of the practical consequences of Decree 77. It failed to analyze or consider whether there was any modifications to rights previously established. The Court fully ignored the main purpose of Article 42 of the FTL, which is to materialize interconnection among carriers’ networks in a timely manner. Rather, the Court simply rubber-stamped what the IFT had decided and adopted

⁸⁹¹ *Id.* at pp. 8-16.

⁸⁹² *Id.* at p. 16.

⁸⁹³ *Id.*

⁸⁹⁴ *Id.* at p. 17.

these arguments to justify its own conclusions. In his expert report, Mr. Soria confirms the complete lack of reasoning in this decision:

In my opinion, the Court's argumentation is disturbingly poor. Even though it addresses every argument made by Tele Facil, there is no analysis of the statements and/or actions made by the IFT. As a matter of fact, it did not analyze if there was a material modification to rights previously obtained, nor did it analyze if the IFT has authority to reverse its own pronouncement. It fully ignored the main purpose of Article 42 of the FTL, which is to immediately materialize interconnection among the carriers' networks. Instead, it took the analysis of the scope of Article 42 made by the IFT as an unquestionable rule without an in-depth analysis of such. The Court never analyzed that the procedure in Article 42 is designed in such a way that by the end of it, all terms and conditions shall be binding, so that interconnection can be immediately executed.⁸⁹⁵

625. According to Mr. Soria:

[The] Mexican judicial system has embraced the exhaustiveness principle, which binds which binds every judge and Court, without exception, to review and study every argument made by the claimant. This principle does not only require the Courts to give an answer to each claim, in terms of quantity, but it also requires an in-depth analysis of each argument. Therefore, the Court's failure to make its own analysis of the interpretation of Article 42 represents a failure to comply with the exhaustiveness principle.⁸⁹⁶

626. Professor Álvarez is in accord. She notes that “[w]hile the lower court included a two-column table trying to compare Resolution 381 with Decree 77, that table did not evidence the supposed similarities between them.”⁸⁹⁷ In terms of the Court's lack of analysis, she states that “[t]here is no indication that the arguments by the court were based on actual or thorough analysis of the issues, or an understanding of the consequences of the resolution. Rather, the

⁸⁹⁵ Soria Report, ¶ 249, C-009.

⁸⁹⁶ Soria Report, ¶ 250, C-009.

⁸⁹⁷ Álvarez Report, ¶ 177, C-008.

court simply rubber-stamped what the IFT had decided without addressing Tele Facil's concerns."⁸⁹⁸

627. Professor Álvarez's conclusion is devastating:

In my opinion, the lower court's considerations were wrong because by confirming Decree 77, it ignored the applicable law, including the importance of interconnection, the underlying policy and principles of interconnection, the consequences of having a regulator with authority only to resolve the disputed terms instead of a regulator with authority to enforce interconnection and interconnection agreements.⁸⁹⁹

628. In short, the Court did not act as an independent, autonomous check on the IFT's activities. This is precisely the kind of conduct that the OECD identified in 2017 as persisting in Mexico despite the reforms, given the lack of expertise and experience on the part of the judicial officials filling these specialized courts; the OECD 2017 Review concluded that "current situation is therefore less effective than it might otherwise be and could ultimately lead to counterproductive outcomes."⁹⁰⁰ This ruling of the Specialized Court represents either a complete abdication of its responsibilities to act as an independent check on the IFT or gross incompetence.

2. The Appellate Court Unjustifiably Denied Access to Justice

629. Tele Fácil was improperly denied the opportunity to pursue its appeal of the lower court's decision. On February 12, 2016, Tele Fácil appealed the decision to the Circuit Collegiate Court in Administrative Matters.⁹⁰¹ However, on April 21, 2016, the Circuit Court

⁸⁹⁸ Álvarez Report, ¶ 178, C-008.

⁸⁹⁹ Álvarez Report, ¶ 179, C-008.

⁹⁰⁰ OECD 2017 Telecommunications Review of Mexico, p. 32, C-084.

⁹⁰¹ Tele Fácil's Appeal to Amparo against Decree, C-065.

dismissed Tele Fácil's appeal, with prejudice, but without addressing the substance of Tele Fácil's claim.⁹⁰² The events culminating in that dismissal are unsettling.

630. As noted above, on January 22, 2016, Tele Fácil's *amparo* against Decree 77 was denied. The opinion issued by the lower court was notified to Tele Fácil on January 25, 2016, granting the company ten days to file an appeal,⁹⁰³ if Tele Fácil wanted to do so. The term of ten days ran from January 27, 2016 to February 11, 2016.

631. On February 11, 2016, the day the appeal was due, Tele Fácil's counsel arrived at the courthouse to make the filing before it closed at midnight.⁹⁰⁴ Court rules and practice guarantee a party's access to the courthouse until midnight on the day of a deadline.⁹⁰⁵ In an unprecedented event, the courthouse security guard denied counsel's access to the court's filing office; instead, he placed two calls to the office but received no answer.⁹⁰⁶ Eventually, at midnight, another call was placed successfully, but the court official refused to file Tele Fácil's appeal, claiming it was now untimely.⁹⁰⁷

632. The following day, Tele Fácil's counsel promptly raised the matter with the relevant judges and administrative officials.⁹⁰⁸ One of the judges requested the registry of calls that established that Tele Fácil's attempt to file its appeal was timely.⁹⁰⁹ The detailed description of the above facts were memorialized in the writing filed by Tele Fácil to the court on February

⁹⁰² Rejection of Tele Fácil's Appeal of Amparo against Decree 77, **C-075**.

⁹⁰³ Amparo Statute, at Article 86, **CL-003**.

⁹⁰⁴ Bello Statement, ¶ 140, **C-004**.

⁹⁰⁵ *Id.* at ¶ 141.

⁹⁰⁶ *Id.*

⁹⁰⁷ *Id.*

⁹⁰⁸ *Id.* at ¶ 143.

⁹⁰⁹ *Id.* at ¶ 143.

24, 2016, which contained the “Statement of Facts Minute” and Tele Fácil’s arguments on why the appeal should be admitted.⁹¹⁰

633. On March 9, 2016, Judge Patricio González Loyola Perez, the Chief Justice of the Circuit Court, formally admitted the appeal as timely after considering the facts listed by Tele Fácil and the evidence presented.⁹¹¹ Judge González Loyola Perez ruled that “taking into consideration that there are elements to consider [Tele Fácil]’s statement as true in the sense that it appeared to file the document within the term provided in the applicable law, in addition that the right of access to justice must prevail in terms of the principles contained in Article 17 of the Constitution, I hereby consider the appeal submission as timely.”⁹¹²

634. Despite these decisions, on April 21, 2016, the Circuit Court, sitting as a panel of three judges, dismissed Tele Fácil’s appeal as untimely, without any reasonable justification.⁹¹³ Inexplicably, according to the Circuit Court, because Tele Fácil did not file within the originally granted term, and regardless that it was denied access to the filing office of the Court, its appeal was untimely. The Circuit Court erroneously dismissed the appeal based on the misapplication of a generic timing rule allowing litigants to file within the first business hour following an early closure of the courts, *e.g.*, for an official holiday.

635. According to the Circuit Court, because Tele Fácil did not file within the Circuit Court’s first business hour on the morning after it was denied access to the filing office, its appeal was untimely. This decision not only misapplied a timing rule intended for different circumstances, but it also failed to consider any of the unique circumstances surrounding Tele

⁹¹⁰ Appeal Statement of Facts, **C-066**.

⁹¹¹ Admission of Amparo Appeal, **C-068**.

⁹¹² *Id.* at p. 3.

⁹¹³ Rejection of Tele Fácil’s Appeal of Amparo against Decree 77, **C-075**.

Fácil's attempted filing: it took Tele Fácil's counsel some time to obtain evidence proving his denial of access, to discuss the situation with court personnel, and to obtain an order issuing the Administrative Record necessary to justify the late filing.⁹¹⁴

636. Shockingly, the Chair of the Circuit Court, Judge Gonzalez Loyola Perez, who had issued the interlocutory resolution that admitted the appeal on March 9, 2017, now voted along with the other judges saying that the appeal was not timely submitted.

637. Under Mexican law, Tele Fácil has no right or ability to appeal the decision of the Circuit Court's decision.

* * *

638. The actions of the Mexican courts are disturbing, but perhaps not surprising. A study by the Mexican Bar of Attorneys of the performance of the Specialized Telecommunications Courts is revealing. The study analyzed the rulings of the Courts between September 2013 and August 2015, including with respect to *amparos indirectos*, the type of *amparo* used to challenge IFT's conduct. The study reports that, during that time period, 88% of all *amparos indirectos* were decided in favor of the regulator; the remaining 12% were decided either fully or partially in favor of the concessionaire.⁹¹⁵

639. The dysfunction revealed by the Mexican Bar of Attorneys' study is confirmed by a more recent study by the OECD. Noting deficiencies in the Specialized Telecommunications Courts, the 2017 OECD Report states:

their practical establishment has encountered some obstacles with respect to human resources and their expertise and experience of such specialized topics. It appears that the training for judicial officials, to date, has

⁹¹⁴ Bello Statement, ¶ 144, C-004.

⁹¹⁵ For a copy of the Mexican Bar of Attorneys' report, see Soria Report, Exhibit K, C-009.

primarily relied on academia and contacts with foreign judicial institutions, while the contributions provided by the Mexican state have been limited.

The current situation is therefore less effective than it might otherwise be and could ultimately lead to counterproductive outcomes.⁹¹⁶

640. Tele Fácil's experiences with the Specialized Courts unfortunately proves this statement correct. In addition to gross incompetence at the lower-court level, the company was denied its right of appeal on a highly arbitrary basis. Accordingly, the actions of the District Court and the Circuit Court denied Tele Fácil critical access to justice in violation of Article 1105.⁹¹⁷

VI. CLAIMANTS ARE ENTITLED TO DAMAGES

A. Overview

641. Claimants have been damaged in the amount of USD 472,148,929 in the form of lost profits and interest as a result of Respondent's breaches of Articles 1110 and 1105 of the NAFTA. Claimants are also entitled to supplemental expenses including the cost of litigation this proceeding and proceedings in the Mexican courts.

⁹¹⁶ OECD 2017 Telecommunications Review of Mexico, p. 60, **C-084**.

⁹¹⁷ The misconduct of the Specialized Courts meets constitutes a denial of justice, which has been defined as including: "(i) the unjustified refusal of a tribunal to hear a matter within its competence or any other State action having the effect of preventing access to justice; (ii) undue delay in the administration of justice; and (iii) the decisions or actions of State bodies that are evidently arbitrary, unfair, idiosyncratic or delayed." *Iberdrola Energía S.A. v. Republic of Guatemala*, ICSID Case No. ARB/09/5, Award (Unofficial English Translation) (Aug. 17, 2012), ¶ 432, **CL-048**; *Mondev International Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, Award (Oct. 11, 2002), ¶ 127 ("whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the available facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subjected to unfair and inequitable treatment."), **CL-057**; Jan Paulsson, *DENIAL OF JUSTICE IN INTERNATIONAL LAW*, 200-201 (2005), **CL-083**.

642. Claimants have retained two prominent economists to calculate the quantum of damages. Dr. Christian Dippon is with NERA Economic Consulting and is based in Washington, D.C. Dr. Elisa Mariscal is with Global Economics Group and is based in Mexico City, Mexico.

643. The calculations and economic models used by both economists are set forth in their respective reports.⁹¹⁸ The legal standards and basis for the damages calculations are discussed in the following sections. Before proceeding, a few salient features about their business and the damages calculation are worth noting.

644. First, the nature of Tele Fácil's business meant that it did not need to make massive upfront investments to be profitable like a mining operation or luxury resort would need to make. While Tele Fácil would have its own switching equipment and colocation facilities, it did not have to construct lines to thousands of residences and businesses the way an incumbent carrier would. Many of its largest customers, such as those providing DID services, would co-locate their equipment in Tele Fácil's offices. For other lines of business, it could utilize the existing lines of other carriers' either unregulated commercial agreements or through regulated interconnection agreements. Even its retail operations were modern, relying heavily on fixed wireless services in lieu of buried cables. This is not to say that Tele Fácil would not incur significant costs during the operation of its business. The company would have spent significant amounts of money as the business progressed, but did not need to make large investments before commencing operations. This progression is similar to what has happened in other countries when a telecommunications market is moving from dominance by a monopoly provider to a more competitive market, where regulators require incumbents to make their physical

⁹¹⁸ Dippon Report, C-010; Mariscal Report, C-011.

infrastructure available to competitors. It also mirrors what happened in the United States when Mr. Nelson launched GLCC with only a [REDACTED]. The significance of this is that an income-based approach to valuation is appropriate because most of the lost value consisted of future cash flows from operations that were foreclosed by Respondent's actions. Because Tele Fácil would have operated for many years "but for" Respondent's actions, a cost-based approach that simply measures the amount of its upfront investment is not appropriate because it does not accurately measure the damages incurred.

645. Second, Claimants worked for many years to be in a position to commence operations in Mexico. It should also be noted, however, that the principals of Tele Fácil had many years of experience in the United States (and Mexico) building up similar lines of business before starting Tele Fácil. Tele Fácil, therefore, is more accurately viewed as an extension of highly successful telecommunications businesses rather than a completely new venture.

646. Third, the lost profits estimates made by the expert economists, for the most part, rely on specifically identified customers and actual traffic in Mexico to support the estimates. Frankly, it is rare for a lost profits damages calculation to have the level of specificity and concrete information that the expert economists have used here.

647. Fourth, by design, Tele Fácil attempted to be "in the right place at the right time." The principals knew that Mexico was undergoing significant telecommunications reform which eventually resulted in an amendment to the Mexican Constitution and the imposition of asymmetric regulation to curb Telmex's long pattern of anti-competitive abuses. It is not uncommon for new entrants into a telecommunications market being liberalized to be allowed to initially make healthy profits that can be used to invest further into servicing the market. This is exactly what GLCC did and what Tele Fácil could have done had it not been destroyed by

Respondents – it had a window of time to make strong profits that it could have used to build its future service offerings to Mexican consumers and carriers.

B. Legal Standards

648. Claimants are entitled to full compensation for the damages suffered as a result of Respondent's breaches of Articles 1105 and 1110 of the NAFTA. The standard of damages in the event of breach of the NAFTA is governed by international law. As the Permanent Court of International Justice declared in the *Chorzów Factory* case, damages must compensate for the injuries caused by the internationally unlawful act by placing the aggrieved party in the position it would have been in but for the wrongful act:

Reparation, must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability have existed if the act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it – such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.⁹¹⁹

649. Article 31 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts adopts the principle of full reparation set forth in *Chorzów Factory* case.⁹²⁰ The commentary to Article 31 explains that full reparation means compensation for any injury caused by the State in connection with its breach of international law:

⁹¹⁹ *The Factory at Chorzów (Germany v. Poland)* (Claim for Indemnity) (Merits), 1928 PCIJ Rep. Ser. A, No. 17 (Sept. 13, 1928), p. 47, **CL-097**

⁹²⁰ Article 31 provides: "1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act. 2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State." J. Crawford, *THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY* (2005) ("ILC Articles on State Responsibility"), Art. 31(1), **CL-099**; *id.*, Art. 36 cmt. 3 ("The fundamental concept of 'damages' is . . . reparation for a loss suffered; a judicially ascertained compensation for wrong. The remedy should be commensurate with the loss, so that the injured party may be made whole.") (quoting *Lusitania* case, UNRIAA, vol. VII (Sales No. 1956.V5), p. 32, at p. 39 (1923)).

The responsible State's obligation to make full reparation relates to the "injury caused by the internationally wrongful act". The notion of "injury" ... is to be understood as including any damage caused by that act. In particular, ... "injury" includes any material or moral damage caused thereby.⁹²¹

650. The *Chorzów Factory* standard is widely recognized in investor-State arbitration: "Many tribunals have applied this principle in deciding on damages due for breach of the standard of fair and equitable treatment."⁹²² For example, in *S.D. Myers, Inc. v. Canada*, a NAFTA arbitration, the tribunal stated, "[t]he principle of international law stated in the *Chorzów Factory* (Indemnity) case is still recognized as authoritative on the matter of general principles."⁹²³ Further, the tribunal in *ADC Affiliate Ltd. v. Hungary* also stated in 2016, "[t]hus there can be no doubt about the present vitality of the *Chorzów Factory* principle, its full current vigor having been repeatedly attested to by the International Court of Justice."⁹²⁴

651. Accordingly, the prevailing rule in investor-State arbitration is that "compensation must take into account 'all financially assessable damage' or 'wipe out all the consequences of the illegal act.'"⁹²⁵

⁹²¹

Id.

⁹²²

El Paso Energy International Company v. Argentine Republic, ICSID Case No. Arb/03/15 Award (Oct. 31, 2011) ¶ 701, **CL-097**.

⁹²³

S.D. Myers, Inc. v. Canada, UNCTRAL (NAFTA), Partial Award (Merits), (Nov.13, 2000) ¶ 311, **CL-061**

⁹²⁴

ADC Affiliate Ltd. v. Republic of Hungary, ICSID Case No. ARB/03/16), Award (Oct. 2, 2006) ¶ 493, **CL-**

089.

⁹²⁵

Siemens A.G. v. The Argentine Republic, ICSID Case No. ARB/02/8, Award (Jan. 17, 2007), ¶ 352 **CL-063**; *Petrobart Ltd. v. Kyrgyz Republic*, SCC Case No. 126/2003, Award (Mar. 2005), at 77-78, (holding that "in so far as it appears that Petrobart has suffered damage as a result of the Republic's breaches of the Treaty, Petrobart shall so far as possible be placed financially in the position in which it would have found itself, had the breaches not occurred"), **CL-095**; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award (Aug. 20, 2007) ¶ 8.2.7 (providing that "regardless of the type of investment, and regardless of the nature of the illegitimate measure, the level of damages awarded in international investment arbitration is supposed to be sufficient to compensate the affected party fully and to eliminate the consequences of the state's action"), **CL-030**; *Biwater Gauff (Tanzania) Ltd. v. Republic of Tanzania*, ICSID Case No. ARB/05/22, Award (July 24, 2008) ¶ 774 (observing that "compensation is to cover 'any financially assessable damage including loss of profits insofar as it is established'"), **CL-091**.

652. This standard of full reparation applies in determining the compensation owed to Claimants based on Respondent's breach of Articles 1105. The NAFTA establishes no *lex specialis* regarding the measure of damages or compensation with respect to breaches of the fair and equitable treatment standard. Accordingly, the general international law principles reflected in *Chorzów Factory* apply.⁹²⁶

653. In addition, the compensation owed to Claimants based on Respondent's breach of Article 1110 also requires full reparation under international law beyond the express standard set forth in the NAFTA. Article 1110(2) establishes a *lex specialis* that applies only in the case of lawful expropriation. That provision provides: "[c]ompensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place [and may include] going concern value ... to determine fair market value." However, Respondent's breach of Article 1110(1) constitutes an unlawful expropriation.

654. Accordingly, in addition to the fair market value of their investments, Claimants are entitled to supplemental damages for all post-expropriation expenses.⁹²⁷ As the tribunal in *Siemens AG v. Argentine Republic* stated: "The Tribunal considers that the claim on account of post-expropriation costs is justified in order to wipe out the consequences of the expropriation."⁹²⁸

655. In the present case, the supplemental damages owed to Claimants consist of the cost of maintaining a skeleton staff to manage Tele Fácil's remaining affairs, of making final

⁹²⁶ Article 1131, NAFTA: "A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law."

⁹²⁷ *Siemens AG v. Argentine Republic*, ICSID Case No. ARB/02/8, Award (Jan. 17, 2007) ¶ 387 (awarding damages for costs of administration associated with skeleton operation post-expropriation), **CL-064**; *Azurix Corp v. Argentine Republic*, ICSID Case No. ARB/01/12, Award (July 14, 2006) ¶ 432 (finding that negotiation costs could in principle be included in recovery as consequential damages), **CL-090**.

⁹²⁸ *Siemens AG v. Argentine Republic*, ICSID Case No. ARB/02/8, Award (Jan. 17, 2007) ¶ 387, **CL-064**.

lease payments, and of funding litigation, initially, to challenge the IFT's measures in Mexican courts and, subsequently, in this NAFTA arbitration.

656. Because Claimants are entitled to full compensation under both theories they are pursuing, i.e., expropriation and failure to provide fair and equitable treatment, the quantum of damages is the same under both theories. Lost profits are appropriate for both types of claim; therefore, Claimants present a single damages model that applies to and provides full compensation for either claim.

657. Claimants are seeking to recover three types of damages: a) fair market value in the form of lost profits; b) interest; and c) supplemental damages.

658. Claimants present the reports of two expert witnesses to show the calculation of the quantum of damages for lost profits and interest on the lost profits. Dr. Christian Dippon of NERA Economic Consulting, based in Washington, D.C., prepared the damages model for three of the revenue streams and his report is found at **C-010**. Dr. Elisa Mariscal of Global Economics Group, LLC, based in Mexico City, prepared the calculation of one of the revenue streams. Dr. Mariscal's report is attached at **C-011**.

659. The total amount of lost profits, with interest, for the DID/Conferencing, International Traffic Termination and Retail lines of business as calculated by Dr. Dippon is USD 357,880,731.

660. The total amount of lost profits, with interest, for the Competitive Tandem Services line of business, as calculated by Dr. Mariscal, is USD 114,268,198.

661. While the expert reports contain the details of the damages calculations, the following sections of this Memorial provide the legal and factual basis of the damages claimed.

C. Methodology – Lost Profits

662. The first decision in choosing a valuation methodology for damages is to determine whether a “going concern” or “liquidation” approach should be used. Liquidation methodologies are useful when an asset is expected to be liquidated on or near the valuation date. Going concern approaches are used when an asset is expected to operate beyond the valuation date and generate positive cash flows in the future. Since Tele Fácil was expected to operate for many years beyond the expropriation date, a going concern approach is appropriate; moreover, for the same reason, a liquidation approach is not appropriate here.

663. There are a number of going concern approaches to use in the valuation of damages including: a) income-based approaches; b) market-based approaches; and c) cost-based approaches.

664. Cost-based approaches are used when the value of an asset relates to the cost paid to create it or recreate it. For example, the value of a factory might be the amount needed to build a new factory. A cost-based approach, however, is not appropriate to value Tele Fácil’s damages. The bulk of Tele Fácil’s damages are for lost profits the business would have generated but for the actions of Respondents. The members of Tele Fácil applied their extensive business acumen, experience and contacts to enter the Mexican market at an advantageous time. What was taken away from them was much more than the replacement costs of various pieces of telecommunications equipment.

665. A market-based approach is used when an asset can be compared to market indicators. For example, a public company could be measured by an industry-wide price-earnings ratio or a real estate project could be measured by square footage prices of similar

projects. Because of the innovative nature of Tele Fácil's business, however, there are few available market indicators to reliably estimate the value of its damages.

666. Income-based approaches are used when an asset's expected cash flow is indicative of its fair market value. Such approaches are used when the parties involved are concerned primarily with the future earning potential of a particular asset or business. The anticipated cash flow is forecasted into the future and then the cash flows are discounted back to the valuation date at an assumed cost of capital. In this situation, therefore, an income-based approach is the most appropriate because Tele Fácil would have continued to operate and generate positive cash flows beyond the date of expropriation. Tele Fácil's value was in its management, experience, customers, contacts, plans and equipment – all in place to generate cash flows for many years.

667. The most common income-based damages methodology is to calculate lost profits: "[i]t is universally accepted that international law provides for the recovery of lost profits."⁹²⁹ "The award of lost profits is consonant with the objective of full compensation: to wipe out all consequences of the illegal act with a view to re-establishing the situation that the claimant would have been in, had the act not occurred."⁹³⁰ The ILC Articles on State Responsibility also provide that compensation shall include "loss of profits insofar as it is established."⁹³¹

668. International tribunals have awarded lost profits where it is reasonably clear that a company would have earned profits – even if, as here, there was no record of earned profits. For example, in *Crystallex v. Venezuela*, the tribunal found that, while there was no proven track

⁹²⁹ S. Ripinsky & K. Williams, *DAMAGES IN INTERNATIONAL INVESTMENT LAW*, 278 (2008), **CL-100**.

⁹³⁰ *Id.*

⁹³¹ *Id.* (citing Article 36(2)).

record of profitability because mining operations had not commenced, it nonetheless was sufficiently established that:

if it had been allowed to operate, it would have engaged in a profitmaking activity and that such activity would have been profitable. The Tribunal considers that this is essentially due to the nature of the investment at stake here as well as the development stage of the project.⁹³²

669. Here, there is no question that Tele Fácil was beyond the development stage of its project; it was at the exploitation stage. It had its concession to provide telecommunications services in Mexico, Resolution 381 established the terms of its interconnection with Telmex (which terms included very valuable rate terms), it was in the right place at the right time to take advantage of Mexico's recent reforms of its telecommunications laws, and it had critical customers already lined up.⁹³³ All that remained was for the IFT to enforce the resolution, and for Tele Fácil to open its interconnection switch. Because of the illegal conduct of the IFT, this never happened. The profits that could reasonably be expected by Tele Fácil are readily calculable, as discussed in detail below, and as Tele Fácil's expert reports make clear.

670. The Discounted Cash Flow, or DCF, method is the most widely accepted method of calculating lost profits. The DCF method is often used in investment treaty arbitrations to calculate the value of an investment that has been expropriated or otherwise impacted by the acts of a host state. DCF is also widely accepted by international agencies, such as the World Bank, for the estimation of damages and fair market valuation.⁹³⁴ The DCF method has been accepted

⁹³² *Crystallex International Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award (April 4, 2016), ¶ 718, **CL-093**

⁹³³ See *supra* Part II.E.

⁹³⁴ World Bank. 1992. *Guidelines* at Section IV(6)(i). Washington, D.C.: The World Bank, **CL-101**. <http://documents.worldbank.org/curated/en/955221468766167766/Guidelines>.

by a number of tribunals as an acceptable basis for quantifying damages.⁹³⁵ As one tribunal noted, “[t]he method has been used widely, including by numerous arbitral tribunals in similar circumstances.”⁹³⁶

671. Ripinsky and Williams, in their respected treatise on damages in international arbitrations, explained how lost profits are used in expropriation cases:

In expropriation cases, if the compensation is measured by reference to the “fair market value” (FMV) of the expropriated investment, and the discounted cash flow (DCF) method is applied, lost profits (more precisely, cash flows), discounted to the appropriate date of valuation, constitute the compensation. This is because the DCF method determines the FMV by calculating the net present value of cash flows that the investment was expected to generate in the absence of the expropriatory conduct.⁹³⁷

672. The DCF method is appropriate even if the claim is not for expropriation. For example, the Tribunal in the *El Paso Energy v. Argentina* matter used the DCF method, noting: “[t]he DCF method is preferred, as being ‘by far the most widely used as a primary valuation tool.’”⁹³⁸

673. In basic terms, the DCF method estimates what the free cash flows from the business would have been and applies a discount rate to estimate the present value of those cash flows. Here, the free cash flow of Tele Fácil is calculated for an approximately six-year period starting with the date the business was destroyed, i.e., January 15, 2015. Those free cash flows are discounted back to that date to arrive at the fair market value of the business on that date.

⁹³⁵ *Sempra Energy Int’l v. Argentine Republic* ICSID Case No. ARB/02/06 Award (Sept. 28, 2007) ¶416, **CL-096**; *ADC Affiliate Ltd and ADC and ADMC Mgt. Ltd v. The Republic of Hungary* ICSID Case No. ARB/03/16 Award (Oct. 2, 2006) ¶ 502, **CL-089**; *CMS Gas Transmission Co. v. Argentine Republic* Award (May 12, 2005) ¶ 416, **CL-092**; *Tidewater, Inc., Tidewater Investments SRL, Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Award (March 13, 2015) ¶165, **CL-098**.

⁹³⁶ *El Paso Energy International Co. v. Argentine Republic*, ICSID Case No. ARB/03/15, Award (Oct. 31, 2011), ¶ 712, **CL-033**.

⁹³⁷ S. Ripinsky & K. Williams, *DAMAGES IN INTERNATIONAL INVESTMENT LAW* 279 (2008), **CL-099**.

⁹³⁸ *El Paso Energy* at ¶ 711, **CL-033**.

674. Tele Fácil planned to have four separate streams of revenue in its business: a) DID/Conferencing; b) International Traffic Termination; c) Competitive Tandem Services; and d) Retail Services. The Claimants anticipated that the profitability of these revenue streams would vary over time and take different lengths of time to develop. Their overall strategy was to use small portions of the immediately profitable revenue streams like the International Traffic Termination service to fund revenue streams like Retail Services that would take longer to develop. Tele Fácil was an integrated business; therefore, its inability to obtain an interconnection agreement with Telmex foreclosed all four revenue streams.

675. Calculation of lost profits using the DCF method can be achieved with reasonable certainty in these circumstances. First, the various lines of businesses were essentially extensions of profitable lines of business that Tele Fácil's founders had conducted in the United States, Mexico and even worldwide in some instances. This means that the principals of Tele Fácil had extensive experience and business relationships with these types of services. Second, most of the lines of business had identifiable customers that had actually signed agreements, or expressed strong intent based on past business relationships. For most of its lines of business, Tele Fácil can identify with specificity the service provider that would have sent traffic to it along with detailed estimates of that traffic. Third, strong demand existed for these services in Mexico because of structural factors in the telecommunications market. For many of these services, the Mexican market was underserved. In fact, Mexico's consumers, in many instances, have not received the telecommunications offerings and pricing that one would expect in an economy as large and as developed as Mexico. As shown below in more detail, damages for each line of business is capable of being estimated with reasonable certainty using a DCF methodology.

D. The Damages for Each Line of Business Can Be Ascertained With Reasonable Certainty

1. The DID/Conferencing Business

676. Lost profits can be calculated for the DID/Conferencing Business with reasonable certainty because: a) Mr. Nelson had extensive experience in building DID/Conferencing traffic in the United States; b) strong consumer demand existed in Mexico for free conferencing and other DID services; and c) many of Mr. Nelson's customers in the United States that provided free conferencing services, audio conferencing services and chat services indicated a desire to provide their services in Mexico through Tele Fácil. Dr. Dippon has calculated the lost profits for the DID/Conferencing line of business and those calculations are in his Expert Report at paragraphs 68 to 80.

677. DID allows callers to directly dial to an extension without encountering an operator or menu system.⁹³⁹ DID allows local phone companies to provide conferencing, chat lines, radio by phone, and other such services.⁹⁴⁰

678. Tele Fácil's DID/Conferencing Business was to consist of a revenue-sharing arrangement between Tele Fácil and various providers of "no-cost" conferencing, chat or broadcast services. For example, a provider would offer free conferencing calling service to consumers and Tele Fácil and the provider would split the interconnection charges. The provider would be responsible for marketing to the consumer and creating demand and Tele Fácil would provide the telecommunication service.

⁹³⁹ Dippon Report at ¶ 27, C-010.

⁹⁴⁰ *Id.* at ¶ 28.

679. Other services include audio call-in services, which involve offering a broadcast signal through a telephone device, and chat rooms, which allow multiple participants to engage in a specifically designated topic or group.⁹⁴¹

680. Mr. Nelson is the founder and Chief Executive Officer of one of the largest Competitive Local Exchange Carriers in the United States.⁹⁴² The DID/Conferencing Project would have been an extension of the DID services provided by Mr. Nelson's company, GLCC. GLCC started in 2005 and has become a multi-million-dollar business by providing DID/Conferencing access service.

681. GLCC has spent many years supporting conference calling, broadcast, and chat line services in the United States that generate high volumes of in-bound traffic.⁹⁴³ Between 2009 and the beginning of 2016, GLCC handled over [REDACTED]⁹⁴⁴ Such high-volume services produced a rate of return of [REDACTED] for GLCC since its inception.

682. When GLCC started in 2005, it entered into contracts with free conferencing call services in order to increase the volume of traffic terminating on its network. This business model generated revenue through the imposition of regulated access charges on long distance carriers.⁹⁴⁵

683. The business model of the free conference-calling providers consists of providing toll telephone numbers to customers such as businesses, nonprofit organizations, religious organizations, and government agencies.⁹⁴⁶ By calling these numbers, each caller pays their own

⁹⁴¹ Dippon Report at ¶¶ 38-39, C-010.

⁹⁴² Nelson Statement, ¶ 2, C-001.

⁹⁴³ *Id.*

⁹⁴⁴ Dippon Report, ¶ 30 Table 2, C-010.

⁹⁴⁵ Nelson Statement, ¶19, C-001.

⁹⁴⁶ *Id.* ¶ 13.

way by paying their long distance carrier whatever charges may apply based on their individual long distance plan, which may be unlimited or a per-minute fee.⁹⁴⁷ This model stands in contrast to the incumbent's historic conference calling services, which utilized a toll-free (1-800) telephone number and requiring the host to pay the full cost for each participant on the call, which usually meant a per-minute, per-caller fee.⁹⁴⁸ Although this "host pays" model was acceptable for large corporations, many small and medium-size business, nonprofit organizations, government agencies, and religious institutions could not afford such services. With the advent of unlimited calling plans in the United States, the free conference-calling model became very successful, unleashing demand for conferencing calling services among a broader swath of the public.

684. GLCC works with nearly all of the significant free conference-calling providers in the United States.⁹⁴⁹ Its most significant relationship is with Free Conferencing Corporation that is one of the largest such services in the world, [REDACTED]

[REDACTED].⁹⁵⁰ It also has relationships with other providers such as No Cost Conference.⁹⁵¹

685. GLCC provides the network that carries millions of conference calls, consisting of billions of minutes, each year in the United States.⁹⁵² In addition to free conference-calling services, GLCC provides service to broadcast services.⁹⁵³ These services allow individuals to use their telephones to listen to broadcasts from radio stations located outside the area in which

⁹⁴⁷

Id.

⁹⁴⁸

Id.

⁹⁴⁹

Id. ¶ 14.

⁹⁵⁰

Id.

⁹⁵¹

Id. ¶ 15.

⁹⁵²

Dippon Report, ¶ 30 at Table 2, C-010.

⁹⁵³

Nelson Statement, ¶ 16, C-001.

they currently live or work.⁹⁵⁴ These services can become critical sources of information for expatriates in the event of natural disasters or political events.⁹⁵⁵

686. The leading providers of broadcast services are AudioNow and Zeno Radio, both of whom are important customers of GLCC in the United States.⁹⁵⁶

687. GLCC's business success in the United States can be credited to the trusted relationships it built with its customers, the service providers, because GLCC satisfied their need for consistent quality and reliability, having built a reliable network capable of handling traffic spikes resulting from unplanned natural disasters or high profile events, such as conference calls hosted by Presidential candidates.⁹⁵⁷

688. Mr. Nelson intended to extend GLCC's success in the United States through Tele Fácil's DID/Conferencing Project in Mexico. Many of his clients had wanted to expand into Mexico but needed a reliable network and service. GLCC's history and relationship with these providers, together with Tele Fácil's interconnection rate with Telmex, uniquely positioned Tele Fácil to be the preferred carrier for these providers in Mexico.

689. Demand for these services existed in Mexico. The free conferencing services draw demand from organizations such as religious groups holding group prayer services, businesses such as multi-level marketers holding organizational calls, and political campaigns holding calls with their volunteers. Dial-in radio services provide access to radio broadcasts from around the world and chat line services allow like-minded people to connect in conversation.

⁹⁵⁴ *Id.* ¶ 16.

⁹⁵⁵ *Id.*

⁹⁵⁶ *Id.*

⁹⁵⁷ *Id.* ¶ 17.

690. Pent-up demand existed for these services in Mexico because, compared to the United States, Mexico has expensive paid conferencing services and little to no free conferencing services.⁹⁵⁸ The price-per-minute for conference calling services in Mexico has remained significantly above the average rates prevailing in the United States.⁹⁵⁹

691. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁹⁶²

692. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁹⁶³ Given Mexico's higher prices for conferencing services, demand for free conferencing would likely be strong.

693. The goal of the DID/Conferencing Project for Tele Fácil was to increase the overall consumption of voice conferencing in Mexico, rather than garnering a share of the

⁹⁵⁸ Bello Statement, ¶ 15, C-004.
⁹⁵⁹ Nelson Statement, ¶ 25, C-001.
⁹⁶⁰ Dippon Report, ¶ 32, C-010.
⁹⁶¹ *Id.* ¶ 71.
⁹⁶² *Id.* ¶ 72.
⁹⁶³ *Id.* ¶ 73.

existing market.⁹⁶⁴ Similar to what happened in the United States, free service would unleash demand for conference calling services, particularly for religious groups, nonprofit organizations, or small businesses who cannot afford the traditional conferencing services.⁹⁶⁵

694. Tele Fácil's DID/Conferencing Project would operate similarly to how GLCC operated in the United States. Its interconnection rate with Telmex would generate significant revenue and, in turn, Tele Fácil would have shared that revenue with these customers through a marketing commercial agreement for [REDACTED] generated by the minutes terminating on Tele Fácil's network.⁹⁶⁶ These revenues would have generated sufficient revenues for these companies to enter the Mexican market and sustain their business if interconnection rates fell.⁹⁶⁷

695. Many of the DID/Conferencing providers have indicated that they would have used Tele Fácil's access services in Mexico.⁹⁶⁸ Although it is certainly not necessary to identify specific customers to build a DCF model, Dr. Dippon was able to identify and interview the most significant service providers who indicated they would have used Tele Fácil's services to enter the Mexican market. This only adds to the strength of his damages calculations.

696. For example, FreeConferenceCall.com ("FreeCC") is the largest provider of no-cost conference calling in the world. It has used GLCC's access services in the United States for many years. FreeCC operates in sixty countries on five continents, and connects more than [REDACTED]

[REDACTED].⁹⁶⁹ It provides service to Fortune 500 companies, nongovernmental

⁹⁶⁴ Nelson Statement, ¶ 72, C-001.

⁹⁶⁵ *Id.* ¶ 72.

⁹⁶⁶ *Id.* ¶ 77.

⁹⁶⁷ *Id.* ¶ 77.

⁹⁶⁸ *Id.* ¶¶ 73, 76.

⁹⁶⁹ Lowenthal Statement, ¶ 2, C-005.

organizations like the [REDACTED], numerous political campaigns, small businesses, and educational organizations.⁹⁷⁰

697. FreeCC was formed in 2001 by David Erikson, the CEO of FreeCC.⁹⁷¹ Mr. Erikson identified an unmet market demand because the prevailing model for conferencing, in which incumbent carriers provide expensive conferencing services requiring the host to pay for each participant, was cost prohibitive for many small and medium-sized businesses, religious groups, and nonprofit organizations that would otherwise benefit from conference calling.⁹⁷²

698. FreeCC pioneered the free conferencing model in the United States whereby participants place a call to a traditional telephone number using their own calling plan and carrier.⁹⁷³ Essentially, a service that was once prohibitively expensive and reserved for the elite was now accessible to anyone with a telephone: a) churches could broadcast their religious services to the elderly and infirm; b) political campaigns could inform staffers and supporters about the progress of the campaign; c) students could form telephonic study groups; and, d) small, home-based businesses could expand their reach.⁹⁷⁴

699. FreeCC earned revenue in this model by co-locating conference equipment with local exchange carriers in exchange for a share of the access charges collected on the conference calls.⁹⁷⁵ One of the key ingredients of success for FreeCC is its relationship with the local exchange carrier.⁹⁷⁶

⁹⁷⁰ Nelson Statement, ¶ 14, C-001.

⁹⁷¹ Lowenthal Statement, ¶ 4, C-005.

⁹⁷² *Id.*

⁹⁷³ *Id.* ¶ 5.

⁹⁷⁴ *Id.* ¶ 6.

⁹⁷⁵ *Id.* ¶ 8.

⁹⁷⁶ *Id.* ¶ 9.

700. FreeCC has relied on GLCC as a primary phone provider to enable calls from people across the United States to be connected on a FreeCC conferencing bridge.⁹⁷⁷ Over the years, [REDACTED]

[REDACTED].⁹⁷⁸

701. GLCC collects revenues in the form of termination charges and shares this revenue with FreeCC. The termination rate, therefore, is critical to this type of business.⁹⁷⁹

702. When Mr. Nelson approached FreeCC about his plans to enter the Mexican market, FreeCC indicated it would be eager to work with his new company, Tele Fácil.⁹⁸⁰ Mexico was a market that FreeCC wanted to pursue because of its proximity to the United States but had not been able to do so in any material way, rather it has only maintained a very minor presence in Mexico as courtesy to its large corporate clients.⁹⁸¹ FreeCC does not market or advertise its services in Mexico, nor has it undertaken the customer acquisition strategies it normally uses.⁹⁸²

703. The reason that FreeCC has not marketed its service in Mexico is because it has been unable to find an adequate access provider that understood its business model and was focused enough to take on Telmex.⁹⁸³ Tele Fácil would have provided all of the necessary ingredients for FreeCC to have been in a position to market its services in Mexico and bring its innovative, cost-saving product offerings to Mexican consumers.

⁹⁷⁷ *Id.* ¶ 10.

⁹⁷⁸ *Id.*

⁹⁷⁹ *Id.* ¶ 11.

⁹⁸⁰ *Id.* ¶ 15.

⁹⁸¹ *Id.* ¶¶ 16-17.

⁹⁸² *Id.*

⁹⁸³ *Id.* ¶ 18.

704. FreeCC had an agreement in place with Mr. Nelson that as soon as Tele Fácil could interconnect with Telmex and begin exchanging traffic, FreeCC would place equipment in the colocation facility in Mexico City and begin marketing services in Mexico.⁹⁸⁴

705. FreeCC believed that the Mexican market was ripe for its service just as the U.S. market had been for a number of reasons. First, the Tele Fácil interconnection rate with Telmex was sufficient to allow revenue sharing between Tele Fácil and FreeCC. Second, the cost per minute of traditional conferencing services in Mexico is extremely high.⁹⁸⁵ Third, unlimited long distance plans are becomingly increasingly prevalent in the Mexican market and, indeed, after the telecommunications reforms in Mexico long-distance charges are being eliminated nationwide, making these services even more attractive to business and individuals throughout the country.⁹⁸⁶ Fourth, lagging fixed and mobile Internet speeds in Mexico means that people are more likely to utilize their landlines for conferencing rather than video chat services.⁹⁸⁷

706. Similarly, SIPMeeting, LLC also would have used Tele Fácil's services in Mexico if they had been available.⁹⁸⁸ SIP Meeting provides service in the United States using GLCC's access service and would have used Tele Fácil's services in Mexico.⁹⁸⁹ It provides no-cost conferencing and chat lines and its customer base includes multi-level marketers, religious groups, and large cultural groups.⁹⁹⁰

⁹⁸⁴ *Id.* ¶ 19.

⁹⁸⁵ *Id.* ¶ 20.

⁹⁸⁶ *Id.*

⁹⁸⁷ *Id.*

⁹⁸⁸ Dippon Report, ¶¶ 46, C-010.

⁹⁸⁹ *Id.*

⁹⁹⁰ *Id.*

707. Approximately [REDACTED]

[REDACTED].⁹⁹¹ SIP, therefore, has wanted to expand into the Mexican market for many years. SIPMeeting has been unable to find a suitable partner to provide access service and has been forced to delay its entry into Mexico.

708. Other DID/Conference service providers that use GLCC's access services in the United States also would have expanded into the Mexican market.⁹⁹²

709. In addition to free conference-calling services and chat services, the DID/Conferencing Project of Tele Fácil would provide service to broadcasters on call-to-listen platforms.

710. AudioNow provides international radio broadcasts through telephony in forty-nine countries. In 2015, [REDACTED]

[REDACTED].⁹⁹³

711. AudioNow works with local exchange carriers to host their equipment in exchange for a share of the access charges. One of the key ingredients for success is the relationship it has with local phone companies to co-locate equipment and share revenue.⁹⁹⁴

712. AudioNow is a customer of GLCC in the United States and relies on GLCC as a primary phone provider to enable calls from people throughout the United States to be connected to AudioNow's broadcast platform.⁹⁹⁵

⁹⁹¹

Id.

⁹⁹²

Id. ¶ 51.

⁹⁹³

<http://www.audionow.com/about-us> (last visited Nov. 5, 2017).

⁹⁹⁴

Cernat Statement, ¶ 7-8, C-006.

⁹⁹⁵

Id. ¶ 7.

713. According to Mr. Cernat, AudioNow was interested in entering the Mexican market when Mr. Nelson approached him with plans for Tele Fácil.⁹⁹⁶ AudioNow viewed Mexico as an attractive market because of its proximity to the United States and its lack of similar services.⁹⁹⁷

714. AudioNow agreed to use Tele Fácil's services when Tele Fácil's services were operational in Mexico.⁹⁹⁸ Other broadcast services, like Zeno Radio, expressed similar intent.

715. Dr. Dippon interviewed many of the potential clients of Tele Fácil for DID/Conferencing services such as FreeCC and AudioNow.⁹⁹⁹ As more fully explained in his report, he estimated the revenue levels for these services in Mexico with Tele Fácil by using the United States as a benchmark and making appropriate adjustments.¹⁰⁰⁰

716. Tele Fácil was operationally ready to provide these services in January 2015.¹⁰⁰¹ Tele Fácil installed equipment including a high-capacity soft-switch, servers, racks that would have allowed it to provide access services to DID/Conference service providers.¹⁰⁰² Tele Fácil had a staffed office in Mexico City to support the provision of access service and Mr. Nelson's team at GLCC would have been available to provide the necessary technical support to ensure a robust, reliable network experience in Mexico, just as GLCC's customers had come to rely upon in the United States.¹⁰⁰³

⁹⁹⁶ *Id.* ¶ 12.

⁹⁹⁷ *Id.* ¶ 13.

⁹⁹⁸ *Id.* ¶ 16; Nelson Statement, ¶ 74, C-001.

⁹⁹⁹ Cernat Statement, ¶ 19, C-006; Lowenthal Statement, ¶ 23, C-005.

¹⁰⁰⁰ Dippon Report, ¶ 75, C-010.

¹⁰⁰¹ Nelson Statement, ¶¶ 55-63 & Appx. 1, C-001.

¹⁰⁰² *Id.* ¶ 61.

¹⁰⁰³ *Id.* ¶ 63.

717. The damages estimates, therefore, for the DID/Conferencing Project rest on a solid foundation. Tele Fácil's business was an extension of GLCC who was successful with this line of business in the United States. The leading providers of these services in the United States have indicated they would have entered the Mexican market and used Tele Fácil's services. Finally, pent-up demand for these services existed in Mexico because its consumers were underserved for these types of services.

2. The International Traffic Termination Business

718. Lost profits can also be calculated with reasonable certainty for the International Traffic Termination line of business because: a) Mr. Blanco had extensive experience in the international traffic termination market that he could use to market such services for traffic to and from Mexico; b) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]; and d) strong demand existing for cost effective traffic termination for U.S.-Mexico telecommunications service. Dr. Dippon calculates the lost profits for this line of business and his analysis can be found at paragraphs 81 to 84 of his report.

719. The International Traffic Termination line of business was based on Tele Fácil's ability to attract international long-distance calls for termination into the Mexican market.¹⁰⁰⁴ Of course, termination of international long-distance calls into Mexico was a large and existing

¹⁰⁰⁴ Blanco Statement, ¶ 37, C-002.

market before Tele Fácil's attempted entry into the Mexican telecommunications industry.

However, Tele Fácil was uniquely equipped to participate and thrive in that market.

720. International Traffic Termination was an extension of a long-standing business relationship between Mr. Jorge Blanco and a U.S. company named [REDACTED].¹⁰⁰⁵ Mr. Blanco has a long and storied career in international telecommunications. It started in 1988 when he went to work for MCI Telecommunications.¹⁰⁰⁶ He eventually became MCI's top salesperson and had the International Markets Group built around him.¹⁰⁰⁷ He helped the United Nations create a private global network and helped formed the telecommunications company Avantel in Mexico (a joint venture between MCI and Grupo Financiero Banamex-Accival).¹⁰⁰⁸

721.

1013

1005 [REDACTED], ¶ 4, C-007.

1006 Blanco Statement, ¶ 6, C-002.

1007 *Id.* ¶ 7.

1008 *Id.*

1009 [REDACTED], ¶ 2, C-007.

1010 *Id.*

1011 *Id.*, ¶ 1.

1012 Blanco Statement, ¶ 39, C-002

1013 *Id.*

722. Demand from the service would have come primarily from [REDACTED]. Mexico was one of [REDACTED]'s biggest markets for telecommunications and certainly for calls coming in and out of the United States.¹⁰¹⁴ [REDACTED]

[REDACTED]

[REDACTED]¹⁰¹⁵ Mr. Blanco spoke to a number of other carriers about sending traffic to Mexico and even signed an Alliance Agreement with [REDACTED] to promote sales for traffic coming from Europe to Mexico.¹⁰¹⁶ Dr. Dippon, however, to be conservative, has only included the estimated traffic from [REDACTED] to Tele Fácil in preparing his damages calculations.¹⁰¹⁷ Furthermore, he has only included traffic to landlines even though Tele Fácil would have carried traffic to cellular telephones as well.

723. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1014 [REDACTED], ¶ 3, C-007.

1015 *Id.*

1016 Blanco Statement, ¶ 41, C-002

1017 Dippon Report, ¶ 83, C-010.

1018 [REDACTED], ¶ 4, C-007.

1019 *Id.* ¶ 6.

1020 *Id.*

[REDACTED]

[REDACTED]¹⁰²² In fact, Dr. Dippon and his staff have reviewed Call Detail Records (“CDR’s”) for every day for which damages are claimed to confirm the volumes that [REDACTED] actually sent through other carriers and, therefore, could have been sent through Tele Fácil.¹⁰²³ This level of detail is rarely available in lost profits cases and conclusively confirms that [REDACTED] could have directed traffic in volumes contemplated by their Memorandum of Understanding.¹⁰²⁴

725. [REDACTED]

[REDACTED]¹⁰²⁵

That discount, which Tele Fácil was willing to offer, and the advantage of a direct connection with Tele Fácil as a carrier, provided strong incentive for [REDACTED] to send traffic to Tele Fácil.

726. Under its Concession, Tele Fácil had the ability to obtain authorization in the form of an “International Port Authorization” to terminate international traffic in Mexico.¹⁰²⁶ The International Port Authorization is a routine administrative filing that is easy to obtain.

727. Tele Fácil could have started providing international traffic termination as early as January 15, 2015.¹⁰²⁷ Tele Fácil had equipment in place as well as a staffed office in Mexico City to support this business. And, of course, the demand for telecommunications traffic to and

¹⁰²¹ [REDACTED] C-020.

¹⁰²³ Dippon Report, ¶ 82, C-010.

¹⁰²⁴ Blanco Statement, ¶ 42, C-002.

¹⁰²⁵ [REDACTED], ¶ 9, C-007.

¹⁰²⁶ Dippon Report, n.11, C-010.

¹⁰²⁷ Nelson Statement, ¶ 62, C-001.

from the United States and Mexico was very strong – as evidenced by [REDACTED] actual call records.¹⁰²⁸

3. The Competitive Tandem Services Business

728. The Competitive Tandem Services project was based on a business model available to, and employed by, various carriers in the U.S. and Mexican telecommunications markets. Dr. Elisa Mariscal, a prominent Mexican economist, prepared the damages estimates for the Competitive Tandem Services Project.

729. Lost profits can be ascertained with reasonable certainty for this line of business because: a) Mr. Sacasa has extensive telecommunications experience in Mexico with similar services; b) a similar transition from legacy TDM technology to the more efficient IP technology took place in the United States; c) an existing market was present in Mexico consisting of carriers that could have profited by using Tele Fácil's services; and d) it is common for carriers in Mexico to transfer its subscriber's telephone number to another carrier thus facilitating Tele Fácil's entry into the market.

730. Under the Competitive Tandem Services line of business, Tele Fácil would offer competitive tandem switching services to other carriers in Mexico and, in so doing, perform a protocol conversion to accelerate the transition to more efficient IP services from the legacy TDM technology that Telmex had historically continued to use.¹⁰²⁹ Tandem services refers to the provision of tandem switching; a tandem switch is a switch that segregates traffic that is bound for several terminating carriers that is delivered by a single carrier. In this instance, traffic bound for several competitive carriers in the market would be delivered to Tele Fácil. Tele Fácil's

¹⁰²⁸ *Id.* ¶ 3.

¹⁰²⁹ Bello Statement, ¶ 71, C-004; Sacasa Statement, ¶ 65, C-003.

tandem switch would analyze the call signaling information and determine which terminating carrier that call needed to be passed on to.¹⁰³⁰ It would then segregate each terminating carrier's traffic so that it could be routed to the appropriate carrier. The business line is referred to as a "Competitive Tandem Service" because this sort of call disaggregation service has historically been a profit center for incumbent carriers, because they possessed control over such significant parts of the telecommunications network. With the advent of IP technology, however, it has become both practical and profitable for companies to compete to provide this service.

731. In Mexico, Tele Fácil was uniquely situated to pursue this line of business because of its negotiated interconnection rate with Telmex.¹⁰³¹ It could act as a wholesale provider to other competitive telephone providers in Mexico because Tele Fácil's negotiated interconnection rate with Telmex was higher than those of other competitive carriers.¹⁰³²

732. In practice, Tele Fácil and other competitive carriers that wanted to utilize its competitive tandem services would negotiate a rate that Tele Fácil would pay for those carriers to associate some of their subscriber's telephone numbers with Tele Fácil. By associating the telephone numbers with Tele Fácil, Telmex's network would know to route calls to those subscribers through Tele Fácil and Telmex would be obligated to pay Tele Fácil the negotiated interconnection rate.

733. Tele Fácil's margin for this business would be the difference between the interconnection rate paid from Telmex and the amount it paid to other competitive carriers to associate some of their subscribers with Tele Fácil.

¹⁰³⁰ Bello Statement, ¶ 71, C-004.

¹⁰³¹ Sacasa Statement, ¶ 69, C-003.

¹⁰³² *Id.* ¶ 66.

734. For many telecommunications carriers, the protocol conversion from TDM protocol to IP protocol was a significant value-add because of Telmex's delay in permitting IP interconnection. Mr. Sacasa had been involved in a number of telecommunications businesses in Mexico and in other parts of Latin America that involved similar services and some of the same carriers that would have been involved in the Competitive Tandem Provider business.¹⁰³³

735. The competitive tandem provider model has been very successful in the United States. Examples include Inteliquent, which was acquired for 800 million in 2016, Hypercube which was acquired for 76 million in 2012, and other companies that provide tandem services in the United States. Tele Fácil's business model was virtually identical to this proven model in the United States.

736. Moreover, unlike in the United States, however, it is common practice in Mexico for one carrier to transfer its subscriber's telephone number to another carrier, which would have made it easier for Tele Fácil to enter this market.¹⁰³⁴

737. Representatives of [REDACTED] and [REDACTED], both competitive carriers in the Mexican market, had discussions with Tele Fácil about this arrangement.¹⁰³⁵ No carrier, however, would assign its subscriber's numbers to Tele Fácil until Tele Fácil had an interconnection agreement with Telmex that was in force and traffic between the carriers was flowing.

738. Because it is not realistic or practical to expect other competitive carriers to assign their subscribers to Tele Fácil before Tele Fácil had a working interconnection agreement with Telmex, Dr. Mariscal uses a game theory econometric model to estimate how many carriers

¹⁰³³ *Id.* ¶¶ 5-7.

¹⁰³⁴ *Id.* ¶¶ 66-69, C-003.

¹⁰³⁵ *Id.* ¶ 69, C-003.

would assign subscribers to Tele Fácil and the volume resulting from those assignments.¹⁰³⁶ The model is explained in detail in her report.

4. The Retail Services

739. Lost profits for the Retail Services line of business can also be calculated with reasonable certainty because: a) Messrs. Sacasa, Blanco and Nelson had experience in providing various types of retail services in the United States and in Mexico; b) Tele Fácil focused on specific geographic regions with high demand for telecommunications services; and c) infrastructure existed that Tele Fácil could use to service these markets without extensive build-out. Dr. Dippon has calculated lost profits for this line of business and his analysis can be found at paragraphs 85 to 89 of his report.

740. The concession awarded to Tele Fácil by the Mexican government on May 17, 2013 included rights to provide: a) local and long distance landline telephone service; b) local and long distance mobile telephone service; and c) broadband internet service.¹⁰³⁷

741. Tele Fácil intended to provide retail telecommunications services in selected geographic markets in Mexico, primarily Mexico City, Guadalajara and Monterrey.¹⁰³⁸ Mr. Sacasa was the General Manager of Tele Fácil and very involved in the preparations for providing retail services.¹⁰³⁹ Tele Fácil could have started providing these services by January 15, 2015.

¹⁰³⁶ Mariscal Report, ¶¶ 48-113, C-011.

¹⁰³⁷ Blanco Statement, ¶ 33, C-002; Sacasa Statement, ¶ 28, C-003.

¹⁰³⁸ Sacasa Statement, ¶ 31, C-003.

¹⁰³⁹ *Id.*

742. It was anticipated that a small portion of the revenue from the DID/Conferencing business and International Traffic Termination business would fund the build-out of the retail service business.¹⁰⁴⁰

743. Demand for the retail services would come from consumers in Mexico. Mexican consumers in the selected markets have sufficient income and technological savvy to generate demand for these services.¹⁰⁴¹

744. Tele Fácil set forth its operational plan in its application for Concession which was approved by the IFT.¹⁰⁴²

745. In summary, lost profits can be calculated with reasonable certainty using the DCF method for all four revenue streams contemplated by Tele Fácil: DID/Conferencing; International Traffic Termination; Competitive Tandem Services; and Retail.

E. Calculation of Lost Profit Damages

746. The details of the damages calculation for three of the revenue streams are contained in Dr. Dippon's report and the calculation of one revenue stream is explained in Dr. Mariscal's report. The legal and factual bases of the major parameters of the calculation, however, are discussed here, including: a) the time period of damages; b) the estimation of revenue streams; c) the incremental costs to be deducted; and d) the discount factor.

1. The Time Period of Damages

747. The appropriate start of the damages period for both the expropriation claim and the fair and equitable treatment claim is January 15, 2015.

¹⁰⁴⁰ Blanco Statement, ¶ 47, C-002; Sacasa Statement, ¶ 34, C-003.

¹⁰⁴¹ Blanco Statement, ¶ 48, C-002.

¹⁰⁴² Blanco Statement, ¶ 45, C-002; Sacasa Statement, ¶ 32, C-003.

748. As explained, on or about that date, the IFT Chair convened a meeting wherein he revealed his plan not to enforce Resolution 381.¹⁰⁴³ From that point forward, Tele Fácil's interconnection rights were completely neutralized; without an interconnection agreement with Telmex, the company was unable to operate as a telecommunications carrier in Mexico.

749. The damages period consists of almost six years including three years covered by the original interconnection agreement and renewals at lower rates. This is appropriate because Tele Fácil intended to be in the Mexican market for a long-term period, well beyond the six years used for the calculation of damages. Claimants recognize, however, that a damages period of ten or twenty years would be difficult to forecast and, for the sake of being conservative, have limited their claim to five years from the date of expropriation.

750. Given the established demand for telecommunications services in Mexico, six years is appropriate and actually conservative as a damages period.

2. Estimation of Revenue Streams

751. *DID/Conferencing* – For the DID/Conferencing line of business, Dr. Dippon created an econometric model using actual U.S. traffic data from the various conference service providers to forecast the estimated traffic in Mexico. A description of his model is contained in Appendix C of his report.¹⁰⁴⁴ In simple terms, the NERA Model disaggregates each of the DID traffic projections and then uses market shares to allocate traffic going to Telmex, other

¹⁰⁴³ See *supra* Part II.F.1.

¹⁰⁴⁴ Dippon Report, ¶¶ 65-108, C-010.

landlines, Telcel, etc.¹⁰⁴⁵ The NERA Model then multiplies the traffic by termination rates for each provider.¹⁰⁴⁶ The details, of course, are provided in Dr. Dippon's report.

752. *International Traffic Termination* – Dr. Dippon's estimation of the revenue that Tele Fácil would have received from the International Traffic Termination business is straightforward and based on records provided by [REDACTED].¹⁰⁴⁷ His calculations are more fully explained in his report but essentially he took [REDACTED]'s actual minutes of fixed line traffic and multiplied them by the competitive international termination rate that Tele Fácil would have offered.¹⁰⁴⁸

753. Tele Fácil planned to provide access service through indirect interconnection with Nextel who, in turn, had an interconnection agreement with Telmex. Tele Fácil would have to pay a transit fee to Nextel for any traffic that Tele Fácil sent through Nextel for termination with Telmex, while Telmex would have had to pay the transit fee for traffic originating on its network. The transit fee would have started at MXN 0.009680 and then be adjusted for inflation.

754. Because the actual traffic levels and negotiated rates are known for the entire time period these damages are claimed, Dr. Dippon's revenue calculation for International Traffic Termination is a very solid estimate.

755. *Competitive Tandem Services* – Dr. Mariscal uses an econometric model to estimate revenue for the Competitive Tandem Services line of business. Her report, of course, explains the model in detail but, in general terms, in her Conservative Scenario she estimates the minimum value of the residential and non-residential subscribers that would have been

¹⁰⁴⁵ *Id.* ¶ 75.

¹⁰⁴⁶ *Id.* ¶ 78.

¹⁰⁴⁷ *Id.* ¶ 81-83.

¹⁰⁴⁸ *Id.* ¶ 82.

transferred to Tele Fácil using a 30% estimate of subscribers transferred. She also uses a [REDACTED] revenue split between Tele Fácil and the competitive carriers transferring subscribers.¹⁰⁴⁹ In her Moderate scenario, she uses a more optimistic assumption of 50% of subscribers transferred and an [REDACTED] split of revenue between Tele Fácil and the other competitive carriers.¹⁰⁵⁰ Although her revenue estimations are more complex than those for the other revenue streams, her estimations are based on a well-accepted model for non-facilities based entry, which is when an entrant interconnects with existing carriers rather than building a new network infrastructure, into a market as well as based on actual data from the Mexican telecommunications market.

756. *Retail* – Because Tele Fácil planned to offer retail service bundles to subscribers at a monthly rate, Dr. Dippon estimates retail revenue based on total subscribers rather than based on traffic.¹⁰⁵¹ Estimated subscriber count is multiplied by the monthly bundle fees and then annualized.¹⁰⁵² Dr. Dippon estimated demand from Tele Fácil’s concession application and then adjusted market prices and revenues to account for inflation from 2011 to 2015.¹⁰⁵³

3. Calculation of Incremental Costs

757. In a DCF lost profits calculation, it is necessary to subtract incremental costs that would have been incurred by Tele Fácil in the “but-for” world but were avoided because the business was destroyed.¹⁰⁵⁴ Actual costs that were incurred by Tele Fácil, referred to as sunk costs, are not subtracted because they were not avoided.¹⁰⁵⁵

¹⁰⁴⁹ Mariscal Report, ¶ 130, C-011.

¹⁰⁵⁰ *Id.*

¹⁰⁵¹ Dippon Report, ¶ 85, C-010.

¹⁰⁵² *Id.* ¶ 87.

¹⁰⁵³ *Id.* ¶ 90.

¹⁰⁵⁴ *Id.* ¶ 91.

¹⁰⁵⁵ *Id.*

758. The upfront costs, or sunk costs, for Tele Fácil were modest in comparison to its expected cash flow. This is because Tele Fácil was a non-facilities based entrant into the Mexican telecommunications market. For the most part, it could use existing networks and would not have to build an entire telecommunications system from scratch. This is a common way to inject competition into a market with monopolistic participant. For example, in the United States, MCI Telecommunications was a non-facilities based competitor to AT&T, the dominant carrier at the time.

759. Various incremental costs have been subtracted to determine the lost profits damages. Such costs include cost of sales, incremental capital expenditures and incremental operating expenditures.¹⁰⁵⁶

760. Cost of sales for the DID business consists of [REDACTED] that would be shared with Tele Fácil's customers, the various service providers such as Free Conferencecall.com, AudioNow, SIP and others.¹⁰⁵⁷ Similarly, in the Competitive Tandem Service provider business, [REDACTED] would be shared with various carriers for the assignment of some of their subscribers to Tele Fácil.¹⁰⁵⁸

761. Incremental capital expenditure covers the purchase of additional equipment required to support more traffic or replace expired assets.¹⁰⁵⁹ A complete list of such assets is included in Appendix C to Dr. Dippon's report.¹⁰⁶⁰

762. Tele Fácil would have incurred some operating expense and recurring fees to maintain its network and these have been deducted as incremental.¹⁰⁶¹

¹⁰⁵⁶ *Id.* ¶ 94.

¹⁰⁵⁷ *Id.* ¶ 94.

¹⁰⁵⁸ Mariscal Report, ¶ 130, C-011.

¹⁰⁵⁹ Dippon Report, ¶ 98, C-011.

¹⁰⁶⁰ Dippon Report, App. C, C-010; Nelson Statement, App. 1, C-001.

4. Discounting

763. The discount rate is a key part of the DCF method because the free cash flow is discounted by a specified amount, call the discount rate, that takes into account the time value of money and the uncertainty of future cash flows. Application of the discount rate creates the net present value (“NPV”) of the business’s free cash flows and therefore its fair market value under the DCF approach.

764. There is no single agreed upon method of calculating discount rates. Dr. Dippon used a method called the build-up method that incorporates a weighted average cost of capital (“WACC”).¹⁰⁶² The build-up method adds together different components of risk facing a company and then combines them to determine an overall discount rate.

765. Numerous international tribunals have used the build-up method with a WACC component.¹⁰⁶³

766. The discount rate used for Claimants’ damages calculation is 12.36%, calculated as follows.¹⁰⁶⁴ The process starts with developing a cost of equity consisting of: a) the risk-free rate; b) a risk premium for equity; c) an industry beta; d) a size premium; e) any company-specific risk premium; and f) any country-specific risk premium. The cost of equity calculation feeds directly into the WACC along with the cost of debt. Essentially, the WACC is the weighted cost of equity and the weighted post-tax cost of debt.

¹⁰⁶¹ Dippon Report, ¶ 98, C-011.

¹⁰⁶² *Id.* ¶ 101, C-010.

¹⁰⁶³ See, e.g., *Quibrox S.A., Non Metallic Minerals S.A. v. Bolivia*, ICSID Case No. ARB/06/2, Award (15 Sept. 2015) ¶¶ 464-501, CL-094. *El Paso Energy International Co. v. Argentine Republic*, ICSID Case No. ARB/03/15, Award (Oct. 31, 2011), ¶¶ 718-725, CL-033

¹⁰⁶⁴ Dippon Report, ¶ 104, C-010.

767. The exact calculations for the discount rate and WACC are found in Dr. Dippon's report. The following is a brief discussion of each component of the discount rate without the calculations used to determine the precise rate.

768. The starting point for the cost of equity calculation is the risk-free rate. This is the rate that an essentially risk-free investment would require. The 20-year U.S. Treasury Coupon Bond yield is used for this because it is commonly used as a proxy for a risk-free investment.¹⁰⁶⁵

769. The risk premium reflects the inherently riskier nature of stock investments as compared to risk-free U.S. Treasury bond investments. Here, the long-horizon, large company stock returns minus long-term government bond income returns are used to reflect this premium.

770. The industry beta shows extra risk premium to compensate for the volatility for the telephone communications industry as a whole. In financial analysis, "beta" refers to the volatility of an entire industry compared to the volatility of the market. The beta used is for the Telephone Communications, Except Radiotelephone (SIC Code 4813).

771. The size premium reflects a risk premium based on the size of a company. Because of Tele Fácil's size, the size premium used is to the Micro-Cap Deciles 9-10.

772. The company-specific risk premium is assumed to be zero because Tele Fácil was not a start-up company.¹⁰⁶⁶

773. The country-specific risk premium reflects the comparative risk profile for investments in Mexico compared to that of the United States.¹⁰⁶⁷ The premium used is the final, adjusted country-risk premium from the data compiled by Professor Aswath Damodaran of the

¹⁰⁶⁵ Dippon Report, Table 12, **C-010**.

¹⁰⁶⁶ *Id.* ¶ 101.

¹⁰⁶⁷ *Id.*

Stern School of Business at New York University.¹⁰⁶⁸ Essentially, this risk premium reflects the fact that the equity risk premium should be greater than the target country's default spread.¹⁰⁶⁹

774. After the cost of equity is calculated, it is weighted 75% and the weighting for debt financing is 25% for calculation of the WACC. The weighting is based on the expected mix of debt and equity financing for the company.¹⁰⁷⁰ The cost of debt is the lending interest rate from the World Bank for Mexico in 2015 and 2016.¹⁰⁷¹ The tax rate used is the federal corporate tax rate for Mexico.¹⁰⁷²

775. The calculation of the discount rate, therefore, rests on well-settled principles of corporate finance and well-respected data sources for each component of the discount rate.

5. Interest

776. Claimants are entitled to pre-award interest on their damages. NAFTA, at Section 1135(a), provides that the tribunal may award "monetary damages and applicable interest."¹⁰⁷³ Interest is also available under international customary law. It is very common for tribunals to award interest in addition to damages.

777. Awarding interest is also fundamentally fair because of the delay in making an award. Claimants should be reimbursed for the loss of use of the funds and Respondents should not be incentivized to delay the award.

778. Specifically, Claimants are entitled to interest at the rate of 12.36% for 2015 and 13.05% for the 2016-2018 period. The interest is calculated as starting on January 15, 2015 (the

¹⁰⁶⁸

Id.

¹⁰⁶⁹

Id.

¹⁰⁷⁰

Id. ¶ 103.

¹⁰⁷¹

Id.

¹⁰⁷²

Id.

¹⁰⁷³

NAFTA 1135(a).

date of expropriation) and ending on October 1, 2018, the estimated date of the hearing and compounded annually.

6. Supplemental Expenses

779. Claimants are also entitled to supplemental expenses including the funding of the litigation of this arbitration and challenges to the IFT's actions in the Mexican judicial system. Because this proceeding is still ongoing, Claimants will wait to detail the amount of supplemental expenses until an appropriate time.

VII. REQUEST FOR RELIEF

780. On the basis of the foregoing, without limitation and fully reserving their right to supplement this request, Claimants respectfully request the following relief:

- a. A final declaration that the Government has breached its obligations to Claimants under the NAFTA;
- b. An order that the Government pay Claimants compensation for their losses, currently quantified at USD 472,148,929;
- c. An order that the Government pay Claimants pre-award compound interest, at a commercially reasonable rate or such other rate determined by the applicable law;
- d. An order that the Government pay Claimants post-award compound interest, at a commercially reasonable rate or such other rate determined by the applicable law, until the date the compensation is actually paid;
- e. An order that the Government pay the costs of this arbitration proceeding, including the costs of the Tribunal and the legal and other costs incurred by the

Claimants, on a full indemnity basis, together with interest on such costs, in an amount to be determined by the Tribunal; and

f. Such other and further relief as the Tribunal may deem appropriate.

781. Claimants reserve the right to amend or supplement this Statement of Claim.

Respectfully submitted

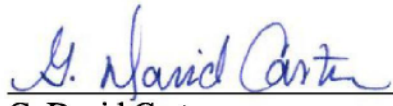
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